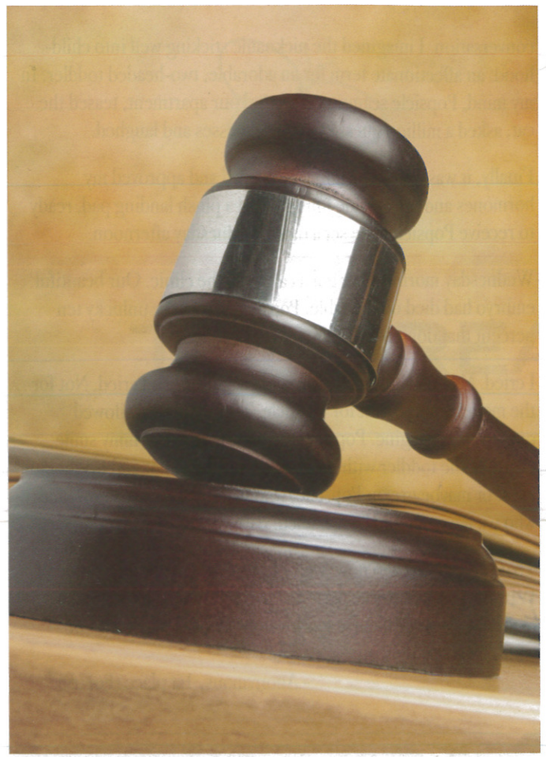


The Pratten Case:

A Landmark Decision Coming Up

by Sara Cohen

Undoubtedly, the *Pratten*[1] decision is one of the most important cases decided in the past couple of years relating to assisted third-party reproduction in Canada. If Ms. Pratten is successful at the Supreme Court of Canada, the decision will have far-reaching consequences and implications that will not only affect the practice of third-party gamete donation across Canada, but will also affect our understanding of who is a parent, which decisions ought to be left to parents to determine the best interests of a child and which are to be answered by the state, what are appropriate limits on reproductive freedoms, whether a right to know one's familial past exists at common law and whether the courts can force the Government's hand to draft and enact legislation where none exists.

Types of donors: known vs. open-identity vs. anonymous

Before we delve into the *Pratten* decision, let's take a brief look at the practice of gamete donation in Canada today. In contrast to the time in which Olivia Pratten was conceived (the early 1980s), when only anonymous gamete donors were available, there are currently three types of third-party gamete donors: known donor[2], -open-identity donor (referred to as an "open-ID donor") and anonymous donor.

A known donor is simply a donor who is known to the intended parent(s). In my fertility law practice, I often see sisters, brothers, cousins and friends donating gametes for the recipient's reproductive purposes. A known donor does not necessarily have any greater obligation than an anonymous donor to provide, among other information, updated family medical histories to the recipient, and the parties have no more of a legal obligation to disclose to the child how he or she was conceived. These obligations, if any exist, ought to be dealt with in a contract between the parties.

An open-ID donor is a donor whose identifying information (often including contact information, social insurance number, date of birth, etc.) will become available to the donor-conceived child when he or she reaches the age of 18. The donor's obligation to update his or her medical history, provide updated contact information and provide updated medical histories is determined by the specific contractual obligations (typically between the donor and the sperm bank). The information provided to the donor-conceived person, while generally quite similar, will vary depending on which sperm bank was used.

> Ms. Pratten alleged that donor-conceived people who do not have access to identifying information about the donor can and do suffer from anxieties and other harms.

Finally, there is the anonymous gamete donor. The expectation in the case of an anonymous donor is that he or she will remain anonymous, even after the donor-conceived child reaches the age of 18. Depending on the practices of the sperm bank and/or clinic, this may or may not be reflected in an agreement between the donor and the sperm bank, or in an agreement between, for example, an anonymous ova donor and the recipient intended parent. From a legal perspective, there is no reason why an anonymous donor could not be contractually obligated to provide updated medical and family histories in much the same way as are some open-ID donors. However, at this time, with few exceptions, this is not the general practice.

Several elements point to how practices and our conceptions of third-party reproductive technologies are evolving. At the time when the Pratten decision was first heard less than two years ago, the evidence before the court was that Repromed, the only Canadian sperm bank with its own donors, had no open-ID donors in Canada. It now has several, and the number is expected to rise. Furthermore, about 60% of all sperm imported into Canada is now open ID.

What is the *Pratten* decision?

The lower court decision

Olivia Pratten was conceived in the early 1980s in the Province of British Columbia through the use of anonymously donated sperm. In 2011, Madam Justice Adair of the Supreme Court of British Columbia heard Ms. Pratten's case. Ms. Pratten alleged that donor-conceived people who do not have access to identifying information about the donor can and do suffer from anxieties and other harms. Ms. Pratten contends that medical information and family medical histories are necessary, but not enough – identifying information about the donor is necessary to alleviate the harm. Olivia Pratten argued that the experience of donor-conceived adults is analogous to that of adult adoptees and that just as closed adoptions are prohibited in Canada, so too should be anonymous gamete donation, and that donor-conceived adults should have access to the same information about the donor that adult adoptees do about birth parents[3]. Ms. Pratten's argument is that by failing to provide her such information, British Columbia breached her constitutional rights under sections 15 and 7 of the *Charter of Rights and Freedoms*[4].

Madam Justice Adair largely agreed with Ms. Pratten, and found that donor-conceived adults were discriminated against as compared to adult adoptees, that adult adoptees were an analogous group, and that Ms. Pratten's section 15 (1)

Charter rights had been violated. Accordingly, Madam Justice Adair ordered that the provisions of British Columbia's *Adoption Act* and *Adoption Regulation* specified by Ms. Pratten[5] are unconstitutional and are therefore of no force and effect, giving British Columbia fifteen months in which to revise the legislation. She also granted a permanent injunction prohibiting the destruction, disposal, redaction or transfer out of British Columbia of gamete donor records in British Columbia[6]. Interestingly, although she specifically held at paragraph 215 that "…based on the whole of the evidence, …using an anonymous gamete donor is harmful to the child, and it is not in the best interests of donor offspring," Madam Justice Adair did not specifically prohibit anonymous gamete donation (and was not specifically asked to do so, although the *Pratten* decision is generally referred to as doing so), but instead found British Columbia's adoption legislation unconstitutionally underinclusive (which would have more or less the same effect).

Olivia Pratten argued that the experience of donor-conceived adults is analogous to that of adult adoptees and that just as closed adoptions are prohibited in Canada, so too should be anonymous gamete donation.

The decision of the Court of Appeal for British Columbia

At the end of November, 2012, the Court of Appeal for British Columbia released its long-awaited decision on the *Pratten* appeal. The Honourable Mr. Justice Frankel, writing on behalf of a unanimous court, overturned Madam Justice Adair's decision and held that even if donor-conceived adults are discriminated against as compared to adult adoptees, this potential breach of section 15(1) *Charter* rights is constitutionally supported by section 15(2) of the *Charter* (the affirmative action provision). In other words, just because the legislature saw fit to provide certain rights to one disadvantaged group doesn't mean it must legislate the same rights for everyone. The Court of Appeal agreed with the lower court in finding that Ms. Pratten's section 7 *Charter* rights had not been breached. Justice Frankel specifically noted that there is no such right in law to know one's past, referring to *Marchand v. Ontario*[7], an Ontario Court of Appeal decision (which, interestingly enough, the Supreme Court of Canada refused to hear) where an adoptee was seeking the disclosure of her biological father's name[8]. In denying the appeal in *Marchand*, the Ontario Court of Appeal held that,

> The unconditional disclosure of identifying personal information of third parties, even if they are birth parents of the claimant, without regard to the privacy and confidentiality interests of the persons identified and without regard to any serious harm that might result from disclosure, fails to meet the above criteria. It is not a principle that is vital or fundamental to our societal notion of justice. It is instead a proposition of public policy that continues to be vigorously debated.

Further, Justice Frankel points out in paragraph 51 of the Court of Appeal Pratten decision that,

> what Ms. Pratten seeks is far more extensive than what is enjoyed by most people in Canada and would result in state intrusion into the lives of many. There are many non-donor offspring who do not know their family history or the identity of their biological father because of decisions taken by others, or because of the circumstances of their conception. For example, there is presently no law that compels a biological parent to share with a child whatever medical, social, or cultural information he or she may have concerning the other biological parent.

What is the next step in the legal process of the *Pratten* decision?

In a number of interviews, Olivia Pratten has made it clear that she intends to see her case all the way to the Supreme Court of Canada. We are now waiting to hear whether the Supreme Court of Canada will grant leave to hear her case. If leave is granted, the Supreme Court of Canada would then hear the case and make a final ruling. If leave is denied, the Court of Appeal decision will stand.

What happens if Olivia Pratten is successful at the Supreme Court of Canada?

I am frequently asked by clients, doctors and clinics what the consequences will be if Ms. Pratten is successful at the Supreme Court of Canada. Although I don't have a magic crystal ball, here are some of the expected implications:

• Perhaps, with the exception of Québec, the *Pratten* decision will affect all provinces across Canada and not just British Columbia.

Over the past few decades, provincial legislation has been enacted across Canada setting out the information about birth parents that ought to be made available to adult adoptees[9]. For example, in 2008, Ontario enacted the *Access to Adoption Records Act, 2008,* the relevant parts of which are similar to the provisions of British Columbia's *Adoption Act* (R.S.B.C. 1996, c. 5) challenged by Olivia Pratten. Should the Supreme Court of Canada restore the lower court decision and determine that donor-conceived people are discriminated against vis-à-vis adult adoptees contrary to section 15(1) of the *Charter* and that such discrimination cannot be saved by section 15(2) or 1 of the *Charter*, then it logically follows that all provincial legislation similar to the impugned legislation is similarly unconstitutional.

The order sought by Ms. Pratten is limited to gamete donation. Accordingly, even if Ms. Pratten is successful at the Supreme Court of Canada, the order would not necessarily extend to include embryo donation as an embryo is not a gamete.

• The Pratten decision will affect the practice of using third-party donor ova in addition to donor sperm.

Although Olivia Pratten was born through the use of third-party donor sperm and not donor ova, the order she seeks is with respect to all people conceived through donor gametes and not sperm in particular. This is interesting because unless things have substantially changed with the importation of frozen donor ova from the US, ova donors in Canada tend to either be anonymous or known and not open-ID.

• It would seem logical that the (far less frequent) practice of embryo donation will be affected as well.

To my knowledge, embryo donation is practiced far less frequently in Canada than is either sperm or ova donation. The order sought by Ms. Pratten is limited to gamete donation. Accordingly, even if Ms. Pratten is successful at the Supreme Court of Canada, the order would not necessarily extend to include embryo donation as an embryo is not a gamete. However, the arguments made by Ms. Pratten and her counsel can equally relate to embryo donation, so this would be a logical extension.

The Final Word

For now, we don't know whether the Supreme Court of Canada will even grant leave to hear the *Pratten* case, let alone

what it will decide if it does choose to hear it. However, in the interim, sperm banks and clinics may want to consider keeping records on all gamete donors indefinitely. Moreover, it's important for parents considering the use of anonymously donated gametes, and for anonymous gamete donors themselves, to know that they may be unable to rely on this anonymity in the future. Furthermore, websites such as the Donor Sibling Registry and innovative techniques such as DNA matching make it impossible to guarantee anonymity today. Regardless, whatever the decision, and whether or not we agree with her position, Olivia Pratten has highlighted some important issues for us to think about with respect to the use of donor gametes in Canada. ■

References

1 *Pratten v. British Columbia (Attorney General)*, 2011 BCSC 656, overturned 2012 BCCA 480

2 Note that in making its finding of fact in *Pratten*, the court only took notice of open-identity donors and anonymous donors and did not examine known donors.

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

4 *Constitution Act*, 1982, c.11.

5 Other than s. 4(1)(e) to (h) of the *Regulation*

6 *Supra* note 4 at para. 335

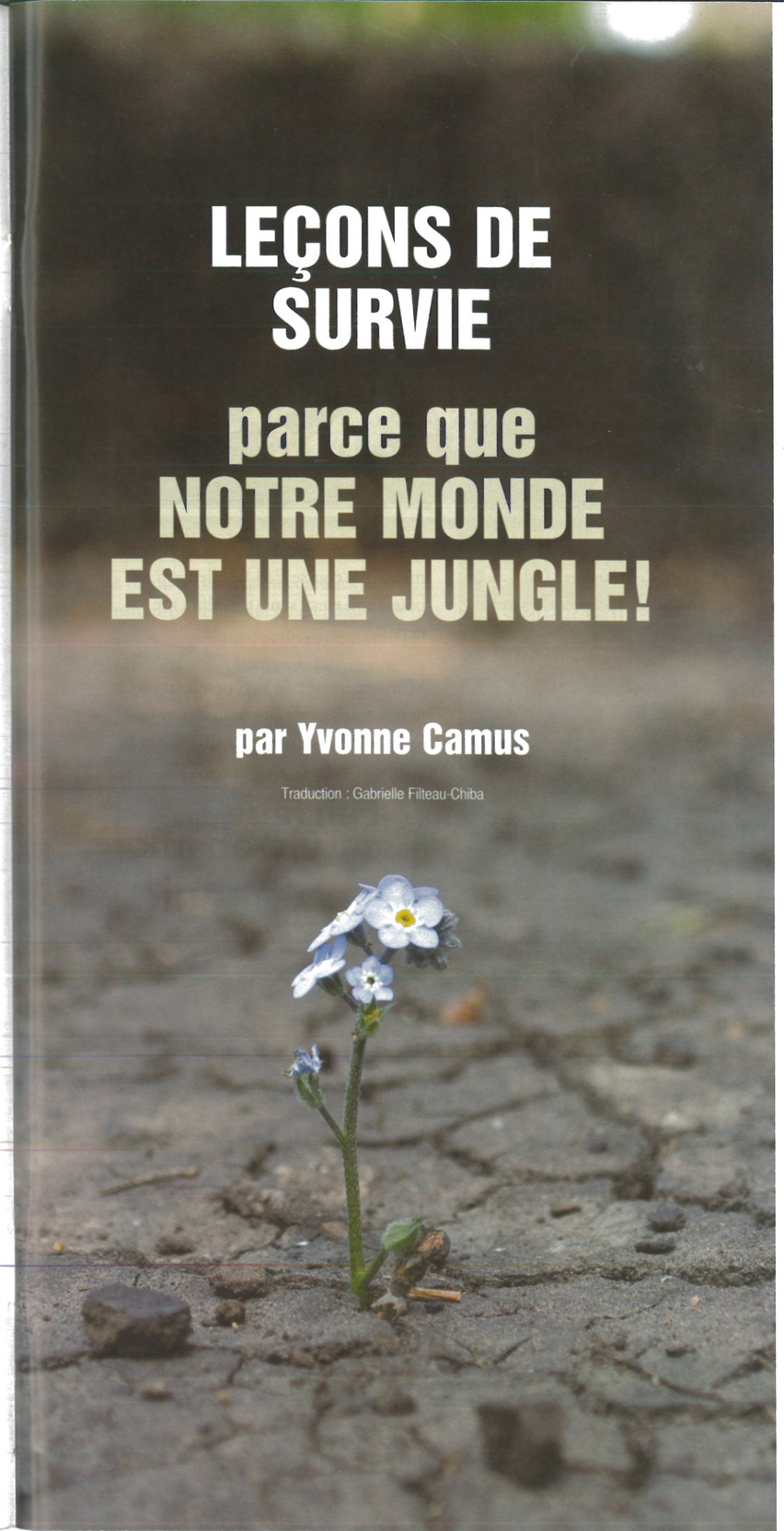
7 2007 ONCA 787, 288 D.L.R. (4th) 762, aff'g (2006), 81 O.R. (3d) 172 (S.C.J.), leave ref'd [2008] 1 S.C.R. ix *(sub nom. Infant Number 10968)*

8 2012 BCCA 480 at para. 52-

9 See, for example, Alberta's *Child, Youth and Family Enhancement Act*, C. c-12.

About the Author

Sara R. Cohen is a fertility lawyer in Toronto, Canada, but with clients throughout the country and beyond. She approaches fertility law with the compassion, empathy and respect it deserves. Sara's passion is to help build families and she considers herself very fortunate to have such a fulfilling career. Sara has been widely quoted in the media about issues relating to fertility law in Canada. She is an advocate for all parties involved in third-party reproductive technology and works closely with intended parents, surrogate mothers, gamete donor and recipients, as well as domestic and international businesses in the fertility industry. You can read more about her practice at www.fertilitylawcanada.com, follow her on Twitter @fertilitylaw or on Facebook at www.facebook.com/FertilityLawCanada.



« Cherchez à mener la vie de vos rêves, et vous connaîtrez le succès là où vous ne vous y attendiez pas. » Voilà comment je conclus la plupart des exposés que je présente à des équipes, des entreprises, des dirigeants et des étudiants. Une fois prononcés, ces mots semblent sortir de leur banalité et se transformer en un message fort qui nous dévoile tous les possibles.

La première leçon que j'ai apprise est que la clé de la survie, c'est l'attitude.

J'ai eu l'occasion de tester les limites du possible lorsque j'ai participé en l'an 2000 à la course Eco-Challenge à Bornéo, en Malaisie. Cette course d'aventure est certes l'un des plus grands défis auxquels j'ai fait face dans ma vie. Il s'agit d'une course sans escale sur 500 km dans les coins les plus reculés de la planète. Les athlètes sont regroupés en équipes mixtes de quatre personnes, et la plupart sont formées de trois hommes et d'une femme. Les membres de l'équipe doivent rester ensemble en tout temps. Nous transportons toute notre nourriture et tout notre équipement en plus de devoir trouver et purifier l'eau dont nous avons besoin pour survivre. Ce faisant, nous devons nous orienter à l'aide de cartes topographiques et de boussoles – les GPS sont interdits ! « L'Eco-Challenge ne fait qu'une bouchée d'Ironman », a dit un journaliste.