IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pratten v. British Columbia (Attorney General),*
2011 BCSC 656

Date: 20110519
Docket: S087449
Registry: Vancouver

Between:

Olivia Pratten

Plaintiff

And

Attorney General of British Columbia and
College of Physicians and Surgeons of British Columbia

Defendants

Before: The Honourable Madam Justice Adair

Corrected Judgment: The text of the judgment was corrected on the front page in the Style of Cause showing Sean Hern as Counsel for the Plaintiff. The change was made on May 20, 2011

Reasons for Judgment

Counsel for the Plaintiff:	Joseph J. Arvay, Q.C., Sean Hern and Alison M. Latimer
Counsel for the Attorney General of British Columbia:	Leah Greathead, Bryant Mackey and Alison Luke
Place and Date of Hearing:	Vancouver, B.C. October 25-29, November 1-3, 2010
Written Submissions Received	March 25, 2011
Place and Date of Judgment:	Vancouver, B.C. May 19, 2011

Introduction

[1] Olivia Pratten is a successful journalist in her late twenties. In 1981, she was conceived using sperm from an anonymous donor. Like many donor offspring, Ms. Pratten knows almost nothing about the man who provided one-half of her genetic makeup. She has long felt that a part of her identity is missing. She risks inadvertently forming a romantic relationship with a half-sibling. She worries her health, and the health of her future children, could be comprised by the lack of information.

[2] Ms. Pratten went to Dr. Gerald Korn, the Vancouver doctor who performed the insemination, seeking information about her donor. As of November 2002, when he retired, Dr. Korn was not obliged to keep records for a patient for more than six years from the last entry recorded, according to the rules of the College of Physicians and Surgeons of British Columbia (the "College") then in place. Dr. Korn says he no longer has any records relating to Ms. Pratten's donor, and that all records have been destroyed. Ms. Pratten says that the government of British Columbia (the "Province") permitted the destruction, thereby depriving her of basic personal information that is necessary for her physical and psychological health.

[3] From Ms. Pratten's perspective, the Province has recognized, in the experience of adopted children, that questions about biological origins and feelings of loss and incompleteness are legitimate. The Province has addressed those concerns by enacting laws whereby information about the biological origins and family history of adoptees is gathered and preserved, and adoptees have the

opportunity (and in some cases, the right) to obtain that information. These laws are found in the ***Adoption Act***, R.S.B.C. 1996, c. 5, and the ***Adoption Act; Financial Administration Act – Adoption Regulation***, B.C. Reg. 291/96 (the "***Adoption Regulation***"). Ms. Pratten cannot understand why the Province would recognize the needs of adoptees to learn about their biological parents and roots, but ignore the very same needs of individuals who, like her, are donor offspring and experience the same sense of loss and incompleteness as adoptees.

[4] Ms. Pratten asserts that this situation is profoundly unfair and discriminatory, and contrary to the ***Canadian Charter of Rights and Freedoms***. She has therefore brought a constitutional challenge to the absence of legislation that would ensure information about gamete donors is recorded and preserved for donor offspring, and could be made available to them.

[5] Ms. Pratten's challenge has two parts.

[6] The first part is a claim under s. 15 of the ***Charter*** alleging discrimination as between adoptees and donor offspring. Ms. Pratten says that the Province has discriminated against donor offspring by enacting underinclusive legislation – namely, the ***Adoption Act*** and ***Adoption Regulation*** – and by failing to enact any legislation to provide her and other donor offspring with the rights and opportunities to know their origins that most Canadians take for granted.

[7] The second part is a claim under s. 7 of the ***Charter*** that the liberty and security rights of donor offspring are violated by the Province's failure to enact legislation to protect fundamental aspects of their personal autonomy and health. Here, Ms. Pratten argues that s. 7 of the ***Charter*** guarantees a positive right to liberty and security of the person, and therefore guarantees a free-standing constitutional right to know one's origins and genetic heritage. Ms. Pratten seeks, on her own behalf and on behalf of all donor offspring, the right to the identity of the donor, irrespective of when donor offspring were conceived, and irrespective of whether the donor believed that he would remain anonymous.

[8] Ms. Pratten says that neither of these breaches of the ***Charter*** can be justified in a free and democratic society.

[9] If Ms. Pratten's claim succeeds, one potential consequence is that, going forward, anonymous gamete donation (just like closed adoptions) would not be permitted in British Columbia. Instead, persons conceived by gamete donation would, upon reaching the age of majority, have the right to learn the identity of the gamete donor.

[10] The defendant Attorney General of British Columbia (the "AGBC") acknowledges that Ms. Pratten's case raises many sympathetic issues. However, the AGBC says the case raises other issues, specifically the respective roles of the legislature and the courts. The legislature has the job of making policy choices and making laws. The court's task is to review the laws, not enact legislation. The AGBC says that Ms. Pratten seeks an unprecedented remedy, and that, in effect, she seeks to have an entire legislative scheme – one that would prohibit, both prospectively and retrospectively, anonymous gamete donation – created by judicial degree.

[11] The AGBC says further that practices have changed dramatically and significantly since the early 1980s. The result is that, today (as compared with the 1980s), a woman in B.C. seeking donor insemination can be provided with detailed social and medical information on the sperm donor and his family, even when the donor is "anonymous." The AGBC says that, in view of the current practices, Ms. Pratten's case (and particularly her s. 7 claim) must fail because the evidence does not support the conclusions she wishes the court to draw and that are necessary in order for the relief she is seeking to be granted. The AGBC says there simply is no constitutional right to know one's origins and genetic heritage, whereas there is a constitutionally-protected right to privacy.

[12] The broad issues I must address on the merits of Ms. Pratten's claim are:

(a) is the omission of donor offspring from the benefits and protections provided to adoptees under the ***Adoption Act*** and ***Adoption Regulation*** a violation of s. 15(1) of the ***Charter***?

(b) should s. 7 of the ***Charter*** be interpreted in this case to impose on the Province a positive duty to act to protect the rights of liberty and security of the person of donor offspring? If not, has Ms. Pratten nevertheless established that she and other donor offspring have been deprived of those rights, in violation of s. 7?

(c) if Ms. Pratten establishes a violation of the ***Charter***, is the violation justifiable under s. 1 of the ***Charter***? and

(d) If Ms. Pratten establishes a violation of the ***Charter*** that cannot be justified under s. 1, what remedy or remedies should be granted?

[13] I will make some brief comments concerning terminology used in this judgment. I refer to individuals who, like Ms. Pratten, were conceived by using donated gametes from anonymous donors as “donor offspring.” “Gametes” are human sperm or eggs. I use the term “donor” to refer to an individual who donated gametes on an anonymous basis. (I did not have any evidence of an individual who either donated eggs or who was conceived as a result of a donation of eggs, and therefore, unless the context indicates otherwise, a “donor” is a sperm donor.) Many donor offspring have a father (i.e., the individual who functions in the family as the father) who is sometimes called the “social father,” to distinguish that person from the donor or the “biological father.” Generally, when I use the term “father,” I mean an individual’s social father.

[14] In these reasons, I will first review the procedural background, and include a brief discussion about the fact that this matter is being heard as a summary trial. Next, I will review the evidence. I will begin with the evidence from the donor offspring and Ms. Pratten’s experts. I will then discuss the study in Canada of new reproductive technologies and the legislative response. Next, I will review the

evidence from Dr. Korn and concerning the keeping of medical records in B.C., and also the evidence regarding the current practices at selected fertility clinics. Finally, I will review the evidence concerning the reform of adoption legislation. As part of that review, I will discuss both the provisions of the ***Adoption Act*** and ***Adoption Regulation*** that Ms. Pratten is challenging, and the processes available to adoptees wanting to obtain information about birth parents.

[15] Following my review of the evidence, I will set out my analysis and discussion of the legal issues, beginning with Ms. Pratten's claim under s. 15, and ending with a discussion of remedies. I will then summarize the relief that I have concluded should be granted in this action.

Procedural Background

[16] Ms. Pratten filed her action in October 2008 as a proposed class action on behalf of a class of donor offspring. Dr. Korn was never a defendant.

[17] An interim injunction was pronounced on October 28, 2008, prohibiting "the destruction, disposal, redaction or transfer out" of B.C. of records (referred to as "Gamete Donor Records") created or maintained by persons who administered artificial insemination procedures and which recorded information about the donors, patients who were impregnated and children who were conceived. On December 18, 2008, Madam Justice Gerow extended that injunction until the conclusion of this proceeding or further order of the court. Persons affected had leave to apply to court to set aside or vary the terms of the injunction on notice to the parties here.

[18] In February 2009, counsel for the parties reached an agreement concerning the proceedings, including that:

(a) this action would proceed as an ordinary action (rather than under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50);

(b) the defendants would not seek to set aside or vary Madam Justice Gerow's order, and if a third party applied to set aside or vary the order, neither defendant would support it; and

(c) if a declaration of invalidity were to be made by this court following a trial on the merits, the defendants would consent to a preservation order over all of the Gamete Donor Records covered by Madam Justice Gerow's order, until such time as provincial legislation is brought into conformity with the ***Charter*** or the matter was overturned on appeal.

[19] Ms. Pratten's claims are set out in her amended notice of civil claim filed October 18, 2010 (the "Notice of Claim"). In summary, Ms. Pratten alleges that:

(a) she does not know the identity of her donor and knows very little about his medical or social history. Dr. Korn's records contain information about her donor's identity and likely contain information about his medical and social history (e.g., ancestry, culture, language, religion, race and ethnicity). This information could one day be vital to Ms. Pratten's health, and if the records are lost or destroyed, the information would be lost for all time and Ms. Pratten's health and safety could be compromised. The records also identify the donor. Ms. Pratten wishes to have the opportunity to know his identity, and that knowledge would alleviate the psychological stress Ms. Pratten experiences in not knowing her biological origins;

(b) Dr. Korn has provided Ms. Pratten with some information, but refused to provide more or to identify her donor on the basis that the donor provided sperm with the expectation he would remain anonymous. Dr. Korn refused to assure Ms. Pratten that records concerning her donor will be preserved indefinitely;

(c) British Columbians who were adopted or who were conceived by gamete donation do not know the identity of their biological parents. Both adoption and conception by gamete donation are circumstances within the regulatory control of the Province;

(d) for individuals adopted in B.C., sections in the ***Adoption Act*** and the ***Adoption Regulation*** provide that:

  (i) records relating to the medical and social history of their biological parents are created and preserved for the child, so the information can be made available in the event of medical necessity, and can be provided to the child any time after he or she turns 19;

  (ii) records relating to the identity of the biological parents of an adopted person are created and preserved;

  (iii) on reaching age 19, an adopted person has, depending on whether the adoption occurred before or after 1996, the right or the opportunity to obtain the records showing the identity of his or her biological parents (if adopted prior to 1996, the adopted person has the opportunity to obtain identifying information because the birth parent can file a disclosure veto, whereas if adopted after 1996, the adopted person has the right to the identifying information as the birth parent can only file a no-contact order);

  (iv) where contact is consensual, the government will assist with the process of reuniting the adopted person with his or her biological parent(s); and

  (v) adopted people have the ability to compare records relating to the identity of their biological parents so that they can ensure that a sexual partner or proposed sexual partner is not biologically related to them.

The specific provisions that Ms. Pratten alleges provide for these benefits are found in sections 6, 8, 9, 32, 48, 56 and 58-71 of the ***Adoption Act*** and sections 4 and 19-24 of the ***Adoption Regulation***. These provisions are set out in Schedule "A" to these reasons. (When I refer in these reasons to the "impugned legislation," I am referring to these specific provisions.)

(e) these legislative provisions provide benefits to adoptees, but there is no legislation in place providing donor offspring with equivalent benefits. As a result, donor offspring are treated differently than people in B.C. who do not know the identity of a biological parent because those people were adopted, despite each group having the same needs for the same information. The differential treatment arises because of a law that draws a distinction based on the manner in which donor offspring were conceived. It imposes a disadvantage on donor offspring, compared with adoptees, and undermines the human dignity of donor offspring.

(f) discrimination against donor offspring on that basis that they were conceived by gamete donation rather than by sexual intercourse and adopted is prohibited by s. 15 of the ***Charter***. Therefore, the underinclusiveness of the ***Adoption Act*** and ***Adoption Regulation*** provisions contravenes s. 15;

(g) the Province and the College have historically permitted medical practitioners who facilitate conception by gamete donation to fail to create and to destroy records containing:

(i) the identity, medical and social history of donors;

(ii) the identity of patients who received gamete donations, the procedures administered and the identity of the donor from whom the gametes were received; and/or

(iii) the identity of each child conceived from a specified donor's donated sperm or egg.

(Ms. Pratten describes these collectively as the "Gamete Donor Records.")

(h) according to the bylaws enacted by the College, Gamete Donor Records need only be preserved for 6 years, and thereafter may be destroyed. The bylaws and their predecessor rules have at all material times been approved and/or authorized or not disallowed by the Province;

(i) circumstances of medical necessity may arise where access to the Gamete Donor Records is required to safeguard the physical and psychological well-being of donor offspring;

(j) the decision of the defendants not to ensure that Gamete Donor Records are created and preserved permanently and made available in circumstances of medical necessity or otherwise to donor offspring deprives donor offspring of their right to security and/or liberty, contrary to s. 7 of the ***Charter***. Ms. Pratten asserts that she does not need to prove this deprivation is not in accordance with the principles of fundamental justice, but, if it is necessary to do so, then the deprivation is contrary to the principle of equality, is arbitrary, irrational, grossly disproportionate, grossly underinclusive and contrary to the duty of the state to reasonably accommodate persons with disabilities.

[20] Ms. Pratten claims the following remedies:

(a) a permanent injunction prohibiting the destruction, disposal or redaction of any and all Gamete Donor Records in British Columbia;

(b) a declaration that the provisions of the ***Adoption Act*** and the ***Adoption Regulations***, set out in Schedule “A”, unjustifiably contravene s. 15 of the ***Charter***, and as a result, are of no force or effect (Ms. Pratten calls this the “Declaration of Invalidity”). Mr. Arvay, Ms. Pratten’s counsel, clarified during argument that Ms. Pratten is seeking a declaration that these provisions also unjustifiably contravene s. 7 of the ***Charter***;

(c) an order that the Declaration of Invalidity be suspended for the amount of time as is reasonably required (which Mr. Arvay submitted should be no more than six months) for the Province to enact legislation that conforms to the ***Constitution Act, 1982*** (which includes the ***Charter***), and in particular, provides for:

  (i) the permanent preservation of all Gamete Donor Records in British Columbia;

  (ii) a process by which records relating to the identity of the donor who is their biological parent are created and preserved for Ms. Pratten and other donor offspring;

  (iii) a process by which the information relating to the medical and social history of a donor is recorded and made available to donor offspring (including Ms. Pratten) in the event of medical necessity, and in any event is made available to donor offspring upon application when they are 19 years or older;

  (iv) a process by which donor offspring who are 19 years or older have the right or opportunity to learn the identity of the donor who is their biological parent, and to make contact with them; and

(v) a process by which donor offspring have an opportunity to determine whether they are biologically related to a sexual partner or proposed sexual partner;

(d) a declaration that the decision of the Province not to ensure that Gamete Donor Records are created, preserved permanently and made available in circumstances of medical necessity or otherwise to Ms. Pratten and other donor offspring unjustifiably contravenes s. 7 of the ***Charter***; and

(e) an order requiring the College to amend Bylaw 3-6 of the College's bylaws made under the ***Health Professions Act***, R.S.B.C. 1996, c. 183, to include a requirement that physicians and retired physicians in B.C. must record and preserve Gamete Donor Records permanently and provide the information in the Gamete Donor Records to the provincial government, or otherwise in accordance with the decision of the Court.

[21] In its amended response filed October 20, 2010, the AGBC asserts that (among other things):

(a) none of the sections in the impugned legislation is discriminatory. The ***Adoption Act*** generally, and the impugned legislation in particular, is targeted specifically to meet the needs of people not living with either birth parent and who have been given up for adoption. The information collected pursuant to the impugned legislation is provided voluntarily by birth parents and not provided through records maintained by physicians. Records relating to the identity of the biological parents of adoptees are not created and preserved especially for adoptees. Rather, adoptees, on turning 19, may apply to the Vital Statistics Agency for a copy of their original registration of live birth. This document may or may not provide an adoptee with information about the identity of his or her birth parents;

(b) the impugned legislation is not underinclusive, and there is no obligation on the Province to legislate to create certain programs for donor offspring. Even if there is some obligation to legislate or create a program, the obligation is met by federal legislation;

(c) with respect to the s. 7 claim, the absence of legislation requiring the retention of medical records does not constitute state action for the purposes of that section. A failure to enact legislation cannot form the basis for any claim. Ms. Pratten is attempting to use the ***Charter*** to usurp the role of the legislature;

(d) Gamete Donor Records are created and preserved, and provisions concerning their creation and preservation are contained in federal legislation;

(e) the ***Charter*** does not confer any right to know or to obtain personal information about a donor. No principle of fundamental justice requires the AGBC to create a system that would allow donor offspring to determine the identity of or personal information about donors. Instead, such a system would be contrary to the principles of fundamental justice.

[22] On September 29, 2010, Madam Justice Gropper pronounced an order with the consent of Ms. Pratten and the College. The order provided for a stay of proceedings against the College and that:

(a) if Ms. Pratten obtains either or both of the declarations set out in paras. 20(b) and (d) above, then the College must, within a reasonable time thereafter, amend its Bylaw 3-6 (or the equivalent bylaw in force at the time) to include a requirement that registrants must record and permanently preserve Gamete Donor Records (as that term is defined in the Notice of Claim) and provide the information in the Gamete

Donor Records to the provincial government, or otherwise in accordance with the decision of the court;

(b) the College has the power to decide on the form, language and structure of any bylaw amendment;

(c) upon the occurrence of any one of the following events:

(i) dismissal of Ms. Pratten's claims for the declarations as against the AGBC, and, if appealed, the upholding of the dismissals on appeal;

(ii) the dismissal of Ms. Pratten's claims for the declarations as against the AGBC on an appeal; or

(iii) the coming into force of the bylaw amendment that the College may be required to make under this order;

then this action will stand as dismissed as against the College, with the same force and effect as if it had been dismissed on the merits following a trial of the action; and

(d) there shall be no costs payable between Ms. Pratten and the College in any event and without regard to the outcome of this action as between Ms. Pratten and the AGBC.

As a result of the consent order, the College took no part in the hearing.

[23] In September 2010, the AGBC brought an application to have Ms. Pratten's claim dismissed on the basis that it was moot, academic and/or futile, and that Ms. Pratten lacked standing to bring the claim. Alternatively, the AGBC sought an order adjourning the hearing of the summary trial until six months after the release of the Supreme Court of Canada's decision on the appeal of the ***Québec Reference*** (referred to below) concerning the constitutional validity of the ***Assisted Human Reproduction Act***, S.C. 2004, c. 2. Those applications were dismissed by Madam

Justice Gropper: see ***Pratten v. British Columbia (Attorney General)***, 2010 BCSC 1444, 325 D.L.R. (4th) 79.

[24] On the issue of Ms. Pratten's standing, Madam Justice Gropper said, at para. 37:

> Ms. Pratten is in a position to pursue a systemic challenge to the Province's failure to enact or extend legislation to ensure that donor records pertaining to her and other people conceived from gamete donation are preserved, in the event that the evidence becomes medically necessary. She is also in a position to challenge the lack of equal benefits under the law for people conceived from gamete donation to know their biological heritage, and have it protected to the same standard as is available to people who have been adopted.

[25] Ms. Pratten seeks final judgment on a summary trial of her case under Rule 9-7 of the ***Supreme Court Civil Rules***, rather than having a conventional trial. Ms. Pratten and AGBC agree that the case is suitable for determination on a summary trial, and wish to have a final ruling on the merits at this time.

[26] Between them, the parties filed approximately 50 affidavits, including (on Ms. Pratten's side) affidavits from a number of experts. However, neither party requested or conducted any cross-examination on any of the affidavits. Some of the affidavits contain material that would be inadmissible at trial (e.g., Affidavit No. 4 of Shirley Pratten contains double and triple hearsay), and I have disregarded such material.

[27] The AGBC objected to the admissibility of Affidavit No. 3 of Sally Yee on the basis that it is irrelevant, and cited ***British Columbia Teachers' Federation v. Attorney General of British Columbia***, 2008 BCSC 1699, 91 B.C.L.R. (4th) 345, in support of his position. The purpose of Ms. Yee's Affidavit No. 3 was to show that the Province has already contemplated one means of collecting identifying information about donors, and has created a form to do so. However, other evidence disclosed that the form was drafted in 2005 (for discussion purposes only and as part of a brainstorming effort) for a working group that included individuals from the office of the AGBC, the Ministry of Health and the Vital Statistics Agency,

and that the working group was developing a proposal for determining and recording legal parentage, including for donor offspring. The form did not progress beyond the draft stage, and was not the subject of legislative debate.

[28] The general rule is that extrinsic evidence pertaining to government deliberations, in order to be admissible, must relate to legislative purpose and the intent of the Legislature as a whole: see ***British Columbia Teachers' Federation***, at para. 76. The document attached as Exhibit "A" to Ms. Yee's Affidavit No. 3 does not satisfy those criteria. Ms. Yee's Affidavit No. 3 is therefore irrelevant and inadmissible.

[29] By agreement of counsel, Affidavit No. 1 of Gerrit Clements did not form part of the record.

[30] Otherwise, and for the most part, the evidence contained in the affidavits tendered by one party was not challenged by the opposing party. Ms. Pratten asserts that, on the evidence, she has established breaches of both s. 15 and s. 7 of the ***Charter***. The AGBC says that Ms. Pratten has failed to prove what she alleges in her pleadings and, generally, has failed to prove her claims.

[31] With one exception, the AGBC did not object to the admissibility of any of the evidence of Ms. Pratten's experts. The AGBC did not assert that any expert was not properly qualified to give opinion evidence, or that any opinions went beyond the scope of the expert's qualifications, or that any expert strayed impermissibly into advocacy. The AGBC did not challenge the opinions stated. The AGBC objected to Affidavit No. 2 of Professor Ken Daniels filed October 7, 2010, on the grounds that the affidavit was delivered late and is improper rebuttal. I overruled the objection.

[32] I am satisfied that, on the whole of the evidence, I can find the facts necessary to decide the issues of fact and law, and it would not be unjust to do so on a summary trial.

[33] Finally, after the hearing of the summary trial, the Supreme Court of Canada released decisions in two cases that are relevant to the issues in this case: the

Assisted Human Reproduction Act Reference and ***Withler*** (both referred to below). At my request, counsel provided further written submissions on both of those cases, and I have considered these further submissions in addition to the other materials filed.

The Experience of Donor Offspring

[34] Ms. Pratten tendered a substantial body of evidence to show the importance of knowing identifying and non-identifying information about one's origins (whether an individual is donor-conceived or is adopted), and the hardships caused by donor anonymity. The AGBC did not challenge that evidence, or the conclusion that donor anonymity causes real hardship to donor offspring, or the fact that both donor offspring and adoptees have the same (or at least very similar) psychological and medical needs in respect of obtaining information about their biological origins. Rather, the AGBC argues that the needs of donor offspring are now being met by current practices, and that adoptees have other, separate needs that adoption legislation is designed to address.

[35] In this section, I will first review the individual stories of the donor offspring who provided evidence in this case. I will then discuss briefly the Donor Sibling Registry, an internet-based registry, for donors and donor offspring, created in 2000. Following that, I will turn to the expert opinion evidence Ms. Pratten has tendered concerning medical and psychological issues and challenges faced by donor offspring. I will then summarize my conclusions.

(a) Individual stories

[36] Ms. Pratten was conceived by donor insemination in British Columbia. Ms. Pratten’s mother, Shirley Pratten, was unable to conceive a child with her husband (Ms. Pratten’s father) due to complications that he had experienced following bladder surgery. The couple was eventually referred to Dr. Korn, a reproductive health specialist practicing in Vancouver. After further unsuccessful fertility treatments to obtain viable sperm, the couple agreed to try artificial insemination with

donor sperm. In 1981, Dr. Korn administered an insemination procedure on Shirley Pratten using sperm from an anonymous donor. As a result of that procedure, Shirley Pratten became pregnant with Ms. Pratten, who was born in March 1982.

[37] When Ms. Pratten was 5 years old, she was told by her parents that she was the product of donor conception, and that her father was not her biological father. Over time she learned that neither her mother nor her father knew the identity of the donor, and neither knew any background information about him.

[38] The decision to tell Ms. Pratten the truth about her origins was a difficult one for Shirley Pratten. She and Ms. Pratten's father had consented to the procedure on the basis that the donor was anonymous, and would remain so. Shirley Pratten recalled that, at the time, Dr. Korn had advised her that most people did not say anything to the child and that it was probably best if she not say anything to Ms. Pratten either. To say Shirley Pratten struggled with this advice puts it too mildly. She felt isolated and became severely depressed. She eventually concluded that the truth about Ms. Pratten's origins was fundamental information which belonged to Ms. Pratten, and was not Shirley Pratten's to hide. Shirley Pratten felt that concealing her daughter's biological heritage from her would be wrong.

[39] Ms. Pratten has always had a good relationship with her father, but over time she became interested in who her donor was. When she was still quite young, Ms. Pratten started to speak out for change in new reproductive technologies. She says that she chose to transform a deeply-felt personal experience into public action and change. At age 15, she presented her story at a fertility conference, and thereafter continued to speak at conferences and give interviews concerning the regulation of gamete donation.

[40] In 2001, when she was 19, Ms. Pratten visited Dr. Korn at his office, and asked him to provide her with information about her donor. Dr. Korn jotted down some information on a notepad: her donor was a Caucasian medical student who had a stocky build, brown hair, blue eyes and type "A" blood. Dr. Korn advised that

the donor "was healthy." He would reveal no further information. This is all of the information Ms. Pratten has about her biological father.

[41] Ms. Pratten describes the experience of being conceived through an anonymous donor as living with a number of highly personal questions that are never answered. She says that there are many situations where questions or issues about her biological origins arise, for example: when she notices she looks different from her parents; when someone asks about personal mannerisms she does not share with either parent; when she sees people who look like her and wonders, is that my father or a sibling. When others discuss their personal genealogy, she is aware that half of her genealogy is blank.

[42] Ms. Pratten fears that her health could be compromised by her lack of knowledge about her donor. When she is asked to provide a history at a medical appointment, her answers are necessarily incomplete because she knows only about her mother's side of her biological heritage. She is concerned that not knowing the history on her donor's side will one day compromise her health because a doctor will fail to identify a health concern as a symptom of a medical condition or disease for which she may be genetically or biologically predisposed, and she may be prevented from receiving effective treatment at an early stage. Ms. Pratten also worries that she might unknowingly pass on genetic diseases to her future children.

[43] When she becomes romantically involved with someone, Ms. Pratten worries about whether the person is a half-sibling. She says that not knowing about her biological origins makes her feel incomplete and medically more vulnerable.

[44] Like Ms. Pratten, Shelley Deacon was conceived using sperm from an anonymous donor, in a procedure performed by Dr. Korn in about 1981. She learned about the manner of her conception when she was about 10. Her mother told her that she chose to use sperm donation as a means of having a child because she was a single woman who badly wanted a child but did not have a partner. Ms. Deacon grew up with just her mother.

[45] Ms. Deacon says that the emotional effects of being conceived through anonymous sperm donation have been many, and they have varied with age. When she was younger, she thought she was very special. However, as she grew older and learned that she could not find out who her donor was, she realized her situation was much more complicated. In her late teens, she became depressed about the lack of information.

[46] Ms. Deacon made attempts to find her donor by contacting Dr. Korn. She first went to see Dr. Korn when she was 13, but she got no information. Ms. Deacon went to see Dr. Korn again when she was 15, and then she was told about a blood type, the eye and hair colour and the height and weight of her donor when she was conceived. She asked Dr. Korn to try and contact her donor, but was told that Dr. Korn could not find him. Dr. Korn told Ms. Deacon that her donor had been a medical student, and she went through old yearbook photos of UBC medical school graduates, looking for someone who might resemble her.

[47] Ms. Deacon says that family is very important to her, but, as a donor offspring, she is missing information about half of her background. She is now a mother, and would like her son to be able to know his heritage as well. Ms. Deacon says that she would like the option of having a relationship with her donor. Even if he did not want a relationship and she was unable to get to know him, Ms. Deacon says that she would still choose to know who he is.

[48] Ms. Deacon always wanted siblings, and she was told by Dr. Korn that she has four or five half-siblings. However, Dr. Korn would not tell her anything else about them. She has tried to find them, but unsuccessfully. Ms. Deacon says that to know that somewhere out there she likely has siblings, but to be unable to know who they are, hurts her. She has had genetic DNA testing done with three women who were also conceived through Dr. Korn's clinic. However, none was a potential match.

[49] Ms. Deacon feels frustrated and saddened about the lack of information about her donor. She is very concerned about not having access to her donor's medical

history. Ms. Deacon does not know what diseases or predispositions she may have passed on to her son as a result of her donor's history. When she was younger, Ms. Deacon worried about having romantic relationships with someone to whom she might unknowingly be related, and she worries about this for her son.

[50] Ms. Pratten's and Ms. Deacon's experiences and feelings are not unique, but are shared among donor offspring. They care very deeply about being able to know their biological origins. Not knowing, and not being able to know, are sources of great frustration, anger, depression, anxiety and sadness. They worry about the implications for their health, and the health of their own children. They mourn the loss of half-siblings, but also fear unknowingly developing romantic relationships with a half-sibling.

[51] Alison Davenport lives in England and is now in her 60s. She was diagnosed with a rare form of lymphoma in 2007, and she was informed in 2008 that a bone marrow transplant was her best treatment option. As a result of trying to find a match, Ms. Davenport eventually learned from her mother (then age 96) that she had been conceived by sperm donation in 1946. All her mother knew about the donor was that he was a student and was musical. Ms. Davenport found the news of her conception shocking. She says that, in a single moment, she felt that she had lost 50% of her understanding of herself and where she came from, and that her sense of self "disintegrated" as a result. Moreover, because of the anonymity of her donor, Ms. Davenport had great difficulty finding a close enough match for a bone marrow transplant.

[52] Ms. Davenport regards her conception as a secret contract between the donor, the doctor and her parents to protect their own interests. Although she was the product, she feels that those involved did not consider the effects anonymity would have on her. Ms. Davenport has a vital need for her genetic information, and she fears she may be deprived of years of life because the truth of her biological heritage was hidden from her.

[53] Damian Adams is a medical researcher living in South Australia. When he was about 3, his parents told him that he was a donor offspring. His father was a paraplegic with kidney failure, and was unable to produce sperm. While he has heard that early disclosure leads to a person being happy with his or her identity as a donor offspring, Mr. Adams' personal experience is different.

[54] Mr. Adams says that, when he had his own children, his eyes were opened to what was missing from his life because he had no information about his origins: that grounding that nearly everyone else has, a heritage and a connection with the past. Mr. Adams describes feeling "false," like one of the experiments he conducts in his lab, dehumanized and commodified. He feels that half of his identity is missing. He can never fully answer doctors' questions about his family history, and cannot fill out other documents (such as census records) concerning his background. Mr. Adams describes being disadvantaged in receiving timely and effective medical diagnosis and treatment because of a lack of a full medical history. He is concerned that a lack of a full family medical history could affect his own children. He is distressed because he cannot find out whether he has half-siblings.

[55] Victoria Reilly, now retired and living in Washington State, learned by accident that she is a donor offspring. When she was about 9 years old, she overheard a discussion among adults at her grandparents' house. Mumps had left her father sterile, and her mother had gone to a "special doctor" in Chicago to get pregnant. Ms. Reilly was never able to bring herself to discuss the circumstances of her conception with either of her parents. She says that the secrecy and her unknown background have shaped her life. Ms. Reilly says that she thinks about them every day, and sometimes obsesses over them. She has not yet come to accept that she will never know the identity of her donor. The fact that she might never know has been stressful, and has undermined Ms. Reilly's sense of her own identity.

[56] Ms. Reilly also wants to know her donor's medical history and information. She has a condition, called prosopagnosia (i.e., face blindness), which is genetic

and absent on her mother's side of the family. She says that knowing whether she had a genetic predisposition to this condition would have made a difference to her lifestyle and treatment, since finding out that she had a definite medical condition (and was not "crazy") was a big relief. Ms. Reilly has also been treated for melanoma, although her mother's side of the family has never been afflicted with this type of cancer. She says that had she known about a predisposition to melanoma, she would have been more observant of her own children and their exposure to the sun.

[57] Both Ms. Reilly's mother and maternal grandmother were afflicted with Alzheimer's disease. Ms. Reilly says that if she knew her donor did not have this, then she could hope that she would have a chance to live without this condition. Moreover, Ms. Reilly wants to know if she has half-siblings. She says that not knowing feels to her like having a part of her life left in the dark.

[58] Barry Stevens was born in 1952 in London, England, and now lives in Toronto. In 1970, the year his father died, Mr. Stevens' mother told him that he and his sister were conceived as a result of artificial insemination, using sperm from anonymous donors. Mr. Stevens says that his mother told him she had always wanted the children to know the truth, but his father did not. Apparently, Mr. Stevens' father felt ashamed of his infertility and ashamed that his son and daughter were not biologically his. Mr. Stevens says that it was a relief to know the truth, but he was sorry not to know sooner.

[59] Through persistent detective work over the course of more than 6 years, Mr. Stevens finally discovered the identity of his donor. He confirmed the identity through a complex course of DNA tests of potential half-siblings and others, which were corroborated by his research of documentary evidence and oral accounts. Mr. Stevens describes finding out the identity of his donor as a highly satisfying experience. He says that it gives him a greater sense of identity and self-knowledge. The information about his donor's background, ethnicity, religion and

culture has given Mr. Stevens a sense of being grounded, and a greater sense of confidence through being able to see where he came from.

[60] Mr. Stevens has also identified (so far) 13 half-siblings (in addition to his sister), and says that he is delighted to have this new family. Mr. Stevens has become very close to a half-brother he discovered quite early in his search. He also has a number of nieces and nephews, and the extended family maintain relationships by way of the internet. Mr. Stevens says that he has a greater sense of membership and belonging through being able to participate in an extended family.

[61] A common concern that Mr. Stevens shares with other donor offspring is that of inadvertently meeting someone who is in fact a half-sibling. He says that the siblings he has discovered may be a small minority of the siblings that exist, because the sperm provider who is Mr. Stevens' genetic parent was the principal provider to the fertility doctor over a 30-year period. That doctor was the leading inseminator in London for much of that time.

[62] Mr. Stevens says that he found it demeaning to be deprived of his own important personal and medical information, against his will. He now has access to medical information about his biological father, and is glad of it. Mr. Stevens learned that his biological father died of a heart attack at age 71, and this information led Mr. Stevens to alter his lifestyle, including his diet and approach to cardiovascular disease determinants.

[63] Kathleen LaBounty is a research co-ordinator at Baylor College of Medicine in Houston, Texas. When she was eight, her mother told her that she had been conceived by an anonymous sperm donation. Her mother told Ms. LaBounty that she had turned to a sperm bank because of Ms. LaBounty's father's low sperm count, and that Ms. LaBounty's biological father was an unknown medical student at Baylor College of Medicine when he provided sperm in 1981.

[64] Ms. LaBounty says that, as a child, she thought that her conception was magical and unique, and she would daydream about her "mystery father." By her

teenage years, she wanted to know more about him: what he looked like, was he married, did he have other children? She wondered whether he was curious about her. She began to speak out publicly against anonymous sperm donation. Ms. LaBounty says that, as an adult, she continues to feel both curiosity and a great loss in being the product of an anonymous sperm donor, and from not knowing her biological father. She feels a psychological need to find him.

[65] Ms. LaBounty undertook an extremely time-consuming search to find her “missing family.” She photocopied 1979 to 1984 Baylor College of Medicine yearbooks, with the hope of having her biological father’s face “pop off the page.” However, that did not happen, and Ms. LaBounty then wrote to all 600 graduates. She says that nearly half of the graduates responded in the form of letters, cards, phone calls and in-person meetings. Ms. LaBounty discovered that 40 were donors, and fourteen seemed like good candidates for being her biological father. Paternity tests were done, but all fourteen came back negative. After spending at least 800 hours in her search, Ms. LaBounty has not taken any further steps to try and find her biological father, because she believes there is nothing left for her to do.

[66] Ms. LaBounty also describes how she has felt the effects of not knowing her full medical history. She developed unusual symptoms and was diagnosed with atypical diabetes, although no one in her maternal family had blood sugar problems and she had none of the standard risk factors for the condition. She experienced misdiagnosis and delayed treatment.

[67] Ms. LaBounty says that, as a donor offspring, she lacks a great deal of information about her own history. She would like to be able to find her half-siblings, if any exist, as well as her biological father. Ms. LaBounty now has a son, but she is missing one-quarter of his medical history.

[68] John Hunter is in his 20s and a business owner in Kitchener, Ontario. When he was 22, Mr. Hunter was visiting his grandmother. He says that late one evening, they were discussing family, and his grandmother told him “your dad is not your dad.” When Mr. Hunter asked what she meant, his grandmother told him that his

parents could not get pregnant, and had used a sperm donor. When Mr. Hunter asked his mother, she confirmed what he had been told by his grandmother. Mr. Hunter says that his mother told him she was instructed not to tell him about the procedure. She was upset that he had learned about his conception, especially since Mr. Hunter's father did not know he had been told.

[69] Mr. Hunter says that for about six months after learning about his conception, he was very depressed. He would occasionally start crying unexpectedly. He avoided going home for months at a time, and felt betrayed by his parents. Mr. Hunter says that what had previously been a strong trusting relationship with his mother had been undermined by knowing that she had kept the circumstances of his conception a secret.

[70] Mr. Hunter says that he finally discussed his knowledge of his conception with his father, and their relationship has improved since they have been able to discuss Mr. Hunter's origins. Mr. Hunter feels that the secret previously stood in the way of their closeness.

[71] Mr. Hunter has taken steps to try and find out about his sperm donor, including contacting the clinic, but with frustrating results. Finally, and on providing his mother's consent, he received non-identifying information about his donor: his hair and eye colour, age range, height, weight and a very brief statement about his health history. Mr. Hunter learned his donor was a student at the University of Western Ontario. However, Mr. Hunter received no information about such things as his donor's medical or cultural background, ethnicity, interests or occupation. Mr. Hunter wants to know more information about his donor, but information is not available to him.

[72] Mr. Hunter says that he has a strong desire to know more about his genetic background. He went through DNA testing with another man conceived at the same clinic to see whether or not they were half-siblings (they were not). Mr. Hunter is an only child, and he believes he would find it very rewarding to find half-siblings. Like other donor offspring, he is concerned about the possibility of unknowingly and

inadvertently meeting and having a relationship with a half-sibling. Mr. Hunter also feels that it is vital for him to have access to medical information.

[73] From Mr. Hunter's perspective, conception using anonymous sperm donation is centred around the parents, without sufficient respect for the separate interests of the offspring. Mr. Hunter has a close friend who was adopted, and who has been able to find her birth family and siblings. Mr. Hunter feels that it is unfair he does not have the ability to do the same thing.

(b) The Donor Sibling Registry

[74] A number of these individuals have joined the "Donor Sibling Registry" (the "DSR"). In her evidence, Wendy Kramer, the executive director and co-founder of the DSR, described its background, features and services.

[75] Ms. Kramer created the DSR in 2000, together with her son, Ryan. Ryan had been conceived through artificial insemination with sperm from an anonymous donor. Ms. Kramer says that she did not hide from Ryan the circumstances of his conception. When he reached his teenage years and young adulthood, Ms. Kramer observed that Ryan became increasingly curious about the identity and personal history of his biological father. Ms. Kramer was certain that other donor offspring would have the same curiosity as her son did about his biological origins, and because no public outlet exists for consensual contact between individuals born from anonymous sperm donation, she and Ryan then started the DSR.

[76] The DSR is designed to assist individuals conceived by way of gamete donation to contact people with whom they share genetic ties. This includes half-siblings and biological parents. The DSR is primarily accessed over the internet. Donors, donor offspring over 18, and parents of donor offspring who are under 18 can register through the DSR's website. Once registered, individuals can then post information about themselves and what they know about their conception, or, if they were donors, about where and when they donated. This information often includes

the name of the doctor who performed the procedure, the name and location of the clinic where it took place, and the approximate date of conception.

[77] Donors can also register and make themselves available to be contacted where there is mutual consent. On the summary trial, Ms. Pratten tendered affidavits from two donors who so registered, one of whom (Dwight Jones) made sperm donations at Dr. Korn's clinic over a period of about 10 years, beginning in 1977.

[78] According to Ms. Kramer, as of October 2009, the DSR had 25,425 members, of whom 982 are donors. The number of donor offspring then in the DSR who listed B.C. as their place of conception was 158, and six donors listed B.C. as their place of donation. Ms. Kramer says that, since 2000, there have been no matches made between B.C. donor offspring and their donors. However, since 2000, there have been 59 matches involving one or more half-siblings in B.C.

[79] Ms. Kramer says that, despite efforts through the DSR to enable donor offspring to make contact with their half-siblings and donors, the lack of information is a significant impediment to establishing successful matches through the DSR.

(c) Expert Evidence

[80] Ms. Pratten has filed affidavits and reports from several experts discussing the hardships faced by donor offspring, including those resulting from donor anonymity. Dr. Julie Lauzon is a medical doctor and a clinical assistant professor in the Department of Medical Genetics at Alberta Children's Hospital. Dr. Diane Ehrensaft is a developmental and clinical psychologist, and founder of the Psychoanalytic Institute of Northern California Reproductive Technology Research Group. Ms. Elizabeth Marquardt is a researcher and author, and the vice-president for family studies and director of the Center for Marriage and Families at the Institute for American Values in New York City. Professor Ken Daniels is a clinical social worker, a professor at the University of Canterbury in Christchurch, New Zealand,

and deputy chair of the New Zealand Government Advisory Committee on Assisted Reproductive Technology.

[81] Each of the experts certified that she or he is aware of the duty as an expert witness to assist the court, and not to be an advocate for any party. All swore under oath that their written testimony (i.e., their reports) has been given in conformity with that duty. The AGBC did not challenge their evidence.

(i) Dr. Julie Lauzon

[82] Dr. Lauzon was asked to provide an opinion on the following three questions:

(a) are there ways in which a person's inability to know the identity of one of their parents can compromise that person's health and well-being?

(b) when a person has a genetic disease or condition that may be inherited by the person's offspring, does prior knowledge of that fact assist with the diagnosis of whether the genetic disease or condition is present in the offspring? and

(c) when a person has a genetic disease or condition which may be inherited by the person's offspring, are there benefits to the offspring's health and/or well-being from identifying at an early stage whether the disease or condition has in fact been inherited?

I accept her as an expert qualified to give opinion evidence on these questions.

[83] In responding to these questions, Dr. Lauzon says:

> We know that an individual's genetic make-up plays a significant role in their health by influencing everything from their risk of congenital anomalies to their chance of developing a common disorder such as cardiovascular disease, asthma, and obesity. . . .
>
> The integration of genetic information into medical practice provides physicians with the tools to identify individuals who are at risk of developing medical problems or to diagnose those already affected so that effective preventive treatment measures can be instituted and family members offered counselling. We have known for a long time that many diseases 'run in

> families'. . . . As such, your family medical history is important in identifying disease-risk and new genetic tests are helping us to understand these risks better. However, no genetic test developed to date can determine and accurately quantify risk for all diseases. Therefore, a 'good old-fashioned' family history remains the best way to screen for genetically linked health problems.
>
> . . .
>
> . . . Caring for [donor offspring] and providing them prevention and/or screening strategies based on possible inherited or genetic disease is problematic. Therefore the impact of genetic information (or lack thereof) on the health of [donor offspring] in the context of genetic disease for gamete donors, donor recipients, and donor-offspring and their families is substantial.

[84] Later in her report, Dr. Lauzon develops the point concerning the importance of family history in health care, and says (**bold** in original; endnotes omitted):

> The importance of knowing your medical family history is well recognized. In obtaining a family history, physicians can learn about the various diseases affecting family members as well as environmental and social factors that can influence health and disease. There are many components to a family history that can reveal risk factors for disease, most of which are shared by family members. . . .
>
> Obtaining a family history is considered a standard element of good medical care. **Primary care practitioners** use the family history as a tool to identify the known genetic diseases present in their patients' relatives as well as identify any other non genetic risk factors that may be present. Further steps can then be taken in terms of screening and prevention strategies and in certain cases, a referral to a medical genetics specialist is warranted. The presence of specific symptoms of disease in family members can guide diagnosis in a patient. . . .
>
> . . .
>
> The family history is a key component of every **medical genetics clinical assessment** and is performed in every patient encounter. . . . Knowing that there is a family history of a disease and who is affected can help guide us in determining which conditions to test for but can also tell us about the mode of inheritance to enable us to appropriately identify at-risk family members and potentially offer genetic testing to at-risk individuals as well as treatment, screening and/or prevention strategies. . . .
>
> . . .
>
> In summary, family history can help us recognize that a condition may be genetic; guide diagnostic testing and treatment; identify at-risk family members and offer genetic testing if available; implement screening strategies in affected or at-risk individuals; provide education, understanding and support to families; and discuss reproductive options and family planning.

[85] Dr. Lauzon responds to the question, "can't we just do a genetic test to assess disease risk"? This notion is implicit in the idea (and the stereotype) that knowing your biological roots is unnecessary, because you can find out all you need to know relevant to your health through a genetic test or tests. She says (endnotes omitted):

> [N]ew genetic technologies have allowed us to generate vast amounts of genetic data, however we have yet to determine and understand the "benefits and harms associated with this testing including related clinical interventions, effectiveness and social consequences." Therefore, an "old-fashioned family history is more predictive than all the new gene tests we identified." Furthermore, as previously illustrated, "genetic tests are most often ordered and best interpreted in the context of family history."

[86] There is a significant medical risk associated with not knowing whether you are genetically related to a prospective sexual partner. Dr. Lauzon says:

> A brother and sister share half their genes and half siblings share ¼ of genes. Given that these individuals share a greater proportion of their genes, a child from these unions would be at significantly increased risk of a major birth defect or handicapping condition.

[87] In Dr. Lauzon's opinion:

> Clinically, harm can ensue from falsely assuming that the genetic history of your non-biological parent is your own. This can lead to misdiagnosis of a genetic condition and perhaps to screening for a condition for which you are not at risk.

[88] Dr. Lauzon concludes by saying:

> Knowledge is empowering – in both health and disease. Knowing our medical family history is important and can lead to improved medical care allowing for earlier detection of disease and improved treatment, and optimal health promotion with targeted prevention and screening strategies.
>
> Genetic predisposition to disease currently is best obtained by medical family history which taken into account both genetic and non-genetic influences on health. . . .

[89] Donor offspring in this case (for example, Ms. Davenport (cancer), Ms. LaBounty (diabetes), Ms. Reilly (melanoma and facial blindness) and Mr. Adams

(immune deficiency)) have had medical concerns or conditions for which treatment has been impaired or delayed because of a lack of a proper family history.

(ii) Dr. Diane Ehrensaft

[90] For the past 25 years, Dr. Ehrensaft has conducted qualitative clinical research and provided mental health services to donors, children, parents and adult offspring in assisted reproductive technology families. Among other things, in her private clinical practice, Dr. Ehrensaft provides both short-term and long-term psychotherapy to donor offspring (both children and adults). She also provides both consultation and in-depth psychotherapy to individuals and couples who have used assisted reproductive technology to build their families and to individuals who have themselves been gamete donors. She is the author of a book published in 2005 and entitled, *Mommies, Daddies, Donors, Surrogates: Answering Tough Questions and Building Strong Families*.

[91] Dr. Ehrensaft has provided an expert report relating to the issue of whether psychological harms are experienced by donor offspring who cannot access information about their biological parentage. I accept her as an expert qualified to give opinion evidence on that issue.

[92] Dr. Ehrensaft addresses the psychological effect on donor offspring of donor anonymity, and says:

> The donor's responsibility for half the offspring's genetic relationship relates to a final impediment to a donor offspring's healthy development when a donor remains anonymous. While our society is becoming increasingly acclimated to the medical advances that have afforded new forms of conception with the aid of reproductive technology, medical studies are simultaneously discovering more and more ways that our physical and mental health are affected by heredity and genetic loadings. . . . For donor offspring with anonymous donors, to be denied access to half their genetic history can not only create medical risk but be a trigger for anxiety and depression, as the offspring suffer duly from barred access to vital medical information and from the awareness that someone is intentionally blocking them from receiving this information, a blockage that could have negative if not life threatening consequences.

[93] In Dr. Ehrensaft's opinion, the negative psychological effects that may arise from not knowing or not having access to information about one's donor can include identity dysphoria, anxiety, anger, depression, and medical and social angst stemming from being barred access to half of one's genetic history. Such effects can be found in the donor offspring here, including Ms. Pratten. Dr. Ehrensaft's observations that the search for the biological parent is in part a search for one's own identity, reflects a common theme in the evidence from the donor offspring in this case.

[94] Dr. Ehrensaft explains (underlining added)

> In our Western culture, we privilege the importance of genetic heritage in our family building and in our society at large. Yet an entire group of people conceived with donor gametes anonymously donated are told that for them such roots really do not matter. . . . The general feeling among donor offspring is that it is not fair to leave them deluded about who they are. Donor offspring of anonymous donors, denied access to information about their donors and frustrated in their desire to know their genetic roots, are left with the same sense of genealogical bewilderment that has so negatively affected adopted children's sense of self, belonging and identity and indeed led to the transformation of adoption laws . . . .
>
> The offspring of anonymous donors are left with a sense of being different, of being "other", and are burdened with the added anxiety of unwitting incest. . . . I observe this "incest angst" repeatedly in my practice, both by the donor offspring and also by their parents. Even though such eventualities of unwitting incest may be remote possibilities, to the donor offspring they are psychologically implanted as a daily anxiety.

[95] Another common theme in the evidence of the donor offspring in this case is the searching for the donor parent and the strong desire for information about him. For example, Ms. Pratten, Ms. Deacon, Ms. LaBounty, Mr. Hunter and Mr. Stevens all described their searches. Only Mr. Stevens was successful, and he describes the great satisfaction he experienced as a result. Dr. Ehrensaft's evidence indicates that this searching is provoked by a void in the process of identity formation, which is a key part of psychological development and the establishment of psychological integrity. The commitment to searching and locating genetic parents is indicative of the kind of need for information that is keenly felt by donor offspring, as

demonstrated by the evidence of the donor offspring in this case. Dr. Ehrensaft elaborates (<u>underlining</u> added):

> Donor children, if told the truth about their origins, typically express a desire to search for some actual information about their donor . . . to establish their unfolding adult identities. In my own practice, the interest in this information surfaces most powerfully at about age eleven or twelve and then builds from there. <u>In the sperm or egg donor family, like the adoptive family</u>, the adolescent identity quest typically involves a search for one's genetic roots – from whence did I come, what are my origins, and how do they relate to who I am and who I will be?
>
> For children conceived through assisted reproductive technology, the search for an identity, a sense of "who I am based on the fact that half of my genes come from someone else who has not functioned as a parent" can generate a strong desire to seek out the donor not to find a long-lost parent or replace the existing ones, but to lay claim to one's own heritage and future, to gather information about themselves and their roots. When squelched in this effort, because of barred access to donor identity or information about donor characteristics, children, youth, and adult offspring show signs not only of frustration and anger, but depression as well. I would say that in observations from my own clinical work, anxiety and depression co-mingle as patients zero in on the loss to identity when there is no access to information about their genetic roots.
>
> Donor offspring with anonymous donors may suffer from the psychological phenomenon referred to as genealogical bewilderment, confusion about from whence they come, along with accompanying psychological dysphoria as a result of grappling with the "missing piece" of themselves. . . . In Western culture, it is presumed that children will have a better sense of their identity and higher self-esteem if they know their genetic roots. Denied that information . . . they will have a more difficult time solidifying the foundations of their adult identity. . . . I have definitely observed genealogical bewilderment to be the experience in my own patients.

[96] Dr. Ehrensaft continues:

> An individual's identity is never formed in isolation. It is in part dependent on a mirroring back from one's intimate others. In childhood and in adolescence, those others will most importantly be a child's parents. Parents are significant primarily for their socialization functions, but they also serve as a genetic mirror. . . . When a parent of an adolescent cannot provide a "genetic" mirror because that parent has no biological link to the child, the son or daughter will have to look elsewhere for the reflections. Thus, the quest to establish one's adult-bodied self . . . typically lead the adolescent to either search out his or her actual donor or surrogate.
>
> Many of my donor offspring patients who have had an anonymous donor lament that they are missing a key person who could be one of those mirrors. . . .

> . . .
>
> . . . What [donor offspring] do lament is the inability to create the whole picture when the donor is anonymous and when they are told that they will never be able to gain access to this person, either because of medical, legal, or parental decree; lack of information to locate the person; or insistence by that person that he or she wants no contact with the offspring he or she has contributed to creating. While they may fully understand the binding nature of a contract signed by the donor many years ago, I have observed in my clinical work a depression that sets in for affected individuals stemming from the thwarting of their own development and well-being through absence of that information and the privileging of that other person's desires over the offspring's own psychological and indeed physical well-being.
>
> In forging their identity, donor offspring wonder about whether their donor thinks about them . . . . If that donor remains permanently anonymous, they will never know. With that foreclosure comes mourning about the missing pieces and a realization that the quest for knowing one's origins as it affects the development of a self will forever remain compromised. . . .
>
> For the donor offspring blocked access to identity of their donors, identity dysphoria can also be accompanied by a depressive fantasy . . . that, like adopted children, "somebody gave me up." Without having access to information about this person who donated gametes and then apparently walked away with no thought to the child being created, and without access to the donor him or herself . . ., these fantasies of rejection . . . stand to remain frozen and immutable in the offspring's psyche.

[97] Dr. Ehrensaft's conclusions and opinions about the negative psychological effects on donor offspring of not knowing or not having access to information about their donors are consistent with the evidence of the donor offspring in this case. It is unchallenged by the AGBC.

(iii) Elizabeth Marquardt

[98] Ms. Marquardt is a co-investigator for a report entitled "my daddy's name is DONOR." The report was released internationally in June 2010 by the Commission on Parenthood's Future, an independent, nonpartisan group of scholars and leaders who have come together to investigate the status of parenthood and make recommendations for the future. The report is stated to be based on a large, representative, comparative study of adult donor offspring, adoptees and persons raised by their biological parents. A copy of this report is attached to Ms. Marquardt's affidavit, and includes a statement of the methodology used to obtain

the research behind the report, as well as summaries of the data gathered in the research. I note that some of the donor offspring witnesses in this case (e.g., Ms. Pratten herself) are quoted in the report.

[99] Ms. Marquardt was asked to provide an opinion concerning how the findings in the report are related to the effects of anonymity of genetic parents on young adults conceived by sperm donation. I accept her as an expert qualified to give opinion evidence on these issues. Ms. Marquardt confirms in her affidavit that the findings and recommendations found in this report reflect her own expert opinion and are based wholly on research that she has conducted and collaborated on in this field.

[100] Specifically, in Ms. Marquardt's opinion:

(a) young adults conceived through sperm donation and who are aware of this fact can experience profound struggles with their origins and identities;

(b) donor offspring are legitimately concerned about the implications of interacting with, and possibly forming intimate relationships with, unknown, blood-related family members;

(c) donor offspring broadly affirm a right to know the truth about their origins; and

(d) donor offspring and adoptees experience similar struggles. However, donor offspring do not have the benefit of the kind of positive institutions and processes provided by the state to protect and benefit people who were adopted as children.

[101] Among the recommendations made in the report are the following:

(a) end anonymous donation;

(b) protect the right of children to be born from identified, untampered-with egg and sperm;

(c) to the extent that donor conception occurs, the state should treat donor conception like adoption; and

(d) recognize that reproductive technologies create people, not just babies.

[102] One of the chapters in the report is entitled, "Is Donor Conception 'Just Like' Adoption?" The authors observe that adoption functions as an institution, the purpose of which is to find parents for children who need them. On the other hand, donor conception functions as a market, the purpose of which is to create children for adults who want them. But that is not necessarily a good thing from the perspective of the donor offspring. As can be seen from the recommendations, Ms. Marquardt and her co-authors conclude that donor offspring would be better off if donor conception was treated much more like adoption is now treated, with the focus on the best interests of the child. Ms. Marquardt and her co-authors say (pp. 71-72; *italics* in original; underlining added):

> There *are* some similarities between donor conception and adoption, but there are many more differences. And, if anything, the similarities between adoption and donor conception should prompt caution about intentionally denying children the possibility of growing up with their biological father or mother.
>
> . . .
>
> Perhaps the most important distinction between donor conception and adoption is this: Adoption is a vital, pro-child institution, a means by which the state rigorously screens and assigns legal parents to already-born (or at least, already conceived) children who urgently need loving, stable homes. . . . It is a tough process with one straightforward goal in mind: Protecting the best interests of the child.
>
> With donor conception, the state requires *absolutely none of that*. Individual clinics and doctors can decide what kinds of questions they want to ask clients who show up at their door. . . .

[103] In the commentary for their recommendation that the state should treat donor conception like adoption, Ms. Marquardt and her co-authors say (p. 78; underlining added):

> Adoption is a child-centered institution that seeks to find parents for children who need them. The state and adoption professionals operate amid a rigorous array of laws and practices . . . designed explicitly to protect the best interests of the child . . . . Those who support the practice of donor conception often claim it is no big deal because it is "just like" adoption. If so, then treat it like adoption.

[104] Ms. Marquardt and her co-authors note (p. 24) that, for some donor off-spring, their deep discomfort about their origins appears to lie, at least in part, in their feeling of being a product made to suit their parents' wishes. In this case, Mr. Adams, for example, compares himself to the experiments he conducts in his lab, and Mr. Hunter feels that donor conception is centred around the parents and fails sufficiently to respect the separate interests of the offspring. Ms. Marquardt and her co-authors observe (p. 32) that donor offspring not only grapple with the loss of their biological father and his whole family; they also struggle with the awareness that they might well have a half-dozen, or a dozen, or scores or hundreds, of half-siblings, all over the place. Such concerns are reflected in the evidence of the donor offspring in this case.

[105] Ms. Marquardt and her co-authors discuss the secrecy typically associated with donor conception. This is another theme running through the evidence in this case from the donor offspring and the parents of donor offspring, as well as from Dr. Korn. Ms. Marquardt and her co-authors say (p. 52):

> Donor conception has always been shrouded in secrecy. Anonymity is the thick cloth that permits no one to look inside. For years, the medical profession has touted anonymity as the answer to the quandaries created by sperm and egg donation. Anonymity protects the donor from having to confront the inconvenient truth that a child might be born from his or her own body. It protects parents who do not wish for an "outside" party to intrude on the family, and who quite often choose not to tell their children. And it certainly facilitates the buying and selling of sperm and eggs as products, no longer identified with one wholly unique human being whose life continues to evolve long after the "donation" is made.

[106] With respect to the title of the report, “my daddy’s name is DONOR,” Ms. Marquardt and her co-authors explain that it “comes from a t-shirt marketed to parents of babies who were donor conceived. The designers of the shirt say it’s just meant to be funny. But we wondered how the children feel when they grow up.” Pointedly, one of the recommendations in the report is: “It’s not funny.”

[107] For donor offspring, knowing only that their biological father is “donor” is certainly not funny, even though some of them might use black humour as a coping mechanism. As illustrated by the evidence in this case, donor offspring feel a very deep, painful and personal loss.

(iv) Professor Ken Daniels

[108] The focus of Professor Daniels’ research has been the collection of data to assist in the psychosocial understanding of infertility and the enhancement of child- and family well-being. Professor Daniels provided opinion evidence in a case in the United Kingdom that also concerned the rights of donor offspring. A judgment in that case is found at ***Rose v. Secretary of State for Health***, [2002] EWHC 1593 (Admin.).

[109] In his Affidavit No. 1, Professor Daniels has provided a report and an opinion relating to the issue of the psychosocial consequences an individual may experience from not knowing the identity of one of his/her genetic parents. Professor Daniels says (<u>underlining</u> added):

> In general terms, two issues arise for most offspring wanting information about their donor: who is she/he; and what was his/her motivation in providing gametes. Motivation seems to be important in that offspring want to believe that their donor acted altruistically. There have been concerns expressed to me that a donor may have been motivated by money, this being perceived as inappropriate. . . . Questionable motives on the part of a donor are seen to reflect on them as offspring. This, in my view, relates to the issue of stigma and perceptions of legitimacy and illegitimacy. <u>The fact that donors have been anonymous and that secrecy surrounds the practice suggests there is something illegitimate about the whole procedure. In my opinion, there is a significant psychosocial impact that comes from thinking that you owe your life to actions that are seen or portrayed as, at best, less than worthy, and at worst, illegitimate.</u>

> . . .
>
> Another psychosocial effect of not knowing, or not being able to know, is that with no information and/or contact, there is no possibility of closure for an inquiry into one half of their genetic heritage. The wound remains open and as such can be a painful reminder of powerlessness.

[110] As I noted above, the AGBC objected to Professor Daniels' Affidavit No. 2, on the basis that it was delivered late and is improper rebuttal. Professor Daniels' second report provides a survey of jurisdictions where donor anonymity has been abolished and a survey of research done on the views of donors and their willingness to donate where anonymity is not an option. I overruled the objection and admitted the affidavit into evidence. It is relevant to what are described as "legislative facts" and responded to some evidence from Dr. Del Valle (which I refer to below) concerning his experience in recruiting non-anonymous donors.

(d) Summary

[111] I summarize my findings and conclusions, based on this evidence, 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.

Government Study of reproductive technologies and the Legislative Response

[112] Formal government study of "new" reproductive technologies began in the late 1980s, when the federal government created the "Royal Commission on New Reproductive Technologies." In 1993, this Royal Commission released its final report, entitled "Proceed with Care." The mandate of the Royal Commission was to examine how new reproductive technologies should be handled in Canada. In particular the Commission was to:

> inquire into and report on current and potential medical and scientific developments related to new reproductive technologies, considering in particular their social, ethical, health, research, legal and economic implications and the public interest.

[113] In the Report's Executive Summary, the Royal Commission said (at p. xxxi; underlining added):

> In spite of the existence of standards and guidelines recommended by various professional associations, we found that a varied patchwork of practices exists. . . . Some [practices] are harmful to the interests of children born through the use of various technologies, such as the lack of records kept on their origins.

[114] During its work, the Royal Commission consulted very broadly. It conducted two national surveys, each involving a representative sample of Canadians. According to the report (p. 426), in total, the views, attitudes and opinions of more than 3,500 Canadians were gauged in personal interviews, telephone surveys, focus groups or written questionnaires. The social context for donor insemination was also illustrated by the views and opinions conveyed in public hearings, private sessions and written submissions.

[115] The Royal Commission reported (at pp. 428-429; underlining added):

> Canadians were concerned about record keeping and the needs of DI [donor insemination] recipients and their children with respect to genetic, medical, and other information about donors. Issues such as the anonymity of donors and the lack or unavailability of records were raised, and the need for complete confidentiality of donor information was questioned. It was clear that many of those involved in DI, whether as donors, recipients, DI children, or practitioners, felt that the process of DI should become more open. Many saw a need to protect donor anonymity and familial privacy but were also cognizant of the expressed needs of DI families, especially of some children for information about their genetic origins. There were clear indications that Canadians see a need for record-keeping mechanisms adequate to accommodate the lifelong implications of DI. Many Canadians urged the Commission to look to the adoption experience for lessons about how to deal with the needs of children born as a result of DI.

[116] I note the concerns raised about record keeping, and the link drawn between the adoption experience, and that of donor offspring. The strong and irresistible implication is that there is much to learn from the adoption experience in considering the needs, circumstances and best interests of donor offspring.

[117] The Royal Commission described the issue of donor anonymity as “one of the most controversial issues” in the area of donor insemination, and noted the issue is also related to secrecy about the procedure. The Commission explains (pp. 441-442):

> For decades practitioners believed that anonymity made DI [donor insemination] easier for everyone involved and have protected the identity of both the donor and the recipient. In interviews, many donors have said that they value the guarantee of anonymity because they want to ensure that they are not forced to assume the legal responsibilities of parenthood; they trust clinicians and sperm banks not to reveal their identity, and they have no interest in meeting recipients or their children. It has been argued that eliminating donor anonymity would make it more difficult to find men willing to donate sperm; in a national survey done for the Commission, men identified confidentiality as the number one condition for donating sperm. Most women and couples contemplating DI also prefer an anonymous donor, usually to avoid unwanted involvement by the donor in the life of the family and child. Although two (2 of 33) AI [assisted insemination] programs surveyed by the Commission allow patients to designate a donor, few patients request this.
>
> Donor anonymity may, however, work against the interests of DI children, for example if they want to know about their origins. Some DI children and parents told the Commission that without information about the donor, the children could feel cut off from their genetic origins, might be unaware of potential health problems, or might marry a blood relative unknowingly (see section on Lessons from the Adoption Context).

[118] The Royal Commission considered (at p. 442) three options for making donor information available to families created by donor insemination:

1. full disclosure of all information. Donations would be made on the understanding that recipients and their children would have full access at some time to both identifying and non-identifying information about the donor;

2. a dual system. Donors could choose to have their identity known or to remain anonymous, and recipients could choose whether they wanted an anonymous donor or a named donor; and

3. a system giving DI recipients and children full social, medical, and genetic information about the donor, but concealing his identity unless there was a pressing medical need to reveal further information.

[119] After considering the issues relating to each option, the Royal Commission recommended that information on donors (both medical and identifying information) be retained by a national registry and that there should be disclosure of the non-identifying information. With respect to the identifying information, the Commission recommended that this information should only be released by court order if it is deemed a medical necessity. The Commission states (at pp. 445-446):

> [I]dentifying information would be collected and maintained, however, and could be made available in extraordinary circumstances of medical need under strictly controlled conditions. The Commission believes that this is the best way to balance the needs of children and families. It is a system that acknowledges the need of individuals for social, genetic, and medical information about their biological parent, but it also acknowledges the need for DI families to flourish and form a strong unit if the best interests of the child are to be served. . . .
>
> The Commission therefore proposes a system whereby information (standard non-identifying genetic, social, and medical information) about a donor would be available at any time to DI parents and children. Such information would be stored by the National Reproductive Technologies Commission for 100 years after the birth of the last child from the donor’s sperm. Identifying information on donors (name, date of birth, city of residence) would also be stored for the same length of time, under conditions

> of strict security. Only in very rare cases would this information be revealed if the physical or psychological health needs of the child warranted. . . .

[120] The Royal Commission commented on the issue of secrecy in families using donor insemination, echoing comments from the donor offspring (and their parents) in this case. Again, the Commission draws a link between the circumstances of donor offspring and adoptees. The Commission said (at pp. 464-465):

> On the surface it would seem that secrecy about DI is fairly easy to maintain. Once conception has occurred, the pregnancy continues like any other. In the long run, however, the Commission found that secrecy places great strains on families. Parents must always remain on guard lest they give away the secret, and differences between father and child must be minimized or ignored. The father may feel incomplete or inadequate, but he has to suppress those feelings. Some fathers said they felt fraudulent about how they fit into the family narrative.
>
> . . .
>
> Commission research showed that maintaining secrecy about the means of conception can be contrary to the best interest of the child . . . . Adults born through DI reported that the decision to keep DI a secret was very damaging – they felt deceived and said they had always sensed that something was "wrong" in the family. Some told the Commission that they found out about the method of conception at a time of family crisis, such as a divorce or death in the family . . . . Discovering the truth in this way is doubly traumatic; the shock of discovery during an already stressful period is coupled with the realization that your parents had lied to you all your life.
>
> Adoptive families used to be advised to keep this secret from the community and from the child; studies have since shown, however, that openness and honesty about adoption are healthier for all concerned.

[121] The Royal Commission also comments specifically on "Lessons from the Adoption Context," in relation to the maintenance of records and disclosure of information to donor offspring. The parallels between adoptees and donor offspring were apparent, and lessons could be learned from the adoption experience and applied to the circumstances of donor offspring. (The comments reflect the state of adoption legislation as of 1993, and prior to amendments to the ***Adoption Act***.) The Commission writes, at pp. 468-469 (<u>underlining</u> added):

> At present, DI record-keeping practices are unregulated . . . . An analysis of the evolution of law and policies relating to adoption may help in developing a framework for DI policies. Although adoptive and DI families are different, the experience of adoptees can suggest what DI children need

> with regard to access to information about their social and genetic background. Many adoptees who have little or no information about their origins feel as if their life stories "began at chapter two." These adoptees may develop an incomplete sense of identity and may make the search for their biological roots a primary life focus.
>
> All jurisdictions have some means of providing for the release of non-identifying information about birth parents to adoptive families, in recognition of its importance to the emotional well-being of adoptees. . . .
>
> The goals of adoption record keeping are based on a concern for the best interests of the adopted child. Full adoption records, kept on file for generations, mean that genetically transmitted health problems can be identified and traced; two family members can be prevented from marrying or conceiving a child unknowingly; and adoptive families can have enough information about the child's biological background for their own psychological needs. Record keeping practices in the field of DI [donor insemination] should have similar goals.
>
> Canadian practitioners, particularly solo practitioners, have kept haphazard or even no records on sperm donors, inseminations, and DI births. This effectively closes off all routes for most DI children alive today ever to learn basic information about their paternal genetic and social heritage.

[122] After delivery of the Royal Commission's report, a legislative response came from the federal government. The AGBC relies on this legislative response as part of his defence to Ms. Pratten's claims.

[123] In June 1996, regulations entitled ***Processing and Distribution of Semen for Assisted Conception Regulation*** (the "***Semen Regulations***") came into force: see SOR/96-254. These regulations were enacted under the ***Food and Drug Act***, R.S.C. 1985, c. F-27. In July 2000, the ***Semen Regulations*** were amended to include the *Health Canada Directive – Technical Requirements for Therapeutic Donor Insemination* (the "***Directive***"). The ***Directive*** sets out requirements for semen donor selection. It requires (among other things) that a donor complete a medical questionnaire and be subjected to a medical interview that includes a physical examination, a medical history and laboratory tests. The ***Directive*** also sets out the information that must be collected in relation to the donor. This information includes: the donor's name; a unique identifier of the donor; the donor's address; the donor's date of birth; a completed medical questionnaire; a completed donor consent form; medical records and completed physical examination results;

laboratory test results; and the name and signature of the medical doctor who reviewed, examined and approved the donor.

[124] In the ***Directive***, a distinction is drawn between a requirement (indicated by the words “shall” or “must”) and a recommendation (indicated by the term “should”). With respect to medical records, the ***Directive*** states that “[m]edical records regarding the donor should be kept indefinitely.” In other words, the ***Directive*** makes a recommendation that medical records concerning the donor be kept indefinitely, but does not require that this be done.

[125] It is important to place the ***Semen Regulations*** and the ***Directive*** in context, and to keep in mind that the ***Regulations*** were enacted under the ***Food and Drug Act***. Their primary purpose is to address a situation where a transmittable disease is identified as potentially having been transmitted by the semen. In such a case, the ***Semen Regulations*** attempt to ensure that the processor can track the distribution of all of that donor's semen, prevent further use of the semen and warn those who may have been inseminated. These are important public health precautions. However, I note that the ***Semen Regulations*** contain no requirement that social or genetic information about donors be collected or retained; no requirement that the records relating to the identity of the donors be delivered into Canada (e.g., to the Canadian distributor of the sperm or any government authority); and no requirement that the records be used to provide donor offspring any right or opportunity to gain access to information about their donors.

[126] Beginning in 2001, a proposed ***Assisted Human Reproduction Act*** made its way through the legislative process at the federal level. On March 29, 2004, the ***Assisted Human Reproduction Act***, S.C. 2004, c. 2, received Royal assent. On April 22, 2004, some of the sections came into force.

[127] However, as of the date of the summary trial, much of the ***Assisted Human Reproduction Act*** had not yet been proclaimed in force. The sections not in force included sections 14 to19, which dealt with privacy and access to information,

including the establishment of a registry for donors and donor offspring. For example, s. 14(1) provided:

> A licensee shall not accept the donation of human reproductive material or an *in vitro* embryo from any person for the purpose of a controlled activity [defined to include treating or manipulating gametes for the purpose of creating an embryo], and shall not perform a controlled activity on any person, unless the licensee has obtained from that person the health reporting information required to be collected under the regulations.

"Health reporting information" is defined under s. 3 to mean:

> information provided under this Act respecting
>
> (a) the identity, personal characteristics, genetic information and medical history of donors of human reproductive material and *in vitro* embryos, persons who have undergone assisted reproduction procedures and persons who were conceived by means of those procedures; and
>
> (b) the custody of donated human reproductive materials and *in vitro* embryos and the uses that are made of them.

[128] Sections 17 and 18 provided, in part:

> 17. The Agency [defined as the "Assisted Human Reproduction Agency of Canada" established by subsection 21(1)] shall maintain a personal health information registry containing health reporting information about donors of human reproductive material and *in vitro* embryos, persons who undergo assisted reproduction procedures and persons conceived by means of those procedures.
>
> 18. (1) The Agency may use health reporting information, and information otherwise relating to the controlled activities undertaken by an applicant or licensee, for the purposes of . . . the identification of health and safety risks . . . .
>
> . . .
>
> (3) The Agency shall, on request, disclose health reporting information relating to a donor of human reproductive material or of an *in vitro* embryo to . . . a person conceived by means of such a procedure and to descendants of a person so conceived, but the identity of the donor — or information that can reasonably be expected to be used in the identification of the donor — shall not be disclosed without the donor's written consent.
>
> (4) On application in writing by any two individuals who have reason to believe that one or both were conceived by means of an assisted reproduction procedure using human reproductive material or an *in vitro* embryo from a donor, the Agency shall disclose to both of them whether it has information that they are genetically related and, if so, the nature of the relationship.

[129] There were no regulations for sections (such as sections 14 to 19) that were not in force.

[130] Moreover, in 2008, the Québec Court of Appeal concluded that sections 8 to 19, 40 to 53, 60, 61 and 68 of the ***Assisted Human Reproduction Act*** were *ultra vires* the federal government: see ***In the matter of a Reference by the Government of Québec pursuant to the Court of Appeal Reference Act, R.S.Q., c. R-23, concerning the constitutional validity of sections 8 to 19, 40 to 53, 60, 61 and 68 of the Assisted Human Reproduction Act, S.C. 2004, c. 2***, 2008 QCCA 1167, 298 D.L.R. (4th) 712 (the "***Québec Reference***").

[131] The Attorney General of Canada appealed the ruling in the ***Québec Reference*** to the Supreme Court of Canada. That appeal had been argued, but no decision had been rendered as of the hearing of the summary trial.

[132] Since the enactment of the ***Assisted Human Reproduction Act***, the AGBC has undertaken a comprehensive review of the ***Family Relations Act***, R.S.B.C. 1996, c. 128. According to Jill Dempster, a lawyer with the Civil Policy and Legislation Office of Justice Services of the Ministry of the Attorney General, and the person leading the team responsible for developing policy recommendations, the goal of the review is to modernize B.C.'s family law statute to reflect current social values and family law research and policy developed since 1979 (among other things).

[133] Ms. Dempster indicates that there had been some discussion about the disclosure of information to children conceived through assisted reproduction in the review process leading up to the publication in July 2010 of the "White Paper on *Family Relations Act* Reform." However, according to Ms. Dempster, no policy was developed in this area as part of the review because, from the AGBC's perspective, that field has already been covered by the federal government in the ***Assisted Human Reproduction Act***. The White Paper states (at p. 34) that once the Supreme Court of Canada "decides which level of government is responsible for

laws on this topic, an approach can be developed to deal with the issue in British Columbia."

[134] In his defence of Ms. Pratten's claim, and in argument, the AGBC relied heavily on the ***Assisted Human Reproduction Act***, particularly in combination with current practices, as an answer to Ms. Pratten's claims. He did so even though the relevant sections of that ***Act*** were not in force, and there was no guarantee those sections would ever be brought into force. For example, the AGBC submitted that, under the ***Assisted Human Reproduction Act***, there would be a process whereby donor offspring would have the right or the opportunity to learn the identity of the donor. The AGBC submitted further that: Ms. Pratten's claims were inconsistent with co-operative federalism; her claim that the ***Adoption Act*** is underinclusive must fail because Ms. Pratten had failed to show that no other suitable legislation exists in the light of the ***Assisted Human Reproduction Act***; the existence of that ***Act*** is relevant context for the analysis under s. 15 and s. 1 of the ***Charter***; Ms. Pratten's rights are minimally impaired, in part because of the existence of the ***Assisted Human Reproduction Act***; and it is rational for the Province to fail to protect the interests of donor offspring in part because of the existence of the ***Assisted Human Reproduction Act***.

[135] On December 22, 2010, the Supreme Court of Canada released its decision on the appeal of the ***Québec Reference***: see ***Reference re Assisted Human Reproduction Act***, 2010 SCC 61, 327 D.L.R. (4th) 257 (the "***Assisted Human Reproduction Act Reference***"). The majority of the court concluded that ss. 14-18 (among other sections) are *ultra vires* the federal government.

[136] In his further written submissions, the AGBC indicates that he is currently taking advice on the ***Assisted Human Reproduction Act Reference***, and that persons from the Ministry of Health are working to determine the next steps. The AGBC says that the Supreme Court of Canada's decision identifies a wide array of issues and concerns for the Province to consider in determining what (if anything) the Province should be doing in conjunction with the federal government and in

conjunction with other provinces, and what (if anything) the Province should be doing on its own concerning aspects of assisted human reproduction that the Supreme Court of Canada concluded were outside the jurisdiction of the federal government. The AGBC says that the issue of whether a provincial registry should be created for donor offspring, and, if so, what form this registry should take, is one of the many policy issues flowing from the Court's ruling.

[137] However, in this action, and in view of the Supreme Court of Canada's conclusions in the ***Assisted Human Reproduction Act Reference***, the AGBC's arguments relying on the ***Assisted Human Reproduction Act*** must fail.

Dr. Korn and the Keeping of Medical Records

[138] I turn next to the evidence of Dr. Korn.

[139] Dr. Korn performed artificial insemination on patients from 1972 until he retired in 2002. During that time, he performed artificial insemination procedures for over 2,000 women, including for Shirley Pratten, Shelley Deacon's mother and Susan Henry (another witness). Dwight Jones (also a witness) was one of the donors for Dr. Korn's clinic.

[140] Dr. Korn says that, of the women on whom he performed artificial insemination procedures, only four or five asked him to give them information about the donor.

[141] Dr. Korn says that the donor insemination procedures he performed were done on an anonymous basis, both from the point of view of the woman receiving the procedure, and from the point of view of the donor. Dr. Korn's evidence in this regard is confirmed by the evidence of other witnesses involved with his clinic. He says that the donors all donated sperm on the understanding that their identity would not be disclosed. Dr. Korn says that he discussed the anonymous nature of the donor insemination procedure with all women who accepted and consented to the use of the procedure. The women were told that neither their identity nor the identity of the donor would be disclosed. Dr. Korn says that the anonymous nature of the

procedure was agreed to orally and in writing, and that, while the nature of the written form changed over the years, the underlying premise that the identity of the donor must be anonymous remained consistent.

[142] Dr. Korn, like all medical doctors, was required to keep records.

[143] Generally, there is to be a record for each patient, showing the patient's name and address and the dates seen, and there is to be enough information recorded to explain why the patient came to see the doctor and what the doctor learned both from the history and physical examination. There is no suggestion that Dr. Korn failed to keep records in compliance with his obligations as a medical doctor.

[144] When Ms. Pratten was born in 1982, the regulations made by the College required that members in private practice (such as Dr. Korn) retain patient records for a period of not less than 6 years from the date of the last entry recorded: see s. 11 of B.C. Reg. 306/73, as amended by B.C. Reg. 9/78. The relevant statute was the ***Medical Practitioners Act***, R.S.B.C. 1979, c. 254, which provided (under s. 4) for the election of a council of the College, and gave the council the power to make regulations, including regulations prescribing the records to be kept by members (see s. 4(2)(f)). There was no government involvement in the College's regulations. By the ***Regulations Act***, S.B.C. 1983, c. 10, "regulations" became "rules."

[145] In March 1995, the relevant provisions of the ***Medical Practitioners Amendment Act, 1994***, S.B.C. 1994, c. 11, were brought into force. Section 4 of that ***Act*** was amended such that a rule (such as the rule pertaining to patient records) had no effect until approved by the Lieutenant Governor in Council. The result is that, beginning in March 1995, there is some government involvement in rules made by the council of the College. This was carried forward in the ***Medical Practitioners Act***, R.S.B.C. 1996, c. 285 (the "1996 ***Medical Practitioners Act***") (see s. 5(1)(f) re records and s. 5(4) re approval by the Lieutenant Governor in Council).

[146] Rule 13 of the College's rules made under the 1996 ***Medical Practitioners Act*** concerned patient records. It provided in relevant part:

> Members in practice shall keep:
>
> > a. A clinical record on each patient showing the patient's name and address and the dates seen. For each time a patient is seen there must be enough information recorded to clearly explain why the patient came to see the physician and what the physician found out both from the history and from the physical examination. There must be a clear record of what investigations the physician ordered and a clear record of either a provisional diagnosis or a diagnosis made, and a clear record of the specifics of any treatment prescribed;
> >
> > . . .
>
> All such records shall be typed or legibly written in ink and kept in suitable systematic permanent forms such as books, binders, files, cards, or folders for a period of not less than 6 years from the date of the last entry recorded . . . .

[147] The 1996 ***Medical Practitioners Act*** was repealed effective June 1, 2009 (see the ***Health Professions Amendment Act, 2003***, S.B.C. 2003, c. 57, s. 58(c) and s. 59; and B.C. Reg. 423/2008) and was replaced by the ***Health Professions Act***. Under the ***Health Professions Act***, the "rules" were replaced by "bylaws" with similar content: see s. 19(1)(x.1)(i), (ii), (y), (y.1)(i) and (1.1).

[148] However, under the ***Health Professions Act***, the level of government involvement and oversight is increased, as compared with the 1996 ***Medical Practitioners Act***. A bylaw under s. 19(1) has no effect unless it is filed with the minister (see s. 19(3)), and the minister may disallow a bylaw (see s. 19(3.2)). The minister must disallow a bylaw in certain circumstances (see s. 19(4)). For example, the minister must disallow a bylaw "if the minister is not satisfied that appropriate provision has been made respecting . . . each of the objects referred to in section 16." However, I note that s. 16 distinguishes between "duty" (in subsection (1)) and "objects" (in subsection (2)). Service and protection of the public, and exercising powers and discharging responsibilities in the public interest, are both listed under "duty," not "objects." Under s. 19(5), the minister may request a board to amend or repeal an existing bylaw for its college or to make a new bylaw for its college if the minister is satisfied that this is necessary or advisable. If a board does not comply

with a request under subsection (5) within 60 days after the date of the request, the minister may, by order, amend or repeal the existing bylaw for the college or make the new bylaw for the college in accordance with the request: see s. 19(6).

[149] Ms. Pratten relies on this oversight and power as the "government action" for the purposes of her s. 7 argument. She says that the legislation, rules and bylaws governing record-keeping by members of the College resulted in, or at least contributed to, a breach of her rights under the ***Charter***.

[150] The current bylaws for the College require records to be retained for a minimum period of seven years from either the date of last entry or from the age of majority, whichever is later, except as otherwise required by law: see bylaw 3-6(2).

[151] Dr. Korn has sworn under oath that he has no records relating to Ms. Pratten's donor. He has no records that would identify the donor, and he has no records that would provide any medical or social information on the donor. He does not recall who the donor was.

[152] Dr. Korn says that from 1972 to 2002, he would periodically destroy records when the last encounter with the recipient or donor was more than six years in the past. I note that this destruction of records was lawful, and permitted under the regulations and rules governing medical practitioners. On his retirement in November 2002, Dr. Korn says that he reviewed all of the records in his possession and destroyed any remaining records where the last encounter with the recipient or the donor was more than six years in the past. He has retained any remaining records.

[153] Neither Ms. Pratten nor Shirley Pratten fully accept Dr. Korn's sworn evidence concerning the destruction of his records and information relating to Ms. Pratten's donor. Indeed, Ms. Pratten says that "I know that the information exists, [and] I know who holds the information," namely, Dr. Korn.

[154] However, one of the most important ways to challenge Dr. Korn's evidence and attack his credibility is cross-examination. This was never done. Ms. Pratten's

firm belief and conviction that Dr. Korn must have her records does not prove that he does in fact have those records.

[155] I conclude, based on the evidence concerning Ms. Pratten's discussions with Dr. Korn in 2001 and the fact that he provided her at that time with some information about her donor, that in 2001, Dr. Korn had records relating to Ms. Pratten's donor. However, I conclude (based on Dr. Korn's evidence) that he does not now have any records relating to Ms. Pratten's donor, and that any such records had been destroyed not later than November 2002. Moreover, I conclude (based on Dr. Korn's evidence that he has not destroyed such records) that Dr. Korn has recipient and donor records where the last encounter with either the recipient or donor was less than six years prior to November 2002, and that those records contain the information as was then prescribed by the rules of the College. To put it another way, I conclude that Dr. Korn still has records for those individuals where his last encounter with the recipient or donor was later than November 1996. I have no basis to conclude that those records contain information beyond what was required at the time by the College's rules, and therefore no basis to conclude either that those records contain information of the scope currently collected by some fertility clinics (which I discuss in more detail below), or that the records include the type of information described in s. 4(1) of the ***Adoption Regulation***.

[156] I do not know anything about the demographics of Dr. Korn's donors over the years. Therefore, I am unable to say whether or not someone who donated sperm in the 1980s might have had his "last encounter" with Dr. Korn after November 1996. I can say, based on Dr. Korn's evidence, that Dr. Korn had his last encounter with Ms. Pratten's donor prior to November 1996.

Current Practices at selected Fertility Clinics

[157] Much has happened since the 1980s, when Dr. Korn treated Shirley Pratten and Ms. Deacon's mother. The Royal Commission has issued its report, and the ***Semen Regulations*** and the ***Directive*** are now in effect. B.C.'s adoption legislation has been reformed.

[158] In addition, practices have changed at fertility clinics. Those changes affect the openness and documentation process surrounding donor insemination programs, and also the availability of sperm. I will now review the evidence concerning those changes, from the affidavits of Dr. Alfonso Del Valle, Dr. Abraham Albert Yuzpe and Wendy Baker, R.N. Their evidence is relevant to Ms. Pratten's claim that donor offspring are discriminated against, as compared with adoptees, because of a lack of information about the medical and social history of donors, and to her claim that the rights of donor offspring under s. 7 of the ***Charter*** have been breached. The evidence is also relevant to the AGBC's position that the interests of donor offspring are being met by current practices.

[159] Dr. Del Valle is a medical doctor and a specialist in obstetrics and gynaecology. He is the medical director of the Toronto Institute for Reproductive Medicine ("ReproMed"). He has been involved in the area of reproductive medicine, including donor insemination, for approximately 24 years. He has been working at ReproMed since 1990, and has been the Medical Director there for about 20 years.

[160] Dr. Yuzpe is a medical doctor and a specialist in obstetrics, gynaecology, reproductive medicine and infertility. He is the co-founder of Genesis Fertility Centre, a fertility treatment centre located in Vancouver, B.C., and has been providing infertility treatment for about 15 years. Ms. Baker is a registered nurse, and works at Genesis. She provides orientation sessions to patients undergoing donor insemination at the clinic.

[161] According to Dr. Del Valle, since the 1980s, increased regulation (primarily in the form of the ***Semen Regulations*** and the ***Directive***) has affected the quantity of available donor semen and sperm. Dr. Del Valle notes that, during the 1980s, and prior to 1985, fresh semen was used in donor insemination procedures. Regulations now stipulate that only frozen semen may be used, to allow for testing for disease. However, not all semen freezes well. Dr. Del Valle indicates that currently 79% of potential sperm donors are excluded on the basis that their semen does not meet quality parameters.

[162] Dr. Del Valle indicates that increased regulation has also affected the number of sperm banks in Canada. In the 1980s and 1990s, there were over 20. Now, while there are some fertility clinics in Québec that store sperm for use in their own clinics, ReproMed is the only sperm bank in Canada that provides donor sperm for artificial insemination procedures for clinics outside of Québec, and it is the only Canadian sperm bank providing sperm for B.C. Fertility clinics, doctors and their patients in B.C. rely heavily upon the United States for sources of donor sperm for donor insemination procedures.

[163] ReproMed currently offers, as part of its sperm banking services, an anonymous sperm donor program. In this program, the identity of the sperm donor is not known to the patient, but non-identifying information about the donor is available to the patient. According to Dr. Del Valle, ReproMed's anonymous sperm donor program currently has 37 Canadian donors. Dr. Del Valle testified that these donors have agreed to donate sperm on an anonymous basis, and none has consented to releasing his identity. He says that ReproMed has repeatedly attempted to recruit donors without the condition of anonymity, but these attempts have not been successful.

[164] Currently, the process of donating sperm for use in anonymous artificial insemination is rigorous and involves a significant commitment on behalf of the donor, according to Dr. Del Valle. Dr. Del Valle says that, due to this stringent screening process, the number of donors who successfully make it through the program is very small.

[165] Donor insemination has become a more open process in the last decade, according to these witnesses.

[166] A woman undergoing a donor insemination procedure is now able to choose between two types of donors: closed-identity (in other words, anonymous) donors, who do not authorize the release of their identity; and open-identity donors, who authorize the release of their identity upon the donor offspring reaching the age of majority. Identifying information may include the donor's full name, date of birth, last

known telephone numbers and addresses and other personal identifying information the donor has agreed to release to the sperm bank.

[167] Fertility clinics such as Genesis present and discuss the two options (open-identity vs. anonymous donors) prior to a woman undergoing donor insemination, including the potential psychological and medical ramifications of each choice. Sperm banks also provide material regarding the choice between anonymous and open-identity donors. However, ultimately the choice of whether to use an open-identity donor or an anonymous donor is made solely by the woman, or the woman and her partner, receiving the donor insemination procedure.

[168] According to Dr. Yuzpe, the availability of sperm from open-identity donors is not an issue for Genesis. He says that, in his practice and experience, those women who seek an open-identity donor have had access to this option since it was made available by the U.S. sperm banks who supply the vast majority of sperm used for donor insemination at Genesis.

[169] Regardless of whether an open-identity or anonymous donor is selected, fertility treatment centres and sperm banks require patients and sperm donors to sign consent forms prior to a donation or an insemination procedure. There are particular agreements which are designed to ensure that anonymous donors will remain anonymous. While each sperm bank has its own forms, these agreements generally stipulate that if the donor is anonymous, the offspring will not have the right to access any of the donor’s identifying information, at any point. The forms also indicate that the sperm bank will not disclose any identifying donor information to the patient, or vice versa, or in any way assist in facilitating contact between the patient, their offspring and the donor. At ReproMed, the anonymous donor is informed and acknowledges in writing that his identity will remain confidential.

[170] In the case of open-identity donors, agreements are signed that enable the donor offspring to gain access to identifying information about the donor once the child reaches 18 years of age. However, no identifying information about the donor is available to the offspring or the patient before that.

[171] As compared with the 1980s, sperm banks supplying Canadian fertility clinics and physicians with donor sperm now collect extensive information from donors and keep detailed donor records, including the social and medical backgrounds of each sperm donor, as well as identifying information. Dr. Del Valle says that ReproMed began collecting detailed donor information in 1991 and began developing a system called “DADS” (for “data-assisted donor selection”) in 1992. Detailed donor profiles, containing information about the donor and his genetic, social and medical background, are stored on the DADS system, which has been in use since 1993.

[172] Dr. Del Valle says that ReproMed keeps the records relating to a donor indefinitely, and had been keeping records since 1990. With respect to Genesis, Ms. Baker says that all of the donor information, records and test histories are stored “in perpetuity” by both the sperm bank and Genesis.

[173] Ms. Baker says that:

> Genesis has full access to the complete profile of every donor, which is provided to Genesis by the sperm bank it originated from. Genesis shares all of this information with its patients. Each sperm bank has a specific format for its donor profiles, but the required information is basically the same, and includes medical and personal information on the donor, including medical information pertaining to the donor, his parents, siblings, parents’ siblings and grandparents. Photographs and a Keirsey Temperament Assessment (personality profile) of the donor are also sometimes included in the donor profile.

[174] The donor profiles in evidence cover a wide variety of subjects and characteristics, for example:

(a) physical: ethnic background/ancestry, height, weight, eye and hair colour, skin tone, blood type, sizes and measurements, photographs;

(b) social: educational background, occupation, interests, talents, awards, preferences (favourite colours, movies, animals, music, cars, theatre productions, superheroes), goals (professional, personal and academic), religious beliefs, languages spoken, sports played, alcohol and tobacco consumption, frequency of exercise, quality of sleep, sexual orientation, criminal record history;

(c) medical: vision, hearing, allergies, dietary restrictions, sexual history, genetic and hereditary diseases, other health conditions, hospitalizations, frequency of illness from work, major accidents, operations, dental work;

(d) family medical history: health problems and longevity of donor's grandparents, donor's parents and their siblings, donor's siblings; and

(e) personality: interviews and/or essay questions on childhood memories, characteristics donor admires in others, travel preferences, motivations for donation, Keirsey personality profile or a listing of personality traits.

[175] Some things have not changed: namely, the reasons why individuals seek out treatment. Dr. Yuzpe has testified that donor insemination is provided to patients who cannot or will not conceive by way of sexual intercourse because:

(a) a woman is single;

(b) a woman is part of a same-sex couple;

(c) a woman has a male partner who is infertile; or

(d) a woman has a male partner who is the carrier of an heritable genetic disease.

[176] There can be no doubt that the current practices represent a significant change and substantial improvement over the practices in the 1980s and earlier. I draw the inference that the practices developed, at least in part, as a result of the work done by the Royal Commission (who identified problems with then existing practices, including that lack of records was harmful to donor offspring), as well as a more sophisticated and informed understanding about the needs of donor offspring.

In addition, I think a fair inference is that the more sophisticated and informed understanding was aided by the re-thinking about the best interests of the child that occurred in connection with the reform of adoption legislation in Canada.

[177] Nevertheless, I do not think that practices developed by private service providers, however excellent or thoughtful or thorough, can be a full answer to the circumstances of donor offspring. The Royal Commission, who recognized that donor offspring were and are a vulnerable group, did not recommend that assisted reproduction be left to the private sector. Rather, it recommended government regulation of most or at least many aspects. The AGBC relied on that government regulation as part of his defence to Ms. Pratten's claims. Based on the evidence in this case, at least some of the service providers involved in assisted reproduction recognize the need for detailed records and information on donors, and the importance of maintaining such records "in perpetuity." However, what of other service providers? Private businesses fail or simply cease to exist. Indeed, based on Dr. Del Valle's evidence, there are now fewer sperm banks than there were in the 1980s and 1990s. Records containing vital personal information and intended to be preserved "in perpetuity" may be preserved when a service provider goes out of business, but they may not be.

Adoption Reform – Rethinking the best interests of the child

[178] Prior to 1996, there were no provisions in B.C.'s adoption legislation whereby adoptees could obtain access to information recorded by the Province relating to their birth parents, background and adoption. Although informal open adoption arrangements were not prohibited, under the legislation, once an adoption order was made by the court, the adoption file and records were sealed.

[179] Extensive amendments were made to the ***Adoption Act*** and the associated regulations at the end of 1995 and into 1996. The ***Adoption Act***, S.B.C. 1995, c. 48 was assented to July 6, 1995, and was brought into force on November 4, 1996 (see B.C. Reg. 93/96) along with new regulations (see now the ***Adoption Act*** and the ***Adoption Regulation***). The amendments allowed for increased openness and

disclosure throughout the adoption process, and, among other things, offered search and reunion services.

[180] In reforming adoption legislation and enacting the ***Adoption Act*** in the mid-1990s, the Province acknowledged that society's understanding of a child's best interests had changed. It had been considered to be in the best interests of an adoptee to be treated "as if born to" an adopting family, severing all ties between the adoptee and the adoptee's family and origins. The new legislation recognized that, even if well-intentioned, cutting children off from their biological origins can have a severe impact on adoptees and is not in their best interests.

[181] Prior to the amendments, the Minister of Social Services requested that a review be conducted of current issues in relation to B.C.'s adoption legislation, policies and practices. The *Report to the Minister of Social Services of the Panel to Review Adoption Legislation in British Columbia* dated July 1994 made a number of observations and recommendations, including the following:

> p. 5 The *Adoption Act* was revised in 1957 to provide protection and privacy to all parties to the adoption; however, many members of the adoption circle say they no longer want or need that privacy. In many cases, the secrecy that this has injected into what was once a much more open process is viewed as obstructive at best and at worst, destructive.
>
> p. 6 Adoption in non-aboriginal society has generally been a guarded and confidential affair. This approach to child welfare was strengthened in 1957 with the addition of the term "as if born to" to describe the relationship of the child to the adoptive family. This permanent severing of any connection with the birth family ignores the importance of kinship and does not meet the needs of many members of the adoption circle.
>
> p. 25 Access to adoption records is an important issue for many members of the adoption circle. Numerous times, the Review Panel was told that society's understanding of adoption has changed, and that the way records are handled must change as well. Some presenters described the current practice of limited access to adoption records as "medieval."
>
> p. 26 The secrecy was also meant to hide an adopting couple's infertility, if that was their reason for adopting. The adoptee was to be seen "as if born to" the adoptive family and both the birth and adoptive families and their extended families and friends were to carry on as though the child had either never been born or never been adopted. . . . Any

> attempt by an adoptee to learn about his or her birth family was seen as a sign that the adoption had failed. The adoptee's biological and cultural history no longer existed. Their past was erased or legally concealed.
>
> Supporting this illusion in law has had a devastating effect on many adoptees, birth mothers and other members of the adoption circle. . . .
>
> Adoption must now be seen in a new light. As society has changed, so has our understanding of such things as "family" and children's rights. . . . Rather than destroying pre-adoption history, [the *Adoption Act*] should:
>
> - confer a status which is equal in law to that of a "natural" child;
> - include a right to know for the adoptee about his or her adoption and biological heritage; and
> - reflect the responsibility of the adoptive parent, adoptee and birth parent to keep each other informed of important medical and family information.
>
> This new concept of adoption recognizes the importance of the biological family to the child's entire life. . . . Adoptees felt they had a right to information that was being kept from them without their consent. Sealing adoption records meant that a child's "identity was stolen," as one adoptee described it. Others were eloquent in describing their need for knowledge to become whole, to belong and to be able to put themselves in a biological context. Heredity and the risk of disease was a recurring topic. Some adoptees wanted to know for certain that they would not unknowingly choose to marry a sibling or close family member.

[182] Many of these same concerns are reflected in the evidence in this case from the donor offspring and Ms. Pratten's experts.

[183] The ***Adoption Act*** and ***Adoption Regulation*** contain provisions whereby, before or when a child is placed for adoption, efforts must be taken to obtain as much information as possible about the medical and social history of the child's biological family, and to preserve that information for the child: see ***Adoption Act*** s. 6(1)(c) and s. 8(2)(b). Section 4(1) of the ***Adoption Regulation*** provides details of the type of information that should be collected, as practicable. It includes such things as a physical description of the birth mother and birth father; information about the personality and interests of each of them, their cultural, racial and linguistic heritage and their religious and spiritual values and beliefs; a detailed health and

social history of the birth mother and birth father; and the reason why the birth parents decided to make an adoption plan for the child. The information collected must be recorded in a written report. The ***Adoption Act*** requires further that the prospective adoptive parents be given information about the medical and social history of the child's biological family: see s. 6(1)(d), s. 8(2)(c) and s. 9(b).

[184] In the case of a child who is not a resident of B.C. and is brought into the province for adoption, the ***Adoption Act*** provides that any information obtained about the medical and social history of the child's biological family must be preserved for the child: see s. 48(3).

[185] These are among the legislative provisions that Ms. Pratten says discriminate against her and donor offspring, in that they provide benefits for adoptees, but omit donor offspring, even though the needs of each group are comparable and similar.

[186] Section 59 of the ***Adoption Act*** provides for the making of an openness agreement pre-adoption, for the purpose of facilitating communication or maintaining relationships. Section 60 allows parents and relatives of adoptees under 19 to register under the ***Adoption Regulation*** (see s. 19) to indicate their interest in making openness agreements, and if both an adoptive parent and a relative of an adopted child have registered, the Provincial director of adoptions may assist the parties to reach an openness agreement and, if they wish to exchange identifying information, must disclose the identifying information provided.

[187] Section 61 of the ***Adoption Act*** provides that a director of adoption designated under the ***Act***, or the Provincial director, may disclose identifying information to a person if the disclosure is necessary for the safety, health or well-being of a child or for the purpose of allowing a child to receive a benefit.

[188] The ***Adoption Act*** contains specific provisions whereby adoptees, on turning 19, have the right or the opportunity to learn the identity of their biological parents by applying for copies of their original birth registrations and adoption orders: see s. 63 (application for original birth registration and adoption order), s. 65 (disclosure veto

in respect of individuals adopted under predecessor legislation) and s. 66 (no contact declarations may be made by either the adoptee or a birth parent). Under s. 64, a birth parent can also make application for information, again subject to s. 65 and s. 66.

[189] Section 68 provides that:

> 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.

[190] Under s. 69 of the ***Adoption Act*** and sections 22 and 23 of the ***Adoption Regulation***, an adoptee over 19 and an adult relative of an adoptee over 19 may register with the Provincial director of adoptions to exchange information. If an adoptee and a relative have both registered, then the Provincial director must notify each of them and disclose to each the indentifying information provided by the other. Further, s. 71 of the ***Act*** and s. 24 of the ***Regulation*** provide for search and reunion services and assistance.

[191] These sections describe additional benefits provided under the legislation to adoptees. Ms. Pratten says that, by omitting donor offspring, the legislation is discriminatory.

[192] The ***Adoption Act*** and ***Adoption Regulation*** distinguish between children adopted prior to the new legislation, and children adopted after it came into force. Children adopted prior have the potential opportunity to learn their birth parents' identity, provided complete information was recorded on the registration of live birth, and subject to the birth parent's veto. In addition, the legislation does not provide for, and did not require, the creation and retention of the medical and social history for the birth parents of children adopted prior to the new legislation coming into force.

[193] Thus, an adoptee born in 1982 (when Ms. Pratten was born) could learn the identity of her birth parents, provided that information was recorded on the registration of live birth, and provided further that there was no veto. No new information, either concerning the identity or concerning the medical and social history of the birth parents, is created for that adoptee. Whether an individual was adopted after the ***Adoption Act*** came into force, or under the predecessor legislation, the records relating to the identity of the biological parents are not "created and preserved for the adopted person" under the ***Adoption Act***, contrary to what Ms. Pratten alleges in her Notice of Claim. Such records are created by virtue of the registration of live birth, under the ***Vital Statistics Act***, R.S.B.C. 1996, c. 479 (and its predecessors). However, the ***Adoption Act*** provides for <u>disclosure</u> of the original registration, subject to a veto or a no-contact declaration.

[194] Ann Clayton, who has worked in the adoption area since 1997 and is the Provincial director of adoption services with the Ministry of Children and Family Development, provided evidence concerning the adoption process, the collection of information about birth parents and the creation and provision of identifying information. Ms. Clayton explained that an adoption is not contingent on obtaining information, and the accuracy of the information collected depends on what the ministry is told by the birth parent(s) and family members. No steps are taken to confirm information, by, for example, contacting family doctors.

[195] Ms. Clayton explained that, once an adoptee turns 19, she or he may apply to the Ministry for a copy of her or his file, and a copy of the file, with all identifying information removed, will be provided to the adoptee. An adoptee who wants to know the identity of a birth parent must go to the Vital Statistics Agency to obtain a copy of the registration of live birth and the adoption order. If the individual was adopted before November 1996 and a veto was filed under the ***Adoption Act***, the information available would not include identification of the birth parents. For adoptions after November 1996, identifying information will be available, but it may come with a "no-contact" declaration.

[196] Ms. Clayton explained further that the “registration of live birth” is a document created and maintained by Vital Statistics, and it may or may not list the birth parents. In Ms. Clayton’s experience, it would be unusual not to list the birth mother, but not unusual not to list the birth father.

[197] Roberta Moyer, a regional manager of the Vital Statistics Agency, also provided evidence touching on these points. Ms. Moyer’s evidence was supplemented by evidence from Mark Spearman, one of her colleagues at the Agency.

[198] Ms. Moyer explained that the Vital Statistics Agency is responsible (under the ***Vital Statistics Act***) for keeping statistics on a variety of events, including the birth and adoption of a child. After a child is born in B.C., the child’s birth is to be registered, and the identification particulars are recorded on a registration of live birth. As Ms. Moyer explained, the ***Vital Statistics Act*** identifies who is responsible for registering the birth of a child. The registration of live birth form has undergone modifications over the years. For example, in 2006, the Agency, through policy, changed the form to register a mother, and if she chooses, a father or “co-parent.” According to Ms. Moyer, it is highly unusual not to have particulars of the birth mother on the registration of live birth. She is aware of only one such occasion. However, it is much less unusual not to have the particulars of the birth father. For example, the evidence discloses that, based on a random sample of birth registrations for adoptions in B.C. in 1982 (the year Ms. Pratten was born), 55% did not list the birth father.

[199] Ms. Moyer also described the process when an adoptee requests information. Since about 1920, Vital Statistics has kept the original record of live birth and adoption order for adoptees. These are available once an adoptee turns 19, unless there is a disclosure veto. Ms. Moyer observes that the registration of live birth may contain information about the birth father, or it may not.

[200] The AGBC points out that, for individuals adopted prior to the 1996 amendments, having the <u>opportunity</u> to take advantage of benefits provided under

the ***Adoption Act*** depends on the birth parents' names being recorded on the original birth registration, and that, in the 1980s, it is more likely than not that the name of the birth father (assuming he is the biological father) will be missing. However, based on the evidence, the name of the birth father is listed on a significant portion of the birth registrations for adoptees (45% in 1982, e.g.). Moreover, where the birth father's name is not listed, but an adoptee has access to the birth mother's information, the adoptee can ask the birth mother for information (including identifying information) about the birth father. However, in the case of donor offspring, the birth mother cannot provide any information: the donor is anonymous and known only to the medical doctor who performed the insemination. If that medical doctor no longer remembers, or is unavailable, and if any records have been destroyed, the donor will most likely remain anonymous forever.

[201] On the general point concerning needs of adoptees to know about their background and roots, and the corresponding – and comparable – needs of donor offspring, I found the evidence of Sandra Scarth to be helpful, in addition to the evidence I have already noted. Ms. Scarth is the president of the Adoption Council of Canada, which Ms. Scarth describes as "an umbrella organization for adoption-related organizations in Canada." Ms. Scarth states that the Adoption Council's mandate is to "raise public awareness of adoption, promote the placement of waiting children, stress the importance of post-adoption services, and support search, reunion, and unqualified access to identifying information for both adopted adults and their birth parents."

[202] The Adoption Council has an official position on the openness of adoption records. An element of that official position is the belief that sealed adoption records perpetuate secrecy and shame within adoption. A further element of the policy is that every adopted adult has an unqualified right to access his or her original birth certificate, the court files pertaining to his or her adoption and his or her personal files held by the adoption agency, government and/or licensee.

[203] Ms. Scarth says that:

> It is the position of the [Adoption Council], based on its work with adopted people and the adoption community, that donor offspring have many of the same social, psychological and medical needs for background information about their genetic parents as do adopted people. The [Adoption Council] endeavours to share the significant knowledge obtained in the adoption community about these issues with the assisted human reproduction community. The [Adoption Council] endorses the policy paper of the Evan B. Donaldson Adoption Institute on this subject, titled "Old Lessons for a New World: Applying Adoption Research and Experience to Assisted Reproductive Technology".

[204] The policy paper begins its executive summary by stating:

> Adoption and assisted reproductive technology (ART) have much in common; most significantly, both processes are used to create families in which the child is not genetically related to one or both parents.

Among the findings described in the paper are the following:

> - The problematic effects of secrecy and of withholding information – on adopted persons, birthparents, and adopted families – offer insights for ART policy and practice related to the circumstances of a donor offspring's conception, disclosure of medical and other background information, and the identities of those involved.
> - The child-centered focus of adoption provides a vital perspective for placing greater attention on the children conceived through ART.
>
> . . .
>
> - The legal and regulatory framework for adoption provides a model that ART can utilize to inform its standards and procedures.

[205] In my view, the fact that the Adoption Council perceives this kind of connection between (on the one hand) adoptees and their needs and (on the other hand) donor offspring and their needs is strong support for the conclusion that the groups are, indeed, comparable.

Findings and Conclusions

[206] I have summarized above my conclusions based on the evidence from the donor offspring and Ms. Pratten's experts. I will now summarize my additional conclusions.

[207] First, the Royal Commission's report, the background to the amendments to the ***Adoption Act*** and Ms. Scarth's evidence all support the conclusions that there is much to learn from the adoption experience in considering the needs, circumstances and best interests of donor offspring, that there are many points of similarity between the two groups, that donor offspring share with adoptees many of the same social, psychological and medical needs for information about biological parents, and that, even if well-intentioned, serious harm can be caused by cutting off a child from his or her biological roots.

[208] Second, donor offspring have been recognized, at least since the publication of the Royal Commission's report in 1993, as a vulnerable group because of the lack or unavailability of records and information. This is another area where the adoption experience can teach valuable lessons, with a goal, in the case of donor offspring, of creating and preserving records in the best interests of the child.

[209] Third, although a comprehensive legislative response – namely the ***Assisted Human Reproduction Act*** – eventually followed the release of the Royal Commission's report, provisions addressing the circumstances of donor offspring were never proclaimed in force. Donor offspring remain no better off, except to the extent that the private sector (such as fertility clinics, who started keeping better and more complete records, or, for example, an organization such as the DSR) took up their cause.

[210] Fourth, the circumstances of donor offspring, particularly in matters affecting their physical and psychological health, are too important to leave unregulated. This would not be tolerated in the area of adoption, where there is a strong commitment to identifying and then, through legislation, facilitating measures considered to be in the best interests of children. The private sector cannot provide an adequate substitute for government protection and regulation, and practices developed by the private sector cannot be a full answer to the circumstances of donor offspring. It is unreasonable to say that donor offspring should be content to rely on those practices

in matters fundamental to their health and well-being. The suggestion reflects stereotypical thinking about donor offspring.

[211] Fifth, as with adoption legislation, the primary legislative response needed – and needs – to come from provincial legislatures, not parliament. That is now clear from the majority's ruling in the ***Assisted Human Reproduction Act Reference***. To the extent that the AGBC's defence against Ms. Pratten's case relies on the ***Assisted Human Reproduction Act***, the defence fails.

[212] Sixth, with respect to donor offspring records, I have found that the records relating to Ms. Pratten's donor were destroyed not later than November 2002. However, I have concluded that Dr. Korn has records for those individuals where his last encounter with them was later than November 1996. Those records should contain the information required by Rule 13 of the College's rules made under the 1996 ***Medical Practitioners Act***. The information includes the patient's name.

[213] Moreover, based on the evidence from Dr. Yuzpe, Ms. Baker and Dr. Del Valle, since about the early 1990s, considerably more information about donors is being collected and is available at fertility clinics, reflecting a more sophisticated and informed understanding about the needs of donor offspring. At least at Genesis and ReproMed, that information remains preserved. Both Dr. Korn's and Genesis' records are among the "Gamete Donor Records" covered by Madam Justice Gerow's injunction, and the information in those records should be preserved for the children created, in other words, the donor offspring.

[214] Seventh, contrary to what Ms. Pratten alleges in her Notice of Claim, records relating to the identity of the biological parents of an adoptee are not "created and preserved" pursuant to the impugned legislation, but through the registration of live birth. However, the opportunity (or the right) to learn the identity of one's biological parents by means of access to the records is a benefit provided under the legislation. Even though, in the case of a donor offspring, the registration of live birth does not disclose the identity of the donor, the means exist to create a comparable record identifying the biological parent, through Gamete Donor Records.

[215] Finally, I conclude, based on the whole of the evidence, that assisted reproduction using an anonymous gamete donor is harmful to the child, and it is not in the best interests of donor offspring.

Analysis and Discussion

[216] During argument, I inquired of Mr. Arvay whether, if I found in favour of Ms. Pratten on s. 15, it would then be necessary for me to go on to consider the claim under s. 7. Initially, Mr. Arvay indicated it would not be necessary, although he urged me to address the s. 7 claim nevertheless. However, on further reflection, Mr. Arvay submits that, regardless of the outcome of Ms. Pratten's claim under s. 15, I will also need to address her claim under s. 7. He submitted that this is because s. 15 and s. 7 protect different interests, and the relief Ms. Pratten is seeking under s. 7 – particularly if the section is interpreted to guarantee positive rights to liberty and security of the person – is broader than the relief Ms. Pratten is seeking under s. 15. If s. 7 is interpreted to guarantee positive rights, the result (according to Mr. Arvay) will be to guarantee to donor offspring greater rights than those enjoyed by adoptees.

[217] I will begin my analysis with Ms. Pratten's claim under s. 15.

(a) Section 15

[218] Section 15(1) of the ***Charter*** provides:

> 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.

[219] Section 15 is a constitutional guarantee against discrimination and a guarantee of substantively equal protection and benefit of the law. In other words, it is a guarantee of substantive – and not just formal – equality: see ***Withler v. Canada (Attorney General)***, 2011 SCC 12, 329 D.L.R. (4th) 193, at para. 2. The purpose of s. 15 is to ensure equality in the formulation and application of the law,

and to promote a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration: see ***Law Society of British Columbia v. Andrews***, [1989] 1 S.C.R. 143, at p. 171 (per McIntyre J.). The s. 15(1) guarantee is the broadest of all guarantees, and it applies to and supports all other rights guaranteed by the ***Charter***: see ***Andrews***, at p. 185 (per McIntyre J.).

[220] The test for showing discrimination under s. 15(1) has two parts: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping. See ***Withler***, at para. 30. I will address each in turn.

(i) Does the law create a distinction that is based on an enumerated or analogous ground?

[221] In ***Withler***, the court explained the role of comparison in the first part of the test – whether the impugned legislation creates a distinction – at paras. 62-63:

> [62] The role of comparison at the first step is to establish a “distinction”. Inherent in the word “distinction” is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
>
> [63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. . . .

[222] Ms. Pratten argues that the ***Adoption Act*** and ***Adoption Regulation*** provisions in issue result in both direct and indirect discrimination against donor offspring. Although the legislation does not expressly draw a distinction between individuals who are adopted and donor offspring, Ms. Pratten says the legislation is underinclusive because donor offspring are omitted. Underinclusive legislation is

vulnerable to attack under s. 15: see ***Vriend v. Alberta***, [1998] 1 S.C.R. 493, at paras. 61 and 80.

[223] Ms. Pratten says that the offending distinction is illustrated in s. 2 of the ***Adoption Act*** (underlining added):

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

Ms. Pratten says that, omitting the offending distinction (adoption) from s. 2, the purpose of the legislation is to provide for new and permanent family ties, giving paramount consideration in every respect to the child's best interests. Section 3(1) provides that all relevant factors must be considered in determining the child's best interests, including, for example, the child's cultural, racial, linguistic and religious heritage. The "child's best interests" therefore include not severing the original ties of biological heritage. The legislative provisions in issue in this case – and the benefits available under those provisions – were enacted in that context.

[224] Ms. Pratten says that, by excluding donor offspring, the legislation in issue has in effect created a distinction between individuals who are adopted and individuals who are donor offspring. It has created a distinction on the basis of manner of conception, and specifically conception by anonymous gamete donation. Since the manner of one's conception is a personal characteristic that is immutable, like race, it qualifies as an analogous ground: see ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203, at para. 13. In other words, as compared with individuals who are adopted, Ms. Pratten and other donor offspring are denied equal benefit of the law, based on the manner of their conception. They have neither the opportunity nor the right to learn about their biological origins, and, as compared with adoptees, there is no requirement either to collect as much information as possible about the medical and social history of the donor offspring's biological family or to preserve that information for the child.

[225] Ms. Pratten argues further that the discrimination suffered by donor offspring is also more nuanced and multi-faceted, because the group is disproportionately made up of the offspring of parents with a disability (e.g., infertility), parents who are not heterosexual or parents who are single. Ms. Pratten says that, here, there are interconnected enumerated and analogous grounds: manner of conception, disability, sexual orientation and family status.

[226] The AGBC says that the law does not create any distinction, because the benefits being sought by Ms. Pratten are not benefits prescribed by law. The AGBC argues that Ms. Pratten's claim is analogous to the plaintiffs' case in ***Auton (Guardian ad litem of) v. British Columbia (Attorney General)***, 2004 SCC 78, [2004] 3 S.C.R. 657. There, the Court confirmed (at para. 28) that s. 15 claims are confined to benefits and burdens imposed by law, and the Court concluded (at para. 35) that the benefit being claimed (funding for all medically required services) was not in fact provided for by the law. In this case, the AGBC says that there is no law in B.C. guaranteeing anyone the right to know their genetic heritage and no law granting children, generally, the legal right – constitutional or otherwise – to access a parent's medical history or personal information. The AGBC says that Ms. Pratten cannot show that the Province, through legislation, has treated her differently on the basis of an enumerated or analogous ground.

[227] However, in my view, this argument misstates Ms. Pratten's claim under s. 15. Ms. Pratten claims that the Province violated s. 15 by its omission or failure, in the ***Adoption Act*** or in any other legislation, to provide her and other donor offspring with the benefits that have been provided to adoptees. Ms. Pratten confirmed, in her Notice of Claim and in both her written and oral submissions, that the benefits she is seeking on behalf of donor offspring are the benefits (summarized in her Notice of Claim) available to adoptees under the provisions reproduced in Schedule "A". Unlike ***Auton***, the benefits in issue here, and which Ms. Pratten is seeking on behalf of donor offspring, are provided by law.

[228] The AGBC argues further that the ***Adoption Act***, by its very nature, is designed to exclude all those persons who were not adopted, and in this respect, it directly creates a distinction between adopted people and all others. In the AGBC's submission, the legislation creates this distinction for ameliorative reasons and, therefore, is more properly assessed under s. 15(2), not s. 15(1). I will return to this point shortly.

[229] The AGBC says that Ms. Pratten and other donor offspring are treated differently under the legislation, not because of the manner of their conception, but because they are not adopted. The AGBC says that Ms. Pratten cannot establish the necessary comparison, based on an enumerated or analogous ground, to prove differential treatment in the light of the many differences between state-regulated adoption practices and the largely unregulated world of conception by anonymous gamete donation.

[230] I do not agree. In my opinion, the impugned legislation seeks to remedy a harm perceived to be caused to adopted children from alienation by whatever means of a child from a biological parent. The unchallenged evidence in this case is to the effect that donor offspring, alienated from the donor, suffer harm similar and comparable to that suffered by adoptees.

[231] Equality is an inherently comparative concept. However, the Supreme Court of Canada has confirmed in ***Withler*** that what is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group (see ***Withler***, at para. 40).

[232] In my view, the evidence in this case provides strong support for the conclusion that the circumstances of adoptees and those of donor offspring, with regard to the need to know and have connection with one's roots, are closely comparable. The concerns expressed by donor offspring are very similar to those expressed by adoptees and that provided the impetus for the amendments to B.C.'s

adoption legislation in the mid-1990s. Both groups express a strong need to know their birth origins, for reasons that include completing their sense of identity, obtaining valuable and necessary information relevant to their health and to help them avoid intimate relationships with close genetic relatives. The Adoption Counsel of Canada has acknowledged similarities between adoptees and donor offspring, in areas relevant to Ms. Pratten's claims, as did the Royal Commission.

[233] Here, the legislation creates a distinction between those individuals who are disassociated from their biological parents because of adoption, and those who are disassociated from a biological parent because of anonymous gamete donation.

[234] I conclude that the appropriate comparison at step one of the analysis is between adoptees, i.e., those who have received the benefits in issue under the legislation being challenged by Ms. Pratten, and donor offspring, those whom Ms. Pratten asserts are denied those benefits because of the manner of their conception. In my view, excluding donor offspring from the benefits and protections of the ***Adoption Act*** and ***Adoption Regulation*** creates a distinction between adoptees and donor offspring. Furthermore, the distinction is based on an analogous ground, namely manner of conception, and, specifically, conception by anonymous gamete donation. Like race, this is a personal characteristic that is immutable.

(ii) Section 15(2)

[235] Before turning to discuss the second part of the test under s. 15(1), I will address the argument of the AGBC that s. 15(2) of the ***Charter*** applies to this case, and provides him with a defence to Ms. Pratten's claims under s. 15(1). The AGBC relies on ***R. v. Kapp***, 2008 SCC 41, [2008] 2 S.C.R. 483, in support of this argument.

[236] Section 15(2) provides:

> 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.

[237] In ***Kapp***, the Court explained (at para. 40) that:

> [O]nce the s. 15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. This approach has the advantage of avoiding the symbolic problem of finding a program discriminatory before “saving” it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1). Should the government fail to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory.

[238] Section 15(2) is preceded by the heading "Affirmative action programs." It is aimed at addressing the problem of what to do when identical treatment results in inequality. Section 15(2) ensures that the government is not precluded by s. 15(1) from enacting any law or creating any program that has as its objective the amelioration of conditions of disadvantaged individuals or groups.

[239] In my opinion, s. 15(2) has no application to the present case because Ms. Pratten is not seeking to preclude the Province from enacting the ***Adoption Act*** and the ***Adoption Regulation***. Ms. Pratten does not say that adoptees should not have the benefits provided to them under that legislation. Rather, her position is that the legislation is underinclusive, and therefore discriminatory, as a result of omitting donor offspring. Ms. Pratten made clear that although she is seeking an order declaring the impugned provisions of the ***Adoption Act*** and the ***Adoption Regulation*** to be of no force or effect, this is only because that is a remedial device courts suggest is appropriate in the case of underinclusive legislation.

(iii) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[240] I turn then to the second part of the test under s. 15(1).

[241] A distinction based on an enumerated or analogous ground is not by itself sufficient for a violation of s. 15(1). The question at the second step is: does the distinction create a disadvantage by perpetuating prejudice or stereotyping? This, of course, is a question about discrimination.

[242] Context is critical to the analysis. As Chief Justice McLachlin (for the majority) observed in ***Gosselin v. Québec (Attorney General)***, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 24, "[t]o determine whether a distinction made on an enumerated or analogous ground is discriminatory, we must examine its context." She continued, at para. 25:

> [25] The need for a contextual inquiry to establish whether a distinction conflicts with s. 15(1)'s purpose is the central lesson of *Law*. The issue . . . is whether "a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity" having regard to the individual's or group's traits, history, and circumstances [citations omitted].

[243] In ***Withler***, the Court said, at paras. 65-66:

> [65] The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. At this step, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances. [citation omitted]
>
> [66] The particular contextual factors relevant to the substantive equality inquiry at the second step will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other: *Kapp*. Factors such as those developed in *Law* — pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected — may be helpful. However, they need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory [citations omitted]. . . . At the end of the day all factors that are relevant to the analysis should be considered. . . .

[244] The question here is whether, having regard to the relevant context, the omission of donor offspring from the Province's adoption legislation perpetuates disadvantage or prejudice, or stereotypes the claimant group.

[245] In this case, I have concluded that the contextual factors that are relevant and helpful to my analysis are those developed in ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497, namely: pre-existing

disadvantage and stereotyping; correspondence with actual characteristics; ameliorative purpose or effects of the impugned law on other groups (specifically adoptees); and the nature of the interest affected.

(A) Disadvantage and stereotyping

[246] The first way that discrimination may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice or disadvantage to members of a group on the basis of personal characteristics within s. 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group: see ***Withler***, at para. 35. The second way that discrimination may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant group: see ***Withler***, at para. 36.

[247] There is some evidence in this case to support the conclusion that donor offspring, as a group, have been historically disadvantaged. Historically, secrecy, and frequently shame, has been attached to their origins. Among other things, the secrecy, and firm barriers to unlocking the secrets, result in psychological distress and the inability to receive timely medical treatment. As the evidence in this case discloses, using an anonymous donor remains the choice of many would-be parents who want to have control over what their child knows, when their child knows it, and who might be involved in their child's life. It may be the only practical option available, as Dr. Del Valle suggests. But, based on the evidence in this case, I have concluded that anonymity is not in the <u>child's</u> best interests.

[248] More significantly, in my view, this case also demonstrates that donor offspring are the victims of stereotypical thinking about their circumstances and needs.

[249] Indeed, some of the arguments advanced in this case appear to me to be based on a stereotypical view of donor offspring, rather than their actual

circumstances and characteristics. In distinguishing adoptees from donor offspring, the AGBC argues that adoptees do not know either of their genetic parents and that adoption involves the "translation" or "transition" of a child's previous identity into a new identity by order of the court. Therefore (the argument continues), it is incumbent on the government to "restore" that identity by providing the child with information about the birth parent(s). The AGBC argues that, in contrast, donor offspring are part of a family with at least one biological parent in place, and most are raised by their biological mothers.

[250] The implication of this argument is that, because donor offspring have a biological parent in place, they do not in fact have needs similar to adoptees – or indeed any need – for information about the other half of their biological history. However, that conclusion is based on a stereotypical view of donor offspring: namely, so long as one biological parent in place, then either needs do not exist at all (a proposition refuted by the unchallenged evidence in this case), or the missing information is unimportant because the donor offspring already has some information (a proposition also refuted in this case). Once the conclusion is reached that information is unimportant, then anonymity – a permanent barrier to learning the truth – ceases to be problem. However, this reasoning substitutes denial in place of thoughtful examination of what is in the best interests of the donor offspring, and relies on acceptance of stereotypes about donor offspring, rather than looking at their actual circumstances and needs.

[251] Donor offspring can carry the burden of stigma that comes of feeling that they are perceived as biological products. Mr. Adams, who sometimes thinks of himself as one of his lab experiments, provides a poignant example. The more sinister stereotype is that donor offspring are, in a sense, manufactured, and either they lack normal human needs, or if they have needs, it is acceptable to ignore them.

[252] These stereotypes are not supported by the evidence from the donor offspring themselves. They are not supported by the evidence from the experts. They are not supported by the conclusions drawn by the Royal Commission, who

recommended that government must act to protect a vulnerable group. They are not supported by the evidence from the Adoption Council of Canada, who sees a strong link between adoptees and donor offspring.

[253] Other assumptions are made about donor offspring. For example: because donor offspring are “wanted” children, they will not need or want background information about their biological roots, and are not subject to emotional or psychological stresses because they have been separated from those roots. This stereotype was also applied to adoptees, and was rejected (because it did not reflect their actual characteristics) when the legislation was reformed. Another assumption made about donor offspring is that, because they are “wanted” children, it is acceptable to disregard their best interests in favour of the interests of their parents, who may have compelling reasons for preferring (or requiring) donor anonymity. However, these assumptions are based on stereotypes. They do not reflect the actual experiences and characteristics of donor offspring, as disclosed by the evidence in this case.

[254] Strong and positive relationships with social parents do not satisfy or eliminate the desire and need of donor offspring to know where they came from, and their need to know their origins is just as powerful and real as those of adoptees. The AGBC did not challenge the evidence submitted by Ms. Pratten that supports those conclusions. Rather, the AGBC argued that current practices and the ***Assisted Human Reproduction Act*** met the needs of donor offspring. However, I have concluded that the private sector cannot provide an adequate substitute for government protection and regulation, and the majority’s ruling in the ***Assisted Human Reproduction Act Reference*** is fatal to the other plank in the AGBC’s argument.

(B) Correspondence with actual characteristics, needs or circumstances

[255] This factor looks at the distinction complained of, and the actual characteristics, needs or circumstances of the claimant group. Where the claim is

that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances: see ***Withler***, at para. 38. Perfect correspondence is not required to find that a challenged provision does not violate s. 15: see ***Gosselin***, at para. 55 and ***Withler***, at para. 67.

[256] Here, the distinction Ms. Pratten complains of is between adoptees, who, by the ***Adoption Act*** and ***Adoption Regulation***, are provided with means to access and connect with their biological roots, and donor offspring, who are not. In my view, there is no correspondence with the actual characteristics, needs and circumstances of donor offspring. They simply have not been addressed. One of the explanations for the lack of correspondence lies in stereotypical thinking about what those characteristics, needs and circumstances are.

[257] At the hearing, the AGBC advanced another explanation. He argued that, while the Province has not made provision for donor offspring in its adoption legislation, the federal government had created legislation, namely, the ***Assisted Human Reproduction Act***, to address the needs and circumstances of donor offspring, and (as a result) their actual needs and circumstances were and are not being ignored. However, this argument cannot survive, given the majority ruling in the ***Assisted Human Reproduction Act Reference***.

[258] I conclude that the legislative scheme in issue does not correspond with the needs and circumstances of donor offspring. To the extent that a distinction has been drawn between the needs and circumstances of adoptees and those of donor offspring, that distinction is based on stereotyped views of the needs and circumstances of donor offspring.

(C) Ameliorative purpose of the impugned legislation

[259] On this factor, Mr. Justice Iacobucci observed in ***Law***, at para. 72:

> An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely

> corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense. Underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination [citation omitted].

[260] The inquiry into this factor, as with all the contextual factors, must be conducted from the perspective of the reasonable claimant, that is, a reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant. However, even if a legislative distinction serves a relevant ameliorative purpose, the reasonable claimant may still perceive that his or her dignity has been infringed. See ***Trociuk v. British Columbia (Attorney General)***, 2003 SCC 34, [2003] 1 S.C.R. 835, at para. 28.

[261] The AGBC submits that a reasonable person in Ms. Pratten's position must take into account that the provisions in the ***Adoption Act*** and ***Adoption Regulation*** have an ameliorative purpose. The AGBC says that adopted children (except in the case of step-parent adoptions) know neither of their genetic parents, implying that donor offspring are more advantaged (relatively speaking) because they know one of their genetic parents. The AGBC submits that the amendments to B.C.'s adoption legislation were intended to increase the ability of adoptees to access information, to search for birth parents and to make contact with relatives seeking reunion. These rights were given to adoptees, who had no ties or knowledge of either of their biological parents, as compared with donor offspring.

[262] There is no dispute that the ***Adoption Act*** and ***Adoption Regulation*** have among their purposes the amelioration of the circumstances of adoptees and the implementation of measures that will advance the best interests of adoptees. However, that does not shield the legislation from scrutiny.

[263] Looking at the respective needs and circumstances of adoptees and of donor offspring in the light of the evidence in this case, I am not prepared to conclude that

adoptees are more disadvantaged. It is true, as the AGBC points out, that donor offspring know one of their biological parents. However, the potential for harm arising from the anonymity of the other biological parent is, in my view, no different than the harm to adoptees that the amendments to the adoption legislation were intended to address. After thorough and careful study, the legislature concluded in the mid-1990s that maintaining secrecy about a child's origins, and cutting the child off from those origins, were not in the child's best interests. I am unable to conclude that, because a donor offspring knows a biological parent, being cut off from half of his or her origins is any less harmful. The evidence in this case, including the evidence of current practices that are designed to avoid cutting off donor offspring from their roots, compels me to the conclusion that cutting off a child from half of his or her biological origins is not in that child's best interests.

[264] I conclude that a reasonable claimant in the circumstances of Ms. Pratten would perceive that the Province could protect and provide for adoptees without arbitrarily excluding donor offspring and exposing them to the harm associated with being cut off from their biological roots. The reasonable claimant would conclude that it was not necessary to exclude donor offspring in order to achieve the ameliorative purpose of providing for new and permanent family ties for adoptees.

(D) Nature of the interest affected

[265] The last contextual factor is whether the nature and scope of the interest affected by the impugned law is such that it merits constitutional protection. In this case, the interests affected concern an individual's social, cultural, ethnic and genetic heritage.

[266] The AGBC submits that, while the ***Adoption Act*** and the ***Adoption Regulation*** do not address Ms. Pratten's concerns on behalf of donor offspring, that does not mean that the interests of donor offspring have been ignored. The AGBC points to the years of policy work and consultation, including in particular the work done by the Royal Commission, that went into developing the ***Assisted Human Reproduction Act***. The AGBC argues that an individual's interests will be more

adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction does recognize or accommodate the interests, but does so in a manner that is simply more restrictive than some would like. However, these arguments rely on the ***Assisted Human Reproduction Act*** as an answer to Ms. Pratten's claims.

[267] In my view, the interests affected in this case are such that they merit constitutional protection, something that the AGBC recognizes and acknowledges, at the very least implicitly, in his arguments. At the hearing, the AGBC's answer to Ms. Pratten's argument was to point to the legislative response following the publication of the Royal Commission's report, as evidence that in fact the interests had not been ignored by government. As of the hearing, this argument was problematic, and, in my view, unconvincing, because the specific provisions in the ***Assisted Human Reproduction Act*** that arguably responded to the interests had never been proclaimed in force. Since the hearing, the Supreme Court of Canada has ruled that these provisions are *ultra vires* the federal government. They cannot be an answer to Ms. Pratten's claims.

(iv) Summary of conclusions on s. 15

[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.

[269] As a result, there is a violation of the rights of Ms. Pratten and donor offspring under s. 15(1) of the ***Charter***.

(b) Section 7

[270] Section 7 of the ***Charter*** provides that:

> 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.

[271] Ms. Pratten claims that the Province has breached her liberty and security of the person by failing to enact protective legislation that would provide her and other donor offspring with the right or opportunity to know their origins. She alleges that the Province and the College have permitted and continue to permit medical practitioners to fail to create and to destroy records containing essential information for donor offspring. Ms. Pratten alleges that the Province has the power to approve or authorize the College's bylaws, and that when the College passed bylaws permitting destruction of records after 6 years, there was sufficient government action for purposes of s. 7. She claims that circumstances of medical necessity may arise where access to the records is required to safeguard her physical and psychological well-being, and that of other donor offspring. Ms. Pratten asserts that the failure of the Province and the College to ensure that the records are created and preserved permanently and made available to her and other donor offspring in circumstances of medical necessity or otherwise deprives her and other donor offspring of their right to liberty and security of the person, contrary to s. 7 of the ***Charter***.

[272] Ms. Pratten argues that s. 7 of the ***Charter*** should be interpreted as comprising two rights, one positive and one negative. She says that s. 7 guarantees a positive right to liberty and security of the person, and as such, she need not show that a breach of her rights violates any principles of fundamental justice. In the

alternative, Ms. Pratten argues that she and other donor offspring are deprived of liberty and security of the person because the state (i.e., the Province), by virtue of its oversight of the bylaws of the College, continues to permit the destruction of records containing identity and health information about donors, and this breach of s. 7 violates the principles of fundamental justice.

[273] Mr. Arvay summarizes Ms. Pratten's position on s. 7 as follows:

(a) Ms. Pratten has a constitutional right to know from where she comes. This right is encompassed by either or both the right to liberty or the right to security of person. Her right is not grounded in access to a particular statutory regime, but is a free-standing constitutional right;

(b) without state action, whether it be legislation enacted by the Province or bylaws enacted by the College that require doctors to create and preserve the donor records for her benefit, Ms. Pratten is not able to exercise or fulfil her fundamental rights. She is beholden to the wishes of her donor, the doctor (Dr. Korn) or her parents;

(c) the fact that the Province has legislated in areas relating to these rights shows that the Province is truly accountable for interfering with the exercise of her right. This is evident in the underinclusiveness of the ***Adoption Act*** and even more directly in the Province's approval or implicit authorization of the College's bylaws, which encourages, orchestrates or sustains the violation of Ms. Pratten's fundamental rights.

[274] The AGBC submits that s. 7 does not impose upon the Province an obligation to legislate and that the issues raised by Ms. Pratten in her "positive rights" argument are not justiciable. Further, the AGBC argues that there is no constitutional right to know one's genetic heritage, and that, based on the evidence, there has been no deprivation of the right to liberty or security of the person in this case. The AGBC says that, even it could be argued that s. 7 creates positive rights

to legislate, the unprecedented, novel approach advanced by Mr. Arvay on behalf of Ms. Pratten should not be adopted here. Finally, the AGBC submits that the legislation establishing the College and providing a mechanism for the College to make rules cannot constitute the requisite state action.

[275] I will first address Ms. Pratten's argument that s. 7 should be interpreted in this case to include positive obligations. In my view, it should not be. I will then address whether the Province has deprived Ms. Pratten and other donor offspring of liberty or security of the person. In my view, there is insufficient state action to bring this case within s. 7. In that light, I do not need to address whether there has been a deprivation in accordance with the principles of fundamental justice.

(i) Should s. 7 be interpreted to include positive obligations?

[276] Here, the "right" asserted by Ms. Pratten is described variously as the right to know one's biological parents, and also as an individual's right to know his or her biological origins, as well as the right to know where he or she came from. The right is advanced as a free-standing, constitutionally protected right. Ms. Pratten says that there is no requirement that she show a <u>deprivation</u> as a result of state action. Rather, Ms. Pratten argues that <u>realization</u> of the right requires <u>positive</u> state action.

[277] Generally, in order to establish a breach of s. 7, a claimant must first show that she was deprived of her right to life, liberty or security of the person, and then must establish that the state caused such deprivation in a manner that was not in accordance with the principles of fundamental justice: see, for example, ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 47.

[278] On behalf of Ms. Pratten, Mr. Arvay is very candid in submitting that Ms. Pratten's s. 7 argument requires the court to squarely confront, perhaps for the first time, whether s. 7 imposes on the state a <u>positive</u> duty to take steps – to legislate – to protect life, liberty or security of the person. Mr. Arvay is also very candid in acknowledging that he is asking the court to adopt the framework of analysis of s. 7

relied on by Madam Justice Arbour in her dissenting judgment in ***Gosselin***. Mr. Arvay submits that, if I accept the approach to s. 7 described by Madam Justice Arbour, then the typical "negative rights" analysis (such as is described in ***Blencoe***) does not apply.

[279] In addition, because, on this analysis, the question whether there has been a deprivation is irrelevant, there is no requirement to consider whether a deprivation is in accordance with the principles of fundamental justice: see ***Gosselin***, at paras. 386-387 (per Arbour J.). At least implicitly, a further element of Mr. Arvay's argument is that there is no need to show positive state action causing a deprivation, and therefore no need to establish any causal link between state action and harm alleged to have been suffered. Mr. Arvay argues that, if I find that the Province has a positive duty in this case to protect the right to either liberty or security of the person, that is the end of the s. 7 analysis.

[280] The issue in ***Gosselin*** was whether a Québec government social assistance scheme violated sections 15 and 7 of the ***Charter*** and s. 45 of the ***Québec Charter***. Under the scheme, the base amount payable to welfare recipients under 30 was less than the amount payable to those over 30, and, to receive an amount comparable to the amount payable to those over 30, those under 30 had to participate in a designated work activity or education program. The majority of the court held that the evidence failed to support Ms. Gosselin's claim (which was brought in a representative capacity on behalf of all single welfare recipients in Québec, who were under 30 at the relevant time) on any of the asserted grounds, and the appeal was dismissed.

[281] In dissent, Madam Justice Arbour was willing to impose a positive duty on the state under s. 7. She concluded (paras. 308-309 and 400) that the legislation in issue denied those to whom it applied their right to security of the person, and she would have allowed the appeal.

[282] In her analysis of the s. 7 claim, Madam Justice Arbour said, at para. 319:

> [319] There is a suggestion that s. 7 contains only negative rights of non-interference and therefore cannot be implicated absent any positive state action. This is a view that is commonly expressed but rarely examined. It is of course true that in virtually all past s. 7 cases it was possible to identify some definitive act on the part of the state which could be said to constitute an interference with life, liberty or security of the person and consequently ground the claim of a s. 7 violation. . . . One should first ask, however, whether there is in fact any requirement, in order to ground a s. 7 claim, that there be some affirmative state action interfering with life, liberty or security of the person, or whether s. 7 can impose on the state a duty to act where it has not done so. (I use the terms “affirmative”, “definitive” or “positive” to mean an identifiable action in contrast to mere inaction.) No doubt if s. 7 contemplates the existence only of negative rights, which are best described as rights of “non-interference”, then active state interference with one’s life, liberty or security of the person by way of some definitive act will be necessary in order to engage the protection of that section. But if, instead, s. 7 rights include a positive dimension, such that they are not merely rights of non-interference but also what might be described as rights of “performance”, then they may be violable by mere inaction or failure by the state to actively provide the conditions necessary for their fulfilment. . . .

[283] In Madam Justice Arbour’s opinion (see paras. 324 and following), the case law was consistent with the view that s. 7 includes a positive dimension. She concluded her detailed interpretive analysis of s. 7 by saying, at para. 357:

> [T]he results are unequivocal: every suitable approach to *Charter* interpretation, including textual analysis, purposive analysis, and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension.

[284] As part of the “negative rights” analysis of s. 7, the claimant must show that the deprivation of rights resulted from government action, in other words, that it was state-imposed: see, e.g., ***Blencoe***, at paras. 57 and 60. In addressing this point, and whether in the “positive rights” analysis a claimant is required to demonstrate any causal link with government action, Madam Justice Arbour said (at paras. 379-381):

> [379] The absence of a direct, positive action by the state may appear to create particular problems of causation. Of course, state accountability in this context cannot be conceived of along the same lines of causal responsibility as where there is affirmative state action that causally contributes to, and in some cases even determines, the infringement. By contrast, positive rights are violable by mere inaction on the part of the state. This may mean that one should not search for the same kind of causal nexus tying the state to the

> claimants' inability to exercise their fundamental freedoms. Such a nexus could only ever be established by pointing to some positive state action giving rise to the claimants' aggrieved condition. While this focus on state action is appropriate where one is considering the violation of a negative right, it imports a requirement that is inimical to the very idea of positive rights.
>
> [380] . . . Here, as in all claims asserting the infringement of a positive right, the focus is on whether the state is under an obligation of performance to alleviate the claimants' condition, and not on whether it can be held causally responsible for that condition in the first place.
>
> [381] All of which indicates that government accountability in the context of claims of underinclusion is to be understood simply in terms of the existence of a positive state obligation to redress conditions for which the state may or may not be causally responsible. . . .

[285] Mr. Arvay notes that Ms. Gosselin's case failed on the facts. He draws some comfort in making his "positive rights" argument from the majority judgment of Chief Justice McLachlin. She wrote, at paras. 82-83:

> [82] One day s. 7 may be interpreted to include positive obligations. . . . The question therefore is not whether s. 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.
>
> [83] I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. . . .

[286] However, Chief Justice McLachlin prefaced these remarks by saying, at para. 81 (<u>underlining</u> in original):

> [81] . . . Section 7 speaks of the right <u>not to be deprived</u> of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to <u>deprive</u> people of these. Such a deprivation does not exist in the case at bar.

[287] Mr. Justice Bastarache (dissenting in the result in ***Gosselin***) was even more emphatic, and said, at para. 209: "Section 7 does not grant a right to security of the person, full stop."

[288] Several years after ***Gosselin*** was decided, the Supreme Court of Canada considered the scope of s. 7 in ***Chaoulli v. Québec (Attorney General)***, 2005 SCC 35, [2005] 1 S.C.R. 791. This case involved the constitutionality of provincial legislation prohibiting Québec residents from taking out insurance to obtain private health care for services available under the province's health care plan.

[289] In their joint reasons, Binnie and LeBel JJ. (dissenting in the result) observed (at para. 193) that s. 7 gives rise to some of the most difficult issues in ***Charter*** litigation:

> Because s. 7 protects the most basic interests of human beings — life, liberty and security — claimants call on the courts to adjudicate many difficult moral and ethical issues. It is therefore prudent, in our view, to proceed cautiously and incrementally in applying s. 7 . . . .

In my view, these comments (albeit in dissenting reasons) dictate caution and restraint before adopting Madam Justice Arbour's analysis, in the way Mr. Arvay is encouraging me to do.

[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.

[291] In that light, I have concluded that this case will not be the "one day" when s. 7 is interpreted to impose on the state a positive duty to act and legislate where it has not done so. I respectfully decline to adopt Madam Justice Arbour's analysis of s. 7 in ***Gosselin***.

(ii) Has the Province deprived Ms. Pratten and other donor offspring of liberty or security of the person?

[292] I turn then to consider Ms. Pratten's "negative rights" argument: her assertion that she has been deprived of the right to liberty and security of the person, contrary to s. 7.

[293] Ms. Pratten claims she and other donor offspring have been deprived of both liberty and security of the person. She asserts that the government action that has resulted in the deprivation is the Province's involvement in the approval or disallowance of the rules or bylaws of the College permitting destruction of patient records. This involvement begins in March 1995, when a College rule has no effect until approved by the Lieutenant Governor in Council. When the 1996 ***Medical Practitioners Act*** was repealed, the involvement expands pursuant to the various provisions of s. 19 of the ***Health Professions Act***, which (as I noted above) provide that, among other things, the minister "may" disallow a bylaw, "may request" amendment of a bylaw and "must" disallow a bylaw in certain circumstances.

[294] The AGBC argues that the legislation in respect of the College, its rules and bylaws simply cannot constitute the requisite state action for purposes of s. 7. Moreover, in the AGBC's submission, the evidence does not support the conclusion that the effect – whether physical or psychological or both – on Ms. Pratten and other donor offspring of not having access to information about their origins is or has been either serious or state-imposed.

(A) Liberty and security of the person

[295] The liberty interest protected by s. 7 protects the rights of citizens to make fundamental life choices without interference from the state. It includes the "right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference," where the decisions being made are fundamentally or inherently personal such that, "by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and

independence." See ***Godbout v. Longueuil (City)***, [1997] 3 S.C.R. 844, at para. 66; and also ***Blencoe***, at paras. 49-52.

[296] Ms. Pratten says that nothing could be more fundamental or inherently personal as knowing one's biological origins and all that this entails. I do not disagree. However, in my view, what is being described is best captured in the concept of security of the person, rather than liberty.

[297] "Security of the person" is probably the broadest of the s. 7 interests. In ***R. v. Morgentaler***, [1988] 1 S.C.R. 30, at p. 56, Dickson C.J.C. (for himself and Lamer J., as he then was) defined an infringement of the right to security of the person as "state interference with bodily integrity and serious state-imposed psychological stress." The right to security of the person protects both the physical and psychological integrity of the individual: see ***New Brunswick (Minister of Health and Community Services) v. G. (J.)***, [1999] 3 S.C.R. 46, at para. 58. In ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 S.C.R. 519, Mr. Justice Sopinka (for the majority) held, at pp. 587-88 (<u>underlining</u> added):

> In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. . . .There is no question, then, that <u>personal autonomy</u>, at least with respect to <u>the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person</u> . . . .

[298] In ***Blencoe***, Bastarache J. (for the Court) emphasized that the interference must be both state-imposed and serious. He said, at para. 57 (<u>underlining</u> in original):

> The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be <u>state imposed</u>, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be <u>serious</u>. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations.

[299] In ***Chaoulli***, McLachlin C.J.C. and Major J. reiterated the point that the adverse impact must be serious, at para. 123:

> [123] Not every difficulty rises to the level of adverse impact on security of the person under s. 7. The impact, whether psychological or physical, must be serious. However, because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s. 7 protection of security of the person is engaged. . . .

In addition, McLachlin C.J.C. and Major J. said (at para. 116) that serious psychological effects “need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety,” citing ***G (J.)***, at para. 60.

[300] Here, neither Ms. Pratten nor Ms. Deacon (the only B.C. donor offspring who provided evidence in this case) has been examined by a psychiatrist or a psychologist, so there is no opinion evidence specific to either woman on the question whether their circumstances as donor offspring have caused either serious psychological stress. The AGBC notes the court’s comments in ***Marchand*** (at paras. 75, 111 and 119) concerning the absence of such evidence. There is no opinion evidence specific to either woman about any serious effect on her physical health resulting from her circumstances as a donor offspring. The AGBC argues that, absent such evidence, and also in the light of the evidence concerning current practices, where records are maintained concerning the medical history and other information about donors, Ms. Pratten cannot prove a breach of s. 7.

[301] However, Ms. Pratten has public interest standing to pursue the claims in this action. So long as there is admissible evidence to support the conclusion that some donor offspring in British Columbia probably have experienced, are experiencing or could experience serious physical or psychological effects as a consequence of their circumstances as donor offspring, that is sufficient: see ***Chaoulli***, at paras. 200, 204 and 207.

[302] As I have noted, the evidence from Ms. Pratten, Ms. Deacon and the other donor offspring, and from Ms. Pratten’s experts Dr. Lauzon, Dr. Ehrensaft, Ms. Marquardt and Professor Daniels, about the effects on donor offspring of absence

and denial of information concerning their biological origins and family history is unchallenged by the AGBC. Dr. Korn, Dr. Yuzpe and Ms. Baker provided evidence about practices in fertility clinics in B.C. over a number of years (including the approximate number of women who have received treatment), and Dr. Del Valle provided evidence concerning the practices at ReproMed in Ontario.

[303] In my opinion, that evidence supports the conclusions, relevant to the issue of security of the person, that, despite changes in practices since the early 1980s:

(a) some donor offspring do not have access to what might be important background medical information that would assist in early identification of illness or disease and in treatment, and do not have access to this information even in circumstances of medical necessity;

(b) some donor offspring do not have access to a biological parent's medical history, and as a result are impaired in identifying or treating genetic conditions;

(c) without further biological testing, some donor offspring do not have the information required to determine if another individual is a biological half-sibling, and are therefore at risk for inadvertent consanguinity;

(d) some donor offspring do not have access to important information about their paternal heritage, culture, religion and other elements that are important to the formation of their identity, and which can be responsible for psychological distress.

[304] Therefore, as a result of the lack of this information, some donor offspring (probably including Ms. Pratten and Ms. Deacon) are at risk – and may be at serious risk – with respect to the security of their person. I say "some" donor offspring because, based on the evidence of current practices at fertility clinics, at least some of this information is now being collected and is preserved "indefinitely." How long it will be collected and remain preserved is unknown. However, Ms. Pratten does not need to show that all donor offspring are in the same position. It is sufficient at this

stage if some donor offspring on some occasions are at serious risk with respect to their security of the person. Based on Dr. Lauzon's evidence, lack of medical information can mean that an individual is unable to obtain timely health care for a condition that is clinically significant to that individual's current and future health. That, in my view, is sufficient to engage security of the person.

(B) Is the harm the result of state action?

[305] However, is this threat or harm to a donor offspring's security of the person the result of state action? Ms. Pratten must demonstrate a significant connection between serious harm and state action in order to invoke s. 7 of the ***Charter***: see ***Blencoe***, at paras. 57 and 69-70. In my opinion, she cannot do so.

[306] In ***Gosselin***, Chief Justice McLachlin addressed the scope of the interests that s. 7 is designed to protect. She observed (at para. 77) that the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those that occur as a result of an individual's interaction with the justice system and its administration. The "justice system and its administration" refers to the state's conduct in the course of enforcing and securing compliance with the law. This view of s. 7 limits the potential scope of "life, liberty and security of the person" by asking whom or what s. 7 protects against. Under this interpretation (which Chief Justice McLachlin describes as "narrow"), s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice.

[307] Chief Justice McLachlin continued, at paras. 78-80 (<u>underlining</u> in original):

> [78] This Court has indicated in its s. 7 decisions that the administration of justice does not refer exclusively to processes operating in the criminal law . . . Rather, our decisions recognize that the administration of justice can be implicated in a variety of circumstances [citations omitted]. Bastarache J. [in his dissenting reasons in *Gosselin*] argues that s. 7 applies only in an adjudicative context. With respect, I believe that this conclusion may be premature. An adjudicative context might be sufficient, but we have not yet determined that one is <u>necessary</u> in order for s. 7 to be implicated.

> [79] In my view, it is both unnecessary and undesirable to attempt to state an exhaustive definition of the administration of justice at this stage, delimiting all circumstances in which the administration of justice might conceivably be implicated. The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. The issue here is not whether the administration of justice is implicated – plainly it is not – but whether the Court ought to apply s. 7 despite this fact.
>
> [80] Can s. 7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered. . . .

[308] In ***Chaoulli***, Binnie and LeBel JJ. commented on this point, at para. 196:

> [196] It will likely be a rare case where s. 7 will apply in circumstances entirely unrelated to adjudicative or administrative proceedings. That said, the Court has consistently left open the possibility that s. 7 may apply outside the context of the administration of justice: *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, at paras. 78-80 and 414.

[309] As I noted above, ***Chaoulli*** involved the constitutionality of certain statutory provisions prohibiting Québec residents from taking out insurance to obtain private health care for services available under the province's health care plan. The plaintiffs asserted that the provisions infringed on their rights to life and security of the person. Binnie and LeBel JJ. observed (at para. 195) that the challenge did not arise out of an adjudicative context or one involving the administration of justice. Nevertheless, there was no serious question that the challenge fell within the scope of s. 7. The government action in enacting specific statutory provisions prohibiting Québec residents from taking steps to obtain private health care was sufficient.

[310] On behalf of Ms. Pratten, Mr. Arvay argues further that the parallels between this case and ***Victoria (City) v. Adams***, 2009 BCCA 563, 313 D.L.R. (4th) 29, are striking. ***Adams*** concerned the prohibition, found in two city bylaws, against erecting temporary shelter on public property. The trial judge (Ross J.) concluded that the bylaws, which prohibited certain conduct, constituted state action that directly engaged the justice system, and this conclusion was affirmed on appeal: see ***Adams***, at paras. 83-85.

[311] However, in this case, there is nothing even remotely similar to the circumstances in ***Chaoulli*** or in ***Adams***. Ms. Pratten's challenge plainly does not arise out of an adjudicative context or one involving the administration of justice. The provisions of the 1996 ***Medical Practitioners Act*** (and its predecessor) and the ***Health Professions Act*** on which Ms. Pratten relies as the state action for purposes of her s. 7 claim are far removed from either. In my opinion, they are too far removed to constitute sufficient state action in order to sustain a claim under s. 7 of the ***Charter***.

[312] The theory of Ms. Pratten's argument is that the rules (and later the bylaws) of the College permitted the destruction of essential records containing information affecting donor offsprings' security of the person. The destruction is the source of the harm, since once the information is lost, it is lost forever. But there is no state action that results in – or causes – the destruction. The state has never mandated that records must be destroyed after a particular time. Dr. Korn was not acting as an agent of the state when he periodically destroyed records. Moreover, on the evidence, medical professionals such as Dr. Yuzpe and others at Genesis, are preserving relevant records indefinitely. I have concluded that even Dr. Korn has preserved records, and he did so before the injunction was pronounced in this case, requiring him to do so.

[313] At best, the state action in this case amounts to no more than the tacit permission given through the approval given to the College's rules by the Lieutenant Governor in Council, and the theoretical failure of the minister to require the College's rules and bylaws to contain particular provisions concerning records relating to donors and donor offspring. However, the argument assumes a positive obligation on the Province to act in a particular way. In my view, this amounts to simply an alternative statement of Mr. Arvay's "positive rights" interpretation of s. 7, which I have rejected.

[314] There are examples, such as ***Rodriguez*** and ***Morgentaler***, where the government has argued that the cause of the claimant's deprivation was not

government action but something else. In ***Rodriguez***, the government argued that the cause was Ms. Rodriguez's disabilities. However, such arguments have been unsuccessful, because the Court has found that, in the absence of government involvement (in Ms. Rodriguez's case, a ***Criminal Code*** prohibition on assisted suicide, which prevented Ms. Rodriguez from managing her death), there would not have been a deprivation of s. 7 rights. Here, however, the position advanced by Ms. Pratten is to this effect: because of the absence of government involvement, she and other donor offspring have suffered a deprivation of rights. Again, in my view, this is simply an alternative statement of the "positive rights" interpretation of s. 7.

[315] Since, in my view, there is insufficient state action to support Ms. Pratten's s. 7 claim, I do not need to address whether there has been a deprivation contrary to the principles of fundamental justice.

(iii) Summary of conclusions on s. 7

[316] In summary, I decline to adopt Madam Justice Arbour's analysis of s. 7 in ***Gosselin***, leading to the conclusion that Ms. Pratten has positive rights to liberty and security of the person, and a constitutionally protected right to know her biological origins. I conclude further that there is insufficient state action to support Ms. Pratten's claim under s. 7.

(c) Section 1

[317] Section 1 of the ***Charter*** provides:

> 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.

[318] The analytical framework for s. 1 was first established in ***R. v. Oakes***, [1986] 1 S.C.R. 103. It is conveniently summarized in ***Vriend***, at para. 108:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic

> society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

This is often referred to as the ***Oakes*** test.

[319] In relation to the impugned provisions in the ***Adoption Act*** and ***Adoption Regulation*** (except for s. 4(1)(e) to (h)), I have found a violation under s. 15 of the ***Charter*** of the equality rights of Ms. Pratten and donor offspring. Accordingly, the burden falls on the AGBC to prove that such a limit on their rights is a reasonable one that is demonstrably justifiable in a free and democratic society. Because the problem with the provisions is that, by omitting donor offspring, they are underinclusive, the legislation as a whole, the impugned provisions and the omission itself are all properly considered: see ***Vriend***, at paras. 109 and 111.

[320] I turn then to the first condition that the AGBC must prove under the ***Oakes*** test: that the objective of the legislative omission is pressing and substantial.

[321] The AGBC says that the purpose of the ***Adoption Act*** is to "provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests": see s. 2. He says that the legislation provides the framework to find loving parents for children who have no parents, and that is its primary focus. The AGBC says that the legislation is targeted rather than comprehensive. It applies to children who have been or are in need of adoption, and not to people in British Columbia generally.

[322] The AGBC says further that all jurisdictions in Canada have legislation relating to adoption. None of these jurisdictions uses its adoption legislation to provide benefits to, or otherwise regulate, children conceived by way of sperm donation. In the AGBC's submission, this highlights the reasonableness of not including donor offspring in legislation concerning adoption.

[323] The AGBC then says that there is a pressing and substantial objective to the omission of donor offspring from adoption legislation: namely, that they are not adopted and are provided for under the ***Assisted Human Reproduction Act***, which the AGBC argued better met Ms. Pratten's demands. I note, however, that the AGBC did not adduce evidence to support the conclusion that this was the objective of the omission: see ***Vriend***, at paras. 113-116. The AGBC submits that the Province's approach (in omitting donor offspring) avoids the duplication of legislation and (under the ***Assisted Human Reproduction Act***) allows for a registry system with the broadest possible coverage. Indeed, for virtually every element of the ***Oakes*** test – pressing and substantial objective, rational connection, minimal impairment and proportionality – the AGBC relied to some degree on the ***Assisted Human Reproduction Act***. It was an essential part of the AGBC's defence under s. 1. Without it, the defence is doomed.

[324] Of course, the AGBC can no longer rely on the ***Assisted Human Reproduction Act***, in the light of the Supreme Court of Canada's ruling in the ***Assisted Human Reproduction Act Reference***. I would not in any event accept it as an element of a pressing and substantial objective in relation to the omission of donor offspring. At best, it might provide an explanation for the omission of donor offspring, although not a very convincing one in my view. The legislation did not exist when the revisions were made to B.C.'s adoption legislation in the mid-1990s. The sections of the ***Assisted Human Reproduction Act*** on which the AGBC's s. 1 argument was based had never been brought into force before being struck down, and there was never any guarantee those sections would ever have been brought into force. Unless and until the relevant provisions of the ***Assisted Human Reproduction Act*** came into force, there was no risk of duplication. Moreover, I am not aware of any case (and the AGBC did not cite any) where a province has been allowed to justify underinclusive legislation on the grounds of federal legislation, where there was no duplication and the province has jurisdiction to legislate.

[325] In my view, the AGBC has failed to establish that the objective of the omission of donor offspring was or is pressing and substantial, having due regard to

the necessary context. The result is that the AGBC has failed to satisfy the first condition under the ***Oakes*** test, and his case under s. 1 therefore fails.

(d) Remedies

[326] When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1) of the ***Constitution Act, 1982***, which provides that the law is of no force or effect to the extent that it is inconsistent with the ***Charter***. Depending on the circumstances, a court may simply strike down the law; it may strike down and temporarily suspend the declaration of invalidity; or it may resort to the techniques of reading down or reading in: see ***Schachter v. Canada***, [1992] 2 S.C.R. 679, at p. 695.

[327] In ***Schachter***, Chief Justice Lamer, for the majority, noted (at p. 699) that s. 52 (underlining in original):

> . . . says that a law is of no force or effect to the extent of the inconsistency. Therefore, the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

[328] Ms. Pratten asks that all of the sections of the ***Adoption Act*** and ***Adoption Regulation*** set out in Schedule "A" be declared to be of no force or effect. Recognizing the severe problems and hardship that an immediate declaration of invalidity would create, Ms. Pratten says that the declaration should be suspended for a period of time (which Ms. Pratten submits should be no more than six months) as is reasonably required for the Province to enact legislation that conforms with the ***Charter***. Further, Ms. Pratten wishes me to give specific directions to the Province and the AGBC concerning the content of the new legislation. Specifically, Ms. Pratten says I should direct that new legislation must provide for:

(a) the permanent preservation of all Gamete Donor Records in British Columbia;

(b) a process by which records relating to the identity of the donor who is their biological parent are created and preserved for Ms. Pratten and other donor offspring;

(c) a process by which the information relating to the medical and social history of a donor is recorded and made available to donor offspring (including Ms. Pratten) in the event of medical necessity, and in any event is made available to donor offspring upon application when they are 19 years or older;

(d) a process by which donor offspring who are 19 years or older, have the right or opportunity to learn the identity of the donor who is their biological parent, and to make contact with them; and

(e) a process by which donor offspring have an opportunity to determine whether they are biologically related to a sexual partner or proposed sexual partner.

[329] With respect to remedy where I have found a violation of s. 15 of the ***Charter***, the AGBC does not argue that another option is preferable to a declaration of invalidity. However, the AGBC says that s. 52(1) requires that the remedy must be limited to only those parts of the legislation where Ms. Pratten has demonstrated a breach of s. 15. Moreover, citing ***Mahe v. Alberta***, [1990] 1 S.C.R. 342, ***Reference re: Public Schools Act (Man.)***, [1993] 1 S.C.R. 839 (at pp. 860-861), ***Hunter v. Southam Inc.***, [1984] 2 S.C.R. 145 (at p. 169) and ***Schachter*** (at pp. 705-707), the AGBC submits that the declarations sought by Ms. Pratten concerning the content of new legislation are too prescriptive, amounting to legislation by judicial decree. The AGBC submits that it is only in the most exceptional of circumstances that the court will dictate the manner in which the government must fulfill its constitutional obligations. The AGBC says that a 6-month suspension of a declaration of invalidity would be wholly inadequate, and that 18 months would be more appropriate.

[330] Here, I have determined that the omission of donor offspring from the provisions of the ***Adoption Act*** and ***Adoption Regulation*** set out in Schedule "A" (except for s. 4(1)(e) to (h) of the ***Regulation***) is discriminatory and breaches s. 15 of the ***Charter***. That is the extent of the inconsistency between the legislation and the ***Charter***. The appropriate remedy is to grant a declaration that those provisions are of no force or effect.

[331] A suspension of that declaration is essential. In this case, the problem is that the legislation is underinclusive, and an immediate declaration of invalidity harms those who rightly benefit from the legislative scheme, while extending nothing to those who have been excluded from it: see ***Schachter***, at p. 719. The only issue is the length of the suspension.

[332] I have concluded that the declaration should be suspended for a period of fifteen months from the date of this judgment. This is less time than the AGBC requested, although it is more time that Ms. Pratten submits should be necessary. However, the issues are complex, and the Province should be given sufficient time to craft the appropriate legislative response. Nevertheless, the AGBC's consideration of legislation to address the needs and circumstances of donor offspring ought to have begun when the Supreme Court of Canada released its decision in the ***Assisted Human Reproduction Act Reference*** on December 22, 2010. This is consistent with the evidence of Ms. Dempster to the effect that development of an approach to deal with the issue of disclosure of information to donor offspring was awaiting release of the Supreme Court of Canada's judgment. Indeed, I infer from the AGBC's written submissions filed March 25, 2011, that work is already underway to develop a suitable legislative response, in the light of the Supreme Court of Canada's ruling.

[333] I decline to make the declaration sought by Ms. Pratten concerning the content of new legislation, as I do not believe it is either appropriate or necessary in the circumstances of this case. It will be the Province's responsibility to draft and enact legislation that complies with the ***Charter***, in the light of these reasons.

[334] Finally, with respect to the continuation of the injunction ordered by Madam Justice Gerow concerning Gamete Donor Records, the AGBC submitted that it was unnecessary because there was no evidence that medical doctors were failing to comply with the ***Directive***, and the injunction was overly broad. However, the ***Directive*** (assuming it is relevant) does not require that records be kept indefinitely; it merely recommends this. Dr. Korn's destruction of records in 2002 is evidence that not everyone was following the recommendation. Moreover, continuation of the injunction was part of the agreement reached among counsel in February 2009. I therefore pronounce a permanent injunction prohibiting the destruction, disposal, redaction or transfer out of British Columbia of Gamete Donor Records, as those are defined in Madam Justice Gerow's order pronounced December 18, 2008. Paragraph (4) of that order, whereby any person affected by the injunction has leave to apply to the court, with 14 days notice to Ms. Pratten, the AGBC and the College, to set aside or vary its terms, remains in effect.

Disposition – Summary

[335] In summary:

(a) this Court declares that, except for s. 4(1)(e) to (h) of the ***Regulation***, the provisions of the ***Adoption Act*** and ***Adoption Regulation*** set out in Schedule "A" unjustifiably contravene s. 15 of the ***Charter*** and are not saved by s. 1 of the ***Charter***, and, as a result, are of no force or effect;

(b) this declaration is suspended for a period of fifteen months from the date of this judgment;

(c) I grant a permanent injunction, in accordance with these reasons, prohibiting the destruction, disposal, redaction or transfer out of B.C. of Gamete Donor Records in British Columbia; and

(d) Ms. Pratten's claims for declarations under s. 7 of the ***Charter*** are dismissed.

[336] As I have granted the relief sought by Ms. Pratten in para. (b) of the “Relief Sought” in her Notice of Claim, para. 2 of the consent order pronounced by Madam Justice Gropper on September 29, 2010 is effective, as between Ms. Pratten and the College.

[337] I thank counsel for their thorough, thoughtful and helpful submissions.

[338] Ms. Pratten and the AGBC each have leave to speak to costs.

“The Honourable Madam Justice Adair”

Schedule "A"

(a) Provisions of the *Adoption Act* alleged to violate the *Charter*

Adoption Act s. 6(1)(a), (c) and (d); s. 8(1), (2)(a), (b) and (c); s. 9(b); s. 32; s. 48(1), (2)(a), (b), (3); s. 56; ss. 58 to 71 (inclusive):

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.

(b) Provisions of the *Adoption Regulation* alleged to violate the *Charter*

Adoption Regulation s. 4(1), (2) and (3); and ss. 19 to 24 (inclusive)

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 persons 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.