Is Secrecy Still Appropriate Or Acceptable In Gamete Donation?

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Introduction

Individuals, who are conceived through the science of assisted reproductive technology and anonymous gamete donation, often do not know the identity of all of the individuals who have provided the necessary genetic material for their conception. Some of these people have a great desire to obtain this information. In a very small number of circumstances there is virtually no prospect of ascertaining this information. However, when this information is available, should it forever be denied to those with a desire to learn of his or her heritage?

A historical review of adoption cases provides some insight into how society dealt with the issue of secrecy. Where a birth parent or adoptee sought disclosure, the application nearly always ended in failure.[1] The cases generally showed little empathy for the applicant. An attempt by Ontario to open confidential adoption records to provide identifying information, by amending the *Vital Statistics Act*[2], was found unconstitutional, in a decision that granted wider relief than sought by the applicants.[3] In a more recent decision, again where the application for disclosure failed, the judge observed "[T]he emotional impediments of which the applicant complains are highly subjective and not borne out by the evidence as being the product of this legislative scheme."[4] An appeal to

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[1] See *D. (J.M.)* v. *Director of C.F.S. et al*., 2001 MBQB 168, 18 R.F.L. (5th) 257; *Ferguson v. Ontario (Director of Child Welfare)* (1983), 36 R.F.L. (2d) 405, 44 O.R. (2d) 78 (Ont. S.C .(AD)); *Re Adoption of B.A.* (1980), 17 R.F.L. (2d) 140 (Man Co. Ct.)

[2] R.S.O. 1990, c. V.4

[3] *Cheskes v. Ontario (Attorney General)* (2007), 87 O.R. (3d) 581, 288 D.L.R. (4th) 449 (S.C.J.)

[4] *Infant Number 10968 v. Ontario*, 2006 CanLII 19946, 81 OR (3d) 172 (Ont. S.C.)

the Ontario Court of Appeal[5] and an application for leave to the Supreme Court of Canada[6] were unsuccessful.

However, a recent decision,[7] in response to an application brought by a woman conceived using the sperm from an anonymous donor, has carefully examined the needs of donor offspring. The applicant successfully argued, by way of a constitutional challenge, that information about gamete donors should be recorded and preserved for donor offspring so that it could be made available to them. This decision recognized the legitimate needs of donor offspring.

As further background to this issue, in 1989, by Order in Council, the federal government established a Royal Commission to examine how reproductive technologies should be handled in Canada, and in 1993 their 1275 page report was issued.[8] The Commission reported, *inter alia,* that secrecy surrounding donor insemination could give rise to conflict within the family.[9] They also reported:[10]

> Surveys and research done for the Commission show that Canadians attach importance to having a genetic link between themselves and their children … Many aspects of Western and other cultures reflect as well as reinforce the importance of the genetic link between parent and child. As a result, many practitioners suggest that DI [donor insemination] be kept secret, even from the child, to preserve the appearance that the family does not differ from most other families. Some clinics even require couples to sign a form stating that they will never tell anyone about their DI procedure. At the same time, our society values honesty and openness in personal

[5] 2007 ONCA 787, 45 R.F.L. (6th) 260
[6] 2008 CarswellOnt 2359
[7] *Pratten v. British Columbia (Attorney General)*, 2011 BCSC 656, 99 R.F.L. (6th) 290
[8] Royal Commission on New Reproductive Technologies, *PROCEED WITH CARE,* (Ottawa: Public Works and Government Services Canada, 1993)
[9] *Ibid* at 463
[10] *Ibid*

> relationships. This results in great ambivalence for many individuals involved, as secrecy often implies something to be ashamed of.

The Commission, while noting that secrecy about donor insemination is fairly easy to maintain, reported that "[I]n the long run … secrecy places great strains on families" and that "[C]omission research showed that maintaining secrecy about the means of conception can be contrary to the best interests of the child".[11] The Commission also noted that "[A]doptive families used to be advised to keep this secret from the community and from the child; studies have since shown, however, that openness and honesty about adoption are healthier for all concerned."[12]

Does the present quest by children of gamete donor recipients to obtain information about their conception history bear any resemblance to the struggle Canadian women had in the past to receive a share in property accumulated during a marriage? One need only remember that in 1973 the majority of the Supreme Court of Canada, who were unwilling to use equitable principles to achieve justice, ruled that a hardworking farm wife, who had worked alongside her husband for 25 years, was not entitled on divorce to any share of the accumulated wealth.[13] At that time Canadians had to rely on their legislatures, and not the courts, to remedy what most considered an obvious injustice.

What is gamete donation?

- Definition and disclosure

[11] *Ibid* at 464 - 465
[12] *Ibid* at 465
[13] *Murdoch v. Murdoch,* [1975] 1 S.C.R. 423, 1973 CarswellAlta 119

Gametes are the reproductive cells of men and women, namely, the male sperm and the female eggs (or ova). The fertilized egg results in an embryo.[14] Four levels of gamete information sharing are possible, namely, non-identifying information, non-identifying contact for medical updates, non-identifying personal contact, and identifying information.[15]

- How generally dealt with in Canada

A regulation entitled "Processing and Distribution of Semen for Assisted Conception Regulation",[16] enacted under the federal *Food and Drug Act*,[17]provides for the screening of donor semen, in order to prevent disease transmission, and for the collection of non-identifying donor information. The records are not required to be kept indefinitely.

In Canada, the federal *Assisted Human Reproduction Act*[18] provides the legislative framework for reproductive technology. This legislation does not deal with the issue of the parentage of a child born as a result of reproductive technology, because it is a matter within provincial jurisdiction. Not all provisions of this Act have been proclaimed, and some sections have been determined to exceed the authority of the Canadian Parliament.[19] The sections of this Act that provided for the maintaining of a personal health information registry of gamete donors for the purposes of identifying health and

[14] See Sonya Norris, "REPRODUCTIVE TECHNOLOGIES: SURROGACY, AND EGG AND SPERM DONATION", (Ottawa: Science and Technology Division, 2001)
[15] Ethics Committee of the American Society for Reproductive Medicine, "Interests, obligations, and rights of the donor in gamete donation" (2009) 91:1 Fertility and Sterility 22 at 24
[16] SOR/96-254
[17] R.S.C. 1985, c. F-27
[18] 2004 S.C., c.2
[19] *Reference re Assisted Human Reproduction Act,* 2010 SCC 61, [2010] 3 S.C.R. 457

safety risks, and the requirement to disclose this information to donor offspring, on request, were found *ultra vires* Parliament.[20]

The *Assisted Human Reproduction Act* has also established a federal agency, "Assisted Human Reproduction Canada" (AHRC).[21] On their web-page they describe themselves as the "federal regulatory agency responsible for protecting and promoting the health, safety, dignity and rights of Canadians who use or are born of assisted human reproduction while allowing scientific advances that benefit Canadians."[22]

The AHRC web-page,[23] under the heading "Accessing donor information in Canada" provides the following information for the reader (bullets added):

- In all situations, you may be able to receive certain information directly from the reproductive clinic or physician that performed the procedure. There are also voluntary registries available online where you may be able to connect with donors or genetic half-siblings who are also willing to be identified. Commercial and non-profit DNA testing facilities can provide clues to your genetic origins, including health matters or relatedness to other genetic siblings or half siblings. DNA testing is the most accurate way to establish a genetic relationship.
- Information collected by clinics and physicians provides access to the donor's genetic profile and health history, but preserves the individual's anonymity if that is his or her choice. A donor may choose to be identified or not; confidential information cannot be released without the donor's consent.
- Donor sperm, eggs or in vitro embryos may be imported from another country, most frequently the United States.

  If your parent(s) travelled to other countries to undergo assisted human reproductive procedures, your ability to obtain information about your donor will vary from country to country, as reproductive clinics abroad operate by different laws and regulations than those in Canada.

[20] *Ibid*
[21] *Supra* note 18
[22] <http://www.ahrc-pac.gc.ca/v2/aaa-app/index-eng.php>
[23] <http://www.ahrc-pac.gc.ca/v2/faq/accessFAQ-accesFAQ-eng.php>

> Additional information may be available through donor banks or the reproductive clinic used by your parent(s).

This may be an overly optimistic description of the information that is actually available to donor recipients.

In Canada, there are only a few provinces that have some form of legislation that deals with the rights of gamete donors, and the legal status of parents and the donor children.[24]

- How gamete donation generally dealt with in other countries

In 2001 it was reported that internationally the vast majority of countries endorsed anonymous gamete donation, however, there did "in recent years seem to be a discernible trend towards allowing children access to identifying information about their gamete donor".[25]

The United States has no legislation with respect to gamete donation, but a review of donor insemination programs has shown that the number of open-identity donor insemination programs is increasing.[26] It has been suggested that the increase in open-identity programs indicates that the industry is changing in recognition that the option to access the donor's identity is important to those involved.[27] The Ethics Committee of the American Society for Reproductive Medicine has stated:[28]

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[24] Angela Cameron, Vanessa Gruben & Fiona Kelly, "De-anonymising Sperm Donors in Canada: Some Doubts and Directions" (2010) 26 Can. J. Fam. L. 95 at 106

[25] Lucy Frith, "Gamete donation and anonymity: The ethical and legal debate" (2001) 16:5 Human Reproduction 818 at 818

[26] Joanna E. Scheib & Rachel A. Cushing, "Open-identity donor insemination in the United States: is it on the rise?" (2007) 88:1 Fertility and Sterility 231 at 232

[27] *Ibid*

[28] A. Braverman, "Interests, obligations, and rights of the donor in gamete donation" (2009) 91:1 Fertility and Sterility 22 at 27

> Traditional practices of anonymity in gamete donation are slowly changing. The ASRM Ethics Committee and other advisory groups and researchers have encouraged recipient parent(s) to disclose the fact of gamete donation to offspring, and a growing number of clinics provide for some form of future contact between donor and offspring if the participants agree.

In 2005 the United Kingdom enacted legislation that required the donor of gametes or embryos to agree to the disclosure of their identity to any offspring reaching the age of 18.[29] Any donor-conceived person 18 years old, or older, who was conceived after April, 2005 can request the identity of the donor from the "Human Fertilization and Embryology Authority" (HFEA).[30] The regulatory authority, HFEA, states in literature for parents, that "[I]t is certainly best to be open with your child/children about the circumstances of their conception. Secrecy on this subject isn't in their interests."[31]

In 1984 Sweden was the first country to remove the anonymity of gamete donors, and allow the child, when sufficiently mature, to find out the identity of their sperm donor.[32] Austria allows the child to obtain identifying information after medically assisted procreation.[33] In 1992 Switzerland added a new article to its constitution that guarantees a child access to data concerning his\her lineage, and such entitles him\her to receive identifying information about his\her donor.[34] In 2000 Holland enacted legislation allowing only non-anonymous sperm donation and all sperm banks are obliged to recruit

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[29] Lucy Frith, Eric Blyth & Abigail Farrand, "UK gamete donors' reflections on the removal of anonymity: implications for recruitment" (2007) 22:11 Human Reproduction 1675 at 1675
[30] *Ibid*
[31] Fiona MacCallum & Susan Golombok, "Embryo donation families: mothers' decisions regarding disclosure of donor conception" (2007) 22:11 Human Reproduction 2888 at 2894
[32] *Supra* note 25 at 819
[33] *Ibid*
[34] *Ibid*

non-anonymous donors.[35] In Iceland anonymous and non-anonymous donations are permitted.[36] In Australia, some jurisdictions have abolished donor anonymity.[37]

Are there societies in which gamete donation is not permitted, and if so, why?

There are countries that forbid the use of donated gametes in *in vitro* fertilization, for what they describe as moral and religious reasons.[38] In 2004, Italy passed a national law, which was upheld in a referendum, prohibiting the use of donor gametes in *in vitro* fertilization.[39] Turkey bans the use of all donor gametes, and Norway prohibits the donation of ova.[40] Religious declarations (fatwas) set out what is permissible as a matter of medical practice in some Muslim societies.[41] In many Middle Eastern countries, such as Egypt, Jordan, Morocco and Qatar, religious declarations have banned the donation of gametes.[42]

Four reasons are given for banning the use of donor gametes, namely, it is a threat to marriage, it poses a danger to children and families, it poses risks to donors, and it poses a threat to society at large.[43]

Those who see the use of donor gametes as a threat to marriage, express the view that one of the core meanings of marriage is that men and women should only have children

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[35] *Ibid*
[36] *Ibid*
[37] *Ibid*
[38] Timothy F. Murphy, "Ethics and the prohibition of donor gametes in fertility medicine" (2008) 4:1 Ethics, Bioscience and Life 60 at 60
[39] *Ibid*
[40] *Ibid*
[41] *Ibid*
[42] *Ibid*
[43] *Ibid* at 61

with each other, and others argue that it threatens marriage by making the having of children, through marriage, as irrelevant and without moral meaning. [44]

Those who believe that gamete donation pose a danger to children and families argue that the children face psychological harm, distorted family relationships and social stigmatization.[45] They also express a concern that it commoditizes the having of children.[46]

Those who express concern that gamete donation is risky for donors, point out that the retrieval of human eggs has identifiable risks, and that the procedure may also have some yet to be identified risks, due to the various medical procedures that must be performed.[47]

Those who believe that gamete donation threatens society at large argue that it separates conception and marriage, threatens the unity and stability of the family, atomizes sexual relationships by relocating child-bearing functions outside the marriage, is of doubtful value because of overpopulation, or may lead to an unknowing incestuous relationship.[48]

Brief history of gamete donation

[44] *Ibid*
[45] *Ibid*
[46] *Ibid*
[47] *Ibid* at 64
[48] *Ibid* at 65

Using rabbits, in the 1890s, a successful birth occurred after an embryo conceived from one animal was placed into the uterus of another.[49] Artificial insemination, using a husband's spermatozoa, was first attempted in the late 1800s.[50] Donor insemination, generally practiced in secret, was first used in clinical practice in England in the late 1930s.[51] In 1945 a British gynecologist published an article about her donor insemination program, and the response to the described practice was one of outrage and condemnation.[52]

In Britain, between the late 1940s and early 1980s, there were a number of Commissions and Committees that examined reproductive technologies.[53] The reports included an objection to masturbation, the opinion that "sperm donating was 'an activity which might be expected to attract more than the usual proportion of psychopaths'", that it was an intrusion in the holy sacrament of marriage and a recommendation that the practice be made a criminal offence.[54] By 1982 it was noted that gamete donation was carried out covertly, without central record keeping or regulation, that the donor offspring were illegitimate and therefore the husband of the recipient had no legal obligation to the child, and that a criminal offence was committed by entering false information on the birth

[49] Mark V. Sauer & Suzanne M Kavic, "Oocyte and embryo donation 2006: reviewing two decades of innovation and controversy" (2006) 12:2 Reproductive BioMedicine Online 153 at 153
[50] *Supra* note 38 at 60
[51] *Supra* note 25 at 820
[52] *Ibid*
[53] *Ibid*
[54] *Ibid*

certificate.[55] It was with this type of expressed concern that donor anonymity was seen as a necessary practice.[56]

In 1978 the first "test tube baby" was born as a result of *in vitro* fertilization.[57] By 2007 it was reported that *in vitro* fertilization gave rise to 1 in 50 births in Sweden, 1 in 60 births in Australia, and 1 in 80 births in the United States.[58]

In 2000 the US-based worldwide registry, the Donor-Sibling Registry (DSR), was founded.[59] The DSR has been described as very successful in enabling many parents and donor offspring to locate and contact donor siblings and donors.[60] However, there remain many donor offspring who still have no access to any identifying information about their donor.[61]

The arguments in support of and against secrecy

The parties in gamete donation, namely, the donor, the recipient and the offspring, have distinct, but sometimes competing interests.[62] The donor wants to be protected from any obligation imposed without his or her consent. The recipient wants a healthy child and no unwanted involvement of the donor. The offspring wants to have information about possible health risks and the option of having information about genetic parents.

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[55] *Ibid*
[56] *Ibid*
[57] H. Colpin & G. Bossaert, "Adolescents conceived by IVF: parenting and psychosocial adjustment" (2008) 23:12 Human Reproduction 2724 at 2724
[58] *Ibid*
[59] T. Freeman et al, "Gamete donation: parents' experiences of searching for their child's donor siblings and donor" (2009) 24:3 Human Reproduction 505 at 506
[60] *Ibid* at 516
[61] V. Jadva et al, "Sperm and oocyte donors' experiences of anonymous donation and subsequent contact with their donor offspring" (2011) 26:3 Human Reproduction 638 at 638
[62] *Supra* note 15 at 22

- Right to privacy

The secrecy associated with gamete donation is reminiscent of that which existed with adoption in the past. The case law with respect to adoptees attempting to obtain adoption records illustrates how courts often deal with this issue. While acknowledging that societal attitudes have changed with respect to unwed pregnancy and the "shame of infertility", the protection of privacy is stated to be a fundamental value in our modern democracy.[63] It has been held that the ability of the birth parent to "control the dissemination of personal information is an element of the right to privacy."[64] It has also been successfully argued that birth parents, absent health and safety reasons of the adoptee, have a reasonable expectation of privacy.[65] The Supreme Court of Canada has recognized that a person may have a reasonable expectation of privacy, and in *R. v. Plant*,[66] Sopinka J., for the majority, stated:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individuals.

However, an emphasis on the right of the birth parent, or the gamete donor, fails to recognize that the children created "have needs and rights separate from the wishes of their parents."[67] One Canadian author has opined that "[C]learly, privacy rights carry

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[63] *Cheskes, supra* note 3 at para. 62
[64] *Ibid*
[65] *Ibid* at para. 69
[66] [1993] 3 S.C.R. 281 at 293, 1993 CarswellAlta 94
[67] A. McWhinnie, "Gamete donation and anonymity: Should offspring from donated gametes continue to be denied knowledge of their origins and antecedents?" (2001) 16:5 Human Reproduction 807 at 813

greater weight than mental health and psychological development in Canadian adoption law".[68]

- Increased difficulty in finding donors

As previously described, in 2005 legislation was changed in the United Kingdom to require a donor of gametes to agree to the disclosure of their identity to offspring upon reaching the age of 18. While an increased difficulty in finding donors was confirmed to be a valid issue, research showed that better education and counseling could be used to maintain gamete donor recruitment.[69] As far back as the 1980s it was noted that there was a proportion of contemporary donors who understood the future child's need for information about his or her biological parent(s).[70] In Sweden, following a change in their legislation, it was found that sperm donors could be recruited within a system of openness.[71]

- Protection from legal and financial responsibility

Some donors are concerned that the removal of anonymity may create legal and financial responsibility for donor offspring.[72] Legislation in the United Kingdom, for example, removed this possibility.[73]

- Fear of being found

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[68] Cindy L. Baldassi, "The Quest to Access Closed Adoption Files in Canada, Understanding Social Context and Legal Resistance to Change" (2005) 21 Can. J. Fam. L. 211 at 261
[69] *Supra* note 29 at 1678
[70] *Supra* note 67 at 813
[71] K. Daniel et al, "Sperm Donation: Implications of Canada's Assisted Human Reproduction Act 2004 for Recipients, Donors, Health Professionals, and Institutions" (2006) 28:7 J Obstet Gynaecol Can 608 at 613
[72] *Supra* note 29 at 1678
[73] *Ibid*

Some donors express a concern that if anonymity is removed, and they are found, that they will face emotional liability, moral obligations and unwanted involvement with donor offspring.[74] Some have also expressed a concern about their personal security and the impact that discovery will have on their family members.[75] This is the same type of concern expressed by birth parents of adopted children, in response to the possible retroactively opening of adoption records.[76] In women-headed families (lesbian couples and single women), a concern is expressed about whether the sperm donor, once known, will have parenting rights that may be exercised contrary to their wishes.[77]

- Health needs

In the recent *Pratten*[78] decision, Adair, J accepted the following expert medical evidence (bullets added):

> - … an individual's genetic make-up plays a significant role in their health by influencing everything from their risk of congenital anomalies to their chance of developing a common disorder such as cardiovascular disease, asthma, and obesity;
> - The integration of genetic information into medical practice provides physicians with the tools to identify individuals who are at risk of developing medical problems or to diagnose those already affected so that effective preventive treatment measures can be instituted and family members offered counselling. We have known for a long time that many diseases 'run in families'…. As such, your family medical history is important in identifying disease-risk and new genetic tests are helping us to understand these risks better. However, no genetic test developed to date can determine and accurately quantify risk for all diseases. Therefore, a 'good old-fashioned' family history remains the best way to screen for genetically linked health problems;

[74] *Ibid* at 1676
[75] *Ibid* at 1677
[76] *Supra* note 3 at para. 65
[77] *Supra* note 24 at 120
[78] *Supra* note 7 at paras. 83 and 84

- Caring for [donor offspring] and providing them prevention and/or screening strategies based on possible inherited or genetic disease is problematic. Therefore the impact of genetic information (or lack thereof) on the health of [donor offspring] in the context of genetic disease for gamete donors, donor recipients, and donor-offspring and their families is substantial;
- Obtaining a family history is considered a standard element of good medical care. Primary care practitioners use the family history as a tool to identify the known genetic diseases present in their patients' relatives as well as identify any other non genetic risk factors that may be present;
- The family history is a key component of every medical genetics clinical assessment and is performed in every patient encounter.

Justice Adair summarized her findings and conclusions, based on the medical evidence, as follows (bullets added):[79]

- Donor offspring fear that their health can be compromised, and may be seriously compromised, by the lack of information about their donor. … these fears are justified. Even with the availability of genetic testing, a good old-fashioned family history is more predictive, and genetic testing is best interpreted in the context of a family history;
- Because of a lack of information, donor offspring can face delayed medical treatment, and an inability to have conditions that are inherited or genetic diagnosed and treated.

- Anxiety and stress because of the absence of personal and family information

In the past, when adoptees sought disclosure of birth records, they sometimes argued that they needed this information for their proper psychological development.[80] Although their evidence may have been referred to as "compelling and heartfelt", this argument was often given little weight in Canadian courts, and the social science cited in support of

[79] *Supra* note 7 at para. 111
[80] *Supra* note 68 at 245

it was described as inconclusive.[81] In the United Kingdom, a different approach was taken, where it was held that respect for private and family life required that every person should be able to establish details of their identity as human beings, including their origins and the opportunity to understand them.[82] In the *Pratten*[83] decision, after carefully reviewing expert evidence on this issue, Justice Adair held (bullets added):

- It is important psychologically and medically, for donor offspring to have the ability to know identifying and non-identifying information about their donor, and their psychological and medical needs in that respect are substantially the same as adoptees;
- For donor offspring, having information – both identifying and non-identifying – matters deeply, both to complete their personal identities and to alleviate the stress, anxiety and frustration caused by not knowing;
- Donor offspring experience sadness, frustration, depression and anxiety – in other words, they suffer psychological and psychosocial difficulties – when they are unable to obtain information.

- The United Nation's *Convention on the Rights of the Child*

Article 7 of the *Convention on the Rights of the Child* (CRC)[84] states:

1. 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.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8 of the CRC states:

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[81] See *Cheskes*, *supra* note 3 at paras. 64-67
[82] *Rose v. Secretary of State for Health* [2002] EWHC 1593 (QB (Admin)); [2002] 2 F.L.R. 962
[83] *Supra* note 7 at para. 111
[84] *Convention on the Rights of the Child*, 28 May 1990, Can. T.S. 1992 No. 3, (Ratified 13 December 1991)

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establish speedily his or her identity.

Articles 7 and 8 of the CRC have been used by various legislatures around the world to justify policies of non-anonymous gamete donation.[85] Canadian courts, when dealing with the issue of the disclosure of identifying information to adoptees, have paid little or no attention to the CRC.[86]

However, as stated by L'Heureux-Dube, J, "[O]ur *Charter* is the primary vehicle through which international human rights achieve a domestic effect".[87] Further, as pointed out by Dickson, CJC, in *Slaight Communications v. Davidson:*[88]

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of 'the full benefit of the *Charter's* protection'. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

- *Charter* Arguments

Those seeking disclosure of confidential records that may possibly identify their parentage have argued that secrecy provisions violate their rights under the *Canadian Charter of Rights and Freedoms* (*the Charter*).[89] More particularly, they argue that non-

[85] *Supra* note 25 at 820
[86] See *Infant No. 10968, supra* note 4 at paras. 114-115 and *Cheskes, supra* note 3
[87] *R. v. Evanchuk*, [1999] 1 S.C.R. 330 at para. 73; 1999 CarsellAlta 99
[88] [1989] 1 S.C.R. 1038 at 1989; 1989 CarswellNat 193
[89] Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c11

disclosure provisions infringe on their right to life, liberty and security of the person under s. 7 of the *Charter* and their equality rights under s. 15(1) of the *Charter.*

In *Cheskes,*[90] s.7 of the *Charter* was the basis for declaring invalid, legislation that would have retroactively opened confidential adoption records, and allowed access to identifying information without the consent of the person being identified.

In *Infant Number 10968,*[91] an adult adoptee, who described emotional impediments that occurred because of her inability "to know where she comes from", sought disclosure with respect to the identity of her birth parents. She was unsuccessful in arguing that the adoption non-disclosure provisions infringed on her rights under ss 7 and 15 of the *Charter.*

However, in *Pratten,*[92] a decision that might be described as taking a more contemporary approach, it was successfully argued by a donor offspring that the distinction between individuals who are adopted and donor offspring, within adoption legislation, amounted to discrimination, and as a result s. 15 of the *Charter* was violated. Ms. Pratten's s.7 *Charter* claim was unsuccessful. A case comment[93] has suggested that Justice Adair's cautious approach with respect to s. 7 of the *Charter* missed an opportunity, grounded on the living tree doctrine, to take a progressive approach to protect the interests of donor offspring.

- Social Attitudes Have Changed

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[90] *Supra* note 3
[91] *Supra* note 4
[92] *Supra* note 7
[93] Sahar Zomorodi, "Case Comment on Pratten v. British Columbia (Attorney General) and the Interpretation of s. 7 of the Charter" (2011) Regquest 04-09-01

It has been acknowledged that the culture of assisted human reproduction has changed in recent years, with an increasing acceptance of openness and sharing of information between the involved parties.[94] This change is said to be as a result of increased public discussion and debate about assisted human reproduction in the media, and public education "aimed at diminishing the secrecy, ignorance, and stigma" associated with it.[95]

- Fear of Inadvertent Consanguinity

As accepted to be a fact in *Pratten,*[96] secrecy causes donor offspring to commonly, and legitimately, fear inadvertent consanguinity.

What, if anything, does social science tell us about the impact of secrecy on those involved?

In 2001 a paper[97] was written that argued that there should be a change of focus from the unhappiness of the infertile couple, to the long-term outcome and consequences of gamete donation on the children created, and the adults that they will become. The author described the reported reactions of donor offspring on learning of their origins, as "anger, resentment at the lies and deceit, loss of a sense of self and of their identity."[98] It was further reported that:[99]

> A recurring comment about their anger and frustration is that no one thought them important enough to keep records about their donor father and that the system was set up intentionally to deceive them and to make it impossible for them ever to know. Even their birth certificate is a lie.

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[94] *Supra* note 71 at 613
[95] *Ibid*
[96] *Supra* note 7 at para. 111
[97] *Supra* note 67
[98] *Ibid* at 812
[99] *Ibid* at 813

Some time ago, the term “genealogical bewilderment” was coined to refer to children who had uncertain or no knowledge of their birth parents, and it was argued that “such uncertainty could have a detrimental effect on the child’s mental health.”[100] It was also argued that this information was “deemed essential to human well-being and that people have the right to the truth about their origins.”[101]

Research with respect to adoption is of value when discussing the appropriateness of secrecy in gamete donation. The current view with respect to adoption is as follows:[102]

> The current state of the art in adoption practice is that the adopted person should know about his or her adopted status as a “natural part” of family life. The implication is that secrecy on this issue can be hurtful and harmful to the child’s development.

Data from donor offspring and parents who have conceived using donor gametes has also shown that contact with half-siblings and donors can be a positive experience.[103] Research has shown that parents generally report that their and the children’s meeting with donor siblings as being positive.[104] Parents also reported, while reticent about making contact with their child’s donor, that they had very positive experiences with these meetings, and the ensuing relationship between the donor and child.[105] Parents in the study “emphasized that it was a child’s choice and right to know about their genetic origins”, and it was opined that “[T]his reflects a more general policy shift away from the

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[100] *Supra* note 25 at 821
[101] *Ibid*
[102] Susan M. Henney et al, “Birth Mothers’ Perceptions of Their Parented Children’s Knowledge of and Involvement in Adoption” (2007) 10:3-4 Adoption Quarterly 103 at 126
[103] *Supra* note 61 at 639
[104] *Supra* note 59 at 513
[105] *Ibid*

perception that knowledge of one's genetic history is likely to be detrimental where this conflicts with one's social parentage towards a recognition that access to such information is in 'the best interests of the child'".[106]

In a study aimed at examining the impact of telling children about their donor conception during the preschool years, it was noted that (bullets added and endnotes omitted):[107]

- Those who become parents through assisted reproductive procedures involving gamete donation tend not to tell their children about their donor conception; thus, the majority of children conceived in this way remain unaware that the person they know as their father (in the case of sperm donation) or their mother (in the case of egg donation) is not their genetic parent;
- There has been considerable concern about the secrecy that surrounds families created through gamete donation. It has been argued that secrecy will have an adverse effect on family relationships and, consequently, on the child;
- Findings suggestive of an association between secrecy and negative outcomes for donor conceived children have come from research on adoption, which has shown that adopted children who are not given information about their biological parents may become confused about their identity and are at risk for psychological problems;
- It is now generally accepted that adopted children benefit from open communication with their parents about their adoption and information about their biological parents;
- Family therapists have also argued that secrecy may jeopardize communication between family members and result in a distancing of some members of the family from others;
- In relation to donor insemination [it] has [been] suggested that keeping the circumstances of conception secret will separate those who know the secret (the parents) from those who do not (the child);

[106] *Ibid* at 514

[107] Susan Golombok et al, "Children Conceived by Gamete Donation: Psychological Adjustment and Mother-Child Relationships at Age 7" (2011) 25: 2 Journal of Family Psychology 230 at 230-231

- Little is known about the consequences of openness about gamete donation for family relationships and child development, largely because so few individuals have been told about their genetic origins;
- From studies of the small number of people who are aware of their donor conception, the age of the child when told and the manner of disclosure appear to have an impact on their reaction. Young children tend to show curiosity about their unknown donor and a desire to discover more about him or her. Similarly, adolescents who have known about their donor conception since childhood wish to find out more about their donor, with many believing that this would help them learn more about themselves. This is in line with studies of adopted individuals who search for their birth parents, the majority of who report that curiosity and a desire to acquire a more complete sense of identity are their primary motivations for initiating a search;
- In contrast, those who discover their donor conception later in life, particularly those who find out by accident or under adverse circumstances such as parental divorce, appear to show more negative responses, including anger, toward their social parents and feelings of betrayal and distrust.

The authors of the above study also noted that a lack of communication about the child's genetic origins may interfere with positive interaction between mother and child.[108] It was suggested that perhaps the children sense when they are not being told something.[109] This study reported that, like adoptive families, "gamete donation families may benefit from open communication about the child's genetic origins."[110] They concluded (endnote omitted):[111]

> Studies of adoptive families show that the earlier children are informed about their adoption, the better the outcome in terms of their emotional and identity development, and it is now recommended that children are told about their adoption in the preschool years. The findings of the present study similarly suggest that assisted reproduction families may benefit from

[108] *Ibid* at 237
[109] *Ibid*
[110] *Ibid*
[111] *Ibid* at 238

> disclosure to children about the nature of their conception before they enter school.

It would appear that those preferring anonymous gamete donation focus on their needs and desires, rather than those of the children, because such allows them to establish clear boundaries between those involved, and avoid the possible interference of the donor.[112] It has been said that couples determined to maintain secrecy "expressed fears of negative social and familial consequences" and that they "perceived a social, cultural and/or religious negative attitude towards gamete donation" and that such couples should be "counselled in order to cautiously balance these risks with those involved with late and/or incidental disclosure."[113]

Should history be falsely rewritten in gamete donation?

When scientific journals and articles dealing with the issue of assisted reproduction are reviewed, the focus is generally on treating the infertile person. In many reported legal decisions and articles the judges and authors discuss the rights and obligations of the gamete donors, surrogate parents, social parents and /or birth parents, with very little focus on the fact that a successful conception creates a human being with his or her own legal rights.

[112] C. Laruelle et al, "Anonymity and secrecy options of recipient couples and donors, and ethnic origin influence in three types of oocyte donation" (2011) 26:2 Human Reproduction 382 at 388
[113] *Ibid*

The Supreme Court of Canada, in deciding that legislation cannot validly permit the arbitrary exclusion of a father's particulars from his children's birth certificate, stated (Deschamps J):[114]

> A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. Such ties do not exhaustively define the parent-child relationship. However, they are a significant feature of that relationship for many in our society …

Professor James G. McLeod, in his annotation to this case, wrote – "[T]he obvious question is why either parent should have the right to ignore reality when it comes to public record-keeping."[115] In the United Kingdom it has been argued that donor-conceived people should have that fact, and the identity of their genetic parents, recorded on their birth certificate.[116]

A Swedish study has provided some insight into why parents choose to tell, or not tell, their children about their method of conception.[117] They reported, while recognizing the limitation of their study due to a small sample size:[118]

> … the findings do indicate that a marked proportion of parents recognize the importance of sharing [donor insemination] information with their children. … Those parents who were open with their children gave the following reasons for their decision:
>
> (i) To avoid accidental discovery
>
> (ii) The desire for openness and honesty within the family

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[114] *Trociuk* v. *British Columbia (Attorney General)* 2003 SCC 34 at para. 16, 2003 CarswellBC 1350
[115] *Ibid* at 1356
[116] Rupert Rushbrooke, "Proposals to bring donor-conceived people's birth certification into line with that of all UK citizens" (29 April 2008), online DC Birth Certification <http://www.dcbirthcertification.org/node/4>
[117] A. Lalos, C. Gottlieb & O. Lalos, "Legislated right for donor-insemination children to know their genetic origin: a study of parental thinking" (2007) 22:6 Human Reproduction 1759
[118] *Ibid* at 1765-1766

> (iii) The fundamental right of the child to know his/her genetic origin.
>
> …
>
> Regarding reasons cited by parents who were not inclined towards disclosure of the [donor insemination], the parents generally responded that they considered it to be a private matter, and they wanted to keep it secret in order to protect the family, and especially the child, against the possible negative attitudes and opinions of others. … Finally, an additional factor involved in the wish to 'protect' the child from knowing about the [donor insemination] was connected with the father's fear of being rejected by the child and no longer regarded as her/his 'real' father since they were not genetically related to each other. In other words, trying to 'protect' the child from awareness obviously had just as much to do with trying to protect the man. … Interestingly, the women and men who did not intend to tell in the present study seemed not to have thought of the possible damage that secrets and lies may impose on the offspring, as well as on the couple, nor the risk of accidental discovery by the child – or later as a teenager or an adult.

The authors of the above study, as part of their discussion, also noted (endnotes omitted):[119]

> From children conceived by [donor insemination], there is emerging confirmation that those who learnt about the [donor insemination] later in life experience uncertainty and confusion and take some time to adjust to this information, whereas early disclosure prevents disturbance in identity development. In addition, not sharing information about [donor insemination] with the children can have a negative impact on the parents, which in turn may become destructive for the children.

It is difficult to discern a rational basis, in the best interest of the child, who will eventually reach adulthood, for our society to condone the known false recording of genetic history. As has been previously written, "[A]ncestry is part of a human being's story and we should not be afraid to acknowledge it".[120] Other than in the area of gamete donation,

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[119] *Ibid* at 1766

[120] *Supra* note 67 at 814

and adoption, is there any other area of our legal system that condones or sanctions a known lie or falsehood?

Is a state sanctioned fiction and\or falsehood appropriate in our society?

It is self-evident that our society values truth and honesty above all else. From a young age, children are taught the need to tell the truth, and not just when convenient to do so. There are no exceptions to this basic human value. Children are not taught that it is acceptable to tell or maintain a lie if it serves a perceived benefit. Children, before being able to testify in court are assessed by a judge to determine if they understand "the moral significance of making a commitment to tell the truth" and that they "appreciate the importance of telling the truth in court proceedings".[121] It may be that the value of truth and honesty is ingrained into our culture because of the recognition that the adjudicative attempt to ascertain the truth is subjective and uncertain.[122] As an example, we are repeatedly made aware of the very significant consequences that often follow when a member of the police acts with less than the highest standard of integrity.[123] The ongoing state sanctioned fiction and falsehood associated with gamete donation cannot be in accord with our core Canadian values, and what we now recognize to be in the best interest of those conceived through the use of gamete donation.

Recommendation

[121] See Nicholas Bala et al, (2005) "Bill C-2: A New Law for Canada's Child Witnesses" 32 CR-ART 48
[122] See Lloyd P. Deshaye, (2006) "Fact-Finding: A Judicial Perspective" 19 Can. J. Admin. L. & Prac. 107
[123] Julia Hughes, (2011) "Case Comment on *R. v. Kelly*" 81 CR-ART 41

In all of the circumstances I would submit that continued secrecy is not appropriate or acceptable in gamete donation. However, there must still be a balancing of the interests of those involved. I would therefore recommend:

1. That Canadians not be permitted the use of anonymously donated gametes or embryos, and that the disclosure of the identity of donors be available to any offspring, conceived after a fixed date, when they reach the age of 18;
2. That all birth certificates be required to disclose the identity of all known genetic parents, in conjunction with the child's social parents; and
3. That uniform provincial legislation be prepared that addresses the legal rights, and where appropriate, the obligations, of gamete donors, gamete recipients and donor offspring.

Delay in confronting and resolving the issue of secrecy in gamete donation serves the interest of no one. The United Kingdom would appear to have developed a reasonable model that would meet the needs of Canadians.