

Thoughts on identity in legal developments: a right of the child's perspective

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Reference re: Assisted Human Reproduction Act
Implications of the Supreme Court's Decision
University of Toronto

Content of this presentation

- Brief overview of the law
- Notion of identity, including the right to know one's biological origins
- Human rights perspective: Looking beyond the *Canadian Charter*
 - European Court of Human Rights case law
 - Child's rights: UN Convention on the Rights of the Child explicit recognition of the right to Identity
- Provincial legislative action is needed in this area. Importance of taking Identity into account

Overview of the law

- Provinces and territories apply the rule of confidentiality in assisted reproduction. One example: Section 542 C.c.Q. states that : « Personal information relating to medically assisted procreation is confidential ».
- The sections of the federal *AHRA* regarding information were to the same effect (and have been struck down)
- Result of the SCC December 2010 decision: the provinces/territories have responsibility to legislate in this matter.
- *Pratten v. British Columbia (Attorney General)*, 2011 BCSC 656 (Madam Justice Adair, May, 19, 2011. Now before the B.-C. Court of Appeal.)

Pratten v. British Columbia (A. G.), 2011 BCSC 656 (19 May 2011)

- Facts:

Olivia Pratten was conceived with sperm from an anonymous sperm donor in 1981. She seeks information about her donor.

Doctor said he is not obligated to keep records for a patient for more than six years after the last entry recorded.

She claims that the Province allowed the destruction of the files, depriving her of basic personal information necessary for her physical and psychological health.

She demands that, as in Adoption, information about the biological origins and family history be preserved.

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

- Arguments:
- Pratten alleged discrimination (Section 15 Charter) between adoptees and donor offsprings.
- She also claimed under s.7 of the Charter that the liberty and security rights of donor offspring were violated by the Province's failure to enact legislation to protect fundamental aspects of their personal autonomy and health, also claiming a right to the identity of the donor.

Pratten v. British Columbia (A. G.), 2011 BCSC 656 (19 May 2011)

- Grounds for decision:

The Claim under s. 15 of the Charter was granted.

The claim under s.7 was dismissed.

Identity

- Identity is composed of two distinct parts:
 - “dynamic” (intellectual, moral, cultural, religious, political, professional, etc.)
 - “static” (image, physical features, name, birth information, sex, parenthood, **genetic heritage**, nationality, etc.)

It is what makes every human being an individualised person.

- Important to make a distinction between filiation (who is the legal parent of the child ?) and origins (who is the progenitor of the child ?)

Human Rights Perspective

The right to identity is related to several other rights (e.g.: the rights to equality, privacy, to health, to physical integrity, honour, name, etc.) and principles (such as dignity, the free development of the personality, etc.).

Human Rights Perspective: Looking beyond section 15, *Canadian Charter*

- The European Court of Human Rights case law
 - *European Convention of Human Rights*, section 8: Implicit recognition of the right to Identity through the right to privacy

ECHR, Section 8

- “1. Everyone has the right to respect for his private and family life ...
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

S. 8 On privacy and family life: ECHR interpretation

- Several decisions of the ECHR have recognised the right to identity: namely in *Odièvre c. France*, [GC] n° 42326/98, CEDH 2003-III
- “The applicant complained that she had been unable to obtain details identifying her natural family, contrary to Article 8 (right to respect for private and family life) of the European Convention on Human Rights. She said that her inability to do so was highly damaging to her as it deprived her of the chance of reconstituting her life history.”

Odièvre

- « The Court reiterates [...] that “Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. ... The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life” [...] », para. 29

Odièvre

- “Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents[...]”
- “Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. [...]” para. 29

UN Convention on the Rights of the Child

- The *CRC* stresses the transcendental value of identity throughout the text (in Articles 2.1, 14, 29, 30, etc.), but the articles in which the right to identity has particular recognition are paragraphs 1 of Articles 7 and 8.

UN Convention on the Rights of the Child

- Article 7.1: “[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, **as far as possible, the right to know and be cared for by his or her parents**”.
- Article 8.1: “**States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference**”

UN Convention on the Rights of the Child

- Canadian legislation should be consistent with the values, principles and rights of the *CRC and thus* with respect to the fundamental right to identity.
- Several Reports have ask for change:
 - The Committee on the Right of the Child (UN) (2003)
 - The Canadian Senate Committee on Human Rights
 - Etc.

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Implementation of the CRC Report

Nov. 1, 2011, p.48

- **Right to Access Information about Birth and Biological Parents**
- « The right of adopted children to know their biological parents, addressed in article 7 of the Convention, is implemented unevenly from one province to the next. Little progress has been made on the UN Committee recommendation to amend legislation to ensure birth information is made available to adoptees, made in the Concluding Observations from Canada's second review.
- In May 2011, the Supreme Court of British Columbia ruled that children born through artificial reproduction have the right to access information about the donors involved in their origins. The court ruled that the 5% of the population who are donor offspring and adopted persons have the same right to information about their biological identity as the 95% of the population who know their birth parents. »

CCRCC

Implementation of the CRC Report

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- One of the recommendations:
 - « Pass a law to ensure that all adults who were adopted and adults who were born through assisted reproduction can obtain appropriate information about their biological parents. »

Conclusion

- Legislative action is needed at the provincial level
- Right of the Child (and now adult) to identity should be explicitly recognised.

Merci de votre attention!

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