COURT FILE NO.: 05-FA-013357
DATE: 20060606

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
M.D.R. AND M.P.S. E.E.R.-P., MINOR AND A.D.R.-P., MINOR (BY THEIR LITIGATION GUARDIANS M.D.R. AND M.P.S.) L.F. AND R.E. S.R.E. ("E.-P."), MINOR (BY HER LITIGATION GUARDIAN L.F. AND R.E.) B.V. AND B.A. S.J.T.V.A., MINOR (BY HIS LITIGTION GUARDIANS B.V. AND B.A.) R.N.G. AND V.D. A.Z.C.D., MINOR (BY HER LITIGATION GUARDIAN R.N.G. AND V.D.) Applicants	Martha McCarthy and Joanna Radbord, for the Applicants
- and - DEPUTY REGISTRAR GENERAL FOR THE PROVINCE OF ONTARIO Respondent	Vanessa Yolles and Elaine Atkinson, for the Respondent
	HEARD: March 27, 28 and 29, 2006

RIVARD J.

[1] The Applicants are lesbian parents. Their children were conceived through anonymous donor insemination. They seek to include the particulars of both parents on each child's Statement of Live Birth.

[2] The Applicants state they are entitled to registration of accurate particulars of their families under the *Vital Statistics Act* ("VSA") and declaration of parentage pursuant to the *Children's Law Reform Act* ("CLRA"). They urge a modern approach to the interpretation of the VSA and CLRA to accomplish this.

[3] In the alternative, the Applicants ask this Court to exercise its *parens patriae* jurisdiction to protect the best interests of children born into lesbian families.

[4] In the further alternative, the Applicants submit that if the statutes do not allow the relief sought, the VSA is unconstitutional and the *Charter* compels the result they seek. The Applicants argue the legislation violates both sections 7 and 15 of the *Charter*.

[5] Pursuant to section 4 of the CLRA, the declarations of parentage sought by the Applicants were granted during the course of the hearing of this Application, with the consent of the Respondent. A declaration of parentage was not necessary in the case of the Applicants B.V. and B.A. who had received such a declaration from Justice Backhouse on September 14, 2005.

THE FACTS

[6] The Applicants B.V. and B.A. were married on March 17, 2004. They are the parents of S.J.T.V.A. born […], 2005. Ms. B.A. is S.J.T.V.A.'s birth mother. Ms. B.V. was in attendance at the child's conception and birth. Both Ms. B.V. and Ms. B.A. are parents to S.J.T.V.A.. They refused to proceed with an adoption stating it felt immoral and dishonest to them to do so.

[7] Ms. B.A. and Ms. B.V. see no difference between their situation and that of a heterosexual couple who have used donor sperm to conceive.

[8] After the commencement of these proceedings, Ms. B.A., the birth mother, was diagnosed with breast cancer. Ms. B.A. and Ms. B.V. worried that Ms. B.V. had no proof of her status as S.J.T.V.A.'s parent. They feared that if Ms. B.A. died without an adoption order or a declaration of parentage, Ms. B.V. and S.J.T.V.A. would be left without any certainty as to the parentage.

[9] The Deputy Registrar General had refused to immediately recognize both mothers as S.J.T.V.A.'s parents. At an emergency case conference, Justice Backhouse granted a declaration on consent that each is S.J.T.V.A.'s mother.

[10] The Applicants R.E. and L.F. are the parents of the child S.R.E. who is now thirteen years old. Both Ms. R.E. and Ms. L.F. have been committed to equal parenting for S.R.E. since the planning of the child's conception.

[11] The Deputy Registrar General rejected the Statement of Live Birth showing the particulars of Ms. L.F., the non-birth mother. She refused to register the child's surname as "E.-F.".

[12] The Deputy Registrar did subsequently offer to amend the child's surname to "E.-F." to reflect the surnames of both her mothers but continued to refuse to recognize Ms. L.F. as the child's parent on the birth registration document.

[13] Ms. R.E. and Ms. L.F. are now separated but they continue to jointly parent S.R.E.. They seek recognition of the particulars of both parents on the Statement of Live Birth to provide presumptive proof of parentage in addition to the declaration of parentage.

[14] The Applicants M.P.S. and M.D.R. are the parents of twin boys, E.E.R.-P. and A.D.R.-P., born on […], 2005. Ms. M.D.R. is the genetic mother of the twins, who were conceived from her fertilized ova and implanted in Ms. M.P.S. as embryos. Both Ms. M.D.R. and Ms. M.P.S. "refuse to lie" by excluding Ms. M.D.R. from the birth registration document and they are unwilling to adopt their own children. They say they feel marginalized, dehumanized and vulnerable because they were required to commence these proceedings to secure parental status recognizing them as the mothers of their children.

[15] Ms. M.D.R. and Ms. M.P.S. are American citizens who moved to Hamilton, Ontario. They point to the fact that adoption would not equally protect their family because many U.S. states do not recognize the validity of adoptions by same-sex couples.

[16] Subsequent to the issuance of this Application, the Deputy Registrar agreed that Ms. M.D.R. and Ms. M.P.S. could both be registered on the Statement of Live Birth as the parents of their children because there arose an urgent need for documentation to facilitate cross-border travel. Although they have obtained the personal relief they were seeking under the VSA, they are offended they were required to divulge their personal reproductive choices to have their parentage acknowledged.

[17] The Applicants R.N.G. and V.D. are the parents of A.Z.C.D., born […], 2002. Ms. R.N.G., the birth mother, and Ms. V.D., the co-mother, attempted to register their child's birth with both of their particulars as parents. Their application was rejected by letter to Ms. R.N.G. stating that the "partner's particulars" should be omitted and the other parent's side of the form should be left "completely blank".

[18] Ms. R.N.G. and Ms. V.D. feel the government shows a lack of respect for their parenting and their child in excluding one parent's particulars from the birth record. Ms. R.N.G. deposes, "this devaluing / non-recognition of the same-sex families creates a stigma that impacts our feelings of self worth, self respect and our children's self esteem."

[19] The only child old enough to give evidence in this case is S.R.E.. She deposes she fears that one of her mothers will not be recognized by medical staff. She describes the pain of misrepresenting her family in her passport signature, at the border and even listing her legal name on her affidavit in this proceeding. She wants both her mothers recognized as her mothers. She would like her family to be recognized the same way as any other family. She wants to sign her own signature "S.R.E.-F.".

[20] The Applicants seeks to protect their children in the event of death, incapacity or separation. They want presumptive proof of parentage, the benefit of appearing on the Statement of Live Birth.

[21] Throughout this judgment, I have adopted the term "co-mother" in reference to partners of lesbian birth mothers as used by the Applicants in this case to label themselves.

Statutory Interpretation

LAW

[22] Statutory interpretation requires a textual, contextual and purposive analysis:

> …the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Driedger's Construction of Statutes (2nd ed. 1983) at 87).

[23] Statutory interpretation involves a textual analysis. According to Professor Sullivan this involves looking at the words in their immediate context by focusing on the specific provision in which the words appear and attempting to understand the reasons why the legislature chose the combination of words, the structure, the punctuation and so on. (Ruth Sullivan, *Statutory Interpretation* (Concord: Irwin Law, 1997) at p.53. A contextual analysis, which involves looking at the words in their larger context may include the act as a whole, other legislation, the legal system as a whole, and the social conditions in which the legislation operates. (Ruth Sullivan at p.108). Finally in a purposive analysis, the purpose of the provision and larger units (parts, divisions, and the Act as a whole) are identified and relied on to help establish the meaning of the text. (*Statutory Interpretation* at 135).

[24] The parties disagree on whether or not to use the 1983 or 1994 statement of Driedger's principle of interpretation. The essence of the disagreement rides on whether or not *Charter* values can be considered in looking at the total context of a provision or whether they only come into play if there is ambiguity. The Supreme Court of Canada is clear that the text, context and

purpose of a provision must be considered before one can determine if a provision is reasonably capable of multiple interpretations (*Bell ExpressVu Limited Partnership v. R.*, [2002] 2 S.C.R. 559 at para. 29). The Supreme Court of Canada stressed that "*Charter* values" can only be used as an interpretive principle in circumstances of genuine ambiguity. (*Bell ExpressVu* at para. 69). In situations of genuine ambiguity:

> …the common law should develop in accordance with the values of the *Charter*…and that where a legislative provision, on a reasonable interpretation of its history and on the plain reading of its text, is subject to two equally persuasive interpretations, the Court should adopt the interpretation which accords with the *Charter* and the values to which it gives expression. *R. v. Zundel*, [1992] 2 S.C.R. 731 at para. 59.

[25] The first step, therefore, is analyzing the provision without regard to *Charter* values. If the provision remains subject to more than one meaning, then the interpretation that is consistent with *Charter* values takes priority over the interpretation that does not.

[26] The VSA and CLRA shall also be interpreted liberally in light of s.10 of the *Interpretation Act*, R.S.O. (1990) C.1.11 which states that:

> Every Act shall be deemed to be remedial whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of anything that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal a construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

[27] Finally, as stated by Ruth Sullivan (*Construction of Statutes* at p.3):

> At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just.

Vital Statistics Act

Short Summary of the Parties' Positions

[28] The Applicants argue that the term "father" in the VSA should be read as a plural and gender neutral term in order to include lesbian co-mothers. The interpretation of "father", they argue, is consistent with the purpose of the statute, which is recording social parentage. "Mother", "father" and "parent" are broad legal concepts that are not simply concerned with

biology. There are a number of other Ontario statutes, including the CLRA, that recognize social parentage [Applicants factum para.32]. They argue for consistency between statutes when dealing with the same subject manner. They request a declaration (previously a *mandamus* order) that same-sex parents may register under the VSA. The Respondent has undertaken to comply with a declaration.

[29] The Respondent, on the other hand, argues that the term "father" refers strictly to the biological father. The birth registry does not define social families rather, its purpose is to accurately register the biological parents at the moment of birth. They argue that a declaration under the CLRA or an adoption order is the proper forum for determining whether the relationship of social parent is established.

[30] The government also identifies secondary purposes that include: (i) the provision of birth certificates, which are primary identity documents for persons born in Ontario, and (ii) the collection of statistical information for medical, sociological and familial research and for public policy decision-making.

Conclusion

[31] Part of the difficulty with this analysis is that the legislation is clearly outdated. Due to the advent of reproductive technology, even the Ministry of the Attorney General interprets the VSA and CLRA in a liberal, flexible manner that seems to stretch the meaning of the text. For instance, genetic mothers (as compared to gestational mothers) have been registered on the Statement of Live Birth under the rubric of father. The Ministry also suggests that the proper approach to achieve legal parental status is via a declaration under the CLRA, however, this avenue is still fragile considering Aston J.'s rejection of a declaration of parentage for a lesbian co-mother. Aston J.'s decision was appealed, however, it still establishes an authority for rejecting such applications under the CLRA. (See *A.A. v. B.B.*, [2003] O.J. 1215 (S.C.J. Fam.Ct.)).

[32] The purpose of the VSA is to record the child's birth and to create a record of parentage. A record of parentage is important to affirm the parent-child relationship. Often the biological parents are the same as the social parents. However, there is nothing in the text or context of the VSA to suggest that parentage is restricted to biological/genetic parentage. The VSA should be interpreted in "such fair, large and liberal a construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." (s.10 *Interpretation Act).* The notion of parentage should be interpreted broadly, to include not only biological parents, but also social parents.

[33] Despite the broad purpose of the VSA, there can only be two parents according to the textual analysis: one mother and one father. This is because the terms mother and father are preceded throughout the VSA by "the", so that they read "the mother" and "the father". The interpretation that there can only be one parent of each sex on the Statement of Live Birth is consistent with Aston J.'s decision in *A.A. v. B.B.* Therefore, in a situation of anonymous donor

insemination, a father who is not the biological father, meaning one who has no genetic relationship to the child, can still register on the Statement of Live Birth. However, in a lesbian relationship, the co-mother cannot be included, because including her would mean that there would be two mothers on the Statement of Live Birth: the birth mother and the co-mother.

[34] Even if the article "the" were interpreted to mean a group of mothers or fathers, it is implausible to interpret "father" as including women. To alter the meaning of "father" to include non-biological lesbian co-mothers is stretching the plausible use of the expression. Although s.28(j) of the *Interpretation Act* says that a singular can be plural, and a male term can include females and vice versa, in this case it is a linguistic implausibility to interpret father as including mother. The Supreme Court has opined that "women can only be mothers and men fathers. (See *Trockiuk v. British Columbia (A.G.)*, [2003] 1 S.C.R. 835, para. 10*)*. It must be presumed that the legislature chose the use of gender specific terms specifically.

[35] Therefore, although the purpose of the VSA includes recording social parentage when it furthers important social values, a textual analysis reveals that parents are restricted to one mother and one father: a maximum of two parents per child. As a result, statutory interpretation is not the proper tool for granting the co-mother Applicants status as "mothers". An examination of *parens patriae* is therefore necessary.

Purposive Analysis

[36] The relevant statutory provisions are attached as schedule A.

[37] The VSA works as follows. According to s. 9(2) "within thirty days of a child's birth in Ontario, the mother and father shall make and certify a statement in the prescribed form respecting the child's birth" and mail it to the Deputy Registrar's Office. As stated in paras. 20 and 21 of the Respondent's factum:

> The Province of Ontario has kept records of vital events under statutory authority since 1869. The VSA governs the registration of vital life events in Ontario, including births, deaths, marriages, adoptions and changes of name. The Act requires the Registrar General (Minister of Government Services) to direct a uniform system of registration of these events, and provides that the Registrar General is charged with the enforcement of the provisions of the Act .
>
> The Registrar General appoints a Deputy Registrar, who has direct supervision of the Office of the Registrar General (the "ORG"). The Deputy Registrar is responsible for the conduct of the ORG and performs such other duties as may be prescribed in the regulations or delegated to her by the Registrar General (s.6 (1) VSA).

[38] The Statement of Live Birth, the form in which the particulars of the parents are recorded, is the foundational document of the Birth Certificate. Once the birth has been registered, persons named as parents on the Statement of Live Birth (or persons with legal custody of the child) can apply for a birth certificate. A birth certificate, according to s. 46 of the VSA, is proof of parentage in the absence of evidence to the contrary. As put by the Applicants:

> Birth registration provides an important means for parents to participate in their child's life. The inclusion of a parent's particulars on a child's birth registration document ensures that consent is required for an application for the child's adoption and that the parent is entitled to participate in determining the child's surname. It allows the named parent(s) to obtain a birth certificate, an OHIP card, a social insurance number, register the child in school, obtain airline tickets and passports for the child, and to assert his or her rights under various laws. It facilitates cross-border travel by the named parent(s) with the child. It is a marker of the parent-child relationship and the composition of the child's family. (Applicants factum at Para. 102).

[39] In examining the registration and naming provisions under (ss.9 and 10 of the VSA), the Ontario Court of Appeal outlined the legislative purpose as providing: "a system which ensures that children born in Ontario will have their births registered with a central registry, in a timely manner, and with the accurate particulars the legislature has determined are needed…". *Kreklewetz v. Scopel* (2002), 60 O.R. (3d) 187 at paras. 29 and 30. This primary purpose is consistent with s.2 of the VSA which states that: "the Registrar General shall direct a uniform system of registration of births, marriages, deaths, still-births, adoptions and changes of name in Ontario, and is charged with the enforcement of the provisions of this Act."

[40] The language of *Kreklewetz* articulates a broad purpose to the VSA, which does not specifically state that social parentage is registered, but also does not speak to the issue of biology, suggesting that it is not relevant, or has little import in understanding the purpose. That said, this case was primarily focused on the naming provisions of the VSA and appears to have focused on those provisions, and birth registration as it relates to naming, rather than on the system of birth registration overall. Naming is only one aspect of VSA, and not necessarily linked to registration of parents, given the possibility under the current scheme to use the surname of a lesbian co-parent under the cultural reasons exception.

[41] The VSA, however, does more than simply record, it also creates a presumption of parentage based on the particulars in the Statement of Live Birth. This secondary purpose of the VSA was highlighted by the Ontario Law Reform Commission in their Report on Human Artificial Reproduction and Related Matters (Ministry of the Attorney General, Volume 1, 1985) at 65 [OLRC Report]:

> In addition to functioning as a record of the circumstances of birth, the system of birth registration has a second purpose; along with the CLRA, it is a means by which

> the parentage of children is established…the relationship of a parent and child is presumptively established by the administrative act of registering the birth.

[42] If the VSA creates a presumption of parentage, then what kinds of parentage is it recognizing? Is the purpose of the VSA to record social or simply biological parentage?

[43] The ambiguity in the concept of parentage was referred to in the OLRC Report back in 1985: "various reproductive technologies in current and foreseeable use may allow children to be produced by numerous combinations of participants. Depending on how the term "parent" is to be defined, several individuals involved in the creation of a single infant may justifiably claim that status by reason of some form of connection to the child." (OLR Report at 70)

[44] In *Trociuk*, the Supreme Court of Canada asserted as a secondary purpose of the British Columbia VSA the establishment of biological ties between parent and child. Deschamps J. for the court said:

> A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. *Such ties do not exhaustively define the parent-child relationship.* (emphasis added) (*Trociuk* para. 16).

It is clear that the Supreme Court thought that included in purpose of the VSA was recording biological ties.

[45] The Applicants argue that these comments have little relevance given that they are speaking about the British Columbia Act. However, the language of the Act is similar in relevant respects, despite differences overall in the scheme in British Columbia, I do not see a principled reason to distinguish it on this basis. Notably, neither act explicitly mentions biology or provides definitions for mother or father. In fact, the Ontario Court of Appeal in *Kreklewetz* relied upon the British Columbia Court of Appeal's analysis in this same case, suggesting that the court recognized that analysis of the British Columbia Act has relevance to analysis of Ontario's act. These statements appear to be the only statements of the Supreme Court of Canada in interpreting any scheme of birth registry, and therefore must be taken into account.

[46] Deschamps J.'s comments do not follow a detailed explanation. *Trociuk* appears to modify the purpose of the VSA as identified in *Kreklewetz*, adding the element of biology. However, in essence it is consistent with *Kreklewetz.* *Trociuk* is a case that looks at the rights of biological fathers to be included on the birth registration in circumstances where the biological mother opposes it. It interprets the phrase "unacknowledged by the mother" and the section of the VSA prohibiting the father from challenging the exclusion by the mother. Hence, although recording biological information is one intent of the VSA when dealing with a biological father, it does not necessarily preclude the registration of non-biological fathers. Put otherwise, such ties *do not exhaustively define the parent-child relationship.* Furthermore as emphasized in the cite above, Deschamps J. qualifies the preposition in stating that biological ties do not

exhaustively define the parent-child relationship, thus leaving open parent-child relationships in situations without biological ties. Perhaps the analysis would have been different had the court faced the question of the rights of non-biological lesbian co-mothers.

[47] The significance of *Trociuk* and *Kreklewetz* when read in conjunction is that the purpose of birth registration is accurate and prompt recording of births, as I believe all parties would agree. However, one aspect of this purpose is to "evidence biological ties between parent and child". That does not, however, mean that this is the only purpose of the VSA. The VSA has always balanced the registration of biological parentage with social parentage due to the need to promote other important purposes, the most clear purpose in the past being to ensure the legitimacy of children.

[48] The government recognized that the importance of identifying biological parentage was tempered by the need historically to promote legitimacy. Part of that social goal was to protect children in a society that differentiated between legitimate and illegitimate children. In the pre-1986 legislation, social parentage trumped registration of biological parentage where a child was born to married parents. At the time, a married woman was required to register her husband's information on the Statement of Live Birth regardless of whether he was the actual father of the child. The only exception was if the mother filed a statutory declaration asserting that at the time of conception she was living apart from her husband.

[49] The irony is that under the pre-1986 version of the VSA where wedlock determined parental status, married couples who used assisted reproductive technology were registered on the Statement of Live Birth regardless of biological connection. Presumably, lesbian co-mothers married to birth mothers could have availed themselves of a similar provision (minus the requirement that they be a father).

[50] The current VSA, introduced in 1986, abandons the focus on legitimacy. Marital status is no longer determinative of the particulars to be entered on the Statement of Live Birth. The Court of Appeal in looking at ss.9 and 10 of the current VSA said.

> In the context of the legislative purpose of the provisions, it is important to note that, unlike the former Acts, the scheme no longer turns on marital status of the parents of the child. The scheme is the same whether the parents are married, in an ongoing relationship, or not in a relationship at all. It turns on the wishes of both parents if they are capable, or the wishes of only the mother if the father is unknown to or unacknowledged by her. *Kreklewetz v. Scopel* (2002), 60 O.R. (3d) 187 at paras. 29 and 30.

[51] Since the 1986 amendment where the mother's husband was no longer required to be registered, there were no amendments to either the forms or the instructions to signal any change in approach [para.35 Applicants Reply factum]. The legislative history of this provision reveals that the birth registration scheme has tracked the particulars of parentage differently depending

on the government's and society's views in any given historical period [See para. 161 Applicants factum].

[52] The Applicants raised an important interpretive point that the amendments made to the VSA in 1986 were concerned with ensuring the equality between all children and abolishing the distinction between legitimate and illegitimate children. As such, the amended provisions are ameliorative, and should be interpreted in light of the intent to create equality between all children. The point was not to get rid of one set of social conventions only to replace them with another.

[53] Today, important social purposes include privacy interests. The government has recognized in argument that enabling parents to maintain a sphere of privacy justifies not using DNA testing, even if the collection of biological information is one of the purposes of the VSA.

[54] Another competing social purpose is protecting women who become pregnant through rape or incest from their assailants *(See Trockiuk)*. The legislation permits a mother to "unacknowledge" a father and thereby intentionally exclude a known genetic parent from the birth registration document. In these circumstances, the purpose of the statute is not to record genetic or biological parentage.

[55] Some social purposes are important enough to justify a departure from the collection of purely genetic material. Identifying biological parentage remains a key purpose of the act, but that the VSA reflects other overarching concerns of the day including the inclusion of marginalized groups within Canadian institutions.

[56] Including non-biological parents in situations where they clearly intend to parent the child would fall under a purpose of the VSA. Where the genetic father is unknown, for example an unknown sperm donor, there is no reason for him to think that he is doing anything wrong; it is common sense to view the non-biological father in such a situation as "the father" of the child. Being a parent is not only about being genetically related to the child, as other family acts illustrate. Moreover, there are no procedures or mechanisms in place to indicate to a social father that he should not be listed on the Statement of Live Birth. As stated in the Applicants factum: "R.E. and L.F. together dreamed of having S.R.E., were there when she was conceived, held her after she was born, woke to care for her in the night, and love her so much they feel their hearts will break. She is their child, together…" (para. 100 Applicants factum).

[57] Defining the purpose of the provision and of the VSA is important in understanding the ordinary meaning of the provisions and to clarify doubts about the scope of generally worded provisions: "where the ordinary meaning of a provision appears to be clear but conflicts with the legislatures apparent purpose, there is work to be done. An interpretation must be sought that accords with purpose without imposing too great a strain on the text". (*Construction of Statutes* pp.144-145).

Textual and Contextual Analysis

[58] The terms “mother”, “father”, and “parent” are not defined in the VSA. These are broad terms that at first blush can refer to either biological parents or social parents. In our cultural lexicon both understandings of the term are common. Furthermore the *Divorce Act*, the *Family Law Act*, and the *Children’s Law Reform Act* recognize social parentage (s.1(1) FLA “Parent: includes a person who has demonstrated a settled intention to treat a child as a child of his or her family…”, *Divorce Act* s.2(2), CLFA *Low v. Low).*

[59] In the VSA there are no adjectives to elucidate the meaning of terms such as the "relationship of mother" or "natural father". The only textual aid in breaking down the meaning of the terms is the inclusion of the term mother in the definition of birth in s.1 of the VSA: "the complete expulsion or extraction from its *mother* of a fetus…" [emphasis added]. This reference to "mother" does not actually define what is meant by mother. The definition provides an exhaustive definition of birth. Clearly, the person giving birth is a mother, but it is an error of logic to thereby conclude that all mothers must give birth. In fact, the Respondent has conceded that biologically speaking there can be more than one mother: gestational and genetic. A genetic mother who uses a surrogate is not involved in the birthing process. However, given that the term mother is included in the definition of birth, it is clear that at least one meaning of mother is birth mother. This point is neutral, neither supporting the idea that a mother is a biological mother, nor supporting an argument that it is a social concept.

[60] The Applicants argue that the terms “mother” and “father” should be interpreted in light of s. 28(j) of the *Interpretation Act*. This section provides that “Unless the contrary intention appears … the words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one...” However, in the context of s.9(2) of the VSA, a plural interpretation does not make sense. Section 9(2) refers to “the mother and father” in contrast to “mothers”, “a mother” or “parents”.

[61] Aston J. faced a comparable interpretative hurdle in examining the CLRA when he refused to grant a lesbian co-mother parental status under s.4 because he interpreted "the mother" as standing for the proposition that "mother" was a singular concept in the CLRA. As stated at para.14 of *A.A. v. B.B.:* “where the legislation uses a word such as “the”, it is presumed to do so precisely and for a purpose. It represents a choice of the definite article over the indefinite article. Considerable weight must be given in its clear and ordinary meaning.”

[62] The government sought to distinguish this case on the basis that Aston J. was concerned that a parent could not have three legal parents. In that case, not only were there two mothers involved with the child, but also a male friend who was the sperm donor. In this application, the families all used anonymous sperm donors therefore, they are not asking for a declaration of more than two parents. Justice Aston states at para. 23 that the issue comes down to whether or not s.4 allows him to declare more than two persons to be parents of a child. He also raised concerns about the practical repercussions of recognizing more than two parents.

[63] I agree with the Applicants' argument in reply that the ratio of this case is not restricted to situations in which there are more than two potential parents seeking parentage. Aston J.'s analysis ultimately turns on the interpretation of "the", which led him to conclude that there could not be two parents of the same gender.

[64] In his analysis, Aston J. placed a lot of emphasis on the definite article. If a grammatical feature of a provision is to be given such great weight, it is important that it is understood in the context of the provision. I would agree with Aston J. that nothing in the context of the provision suggests an absurd result in interpreting "the" mother to mean one mother. And suggesting that "the" mother is the same as "a" mother fails to account for the legislature's deliberate word choice. I do not agree with the Applicants that this language merely means that if there are two mothers, both would say I am "the mother", and each would complete a separate declaration. Rather, both mothers would say I am "a mother", or I am "the mother" and then provide a descriptor such as the birth-mother or the co-mother. While the *Interpretation Act* does allow for pluralization, that does not mean it can serve to render a definite article indefinite. Again, as Aston J. points out, this choice of language appears to be deliberate. If an individual can only have one father, it follows that there is symmetry to the legislation and that an individual be limited to having one mother. Furthermore, Justice Aston's interpretation conforms with common sense.

[65] In this case, Justice Backhouse has already made an order on consent declaring the Applicant, B.V., a mother and ordered the Registrar General to register her on the Statement of Live Birth. I also made an order on consent granting declarations of parentage to the Applicant co-mothers. According to this interpretation of the CLRA, it was not possible to grant these declarations under the CLRA. While the parties, including the Respondent consented to the granting of the declarations, there is concern that consent alone cannot give a court jurisdiction when it otherwise has none. However, as discussed later, these declarations could have either been granted under the *parens patriae* jurisdiction, or s.52 of the *Constitution* and were therefore granted pursuant to a valid exercise of the court's authority.

[66] In the alternative, even if more than one father or mother was read into the VSA, a s.28(j) analysis would still involve including the female gender in the term "father" so as to include the particulars of two mothers on the Statement of Live Birth [Applicants factum at para 137]. The actual Statement of Live Birth form only has space for two parents: a mother and a father.

[67] The Applicants rely on *R. v. Goulet* (1998), 1989 CarswellOnt 2454 where the Provincial Court applied the equivalent Federal rule to the pronoun "he" in the Criminal Code when referring to a prostitution related offence. However, it was clear from recent amendments that this was a legislative oversight; the description of the prostitute as a "female person" was replaced by the gender neutral term "person" and yet the offender remained "he". *R. v. Goulet* is of limited use in the present context.

[68] To include a woman under the term "father" is stretching the language of the VSA. Although s.28(j) of the *Interpretation Act* says females include males and the converse, it is difficult to see the logic behind the legislature intending "father" to be read as gender neutral as it would when a term like "man" is used in a Criminal Code provision. Rather, the legislature assumed this provision would be read in light of common understandings of the family. In these understandings, a father is a man. As recognized by the Supreme Court, "women can only be mothers and men fathers (*Trociuk* at para. 10).

[69] There was no evidence in this case, of a lesbian co-mother calling herself father- rather, it indicated that she sought to change the term father to co-parent etc, and only used the term father when seeking to pass under the radar.

[70] Furthermore, underlying s.28(j) is that women were historically included in the term man. As put by William Blackstone in *Commentaries on the Laws of England*. Vol, 1 (1765), at 442: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs every thing". Therefore, in Canada's patriarchal past reference to a man included his wife. Also, the English language does not have a singular gender neutral term when referring to a person; "she" and "he" are often used interchangeably when not wanting to specify the gender.

[71] To extend the term father to women imposes too great a strain on the words of the text. It must be presumed that the legislature chose the use of terms specifically. "…the legislature is a competent language user it would not have chosen *these* words to express *that* meaning" (p.157 Ruth Sullivan) Finally, in fairness to co-mothers, they should have their own title that works for them, not a derivative title.

Conclusion

[72] Although a purpose of the VSA includes social parentage, only one woman and one man shall be listed. Biological particulars are one piece of information that are gathered, although not exclusively. This purpose is balanced with the need to promote other important social values, including the equality of all children in Ontario and privacy of families.

Children's Law Reform Act

[73] The CLRA is clearly not restricted to granting declarations of parentage to only biological parents. As was stated by Aston J. in *A.A. v. B.B.* where he cites Ferrier J. in *Low v. Low* (1994), 4 R.F.L. (4th) 103 (Ont. Gen. Div.):

> "Nowhere in s.5 is there any suggestion that the 'relationship of father and child' must have a biological or genetic character." Adapted to the facts of this case, subsection 4(3) of the Children's Law Reform Act does not require that "the relationship of mother and child" must have biological or genetic character.

[74] Similarly, the Respondent concedes that the purpose of the CLRA is to grant legal status of parentage to social parents. They argue that the CLRA is the proper forum for such applications. In *Low v. Low*, Ferrier J. granted a father who was not biologically related to a child's status largely based on the expression in s.5(3) "relationship of father and child". Similarly, in *Zegota* the non-biological father was granted legal parentage. (*Z (N.J.) v. Z (A.N.)* (1995), 10 R.F.L. (4th) 384 (Ont. Gen. Div.)).

[75] Overall, I agree with the statutory interpretation in *A.A. v. B.B.* Despite the social parentage purpose of the CLRA, Aston J. interpreted the CLRA as restricting the number of parents to two: one father and one mother. The textual analysis restricts not only the total number of parents, but limits the parents of each sex to one (see the analysis under the VSA).

[76] Ironically in this case, the Attorney General's reading of this act is broader and more remedial than the case law up to this point.

[77] *A.A. v. B.B.* can be distinguished from the case at bar. As discussed earlier, Aston J.'s primary consideration is that the number of parents be limited to two. Aston J's decision involved a lesbian couple where the biological father was actively involved in the raising of the child. Therefore, granting parental status to the co-mother meant there would have been a third parent. In our case, we are dealing with situations where there are anonymous sperm donors, therefore at most there will only be two parents, and the policy concerns raised by Aston J. do not apply:

> …the court also must be concerned about the best interests of other children not before the court. For example, if this application is granted, it seems to me the door is wide open to stepparents, extended family and others to claim parental status in less harmonious circumstances. If a child can have three parents, why not four or six or a dozen? What about all the adults in a commune or a religious organization or sect? Quite apart from social policy implications, the potential to create or exacerbate custody and access litigation should not be ignored. (*A.A. v. B. B. at para. 41).*

[78] Furthermore, in light of the clearer purpose of the CLRA, it is easier to justify two mothers, or two fathers than in the VSA. However, the crux of *A.A. v. B.B.* comes down to the use of the definite article "the" before both mother and father.

Parens Patriae

Nature of the Jurisdiction

[79] Justice La Forest, speaking for a unanimous court, articulated the nature of the *parens patriae* jurisdiction in *E.(Mrs.) v. Eve*, [1986] 2 S.C.R. 388 at paras. 72 and 73:

> Before going on, it may be useful to summarize my views on the *parens patriae* jurisdiction. From the earliest time, the sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in *Wellesley v. Duke of Beaufort*, *supra* at 2 Russ., at p. 20, 38 E.R., at p. 243 is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early [page426] England, the *parens patriae* jurisdiction was confined to mental incompetents, but its rationale is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior courts of this country, and in particular, those of Prince Edward Island.

[80] The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

[81] While the Superior Court retains a residual jurisdiction to use the *parens patriae* power, it will not do so lightly. This jurisdiction is to be exercised to protect children and other vulnerable individuals, not their parents: *Eve*, at paras. 77 and 82. The courts have determined that *parens patriae* is available in two situations: to fill a legislative gap or on judicial review: *B. (D.) v. Newfoundland (Director of Child Welfare)*, [1982] 2 S.C.R. 716 at 724.

[82] As I have rejected the application for judicial review in this case, *parens patriae* is only available in this case if there is a gap in the legislation.

[83] The Applicants also argue that *parens patriae* may be available more broadly whenever it is necessary to protect children's best interests. In support of this proposition, the Applicants quote the cases of *K.(K.) v. L.(G.)*, [1985] 1 S.C.R. 87 and *R.(C.) v. Children's Aid Society of Hamilton* (2004), 8 R.F. L. (6th) 285 (Sup.Ct.). In *K.(K.)*, the Supreme Court considered the *Beson* case, and concluded that it is an application by that court of the *parens patriae* jurisdiction "to override all other considerations in dealing with custody matters".: para. 22. In fact, in *Beson*, the Supreme Court reviewed British jurisprudence regarding child wardship and, although the appellants in that case argued that it was a complete jurisdiction not limited to gaps in the legislation, concluded that *parens patriae* was only available when there was a gap in legislation or on a judicial review. The comments in *R.(C.) v. Children's Aid Society of Hamilton*, which is a recent Superior Court decision, speak to the ability of a court to use *parens patriae* to review a decision when the society has not acted fairly or met the needs of children. To the extent that these comments are not consistent with *Beson*, they are not good law.

[84] Clearly, the protection of children's best interests is an important, if not the most important, consideration in matters pertaining to children, as is reflected in Ontario's comprehensive legislative scheme dealing with issues of child welfare and custody. However, given that the best interests' standard is already built into this legislation, it is unclear what is to be provided by enabling the courts to circumvent this legislative scheme and to make all decisions regarding children on a purely discretionary basis. In doing so, they may fail to consider other important legislative objectives or legislated articulations of the factors that inform the best interests test. Notably, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the court noted that in immigration cases involving children, while the best interests of the children are an important factor, they are not the primary consideration. I would therefore suggest that while in some contexts such as child custody the best interests of the child is the only consideration, that will not always be the case in situations involving children, and that exercise of the *parens patriae* jurisdiction should be avoided unless there is either a legislative gap or a judicial review.

Is there a Gap?

[85] The Applicants request that the court exercise its *parens patriae* jurisdiction to enable them to immediately register the births of their children. They submit that the gap in the VSA is the failure to appropriately address children born from assisted reproductive technologies contrary to the need to protect the best interests of children.

[86] According to the government, there is a legislative gap when a situation is not contemplated by legislation, not when a deliberate policy choice is made in drafting legislation. The government argues that the legislature did contemplate the circumstances of non-biological parents in drafting the VSA and excluded them nonetheless.

[87] Assuming that a declaration of parentage is available to a lesbian co-mother, there are two ways to look at the legislation. The first is to read the VSA in conjunction with the CLRA to conclude that while the scheme does not provide for registration of a lesbian co-mother as of right, it may provide for a declaration of parentage or adoption and the subsequent registration of that individual. There is therefore no legislative gap. Rather, the legislature has made an intentional choice to provide a different mechanism for a non-biological parent to gain parental status. The second way of looking at the legislation is that the lesbian co-parent has no means of registering as of right under the VSA, which is the particular benefit she is seeking, and that therefore there is a gap in the legislation. On this reading of the legislation, even though the government has provided for other means through which recognition of parentage is possible, there is a gap regarding the benefit of registration as of right. If a CLRA declaration is not available, and a lesbian co-mother only has a limited right to adoption, there may be a further argument that there is a legislative gap in the overall scheme. While the CLRA recognizes social parentage, it does not allow for registration of a lesbian co-mother.

[88] In *Lennox and Addington Family and Children's Services v. T.S.*, [2000] O.J. No. 1420 (Sup. Ct.) the Family and Children's Services sought to transfer a child protection matter to the jurisdiction of Iceland's child protection agency. Robertson J. concluded that Ontario law does not provide for such a transfer, and that *parens patriae* was not available to effect the transfer. He stated at para. 20:

> The court is unable to repair any legislative shortcoming through parens patriae. As a court of superior jurisdiction, *parens patriae* authorizes the court through its inherent jurisdiction to intervene and rescue a child in danger. It can sometimes be used to bridge a legislative gap. *It does not confer supplemental jurisdiction so as to rewrite legislation and procedure* [emphasis added].

[89] It is therefore necessary that a court not over-reach in order to find that there is a gap in legislation. However, courts that have examined this jurisdiction in the child welfare context have differed in when they find that a legislative gap is present, as they must determine if a gap is intentional or part of a comprehensive scheme of legislating in a given area.

[90] In *C.G. v. Catholic Children's Aid Society of Hamilton-Wentworth* (1998), 40 O.R. (3d) 334, the Court of Appeal rejected an application to permit foster parents to bring an application for custody under the *Children's Law Reform Act* or under the *parens patriae* jurisdiction. It concluded that the legislature had carefully circumscribed the rights of foster parents under the *Child and Family Services Act* to prevent them acquiring an advantageous position to that of the natural parents. The legislature did not include them in the definition of parent for the purposes of applying for a status review in order to terminate a crown wardship. The court concluded that given that there was an avenue of review available to foster parents, being a review of a decision to remove the children from the care of their foster parents under s.68, that even though they had no avenue leading to custodial rights because as foster parents they did not have such rights, there was no gap in the legislation. Therefore, the Court of Appeal was content that the legislature had turned its mind to the scheme for child welfare, and therefore it was not appropriate to fill a "gap" that was intentionally present in the legislation, in the presence of some means of review of their rights.

[91] Conversely, a legislative gap was found to exist in *Children's Aid Society of Metropolitan Toronto v. Dizio* (1990), 75 O.R. (2d) 92 (Div. Ct.), because the *Child and Family Services Act* was replete with time limits, but there was none for a director's review, and no limit on the number of reviews to be had. The court stated that this was an obvious inconsistency and contrary to the Act's declared objective of serving the best interests of children.

[92] A gap was also found to exist in *B. (D.) v. Newfoundland (Director of Child Welfare*), [1982] 2 S.C.R. 716. In this case, the Director of Child Welfare for Newfoundland removed a child from an adoptive home seven days before the expiration of the probationary residence period of six months required for an adoption. The Supreme Court concluded that it was appropriate to exercise *parens patriae* jurisdiction in this case as the adoptive parents had no

right of appeal under the statute during the probationary period, and concluded that it was in the best interests of the child to not only grant custody to the adoptive parents, but to grant an adoption order. The court concluded that intervention was justified in this case due to the legislative gap, and would also have been justified if judicial review had been sought.

[93] Upon reviewing these cases, it appears that the challenge is to consider whether or not there is a gap in light of the purpose of the act, and the overall scheme of the act, as understood in part by whether or not the statute already provides for the best interests of the child. How are these principles applied in case law examining the VSA and CLRA?

[94] In *Kreklewetz v. Scopel* (2002), 60 O.R. (3d) 197, the Court of Appeal refused to use its *parens patriae* jurisdiction to find a gap in the VSA so that a child would bear the hyphenated name of his mother and father when the mother had unacknowledged the father. It found that the legislative structure on naming represented the view of the legislature that the best interests of affected children are met by compliance with that legislation. Even if it could exercise its jurisdiction in an unusual case, this was not be an appropriate case given the mother's intent to raise the child alone.

[95] The VSA was found to have a legislative gap in the case of *K.G.D. v. C.A.P.*, [2004] O.J. No. 3508 (Sup. Ct.). In that case, the applicant was a gay male who had a biological child with an anonymous ova donor and implanted into a surrogate mother. The applicant did not want the surrogate to be registered on the Statement of Live Birth. All parties consented to the application except for the Deputy Registrar General for the Province of Ontario. However, both the applicant and the Deputy Registrar General agreed that there was a legislative gap in that the VSA does not contemplate the registration of a child without a mother and that the court had *parens patriae* jurisdiction to fill this gap if it found it to be in the best interests of the child to do so. Therefore, this case is distinguishable from the one at bar because there exists alternate means of registration via adoption or CLRA declaration. However, I would not characterize this situation as one in which there was a complete inability to register: the birth mother could have registered and then later removed. However, the father wanted to register without the inclusion of the surrogate mother, and presumably the court was in part swayed by the fact that it was in the child's best interests to allow this.

[96] In *K.G.D.*, given the agreement that there was a gap in the legislation, there was no need to explore the purpose of the VSA in order to determine if the gap was intentional. In this case, I have concluded that the purpose of the VSA is in part to maintain a record of biological parentage but also to maintain other important social values. However, it is also necessary to consider that the VSA clearly contemplates that only one mother can be registered, given the use of the definite article. The legislature has therefore signalled an intent that only one female parent can be registered and, if only one female parent is registered, she must be the biological/gestational mother. Nowhere in the VSA is mention made of the possibility of more than two parents or one mother.

[97] In light of this purpose, it is my view that the fact that lesbian co-mothers are not able to register under the VSA does not appear to be a mere gap, but part of a comprehensive scheme for birth registration and recognition of parentage. It was the legislature's intent that their primary source of recognition would be through a CLRA declaration or adoption. Like in *C.G.,* the legislature has set out alternate routes through which an individual can be found to be a parent. While the alternative option is not as favourable to the Applicants, again like in *C.G.,* this does not mean that the legislature has not turned its mind to the issue. It has determined that it is in the best interests of children to have more difficult issues of non-biological parentage considered by the courts. In part, this assumption rests on the legislative understanding/intent that there can only be two parents. Whether or not this distinction is discriminatory is another issue. This case is therefore unlike the cases in which a gap was found to exist as there was no recourse available to adoptive parents, when it was in the best interests of children that they have a means of recourse. In this case, the legislature has turned its mind to meeting the best interests of the children and attempted to draft legislation that contemplates those interests by providing a mechanism for adjudicating parentage.

[98] In summary, the fact that the VSA is in part about biological parentage, that it indicates that there can only be one mother, and that there is an alternative means of obtaining parentage for a lesbian-co mother suggest that there is no "gap" in the legislation. If there is a gap in the VSA, it would be in situations in which a child has two biological mothers (gestational and genetic), as the purpose of the VSA is in part to recognize biological parentage. It may be possible to find such a gap despite the use of the definite article because clearly it is in the contemplation of the VSA to register biological parents. That does not mean, however, that there is a gap for non-biological lesbian co-mothers, who fall under the rubric of social parentage.

[99] I note that this argument rests in part on the assumption that only biological parents can properly register under the VSA (or that they are the preferred first parents under the VSA). It also rests on an assumption that the CLRA declaration is available, which is yet to be determined by the Court of Appeal. If it is not available, then the argument becomes weaker as the only option available to co-mothers is adoption. However, I would suggest that it is more appropriate to find the legislative gap in the CLRA as it expressly considers social parentage and provides for an individualized mechanism for recognizing parentage that is in keeping with the best interests analysis under the *parens patriae* jurisdiction.

[100] Aston J. opined on whether or not there is a gap in the CLRA in *A.A. v. B.B.*, [2003] O.J. No. 1215. He concluded at para. 38 that "Courts are generally reluctant to fill gaps in legislation. One reason is that a "gap" may be deliberate. Perceived gaps from provisions that seem under-inclusive effectively require the court to legislate. In my view that is the case here. There is no legislative gap."

[101] According to Aston J., there is no gap in the CLRA scheme, and notwithstanding that the application could be perceived to be in the best interests of the particular child before him, that is not reason enough to use the *parens patriae* jurisdiction. Justice Aston's reasoning

on the exercise of parens patriae included concerns that if he made such a declaration it would open to multiple parents seeking parentage of a child in acrimonious situations.

[102] I agree with Aston J. that there is no reason to think that there is a legislative gap in the CLRA when it comes to recognizing three parents, as there is no place in the CLRA that contemplates more than two parents. Rather, the CLRA expressly recognizes that there will be "the" mother and "the" father, or no more than two parents. However, while I found that his reasoning on the interpretation of the CLRA was not limited to the facts of the case before him, I find that his analysis of the *parens patriae* jurisdiction was. P*arens patriae* cases ultimately turn on facts, and the concerns identified by Aston J are not present when there are only two potential parents involved with a child. The CLRA currently provides that two parents, who can be social parents, can be registered. These parents can be spouses. However, one parent must be male and one female. Conversely, through a family adoption under the CFSA a child can have two parents of the same gender, and there is no reason that a parent who can adopt should not be able to get a declaration of parentage. Therefore, unlike in the VSA, I do not think that the use of the definite article is as significant in signifying the intent of the legislature. The reason I do not think it is as important in the CLRA is because, unlike the VSA which is meant to be a simple system of registration that is not set up to cope with controversies over registration, the CLRA is meant to provide a mechanism for the judiciary to make determinations about parentage. A CLRA declaration is the final stop for parents seeking registration as parents, and therefore must be interpreted more broadly than the VSA. I conclude that the potential "gap" in the CLRA is that it does not provide for a declaration of parentage of two parents of the same sex. I note that even the Respondent recognizes that there can be two biological mothers, while admitting they had not previously contemplated this possibility. I would suggest that the only reason they have not consented that there is a gap in the CLRA is due to their consent that CLRA declarations be issued in this case and their position that the CLRA can be interpreted to include two mothers. It is open to debate whether or not there is a gap in the CLRA.

[103] If I am wrong and the government intended to exclude lesbian co-mothers from declarations of parentage, which are about social rather than biological parentage, then the government had a discriminatory intent.

[104] Aston J. noted in *A.A. v. B.B.* that the parties did not raise a constitutional argument in that case, and that he did not think that it was proper to amend the CLRA through the indirect route of inherent jurisdiction. The comments signals that the courts will be more favourable towards a constitutional argument than to using a broad, remedial jurisdictional power to re-write a planned legislative scheme. I would agree with this statement. As a *Charter* argument was raised in this case, the CLRA can be considered on this basis. Therefore, I note briefly that if the language of the CLRA does not support the use of *parens patriae* jurisdiction, then it supports a s. 15 *Charte*r challenge. If there was not a legislative gap because the government intentionally excluded lesbian co-mothers from a social parentage scheme, this is clearly a discriminatory intent that is discriminatory in effect to lesbians and such a purpose cannot be upheld under s.1.

Remedy

[105] The Applicants seek not only declarations of parentage for themselves, but also to protect the best interests of all children of lesbian parents by interpreting the VSA to permit registration of both mothers. If the declaration is granted due to a gap in the CLRA, then only an individual remedy should be made available. The CLRA provides a mechanism for the adjudication of individual cases of parentage. While this judgment may pave the way for the courts to issue CLRA declarations in other situations in which a co-mother applies, it cannot pre-emptively conclude that those individuals will always be mothers. Rather, it is necessary for the courts to consider the same factors they do when any individual applies for a declaration, most particularly the presumptions of parentage for a male person as found under s.8, including a person married to the mother of the child at the time of the birth of the child.

[106] If the Applicants are successful in establishing that there is a legislative gap in the VSA, and it is appropriate to enable them to register as of right on the basis of *parens patriae* jurisdiction, then it is arguable that this remedy could be extended to others in their situation. In fact, if it is not, then the remedy granted will be no more in effect than a CLRA declaration. Only through enabling other parents to register under the VSA without having to go to court will the Applicants be successful in establishing that lesbian co-mothers are parents as of right. Therefore, I will consider if such a remedy is properly available under the *parens patriae* jurisdiction.

[107] The case law, canvassed by the parties, deal exclusively with individuals, seeking individual remedies. Furthermore, some of the statements made in the cases suggest that remedies are to be individual. For example, *E.(Mrs.) v. Eve* quotes at para. 45 *Re X (a minor)*, [1975] 1 All E.R. 697, in which Roskill L.J., said the following about the scope of the jurisdiction. He said, at p. 705:

> I would agree with counsel for the plaintiff that no limits to that jurisdiction have yet been drawn and it is not necessary to consider here what (if any) limits there are to that jurisdiction. The sole question is whether it should be exercised in this case. *I would also agree with him that the mere fact that the courts have never stretched out their arms so far as is proposed in this case is in itself no reason for not stretching out those arms further than before when necessary in a suitable case. [emphasis added]*

[108] While the Applicants argue that the *parens patriae* jurisdiction is unbounded, these cases also point out that this jurisdiction is unbounded for the very reason that it depends upon the case before it, “the suitable case”, in which to stretch its arms or the circumstances of the case. While arguably the case in this instance is the case of all children in the same situation as the Applicants, given the highly discretionary nature of *parens patriae* and the delicate balance of a child’s best interest that it requires, it is difficult to argue that this balance can be done for once and for all, completely unbounded by the legislature.

[109] Instead, I look to the Supreme Court's interpretation of the language in *Re X* at para. 77:

> Though the scope or sphere of operation of the parens patriae jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised…The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

[110] In his rejection of the use of the *parens patriae* jurisdiction to fill a gap in the CLRA, Aston J. suggests that in exercising its *parens patriae* jurisdiction, a judge needs to look beyond the interests of those children in the court: para. 41. His argument mirrors that found in the section on *Charter* remedy: ultimately, there are too many policy considerations for it to be prudent for the court to exercise its jurisdiction broadly without being able to consider the needs of all of the potentially affected parties. The Court is not able to consider the best interests of children not before the court. The Applicants have sought this remedy for all children of lesbian parents. The Applicants are co-mothers in situations where they have planned a pregnancy and together undergone the pregnancy period and birth. These cases involve anonymous sperm donors. While none of the parents in this case are competing with a third individual for rights, some lesbian co-mothers may not be in that situation. Given that at present only two parents are capable of being declared parents under the CLRA, it is not proper for the court to bind these other individuals who may have equally valid claims that need to be adjudicated on an individual basis.

Section 15 Analysis

Overview

[111] I have concluded that there is a breach of s.15 of the *Charter* and that this breach cannot be saved by s.1. In reaching this conclusion, I have focused on determining the appropriate comparator group in light of the purpose and effects of the VSA and the benefit sought.

[112] The purpose is as noted above. As to effect, it is reasonable to infer that heterosexual couples are successfully registering the names of non-biological fathers on the Statement of Live Birth. Conversely, lesbian co-mothers are not being registered. The benefit sought under the VSA is access to the benefit of being able to register both intended parents as of *right*, with the resulting presumption of parentage, or access to the social and symbolic institution of having their names on the birth record at first instance.

[113] Based on these factors, I have concluded that the claimants can be characterized as lesbian co-mothers who plan a pregnancy with a spouse using assistive reproductive technology and that the appropriate comparator group is heterosexual non-biological fathers who plan a pregnancy with a spouse using assistive reproductive technology. Equally, it is appropriate to compare the claimant children with children of heterosexual-non fathers who planned their pregnancy using reproductive technology. While I struggled with this issue, I have made the comparison groups very specific so as to only consider the particular situation of those before the court.

[114] On the basis of these comparator groups, I concluded that there is a distinction between the claimants and the comparator group on the basis of sex and the analogous ground of sexual orientation. This distinction is as a result of both the VSA itself and of state action. This distinction is discriminatory due to pre-existing disadvantage and stereotype, the lack of correspondence between the benefit and the needs of lesbian co-mothers who use reproductive technology and their children, and the engagement of core dignity interests.

[115] Section 1 is applicable in this case. Applying the *Oakes* test, I concluded that the government failed to offer evidence to establish that the objective of prompt and accurate registration of birth particulars and of the exclusion of lesbian co-mothers to further this purpose are pressing and substantial. Furthermore, the exclusion of lesbian co-mothers from the VSA is not rationally connected to that purpose, minimally impairing, or proportionate to the serious harm faced by lesbian co-mothers due to exclusion.

[116] It is my view that the Respondent's submissions on the *Charter* remedy are substantially correct: it is appropriate to strike down the legislation but suspend. The key problem at the remedy stage is having rejected the argument that a child's parents at birth must be her biological parents, it becomes necessary to re-define who can be a parent under the VSA. Redefining the legal concept of parent under the VSA is a job for the legislature, not the court.

Law

[117] The Supreme Court articulated the proper s. 15 test in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 which it summarized at para. 88. A court that is called upon to determine a discrimination claim under s.15(1) should make the following three broad inquiries:

> Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> Is the claimant subject to differential treatment based on one or more enumerated

> or analogous grounds?
>
> Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[118] In making the third inquiry, the relevant contextual factors that will assist in determining whether the claimant's dignity has been demeaned are:

> pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the claimant or the claimant's group;
>
> the correspondence, or lack thereof, between the ground on which the claim is based and the actual need, capacity, or circumstances of the claimant or others;
>
> whether the impugned law has an ameliorative purpose or effect; and
>
> the nature and scope of the interest affected by the impugned law.

[119] However, before applying the test from *Law*, it is first necessary to establish the appropriate comparator group. Ultimately, much of a s.15 analysis will turn on the correct choice of a comparator group. In order to determine that group, it is first necessary to pinpoint the purpose of the act and the benefit sought under that act. Then, it is necessary to determine that actual effect of the act, and determine the correct comparator group in relation to that effect. I would note that it is sufficient in this case that if either the purpose or the effect of the act in question is not about recording biological parentage, that biological parents cannot be the proper comparator group. Therefore this analysis will deal with these preliminary issues prior to applying the *Law* framework.

Purpose

[120] Please refer to the comments above on purpose.

Effect

[121] Prior to making a determination under s.15 of the *Charter*, it is necessary to determine one key factual issue that is in dispute: who is getting registered under the VSA. Is it

only couples with biological links to their children, or does it include individuals in heterosexual couples who use reproductive assistance technologies? If the former is the case, it strengthens the government's argument that biology is the grounds of distinction, without determining if this is or is not a permissible distinction. If the latter is the case, then it is evidence that in its effects, the law discriminates between heterosexual and homosexual couples who are otherwise in like circumstances, and provides a much stronger argument of *per se* discriminatory.

[122] It is the position of the government that the VSA is neutral in its effects, as it only contains the birth particulars of biological parents, and therefore excludes the particulars of all non-biological parents. However, the Applicants assert that the key issue is not if the VSA is neutral on its face, but if in its effect it targets lesbian couples. In effect, non-biological fathers are registering without scrutiny but lesbian mothers who attempt to do so are subject to the scrutiny of the Registrar and are unable to register themselves.

The VSA

[123] The VSA does not permit the registration of two mothers due to the language "the mother" under s.9, as discussed above. This language does not, however, preclude the registration of a birth mother and a non-biological birth father. On the face of the VSA, therefore, there is potential for a differential effect.

Evidence on Effect

[124] Ultimately, the question what is the effect of the VSA is a question of fact. When a party submits that the legislation infringes the *Charter* in its effects, it is necessary to establish the deleterious effects or there can be no *Charter* violation: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 20.

[125] The Applicants' key factual argument in this case is that heterosexual non-biological fathers are able to register their names on birth registration as of right and are not scrutinized for doing so. The government submitted that there was no direct evidence that non-biological fathers are on birth registration.

Evidence of Non-Biological Birth Fathers Being Registered

[126] The Applicants brought forward a record on this application consisting of affidavit evidence of the Applicants and of leading experts in the field who work with families who use reproductive technology. What the Applicants did not do is bring forward the affidavit evidence of heterosexual couples in which the non-biological father has registered as of right and without challenge. Clearly, such evidence would have helped to resolve this evidentiary issue. However, it is reasonable to infer that if this evidence was available, it was not possible for the Applicants to raise it. While non-biological heterosexual parents likely do slide under the radar, that does not mean that they would not be challenged by the Deputy Registrar if they participated in this kind of litigation, particularly given the need for the government to maintain its position

that it does not differentiate on the basis of sexual orientation and its evidence that it does conduct such hearings. There are also important privacy interests at stake that may prevent families from choosing to provide evidence. As such, while direct evidence would have made this factual determination simpler, its absence is not fatal to this claim.

[127] The Applicants presented the evidence of two leading experts, Kelly Jordan, who is a lawyer practicing in the area of family law and assisted human reproduction law with particular expertise in assisting clients in same sex relationships; and Sherry Dale, a clinical social worker specializing in infertility and other reproductive losses.

[128] According to the affidavit evidence of Kelly Jordan, it is her understanding that in practice, heterosexual couples using donor semen note the particulars of the birth mother's male partner on the Statement of Live Birth. She also gave evidence that she is aware of many lesbian couples with gender ambiguous forenames who have registered their particulars without a court order, and was aware of one case in which a couple completed a name change prior to a birth to have the same surname, but had gender specific forenames, and were able to register a child without a court order. Kelly Jordan agreed on cross-examination that she does not watch parents fill out the Statements of Live Birth.

[129] According to Sherry Dale, her best guess is that 600 babies are born each year using donor sperm through a clinic. In her work with hundreds of heterosexual couples using donor insemination, she is not aware of any case in which the parents intended, attempted or in fact obtained a court order to recognize the parental status of a non-genetic father. That said, she agreed on cross-examination that she does not see the Statements of Live Birth. She indicated her knowledge came from what the clients have told her, as well as her understanding of common practice.

[130] In their affidavit, two of the Applicants, B.A. and B.V., indicate their understanding that heterosexual couples that use a sperm or egg donor, report the particulars of the couple on the birth registration. Counsel later indicated by letter that the source of this knowledge was their knowledge as members of the community rather than a particular identifiable source.

[131] The government is correct to note that neither expert has first-hand seen birth registrations including the particulars of a non-genetic father. However, both expressed the opinion, without hesitation, in their affidavits and on cross-examination, that it is the practice for such individuals to simply put their names on birth registration. There is no dispute that they are experts in their fields of practice, and it is reasonable to infer that if non-biological fathers were having difficulties with getting registered that they would have sought out assistance from practitioners in the field of reproductive health and law.

[132] The Applicants also asked the court to take judicial notice that non-biological fathers who use sperm donors get registered, but that when same-sex couples use sperm donors, the co-mother does not get registered. It is not appropriate in this case to take judicial note of this

fact: the nature of reproductive technologies is that their use is often a private decision and knowledge of such use is not always in the public realm. While counsel may have personal knowledge of such information that suggests judicial note is possible, it is not the case that the court shares personal knowledge of that which is "commonly known" in the community: *R. v. Potts* (1982), 36 O.R. (2d) 195 (C.A.) at 203-04.

Evidence on Government Enforcement of the VSA

[133] There is also evidence on the record pertaining to the government's efforts to enforce the VSA. This evidence suggests that the government lacks a mechanism to prevent non-biological fathers from registering, and makes no effort to do so, but that it does target lesbian co-mothers.

[134] According to the Respondent, the Registrar General does not permit either opposite or same-sex couples to name a non-biological parent, who does not have a CLRA declaration of parentage, as a parent on a birth certificate as first instance. If these individuals choose to register nonetheless, there is no legal basis for this inclusion and the Deputy Registrar will cancel their birth registration under s.52 of the VSA. In the cross-examination on her affidavit, it was the position of the Deputy Registrar General that she is unaware of any registration that contains information about non-genetic or biologically related parents without a court order, and that she does not believe that Registrar General registers such parents.

[135] While the government makes this claim, relying on the facially neutral purpose of the VSA, there are no steps built into the VSA that would catch non-biological parents who register themselves as part of a heterosexual couple.

[136] The VSA does not tell parents that only biological parents can register. The Deputy Registrar General agreed that the word genetic and biological are not contained on the form or its instructions and that no DNA test is required to complete a Statement of Live Birth (cross-examination on her affidavit, November 9, 2005, in Qs. 117-121). Nonetheless, it is her position that individuals complete the form based on genetics or biology.

[137] Given that it is up to parents to interpret the form based on their understanding of mother and father, in the absence of forms to the contrary, the set-up of this scheme is consistent with individuals self-reporting parentage in accordance with their understanding of the terms mother and father, which may include non-biological fathers.

[138] Furthermore, the birth registry system in Ontario is not set up to police who is getting on the system. The Registrar General "will receive" information, and therefore relies on an honour system. In 2003 and 2004, only 52 birth registrations were cancelled as the result of hearings. However, according to the undisputed evidence of Dr. John Waye, Professor in the Department of Pathology and Molecular Medicine at McMaster University and Head of Molecular Diagnostic Genetics, Hamilton Regional Laboratory Medicine Program, it can be estimated that 3.3% of births in Ontario each year are cases of non-paternity. Therefore, records

are 97% accurate as to biological information. It was his opinion that the current birth registration system does not serve as a reliable record of genetic parentage and that sources of error include non-paternity and cases where anonymous egg donors are used.

[139] In the end, the effects must be established on a balance of probabilities. While it is not appropriate to take judicial note of the practice of registration of heterosexual non-biological parents, it is appropriate to fill in the gaps in the evidence that have been provided with common sense inferences about human behaviour. The experts have provided some evidence that heterosexual couples that use reproductive technologies register the birth-mother's partner as the child's father, regardless of biological link. In *Gill v. Murray,* [2001] B.C.H.R.T.D. the British Columbia Court of Appeal found that in British Columbia only lesbian co-mothers are questioned as to their biological relationship to the child, and there is no reason to believe the practice is different in Ontario.

[140] In conclusion, given privacy interests, the fact that the forms do not specify that a parent need be biological, and the fact that the Deputy Registrar has no screening mechanism, it is reasonable to infer that heterosexual couples are registering the names of non-biological fathers, consistent with the understanding of the experts in the field.

The Registration of Lesbian Co-Mothers

[141] Conversely, are lesbian co-parents with non-biological links similarly able to register free from scrutiny? The government states that it does not attempt to guess whether a woman's particulars are listed under the heading of "father". The Registrar General relies on the particulars provided and will assume the individual named as "father" is a man unless something causes staff to believe otherwise, whether it is specific knowledge of the gender of an individual or a notation that would raise a question. In fact, there have been two cases now brought to the Deputy Registrar's attention in which co-mothers were successfully registered. The Deputy Registrar has not yet taken action in those cases.

[142] The Deputy Registrar General stated in her cross-examination that there is no ability to check gender as gender is not collected as a data element. When asked if there is a casual effort to see if it looks like one woman or two women are registering, she responded that they are busy doing other things they are supposed to do under the statute. I have two concerns with this statement. First, many names are gender specific and I would infer that it would be possible to guess gender with a high degree of accuracy without a record of gender. Second, if it is the Deputy Registrar's position that only biological parents are to be registered, then checking to see the gender of the two parents would not necessarily be contrary to their statutory mandate.

[143] Intent is not necessary to find a *Charter* breach, rather it is sufficient that the impact be discriminatory. However, the Applicants submit that they might legitimately suspect that the differential treatment of lesbian co-mothers is intentional. The Deputy Registrar only makes an effort to verify a genetic or biological connection between a child and the listed parents in the case of lesbian parents. This assertion is supported by an internal document, Naming Policy, dated December 16, 1978. Point eight in this policy states that: "Only the mother may be entered on the Statement of Birth but the child's surname may be a combination of the two parents' surnames. A letter from the parent who is not listed on the statement is required in order for the child to have both names."

[144] While this document could have spoken broadly about what to do when couples apply to register who use assistive reproductive technology, instead it focuses on same-sex couples exclusively. Except for a policy concerning surrogate mothers, to my knowledge the Registrar General did not disclose any similar internal memorandums speaking to how to handle the registration of non-biological parents. This memorandum suggests some intention to specifically target same sex-couples for a higher level of scrutiny. Furthermore, in failing to address who is the mother in cases in which there are two female parents, it fails to contemplate the registration of a lesbian co-mother who does have a biological link to the child. Implicit in the document is a presumption that the birth mother is the mother, and any other female parent of the child is a non-mother.

[145] The government also developed a policy document in which couples who use surrogates can apply for a CLRA declaration in advance of birth registration, which leaves no record of the birth mother and therefore intentionally fails to capture the particulars of a biological mother. Clearly, this option of dealing with non-biological parents would not be available to lesbian couples in which one is carrying the child, but would be to heterosexual couples in which the female partner is unable or chooses not to conceive.

[146] Furthermore, even if the government is correct in asserting that the failure to register lesbian co-parents is about the need to preserve the biological purpose of the VSA, and that non-biological fathers who register do so in contravention of the VSA, there is still a case to be made that biologically-related lesbian co-parents are discriminated against in effect. The Deputy Registrar does not inquire if a lesbian co-parent has a biological connection before rejecting a registration. A lesbian co-mother is assumed to be a non-biological parent. Since this legislation, the Registrar did permit a couple in which one mother had a genetic connection and one had a gestational link to both be registered on the Statement of Live Birth. However, an assumption is made, without DNA testing, that when both parents named are of different genders that they are the biological parents. Such an assumption must rest on the idea that only heterosexual parents can be the “natural” parents of a child. The government has also not yet reconciled the fact that there can be two biological mothers with the fact that they only recognize that there can be two parents on the Statement of Live Birth. The Deputy Register agreed when cross-examined on her affidavit that there currently is not room on the forms for three people, and while unrelated amendments are anticipated to the forms, there is no plan to put two mother boxes on the form.

[147] In conclusion, there is some evidence on intent and ability on the part of the Registrar General to exclude lesbian co-mothers, including an internal policy memorandum targeted at same-sex couples and the government’s weak statement that it does not check the gender of parents. More significantly, there is the direct evidence of the Applicants themselves that they have been unable to register as lesbian co-mothers. It is not necessary to conclude if the Registrar General is intentionally targeting lesbian co-mothers for exclusion, but sufficient to conclude that the evidence establishes on a balance of probabilities that the effect of the VSA and the Registrar General’s enforcement of the VSA is the exclusion of lesbian co-mothers, but not non-biological fathers in heterosexual relationships with the birth mother.

Benefit

CLRA

[148] The Applicants seek a declaration under the CLRA. The nature of this benefit is not at issue. The Respondent has consented to such a declaration and therefore it is not necessary to determine if the CLRA discriminates against the Applicants by refusing them the benefit of a CLRA declaration.

VSA

[149] In determining whether or not the claimants have had equal benefit of the law, it is necessary to adequately define the benefit at issue.

[150] I agree with the Applicants, the benefit they seek under the VSA is access to the benefit of being able to register both intended parents as of right, or access to the social and symbolic institution of having their names on the birth record at first instance. For the child, the benefit is in having their parents put on the birth registration at first instance. As argued by the Applicants access to a court proceeding is not the same thing as access to parental recognition at first instance, especially given that two judges have opined that a declaration of parentage is not even available for a lesbian co-mother. In short, the benefit sought is presumptive proof of parentage.

[151] It is more difficult to identify the benefit as seen from the perspective of the Respondent.

[152] According to the Respondent, the key issue in this case is access to registration on the birth certificate, which is currently available following a CLRA declaration. As such, there is no complete denial of this benefit to lesbian co-parents, although they will have to take additional procedural steps that biological parents do not have to take to access this process. The Respondent take issue with the Applicants' s.15 claim on the basis of non-recognition of their parental status, which they argue is inaccurate and misleading. On this basis, it would appear that the government is taking a position that the benefit at issue is not that of registration as of right, but the ability to register. While the government may concede the Applicants are treated differently in that it is more difficult for them to register, they are ultimately able to register.

[153] Notwithstanding that position, for the purposes of determining the comparator group, the government argues that the relevant benefit is inclusion on the birth document without a court order, and notes that in this respect the Applicants are no different than parents who use surrogates, adopt or use donor sperm. However, during the s.1 analysis, the government again seeks to minimize the benefit sought, indicating that the right to equal benefit of the law is only minimally impaired by the requirement of having to get a declaration of parentage. While there is

some slippage in the government's argument about the benefit, it appears that it is conceding, for the point of comparison, that there is a distinction in that non-biological parents cannot be registered as of right, but that it is not conceding that this benefit has a further intangible symbolic value.

[154] What is clear is that the Respondent does not agree that access to birth registration is about obtaining a benefit to legal parentage. It argues that the source of legal parentage is either a biological connection or a court order. Nonetheless, the government did concede in argument that inclusion on a birth certificate serves as presumptive proof of parentage.

[155] The Respondent's argument on this point is circular. In stating that legal parentage at birth is equated with biology, and that there is therefore nothing to be gained by a lesbian being registered as a parent as of right, they are presupposing the question of who is a legal parent. Surely if a lesbian co-parent can be registered as of right, that legal presumption would broaden to include such non-biological parents.

[156] While the dignity analysis under the *Law* test will permit a greater analysis of the nature of the benefit at issue, it would seem that in identifying the benefit at the outset it is necessary to consider the symbolic feature of the benefit from the perspective of the Applicants. In this respect, this case is analogous to the gay marriage cases: the Applicants want access to the same scheme as heterosexual parents, not a parallel scheme. They view themselves as totally excluded. Furthermore, they want to ensure that they do not need to waive their privacy to gain parentage and to forgo the risk that they will not receive a declaration of parentage or adoption.

Comparator Group

[157] It is essential to select the proper comparator group prior to undertaking a s. 15 analysis. In *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, the Supreme Court reviewed the jurisprudence on comparator groups, and recognized at para. 18 that "As is evident, a misidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis. In fact, the seemingly straightforward selection of a comparator group has proven to be the Achilles' heel in a variety of recent cases".

[158] It summarized the importance of selecting the proper comparator at para. 17:

The identification and function of the "comparator group" in applying s. 15(1) of the *Charter* was encapsulated by Iacobucci J. in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 62, as follows:

> ... there are three basic stages to establishing a breach of s. 15. Briefly, the Court must find (i) differential treatment, (ii) on the basis of an enumerated or analogous ground, (iii) which conflicts with the purpose of s. 15(1) and, thus, amounts to substantive discrimination. Each of these inquiries proceeds on the basis of a

> comparison with another relevant group or groups, and locating the relevant comparison groups requires an examination of the subject-matter of the law, program or activity and its effects, as well as a full appreciation of the context. [Emphasis added in *Hodge*.]

[159] It is worth repeating that the selection of the comparator group is not a threshold issue that, once decided, can be put aside. On the contrary, each step in the s. 15(1) analysis proceeds "on the basis of a comparison". Indeed in many of the decided cases, the characteristics of the "comparator group" are only developed as the analysis proceeds, especially when considering the "contextual factors" relevant at the third stage, i.e., whether discrimination, as opposed to just a "distinction", has been established.

[160] The starting point in identifying the relevant comparator group is the point of view of the claimant. However, the proposed comparator group may not be sufficient as the differential treatment may not be between the groups identified by the claimant but between other groups: *Law* at para. 58.

[161] The Applicants do not articulate a particular comparator group. They stress the need for a flexible comparative approach. They articulate that there is differential treatment on the following grounds:

a. on the basis of the listed ground of sex; only the forms that change the designation, “father” to “mother” or “co-parent” are rejected;

b. on the basis of the analogous ground of sexual orientation: only the forms of lesbian parents – those that show two women [the “same-sex couples”] or perhaps those that are marked to suggest that the parents are a same-sex couple, are rejected; and

c. on the basis of family status: only the forms of those families who require the use of assisted reproduction, namely anonymous donor insemination, are rejected.

[162] The government submits that the birth registry does not distinguish between heterosexual and same sex couples, but between biological and non-biological parents. Lesbian mothers are a subset of non-biological individuals who can get on the registry. The government further argues that the equation of non-biological parents with families who rely on assisted reproduction ignores the impact of the distinction on others, notably adoptive parents.

[163] *Hodge* provide guidance to the court in selecting a comparator as follows starting at para. 23:

> The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the

> *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*. An example of the former is the requirement that spouses be of the opposite sex; *M. v. H., supra*. An example of the latter is the omission of sexual orientation from the Alberta *Individual's Rights Protection Act*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[164] The usual starting point is an analysis of the legislation (or state conduct) that denied the benefit or imposed the unwanted burden. While we are dealing in this case with access to a government benefit, and the starting point is thus the *purpose* of the legislative provisions, a similar exercise is required where a claim is based on the *effect* of an impugned law or state action.

[165] In either case, the universe of people potentially entitled to equal treatment in relation to the subject matter of the claim must be identified. I use the phrase "potentially entitled" because the legislative definition, being the subject matter of the equality rights challenge, is not the last word. Otherwise, a survivor's pension restricted to white protestant males could be defended on the ground that all surviving white protestant males were being treated equally. The objective of s. 15(1) is not just "formal" equality but *substantive* equality (*Andrews, supra*, at p. 166).

[166] Nevertheless, in a government benefits case, the initial focus is on what the legislature is attempting to accomplish. It is not open to the court to rewrite the terms of the legislative program except to the extent the benefit is being made available or the burden is being imposed on a discriminatory basis.

[167] In *Doe v. Canada (Attorney General*), [2006] O.J. No. 191 (Sup. Ct.) at para. 70, Justice Dambrot found it useful to break these principles down into the following steps:

> Identification of the purpose of the legislative scheme in question;
>
> Identification of the universe of persons potentially entitled to relief from the burden imposed;
>
> Identification of the distinction between those entitled to relief from the burden and those who are not; and
>
> Identification of the appropriate comparator group, which will mirror the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition will include a personal characteristic in a way that [the claimant argues] is offensive to the Charter or omit a personal characteristic in a way that [the claimant argues] is

offensive to the Charter.

I have structured my analysis above in light of this case law on comparator groups.

Purpose:

[168] The purpose of the VSA has been articulated above. While one purpose of the VSA is to maintain a record of biological parentage, this purpose is balanced with the need to promote other important social values, including the equality of all children in Ontario and privacy of families.

Potential Universe

[169] What is the potential universe of individuals entitled to the benefit of registration on the Statement of Live Birth as of right? While the government may argue that this benefit is available only to biological parents (and therefore to all children, as all children who have lesbian parents also having a male biological father even if unknown), the potential universe of registrants need not be limited by entitlement as understood by the government. The government's interpretation would limit the analysis to formal rather than substantive analysis. Furthermore, I have already concluded that in effect, the provisions do enable non-biological parents to have access to this benefit without scrutiny by the Deputy Registrar, notwithstanding its interpretation that the legislation limits registration to biological parentage.

[170] I agree with the Applicants that this universe consists of all parents registering their children's births and all children who need to be registered. I would perhaps somewhat modify this statement to refer instead to all individuals who believe themselves to be parents at the time of birth, to avoid a definitional problem at this state of the analysis. I do not want to put the cart before the horse and presume to determine who should be recognized as a parent at this stage of the analysis. As I address in my remedy section, if we can no longer say an individual is only a parent on the basis of biology, then it becomes difficult to pinpoint what makes an individual a parent.

Distinction

a. biology

[171] The Respondent seeks to divide up this universe as being between biological and non-biological parents. The Applicants submitted that to use a comparator group based on biology is to repeat the same argument from biology used in every gay rights case. The Respondent argued that while the court was correct that in other cases that biology was

irrelevant, this case is different. Marriage is a social construct, but birth is not. We still need one male and one female parent for babies to come into the world.

[172] It is beyond dispute that biology is a suspicious means for distinguishing between individuals. In *Halpern*, the Court of Appeal pointed out the danger in using a definition based in biology at para. 71:

> an argument that marriage is heterosexual because it "just is" amounts to circular reasoning. It sidesteps the entire s. 15(1) analysis. It is the opposite-sex component of marriage that is under scrutiny. The proper approach is to examine the impact of the opposite-sex requirement on same-sex couples to determine whether defining marriage as an opposite-sex institution is discriminatory: see *Miron v. Trudel*, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693, at pp. 488-93 S.C.R. per McLachlin J.

[173] *Halpern* quotes Justice McLachlin in *Miron v. Trudel,* when she stated at para. 136:

> Following the lesson of Brooks, I would respectfully suggest that more is required; if we are not to undermine the promise of equality in s. 15(1) of the *Charter*, we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s. 15(1) aims to eradicate.

[174] That is not to say that biology can never be a legitimate basis of comparison. In fact, *Hodge* cites *Trociuk* at para. 29 as a "straightforward example" in which the relevant universe of potential claimants were biological parents. In that case, Mr. Trociuk claimed discrimination on the basis of sex, since his biological relationship to the child was the equivalent to that of the mother in all relevant aspects. The appropriate comparison was made in that case between biological mothers and biological fathers, and his claim succeeded. That case differs from the Respondent's argument in that the distinction in that case was between the rights of mothers and fathers, not between biological and non-biological parents. As both parents involved in the case were biological, there was no need to consider the rights of non-biological parents.

[175] Furthermore, in *Schafer v. Canada (Attorney General)* (1997), 149 D.L.R. (4th) 705 the Court of Appeal compared biological and adoptive mothers, and concluded that a distinction on the basis of biology was appropriate in that case given that benefits were aimed at addressing physiological changes that occur during childbearing that are not experienced by adoptive mothers.

[176] In this case, I agree with the Respondent that birth is <u>not</u> a social construct. At present, it takes one ovum and one sperm for a child to be created. However, that does not mean that parentage is not a social construct. In fact, our expanded understanding of parent for child support purposes suggests that we do see parentage as such a construct, and perhaps understand

it as a concept that may change depending on context.[1] The Respondent's error is in comparing birth to marriage, rather than parentage to marriage.

[1] *Family Law Act*, R.S.O. 1990, c. F-3, s. 1, 31.

b. sex, sexual orientation, and the use of reproductive technology

[177] It is the position of the Applicants that there is a distinction amongst the potential universe of claimants, on the basis of the factors of sex, sexual orientation and the use of reproductive technology.

[178] In *Falkiner*, a claim was similarly made for the use of multiple comparator groups as they were discriminated against on the basis of more than one personal characteristic, and no single comparator group would capture the differential treatment. The Court of Appeal concluded at para. 72 that "Because the Respondents' equality claim alleges differential treatment on the basis of an interlocking set of personal characteristics, I think their general approach is appropriate. Multiple comparator groups are needed to bring into focus the multiple forms of differential treatment alleged each aspect brought into focus a different part of the discrimination."

[179] I generally support this intersectional analysis. However, in this case, I am not sure that each form of discrimination brings out a different aspect of the claim. Rather, part of the issue in this case is that a lesbian co-mother faces both sex discrimination and sexual-orientation discrimination when compared with her male, heterosexual counterpart. There is no need to do separate comparisons on the basis of sex and sexual orientation as these factors are intimately connected. Rather, as I note below, it can be understood that as a lesbian these mothers simultaneously experience both forms of discrimination. Furthermore, unlike in *Falkiner* in which social assistance was an independent ground of discrimination for single mothers, in this case the use of reproductive technology is not itself the source of discrimination. Rather, it is because lesbian mothers cannot reproduce biologically that they require the assistance of reproductive technology.

[180] That said, the distinctions identified by the Applicants are born out by the evidence as to the effects of the legislation. The evidence indicates that biological parents and non-genetic fathers who use reproductive technology to get pregnant with their partners are being registered on birth certificates but that non-genetic lesbian co-mothers are not. (This claim may be a stretch. In fact, the evidence is just that non-genetic fathers are not registering, we do not know at what stage they got involved in parentage. However, the evidence on this point did relate to non-genetic fathers who were in couples that used sperm donors.) It is arguable that genetic lesbian co-mothers are being registered, but given that there have only been two cases of this occurring to date, it would appear that all lesbian co-mothers are at this point being denied the right to register without either a declaration of parentage of a DNA test. There is also an argument to be made that non-genetic mothers in heterosexual couples who use surrogates are being registered, but again there is a lack of evidence on this point. It is therefore arguable that the key comparison to be made is between some subset of non-biological fathers and lesbian co-mothers.

[181] The government argued that families that use reproductive assistance cannot be the proper comparator as such a group does not capture those who adopt. I would agree that this cannot be the correct comparator, but do so on the basis of the evidence that heterosexual families, that are using reproductive technology, are getting registered. More substantively, I agree with the Respondent that the above analysis does not account for other non-biological individuals who may make up the pool of potential claimants, including adoptive parents and gay parents who are also not currently registered. Therefore, it seems that the distinction is being made between, on the one hand, biological parents and non-genetic fathers who use reproductive technologies, and on the other hand, lesbian co-mothers and non-biological parents, such as adoptive parents, who do not use reproductive technology. The question is, how does this impact on the choice of a comparator?

Comparator

[182] The issue which has presented some difficulty is whether or not it is necessary to consider all of the universe of potential claimants when determining the comparator group, or if it sufficient to focus on the claimants before the court and to ensure that they are compared to individuals in the pool of universe of claimants who mirror the characteristics of the claimant in a relevant manner.

[183] In *Schafer, supra*, which was a pre-Law case, the appellants submitted that the proper comparison was between biological mothers and other parents. The Respondent argued that it was between biological mothers and fathers in one group and adoptive parents in the other. The Court of Appeal concluded that the facts of the case required comparison between biological mothers and adoptive mothers. They rejected the inclusion of fathers because they were not parties to the litigation and their inclusion distorted the equation: at para. 40. Similarly, in this case the inclusion of adoptive parents when they are not before the court equally distorts the picture.

[184] In *Falkiner*, the Court of Appeal adopted multiple comparator groups. The court was clear that the comparator groups should not be defined by reference to the formal distinction drawn in the impugned definition of spouse. Similarly, the comparison here need not be between all of those captured in the definition of parent, and all of those who are not captured.

[185] It is the evidence that in all of the families whose members are claimants that, prior to conception, a pregnancy was planned between the partners, and the non-birth parent provided support throughout the pregnancy and participated in the parenting once the child was born. There would be no doubt in these cases that these individuals would be recognized as parents under the FLA. The cases at bar are not situations in which a non-biological individual became involved post-birth, or even post-conception. There is therefore no reason in this case to include in the group of claimants non-biological parents who get involved with children post-birth, such as adoptive parents, as they have not formed the same intent to parent prior to the birth of the child. I would note that at this point I am focusing on the choice to parent prior to the conception of a child because this is a key factor on the record before me. I make no comment on

whether or not this is necessary to be a parent. All that is relevant at this point is that the Applicants before this court did plan to get pregnant with a partner and used reproductive technology to do so. They are therefore similar to heterosexual couples who plan a pregnancy with the help of reproductive technology.

[186] I conclude that the claimants can be characterized as lesbian co-mothers who plan a pregnancy with a spouse using assistive reproductive technology and that the appropriate comparator group is heterosexual non-biological fathers who plan a pregnancy with a spouse using assistive reproductive technology. Equally, it is appropriate to compare the claimant children with children of heterosexual non biological fathers who planned their pregnancy using reproductive technology. I would suggest that it is appropriate to compare parents with parents, and children with children, as their rights may differ. As some of the case law I discuss below indicates, it is important to use the correct unit of analysis, be it an individual, couple or possibly a family, in order to pinpoint the discrimination and to recognize how those affected are differently impacted. I have made the comparison groups very specific as I am conscious that the rights of those not before the court, and who have not had an opportunity to present an evidentiary record, should not be engaged.

Distinction

[187] According to the Applicants, they are denied equal benefit of the law because they are denied presumptive proof of parentage. The government concedes this point. Lesbian co-mothers who plan a pregnancy with a spouse using reproductive technology are excluded by the language of s. 9 of the VSA, unlike non-biological fathers who plan a pregnancy with a spouse using reproductive technology. The overall structure of the legislation and the actions of the Registrar General support this different treatment.

Ground

[188] The government argues that lesbian co-parents are treated the same as non-biological parents. Being a “non-biological parent” is not an analogous ground, as non-biological parents are not an insular and discrete group but rather a heterogeneous one that includes individuals who use reproductive technologies because of personal choice, medical risk, genetics as well as the inability to reproduce.

[189] The Applicants argue that the differential treatment to access a process that confers a benefit offends equality on the bases of sexual orientation, family status and sex, as recognized in *Gill v. British Columbia (Ministry of Health)*, [2001] B.C.H.R.T.D. No. 34 at para. 82.

Sex

[190] First, the Applicants argue that there is differential treatment on the basis of sex of the co-parent as only Statements of Live Birth that change the reference of "father" to "co-parent" or "mother" or include a female name under "father" are rejected. Sex is clearly an enunciated ground of prohibited discrimination, and the evidence bears out that a distinction is being made on this basis.

Sexual Orientation

[191] Second, the Applicants argue that there is discrimination on the basis of sexual orientation as they claim that the evidence shows parentage of heterosexual couples is immediately affirmed, regardless of the use of donor gametes, but parentage of lesbian mothers is not.

[192] The government concedes that if there is discrimination on the basis of sexual orientation, then this is an analogous ground, as it settled by the Supreme Court: *M v. H.*, *Halpern.* However, the government submitted that even if the proper ground is sexual orientation, then the distinction is not discriminatory under the *Law* test.

[193] The evidence establishes that lesbian co-mothers are being excluded when heterosexual male partners are not, and that their exclusion is in part due to their sexual orientation: in most situations in which a child has two mothers who both want to register at birth it will be because her parents are in a same-sex relationship.

[194] Third, the Applicants submit that even if it were true that all individuals using donor gametes were denied immediate registration of parentage, there would still be an adverse effect because unlike most heterosexual couples who have the ability to reproduce biologically, lesbians require assisted reproduction. They would be impacted by a standard with no legitimate justification centred on majoritarian experience, which excludes lesbian families.

[195] I agree with the Applicants that even if the distinction is being consistently made on biological grounds, that there is still adverse-effect discrimination to lesbian mothers given their inability to procreate "naturally". As the Supreme Court concluded in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, it is up to the government to ensure that the disadvantaged are served equally by government services. The Applicants are correct that there is no reason that non-biological mothers should have to ask permission to recognize the physical necessity of their relationships with their own children. Thus, they are not merely seeking accommodation in this case through a separate scheme of parental recognition. They are arguing that the institution of parentage must be challenged, in order that their experiences can be part of that institution. They do not want a concession to difference, but a reconceptualization in light of their needs and experiences of what is normal in our society.

[196] It is useful to consider Justice McLachlin's comments on formal equality reasoning in *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 134 and 136:

> Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination under s. 15(1). The only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group. This, as I understand it, is the lesson of the early decisions of this Court under s. 15(1). The focus of the s. 15(1) analysis must remain fixed on the purpose of the equality guarantees which is to prevent the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics in violation of human dignity and freedom.
>
> The danger of using relevance as a complete answer to the question of whether discrimination is made out, and thus of losing sight of the values underlying s. 15(1), is acute when one is dealing with so-called "biological" differences. This is the lesson of *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219. In Bliss, a Bill of Rights case, this Court denied benefits to pregnant women under the Unemployment *Insurance Act*, 1971, on the reasoning that the distinction drawn under the Act was based on relevant biological differences. Ten years later, in *Brooks*, this Court acknowledged that the superficial relevance of the biological difference between women and men had led it astray in *Bliss*. The ultimate issue was whether the impugned distinction denied benefits to a class of people -- pregnant women -- in a way which was discriminatory on the basis of sex. In the result, the Court concluded that the denial of benefits had the effect of denying equality to women, the only class of persons who could become pregnant, and unfairly placed an economic burden due to pregnancy solely on the shoulders of women. Much as this Court did in *Bliss*, La Forest J. relies on the biological differences between heterosexual and homosexual couples to find that the *Old Age Security Act* does not discriminate on the basis of sexual orientation. Following the lesson of *Brooks*, I would respectfully suggest that more is required; if we are not to undermine the promise of equality in s. 15(1) of the *Charter*, we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s. 15(1) aims to eradicate.

Child Claimants

[197] The Applicants also claim that their children have been discriminated against on the basis of the sex and sexual orientation of their parents as in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at paras. 77-86, in which the Supreme Court concluded that when access to benefits such as citizenship is restricted on a basis intimately connected and beyond ones control, such as gender of a parent, s. 15 is invoked. I accept this analysis.

Family Status

[198] The Applicants also argue that if the comparison is between biological and non-biological families, that being a non-biological, assisted reproductive family is an analogous ground. The children's claims can also be characterized as discrimination on the basis of family status, that is, that the children of different-sex families are granted full and easy recognition of parentage whereas children of lesbian families are not, resulting in risks to their stability and security. The Respondent argues that there is no such ground as "family status" and that the Applicants have not laid an evidentiary foundation to establish such a ground.

[199] As I have not found that the proper comparator group is biological families, it is not necessary to consider whether or not a distinction is made between biological and non-biological families is an analogous ground. Furthermore, given that sex and sexual orientation are clearly grounds of discrimination engaged in this case, it is not necessary to consider how adding in the factor of family status otherwise assists the Applicants' case. I think that this issue is too broad an issue to be decided on the facts of this case if it does not need to be decided.

Dignity Analysis

[200] In *Law*, *supra*, at para. 53, Iacobucci J. elaborated on the meaning and importance of respecting human dignity, particularly within the framework of equality rights:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

[201] The assessment of whether or not a law demeans a claimant's dignity is undertaken from a subjective-objective perspective: *Halpern, supra,* at para. 29. The perspective is of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member": *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 56, *Law* at para. 59.

Pre-Existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue.

[202] The Applicants submit that lesbian parents have been the subject of pre-existing disadvantage, stereotyping prejudice or vulnerability. The government relies on *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at paras. 73, for the proposition that this factor, in the *Law* analysis, is not just about whether or not there is pre-existing disadvantage, but on whether the distinction furthers that stereotype. Otherwise, every time a law applies to a disadvantaged group, a *Charter* claim will be successful. I agree, and that is why the dignity analysis must be conducted. However, I also agree with the Applicants that the analysis does not turn on whether or not the Applicants are subject to a stereotype, but on whether there is an impact on their dignity: *Law, supra* , at para. 64.

[203] The Supreme Court has recognized that same-sex relationships have not always been given equal concern, respect and consideration: *M. v. H.*, [1999] 2 S.C.R. 3, paras. 68-69, 73.

[204] Justice Cory described the historic disadvantage of gays and lesbians in *Egan, supra* at para. 173.

> The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation . . . . They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation . . . . The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.

> Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated

in an individual's conduct by the choice of a partner . . . . [S] tudies serve to confirm overwhelmingly that homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.

[205] More particularly, the Applicants point to the absence of lesbian parents in popular culture. Lesbian mothers lack even a language to identify themselves. Given this overall context of homophobia and heterosexism, it makes an even bigger difference to them for the government to recognize their parental relationships. Failure to recognize these relationships perpetuates views that there is something wrong or unnatural about their families. Rather than the law seeking to remedy their historic disadvantage, it is placing additional burdens upon them, and is therefore discriminatory. I agree with this analysis. Likewise, for children of lesbian mothers, who are even more vulnerable than their parents to the lack of symbols of their families in popular culture, exclusion of their parents from birth registration furthers this vulnerability.

[206] The government suggests an alternate analysis on the basis of its comparator group of non-biological parents, submitting that non-biological parents have not been subjected to differential treatment founded on stereotype. Rather, it is a fact that biological parents have an indisputable right of parentage whereas those without a biological connection may or may not, and require confirmation of their status. As the Applicants have submitted, and as discussed above, non-biological parents have been the subject of prejudice and discrimination. Their inability to biologically procreate has meant that they have been viewed as un-natural, i.e. deviant, families.

The correspondence, or lack thereof, between the grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others.

[207] According to the Applicants, the Respondent's claim turns almost entirely on the claim that the distinction is based on correspondence. Therefore, the government is seeking to import s.1 concerns into the s.15 analysis. It is the position of the Applicants that there is no correspondence between the distinction and their needs, capacities and circumstances. Lesbian mothers have an even greater need for proof of parentage because their status as mothers is more likely to be challenged. Their children have the same need for a birth record that represents the reality of their family.

[208] The Respondent submitted that the government can use reasonable correspondence and that a biological link is a reasonable general approach in this case: *Law, supra* at para. 105. The VSA recognizes the actual circumstances of the claimants by recognizing the reality that like all non-biological parents, the presumptive marker of parenthood is missing. A biological link provides a reasonable marker of parenthood. If non-biological parents were added to the birth registration, there would be competing claims for parenthood. These claims are more appropriately dealt with within the confines of the CLRA. As only biological parents are currently able to register, the Registrar General has the capacity to assess these claims through the use of DNA testing.

[209] I agree with the Applicants that the Respondent's argument that a biological link provides a reasonable marker of parenthood is more appropriately dealt with in the s.1 analysis as it seeks to justify the exclusion of biological parents from the perspective of biological parents or of the government, not from the reasonable perspective of the claimants: see *Halpern* at para.

91. The Respondent also asserts that biology is the only presumptive marker of parentage without providing a basis, other than convenience, for this position. Clearly, other markers of parentage are used in other legislative schemes that focus on social parentage. If the Applicants reasonably perceive themselves to be parents, it does not follow that they will agree that biology is the only presumptive marker of parentage. They understand that being a parent means more than just having a biological link. Furthermore, I agree with the Applicants that lesbian mothers have a vulnerable status, and would expect the government to provide protection to their parental status rather than to make it difficult for them to access equal benefit to that status.

[210] Furthermore, the government's argument about correspondence rests on the faulty premise that parentage on a birth certificate needs to be limited to biological parentage as a child can only have two parents and if more parents seek registration, parentage must be adjudicated. However, there is no reason to believe that the needs of biological parents are only protected by an exclusion of non-biological parents from birth registration. While it would appear that the current legal structure suggests that only two parents are registered on the VSA and the CLRA; the FLA is clear that multiple individuals can act as parents, and have obligations as parents. The government itself has conceded that its own understanding of mother and father leads to the inevitable conclusion that there can be a gestational mother, a genetic mother and a genetic father.

[211] From the reasonable perspective of the child claimant, her needs may be better recognized by the inclusion of social parents who plan to be involved in caring for her rather than genetic parents who do not. Furthermore, as identified by the Applicants, for her the exclusion of some of her parents from the birth record is arbitrary as she has the same need for social recognition of her parents as do other children.

The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society.

[212] Both parties agree that the scheme does not serve an ameliorative purpose and that this factor is therefore neutral.

The nature and scope of the interest affected by the impugned law.

[213] In their submissions, counsel for the Applicants spoke forcefully and at great length about the nature of the interests affected. They articulated this with several vivid images:

- It forces them to go to court each time is institutionalized indecency.
- The essence of attack on their dignity is that they are already parents, but they have to ask the court to be mothers of their own children.
- The idea that you can only be a parent if we say it is okay is offensive to dignity.
- It is a means to render the lesbian co-mother invisible as mother.
- The idea of having to ask for permission.

- Their children are taken away symbolically.
- They are denied a symbol. It is an initial non-recognition of humanity and parenthood.

[214] Conversely, the Respondent submits that the restrictions are *de minimus* in this case. To request a CLRA declaration is not a major court proceeding and the legal fees suggested by Kelly Jordan of $4,000 is not large. The government notes that there is no evidence as to the costs of an unopposed declaration and no evidence as to significant delays in getting a declaration.[2] The government also points out that nothing in the legislation is disapproving of lesbian women.

[215] In making this argument, the government again seeks to import s.1 concerns into the s.15 analysis. At this stage of the analysis, it is the Applicants' and not the government's perspective that is relevant. More critically, in making this argument, the government misidentifies the benefit being sought. The benefit sought is not access to parentage, but access to parentage as of right. Therefore, when the government argues that there is not complete exclusion from this benefit, it is wrong. As noted by the Applicants, the very harm that they are experiencing is a sense of having to ask for permission to enter the institution of parentage. That makes this case similar to *Halpern*, which recognized the symbolic value of marriage and the message of exclusion sent to same-sex couples who could not participate in this institution: *Halpern* at para. 6.

[216] In order to understand how denial of the benefit affects the interests of the Applicants, it is helpful to consider their own words.

[217] In her affidavit, R.E. writes at para. 18:

> One of the most frequently asked questions of lesbian parents who are parenting together, is "who's the real mom?" In our eyes, the question makes no sense as we are both real moms in the same way heterosexual couples who have children, or adoptive couples, are both "real" parents. But the question implies a hierarchy based on biology, and once again devalues non-biological parents and deems them "lesser than" biological parents.

[218] In their affidavit, B.A. and B.V. write at para. 11:

> We do not want to proceed with an adoption because it feels immoral and dishonest. We are both parents to this child; we were both in attendance at the conception and at the birth. We see no difference between our situation and, for example, a heterosexual couple who have had to use donor sperm to conceive.

[2] I would briefly note that the Applicants rightly take issue with this evidentiary point given that the government did not consent to a CLRA declaration prior to this application.

[219] In her affidavit, the child of lesbian parents, S.R.E. (S.E.) explains at para. 15:

> I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this – they take for granted that their parents are legally recognized as their parents. I would like my family recognized the same way as any other family, not treated differently because both my parents are women.
>
> Most kids understand that I have two moms. But a few kids are mean or just do not understand. They ask who my "real" mom is. I explain that both of my moms are my real moms. Some adults do not understand either. It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everybody else's family.
>
> Imagine winning the case, it would feel amazing. It would feel like we would not have to lie anymore. We would not have to worry about getting in trouble. Nobody could question who my mothers are anymore. I would fee more secure and safer. We could tell the truth. I could just be who I am, and sign my own signature, S.R.E.-F..

[220] Besides threats to their psychological integrity and to feelings of exclusion from a fundamental institution of parentage (or due to not having their parents recognized), the families also pointed to more immediate concrete forms of exclusion. In the case of one applicant recently diagnosed with breast cancer, there was a risk that if her partner had not received a declaration of parentage, that if she died her partner could loose the ability to obtain this right. In cases in which the birth mother dies, becomes incompetent, or has a change of intention, the rights of the lesbian co-mother to recognition as a parent may be threatened.

[221] During the period that a lesbian co-mother is awaiting a declaration of parentage, her ability to act as a parent to her child *vis-à-vis* the outside world are severely circumscribed. She will not be able to receive documentation on behalf of that child such as a passport, receive medical care for that child, or travel with that child outside Canada. In seeking a CLRA declaration, she will have to make public private family planning decisions

[222] The affidavit evidence in this case reveals a lot of pain on the part of lesbian co-parents who have not been able to have their children registered to both parents as of right. Clearly, the subjective feelings of these women about parenting their children indicate that their ability to registrar through the VSA engages core dignity interests.

[223] To support these subjective feelings with an objective basis, the Applicant submitted numerous pieces of social science evidence that indicate that the experiences of these claimants are not particular, but common concerns amongst lesbian mothers. This evidence is helpful in demonstrating that the Applicants are describing the feelings of a reasonable

individual in their circumstances. However, I note briefly that there is something inherently offensive in asserting that when these mothers are speaking about their most personal feelings of motherhood, that they need to prove that they are reasonable in the position they are taking. In fact, I would note that after voicing their feelings of exclusion, having to prove that these feelings are justified requires them to once again ask permission to have their feelings as parents recognized.

[224] The affidavit of fertility counselor Sherry Dale echoes the practical concerns voiced by the Applicants: that non-genetic mothers of a child born to lesbian parents express grave concerns regarding their legal status as a parent, and wonder if they would not have legal protection with respect to their child if something happened to the birth mother and that they would not be able to direct medical personnel if their child required medical treatment.

[225] Lesbian co-mothers also face financial burdens. According to Kelly Jordan, even if the court has authority to grant a declaration of parentage, obtaining such a declaration is time-consuming and expensive. She charges $4,000 to obtain such a declaration.

[226] In focus groups conducted by Lori Ross,[3] a researcher who specializes in women's mental health in pregnancy and post-partum, particularly with lesbian and bisexual women, these women expressed frustration about the double standard that their families experience. They are recognized by the government when it is financially beneficial to the government, such as in the collection of taxes, but not when it is to protect their families, such as in barriers to parental rights for non-biological mothers.

[227] The experiences reported by Canadian lesbian co-mothers are not unique. *The Victorian Law Reform Commission on Assisted Reproductive Technology*, Australia, reports at p. 16 on submissions received in the preparation of that report:

> These submissions reported that the non-birth mother often encounters obstacles and ignorance, and at times hostility, in her dealings with government agencies and service providers where legal status is a relevant factor. Because the non-birth mother cannot be named as a parent on the child's birth certificate, she is unable to produce evidence of her relationship to the child unless she has taken steps to obtain a Family Court parenting order or some form of written authority from the birth mother.

[228] A submission made by the Lesbian Parents Project Group for that same report was quoted at p. 17 of that report as stating:

> …we feel that legal recognition or our role as parents to our children is essential for their safety and social well-being. It is critical to children that they have reflected back to them the value and integrity of their lives, including the

[3] Researcher at Women's Mental Health & Addiction Research Section of the Centre for Addiction and Mental Health and Assistant Professor in the Department of Psychology, University of Toronto

> legitimacy of their families…Equal familial status sends a powerfully positive message to all social institutions that have an influence on our children's lives. It obliges them to acknowledge and respect the families our children live in.

[229] Part of the difficulty of being a co-mother is the difficulty in finding an identity for a category of parent not recognized in our society. Ms. Sullivan writes the following about the experience of being a non-biological mother:

> Being "alive" to social situations in ways that others may comfortably approach without calculation and attention is not only (and somewhat paradoxically) alienating, as Goffman suggests, it is also work. We might think of this mental, emotional, educational, and social labor that lesbian comothers do as identity-work or construction work. It is constructive in the sense that comothers are creating new impressions of and expectations for a wider variety of hitherto unrecognized and preemptively delegitimated modes of human affinity. In a sense, comothers are creating more unconcealed space for sexual and familial nonconformists. [4]

[230] Similarly, Cassandra M. Wilson writes:

> Language can also represent created concepts that comply with and perpetuate dominant norms. The absence of words and language to succinctly describe the co-mother's role in the family is symbolic of her invisibility. "Nonbiological" lesbian mothers are viewed as lacking and empty. They are truly the invisible other, existing without speech, reason, or life in association to the feminine other. The lesbian co-parent has to lose either her life, her speech, or her gender in her attempt to name herself, her role, and her relationship to the mother and child. Finally, the term "co-mother" more accurately speaks to being a mother, yet still lacks a clear differentiation as a unique, congruous and real identity. [5]

[231] Despite the presentation of this and other documentary evidence, the government argues that there is no objective evidence that the Applicants' feelings arise from the birth registry legislation, as opposed to other aspects of being a lesbian parent. Given the clear evidence that lesbian mothers face discrimination and a multitude of barriers due to their social marginalization, it does not lie in the mouth of government to claim that the Applicants cannot specify a particular link to the particular harm of exclusion in this case. This exclusion is part of the broader exclusion of lesbian mothers. Furthermore, it is reasonable to infer that the exclusion

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[4] "Alma Mater: Family Outings and the Making of the Modern Other Mother (MOM)," M. Bernstein and R. Reimann, eds., *Queer Families, Queer Politics: Challenging Culture and the State* (New York: Columbia University Press, 2001) at 235.

[5] "The Creation of Motherhood: Exploring the Experiences of Lesbian Co-Mothers" Cassandra M. Wilson, Journal of Feminist Family Therapy, vol (12)1 2000 at 25.

of lesbian mothers means there is not a lot of social science evidence available on their situation. The Respondent's argument also relies on fallacious logic. They claim that because the social worker Sherry Dale identifies that both genetic and non-genetic mother share the same feelings, it cannot be that those feelings are because of lack of registration. However, the failure to register one parent signifies to both parents the lack of recognition of their family as a unit.

[232] Furthermore, aside from the evidentiary record particular to this case, the Supreme Court has already acknowledged the importance of birth registration in *Trociuk* at para. 15 and 16:

> Parents have a significant interest in meaningfully participating in the lives of their children. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 85, La Forest J. wrote that "individuals have a deep personal interest as parents in fostering the growth of their own children". In a similar vein, Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 319, wrote: "The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world."
>
> Including one's particulars on a birth registration is an important means of participating in the life of a child. A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. Such ties do not exhaustively define the parent-child relationship. However, they are a significant feature of that relationship for many in our society, and affirming them is a significant means by which some parents participate in a child's life. The significance of this affirmation is not only subjectively perceived. The legislature of British Columbia has attached important consequences to the presence of a father's particulars on his child's birth registration. It has decided that where a father's particulars are included on the birth registration, his consent is always required for his child's adoption. However, where his particulars are not included, a father must fulfill at least one of an alternative set of conditions. As Prowse J.A. notes, ss. 13(1)(c) and 13(2)(a) of the *Adoption Act*, R.S.B.C. 1996, c. 5, provide that "a father who is named on the birth registration must be given notice of the proposed adoption of his child. He may, or may not, qualify for notice apart from registration" (para. 141).

Conclusion on Section 15 Analysis

[233] I find that the existence of pre-existing disadvantage and stereotype, the lack of correspondence between the benefit and the needs of lesbian co-mothers who use reproductive technology and their children, and the engagement of core dignity interests mean that the VSA is discriminatory.

Section 1

Evidence

[234] Once a *Charter* breach has been found, the onus switches to the government to justify the breach under the s.1 test.

[235] As stated in *R. v. Oakes*, [1986] 1 S.C.R. 103:

> Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident [citations omitted]: para. 68.

[236] According to the Applicants, the government has not provided cogent evidence to prove its justification. I agree that the Respondent failed to provide evidence establishing that the objective of the legislation is pressing and substantial, or that it is a minimally impairing means to achieve those objectives. Therefore, their assertions rest upon a "self evident" understanding of the importance in recording biological information. This lack of evidence is particularly problematic in light of Supreme Court jurisprudence that is suspect of claims regarding biological necessity.

Need for a Section 1 Analysis

[237] The Applicants also raises concerns about the need to engage in a s.1 analysis having concluded that there is a s.15 breach. First, the Applicants argue that given that the language of the VSA is neutral, the breach of the *Charter* rights occurred when the Deputy Registrar interpreted the VSA as having a biological meaning. Therefore, the breach is not caused by the statute, but by the action of a state actor. If this is true, then there is no need to engage in a *Charter* analysis at all. If the VSA could be read to permit lesbian co-mothers to be registered on a Statement of Live Birth, then this situation is remedied through statutory interpretation not through remedying a *Charter* breach.

[238] In this case the *Charter* breach is in s.9 of the VSA, and is furthered by the actions of the state, and must therefore be justified under s.1.

***Oakes* Test**

[239] The party seeking to uphold the impugned law has the burden of proving on a balance of probabilities that:

The objective of the law is pressing and substantial; and

The means chosen to achieve the objective are reasonable and demonstrably justifiable in a free and democratic society. This requires:

The rights violation to be rationally connected to the objective of the law;

The impugned law to minimally impair the Charter guarantee; and

Proportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgement of the right: *Oakes*, para. 69-71.

Pressing and Substantial Objective

[240] To justify infringing a right, at minimum, the objective must "relate to concerns which are pressing and substantial in a free and democratic society": *Oakes*, para. 69. When a law has been found to violate the *Charter* due to under inclusion, both the objective of the law as a whole and the objective of the exclusion must be considered: *Vriend v.* Alberta, [1998] 1 S.C.R. 493 at para. 109; *M. v. H.* at p. 62; *Halpern* at para. 115.

[241] According to the Respondent, the pressing and substantial objective of the VSA is the accurate and prompt recording of births in Ontario, including the particulars of the child's biological parents. It argues that limiting registration to only biological parents (i.e. exclusion of non-biological parents) is necessary to further the purpose of prompt and accurate recording given that in the absence of a court order, the Deputy Registrar General has no mechanism to determine whether a person without a biological connection to the child is a parent. The government does not provide any explanation or evidence for why this objective is pressing and substantial.

[242] According to the Applicants, if the government is correct that the purpose is to collect particulars of biological parents only, then that purpose is itself discriminatory, in that it fails to provide equal protection to all children who need to have their parents recognized, whether they are biologically related or not. It should be noted that all children have the right to such registration, which is recognized in the *Convention on the Rights of the Child*.

[243] The Applicants are correct in asserting that a purpose which, in of itself is discriminatory, cannot be pressing and substantial. In *Halpern, supra,* the Court of Appeal concluded that there is no valid objective served in maintaining marriage as an exclusively heterosexual institution. Such a purpose results in favouring one relationship over another, suggesting that uniting two persons of the same sex is of lesser importance. A purpose that demeans the dignity of same-sex couples is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial: paras. 117, 119.

[244] Similarly, in this case, excluding non-biological parents because the government has no means to determine if they are parents prior to promptly registering their children is discriminatory. The government has not pointed to any pressing need for biological rather than non-biological particulars of parents to be registered, other than because the requirement of promptness requires only biological parents are included. It is not clear why only lesbian co-mothers need to be excluded to ensure that birth records are promptly recorded. No evidence is presented about the delay that would be caused by having to adjudicate parentage prior to registration. In fact, the Deputy Registrar had a policy of letting parents who use a surrogate determine parentage prior to completing the Statement of Live Birth. Furthermore, given that the system is replete with false genetic information, it cannot be the case that there is a pressing and substantial need to use the registry as some sort of DNA database. The system is designed such that it will always contain erroneous biological material.

[245] The Applicants also raises a forceful argument that if other provinces have been able to recognize non-biological parents within the birth registry scheme, albeit in some provinces after facing a *Charter* challenge, then the objective of keeping the record free from non-biological parents cannot be pressing. There is no reason to believe that the province of Ontario has different needs than other provinces in terms of who needs to be registered. All children in Canada have the same basic needs when it comes to recognition of parentage.

[246] Furthermore, the Applicants argues that it need not accept the government's articulated purpose during the s.1 analysis, but can look at the functional purpose of the VSA: *Miron v. Trudel,* [1995] 2 S.C.R. at 477. This purpose is to provide a foundational document for all children born in Ontario. If such a document is to record social parentage, excluding mothers is contrary to this purpose, and therefore the exclusion cannot be pressing and substantial.

[247] The purpose of the VSA seeks to record biological parentage but to do so in light of other important social values including privacy and equality of all children. In its function, the VSA permits the registration of non-biological fathers, but excludes non-biological co-mothers. While I accept that there is a pressing and substantial need for some form of accurate and prompt birth registration, particularly in light of a child's international right to such a record, it does not follow that the exclusion of a lesbian co-mother serves an objective in light of that purpose.

[248] That said, in *Trociuk*, the parties agreed that the VSA's objective was accurate and prompt recording of births and that this satisfied the first branch of the *Oakes* test. The Supreme Court made no comment on the correctness of this position. I am therefore prepared to

accept that this objective is pressing and substantial if only for the purpose of considering the other parts of the analysis. The Applicants raise even stronger arguments surrounding reasonable impairment of their rights, and I will therefore focus my analysis on those points.

Rational Connection

[249] The Respondent asserts that to meet this first branch of the proportionality test that they need only demonstrate the government's purposes are "logically furthered" by the means chosen. Their argument is essentially that since court orders are required to confirm non-biological parentage, and since court orders may not be available immediately upon birth, the goal of prompt and accurate recording is furthered by the immediate inclusion of biological parents only. It is irrelevant that birth registration is not a perfect record of biological particulars, as the legislation tolerates a small percentage of inaccurate records to further other government objectives such as protecting the privacy interests of women and families in certain circumstances.

[250] The Applicants submitted that leaving a parent off the birth registry makes it less accurate, so the exclusion of lesbian co-mothers from the registry is not related to the purpose of the act, being to register social parentage. Furthermore, some lesbian co-parents may have a biological relationship. The Applicants point out that non-recognition of lesbian parentage is not a reasonable means to give all interested parties a chance to be heard and to consider the best interests of the child. There may be no other interested parties when an anonymous donor is used or other interested parties can use the CLRA mechanism. I agree with the Applicants.

[251] Given the purpose of the VSA is in part to recognize social parentage when it furthers important social values, exclusion of lesbian co-mothers is not rationally connected to that purpose. If the purpose is to collect accurate biological information, then it is not the exclusion of lesbian co-mothers that threatens this process. Rather, the problem is the government's failure to require individuals to specify a biological connection to the child. Recognizing lesbian co-mothers need not be done to the exclusion of this collection of biological information.

Minimal Impairment

[252] According to Justice McLachlin in *RJR-Macdonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199 at para 160 when considering the minimal impairment, it is necessary to consider that:

> The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. On the other hand, if the government fails to explain why a significantly less intrusive

> and equally effective measure was not chosen, the law may fail. [citations omitted].

[253] The Respondent argues that it is critical in this case to consider that lesbian co-mothers are not completely excluded, and that they are not required to accept a substitute regime as in the other gay rights cases. Once a court order is obtained, they will have the same benefit: their names will be recorded on the child's birth registration. It is a minimal burden to have to obtain a CLRA declaration. The government's argument repeats it position that the Applicants are ultimately seeking the benefit of recognition of their parentage. However, as I concluded above, the real benefit they are seeking is recognition of parentage *as of right*. Given that this is the right they seek, they are not being minimally burdened through having to complete a court process to gain parentage rights. Rather, they are being completely excluded from that benefit. As such, it is not a minimal burden. Furthermore, even if the benefit was just recognition of parentage, it is not a certainty that a lesbian co-mother would be able to get such a declaration given that she may be excluded from the CLRA and she will need to overcome the evidentiary hurdle.

[254] The Respondent also argues that allowing people who are not biologically related to be named on the birth registration will lead to an increased number of disputes about who is a parent, as not all cases will be as straightforward as this case. As pointed out by the Deputy Registrar, determining who is a parent when biology is not the sole criteria is a difficult determination that the Deputy Registrar is not currently suited to make. Allowing non-biological parents on the birth registry will require operational changes and may lead to an increase in disputes. However, that does not mean that these operational changes cannot be made, or that the current system is one of the most minimally impairing. In fact, the legislation in Alberta, as now altered by the *Charter* challenge in *Fraess*, is one example of legislation that would protect the rights of lesbian co-mothers, and other non-biological parents who raise children with their spouses. It is targeted legislation that specifically talks to the situation of individuals who use assistive reproductive technologies. With the "reading in" of female partners, s.13(2) of Alberta's *Family Law Act* provides that:

> A person is the parent of the resulting child if at the time of an assisted conception the person was the spouse of in a relationship of interdependence of some permanence with the female person and
>
> a) His sperm was used in the assisted conception even if it was mixed with the sperm of another male person, or
>
> b) The person's sperm was not used in the assisted conception, but the person consented in advance of the conception to being a parent of the resulting child.

[255] I would also note that underlying the government's position is an assumption that this case is about either/or: either a biological parent must be registered or a non-biological

parent can be registered in his place. This reduces the case to one of the rights of lesbian co-mothers against those of birth fathers, whom the Supreme Court has recognized as a protected class of parents. On the basis of this either/or proposition, it is difficult to conceive of an alternative regime that would preserve the government's purpose without impairing the rights of the Applicants. However, nowhere has the purpose been articulated as the registration of two parents exclusively- although this has been implied in the government's position, and clearly the Deputy Registrar has yet to "operationalize" a means of recognizing three parents despite its admission that there can be a gestational mother, a genetic mother and a genetic father. In fact, once one gets past the idea that an individual can only have two parents, then it is possible to reach the position of the Applicants, that the government does have alternatives that would be less impairing of the rights of lesbian co-parents but that would be consistent with maintaining a record of the biological particulars of parentage. There is no reason not to capture both sets of information.

[256] It is true that Justice Aston raised concerns in *A.A. v. B.B.* about the scope of who could become parents if more than two parents can be recognized, noting that groups such as cults could seek rights of parentage. However, that is not the question the court must decide today. It is up to the legislature to ensure that birth registration protects the rights of biological parents and lesbian co-parents. This court need not determine the rights of other potential non-biological parents.

Proportionality

[257] "The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society": *Oakes*, para. 71.

[258] The Respondent argued that the benefit outweighs the harm, in that any delay in obtaining registration does not preclude individuals from travelling, registering their children in school or attending medical appointments. This view stems from the Respondent's position that the birth registration is not a record of the parents in a child's life, and that delay is not a judgment about the importance of the non-biological mother's role in the child's life. I cannot accept this view as set out in my earlier comments.

[259] Conversely, the Applicants argue that any benefit to the government achieved by refusing to register lesbian co-parents would be an increase in the accuracy of the biological information in the system by ½ a percentage. Currently, there are almost 4500 non-biological parents listed a year in Ontario, and almost 4000 applications do not contain the particulars of a biological father. If half of the 600 births a year that use donation involved lesbian couples, there would be 300 more births a year registered that did not contain accurate biological information. On the other side of the equation is a lot of pain and hardship that goes to the core of the essential dignity of the Applicants. The harm clearly outweighs any nominal benefit in this case.

Remedy

[260] The Respondent's submissions on the *Charter* remedy are substantially correct: it is appropriate to strike down the legislation but suspend.

[261] In understanding the *Charter* breach, it is necessary for the court to confine itself to the Applicants before it and the record they have produced. However, in choosing an appropriate remedy, there is a need to look beyond the parties before the court and to consider the potential ramifications for those who may have competing rights. Most notably, as the government has identified, birth fathers have rights to be registered that must be protected. It is for that reason that the reading in remedies sought by the Applicants would not work. For example, I do not accept the Applicants' argument that given the power of the mother to unacknowledge the father, that the VSA be changed to make the second parent the parent acknowledged by the mother. The right to unacknowledge a specific individual is much narrower than a right to acknowledge any potential individual as co-parent. Giving the mother this much power to determine the co-parent also favours the birth mother over the birth father. As suggested by the Respondent, such a reading in remedy goes beyond merely reading in to importing new concepts into the VSA.

[262] As I see it, the key problem at the remedy stage is having rejected the argument that a child's parents at birth must be her biological parents, it becomes necessary to re-define who can be a parent under the VSA. I can think of the following ways of conceptualizing who those parents might be:

1. biological parents
2. individuals who have an intent to parent at the time of birth (and possibly who evidence such an intent)
3. individuals who have an intent to parent prior to conception – i.e., who use artificial reproduction
4. individuals in a spousal or other relationship of permanence with a biological parent
5. the parent acknowledged by a birth parent
6. some combination of the above

[263] In this case, all of these different conceptions of who is a parent are implicated. For the purposes of this case, it was appropriate to focus on individuals who had an intent to parent prior to conception and who were in a spousal relationship with the birth mother. However, that is not to say that these two factors are necessary to determine who is a non-biological parent. Rather, they were markers of parentage present in this case. Ultimately, it should be the role of the legislature to consider which of these factors, or other factors I have not considered, should be used to expand the definitions of mother, father or parent in the VSA in order to protect the rights of lesbian co-mothers.

[264] A similar concern was raised in *Fraess v. Alberta (Minister of Justice and Attorney General)*, [2005] A.J. No. 1665 (Q.B.) by Justice Clarke at para. 12:

> The Respondents submit that the appropriate remedy is an immediate severance of s. 13(2)(b) of the *Family Law Act*. That remedy would eliminate any discrimination. All parents, whether in a heterosexual or same sex relationship who are not biologically connected to a child can apply to adopt the child of their spouse. A multitude of issues arise out of this matter and there is a need for the Legislature to debate the implications of changes to the legislation including other laws that refer to "mother" and "father" or "parent" in order to respond appropriately to the issue raised. For example, should the legal parent-child relationship arise from (a) strictly biological connection to the child; (b) an intent on the part of the adult to create the relationship; (c) a combination of the two; (d) a relationship to someone with the biological connection to the child? The Respondent says these policy options are best left to the Legislature.

[265] The difference in that case was that the legislature in Alberta has already turned its mind to whether or not a legal parent child relationship can arise from intent on the part of the adult to create a relationship and drafted legislation addressing the intent to parent. Therefore, the court could just “read in” in that case to include lesbian co-mothers by simply changing the male pronoun.

[266] Another important issue is the need to protect the rights of the minor claimants in this case. While this is not a “right to know” case, it is clear that some benefit is provided to children in having a genetic record of parentage. It will be up to the government to determine if these particulars should be collected in addition to those of social parentage.

[267] Therefore, it is up to the legislature to consider the competing policy issues that arise in this case and to figure out best how to operationlize the registration of non-biological parents. One option that is not available to the government is to establish DNA procedures to test all parents, and therefore make a system that is completely about biology. The Applicants argued that rejecting the particulars of all parents without a biological or genetic relationship would shift the group suffering exclusion and marginalization to those persons who suffer a “disability” in relation to human reproduction. While that was not the argument in this case, what is clear is that remedying one *Charter* breach under s.15 should no be a means to creating another, nor should it create a hollow victory in which everyone equally looses out.

Section 7 Analysis

[268] Because of the conclusions I have reached in the s. 15 analysis, it is unnecessary to consider the s. 7 argument. I will make the following brief comments.

[269] Section 7 of the *Charter* guarantees that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. There are two steps in the s.7 analysis. LaForest J. in *R. v. Beare* explained them as follows: " to trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that

the deprivation is contrary to the principles of fundamental justice." (*R. v. Beare*, [1988] 2 S.C.R. 387 at para 28) Thus, if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops at the first step.

[270] Section 7 challenges are rarely granted outside of the criminal context. However, the Supreme Court has recognized that they can apply in situations in which the security interest of a parent is engaged *[New Brunswick (Minister of Health and Community Services) v. G.(J.)]*. In *G.(J.)* the New Brunswick Minister of Health and Community Services was granted custody of G.J.'s 3 children. G.J. did not have the money to pay counsel to represent her at the custody hearing and legal aid was denied because, at the time, custody applications were not covered. The Supreme Court found that G.J.'s s.7 rights were breached. Physical as well as psychological integrity are protected and this extends to child protection proceedings.

[271] This case is distinguishable. G.(J.) suffered the physical removal and loss of custody of her children to the government, while in this case, the Applicant co-mothers can still raise the child. Potentially, there could be a situation where the birth mother passes away before the co-mother receives a co-parent adoption order. If the birth mother's parents or extended family take the child away from the co-mother, she is without recourse (assuming a CLRA is not available to a second mother).

[272] I am disinclined to proceed with an analysis based on this scenario because it is difficult to assess a custody dispute without a factual underpinning. There is a potential s.7 argument to be made, however, I am not convinced it was adequately pleaded by the parties. As stated in *R. v. Danson* (1990), 73 D.L.R. (4th) 686: "This court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack."

Conclusion

[273] In conclusion, the birth registry provisions of the VSA are declared invalid because they have the effect of infringing the Applicants' section 15 *Charter* right to be protected against discrimination based on sex and they are not saved by section 1. This declaration of invalidity pursuant to s. 52 of the *Constitution Act*, 1982 will be delayed for a period of 12 months to provide the legislature an opportunity to remedy the constitutional defects.

[274] Counsel may make written submissions as to costs, within 20 days. These written submissions are not to exceed ten pages.

RIVARD J.

Released: June 6, 2006

SCHEDULE A

Vital Statistics Act

The use of the terms “mother” and “father” in the *Vital Statistics Act*, R.S.O. 1990, c. V.4 are restricted to ss.1, 9 and 10. The relevant provisions are reproduced below:

Section 1

“birth” means the complete expulsion or extraction from its mother of a fetus that did at any time after being completely expelled or extracted from the mother breathe or show any other sign of life, whether or not the umbilical cord was cut or the placenta attached; (“naissance”)

“still-birth” means the complete expulsion or extraction from its mother of a product of conception either after the twentieth week of pregnancy or after the product of conception has attained the weight of 500 grams or more, and where after such expulsion or extraction there is no breathing, beating of the heart, pulsation of the umbilical cord or movement of voluntary muscle. (“mortinaissance”) R.S.O. 1990, c. V.4, s. 1; 1998, c. 18, Sched. E, s. 290; 2001, c. 9, Sched. D, s. 13; 2002, c. 17, Sched. F, Table.

Section 9

(1) In this section and in sections 10, 11 and 12,

"incapable" means unable, because of illness or death, to make a statement; ("empêché d'agir")

"statement" means a statement in the prescribed form respecting a child's birth referred to in subsection (2). ("déclaration")

Statement of birth

(2) Within thirty days of a child's birth in Ontario, the mother and father shall make and certify a statement in the prescribed form respecting the child's birth and shall mail or deliver the statement to the division registrar of the registration division within which the child was born.

Exception

(3) Subsection (2) does not apply,

′s mother, if she is incapable; or

′s father, if he is incapable or is unacknowledged by or unknown to the mother.

Where one parent incapable

(4) If one parent makes the statement without the other parent because the other parent is incapable, a statutory declaration of the fact shall be attached to the statement.

Statement by another person

(5) If a child's parents are both incapable, or the child's mother is incapable and the father is unacknowledged by or unknown to her, another person acting on her behalf may make and certify the statement and shall mail or deliver the statement, together with a statutory declaration that the parents are both incapable or that the mother is incapable and the father is unacknowledged by or unknown to her, as the case may be, to the division registrar of the registration division within which the child was born.

Particulars of parents

(6) A statement shall contain particulars of the mother and, if the father makes the statement, particulars of the father.

Amendment of registration

(9) Where a statement completed by only one parent of the child or by a person who is not the child's parent is registered, any of the following persons may apply to the Registrar General to amend the statement:

mother and father together.

mother, if the father is incapable or is unacknowledged by or unknown to the mother.

father, if the mother is incapable.

Amendment of registration

(12) On receiving a certified copy of an order under section 4, 5 or 6 (child's parentage) of the Children's Law Reform Act respecting a child whose birth is registered in Ontario, the Registrar General shall amend the particulars of the child's parents shown on the registration, in accordance with the order.

R.S.O. 1990, c. V.4, s. 9.

Section 10

(1) A child whose birth is certified under section 9 shall be given at least one forename, subject to subsection (2), and a surname.

How child's surname determined

(3) A child's surname shall be determined as follows:

1. If both parents certify the child's birth, they may agree to give the child either parent's surname or former surname or a surname consisting of one surname or former surname of each parent, hyphenated or combined.

2. If both parents certify the child's birth but do not agree on the child's surname, the child shall be given,

i. the parents' surname, if they have the same surname, or

ii. a surname consisting of both parents' surnames hyphenated or combined in alphabetical order, if they have different surnames.

3. If one parent certifies the child's birth and the other parent is incapable, the parent who certifies the birth may give the child either parent's surname or former surname or a surname consisting of one surname or former surname of each parent, hyphenated or combined.

4. If the mother certifies the child's birth and the father is unknown to or unacknowledged by her, she may give the child her surname or former surname.

COURT FILE NO.: 05-FA-013357
DATE: 20060606

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

M.D.R. AND M.P.S.

E.E.R.-P., MINOR AND A.D.R.-P., MINOR (BY THEIR LITIGATION GUARDIANS M.D.R. AND M.P.S.)

L.F. AND R.E.

S.R.E. ("E.-P."), MINOR (BY HER LITIGATION GUARDIAN L.F. AND R.E.)

B.V. AND B.A.

S.J.T.V.A., MINOR (BY HIS LITIGTION GUARDIANS B.V. AND B.A.)

R.N.G. AND V.D.

A.Z.C.D., MINOR (BY HER LITIGATION GUARDIAN R.N.G. AND V.D.)

Applicants

- and -

DEPUTY REGISTRAR GENERAL FOR THE PROVINCE OF ONTARIO

Respondent

RIVARD J.

Released: June 6, 2006