

Conceiving a Feminist Legal Approach to Frozen Embryos:
Exploring the Limitations of Canadian Responses to
Disposition Disputes and Donor Anonymity

by

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ABSTRACT

This thesis advances a feminist critique of Canadian legal responses to disputes over frozen *in vitro* embryos and embryo donor anonymity. It argues that current laws that provide spouses or partners with joint control over the use and disposition of embryos created from their genetic materials, that mandate the creation of agreements setting out these parties' intentions in the event of a disagreement or divorce and that protect donor anonymity without providing mechanisms to allow donors, recipients and donor offspring to voluntarily exchange information do not adequately account for the lived experiences of women who undergo *in vitro* fertilization treatment or who serve as embryo donors. This thesis provides recommendations for how Canadian laws and policies might better support the express objectives and intentions of Canadian federal and provincial statutes to protect the rights, interests and health of women who seek to build their families through assisted reproductive technologies.

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INTRODUCTION

On July 25 2013, the world's first "test-tube baby" celebrated her 35th birthday.¹ Louise Brown's birth through *in vitro* fertilization (IVF) in 1978 marked a breakthrough in the development of assisted reproductive technologies (ARTs).² It demonstrated that a woman's eggs could be fertilized outside of her body and that the resulting embryos could be successfully implanted in her uterus in order to achieve pregnancy.³ Six years later in 1984, researchers discovered that *in vitro* embryos could be frozen and thawed successfully for future reproductive use,⁴ thus permitting women to undergo multiple cycles of IVF, if required or desired, without needing to undergo several rounds of invasive egg retrieval and ovarian stimulation hormone treatments.

Today, it is estimated that approximately 5.5 million babies worldwide have been born through IVF.⁵ Every year in Canada, thousands of women undergo IVF treatment in attempt to conceive; in 2010, Canadian clinics performed 18,454 IVF cycles,⁶ resulting in 4571 live births.⁷ It is also expected that this number has grown over the last three years, as Quebec has started to provide publicly funded *in vitro* fertilization, and has thus made this treatment financially accessible for a wider section of the Quebec population.⁸

¹ See "'Test-tube baby' Brown hails pioneers on 35th birthday" *The BBC* (25 July 2013), online: BBC <<http://www.bbc.co.uk/news/health-23448665>> [Test-tube baby].

² See Diana Backhouse & Maneesha Deckha, "Shifting Rationales: The Waning Influence of Feminism on Canada's Embryo Research Restrictions" (2009) 21 *Canadian Journal of Women and the Law* 229 at 232.

³ *Ibid.*

⁴ See B Downing et al, "Birth After Transfer of Cryopreserved Embryos" (1985) 142 *Medical Journal of Australia* 409, cited in Eric Blyth et al, "Embryo Relinquishment for Family Building: How Should it be Conceptualised?" (2011) 25:2 *International Journal of Law, Policy and the Family* 260 at 261.

⁵ Test-tube baby, *supra* note 1.

⁶ This number also includes frozen embryo transfer cycles. See Joanne Gunby, "Assisted Reproductive Technologies (ART) in Canada: 2010 Results from the Canadian ART Register" online: http://www.cfas.ca/images/stories/pdf/CARTR_2010.pdf

⁷ *Ibid.*

⁸ See Stefanie Carsley, "Funding In Vitro Fertilization: Exploring the Health and Justice Implications of Quebec's Policy" (2012) 20:3 *Health Law Review* 15.

IVF has been praised for providing medically and socially infertile Canadians with novel means of building their families. For couples unable to conceive through intercourse or artificial insemination, IVF provides a means to potentially achieve pregnancy. It also enables women to conceive using donated eggs or their partner's ova, or alternatively, allows Canadians who decide to enlist the assistance of a surrogate mother to build their families the option of having a genetic connection with their children.

Freezing and storing surplus IVF embryos has also provided Canadians with the opportunity to donate and receive embryos for reproductive use. For Canadians with embryos leftover following IVF treatment, embryo donation for third-party reproduction offers an alternative to destruction, continued storage, or donation to research. In turn, using donated embryos for implantation provides recipients with a less invasive and less costly alternative to IVF, and gives Canadians, who are unable or unwilling to use their own genetic material to conceive, an opportunity to experience pregnancy and have a gestational connection with their child.⁹

⁹ Although not as common as sperm or egg donations, the use of donated embryos for implantation may be viewed as particularly beneficial where an individual has a genetic disease that they do not wish to pass on to their children or where partners carry a chromosomal abnormality that may result in morbidity for the child. Donated embryos may also be useful for women who experience premature menopause, and whose partners similarly are infertile or unable to conceive using their own reproductive material. In addition, embryo donation does not require the recipient to undergo the same hormone treatments for ovarian stimulation or oocyte retrieval as a woman undergoing IVF. Thus embryo implantation provides a less physically invasive, and potentially healthier means of conceiving through assisted procreation. Some individuals also view embryo donation as being a more desirable means of family building than adoption or IVF for social or economic reasons. Research indicates that embryo donors are often inclined to donate multiple or all their embryos to one couple, in the hope that they will conceive more than one child. For recipients this is desirable as it potentially enables them to have several children who are full genetic siblings. See Blyth, *supra* note 4 at 262; Chantal Collard & Shireen Kashmeri, "Embryo Adoption: Emergent Forms of Siblingship Among Snowflakes® Families" (2011) 38:2 *American Ethnologist* 307; Some recipients perceive embryo donation as being more attractive than adoption, because it enables a woman to have a gestational connection with the child, and to care for the child while *in utero*. In addition, donors cannot change their minds and seek to recover the child or withdraw their consent to donate once the embryo is implanted, and thus donation potentially allows for more certainty than adoption. Same-sex couples or single women may also find embryo donation attractive in lieu of sperm or egg donation. See e.g. Kathryn D Katz, "Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation" (2003) 18 *Wisconsin Women's Law Journal* 179 at 226; Elizabeth E Swire Falker, "The Disposition of Cryopreserved Embryos: Why Embryo Adoption is an Inapposite Model for

Yet despite the potential benefits of IVF and embryo donation for Canadians seeking to build their families, these practices also raise a myriad of legal, ethical, social and health issues, many of which continue to be subject to debate among scholars.¹⁰ This thesis focuses on two of these questions, which over the past year have been the subject of legal disputes in Canadian courts.¹¹

The first concerns whether spouses or partners ought to have joint control over the use and disposition of *in vitro* embryos and if so, what should happen in the event they disagree about whether their embryos should be used, donated or destroyed. Embryos are

Application to Third-Party Assisted Reproduction” (2008-2009) 35 William Mitchell Law Review 489 at 519; Moreover, embryo donation also potentially represents a less costly means of conceiving than IVF, egg donation or adoption. Canadian fertility clinics charge on average \$1000-2000 for implantation. See e.g. <http://genesis-fertility.com/general-information/fees>;

http://www.ivfcanada.com/services/fees/general_fee_schedule.cfm; Although Canada prohibits payment for gametes or embryos, most of the available ova come from the United States where donated eggs can be prohibitively expensive. Embryos are commonly donated altruistically, even in the United States or other jurisdictions where payment is permitted. But see I Glenn Cohen & Eli Y Adashi, “Made-to-order Embryos for Sale – A Brave New World?” (2013) 368:26 The New England Journal of Medicine 2517 (which suggests that there is uncertainty in some states regarding whether the law prohibits payment for embryos).

¹⁰ For instance, the practice of IVF raises questions regarding the appropriate age cut-off for women, whether IVF should be publicly funded, how many embryos ought to be implanted in one cycle, the legal and moral status of embryos, whether there ought to be research restrictions on the use of embryos, the desirability of IVF given the medical risks of this procedure for women and children, as well as the morality of donating surplus embryos for reproduction and thus purposefully creating children who are born apart from their genetic relatives. The literature relating to most of these questions is vast; for some examples see Abby Lippman, “‘Never too Late:’ Biotechnology, Women and Reproduction” (1995) 40 McGill Law Journal 875; Carolyn McLeod & Françoise Baylis, “Feminists on the Inalienability of Human Embryos” (2006) 21:1 Hypatia 1; Carsley, *supra* note 8; Jennifer Nedelsky, “Property in Potential Life? A Relational Approach to Choosing Legal Categories” (1993) 6:2 Canadian Journal of Law and Jurisprudence 343; Bernard M Dickens & Rebecca J Cook, “The Legal Status of In Vitro Embryos” (2010) 111 International Journal of Gynecology and Obstetrics 91; Juliet Guichon et al, “‘Canada’s First Embryo Donation Service’: The Unregulated Business of Creating Children for Separation from their Families” UCalgary Medicine (5 July 2010), online: <http://ucalgarymedicine.wordpress.com/2010/07/05/‘canada’s-first-embryo-donation-service’-the-unregulated-business-of-creating-children-for-separation-from-their-families-2/>; Laura Shanner, “When is a Secret Justified? Ethics and Donor Anonymity” in Juliet R Guichon, Ian Mitchell, Michelle Giroux, eds, *The Right to Know One’s Origins: Assisted Human Reproduction and the Best Interests of Children* (Brussels: Academic and Scientific Publishers, 2012).

¹¹ See *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480, leave to appeal to SCC refused, 35191 (May 30 2013) [*Pratten* SCC]; Keith Fraser, “Woman wins Round 1 in embryo fight; Judge says they should be saved at least until couple’s divorce trial” *The Province* [Vancouver, B.C.] (6 December 2012) A6; Christopher Reynolds & Pamela Fayerman, “B.C. woman wins some time in ‘custody’ battle over frozen embryos” *The Vancouver Sun*, online: <http://www.vancouversun.com/mobile/news/top-stories/woman+wins+some+time+custody+battle+over+frozen+embryos/7657253/story.html>

created by fusing a man's sperm and a woman's eggs. There are thus two parties who have genetically contributed to their creation, and who might both seek to make decisions regarding their use or disposition. One of the questions that arises from this situation is whether individuals ought to be able to revoke their previously given consent for the embryos to be used by their spouses or partners for procreative purposes and how the embryos ought to be disposed of in the event this withdrawal is permitted.

The second question is what information, if any, embryo donors, recipients and donor offspring should be able to access about one another where embryos are donated anonymously for reproduction. Where children are born through embryo donation they may have a gestational¹² but not a genetic connection with either of their parents. Some donors, recipients, and their offspring might wish to obtain information about one another for health or personal reasons. Others may wish to maintain their anonymity and privacy. This situation thus raises the question of whose interests should prevail where parties disagree as to whether they are willing to disclose their identifying or non-identifying information.

Canadian governments have long recognized these and other legal issues that might arise in relation to IVF and embryo donation and have purported to respond to them in a way that acknowledges the potential benefits of ARTs, while nonetheless recognizing the ways in which Canadians – and especially women – may be negatively affected by their use. In the 1980s, feminist scholars and activists called on the Canadian government to appoint a public inquiry to consider the potential legal, social, economic and health implications of reproductive technologies.¹³ Their efforts resulted in the creation of the Royal Commission on New Reproductive Technologies, which was asked to provide recommendations for how

¹² The child will not have a gestational connection with one of his parents, however, if a surrogate was used.

¹³ See Backhouse & Deckha, *supra* note 2 at 236.

Canadian governments ought to respond to ARTs in a way that takes particular account of their effects on women, children and families.¹⁴ Their suggestions for law reform were recorded in a 1993 Report entitled *Proceed with Care*,¹⁵ which scholars have pointed out reflected a “clear feminist influence”¹⁶ and which ultimately set the foundation for future legislative responses to these technologies.

Current statutes pertaining to assisted procreation similarly express a commitment to support family building while nonetheless protecting the rights, interests and health of women who make use of ARTs. The *Assisted Human Reproduction Act (AHRA)* declares that in drafting these laws, Parliament intended to give priority to the “health and well-being” of women,¹⁷ to promote “the principle of free and informed consent”,¹⁸ and to recognize that “while all persons are affected by these technologies, women more than men are directly and significantly affected by their application”.¹⁹ In turn, Quebec’s *Act Respecting Clinical and Research Activities Relating to Assisted Procreation* similarly states its objective to “protect the health of persons and more particularly the health of women who resort to assisted procreation activities”.²⁰

Yet, while Canadian governments and lawmakers have paid lip service to these decidedly feminist objectives, current laws seeking to regulate embryo disposition disputes and embryo donor anonymity do not fully support them in practice. These statutes also run counter to their expressed intentions in important respects. Demonstrating how this is so, and

¹⁴ See *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) at 2. See also Backhouse & Deckha, *supra* note 2 at 236.

¹⁵ *Proceed with Care*, *supra* note 14.

¹⁶ See Backhouse & Deckha, *supra* note 2 at 236.

¹⁷ *Assisted Human Reproduction Act*, SC 2004, c 2, 2(c) [AHRA].

¹⁸ *Ibid*, s 2(d).

¹⁹ *Ibid*, s 2(c).

²⁰ *An Act Respecting Clinical and Research Activities Relating to Assisted Procreation*, RSQ 2009, c A-5.01, s 1 [Act Respecting Assisted Procreation].

suggesting alternative approaches better in line with the stated values of Canadian legislatures are at the heart of this thesis.

* * *

In order to understand the current state of the law in response to IVF and embryo donation, some context and history is required. Although legislative responses to ARTs were only introduced within the last decade, Canadian governments sought to respond to reproductive technologies since the late 1980s and in the interim, physicians and patients undertook to protect their respective rights and interests through private contracts.²¹

Prior to the introduction of legislation in relation to ARTs, physicians responded to concerns surrounding the disposition and donation of surplus embryos through the use of clinic consent forms or agreements. Clinics and hospitals determined that where a man and a woman created embryos from their genetic materials, they ought to both have control over how they are used or disposed of; however, physicians asked these parties to sign agreements, prior to the embryos being created or frozen, indicating what should happen to these embryos should one party change his or her mind and no longer agree for them to be used for reproductive purposes.²² These contracts were intended to mitigate potential disputes between spouses by ensuring that these parties decided – ahead of time – as to what should happen to their embryos in the event they can no longer provide compatible consent.

Physicians also determined that individuals should be able to donate or receive gametes or embryos anonymously and Canadian clinics guaranteed that they would protect these parties' anonymity and privacy through contracts or consent forms stipulating that their

²¹ See e.g. Lisa Shields, "Consistency and Privacy: Do These Legal Principles Mandate Gamete Donor Anonymity?" (2003) 12:1 Health Law Review 39 at 41.

²² See *Proceed with Care*, *supra* note 14 at 598.

identifying information would not be released without their consent.²³ Doctors could thus only disclose to recipients and their offspring usually limited non-identifying information about their donor such as eye color, occupation and their general health status.²⁴

Beginning in the 1990s, however, the Canadian federal government sought to introduce legislation. Among the recommendations set out in the Royal Commission's 1993 report *Proceed with Care* were that the embryos' genetic contributors should have joint authority to decide what should happen to these embryos and be required to make decisions regarding the disposition of any spare embryos prior to egg retrieval and fertilization.²⁵ The commissioners recommended that donor anonymity be preserved but that identifying information and non-identifying information about the donors should be collected and preserved for 100 years.²⁶ They also found that the best interests of the child mandate that non-identifying information be available to donor offspring at all times, and that identifying information be made available only in the event that a court deems this warranted on account of medical necessity.²⁷

In response to the Commission's report, in 1996 the Canadian federal government first introduced Bill C-47, *The Human Reproductive and Genetic Technologies Act*,²⁸ which died on the order paper with the calling of an election in 1997.²⁹ Then in 2001, Canada's Health Minister presented draft legislation to the House of Commons Standing Committee on Health, which in turn issued a report entitled *Assisted Human Reproduction: Building*

²³ See e.g. Shields, *supra* note 21 at 41; *Pratten v. British Columbia*, 2011 BCSC 656 at para 169 [*Pratten BCSC*].

²⁴ See *Pratten BCSC*, *supra* note 23 at para 40.

²⁵ *Proceed with Care*, *supra* note 14 at 597-598.

²⁶ *Ibid* at 588.

²⁷ *Ibid* at 446.

²⁸ Bill C-47, *An Act Respecting Human Reproductive Technologies and Commercial Transactions Relating to Human Reproduction*, 2d Sess, 35th Parl, 1996.

²⁹ See e.g. Erin L Nelson, "Comparative Perspectives on the Regulation of Assisted Reproductive Technologies in the United Kingdom and Canada" (2005) 43 *Alta L Rev* 1023 at 1027.

Families (Building Families).³⁰ The Standing Committee recommended that embryos should only be used with the consent of donors and that donors should be able to revoke their consent for the embryos to be used at any time.³¹ It also suggested that Canada should move toward a system that eliminates secrecy in donation, and which requires that donor offspring be provided not only with non-identifying information about donors, but also with identifying information as well.³²

In 2002, Bill C-56 *The Assisted Human Reproduction Act* was introduced into the House of Commons. It was renamed Bill C-13 and passed second and third readings in 2002 and 2003 respectively. Finally in March 2004, what was then Bill C-6, *An Act Respecting Assisted Human Reproduction and Related Research (Assisted Human Reproduction Act)* was adopted by the senate and received Royal Assent.³³

The *Assisted Human Reproduction Act (AHRA)* and its associated *Assisted Human Reproduction (Section 8 Consent) Regulations (AHR Consent Regulations)* sought to respond to the question of who should have control over surplus embryos by stating that where one individual donated their reproductive material³⁴ to another individual for the purpose of creating embryos, only the person for whose reproductive use the embryos were created

³⁰ Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December 2001) [*Building Families*]; See Nelson, *supra* note 29 at 1027.

³¹ *Building Families*, *supra* note 30 at 6, 34.

³² *Ibid* at 21.

³³ See Angela Campbell, “Law’s Suppositions about Surrogacy against the Backdrop of Social Science” (2012) 43:1 *Ottawa Law Review* 29 at 45; Nelson, *supra* note 29 at 1027. Note that while some parts of the *AHRA* came into force in 2004, others have yet to come into force because the Canadian government still has not drafted regulations that were meant to support this legislation. For instance, section 12 of the *AHRA* still is not in force as the government has failed to draft the regulations that would clarify what constitute reimbursable expenses associated with surrogacy, gamete and embryo donation. *AHRA*, *supra* note 17.

³⁴ It should be noted that the appropriateness of using the term “reproductive material” in discussing embryos is subject to debate. For example Jennifer Nedelsky challenges this terminology. See Nedelsky, *supra* note 10, at 343.

would be able to make decisions regarding their use or disposition.³⁵ However, it also provided that where an embryos' genetic contributors were spouses or common law partners at the time of the embryos' creation, both parties would be considered "donors" under the law, and would need to provide written consent to use, donate or destroy these embryos.³⁶ Either party could withdraw his or her previously given consent to use or donate embryos, following the embryos' creation but prior to the embryos being used or implanted.³⁷

With regard to information disclosure, the *AHRA* ignored the recommendations set out in *Building Families* and maintained donor anonymity. Section 15 of the *AHRA* made clear that while non-identifying "health reporting information" about a donor may be disclosed to a person undergoing an ART procedure using donated gametes or embryos, "the identity of the donor – or information that can reasonably be expected to be used in the identification of the donor – shall not be disclosed without the donor's written consent."³⁸ However, the *AHRA* sought to balance donor offspring's potential needs or desires for information by establishing a personal health information registry to collect identifying and non-identifying information about donors, recipients and donor offspring. This registry was intended to enable donor offspring to obtain non-identifying health information about their donors,³⁹ and to also be able to verify whether they were genetically related to another individual born through assisted procreation.⁴⁰ The *AHRA* also allowed for the disclosure of a donor's identity to a physician where this was required to "address a risk to the health or safety of a person who has undergone an assisted reproduction procedure, was conceived by

³⁵ *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137, s 10(1)(a) [*AHR Consent Regulations*].

³⁶ *AHRA supra* note 17, s 8; *AHR Consent Regulations, supra* note 35, ss 10(1)(b), 10(2).

³⁷ *AHR Consent Regulations, supra* note 35, s 14.

³⁸ *AHRA, supra* note 17, s 15.

³⁹ *Ibid*, s 18(3).

⁴⁰ *Ibid*, s 18(4).

means of such a procedure or is a descendant of a person so conceived” but prohibited the physician from disclosing the donor’s identity to his patient.⁴¹ Ultimately, however, the regulations that would have established this health registry were never drafted and these provisions relating to the collection and disclosure of information were short lived.

In 2007, the Quebec government challenged the constitutionality of the *AHRA*. It brought a reference before the Quebec Court of Appeal, arguing that parts of the *AHRA* were *ultra vires* federal criminal law power, and rather fell within provincial jurisdiction over hospitals, property and civil rights and matters of a merely local nature.⁴² Quebec was successful at the Court of Appeal⁴³ and the case was appealed and heard at the Supreme Court.⁴⁴ However, before the Supreme Court could render its decision, Quebec went ahead and introduced its own legislation and regulations pertaining to assisted procreation.

On June 18 2009 the Quebec National Assembly passed Bill 26, *An Act Respecting Clinical and Research Activities Relating to Assisted Procreation*⁴⁵ and then in July 2010 adopted its associated *Regulation Respecting Clinical Activities Related to Assisted Procreation (Regulation Respecting Assisted Procreation)*.⁴⁶ With regard to consent to use or donate embryos, the *Regulation* provided that “at every stage of all assisted procreation activities [...] the woman for whom the embryos were intended and any spouse” are both required to provide free and informed consent in writing regarding the use, storage, donation

⁴¹ *Ibid*, s 18(7).

⁴² *Procureur Général du Québec c Procureur Général du Canada* (Renvoi fait par le gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d’appel, L.R.Q. ch. R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procréation assistée, L.C. 2004, ch.2) 2008 QCCA 1167; [2008] JQ no 5489 [Renvoi].

⁴³ *Ibid*.

⁴⁴ It was heard on April 24 2009; See *Reference Re Assisted Human Reproduction Act*, 2010 SCC 61.

⁴⁵ *Act Respecting Assisted Procreation*, *supra* note 20.

⁴⁶ *Regulation Respecting Clinical Activities Related to Assisted Procreation*, OC 644-2010, 7 July 2010, (2010) GOQ II, 2253 [*Regulation Respecting Assisted Procreation*].

or destruction of their embryos,⁴⁷ and may withdraw their consent.⁴⁸ In turn, Quebec's *Act Respecting Assisted Procreation* confirmed that donors and donor offspring's identifying information is confidential and may not be disclosed "even with the consent of the person concerned."⁴⁹ The sole exception to this provision is found in the *Civil Code of Québec*, which mirrors that of the *AHRA*; it states that "personal information relating to medically assisted procreation is confidential. [...] However, where the health of a person born of medically assisted procreation or of any descendant of that person could be seriously harmed if the person were deprived of the information requested, the court may allow the information to be transmitted confidentially to the medical authorities concerned."⁵⁰

On December 22 2010, the Supreme Court released its decision in *Reference Re Assisted Human Reproduction Act*.⁵¹ In a split decision, it struck down parts of the *AHRA* as being *ultra vires* federal jurisdiction but maintained those provisions that it deemed to fall within the ambit of federal criminal law power. Section 8 of the *AHRA* and its *AHR Consent Regulations* were preserved and thus laws relating to disposition decisions between spouses remained the same.⁵² However, the *AHRA*'s provisions regarding the collection and disclosure of donors' information and the preservation of donor anonymity were struck down.⁵³

The effect of this decision is that currently there exists partial legislation regulating assisted procreation in Canada. Canadian provinces are poised to fill in these gaps; however, to-date only Quebec has taken the initiative to institute its own statute and regulations.

⁴⁷ *Ibid*, s19.

⁴⁸ *Ibid*, s 20.

⁴⁹ *Act Respecting Assisted Procreation*, *supra* note 20, s 44 [emphasis added].

⁵⁰ *Civil Code of Québec*, SQ 1991, c 64, art 542 [CCQ].

⁵¹ *AHRA Reference*, *supra* note 44.

⁵² *Ibid* at paras 288-289, 294.

⁵³ *Ibid* at para 294.

Moreover, where some other provinces have sought to respond to assisted reproductive technologies they have done so primarily by reforming their family law legislation⁵⁴ and have not sought to address issues relating to consent or information disclosure. In turn, no province – including Quebec – has sought to introduce registries or other mechanisms that would allow donors, recipients and donor offspring to exchange information.

Thus, currently where spouses or common law partners have created embryos for their reproductive use using their own sperm and eggs, the *AHRA* requires that these parties provide joint consent to use or dispose of these embryos.⁵⁵ The *AHR Consent Regulations* also permit one individual to revoke his or her previously given consent in writing and thus enable one spouse to prevent the other from using the embryos for their own procreative purposes.⁵⁶ Quebec's *Regulation Respecting Assisted Procreation* stipulates that these parties must agree – prior to embryos being created or frozen – about what should happen to their embryos should one party withdraw his or her consent, and must express their intentions in writing.⁵⁷ Although this is not required by statute in other provinces, clinics and hospitals similarly ask their patients to sign consent forms indicating their intentions regarding embryo disposition should they no longer be able to provide compatible consent.⁵⁸

In relation to embryo donor anonymity, Canadian law continues to protect donors', recipients' and donor offspring's anonymity and privacy through agreements and consent forms,⁵⁹ or in Quebec, through its *Civil Code* and *Act Respecting Assisted Procreation*.⁶⁰

⁵⁴ See e.g. *Family Law Act*, SA 2003, c F-4.5; *Family Law Act*, SBC 2011, c 25.

⁵⁵ *AHRA*, *supra* note 17, s 8; *AHR Consent Regulations*, *supra* note 35, s 10(1)(b), 10(2).

⁵⁶ *AHR Consent Regulations*, *supra* note 35, s 14.

⁵⁷ *Regulation Respecting Assisted Procreation*, *supra* note 46, s 21.

⁵⁸ See e.g. Erin Nelson, Ubaka Ogbogu & Timothy Caulfield, "An Investigation of Embryo Donation, Informed Consent, and Research Oversight in Canadian Human Embryonic Stem Cell Research" (2007) 29:12 *Journal of Obstetrics and Gynaecology Canada* 997 at 1000 (which explains the creation and use of consent forms for donation for reproduction and for research).

⁵⁹ See e.g. Shields, *supra* note 21 at 41.

Clinics may provide embryo recipients and donor offspring with non-identifying information about their donors from the time of the donation, and often now the information provided is more robust than it was 20 years ago and includes descriptions of donors' family history, health and genetic information, hobbies and interests.⁶¹ However, where donations have proceeded anonymously, Canadian law currently does not provide means to enable donors, recipients and donor offspring to obtain or voluntarily exchange information following the donation.

* * *

This thesis explores and critiques current legal responses to disputes between spouses and to embryo donor anonymity. It questions whether laws seeking to regulate the disposition and donation of frozen embryos live up to their stated objectives. Specifically, it asks whether these laws support family building while recognizing the power imbalances between men and women who use assisted reproductive technologies, the potential health effects of IVF and donor anonymity for women, and the factors that influence individuals' decisions and consent to use, donate or dispose of surplus embryos. It concludes that these laws do not go far enough to achieve these objectives. Rather, it argues that current laws relating to embryo disposition disputes and embryo donor anonymity privilege the interests of male spouses or sperm donors and could do more to recognize and address the interests of women who make use of reproductive technologies.

This thesis draws upon empirical research and jurisprudence from Canada and other jurisdictions to assess whether current laws take into account the lived experiences of women who make use of IVF in order to conceive and who make decisions about whether to donate

⁶⁰ CCQ, *supra* note 50 art 542, 33ff; *Act Respecting Assisted Procreation*, *supra* note 20, s 42-44.

⁶¹ See *Pratten BCSC*, *supra* note 23 at paras 11, 176; Angela Cameron, Vanessa Gruben & Fiona Kelly, "De-Anonymising Sperm Donors in Canada: Some Doubts and Directions" (2010) 26 Can J Fam L 95 at 110.

frozen embryos for procreative use. As the number of individuals using *in vitro* fertilization and embryo donation has grown, so has the existing empirical research on individuals who make use of these technologies, as well as the case law dealing with legal disputes relating to these practices. This thesis looks to qualitative and quantitative studies from Canada, the United States, Australia and the United Kingdom, which considered individuals' perceptions of their embryos, reasons for wanting or not wanting to donate embryos for reproductive use, attitudes toward anonymous or open embryo donation programs, and experiences as donors or recipients of surplus embryos.⁶² It also considers existing case law on embryo disposition

⁶² See Anne Drapkin Lyerly et al, "Factors that Affect Infertility Patients' Decisions About Disposition of Frozen Embryos" (2006) 85 *Fertility and Sterility* 1623 [Lyerly, "Factors"]; AD Lyerly, "Decisional Conflict and the Disposition of Frozen Embryos: Implications for Informed Consent" (2011) 26 *Human Reproduction* 646 at 650; Catherine A McMahon & Douglas M Saunders, "Attitudes of Couples with Stored Frozen Embryos Toward Conditional Embryo Donation" (2009) 91:1 *Fertility and Sterility* 140; Robert D Nachtigall, et al, "Parents' Conceptualizations of their Frozen Embryos Complicates the Disposition Decision" (2005) 84 *Fertility and Sterility* 431; Christopher R Newton, et al. "Embryo Donation: Attitudes Toward Donation Procedures and Factors Predicting Willingness to Donate" (2003) 18:4 *Human Reproduction* 878; Giuliana Fuscaldo, Sarah Russell & Lynn Gillam, "How to Facilitate Decisions about Surplus Embryos: Patients' Views" (2007) 22:12 *Human Reproduction* 3129; Sheryl De Lacey, "Decisions For the Fate of Frozen Embryos: Fresh Insights into Patients' Thinking and Their Rationales for Donating or Discarding Embryos" (2007) 22 *Human Reproduction* 1751 [De Lacey, "Decisions"]; Giuliana Fuscaldo & Julian Savulescu, "Spare Embryos: 3000 Reasons to Rethink the Significance of Genetic Relatedness" (2005) 10:2 *Reproductive Biomedicine Online* 164; Sheryl De Lacey, "Parent Identity and "Virtual" Children: Why Patients Discard rather than Donate Unused Embryos" (2005) 20:6 *Human Reproduction* 1661 [De Lacey, "Parent Identity"]; CR Newton et al, "Changes in Patient Preferences in the Disposal of Cryopreserved Embryos" (2007) 22:12 *Human Reproduction* 3124; Robert D Nachtigall et al, "How Couples Who have Undergone In Vitro Fertilization Decide what to do with Surplus Embryos" (2009) 92 *Fertility and Sterility* 2094; Maggie Kirkman, "Egg and Embryo Donation and the Meaning of Motherhood" (2003) 38:2 *Women and Health* 1; Catherine A McMahon et al, "Mothers Conceiving Through In Vitro Fertilization: Siblings, Setbacks and Embryo Dilemmas After Five Years" (2000) 10 *Repro Tech* 131 [McMahon, "Mothers Conceiving"]; Karin Hammarberg & Leesa Tinney, "Deciding the Fate of Supernumerary Frozen Embryos: A Survey of Couples' Decisions and the Factors Influencing their Choice" (2006) 86 *Fertility and Sterility* 86; Julianne Zweifel et al, "Needs Assessment for those donating to stem cell research" 88:3 (2007) *Fertility and Sterility* 560 (which discussed individuals or couples decisions to donate to research but which discusses why some felt that they could not donate to other couples); Fiona MacCallum & Susan Golombok, "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" (2007) 22:11 *Human Reproduction* 2888; Fiona MacCallum, Susan Golombok & Peter Brinsden, "Parenting and Child Development in Families with a Child Conceived through Embryo Donation" (2007) 21:2 *Journal of Family Psychology* 278; Fiona MacCallum & Sarah Keeley, "Embryo Donation Families: A Follow-Up in Middle Childhood" (2008) 22:6 *Journal of Family Psychology* 799; Collard & Kashmeri, *supra* note 9; Lucy Frith et al. "Conditional Embryo Relinquishment: Choosing to Relinquish Embryos for Family-Building through a Christian Embryo 'Adoption' Programme" (2011) 26:12 *Human Reproduction* 3327; Marilyn S Paul, et al. "Relinquishing Frozen Embryos for Conception by Infertile Couples" (2010) 28:3 *Families, Systems and Health* 258. Susan C Klock, Sandra Sheinin & Ralph R Kazer, "The Disposition of Unused Frozen Embryos" (2001) 345 *N Engl J Med* 69.

disputes between spouses; these disputes have primarily arisen in the United States,⁶³ but also in Israel,⁶⁴ the United Kingdom⁶⁵ and, recently, in Canada.⁶⁶

How Canadian law and policy currently deals with analogous issues and disputes in other family law contexts is instructive in considering the rules regulating embryo donation. Thus, this thesis considers how Canadian legislators and courts have responded to similar questions and policy concerns relating to the health of women, free and informed consent, and potential power imbalances between men and women in relation to laws pertaining to domestic contracts, surrogacy agreements, adoption and the parentage of children born through natural or assisted conception. Where there are disparities between legal responses in these contexts and in relation to the disposition or donation of surplus embryos, justifications for these differences are considered.

Like all methodologies, these approaches have some limitations. Drawing on research and case law from a number of different jurisdictions runs the risk of overlooking the ways in which individuals' experiences may have been shaped by legal, social or cultural factors, specific to their respective jurisdictions. For instance, laws in some jurisdictions abolishing donor anonymity or restricting the number of years embryos may be stored,⁶⁷ limit the options available to donors with regard to embryo disposition and may have also shaped their

⁶³ See *Kass v Kass*, 91 NY 2d 554 (1998); *Litowitz v Litowitz*, 146 Wash 2d 514 (2002); *Roman v Roman*, 193 SW 3d 40 (2006); *AZ v BZ*, 725 NE 2d 1051 (2000); *JB v MB*, 751 A 2d 613 (2000); *In re Marriage of Dahl and Angle*, 222 Or App 572, 194 P 3d 834 (2009); *Davis v Davis*, 842 SW 2d 588 (1992); *In Re Marriage of Nash*, 150 Wash App 1029, 2009 WL 1514842 (2009).

⁶⁴ See *Nahmani v Nahmani*, (12 September 1996) CFH 2401/95.

⁶⁵ See *Evans v United Kingdom*, [2006] ECHR 200, (2006) 43 EHRR 21; *Evans v Amicus Healthcare Ltd and others*, [2003] EWHC 2161 (Fam); *Evans v Amicus Healthcare Ltd*, [2004] EWCA Civ 727.

⁶⁶ Fraser, *supra* note 11; Reynolds & Fayerman, *supra* note 11.

⁶⁷ For instance, the United Kingdom and some parts of Australia have banned donor anonymity. See Eric Blyth & Lucy Frith, "Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity" (2009) 23 *International Journal of Law, Policy and the Family* 174. In turn, some parts of Australia have limitations on how many years embryos may be kept in storage. For instance, in New South Wales embryos may only be stored for 5 years. See McMahon & Saunders, *supra* note 62 at 141.

perceptions of the acceptability of open and closed-identity donations. In addition, one might question whether the attitudes and experiences of individuals who use IVF and who serve as donors and recipients can be generalized or accurately ascertained through empirical research or jurisprudence.⁶⁸ As is common with social science literature, these studies acknowledge their limitations with respect to sample size, potential biases, and other factors that might have influenced their results.⁶⁹ These limitations may be particularly prevalent with respect to empirical research on assisted reproductive technologies; given the secrecy that traditionally surrounded the use of ARTs,⁷⁰ as well as the criminalization of payment in return for reproductive materials in Canada,⁷¹ many people may be unwilling to discuss their experiences, and those who are keen to have their voices be heard might be those who are predisposed to hold certain views. Moreover, while some socio-legal scholars rely upon empirical research to make claims for law reform, others caution that such analyses risk overlooking law's varied functions,⁷² and law's potential effects on social practices and individuals' experiences and perceptions.⁷³

An additional limitation specific to this project is that while this thesis aims to examine the experiences of *women*, embryo donors may be both men and women. Some of

⁶⁸ For instance, as Angela Campbell has pointed out, attempting to make generalizations about peoples' experiences through social science literature "risks reducing the analysis to a lowest common denominator inquiry that searches for the most basic similarities" and may not accurately reflect the variations among individuals' experiences. See Campbell, "Law's Suppositions", *supra* note 33 (she made this point in relation to using empirical research to gain insight into the experiences of surrogate mothers).

⁶⁹ See e.g. De Lacey, "Parent Identity", *supra* note 62 at 1667-8.

⁷⁰ See e.g. Josephine Johnston, "Mum's the Word: Donor Anonymity in Assisted Reproduction" (2002) 11:1 Health Law Review 51 at 51.

⁷¹ *AHRA*, *supra* note 17, s 7.

⁷² For instance, laws may not be intended to respond to practices on the ground, but rather to communicate a message about what is acceptable in Canadian society. See e.g. Campbell, "Law's Suppositions", *supra* note 33 at 57.

⁷³ See Robert Leckey, "Law Reform, Lesbian Parenting, and the Reflective Claim" (2011) 20:3 Soc & Leg Stud 331.

the studies relied upon for this research interviewed only women;⁷⁴ others interviewed both men and women separately, or as couples.⁷⁵ While across the board the participation of women in these studies was greater than men, some studies did not always differentiate between male and female respondents' responses.

This thesis has taken into account these limitations in analyzing the data these sources yield. For instance, the timing and potential effect of law reforms in other jurisdictions has been carefully kept in mind. This thesis also does not draw upon this research in attempt to make broad generalizations about Canadians' experiences, but rather to show the varying ways in which Canadians might be affected by IVF and embryo donation, and, in turn, by laws relating to these practices. It also uses these sources to illuminate the ways in which current laws seem to be privileging and accounting for the views and experiences of men over women, and to make arguments about how law could be doing more to balance these parties' interests. Moreover, calling for reform in part on the basis of empirical research seems warranted given federal and provincial legislatures' intentions to account for and respond to the experiences of Canadians using ARTs.

In drawing upon these sources to evaluate current Canadian legal responses, this thesis is informed by feminist theory, which stresses the importance of taking into account the views, voices and experiences of women.⁷⁶ It derives inspiration and seeks to build upon a growing body of Canadian feminist legal scholarship, which looks to empirical studies from Canada and abroad to examine and think critically about Canadian legal approaches to

⁷⁴ See e.g. McMahon, "Mothers Conceiving" *supra* note 62; Kirkman, *supra* note 62.

⁷⁵ See e.g. Lyerly, "Factors", *supra* note 62; De Lacey, "Decisions", *supra* note 62.

⁷⁶ See e.g. Barbara J Berg, "Listening to the Voices of the Infertile" in Joan C Callahan, ed, *Reproduction, Ethics and the Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995) 80; Patricia A Cain, "Feminist Legal Scholarship" (1991) 77 Iowa L Rev 19; Katharine T Bartlett, "Feminist Legal Methods" (1990) 103:4 Harvard Law Review 829; Reg Graycar & Jenny Morgan, "Law Reform: What's in It for Women?" (2005) 23 Windsor Yearbook of Access to Justice 393 at 395.

assisted reproduction.⁷⁷ This thesis also fills gaps in Canadian legal scholarship on ARTs. There is currently no up-to-date scholarship that examines and critiques Canadian legal responses to embryo disputes between spouses.⁷⁸ Moreover, there is currently no literature considering how issues relating to donor anonymity might differ in the context of embryo donation, nor is there any published Canadian legal literature on embryo donation for family building.⁷⁹

Chapter 1 argues that current legal responses to embryo disposition disputes between spouses run counter to the *AHRA* and Quebec's *Act Respecting Assisted Procreation's* stated objectives to recognize power imbalances between men and women and to promote free and informed decision-making. Empirical research and case law suggests that individuals who are asked to sign agreements regarding the disposition of their embryos *prior* to the creation or freezing of these embryos may not be in a position to make free and informed decisions. Current laws that enable one individual to prevent his or her spouse or partner from using embryos for procreative purposes overlook the health implications of IVF for women and the ways in which women will be disproportionately affected by these laws. Canadian law and public policy has resisted treating domestic agreements between spouses, or surrogacy or adoption agreements, the same as binding, commercial contracts in part because of concerns

⁷⁷ See Karen Busby & Delaney Vun, "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26:1 Can J Fam L 13; Campbell, "Law's Suppositions" *supra* note 33; Fiona Kelly, "(Re)forming Parenthood: The Assignment of Legal Parentage within Planned Lesbian Families" (2008) 40 Ottawa Law Review 185; Robert Leckey, "The Practices of Lesbian Mothers and Quebec's Reforms" (2011) 23 CJWL 579.

⁷⁸ The only exception is unpublished conference proceedings recently prepared for the National Judicial Institute. See Angela Campbell, "Averting Misconceptions: Judicial Analyses of Family Disputes over Stored Embryos" in National Judicial Institute, *Proceedings of the National Judicial Institute Family Law Seminar* (February 2012) [unpublished, on file with author].

⁷⁹ There is only an unpublished Master's thesis examining Canadian laws relating to parentage and embryo donation for family building. See Cindy Baldassi, *Babies or Blastocysts, Parents or Progenitors? Embryo Donation and the Concept of Adoption* (LL.M. Thesis, University of British Columbia, 2006) [unpublished].

that these agreements might not be the product of free and informed decision-making. Moreover, laws providing spouses with the ability to revoke their consent to use their embryos seem to provide men with a right not to procreate and a right not to parent, even though it is not clear that such rights exist, or should exist, in the Canadian context in light of laws relating to abortion, adoption and the parentage of children born through assisted procreation or natural conception.

Chapter 2 argues that by supporting donor anonymity without providing means for parties to exchange information with mutual consent, current laws do not go far enough to achieve their objectives to protect the health and well-being of women and to support family building through the use of ARTs. Current laws surrounding donor anonymity are based on the interests of the paradigmatic male sperm donor who does not wish to have access to information about his biological kin and who is only willing to donate if his anonymity and privacy are guaranteed. In the context of embryo donation, however, empirical research demonstrates that the lack of information available to Canadians who donate their embryos anonymously may be one factor that is dissuading some potential embryo donors – and especially female embryo donors – from wanting to donate their embryos for third-party reproductive use. In addition, donors' inability to obtain further identifying or even non-identifying information about their genetic offspring may be having negative health and psychological outcomes for some individuals who do make the decision to donate their embryos. The lack of mechanisms in place to enable these parties to exchange information voluntarily is also at odds with how Canadian law has responded to adoptees' and birth parents' potential needs or desires for information in the context of adoption.

Both chapters consider alternative means of responding to embryo disposition disputes and donor anonymity. They look to how courts within Canada and in other jurisdictions have responded to the same or similar legal issues and also consider other Canadian scholars' proposals for law reform. This thesis concludes that each of these approaches does not adequately serve to meet the law's objectives and overlooks the experiences of women who use IVF or who serve as embryo donors. These approaches in some cases pose additional problems as they may also conflict with other areas of Canadian law and public policy.

Thus this thesis also provides recommendations for law reform. With regard to embryo disposition disputes, federal and Quebec provincial laws and regulations ought to be reformed to allow an individual to use embryos for procreative purposes, even if a spouse or partner changes his or her mind, and to provide women with priority to use these embryos for implantation. Second, agreements or consent forms setting out spouses or partners' intentions regarding their surplus embryos ought to be legally unenforceable and where neither party wants to use the embryos for procreative purposes, but disagree as to how they ought to be disposed of, embryos ought to be destroyed. In relation to donor anonymity, Canadian law should continue to allow anonymous donations, but should create a registry that allows donors, recipients and donor offspring to exchange non-identifying and potentially identifying information voluntarily, following the donation. Provincial legislatures should follow the lead of some jurisdictions in clarifying the parental rights and obligations of donors and in some instances, individuals who wish to revoke their consent for their embryos to be used for procreation ought to be considered as "donors" under the law, and thus ought to be absolved of parental obligations vis-à-vis their genetic offspring. Finally, this thesis

recommends that providing for increased counselling could help to mitigate some of the issues that arise in relation to both spousal disputes and embryo donation. Adopting these approaches would help to better support family building through the use of IVF and embryo donation, while balancing the health interests of donors and donor offspring, recognizing the potential power imbalances between spouses, and seeking to ensure that donors provide free and informed consent to use and dispose of their embryos.

CHAPTER 1: DISPUTES OVER EMBRYO DISPOSITION

In December 2012, the British Columbia Supreme Court was faced with the first Canadian “custody” dispute over frozen embryos. Like many Canadians who have difficulty conceiving, Gregory and Juanita Nott turned to *in vitro* fertilization treatment in the hope of building their family. They created embryos using their own ova and sperm and Mrs. Nott successfully gave birth to two children. Following treatment in 2004, the couple was left with four embryos, which they jointly consented to freeze and store for future reproductive use. Since then, however, the couple’s relationship has become strained; they separated in 2011 and they are currently obtaining a divorce. In July 2012, they received notice that their fertility clinic was closing down and a request that they jointly consent to their embryos being transferred to another clinic for future storage. The couple had signed a consent form, at the time of the embryos’ creation, saying that should either party refuse to consent to the embryos being transferred, the clinic would have authority to destroy them. Mrs. Nott readily agreed to the transfer as she wishes to use the embryos in an attempt to have more children. Mr. Nott refused to authorize the transfer, as he wants the embryos to be destroyed. In December, Mrs. Nott successfully obtained an injunction to prevent the embryos’ destruction, until their divorce trial can be heard and they can seek a judicial determination regarding what should happen to their surplus embryos.¹ Media reports suggest that the case was to be heard in June 2013,² but a decision has yet to be released.³

¹ See Keith Fraser, “Woman wins Round 1 in embryo fight; Judge says they should be saved at least until couple’s divorce trial” *The Province* [Vancouver, B.C.] (6 December 2012) A6; Christopher Reynolds & Pamela Fayerman, “B.C. woman wins some time in ‘custody’ battle over frozen embryos” *The Vancouver Sun*, online: <http://www.vancouver.sun.com/mobile/news/top-stories/woman+wins+some+time+custody+battle+over+frozen+embryos/7657253/story.html>

² *Ibid.*

³ As of August 19 2013.

This dispute arose in part as a result of section 8 of the federal *Assisted Human Reproduction Act*⁴ (*AHRA*) and its associated *AHR Consent Regulations*.⁵ This legislation requires that spouses or common-law partners provide joint consent to use or donate *in vitro* embryos created for their reproductive use,⁶ and also allows one spouse or partner to unilaterally withdraw his or her previously given consent, in writing,⁷ prior to the embryos being used, thawed or designated for a specific purpose.⁸ One effect of these laws is that where a couple, like Mr. and Mrs. Nott, have created embryos from their own ova and sperm in order to build their family,⁹ one party may change his or her mind and prevent the other from using these embryos to have more children.¹⁰

⁴ *Assisted Human Reproduction Act*, SC 2004, c 2 [*AHRA*]

⁵ *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137 [*AHR Consent Regulations*].

⁶ See *AHRA*, *supra* note 4 s 8(3) (which explains that embryos may not be used without the donor's consent); *AHR Consent Regulations*, *supra* note 5, s 10(1) (which explain that a "donor" is the "individual or individuals for whose reproductive use an *in vitro* embryo is created" and includes "the couple who are spouses or common-law partners at the time the *in vitro* embryo is created, regardless of the source of the human reproductive material used to create the embryo"), s 10(2) (which requires compatible consent from a couple for their consent to comply with the regulations) and s 13 (which requires that prior to making use of an *in vitro* embryo, an individual will have the written consent of the donor stating that the embryo may be used for the donor's own reproductive use, or may be donated for third-party reproduction, for research or for instruction.)

⁷ See *AHR Consent Regulations*, *supra* note 5, s 14(3) (which allows either spouse or partner to withdraw the donor's consent) and s 14(1) (which clearly stipulates that this withdrawal must be in writing).

⁸ The timing for revocation differs depending on whether consent was given to use the embryos, or to donate them for third party reproduction, for research or for instruction. In the case of consent given to use the embryos for their own reproductive use, revocation can only happen before implantation. In the case of donation for third party reproductive use, withdrawal is only possible "before the third party acknowledges in writing that the embryos have been designated for their reproductive use." In the case of donation for research or instruction, withdrawal must happen before the embryos are thawed, or a person acknowledges in writing that the embryos have been designated for that purpose, or before the creation of a stem line, whichever of these occurrences happens the latest. See *AHR Consent Regulations*, *supra* note 5, s 14.

⁹ While a spouse or partner who does not contribute his or her own reproductive material to the creation of embryos may be considered a "donor" and be required to provide consent to the embryos being used or donated while the parties are still in a relationship, the law also stipulates if their relationship or marriage breaks down, only the genetic contributor will be considered the "donor" under the law. *AHR Consent Regulations*, *supra* note 5 s 10(3).

¹⁰ This would mean that a woman cannot use the embryos for her own IVF cycle, and that a man could not use them with a new partner. It would also mean that both a woman and a man cannot use the embryos with a surrogate. According to her lawyers' website, Mrs. Nott is reportedly arguing that section 8 of the *AHRA* is unconstitutional as it violates her right to life, liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms* and is *ultra vires* federal jurisdiction. See <http://www.bcfamilylaw.ca/2012/12/05/bc-and-canadian-frozen-embryo-family-dispute-lawyers/>

This case has also come about because of uncertainty under the law as to whether embryo disposition agreements or consent forms are legally enforceable. While the *AHRA* states that embryos cannot be used or donated without the consent of both spouses,¹¹ it does not clarify what will happen to a couple's surplus embryos in the event the parties cannot come to an agreement and provide compatible consent. In other words, it does not say whether the embryos would have to remain in storage or could be destroyed. Quebec has sought to address this issue through its *Regulation Respecting Clinical Activities Related to Assisted Procreation*¹² (*Regulation Respecting Assisted Procreation*), which stipulates that where embryos have been created but not used, spouses must express their intentions in writing regarding what should happen to their embryos in the event they disagree, one dies, their relationship or marriage ends, or the woman for whom the embryos were created is no longer of childbearing age or physically able to use them.¹³ While not legally required elsewhere in Canada, Canadian fertility clinics also ask their clients to sign consent forms – prior to embryos being created or frozen – indicating what should happen to embryos if the parties can no longer provide compatible consent. If these agreements are legally enforceable then they may enable parties to contract around the right to revoke consent and allow for embryos to be used for reproduction or be donated, even in the event one spouse changes his or her mind. They may also, however, provide that embryos will be destroyed, even if one spouse – like Mrs. Nott – wishes to use them to have more children.

This chapter examines these approaches towards resolving disputes over surplus embryos and considers whether they seek to promote free and informed decision-making,

¹¹ For the sake of simplicity, the rest of the chapter will use the language of “spouse” to denote both spouses and partners.

¹² *Regulation Respecting Clinical Activities Related to Assisted Procreation*, OC 644-2010, 7 July 2010, (2010) GOQ II, 2253, ss 19-20 [*Regulation Respecting Assisted Procreation*].

¹³ *Ibid*, s 21.

and whether they recognize potential power imbalances between male and female spouses in accordance with the express objectives of the *AHRA* and Quebec's *Act Respecting Clinical and Research Activities Relating to Assisted Procreation (Act Respecting Assisted Procreation)*. It suggests that these laws do not go far enough to attain these objectives in practice, and may have the effect of subverting them. Adopting a contract model or allowing one individual to prevent his or her spouse or partner from using embryos for procreation overlooks the experiences of women who undergo *in vitro* fertilization treatment and also does not accord with how Canadian law and public policy has responded to similar conflicts between spouses, or to agreements that seek to control or restrict women's reproductive choices. This chapter thus considers alternative means of responding to these disputes and ultimately provides suggestions for law reform. This analysis contributes to longstanding debates within Canada – predating the creation of the *AHRA* – regarding the potential merits and problems with allowing spouses to jointly control embryo disposition and sign consent forms indicating their intentions.¹⁴ In doing so, it takes into account the current state of

¹⁴ See Jennifer Nedelsky, “Property in Potential Life? A Relational Approach to Choosing Legal Categories” (1993) 6:2 *Canadian Journal of Law and Jurisprudence* 343; Michael Trebilcock, et al, “Testing the Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services” (1994) 32 *Osgoode Hall Law Journal* 613; *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993); Roxanne Mykitiuk & Albert Wallrap, “Regulating Reproductive Technologies in Canada” in Jocelyn Downie, Timothy Caulfield & Colleen M Flood, eds, *Canadian Health Law and Policy*, 2nd ed (Markham, Ont.: Butterworths, 2002) 367; Christine Overall, “Frozen Embryos and ‘Fathers’ Rights’: Parenthood and Decision-Making in the Cryopreservation of Embryos” in Joan C Callahan, ed, *Reproduction, Ethics and the Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995) 178. With the exception of Overall, none of this scholarship considers the merits or problems with these approaches in any detail but rather mentions them in passing. In addition, with the exception of Mykitiuk's piece which is from 2002, the rest of this literature dates back to the early 1990s. There does not exist any recent published scholarship on this topic; this chapter however cites to unpublished conference proceedings, recently prepared by Angela Campbell for the National Judicial Institute, on section 8 of the Assisted Human Reproduction Act and the different ways in which Canadian courts might seek to resolve disputes between spouses over surplus embryos. Her piece does not however advance an argument in favour of one approach over another and does not discuss Quebec's legislation. See Angela Campbell, “Averting Misconceptions: Judicial Analyses of Family Disputes over Stored Embryos” in National Judicial Institute, *Proceedings of the National Judicial Institute Family Law Seminar* (February 2012) at 4 [unpublished, on file with author].

Canadian law and public policy, the growth of empirical research on IVF and the development of increased case law relating to the disposition of reproductive materials.

Part I argues that enforcing agreements or consent forms does not take into account studies and jurisprudence that call into question whether parties are in a position to make autonomous, informed decisions regarding embryo disposition prior to undergoing IVF treatment. In addition, Canadian law pertaining to domestic contracts, surrogacy and child adoption resists treating agreements in these contexts the same as binding commercial contracts because of similar concerns about whether such agreements reflect free and informed decision-making.

Part II argues that allowing one individual to prevent his or her spouse from using their embryos for reproduction ignores the ways in which women are especially affected by the creation of embryos and disregards the costs of IVF. These laws seem to provide Canadians with the equivalent of a right not to procreate or parent, even though Canadian law relating to abortion, adoption and parentage or filiation do not provide similar rights. We might therefore question whether such rights ought to exist in relation to IVF embryos.

Part III then explores alternative means of resolving disputes over frozen embryos. It considers how legislatures and courts in other jurisdictions¹⁵ have responded to conflicts between spouses over embryo disposition and, in turn, how Canadian courts have dealt with analogous situations involving control over genetic material. These varied approaches raise similar issues to the Canadian contractual or joint consent models, and would also conflict with Canadian law and public policy relating to reproductive rights and the non-commodification of reproductive materials.

¹⁵ This chapter considered existing case law on disputes between spouses. The majority of case law is from the United States, but there have also been cases in Israel and the United Kingdom.

Part IV provides recommendations for how Canadian legislatures and courts might resolve disputes between spouses over their surplus embryos, in a manner that recognizes the experiences of individuals who undergo IVF treatment and the ways in which women are uniquely affected by assisted reproductive technologies. Genetic contributors should be unable to prevent their spouses from using embryos they have created for procreative purposes, but in the event that the parties divorce and both wish to use them, a female spouse should be given priority in light of the greater health risks and complications associated with IVF for women than for men. In addition, agreements between spouses signed prior to a woman undergoing IVF ought to be legally unenforceable. Moreover, some of the issues that arise in relation to embryo disposition could be resolved by clarifying the parental rights and obligations of men or women who do not wish for their spouse or partner to use their frozen embryos for procreative purposes and by providing for increased and mandatory counselling.¹⁶

I. EMBRYO DISPOSITION AGREEMENTS AND CONSENT FORMS

While Canadian courts have yet to clarify whether agreements between spouses or clinic consent forms are legally binding, it is worth exploring the implications of adopting a contract model in this context. On this approach, the decision parties made prior to creating embryos would be binding, unless spouses jointly agreed to update their consent form or agreement at a later point in time. Thus if spouses had elected, for instance, to donate their embryos for reproduction in the event of a disagreement, they would be bound by this

¹⁶ It should be noted that one might argue that an additional means of resolving these disposition issues would be to freeze a woman's eggs rather than embryos for future reproductive use and to thus avoid issues of joint control in the first place. In the future this may provide a viable way to resolve these issues. At the moment, however, while egg freezing techniques are becoming increasingly sophisticated, this procedure is still in its infancy and experimental. Embryo freezing remains common practice because embryos are more resistant to freezing techniques and are able to be thawed and implanted with a greater chance of successful pregnancy than frozen eggs. See e.g. Alison Motluk, "Growth of Egg Freezing Blurs 'Experimental' Label" (2011) 46 *Nature* 382; Karey Harwood, "Egg Freezing: A Breakthrough for Reproductive Autonomy?" (2009) 23 *Bioethics* 39.

decision even if, at a later date, one of the parties no longer finds this option palatable. Importantly, their original choice would also be enforced if one party still wishes to use the embryos for reproduction. These agreements might also, however, allow spouses or partners to potentially circumvent the *AHRA* and *AHR Consent Regulations*, which require joint consent to use or donate embryos.¹⁷ For instance, parties might have stipulated in their agreement that if they disagree or divorce, one spouse will be uniquely given control over the embryos, or a third party, such as a judge or clinic, will be given authority to make a decision. The only decisions that could not be binding would be those that would clearly violate Canadian law and public policy.¹⁸

This contractual approach has long received support from Canadian scholars, ethicists and physicians. Twenty years ago, when Canadians were first debating how best to address potential conflicts over frozen embryos, the government-appointed Royal Commission on New Reproductive Technologies recommended that gamete providers be jointly required to make decisions regarding the disposition of their embryos prior to gametes being retrieved or embryos created, and to indicate their preferences in consent forms that would be binding for the clinic involved.¹⁹ Some Canadian scholars similarly proposed that while it might be appropriate for the Canadian government to establish a default for what would happen to embryos in the event that the genetic contributors divorce or die, Canadians ought to be able to contract around this default using consent forms.²⁰

¹⁷ See below Part II for a detailed discussion of these provisions regarding joint consent.

¹⁸ For instance, parties could not agree that in the event they divorce, the remaining embryos could be sold for reproductive use or research and the proceeds divided amongst the spouses; such an arrangement would directly contravene the *AHRA*'s prohibitions on buying and selling gametes. See *AHRA*, *supra* note 4, s 7; They also could clearly not sign a binding agreement that in the event of a disagreement between spouses, the female spouse would nonetheless be forced to use the embryos for procreation as this too would violate Canadian public policy relating to women's reproductive autonomy.

¹⁹ *Proceed with Care*, *supra* note 14 at 598.

²⁰ See Trebilcock, *supra* note 14 at 691.

Support for a clear-cut contractual approach is not surprising. It was thought that enforcing agreements would prevent disputes between spouses and litigation over embryo disposition.²¹ In theory, using agreements to resolve disputes would also mean that neither party would be forced to dispose of their embryos in a manner that they had not previously contemplated; spouses would have been aware precisely of what would happen to their embryos should certain events arise and couples would have been in a position to negotiate at that time what they felt would be the most appropriate manner to resolve any future disputes. The parties would be informed as to their options, and would be free to refuse to consent to treatment should they be unable to come to an agreement.

It is far from clear, however, that Canadians are able to provide free and informed consent regarding embryo disposition at the time these agreements and consent forms are signed. As the number of individuals undergoing IVF has grown over the last three decades, so has the social science research available on the experiences of individuals undergoing treatment and the decisions they make regarding their frozen embryos. This literature demonstrates that many individuals change their minds about whether they would like to use, donate or destroy their surplus embryos following IVF treatment and especially following the birth of a child. The lack of mandatory counseling and legal advice for individuals undergoing IVF in Canada may mean that spouses make decisions without fully understanding the legal implications of their choices. In turn, judicial decisions from Canada and abroad also suggest that individuals – and especially women – who make decisions regarding their embryos may be so eager to begin the IVF process that they may not contemplate the potential consequences of the agreements they are signing, or may agree to a

²¹ See *Proceed with Care*, *supra* note 14 at 598.

disposition option in order to appease their spouse. The following section will consider each of these concerns in turn.

A. Free and Informed Consent

1) *Change of Heart*

Empirical research demonstrates that many patients change their minds regarding what should happen to their extra embryos following IVF and especially after successfully giving birth to a child through these methods.²² A number of studies have shown that while a substantial number of donors indicated initially – pre-IVF treatment – that they would be interested in donating their surplus embryos for third-party reproduction or research, the vast majority did not follow through when asked again to make a decision following treatment.²³ For instance, in one American study 71% of couples changed their preference regarding disposition between the time the embryos were created and when they were asked to make a final decision.²⁴ A Canadian study demonstrated that while most patients preferred to donate their embryos to research prior to undergoing IVF, and indicated this preference on their consent forms, many had a change of heart after completing IVF and decided to discard them.²⁵

Some scholars have hypothesized that this change of heart may be linked to individuals' changing perceptions of their embryos.²⁶ Qualitative and quantitative research on IVF and embryo donation suggests that donor's perceptions of their frozen embryos often

²² See Eric Blyth et al, "Embryo Relinquishment for Family Building: How Should it be Conceptualised?" (2011) 25:2 International Journal of Law, Policy and the Family 260 at 266.

²³ See e.g. Sheryl De Lacey, "Parent Identity and "Virtual" Children: Why Patients Discard rather than Donate Unused Embryos" (2005) 20:6 Human Reproduction 1661 at 1661-1662 [De Lacey, "Parent Identity"]; CR Newton et al, "Changes in Patient Preferences in the Disposal of Cryopreserved Embryos" (2007) 22:12 Human Reproduction 3124 [Newton, "Changes"].

²⁴ See Susan C Klock, Sandra Sheinin & Ralph R Kazer, "The Disposition of Unused Frozen Embryos" (2001) 345 N Engl J Med 69.

²⁵ See Newton, "Changes", *supra* note 23 at 3127.

²⁶ See Blyth, *supra* note 22 at 267.

shifts over time and is particularly liable to change following IVF treatment.²⁷ These studies reveal that many women who successfully conceived using IVF began to see their embryos as their potential children.²⁸ For instance, one study recounted that of 75 women interviewed who had undergone IVF, 90% viewed their embryos as potential persons and as potential brothers or sisters to their own children.²⁹ Other research explains that couples with *in vitro* embryos began to describe them as their “virtual children.”³⁰

Once individuals successfully conceived through IVF, many expressed reluctance to donate what they perceived as their biological offspring or “children.”³¹ Some drew an analogy to adoption, and explained that they could not bear the thought of giving away their genetic kin.³² For instance, one woman who changed her mind explained: “And I felt good about that whole thing until the time came when I had to make that decision and I found that [began weeping] ... I couldn’t donate them. I never thought about that [someone else having my child] really.”³³ Several respondents in other studies explained that they could not conceive of their genetic offspring living elsewhere and being raised by other parents.³⁴ As

²⁷ See e.g. Robert D Nachtigall et al, “How Couples Who have Undergone In Vitro Fertilization Decide what to do with Surplus Embryos” (2009) 92 Fertility and Sterility 2094; Newton, “Changes”, *supra* note 23.

²⁸ See e.g. Robert D Nachtigall et al., “Parents’ Conceptualizations of their Frozen Embryos Complicates the Disposition Decision” (2005) 84 Fertility and Sterility 431 at 433 [Nachtigall, “Parents’ Conceptualizations”]; Catherine A McMahon et al, “Mothers Conceiving Through In Vitro Fertilization: Siblings, Setbacks and Embryo Dilemmas After Five Years” (2000) 10 Repro Tech 131 at 133 [McMahon, “Mothers Conceiving”].

²⁹ See McMahon, “Mothers Conceiving”, *supra* note 28 at 133.

³⁰ See De Lacey, “Parent Identity”, *supra* note 23; Nachtigall, “Parents’ Conceptualizations” *supra* note 28 at 433; De Lacey clarifies, however, that this view is distinct from the perception that embryos are “unborn children” or are already lives from the moment of conception. See De Lacey, “Parent Identity”, *supra* note 23 at 1667.

³¹ See De Lacey, “Parent Identity” *supra* note 23 at 1665; McMahon, “Mothers Conceiving”, *supra* note 28 at 133.

³² See e.g. Maggie Kirkman, “Egg and Embryo Donation and the Meaning of Motherhood” (2003) 38:2 Women and Health 1 at 10; De Lacey, “Parent Identity”, *supra* note 23 at 1666; Sheryl De Lacey, “Decisions For the Fate of Frozen Embryos: Fresh Insights into Patients’ Thinking and Their Rationales for Donating or Discarding Embryos” (2007) 22 Human Reproduction 1751 at 1754.

³³ See De Lacey, “Parent Identity”, *supra* note 23 at 1664.

³⁴ See e.g. Catherine A McMahon & Douglas M Saunders, “Attitudes of Couples with Stored Frozen Embryos Toward Conditional Embryo Donation” (2009) 91:1 Fertility and Sterility 140 at 144; Julianne Zweifel et al, “Needs Assessment for those donating to stem cell research” 88:3 (2007) Fertility and Sterility 560 at 562;

one pointed out: “I feel guilty that I have five embryos in storage and that I am unwilling to donate them. But I see the embryos as my children, and them being raised by someone else would be something I would never get over. I see it as like adopting out one of my twins.”³⁵ Another explained: “Having my child living somewhere else is not acceptable. It’s not like I’m donating an egg. I’ve thought of this as well. It’s not like my egg or P’s sperm. It’s our child.”³⁶

As a result of these findings, researchers have questioned whether individuals who are planning to use IVF in attempt to build their families are in a position to make informed decisions prior to undergoing treatment,³⁷ and whether such agreements ought to be legally binding.³⁸ As was mentioned previously, this research, like all empirical studies, has some methodological limitations and may not reflect the experiences of all individuals who undergo IVF. However, this change in decision-making following IVF treatment has been identified in studies across different jurisdictions³⁹ and, importantly for the purposes of this chapter, this trend has been studied and identified in Canada as well.⁴⁰

2) *Counselling and Legal Advice*

Canadians may also not be currently receiving adequate information about the potential consequences of the consent forms or agreements they are signing. Under the *AHR Consent Regulations*, donors must be informed in writing about how their embryos will be

Karin Hammarberg & Leesa Tinney, “Deciding the Fate of Supernumerary Frozen Embryos: A Survey of Couples’ Decisions and the Factors Influencing their Choice” (2006) 86 *Fertility and Sterility* 86 at 90.

³⁵ See McMahon & Saunders, *supra* note 34 at 144.

³⁶ See McMahon, “Mothers Conceiving”, *supra* note 28 at 133.

³⁷ See e.g. Brandon J Bankowski et al, “The Social Implications of Embryo Cryopreservation” (2005) 84:4 *Fertility and Sterility* 823 at 827-828; AD Lyerly, “Decisional Conflict and the Disposition of Frozen Embryos: Implications for Informed Consent” (2011) 26 *Human Reproduction* 646 at 650.

³⁸ For a critique of using these consent forms in the United States see Deborah L Forman, “Embryo Disposition and Divorce: Why Clinic Consent Forms are not the Answer” (2011) 24 *J Am Acad Matrimonial Law* 57.

³⁹ See e.g. Blyth, *supra* note 22 (which summarizes the findings across different jurisdictions.)

⁴⁰ See Newton, “Changes”, *supra* note 23.

used, and the manner and period of time in which they may withdraw their consent.⁴¹ In turn, Quebec's *Regulation Respecting Assisted Procreation* specifies that a physician or health professional must inform IVF patients about the possibility that the number of embryos produced will exceed their reproductive needs and the need to plan, along with their spouse, as to how they should be disposed of.⁴² However, it is unclear how much time clinics or hospitals take to explain their consent forms to patients, and also whether patients are being provided with sufficient information about these consent forms' potential legal implications.

Counselling and legal advice for individuals who create or donate embryos is not required under the law, despite being highly encouraged or required by some clinics, and will increase the substantial costs already associated with IVF.⁴³ Prior provisions of the *AHRA* had required that counselling services be made available to individuals donating reproductive materials or *in vitro* embryos and that licensees ensure that donors receive these services. However, these provisions were among those struck down by the Supreme Court of Canada in 2010 as being *ultra vires* federal jurisdiction.⁴⁴ Quebec's *Regulation Respecting Assisted Procreation* currently states that physicians must inform patients about "the availability of psychological support at the centre."⁴⁵ However, in many cases patients will need to pay to receive this counselling, which might discourage them from receiving needed support.⁴⁶

While clinics may purport to provide patients with information about their legal rights and obligations with regard to any surplus embryos, this information may be inadequate. For

⁴¹ *AHR Consent Regulations*, *supra* note 5, s 12.

⁴² *Regulation Respecting Assisted Procreation*, *supra* note 12, s 20(8).

⁴³ With the exception of Quebec where IVF is covered. However, even in the case of Quebec, while some clinics provide a complementary counselling session this is not required. See Stefanie Carsley, "Funding In Vitro Fertilization: Exploring the Health and Justice Implications of Quebec's Policy" (2012) 20:3 Health Law Review 15 at 24.

⁴⁴ *AHRA*, *supra* note 4, s 14; *Reference Re Assisted Human Reproduction Act*, 2010 SCC 61.

⁴⁵ See *Regulation Respecting Assisted Procreation*, *supra* note 12, s 20(12).

⁴⁶ See Carsley, *supra* note 43 at 24.

instance, an Ottawa fertility clinic's information pamphlet indicates that the woman for whom the embryos were created and any partner must "provide for disposition of any embryos that are not used for the purpose of attempting to initiate a pregnancy, in case of any subsequent change to [their] health or marital status" and explains that donors have the right to modify this choice at any point in the future by withdrawing consent in writing.⁴⁷

However, this pamphlet does not clarify that spouses would need to *jointly* decide to change their decision. Thus, for instance, a woman who indicates on the consent form that the embryos may be donated to a third-party in the event that she and her spouse separate may not, in fact, ever have the ability to change her mind, should her spouse refuse to modify his consent. This clinic also explains that "legal principles and requirements around embryo freezing have not been firmly established" and that it is the "couple's responsibility to seek legal advice where legal ownership [of the embryos] may be in question."⁴⁸

3) *Pressure to Begin Treatment*

Women who are eager to start the IVF process may also not be in a position to fully contemplate the outcomes of signing these agreements. Usually IVF represents a last attempt for individuals or couples to have a genetic child. They turn to IVF after they have already unsuccessfully attempted to conceive naturally for over a year and usually after they have already tried other less invasive methods of assisted procreation, such as artificial insemination. In addition, because a woman's chances of conceiving continue to decrease as she ages,⁴⁹ women may feel pressure to undergo IVF as quickly as possible, and may not be

⁴⁷ "Patient Information Kit: Freezing Human Embryos After In Vitro Fertilization" online: <http://www.conceive.ca/incfiles/library/docs/Freezing-Human-Embryos-en.pdf>

⁴⁸ *Ibid.*

⁴⁹ See e.g. James P Toner, "Age = Egg Quality, FSH Level = Egg Quantity" (2003) 79:3 Fertility and Sterility 491.

willing or feel able to take the time to consider the implications of an embryo disposition agreement.

The case of *Roman v Roman* demonstrates this potential issue. The Court of Appeals of Texas upheld a clinic consent form that allowed for a couple's embryos to be destroyed in the event of a disagreement. Mrs. Roman wished to use them for reproduction, and had not yet had a chance to undergo a first round of IVF, as her husband withdrew his consent following the extraction and fertilization of her eggs, but the night prior to her scheduled implantation. Mrs. Roman testified that while she signed the agreement, "she would have signed anything to move forward because her goal was to have a child" and that she and her ex-husband never discussed the prospect of divorce or what would happen to their embryos in the event they should disagree.⁵⁰

Donors might also understand the legal implications of these consent forms but give in to their spouse or partner's requests or demands simply because they wish to begin the IVF process. For instance, the decision of the British Columbia Supreme Court in *K.D. v. N.D.* demonstrates that one spouse may decide to sign an embryo disposition agreement that does not reflect his or her wishes. In this case, a couple signed an agreement prior to undergoing IVF that clarified that in the event they should disagree or divorce, "custody" over the embryos would be decided in court. While their clinic's standard consent form would have given Mrs. KD control over the embryos, Mr. ND had revised the agreement without consulting her and then asked for her signature. She complied, even though she claimed that she was unhappy about the modification.⁵¹ Their marriage deteriorated, and at the time of divorce she initially sought an order that she be given control over the embryos.

⁵⁰ *Roman v Roman*, 193 SW3d 40 (2006) at 15 [*Roman*].

⁵¹ *KD v ND*, 2009 BCSC 995 at para 17.

However, by the time of the divorce trial the parties had agreed that the embryos would be destroyed. Thus the Court was not asked to determine the validity of their prior agreement, but rather simply granted the order that Mr. ND requested: that the embryos “be destroyed in a manner acceptable to K.D.” and that she be required to provide proof that the embryos have been destroyed.⁵² The Judge did not inquire into the circumstances under which Mrs. KD signed the original agreement, or question what caused her to change her mind and give in to her ex-husband’s request to have the embryos destroyed.

The experiences of individuals, and particularly women, who undergo *in vitro* fertilization combined with the potential lack of counselling and legal advice for couples making embryo disposition decisions thus raises questions about whether contracts signed prior to a woman undergoing IVF should be given legal weight. If donors were unable to contemplate the effects of these agreements or how they might later feel about their decision, then they were not in a position to make enlightened, informed choices regarding embryo disposition. It is also not clear to what extent these consent forms or agreements reflect the autonomous wishes of spouses. Given that spouses need to decide, from the outset, as to how embryos should be disposed of at a later date, if they disagree at the time of the contract’s creation one spouse is likely to bend to the wishes of the other in order to proceed with treatment. In light of these circumstances, enforcing agreements may run directly counter to the intentions of the *AHRA* and Quebec’s *Regulation Respecting Assisted Procreation* to ensure that embryos are only used or donated in circumstances where donors have provided free and informed consent.⁵³

⁵² *Ibid* at para 180.

⁵³ *AHRA*, *supra* note 4, s 2(d); *Regulation Respecting Assisted Procreation*, *supra* note 12, s 19.

B. Legally Enforceable Agreements

Canadian law and public policy resists applying a traditional contract model to a variety of family law agreements, in part because of concerns about whether parties are in a position, at the time of the agreement's creation, to provide free and informed consent. For instance, while Canadian courts have emphasized the importance of upholding domestic contracts between spouses, these agreements may be potentially set-aside in circumstances where an ordinary, arm's length commercial contract would not be subject to judicial interference.⁵⁴

Canadian legislation and jurisprudence also demonstrates that surrogacy contracts are not to be treated the same as commercial agreements.⁵⁵ For instance, Quebec, Alberta and British Columbia's family law legislation makes clear that these agreements are not legally enforceable and do not constitute valid consent to relinquish a child.⁵⁶ In order for intending parents to acquire parental rights to the exclusion of a surrogate mother, a surrogate must

⁵⁴ For instance, in *Miglin v. Miglin*, the Supreme Court of Canada made clear that in assessing the weight to be given to an agreement that limits spousal support under the *Divorce Act*, a court need not look for "unconscionability" to set aside the agreement or modify its intended outcome. See *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 SCR 303 [*Miglin*]; Campbell, "Averting Misconceptions", *supra* note 14 at 17-18.

⁵⁵ Under a surrogacy agreement, a woman agrees – prior to conception – to carry a baby for another couple and if the pregnancy is successful to give up the child following the birth. Some of these agreements may also set out the surrogate and intending parents' mutual expectations and aspirations with regard to the surrogate's lifestyle choices during pregnancy, doctors visits and the reimbursement of her expenses. See e.g. Shireen Kashmeri, *Unravelling Surrogacy in Ontario, Canada: An Ethnographic Inquiry on the Influence of Canada's Assisted Human Reproduction Act (2004) on Surrogacy Contracts, Parentage Laws, and Gay Fatherhood* (MA Thesis, Concordia University, 2008) at 68 [unpublished].

⁵⁶ Surrogacy agreements are "absolutely null" under article 541 of the *Civil Code of Québec*. This reflects the view, unique to Quebec, that even altruistic surrogate motherhood violates public order and ought to be prohibited; See Angela Campbell, "Law's Suppositions about Surrogacy against the Backdrop of Social Science" (2012) 43:1 *Ottawa Law Review* 29 at 50; *Civil Code of Québec*, SQ 1991, c 64, art 541 [CCQ]; Alberta's *Family Law Act* similarly states that an agreement in which a surrogate consents to relinquish a child to intending parents is not enforceable, but may potentially provide evidence of intending parents' consent to parent a child born through surrogacy. *Family Law Act*, SA 2003, c F-4.5, s 8.2(8) [Alberta *FLA*]; British Columbia's *Family Law Act* also states that an agreement "to act as a surrogate or to surrender a child" does not constitute consent to give up a child, but "may be used as evidence of the parties' intentions with respect to the child's parentage if a dispute arises after the child's birth." *Family Law Act*, SBC 2011, c 25, s 29(6) [BC *FLA*]; It should also be noted, however, that some scholars have suggested that surrogacy agreements ought to be enforceable, despite these laws. See e.g. Louise Langevin, "Réponse Jurisprudentielle à la Pratique des Mères Porteuses au Québec; Une Difficile Réconciliation" (2010) 26 *Canadian Journal of Family Law* 171.

consent to give up the child, and her parental rights, *following* the child's birth.⁵⁷ Prior jurisprudence also suggests that Canadian courts would be unwilling to force a surrogate to give up a child against her wishes, even in those provinces that do not have explicit legislative provisions declaring that that surrogacy contracts are unenforceable. Canadian courts have not yet needed to contend with a custodial contest between a surrogate and intending parents as the only Canadian surrogacy dispute was never reported as going to trial.⁵⁸ However, in cases where the surrogates and the intending parents agreed that the intending parents would have sole custody, Canadian judges have nonetheless noted that they were able to transfer parental rights to intending parents in part because the surrogate consented, following the birth, to not be considered the child's legal parent.⁵⁹

Canadian adoption law statutes also do not permit women to provide binding consent to an adoption prior to giving birth and also provide birth parents with a period of time in which they may revoke their consent. Provincial statutes across Canada make very clear that consent to adoption is only valid if it is given in writing,⁶⁰ following the birth of the child, and often following a specific number of days stipulated in each province's adoption

⁵⁷ Note however that in Quebec, a surrogate's consent may not even be sufficient. Intending parents are only able to receive legal recognition by obtaining a special consent adoption under article 555 CCQ, and case law has demonstrated that while some judges have been willing to allow for these adoptions, others have not because this has been viewed as circumventing article 541 CCQ which states that surrogacy agreements are null and void. See CCQ *supra* note 56, art 541, 555; *Adoption –091*, 2009 QCCQ 628, [2009] RJQ 445, where a judge refused to allow for a special consent adoption, even where the birth mother consented; But see *Adoption – 09184*, 2009 QCCQ 9058, [2009] RJQ 2694 and *Adoption – 09367*, 2009 QCCQ 16815, [2010] RDF 387, where Quebec judges have been willing to allow intending parents to adopt a child born through surrogacy.

⁵⁸ *W(HL) v T(JC)*, 2005 BCSC 1679.

⁵⁹ See e.g. *R(J) v H(L)*, [2002] OJ No 3998 (where the court granted intending parents' application to declare the gestational carrier not to be the mother of the twins she carried, but where Justice Kiteley noted that had the surrogate opposed this application, there may have been a problem); See *WJQM v AMA*, 2011 SKQB 317, 339 DLR (4th) 759 (where the court noted that Mary, the surrogate mother, "does not view herself as Sarah's mother and supports the petitioners' application to remove her name from that designation on Sarah's registration of live birth");

⁶⁰ Different provinces have different formalities for providing written consent. For instance, British Columbia requires birth parents to fill out certain forms. *Adoption Regulation*, BC Reg 291/96, s 9; Quebec requires that consent be given in writing before two witnesses. CCQ, *supra* note 56, art 548.

legislation. For example, British Columbia's *Adoption Act* clarifies that a birth mother's consent will only be valid if it is given at least ten days after the child's birth,⁶¹ whereas in Ontario birth parents' consent may only be given once the child is seven days old.⁶² A birth mother is also given the opportunity to revoke her consent up to a certain point after the child's birth. For instance, in British Columbia and Quebec the period of time for revocation is 30 days after consent was given.⁶³ In Ontario it is 21 days.⁶⁴ If consent is withdrawn during the revocation period, then the child must be returned; however, if the period of time has elapsed, then the child is to remain with his adoptive family, subject to some exceptions.⁶⁵ Any agreements, verbal or written, that were created prior to these statutory time periods are not legally binding.

In each of these contexts, the law recognizes that agreements between spouses or between a pregnant woman and third parties ought not to be treated the same as other contracts, because of the nature of these agreements and the circumstances in which they were created. The lower threshold for judicial intervention in the context of domestic agreements reflects the law's recognition that these agreements may be negotiated in emotional circumstances and may reflect power imbalances between spouses or partners.⁶⁶ In the context of adoption and surrogacy, Canadian laws seem to recognize that a surrogate or a birth mother may change her mind and wish to keep the child she has carried following pregnancy and childbirth, and that where a woman does give up a child, it should be in circumstances where she has been given the time to reflect upon this decision and is given

⁶¹ *Adoption Act*, RSBC 1996, c 5, s 14 [BC *Adoption Act*].

⁶² *Child and Family Services Act*, RSO 1990, c C11, s 137(3) [CFSA].

⁶³ CCQ, *supra* note 56, art 557; BC *Adoption Act*, *supra* note 61, s 19.

⁶⁴ See CFSA, *supra* note 62, s 137(8).

⁶⁵ For example, the *Civil Code of Québec* explains that if a birth parent fails to revoke consent within 30 days he or she may nonetheless apply to a court to have the child returned before the order of placement. CCQ, *supra* note 56, art 558.

⁶⁶ See e.g. Miglin, *supra* note 54, at paras 74-75.

the opportunity to make an informed and autonomous decision. Laws relating to adoption and surrogate motherhood also arguably reflect a desire under Canadian public policy to protect women's reproductive autonomy and to prevent the commercialization of reproduction.⁶⁷ They seek to preclude third parties from making decisions that will determine whether a woman may raise the child she has carried and to prevent children from being treated as commodities than can be exchanged on the market.

These agreements are not entirely analogous to embryo disposition agreements. Unlike marriage, cohabitation or separation agreements, embryo disposition contracts or consent forms do not deal with financial obligations, the distribution of property or custody and access with regard to children;⁶⁸ Canadian law makes clear that embryos are not "persons" and thus are not children,⁶⁹ and it would be inconsistent with the *Assisted Human Reproduction Act*, which prohibits the commercialization of reproductive material,⁷⁰ to treat embryos the same as other property that may be negotiated for, contracted over and bought and sold on the market. Domestic agreements also do not seek to make decisions that may ultimately determine whether one party may be able to reproduce and raise a child. In turn,

⁶⁷ See e.g. *AHRA*, *supra* note 4, s 6 (which prohibits commercial surrogacy); *BC Adoption Act*, *supra* note 61, s 84 (which prohibits giving or receiving payment for an adoption). See also Campbell, "Law's Suppositions", *supra* note 56 at 48-51 (which explains that some of the concerns driving the *AHRA* and the *Civil Code of Québec*'s responses to surrogacy as set out in legislative debates, were related to commodification to human life, concerns about women's reproductive autonomy and informed consent.)

⁶⁸ Note that marriage contracts and cohabitation agreements, however, may not deal with custody and access. See e.g. *Family Law Act*, RSO 1990, c F3, s 52-53.

⁶⁹ See e.g. *Daigle v Tremblay*, [1989] 2 SCR 530 [*Daigle*] (where the Supreme Court held that a foetus is not a human being thus does not enjoy a "right to life" under Quebec's *Charter of Human Rights and Freedoms*); *Winnipeg Child and Family Services (Northwest Area) v G(DF)*, [1997] 3 SCR 925 (which confirmed that a foetus or unborn child is not a person who possesses legal rights under common law). A foetus is defined as "a human organism during the period of its development beginning on the fifty-seventh day following fertilization or creation, excluding any time during which its development has been suspended, and ending at birth." *AHRA*, *supra* note 4, s 3; An *in vitro* embryo is less developed as it is not permitted to remain outside of a human body for longer than fourteen days following fertilization or creation unless its development is suspended through cryopreservation or vitrification. See *AHRA*, *supra* note 4, s 5(d). Thus if a fetus is not a person, then by extension an embryo also does not have legal personhood status.

⁷⁰ *AHRA*, *supra* note 4, s 7.

unlike a surrogate or birth mother, a woman who donates or destroys her embryos in accordance with a clinic consent form or spousal agreement does not give up a child she has carried and birthed.

However, embryo disposition agreements nonetheless raise similar issues as domestic contracts, surrogacy contracts, and adoption agreements. Agreements or consent forms setting out spouses' intentions regarding their embryos may also be signed in emotional circumstances, and may not reflect both parties' wishes. Embryo donors, much like surrogates or birth mothers, may change their minds regarding whether they would like to donate their embryos – and thus give up an opportunity to have and raise a child – after they experience pregnancy and childbirth. In turn, embryo disposition agreements, much like surrogacy contracts or adoption agreements, seek to restrict or control a woman's ability to reproduce or her choice to carry and/or raise her genetic children, and thus are arguably problematic on grounds of public policy.

This thesis contends that given these similarities, embryo disposition agreements ought not to be treated the same as binding contracts and should be legally unenforceable. The threshold for judicial interference in relation to domestic contracts seems too high for embryo disposition agreements given that they involve decisions regarding women's reproduction. Moreover, much like surrogacy contracts or pre-birth agreements to relinquish a child for adoption, these contracts may be executed at a time when women do not have sufficient information in order to make free and informed decisions regarding the disposition of their embryos.

II. THE IMPLICATIONS OF JOINT CONSENT AND CONTROL

Even if embryo disposition agreements are not treated as legally binding, federal and Quebec provincial laws and regulations would still apply to mandate that spouses have joint control over these embryos and that one party may revoke his or her consent prior to embryo implantation. Under section 8 of the *AHRA* and its *AHR Consent Regulations*, if spouses or partners used their own genetic material in order to create embryos for reproduction, these embryos cannot be used and cannot be donated without their mutual consent.⁷¹ As a result, if one spouse is unwilling to consent to use or donate the couple's surplus embryos, the embryos will either have to remain in storage or can potentially be destroyed. What happens to these embryos if one spouse withdraws his or her consent might depend upon whether spouses are within or outside of Quebec. Quebec's *Regulation Respecting Assisted Procreation* has the added requirement that spouses mutually consent to embryos being destroyed,⁷² and also states that if both parties fail to make contact with a fertility centre for over five years to re-express their intentions regarding their embryos, the centre may dispose of them as it wishes.⁷³ Thus Quebec's *Regulation* provides a default that appears to contradict the *AHRA*'s provisions; Quebec clinics are authorized to donate or destroy embryos even without parties consenting to dispose of them in that manner.

What is most important for the purposes of this chapter, however, is that in Quebec and across Canada, the *AHRA*'s provisions regarding joint consent and unilateral revocation may have the effect of preventing one spouse from using embryos they have created for

⁷¹ *AHRA*, *supra* note 4, s 8(3), *AHR Consent Regulations*, *supra* note 5, s 10(1), 10(2).

⁷² See *Regulation Respecting Assisted Procreation*, *supra* note 12, s 19(3). It should be noted that the regulations do not use the term "destroy", but rather "dispose of" which might be thought to connote donation as well as destruction; however, the French version uses the language "élimination" suggesting that what they intended was destruction.

⁷³ *Regulation Respecting Assisted Procreation*, *supra* note 12, s 24; Quebec's *Regulation* also requires that spouses must jointly contact a centre once a year to re-express their intentions regarding the freezing and storage of their embryos. See *Regulation Respecting Assisted Procreation*, *supra* note 12, s 23.

reproductive purposes. In the Nott case discussed in the introduction to this chapter, even if Mr. and Mrs. Nott had not signed an agreement stating that their embryos may be destroyed, Mrs. Nott would still be unable to use the embryos to reproduce without her former husband's consent. In addition, the *AHRA* also seems to enable a male spouse to not only revoke his consent years after the embryos' creation, but also immediately after, providing he withdraws his consent prior to the embryos being implanted. Embryo implantation occurs 2-5 days after embryos are created.⁷⁴ It is thus possible – as is evidenced in jurisprudence from the United States⁷⁵ – for a male spouse to revoke his consent midway through the first IVF cycle, after his spouse or partner has already undergone fertility treatment and ova extraction, but just prior to implantation.

These laws providing spouses with joint control seem to be based on the notion that as co-genetic contributors, men and women ought to have an equal say in what becomes of their embryos. It seems that in allowing one party to withdraw his or her consent, these provisions also reflect the view that one spouse should not be forced to procreate or be a parent against his or her wishes. As one feminist scholar has pointed out, allowing both partners to make decisions regarding their embryos might be desirable because “we think a sense of attachment and concern about the potential life one shared in creating is appropriate” and because “we might well judge that this sense of attachment should be honoured even in the form of permitting one partner to refuse to allow the potential life to

⁷⁴ See e.g. Manon Ceelen et al, “Growth and Development of Children Born After In Vitro Fertilization” (2008) 90:5 *Fertility and Sterility* 1662 at 1662; Charles P Kindregan Jr & Maureen McBrien, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science*, 2nd ed (Chicago ABA Publishing, 2011) at 92-93.

⁷⁵ See *Roman*, *supra* note 50.

develop into a child under circumstances over which he or she could have no control.”⁷⁶

Other Canadian feminist commentators, however, have pointed out that an approach which privileges joint control over embryos does not recognize the potential power imbalances between men and women and the fact that women undergo invasive treatment in order to create their embryos.⁷⁷

The following section takes up the latter argument and suggests that an approach that requires joint consent and which allows for joint revocation does not adequately account for the health effects of IVF, the biological differences between men and women and the high costs of *in vitro* fertilization treatment. These factors call into question the idea that men and women ought to have joint control. While both parties may have contributed genetically to the creation of embryos, their contribution to the process of IVF is not equal and these laws disproportionately disadvantage women.

A. Equitable Contribution and Effects?

1) *Health Effects of IVF*

Allowing a man to prevent a woman from using embryos for reproduction ignores the health risks and effects women endure as part of the IVF process. Women who undergo IVF subject themselves to an invasive and risky procedure in order to cultivate their limited number of ova to create embryos.⁷⁸ They are typically required to take hormone medication in order to stimulate their ovaries to produce multiple oocytes. When the ova are ready to be retrieved, a physician uses an ultrasound probe to remove them, by directing a needle

⁷⁶ See Nedelsky, *supra* note 14 at 361. She also points out: “A sense of concern and responsibility for the future of the children one has participated in bringing into the world may, however, be thought to be grounds for granting even a “vetopower” of joint control.”

⁷⁷ See Overall, *supra* note 14 at 187-191; Mykitiuk & Wallrap, *supra* note 14 at 415.

⁷⁸ See Mykitiuk & Wallrap, *supra* note 14 at 415; Overall, *supra* note 14 at 187-191.

through the vaginal wall into the ovarian follicles. The eggs that are successfully retrieved are then fertilized in a Petri dish in order to create embryos for implantation.⁷⁹

Studies are mixed on the adverse health risks of IVF for women, with some indicating that women undergoing IVF treatment have an increased risk of blood clots, ectopic pregnancies, preeclampsia and placental separation.⁸⁰ It is clear, however, that the fertility drugs used to stimulate women's ovaries may result in ovarian hyperstimulation syndrome, which is estimated to affect between 1-10% of women undergoing IVF treatment.⁸¹ This condition, in which fertility medications cause patients to produce too many eggs, is potentially life threatening. Common side effects include rapid weight gain, difficulty breathing, abdominal pain and vomiting, but this may also result in more serious complications such as kidney failure, blood clots and death.⁸²

The purpose of creating and freezing surplus embryos is to reduce the number of times a woman will need to undergo ovarian stimulation and egg cultivation procedures because of the risks and discomfort associated with this process. Denying a woman the ability to use these embryos frustrates these intentions, as it would compel her to undergo an additional round of unnecessary medical treatment, providing she is able to physically or financially afford to undertake an additional IVF cycle.

⁷⁹ See e.g. Ceelen, *supra* note 74 at 1662; Kindregan, *supra* note 74 at 92-93.

⁸⁰ See e.g. Tarek A Gelbaya, "Short and Long-Term Risks to Women who Conceive Through In Vitro Fertilization" (2010) 13:1 Human Fertility 19 at 19.

⁸¹ See Margarida Avo Santos, Ewart W Kuijk & Nick S Macklon, "The Impact of Ovarian Stimulation for IVF on the Developing Embryo" (2010) 139 Reproduction 23 at 25; William M Buckett et al. "Obstetric Outcomes and Congenital Abnormalities After In Vitro Maturation, In Vitro Fertilization, and Intracytoplasmic Sperm Injection" (2007) 110:4 Obstetrics & Gynecology 885 at 885; See Justin J Madill, Neil B Mullen & Benjamin P Harrison, "Ovarian Hyperstimulation Syndrome: A Potentially Fatal Complication of Early Pregnancy" (2008) 35:3 The Journal of Emergency Medicine 283 at 283.

⁸² See e.g. The Practice Committee of the American Society for Reproductive Medicine, "Ovarian Hyperstimulation Syndrome" (2008) 90 Fertility and Sterility S188 at S189; Gelbaya, *supra* note 80 at 20; Madill, *supra* note 81 at 285. See also Alison Motluk, "I thought I just had to sleep it off": Egg donor sues Toronto fertility doctor after suffering stroke" *National Post* (March 28 2013) A5.

2) *Biological Differences*

Laws mandating that spouses provide joint consent to use their embryos also do not recognize that because of biological differences between men and women, a couple's frozen embryos may represent a woman's best or only chance of conceiving. In the absence of a medical condition, men can continue to produce viable sperm at a much older age than women can produce ova. Women's eggs become less viable as they age and thus women may be less likely to conceive using newly created embryos, than ones that had been frozen previously. Women also may be at higher risk of complications if they retrieve their eggs at a later age, as they will be required to take increased hormone medication to stimulate their ovaries.⁸³ Thus even if a woman is willing to undergo further rounds of IVF because she is unable to use the embryos she has in storage, she may no longer be able to use her own eggs successfully in order to conceive. She would also, of course, need to find a new partner or use donated sperm in order to create new embryos for IVF.

3) *Costs of IVF*

Allowing one party to revoke his or her consent and requiring that the embryos either remain in storage or be destroyed also ignores the costs of IVF. Only Quebec currently provides publicly funded *in vitro* fertilization;⁸⁴ in the remaining provinces these services are a significant investment for many couples and beyond the means of many Canadians. For instance, one basic cycle costs approximately \$6,000 plus anywhere between \$2,500-7,000

⁸³ See e.g. Toner, *supra* note 49; See also Sharon Kirkey, "Freezing the tick tick tock of the biological clock" *The Ottawa Citizen* (17 January 2011) A1; Sarah Boseley, "High Doses of IVF Drugs May Cause Harm to Eggs" *The Guardian* (4 July 2011) online: <http://www.theguardian.com/science/2011/jul/04/ivf-drugs-women-chromosome-eggs>.

⁸⁴ See Carsley, *supra* note 43.

for medications.⁸⁵ Given the relatively low success rate of IVF,⁸⁶ many couples will also need to undergo more than one cycle in order to potentially conceive. As a result, if one spouse withdraws his or her consent and the other spouse still wishes to have more children, that spouse may be unable to afford further rounds of *in vitro* treatment.

In addition, where one spouse withdraws his or her consent, this may also result in added costs and expenses. For instance, if a woman is required to use donated eggs and/or sperm because her partner has revoked his consent, this will increase the costs associated with these treatments. IVF clinics charge increased fees for using donated genetic material,⁸⁷ and while Canada has banned payment for sperm and eggs, individuals who need to use donations often turn to the United States to purchase gametes, as the restrictions on payment in Canada has resulted in a shortage of donors.⁸⁸ In turn, storing *in vitro* embryos also costs several hundred dollars per year.⁸⁹ Thus if the *AHRA* mandates that embryos remain in storage until a couple can come to a decision, this too can lead to further costs, as well as conflicts between spouses regarding who ought to be paying for these storage fees.

While allowing either spouse to withdraw his or her consent may affect both male and female spouses, overall these laws are likely to have disproportionate effects on women.

⁸⁵ Ovo Consulting, *In-Vitro Fertilisation in Canada: Cost Structure Analysis* (Montreal: Ovo Consulting, 2009) at 11, 14-15, online: Canadian Fertility and Andrology Society <http://www.cfas.ca/images/stories/pdf/ivf_cost_structure_analysis.pdf>.

⁸⁶ In 2010, live birth rates ranged on average between 27% to 31% depending on the type of cycle performed (e.g. started IVF cycle or frozen embryo transfer). They also differed dramatically depending on the patient's age, for instance with only 11% of women 40 or over having given birth to a live baby through IVF. See "Assisted Human Reproduction Live Birth Rates for Canada" online: http://www.cfas.ca/index.php?option=com_content&view=article&id=1205%3A%20live-birth-rates-2012&catid=929%3A%20press-releases&Itemid=130.

⁸⁷ See e.g. <http://www.conceive.ca/fees/index.php?lang=en&link=OHIPinsuredIVF>; <http://genesis-fertility.com/general-information/fees>; http://www.ivfcanada.com/services/fees/general_fee_schedule.cfm

⁸⁸ See e.g. Nicholas Bala & Christine Ashbourne, "The Widening Concept of "Parent" in Canada: Step-Parents, Same-Sex Partners & Parents by ART" (2012) 20:3 *Journal of Gender, Social Policy & the Law* 525 at 547; Jocelyn Downie & Françoise Baylis, "Transnational Trade in Human Eggs: Law, Policy and (In)Action in Canada" (2013) 41:1 *Journal of Medicine, Law and Ethics* 224.

⁸⁹ For example, at an Ottawa fertility clinic annual freezing costs 300 dollars per year. See <http://www.conceive.ca/fees/index.php?lang=en&link=OHIPinsuredIVF>

Given the fact that men do not undergo invasive treatment to create embryos and may also have a greater chance of conceiving at an older age, it seems that they will be more likely willing to revoke their consent than women. Jurisprudence from within and outside of Canada supports this theory. Among ten reported judicial decisions involving disputes between spouses in Canada, the United States, the United Kingdom and Israel, only one involved a case where a woman withdrew her consent to use the embryos while her former husband wanted to use them with a surrogate.⁹⁰ This potential power imbalance between male and female spouses thus challenges potential justifications for joint consent grounded in the idea that men and women equally contribute to the creation of these embryos and thus should have an equal say in whether they are used for procreative purposes. These laws affording men and women equal rights also ignore the health implications of IVF for women and the ways in which women are more affected by these technologies than men and thus arguably do not support the *AHRA* and Quebec's *Act's* intended objectives.

B. Revoking Consent to Procreate or Parent

In other contexts where there may be conflicts between spouses with regard to one party's desire to procreate or be a parent, Canadian law has acknowledged power imbalances between men and women and has refused to recognize a right not to procreate or parent. Currently under Canadian law a man does not have a legal right to revoke his consent to procreate where a child is conceived through intercourse. In other words, he cannot legally prevent a woman from giving birth to a child conceived from his genetic material, even should he not wish, or have never intended, to have genetic offspring. Canadian law makes explicit that a woman's decision to have an abortion is hers alone to make and that she

⁹⁰ *In Re Marriage of Nash*, 150 Wash App 1029, 2009 WL 1514842 (2009) [*Nash*] (citing to unpublished lower court decision).

cannot be compelled by the potential child's father to abort a fetus or, conversely, to carry the child to term,⁹¹ because to do so would interfere with her bodily integrity and reproductive choices.

In addition, once a child is born, a man typically does not have a right to avoid legal parenthood where he has a genetic connection to the child, even if he did not intend to be a parent. An exception may exist if he can prove that he and the child's parent(s) had intended for him to be considered a donor under the law,⁹² or that he had not consented to his spouse or partner using assisted procreation to conceive a child.⁹³ This ability to potentially avoid being considered a parent under the law, however, is only set out in some provincial family law legislation.⁹⁴

A man also cannot avoid these parental obligations by forcing a birth mother to give up a child for adoption. Birth parents are required to jointly consent to an adoption, unless a birth parent is not found to have parental status or the capacity to consent.⁹⁵ However, where birth parents disagree and one does not provide consent, the effect will be that the dissenting parent will be able to keep the child. In other words, should the birth father want to relinquish the child for adoption and the birth mother would like to keep the child, he will not be able to override her wishes – and he will also be liable to pay child support. The same would be true in the reverse situation where the birth mother wishes to give up the child and the birth father does not; he too will not be denied the ability to be a parent.⁹⁶

⁹¹ *Daigle*, *supra* note 69; *R v Morgentaler*, [1988] 1 SCR 30.

⁹² See e.g. CCQ, *supra* note 56, art 538.2; BC *FLA*, *supra* note 56 s 24; Alberta *FLA*, *supra* note 56, s 7(4).

⁹³ BC *FLA*, *supra* note 56, s 27(3).

⁹⁴ See Alberta *FLA*, *supra* note 56, s 7(4); BC *FLA*, *supra* note 56, s 24; CCQ, *supra* note 56, art 538.2; *Birth Registration Regulations*, NS Reg 390/2007, s 3; *Child and Family Services Act*, RSY 2002, c 31, s 13(6); *Children's Law Act*, RSNL 1990, c C-13, s 12(6).

⁹⁵ See e.g. BC *Adoption Act*, *supra* note 61, s 13; CCQ, *supra* note 56, art 551-552.

⁹⁶ While it is beyond the scope of this paper to critique these adoption laws, it should be noted that Lori Chambers has argued that the ability for birth fathers to override a woman's ability to give up a child for

These laws relating to abortion, adoption and parentage recognize and seek to address the potential power imbalances between men and women in relation to reproduction. Laws that support a woman's right to choose whether or not to have a baby once pregnant, and thus deny a man a say in whether a child is born through his genetic material, recognize that women should have control over their bodies and should not be forced to undergo medical interventions against their wishes. Laws relating to parentage and adoption are intended to serve the best interests of the child,⁹⁷ but also to protect birth mothers from being pressured to give up a child against their wishes, or from raising a child alone where this was not their intention.

There are important legal and social differences between the status of an *in vitro* embryo, an implanted embryo or fetus and a child once born. An *in vitro* embryo does not have personhood status,⁹⁸ and has not yet been implanted in a woman's womb. Thus an embryo does not have legal rights and also does not present legal responsibilities for a child's mother, unlike a child who is born alive and viable.⁹⁹ Because *in vitro* embryos have not yet been implanted, should a man revoke his consent to use an embryo, a woman will not be

adoption infringes women's reproductive autonomy. She argues that this decision should be a woman's decision alone to make and that joint consent should not be required. See Lori Chambers, "Newborn Adoption: Birth Mothers, Genetic Fathers, and Reproductive Autonomy" (2010) 26 Can J Fam L 339.

⁹⁷ See e.g. BC *Adoption Act*, *supra* note 61, s 3; CCQ, *supra* note 56, art 33, 543.

⁹⁸ See discussion, *supra* note 69.

⁹⁹ While Canadian civil and common law jurisdictions have adopted legal fictions, which permit an unborn child to be accorded certain legal rights, the law also makes clear that these rights can only be enjoyed if the foetus develops into a child and is born alive and viable. For instance, in *Montreal Tramways v Léveillé* the Supreme Court of Canada held that a child, once born, has a right to sue a third party for injuries caused to it while *in utero*. *Montreal Tramways Co v Léveillé*, [1933] SCR 456; Similarly, in *Duval v Seguin*, the Ontario Supreme Court held that a third party owes a duty of care to a child *en ventre sa mère* and can be held liable, following the child's birth, for prenatal injuries caused to the foetus while in the womb. *Duval v Seguin*, [1972] 2 OR 686, 26 DLR (3d) 418, *aff'd* in (1973), 1 OR (2d) 482, 40 DLR (3d) 666; Moreover, in *Dobson v Dobson* the Supreme Court held that a pregnant woman does not owe a duty of care to her fetus or subsequently born child and thus that she cannot be held liable for injuries caused to her fetus while *in utero*, because of policy concerns with regard to the autonomy and privacy of pregnant women and the problems associated with "articulating a judicial standard of conduct for pregnant women". See *Dobson (Litigation Guardian of) v Dobson*, [1999] 2 SCR 753, 174 DLR (4th) 1 at para 21.

required to undergo an abortion. Moreover, currently in Canada, frozen embryos may remain in storage indefinitely, and may be used years and even decades after they were originally frozen.¹⁰⁰ Embryos may also – unlike a baby – be destroyed or donated to research. As a result, one might argue that, within the context of embryo disposition decisions, it makes sense for a man to be able to revoke his consent to procreate and for the law to recognize an interest in not being forced to procreate against one’s will.¹⁰¹

Yet, despite these differences, similar power imbalances exist in the context of embryo disposition, and are exacerbated by Canadian laws allowing a man to revoke his consent for embryos to be used for reproduction. While an embryo donor is not pregnant, she has already undergone invasive and risky medical interventions to create these embryos. As discussed previously, she will also be required to undergo further rounds of treatment should she want to create more embryos in an attempt to conceive. It is thus questionable whether the fact that the embryos are not yet implanted should justify a man’s ability to override his spouse’s desire to use the embryos for reproduction. Allowing a man to revoke his consent is nonetheless enabling him to interfere with a woman’s body and reproductive choices.

In addition, it also seems fair to question whether the fact that embryos are frozen in time should make a difference with regard to whether an individual will be found to have parental obligations. Both individuals did, at one time, consent to their genetic material being used in attempt to reproduce and both intended to be parents. If they had not, the embryos would never have been created, and if the embryos had been implanted and resulted in

¹⁰⁰ For instance, it was recently reported that a baby was born in the United States using embryos that had been in storage for 19 years. See Sarah Elizabeth Richards, “Get used to embryo adoption” *Time* (24 August 2013), online: <http://ideas.time.com/2013/08/24/get-used-to-embryo-adoption/?iid=tsmodule>.

¹⁰¹ For some examples of scholarship discussing whether United States’ laws support, or ought to support a right not to procreate or parent see e.g. I Glenn Cohen, “The Right Not to be a Genetic Parent” (2008) 81 S Cal L Rev 1115; I Glenn Cohen, “The Constitution and the Rights Not to Procreate” (2008) 60 Stan L Rev 135.

childbirth, both would have been parents under the law. It seems problematic that a man can revoke his consent to be a parent where he had previously expressed a clear intention to be a parent and where a woman elected to undergo IVF based on the understanding that her spouse or partner would be equally responsible for supporting any children produced. Given that laws in relation to abortion, adoption and parentage recognize the power imbalances between men and women with regard to reproduction, arguably the law should not be ignoring the ways in which women might be similarly vulnerable where they have created embryos for IVF, and also should not be serving to exacerbate this vulnerability by allowing a man to revoke his previously given consent to procreate and to be a parent under the law.

III. ALTERNATIVE APPROACHES TO EMBRYO DISPOSITION

In light of the weaknesses identified with current Canadian legal approaches to disputes over frozen embryos, this chapter contends that these laws ought to be modified to better account for the experiences of individuals who undergo *in vitro* fertilization in order to build their families. This Part considers other existing approaches for dealing with disputes between spouses. It explores how judges and legislators in other jurisdictions have sought to respond to these disputes. It also considers how Canadian courts have previously responded to related conflicts between spouses over donated sperm, or between an embryo's genetic contributors where the parties were *not* spouses. It suggests, however, that each of these models fails to adequately address the issues discussed in Parts I and II of this chapter and that each of these alternative approaches would also conflict with Canadian law and public policy relating to assisted procreation.

A. Right not to Procreate

A major trend in judicial decisions in the United States has been to enforce consent forms or contracts between spouses, unless these agreements would force one party to procreate against their wishes. In other words, courts have been willing to uphold agreements mandating that embryos be destroyed in the event the parties disagree or divorce. However, they have been generally unwilling to enforce agreements that will allow for an embryo to be used for procreative purposes in the event one party changes his or her mind, on the grounds that this “forced procreation” would violate public policy. For example, in *Kass v. Kass*, the Supreme Court of New York upheld an agreement that a couple’s surplus embryos would be donated to research, despite Mrs. Kass’ wish, at the time of the divorce, to use the embryos to have more children.¹⁰² In *Litowitz v. Litowitz* the Supreme Court of Washington similarly enforced an agreement that allowed a clinic to destroy a couple’s unused embryos despite Mrs. Litowitz’s desire to use the embryos for reproduction using a surrogate.¹⁰³ However, in *A.Z. v. B.Z.* the Massachusetts Supreme Court refused to enforce an agreement that said that if the couple separated, the embryos would be given to one spouse for implantation. It found that doing so would run counter to public policy, as it would mean forcing one individual to procreate against his or her wishes.¹⁰⁴ *J.B. v. M.B.* involved an alleged oral agreement, corroborated by the husband’s family, that surplus embryos would be donated to third-parties for reproductive use, as well as a written agreement allowing a court to make a determination as to who should have control over the embryos in the event the parties divorce. The husband wanted the embryos to be donated to infertile couples, while the wife did not want them to be

¹⁰² *Kass v Kass*, 91 NY 2d 554 (1998).

¹⁰³ *Litowitz v Litowitz*, 146 Wash 2d 514 (2002); See also *Roman*, *supra* note 50 (where the Court of Appeals of Texas similarly upheld an agreement that stipulated that in the event of a divorce the couples’ embryos would be destroyed. It did so even though Mrs. Roman wished to use them for reproduction).

¹⁰⁴ *AZ v BZ*, 725 NE 2d 1051 (2000).

used by anyone for procreative purposes.¹⁰⁵ The Supreme Court of New Jersey held that the wife's right not to procreate outweighed the husband's right to procreate and that a contract to reproduce is unenforceable on grounds of public policy.¹⁰⁶ *In re Marriage of Dahl and Angle* the Court of Appeals of Oregon enforced an agreement, which stipulated that in the event the parties divorced the wife would be given control over the embryos. The wife wanted the embryos to be destroyed, while the husband wanted to donate them for third-party reproductive use. In deciding that they could be destroyed, the court was privileging the wife's right not to procreate, and thus not to have genetic offspring out in the world, even if they were to be born to another couple.¹⁰⁷

This trend in United States jurisprudence is effectively a combination of the contractual approach and the joint consent approach discussed in the first two parts of this chapter and is vulnerable to the same criticisms developed there. It allows for contracts to be recognized and enforced providing they allow for embryos to be destroyed, donated to research or kept in storage. However, it does not allow for parties to contract around the requirement that both spouses agree to use the embryos for procreation or donate them for third-party reproduction. This approach fails to take account of the power imbalances that can arise within spousal relationships and women's unique contribution to the creation of the embryos.

Some courts have tempered the right not to procreate by making an exception where the party who wishes to use the embryos would not otherwise be able to conceive. For instance in *Davis v. Davis*, the Supreme Court of Tennessee explained that in the absence of an agreement between spouses, courts should give priority to the party who does not wish to

¹⁰⁵ *JB v MB*, 751 A 2d 613 (2000) at page 615-616.

¹⁰⁶ *Ibid* at page 69.

¹⁰⁷ *In re Marriage of Dahl and Angle*, 222 Or App 572, 194 P 3d 834 (2009).

procreate, unless the other spouse will not otherwise have a reasonable means of becoming a parent.¹⁰⁸ In *Nahmani v Nahmani* the Supreme Court of Israel relied upon public policy to support a woman's "right to reproduce." It found that in this case using the embryos represented Mrs. Nahmani's only chance to achieve biological parenthood and that her claim should supersede that of her former husband not to reproduce.¹⁰⁹ In *Re Marriage of Nash*, the Court of Appeals of Washington upheld the trial judge's decision to award control over the embryos to Mr. Nash who wished to use the embryos with a surrogate to have more children. The trial judge had been granted authority to decide who would control the embryos in the event of a disagreement, and decided in favour of Mr. Nash as it found that the "husband's alternatives to achieve parenthood are not reasonable as it would require him to restart the expensive process [of IVF] and the success of the process is questionable due to his age."¹¹⁰

This approach towards resolving disputes is certainly preferable to the aforementioned contractual, joint consent or strict "right not to procreate" models. It acknowledges the potential unjust outcomes of allowing one party to unilaterally revoke his or her consent, such as the particular effects this may have on women, the costs of IVF, and the fact that without using the embryos some individuals will be unable to otherwise have children because of biological factors that are beyond their control.

However, this approach does not seem to go far enough. Just because a man or woman might have the *ability* to create new embryos on account of their age, physical or

¹⁰⁸ *Davis v Davis*, 842 SW 2d 588 (1992) at page 21-22. In this case, there was no agreement between the parties and by the time it reached the Supreme Court Mrs. Davis no longer wanted to use the embryos for her own reproductive use and instead wanted to donate them for third-party reproductive use. Mr. Davis wanted them to be destroyed. The court noted that if Mrs. Davis wanted to use them for her own reproduction then it would have been a more difficult decision. However, it maintained that she could still undergo another round of IVF or adopt, and thus it would not have necessarily privileged her desire to use the embryos to have her biological children, or recognized the difficulties of undergoing further rounds of IVF.

¹⁰⁹ *Nahmani v Nahmani*, (12 September 1996) CFH 2401/95 [*Nahmani*].

¹¹⁰ *Nash*, *supra* note 90.

financial situation, does not seem to adequately justify allowing existing embryos to be destroyed. The standard for “unreasonableness” in jurisprudence from the United States seems too high; it does not recognize that a woman will still be required to undergo further rounds of invasive and risky egg retrieval procedures should she wish to use IVF to have more children.

In addition, the *Nahmani* decision is based on the idea that in certain circumstances a woman has a legal “right to reproduce”. This judicial decision was based upon Jewish law as well as the idea that public policy in Israel supports encouraging reproduction and parenthood as beneficial for Israeli society.¹¹¹ It has been suggested that a similar “right to reproduce” might exist in other jurisdictions;¹¹² however, to-date this right has yet to be recognized under Canadian law,¹¹³ and at least one Canadian scholar has pointed out the problems associated with recognizing such a right in the Canadian context.¹¹⁴

B. Automatic Destruction if Revocation

In the United Kingdom, the *Human Fertilisation and Embryology Act of 1990* (*HFEA*) mandates that in the event one spouse revokes his or her consent, embryos must be

¹¹¹ See Campbell, “Averting Misconceptions”, *supra* note 14 at 13; *Nahmani*, *supra* note 11; Janie Chen, “The Right to Her Embryos: An Analysis of *Nahmani v. Nahmani* and its Impact on Israeli In Vitro Fertilization Law” (1999) *Cardozo J Int’l & Comp L* 325 at 355.

¹¹² See Campbell, “Averting Misconceptions”, *supra* note 14 at 13.

¹¹³ It should be noted, however, that in the past some Canadian jurisprudence has demonstrated reluctance in specific circumstances to recognize a right to procreate. For instance, in *Re Eve* Justice LaForest responded to an argument that there is a fundamental right to have or not to have children under section 7 of the *Canadian Charter of Rights and Freedoms* by stating that this argument goes “beyond the kind of protection s. 7 was intended to afford.” *E(Mrs) v Eve*, [1986] 2 SCR 388 at para 96. See also Campbell, “Averting Misconceptions”, *supra* note 14 at 20; In addition the Nova Scotia Supreme Court’s decision in *Cameron v. Nova Scotia*, also suggests that section 7 does not support a women’s right to access assisted procreation. In that case, the plaintiffs unsuccessfully argued that Nova Scotia’s *Health Services and Insurance Act* and the *Canada Health Act* infringed their section 7 rights by failing to consider IVF as a medically necessary treatment whose costs should be covered by Medicare. *Cameron v Nova Scotia (Attorney General)* (1999), 172 NSR (2d) 227, [1999] NSJ No 33 at 154-155; When the decision was appealed, the section 7 claim was dropped.

¹¹⁴ See Laura Shanner, “The Right to Procreate: When Rights Claims Have Gone Wrong” (1995) 40 *McGill Law Journal* 823.

destroyed.¹¹⁵ Thus even if one spouse has no alternative means of reproducing for physical or other reasons, the other spouse may veto his or her ability to use embryos for reproduction as the parties are given joint control over these embryos' disposition. This approach is similar to the Canadian model under the *AHRA* and Quebec's *Regulation Respecting Assisted Procreation*, except that it makes clear that embryos must be destroyed, even if one party seeks to use them for procreation. Recall that under Canadian law it is not entirely clear what should happen to the embryos in the event of a dispute and if agreements are not enforceable. They may need to remain in storage until the parties can agree, and this seems to necessarily be the case in Quebec where its regulations indicate that both parties must consent for embryos to be destroyed.¹¹⁶

Having a "default" of destruction might be a desirable solution in the event spouses cannot agree on how their embryos should be disposed of and *neither* wants to use them for reproduction. However, allowing for this default even where one individual still wishes to use the embryos for procreation is problematic for the same reasons outlined in Part II of this chapter.

The potential injustice of this approach is perhaps best illustrated by *Evans v United Kingdom*.¹¹⁷ In this case, Evans and her spouse discovered that she had pre-cancerous tumors on her ovaries during preliminary IVF testing. Her eggs were then harvested, and fertilized using her husband's sperm and she subsequently had her ovaries removed. However, prior to using the embryos for implantation, the couple's relationship deteriorated and her spouse withdrew his consent to store the embryos. Under the *HFEA* their clinic was required to destroy the embryos, and Evans thus sought an injunction to prevent their destruction. The

¹¹⁵ *Human Fertilisation and Embryology Act of 1990* (UK), 1990 c 37, Schedule 3, s 8(2).

¹¹⁶ See *Regulation Respecting Assisted Procreation*, *supra* note 12, s 19(3).

¹¹⁷ *Evans v United Kingdom*, [2006] ECHR 200, (2006) 43 EHRR 21 [*Evans*].

trial court and Court of Appeal dismissed her claim,¹¹⁸ the House of Lords refused her leave to appeal; thus she appealed to the European Court of Human Rights (ECHR). The ECHR ultimately upheld the validity of the *HFEA* and found that there was no violation of her rights under the *Convention for the Protection of Human Rights and Fundamental Freedoms*.¹¹⁹ She was thus unable to use the embryos she had created even though it was clear that she would have no other way of conceiving. She had already decided to have her ovaries removed, based on the understanding that she would be able to use the embryos in an attempt to build her family.¹²⁰

C. Property Approach

An additional approach, which derives inspiration from some recent judicial decisions in Canada, would be to treat the embryos as property. Under this model, a court could divide the embryos among divorcing spouses for them to do with them as they wish or give them to one spouse to the exclusion of the other. A court's determination could be based on the financial value of these embryos and whether one or both parties had borne the costs of creating them. Thus for instance, if a man had paid for IVF treatments as well as for the embryos' storage, his female spouse would be able to use them even if he disagrees, but in return the division of their property and assets would reflect the fact that he had paid for these treatments. In other words, she would be required to compensate him for the costs IVF and storage.

While Canadian courts have yet to make a determination as to what should happen to embryos in the event of a dispute between spouses, they have seen one dispute between

¹¹⁸ *Evans v Amicus Healthcare Ltd and others*, [2003] EWHC 2161 (Fam); *Evans v Amicus Healthcare Ltd*, [2004] EWCA Civ 727.

¹¹⁹ *Evans*, *supra* note 117.

¹²⁰ *Ibid* at para 11.

partners over frozen sperm vials¹²¹ and one dispute between genetic contributors – who were not spouses – over the control of frozen embryos.¹²² These cases took a similar approach in characterizing reproductive materials as property and basing their analysis, in part, on the financial value of this genetic material.

In *C.C. v A.W.*, the Alberta Court of Queen’s Bench was asked to determine whether a woman could have access to embryos without the consent of the male genetic contributor. Mr. AW, a friend and former boyfriend of Ms CC, provided her with sperm to use for *in vitro* fertilization. CC underwent IVF, successfully became pregnant and gave birth to twins. Four embryos were frozen and placed in storage, for which CC paid an annual storage fee. CC later sought to use the embryos for further IVF cycles but AW refused to consent to their release.¹²³ The court held that AW’s sperm was “an unqualified gift given in order to conceive children” and that “the remaining fertilized embryos remain *her property* [and] are chattels that can be used as she sees fit.”¹²⁴ It emphasized the fact that AW knew that his sperm would be used for reproductive purposes, and that fact that CC had paid for the embryos’ storage.¹²⁵

Some commentators have suggested that the *C.C. v A.W.* decision may be of limited authoritative value as it was decided in 2004 and thus before the *AHRA* came into force.¹²⁶ Others have pointed out that it was nonetheless decided following the introduction of the *AHRA* in 2004, and may run counter to it, given that this decision permits the use of embryos

¹²¹ *JCM v ANA*, 2012 BCSC 584 [*JCM*].

¹²² *CC v AW*, 2005 ABQB 290, [2005] AWLD 2498.

¹²³ *Ibid*. He refused to consent on the grounds that he had difficulty gaining access to the twins. The case does not make clear whether Ms. CC’s intention was for Mr. AW to be a parent under the law, but suggests that over time their relationship became increasingly strained.

¹²⁴ *Ibid* at para 21 [emphasis added].

¹²⁵ *Ibid* at para 20-21.

¹²⁶ See Clare E Burns & Anastasija Sumakova, “Mission Impossible: Estate Planning and Assisted Human Reproduction” (2010) 60 ETR (3d) 59 at 3.

despite one of the “donors” revoking his consent.¹²⁷ These scholars have neglected to mention, however, that if this case had been decided today the *AHR Consent Regulations*, which came into force in 2007, would apply and it would have been unnecessary to determine that the embryos were CC’s property.¹²⁸ Under these *Regulations* she would have been considered the sole donor of the embryos, as AW was not her spouse or partner at the time of the embryos’ creation. Thus, only *her* consent would have been required in order for her to use or dispose of the embryos.¹²⁹ This case is thus only of limited authority in determining whether one spouse or partner should be able to override the other’s desire to use embryos for reproductive use. However, it indicates one court’s willingness to characterize embryos as “property” and thus to potentially enable them to be divided among divorcing spouses.

Similarly, while *J.C.M. v. A.N.A.* dealt with a dispute over gametes rather than embryos, it demonstrates that Canadian courts have been willing to treat reproductive material as property. The British Columbia Supreme Court held that frozen sperm vials that had been purchased in the United States could be treated as property, and thus could be divided among lesbian partners who had decided to separate.¹³⁰ The court also decided that since there was an uneven number of sperm straws, JCM should pay ANA for the additional sperm straw she received, and that ANA could sell the remaining straws to JCM if she wished to do so.¹³¹

Intuitively, this approach might seem like a better solution than the aforementioned models. It provides women with the possibility of using embryos even without their spouse’s

¹²⁷ See Campbell, “Averting Misconceptions”, *supra* note 14 at 4.

¹²⁸ *AHR Consent Regulations*, *supra* note 5.

¹²⁹ See *AHR Consent Regulations*, *supra* note 5, s 10(1)(a).

¹³⁰ *JCM*, *supra* note 121.

¹³¹ *Ibid* at para 96.

consent and even where it is not the case that using these embryos would be her only chance of conceiving. However, this approach would contravene the express provisions and spirit of the *AHRA*. Section 7 of the *AHRA* criminalizes buying and selling gametes and embryos because it seeks to ensure that individuals who donate their reproductive material are doing so voluntarily and are not induced to donate simply because of the prospect of financial gain.¹³² While under this model embryos would not necessarily be sold to third parties, they could nonetheless be exchanged between spouses in return for financial compensation, which would still contravene the *AHRA*'s intentions to prevent the commodification of reproductive materials and services.¹³³

Treating embryos as property – whether as true property which may be exchanged for commercial value, or as quasi property that may be controlled by spouses but not traded on the market¹³⁴ – also objectifies women's bodies, reproductive capacities, and genetic material.¹³⁵ The *AHRA* makes clear that embryos and gametes are not to be treated like other property, and the research restrictions it places upon embryos are also based on the idea that as potential human life these embryos ought to be accorded a certain measure of respect.¹³⁶ A property model would serve to undermine these intentions.

In addition, endorsing a property approach could result in these embryos being used as a negotiation tool in acrimonious divorces. It is not difficult to imagine a situation in which one individual uses his or her spouse's desire to have more children as a means of getting more than their equitable share of their property and assets. Most case law that has

¹³² *AHRA*, *supra* note 4, s 7.

¹³³ *Ibid*, s 2(f).

¹³⁴ See Mykitiuk & Wallrap, *supra* note 14 at 401.

¹³⁵ See Nedelsky, *supra* note 14 at 347 (who similarly argues that treating embryos as property would exacerbate the exploitation, objectification and commodification of women's bodies and would alienate women from their own bodies).

¹³⁶ See e.g. Maneesha Deckha, "Legislating Respect: A Pro-Choice Feminist Analysis of Embryo Research Restrictions in Canada" (2012) 58:1 McGill Law Journal 199.

involved disputes over gametes or embryos has occurred upon divorce. It is not clear whether disagreements over genetic material led to these divorces, or whether divorces led to these conflicts, but it does not seem far-fetched to suggest that treating embryos as property may allow these embryos to be an additional “commodity” that spouses compete over. Treating embryos as property might also spark disputes upon marital dissolution where otherwise there would have been no discord, precisely because these embryos may be viewed as invaluable to a spouse who seeks to have more children and thus potentially more important than their financial assets.

IV. RECOMMENDATIONS FOR LAW REFORM

This chapter has demonstrated that current legal responses to embryo disposition disputes both within and outside of Canada do not adequately support the objectives of Canadian statutes seeking to regulate the use of ARTs. Enforcing embryo disposition agreements or consent forms would not take account of the fact that individuals may not be in a position at the time of these agreements’ creation and signing to make free and informed decisions regarding the disposition of any surplus embryos. This approach also would have the effect of treating embryo disposition agreements as binding contracts, even though Canadian law and policy refuses to treat domestic agreements between spouses, or contracts relating to adoption or surrogacy the same as commercial contracts. Allowing one genetic contributor to prevent his or her spouse from using embryos for procreation ignores the costs of IVF and the ways in which women are disproportionately affected by ART treatment and by laws preventing them from using their frozen embryos. This response also enables a man to revoke his consent to procreate and to be a parent, even though Canadian law in relation to abortion, adoption and the parentage of children born through natural conception and assisted

procreation, seek to deny men these rights in response to the fact that women are more affected than men by reproduction and may be vulnerable to men revoking their consent to parent.

Moreover, other existing methods for dealing with embryo disputes raise similar issues and also pose additional problems. Allowing for a right not to procreate, even with an exception for individuals who cannot otherwise conceive, and providing for automatic destruction in the event of a disagreement raise the same issues as current Canadian responses. Adopting a property approach conflicts with Canadian public policy, which seeks to counter the commodification of reproductive materials. It seems therefore that a novel approach is warranted for dealing with these disputes within the Canadian context.

One suggestion for law reform is that an individual who wishes to use embryos for procreative purposes ought to be able to do so, even if their spouse or partner disagrees. In other words, a male donor should be unable to prevent a female donor from using embryos for reproductive purposes and a woman should not be permitted to prevent her male spouse from using embryos with a surrogate or new partner. This mutual inability to block the use of embryos for procreation would recognize the considerable costs associated with creating and freezing embryos for IVF, as well as the fact that men and women might be otherwise unable to reproduce without the use of these embryos. However, where male and female donors each wants to use their embryos for reproductive purposes, the woman should be given preference to use them, in recognition of the greater physical contribution that she made in harvesting her eggs, and the biological reality that women's ova become less viable as they age. This approach would also be preferable to dividing them equally between spouses, as

allowing for this division could communicate a message that embryos can be treated the same as other property.

Although it has been argued in some foreign jurisprudence that it is contrary to public policy to force one spouse to procreate against his or her will, the argument is exaggerated. The stronger argument is that forcing one individual to destroy their embryos or donate them against their wishes runs counter to Canadian law and public policy. As was discussed in Part II of this chapter, while men and women may bear the costs of ART treatment and may need to use IVF in order to conceive, women are affected more than men by the IVF process and because of biological differences may have more difficulty conceiving at an older age than men. Canadian law and public policy has recognized women's disproportionate contribution in the context of laws relating to abortion. Moreover, as was discussed in the introduction to this thesis, the *AHRA* and Quebec's *Act Respecting Assisted Procreation* make clear that their provisions are intended to recognize the power imbalance between men and women who make use of assisted procreation, and the particular health risks for women undergoing ART treatment. In light of this, it seems that law and public policy in the context of embryo donation ought to support women's potential desire to have more children ahead of men's potential wish to procreate and also ought to favour the spouse who seeks to procreate over a spouse who wants for the embryos to remain in storage, be donated or destroyed.

Patients should, however, be clearly informed prior to providing their genetic material for IVF that they will be unable to revoke their consent to procreate. In other words, their spouse or partner will still be able to use the embryos for reproduction even if they change their minds. Patients should be able to make a free and informed decision as to whether they feel comfortable with this option; the empirical research which calls into

question individuals' abilities to make informed decisions prior to IVF suggests that where individuals changed their minds it was with regard to their previously expressed intentions regarding donation or destruction.¹³⁷

It might also be argued that this approach problematically forces individuals to be parents against their wishes even if a substantial period of time has passed since they gave their consent to use their reproductive material for assisted procreation. For instance, in the Nott case discussed in the introduction to this chapter, the embryos have now been in storage for 9 years. Currently in Canada, unlike other jurisdictions, there are no limitations on how long embryos can remain in storage. Moreover, a woman may be able to use embryos for implantation up until menopause and potentially until she reaches the age of 55.¹³⁸ This means that it would be possible for embryos to be used by one spouse, thirty-something years after the other spouse had provided their consent to use their genetic material for procreation.

This potential issue could, however, be addressed without preventing one spouse from using embryos for procreative purposes. Rather, should spouses divorce and one no longer wishes for the embryos to be used for procreation that spouse could be absolved of parental obligations and denied parental rights. A number of provinces have now made clear that a sperm donor is not a parent simply by virtue of his donation.¹³⁹ A smaller number have also stipulated that egg donors and embryo donors are similarly not to be considered legal

¹³⁷ See e.g. De Lacey, "Parent Identity", at 1661-1662; Newton, "Changes" *supra* note 23.

¹³⁸ See e.g. Sharon Kirkey, "A shift in the stance on pregnancy after 50" *The Edmonton Journal* (18 March 2013), online: <http://www.edmontonjournal.com/health/women/shift+stance+pregnancy+after/8114245/story.html>; Susan Drummond, "A principled limit to assisted reproduction and parental age" *The Toronto Star* (23 May 2013) A13.

¹³⁹ See Alberta *FLA*, *supra* note 56, s 7(4); BC *FLA*, *supra* note 56, s 24; CCQ, *supra* note 56, art 538.2; *Birth Registration Regulations*, NS Reg 390/2007, s 3; *Child and Family Services Act*, RSY 2002, c 31, s 13(6); *Children's Law Act*, RSNL 1990, c C-13, s 12(6).

parents, unless this was the donors' and the child's parents' intentions.¹⁴⁰ A spouse who changes his or her mind and does not wish for embryos created from their sperm or ova to be used for reproduction could be legally considered to be a donor under the law. In turn, British Columbia's new *Family Law Act*, now provides that if a child was conceived¹⁴¹ through the use of assisted procreation, while a couple was married or in a marriage-like relationship, the birth mother's spouse or partner will not be considered the child's parent where there is evidence that he or she did not consent to be a parent or withdrew his or her consent prior to implantation.¹⁴² This provision similarly demonstrates that it is possible to find that a spouse should not be held to be a legal parent despite his or her relationship with the child's mother and potentially despite this spouse having a genetic connection to the child.

However, a spouse should only be absolved of parental obligations where a substantial period of time has elapsed between the time of the embryos' creation and implantation. Allowing one spouse to revoke his or her consent to be a parent immediately or shortly after the embryos' creation would be troubling in light of Canadian family law legislation. Where a woman becomes pregnant and a couple divorces or separates, the male spouse or partner will not be off the hook for child support simply because he changed his mind. This limitation period could be set, for instance, at 3 years or some other length of time that is deemed appropriate to reflect the period of time in which a couple might have attempted and reattempted to have children using frozen embryos. And once again patients should be informed prior to undergoing IVF that regardless of whether they separate, they will be held to have parental rights with regard to any children conceived during that time period.

¹⁴⁰ CCQ, *supra* note 56, art 538.2; BC *FLA*, s 24; Alberta *FLA*, *supra* note 56, s 7(4).

¹⁴¹ Conception is defined as implantation in the case of embryos. See BC *FLA*, *supra* note 56, s 20(2).

¹⁴² BC *FLA*, *supra* note 56, s 27.

Freeing unwilling parents from having parental obligations does not stop them from having children produced from their genes against their wishes. However, this situation is comparable to one in which individuals decide to donate their embryos to a third-party and then only decide to revoke their consent after the revocation period has elapsed. It may result in children being produced contrary to their present intentions, but public policy and respect for women's ability to make reproductive choices necessitates that the donors be prohibited from revoking their consent in these instances. In addition, while this solution may not fully satisfy either of the parties, it is certainly a more just outcome than preventing one spouse – and especially a woman – from using the embryos for reproductive purposes.

In addition, agreements between spouses and fertility clinics as to how to dispose of surplus embryos ought to be legally unenforceable, especially if they are created prior to successfully giving birth, or unsuccessfully completing a round of IVF. This would recognize that spouses might not be in a position to make free and informed decisions as to how to dispose of their surplus embryos prior to undergoing even a first cycle of IVF. Spouses ought to be encouraged, following completion their first round of IVF to discuss and stipulate in writing what they would like to do with their surplus embryos and what they think should happen in the event they divorce, or disagree. But these agreements should be viewed – similar to surrogacy agreements – as non-binding contracts that set out the parties' wishes, aspirations and expectations. Consent provided by either spouse to donate or destroy their embryos prior to undergoing IVF treatment and making an informed decision that they no longer wish to use the embryos for procreation should be considered invalid, in the same way that a birth mother cannot consent to an adoption prior to giving birth.

Should a disagreement arise between spouses, and neither wishes to use the embryos for their own procreation, it seems reasonable to create a default that the embryos should be destroyed. Allowing for the embryos potentially to be donated against one spouse's wishes would be problematic in light of the empirical research, discussed in Part I, indicating that most of the time when individuals change their minds regarding their disposition decisions they opt to destroy their embryos rather than donate them. Dividing them equally among spouses could amount to treating the embryos as property. In turn, keeping them in storage would require parties to continue to pay annual storage fees and would also, over time, likely create problems for fertility clinics with regard to storage space. While the precise number of embryos in storage is unknown, it is estimated that there are currently 45,000 in storage and this number will only continue to grow.¹⁴³ It seems likely that Canada will eventually follow the lead of other jurisdictions, which require that parties make a disposition decision after a certain number of years.¹⁴⁴ Moreover, destruction is the most commonly selected option for individuals with surplus embryos and thus is arguably a more appropriate default than donation.

Establishing a default of destruction would not please everyone. Some might criticize this approach as wasting embryos that might otherwise be used for research or which might help a childless couple conceive. In turn, the act of destroying embryos might be unthinkable to some donors on account of their personal or religious beliefs. However, this default would only come into effect should a disagreement arise between spouses. Should they not wish for

¹⁴³ The last count was 15,615 stored in 13 clinics in 2003. Françoise Baylis et al, "Cryopreserved Human Embryos in Canada and their Availability for Research" (2003) 25:12 *Journal of Obstetrics and Gynaecology Canada* 1026. It is estimated that there are currently three times this amount in storage. Campbell, "Averting Misconceptions", *supra* note 14 at 1.

¹⁴⁴ Restrictions on the number of years embryos may remain in storage differs among countries and jurisdictions. For instance, in New South Wales embryos may only be stored for 5 years. See McMahon & Saunders, *supra* note 34 at 141.

the embryos to be destroyed they would be given the option to use them for their own reproductive purposes instead.

A related recommendation is that embryos should not be donated to research or for reproduction unless both parties explicitly consent. To ensure that embryo donors are given an adequate period of time for revoking their joint consent to donate their embryos, embryo donation regulations should stipulate an explicit number of days that donors will have to revoke their consent, *prior* to the embryos being used or designated for use in accordance with their expressed intentions. The number of days would have to be relatively short in the case of fresh donations, given the restrictions on the number of days that an embryo can be kept outside of the human body;¹⁴⁵ however, for frozen embryos, the number of days for revocation could, for instance, mirror those given for adoption if this was determined to be appropriate and adequate to enable the donors to potentially change their minds and revoke their consent.

Finally, fertility clinics should seek to mitigate potential conflicts and power imbalances between spouses through increased education and counselling. It would undoubtedly be beneficial for provincial regulations to mandate that all clinics and hospitals provide at least one counselling session to individuals who undergo IVF, embryo implantation and other forms of treatment involving reproductive technologies. These clinics should also ensure that individuals undergoing IVF are not only aware of the health risks associated with the procedure, but also of the laws that apply to them with regard to embryo disposition. Thus for instance, if the aforementioned recommendations were to be applied, a male spouse should be informed that even if he no longer wishes to use the embryos for reproduction, his spouse may nonetheless be able to use them, but he will not have rights or

¹⁴⁵ See *AHRA*, *supra* note 4, s 5(d).

obligations with regard to any children born through the use of his sperm. In turn, both spouses would need to be informed regarding how long they would have to revoke their consent to donate their embryos for research or reproduction.

This overall approach would better account for the experiences of individuals who undergo IVF and who need to make decisions regarding the disposition of their embryos. It would reflect the fact that women more than men are affected by the use of assisted reproductive technologies and would also help to ensure that donors are making informed and autonomous decisions in relation to the disposition of their embryos. It would consequently better support the *AHRA* and Quebec's Act's objectives to promote the health and well-being of women who use ARTs and to ensure that individuals who undergo treatment or who donate their genetic materials provide free and informed consent.

In turn, these suggestions would also potentially have positive effects not only for spouses who make decisions regarding the disposition of their surplus embryos but also for third-parties who receive any donated embryos for reproductive purposes. As will be discussed in the following chapter, embryo donation for reproduction also raises a host of potential legal and social issues, especially with regard to the disclosure of donors, recipients and donor offspring's identifying and non-identifying information. Providing donors with counselling and ensuring that their embryos are only donated where donors mutually consent, could help to also prevent some of the issues that might arise for embryo donors, recipients and donor offspring where embryos are donated for third-party reproduction.

CHAPTER 2: EMBRYO DONOR ANONYMITY

In November 2012, the British Columbia Court of Appeal held that children born through gamete donations do not have a right to access information about their genetic relatives.¹ Olivia Pratten, a woman who was born through the use of an anonymous sperm donation in the 1980s, challenged the constitutionality of laws that support donor anonymity in Canada, claiming that they violate sections 15(1) and 7 of the *Canadian Charter of Rights and Freedoms*.²

Currently, where an individual or couple elects to anonymously donate or receive gametes or embryos, Canadian law serves to protect donors', recipients' and donor offspring's privacy by ensuring that their respective identities will not be revealed without their consent.³ Fertility clinics typically create records of these parties' identities, and provide recipients with non-identifying information about donors such as their family history, health and genetic information, physical descriptions, hobbies and interests, from the time of the

¹ *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480 at para 4 [*Pratten BCCA*].

² *Ibid.*

³ In most provinces, anonymity is ensured through agreements between physicians and patients. See e.g. Lisa Shields, "Consistency and Privacy: Do These Legal Principles Mandate Gamete Donor Anonymity?" (2003) 12:1 Health Law Review 39 at 41; Anonymity is also protected under privacy legislation. See Vanessa Gruben, "Assisted Reproduction without Assisting Over-Collection: Fair Information Practices and the Assisted Human Reproduction Agency of Canada" (2009) 17 Health LJ 229 at 232-234 (who explains that the informational privacy of individuals who use assisted reproduction is protected through federal privacy statutes, like the Federal *Privacy Act* and likely the *Personal Information Protection and Electronic Documents Act* [*PIPEDA*], as well as provincial privacy legislation that specifically seeks to regulate the disclosure of health information in Alberta, Manitoba, Ontario and Saskatchewan.) See *PIPEDA*, SC 2000, c 5; *Privacy Act*, RSC 1985, c P-21; *Health Information Act*, RSA 2000, c H-5; *Personal Health Information Act*, CCSM 2011, c P33.5; *Personal Health Information Protection Act*, SO 2004, c 3; *Health Information Protection Act*, SS 1999, c H-0.021. In Quebec, anonymity is protected under its *Act Respecting Assisted Procreation* and the *Civil Code of Québec*, which make clear that clinics and agencies are to maintain the confidentiality of donors', recipients and donor offspring's personal information and identity. See *An Act Respecting Clinical and Research Activities Relating to Assisted Procreation*, RSQ 2009, c A-5.01, s 42-44 [*Act Respecting Assisted Procreation*]; *Civil Code of Québec*, SQ 1991, c 64, art 542, 33ff [CCQ]; Anonymity may also, in practice, be preserved through inadequate record keeping and the potential destruction and transfer of records; with the exception of Quebec, Canadian provincial laws do not currently mandate that clinics maintain records with donors and recipients' information for an extended period of time and thus this information may not be stored for as long as is needed. See *Act Respecting Assisted Procreation*, s 43.

donation.⁴ However, these parties generally do not have the opportunity to obtain or provide further information, as there are no legal mechanisms in place to enable them to voluntarily exchange non-identifying or identifying information following the donation.

Pratten argued that donor offspring, like adoptees, are not genetically related to at least one of their parents and may have a similar desire or need to know their genetic parents' identities for their psychological well-being, to prevent inadvertent incest with a relative, and in order to obtain updated health information that might assist them with the diagnosis of genetic diseases.⁵ She pointed out that under British Columbia's *Adoption Act* and *Adoption Regulations*, adoptees and birth parents have the right or the ability to access adoptees' original birth records and adoption order and thus to obtain identifying information about one another once the adoptee reaches the age of majority.⁶ Pratten maintained that the Province of British Columbia discriminated against donor offspring by not providing them with the same rights and protections as adoptees and also infringed donor offspring's rights to life, liberty and security of the person by failing to enact legislation that would enable them to know the identity of their donors.⁷

The Supreme Court of British Columbia rejected Pratten's section 7 arguments, but held that the *Adoption Act* and *Adoption Regulations* violate section 15(1) of the *Charter*, as their provisions are underinclusive and discriminate against donor offspring on the basis of

⁴ Angela Cameron, Vanessa Gruben & Fiona Kelly, "De-Anonymising Sperm Donors in Canada: Some Doubts and Directions" (2010) 26 Can J Fam L 95 at 110.

⁵ *Pratten v. British Columbia*, 2011 BCSC 656 at para 41-43 [*Pratten BCSC*].

⁶ Where the adoption took place prior to these legislative reforms then birth parents and adoptees will have the ability to issue a non-disclosure veto preventing the release of their identifying information. If the child was adopted after this legislation was introduced in 1996 then these parties will have the right to access these records but the option to issue a veto preventing either party from using that information to contact them. If one party has issued a veto, the other will be prevented from using an active search registry to locate or make contact with that individual; however, these birth parents and adoptees may still register with a passive registry, which will enable them to exchange identifying or non-identifying information should they mutually consent. *Adoption Act*, RSBC 1996, c 5, ss 63, 64, 65, 66 [*BC Adoption Act*]; *Pratten BCSC*, *supra* note 5 at para 3.

⁷ *Pratten BCCA*, *supra* note 1 at para 4.

their manner of conception.⁸ The British Columbia Court of Appeal agreed that there does not exist a constitutionally guaranteed right to know one's past or origins; however, it also held that British Columbia's adoption laws and regulations constitute an ameliorative program under section 15(2) of the *Charter*, and consequently do not violate section 15(1).⁹ While Pratten applied for leave to appeal to the Supreme Court of Canada, ultimately her application was denied, leaving in place the Court of Appeal's decision.¹⁰

This decision marked the most recent development in a longstanding debate in Canada over laws supporting donor anonymity. Over the past twenty-five years, scholars, physicians and activists have presented arguments for and against abolishing donor anonymity, or moving toward a system that enables parties to exchange identifying information once donor offspring reach the age of majority.¹¹ Proponents of maintaining anonymity have stressed, for instance, that anonymity is necessary in order to protect donors' and recipients' rights to privacy and to ensure that donors do not interfere with recipients' families.¹² Opponents have primarily criticized donor anonymity on the grounds that it may have detrimental physical and psychological health effects for donor offspring and

⁸ *Pratten BCSC*, *supra* note 5 at paras 268, 319.

⁹ *Pratten BCCA*, *supra* note 1.

¹⁰ *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480, leave to appeal to SCC refused, 35191 (May 30 2013).

¹¹ See e.g. *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) at 441 ff [*Proceed with Care*]; Roger Collier "Disclosing the Identity of Sperm Donors" (2010) 182:3 CMAJ 232 [Collier, "Disclosing"]; Cameron, Gruben & Kelly, *supra* note 4; Michelle Giroux & Mariana De Lorenzi, "'Putting the Child First': A Necessary Step in the Recognition of the Right to Identity" (2011) 27 Canadian Journal of Family Law 53 [Giroux & De Lorenzi, "Putting the Child First"]; Josephine Johnston, "Mum's the Word: Donor Anonymity in Assisted Reproduction" (2002) 11:1 Health Law Review 51; Laura Shanner, "Viewpoint: Legal Challenges to Donor Anonymity" (2003) 11:3 Health Law Review 25 [Shanner, "Viewpoint"]; Shields, *supra* note 3; Michelle Giroux, "Le droit fondamental de connaître ses origines biologiques: impact des droits fondamentaux sur le droit de la filiation" dans Me Alain-Robert Nadeau ed, *La Charte Québécoise: Origines, Enjeux et Perspectives*, La Revue du Barreau du Québec (Montreal: Les Éditions Yvon Blais, 2006) 255; Juliet R Guichon, Ian Mitchell, Michelle Giroux, eds, *The Right to Know One's Origins: Assisted Human Reproduction and the Best Interests of Children* (Brussels: Academic and Scientific Publishers, 2012).

¹² See e.g. *Proceed with Care*, *supra* note 11 at 442-443; Cameron, Gruben & Kelly, *supra* note 4 at 120-135. Shanner, "Viewpoint", *supra* note 11 at 26.

contravenes their rights under domestic and international law by denying them identifying information and updated health information about their biological relatives.¹³ These commentators have also often, like Pratten, drawn an analogy to adoption and argued that donor anonymity is inconsistent with some provincial laws, which allow adoptees the right to obtain identifying information about their birth parents upon reaching the age of majority.¹⁴

Yet while donor anonymity has implications for gamete and embryo donation, Canadian conversations have focused exclusively on gamete donation, and primarily on the benefits and drawbacks of abolishing *sperm* donor anonymity. Scholars and other commentators have overlooked the ways in which *embryo* donation might differ from sperm donation, and how the experiences and stories of embryo donors and recipients might contribute to the current debate over the abolition of anonymity.¹⁵ This focus is not surprising; embryo donation is far less common than sperm or egg donation,¹⁶ and those donor offspring – like Pratten – who have come of age and who have been agitating for legal

¹³ See e.g. Johnston, *supra* note 11 at 53; Shanner, “Viewpoint”, *supra* note 11 at 26; Shields, *supra* note 3 at 41; Giroux & De Lorenzi, “Putting the Child First”, *supra* note 11 at 69ff. For instance, it has commonly been argued that knowledge of one’s updated family medical history is increasingly important for the prevention and diagnosis of genetic disease for instance like Huntington’s disease, or diseases like breast cancer that are linked to the specific BRCA1 and BRCA2 genes and that children born through anonymous donations may not have access to this information. See Cameron, Gruben & Kelly, *supra* note 4 at 109-113. Julie L Lauzon, “The Health Benefits to Children Having their Genetic Information: The Importance of Family Trees” in Juliet R Guichon, Ian Mitchell, Michelle Giroux, eds, *The Right to Know One’s Origins: Assisted Human Reproduction and the Best Interests of Children* (Brussels: Academic and Scientific Publishers, 2012) 192.

¹⁴ See e.g. Juliet R Guichon, “A Comparison of the Law in Canada Related to the Disclosure of Information Regarding Biological Parents of Adoptees and the Donor-Conceived” in Juliet R Guichon, Ian Mitchell, Michelle Giroux, eds, *The Right to Know One’s Origins: Assisted Human Reproduction and the Best Interests of Children* (Brussels: Academic and Scientific Publishers, 2012) 276 [Guichon, “Comparison”]; See also Cameron, Gruben & Kelly, *supra* note 4 at 132, 136-139; Shanner, “Viewpoint”, *supra* note 11 at 25-26.

¹⁵ Only Cameron, Gruben & Kelly have noted in their article that sperm donation may have different gendered implications than egg or embryo donation, but explain that they are focusing on sperm donation exclusively. See Cameron, Gruben & Kelly, *supra* note 4 at 98-99.

¹⁶ While the precise number of children born through embryo donation in Canada is unknown, as will be discussed in Part I of this chapter, very few individuals make the decision to donate their embryos for reproductive use.

reform in Canada, were born through the use of anonymous sperm donations.¹⁷ However, the last several years has seen an increase in the number of embryo donation programs in Canada¹⁸ and as more Canadians continue to use IVF to develop their families, there will likely be an increase in the number of embryos donated for third-party reproduction. It seems that if legislators are to consider abolishing donor anonymity or providing for increased access to information for donors, recipients and donor offspring, they ought to be urged to consider the implications of current laws and potential law reforms in relation to embryo as well as gamete donation.

This chapter seeks to fill this lacuna in the literature. It points out that current laws surrounding donor anonymity and proposals for law reform are both based on the perceived interests of the paradigmatic male sperm donor, who is typically described as being disinterested in having further information about his potential genetic offspring, and unwilling to donate unless his anonymity and privacy is preserved indefinitely. Thus supporters of maintaining the status quo with regard to donor anonymity have often stressed that anonymity is needed to protect the interests of sperm donors, encourage sperm donations

¹⁷ In *Pratten*, Justice Adair explained: “I did not have any evidence of an individual who either donated eggs or who was conceived as a result of a donation of eggs, and therefore, unless the context indicates otherwise, a “donor” is a sperm donor.” *Pratten BCSC*, *supra* note 5 at para 13; It should be noted as well that throughout her judgment she makes reference to gamete donation, but never mentions embryo donation. Moreover, in attempting to distinguish donor offspring from adoptees the AG argued that “donor offspring are part of a family with at least one biological parent in place”, thus overlooking the fact that embryo donor offspring similarly do not share a genetic connection (and only a gestational one) with their social parents. See *Pratten BCSC*, *supra* note 5 at para 249.

¹⁸ See e.g. Angela Krueger, “An Overview of Embryo Donation in Canada” (Spring 2011), online: Infertility Awareness Association of Canada <<http://www.iaac.ca/print/584>>; Kerry Bowman & Michael Szego, “Embryo Donation: The New Program at Mount Sinai Hospital CFRH” online: Infertility Awareness Association of Canada <<http://www.iaac.ca>>; Lisa Priest, “The birth of Canada’s first embryo donation program”, *The Globe and Mail* (3 April 2010) A1 [Priest, “The birth”]; Sharon Kirkey, “Finding parents for ‘orphan’ embryos” *The Vancouver Sun* (14 March 2011), online: <<http://www2.canada.com/vancouvernews/archives/story.html?id=4994ab30-0e03-4838-94f1-450c84cb73e9>>

and thus to support family building through the use of donated genetic material. In turn, scholars' arguments in favour of abolishing anonymity and their proposals for reform seem to presume that anonymous donors will not willingly provide information to donor offspring and also will not be interested in acquiring information about their genetic children. These arguments for or against donor anonymity do not account for the experiences of embryo donors – and especially female embryo donors – who may have an interest in accessing information about their genetic offspring, and providing their kin with information that they might find helpful for their health or well-being. While it is not possible to draw definitive conclusions from the empirical research available, studies suggest that this stronger interest in acquiring and exchanging information is likely both reflective of a gendered difference between male and female donors' perceptions of their reproductive material and a result of the fact that what are being donated are embryos rather than gametes, and that these embryos have been previously created for donors' own reproductive use.

Part I draws on qualitative and quantitative research to argue that donors, recipients and donor offspring's inability to exchange further information following an anonymous donation may be discouraging embryo donations, and may also be having negative psychological effects not only for donor offspring, but also for *donors*. It also points out that the lack of mechanisms in place to enable donors and donor offspring to give and receive information is odd in light of how Canadian provinces have responded to both adoptees and birth mothers' potential desires or needs to exchange information following an adoption. While not all provinces provide adoptees and birth parents with the right to access identifying information about one another, all have registries in place to enable these parties

to voluntarily exchange information following the adoption.¹⁹ Consequently, this chapter maintains that current laws pertaining to donor anonymity do not go far enough to support the *Assisted Human Reproduction Act*'s and Quebec's *Act Respecting Assisted Procreation*'s objectives to protect the health and well-being of women,²⁰ while promoting family building through the use of ARTs.²¹

Part II then considers whether Canadian scholars' and activists' varied suggestions for law reform in the context of sperm donation could help to resolve these issues. It argues that their recommendations with regard to increased information disclosure or abolishing anonymity would not necessarily help to support donors' interests and might similarly discourage embryo donations. Existing proposals might also raise additional issues and problems, specifically with regard to the privacy interests of donor offspring, and might conflict with how Canadian law has responded – or in some cases has not responded – to similar issues in relation to adoptees or children born through natural conception.

Part III therefore provides recommendations for law reform, arguing in favour of maintaining donor anonymity, but creating registries that facilitate the collection and disclosure of non-identifying information to recipients and donors at the time of the donation. These registries could also enable donors, recipients and donor offspring to obtain and exchange further information – including identifying information – following the donation,

¹⁹ See Guichon, "Comparison", *supra* note 14 at 280-281 (who discusses the various types of registries in place to enable parties to exchange information within different Canadian provinces).

²⁰ *Assisted Human Reproduction Act*, SC 2004, c 2, s 2(c); *Act Respecting Assisted Procreation*, *supra* note 3, s 1.

²¹ While neither statute explicitly states their intention to promote family building through these means, legislative debates and reports suggest that this was one of the factors that affected how Canadian governments chose to respond to ARTs. For instance, as will be explained in more detail below, one of traditional justifications given for the government's decision to maintain sperm donor anonymity was to maintain the current supply of donor sperm in order to enable Canadians to build their families through these means. See *Proceed with Care*, *supra* note 11 at 442-443. In relation to Quebec's statute, one of the objectives of this statute was to support and regulate the increased use of IVF as a result of Quebec's decision to publicly fund this treatment. See Stefanie Carsley, "Funding In Vitro Fertilization: Exploring the Health and Justice Implications of Quebec's Policy" (2012) 20:3 Health Law Review 15.

providing the parties mutually consent. Clarifying the parental rights and obligations of embryo donors under Canadian family law legislation and providing for mandatory counselling for donors and recipients, could also help to encourage further openness and information exchange, without abolishing anonymity.

I. EFFECTS OF ANONYMITY AND LACK OF INFORMATION DISCLOSURE

Currently, where Canadians make the decision to donate or receive embryos for reproductive use, they have the option to maintain their anonymity or to disclose their identities. Some Canadian clinics offer anonymous embryo donation programs in which donors' embryos are provided to the next individual or couple on a wait list.²² Some embryo donation programs also provide Canadians with the option of donating their embryos to a known recipient.²³ Still others allow donors to select among potential recipients on the basis of their non-identifying information, but then mandate that donors and recipients exchange identifying information once they are matched.²⁴ Moreover, while it is unclear whether Canadian clinics are offering identity-release donations – *i.e.* donations where donors agree to allow their identities to be released once their genetic offspring reach the age of majority – Canadians may be able to seek out identity-release donors from other jurisdictions.²⁵

Once individuals make the decision to donate or receive embryos anonymously, however, they will be limited with regard to the information – including non-identifying

²² For instance, the McGill University Health Centre Reproductive Centre in Montréal offers this type of program. See Krueger, *supra* note 18; Mount Sinai Hospital's embryo donation program in Toronto similarly only permits individuals to donate anonymously; it provides recipients with the donor's medical history, and the option of being given an embryo that matches their visible ethnicity, but donors are unable to choose who receives their embryos, and donors and recipients' identities are not disclosed to one another, nor to any donor offspring produced. See Bowman, *supra* note 18.

²³ For example, this type of program is offered by the Regional Fertility Program in Calgary. See Krueger, *supra* note 18.

²⁴ Beginnings Family Services, an adoption agency in Hamilton Ontario currently offers this type of program. Priest, "The birth", *supra* note 18.

²⁵ Cameron, Gruben & Kelly, *supra* note 4 at 96.

information – that they are able to receive about one another. In anonymous programs, donors are not provided with any information about the recipients or about the outcome of their donations. Recipients may be provided with non-identifying information about the donors, such as their medical history and ethnicity, but currently Canadian law does not mandate that this information be recorded, preserved or disclosed²⁶ and thus the amount of information they are given may vary in clinics across Canada.

Where a donation proceeded anonymously, donors, recipients and donor offspring typically also do not have the opportunity to exchange further information following the donation. One Toronto hospital reportedly offers to convey to recipients and donor offspring any updated health information provided by a donor.²⁷ The *Civil Code of Québec* and Quebec's *Act Respecting Assisted Procreation* enable donors' identifying information to be disclosed to medical authorities – but not to donor offspring or recipients – where this is required under the *Public Health Act* or where the health of a person born through the use of ARTs or their descendants, may be seriously harmed if this information is not revealed to their physicians.²⁸ However, Canadian provinces do not otherwise provide means to voluntarily give and receive information.

Laws maintaining donor anonymity were intended to encourage and support family building through the use of sperm donation. It has long been pointed out that in the absence of donor anonymity a smaller number of sperm donors would be willing to donate, and many Canadian families would also feel uncomfortable using donated genetic material in order to

²⁶ One exception is Quebec which does legally mandate the collection and preservation of information but which does not mandate its disclosure. See *Act Respecting Assisted Procreation*, *supra* note 3, s 43.

²⁷ Mount Sinai Hospital offers to act as intermediary for any relevant medical information that the donor might give to the recipient/offspring. So for instance, where a donor discovers that a previously unknown and undiagnosed genetic condition runs in his or her family, the hospital can be notified and if this information is deemed medically relevant then the recipients may be notified. See Bowman, *supra* note 18.

²⁸ *Act Respecting Assisted Procreation*, *supra* note 3, s 44; CCQ, *supra* note 3, art 542.

conceive.²⁹ Scholars and doctors have stressed that there are already a small number of donors available in Canada and that removing anonymity would make it more difficult for Canadians to find an appropriate donor and would potentially drive individuals to engage in reproductive tourism and seek out gametes from the United States and other countries which do not have restrictions on anonymity.³⁰ While it was recognized that some donor offspring might have a need and desire to know the identities of their donors, the Canadian government felt that maintaining anonymity was necessary in order to support the interests of donors and recipients.³¹

Empirical research suggests, however, that the experiences and interests of anonymous embryo donors may differ from those of sperm donors. It indicates that in the context of embryo donation the lack of mechanisms in place to enable donors and recipients to exchange information is potentially discouraging donations and is thus not supporting family building through these means. Moreover, donors', recipients' and donor offspring's inability to exchange information where a donation proceeded anonymously is not only potentially having negative health and psychological implications for donor offspring, but also potentially for donors.

²⁹ See e.g. *Proceed with Care*, *supra* note 11 at 442-44. Scholars have also pointed out that countries that have eliminated donor anonymity have seen at least an initial drop in the number of donations, and over time a shift towards older donors, who provide less viable sperm and who may also seek to have a relationship with their offspring, when this might not be desired by recipient families. Cameron, Gruben & Kelly, *supra* note 4 at 133-135. The potential effects of mandated known donors or identity-release donations on the Canada sperm supply was also highlighted more recently in the *Pratten* case. For instance, Dr Del Valle, medical director of the Toronto Institute for Reproductive Medicine (ReproMed) explained that his clinic only has 37 Canadian sperm donors, none of whom have consented to release their identity. He further explained that although the clinic has tried to recruit identity release donors thus far they have been unsuccessful. *Pratten BCSC*, *supra* note 5 at para 163.

³⁰ See e.g. Cameron, Gruben & Kelly, *supra* note 4 at 135; Collier, "Disclosing" *supra* note 11; However, it has also been argued that the prohibition regarding payment is really what is restricting access to donated sperm in Canada. See e.g. Roger Collier, "Sperm Donor Pool Shrivels when Payments Cease" (2010) 182:3 CMAJ 233.

³¹ *Proceed with Care*, *supra* note 11 at 442-44.

A. Discouraging Donations

Although an increasing number of Canadians are using IVF to conceive and have frozen embryos in storage that might be used for reproductive purposes, very few Canadians have been willing to donate their embryos. Consistent with research from other jurisdictions, Canadian studies demonstrate that less than 10% of individuals or couples who had surplus embryos decided to donate them for reproduction. For instance, a study conducted out of The Ottawa Hospital revealed that over the course of an eleven-year period, only 11 out of 782 individuals or couples who underwent IVF decided to donate their embryos anonymously for third-party reproductive use.³² Another Canadian study showed that among individuals who had decided not to use their embryos to conceive, only 8% decided to donate a total of 88 embryos for reproduction.³³ Far greater numbers of Canadians decide to destroy their embryos, keep them in storage or donate them to research.³⁴

As a result, currently the demand for a donated embryo greatly outweighs supply. For instance, Regional Fertility Clinic in Calgary was last reported as having a two-and-a-half year waiting list for donated embryos.³⁵ Other clinics that offer embryo donations have reportedly not been able to provide any donated embryos to their clients, as they have found that no individuals with surplus embryos have been willing to donate them.³⁶

Reasons given for not wanting to donate embryos vary, and as was discussed in Chapter 1 may be linked to individuals' perceptions of their embryos.³⁷ However, research

³² Kimberly Elford et al, "Research Implications of embryo cryopreservation choices made by patients undergoing in vitro fertilization" (2004) 81:4 *Fertility and Sterility* 1154 at 1155.

³³ CR Newton et al, "Changes in Patient Preferences in the Disposal of Cryopreserved Embryos" (2007) 22:12 *Human Reproduction* 3124 at 3126-7 [Newton, "Changes"].

³⁴ Elford, *supra* note 32 at 1154-1155; Newton, "Changes" *supra* note 33 at 3125.

³⁵ Priest, "The birth", *supra* note 18.

³⁶ Bowman, *supra* note 18.

³⁷ See e.g. Sheryl De Lacey, "Parent Identity and "Virtual" Children: Why Patients Discard rather than Donate Unused Embryos" (2005) 20:6 *Human Reproduction* 1661 at 1661-1662 [De Lacey, "Parent Identity"];

from Canada and other jurisdictions demonstrates that many individuals are unwilling to donate their surplus embryos because of concerns related to information disclosure. Some explain that they are nervous that their identities will later be revealed against their wishes even if they opt to donate their embryos anonymously. They are thus hesitant to donate because they worry about protecting their families' privacy and ensuring that donor offspring cannot claim child support or inheritance.³⁸ However, many potential donors also say that they are reluctant to donate their embryos for reproductive purposes because of the *dearth of information* available to them about recipients and donor offspring.

Some women or couples who were considering donating or who had made the decision to donate their embryos explained that they would only be content to donate to known recipients or to engage in "identity release" donations, as they feel comfortable disclosing their identities and would want to, in turn, know the identity of recipients and their genetic offspring.³⁹ To some, knowing the identity of their genetic kin is important in order to ensure that their own children do not encounter and marry their biological siblings or relatives.⁴⁰ Others said that they would find having a child "out there" too emotionally

Newton, "Changes" *supra* note 33; Robert D Nachtigall et al, "How Couples who have Undergone In Vitro Fertilization Decide what to do with Surplus Embryos" (2009) 92 Fertility and Sterility 2094; Robert D Nachtigall et al, "Parents' Conceptualizations of their Frozen Embryos Complicates the Disposition Decision" (2005) 84 Fertility and Sterility 431 at 433.

³⁸ See e.g. De Lacey, "Parent Identity", *supra* note 37 at 1666; Catherine A McMahon et al, "Mothers Conceiving Through In Vitro Fertilization: Siblings, Setbacks and Embryo Dilemmas After Five Years" (2000) 10 *Repro Tech* 131 at 133; Maggie Kirkman, "Egg and Embryo Donation and the Meaning of Motherhood" (2003) 38:2 *Women and Health* 1 at 9; Giuliana Fuscaldo, Sarah Russell & Lynn Gillam, "How to Facilitate Decisions about Surplus Embryos: Patients' Views" (2007) 22:12 *Human Reproduction* 3129 at 3134.

³⁹ See e.g. Kirkman, *supra* note 38 at 13; Fuscaldo, Russell & Gillam, *supra* note 38 at 3136; Lucy Frith et al. "Conditional Embryo Relinquishment: Choosing to Relinquish Embryos for Family-Building through a Christian Embryo 'Adoption' Programme" (2011) 26:12 *Human Reproduction* 3327 at 334-3335; Marilyn S Paul, et al, "Relinquishing Frozen Embryos for Conception by Infertile Couples" (2010) 28:3 *Families, Systems and Health* 258; Christopher R Newton, et al, "Embryo Donation: Attitudes Toward Donation Procedures and Factors Predicting Willingness to Donate" (2003) 18:4 *Human Reproduction* 878 at 883 [Newton, "Embryo Donation"].

⁴⁰ E.g. Fuscaldo, Russell & Gillam, *supra* note 38 at 3135; Catherine A McMahon & Douglas M Saunders, "Attitudes of Couples with Stored Frozen Embryos Toward Conditional Embryo Donation" (2009) 91:1 *Fertility and Sterility* 140 at 144.

difficult for them.⁴¹ For instance, respondents in one study explained that they might never feel a sense of closure and would worry and wonder if every child on the street is theirs.⁴²

However, there is also a substantial subset of potential donors who wish to donate anonymously, but who would like the opportunity to give and receive increased non-identifying information at the time of the donation and who wish to exchange further information in the years that follow. These individuals and couples are hesitant to donate because they will not be provided with even non-identifying information about the outcome of their donation and about who has ultimately received their embryos. Some potential donors explained that they would find it too difficult not to know whether their donation and embryo implantation had been successful and had resulted in the birth of a child.⁴³ For instance, one study reported that many of the women interviewed found that “the prospect of not knowing whether they had other genetic offspring too ambiguous and psychologically charged for them to tolerate.”⁴⁴

In addition, a common theme that runs throughout studies on the disposition decisions of individuals with surplus embryos is their concern about the health and well-being of any offspring that might be produced. Many respondents expressed a strong sense of responsibility for their genetic offspring.⁴⁵ For instance women or couples often said they

⁴¹ E.g. Julianne Zweifel et al, “Needs Assessment for those donating to stem cell research” 88:3 (2007) *Fertility and Sterility* 560 at 652; Fuscaldo, Russell & Gillam, *supra* note 38 at 3132.

⁴² De Lacey, “Parent Identity”, *supra* note 37 at 1666.

⁴³ Sheryl De Lacey, “Decisions For the Fate of Frozen Embryos: Fresh Insights into Patients’ Thinking and Their Rationales for Donating or Discarding Embryos” (2007) 22 *Human Reproduction* 1751 [De Lacey, “Decisions”]; Zweifel, *supra* note 41 at 562; Fuscaldo, Russell & Gillam, *supra* note 38 at 3132; Kirkman, *supra* note 38 at 9.

⁴⁴ McMahon, *supra* note 38 at 133.

⁴⁵ See e.g. McMahon & Saunders, *supra* note 40 at 144; Anne Drapkin Lyerly et al, “Factors that Affect Infertility Patients’ Decisions About Disposition of Frozen Embryos” (2006) 85 *Fertility and Sterility* 1623 at 1627; Fuscaldo, Russell & Gillam, *supra* note 38 at 3134.

were reluctant to donate because they would be unable to know whether their embryos had gone to a “good home” and whether their genetic children were being “properly cared for.”⁴⁶

The applicability of this research in the Canadian context is also confirmed anecdotally through a recent article published by Infertility Awareness Association of Canada. Samantha Yee, a social worker at Mount Sinai Hospital’s Centre for Fertility and Reproductive Health pointed out that potential donors were often concerned about who would be receiving their donated embryos. She reports that “[t]he most frequent question I hear from patients struggling with embryo donation is ‘how do you assess or screen the recipient couples?’ It’s obvious that most donors want their embryos to go to a “good home” and be raised by good people, but they do not necessarily want open contact or disclosure of their identifying information because of unknown future implications.”⁴⁷

Empirical research also suggests that those individuals who are inclined to donate their embryos not only potentially want to receive increased information about their donation, but also are willing to give increased information. A Canadian study explains that those individuals or couples who are willing to consider embryo donation are often open to the idea of having some future contact or exchange of information with a child born through their donation, but while some were willing to divulge their identities others wanted to maintain their anonymity.⁴⁸ In addition, this study revealed that potential donors did not view donation as a disinterested gift, but rather wanted to give information about themselves that might be helpful to a child born through their donation.⁴⁹

⁴⁶ See e.g. De Lacey, “Parent Identity”, *supra* note 37 at 1665-1667; Kirkman, *supra* note 38 at 10.

⁴⁷ Krueger, *supra* note 18.

⁴⁸ Newton, “Embryo Donation”, *supra* note 39 at 883.

⁴⁹ *Ibid.*

On account of these findings, some researchers have suggested that allowing for “conditional donations” – which enable donors to specify recipients’ characteristics and to potentially choose them – might increase the number of individuals who are willing to donate their embryos.⁵⁰ Notably, a Canadian study found that providing the option of conditional donations could make the choice to donate embryos for reproductive use more acceptable for some IVF patients.⁵¹ In addition, scholars have suggested that allowing donors and recipients to negotiate the amount of information they exchange and potential contact could also make donation more appealing for a subset of individuals with surplus embryos.⁵² Yet, currently in Canada, those individuals who wish to donate anonymously but to exchange information with donor offspring and recipients are unable to do so. The lack of mechanisms in place to enable donors, recipients and donor offspring to give and receive information is therefore potentially discouraging some Canadians from donating their embryos for reproductive use.

B. Psychological Implications for Donors

Although few people make the decision to donate their embryos for reproduction, Canadian studies and media reports indicate that *some* Canadians do decide to donate anonymously or elect to receive anonymously donated embryos for implantation.⁵³ Research from other jurisdictions shows that some embryo donors, recipients and donor offspring will have positive experiences despite the anonymous nature of these donations and the lack of information exchange between these parties. For instance, follow-up studies on embryo donation families have found that they are functioning well and that children born through

⁵⁰ See e.g. McMahon & Saunders, *supra* note 40 at 143; Newton, “Embryo Donation”, *supra* note 39 at 878; Giuliana Fuscaldo & Julian Savulescu, “Spare Embryos: 3000 Reasons to Rethink the Significance of Genetic Relatedness” (2005) 10:2 Reproductive Biomedicine Online 164 at 166.

⁵¹ See Newton, “Embryo Donation”, *supra* note 39 at 878.

⁵² See e.g. McMahon & Saunders, *supra* note 40 at 146; Fuscaldo & Savulescu, *supra* note 50 at 166.

⁵³ See e.g. Elford, *supra* note 32; Newton, “Changes” *supra* note 33; Kirkey, *supra* note 18.

these donations were not at increased risk of psychological problems.⁵⁴ Some individuals and couples who donated anonymously also report that they are happy with their decision to donate, and do not regret it, and did not express concerns about not knowing the outcome of their donation or the identity of their genetic kin.⁵⁵ However, research also demonstrates that some donors long to have further information about any children born through their donation and may experience negative psychological outcomes on account of not having access to this information. For instance, one study found that two of three women who had donated their embryos for reproductive use were emotional and upset when discussing their decision to donate and expressed “an intense ongoing curiosity about the child.”⁵⁶ These women wondered about whether it was a boy or a girl, and whether they would ever meet, and one of the respondents reported that she “agonized every day about whether it had been the right decision, 18 months after making it.”⁵⁷ Research to-date is too limited to know whether these women’s experiences are common; however, they call into question assumptions that donors are not negatively affected by the lack of information available following an anonymous donation. This research also suggests that the creation of registries that enable donors, recipients and donor offspring to exchange information – even anonymously – could help to mitigate some of these negative psychological effects.

C. No Ability or Right to Access Information

The ways in which Canadian lawmakers have responded to similar issues in the context of adoption also suggests that current laws relating to ARTs could be doing more to

⁵⁴ See e.g. Fiona MacCallum & Sarah Keeley, “Embryo Donation Families: A Follow-Up in Middle Childhood” (2008) 22:6 *Journal of Family Psychology* 799 at 799. Fiona MacCallum, Susan Golombok & Peter Brinsden, “Parenting and Child Development in Families with a Child Conceived through Embryo Donation” (2007) 21:2 *Journal of Family Psychology* 278.

⁵⁵ See e.g. De Lacey, “Decisions”, *supra* note 43 at 1754-1755.

⁵⁶ McMahon, *supra* note 38 at 133.

⁵⁷ *Ibid.*

meet their objectives to support family building while nonetheless protecting the health and well-being of women and children. While adoption law is not concerned with promoting or encouraging adoptions, it nonetheless recognizes birth parents, adoptive parents and adoptees' potential needs and desires for privacy as well as information and seeks to balance these interests in different ways. At present, where an adoption proceeds anonymously, birth parents, adoptive parents and adoptees nonetheless have the ability, and, in some provinces, the right, to obtain or exchange information prior to and following the adoption.

Canadian provinces and territories have established adoption registries or have privately run adoption registries within their jurisdiction,⁵⁸ which enable adoptees and birth parents to potentially obtain identifying or non-identifying information about one another. Active registries enable adoptees, and sometimes birth parents,⁵⁹ to search for one another and most require that the party who is located through a search provide consent prior to their identifying information being released.⁶⁰ Passive registries allow for birth parents, adoptive parents and adoptees to exchange information where they have voluntarily registered and provided consent to release their information.⁶¹ Typically, adoptees and birth parents will be able to obtain non-identifying information such as medical history, interests, education and information about physical appearance, where the other party refuses to consent to disclose their identifying information. For instance, British Columbia has an exchange registry that allows birth parents and adoptive parents to exchange non-identifying information and to communicate anonymously through the registry, until the adoptee reaches adulthood. This

⁵⁸ See e.g. *Adoption Regulation*, BC Reg 291/96, s 19-22 [*BC Adoption Regulation*]; *The Adoption Act*, SS 1998, c A-5.2, s 30(1); *The Adoption Act*, CCSM 1997, c A2, s 108ff.

⁵⁹ In Ontario, for instance the active registry will only search on behalf of the adoptee, not the birth parents. See Cindy L Baldassi, "The Quest to Access Closed Adoption Files in Canada: Understanding Social Context and Legal Resistance to Change" (2004-2005) 21 Can J Fam L 211 at 254.

⁶⁰ See Baldassi, *supra* note 59 at 254-257; See Guichon, "Comparison", *supra* note 14 at 280-281.

⁶¹ See *Ibid* at 219; Guichon, "Comparison", *supra* note 14 at 280-281.

registry thus facilitates openness or contact between birth and adoptive parents who did not decide from the outset to have an open adoption or to create an openness agreement.⁶²

Some provinces also, exceptionally, permit the release of identifying information without consent where this is required for health reasons. For instance, while adoption files in Québec are confidential, and typically may not be released without consent, the *Civil Code of Québec* provides that an adopted person has the right to obtain information about his birth parents, if being deprived of this information would result in serious injury to the adoptee or any of his close relatives.⁶³ In Ontario, an adopted individual or their descendant, a birth family member, or an adoptive parent may request a “severe medical search” which would enable them to locate and contact their biological relatives in order to obtain information that may help them to treat or diagnose a severe physical or mental illness.⁶⁴

In addition, while some provinces and territories continue to protect birth parents’ and adoptees’ anonymity unless these parties provide consent for the disclosure of their identifying information, British Columbia, Alberta, Ontario, Newfoundland and Labrador and the Yukon now provide these parties with the right to obtain access to each other’s identifying information – as indicated on the child’s birth records – once the adoptee reaches the age of majority.⁶⁵ These jurisdictions thus have “open adoption records”, unlike the remaining provinces and territories whose adoption records are sealed. Consider for example British Columbia, which amended its *Adoption Act* and *Adoption Regulations* in 1996. This legislation did not abolish anonymity retroactively; rather, where an adoption took place

⁶² BC *Adoption Regulation*, *supra* note 58, s 19; http://www.mcf.gov.bc.ca/adoption/post_registry.htm.

⁶³ CCQ, *supra* note 3, art 584.

⁶⁴ *Adoption Information Disclosure*, O Reg 464/07, s 16-18.

⁶⁵ BC *Adoption Act*, *supra* note 6, s 65; *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 74.2-74.3; *Vital Statistics Act*, RSO 1990, c V4, s 48.1ff; *Adoption Act*, SNL 1999, c A-2.1, ss 48-51; *Child and Family Services Act*, SY 2008, c 1, s 140ff.

prior to the introduction of this legislation, birth parents and adoptees who would like to maintain their anonymity have the opportunity to file a disclosure veto form, preventing the release of their identifying information.⁶⁶ Where a child was adopted after 1996, birth parents and adoptees will have a right to access information but will be able to issue a “no-contact declaration” which prohibits the party accessing birth or adoption records from using the information obtained to contact or harass them.⁶⁷ This contact veto provides space for the adoptee or birth parent to explain their reasons for not wanting to be contacted, and to provide any health or other information they feel might be relevant or helpful to the other party. If a contact veto has been issued, the birth parent or adoptee will not be entitled to access information unless they agree to sign an agreement not to contact the other party. Those parties who contravene this veto are liable to face fines and a period of imprisonment.⁶⁸

Thus while Canadian provinces have taken different approaches towards enabling or mandating the exchange of information between birth parents and adoptees, all provide these parties with the possibility to access updated non-identifying and potentially identifying information about one another. This contrasts remarkably with laws relating to embryo donation, which currently do not provide similar means for donors or donor offspring to give or receive information, even with mutual consent.

Certainly there are some important distinctions between embryo donation and adoption. For instance, unlike adoption, a child born through embryo donation may nonetheless have a gestational connection with one of his social parents, providing a

⁶⁶ BC *Adoption Act*, *supra* note 6, s 65.

⁶⁷ *Ibid*, s 66.

⁶⁸ For instance, individuals who breach a veto may be subject to a \$10,000 fine or six months imprisonment in British Columbia. BC *Adoption Act*, *supra* note 6, s 87.

surrogate has not been used. One might therefore suggest that an embryo donor is quite unlike a birth mother in that she did not experience pregnancy and childbirth. Moreover, while Chapter 1 of this thesis has pointed out that not all donors may necessarily view donation as a choice, and may not be making an informed decision to donate anonymously, embryo donors arguably have more of a choice than birth mothers. Birth mothers only have two options: keep the child or place the child for adoption. Women or couples with surplus embryos who decide that they do not wish to use them for their own reproductive purposes may choose to donate them for reproduction, but they may also donate them to research or elect for their destruction. They may also opt not to make a decision at all, and to keep the embryos frozen in storage indefinitely providing they agree to pay an annual storage fee. One might also suggest that donor offspring might be less curious than adoptees to meet their birth parents. Unlike adoptees, donor offspring were not given away because their parents were unwilling or unable to care for them, but simply because a doctor had not selected them for implantation. Without the donation these embryo donor offspring would never have been born, and even if their genetic parents had decided to “keep” them and use them for reproduction, there is no guarantee that the implantation would have been successful.

These distinctions, however, do not seem to justify giving birth mothers and adoptees the potential to access information and denying donor offspring and donors the same abilities. In the case of adoption, these laws and policies arose because of a recognition that some adoptees and birth parents would benefit from having access to information about their genetic relatives.⁶⁹ In the case of embryo donation, empirical research suggests that enabling donors and donor offspring to exchange information could also be potentially beneficial for their physical and emotional well-being.

⁶⁹ See Baldassi, *supra* note 59; see also *Pratten BCSC*, *supra* note 5 at para 78-81.

The current inability of donors, recipients and donor offspring to voluntarily exchange information is thus troubling given empirical research on the experiences of embryo donors and recipients as well as in light of trends in adoption law. It seems that if provided with means to give and receive information, a larger number of Canadians would be willing to donate their embryos. In turn, these initiatives could also go some way towards addressing the potential health and psychological implications of anonymity for some donors and donor offspring.

II. ALTERNATIVE APPROACHES TO INFORMATION DISCLOSURE

Given the problems identified with current Canadian responses to information disclosure, this Part considers whether Canadian scholars and activists' recommendations for law reform in relation to sperm donor anonymity might help to resolve these issues. It argues, however, that each of these proposed models fails to adequately address and account for the experiences and potential interests of embryo donors and also may pose additional problems for embryo recipients and donor offspring. Scholars who argue in favour of abolishing anonymity or providing increased access to information for donor offspring through other means do not account for *donors'* desires or needs for information, nor do they consider how donors seeking information might impact upon donor offspring's privacy. Moreover, many of their suggestions are also not in line with the legal rights and protections afforded to adoptees and birth parents, or to Canadians who conceive or are born through, natural conception.

A. Anonymity with a Health Registry

One proposed means of balancing the interests of donors, recipients and donor offspring is to maintain anonymity but to create a health registry such that donor offspring

can obtain updated health information about their donors and can also apply to the registry to see if they are genetically related to a potential partner. As already mentioned, prior to the Supreme Court's decision in *Reference Re Assisted Human Reproduction Act*, this was how the Canadian government sought to respond to some donor offspring's potential needs for information while recognizing some donors' and recipients' desires to donate or receive genetic material anonymously.⁷⁰ Sections 14 to 18 of the *AHRA* established a legal framework for the "collection, use and disclosure of information" related to assisted procreation activities.⁷¹ While the specific requirements for the types of information to be collected were intended to be set out in a separate set of regulations,⁷² the *AHRA* nonetheless provided a series of privacy provisions relating to the "health reporting information" – i.e. the identity, personal characteristics, genetic information and medical history – of gamete and embryo donors, individuals undergoing assisted reproduction procedures, and donor offspring.⁷³ This statute required that prior to accepting donated embryos or implanting them into a recipient, a licensed clinic or hospital needed to collect donors and recipients' health reporting information,⁷⁴ and that if the embryo was transferred to another licensee this information needed be conveyed along with it.⁷⁵ In turn, the *AHRA* required licensees to disclose to individuals who would undergo implantation with a donated embryo, donors' *non-identifying* health reporting information. It maintained donor anonymity by prohibiting

⁷⁰ See Introduction, above for a discussion of the history behind the *AHRA*; *Reference Re Assisted Human Reproduction Act*, 2010 SCC 61.

⁷¹ *AHRA*, *supra* note 20, s 14-18; See also Gruben, *supra* note 3 at 235.

⁷² See Gruben, *supra* note 3 at 235-6.

⁷³ See *AHRA*, *supra* note 20, s 3; Gruben, *supra* note 3 at 235-238.

⁷⁴ *AHRA*, *supra* note 20, s 14 (1); See also Vanessa Gruben, "Exploiting the Fiduciary Relationship: The Physician as Information Intermediary in Assisted Human Reproduction" (2009) 18:1 Health Law Review 29.

⁷⁵ *AHRA*, *supra* note 20, s 15(3).

the disclosure of the donor's identity "or information that can reasonably be expected to be used in the identification of the donor" without obtaining the donor's written consent.⁷⁶

The licensee also needed to disclose all health reporting information to the Assisted Human Reproduction Agency of Canada (the Agency),⁷⁷ which was required to "maintain a personal health information registry containing health reporting information about donors of [...] *in vitro* embryos, persons who undergo assisted reproduction procedures and persons conceived by means of these procedures."⁷⁸ Embryo recipients and donor offspring could then request and be provided with their donor's non-identifying health reporting information.⁷⁹ In addition, donor offspring would be able to apply to the Agency to verify whether they are genetically related.⁸⁰ Similar to most adoption registries, however, no identifying information could be disclosed without the donors' consent.⁸¹ Unlike adoption registries, the *AHRA* did not provide donors with the ability to obtain information about their genetic offspring.

The purpose of the *AHRA* registry was not to enable donor offspring to obtain information about their biological origins or to help to reunite genetic relatives. Rather, it was intended to promote the health of recipients and donor offspring. The registry provided donors with the opportunity, should they wish, to modify and update their health reporting information.⁸² Identifying information could only be provided without the donors' consent to

⁷⁶ *AHRA*, *supra* note 20, s 15(4).

⁷⁷ *Ibid*, s 15(2).

⁷⁸ *Ibid*, s 17.

⁷⁹ *Ibid*, s 18(3).

⁸⁰ *Ibid*, s 18(4).

⁸¹ *Ibid*, s 18(3).

⁸² *Ibid*, s 16.

physicians where this was required because of a health or safety risk to the woman undergoing the assisted reproductive procedure, or to donor offspring.⁸³

Given that these provisions were introduced after decades of debate and were struck down by the Supreme Court on the grounds that they fell within provincial jurisdiction, it seems possible that if provincial legislatures decide to institute their own regulations in relation to ARTs, they might adopt a similar framework. Yet, while this approach helps to potentially meet some donor offspring's needs for health information, and may enable them to obtain identifying information about their donors should they consent, this health registry would not enable donors to receive any information about their offspring. As was discussed in Part I, donors may also desire increased information about the outcome of their donation and their genetic children and may potentially experience negative psychological outcomes on account of donor anonymity. As a result, it would arguably be problematic to afford donor offspring this ability, but not donors. This would run counter to the objectives of Canadian laws pertaining to assisted procreation which seek not only to protect the health and interests of children born through assisted procreation, but also women who make use of these technologies.⁸⁴

It might be argued that allowing donor offspring, but not donors, to access information can be justified because donors make a conscious choice to donate their embryos and need not donate if they feel uncomfortable with the anonymous nature of the donation and the lack of information they receive. For some donors, however, donation for reproduction may not be a "choice", or at least may not be the result of a fully informed decision. Studies suggest that while some donors donated their embryos in order to help

⁸³ *Ibid*, s 18(7). It should be noted that this identifying information could not, however, be communicated to donor offspring or recipients.

⁸⁴ *AHRA*, *supra* note 20, s 2(c); *Act Respecting Assisted Procreation*, *supra* note 3, s 1.

another childless couple build their family,⁸⁵ more commonly embryos were donated because among the options for embryo disposition, donation for reproduction was viewed as “the lesser of all evils.”⁸⁶ Some individuals donated their embryos for reproduction because the other options – destruction, donation to research or indefinite storage – were undesirable or even unthinkable to them.⁸⁷ As discussed in Chapter 1 of this thesis, if agreements between spouses and fertility clinics signed prior to undergoing IVF are legally enforceable, they may also have the effect of potentially requiring an individual to donate their embryos, even if they change their mind.⁸⁸ Moreover, it seems fair to question whether individuals or couples who consent to donate their embryos for reproduction are making a truly informed decision. They need not only contemplate how they will feel at the time of the donation, but also years into the future. Donors might feel comfortable initially with not having any information, but might later on regret this decision.

Denying donors an opportunity to access information would also be inconsistent with adoption laws, which, as mentioned, typically provide birth parents with the same abilities or rights as adoptees to access information once the child reaches the age of majority. It would also not permit donors and donor offspring to be notified that the other party is seeking to obtain information about them in the same way as an active adoption search registry. It would be strictly a passive registry, which would only provide donor offspring with increased information should donors update their profiles and should donor offspring choose to look for this information.

⁸⁵ De Lacey, “Decisions”, *supra* note 43 at 1755.

⁸⁶ Paul, *supra* note 39 at 263.

⁸⁷ De Lacey, “Decisions”, *supra* note 43 at 1753; Paul, *supra* note 39 at 262-263; Frith, *supra* note 39 at 3334.

⁸⁸ See above Chapter 1 for further discussion.

B. Identity Release with Disclosure and Contact Vetoes

Some scholars and activists who argue in favour of abolishing donor anonymity have suggested that – similar to adoptees in some Canadian provinces – donor offspring should be given the right, once they reach the age of majority, to access identifying information about their biological parents.⁸⁹ A smaller number of scholars have also argued that donors should be given the right to access identifying information about their adult biological children.⁹⁰ Some commentators also argue that like adoption, the abolition of anonymity should not be retroactive and thus donors who donated prior to the abolition of anonymity should be given the option to issue a non-disclosure veto.⁹¹ They point out that allowing for the retroactive abolition of anonymity would violate donors and recipients' rights to privacy under section 7 of the *Canadian Charter*, as these parties engaged in anonymous donations with the expectation that their anonymity would be protected.⁹² Some scholars also suggest that, similar to adoptees and birth parents, donors and donor offspring should also be able to issue contact vetoes to prevent the other party or a search registry from contacting them against their wishes.⁹³

While these suggestions mirror some provincial adoption laws, it is not clear whether such approaches would necessarily be in the best interests of donor offspring and would support their health and well-being, in light of evidence that some embryo donors also want to obtain information about their offspring. These scholars neglect to mention that it has yet

⁸⁹ See e.g. Cameron, Gruben & Kelly, *supra* note 4 at 137; Giroux & De Lorenzi, "Putting the Child First", *supra* note 11; See also Shields, *supra* note 3 at 39.

⁹⁰ See Cameron, Gruben & Kelly, *supra* note 4 at 144-145.

⁹¹ See Juliet Guichon, "How Canadian Common Law Might Change to Facilitate Legislation to Permit the Donor-Conceived to Access Information Regarding Their Progenitors" in Juliet R Guichon, Ian Mitchell, Michelle Giroux, eds, *The Right to Know One's Origins: Assisted Human Reproduction and the Best Interests of Children* (Brussels: Academic and Scientific Publishers, 2012) 319 at 327 [Guichon, "Canadian Common Law"]; Cameron, Gruben & Kelly, *supra* note 4 at 145.

⁹² See Cameron, Gruben & Kelly, *supra* note 4 at 132.

⁹³ *Ibid* at 139, 145.

to be seen whether there will be any potential negative consequences that result from open-record adoptions in Canada. British Columbia was the first province to amend its adoption legislation to provide for open records once the adoptee reaches the age of majority. However, its provisions regarding mandatory disclosure will only come into effect in 2015, when the first adoptees under its 1996 statute reach the age of 19. While this legislation may have beneficial health implications for some adoptees who wish to obtain information, it seems possible that it might also have negative psychological implications for some adoptees – and by extension could also have negative consequences for some donor offspring – who will not want for their genetic parents to have access to their identifying information.

Scholars tend to speak about adoptees and donor offspring as if they were unified groups. They seem to presume that children will want to access identifying information about their biological parents, and have some contact or relationship with them and that adoptees and donor offspring will not mind if birth parents and donors have access to their identifying information in return. However, Canadian case law demonstrates that not all adoptees will be happy to have their information disclosed against their wishes. In *Cheskes*, three adult adoptees and one birth parent successfully argued that Ontario's 2005 Amendments to the *Vital Statistics Act* – which allowed for the retroactive opening up of their confidential birth records – violated their rights under section 7 of the *Canadian Charter of Rights and Freedoms*.⁹⁴ The Court found that these parties had a reasonable expectation of privacy under

⁹⁴ *Cheskes v Ontario*, [2008] OJ No 3515 [*Cheskes*]; The *Adoption Information Disclosure Act* enabled the disclosure of adoptees and birth parents' identifying information once the adoptee turned 19 except where one of these parties could prove that there were exceptional circumstances that justified issuing a non-disclosure order (i.e. to prevent significant emotional, physical or sexual harm to the birth parent or adoptee). *Adoption Information Disclosure Act* SO 2005, c 25, ss 48.5, 48.7. Following the decision in *Cheskes*, this statute was subsequently amended in 2008 to remove the requirement for mandatory retroactive disclosure. Rather, where a child was adopted prior to the introduction of this legislation, the adoptee and birth parent will have the ability, but not the right, to access these records and obtain identifying information. Birth parents and adoptees who

prior adoptions laws and that the disclosure of their birth records would result in “an invasion of the dignity and self-worth of each of the individual applicants.”⁹⁵ Where children are adopted after the introduction of legislation mandating open records they will not have a reasonable expectation of privacy; however, they may still feel that their privacy is violated through the disclosure of their information. It seems that some donor offspring may similarly not be content to release their identifying information and arguably should not be required to do so.

In turn, while contact vetoes enable adoptees and birth parents to prohibit the other party from contacting them, this does not prevent either party from, once they have obtained identifying information, searching for the other party on the Internet and obtaining photos or contact information. Moreover, the contact vetoes in themselves may have further negative health implications. A birth parent or a child who so desperately wants to get in touch with their genetic parent or kin may be devastated to find out that their relative has intentionally signed a document forbidding them from ever contacting them. Some parties who wish to get in touch with their genetic relatives may also be willing to breach these vetoes even though doing so may result in jail time and/or fines. It seems prudent to first observe any potential negative outcomes from open records and vetoes in adoption prior to recommending that a similar model be applied in the context of donations.

Finally, it ought to be reiterated that while certainly the trend has been to move towards increased openness in adoption, open-record adoptions are still not the norm in Canada and Canadian governments do not unanimously agree that identity disclosure should be required. While scholars and activists have consistently argued in favour of abolishing

would like to maintain their anonymity have the opportunity to file a disclosure veto form, preventing the release of their identifying information. See also Cameron, Gruben & Kelly, *supra* note 4 at 132-133.

⁹⁵ Cheskes, *supra* note 94 at para 83.

anonymity on the basis that this would be consistent with adoption law in Canada, not all Canadian provinces and territories give adoptees the right to obtain identifying information about their birth parents.⁹⁶ In the remaining provinces and territories adoptees and birth parents may have the ability to engage in an open adoption, and voluntarily exchange identifying or non-identifying information about one another either at the time of the adoption, or afterward, using provincial adoption registries. In this way, birth parents, adoptive parents and adoptees may preserve their anonymity if they so choose, but nonetheless may be able to give and receive information that might be important for the adoptees', and potentially the birth parents', physical and psychological health and well-being.

C. **Mandatory Known Donors**

Other scholars and activists argue in favour of openness and identity disclosure between donors and recipients from the outset of the donation. In other words, they argue in favour of banning anonymity completely.⁹⁷ One Canadian embryo donation program has heeded this advice. Beginnings Family Services, an adoption agency in Hamilton Ontario, offers an embryo donation program that requires that donors and recipients to reveal their identities to one another. The parties involved then negotiate the amount of contact or further exchange of information that they deem appropriate or desirable.⁹⁸

While providing Canadians with the option of known donations is desirable, mandating that only these types of donations be available to recipients would discourage

⁹⁶ As already mentioned, only British Columbia, Alberta, Ontario, Newfoundland and Labrador and the Yukon have open records.

⁹⁷ See Cameron, Gruben & Kelly, *supra* note 4 at 116 for a discussion of this movement. It should be noted that where Canadian scholars call for the abolition of anonymity it is not always clear whether they are calling for a complete ban on anonymity or for identity release once the child reaches the age of majority. Shanner and Johnston for instance seem to be calling for a complete ban, but this is not entirely clear. See Shanner, "Viewpoint", *supra* note 11; Johnston, *supra* note 11.

⁹⁸ <http://www.beginnings.ca/embryo-donation/faq>

donations. As was discussed in Part I of this chapter, while empirical research reveals that increased openness and information exchange might encourage more individuals with surplus embryos to donate them, it also demonstrates that some respondents would only be willing to donate anonymously or to reveal their identities once the child reaches the age of majority. Some embryo donors are only willing to donate anonymously because of concerns that they might be found to have parental obligations vis-à-vis their genetic kin. They are worried about being liable to pay child support or express fears that their genetic offspring might be able to claim from their estate and might therefore deprive their children of their inheritance.⁹⁹ Some also express concerns about their family's privacy; they worry that their genetic offspring might one day "knock on their door" wanting to establish a relationship.¹⁰⁰

In turn, mandatory known donations might also discourage some potential embryo recipients from building their families through the use of donated embryos. In the context of sperm donation, some Canadians choose to use anonymous donors because they worry about a known donor claiming parental rights and disrupting their family unit.¹⁰¹ The same concerns would be present for embryo recipients as well. Currently, only three provinces clarify that embryo donors are not considered legal parents simply by virtue of their donation and genetic connection to the child.¹⁰² As a result, where known donors are used, there is a risk that they might seek – and potentially be awarded – custody and/or access, even where these donors and recipients had initially agreed that donors would not be considered legal parents.¹⁰³ Even if embryo donors were to be denied parental rights, it is nonetheless possible

⁹⁹ See e.g. McMahon, *supra* note 38 at 133; De Lacey, "Parent Identity", *supra* note 37 at 1666.

¹⁰⁰ See e.g. McMahon, *supra* note 38 at 133.

¹⁰¹ Cameron, Gruben & Kelly, *supra* note 4 at 130.

¹⁰² *Family Law Act*, SA 2003, c F-4.5, s 7(4); *Family Law Act*, SBC 2011, c 25, s 24; CCQ, *supra* note 3, art 538.2

¹⁰³ There have yet to be any disputes over parentage in relation to embryo donation, but case law relating to sperm donation is nonetheless instructive as to what might happen if an embryo donor tried to claim parental

that they would still seek to develop a relationship with their genetic offspring against recipients' wishes. In addition, some couples report using donated embryos in order to avoid one spouse having a genetic connection to the child, and thus to downplay the importance of genes in building their family.¹⁰⁴ Having mandatory known donations arguably contravenes these objectives. By requiring that the identities of donors be known it communicates a message to recipients and to society about the importance of a child's genetic heritage, and also suggests that a child's social parents are "second best" to their genetic parents.¹⁰⁵

Some scholars have suggested that clarifying the rights and obligations of donors under the law could allow sperm donors and recipients to feel more comfortable with using known donors or identity-release donations.¹⁰⁶ This seems to be the case with regard to embryo donation as well. However, given that donors and recipients also elect to engage in anonymous donations in order to protect their privacy or for symbolic or other reasons, reforming parentage laws across Canada would not, in itself, make abolishing anonymity acceptable for all donors and recipients.

rights. It seems that especially if a single mother by choice or a lesbian couple were to use donated embryos to conceive, they might be liable to have a male embryo donor awarded parental rights as courts have been willing in some instances to "locate a father" for a child, where otherwise there would be none. See e.g. *Johnson-Steeves v Lee*, [1997] AJ No 512 (where a man was granted access to a child against the wishes and intentions of a single mother by choice. She considered him to be a known donor, while he viewed himself as a father); Consider also *SG v LC*, [2004] RDF 517 (where the parties had not drafted an agreement stipulating their intentions regarding parentage and thus a known sperm donor was able to claim parental rights on the grounds that he, not the birth mother's same sex partner, was a party to the parental project. This was the case even though the birth mother's same-sex spouse appeared on the child's birth certificate and this couple was in a civil union). For a discussion of additional cases where courts have been willing to treat donors as fathers see e.g. Cameron, Gruben & Kelly, *supra* note 4 at 123-125; Fiona Kelly, "Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family" (2009) 21:2 Canadian Journal of Women and the Law 315; Angela Campbell, "Conceiving Parents through Law" (2007) 21 International Journal of Law, Policy and the Family 242.

¹⁰⁴ See Eric Blyth et al, "Embryo Relinquishment for Family Building: How Should it be Conceptualised?" (2011) 25:2 International Journal of Law, Policy and the Family 260 at 262.

¹⁰⁵ See generally Angela Campbell & Robert Leckey, "Parentage is about more than DNA" *The Globe and Mail* (28 October 2010) A23; See also Robert Leckey, "Adoptive parents aren't second best" *The Globe and Mail* (8 October 2009) A17.

¹⁰⁶ See Johnston, *supra* note 11 at 51; Cameron, Gruben & Kelly, *supra* note 4 at 145-148.

D. Notations on Birth Certificates

Finally, some scholars have suggested that where a child is conceived using donated genetic material the law should require that a notation be made on their birth certificate and that an appendix recording the child's genetic parents be attached and revealed when the child reaches the age of majority.¹⁰⁷ They have pointed out that even if anonymity were to be abolished, this would not stop opposite-sex couples from keeping secret from their children the fact that they were conceived using donations.¹⁰⁸ Donor offspring would then not even be aware that they might want to obtain medical or other information about their donor. Moreover, it has been suggested that this secret keeping might have negative psychological effects for donor offspring.¹⁰⁹ Some scholars have also argued that by not having a notation on the child's birth certificate, Canadian law is "colluding" with a child's parents to keep this secret and is also contravening children's rights to have an accurate record of their genetic lineage, which they claim is supported by article 7(1) and article 8 of the United Nations *Convention on the Rights of the Child*.¹¹⁰ They contend that appending a note to the child's birth certificate would ensure that gamete and embryo recipients disclose to their children their use of ARTs with donations.

Empirical research on families who conceived through embryo donation confirms that, like gamete recipients, many embryo recipients intend to keep the manner of their

¹⁰⁷ See e.g. Johnston, *supra* note 11 at 54; Guichon, "Canadian Common Law", *supra* note 91 at 322; See also Giroux & De Lorenzi, "Putting the Child First", *supra* note 11 at 91.

¹⁰⁸ See e.g. A Lalos, C Gottlieb & O Lalos, "Legislated Rights for Donor-Insemination Children to Know their Genetic Origin: A Study of Parental Thinking" (2007) 22 *Human Reproduction* 1759 at 1766; Cameron, Gruben & Kelly, *supra* note 4 at 111; Shanner, "Viewpoint", *supra* note 11 at 25.

¹⁰⁹ See Cameron, Gruben & Kelly, *supra* note 4.

¹¹⁰ See Guichon, "Canadian Common Law", *supra* note 91 at 321; Giroux & De Lorenzi, "Putting the Child First", *supra* note 11; Michelle Giroux & Mariana De Lorenzi, "The Recognition of the Right to Identity of Children Born of Assisted Procreation: A Provincial Responsibility" in Juliet R Guichon, Ian Mitchell, Michelle Giroux, eds, *The Right to Know One's Origins: Assisted Human Reproduction and the Best Interests of Children* (Brussels: Academic and Scientific Publishers, 2012) 310 at 311-312.

child's conception a secret. For instance, one study from the United Kingdom has reported that only 33% of embryo donation parents interviewed had told or were planning to tell their child that they were not genetically related to them.¹¹¹ Secrecy might similarly have negative effects on embryo donor offspring, who may potentially have a stronger need or desire than children born through gamete donation to obtain information, as they do not have a genetic connection to either of their social parents.

However, while including a notation on the child's birth certificate might go some way towards discouraging this secret keeping, this proposal is problematic for the same reasons as having a health registry; it would not provide donors with similar information. Arguably this notation could also violate donor offspring's privacy. While some children may wish to know the manner of their conception this does not mean that they wish for others who will see their birth certificate to know that they were born through the use of donated gametes or embryos. It should be a child's choice as to whether to disclose this information to the public and providing for a notation on the birth certificate itself would deny them this option.

In addition, recording donors' names on birth certificates or in an appendix to the birth registration could also devalue social parents' connection to their child and disregard the practical and symbolic functions of birth certificates under Canadian law. Where a child is born through assisted procreation using donations, birth certificates serve as a means for a child's parents to demonstrate their relationship with a child – despite their lack of genetic connection. It is not merely intended to “evidence the biological ties between parent and

¹¹¹ See Fiona MacCallum & Susan Golombok, “Embryo Donation Families: Mothers’ Decisions Regarding Disclosure of Donor Conception” (2007) 22:11 *Human Reproduction* 2888 at 2888 [MacCallum & Golombok, “Embryo Donation Families”]. See also MacCallum, Golombok & Brinsden, *supra* note 54 at 285.

child”¹¹² but also to serve as a “marker of the parent-child relationship and the composition of the child’s family.”¹¹³ In addition, birth certificates provide named parents with certain legal rights. As was explained in *M.D.R. v Ontario*:

Birth registration provides an important means for parents to participate in their child’s life. The inclusion of a parent’s particulars on a child’s birth registration document ensures that consent is required for an application for the child’s adoption and that the parent is entitled to participate in determining the child’s surname. It allows the named parent(s) to obtain a birth certificate, an OHIP card, a social insurance number, register the child in school, obtain airline tickets and passports for the child, and to assert his or her rights under various laws.¹¹⁴

It is thus arguably inappropriate for donors, who have no intention to serve as parents to their genetic offspring, to have their names recorded or appended to a child’s birth certificate.

Furthermore, while including such a notation would perhaps discourage recipients from keeping the manner of their child’s conception a secret, it is not the role of the state to force Canadians to disclose to their children that they are not genetically related to them. Adoption law does not mandate that adoptive parents disclose to their children that they were adopted. This disclosure has become common practice in adoption and is encouraged by adoption agencies and counsellors; however, it is not legally required and Canadians who adopt a child who has similar racial or ethnic characteristics as themselves may be able, and may choose, to keep this a secret. The same is true where a child’s mother conceives naturally but not with her husband or partner; the law does not mandate that she disclose to

¹¹² See *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 SCR 835 at para 16.

¹¹³ *MDR v Ontario (Deputy Registrar General)* (2006), 270 DLR (4th) 90, 81 OR (3d) 81 at para 38.

¹¹⁴ *Ibid.* See similarly *Rypkema v British Columbia*, in which the BC Supreme Court was willing to remove a surrogate mother’s name from the birth registration and replace it with the intending parents’, explaining that this was appropriate in the circumstances in part because the surrogate and her husband did not intend to parent the child and had released all claims to parent the child. The court explained that placing the child’s intending parents names on the birth certificate would ensure that the child would not be disadvantaged and would enable his parents to “register the child in school, obtain airline tickets and passports for him, and assert his rights under laws including the B.C. Benefits (Child Care) Act and Young Offenders Act”. It would also be a means to participate in his life, would affirm the parent-child relationship, and would provide presumptive proof of the relationship.”; *Rypkema v British Columbia*, 2003 BCSC 1784, 233 DLR (4th) 760 at para 31.

her child, or her spouse, the identity of the child's genetic father. Canadian law also does not require parents to disclose to their children whether they are predisposed to certain genetic illnesses. Parents who discover that they have an incurable genetic illness may choose to hide this from their children if they so wish, for instance, so as not to worry them about their medical condition.

Finally, having such a notation may not be needed if donors, recipients and donor offspring have the means to exchange information following the donation. Empirical research suggests that the lack of information available to recipients and donor offspring about embryo donors may be one factor that is encouraging families to keep this secret. One of the primary reasons given for why parents intended to keep secret their use of embryos was in order to protect their child. Respondents expressed that because they had received embryos that were donated anonymously they felt that disclosure would potentially be more harmful than helpful. It was explained that their child might want increased information about their donors and would potentially be hurt by their inability to obtain this information.¹¹⁵ This research thus suggests that if there were opportunities to exchange information either anonymously or openly following the donation, then potentially fewer individuals would be inclined to keep secret their use of assisted procreation and donated reproductive material.

III. RECOMMENDATIONS FOR LAW REFORM

In light of the problems identified with these aforementioned approaches to information disclosure, this chapter provides its own recommendations for law reform. Maintaining anonymity, but creating registries to enable donors, recipients and donor offspring to voluntarily exchange information, could help to better balance these parties'

¹¹⁵ See MacCallum & Golombok, "Embryo Donation Families", *supra* note 111 at 2893.

respective interests. It would recognize donors' and donor offspring's potential desires to give and receive information, while nonetheless protecting the anonymity of those parties who do not wish to exchange information. Moreover, clarifying the rights and obligations of donors under the law and providing for increased counselling could also encourage openness and information exchange through this registry.

Maintaining anonymity would not only encourage donations and protect donors' and recipients' privacy, but importantly could also help to protect the privacy interests of donor offspring. While some embryo donors and donor offspring might desire increased information about their genetic relatives, not all will necessarily be comfortable having their identifying information released without their consent. Given empirical research that suggests that donors may also seek information about their genetic kin, it seems crucial that the law protect their offspring's privacy.

However, if Canadian law is going to continue to protect donor anonymity, then it seems paramount that provincial legislatures create registries to enable donors, recipients and donor offspring to exchange information. Donor registries, similar to those in place for adoptees and birth parents, should be created to require the collection and disclosure of non-identifying health reporting information, and to enable, but not mandate the disclosure of identifying information with the parties' consent. Up until the child reaches the age of majority, the registry could be passive and thus enable donors and recipients to elect to exchange information should they desire and without being prompted. For instance, donors and recipients who wish to maintain their anonymity but nonetheless to have contact could exchange email information through the registry, similar to how some parents decide to exchange letters or emails through their adoption agency. Donors could also provide updated

medical information through the registry as well as other forms of non-identifying or potentially identifying information, should they wish. These registries could also enable two individuals who are conceived through donations to check whether they are genetically related. They could allow for “severe medical searches” in all provinces such that if a donor-conceived child’s health is dependent on doctors obtaining information about the donor(s) and contacting them, physicians may receive this information.

Once the child reaches the age of majority, donors and donor offspring could both be contacted to see if they would like to disclose further information, or would like to be put in contact with each other. Having a passive registry while the child is under the age of majority would help to ensure that donors and donor offspring are not bothered by requests for information from either party and could help to protect their privacy. However arguably once donor offspring are adults, it would make sense to have an active registry in place that enables the registry to contact either donors or donor offspring should the other party request information. The disclosure of information, however, should be purely voluntarily in order to balance donors’ and recipients’ potential desires for privacy.

Empirical research suggests that some embryo donors will be willing to give donor offspring information and that these voluntary registries could thus go a long way toward resolving some of the issues donor offspring face with regard to obtaining health and identifying information. One presumption that seems to be underlying arguments in favour of abolishing donor anonymity is that anonymous donors will be unwilling to give any updated information about themselves unless they are compelled to do so. This does not seem to be the case with regard to embryo donation. While some donors might not be willing to provide identifying information, studies suggest that given the attachment and responsibility these

embryo donors feel for their embryos and genetic kin, many donors would likely want to provide whatever information their genetic offspring might require. They simply need to have a means through which to communicate this information.

Moreover, in order to further encourage donors, recipients and donor offspring to elect to exchange information through these registries, it could also be helpful to clarify the rights and obligations of embryo donors under the law. As was mentioned in Part II, few provinces have made clear that embryo donors do not become legal parents merely by virtue of their genetic connection to donor offspring. If Canadian law made absolutely clear that donors will not be held responsible for child support or inheritance, and will not be able to obtain custody or access, then this could help to encourage further openness. Consider the example of adoption. Under Canadian adoption law, an adoption severs parental ties between birth parents and adoptees.¹¹⁶ Birth parents thus know that even if their identity is known, they will not be financially responsible for adoptees. In turn, adoptive parents do not have to worry that birth parents will be able to claim parental rights once the adoption is finalized; the law makes clear that any openness between the parties is voluntary, and that openness agreements between the parties are not legally enforceable.¹¹⁷ While severing parental ties would not necessarily be appropriate in the context of donations, as some recipients wish for donors to be considered legal parents,¹¹⁸ similar clarity about donors' rights and obligations could nonetheless be beneficial in order to encourage further information disclosure where a

¹¹⁶ See e.g. *BC Adoption Act*, *supra* note 6, s 37; *Child and Family Services Act*, RSO 1990 c 11, s 158; CCQ, *supra* note 3, art 577.

¹¹⁷ See e.g. See e.g. *BC Adoption Act*, *supra* note 6, s 59; *Practice Standards and Guidelines for Adoption* (British Columbia: Ministry for Children and Families Adoption Branch, 2001) at p 2-2, available online: http://www.mcf.gov.bc.ca/adoption/pdf/adopt_stand.pdf

¹¹⁸ See e.g. *AA v BB*, 2007 ONCA 2, [2007] OJ No 2.

donation has proceeded anonymously. It could also make some donors and recipients less fearful about engaging in known or identity-release donations.

Finally, providing counselling for donors, recipients and donor offspring could also help to encourage openness and disclosure without abolishing anonymity. Here too, adoption laws could provide helpful inspiration for law reform in relation to embryo donation. For instance, Ontario's *Child and Family Services Act* regulation mandates that adoption agencies inform birth parents that Ontario's birth records are now open, and that parents and adoptees have the right or the ability to obtain identifying and non-identifying information about one another.¹¹⁹ Similarly, embryo donation regulations should stipulate clearly that embryo donors and recipients be informed about the current state of the law relating to donor anonymity, and the potential consequences of anonymity and secrecy for donor offspring as well as for donors. They could also be encouraged to exchange non-identifying information through provincial registries.

While this chapter has sought to explore the implications of current laws and proposals for law reform in the context of embryo donation, it does not advocate that legislators adopt a separate set of laws for embryo donation. If provincial legislatures decide to reform current laws to allow for information disclosure, it is unlikely that they would design more than one set of rules to apply to gamete and embryo donations. Moreover, this chapter contends that while the interests of donors in acquiring information about the outcome of their donation is not discussed in the context of sperm donation, there are likely some sperm donors who, like embryo donors, wish to have access to information about their biological kin where they have donated anonymously. Egg donors may similarly be interested in acquiring further information. In these contexts it thus also seems important to

¹¹⁹ *Child and Family Services Act*, RRO 1990, Reg 70, s 49.2

provide means to exchange information, but not to provide a right to access identifying information in order to balance donors', recipients' and donor offspring's potential conflicting interests in protecting their privacy and anonymity or obtaining and exchanging information.

These recommendations for reform are not without their limitations. While *Pratten* confirmed that donor offspring do not have a right under domestic law to access identifying information about their biological parents, scholars who contend that this right is supported under international law will not be satisfied with this chapter's proposal to maintain anonymity. In turn, scholars might point out that provincial registries would not be of much assistance given the potential for transfers from one clinic to the next as well as cross-border donations.¹²⁰ However, it seems that prior to contending with the implications of donor anonymity on an international scale, Canadian law ought to be responding to the problems with the lack of information disclosure at the domestic level.

Ultimately, introducing registries, clarifying the rights and obligations of donors and providing for counselling under the law will not solve all the potential problems associated with the lack of information exchange between donors, recipients and donor offspring, but it would go some way towards balancing these parties' respective interests. Giving these parties the ability, but not the right, to exchange information that they deem appropriate or desirable could help to mitigate at least some of the potential health implications for donors

¹²⁰ Given the limited number of available donated embryos as well as the restrictions on receiving payment for embryos in Canada, Canadians may choose to donate their embryos outside of Canada or to receive frozen embryos from donors in another country. For instance, media reports indicate that some Canadians have donated their embryos through programs in the United States; See Priest, "The birth", *supra* note 18; Lisa Priest, "Embryo-adoption program to offer infertile couples one last chance" *The Globe and Mail* (4 March 2002) A1; See also Jocelyn Downie & Françoise Baylis, "Transnational Trade in Human Eggs: Law, Policy and (In)Action in Canada" (2013) 41:1 *Journal of Medicine, Law and Ethics* 224 (while they discuss egg donation, rather than embryo donation, they provide some insight into the practices of cross-border trading of reproductive material in Canada).

and donor offspring that might result from a lack of information. In turn, it would not only maintain the small number of current donors who are willing to donate anonymously, but could potentially increase the number of Canadians who are willing to donate their embryos for reproduction. Finally, it would help to balance donors', recipients' and donor offspring's potential needs and desires to maintain their anonymity and privacy. It would thus help to support the use of ARTs for family building while better promoting the health and well-being of women and children.

CONCLUSION

This thesis has argued that current legal responses to embryo disposition disputes and embryo donor anonymity do not, in practice, go far enough to support the expressed objectives of the *AHRA* and Quebec's *Act Respecting Assisted Procreation*. Federal and provincial laws providing spouses with joint decision-making power with regard to their surplus embryos do not recognize the potential negative health effects of IVF for women, and the ways in which women are disproportionately affected by laws that enable one spouse to withdraw his or her previously given consent for embryos to be used for procreative purposes. The creation and potential enforcement of embryo disposition agreements does not take into account that women may not have sufficient information or support to make free and informed decisions about how their embryos ought to be disposed of, prior to undergoing an IVF cycle. In turn, the lack of mechanisms in place to enable donors, recipients and donor offspring to exchange information following an anonymous donation is potentially discouraging family building through the use of embryo donation, and may have negative effects on the health and well-being of women.

Existing or proposed alternative legal approaches to embryo disposition disputes and embryo donor anonymity also do not help to better support these statutes' objectives, and in some cases, pose additional problems. Providing for a right not to procreate and allowing for automatic destruction of embryos in the event one spouse revokes his or her consent raise the same issues as current legal approaches to embryo disposition in Canada. Treating embryos as property that can be divided between spouses also contravenes the *AHRA*'s express intentions to prevent the commodification of reproductive materials. Permitting anonymity but allowing for a health registry for donor offspring to access non-identifying information

would not adequately address the health interests of donors and donor offspring as it would deny donors the opportunity to receive information about their offspring and would not permit these parties to notify one another that they would like to exchange information. In turn, mandatory identity-release donations with vetoes would not necessarily support the health and well-being of some donor offspring and donors who might seek to protect their privacy, while mandatory known donations could further discourage family building through the use of donated embryos. Finally, providing for notations on birth certificates could contravene the practical and symbolic function of these documents and could inappropriately interfere with parents' decisions about whether to disclose to their children the manner of their conception, as well as children's decisions about whether to disclose to the public that they were conceived through the use of donations.

In light of these arguments and observations, this thesis has provided recommendations for how Canadian legislatures might better respond to issues relating to embryo disposition disputes and donor anonymity in a way that accords with the intentions and objectives of the *AHRA* and Quebec's *Act Respecting Assisted Procreation*. It suggests that the *AHRA* and Quebec's *Regulation Respecting Assisted Procreation* should be reformed such that one individual cannot prevent his or her spouse or partner from using their surplus embryos for their own procreative purposes. However, where both spouses want to use the embryos for procreation separately, a woman should be given priority given the greater health risks for women who undergo egg retrieval and the biological differences between men and women that would potentially make it more difficult for women to conceive without the use of these embryos. In light of empirical research revealing women's changing perceptions of their embryos as well as the emotional circumstances surrounding IVF

treatment, embryo disposition agreements signed prior to a woman undergoing an IVF cycle ought to be legally unenforceable, but nonetheless can be encouraged as a means for spouses to set out their expectations and aspirations regarding embryo disposition. Moreover, where parties disagree as to how embryos ought to be disposed of, but neither wishes to use the embryos to have more children, these embryos ought to be destroyed, as embryos should only be donated where both parties consent.

This thesis also recommends that Canadian law continue to support donor anonymity; empirical research suggests that at present, many donors would not feel comfortable donating if they could not do so anonymously because of concerns with regard to protecting their privacy and ensuring that they are not responsible financially for their genetic offspring. Some recipients similarly would also not be content to use known or identity-release donors, in order to protect their families from the intrusion of a donor, whom they did not intend to have parental rights. However, if Canadian law continues to support donor anonymity then it is crucial that provincial legislatures create registries that allow donors, recipients and donor offspring to exchange and obtain non-identifying or identifying information voluntarily, and that allow these parties to notify one another, once the child reaches the age of majority, about their desire to obtain further information.

It would also be desirable in relation to both disputes between spouses and donor anonymity for provinces that have not yet done so to clarify the rights and obligations of embryo donors under the law. Where a substantial period of time has passed between the time the embryos were created and the time when one spouse wishes to use them for procreative purposes, then, should one spouse not wish for the embryos to be used for procreation, he or she should be considered a donor under the law and should not be liable to

pay child support or to have other parental obligations. Clarifying that embryo donors do not have parental rights or obligations would also likely make some donors and recipients less apprehensive about potentially exchanging increased non-identifying or even identifying information.

Finally, providing for increased and mandatory counselling for Canadians who use their reproductive materials to create embryos, and for embryo donors, recipients and donor offspring could help to resolve some of the issues that arise in relation to embryo disposition disputes and embryo donor anonymity. Counselling could help to confirm that those individuals who make the decision to donate their embryos are making free and informed decisions, and could also ensure that prior to creating embryos, spouses are informed of their rights and their inability to withdraw their consent for their embryos to be used for their spouse or partner's procreative purposes. In turn, counselling could also promote openness and information exchange between donors, recipients and donor offspring and could encourage recipients to disclose to their children the manner of their conception.

Reforming current laws in accordance with these recommendations could help to better support the objectives of current statutes and regulations relating to ARTs. It could help to support those individuals or couples who wish to build their families through the use of IVF or embryo donation. However, it would also recognize and seek to mitigate the potential negative health effects of these practices for women and children and would help to ensure that Canadians are making free and informed decisions regarding the use, disposition or donation of their surplus embryos.

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