

STATEMENT OF ARGUMENT¹

THE ELEVATION OF MYTH TO THE RIGHT TO PRIVACY AND THE CREATION OF A RIGHT TO PROCREATIVE ANONYMITY

The great enemy of the truth is very often not the lie -- deliberate, contrived and dishonest -- but the myth -- persistent, persuasive and unrealistic. (J.F. Kennedy)

1. Over the years the issue of the right to privacy in reproduction has grown to proportions such that a human being who is adopted alone faces the specter of their need to know who they are, something they had until they were adopted, and, until and if, the adoptive parents chose to re-register their statement of live birth

2. The Applicant submits that this is a myth - a myth so pervasive that has permeated nearly all of the decisions including this case. But for several U.S. decisions, the leading one being the *Doe v. Sunquist*, referred to in the Applicant's Memorandum for Leave, none have looked behind the practice of adoption and actually determined the constitutional issues regarding whether there may be a reasonable expectation of privacy or whether in fact, what those are arguing is, in fact, the expectation of reproductive anonymity. The Applicant submits, as in her case, that the information has always been "out there". Names of birth parents are on adoption records and other records held by the adoptive parents and can be given to the adopted person by the adoptive parents if the latter chooses.

Report on the Committee Hearings on Bill-183, September 15, 2005, attached as Tab A to this Statement of Argument.

3. The Applicant reiterates the words of the Tomlin Committee on the issue of the deliberate deprivation of people of their roots.

Apart from the question of whether it is desirable or even admissible to deliberately eliminate or obscure the traces of a child's origins so that it shall be difficult or impossible thereafter for such origins to be ascertained we think that the system of secrecy would be wholly unnecessary and objectionable in connection with a legalized system of adoption and we should deprecate any attempt to introduce it.

¹ The Applicant learned the evening she completed these documents that new legislation will allow some adopted people to begin the process of getting their records September 2009. There are disclosure vetoes in the new Act that will limit access to some adopted people.

4. As the Applicant states in her leave application this is the crux of the section 15 argument. The Applicant submits that leave panel has relied on the Ontario Court of Appeal's findings which, in turn, relied on the Application Judge's findings neither of which looked to the statute to find if, as a matter of fact, there could be any expectation of privacy.

5. At Tab 6, page 3, para. 2, of the Applicant's Leave Memo, Samuels concludes (paraphrased):

...that people with vested interests not necessarily having anything to do with the best interests of adopted people were making assertions for the interpretation of laws to serve their own self-interest.

6. Further evidence of this self-interest is provided by E.Wayne Carp the government's own witness. Citing June Nash, who operates an adoption agency, at lines 66:19 – 67:5 Carp states:

“of course we were promised confidentiality. It's an ideological point. It's been made over and over again, even if they made the promise of confidentiality, we cannot admit that it was ever made”. [Then he says -]It was made - it was made by people who perhaps weren't supposed to have made it. It's not necessarily in the legislation, but this was the promise they made.

At lines 16-19 he states:

And adoption agencies promised that. That they couldn't enforce it, that they had nothing – that's another story.

At 86:9-16:

...the adoption agencies wanted, I think to drum up business. I say this in Family Matters. They wanted the business of families, the adoptive parents, and they offered security. They said to adoptive parents, "Look, if you come to my agency, I'll guarantee you that these adoptive – these birth parents won't bother you. They couldn't of course, enforce that, but this is what they said.

TAB 23, pages 301 -306 of Leave Memo; Tab A of Reconsideration Motion

7. At para. 93 of the decision Frank J finds and the Ontario court of Appeal and leave panel do not overrule it:

Dr. Carp echoes the view that confidentiality is a legitimate interest of all members of the adoption triad.

The Applicant submits that the Carps' contention of this legitimate interest is countered by his own previous testimony. Moreover, the Applicant submits in the alternative and in

support of her submissions, that Carp's contention is confidentiality not privacy as between the birth parents and the children they gave birth to. The Applicant, at paras.14 (vi) of the leave application, discusses the shifting meaning attributed to the word "confidentiality" in the adoption regime. If we assume Carp's meaning is privacy - Carp's contention shows the power of myth. If, we assume alternatively, his meaning is confidentiality than it is not to be taken as privacy as between the children born and their biological parents and there is no conflict between his historical accounts of the need for closed courts in the adoption process. He does however, despite this, contradict his own beliefs that there needs to be a balance between the right to know and the right to privacy. Samuel's picks up on this in FN 196, at page 42 of her article.

Samuels article, Tab 26, Memorandum for Leave

8. Further support for the Applicant's position that there was no privacy guaranteed as between the child and his or her biological origins is found in the testimony of Margaret O'Reilly of the CCAS. In her transcript at pages 34:25 to 35:4 of the transcript: [233 compendium] the following evidence is offered:

Question: Are any guarantees given, anything put in writing?

Answer: Nothing in writing. I wouldn't think we would put it - I haven't - I have no recollection of putting something like that in writing.

Attached as Tab a of Statement of Argument for Reconsideration of Application for Leave

9. The Applicant submits that there were no promises made because there was no legislation supporting any promises that may have been made. If promises were made that could not be enforced and birth mothers relied on them, they were relying on false promises. The Applicant submits that neither promises nor false promises are enforceable by law and should not be elevated to a right to privacy nor an expectation of procreative anonymity.

10. Further evidence that there were no promises made is found in the both the Affidavit and transcripts of Dr. Karen March. First in her Affidavit at para. 17 Dr. March states:

Although I signed adoption consent forms, I did not receive any legal documents or written information on my birth daughter's adoption at the time that she was placed. I cannot remember so cannot attest to whether I was promised

confidentiality. When I first met my daughter's mother, however, she told me that she had driven by my parents' house several times over the years wondering about me. My maiden name is on her adoption order and because my father was the only person in the region with this surname, she was able to identify me.

The Applicant submits that although Dr. March can't remember if she was promised confidentiality (*cf.* promises again are not enforceable by law) but, moreover, the fact that her name appeared on her daughter's adoption certificate is counter indicative of the any expectation of privacy.

March Affidavit, Notice of Motion to a Judge to Adduce New Evidence [1]

11. In cross-examination, Dr. March states the following at pages 54:21 – 55:6:

And one of the really interesting things was – is, you now, Stoneman and all their studies say as biological mothers who had had their children in the 60s, and the late 50s, they all expected their children to come and find them. And I did. I didn't know how she going to do it, but I expected her to come find me. It just was part of --- I just figured that one day she would come and find me. So when I started doing my research, someone said to me," Well, she can't find you unless..." – because of the legal situation at the time – "... unless you actually register." So I registered.

March Cross-examination, included as evidence in Notice of Motion to a Judge to Adduce New Evidence (February 4th, 2008)

The Applicant submits that the expectation that Dr. March's and the other women referred to in the Stoneman study indicate that there was no expectation of privacy from their own children but of openness and reconnection. The Applicant submits that if a law existed that would provide the "right to privacy" that it would apply to all or apply to no one. The fact of the birth mother's name being on the Adoption Certificate is an example of how the "right to privacy" did not apply to some. It either applies to all or applies to none.

12. Finally, in terms of the power of myth, Samuels notes that it can easily permeate the court and in a very short time. At page 22, she cites the case of a Louisiana Court accepting that there was a right to anonymity even though the records were closed only 2 years earlier and the adoptee seeking the information was an adult.

Samuels, *supra*, Tab 26, Memorandum for Leave

B) EMOTIONAL IMPACTS ON LEGAL REASONING – APPEARANCE OF JUDICIAL BIAS

13. The Applicant submits that the power of myth in combination with a decision makers own interest in a case that holds so much emotional power can lead to judicial bias. The emotional issues involve loss: infertility of the adopting parent(s), relinquishment of a child because of lack of real choice, and the adopted person's loss of their roots and place in the river of life. It also means rethinking the conditions under which a birth mother gave up her child so that the adoptive parents could adopt; the consequences of not having access to critical understanding of the losses of an adoptive child on adoption; and, being lead to believe that adoption agencies practice of presenting adoption as a win/win situation with little attention paid to the losses and trauma adoption entails for adopted persons. Birth parents know where they come from as do adoptive parents; it is only the adoptee who is denied the right to their ancestry.

14. In *Cheskes, supra*, COAR, a coalition for birth parents and adoptees were interveners. The adopted people in *Cheskes, supra*, did not want their records released to their birth parents but wanted control of those records themselves. Paradoxically, in winning their right to not have birth mothers access the adopted peoples' records, adopted people themselves, lost access to their own records. The problem of false promises and the claim that there are reasonable expectations are ones that have been created after the fact of the relinquishment of the child, and possible adoption. The Applicant respectfully reminds This Honourable Court, that the sealing of the records is totally in the control of possible future third parties [the adoptive parents] after the fact of the relinquishment. Quite simply, and in other words, if a child is relinquished but not adopted they will have the names of their birth parents in their records of birth, leaving the interest in sealing the records to the adoptive parents. Hence, those that have the power and the interest in maintaining "secrecy" may have the power to turn a myth into a legal reality and create a "right to privacy".

15. As to the issue of judicial bias the Applicant relies on *Wewakum Indian Band v. Canada* at tab 41, where in the concluding paragraph, Mr. Justice Deschamps cites Lord Goff in *R. v. Gough*, [1993] A.C. 646 at 661 states:

there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. . . . These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. . . . In such a case, . . . not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

16. The Applicant submits that unless a non-adoptive mother or father, or a non-relinquishing birth parent addresses the issues in this case, a reasonable person can conclude that the decision maker can, because of the deep subconscious emotional issues, be lead to believe in myths and fail to actually examine the legislation and the purpose of the legislation – the best interests of the child.

17. The Applicant submits that it is an indignity for adopted people to have to ask another human being for that which the other human being takes for granted. The Applicant submits wisdom is about the entire human being and striving to understand and empathize with those whose experiences are beyond our own imaginations. The Applicant submits that this sense of wisdom underlies and encourages a purposive approach to section 15(1) litigation and towards the dignity and worth of all human beings. The Applicant submits that waiting from 1983 and 1999 only to be told over the telephone her mother, Alice, had died in 1973 that there is neither common sense nor compassion within the Adoption Disclosure Registry. The Applicant submits that the adopted people should not rely on the ADR to begin to do the “right thing” now, even less so when the Court has failed to address the insensitive manner in which the Applicant’s request was handled.²

(Please see: 1 of Applicant’s Memorandum for Leave re Mr. Justice Killean’s comments regarding the “magic door” and the dysfunctional nature of the ADR.).

² For example, the Applicant’s records were treated as sealed from 1983 until May 31, 2005, when the respondent released the records, arguing at the application hearing, that the Applicant had no standing to challenge the legislation because of this.

18. Finally, the Applicant submits as a matter of logic, that the Application Judge's focus on the Applicant's issue of standing is illuminating as to whether there can be a reasonable expectation of privacy. The Application Judge finds that Applicant has no standing because her records along with almost 40% of the records are not sealed. This is plainly counter indicative that there could be any expectation of privacy. This finding that the Applicant has not been affected by any legislation, with all due respect, can mean only that records are not aromatically "sealed" but occurs only if a third party, at a later time, chooses to re-register the statement of live birth. Otherwise the information is available to the adopted person. The Applicant submits is would be available to an adopted person even if the adoptive parents did make this choice by simply photocopying the identifying information and keeping it around for the adopted person's benefit at a later time.

Records of the Hearing Committee, September 15, 2005, pages 5 - 7, attached as Tab A to this Statement of Argument

STATUTORY INTERPRETATION: ANODYNE TO MYTH

19. The Applicant submits that the reading of section 28 of the VSA is clear about any expectation of privacy³. First, and reflected of Mr. Green's letter, the wording of section 28(2) is clear: the sealing of the original birth registration containing the true biological identity of the adoptive person is triggered only upon request of the adoptive parents. The language of these subsections is conditional - not mandatory. Since 1927, the language in the VSA has been the same – conditional not mandatory - which explains why the Applicant and at least 40% of adopted people have access to this information and a lot of other information.

Please see: VSA, Tab 13 of the Applicant's Memorandum for Leave.

³ The Applicant submits it is not incidental that the Respondent repealed section 28(2) of the VSA shortly after the issue of the Constitutionality of the province unilaterally exempting one class of people, adoptive parents from the operation of the Criminal Code's section 377 and 378 whereby 'it is a criminal offence to knowingly put false information on, inter alia, a statement of live birth', and thereby denying adopted people equal protection and benefit of the *Criminal Code*. This is distinct from s.143 of the *Criminal Code* itself where the Federal government itself creates the exemption. The Applicant notes, as an aside, that the *Federal Assisted Reproduction Act*, is woefully lacking in its concerns for the person most affected by that legislation – the person being created.

20. The Applicant submits further, that sub-section 28(5) of the VSA is also counter-indicative of adopted people not having access to their original statements of live birth.

Subsection 28(5) states:

The holder of a birth certificate in respect of a registration of a birth that has been withdrawn pursuant to subsection (2) or a certified copy of such a registration shall, forthwith upon demand by the Registrar General, deliver it to the Registrar General for cancellation.

The Applicant submits that subsection 28(5) also begs the question of enforceability and again challenges the myth-makers claims that there was any expectation of privacy. Specifically, unless the adoptive parents voluntarily contact the Registrar, the Registrar and, subsequently the Court, will not know of the existence of these documents.

CONCLUSIONS RE THE MYTH OF A RIGHT TO PRIVACY OF BIRTH PARENTS

21. The Applicant submits, that the language of the statute in combination with the submissions paragraphs 5 – 12, that those with an interest in creating to and prescribing to this myth were the adoption agencies who in their own interests misled adoptive parents as to the best interest of the child – a person who would grow up with the same needs as all human beings – to know who they are and know the truth of their existence. The Applicant submits that under the Statement of Principles of this Honourable Court that a section 15(1) analysis be made of the impugned legislation according to the rule of law including a proper section 1 analysis; that there clearly is discrimination against adopted people; and, that the Respondent has failed to justify it. The Applicant submits that the Court should defer to policy decisions, however, it is not the role of the Court to create policy decisions where there have been none, especially when the purpose and objective of the impugned legislation is the best interest of the adopted person, and only evidence that the drafters of the original legislation put to their minds regarding confidentiality was the confidentiality of the process. As to deliberately depriving people of their genetic and ancestral history, they are clear: “it would be undesirable and wholly objectionable in a legalized system of adoption” (*cf.* Tomlin Report, *supra*, at para. 3).

SECTION 1 ANALYSIS – BRIEFLY

22. Where an infringement of the *Charter* has been proven by the claimant, the burden shifts to the government to justify that infringement under section 1 of the

Charter on a balance of probabilities. First, the limits must be “prescribed by law”. If that hurdle is met, the further requirements of this defense are:

- a. the legislative objectives giving rise to the limitation must be a pressing and substantial concern of sufficient importance to warrant overriding a constitutional right;
- b. the means chosen to attain those objectives must be proportional or appropriate to the ends in three respects:
 - i. the limiting measures must be rationally connected to the objective;
 - ii. they must impair the right as little as possible; and,
 - iii. the benefits which accrue from the limitation must be proportional to its deleterious effects.

R. v. Oakes, [1986] 1 S.C.R. 103 at pages 135 and 138 to 139

23. The Applicant submits that under Part “a”, the creation of genetic orphans in the interests of protecting people from their own actions in the pasts – is not a pressing objective. Moreover, it creates a positive liberty right in procreative anonymity that no other procreative actors have, while depriving generations of people of their genetic and ancestral history.

24. Under Part “B” there are 3 respects in which the means must be appropriate to the ends.

25. Under Part “b (1)”, the objective can be summed up in one word – shame. The Respondent has not shown a rational connection supporting the need for this discrimination now or since the Garber Report recommending open records was released in 1985. Illegitimacy, bastardry, and the moral ineptitude of unwed motherhood, are discriminatory social constructs which should no longer be supported. Moreover, any law based on the belief that it is necessary to protect people from adopted people is an unjustified concern and perpetuates the negative stereotypes about adopted people.

Garber Report, page 23, attached as Tab B.

26. To be a minimal impairment the impugned legislation must impair the right as little as possible. In *Libman*, at para. 62, the Court finds: Laws will fail the minimal impairment component of the section 1 test if there are measures “clearly superior to the measures currently in use”. These measures are already in use in, *inter alia*, England, Scotland, and Tennessee, and a number of other jurisdictions without s.15 equality

rights⁴, that allow adopted people unconditional access to their original unaltered records of birth.

Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569

Are the limits proportional to its deleterious effects?

27. While the first 3 stages relate to reasonableness, the fourth examines the nature of the infringement and asks whether its costs outweigh its benefits. The implication of finding a violation at the fourth stage is that even a minimum impairment is too much – the costs outweigh the benefits so much that no solace is found in the fact that the legislation violates the *Charter* as little as reasonably possible. Moreover, if the costs are significant enough and the legislation only partly achieves its objectives, greater evidence of its benefits may be necessary. The Applicant is not asking This Honourable Court to require the Respondent to spend money, but, the opposite: to eliminate a costly, invasive and dysfunctional system – the ADR.

The Remedy that will be requested upon leave being granted:

28. The Applicant requests under section 52(1) of the Constitution, that this Honourable Court issue a declaration stating that any law, regulation or practice of the Government of Ontario, a society or a licensee that deliberately deprives a person of their true biographical information and the circumstances of their adoption is unconstitutional and of no force and effect and where this information has been denied it shall be provided upon request forthwith.

29. The Applicant respectfully submits that this appeal be reconsidered and leave be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2008.

D. Marie Marchand
Applicant acting in person

⁴ The Applicant submits that the more a person is told they aren't allowed to know something secret about themselves the more driven they are to find out.