Family As Status in Doe v Canada: Constituting Family Under Section 15 of the Charter

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Abstract

The Ontario Court of Appeal recently released a decision rejecting a constitutional challenge to the Processing and Distribution of Semen for Assisted Conception Regulations. In this paper I argue that the Court’s reasoning in Doe v Canada is flawed and that certain provisions of the Semen Regulations constitute an unjustified infringement of section 15 of the Canadian Charter of Rights and Freedoms. I also argue that the claimants in this case would have been better served by the jurisprudence of section 15 of the Charter had they premised their argument on the assertion that they were discriminated against on the basis of family status rather than sexual orientation. Such an approach would be preferable both in terms of avoiding the pitfalls of the formal equality approach to section 15 adopted by both levels of court in this case, in addition to providing a more inclusive and progressive litigation strategy for acquiring legal recognition of familial relationships which deviate from the hetero-normative paradigm assumed by the Semen Regulations.

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I. INTRODUCTION

As the legal regulation of reproductive technologies in Canada has increased, so too have the legal (and with them financial) obstacles to parenthood such regulation presents to individuals, couples and families whose methods of reproduction are in some respect outside the norm. The Ontario Court of Appeal recently released a decision rejecting a constitutional challenge to the *Processing and Distribution of Semen for Assisted Conception Regulations*.\(^1\) This paper will argue that the Ontario Court of Appeal erred in adopting the reasoning of the lower court in *Doe v Canada*,\(^2\) and that certain provisions of the *Semen Regulations* constitute an unjustified infringement of section 15 of the *Canadian Charter of Rights and Freedoms*.\(^3\) It will further argue that the claimants in this case would have been better served by the jurisprudence of section 15 of the *Charter* had they premised their argument on the assertion that they were discriminated against on the basis of family status rather than sexual orientation. Such an approach would be preferable both in terms of avoiding the pitfalls of the formal equality approach to section 15 adopted by both levels of court in this case, in addition to providing a more inclusive and progressive litigation strategy for acquiring legal recognition of familial relationships which deviate from the hetero-normative paradigm assumed by the *Semen Regulations*.

My discussion will be divided into three parts. In the first part I will provide a brief historical background and overview of the *Semen Regulations* followed by a

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\(^1\) S.O.R./96-254 [hereinafter the “Semen Regulations” or alternatively the “Regulations”].

\(^2\) *Susan Doe v. Canada (Attorney General)*, 79 O.R. (3d) 586 aff’d 276 D.L.R. (4th) 127 (C.A.) [hereinafter “Doe v Canada”]. The constitutional validity of the *Semen Regulations* was originally challenged in an earlier case *Jane Doe v Canada (Attorney General)*, [2006] O.J. No. 191 which was dismissed after the claimant successfully conceived through home insemination.

\(^3\) Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the “Charter”].
discussion of the reasoning in the *Doe v Canada* decision. Included in this section will be an observation of the difficulties, as well demonstrated in the *Doe v Canada* decision, with the jurisprudential trend towards privileging legislative objective over ensuring equal protection from inequitable legal effect,\(^4\) under section 15 analysis. In the second section of the paper I will suggest that a better strategy for the claimants in *Doe v Canada* would have been to argue that the *Semen Regulations* violate the equality guarantees under section 15 of the *Charter* by discriminating on the basis of family status. The third section of the paper will suggest that while the critique advanced by some scholars suggesting that equality jurisprudence has essentialized gay and lesbian identity and failed to adequately subvert oppressive heterosexual norms is not without some merit,\(^5\) we ought not overlook the manner in which the legal successes of the gay and lesbian rights movement may have laid the groundwork or set the stage for the types of social progress and transformations understandably embraced by these critics. This section will conclude with the observation that while the categorical approach to equality jurisprudence in Canada (and its potentially essentializing and homogenizing tendencies) may be here to stay (at least for now), queer activists, litigants and academics ought not to conclude that progressive advancement cannot be achieved under section 15 of the *Charter*. Instead, we ought to set about queering the categories of prohibited discrimination enumerated or analogized under section 15. I will conclude my discussion by suggesting that the *Doe v Canada* case offers yet another opportunity to critically re-think what family means in Canadian society.

\(^4\) See for example Dianne Pothier, “Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What’s the Fairest of Them All?” in *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* eds Sheila McIntyre & Sandra Rogers (Butterworths: Canada, 2006) 135.

II. **SUSAN DOE v CANADA AND THE SEMEN REGULATIONS**

The *Semen Regulations* were enacted in 1996 under the *Food and Drug Act*. The impetus for the *Regulations* arose as a result of a concern expressed in the *Report of the Royal Commission on New Reproductive Technologies* in 1993 over the lack of uniform national standards applicable to the several sperm banks (now called semen establishments) across Canada responsible for the screening and collection of semen from anonymous donors. The concern was that women who utilized semen from anonymous donors who had deposited at sperm banks that did not screen for diseases were at risk of contracting some form of communicable disease. The source of the Royal Commission’s concern with the risk of infection from donor insemination was the use of semen from anonymous donors, not the use of semen from known donors. In fact it is unlikely that the Commission focused on known donors at all, given that the Report doesn’t actually distinguish between known and anonymous donors.

The *Regulations* prohibit the clinical use of semen in “assisted conception” unless and until the following has occurred: the donor has tested negative for a number of communicable diseases including HIV and Hepatitis B and C, the semen has been cryo-preserved (frozen) and quarantined for six months and, the donor has then re-tested negative for these diseases. The inequality created by the *Semen Regulations* relates primarily to their application to known donors rather than to restrictions and prohibitions.

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6 R.S.C. 1985, c. F.27, s.31.
on the use of anonymous semen donation in assisted conception practices.\textsuperscript{8} The inequality stems from the Regulations’ definition of “assisted conception”.

The Semen Regulations define “assisted conception” as a “reproductive technique performed on a woman for the purpose of conception using semen from a donor who is not her spouse or sexual partner”.\textsuperscript{9} In other words, women who are married to, living together in common-law relationships with, or having sex with their chosen donor, can access assisted conception procedures without being subject to the Regulations’ restrictions; they can be inseminated by their physicians without their donor first undergoing the screening, and without being subjected to the wait period and the costs (both pecuniary and otherwise) imposed as a result of the Semen Regulations. Women who are not in a spousal or sexual relationship with their chosen donor do not have this option. Individuals who are not in a spousal or sexual relationship with their chosen donor, regardless of their relationship to the donor, will, in order to receive assisted conception services, first have to incur the cost of having the semen screened, cryopreserved for six months and then re-screened\textsuperscript{10} – a cost which is measured in the thousands. In the end, they will only have access to cryo-preserved semen rather than fresh semen. The rate of successful assisted conception using frozen sperm is, however, significantly lower than the rate of success when assisted conception is conducted with fresh sperm.\textsuperscript{11}

\textsuperscript{8} The potential section 15 challenge to the Semen Regulations on the basis that they outright prohibit all anonymous semen donations from gay men should be noted but will not be addressed in this paper. This prohibition raises issues similar to those being litigated in relation to the Red Cross’ outright prohibition against all gay male blood donors.

\textsuperscript{9} Supra note 1 at s. 1.

\textsuperscript{10} Supra note 1 at s.4, 9-11.

\textsuperscript{11} This was a finding of fact recognized by the Court in Doe v Canada, supra note 2 at para. 51.
The Regulations impose an additional barrier to accessing assisted conception procedures for those women who are not in a sexual or spousal relationship with their known donor and whose known donor is gay or over 40. Prior to 2002, under the Regulations the use of semen in assisted conception from men belonging to one of a number of particular categories was not permitted under any circumstances. The excluded categories include men over the age of forty, alcoholics, and men who have had sex with another man, even once, since 1977.\(^\text{12}\) In 2002 the government amended the Regulations to provide for what is described in the Regulations as Special Access Authorization.\(^\text{13}\) Under the new provisions a physician can now, with special government authorization, use the semen of a gay man to perform assisted conception procedures. To acquire that authorization a physician is required to provide the government with, among other things, a rationale outlining “the reasons that justify the use of the requested semen” and the “reasons why the needs of the patient cannot be met using semen” from a man who hasn’t had sex with another man, even once, since 1977.\(^\text{14}\) This requirement for special authorization to use the semen of a man from the excluded category of donors is required after the known donor and his semen have undergone the testing regiment required by the Regulations and been deemed safe. In other words, individuals whose known donor is a gay man (as often seems to be the case for lesbian couples\(^\text{15}\)) will, even

\(^{12}\) Seem Regulations, supra note 1 at s. 1 (adopting the Health Canada Directive entitled Technical Requirements for Therapeutic Donor Insemination. The exclusions are enumerated at section 2.1 of the Directive.)

\(^{13}\) Seem Regulations, supra note 1 at s.19(2)(m)(i) and (ii).

\(^{14}\) Ibid.

after their chosen donor has twice been tested and cleared, still need their physician to apply to the government for a Special Access Authorization.\textsuperscript{16}

\textit{Doe v Canada} involved a challenge to the Semen Regulations by ‘Susan Doe’ a woman who sought assisted conception to conceive using semen from the same gay man who had biologically fathered the claimant and her partner’s first child. The claimant’s partner conceived and gave birth to the family’s first child and the couple wanted their second child to be biologically related to their first child; in other words they wanted the child to be biologically fathered by the same man who had biologically fathered their first child. However, because Susan Doe was not in a sexual or spousal relationship with him, her donor and his semen were subject to the Regulations. In addition, because he was a gay man over the age of 40 it could only be used if Susan Doe’s physician received Special Access Authorization from the federal government.\textsuperscript{17} While her donor was willing to provide fresh semen for use in assisted conception he was not willing to have his semen cyro-preserved and quarantined. As a result, Susan Doe was denied access to assisted conception procedures using her chosen donor’s semen.

As a result, Susan Doe challenged the constitutional validity of the definition of “assisted conception” under the Regulations, arguing that it violated section 15 of the Charter by discriminating on the basis of sexual orientation.\textsuperscript{18} The Ontario Superior Court of Justice held that the definition of “assisted conception” in the Semen

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\item[\textsuperscript{16}] Semen Regulations, supra note 1 at s.19(2)(m)(i) and (ii).
\item[\textsuperscript{17}] Ibid.
\item[\textsuperscript{18}] The claimant also unsuccessfully challenged the Semen Regulations under section 7 of the Charter. It is Justice Dambrot’s section 15 analysis with which this paper is most concerned. Doe v Canada, supra note 1. Notably, the Assisted Human Reproduction Act declares, as one of its declaratory principles that “persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status”. S.C. 2004, c.2, s.2(e)
\end{itemize}
}
Regulations did not violate the claimant’s rights under section 15 of the Charter and this decision was upheld on appeal.

Susan Doe argued that this exemption from the Regulations for the semen of a woman’s spouse or sexual intimate discriminates against lesbians who by definition will not have a semen donor who is a spouse or sexual partner. Justice Dambrot, of the Ontario Superior Court of Justice, and Justice Macpherson of the Ontario Court of Appeal (who on the whole adopted Justice Dambrot’s reasoning) disagreed. Justice Dambrot found that the exemption from the Regulations was not, as Susan Doe had argued, a recognition that “women are entitled to knowingly and voluntarily accept the risks to themselves and to their unborn children associated with conceiving a child with the donor of their choice.” His rejection of this claim was premised on the fact that heterosexual women who are not in a sexual or spousal relationship with their donor are also subject to the Regulations. As such he reasoned,

…simple logic tells me that the justification for the exemption of spouses and sexual partners cannot be recognition that women are entitled to knowingly and voluntarily accept the risks to themselves and to their unborn children. It would be impossible to reconcile that purpose with the fact that a heterosexual woman who wants to be inseminated by a known donor is not exempt from the scheme…In other words a heterosexual woman who wants to be inseminated by a known donor is denied the right to knowingly and voluntarily accept the risks to themselves and to their

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19 Doe v Canada, supra note 2.
20 Ibid. at para. 79-80.
unborn child associated with conceiving a child with the donor of their choice.\textsuperscript{21}

Instead he suggests, “it makes perfect sense to exclude from the scheme women seeking assisted conception with the semen of their spouses or sexual partners, because there is no point in imposing the Semen Regulations on such women having regard to the fact that they have already been exposed to any risk that exists, and will likely continue to be exposed.”\textsuperscript{22} As such, for Justice Dambrot the logical distinction to be drawn is between donors who are sexually intimate with, or married to, the women seeking assisted conception and donors who are not. This health based rationale for the exemption assumes that the risk of acquiring infectious diseases is the same whether or not the donor is known to the recipient or anonymous. “It also makes perfect sense not to exclude any other donors, but rather to insist on the same safeguards for all of them, whether they are known to the woman or not.”\textsuperscript{23}

Having identified this as the purpose of the exclusion, Justice Dambrot unsurprisingly came to the conclusion that while concededly “lesbians do not ordinarily have spouses or sexual partners who can donate semen” and therefore the \textit{Regulations} do impose differential treatment on them, sexual orientation is not the basis for this differential treatment.

There are two difficulties with Justice Dambrot’s reasoning. Firstly, it adopts an Aristotelian conception of equality which our courts have purportedly rejected in favour

\textsuperscript{21} \textit{Ibid.} at para. 82.
\textsuperscript{22} \textit{Doe v Canada}, supra note 2 at 83.
\textsuperscript{23} \textit{Ibid.}
of a more substantive approach to equality. While conceding that the definition of assisted conception does, in its effect, subject lesbian women to differential treatment based on sexual orientation, the Court employed a formal notion of equality, one that privileges legislative objective over legislative effect, in order to determine that sexual orientation was not the basis for the differential treatment. The difficulty with Justice Dambrot’s decision is that he conflates a section 15 analysis with selective elements of a section 1 analysis which as a result fails to take into account the salient difference between lesbians and heterosexual women in this context. Unsurprisingly, and as the Royal Commission on Reproductive Technologies noted in their report, and Justice Dambrot acknowledged in Doe v Canada, a disproportionate number of Canadian women without access to semen from their sexual partners happen to be lesbian. In fact, the majority of individuals seeking assisted insemination with the semen of a known donor with whom they are not sexually intimate are same sex oriented women. By undertaking a section 15 analysis heavily reliant on legislative objective to identify the appropriate comparator group, and to determine whether the differential treatment experienced by lesbians under the Semen Regulations is based on their sexual orientation, Justice Dambrot’s decision results in a formal concept of equality which denies the claimant the substantive type of equality that the Supreme Court of Canada committed

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24 See Law Society of British Columbia v Andrews [1989] 1 S.C.R. 143 at 164 [hereinafter Andrews]. For an excellent discussion on this point see Pothier, supra note 4 at 135, citing Andrews, in which the Supreme Court stated that “identical treatment may frequently produce serious inequality,” she notes that “[i]n rejecting a “similarly situate” test as “deficient”, the Supreme Court of Canada began its section 15 interpretation by embracing substantive equality.”

25 Supra note 8.

26 Supra note 2.

itself to in the nascent days of its section 15 jurisprudence. Justice Dambrot’s reasoning is a direct invocation of the similarly situated test. It is true that heterosexual women without access to semen from their sexual partner who seek assisted conception with the use of chosen donor semen are in the same legal situation under the Semen Regulations as lesbian women; it is equally true that in British Columbia before 1997 it wasn’t only deaf patients who didn’t receive a sign language interpreter upon admission to hospital.  

The second difficulty with the reasoning in Doe v Canada is that, despite how obvious, simple and logical it seems to Justice Dambrot, it actually does not reflect reality logic or reality to suggest that a woman using a non-spousal known donor would be unlikely or less likely to take suitable precautions, such as STD testing, for her designated donor. Indeed women in such circumstances may very well be more likely to insist that their chosen donors be tested than are women who are in an intimate spousal or sexual relationship with their donors. Justice Dambrot also suggested that “unlike the case where the donor was a spouse or sexual partner, where any risk of infection had already been assumed before the assisted conception procedure, in the case of other known or anonymous donors the woman had not assumed any risk prior to the assisted conception procedure.” This reasoning too defies both logic and reality. In many situations, before incurring the expense and intervention of assisted conception, women who approach their doctors for assistance in conceiving with known donor semen will have first attempted home insemination; therefore they too will have already been exposed to the risk of

28 See Eldridge v British Columbia (Attorney General) [1997] 3 S.C.R. 624 where the Supreme Court found that failure to provide sign language interpreters where necessary for effective communication for the procurement of medical services is a violation of equality rights under s. 15(1) of the Charter.

29 Doe v Canada, supra note 2 at 23.

30 In Jane Doe v Canada, [2003] O.J. No. 5430 a lesbian couple who had been unable to conceive with their known donor through home insemination challenged the constitutionality of the Semen Regulations. While the facts do not indicate one way or the other, it seems reasonable to suspect that Susan Doe also
infection. What is more, women do not automatically, upon initial exposure to infected semen, contract sexually transmitted diseases such as HIV. Arguably, any woman who has not actually been infected by diseased semen faces the same risk from assisted conception, regardless of whether she has previously been exposed to the semen. In other words, the purpose of the exclusion identified by the Court is only logical for women who have already been infected by the semen of their spouse or sexual intimate. Those excluded women, who are in a spousal or sexual relationship with their donor, but who have not been infected by their semen, are, in terms of risk of infection, in the same position as women who are subject to the requirements of the *Semen Regulations*.

Finally, if the purpose of the restrictions against using semen donated by men over 40 or by alcoholic men is actually to prevent birth defects, as was suggested by the Court, it isn’t logical to exclude from this restriction women who are in a spousal or sexual relationship with men over 40 or alcoholic men.

Undeniably, one of the legislative objectives of the *Semen Regulations* is to prevent the spread of communicable diseases. In keeping with this objective, it is simple, and logical (to use Justice Drambot’s language) to subject anonymous semen to the regiment of testing prescribed in the *Semen Regulations*. It would also be consistent with the legislative objective articulated by the Court, although for the reasons stated above perhaps not efficacious, to subject the semen of all known donors to this regiment of testing. However, as argued above, there doesn’t appear to be a well reasoned basis, consistent with the stated objective, to exclude from the strictures of the *Semen Regulations*, some known donors, but not others. I would suggest that the exclusion from

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would have attempted the more personal and private home insemination approach before seeking medical intervention.
the *Semen Regulations* of known donors who are in a spousal or sexual relationship with the women seeking assisted conception, is actually based on hetero-normative and outdated assumptions or understandings about family and interpersonal relationships in contemporary Canadian society. That is to say, the exclusion from the *Regulations* is premised on a monogamous, heterosexual ideal of the family which presumes that the semen of husbands ought not to be subjected to the same testing and restrictions as that of any other known donor semen. If this is so then, the constitutional difficulty with the definition of “assisted conception” under the *Semen Regulations* isn’t only that its’ effects impose a differential burden to some as a result of their sexual orientation but that, by relying on a hetero-normative, traditional conception of the family its purpose imposes differential treatment based on family status. If this is the case then, even within an analytical framework which privileges purpose over effect, the definition of assisted conception under the *Regulations* violates section 15 of the *Charter*.

In appealing Justice Dambrot’s decision, Susan Doe’s counsel described the issue of the purpose of the exclusion as “the $64,000 question”, candidly, and in my opinion mistakenly, acknowledging to the Court that “if I am wrong with respect to the purpose of the *Regulations*, I have a much tougher case”. Indeed, Susan Doe’s appeal of the decision to dismiss her section 15 challenge failed directly as a result of this issue. The Ontario Court of Appeal, describing it as the pivot of the appellant’s challenge, adopted Justice Dambrot’s conclusion as to the purpose of the exclusion, rejecting the appellant’s argument that its purpose pertained to respecting women’s autonomy and that this concept of voluntariness under the *Regulations* should apply to both heterosexual and lesbian women using known donors. Had Susan Doe argued that the definition of

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31 276 D.L.R. (4th) 127 (C.A.) at para. 27.
assisted conception treated certain types of families differently and that the purpose of this differential treatment was based on family status, her claim at the very least would not have fallen prey to the formalistic bent with which Courts of late appear to be approaching section 15 challenges.\textsuperscript{32}

**III. DISCRIMINATION ON THE BASIS OF FAMILY STATUS**

*Status* 1. social position, rank, relation to others, relative importance…\textsuperscript{33}

*Family* …5. the basic unit in society traditionally two parents rearing their own or adopted children; also any of various social units differing from but regarded as equivalent to the traditional family <a single parent ~>…\textsuperscript{34}

Over ten years ago, in *Miron v Trudel*, Justice McLachlin, as she then was, in determining that marital status constituted an analogous ground under section 15, noted that “[o]f late, legislators and jurists throughout our country have recognized that distinguishing between cohabitating couples on the basis of whether they are legally married or not fails to accord with current social values or realities (emphasis added)”\textsuperscript{35}. Justice McLachlin’s conclusions in *Miron v Trudel* recognized that the notion of family in Canada had evolved and that the equality protections guaranteed under section 15 of the *Charter* require that the government enact laws which do reflect current social realities and values and do not treat individuals differently because of the types of families to which they belong.\textsuperscript{36} In *Canada v Mossop*, Justice L’Heureux-Dube, writing

\textsuperscript{32} See Pothier, *supra* note 4.
\textsuperscript{33} The Concise Oxford Dictionary, 7\textsuperscript{th} ed.,
\textsuperscript{34} Merriam-Webster’s Collegiate Dictionary, 10\textsuperscript{th} edition
\textsuperscript{36} In *Nova Scotia v Walsh* [2002] 4 SCR 325 the Supreme Court of Canada denied a section 15 challenge to the definition of spouse (which distinguishes between common law and married couples) under Nova Scotia’s *Matrimonial Property Act*, RSNS 1989, c.275. While the crown conceded, and the Court agreed, that marital status is an analogous ground under section 15, the challenge was denied on the basis that the
in dissent in reference to an interpretation of the Canadian Human Rights Code, adopted an experiential definition of the family:

A review of our legislation reveals the extent to which laws have changed to reflect the realities of families. The treatment of common law spouses is but one example. Law and Family have long been engaged in an Escherian dialectic, each shaping the other while at the same time being shaped…. [T]he interpretation of “family status” in the Act must account not only for current legal and societal conceptions, but also for the lived experience of family. 37

Whether one adopts Justice L’Heureux-Dube’s broad interpretation of the legal recognition of family, an interpretation based on concordance with current social values or realities, or even a more narrow definition incorporating only those family structures which have received legal recognition, the types of families, members of whom are discriminated against by the Semen Regulations, would likely qualify. The notion of family has further evolved in the twelve years since Miron v Trudel was decided; today’s ‘current social reality’ in terms of the family includes not just unmarried, cohabiting common law couples and their offspring but a variety of other non-conventional or ‘queer’ family structures.

[1993] 1 S.C.R. 554 at para. 120. While Justice L’Heureux-Dube was in dissent in Mossop, her observations regarding the family, particularly in light of the legal recognition which gay and lesbian couples have received since the majority wrote their decision in Mossop, are noteworthy.
Decreasing numbers of Canadian and American families fit the traditionally normative pattern of the nuclear family that consists of a father and mother and their children. Increasing numbers of lesbians are choosing to create families without heterosexual sex. The lesbian and gay baby boom is creating a culture of its own, evolving new definitions of family relationships.\(^\text{38}\)

One non-conventional family structure which has recently received legal recognition in Canada is the three parent or shared parenting family model. Legal recognition of this type of family was demonstrated in a recent Ontario Court of Appeal decision, \(A.A. \text{ v } B.B. \text{ and } C.C.\).\(^\text{39}\) \(A.A. \text{ v } B.B.\) involved a three parent family consisting of a five year old son (D.D.), his biological father (B.B.) and mother (C.C.) and his biological mother’s partner (A.A.). His two mothers serve as D.D.‘s primary caregivers. However, B.B., whose role was not limited simply to the donation of semen, has remained involved in the child’s life. The family sought a declaration under the *Children’s Law Reform Act* recognizing that A.A is also D.D.’s mother. The couple did not apply for an adoption order because under an adoption order B.B. would lose his status as D.D.’s parent. In other words, what this family sought was legal recognition of all three parents; the Ontario Court of Appeal granted their family this recognition. While the decision was not based on constitutional/equality grounds, but rather on the basis of the Court’s *parens patriae* jurisdiction and the best interests of the child, it nevertheless constitutes legal recognition of a three parent family.


The *Semen Regulations* deny a benefit to many individuals whose family structure does not conform to traditional understandings of family, while providing that benefit to those whose family status does reflect the traditional normative family model. They draw a distinction based on the nature of the relationship between the individual seeking insemination and the potential biological father. Those seeking to create a conventional family which has one mother, the biological mother, and one father, the biological father avoid the costs and burdens imposed by the *Semen Regulations*. While those seeking to create a non-conventional family, whether that be, for instance, a shared parenting family, such as the one at issue in *A.A. v B.B.*, a single parent family headed by a celibate woman, a family such as the one at issue in *Doe v Canada* in which a lesbian couple want to use the same donor a second time so that their children will be biologically related, or any other non-traditional family model, are subject to the costs and other burdens of the *Regulations*. Regardless of the role that one’s chosen donor will play in the family, individuals who belong to, or are seeking to build, non-traditional or queer families are subject to the *Semen Regulations* while those seeking to create biologically created, two parent, hetero-normative families are not.

In his concurring opinion in *M v H*, Justice Bastarache noted that “it would be consistent with Charter values of equality and inclusion to treat all members in a family relationship equally and all types of family relationships equally.” In *M v H*, Justice L’Heureux-Dube, built on her experiential definition of family by adding a functional component to the definition of family:

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40 In *M v H*, [1999] 2 S.C.R. 3 the Supreme Court of Canada found that the heterosexual definition of spouse in section 29 of Ontario’s *Family Law Act* contravened section 15 of the *Charter* by discriminating on the basis of sexual orientation. The Court’s recognition of the need to treat all family relationships equally is useful for the purposes of this argument.
The functional approach involves an examination of a cluster of variables that may be commonly found in families. These variables include the existence of a relationship of some standing in terms of time and with the expectation of continuance, self-identification as a family, holding out to the public of the unit as a family, an emotional positive involvement, sexual union, raising and nurturing of children, care giving to children or adults, shared housework, internal division of life-maintenance tasks, co-residence…Not all variables are present in any given family, and there is no one variable that is present in all families.\(^{41}\)

For purposes of providing or denying benefits, the government and courts often take a functional approach to defining family.\(^{42}\) Under a functional approach, many of the families created through the use of a chosen donor who is not in a sexual relationship with the birth mother would receive legal recognition in terms of tax laws, child support laws and child custody laws. If these relationships are, or should be, recognized as family under the law, then correspondingly, they should also be protected against discrimination on the basis of family status, under section 15 of the Charter. By excluding from the obligations and costs of the Semen Regulations individuals whose choice of known donor, and therefore type of family unit, is premised on a sexual union, while excluding all others whose known donor is not sexually united to them, the Regulations privilege members of one type of family while unnecessarily burdening individuals whose family structure is based on other types of relationships.

\(^{41}\) M v H, supra note 40 at para. 137

The under inclusive exception created by the *Semen Regulations* relies on stereotypical attitudes about the presumed characteristics or situations of individuals involved in non-traditional familial relationships which deviate from the monogamous two parent heterosexual norm. “In the great majority of cases the existence of prejudicial treatment based on an enumerated or analogous ground leads to a conclusion that s. 15(1) has been infringed. Distinctions made on these grounds are typically based on stereotypical attitudes about the presumed characteristics or situations of individuals rather than their true situation or actual ability.”43

The distinction in the *Semen Regulations* should be between anonymous donors and known donors, not between known donors whose connection to the biological mother is sexual or spousal and known donors whose connection to the biological mother is not sexual. In the majority of cases, some degree of familial connection will be created when a woman or couple (such being predominantly lesbian not heterosexual couples) uses a known donor.44 In fact, in a significant number of cases, the known donor will play some parental role in the family.45 Lesbian women who use known donors frequently share a family status similar to that of the claimants in *A.A. v B.B.*: a three parented family in which a lesbian couple and a male individual (in the majority of cases a gay male individual46) with whom they have some form of relationship together, form a familial unit.47 Family status is also implicated, regardless of the degree of further involvement of the known donor, for those queer families who wish to have additional

45 *Ibid.* In that study they found that up to 10 % of known donors played a co-parenting role in the child’s family.
46 *Ibid.* where they found that the majority of known donors for lesbian couples were gay men.
47 *Ibid.* where they found that half to two thirds of the known donors had some contact with their biological child/children.
children ‘biologically fathered’ by the same known donor, as was the case in *Doe v Canada*. The *Regulations*, by imposing high costs and lower rates of conception on women whose donors are not their sexual or spousal intimate discriminate on the basis of family status; they discriminate not just against the women seeking assisted conception of this sort but also, depending on the circumstances of a given case, against known donors, and/or non-biological co-parents.

### III. The Subversive Potential of the Family as Status

Premising a constitutional challenge to the *Semen Regulations* on the basis of family status discrimination rather than simply on the basis of sexual orientation discrimination is both more inclusive now, and more likely to promote greater inclusivity in the future.

In “On Law’s Categories” Professor Gotell, borrowing from Foucault, engages in a discursive analysis of the *Vriend v Alberta* decision, in order to conclude that “through a reliance on fixed sexual identity categories the liberal legal framing of sexual orientation” in *Vriend* works to reinforce the naturalness of heterosexuality. Her emphasis is on the increasingly powerful role of law in constructing sexual subjectivity and the limits placed upon the potential for transformative social and political change embedded in producing a rigidly demarcated category of gay/lesbian. However, also to be drawn from her analysis is the assertion that by relying on a rigid

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48 [1998] 1 S.C.R. 493 [hereinafter *Vriend*]. In *Vriend*, the Supreme Court of Canada found that Alberta’s refusal to include sexual orientation under provincial human rights legislation was a non-justifiable violation of section 15 of the *Charter*. The Court recognized sexual orientation as an analogous ground under section 15 three years earlier in *Egan v Canada* [1995] 2 S.C.R. 513 [hereinafter *Egan*] however, *Vriend* was the first time that a denial of formal equality to gays and lesbians was recognized by the Supreme Court of Canada as an unreasonable violation of section 15.


heterosexual/homosexual divide, claims of discrimination based on sexual orientation serve to heterosexualize other important human signifiers which have been identified under section 15 as prohibited grounds of discrimination.\textsuperscript{51} She suggests that this process of heterosexualization was instigated prior to the addition of explicit sexual orientation protections under anti-discrimination provisions. Professor Gotell contends that the initial exclusion of sexual orientation clauses from human rights legislation has precluded the ability of “non-heterosexuals” to claim protection against other prohibited types of discrimination. She notes, citing cases such as \textit{Canada v Mossop}\textsuperscript{52}, that “prior to the addition of explicit sexual orientation protections” unsuccessful complaints were made on the basis of existing categories, including sex, marital status and family status.

Borrowing from Professor Katherine Lahey’s conclusions in \textit{Are We Persons Yet? Law and Sexuality in Canada}\textsuperscript{53}, she suggests that such decisions confirmed the exclusion of “non-heterosexuals” from these categories. “Discrimination against gays and lesbians, in other words, was not about sex, family status and so on; instead, it was discrimination on the basis of a missing pocket, --sexual orientation.” In this way, she suggests, the existing grounds were effectively heterosexualized and sexual identities, as constituted by the law, further essentialized. For example in \textit{Mossop}, the Court denied a human rights complaint of discrimination on the basis of family status made by Brian Mossop after he was denied bereavement leave by his employer. Lahey suggests that the Supreme Court, “in concluding that this discrimination was not ‘really’ on the basis of marital status, but

\textsuperscript{51} \textit{Ibid.} at 98.

\textsuperscript{52} \textit{Supra} note 37. In \textit{Mossop} the Supreme Court of Canada denied the appeal of a gay man who claimed that he had been discriminated against on the basis of family status, which was prohibited under the \textit{Canada Human Rights Act}. Mossop’s employer had denied him bereavement leave upon his partner’s father’s death. The Court found that the employer’s discrimination was based on sexual orientation, not family status. Sexual orientation was not covered under federal human rights legislation at that time.

\textsuperscript{53} (Toronto: University of Toronto, 1999) at 11 to 13.
was ‘really’ on the basis of unprotected ‘sexual orientation’” extended heterosexual presumptions about family and essentialized Mr. Mossop’s identity by assuming that the source of discrimination against him must relate to his sexual orientation.  

Despite the semen, despite the importation of sexual intimacy into the definition of assisted conception, and despite the litigants’ decision to argue discrimination on the basis of sexual orientation, *Susan v Doe* is not solely about sex…or sexual orientation. It is, in large measure, about family. Yet cases like this are consistently presented to the public, and analyzed on the sole basis of whether or not there has been discrimination on the basis of sexual orientation. Professor Brenda Cossman suggests that the Court’s treatment of gay and lesbian issues in Canada over the past twenty years has left a legacy both of transgression and normalization. She suggests that “the progress of formal equality in same-sex relationship recognition…has brought a new lesbian and gay legal subject on stage. It is a subject constituted in and through the discourses of formal equality – a radically different subject than the lesbian and gay subject that was constituted in and through the conservative discourses of deviance, biology and exclusion.” She argues that while this new legal subject does in some respects challenge and displace the heteronormativity of legal subjectivity in the familial context, the process of inclusion through which this occurs is at the same time a normalizing strategy in which “gays and lesbians are reconstituted through discourses of sameness.”

One of the predominant early critiques concerning the jurisprudence under section 15 of the *Charter* suggested that a more appropriate analytical framework would de-

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54 Lahey, *ibid.* at 12.
emphasize the enumerated and analogous grounds in favour of a more contextual, more
purposive approach to equality;\textsuperscript{57} it suggested that the Court should focus more on human
dignity and whether a person is treated with equal concern, respect and consideration and
less on the requirement of differential treatment. Indeed, until her compromise in the
Court’s unanimous decision in \textit{Law v Canada (Minister of Employment and
Immigration)}\textsuperscript{58} this was the dissenting approach adopted by Justice L’Heureux-Dube in
each of her early section 15 decisions.\textsuperscript{59} It may be that such an approach would be more
conducive to achieving the type of social transformation, the recognition of diverse
interpersonal relationships and the greater re-distribution of social and legal benefits,
advocated by some legal theorists and critics. However, there are issues which should be
noted in response to this assertion.

The legal advances made by certain sexual minorities since \textit{Egan}\textsuperscript{60} and \textit{Vriend}\textsuperscript{61}
should not be underestimated, nor should their future role in laying the groundwork for
further social change be underestimated. Indeed, it may be that until a certain degree of
legal recognition is achieved, legal arguments based on disruption or a queering of the
law or its subjects are likely to fail. Take for example, the right to same sex marriage.
Arguments based on recognizing diverse and alternative familial type relationships and a
queering of the family, in a legal era in which the disruption or destruction of the family
was precisely the argument put forth by opponents to same sex marriage would have been
certain to fail. Indeed, the Ontario Court of Appeal, in granting same sex marriage in

\textsuperscript{57} See for example Douglas Kropp, “‘Categorical’ Failure: Canada’s Equality Jurisprudence – Changing
notions of Identity and the Legal Subject” 23 Queen’s L.J. 201.
\textsuperscript{58} [1999] 1 SCR 497.
\textsuperscript{60} \textit{Ibid}.
\textsuperscript{61} \textit{Supra} note 48.
Halpern v Canada (Attorney-General)\(^{62}\), went to great lengths to assure the Attorney-General that same sex marriage would not lead to the destruction of the family. Moreover, a pre-mature argument focused too heavily on the relational nature of the exclusion of gays and lesbians from the institution of marriage would have played right into the hands of those decision makers responsible for the formal type of equality so parsimoniously handed out in the early same sex marriage decisions\(^{63}\) – ‘we aren’t denying gays and lesbians the right to marital Bliss\(^{64}\) (pun intended): no one is saying homosexuals can’t get married…they just can’t marry each other’. As Cossman notes, arguments “driven by the discourse of sameness”, ones which represented a “less radical shift”, in cases such as \(M v H\), had greater resonance with the Court than did those in the earlier days of \(Mossop\) and \(Egan\) “where at least some litigants were explicitly concerned with resisting a politics of sameness”.\(^{65}\) It may be, however, that while Professor Cossman’s observation is accurate, it is only now, with the wisdom of hindsight and experiential learning that the Canadian public and its legal system, having not witnessed the collapse of life as we know it in an era of gay weddings, is ready to entertain arguments about the value of disrupting the normative family model.\(^{66}\) The reality is, after all, that so long as academics and activist choose to work or theorize within a legal framework, such considerations remain salient.


\(^{64}\) See Bliss v Attorney-General of Canada [1979]1 SCR 183 where the Court denied a Canadian Bill of Rights challenge to provisions of the Unemployment Insurance Act arguing that the provisions discriminated on the basis of sex by providing different benefits for pregnant women than for other claimants under the insurance scheme. The challenge was denied on the basis that “inequality between the sexes in this area is not created by legislation but by nature”. In other words the provisions don’t distinguish between men and women but rather between those who are pregnant and those who are not pregnant.

\(^{65}\) Cossman, supra note 55 at 236.

\(^{66}\) Bill Eskridge advocates for this type of approach both analytically and practically in Equality Practice: Civil Unions and the Future of Gay Rights (Routledge: London, 2001).
Ultimately, Justice L’Heureux-Dube’s vision in her *Egan* dissent did not come to fruition. While in *Law* the Court did compromise by incorporating her emphasis on human dignity into the section 15 analysis, the Court also unanimously affirmed the requirement of differential treatment on the basis of an enumerated or analogous ground of discrimination. Furthermore, the Court has steadfastly maintained this course of analysis ever since. At least for now, the categorical approach to equality, and the obstacles it presents for more transformative, disruptive, perhaps ‘queer’ innovation of our social structures, is here to stay. This doesn’t mean, however, that queer activists, academics and litigants ought to resign themselves to an unproductive (or undisruptive) relationship with equality law under the *Charter*. It means they ought to set about queering or disrupting these categories and, the family being of great institutional significance in our society, family status is a good place to start.

While all have been addressed under the rubric of sexual orientation, there is an important distinction between the form of social exclusion underlying the discrimination at issue in cases such as *Vriend*,67 *Trinity Western University v British Columbia College of Teachers*,68 *Little Sisters Book and Art Emporium v Canada*69 and cases such as *Halpern*,70 *M v H*,71 *Egan*72 or even more obviously *Chamberlain v Surrey School District No. 36*,73 *Mossop*74 or *Doe v Canada*.75 The former set of cases constitute specific claims of direct discrimination on the basis of sexual orientation, the latter set are

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67 *Supra* note 48.
68 [2001] 1 SCR 772.
69 [2000] SCJ No. 66.
70 *Supra* note 62.
71 [1999] SCJ No 23.
72 *Supra* note 56.
74 *Supra* note 37.
75 *Supra* note 2.
cases are about claims to societal recognition of queer relationships and families. The significance of this distinction lies in its illumination of what I would suggest, perhaps optimistically but I hope not naively, is the broader, underlying purpose motivating the latter type of case: a desire for social or institutional affirmation and recognition of a relationship, or a family which deviates from the norm … none of which is necessarily about, or even involves, sexual orientation. To be sure, it would be more than a little formalistic to suggest that a prohibition against same sex marriage isn’t also about discrimination on the basis of sexual orientation. The truth is that it is about both. The subversive potential, the opportunity to queer the family, to ‘de-essentialize’ sexual identity, starts with a recognition of the ability to transpose and thus transcend, if not the identities, then certainly the goals and motivations of various equality seeking or more importantly equality needing groups. One reason gays and lesbians in Canada, relatively speaking, achieved so many rights so quickly, may be because of the legal battles to achieve recognition already fought and won by other non-traditional families in Canada. In other words, the Canadian family was already on the path to disruption so to speak. This helped to produce a legal and social culture less reticent to at least consider the possibility of a family model which might include monogamous gay and lesbian couples. The Court in Susan v Doe was right to suggest that the category of individuals disadvantaged by the Sperm Regulations doesn’t just include lesbian couples, it also includes heterosexual women who wish to start, or who belong to, families with known donors without whom they are in a sexual relationship, such as single women or any three or more parented family. The discrimination at issue in Susan v Doe isn’t

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76 Conversation with Ronalda Murphy 07/2006 comparing the different trajectories of family law reform in Canada and the United States (where common law relationships had not received the same degree of legal recognition by the time the pursuit for same sex marriage began in earnest.)
based on sexual preference; the Semen Regulations discriminate against anyone, regardless of their sexual orientation, who wants to start or expand a family that doesn’t conform to the traditional, stereotypical model, of a monogamous, two biologically parented, heterosexual family, upon which the exclusion was premised. In addition to the possibility of success, the distinct advantage of premising a claim in this case on the basis of family status rather than sexual orientation is that it pursues the same goal, recognition of a different way of life, a different type of family, a different choice, without capitulating to the essentializing effect of a rigid heterosexual/homosexual classification of sexual identity. While still premised on the need to establish differential treatment, a pragmatic reality under the binding analytical framework established by the Court, this approach is more in keeping with both the element of human dignity Justice L’Heureux-Dube sought to have transcend notions of enumerated and analogous group identity and with the desire to further social transformation through the disruption of loci of institutional power, such as the family.

IV. CONCLUSION

Even for that small minority of heterosexual women who do use a known donor with whom they are not sexually intimate, the familial role of that known donor is usually different for them than it is for lesbian women. While the Court in Doe v Canada was correct in noting that it is not only lesbian women who seek assisted conception with the semen of a known donor, it is almost exclusively lesbian women, not heterosexual women, who choose to conceive with a known donor who will then play a role in their child’s life.77 Both the fact that it is almost exclusively lesbian women, not heterosexual

77 See C. Wendland, F. Burn & C. Hill, “Donor Insemination: a comparison of lesbian couples, heterosexual couples and single woman” (1996) 65(4) Fertil Steril 764; see also P. Baetans & A. Brewaey,
women, who choose to conceive with a known donor (most frequently a gay man) who will then play a role in their child’s life, and the fact that the majority of lesbian couples seeking artificial insemination choose a known donor, suggest that not only does the definition of assisted conception under the *Semen Regulations* discriminate on the basis of family status but because it is a family status much more likely to be held by lesbians and gay men the *Regulations* have a disproportionately adverse effect on lesbians and gay men. Simply put, these *Regulations* discriminate against individuals who belong to queer families. Gay folks are statistically more likely to belong to queer families. For them, its effects constitute that double whammy that is intersectionality.

There are both theoretical, as well as practical, difficulties to the suggestion that this issue be approached from a family status perspective rather than, or in addition to, sexual orientation. One practical critique of the approach I have suggested is that it places too much emphasis on, or gives too much legal recognition to, biological parentage, the blood aspect of filial connections between a parent and child. A legitimate concern of lesbian couples who have fought hard to gain legal status for the non-biological mother in their families is that strengthening legal protection against discrimination based on family status would correspondingly strengthen legal claims by biological fathers against lesbian families that do not want to include biological fathers in their families in some capacity. It is not unreasonable, however, to imagine potential legal arrangements which could resolve this concern.  


78 See for example Paula L. Ettelbrick, *Who Is a Parent?: The Need to Develop A Lesbian Conscious Family Law*, 10 N.Y.L. Sch. J. Hum. Rts. (1993); see also Fred A. Bernstein, *This Child Does Have Two Mothers ... And a Sperm Donor with Visitation*, 22 N.Y.U. Rev. L. & Soc. Change 1 (1996) where he suggests a solution to this potential problem based on a model in which an involved donor would be
One theoretical critique would be that the disruptive potential of this suggested strategy is limited—it still constitutes a categorical approach to section 15 which involves problems of exclusion (identified by Cossman\textsuperscript{79}) and essentialization (identified by Lahey\textsuperscript{80}). This is a valid critique; however, it is not my contention that a strategy such as the one I have suggested would avoid what seem to me to be difficulties inherent to any rights based approach to equality. Instead, my suggestion is that, so long as we are working within such a legal paradigm we ought to consider new approaches to the categories within section 15; approaches that might achieve better results for claimants such as Susan Doe while at the same time pursuing some small measure of resistance or opposition to the normative ideals which tend to exclude some and homogenize others.

\textsuperscript{79} Supra note 55.

\textsuperscript{80} Supra note 53.