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IS IT TIME TO TELL? ABOLISHING DONOR ANONYMITY IN CANADA

Fiona Kelly*

Over the past two decades, a growing number of donor-conceived people have spoken out about the impact of donor anonymity on their health and wellbeing. A significant number of legislatures have responded to these concerns by introducing laws that prospectively (and in one case, retrospectively) abolish donor anonymity. This article considers the increasing pressure on Canadian provinces to end anonymity and introduce registers which enable donor conceived people to access their donor's identifying information. While the article does not endorse the genetic essentialism that is often a feature of advocacy in the field, it does argue that there are no longer grounds upon which Canada can justify the practice of prospective anonymity. Substantial evidence suggests that the wellbeing of future generations of donor-conceived people is best met by providing them with the option of accessing their donor's identity. What has received less attention in the literature is what type of open disclosure model should be adopted. Decisions need to be made about issues such as whether legislation should be prospective or also retrospective in its operation, how many families a donor should be permitted to donate to, if and how donor offspring are to be notified of the nature of their conception, and how the expectations of participants are to be managed.

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1. INTRODUCTION

Over the past two decades, a groundswell of opposition to maintaining the anonymity of sperm and egg donors has emerged, with a growing number of jurisdictions prospectively abolishing donor anonymity altogether.¹ The argument consistently made to support legislative change is that maintaining donor anonymity has the potential to harm the psychological wellbeing and health of a significant number of donor-conceived people. The impetus for change has come largely from donor offspring, many of whom are now adults. They have argued that donor anonymity denies them access to vital information about their genetic identity and medical history. Many parents who have used donated gametes to conceive [“recipient parents”] have also called for change, asserting that having access to donor information is in the best interests of their donor-conceived children. Despite growing recognition of the potentially negative impact of donor anonymity on donor-conceived offspring, Canada has remained steadfast in its commitment to the principle. When the *Assisted Human Reproduction Act*, the first federal law to regulate donor conception in Canada, commenced in 2004, the decision was made to retain anonymity.² In 2011, the issue was revived when donor conceived adult Olivia Pratten initiated a constitutional challenge to anonymity. Pratten was successful at trial,³ but the decision was ultimately overturned by the Court of Appeal⁴ and

¹ Donor anonymity requires that the identity of the gamete donor is not revealed to the recipient of the donated gametes or any donor offspring.

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

³ *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656, 99 RFL (6th) 290.

⁴ *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480, 25 RFL (7th) 58.

leave to appeal to the Supreme Court was denied.⁵ Anonymous donor sperm and eggs thus remain available in Canada, though the issue continues to attract significant debate.⁶

While Canada has chosen to maintain donor anonymity, a growing number of jurisdictions have abolished the practice,⁷ suggesting that there will continue to be challenges to the Canadian position. Though details of the disclosure models vary across jurisdictions, the most common approach has been to introduce prospective laws that create a donor register to which children conceived after the date of legislative commencement can apply when they reach a specified age. Reforms have sometimes also included voluntary registers, which allow donor-conceived people and donors who are not covered by the

⁵ *Pratten v British Columbia (Attorney General)*, 35191 (30 May 2013); [2013] SCCA No 36.

⁶ See e.g. Julie Ireton, “Canadian Sperm Donor Registry Overdue, Families Say”, *CBC News* (14 September 2016), online: <www.cbc.ca>; The Current “Advocates Call for Public Registry for Sperm Donors and Offspring” (15 September 2016), online: <www.cbc.ca/radio/thecurrent>.

⁷ These include Sweden in 1984 (*Genetic Integrity Act* (2006: 351)), Austria in 1998 (Fortpflanzungsmedizingesetz BGBl. Nr. 275/1992), Switzerland in 2001 (*Federal Act on Medically Assisted Procreation of 18 December 1998* – FF 1996 III, 197 (LPMA)), The Netherlands in 2002 (Wet donorgegevens kunstmatige bevruchting, 2002), Norway in 2003 (*Act on Biotechnology 2003* (with effect from January 2005)), the UK in 2004 (*Human Fertilisation and Embryology Act 1990* (UK) and the *Human Fertilisation and Embryology Act 2008* (UK)), Finland in 2006 (The Act on Assisted Fertility Treatments (1237/2006) (Finland) (which came into force on 1 September 2007)), New Zealand in 2004 (*Human Assisted Reproductive Technology Act 2004* (NZ)) and Australia in 2005 (NHMRC *Ethical Guidelines on the Use of Assisted Reproductive in Clinical Practice and Research*), and Germany in 2017 (Samenspenderegistergesetz).

prospective laws to voluntarily agree to the exchange of contact information.

In recent years, a growing number of Canadian scholars have called for an end to donor anonymity.⁸ Their attention has focused primarily on whether this can be achieved through litigation and, in particular on the constitutional arguments made in the *Pratten* case.⁹ In this article, I draw on international legislative trends to argue that the Canadian provinces should introduce a *statutory* open disclosure model that is not contingent on identifying any particular constitutional right. The article begins with a discussion of how Canada has historically addressed the issue of donor anonymity, as well as the current legal position. It then provides an overview of the arguments used to support the abolition of anonymity in other jurisdictions. While the article does not endorse the “vein of genetic

⁸ See Jeanne Snelling, “A Time for Change? The Divergent Approaches of Canada and New Zealand to Donor Conception and Donor Identification” in Trudo Lemmens et al, eds, *Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction* (Toronto: University of Toronto Press, 2017) 206; Juliet Guichon, “The Priority of the Health and Well-Being of Offspring: The Challenge of Canadian Provincial and Territorial Adoption Disclosure Law to Anonymity in Gamete and Embryo Provision” in Trudo Lemmens et al, eds, *Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction* (Toronto: University of Toronto Press, 2017) 178; Vincent Couture et al, “Strengths and Pitfalls of Canadian Gamete and Embryo Donor Registries: Searching for Beneficial Solutions” (2014) 28:3 *Reprod BioMed Online* 369.

⁹ See Vanessa Gruben & Daphne Gilbert, “Donor Unknown: Assessing the Section 15 Rights of Donor-Conceived Offspring” (2011) 27:2 *Can J Fam L* 247; Vanessa Gruben, “A Number by No Name: Is There a Constitutional Right to Known One’s Sperm Donor in Canadian Law?” in Lemmens et al, *supra* note 8 at 145; Michelle Giroux & Cheryl Milne, “The Right to Known One’s Origins, the *AHRA Reference*, and *Pratten v AGBC*: A Call for Provincial Legislative Action” in Lemmens et al, eds, *supra* note 8 at 124.

determinism”¹⁰ that is often a feature of advocacy in the field—the belief that an individual’s identity is primarily the product of his or her genes—it does argue that there are no longer grounds upon which Canada can justify the practice of prospective anonymity. Substantial evidence suggests that the wellbeing of future generations of donor-conceived people is best met by providing them with the option of accessing their donor’s identity. It is recommended that this be achieved through the introduction of open disclosure laws that provide for the prospective abolition of donor anonymity, as well as retrospective access to a donor’s identity where he or she consents. The second half of the article tackles the challenging, and often unaddressed, issue in the existing literature of what type of open disclosure model Canadian provinces might adopt. Best practice requires more than simply an end to anonymity. Decisions need to be made about whether legislation should be prospective or whether it should also operate retrospectively; how many families a donor should be permitted to donate to; how donor information is to be stored, managed, and released; if and how donor offspring are to be notified of the nature of their conception; how the expectations of participants are to be managed; how communication and/or contact might be facilitated; what age a child should be to receive donor information; whether identifying information should also be available to donors and recipient parents; and how an open disclosure model might operate in the context of gamete importation. It may also be necessary to review family law legislation to clarify the legal status of gamete donors, as well as explore how the abolition of anonymity might affect the supply of donor gametes.

¹⁰ Jenni Millbank, “Identity Disclosure and Information Sharing in Donor Conception Regimes: The Unfulfilled Potential of Voluntary Registers” (2014) 28:3 *Int'l JL Pol'y & Fam* 223 at 224.

2. DONOR ANONYMITY IN CANADA

There is no restriction in Canadian law on the use of anonymously donated sperm or eggs. When the first Canadian legislation regulating donor conception, the *Assisted Human Reproduction Act*, was introduced in 2004, the decision was made to permit anonymous gamete donation to continue.¹¹ This was a surprising position to have taken given that just months before, the federal Standing Committee on Health concluded that donor anonymity should cease in Canada.¹² The Standing Committee recommended that anonymous donation be abolished on the basis that “where there is a conflict between the privacy rights of the donor and the rights of a resulting child to know its heritage, the rights of the child should prevail.”¹³ Likening donor conception to adoption, the Committee stated that, “we want a donation system that is regulated, non-commercial, and transparent.”¹⁴ However, when drafting the *AHRA*, the legislature preferred the position of the Royal Commission on New Reproductive Technologies (the Baird Commission), which recommended a decade earlier that sperm and egg donation remain anonymous.¹⁵

Though the Baird Commission recognized that “some [reproductive practices] are harmful to the interests of children

¹¹ *AHRA*, *supra* note 2, ss 14–18 (now repealed).

¹² House of Commons, Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December 2001) (Chair: Bonnie Brown), online: <www.parl.gc.ca/HousePublications/>.

¹³ *Ibid* at 21.

¹⁴ *Ibid*.

¹⁵ Canada, *Proceed with Care—Final Report of the Royal Commission on New Reproductive Technologies*, by Patricia Baird (Ottawa: Privy Council Office, 1993, archived) at 1029.

born through the use of various technologies”,¹⁶ it was concluded that their needs could be met through the gathering and regulation of more non-identifying information from donors and better record keeping. Two concrete recommendations related to these issues emerged: (i) non-identifying information about the donor (genetic, social, and medical information) should be made available to donor conceived children and their parents at any time; and (ii) identifying information (name, date of birth, city of residence) should be stored and released “only in very rare cases” where the physical or psychological health needs of the child warranted it. The Baird Committee also recommended a review of parentage laws, warning that a lack of clarity around parentage would make the abolition of anonymity risky.¹⁷

The Baird Commission’s recommendations about information provision were incorporated into the *AHRA*, but donor anonymity was maintained. The *AHRA* mandated that specific health information¹⁸ be obtained from donors and that a “personal health information registry” be created and maintained by the newly-formed Assisted Human Reproduction Agency of Canada. Upon the request of a donor-conceived person, the Agency was required to disclose health information,¹⁹ but the

¹⁶ *Ibid* at xxxi.

¹⁷ For a more recent discussion of the risks posed by the lack of comprehensive parentage legislation see Angela Cameron, Vanessa Gruben & Fiona Kelly, “De-Anonymising Sperm Donors in Canada: Some Doubts and Directions” (2010) 26:1 Can J Fam L 95.

¹⁸ Section 3 of the *AHRA* sets out an expansive definition of “health reporting information” that included “the identity, personal characteristics, genetic information and medical history of donors of human reproductive material and *in vitro* embryos, [of] persons who have undergone assisted reproduction procedures and persons who were conceived by means of these procedures.”

¹⁹ *AHRA*, *supra* note 2, s 18(3).

identity of the donor “shall not be disclosed without the donor’s written consent.”²⁰ The *AHRA* also permitted donor-conceived individuals concerned about consanguinity to request that the Agency disclose to them whether they were genetically related to a second individual and the nature of the relationship.²¹ Ultimately, however, the provisions were of no effect, as they never came into force. Moreover, the Supreme Court of Canada struck them down in 2010 on the grounds that the relevant sections were *ultra vires*, as they concerned matters that were concerned principally with health and thus fell within the legislative authority of the provinces.²² To date, no provincial government has legislated on the issue.

In the wake of growing discontent among donor conceived adults in Canada, a constitutional challenge to the practice of anonymity was launched in the British Columbia Supreme Court in 2010 by Olivia Pratten.²³ Pratten was conceived in 1982 using sperm from an anonymous donor. She had almost no information about him and the doctor who performed the insemination insisted that all records had been destroyed. Suing the Attorney General of British Columbia, Pratten relied on analogy with adoption to assert that she was discriminated against based on her status as a donor-conceived person. Pratten argued that the province’s *Adoption Act*,²⁴ which permits adoptees born pre-1996²⁵ to request identifying

²⁰ *Ibid*, ss 18(2)–(3).

²¹ *Ibid*, s 18(4).

²² *Reference Re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457.

²³ *Supra* note 3.

²⁴ *Adoption Act*, RSBC 1996, c 5.

²⁵ Part 5 of British Columbia’s *Adoption Act* was amended in 1996 to permit adoptees to acquire information about their biological parents in three ways. First, it requires the collection of information about the

information about their birth parent(s) and access that information provided the birth parent(s) have not filed a contact or disclosure veto, violates section 15 of the *Charter* because it is underinclusive. While adoptees can apply to obtain their birth parents' identities, donor-conceived individuals, who often experience analogous "feelings of loss and incompleteness" do not. Pratten also argued that the legislature's failure to enact legislation to allow donor offspring to access biological information violates a "free-standing" positive right to "know one's past", as guaranteed by section 7 of the *Charter*.

Pratten's section 15 argument was successful at trial.²⁶ Drawing on affidavit evidence²⁷ from donor-conceived

medical and social history of the adoptee's biological family. Second, it provides for openness agreements which facilitate communication and contact, if appropriate, between the adoptee and the biological family (often referred to as "open adoption"). Finally, adoptees adopted after 1996 have the opportunity to learn the identity of their biological parents, either through their original birth registrations or adoption order. For those adopted before 1996 (i.e., before the legislation was introduced), identifying information may only be disclosed in instances where the party whose information is being requested has not filed a disclosure veto. Where the birth occurred after 1996, both an adoptee and a birth parent may file a "no contact" declaration which precludes contact between them. Ontario, Alberta, Newfoundland, and the Yukon Territory also have systems of open adoption, though the details vary from province to province. See *Adoption Act*, *supra* note 24; *Ontario Access to Records*, SO 2008, c 5; *Newfoundland Adoption Act*, SNL 1999, c A-2.1; *Alberta Adoption Act*, RSA 2000, c C-12; *Adoption Information Disclosure Regulations*, YOIC 1985/149 (Regulation made under the *Children's Act*, RSY 2002, c 31).

²⁶ For a detailed discussion of the trial decision in *Pratten* see Gruben & Gilbert, *supra* note 9.

²⁷ For a critique of the evidence relied upon in *Pratten* see Lori Chambers & Heather Hillsburg, "Desperately Seeking Daddy: A Critique of *Pratten v British Columbia (Attorney General)*" (2013) 28:2 CJLS 229.

individuals, in which they described the impact on them of not having information about their genetic origins, Adair J. held that the similarities between the experiences of donor-conceived people and adoptees were such that the omission of donor offspring from the *Adoption Act* disadvantaged and perpetuated stereotypes about them which resulted in discrimination. Adair J. further held that the violation of section 15 was not justifiable under section 1 of the Charter.²⁸ However, Pratten's section 7 argument was rejected on the basis that a positive right to "know one's past" is not supported by the section 7 jurisprudence.²⁹

British Columbia's Attorney General successfully appealed Adair J.'s decision.³⁰ With regard to the section 15 argument, the Court of Appeal accepted that the negative effects of not knowing their biological history are the same for adoptees as for donor offspring. However, it is open to the legislature to "provide adoptees with the means of accessing information about their biological origins without being obligated to provide comparable benefits to other persons seeking such information."³¹ Reflecting the changing section 15 jurisprudence signaled by *R v. Kapp*³² and *Alberta v. Cunningham*,³³ the Court concluded that "governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities."³⁴ The Court of Appeal also rejected the section 7 argument, holding that Pratten had not established that access to information about one's

²⁸ *Supra* note 3 at para 325.

²⁹ *Ibid* at para 316.

³⁰ *Supra* note 4.

³¹ *Ibid* at para 42.

³² 2008 SCC 41, [2008] 2 SCR 483.

³³ 2011 SCC 37, [2011] 2 SCR 670.

³⁴ *Supra* note 4 at para 42.

biological origins “has been recognized as so ‘fundamental’ that it is entitled to independent constitutionally protected status under the Charter.”³⁵ Leave to appeal the decision to the Supreme Court of Canada was denied.³⁶

With litigation having failed to produce reform in Canada, it is likely that any change to donor anonymity laws will need to come from the provincial legislatures. At the time of writing, no province or territory has indicated an intention to legislate on the issue, though there have been calls from offspring, recipient parents, and legal and medical experts to do so.³⁷ Anonymous gametes thus continue to be widely used in Canada. Not everyone involved in donor conception has, however, accepted the status quo. Donor-conceived people, their parents, and even some donors, are increasingly using a variety of informal, non-statutory mechanisms to bypass or disrupt anonymity laws and access information about their donor relatives.³⁸

The most widely available mechanism by which to overcome Canada’s donor anonymity laws is for recipient parents to conceive using “identity release” (or “open ID”) sperm or eggs, which can be purchased (at additional cost) from the American sperm and egg banks from which Canada imports

³⁵ *Ibid* at para 50.

³⁶ *Supra* note 5.

³⁷ Ireton, *supra* note 6.

³⁸ Marilyn Crawshaw et al, “Emerging Models for Facilitating Contact Between People Genetically Related Through Donor Conception: A Preliminary Analysis and Discussion” (2015) 1:2 *Reproductive Biomedicine & Society Online* 70; Fiona Kelly & Deborah Dempsey, “Experiences and Motives of Australian Single Mothers by Choice who Make Early Contact with their Child’s Donor Relatives” (2016) 24:4 *Med L Rev* 571.

the majority of its gametes.³⁹ Identity release donor sperm is also available through ReproMed, Canada's only sperm bank.⁴⁰ Identity release donors consent at the time of donation to having their identity disclosed to offspring when the child reaches the age of 18. Sperm banks market identity release donors as providing offspring with an opportunity to know their donor's identity and, by having access to this information, develop a greater understanding of their origins.⁴¹ Though certainly an improvement on blanket anonymity, sperm bank-based identity release programs are not as comprehensive as the various statutory disclosure models. The most striking issue is that most sperm banks permit individual donors to produce in excess of 40 offspring,⁴² making it highly unlikely that the donor will have the capacity to meet each child, let alone develop the type of relationship that might enable a child to explore the donor's role in his or her evolving sense of self. By contrast, most statutory

³⁹ At present, approximately 90% of the donated sperm used in assisted reproduction in Canada is imported from the United States.

⁴⁰ In June 2017, 20 of ReproMed's 62 donors were identity release donors. Only two were not Caucasian.

⁴¹ See e.g. Fairfax Cryobank, "Fairfax Cryobank ID Option Donor Program", (2017), online: <fairfaxcryobank.com> (Fairfax states on its website that its identity release program provides children with the opportunity "to learn more about their donors as a way of exploring more about themselves").

⁴² The majority of the sperm imported into Canada comes from two of the largest American sperm banks, Xytex and Fairfax Cryobank. Xytex has a family unit limit of 60 families worldwide. Fairfax policy states that, "a donor's sales will cease when 25 families (children from the same donor living in one home) have been reported in the US. International distribution stops when 15 families have been reported. After the family limits have been met, vials will only be distributed for sibling pregnancies". However, there are numerous reported instances of donor sibling groups exceeding 100 children. See e.g. Jacqueline Mroz, "One Sperm Donor, 150 offspring", *New York Times* (5 September 2011), online: <www.nytimes.com>.

disclosure regimes place strict numerical limits on the number of families that can use a particular donor's sperm or eggs.⁴³ Sperm banks also do not provide counselling or act as intermediaries between the donor and child when information is released, leaving the parties to negotiate how communication, and perhaps contact, will unfold. By contrast, counselling and the management of parties' expectations by professionals is key to the best statutory models. Finally, because the record keeping practices of sperm banks are not legally regulated in the way that donor registers are in countries that mandate disclosure, it is possible that records will be incomplete or that banks might lose track of donors over time.

For donor offspring who were not conceived using an identity release donor, or who do not wish to wait until they turn 18 to access their donor's identity,⁴⁴ additional informal options for donor linking have emerged. A recent international analysis of voluntary searching services identified a number of common offspring and/or recipient parent-led non-statutory methods by which to identify donors.⁴⁵ They included sperm bank or fertility clinic based donor registry services,⁴⁶ social media searches using information contained in the donor's profile, privately run online donor registries such as the Donor Sibling Registry, and online networks created by recipient parents and/or donor

⁴³ Jenni Millbank, "Numerical Limits in Donor Conception Regimes: Genetic Links and 'Extended Family' in the Era of Identity Disclosure" (2014) 22:3 Med L Rev 325.

⁴⁴ While offspring can access an open identity donor's identity when they turn 18, recipient parents may initiate donor searches prior to that date.

⁴⁵ Crawshaw et al, *supra* note 38; Kelly & Dempsey, *supra* note 38.

⁴⁶ For example, the sperm bank Xytex, a major supplier to Canada, recently launched a new service called xyConnect which allows for anonymous exchanges between donors and offspring and gives the option for exchange of identifying information while the child is still a minor.

offspring that enable the sharing of information, including donor numbers. Web based genealogy services and direct-to-consumer DNA testing services have also emerged as tools for locating donor relatives.⁴⁷ While some offspring and recipient parents have been successful in locating donors and donor siblings using informal mechanisms,⁴⁸ these practices are not an adequate alternative to statutory access. Identifying and potentially contacting a donor located via the internet or DNA testing may raise issues of privacy and consent in circumstances where a donor has been guaranteed anonymity. Identification via these means is also likely to be possible for only a small number of those who desire it.

While there may be means by which individual donors can be informally identified, there is currently no legislation or case law in Canada that enables donor offspring to access their donor's identity or to obtain health information. Given that most of the gametes used by Canadian clinics are imported from the United States, it is significant that the American industry also fails to provide any mechanisms for disclosure.

⁴⁷ Deborah Dempsey & Fiona Kelly, "Transnational Third-party Assisted Conception: Pursuing the Desire for 'Origins' Information in the Internet Era" in Miranda Davies, ed, *Global Babies: Transnational Surrogacy and the New Politics of Reproduction* (London: Zed Books, 2016); Andrea Braverman, "How the Internet is Reshaping Assisted Reproduction: from Donor Offspring Registries to Direct-to-Consumer Genetic Testing" (2010) 11:2 MJLST 477.

⁴⁸ See Dempsey & Kelly, *supra* note 47. See also Kelly & Dempsey, *supra* note 38.

3. WHY END ANONYMOUS SPERM DONATION IN CANADA?

Research suggests that a significant number of offspring support an end to donor anonymity.⁴⁹ Three arguments are commonly cited to support the shift to an open disclosure model, each of which will be discussed in more detail below. The first is that donor anonymity prevents offspring from knowing half of their medical history, which may be important to their health and wellbeing. Second, donor anonymity creates a fear among donor offspring that they may unknowingly form a sexual relationship with donor siblings or other donor relatives. Finally, anonymity denies donor offspring access to information about their genetic origins and identity, which is understood by some offspring as important to their developing sense of self. The abolition of anonymity may also provide some benefits to donors, particularly given the rise in the use of informal mechanisms to identify donors. Within a regulated system, interactions between offspring and donors can be managed by trained intermediaries, removing the risk of the “knock at the door” that some donors fear.

A growing number of legislatures have acted upon the concerns of donor offspring, introducing legislation that shifts the emphasis of assisted reproduction law from protecting the perceived privacy interests of the recipient parents and donors, to focusing on the best interests of the resulting children.⁵⁰ It is typically assumed that the child’s interests can be met by introducing an “open disclosure” model of donor conception,

⁴⁹ See Vasanti Jadvā et al, “Experiences of Offspring Searching for and Contacting their Donor Siblings and Donor” (2010) 20:4 *Reprod BioMed Online* 523; See also Eric Blyth et al, “Donor-Conceived People’s Views and Experiences of their Genetic Origins: A Critical Analysis of the Research Evidence” (2012) 19:4 *JL & Med* 769.

⁵⁰ *Supra* note 7.

whereby donor offspring have the option of accessing their donor's identifying information when they reach a specified age.

(i) ACCESS TO MEDICAL INFORMATION

Perhaps the single most consistent concern raised by donor offspring who are unable to identify their donor is that they do not have access to half of their family medical history. Concerns raised by donor offspring about their lack of access to potentially relevant family medical information fall into two categories. The first relates to general requests for information about a person's medical history.⁵¹ Anyone coming into contact with a health professional is routinely asked to provide details of their family health history. Donor offspring and recipient parents are unable to answer these types of questions accurately. Even when some information is known—most donors now provide a relatively detailed family medical history when they donate—it only provides a “snapshot” in time, with no opportunity to update it as new information emerges. The provision of health information is also dependent on the honesty of the donor and there have been several cases of donors failing to disclose serious medical conditions.⁵²

The second health-related concern raised by anonymity relates to the risk of offspring inheriting a significant genetic condition from their donor.⁵³ In such a case, offspring may miss the opportunity to participate in early screening, are at higher risk of misdiagnosis, or receive delayed diagnosis or treatment when compared with a person who has access to the medical history of their genetic parents. It is also possible that

⁵¹ See Sonia Allan, “Donor Conception, Secrecy and the Search for Information” (2012) 19:4 JL & Med 631 at 637.

⁵² See e.g. Ireton, *supra* note 6.

⁵³ Allan, *supra* note 51.

information about a genetic condition diagnosed in the offspring may be of relevance to the donor and/or his family.

While the frequency of (reported) situations in which serious conditions arise appears relatively low,⁵⁴ there have been a number of tragic cases.⁵⁵ The story of Australian woman Narelle Grech is one such example.⁵⁶ At 27 years old, Grech was diagnosed with stage IV bowel cancer. Terminal bowel cancer in someone so young is usually genetic⁵⁷ and her mother's family had no history of cancer. Grech argued that had she known about the genetic risk, she would have participated in cancer screening at an earlier age. After hearing her story, which she presented to the Victorian Inquiry into Donor Conception, and with her health rapidly deteriorating, the Victorian Premier intervened on her behalf to see if her donor could be found. Grech's records were obtained, her donor was contacted, and he

⁵⁴ It is impossible to know how frequently medical issues arise as sperm banks are not required to report on the issue.

⁵⁵ See e.g. William Heisal, "Code Unknown: Mother Discovers a Secret Donor History and Frightening Health Future" *The Centre for Health Journalism* (31 October 2014), online: <www.centerforhealthjournalism.org> (for the story of a genetic condition inherited from an anonymous donor and passed on through multiple generations of one family); "Denmark Tightens Sperm Donor Law after NF1 Transmissions", *BBC News Online* (25 September 2012), online: <www.bbc.com/news>; Jacqueline Mroz, "In Choosing a Sperm Donor, a Roll of the Genetic Dice", *New York Times* (14 May 2012), online: <www.nytimes.com>.

⁵⁶ See Farrah Tomazin, "'Suddenly She's There': Daughter and Donor Dad United", *Victoria News* (17 March 2013), online: <www.theage.com.au/victoria/>.

⁵⁷ Austl, Victoria, *Inquiry into Access by Donor Conceived People to Information about Donors* (Parl Paper No 120) (2012) at 54 ["Inquiry into Access"].

agreed to meet her immediately. Narelle Grech died five weeks after their first meeting.⁵⁸

It is possible to provide donor offspring with their donor's medical information without also disclosing his identity. As noted above, before sections of the *AHRA* were struck down in 2010,⁵⁹ the legislation provided for the collection, management and disclosure of health reporting information to donor offspring, while still maintaining donor anonymity.⁶⁰ Some offspring, however, may perceive such an arrangement as a continuation of the status quo, whereby third parties control their access to key personal information, diminishing their agency and sense of control over their lives. In addition, some offspring appear to understand their medical history as more than mere health information. As the Nuffield Council noted after hearing witnesses discuss the issue, "it may be the case that an interest in knowing about the medical history of their donor constitutes part of their more general interest in 'knowing about' their donor in a biographical sense, rather than because of the impact on their own health."⁶¹ Thus, while it might be possible to maintain donor anonymity while still providing updated health information to offspring, such an arrangement may not adequately respond to the complex reasons underlying the demand for change.

(ii) THE RISK OF CONSANGUINITY

The second reason consistently raised to support ending donor

⁵⁸ It is likely that at least eight other offspring are also at risk, but their identities are unknown.

⁵⁹ *Supra* note 22.

⁶⁰ Canada is the only jurisdiction to have taken this approach.

⁶¹ Nuffield Council on Bioethics, *Donor Conception: Ethical Aspects of Information Sharing* (London: Nuffield Council, 2013) at 3.1 ["Nuffield Council"].

anonymity is that anonymity places offspring at risk of entering into a consanguineous relationship with a donor sibling or other donor relative. While such an assertion may initially seem far-fetched, there are a number of reported cases of donor siblings coming in contact with each other inadvertently,⁶² particularly when the children are being raised within small and often tight knit communities, such as those created by lesbian mothers and single mothers by choice.⁶³ The issue is exacerbated by the fact that while sperm banks claim they place numerical limits on the number of offspring each donor can produce, in the absence of mandatory record keeping in jurisdictions without regulation these numbers are frequently exceeded.⁶⁴ It is also the case that some donors provide sperm to more than one sperm bank,⁶⁵ making it difficult to identify the genetic links between what would likely be treated as two unrelated groups of offspring. Even if offspring know and can compare their donor's number, where a donor has donated to multiple sperm banks this information is insufficient to reveal the genetic tie. Finally, it has been argued that even if it is unlikely to occur often, the *risk* of consanguinity takes a toll on the emotional wellbeing of

⁶² Kelly & Dempsey, *supra* note 38 at 582, 588; Stu Marvel, "Tony Danza is My Sperm Donor?: Queer Kinship and the Impact of Canadian Regulations Around Sperm Donation" (2013) 25:3 CJWL 221 at 232.

⁶³ Marvel, *supra* note 62 at 233.

⁶⁴ An American Society of Reproductive Medicine survey of more than 5,000 sperm banks found that 35–40% of respondents had not or did not plan to report their pregnancy to the sperm bank. See MA Ottey & S Seitz, "Trends in Donor Sperm Purchasing, Disclosure of Donor Origins to Off-spring, and the Effects of Sexual Orientation and Relationship Status on Choice of Donor Category: A Three Year Study" (2011) 96:3 Fertility and Sterility s268.

⁶⁵ Marvel, *supra* note 62 at 237–38; Sonia Allan, "Psycho-social, Ethical and Legal Arguments for and against the Retrospective Release of Information about Donors to Donor-Conceived Individuals in Australia" (2011) 19:1 JL & Med 354 at 359.

offspring. As Crawshaw notes, “Not all donor conceived people experience such distress and those who do, do not necessarily experience it at all the time but policy makers and professionals need to be aware that the living experience with regard to consanguinity does not necessarily reflect the statistical risk.”⁶⁶

The risk of consanguinity can be addressed without revealing the donor’s identity. It is possible to create a registry, as has been done in jurisdictions such as the United Kingdom, which can be contacted by offspring to verify that they are not genetically related to each other. Of course, the decision to contact such a registry is contingent on offspring knowing that they are donor conceived. Significant numbers of offspring, particularly those being raised in heterosexual families, are still not told they are donor conceived.⁶⁷ They are therefore at risk of unwittingly engaging in consanguinity. Jurisdictions that have abolished donor anonymity have often also introduced non-

⁶⁶ Austl, commonwealth, Senate, Legal and Constitutional Affairs References Committee, *Donor Conception Practices in Australia*, 2011 [“Donor Conception Practices”], Submission 156 (Marilyn Crawshaw) at 7, online: <www.aph.gov.au>.

⁶⁷ It is estimated that less than 50% of donor conceived children are told of their origins, though some studies have found a disclosure rate of less than 10%. See Susan Golombok et al, “Children Conceived by Gamete Donation: Psychological Adjustment and Mother-Child Relationships at Age 7” (2011) 25:2 *J Fam Psychol* 230; Louise Johnson, Kate Bourne & Karin Hammarbarg, “Donor Conception Legislation in Victoria, Australia: The “Time to Tell” Campaign, Donor-Linking and Implications for Clinical Practice” (2012) 19:4 *JL & Med* 803 at 809–10; Sarah Wise & Gabor Kovacs, “Secrecy, Family Relationships and the Welfare of Children Born with the Assistance of Donor Sperm: Developments in Research, Law and Practice” in Alan Hayes & Daryl Higgins eds, *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Melbourne: Australian Institute of Family Studies, 2014) 81 at 82–83.

binding policies aimed at encouraging parents “to tell”,⁶⁸ and have regarded such policies as key to the success of law reform in this area. As will be discussed further below, one Australian state has gone even further, requiring that the Registrar of Births add an addendum to a donor conceived child’s birth certificate indicating that additional information about their birth is available.⁶⁹ Thus, while minimizing the risk of consanguinity can be achieved without abolishing anonymity, the risk is likely best addressed through a package of reforms that includes the prospective removal of anonymity.

(iii) GENETIC IDENTITY AND A SENSE OF SELF

Significant numbers of adult donor offspring are speaking out about the negative impact donor anonymity has had on their psychological wellbeing and sense of identity.⁷⁰ Offspring have reported that when they are told (or discover) that they are donor conceived and that their donor is unknown, they feel that a piece of their identity is missing, and that the only way in which they can construct a complete sense of self is by knowing more about their donor.⁷¹ While research indicates that offspring who are

⁶⁸ Johnson et al, *supra* note 67. Campaigns to encourage parents “to tell” have been reasonably successful in jurisdictions that have adopted them. See the discussion at part (v) below “Should donor offspring be notified that they are donor conceived?”

⁶⁹ *Births, Deaths and Marriages Act 1996* (Vic), s 17B(2).

⁷⁰ For an overview of some of the international and domestic advocacy groups led by donor offspring see Damian Adams & Caroline Lorbach, “Accessing Donor Conception Information in Australia: A Call for Retrospective Access” (2012) 19:4 *JL & Med* 707 at 710–13. See also Blyth, *supra* note 49.

⁷¹ For example, see submissions to a number of Australian inquiries. NSW, Legislative Assembly of New South Wales: Committee on Law and Safety, *Managing Donor Conception Information*, 2/55, October 2013 [“Managing Donor Conception”]; Senate, “Donor Conception Practices”, *supra* note 66; Victoria, “Inquiry into Access”, *supra* note

told they are donor conceived at an early age fare better emotionally than those who are told (or find out) later in life,⁷² members of both groups have spoken of the importance of knowing their genetic origins. As a contributor to The Anonymous Us Project in the United States explained:

Why does genealogy, mothers, fathers, grandparents, sisters, brothers, aunts, uncles, cousins of the shared-DNA kind matter? Because they ground, bind and root us to people and history. Their stories matter. We build our stories from theirs and pass them on to our own children.⁷³

A recent systematic review of 13 empirical studies of donor-conceived children and adults regarding their experiences and perceptions of donor conception concluded that “most donor-conceived people have an interest in securing information about their genetic and biographical heritage—more information than most of them have been able to obtain.”⁷⁴ Knowledge of

57. Similar views were expressed in the affidavits in the *Pratten* case, many of which were cited by Adair J in the trial decision, *supra* note 3.

⁷² Johnson et al, *supra* note 68.

⁷³ Submission to The Anonymous Us Project, 9 March 2013, as quoted in A Ravelingien, V Provoost & G Pennings, “Donor-Conceived Children Looking for their Sperm Donor: What Do They Want to Know?” (2013) 5:4 Facts, Views & Vision in ObGyn 257 at 259, online: <anonymousus.org>: “The *Anonymous Us Project* is a safety zone for real and honest insights regarding third party reproduction (sperm & egg donation, and surrogacy)”.

⁷⁴ Blyth et al, *supra* note 49 at 769 (The authors note that “[a]lthough a number of methodological limitations in the research base are identified, the authors conclude that the evidence is sufficiently robust to promote the implementation of policies and practices that promote transparency and openness in collaborative reproduction, thus

their genetic origins is thus considered integral to the identity formation of many, though not all, donor offspring, particularly in the context of Western society where “we privilege the importance of genetic heritage in our family building and society at large.”⁷⁵ Drawing on adoption literature, offspring⁷⁶ and experts⁷⁷ often refer to this sense of a “lost” or “disrupted” identity as “genealogical bewilderment”.⁷⁸ As Diane Ehrensaft, a psychologist, researcher, and expert witness in *Pratten*, explains:

For children conceived through assisted reproductive technology, the search for an identity, a sense of “who I am based on the fact that half of my genes come from someone else who has not functioned as a parent” can generate a strong desire to seek out the donor not to find a long-lost parent or replace the existing ones, but to lay claim to one’s own heritage and future, to

reflecting the importance of maximizing future choices and opportunities for donor-conceived people”).

⁷⁵ *Supra* note 3 at para 94.

⁷⁶ Victoria, Inquiry into Access, *supra* note 57 at 40–41.

⁷⁷ *Ibid* at 94; See also Allan, *supra* note 65 at 358.

⁷⁸ The concept of ‘genealogical bewilderment’ was first introduced in 1952 by way of a letter to the *Journal of Mental Health* by psychiatrist Erich Wellisch. The term itself was coined in 1964 by psychologist H. J. Sants, who used it to refer to a psychological phenomenon reported by children who have uncertain, little, or no knowledge of one or both of their natural parents. See Erich Wellisch, “Children without Genealogy: A Problem with Adoption” (1952) 13:1 *Mental Health* 41. For the application of the concept to donor offspring see AJ Turner & A Coyle, “What Does It Mean to be Donor Offspring? The Identity Experience of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy” (2000) 15:9 *Human Reproduction* 2041.

gather information about themselves and their roots . . . Donor offspring with anonymous donors may suffer from the psychological phenomenon referred to as genealogical bewilderment, confusion about from whence they come, along with accompanying psychological dysphoria as a result of grappling with the “missing piece” of themselves. . . . In Western culture, it is presumed that children will have a better sense of their identity and higher self-esteem if they know their genetic roots. Denied that information . . . they will have a more difficult time solidifying the foundations of their adult identity.⁷⁹

Not all donor offspring experience the kind of emotional distress described by Ehrensaft. However, those who do not may still want access to information about their donor. For example, a survey based study conducted with members of the Donor Sibling Registry found that among the participants who had a desire to contact their donor, the main reasons cited were curiosity about the donor’s looks and learning about their ancestry and medical history.⁸⁰

For some donor offspring, the emotional distress they experience stems not from the nature of their conception, but from knowing that information about their genetic origins exists but that they are prevented from accessing it.⁸¹ The inability to access and control information that offspring perceive as “theirs” is a common theme in various government inquiries into donor conception. For example, a witness before the Law

⁷⁹ *Supra* note 3 at para 95.

⁸⁰ DR Beeson, PK Jennings & W Kramer, “Offspring Searching for their Sperm Donors: How Family Type Shapes the Process” (2011) 26:9 *Human Reproduction* 24.

⁸¹ Nuffield Council, *supra* note 61 at 4.24.

Reform Commission inquiry in Victoria, Australia, stated that “the lack of control around this is very disempowering, the secrecy and withholding of information about who I am and my conception leads me to feel like a second class citizen.”⁸² Similarly, a donor-conceived adult who appeared before the Australian Senate Inquiry into donor conception practices explained, “I cannot begin to describe how dehumanising and powerless I am to know that the name and details about my biological father and my entire paternal family sit somewhere in a filing cabinet . . . with no means to access it. Information about my own family, my roots, my identity, I am told I have no right to know.”⁸³ Thus, as the U.K. based Nuffield Council on Bioethics noted in its 2013 report on donor conception, for some offspring it is the lack of control over information relating to their identity that prompts their challenge to existing practices.⁸⁴

Some Canadian scholars have been critical of donor offspring who draw on identity based arguments to support their claims. For example, in a critique of the arguments made in *Pratten*, Chambers and Hillsberg describe the search by offspring for their genetic fathers as “disturbing”,⁸⁵ arguing that the claims made in the case “[reify] the notion that men are fathers purely as a result of ejaculation.”⁸⁶ In contrast, they argue that “the true indices of fatherhood are emotional investment and social caring” and that the reification of biological fatherhood in *Pratten* has the potential to undermine the value of caregiving labour, whether performed by social fathers or birth mothers. While the nature of the identity based claims articulated by some offspring, including those cited in *Pratten*, sometimes

⁸² Victoria, Inquiry into Access, *supra* note 57 at 39.

⁸³ Senate, “Donor Conception Practices”, *supra* note 71 at 6.3.

⁸⁴ Nuffield Council, *supra* note 61 at 4.24.

⁸⁵ Chambers & Hillsburg, *supra* note 27 at 246.

⁸⁶ *Ibid* at 245.

exaggerate the significance of genetics and minimize “all the other factors that might contribute to the ongoing construction of personal identity”,⁸⁷ it is possible to support open disclosure laws without endorsing these claims. As Robert Leckey explains:

Taking up a more constructivist account of identity does not entail ending the effort to expand access to information about individuals’ genetic origins, although it may reduce the intensity of the discussion. Accessing information relating to genetic origins may be part of developing one’s identity, without taking biological parentage as the “natural” or “authentic” source of identity.⁸⁸

Thus, while we must continue to resist the erasure of the “kin-making work of gestation, labour, and family practices”⁸⁹ and the concomitant “glorification of genetic connections”,⁹⁰ genetic essentialism is not endorsed by validating the assertion of some offspring that their genetic identity is an important component of their overall sense of self. In fact, the adoption of open disclosure laws is perhaps the best way in which to enable offspring to form their *own* understanding of genetic relatedness

⁸⁷ Petra Nordqvist & Carol Smart, *Relative Strangers: Family Life, Genes and Donor Conception* (Houndmills, UK: Palgrave Macmillan, 2014) at 25.

⁸⁸ Robert Leckey, “Identity, Law, and the Right to a Dream?” (2015) 38:2 Dal LJ 525 at 542.

⁸⁹ *Ibid.* For a discussion of the disproportionate bearing open disclosure laws may have on women-led families in particular see Cameron et al, *supra* note 17 at 116–30.

⁹⁰ Tabitha Freeman, “Introduction” in Tabitha Freeman et al, eds, *Relatedness in Assisted Reproduction: Origins and Identities* (Cambridge: Cambridge University Press, 2014) 1 at 8.

and to make their own choices about the role genetic information plays in the formation of identity.⁹¹ Once the information is freely available, we might even find that its power wanes. For some it may become an intrinsic component of their identity; for others it may have little consequence. As the Nuffield Council on Bioethics, which rejected the suggestion that donor anonymity be re-introduced in the United Kingdom, explained:

It is not the case that all prospective parents, parents and donor-conceived people will find information about the donor meaningful or useful . . . The extent to which information is wanted, or indeed found to be essential, will depend entirely on the individual concerned. While the state, in its stewardship role, has a duty to ensure that information is available for those who might feel an interest in or need for it, this duty is not to be interpreted as an endorsement of the position that people affected by donor conception *must* or necessarily *do* want or need it.⁹²

4. AN OPEN DISCLOSURE MODEL FOR CANADA

While there is growing interest in abolishing donor anonymity in Canada, little attention has been given to the type of disclosure model that might be adopted if reform were to proceed. As noted earlier, best practice requires more than simply an end to anonymity. A range of other issues must also be addressed, such as: whether abolition should apply prospectively or also

⁹¹ Nuffield Council, *supra* note 61 at 4.19. The Nuffield Council suggested that more research needs to be done “to understand what is meant, both psychologically and ethically, by ‘harm to identity’ in the context of donor conception.” At present, little is known about the proportion of offspring who experience temporary or more long-term difficulties in absorbing the fact that they were donor conceived.

⁹² *Ibid* at 6.30.

retrospectively, how many families a donor is permitted to donate to, if and how donor offspring are to be notified of the nature of their conception, and whether identifying information should also be available to donors, recipient parents, and descendants of those involved in donor conception. It is also important that family law legislation be reviewed to clarify the legal status of gamete donors, particularly with respect to lesbian couples and single women whose circumstances are not always addressed by provincial parentage laws.⁹³ Drawing on the various international models available, the following section will address each of these issues and ultimately recommend a best practice model for Canadian reform.

(i) PROSPECTIVE OR RETROSPECTIVE LEGISLATION?

Perhaps the most important question to determine for any jurisdiction considering reform of donor laws is whether the decision to end anonymity should have retrospective application. The position taken in this article is that provinces should adopt a disclosure model that removes anonymity prospectively, but also allows for retrospective access *within a consent-based framework*. Mirroring most provincial adoption disclosure laws, it is recommended that legislation permit both donors and donor-conceived people to lodge a disclosure veto, preventing the release of their identity. It is recommended that when an application is made the subject of that application be contacted and asked whether they wish to have their identity divulged or lodge a disclosure veto. Reform should also include a system of contact preferences, whereby an individual who consents to information release can still specify the type of contact with which they are comfortable. Finally, it is

⁹³ Not all Canadian provinces have legislation that explicitly states that a gamete donor has no rights or obligations with respect to donor offspring. Most provinces also assume that a woman who conceives via donor conception has a partner who will be the second legal parent.

recommended that the law be administered “actively”, such that the administering body can advertise the existence of its services and has the power to search for and contact the subject of an application and counsel him or her about possible disclosure.

Adopting a retrospective model is not without controversy. All but two overseas jurisdictions that have ended donor anonymity have done so prospectively. Prospective laws require that donors who donate after the law comes into force agree to the release of their identifying information to their donor offspring after the children reach a certain age. The practical effect of introducing only prospective laws is that those conceived before the legislation comes into force continue to be denied access to their donor’s identity. This is a problematic outcome from the perspective of the large number of donor-conceived adults and young people who have been at the forefront of the reform movement. They have argued that *all* donor-conceived people should be treated equally and that prospective laws alone cannot achieve this goal.

A number of jurisdictions that have implemented prospective laws have nonetheless attempted to alleviate the impact of differential treatment created by an arbitrary commencement date. The most common strategy has been to introduce some form of voluntary register which enables offspring conceived prior to reform, as well as donors, to voluntarily lodge their identifying information or DNA,⁹⁴ enabling “matches” by mutual consent.⁹⁵ In fact, voluntary

⁹⁴ The UK (Donor Conceived Register) and the Netherlands (FIOM) have created DNA registers to serve as voluntary databases for those conceived prior to the abolition of donor anonymity.

⁹⁵ See e.g. Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations SI 2004/1511 (the UK law banning anonymity, introduced in 2005, included a voluntary mechanism whereby people who donated between 1991 and 2005 could “re-register” to consent to the release of information).

registers are sometimes presented as an alternative to retrospective legislation because they provide those not covered by law reform with an avenue through which to seek identifying information in a manner that does not infringe on the privacy rights of donors.⁹⁶

While voluntary registers may partially address the needs of donor-conceived adults, their potential is often limited by how they are administered. Many voluntary registers are run “passively”, which means register staff do little to actively promote the register, often resulting in limited engagement.⁹⁷ Passively operated registers also tend to prohibit staff from engaging in outreach with potential participants. For example, when a donor-conceived person makes an application for information, the register is not permitted to contact the donor to ask whether he is open to having his identity released. If he has not registered, the process stalls. This can be very frustrating for applicants, particularly in light of research indicating that a significant number of donors, if told that a child is searching for them, are willing to disclose their identity.⁹⁸

⁹⁶ Millbank, *supra* note 10.

⁹⁷ Similar arguments have been made about voluntary registers in the adoption context. For a critique of passive adoption registers see Juliet Guichon, “The Priority of the Health and Wellbeing of Offspring: The Challenge of Canadian provincial and Territorial Adoption Disclosure Law to Anonymity in Gamete and Embryo Provision (‘Donor’ Conception)” in Lemmens et al, *supra* note 8 at 190–91.

⁹⁸ Karin Hammarberg et al, “Proposed Legislative Change Mandating Retrospective Release of Identifying Information: Consultation with Donors and Government Response” (2014) 29:2 Human Reproduction 286. Similar findings have emerged from research in the United Kingdom, see e.g. M Crawshaw et al, “Working with Previously Anonymous Gamete Donors and Donor-conceived Adults: Recent Practice Experiences of Running the DNA-Based Voluntary Information Exchange and Contact Register, UK DonorLink” (2013) 16:1 Human Fertility 26.

When an active approach is taken, voluntary registers may be more successful in alleviating the uneven impact of prospective laws. For example, actively administered voluntary registers are often able to increase participation by engaging in positive efforts to make donors and donor conceived people aware of the register, how it works, and the potential benefits of participation.⁹⁹ Information that addresses the common concerns of donors, such as whether offspring can make a claim on their estate or sue them for child support, may also be provided.¹⁰⁰ Some jurisdictions, such as the Netherlands, have taken a particularly active approach, requiring that clinic staff contact donors who donated in the pre-reform period to tell them about the register and ask whether they will consent to having their identifying information added.¹⁰¹ Recent research suggests that

⁹⁹ This was the approach of the Infertility Treatment Authority (ITA) in Victoria, Australia (The ITA developed contact and counselling protocols for voluntary donor linking, and undertook an extensive public education campaign to encourage greater awareness of and participation in, the voluntary register). Similarly, see Nuffield Council, *supra* note 61 at 6.56 (The Nuffield Council recommended that the government “rather than regulating retrospectively for the removal of anonymity, should instead take action to increase awareness among past donors that a willingness on their part to become identifiable would be highly valued by some donor-conceived adults”).

¹⁰⁰ Inheritance rights turn on whether the deceased was a legal parent of the child. Thus, provided a donor is a not a legal parent, claims on his or her estate are not possible.

¹⁰¹ Similarly, in the UK, pre-reform anonymous donors were invited to register as “identifiable” donors. A similar “active” approach has been employed in the adoption context in Canada, where provincial authorities in every province but Alberta and Nova Scotia have the power to contact a birth parent to let them know that a child is searching for them. This power was introduced because of a concern that birth parents might want to be found, but may be unaware of the existence of the registry. By contrast, the Nuffield Council rejected this approach, except in cases of serious and treatable medical diagnosis,

anonymous donors who are unsupportive of retrospective legislation that mandates disclosure without consent, may nonetheless support active voluntary registers as an appropriate compromise.¹⁰² The success of this type of approach can be seen in Victoria, Australia, where active registers have operated since 1998.¹⁰³ Between 2006 and 2009, the regulatory authority in charge of donor linking¹⁰⁴ reached out to 43 anonymous donors at the request of offspring and parents.¹⁰⁵ All but a handful agreed to the release of their identifying information. Many were initially concerned about the applicant's motives and feared intrusion into their personal and family life, but once the motives for making contact were explained, the vast majority of donors agreed to have their identities revealed.¹⁰⁶ These findings suggest that a well-managed active register can be quite successful in responding to the information needs of donor-conceived people who are not covered by prospective laws. It is therefore recommended that if prospective reform is the

on the basis that it would raise "serious concerns" about breaching confidentiality. See Nuffield Council, *supra* note 61 at 6.57.

¹⁰² Hammarberg *supra* note 98 at 286–292. Similar findings have emerged from research in the United Kingdom, see Crawshaw et al, *supra* note 98.

¹⁰³ *Infertility Treatment Act 1995 (Vic)*.

¹⁰⁴ During this time, the regulatory authority was known as the Infertility Treatment Authority. In 2010, it became the Victorian Assisted Reproductive Treatment Authority.

¹⁰⁵ Johnson et al, *supra* note 68 at 817.

¹⁰⁶ Research with anonymous donors in the UK produced similar results. Most notably, it was found that donors' views about anonymity often changed over time, with a significant number becoming more open to contact as they aged. Jennifer Speirs, "What Adoption Law Suggests about Donor Anonymity Policies: A UK Perspective" in Lemmens et al, *supra* note 8 at 236–38.

preferred option among the Canadian provinces, an active voluntary register should be included in the reform package.¹⁰⁷

While the introduction of an active voluntary register alongside prospective laws will increase access to identifying information, such an approach can never fully address differential treatment based on date of conception. Uneasiness with this perceived inequality led the state of Victoria, Australia to introduce retrospective legislation that enables *all* donor-conceived people, whenever they were conceived, to apply for access to their donor's identifying information.¹⁰⁸ The first version of the Victorian legislation, which came into force in June 2015, provided retrospective access for both donor-conceived people and donors, but required the subject of the application to consent.¹⁰⁹ The legislation drew its inspiration from retroactive adoption laws, both in Australia and overseas, which typically enable identity release unless a disclosure veto has been put in place. It is this consent-based model of retrospective access that is supported in this article. The Victorian law has, however, been further amended, with new legislation taking effect in March 2017, which removed the consent requirement, replacing it with the option of a "contact preference" only.¹¹⁰ The contact preference permits the subject of the application to indicate that he or she does not want contact

¹⁰⁷ An active register will need a larger budget than a passive register due to the increased outreach work. However, given the benefits of such an approach, the additional cost is warranted. In Victoria, Australia, applicants to the voluntary register pay a fee of AUD \$74.45, which is set by the legislation and cannot be waived.

¹⁰⁸ Switzerland also has retrospective legislation, but because most Swiss clinic records have been destroyed, few people have been able to utilize it. Victoria thus remains the only jurisdiction with functioning retrospective laws.

¹⁰⁹ *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic).

¹¹⁰ *Assisted Reproductive Treatment Amendment Act 2016* (Vic).

or that only specific types of contact are permitted (e.g., email or letter). Where a contact preference is filed, identifying information is released to the applicant, but an undertaking must be signed indicating compliance with the preference. Criminal penalties apply in the case of breach.

There are a number of reasons why an actively administered retrospective model that includes a consent provision should be the preferred model for Canada. First, such an approach maximizes “the chance of donor-conceived people finding their donor . . . while allowing donors who [want] to maintain their anonymity to do so.”¹¹¹ Though some donor-conceived people will still be unable to access their donor’s identity, by giving the regulatory authority the power to engage with donors and discuss with them the motivations and goals of the applicant, it provides the best chance of disclosure while still respecting the privacy of the donor and acknowledging the circumstances under which he donated. Australian researchers studying anonymous donors’ views of a consent-based disclosure model found that when they reflected on information sharing, their goals and wishes sometimes coincided with those of donor conceived people.¹¹² This suggests that an “assumption of binary rights”, where donors and donor-conceived people are treated as competing rights-bearers,¹¹³ may be an “inappropriate simplification when policy decisions are being made about how to best serve the needs of donor-conceived people while

¹¹¹ Hammarberg et al, *supra* note 98 at 293.

¹¹² *Ibid.*

¹¹³ Interestingly, analysis of the issue through an international human rights lens suggests that an intermediary model of the type recommended in this article is the appropriate outcome. See John Tobin, “Donor-Conceived Individuals and Access to Information about Their Genetic Origins: The Relevance and Role of Rights” (2012) 19:4 JL & Med 742.

respecting the position of donors.”¹¹⁴ A legislative approach that emphasizes the (potentially common) *interests* of the parties, and enables them to articulate their interests through discussions with those administering the law, is more likely to lead to positive outcomes than one that presumes competing rights or that coerces participation.

The second reason for endorsing a consent-based retrospective model, as opposed to one that only includes contact preferences, is that it is unlikely that a law that does not require consent would survive constitutional scrutiny in Canada. In 2007, in the decision of *Cheskes v. Ontario (Attorney General)*, the Ontario Superior Court struck down retrospective adoption disclosure laws that did not require consent just two days after they came into effect on the basis that they infringed section 7 of the *Charter*.¹¹⁵ In the decision, Belobaba J. held that both birth parents and adoptees had a “privacy expectation” that is “a reasonable expectation that their adoption or birth registration information, absent health or safety reasons, would remain private and would not be disclosed without their permission.”¹¹⁶ This expectation was part of the security of the person rights contained within section 7. The argument has been made that given the similarities between adoption and donor conception, it is likely that gamete donors who donated on the grounds of anonymity, as well as donor offspring and possibly recipient parents, have a similar “privacy expectation”.¹¹⁷ As Belobaba J. explained in *Cheskes*, “people expect, and are entitled to expect, that the government will not share [confidential personal] information without their consent. The protection of privacy is

¹¹⁴ Hammarberg et al, *supra* note 98 at 293.

¹¹⁵ *Cheskes v Ontario (Attorney General)* (2007), 87 OR (3d) 581, 288 DLR (4th) 449 (Ont Sup Ct J) [*Cheskes*]. Ontario did not appeal the decision.

¹¹⁶ *Ibid* at para 69.

¹¹⁷ Gruben, *supra* note 8 at 157, 159.

undeniably a fundamental value in Canadian society, especially when aspects of one's individual identity are at stake."¹¹⁸

While a disclosure model that does not include a consent provision is unlikely to succeed in Canada, provincial adoption disclosure laws that apply retrospectively but *include* consent provisions have been successfully enacted. This suggests that a version of Victoria's 2015 disclosure law could be adopted by Canadian provinces. If administered actively, the law would provide a productive avenue for donor-conceived adults and donors to make contact via mutual consent. It would also ensure that all children born after the date of commencement would have automatic access to their donor's identity.

(ii) THE MANAGEMENT AND RELEASE OF INFORMATION: DONOR CONCEPTION REGISTERS

If the recommended model is to be adopted by Canadian provinces, it must be accompanied by strict guidelines with respect to the gathering, management, storage, and release of identifying information. Jurisdictions that have enacted donor disclosure legislation have typically created a regulatory body to administer the law. Though the Victorian Assisted Reproductive Treatment Authority (VARTA) is often cited as a leader in the field and will be used as a best practice model in this article, there are a number of similar examples to which the Canadian provinces might look.¹¹⁹ Under the Victorian model, VARTA administers the Central Register, in which the identifying

¹¹⁸ *Cheskes*, *supra* note 115 at paras 111–12. Similar conclusions were reached in a second adoption case: *Marchand v Ontario*, 2007 ONCA 787, 88 OR (3d) 600.

¹¹⁹ For example, in the United Kingdom the Human Fertilisation and Embryology Authority stores the records of all donor conception births since 1991, while in Finland, the National Supervisory Authority for Welfare and Health (Valvira) maintains the donation register (Louteri).

information¹²⁰ of those who have participated in donor treatment procedures (i.e., the donor, recipient parent(s), and the resulting child) is stored. An application for access to that information is made to VARTA, which then facilitates the process of information release. To enable the retrospective application of Victoria's law, any hospital or doctor within the jurisdiction who had donor files in their possession was required to provide them to VARTA so that the information could be added to the Central Register. VARTA also administers the Voluntary Register which, following the most recent amendments, is primarily used by recipient parents who apply to have "early contact" with a donor when their child is still a minor. Early contact will be discussed below.¹²¹

There are a variety of approaches to how identity disclosure is managed, with some jurisdictions leaving the process largely in the hands of the applicant, while others offer (or require) counseling and facilitation services. It is recommended that the Canadian provinces adopt a model whereby the regulatory authority plays the role of an active intermediary. The Victorian system again provides an example of best practice in the field, though other jurisdictions have adopted similar measures.¹²² All parties to the identity release process in Victoria are provided with support and counselling. When an application is made, the applicant is required to attend an information and support session, conducted by a counsellor. The applicant must also complete a written Statement of Reasons, in which they identify their reasons for applying as

¹²⁰ Non-identifying information about the donor, such as hair and eye colour, interests, education and occupation, are also held at the Central Register. This information can be disclosed without consent at any time.

¹²¹ See section (iii), "Who can access the register and when?", below.

¹²² For example, counselling is either mandated or offered in Ireland, Austria, the Netherlands, and the United Kingdom.

well as their short and long-term goals. The Statement of Reasons process can be undertaken by the applicant alone, or conducted with the assistance of a VARTA counsellor. VARTA then searches the Central Register to see if the donor's information can be located. In some instances, records will have been lost or destroyed,¹²³ or may be incomplete.¹²⁴ If the donor's identity can be determined, VARTA will contact the donor, advise him of the application, and provide him with the Statement of Reasons. The donor is also provided with counselling and support. While the Victorian law now allows for the automatic release of the donor's identity to the donor conceived person, VARTA is still able to facilitate any contact between them, as well as provide support to other individuals impacted, such as a spouse or the donor's children. Another important service offered by VARTA under the now defunct consent-based model was a "mail box" that enabled those who did not consent to identity disclosure to nonetheless communicate with the applicant using VARTA as a third-party intermediary. Research suggests that those engaged in donor linking are often initially nervous about each other's motivations and thus may benefit from a period of anonymous

¹²³ A number of state and federal Parliamentary Committees, as well as the Victorian Law Reform Commission, have concluded that Australian donor records have been lost or actively destroyed by clinic staff, and have recommended "as a matter of urgency" that legislation be amended to make it an offence to "destroy, tamper with or falsify donor conception records". See e.g. Victoria, Inquiry into Access, *supra* note 57 at 157; Legislative Assembly of New South Wales, *Managing Donor Conception Information*, *supra* note 71 at vi–vii. See also the story of Sarah Dingle whose donor number was cut out of her records by a nurse at the Royal North Shore Hospital in Sydney: Sarah Dingle, "Misconception", *Sydney Morning Herald* (16 August 2014), online: <www.smh.com.au>.

¹²⁴ Under the most recent incarnation of the law, if the donor record cannot be located, VARTA has the power to request treatment records, as well as genetic testing of suspected donors.

communication. In some instances, the parties may choose not to meet at all.¹²⁵ Thus, a regulatory framework that recognizes the often-evolving nature of donor linking relationships and provides ongoing support is likely to meet the broadest range of needs and produce the best outcomes for participants.

(iii) WHO CAN ACCESS THE REGISTER AND WHEN?

Most jurisdictions with donor disclosure laws restrict access to identifying information to donor-conceived people who have reached a certain age.¹²⁶ Such an approach provides a baseline for any reform. However, some jurisdictions allow a wider range of people to make applications and provide access to a variety of different types of identifying and non-identifying information. For example, in the United Kingdom, the parent of a donor-conceived child can apply for non-identifying information, such as the donor's occupation, date and country of birth, physical characteristics, education, ethnicity, and medical history, as well as a "goodwill message" written by the donor to any potential children.¹²⁷ By contrast, in the states of Victoria and Western Australia, the parent(s) of a donor-conceived child can apply to access the donor's *identifying* information which, if he consents, can be provided while the child is still a minor.¹²⁸ Some

¹²⁵ Kelly & Dempsey, *supra* note 38.

¹²⁶ The age at which applications can be made varies from 14 to 18 years old. The majority of jurisdictions require the child to be 18, but 16-year-olds can access their donor's identity in the Netherlands (*Wet donorgegevens kunstmatige bevruchting*, 2002), the UK (*Human Fertilisation and Embryology Act 2008* (UK), s 24) and the state of Western Australia (*Human Reproductive Technology Act 1991* (WA), s 46), while 14-year-olds have access in Austria (*Fortpflanzungsmedizingesetz* BGBl. Nr. 275/1992).

¹²⁷ *Human Fertilisation and Embryology Act 2008* (UK).

¹²⁸ *Assisted Reproductive Treatment Act 2008* (Vic) s 58.

jurisdictions, such as the UK and Finland,¹²⁹ allow *donors* to request information about whether any children have been born as a result of their donations. In the UK, the donor can also find out the sex and year of birth of the children.¹³⁰ Taking it one step further, Victoria, Western Australia and Ireland permit donors to apply for access to their donor offspring's identifying information, though consent is required before it can be released.¹³¹ If the child is still a minor, a parent can consent on their behalf.¹³² Finally, some jurisdictions allow donor-conceived people to apply for information about their donor siblings. For example, in Ireland a donor-conceived person who has reached 18 years of age can register their consent to the release of identifying information to any donor sibling who also applies. Similarly, in Western Australia a donor-conceived person can lodge their identifying information with the Voluntary register, indicating consent to their release if a donor sibling also registers.

The international trend seems to be toward providing identifying information to a variety of parties beyond the donor-conceived person him or herself, but only where there is mutual consent, while non-identifying information is more widely available and is typically released without consent. It is recommended that Canadian provinces adopt a similar approach whereby mutual agreement to information sharing is the principle that underlies retrospective donor linking. Such an

¹²⁹ *The Act on Assisted Fertility Treatments* (1237/2006) (Finland).

¹³⁰ *Human Fertilisation and Embryology Act* 2008 (UK).

¹³¹ *Assisted Reproductive Treatment Act* 2008 (Vic); *Human Reproductive Technology Act* 1991 (WA), s 49(2a); *Children and Family Relationships Act* 2015 Act No 9 of 2015 (Ireland).

¹³² In Western Australia, a child may only consent after he or she turns 16, although parents may consent on his or her behalf earlier. *Human Reproductive Technology Act* 1991 (WA), 49(2c).

approach enables a wider range of interested parties to access information, but only where it is mutually desirable.

An issue that might require additional attention is whether a parent should be permitted to consent to information release on behalf of a minor child. Permitting access in these circumstances is arguably taking the decision away from the child and giving it to the parent and donor before the child is able to express his or her own views, let alone consent. While it is possible that an older child might initiate an application for early contact, research suggests that in jurisdictions where parents can apply for access to the donor's identity (with his consent), the children involved are often very young.¹³³ Given that such applications are clearly driven by the desires of the adults, permitting early access should be viewed cautiously.

Enabling early access may also have unintended family law implications. The legal parentage of a child conceived via assisted reproduction is not always clear in provincial family law legislation, particularly where the child is conceived by an unpartnered woman.¹³⁴ It may be possible that in provinces where conception by un-partnered women is not expressly addressed by parentage legislation that a previously anonymous, but now known donor, could assert a claim to parentage and all of the legal rights and responsibilities associated with that status. Even where the donor is not a legal parent, it is still possible that he might seek contact with the child. A number of provincial statutes permit non-parents to apply for access to a child,

¹³³ Kelly & Dempsey, *supra* note 38.

¹³⁴ See Fiona Kelly, "Autonomous from the Start: Single Mothers by Choice in the Canadian Legal System (2012) 24:3 Child & Fam LQ 257.

provided they have leave of the court.¹³⁵ While it may be in an individual child's best interests to have access to his or her donor, particularly where a positive relationship has developed, it is important that if the law permits parent-initiated early access, the potential legal implications of the practice are made clear to applicants. Knowing that the donor might accrue legal rights once he becomes involved in a child's life may influence the decision of parent(s) to seek early access in the first place. It is thus recommended that any province that introduces donor linking laws, simultaneously reviews its family law legislation, particularly as it pertains to single women and same-sex couples, to ensure that there are no unintended consequences. It is also recommended that if any family law risks are identified, donor linking applicants are made aware of them during counselling.

(iv) NUMERICAL LIMITS ON DONOR OFFSPRING

A variety of arguments have been made to support limiting the number of offspring each donor can produce, or the number of families to which he can donate. While reducing the risk of consanguinity was for a long time the main focus of the numerical limits debate,¹³⁶ it has been somewhat superseded in

¹³⁵ See e.g. *Family Law Act*, SA 2003, c F-4.5, s 35(1); *Child and Family Services Act*, CCSM c C80, s 78(1.1), 78(2); *Family Law Act*, SBC 2011, c 25, s 59.

¹³⁶ Margaret Nelson, Rosanna Hertz & Wendy Kramer, "Gamete Donor Anonymity and Limits on Numbers of Offspring: the Views of Three Stakeholders" (2015) 3:1 *JL & Biosciences* 1 at 5; Gunilla Sydsjo et al, "The Optimal Number of Offspring Per Gamete Donor" (2015) 94:9 *Acta Obstetricia et Gynecologica Scandinavica* 1022; Neroli Sawyer, "Sperm Donor Limits that Control for 'Relative' Risk Associated with the use of Open-Identity Donors" (2010) 25:5 *Human Reproduction* 1089.

more recent years,¹³⁷ perhaps because of the rise of open disclosure laws, by questions about the psycho-social impact on donor offspring of having large numbers of donor siblings. It is unclear at this stage what the psycho-social implications of having a large group of donor relatives might be for each of the key stakeholder groups: offspring, donors, and recipient parents.¹³⁸ However, preliminary research suggests that failing to address the issue of numerical limits may increase the likelihood of negative outcomes, particularly in circumstances where donor relatives have the opportunity to make contact with each other.¹³⁹ A common concern identified in the research is the emotional and social challenge of integrating a large group of previously unknown “relatives”, sometimes unexpectedly, into one’s life. As Scheib and Ruby have argued, “[m]eeting a few or even ten donor-linked families can be joyous and incredibly positive; the impact of meeting 25–50 families may be more challenging and even negative.”¹⁴⁰ In research with donor offspring, it has been reported that large groups of donor siblings can become “unwieldy” and may fragment more easily into sub-

¹³⁷ The advent of DNA testing as well as the increase in parents telling offspring that they are donor conceived has meant that consanguinity has become less of a concern for donor conceived people.

¹³⁸ Recipient parents of donor-conceived children generally favour numerical limits, though they do not always agree on what that limit should be: Millbank, *supra* note 43 at 344–45; Nelson et al, *supra* note 136 at 59–62.

¹³⁹ See e.g. Sawyer, *supra* note 136; Joanna Scheib & Alice Ruby, “Beyond Consanguinity Risk: Developing Donor Birth Limits that Consider Psychosocial Risk Factors” (2009) 91:5 *Fertility & Sterility* e12; Pim Janssens et al, “Evolving Minimum Standards in Responsible International Sperm Donor Offspring Quota” (2015) 30:6 *Reprod Biomed Online* 568 [“Evolving Minimum Standards”]; Pim Janssens, A Nap & L Bansci, “Reconsidering the Number of Offspring Per Gamete Donor in the Dutch Open-Identity System” (2011) 14:2 *Human Fertility* 106; Nelson et al, *supra* note 136.

¹⁴⁰ Scheib & Ruby, *supra* note 139 at e12.

groups.¹⁴¹ Those who come to established groups late, often because of delayed disclosure by their parents, experience additional challenges, with offspring noting that it can be very difficult to integrate into the group or to get across the urgency they feel to establish relationships.¹⁴²

Limiting the number of offspring produced by each donor is likely to become even more important where prospective donor linking is available. While not every donor conceived person will meet their donor or develop a relationship with him or her, it is unlikely that a donor who is willing to have face-to-face contact could feasibly do so in any meaningful way with more than a handful of individuals.¹⁴³ In a study investigating the similarities and differences between jurisdictions that have abolished donor anonymity, sperm donors expressed concern about the psychological and social complexities of “trying to come to grips with multiple genetically-linked siblings in a number of different families”.¹⁴⁴ The donor’s willingness and/or ability to invest in relationships may change over time as more offspring emerge, potentially creating different experiences for offspring of the same donor. As Neroli Sawyer has argued:

The quality of future relationships between donors, their DI [donor insemination] offspring and their respective families will be directly

¹⁴¹ Margaret Nelson & Rosanna Hertz, “As Anonymity Disappears the Focus Becomes Limits on Donor Offspring” (2016) 3:3 *JL & Biosciences* 704 at 709.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ 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) 23:2 *Int’l JL Pol’y & Fam* 174.

affected by the number of DI offspring each donor fathers...the number of potential familial contacts needs to be contained, as soon as possible, to give donors and their offspring the best possible chance of having positive, sustainable and manageable relationships with their extended DI family members in the future.¹⁴⁵

Many jurisdictions with prospective disclosure laws, such as the United Kingdom, the Netherlands and some Australian states, have statutory limits on the number of offspring each donor can produce, or the number of families or women to which a donor can donate.¹⁴⁶ The numbers range dramatically, from 5 families per donor in Western Australia to 25 children per donor in the Netherlands.¹⁴⁷ However, the vast majority of jurisdictions place the limit at around 10 offspring or families. Ten was also the number identified by sperm and egg donors who were surveyed for a Swedish study on numerical limits.¹⁴⁸ In 2015, an international working group of European reproductive experts was formed to make recommendations on the global (rather than jurisdiction-specific) number of offspring

¹⁴⁵ Sawyer, *supra* note 136 at 1093.

¹⁴⁶ The way that numerical limits are defined varies considerably across jurisdictions. Some express the limit as the number of offspring while others refer to the number of “families”. In Victoria, Australia, the limit is placed on the number of *women* who use the donor to conceive. Setting the limit according to the number of families is preferable as it ensures that families who have one child via a particular donor will have access to his sperm for any subsequent children.

¹⁴⁷ For an overview of arguments about numerical limits across a number of jurisdictions see Millbank, *supra* note 43 at 333–36.

¹⁴⁸ Gunilla Sydsjo et al, “Oocyte and Sperm Donors’ Opinions on the Acceptable Number of Offspring” (2014) 93:7 *Acta Obstetricia et Gynecologica Scandinavica* 634.

a sperm donor should be permitted to produce.¹⁴⁹ Though the working group was unable to agree on a specific number, there was consensus that it should never exceed 100 families globally.¹⁵⁰ Thus, while there is no agreed upon best practice standard with regard to numerical limits, there is consensus that offspring numbers *should be limited*, particularly where prospective linking is available. Neroli Sawyer has argued that until we have a better understanding of the psycho-social impact on offspring, donors, and recipient parents of large numbers of donor relatives, particularly in open disclosure regimes, a conservative approach to numerical limits should be taken.¹⁵¹

(v) SHOULD DONOR OFFSPRING BE NOTIFIED THAT THEY ARE DONOR CONCEIVED?

Historically, it was standard practice for medical practitioners to advise parents not to tell children that they were donor conceived.¹⁵² The prevailing wisdom was that anonymity and secrecy was better for children, families, and donors. In some instances children still discovered the information, which was often disclosed by a relative or third party in the context of familial conflict or turmoil.¹⁵³ Attitudes towards disclosure began to shift in the 1980s in the context of both donor conception and adoption.¹⁵⁴ Over time it became accepted that

¹⁴⁹ Janssens et al, *supra* note 139.

¹⁵⁰ *Ibid* at 578.

¹⁵¹ Sawyer, *supra* note 136 at 1093.

¹⁵² A Brewaeys, “Donor Insemination, The Impact on Family and Child Development” (1996) 17:1 J Psychosom Obst Gyn 1.

¹⁵³ Jadvá et al, *supra* note 49; R Berger & M Paul, “Family Secrets and Family Functioning: The Case of Donor Assistance” (2008) 47:4 Family Process 553.

¹⁵⁴ Richard Chisholm, “Information Rights and Donor Conception: Lessons from Adoption?” (2012) 19:4 JL & Med 722.

telling children about their donor conception as early as possible, so that they could integrate the information into their identity, was preferable. In fact, contrary to reported parental fears, donor-conceived people who are told of their origins report feeling more positively towards their parents, especially the non-biological parent.¹⁵⁵ By contrast, keeping a child's donor conception secret can create a barrier between those in the family who know the truth and those who do not, resulting in less trust and increased emotional distance between family members.¹⁵⁶ By the 1990s, counselling practice for parents using donated gametes had moved from advocating secrecy to promoting openness.¹⁵⁷ A number of jurisdictions also implemented information campaigns to encourage parents to tell and provided resources to assist them to do so.¹⁵⁸ There is evidence that the trend among parents is towards greater disclosure particularly in jurisdictions where anonymity has been abolished,¹⁵⁹ though this may be in part because the primary users of donated sperm are lesbian couples and single women who have little choice but to tell. By contrast, a significant number of heterosexual couples continue to withhold

¹⁵⁵ Turner, *supra* note 78.

¹⁵⁶ Berger, *supra* note 153.

¹⁵⁷ Ken Daniels & K Taylor, "Secrecy and Openness in Donor Insemination" (1993) 12:2 *Polit Life Sci* 155.

¹⁵⁸ Johnson et al, *supra* note 65. In 2004, the American Society of Reproductive Medicine (ASRM) formally stated its support for parental disclosure of donor conception: ASRM, "Informing Offspring of their Conception by Gamete Donation" (2004) 81:3 *Fertility & Sterility* 527.

¹⁵⁹ Eric Blyth, D Langridge & R Harris, "Family Building in Donor Conception: Parents' Experiences of Sharing Information" (2010) 28:2 *J Reprod Infant Psych* 116; W Soderstrom-Antilla, M Salevaara & A Suikkari, "Increasing Openness in Oocyte Donation Families Regarding Disclosure over 15 years" (2010) 25:10 *Human Reproduction* 2535.

the information.¹⁶⁰ Parents who do not disclose frequently express concern about *how* to go about it, and indicate that they require more professional support and guidance, as well as tools, for sharing this information.¹⁶¹

A number of jurisdictions with prospective linking laws have explored the possibility of requiring parents to disclose that a child is donor conceived. Donor-conceived people obviously cannot make choices about whether or not they wish to seek further information about their donor, if they do not know that they are donor conceived. Only Croatia has a legal requirement that parents disclose. Article 1 of the *Law on Medically Assisted Reproduction* states that parents must inform the person conceived and born with the help of medically assisted conception using donated sperm, ova, or embryos, the nature of their conception no later than the age of 18.¹⁶² The state of Victoria has attempted to achieve the same outcome with a less coercive approach, choosing to add an addendum to the child's birth registration so that when they apply for their birth certificate as an adult they will be told that additional

¹⁶⁰ Jennifer Readings et al, "Secrecy, Disclosure and Everything in-between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22:5 *Reprod Biomed Online* 485; Gab Kovacs, Sarah Wise & Sue Finch, "Functioning of Families with Primary School-Age Children Conceived Using Anonymous Donor Sperm" (2012) 28:2 *Human Reproduction* 375; S Isaksson et al, "Disclosure Behaviour and Intentions among 111 Couples Following Treatment with Oocytes or Sperm from Identity-Release Donors: Follow-up at Offspring Age 1–4 years" (2012) 27:10 *Human Reproduction* 2998.

¹⁶¹ Kirstin MacDougall et al, "Strategies for Disclosure: How Parents Approach Telling Their Children that They Were Conceived with Donor Gametes" (2007) 87:3 *Fertility and Sterility* 524.

¹⁶² *Zakon O Medicinski Pomognutoj Oplodnji* (Law on Medically Assisted Reproduction, 12 July 2012) (Croatia), No: 71-05-03/1-12-2, Art 1.

information about their birth is available.¹⁶³ If the information is requested, the individual will be informed that they were donor conceived. While the Victorian system does not coerce disclosure, knowing that the child can access the information as an adult makes it much more likely that parents will disclose while the child is still a minor. Recognizing that disclosure may be daunting for parents, VARTA provides significant resources,¹⁶⁴ including a regular “Time to Tell” seminar.

It is recommended that the Canadian provinces consider introducing an annotated birth registration for donor-conceived children so that they can make a choice about whether or not they wish to explore their origins and/or participate in donor linking. Prospective disclosure laws can only achieve their objective if all donor-conceived people know the story of their conception. Resolving the issue through an annotated birth registration is preferable to an expressly coercive system, as the latter might encourage parents who do not wish to disclose to hide the fact that donor conception was used or travel to a jurisdiction that does not require disclosure.¹⁶⁵

(vi) THE ELEPHANT IN THE ROOM: IMPORTED GAMETES

Perhaps the biggest challenge facing any attempt by Canadian provinces to address the issue of donor anonymity is the fact that the vast majority of gametes used in Canada’s fertility clinics are imported from the United States. Canada has only one sperm

¹⁶³ *Birth, Deaths and Marriage Registration Act* 1996 (Vic) 1996, s 17B.

¹⁶⁴ *Resources*, VARTA (5 October 2017), online: <www.varta.org.au/resources>.

¹⁶⁵ While people could attempt to avoid the birth certificate requirement by travelling overseas, the child would also need to be born overseas. If a child is donor conceived and born in Victoria, parents must indicate that fact on the child’s birth registration.

bank, ReproMed, which operates out of Toronto and offers 64 donors, 23 of whom are “open identity”.¹⁶⁶ Ending donor anonymity without decimating the Canadian fertility industry is likely to require provinces to either develop their own donor gamete banks and/or only permit identity-release gametes to be imported.

If the provinces decide that building a domestic gamete market is the best approach, they can look to the recruitment practices adopted by other jurisdictions trying to increase donor registrations. In countries where anonymity has been abolished, government authorities and private sperm banks have used targeted advertising campaigns to attract new donors, focusing on the altruistic nature of the practice.¹⁶⁷ In countries such as the UK and Australia, changes to donor laws have led to a change in the demographic characteristics of sperm donors. Historically, donors were younger men, often university students, without families of their own. Following the introduction of identity disclosure laws, donors are now more likely to be gay men or older married men with young children.¹⁶⁸ It is therefore recommended that if Canadian provinces intend to build their own sperm industry, they specifically target this new population of donors.

While it is recommended that Canadian provinces attempt to build the domestic gamete market, it may be possible

¹⁶⁶ Repromed, “Sperm Donor Catalogue” (3 June 2017), online: <www.repromed.ca/sperm_donor_catalogue>.

¹⁶⁷ For examples of some of the advertisements that have been used in Australia see Jane Hansen, “More Single Women Opting for Sperm Donors to Have Children”, *The Daily Telegraph* (22 May 2016) online: <www.dailytelegraph.com.au/news/>.

¹⁶⁸ Damien Riggs & Laura Russell, “Characteristics of Men Willing to Act as Sperm Donors in the Context of Identity–Release Legislation” (2011) 26:1 *Human Reproduction* 266 at 266–67.

to keep importing sperm yet still satisfy open disclosure rules. For example, a number of Australian states allow sperm to be imported, but donors must meet the statutory requirements of the importing jurisdiction. In the state of New South Wales (NSW), for example, international donors must agree to identity disclosure, to the registration of their details on the NSW Central Register, and to participate in mandatory counselling with a clinic counsellor to ensure they fully understand the implications of donating in NSW. Donor offspring who want face-to-face contact with an international donor may find it harder to achieve that outcome than a child with a local donor. However, because the donor's identifying information is held on the state's Central Register access to his *identity* is still guaranteed. It is therefore recommended that if Canadian fertility clinics are to continue to import gametes that they be required to adopt a recruitment protocol similar to the one in NSW.

It has been argued that countries that end donor anonymity will experience a shortage of available gametes.¹⁶⁹ While this might initially be the case,¹⁷⁰ it is certainly not a universal or necessarily long-term outcome.¹⁷¹ In fact, in some

¹⁶⁹ Guido Pennings, "How to Kill Gamete Donation: Retrospective Legislation and Donor Anonymity" (2012) 27:10 Human Reproduction 2881 at 2882. See also Sonia Allen, "Donor Identification 'Kills Gamete Donation': A Response" (2012) 27:12 Human Reproduction 3380. The argument has also been made that prohibition on payment decreases the number of men willing to be sperm donors. Certainly, once Canada introduced such a prohibition, donations declined. Countering this trend can be achieved in much the same way as countries have countered declining donations when anonymity is abolished.

¹⁷⁰ Eric Blyth & Lucy Frith, "The UK's Gamete Donor 'Crisis'—A Critical Analysis" (2008) 28:1 Critical Social Policy 74.

¹⁷¹ Lucy Frith, Eric Blyth & Abigail Farrand, "UK Gamete Donors' Reflections on The Removal of Anonymity: Implications for Recruitment" (2007) 22:6 Human Reproduction 1675.

instances where a reported gamete shortage has been attributed to the ban on donor anonymity, it has been shown that donor registrations did not fall following the ban, but rather demand increased.¹⁷² For example, it has been widely reported in the media that the current “sperm shortage” in the UK is the result of the introduction of identity disclosure laws.¹⁷³ The statistics gathered by the Human Fertilization and Embryology Authority (HFEA), however, suggest another story: that gamete donor registrations have actually *increased* in the years since identity disclosure was introduced. In 2005, the year the law came into effect, there were 271 new sperm donor registrations in the UK. In 2013, there were 586. During the same time period, new egg donor registrations rose from 1023 to 1103. None of this data means that there is not a gamete shortage in the UK, but if one exists, donor disclosure laws have not caused it.¹⁷⁴ It might

¹⁷² See HFEA statistics on donor numbers across the UK from 1992 to 2010, online: <www.hfea.gov.uk/3411.html>. See also HFEA, *Egg and Sperm Donation in the UK: 2012-2013*, online: <www.hfea.gov.uk>. In Victoria, legal changes were blamed for sperm shortages, but numbers have actually remained steady since the legislative changes were made. What has changed is the level of demand, particularly among lesbian couples and single women. See the comments of VARTA CEO Louise Johnson: “#TalkAboutIt: The Ins and Outs of Sperm Donation”, *ABC News* (30 August 2015) online: <www.abc.net.au>.

¹⁷³ Sam Frizell, “UK Facing ‘Major’ Sperm Shortage”, *Time* (28 June 2014); Sara Kamouni, “Sperm Stocks Running Dry: Sperm Donors ‘Should Be Given Right to Remain Anonymous to Halt Chronic Shortage of Donations’”, *The Sun*, (1 November 2016), online: <www.thesun.co.uk>.

¹⁷⁴ Similarly, in Victoria, where anonymity has been banned since 1998, the number of registered sperm donors has steadily increased each year. VARTA reported that in 2014–15, the number of new sperm donors recruited increased by 79 per cent. However, demand increased during the same time period. See VARTA, Media Release, “New Data Reveals Changing Face of Family Formations in Victoria” (2015), online: <www.varta.org.au>.

be because donors are now limited in the number of offspring they can produce, that they donate for shorter periods of time, or that demand for donor sperm may be increasing more rapidly than supply.¹⁷⁵ Thus, it may be true that some countries with open disclosure laws will struggle to meet the demand for gametes, but the assertion that the law is the immediate or sole cause is not supported by the evidence. It should also be noted that even if banning donor anonymity did decrease donations, a sperm shortage does not outweigh the ethical arguments in favour of the ban.¹⁷⁶

CONCLUSION

There is a clear international trend toward the prospective abolition of donor anonymity. In countries that have introduced open disclosure laws, the impetus for change has come primarily from donor-conceived people and their parents, though a significant number of sperm donors have joined the call for reform. Advocates for change have also been supported by the growing body of scholarly evidence that suggests that the wellbeing of donor-conceived people is best met by providing them with the *option* of accessing their donor's identity if they wish.

¹⁷⁵ In many jurisdictions, the recent increase in demand is coming from lesbian couples and single women who were historically barred from accessing fertility clinics. For example, in 2014 it was reported that of the 1362 women who received donor treatment in Victoria, only 202 women were in heterosexual relationships (15%), while 684 were single women (50%), and 476 women were in same-sex relationships (35%). Just four years earlier, it had been illegal for Victorian fertility clinics to offer services to lesbian couples and single women. See VARTA, *supra* note 174. See also Riggs & Russell, *supra* note 168 at 1–2.

¹⁷⁶ Roger Collier, “Disclosing The Identity of Sperm Donors” (2010) 182:3 Canadian Medical Association Journal 232.

If the international trend is to be followed by Canada, important decisions need to be made about how best to regulate an open disclosure system. Much can be learned from other jurisdictions where a variety of legislative models have been introduced. While there may not be a single “best practice” framework from which the Canadian provinces can draw, successful models tend to share a number of common features. They are well resourced, take an “active” approach to donor linking, and work to find the common ground between stakeholders rather than presume they have competing interests. In moving forward, it is recommended that the Canadian provinces embrace open disclosure laws, permitting prospective access, as well as retrospective access where there is mutual consent. However, it is also important that the framework in which the laws operate is one where the underlying objectives of open disclosure are able to be met. It is therefore important that Canadian registers operate actively and provide the support mechanisms needed to guide participants through the process.