LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

# REPORT

# ON

# CONFIDENTIALITY OF ADOPTION RECORDS

February 12, 1979

Report #30

MG-3750

The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

The Commissioners are:

C.H.C. Edwards
R. Dale Gibson
C. Myrna Bowman
Robert G. Smethurst, Q.C.
Val Werier
Sybil Shack
Kenneth R. Hanly

Ms. E.-Kerrie Halprin is Legal Research Officer to the Commission. The Secretary of the Commission is Miss Suzanne Pelletier.

The Commission offices are located at 521 Woodsworth Building, 405 Broadway, Winnipeg, Manitoba R3C 3L6, Tel. (204) 944-2896.

TABLE OF CONTENTS

INTRODUCTION

The issue of the confidentiality of adoption records has become very topical in the last number of years. Media coverage of this subject is increasing and regularly newspapers report reunions between biological parents and the children they gave up for adoption years before. In fact, however, there are many more biological parents and adoptees who for years search for contact with, or information about their child or parent with limited or no success, the reason being that most jurisdictions, like Manitoba, have enacted "sealed records statutes" which prevent the release of much of this information. In response, vocal groups such as *Parent Finders* have sprung up across North America, demanding legislation which will open up adoption records.

In Manitoba, it is the strict confidentiality in *"The Child Welfare Act"*[1] which has posed difficulties in this jurisdiction for the increasing number of adoptees who wish to trace their forebears. On February 22, 1977, in response to requests received by his office, the Honourable the Attorney-General wrote to the Manitoba Law Reform Commission requesting that we examine and review the subject of the confidentiality of adoption records under this Act, and indicate possible reforms. At the outset, we realized that the legislative issues involved in the question of access to adoption records concealed many practical implications as well as an underlying conflict of values and interests. In order to explore properly the full implications of the various choices for reform, we decided to invite written submissions on the subject from as wide a cross-section of the public as possible.

Advertisements inviting the legal profession to

write to us expressing their views were inserted in the legal publications. In addition, letters were written to various individuals, groups and child caring agencies. On the basis of the comments received, we published a twenty-nine page Working Paper entitled *Confidentiality of Adoption Records*. The paper set out the choices for reform we had to consider and served to focus the attention of our readers on the issues of concern. As a result of this topic's obvious emotional appeal, a large number of comments and submissions were received, particularly from the social work profession and government agencies but also from individual adoptees and adoptive parents. With one exception, none of the submissions appeared to have been sent by biological parents who had previously given up their children for adoption. Even so, we think the views of this group were well represented both in the literature we reviewed and by child placement agencies who corresponded with us. The absence of input into this project by biological parents is itself revealing commentary and caused us some concern about the subject of opening sealed records and the possible reunion of child and parent.

The problem we had to face, and which we presented to our readers, was to strike a proper balance between the desirability on the one hand of preserving the anonymity of the parties and the desirability, on the other, of ensuring that adoptees and biological parents who desire to acquire information about, or to contact one another, are not prevented from doing so by oppressive and unfair legislation. The majority of opinions we received agreed that there might be situations where an adoptee should be permitted to have the records of his adoption unsealed, enabling him to know the identities of his biological parents and the circumstances surrounding his adoption. The more difficult question concerned

the basis on which the records should be permitted to be opened. It involves social concerns and matters of public policy, as well as individual need.

Each party in the "adoption triangle" (that is the adoptee, the biological parents, and the adoptive parents) seems to have conflicting interests. When they give up their children, biological parents are promised that their identities will never be revealed without their consent. Yet while many wish to have nothing to do with the child they gave up, years later some desire to have more information about, or even meet with, the adoptee. At the same time, adopting parents are assured that the adoptee will be their child in all respects, and that no one, particularly biological parents, will interfere with their parentage. Weighing against the interests of both the biological and adoptive parents in maintaining secrecy are the rights of the adoptee to know his biological origins. As they grow older some adoptees develop a need to establish their identity, a "psychological need to know". In these circumstances, it may be very much in their interests to meet with, or know more about their biological parents.

Obviously, the issues which confront us are complex and extremely sensitive ones, that touch deeply upon the lives of many people. The primary question to be considered when examining this area is: can there be legislated a freer flow of adoption information, while still giving equal consideration and protection to the interests of the parties in the "adoption triangle"?

THE CURRENT SITUATION

According to *"The Child Welfare Act"*, once an adoption order is made,

> . . . all prior parental ties of the child cease to exist under law, and the relationship newly constituted . . . has the same effect as if the child had been born to the adopting parents.[2]

In order to protect this new relationship, the agency records of the adoption are sealed and can be opened only by the Director of Child Welfare, the executive director of the agency or on the order of a judge of the Court of Queen's Bench, County Court or Surrogate Court.[3] The Court records of the adoption order made in County Court are also confidential, and can be opened only on the order of a judge of the Court of Queen's Bench, County Court or Surrogate Court.[4] It should be noted that *"The Child Welfare Act"* does not state under what circumstances the discretion to open up the adoption records should be exercised. Also, anyone, not only a member of the "adoption triangle", can make application for access to those records.

Though there may seem to be adequate avenues by which to open up the adoption information in proper circumstances, in practice, this discretion is rarely exercised. While adoption agencies will provide the adult adoptee (and the biological parent) with as much background material (that is, non-identifying information) as they can about the other party, the practice of most adoption agencies is not to facilitate contact between the biological parents and the adult adoptee unless both parties have indicated their interest in meeting one another.[5] Reunions are effected only when, in the opinion of the agency, it would not be

detrimental to the parties.[6]

Whereas the practices of the agencies may vary, there are no reported Canadian cases where a court has allowed the adoption records to be opened under statutes such as the present one.[7] The only guideline that has been given as to when the records will be opened is that there must be "compelling circumstances".[8] In *L.J.M. v. The Director of Child Welfare (Manitoba)*,[9] the Court stated that a court order under s. 94 of *"The Child Welfare Act"* and it would follow, under s. 93(c) would be made only with notice to all parties in the "adoption triangle". And this notice would be given only in the face of "compelling circumstances". It was held that the psychological need to know on the part of the biological mother applicant, and evidence of genealogical problems in her lineage, did not constitute "compelling circumstances" so as to facilitate the serving of notice on the adoptee and the adoptive parents. It was implicit in the court's judgment that the "psychological need to know" on the part of the adoptee would be a stronger ground for making an order than the "psychological need to know" on the part of the biological parent.

American cases are of some assistance in providing guidelines as to when a Court will order the adoption records to be opened under a statute such as *"The Child Welfare Act"*. The pertinent American statutes allow adoption records to be opened providing there is "good cause" shown to the satisfaction of the Court. Such statutes would, in practical terms, be no different from our own Act, in that it is implicit in the duty of deciding a matter judicially, that "good cause" be demonstrated under the Manitoba statute.

The American cases state that mere curiosity as

to one's forebears is not sufficient reason to open up the adoption records.[10] The fact that confidential information would be necessary to help defend a filiation proceeding also would not constitute a "good cause".[11] Compelling psychological need on the part of the adoptee may constitute a "good cause", but it would have to be weighed against the biological parent's right to privacy.

As is evident, the present policy of almost total confidentiality provides many roadblocks to an adoptee or a biological parent who wishes to find out more about the other. The only crack in the wall of confidentiality is the informal policy of adoption agencies to provide background information (if any is available) to a member of the "adoption triangle". The agencies and the Director of Child Welfare never seem to exercise their discretion to give out identifying information unless both the adult adoptee and the biological parent have registered their wishes to have contact. The Courts will open up the adoption records if sufficient cause is shown, but it is not at all certain when (or if) this discretion will be exercised.

Not all jurisdictions handle adoption information as we do. The policies are quite different in England and Scotland where the adult adoptee has access to official records and information that could lead to the tracing of his original parents. In Scotland, for example, any person over the age of 17 years can write or visit Register House in Edinburgh and, on production of evidence about himself, ask for a copy of his original birth certificate. In various American States such as Alabama and Kansas, to name two, an adoptee may not see his original birth certificate but may, upon reaching adulthood, read his adoption records.

Since these records usually contain either the names of his biological parents or other identifying information, the adoptee in these jurisdictions is also able to learn his biological identity.

Closer to home, we note the experience of the Nova Scotia legislature which amended its *"Vital Statistics Act"*[12] in 1975, to allow an adoptee automatic access to his original birth documents and records upon his attaining the age of majority. Unhappily, one of the first adoptees to exercise his right under the legislation, actually succeeded in tracing his biological mother. The woman, who had been unmarried at the time of the birth, had since married, having made a conscious decision not to reveal the events of the earlier birth. Needless to say, the woman experienced great trauma and shock, and her family life was shattered when the applicant purporting to be her son, came knocking at her door.[13] The provision has since been repealed. According to one correspondent, the Nova Scotia Department of Social Services is now in the process of developing a policy to replace it. It is intended that the new provision will take "into account, in a fair and reasonable way, the rights and concerns of all three sides of the adoption triangle".[14]

Connecticut seems to have experienced similar problems with its legislation. In 1975, the General Assembly did away with the adoptee's statutory right to obtain birth information and provided that a written order from a judge of the probate court must be obtained before an adult adoptee could obtain his birth certificate. The written order must state that the judge is satisfied that "examination of the birth record . . . will not be detrimental to the public interest or to the welfare of the adopted person or to the welfare of the natural or adopting parents".[15]

Unlike those jurisdictions, where access to birth records legislation is still new and the full implications of its enactment uncertain, Scotland is one of the very few where access to birth information has existed since the 1930s. A Committee appointed to reassess the practice has recently recommended that the relevant legislation not be repealed.[16] The Nova Scotia and Connecticut examples nevertheless illustrate the dilemma which legislators and law reform agencies such as this one face in dealing with the question of adoption records access. Obviously the interests of adoptees cannot be considered without regard for the welfare of the other parties involved. It was, after all, through experience with unfortunate intrusions into adoptive families and other abuses that the practice of "sealing" adoption records began.[17] Whatever changes are ultimately made, it will be important to safeguard the welfare of all parties to adoption.

## THE INTERESTS OF THE PARTIES IN THE ADOPTION TRIANGLE

### Adopting Parents

The rationale for confidentiality of adoption records is ostensibly to best protect the diverse interests of the parties in the "adoption triangle". As for the adoptive parents, confidentiality protects the status given to them under s. 96(1) of *"The Child Welfare Act"* (that is, the status of being the parent of the adoptee for all lawful purposes). They are shielded from the possible pryings of the biological parents who may interfere with the proper upbringing of the adoptee. Confidentiality assures the adopting parents

> . . . that they may treat the child as their own in all respects and need not fear that the adoption records will be a means of hurting the child . . . or of harming themselves.[18]

Confidentiality protects the adoptive parents against the fear that if the biological parents meet with the adoptee, the adoptee will leave them, effectively rendering them babysitters for many long years.

Yet research shows that the adoptive parents' fears with respect to adult adoptees are largely unfounded. One set of experts[19] have found in their research of these reunions that there was no proven harm to the adoptive parents when the reunion took place with an adult adoptee. Other writers have stated,[20] and, we believe, correctly, that adoptive parents should not feel threatened by such a reunion, since the adult adoptee is often seeking only his identity,and is not searching for a new set of parents. The adoptee will still consider his adoptive parents to be his true parents.

Biological Parents

As to the position of the biological parents, the picture that immediately springs to one's mind is that of a young single mother who gives up her child, and then tries to build her life anew, trying to forget the regrettable experience. As one correspondent put it, disclosure of identifying information to the adoptee

> . . . would be a very cruel and destructive action for many natural . . . mothers who have tried to rebuild their lives. In my case it would bring only shock and heartbreak to me and my family.

The effect of the present legislation and practice is to give biological parents an assurance of anonymity, an assurance

that their indiscretions will never be divulged, and disclosure of identifying information to the adoptee would be directly contrary to these assurances.

Though this may be the common picture, some biological parents may have had second thoughts about giving up their child, and subsequently may develop a psychological need to meet, or at least to know more about the child they gave up. In fact, an American survey[21] has indicated that 76% of the biological parents surveyed felt that adoptees should have access to information identifying their biological parents, and 86% desired updated reports on the child they had given up.

In spite of some of these statistics, we are of the view that the privilege of the biological parents to retain their anonymity, if they desire it, must be safeguarded in any proposal to alter the cloak of confidentiality surrounding adoption records.

Adoptees

As to the position of the adoptee, he may not be aware of his adopted status or, being so aware, may have no desire to have any contact with his biological parents. Certainly in his adolescence, contact with his parents could prove emotionally traumatic and confusing. Clearly then there are instances where it would not be in the adoptee's interest to supply his biological parents with identifying information. But conversely, there may often be instances where it may very much be in the adoptee's interests to have contact with, or at least know more about his biological parents. The deep psychological needs of some adoptees go far beyond mere curiosity. They may be "genealogically

bewildered",[22] this bewilderment being cured only by more knowledge of their background, or perhaps meetings with one or both of their biological parents. Others maintain they are being denied access to their birthright, that part of their identity is to know who they are.

ALTERNATIVES

Among the possible alternatives outlined in our Working Paper we suggested a system of "open" adoption records, where adoption information would be available on demand to members of the adoption triangle. Though this system has been adopted in a few jurisdictions (for example, Kansas and Scotland where adult adoptees have access to identifying information), we tentatively concluded that the introduction of such a practice into Manitoba would be untenable, primarily because the interests of the party searching for contact would always be favoured over the party who wished to forget about the adoption.

While we expected the matter of unrestricted access to adoption records to elicit a highly variable response from our readers, this question proved to be less controversial than anticipated. None of our correspondents favoured a complete "open" system. In fact, most seemed to support the policy of denying information about adoption to both biological and adoptive parents, as well as to the adoptee himself. We were, however, twice criticized for our apparent insensitivity to the adoptee's identity crisis.

The strongest proponent of the open access proposal was the *Parent Finders* group. While they opposed full access for biological and for adoptive parents, this group considered the opening up of adoption records to be crucial

for the psychological development and advancement of the adoptee. It was their view that upon coming of age, adoptees have an unconditional right to adoption information and consequently, that they ought not to be bound by guarantees of confidentiality made to others at the time of placement.

The rationale behind this submission is that if the interests of any party should be favoured, it should be the adoptee, as he or she is the innocent pawn in the adoption process, and ought not to be bound by promises of anonymity made to others. Disclosure of an illegitimate or other previous birth, it has been suggested, is not unlike other facts about a person's life that he or she may prefer to remain unknown, such as previous history of mental illness, extra-marital affairs and so on.

A second, and certainly more compelling argument weighing in favour of the interests of the adoptee are the findings reported in a recent study conducted in the United States. According to this study, 76% of biological parents sampled felt that their child should be given access to information revealing their identities.[23] Many said they would be receptive to a possible reunion. Only 17% of adoptive parents surveyed were however similarly disposed to making these records available to their children.[24]

It is interesting to note that the views of adoptive and biological parents alike found expression in the many submissions we received from the Children's Aid Societies in this province. While acknowledging the needs of a great many adult adoptees, representatives of these agencies were generally unanimous in the view that commitments to biological and adoptive parents in past adoptions must be honoured. In

addition many voiced strong concerns that adoptees might be hurt, rejected or humiliated by biological parents and the realities of their life styles. This view was also shared by at least one adoptee who admitted natural curiosity about his origins. He nevertheless wrote:

> I have read with interest many newspaper and magazine articles authored by adult adoptees who have "found their identity" at the end of a long and rewarding search for their "natural parents". But I have been left with the suspicion that many others whose odyssey has been less satisfying have remained silent. . . .
>
> But beyond all that I remain skeptical about the therapeutic value of meeting one's physical parents. It seems to me that such a reunion could result in shock and disillusionment -- on the part of either parents or children -- and that perhaps only those in such a robust state of mental health that they are capable of weathering all types of psychological storms are properly equipped for such a meeting.
>
> . . . If your bibliography is indicative, little is known, or at least little has been written, about the benefits, short-term or long-term, of reunions, or, for that matter, about harmful side effects on the parties involved. . . .
>
> To sum up, then, . . . I am deeply suspicious of any supposed psychological benefits attributed to reunions . . . and, I am chary of possible embarrassment to some parties, and of possible harmful effects of disillusionment or shock that inevitably results in some cases. I suspect that were the law to be liberalized, in many cases the very people least equipped to handle such reunions would be seeking their ancestors out.

Until recently there was, it is true, little or no detailed research on the psychological aspects of adoptee and biological parent reunions, occurring once the child had reached adulthood. However, in 1973 psychiatric social worker and

author, John Triseliotis published his findings on a comprehensive study of adoptees who had applied for birth information between December 1969 and November 1970 at Register House in Edinburgh, Scotland. Of the sample of 70 adoptees, 60% reported, as their main goal, the meeting of their biological parents. Thirty-seven percent were primarily interested in obtaining information about their social and biological origins and not in effecting a reunion. Generally, it was the hope of all of these adoptees that the attainment of their respective goals would eventually lead to greater "happiness, satisfaction or adjustment".[25]

The results of the Triseliotis study suggest that of the two groups, adoptees who sought only information about their biological parents were generally satisfied with the results of their enquiries. Some expressed a desire for more complete records. Of those who set out to find their parents however, many experienced less satisfaction. One in every five adoptees, mostly those searching for a biological parent, was either uncertain of the value of information obtained or certain that it contributed to increased "restlessness and unhappiness". Some of this group were in favour of discontinuing their legal right to identifying birth information.[26]

In spite of mounting pressure in some quarters to do otherwise, we are therefore of the view that automatic access to adoption records is not a viable approach for reform at this time. On the other hand, an outright policy of absolutely closed adoption files seems equally undesirable. Certain refinements and translations of current practice into legislative directions seem to be required in order to make the system work better.

For example, certain refinements would be required in the practices of the adoption agencies and of the Director of Child Welfare in releasing adoption information. The current practice as to non-identifying information (that is, open access to it for any party in the "adoption triangle", not including minor adoptees) is laudable, and has been endorsed in a number of reports.[27] In our Working Paper we suggested that release of this information might also be extended to minor adoptees where they have obtained adoptive parental consent. This view found expression in the similar recommendations of the Committee on Record Disclosure to Adoptees, in Ontario.[28] And of the various child caring and placement agencies which corresponded with us, almost all endorsed this proposal as an eminently sensible one.

We received only one brief in opposition to that suggestion. According to this writer, adolescence was not a time when adoptees could be expected to cope easily with the disclosure of previously unknown and especially unsavory facts about their adoptions. On the other hand, the age of majority in Manitoba was thought to be low enough to allow the adopted individual to begin the quest for additional information on his own. It was further pointed out that this recommendation tended to impose a substantial liability on adoptive parents by placing them in a position of making a critical decision about this sensitive area in their child's life. The placing of the onus and ultimate control of disclosure in the hands of the adoptive parents at this stage was felt to be inappropriate in that it might result in unnecessary strain on the relationship between adoptive child and parent. Interestingly, none of our adoptive parent correspondents shared this fear. At least none expressed it.

While these observations are certainly worthy of note, we do not agree that it would be inappropriate to allow minor adoptees access to non-identifying information where they have the consent of their adoptive parents. Of the adoptees interviewed in the Scottish study, a large number reported a general reluctance on the part of their parents to share or review information about their original genealogy and how they came to be adopted. Many of these adoptees reported receiving only minimal information. As a general rule, the subject of adoption was discussed only once, after which it became taboo at home.[29] This attitude seemed to be the result of parental anxiety and fear respecting the manner in which this subject should be confronted. In such circumstances we think that many adoptive parents would welcome the opportunity to have a qualified social worker discuss and share with the adoptee alone, or in their presence, information from the adoption record. Indeed, we are unanimously of the view that the present practice of open access to non-identifying information be extended to <u>minor</u> adoptees who have adoptive parental consent.

Recent literature on adoption shows that the more information which an adoptee has about his background, the more accepting of his adoption he will be and, not surprisingly, the less likely it is that he will attempt to locate his biological parents.[30] Although adoption agencies are more than ever aware of the importance of gathering as much information as possible, much of the information currently possessed by agencies is sketchy and out of date.

In our Working Paper we therefore suggested that biological and adoptive parents be required to provide background information: that both sets of parents supply biological

information about themselves, their general physical characteristics, education, profession or trade, and finally that they be given the option of returning to the agency periodically to give updated reports about themselves and in the case of adoptive parents, about the child.

Our readers overwhelmingly agreed. Those of our correspondents who identified themselves as adoptees were generally unanimous in their desire for more information about the circumstances of their adoptions. They wished to be provided with information about why their original parents relinquished them as well as a more detailed description of their biological parents' personal, social and physical traits. In some cases adoptees wished to know such simple facts as where they were born. Adoptive parents also viewed the sharing of background information, in particular medical histories, as vital to their children and subsequent offspring. Sometimes these parents were critical of adoption workers for failing to supply them with the most basic of information. One reader wrote as follows:

> At present there is very sketchy information gathered in a rather haphazard fashion about the background of [natural or birth] parents and the child. There is sometimes a complete lack of information regarding the health, physical and mental,genealogical, religious or historical background of the family, which information often becomes vital to the adoptee. . . .
>
> Provision of such information to the adopting parents is not only of great importance to the adoptee in life and death matters, but also may be of very great help in enabling the adopting parents to help the child adjust to its new family, to cope with physical and emotional problems that often arise later when it may be too late to attempt to gather any information and to establish an identity which many a child seeks in later life.

In defence of the agencies, we point out however, that the extent of information available to them varies quite substantially depending on the extent and nature of agency contact with biological parents and in particular these persons' knowledge of their own families. In cases of rape, for example, or when a putative father denies paternity or refuses to give information, very little paternal history is available. In private and *de facto* adoptions, agencies may be unable to establish any contact with or obtain any information about biological parents. Nevertheless, we have concluded that better methods are needed to gather details about the social and medical backgrounds of biological parents and adoptees both at the time of placement and in later years, so that this information can be made available to all parties in the adoption process. Greater emphasis must be placed upon requiring parents to provide information to the agency as a compulsory pre-requisite to adoption. There are other ways in which agencies can respond to this need. Parents should be advised of their right to continue to supply information about themselves and the child, and encouraged to do so. Agencies must impress upon all biological parents the likelihood of certain medical conditions developing in their families which might bear on the health of the adoptee. The need to provide current information in such matters must be stressed.

Like the practice with respect to non-identifying information, the current policy of many placement agencies with respect to disclosure of identifying information (that is, that it be released only on the independent expressions of interest of both the <u>adult</u> adoptee and the biological parent) seems to provide the best protection to the interests of all parties. As the name implies, identifying information is

information which is most likely to lead to the identification of any one of the adoption principals. In our view details such as names, addresses and, in some cases, even specific job designations ought not to be provided to adoptees or biological parents by an agency, except where there is mutual agreement.

On the other hand, we think that some assurance must be given that, assuming these conditions are met, the wishes of the parties will be respected and the identifying information made available. Uniformity in the application of these rules is important and we think it lacking at the present time. For example, one agency wrote to advise us that unlike some other agencies it had never considered itself to be in the position to facilitate contact between adult adoptees and their biological parents -- first, because there is no written directive from the Director of Child Welfare authorizing such practice and second, because this policy had not received the approval of its Board of Directors. Certain modifications are therefore required in this practice.

One such change would be to provide for the establishment of a "central registry" of adoption information. The advantage of such a registry would be in having one central index of adoptions finalized in Manitoba along with a record of any and all requests for information in respect of each of these. Individual adoption agencies would, however, still provide the direct service. Information would be relayed to the adoption principals through the agency or appropriate regional office which handled the placement, once the Central Registry had authorized it to

do so. Counselling would still be available to interested parties through the agencies or regional offices concerned in the original placement. The concept of a central registry of adoptions finds support in a number of sources.[31] As well, it attracted little disagreement from our readers.

The establishment of the Central Registry could be achieved with minimal disruption and at little cost. The Department of Health and Social Development already maintains a file on each adoption which has taken place in the province. It is through this Department that much of the current practice with respect to the release of adoption information is carried out. Though the agency files on the adoption are more complete, the Department would have sufficient information to direct the agencies in the release of information from their files.Hence, we are of the view that the natural location for the legislated "central registry" would be within the Department of Health and Social Development, under the supervision of the Director of Child Welfare. This conclusion, advanced tentatively in our Working Paper attracted no disagreement from our correspondents, many of whom expressed the view that it would facilitate access to information which might otherwise remain inaccessible.

Explicit safeguards and conditions for the operation of the Central Registry would still need to be established however. In fact many of our readers expressed serious concern about the terms of reference which the Registry would have. At the time we issued our Working Paper it appeared to us that the proposed new registry should take a "passive" rather than an "active" role in effecting reunions. The current practice is, of course, a passive one - that is, a party is not sought out by an agency unless he or she has already expressed interest in a possible meeting. Some of

our correspondents have expressed the view that a passive registry would be inadequate in terms of the present situation. The problems with the passive registry are that a biological parent may not know of his right to inquire and receive information about the child or that an inquiry has been lodged by the child who is desirous of effecting a reunion. Thus it was suggested that to operate on a passive basis would be effective only if both parties, that is biological parent and adult adoptee, were aware of their right to this type of information.

The *Parent Finders* organization has also suggested that the registry should be active on the part of adoptees, making inquiries on their behalf regarding their birth parents' willingness to experience a reunion. While Prof. Gibson agrees with this position, the majority of us are still of the view that the proposed departure from current practice would not be desirable. The chief reason for this is our concern about the danger of some adoptee troubling his or her biological parent in circumstances which would not be welcomed by the latter. There is no question in our minds that the anonymity of some biological parents might be compromised in such circumstances. In any event, one of the roles of the Court in the present system is to hear applications to unseal agency files and provide information from these records where only one of the adoption principals is known to favour its release. In the past, the courts have exercised extreme caution in determining how best to proceed in such matters and we see no reason why this power should not remain one of judicial discretion and determination. After careful deliberation we have, however, concluded that some consideration should perhaps be given by the Central Registry to ascertaining whether or not the party being sought out is deceased. Having reviewed the comments

received, it now seems to us that, at least in cases where the biological parents or adoptee died in Manitoba, it would be a relatively easy matter to establish that fact and to provide it to the interested party. We therefore recommend that the Central Registry be required to search the relevant provincial records and provide this information when an adoptee or biological parent makes an inquiry, either with respect to a possible reunion or seeking general background information. Prof. Gibson is of the opinion that in such circumstances the adoptee should also be informed, on request, of the identity of the deceased parent.

As for advising adoption parties who might have moved from Manitoba or who would otherwise be unaware of these laws, we recommend publication of folders or brochures explaining the operation and function of the new Registry. This recommendation is, however, subject to dissent from one Commissioner who believes that the purpose of the recommendation should be to satisfy a need for information which arises spontaneously rather than to create a need through advertising.

Another matter which concerns us on the question of identifying information is the prerequisites to be established for the release of this kind of information. The current informal practice is to release identifying information on the expression of interest of both the adult adoptee and the biological parent. But, should the consent of the adoptive parents be involved in this process? In our Working Paper we expressed the opinion that it would not. Since adult adoptees are involved in the reunion process, the reunion should not be prejudicial to the adoptive parents' upbringing of the adoptee. Moreover studies show that in such reunions the adoptee does not seek a new set of parents,but is simply trying to satisfy a need to know and understand his origins. The only time the adoptive parents' interests might be prejudiced by a reunion, is if the adult

adoptee still lives at home. But even then, the adoptee, by right of his adult status, should be able to have access to identifying information irrespective of his adoptive parents' wishes. Finally, we recommended that minor adoptees be able to make use of the registry to seek identifying information, if they have adoptive parental consent. Nothing we have learned since the publication of our Working Paper has caused us to alter that belief. In our view, there will always be some adoptees who have special needs. These needs may manifest themselves earlier in some adoptees than in others and, provided they are recognized as valid ones by the adoptive parents, we can see no reason to prevent a minor from seeking identifying information.

As to the position of parties other than those immediately concerned in the adoption, we think that the right to apply to the Central Registry for disclosure should be restricted to members of the adoption triangle only. Although we can foresee the need for others, such as the grandparents, siblings and children of an adoptee to obtain such information, we recommend that such persons be required to apply to a court on the issue of release of identifying information.

Given a registry concept as outlined above, one could question the advisability of allowing the Director of Child Welfare and the executive directors of the adoption agencies to retain their present discretions to open up adoption files. As mentioned before, both these offices currently have a total discretion to open up the adoption files, as provided by s. 93 of *"The Child Welfare Act"*. And these discretions have given rise to the present informal registry practice. The adoption of a formal registry would seem to end the need to grant these officials greater leeway in the record-opening information releasing process. If an applicant wished to

have the records of his adoption opened apart from the registry process he could always have recourse to the courts under s. 93(c) and 94 of *"The Child Welfare Act"*. At the time we submitted our Working Paper, it therefore seemed to us that there was no need to retain the further discretions of the Director of Child Welfare and the executive directors under s. 93 of the Act to open up the records. We tentatively recommended that their present powers be removed.

This tentative recommendation was met with considerable opposition by our readers. Of the six placement agencies which corresponded with us, all agreed that these proposals amounted to an unnecessary removal of the rightful responsibilities of their agencies. There are it seems ample instances where the right of the executive director of an agency to decide whether or not to open an adoption file has been critical and essential in view of a specific request. One such situation might be where an adopted child is in hospital and where the medical authorities are seeking vital medical information, which is frequently required in a matter of hours. Within a child caring agency, the executive director can very quickly authorize the opening of these files and the transmittal of this information to the appropriate medical authority. If the discretionary power were removed from the executive director it would be necessary for an agency to make application to the County Court for permission to open the records and obtain this information.

There were many other instances cited to us where matters of administration might also compel the director of an agency to "unseal" the records of an adoption. These might include:

(a) meeting an adoptive parents' request to have their adoption study released as the basis for succeeding adoption application studies;

(b) providing non-identifying background information to adoptive parents who have lost or forgotten the information given them at placement;

(c) returning to adoptive parents personal documents such as original marriage certificates, which have inadvertently been kept on file after serving their purpose in the adoption procedure;

(d) possible confidential research projects authorized by the Director;

(e) for reference, when information is required for post adoption counselling; and

(f) verification of adoption which may be required by adoptive parents or adult adoptees in relation to passport or visa applications or to meet religious or other requirements.

Services to adoptive parents might be severely hampered if the director of an agency were denied access to its records. These services could not be provided by the Courts since the Court records only contain legal documentation and, since 1961, only summaries of an adoptee's background are included. We therefore see it as advantageous to retain the discretions both of the Director of Child Welfare and of the executive directors of the various agencies to open adoption files and obtain and disclose non-identifying information.

In addition to the establishment of the Central Registry and other legislated safeguards some modification (albeit minor) would also appear to be necessary in the process by which a Court may order adoption records to be opened.

It could be said that given a registry concept which operates without resort to a Court, perhaps there is no need for an additional judicial role in the record opening

process. However, as we envisage it, the Central Registry would not address itself to applications for identifying information by members of the general public other than the adoption principals. Nor would it concern itself with requests for identifying information where only one of the adoption principals has indicated interest in disclosure. Practically speaking such applicants would have to come to court and demonstrate "compelling circumstances" before the records would be unsealed and the requested information disclosed.

Furthermore, since it is impossible to foresee what actual situations may arise in the future, the retention of some judicial discretion could help adapt the record opening criteria to changing circumstances. Because of personality or other special factors it is possible that for some adoptees no amount of information or counselling will satisfy or deter their quest for identifying information. While we anticipate their numbers to be small, in extreme cases such adoptees may view a meeting with their biological parents as the only solution to their identity crisis and in this respect the Court may have to exercise its judgment whether to open the records and release the information or to proceed in some other manner. Given the extreme caution that the judiciary has exercised to date, we are firmly of the view that the adoption information would never be haphazardly released.

Having decided to retain this judicial discretion, the next question would be whether it should be better defined. As it stands now there are no guidelines in the statute as to when the discretion is to be exercised (case law has provided the "compelling circumstances" criterion). Several jurisdictions in North America have adopted "good cause" as a criterion.[32] But, as mentioned before, such a delimi-

tation would not serve to further define the Court's discretion, since such a restriction is implied in the duty of deciding a matter judicially.

Almost all of our correspondents were in favour not only of retaining this system but also it seemed of improving it. Many were of the view that guidelines ought to be enacted so that the Court's discretion might be exercised in a way that is reasonably uniform as well as consistent with the social and policy considerations of the day. Though guidelines might seem to direct a Court, they may not, in fact, be the answer. A lack of express guidelines can be an advantage to a Court.

Without guidelines, a judge is given, within the judicial framework, the discretionary leeway necessary in dealing in an area where no two sets of circumstances can be exactly the same. The provision of guidelines could create overly rigid limits in which the judge would have to operate. The judicial caution that has been exercised in this area reveals that courts have not taken an unduly free reign due to their complete discretion. This should not however preclude them from weighing the interests of one party against another and in appropriate or "compelling circumstances" ordering that the information will be disclosed. Though terms like "compelling circumstances" are difficult to define they are easier to recognize once they arise. Hence we are of the view that due to the danger of providing overly rigid limits, the judicial discretion under ss. 93(c) and 94 of *"The Child Welfare Act"* should remain without more express guidelines other than "compelling circumstances".

Only one amendment seems to be required to make the Court process work better. At the present time no express provision exists, requiring that notice be given to the parties in the adoption triangle before a Court can order the opening of the records. In *L.J.M. v. The Director of Child Welfare*[33] Philp, C.J.C.C. stated that he would (at p.3)

> . . . not consider making an order under s. 94 to permit a search of the Court records with respect to the adoption in question, without notice to those other parties [in this case, the adoptee and the adopting parents].

Philp, C.J.C.C. went on to say that if "compelling circumstances" were shown, he (at p. 3):

> . . . would give them [that is, the other members of the adoption triangle] notice of [the] proceedings without disclosing their whereabouts or identity; and at the very least [they could] give the Court some indication of their attitude towards the application that has been made.

Although Philp, C.J.C.C. had the foresight not to make an order opening the adoption records without notice to the other directly interested parties, it is not yet clear whether other courts will follow this laudable practice. Representations to the Court by these parties (who would retain their anonymity) would ensure that the Court would come to a well informed decision. Hence we are of the view that legislative provision be made along the lines suggested by Philp, C.J.C.C. above, that is, once the compelling circumstances are established a discreet serving of notice (with the Director of Welfare or his nominee being required to make this discreet contact) to the other members of the "adoption triangle" would have to be given and they, while being allowed to retain their anonymity, would be allowed to make full representations to

the Court (through counsel, if necessary). Discreet notice would, of course, maintain the confidentiality of all of the parties, even as among themselves.

CONCLUSION

The recommendations made above as to the matter of confidential adoption records would not operate fairly at all times - indeed, occasionally one party's interests could be hurt by such a system of semi-confidentiality. Nevertheless these recommendations seem preferable to the wholesale disclosure advocated by some groups, and we think, will come close to successfully providing equal protection to the interests of all parties in the adoption triangle.

For ease of reference our recommendations may be summarized as follows:

1. Adoption records should not be completely "open" (pp. 11-15).

2. The present practice of open access to non-identifying information is endorsed but should be extended to minor adoptees who have adoptive parental consent (pp. 15-17).

3. Adoptive and biological parents should be required to provide background information and be told of their option to continue to supply such information about themselves and the adoptee (pp. 17-19).

4. *"The Child Welfare Act"* should provide that a central registry be established. The registry should be located in the Department of Health and Social Development under the direction of the Director of Child Welfare (pp. 19-21).

*5. The Central Registry should have the power to compel release of identifying information from the agency files by the agency or other appropriate regional office which arranged the placement when it receives the written consents of the adult adoptee and biological parent. Minor adoptees might apply to have access to the information if they have their adoptive parents' consent. Counselling should be available to interested parties

through the various placement and child caring agencies (p. 20).

6. The Central Registry should accept applications for identifying information only from members of the adoption triangle. Parties outside the adoption triangle who desire identifying information must apply to the court (pp. 23-24).

*7. The Central Registry, as well as the various adoption agencies, should be required to search the relevant provincial records and advise persons seeking both identifying and non-identifying information of the fact that a biological parent or child is deceased (p. 22).

*8. Services provided by the Central Registry should be publicized (p. 22).

9. The discretion of the Director of Child Welfare and of the executive directors of the adoption agencies under s. 93 of *"The Child Welfare Act"* should be limited to opening adoption files for administrative purposes or for the release of non-identifying information only. Given the "central registry" concept we see no need to retain their further discretion to open these files for the purpose of releasing identifying information (pp. 24-26).

10. On application to the Court for the opening of adoption records, once the "compelling circumstances" are established, the Court should require that discreet notice be given to the members of the "adoption triangle" in order to solicit their views, before it can order the records to be opened. Anonymity must be preserved in giving such notice (pp. 26-29).

*These are the recommendations of the majority of the Commissioners. For the minority views, please see pp. 21 and 22.

This is a Report pursuant to section 5(3) of *"The*

*Law Reform Commission Act*" signed this 12th day of February, 1979.

C.H.C. Edwards, Commissioner

R. Dale Gibson, Commissioner

C. Myrna Bowman, Commissioner

R.G. Smethurst, Commissioner

Val Werier, Commissioner

Sybil Shack, Commissioner

Kenneth R. Hanly, Commissioner

FOOTNOTES

1. C.C.S.M., c. C80.

2. C.C.S.M., c. C80, s. 96(1)

3. *"The Child Welfare Act"*, C.C.S.M. c. C80, s. 93.

4. *"The Child Welfare Act"*, C.C.S.M. c. C80, s. 94.

5. Memorandum from Ruth Raven, Programme Executive for Adoptions in the Department of Health and Social Development, August 6, 1976. Letter from R.J. Ross, Director of Child Welfare, May 5, 1977-

6. Ruth Raven, Programme Executive for Adoptions in the Department of Health and Social Development, conversations of June 13 and 16, 1978.

7. As far as we know, there are no unreported Manitoba cases where a court has ordered the adoption records to be opened.

8. *Re Nichols* (1974), 18 R.F.L. 127 at 131 (Ont. C.A.); *L.J.M. v. The Director of Child Welfare (Manitoba)*, April 19, 1977 (Wpg. Co. Ct.), (unreported).

9. *Supra*, n. 8.

10. *In re Ann Carol S.*, 1974 N.Y.L.J. 31 (1974, Sur. Ct. Bronx Cnty.).

11. *In re Minicozzi*, 273 N.Y.S. 2d 632 (1966, Sup. Ct. Suffolk Cnty).

12. R.S.N.S. 1967, c. 330.

13. Gary R. Rankin, "The Adoptees' Right to Identifying Information: The Nova Scotia Policy and the Need to Balance Interest in Each Case (unpublished student paper, McMaster University, Faculty of Law).

14. MacEachern, "Adoptions: Showing Concern", *The Chronicle Herald*, November 18, 1977, Opinion page, Id. at p. 22.

15. Pub. Act No. 75-170 (May 27, 1975) amending Conn. Sen. Stat. Ann. 7-53 (1973). See also P.G. Luysack, "Sealed Records In Adoptions: The Need for Legislative Reform" (1975) 21 Catholic Lawyer 211 at 213.

16. Final Report of the Departmental Committee on the Adoption of Children (Cmnd. 5107) published October 1972.

17. W.B. Randolph, Adoption Reform: A Proposal (1971) 10 *New Engl. L.R.* 371 at 379.

18. *"People v. Doe"*, 138 N.Y.S. 2d 307 at 309 (1955, Erie Co. Ct.).

19. Baran, Sorosky and Pannor, "The Dilemma of Our Adoptees", *Psychology Today*, December 1975.

20. Prager and Rothstein, "The Adoptee's Right to Know his Natural Heritage" (1973), 19 *N.Y.L.F.* 137 at 148; Scheppers, "Discovery Rights of the Adoptee - Privacy Rights of the Natural Parents: A Constitutional Dilemma" (1975), 4 *San Fernando L. Rev.* 65 at 79.

21. Hanley, "A Reasonable Approach to the Adoptees Sealed Records Dilemma", [1975] 2 *Ohio Northern L. Rev.* 542 at 547.

22. *Id.* at 546.

23. *Id.* at 547.

24 *Id.* at 548.

25. John Triseliotis, *In Search of Origins: The Experience of Adopted People* (London: Routledge and Kegan, 1973).

26. *Id.* at 141-142.

27. Report of the Committee on Record Disclosure to Adoptees, a Report to the Honourable James A. Taylor, Q.C., Minister of Community and Social Services (Ont.) June 22, 1976, Toronto. A Proposed Policy for the Release of Adoption Information, Saskatchewan; Fifth Report of the Royal Commission on Family and Children's Law, Part VII Adoption, Vancouver, B.C., March 1975.

28. *Id.* at p. 19.

29. *Supra* n. 25 at pp. 38-55.

30. *Supra* n. 15 at pp. 217-219.

31. Eg. The Ontario Report (*supra* n. 27) The Children's Aid Society of Western Manitoba, letter of May 24, 1977

32. Eg. *"Adoption Act"* R.S.B.C. 1960, c. 4, s. 13(1).

33. *Supra*, n. 8.

## APPENDIX A

LIST OF ORGANIZATIONS AND INDIVIDUALS WHO CORRESPONDED WITH US ON THE MATTER OF CONFIDENTIALITY OF ADOPTION RECORDS

(the names of some of the individuals who wrote to us have been withheld to preserve their anonymity)

Director of Child Welfare, Manitoba Department of Health and Social Development

Parent Finders (Winnipeg)

Alastair Bissett-Johnson, Professor of Law, Dalhousie University, Halifax

Caroline B. Cramer, Barrister

The Children's Aid Society of Central Manitoba

Francis C. Muldoon, Q.C., Chairman, Law Reform Commission of Canada

Brian Colli, Graduate-at-Law

Euclid J. Herie, M.S.W., R.S.W.

W.F. Bowker, Q.C., Director, The Institute of Law Research and Reform, Alberta

Family Services of Winnipeg, Inc.

The Children's Aid Society of Winnipeg

The Children's Aid Society of Eastern Manitoba

The Children's Aid Society of Western Manitoba

Frank L. Cvitkovitch, Q.C.

J.F. Reeh Taylor, Q.C.

Jewish Child and Family Service

Robert M. Kozminski, Barrister

R.H.G. Flett, Barrister