

Canadian Journal of Family Law

Volume 28 | Number 1

2012

Autonomous Motherhood and the Law: Exploring the Narratives of Canada's Single Mothers by Choice

Fiona Kelly

Follow this and additional works at: <https://commons.allard.ubc.ca/can-j-fam-l>



Part of the [Family Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

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.

The University of British Columbia (UBC) grants you a license to use this article under the [Creative Commons Attribution- NonCommercial-NoDerivatives 4.0 International \(CC BY-NC-ND 4.0\) licence](#). If you wish to use this article or excerpts of the article for other purposes such as commercial republication, contact UBC via the Canadian Journal of Family Law at cdnjfl@interchange.ubc.ca

AUTONOMOUS MOTHERHOOD AND THE LAW: EXPLORING THE NARRATIVES OF CANADA'S SINGLE MOTHERS BY CHOICE

By Fiona Kelly*

Abstract: *In the past three decades, single mothers by choice (SMCs) have emerged as a new and rapidly growing component of Canada's single mother population. SMCs are women who choose to have a child, usually via some form of assisted conception, with the intention that they be their child's sole parent. While SMCs are part of an increasing number of non-normative family configurations in Canada, they pose some unique social and legal questions. However, unlike some other non-normative families, such as lesbian and gay families, SMCs have received very little academic attention and almost none pertaining to the role of law in their lives. In an effort to fill this knowledge gap, this article presents the findings from a small interview-based study of Canadian SMCs that explored the ways in which the pre-conception decision-making and post-birth experiences of the mothers were shaped by law. Though the law was rarely an overt presence in the women's lives, they identified three aspects of becoming and being an SMC that were nonetheless shaped by law: (i) the pre-conception period during which they were forced to navigate a largely unregulated fertility industry; (ii) when making decisions about the type of sperm donor with which to conceive; and (iii) once they had their child, the ways in which*

* Senior Lecturer, School of Law, La Trobe University School, Melbourne, Australia. This research was funded by a SSHRC Strategic grant. I wish to thank Susan Boyd, Dorothy Chunn, and Wanda Wieggers for their invaluable feedback on earlier drafts.

everyday activities were sometimes complicated by a legal system that assumes a two parent, biological family.

INTRODUCTION

While single mother families have long been part of the Canadian familial landscape, in the past three decades a new type of single mother has emerged: single mothers by choice (SMCs). SMCs are women who become mothers, usually via adoption or assisted conception, with the intention of being the child's sole parent from the outset. They choose to have and parent their children alone, though often with substantial networks of support around them. While the number of SMCs in Canada appears to be growing at a fairly rapid rate, they have received virtually no academic attention or legal recognition. SMCs have been largely omitted from the growing number of provincial statutory reforms related to legal parentage¹ and, on the few occasions in which they have appeared in Canadian courts,² judges have refused to accept that a woman can *choose* to parent on her own. Though SMCs rarely experience the overt intervention of law in their lives, as this article demonstrates, the preference of law for a two-parent, biological family, can make choosing to become an SMC fraught with legal complexity.

¹ *Vital Statistics Act*, CCSM c V60, s 3(6); arts 538-42 CCQ; *Family Law Act*, SA 2003, c F-4.5, s 5.1(1)(a); *Child Status Act*, RSPEI 1988, c C-6, ss 9(5) & 9(6); *Family Law Act*, SBC 2011, c 25.

² *Johnson-Steeves v Lee* [1997] AJ no 512 (Alta QB); *Johnson-Steeves v Lee* [1997] AJ no 1057

(Alta CA); *Caufield v Wong*, 2007 ABQB 732; *G.E.S. v D.L.C.* [2005] SJ no 354 (Sask QB); *GES v DLC* [2006] SJ no 419 (Sask CA); *Doe v Alberta* [2005] AJ no 1719 (Alta QB); *Doe v Alberta* [2007] AJ no 138 (Alta CA); *LB & EB c. GN*, [2011] JQ no 7881.

While single mothering by choice is growing in popularity, there is only limited legal³ and social science⁴ research addressing the phenomenon. Because the practice is so new, the majority of existing research focuses on demographics, the decision-making process the women undertake, and the social and economic reality of their lives once their children are born. The research also derives primarily from the United States. The lack of academic attention given to the legal experiences of SMCs means that we have little sense of how, and in what ways, this particular group of single mothers interacts with the law. In an effort to fill this

³ The legal treatment of SMCs has been given limited attention in Canada: Susan Boyd, “Autonomy for Mothers: Relational Theory and Parenting Apart” (2010) 18:2 *Fem Legal Stud* 137; Fiona Kelly, “Autonomous from the Start: Single Mothers by Choice in the Canadian Legal System (2012) 24:3 *Child and Family Law Quarterly* 257 [Kelly, “Autonomous from the Start”]; 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, Equal Children”]; Angela Cameron, Vanessa Gruben & Fiona Kelly, “De-Anonymising Sperm Donors in Canada: Some Doubts and Directions” (2010) 26 *Can J Fam L* 95; Robert Leckey, “Two Mothers in Law and Fact” (2013) 21 *Fem Legal Stud* 1; Susan Boyd, “Rights of Single Moms by Choice Collide with Claims of Genetic Dads”, *The Lawyers Weekly* (15 February 2008) at 13.

⁴ Vasanti Jadva, Shirlene Badger, Mikki Morrissette & Susan Golombok, “Mom by Choice, Single by Life’s Circumstances . . . Findings from a Large Scale Survey of the Experiences of Single Mothers by Choice” (2009) 12:4 *Human Fertility* 175; Rosanna Hertz, *Single by Chance, Mothers by Choice: How Women are Choosing Parenthood Without Marriage and Creating the New American Family* (New York: Oxford University Press, 2006) at 13; Fiona MacCallum & Susan Golombok, “Children Raised in Fatherless Families From Infancy: A Follow-up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence” (2004) 45:8 *Journal of Child Psychology and Psychiatry* 1407.

knowledge gap, this article presents the findings from a small interview-based study of SMCs that addressed, amongst other things, the ways in which the pre-conception decision-making and post-birth experiences of the mothers were shaped by law.

The article begins with a discussion of the social and legal context in which SMCs parent, focusing in particular on how the rise of neo-liberalism, and its impact on family law, has both benefitted and hindered SMCs. Part 2 provides an overview of the study, including a demographic description of the participants. Drawing on the interview data, Part 3 of the article analyses the ways in which law limits and constructs the experiences and decision-making of SMCs. The mothers identified three aspects of becoming and being an SMC that were shaped by the law, though rarely through overt intervention: (i) the pre-conception period during which they had to navigate the law, or absence of law, surrounding the fertility industry; (ii) when making decisions about the type of sperm donor (known or anonymous) with which to conceive; and (iii) once they had their child, the ways in which common activities, such as border crossings, were complicated by a legal system that assumes a two parent, biological family. The article concludes with some brief suggestions for reform.

SINGLE MOTHERS BY CHOICE: THE SOCIAL AND LEGAL CONTEXT

While women who actively choose to become single mothers have existed for some time, the prevalence of SMCs appears to have increased substantially in the past decade. Though it is impossible to know exactly how many Canadian SMCs there are, a number of factors suggest their numbers are growing. Recent statistics show that an increasing number of older women are becoming single mothers, which accords with research showing that SMCs tend have their first child in their

late 30s or early 40s.⁵ The number of single women aged 35-39 having children has risen from 3935 in 1991 to 9706 in 2011.⁶ There has also been a significant increase in births during the same time period to single women aged 30-34 and 40-44. By contrast, single women in their 20s have experienced little increase in births during the same time period. Although it is impossible to know the circumstances surrounding the pregnancies of these solo mothers in their 30s and 40s, a demographic not typically associated with accidental pregnancy, it is possible that it represents a growth in single motherhood by choice. Statistics from Canadian fertility clinics seem to support this assertion. According to Dr Sam Batarseh, director of IVF Canada, the number of single women coming to his clinic for donor insemination has tripled in the last thirty years.⁷ In 2010, at Vancouver's largest fertility clinic, single women represented just over 13 per cent of clients (approximately 280 women).⁸ Some U.S. fertility clinics report that up to 20 per cent of their clientele are single women.⁹

The enormous growth in both face-to-face and online support groups for SMCs also suggests a surge in their numbers. The international organization Single Mothers by Choice, which has chapters in most North American cities, has grown from a one-woman operation in 1981 to an international

⁵ Hertz, *ibid.*

⁶ Statistics Canada, *Live births, by age and marital status of mother, Canada*, CANSIM Table 102-4507 (annual).

⁷ Cited in Helen Buttery, "The single life: Affluent, educated and autonomous - why are more women enjoying motherhood on their own?", *Elle Magazine*, online: *Elle Magazine Online* <<http://www.ellecanada.com>>.

⁸ Statistics obtained via private communication in 2011 with Genesis Fertility Centre.

⁹ See, for example, The Sperm Bank of California: <<http://www.thespermbankofca.org/content/why-choose-tsbc>>.

organization with over 13,000 members during its thirty-year existence.¹⁰ A second organization, Choice Moms, oversees an active website, blog,¹¹ and internet message board, has produced numerous “how to” guides as well as the book *Choosing Single Motherhood: A Thinking Woman’s Guide*, and facilitates five to ten workshops a year in the U.S. and Canada to promote and support what it refers to as “choice motherhood”.

Given that single mothering can be both challenging and a much maligned identity in western society,¹² one might ask why a growing number of women are *choosing* to become single mothers. There is no clear answer to this question. However, a number of social and legal factors have combined in recent years to create the circumstances in which single mothering by choice may be viewed as an acceptable, or even appealing, option for some women. The increased workplace participation and thus economic independence of women,¹³ the growing acceptance of and availability to single women of assisted reproduction services, and the increasing legal and

¹⁰ Information obtained via private correspondence with Jane Mattes.

¹¹ See <<http://www.choicemoms.org/>>.

¹² A recent Pew Research Center survey conducted in the United States found that over 70 per cent of those surveyed thought that “mothers having children without male partners to help raise them” is “bad for society”. Paul Taylor, Rich Morin & Wendy Wang, “The Public Renders a Split Verdict on Changes in Family Structure”, *Pew Research Center* (16 February 2011) online: Pew Research Center <<http://www.pewsocialtrends.org/files/2011/02/Pew-Social-Trends-Changes-In-Family-Structure.pdf>> at 2.

¹³ In 2008, 59.3% of women aged 15 and over were in paid employment in Canada compared to 41% of women in 1976. Statistic Canada, *Women in Canada: A Gender-based Statistical Report* (1 April 2011).

social recognition of non-normative family of various kinds,¹⁴ have created an environment in which women may feel that it is possible to choose single motherhood. Given the prevalence of separation and divorce, single mothering has also become an increasingly common feature of the Canadian familial landscape.¹⁵ Yet as this article demonstrates, while SMCs may enjoy a more accepting social environment than single mothers of previous generations, they nonetheless experience significant legal obstacles unique to their position as single mother *by choice*. Some of the legal challenges SMCs experience are the product of the inherent hetero-normativity of family law, while others stem from the growing influence of neo-liberalism within Canadian society.

Hetero-normativity and neo-liberalism interact in the family law context to produce some contradictory trends for women who create non-normative families. As Brenda Cossman has argued, neo-liberalism is not particularly wedded to a specific family form provided that the private family can absorb the costs of reproduction.¹⁶ Thus, the expansion of family law to include non-normative families, such as lesbian and gay families, poses no direct challenge to neo-liberalism as long as the family members are capable of internalizing costs. In fact, some law reforms, such as the extension of spousal and

¹⁴ For example, the legal recognition of same-sex parents via provincial parentage laws (e.g. *Family Law Act*, SBC 2011, c 25, ss 23-33) and the legal recognition of same sex marriage (*Civil Marriage Act*, SC 2005, c 33).

¹⁵ There were over 1 million female-headed lone parent families in Canada in 2001, an increase of 13% since 1996 and 35% since 1991. Statistics Canada, *Women in Canada* (Ottawa: Target Group Project, 2006) (Catalogue No 89-503-XIE) at 38.

¹⁶ Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-conservative Visions of the Reprivatization Project" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 169 at 182.

child support obligations to same-sex spouses, serve to extend the reach of neo-liberalism's privatization project.¹⁷ However, because of neo-liberalism's commitment to privatization – the process whereby the costs of social reproduction are shifted from the public sphere to the private family unit¹⁸ – there is typically a preference for two parent families, the assumption being that two parents are better able to bear the costs of privatization than one. While the second parent need not be the child's biological father, because biological parents have presumptive financial obligations to their children, the desire for a second parent often translates into finding the biological father of the child. In fact, case law suggests that where the biological father of a child born to an SMC wishes to be involved in the child's life, he is likely to succeed, even when such an outcome is contrary to his pre-conception agreement.¹⁹

Canadian family law has also been heavily influenced in recent decades by the fathers' rights movement²⁰ which

¹⁷ See e.g. *M v H*, [1999] 2 SCR 3 in which the Supreme Court of Canada held that excluding same-sex couples from the Ontario spousal support regime was unconstitutional. One of the arguments used to support the conclusion was that because the existing legislation left “potentially dependent individuals without a means of obtain support from their former partners”, it “burdens the public purse with their care” (at para 283).

¹⁸ Cossman, *supra* note 16 at 169.

¹⁹ For a list of relevant cases, see note 2.

(Alta CA); *Caufield v Wong*, 2007 ABQB 732; *GES v DLC*, [2005] SJ no 354 (Sask QB); *GES v DLC*, [2006] SJ no 419 (Sask CA); *Doe v Alberta* [2005] AJ no 1719 (Alta QB); *Doe v Alberta* [2007] AJ no 138 (Alta CA); *LB & EB c GN*, [2011] JQ no 7881.

²⁰ Susan Boyd & Claire Young, “Who Influences Family Law Reform? Discourses on Motherhood and Fatherhood in Legislative Reform Debates in Canada” (2002) 26 *Studies in Law, Politics, and Society* 43; Susan Boyd, “Is Equality Enough? Fathers' Rights and Women's Rights Advocacy” in Rosemary Hunter, ed, *Rethinking*

tends to reinforce the neo-liberal preference for a second parent, though typically out of a desire to preserve the hetero-normative, patriarchal nuclear family, rather than fiscal restraint. The effect of the fathers' rights movement on family law can be seen in legislative²¹ or de facto presumptions in favour of shared parenting,²² a judicial presumption that father/child access is in a child's best interests,²³ and the

Equality Projects in Law: Feminist Challenges (Oxford: Hart Publishing, 2008) 59.

- ²¹ For example, section 39 of British Columbia's new *Family Law Act*, SBC 2011, c 25, includes a presumption in favour of joint guardianship in circumstances where the parents have cohabited. It is speculated that the federal government will soon propose similar amendments to the *Divorce Act*. C Schmitz, "Divorce Act Reforms Could be Coming Down the Pipe", *The Lawyers Weekly* (15 July 2011).
- ²² A number of scholars have argued that there is a *de facto* presumption in favour of shared parenting already operating in Canadian family law. This argument is supported by the dramatic increase in court-ordered joint custody awards over the past twenty years, despite the absence of any legislative impetus for the change. Statistics Canada reported that in 2003, 44% of court-determined custody cases arising out of a divorce resulted in an order for joint custody, more than double the rate from the mid-1990s and four times the rate of the late 1980s. Statistics Canada, *Women in Canada* (Ottawa: Target Group Project, 2006) (Catalogue no 89-503-XIE) at 40.
- ²³ My research on supervised access decision-making demonstrated that it is not uncommon for judges to cite a presumption, not found in the relevant legislation, that father/child access is in a child's best interests. For example, the Ontario Superior Court stated in 2004 that "[t]here is a presumption that regular access by a non-custodial parent is in the best interests of children": *VSJ v LJG* (2004), 5 RFL (6th) 319 at para 128. This assertion has been cited with approval in *Elwan v Al-Taher* (2009), 69 RFL (6th) 199 at para 76 (Ont Sup Ct J); *MI v MW*, [2011] OJ no 1685 (QL) at para 102 (Sup CJ); *Norman v Penney* (2010), 305 Nfld & PEIR 241 at para 22 (SC Trial Div); *Matos v Driesman* (2009), 86 WCB (2d) 27 at para 39 (Ont Sup Ct J).

imposition of “fathers” on lesbian families.²⁴ These trends have a particularly drastic effect on SMCs. While there is only limited case law in the area, it is common in disputes where known sperm donors challenge the sole parentage of SMCs for judges to draw little distinction between the legal status of men who conceive a child via intercourse and those who donate their sperm to a woman they know.²⁵ The child’s need for a father is understood as paramount and judges assume that these men can only add to women-led families. As Jenni Millbank explains in the context of lesbian-headed families:

[B]ecause it is same-gendered parenting, the addition of a male parent is not seen to *take away anything* from the family (for example, by intruding on their autonomy or invalidating their family form), it only *adds* to it. The mothers are viewed as inexplicably trying to deny their child something good, something special and something that their family lacks; a daddy. The mothers’ behavior in resisting a third parent in their family is therefore selfish, non-child centered and weird; while the donor/father’s behavior in trying to join or control that family is *natural*, understandable and loving.²⁶

For a discussion of the trend see Fiona Kelly, “Enforcing a Parent/Child Relationship at all Cost? Supervised Access Orders in the Canadian Courts” (2011) 49 Osgoode Hall LJ 277 at 298.

²⁴ Jenni Millbank, “The Limits of Functional Family” (2008) 22 Int’l J Law Pol’y & Fam 149; Kelly, “Equal Parents, Equal Children”, *supra* note 3.

²⁵ For an overview of the Canadian case law see Kelly, “Autonomous from the start”, *supra* note 3.

²⁶ Millbank, *supra* note 24 at 162.

Millbank's analysis is even more persuasive in the context of families headed by an SMC. Adding a "father" to an SMC family is not understood as an intrusion because the family is perceived as having an inherent "gap": the lack of a second parent. While lesbian parents may be able to argue that their child already has two parents and thus their family is complete, SMCs have the double burden of overcoming the preference for both a father *and* a two-parent family.

Unfortunately, provincial parentage laws do little to alleviate the situation for SMCs, particularly those who conceive with known donors. The parentage laws of only one province, Quebec, explicitly envisage the possibility of an SMC,²⁷ though the sole judicial decision made under the provision was decided in favour of the donor.²⁸ The very limited case law outside of Quebec – typically access and parentage disputes between SMCs and their known donors – has all been concluded in favour of the donor.²⁹ Though each of the cases was factually complex, the results are not particularly heartening for SMCs. There have, however, been a

²⁷ Article 538 of the Quebec *Civil Code* states that: "A parental project involving assisted procreation exists from the moment a *person alone* decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project." Article 538.2 establishes states that, "The contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project." Thus, in the case of a woman alone deciding to enter into a parental project the sole filial relationship established is between the child and mother. *Civil Code of Quebec*, SQ 1991, c 64.

²⁸ *LB & EB c GN*, [2011] JQ no 7881.

²⁹ *Johnson-Steeves v Lee* [1997] AJ No 512 (Alta QB); *Johnson-Steeves v Lee* [1997] AJ no 1057 (Alta CA); *C.C v A.W* [2005] AJ no 428; *Caufield v Wong*, 2007 ABQB 732; *Doe v Alberta* [2005] AJ no 1719 (Alta. Q.B.); *Doe v Alberta* [2007] AJ no 138 (Alta CA).

number of statutory reforms directed at protecting the parentage of lesbian couples that have simultaneously benefitted SMCs. For example, several Canadian provinces now have a statutory provision stating that a gamete donor is not, by reason of his or her donation, a legal parent.³⁰ Section 24 of British Columbia's new *Family Law Act* states that:

- If a child is born as a result of assisted reproduction, a donor who provided human reproductive material or an embryo for the assisted reproduction of a child
- (a) is not, by reason only of the donation, the child's parent,
 - (b) may not be declared by a court, by reason only of the donation, to be a child's parent, and
 - (c) is the child's parent only if determined, under this Part, to be the child's parent.³¹

Section 24 can be relied upon by any individual who conceives a child via "assisted reproduction", defined as "a method of conceiving a child other than by sexual intercourse."³² An SMC who conceives with a known donor

³⁰ *Vital Statistics Act*, CCSM c V60, s 3(6); *Civil Code of Quebec*, SQ 1992, c 64, arts 538-42; *Family Law Act*, SA 2003, c F-4.5, s 5.1(1)(a); *Child Status Act*, RSPEI 1988, c C-6, ss 9(5) & 9(6); *Family Law Act*, SBC 2011, c 25. While Nova Scotia's *Vital Statistics Act*, RSNS 1989, c 494, makes no mention of same-sex couples or assisted reproduction in its birth registration provisions, regulations under the *Act* permit the mother's spouse, male or female, to register as a legal parent where a child is conceived via "assisted conception", defined as "conception that occurs as a result of artificial reproductive technology, using an anonymous sperm donor." See Birth Registration Regulations, NS Reg 390/2007.

³¹ *Family Law Act*, SBC 2011, c 25, s 24(1).

³² *Ibid* at s 20(1).

should therefore benefit from the presumption found in section 24. It is evident, however, from the surrounding provisions, as well as the various law reform documents that preceded the introduction of the *Family Law Act*, that the assumption underlying section 24 is that a second parent will take the place of the gamete donor.³³ In an SMC family, this is obviously not the case.

THE STUDY

Despite the rapid increase in SMCs in recent years, almost nothing is known about their interactions with the law. As the discussion above suggests, while Canadian family law is increasingly accommodating of some non-normative families, it continues to pose serious challenges to women who choose to parent without a partner. In an attempt to better understand the role law plays in the lives of SMCs, ten women who self-identified as SMCs were interviewed. The women were all members of their local SMC support group, lived within a 150km radius of a large Canadian city, and were recruited via the group's online message board. Due to the small sample

³³ See for example, the Public Consultation document issued by the Attorney General's office in which a discussion of the legal parentage of the birth mother is followed by the sub-heading "Who is the *other* legal parent?" Similarly, the discussion of the parentage provisions in the *White Paper on Family Relations Act Reform* assumes that the birth mother has a partner and that the partner will be the child's second legal parent. This assumption is reflected in section 27 of the *Family Law Act*, which extends presumptive parentage to the birth mother's spouse. British Columbia, Ministry of Attorney General Justice Services Branch Civil and Family Law Policy Office, *Family Relations Act Review: Report of Public Consultations* (British Columbia: Civil and Family Law Policy Office, 2009) at 48. British Columbia, Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (British Columbia: Civil and Family Law Police Office, 2010) at 30.

size, it is necessary to be cautious about making any generalizations about the SMC population in Canada. However, given the absence of any other empirical work with Canadian SMCs, the data nonetheless provides us with some important insight into the SMC experience.

Demographically, the participants in the study were virtually identical to SMCs who have participated in similar research in the United States and United Kingdom.³⁴ They were a fairly homogenous group that shared little, at least demographically, with most other single mothers.³⁵ Almost all were Caucasian, most earned over \$50,000 and many had an annual income of \$75,000 to \$100,000. However, two were self-employed with variable incomes, sometimes earning as low as \$20,000 in a year. However, in both cases the women

³⁴ Hertz, *supra* note 4; Jadva, *supra* note 4; Valerie Mannis, “Single Mothers by Choice” (1999) 48:2 *Family Relations* 121; Rosanna Hertz & Faith Ferguson, “Kinship Strategies and Self-Sufficiency Among Single Mothers by Choice: Post Modern Family Ties” (1997) 20:2 *Qualitative Sociology* 187; Jane Bock, “Doing the Right Thing? Single Mothers by Choice and the Struggle for Legitimacy” (2000) 14:1 *Gender & Society* 62; Susan Golombok & Shirlene Badger, “Children Raised in Mother-headed Families from Infancy: A Follow-up of Children of Lesbian and Single Heterosexual Mothers, at Early Adulthood” (2010) 25:1 *Human Reproduction* 150.

³⁵ The most notable difference between the SMCs interviewed and single mothers as a broader population was with regard to economic stability. The SMCs were significantly better off than the average single mother in Canada. For example, the average income of the SMCs interviewed was well above that of single mothers generally (\$42,300 in 2008) and, while two of the women had experienced a year or two of low income (usually by choice), none were living in poverty. By contrast, 21 per cent of Canadian single mothers live in poverty (compared to nine per cent of the general population and seven per cent of single fathers). Statistic Canada, *Women in Canada: A Gender-based Statistical Report* (2011) (Catalogue no: 89-503-XWE).

had chosen to reduce their workload so they could spend more time with their child, a luxury most other single mothers do not enjoy. Almost all had attended university, with half holding a graduate degree, a figure substantially higher than the general population.³⁶ Most of the women were professionals of some sort, with their occupations including accountant, lawyer, school counselor, and a professional staff member at a university. Their average age at the time of their first child's birth was 38 and all but one had only one child. The average age of the children was three. All of the women were biological mothers who had conceived their children via donor insemination or *in vitro* fertilization. Two of the women conceived with known donors, while the remaining eight used anonymous donor sperm purchased from a sperm bank. Six of the eight anonymous donors were designated "open identity" which meant that the donor's identifying information could be accessed by the child upon reaching the age of majority.

While the women who participated in the study were demographically similar to SMCs interviewed for other research, two features distinguished the sample from others. First, less than half of the women owned the property in which they lived. The majority rented 1 or 2 bedroom apartments or lived in co-operative housing, and few anticipated being able to purchase a home in the near future. While the lack of home ownership might suggest that the women interviewed for this study were not as financially secure as SMCs who participated in other studies, the more likely explanation is that the cost of housing in the region is unusually high. Notably, the three women who owned houses lived in semi-rural areas, well outside of the city. The second demographic difference was

³⁶ According to Statistics Canada, 6.5% of working-age Canadians in 2010 had a graduate degree. Statistics Canada, "Table 282-0004 - Labour force survey estimates by educational attainment, sex and age group" online: <<http://www.statcan.gc.ca/pub/12-581-x/2012000/edu-eng.htm>>.

that only half of the women identified as heterosexual, a figure considerably lower than recorded in other studies. One woman identified as lesbian, one as queer, one as bisexual, and two described their sexuality as undetermined or “in progress”. It is difficult to know why such a large proportion of the women identified as something other than heterosexual as there is no indication from other research that queer women are attracted to single mothering by choice at greater rates than heterosexual women. That said, the region in which the women live is known for its progressive politics and large, well-established lesbian and gay communities. It is therefore possible that non-heterosexual women are simply a greater percentage of the overall population than in other places, or that living in a politically progressive environment makes women feel more comfortable exploring their sexuality.

With the exception of these two demographic differences, the study re-confirmed that SMCs tend to share a number of distinct characteristics: they are usually in their late 30s or early 40s, well educated, financially independent, and Caucasian. SMCs are thus a fairly privileged group of women, particularly when compared to single mothers by chance or those who become single mothers due to separation or divorce. There is no doubt that the class and race privilege of the SCMs interviewed enhanced their ability to choose single motherhood as well as navigate the legal system. In particular, because they were largely capable of economic self-sufficiency, they were able to avoid the economic stigma associated with single motherhood in the neo-liberal era.³⁷

³⁷ Relying on historical data, Lori Chambers has argued that women who choose to become single mothers and who have sufficient economic independence to support their child may experience less stigma than single mothers who live in poverty. Lori Chambers, *Misconceptions: Unmarried Motherhood and the Ontario Children of Unmarried Parents Act, 1921 to 1969* (Toronto: University of Toronto Press, 2007).

While all of the women interviewed indicated that they had “chosen” to become single mothers, self-identified as “single mothers by choice”, and considered themselves to be parenting autonomously, it is important that the notions of “choice” and “autonomy”, terms that are closely associated with liberal individualism and a central feature of the neo-liberal project, be problematized. As the demographic analysis indicates, the freedom to “choose” single motherhood is primarily reserved for a certain class of women: well educated, middle to upper class, white women, who are able to purchase the services required to achieve single motherhood and deflect, via their race and class privilege, the stigma traditionally associated with the status. Thus, while women who “choose” to parent alone may attract a degree of social acceptance, that acceptance is contingent on the woman’s capacity to absorb the costs of her (autonomous) social reproduction and be independent from the state. Given the social and economic context in which they parent, it is not surprising that some SMCs become, perhaps unwittingly, proponents of neo-liberal thought. At the same time, many SMCs, including those interviewed for this study, embrace a version of autonomy that is best described as relational.³⁸ Rejecting the paradigm of the autonomous liberal individual, most had created rich networks of support that often included other SMCs. Thus, their autonomy was “nourished in relationships with others.”³⁹ Though they did not expressly challenge the social structures that demanded self-sufficiency of them, they did undermine them in small ways by building self-sufficiency through relationship.

³⁸ Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011).

³⁹ Sumi Madhok, Anne Phillips & Kalpana Wilson, eds, *Gender, Agency, and Coercion (Thinking Gender in Transnational Times)* (Houndmills: Palgrave MacMillan, 2013).

Single motherhood by choice and the law

While a number of themes emerged from the interviews, this article focuses on the mothers' interactions with the law. Participants were provided with a number of opportunities during the interview to reflect on the role, if any, law played in their lives. Specific questions related to accessing fertility services, choosing a donor, and establishing parentage, provided an opportunity to discuss the most common legal challenges. However, there were many other instances during the interviews where legal regulation of various kinds emerged as a topic for discussion.

When discussing the role of law in their lives the mothers identified three areas of common concern. The first, referred to by almost all of the mothers, was the lack of legal regulation surrounding the fertility industry. The second was with regard to choosing a sperm donor. Many of the mothers preferred, or would have at least considered the possibility of, using a known donor but felt that the lack of certainty surrounding the legal status of such an individual made the choice too risky. The final set of concerns raised by the mothers related to post-birth challenges to their status as sole parents, typically by government employees during fairly routine activities such as border crossings.

The legal regulation of the fertility industry

The evolution of reproductive choice in the modern era means that women have access to a dizzying array of reproductive technologies that enable pregnancy without a partner. The fertility industry, made up of both fertility clinics and sperm banks, now welcomes single women with open arms. The reproductive autonomy enabled by such clinics sets SMCs apart from many other single mothers. Achieving pregnancy through the services of a fertility clinic, though expensive, allows women to take control of the process of becoming a

mother, reduces the legal and health complications that may be associated with other methods of conception and, because of the availability of anonymous donor sperm, enables them to achieve motherhood in a manner that protects their autonomy as their child's sole parent. Yet almost all of the mothers felt that the fertility clinics and sperm banks were not sufficiently regulated and that the lack of legal regulation was not in the interests of either themselves or their children.

Eight of the ten women interviewed conceived using anonymous donor sperm through the services of a fertility clinic. None experienced any barriers in accessing a clinic or purchasing sperm and most indicated that they felt welcome as single women. However, many of them argued that the regulatory environment surrounding the fertility industry was extremely troubling. The most common complaint pertained to the lack of legal control over the number of offspring each donor could produce and the perceived dishonesty of the sperm banks with regard to this issue. A smaller number of women complained that the few regulations that did exist, such as those pertaining to the use of known donor sperm within a clinic environment,⁴⁰ were misguided and particularly onerous for single women.

By far the most common concern the women had about the fertility industry, and the issue around which they felt most vulnerable, was the complete absence of statutory regulation of sperm banks. In particular, the women were concerned that, despite strict regulations with regard to how sperm is processed, Canadian law places no limit on the number of offspring produced by a particular donor. It is thus possible for

⁴⁰ *Processing and Distribution of Semen for Assisted Conception Regulations* (SOR/96-254); *Technical Requirements for Therapeutic Donor Insemination* (Health Canada Directive, July 2000) online: <http://www.hc-sc.gc.ca/dhp-mps/alt_formats/hpfb-dgpsa/pdf/prodpharma/semen-sperme_directive-eng.pdf>.

a child to have in excess of a hundred donor siblings. For Sally, whose daughter has at least 70 half-siblings, this information, inadvertently gleaned during a conversation with a sperm bank employee, caused significant distress. As she explained, “Well, I kind of freaked out internally [when I found out]. I mean I had an internal freak out, just in terms of the number, the number of half siblings.”

In addition to placing no limits on the number of donor offspring, Canada also has no independent watchdog overseeing the industry, which means that sperm banks can, and do, make assertions about offspring numbers that go unchecked. For example, Canada’s only sperm bank, ReproMed, is self-regulating. In its internal guidelines it claims to *attempt* “to limit Donors to three live births per region of 100,000 populations. Siblings of the same patient using the same Donor are considered one live birth.”⁴¹ As has been pointed out by a Canadian journalist, this could entail as many as 75 donor offspring living in a city the size of Toronto.⁴² ReproMed also claims to perform “regularly scheduled surveys of our physicians and treatment outcomes of their patients, and employs these data to monitor use of certain Donors in particular geographical areas.”⁴³ Yet, there is no legal requirement that parents report the conception or birth of a child using sperm from ReproMed. In fact, a U.S. study of 5000 sperm bank users conducted in 2011 by the American Society of Reproductive Medicine (ASRM) found that 35 per cent of participants had not or did not plan to report their

⁴¹ “Donor FAQ”, online: Repromed < http://www.repromed.ca/donor_faq>.

⁴² Tom Blackwell, “Limit pregnancies by same sperm donor: Fertility experts”, *National Post* (8 September 2011) online: The National Post < <http://news.nationalpost.com>>.

⁴³ “Donor FAQ”, *supra* note 41.

pregnancy to the sperm bank.⁴⁴ As the authors of the study noted, this lack of reporting “does not allow for accurate pregnancy tracking to limit the number of family units per donor.”⁴⁵ The situation appears to be similar in Canada. In fact, a number of the women interviewed noted that, while they had reported their pregnancy to the fertility clinic, they had not known until several years after the fact that they were also supposed to notify the sperm bank.

While the situation in Canada is concerning, an estimated 95 per cent of sperm used in Canadian fertility clinics is actually imported from the United States.⁴⁶ The largest provider of sperm to Canada appears to be Fairfax Cryobank which claims to cover “over 80% of the Canadian sperm market.”⁴⁷ Fairfax’s policy for limiting offspring numbers can be found on the bank’s website. It states:

Fairfax Cryobank limits the total number of births for any donor based on the application of several criteria. Specifically, a donor's sales will cease when either of the following criteria is reached:

1 When 25 family units (children from the same donor living in one home) have been reported in the US. International distribution stops when 15 family units have been reported. After the family

⁴⁴ Michelle Ottey & Suzanne Seitz, “Trends in donor sperm purchasing, disclosure of donor origins to offspring, and the effects of sexual orientation and relationship status on choice of donor category: a three year study” (2011) 96 *Fertility and Sterility* S268.

⁴⁵ *Ibid.*

⁴⁶ Blackwell, *supra* note 42.

⁴⁷ “International Role of Fairfax Cryobank”, online: Fairfax Cryobank <<http://www.fairfaxcryobank.com/blog/?p=110>>.

unit limits have been met, vials will only be distributed for sibling pregnancies; OR
 2. Total number of units sold reaches our designated limit (*actual numbers are not disclosed*).⁴⁸

According to the first part of the policy, Fairfax appears to cap distribution at 40 families worldwide. While this may appear modest on a global scale, it is necessary to take into account the ASRM finding that approximately 35% of families will not report their pregnancies. If it is assumed that each of the reporting families has between 1-3 children (siblings are treated as only one child under the policy), the 40 family units will have produced approximately 80 children. If the unreported children are added (an additional 35% of families, each with 1-3 children) a single Fairfax donor may have produced up to 108 offspring. When one also takes into account that women often “sell on” leftover vials through online groups or that some men donate to more than one sperm bank,⁴⁹ the numbers may be considerably higher. The second element of the Fairfax policy, which can be applied as an *alternative* to the first paragraph, is similarly concerning. The second option available to Fairfax is to cease sales of a particular donor when the bank’s designated limit, which it *expressly* refuses to disclose, is reached. With no way of knowing what the limit might be or how it is calculated (reported births? speculated births? vials sold?), one can only speculate as to how many children a donor might produce.

⁴⁸ Emphasis added. “Read First”, online: Fairfax Cryobank <<http://www.fairfaxcryobank.com/ReadFirst.shtml>>.

⁴⁹ A study of 63 donors, surveyed about their experiences of anonymous donation, found that 27 per cent had donated at more than one sperm bank. Tabitha Freeman et al, “Sperm and Oocyte Donors’ Experiences of Anonymous Donation and Subsequent Contact with their Donor Offspring” (2011) 26:3 Human Reproduction 638 at 640.

Given the existing situation, it is not surprising that the mothers expressed concern about the lack of regulation surrounding sperm banks, both in Canada and the United States. While most of them admitted that they went into the process of choosing a donor with considerable naiveté, now that they knew more about the fertility industry they felt that the absence of a regulatory framework had created a situation that was not in their children's interests. The women's concerns began with the lack of information provided by their fertility clinic with regard to choosing a donor. None of the women was given any choice about which sperm bank they purchased from. Nor were they told that sperm banks have different policies with regard to matters such as offspring limits, the availability of open-identity donors, and how the bank deals with notifications of serious illness in children conceived using donor sperm. Rather, the fertility clinic told their clients which sperm bank they worked with and instructed them to purchase sperm from that bank, typically online. This made it virtually impossible for women who were aware of differences between sperm banks to exercise any choice. Casey, for example, wanted to import sperm from The Sperm Bank of California ("TSBC"), a non-profit fertility clinic that was established by feminists in the 1980s. TSBC was the first sperm bank in the United States to offer services to lesbian women, provide open-identity donors, and cap offspring numbers at 10 per donor. TSBC also maintains contact with families who use their services so that they can accurately track offspring numbers. However, because the clinic Casey approached did not do business with TSBC, she was told that it was not an option. After investigating the two sperm banks that were available to her, Casey concluded that both had questionable practices with regard to offspring numbers. Frustrated with her lack of choice, Casey eventually chose to pursue at-home insemination with the sperm of a known donor.

Once the women had their children, many of them began to hear troubling information about sperm bank

practices, often through conversations with other SMCs. Over time, a number of them developed a critique of the industry. The most common criticism was that the sperm banks are dishonest and that their dishonesty had the potential to create social issues for children conceived using donor sperm. As Rachel explained, she was led to believe by the sperm bank – and she presumed donors were provided with similar information – that each donor might produce five or six children. She was also given the impression that the sperm bank follows up with clients in an effort to track births, which she now knows is not true. Concerned by what she was hearing about offspring numbers from other SMCs, Rachel contacted the sperm bank to ask how many children her daughter’s donor had produced. She was told that it was the bank’s policy that such information not be disclosed. Rachel was instead referred to the website which categorized each donor’s offspring numbers as 5, 10, 15, or “20 plus”. Rachel’s donor fell into the last category. As Rachel put it, “That could be 21, or it could be a hundred!” Due to this experience, Rachel felt quite strongly that sperm banks should be legally regulated and, in particular, that regulations should dictate a limit on how many offspring a donor can produce. She argued that this was particularly important in the case of open-identity donors, where there was often an expectation on the part of parents that the donor would be willing to meet the child. As she explained:

[The open-identity donors will] disappear when they realize they have 150 children! I think that the whole thing has been presented a little bit misleadingly. By the banks and, you know, maybe not ever intentionally, but I think that a lot of the donors were led to believe they might have five or six children. And when they find out they have a hundred, they might not be so willing to be known.

Sally shared Rachel's concerns, though in Sally's case, her fears had been realized. When her daughter was an infant, Sally logged on to the Donor Sibling Registry to determine how many donor-siblings her daughter had. There were 67 children reported. Given that many families are not aware of the DSR and others may not wish to join, the likely number of donor siblings was, as Sally put it, "mind boggling". Sally's donor had chosen an "open identity" status, which meant he was willing to have his contact details released to offspring when they turned eighteen. Sally felt it was completely unrealistic that a donor in such a situation would have the willingness, or capacity, to meet or even communicate with 67-plus children. While she did not envisage her daughter ever having a relationship with her donor, Sally was nonetheless frustrated with a system that promoted and charged additional money for open-identity donors, but did not limit the number of offspring they produced. She argued that sperm banks should be forced by law to restrict offspring numbers,⁵⁰ particularly in the case of open-identity donors, as well as to implement a system of compulsory reporting so that submitting paperwork

⁵⁰ For example, in the U.K., the *Human Fertilisation and Embryology Act* 2008 limits the number of families a donor can assist to ten. The justification for this limit was explained in a 2011 press release from the regulatory body that governs the fertility industry in the U.K., the Human Fertilisation and Embryology Foundation: "The Authority was persuaded by views expressed during the consultation that, for psychological reasons, a limit should be placed on the number of possible siblings that a donor-conceived person could expect to have. There is also a perception that a higher family limit would risk two genetically related siblings entering into a relationship without knowing they were related (although the actual risk of this remains very low)." Human Fertilization and Embrology Authority, "HFEA Agrees new policies about family donation and the number of families one donor can create", online: HFEA <<http://www.hfea.gov.uk/6518.html>>.

to the sperm bank was part of the birth registration process.⁵¹ Both Sally and Rachel also expressed concern about the risk of inadvertent dating amongst donor siblings in large sibling groups, particularly given that the SMC community was fairly close-knit.

While most of the women called for more regulation of the fertility industry, several noted that the minimal regulation that did exist had a disproportionately negative impact on SMCs. The most frequently noted concern was with regard to the limits imposed by Health Canada on a woman's use of known donor sperm where the donor is not the woman's sexual partner. While a woman can conceive using the sperm of a known donor via home insemination without express regulation,⁵² if she finds it necessary to employ the additional expertise of a fertility clinic the same donor is subject to the *Processing and Distribution of Semen for Assisted Conception*

⁵¹ Several Australian states have introduced compulsory reporting registries for individuals involved in donor conception. For example, in the state of Victoria, Part 6 of the *Assisted Reproductive Treatment Act 2008* (Vic) created a registry, administered by Births, Deaths and Marriages, which records information about people involved in donor conception. The Central Register records information about births arising from the use of donor sperm, eggs or embryos since July 1988. The treating clinic provides the Registry with information about the parents, the donor, and the child that has been born. When registering a birth, the parent needs to confirm on the birth registration statement that donor conception occurred. The Act also introduced a second registry, the Voluntary Register, which allows people who have been involved in donor conception in Victoria before July 1988, to voluntarily register information about themselves and their willingness to exchange information with other persons on the Voluntary Register.

⁵² Though the legality of doing so remains unclear: Fiona Kelly, "An Alternative Conception: The Legality of Home Insemination under Canada's *Assisted Human Reproduction Act*" (2010) 26 Can J Fam L 149.

Regulations (“the *Regulations*”).⁵³ The *Regulations* apply to all sperm used in fertility clinics in Canada where the recipient and donor are not in a sexual relationship. They include a series of exclusion criteria that prohibit certain men, such as men over 40 and men who have had sex with another man, from donating.⁵⁴ The objective of the *Regulations* is to protect the health of women who purchase anonymous sperm from sperm banks. However, they apply equally to a woman who conceives via assisted conception with a donor who is *known* to her but with whom she has no sexual relationship. Such a woman, if she wishes to conceive at a clinic with the sperm of her known donor, must apply to the “Special Access Programme”.⁵⁵ Under the programme an excluded donor can be permitted to donate, provided he submits to extensive testing. This includes being tested for infectious diseases, having his sperm quarantined for 6 months, and then being retested. If all the tests are negative, the woman’s physician may apply to Health Canada for a

⁵³ *Processing and Distribution of Semen for Assisted Conception Regulations* SOR/96-254.

⁵⁴ *Technical Requirements for Therapeutic Donor Insemination* (Health Canada, July 2000), paras 2.1(b) & 2.1(c)(i). The exclusions contained within the *Technical Requirements for Therapeutic Donor Insemination* have been challenged and upheld. In *Susan Doe v Attorney General of Canada*, 2007 ONCA 11, it was held that men who have sex with men are deemed to be at higher risk of carrying certain infectious diseases, such as HIV, and the sperm of men over the age of 40 is believed to have higher rates of “spontaneous genetic mutations” than the sperm of younger men (at para 42). The challenge failed in part because men who fall within the excluded categories may be able to donate if they are accepted under the special access program.

⁵⁵ Health Canada, *Guidance on Donor Semen Special Access Programme: Donor Semen Eligible for Special Access* (Nov 27, 2002) online: Health Canada < http://www.hc-sc.gc.ca/dhp-mps/alt_formats/hpfb-dgpsa/pdf/prodpharma/dssap-passd_eligiblesemen_spermedonneur-eng.pdf>.

special access authorization. The physician must indicate that he or she has explained and identified any health risks to the recipient woman. Health Canada will then review the application and either approve or reject it. There is no certainty that a donor will be approved by virtue of going through the process. A woman who conceives through a fertility clinic with the sperm of her sexual partner is not subject to these regulations.

For Beth, who began her journey towards becoming an SMC when she was 42, the *Regulations* proved to be a significant legal hurdle. It was Beth's first choice to conceive with the assistance of a male friend who was willing to be known to any prospective child. However, after numerous unsuccessful attempts at home insemination, Beth began to wonder if employing the services of a fertility clinic might help. When she approached a clinic in the city in which she resided, she was told that, though she had been conducting inseminations using her donor's sperm for months, the clinic could not assist her because her donor was 43 and gay, and thus excluded under the *Regulations*. Beth later discovered that this information was inaccurate. It was possible to use her donor's sperm if he was willing to apply under the Special Access programme. However, knowing that her age meant she had a limited timeframe in which to conceive, Beth decided to pursue other options.

The other options available to Beth were limited, however, by her lack of predictable resources. With an unstable income that varied from month to month, Beth found the regular costs associated with purchasing sperm overwhelming.⁵⁶ Frustrated by the situation, Beth felt driven to

⁵⁶ The purchase of sperm is the most significant cost associated with donor insemination. Most women reported that the sperm they purchased cost \$500-\$800 a vial. The inseminations themselves cost approximately \$250.

engage in higher-risk activities in order to get pregnant. Following her failed attempts to conceive with the first known donor, Beth made an arrangement with an American man she met online through one of the many “free sperm” websites. As Beth told the story, she expressed embarrassment about the risks she took, noting in particular the “disgusting, grotesque, narcissistic” men she encountered on the free sperm websites who “all seemed to [want] sex without condoms.” However, she felt compelled to follow that route because of her age, the cost of sperm, and the limits imposed upon her by the Health Canada regulations. As she reflected, “Well, the cost is, is so high that I did do unsafe things. The law as well. It pushed me to get more and more risky. So I feel like those barriers pushed me to do things that I would have never ever thought of.” After months of trying to get pregnant at home, Beth had saved enough money to fund two more inseminations at a fertility clinic using open-identity donor sperm. On the second attempt, she became pregnant and, at 43, she gave birth to her daughter. While she was happy to have finally become a mother, she expressed considerable frustration with the law for limiting her reproductive autonomy, especially in a manner that seemed particular to SMCs.

Choosing a sperm donor in the shadow of the law

Given that eight of the ten women interviewed conceived using the sperm of an anonymous donor one might assume that SMCs have a preference for anonymity. The interviews, however, revealed a much more complex picture. Six of the eight women who conceived with the sperm of an anonymous donor stated that they would have preferred to use a known donor. While none provided exactly the same reasons for their preference, common explanations were that a known donor would be accessible to the mother and child if needed, was less likely to produce large numbers of children, would be able to provide ongoing medical information, and did not charge for his sperm. Several of the women also noted that conceiving

with a known donor meant they could avoid the fertility industry and the medicalization of conception. Yet, despite the perceived advantages of a known donor, these six women felt that a choosing one was too great a legal risk.

Sara, for example, considered conceiving with a known donor and had even discussed the possibility with an old friend. However, once she started investigating the matter she discovered that the choice raised some substantial legal concerns. As Sara explained:

I did a little bit of research and I wasn't sure about the legalities of it. There's still a lot that's unknown, I don't know. I don't think it's, I want to say bullet proof...I might have given more consideration to it, the known donor, if there had been a little bit more legal certainty around it.

Chelsea had also favoured a known donor but developed similar concerns, particularly after she joined her local SMC group and received emails about ongoing litigation involving SMCs in Canada and elsewhere. As she explained:

All the stuff I saw, the emails and stuff like that, it just, I just cannot imagine having an agreement in place, having parental rights severed, and then, for whatever reason, being able to have that challenged at a later date in any way, shape, or form. Whether the person changed their mind or the person passed away, or whatever. Cause obviously we all have [the] best interests of our children at heart. And we want, we're just trying to protect them beyond anything else. And how that can be changed, like, I just. It just isn't right.

Many of the women who favoured known donors but ultimately decided against them expressed similar concerns, referring to such arrangements as “dangerous”, “legally risky” or, as Sally put it, “a hot bed of legal crazy.”

The women were justified in fearing known donors. Single women in Canada who have conceived, whether via intercourse⁵⁷ or assisted conception, with a known donor who has subsequently sought access through the courts have uniformly lost their cases.⁵⁸ Courts have refused to consider known donors to be anything but legal fathers and have awarded access on a routine basis. Even in Quebec, the only jurisdiction in Canada in which the possibility of a single mother by choice is explicitly recognized via legislation (even when conception occurs via intercourse),⁵⁹ the case law has not been encouraging.⁶⁰ Once the women joined their local SMC group they became aware of this legal environment and, with the case law as a backdrop, few of them felt comfortable pursuing a known donor arrangement.

Despite all of the risks involved, two of the mothers, Casey and Marjorie, nonetheless chose to conceive with known donors. Interestingly, both women identified as lesbians and, because of their involvement in the lesbian community, were familiar with the legal challenges associated with known donor arrangements long before they decided to have a child on their own. Perhaps because of their familiarity with the legal issues, both Casey and Marjorie chose to engage with the law during

⁵⁷ In Quebec, conception via intercourse does not preclude the possibility of the man being considered a sperm “donor”. *Civil Code of Quebec*, SQ 1991, c64, articles 538 & 538.2.

⁵⁸ For a discussion of the case law on this issue see Kelly, “Autonomous from the Start”, *supra* note 3.

⁵⁹ Arts 538-42 CCQ.

⁶⁰ *LB & EB c GN*, [2011] JQ no 7881.

the pre-conception period in an attempt to clarify the legal relationships involved. They each received independent legal advice from a lawyer who specialized in lesbian and gay parenting arrangements and entered into written agreements with their donors. Though they included a variety of issues, the essence of the agreements was that the donor was not a legal parent and that the mother was the child's sole parent.

Despite their engagement with the law, Marjorie and Casey knew that there was little they could do to protect themselves legally. For example, both women understood that the agreements they had entered into, and paid a considerable amount of money to have prepared, were of little legal value. Yet, they clung to the few legal mechanisms available to them out of fear. As Casey explained:

I knew the agreement wasn't worth much more than the paper it was printed on. However, I knew that it was a huge mistake not to have one. You know, it doesn't, it's one of those situations where there's this gap in the law. Where all, where the best thing one could do, according to the advice I had was to state our intentions and move forward from there. Which is what I did.

As Casey's comment suggests, the women understood that despite their attempts to engage the law, they remained legally vulnerable. In particular, they struggled with the idea that they could not formally sever any legal rights the donor might have, creating a situation of constant uncertainty. As Marjorie explained:

I think it would be useful for SMCs to have a single person be able to be the sole legal parent. Because it, you know, it does put us into legal jeopardy. Because as far as I know you can't, I can't legally [sever] Sam's [parental rights],

without having a second person to put on the birth certificate in his place. And I think that's dangerous, because it leaves the parent and any children conceived out of that donor insemination agreement perpetually at risk of, you know, custody or access [disputes]. Or, you know Sam...was cut off from his family of origin because he's gay, and so we've never had to deal with, you know, what his siblings or grandparents think. But, you know, if Sam and I had had this agreement and he was the one who had the early death and his parents wanted to go after my kids because they were his genetic information, or that sort of thing. Like I, that's again not my particular case. But I could see that being a concern for single parents by choice. [They] need to be able to be a sole legal parent without having to have a second name [on the birth certificate]. You know, if the agreement is that you're intentionally bringing a child [into the world] on your own...the law should support that.

While Marjorie's donor, Sam, was respectful of their agreement, Marjorie nonetheless understood that she was, at least objectively, "perpetually at risk." While Marjorie could live with this uncertainty, Casey could not.

Casey conceived her daughter with a known donor, a friend who was supportive of her decision to become an SMC. They each received independent legal advice and signed a written agreement that stated that Casey was the sole parent and the donor would only be known to the child upon the child's request. Knowing that "the agreement wasn't worth much more than the paper it was printed on", Casey asked her lawyer whether there were any other legal mechanisms available to clarify her sole parent status. Casey's lawyer noted

that an increasing number of lesbian couples with known donors were applying, at the time of their child's birth, for a declaration of legal parentage that served to sever any parental rights the donor might have.⁶¹ Though an SMC had never attempted to secure such a declaration, and would not be able to provide a second parent to fill the void left by the donor, the lawyer speculated that Casey might still be able to utilize the procedure. When her daughter was a few months old and, with the support and consent of the donor who had never met the child, Casey applied for such a declaration. The response was swift and shocking.

Within 48 hours of filing the application "it blew up." Casey's lawyer was told that if the application were pursued, the Attorney General would oppose it and "take her all the way to the Supreme Court of Canada." Given the threat, as well as the leaking of the case to the media, Casey withdrew her application. As Casey explained:

The Attorney General intervened and had a complete fit at the mere idea that the province would support a woman to be a sole parent. That this was something to be pitied and not sought after, this particular role. And that certainly the state had an obligation to object. Because it would open the door for letting dead beat dads off the hook everywhere. And, it would elevate the status of sole parents in society and make this seem like a legitimate family structure, like when in fact it's, the impression I got really is that it's, you know, morally, legally, everything else objectionable to the state at this time. And

⁶¹ The benefit of a declaration of legal parentage is that it can be applied for at the time of the child's birth, whereas a second parent adoption, the method by which non-biological lesbian mothers usually become legal parents, cannot be obtained until the child is six months old.

they made it clear that they would go all the way to the Supreme Court of Canada and fight this tooth and nail. And my lawyer just said, hands down, it's a resource-based system. You will be dragged through the courts for ten years. If you choose to fight this, you will absolutely lose. . . You'd be completely crazy to even try it. You do not go up against a force like that. They've made it clear that they'll stop at nothing to make sure you do not get to be legally recognized as the sole parent of your child.

Casey's experience demonstrates how invested, both economically and socially, the state remains in perpetuating the two parent family. The fear that SMCs will become a strain on the public purse or that single motherhood will become a "legitimate" form of family represent the hallmarks of both neo-liberal and neo-conservative thought. The intervention of the Attorney General also suggests that if SMCs attempt to pursue recognition of their families in the courts, they will face strong opposition.

Interestingly, Casey's story did not end with the withdrawal of her application. Adamant that she be recognized as her child's sole legal parent, she applied six months later to complete a single parent adoption of her own child as a backdoor way by which to achieve sole parentage. In a bizarre turn of events, the application was allowed. Casey and her donor consented to the severing of their parental rights and then Casey adopted her daughter as a sole parent. The entire matter was completed before a desk clerk and left Casey bewildered. As she explained:

The first step was to give up my rights as a birth parent. I did do that even though it's just, I think it's highly objectionable. I objected to having to do that on all kinds of grounds. And certainly,

you know, the Attorney General is a fool in my mind that it even got passed as easily as it did. I thought the desk clerk must have been drunk or something at the time. To like, they did not even question what this was. They signed off, no problem. So the idea that my plan to be my child's sole parent wasn't viable or acceptable to them, but I could adopt my own child without a blink of an eye. It's like, holy smokes!

While Casey achieved her goal of becoming her daughter's sole legal parent, she was concerned about the future. For example, she noted that she had recently filled in several forms which asked whether her child was adopted. She had not known how to respond given that her daughter was both her birth child and adopted. She also worried for her daughter who would likely face similar administrative problems as she got older. Casey thus lamented the fact that the law was not more welcoming to SMCs, arguing that the failure of the law to acknowledge her family had created a much more damaging legal situation for her child.

Casey's story, coupled with the small number of judicial decisions involving SMCs, demonstrate exactly why many of the women felt that, despite their individual preferences, it is simply too risky to conceive with a known donor.⁶² Anonymity brought with it legal certainty and, for as long as the law refused to respect a woman's decision to parent on her own, it remained the most sensible option for most SMCs.

⁶² My research on lesbian mothers revealed similar findings. While about a third of the mothers I interviewed chose to conceive with a known donor, many more would have done so had the law provided some clarity as to the donor's legal status. Fiona Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver: UBC Press, 2011) at 98-101.

Post-birth legal autonomy

Once the women had their children, most were surprised to find that they experienced little overt challenge to their sole parentage. None were challenged when they registered their child's birth as a sole parent, or when they applied for a passport or birth certificate. Enrolling their children in daycare and school also posed no challenge. That the women were rarely questioned about their assertion of sole parentage by bureaucratic bodies such as Vital Statistics is interesting in light of the Supreme Court of Canada decision in *Trociuk v British Columbia*.⁶³ In *Trociuk*, the biological father of triplets challenged the mother's decision to exclude him from their children's birth certificates and give them her surname only. The mother excluded the father on the basis that they had only briefly co-habited prior to the children's conception and that she was essentially raising the triplets on her own. Finding in favour of the father, the Supreme Court held that the statutory provisions⁶⁴ that permitted the mother to "arbitrarily" exclude the father from the children's birth certificates and the process of naming infringed upon his *Charter* equality rights.⁶⁵ Given the decision in *Trociuk*, it is surprising that none of the women were questioned about their child's paternity when registering the birth or applying for a birth certificate. Rather, the assertion of sole parentage by the mothers was accepted without question, suggesting that *Trociuk* has had little impact on the day-to-day practices of Vital Statistics.

Reflecting on why their status as sole parents was rarely questioned by the numerous bureaucratic bodies they encountered, some of the women suggested that they were simply the beneficiaries of a progressive and tolerant

⁶³ *Trociuk v British Columbia (AG)* [2003] 1 SCR 835.

⁶⁴ *Vital Statistics Act*, RSBC 1996, c 479, s 3(1)(b).

⁶⁵ *Trociuk*, *supra* note 63 at paras 15-19.

environment. For example, Lisa, who had moved to Canada in her thirties, believed that the diversity of the city in which she lived meant that she experienced a greater level of acceptance than she would have in her country of origin. As Lisa explained:

I think it's just a very open community where I know that [my son] is not going to be the only child with a single parent, you know. So I think it's the demographics of [this city] where there's so many different families. And I think we are a lot more of an accepting community. I get that sense anyways, so that's why I didn't really hesitate to...do it. Had I been in [my home country], I don't know if I would have got as much support. Um, but I've never done it, so who knows?

Lydia, who grew up on the Canadian prairies, also argued that the diversity and progressiveness of the city in which she lived made it conducive to becoming an SMC. Before having her daughter, Lydia had considered moving back to her hometown to be closer to family, but when she explored the websites of the local fertility clinics she noticed that, in stark contrast to the clinics in the city in which she lived, single women were not even mentioned. She also failed to locate a local SMC support group. Fearing that she might find herself legally and socially marginalized in the prairies, Lydia decided to stay put.

Several of the women speculated that they also reduced the likelihood of bureaucratic challenge by approaching situations pro-actively. For example, a number of the mothers noted that when they enrolled their child in a new daycare or school they usually made an appointment with the appropriate official to discuss their family situation. This was designed to reduce speculation about the family's circumstances and

circumvent any challenge to the mother's assertion that she was the child's sole parent. Given that many school and daycare enrolment forms require the contact details of the child's father or, if the parents are separated, a custody agreement indicating each parent's level of access, the mothers felt it best to address the issue pro-actively. As Lydia, who always wrote "Not applicable" on the "father" section of forms, explained, "I'm straight up with everybody, you know? I don't want them to feel uncomfortable asking and have the awkwardness there. It's more proactive as opposed to waiting."

While few of the women had experienced overt legal challenge to their assertion of sole parentage, most had felt the subtle impact of a legal and social environment that assumes and favours the two-parent, biological family. Whether filling in school enrolment forms or crossing international borders, the women found themselves carefully negotiating a normative environment that rendered them suspect. The circumstance in which the women were most frequently challenged as SMCs was when they travelled internationally with their children. Border crossings usually resulted in extensive questioning of the women and, sometimes, their children. Interestingly, all of the women who had experienced harassment during border crossings noted that Canadian immigration officials were the most likely to challenge them and were the most rigorous in their questioning. Lisa described a fairly typical situation where she was returning to Canada from the United States with her toddler son:

I went to the States. I was grilled on the way back to Canada. I only ever travel with his passport. I'd never considered that I needed his birth certificate. And the guy at the border crossing on the way back said, "Okay, well, who's his dad?" And I said, "Well, he doesn't have one." And he said, "He's got to have one." I said, "You know, I had a donor. He's a donor

baby.” And he said, “Well, what’s to say you’re, you know, you’re not taking him out of the country?” And I was like, “Well, I’m coming back into Canada!” So there was this whole big thing. So he, he gave me, you know, a bit of the third degree. And I was like, okay, but I’ve never been asked this before. And he said, “But you’re just telling me you’re his Mum.” “Well, I am!” And he said, “Well, you know, you should have his birth certificate.” So, of course the next three times I went across the border I had his birth certificate and his passport and nobody asked.

While immigration officials have an obligation to ensure that a child is not being abducted, the women felt that the guards subjected them to an unusual level of questioning, particularly once they asserted that their child did not have a father. After her experience with the border guard, Lisa suggested that birth certificates include some mechanism for verifying that the child has only one legal parent so questioning of the kind she experienced could be avoided.

In an attempt to diminish challenges such as those experienced at the border, many of the women had obtained a letter from their fertility clinic indicating that their child was donor conceived and had only one parent. A number of the women noted that border officials routinely asked for a clinic letter as “proof” when the mother asserted that the child was donor conceived, suggesting that such letters have become part of the legal fabric surrounding SMCs. Of course, only those who conceive at a fertility clinic can produce such a letter, reinforcing the vulnerability of women who conceive with known donors. Marjorie, who conceived her two daughters with a known donor, travels with a statutory declaration stating that she is their sole parent. However, she quickly noted that “it has no real legal standing.”

While the women experienced little overt legal challenge to their assertion of sole parentage, they were all very conscious of the times where they were potentially vulnerable. They carefully negotiated those situations by being pro-active and gathering supporting documentation, perpetually ready to meet the challenge. Though few complained about the situation in which they found themselves, a number voiced frustration that even in the face of dramatic legal and social change, the non-normative nature of their families attracted additional surveillance.

CONCLUSION

The law was rarely an overt presence in the lives of the SMCs interviewed, but it nonetheless shaped some key aspects of their motherhood. Provincial parentage laws denied them a mechanism by which to clearly establish their sole parentage and required them to accept legal uncertainty if they wished to conceive with a known donor. The law's preference for, and assumption of, a two-parent family meant that they needed to be pro-active in explaining their situation in order to avoid bureaucratic challenge. Finally, the women found that the *lack* of law surrounding the fertility industry meant that sperm banks and fertility clinics determined important issues such as the number of offspring a donor could produce. While law reform was not an explicit topic of the interviews, the women expressed support for reforming Canada's legal parentage laws, as well as the fertility industry. Most supported a complete overhaul of provincial parentage laws to include the explicit recognition of SMC-headed families and clarification of the legal status of known donors. All of the mothers also called for reform of the fertility industry, with many noting that Canada needed to develop its own sperm banks so that the lack of regulation in the United States would no longer be a burden experienced by Canadian SMCs.

At present, SMCs have little voice at the law reform table. Despite representing approximately 13 per cent of clients using fertility services in British Columbia, SMCs were not mentioned once in the many law reform documents associated with British Columbia's new parentage laws. It is thus not surprising that the reforms offer only minimal recognition for SMCs. Yet, as their numbers grow and their sense of community is strengthened, there is no doubt that SMCs will join lesbians, gay men, and other non-normative families at the bargaining table, demanding recognition of their families of choice.