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Stefanie Carsley*

DNA, Donor Offspring and Derivative
Citizenship: Redefining Parentage under
the *Citizenship Act*

Under Canada's Citizenship Act, children born outside Canada acquire derivative citizenship—that is, citizenship through descent or parentage—if at least one of their parents is Canadian. However, according to Citizenship and Immigration Canada, in order to qualify for derivative citizenship a child must have a genetic link to a Canadian citizen. Canadians who use donated sperm or eggs to conceive—including women who give birth using donated eggs—are therefore not considered parents for citizenship purposes. According to the Federal Court of Appeal, Canadian donors may also pass on their citizenship to their genetic offspring. This article argues that current interpretations of the Citizenship Act disadvantage donor offspring and their families, and run counter to the Act's objectives, Parliament's intentions and developments in Canadian family law. It maintains that the Canadian government has provided inadequate justifications for excluding Canadians' non-biological children from obtaining citizenship by descent, particularly in light of reforms permitting international adoptees to acquire citizenship from their Canadian adoptive parents. It recommends that citizenship officers be required to grant citizenship to donor offspring where Canadians are recognized as their parents for family law purposes, and can prove that their children were conceived using donated genetic material.

Sous le régime de la Loi canadienne sur la citoyenneté, les enfants nés à l'étranger acquièrent la citoyenneté par filiation si au moins un de leurs parents est canadien. Toutefois, selon Citoyenneté et Immigration Canada, pour avoir droit à la citoyenneté par filiation, un enfant doit avoir un lien génétique avec un citoyen canadien. Les Canadiens qui utilisent du sperme ou des ovules donnés pour concevoir, y compris les femmes qui donnent naissance à la suite de dons d'œufs, ne sont donc pas considérés comme étant des parents aux fins de citoyenneté. Selon la Cour d'appel fédérale, les donneurs canadiens peuvent également transmettre leur nationalité à leur descendance génétique. L'auteure avance que les interprétations actuelles de la Loi sur la citoyenneté désavantagent les enfants des donneurs et de leurs familles et vont à l'encontre des objectifs de la Loi, des intentions du législateur et de l'évolution du droit canadien de la famille. Elle soutient que le gouvernement du Canada a invoqué des motifs inadéquats pour empêcher des enfants non biologiques de Canadiens d'obtenir la citoyenneté par filiation, en particulier à la lumière des réformes autorisant les personnes adoptées à l'étranger à acquérir la nationalité de leurs parents adoptifs canadiens. Elle recommande que les agents de citoyenneté soient tenus d'accorder la citoyenneté aux descendants des donneurs lorsque des Canadiens sont reconnus comme étant leurs parents aux fins du droit de la famille et lorsqu'ils peuvent prouver que leurs enfants ont été conçus en utilisant du matériel génétique donné.

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Introduction

Under Canada's *Citizenship Act*, children born outside of Canada acquire derivative citizenship—that is, citizenship through descent or parentage—if at least one of their parents is Canadian.¹ These children are deemed to be Canadian citizens from birth, and receive the same rights and privileges as their Canadian parents. They may apply for a Canadian passport,² at the age of 18 they have the right to vote,³ and their mobility rights are protected

1. *Citizenship Act*, RSC 1985, c C-29, 3(1)(b). As is discussed in more detail in Part I of this article, the *Citizenship Act* explicitly excludes adoptees and children who are the second generation born abroad from automatically obtaining citizenship by descent pursuant to paragraph 3(1)(b). Children adopted by Canadian citizens will be granted citizenship pursuant to section 5.1 of the *Act* providing certain criteria are met.

2. After being issued citizenship certificates proving that they are Canadian citizens born abroad.

3. Providing they have since become residents of Canada, or otherwise meet the criteria for non-residents. Note, however, that restrictions on voting based on residency have recently been challenged as violating the *Canadian Charter of Rights and Freedoms*. The Ontario Court of Appeal upheld these restrictions on 20 July 2015, but the Supreme Court of Canada granted leave to appeal on 14 April 2016. See *Canada Elections Act*, SC 2000, c 9, ss 3, 6, 11, 127; *Canadian Charter of Rights and Freedoms*, s 3, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]; *Frank v Canada (AG)*, 2015 ONCA 536, 126 OR (3d) 321, leave to appeal to SCC granted, 36645 (14 April 2016).

under the *Canadian Charter of Rights and Freedoms*.⁴ Where children are born abroad using assisted reproductive technologies, however, they may not be eligible for citizenship by birthright.

In order to be considered parents for family law purposes,⁵ Canadians do not need to be genetically related to their children. A woman who conceives using donated eggs will be presumed to be her child's legal mother by virtue of giving birth,⁶ despite not having a genetic connection to her child.⁷ In turn, the birth mother's opposite-sex spouse or partner will be presumed to be the child's biological and legal father where donated sperm was used.⁸ Canadians who have neither a gestational nor a genetic connection to a child may also acquire parental status on account of their intentions to parent or their actions in caring for a child, and may be legally recognized as parents instead of a donor or a surrogate mother.⁹ According to Citizenship and Immigration Canada (CIC), however, a child must have a genetic link to a Canadian parent in order to qualify for derivative citizenship.¹⁰ Canadians who do not use their own sperm or eggs to conceive are ineligible to pass on their citizenship to their children. Under CIC's current policy, having a biological, gestational connection to a child is also insufficient. Canadian mothers who give birth using donated eggs are therefore also not considered parents for citizenship purposes.¹¹ While

4. *Charter*, *supra* note 3, s 6 (which guarantees mobility rights "to enter, remain in and leave Canada").

5. It should be noted that, unless otherwise specified, where I use the language of "parent" I am referring to a child's legal parents under family law. These parents may or may not have a genetic connection to their children. I use the terms "donor" or "surrogate mother" to refer to individuals who have a genetic or gestational connection with a child, but who have not been legally recognized as this child's parents, or who were initially presumed to be this child's parents, but who consented to relinquish their parental rights.

6. In many jurisdictions, the birth mother is automatically considered the child's legal parent, according to the maxim *mater est quam gestatio demonstrat* (or "by gestation the mother is demonstrated"). She may only sever her parental ties by consenting, following the child's birth, to place the child for adoption or to relinquish her parental rights. See, e.g., Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies" (2001) 39:4 *Osgoode Hall LJ* 772 at 786.

7. A woman who gives birth using donated eggs has a gestational and thus biological connection to the child she has carried, but she does not have a genetic connection to the child.

8. See, e.g., Art 538.3 CCQ; *Family Law Act*, SBC 2011, c 25, s 27 [BC *FLA*].

9. See Part II of this paper for examples of Canadian provinces' and other jurisdictions' approaches to legal determinations of parentage where children are conceived through gamete donation or surrogacy. For further discussion of who is considered a parent under Canadian provincial law see, e.g., Nicholas Bala & Christine Ashbourne, "The Widening Concept of 'Parent' in Canada: Step-Parents, Same-Sex Partners & Parents by ART" (2012) 20:3 *J of Gender, Social Policy & the L* 525.

10. Citizenship and Immigration Canada, "Who is a parent for citizenship purposes where assisted human reproduction (AHR), including surrogacy arrangements, are involved" (2014), online: Government of Canada <www.cic.gc.ca/english/resources/tools/cit/admin/id/parent-assist.asp> [CIC, "Who is a parent"].

11. *Ibid.*

CIC will usually accept birth certificates as evidence that a Canadian citizen is a child's parent, it exercises its discretion to require DNA testing where it suspects that a parent is not genetically related to his or her child. Where Canadian parents refuse a DNA test or the result is negative, they will be required to proceed through adoption or immigration processing in order to obtain citizenship for their children.¹² By contrast, a child who has "Canadian DNA" is a citizen by descent. In 2014, the Federal Court of Appeal confirmed in *Minister of Citizenship and Immigration v. Kandola* that Canadian fathers must be biologically related to their children in order to pass on their citizenship.¹³ However, the majority also held that for the purposes of derivative citizenship a genetic link is *sufficient* to establish parentage.¹⁴ As a result, Canadian sperm donors, who are not recognized as parents for family law purposes, may convey their citizenship to their genetic offspring.¹⁵

This article explores the implications of CIC's policy and the Federal Court of Appeal's decision for families who conceive through assisted reproductive technologies. It also examines the policy rationales that the Minister of Citizenship and Immigration (the Minister) has provided for making derivative citizenship dependent on having Canadian genes. It argues that current law and policy may significantly disadvantage Canadians who use donated genetic material to build their families and that the Canadian government has provided inadequate justifications for its treatment of children conceived through reproductive technologies. It recommends that Parliament amend the *Citizenship Act* to grant donor-conceived offspring¹⁶ Canadian citizenship if they have legally recognized Canadian parents and to exclude Canadian donors and surrogates from passing on their citizenship to their progeny.

This article builds upon existing scholarship that discusses the application of Canadian citizenship laws and policies to children conceived

12. *Ibid.*

13. *MCI v Kandola*, 2014 FCA 85 at paras 58-59, 71, [2015] 1 FCR 549 [*Kandola*].

14. *Ibid* at para 70.

15. *Ibid* at para 76. As will be discussed in more detail in Part I, the majority noted in *obiter* that a Canadian woman ought to qualify as a "mother" under the *Citizenship Act*, *supra* note 1 where she has *either* a genetic or a gestational connection to a child. Should this interpretation be adopted by CIC, this would mean that a Canadian mother who gives birth using donated eggs could pass on her citizenship. It would also mean that Canadian surrogate mothers and egg donors could also be recognized as parents for citizenship purposes.

16. Donor-conceived offspring or donor offspring are terms commonly used to refer to children conceived through donated sperm, eggs or embryos.

through donated sperm¹⁷ or surrogacy.¹⁸ It complements legal literature examining the incongruence between law's treatment of families under immigration law and family law.¹⁹ Through its focus on Canadian law, it also contributes to wider discussions about how parentage is defined for citizenship purposes in other jurisdictions and how these definitions affect families who use assisted reproductive technologies.²⁰ This piece does not focus on the moral propriety of international surrogacy agreements²¹ or "reproductive tourism."²² It also does not consider the consequences of derivative citizenship laws for children who were *not* conceived through

17. Lois Harder examines how legal processes look to lineage to determine Canadian citizenship and political membership. She argues that citizenship should not be tied to parentage and instead we should devise a "foundation for political membership that is based on mutual respect and care, rather than luck, exclusivity, and risk aversion." See Lois Harder, "Does Sperm Have a Flag? On Biological Relationship and National Membership" (2015) 30:1 CJLS 109 at 111.

18. Erin Nelson examines very briefly how Canadian citizenship laws may affect children born through surrogacy. See Erin Nelson, "Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy" (2013) 41:1 JL Med & Ethics 240 at 245-246; Karen Busby explores issues surrounding cross-border surrogacy and parentage, but notes that a thorough review of citizenship issues for Canadians who use surrogacy goes beyond the scope of her article. Karen Busby, "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere" (2013) 25:2 CJWL 284 at 294.

19. Lene Madsen, "Second Class: Law Meets Family in the Immigration Context" (2003) 21 CFLQ 103; Lene Madsen, "Biology not Destiny? *O(MA) v Canada (Minister of Citizenship & Immigration)* and the Recognition of Relationship" (2004) 22 CFLQ 177; Cindy L Baldassi, "DNA, Discrimination and the Definition of 'Family Class': *MAO v Canada (Minister of Citizenship and Immigration)*" (2007) 21 J L & Soc Pol'y 5.

20. See Jenni Millbank, "The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?" (2011) 35 Melbourne UL Rev 165; Scott Titshaw, "Sorry Ma'am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology" (2010) 12 Fla Costal L Rev 47; Victoria Degtyareva, "Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent" (2010) 120 Yale LJ 862; Kristine S Knaplund, "Baby Without a Country: Determining Citizenship for Assisted Reproduction Children Born Overseas" (2014) 91:2 Denver UL Rev 335.

21. For a recent examination of ethical issues associated with transnational commercial surrogacy, see, e.g., Françoise Baylis, "Transnational Commercial Contract Pregnancy in India" in Françoise Baylis & Carolyn McLeod, eds, *Family-Making: Contemporary Ethical Challenges* (Oxford: Oxford University Press, 2014).

22. Reproductive tourism, fertility tourism, or reproductive travel, refer to the practice of going abroad for fertility treatments. See, e.g., Richard F Storrow, "Quest for Conception: Fertility Tourists, Globalization and Feminist Legal Theory" (2006) 57 Hastings LJ 295; I Glenn Cohen, "Circumvention Tourism" (2012) 97 Cornell L Rev 1309. The transnational trade of human sperm, eggs and embryos is also associated with reproductive tourism as it involves individuals or couples seeking gametes or embryos from other jurisdictions. For discussions of Canadian legal responses to the transnational trade in human eggs, see Jocelyn Downie & Françoise Baylis, "Transnational Trade in Human Eggs: Law, Policy and (In)Action in Canada" (2013) 41 J L Med & Ethics 224; Susan G Drummond & Sara R Cohen, "Eloquent (In)action: Enforcement and Prosecutorial Restraint in the Transnational Trade in Human Eggs as Deep Ambivalence about the Law" (2014) 26 CJWL 206.

assisted reproduction but who are nonetheless found, through DNA testing, not to have a genetic connection to their legal fathers.²³

Part I sets out current law and policy pertaining to derivative citizenship. It discusses the pertinent provisions of the *Citizenship Act* as well as CIC's operational bulletins and policy documents. It then examines the Federal Court of Appeal's decision in *Kandola*.

Part II explores the practical and symbolic implications of these laws and policies. It argues that CIC's discretionary DNA policy disproportionately affects certain families, and that children who are deemed ineligible for derivative citizenship will face arduous, time consuming and uncertain processes in applying for citizenship. It also maintains that while in principle donor-conceived offspring could acquire citizenship by descent if their parents ensure that their sperm donor is Canadian, in practice few families are likely to benefit from this provision. Moreover, enabling donors to pass on their citizenship while excluding non-genetic parents does not accord with the *Citizenship Act*'s objectives, Parliament's intentions and legislative and jurisprudential developments in Canadian family law.

Finally, Part III scrutinizes the Minister's policy justifications for preventing Canadian parents, who conceived through assisted reproductive technologies, from passing on their citizenship to their non-genetic children. The Minister has said that current law and policy responses are intended to combat fraud, human trafficking and undue gain.²⁴ This Part argues that while these concerns are not without merit, they can be addressed in a manner that minimizes the differential treatment of biological and non-biological children. It explains that while adoptees were also initially required to obtain citizenship through immigration processing because of similar concerns, over time the *Citizenship Act*'s provisions pertaining to adoptees were subject to a discrimination complaint under the *Canadian Human Rights Act*²⁵ and a constitutional challenge under section 15 of the

23. For instance, such a situation may arise where a birth mother has had multiple sexual partners around the time of the child's conception. See, for e.g., *Valois-d'Orleans v Canada (MCI)*, 2005 FC 1009 [Valois] (where CIC cancelled a citizenship certificate because a child's legally recognized father discovered he was not the biological father shortly after the birth, and sought to contest his paternity).

24. Before the Federal Court in *Kandola*, the Minister argued that the requirement that a child have a genetic connection in order to qualify for citizenship under paragraph 3(1)(b) of the *Act* is intended to prevent "human trafficking and undue gain" and the use of "easily obtained false documents claiming to be evidence of birth via assisted human reproduction that can easily explain DNA tests which do not demonstrate shared genetic material with parents." See *Kandola v Minister of Citizenship and Immigration*, 2013 FC 336 at para 16, [2013] 3 FCR 335 [Kandola FC].

25. *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA]; *Canada (AG) v McKenna* [1999] 1 FC 401 (CA) [McKenna].

Charter.²⁶ Parliament ultimately amended the *Citizenship Act* to require the Minister to grant citizenship to children adopted by Canadians if the adoption is legitimate and accords with domestic and international law.²⁷ This article concludes that the Canadian government could better attain its stated objectives by providing donor offspring with the right to obtain a grant of citizenship in circumstances where their Canadian parents can provide proof of their legal parentage as well as satisfactory evidence that their children were conceived through assisted reproduction. It also suggests that Parliament ought to redefine parentage under the *Citizenship Act* to clarify that Canadian donors and surrogate mothers ought not to be considered “parents” for the purposes of derivative citizenship.

I. *Parentage and derivative citizenship*

1. *The Citizenship Act and CIC’s policy*

Under paragraph 3(1)(b) of the *Citizenship Act*, a person born outside of Canada after February 14, 1977 is a Canadian citizen if, at the time of birth, at least one of his or her parents was Canadian.²⁸ The *Act* explicitly carves out two exceptions to this rule. First, where Canadian parents adopt, their child does not acquire citizenship under section 3.²⁹ Instead, section 5.1 of the *Act* states that the Minister will grant citizenship to adoptees after the adoption is complete, providing the adoption: “(a) was in the best interests of the child; (b) created a genuine relationship of parent and child; (c) was in accordance with the laws of the place where the adoption took place and the laws of the country of residence of the adopting citizen; (c.1) did not occur in a manner that circumvented the legal requirements for international adoptions; and (d) was not entered into primarily for the purpose of acquiring a status or privilege in relation to immigration or

26. *Charter*, *supra* note 3, s 15; *Worthington v Canada*, 2008 FC 409, [2009] 1 FCR 311 [*Worthington*].

27. *Citizenship Act*, *supra* note 1, s 5.1. This provision’s specific requirements are discussed in more detail in Part I of this article.

28. *Ibid*, s 3(1)(b).

29. The English version of paragraph 3(1)(b) explicitly excludes adoptive children. It states: “Subject to this Act, a person is a citizen if... (b) the person was born outside Canada after February 14 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen.” As will be discussed further later on in this article, the French version implies that adoptees are excluded as it uses the language “née d’un... père ou d’une mère,” or “born of a... father or a mother.” It reads: “Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne... (b) née à l’étranger après le 14 février 1977 d’un père ou d’une mère ayant qualité de citoyen au moment de la naissance.”

citizenship.”³⁰ The *Act* also specifies different criteria where the adoptee was over the age of 18,³¹ or where the adoptive parents reside in Quebec.³²

Second, individuals who are the second generation born abroad no longer qualify for derivative citizenship.³³ In other words, persons who were born outside of Canada and who were not citizens before 17 April 2009 are no longer automatically citizens if their Canadian parents had also acquired citizenship by descent or if their parents were adopted and were granted citizenship under section 5.1 of the *Act*.³⁴ Although the *Citizenship Act* does not otherwise define who qualifies as a “parent” for the purposes of paragraph 3(1)(b), CIC maintains that citizenship by descent (or *jus sanguinis*) is literally determined “by blood” and is intended to apply exclusively to Canadians’ genetic offspring.³⁵ Recognizing that the use of assisted reproductive technologies may result in children who do not have a genetic connection to one or more of their legal parents, in 2010 and 2012 CIC issued operational bulletins clarifying its policy regarding who is a parent for citizenship purposes where a child is born through reproductive technologies or surrogacy.³⁶ These policy documents explain that in order to be considered a parent for the purposes of paragraph 3(1)(b), an individual must have a genetic link to his or her child. Thus where a Canadian parent conceives through reproductive technologies but uses his or her own sperm or eggs, the child will be a Canadian citizen. If,

30. *Citizenship Act*, *supra* note 1, s. 5.1(1). In assessing these criteria, CIC is to consider a variety of factors set out in the *Citizenship Regulations*, which vary depending on whether the adoptive parents resided within or outside of Canada at the time of the adoption, whether the country in which the intended parents resided is a party to the *Hague Convention on Adoption* and whether at the time of the adoption the parents intend to move to a Canadian province. See *Citizenship Regulations*, CRC, c 400, s. 5.1(1); See also Citizenship and Immigration Canada, *CP-14 Adoption: Grant of Canadian Citizenship for Persons Adopted by Canadian Citizens*, (2015) at 34ff, online: <www.cic.gc.ca/english/resources/manuals/cp/cp14-eng.pdf> [CIC, *CP-14*]; *Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 29 May 1993, 33 [*Hague Convention on Adoption*].

31. *Citizenship Act*, *supra* note 1, s. 5.1(2).

32. *Ibid.*, s. 5.1(3).

33. See, e.g., Lois Harder & Michelle Thomarat, “Parentage Law in Canada: The Numbers Game of Standing and Status” (2012) 26:1 *Intl JL Pol’y & Fam* 62 at 69.

34. *Ibid.*, s. 3(3). This first generation limit only does not apply if at the time of the child’s birth his or her parent was employed outside of Canada with the Canadian armed forces or the federal public administration or public service of a province or territory, or at the time of the child’s parent’s birth the child’s grandparent was employed in such a position.

35. CIC, “Who is a parent,” *supra* note 10.

36. “Operational Bulletin 197–April 12 2010,” online: Government of Canada website <www.cic.gc.ca/english/resources/manuals/bulletins/2010/ob197.asp> “Operational Bulletin 381–March 8 2012,” online: Government of Canada <www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob381.asp>; While both bulletins are listed as “expired” on CIC’s website, their contents now form part of CIC’s current policy for how citizenship may be acquired where assisted reproductive technologies are used. See CIC, “Who is a parent,” *supra* note 10.

however, Canadian parents use donated genetic material to conceive, then their children are ineligible for derivative citizenship, and CIC will refuse to issue citizenship certificates attesting that their children are citizens born abroad.

2. Minister of Citizenship and Immigration v. Kandola

In 2014, a Canadian parent whose daughter was denied a citizenship certificate challenged CIC's interpretation of paragraph 3(1)(b) of the *Citizenship Act*. Mr. Kandola, a Canadian citizen, and Mrs. Kandola, a citizen of India, had used *in vitro* fertilization to build their family while they were living in India. Unable to conceive using their own eggs and sperm, they elected to use anonymously donated embryos and Mrs. Kandola gave birth to a daughter, Nanakmeet.³⁷ While Mrs. Kandola has a gestational connection to her daughter, neither she nor Mr. Kandola has a genetic connection to Nanakmeet. The Kandolas were forthcoming about their use of assisted reproductive technologies and CIC found that Nanakmeet was not a Canadian citizen following DNA testing.³⁸ While Mr. Kandola successfully applied for judicial review to the Federal Court,³⁹ the Federal Court of Appeal reversed and upheld the Minister's prior decision to refuse to issue a citizenship certificate.

The Federal Court of Appeal held that in order to qualify for derivative citizenship a child must have a biological connection to a Canadian citizen. While the English version of paragraph 3(1)(b) says that a child born abroad is Canadian if "at the time of his birth one of his parents, other than a parent who adopted him, was a Canadian citizen,"⁴⁰ the French version is worded differently. It states that a child is a citizen if he or she was "*née ... d'un père ou d'une mère*"⁴¹ and thus was "born... of a father or mother." The majority explained that the French version is to be preferred over the English because of "its greater precision,"⁴² as it is clear that in order to be "born of a father," a child needs to have a genetic connection to his or her father.⁴³

While the current French wording is the result of an administrative redrafting of the *Revised Statutes of Canada*,⁴⁴ the majority found that it may be relied upon because the revision did not alter the provision's

37. *Kandola*, *supra* note 13 at paras 6-7.

38. *Ibid* at para 8.

39. *Kandola FC*, *supra* note 24.

40. *Citizenship Act*, *supra* note 1, s 3(1)(b).

41. *Ibid*.

42. *Kandola*, *supra* note 13 at para 59.

43. *Ibid*.

44. *Revised Statutes of Canada*, RSC 1985, c 40 (3rd Supp).

meaning.⁴⁵ Prior to 1985, the French version did not use the language “born of” and it mirrored more closely the current English version. It stated that a child is a citizen if, at the time of birth, the child’s mother or father, but not an adoptive parent, was a citizen.⁴⁶ The majority explained that in the earlier version, the use of the words father and mother still required a genetic link, as the “primary definitions” of “*père*” and “*mère*” in French dictionaries show that these words were intended to refer to a child’s biological progenitors.⁴⁷

The majority also held that Canadian citizens do not need to be legally recognized as parents in order to convey citizenship to their offspring. According to the majority, there is no basis in law for requiring a legal parent–child relationship as a condition for derivative citizenship,⁴⁸ and paragraph 3(1)(b) is “totally divorced from family law considerations.”⁴⁹ Instead, the wording “*née d’un père*” indicates that all that is required for a child to be a citizen is for a Canadian man to have contributed to the child’s genetic makeup. As a result, the majority noted that a Canadian sperm donor also qualifies as a “parent” for the purposes of derivative citizenship.⁵⁰

The majority further commented in *obiter* that the wording “*née d’une mère*” is ambiguous, as it may mean that a child must have a gestational or a genetic connection to a Canadian woman.⁵¹ In contradiction of its prior operational bulletins and policy, the Minister argued before the court that in order to convey derivative citizenship a woman must have a

45. *Kandola, supra* note 13 at paras 62-64. The majority explained: “There is a presumption that changes in terminology in a revised statute are technical or aesthetic in nature and do not change the state of the law....[Thus] if new law can be gleaned from the legislative text enacted through this process, it must be ignored, and reliance must be placed on the original text.” See *Kandola, supra* note 13 at para 62; See also *Flota Cubana de Pesca (Cuban Fishing Fleet) v Canada (MCI)*, [1997] FCI No 1713, [1998] 2 FCR 303.

46. From 1977 to 1985, the provision read: “Sous réserve des autres dispositions de la présente loi, est citoyen toute personne ... (b) qui est née hors du Canada après l’entrée en vigueur de la présente loi et dont, au moment de sa naissance, le père ou la mère, mais non un parent adoptif, était citoyen canadien.” See *Kandola, supra* note 13 at paras 5, 88.

47. The majority cites *Le Petit Robert, 2006* dictionary which provides the following definitions: “*père*”—“Homme qui a engendré, qui a donnée naissance à un ou plusieurs enfants” and “*mère*”—“Femme qui a mis au monde un ou plusieurs enfants.” The majority also notes that *Le Grand Robert, 1996*, *Le Petit Larousse, 1999* and *Multidictionnaire de la langue française, 2003* dictionaries have similar definitions. See *Kandola, supra* note 13 at para 63.

48. *Kandola, supra* note 13 at para 70.

49. *Ibid* at para 66.

50. *Ibid* at para 76.

51. *Ibid* at para 71.

genetic connection *and* have given birth to the child.⁵² As a result of the development of *in vitro* fertilization, the woman who gives birth and the woman whose egg is used to conceive may be different individuals, both of whom have a biological connection to the resulting child.⁵³ While the facts of this case did not require the court to determine in what circumstances a mother would convey citizenship to her child, the majority noted in *dicta* that requiring a Canadian woman to have a genetic *and* gestational link to the child “would give rise to an unequal treatment between father and mother as the father would convey derivative citizenship by way of a genetic link and the mother would not.”⁵⁴ Ultimately, the majority held that the Minister was correct that Mr. Kandola did not convey his citizenship to his daughter by birth, as Nanakmeet lacked Canadian genes.⁵⁵

The dissenting judge, by contrast, explained that a textual, contextual and purposive analysis of paragraph 3(1)(b) indicates that Parliament intended the term “parent” to refer to a legally recognized parent, and for children to be eligible for derivative citizenship even where they do not have a genetic connection to their Canadian parent(s). The dissent found that the 1985 revision altered the meaning of the French version of paragraph 3(1)(b) and as a result, the court could not rely upon the language “*née ... d’un père ou d’une mère*.”⁵⁶ According to the dissent, Parliament’s explicit exclusion of adoptive parents in paragraph 3(1)(b) showed that it had intended the term “parent” to refer to a legal parent. If lawmakers had intended for “parent” or “mother or father” to refer exclusively to a child’s biological parents, then excluding adoptive parents would have been unnecessary and redundant.⁵⁷ Moreover, had Parliament wished to only include parents who have a genetic connection with their children it would have explicitly excluded fathers who were recognized under Canadian family law as parents, but who did not have a genetic connection to their children.⁵⁸ The dissent also noted that lawmakers have sought to expand who can acquire derivative citizenship and to treat

52. *Ibid* at para 72; In making this argument, CIC was likely trying to preclude a Canadian surrogate mother or egg donor from conveying citizenship to her genetic or gestational offspring. However, this interpretation would also mean that a Canadian woman who used her own eggs to conceive with the assistance of a surrogate mother could not pass on her citizenship, even though a Canadian man who used his sperm with a surrogate could do so.

53. *Ibid* at para 71.

54. *Ibid* at para 74.

55. *Ibid* at para 67.

56. *Ibid* at paras 88-94.

57. *Ibid* at para 100.

58. *Ibid* at para 103; He explained that when paragraph 3(1)(b) was introduced in 1977, a man who did not have a genetic link to a child could nonetheless be presumed to be the child’s legal and biological father under provincial family law.

children “substantially equally” regardless of the circumstances of their births.⁵⁹ Over time, the *Citizenship Act* has been amended to remove distinctions between children born within and outside of wedlock, and to minimize distinctions between biological children and adoptees.⁶⁰ The dissent reasoned that it was therefore unlikely that Parliament had sought to maintain a distinction between children who do and do not have a genetic connection to their parents and noted that this distinction might be subject to a human rights complaint on the grounds of family status or a section 15 *Charter* challenge, using “manner of conception” as an analogous ground.⁶¹ The dissenting judge ultimately would have granted citizenship to Nanakmeet on the basis that Mr. Kandola, a Canadian citizen, is legally recognized as her father.⁶²

As a result of the Federal Court of Appeal’s decision, a Canadian father who is found not to have a genetic connection with his child will not be eligible to pass on his citizenship. However, if it can be proven that the sperm used to conceive the child was derived from a Canadian citizen, then the child will be Canadian even if the genetic contributor is not the child’s legal or social parent but rather only a sperm donor.

With regard to a Canadian mother, while the majority of the Federal Court of Appeal explained in *obiter* that a child ought to be eligible to obtain derivative citizenship from his birth mother or his genetic mother, CIC has not amended its policy to reflect the court’s in *dicta* statements. Rather, under CIC’s current policy, a Canadian mother who gives birth abroad using donated eggs still does not qualify as a parent for the purposes of derivative citizenship as she does not have a genetic link to her child. Moreover, because the Minister had argued before the court that a child must have a genetic *and* a gestational connection to a Canadian mother in order to acquire citizenship, it is now uncertain whether CIC will also deny citizenship to a child who was born abroad to a surrogate mother but whose Canadian intending mother used her own eggs, or a Canadian donor’s eggs, to conceive. As the majority of the Federal Court of Appeal correctly noted, whether donors or gestational mothers ought to be considered parents under the *Citizenship Act* are policy questions that “are worthy of further consideration and risk being answered by the courts unless Parliament exercises its prerogative to deal with them by legislation.”⁶³ In the meantime, as will be discussed below, these

59. *Ibid* at para 119.

60. *Ibid* at paras 112-119.

61. *Ibid* at paras 118-120.

62. *Ibid* at paras 123-124.

63. *Ibid* at para 76.

legislative gaps and current law and policy may have important practical and symbolic implications for Canadians and their families.

II. *Donor offspring and differential treatment*

1. *Discretionary DNA and disproportionate effects*

Although the Federal Court of Appeal held that a legal parent–child relationship is not required for derivative citizenship, in many cases CIC still relies on evidence of legal parentage in order to determine who is a parent for citizenship purposes. The Government of Canada’s website currently explains:

[W]here there is no question with respect to the genetic relation between the parent and the child, birth certificates are accepted as valid evidence in the establishment of who is the parent.DNA will not be requested systematically, but rather only where there is evidence suggesting that the Canadian parent (through whom a claim by descent or derivative claim of citizenship is made) is not the genetic parent.⁶⁴ It is unclear what evidence would lead CIC to believe that there is a definitive biological link between a child and his legally recognized mother and father. The potential for women to have more than one sexual partner,⁶⁵ and the ability for individuals or couples to conceive using donated sperm, eggs or embryos means that CIC can never be sure, in the absence of DNA testing, that the people listed on the birth certificate have a genetic link to the child.

It is clear that CIC’s discretionary DNA policy disproportionately targets certain groups of Canadians. To date, reported cases involving requests for DNA testing in relation to paragraph 3(1)(b) have all involved Canadians living in Asia and Africa—notably, India,⁶⁶ Morocco,⁶⁷ the Philippines⁶⁸ and Russia.⁶⁹ Time will tell whether CIC will request DNA from Canadian citizens living on other continents. However, in the

64. CIC, “Who is a parent,” *supra* note 10.

65. Genetics researchers estimate that for children conceived through intercourse, up to 10% do not have a genetic connection to their legally recognized father. See Baldassi, *supra* note 19 at 25.

66. *Kandola*, *supra* note 13; Other cases did not go to court but have been reported in Canadian newspapers. See Raveena Aulakh, “Surrogacy mixup leaves couple stranded 6 years” *The Toronto Star* (20 August 2011) GT1 [Aulakh, “Surrogacy Mixup”]; Raveena Aulakh, “Baby Quest Traps Couple in India: Toronto parents living in squalor, fighting to bring twins to Canada after surrogate pregnancy mix-up” *The Toronto Star* (21 December 2010) A1 [Aulakh, “Baby Quest”]; Tara Carman, “IVF babies born abroad test Canada’s citizenship laws: appeal court enforces requirement that child be genetically related to one parent” *Vancouver Sun* (7 January 2015) A1; Rick Westhead, “Troubling questions surround surrogate-born children in India” *The Toronto Star* (26 April 2010), online: <www.thestar.com/life/health_wellness/2010/04/26/troubling_questions_surround_surrogateborn_children_in_india.html>.

67. *Azziz v Canada (MCI)*, 2010 FC 663, 368 FTR 281 [Azziz].

68. *Watzke v Canada (MCI)*, 2014 FC 19, 445 FTR 226 [Watzke].

69. *Valois*, *supra* note 23.

context of family sponsorship applications, scholars have noted that CIC has similarly requested DNA testing to prove a biological link, primarily from applicants from a few African and Asian countries, suggesting that CIC may not be applying its policy equally to all applicants and may be singling out some countries for closer scrutiny.⁷⁰

Case law also reveals that certain factors cause CIC to suspect that a biological link might not exist between parent and child. CIC has, unsurprisingly, ordered genetic testing where a father sought to contest his paternity.⁷¹ It has also required DNA testing where children were born outside of a hospital or with the assistance of a midwife,⁷² and where a woman's age suggests that she would be unlikely or unable to conceive without *in vitro* fertilization, donated gametes or a surrogate.⁷³ CIC would most likely request DNA testing where same-sex couples apply for citizenship certificates for their children,⁷⁴ or where a Canadian citizen does not physically resemble the child applicant.⁷⁵ Moreover, CIC mandates that families who use reproductive technologies and/or surrogacy submit proof of payment of their hospital bills, a contractual agreement with their surrogate mother (if applicable), as well as a contractual agreement with the laboratory which helped them to conceive through assisted reproduction.⁷⁶ Families who comply and disclose that their child was conceived through assisted reproduction have thus also been asked to submit to DNA testing.⁷⁷

CIC's DNA policy undoubtedly enables some children—who do not have a genetic link to their parents—to obtain citizenship by descent. If the child was born in North America, Australia, or parts of Europe, for instance, and the parents are a young, opposite-sex couple, who appear to be biologically related to the child, it seems unlikely that CIC will request a DNA sample. It will simply issue a citizenship certificate after receiving the child's birth certificate.

70. Baldassi, *supra* note 19 at 17.

71. Valois, *supra* note 23.

72. Watzke, *supra* note 68; Azziz, *supra* note 67.

73. Azziz, *ibid.*

74. In most cases, same-sex couples necessarily need to use donated genetic material to build their families. However, it is possible for a same-sex couple to conceive using their own genetic material if one spouse or partner was born with reproductive organs of the opposite sex and the couple conceived prior to that spouse undergoing hormone treatment or surgery on his or her reproductive organs. It is also possible for a transgender person to freeze his or her gametes prior to this medical treatment in order to use them later on to conceive through assisted reproduction.

75. For example, if the child's parents are of different racial or ethnic backgrounds and the child does not share the Canadian parent's skin tone, CIC would likely order DNA testing.

76. CIC, "Who is a parent," *supra* note 10.

77. Kandola, *supra* note 13.

By contrast, other parents—who may, in fact, be genetically related to their children—will be required to undergo invasive DNA testing at their own expense, because of their country of residence, their means of conception, their age, race or ethnicity, the circumstances of the child's birth or their same-sex relationship.⁷⁸ If they refuse, are unable to pay for the costs of these tests,⁷⁹ or if they proceed and the results are negative, their children will be denied citizenship certificates.

2. *Adoption requirements*

CIC requires that Canadian parents who conceived using donated sperm or eggs, and who wish to pass on their citizenship, first seek to adopt their children.⁸⁰ As noted in Part I, individuals who are born outside of Canada and who are adopted by Canadian citizens may acquire citizenship by grant pursuant to section 5.1 of the *Citizenship Act*. The adoption must be found to be legitimate and lawful,⁸¹ and these adoptees must have been the first generation born outside of Canada to acquire citizenship by virtue of having Canadian parents.⁸² These children do not need to immigrate to Canada in order to become citizens.⁸³ Canadians who are living abroad and who adopt a child within their country of residence (domestic adoption) or from another country (international or intercountry adoption) have the same ability to transfer their citizenship to their adopted children as Canadian citizens who are residents of Canada and who go through the international adoption process to adopt a child from another country and bring the child

78. CIC explains that applicants “must be made to understand that they will have to cover all costs related to the DNA test, regardless of the result (i.e., all costs including sample-taking, courier costs for shipping, the laboratory analysis of all DNA samples and the final report submitted directly from the laboratory to CIC and the applicant).” See “Establishing parentage for citizenship purposes,” online: Government of Canada <www.cic.gc.ca/english/resources/tools/cit/admin/id/parent.asp> (accessed 10 November 2015).

79. CIC requires that parents use a laboratory accredited by the Standards Council of Canada. This DNA testing is expensive and may be beyond the means of some families. For example, EasyDNA Canada, which is based in Toronto, charges \$599 for an Immigration DNA test that meets CIC's requirements, and charges additional fees for overseas sample collection. See “Immigration DNA Test,” online: <www.easydna.ca/immigration-dna-testing/> (accessed 10 November 2015).

80. CIC, “Who is a parent,” *supra* note 10.

81. Citizenship will be granted under s 5.1 to minors who were adopted by Canadian citizens providing the adoption: was in the best interests of the child; created a genuine parent-child relationship; was carried out in accordance with the laws of the jurisdiction where the adoption occurred and the laws of the adopting citizens' country of residence; did not circumvent legal requirements for international adoption and was not “entered into primarily for the purpose of obtaining a status or privilege in relation to immigration or citizenship.” There are also different rules where the adoptee is an adult or the parents are residents of Quebec. For a list of factors that officials must consider in determining whether the criteria for s 5.1. are met see CIC, *CP-14*, *supra* note 30 at 34ff.

82. See *Citizenship Act*, *supra* note 1, s 5.1(4); There are however exceptions for the children or grandchildren of individuals who were employed in the Canadian armed forces. See s 5.1(5).

83. CIC, *CP-14*, *supra* note 30 at 34.

to Canada.⁸⁴ However, the process adoptive parents must undergo in order to legally adopt a child, and apply for Canadian citizenship on behalf of the adoptee, depends on the jurisdiction(s) in which the adoptive parents and the adoptee were residing at the time of the adoption.⁸⁵

In some jurisdictions, where a child is conceived using donated gametes, a Canadian intending parent⁸⁶ may be eligible, or may be required, to adopt his or her child in order to be legally recognized as a parent for family law purposes. For example, in some parts of the United States second-parent adoptions allow a birth mother's same-sex spouse or partner to be named as a legal parent.⁸⁷ In the United Kingdom, if a child is born through surrogacy using donated sperm *and* eggs, the intending parents cannot avail themselves of a parental order in order to transfer parentage, and must apply to adopt their child.⁸⁸ Once the adoption is complete, these children will be eligible to apply for a grant of citizenship by virtue of being adopted by Canadian parents.

However, many Canadians who conceive through assisted reproduction, and whose children are born abroad, will be their children's legal parents *without* proceeding through adoption and their children will therefore be unable to acquire citizenship pursuant to section 5.1 of the *Act*. A birth mother and her spouse or partner of the opposite sex may be presumed to be the child's biological parents and be legally recognized as such, even if they used donated gametes to conceive. In some jurisdictions

84. *Ibid.*

85. See, e.g., Government of Canada, "International Adoption Process," online: <www.cic.gc.ca/english/immigrate/adoption/internationalprocess.asp> (accessed 26 May 2016); CIC, *CP-14*, *supra* note 30.

86. The terms "intending father," "intending mother" or "intending parents" are commonly used to refer to individuals who use assisted reproductive technologies to build their families and who intend to be legally recognized as the child's parents.

87. See Nancy D Polikoff, "A Mother Should Not Have to Adopt her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century" (2009) 5:2 *Stan J of Civil Rights & Civil Liberties* 201 at 204; Leslie M Fenton & Ann Fenton, "The Changing Landscape of Second-Parent Adoptions" (2011) 14:1 *Children's Rights Litigation* at 8. See also Family Equality Council, "Second Parent Adoption," online: <www.familyequality.org/get_informed/equality_maps/second-parent_adoption_laws/> (accessed 8 November 2015) (for an updated map indicating which states permit second-parent adoptions).

88. *Human Fertilisation and Embryology Act 2008* (UK), c 22, s 54 [*HFEA*]; Human Fertilisation and Embryology Authority, "Legal Issues around Surrogacy," online: <www.hfea.gov.uk/1424.html#8271> (accessed 8 November 2015). It should be noted that the requirement that parents proceed through adoption where they have used a surrogate and donated embryos to conceive may be justified, as this scenario is more akin to child adoption than a situation in which an intending parent has a genetic or a gestational connection to the child.

in the United States,⁸⁹ Europe⁹⁰ and Australia,⁹¹ a birth mother's same-sex spouse or partner has similarly been recognized as a legal parent through statute or judicial order. In the United Kingdom and Australia, courts may also transfer parentage from a surrogate mother to intending parents, provided that certain conditions are met.⁹² In India and Ukraine, intending parents' names have been recorded on children's birth certificates even where surrogate mothers gave birth.⁹³ In each of these circumstances, adoption will *not* be an option: a person cannot adopt his or her legally recognized child.⁹⁴ Some jurisdictions also prevent same-sex couples from adopting within their borders,⁹⁵ while others do not permit interreligious adoptions.⁹⁶ CIC acknowledges these potential obstacles to adoption, but explains that parents must nonetheless obtain a written confirmation from the foreign jurisdiction in which the child was born or from their visa office stipulating that adoption is not legally possible. Only then may they apply for citizenship through other avenues.⁹⁷

3. *Processing times, residency requirements and ministerial discretion*

Children who are ineligible for derivative citizenship or adoption must undergo a much more time consuming, onerous and uncertain process in

89. For instance, courts in California and Oregon have interpreted these states' parentage laws as allowing for the recognition of a lesbian partner as a child's legal parent. See *Elisa B v Superior Court*, 117 33 Cal (3d) 46 (Ca Sup Ct 2005); *Charisma R v Kristina S*, 96 Cal (3d) 26 (CA 1st Cir Ct App 2009); *Shineovitch and Kemp v Kemp*, 214 P.3d 29 (Or Ct App 2009). See Polikoff, *supra* note 87 at 218-221.

90. For example, this is the case in the United Kingdom, pursuant to the *HFEA*, *supra* note 88, ss 42-45; Iceland, Sweden, Norway and Spain similarly recognize a lesbian partner as the parent of a child conceived through donor insemination. See Polikoff, *supra* note 87 at 230.

91. For example, Western Australia, the Northern Territory and the Australian Capital Territory have all amended their family law legislation to recognize the birth mother's same-sex partner as the child's parent from the moment of birth, unless there is evidence that she did not consent to her partner undergoing assisted procreation. See *Artificial Conception Act 1985* (WA), s 6A; *Status of Children Act 1978* (NT), s 5DA; *Parentage Act 2004* (ACT); See also Jenni Millbank, "Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children" (2006) 34 Federal L Rev 205 at 251.

92. See, e.g., *Parentage Act 2004* (ACT), ss 23-31; *Status of Children Act 1974* (Vic), ss 20-22; *Surrogacy Act 2010* (NSW), ss 12ff; *Surrogacy Act 2010* (Qld), ss 20-38; *Human Fertilisation and Embryology Act 2008* (UK), c 22, s 54; See also Nelson, *supra* note 18 at 243-244; Millbank, *supra* note 20 at 178-186.

93. Busby, *supra* note 18 at 293; Usha Rengachary Smerdon, "Birth Registration and Citizenship Rights of Surrogate Babies Born in India" (2012) 20:3 Contemporary South Asia 341 at 342.

94. See *Kandola*, *supra* note 13 at para 51.

95. David C Bell, "The Ironic Twist and International Adoption: Same-Sex Couples and International Adoption Challenges" (2012) 12:1 Whittier J of Child & Family Advocacy 151 at 152; Lynn D Wardle, "The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples or Partners" (2008) 18:1 Ind Intl & Comp L Rev 113 at 128-129.

96. CIC, "Who is a parent," *supra* note 10.

97. *Ibid.*

order to obtain citizenship. CIC has recommended that these children's parents apply for a discretionary grant under subsection 5(4) of the *Citizenship Act*, which permits the Minister to "in his or her discretion, grant citizenship to any person to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada."⁹⁸ In the alternative, CIC suggests that Canadian parents may apply for a temporary resident permit for their child to enter Canada and then apply within Canada for permanent residency status for the child on humanitarian and compassionate grounds.⁹⁹ The child can then obtain citizenship through naturalization, pursuant to subsection 5(2) of the *Citizenship Act*.¹⁰⁰ CIC has also explained that Canadian parents who use *in vitro* fertilization and donated gametes *without* a surrogate mother may sponsor their children as members of the family class, and their children may apply for citizenship after fulfilling residency requirements.¹⁰¹

Each of these options may present a number of difficulties for Canadian parents who conceive through reproductive technologies. With regard to a discretionary grant, it is unclear under what circumstances citizenship would be granted. To date, the Minister has yet to exercise his discretion to grant citizenship through these means in any reported cases involving

98. *Citizenship Act*, *supra* note 1, s 5(4).

99. CIC, "Who is a parent," *supra* note 10.

100. *Citizenship Act*, *supra* note 1, s 5(2).

101. Canadian parents may sponsor their "dependent children"—*i.e.*, their biological or adopted children who are less than 19 years of age or who are older than 19 but who are "unable to be financially self-supporting due to a physical or mental condition." *Immigration and Refugee Protection Act*, SC 2001, c 27, s 12 [IRPA]; *Immigration and Refugee Protection Regulations*, SOR/2002-227 s 2 [IRPR]; However, CIC notes in its operational manual, *OP 2: Processing Members of the Family Class* that the term "biological child" also includes children conceived through assisted reproduction who do not have a genetic connection to their parents. It explains that a child who is not genetically related to the parent making the application, but who was born through the use of assisted reproductive technologies to the applicant or the applicant's spouse, common law partner or conjugal partner at the time of birth, may be considered a "biological child" under IRPR. However, "the female spouse or partner must have given birth to the child," and thus the child will not be considered a biological child for the purposes of this definition, if born to a surrogate mother. See Citizenship and Immigration Canada, *OP 2: Processing Members of the Family Class*, (2006) at 16, online: <www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf> [CIC, *OP 2*]. Baldassi, *supra* note 19 at 27-28; See also *Khosa v Minister of Citizenship and Immigration*, 2010 CanLII 94141 at para 25 (CA IRB) (which found that the appellant had met the onus to prove on the balance of probabilities that the applicant meets the definition of "dependent child" because the child was born through assisted reproductive technologies "to the person who, at the time of the birth of the child, was the spouse of the parent making the application"); *Tian v Minister of Citizenship and Immigration*, 2011 CanLII 75008 (CA IRB) (the appellant child was found not to meet the definition of "dependent child" because he was born to a surrogate mother).

donor-conceived offspring born abroad.¹⁰² This grant will also only be awarded in “very exceptional cases”¹⁰³ and thus few children will be able to benefit from this provision. Applications for permanent residency on humanitarian and compassionate grounds are also subject to a significant degree of discretion. The Minister grants permanent residency status on humanitarian and compassionate grounds to individuals who would otherwise be inadmissible, provided this is justified on the basis of certain discretionary factors, including the best interests of a child affected.¹⁰⁴ As a result, neither of these options provides a guaranteed means for Canadian parents to acquire citizenship for their non-genetic children.

Families who apply for citizenship for their children through immigration will also be required to fulfill residency requirements and will face long wait times for processing their applications. While some Canadian parents apply for citizenship certificates for their children precisely because they seek to bring them to Canada,¹⁰⁵ others may not wish to relocate. They may simply want their children to be Canadian citizens for symbolic reasons, or to provide them with the same rights and opportunities as Canadian citizens once they are adults. Children who seek to obtain citizenship through naturalization, however, will be unable to obtain citizenship without residing in Canada. In addition, the current average processing time for an application for permanent residency under humanitarian and compassionate grounds is 30 to 42 months,¹⁰⁶ while sponsoring a dependent child under the family class may take anywhere between 7 and 49 months depending on the visa office.¹⁰⁷ Once permanent residency status is acquired, the child may apply for citizenship, which

102. This includes cases that have been reported in Canadian judgments and media sources. See *Kandola*, *supra* note 13; *Azziz*, *supra* note 67; Aulakh, “Surrogacy Mixup,” *supra* note 66; Aulakh, “Baby Quest,” *supra* note 66; Carman, *supra* note 66; Westhead, *supra* note 66; Tom Blackwell, “IVF babies caught in citizenship ‘paradox’; Baby born in India not Canadian despite father, court rules,” *National Post* (9 April 2014) A1.

103. “Citizenship: Ministerial discretion to grant citizenship in special cases,” online: Government of Canada <www.cic.gc.ca/english/resources/tools/cit/grant/discretion.asp> (accessed 10 November 2015).

104. *IRPA*, *supra* note 101, s 25.

105. See, e.g., *Kandola*, *supra* note 13.

106. “Processing times: Permanent Residence—Other Applications,” online: Government of Canada <www.cic.gc.ca/english/information/times/perm-other.asp> (accessed 10 November 2015).

107. “Processing Times: Family Sponsorship,” online: Government of Canada <www.cic.gc.ca/english/information/times/perm-fc.asp> (accessed 10 November 2015); “Processing times for sponsorship of spouses, common-law or conjugal partners and dependent children applications,” online: Government of Canada <www.cic.gc.ca/english/information/times/perm/fc-spouses.asp> (accessed 10 November 2015). The months I have noted include step one of the process, in which the sponsor is assessed. This takes on average 62 days and must be added to the time estimated for each visa office.

takes on average between 12 and 36 months.¹⁰⁸ Thus, while a child who is eligible for derivative citizenship may obtain a citizenship certificate within 5 to 9 months,¹⁰⁹ children lacking a genetic connection to their parents may need to wait over 7 years before they obtain Canadian citizenship.

4. *Canadian sperm donors and citizenship*

As a result of the Federal Court of Appeal's decision in *Kandola*, children who do not have a genetic link to their legal parents are able—at least in theory—to obtain derivative citizenship through their donors. One might therefore argue that Canadian parents ought to simply use a Canadian sperm donor¹¹⁰ in order to ensure that their child will be Canadian and to avoid the aforementioned processing times, uncertainty and residency requirements associated with other means of obtaining citizenship.

In practice, parents may have difficulty establishing that their child has “Canadian genes.” Although some Canadians use known genetic contributors to build their families, many still use anonymous donations in order to conceive. If a person donates anonymously, Canadian law protects his identity from being disclosed¹¹¹ and a clinic will only release non-identifying information, such as descriptions of donors' family history, health and genetic information, hobbies and interests from the time of

108. “Processing Times: Grant of Citizenship,” online: Government of Canada <www.cic.gc.ca/english/information/times/canada/cit-processing.asp> (accessed 10 November 2015).

109. “Processing Times: Citizenship Certificate (Proof of Citizenship),” online: Government of Canada <www.cic.gc.ca/english/information/times/canada/certif-processing.asp> (accessed 10 November 2015).

110. Recall that the Federal Court of Appeal in *Kandola* determined that a sperm donor would be considered a parent for citizenship purposes. The court only noted in *obiter* that a Canadian woman who has a genetic or a gestational connection to a child ought to similarly convey her citizenship. CIC is therefore not required by law to allow a Canadian egg donor to convey her citizenship in the same manner as a sperm donor.

111. In Quebec, anonymity is protected under its *Act Respecting Assisted Procreation* and the *Civil Code of Québec*, which makes clear that clinics and agencies are to maintain the confidentiality of donors, recipients and donor offspring's personal information and identity. See *An Act Respecting Clinical and Research Activities Relating to Assisted Procreation*, RSQ 2009, c A-5.01, s 42-44; art 542 CCQ. In other provinces, anonymity is ensured through agreements between physicians and patients and through privacy legislation. See, e.g., Lisa Shields, “Consistency and Privacy: Do These Legal Principles Mandate Gamete Donor Anonymity?” (2003) 12:1 Health L Rev 39 at 41; Vanessa Gruben, “Assisted Reproduction Without Assisting Over-Collection: Fair Information Practices and the Assisted Human Reproduction Agency of Canada” (2009) 17 Health LJ 229 at 232-234. Between 2006 and 2010 anonymity was further protected under s 15 of the *Assisted Human Reproduction Act (AHRA)* which provided that “the identity of the donor—or information that can reasonably be expected to be used in the identification of the donor—shall not be disclosed without the donor's written consent.” However, in 2010, the Supreme Court of Canada struck down parts of the *AHRA* (including this provision) as being *ultra vires* federal jurisdiction as it found the impugned provisions fell under provincial jurisdiction over hospitals, property and civil rights and matters of a merely local nature. See *Assisted Human Reproduction Act*, SC 2004, c 2; *Reference Re Assisted Human Reproduction Act*, 2010 SCC 61, 2010 3 SCR 457.

the donation.¹¹² While a clinic might provide information regarding the donor's citizenship, providing this had been collected, CIC's officers will be unable to confirm this information or order a DNA test to prove his genetic connection with the child applicant, as they will not be permitted to contact the donor.

Even if the citizenship of these anonymous donors could somehow be confirmed there also currently exist only a very limited number of anonymous Canadian sperm donors. For example, in 2011 it was reported that Repromed—the only sperm bank in Canada providing donated sperm for clinics outside of Quebec—had 37 Canadian donors.¹¹³ Fertility clinics in Canada often turn to the United States to make up for the dearth of Canadian donors; it is estimated that 95 per cent of the sperm used by Canadian clinics is imported from the United States.¹¹⁴ Obtaining access to Canadian sperm thus may prove difficult, or potentially undesirable, for parents seeking to conceive using donated gametes given the limited number of Canadian donors available.

Individuals who used a *known* Canadian sperm donor would theoretically have an easier time proving that their child is a Canadian citizen. The donor could be available for DNA testing to prove he is genetically related to the child and could provide CIC with evidence of his Canadian citizenship status. However, many Canadians specifically elect to use anonymous donors, and many men might be uncomfortable acting as a known donor, because of a lack of clarity under some provincial family law regimes regarding the parental rights and obligations of donors.¹¹⁵ While several provinces' family law statutes provide that a donor does not have parental rights or obligations simply on account of his genetic connection to the child,¹¹⁶ disputes nonetheless arise as to whether the donor intended to be a parent.¹¹⁷ Individuals might attempt to clarify their intentions by drafting agreements, but it is not clear whether, and under what circumstances, judges will rely on these contracts to determine who

112. Angela Cameron, Vanessa Gruben & Fiona Kelly, "De-Anonymising Sperm Donors in Canada: Some Doubts and Directions" (2010) 26:1 Can J Fam L 95 at 110 [Cameron]; *Pratten v British Columbia*, 2011 BCSC 656 at paras 11, 176, 22 BCLR (5th) 307 [*Pratten*].

113. See *Pratten*, *ibid* at paras 162-163.

114. Fiona Kelly, "Autonomous Motherhood and the Law: Exploring the Narratives of Canada's Single Mothers by Choice" (2012) 28:1 Can J Fam L 63 at 83 [Kelly, "Autonomous Motherhood"].

115. Cameron, *supra* note 112 at 115ff.

116. This is the case for instance in Alberta, British Columbia and Quebec. See *Family Law Act*, SA 2003, c F-4.5, s 7(4) [AB *FLA*]; BC *FLA*, *supra* note 8, s 24; CCQ art 538.2.

117. See, e.g., *SG c LC*, [2004] JQ no 7060, JE 2004-1340; *Droit de la Famille-111729*, 2011 QCCA 1180, [2011] JQ no 7881; In Ontario, provincial legislation has yet to clarify that a donor is not a parent and disputes have similarly arisen. See *WW v XX and YY*, 2013 ONSC 879, 31 RFL (7th) 402.

is a parent.¹¹⁸ Intending parents might therefore be especially worried about the implications of the citizenship process for potential disputes regarding parentage. If a sperm donor is asked to apply as the child's parent for the purposes of derivative citizenship, this might also be used as evidence by Canadian courts that the intending parents meant for the donor to be a legally recognized parent—and to have parental rights—in circumstances where this was not the parties' intentions.

5. *The Act's objectives and Parliament's intentions*

Allowing Canadian sperm donors to pass on their citizenship does not accord with the *Citizenship Act's* stated objectives. The Supreme Court of Canada has explained that the *Citizenship Act* aims to “provide access to citizenship while establishing a commitment to Canada and safeguarding the security of its citizens.”¹¹⁹ The Federal Court and Federal Court of Appeal have also stated that “the overall purpose of the *Citizenship Act* is that it serves as Parliament's mechanism for ensuring some form of connection between Canada and its citizens”¹²⁰ and that “the fundamental ingredient in acquiring citizenship by right is a connection to Canada.”¹²¹ However, making the use of Canadian sperm the litmus test for Canadian citizenship may provide non-Canadians, who have no connection or commitment to Canada, a means to obtain citizenship for their children in circumstances where they would otherwise be ineligible. It has the potential to encourage reproductive tourism, where citizens of other countries explicitly seek out donated Canadian sperm in order to obtain Canadian citizenship for their children.¹²²

Excluding non-genetic parents from conveying their citizenship and recognizing donors as parents also does not reflect Parliament's intentions. When paragraph 3(1)(b) was introduced in 1977, lawmakers could have never intended to make derivative citizenship dependent on simply having Canadian DNA. DNA testing was developed in the late 1980s¹²³ and CIC

118. In some cases courts have found that these agreements provide evidence of who intended to be the child's parents. See *LO v SJ*, 2006 QCCS 302, [2006] RJQ 775. In others, judges have been unwilling to enforce an agreement in light of evidence demonstrating that a donor had taken on a parental role in practice. See *MAC v MK*, 2009 ONCJ 18, 94 OR (3d) 756.

119. *Benmer v Canada*, [1997] 1 SCR 358 at para 94, [1997] SCJ no 26.

120. *Worthington*, *supra* note 26 at paras 47, 97.

121. *McKenna*, *supra* note 25 at para 57.

122. It should be noted that should CIC adopt the FCA's *obiter* interpretation of “mother” as including women who have a gestational or genetic connection to a child but who are not legally recognized as parents, this would raise these same issues with respect to Canadian egg donors and surrogate mothers.

123. Knaplund, *supra* note 20 at 350; See also Timothy Caulfield, “Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing” (2000) 26:1 Queen's LJ 67 (who discusses the development and use of DNA paternity testing in Canadian family law cases in the 1990s).

only began to use this testing in 1991, for the purposes of permanent residency applications.¹²⁴ In 1977, it would have been impossible to prove with certainty that a man's sperm was used to conceive a child. Using less reliable blood testing, it was only possible to demonstrate that a man was *not* a child's biological father.¹²⁵

In 1977, lawmakers also would not have intended to exclude a Canadian birth mother or her spouse or partner from passing on their citizenship. *In vitro* fertilization was only first used successfully in 1978 in Britain.¹²⁶ As a result, a woman who gave birth to a child in 1977 was necessarily also the child's genetic mother. This birth mother was legally recognized as the child's parent, and could only sever her parental ties through adoption.¹²⁷ In turn, Canadian common and civil law provinces recognized the birth mother's male spouse as the father as he was presumed to be the child's progenitor.¹²⁸ This presumption operated even in circumstances where, in reality, the child might have been conceived through artificial insemination using donated sperm, or through intercourse with a man other than the birth mother's spouse.¹²⁹ Accordingly, by using the terms "parent" or "*mère*" and "*père*" in paragraph 3(1)(b), and explicitly excluding adoptive parents, Parliament could only have been referring to a child's birth mother and the man who would have been *presumed* to be the biological father under provincial family law.¹³⁰

124. Baldassi, *supra* note 19 at 15.

125. See WG Pickney, "The Use of Blood Tests in Cases of Disputed Paternity" (1969) 34 Sask L Rev 142 at 143.

126. See, e.g., Diana Backhouse & Maneesha Deckha, "Shifting Rationales: The Waning Influence of Feminism on Canada's Embryo Research Restrictions" (2009) 21:2 CJWL 229 at 232.

127. Mykitiuk, *supra* note 6 at 786.

128. See, e.g., *An Act to reform the Law respecting the Status of Children*, RSO 1977 c 41, s 8; art 218 CCLC (1976).

129. See *Massie c Carrière*, [1972] CS 735; Mykitiuk, *supra* note 6 at 780-781, 786-788. It should be noted as well that while provincial legislation did not yet explicitly address parentage in the case of artificial insemination, legislators in Quebec had introduced draft legislation in 1974 and in 1977 stipulating that in the event that artificial insemination and donor sperm are used to conceive a child with the consent of the birth mother's husband, the husband may not then contest his paternity and disavow the child. In other words, the husband would still be recognized as the child's father despite not having a genetic connection to the child. Provisions addressing artificial insemination were ultimately adopted in 1980. See especially art 586 CCQ (1980); See Bartha Maria Knoppers, "The 'Legitimization' of Artificial Insemination: Promise or Problem?" (1978) 1:2 Fam L Rev 108 at 110-111; Benoît Moore, "Les enfants du nouveau siècle (libres propos sur la réforme de la filiation)" (2002) 176 *Développements récents en droit familial* 75 at 91.

130. Neither the majority nor the dissent in *Kandola* was therefore correct in finding that Parliament had intended that solely a genetic link, or solely a parental link, was required to convey citizenship. At that time, a woman who passed on her citizenship would have had a genetic, gestational and legal link to her child. A man would have only been required to have a legal link; however, his legal parentage was based on the presumption that he was the child's biological father.

6. *Canadian family law*

Defining parentage solely on the basis of a genetic connection to a child also does not accord with developments in Canadian family law. In response to the advancement and increased use of reproductive technologies, several provincial legislatures and courts have adopted more inclusive definitions of parentage and have recognized a wider variety of family forms.¹³¹ While biology, or presumptions of biology, still play a role in determining who is a parent in the eyes of the law, parental intentions and actions may trump genetics in determining who is a legal parent.¹³²

For example, Alberta and British Columbia's family law statutes and Quebec's *Civil Code* clarify that where a woman or a couple use donated sperm, eggs or embryos to conceive, the donor(s) are not parents under the law by virtue of their genetic connection to the resulting child.¹³³ Rather, a birth mother and her spouse or partner (of the same or opposite sex) may be legally recognized as a child's parents even where donated genetic material was used.¹³⁴ The *Civil Code of Québec* provides that where assisted reproductive technologies are used, filiation is first established by the act of birth, an official document which records the child's birth mother and, if applicable, the child's second parent.¹³⁵ As in other Canadian provinces, DNA tests are not required in order for the birth mother's spouse or partner to be registered as a parent.¹³⁶ If no act of birth exists, then filiation can be established through possession of status (facts demonstrating a parent-child relationship) or through presumptions of parentage for the birth mother's spouse.¹³⁷ In British Columbia and

131. See generally, Bala & Ashbourne, *supra* note 9; Fiona Kelly, "Multiple-Parent Families Under British Columbia's New *Family Law Act*: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-sex Parenting?" (2014) 47:2 UBC Law Rev 565 [Kelly, "Multiple-Parent"].

132. See, e.g., Fiona Kelly, "Equal Parents, Equal Children: Reforming Canada's Parentage Laws to Recognize the Completeness of Women-led Families" (2013) 64 UNBLJ 253 [Kelly, "Equal Parents"]; Wanda Wiegiers, "Assisted Conception and Equality of Familial Status in Parentage Law" (2012) 28:2 Can J Fam L 147; Angela Campbell, "Conceiving Parents Through Law" (2007) 21:2 Intl JL Pol'y & Fam 242; Susan B Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility" (2007) 25:1 Windsor YB Access Just 63.

133. AB *FLA*, *supra* note 116, s 7(4); BC *FLA*, *supra* note 8, s 24; art 538.2 CCQ. Note, however, that under article 538.2 of the *Civil Code of Québec* if sperm is donated via intercourse the donor may claim parental status within one year following the birth.

134. Robert Leckey, "'Where the Parents are of the Same Sex': Quebec's Reforms to Filiation" (2009) 23:1 Intl JL Pol'y & Fam 62 [Leckey, "Parents are of the Same Sex"]; Kelly, "Equal Parents," *supra* note 132.

135. Art 538.1 CCQ; See Régine Tremblay, "Surrogates in Quebec: The Good, the Bad, and the Foreigner" (2015) 27:1 CJWL 94 at 99.

136. Harder & Thomarat, *supra* note 33 at 65.

137. Arts 538.1, 538.3 CCQ; See also Tremblay, *supra* note 135 at 99; Robert Leckey, "The Practices of Lesbian Mothers and Quebec's Reforms" (2011) 23:2 CJWL 579 at 585.

Alberta, where a child is conceived through assisted reproduction using donated gametes or embryos, the child's legal parents are the birth mother and the person who was married to or in a marriage-like relationship with the child's birth mother at the time of conception and who consented to be the child's parent.¹³⁸ British Columbia's *Family Law Act* also uniquely recognizes three-parent families¹³⁹ while Quebec's *Civil Code* explicitly enables a woman to be recognized as a child's sole legal parent where she used assisted conception with the intention of parenting alone.¹⁴⁰ Canadian courts have also issued declarations of parentage, identifying intending parents as legal parents in lieu of donors or surrogates.¹⁴¹ The disconnect between family law and citizenship law results in situations in which non-genetic parents are legally recognized as parents for family law purposes, but are treated as legal strangers when it comes to citizenship. In turn, donors who are not recognized as parents under Canadian family law nonetheless have the right to pass on their citizenship to their genetic offspring. As discussed previously, CIC's policy and current interpretations of the *Act* have important practical consequences for these families. However, they also have symbolic implications as well. They communicate that non-biological parents are not "full parents" and are therefore not accorded certain rights and privileges. In sending this message, the Canadian government arguably undermines progress made by provincial legislatures and courts to afford non-biological parents and their children the same recognition as other families.

138. BC *FLA*, *supra* note 8, s 27; AB *FLA*, *supra* note 116, s 8.1; See also Kelly, "Equal Parents," *supra* note 132 at 273; Note that in British Columbia if a child is conceived using donated gametes or embryos and a surrogate, then intending mothers or fathers may be legally recognized as a child's parents rather than the child's birth mother, without obtaining an adoption or judicial declaration, providing certain conditions are met. See BC *FLA*, *supra* note 8, s 29.

139. BC *FLA*, *supra* note 8, s 30 (which provides that if a written pre-conception agreement stipulates that intending parents and a donor or a surrogate all agree to be the child's parents, then the three parties to the agreement will be the child's legal parents following the birth); See also Kelly, "Multiple-Parent," *supra* note 131; Rachel Treloar & Susan Boyd, "Family Law Reform in (Neoliberal) Context: British Columbia's New Family Law Act" (2014) 28:1 Intl JL Pol'y & Fam 77 at 85; It should be noted that, while Ontario does not have legislation allowing for three-parent families, the Ontario Court of Appeal in *AA v BB* issued a declaration of parentage that allowed for the recognition of a third parent. See *AA v BB*, 2007 ONCA 2, 83 OR 3D 561.

140. *CCQ*, *supra* note 8 at art 538. See especially Leckey, "Parents are of the Same Sex," *supra* note 134 at 66; See also Kelly, "Autonomous Motherhood," *supra* note 114 at 73; Susan Boyd et al, *Autonomous Motherhood?: A Socio-Legal Study of Choice and Constraint* (Toronto: University of Toronto Press, 2015) at 179.

141. See, e.g., *AWM v TNS*, 2014 ONSC 5420, 54 RFL (7th) 155 (where a male same-sex couple was declared to be the child's parents. They had used a surrogate and donated eggs to conceive). See also Busby, *supra* note 18; Joanna Radbord, "Same-Sex Parents and the Law" (2013) 33 Windsor Rev Legal Soc Issues 1.

III. *Policy justifications*

1. *Fraud, human trafficking and undue gain*

When *Kandola* was before the Federal Court, the Minister argued that current law and policy pertaining to derivative citizenship is intended to prevent fraud, human trafficking and undue gain.¹⁴² With regard to fraud, reproductive technologies concern immigration officials because of the possibility that Canadian citizens will claim that they used donated gametes to conceive—when this was not the case—in order to explain situations in which they do not have a genetic connection to a child claiming citizenship. Fraudulent birth certificates and false documents indicating that a child was conceived through reproductive technologies could, theoretically, be used to enable Canadians to obtain citizenship for individuals who are not their legal children.¹⁴³ As well, there is the possibility that adoptive parents could circumvent the lengthy and expensive international adoption process by claiming that they used reproductive technologies.¹⁴⁴ By making derivative citizenship dependent on having a genetic link to a Canadian parent, and ordering DNA testing where CIC suspects that birth certificates may not reflect the child's biological parentage, the Minister seeks to prevent such activity.

CIC has not explained precisely what it means by human trafficking and undue gain in relation to assisted reproductive technologies. The Government of Canada has, in other contexts, defined human trafficking as involving “the recruitment, transportation, harbouring and/or exercising control, direction or influence over the movements of a person in order to exploit that person, typically through sexual exploitation or forced labour.”¹⁴⁵ In relation to adoption, CIC has used “child trafficking” more narrowly, to include situations in which children are not necessarily exploited for sex or labour, but are kidnapped and placed for adoption.¹⁴⁶ In these situations, adoptive parents may have no knowledge that the child was placed for adoption without parental consent. CIC has used “undue gain” to refer to instances in which a child is sold to an orphanage or

142. See *Kandola* FC, *supra* note 24 at para 16.

143. *Ibid.*

144. A media article reported that in October 2013 a CIC immigration program manager in New Delhi expressed this concern in an internal email. She was discussing a case where intending parents used a surrogate and donated embryos to have a child. She explained: “If there is a positive decision on this case and future ones like it, there is a risk that this process will be seen as an alternative to adoption that does not require a homestudy or the involvement of Indian authorities.... Anyone who wants a baby and can afford to pay for one can come to India and have one produced.” See Carman, *supra* note 66.

145. Ministry of Public Safety, *National Action Plan to Combat Human Trafficking* (Ottawa: Queen's Printer, 2012) at 4.

146. CIC, *CP-14*, *supra* note 30 at 51-52.

to adoptive parents, or where there is otherwise an illegal exchange of money in relation to adoption.¹⁴⁷ For example, in Canada, provincial adoption laws prohibit paying or accepting payment for an adoption, with exceptions made for lawyers, health providers and adoption agency fees and the birth mother's expenses.¹⁴⁸

Through its policy pertaining to assisted reproduction, the Minister seeks to prevent fraud that might conceal trafficking and undue gain in relation to adoption. However, CIC might also be seeking to prevent situations in which children born through surrogacy are taken from their birth mothers without consent, or where there is an illegal exchange of money in relation to surrogacy or gamete donation. For example, the federal *Assisted Human Reproduction Act* prohibits, *inter alia*, paying, offering to pay or advertising to pay surrogate mothers and donors.¹⁴⁹ A Canadian case from 2010 demonstrates the potential for fraud and trafficking where children are born outside of Canada. In *Azziz v. Citizenship and Immigration Canada*,¹⁵⁰ a Canadian couple, Mr. Azziz and Ms Mesbahi, applied for a citizenship certificate for their son, Farid, who was born in Morocco. Although the couple was living in Canada they travelled to Morocco in March 2009 and their son was born 11 days later.¹⁵¹ Ms Mesbahi claimed that she gave birth to Farid and she and Mr. Azziz were listed on the child's birth certificate.¹⁵² The consular officer who analyzed Farid's citizenship application had doubts that he was their biological son. Ms Mesbahi was 51 years old¹⁵³ and thus her age suggested that if she did give birth to Farid, she would have likely needed to use donated eggs to conceive.

147. *Ibid* at 51.

148. See, e.g., *Adoption Act*, RSBC 1996, c 5, s 84; *Adoption Regulation*, BC Reg 291/96, s 10.

149. *AHRA*, *supra* note 111, s 6-7. Section 12 of the *AHRA* states that no expenses may be reimbursed except in accordance with regulations; however, these regulations have yet to be introduced. For further discussion of section 12 of the *AHRA* and the lack of regulations, see, e.g., Dave Snow, Françoise Baylis & Jocelyn Downie, "Why the Government of Canada Won't Regulate Assisted Human Reproduction: A Modern Mystery" (2015) 9:1 McGill JL & Health 1; For further discussion of the criminal prohibitions associated with paying for surrogacy and gametes see, e.g., Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Burlington: Ashgate, 2014); Alison Harvison Young, "Let's Try Again...This Time with Feeling: Bill C-6 and New Reproductive Technologies" (2005) 38:1 UBC L Rev 123; Alana Cattapan, "Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation" (2014) 29:3 CJLS 361. See also Karen Busby & Delaney Vun, "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26:1 Can J Fam L 13; Rakhi Ruparelia, "Giving Away the 'Gift of Life': Surrogacy and the Canadian *Assisted Human Reproduction Act*" (2007) 23:1 Can J Fam L 11.

150. *Azziz*, *supra* note 67.

151. *Ibid* at para 7.

152. *Ibid* at para 8.

153. *Ibid* at para 9.

The officer requested further information and the couple explained that Farid had been conceived using *in vitro* fertilization at the Royal Victoria Hospital in Montreal.¹⁵⁴ When the hospital was asked to verify its records it found that Ms Mesbahi had not been a patient. The couple also had no proof of payment for *in vitro* fertilization treatment, or ultrasound images to demonstrate that the pregnancy was successful.¹⁵⁵ They provided three medical documents from Morocco, intended to demonstrate that Ms Mesbahi was pregnant, but the officer suspected that these were fabricated.¹⁵⁶ When CIC requested DNA testing, Mr. Azziz said that they had used donated sperm and eggs to conceive.¹⁵⁷ CIC refused to issue a citizenship certificate for their son, and upon judicial review the Federal Court found that it was reasonable for CIC to have requested additional evidence from the couple and to have denied their son citizenship by descent.¹⁵⁸ It seems that in this case, Mr. Azziz and Ms Mesbahi may have been attempting to adopt a child illegally or may have been lying in order to conceal that their child was born through surrogacy.

Another recent case provides examples of conduct that qualifies as undue gain in relation to reproductive technologies. In 2013, Leia Picard, a Canadian surrogacy agent, was prosecuted under sections 6 and 7 of the *Assisted Human Reproduction Act (AHRA)*. Prohibited behavior under the *AHRA* includes paying for surrogacy services and genetic material or accepting payment as an intermediary who connects intending parents with surrogate mothers.¹⁵⁹ One of Picard's offences related to being paid to refer clients to an American lawyer who, unbeknownst to Picard, was operating a baby-selling ring. The American lawyer, Hilary Neiman, had made arrangements for women in Ukraine to become pregnant through assisted reproductive technologies. She lied and claimed that these women had arranged to act as surrogates for other couples, and had signed agreements to this effect prior to their pregnancy, but that the intending parents had backed out of their agreements. These children were then offered to couples, including Canadians, who each paid Neiman up to

154. *Ibid.*

155. *Ibid* at para 10.

156. *Ibid* at paras 15-16.

157. *Ibid* at para 22.

158. *Ibid* at para 92.

159. *AHRA*, *supra* note 111, ss 6-7.

\$150,000. Neiman paid Picard \$10,000 on three different occasions in return for Picard providing Neiman with referrals to her clients.¹⁶⁰

As these examples reveal, the Canadian government has reason to be concerned about the potential for fraud, child trafficking and undue gain.¹⁶¹ The *Azziz* case also demonstrates that CIC's policy—to require DNA testing where it suspects that parents may not have a genetic connection to their children—might expose fraudulent activity and, by extension, might uncover some instances of human trafficking and illegal payment as well.

However, CIC's policy also denies citizenship to children who were conceived through reproductive technologies where there was no fraud or illegal activity involved. For instance, this policy prevented Mr. Kandola from passing on his Canadian citizenship to his daughter in circumstances where Mr. and Mrs. Kandola were honest about their use of assisted reproductive technologies, and where CIC was certain that Mrs. Kandola was impregnated using donated embryos.¹⁶² In this situation, requiring a DNA link excluded one type of family from acquiring citizenship for their child by descent, without adequate justification on legal or policy grounds.

2. *International adoption and Canadian citizenship*

The *Citizenship Act's* provisions pertaining to adoptees demonstrate that there exist other means to address CIC's concerns about fraud and illegal activity, while nonetheless allowing donor-conceived offspring to obtain citizenship from their Canadian parents. The legislative and judicial history behind the *Act's* responses to international adoption provides helpful insight into the *Act's* current treatment of donor-conceived offspring. Just like donor offspring, adoptees were initially required to apply for permanent residency status in order to obtain citizenship under subsection 5(2) and were later permitted to apply for a discretionary grant of citizenship under subsection 5(4). The Minister also similarly argued that the exclusion of adoptees from obtaining citizenship by descent was warranted because of concerns relating to immigration fraud. Eventually, both Parliament and

160. See Alison Motluk, "First Prosecution under *Assisted Human Reproduction Act* Ends in Conviction" (2014) 186:2 CMAJ E75-E76 at E75; Tom Blackwell, "Canadian fertility consultant received \$31k for unwittingly referring parents to U.S. 'baby-selling ring,'" *National Post* (15 December 2013), online: <news.nationalpost.com/2013/12/15/canadian-fertility-consultant-received-about-30000-for-unwittingly-referring-parents-to-u-s-baby-selling-ring/>.

161. Lois Harder has similarly noted: "Given the demand for reproductive services and significant numbers of poor women in both developed and developing countries, it is not surprising that keen-eyed entrepreneurs would see a lucrative opportunity to establish "baby factories." [T]he ready availability of documentation certifying parentage for a genetically unrelated child conceived with the assistance of assisted reproductive technologies does raise concerns about the prospects for a flourishing traffic in children." Harder, *supra* note 17 at 122.

162. *Kandola*, *supra* note 13 at paras 7-8.

the Federal Court agreed that that the differential treatment of adoptees and biological offspring constituted unjustified discrimination because there were other means available to achieve the *Act's* objectives.

When Parliament amended the *Citizenship Act* in 1977, it was similarly concerned about the potential for fraud and child trafficking in relation to international adoption. It explicitly excluded adoptees from obtaining citizenship under paragraph 3(1)(b) because of concerns about “adoptions of convenience”—that is, situations in which individuals might seek to use a fraudulent adoption to gain admission to Canada without qualifying as an immigrant.¹⁶³ The concern was that if adoptees obtained citizenship under paragraph 3(1)(b) simply by having Canadian adoptive parents, CIC would not have the power or discretion to inquire into the legitimacy of the adoption.¹⁶⁴ Thus the *Immigration Act* was amended in 1978 to give visa officers the power to decide whether an adoption was *bona fide*,¹⁶⁵ and adoptees were required to go through the immigration process to obtain citizenship.

Over time, the exclusion of adoptees under paragraph 3(1)(b) was subject to a discrimination complaint. In *Canada (Attorney General) v. McKenna*, a woman who had adopted two children from Ireland argued that the requirement that a child adopted abroad obtain permanent residency status in order to become a Canadian citizen discriminated on the basis of family status contrary to sections 3 and 5 of the *Canadian Human Rights Act*.¹⁶⁶ The Human Rights Tribunal held that the differential treatment of adopted and biological children born abroad constituted *prima facie* discrimination and that this was not reasonably justified. Upon judicial review, the motions judge at the Federal Court set aside the Tribunal's decision, and the case was appealed to the Federal Court of Appeal.¹⁶⁷ At the appellate level, the case ultimately turned on a procedural

163. *McKenna*, *supra* note 25 at para 49.

164. *Ibid.*

165. *Ibid.* The *Immigration Regulations*, CRC, c 940, s 2(1) (1978) stated that “adopted” “means a person who is adopted in accordance with the laws of a province or of a country other than Canada or any political subdivision thereof, where the adoption creates a genuine relationship of parent and child, but does not include a person who is adopted for the purpose of gaining admission to Canada or gaining the admission to Canada of any of the person's relatives.”

166. *CHRA*, *supra* note 25; *McKenna*, *supra* note 25; Note that the year before, in 1997, the Federal Court held in *Minister of Citizenship and Immigration v Dular* [1997] FCJ no 1423, [1998] 2 FCR 81 that “adoptive status” was an analogous ground under the *Charter*. In that case the applicant challenged the provisions of the *Immigration Act*, RSC 1985, c I-2, which excluded children who were adopted over the age of 19 from being sponsored as members of the family class. At that time biological children could be sponsored over that age. The court held that these provisions violated s 15 of the *Charter* and were not saved under s 1.

167. *McKenna*, *supra* note 25 at 15-16.

issue and the majority dismissed the appeal.¹⁶⁸ Nonetheless, the judges of the Federal Court of Appeal, although divided in their reasons, agreed that the provisions of the *Citizenship Act* excluding adoptees from section 3 and requiring them to obtain citizenship pursuant to subsection 5(2) constituted *prima facie* discrimination.¹⁶⁹ The dissenting judge also found that there was no *bona fide* justification for this exclusion. He wrote:

The policy objective of the legislation in this case was the prevention of the potential abuse that would occur when people improperly attempt to bypass the immigration system by using adoption as a means of gaining admission of persons to Canada without their qualifying as immigrants. ... All parties agree that there is a need to keep the Canadian immigration system honest, but this can be accomplished without discriminating against adopted children. ... Once it is established that the adoption has been performed according to local law and has created a true parent-child relationship no more is necessary.¹⁷⁰

He thus explained that Parliament's desire to counter fraud and adoptions of convenience could be accomplished without requiring adoptees to proceed through the immigration process. Instead, children adopted by Canadian parents could be granted citizenship providing the adoption is proven to be legitimate.

In 1999, one year after *McKenna*, Parliament introduced draft legislation to allow adoptees to obtain citizenship without becoming permanent residents and without immigrating to Canada.¹⁷¹ Then in 2001, the Minister established a special interim measure to permit adoptees to apply for a discretionary grant of citizenship under subsection 5(4) of the *Citizenship Act*.¹⁷² After a series of unsuccessful bills,¹⁷³ Bill C-14, *An Act*

168. The judges disagreed as to whether the discrimination arose under s 3 of the *Citizenship Act* as well as under s 5(2). The majority found that there was a breach of natural justice, because the Minister was not given notice that s 5(2) was in issue and that he would be required to establish a *bona fide* justification for the requirements related to permanent residency.

169. *McKenna*, *supra* note 25.

170. *Ibid* at paras 49, 52.

171. See Margaret Young, *Bill C-16: The Citizenship of Canada Act*, Library of Parliament, online: Parliament of Canada <[www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=c16&Parl=36&Ses=2&source=library_prb#4.%20Children%20Adopted%20Abroad\(txt\)](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=c16&Parl=36&Ses=2&source=library_prb#4.%20Children%20Adopted%20Abroad(txt))> (accessed 3 November 2015).

172. Elizabeth Kuruvila, *Bill C-14: An Act to Amend the Citizenship Act (Adoption)* (Library of Parliament, 2006) at 2, n 8.

173. Bill C-16, *The Citizenship of Canada Act*, 2nd Sess, 36th Parl, 2000, [Bill C-16], which contained a similar provision as s 5.1 of the *Citizenship Act*, passed third reading in the House of Commons in May 2000, but died on the Senate *Order Paper*. In 2002, Bill C-18, *An Act respecting Canadian Citizenship*, 2nd Sess, 37th Parl, 2002 [Bill C-18] was referred to Committee after second reading but was not passed due to the prorogation of Parliament. Bill C-76, *An Act to amend the Citizenship Act*, 1st Sess, 38th Parl, 2005 [Bill C-76] died on the *Order Paper* with the dissolution of Parliament in fall 2005. See Kuruvila, *supra* note 172 at 3.

to Amend the Citizenship Act, received Royal Assent in June 2007.¹⁷⁴ Its provisions came into force in December 2007, enabling adoptees to obtain a grant of citizenship under section 5.1 of the *Citizenship Act*.

Prior to Bill C-14 coming into force, the *Act* was subject to another discrimination complaint, this time under the *Charter*. In *Worthington v. Canada*, an adoptee who had been refused citizenship under section 3 of the *Act* and who had also been denied a discretionary grant of citizenship under subsection 5(4), brought a constitutional challenge before the Federal Court arguing that section 3 of the *Citizenship Act* violated section 15 of the *Charter*.¹⁷⁵ The court found that there was a violation¹⁷⁶ and that this was not justified under section 1.¹⁷⁷

In its section 1 analysis, the court found that the objectives of section 3—to ensure a connection between Canada and its citizens, to safeguard the security of Canadians while providing access to citizenship, and to prevent adoptions of convenience—were pressing and substantial.¹⁷⁸ The judge also held that a rational connection existed between these goals and requiring adoptive children to apply for citizenship through a discretionary grant under subsection 5(4). The discretionary nature of this grant enabled the Canadian government to verify that the adoption was not an adoption of convenience, was in the best interests of the child, and was in conformity with its international obligations under the *Hague Convention on Adoption*, in a way that would not be permitted under section 3.¹⁷⁹ The judge concluded, however, that this does not minimally impair the rights of adoptees; because their status is subject to the Minister’s discretion under subsection 5(4), this leaves adopted children “completely at the mercy of the Minister.”¹⁸⁰

The judge noted that a “less impairing and therefore more appropriate legislative scheme” would be one that “provides that the Minister “shall grant citizenship” to a minor child adopted by a Canadian provided it is proven that the adoption is in the best interests of the child, is a legally valid adoption, and is not an adoption of convenience.”¹⁸¹ While the

174. Bill C-14, *An Act to Amend the Citizenship Act*, 1st session, 39th Parl, 2007.

175. *Worthington*, *supra* note 26.

176. The court accepted the argument that the requirement that adopted children must apply for citizenship under s 5 while “natural-born” children apply under s 3 draws a formal distinction on the basis of a personal characteristic and that the status of being adopted is an analogous ground of discrimination. It also found that adopted children suffer from a pre-existing disadvantage and that the impugned law did not have an ameliorative purpose for a more disadvantaged group.

177. *Worthington*, *supra* note 26 at paras 96-105.

178. *Ibid* at para 97.

179. *Ibid* at para 99; *Hague Convention on Adoption*, *supra* note 30.

180. *Worthington*, *supra* note 26 para 103.

181. *Ibid* at para 104.

court's reasons did not mention the pending revisions to the *Act*, in effect the court agreed with Parliament that by enabling adoptees to obtain a grant of citizenship providing certain requirements are met, section 5.1 provided a better, and more just alternative than requiring adoptees to obtain permanent residency status or a discretionary grant of citizenship.

This history suggests that the government's current treatment of donor offspring might similarly not withstand constitutional scrutiny.¹⁸² Excluding Canadians' non-genetic children from obtaining citizenship by descent, and failing to provide them with means to obtain a grant of citizenship similar to adoptees, does not minimally impair their rights. A less impairing scheme would instead require the Minister to grant donor offspring citizenship if Canadian parents can provide evidence that their children were conceived through reproductive technologies. CIC already requests and verifies this documentation where parents apply for citizenship or permanent residency status on behalf of their children.¹⁸³ Where these documents do not match up with hospital records, as in the *Azziz* case, CIC can request additional information and refuse citizenship if this is not provided. Where this documentation is found to be legitimate, the child ought to be granted citizenship. Requiring these children to instead proceed through immigration processing does not further serve to combat fraud, trafficking or undue gain.

Conclusion

Current laws and policies pertaining to derivative citizenship have significant implications for some Canadian parents and their children. CIC's discretionary DNA policy targets certain population groups based on their country of origin and means of conception. It will also

182. Questions for future research include how a discrimination complaint in this context might be argued and its likelihood of success. However, *Pratten v British Columbia* provides insight into some obstacles that claimants might face in bringing a s 15 *Charter* challenge. In that case, Olivia Pratten, a woman conceived through the use of anonymously donated sperm, challenged the constitutionality of British Columbia's laws supporting donor anonymity. One argument she had advanced was that British Columbia's adoption legislation and regulations discriminate against donor offspring by not providing them with the same rights or abilities as adoptees to obtain identifying information about their biological parents once they reach the age of majority. The British Columbia Supreme Court found that the impugned provisions violated s 15 and were not saved under s 1. However, the British Columbia Court of Appeal reversed the decision and found that these provisions qualify as an ameliorative program under s 15(2). See *Pratten v British Columbia (AG)*, 2012 BCCA 480, 272 CRR 92d) 205, rev'g 2011 BCSC 656. For a discussion of the rights claims of donor offspring to know their genetic origins pursuant to s 15 of the *Charter*, see Vanessa Gruben & Daphne Gilbert, "Donor Unknown: Assessing the Section 15 Rights of Donor-Conceived Offspring" (2011) 27:2 Can J Fam L 247; See also Lori Chambers & Heather Hillsburg, "Desperately Seeking Daddy: A Critique of *Pratten v British Columbia (AG)*" (2013) 28:2 CJLS 229.

183. CIC, "Who is a parent," *supra* note 10; CIC, *OP 2*, *supra* note 101 at 16.

disproportionately affect older parents, gay and lesbian couples, parents who do not physically resemble their children and Canadians who disclose their use of reproductive technologies. Children who are denied citizenship by descent will be required to apply for citizenship through adoption, a discretionary grant or by first applying for permanent residency—all of which may present various difficulties for children conceived through reproductive technologies. Enabling Canadian donors to pass on their citizenship will not necessarily benefit Canadian families. Moreover, current interpretations of the *Citizenship Act* run counter to the *Act*'s objectives and Parliament's intentions, and undercut progress that has been made in Canadian family law with respect to recognizing "non-traditional" families and non-genetic parents.

The Minister has provided insufficient justifications for excluding non-genetic parents—who conceived through donated gametes—from passing on their citizenship to their children. Reforms to the *Act* in relation to adoptees show that CIC's concerns regarding fraud, trafficking and undue gain could be addressed while minimizing the distinctions drawn between biological and non-biological children.

Drawing inspiration from the adoption context, this article recommends that the *Act* could be modified to *require* citizenship officers to grant citizenship where a child's legal Canadian parent provides satisfactory evidence that his or her child was conceived through assisted reproductive technologies. This would enable the Minister to refuse to grant citizenship in circumstances, like the *Azziz* case, where there is insufficient evidence demonstrating that the child was conceived through donated gametes. It would also allow parents like Mr. Kandola, who are able to prove that they conceived through reproductive technologies, the opportunity to pass on their Canadian citizenship to their children. Their children could then obtain citizenship within a much shorter period of time, without undergoing costly and invasive DNA tests, and without moving to Canada to fulfill residency requirements.

This article also urges Parliament to clarify that donors and surrogate mothers ought not to be considered parents for the purposes of derivative citizenship. Currently, Canadian sperm donors may convey their citizenship on account of the Federal Court of Appeal's decision in *Kandola*. Should the majority's *obiter* comments be adopted by CIC, egg donors or surrogate mothers would similarly qualify as mothers under the *Citizenship Act*. Requiring instead that Canadians be legally recognized as parents for family law purposes in order to pass on their citizenship would ensure that non-Canadians do not seek to use a Canadian donor or surrogate in order to obtain citizenship for their children. It also would

have important practical and symbolic implications for Canadian parents who use assisted procreation to build their families as it would recognize that parentage—for both family law and citizenship law purposes—ought not to be determined on the basis of DNA alone.

