Court File No: 02-CV-226505CM3

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JANE DOE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE FOUNDATION FOR EQUAL FAMILIES,
EGALE CANADA INC., B, SUSAN DOE and D

Interveners

FACTUM OF THE INTERVENERS THE FOUNDATION FOR EQUAL FAMILIES, EGALE CANADA INC., B and D

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PART I – INTRODUCTION

Nature of the Application

1. The Interveners, The Foundation for Equal Families (FEF), EGALE Canada Inc. (EGALE), B and D are two community organizations and two individuals who have intervened in this application as parties challenging the constitutionality of the *Processing and Distribution of Semen for Assisted Conception Regulations* (the "*Semen Regulations*") under the *Food and Drugs Act*. Specifically, the Interveners submit that the *Semen Regulations* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and are not saved by section 1.

Outline of the Interveners' Position

2. The *Semen Regulations* contain at least two kinds of unconstitutionality, both of which are evident in this application:

(a) The definition of "assisted conception" (as a "reproductive technique performed on a woman...using semen from a donor *who is not her spouse or sexual* partner") results in lesbians never being exempt from the *Regulations* since by definition they will not have a male spouse or sexual partner. The unconstitutionality of this definition is the primary focus of the Applicant Jane Doe and Intervener Susan Doe's submissions. Practically, it means that a lesbian requesting assisted insemination must comply with the onerous donor qualifications, testing, storage and record-keeping requirements of the *Regulations*; whereas women using semen from spouses or sexual partners are exempt from the *Regulations*. The unconstitutionality arises regardless of the attributes of the donor.

(b) A different and second kind of unconstitutionality arises from the Donor Exclusion Criteria incorporated into the *Semen Regulations*. The Criteria contain some thirty-seven grounds for Excluding Donors including age greater than 40 years and "men who have had sex with another man, even once, since 1977 (MSM)". Practically, this means that gay men and/or men older than 40 (regardless of sexual orientation) are prevented from donating semen unless they qualify under a "Donor Semen Special Access Program (DSSAP)". The unconstitutionality of this age and sexual

orientation-based criteria and the DSSAP is the focus of the Intervener FEF, EGALE, B and D's submissions in this factum.

3. Under the *Semen Regulations*, gay men and/or men over 40 require state approval before they can father a child through assisted conception. Obtaining a "permit to procreate" is offensive, demeaning, and unconstitutional. Whether the father is homosexual or heterosexual, old or young, the state has no business in the private decision of a couple to become biological parents.

4. Until November 2002, gay men and/or men over 40 were prohibited *entirely* from becoming fathers by donating semen. Since November 2002, after such men are tested and retested for infectious diseases, the prospective mother's physician may apply to Health Canada and obtain a special exemption allowing the physician to use the semen. The couple intending to have a child loses control to a physician, who in turn must apply to the government for authorization to use the donated semen. The *Semen Regulations* transform a personal decision of the couple into a series of discretionary decisions made by a physician and government bureaucrat.

5. Health Canada's rationale for such exceptional treatment is the higher risk of HIV infection and the higher risk of genetic mutation associated with the semen of gay men and older men respectively. Such exceptional treatment is indefensible when dealing with a woman who has chosen a specific donor, known to her, whether that donor is gay or heterosexual, under or over 40.

6. There is no evidence that the *Semen Regulations*' treatment of gay and/or older men leads to better health outcomes for the recipients or their unborn children. In fact, there is evidence that the *Regulations* deter couples from clinical testing, with the result that they are subject to the increased health risks associated with home insemination. Gay men and lesbians have a well-founded fear of discrimination, particularly from health care providers, and may choose the self-help option, rather than risking disclosure of their sexual orientation to their physicians and/or to the government, since it will be up to the physician and the government to approve the donated semen.

7. The ability to conceive a child with the person of one's choice without state interference is a fundamental right. By limiting and impeding this choice, the *Semen Regulations* infringe the *Charter* section 7 right to liberty and security of the person.

8. These section 7 and section 15 infringements are not demonstrably justified in a free and democratic society that recognizes equal marriage for same-sex couples and gay and lesbian parenthood.

9. To the extent that the Applicant Jane Doe and Intervener Susan Doe seek an amendment to the definition of "assisted conception" whereby spouses, sexual partners "*or other designated donors of the woman's* choice" are not subject to the *Semen Regulations*, the remedy they seek will satisfy the remedy sought by the Interveners FEF, EGALE, B and D.

PART II – FACTS

10. The Interveners adopt the Applicant Jane Doe and Intervener Susan Doe's facts as stated in their factum. The Interveners rely upon the following additional facts.

The Nature of the Parties and the Litigation

11. The Applicant, Jane Doe, is a lesbian who sought her physician's assistance in being inseminated with the semen of a chosen donor. That donor, a close and trusted friend, is the intervening party B, and a gay man over the age of 40 years. Jane Doe was prevented from being inseminated with B's semen by the "*Semen Regulations*".

> ***Affidavit of Jane Doe, sworn March 12, 2002, at paras. 1-4,* Exhibit Book of the Appellant, Vol. I, Tab 1, Interveners' Appeal Book at Tab 1.**

12. Similarly, the Intervener, Susan Doe, is a lesbian who sought her physician's assistance in being inseminated with the semen of her chosen donor, D, a close and trusted friend and a gay man over the age of 40 years. D is an intervening party. Susan Doe was prevented from being inseminated with D's semen by the *Semen Regulations*.

13. The *Semen Regulations* apply whenever a woman requests a reproductive technique using semen from a donor who is not her spouse or sexual partner.

> ***Processing and Distribution of Semen for Assisted Conception Regulations*, SOR/96-254, Exhibit Book of the Appellant, Vol. II, Tab 3A, Interveners' Appeal Book at Tab 2.**
>
> ***Technical Requirements for Therapeutic Donor Insemination*, Department of Health, Ottawa, July 2000, Exhibit Book of the Appellant, Vol. II, Tab 3C, Interveners' Appeal Book at Tab 3.**

14. These *Regulations* prevent a man who has had sex with another man (MSM), even once, since 1977, or who is over 40, from donating semen. Thus the regulations, although drafted in terms of sexual behaviour, not orientation, draw a distinction between donors on the basis of sexual orientation and age.

> ***Processing and Distribution of Semen for Assisted Conception Regulations*, SOR/96-254, s. 9, Exhibit Book of the Appellant, Vol. II, Tab 3A, Interveners' Appeal Book Tab 4.**
>
> ***Technical Requirements for Therapeutic Donor Insemination*, Department of Health, Ottawa, July 2000, Exhibit Book of the Appellant, Vol. II, Tab 3C, Interveners' Appeal Book Tab 4A.**

15. On March 12, 2002, Jane Doe filed a Notice of Application, challenging the *Semen Regulations,* on the grounds that they discriminate against her because of her sexual orientation.

> ***Notice of Application issued March 12, 2002,* Court File No. 02-CV-226505CM3, Appellant's Appeal Book Tab 8.**

16. Three Interveners, The Foundation for Equal Families (FEF), EGALE Canada Inc. (EGALE), and B, were added as parties to the Application.

> ***Order of Dyson J. entered February 28, 2003*, Appellant's Appeal Book Tab 5.**

17. In November 2002, subsequent to the filing of the Application, Health Canada issued a Guidance Document clarifying that donors who are MSM and/or over 40 may still donate semen if a physician makes application through a special exemption process, the *Donor Semen Special Access Programme (DSSAP)*. In effect, the *DSSAP* provides that in the case of gay men, and/or men over 40, permission must be obtained from the government of Canada in order to conceive a child by assisted insemination. The Applicant and Interveners believe that the *Semen Regulations* are demeaning and remain constitutionally invalid.

The Foundation for Equal Families (FEF) and EGALE

18. Both FEF and EGALE are national not-for-profit organizations with membership representing a broad spectrum of the lesbian, gay, bisexual and transgendered communities.

> ***Affidavit of Michelle Douglas, sworn October 29, 2002*, at paras. 1-12, Exhibit Book of the Appellant, Vol. VI, Tab 12, Interveners' Appeal Book Tab 5.**
>
> ***Affidavit of John Fisher, sworn October 30, 2002*, at paras. 1-5, Exhibit Book of the Appellant, Vol. VI, Tab 13, Interveners' Appeal Book Tab 6.**

19. EGALE's purpose is to advance equality and justice for lesbians, gays, bisexuals and transgendered persons across Canada. Through its activities, EGALE has developed a special expertise in *Charter* issues affecting lesbians, gays, bisexuals and transgendered people.

> ***Affidavit of John Fisher, sworn October 30, 2002*, at paras. 8-13, Exhibit Book of the Appellant, Vol. VI, Tab 13, Interveners' Appeal Book Tab 6.**

20. FEF, whose purposes include achieving equal recognition for same sex couples and families under the laws of Canada, has also developed a special expertise in addressing equality rights of lesbian, gay and bisexuals' equality rights under the *Charter.*

> ***Affidavit of Michelle Douglas, sworn October 29, 2002*, at paras. 11-15, Exhibit Book of the Appellant, Vol. VI, Tab 12, Interveners' Appeal Book Tab 5.**

Facts concerning B

21. B has known Jane Doe personally for about 7 years. B is the biological father of Jane Doe's partner's child, "L". B remains in contact with L and although L's custodial parents are Jane Doe and her partner "W", B maintains a close relationship with L. L calls B "Daddy".

> ***Affidavit of B, sworn March 5, 2003*, at para. 3, Exhibit Book of the Appellant, Vol. VI, Tab 15, Interveners' Appeal Book Tab 7.**

22. B agreed to become the biological father of Jane Doe's child and planned to maintain a relationship with the child.

> ***Affidavit of B, sworn March 5, 2003*, at para. 4, Exhibit Book of the Appellant, Vol. VI, Tab 15, Interveners' Appeal Book Tab 7.**

23. From about April 2000, Jane Doe tried to get pregnant using home-based insemination of B's semen.

> ***Cross-examination of B, December 3, 2002*, q. 69, Exhibit Book of the Appellant, Vol. VII, Tab 24, Interveners' Appeal Book Tab 8.**

24. When it became apparent that home-insemination was not succeeding, from February 2001, Jane Doe sought medical assistance. B learned from Jane Doe that, because he was a gay man, his semen donation would not be accepted.

> ***Affidavit of Jane Doe, sworn March 12, 2002*, at para. 1, Exhibit Book of the Appellant, Vol. I, Tab 1, Interveners' Appeal Book Tab 1.**

> ***Cross-examination of B, December 3, 2002*, qq. 75-82, Exhibit Book of the Appellant, Vol. VII, Tab 24, Interveners' Appeal Book Tab 8.**

25. Subsequently, in March 2002, B learned that his semen donation would have also been rejected on the basis of his age since he was older than 40. B's date of birth is September 11, 1961.

> ***Cross-examination of B, December 3, 2002*, qq. 84-89, Exhibit Book of the Appellant, Vol. VII, Tab 24, Interveners' Appeal Book Tab 8.**

26. When Jane Doe informed B that his semen could not be used because of the *Semen Regulations*, he felt that the government was stating that he was unworthy of becoming a parent because of his sexual orientation. He felt that the government was stating that, because

of his sexual orientation, he was automatically deemed to be diseased and therefore unfit to donate semen. He felt restricted in his fundamental personal choice to become a father.

> ***Affidavit of B, sworn March 5, 2003*, at para. 9, Exhibit Book of the Appellant, Vol. VI, Tab 15, Interveners' Appeal Book Tab 7.**

27. B is aware that Health Canada subsequently created a program whereby a recipient woman's physician may apply for a special access exemption when dealing with a known donor who is an MSM and/or over 40. B believes that the special access program reinforces the message that gay men and men over 40 are less worthy of being parents than heterosexual and younger men, and that the government must scrutinize them carefully before allowing them to reproduce. B views this as an affront to his dignity.

> ***Affidavit of B, sworn March 5, 2003*, at para. 11, Exhibit Book of the Appellant, Vol. VI, Tab 15, Interveners' Appeal Book Tab 7.**

28. Jane Doe learned that she was pregnant with B's child on May 30, 2002. She became pregnant through home insemination. In February 2003, Jane Doe gave birth to B's child (for the purposes of anonymity herein named "E").

> ***Affidavit of Francisca Agbanyo, resworn October 22, 2002*, at para. 101, Exhibit Book of the Appellant, Vol. II, Tab 3, Interveners' Appeal Book Tab 9.**
>
> ***Affidavit of B sworn March 5, 2003,* at para. 7*, Exhibit* Book of the Appellant, Vol. VI, Tab 15, Interveners' Appeal Book Tab 7.**

Facts concerning D

29. On June 3, 2005, the Ontario Court of Appeal permitted Susan Doe and D to intervene in this Application. The terms of D's intervention are those set out in the Order of Dyson J. dated February 7, 2003 as they relate to B.

> ***Reasons of the Ontario Court of Appeal dated June 3, 2005*; Supplementary Application Record of Jane Doe and Susan Doe, Tab 3, p. 31.**

30. D is a gay man who is now 44 years old. His date of birth is September 8, 1961.

> ***Affidavit of D, sworn April 11, 2005 ("Affidavit of D")*, para. 3; Supplementary Application Record of D, Tab 1, p.**

31. D has known Susan Doe personally for about 17 years. Susan Doe considers D a close family friend who she has come to know and trust through her relationship with her partner J.

> ***Affidavit of D,* para. 4; Supplementary Application Record of D, Tab 1, p.**
> ***Affidavit of Susan Doe*, para. 3, Supplementary Application Record of Jane Doe and Susan Doe, Tab 2, p. 10.**

32. D is the biological father of Susan Doe's partner's [J's] child, "C". C was born in May of 1999. C was conceived in 1998 via "home insemination". This involved D ejaculating into a receptacle and Susan Doe using an eye-dropper or syringe for insertion. No clinical insemination was used in C's birth.

> ***Affidavit of D,* para. 4; Supplementary Application Record of D, Tab 1, p.**
> ***Transcript of Cross-Examination of D, July 5, 2005 ("D Cross-Examination"), at 99-105, 111, 115;* Supplementary Application Record of D, Tab 2, p.**

33. C is now 6 years old. D remains in contact with C and although C's custodial parents are Susan Doe and J, D maintains an active parental role and close relationship with C. C calls D "Daddy".

> ***D Cross-Examination, at 116;* Supplementary Application Record of D, Tab 2, p.**
> ***Affidavit of D,* para. 4; Supplementary Application Record of D, Tab 1, p.**

34. Susan Doe and J wanted to have another child and to have that child biologically related to C by having D as the father. In 2001, J and D participated in a "sperm wash" program at the reproductive unit at Mount Sinai hospital. Sperm wash uses centrifugal force to

select healthy sperm that are then implanted in the recipient. Eventually in 2002, J conceived but the foetus was catastrophically deformed and not carried to term.

D Cross-Examination, at167-175; **Supplementary Application Record of D, Tab 2, p.**

35. In March 2004, J and Susan Doe approached D again to have a child, but this time with Susan Doe. D agreed to become the biological father of Susan Doe's child and planned to maintain a relationship with the child, just as he did with C.

Affidavit of D, **para. 5; Supplementary Application Record of D, Tab 1, p.**
D Cross-Examination, at 209; **Supplementary Application Record of D, Tab 2, p.**

36. D successfully underwent a series of blood tests for HIV, hepatitis and other conditions prior to J conceiving in 1998 (which resulted in the birth of C), 2002 (which resulted in an aborted foetus), and D attempting to conceive with Susan Doe in 2004.

D Cross-Examination, at 180-187, 210-214, 260; **Supplementary Application Record of D, Tab 2, p.**

37. D was prevented from donating semen for Susan Doe's use because Susan Doe and D are not spouses or sexual partners. D was also prevented from donating semen for Susan Doe's use because he is gay and over 40 years of age.

Affidavit of D, **para. 9; Supplementary Application Record of D, Tab 1, p.**
D Cross-Examination, at 258-288; **Supplementary Application Record of D, Tab 2, p.**

38. When D was informed that Susan Doe could not be artificially inseminated with his semen because of the *Semen Regulations*, he felt marginalized and demeaned. He felt that the government of Canada was stating that he was unworthy of becoming a parent because of his age and sexual orientation. He felt that he had been restricted in his fundamental personal choice to become a biological father. It was an affront to his dignity and interference in a deeply personal choice. He felt profoundly wronged.

Affidavit of D, **para. 10; Supplementary Application Record of D, Tab 1, p.**

39. D is aware that due to amendments to the *Semen Regulations* in 2000 and a guidance document published by Health Canada in 2002, it would now be possible for Susan Doe to access his semen by having her physician apply for "special access authorization". D believes that the "special access program" reinforces the message that gay men and men over forty, as set out in the exclusion criteria of the *Semen Regulations*, are less worthy of being parents than heterosexual and younger men and that the government must scrutinize them carefully before allowing them to reproduce. D sees this as a terrible affront to his dignity.

> ***Affidavit of D,*** **para. 11; Supplementary Application Record of D, Tab 1, p.**

40. D understands that even if Susan Doe accessed his semen through the Special Access Program, his semen would still have to be frozen and stored for a period of at least six months. D is uncomfortable with this procedure. He can never be absolutely sure of what happens after he provides his semen for storage, for instance, whether it might be used by someone other than who he intended or whether he would get his semen sample back.

> ***Affidavit of D,*** **para. 12; Supplementary Application Record of D, Tab 1, p.**
> ***D Cross-Examination, at 310-314 ;*** **Supplementary Application Record of D, Tab 2, p**.

The Regulatory Scheme

41. Semen for assisted conception falls within the definition of a drug and is regulated under the authority of the *Food and Drugs Act*. The *Semen Regulations* have existed since June 1, 1996.

> ***Affidavit of Francisca Agbanyo, resworn October 22, 2002*****, at para. 9, Exhibit Book of the Appellant, Vol. II, Tab 3, Interveners' Appeal Book Tab 10.**

42. The *Semen Regulations* set out requirements concerning, among other things, donor screening, donor exclusion criteria and serological (blood) testing.

***Affidavit of Francisca Agbanyo, resworn October 22, 2002*, at para. 10 Exhibit Book of the Appellant, Vol. II, Tab 3, Interveners' Appeal Book Tab 10.**

43. The donor exclusion criteria are specifically set out in a Health Canada Directive*, Technical Requirements for Therapeutic Donor Insemination, July 2000.* The *Semen Regulations* were amended to incorporate certain sections of the *Directive*, in particular, the donor exclusion criteria:

2. Exclusions

2.1 Exclusion Criteria

(a) ....

(b) Age greater than 40 years;

(c) Indications of high risk for the Human Immunodeficiency Virus (HIV), Hepatitis B virus (HBV), Hepatitis C virus (HCV), or Human T-cell Lymphotropic Virus (HTLV), including:

i. men who have had sex with another man, even once, since 1977;

***Affidavit of Francisca Agbanyo, resworn October 22,* at para. 18*,* Exhibit Book of the Appellant, Vol. II, Tab 3, Interveners' Appeal Book Tab 11.**

44. In December 2000, the *Semen Regulations* were amended to allow physicians special access, under exceptional circumstances, to donor semen that had not been processed in accordance with the *Semen Regulations*. The impetus for the amendment was the discovery, in March 1999, that some of the semen banks were not complying with testing requirements. All semen not in compliance was quarantined, however, access to this semen was allowed via the special access program.

***Affidavit of Francisca Agbanyo, resworn October 22, 2002*, at para. 22 Exhibit Book of the Appellant, Vol. II, Tab 3, Interveners' Appeal Book Tab 11.**

***Cross Examination of Francisca Agbanyo, October 22, 2002*, q. 31, Exhibit Book of the Appellant, Vol. VII, Tab 20, Interveners' Appeal Book Tab 12.**

45. In December 2000, Health Canada issued a guidance document, *Therapeutic Products Programme Guidance – Donor Semen Special Access Programme*, to provide an overview of the donor semen special access provisions of the *Semen Regulations*, including the application process.

***Therapeutic Products Programme Guidance – Donor Semen Special Access Programme,* Exhibit Book of the Appellant, Vol. II, Tab D, p. 000225, Interveners' Appeal Book Tab 13.**

46. In November 2002, Health Canada issued a further guidance document entitled, "Guidance on Donor Semen Special Access Programme: Donor Semen Eligible for Special Access" to provide further clarification regarding semen donations that are eligible for special access authorization. The *November 2002 Guidance Document* specified that semen excluded under the *Semen Regulations* is eligible for special access authorization. There are now four categories of semen eligible for special access authorization:

(a) Donor semen that was processed in accordance with regulatory requirements that have been superseded by updated requirements;

(b) Donor semen that was incorrectly processed (i.e. where certain tests were inadvertently omitted or done incorrectly);

(c) Donor semen that has been the subject of an investigation under section 15 of the *Semen Regulations* and the results of the investigation are inconclusive as to whether the semen is contaminated with an infectious agent; or

(d) Semen collected from excluded donors in anticipation of distribution pursuant to a special access authorization.

47. Health Canada confirms that a physician dealing with the semen of a known donor who has had sex with men and/or is over 40, can now make application under the 4th category.

> ***Affidavit of Francisca Agbanyo, sworn June 12, 2003*, at para. 4, Exhibit Book of the Appellant, Vol. V, Tab 9, Interveners' Appeal Book Tab 14.**
>
> ***Cross Examination of Francisca Agbanyo, October 22, 2002,* q. 44, Exhibit Book of the Appellant, Vol. VII, Tab 20, Interveners' Appeal Book Tab 15.**

48. According to Health Canada, the process of obtaining special access authorization works in the following way: Semen processing establishments have been informed by Health Canada that they are not required to exclude known donors if the semen is intended for special access distribution. This means that the establishments can collect and cryopreserve (freeze) semen for assisted conception. The woman will inform the semen establishment [which is different from her family physician] that she is using the semen from a known donor for assisted conception. Following initial testing, and retesting of the donor after a 6-month quarantine period, the woman then asks her physician to apply for a special access authorization, and provides the physician with the name of the semen processor and the information on the donor she has chosen. The information on the donor is required in order to identify the donations made by the chosen donor, e.g. the donor identification number assigned to the donor by the semen processor. This identification number, not the donor's name, is provided in the DSSAP application submitted to Health Canada.

> ***Affidavit of Francisca Agbanyo, sworn June 12, 2003,* at para. 8, Exhibit Book of the Appellant, Vol. V, Tab 9, Interveners' Appeal Book Tab 14.**

49. The other information required for special access authorization is set out in section 19(2) of the *Semen Regulations* and requires the physician to make an application that includes, *inter alia*:

(a) contact information for the physician, semen processor; importer and distributor, and the health care facility to which semen will be shipped;

(b) the initials and date of birth of the patient;

(c) a declaration signed by the processor with respect to compliance with the regulatory requirements, with reasons why certain requirements were not met (if applicable);

(d) the dates tests were performed and the test results;

(e) a statement from the physician indicating he/she has no reasonable grounds to believe an infectious agent may have been transmitted to a woman using semen from the same donor;

(f) a rationale from the physician that outlines:

(i) the reasons for using semen from the donor, having regard to the available information on the safety of the semen and the needs of the patient;

(ii) the reasons why the needs of the patient cannot be met using semen that has been processed in accordance with the requirements of paragraphs 4(1)(b) [six months quarantine] and 9(1)(a) [screening] and section 10 [lab controls];

(g) a statement from the physician indicating that in his or her opinion, the use of the semen does not pose a serious health risk to the woman or her offspring, having regard to the available information on the safety of the semen and the health of the patient; and

(h) a statement from the physician indicating that he/she has informed the patient of the risks associated with the use of semen and has obtained the patient's informed consent.

> ***S. 19(2) of the Semen Regulations,* Exhibit Book of the Appellant, Vol. 2, Tab 3A, Interveners' Appeal Book Tab 15*; Also see Affidavit of Francisca Agbanyo, sworn June 12, 2003,* at para. 10, Exhibit Book of the Appellant, Vol. V, Tab 9, Interveners' Appeal Book Tab 14.**

50. Health Canada claims that the reason for the change in the *Guidance Document* is its recognition of the unique circumstances of known donors that would otherwise be excluded from donating and the desire of women, both heterosexual and lesbian, to accept certain health risks for themselves and their unborn children for the benefit of choosing such a donor as their child's father.

> ***Affidavit of Francisca Agbanyo, sworn June 12, 2003*, at para. 15 and 22, Exhibit Book of the Appellant, Vol. V, Tab 9, Interveners' Appeal Book Tab 16.**

51. A diagram of the regulatory effect of the *Semen Regulations* is included at Tab A of this Factum. It illustrates that for lesbians seeking conception other than through sexual intercourse (i.e. the norm for lesbians seeking conception), since a lesbian has a female spouse or sexual partner who is incapable of being a semen donor, the semen donation is <u>always</u> subject to the *Semen Regulations*. The diagram also illustrates that the *Semen Regulations* require men older than 40 or men who have had sex with another man (even once, since 1977) to obtain state permission to father a child <u>even if they have been specifically chosen</u> by the woman donee.

> ***Factum of the Interveners, Tab A***

Proposed Amendments to *Semen Regulations*

52. In July 2003, Health Canada stated that it was considering amending the *Semen Regulations* to incorporate sections of the Canadian Standards Association's *Tissues for Assisted Reproduction* standard. The CSA's standard removes the MSM and over-40 categories from the exclusion criteria in the case of known donors. Anonymous donors who are MSM and/or over 40 are still included in the exclusion criteria listed in the CSA Standard.

> **Canadian Standards Association's *Tissues for Assisted Reproduction,* Standard Z900.2.1-03, February 2003, provided in response to an undertaking agreed to at the Cross-examination of Francisca Agbanyo, July 4, 2003, q. 59, Exhibit Book of the Appellant, Vol. VIII, Tab 27 (cross-examination), Interveners' Appeal Book Tab 17, Exhibit Book of the Appellant, Vol. VIII, Tab 28 (Canadian Standards Association Document), Interveners' Appeal Book Tab 18.**

53. The CSA's exclusion criterion for MSMs is "men who have had sex with another man *in the preceding 5 years*". This criterion is less stringent than the *Semen Regulations*' exclusion of "men who have had sex with another man, even once, since 1977".

> **Canadian Standards Association's *Tissues for Assisted Reproduction,* Standard Z900.2.1-03, February 2003, provided in response to an undertaking agreed to at the Cross-examination of Francisca Agbanyo, July 4, 2003, q. 59, Exhibit Book of the Appellant, Vol. VIII, Tab 27 (cross-examination), Interveners' Appeal Book Tab 17, Exhibit Book of the Appellant, Vol. VIII, Tab 28 (Canadian Standards Association Document), Interveners' Appeal Book Tab 18.**

54. Health Canada stated that the target date for publishing the amended *Semen Regulations* in the Canada Gazette Part I for comments was the fall of 2003 and that the anticipated final amended regulations would be in place in the spring of 2004. Although promised, no legislative amendments have been made to date.

> ***Affidavit of Francisca Agbanyo, resworn October 22, 2002*, at para. 97, Exhibit Book of the Appellant, Vol. II, Tab 3, Interveners' Appeal Book Tab 19.**
>
> ***Affidavit of Francisca Agbanyo, sworn June 12, 2003*, at para. 26, Exhibit Book of the Appellant, Vol. V, Tab 9, Interveners' Appeal Book Tab 20.**

55. If Health Canada were to amend the *Semen Regulations* to incorporate the exclusion criteria contained in the CSA standard, the amended *Semen Regulations* would:

(a) in the case of known donors who are MSM and/or over 40, treat them the same as heterosexual and/or younger men (i.e. their semen could be used without special permission);

(b) in the case of anonymous donors who are MSM and/over 40, continue to prohibit their semen from being used, but only if they had sex with another man in the preceding 5 years.

56. Health Canada justifies its exceptional treatment of men over 40 based on the hazards associated with older donors such as spontaneous genetic mutations.

> ***Affidavit of Francisca Agbanyo, resworn October 22, 2002*, at paras. 37 and 94, Exhibit Book of the Appellant, Vol. II, Tab 3, Interveners' Appeal Book Tab 21.**

57. Health Canada justifies its exceptional treatment of MSMs, even when the MSM donor is known and tests (and retests) negative for HIV infection, on the higher prevalence of HIV in the MSM population and the alleged shortcomings of the testing procedures. It is therefore important to appreciate how a potential semen donor is tested for HIV.

> ***Affidavit of Francisca Agbanyo, resworn October 22, 2002,* at paras. 33 – 36, Exhibit Book of the Appellant, Vol. II, Tab 3, Interveners' Appeal Book Tab 21.**

Reliability of HIV Testing

58. Although the relevant bodily product is semen, donor testing is based on testing of serological (blood) assays. The most common form of HIV testing involves two tests: a

screening test called the Enzyme Immuno Assay (EIA test, also called the ELISA test) and then a confirmatory test called the Western Blot.

> ***Cross Examination of Paul Sandstrom on Affidavit sworn June 13, 2003,* qq. 5 - 7, Exhibit Book of the Appellant, Vol. VIII, Tab 29, Interveners' Appeal Book Tab 22.**

59. Health Canada acknowledges that the ELISA test is extremely reliable at detecting HIV. Studies show that it typically identifies 99.7% of HIV positive samples.

> ***Cross Examination of Paul Sandstrom on Affidavit sworn June 13, 2003,* qq. 12 and 15, *Exhibit* Book of the Appellant, Vol. VIII, Tab 29, Interveners' Appeal Book Tab 23.**

60. When there is a HIV positive indication with the ELISA test, a donor is not automatically deemed to be HIV positive. The blood sample or a new sample is retested to see if another positive test will result. The EIA screening test is either repeated or the test is passed on to a confirmatory stage where another test, the Western Blot, is performed. If the Western Blot test confirms the presence of HIV infection, the HIV positive status is typically confirmed.

> ***Cross Examination of Paul Sandstrom on Affidavit sworn June 13, 2003,* qq. 20 – 21, Exhibit Book of the Appellant, Vol. VIII, Tab 29, Interveners' Appeal Book Tab 24.**

61. Health Canada also acknowledges that the Western Blot test is also extremely reliable at detecting HIV. Studies show that it typically identifies 99.3% of HIV positive samples. The combination of ELISA and Western Blot are extremely reliable at detecting HIV.

> ***Cross Examination of Paul Sandstrom on Affidavit sworn June 13, 2003,* qq. 22- 31, *Exhibit* Book of the Appellant, Vol. VIII, Tab 29, Interveners' Appeal Book Tab 24.**

Gay and Lesbians Increasingly Becoming Biological Parents

62. Parenthood has always been an important part of the lives of gay and lesbian individuals and couples, and it is becoming more so. More and more lesbians and gays are choosing to become parents, and there is growing acceptance and acknowledgement of this from Canadian society.

> ***Affidavit of Rachel Epstein, affirmed April 15, 2003*, at paras. 4 - 8 Exhibit Book of the Appellant Vol. VI, Tab 17, Interveners' Appeal Book Tab 25.**

63. The choices available to lesbians who wish to be biological parents are:

- pregnancy through self insemination or home insemination with a known donor
- pregnancy through assisted (clinical) insemination with a known donor
- pregnancy through assisted insemination with an anonymous donor
- pregnancy through sexual intercourse with a man

> ***Affidavit of Leah Steele sworn April 14, 2003*, at para. 5, Exhibit Book of the Appellant, Vol. VI, Tab 16, Interveners' Appeal Book Tab 26.**

64. The choices available to gay men who wish to be biological parents are:

- semen donation for assisted clinical insemination (requires the woman's physician to apply for a special access authorization)
- semen donation through home insemination of a woman
- sexual intercourse with a woman

> ***Affidavit of Leah Steele sworn April 14, 2003*, at para. 5, Exhibit Book of the Appellant, Vol. VI, Tab 16, Interveners' Appeal Book Tab 26.**

65. Health Canada admits that the only way an MSM can make a semen donation is through the special exemption application. MSMs are not permitted to donate semen anonymously, however, that exclusion is not at issue in this application.

> ***Cross Examination of Francisca Agbanyo, July 4, 2003*, qq. 45–46, Exhibit Book of the Appellant, Vol. VIII, Tab 27, Interveners' Appeal Book Tab 27.**

LGBT Interaction with Health Care Providers

66. Lesbians and gay men are a marginalized population that have faced stigma throughout their lives. As a population, they tend to be fearful of discrimination by society at large, and particularly by the health care system. That makes them sensitive to perceived invasions of privacy and discrimination.

> ***Cross-examination of Leah Steele on Affidavit sworn April 14, 2003*, q. 139, Exhibit Book of the Appellant, Vol. VIII, Tab 30, Interveners' Appeal Book Tab 28.**

67. Self-insemination involves exposure to semen and attendant risks of contracting sexually transmitted diseases similar to having sexual intercourse with a spouse or sexual partner.

> ***Cross Examination of Francisca Agbanyo, October 22, 2002*, qq. 81-82, Exhibit Book of the Appellant, Vol. VII, Tab 20, Interveners' Appeal Book Tab 29.**

68. Access to reproductive technologies is of immense importance to the gay and lesbian community, as its members are conceiving children in manners that are, by current standards, non-traditional, and require greater participation in the medical system.

> ***Exhibit A to the Affidavit of Chantal Trepanier sworn August 29, 2002* (Royal Commission on Reproductive Technologies), p. 428, Exhibit Book of the Appellant, Vol. IV, Tab 5A, Interveners' Appeal Book Tab 30.**

69. In particular, lesbian women, for obvious reasons, are more likely to use assisted insemination, rather than sexual intercourse with a male partner, in order to become pregnant. They are also more likely to choose gay men as donors.

> ***Exhibit A to the Affidavit of Chantal Trepanier sworn August 29, 2002*, (Royal Commission on Reproductive Technologies), p. 428, Exhibit Book of the Appellant, Vol. IV, Tab 5, Interveners' Appeal Book Tab 30.**
>
> ***Affidavit of Rachel Epstein, sworn April 15, 2003*, at para. 9, Exhibit Book of the Appellant, Vol. VI, Tab 17, Interveners' Appeal Book Tab 25.**

70. Health Canada does not investigate or control how doctors use their discretion. If the physician objects, for whatever reason, he or she will not make the special access application at all, and the woman seeking assisted insemination would be denied the ability to have a child with the person of her choice.

> ***Cross Examination of Francisca Agbanyo, July 4, 2003,* qq. 40 and 42, Exhibit Book of the Appellant, Vol. VIII, Tab 27, Interveners' Appeal Book Tab 31.**

71. Given the difficulties a woman faces if her donor of choice is a gay man, or a man over 40, some women have considered either misrepresenting themselves to the medical system (by holding themselves out as the man's sexual partner) or impregnating themselves at home, outside of the much safer and more effective clinic system.

> ***Affidavit of Rachel Epstein, sworn April 15, 2003,* at para. 9 and 10, Exhibit Book of the Appellant, Vol. VI, Tab 17, Interveners' Appeal Book Tab 25.**

PART III – ISSUES AND THE LAW

72. From the Interveners' perspective, this Application raises the following issues:

(a) whether the *Semen Regulations* violate section 15 of the *Charter* by excluding known donors who are men older than 40 or men who have had sex with another man, even once, since 1977;

(b) whether the *Semen Regulations* violate section 7 of the *Charter* by excluding known donors who are men older than 40 or men who have had sex with another man, even once, since 1977;

(c) whether any violation of sections 7 and 15 are reasonable limits that are demonstrably justified in a free and democratic society under section 1 of the *Charter*; and

(d) the appropriate remedy for any *Charter* violation.

***Charter* Section 15 Test**

73. The Interveners adopt and rely on the Applicant Jane Doe and Intervener Susan Doe's statement of the test for interpreting section 15 of the *Charter*.

Comparator Group Based on Applicant Jane Doe and Intervener Susan Doe's Claims Satisfy Interveners' Claim

74. By Order of Dyson J. and the Court of Appeal, the Interveners were permitted to intervene as parties in Jane Doe's Application on condition that they not raise issues related to the rights of anonymous sperm donors and that they not seek relief beyond the relief sought by Jane Doe in her Application.

> ***Order of Dyson J. entered February 28, 2003*, at para. 2, Appellant's Appeal Book Tab 5.**
> ***Order of the Court of Appeal, June 3, 2005***

75. Men who have sex with men (MSMs) and/or men who are over 40 seek equality with heterosexual men and/or men under 40 years old in terms of being able to father a child (i.e. donate semen) with the woman of their choice without state interference. To the extent that

Jane Doe and Susan Doe seek an amendment to the definition of "assisted conception" whereby spouses, sexual partners "*or other designated donors of the woman's* choice" are not subject to the *Semen Regulations*, the remedy they seek will satisfy the remedy sought by the Interveners FEF, EGALE, B and D.

B. Application of the *Charter* Section 15 Test

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

76. The impugned law draws a formal distinction between the claimant and others based on the donor's age and sexual orientation.

77. B and D are men who are older than 40 who have had had sex with another man, at least once, since 1977. The semen regulations draw a formal distinction between B and D, as claimants, and others based on age and sexual orientation. Since they are older than 40, their semen will not be distributed for the purposes of assisted conception due to the exclusion criteria dealing with age (unless the recipient's physician obtains special permission from the government to use their semen). Since B and D are gay and have engaged in sexual behaviour consistent with their sexual orientation, their semen will also not be distributed due to the exclusion criteria dealing with MSMs (unless the recipient's physician obtains special permission from the government to use their semen).

78. If a woman (heterosexual or lesbian) chooses someone like B or D to be a semen donor, the woman would be a claimant as well since, due to her choice of donor, she must rely on her physician to obtain special permission from the government to use her chosen donor's semen.

79. The *Semen Regulations* also fail to take into account gay and lesbian claimants' already disadvantaged position within Canadian society. Traditionally, society has considered gays and lesbians to be incapable of becoming parents or raising healthy children. Not only do the *Semen Regulations* fail to take into account the existing disadvantageous position of gays and lesbians in society, but they also reflect and reinforce the disadvantage by requiring potential gay fathers to seek government authorization to have children via assisted conception.

> ***Egan v. Canada,*** **[1995] 124 D.L.R. (4th) 609 at 674-5.**
> ***Vriend v. Alberta,*** **[1998] 156 D.L.R. (4th) 385 at 411 and 424.**
> ***Halpern v. Canada*** **(Attorney General), (2003) 225 D.L.R. (4th) 529 (Ont. C.A.) at 555-58.**

(2) Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?

86. The claimants B and D, and other gay men and/or men over 40, are treated differently on the basis of age, an enumerated ground, and sexual orientation, an analogous ground.

(3) Does the differential treatment discriminate in a substantive sense bringing into play the purpose of section 15 of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?

87. The differential treatment discriminates in a substantive sense because:

(a) it restricts access to parenthood, a fundamental human right;

> ***Trociuk v. British Columbia (Attorney General)*** **(2003), 226 D.L.R. (4th) 1 (S.C.C.) at 8-9.**

***E. (Mrs.) v. Eve* [1986] 31 D.L.R. (4th) 1 at 20, citing Heilbron J. of the Family Division of the English High Court of Justice in *Re D (a minor)*, [1976] 1 All E.R. 326**

(b) the "permit to procreate" scheme is an affront to the dignity of men over the age of 40 because it stereotypes such donors as less capable of fathering healthy children;

(c) the scheme is an affront to the dignity of gay men because it stereotypes such donors as diseased with HIV unless a physician and the government state otherwise;

(d) the scheme is an affront to the dignity of lesbians who may disproportionately tend to know and choose gay men as semen donors;

(e) the scheme promotes the view that men over 40 and gay men are less worthy or capable of fathering healthy children;

(f) the scheme, which depends on a physician's opinion and the government's consent, fails to recognize the discrimination, both real and perceived, faced by gays and lesbians when dealing with the health care system;

***Cross-examination of Leah Steele, July 7, 2003,* q. 139, Exhibit Book of the Appellant, Vol. VIII, Tab 30, Interveners' Appeal Book Tab 28.**

(g) the scheme discourages gays and lesbians from accessing assisted (clinical) conception which may be safer than home insemination;

***Cross-examination of Leah Steele, July 7, 2003,* q. 139 and 141, Exhibit Book of the Appellant, Vol. VIII, Tab 30, Interveners' Appeal Book Tab 28.**

(h) the exclusion of known donors who are older than 40 or who have had sex with another man, even once, since 1977, suggests that the state knows better than the prospective parents about what risks they ought to be willing to undertake in order to conceive a child.

88. The equality rights of the claimants are clearly infringed, since all the factors concerning discrimination are met.

***Law v. Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.) at pp. 37-41.**

89. The Supreme Court has repeatedly emphasized that s.15 and s.1 of the *Charter* must be kept analytically distinct, and s.1 factors are not to be considered in the s.15 analysis. Any

factors advanced by the government to justify the restrictions on the use of semen of donors who are gay or over 40 can therefore only be considered under s. 1.

> ***Lavoie v. Canada* (2002), 210 D.L.R. (4th) 193 (S.C.C.) at 225-226; *Andrews v. Law Society of B.C.,* [1989] 56 D.L.R. (4th) 1 (S.C.C.) at 20-21; *Egan v. Canada, supra* at 663 and 668; *Eldridge v. B.C. (A.G.),* [1997] 151 D.L.R. (4th) 577 (S.C.C.) at 623; *Law v. Canada, supra* at p. 35.**

Charter Section 7 Test

90. The Interveners adopt and rely on the Applicant Jane Doe and Intervener Susan Doe's statement of the test for interpreting section 7 of the *Charter*.

Application of the *Charter* Section 7 Test

Deprivation of Liberty

91. B and D's rights to liberty under section 7 include the right to father a child free of state interference. The decision to procreate is one of the most important and fundamental of life choices. The choice of semen donor is an essential and inseparable part of the decision to procreate.

92. The *Semen Regulations*' restriction on the right of gay men or older men to donate semen, and the right of women to use semen from known gay or older men constitutes a serious deprivation of liberty.

Security of the Person

Physical Integrity of the Recipient is Threatened

93. Since the *Semen Regulations* require women in Jane Doe and Susan Doe's position to gain special authorization, the *Regulations* create a deterrent for women to access a clinic, therefore increasing the likelihood that they will instead self or home inseminate. Home insemination carries a higher risk of infection, as it does not require proper and timely testing and retesting of a donor.

> ***Affidavit of Rachel Epstein, affirmed April 15, 2003,*** **at paras. 9 and 10, Exhibit Book of the Appellant, Vol. VI, Tab 17, Interveners' Appeal Book Tab 25.**

94. Thus the *Semen Regulations* force a woman to make an unacceptable choice: either face the delay, expense, lack of control, risk of discrimination and invasion of privacy attendant with an application for special authorization, or face the significant physical risks attendant with home insemination. That many women might opt for the latter, in order to retain personal autonomy over a fundamental choice, shows that the *Regulations* have the effect of putting women's, and their unborn children's health at risk. This is a violation of the section 7 right to physical integrity. Refusing access to a generally safe medical procedure and thus exposing women to health risks was found to be a violation of section 7 in *R. v. Morgentaler,* and it is similarly offensive in this case.

> ***R. v. Morgentaler*****, [1988] 44 D.L.R. (4th) 385 (S.C.C.) at 402.**

Uncertainty Following Passage of *Assisted Human Reproduction Act*

95. On April 22, 2004, certain sections of the *Assisted Human Reproduction Act* came into force, in particular, section 10(3)(a), which arguably prohibits home insemination, unless authorized by regulations and a licence:

10(3): No person shall, except in accordance with the regulations and a licence, obtain, store, transfer, destroy, import or export

(a) a sperm or ovum, or any part of one, for the purpose of creating an embryo;

Assisted Human Reproduction Act, 2004, c. 2, s. 10(3)(a)

96. No regulations under the *Assisted Human Reproduction Act* have been passed to date clarifying that home insemination is not a regulated activity, therefore, uncertainty has been created as to whether home insemination - as an alternative to assisted conception (i.e. assisted conception under the *Semen Regulations*) - is legally available to couples with a donor who is not a spouse or sexual partner.

97. If the government is increasingly regulating consensual reproductive activity in private settings, then it must make reproductive technologies in clinical settings equally available regardless of sexual orientation or marital status. In fact, the Principles of the *Assisted Human Reproduction Act* recognize that:

Section 2(d): the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies;

Section 2(e): persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status.

Assisted Human Reproduction Act, ss. 2(d) & (e)

Psychological Integrity of Donor and Recipient Threatened

98. The right to security of the person includes a right of personal autonomy relating to personal choices concerning one's own body, free from state-imposed psychological stress.

99. The *Semen* Regulations impose serious psychological stress on the donor and recipient in a number of ways:

(a) Despite knowing and trusting each other, the gay or older donor and recipient are not free to automatically use the donor's semen for assisted conception;

(b) the recipient must disclose to her physician that special authorization is required because she is using the semen of a gay or older man;

(c) the recipient has to justify to her physician why she is using the semen of a gay or older man and not the semen of a man for whom special authorization is not required;

(d) for gay donors and lesbian recipients this may involve disclosing their sexual orientation to a physician, with the attendant concerns about the physician's handling and confidentiality of the issue;

(e) the gay or older donor and recipient are dependent on the recipient physician's opinion of the donor's risk factors and reasons for special authorization when making application to the government;

(f) the donor and recipient are dependent on the government's authorization of the physician's application;

(g) home insemination, as an alternative to assisted insemination regulated by the *Semen Regulations*, may itself be prohibited or regulated under the *Assisted Human Reproduction Act* and therefore no longer legally permissible.

(c) Deprivation not in Accordance with Fundamental Justice

97. The principles of fundamental justice are to be found in the basic tenets of the legal system. These tenets include logic and proportionality. According to Health Canada, the *Donor Special Access Program* is premised on allowing women and known donors to accept certain health risks for themselves and their unborn children. However, the scheme illogically and unnecessarily requires the couple to get special permission from the government in

contradiction to its stated purpose. Also, the loss of autonomy for the couple is significant and out of proportion to the minimal incremental safety provided by the *DSSAP* regime.

Reference Re s. 94(2) of the Motor Vehicle Act (B.C.), **[1985] 24 D.L.R. (4th) 536 at 550.**

Whether Section 7 and 15 Infringements Justified under Section 1

98. The Interveners adopt and rely on the Applicant Jane Doe and Intervener Susan Doe's statement of the test for interpreting section 1 of the *Charter*.

99. The Interveners adopt and rely on the Applicant Jane Doe and Intervener Susan Doe's statement of the potential objectives of the *Regulations,* and concede that either the broader objective – of protecting the health and safety of all women who choose to undergo assisted insemination – or the narrower objective – of protecting the health and safety of those women who choose to undergo assisted insemination using semen from an anonymous donor – will qualify as pressing and substantial.

The Proportionality Test

(a) Rational Connection

100. The Interveners submit that the *Semen Regulations* are not rationally connected to the objective of the legislation, for the following reasons:

101. The *Regulations* defeat their own purpose by creating an incentive to avoid assisted insemination altogether. If a woman opts for assisted conception with a known gay donor, she risks discrimination and delay at the hands of her physician. Both she and her chosen donor must suffer the indignity of having to apply for a permit to procreate. With these risks and costs, there is a perverse incentive to avoid the clinic system altogether, and opt for self-

insemination. Self-insemination takes the donor and recipient outside of the regulated health system. It is a riskier method of insemination. Thus while the *Regulations* aim to improve health outcomes for Canadian women, they actually undercut this goal in a number of cases.

102. The exemption of spouses and sexual partners, but not men to whose semen the woman has already been exposed who are *not* a spouse or sexual partner, is illogical. When the donor is a spouse or sexual partner, Health Canada presumes that the woman has already been exposed to his semen, and thus any attempt at risk prevention is moot. It is not spousal status or past sexual intercourse that should justify the exemption; rather, it is the (assumed) fact of prior exposure. Thus women in Jane Doe and Susan Doe's circumstances, who have exposed themselves to the semen of the known donor before requesting assisted insemination, should be treated in the same manner as women who want to use the semen of a spouse or sexual partner. The donor should be treated in the same manner as a spouse or sexual partner, and permitted to donate semen without special authorization.

(b) Minimal Impairment

103. The Interveners submit that the *Semen Regulations* fail the minimal impairment step of the *Oakes* test, because the Donor Semen Special Access Program is redundant. The aim of the *Regulations* is to improve health outcomes for women, and the aim of the special access program is to allow women to use the semen of a known donor who would otherwise be excluded. But the fact is that *no further tests of any kind* are done on the semen of a known donor who would otherwise be excluded. The known donor's semen goes through the same testing regimen as all other semen; and only once it has passed and found to be safe is the

application made. The physician is under the same duty to warn about associated risks as s/he would be in any case. Thus the application satisfies a bureaucratic requirement but does not add to the safety of the semen supply. Meanwhile, it impairs the autonomy of both women and gay and/or older men more than necessary.

104. The restriction on the use of semen provided by men who have had sex with men "even once, since 1977" is also sweeping and overbroad. It excludes a whole class of gay men based upon arbitrary and unsustainable presumptions about their health status. It fails to distinguish between nature, kind and frequency of sexual activity, and encompasses sexual activity which is effectively no-risk or which may pose no greater risk than equivalent forms of heterosexual activity. The restriction would encompass two HIV-negative men in a long-term monogamous relationship, even though such men posed no risk of transmission. Such broad and irrational restrictions, unrelated to actual risk categories or behaviours, cannot be considered a "minimal impairment" of the *Charter* rights of donors or women.

105. Excluding MSMs and men over 40 who are not the woman's sexual partner does not improve health outcomes for women. Proof of the inappropriateness of the donor special access authorization program can be found in the fact that Health Canada, as early as Fall 2003 was purportedly considering allowing access to semen of known MSM donors and men over 40 *without* special authorization. If Health Canada no longer sees the need to exclude MSMs and men over 40, then there is little strength to the argument that special access authorization is necessary let alone demonstrably justified in the face of two separate constitutional violations.

(c) Salutary vs. Deleterious Effects

106. The Interveners submit that the *Regulations* fail the balancing portion of the *Oakes* test. The deleterious effects of the *Regulations* are severe and localized: a particular subset of Canadians, gay men and men over 40, are singled out as unsafe and unfit to provide semen for purposes of insemination, unless 'special access' is granted. Members of another subset, women who wish to use the semen of a known donor who is excluded because of age or sexual history, are presented with an unacceptable choice - violation of dignity and access to assisted insemination, or preservation of dignity through home insemination. Furthermore, the relationship between the donor and recipient is made subject to state intervention. Whether anonymous or not, this intervention is insulting and inappropriate.

107. Conversely, the salutary effects of the *Regulations,* and in particular the exclusions and Special Access Authorization Program, are negligible. The Program does not add any further safety to the process, and the exclusions impose statistical generalizations on an essentially individual and personal choice.

108. In conclusion, the *Semen Regulations* violate section 7 and 15 of the *Charter,* and the infringements cannot be demonstrably justified as a reasonable limit in a free and democratic society.

PART IV – ORDER REQUESTED

109. As per the order of Dyson J. dated February 7, 2003, the Interveners are not permitted to seek relief beyond the relief sought in the Notice of Application, therefore the

Interveners respectfully request the same relief as sought by the Applicant Jane Doe and Intervener Susan Doe.

110. Such other relief as counsel may request and this Honourable Court may allow.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of September 2005:

____

Andrew M. Pinto
Counsel For The Interveners

Schedule "A"
List of Authorities

Andrews v. Law Society of B.C. (1989), 56 D.L.R. (4th) 1 (S.C.C.).

E. (Mrs.) v. Eve (1986), 31 D.L.R. (4th) 1 (S.C.C.)

Egan v. Canada (1995), 124 D.L.R. (4th) 609 (S.C.C.)

Eldridge v. B.C. (A.G.) (1997), 151 D.L.R. (4th) 577 (S.C.C.).

Hodge v. Canada (Minister of Human Resources Development), 2004 SCC 65

Lavoie v. Canada (2002), 210 D.L.R. (4th) 193 (S.C.C.)

Law v. Canada (Minister of Employment and Immigration) (1999), 170 D.L.R. (4th) 1 (S.C.C.)

Nova Scotia (Workers' Compensation Board) v. Martin (2003), 192 D.L.R. (4th) 611 (S.C.C.)

R. v. Morgentaler (1988), 44 D.L.R. (4th) 385 (S.C.C.)

Reference Re s. 94(2) of the Motor Vehicle Act (B.C.) (1985), 24 D.L.R. (4th) 536 (S.C.C.)

Trociuk v. British Columbia (Attorney General) (2003), 226 D.L.R. (4th) 1 (S.C.C.)

Vriend v. Alberta (1998), 156 D.L.R. (4th) 385 (S.C.C.)

Schedule "B"
Statutes and Regulations

(a) ***Assisted Human Reproduction Act, 2004*, c.2**

(b) Processing and Distribution of Semen for Assisted Conception Regulations, SOR/96-254

1. The definitions in this section apply in these Regulations.

"assisted conception" means 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.

"Directive" means the directive entitled Technical Requirements for Therapeutic Donor Insemination, published by the Department of Health, Ottawa, July 2000

2. These Regulations apply only in respect of semen that is used or intended for use in assisted conception.

9. (1) Every person who processes semen for distribution shall

(a) take the following measures:

(i) determine that the donor is not within a group set out in the Directive under the heading "Exclusions"

19. (1) If a physician wishes to obtain access to semen that has not been processed in accordance with the requirements of paragraphs 4(1)(*b*) and 9(1)(*a*) and section 10 or that has been reserved for special access distribution for use in performing assisted conception on a patient whose needs can not be met using semen that has been processed in accordance with those requirements, the physician shall apply in writing to the Minister for a special access authorization that permits the processor, distributor or importer of the semen or several of those persons to distribute or import for distribution the semen for that purpose.

(2) The application shall contain the following:

(*a*) the name, business address and business telephone number of the physician;

(*b*) the name and business address of the processor of the requested semen;

(*c*) the name and business address of the distributor from whom the physician obtained or will obtain the semen;

(*d*) the name and business address of the person who is in possession of the semen;

(*e*) in the case of semen that is to be imported, the name and business address of the importer of the semen;

(*f*) the name and address of the health care facility to which the semen is to be shipped;

(*g*) the initials and date of birth of the patient;

(*h*) the number of containers of semen requested and the identification code of each requested container;

(*i*) a declaration signed by the processor or an authorized agent of the processor

(i) certifying that the requested semen has been processed in accordance with section 11,

(ii) certifying that the tests referred to in paragraph 20(1)(*b*) have been performed in respect of the donor of the requested semen and that the results of the tests were negative, and

(iii) indicating which measures required under paragraphs 4(1)(*b*) and 9(1)(*a*) have not been taken and the reasons why they have not been taken;

(*j*) the date that the requested semen was donated and the tests, screening and monitoring performed in respect of the donor of the semen and the dates and results of those measures, including, if necessary, an interpretation of the results;

(*k*) a statement by the physician that he or she has obtained information from the processor as to whether the requested semen was processed in accordance with section 10;

(*l*) a statement by the physician indicating that he or she does not have reasonable grounds to believe that an infectious agent may have been transmitted to a woman as a result of assisted conception having been performed on the woman using semen from the same donor as that of the requested semen;

(*m*) a rationale by the physician that outlines

(i) the reasons that justify the use of the requested semen, having regard to the available information on the safety of the semen and the needs of the patient, and

(ii) the reasons why the needs of the patient cannot be met using semen that has been processed in accordance with the requirements of paragraphs 4(1)(*b*) and 9(1)(*a*) and section 10;

(*n*) a statement by the physician that, in his or her opinion, the use of the requested semen would not pose

(i) a serious risk to the health of the patient, having regard to the available information on the safety of the semen and the health of the patient, or

(ii) a serious risk of transmitting an infectious agent to a child to be conceived from the semen, having regard to the available information on the safety of the semen; and

(*o*) a statement by the physician that he or she has informed the patient of the risks that the use of the requested semen could pose to the patient and to a child to be conceived from the use of the semen and has obtained the patient's written consent to its use.

Technical Requirements for Therapeutic Donor Insemination, Department of Health, Ottawa, July 2000

2.1 Exclusion Criteria

The exclusion criteria shall include the following:

(b) Age greater than 40 years;

(c) Indications of high risk for the Human Immunodeficiency Virus (HIV), Hepatitis B virus (HIBV), Hepatitis C virus (HCV) or Human T-cell Lymphotropic Virus (HTLV), including:

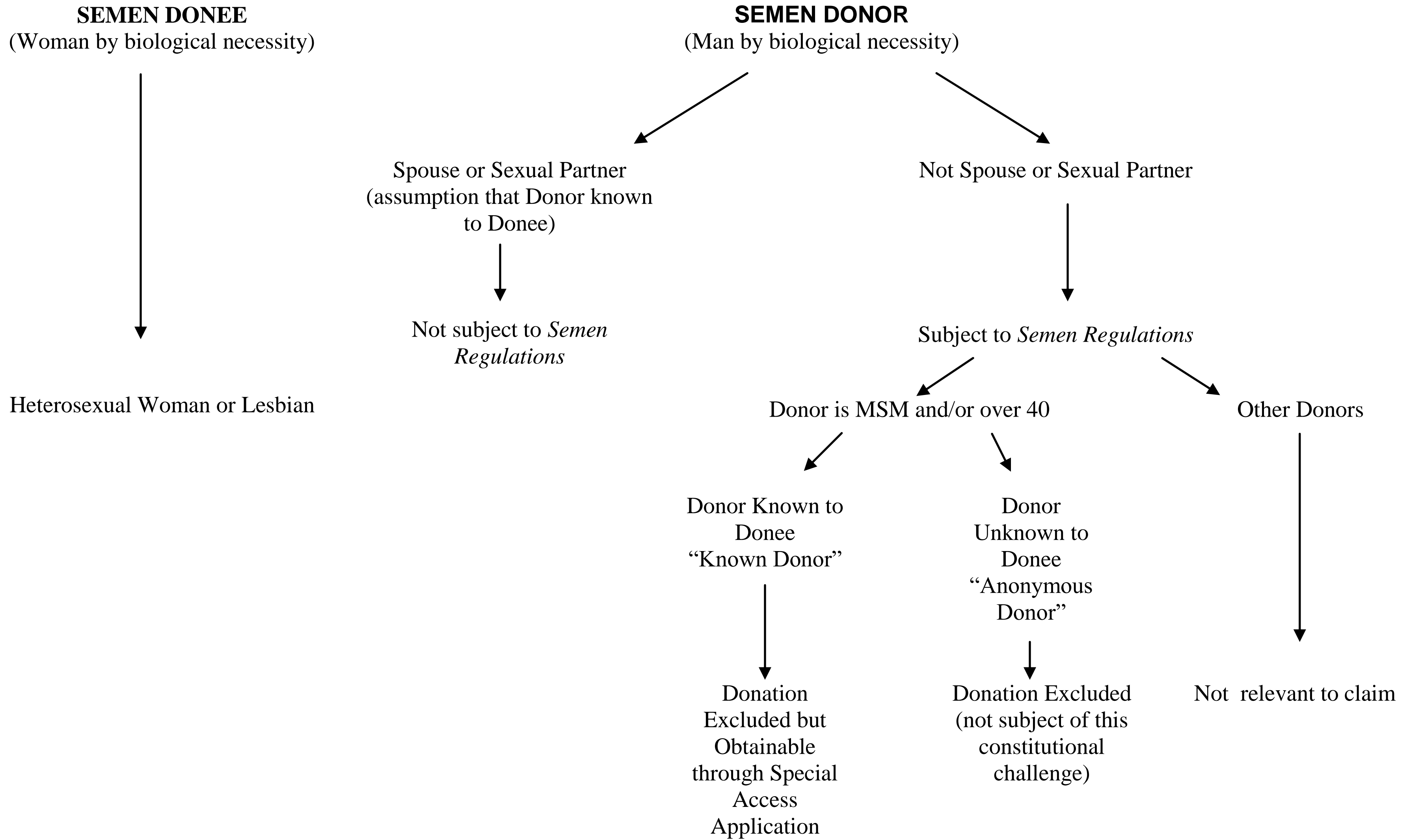
i. men who have had sex with another man, even once, since 1977;

Schedule "C" – Articles

Michael Morris and Joseph Cheng, "The Supreme Court of Canada's Consideration of Section 15(1) in 2003-2004: Shifting Landscapes and Deciding Who Should Decide", <u>The Legal and Practical Guide to Constitutional Litigation in Civil Matters</u>, Canadian Institute, June 2004.

TAB A

<u>EFFECT OF *SEMEN REGULATIONS*</u>



Court File No. C40982

JANE DOE - and - ATTORNEY GENERAL OF CANADA and THE FOUNDATION FOR EQUAL FAMILIES, EGALE CANADA INC. and B

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

FACTUM OF THE INTERVENERS

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