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Angela Cameron

Vanessa Gruben

Fiona Kelly

DE-ANONYMISING SPERM DONORS IN CANADA: SOME DOUBTS AND DIRECTIONS

Angela Cameron, Vanessa Gruben,[*] and Fiona Kelly[**]

Abstract: *This paper addresses whether sperm donor anonymity should continue in Canada and what the effects might be of abolishing anonymity, particularly for marginalized groups such as lesbian mothers. The first part of the paper outlines the legislative and historical context surrounding the donor anonymity debate in Canada. The second part of the paper addresses the interests of the various social and legal stakeholders, including donor conceived offspring, the social and biological parents of those offspring, and sperm donors. The final segment outlines a twofold law reform agenda. First, it is proposed that Canada prospectively abolish donor anonymity in an effort to meet the health and psychological needs of donor conceived children. Second, it is recommended that legal parentage laws be simultaneously amended so that the legal vulnerabilities women-led families currently experience, and which would be exacerbated by the de-anonymizing of donors, are removed.*

INTRODUCTION

At present, Canadian law permits sperm donor anonymity. What this means is that donor conceived offspring cannot know the identity of their donor and their donor cannot know the identity of any offspring born as a result of their donations.

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[*] Assistant Professors, Faculty of Law, University of Ottawa. We would like to thank our research assistant Sindura Dar for her work.

[**] Assistant Professor, Faculty of Law, University of British Columbia.

Offspring also do not have access to updated medical information pertaining to their donor. While the majority of donated sperm used by prospective parents in Canada falls into the category of "anonymous", also available are what are referred to as "identity release" or "open ID" donors. Identity release donors have agreed to allow identifying information to be provided to donor offspring when the offspring reach the age of majority. Identity release donors are, however, far less common in Canada than completely anonymous donors and this option has only become available in the last few years.

Whether sperm donor anonymity should remain the predominant law of Canada, or whether we should move to a system of compulsory identity release donors or even retroactive de-anonymisation, are questions Canadians have struggled with for many years. The issue has become more pressing recently for a number of reasons. First, more and more Canadians, whether they be heterosexual couples, same-sex couples, or single women, are using assisted reproduction technologies ("ARTs") that require donated sperm to create their families.[1] Second, there is a growing emphasis on the use of family and genetic history in the prevention and treatment of disease.[2] This, in turn, is increasing the emphasis on biological

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1 In 2005 2, 687 AHR cycles resulted in a live birth: "Hope, Health and Safety: 2007-2008 Annual Report," Assisted Human Reproduction Canada, online: Assisted Human Reproduction Canada <http://www.ahrc-pac.gc.ca>. While in 2006 12,052 ART cycles resulted in live births: 2005 and 2006 Art Reports, online: The Canadian Fertility and Andrology Society <http://www.cfasonline.ca>. This is consistent with the global trends which illustrate a 25 percent increase in ART cases between 2000 and 2002 with approximately 250,000 live births in 2002: Will Boggs, "Assisted Reproduction Rates Increasing Worldwide" *Reuters* (4 June 2009), online: Reuters <http://www.reuters.com/article/healthNews/idUSTRE5536KG20090604>.

2 Josephine Johnston, "Mum's the Word: Donor Anonymity in Assisted Reproduction" 11 Health L. Rev. 51 at 53 [Johnston].

connections and the desire to know one's biological progenitors. Third, a number of provinces have amended their adoption legislation to permit retroactive disclosure of adoption records once the adoptee has reached the age of majority.[3] The shift towards retroactive identity disclosure in the adoption context has prompted Canadians to question ongoing anonymity in the context of sperm donation. Finally, a recent class action suit filed in British Columbia challenging the destruction of sperm donor records as well as donor anonymity more broadly, *Pratten v. Attorney General of B.C. and the College of Physicians and Surgeons of B.C.*,[4] has brought significant public attention to the issue. Over the next few years, the *Pratten* litigation will force the Canadian courts to address the appropriateness of donor anonymity for the first time.

In this paper, we address whether donor anonymity should continue in Canada and what the effects of abolishing anonymity might be, particularly for marginalized groups such as lesbian mothers. De-anonymisation is typically understood

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3 See, for example, *Adoption Act*, R.S.B.C. 1996, c. 5, ss. 58-74 [B.C. *Adoption Act*]; *Child and Family Services Act*, R.S.O. 1990, c. 11, ss. 145.1-145.2; *Vital Statistics Act*, R.S.O. 1990, Chapter v.4, ss. 48.3-48.7. Ontario's new disclosure provisions came into force on 1 June 2009.

4 Unreported judgment, 28 October 2008 [*Pratten*]. In this case the plaintiff successfully sought an injunction preventing any changes to or destruction of donor sperm records in British Columbia. She is a 26 year old donor conceived woman whose only information about her sperm donor consists of his basic physical characteristics. The remainder of Pratten's claim argues violations of both s. 7 and s. 15 of the *Charter*. The plaintiff argues that donor conceived offspring are treated differently from those who are adopted. Donor conceived offspring cannot access medical, social, or identifying information pertaining to their donor, unlike adopted children when they reach the age of majority.

to permit donor conceived offspring, and possibly donors, to access identifying information about each other once the offspring reach the age of majority. If applied retroactively, it would permit identity disclosure in situations where both the intending parents and donor had operated under an expectation of complete anonymity. While the abolition of donor anonymity could take a number of forms, the majority of those advocating for it seek complete and retroactive disclosure. The first part of the paper outlines the legislative and historical context surrounding the donor anonymity debate in Canada. The second part addresses the interests of the various social and legal stakeholders, including donor conceived offspring, the social and biological parents of those offspring, and sperm donors. In this section we argue that while de-anonymising sperm donors may provide some benefits to donor conceived offspring, to make such a change, particularly if retroactive, without first providing adequate legal protections for women-led families – lesbian families and those headed by single mothers by choice – is likely to create significant vulnerabilities. The article concludes by outlining a twofold law reform agenda. First, we propose that Canada prospectively abolish donor anonymity in an effort to meet the health and psychological needs of donor-conceived children. Second, we recommend that legal parentage laws be simultaneously amended so that the legal vulnerabilities women-led families currently experience, and which would be exacerbated by the de-anonymisation of donors, are removed.

Although both sperm and egg donation raise many comparable legal concerns, because there are significant gendered differences between the two practices they warrant individualized attention.[5] Due to these differences, this paper addresses sperm donation only.[6]

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[5] There are two reasons for this division of gametes; both implicate important gendered differences between egg and sperm donation. First, a full analysis of ova donation will require an examination of

THE HISTORY OF SPERM DONOR ANONYMITY IN CANADA

In March 2006 the federal government introduced the *Assisted Human Reproduction Act* (the "*AHRA*"),[7] which governs many aspects of assisted human reproduction, including sperm donor anonymity. This legislation, however, was preceded by two decades of public debate and government inquiries exploring, in part, issues related to sperm donation and the question of anonymity. In the discussion below, we describe these debates in some detail, as they highlight the variable public and government positions on sperm donor anonymity that have been considered to date in Canada.

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reproductive technologies such as surrogacy, which is beyond the scope of this paper. As feminists we begin our analysis from the reproductive autonomy of women, and would wish to deal extensively with the gendered implications of ova donation. Second, from the perspective of women's health, the process of egg donation is significantly more onerous and dangerous than sperm donation. Sperm retrieval is a relatively easy process and involves no direct medical intervention. In contrast, ova retrieval is a difficult and painful medical procedure which carries with it several serious side effects. The egg donor must undergo hormone treatments and the ova must be surgically retrieved from her ovaries. There are significant risks associated with both the hormone stimulation and the retrieval, the most serious being ovarian hyperstimulation syndrome. A separate paper taking into account the implications of these gendered health risks is warranted.

6 In fact, the Royal Commission on Reproductive Technologies concluded that these processes were not parallel and made different recommendations with respect to each: Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Minister of Government Services Canada, 1993) at 588 [Commission]. This paper also does not address donated embryos and the questions arising from their use in assisted human reproduction procedures.

7 *Assisted Human Reproduction Act*, S.C. 2004, c. 2 [*AHRA*].

Royal Commission on New Reproductive Technologies (1989)

In 1989, the federal government created the Royal Commission on New Reproductive Technologies (the "Commission") to study reproductive technologies and their regulation in Canada. The Commission made 293 recommendations, including that sperm donation remain anonymous.[8] Importantly, the Commission concluded that egg and sperm donation are different processes which give rise to distinct concerns and, accordingly, made different recommendations with respect to each.[9] Egg donation is significantly more onerous and dangerous than sperm donation because ova can only be retrieved surgically from a woman's ovaries.[10] Further, the difficulties associated with freezing ova means that egg donation is generally restricted to fresh ova which results in fewer ova and poses greater risk of contracting body-fluid borne pathogens, such as HIV.[11]

The Commission articulated several rationales in support of its recommendation to maintain the anonymity of sperm donors. First, the Commission was concerned that disclosure of the donor's identity would invade the privacy and security of the newly formed family.[12] In addition, for those who decide to use an anonymous donor as opposed to a known

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8 The Commission recommended that identifying information about sperm donors remain confidential, *supra* note 6 at 476 (Recommendation no. 88).

9 *Ibid*. at 588.

10 *Ibid.*

11 Tao Tao & Alfonso De Valle, "Human Oocyte and Ovarian Tissue Cyropreservation and its Application" (2008) 25 J. Assist. Reprod. Genet. 287.

12 *Supra* note 6 at 443.

donor, and who choose to structure their family in such a way as to exclude the donor from the family, erasing donor anonymity directly undermines this choice. Second, the Commission expressed concern that full disclosure would affect the supply of donor sperm because fewer men would be willing to donate knowing that offspring could contact them later in life.[13] The Commission indicated that the ambiguity surrounding the legal status of sperm donors—specifically, whether donors may be financially or legally responsible for their donor conceived offspring—raised significant concerns. The Commission indicated that donors were particularly concerned that they be protected from the legal responsibilities of parenthood.[14] Third, the Commission noted that children conceived using donor sperm are not unlike many other children who do not know the identity of their male progenitor. The Commission cited that approximately 6-10% of children have no father identified on the birth certificate.[15] Further, the Commission noted that the likelihood of non-paternity in children of heterosexual intimate couples in the general population may be as high as 10%.[16]

The Commission did recognize the donor conceived offspring's interest in receiving information about his or her biological progenitor. In particular, the Commission affirmed the importance of donor information to the offspring's physical and psychological well-being. However, the Commission ultimately took the position that these considerations were outweighed by factors that supported donor anonymity and could be met through the disclosure of non-identifying information.

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13 *Ibid.* at 444.

14 *Ibid.* at 441.

15 *Ibid.* at 443.

16 *Ibid.* at 441.

House of Commons Standing Committee on Health: Assisted Human Reproduction (2001)

The question of donor anonymity arose again in 2001 when the House of Commons Standing Committee on Health (the "Standing Committee") was asked to review a draft version of the *AHRA*. The Standing Committee heard a number of diverse perspectives on the issue of donor anonymity. The Standing Committee concluded that "where there is a conflict between the privacy rights of a donor and the rights of a resulting child to know its heritage, the rights of the child should prevail".[17] Unlike the Royal Commission, the Standing Committee recommended that "consent to the release of identifying information be mandatory before accepting an individual" as a sperm donor.[18] However, the Standing Committee did not recommend any particular model for de-anonymising sperm donation.

THE CURRENT LEGAL STANDARDS

The *Assisted Human Reproduction Act*: Preserving Donor Anonymity

Despite the Standing Committee's recommendation that donation of sperm be open, the *AHRA*, passed in 2004, preserves the anonymity of donors. It does so by prohibiting the disclosure of any identifying information about the donor without his consent. However, the *AHRA* does address some of the concerns that arise from donor anonymity, most notably, those that relate to the physical and psychological health and well-being of the offspring. The *AHRA* requires the disclosure of certain non-identifying information about the donor,

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17 House of Commons Standing Committee on Health, "Assisted Human Reproduction: Building Families" (December 2001) at 21.

18 *Ibid.* at 24.

including a basic family medical history, information about personal characteristics such as hair colour, eye colour, height, weight, etc. to the person undergoing the assisted human reproduction procedures,[19] as well as to the donor-conceived offspring[20] and his or her descendants.[21]

The Assisted Human Reproduction Agency of Canada (the "Agency") is responsible for much of the disclosure of non-identifying information about the donor to the donor-conceived offspring.[22] The Agency is charged with creating and maintaining a registry of personal health information of (1) donors; (2) individuals undergoing assisted human reproduction procedures; and (3) those conceived using AHR procedures.[23] The registry will be used for several purposes in addition to providing non-identifying information to the donor-conceived offspring. One of the most important functions of the registry will be to ensure that individuals who know or suspect they were conceived using ARTs will be able to determine whether they are biologically related to another person by making an application with that person to the Agency.[24] This is designed to prevent donor offspring from mistakenly engaging in intimate relations with partners who are biologically related to them.

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19 *Supra* note 7, s. 15(4).

20 *Ibid.,* s. 18(3).

21 *Ibid.*

22 *Ibid.*

23 *Ibid.,* s. 17. Given that the majority of sperm used by intending parents in Canada is imported from the United States, this registry may be of limited practical utility.

24 *Ibid.,* s. 18(4).

The *Pratten* Litigation: Challenging Donor Anonymity

Following the introduction of the *AHRA* in 2004, donor anonymity has become well established in Canadian law. However, the practice has recently come under threat as a result of class action litigation challenging the constitutionality of maintaining anonymity.[25] In *Pratten*, the plaintiff, a donor conceived adult, is challenging the constitutionality of preserving donor anonymity in the context of assisted human reproduction. The case alleges two distinct constitutional violations. First, Pratten argues that the destruction of medical records pertaining to donor conception, as required by provincial regulations, violates the donor-conceived offspring's right to security of the person protected by section 7 of the *Canadian Charter of Rights and Freedoms*[26] (the "*Charter*") . Pratten argues that this right is violated because the records are not available to the offspring in circumstances of medical necessity, such as when it is required to safeguard his or her physical or psychological health. Pratten argues that this violation is not in accordance with the principles of fundamental justice because it is arbitrary, irrational, disproportionate, under-inclusive, and contrary to the duty of the state to reasonably accommodate certain persons with disabilities.

The second constitutional violation Pratten alleges relates to British Columbia's *Adoption Act*[27] (the "*Adoption Act*") and its regulations. She argues that the B.C. *Adoption Act* contravenes section 15 of the *Charter* because, unlike for adopted offspring, it fails to include a process whereby donor-

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25 Ms. Pratten's statement of claim can be accessed online: Arvay FinlayBarristers <http://www.arvayfinlay.com/news/Writ%20of%20Summons%20and%20Statement%20of%20Claim.pdf>

26 *Canadian Charter of Rights and Freedoms,* R.S.Q c. C-12.

27 *B.C. Adoption Act, supra* note 3.

conceived offspring can learn the identity of their donor once they reach the age of majority. In other words, it treats adopted offspring and donor-conceived offspring differently.

In October 2008, Pratten was successful in securing an injunction to prevent the destruction of any existing records, including those that might pertain to her own conception. As of April, 2010, the case had not yet been heard.

Although Pratten's lawsuit does not squarely engage the provisions of the *AHRA* which protect donor anonymity, if successful, the case will certainly have an impact on them. In addition, the case has already attracted significant media attention and is likely to continue to do so. As a result, the question of donor anonymity will likely be near the top of Parliament's agenda when it undertakes a review of the *AHRA,* which is required by law later this year.[28] Given the often emotive nature of the public debate, it is of vital importance that the *legal* effects of abolishing donor anonymity be analyzed with care.

Legal Parentage in the Context of Assisted Conception

While the *AHRA* provides a comprehensive framework governing the disclosure of information about donors and donor-conceived offspring, the legal status of donors, if any, with regard to the families who use their sperm to conceive remains unaddressed. Legal parentage is the domain of provincial governments, yet few provinces have addressed the issue via legislation. Those that have are inconsistent in the approach they have taken. As a result, the extent of a sperm donor's rights and responsibilities, if any, *vis-à-vis* donor-conceived offspring are uncertain. Is the donor responsible for child support? Does the donor have a right to contact or access the offspring? How do the rules of intestacy apply? These

28 *Supra* note 7, s. 70.

uncertainties have aggravated existing concerns about the abolition of donor anonymity. If anonymity is to end, the law needs to be clear about the donor's legal status.

The few provinces that have enacted legislation addressing the legal status of sperm donors explicitly state that a man who donates sperm does not enjoy any legal status as a parent *vis-á-vis* the offspring. For example, Alberta's *Family Law Act*[29] provides that a sperm donor who is not in a "relationship of interdependence of some permanence" with a female person has no legal status as a parent to offspring conceived using his sperm. Similarly, in Quebec, the contribution of genetic material for the purposes of a third party "parental project" does not create any bond of filiation or parental relationship between the donor and the offspring conceived there from.[30] In both provinces, the legislation applies to both heterosexual and same-sex couples who achieve conception via ARTs.

By contrast, a man who is *not* the biological progenitor of offspring conceived using ARTs may acquire status as a legal parent under certain circumstances. For example, in Alberta, a man may qualify as a legal parent if, at the time of an assisted conception, he was the spouse of or in a relationship of interdependence of some permanence with the woman who gave birth to the offspring and he consented to the reproductive procedure.[31] In Quebec, there is a presumption that the spouse

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29 *Family Law Act* S.A., c. F-4.5, s.13(3).

30 Art. 538.2 C.C.Q. While not explicitly defined, 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:" Art. 538 C.C.Q. The civil code applies to filiation rules only where the donation does not occur through sexual intercourse.

31 *Family Law Act*, *supra* note 29.

of the woman who gives birth to the child is the child's other parent, providing the individuals are party to a "parental project". However, this presumption can be rebutted in several situations.[32] Similar statutory provisions exist in Newfoundland and Labrador,[33] Nova Scotia,[34] and the Yukon.[35]

A small number of provinces have explicitly addressed the parental status of non-biological mothers in lesbian-led families created via ARTs, extending the same protection to them as they do to non-biological fathers. For example, Quebec's *Civil Code* explicitly provides that where both parents are women, the rights and obligations assigned by law to the father, are assigned to the mother who did not give birth to the child.[36] However, as discussed below, Quebec courts have granted a known sperm donor the rights and obligations of a father even where both members of a lesbian couple appeared to acquire parental status under the legislation and

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32 Art. 538.3 C.C.Q. The presumption applies where the child is born during the marriage, the civil union or within 300 days of its dissolution or annulment.

33 A sperm donor will not be considered the legal father of a child where his semen is used to artificially inseminate a woman to whom he is not married or with whom he is not cohabiting at the time of the insemination: *Children's Law Act,* R.S.N.L. 1990, c. C-13, s. 12(6) [*CLA*]. A man whose semen is used to artificially inseminate a woman to whom he is married or with whom he is cohabiting is considered in law to be the father of the child: *CLA,* s. 12 (2). Similarly, a man whose semen is not used to artificially inseminate a woman to whom he is married or cohabiting where he consents in advance to the artificial insemination is considered in law to be the father of the child: *CLA*, ss. 12(3) and (4).

34 *Birth Registration Regulations*, N.S. Reg. 390/2007**,** s. 3(1) [*Birth Registration Regulations* (see next page)].

35 *Children's Act,* R.S.Y. 2002, c. 31, s. 13.

36 Art. 539.1 C.C.Q.

intended to exclude the known sperm donor from the family unit.[37] In Nova Scotia, the *Birth Registration Regulations* states that where a child is conceived through ARTs, the spouse of the mother is the child's other parent.[38] The use of the gender neutral term "spouse" appears to extend recognition to either a female or male partner.

The dearth of legislation in Canada addressing the parentage of children born via sperm donation is a significant concern for those who are already unsure about the merit of abolishing donor anonymity. Without clear parentage laws in place for families who conceive using ARTs, it is not obvious who the child's legal parents might be. Families are justifiably concerned that, without the protection of the law, donors might intervene in their established relationships and pose a threat to their family security. Lesbian families have reason to be particularly concerned given how few provinces protect the parentage of non-biological mothers. Single mothers by choice are also vulnerable to donor intervention given that the absence of a second parent.

EQUALITY CONCERNS AND SPERM DONATION

Both preserving the status quo (sperm donor anonymity) and de-anonymising donors once a child reaches the age of majority raise a number of questions. What are the consequences of de-anonymising donation? What is in the best interests of the offspring? How do we protect and promote Canadian families? In the next section we will discuss some of these issues, addressing the interests of each of the stakeholder groups: (a) donor-conceived offspring; (b) those who use donor sperm, focusing in particular on the unique vulnerabilities of women-led families; (c) donors; and, (d) prospective parents.

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37 *Infra* notes 84 and 86.

38 *Supra* note 35.

The Rights and Interests of the Donor-Conceived Child

Much of the debate around de-anonymising sperm donors centers on the right of donor offspring to know their genetic origins. "Knowing ones genetic origins" is defined variably to include a right to access health and psychosocial information, to know the identity of the gamete donor, or even to meet and form a relationship with the donor. This "right" is not without critique. For example, the right to know one's genetic origins has been criticized by feminist scholars on the basis that it promotes genetic essentialism. They argue that in countries that have de-anonymized sperm donors "children may attempt to find their 'parents' not necessarily because of a 'natural' desire to know their origins, but because such a desire is constructed, recognized and legitimized by the law".[39] In this section we address the rights and interests of donor conceived offspring, focusing on their physical and psychological health needs as well as the legal mechanisms they have drawn on to support their claims.

Knowledge of one's family and genetic history is increasingly important in the prevention and treatment of disease. This is certainly true for diseases that are linked to specific genes, such as Huntington's disease, or the association between the BRCA1 and BRCA2 gene and breast cancer.[40] One's family medical history is also arguably important in making day-to-day health decisions. For example, if there is a family history of colon cancer, a person may decide to have a

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39 Ilke Turkmendag, Robert Dingwall, & Therese Murphy, "The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-be Parents" (2008) Int'l J. of Law, Policy and the Family 283 at 291.

40 A mutation in the BRCA1 and BRCA2 gene is the most commonly detectable cause of hereditary breast cancer: Mark Robson & Kenneth Offit, "Management of an Inherited Predisposition to Breast Cancer" (2007) 357 N. Engl. J. Med. 154.

colonoscopy at an earlier age. Since genetic information is considered an important tool in the prevention and treatment of disease, this tends to be the most frequently invoked and readily accepted argument in support of abolishing sperm donor anonymity.[41] De-anonymisation is considered by some to be the most effective way to gain access to this information. However, alternatives that do not involve de-anonymisation are available, such information registries like the one provided for in the *AHRA*.[42]

The right to know one's genetic origins is also considered by some to be vital to donor offspring's psychological health.[43] At least two types of psychological harm to offspring have been identified. First, it is argued that donor-conceived offspring may suffer psychological damage as a result of the presence of a secret being kept in the home.

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41 Johnston, *supra* note 2 at 52.

42 Many of these health concerns will be addressed by privacy and access to information provisions of the *AHRA,* which are not yet in force. See Vanessa Gruben, "Assisted Reproduction Without Assisting Over-Collection: Fair Information Practices and the Assisted Human Reproduction Agency of Canada" (2009) 27 Health Law Journal 229 [Gruben]. Practically speaking, for many decades preceding the coming into force of these provisions, families and offspring have received significant non-identifying information about their donor including family history, health, and genetic information about the donor, robust physical descriptions, and in some cases social information such as favourite colour, hobbies, photographs of the donor in child and adulthood, and essays about why they donated sperm.

43 Professor Michelle Giroux, "Should Egg and Sperm Donors Remain Anonymous?" (Paper presented at Public Panel Discussion on Gamete Donor Anonymity, March 26th, 2009, University of Ottawa Faculty of Law) [unpublished] [Giroux]; Michelle Dennison, "Revealing Your Sources: The Case for Non-Anonymous Sperm Donation" (2007-08) 21 J.L. & Health 1 at 16.

Much research has been done in the context of adoption concerning the harm that is inflicted on children as a result of keeping secrets.[44] A similar argument is raised in the context of donor offspring, who face similar psychological burdens if they discover that their biological identity has been kept a secret by their intending parents.[45] The problem identified by this argument is not with anonymity; rather, it is with parents who are not honest with their children about the nature of their conception. Although de-anonymisation may prompt more parents to be open with their donor conceived children, a more effective solution would be to either require or encourage parents to disclose to their children that they are donor-conceived. An increasing number of fertility clinics are counseling parents to do so, though the rates of disclosure remain low within the heterosexual community.[46]

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44 Amanda Baden & Mary O'Leary Wiley, "Counselling Adopted Persons in Adulthood: Integrating Practice and Research" (2007) 35 The Counselling Psychologist 868; Marianne Brower Blair, "The Impact of Family Paradigms, Family Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination" (2000-01) 22 Mich. J. Intl Law 587.

45 A. Lalos, C. Gottlieb, & O. Lalos, "Legislated Right for Donor-Insemination Children to Know Their Genetic Origin: A Study of Parental Thinking" (2007) 22 Human Reproduction 1759 at 1766 [Lalos, Gottlieb & Lalos]. See also: Angela Campbell "Conceiving Parents through Law" (2007) 21 International J of Law, Policy & the Family 242.

46 For example, in a study of heterosexual couples from Sweden who had conceived via donor insemination, 89% had not informed their children: Claes Gottlieb, Othon Lalos, & Frank Lindblad, "Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes" (2000) 15 Human Reproduction 2052.

The second psychological concern for donor offspring is that an inability to access one's genetic history may result in emotional harm because the affected individuals do not have access to one half of their "identity". For some, knowledge of one's biological progenitors is necessary to having a fuller sense of one's own individual identity.[47] This may be limited to knowledge of social information such as eye colour, height, and education, information already provided by the existing system in Canada. However, it may also extend to knowing the actual identity of the donor and forming a relationship with him.[48] For those who wish to meet their donor, the abolition of anonymity is the only viable option.

Those advocating for the interests of donor offspring, including offspring themselves, have raised various legal arguments to support their right to know their genetic origins.[49] Many have drawn on international law.[50] For example, the right to know one's genetic origins is considered by some to be a right protected by several provisions of the UN Convention on

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47 A. J. Turner & A. Coyle, "What Does it Mean to be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy" (2000) 15 Human Reproduction 2041 at 2046.

48 *Ibid.* at 2047.

49 For a discussion of the various rights-based arguments raised in the context of the *European Convention on Human Rights,* see Giroux, *supra* note 43.

50 Eric Blyth & Abigail Farrand, "Anonymity in Donor-Assisted Conception and the UN Convention on the Rights of the Child" (2004) The Int'l J. of Children's Rights 89 at 93 [Blyth & Farrand]; Michelle Giroux, "Le droit fondamental de connaître ses origines biologiques: impact des droits fondamentaux sur le droit de la filiation" (2006) Revue du Barreau / Numéro thématique hors série 255-294; Lucy Frith "Gamete Donation and Anonymity: The Ethical and Legal Debate" (2001) 16 Human Reproduction 818 at 820-21.

the Rights of the Child (the "CRC").[51] These include: Article 3 (the best interests of the child), Article 7 (the right to know and be cared for by one's parents), Article 8 (respecting the right of the child to preserve his or her identity), the Preamble and Article 18 (which together require respect for identity, family and private life), Article 13 (right to information), and Article 2 (non-discrimination).

Article 3 of the CRC requires that the best interests of the child should be a primary consideration in all actions concerning children. Those advocating for de-anonymisation have argued that it is in the best interests of children to know the identities of their biological progenitors and that this is best achieved through the abolition of donor anonymity.[52] However, Article 3 has also been invoked to *support* maintaining donor anonymity.[53] It has been argued that anonymity is, in fact, in the best interests of the child. In families where donor offspring have been raised by social parents, an overemphasis on biological notions of family at the expense of social notions of family undermines and diminishes the donor offspring's social family.[54] Further, donor anonymity may be in the best interests of the child where it protects the offspring from unwanted intrusion by the donor, or in circumstances where previously anonymous donors express homophobia or racism towards the offspring's social parents or family. Finally, similar disclosure rules do not apply to children conceived through heterosexual intercourse. Biological mothers may not know, or choose to disclose the true male progenitors of their children, for numerous reasons.

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51 Blyth & Farrand, *ibid.*

52 Johnston, *supra* note 2 at 52.

53 Blyth & Farrand, *supra* note 50 at 94.

54 See Daphne Gilbert & Diana Majury, "Infertility and the Parameters of Disability Discourse" in Dianne Pothier & Richard Develin Eds., *Critical Disability Theory* (Vancouver: UBC Press, 2006) at 295-6.

Article 7, the article of the CRC most frequently cited in support de-anonymisation, states:

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Some member states, such as Austria, have interpreted Article 7 to give effect to the donor-conceived person's right to know the identity of the donor.[55] However, such an interpretation depends on how one defines "parents" and whether it necessarily includes a genetic connection.[56] Non-biological lesbian mothers act as parents to their children and are almost always recognized as such by the children themselves.[57] Thus, Article 7 could just as easily be interpreted to protect the children of lesbian parents from the intrusion of a donor who is no more than a sperm provider.

In Canada, the *Pratten* litigation has suggested that there may be a number of domestic laws that favour de-anonymisation. As noted above, Pratten argues that the right to know one's genetic origins may be protected by sections 7 and 15 of the *Charter*. She alleges that donor anonymity violates the security of the person protected by section 7 as it threatens the offspring's physical and psychological health. With regard to section 15, Pratten argues that donor anonymity violates the equality rights of donor offspring by failing to make available to them a process such as that available to adoptees by which

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55 Blyth & Farrand, *supra* note 50 at 94.

56 *Ibid.*

57 A. Brewaeys *et al.*, "Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families" (1997) 12 Human Reproduction 1349 at 1356 [Brewaeys *et al.*].

they can learn the identity of their donor when they reach the age of majority. Given that the case has not yet been heard, it is difficult to know how a court might respond to Pratten's argument.[58] However, should she be successful, the issue then becomes *how* such a process might be managed, including what options might be available to both donors and donor offspring for lodging vetoes or non-disclosure requests.

While the health and identity-related issues raised by donor offspring must be taken seriously, the de-anonymisation of sperm donation, particularly if applied retroactively, could also lead to several damaging consequences. In the next section, we address some of these consequences, focusing on the potential impact of de-anonymisation on women-led families.

Interests of Canadian Families

Many Canadian families are worried about de-anonymising sperm donors. Parents are concerned that the donor will intrude into and disrupt the family unit. This concern is aggravated by inconsistent legislation regarding the parental status of donors and social parents. While there are some commonalities, the concerns of heterosexual families are often starkly different from women-headed families. The next section describes the concerns of lesbian-led and single mother families and the potential consequences of de-anonymisation on these families.

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[58] Vanessa Gruben & Daphne Gilbert, "Equality and Security: Assessing the Charter Rights of Donor-Conceived Offspring" in Juliet Guichon, Ian Mitchell, & Michelle Giroux, *The Right to Know One's Origins* (Montreal: McGill-Queen's University Press) [forthcoming].

The Equality Rights of Women Using Donors: Lesbian and Single Choice

De-anonymising sperm donors creates unique concerns for women-headed families that must be addressed *before* we proceed with abolishing or further regulating sperm donor anonymity. Women-headed families include lesbian couples as well as single women, regardless of sexual orientation, who have used an anonymous sperm donor to conceive. While de-anonymisation is typically understood to permit donor conceived offspring, and possibly donors, to access identifying information about each other once the offspring reach the age of majority, there is a strong movement proposing a complete ban on anonymity at any stage.[59] This means that women-led families are vulnerable to having previously anonymous sperm donors inserted into their family against their wishes before their children reach the age of majority and choose such a relationship themselves. The legal vulnerabilities described below may also be exacerbated where the women heading these families are also racialised, differently abled, or living in poverty.[60]

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[59] Some donor conceived adults, particularly those who were not informed of their origins until later in life, believe donor anonymity should be banned altogether. This position is frequently voiced by donor conceived adults on the Donor Sibling Registry list-serves and has been expressed in published material written by donor conceived adults. See, for example, "Narelle's story" in Heather Grace Jones & Maggie Kirkman, eds., *Sperm Wars: The Rights and Wrongs of Reproduction* (Sydney: ABC Books, 2005) 170.

[60] In the context of Canadian family law, women living at the intersection of multiple oppressions are more vulnerable to having access or custody of their children awarded to fathers or father figures against their wishes. See Susan B. Boyd, *Child Custody, Law and Women's Work* (Don Mills: Oxford University Press, 2003).

Women-headed Families

We know that many queer and single mother-led families are using ARTs to bring biological children into their families. For instance, recent Canadian statistics indicate that 15-20% of those using fertility clinics are lesbian women.[61] Similar statistics have been cited with regard to single women.[62]

While there are a myriad of queer family forms[63] there are four basic forms of queer families in Canada that may be affected by questions of sperm donor anonymity:

1) A lesbian couple in an intimate relationship who conceives using an *anonymous* sperm donor in a fertility clinic setting to conceive and create a "homo-nuclear" family.

2) A single woman, whether heterosexual or lesbian, who conceives using an *anonymous* sperm donor in a

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61 In 2001, an employee of the Genesis Fertility Clinic in Vancouver testified before the B.C. Human Rights Tribunal that of the 400 assisted inseminations the clinic performs each year, 15 to 20 per cent are for same-sex couples: *Gill and Maher, Murray and Popoff v. Ministry of Health*, 2001 BCHRT 34.

62 According to Dr. Sam Batarseh, director of IVF Canada, the number of single women coming to him for donor insemination has tripled over the last 30 years: Helen Buttery, "The Single Life: Affluent, Educated and Autonomous – Why are more Women Enjoying Motherhood on their Own?" *Elle Canada*, online: Elle Canada< http://www.ellecanada.com/living/the-single-life/a/24814>.

63 Including the possibility, at least in Ontario, of a three parent queer family. The decision in *(A.)A. v. (B.)B.*, [2007] O.J. No. 2 permitted the legal recognition of a family made up of two mothers and a father. However, the court made it very clear that the decision was specific to the factual circumstances and should not be understood as automatically enabling three parent families.

fertility clinic to conceive and create a single mother family.

3) A lesbian couple in an intimate relationship, or a single woman, who conceives using a *known* sperm donor outside of a fertility clinic and forms a *parenting relationship* with the known donor that may give rise to legal rights and responsibilities.

4) A lesbian couple in an intimate relationship, or a single woman, who conceives using a *known* sperm donor outside of a fertility clinic and forms a *non-parenting relationship* that consists of either limited or no contact between donor and child and no intended parenting rights on the part of the donor.

The family forms most affected by the de-anonymisation of sperm donation are the first two: the "homo-nuclear" family and the single mother by choice family created via anonymous donation.[64] These families have often consciously and politically chosen an anonymous sperm donor to avoid the legal and parenting complexities that come with using a known donor.

The Practical Issues

Anonymous sperm donors are particularly important for lesbian-led families for a number of practical reasons, some of which also pertain to single mothers by choice. First, there are

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64 We recognize that the homonuclear family represents only one part of the queer family spectrum, and do not intend to privilege this relatively conservative family form. Other queer family forms, however, because of their use of known donors, are not as deeply affected by de-anonymising sperm donation.

still provinces where same-sex couples cannot adopt,[65] or where adopting is difficult,[66] making access to ARTs on terms agreeable to lesbian-led families a priority. Second, restrictions placed on sperm donation by queer donors, the most popular choice of donor for lesbian couples, means that without anonymous donors, lesbian women are severely restricted in their ability to procreate. [67] Men who have had sexual contact with other men since 1977, cannot donate sperm at Canadian fertility clinics without written consent from Health Canada, which involves a lengthy approval process.[68] This means that in order to conceive with a queer, known donor, single and lesbian women face a number of obstacles. First, because these women are forced to self-inseminate outside of a fertility clinic they do not have access to the sperm screening procedures mandated by Health Canada and available to those who use

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65 New Brunswick for instance is poised to change their adoption legislation to allow for non-biological, same-sex parent adoption: Kevin Bissett, "New Brunswick Government to Amend Adoption Rules for First Time Since 1980" *Canadian Press NewsWire* (27 March 2007), and it is ambiguous as to whether gay men and lesbians can adopt in the Yukon: *Children's Act*, *supra* note 36, s. 80.

66 Lance Anderson and Blair Croft were the first same-sex couple to be allowed to adopt in Alberta, following intense resistance from provincial child welfare agencies. See Mike Sadava, "Gay Couple Leaps 'Walls' to Adopt Son" *Edmonton Journal* (9 February 2007).

67 See Angela Cameron, "Regulating the Queer Family: The *Assisted Human Reproduction Act*" (2008) 24 Canadian Journal of Family Law 101 [Cameron].

68 This prohibition was recently upheld in *Susan Doe v. Canada* (*Attorney General)*, [2007] O.J. No. 70 (C.A.). There is an exception to this rule if the sperm donor is the sexual partner or spouse of the woman who wishes to use their donor sperm. This scenario is unlikely in the case of a queer man and a lesbian couple or single woman.

fertility clinics.[69] Second, if there is a fertility issue the woman has limited access to medical professionals with fertility expertise outside of a fertility clinic.

The Social Issues

At a political and social level, lesbian and single mother-led families may use anonymous sperm donors to resist the larger popular discourse of a child *needing* a "father" or "father figure" in order to thrive.[70] Eliminating access to anonymous donors raises a challenge to all women-led families who wish to parent *without* a father or father figure. This implicates both women's autonomy to parent independently from men as well as the right of single women and same-sex couples to form a family, a right which has historically been protected for heterosexual couples. We argue that both of these socio-political choices should be vigorously protected under any legislative regime eliminating or altering the current sperm donor anonymity regime.

The Legal Issues

Perhaps the most significant reason why the de-anonymising of sperm donation is a concern for women-led families is that

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69 *Health Canada Directive: Technical Requirements for Therapeutic Donor Insemination* (Ottawa: Health Canada, 2000), s. 2.1(c)(i). It is also unclear whether self-insemination with fresh sperm is prohibited under the Act as it currently stands. See Cameron, *supra* note 67 at n. 38.

70 Recent research indicates that children from women led families fare as well or better than families where a father is present. See Brewaeys *et al., supra* note 57; 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) 8 Journal of Child Psychology and Psychiatry 1407.

Canadian family law is ambiguous about whether the sperm donor, once known, will have parenting rights that may be exercised contrary to the wishes of the lesbian parents or single mother.[71] Lesbian couples and single women experience the effect of this uncertainty in different ways. For lesbian couples, the most challenging aspect of the lack of legal clarity pertains to the non-biological or "social" mother. Because in most lesbian families[72] one of the lesbian parents is not biologically related to their child, the concept of "social parent" becomes extremely important in these families.[73] Biological ties typically take a backseat to the shared, everyday experience of parenting the child, and the strong parent-child connection that results from this shared experience. Uncertainty around the legal status of the donor poses a direct threat to lesbian social mothers, particularly given that most Canadian provinces only permit two legal parents.[74] As the discussion of case law below indicates, courts have few qualms about inserting a donor into a

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71 As compared to lesbian-led families who choose known donors, who often enter into parenting agreements, or other legal arrangements, prior to the birth of the child.

72 Unless an egg from one woman partner is fertilised and implanted into the other woman partner.

73 See for instance Nancy J. Mezey, *New Choices, New Families*: *How Lesbian Mothers Decide about Motherhood* (Baltimore: Johns Hopkins Press, 2008); Rachel Epstein ed., *Who's Your Daddy; and Other Writing on Queer Parenting* (Toronto: Sumach Press, 2009). Social parenting refers to a parent-child relationship (which may or may not be legally recognised) where there is no shared biology. This could be an adoptive parent, a step-parent, a foster parent, etc.: Susan Golombok & Clare Murray, "Social versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation" (1999) 40 J Child Psychol Psychia 519.

74 The one exception is Ontario which has allowed a three parent family. It is not clear what precedential value the case has, however, given the factual context. See *A.A. v. B.B., supra* note 64.

lesbian family in order to preserve a degree of hetero-normativity. In the single mother context, the lack of clarity around the legal status of donors presents the possibility of courts inserting the donor into the single mother household in order to create a dyadic nuclear family.

The legal definition of family in Canada has expanded in recent years to include legal protections for women-led families. For instance, non-biological lesbian mothers can now appear on their children's birth certificates at birth as well as enter into second-parent adoptions,[75] gays and lesbians can marry and divorce,[76] and married gays and lesbians may therefore be subject to the *Divorce Act* in making custody and access arrangements for their children following the termination of an intimate relationship.[77] These legal definitions of family, however, are deficient in a number of important ways that leave lesbian-headed families open to the disruption of their family units in ways that heterosexual, dual-parent families are not. Most notably, and with the exception of those living in Quebec and Alberta, lesbian women do not have access to presumptions of parentage that apply to heterosexual couples who conceive using donor insemination.

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75 Susan B. Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality, and Responsibility" (2007) 25 Windsor Y.B. of Access to Justice 63 at 75.

76 See, for example, *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 2 (definition of spouse). Marriage and divorce are now equitably available as a result of litigation by gay and lesbian couples. See e.g. *M.M. v. J.H.,* (2004) 73 O.R. (3d) 337 (S.C.).

77 Whether the custody and access *Divorce Act* provisions will apply identically to lesbian families remains uncertain. Absent a second-parent adoption, the parental status of a non-biological mother remains uncertain in most provinces. It is therefore possible that courts might distinguish between biological and social mothers in the context of custody and access decision-making.

As discussed above, the legal parenting rights and responsibilities of sperm donors are not defined or limited by law in most provinces.[78] Those provinces that have enacted legislation in this area have largely chosen to omit lesbian mothers from their protection. As a result, lesbian mothers remain vulnerable to the legal incursions of donors. While second parent adoptions and two mother birth certificates have provided non-biological mothers with some degree of legal protection, neither adequately meets the immediate post-birth needs of lesbian couples. Adoptions cannot be completed until the child is six months of age and birth certificates are always rebuttable by someone with a "better" typically biological, claim to the child. Removing the choice of an anonymous donor without appropriate legal reform, risks invalidating homo-nuclear, lesbian-led families.[79]

While lesbian couples have some legal instruments available to them, single mothers by choice have virtually no legal protection from the intrusion of a donor. In fact, courts have been largely unwilling to recognize the right of a woman to parent alone and have routinely treated known donors as legal fathers.[80] Single mothers by choice are thus particularly vulnerable if donor anonymity should cease.

Not surprisingly given the lack of legislative guidance, jurisprudence in Canada and a number of other Commonwealth

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78 Even in provinces where the role of sperm donors is ostensibly limited, donors have still been inserted into lesbian-led families against the wishes of the lesbian parents. See for instance *S.G. v. L.C., infra* note 84.

79 Jenni Millbank, "The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family" (2008) 22 International Journal of Law, Policy and the Family 149 [Millbank].

80 See e.g. *Johnson-Steeves v. Lee, infra* note 102; *G.E.S. v. D.L.C.*, *infra* note 103; *Doe v. Alberta*, *infra* note 105.

jurisdictions is ambiguous as to the legal status of known donors. Below are outlined some of the cases which support the false notion that a known sperm donor in a parenting role, or contact by a donor, can only be a welcome addition, not an intrusion into a lesbian family.[81] While all of these cases deal with "known" donors, abolishing anonymity may raise similar concerns, particularly if applied retroactively.

There are a number of cases where non-biological, social lesbian mothers have been denied legal parenting rights due to the presence or the actions of a known donor. In all of these cases, the known donor had some contact with the child in question, but in all cases except one[82] the donor was not, in our opinion, a social parent by any definition.

As with many aspects of queer parenting and/or reproductive technologies and parenting, there is relatively little jurisprudence to date, as these family forms, the related technologies, and the law continue to develop. However, there are four Canadian cases that address the legal status of known donors. The first is a 2004 interim decision of the Quebec Superior Court, *S.G. v. L.C.*.[83] In *S.G.,* the child was conceived using the sperm of a known donor who had some limited contact with the child in the early months of her life. However, after the mothers began limiting the contact between the donor and child, the donor sought an order of filiation, arguing that a "parental project", as defined by article 538 of the Quebec *Civil Code*, existed between himself and the biological mother.[84] The court responded by characterizing the biological lesbian mother as being in a "parental project" with a known sperm donor to

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81 For more on this topic see Millbank, *supra* note 79.

82 *M.A.C. v. M.K., infra* note 91.

83 [2004] R.D.F. 517 (Sup Ct).

84 Art. 538 C.C.Q.

the exclusion of her partner, the non-biological, social lesbian mother. The court awarded thrice weekly access to the then nine month old child against the wishes of the lesbian parents. This was in spite of the fact that the lesbian couple had entered into a registered civil union, and both appeared as parents on the child's birth registration. The court awarded the donor parental status in part because he has been in a year long dating relationship with the biological mother more than a decade before the insemination, after which they continued to be friends.[85] The judge also appeared to discount both the legislative regime and the parental relationship that develop between the non-biological mother and child. For example, the judge alleged that the parental relationship was being "created artificially"[86] and framed the mothers' attitude as "totally destructive" because they were denying the child her "rights to her father".[87]

The second Quebec paternity case involving sperm donation by a known donor to a lesbian couple, *L.O. v. S.J.*,[88] produced a different result. Given the clarity of the factual evidence in *L.O.*, the Quebec Superior Court had little choice

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85 A similar, more recent Quebec case refused to grant a known donor parental status under the same legal regime. See *A v. B., X* and *C* [2007] J.Q. No. 1895. Family law in Quebec is unique in a number of important ways that effect outcomes in these cases. In particular, laws of filiation and legislation dealing specifically with the status of sperm donors *should* more closely control outcomes in cases involving sperm donors and lesbian mothers. See Mario Provost, « La procréation médicalement assistée » *Droit de la famille québécois*, Montréal, CCH, vol. 1 50- 215 and Renée Joyal et Mario Provost, *Précis de droit des jeunes, 3e édition : Le droit civil de l'enfance et de l'adolescence* (Québec: Éditions Yvon Blais, 1999).

86 *Supra* note 84 at para 50.

87 *Ibid*. at para 54.

88 (2006) J.Q. No. 450 (Sup. Ct.).

but to follow the clear instruction of the filiation provisions in the *Civil Code*. The parties had a donor agreement that specified that the donor agreed to relinquish all rights he may have as a legal parent. The court relied on the agreement as written confirmation of the intention of the parties with regard to the "parental project". In addition, the court relied on the fact that the women already had two children conceived using the sperm of a different donor to support the assertion that the donor was not intended to be part of the parenting arrangement. Based on these facts, the court held that the parties to the "parental project" were the two women and that the donor was a third party gamete provider. For this reason, the donor was excluded from the status of father on the basis of article 538.2. By way of counter argument, the donor asserted that the parental project involved three individuals – himself and the two mothers – but the court rejected the claim because Quebec law does not permit three legal parents. The decision in *L.O.* suggests that sperm donors will not always be successful in asserting paternity. However, the clarity of the facts and the clear legislative statement on the issue left the court with little choice but to make the decision it did. By contrast, the lack of factual clarity in *S.G.* meant that the court had far greater freedom to make a decision based on the desire for a normative family arrangement.

The next case is a Quebec Court of Appeal decision, *A v. B, C and X*.[89] Again, in this case, the court characterized a biological lesbian mother as being party to a "parental project" with a known sperm donor to the exclusion of her former partner, the non-biological, social lesbian mother. According to the court, despite having had virtually no contact with the child, and openly acknowledging his role as a donor and not father, the donor was designated a "father" because the child

89 *A v. B, C and X* 2007 R.D.F. 217.

had been conceived via intercourse.[90] The lesbian co-mother, despite having actively parented the child since birth, was not granted parental rights.

The fourth case is a 2009 Ontario Court of Justice case, *M.A.C. v. M.K* ("*M.A.C.*").[91] In this case, a non-biological lesbian mother's application to be recognized as a legal parent through second-parent adoption was denied based on the refusal of the known donor to provide consent. Unlike the Quebec cases, the donor had significant parenting involvement in the life of the child. He had earlier been awarded continued interim access against the wishes of the lesbian co-mothers.[92] Because of his involvement in the life of the child, he was granted parental rights. While this may have been an appropriate response to the donor's significant involvement, the effect of the decision was to negate the parental relationship between the non-biological mother and child.

M.A.C. can be contrasted with the final case, *Re: SSM*,[93] where lesbian co-mothers were granted a joint adoption despite the presence of a known donor. However, in *Re: SSM* the known donor consented to the adoption and the lesbian co-mothers were actively fostering a relationship with him through regular access to the child. In other words, the donor's status as "father" was not threatened by the adoption.

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90 Without the knowledge of the non-biological lesbian co-mother, the child was conceived through intercourse rather than insemination during her relationship with the biological mother.

91 *M.A.C. v. M.K*. 2009 ONCJ 18. The couple had previously been denied an adoption despite the consent (at that time) of the known donor due to his involvement in the child's life.

92 *K. (M.) v. C. (M.)* and *D.(C.),* 2007 ONCJ 456.

93 *Re: SSM* [2007] O.J. No. 4290 (Ont. Ct. Just.).

Cases in other jurisdictions point to similar trends. For example, in the Australian case of *Re Patrick*, a donor who had limited contact with a child was awarded generous access and characterized as a "father" against the wishes of the lesbian co-mothers.[94] Similarly, in the U.S. case of *Thomas S. v. Robin Y.,* [95] a minimally involved known sperm donor was granted parental status and extensive parenting rights against the wishes of both lesbian mothers. Finally, in the Scottish case of *X and Y*,[96] the court characterized the lesbian co-mothers' behavior in resisting a known donor's insertion into their family as "selfish, non-child centred and weird…."[97] Ultimately, the known donor was awarded a parenting order against the wishes of the lesbian co-mothers.[98]

Finally, the 2004 New Zealand case of *P v. K and M*[99] amply illustrates the reasons Canadian lesbian-led, homo-nuclear families may be apprehensive regarding de-anonymising donors. In this case, even in the presence of legislation that *severed the parental status of gamete donors,* a

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94 *Re Patrick* (2002) FLC 93-096. For a discussion of this case see Fiona Kelly, "Redefining Parenthood: Gay and Lesbian Families in the Family Court – The Case of *Re Patrick*" (2002) 16 Australian Journal of Family Law 204.

95 *Thomas S. v. Robin Y* 618 NYS2d 356 (1994); 599 NYS2d 377 (1995).

96 *X and Y* (2002) SLT (Sh. Ct.) 161.

97 Millbank, *supra* note 79 at 162.

98 Leanne Bell, "Is the Human Fertilisation and Embryology Act 2008 Compatible with the Universal Declaration of Human Rights?" [2009] 1 Web J. of Current Legal Issues at 20.

99 There have now been six judgments in this case. *K. v. M*, (2002) 22 F.R.N.Z. 360; *P. v. K. & M.*, (Fam. Ct. N.Z.), [Unreported, Doogue J, 8 August 2002]; *P v. K* [2003] 2 N.Z.L.R. 787; *P. v. K. & M.* [2004] N.Z.F.L.R. 752; *P. v. K.* [2004] 2 N.Z.L.R. 421; *P. v. K.* [2006] N.Z.F.L.R. 22.

relatively uninvolved, known sperm donor was granted three-day weekends every second weekend, and half of all school holidays to foster what the court referred to as a "father and son" relationship. This extensive access was granted over the objection of the lesbian co-mothers, and despite a pre-conception agreement indicating that the donor would have no formal parenting rights whatsoever.[100]

Single mothers by choice who use anonymous donors to conceive children face similar issues. As women-headed families, they run the risk of having a donor inserted as a "father" or "father figure" into their family of choice, particularly given the absence of a second parent and thus the option of entering into a second parent adoption. As with homo-nuclear lesbian families, the Canadian jurisprudence illustrates a trend towards finding "fathers" for these women-led families. For instance, in the 1997 Alberta Court of Appeal decision *Johnston-Steeves v. Lee,*[101] a man who the mother characterized as a known sperm donor, but who saw himself as a "father," was granted extensive access to the child against the wishes of a single mother by choice. Similarly in *G.E.S. v. D.L.C.,*[102] a decision that was ultimately overturned on appeal,[103] a platonic male friend of a single mother by choice, who was *not the donor* for insemination, was granted access to the children in question. Finally, in *Doe v. Alberta,*[104] a single mother by choice was inseminated with donor sperm. She was in an intimate relationship with a male partner, but the parties had agreed that he would not be a parent to the child. The mother and her partner sought a joint declaration that he was

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100 Millbank, *supra* note 79 at 162.

101 [1997] A.J. No. 512.

102 [2005] S.J. No. 354.

103 [2006] S.J. No. 419.

104 [2005] A.J. No. 1719.

not a "father", and had no rights and obligations in relation to her child. The application was denied by the court, which asserted that such a man could not help but become a "father" given that he was living with the child.

Given the existing jurisprudence, homo-nuclear lesbian-headed families, as well as single mothers by choice, face significant risks if donor anonymity is abolished without first ensuring that their families are legally and socially protected from the unwanted intrusion of a third party. Women-headed families currently *have* the ability to choose a known donor, and the non-nuclear possibilities that entails, including the risk of conflict within an "extra parent" family. However, for those families who have chosen anonymous donors it is *precisely to avoid* the legal ambiguity, and unwanted shared parenting that can come with a known donor. It is essential that the law respect that choice.

Heterosexual Families

Heterosexual families have quite different concerns about de-anonymizing sperm donation. First and foremost, unlike women-headed families, secrecy about the use of donated sperm is longstanding and continues to occur in heterosexual families. Although there is a trend towards disclosure, recent studies demonstrate that a number of heterosexual parents wish to keep the manner of conception and the use of donated sperm secret.[105] In contrast, women-headed families generally inform the offspring about the use of a sperm donor from a young age.[106] Women-headed families do so in the context of explaining their chosen family form to their offspring.[107]

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105 Lalos, Gottlieb & Lalos , *supra* note 45 at 1760.

106 Brewaeys *et al.*, *supra* note 57 at 1357.

107 *Ibid.*

The secrecy surrounding the use of donor sperm by heterosexual families, rightly or wrongly, is driven by a number of factors. First, heterosexual families are concerned that disclosure will negatively affect the offspring.[108] Second, male partners or social fathers are concerned about disclosing the use of donated sperm because they do not want others to learn they are infertile.[109] Third, heterosexual parents worry about the impact of disclosure on family bonds, especially between child and father. There is a fear, especially among social fathers, that the offspring will reject the social father on the basis that he is not the offspring's "real" or biological father.[110]

Abolishing donor anonymity diminishes the heterosexual parents' opportunity to keep the use of donated sperm secret. Even in the absence of a mandatory duty to disclose the use of donated gametes to the offspring, the abolishment of donor anonymity greatly increases the likelihood that the offspring will learn of the method of his or her conception later in life. Thus, many heterosexual families have also expressed some reluctance regarding de-anonymisation of sperm donors and have advocated for certain protections, such as delaying disclosure until the offspring reaches the age of majority.

Rights and Interests of the Donor

The third stakeholder in the debate around donor anonymity is the donors themselves. The nature of the donor's rights and interests vary depending on whether we are referring to prospective donors or men who have already donated sperm under the anonymous regime. There is no right to donor

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[108] Lalos, Gottlieb & Lalos, *supra* note 45 at 1766.

[109] *Ibid.*

[110] *Ibid.*

anonymity *per se*. Rather, the donor's right to remain anonymous is a "constructed right", that is, it is either created by contract or created by law.[111] In Canada, the right to donor anonymity is created by virtue of the *AHRA*. Thus, if the *AHRA* were amended to require compulsory identity release sperm donors, a prospective donor would not enjoy the right to be an anonymous donor.

However, an individual who has donated sperm under the anonymous regime may have a personal interest in either the maintenance of donor anonymity or in de-anonymising donation. However, in all Canadian jurisdictions at the time the sperm was donated, the donor had a reasonable expectation that his identity would not be revealed. This reasonable expectation of privacy may be protected by section 7 of the *Charter*. As a result, any legislation that seeks to open previously confidential records regarding the donor or provide identifying information about donors or offspring requires balancing mechanisms to protect these section 7 rights as against any claims made by donor conceived offspring.

In the context of adoption, which is arguably analogous, the Ontario Superior Court in *Cheskes* held that birth parents and adoptees enjoyed a reasonable expectation that their identity would remain private.[112] The impugned adoption legislation, the *Adoption Information Disclosure Act* ("*AIDA*"),[113] authorized the disclosure of identifying information except where an individual had established that they were entitled to a non-disclosure order on the basis that

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111 Lisa Shields, "Consistency and Privacy: Do These Legal Principles Mandate Gamete Donor Anonymity" (2003) 12 Health L. Rev. 39 at para. 15.

112 *Cheskes v. Ontario,* [2008] O.J. No. 3515 [*Cheskes*].

113 S.O. 2005, c. 25 [*AIDA*]. The *AIDA* amended the *Vital Statistics Act*, *supra* note 3.

there were exceptional circumstances to prevent sexual harm or significant physical or emotional harm to the adopted person or birth parent.[114] In addition, adopted persons and birth parents could file a no-contact notice.[115] The court concluded that the disclosure of birth and adoption records under these circumstances was found to violate their right to privacy which was an essential aspect of their right to liberty in a free and democratic society. The court held that disclosure of identifying information was inconsistent with the principles of fundamental justice: the reasonable expectation that their private and confidential information would not be disclosed to third parties without their consent.[116]

Interests of Prospective Parents

The stakeholders whose interests most often dominate the debate about the abolition of donor anonymity sperm donation are "would-be" or prospective parents. The principal concern of prospective parents is that de-anonymisation will significantly reduce sperm supply and will result in significant delays, inappropriate donors or unsafe use of ARTs. It is argued that with the cloak of secrecy removed, men will no longer be willing to donate sperm.[117] This shortage impacts the reproductive autonomy of those who wish to use donor sperm and may threaten the health and safety of those who seek to use donated sperm.

A decrease in sperm supply immediately following de-anonymisation appears to have occurred in certain jurisdictions

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[114] *AIDA*, *ibid.*, ss. 48.5 and 48.7.

[115] *Ibid.*, ss. 48.4 and 56.1

[116] *Cheskes, supra* note 112 at para. 132.

[117] This concern was foremost in the mind of the Baird Commission discussed above.

where complete donor anonymity has been removed.[118] Some studies have indicated that sperm donations eventually rebound.[119] However, more research is required to determine the true impact of de-anonymisation on supply.

What are the consequences of a sperm donor shortage? The most obvious consequence is significant delays for prospective parent(s) who require donated sperm.[120] In addition, a shortage of sperm may make it difficult for prospective parents to find an appropriate donor. For example, with fewer donors it is more difficult to find a donor who shares personal characteristics of the parent(s).[121] This is already a problem for racialized individuals who seek a donor who shares their racial background. The donor may also be inappropriate because of age. As mentioned, the de-anonymisation of sperm donation often results in a shift in the donor profile in favour of older men who already have families of their own. Although this is a positive development in several

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[118] For example, in Sweden, there was an initial decline in sperm donation following the removal of donor anonymity in 1984: A. Lalos, *et al*. "Recruitment and Motivation of Semen Providers in Sweden" (2003) 18 Human Reproduction 212 at 212 [Lalos]. In the United Kingdom, there is a perception that the removal of donor anonymity has resulted in a shortage of sperm: Turkmendag, *supra* note 39 at 296.

[119] For example, in Sweden, donations eventually rose with the subsequent increase being attributed to a shift in recruitment methods, and a shift in the donor profile to older men: Lalos, *ibid.* at 212. Similarly, in the United Kingdom, recent reports from Human Fertilisation and Embryology Authority indicate that the number of sperm donors is increasing once again: "Number of Sperm Donors Up Following Anonymity Law Changes" *Human Fertilisation and Embryology Authority* (3 May 2007), online: Human Fertilisation and Embryology Authority <http://www.hfea.gov.uk/465.html>.

[120] Turkmendag, *supra* note 39.

[121] *Ibid.* at 295.

respects, it is negative from a clinical perspective as sperm from older men tend to be of lower quality and as a result are less able to fertilize the ova.[122] Notably, these donors tend to be motivated by procreation and are more likely to want a relationship with their offspring, which could result in the unwanted intrusion of the donor on the family unit, which as we have discussed, is a particularly acute concern for women-led families.[123]

Further, a shortage of sperm donors may result in prospective parents seeking sperm outside the licensed system. For example, in the United Kingdom, a fresh sperm market has developed on the Internet, often with unscreened sperm.[124] The use of fresh unscreened sperm may put women at risk as there are no guarantees that the donor sperm were subjected to rigorous testing for quality and disease, such as chlamydia or HIV.[125] Further, the legal parentage laws only apply where the sperm is acquired through a licensed facility. A shortage of sperm donors may also result in "reproductive tourism", in other words, prospective parents go abroad for fertility

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122 *Ibid.* at 288.

123 Kate M. Godman, *et al.,* "Potential Sperm Donors', Recipients' and Their Partners' Opinions Towards the Release of Identifying Information in Western Australia" (2006) 21 Human Reproduction 3022 at 3026.

124 Turkmendag, *supra* note 39 at 284. The UK authorities recently charged two men for not having a valid license to broker the sale of "fresh" sperm from anonymous donors: MacKenna Roberts, "Directors of Online Sperm Donor Business Face Criminal Prosecution" *BioNews* (8 June 2009), online: BioNews <http://www.bionews.org.uk/new.lasso?storyid=4392>.

125 "FAQs about Treatment" *Human Fertilisation and Embryology Authority*, online: Human Fertilisation and Embryology Authority <http://www.hfea.gov.uk/2567.html >.

treatment, which of course also exposes prospective parent(s) to additional risks.[126]

WHERE TO FROM HERE?

Given the often disparate rights and interests of donors, the donor-conceived and intending parents, creating a legal regime palatable to everyone is not an easy task. Perhaps one of the most appropriate responses is to consider comparable legal dilemmas, such as that presented by adoption, as well as legislative models in force in other jurisdictions.

Adoption

A brief consideration of how adoption law has dealt with issues of anonymity may provide some useful guidance in formulating policies and legislation on donor anonymity in the context of ARTs. The adoption model is apt as at least one biological parent whose identity was historically unknown is absent from the family unit. In response to some of the same concerns around health and identity-formation, some Canadian provinces amended their legislation to permit two new mechanisms by which children can have access to their biological progenitors. The first is open adoption, whereby the adoptive parents and the biological parents or other biological family members agree to an ongoing relationship. Open adoption agreements are typically made while the adoptee is

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126 "Thinking of Going Abroad? Think Twice about Going Abroad for Fertility Treatment" *Human Fertilisation and Embryology Authority* (27 April 2006), online: Human Fertilisation and Embryology Authority <http://www.hfea.gov.uk/623.html>. Notably, the website which Turkmendag *et al.* were studying was closed by the HFEA for a period of time because they were concerned about the increasing number of postings about offshore facilities that offered reproductive services using anonymous gametes: Turkmendag, *supra* note 39 at 294.

still a child. The second, which is perhaps most applicable to the donor conception context, is adoption record disclosure which gives the adoptee access to his or her biological parents' identities once the child reaches the age of majority. In our view, the new disclosure mechanisms provide useful guidance on how to regulate the disclosure of the donor's identity and the safeguards required to protect donor-conceived offspring, social parents and the donor. In the context of adoption, disclosure has been embraced in several provinces. We will focus on two examples, British Columbia and Ontario, both of which permit disclosure but also provide appropriate protective mechanisms, such as disclosure vetoes.

British Columbia's *Adoption Act* establishes a disclosure regime that is applicable once the child reaches the age of majority.[127] For all adoptions taking place after the coming into force of the *Adoption Act*, the director may disclose to any adult, who, as a child was adopted, any information in the adoption record.[128] The regulations to the *Adoption Act* set out a number of requirements in terms of the collection of information.

Similarly, on May 14, 2008, the Ontario government enacted legislation, the *Access to Adoptions Records Act, 2008* which permits the opening of past and future adoption records in Ontario.[129] This legislation authorized adult adoptees and birth parents to access adoption records which would allow them to contact their birth parents or biological children

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127 *Supra* note 3.

128 *Ibid.*, s. 56.

129 *An Act to Amend the Vital Statistics Act in Relation to Adoption Information and to make Consequential Amendments to the Child and Family Services Act,* S.O. 2008, c. 5 [*Act to Amend*].

respectively.[130] The first version of the act, the *AIDA* involved a more robust system of identification with few protections for those who did not want their records to be made retroactively available. However, as discussed above, the act was struck down by the Ontario Superior Court of Justice in *Cheskes*.[131] The new version includes a number of mechanisms that protect those who do not want their identities to be revealed retroactively.

While both the British Columbia and Ontario legislation permits disclosure of information to adult adoptees, both acts include several protective mechanisms that limit the effect of disclosure. In British Columbia, both an adult adopted person and a birth parent may file a disclosure veto which precludes the disclosure of any information in a record that relates to the person who filed the veto.[132] In addition, both a birth parent and an adult adopted child may file a no-contact declaration.[133] Where a no-contact declaration has been executed, a person applying to see a copy of a birth registration or other record must sign an undertaking stating that they will not knowingly contact or attempt to contact the person who filed the declaration, procure another person to contact the person who filed the declaration, use information obtained under the *Adoption Act* to intimidate or harass the person who filed the declaration, or procure another person to intimidate or

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130 The type of information typically found in adoption orders and birth registrations may include the child's birth name, the name of the child's mother, the name of the child's father, and the name of the hospital where the baby was born, online: Minister of Community and Social Services - Adoption Information <http://www.mcss.gov.on.ca>.

131 *Supra* note 112.

132 *Adoption Act*, *supra* note 3, s. 65.

133 *Ibid.*, s. 66.

harass the person who filed the declaration, using information obtained under the *Adoption Act.*

As noted above, in Ontario, the act preceding the ultimate legislation, the *AIDA,* sought to establish a more open system in adoption by requiring that adoption records be retroactively opened without the consent and even contrary to the wishes of the adult adoptee or the birth parent. The revised version, in the form of amendments to the *Vital Statistics Act*, offers two mechanisms to protect the privacy interests of adoptees and birth parents for adoptions occurring prior to September 1, 2008. First, either the adoptee or a birth parent may register a disclosure veto which prevents the disclosure of any information relating to the adoption.[134] A disclosure veto must be filed by June 1, 2009. Second, the adoptee or the birth parent may execute a no-contact notice.[135]

The adoption models in British Columbia and Ontario provide some guidance as to how donor anonymity might be dealt with. In particular, the availability of no-contact and non-disclosure orders have the potential to protect those for whom de-anonymisation is unwanted.

The UK: Open Donation and Assisted Human Reproduction

Numerous jurisdictions have already grappled with the issue of donor anonymity and thus provide models for how the dilemma might be dealt with in Canada.[136] For example, the United

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134 *Act to Amend*, *supra* note 129, ss. 48.1 and 48.2.

135 *Ibid.*, s. 48.4.

136 Eric Blyth & Lucy Frith, "Donor Conceived People's Access to Genetic and Biographical History: An Analysis of Different Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity" (2009) 23 International Journal of Law, Policy and the Family 174.

Kingdom recently revised the *Human Fertilisation and Embryology Act 1990* ("*HFEA"*) to provide for open donation of sperm and embryos.[137] Previously, the legislation preserved donor anonymity, but required that a register of identifiable individuals be kept for a number of purposes, including the disclosure of non-identifying information to the donor-conceived offspring.[138] The new provisions followed public consultations with various stakeholders[139] as well as a legal decision concerning the applicability of Article 8 of the *European Convention on Human Rights*, which protects the right to respect for private and family life, to donor anonymity.[140] Though it ultimately refused to find a violation of Article 8,[141] the court held that:

> [r]espect for private and family life requires that everyone should be able to establish details of their identity as individual human beings. This includes their origins and the opportunity to understand them. It also embraces their physical and social identity and psychological integrity.[142]

Responding to concerns about the rights of donor conceived offspring, the new legislation abolished donor anonymity,

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137 *Human Fertilisation and Embryology Act* (U.K.), 1990, c. 37 [*HFEA*].

138 *Ibid.*, s. 31.

139 For a discussion on the consultation process, see Turkmendag, *supra* note [40].

140 *R (on application of Rose) v. Secretary of State for Health,* [2002] EWHC 1593. It is important to note that the purpose of the litigation was not to achieve compulsory disclosure of the identity of donors.

141 *Ibid*. at para. 46.

142 *Ibid.* at para 45.

replacing it with a system that permits a donor conceived person over the age of 18 to have access to information about their donor's appearance, as well as the name, date, place of birth and last known address of the donor.[143] Notably, the regulation is not retroactive.[144] Thus, donor conceived offspring who were born prior to the coming into force of the legislation, April 1, 2005, are not authorized under the legislation to access the identity of their donors.[145] However, offspring who were born prior to the legislation coming into force and are over age 18, or are over age 16 with the intention of marrying, can ask the licensing authority to establish whether he or she might have been born as a result of ARTs and, if so, to advise whether the person whom the applicant proposed to marry is related.[146]

To address the absence of retroactivity, the UK's Department of Health established the UK DonorLink.[147] This was a voluntary contact register established to enable people conceived through donated sperm and/or eggs, their donors and half-siblings to exchange information and, where desired, to contact each other if they mutually consent. The register is available to individuals over the age of 18 conceived using donated sperm or eggs, or who donated in the UK before the *HFEA* came into force in August 1991.

Though not directly in response to the abolition of donor anonymity, the United Kingdom has also enacted

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143 *Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations* 2004 (SI 2004/1511).

144 *HFEA, supra* note 138, s. 31(5).

145 *Ibid*.

146 *Ibid.*, s. 31(3).

147 For more information on UK DonorLink, see <http://www.ukdonorlink.org.uk/default.asp>.

legislation governing parental status where assisted human reproductive technologies have been used. Initially, the changes applied only to heterosexual couples. For example, section 28(2) of the *HFEA* provides that where a woman is married and she has been inseminated with the sperm of another man, provided that her husband has consented, he will be treated as the legal father of the child.[148] However, s. 28(3) limits the presumption of paternity to situations where the insemination is carried out in a licensed clinic and where the parties are seeking the treatment "together".[149] This provision is meant to ensure legal paternity of the child born to a woman and her *bona fide* partner as a result of using donor sperm only where the procedure is carried out in a licensed facility. The presumption would not apply if the donor provided a specimen to an unmarried couple, an unlicensed practitioner, or where insemination occured outside of a licensed facility. In 2008, amendments to the *HFEA* incorporated lesbian couples who have entered into a civil union into the Act's provisions. If two women are party to a civil partnership and both consent to the treatment, the birth mother's female partner will be treated as the child's second legal parent.[150] These changes created rules of presumptive parenthood for lesbian non-biological mothers and permitted them to be named on the child's birth certificate.

Though not the only model available, the UK reforms seek to balance the needs of the various stakeholders in the donor anonymity debate. While respecting the donor offspring's right to know his or her genetic origins, it also respects the privacy rights of those who supplied and used sperm at a time when complete anonymity was guaranteed. Significantly, it also clarifies the legal status of donors and social parents, at least where the procedure is carried out in a

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148 *Supra* note 13, s. 28(2).

149 *Ibid*., s. 28(3)

150 *Ibid*., ss. 42-47.

licensed facility, thus protecting both heterosexual and lesbian families from the legal claims of donors, and donors from the legal claims of intending parents. The only group omitted from the changes is single mothers by choice who cannot rely on the existence of a second parent to offset the claim of a donor.

CONCLUSION: CANADIAN LAW REFORM

Due to the unique vulnerabilities of women-led families identified above, we recommend that donor anonymity be abolished *only* after sufficient legal protection for women-led families, and particularly lesbian social mothers and single mothers by choice, exists. Accordingly, we recommend that before the *AHRA* is amended, the legal status of donors and social parents be clearly set out in provincial family laws. The UK model provides an example of how that might be achieved. In addition, the *AHRA* itself should be amended to include a number of veto and non-disclosure provisions, similar to those applied in the adoption context. Such provisions would be particularly vital if any form of retroactivity were to be introduced.

Amendments to the *AHRA*

We recommend that donor anonymity be excised from the *AHRA*. Completely anonymous sperm donation would be abolished. However, several restrictions are necessary to protect the best interests of the child, the integrity of the family unit and the interests of donors. First, contact between the donor and the offspring must be prohibited until the offspring reaches the age of majority. This is essential to preserve the integrity of the social family unit whether it is a single-mother by choice, lesbian-led, or heterosexual family.

Second, prior to the age of majority the offspring should have access to certain non-identifying information about his or her donor that will be located in a health registry. This

information may include basic personal characteristics and regularly updated medical information. The offspring may have access to additional information which the donor has voluntarily provided. The *AHRA* currently creates a personal health information registry for identifying and non-identifying information of individuals who have donated reproductive materials, persons who have undergone ARTs and individuals conceived using ARTs. The Assisted Human Reproduction Agency of Canada will be responsible for the registry. The nature and scope of the information to be included in the registry has been left to the regulations, which are not yet drafted. We recommend that a catch-all approach to information collection, use and disclosure be avoided and that only information that is necessary to the physical and psychological well-being of the persons involved in ARTs be subject to the *AHRA*.[151] This can be ascertained through consultation with donor-conceived offspring, social parents, donors, physicians, legislators, and the Canadian public.

Third, the offspring, upon reaching the age of majority or becoming sexually active, whichever occurs first, should be entitled, with their potential sexual partner to make an application to determine if either one or both of them were conceived using ARTs and whether they are related. Based on their application, the Agency will disclose to them whether there is information in the registry indicating that they are genetically related and, if so, the nature of the relationship.[152]

We also recommend that a mechanism be included in the *AHRA* to allow those who were conceived through anonymous donation and have reached the age of majority and those who donated sperm anonymously to learn the identities of their donors and offspring, should both parties consent. This

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151 Gruben, *supra* note 43.

152 *AHRA*, *supra* note 7, s. 18(4).

could be accomplished in two ways. A voluntary donor registry could be established as has been done in the UK. This registry would allow donor-conceived offspring, their donors and half-siblings to exchange information and to contact one another, if desired. The registry would be strictly voluntary. Alternatively, the *AHRA* could establish a system similar to that pertaining to adoption in Ontario and British Columbia. Such a system would allow offspring and their donors to receive identifying information about each other once the child has reached the age of majority, unless either filed a disclosure veto or executed a no-contact declaration.

Amendments to Provincial Family Laws

Family law reform is also necessary in order to address the equity concerns raised by de-anonymising sperm donation for women-led families.[153] The main issue to be addressed is legal parentage in the context of assisted conception, which is primarily a provincial concern. Because of the unique legal vulnerabilities women-led families' experience in the context of legal parentage, it is imperative that each province reform its parentage laws before anonymous sperm donation is abolished.

As discussed above, lesbian and single mothers face significant legal vulnerabilities when it comes to provincial parentage laws. With the exception of those living in Quebec and Alberta, lesbian couples do not have access to the parentage presumptions that apply to heterosexual couples who conceive via donor insemination. As a result, non-biological

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153 A comprehensive model for reform in this area has been provided by Fiona Kelly as a result of her empirical research into lesbian families in Canada. See "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families" 40 Ottawa L. Rev. [Forthcoming in 2009] [Kelly]. See also: Robert Leckey, "Where the Parents are of the Same Sex: Quebec's Reforms to Filiation" (2009) 23 International J of Law, Policy & the Family 52.

lesbian mothers have no automatic legal rights to their children. In order to rectify this situation, non-biological lesbian mothers must take positive steps to secure legal parentage, typically via a second parent adoption. However, second parent adoption relies on the consent of the child's biological parents, including a known donor, cannot be completed until the child is six months old and generally requires legal assistance. By contrast, parentage presumptions apply at birth, do not require any form of consent, and treat non-biological parents identically to biological parents. While two-mother birth certificates, now available in many provinces, have alleviated some of the stress of securing a second parent adoption, a birth certificate is a rebuttable document. Only an adoption can sever the rights, if any, of a donor and vest in the non-biological mother irrebutable parental rights.

Single mothers by choice would arguably be even more vulnerable if sperm donation were to be anonymized. When there is only one parent, legal mechanisms such as a second parent adoption or a gender neutral birth certificate are of no use, leaving a single mother with no way in which to assert her sole legal parentage. Quebec is the only province to address legal parentage in the context of single mothers by choice and does so by securing the mother's sole parentage and severing the rights and responsibilities, if any, of a donor. Absent such a law, the abolition of donor anonymity would likely pose a significant threat to single mothers who have no way of legally asserting their desire to parent alone.

Given the existing vulnerabilities women-led families experience in the context of legal parentage, a number of reforms should be made to provincial parentage laws. First, the legal status of sperm donors, if any, should be addressed by the provinces. We recommend an approach similar to that taken in Quebec, given that it is the only province to address parentage

in the context of *both* lesbian couples and single women.[154] The key features of such a legislative regime are as follows. First, it is necessary to clarify that a donor to a heterosexual couple, a same-sex couple, or a single woman is *not* a legal parent, whether conception occurs at a fertility clinic or via home insemination. Second, it is necessary to presumptively establish that any partner of the birth mother, whether male or female and in the event that he or she has consented to the conception, is the child's other legal parent. In the absence of a partner, the biological mother must be presumed to be the child's sole legal parent. Finally, in the rare cases where couples or single women enter into a parenting agreement with their donor which specifies that he is to play a parental role, such an agreement should be respected by the court.[155] Because courts are generally unwilling to permit parents to "contract" about their children, it would be optimal if such agreements could be filed with the court and thus turned into court orders.[156] Alternatively, provinces could develop some sort of legislative "opt-in" framework that would enable a donor, with the consent of the presumptive parents and within a year of the child's birth, to opt-in to the status of legal parent.[157]

Absent changes to provincial parentage laws, the de-anonymisation of sperm donation poses a significant risk to

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154 Art. 538 C.C.Q. Similar legislation has also been recently passed in Victoria, Australia: *Assisted Reproductive Treatment Act* 2008 (Vic.), Part III. The Victorian legislation addresses parentage in relation to women "with a female partner" and women "without a partner".

155 An example of such a scenario is the Ontario decision of *A. A. v. B. B.* in which the court permitted the child, upon application by a lesbian couple and their donor, to have three legal parents: *A.A. v B.B., supra* note 63.

156 This is the approach taken in New Zealand. See *Care of Children Act* (N.Z.), 2004/090, s. 41.

157 Such a recommendation was made by Kelly, *supra* note 153.

women-led families. Already vulnerable to the legal incursions of known donors, de-anonymisation would only add to the legal uncertainty. It is therefore imperative that reforms to provincial parentage laws be understood as a necessary element of any changes to the rules regarding donor anonymity.