

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pratten v. British Columbia (Attorney General)*,  
2010 BCSC 1444

Date: 20101015  
Docket: S087449  
Registry: Vancouver

Between:

**Olivia Pratten**

Plaintiff

And

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

Defendants

Before: The Honourable Madam Justice Gropper

## Reasons for Judgment

Counsel for the Plaintiff:

J. J. M. Arvay, Q.C.  
S. Hern

Counsel for the Defendant Attorney General  
of British Columbia:

L. Greathead  
B. A. Mackey

Counsel for the Defendant, College of  
Physicians and Surgeons of British  
Columbia:

J. R. Shewfelt

Place and Date of Hearing:

Vancouver, B.C.  
September 29, 2010

Place and Date of Judgment:

Vancouver, B.C.  
October 15, 2010

## **Introduction**

[1] In October 2008, Olivia Pratten filed a statement of claim against the Attorney General of British Columbia (the “Province”) and the College of Physicians and Surgeons of British Columbia (the “College”).

[2] Ms. Pratten was conceived in 1981 in a gamete donor insemination procedure administered by Dr. Gerald Korn, an early practitioner of donor sperm insemination.

[3] The parties have provided definitions which I adopt. Gamete means “human egg or sperm”. Gamete donor means “a person, whether alive or deceased, who provided one or more gametes which were used in artificial insemination procedures and which resulted in the conception and birth of a child by a woman who is not the gamete donor, spouse or sexual partner.”

[4] Ms. Pratten is seeking a declaration, among other things, that the Province has failed to protect her right to know the identity of her biological father. The prayer for relief seeks:

- a) a declaration that the provisions of the *Adoption Act*, R.S.B.C. 1996, c. 5 and the *Adoption Regulation*, B.C. Reg. 291/96, unjustifiably contravene s. 15 of the *Charter* and, as a result, are of no force and effect;
- b) an order that the Province enact legislation that provides for the permanent preservation of all gamete donor records in British Columbia, and a process by which that information is made available to the plaintiff and other people conceived from gamete donation; and
- c) a declaration that the Province and the College unjustifiably contravened s. 7 of the *Charter* in not ensuring that gamete donor records are preserved permanently and made available in circumstances of medical necessity or otherwise to her and others conceived in British Columbia from gamete donation.

[5] The Province seeks an order dismissing Ms. Pratten's claim on the basis that it is moot, academic and/or futile, and that Ms. Pratten lacks standing to bring the claim. Alternatively, the Province seeks an order adjourning the hearing of the Rule 18A application presently set for October 25, 2010, until six months following the release of the Supreme Court of Canada decision in *Québec (Procureur général) c. Canada (Procureur général)*, 2008 CarswellQue. 9848 which will establish the constitutional validity of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2 (the "federal legislation").

### **Records**

[6] Ms. Pratten and her mother have attempted to obtain records concerning the sperm donor who participated in her conception from Dr. Korn, the gynaecologist who performed the procedure. There is a dispute over whether her records still exist.

[7] Dr. Korn says that he destroyed them, either six years after he last saw Ms. Pratten's mother as a patient, or sometime later, which may have been after her mother first sought the records in 1988. The evidence is equivocal about whether Ms. Pratten's records were destroyed and, if they were, when and why.

[8] There is no provincial legislation requiring physicians in British Columbia to maintain these records. In December 2008, Ms. Pratten obtained an interlocutory injunction prohibiting the destruction, disposal, redaction, or transfer out of British Columbia of gamete donor records by any person until the conclusion of this proceeding or further order of the court.

[9] Based on statements made by Dr. Korn, the Province takes the position, that records in relation to the sperm donor who provided sperm for the insemination of Ms. Pratten's mother no longer exist.

[10] Ms. Pratten and her mother believe that the records may exist, based on conversations and correspondence that they each had with Dr. Korn between 1998 and 2004.

[11] The Province maintains that because there are no records that would identify or provide additional social and medical information about the donor that provided sperm for the conception of Ms. Pratten, her action to obtain those records, to challenge the *Adoption Act* (when she was not adopted) and to have the Province establish a process to store and provide access to those records is moot, academic and futile. It is also the basis upon which the Province asserts that Ms. Pratten lacks a private interest standing to bring the claim.

[12] As stated, the Province asserts that no records exist. Ms. Pratten asserts that the records may exist. For the reasons that I will provide, it is unnecessary for me to decide whether the records exist or not. The trial judge will have a greater opportunity to consider whether the records exist.

### **Mootness**

[13] The Supreme Court of Canada described the doctrine of mootness in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at para. 15:

The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.

[14] The Court provided the relevant factors to the exercise of judicial discretion in determining mootness at para.16:

16 The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[15] The Court then set out three rationales that underlie the doctrine of mootness: the first rationale is "that a court's competence to resolve legal disputes is rooted in the adversarial system" (at para. 31); the second broad rationale is the concern for

judicial economy (at para. 34); and the third underlying rationale is “the need for the court to demonstrate a measure of awareness of its proper law-making function” (para 40).

[16] The Court offered the following guidance on assessing the factors (at para. 42):

42 In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

[17] The Province argues that it is not possible for the court to grant Ms. Pratten the remedy she seeks. There are no records related to the gamete donor whose sperm resulted in her conception. It is not possible to establish a process by which the medical and social information relating to the sperm donor is released to Ms. Pratten or to establish a process that will grant Ms. Pratten the opportunity to learn the identity of the sperm donor. Nor is it possible to establish a process by which Ms. Pratten has the opportunity to determine whether she is related to a sexual partner or a proposed sexual partner. As Ms. Pratten is the only plaintiff in the proceeding, the matter has become academic and moot.

[18] The Province says that based on the three rationalia, the court ought not to exercise its discretion. The Province refers to these factors:

- 1) the federal government has legislated on the topic raised by the claim;
- 2) the federal legislation is challenged by the Province of Quebec, as outside the jurisdiction of the federal government. The Supreme Court of Canada heard that appeal in April 2009 and the matter has been under reserve since that date;
- 3) currently the practice in British Columbia, is that women undergoing donor insemination are generally given details, including social and medical

information, about the sperm donor, and they can choose whether to use a donor who has agreed that his identity may be released to the child when the child becomes an adult; and

- 4) Ms. Pratten did not certify her action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, nor has she identified a person for whom the court order will have any practical effect.

[19] The Province argues that proceeding with Ms. Pratten's action will cause the court to intrude into the role of the legislative branch, which is the third rationale to be weighed in exercising discretion to hear a moot matter. The Province says the plaintiff is asking the Province to create a scheme by which gamete donor records are preserved permanently and made available to the plaintiff and people conceived in British Columbia from gamete donation. It argues that this is the prerogative of the legislature, not the court.

[20] The Province points out that there are some instances where a court will exercise its discretion to hear a matter that is moot, including where the issue in question is evasive of review because of timing or lack of another applicant to bring the challenge. That is not the situation here. The Province argues that a plaintiff who was conceived by gamete donation where the records relating to the gamete donor exist would be the proper plaintiff.

[21] Ms. Pratten asserts that the matter is not moot, academic or futile, whether or not records of the gamete donor who participated in her conception exist. She says that it is unnecessary for her to seek to certify herself as a representative in a class action. Ms. Pratten is not seeking damages in her prayer for relief.

[22] In *Nanaimo Immigrant Settlement Society v. British Columbia*, 2001 BCCA 75, the court considered the preferable procedure for constitutional questions at paras. 13 and 14. The court referred to the obiter dictum of Gonthier, J. in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, where he observed at para. 19 that:

Although it cannot be said that damages can never be obtained following a declaration of constitutional validity... as a general rule, ... an action for damages under s. 24(1) of the *Charter* cannot be coupled with a declaratory action for invalidity under s. 52 of the *Constitution Act*, 1982

[23] Gonthier J. added, at para. 20:

...while it is true that it is not necessary to pursue a class action to obtain a declaration of constitutional invalidity and therefore, that it is generally undesirable to do so...

[24] Ms. Pratten asserts that her action is not moot. The records she seeks may exist and even if they do not, this is a case where the court ought to exercise its discretion to hear the matter. She asserts that her action falls within the three rationalia in *Borowski*. This action identifies the presence of an adversarial context. There are other people with a stake in the outcome and there are collateral consequences if not for the plaintiff, then for someone else. Ms. Pratten refers to *Collins v. Abrams*, 2002 BCSC 1774, at para. 41, where the court sets out various examples of collateral consequences referred to in *Borowski*:

41 Examples of collateral consequences referred to in *Borowski* are: prosecutions for municipal bylaw violations outstanding against an individual who had sold a restaurant and therefore could no longer pursue an order for mandamus for a licence; criminal proceedings where the sentence has been served before the appeal is heard; and the existence of other persons with a stake in the outcome who can be substituted as parties or interveners. Other examples [include] ...

where there are other cases, either before the court or likely to come before the courts, involving other litigants where the issue decided on this application will have to be litigated...[or] where the judgment under appeal places in doubt the legality of governmental action, other than the action in issue in the specific case, engaged in by the government in reliance on the challenged statutory authority...[or] where the nature of the issue raised on appeal is such that it will almost always be rendered moot before the opportunity for appellate review arises.

[citations omitted]

[25] In respect of judicial economy, Ms. Pratten argues that the case is ready to be argued and decided. Ms. Pratten is ready to proceed to summary judgment on October 25, 2010. In response to the particular assertions the Province makes in respect of judicial economy Ms. Pratten says:

- 1) The federal government has enacted legislation on the topic, but the sections regarding records are not in force. It is unknown whether or when they will be.
- 2) The plaintiff is seeking more in her declaration than the federal legislation contemplates, even if those provisions were in force.
- 3) Whether or not doctors currently performing artificial insemination are keeping records, this practice does not address people like Ms. Pratten, who were conceived before it became the practice. The practice also appears to be donor centric. Ms. Pratten is seeking the establishment of a registry which provides rights to the children of gamete donation.
- 4) Ms. Pratten does not need to certify her action under the *Class Proceedings Act*. The Province has admitted that Ms. Pratten brings the action on her own behalf and on behalf of others in para. 3 of the statement of defence.
- 5) The records that Ms. Pratten seeks may exist, and in any event, there are thousands of offspring resulting from gamete donation that will benefit from the declarations the plaintiff seeks.

[26] In respect of the final rationale, the need for the court to demonstrate a measure of awareness in its proper law making function, the plaintiff argues that in this constitutional challenge she is similar to an adopted child and under the provision of the *Adoption Act*, should have the same rights. Ms. Pratten refers to *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 at para. 107:

While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it.

[27] The plaintiff is challenging the under inclusiveness of the *Adoption Act*. She says that she should enjoy the same rights as adopted children have to obtain records of their biological parents, citing *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 80:

If the mere silence of the legislation was enough to remove it from s. 15(1) scrutiny then any legislature could easily avoid the objects of s. 15(1) simply by drafting laws which omitted reference to excluded groups. Such an approach would ignore the recognition that this Court has given to the principle that discrimination can arise from underinclusive legislation. This principle was expressed with great clarity by Dickson C.J. in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1240. There he stated: "Underinclusion may be simply a backhanded way of permitting discrimination".

### **Decision**

[28] Whether the records the plaintiff seeks exist or not, I am satisfied that the issues raised in Ms. Pratten's pleadings are not moot, academic or futile. The plaintiff's pleadings do not create a hypothetical or abstract question. The declaration that she seeks will have an effect of resolving some controversy, which affects or may affect the rights of persons like Ms. Pratten and others who were conceived through gamete donation. 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.

[29] I consider that Ms. Pratten's claim provides the adversarial context for determination of the issues. I accept that Ms. Pratten is ready to proceed to summary judgment on October 25, 2010. I agree with Ms. Pratten that there is no merit to the assertion that her claims intrude into the court's proper function. As noted in *Chaoulli*, the courts have an ongoing and significant role "vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it."

[30] This is a serious matter, and the plaintiff and others are directly affected. The Province has not demonstrated that there is a better avenue for Ms. Pratten and others like her to address these issues.

### **Standing**

[31] The Province asserts that Ms. Pratten lacks direct or public interest standing. She lacks direct interest standing to challenge the *Adoption Act* and its *Regulations* because she was not adopted and her sperm donor records do not exist. She does not meet the test for public interest standing as set out by the Supreme Court of Canada in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, which requires that the applicant demonstrate that there is a serious issue to be tried, that the plaintiff has demonstrated a genuine interest and that there is no other reasonable or effective way to bring the issue before the court. All three parts of the test must be met before the applicant is entitled to litigate the legal rights of others. The Province reiterates that Ms. Pratten seeks to challenge the *Adoption Act* but she was not adopted and no records exist as to the identity or the social and medical history of the sperm donor involved in her conception. The Province asserts that because of this, the facts concerning Ms. Pratten do not provide a basis for public interest standing.

[32] Ms. Pratten asserts that even if her own records have been destroyed, she continues to have private interest standing because she will benefit from the preservation of the records of other donor conceived people and the creation of the registry. This is because the existence of a registry will allow any of Ms. Pratten's sexual partners or prospective sexual partners to enquire if they were conceived from gamete donation in B.C. and, if so, obtain some information in that regard, so that Ms. Pratten and her partner can reduce or exclude the possibility that they are related.

[33] Ms. Pratten further asserts that even if she has no private interest standing, she should be recognized as having public interest standing. She has long been involved in advocating for change in respect of the rights of people born from

donated gametes; she knows of no other person better able to advocate over this important issue; the secrecy and shame which accompany these issues inhibit many people in Ms. Pratten's position from publicly sharing their own stories; the Province has effectively acknowledged and conceded Ms. Pratten's representative nature in their consent to maintaining the injunction; and if her records have been destroyed, this has resulted from the Province's failure to take any action to protect Ms. Pratten's rights.

[34] The plaintiff also points out that if this action is dismissed, the injunction currently in place regarding sperm donor records will no longer exist, and some records may be destroyed.

### **Decision**

[35] I am satisfied that Ms. Pratten has public interest standing, and potentially direct interest standing, in the event that the records she seeks do exist. She has satisfied me that there is a serious issue to be tried; that her position that the Province has failed to enact protective legislation in respect of gamete donors is one which affects Ms. Pratten directly or she has a genuine interest in protecting; and that she also has standing under s. 52 of the *Constitution Act*, 1982.

[36] The circumstances are like those described in *Chaoulli* at para. 189:

All three of these conditions are met in the present case. First, there is a serious challenge to the invalidity of the impugned provisions. Access to medical care is a concern of all Quebec residents. Second, Dr. Chaoulli and Mr. Zeliotis are both Quebec residents and are therefore directly affected by the provisions barring access to private health insurance. Third, the appellants advance the broad claim that the Quebec health plan is unconstitutional for systemic reasons. They do not limit themselves to the circumstances of any particular patient. Their argument is not limited to a case-by-case consideration.

[37] These comments are apposite to the application here: Ms. Pratten is in a position to pursue a systemic challenge to the Province's failure to enact or extend legislation to ensure that donor records pertaining to her and other people conceived from gamete donation are preserved, in the event that the evidence becomes

medically necessary. She is also in a position to challenge the lack of equal benefits under the law for people conceived from gamete donation to know their biological heritage, and have it protected to the same standard as is available to people who have been adopted.

### **Adjournment**

[38] The Attorney General seeks to adjourn the hearing of this matter for a period of six months following the release of the Supreme Court of Canada's decision in the *Quebec* case. The Province argues that the question of whether the federal government has jurisdiction to legislate in the area of assisted human reproduction, including the establishment of a registry for sperm donors and children conceived by way of artificial means, and the determination that the identity of the sperm donors may only be released with the written consent of the donor, is directly relevant to these proceedings. If Parliament has jurisdiction to legislate in the area, then there is no jurisdiction in the court to require the Province to establish its own provincial scheme. On the other hand, if the Supreme Court of Canada finds that Parliament does not have the jurisdiction to legislate in this area, then the Province will need time to determine what action should be taken.

[39] The Province says that the federal legislation is prospective, nothing can be done retroactively for Ms. Pratten or people in her position. The adoption model upon which she relies is not retroactive.

[40] The Province asserts that the interests of justice and the efficacy of the judicial system are best served by adjourning consideration of Ms. Pratten's application, given that closely related issues are under consideration in the Supreme Court of Canada. Even if the Supreme Court of Canada does not deal directly with all of the issues raised by Ms. Pratten, the issues will be more definitively argued and more readily resolved by the court.

[41] Ms. Pratten asserts that health is within provincial jurisdiction. Even if the Supreme Court of Canada upholds the federal legislation, including all of its sections, Ms. Pratten seeks relief that the legislation will not address. Furthermore,

such a result does not necessarily mean that the Province has addressed the matters in issue in this case. Ms. Pratten argues that if the Supreme Court of Canada strikes the federal legislation down, there is no need for the Province to take time to determine what action it should take. The court can still find a violation of Ms. Pratten's *Charter* rights. The trial judge will still have to reach a conclusion about whether the violation of s. 15 is justified under s. 1 of the *Charter* and whether the federal legislation is sufficient to meet s. 1. Finally, Ms. Pratten asserts that in this case the court can simply declare that the *Adoption Act* is a violation of s. 15 and suspend the declaration of invalidity for an amount of time which is as reasonably required for the Province to enact legislation that conforms to the *Constitution Act, 1982*.

### **Decision**

[42] I am not convinced that this matter ought to be adjourned awaiting the decision of the Supreme Court of Canada in the *Quebec* case. The effect of the judgment is unknown until it is rendered. There remain matters raised by Ms. Pratten that the court ought to address. The federal legislation, if held to be valid, is a known entity and it does not necessarily address the plaintiff's claims in this action. Furthermore, significant portions of the federal legislation, including the establishment of a registry, are not in force. Whether or when it will be remains a question even after the Supreme Court of Canada has rendered its decision. There is no basis for adjourning the hearing of this summary judgment application.

### **Conclusion**

[43] I refuse to dismiss the plaintiff's action on the basis that it is moot or that Ms. Pratten does not have the requisite interest. I refuse to grant an adjournment of the summary trial scheduled for October 25, 2010.

"Gropper J."