Desperately Seeking Daddy: A Critique of *Pratten v British Columbia (Attorney General)*

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Abstract

Current Canadian law, by silence rather than explicit choice, does not prevent anonymous sperm donation. Anonymous sperm donation, however, may soon disappear. In the recent *Pratten* decision, the Supreme Court of British Columbia determined that anonymity violates the constitutional rights of children born of Assisted Reproductive Technologies (ARTs). While finding that children should have access to genetic knowledge, the court failed to consider the impact of the elimination of anonymity on other parties to ARTs, both sperm donors and ART families. The case was appealed by the Attorney General of British Columbia and heard by the British Columbia Court of Appeal in February 2012 and was overturned. While agreeing with the decision of the Court of Appeal, this article argues that the court failed to provide a fulsome analysis of issues related to privacy, genetic knowledge, alternative family formation, and the false assertion that sperm donation makes a man a father.

Keywords: sperm donation, privacy, anonymity, alternative family formation, adoption, definitions of fatherhood

Résumé

Les lois canadiennes actuelles, par omission plutôt que par choix explicite, n'interdisent pas les dons anonymes de sperme. Les dons anonymes pourraient, par contre, bientôt cesser. Dans la récente décision *Pratten*, la Cour suprême de la Colombie-Britannique a déclaré que l'anonymat porte atteinte aux droits constitutionnels des enfants nés à l'aide des technologies de reproduction assistée (TRA). Tandis que la cour reconnaissait le droit des enfants d'avoir accès à des données génétiques, la cour n'a pas reconnu l'impact de l'élimination de l'anonymat sur les autres parties impliquées dans les TRA, c'est-à-dire les donneurs de sperme et les familles issues des technologies de reproduction assistée. Au mois de février 2012, cette affaire était portée devant la Cour d'appel de la Colombie-Britannique par le Procureur général de cette province. En plus de souligner les aspects problématiques de la décision *Pratten*, cet article fait une analyse approfondie des notions de confidentialité, de connaissances génétiques, et de formations familiales alternatives ainsi que de la fausse affirmation selon laquelle un homme est un père s'il donne du sperme.

Mots clés : don de sperme, confidentialité, anonymat, formations familiales alternatives, adoptions, définitions de la paternité

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Desperately Seeking Daddy[1]: A Critique of *Pratten v British Columbia (AG)*

The number of families created through Assisted Reproductive Technologies (ARTs) is increasing rapidly in Canada,[2] and a pressing legal issue is sperm donor anonymity[3]: Are children entitled to be given information about donors? And what are the implications of identity release for other parties to ARTs?[4] Under current Canadian law,[5] unless a donor has consented to the disclosure of identifying information, parties to ARTs are only allowed access to non-identifying information about the donor.[6] Anonymous sperm donation, however, has been challenged. In the recent *Pratten* decision, the Supreme Court of British Columbia determined that anonymity violates the constitutional rights of children born of ARTs. The case was overturned by the Court of Appeal with reasons issued on November 27, 2012.[7] Olivia Pratten has announced her intention to seek leave to appeal to the Supreme Court of Canada. We argue both that the Supreme Court of British Columbia erred in the original decision, and that the full complexity of sperm donation and its societal implications must be considered if the Supreme Court of Canada chooses to hear this case. First, donors have privacy rights. Second, children should not be considered to have a constitutional right to genetic information about their parents. Third, the elimination of anonymity would have a disproportionate impact on same-sex families and single mothers. Finally, the genetic essentialism

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1 Arlene James, *Desperately Seeking Daddy* (Buffalo, NY: Silhouette Romances, 1996). The phrase "desperately seeking" also appears in the 1985 film *Desperately Seeking Susan*.

2 According to the Canadian Fertility and Andrology Society's 2009 report, there were 4,412 live births that year that were the product of ARTs (Joanne Gunby, "CARTR Annual Report 2009," *Canadian Fertility and Andrology Society*: Montreal, 2009).

3 Ellen Waldman, "What Do We Tell the Children?" *Capital University Law Review* 35 (2006): 517.

4 This paper will deal exclusively with sperm donor anonymity. Although some of the principles discussed herein apply to egg donation, the invasive nature of egg donation, and the risks to the donor, must also be considered.

5 Some Western countries, however, have moved to systems of donation that require a willingness to release identity, but information is only released once donor children reach adulthood. Importantly, nowhere has retroactive de-anonymization been endorsed. For further information, see Eric Blyth and Lucy Frith, "Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity," *International Journal of Law, Policy and the Family* 23 (2009): 176. Reproductive tourism has increased in such jurisdictions (Lisa Ikemoto, "Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services," *Law and Inequality* 27 (2009): 296).

6 "Under Bill C-13, a licensee is required to collect health reporting information from donors of human reproductive material before accepting the material. However, unless the donor has consented to the disclosure of identifying information, individuals who make use of, or who are conceived by means of, the donation are entitled only to the non-identifying health information of the donor held by the licensee" (Jennifer Foster and Barbara Slater, "Privacy and Human Reproduction: A Discussion Paper," *Health Law Review* 11, no. 1 (2002): 56–61 at para 22). Bill C-47, the *Human Reproductive and Genetic Technologies Act*, was introduced in 1996, and the *Assisted Human Reproduction Act* was introduced in 2002. Key provisions of the *Assisted Human Reproduction Act* came into force on April 22, 2004. (Health Canada: http://www.hc-sc.gc.ca). Donated sperm must be obtained through a clinic (Angela Cameron, Vanessa Gruben, and Fiona Kelly, "De-Anonymising Sperm Donors in Canada: Some Doubts and Directions," *Canadian Journal of Family Law* 26 (2010) at para 1).

7 Eric Blyth, "ART Regulation in Canada—birth much delayed," *BioNews*, July 11, 2011; see also N. Hall, "BC government appeals landmark sperm donor ruling," *Vancouver Sun*, June 17, 2011. *Pratten v British Columbia (AG),* [2012] BCJ no 2460.

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inherent in Pratten's claim must be contested: sperm donation does not make a man a father.[8]

Pratten v British Columbia (AG)

Olivia Pratten was conceived using sperm from an anonymous donor. Although Pratten's mother informed her daughter about the use of sperm donation,[9] Pratten knows "almost nothing about the man who provided one-half of her genetic makeup."[10] In her claim, Pratten asserted that "she has long felt that a part of her identity is missing."[11] From an early age, Pratten was vocal about her desire to know her genetic origins: "At age 15, she presented her story at a fertility conference, and thereafter continued to speak at conferences and give interviews concerning the regulation of gamete donation."[12] When she was nineteen, she sought information about her donor from Dr. Gerald Korn, who had facilitated the insemination and "jotted down some information on a notepad: her donor was a Caucasian medical student who had a stocky build, brown hair, blue eyes and type A blood. Korn advised that the donor was healthy."[13] Under existing rules of the College of Physicians and Surgeons of British Columbia, Korn was not obligated to keep

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8 This point has been made by other authors and is a serious issue of contention with powerful fathers' rights groups, which posit that men have a right to visit and control children (and their mothers) purely on the basis of a genetic connection. For further information, see Katharine Baker, "Bargaining or Biology: The History and Future of Paternity Law and Parental Status," *Cornell Journal of Law & Public Policy* 14, no. 1 (2004); Susan Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility," *Windsor Yearbook of Access to Justice* 25 (2007): 63; Boyd, "Demonizing Mothers: Fathers' Rights Discourse in Child Custody Law Reform Processes," *Journal of the Association for Research on Mothering* 6, no. 1 (2004): 52; Angela Cameron, Vanessa Gruben, and Fiona Kelly, "De-Anonymising Sperm Donors in Canada: Some Doubts and Directions," *Canadian Journal of Family Law* 26 (2010); Angela Campbell, "Regulating the Queer Family: The Assisted Human Reproduction Act," ibid. 24 (2008): 101; Angela Campbell, "Conceiving Parents Through Law," *International Journal of Law, Policy, Family* 21 (2007): 248; Chambers, "Newborn Adoption: Birth Mothers, Genetic Fathers and Reproductive Autonomy," *Canadian Journal of Family Law* 26, no. 2 (fall 2010): 339; Chambers, "In the Name of the Father: Children, Names and the Law in English Canada," *University of British Columbia Law Review* 43, no. 1 (September 2010): 1; Jonathon Cohen and Nikka Gershbain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact," *Canadian Family Law Quarterly* 19 (1999): 121; Felicity Kaganas and Shelley Day Sclater, "Contact Disputes: Narrative Constructions of 'Good' Parents," *Feminist Legal Studies* 12 (2004): 5; M. Kaye and J. Tolmie, "Discoursing Dads: The Rhetorical Devices of Fathers' Rights' Groups," *Melbourne University Law Review* 22 (1998): 180; Kelly, "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families," *Ottawa Law Review* 40 (2008–2009): 185; Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver: University of British Columbia Press, 2011); Kelly, "Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family," *Canadian Journal of Women and the Law* 21, no. 2 (2009): 315; Hester Lessard, "Mothers, Fathers and Naming: Reflections on the *Law* Equality Framework and *Trociuk v. British Columbia (AG),*" ibid. 16, no. 1 (2004): 165; and Wanda Wiegers, "Gender, Biology, and Third Party Custody Disputes," *Alberta Law Review* 47, no. 1 (2009).

9 Unfortunately, no studies about disclosure have been done in Canada. In a study of heterosexual couples in Sweden who conceived through donor insemination, 89 percent had not informed their children (see Claes Gottleb, Othon Lalos, and Frank Lindblad, "Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes," *Human Reproduction* 15 (2000): 2052.

10 *Pratten,* [2011] at para 1.

11 Ibid. at para 1.

12 Ibid. at para 39.

13 Ibid. at para 40.

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records for a patient for more than six years from the last entry recorded. Korn remains adamant that he is committed to protecting the privacy of his clients: "And what if the law were to change, forcing him to release information on his donors? 'I might destroy the records' he said."[14] Pratten has also pursued web-based search networks that rely on voluntary donor registration in an attempt to find her genetic father but has been unsuccessful.

Pratten filed her action in October 2008 "as a proposed class action on behalf of a class of donor offspring."[15] In December 2008, she obtained an interlocutory injunction "prohibiting the destruction, disposal, redaction, or transfer out of British Columbia of gamete donor records."[16] Korn asserted that all records related to Pratten's insemination had been destroyed.[17] Although this may have been a deliberate attempt to thwart Pratten's request, his actions were not illegal, and because the records no longer exist, the Province sought to have Pratten's claim deemed "moot, academic and futile."[18] Gropper J., however, found that "the plaintiff's pleadings do not create a hypothetical or abstract question . . . While it may not be possible for the court to grant Ms. Pratten one of the remedies she seeks, specifically records of her biological father, other aspects of her claim are not dependent on the existence of those records."[19] The case was then heard by Adair J. in the Supreme Court of British Columbia.

Pratten made arguments based on ss 15 and 7 of the *Charter*. She used an analogy with adoption to assert that she was discriminated against based on her status as a child of ARTs. In British Columbia, adopted children can open their adoption files and have access to any genetic information held therein when they turn nineteen.[20] Children conceived through donation of sperm, however, cannot access their donor files. This, Pratten argued, constituted a violation of her equality rights, and her s 15 equality claim succeeded. She argued, moreover, that access to genetic information is in the child's best interest and that the court must promote such interests, irrespective of the needs and desires of either prospective parents or donors who were promised anonymity.[21] This issue was not explicitly decided by the court. Pratten also asserted that the destruction of medical records pertaining to donor conception violates the donor-conceived offspring's right to security of the person and that the government had failed to protect her interest in knowledge about her genetic origins. However, her assertion that "s 7 of the *Charter* guarantees . . . a free-standing constitutional right to know one's origins and genetic heritage"[22] was rejected. The legislation was declared to be null and void, and the province of British Columbia was required to amend its legislation. The Attorney General of British Columbia appealed, asserting "that the trial judge erred in finding a

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14 Chad Skelton, "Searching for their genes," *Vancouver Sun,* Saturday, April 22, 2006.
15 *Pratten,* [2011] at para 16.
16 *Pratten v British Columbia (AG),* [2010] BCJ no 2012 at para 8.
17 Ibid. at para 7.
18 Ibid. at para 11.
19 Ibid. at para 28.
20 *Adoption Act,* RSBC 1996, ss 63, 65, 66.
21 Her statement of claim can be accessed at Arvay Finlay Barristers: http://www.arvayfinlay.com/news/Writ%20of%20Summons%20and%20Statement%20of%20Claim.pdf.
22 *Pratten,* [2011] at para 7.

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violation of s 15(1) of the *Charter*," and Pratten launched a cross-appeal, contending "that the judge erred in not declaring positive rights under s 7."[23]

Frankel J. A. found that "the purpose of the impugned provisions is to remedy the disadvantages created by the state-sanctioned dissociation of adoptees from their biological parents."[24] Therefore, the legislation, while distinguishing between children on the basis of the manner of conception, an analogous ground of discrimination, is valid, as it is ameliorative in purpose and protected under s 15 (2) of the *Charter*.[25] Frankel J. A. also rejected Pratten's cross-appeal, asserting that "Ms. Pratten has not established that access [to genetic information] has been recognized as so 'fundamental' that it is entitled to independent constitutionally protected status under the *Charter*"[26] and that the right that "Ms. Pratten seeks is far more extensive than what is enjoyed by most people in Canada and would result in state intrusion into the lives of many."[27] We agree with the decision of the Court of Appeal in its result. However, the limited legal language of the decision requires more fulsome contextual analysis.

The Privacy Rights of Sperm Donors

Retroactive de-anonymization is inherently problematic. The privacy concerns of donors in relation to assisted reproduction are legitimate. The rights of birth parents have been acknowledged in previous decisions.[28] This is not to assert that the concerns of birth mothers and those of sperm donors are equivalent. In adoption, the birth mother has to endure nine months of pregnancy and the birth itself before relinquishing her child. This has social implications with regard to bonding and grief that do not apply in the context of ejaculation into a cup for the purposes of sperm donation. Relinquishing mothers also run significant risk of being stigmatized, a risk not faced by sperm donors.[29] However, with regard to privacy, there are points of convergence between the interests of sperm donors and those of birth mothers. Sperm donors may wish to keep the knowledge that they have donated private; they may certainly oppose the intrusion of a biological child into their lives. In all Canadian jurisdictions where a sperm donor provided the "gift of life," he did so in the "reasonable expectation that his identity would not be revealed and this reasonable expectation, like the privacy of the birth mother, may be protected by s 7 of the *Charter*."[30]

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23 *Pratten,* [2012] at para 6.
24 Ibid. at para 37.
25 Ibid. at para 42. In explaining this decision, Frankel J. A. cited *Cunningham*: "Section 15 (2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities . . . The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice" (*Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 at para 41).
26 Ibid. at para 50.
27 Ibid. at para 51.
28 *Pratten,* [2011] at para 116.
29 See Chambers, *Misconceptions: Unmarried Motherhood and the Ontario Children of Unmarried Parents Act, 1921-1969* (University of Toronto Press/Osgoode Society Press, 2007); and Chambers, "Newborn Adoption: Birth Mothers, Genetic Fathers and Reproductive Autonomy," *Canadian Journal of Family Law,* 26, no. 2 (fall 2010): 339.
30 Cameron et al., "De-Anonymising Sperm Donors in Canada" at para 56.

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The privacy interests of parties to adoption were most fully considered in *Cheskes v Ontario*, in which the applicants, three adopted children and a birth parent, mounted an s 7 challenge to changes to Ontario adoption law that would have allowed the retroactive opening of adoption records without the consent of birth parents or adoptees.[31] This represented a dramatic reversal of the longstanding policy of the protection of the anonymity of the birth mother.[32] The 2005 Adoption Information Disclosure Act (AIDA) allowed "an adopted person . . . [to] apply to the Registrar General for a copy of his or her birth registration or adoption order."[33] The applicants asserted that the new legislation violated their rights to security of the person.[34] Although the law did provide a mechanism for birth parents and adopted children to file "no contact" orders and set out criminal proceedings for violation of such orders,[35] the applicants asserted that such provisions were inadequate for the protection of their privacy and dignity. They claimed that "the opening of confidential adoption records on a retroactive basis and the removal of the consent requirement violates the applicants' right to privacy under s 7 of the *Charter*."[36] The *Cheskes* court noted that while the interests of "searching" adopted children have been the subject of public discussion, "the feelings and the fears of the 'non-searching' adoptees and birth parents who do not want to be found are no less legitimate and no less compelling" and that "the impact on their lives and those of their families is just as significant . . . Lives could be shattered."[37]

The parallel between sperm donors and the fourth applicant in *Cheskes* is particularly compelling. D. S. had fathered a child who was subsequently adopted. Many years later, he was contacted by a social worker asking if he would be willing to reveal his identity to his birth child. He declined, as his wife and family were and

31 *Cheskes* at para 1. Joy Cheskes asserted that the proposal that a disclosure veto be obtained via a hearing violated her right to make autonomous decisions (*Cheskes* at para 33). Denbigh Patton was concerned about the impact of contact with a birth parent on his elderly, and very loving, adoptive parents, and found "no comfort from the option of filing a no-contact preference. The no-contact provision would not prevent the disclosure of his identity and with that identifying information" (*Cheskes* at para 35). C. M. had known for fourteen years that a birth parent was avidly searching for her and asserted that "the no contact order is totally irrelevant to me, because no contact will not mean that they cannot watch me, they can't drive past my house. This person could get my name and give this to children that she has, to other friends, to relatives . . . I could be stalked" (*Cheskes* at para 41).

32 In Ontario, adoption was established by statute in 1921 and adoption records were officially sealed in 1927. See Adoption Act (1921), c 55 and Adoption Act, RSO 1927. See also RSO 1980, c 66 and SO 1984, c 55. Adoption files could be opened only on proof of "good cause" in a court of law, and when adoptees attempted to expand "the meaning of 'good cause' to become more inclusive," they had little success in court (Naomi Cahn and Jana Singer, "Adoption, Identity and the Constitution: The Case for Opening Closed Records," *University of Pennsylvania Journal of Constitutional Law* 2 (1999–2000): 161). Access to identifying information from adoption files was consistently denied by courts in Ontario and elsewhere in Canada: *Kelly v Superintendent of Child Welfare and Williams* (1980), 23 BCLR 299 (SC); *Ferguson v Director of Child Welfare et al.* (1983), 40 OR (2d) 294; *Tyler v Ont Dist Ct,* [1986] OJ no 3074; *Phelps v Manitoba (Director of Child and Family Services)* (1987), 51 Man. R. (2d) 64, [1987] MJ no 542 (QB (Fam Div)) (QL) [Phelps]. In Ontario, an Adoption Disclosure Registry was established in 1987.

33 *Cheskes* at para 19. It is interesting to note that the AIDA ran into serious opposition: Hansard, 2005, pp. 1069–1074.

34 *Cheskes* at para 4.

35 Ibid. at para 22.

36 Ibid. at para 28.

37 Ibid. at para 65.

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are unaware of the existence of the adopted child, and he feared that knowledge of the adoption would tear his family apart.[38] The violation imposed by the AIDA was deemed to be not simply an invasion of documents or records but "of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society."[39]

In the context of criminal law, the Supreme Court of Canada has asserted that "the essence of privacy is that once invaded, it can seldom be regained."[40] Although such statements were not made explicitly in the context of a discussion of sperm donation, the Privacy Commission has eloquently argued that "governments . . . [are] increasingly asking for the right to collect . . . ever more personal and intrusive types of information . . . with the assurance that privacy will be respected. Government has a responsibility to keep its word."[41] While the Supreme Court has recognized limits on the extent of privacy, particularly with regard to freedom of the press and the right of the public to know about court proceedings,[42] such cases can be distinguished from those in which a vulnerable party deserves protection from harm that could be caused by disclosure of identity. This distinction was recently made clear by the Ontario Court of Appeal in *MEH v Williams*, in which a decision protecting a family law litigant's privacy was overturned but her identifying personal information was nonetheless protected.[43] The *Cheskes* court also found that no-contact orders would be deficient as they (ostensibly) prevented contact but not the release of identifying information.[44]

In the wake of the *Cheskes* decision, the Ontario government announced that it would not appeal and would instead introduce new legislation.[45] Although the interests of sperm donors do not have the weight of those of birth mothers, the privacy rights of these men are nonetheless worthy of protection; this was explicitly recognized with regard to the "sperm donor" father in the *Cheskes* adoption case. It is not reasonable that a person who donated sperm on the assumption of no contact would find his life disrupted, without his consent, years after such a

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38 *Cheskes* at paras 45–50.

39 Ibid. at para 82.

40 *R v O'Connor,* [1995] 4 SCR 411 at para 117.

41 Jennifer Stoddart (Privacy Commissioner), "Statement in Support of the Remarks of the Information and Privacy Commissioner of Ontario," (May 11, 2005) at 1.

42 *Edmonton Journal v Alberta, (AG),* [1989] 2 SCR 1326. The court found that legislation in Alberta prohibiting the printing of evidence from matrimonial/divorce hearings violated freedom of expression guarantees, because even when "a newspaper chose to publish a story which scrupulously avoided revealing the identity of parties or witnesses but discussed in general terms the kind of evidence introduced in matrimonial proceedings, the newspaper would be in contravention of s 30 (1)" (*Edmonton Journal* at para 26 (as per Cory J.)) The court did not reject the importance of the protection of privacy interests with regard to identifying information about litigants.

43 *MEH v Williams*, [2012] OJ no 525.

44 *Cheskes* at para 84. The limitations of no-contact orders are evident in the context of Tennessee (Carol Chumney, "Tennessee's New Adoption Contact Veto is Cold Comfort to Birth Parents," *University of Memphis Law Review* 27 (1997): 851.

45 *Globe and Mail,* November 14, 2007, p. A8. In Ontario, adopted adults and birth parents can file a disclosure veto to protect their privacy if the adoption was finalized before September 1, 2008. The veto prevents the release of post-adoption information about the person who filed it. If the adoption was finalized after the specified date, a person can file a no-contact notice if they do not want to be contacted but if they are willing to have their identifying information released: http://www.ontario.ca/en/information_bundle/adoption/111872.html.

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donation. It is important to note that no jurisdiction that has created a system requiring sperm donors to agree to identity release has made such a system retroactive.[46] Pratten's claim, however, has even more problematic implications for women's autonomy interests.

The Adoption Analogy and Constitutional Rights

Pratten's s 15 argument relied on an analogy with adoption to support the assertion that she is discriminated against as the result of her birth status. British Columbia has the most generous provisions in Canada with regard to adoption records. Birth parents and adult adoptees can access adoption files unless a contact or disclosure veto has been filed. If a contact veto is in place, any party requesting identifying information must sign "an undertaking not to attempt contact or harassment of the vetoing party."[47] No such system exists for donor-conceived children. Pratten asserted that adoption record reform in British Columbia was based upon recognition "that questions about biological origins and feelings of loss and incompleteness are legitimate."[48]

Pratten relied upon expert evidence that lack of knowledge about identity creates insecurity, an inability to form lasting adult relationships, and an overwhelming sense of loss and "not belonging." One of her witnesses, Dr. Diane Ehrensaft, asserted that being "denied access to half their genetic history can not only create medical risk but be a trigger for anxiety and depression, [and] . . . could have negative if not life threatening consequences."[49] Although this rhetoric was deliberately dramatic, the Attorney General of British Columbia did not contest the evidence. There is no doubt that Pratten's distress is sincere; however, it is problematic to generalize with regard to all children born of ARTs from her example or from the analogy with adoption.

Neither Pratten nor the court distinguished between harm caused by secrecy and harm caused by anonymity. Advocates of disclosure argue "that family secrets are destructive, that secrecy reinforces . . . stigma"[50]; these arguments, however, are not applicable to Pratten, who was informed of her status as a child of ARTs. Arguments with regard to the harm created by anonymity and lack of genetic knowledge are much more controversial, and the evidence with regard to harm is prone to sample bias.[51] In rejecting an application to open adoption records and

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46 Blyth and Frith, "Donor-Conceived People's Access to Genetic and Biographical History," 176.

47 Cindy Baldassi, "The Quest to Access Closed Adoption files in Canada: Understanding Social Context and Resistance to Change" *Canadian Journal of Family Law* 21 (2005): 211–265 at para 59. See also Adoption Act, RSBC 1996, c 5, and the Adoption Act; Financial Administration Act—Adoption Regulation, BC Reg. 291/96. Interestingly, the adoption provisions in British Columbia are very much like those overturned in *Cheskes*.

48 *Pratten,* [2011] at para 3.

49 Ibid. at para 92.

50 Dena Moyal and Carolyn Shelley, "The Future Child's Rights in New Reproductive Technology: Thinking Outside the Tube and Maintaining the Connections," *Family Court Review* 48, no. 3 (July 2010): 431.

51 It is now widely recognized that many of the early studies of the so-called negative impact of adoption were seriously flawed. The foundational studies of Arthur Sorosky, Annette Baran, and Rueben Pannor have come under particularly harsh criticism for their lack of empirical soundness but continue to be cited by court experts. See Baran, Pannor, and Sorosky, "Open Adoption," *Social Work* (March 1976): 98.

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reveal the identity of an adopted woman's father, the *Marchand* court concluded in 2006 that expert testimony claiming harm based on lack of knowledge of genetic origins was "contradicted by the large, randomized empirical studies that have found no significant differences between the behaviors and characteristics of matched groups of adopted children and non-adopted children."[52] Studies of the impact of adoption on children are problematic as "typical recruitment of research participants through support networks may lead to a significant selection bias."[53] Equally, studies of children of ARTs are often biased because "only offspring who felt compelled to join a donor-insemination support network [are] contacted and solicited to participate."[54] As an Ontario court found in *Cheskes*, "there are few, if any, clinical studies (of adopted children opposed to disclosure) . . . because the non-searching population prefers anonymity and is hence unorganized. Unlike the searching population, it does not have lobby groups working on its behalf."[55]

Without fully considering either the validity of the harm argument or previous adoption cases in which requests to open files had been denied, Adair J. asserted that "the strong and irresistible implication is that there is much to learn from the adoption experience in considering the needs, circumstances and best interests of donor offspring" and ordered that records not be destroyed.[56] Yet the leading Canadian decisions with regard to adoption disclosure up until the time of *Pratten* had concluded that "there is no liberty right to obtain identifying information about a person who has expressly refused to consent to its disclosure."[57]

Further, adoption records provide information for children about their birth mothers, but they often do not contain such information about fathers. Although the issue was not discussed by Adair J., even under revised adoption legislation, many children will not have access to information about their paternity. Adoption records "are created by virtue of the registration of live birth,"[58] which does not require registration by a father, and while "it is highly unusual not to have particulars of the birth mother . . . it is much less unusual not to have the particulars of the birth father."[59] Pratten's adoption analogy fails. Adopted children, even in an open record regime, do not have practical access to genetic information about their fathers.

Pratten asserted that all children, except those born via sperm donation, know their genetic histories. This, too, is erroneous. As the Royal Commission on New Reproductive Technologies acknowledged in 1989, "[A]pproximately 6–10% of children have no father identified on the birth certificate. Further, the Commission

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52 *Ontario v Marchand,* [2006] OJ no 2387 at para 85.

53 Vardit Ravitsky, "'Knowing Where You Come From': The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness," *Minnesota Journal of Law, Science and Technology* 11, no. 2 (2010): 670.

54 Waldman, "What Do We Tell the Children?" 537.

55 *Cheskes v Ontario (AG),* [2007] OJ no 3515 at para 65.

56 *Pratten,* [2011] at para 116.

57 *Marchand,* [2006] at para 116. It is important to note that leave to appeal to the Supreme Court of Canada was filed January 29, 2008, submitted to the Court on March 10, 2008, and dismissed by McLachlin C. J. and Fish and Rothstein J. J. on April 24, 2008, without reasons (*Marchand v Ontario,* [2008] SCCA no 37).

58 *Pratten,* [2011] at para 193.

59 Ibid. at para 198.

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noted that the likelihood of non-paternity in children of heterosexual intimate couples in the general population may be as high as 10%."[60] In this context, the assertion of the Attorney General of British Columbia that "there is no law in B.C. guaranteeing anyone the right to know their genetic heritage and no law granting children, generally, the legal right—constitutional or otherwise—to access a parent's medical history or personal information" has significant merit.[61] Courts have, in fact, protected the privacy rights of parents who do not wish their children to know that they are not genetically related to their social fathers.[62]

Pratten's argument that children have a constitutional right to genetic knowledge about their fathers, if accepted, would represent a gross violation of women's autonomy rights.[63] We do not, and cannot, force all women to name the fathers of their children, nor do we force them to undertake genetic testing to prove that marital children are actually sired by husbands.[64] Further, parents are not forced to release their medical records to their children; instead, access to such records is strictly protected, and s 13 (1) of the Privacy Act states that medical records cannot be released if such release is not in the best interests of the individual about whom the records are kept.[65]

Adair J. accepted the s 15 claim but ostensibly limited the implications of the decision by asserting that "the appropriate comparison . . . is between adoptees . . . and donor offspring"[66] rather than children who do not know the identity of their fathers. However, it is clear that many adopted children will not be able to learn the identities of their genetic fathers. Ironically, even a limited acceptance of Pratten's s 15 claim would give donor children greater rights to knowledge of paternity than is available either to adopted children or to those without registered fathers. This problem was identified by the Court of Appeal: "[T]here are many non-donor offspring who do not know their family history or the identity of their biological father."[67] Pratten's claim, however, reifies the centrality of biology to fatherhood and reinforces the vulnerability of families formed without men.

Clarification of Parental Status

Single mothers by choice and lesbian couples are vulnerable to interference by men and/or the state and require access to anonymous sperm in a context in which

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60 Cameron et al., "De-Anonymising Sperm Donors in Canada" at paras 6–7.

61 *Pratten,* [2011] at para 226.

62 Timothy Caufield, "Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing," *Queen's Law Journal* 26 (2000) at para 20.

63 Autonomy rights, according to many health theorists, are the leading concern in medical practice (Vanessa Lentz, "Asking the Inconceivable? Ethical and Legal Considerations Regarding HIV-Seropositive Couples' Request to Access Assisted Reproductive Technologies (ARTs): A Canadian Perspective," *Health Law Journal* 16 (2008): 10).

64 In fact, this possibility was explicitly rejected by an Ontario court. A successful challenge under s 15 of the *Canadian Charter of Rights and Freedoms* was made in *MDR v Ontario (Deputy Registrar General)* regarding the difficulties that lesbian co-mothers experience in registering both mothers' names as parents. Rivard J. held that identification of biological parentage is a key purpose of vital statistics regimes, but not the *only* purpose (ibid., [2006] OJ no 2268 (SCJ)).

65 RSC, 1985, c P-21.

66 *Pratten,* [2011] at para 234.

67 *Pratten,* [2012] at para. 51.

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parentage in relation to children born of ARTs has not been clarified.[68] Canadian family law, with the exception of Alberta, Quebec, and British Columbia, does not clearly outline who does, and who does not, have parental rights in the context of sperm donation and other reproductive technologies. In Alberta, a sperm donor who is not in a "relationship of interdependence of some permanence" with a female person has no legal status as a parent with offspring from his sperm.[69] In Quebec, donation of genetic material for a "parental project" does not create a parental relationship or filial bond.[70] The new Family Law Act in British Columbia also makes clear that a sperm donor is not a legal parent.[71] In all other provinces, donors could find themselves financially liable for their genetic progeny, and families using sperm donation could be disrupted by sperm donors.

The vulnerability of single mothers and lesbian families is reinforced by the failure to distinguish between disclosure and anonymity. Heterosexual families can avoid the implications of donor identity release by not informing their children about the use of donor sperm. Social science research suggests that few heterosexual parents "disclose the nature of conception to their donor-conceived children."[72] Parents wish to prevent children from suffering from lack of knowledge about their donors. However, they also cite a desire "to protect the father from either potential rejection by the child or the social stigma associated with male infertility."[73] As Ellen Waldman has argued, "children will not know to look for their donor or their original records unless parents reveal that a donor was involved in their birth."[74] Based upon evidence regarding the harm of secrecy, a requirement to disclose ARTs status could be made. However, such a regulation would seriously interfere with the decision-making rights of parents. No jurisdiction that has eliminated anonymity has legislated that parents must tell their children about the use of donor sperm.

Lesbian couples and single mothers by choice, however, do not have the option of not disclosing the use of donor sperm. Studies have found that "almost all lesbian and single mother families had told their children at a young age,"[75] often in a context in which they have deliberately selected anonymous donors. There is considerable fear "that men might assume that donating semen would give them rights over the child."[76] There was a fear that "even donors with no involvement could turn up after some years, demanding contact."[77] Existing jurisprudence suggests that women have reason to be concerned.

For example, in *Johnson-Steeves v Lee*, the mother asserted that the intention had been for her to be a single mother in a situation "analogous to that of a donor

68 Foster and Slater, "Privacy and Human Reproduction," 56–61.
69 Alberta Family Law Act, SA, c F-4.5, s 13 (3).
70 Quebec, Art 528.2 CCQ.
71 SBC 2011, c 25, Part 3.
72 Vasanti Jadva, Tabitha Freeman, Wendy Kramer, and Susan Golombok, "The experiences of adolescents and adults conceived by sperm donation: comparisons by age of disclosure and family type," *Human Reproduction* 24, no. 8 (2009): 1909.
73 Jadva et al., "The experiences of adolescents and adults conceived by sperm donation," 1910.
74 Waldman, "What Do We Tell the Children?" 545.
75 Jadva et al., "The experiences of adolescents and adults conceived by sperm donation," 1912.
76 Eric Haimes and Kate Weiner, "'Everybody's got a dad': Issues for lesbian families in the management of donor insemination," *Sociology of Health and Illness* 22, no. 4 (2000): 486.
77 Ibid., 488.

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insemination where she maintained custody and primary decision-making powers." When disagreement arose about access,[78] Lee asserted that the child had a "right to know his biological father," an argument that was implicitly endorsed by the court despite the absence of a relationship between the biological father and child. The court found that "society and biology have not yet reached the point where we have dispensed with fathers or mothers completely."[79] As Roxanne Mykitiuk has asserted, this case suggests that "in situations characterized by the absence of a man who has developed a socially based paternal relationship with a child, when the courts are able to identify a biological father they are most likely to do so."[80] In this context, single mothers by choice are vulnerable if the court can identify a genetic father, and lesbian co-parents share these vulnerabilities.

Ironically, even in Quebec, one of the few provinces to carefully protect the partner of the birth mother as the second parent in a conception project, courts have been quick to "find fathers" for lesbian families. For example, in a case heard in 2004, a couple had a child with a known donor. Against the wishes of the mothers, the father was awarded access three times per week, and the non-biological mother was considered a non-parent. The parental project was deemed to be between mother and biological father, despite the fact that the lesbian couple had a formalized relationship with each other and that both had signed the birth certificate.[81] In another case, despite the fact that the father had had virtually no contact with the child, he was declared to be the father, while the lesbian co-mother, despite having acted as a parent to the child from birth, was excluded from parental rights and status.[82] These cases illustrate the vulnerability of lesbian families and their need for anonymous sperm donation.

Outside Quebec, lesbian co-mothers can assert parenthood for the non-biological mother through one of two processes. The non-biological mother can undertake a second parent adoption, but this can only be done when the donor is either unknown or consents to the process.[83] Or, in some provinces, the two mothers can sign the initial statement of live birth and therefore become presumptive parents.[84] However, the ability to sign the initial statement of birth was achieved not through

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78 Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies," *Osgoode Hall Law Journal* 39 (2001) at para 54.

79 *Johnson-Steeves v Lee* (1997), 33 RFL (4th) 278 (Alta CA) at para 16; see also ibid., 29 RFL (4th) 126 (Alta Ct QB).

80 Mykitiuk, at para 57.

81 *SG v LG,* [2004] RDF 517 (Sup Ct).

82 *A v B, C and X* (2007), RDF 217.

83 Currently, same-sex second parent adoption is permitted in all Canadian jurisdictions except Prince Edward Island and Nunavit. See *Re K; Re A* (1999), 181 DLR (4th) 300 (Alta QB); *Re Nova Scotia (Birth Registration No. 1999-02-00420)* (2001), 194 NSR (2d) 362 (SC) (Nova Scotia); Adoption Act, CCSM 1997, c A2, s 10 (Manitoba); Adoption Act, SNL 1999, c A-2.1, s 20 (Newfoundland and Labrador); Adoption Act, SS 1998, c A-5.2, s 23 (Saskatchewan); *Adoption Act*, RSBC 1996, c 5, ss 5, 29 (British Columbia); Adoption Act, SNWT 1998, c 9, s 5 (Northwest Territories); and *Re: K* (1995), 15 RFL (4th) 129 (Ont Prov Ct).

84 In all but Quebec and Manitoba, the gender-neutral birth certificate was achieved through litigation. The provinces that currently allow the second mother to sign the birth certificate are: Alberta (*Fraess v Alberta (Minister of Justice and Attorney General),* [2005] AJ no 1665; British Columbia (*Gill v Murray,* 2001 BCHRT 34); New Brunswick (*AA v New Brunswick (Department of Family and Community Services),* [2004] NBHRBID no 4); Manitoba (*Vital Statistics Act*, RSM 1997, c V60, s 3 (6)); Quebec (Civil Code of Quebec*);* and Ontario (*MDR v Ontario (Deputy Registrar General),* [2006] OJ no 2268).

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legislation, but through slow and painful litigation. In Saskatchewan, the possibility of acknowledging the planning of a lesbian couple was rejected "simply because a woman could not have provided the seed," illustrating very clearly the emphasis on biology that is central to presumptions of parentage.[85] In British Columbia, the right of lesbian co-mothers to register was established as a result of a human rights complaint.[86] In Ontario, in a successful challenge under s 15 of the *Charter*, the court held that identification of biological parentage is a key purpose of vital statistics regimes, but not the only purpose. The court also clearly asserted that one option that was not available was to establish DNA procedures to test all parents.[87] Even the gender-neutral birth certificate provides only presumptive proof of parentage and is thus contestable; it can be challenged by either the biological mother or a known donor.[88]

In contrast, if non-disclosing heterosexual parents cohabitate, the child is presumed to be the offspring of the person in an intimate relationship with the mother, even absent such a man signing a birth certificate.[89] The *Pratten* decision is unlikely to encourage more heterosexual parents who utilize ARTs to be honest with their children. In a context in which anonymity could be abolished but disclosure would not be mandated, lesbian families and single mothers by choice would have their reproductive options significantly narrowed.[90] Moreover, the potential for interference from donors reinforces an essentialist, biological understanding of parenthood.[91]

Resisting Genetic Essentialism

Disregard for the social labor of parenting is dangerous for all mothers.[92] Genetic essentialism has been endorsed not only by fathers' rights groups but also by some academics. John Eekelaar argues for the alignment of legal and physical truth, in particular with regard to paternity, in order to eliminate the shame of illegitimacy and infertility.[93] However, as Carol Smart asserts, "[W]e need to consider how this one form of truth (genetic parentage) has become so overarching in significance?"[94] Decisions driven purely by genetic "truths" have devastating consequences for women who perform the bulk of relational labor in families.

Pratten's claim reflects the "resurgence in the importance of biological paternity"[95] in Canadian courts. In part, this resurgence has occurred because the identification

85 *PC v SL,* 2005 SKQB 502 at para 17. This is ironic, as planning for a lesbian pregnancy requires significantly more intent than ejaculation. Lesbian couples always intend to inseminate when donor sperm is used, but most men only rarely intend to procreate when they ejaculate.

86 Susan Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility," *Windsor Yearbook of Access to Justice* 25 (2007), 63 np (QL).

87 *MDR v Ontario (Deputy Registrar General)*, [2006] OJ no 2268 (SCJ).

88 Kelly, "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families," *Ottawa Law Review* 40 (2008–2009): 185 at para 10.

89 For example, in Ontario a father is clearly defined under the Children's Law Reform Act, s 8 (1).

90 Cameron et al., "De-Anonymising Sperm Donors in Canada," 130.

91 Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver: University of British Columbia Press, 2011), 37.

92 Jenni Millbank, "The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family," *International Journal of Law, Policy, Family* 22 (2008): 160.

93 John Eekelaar, *Family Law and Personal Life* (Oxford: Oxford University Press, 2006).

94 Smart, "Family Secrets," 554.

95 Kelly, "Producing Paternity," *Canadian Journal of Women and the Law* 21, no. 2 (2009): 329.

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of biological fathers "enables the imposition of child support liability."[96] However, Pratten is an adult and has a social father, so the issue of financial support in her case is moot. Although Pratten does not argue from a fathers' rights perspective, her arguments emphasize the importance of sperm, genetics, and biological connection in ways that echo the rhetoric of fathers' rights groups. Such rhetoric has "ever-increasing political clout" and public support, but it is dangerous to the interests of women.[97] Disputes over the naming of children and the adoption of newborns illustrate the influence of fathers' rights rhetoric in Canadian courts.

As *Trociuk*, the leading naming case in Canada, illustrates, recognition of the genetic ties of men has imposed significant limits on the autonomy rights of mothers. Darrell Trociuk, an unwed father, did not have a relationship with Reni Ernst that would have met the statutory definition of "father" in British Columbia.[98] Ernst excluded him from registration and gave her triplets her maiden name as their sole surname. Trociuk commenced proceedings for access and guardianship rights and underwent DNA tests. In September of 1997, he was legally recognized as the father of the children. He paid ordered child support semi-regularly but did not exercise his right to access. He applied for an order to vary birth registration forms so that he would be included and the children would carry his name. Ernst agreed to amend the birth register but refused to change the children's names.[99] The Director of Vital Statistics asserted that "if the mother was required to include the father's particulars, information would be less readily provided and would be less reliable."[100] The court of first instance rejected Trociuk's request[101] and denied his claim that exclusion from the birth registration constituted a violation of his equality rights.[102] Trociuk received sympathetic press from fathers' rights organizations and asserted that "all Canadians should feel outraged."[103]

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[96] Ibid., 329.

[97] Ibid., 331.

[98] Family Relations Act, RSBC, c 128, s 1. They were not cohabiting at the time of birth and the babies were born more than nine months after the couple had ceased cohabitation (Family Relations Act, RSBC, c 128, s 95).

[99] Proceedings commenced in 1998, in the names of the children, by the father as litigation guardian. On February 25, 1999 Collver J. ordered that the infant petitioners "be removed as parties to the proceedings and that their names be struck from the style of cause" and explicitly acknowledged a central issue in the case that was thereafter ignored by subsequent courts: "It is primarily his interests at stake," and the interests of the father and those of the children must be differentiated (*Trociuk v British Columbia (AG),* [2001] BCJ no 1052).

[100] Ibid., [1999] BCJ no 1146 at para 17. It is noteworthy that before the case was heard by the Supreme Court, the biological basis for registration had been exposed as hollow in *Gill v Murray*, in which the BC Court of Appeal rejected the government's claim that the mother and father requirement for registration was based on biology and deemed that the exclusion of lesbian parents, one of whom had borne a child via anonymous donor insemination, constituted discrimination (*Gill v Murray*, [2001] BCHRTD no 34, rev'd in part *British Columbia (Minister of Health Planning) v British Columbia (Human Rights Tribunal)* (2003), 17 BCLR (4th) (BCSC)).

[101] *Trociuk,* [1999] at para 16.

[102] *R v Oakes* (1986), 24 CCC (3d) 321 (SCC)

[103] Andy Ivens, "Dad 'feels like dirt': Father has no right to give his own sons his surname," *The Province,* Thursday, May 24, 2001. As critics of men's rights groups have noted, such groups employ rhetorical devices to normalize the idea that men are discriminated against in the context of family law, in order to make claims on this basis for formal equality for men as victims and to conflate the interests of children with the desires of men. ("Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups," *Melbourne University Law Review* 22 (1998): 180).

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In January 2001, Trociuk's appeal was dismissed.[104] The majority decision, delivered by Southin J., asserted that to grant naming rights to fathers would be thought "by many mothers and would-be mothers, especially those who have deliberately chosen to be single mothers, to be a serious diminution of their rights."[105] Newbury J. A., concurring in the result, was explicit that the mother's interests should prevail over those of the father; otherwise, the mother would "be required, sooner or later, to acknowledge a father against her wishes, or provide her reasons for not doing so," and this would represent a serious invasion of the mother's privacy and a violation of her autonomy rights.[106] This issue was ignored in later court proceedings.

Prowse J. A. dissented, and her arguments would prove to be prescient in terms of subsequent findings by the Supreme Court of Canada. She asserted that the mother's "unfettered power to refuse to acknowledge the biological father of a child" was unconstitutional. She further argued that a show cause procedure should be instituted to provide "the father with the right to challenge his exclusion from the registration and naming process."[107] She admitted that this might allow a "father of a child, or a person claiming to be the father, to harass the mother at a time when she is vulnerable" but considered this risk to be acceptable.[108]

On October 22, 2001, Trociuk filed his application for leave to appeal to the Supreme Court of Canada.[109] The appeal was allowed, and the reasons of the court were issued on June 6, 2003. The result was deeply disturbing. Deschamps J. argued "that including one's particulars on a birth registration is an important means of participating in the life of a child."[110] This assertion elevated the importance of the biological tie over all other connections that the father, or another parent, might develop with the child over time.[111]

The impact of *Trociuk* was immediately apparent in newborn adoption cases. In 2006, the so-called Saskatchewan Dad Case "became a cause célèbre for the

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[104] In the interim, the court had appointed an *amicus curiae* to represent the interests of the children, and his report recommended allowing the appeal and registering the changes of names for the three boys. The reasons given by the *amicus curiae* are disturbingly patriarchal. He argued that it was "in the best interests of the children for their name to include their father's surname" because (a) the father was present at their births; (b) the father is not a mere "sperm donor"; (c) the father has provided regular financial support; (d) the father "has taken legal action to gain access to the children," and his failures of access were blamed on "the hostility of the mother"; (e) "it is in the children's interest to grow up with a strong sense of their family heritage"; (f) "it is still the social norm for children, whose fathers are known, to have their father's name"; (g) particularly since the children are boys, it is "in the children's interest to know who their father is"; and (h) "the father has always treated the mother with respect" (a claim that Reni Ernst might have contested, see *Trociuk* (2001) at para 26) (Southin J.quoting from the deposition of the *amicus curaie*).

[105] *Trociuk* (2001) at para 177.

[106] Ibid. at para 153.

[107] Ibid. at para 153.

[108] Ibid. at para 159.

[109] The motion to state a constitutional question was granted on July 9, 2002 and the case was heard and reserved on December 4, 2002 (*Trociuk v Attorney General of British Columbia and the Director of Vital Statistics and Reni Ernst,* [2001] SCCA no 410).

[110] *Trociuk,* [2003] at para 16.

[111] Disturbingly, it also suggests that "beyond circumstances of rape and incest there is no justification for a mother to 'arbitrarily' fail to name a biological father" (Kelly, "Producing Paternity," 330).

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fathers' rights movement in Canada,"[112] when the "Dad" contested the mother's right to relinquish the child for adoption and made relentless use of the media to promote his cause.[113] The mother had terminated a relationship with the genetic father at the time that she had become pregnant. The relationship between the parties had ended as the result of a "violent incident."[114] Hendricks initially denied the violence; though he later admitted to violent actions, he blamed "his problematic relationship with Rose."[115] The mother had a history of substance abuse and limited financial resources.[116] Smith J. described her as "self-aware of her own failings" instead of evincing any contextualized understanding of the problems she faced as an Aboriginal woman in a society rife with colonialism.[117] With the help of her sister, who worked in a First Nations service agency, the mother had hand-selected an adoptive couple to parent her son.[118] She had then endured a complicated and life-threatening pregnancy.[119] Ultimately, it was determined that the best interests of the child would be met by custody remaining with the adoptive parents.[120] The terms of the decision, however, elevated the importance of genetics and biology. Smith J. quoted Abella J. A. in declaring that custody must be determined from the perspective of the child: "It is a mistake to look down at the child as a prize to be distributed, rather than from the child up to the parent as an adult to be accountable."[121] But to consider the father to be a parent in any capacity is to look at the situation from a biologically based perspective of ownership. The genetic father had no relationship with the child to be upheld. Hendricks would undoubtedly have appealed the ruling had he not been killed "in a [tragic] motor vehicle accident in August 2007."[122] Given the argument in *Trociuk,* that birth fathers have significant interests to be protected even absent any relationship with a child,[123] the outcome of such an appeal would have been far from certain.

A 2009 case, heard in the Ontario Superior Court of Justice, illustrates the likely future of newborn adoption cases.[124] The father had been informed of the

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112 Wanda Wiegers, "Gender, Biology, and Third Party Custody Disputes," *Alberta Law Review* 47, no. 1 (2009) at para 1.
113 For more information, see Saskatoon Dad, www.saskatoondad.com.
114 Wiegers, "Gender, Biology, and Third Party Custody Disputes" at para 17.
115 Ibid, at para 16. Neither the Saskatchewan Court of Queen's Bench, family division nor the press noted that such victim-blaming behavior is indicative of abuse. For information regarding characteristics of an abusive personality, see Donald Dutton, *The Abusive Personality: Violence and Control in Intimate Relationships*, 2d ed (New York: Guilford Press, 2007).
116 *Hendricks v Swan*, 2007 SKQB 36 at para 2.
117 Ibid. at para 18. For a discussion of the need for contextualized understanding of the circumstances faced by Aboriginal women, see Sherene Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George," *Canadian Journal of Law and Society* 15, no. 2 (2000): 91.
118 Ibid. at para 18.
119 Wiegers, "Gender, Biology, and Third Party Custody Disputes" at paras 28–30. Disregarded in press accounts was the fact that in the adoptive family, it was the father who had chosen to be "a stay-at-home parent."
120 The court considered the relative parenting abilities of the genetic father and the adoptive parents and found that the adoptive parents were financially and emotionally stable and committed to parenting (ibid. at para 64).
121 *MacGyver v Richards* (1995), 22 OR (3d) 481 at para 38.
122 Wiegers, "Gender, Biology, and Third Party Custody Disputes" at para 1.
123 *Trociuk,* [2003] at para 16.
124 *AL v SM*, [2009] OJ no 2972.

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pregnancy. The parents had agreed upon an abortion, but the mother decided that she could not follow through with this decision. The father knew that she had not aborted, but he did not show interest in the mother's pregnancy or provide her with financial or emotional support. After the birth, the mother told him that the child had been stillborn, when in fact the child had been released for adoption.[125] Adoption proceedings were underway, with the child in a probationary placement, when the father filed his acknowledgement of paternity.[126] The court found that "the essence of the father's case is established, namely that she did deceive him by telling him the child was stillborn and in this way prevented him from asserting his paternity," but it did not contextualize the fact that the father had been adamant that the mother should abort. The court admitted that the father did not fall within the strict definition of a father as set out in the Children's Law Reform Act.[127] However, the father argued that the strict definition should be avoided "by reference to principles of fundamental justice, including *Charter* values."[128] The father relied expressly on the ratio in *Trociuk* to argue that the definition of "father" "may be ripe for reconsideration."[129] The mother countered that she would prefer to seek custody herself rather than to have the biological father obtain custody, but the court declared that "the adoption placement is vulnerable as to the father only and not as to the mother."[130]

Naming and adoption cases illustrate the practical and lived implications for women implicit in the notion that sperm donation (whether through intercourse or through ejaculation into a cup for the purposes of ARTs) constitutes fatherhood. Pratten's claim has the potential to further entrench the genetic essentialism evident in cases such as *Trociuk* and *AL v SM*. The tendency of the court to endorse the purely genetic claims of men has very real and negative implications for women's lived experience as primary parents.

Conclusion

Pratten's claim that genetic information is essential to the well-being of children reifies the notion that men are fathers purely as a result of ejaculation. It would be a violation of the privacy of sperm donors to retroactively release identifying information without their consent. More importantly, children should not have a right to know about their genetic parents and to "find fathers." As the Attorney General of British Columbia rightly asserted and the Court of Appeal upheld, "[T]here simply is no constitutional right to know one's origins and genetic heritage."[131] To introduce such a broad right to genetic knowledge would violate the privacy and autonomy rights of women and force them to name fathers in all contexts. Even if we were to accept a right to information limited to ARTs, a future system of mandatory identity release for sperm donation would require significant

[125] Ibid. at para 1.
[126] Ibid. at para 4.
[127] Children's Law Reform Act, RSO 1990, c C.12, s 8 (1).
[128] *AL v SM,* at para 21.
[129] Ibid. at para 30.
[130] Ibid. at para 58.
[131] *Pratten*, [2011] at para 11.

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reform of family law in advance of de-anonymization. Even with clarification of parentage law, the elimination of anonymous donation would have a potentially disproportionate impact on same-sex families and single mothers, a potential violation of the equality rights of such families. Finally, the search for genetic fathers is disturbing. The true indices of fatherhood are emotional investment and social caring. Pratten's claims reify biological fatherhood "as an essentialized identity"[132] and reinforce patriarchal control of women and children, and her "call for change may be ill-advised."[133]

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[132] Kelly, "Producing Paternity," 336.
[133] Waldman, "What Do We Tell the Children?" 535.

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