

## The Commercialization of Reproduction and Donor Anonymity in Canada

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### Introduction

Advancements in reproductive technologies over the past two decades have prompted moral and ethical debates worldwide. Canada has approached this new ethical landscape and the development of new reproductive technologies by constructing a legislative framework to “protect the health and safety, rights and dignity of Canadians.”<sup>1</sup> Canada boasts having created “one of the most comprehensive pieces of legislation in the world” to address the many issues that arise when individuals employ the use of reproductive technologies and engage in biological research to explore human reproduction.<sup>2</sup> Canada’s *Assisted Human Reproduction Act (AHRA)* covers a wide range of topics involving all stages of assisted human reproduction, and Canada’s case law covers a number of topics as well. However, this document will focus specifically on Canada’s prohibition on the purchase of human reproductive materials and services as well as a recent development in Canada’s donor anonymity laws. First, this report will explore how the *AHRA* has attempted to avoid the “commercialization of reproduction” in Canada and how the relevant portions of the law pertaining to the sale of gametes and surrogacy services have been accepted by the provinces while other portions have been challenged. Second, this report will explore

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<sup>1</sup> Introduction to Assisted Human Reproduction, HEALTH CANADA, Jan. 2, 2008, <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/index-eng.php>.

<sup>2</sup> *Id.*

the status of federal donor anonymity laws in Canada and how a recent case from the Supreme Court of British Columbia has changed the status quo and given hope to donor offspring.

### ***Prohibition on the Commercialization of Human Reproduction***

According to Health Canada's website, as many as one out of eight Canadian couples will have problems with infertility.<sup>3</sup> Occasionally an individual's infertility situation cannot be remedied and the only opportunity available for a couple to have a child that is biologically-related to at least one of them is through the use of donated eggs or sperm or the services of a surrogate mother. In addition, a growing number of single women and homosexual couples have expressed a desire to have a child through nonconventional methods involving assisted reproductive technologies. These types of situations have created an increase in the demand for egg and sperm donors and surrogate mothers, and the increased demand has created an entire infertility industry in many countries. When the commercial purchase and sale of these types of "products" and services is permitted, major market players are able to profit from the transactions in countries such as the United States. However, a number of ethical issues are involved in such commercialization of human reproduction. For example, some studies have revealed that the women who donate their eggs or relinquish their bodies to provide surrogacy services are often from lower socioeconomic groups while the women who receive donated eggs or a child born from a surrogate tend to be more "socially and economically advantaged."<sup>4</sup> As a note from the *William & Mary Journal of Women & Law* explained, a woman who is struggling financially "may feel compelled to undergo the dangerous medical procedure [of donating her eggs] in order to make ends meet."<sup>5</sup>

### ***The Assisted Human Reproduction Act***

In 1989 the Canadian federal government created the Royal Commission on New Reproductive Technologies, known as the "Baird Commission," to study human reproduction technologies.<sup>6</sup> The Commission inquired into existing medical technologies as well as foreseeable scientific and medical advances and in 1993 released its final report entitled *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies*.<sup>7</sup> The report made various recommendations to Parliament, including a recommendation to prohibit and criminalize "certain aspects of new reproductive technologies."<sup>8</sup> The Commission was apprehensive and concerned about specific practices and "pressed the government to pass legislation to limit their use."<sup>9</sup> For example, it strongly recommended criminal prohibitions on "selling human eggs, sperm, zygotes, or fetal tissue; [and] advertising for, paying for, or acting as an

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> M. Elliott Neal, Note, *Protecting Women: Preserving Autonomy in the Commodification of Motherhood*, 17 WM. & MARY J. OF WOMEN & L. 611, 618 (2011).

<sup>6</sup> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 (Can.) [*Assisted*].

<sup>7</sup> *Id.* at para. 160.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* para. 5.

intermediary for preconception (surrogacy) arrangements.”<sup>10</sup> The Commission alleged that “to allow commercial exchanges of this type [buying and selling embryos, use of financial incentives, etc.] would undermine respect for human life and dignity and lead to the commodification of women and children.”<sup>11</sup>

After the final report was released, various legislation was proposed and dismissed, but on March 3, 2004, the Senate adopted Bill C-6, *An Act Respecting Assisted Human Reproduction and Related Research*, also referred to as the *Assisted Human Reproduction Act*.<sup>12</sup> On March 29, 2004 the *Assisted Human Reproduction Act* received Royal Assent and became law.<sup>13</sup> The Canadian Ministry of Health had two objectives in drafting the bill: to ensure that Canadians do not compromise their health and safety through the use of reproductive technologies, and to regulate research on human reproductive material.<sup>14</sup> The pertinent sections of the *AHRA* related to the prohibition on the purchase of gametes and surrogacy services are included in Sections 5 through 9 which “prohibit human cloning, the commercialization of human reproductive material and the reproductive functions of women and men, and the use of in vitro embryos without consent.”<sup>15</sup> Also, Section 60 outlines the penalties to be invoked for violations of Sections 5 through 9.<sup>16</sup> The specific language from the *AHRA* regarding the relevant sections includes the following:<sup>17</sup>

6. (1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.

(2) No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services.

(3) No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it.

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<sup>10</sup> Nancy Miller Chenier, *Reproductive Technologies: Royal Commission Final Report*, CANADA DEPOSITORY SERVICES PROGRAM, Apr. 22, 1994, <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/MR/mr124-e.htm>.

<sup>11</sup> *Assisted*, *supra* note 6 at para. 111 (citing Canada, Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, Ottawa: Minister of Government Services Canada, 1993 at 718).

<sup>12</sup> A Chronology of the Assisted Human Reproduction Act, HEALTH CANADA, Jan. 02, 2008, <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/general/chronolog-eng.php>.

<sup>13</sup> *Id.*

<sup>14</sup> L. Bernier & D. Grégoire, *Reproductive and Therapeutic Cloning, Germline Therapy, and Purchase of Gametes and Embryos: Comments on Canadian Legislation Governing Reproductive Technologies*, 30 J. MED ETHICS 527, 527 (2004).

<sup>15</sup> *Assisted*, *supra* note 6.

<sup>16</sup> *Id.*

<sup>17</sup> *Assisted Human Reproduction Act*, S.C. 2004.

7. (1) No person shall purchase, offer to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor.

(2) No person shall purchase, offer to purchase or advertise for the purchase of an in vitro embryo; or sell, offer for sale or advertise for sale an in vitro embryo.

(4) In this section, “purchase” or “sell” includes to acquire or dispose of in exchange for property or services.

**60.** A person who contravenes any of sections 5 to 9 is guilty of an offence and (a) is liable, on conviction on indictment, to a fine not exceeding \$500,000 or to imprisonment for a term not exceeding ten years, or to both.

The *AHRA* not only prohibits the purchase of gametes or the services of a surrogate mother, it makes it a criminal offense to do so that is punishable by up to \$500,000 or ten years in prison. However, altruistic surrogacy and egg or sperm donation is not prohibited, and according to Health Canada’s website, donors and surrogate mothers can be reimbursed for the expenditures associated with donation and surrogacy, “provided that the expenditures are receipted, and that they meet licensing and regulatory requirements.”<sup>18</sup> The fact that it is the *purchase and sale* of human gametes and surrogacy services that is prohibited means that the *AHRA* reflects the Baird report’s attitude toward the commodification of women and children and the commercialization of reproduction. The ethical concerns that the Canadian government has with assisted human reproduction focus on the treating of human reproduction as products on the open market, rather than on the technologies themselves. According to an article written by L. Bernier and D. Grégoire in the *Journal for Medical Ethics*, the prohibition on the purchase and sale of embryos reflects the Canadian government’s belief that “since embryos contain the potential of eventually becoming human beings, they should not be treated as commodities or objects.”<sup>19</sup> The Canadian government’s position on the sale of human eggs and sperm also coheres with the idea that the human body and all of its parts are “inalienable.”<sup>20</sup> Lastly, although the *AHRA* has been challenged by the province of Quebec (see below) the key portions of the law pertaining to the purchase of gametes and surrogacy services were conceded. Therefore, the notion that the commercialization of human reproductive materials is harmful and that the criminalization of such behavior is within the jurisdictional power of the federal government has been conceded by the Canadian provinces.

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<sup>18</sup> Healthy Living Frequently Asked Questions, HEALTH CANADA, <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/faq/index-eng.php>

<sup>19</sup> Bernier & Grégoire, *supra* note 14, at 530.

<sup>20</sup> *Id.*

## **Quebec Challenges the Assisted Human Reproduction Act**

After its passage, the *AHRA* was challenged on constitutional grounds by the Attorney General of the Province of Quebec. According to an article from CBC News, in 2008 the Quebec Court of Appeal ruled that parts of the *AHRA* were unconstitutional because they violated the right of the provinces to regulate health care.<sup>21</sup> The Canadian government appealed the appellate court's decision and the case went before the Supreme Court of Canada on April 24, 2009.<sup>22</sup> On December 22, 2010 the Supreme Court released a split decision which enforced the right of the provinces to regulate health care, but also upheld the federal ban on compensation for egg or sperm donation.<sup>23</sup> In fact, the portions of the act which criminalize commercial payments to egg and sperm donors and surrogate mothers were not part of the constitutional challenge made by Quebec.<sup>24</sup> The Supreme Court explained that Sections 5 through 7 were conceded by Quebec to be valid criminal law.<sup>25</sup> As mentioned above, the province recognized that that the criminalization of the sale of human gametes and surrogacy services was a valid exercise of the power of the federal government.

In the Supreme Court's written opinion, it continually referenced the moral values which are reflected in the *AHRA*. For example, it explained that the "dominant purpose and effect of the legislative scheme is to prohibit practice that would undercut moral values, produce public health evils, and threaten the security of donors, donees, and persons conceived by assisted reproduction."<sup>26</sup> Since the sale of human gametes is prohibited by the act, one can assume that the Canadian government views such a commercialization of egg and sperm donors as a practice that undercuts moral values. In fact, the court explained that the dominate purpose of the prohibitions listed in Sections 5 through 7 is to "criminalize conduct that Parliament has found to be fundamentally immoral, a public health evil, a threat to personal security, or some combination of these factors."<sup>27</sup> Lastly, the Supreme Court made the following observation about morality as reflected through the *AHRA*.<sup>28</sup>

The creation of human life and the processes by which it is altered and extinguished, as well as the impact this may have on affected parties, lie at the heart of morality. Parliament has a strong interest in ensuring that basic moral standards govern the creation and destruction of life, as well as their impact on persons like donors and mothers. Taken as a whole,

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<sup>21</sup> Regulating and treating conception problems, CBC NEWS, Dec. 22, 2010, <http://www.cbc.ca/news/health/story/2009/02/05/f-reprotech.html>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Tom Blackwell, *Blackwell on Health: Supreme Court Keeps Fertility-Donor Payments in Feds' Hands*, NATIONAL POST, Dec. 22, 2010, <http://news.nationalpost.com/2010/12/22/blackwell-on-health-supreme-court-keeps-fertility-donor-payments-in-feds-hands/#more-39105>.

<sup>25</sup> *Assisted*, *supra* note 6.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at para. 88

<sup>28</sup> *Id.* at para. 61

the Act seeks to avert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants.

In other words, it is the opinion of the Supreme Court of Canada that allowing the purchase of human gametes and surrogacy services devalues human life and degrades those who choose to participate in such a commercial transaction.

Therefore, through the recommendations made by the Royal Commission on New Reproductive Technologies and the creation of the *AHRA*, Canada has been able to avoid much of the commercialization of reproduction and its underlying ethical concerns. Although Quebec challenged the constitutionality of portions of the *AHRA* before the Supreme Court, it accepted those sections prohibiting the sale of human gametes and surrogacy services. The Supreme Court has also made it clear that the criminalization of this type of behavior reflects the Canadian government's position that allowing such practices would undermine basic moral standards and degrade its citizens. It is unfortunate that the country's federal laws are unable to reflect such a strong stance pertaining to gamete donor anonymity, which will be explored in the following section.

### ***Donor Anonymity***

One of the implications of modern reproductive technologies is the psychological struggles faced by many of the children who are born through the use of donor gametes. Often times these individuals have no way of obtaining information about the person who makes up one half of their biological identity because egg and sperm donations are made anonymously. Those who advocate donor anonymity argue that if information disclosing the identity of the donors were released, fewer people would be willing to become donors. However, others explain that donor anonymity "undermines the interests of offspring regarding their genetic medical history and ancestral heritage."<sup>29</sup> Without knowledge of their genetic history, individuals conceived through donor offspring could lose opportunities to make medical decisions to help prevent the development of certain genetic diseases, for example. An individual might also experience emotional distress from never having the opportunity to know anything about one of his/her biological parents. Unfortunately, such consequences of the use of assisted reproductive technologies tend to be experienced by the innocent offspring rather than the individuals who made the decision to contribute to or undergo modern reproductive techniques.

The personal struggles of individuals who have been conceived through the use of gametes of anonymous donors have prompted many individuals to

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<sup>29</sup> Laura Shanner & Jeffrey Nisker, *Bioethics for Clinicians: 26 Assisted Reproductive Technologies*, 164 CAN. MED. ASSOC. J. 1589, 1590 (2001).

advocate for legislation which is against donor anonymity. Canada has attempted to federally regulate donor anonymity through the *AHRA*, but for reasons explained below the power to enforce such regulations is in the hands of the individual provinces. Nevertheless, it is helpful to examine the Royal Commission on New Reproductive Technologies' stance on donor anonymity as well as the position that the federal government attempted to establish through the *AHRA*. Since the portions of the *AHRA* pertaining to donor anonymity have been declared unconstitutional because they infringe upon the rights of the individual provinces, the provinces have had the opportunity to begin to shape donor anonymity law in their jurisdictions. A recent decision from the Supreme Court of British Columbia has begun to change the status quo and given new hope to individuals conceived through the use of anonymous egg and sperm donations.

### ***Donor Anonymity and the Assisted Human Reproduction Act***

The Royal Commission on New Reproductive Technologies discussed donor anonymity with regard to reproductive technologies in its *Proceed With Care* Report. The Commission expressed concern that "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."<sup>30</sup> According to the report, it reflects the views of more than 3,500 Canadians and many of them were concerned with record keeping and "the needs of donor insemination recipients and their children with respect to genetic, medical, and other information about donors."<sup>31</sup> However, the report also discussed the current level of confidentiality involved in sperm donation and the possibility that fewer men would be willing to donate sperm if the anonymity of the process were eliminated.<sup>32</sup> In the end, the Commission recommended that both medical and identifying information pertaining to donors be retained by a national registry, and that non-identifying information be disclosed to those who receive the donations and their offspring. Identifying information should be disclosed only by court order if deemed a medical emergency.<sup>33</sup> The considerations given to donor anonymity and the recommendations made by the Commission were later incorporated into the *AHRA*.

Consistent with the Commission's report, donor anonymity with regard to identifying information was upheld in multiple sections of the *AHRA*. For example, Section 15(4), which pertains to disclosures made to individuals before undergoing

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<sup>30</sup> *Pratten v. British Columbia (Attorney General)*, 2011 BCSC 656 at para. 113 [*Pratten*] (citing Canada, Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, Ottawa: Minister of Government Services Canada, 1993 at xxxi).

<sup>31</sup> *Id.* at para. 114-15 (citing Canada, Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, Ottawa: Minister of Government Services Canada, 1993 at 428).

<sup>32</sup> *Id.* at para. 117 (citing Canada, Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, Ottawa: Minister of Government Services Canada, 1993 at 441-42).

<sup>33</sup> *Id.* at para. 118



assisted reproduction procedures, explains that “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.”<sup>34</sup> Section 18(3), which pertains to disclosures made to a person conceived by means of an assisted reproduction procedure using human reproductive material obtained by a donor, repeats the language used in Section 15 and also explains that “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.”<sup>35</sup> However, both Section 15 and Section 18 were deemed to exceed the legislative authority of Parliament and were held to be unconstitutional by the Supreme Court of Canada.<sup>36</sup> This means that the federal government does not have the power to regulate donor anonymity because it is within the jurisdictional power of the individual provinces. One province, British Columbia, has already experienced some changes in its donor anonymity laws.

### ***Pratten v. British Columbia (Attorney General)***

A May 19, 2011 decision from the Supreme Court of British Columbia addressed donor anonymity. The plaintiff, Olivia Pratten, was conceived using sperm from an anonymous donor and has never had access to information about her biological father.<sup>37</sup> When the physician who performed the insemination through which she was conceived retired, he destroyed all medical records pertaining to the plaintiff’s donor. According to the College of Physicians and Surgeons of British Columbia, the physician was under no obligation to keep records for a patient for more than six years after the last entry was recorded.<sup>38</sup> The plaintiff brought suit alleging that the government of British Columbia permitted the destruction of the medical records, “thereby depriving her of basic personal information that is necessary for her physical and psychological health.”<sup>39</sup> The plaintiff claimed that donor offspring have been discriminated against because British Columbia’s adoption laws preserve information about the genetic history of adopted children and provide ways for adopted children to access this information, and no such laws exist pertaining to the genetic history of donor offspring. The adoption laws include the *Adoption Act* and the *Adoption Regulation*, which give adopted children the opportunity to obtain the type of information that the plaintiff has been deprived of.<sup>40</sup> For example, the *Adoption Act* allows any and all information that is available in an adoption record to be disclosed to an adopted child once he/she reaches the age of majority.<sup>41</sup>

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<sup>34</sup> *Assisted Human Reproduction Act*, S.C. 2004, c.2.

<sup>35</sup> *Id.*

<sup>36</sup> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 (Can.)

<sup>37</sup> *Pratten*, *supra* note 30, at para. 1

<sup>38</sup> *Id.* at para. 2

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at para. 3

<sup>41</sup> Angela Camera, Vanessa Gruben & Flona Kelly, *De-Anonymising Sperm Donors in Canada: Some Doubts and Directions*, 26 CAN. J. FAM. L. 95, 137 (2010).



The plaintiff brought the discrimination claim under Section 15(1) of the *Canadian Charter of Rights and Freedoms (Charter)*<sup>42</sup> which forms part of the Constitution of Canada. The plaintiff also alleged that donor offspring have a constitutional right under Section 7 of the *Charter* to know their origins and genetic heritage which has been violated by British Columbia's failure to enact legislation protecting this information.<sup>43</sup> Section 15(1) provides that "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."<sup>44</sup> In addition, Section 7 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."<sup>45</sup>

The court agreed with the plaintiff with regard to the discrimination claim and found that there was a violation of the rights of the plaintiff and other donor offspring under Section 15(1) of the *Charter*.<sup>46</sup> The Supreme Court Justice who wrote the court's opinion, Justice Adair, explained that excluding donor offspring from the *Adoption Act* and *Adoption Regulation* creates a distinction between adoptees and donor offspring. Justice Adair explained that the distinction is discriminatory because it "creates a disadvantage to donor offspring by perpetuating stereotypes about [them]."<sup>47</sup> The stereotypes she is referring to include the belief that because donor offspring were "wanted" they do not desire information about their biological histories or suffer mentally and emotionally when deprived of this information.<sup>48</sup> The Justice explained that these stereotypes are simply not true. Olivia Patten described her experience of being the offspring of a donor as "living with a number of highly personal questions that are never answered." She said that when she notices people who resemble her she wonders if they are her siblings.<sup>49</sup> She fears that without information about her biological history her health will be compromised or she will be unaware of genetic diseases that she could potentially pass on to her children.<sup>50</sup> Lastly, she worries that an individual she becomes romantically involved with could wind up being related to her. Ms. Pratten told the court that her lack of knowledge about her origins leaves her feeling "incomplete and medically more vulnerable."<sup>51</sup>

The British Columbia Attorney General attempted to rely on Section 1 of the *Charter* to justify the omission of donor offspring from the adoption legislation and argue against finding a Section 15(1) violation. Section 1 explains that the *Charter* "guarantees

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<sup>42</sup> Pratten, *supra* note 30, at para. 6.

<sup>43</sup> *Id.* at para 7.

<sup>44</sup> *Id.* at para. 218.

<sup>45</sup> *Id.* at para. 270.

<sup>46</sup> *Id.* at para. 269.

<sup>47</sup> *Id.* at para. 268.

<sup>48</sup> *Id.* at para. 253.

<sup>49</sup> *Id.* at para 41.

<sup>50</sup> *Id.* at para. 42.

<sup>51</sup> *Id.* at para. 43.

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.”<sup>52</sup> In other words, individuals may be deprived of a constitutional guarantee in very limited circumstances. In order for the Attorney General of British Columbia to use Section 1 to justify an infringement of a constitutional right, it must prove two elements: (1) the objective of the legislation is “pressing and substantial” and (2) the process used to attain that objective is “reasonable and demonstrably justifiable in a free and democratic society.”<sup>53</sup> The two-element test is referred to as the “*Oakes test*” and was established by the Supreme Court of Canada in the 1986 decision of *R. v. Oakes*.<sup>54</sup> In the *Pratten* case, the constitutional guarantees provided in Section 15(1) were violated, and the court determined that Section 1 did not apply because the defendant failed to establish that the omission of donor offspring from the adoption laws was the result of a pressing and substantial objective, which is the first element of the *Oakes test*.<sup>55</sup>

The defendant argued that there was a pressing and substantial objective behind omitting donor offspring from the adoption laws because the rights of donor offspring were already addressed in the *AHRA*, and there would be “duplication of legislation” if donor offspring were included in the adoption laws as well.<sup>56</sup> However, the sections of the *AHRA* which pertain to the rights of donor offspring to obtain information about their donors (Sections 15 and 18) are not valid law. The Supreme Court of Canada ruled that they were unconstitutional because they infringed upon the rights of the provinces. Therefore, the court rejected the argument that the inclusion of donor offspring in the *AHRA* created a pressing and substantial objective to omit donor offspring from the adoption laws as well as the duplication argument.<sup>57</sup> It explained that it was not aware of any instance “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.”<sup>58</sup>

While the court did find that Ms. Pratten had a valid discrimination claim under Section 15(1), the court did not agree that her rights under Section 7 had been violated. Section 7 protects both the liberty and the security of the person, and although Ms. Pratten has suffered harm to her personal security due to her lack of medical information, the court explained that the harm suffered must have been the result of a state action in order to evoke a Section 7 violation.<sup>59</sup> The harm suffered by Ms. Pratten was the result of the physician’s medical records being destroyed, not the specific actions of the state. Justice Adair explained, “The state has never mandated that records must be destroyed after a particular time. [The physician] was not acting as an

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<sup>52</sup> *Id.* at para. 317.

<sup>53</sup> *Id.* at para. 318.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at para. 325.

<sup>56</sup> *Id.* at para. 323.

<sup>57</sup> *Id.* at para 324.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at para. 304-05.

agent of the state when he periodically destroyed the records.”<sup>60</sup> The physician chose to destroy the records and there was merely a government regulation in place that permitted him to do so after the requisite time period had passed. Mere approval of the College’s rules that allowed records to be destroyed after six years does not amount to sufficient state action needed for a Section 7 violation.<sup>61</sup> Therefore, the court ruled that British Columbia did not violate the plaintiff’s rights as protected under Section 7 of the *Charter* by its failure to pass legislation providing opportunities for donor offspring to obtain their biological information or include donor offspring in the adoption laws.

In conclusion, the court determined that the omission of donor offspring from the *Adoption Act* and *Adoption Regulation* was discriminatory, violates Section 15(1) and is not saved by Section 1 of the *Charter*. As a remedy, the court declared that certain provisions of the *Adoption Act* and the *Adoption Regulation* have no force or effect.<sup>62</sup> However, the declaration will be suspended for fifteen months in order to give the legislature a sufficient amount of time to craft new provisions which are consistent with the court’s decision and Section 15 of the *Charter*. The new provisions must include donor offspring as well as adoptees, and will replace the ones in the adoption legislation that the court has nullified.<sup>63</sup> Lastly, the court granted the plaintiff a permanent injunction which prohibits “the destruction, disposal, redaction or transfer out of British Columbia of Gamete Donor Records.”<sup>64</sup> It is also significant to note that Justice Adair expressly concluded that, based on the evidence, “assisted reproduction using an anonymous gamete donor is harmful to the child, and not in the best interests of donor offspring.”<sup>65</sup> This conclusion is reflected in the remedy which was granted by the court.

According to an article from the Canadian press, Ms. Pratten’s attorney, Joseph Arvay, stated that “this case represents a monumental victory for our client, Olivia Pratten, and all the donor offspring she represents who have for too long been disadvantaged by their exclusion from the legislative landscape which has promoted and perpetuated prejudice and stereotyping and caused them grave harm.”<sup>66</sup> Even though the decision will not be able to help Ms. Pratten discover the information she has been deprived of, it will prevent future donor offspring from experiencing the type of struggles she has been subject to from the result of lack of information. Her case will give donor offspring in British Columbia the same rights as adopted children to access information about their biological history and genetic heritage. In addition, although the decision does not have binding effect outside of the province of British Columbia, news

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<sup>60</sup> *Id.* at para. 312.

<sup>61</sup> *Id.* at para. 312-13.

<sup>62</sup> *Id.* at para. 332.

<sup>63</sup> *Id.* at para. 335.

<sup>64</sup> *Id.* at page para. 334.

<sup>65</sup> *Id.* at para. 215.

<sup>66</sup> Canadian Press, *B.C. Judge Says Anonymity for Sperm, Egg Donors is Unconstitutional*, VANCOUVER OBSERVER, May 19, 2011, <http://www.vancouverobserver.com/world/canada/2011/05/19/bc-judge-says-anonymity-sperm-egg-donors-unconstitutional>.

of the ruling could prompt other donor offspring to pursue similar lawsuits in their own provinces.

### ***British Columbia Appeals to the Supreme Court***

While the *Pratten* decision marks a victory for Olivia Pratten and other donor offspring in British Columbia, Justice Adair's proposed change in the adoption laws is not final. According to an article from the Vancouver Sun, British Columbia has appealed the decision.<sup>67</sup> The government will argue that the trial judge erred in her determination that British Columbia's adoption laws were discriminatory and therefore unconstitutional.<sup>68</sup> The Attorney General of British Columbia issued a statement explaining that "The B.C. government is appealing the Pratten decision because it raises important constitutional principles that extend beyond this particular case."<sup>69</sup> However, the B.C. government has also stated that it plans to establish a program for donor offspring to address the concerns raised by Olivia Pratten in the case.<sup>70</sup>

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<sup>67</sup> Neal Hall, *B.C. Government Appeals Landmark Sperm Donor Ruling*, VANCOUVER SUN, June 17, 2011, <http://www.vancouversun.com/health/government+appeals+landmark+sperm+donor+ruling/4966861/story.html>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*