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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
JOY CHESKES, DENBIGH PATTON, C.M. AND D.S.	)	*Clayton C. Ruby, Caroline Wawzonek* and *Stacy Stevens* for the Applicants
Applicants	)	
- and -	)	
THE ATTORNEY GENERAL OF ONTARIO	)	*Janet E. Minor* and *S. Zachary Green* for the Respondent
Respondent	)	
- and -	)	
COALITION FOR OPEN ADOPTION RECORDS	)	*Ivan G. Whitehall Q.C., Judith Parisien* and *Adam Goodman* for the Intervener
Intervener	)	
	)	**HEARD:** June 25 and 26, 2007

BELOBABA J.

REASONS FOR JUDGMENT

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I. Introduction

[1] The applicants challenge the constitutional validity of the recent change in Ontario law that will retroactively open confidential adoption records and allow access to identifying information without the consent of the person being identified.

[2] Under the old law, adoption information could only be disclosed to adoptees or birth parents, health or safety reasons aside, with the consent of both parties. Under the new law, which is set out in a new sub-part that has been added to the *Vital Statistics Act*[1] ("the VSA"), personal identifying information will now be disclosed without the consent and even contrary to the wishes of the affected adoptee or birth parent.

[3] The applicants are three adult adoptees and a birth parent. They are in their 40s and 50s. They have lived their lives to date on the assumption that their birth and adoption records would remain confidential and would not be "retroactively"[2] opened, revealing their personal identifying information without their permission.

[4] The applicants challenge the validity of ss. 48.1, 48.2 and 48.11 of the recently-amended VSA, the key provisions that provide for the disclosure of the identifying information. The applicants submit that the impugned provisions violate s. 7 of the *Canadian Charter of*

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[1] R.S.O. 1990, c. V.4. The new law was fully proclaimed in force on September 17, 2007.

[2] Strictly speaking, as counsel for the intervener correctly pointed out, the new law is not retroactive but retrospective. Retroactive legislation is backward-looking and takes effect as of a date prior to the date of enactment. Retrospective legislation is forward-looking and attaches new consequences for the future (e.g. adoption records will now be opened) to events that took place before the new law was enacted (adoption records had been sealed). See the discussion in *Epiciers Unis Metro-Richelieu Inc., division "Econogros" v. Collin*, [2004] 3 S.C.R. 257 at para. 46. The new law is therefore retrospective. I will, however, continue to use the word "retroactive" in these reasons because this is the more common expression and is more easily understood. This is the word that was used in the Ontario Legislature when the new law was enacted. It is also the word that is used in the adoption literature and in public discussion. The gist of the applicants' concern is that even though the new law will not take effect in the past, it reaches back and "retroactively" opens up confidential records that for decades have been inaccessible and provides for the release of identifying information that until now required the consent of the party being identified.

Rights and Freedoms[3] ("the *Charter*") in a manner not justified by s. 1 and are therefore of no force or effect.

[5] The issues raised in this lawsuit can be stated broadly as follows. Is it a breach of the *Charter* for the government to retroactively disclose confidential birth and adoption information to a searching birth parent or adoptee without the other's consent? Is there a *Charter*-protected right to privacy in the disclosure of this personal information? Has this right been denied to the applicants? Is the government's denial of this right a reasonable limit that can be justified in a free and democratic society?

[6] For ease of reference, I will refer to the recent amendments to the VSA as "the new law," to the three sections that are being challenged herein as "the impugned provisions" and to the previous legislative regime as "the old law."

II. The legislation

(1) The old law

[7] **Adoption orders.** The history of adoption legislation in Ontario was summarized by this court in *Marchand v. Ontario.*[4] In 1921, Ontario enacted the first *Adoption Act.*[5] The Act gave judges the power to make adoption orders, which extinguished the birth parents' rights respecting the child and made the child, for all intents and purposes, the child of the adopting parent. Judges had discretion to give the adopted child the surname of the adoptive parent in the adoption order. The 1921 *Adoption Act* provided that adoption applications would be heard in

[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[4] (2006), 81 O.R. (3d) 172 (Sup. Ct. Jus.) at paras. 6-16.
[5] S.O. 1921, c. 55.

chambers, but did not otherwise impose secrecy over adoption or records. A copy of every adoption order was to be forwarded to the Registrar General to be recorded. [6]

[8] Six years later, adoption records were made confidential. Section 9(3) of the 1927 *Adoption Act* [7] provided that papers used for an adoption application "shall be sealed up and shall not be open for inspection save upon the direction of a Judge or the Provincial Office." The 1927 Act also required the Registrar General to establish a register of adoption orders and to mark the birth registrations of adopted children with the word "adopted." In 1954, the *Adoption Act* was repealed and adoption became regulated under the *Child Welfare Act*,[8] the precursor to the *Child and Family Services Act*.[9]

[9] *The Child Welfare Act* was amended in 1978 to establish the "voluntary disclosure registry."[10] If both the adult adoptee and his or her birth parent registered, and both parties as well as the adoptive parents consented, then identifying information would be disclosed and a reunion could take place. The registry accepted voluntary registration but did not actively search for unregistered individuals.[11]

[10] In 1985, the Ontario Minister of Community and Social Services appointed a special commissioner, Dr. Ralph Garber, to make recommendations regarding the disclosure of adoption information.[12] The provisions of the *Child Welfare Act* were amended to incorporate most of the recommendations in the Garber Report. Notably, the legislature did not accept a

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[6] *Marchand, supra* note 4 at para. 6.
[7] S.O. 1927, c. 53.
[8] S.O. 1954, c. 8.
[9] R.S.O. 1990, c. C. 11 ["CFSA."]
[10] S.O. 1978, c. 85, ss. 80-81
[11] *Marchand, supra* note 4 at para. 9.

recommendation that adult adoptees be provided with identifying information about their birth parents without the birth parents' consent. The reason given by the Minister for this decision was the protection of the birth parent's confidentiality and privacy.[13]

[11] The post-Garber amendments to the disclosure provisions of the *Child Welfare Act* established the "adoption disclosure register."[14] The disclosure register became an active search system whereby adopted persons and certain categories of birth relatives could be located even if they had not registered in the passive registry. The identifying information of located persons could be exchanged only if both parties agreed. The Registrar had discretion to permit disclosure of identifying information without this consent when the disclosure was required for the health, safety or welfare of any individual.[15] Policy guidelines, under which the Registrar's discretion was exercised, stated that this section was "intended primarily for 'true emergency' situations, and not to circumvent the normal disclosure process and consent requirement where time is not of the essence".[16]

[12] The form of the adoption order has changed somewhat over time. During the time period that affects the applicants, an adoption order contained the pre-adoption surname of the adopted child (typically the birth mother's surname), the names of the adoptive parents and the adopted child's post-adoption surname.[17] The adoption order thus contains information that

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[12] Dr. Ralph Garber, Dean of the Faculty of Social Work at the University of Toronto, delivered his report *Disclosure of Adoption Information* to the Minister of Community and Social Services in November 1985 ["the Garber Report"].

[13] *Marchand, supra* note 4 at para. 10.
[14] CFSA, supra note 9, ss. 162-174.
[15] *Ibid*, s. 168.
[16] Ministry of Community and Social Services, *Policy and Guidelines for the Disclosure of Adoption Information* (February 1988).
[17] *Child Welfare Act*, S.O. 1954, c. 8, s. 71 (as amended by S.O. 1958, c. 11); *An Act to revise the Child Welfare Act*, S.O. 1978, c. 85, s. 80(2); *Child and Family Services Act*, R.S.O. 1990, c. 11, s. 162(3); see also s. 165(2)(g).

would help a searching adoptee find his or her birth mother and help a birth parent find his or her biological child.

[13] **Birth registrations.** Parents in Ontario have been under a legal obligation since 1868 to register the births of their children with provincial authorities.[18] During the time period that affects the applicants, a registration of birth has contained the following information: the child's name, the date and place of birth, and the birth mother's particulars (her name, age, marital status, and residence at date of child's birth). If the mother was married, the registration of birth also contained the husband's particulars. If the mother was unmarried, the birth father's particulars were not recorded unless the father had acknowledged paternity.[19]

[14] In 1958, the VSA was amended to allow the adoptive parents to apply for a substituted birth registration as if the adopted child had been born to the adoptive parents.[20] When a substituted registration of birth was created, the original registration was withdrawn from the registration files and sealed.[21]

[15] As a result of the 1958 amendments, about sixty per cent of adopted persons in Ontario have two registrations of birth: a sealed original birth registration containing the information noted above and a substituted birth registration containing the post-adoption name and the particulars of the adoptive parents.[22]

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[18] *An Act to provide for the Registration of Births, Marriages and Deaths*, S.O. 32 Victoria, 1868. The Supreme Court of Canada has held that the accurate and prompt recording of births is a pressing and substantial legislative objective: *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835 at para. 33.
[19] *Vital Statistics Act*, S.O. 1948, c. 97, s. 6; O. Reg. 217/48, Form 2; *Vital Statistics Act*, R.S.O. 1980, c. 524, s. 6; R.R.O. 1980, Reg. 942, Form 2.
[20] *Child and Family Services Statute Law Amendment Act, 2006*, S.O. 2006, c. 5, s. 53.
[21] *An Act to amend the Vital Statistics Act*, S.O. 1958, c. 122; O. Reg. 7/59, ss. 1-2; R.R.O. 1980, Reg. 942, s. 14 and Form 6; VSA s. 28(2).
[22] *Marchand*, *supra* note 4 at para. 26.

[16] In sum, adoption records in Ontario have been confidential since 1927. A searching adoptee was not entitled to a copy of his or her adoption order or original birth registration in order to learn the name of the birth mother and possibly the birth father. A searching birth parent was not entitled to a copy of the adoption order in order to learn the adopted name of his or her biological child. The adoption records system in Ontario, subject to the health and safety exceptions noted above, was a closed system that permitted disclosure (absent true emergencies) only in cases of mutual consent.

[17] The "old" system has been upheld by Ontario courts as striking a reasonable balance among the different and often competing interests of the members of the adoption triad - birth parents, adoptees and adoptive parents.[23]

(2) The new law

[18] In November 2005, the Ontario Legislature enacted the *Adoption Information Disclosure Act* ("AIDA").[24] The AIDA, in essence, replaced the closed records system with a more open system by adding a new sub-part to the VSA titled "Disclosure re Adopted Persons" at ss. 48.1 to 48.12. The full text of the provisions that are being challenged on this application, ss. 48.1, 48.2 and 48.11, is set out in an appendix attached to these Reasons.

[19] Section 48.1(1) of the amended VSA provides that an adopted person may apply to the Registrar General for a copy of his or her birth registration or adoption order. Section 48.2(1) provides that a birth parent may apply for copies of the adopted person's birth registration, substituted birth registration and adoption order. Section 48.11 authorizes the

[23] *Ibid.* at para 105.
[24] S.O. 2005, c.25.

Registrar General to "unseal" any file that has been sealed to date for the purposes of any requests made pursuant to the above-noted sections.

[20] An adopted person who is 18 years old or older will now be able to obtain copies of his or her adoption order and original birth registration. With this information, the adult adoptee will be able to identify his or her birth mother, and possibly birth father.

[21] A birth parent will be able to obtain the information contained in the birth registration and the adoption order if the adoptee has reached 19 years of age. The adoption order will provide identifying information about the adoptee, specifically his or her adopted name.[25] With this information, the birth parent may be able to locate his or her biological child.

[22] The new law also provides that birth parents and adult adoptees who do not wish to be contacted can file a "no contact" notice with the Registrar General. If a "no contact" notice has been filed, the searching birth parent or adoptee must agree in writing not to contact the person who registered the "no contact" notice before they can obtain a copy of the birth registration or adoption order. Anyone who violates a "no contact" notice may be subject to criminal prosecution and fined up to $50,000.[26]

[23] For persons who do not wish to have their identifying information disclosed, ss. 48.5 and 48.7 of the VSA provide that birth parents and adult adoptees can apply to the Child and Family Services Review Board ("the Board") for a "non-disclosure order." Sections 48.5(7) and 48.7(3) of the VSA requires the Board to grant a non-disclosure order if it is satisfied that

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[25] Any information about the adoptive parents would be removed: s. 48.2(1).
[26] VSA ss. 48.4 and 56.1.

"because of exceptional circumstances the order is appropriate to prevent sexual harm or significant physical or emotional harm to [the adopted person or birth parent]."

[24] In sum, the new law opens past and future adoption records to searching adult adoptees and birth parents. Mutual consent is no longer required before the identifying information can be released. There are two safeguards in the new law to protect those who do not want their identifying information disclosed - first, the "no contact" notice, and second, the right to apply to a government Board for a non-disclosure order that will be issued if certain pre-conditions are satisfied.

(3) Section 7 of the *Charter*

[25] Section 7 of the *Charter* provides 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.

[26] The analysis under s. 7 involves a two-step process: the applicants must show first, that there has been a deprivation of their right to life, liberty or security of the person, and second, that this deprivation was not in accordance with the principles of fundamental justice.[27] If a breach of s. 7 has been established by the applicants, the burden then shifts to the government respondent to show, under s. 1, that the breach of s. 7 is nonetheless a reasonable limit on the s. 7 right and can be demonstrably justified in a free and democratic society.[28]

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[27] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9 at para. 12; *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 47.

[28] Section 1 of the *Charter* provides that the rights and freedoms set out in the *Charter* are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

III. The parties' positions

(1) The applicants' position

[27] The applicants do not oppose the new law on a going-forward basis. They do not argue that the registrations and records of future adoptions must be sealed. Rather they object to the retroactive application of the legislation – that the new law now allows searching birth parents and adoptees to access identifying information that up to now has been sealed or otherwise inaccessible.

[28] The applicants submit that this is not a case where both sides in the dispute have *Charter*-protected rights. The opening of confidential adoption records on a retroactive basis and the removal of the consent requirement violates the applicants' right to privacy under s. 7 of the *Charter* in a manner that cannot be justified under s. 1. On the other hand, the right of searching adoptees or birth parents to gain access to confidential adoption information, although important and heart-felt, is not a *Charter*-protected right. Neither the no-contact veto nor the ability to apply to the Board for a non-disclosure order, say the applicants, can save the impugned provisions. In order for the new law to be constitutional, Ontario should do as the other Canadian provinces have done – either keep the mutual consent system in place or, if adoption records are to be opened retroactively, provide a disclosure veto to adoptees and birth parents who do not want to have their identifying information disclosed.

[29] Personal privacy is a matter of great importance for each of the applicants. For the purposes of this litigation, each of them took steps to safeguard their privacy. Two of the applicants obtained court orders allowing them to use their initials in the notice of application.

All of them were careful to exclude information from the public record that could identify them, such as birthdates or places of birth. None of them want to be found by a birth parent or an adoptee unless it is with their consent.

[30] **Joy Cheskes,** the first named applicant, is a school teacher. She was adopted shortly after her birth through a private adoption agency in Ontario. She has four siblings, one of whom was also adopted. All five of the children grew up as part of a "close-knit" and "supportive" family. She describes her adoption experience as "wholly positive" for both herself and her family.

[31] Ms. Cheskes believes very strongly that the decision to disclose her identifying information to her birth parents is hers alone to make:

> My identity and location and the genetic relationship with my biological parents are intimate and personal matters of fundamental personal importance... [this] is my personal information that I should have control over, so I can decide if and when. Because, personally, I can't see anything more fundamental than deciding for myself rather than having someone else decide for me."

[32] Ms. Cheskes is aware that she had the right to register her name on the adoption registry, which would have allowed her personal identity to be disclosed to her birth mother. She has given "great consideration to my emotional and psychological needs as well as the needs of my family" and decided against it:

> Registering to allow my identifying information to be disclosed to a birth-parent would have an enormous impact on the people closest to me in my life including my parents, my siblings and my daughter. By disclosing my identity, I am disclosing theirs, too. My family structure is very stable, strong and supportive and they have always encouraged me to make my own decision whether or not to seek or allow disclosure of personal information. I believed that I had made the choice that was right for me, that met my personal needs and that would be of the greatest benefit to my personal emotional well-being as well as that of my family.

[33] The prospect of having to apply to a government board for a non-disclosure order that will only be granted in very limited circumstances is upsetting:

> My reasons for not wishing to seek out my birth family and wanting to keep my family information private are my own…I do not see why I should be forced to reveal this information or go through the stress and emotional turmoil of having to divulge these feelings to a board in the hope of then being allowed to keep my personal information private.

[34] **Denbigh Patton,** the second named applicant, is a computer consultant. He was adopted shortly after birth and has enjoyed an "extremely supporting and happy life" with his adoptive family. Mr. Patton has considered whether or not to list his name on the adoption registry and allow his identifying information to be released to a birth parent:

> My present decision is that I do not want my personal information that is in my adoption file to be disclosed to my birth parents. I am not currently willing to risk trauma to my life as it is, to my family, to my loving aging parents, to my identity. This is a weighty decision that I have carried all my adult life and will continue to ponder. But it is for me to ponder and it is I who will suffer or benefit as a consequence of this decision.

[35] Mr. Patton is concerned about the impact the disclosure of his name would have, particularly on his adoptive parents. He is worried about his parents' reactions "late in life after raising me with such love and commitment, to the disclosure of my name to one of my birth parents." He finds no comfort from the option of filing a no-contact preference. The no-contact provision would not prevent the disclosure of his identity and with that identifying information, says Mr. Patton:

> It would not be hard to use the Internet or do some simple investigation and research in order to learn myriad details about my life and who I am… It causes me stress and anxiety that someone with a particular interest in my identity and who I am could then find my address and learn about my interests and associations. To me, that is much worse than a birth parent being able to "meet" me. The loss of control over that decision weighs heavily on my mind every day.

> I'm very concerned about dissemination and sharing. I am most concerned and centrally concerned about the disclosure of the information, period.

[36] Mr. Patton is also distressed by the procedure of having to go before a government board. He describes the notion that the privacy seeker should have to supply a justification to a government board to maintain his privacy as "grotesque."

[37] The imminent loss of control over the release of the identifying adoption information that has been collected by the government has caused Mr. Patton considerable stress and anxiety. He has sought medical treatment for symptoms that include tightness in the chest and irritable bowel syndrome. For Mr. Patton, "part of what is so stressful… is not knowing what will happen next or when."

[38] C.M. is a social worker. She was adopted shortly after her birth. She is happily married with four children. She sees herself as having "benefited from the adoption process" and believes that "being adopted is part of who I am." She recalls being asked years ago, "don't you want to find your real mother?" She replied that "my adoptive parents are my real parents" and she explains that "this short but dramatic interaction has remained with me ever since and my conviction remains the same. It is a fundamental part of how I define myself."

[39] C.M. has worked with families going through the adoption process and has counseled them to be aware of the changes in adoption policy favoring increased openness. Nevertheless, she "firmly believed that safeguards would continue to uphold a person's choice in the matter. The existence of safeguards were explained to birth parents and adopted parents as part of the adoption process."

[40] Fourteen years ago, C.M. first became aware of ads appearing in her local newspaper looking for a child who had been relinquished for adoption. The ads began appearing on her birthday with sufficient identifying information that C.M. knew that the ads were directed at her. She decided against making contact with her birth parent:

> When the first such ad appeared, I had lost my father only two years before. I did not want to have any correspondence or communication with the other party partly out of respect for my father and out of consideration for my mother. My mother told me to do what was best for me and I made a very well thought out decision. My main reasons for refusing contact was my satisfaction with my life, and the concern of introducing to my family a stranger for whom I had no emotional connection.

[41] C.M. responded to the ad with some general information about her life and a request that any further communication go through the registry. Over the next six years, the ads continued to appear. C.M. wrote again, explaining her desire not to have any contact or communication, and asking that the ads be stopped. Given the persistency of her searching birth parent, C.M. doubts that a no-contact preference would "have any meaningful effect."

> Given that my birth parent disregarded the personal request I made in my response to the first letter not to seek any further contact from me unless through the appropriate channels and that this person instead continued to pursue me publicly, I do not believe that a simple "no-contact" request will be of any use in protecting me, my children or my sibling and parents. The prospect of having my name made available to one of my birth parents, along with the actions of my birth parent to date in attempting to contact me causes me great anxiety and stress.

> The no contact is totally irrelevant to me, because no contact will not mean that they cannot watch me, they can't drive past my house. This person could get my name and give this to children that she has, to other friends, to relatives. It...does not provide me any comfort whatsoever - whatsoever, other than I could be stalked.

[42] C.M. is also concerned that the Board procedure set out in the new law would force her to reveal deeply personal information about herself "and plead for someone else's permission to keep my life private." She goes on as follows:

> I have no evidence as to what kind of people my birth parents are and I do not want to have to gather such evidence to persuade a government Ministry or Board that they should safeguard my privacy. I have no ill-will whatsoever towards my birth parents, but I do want to be left to make my own choice about disclosing my identity to them.

[43] Despite her fears about the disclosure of her identity as an adopted person, C.M. agreed to join as a party to this litigation. She described the reasons for taking this risk when cross-examined on her affidavit:

> I feel that I have no choice but to plead to the court. I'm hoping that by pleading to the court that this entire process can then be avoided for myself and for anybody else who does not want to go in front of a review board and have to plead for our privacy.
>
> We are not an organized group. There is nobody to speak for us. I've gone through a process where I was searched for so many years, and I know the feelings that I went through when I was being searched. It felt like I was being hunted. And if I can help another person not have to go through those feeling, I feel - - I do feel a responsibility.

[44] The fears and anxieties that C.M. previously experienced, when she first became aware of the ads being placed on her birthday, have begun to reappear. The emotional stress had eased over time when she realized with each advertisement that the birth parent had not uncovered her identity: "Each passing year made me feel more confident that they would not be able to find me." However, the new law, says C.M., has renewed these fears and anxieties.

[45] **D.S.**, the fourth applicant, is a business development director for a research firm. He has two daughters from his first marriage and has been married for over 27 years to his second wife. In the early 1970s, when he was 20, he had a brief sexual relationship with a young

woman. Approximately nine months later, D.S. was telephoned by a government official who told him that he was the father of an unborn child and asked him how he intended to deal with the situation. D.S. denied paternity. He was then advised by the government official that he had nothing to worry about and would not be identified as a father since he had denied paternity. "They made it very, very clear to me... that this would not go any further... they assured me at the time that was the last I would ever hear of it."

[46] Several years later, D.S. learned from a third party that the young woman's baby had been adopted. He heard nothing further for more than twenty years. Sometime in 2001 or 2002, D.S. received a letter from an Ontario government ministry informing him that records indicate he is a birth father and asking whether he would consent to contact with the adopted person. D.S. believes it was "sheer luck" that he received the letter instead of his wife who does not know about the adoption. The unexpected letter has left D.S. "fearful of the effect that an unexpected revelation would have on my relationships, especially with my wife."

[47] After receiving the letter, D.S. became more vigilant but "took great comfort from knowing that the records were inherently private and would require my consent before any identifying information would be revealed." D.S. says that the assumption on which he has built his life has been "destroyed" by the new disclosure regime. D.S. believes that to tell his wife only now about the adoption would "sever" their emotional connection. After 27 years of marriage, says D.S., "I love her too much to put her through this or to threaten the life we have together."

[48] The availability of the no-contact feature provides no comfort. D.S. feels compelled to protect his identifying information, rather than live with the frightening possibility

of his family being torn apart by a breach. Even if data shows that a breach of the no-contact agreement is rare, says D.S., that is small comfort to anyone whose relationships would be shattered by such a breach.

[49] For D.S., the Board review procedure is likewise useless and upsetting. D.S. does not feel that appearing before a Board to justify his desire to maintain confidentiality over his personal identifying information offers him any protection over his privacy or reduces his emotional turmoil:

> I cannot risk having any phone calls or communications sent to my home. Nor do I want to have to reveal my identity in order to protect it or share my deepest fears with strangers in the hope that they may allow me to keep my privacy. This exposure would render me even more powerless, humiliated and vulnerable. Such an experience would cause me enormous emotional and psychological stress and I am very worried of what effect that would have on me and on the maintenance of my family relationships.

[50] D.S. states that he made a choice many years ago about how he would deal with the fact of the adoption and order his family life. "These choices have been made," he concludes, "and I cannot alter them now at the expense of my family."

[51] The four applicants speak with one voice. Their position is straightforward. They say that their right to liberty and security of the person as guaranteed by s. 7 of the *Charter* is infringed by the impugned provisions because their personal identifying information will now be disclosed against their consent and contrary to their desires for personal and family privacy. They say these infringements are in violation of their right to privacy which in these circumstances, they argue, is a denial of a principle of fundamental justice.

[52] The no-contact option, they say, is meaningless because the concern is not about contact but about the disclosure of identifying information. The requirement to go before a government board to justify one's right to privacy, only to be denied this right unless one can show "exceptional circumstances" relating to his or her personal safety, is harsh and humiliating. It is certainly not a reasonable procedure in a free and democratic society that values the individual's right to keep his or her personal information private. The violation of their *Charter*-protected right under s. 7, they say, cannot be justified under s. 1. The applicants ask that the impugned provisions be declared unconstitutional and of no force and effect.

(2) The respondent's position

[53] Ontario's position is also relatively straightforward. The Attorney General submits that any system for the disclosure of information relating to adoption must make difficult choices between the competing and often irreconcilable demands of those who seek access to information and those who seek protection of privacy. Among the members of the adoption triad -- adopted persons, adoptive parents, and birth parents -- there is a broad divergence of views on how the balance between these competing demands should be struck. Ontario's new adoption disclosure legislation, says the Attorney General, balances the legitimate needs of all parties by permitting the disclosure of adoption records within a framework that protects the privacy and well-being of the triad members. The approach in the new law is supported by expert opinion that favours openness in adoption records and by the positive experience of other jurisdictions that have opened their adoption records. Ontario says the new law is carefully balanced and does not infringe the applicants' right to liberty or security of the person under s. 7 of the *Charter*.

[54] Even if the applicants can establish this infringement, argues Ontario, they cannot show that this infringement is contrary to any accepted principle of fundamental justice. On the contrary, says the Attorney General, the new law is carefully tailored to protect the privacy of adopted adults and birth parents as much as is reasonably possible, while providing individuals with information that is of significant personal importance to their self-identity and self-esteem. Section 7 of the *Charter* has not been breached. And, even if it has, the breach can be justified under s. 1.

(3) The intervener's position

[55] The Coalition for Open Adoption Records ("COAR") represents "searching" adopted adults and birth parents that favour open adoption records and retroactive access. It does not speak for "non-searching" adoptees or birth parents, such as the applicants, who oppose the retroactive aspect of the new law.

[56] COAR believes that adopted adults and their birth parents have a right to know each other. COAR argues that when Ontario started to seal adoption records in 1927, social attitudes were very different from what they are today. It was considered shameful to have a baby outside of marriage. Sealing adoption records was considered necessary as a protection from the embarrassment of "bastardy." But the times have changed, says COAR. The new law reflects society's current view, which no longer deems illegitimacy or infertility to be shameful and which is based on the premise that adopted adults should have the same access to their medical and personal history that non-adopted people have.

[57] Counsel for COAR supports the submissions of the Attorney General and urges this court to find that s. 7 of the *Charter* has not been breached, and if breached, that the new law

is fully justifiable as a reasonable limit under s. 1. The new law, says COAR, reflects current norms and social beliefs and contains a carefully balanced scheme that protects the interests of birth parents, adopted adults and adoptive parents, and is therefore constitutional.

IV. Some additional background points

[58] The written submissions of the parties were extensive. I have reviewed a wide array of relevant evidence, including the filed affidavits and cross-examinations of the parties and their experts, the history of adoption legislation in Ontario, the legislative debates leading to the enactment of the new law, and the legislative approaches that have been taken in other jurisdictions.

[59] From this small mountain of paper, I have distilled a number of key points that I set out below as additional "background facts." Some of these "background facts" are self-evident. Others were disputed to some degree by one side or the other. I am, however, satisfied that the following points have been established on the evidence before me and provide a helpful foundation for the legal analysis that follows. There are ten such points.

[60] One, the movement for open adoption records is prompted in large part by the fact that social attitudes have changed. The Garber Report reviewed the assumptions underlying the need for secrecy in adoption information, including the stigma of illegitimacy, the shame of the birth mother, and the shame of infertility for the adoptive parents. The Report found that these assumptions, which prevailed in 1927 when adoption records were sealed, are no longer supported by modern practice or by the public's changing attitudes of morality. According to the

Garber Report, these changes in social attitudes "have combined to create increasing public pressure for more openness in adoption."[29]

[61] Two, the birth and adoption information that is at issue in this lawsuit is intensely private information and may well be, as the federal Privacy Commissioner has noted, "some of the most sensitive information in our society."[30] Societal attitudes may have changed over the years, but the birth and adoption records that are about to be opened were gathered during a time when the stigma of an unwanted or out of wedlock pregnancy or the shame of infertility was very real and secrecy was the norm. Even decades later, the release of sensitive birth or adoption information may still cause great harm. The fact that adoption information remains intensely private has been recognized in our courts.[31]

[62] Three, the protection of privacy is a fundamental value in modern democracies.[32] This is particularly so in Canada where the last several decades have seen the enactment of federal and provincial privacy laws, the appointment of privacy commissioners and the emergence of a national consensus that the protection of privacy is indeed a fundamental Canadian value.[33] The individual's ability to control the dissemination of personal information is an element of the right to privacy.[34] The Supreme Court has confirmed that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as

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[29] *Garber Report, supra* note 12 at pp. 234-241.
[30] Jennifer Stoddart, the Privacy Commissioner of Canada, in a letter to the Ontario Government on May 11, 2005: "The information at play is absolutely some of the most sensitive information in our society and it was gathered under the assurance of the utmost confidentiality. Reckless release of this information even 60 years after the event could certainly damage relations within families, and harm individuals."
[31] See e.g. *R. v. W. (D.D.)* (1997), 114 C.C.C. (3d) 506 (B.C.C.A.) per McEachern C.J.B.C. at para. 43: "I doubt if there could be any higher privacy right than that enjoyed by an adopted child at least until such time as she, having attained the age of majority, might decide to seek out her natural parents or one of them." Chief Justice McEachern's reasons on this point were adopted by the Supreme Court of Canada in *R. v. W. (D.D.)*, [1998] 2 S.C.R. 681.
[32] *Lavigne v. Canada (Commissioner of Official Languages)*, [2002] 2 S.C.R. 773 at para. 24.
[33] See the discussion, below, para. 114 *et seq.*

he sees fit.[35] In *Duarte,* La Forest J. stated that "privacy may be defined as the right of the individual to determine for himself when, how and to what extent he will release personal information about himself."[36]

[63] Four, the opening of government adoption records is not the only way that identifying information can be obtained, but it is the most efficient and most reliable route. Other methods are also available. Since 1958, for example, an adoptive parent has been entitled to obtain the original adoption order relating to his or her adopted child. There is no legal reason why the adoptive parent cannot share this information with his or her adopted child or with anyone else. Searchers can also register with Internet search sites and self-help search agencies. They can check city directories, court records, historical town documents, church baptismal and marriage records, gravestones, school year-books and newspaper files. Some searchers have interviewed neighbours, teachers, doctors, clergy and pharmacists who they believe may know the identity of the person being sought. Ads can be placed in newspapers. Accessing information from government adoption records, however, is the preferred and most efficient method. This no doubt explains, in large part, why COAR, Parent Finders and many other such groups continue to lobby for open adoption records legislation.

[64] Five, the demand for more openness in the disclosure of adoption information is based on experiences and arguments that are compelling and heart-felt. The adoption literature is replete with studies that show that many adopted adults and biological parents experience an extraordinary level of grief, anxiety, and stress because they lack personal and family information. The efforts of these "searching" adoptees and birth parents, and of organizations

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[34] *R. v. Mills,* [1999] 3 S.C.R. 668 at para. 80.
[35] *R. v. Dyment,* [1988] 2 S.C.R. 417 at para. 33.

lobbying on their behalf, are rooted in feelings and beliefs that are genuine and completely understandable. The primary motivating factor for each group, according to the literature, is the desire to reconcile personal uncertainties created by adoption. Whether an adopted adult lacks biological background information or a biological parent is denied details on a birth child's life circumstances, each party considers access to this knowledge as a way to reclaim hidden parts of his or herself. Simply put, both adoptees and birth parents interested in finding the other have compelling reasons for doing so.[37]

[65] Six, the feelings and the fears of the "non-searching" adoptees and birth parents who do not want to be found are no less legitimate and no less compelling. The impact on their lives and those of their families is just as significant. The difference here is that there are few, if any, clinical studies documenting this impact because the non-searching population prefers anonymity and is hence unorganized. Unlike the searching population, it does not have lobby groups working on its behalf. But the evidence before this court is clear that opening records retroactively will be harmful to the non-searching members of the adoption triad. Lives could be shattered. The evidence is also clear that some adoptees and birth parents are not interested in being reunited. They do not want to revisit the past. And, as one adoption expert noted, these feelings and these individuals are completely normal.[38]

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[36] *R. v. Duarte*, [1990] 1 S.C.R. 30 at para. 27.

[37] Studies have shown that the top five reasons why adopted adults have wanted to find their birth parents are as follows: they were curious about their genealogical background; they wanted medical history; they wanted to answer the question, "who do I look like?" they wanted more detailed information about their 'roots'; and they felt 'out of place' in their adoptive family. The top five reasons why biological parents reported that they were searching was because they wanted to establish a relationship with their child; they needed to know the child was well; they hoped to find inner peace or some kind of healing through contact; they wanted to tell the child they loved him or her; and they wanted to explain their placement decision. The literature on biological parents reveals that both genders report chronic anxiety over the fate of their birth children, as well as diminished self-esteem, depression, feelings of unworthiness, and recurrent emotions of grief and loss from placement.

[38] Dr. Anne-Marie Ambert, a professor of sociology at York University: see discussion below and note 39 at 3.

[66] Seven, because there has been little to no study of the non-searching population, the social science evidence can only be described as inconclusive in terms of appropriate legislative design. In making this finding, I rely on a study published by the Information and Privacy Commission of Ontario that reviewed the literature on adoption-related research.[39] This IPC study received the approval of Dr. Anne-Marie Ampert, a sociology professor at York University, who provided an independent expert review. According to the Vanier Institute of the Family in Ottawa, Dr. Ampert is the most informed general expert in the area of family studies in Canada. One of her areas of expertise is in the field of adoption. Dr. Ampert concluded that the IPC Study is "the best informed and least biased paper I have ever read on the topic and would be accepted for publication by any scholarly journal with high standards... It is extremely well balanced."[40]

[67] The IPC Study reviewed the three kinds of research that have been cited to support open adoption records: search and reunion studies, studies of the impact of open adoption records legislation in other jurisdictions, and survey research on attitudes about the unsealing of adoption-related records. The Study found that a close analysis of the research design and methodology used in the bulk of these studies reveals a significant number of shortcomings which cast serious doubt on the generalisability of the results and the validity of some of the conclusions. First, almost all of the research has been conducted using self-selected samples of adoptees, birth parents and adoptive parents, thus biasing the research in favour of positive outcomes; second, much of the research has been conducted on adoptees and birth parents who have sought out and attempted to reunite with a birth relative, further biasing the results of the

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[39] Office of the Information and Privacy Commissioner of Ontario, *"A Review of the Literature on Adoption-Related Research: The Implications for Proposed Legislation"* (2006).
[40] *Ibid*, at 2-3.

research; third, no studies have been conducted on the long-term effects of contact vetoes; and finally, there are no systematic surveys of adoptees, birth parents and adoptive parents on their attitudes towards unqualified access to adoption records. As a result, the overall conclusion of the IPC Study was that "the body of research provides no conclusive evidence to support one legislative approach over another."

[68] Eight, the applicants are very much in the minority in the debate about open adoption records. Most adoptees want to know something about their birth parents and even make contact with them, and most birth parents want to know something about the whereabouts and well-being of the child that was adopted. The applicants, however, are part of a small minority of "non-searching" adult adoptees and birth parents who would not consent to the release of their identifying information. The data indicates that the size of this non-searching and non-consenting minority is very small in percentage terms. Only about 3 to 5% of adoptees and birth parents would not consent to the disclosure of their identifying information and would exercise a disclosure veto if it were available.

[69] Nine, the applicants have established a reasonable expectation of privacy – a reasonable expectation that their adoption or birth registration information, absent health or safety reasons, would remain private and would not be disclosed without their permission. I make this finding on several grounds. Since 1927, the statutory framework in Ontario has been predicated on confidentiality. Over the years, as is plain from the evidence, birth and adoptive parents have been reassured by private adoption practitioners, children's aid societies, social workers, lawyers and sometimes government officials that the adoption records would be sealed and no identifying information would be released without consent. As this court concluded in *Marchand*, "their understanding and expectation was that their confidentiality would be

maintained."[41] The Supreme Court of Canada has agreed that a reasonable expectation of privacy exists with respect to adoption records: see the Court's approval of the reasons of the B.C. Court of Appeal in *W.(D.D.)*[42] and in its recognition in *Mills* that the expectation of privacy in certain records such as counseling or adoption records is at a different and higher level than, say, school attendance records.[43]

[70] The tenth and final background fact is this: Ontario is the only jurisdiction in Canada, indeed in North America, that gives a retroactive, unqualified right to obtain confidential identifying information of an adopted person or birth parent without the consent and even over the objections of the individual whose personal information is being disclosed.[44] No other Canadian province allows the disclosure of personal identifying information, absent issues of health or safety, without the consent of the person being identified. The provinces that have amended their legislation to improve access to adoption records have ensured that individuals who choose to maintain absolute privacy over their identifying information may do so through the use of a disclosure veto.

V. The issues

[71] Two preliminary matters were raised at the outset of the hearing:

1. Whether the application is premature because the applicants have not yet exhausted all of their statutory remedies; and

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[41] *Marchand*, supra note 4 at para. 95.
[42] *Supra* note 31. In his decision at the Court of Appeal, McEachern C.J.B.C noted the "reasonable expectation of the child and her parents" that the adoption information would not be disclosed (para. 13).
[43] *Mills*, supra note 34 at para. 136: "with respect to the privacy interest in records [held by third parties] the expectation of privacy in adoption or counseling records may be very different from that in school attendance records."
[44] I will discuss the legislative approaches in the other provinces, the U.S. the U.K. and Australia later in these reasons as part of the s. 1 analysis.

2. Whether D.S. has standing.

[72] The *Charter* issues are these:

1. Do sections 48.1, 48.2 and 48.11 of the VSA deprive the applicants of their right to liberty as guaranteed by s. 7 of the *Charter*?

2. Do sections 48.1, 48.2 and 48.11 of the VSA deprive the applicants of their right to security of the person as guaranteed by s. 7 of the *Charter*?

3. If the impugned provisions deprive the applicants of their right to liberty or security of the person, is the deprivation in accordance with the principles of fundamental justice?

4. If not, can the breach of s. 7 be justified as a reasonable limit under s. 1 of the *Charter*?

VI. Analysis

(1) Is the application premature?

[73] The Attorney General submits that the application is premature because the applicants have not exhausted their statutory remedies. More specifically, the Attorney General notes that the applicants (apart from Ms. Cheskes) have not applied for a non-disclosure order from the Board and that Ms. Cheskes' application to the Board is still pending. The Attorney General argues that it is a basic principle of constitutional law that a court should only make a constitutional determination if the case cannot be resolved on other grounds. If the Board makes an order prohibiting the disclosure of the applicants' information, then the constitutional issue in

this application will not arise. More facts are needed, says the Attorney General. The application should be dismissed as premature.

[74] I do not agree. The remedy that is being sought on this application, that the impugned provisions be declared unconstitutional and set aside, is being sought under the "supremacy clause," s. 52(1) of the *Constitution Act* [45], not under s. 24(1) of the *Charter*. The case law is clear that if the constitutional challenge is brought under s. 52(1), there is no requirement that all available statutory remedies must first be exhausted.[46] The issues raised and the relief being sought can be adjudicated on the facts that are before the court.[47] In my view, the application is not premature.

(2) Does D.S. have standing?

[75] When this application was heard, I asked counsel if D.S. had standing to participate in this constitutional challenge. I was concerned about the fact that he was not an acknowledged birth parent, only a possible birth parent. I queried whether D.S. could simply contact Ministry officials and have the erroneous information on the applicable birth record corrected. Since he had denied paternity, he should not have been listed as a birth father. In other words, I was asking if there were other and better birth parent applicants, i.e. birth mothers who were concerned about the release of their private information to searching adoptees or birth fathers who had acknowledged paternity and had been correctly identified as having done so on the birth record.

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[45] Section 52(1) of the *Constitution Act* provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."
[46] *Falkiner v. Ontario* (Ministry of Community and Social Services) (1996), 140 DLR 4th 115 at para. 7.
[47] See *Mills, supra* note 34; *Khadr v. Canada*, [2004] F.C.J. No. 2061; *R v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Hitzig* (2003), 177 C.C.C. (3d) 449 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 5.

[76] Counsel for both D.S. and the Attorney General urged me to grant standing. Counsel for the Attorney General said she was consenting to D.S. having standing for three reasons: one, D.S. has a reasonable belief, based on his two contacts with the government, that he may be affected by the impugned provisions, i.e. he is not a busy body; two, it would in fact be very difficult for D.S. to locate and verify the information in the relevant birth record because he is unable to recall the name of the birth mother; and three, it would not promote judicial economy if a different birth parent had to bring the same challenge, particularly since the government's evidence, said counsel for the Attorney General, would be the same.

[77] Given these submissions and, in particular, the request from the Attorney General that the issues in this constitutional challenge relating to birth parents not be deferred and then re-litigated on the same evidence, I find that D.S. has standing to challenge the impugned provisions.

(3) Has there been a breach of the applicants' right to liberty?

[78] This case, in essence, is about the applicants' right to privacy. The basic issue is whether the applicants have a *Charter*-protected right to privacy in circumstances such as these where confidential, personal information is about to be released by the government, retroactively and without their permission, to the persons whom they would least want to have it. The issue is not whether the applicants' privacy has in fact been infringed by the impugned provisions – clearly it has – but whether this infringement constitutes a breach of their rights under the *Charter* and is therefore unconstitutional.

[79] Unlike other bills of rights, there is no freestanding right to privacy in the *Charter*.[48] If a right to privacy exists under the *Charter*, it has to be found in the provisions that touch on matters of individual autonomy. For example, the case law is clear that there is a constitutional basis for the protection of privacy in situations involving unreasonable search and seizure. The Supreme Court has recognized that the primary purpose behind the right set out in s. 8 of the *Charter* – the right to be secure against unreasonable search and seizure – is the protection of the privacy of the individual.[49]

[80] The Supreme Court has also indicated in several cases that "certain privacy interests may also inhere in the s. 7 right to life, liberty and security of the person."[50] The Ontario Court of Appeal referred to some of this case law in a recent decision and pronounced what should now be beyond dispute – that the protection of privacy as a fundamental value is "enshrined" not only in s. 8 but also in s. 7 of the *Charter*.[51] In other words, privacy interests are not only protected in search and seizure cases under s. 8, but also in certain circumstances under s. 7. The question, however, is whether any s. 7 privacy interest has been infringed in this case.

[81] The Supreme Court has tended to find the protection of privacy within the s. 7 liberty interest more often than within the security of the person guarantee. There are cases that suggest the latter, but most of the Court's jurisprudence focuses on the liberty interest. The Court

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[48] *Euteneier v. Lee* (2006), 77 O.R. (3d) 621 (C.A.) at para. 63. The intervener argues that if Parliament had wanted to protect privacy as a free-standing right in the *Charter*, it could have done so expressly. For example, section 5 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, enacted in 1975, provides explicitly that "every person has a right to respect for his private life."

[49] *Dyment, supra* note 35 at para. 26; *Duarte, supra* note 36 at para. 33: "our right under s. 8 of the Charter extends to a right to be free from unreasonable invasions of our right to privacy."

[50] *R. v. Hebert,* [1990] 2 S.C.R. 151 and *R. v. Broyles,* [1991] 3 S.C.R. 595, cited in *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403 at paras. 65-66. See also *O'Connor, infra* note 53 at para. 110 and *M.(A).v.Ryan,* (1997) 4 C.R.(5th) 220 (S.C.C.)

[51] *Cash Converters Canada Inc. v Oshawa (City),* 2007 ONCA 502 at para. 29 – 30; also see *Euteneier v. Lee, supra* note 48.

has noted that these privacy interests are at their strongest where aspects of one's individual identity are at stake.[52]

[82] The clearest statement that a privacy interest inheres in the right to liberty in s. 7 is probably found in *R. v. O'Connor*.[53] It was here that the Supreme Court stated that "respect for individual privacy is an essential component of what it means to be free" and, as a corollary, that "the infringement of this right undeniably impinges upon an individual's 'liberty' in our free and democratic society."[54] Even more pertinent to this litigation is what the Court said about the disclosure of private information and its impact on a person's liberty under s. 7 of the *Charter*:

> When a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society.[55]

[83] In this case, to track the language of the Supreme Court in the *O'Connor* excerpt above, the disclosure of the birth and adoption records under the new law, in circumstances where a reasonable expectation of privacy has been created (recall the finding of fact above) constitutes an invasion of the dignity and self-worth of each of the individual applicants, and their right to privacy as an essential aspect of their right to liberty in a free and democratic society has been violated.

[84] Neither the no-contact provision nor the non-disclosure procedure tempers this breach of the applicants' liberty interest. The no-contact provision does not prevent the release of the information. As for the non-disclosure procedure, as I have already noted, the Board will

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[52] *Mills, supra* note 34 at para 80.
[53] [1995] 4 S.C.R. 411.
[54] *Ibid.* per L'Heureux-Dube J. at para. 114.

grant a non-disclosure order only in exceptional circumstances and only to prevent sexual harm or "significant" physical or emotional harm. The non-disclosure order will not granted simply to protect one's privacy.

[85] I therefore have no difficulty concluding on the evidence before me that the applicants' right to liberty as set out in s. 7 and as interpreted by the Supreme Court of Canada in *O'Connor* has been infringed.

[86] There is another basis upon which the right to liberty may have been infringed. I say "may have been" because it is not necessary for me to make a finding on this alternative ground. I will, however, add these comments.

[87] The case law is clear that the liberty interest protected by s. 7 of the *Charter* includes more than freedom from physical restraint. The liberty interest also protects the rights of citizens to make fundamental life choices without interference from the state. Or, to put it in the language used by the Supreme Court in *Malmo-Levine*, the right to liberty in s. 7 includes the "right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference." The only caveat is that the decisions being made must be fundamentally or inherently personal such that, "by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence."[56]

[88] For example, the courts have found that a person's decision where to live and locate one's home is a fundamentally personal decision going to the very essence of what each

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[55] *Ibid.* at para. 120

[56] *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 85, quoting *Godbout v. Longueuil (Ville)*, [1997] 3 S.C.R. 844 at para. 66. Also see *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 83, at para. 49; *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 368-9; *Morgentaler, supra* note 47 per Wilson J. (concurring); and *Hitzig, supra* note 47at para 92.

individual values in ordering his or her private affairs, and that the state should not to be permitted to interfere in this private decision-making process absent compelling reasons for doing so.[57] The courts have also found that the decision to use marihuana, for those with a medical need to use marihuana to treat the symptoms of their serious medical conditions, is also one of fundamental personal importance.[58] How then, ask the applicants, can an individual's decision about the disclosure of identifying adoption information that could profoundly alter his or her life be anything other than a fundamentally personal decision that is also protected by the liberty interest in s. 7?

[89] The decision whether or not to permit the disclosure of one's identifying information to one's birth parent or adopted child, say the applicants, is a fundamentally personal decision with enormous implications. Their affidavit evidence on this point is clear. It is a decision that the applicants have considered over the course of their adult lives, and for various personal reasons they have decided not to allow the government to release this information. They may decide differently one day but that decision, they say, is theirs alone to make.

[90] The Attorney General submits that the 'fundamentally personal decision' line of cases does not apply because here the private information is under the control of a government ministry. Strictly speaking, the decision whether or not to release the identifying information is the government's, not the applicants'. I accept this distinction but I am more persuaded by the following two points – the first point was made by a Supreme Court judge and the second by an expert on adoption. First, that all information about a person is in a fundamental way her own,

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[57] *Godbout, ibid.* at paras. 67-8.
[58] *Hitzig, supra* note 47 at para. 93.

for her to communicate or retain for herself as she sees fit,[59] and second, that the facts surrounding an individual's adoption belong to that person regardless of where and how that information is stored.[60] Furthermore, to say that the information is in the "control" of a government ministry begs the very question that's before me. The applicants argue that though the government possesses their identifying information and could physically transfer it to any party, s. 7 of the *Charter* protects their ability to choose whether the government may make such a transfer. I can see no reason why the government's collection of personal information permits it to intrude on fundamental personal choices that would otherwise fall within the ambit of the liberty interest.

[91] In short, the line of cases that stretches from *Morgentaler* to *Malmo-Levine* may well support a second ground for finding a breach of the right to liberty in s. 7 of the *Charter*. However, as I have already noted, it is not necessary for me to resolve this issue. I have found a breach of the right to liberty by focusing on the informational privacy interest and applying the reasoning in *O'Connor* as set out above.

(4) Has there been a denial of security of the person?

[92] Having found that the right to liberty has been infringed, there is no need to find that the applicants' right to security of the person has also been infringed. For the sake of completeness, however, I will add these brief comments.

[93] The right under s. 7 to security of the person has been held to protect both the physical and psychological integrity of the individual. Serious state-imposed psychological

[59] *Dyment, supra* note 35 at para. 33.
[60] *Garber Report, supra* note 12 at 27.

stress can amount to a breach of the security of the person guarantee.[61] However, the state action that is being challenged must have had a serious and profound effect on a person's psychological integrity. It is not enough that a law simply upsets a particular claimant. The right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. In order to constitute a deprivation of security of the person under s. 7 of the *Charter*, the state action complained of must be shown, on an objective standard, to cause a serious and profound effect on the psychological integrity of a person of reasonable sensibility.[62]

[94] Here there is no medical evidence that states definitively that any of the four applicants have been seriously and profoundly affected in terms of their psychological integrity. None of the applicants has been examined by a psychiatrist or a psychologist. However, in my view, in the circumstances of this case, individual medical examinations may not be needed to find that serious state-imposed psychological stress has been sufficiently established.

[95] One of the applicants' experts, Dr. Nitza Perlman, states in her affidavit that given the intensely personal nature of adoption information, any scheme that favors disclosure over privacy "puts the emotional and psychological well-being of the affected individuals at serious risk." The risk of harm is not merely the actual disclosure of the information, she says, "but also the contemplation that such disclosure could take place at any time without their consent or prior approval."

[96] In circumstances such as we have here, where the affidavit evidence of the applicants is uncontradicted, and the traumatic implications of disclosure are corroborated by the

[61] *Blencoe, supra* note 56 at para. 83.

expert and uncontradicted opinion of an experienced clinical psychologist, it may well be possible for a court to find the necessary level of state-imposed stress and a resulting infringement of the right to security of the person, even in the absence of individualized medical assessments. I simply offer these comments. I do not have to make this finding because I have already found a breach of the right to liberty.

(5) Has there been a violation of a principle of fundamental justice?

[97] The second stage of the s. 7 analysis, on the facts of this case, is to ask if the infringement of the applicants' right to liberty is in violation of a principle of fundamental justice. The applicants say that two separate principles of fundamental justice have been contravened – the right to be protected against laws that are "grossly disproportional" and the right to privacy, or at least a formulation of the right to privacy as it applies in the circumstances of this case.

[98] I will deal first with what I consider to be the stronger submission, that the right to privacy, in some appropriate formulation, is a principle of fundamental justice and that this principle of fundamental justice has been contravened.

[99] Several points should be made about the meaning of the phrase "principles of fundamental justice." First, the principles of fundamental justice that underpin s. 7 are not limited to procedural justice, but cover principles of substantive justice as well.[63] Courts have identified the following as principles of fundamental justice even though they go beyond procedure and deal with the substantive content of the law: for example, the need for *mens rea* or guilty mind, the principle of gross disproportionality, the need for reasonably clear laws, and, of

[62] *New Brunswick (Minister of Health) v. G. (J.)*, [1999] 3 S.C.R. 46 at paras. 59-61.

course, the various rights and guarantees set out ss. 8 to 14 of the *Charter*[64] which have been judicially described as examples or illustrations of the principles of fundamental justice protected under s.7.[65]

[100] Second, like other *Charter* rights, the rights guaranteed under s.7, including the principles of fundamental justice, are not frozen in time but are continuously evolving.[66] What was not considered a principle of fundamental justice when the *Charter* was proclaimed in force some twenty-five years ago may be such a principle today. Whether any given principle is found to be a principle of fundamental justice within the meaning of s. 7 will depend upon an analysis of the nature, sources, rationale and essential role of the principle within the judicial process and in our legal system "as it evolves."[67]

[101] Third, the overall context is essential. As noted by the Court of Appeal in *Hitzig*, "all parts of the s. 7 analysis must be sensitive to the specific context in which the claim is made... where legislative provisions are in play, context refers to the language of the statute and the legislative and common law history leading up to the enactment of the challenged provision."[68] In this case, the "context" factor means that I must consider the implications of the old law, including whether a reasonable expectation of privacy had been created under that law.

[102] Four, the judicial recognition of a new principle of fundamental justice must be undertaken with care. This decision must rest on accepted analytical criteria. The process of

[63] *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 [the "*B.C. Reference*"]
[64] For example, (8) the right to be secure against unreasonable search and seizure, (9) the right not to be arbitrarily detained or imprisoned, (10(a)) the right to retain counsel, (12) the right not to be subjected to cruel and unusual punishment, (13) the right against self-incrimination and (14) the right to an interpreter.
[65] *B.C. Reference*, *supra* note 63, at paras. 35-6.
[66] As McLachlin J. (as she then was) noted in *Hebert*, *supra* note 50 at para. 73: "It would be wrong to assume that the fundamental rights guaranteed by the Charter are cast forever in the straightjacket of the law as it stood in 1982."
[67] *B.C. Reference*, *supra* note 63 at para. 74.

elucidating a principle of fundamental justice is not, as the case law makes clear, the constitutional equivalent of "the Chancellor's foot."[69] Principles of fundamental justice, whether old or new, must accord, in my view, with the proposition articulated by McLachlin C.J.C. in *Charkaoui* – that principles of fundamental justices are the "basic principles that underlie our notions of justice and fair process."[70]

[103] What then are the analytical criteria? In the *B.C. Reference*, Lamer J. (as he then was) observed that principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.[71] In order for a rule or principle to qualify as a principle of fundamental justice for the purposes of s. 7, three prerequisites must be satisfied:

> (1) it must be a legal principle;
>
> (2) there must be a significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate; and
>
> (3) it must be capable of being identified with precision and applied to situations in a manner that will yield predictable results.[72]

[104] In their factum, the applicants submitted that the principle of fundament justice contravened in this case is "the right to privacy." In my view, this proposition is stated much too broadly. A right to privacy *simpliciter* may be a legal principle, but stated without any further qualification or without any reference to reasonable expectations it would fail to satisfy the

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[68] *Hitzig, supra* note 47 at para. 78.
[69] *Ibid.* at para. 106.
[70] *Charkaoui, supra* note 27 at para. 19.
[71] *B.C. Reference, supra* note 63 at para. 72.
[72] *Malmo-Levine, supra* note 56 at para. 113.

second and third criteria listed above. It is important to remember that the right to privacy is not absolute. As the Supreme Court noted in *O'Connor*:

> Privacy can never be absolute. It must be balanced against legitimate societal needs. This court has recognized that the essence of such a balancing process lies in assessing a reasonable expectation of privacy and balancing that expectation against the necessity of interference from the state... The greater the reasonable expectation of privacy and the more significant the deleterious effects flowing from its breach, the more compelling must be the state objective and the salutary effects of that objective in order to justify interference with this right.[73]

[105] During the course of oral argument counsel for applicants recalibrated the principle of fundamental justice that they were positing. They reformulated the applicable principle as follows: *when the life, liberty or security of the person is at stake, any deprivation of these rights must accord with reasonable expectations of privacy and the individual's ability to control the dissemination of confidential personal information.*

[106] Counsel for the applicants explained that this reformulation reflected the above-quoted dictum from *O'Connor* and focused attention on the fact that, in the case at bar, a reasonable expectation of privacy in one's adoption records has been established on the evidence, and one's ability to control the dissemination of personal information has been judicially acknowledged as an element of the right to privacy.

[107] In my view, the principle being suggested by the applicants can be stated more directly as follows: *where a reasonable expectation of privacy has been established in the collection and storage of one's personal and confidential information, one should have the ability to control the dissemination of this information.* Or, to put it even more plainly:

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[73] *O'Connor, supra* note 53 at para. 118.

> *Where an individual has a reasonable expectation of privacy in personal and confidential information, that information may not be disclosed to third parties without his or her consent* ("the Suggested Principle.")

[108] The question, of course, is whether the Suggested Principle qualifies as a principle of fundamental justice under s. 7. I now return to the three criteria that must be satisfied before the Suggested Principle can be recognized as a principle of fundamental justice.

[109] First, is this a legal principle? I reiterate that 'legal principles' are not limited to aspects of the judicial process, but also may be found in other components of our legal system.[74] Broadly speaking, privacy norms are a part of the common law, an important feature in our international conventions, and the core of our federal and provincial privacy laws. All parties acknowledge that privacy is a basic tenet of our system of law.

[110] Turning more particularly to the Suggested Principle, the individual's ability to control the dissemination of his or her personal information features with increasing prominence in legislation and public discourse. There are now extensive legal regimes governing the collection, storage, and disclosure of personal information. Such protection of personal information is not merely "a vague generalization about what our society considers to be ethical or moral,"[75] but rather has come to be a core component of our system of law. This point is only made more forceful given that the applicants have submitted the more tailored 'reasonable expectation of privacy'—rather than a broad 'right to privacy'—as a threshold requirement in the Suggested Principle.

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[74] *B.C. Reference, supra* note 63 at para. 64.

[75] *Rodriguez v. British Columbia,*[1993] 3 S.C.R. 519 at para. 26.

[111] Second, is the requisite 'significant social consensus' present? The government routinely collects person information about individuals, in a variety of contexts and for a variety of purposes. Such collection is necessary for the functioning of a modern state. Where this information is of a confidential nature, and where individuals have a reasonable expectation of privacy in the information, there is a societal expectation that the government will act with great care. People expect, and are entitled to expect, that the government will not share such information without their consent.

[112] The protection of privacy is undeniably a fundamental value in Canadian society, especially when aspects of one's individual identity are at stake.[76] The significant role that privacy legislation plays in legislative enactments is reflective of this community concern. Indeed, the two elements of the Suggested Principle—the protection of reasonable expectations of privacy and the right of the individual to control the dissemination of his or her personal information—provide the bedrock for the modern understanding of privacy protection. In my view, the Suggested Principle is a basic norm for how the state deals with its citizens,[77] and it is beyond dispute that the Suggested Principle is viewed today by the vast majority of Canadians as fundamental to the way in which our legal system, which includes the legislation enacted by our government, ought fairly to operate[78]

[113] Counsel for the Attorney General raised some concerns about the need to balance interests in the process of formulating a principle of fundamental justice. It wasn't clear to me if the submissions on this point were directed at the broadly stated "right to privacy" principle or at

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[76] As discussed above in Part IV, and see *Mills, supra* note 34 at para. 80.
[77] *Canadian Foundation for Children, Youth, and the Law,* [2004] 1 S.C.R. 76 at para. 8
[78] *Malmo-Levine, supra* note 56 at para. 113.

the more refined Suggested Principle. In any event, let me set out my understanding of the role of balancing at the s. 7 stage of the analysis.

[114] The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice – and here the relevant interests were balanced by using language such as "reasonable expectation of privacy." Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account any further societal interests, such as the rights of the searching adoptee or birth parent or the implications for government record-keeping etc. These considerations will be looked at, if at all, under s. 1, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. [79]

[115] The respondent's argument that the rights of the searching adoptee or birth parent should figure in the formulation of the applicable principle of fundamental justice is misguided. It is correct to say that in certain circumstances the court is obliged to balance competing rights. As the Supreme Court has noted, "when the protected rights of two individuals come into conflict ... *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights."[80] But this is not a case where we have competing *Charter*-protected rights. The applicants' right to liberty under s. 7 has been breached. The rights of the searching adoptees or birth parents to the disclosure of confidential adoption information, although important and heart-felt, are not protected by s. 7 or any other provision of the *Charter*.

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[79] *Ibid.* at para 9.

[80] *Mills, supra* note 34 at para. 61, citing *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at para. 75.

[116] The searching adoptee's or birth parents' right to access identifying information – "the right to know one's past" – is not a constitutionally protected right under Canadian law. Claims by adoptees seeking unqualified access to adoption records have been repeatedly refused by Canadian courts and quasi-judicial bodies such the Information and Privacy Commissioners. The right to access information has always been subordinated to the right to maintain personal privacy.[81] For example, in *Marchand*, a case where a searching adoptee was trying to gain access to confidential information that would identify her birth father, this court concluded that "the applicant's freedom is constrained by the privacy interest of the man who chooses not to have his identity revealed to her"[82] and that "there is no liberty right to obtain identifying information about a person who has expressly refused to consent to its disclosure."[83] The same point was made by the B.C. Court of Appeal in *W.(D.D.)* in reasons approved by the Supreme Court of Canada.[84]

[117] The proposition that a right to privacy trumps a right of access to information is also evident in our federal privacy and access laws. Consider, for example, the interplay between the federal *Privacy Act*[85] and the federal *Access to Information Act*.[86] The interaction of the two statutes were described by Deschamps J. in *Heinz* as follows:

> The legislative scheme established by the *Access Act* and the *Privacy Act* clearly indicates that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation.[87]

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[81] *Marchand, supra* note 4 at para. 100; *Pringle v. Alberta (Human Rights, Multiculturalism and Citizenship Commission)* (2004), 246 D.L.R. (4th) 502 (Alta. Ct. Q.B.) at paras. 55, 58; *W. (D.D.), supra* note 31 at paras. 23, 43, and 75.
[82] *Marchand, ibid.* at para. 113.
[83] *Ibid.* at para. 116.
[84] *W. (D.D.), supra* note 31 at paras. 23, 43, and 75.
[85] R.S.C. 1985, c. P-21.
[86] R.S.C. 1985, c. A-1.
[87] *H.J. Heinz Co. of Canada Ltd., supra* note **Error! Bookmark not defined.** at paras. 24 and 26. I would only add that "except as prescribed by legislation" can only mean "except as prescribed by constitutionally valid legislation."

[118] The Ontario government has historically recognized the importance of maintaining privacy over adoption records by excluding these records from the application of the *Freedom of Information and Protection of Privacy Act* (FIPPA).[88]

[119] To return to the issue at hand, this is not a case where the court has to balance competing *Charter*-protected rights because the right to access confidential information as claimed by searching adoptees and birth parents is not a *Charter*-protected right. Nor is this a case where we have competing principles of fundamental justice as in *Mills,* where the Supreme Court had to balance the accused's s. 7 right to make full answer and defence against the complainant's s. 8 right to be free from unreasonable search and seizure.[89] It is interesting to note that even where one principle of fundamental justice, such as the right to make full answer and defence, competes with the right to privacy that is part of another principle of fundamental justice, namely the right to be secure from unreasonable search and seizure, the courts have typically found in favour of privacy.

[120] Consider also the reasoning in *R. v. W. (D.D.)*[90] The accused in this case was convicted of incest, rape and indecent assault of his sister. Allegedly, a child was born as a result of one of the incidents and was adopted. Relying in part on the right to make full answer and defense, the accused sought access to the adoption records in order to conduct a DNA paternity test. A negative paternity test would have exonerated the accused of at least the one alleged incident and seriously damaged the complainant's credibility. The B.C. Court of Appeal recognized the "near paramountcy" of this right but upheld the trial judge's ruling that the right

[88] R.S.O. 1990, c. F-31. When FIPPA was introduced, only certain classes of records were excluded from its reach due to their confidential nature. Adoption records are excluded from the application of FIPPA pursuant to s. 165 of the CFSA and s. 28(2) of the VSA. CFSA, *supra* note 9 at s. 165; VSA, *supra* note 1 at s. 28(2).

of the accused to make full answer and defense could not override the privacy rights of the adopted child. In so deciding, Chief Justice McEachern said this:

> The purpose of the disclosure sought on this application was clearly contrary to the best interests of the child and contrary to the reasonable privacy expectations of the child and her parents as contemplated by the *Adoption Act*. In fact, I doubt if there could be any higher privacy right than that enjoyed by an adopted child at least until such time as she, having attained the age of majority, might decide to seek out her natural parents or one of them.[91]

[121] Applying the factors that had been recently articulated by the Supreme Court in *O'Connor* relevant to third party records applications, Chief Justice McEachern found that all grounds pointed against disclosure and concluded the issue of "balancing" competing interests as follows:

> A balancing process such as is required in this case depends ultimately upon the view of the judge upon the relative significance of the competing interests. The right to make full answer and defence is indeed a most important, constitutionally protected right, but so is privacy, particularly for innocent children.[92]

[122] In a concurring judgment, Justice Hall further explained why no injustice accrued to the appellant:

> For good policy reasons, the legislative regimes in the provinces across Canada have long protected and fostered the confidentiality interests of adopted persons and adopting parents. There are compelling policy reasons to support this legislative approach and the privacy rights or interests of these parties are interests that in my view should be sedulously fostered. I do not believe that in this case the appellant had any "right" proceeding from the *Charter* or otherwise to break in upon the privacy rights of the adopted child and adopting parents.[93]

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[89] *Supra* note 34.
[90] *Supra* note 31.
[91] *Ibid.* at para. 13.
[92] *Ibid.* at para. 43.
[93] *Ibid.* at para. 74.

[123] The Supreme Court upheld the B.C. Court of Appeal's decision "for the reasons of Chief Justice McEachern and Justice Hall". The reasons of the these two Court of Appeal judges now have the imprimatur of the Supreme Court of Canada.[94]

[124] The reasons in *W. (D.D.)* underline several important points that have already been made – about the primacy of privacy rights in adoption cases, about the importance of protecting reasonable expectations of privacy, and about the fact that even where a searching birth parent relies on a principle of fundamental justice to gain access to identifying information, this right of access is trumped by the non-searching adoptee's right to privacy.

[125] Here, there are no competing *Charter*-rights. There are no competing principles of fundamental justice. Any further "balancing" can therefore only take place within the context of s. 1. The Suggested Principle, in my view, clears the second hurdle – it is a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate.

[126] The third and final criterion is that the principle of fundamental justice must be capable of being identified with precision and applied to situations in a manner that yields predictable results. For example, in *Chaoulli*, Binnie and Lebel JJ. concluded that the policy objective of "health care of a reasonable standard within a reasonable time" could not qualify as a principle of fundamental justice because there was no societal consensus about what this means

[94] *Supra* note 31.

or how it could be achieved.[95] This suggested health care principle could not be applied in practical situations to yield a predictable result.

[127] In my view, however, the principle of fundamental justice that is being suggested in this case is capable of being identified with precision and applied to situations in a manner that yields predictable results - or at least, with as much precision and predictability as the other principles of fundamental justice that have been judicially recognized to date. It may be helpful to restate the Suggested Principle for ease of reference:

> *Where an individual has a reasonable expectation of privacy in personal and confidential information, that information may not be disclosed to third parties without his or her consent.*

[128] The only part of this Suggested Principle that is arguably imprecise is the part that requires a finding of a "reasonable expectation of privacy" in one's personal information. Fortunately, our courts have had considerable experience in the search and seizure area, under s. 8 of the *Charter,* with what constitutes a reasonable expectation of privacy. Given this judicial experience, I see nothing that is inherently unmanageable or unpredictable about the concept of "reasonable expectation of privacy." This is already a workable legal concept that is being used on a daily basis by police officers, privacy commissioners, judges and others involved in the administration of our legal system. In my view, there is nothing in the Suggested Principle that is novel or unfamiliar to our law. None of the words or phrases is inherently difficult to interpret. There is no reason to believe that its interpretation would yield unpredictable results.

[129] In considering how the Suggested Principle would fare in future cases, it is worth noting that the Suggested Principle finds a familiar context within the s. 8 rubric. Under the s. 8

[95] *Chaoulli v. Quebec (Attorney General),* [2005] 1 S.C.R. 791 at para. 209, per Binnie and Lebel JJ., dissenting.

analysis, an applicant must demonstrate a reasonable expectation of privacy in the place or thing being searched or seized as a threshold issue; where such a reasonable expectation is established, the state may not conduct an unreasonable search or seizure. Similarly, the Suggested Principle first requires a showing of a reasonable expectation of privacy in the collection and storage of personal and confidential information; where such a reasonable expectation is established, the state may not disclose the information to third parties without his or her consent. I find this to be a manageable standard that the courts can apply with predictability in future cases.

[130] In any event, even if this was not the case, I would have difficulty agreeing with the submission that the words and phrases in the Suggested Principle are inherently more difficult to interpret and apply than the words and phrases that anchor the other principles of fundamental justice that are in use today – such as, for example, "the need for reasonably clear laws," the principle of "gross disproportionality" or the right not to be subjected to "cruel and unusual punishment."

[131] In sum, I am of the opinion that the three criteria for finding a principle of fundamental justice have been satisfied.

[132] The suggested principle – *where an individual has a reasonable expectation of privacy in personal and confidential information, that information may not be disclosed to third parties without his or her consent* – is, in my view, a principle of fundamental justice that has been contravened on the facts of this case. The applicants have established a reasonable expectation of privacy in the government's collection and storage of their confidential birth and adoption records. The impugned provisions (ss. 48.1, 48.2 and 48.11) will permit the release of this information to third parties without their consent. The applicants are thus being denied the

ability to control the dissemination of this personal and confidential information. Neither the no-contact provision nor the non-disclosure order responds to this essential point. The deprivation of the applicants' liberty interest under s. 7 is therefore not in accordance with the principles of fundamental justice.

(6) The principle of "gross disproportionality"

[133] Having found that the Suggested Principle is a principle of fundamental justice that has been contravened, it is not necessary for me to consider the principle of "gross disproportionality" which the applicants say has also been contravened. I should say, however, that if I were to consider this argument I would not accept it.

[134] In *Malmo-Levine*, the Supreme Court held that laws that deprive individuals of liberty or security will violate fundamental justice if they are "grossly disproportionate" to their legislative purpose – that is, the legislative response must not be grossly disproportionate to the state interest sought to be protected.[96] Fundamental justice is not offended by laws that are *merely* disproportionate; rather, the legislation must be *grossly* disproportionate, so much so that Canadians would find it "abhorrent or intolerable."[97]

[135] I would not have been able to conclude on the evidence before me that the impugned provisions are grossly disproportionate to the state interest that is being protected. The state interest is in opening adoption records to searching adoptees and birth parents. The average Canadian might find the retroactive application of the new law to be wrong-headed and unfair, but I cannot conclude, without more evidence, that Canadians would find that this retroactive aspect was "abhorrent or intolerable".

[136] It goes without saying, however, that even if the new law is not grossly disproportionate, this does not diminish or detract from the finding made above that the impugned provisions are in breach of s. 7. Laws that are not abhorrent or intolerable to average Canadians can still be unconstitutional. I have found that the applicants have been deprived of their right to liberty and that this deprivation has not been in accordance with the principles of fundamental justice. The applicants' s. 7 *Charter* right has been breached. The next question is whether this breach can be justified under s. 1.

(7) Can the breach of section 7 be saved under section 1?

(a) Is section 1 available?

[137] Can the denial of a liberty right in violation of a principle of fundamental justice be justified as a reasonable limit in a free and democratic society? The Supreme Court has made clear that justifying s.7 violations under s.1 is a difficult task for two reasons: (1) the rights protected are very significant and cannot ordinarily be overruled by competing social interests; and (2) contraventions of principles of fundamental justice will rarely be upheld.[98] Indeed in the *B.C. Reference*, Lamer J. (as he then was), speaking for the majority, noted that s. 1 can save a s.7 violation but "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like."[99] In *Charkaoui* the Supreme Court restated this proposition by noting that it would be possible to justify a s. 7 violation under s. 1 only "in extraordinary circumstances where concerns are grave and the challenges complex."[100]

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[96] *Malmo-Levine, supra* note 56 at paras. 133 and 141-143.
[97] *Ibid.* at paras. 159-161 and 169.
[98] *New Brunswick (Minister of Health) v. G. (J.), supra* note 62 at para. 99.
[99] *B.C. Reference, supra* note 63 at para. 93.
[100] *Charkaoui, supra* note 27 at para. 66.

[138] If these Supreme Court pronouncements are to be taken seriously, and I assume that they are, then s. 1 is not available in the circumstances of this case to justify the violation of the applicants' rights under s. 7. This is not a case involving a natural disaster or the outbreak of a war or an epidemic; nor is it a case where the circumstances can be described as extraordinary, the concerns as grave and the challenges as complex. Legislation opening adoption records on a retroactive basis is no doubt extremely important for many, but the new law cannot be said to fall within any of the extraordinary or emergency categories listed above.

[139] In my view, recourse to s. 1 is not available on the facts of this case. There is therefore no need for me to engage in a s. 1 analysis. However, if I am wrong in this regard and for the sake of completeness, I will undertake the s. 1 analysis.

(b) The section 1 analysis

[140] Section 1 of the *Charter* provides that the rights and freedoms set out in the *Charter* are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." A limitation to a constitutional guarantee will be justified and sustained if two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative objective must be reasonable and demonstrably justified in a free and democratic society. In order to satisfy the second requirement, three criteria have to be satisfied: (1) the rights violation must be rationally connected to the *Charter* guarantee; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not

outweighed by the abridgement of the *Charter* right. In all s. 1 cases, the burden of proof is on the government to show on a balance of probability that the violation is justifiable.[101]

(i) Pressing and substantial objective

[141] I agree with counsel for the Attorney General that the objective of the new law is pressing and substantial and that the first hurdle in the s. 1 analysis is cleared. The stated purpose of the AIDA, according to the Minister of Community and Social Services who introduced the new law and whose ministry is responsible for its implementation, is to provide both birth parents and adult adoptees information about their past. In the course of her comments introducing the bill for second reading, the Minster said this:

> We believe that individuals who are trying to learn about their identity and personal history should be able to do so without unnecessary hardship and delay. Our plan would give individuals whose adoptions were finalized in Ontario the right to know about their identity and their history by the following methods: allowing adoptees over the age of 18 to have access to copies of their original birth records that will provide them with their original birth name and may identify birth parents; allowing birth parents to have access to birth records and adoption orders once the adoptee has reached 19; providing the name that the child was given after the adoption; making all disclosure provisions for adoptions finalized in Ontario retroactive to cover all records; and, in exceptional safety-related circumstances, allowing an individual the right to apply for a non-disclosure order to prevent identifying information from being released. That, essentially, is the bulk of the bill.[102]

[142] The applicants also agree that improving access to adoption records for the purposes just stated may well be a pressing and substantial objective, but only to the extent that

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[101] *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 182, per Iacobucci J., (dissenting, but not on this point), summarizing the "Oakes test" from *R. v. Oakes*, [1986] 1 S.C.R. 103.

[102] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 135a (26 April 2005) at 6579 (Hon. Sandra Pupatello, Minister of Community and Social Services) at 6579 ["Ontario Hansard of April 26, 2005"]

the legislation is not retroactive and does not, as they say, trample on the rights of other citizens to their own sense of identity, personal history and family.

(ii) Rational connection

[143] I also agree with counsel for the Attorney General that the "rational connection" hurdle has also been cleared. The rational connection component in the proportionality test requires that the measures abridging the right or freedom in question be rationally connected to the legislative objectives. As long as the challenged provision can be said to further in a general way an important government aim it cannot be seen as irrational.[103] In my view, the impugned provisions in the new law cannot be said to be irrational in the sense of being unable to further the objectives of the new law as were summarized by the Minister in the above excerpt.

(iii) Minimal impairment

[144] Here is where I part company with the Attorney General and the intervener. The question under the "minimal impairment" prong is whether the Legislature had a reasonable basis for concluding that the impugned limit interferes as little as possible with the guaranteed right given the Legislature's objectives. The Supreme Court has emphasized that the Legislature is not required to search out and adopt the absolutely least intrusive means of attaining its objective. However, when assessing the alternative means which were available to the

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[103] *Canada Human Rights Commission v. Taylor*, [1990] 3 S.C.R. 892 at para. 56; *Harper v. Canada (Attorney General)*, [2004 1 S.C.R. 827 at paras. 29-30; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paras. 85 and 89.

Legislature, it is important to consider whether a less intrusive means would achieve the same objective or would achieve the same objective as effectively. [104]

[145] Counsel for the Attorney General says that the adoption disclosure provisions in the new law are "carefully tailored" and do not unreasonably overshoot their purposes. Other free and democratic societies that share Canadian legal and constitutional values, argues Ontario, such as the United Kingdom, the United States, and Australia, employ analogous legislative mechanisms to provide access to adoption information within a framework of respecting the rights and needs of all parties to adoption.

[146] With respect, I do not agree with this characterization of the evidence.

[147] As I have already noted, no other province that has reformed its adoption disclosure law on a retroactive basis has done so without providing non-searching adoptees and birth parents with a disclosure veto. Ontario is the only province in Canada, indeed, the only jurisdiction in North America that gives a retroactive, unqualified right to obtain confidential identifying information of an adopted person or birth parent without, and even directly contrary to, the consent of the individual whose personal information is disclosed.

[148] Four provinces continue to maintain the system that prevailed in Ontario under the old law and that requires mutual consent before identifying information can be released: Quebec, Nova Scotia, New Brunswick and P.E.I.[105] In the four provinces that have recently reformed their adoption information disclosure to provide access to identifying information on a retroactive basis, non-searching adoptees and birth parents are provided a disclosure veto: B.C.,

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[104] *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at para. 65.

Alberta, Manitoba and Newfoundland.[106] In Saskatchewan, the adoption disclosure law combines both approaches: for adoptions that took place after the 1996 law took effect, the records are made available subject to a disclosure veto; for adoptions that took place prior to 1996 mutual consent is still required.[107]

[149] In the U.S., the handful of states that have opened their adoption records on a retroactive basis have limited the access to identifying information to adoptees only, not birth parents: the seven states that have provided access to adult adoptees are Alabama, Alaska, Kansas, Maine, New Hampshire, Oregon, and Tennessee. In about half of the U.S. states the retrieval of identifying information remains subject to permission or a disclosure veto. In the remaining states, the only way that one can gain access to confidential adoption records is by court order based on a showing of good cause or the best interests of the child. [108]

[150] In sum, in the U.S., the vast majority of states have retained the need for consent or have given disclosure vetos to the adoptees or birth parents that do not wish to have their private information disclosed. The seven states that have opened their adoption records have done so for adoptees only, not birth parents. Contrary to the submissions of the Attorney General, Ontario is the only jurisdiction in North American that has retroactively opened its confidential adoption records to both adoptees <u>and</u> birth parents without protecting non-searching parties by providing them with the right to file a disclosure veto.

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[105] *Civil Code of Quebec*, S.Q. 1991, c. 64, arts. 582-3; *Adoption Information Act*, S.N.S. 1996, c. 3, s. 19; *Family Services Act*, S. N. B. 1980, c. F-2.2, ss. 91-2; *Adoption Act*, R. S. P. E. I. 1988, c. A-4.1, s. 53.
[106] *Adoption Act*, R.S.B.C. 1996, c. 5, s. 53; *Child, Youth and Family Enhancement Act*, R. S. A. 2000, c. C12, s. 74.2(4); *The Adoption Act*, C.C.S.M., c. A2, s. 112; *Adoption Act*, S. N. L. 1999, c. A-2.1, s. 50.
[107] *The Adoption Act, 1998*, S. S. 1998, c. A-5.2, Reg 1, ss. 28.
[108] See the on-line summary at http://www.americanadoptioncongress.org/state.php.

[151] The situation in the U.K. is similar to that in the seven American states noted above, with one minor difference that relates to birth parents. In Scotland, an adult adopted person has the right to access his or her adoption and original birth records.[109] In England and Wales, adopted persons over the age of eighteen have the right to obtain their original birth certificates.[110] The *Children Act, 1975* made no provision for birth mothers to access their biological children's birth records. Consequently, birth mothers criticized the law for not recognizing their rights and spoke of their desire to know the fate of their children. With the enactment of the *Adoption and Children Act 2002*, birth parents were given the right to apply for disclosure of identifying information, but this was made subject to the adopted person's consent to disclosure.[111] Thus, the U.K. is very much like the seven U.S. states that have allowed access to identifying information for adult adoptees; the fact that birth parents in the U.K. also have this right is a minor difference because the birth parents' right is subject to what amounts to a disclosure veto that has been given to the adoptee.

[152] The only jurisdiction that has opened its adoption records to both adoptees and birth parents is New South Wales, Australia. The adoption information law in N.S.W. entitles adopted adults to receive copies of their original birth certificates and information that allows them to identify their original birth parents. It also gives birth parents the right to a copy of the certificate of adoption, and information enabling them to identify the child whom they had put up for adoption.[112] In short, New South Wales is the only other jurisdiction that provides for

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[109] *Adoption of Children (Scotland) Act, 1930* (U.K.)

[110] *Children Act 1975*, c. 72 (U.K.), s. 26; *Adoption Act (England and Wales) 1976*, c. 36 (U.K.), s. 51.

[111] *Adoption and Children Act 2002*, c. 38 (U.K.)

[112] NSW Law Reform Commission Report at 7.1-7.23; *Adoption Information Amendment Act 1995*, No. 61 (NSW); *Adoption Act 2000*, No. 75 (NSW), Chap. 8.

unrestricted "two-way access" (i.e. for both adoptees and birth parents). It is useful to remember, however, that neither N.S.W. nor Australia has an entrenched bill of rights.

[153] The admonition of the Supreme Court in *Oakes* is that a *Charter* right should be interfered with as little as possible. If a *Charter* right is to be breached by a legislative provision, the impairment of that right should be minimal. Here, the new law jettisons completely the historical requirement for mutual consent. Identifying information will now be released to searching adoptees and birth parents without regard to the fact that the non-searching party has not consented to the release of this personal information and may even be objecting to its disclosure. Unlike the law in several of the other provinces, there is no disclosure veto. This is not a minimal impairment of a *Charter*-protected right but its total obliteration. Contrary to the submission of the Attorney General, the disclosure provisions in the new law have not been "carefully tailored." The applicants' rights under s. 7 have been completely eradicated.

[154] The Attorney General points to two features in the new law that are intended to address the privacy concerns of the applicants and others like them. The Attorney General says that the no-contact provision and the opportunity to obtain a non-disclosure order from the Child and Family Services Board provide a reasonable protection for the applicants' privacy concerns and thus "save" the impugned provisions as reasonable limits under s.1 of the *Charter*.

[155] I do not agree. In my view, neither the no-contact provision nor the possibility of being granted a non-disclosure order from the Board can transform a clear breach of s. 7 into a reasonable and justifiable infringement under s. 1.

[156] **The no-contact provision.** As the affidavit evidence before me makes clear, the harm is not contact, but disclosure. The applicants object to the fact that their identities will be

disclosed to persons that they would least want to have this information. Whether or not contact actually takes place in breach of the no-contact provision is a secondary concern.

[157] The reasons given in the evidence why the no-contact restriction is insufficient from the perspective of the "privacy seekers" include the following:

- The no-contact restriction will not prevent or minimize the harm that could result to the date rape victim that put her child up for adoption years 20 ago when she was young. Today she is married with her own family. She continues to live in the same community, as does the birth father. Her family does not know about the adoption. If the adoptee identifies her and tells the birth father, the birth father will spread the news through the small community and this will cause great harm to her marriage, her children and to the stability of her family.

- The no-contact restriction will not prevent someone from stalking or watching or making phony phone calls or front-door deliveries. As C.M. stated in her affidavit:

> The no-contact is totally irrelevant to me, because no contact will not mean that they cannot watch me, they can't drive past my house. This person could get my name and give this to children that she has, to other friends, to relatives. It...does not provide me any comfort whatsoever - whatsoever, other than I could be stalked.

- The no-contact provision would not prevent the disclosure of one's identity and with that identifying information, as Mr. Patton noted in his affidavit,

> It would not be hard to use the Internet or do some simple investigation and research in order to learn myriad details about my life and who I am... It causes me stress and anxiety that someone with a particular interest in my identity and who I am could then find my address and learn about my interests and associations. To me, that is much worse than a birth parent being able to "meet" me. The loss of control over that decision weighs heavily on my mind every day.
>
> I'm very concerned about dissemination and sharing. I am most concerned and centrally concerned about the disclosure of the information, period.

[158] In sum, the no-contact provision does not address the privacy concerns of the applicants. The issue is information disclosure, not contact. The fact that the enforcement data from New South Wales suggests that the no-contact provision is rarely breached may speak more to the difficulties of getting caught and being prosecuted than to the incidence of actual non-compliance. However, as D.S. noted in his affidavit, even if breaches of the no-contact agreements are rare, that is of small comfort to anyone whose relationships are in fact shattered when such a breach occurs.

[159] I repeat the point that was made by the Supreme Court in *O'Connor*:

> The essence of privacy is that once invaded, it can seldom be regained. For this reason, it is all the more important for reasonable expectations of privacy to be protected at the point of disclosure. As La Forest J. observed in *Dyment*, "if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated."[113]

[160] **The non-disclosure order.** As already noted, the application by the non-searching adoptee or birth parent for a non-disclosure order under ss. 48.5 and 48.7 will only be granted if the Board "is satisfied that, because of exceptional circumstances, the order is appropriate in

order to prevent sexual harm or significant physical or emotional harm to the adopted person [or birth parent]."[114]

[161] The jurisdiction of the Board to issue a non-disclosure order is extremely limited – only in "exceptional circumstances" and only "to prevent sexual harm or significant physical or emotional harm." It is evident that the new law limits the jurisdiction of the Board to grant non-disclosure orders, basically, in situations involving personal safety. The web site of the Ministry of Community and Social Services describes the role of the Board as granting non-disclosure orders "where there are concerns for personal safety."[115] When summarizing the Board's jurisdiction to the Legislature during second reading, the Minister stated that a non-disclosure order could be granted "in exceptional safety-related circumstances."[116]

[162] Even if the Board wanted to disregard this stated government policy and grant a non-disclosure order in circumstances that did not involve personal safety, their limited jurisdiction would not allow them to do so. The Board does not have the jurisdiction to grant a non-disclosure order simply because the adoptee or birth parent does not wish to consent to the release of his or her identifying information and wants to maintain his or her privacy. The Board can only grant a non-disclosure order in exceptional circumstances that relate to the applicant's personal safety. This limited jurisdiction, say the applicants, does not address their basic concern, which is the right to give or withhold consent and control the dissemination of personal information, a right that is protected under s. 7 of the *Charter*.

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[113] *O'Connor, supra* note 53 at para. 119, quoting *Dyment, supra* note 35 at para. 22.
[114] VSA, *supra* note 1 at ss. 48.5(7) and 48.7(3).
[115] www.mcss.gov.on.ca/mcss/english/pillars/community/questions/adoption/about_ad (June 19, 2007)
[116] Ontario *Hansard* of April 26, 2005, *supra* note 102 at 6579.

[163] The applicants also point to numerous procedural issues that combine to make the application process inordinately complex and unnecessarily adversarial. For example, if the adoptee has applied for a non-disclosure order, the affected birth parent is entitled to participate in the hearing process and present his or her side. Information provided to the Board by the applying adoptee can be disclosed to the birth parent (with names redacted) so that the latter can respond to any allegations that have been made by the adoptee. The Board may request that the applying adoptee undertake a psychiatric assessment. Either side can ask the Board to reconsider its decision. In short, birth parents and adopted persons are pitted against one another as adversaries with the Board as the final, unappealable arbiter. Even in New South Wales, say the applicants, where adoption records have been opened to both adoptees and birth parents, no one is subjected to such a heavy-handed bureaucratic process.

[164] In my view, the problem with the Board and its paper-thin jurisdiction is not procedural. The real problem with having to go before a government board is more fundamental. It was best expressed by the applicants themselves in their affidavit evidence:

- *Joy Cheskes*: My reasons for not wishing to seek out my birth family and wanting to keep my family information private are my own... I do not see why I should be forced to reveal this information or go through the stress and emotional turmoil of having to divulge these feelings to a board in the hope of then being allowed to keep my personal information private.

- *Denbeigh Patton*: The notion that the privacy seeker should have to supply a justification to a government board to maintain his privacy is "grotesque."

- *C.M.*: I believe this process would force me to reveal deeply personal information about myself and plead for someone else's permission to keep my life private.

- *D.S.*: I do not want to have to reveal my identity in order to protect it or share my deepest fears with strangers in the hope that they may allow me to keep my privacy. This exposure would render me even more powerless and humiliated.

[165] The problem with the Board is, at root, the idea of having to go before a government board to plead for a right to privacy and a right to have some degree of control over the disclosure of intensely personal information. As was asked in a letter sent to the Ontario Privacy Commissioner: "Shouldn't the government be protecting my privacy rights instead of requiring me to justify why my private information should not be disclosed?" I am not suggesting that a valid non-disclosure procedure can never involve application to and decision-making by a government body. I am simply saying that, on the facts herein, the non-disclosure procedure set out in the new law does not respond to the reality that the applicants are being denied their *Charter*-protected right to privacy and to the control of their personal information.

[166] In my view, the total eradication of the applicants' s. 7 right to privacy and their right to control the dissemination of their private information is not saved by the no-contact provision or by the provision that offers the possibility of a non-disclosure order but restricts it to situations relating to personal safety and involves, as the applicants see it, a humiliating and adversarial application procedure. For the reasons already stated, this is not minimal impairment.

(iv) Overall proportionality

[167] The final step in the proportionality analysis under s. 1 of the *Charter* requires the court to weigh the benefits and the costs of the challenged law. In weighing these pluses and minuses, it is useful to recall what was said by the B.C. Court of Appeal in *W. (D.D.)*:

> The privacy interest of the adopted person to be left alone and not be subjected to potentially devastating psychological harm... should be respected on human and juridical grounds in all but the most compelling circumstances.[117]

[168] It is also important to recall the Supreme Court's admonition in *O'Connor* because it applies so directly to the facts in this case:

> ...the greater the reasonable expectation of privacy and the more significant the deleterious effects flowing from its breach, the more compelling must be the state objective and the salutary effects of that objective in order to justify interference with this right.[118]

[169] I have already found that the reasonable expectation of privacy, in the context of this case because it involves the disclosure of adoption information, is at a high level.[119] It is also apparent from the uncontradicted evidence of the applicants that the impact of uncontrolled disclosure on their lives and families could be devastating. In light of these facts, how compelling is the state objective? And, more importantly, how compelling are the "salutary effects" as compared to the harm that would be caused to the applicants?

[170] Recall my earlier finding that only a small minority, about 3% of adoptees and birth parents, would use a disclosure veto to prevent the release of their identifying information. That is, in about 97% of the cases, searching adoptees or birth parents would be able to obtain

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[117] *Supra* note 31 at para 23. I would add that the same observation can apply to the non-searching birth parent.
[118] *O'Connor*, *supra* note 53 at para. 117.
[119] Recall the discussion above in Part IV.

the identifying information that they seek even in jurisdictions that have a disclosure veto. Where, then, is the overall proportionality between the costs and the benefits? Is it reasonably proportional to breach the *Charter* rights of a minority so that an additional 3% of searching adoptees and birth parents will be successful in accessing the information that they seek? Do these additional three percentage points justify the total denial of a minority's rights under s. 7 of the *Charter*? In my view, they do not. And no compelling reasons have been offered by the respondent government to suggest otherwise. The Attorney General has failed to show that the "salutary effects" of the new law are so compelling that the breach of the *Charter* can be justified.[120]

[171] In sum, the government has failed to show that the breach of the applicants' rights under s. 7 of the *Charter* is demonstrably justified in a free and democratic society. More specifically, the government has failed to show that the impairment of this *Charter* right was as minimal as possible and that there is an overall and reasonable proportionality between the benefits of the new law and the costs or the harm that would result.

[172] It is not the obligation of the applicants and certainly not that of the court to suggest ways how the new law could comply with *Charter*. In this case, however, the answer seems obvious. In her submission to the standing committee that was considering the new law, the Information and Privacy Commissioner of Ontario, Ann Cavoukian, argued that a disclosure veto would not only protect the privacy rights of the minority but would in fact allow the vast majority to get the information they were seeking. Not to adopt a disclosure veto for past

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[120] During the legislative debate, the point was made repeatedly by members of the opposition that if a disclosure veto was provided to the 3% that would use it, the vast majority of searching adoptees and birth parents (about 97%) would be able to obtain the information that they seek and the constitutionality of the new law would not have been challenged.

adoptions, said Ms. Cavoukian, "would be to ignore the wishes of an entire segment of society: birth parents and adopted persons who were once promised privacy, who still want it and who have governed their entire lives according to that assurance." [121]

[173] The Privacy Commissioner of Canada, Jennifer Stoddart, connected the need for a disclosure veto to concerns about consent, protecting reasonable expectations of privacy and maintaining confidence in the government's collection and use of private information:

> While I believe it is quite right to go back and modify adoption policy to permit the more open approach we have today, which respects the human rights of the child, we cannot with the stroke of a pen rewrite the history of the lives of the individuals who trusted government to keep their birth records and adoption arrangements secret. Confidentiality commitments do not expire like patent protection.
>
> Consent for the collection, use and disclosure of personal information is the cornerstone of our privacy law in Canada. Confidence in the assurances of government rests on our respecting the terms under which we gathered personal information…We find governments around the world increasingly asking for the right to collect ever more information and ever more personal and intrusive types of information, all with the assurances that privacy will be respected. Government has a responsibility to keep its word. [122]

[174] Whether or not governments keep their word is generally a political question. It is not a matter for the courts. Legislatures are sovereign and can enact new laws that change the old rules - provided, of course, that the new law does not breach the *Charter of Rights*, as happened here.

VII. Conclusion

[175] The impugned provisions, ss. 48.1, 48.2 and 48.11, breach the applicants' rights under s. 7 of the *Charter*. For reasons already stated, s. 1 is not available to save or justify this

[121] Ontario, Standing Committee on Social Policy, *Official Reports of Debate (Hansard)* (11 May 2005) at SP-1074.

breach of a *Charter*-protected right. If s.1 is available, the respondent government has failed to show that the breach of the *Charter* is nonetheless justifiable in a free and democratic society.

[176] This is not a case where the impugned provisions should be "read down" so that their application is limited only to future adoptions. In this case, all parties agreed that the stated purpose of the new law and the reason for the constitutional challenge to this law was the opening of past adoption records. Indeed, counsel for the Attorney General made it clear that the impugned provisions should stand or fall on this basis. Reading down was never suggested as a possible remedy.

[177] The application is therefore allowed. Sections 48.1, 48.2 and 48.11 of the VSA are declared invalid and of no force and effect.

[178] I have come to this conclusion after much deliberation. No judge takes lightly his or her responsibility as a "constitutional umpire." No judge is eager to find that a law enacted by a democratically-elected majority is unconstitutional and must be set aside. But our system of government is not based on majority-rule alone. Ours is a constitutional democracy with an entrenched *Charter of Rights and Freedoms* that is intended primarily to protect individuals and minorities against the excesses of the majority. Included within the *Charter's* ambit of protection are the applicants, who are part of a small minority of adoptees and birth parents that wish to protect their privacy. They have every right to do so. The applicants have established that their right under s. 7 of the *Charter* has been breached and the government has failed to justify this breach under s. 1.

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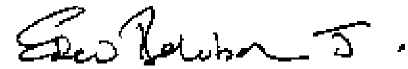
[122] Jennifer Stoddart, "Statement in Support of the Remarks of the Information and Privacy Commissioner of Ontario", (May 11, 2005) at 1.

VIII. Disposition

[179] Sections 48.1, 48.2 and 48.11 of the *Vital Statistics Act*, R.S.O. 1990, c.V.4 are declared invalid and of no force or effect pursuant to s. 52(1) of the *Constitution Act*.

[180] If the parties are unable to agree on costs, I would be pleased to receive brief written submissions from the applicants within 15 days and from the Attorney General and the Intervener within 10 days thereafter.

[181] I am grateful to counsel for their assistance.



Belobaba J.

Released: September 19, 2007

APPENDIX

Sections 48.1*, 48.2* and 48.11 of the *Vital Statistics Act*, R.S.O. 1990, c.V.4

[*PROCLAIMED IN FORCE ON SEPTEMBER 17, 2007]

Disclosure to an adopted person

48.1 (1) An adopted person may apply to the Registrar General for an uncertified copy of the original registration, if any, of the adopted person's birth and an uncertified copy of any registered adoption order respecting the adopted person. 2005, c. 25, s. 6.

Age restriction

(2) The adopted person is not entitled to apply for the uncertified copies until he or she is at least 18 years old. 2005, c. 25, s. 6.

Disclosure

(3) Subject to subsections (5), (7) and (8), the applicant may obtain the uncertified copies from the Registrar General upon application and upon payment of the required fee, but only if the applicant produces evidence satisfactory to the Registrar General of the applicant's identity and age. 2005, c. 25, s. 6.

Notice of preferred manner of contact

(4) If a notice registered by a birth parent under subsection 48.3 (2) is in effect, the Registrar General shall give the applicant a copy of the notice when the Registrar General gives the applicant the uncertified copies. 2005, c. 25, s. 6.

Notice of wish not to be contacted

(5) If a notice registered by a birth parent under subsection 48.4 (3) is in effect, the Registrar General shall not give the uncertified copies to the applicant unless the applicant agrees in writing not to contact or attempt to contact the birth parent, either directly or indirectly. 2005, c. 25, s. 6.

Same

(6) The Registrar General shall give the applicant a copy of the notice when the Registrar General gives the applicant the uncertified copies. 2005, c. 25, s. 6.

Effect of application for order prohibiting disclosure

(7) If the Registrar General receives notice of an application under section 48.7 for an order directing him or her not to give the uncertified copies to the applicant, the Registrar General shall not give the uncertified copies to the applicant before the Registrar General receives,

(a) a certified copy of the order; or

(b) notice that the application for the order has been dismissed, withdrawn or abandoned. 2005, c. 25, s. 6.

Effect of order

(8) If the Registrar General receives a certified copy of an order of the Board directing the Registrar General not to give the uncertified copies to the applicant, the Registrar General shall not give them to the applicant. 2005, c. 25, s. 6.

Rescission of order

(9) Subsection (8) does not apply if the Registrar General receives notice that the Board has rescinded the order. 2005, c. 25, s. 6.

Notice of prohibition against disclosure to a birth parent

(10) If the Registrar General has received notice under section 48.9 that, by virtue of that section, he or she is prohibited from giving the information described in subsection 48.2 (1) to the applicant's birth parent and if that notice has not been rescinded, the Registrar General shall give the applicant a copy of the notice when the Registrar General gives the applicant the uncertified copies. 2005, c. 25, s. 6.

Deemed receipt by Registrar General

(11) For the purposes of this section, the Registrar General shall be deemed not to have received a notice or certified copy referred to in this section until the Registrar General has matched the notice or copy with the original registration, if any, of the adopted person's birth or, if there is no original registration, until the Registrar General has matched it with the registered adoption order. 2005, c. 25, s. 6.

Disclosure before deemed receipt

(12) Subsections (7) to (10) do not apply if, before the Registrar General is deemed to have received the notice or copy, as the case may be, the Registrar General has already given the uncertified copies to the applicant. 2005, c. 25, s. 6.

Mandatory delay in disclosure

(13) If the Registrar General receives notice that the Child and Family Services Review Board has given him or her a direction described in subsection 48.7 (6), the Registrar General shall comply with the direction. 2005, c. 25, s. 6.

Disclosure to a birth parent

48.2 (1) A birth parent of an adopted person may apply to the Registrar General for all the information contained in the following documents, with the exception of information about persons other than the applicant and the adopted person:

1. The original registration, if any, of the adopted person's birth.
2. Any birth registration respecting the adopted person that was substituted in accordance with subsection 28 (2).
3. Any registered adoption order respecting the adopted person. 2005, c. 25, s. 6.

Age restriction

(2) The birth parent is not entitled to apply for the information described in subsection (1) until the adopted person is at least 19 years old. 2005, c. 25, s. 6.

Disclosure of information

(3) Subject to the restrictions set out in this section, the applicant may obtain the information described in subsection (1) from the Registrar General upon application and upon payment of the required fee, but only if the applicant produces evidence satisfactory to the Registrar General of the applicant's identity and the adopted person's age. 2005, c. 25, s. 6.

Notice of preferred manner of contact

(4) If a notice registered by the adopted person under subsection 48.3 (1) is in effect, the Registrar General shall give the applicant a copy of the notice when the Registrar General gives the applicant the information described in subsection (1). 2005, c. 25, s. 6.

Notice of wish not to be contacted

(5) If a notice registered by the adopted person under subsection 48.4 (1) is in effect, the Registrar General shall give the applicant a copy of the notice when the Registrar General gives the applicant the information described in subsection (1). 2005, c. 25, s. 6.

Temporary restriction on disclosure

(6) The Registrar General shall not give the information described in subsection (1) to the applicant while any of the following circumstances exist:

1. The Registrar General is required by section 48.9 to ask a designated custodian for notice about whether the Registrar General is prohibited, by virtue of that section, from giving the information to the applicant, but the Registrar General has not yet received the notice.
2. The Registrar General has received notice of an application under section 48.5 or 48.6 for an order directing him or her not to give the information to the applicant, but the Registrar General has not yet received either a certified copy of an order or a notice that the application has been dismissed, withdrawn or abandoned.
3. A notice registered by the adopted person under subsection 48.4 (1) is in effect, but the applicant has not yet agreed in writing that he or she will not contact or attempt to contact the adopted person, either directly or indirectly. 2005, c. 25, s. 6.

Prohibition against disclosure

(7) The Registrar General shall not give the information described in subsection (1) to the applicant if either of the following circumstances exist:

1. The Registrar General has received notice under section 48.9 that, by virtue of that section, the Registrar General is prohibited from giving the information to the applicant, that notice has not been rescinded, and there is not a notice of waiver under section 48.10 that is in effect.
2. The Registrar General has received a certified copy of an order under section 48.5 or 48.6 directing him or her not to give the information to the applicant, and the Registrar General has not received notice that the order has been rescinded. 2005, c. 25, s. 6.

Deemed receipt by Registrar General

(8) For the purposes of this section, the Registrar General shall be deemed not to have received a notice or certified copy referred to in this section until the Registrar General has matched the notice or copy with the original registration, if any, of the adopted person's birth or, if there is no original registration, until the Registrar General has matched it with the registered adoption order. 2005, c. 25, s. 6.

Disclosure before deemed receipt

(9) Subsections (4) and (5), paragraph 2 of subsection (6) and paragraph 2 of subsection (7) do not apply if, before the Registrar General is deemed to have received the notice or copy, as the case may be, the Registrar General has already given the information described in subsection (1) to the applicant. 2005, c. 25, s. 6.

Mandatory delay in disclosure

(10) If the Registrar General receives notice that the Child and Family Services Review Board has given him or her a direction described in subsection 48.5 (8) or 48.6 (6), the Registrar General shall comply with the direction. 2005, c. 25, s. 6.

See: 2005, c. 25, ss. 6, 36 (2).

Unsealing of files

48.11 For the purposes of sections 48.1 to 48.10, the Registrar General may unseal any file that was sealed under this Act or a predecessor of this Act. 2005, c. 25, s. 10.

DATE: 20070919
DOCKET: 06-CV-319936PD2

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOY CHESKES, DENBIGH PATTON, C.M. AND D.S.

Applicants

- a n d -

THE ATTORNEY GENERAL OF ONTARIO

Respondent

- a n d -

COALITION FOR OPEN ADOPTION RECORDS

Intervener

REASONS FOR JUDGMENT

BELOBABA J.

Released: September 19, 2007