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Access to Assisted Conception: A Call for Legislative Reform in Light of the Modern Family (*Susan Doe v. Attorney General of Canada*)

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CASE COMMENT: *SUSAN DOE V. ATTORNEY GENERAL OF CANADA*

ACCESS TO ASSISTED CONCEPTION: A CALL FOR LEGISLATIVE REFORM IN LIGHT OF THE MODERN FAMILY

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Abstract: *This paper explores the impact of laws regarding assisted conception and the discriminatory effect these laws have in light of non-traditional family forms. Specifically, it considers the Processing and Distribution of Semen for Assisted Conception Regulations and how these regulations serve to exclude certain individuals who do not fit into the "traditional" nuclear family model. The author critiques the judgement of* Susan Doe v. Attorney General of Canada *and calls for legislative reform in order for the laws to accurately reflect realities of the family in the 21st century.*

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INTRODUCTION

The family has always been an integral part of society, and for many individuals, procreation is the goal and purpose of human existence. It is, therefore, disconcerting to couples when natural conception proves to be an ineffective means of having children. In modern society, there is a plethora of options to help couples experiencing difficulty achieving a pregnancy. However, treatments are not equally available to all members of society. Financial restraints aside, individuals outside of the mainstream are often unable to access assisted conception due to reasons grounded in discrimination and prejudice.[1] A relatively recent case, *Susan Doe v. Attorney General of Canada,*[2] illustrates how sperm donor regulations in Ontario serve to exclude individuals based upon age and sexual orientation.

The judgments in *Susan Doe* reflect some of the biases and prejudices underlying Canadian law and policy. This case provides a basis for a critique of how discriminatory beliefs continue to infiltrate Canadian society despite the existence of the *Canadian Charter of Rights and Freedoms*.[3] In this case comment, I will first discuss the need for legal reform in light of changing family compositions and the shift away from the traditional family. I will then provide a brief overview of the facts, issues, and litigants in the *Susan Doe* case.

Once the groundwork is laid, I will analyze the discrimination that arises in the judgments, drawing on the

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1 The discrimination in this case is both explicit and implicit, grounded in the legislation, the judicial decision, and social norms.

2 *Susan Doe v. Canada (Attorney General)* (2007), 84 O.R. (3d) 81.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.

underlying themes of individual and family autonomy and equality. In particular, I will consider the discriminatory treatment, in both the case and the relevant regulations, of the following: men over the age of 40, men who have had sex with another man, lesbian women, and women unable or unwilling to conceive via sexual intercourse with a man. I conclude, first, that there is an absence of relevant and modern legal principles that accurately reflect the reality of assisted reproduction and, second, that there is a significant need to reform Canadian sperm donor legislation in order to eliminate discrimination, and to better respect equality and autonomy.

THE CHANGING FAMILY & THE UNCHANGING LAW

Families have undergone a transformation throughout the 20th century; consequently, traditional families are no longer the norm.[4] There is an increase of working mothers, lone-parent families, and children born outside of marriage; there is also the increasing acceptance by Canadian society of these changes.[5] In addition, courts have slowly begun, in certain cases, to allow for a more functionalist approach that recognizes non-traditional family units that function as a family. In a 1993 dissent, Justice L'Heureux-Dubé recognized the changing nature of families and the need to focus on underlying values.[6] Over the past fifteen years, some majority

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4 Mary Jane Mossman, *Families and the Law in Canada (*Toronto: Emond Montgomery Publications Limited, 2004) at 1.

5 *Supra* note 4 at17. There is some evidence that queer families are on the rise; however, the counting of same-sex couples began only in 2006 and therefore trends are more difficult to identify. See Statistics Canada, *2006 Census: Family portrait: Continuity and change in Canadian families and households in 2006: National portrait: Census families* (Census) (Ottawa: Demography Divsion, 2007) at 12.

6 *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

judgments have come to accept and respect the preference for alternative family arrangements. An additional example of functionalism may be found in some legislation, such as the *Children's Law Reform Act*, which assumes males in particular circumstances to be the father of a child, unless proven otherwise.[7]

The gradual acceptance of different family forms is by no means an indication that legal frameworks have kept up with the times. Specifically, legislation has not yet been amended to adopt new legal principles that have been established in the common law. For example, thus far, issues regarding assisted conception have been resolved on a case-by-case basis, but have not yet stimulated the Parliament to clarify the existing laws.[8] The case critiqued in this comment highlights the need for legislative reform in light of the changing family norms.

Change is difficult to implement, as many policy makers have traditional beliefs and ideas about the ways families live, but "these ideas are not always representative of the broad range of lifestyles prevalent in modern society".[9] Therefore, a mere call for legislative reform is not sufficient because such reform may take the approach of reinstating the traditional nuclear family rather than creating laws capable of conforming to the changing context of families. As a foundation for new legislation, there must first be an understanding of the needs and interests of alternative families, which may then be used to guide legislators in making amendments. In addition, there must be a greater understanding of underlying themes such as autonomy and equality that permeate so many legal issues in family law.

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7 *Children's Law Reform Act,* R.S.O. 1990, c. C-12, s. 8.

8 *Supra* note 4 at 190.

9 *Ibid.* at 17.

Susan Doe highlights the need for more research to be performed on alternative families and for the modification of the sperm donor exclusion criteria in a way that conforms with the changing needs of the modern family.[10]

In *Susan Doe,* two particular features of the changing family are most relevant: (1) that childbirth is often postponed, and (2) that childbirth is no longer limited to heterosexual couples. [11] As postponed childbirth and same-sex marriages become increasingly common, the sperm donor exclusions in Canada simultaneously become increasingly problematic.[12] It is noteworthy that one of the guiding principles in the federal *Assisted Human Reproduction Act* ("*AHRA*") is 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". [13] However, in the case of *Susan Doe* both of these grounds, among others, were infringed.[14]

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[10] Only the Parliament has the power to change the *Processing and Distribution of Semen for Assisted Conception Regulations*, which incorporates the exclusion criteria by reference to the Directive in which they are found.

[11] In a 2006 Census, Statistics Canada found that 16.2% of same-sex married spouses had children and that the number of same-sex couples grew dramatically in the previous five years. As well, the Census found that there were more never-married lone parents than in previous years. See Statistics Canada, *2006 Census: Family portrait: Continuity and change in Canadian families and households in 2006: National portrait: Census families* (Census) (Ottawa: Demography Divsion, 2007) at 12-13.

[12] Based on the fact that children are more common in married same-sex relationships rather than unmarried same-sex relationships, and the fairly recent legalization of same-sex marriage, I suspect there will be a growing interest in assisted conception in the future.

[13] *Assisted Human Reproduction Act*, S.C. 2004, c. 2, s. 2. Although the *AHRA* is not paramount to the sperm donor regulations, it is relevant

BRIEF OVERVIEW OF *SUSAN DOE*

In the 2007 case of *Susan Doe v. Attorney General of Canada*, a woman sought access to assisted conception. Due to the fact that she is in a lesbian relationship, she and her partner decided to use the sperm of a male friend, who had previously assisted with the conception of their other daughter. However, they immediately faced challenges, as the *Processing and Distribution of Semen for Assisted Conception Regulations,* [15] which fall under the federal *Food and Drugs Act,*[16] do not allow men over the age of 40, or men who have had sex with another man, to donate their sperm to the general, national sperm donor program – to known or unknown recipients - due to health reasons. The donor in this case fell into both categories. There is one avenue to circumvent this regulation: men who are excluded, depending on the reason, may apply to the Minister of Health for special permission to donate to a known woman. This process, however, involves rigorous screening and takes several months longer to process than a normal donation. It also involves greater expense than the process for recipients using semen from a spouse or sexual partner and excludes the possibility of using fresh semen, "which is more effective for conception". [17]

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for comparative purposes because it is legislation on a related topic for which the Minister of Health is also responsible.

14 Sexual orientation was recognized as an analogous ground in a trilogy of equality rights cases beginning in 1995. See *Egan v. Canada,* [1995] 2 S.C.R. 513*, Vriend v. Alberta,*[1998] 1 S.C.R. 493, and *M. v. H.,* [1999] 2 S.C.R. 3.

15 *Processing and Distribution of Semen for Assisted Conception Regulations,* S.O.R. 96-254.

16 *Food and Drug Act,* R.S.C. 1985, c. F-27.

17 *Susan Doe v. Attorney General of Canada; The Foundation for Equal Families et al., Intervenor,* (2006) 79 O.R. (3d) 586 at 51.

The appellant would likely have taken the special access path had the donor agreed. However, he did not feel comfortable having his semen stored for a long period of time in a sperm bank due to concerns that it would be used to impregnate someone other than the appellant. The appellant therefore looked to the *Regulations* to find of way of avoiding going down the special access path.

The appellant took issue with the definition of "assisted conception", claiming it violated her s. 7 and s. 15 *Charter* rights. The definition of assisted conception in the *Regulations* is stated 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". It was argued that this definition is problematic because lesbians "by definition cannot be inseminated by a spouse or sexual partner". The court ultimately concluded that because this rule also applies to heterosexual women using a donor who is not a spouse or sexual partner, it is not discriminatory due to underlying reasons of sexual orientation. Both the Ontario Superior Court of Justice and the Ontario Court of Appeal held that the appellant's *Charter* rights were not infringed. The donor acted as an intervener in the case, arguing that the exclusion criteria infringed his s. 15 rights as well. His arguments were heard only to the extent that they advanced the appellant's claim, and were therefore not expressed and analyzed to the fullest extent possible. The arguments brought forward by the litigants have some merit, but are overall quite weak. [18] Despite the weakness of some of the appellant's

[18] In terms of her s. 7 *Charter* argument, the appellant claimed that she suffered psychological harm because the special access program required a longer waiting period. In both the author and the court's opinion, this is a weak argument because it is not a deprivation of her right to security of the person. The Court of Appeal characterized the appellant's reported psychological harm as "better ... described as frustration".

arguments, I respectfully disagree with the Court's decision and argue that it ought to have found for the interveners under s. 15 of the *Charter* as the effect of the *Regulations* is discriminatory toward the donor. However, the Court stated that it was unable to decide on this matter due to the scope of the intervener's status and the relief sought. In the alternative, the Court ought to have taken advantage of the opportunity this case presented to call for Parliamentary action to remedy the discriminatory effect of the *Regulations*.

At the present time it does not appear that the appellant is seeking leave to appeal to the Supreme Court of Canada.

THE EXCLUSION OF MEN OVER 40 FROM THE GENERAL ASSISTED CONCEPTION PROGRAM IS DISCRIMINATORY AND INFRINGES ON WOMEN'S AUTONOMY TO CHOOSE A KNOWN DONOR IN THIS CATEGORY

Age discrimination, though an enumerated ground, is more difficult to establish than other forms of discrimination, largely because age is not a fixed category. [19] Throughout life, an individual has opportunity to both take advantage of and be excluded from various experiences. It is hardly a legal concern that fourteen year olds in Ontario are not permitted to drive or that senior citizens may not purchase children's tickets when going to the theatre. However, in *Susan Doe* the age discrimination is alarming because the rule is not applied to those over 40 years of age in a universal manner.

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[19] Section 15 of the *Canadian Charter of Rights and Freedoms* states that, "[e]very individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

The Court of Appeal held that it is not discriminatory that men over 40 are excluded from donating their sperm to anonymous recipients or known donors who are not spouses or sexual partners in the general donor program. [20] It reasoned that, firstly, the policy is based on serious health concerns, and secondly, that in light of the Donor Semen Special Access Program ("DSSAP"), available since 2000, men over 40 are entitled to donate their sperm to known recipients who are not sexual partners and are therefore not actually excluded. It was stated by Justice MacPherson in the Court of Appeal judgment that:

> [t]here is a clear correspondence between the ground of age and the nature of the differential treatment. As noted by Dr. Francesca Agbanyo, a senior scientist at Health Canada, men in this age group are subject to an increased risk of spontaneous genetic mutations. The over 40 exclusion protects unborn children from this risk. [21]

The donor and Egale Canada Inc., another intervener, argued that the DSSAP is an additional, lengthier step that younger men need not take and this therefore amounts to differential treatment. The court did not agree with the interveners as the exclusions are no longer absolute. I am inclined to agree with the interveners and I take issue with the fact that no such screening is required of couples capable of natural conception or women using the semen of a sexual partner or spouse. Health Canada specifies that, "semen belonging to a spouse or a sexual partner of the recipient is not subject to any of the requirements outlined in the *Semen*

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20 *Supra* note 2.

21 *Supra* note 2, at para. 42.

Regulations". [22] Therefore, a man is legally entitled to have a child with his spouse at 70 years of age if he so chooses and there is no statutory bar to this event. Why is it then that when one needs technological assistance older men who are not sexual partners or spouses are suddenly subject to these rules? As mentioned in the case and quoted above, health is a primary concern. But would it not be acceptable to explain this to a woman seeking assisted conception and take her consent as acceptance of the risk? Surely a woman who has the mental capacity to make her own decisions about pregnancy and health care, is deserving of such consideration. Failing to give such consideration undermines the woman's autonomy to make decisions about her body, and the autonomy of her family, in this case, Susan Doe and her long-term partner's autonomy to create a sibling biologically related to their existing child. The failure of the court to rectify this problem calls into question how much autonomy is really granted to individuals and families in these circumstances, particularly women seeking pregnancy from someone other than a heterosexual spouse or partner.

THE EXCLUSION OF QUEER MEN FROM THE GENERAL ASSISTED CONCEPTION PROGRAM IS DISCRIMINATORY AND PATERNALISTIC TOWARDS WOMEN

Queer men, [23] unlike heterosexual men, may not donate their sperm unless they have applied to the Minister of Health for a "special access authorization" and are donating only to a

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22 Canada Business, *Processing and Distribution of Semen for Assisted Conception* (Ottawa: Health Canada, 2007), online: http://www.canadabusiness.ca/servlet/ContentServer?pagename= CBSC_FE/display&c=Regs&cid=1081944204151&lang=en.

23 "Queer" is an all-encompassing term and includes men who have had sex with another man, but do not necessarily identify as gay.

consenting known recipient.[24] However, it was held in *Susan Doe* that this differential treatment is not discriminatory. The underlying rationale for the exception is health policy, specifically, that "medical evidence … establishes that there is a higher prevalence of HIV and Hepatitis among men in the MSM category". Granted, men in the MSM category may be *more* likely than heterosexual men to have sexually transmitted infections, but this is not to say that all men in this category are infected. To exclude *all* queer men from donating their sperm on this basis is bizarre, particularly if the donation is provided for an informed and consenting close friend.

The court appears to confuse the issue by claiming, "the differential treatment is not discriminatory and does not promote the view that gay men are less worthy of being parents".[25] The real issue in the case regards discrimination in the context of donating sperm, not parenting, and indeed discriminates on the basis of sexual orientation, despite the court's allegation that it does not. How could it not discriminate on the basis of sexual orientation when the policy specifically excludes men who have had sex with men? It is absurd to think that a healthy man, who had sex with a male once in his life, in the late 1970s, is not entitled to donate his sperm to a consenting long-term friend in the 21st century. Also concerning is the chilling effect on the formation of homosexual families if the application process appears too burdensome, embarrassing, or offensive. [26]

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24 Health Canada, *Health Canada Directive: Technical Requirements for Therapeutic Donor Insemination* (Directive) (Ottawa: Blood and Tissues Divsion, 2000) at 2, online: <http://www.hc-sc.gc.ca/dhp-mps/brgtherap/applic-demande/guides/semen-sperme-acces/semen-sperme_directive-eng.php#2>.

25 *Supra* note 2, at para. 43.

26 Angela Cameron, "Regulating the Queer Family: The Assisted Human Reproduction Act" (2008) 24 Can. J. Fam. L. 101 – 121.

Drawing on the theoretical perspective of familialism, in which ideologies are modelled on "traditional" family values, the reasoning behind the MSM exclusion policy appears outdated and offensive. Familialism is an approach that, according to Katherine O'Donovan, "opens up questions about how idealized families (often patriarchal and heterosexual) are deeply embedded within social and legal policies". [27]Drawing on this "family values" framework, it appears as though the reasoning behind the exclusion of queer men (and men over 40 years of age) is paternalistic, rooted in the traditional practice of men making important decisions on behalf of women. The appellant argues that only women "whose donors are their spouse or sexual partner … 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". [28]The appellant contrasts this with lesbian women who, as a result of their sexual orientation, do not have a partner capable of producing sperm. What are some possible explanations for this policy, beyond the stated health concerns underlying the regulations? How can one justify infringing individual autonomy in such a way? The Court of Appeal clearly acknowledges that the scheme is "not primarily concerned with personal autonomy… but rather with health". [29] I question whether physical health concerns of such a protectionist and paternalistic nature should triumph the principles of equality and autonomy in cases where one consents to the health risks.

It appears as though legislators grant greater autonomy to women with male partners. One possible reason for this discriminatory treatment, raised through the familialism lens, is that policy-makers may have thought women were not capable

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27 *Supra* note 4, at para. 28.

28 *Supra* note 2, at para. 28.

29 *Ibid.* at para. 29.

of making decisions relating to families. This line of thinking fails to recognize both the autonomy and equality of women in society. Lesbian couples are by nature a female unit without a male head of house to make decisions. Single heterosexual women also lack a male partner and are perhaps thought of as less capable. Perhaps these underlying beliefs, which refuse to recognize a family as a unit without a male figure, have yet to be eradicated from the sperm donor legislation. It is possible that they reflect thinking from a different time, when lesbians were not able to marry and single mothers were uncommon and stigmatized. The Court should have identified this blatant discrimination and paternalism, and used this case as an opportunity to speak out against these injustices.

THE REGULATIONS ARE DISCRIMINATORY TOWARDS LESBIANS, SINGLE HETEROSEXUAL WOMEN, AND TO ALL WOMEN SEEKING ASSISTED CONCEPTION

The appellant claimed that the *Regulations* allow only women whose donors are their sexual partners to voluntarily accept the associated risks; this includes both risks to self and risks to the unborn child. The argument is extended to point out that since heterosexual women may use known donors, lesbian women should be entitled to do so as well. As clarified by the courts, heterosexual women using a donor who is not a sexual partner are also not entitled to voluntarily accept the associated risks. However, the mere fact that a judge recognizes this similarity does not suggest that the policy is necessarily correct. While the discrimination is not strictly based on sexual orientation, it is based on whether or not a woman is in a sexual relationship with a man. This policy serves to exclude both lesbian couples and single heterosexual women, and this exclusion is not justified. The problem arises not because the policy is based on health and safety, or even allegedly on sexual orientation, but because the policy fails to recognize and balance other

important considerations. Two of the neglected considerations are the principles of autonomy and equality. [30]

This case begs the question: why can mothers not choose to assume the risk for themselves and their child? After all, mothers who are capable of conceiving naturally may do so with men over 40 or men who have had sexual intercourse with another man. In addition, throughout the pregnancy, and even post-pregnancy, mothers determine the nature and weight of their child's interests. Only women who cannot or choose not to conceive naturally are subject to legal principles that regulate the source of the sperm. The court attempts to reconcile this argument by pointing out that all sperm must go through some level of testing, but this fails to acknowledge the fact that there is no such testing in natural conceptions.

It is particularly interesting that a reigning principle of family law, "the best interests of the child", is upheld only for women using sperm from someone who is *not* their sexual partner. The application judge specified the purpose of the *Regulations* as protecting the "health of women undergoing assisted conception, to reduce the risk to women and their partners of acquiring transmissible infectious diseases and to reduce the risk to their unborn children of acquiring

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30 Equality was in fact discussed in the case as the appellant raised a s. 15 *Charter* argument in regard to her and the donor. Both claims failed. However, I believe that the analysis only failed to find discrimination toward Susan Doe because the appellant selected the incorrect comparator group. Rather than comparing lesbians to heterosexual women, the comparison should have been, as the judge acknowledged, to "women seeking insemination with the semen of their spouse or sexual partner." In addition, the equality argument regarding the intervener was dismissed due primarily to administrative reasons. The application and appeal court judges failed to acknowledge the important issues brought before them by the inventors and to take advantage of the opportunity to make much needed advances in the common law and human rights movement.

transmissible infectious diseases and suffering birth defects".[31] While it is partially true that a woman "seeking assisted conception with the semen of her spouse or sexual partner … has already been exposed to any risk", this reasoning applies only to the MSM exclusion, and does not imply that the unborn child faces no risk at all.[32] For example, a woman faces no risk to her own health if her sexual partner is over 40, but her unborn child faces an increased risk of spontaneous genetic mutations. The risks are identical for unborn children whether or not the donor is a sexual partner of the mother; however, only where the donor is not a sexual partner does the age serve as a sufficient reason to exclude. Why is it that the interests of the child do not seem to matter in these cases? Both women conceiving "naturally" and women using a known donor who is a sexual partner are exempt from the application of this principle. This differentiation violates the principle of equality, confuses the importance of the best interests of the child, and points to an inconsistency that ought to be remedied.

CONCLUSION

Patricia Baird has suggested, and I could not agree more, that "[w]ell thought out social policy goals are needed" in the area of reproductive technologies, and that "the law needs to be amended in the attainment of these goals".[33] The 21st century family and the role of parents within the family unit are increasingly complex. Viewing families through a familial lens fails to appreciate the diversity of situations and the integrity of the family unit. It is time to start viewing the family through a post-modern lens, which views small accounts of the world and accepts that more than one true, or correct, path is available.[34]

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31 *Supra,* note 2. at para. 20.

32 *Ibid.* at para. 21.

33 *Supra* note 4 at 190.

34 *Ibid.*

In Susan Doe's situation, where her male donor is a close friend and the father of her daughter, it may perhaps be more useful to take account of the specifics of the case, rather than treat it as a generic lesbian couple accessing assisted conception in the hopes of having a child.

One way to accommodate situations such as the one found in *Susan Doe* is to modify the Health Canada directive entitled *Technical Requirements for Therapeutic Donor Insemination*.[35] The Exclusion Criteria found in this directive could be amended so that known donors who are queer or over 40 years of age – provided they do not fall into any of the other excluded categories – are treated virtually the same as spouses and sexual partners who wish to donate semen.[36] This would require high risk individuals, such as persons who have been exposed to known HIV infected blood, to donate through the special access program. It would also ensure that recipients of anonymous donors' semen are not exposed unknowingly to the risks of semen from queer men and men over 40 years of age. Such a scheme would demonstrate greater respect for the autonomy of lesbian couples, single women, and heterosexual couples unable to conceive and wishing to use a known donor. It would also have the effect of treating these groups more equally in comparison with women using a known donor who is a sexual partner or spouse. In addition, I suspect that most known donors and their recipients would take steps to ensure that the donor undergoes independent testing prior to donating semen.

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35 *Supra* note 24.

36 While requiring these donors to fall outside all the other exclusionary criteria treats persons using assisted conception differently than persons using natural conception (*e.g.* a person with active viral hepatitis may conceive naturally but would be excluded under the Regulations), it is still of utmost importance to uphold the integrity of the *Regulations* and maintain health as a fundamental concern.

Although the justices in *Susan Doe* failed to recognize the absence of legal principles that account for modern families and assisted reproduction technologies, perhaps the government will appreciate the significance of the important issues this case raises, and begin to better address the need for equality and autonomy in the assisted conception legislation.