

## GAMETE DONOR ANONYMITY: WHAT'S PRIVACY GOT TO DO WITH IT?

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*In Canada, gamete donor anonymity is tacitly protected in the absence of laws or regulations that explicitly address the topic. This article explores and characterizes the historical and contemporary role of privacy, as a publicly protected legal interest, in the context of gamete donation. Ultimately, this article argues that anonymous gamete donation is not supported by the principle of privacy in Canadian law. The argument proceeds by identifying and exploring three candidate rationales for gamete donors' interests in privacy as referenced in past and current government reports, legislation, and case law, but ultimately reveals them as wanting and unfounded from a legal standpoint. The implication of this is that the protection of donor anonymity cannot find support in appeals to donors' privacy interests, and that the legal defensibility of the practice — if it can be defended at all — must be found elsewhere.*

### TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	1001
II.	HISTORY OF GAMETE DONOR ANONYMITY AND ATTEMPTS AT REFORM . . . . .	1004
	A. PRE-1989: EARLY ADVANCEMENTS AND INQUIRIES . . . . .	1004
	B. 1989: ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES (THE BAIRD COMMISSION) . . . . .	1005
	C. 2001: HOUSE OF COMMONS STANDING COMMITTEE ON HEALTH: ASSISTED HUMAN REPRODUCTION . . . . .	1006
	D. 2004: ASSISTED HUMAN REPRODUCTION ACT . . . . .	1006
	E. 2010: REFERENCE RE ASSISTED HUMAN REPRODUCTION ACT . . . . .	1008
	F. 2012: PRATTEN V. BRITISH COLUMBIA AND THE CHARTER . . . . .	1008
	G. TODAY: CURRENT PRACTICES IN PRIVACY LAW AND DONOR ANONYMITY . . . . .	1010
III.	RATIONALES FOR A PRIVACY INTEREST FOR GAMETE DONORS . . . . .	1013
	A. RATIONALE ONE: PROTECTING DIGNITY AND AUTONOMY . . . . .	1014
	B. RATIONALE TWO: AVOIDING THE RESPONSIBILITIES OF PARENTHOOD . . . . .	1018
	C. RATIONALE THREE: SECRECY AND MAINTAINING AN IMAGE OF “NORMALCY” . . . . .	1020
IV.	CONCLUSION . . . . .	1021

### I. INTRODUCTION

The questions of whether sperm and egg donors should remain anonymous, and what information, if any, should be collected and disclosed to donor-conceived offspring are as multifaceted and controversial as they are fascinating. Many are surprised to learn that these

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questions have not been settled in Canada, where donor anonymity is tacitly protected across the country in the absence of laws or regulations that explicitly address the issue, and despite historical efforts for the creation of oversight mechanisms. Instead, whether a donor's identifying information remains confidential is governed by private contract and blanket health privacy legislation. The topic of gamete donor anonymity is only growing in importance given the increasing numbers of same-sex couples, single parents, and older couples that are turning to assisted reproduction to help them conceive.<sup>1</sup> Additionally, as a growing number of legislatures across the globe have introduced assisted reproduction laws that prohibit donor anonymity, in a shift away from protecting donor privacy and toward the best interests of donor-conceived offspring, Canada is in the spotlight as one of few jurisdictions where donor anonymity is permitted.<sup>2</sup>

Existing scholarship that explores the topic of gamete donor anonymity typically engages in the weighing of several factors and stakeholder perspectives, including: the interests of egg and sperm donors; the desires of intended parents; the integrity of the family unit; the best interest of donor-conceived offspring; and the legal and supply concerns of health providers and medical facilities, to name a few.<sup>3</sup> Despite the rich and extensive policy and academic literature on the topic, there is one stakeholder interest that has received little attention, particularly in the Canadian context: the privacy interests of gamete donors.<sup>4</sup> That is, despite the public importance that privacy rights have been afforded in Canadian law, the privacy interests of gamete donors within current legislative schemes have not been

<sup>1</sup> Statistics Canada, *Seeking Medical Help to Conceive*, by Tracey Bushnik et al, Catalogue No 82-003-X (Ottawa: Statistics Canada, 17 October 2012). In 2011, approximately 5 percent of IVF cycles in Canada used donor gametes: Joanne Gunby et al, "Assisted Reproductive Technologies (ART) in Canada: 2007 Results from the Canadian ART Register" (2011) 95:2 *Fertility & Sterility* 542.

<sup>2</sup> Fiona Kelly, "Is It Time to Tell: Abolishing Donor Anonymity in Canada" (2017) 30:2 *Can J Fam L* 173 at 176. Jurisdictions where donor anonymity is prohibited include Sweden in 1984 (2006: 351 *Civil Code* (Sweden)); Austria in 1998 (*Fortpflanzungsmedizinengesetz BGBl. Nr. 275/1992*); Switzerland in 2001 (*Federal Act on Medically Assisted Procreation of 18 December 1998*); the Netherlands in 2002 (*Wet donorgegevens kunstmatige bevruchting, 2002*); Norway in 2003 (*Act of 5 December 2003 No. 100 relating to the application of biotechnology in human medicine, etc.*); the United Kingdom in 2004 (*Human Fertilisation and Embryology Act, (UK) 1990 and Human Fertilisation and Embryology Act, (UK) 2008*); Finland in 2006 (1237/2006 *Civil Code* (Finland)); New Zealand in 2004 (*Human Assisted Reproductive Technology Act 2004* (NZ), 2004/92); Australia in 2003 (Austl. Commonwealth, National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (Canberra: NHMRC, 2017)); and Germany in 2017 (*Samenspenderregistergesetz*).

<sup>3</sup> For example, Kelly, *ibid*, focuses on the well-being of donor-conceived people; Matt Malone, "Gamete Donor Anonymity in Canada: An Overview of Potential Policy Solutions" (2017) 38 *Windsor Rev Legal Soc Issues* 71 weighs the competing interests of donor-conceived individuals, donors, intended parents, medical professionals, and governments; Vanessa Gruben & Angela Cameron, "Donor Anonymity in Canada: Assessing the Obstacles to Openness and Considering a Way Forward" (2017) 54:3 *Alta L Rev* 665 discusses the struggles of donor-conceived persons and the needs of modern family units; Angela Cameron, Vanessa Gruben & Fiona Kelly, "De-Anonymising Sperm Donors in Canada: Some Doubts and Directions" (2010) 26:1 *Can J Fam L* 95 address the interests of competing social and legal stakeholders, including donor-conceived children, social and biological parents, and sperm donors with a particular emphasis on women-led families.

<sup>4</sup> Two articles in the Canadian context have discussed privacy and assisted human reproduction in considerable detail. The first, and more recent, is Vanessa Gruben, "Assisted Reproduction Without Assisting Over-Collection: Fair Information Practices and the Assisted Human Reproduction Agency of Canada" (2009) 17:1 *Health LJ* 229. This article assesses whether the proposed privacy provisions of the *Assisted Human Reproduction Act*, SC 2004, c 2 [AHRA], as it existed in 2009, protected the privacy of people seeking reproductive health services by measuring the Act's privacy framework against fair information practices. The AHRA has since been completely restructured, and so the present research responds to a more current gap in the scholarship. The second article that addresses privacy is Lisa Shields, "Consistency and Privacy: Do These Legal Principles Mandate Gamete Donor Anonymity?" (2003) 12:1 *Health L Rev* 39. Having been written in 2003, the present research provides an updated analysis.

considered in comprehensive detail by existing scholarship, nor have they received significant attention from courts and legislatures. For these reasons, gamete donor anonymity from the viewpoint of privacy is a ripe and unexplored area of legal inquiry.

This article aims to respond to this gap in the scholarship by exploring, and characterizing the historical and contemporary role of privacy, as a publicly protected legal principle, in the context of gamete donation in Canada. Do gamete donors have a legally grounded right to privacy in Canadian law? Ultimately, this article argues that the answer is no. Outside of the law of private contract and blanket health information protection legislation, anonymous gamete donation is not supported by existing understandings of the principle of privacy as a publicly protected legal interest in Canadian law. Put another way, donors have a weak claim to anonymity based on privacy rights that currently receive public protections in Canadian law. The argument proceeds by exploring three candidate rationales for gamete donors' interest in privacy as referenced in past and current government reports, legislation, and caselaw and canvasses them against existing privacy rights that have been recognized in Canadian law, but ultimately reveals each candidate as wanting. The implication of this finding is that the protection of donor anonymity in Canada cannot find support in appeals to donors' publicly protected privacy interests. Thus, the defensibility of the protection of donor anonymity — if it can be defended at all — must be found elsewhere.

A few words are warranted about what this article does *not* do. First, the article does not address in detail the privacy interests of intended parents, that is, the perspective that privacy rights include the ability of parents to create and maintain family in their desired form without the intrusion of donors. Rather, the article limits its scope to the privacy interests of gamete donors specifically. Second, in discussing privacy as it relates to anonymity and the disclosure of information, the article limits its scope to identifying information. This is because the disclosure of non-identifying information, such as medical and genetic information, is already well-explored in the literature and jurisprudence and is generally not a contentious topic. Third, because the article is focused on the *prima facie* privacy interest itself, it does not endeavour to examine competing considerations in a weighing exercise, nor does it factor into its analysis considerations that are facilitated or inhibited through anonymity that are not themselves constitutive of a privacy interest for the donor, including, but not limited to: the maintenance of the gamete supply; physicians seeking to avoid involvement in lawsuits; the high costs of maintaining an information registry for either governments or individual clinics; and preventing consanguinity between donor-offspring. While these considerations and factors are indeed important and should undoubtedly be considered in answering the much larger question of whether anonymous gamete donation is permissible from a legal or ethical standpoint, it is not the goal of this article to answer this broad question. Rather, the article simply aims to offer a more nuanced and clearer understanding of the role, if any, that privacy as a publicly protected interest plays in gamete donation, and whether this privacy interest finds legal grounding in privacy rights that are already recognized in Canadian law. In this way, the article provides an additional consideration that can be used by scholars, legislators, and policymakers when balancing all stakeholder interests in the debate about the defensibility, or indefensibility, of anonymous gamete donation.

Part II of the article describes the history and background of gamete donor anonymity in Canada, including an account of current sources of privacy protections in Canadian law and practices in gamete donation. Part III, through a doctrinal analysis of case law, bills, statutes, and government commission and reports, identifies three frequently cited rationales for a privacy interest for gamete donors, but ultimately reveals them to be weak and unfounded from the standpoint of existing publicly protected privacy interests in Canadian law. Finally, the article concludes with a discussion of what these findings about donors' privacy interests might entail for gamete donation in Canada.

## II. HISTORY OF GAMETE DONOR ANONYMITY AND ATTEMPTS AT REFORM

Part II endeavors to track the history of gamete donor anonymity in Canada and concludes with an account of existing sources of privacy protections in Canadian law as well as a description of current practices in gamete donation. The section starts with the early beginnings of assisted human reproduction. Then, the section tracks historical government attempts at regulation in the area of donor anonymity, starting with recommendations from a government Royal Commission and Standing Committee, followed by the enacting of legislation and the appeal of key provisions in that legislation, and finally, an unsuccessful *Charter* challenge. Privacy has received long-standing constitutional, statutory, and common law protections; however, today, donor anonymity is tacitly protected insofar as the area remains largely untouched by legislatures.

### A. PRE-1989: EARLY ADVANCEMENTS AND INQUIRIES

In 1949, the cryopreservation of semen became possible.<sup>5</sup> This brought significant advances in in vitro fertilization (IVF) technologies, leading eventually to the first fertilization of a mammal (a rabbit) in 1959, and the birth of the first “test tube baby” (a human child born from IVF) in 1978.<sup>6</sup> In the wake of the first Canadian in vitro fertilization IVF at the University of British Columbia in 1983,<sup>7</sup> the Ontario government published its *Report on Human Reproduction and Related Matters* in 1985.<sup>8</sup> The internal report canvassed relevant legislation and made recommendations to amend language in certain places; however, the recommendations were about identifying areas that needed to be clarified, rather than suggestions to reform the law.

With respect to anonymity, the report identified laws that related to the donation of gametes,<sup>9</sup> as well as access and confidentiality of medical records.<sup>10</sup> On gamete donation, the

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<sup>5</sup> Naomi R Cahn, *Test Tube Families: Why the Fertility Market Needs Legal Regulation* (New York: New York University Press, 2009) at 47. Cryopreservation of eggs came much later, with the first live birth from a cryopreserved egg occurring in 1983; see “First Baby Born of Frozen Embryo,” *The New York Times* (11 April 1984) A16, online: <[www.nytimes.com/1984/04/11/us/first-baby-born-of-frozen-embryo.html](http://www.nytimes.com/1984/04/11/us/first-baby-born-of-frozen-embryo.html)>.

<sup>6</sup> MC Chang, “Fertilization of Rabbit Ova *In Vitro*” (1959) 184:4684 *Nature* 466; Fergus Walsh, “30th Birthday for First IVF Baby,” *BBC News* (14 July 2008), online: <[news.bbc.co.uk/2/hi/health/7505635.stm](http://news.bbc.co.uk/2/hi/health/7505635.stm)>.

<sup>7</sup> Glenn Rivard & Judy Hunter, *The Law of Assisted Human Reproduction* (Markham: LexisNexis, 2005).

<sup>8</sup> Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* (1985).

<sup>9</sup> *Ibid* at 59–63.

<sup>10</sup> *Ibid* at 78–83.

report concluded that existing law, at the time of publication, had not kept pace with medical developments.<sup>11</sup> On medical records, the report acknowledged the “general injunction to maintain confidentiality, and the present practice of most artificial conception practitioners to respect the anonymity of those involved in artificial conception procedures” while calling for stronger oversight and clarification in other areas.<sup>12</sup> For instance, the report recommended clarity on whether donors are “‘patients’ for the purpose of [record keeping],” and also suggested that screening for genetic disorders “should not be left to the dictates of individual doctors.”<sup>13</sup> The report, in essence, called to amend statutes and legislate standards, a timely endeavor given that the number of children born from gamete donors began to see a dramatic increase as technology advanced, awareness of infertility grew, and a recourse for those who were facing barriers conceiving — such as single-parented and LGBTQ+ families — was finally available.<sup>14</sup> It was against this backdrop that the government first attempted to regulate in the area of reproductive technologies through the creation of a royal commission intended for this purpose.

## B. 1989: ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES (THE BAIRD COMMISSION)

In October 1989, the Conservative government under then-Prime Minister Brian Mulroney established the Royal Commission on New Reproductive Technologies (the Commission). The Commission was created in response to public demands for an examination of reproductive technologies in the aftermath of significant and rapidly evolving advancements in the area, including the aforementioned birth of the first “test tube baby” in 1978.<sup>15</sup> This Commission, popularly known as the Baird Commission, was tasked with investigating “current and potential medical and scientific developments related to new reproductive technologies” so as to consider their “social, ethical, health, research, legal and economic implications and the public interest, recommending what policies and safeguards should be applied.”<sup>16</sup> The Commission’s efforts culminated in a final report completed in 1994, titled *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*.<sup>17</sup> The report made 293 recommendations, which played a significant role in Canada’s future directions in the area of reproductive technologies.<sup>18</sup>

Within the report’s 1000+ pages, the Commission included commentary and recommendations related to donor anonymity. To start, the report pointed out that early inquiries in Canada have defended the principle of anonymity, but also acknowledged that “[m]ore recent inquiries in Canada and abroad” have supported a child’s right to both non-identifying and identifying disclosure about the donor.<sup>19</sup> As well, the report differentiated between egg and sperm donation, concluding that the two are different processes that lend

<sup>11</sup> *Ibid* at 63.

<sup>12</sup> *Ibid* at 83.

<sup>13</sup> *Ibid*.

<sup>14</sup> Malone, *supra* note 3 at 74.

<sup>15</sup> Walsh, *supra* note 6.

<sup>16</sup> House of Commons, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol 1 (Ottawa: Minister of Government Services Canada, 1993) at 3 (Chair: Patricia Baird) [*Royal Commission on New Reproductive Technologies*].

<sup>17</sup> *Ibid*.

<sup>18</sup> Malone, *supra* note 3 at 75.

<sup>19</sup> *Royal Commission on New Reproductive Technologies*, *supra* note 16 at 142.

themselves to wholly distinct concerns and recommendations.<sup>20</sup> On anonymity for sperm donors, the report recommended that identifying information about donors remain confidential.<sup>21</sup> On anonymity for egg donors, the Commission recommended that voluntary anonymous egg donation is appropriate only where females are having an egg retrieval procedure anyway, such as in the process of an IVF program.<sup>22</sup> Ultimately, the Commission endorsed a model of non-identifying information disclosure, which involves the collection and maintenance of identifying information that is only to be made available in extraordinary circumstances of medical need.<sup>23</sup> The Commission, therefore, was of the view that standard non-identifying genetic, social, and medical information should be available at any time to both recipient parents and donor-conceived children, but identifying information should not. The Commission held that this approach respected “marital and familial privacy.”<sup>24</sup>

### C. 2001: HOUSE OF COMMONS STANDING COMMITTEE ON HEALTH: ASSISTED HUMAN REPRODUCTION

In May of 2001, seven years after the release of the report of the Baird Commission, the House of Commons Standing Committee on Health (the “Standing Committee”) was asked to review *Proposals for Legislation Governing Assisted Human Reproduction*, tabled by then-Minister of Health Allan Rock, which recommended that donors could consent or not consent to having their identity known by the offspring.<sup>25</sup> The Standing Committee responded in December 2001 with the report entitled *Assisted Human Reproduction: Building Families*, in which the Committee treated the physical and emotional well-being of resulting children as its first concern,<sup>26</sup> and in doing so, recommended to move toward an open system wherein donation records are “controlled but accessible to those who [require] information.”<sup>27</sup> Ultimately, the Standing Committee recommended that only donors who consent to have their identifying information released to offspring should be accepted as donors, ending the system of anonymous donation.<sup>28</sup>

### D. 2004: ASSISTED HUMAN REPRODUCTION ACT

There were two attempts at federal statutes addressing human reproduction before legislation was successfully passed. The first was Bill C-56: *An Act respecting assisted human reproduction*, which made it to the second reading and referral to the Standing Committee on Health in June 2002.<sup>29</sup> The second was Bill C-13: *An Act respecting assisted human reproduction and related research*, which made it to the second reading in the Senate

<sup>20</sup> *Ibid* at 588. The report made a distinction because egg donation is more onerous compared to sperm donation as egg retrieval involves surgical removal of ova from the ovaries, *inter alia*. See further Cameron, Gruben & Kelly, *supra* note 3.

<sup>21</sup> *Royal Commission on New Reproductive Technologies*, *ibid* at 476 (Recommendation No 88).

<sup>22</sup> *Ibid* at 592.

<sup>23</sup> *Ibid* at 445.

<sup>24</sup> *Ibid*.

<sup>25</sup> Health Canada, *Proposals for Legislation Governing Assisted Human Reproduction: An Overview* (Ottawa: Health Canada, 2001) at 8.

<sup>26</sup> House of Commons, *Assisted Human Reproduction: Building Families: Report of the Standing Committee on Health* (December 2001) (Chair: Bonnie Brown) at 1 [*Building Families*].

<sup>27</sup> *Ibid* at 21.

<sup>28</sup> *Ibid* at 22 (Recommendation 19(a)).

<sup>29</sup> Bill C-56, *An Act respecting assisted human reproduction*, 1st Sess, 37th Parl (2002) [Bill C-56].

over a year later in November 2003.<sup>30</sup> Both bills, if passed, would have established a legal right of anonymity for donors by requiring consent for the disclosure of identifying information.<sup>31</sup> However, neither received royal assent. For both bills, donor anonymity was a heavily discussed and polarizing issue. Interestingly, the transcript of a meeting of the Standing Committee on Health for Bill C-56 revealed that the issue of donor anonymity was perceived to be more about the depletion of the gamete supply than issues of privacy.<sup>32</sup>

Finally, in March 2004, the *AHRA* passed by virtue of the federal government's power over criminal law.<sup>33</sup> The *AHRA* established two categories of activities: the first, prohibited activities, included things like the purchasing of human sperm and eggs, and were prohibited in all circumstances.<sup>34</sup> The second category of activities, controlled activities, could occur through licensing.<sup>35</sup> Such activities included provisions that were related to information collection, use, and disclosure.<sup>36</sup>

Contrary to the recommendations made three years prior by the Standing Committee on Health for an open donation system and consistent with the two bills proposed prior, the *AHRA* in its earliest form preserved the anonymity of gamete donors by prohibiting the disclosure of identifying information without consent.<sup>37</sup> The *AHRA* also contained regulatory provisions which called for the establishment of a centralized health reporting information agency, with one of the agency's responsibilities being the collection and maintenance of information from donors, including identifying information.<sup>38</sup> The information registry was meant to provide non-identifying information to donor-conceived individuals.<sup>39</sup>

The slow and reluctant rollout of certain provisions of the *AHRA* may have further bolstered anonymity.<sup>40</sup> More specifically, as assessed by Professor Vanessa Gruben at the time, "[t]he collection of health reporting information [appeared] to lack the transparency required by fair information practices."<sup>41</sup> What is more, others have noted that the regulatory framework envisaged by the *AHRA* was never realized, since Health Canada delayed the drafting of regulations.<sup>42</sup> Indeed, these inadequacies and delays may have served to indirectly further protect donor anonymity beyond the explicit requirements provided for by statute.

<sup>30</sup> Bill C-13, *An Act respecting assisted human reproduction and related research*, 2nd Sess, 37th Parl (2003).

<sup>31</sup> *Ibid.*, s 18; Bill C-56, *supra* note 29, s 18.

<sup>32</sup> House of Commons, Standing Committee on Health, *Evidence*, 37-1 Meeting No 89 (12 June 2002).

<sup>33</sup> *AHRA*, *supra* note 4.

<sup>34</sup> *Ibid.*, ss 5-9.

<sup>35</sup> *Ibid.*, ss 10-13.

<sup>36</sup> *Ibid.*, formerly ss 14-18.

<sup>37</sup> *Ibid.*, s 15(1)(a).

<sup>38</sup> *Ibid.*, s 17.

<sup>39</sup> *Ibid.*, s 18(3).

<sup>40</sup> Malone, *supra* note 3 at 76.

<sup>41</sup> Gruben, *supra* note 4 at 252.

<sup>42</sup> Dave Snow, Françoise Baylis & Jocelyn Downie, "Why the Government of Canada Won't Regulate Assisted Human Reproduction: A Modern Mystery" (2015) 9:1 McGill JL & Health 1 at 2.

**E. 2010: REFERENCE RE ASSISTED  
HUMAN REPRODUCTION ACT**

After its passing in 2004, the *AHRA* was challenged by the government of Quebec. Specifically, the constitutionality of several provisions was challenged on the basis that they were ultra vires Parliament insofar as they sought to regulate medical research and practice related to assisted reproduction, areas that were argued to fall within provincial jurisdiction. The matter was decided in 2010 by the Supreme Court in *Reference re Assisted Human Reproduction Act*.<sup>43</sup> In a split decision, 22 provisions of the *AHRA* were deemed ultra vires the federal government and therefore invalid, including the provisions about information disclosure. More specifically, Justices Lebel and Deschamp held on behalf of four justices that the information-gathering and privacy-related provisions at sections 14–18 of the *Act* were outside federal jurisdiction,<sup>44</sup> and Justice Cromwell agreed that the provisions exceeded the legislative authority of the Parliament.<sup>45</sup> Following the decision, Parliament repealed these provisions and the agency envisaged to be responsible for collecting and maintaining information was dismantled.

In short, the responsibility of donor identity disclosure was determined in the decision to be an area that falls within provincial law-making authority, effectively removing any federal law that relates to donor anonymity. Ultimately, this left it open to the provinces to legislate in this area. Given that much of assisted human reproduction falls within provincial jurisdiction, a nationally coordinated approach would be extremely challenging to facilitate; for this reason, some who advocate for an open system of gamete donation cite the division of powers as a major obstacle.<sup>46</sup>

**F. 2012: PRATTEN V. BRITISH COLUMBIA  
AND THE CHARTER**

The *Canadian Charter of Rights and Freedoms* is one avenue through which litigants can challenge government action or inaction.<sup>47</sup> However, efforts to use the *Charter* to reform the law with respect to donor anonymity have thus far been unsuccessful. The most noteworthy *Charter* case that relates to anonymous gamete donation came from litigant Olivia Pratten, who was born from anonymously donated sperm and was unable to gather information about her biological father, including his medical records.<sup>48</sup> Because of this, Pratten raised two constitutional arguments against the province of British Columbia claiming a right to both identifying, and non-identifying information, both of which were unsuccessful.

Pratten's first challenge was a section 7 claim. Pratten argued that section 7 of the *Charter* protected a freestanding constitutional right to know one's genetic origins, which if correct, would mandate the government to provide her and other donor-conceived persons with both

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<sup>43</sup> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

<sup>44</sup> *Ibid* at paras 280–81.

<sup>45</sup> *Ibid* at para 294.

<sup>46</sup> See Gruben & Cameron, *supra* note 3 at 668.

<sup>47</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>48</sup> *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656 [*Pratten BCSC*], rev'd in part 2012 BCCA 480 [*Pratten BCCA*].



identifying and non-identifying information about their respective donors.<sup>49</sup> This argument was unsuccessful at both the trial court in 2011 and the Court of Appeal in 2012. Canadian courts have thus far limited section 7 to protecting individuals from state action that cause a deprivation of life, liberty, and security of the person, and have refused to extend the protections to positive rights.<sup>50</sup> However, even if section 7 could guarantee positive rights, the Court of Appeal still would have held that the right “to know one’s past” is not of “such fundamental importance that it is entitled to free-standing constitutional recognition,” despite the trajectory in Canada and internationally toward donor openness.<sup>51</sup> Professors Gruben and Cameron have pointed out additional obstacles beyond the positive rights hurdle to a constitutional right to know one’s genetic origins, including the difficulty in defining the scope of the right and overcoming the high bar that is set for the legal protection of individual privacy.<sup>52</sup>

Pratten’s second constitutional argument was rooted in equality by way of section 15 of the *Charter*. Pratten argued that British Columbia’s *Adoption Act*,<sup>53</sup> violated section 15 because it permitted adoptees to access information about their birth parents, but did not provide the same privilege to donor-conceived individuals, which amounted to discrimination.<sup>54</sup> The *Adoption Act* requires the collection and maintenance of medical and social information about an adoptee’s family, and also provides for the creation of openness agreements, and the opportunity for adoptees to learn the identity of their birth parents.<sup>55</sup> These provisions only apply to adoptees, and not to donor-conceived persons. Although the trial court sided with Pratten and held that the exclusion of donor-conceived individuals from the *Adoption Act* was discriminatory and did not constitute ameliorative legislation that could be protected by section 15(2), the Court of Appeal, in contrast, held that that the information provisions for adoptees did indeed fall within section 15(2), and were therefore not subject to the same level of scrutiny as other legislation.<sup>56</sup>

The lessons of the *Pratten* case are that the right of donor-conceived persons to know their genetic origins finds no grounding in the constitution, and that attempts at law reform in this area through *Charter* litigation have thus far been unsuccessful. The case also demonstrates parallel concerns between adoptees and donor-conceived individuals. However, it is important to note that while the court in *Pratten* makes important points about the privacy interests of donors, it is not a case about privacy per se; rather, it is a case about donor-conceived persons, and their right to know their genetic parentage. In fact, courts have not ruled on the privacy rights of donors as weighed against the right of donor-conceived persons

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<sup>49</sup> *Pratten* BCSC, *ibid* at para 7.

<sup>50</sup> *Pratten* BCCA, *supra* note 48 at paras 46–50.

<sup>51</sup> *Ibid* at para 62.

<sup>52</sup> Gruben & Cameron, *supra* note 3 at 677.

<sup>53</sup> *Adoption Act*, RSBC 1996, c 5.

<sup>54</sup> *Pratten* BCCA, *supra* note 48 at paras 24–28.

<sup>55</sup> Only adoptees who have been adopted after the amendment of the *Adoption Act* in 1996 may learn the identity of their birth parents; those who were adopted before require the consent of both the adoptee and the biological parents.

<sup>56</sup> *Pratten* BCCA, *supra* note 48 at para 37.

because, to date, no court has recognized that donor-conceived individuals have a right to know their genetic origins; this is similarly the case in the adoption context.<sup>57</sup>

### G. TODAY: CURRENT PRACTICES IN PRIVACY LAW AND DONOR ANONYMITY

Even though “there is no free-standing right to [individual] privacy” in Canadian law, privacy has nonetheless risen to the level of a publicly protectable interest in many contexts in that it has received long-standing constitutional, statutory, and common law protections.<sup>58</sup> The first major source through which privacy interests are protected that is relevant to the context of gamete donation is the *Charter* in that privacy underlies several *Charter*-protected rights.<sup>59</sup> Section 8 of the *Charter*, for instance, protects against unreasonable search and seizure by way of protecting against unjustified intrusion on one’s privacy interest.<sup>60</sup> The Supreme Court of Canada has interpreted section 8 to provide for three kinds of privacy: personal, territorial or spatial, and informational.<sup>61</sup> Privacy also underlies section 7 of the *Charter*, which protects the right to life, liberty, and security of the person.<sup>62</sup> Specifically, the Supreme Court has held that privacy engages the right to liberty insofar as “[r]espect for individual privacy is an essential component of what it means to be ‘free.’”<sup>63</sup> The Supreme Court has also held that the right to liberty protected in section 7 inheres the right to “make inherently private choices free from state interference.”<sup>64</sup> In the adoption context, section 7 has been used to strike down legislation that provided for the retrospective disclosure of identifying information, protecting the privacy of birth parents.<sup>65</sup> To date, the *Charter* has not been used to defend the privacy interests of donors because, as noted above, courts have not ruled on the publicly protectable privacy rights of donors as weighed against the right of donor-conceived persons since no court has recognized that donor-conceived individuals have a right to know their genetic origins.

Beyond constitutional protection, the second legal mechanism through which privacy is publicly protected that is relevant to the context of gamete donation is legislation. At both the federal and provincial levels, there are statutes that directly relate to privacy. At the federal level, the *Personal Information Protection and Electronic Documents Act* covers how private sector businesses handle personal information.<sup>66</sup> *PIPEDA* applies to certain health information since activities of health entities in private practice, such as assisted human reproduction procedures which are usually privately funded and take place in private clinics, qualify as commercial activities.<sup>67</sup> At the provincial level, there are statutes in certain provinces that serve to regulate the collection, use, and disclosure of health information in

<sup>57</sup> Vanessa Gruben, “Chapter 7: A Number but No Name: Is There a Constitutional Right to Know One’s Sperm Donor in Canadian Law?” in Trudo Lemmens et al, eds, *Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction* (Buffalo: University of Toronto Press, 2017) 145 at 158 [Lemmens et al, *Regulating Creation*].

<sup>58</sup> *Ibid* at 157–60.

<sup>59</sup> *Charter*, *supra* note 47.

<sup>60</sup> *Ibid*, s 8.

<sup>61</sup> *R v Dymont*, [1988] 2 SCR 417 at 255; *R v Tessling*, 2004 SCC 67 at para 20.

<sup>62</sup> *Charter*, *supra* note 47, s 7.

<sup>63</sup> *R v O’Connor*, [1995] 4 SCR 411 at para 113.

<sup>64</sup> *R v Malmo-Levine*, 2003 SCC 74 at para 85.

<sup>65</sup> *Cheskes v Ontario (Attorney General)* (2007), 87 OR (3d) 581 (Sup Ct) [*Cheskes*].

<sup>66</sup> *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*].

<sup>67</sup> Gruben, *supra* note 4 at 232–33.

the therapeutic context.<sup>68</sup> Ontario's *Personal Health Information Protection Act, 2004* is an example of such legislation.<sup>69</sup> Such statutes apply to information that is generated through the use of assisted human reproduction.<sup>70</sup>

In the context of gamete donation, the privacy interests of gamete donors are not explicitly addressed in Canadian law. The Supreme Court's decision in *Reference re Assisted Human Reproduction Act* left it open to the provinces to legislate in the area,<sup>71</sup> but so far, very few provinces have done so. As such, there are few rules in place that directly govern gamete donation and information disclosure, either by requiring disclosure of the donor or by protecting anonymity. For this reason, donor anonymity is the default. Importantly, there is no centralized registry, national or provincial, that is responsible for collecting, storing, and disclosing donor information; rather, this responsibility lies with individual clinics, and health service providers on a voluntary and contractual basis. When such information is collected, it is by and large done to measure success rates (such as the number of cycles, age of recipient, and so on) rather than for the purpose of information disclosure.<sup>72</sup>

Since the Supreme Court's 2010 decision in *Reference re Assisted Human Reproduction Act*,<sup>73</sup> some provinces have enacted legislation or pursued policies that relate to assisted human reproduction.<sup>74</sup> First, following the decision, the government of Quebec created a funding scheme that required the use of anonymous sperm and egg donors, although the policy was repealed when there was a change in government a few years later.<sup>75</sup> Additionally, Quebec has passed *Loi sur les activités cliniques et de recherche en matière de procréation assistée*, which provides that information that allows a donor to be identified is confidential and may not be disclosed, even with the consent of the person concerned, with limited exceptions.<sup>76</sup> Second, the government of Ontario in 2015 introduced a funding scheme that allocates a certain number of IVF cycles to individual clinics who are then responsible for deciding how they will be allocated; however, there is no corresponding regulatory regime, and therefore, no rules pertaining to donor anonymity or any other aspect of assisted human reproduction.<sup>77</sup>

<sup>68</sup> PIPEDA does not apply in provinces that have substantially similar legislation. See *PIPEDA*, *supra* note 66, s 25(2)(b).

<sup>69</sup> *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Schedule A.

<sup>70</sup> There are several other sources of privacy law that are not discussed here because they are not relevant to the context of gamete donation. This includes the common law (in 2012, the Ontario Court of Appeal, for example, recognized a new common law tort for the invasion of privacy: *Jones v Tsige*, 2012 ONCA 32.) Other sources of protection for privacy which are not discussed in this article, include international law by virtue of article 12 of the *Universal Declaration of Human Rights* (GA Res 217A, UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71) and article 17 of the *International Covenant on Civil and Political Rights*, (19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976)). As well, the right to privacy is protected in section 5 of Quebec's *Charter of Human Rights and Freedoms*, CQLR c C-12.

<sup>71</sup> *Reference re Assisted Human Reproduction Act*, *supra* note 43.

<sup>72</sup> Gruben & Cameron, *supra* note 3 at 672; Ontario, *Born & Growing: Annual Report 2012-14: Two Years of Progress* (Ottawa: BORN Ontario, 2015).

<sup>73</sup> *Reference re Assisted Human Reproduction Act*, *supra* note 43.

<sup>74</sup> Gruben & Cameron, *supra* note 3 at 670.

<sup>75</sup> Bill 20, *An Act to enact the Act to promote access to family medicine and specialized medicine services and to amend various legislative provisions relating to assisted procreation*, 1st Sess, 41st Leg, Quebec, 2014. See further Stefanie Carsley, "Funding In Vitro Fertilization: Exploring the Health and Justice Implications of Quebec's Policy" (2012) 20:3 Health L Rev 15.

<sup>76</sup> *Loi sur les Activités Cliniques et de Recherche en Matière de Procréation Assistée*, SQ 2009, c 30, s 44.

<sup>77</sup> Ministry of Health and Long-Term Care, "Ontario's Fertility Program: Fertility Services," online: <health.gov.on.ca/en/pro/programs/fertility/>.

Insofar as anonymous gamete donation is not explicitly prohibited in most Canadian provinces, it is tacitly protected. Individuals that seek donated gametes in Canada can access either anonymous or identity-release gametes, or a known donor can be used.<sup>78</sup> The identity-release approach to gamete donation, in which the donor agrees to have their identity provided to the donor-conceived individual at a specified age, is established through contract as there is no Canadian legislation that governs disclosure of this kind.<sup>79</sup> When gametes are donated from a donor who wishes to stay anonymous, health care providers are required to keep identifying information private due to provincial privacy statutes that explicitly prohibit the sharing of identifying information without the consent of the patient.<sup>80</sup> Individual clinics may also promise anonymity to donors by way of contractual confidentiality clauses, as there are no legislative regimes preventing this from occurring. As such, donor-conceived individuals who seek information about their donors who are unable to rely on clinic registries due to legislated or contractual confidentiality concerns may otherwise be forced to use private DNA kits, and websites.<sup>81</sup> Notably, some have argued that even where anonymity is provided for, either by legislation or by contract, anonymity can never be fully guaranteed as donors can be traced if their DNA, or the DNA of a relative, is added to a direct-to-consumer genetic testing database.<sup>82</sup>

Professors Gruben and Cameron have hypothesized why provincial legislatures have failed to legislate or regulate in the area of donor anonymity.<sup>83</sup> First, the use of assisted reproduction and gametes provided by donors has been historically stigmatized and surrounded by secrecy, and legislatures' lack of action may be attributable to these harmful notions.<sup>84</sup> Second, there are concerns that action at the provincial level would be ineffective insofar as individuals could simply go to other provinces where anonymous gamete donation is permitted, and, so the argument goes, gametes are more readily available.<sup>85</sup> Third, provincial governments may have concerns about the cost and effort of creating a registry which would facilitate the collection and disclosure of information.<sup>86</sup> To add a fourth possibility to Professors Gruben and Cameron's list, laws that involve reproductive health have in the past been subject to messy and time-consuming litigation and can have the effect of dividing an electorate, which provinces may wish to avoid; for example, following the Supreme Court's *R. v. Morgentaler* decision about abortion,<sup>87</sup> legislatures have avoided creating laws on abortion altogether.<sup>88</sup>

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<sup>78</sup> Gruben & Cameron, *supra* note 3 at 667–68.

<sup>79</sup> Alicia Czarnowski, “Retrospective Removal of Gamete Donor Anonymity: Policy Recommendations for Ontario Based on the Victorian Experience” (2020) 33:2 Can J Fam L 251 at 261.

<sup>80</sup> See e.g. *Personal Health Information Protection Act, 2004*, *supra* note 69.

<sup>81</sup> Emily Chung, Melanie Glanz & Vik Adhopia, “Donor-Conceived People Are Tracking Down Their Biological Fathers, Even If They Want to Hide,” *CBC News* (20 August 2018), online: <[www.cbc.ca/news/technology/sperm-donor-dna-testing-1.4500517](http://www.cbc.ca/news/technology/sperm-donor-dna-testing-1.4500517)>.

<sup>82</sup> Joyce C Harper, Debbie Kennett & Dan Reisel, “The End of Donor Anonymity: How Genetic Testing Is Likely to Drive Anonymous Gamete Donation Out of Business” (2016) 31:6 Human Reproduction 1135.

<sup>83</sup> Gruben & Cameron, *supra* note 3 at 671–72.

<sup>84</sup> *Ibid* at 671.

<sup>85</sup> *Ibid* at 671–72. This concern has been applied in the international context, such as Canadians going to other jurisdictions to use anonymous gametes: Jocelyn Downie & Françoise Baylis, “Transnational Trade in Human Eggs: Law, Policy, and (In)action in Canada” (2013) 41:1 JL Med & Ethics 224.

<sup>86</sup> Gruben & Cameron, *ibid* at 672.

<sup>87</sup> *R v Morgentaler*, [1988] 1 SCR 30.

<sup>88</sup> Malone, *supra* note 3 at 85.

To conclude Part II, gamete donor anonymity in assisted human reproduction received much attention from legislatures leading up to 2010. However, after it was determined by the Supreme Court that donor anonymity was an area that fell within provincial jurisdictions, the provinces have, for the most part, remained silent. Insofar as anonymous gamete donation is not explicitly prohibited in most Canadian provinces, it is tacitly protected.

### III. RATIONALES FOR A PRIVACY INTEREST FOR GAMETE DONORS

Part III seeks to understand the privacy interest for gamete donors in the context of gamete donation. The section begins by exploring the theoretical rationales for the privacy interest generally, and then, through a doctrinal analysis of the case law, bills, statutes, and government commission and reports described in Part II, canvasses the most frequently cited rationales for a privacy interest for gamete donors, and compares them to recognized privacy interest that have received public protections in Canadian law. Ultimately, each rational is revealed to be weak, and unfounded from a legal standpoint insofar as they do not find grounding in existing privacy rights.

In parsing out the rationales for a privacy interest for gamete donors, it is helpful to start with an understanding of the underlying rationales for privacy, generally. From a basic theoretical lens, privacy can be understood through two philosophical approaches: deontology and consequentialism.<sup>89</sup> Simply put, while deontology focuses on privacy as an inherently worthy end in and of itself, consequentialism is utility-based in that it views privacy as important because it promotes something else.<sup>90</sup> Importantly, the two approaches are not mutually exclusive, and should be viewed not as opposites, but together.<sup>91</sup>

From a deontological standpoint, privacy can be understood in reference to dignity, autonomy, and personhood.<sup>92</sup> Deontology has its roots in Kantian ethics; “[f]or Kant, at [dignity’s core] is the [idea that individuals are] treated as an end in [themselves],” and not as a means to the ends of another person or society.<sup>93</sup> Hunt stipulates that privacy invasions can affront dignity in three ways: (1) the offender portrays that the victim’s choices are not important by prioritizing their own choices over the victim’s; (2) the offender is unconcerned with the feelings of the victim; and (3) the victim is transformed “from *subject* to *object*” which is insulting because it fails to treat people as subjects that are responsible and capable

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<sup>89</sup> A full review of the philosophical underpinnings of privacy is beyond the scope of this article.

<sup>90</sup> See Chris DL Hunt, “Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada’s Fledgling Privacy Tort” (2011) 37:1 *Queens LJ* 167. See also Immanuel Kant, *Grounding for the Metaphysics of Morals*, translated by James W Ellington (Indianapolis: Hackett, 1981) at 35–36:

[M]an [as a] rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. He must in all his actions, whether directed to himself or to other rational beings, always be regarded at the same time as an end.... Persons are, therefore, not merely subjective ends, whose existence as an effect of our actions has a value for us; but such beings are objective ends, i.e., exist as ends in themselves.

<sup>91</sup> Hunt, *ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* at 203.

for their own decisions and relations.<sup>94</sup> This is related to autonomy, which Hunt describes as “each individual’s capacity to be self-determining.”<sup>95</sup> To invade someone’s privacy is to disregard their autonomy by failing to see them as an autonomous agent that is entitled to make their own decisions, and choose for themselves how much to reveal about themselves.<sup>96</sup> Finally, privacy refers to personhood insofar as respecting ones’ privacy is a precondition for one to experience moral ownership of oneself.<sup>97</sup>

Consequentialism is different from deontology in that it views privacy as a means to something else. As Hunt points out, consequentialism is important for resolving legal privacy claims because it adds specificity to a court’s balancing exercise, whereas a solely deontological approach would render each party asserting its dignity, autonomy, and personhood with no ability to weigh rights, interests, and values against one another.<sup>98</sup> Hunt categorizes consequentialist understanding of privacy into three ideas: (1) as valued to the individual by way of creating a sanctuary “free from social pressures” and facilitating human flourishing; (2) as valued to the individual’s relations with others, specifically by facilitating relations of respect, love, trust, and affection; and (3) as valued to society, by way of society’s respect toward its members as individuals, and its commitment to civility and humanity.<sup>99</sup>

In seeking to identify the underlying rationales for a privacy interest for gamete donors, an understanding of the theoretical rationales for the privacy interest generally is a useful tool. The following three subsections identify three main rationales that have been cited in defence of a privacy interest for gamete donors: the protection of dignity and autonomy; avoiding the responsibilities of parenthood; and secrecy, and maintaining an image of “normalcy.” Ultimately, each rational is revealed to be weak and unfounded from a legal standpoint insofar as they fail to find strong grounding in existing privacy rights that have thus far received public protections in Canadian law.

#### **A. RATIONALE ONE: PROTECTING DIGNITY AND AUTONOMY**

The first and perhaps most legally supported rationale for a privacy interest for gamete donors is that privacy is rooted in dignity and choice. The rationale of donor privacy as rooted in dignity, and autonomy responds to mandatory disclosure of identifying information as a failure to see donors as autonomous agents that are entitled to make their own decisions and choose for themselves how much to reveal about themselves.<sup>100</sup> In this case, whether or not to disclose their identity. This reflects an understanding of privacy as the “right of the individual to determine for [themselves] when, how, and to what extent [they] will release

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<sup>94</sup> *Ibid* at 205, citing Jeffrey Rosen, “The Purposes of Privacy: A Response” (2001) 89:6 *Geo LJ* 2117 at 2124 [emphasis in original] and referencing Stanley I Benn, “Privacy, Freedom, and Respect for Persons” in J Roland Pennock & John W Chapman, eds, *Nomos XIII: Privacy* (New York: Atherton Press, 1971) 1.

<sup>95</sup> Hunt, *ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid* at 209.

<sup>99</sup> *Ibid* at 210.

<sup>100</sup> *Ibid* at 205.

personal information about [themselves].”<sup>101</sup> This rationale reflects a deontological standpoint in that it understands privacy as an inherently worthy end in and of itself. Throughout case law, bills, statutes, government commissions, and reports that opine on the topic of donor anonymity, the values of dignity, autonomy, and choice are frequently cited as reasons for the protection of anonymity, although these values have also been referred to in support of the opposite conclusion, specifically mandatory disclosure. Additionally, while privacy has been deemed deserving of public protections in other instances,<sup>102</sup> it is not likely that identifying information in the context of gamete donation is deserving of such protections. It is for these reasons that an appeal to privacy as an aspect of dignity and autonomy is ultimately a weak basis for the legal defensibility of anonymous gamete donation.

Starting with the Baird Commission, the Commission’s 1993 *Proceed with Care* report was opposed to a dual system of sperm donation, in which men can choose whether to have identifying information released when the child reaches the age of majority.<sup>103</sup> This was because the Commission was of the view that a donor’s beliefs and feelings about his role may change, and a donor’s desire to withdraw consent to be contacted months or even years after the donation would render the recipient parents’ choice for an identifiable donor meaningless.<sup>104</sup> In this way, the Commission placed a significant emphasis on the value of choice in its ultimate recommendation of mandating anonymity. On anonymity for egg donors, the Commission concluded and recommended that voluntary anonymous egg donation is appropriate only where females are having an egg retrieval procedure anyway, such as in the process of an IVF program, or during a procedure that is unrelated to the donation of eggs.<sup>105</sup> The Commission cited its reason for this recommendation as ensuring respect and autonomy for women and avoiding undue pressure to donate eggs.<sup>106</sup> Again, a large emphasis in the Commission’s recommendation was placed on autonomy as a value that is inherently worth protecting in the context of donor anonymity.

The House of Commons Standing Committee on Health in 2001 also addressed dignity and autonomy. The Committee’s *Building Families* report cited dignity and autonomy in support of its findings; however, it came to the opposite conclusion as the Baird Commission by recommending that donors should only be allowed to donate if they disclose identifying information.<sup>107</sup> While “[r]espect for human individuality, dignity and integrity” and “[i]nformed choice” were two of five over-arching considerations that the Committee relied on,<sup>108</sup> the Committee was explicit about treating the physical and emotional well-being of resulting children as paramount.<sup>109</sup> The Committee recommended a purpose clause in the legislation with several subclauses, one of which stated that “the interests of the adults participating in assisted human reproduction procedures be protected and their participation

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<sup>101</sup> *R v Duarte*, [1990] 1 SCR 30 at 46.

<sup>102</sup> *Sherman Estate v Donovan*, 2021 SCC 25 [*Sherman Estate*], in which dignity was central to the Supreme Court’s analysis respecting privacy as a publicly protectable interest in the context of probate proceedings.

<sup>103</sup> *Royal Commission on New Reproductive Technologies*, *supra* note 16 at 444.

<sup>104</sup> *Ibid* at 445.

<sup>105</sup> *Ibid* at 592.

<sup>106</sup> *Ibid* at 587.

<sup>107</sup> *Building Families*, *supra* note 26 at 22 (recommendation no 19(a)).

<sup>108</sup> *Ibid* at 5.

<sup>109</sup> *Ibid* at 1.

is based on informed choice”<sup>110</sup> and also recommended continual assessment of consent, and acknowledgement that consent may be withdrawn at any time for most activities.<sup>111</sup> Curiously, despite this explicit emphasis on the interests of adult participants and the ability to withdraw consent, the Committee barely acknowledged the privacy rights of donors except to state that “the rights of the child [would] prevail.”<sup>112</sup> In a dissenting opinion, one Member of Parliament, a Progressive Conservative Party critic, also stated that donor’s “right to personal anonymity should be their own choice”<sup>113</sup> reflecting an understanding of anonymity as rooted in autonomy.

The earliest version of the *AHRA*, passed in 2004, also used language of dignity and choice.<sup>114</sup> In section 2, some of the components the *AHRA* listed in its declaration of principles included the protection of dignity and rights,<sup>115</sup> and the application and promotion of free and informed consent.<sup>116</sup> The health and well-being of children were also explicitly prioritized.<sup>117</sup> These principles were consistent with the recommendations made by the House of Commons Standing Committee on Health in 2001, however, the *AHRA* preserved donor anonymity by prohibiting the disclosure of identifying information without consent.<sup>118</sup> In this way, it appears that the original *AHRA* relied on the principles of dignity and autonomy in protecting donor anonymity. This notion is supported in the Supreme Court’s reference decision concerning the *AHRA* in 2010, in which Chief Justice McLachlin, writing for herself and three other justices, wrote that the privacy and access to information provisions ensured that the privacy of participants was protected so that “the laudable ends of informed consent do not unduly compromise human dignity” referring specifically to the provision about donor anonymity.<sup>119</sup> Indeed in the original assisted human reproduction statute, donor privacy was protected through appeals to dignity, autonomy, and choice.

With respect to caselaw, while the *Pratten* case dealt more with the alleged right of donor-conceived individuals to know their genetic origins than any right of donors to privacy, it did make reference to cases from the adoption realm that addressed dignity and autonomy. Courts in the adoption context, specifically *Cheskes v. Ontario (Attorney General)*, have characterized birth and adoption information as “intensely private” and an example of “the most sensitive information in our society,”<sup>120</sup> and have ruled that the retrospective disclosure of the identities of birth parents without their consent constitutes a violation of section 7 liberty rights insofar as it constitutes an “invasion of the *dignity* and self-worth” of birth parents.<sup>121</sup> The Court also explored the possibility that the decision to disclose identifying adoption information, which could profoundly alter one’s life, constitutes a “fundamentally personal decision that is also protected by the liberty interest.”<sup>122</sup> Finally, the Court held that it was a principle of fundamental justice that where individuals have a reasonable expectation

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<sup>110</sup> *Ibid* at 8 (recommendation no 4(b)).

<sup>111</sup> *Ibid* at 6.

<sup>112</sup> *Ibid* at 21.

<sup>113</sup> *Ibid* at 93.

<sup>114</sup> *AHRA*, *supra* note 4, s 2.

<sup>115</sup> *Ibid*, s 2(b).

<sup>116</sup> *Ibid*, s 2(d).

<sup>117</sup> *Ibid*, s 2(a).

<sup>118</sup> *Ibid*, ss 15(1)(a), 18(2).

<sup>119</sup> *Reference re Assisted Human Reproduction Act*, *supra* note 43 at para 143.

<sup>120</sup> *Cheskes*, *supra* note 65 at para 61.

<sup>121</sup> *Ibid* at para 82 [emphasis added].

<sup>122</sup> *Ibid* at para 88.



of privacy in personal and confidential information, that the information not be disclosed to third parties without consent. Here, the Court focused on “the individual’s ability to control the dissemination of [their] personal information,”<sup>123</sup> which is a clear nod to an understanding of the invasion of privacy as a disregard of autonomy by failing to see one as an autonomous agent that is entitled to choose how much to reveal about themselves.<sup>124</sup> In the adoption context, then, courts have clearly emphasized dignity, autonomy, and choice in protecting birth parent anonymity against the background of retrospective information disclosure.

Clearly, understandings of donor anonymity as rooted in the protection of privacy in reference to dignity, autonomy, and choice have been well-explored, and often cited in government reports, commissions, legislation, and case law. Ultimately, however, this rationale for donor privacy is weak, and unsupported from the perspective of existing privacy rights in Canadian law. As Hunt points out, solely deontological approaches to privacy render each party asserting its dignity, autonomy, and personhood with no ability to weigh rights, interests, and values against one another.<sup>125</sup> In this respect, it is telling that the exact values that were used to defend donor anonymity in the Baird Commission,<sup>126</sup> the early *AHRA*,<sup>127</sup> and *Reference re Assisted Human Reproduction Act*,<sup>128</sup> were also utilized to recommend against anonymity in the report of the House of Commons Standing Committee on Health.<sup>129</sup> That is to say, while donors can be said to have a privacy interest in dignity, autonomy, and choice, so too do other relevant parties, such as intended parents and donor-conceived offspring. In this respect, dignity has been described as an ambiguous notion with an imprecise character, albeit one that has been increasingly invoked in case law and legislation alike.<sup>130</sup> Despite this, there has been a trajectory in law to prioritize the interests of offspring over those of donors across international jurisdictions,<sup>131</sup> which suggests that in a full weighing exercise, the dignitary interests of offspring may be found to be paramount.

The protection of dignity and autonomy as a rationale for donor anonymity is also weak, and unsupported from the perspective of existing privacy rights Canadian law insofar as it is unlikely that identifying information in this context is deserving of public protections. Case law addressing privacy rights can be insightful in this regard, insofar as court decisions shed some light into what kinds of information have been deemed worthy of public protection in other contexts that have received attention from legislatures, and courts, particularly case law surrounding section 8 of the *Charter*.<sup>132</sup> The Supreme Court in *Sherman Estate v. Donovan*, a recent decision about privacy in the context of the open court principle in probate proceedings, commented that when privacy is “about safeguarding a person’s dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they

<sup>123</sup> *Ibid* at para 110.

<sup>124</sup> Hunt, *supra* note 90 at 205.

<sup>125</sup> *Ibid* at 167.

<sup>126</sup> *Royal Commission on New Reproductive Technologies*, *supra* note 16.

<sup>127</sup> *AHRA*, *supra* note 4.

<sup>128</sup> *Reference re Assisted Human Reproduction Act*, *supra* note 43.

<sup>129</sup> *Building Families*, *supra* note 26.

<sup>130</sup> Dominique Goubau, “Dignity in Canadian Law, a Popular but Ambiguous Notion” in Brigitte Feuillet-Liger & Kristina Orfali, eds, *The Reality of Human Dignity in Law and Bioethics: Comparative Perspectives*, *Ius Gentium: Comparative Perspectives on Law and Justice*, vol 71 (Cham, Switzerland: Springer Nature Switzerland, 2018) 191.

<sup>131</sup> Kelly, *supra* note 2.

<sup>132</sup> *Sherman Estate*, *supra* note 102 at para 78.

are as a person.”<sup>133</sup> Applied to the context of anonymous gamete donation, it likely that a donor’s name is more akin to “generic information” than to information that “reveals something intimate and personal about the individual, their lifestyle or their experiences,”<sup>134</sup> and is therefore undeserving of public protection.

Notably, and importantly, this cannot be said for retrospective disclosure, which involves donors who, due to contractual or other arrangements, have a legally grounded reasonable expectation of privacy that their information will not be disclosed. In the adoption context, courts have protected the privacy of birth parents in the face of retrospective disclosure specifically because such disclosure would constitute an invasion of their dignity and self-worth of birth.<sup>135</sup> For this reason, it is also likely that any legislation that provides for the retrospective disclosure of identifying information of gamete donors would also be struck down by a court. Despite this, it still stands that an appeal to privacy as an aspect of dignity, and autonomy is ultimately a weak basis for the legal defensibility of current and prospective anonymous gamete donation.

## B. RATIONALE TWO: AVOIDING THE RESPONSIBILITIES OF PARENTHOOD

A second rationale for a privacy interest for gamete donors is the avoidance of parental responsibilities. Indeed, anonymous gamete donation can be viewed as preventing the onset of parental duties for gamete donors. This rationale is reflected in case law, government commissions, and reports that opine on the topic of donor anonymity. For example, the Baird Commission, in relying on interviews with donors, stated that sperm donors valued anonymity because they wished to avoid legal responsibilities of parenthood, and moreover, that they had no interest in meeting or being contacted by recipient parents or children.<sup>136</sup>

The protection of donor anonymity for the purpose of avoiding the responsibilities of parenthood reflects a consequentialist understanding of privacy in that it views privacy as a means to something else. Specifically, the protection of anonymity for the purpose of avoiding the responsibilities of parenthood may reflect a donor’s value of sanctuary “free from social pressures” by way of avoiding society’s role-expectations and behaviour norms associated with parenthood, and by extension, avoiding the social sanction that comes with failure to abide by those expectations.<sup>137</sup> Privacy through anonymity on this account “provides the necessary space for an individual to be ‘off-stage’, free to do and say what he likes, and ‘simply *be* rather than *be respectable*’” in that anonymity provides donors with a sanctuary where they do not have to project the socially acceptable image of being a responsible parent.<sup>138</sup>

As well, the protection of anonymity for the purpose of avoiding the responsibilities of parenthood may reflect the facilitation of relations with others. That is, there is a risk of

<sup>133</sup> *Ibid* at para 75.

<sup>134</sup> *Ibid* at para 77.

<sup>135</sup> *Cheskes, supra* note 65.

<sup>136</sup> *Royal Commission on New Reproductive Technologies, supra* note 16 at 441–42.

<sup>137</sup> Hunt, *supra* note 90 at 210.

<sup>138</sup> *Ibid* at 211, citing Sidney M Jourard, “Some Psychological Aspects of Privacy” (1966) 31:2 *Law & Contemp Probs* 307 at 310–11 [emphasis in original].

damage to existing relationships when private information is disclosed.<sup>139</sup> This was precisely the case for one of the applicants in the *Cheskes* adoption case.<sup>140</sup> Although a case about adoption, the circumstance of one *D.S.* is transferable to that of anonymous gamete donation. When *D.S.* was 20, he had a brief sexual relationship with a young woman. When contacted by a government official nine months later informing him that he was the father of a soon-to-be baby, *D.S.* denied paternity and was advised that he would not be identified as the father. Three decades later in the early 2000s, *D.S.* received a letter from the government informing him of records indicating that he was a birth father, and asking whether he would consent to contact with the adoptee, which he refused. *D.S.* stated that a regime of retrospective disclosure of identifying information would sever the emotional connection between him and his wife, who did not know about the child, and threaten the life they had together.<sup>141</sup> If applied to the gamete donation context, the account of *D.S.* reflects an understanding of privacy protection as the facilitation of relations with others, in this case, relations of love, trust, and affection with one's spouse.<sup>142</sup>

For donors, anonymous gamete donation can be viewed as protecting privacy interests by offering protection against unwanted parental responsibilities. However, this rationale is weak and unfounded from a legal standpoint insofar as it is not a real concern. First, most, if not all, fertility clinics require gamete donors to waive any claims to parentage. Second, there is case law holding that the pre-conception intention of parties is a defining factor in parentage cases, such that donors can successfully bring a declaration of non-parentage.<sup>143</sup> Third, family law in many jurisdictions prevents donors from being granted parental status. Indeed, several provincial governments have considered and responded to the concerns of donors and intended parents alike who do not want the donor to be a legal parent, effectively eliminating this concern through comprehensive family law reform. The House of Commons Standing Committee on Health in 2001, in fact, explicitly recommended that relevant family law be amended so that donors are excluded as legal parents of donor-conceived children.<sup>144</sup> In December 2016, the province of Ontario amended the *Children's Law Reform Act* to provide that gamete donors shall not be recognized in law as parents.<sup>145</sup> British Columbia has similar provision in its family law legislation, providing that a donor is not the child's parent, and cannot be declared by a court to be the parent by reason of the donation.<sup>146</sup> If provincial governments continue to amend their respective family law statutes to provide that gamete donors are not legal parents, as many scholars advocate that they should,<sup>147</sup> the desire to avoid legal responsibilities will cease to be a rationale for the protection of donor privacy through anonymity.

<sup>139</sup> Hunt, *ibid* at 214.

<sup>140</sup> *Cheskes*, *supra* note 65.

<sup>141</sup> *Ibid* at paras 45–47.

<sup>142</sup> Hunt, *supra* note 90 at 213–14.

<sup>143</sup> *R (MR) v M (J)*, 2017 ONSC 2655.

<sup>144</sup> *Building Families*, *supra* note 26 at 22 (recommendation no 19(h)).

<sup>145</sup> *Children's Law Reform Act*, RSO 1990, c C.12, s 5.

<sup>146</sup> *Family Law Act*, SBC 2011, c 25, s 24(1).

<sup>147</sup> Gruben & Cameron, *supra* note 3 at 674; Juliet R Guichon, "Chapter 8: The Priority of the Health and Well-Being of Offspring: The Challenge of Canadian Provincial and Territorial Adoption Disclosure Law to Anonymity in Gamete and Embryo Provision ('Donor' Conception)" in Lemmens et al, *Regulating Creation*, *supra* note 57, 178.

### C. RATIONALE THREE: SECRECY AND MAINTAINING AN IMAGE OF “NORMALCY”

A third rationale for a privacy interest for gamete donors is secrecy, and maintaining an image of “normalcy.” Indeed, for much of history, the use of reproductive technology has been associated with shame and stigma; for example, in the first Canadian case in which artificial insemination appeared in 1921, the woman who was artificially inseminated without her husband’s consent was found to be guilty of adultery because she surrendered “to another person [her] reproductive powers or faculties.”<sup>148</sup> It is notable that the issue of secrecy seems to be a larger concern for recipient parents and their families than it is for donors. The stigma associated with infertility, in particular, has been a main reason for the preference of intended parents for anonymity.<sup>149</sup> The Baird Commission, for instance, underscored the significant value that Western culture places on a genetic link between parent and child, and pointed out that recipients preferred to keep the procedure secret because it keeps the “man’s infertility ... hidden,” maintains “an image of normalcy” and evades children from “[growing] up feeling different from ... peers,” among other reasons.<sup>150</sup> The Baird Commission also pointed out that cultural attitudes about genetic links are different for women than men, pointing to the fact that male partners had a stronger tendency to report “negative consequences on privacy and feelings of control” as opposed to female partners.<sup>151</sup> These sentiments were also reflected in meetings of the House of Commons Standing Committee on Health, with one witness stating “[o]n this whole business of anonymity and secrecy ... it’s also based on a sense of shame, because men feel that they’re somehow less.”<sup>152</sup>

It does not appear that secrecy and an image of “normalcy” are pressing concerns for donors, but the extent to which they are reflects a consequentialist understanding of privacy. The protection of anonymity for the purpose of keeping stigmatized information a secret, and maintaining an image of “normalcy” may reflect a donor’s value of sanctuary “free from social pressures” by way of avoiding society’s expectations and norms associated with “normal” reproduction.<sup>153</sup> Regardless of whether secrecy is an actual concern for donors, it is nonetheless a rationale that is weak from a legal standpoint. A privacy interest is not justified or legally grounded just because the issue at hand is historically and socially stigmatized. The Baird Commission, in fact, stated that “secrecy about [donor insemination has served to compound] the legal vacuum” surrounding the practice,<sup>154</sup> suggesting that it is socially-entrenched secrecy about infertility that had contributed to statutory silence at the time. Importantly, stigma was implicitly addressed in the Supreme Court reference, with the *Lebel-Deschamps* decision starting with a reference to infertility existing among one in eight Canadian couples.<sup>155</sup> This demonstrates that assisted human reproduction, perhaps once something to be ashamed about, is more socially acceptable now than ever before in light of decreasing stigma surrounding infertility, and increasing acceptance of same-sex and single

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<sup>148</sup> *Orford v Orford* (1921), 58 DLR 251 at 258.

<sup>149</sup> Malone, *supra* note 3 at 82.

<sup>150</sup> Royal Commission on New Reproductive Technologies, *supra* note 16 at 464.

<sup>151</sup> *Ibid* at 533.

<sup>152</sup> House of Commons, *Standing Committee on Health, Evidence*, 37-2, Meeting No 9 (2 December 2002) at 1635 (Mr. Barry Stevens).

<sup>153</sup> Hunt, *supra* note 90 at 210.

<sup>154</sup> Royal Commission on New Reproductive Technologies, *supra* note 16 at 465.

<sup>155</sup> *Reference re Assisted Human Reproduction Act*, *supra* note 43 at para 157.

parents.<sup>156</sup> Indeed, there is no claim to privacy on the basis of donors wishing to uphold secrecy.

To conclude Part III, all three possible rationales for a privacy interest for gamete donors are weak from a legal standpoint. The first rationale, the protection of dignity and autonomy, is well established in government commissions and reports, legislation, and case law. However, the rationale is wanting insofar as other parties have similar interests in dignity and autonomy, such as intended parents, and donor-conceived offspring. As well, since there is no statute that explicitly protects donor anonymity (except in Quebec),<sup>157</sup> and because courts have not directly ruled on the privacy rights of donors, gamete donors cannot be said to have privacy interests that are rooted in statute, or the common law, beyond what is already protected in provincial and federal privacy statutes. It is also unlikely that identifying information is deserving of public protections, given the trajectory of legislation, and case law on this topic. The second rationale, avoiding the responsibilities of parenthood, is similarly unfounded in law because donors do not have a claim to legal parentage, as governed by contract, case law, and family laws in many provinces that prevent donors from being granted parental status. Finally, the third rationale, secrecy and maintaining an image of “normalcy,” is unfounded because a publicly protected privacy interest does not stem from the fact that a particular circumstance is historically, and socially, stigmatized. The following conclusion offers a discussion of what these findings about donors’ privacy interests might entail for anonymous gamete donation in Canada.

#### IV. CONCLUSION

In Canada, donor anonymity is tacitly protected across the country because there is an absence of provincial laws or regulations that explicitly address the issue. Anonymity is the default. Among the extensive literature about the issue of donor anonymity, very little has been written about the privacy interests of gamete donors. This article endeavoured to fill this gap, and characterize the role of privacy, as a publicly protected legal principle, in the context of gamete donation in Canada. Through an exploration of government commissions, reports, case law, and statutes, three rationales for a privacy interest for gamete donors were identified: the protection of dignity and autonomy; avoiding the responsibilities of parenthood; and maintaining secrecy and an image of “normalcy.” These rationales were argued to be weak and unfounded from a legal standpoint, entailing that anonymous gamete donation is not supported by the principle of privacy as a publicly protected legal interest in Canadian law, and that the continued tacit protection of donor anonymity cannot be supported by appeals to donors’ privacy interests.

Of course, donor privacy is just one factor that needs to be considered in the larger debate about the acceptability of anonymous gamete donation. Other major and often cited considerations include the desires of intended parents and the best interests of donor-conceived offspring. Additional factors that have been considered include the integrity of the family unit, the legal and supply concerns of health providers, and medical facilities, the high costs of maintaining an information registry, the system of federalism that prevents a national

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<sup>156</sup> Malone, *supra* note 3.

<sup>157</sup> *Loi sur les Activités Cliniques et de Recherche en Matière de Procréation Assistée*, *supra* note 76.

approach to information collection and use, and accidental consanguinity between donor-offspring, among other factors.

It is outside of the scope of this article to engage in a comprehensive weighing exercise of *all* relevant factors. Instead, this article offers a nuanced and clearer understanding of the role — or, perhaps it is more accurate to say the *lack* of a role — that privacy plays in gamete donation, and in this way provides an additional consideration that can be used by scholars, legislators, and policy-makers. While the article does not draw a conclusion about the ultimate defensibility or indefensibility of anonymous gamete donation, it is nonetheless consistent with recent scholarship that calls for an end to the practice of anonymous gamete donation in Canada.<sup>158</sup> Indeed, as this article argues, the practice of anonymous gamete donation cannot be supported by appeals to donors' privacy interests, which are publicly protected in Canadian law. Without this, it remains to be seen whether the practice has a strong leg left to stand on.

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<sup>158</sup> Kelly, *supra* note 2; Cameron, Gruben & Kelly, *supra* note 3; Lemmens et al, *Regulating Creation*, *supra* note 57.