

# DNA DATABASE CONSENT AND WAIVER AGREEMENT RE: DR. BARWIN CLASS ACTION

## I. BACKGROUND

1. Dr. Norman Barwin performed artificial inseminations as a fertility doctor in Ottawa, Ontario between 1973 and 2012. He practiced at the Ottawa General Hospital and then at his own clinic, the Broadview Fertility Clinic.
2. In November 2016, the law firm of Nelligan O'Brien Payne LLP commenced a class action proceeding against Dr. Barwin in the Superior Court of Justice (Ottawa) being Court File 16-70454CP alleging various errors in his fertility practice. The allegations include the following scenarios:
  - a. Cases where individuals were to be conceived using their father's semen and who subsequently discovered they were not so conceived. They now do not know whose sperm was used at the time of their conception.
  - b. Cases where an individual was to be conceived using a specific anonymous donor or a specific known donor and subsequently discovered that that the donor sperm was not so used. They now do not know whose sperm was used at the time of their conception.
  - c. Cases in which a former patient provided semen to Dr. Barwin for a particular use or purpose and that semen was used to conceive a child or children for another patient.
3. As a result, the individuals conceived do not have accurate information about their medical and health history on the paternal side.
4. These individuals and/or their parental guardians are concerned that they have half-siblings whom they do not know. They are also concerned about the risk of consanguinity (related by blood) if they unknowingly were to meet and form a romantic relationship with a half-sibling.

5. The purpose of the DNA Database is to facilitate DNA matching among class members and individuals who left semen with Dr. Barwin. The goal is to identify half-sibling and paternal biological relationships among Participants in the DNA Database.
6. Although some class members have successfully located half-siblings and their sperm donors through commercial DNA websites like 23andMe.com, Ancestry.ca, and FamilyTreeDNA.com, many others are concerned about the privacy implications of providing their DNA to a commercially operated company. The purpose of the DNA Database is to provide a mechanism for DNA matching among Class Members and former patients of Dr. Barwin in a private and controlled manner.

## **II. DEFINITIONS**

7. "**Offspring**" is a person who was born to a former patient of Dr. Barwin at the Broadview Fertility Clinic and/or the Ottawa Hospital and was conceived by way of assisted reproduction with Dr. Barwin's assistance or at another clinic with semen that had previously been stored with Dr. Barwin.
8. "**Minor Child**" is an individual who is younger than 18 years of age at the time that this Agreement is executed.
9. "**Assisted Reproduction**" means a method of conceiving other than by sexual intercourse.
10. "**Potential Progenitor**" includes any person whose semen was stored with Dr. Barwin at the Broadview Fertility Clinic and/or the Ottawa Hospital for the purposes of semen storage, artificial insemination, or anonymous or known sperm donation.
11. "**OrchidPro**" aka Orchid PRO-DNA, an operating name of Dynacare-Gamma Laboratory Partnership ("Dynacare"), which is the DNA testing company that will collect DNA samples from Participants at the request and direction of Nelligan O'Brien Payne to operate the DNA Database and to perform DNA testing in the Database. The term "OrchidPro" includes Dynacare, its affiliates, and its successors.

12. "**DNA Database**" is a database that will be set up by Nelligan O'Brien Payne for the purposes of identifying biological connections among former patients of Dr. Barwin, their offspring, and anonymous sperm donors. Nelligan O'Brien Payne has contracted OrchidPro to collect the DNA of the Participants and perform testing and matching services among the Participants.
13. "**Participant**" includes:
- a. an individual who is 18 years of age or older who chooses to participate in the DNA Database;
  - b. an individual who is 18 years of age or older who lacks capacity to consent to participate in the DNA Database and whose Guardian for Personal Care consents to their participation in the DNA Database on their behalf; and
  - c. an individual who is under the age of 18 years at the time this Agreement is executed and whose parents or legal guardians consents for the Minor Child to participate in the DNA Database.
14. "**Biological Match**" means any DNA connection between two or more Participants in the DNA Database including biological paternity matches and biological half-sibling matches.
15. "**Nelligan O'Brien Payne**" is the law firm representing the plaintiff class members in the class action against Dr. Barwin.
16. "**Inconclusive DNA Match**" means that a biological relationship cannot be confirmed or ruled out based on initial DNA testing.
17. "**Consanguinity**" means "blood relation" i.e. being from the same ancestral line as another individual. Consanguineous marriages and/or consanguineous sexual relationships can increase the risk of genetic diseases being passed down to the offspring.

18. “**Person under Disability**” is an individual who is 18 years of age or older who lacks capacity to consent.

### **III. LEGAL CONSIDERATIONS**

19. The purpose of the class action is to allow former patients of Dr. Barwin and their Offspring to advance claims for compensation for alleged errors arising out of artificial insemination performed by him at the Ottawa Hospital and the Broadview Fertility Clinic or performed by others using semen which had been entrusted to him by the patients.

20. To help resolve some of the alleged errors summarized above, class members and potential class members will have the opportunity to **voluntarily participate** in this DNA Database. You will only be tested against someone else who has signed this Agreement and voluntarily decided to participate in the DNA Database. No one’s DNA will be transferred into the DNA Database without their agreement. The voluntary nature of the DNA Database means that you will not be able to test against every person who left sperm with Dr. Barwin or who was conceived with Dr. Barwin’s assistance. The purpose is to facilitate testing only among the individuals who wish to undergo DNA testing. As a result, there is **no guarantee** you or an individual on whose behalf you are signing this Agreement will make any matches in the DNA Database.

21. **Purpose of the DNA Database:** The DNA Database is an opportunity for Participants to test for potential biological offspring, progenitors and/or half-siblings. The DNA Database will only conduct paternity DNA tests and half-sibling DNA tests among Participants.

22. **Legal Obligations:** Biological Matches made in the DNA Database cannot be used to create obligations under the *Children’s Law Reform Act*, R.S.O. 1990, c. C.12, the *Family Law Act*, R.S.O. 1990, c. F.3, the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, the *Health Care Consent Act*, S.O. 1996, c. 2, the *Substitute Decisions Act*, S.O. 1992, C.30, the common law, or any other applicable statute or legislation in your jurisdiction of residence. **By joining the DNA Database, you waive any legal rights or obligations that may arise as a result of any biological connection you may discover through the DNA Database.**

23. **Child Support:** Without limiting the foregoing, as a condition of participating, you specifically release and waive any right to claim child support (past, present, and future) from any Potential Progenitor you or your Minor Child may match with in the DNA Database.
24. **Parenting (Decision-Making, Parenting Time, Contact):** Without limiting the foregoing, you specifically waive the right to seek any decision-making authority (formerly known as “custody”), parenting time (formerly known as “access”), or contact with or in relation to any Minor Children with whom you share a Biological Match in the DNA Database.
25. **By signing this agreement, the Participants waive any rights or obligations to each other that may arise as a result of a biological connection made through the DNA Database. You specifically waive any and all rights you or your Minor Child may have to seek or claim financial support from any other Participant.**
26. **Best Interests of the Child:** Notwithstanding anything in this agreement, Canadian courts are not obligated to follow contractual arrangements when it comes to issues of child support, decision-making authority (formerly known as “custody”), parenting time (formerly known as “access”), or contact with or in relation to any Minor Children. The court will determine these issues based on the best interests of the child. **We therefore cannot guarantee that there will be no legal obligations flowing from a Potential Progenitor/offspring match in the DNA Database. However, courts will respect contractual arrangements wherever possible.**
27. The best interests of any child is not a fixed or final analysis and will remain fluid. Your risks with respect to child support, decision-making authority, parenting time, and contact with or in relation to any Minor Children, may change once relationships are established, particularly if you take on a role similar to that of a parent to a child. **If you form connections and relationships as a result of this DNA Database (beyond the exchange of medical**

information), you do so with the knowledge that this could create binding legal obligations *Family Law Act* in the future, such as child support obligations under the *Family Law Act* or dependent support obligations under the *Succession Law Reform Act* (as examples).

#### **IV. CONSENT**

28. By signing this Agreement, you consent to OrchidPro using the data in its possession in regard to your DNA (or that of any Minor Child or Person Under Disability on whose behalf you are signing this Agreement) in the DNA Database for the purpose of making comparisons to the DNA of all other Participants in the DNA Database.
29. **Authorization for Re-Use of Genetic Profile:** Where you, your Minor Child, or Person under Disability on whose behalf you are signing this Agreement has previously provided a DNA sample to OrchidPro, you consent to OrchidPro reusing that genetic profile in the DNA Database. In most cases, you, your Minor Child, or Person under Disability on whose behalf you are signing this Agreement will not need to provide an additional DNA sample for testing in the DNA Database.
30. If you, your Minor Child, or the Person under Disability on whose behalf you are signing this Agreement have not previously provided a DNA sample to OrchidPro, you agree to attend a designated OrchidPro location to provide a DNA sample for yourself or for a Minor Child or Person under Disability on whose behalf you are signing this Agreement. Some individuals who previously provided DNA to OrchidPro may be required to re-attend to submit a sample. You will be contacted directly by Nelligan O'Brien Payne if you are required to resubmit a DNA sample.

#### **V. PRIVACY AND DISCLOSURE OF INFORMATION**

31. **Consent to share identifying information:** As a condition of participating in the DNA Database, you must **consent** to providing your **name** and **email address** to a Biological Match. Participants are required to:

- a. Provide Nelligan O'Brien Payne with an email address that Nelligan O'Brien Payne may forward to your Biological Matches; and
- b. Update Nelligan O'Brien Payne of any changes in your email address in order to ensure that our records remain up to date and accurate.

32. **Exception for Minor Children and Persons under Disability:** Minor children and Persons under Disability are not required to provide their names and email addresses to a Biological Match to participate in the DNA Database. The person participating on their behalf is required to:

- a. **For Minor Children:** The Minor Child's parent(s) or legal guardian(s) are required to provide their name and email address to a Biological Match (i.e. the parent or legal guardian's name and email must be provided).
- b. **For a Person under Disability:** The Guardian for Personal Care is required to provide his or her name and email address to a Biological Match (i.e. the Guardian for Personal Care's name and email must be provided).

33. The names of Minor Children and Persons under Disability must still be provided to Nelligan O'Brien Payne and to OrchidPro for the purposes of conducting DNA testing in the DNA Database.

34. **DNA Match:** Following a match, OrchidPro will provide Nelligan O'Brien Payne with the names of the Participants who have matched and the nature of the match (i.e. half-siblings or paternity match). Nelligan O'Brien Payne will then advise the affected parties that there has been a match and the nature of the match. **Nelligan O'Brien Payne will exchange the names and emails of the individuals who match each other.** In the case of a Minor Child or Person under Disability, Nelligan O'Brien Payne will provide the name and email of the person signing this Agreement on their behalf as set out at paragraph 32. Only Participants who have a Biological Match will be contacted.

35. **Questions about the DNA Database:** Any inquiries about the DNA Database are to be directed to Nelligan O’Brien Payne and not to OrchidPro. Participants may contact Class Counsel as follows:

Peter Cronyn Tel: 613-231-8213 Fax: 613-788-3659 <a href="mailto:peter.cronyn@nelliganlaw.ca">peter.cronyn@nelliganlaw.ca</a>	Jessica Fullerton Tel: 613-231-8366 Fax: 613-788-3651 <a href="mailto:Jessica.fullerton@nelliganlaw.ca">Jessica.fullerton@nelliganlaw.ca</a>
Frances Shapiro Munn Tel: 613-231-8355 Fax: 613-788-3697 <a href="mailto:frances.shapiromunn@nelliganlaw.ca">frances.shapiromunn@nelliganlaw.ca</a>	Robyn Beaulne – law clerk Tel: 613-231-8214 Fax: 613-788-2370 <a href="mailto:robyn.beaulne@nelliganlaw.ca">robyn.beaulne@nelliganlaw.ca</a>

36. **Confidentiality:** By participating in the DNA Database, and in consideration of the other Participants, you **agree that you will not publish this agreement or the identity of any of your Biological Matches without their consent to any public forum such as newspapers, magazines, internet blogs, television, radio, Facebook or other social networking site.** You agree to be respectful in all of your correspondences and communications with any of your matches and to respect the privacy, confidentiality, and boundaries of any individuals against whom you match.

37. **Exception to Joint Retainer Disclosure:** In a joint retainer, the law firm is unable to keep information confidential from one client that may impact another client. **You acknowledge that by participating in this DNA Database that you are agreeing to an exception to the Joint Retainer Disclosure rules.** You agree that Nelligan O’Brien Payne cannot provide you with any information about any of your Biological Matches other than their names and email addresses.

38. **Independent Legal Advice:** Nelligan O'Brien Payne is unable to provide you with any legal advice in relation to this agreement or a Biological Match arising out of the DNA Database.



In executing this agreement, you acknowledge that you have been advised to seek independent legal advice about this agreement or a Biological Match arising out of the DNA Database.

39. **Jurisdiction:** This agreement is governed by the laws of the Province of Ontario. In executing this agreement, you acknowledge and agree that this agreement will be interpreted under the laws of the Province of Ontario. Nelligan O'Brien Payne is unable to provide you with any legal advice regarding the laws of jurisdictions outside of the Province of Ontario. If you reside outside of Ontario, you acknowledge and understand that Nelligan O'Brien Payne is unable to advise you as to your rights, obligations and risks under the laws of any other jurisdiction. In executing this agreement, you acknowledge that you have been advised to seek independent legal advice in your jurisdiction of residence.
40. Delivery of a signed Agreement by e-mail or fax or other electronic means to Nelligan O'Brien Payne will be sufficient and an electronic copy will have the same effect as an original executed Agreement.

### **Potential Progenitors**

41. In order to participate in the DNA Database, you must execute this Consent and Waiver Agreement and agree to the release of your name and email to an Offspring and/or the Offspring's parents (in the case of a Minor Child) following a match.
42. For Persons under Disability, their Guardian for Personal Care must execute this Consent and Waiver Agreement and agree to the release of the Guardian for Personal Care's name and email to an Offspring and/or the Offspring's parents (in the case of a Minor Child) following a match.
43. **Medical and Health History Form:** If a match is made, you may consider completing the Medical and Health History Form drafted by Nelligan O'Brien Payne and attached as Schedule "A." You do not need to complete this form as a condition of participating in the DNA Database. However, many of the Offspring participating in the DNA Database will

appreciate having this information or similar information from you about their medical history following a match. If you do complete the Medical and Health History Form, you may provide a copy of it to the Offspring or the Offspring's parents in the event of a Biological Match.

### **Offspring**

44. In order to participate in the DNA Database, you must execute this Consent and Waiver Agreement and agree to the release of your name and email to a half-sibling or Potential Progenitor match.
45. For Minor Children or Persons under Disability, their parent, legal guardian, or Guardian for Personal Care must execute this Consent and Waiver Agreement and agree to the release of the parent(s)'s, legal guardian's, or Guardian for Personal Care's name and email in the event of a match.
46. **Inconclusive DNA Match:** Where a match is an Inconclusive DNA Match as defined at paragraph 16, Nelligan O'Brien Payne will advise the affected parties of the Inconclusive DNA Match. No names or emails will be exchanged. Rather, the parties will be notified of the type of match (i.e. paternity or half-sibling) and that there was an inconclusive result. The parties will have the option of engaging in further DNA testing in order to resolve the inconsistency. **It would require the consent of both parties to proceed with further testing.** Names and emails will only be exchanged if further testing confirms a Biological Match among the parties.
47. **False positives:** DNA testing for half-sibling relationships carries a risk of false positives where by chance there are commonalities in DNA between two Participants. By signing this Agreement, you acknowledge the risk you or the person on whose behalf you are signing this Agreement may receive a false positive result.

## **VI. END OF DATABASE**

48. Your DNA will remain in the DNA Database until February 15, 2022 when the DNA Database will cease to operate. Your DNA sample or the DNA sample of your Minor Child or a Person under Disability on whose behalf you are signing this Agreement will be retained by OrchidPro for a period of up to one year prior to its destruction. OrchidPro will retain a copy(ies) of your DNA profile pursuant to its standard practices for DNA testing. No further DNA testing will be conducted using the copies of your DNA without your explicit authorization.

## **VII. WAIVER OF CLAIMS AND RELEASE OF LIABILITY**

49. **In consideration of providing your DNA, your Minor Child’s DNA, or the DNA of a Person under Disability on whose behalf you are signing this Agreement for biological matching in the DNA Database, YOU AGREE TO:**

- a. **WAIVE ANY AND ALL CLAIMS** that you, your Minor Child, and/or the Person under Disability on whose behalf you are signing this Agreement have or may have in the future against OrchidPro including its affiliates, directors, officers, employees, agents, representatives, successors and assigns AND/OR as against Nelligan O’Brien Payne including its affiliates, partners, employees, agents, representatives, successors and assigns (together referred to as “THE RELEASEES”) and to **RELEASE THE RELEASEES** from any and all liability for any loss, damage, expense or injury you may suffer, your next of kin may suffer, or any Minor Child or Person under Disability on whose behalf you are signing this Agreement may suffer resulting from your participation (or the participation of the person on whose behalf you are signing this Agreement) in the DNA Database and any Biological Matches which may be disclosed through it.
- b. **YOU AGREE TO WAIVE ANY AND ALL CLAIMS** as against the RELEASEES arising from the DNA Database or matches disclosed through the DNA Database resulting from ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE ON THE PART OF THE RELEASEES, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE.

**VIII. CONSENT TO PARTICIPATE**

I have read the terms of this agreement and consent to participate based on the conditions set out above. **By signing this Agreement, I understand that I am waiving any/all claims that I have as against OrchidPro and/or Nelligan O’Brien Payne arising from providing my DNA to the DNA Database as set out in this Agreement.** I authorize Nelligan O’Brien Payne to release the results of any Biological Matches I make with another Participant in the DNA Database as indicated in this Agreement.

**Date:**

\_\_\_\_\_

**Name of Participating Party:**

\_\_\_\_\_

**Email address to be provided to a Biological Match:**

\_\_\_\_\_

**Signature of Participating Party:**

\_\_\_\_\_

**Date of Birth:**

\_\_\_\_\_

**Contact Information** (\*this information will NOT be shared with a Biological Match)

**Phone Number:**

\_\_\_\_\_

**Address:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**CONSENT ON BEHALF OF A MINOR CHILD**

I confirm I am the legal guardian of the child or children named below and that I have legal decision-making authority in relation to the child or children named below. **By signing this Agreement, I understand that I am waiving any/all claims that I and/or my Minor Child may have as against OrchidPro and/or Nelligan O’Brien Payne arising from providing my Minor Child’s DNA to the DNA Database as set out in this Agreement.** I give consent to Nelligan O’Brien Payne to have my child or children’s DNA samples taken for use in the DNA Database. I authorize Nelligan O’Brien Payne to release the results of any Biological Matches my child or children makes in the DNA Database as indicated in this agreement.

**Date:** \_\_\_\_\_

**Name of Child 1:**

\_\_\_\_\_

**Name of Child 2:**

\_\_\_\_\_

**Date of Birth Child 1:**

\_\_\_\_\_

**Date of Birth Child 2:**

\_\_\_\_\_

**Name of Legal Guardian 1:**

\_\_\_\_\_

**Name of Legal Guardian 2:**

\_\_\_\_\_

**Signature of Legal Guardian 1:**

\_\_\_\_\_

**Signature of Legal Guardian 2:**

\_\_\_\_\_

**Email address to be provided to a Biological Match:**

\_\_\_\_\_

**Contact Information** (\*this information will NOT be shared with a Biological Match)

**Phone Number:**

---

**Address:**

---

---

---

---

---

**CONSENT ON BEHALF OF A PERSON UNDER DISABILITY**

I confirm I am the Guardian for Personal Care of the individual named below and that I have legal decision-making authority in relation to the individual named below. I agree that I will provide a copy of my Power of Attorney for Personal Care along with the executed copy of this Agreement. **By signing this Agreement, I understand that I am waiving any/all claims that I and/or the individual on whose behalf I am signing this Agreement may have as against OrchidPro and/or Nelligan O'Brien Payne arising from providing their DNA to the DNA Database as set out in this Agreement.** I give consent to Nelligan O'Brien Payne to have the individual on whose behalf I am signing this Agreement have samples taken for use in the DNA Database. I authorize Nelligan O'Brien Payne to release the results of any Biological Matches the individual on whose behalf I am signing this Agreement makes in the DNA Database as indicated in this Agreement.

**Date:** \_\_\_\_\_

**Name of Person under Disability:**

\_\_\_\_\_

**Name of Guardian for Personal Care:**

\_\_\_\_\_

**Date of Birth of Person under Disability:**

\_\_\_\_\_

**Signature of Guardian for Personal Care:**

\_\_\_\_\_

**Email address to be provided to a Biological Match:**

\_\_\_\_\_

**Contact Information** (\*this information will NOT be shared with a Biological Match)

**Phone Number:**

\_\_\_\_\_

**Address:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_