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DONOR UNKNOWN: ASSESSING THE SECTION 15 RIGHTS OF DONOR-CONCEIVED OFFSPRING*

Vanessa Gruben^{**}
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INTRODUCTION

A number of donor-conceived offspring have expressed a need to know their genetic origins, but do they have a constitutionally protected right to know the identity of their biological progenitor? Several factors have triggered these rights claims and have re-invigorated the debate over whether egg and sperm donors should remain anonymous.¹ First, there

* Editor's Note: While this volume went to press, the British Columbia Court of Appeal released their decision in the Pratten case. See *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480.

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¹ This paper focuses on anonymous sperm donation, which has been better studied than ova donation for several reasons. Sperm donation is much more common in Canada than ova donation, although individuals are using donated ova more frequently: S Purewal & OBA van den Akker, "Systematic Review of Oocyte Donation: Investigating Attitudes, Motivations and Experiences" (2009) 15 *Human Reproductive Update* 499. This may be due in part to the fact that these donation processes are distinct. Unlike sperm donation, donating ova is physically intrusive and carries with it serious risks such as ovarian hyperstimulation. As a result, ova shortages are far greater than sperm shortages. This appears to be the case in the United Kingdom: Ilke Turkmendag et al, "The Removal of Donor

has been a shift to greater openness in the context of adoption, prompting many to ask whether a similar shift is warranted in the context of assisted human reproductive technologies (ARTs).² Second, there is an increased emphasis on one's family medical history and genetic information in the prevention and treatment of disease. Third, some countries have recently abolished donor anonymity including the United Kingdom,³ Sweden,⁴ the Netherlands,⁵ New Zealand and a couple of states in Australia.⁶ Finally, a number of donor-conceived offspring are expressing a desire to learn more about their donors, including the donor's identity. This quest for information has prompted some donor-conceived offspring to take action. Many have enrolled in donor registries, like the Donor Sibling Registry, where they hope to find their half-

Anonymity in the UK: The Silencing of Claims by Would-be Parents" (2008) 22 Int'l JL Pol'y & Fam 283 at 297.

- ² *Vital Statistics Act*, RSO 1990, c V.4; *Adoption Act*, RSBC 1996, c 5. For a discussion of the movement towards greater openness, see Cindy Baldassi, "The Quest to Access Closed Adoption Files in Canada: Understanding Social Context and Legal Resistance to Change" (2005) 21 Can J Fam L 211.
- ³ *Human Fertilisation and Embryology Act 1990*, c 37. See generally Eric Blyth & Lucy Frith, "Donor Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity" (2009) 23 Int'l JL Pol'y & Fam 174.
- ⁴ *Swedish Law on Artificial Insemination 1985*, no 1140/1984. See also Ken Daniels, "The Swedish Insemination Act and Its Impact" (1994) 34 Australian and New Zealand Journal of Obstetrics and Gynaecology 437.
- ⁵ PMW Janssens et al "A New Dutch Law Regulating Provision of Identifying Information of Donors to Offspring: Background, Content and Impact" (2006) 21:4 Human Reproduction 852.
- ⁶ *Human Reproductive Technology Act 1991* (WA).

siblings or donors.⁷ Others, like Olivia Pratten, have turned to the courts in the hopes of bringing about legal reform in this area.⁸

This paper explores the rights claims of donor offspring pursuant to section 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*).⁹ In the first part, we describe the history of donor anonymity in Canada. In Part II, we describe the legal challenge to donor anonymity brought by Olivia Pratten. In Part III, we consider the equality dimensions to a constitutional claim against British Columbia's *Adoption Act* under section 15 of the *Charter*. In our view, Justice Adair's analysis misses the mark in several respects: her comparison of adoptees and donor offspring warrants more careful consideration; she was too quick to accept the manner of conception as an analogous ground while failing to consider the more appropriate ground of family status; and, her focus on whether the dignity of donor offspring has been violated as opposed to whether they have suffered prejudice, stereotyping or disadvantage was misplaced. We believe that it may be possible for donor offspring to address these shortcomings and we offer suggestions as to how to do so throughout. Assuming a violation of section 15 exists, in the fourth part, we discuss why the government will be hard pressed to establish that the limit on donor conceived offspring's rights is a reasonable limit

⁷ The Donor Sibling Registry, online: The Donor Sibling Registry <<http://www.donorsiblingregistry.com>>.

⁸ *Olivia Pratten v Attorney General of British Columbia and College of Physicians and Surgeons of Ontario*, 2011 BCSC 656, 235 CRR (2d) 118 [Pratten]. Pratten (Statement of claim) online: Arvay Finlay Barristers <<http://www.arvayfinlay.com/news/news-oct28-2008.html>> [Pratten Statement of Claim].

⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11.

that is demonstrably justifiable in a free and democratic society.

Importantly, this paper is limited in its scope in several respects. We do not address the argument that section 7 of the *Charter* confers upon donor offspring the right to know their genetic origins. We also restrict our analysis to sperm donors. Further, this paper is prospective in its focus. The question of retroactivity, specifically whether donor-conceived offspring have a right to access the confidential records of their gamete donors where the donation was made with an expectation that it would remain anonymous, is not considered. Whether these gamete donors have a right to privacy under such circumstances that may compete with and limit the scope of any rights donor-conceived offspring may enjoy is also outside the scope of this paper. In the end we conclude that there is a reasonable likelihood that donor-conceived offspring will demonstrate that their section 15 rights have been violated in a way that cannot be justified under section 1. Regardless of the outcome of this constitutional case, we believe that provincial legislatures across Canada must create a registry system for donor offspring that mirrors provincial adoption registries as soon as possible.

THE HISTORY OF DONOR ANONYMITY IN CANADA

In Canada, there is no prohibition on the use of anonymous donated sperm and egg to create one's family and there is no law requiring the disclosure of a donor's identity to the offspring. The federal *Assisted Human Reproduction Act*¹⁰ (AHRA) protected the anonymity of gamete donors. However, these provisions are not in force and were declared *ultra vires* Parliament following the Supreme Court of Canada's

¹⁰ *Assisted Human Reproduction Act*, SC 2004, c 2 [AHRA].

*Reference re Assisted Human Reproduction Act*¹¹ in December 2010. According to the Court, these provisions, together with several others, were matters that were concerned principally with health and fell within the legislative authority of the provinces. Although the Court did not declare these provisions to be of no force or effect, we believe that they will eventually be repealed by Parliament. In any event, it is clear that the regulation of donor anonymity now falls to the provinces.

The decision to allow anonymous gamete donation under the *AHRA* was the subject of significant public debate and disagreement spanning many years. Indeed, the Royal Commission on New Reproductive Technologies (Baird Commission)¹² and the Standing Committee on Health¹³ (Standing Committee) presented starkly different recommendations to Parliament on this difficult issue. The Baird Commission, albeit close to two decades ago, considered egg¹⁴ and sperm¹⁵ donation separately, but concluded that both should remain anonymous.¹⁶ The Standing Committee reached a different conclusion recommending that anonymous donation end on the basis “that where there is a conflict between the privacy rights of a donor and the rights of a resulting child to

¹¹ 2010 SCC 61, [2010] 3 SCR 457.

¹² Canada, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, (Ottawa: Minister of Government Services Canada, 1993) [*Proceed with Care*].

¹³ Standing Committee on Health, *Assisted Human Reproduction: Building Families* (2001), online: Parliament of Canada <<http://cmte.parl.gc.ca/Content/HOC/committee/371/heal/reports/rp1032041/healrp02/healrp02-e.pdf>> [*Building Families*].

¹⁴ *Proceed with Care*, *supra* note 12 at 587.

¹⁵ *Proceed with Care*, *supra* note 12 at 445.

¹⁶ *Proceed with Care*, *supra* note 12 at 479 (Recommendation No 94), 590 (Recommendation No 163).

know its heritage, the rights of the child should prevail.”¹⁷ Ultimately, the *AHRA* reflected the Baird Commission’s recommendation that anonymous gamete donation continue.¹⁸

Although the provisions of the *AHRA* are unconstitutional, it is useful to describe them as they form the backdrop against which the Pratten litigation evolved and was argued. It may also represent a possible model for a provincially-based donor registry. The *AHRA* protected the anonymity of donors by prohibiting the disclosure of identifying information about the donor without his or her consent.¹⁹ The *AHRA* authorized the disclosure of certain non-identifying information about the donor to the donor-conceived offspring either indirectly by the licensee or directly by the Assisted Human Reproduction Agency of Canada (Agency), which played a key role in the collection, use and disclosure of information under the *AHRA*. The *AHRA* created an elaborate framework for the collection, use and disclosure of identifying and non-identifying “health reporting information” of donors, those undergoing ARTs, and donor-conceived offspring. Many of the details were to be contained in the regulations. However, the regulations were not drafted, and therefore no registry was in place at the time of the Supreme Court case.²⁰ Nevertheless, it is possible to make a few general comments about how identifying and non-identifying information was to be collected, used and disclosed under these now defunct provisions.²¹

¹⁷ *Building Families*, *supra* note 13 at 21.

¹⁸ *AHRA*, *supra* note 10 ss 14-18.

¹⁹ *AHRA*, *supra* note 10 ss 15(4) (licensees), 18(2), 18(3) (Agency).

²⁰ *AHRA*, *supra* note 10 s 78.

²¹ A detailed discussion of these provisions can be found in Vanessa Gruben, “Assisted Reproduction Without Assisting Over-Collection: Fair Information Practices and the Assisted Human Reproduction

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Although the physician was required to collect both identifying and non-identifying information from the donor, the physician was only authorized to disclose certain non-identifying information to the recipient of the donated sperm.²² The disclosure of this information was intended to assist the recipient in selecting a donor and would likely have included the donor's personal characteristics such as height, weight, eye colour, education, as well as the donor's medical history.²³ This non-identifying information could well have been provided to the donor-conceived offspring by the social parent.

The Agency was also authorized to disclose certain non-identifying information directly to the offspring. The *AHRA* charged the Agency with creating a health information registry composed of identifying and non-identifying information of gamete donors, those who had undergone assisted human reproduction procedures and those who were conceived using ARTs.²⁴ The Agency was to indirectly collect

Agency of Canada" (2009) 17 Health LJ 229 ["Assisting Over-Collection"].

- ²² *ARHA*, *supra* note 10 at s 15(4). In addition, the *AHRA* authorizes the physician to disclose different fragments of the information collected from donors to a variety of parties for different purposes. See Vanessa Gruben, "Assisting Over-Collection", *ibid*.
- ²³ Health reporting information is defined to include section 3 of the *AHRA*. The precise extent of the information to be collected will be set out in the regulations, which are not yet drafted. However, some experts have speculated on the extent and scope of this information, see Health Canada, *Workshop on the Licensing and Regulation of Controlled Activities under the AHR Act and the Obligations of Licensees Regarding Health Reporting Information* (11 July 2007) online: Health Canada <http://www.hc-sc.gc.ca/hl-vs/pubs/reprod/index-eng.php#_1> at 26.
- ²⁴ *AHRA*, *supra* note 10, s 17.

this information through the physician.²⁵ The Agency could use and disclose the registry information for a number of purposes.²⁶ The Agency could disclose certain non-identifying information about the donor to the donor-conceived offspring.²⁷ The Agency had the authority to advise any two individuals having reason to believe that one or both were conceived by means of an ART using human reproductive material whether they were genetically related and, if so, the nature of the relationship.²⁸ In addition, the *AHRA* authorized the Agency to disclose the identity of a donor to a physician if, in the Agency's opinion, the disclosure was necessary to address a risk to the health or safety of a donor-conceived offspring.²⁹ The physician could not, however, disclose the donor's identity. Thus, while the physician and the Agency were required to disclose certain non-identifying information about the donor, neither would be authorized to disclose the donor's identifying information without his consent.

Thus, the collection and disclosure of information about sperm donors and the resulting offspring now falls to the provinces. To date, no province has acted. This may be, in part, because of constitutional challenge by Olivia Pratten, a donor-conceived offspring who has brought a lawsuit against the Attorney General of British Columbia.³⁰

²⁵ In this sense, the physician acts as an information intermediary for the Agency.

²⁶ Vanessa Gruben, "Assisting Over-Collection", *supra* note 21.

²⁷ *AHRA*, *supra* note 10 s 18(3).

²⁸ *AHRA*, *supra* note 10 s 18(4).

²⁹ *AHRA*, *supra* note 10 s 18(7).

³⁰ *Pratten*, *supra* note 8.

THE PRATTEN LITIGATION

Olivia Pratten is searching for information about her sperm donor or biological progenitor. In her lawsuit, she alleges that provincial legislation, or the lack thereof, violates the constitutional rights of donor-conceived offspring. First, Pratten argues that she has a free-standing constitutional right to know her biological origins and that the state must take legislative action to ensure that she can exercise this right. In the alternative, Pratten argues that the provincial rules authorizing the destruction of medical records after six years, including the medical records of sperm donors, violates her right to physical and psychological security of the person.³¹ Pratten alleges that this deprivation is not in accordance with the principles of fundamental justice because it is “arbitrary, irrational, grossly disproportionate, grossly under-inclusive and contrary to the duty of the state to reasonably accommodate persons with disabilities.”³² Pratten’s section 7 claim was not successful at trial.³³

Second, Pratten argues that the *Adoption Act* violates section 15 of the *Charter* because it is underinclusive. British Columbia’s *Adoption Act* is different in many respects from the registry that was to be established pursuant to the *AHRA*.³⁴ The *Adoption Act* establishes a legal mechanism through which

³¹ Pratten Statement of Claim, *supra* note 8 at 29.

³² Pratten Statement of Claim, *supra* note 8 at 30.

³³ Pratten, *supra* note 8 at para 316.

³⁴ Four other provinces have open adoption legislation, although each has different features: *Ontario Access to Records*, S.O. 2008, ch.5; *Newfoundland Adoption Act*, SNL 1999, c A-2.1; *Alberta Adoption Act*, RSA 2000, c C-12; *Adoption Information Disclosure Regulations*, YOIC 1985/149 (Enabling Statute: *Children’s Act*, RSY 2002, c. 31).

adoptees can acquire information about their biological parents. It does so in three ways: it requires the collection of information about the medical and social history of the adoptee's biological family; provides for the making of openness agreements which facilitate communication between the adoptee and the biological family; and, provides adoptees (adopted *after* 1996) with the opportunity to learn the identity of their biological parents (either through their original birth registrations or adoption orders). For those adopted *before* 1996, identifying information may only be disclosed with the consent of both the adoptee and the birth parent(s). An adoptee over the age of 19 and an adult relative of an adoptee over the age of 19 may register to exchange identifying information. Only where both have registered may identifying information about the other be disclosed. Notably, the *Adoption Act* permits either the adoptee or the biological parent(s), regardless of whether the adoption occurred before or after 1996, to file a no contact declaration which precludes contact between them. The adoption registry is restricted to adoptees and birth parents. It does not extend to gamete donors and donor-conceived offspring.

At trial, Ms. Pratten's claim under section 15 of the *Charter* succeeded.³⁵ The British Columbia Supreme Court agreed that the *Adoption Act* violates section 15 because it fails to include donor-conceived offspring. As is discussed in greater depth below, Justice Adair concluded that because of the similarities between adoptees and donor-conceived offspring, the omission of donor offspring from the *Adoption Act* created a disadvantage to and perpetuated stereotypes about donor-conceived offspring which resulted in discrimination. Justice Adair concluded that this violation of section 15 was not justifiable under section 1 of the *Charter*.³⁶

³⁵ *Pratten, supra* note 8 at para 268.

³⁶ *Pratten, supra* note 8 at para 325.

The Attorney General of British Columbia appealed the Court's decision on section 15 of the *Charter* to the British Columbia Court of Appeal. Ms. Pratten cross-appealed the Court's decision on section 7 of the *Charter*. The Court of Appeal heard the appeal in February, 2012. To date, the Court of Appeal has not yet released a decision.

SECTION 15: THE EQUALITY PROVISION

This case provided one of the first opportunities for a judge to consider the proper approach to section 15 after the Supreme Court of Canada's refashioning of its test in the *Kapp*³⁷ and *Withler*³⁸ decisions.

A Brief Overview of Section 15

Section 15 of the *Charter of Rights and Freedoms* came into force in 1985. The current Chief Justice of the Supreme Court of Canada, Chief Justice McLachlin, has described it as the most difficult right and section 15 has endured many efforts to interpret its meaning. For a decade (from 1999-2008), the prevailing approach in assessing whether government legislation or action violated section 15 was rooted in a three-part test developed by the Supreme Court in *Law v. Canada*.³⁹ In short, the *Law* test made three broad inquiries, asking: (1) if the impugned law (i) drew a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (ii) failed to take into account the claimant's already disadvantaged position within Canadian society

³⁷ *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

³⁸ *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*].

³⁹ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1.

resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics; (2) if the claimant was subject to differential treatment based on one or more enumerated or analogous ground; and (3) whether the differential treatment discriminated, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration. The *Law* test proved difficult to apply and was the target of much critique from academics, activists and lawyers who found it unpredictable, unfair and counter-productive to the cause of promoting constitutional equality values.⁴⁰ The most troubling aspect of the *Law* test was its focus on harms to human dignity as the essence of equality violations.

In 2008, the Supreme Court refashioned the *Law* test, while purporting to return to the principles set out in its first section 15 case, *Andrews v. Law Society of British Columbia*.⁴¹ In *Kapp*, the Court emphasized that section 15 is “aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in section 15 and analogous grounds.”⁴² A judge must consider these two questions in assessing whether the equality provision in the *Charter* has been breached: (1) Does the law create a

⁴⁰ In *Kapp*, *supra* note 37, the Court included two footnotes outlining the various sources of academic critique of the *Law* test.

⁴¹ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

⁴² *Kapp*, *supra* note 37 at 16.

distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? In returning to its *Andrews* foundations, the Court distanced itself from the focus on human dignity that had confounded cases after *Law*.

More recently, the Supreme Court tackled another persistent problem in section 15 cases: the choice of the proper comparator group. In *Withler*, the Court revisited the appropriate role comparison should play in equality analysis and deemphasized the need to choose a single, “correct” comparator group. In the first step of the *Kapp* analysis, comparison helps to establish the distinction in treatment. At this stage it is unnecessary to find a particular group that “precisely corresponds to the claimant group.”⁴³ At the second step, the Court noted that “[c]omparison may bolster the contextual understanding of the 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.”⁴⁴

Justice Adair relied on both *Kapp* and *Withler* in her section 15 analysis in the *Pratten* decision. Her reasons are fairly short and she had little to go on in terms of examples of how to apply the Supreme Court’s new direction. In our view, many of her conclusions are rooted in language and an approach that more properly follows the *Law* decision. In particular, the language she uses to support Ms. Pratten’s claim focuses on a dignity-style analysis. The *Pratten* case may have been more successfully framed under *Law* than under the Supreme Court’s new direction in *Kapp* and *Withler*. This is ironic given an effort by section 15 scholars to encourage a

⁴³ *Withler*, *supra* note 38 at para 63.

⁴⁴ *Ibid* at para 65.

move away from *Law*, because of its tendency to result in denied claims.

The First Challenge: Comparative Analysis

Justice Adair compared the claimant's group of donor offspring to adopted children. The claim was argued as one of underinclusivity, with Ms. Pratten seeking inclusion in the legislative scheme that gives adopted children access to information about their birth parents. Ontario courts have rejected arguments in a similar vein brought by adopted children comparing themselves to the biologically born and raised.⁴⁵ There is no constitutional right for adopted children to know the identity of their birth parents. Courts held that Ontario was not constitutionally required to ensure that adopted children had access to the identity of their birth parents.⁴⁶

There are obvious parallels between adopted children and donor offspring. Individuals belonging to either group may not know the identity of one, or both, of their genetic progenitors. As discussed above, the practices of gamete donation and adoption have long histories of secrecy and anonymity. Adopted children claim a "right to know" their genetic histories because that knowledge plays a key role in the positive development of their self-identity.⁴⁷ On this basis, arguments surrounding the best interests of the child prompted legislative reforms that favoured disclosure over anonymity.⁴⁸

⁴⁵ *Ontario v Marchand* (2006), 81 OR (3d) 172, 142 CRR (2d) 25 (Ont Sup Ct), aff'd 2007 ONCA 787, 288 DLR (4th) 762 [*Marchand* cited to OR].

⁴⁶ *Cheskes v Ontario (Attorney General)* (2007), 87 OR (3d) 581, 159 CRR (2d) 191 [*Cheskes*].

⁴⁷ Turkmendag, *supra* note 1 at 289.

⁴⁸ *Adoption Information Disclosure Act*, 2005, SO 2005, c 25.

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It can be argued that the same concerns that prompted these reforms are also present for donor-conceived offspring. They too feel a need to know their genetic heritage. Some argue that denying donor-conceived offspring access to the same type of regime available to adopted children is demeaning to their sense of self-worth. Differential treatment might suggest to donor-conceived offspring that their curiosity or need to know their biological heritage is less understandable, or less significant than the feelings and self-perception of adopted children. Justice Adair accepted the parallels and concluded that donor offspring are subject to differential treatment.

In our view, this conclusion was based on a superficial appreciation of the alleged harm. To be fair, Justice Adair is clear in her findings of fact that many of the claimants arguments were uncontested by the government.⁴⁹ We posit that despite the apparent similarities, there are differences between the process of adoption and the practice of gamete donation that may explain why adopted children are currently treated differently with respect to accessing the identity of their biological parents that the court should have addressed. In the context of adoption, both parents are social parents, whereas a donor offspring is often the biological child of one of his parents.⁵⁰ The adopted child was relinquished by his or her biological parents as opposed to a donor offspring who was, in essence, *created* by his or her social parents. Some argue that this is a critical distinction for adopted children who may face unique psychological struggles in feeling that they were “given away” at birth and may not know either of their biological

⁴⁹ *Pratten, supra* note 8 at 230, 232.

⁵⁰ However, there are an increasing number of people who are using donated embryos to create their families. See for example the embryo donation program operated through Beginnings, online: Beginnings Family Services <<http://www.beginnings.ca/>>.

parents. This perception could justify the distinction in treatment.⁵¹

However, while it is true that donor offspring do not have to deal with the same form of rejection confronted by adopted children, this position assumes that the “need” expressed by adopted children to understand their genetic history is fuelled by feelings of rejection, rather than an innate desire to know their genetic make-up. This is arguably not the case. Some adopted children and donor offspring simply express desires to know which family member they look like, or whose mannerisms they have. This implies that adopted children feel an urge to connect with their genetic origins and are not just looking for answers about why they were given up for adoption.

Others have tried to distinguish adopted children from donor-conceived offspring on the basis that a donor-conceived child integrates with the gestational mother during pregnancy and has the potential of experiencing breast-feeding.⁵² These arguments explain why a donor-conceived child may, or may not, bond faster with his or her mother as compared to an adopted child. Whether this is the case or not, the gestational experience does not necessarily take away from the desire the offspring has to ascertain the identity of his or her genetic father. It is not the case that the more a child bonds with one parent, the less they may want to know about the other.

There is arguably a significant difference between a biological mother relinquishing a child for adoption after a pregnancy and childbirth and a man donating sperm. Aside

⁵¹ Pasquale Patrizio et al, “Disclosure to Children Conceived with Donor Gametes Should be Optional” (2001) 16 Human Reproduction 2036.

⁵² *Ibid.*

from the obvious differences in physical burdens between the two experiences, presumably most children who are relinquished for adoption were not conceived expressly for that purpose. Gamete donors on the other hand, whether sperm or egg donors, give up their genetic material in full appreciation that it will be used in *in vitro* or artificial insemination practices and may result in conception. Sperm donors in particular can become biological “parents” of multiple children arising from one donation.⁵³ The position of women who give up a child for adoption and gamete donors is distinct in a way that makes those two groups incomparable. The children arising from those two groups however may have similar experiences and concerns about their genetic histories or a need to actually meet a biological parent.

The question is really whether adopted children are distinct from donor-conceived offspring in such a way that warrants this differential treatment. If so, the distinction will not be considered discriminatory within the meaning of section 15. The legislature implemented a pro-disclosure policy in order to address the negative ramifications experienced by

⁵³ As a result, many states impose limits on the number of offspring per gamete donor: PM Janssens et al, “Reconsidering the Number of Offspring Per Gamete Donor in the Dutch Open-Identity System” (2011) 14 Human Fertility 106; N Sawyer, “Sperm Donor Limits that Control for the 'Relative' Risk Associated with the Use of Open-Identity Donors” (2010) 25 Human Reproduction 1089. The potential number of donor offspring arising from a single donor may have significant pragmatic consequences for any attempt to legislate information disclosure. Sperm donors may be far more reluctant to register identifying or contact information, given that dozens of potential offspring may come forward. The emotional reward of reconnecting with a single child given up for adoption seems manifestly different from the emotional minefield of discovering dozens of children. Sperm donors do not even know for certain that their donation ever produces a child.

adopted children who did not know the identity of their biological parents. It is arguable that donor-conceived offspring also suffer these same negative consequences when denied access to their genetic heritage. If the similarities between donor-conceived offspring and adopted children can be successfully established and the differences adequately addressed, we believe the section 15 claim will be strengthened.

The Kapp Test

Step One: The Ground of Discrimination

After establishing differential treatment, a claimant must demonstrate that he or she belongs to a group that can be described in reference to one of the grounds of discrimination enumerated in section 15 or analogous thereto. Neither adoption nor gamete donation are listed or enumerated in section 15. In her class action suit, Olivia Pratten argued that she faces discriminatory treatment by virtue of the fact that she was conceived by gamete donation rather than by sexual intercourse. Her “mode of conception” is the location of her discrimination, “because of physical disability, sexual orientation, family status or is otherwise analogous to the grounds enumerated in that section.”⁵⁴ This is a claim based on a relationship of association. It alleges that a child conceived by gamete donation suffers discrimination on the basis of a ground occupied by her legal parents. As a partner in a same-sex relationship, or a woman with a disability unable to conceive or bear a biological child, or a single person wishing to raise a child, her parent occupied a ground that is either enumerated in section 15 or analogous thereto. The child herself is not a member of either an enumerated or analogous ground. Based on equality jurisprudence to date, it is unlikely a

⁵⁴ *Pratten Statement of Claim, supra* note 8 at 25.

section 15 claim can proceed on the basis of being related to, or impacted by (but not directly a member of) an enumerated or analogous ground. Certainly we can think of no examples where such a claim was successful.

Justice Adair accepted the analogous ground of “mode of conception”. The criteria for describing an analogous ground were laid out in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*.⁵⁵ The Supreme Court of Canada held that, “the thrust of identification of analogous grounds . . . is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.”⁵⁶ The focus should be on those personal characteristics that are immutable or constructively immutable. There is no doubt that a child conceived by gamete donation cannot change his or her status. One’s mode of conception is an immutable characteristic. It was solely on this basis that Justice Adair accepted the claimant’s argument that “mode of conception” is an analogous ground. However, in *Corbiere*, the Court argued that analogous grounds should be like those enumerated in that they should be grounds that have often served as a basis for stereotypical decision-making. Members of the analogous ground might be associated with a discrete and insular minority or a group that has been historically discriminated against. Certainly donor-conceived offspring are unable to change their status, but it is less clear whether one’s mode of conception leads to stereotypical decision-making on the part of governments, or historical patterns of discrimination. We do not think there is sufficient evidence of either to find that one’s “mode of conception” is an analogous ground under section 15.

⁵⁵ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere* cited to SCR].

⁵⁶ *Ibid* at para 13.

One other option is to argue based on “family status”. There have been only a handful of cases launched by adopted children challenging anonymity provisions in provincial legislation governing adoption records. These cases have not engaged in a fulsome analysis of the issue and are inconclusive on whether adoption is an analogous ground.⁵⁷ So for example, in *Pringle v. Alberta (Human Rights, Multiculturalism and Citizenship Commission)*, McIntyre J. concluded with little explanation that the legislation governing the release of birth registrations drew a distinction between adult non-adopted children and adult adopted children, on the enumerated ground of “family status”, defined as “the status of being related to another person by blood, marriage or adoption.”⁵⁸ Similarly, in *Marchand v. Ontario*, Frank J. accepted, without finding, that family status was an analogous ground, and ultimately concluded that the impugned provisions of the adoption law did not violate section 15 of the *Charter*.⁵⁹ Adoption, however, would be an argument based on “family status” and not mode of conception (as adopted children would presumably be conceived primarily by sexual intercourse). The Supreme Court of Canada has not definitely ruled on whether ‘family status’ is

⁵⁷ In *Pringle v Alberta (Human Rights, Multiculturalism and Citizenship Commission)*, 2004 ABQB 821, 246 DLR (4th) 502, McIntyre J. stated (at para 48) that the legislation governing the release of birth registrations drew a distinction “between adult non-adoptees and adult adoptees, including Pringle, differential treatment on the enumerated ground of ‘family status’, defined as ‘the status of being related to another person by blood, marriage or adoption.’” In *Marchand*, *supra* note 45, Frank J. reached only a provisional determination on the issue of the ground (at 139): “The Attorney General takes no position as to whether adoption is an analogous ground. For the purposes of this application, I accept that it is an analogous ground, but make no finding.”

⁵⁸ *Ibid* at 48.

⁵⁹ *Supra* note 45 at 139.

an analogous ground under section 15.⁶⁰ Justice Adair did not address this question. We think this is a more promising avenue moving forward as it is likely claimants can adduce evidence that “family status” has been the origin of historic prejudice and stereotyping. Those kinds of arguments are more difficult with “mode of conception” given that there has been little time to accumulate a pattern of exclusion or discriminatory thinking.

⁶⁰ See *Thibaudeau v Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449, per McLachlin J (separated or divorced custodial parenthood an analogous ground) and *Schafer v Canada (Attorney General)* (1997), 35 OR (3d) 1, 149 DLR (4th) 704 (Ont CA), leave to appeal to SCC refused, [1998] 1 SCR xiv [*Schafer* cited to OR] (whether adoptive parent status is an analogous ground). The Ontario Court of Appeal reasoned (at paras 50-53): “[I]t is not immediately apparent to me that the position of adoptive mothers constitutes an analogous ground. Women who have adopted one or more children are a relatively small minority of the population, but that minority is not discrete in the sense of separate or discernible, nor is it insular in the sense of isolated or self-contained. They are simply mothers and, as such, are indistinguishable from other mothers. I also have difficulty with Cameron J.’s statement that “adoptive parents have suffered historical and legal disadvantages as a result of their status as adoptive parents.” The material filed, and in particular the affidavit of Charlene Elizabeth Miall, provides some foundation for a finding that social mythology regards blood ties as somehow “better”, and infertility as a sign of “inadequacy”. There can be no doubt, as well, that adopted children have suffered legal disadvantage, but the advantages denied adoptive parents, save for the Act itself, are neither impressive nor persuasive. I am not persuaded that women who adopt do so necessarily because of a personal characteristic that is immutable, or changeable only at unacceptable personal cost. Not all women who adopt do so for reasons of infertility or the medical risks associated with pregnancy. However, despite my reservations, I am prepared to assume, without deciding, that the position of adoptive mothers does in fact constitute an analogous ground in this situation.”

Step Two: The Discrimination Analysis

Assuming that a donor-conceived offspring could succeed at the first phase of the *Kapp* section 15 analysis, there remains the challenge of establishing that the government is treating this group in a way that perpetuates prejudice or stereotyping or creates disadvantage. Justice Adair agreed with the claimants that donor offspring have been historically disadvantaged.⁶¹ She concluded that donor offspring are stereotyped as not needing donor information because they have one genetic parent. She accepted that “[d]onor offspring can carry the burden of stigma that comes of feeling that they are perceived as biological products.”⁶² As an example, she relied on the testimony of one witness, who confessed that he thinks of himself as “one of his lab experiments.”⁶³ In our view however, the extrapolation of his private misgivings to the level of a stereotype or stigma impacting the entire group, seriously misrepresents the role that stereotyping and stigma play in discrimination analysis. Individual donor offspring may feel some psychological stress or embarrassment at their status, but this is not a widely-perceived association. In *Marchand*, the court refused to see a pattern of discrimination in disclosure regimes with respect to adopted children. Frank J. concluded that there “is no credible evidence that shows this legislation promotes stereotypes or demeaning messages about adopted persons. The scheme does not make stereotypical assumptions about the applicant or adopted persons generally. It is not based on any misconception whereby adopted persons are unfairly portrayed as having undesirable traits, or traits that they do not possess.”⁶⁴

⁶¹ *Pratten*, *supra* note 8 at para 247.

⁶² *Ibid* at 251.

⁶³ *Ibid*.

⁶⁴ *Marchand*, *supra* note 45 at para 146.

In *Schafer*, the court made an obiter comment that adopted children have suffered “legal disadvantage.”⁶⁵ This observation was unsupported by any further explanation and offered in the context of a discussion that disputed whether adoptive mothers constituted an analogous ground. In *Schafer*, the court assumed without deciding that adoptive mothers could fit as an analogous ground, but seemed lukewarm to the idea. Whether their children have suffered from discrimination and prejudice would be relevant in the analysis. In *Pringle*, the Court relied on the dignity analysis in *Law*, and concluded that “knowledge of a person's past is undoubtedly integral to that person's emotional and physical well-being, and legislation impeding an adult adoptee's access to knowledge of his or her past demeans that adult adoptee's psychological and physical integrity or dignity.”⁶⁶ While on its face, this reasoning is supportive of information disclosure, it is a problematic conclusion for the *Pratten* case in two respects. First, the Court in *Pringle* gave too much weight to the notion that any distinction based on an enumerated or analogous ground is *prima facie* discriminatory.⁶⁷ This is a formalistic and not substantive approach to section 15 and not one that is endorsed by the Supreme Court of Canada. Second, the Court relies entirely on concerns about the psychological impact of anonymous donation. The Court's new line of thinking on section 15 after *Kapp* has moved away from concerns with human dignity. It is also evident that the greatest psychological harm could not be prevented by information disclosure regimes. Even in the adoption context, children are not allowed to independently seek parental information until they turn 18. In the donor-conceived offspring context, the feelings of being

⁶⁵ *Schafer*, *supra* note 60 at paras 50-53.

⁶⁶ *Supra* note 57 at 49.

⁶⁷ *Ibid.*

a “lab experiment” presumably arise as soon as the reality of the child’s conception is understood.

Children conceived by artificial reproduction are a relatively new phenomenon and the practice is still not widespread. While there are some parents who have publicly expressed concerns about the discrimination their donor-conceived children may face, it is difficult to describe the location of that mistreatment. Certainly, there is no legislation that makes any facial distinction amongst benefits or entitlements given to children as a class. The location of any discrimination could only be in terms of regimes of disclosure that differ in the provinces between adopted children and donor-conceived offspring. Courts should be reluctant to see a “history” of discrimination and prejudice arising from the very scheme attacked in a claim. The claimants suffer from the problem of having their discrimination defined only by the regime they challenge.

Justice Adair’s reasoning on the discrimination step would likely face more success if it could be framed as a dignity violation under the old *Law* decision. Her reliance on the evidence of Mr. Adams⁶⁸ suggests that she was moved by the individual experiences of the witnesses she heard. Her conclusions on stereotype however, do not seem borne out by the evidence as discriminatory or prejudicial. For example, she argues, “[t]he 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.”⁶⁹ Her judgment cites little objective evidence to support this conclusion, other than the arguments of some of the

⁶⁸ *Pratten*, *supra* note 8 at para 251. Mr. Adams is a donor offspring, who is now a medical researcher living in South Australia. Mr. Adams testified at the *Pratten* trial in British Columbia.

⁶⁹ *Ibid.*

claimants who testified as to their personal feelings of a loss of dignity. In *Marchand*, the Court came to a similar conclusion, as “the denial of the information that is the basis of the applicant's challenge is not the denial of a benefit conferred by law nor is it the imposition of a burden the law does not impose on others. The information the applicant seeks is available to non-adopted persons, not as a result of legislation, but through their personal circumstances. The applicant has not referred the court to any law to support her position to the contrary.”⁷⁰ This is the most striking weakness in the *Pratten* case as well. While there may be psychological harm flowing from the absence of information, that blank slate does not result in any lived experience of prejudice, nor are donor-conceived offspring in any way differentiated by the government in a stereotypical way. To be successful under the *Kapp* framework, Pratten needs to adduce evidence of discrimination based on prejudice and stereotype, and shift her focus from the dignity harms she and other witnesses brought forward at trial. This will be a difficult move.

In our view, there are a number of challenges on appeal in the *Pratten* case. There are many obstacles to a successful section 15 claim, ranging from defining the analogous ground, the tenuous comparison between donor offspring and adopted children, and the establishment of discrimination. The lack of success in equality challenges by adopted children is indicative of the court’s reluctance to see a pattern of harmful stereotyping or prejudicial treatment. To succeed, a more fulsome analysis of the comparison between donor offspring and adopted children is warranted. Further, greater consideration of the ground of discrimination, “mode of conception” as opposed to “family status”, is necessary. Finally, evidence that the government is treating donor offspring in a way that perpetuates prejudice, stereotyping or

⁷⁰ *Supra* note 45 at para 145.

disadvantage, as described above, will be required to discharge the burden established in *Kapp*.

SECTION 1: IS THE VIOLATION JUSTIFIABLE?

Assuming the claimants are successful in a section 15 claim to the impugned provisions, the question remains whether the government can justify the violation at the section 1 stage of the case under *R v Oakes*.

A Pressing and Substantial Objective

The government would have to convince the Court that the exclusion of donor conceived offspring from the *Adoption Act* served an important governmental interest, and that the provisions were integral to the legislative objective as a whole. The purpose of the *Adoption Act* set out in section 2 is to “provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child’s best interest.” Although the *Adoption Act* touches on many aspects of adoption, several sections of the *Adoption Act* promote openness by establishing an information registry for adoptees and biological parents. The government could argue that it is reasonable to limit the adoption information registry to adoptees and to exclude donor conceived offspring for at least two reasons. Both arise from the unique concerns relating to the use of donated gametes.

First, the government may argue that, unlike adoption, a regime requiring the collection, use and disclosure of donor information must ensure an adequate supply of donated sperm and egg to meet the reproductive needs of Canadians. As such, an information registry requiring the disclosure of identifying information should be limited to adoptees. Concerns about supply are frequently invoked as the principal reason for protecting donor anonymity and creating an information registry for donor-conceived offspring that only requires the

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disclosure of non-identifying information about donors. To preserve the choice of individuals to use donated gametes to create their families, the government could argue that a plentiful source of donor gametes is required to protect the integrity of the system and to maintain genetic diversity within the recipient pool.

Many fear a marked decline in donated sperm in the wake of abolishing donor anonymity.⁷¹ Donors may feel that it is in their best interests to remain anonymous in order to avoid the pitfalls of responsibility or obligation (legal or moral) that might attend a process which revealed their identities. Indeed, some have argued that the majority of donors only donate *because* they can remain anonymous and avoid all ties with the children produced by their donation. The only national survey conducted on the motivation of sperm donors in Canada indicated that maintaining anonymity was the “number one condition for sperm donation.”⁷² In Canada, concerns about supply are compounded by the current prohibition on payment for gametes, which has resulted in heavy reliance on sperm imported from the United States; indeed there are currently only 39 sperm donors in Canada.⁷³ A prohibition on payment for gametes combined with a requirement for the donor to disclose certain information, which is discussed below, could aggravate a supply shortage.

Less is known about egg donation, the importance of anonymity for egg donors, and the potential impact on supply

⁷¹ A Lalos et al, “Recruitment and Motivation of Semen Providers in Sweden” (2003) 18 *Human Reproduction* 212 at 212 (concern expressed in Sweden) [Lalos, “Recruitment”]. See also Janssens, *supra* note 5 at 854.

⁷² *Proceed with Care*, *supra* note 12 at 442.

⁷³ *Pratten*, *supra* note 8 at para 163.

should anonymity be abolished. However, it is likely that similar concerns exist in respect of egg donation.

Second, the government could argue that, unlike in adoption, it is in the best interests of donor-conceived offspring and their families to preserve the anonymity of one's biological progenitor. The state has historically favoured gamete donor anonymity for a number of reasons. The considerable legal uncertainty about the parental status of donors in many provinces, unlike in adoption where the legal status of the biological parent is severed, may continue to justify preserving donor anonymity. As such, the government may argue that it is in the best interests of donor-conceived offspring and families to exclude offspring from a registry which requires the disclosure of identifying information about one's biological progenitor.

The government has long taken the position that donor anonymity is in the best interests of the family. Indeed, this position was maintained in the now defunct provisions of the *AHRA* described above. Historically, there was a concern that the use of ARTs and donor sperm threatened to undermine the family unit because of the stigma associated with infertility and illegitimacy.⁷⁴ Some heterosexual parents worried that the offspring would reject the social father because there is no genetic bond between them.⁷⁵ As a result, the use of these technologies was, and for some continues to be, shrouded in secrecy. Donor anonymity and the secrecy it enabled allowed

⁷⁴ Blyth & Frith, *supra* note 3 at 820.

⁷⁵ A Lalos et al, "Legislated Right for Donor-Insemination Children to Know Their Genetic Origin: A Study of Parental Thinking" (2007) 22(6) *Human Reproduction* 1759, at 1766. This worry is so deep that many families do not want to disclose that the child was conceived through donor insemination, let alone advise the child that they have a right to obtain identifying information about the donor.

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parent(s) to choose their preferred family form and promoted “their ability to form family bonds as they see fit.”⁷⁶

The state has also argued that donor anonymity is in the best interests of the donor-conceived offspring and the family because it allows him or her to develop stronger bonds with the newly formed family unit.⁷⁷ As the Baird Commission explained, “knowing the identity of the donor may be seen by them [the family] to belittle their shared experience, as well as actual parenthood. If revelation of the donor’s identity is unwanted but is mandatory, it may well be at the expense of the well-being of the child and the social parents.”⁷⁸ The concern is that the presence of the sperm donor in families would interfere with the bonding between the child and the legal parent. The unwanted presence of the donor could disrupt the “privacy and security” of the newly formed family.⁷⁹

The government’s concern about excluding the donor from the family unit persists today because of the uncertain parental status of sperm and egg donors in many provinces in Canada. Unlike in adoption, the parental status of the donor is not explicitly severed by legislation in many provinces, with the exception of Quebec, Alberta, Newfoundland and Labrador, and British Columbia.⁸⁰ As a result, there is a great

⁷⁶ *Proceed with Care*, *supra* note 12 at 443.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Eric Blyth and Abigail Farrand, "Anonymity in Donor-Assisted Conception and the UN Convention on the Rights of the Child" (2004) 12 Int J Child Rts 89, at 92. See also Janssens, *supra* note 5 at 854.

⁸⁰ Art 538 CCQ; *Family Law Act*, SA 2003, c F-4.5 (Alberta); *Children’s Law Act*, RSNL 1990, c C-1 (Newfoundland and Labrador); *Family Law Act*, SBC 2011, c 25 (British Columbia). For a discussion of the details of this legislation see Angela Cameron,

deal of ambiguity regarding the rights and responsibilities of the sperm donor vis-à-vis the donor-conceived offspring including child support and access.

The concern about the parental status of the donor affects heterosexual families, however, it is particularly acute for lesbian-led and single mother families. Women-led families are uniquely affected by the possibility of the sperm donor intruding into and disrupting their family life because of the propensity of courts to insert a “father figure” into these family units. Indeed this concern is evident in a number of Canadian cases where the presence of a known donor has been the basis upon which the court has denied legal parenting rights to a non-biological lesbian parent or given the donor access rights to the offspring.⁸¹ For example, a Quebec court has excluded the non-biological lesbian mother by concluding that the biological lesbian mother and donor were in a “parental project” under article 538 of the Quebec Civil Code.⁸² The Quebec Court of Appeal applied similar reasoning in granting a known sperm donor parental status despite evidence that the single mother by choice did not intend from him to be involved as a parent.⁸³ In Ontario, the court rejected a non-biological lesbian mother’s application to be recognized as a legal parent because the known sperm donor, who was actively involved in the child’s

“Women-led families, family law and assisted human reproductive technologies: families outside of the law” in Jennifer Kilty, ed, *Women and the Law*, Canadian Scholar’s Press, [forthcoming in 2012].

⁸¹ Angela Cameron, Vanessa Gruben & Fiona Kelly, “De-anonymising Sperm Donors in Canada: Some Doubts and Directions” (2010) 26 Can J Fam L 95.

⁸² *SG v LC*, [2004] RDF.517 (Sup Ct); But see *LO v SJ*, 2006 QCCS 302 and *A v B, X, and C*, 2007 QCCA 361, [2007] RJQ 525.

⁸³ *LB et EB (pour X) c GN*, 2011 QCCA 1180, leave to appeal to SCC denied [2011] SCCA No 444.

life, refused to consent. It will be interesting to see whether the court reaches a similar conclusion in *De Blois v Lavigne*, where a known donor who agreed to give up his parental rights and is now seeking parental status of the child contrary to the wishes of his lesbian co-parents.⁸⁴ In light of these cases, women-led families may be especially reluctant about removing donor anonymity. In short, donor anonymity can be seen as protecting families from the unwanted intrusion of the sperm donor into their family. Whether the same concerns exist for egg donors remain to be seen.

In our view, it is likely that the first of the government objectives (a desire to protect the integrity and supply of the donor system which could be seriously jeopardized if anonymity was prohibited) would likely be considered to be pressing and substantial. Similarly, the second objective, protecting donor-conceived offspring and the family unit, would likely also be described as pressing and substantial. To defeat the government at this stage, the claimant would have to refute that the government has any interest in encouraging gamete donation, and that it has no interest in the dynamics of the families involved in that process. Given that the state's interest in protecting the integrity of Canadian families is long-standing⁸⁵ it is unlikely the Court would deny the government's interests here.

The analysis would then turn to the second part of the section 1 test, proportionality, with its three sub-parts.

⁸⁴ Although the case has not yet been heard on the merits, DeBlois's application for interim access to the child was denied by the court: *DeBlois v Lavigne* 2012 ONSC 3949 (available on Lexis).

⁸⁵ The state's interest in the family is manifest in a number of contexts including marriage, divorce, support, custody & access.

A Rational Relationship

Assuming the Court accepted the two objectives outlined above, the government would have to establish that there is a strong connection between excluding donor-conceived offspring from the adoption registry and its dual goals of guaranteeing the supply of donor gametes and protecting the best interests of families created through third party reproduction. In our view, the government's argument may face some challenges at this stage.

With respect to supply, the government would need to produce some evidence that the supply of egg and/or sperm would be threatened without guaranteed anonymity. The government would not have to prove a definitive threat, but would have to satisfy the Court that it is likely that supply would diminish, and that a reduced supply would be harmful to the success of the assisted reproductive process.

The government can only speculate as to whether this shortage will in fact occur in Canada. The experiences of other Western countries that have abolished donor anonymity offer some clues about the potential impact on sperm supply. Turkmendag *et al*'s review of the experience in various countries reveals that the effects of abolishing donor anonymity are "ambiguous" at best.⁸⁶ This is, in part, because there are few studies on the impact on donor supply. Nevertheless, there appears to be a decline in sperm donation immediately following the abolition of donor anonymity, as seen in Sweden;⁸⁷ the Netherlands;⁸⁸ Western Australia;⁸⁹ and, the

⁸⁶ Turkmendag, *supra* note 1 at 287.

⁸⁷ See also Daniels, *supra* note 4 at 439. However, other factors have been attributed to this decline in supply such as a tightening of the quality control requirements and an increase in the funding for foreign adoptions: Daniels, *supra* note 4 at 438.

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United Kingdom,⁹⁰ among others. However, in many countries, the initial decrease was followed by a gradual increase. An increase in supply was observed in Sweden.⁹¹ An increase in the United Kingdom has also been reported by the Human Fertilisation and Embryology Authority, although some have argued that this has been the result of increases in the

⁸⁸ Janssens, *supra* note 5 at 854. There was a decline in sperm donation during the period the possibility of abolishing donor anonymity was debated. This decline in availability may also be attributed to the fact that a known sperm donor may want to greatly limit the number of children conceived with his gametes as the possibility of contact becomes a “psychological burden”: Janssens, *supra* note 5 at 855. Further, like in Sweden, additional quality guidelines may have also contributed to a decrease in the number of semen banks: Janssens, *supra* note 5 at 855.

⁸⁹ Kate Godman et al, “Potential Sperm Donors', Recipients' and their Partners' Opinions towards the Release of Identifying Information in Western Australia” (2006) 21 *Human Reproduction* 3022. Godman reports a 50% decrease in sperm donation following the abolition of donor anonymity.

⁹⁰ Turkmendag, *supra* note 2 at 294-95.

⁹¹ Recruitment, *supra* note 71 at 212.

compensation of gamete donors⁹² and aggressive marketing campaigns for gamete donors.⁹³

In Canada, it is difficult to say whether the abolition of anonymity will result in decreased sperm supply. On the one hand, the supply problem may be mitigated by the large pool of sperm donors available in the United States, which are the primary source of sperm for Canadians. These concerns may also be mitigated by the prevalence of open-identity or identity release sperm donors, which are increasingly available to individuals wishing to use donated gametes to create their families.⁹⁴ However, the abolition of donor anonymity together with a requirement for the donor to include certain information in a registry may negatively impact the importation of sperm from the United States to Canada. Indeed, there is some

⁹² Human Fertilization and Embryology Authority (HFEA), News Release, “Number of sperm donors up following anonymity law changes”, (3 May 2007) online: Human Fertilization and Embryology Authority <<http://www.hfea.gov.uk/465.html>>. However, it appears that the HFEA is now considering lifting the ban on selling sperm and eggs in light of the shortage of donated gametes caused, in part, by the removal of donor anonymity in 2005: Mark Henderson, “Pay donors to end the shortage of IVF eggs, says UK watchdog” *The [London] Times* (July 27, 2009) online: The Times <<http://www.timesonline.co.uk>>.

⁹³ Jane Hughes, Egg and sperm donors: HFEA in drive to increase numbers” *BBC News* (4 April 2012) online: BBC News <<http://www.bbc.co.uk>>.

⁹⁴ Donors can either be known, that is they are known to the intended parents and the offspring from the outset; permanently unknown, often referred to as anonymous; or, identity-release where the donor’s identity is released when the offspring is eighteen years old. The latter is often termed “as-yet-unknown” donors: HMW Bos & EM Hakvoort, “Child Adjustment and Parenting in Planned Lesbian Families with Known and As-yet-unknown Donors” (2007) 28 *J Journal of Psychosomatic Obstetrics & Gynecology* 121 at 121-122.

question as to whether the introduction of registry system would be coupled with a ban on imported sperm because of the legal difficulties associated with regulating foreign donors, which is discussed in greater depth below.

Thus, the impact of abolishing donor anonymity on gamete supply in Canada is unclear. However, the ambiguity surrounding the impact on supply may potentially undermine the state's argument that a rational connection exists between maintaining donor anonymity and ensuring an adequate donor supply.

With respect to the second objective, the government would need to successfully argue that, unlike adopted families, recipient families are better off under an anonymous regime, and that the exclusion of donor-conceived offspring from the adoption regime is rationally connected to its goal of protecting families created through the use of donated gametes.

In our view, the connection between donor anonymity and protecting the integrity of the family unit may also be questioned. First and foremost, there is some empirical evidence that indicates that knowing the manner of one's conception does not have a negative or detrimental impact on the offspring or their larger family unit.⁹⁵ Indeed, these studies

⁹⁵ Tabitha Freeman & Susan Golombok, "Donor Insemination: A Follow-Up Study of Disclosure Decisions, Family Relationships and Child Adjustment at Adolescence" (2012) 25 *Reproductive Biomedicine Online* 193 at 194; K Vanfraussen et al, "Why Do Children Want to Know More About the Donor? The Experience of Youngsters Raised in Lesbian Families" (2003) 24 *Journal of Psychosomatic Obstetrics & Gynecology* 31 at 36; JE Scheib et al, "Adolescents with Open-Identity Sperm Donors: Reports from 12-17 Year Olds" (2005) 20 *Human Reproduction* 239 at 248; V Jadva et al, "The Experiences of Adolescents and Adults Conceived by Sperm Donation: Comparisons by Age of Disclosure and Family Type" (2009) 24 *Human Reproduction* 1909 at 1910; E Lycett et al,

suggest that offspring who learn that they were conceived using donated sperm, gradually and at a young age, generally suffer no psychological harm and in most cases appear to be quite well-adjusted.⁹⁶ This weakens the state's historical concern about preserving donor anonymity in order to promote the best interests of the child and bonding in the new family unit. Second, the use of donor gametes is becoming increasingly common and as it does, the stigma associated with the use of these technologies continues to fade. Nevertheless, many parent(s) continue to keep the conception status of the offspring secret, out of concerns for family integrity, which is enabled by donor anonymity.

Less clear, however, is the impact of an identity-release donor on the well being and integrity of the various members of the family unit. Unfortunately, there are few studies regarding the psychological impact of knowing the donor's identity (which may simply include knowing the name of the sperm donor or may extend to forming a relationship with the donor) on the donor-conceived offspring. Some scholars have speculated that "by providing personal information about the donor, a perceived emotional link between the child and donor could be created. This may cause a significant problem if the majority of sperm donors do not wish to have contact with recipients or any involvement with

"School-aged Children of Donor Insemination: A Study of Parents' Disclosure Patterns" (2005) 20 *Human Reproduction* 810. See also P Casey, "Child Development and Parent-Child Relationships in Surrogacy, Egg Donation and Donor Insemination Families at Age 7" (Paper delivered at the 24th AGM of the European Society of Human Reproduction and Embryology (ESHRE), Barcelona, Spain, July 2008) cited in ESHRE, *Focus on Reproduction*, online: ESHRE <http://www.eshre.eu/binarydata.aspx?type=doc&sessionId=3qtq5c450mot2u55s4y01azl/ESHRE_Sep_08.pdf>.

⁹⁶ See all studies referenced above, *ibid*.

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biological offspring born as a result of their donation.”⁹⁷ To date, there is little evidence and only limited speculation about whether learning the donor’s identity upon the age of majority has a positive or negative impact on donor-conceived offspring.

However, as mentioned above, there have been a number of troubling court decisions where known sperm donors have been awarded access to their offspring both in the context of lesbian-led and single mother families against the wishes of the intended parents.⁹⁸ These decisions illustrate a tendency on the part of the courts to grant the donor access to the offspring under the guise that it is in the best interests of the donor-conceived offspring that he/she has a ‘father figure’. In our view, there is no question that these decisions undermine the intention of the legal parents and threaten the integrity of women-led families.

Arguably, legal mechanisms, other than preserving donor anonymity, may effectively exclude the sperm donor from the family unit and thereby weaken the government’s rational connection argument. The first possibility is to delay the disclosure of the identifying information to the donor and offspring until the offspring reaches the age of majority when custody, access and support are no longer an issue. Notably, the

⁹⁷ Kate Godman et al, “Potential Sperm Donors', Recipients' and their Partners' Opinions towards the Release of Identifying Information in Western Australia” (2006) 21 Hum Reprod 3022, at 3025.

⁹⁸ Cameron, Gruben & Kelly, *supra* note. 81 See also Tom Blackwell, “Fertility Dispute Triggers Ripples of Concern Across Canada After Sperm Donor Wins Paternity Ruling”, *The National Post* (10 April 2012) online: The National Post <<http://news.nationalpost.com>> referring to LB et EB (pour X) c GN, 2011 QCCA 1180 (available on QL).

adoption registry already does so.⁹⁹ The second way to protect the family unit is through provincial legislation that confirms that the donor does not have parental status and ensures that the social parents enjoy full parental status.¹⁰⁰ However, this type of legislation, while necessary, will certainly not preclude litigation of cases concerning the parental status and rights of known donors in Canadian families.¹⁰¹ In light of the gendered approach adopted by some courts in this context and the reality that parentage laws in most provinces do not reflect the realities of these new family forms, the government may well be able to demonstrate that a rational connection exists between donor anonymity and protecting families, especially women-led families.

Minimal Impairment

This step in the section 1 analysis offers the most potential for claimants, for it is here that the Court often finds that the government has overstepped. While the government does not need to show that it considered every other possibility, it must satisfy the Court that it considered a range of options and chose a “less harmful means of achieving the legislative goal.”¹⁰² If the claimants succeeded at the section 15 stage, it would be because they convinced the Court that they are sufficiently like adopted children to warrant some legislative regime that entitles them to know the identity of a biological parent. As we

⁹⁹ As discussed above, there are now provisions authorizing the disclosure of information about birth parents in the context of adoption in both Ontario (*Vital Statistics Act*, *supra* note 2) and British Columbia (*Adoption Act*, *supra* note 2).

¹⁰⁰ Cameron, Gruben & Kelly, *supra* note 81.

¹⁰¹ *Ibid.*

¹⁰² *Alberta v Hutterian Bretheren of Wilson Colony*, 2009 SCC 37 at para 54, [2009] 2 SCR 567 [*Hutterian Bretheren*].

have noted, courts have been reluctant to constitutionalize a “right to know” for adopted children.¹⁰³ This group has access to identifying information because of a proactive legislative initiative and not because governments are constitutionally compelled to divulge the identity of biological parents. However, should donor-conceived offspring succeed in arguing that the information regime for adoptees should be extended to cover their circumstances, it is unlikely the government could successfully argue that the *absence* of any legislation governing the collection and disclosure of identifying and non-identifying information from donors to offspring is a minimally impairing process.

As discussed above, there is currently no provincial or federal law requiring the collection of information from gamete donors and the disclosure of any information, identifying or not, to the offspring. The *AHRA* established a regime that protected the anonymity of the donor yet ensured that the offspring received relevant non-identifying information about the donor and, in certain circumstances, his or her half-siblings. As these provisions are now defunct, and the provincial governments have not filled this legislative gap, it is unlikely that the government would succeed in arguing that its exclusion of donor conceived offspring from the adoption registry is minimally impairing.

What if a province enacted a registry akin to the now defunct federal regime? Would this satisfy the minimal impairment criteria? An information registry like the one described in the *AHRA* addressed many of the health concerns

¹⁰³ *Cheskes, supra* note 46 and *Marchand, supra* note 45. See also, Vanessa Gruben, “A Number but No Name: Is There a Constitutional Right to Know One’s Sperm Donor in Canadian Law?” (University of Toronto Press) [Forthcoming] [Gruben, “A Number”].

shared by adoptees and donor offspring.¹⁰⁴ The offspring, like the adoptee, would receive a family medical history about his or her biological progenitor. Further, the offspring, like the adoptee, would receive certain psychosocial information about his or her biological progenitor, like the donor's phenotype, education and interests, to name but a few. The registry could also include a mechanism whereby donor offspring could determine whether a prospective intimate partner was a half sibling. Each of these features of the registry would ensure that donor offspring received much of the same type of information about their donors as adoptees do. The only difference remaining would be the absence of the donor's identity and contact information. Notably, this type of registry is prospective and would not have applied retroactively.¹⁰⁵

It is difficult to say whether a registry that includes non-identifying information only would satisfy the minimally impairing standard. Notably, Justice Adair, in the context of her section 7 analysis made the following factual findings regarding the physical and psychological harm that donor offspring who have no information, either identifying or non-identifying, may experience:

- (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;

¹⁰⁴ See Part I.

¹⁰⁵ The question of retroactivity is addressed in greater depth in Vanessa Gruben, "A Number", *supra* note 103.

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(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.¹⁰⁶

There is no mention of identity *per se* in these harms. Thus, it appears that each of these harms can be addressed by providing the offspring with *non-identifying* information about their health, heritage, culture and religion and that disclosure of the donor's *identity* is not required.¹⁰⁷ Notably, this type of non-identifying information is almost always available now to donor offspring in the form of a donor profile that is put together by the sperm bank or broker.¹⁰⁸ In our view, the success of the argument regarding identifying information would depend on whether courts accept that there is a real difference on the feelings and needs of the children impacted

¹⁰⁶ Pratten, *supra* note 8 at 303.

¹⁰⁷ Vardit Ravitsky, "Conceived and Deceived: The Medical Interests of Donor-Conceived Individuals" (2012) 42:1 Hastings Center Report 17.

¹⁰⁸ See for example, online <<http://www.xytext.com/>>.

by adoption and assisted reproduction processes. However, donor offspring could argue that a no-disclosure veto or the possibility of a no-contact order would both be less intrusive on equality rights than a complete ban on identifying information.¹⁰⁹

Indeed, there is some question about whether abolishing donor anonymity and introducing a registry whereby identifying information about the donor would be disclosed to the offspring when he or she reaches a certain age would effectively address the harms allegedly arising from not knowing the identity of one's biological progenitor. That is because unless an offspring is aware that he or she is donor-conceived, he or she will not know that he or she can access information from the registry, or request the identity of the donor where an identity-release donor has been used.

Donor anonymity facilitates secrecy about the fact that a child is donor-conceived, which has been prevalent in heterosexual families.¹¹⁰ Historically, the majority of heterosexual parents chose to keep the manner of the offspring's conception secret.¹¹¹ However, there has been a

¹⁰⁹ See for example, *Adoption Information Disclosure Act*, 2005, SO 2005, c 25.

¹¹⁰ Gruben, "A Number", *supra* note 103.

¹¹¹ See for example, Jennifer Readings et al, "Secrecy, Disclosure and Everything In-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 *Reproductive Biomedicine Online* 485; Ken Daniels et al, "Factors Associated with Parents' Decisions to Tell Their Adult Offspring About the Offspring's Donor Conception" (2011) 26 *Human Reproduction* 2783; Firouz Khamsi et al, "Some Psychological Aspects of Oocyte Donation from Known Donors on Altruistic Basis" (1997) 68 *Fertility and Sterility* 323 at 326 -27.

shift towards greater openness in recent years.¹¹² This shift has been prompted, in part, by the increasing use of donated sperm by lesbian couples and single women, who because of their biology have disclosed the manner of conception to their offspring.¹¹³ It has also resulted from the greater availability of identity-release donors and the prohibition on donor anonymity in several jurisdictions.¹¹⁴ The abolition of donor anonymity may result in great openness because parents fear that the offspring will eventually learn about the manner of their conception. However, the extent to which the prohibition on donor anonymity has or will eliminate secrecy about the offspring's conception status is debatable. Indeed, Jadva has speculated that “[i]t is possible that knowing that the child will be able to contact and meet their donor may actually make parents less likely to disclose.”¹¹⁵ As a result, it is far from certain that abolishing donor anonymity and creating an information registry will address the harms suffered by some donor offspring.

If the information registry is insufficient, what steps could the state undertake to address these harms? The only way to ensure that the donor offspring is aware of the manner of their conception and thus has an opportunity to access relevant information about the donor, would be for the state to introduce a mechanism, such as an annotation on a birth certificate,

¹¹² DR Beeson et al, “Offspring Searching for Their Sperm Donors: How Family Type Shapes the Process” (2011) 26 *Human Reproduction* 2415 at 2415.

¹¹³ *Ibid* at 2416.

¹¹⁴ *Ibid*.

¹¹⁵ Jadva, *supra* note 95 at 1910; see also S Isaksson, “Two Decades After Legislation on Identifiable Donors in Sweden: Are Recipient Couples Ready to be Open About Using Gamete Donation?” (2011) 26 *Human Reproduction* 853.

notifying the offspring that they are conceived using donated gametes. The annotation of the birth certificate has been considered but not implemented in other jurisdictions like the United Kingdom and New Zealand.¹¹⁶ Although a detailed examination is beyond the scope of this article, it is likely that such an approach would meet with considerable resistance from parents as well as from society at large. First, it is likely that many parents will argue that mandating disclosure will interfere with parental choice. For example, in one empirical study on disclosure of conception status, parents regardless of their own decision to disclose or not, “consistently expressed the opinion that disclosure decisions are private, are highly personal, and should be left to the discretion of the individual families and not be regulated in any way.”¹¹⁷ Further, it could be argued that mandating the disclosure of the use of donated gametes places a far more onerous burden on parents who use donated gametes than other families. It is trite that there are many instances of mistaken paternity; that is, where a man erroneously believes that he is the genetic father of his children when in fact he is not.¹¹⁸ Despite the prevalence of this situation, there is neither a legal obligation on women nor any state mechanism to disclose this information to their children.¹¹⁹ Thus, we question whether such an approach, while potentially effective, would be over reaching.

¹¹⁶ Eric Blyth et al, “The Role of Birth Certificates in Relation to Access to Biographical and Genetic History in Donor Conception” (2009) 17 *International Journal of Children’s Rights* 207 (referring primarily to the United Kingdom but also to New Zealand).

¹¹⁷ Dena Shehab et al, “How Parents Whose Children Have Been Conceived with Donor Gametes Make Their Disclosure Decision: Contexts, Influences, and Couple Dynamics” (2008) 89 *Fertility and Sterility* 179 at 182.

¹¹⁸ Gruben, “A Number”, *supra* note 103.

¹¹⁹ Wanda Wieggers, “Fatherhood and Misattributed Genetic Paternity in Family Law” (2011) 36 *Queen’s LJ* 623 at para 2.

A final consideration regarding the introduction of a registry that provides the offspring with access to identifying information about the sperm donor relates to Canada's heavy reliance on imported sperm from the United States. Would it be possible to legally compel American sperm donors to disclose contact information and other identifying information for inclusion into the registry? Although a detailed examination is beyond the scope of this article, it is possible that Parliament could require the disclosure of certain identifying information from the sperm donor as a condition of importing the sperm into Canada. There are currently several health and safety requirements which sperm must meet before it can be imported and used in Canada pursuant to the *Processing and Distribution of Semen for Assisted Conception Regulations* under the *Food and Drugs Act*.¹²⁰ Arguably, information disclosure could be added to these requirements. Indeed, the United Kingdom has adopted such an approach. Donated sperm, eggs and embryos may be imported into the United Kingdom so long as the donor is identifiable and has provided the required information disclosure sheet.¹²¹ Such a requirement would, however, only provide the offspring with information at the time of donation. It would be more difficult,

¹²⁰ Canada SOR/96-254, s 5. See also Health Canada, *Guidance on the Processing and Distribution of Semen for Assisted Conception Regulations* (Ottawa: Health Canada, July 2004), online: Health Canada <http://www.hc-sc.gc.ca/dhp-mps/compli-conform/info-prod/don/gui_41_tc-tm-eng.php>.

¹²¹ UK, Human Fertilisation and Embryology Authority, *Code of Practice*, 8th ed, online: Human Fertilisation and Embryology Authority <http://www.hfea.gov.uk/docs/8th_Code_of_Practice.pdf> at Guidance Note 16. See also Direction 4 of Compliance Committee of the HFEA, "Directions given under the Human Fertilisation and Embryology Act 1990 as amended", online: Human Fertilization and Embryology Authority <http://www.hfea.gov.uk/docs/2009-09-09_General_directions_0006_-_Import_and_export_of_gametes_and_embryos_-_version_2.pdf> at 1.

and perhaps impossible, to require a foreign donor to provide updated health or contact information. Imposing information disclosure requirements may negatively impact the supply of sperm from the United States, where no such requirements exist, to Canada.

For all the reasons stated above, it is difficult to say whether a registry of either non-identifying or identifying donor information and even the abolition of donor anonymity would effectively address the harms suffered by many donor offspring. There are several outstanding questions regarding the extent to which not knowing the identity of the donor is harmful to the offspring, whether a registry without a mandatory disclosure requirement would be effective, and the potential impact of information disclosure requirements. Further, there are legitimate concerns about the impact of an information registry on the supply of sperm in Canada. Nevertheless, we can safely conclude that the legislature's failure to take any steps to collect or disclose any information to offspring, whether non-identifying or identifying, is unlikely to satisfy the minimally impairing threshold under section 1 of the *Charter*.

Proportionality

The proportionality analysis seeks to determine whether “the overall effects of the law on the claimants [are] disproportionate to the government’s objective.”¹²² Although this stage of the analysis is often not determinative of the outcome of a case, its importance has recently been emphasized by the Supreme Court.¹²³ In our view, if the government demonstrates that the law is minimally impairing,

¹²² *Hutterian Bretheren*, *supra* note 102 at para 73.

¹²³ *Ibid* at paras 75-76.

which we believe is unlikely, the government will almost certainly fail at this stage of the section 1 analysis.

When we weigh the benefits and costs of the challenged law, the balance appears to be skewed in favour of the costs. The government will likely argue that the salutary effects of excluding donor offspring from the adoption registry include ensuring an adequate supply of sperm for the creation of Canadian families and protecting the integrity of families that are created through the use of donor sperm. As discussed above, whether these effects are truly beneficial remains to be seen. Even if the government establishes that this exclusion results in real benefits, it will be hard pressed to demonstrate that these benefits outweigh the deleterious effects of the legislation.

The exclusion of donor offspring from the adoption registry, in the absence of any mechanism for obtaining information, identifying or not, about the sperm donor is of serious detriment to offspring. Although the evidence about the extent to which the non-disclosure of identifying information about one's sperm donor results in harm to the donor is uncertain, there is no question that the lack of any medical information about the donor has a detrimental impact on the offspring.¹²⁴ Further, even though there is some question about the effectiveness of a registry, there is no question that some offspring who know their conception status would benefit from such a registry. When weighing the potential benefits of non-disclosure against this harm, it is obvious that the law is disproportionate.

¹²⁴ Ravitsky, *supra* note 107.

CONCLUSION

In conclusion, we believe that there are many laudable reasons why donor anonymity should be abolished in Canada. Donor anonymity may lead to physical and psychological harm for some donor-conceived offspring. Donor-conceived offspring have a legitimate interest in information regarding their donors. Many legislatures have recognized the realities of this harm in adoption and have amended legislation to create adoption registries that ensure the collection and disclosure of certain information about adoptees and birth parents and include appropriate safeguards like disclosure vetos and no contact clauses to ensure that the interests of all members of the adoption triad are met. The failure of the legislatures to do so in the context of ARTs, therefore, appears inconsistent.

The question that remains is whether the best mechanism to bring about this much-needed reform is a court concluding that provincial adoption legislation violates section 15 because it is restricted to adoptees and does not extend to donor offspring. As we have discussed, it is possible that such a section 15 challenge will succeed. Although Justice Adair's analysis in *Pratten v. British Columbia (A.G.)* falls short in several respects, it is possible that to address these shortcomings. In our view, if donor-conceived offspring successfully establish that their section 15 rights are violated, the government will be hard pressed to establish that the violation is reasonable and justified under section 1 of the *Charter*.

Regardless of the success or failure of this type of *Charter* challenge, we believe that the best way to address collection, use and disclosure of identifying and non-identifying information in the context of gamete donation is through immediate legislative reform. This is so for several reasons. Legislative reform will almost certainly result in a quicker response. Regardless of the outcome, it is likely that

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the British Columbia Court of Appeal's decision will be appealed to the Supreme Court of Canada, which will create further delays. And even if donor offspring are ultimately successful, the courts will almost certainly suspend any declaration of invalidity to provide the legislature with time to enact *Charter* compliant legislation. Further, legislative reform will be necessary in those provinces where open adoption registries do not exist.¹²⁵ Finally, legislative reform will allow for proper consultation with all parties involved and will result in an information regime that is tailored to donor offspring and addresses the unique concerns that arise in this context. Accordingly, we believe that as with adoption, legislative reform is the best option at this time for those seeking greater openness in sperm donation in Canada.

¹²⁵ Only five provinces have officially opened their adoption records including British Columbia, Newfoundland, Alberta, Yukon, and Ontario: *supra* note 34. To date, the others have established registries and search programs as a way to deal with the requests of members of the adoption triad for information.