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“PUTTING THE CHILD FIRST”: A NECESSARY STEP IN THE RECOGNITION OF THE RIGHT TO IDENTITY

Michelle Giroux and Mariana De Lorenzi*

***Abstract:** In recent years, the number of nations which have banned the anonymous character of gamete donations has increased, including nations that once strongly supported such a position. This shift in national legislative policy worldwide has aided a growing recognition of the right to know one's origins in international law and gives a wider effect to this fundamental right. In Canada, while there has been discussion about the importance of the right to know one's biological origins, this right has not been universally guaranteed through legislation, either to adoptees or to the donor-conceived. This*

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article refers mostly to Québec legislation, but combines analyses of Québec civil law and common law with continental European legal developments, which can assist legislative reform across the country. The authors are defending the existence of a fundamental right of the child to know his or her biological origins as part of the right to identity protected by the UN Convention on the Rights of the Child (CRC) and are therefore focusing on the perspective of the child. Pursuant to the recent Supreme Court of Canada decision in Renvoi, which partially invalidated the federal legislation that regulated assisted human reproduction, this article takes a position in favour of provincial and territorial law reform that would explicitly recognize the right of the child to know his or her biological origins and ban anonymity in the context of gamete donation.

Résumé: *Depuis quelques années, le nombre de pays qui a banni le caractère anonyme du don de gamète a augmenté, incluant des pays qui auparavant supportaient une telle position. Ce changement de politique législative nationale au niveau mondial a favorisé une reconnaissance grandissante du droit fondamental de connaître ses origines biologiques en droit international. Au Canada, ce droit n'est pas universellement garanti par la législation, que ce soit pour les enfants adoptés ou issus de la procréation assistée, bien qu'il y ait eu des discussions au sujet de son importance. Tout en mettant l'accent sur le droit québécois, ce texte suggère une analyse intégrée des deux systèmes juridiques canadiens et introduit des éléments de droit continental européen. Cela apporte un éclairage utile pour la réforme du droit dans les autres juridictions provinciales du Canada. Les auteurs soutiennent qu'il existe un droit fondamental de l'enfant de connaître ses origines biologiques, composante du droit à l'identité, protégé dans la Convention relative aux droits de l'enfant des Nations Unies (CIRDE). Conformément au Renvoi de décembre 2010 de la Cour suprême du Canada ayant invalidé plusieurs articles de la Loi fédérale sur la procréation*

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assistée, c'est une question qui relève de la compétence des provinces. L'article prend position en faveur d'une réforme législative au niveau provincial afin de reconnaître explicitement le droit de connaître ses origines biologiques et d'interdire le caractère anonyme du don de gamète.

INTRODUCTION

Gamete donor anonymity has been a topic of discussion since 1884, when the first known gamete donation took place,¹ but the topic remains current. As donor-conceived children reach the age of majority, empirical research is demonstrating the need for increased openness.² In *Pratten*, the Supreme Court of British Columbia recently considered whether a child conceived with the use of an anonymous sperm donor has a

¹ R Snowden & GD Mitchell, *The Artificial Family* (London: George Allen & Unwin, 1981) at 13-14; Eric Blyth & Abigail Farrand, "Anonymity in donor-assisted conception" (2004) 12 Int'l J Child Rts 89 at 89. It is said that the first known case of assisted insemination - donor (AID) was performed at Jefferson Medical College (USA). A group of students of the medical school discussed how to solve the difficulties of a couple because of the husband's azoospermia, and suggested that the wife be inseminated with the semen of the "best-looking member of the class". They did so while the woman was anaesthetized, without informing her or her husband. After conception was confirmed the husband was told and, although he was pleased, he decided not to tell his wife. When the person born by AID was 25 years old, the student-donor visited him.

² This paper focuses on legal aspects of the fundamental right to know one's biological origins. However, we can mention one recent and large study on these children, DR Beeson, PK Jennings and W Kramer, "Offspring searching for their sperm donors: how family type shapes the process" (2011) 26:9 Human Reproduction, 2415. See also a comment on this study, Naomi Cahn & Wendy Kramer, "What the kids really want" *BioNews* (8 August 2011), online: <www.bionews.org.uk/page_103648.asp>.

right to identity pursuant to section seven of the *Charter*.³ The Court eventually concluded that the equality rights protected by section 15 of the *Charter* were violated, and the case is now before the British Columbia Court of Appeal. In Canada, there continues to be considerable controversy about the role of anonymity in gamete donation. In other jurisdictions, it is now widely accepted that a child should know the identity of his or her progenitors. In these jurisdictions, the debate has moved on to exploring whether it is possible, or indeed desirable, for the donor to have access to information about the child or if the access to information can be extended to knowledge of the existence and identities of possible genetic siblings.⁴

While some national differences exist, the international trend is toward banning anonymous gamete donation, even in countries that once staunchly defended it.⁵ In the past several

³ *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656. For more details, see *infra* note 77.

⁴ This is the case of some States of Australia and in the United Kingdom. For Australia, see National Health and Medical Research Council, *The Ethical Guidelines on the use of Assisted Reproductive Technology in Clinical Practice and Research 2004* (Canberra: National Health and Medical Research Council, 1996); *The Infertility Treatment Act 1995* (Vic); *The Human Reproductive Technology Amendment Act 2004* (WA); *Human Fertilization and Embryology Act 2008* (WA).

⁵ “I conclude that international instruments, practice and jurisprudence have not yet reached the point where it can conclusively be said that . . . children possess a universal and internationally recognised right to know their biological parentage, although the tide of opinion is flowing in that direction.” See *Hemmes v Young*, [2004] NZCA 289 at para 88. See also chapter 10 of Law Commission – Te Aka Matua o te Ture, *New Issues in Legal Parenthood* (Wellington, NZ: Law Commission, 2005); Michelle Giroux, “Le droit fondamental de connaître ses origines biologiques” in Tara Collins et al, eds, *Rights of the Child: Proceedings of the International Conference, Ottawa 2007* (Montréal: Wilson & Lafleur, 2008) 353 [Giroux, “Le droit

years, legislative reform recognizing a donor-conceived person's right to access information about his or her donors has occurred in Norway (2003), in the United Kingdom (2004), and in Finland (2006).⁶ This worldwide national legislative policy of banning anonymous gamete donation has permitted a growing recognition of the right to know one's biological origins, which is recognized as a fundamental right by the *UN Convention on the Rights of the Child* (CRC).

However, in Canada, the right to know one's biological origins has not been universally guaranteed through legislation, either for adoptees or for donor-conceived children. There has been considerable discussion about its importance, as we discuss below.⁷ The need for an explicit guarantee of this right

fondamental"; 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 *Int'l JL Pol'y & Fam* 174.

⁶ In doing so, these countries adopted legislation like that of Sweden (1984), Austria (1992), Switzerland (1998), in Australia, Victoria (1998) and West Australia (2004), Holland (2004), and New Zealand (2004). These countries either do not allow donor anonymity or had allowed it in the past but have since abolished it. On the other hand, Iceland (1997), Portugal (2006) and Belgium (2007) have a double-track system that recognizes the donor's choice between anonymity and disclosed donation. Canada, Denmark, France, and Greece allow donor anonymity. Italy does not allow ART with donors at all. Some South American countries, Luxemburg, and a number of other countries remain silent with respect to this practice. For some statistics in Europe, see European Society of Human Reproduction and Embryology, *Comparative Analysis of Medically Assisted Reproduction in the EU: Regulation and Technologies* (Belgium: ESHRE, 2008), online at <http://ec.europa.eu/health/blood_tissues_organs/docs/study_eshre_en.pdf>.

⁷ See the discussion in the province of Quebec around *Bill 125 – Québec Civil Code in Parliamentary Commission*: Québec, Assemblée nationale, *Journal des débats*, 7 (5 septembre 1991) at

arises from a democratic conception of the family. This is a new understanding of familial relationships, based upon equality of family members *vis-à-vis* one another. It is encouraged by a re-evaluation of the impact of fundamental rights in family law and its recognition for all of its members.⁸ Within this framework, this article builds on the CRC's recognition of the right to identity as a fundamental right of the child.⁹ We will focus on the importance of recognizing the

254-261, 271, 273; Québec, Assemblée nationale, *Journal des débats*, 30 (5 décembre 1991) at 1231-1242; Québec, Assemblée nationale, *Journal des débats*, 33 (10 décembre 1991) at 1333-1335; *AP v LD*, [2001] RJQ 16 (CA). At the national level, see Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies: Volume 1* (Ottawa: Canada Communications Group, 1993); House of Commons, Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December 2001), online: <<http://www.parl.gc.ca/content/hoc/Committee/371/HEAL/Reports/RP1032041/healrp02/healrp02-e.pdf>>.

⁸ With respect to the evolution and changes in the notion of family, see Mariana De Lorenzi, "Familias ensambladas: ¿Prerrogativa Heterosexual?" (Paper and lecture delivered at the 11th Meeting of Civilist Lawyers, Santa Fe, Argentina, August 2001) [De Lorenzi, "Familias ensambladas"]; Françoise-Romaine Ouellette, Renée Joyal & Roch Hurtubise, *Familles en mouvance: quels enjeux éthiques?* (Québec: PUL, 2005). On the impact of fundamental rights on the family, see Michelle Giroux, "Les bouleversements du droit de la famille au Canada et au Québec : illustration à partir du mariage homosexuel et du droit de connaître ses origines biologiques" (Paper delivered at a seminar entitled *Els drets fonamentals en una societat intercultural. Els Casos de Canada-Quebec I Espanya-Catalunya A Debat*, Barcelona, Spain, 15-16 June 2006).

⁹ This will be developed to a greater extent later in the paper. For now, let us simply mention, as expressed by Jaime Sergio Cerda, "The Draft Convention on the Rights of the Child: New Rights" (1990) 12 Hum Rts Q 115, that during the drafting process of the CRC, everyone agreed that this right existed. However, it is also worth mentioning that there is no unanimity on the issue. See Angela

right to know one's origins at the provincial level,¹⁰ with an emphasis on the *Civil Code of Québec*.¹¹ While this article primarily refers to Québec legislation, it can assist legislative reform across the country.¹²

IDENTITY

The Concept of Identity

The word '*identity*', derived from the Latin term '*identitas*', is defined as "the state of having unique identifying characteristics held by no other person or thing." It is what makes one special and original. The identity of a person is like a snapshot of one's being and feelings; it refers to "the

Cameron, Vanessa Gruben & Fiona Kelly, "De-Anonymising Sperm Donors in Canada: Some Doubts and Directions" (2010) 26:1 Can J Fam L 95.

¹⁰ It is now clear that this issue is within provincial jurisdiction, as the provisions of the *Assisted Human Reproduction Act*, SC 2004, c 2 [AHR] on the matter have been invalidated by the Supreme Court of Canada, in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

¹¹ *Civil Code of Québec*, LQ 1991, c 64.

¹² The framework for determining parentage in Quebec civil law differs from the frameworks of other Canadian common law provinces and territories. Quebec civil law generally states that a donor cannot be the legal parent of a donor conceived child, but this is not as clearly enacted in other parts of the country (see *infra* note 66). To avoid confusing the question of parentage with the one of knowing one's origins, rules determining parentage would need to be reformed where needed before banning confidentiality. This is very important to avoid creating difficult hurdles for some families, especially for lesbian, gay, and single-parent families. See Cameron, Gruben & Kelly, *supra* note 9; Fiona Kelly, "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families" (2009) 40 Ottawa L Rev 185.

individual characteristics by which a person or thing is recognized.”¹³ It is what makes every human being a unique entity¹⁴ that can be individualized in society.

Within this general understanding, identity is composed of two distinct parts: one “dynamic” and the other “static”. The first refers to those characteristics (for example, intellectual, moral, cultural, religious, political, and professional) that are in constant flux. These characteristics enable us to distinguish one person from another in the social milieu. The static sphere, perpetual and immutable, alludes to a group of attributes that make one visible to the outside world (for example, image, physical features, name, birth information, sex, parenthood, genetic heritage, and nationality). These characteristics allow an observer to obtain an immediate first impression. One’s genetic heritage is located within the “static aspect” of one’s identity.¹⁵

The Right to Identity

The “right to identity” can be viewed as the legal protection

¹³ *The Collins English Dictionary*, 2d ed, *sub verbo* “identity”.

¹⁴ Fernández Sessarego, *Derecho a la Identidad Personal* (Buenos Aires: Editorial Astrea, 1992) at 113. According to Fernández Sessarego, it is everything that allows us to identify the individual within the society and what allows every human being to “be ‘oneself’ (himself or herself) and not ‘someone else’.” In other words, it is what makes every individual unique and incapable of being replicated.

¹⁵ *Ibid* at 114. Sarah Wilson, “Identity, Genealogy and the Social Family: The Case of Donor Insemination” (1997) 11 Int’l JL Pol’y & Fam 270 at 272, 281-282. Sarah Wilson also defends a dynamic notion of identity, instead of a monolithic and static one, using the idea of “narrative identity” as opposed to a “fixed identity” in her discussion of the importance of genetic ties.

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afforded to the state's respect for one's identity.¹⁶ To guarantee the right to identity as a whole, the state must recognize a child's right to know his or her genetic origins, which is part of the static aspect of identity, as well as the right to have a family, which is part of the dynamic aspect. These two distinct aspects of identity are recognized by Article 7 of the CRC,¹⁷ which states that every child shall have the "right to know" and to "be cared for by his or her parents."¹⁸

¹⁶ The right to know one's origins also includes the necessity of hearing the opinion of the child (Article 12); the right to seek, receive and impart information and ideas of all kinds, with certain restrictions (Article 13); the access to information and material which promote their social, spiritual and moral well-being and physical and mental health (Article 17); and to enjoy all the rights set forth in the Convention without discrimination of any kind, with the States taking all appropriate measures to ensure their protection (Article 2). With respect to the relationship between anonymity and discrimination, see Claire Breen, "Poles Apart? The Best Interests of the Child and Assisted Reproduction in the Antipodes and Europe" (2001) 9 Int'l J Child Rts 157 at 166.

¹⁷ We do not suggest, however, that the right to identity should be limited to children. The recognition of this right for the child is reinforcing the idea that every individual - whatever his or her age - has the right to know his or her origins. As John Eekelaar has stated: "it would be a grievous mistake to see the Convention as applying to childhood alone. Childhood is not an end in itself, but part of the process of forming the adults of the next generation. The Convention is for all *people*. It could influence their entire lives. If its aims can be realized, the Convention can truly be said to be laying the foundations for a better world". See John Eekelaar, "The Importance of Thinking that Children have Rights" in Philip Alston, Stephen Parker & John Seymour, eds, *Children, Rights and the Law* (Oxford: Oxford University Press, 1992) at 234.

¹⁸ See Mariana De Lorenzi, "El Desconocimiento del Verdadero Origen... ¿y el derecho a la identidad? El anonimato del donante de gametos y preembriones en las técnicas de reproducción humana asistida" (Diploma in Advanced Studies Thesis, University of Barcelona, 2007) [unpublished] at 217-221, 300 [De Lorenzi, "El

Children should be able to know the identity of their progenitors¹⁹ and be cared for by their legal parents.²⁰ The difference between these two characteristics of identity should be recognized at law.²¹ While this distinction may seem simple, it often generates confusion in the literature. The ability to access information about the donor's identity (*who is the progenitor?*) and the legal mechanism for proclaiming filiation (*who is the legal parent?*) are often conceived of as one issue, when in fact they are two separate questions with potentially different answers. Confusion between the two concepts exists, for example, in a decision in which a child's right to know her progenitors is not protected due to a concurrent interest in maintaining her legal link with her legal parents.

When a child is able to access information about the identity of a progenitor, the progenitor need not be considered

Desconocimiento del Verdadero Origen”]; Mariana De Lorenzi, “¿De dónde vengo?” La emblemática pregunta por los orígenes formulada por los hijos nacidos de técnicas de reproducción humana asistida” in Carlos Villagrasa Alcaide & Isaac Ravetllat Ballesté, eds, *Por los derechos de la infancia y de la adolescencia: un compromiso mundial desde el derecho de participación en el XX aniversario de la Convención sobre los Derechos del Niño* (Barcelona: Bosch, 2009) 797 at 814. [De Lorenzi, “¿De dónde vengo?”].

¹⁹ In referring to the progenitors, we may also use the terms “biological parents” or “genetic parents”. See also *infra*, the section of this paper entitled “The *Convention on the Rights of the Child*”.

²⁰ By legal parents, we refer to the people recognized by law as being responsible for the upbringing and care of a child. We will discuss, in the section of this paper entitled “The *Convention on the Rights of the Child*”, whether this interpretation is consistent with the CRC.

²¹ The need for such division has been defended by the Commission of the European Court of Human Rights in *JRM v The Netherlands* (1993), 74 Eur Comm’n HR DR 120.

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the legal parent.²² Additionally, it does not necessitate a social relationship between the child and the progenitor.²³ A

²² As mentioned earlier, legal reforms of parentage frameworks would be required in some provinces and territories to establish this distinction. For more details on legal parentage in Canada, see Cameron, Gruben & Kelly, *supra* note 9. For a discussion of the distinction between “progenitor” and “legal parent”, see Odile Roy, “Le droit de connaître ses origines et la Cour européenne des droit de l’homme: l’affaire Odièvre contre France” in Peter Lodrup & Eva Modvar, eds, *Family Life and Human Rights* (Trondheim: Gyldendal Norsk Forlag, 2004) 606; Julie Wallbank, “The Role of Rights and Utility in Instituting a Child’s Right to Know her Genetic History” (2004) 13 Soc & Leg Stud 245 at 260; Jaap Doek, “Article 8: The Right to Preservation of Identity” in *A Commentary of the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2006) 12. When one talks about ART with a third-party gamete donor, one is not asking for a legal determination of the paternity or maternity of the donor; the legal parents of the child born from the donation are the parents who raise the child socially. As Odile Roy states, in her comment on *Odièvre v France*, no 42326/98, [2003] III ECHR 86, «il ne s’agit pas ici de discuter du rôle que doivent jouer respectivement les facteurs biologique et sociologique dans la définition de la filiation». Furthermore, as Wallbank states, “[u]sually, sperm donors have no desire to act as fathers. There is no reason to believe that this would change if they were identifiable.” Asserting a legal relationship with the donor would also be contrary to the CRC, as a proper interpretation of Article 8 provides not only the right to know one’s genetic origins, but also alleviates the donor from any legal or financial responsibility for the child born from the donation.

²³ Wallbank, *ibid* at 260; Ouellette, Joyal, & Hurtubise, *supra* note 8 at 391-403. This is underscored in some of the literature. For example, see Martin Richards, “Assisted Reproduction and Parental Relationships” in Andrew Bainham et al, eds, *Children and their Families: Contact, Rights and Welfare* (Oxford: Hart Publishing, 2003) 309. Richards points out that the circumstance of “[k]nowing the manner of your conception and the identity, and perhaps some other information, about the gamete provider is not, of course, the same thing as having a social relationship with that person. In the

‘progenitor’ is not necessarily a ‘parent’.²⁴ While a ‘progenitor’ is “a direct ancestor”, a ‘parent’ is the “person acting as a father or mother; guardian.”²⁵ From a legal standpoint, “progenitor” and “parent” are not synonymous.

For example, within the general parentage framework in Québec, in most cases, the same person will be both progenitor and legal parent. One of the legislative criteria to establish either paternity or maternity is the biological link. Filiation by blood usually confirms the biological link.²⁶ The

same vein, Wallbank says that “[f]ulfilling the child’s right to know should not automatically lead to the child having a relationship with her donor or any other third party”, because “[t]o contribute one’s genes to the creation of a child is not congruent with the social role of parenthood.”

²⁴ José Luis Lacruz Berjedo, “La Constitución y los hijos artificiales” (1987) *Actualidad Civil* 2031-2039 at 419; Montes Penades & L. Vicente, “Las categorías negociales en las técnicas de reproducción asistida” (1994) 4 *Actualidad Civil* 957-980 at 968; Hernández Rivero, “Las acciones de filiación y las técnicas de reproducción asistida” in Lledó Yagüe, ed, *Cuadernos de Derecho judicial: “La filiación: su régimen jurídico e incidencia de la genética en la determinación de la filiación”* (Madrid: CGPJ, 1994) 279. For Québec civil law, see Jean Pineau & Marie Pratte, *La famille* (Montréal, Thémis, 2006) at paras 387ff and 421ff. In Spain, Lacruz Berjedo is recognized as being the one who established the distinction between “*padre*” and “*progenitor*” based on the socio-cultural and legal sense of the first term and the biological and genetic sense of the second. Today, this distinction is accepted and shared by almost all jurists, thus abandoning the idea of parenthood as a situation defined by the biological fact.

²⁵ *The Collins English Dictionary*, *supra* note 13, *sub verbo* “parent”, “progenitor”.

²⁶ It is however factually possible that an individual might have two progenitors, one gestational progenitor, one legal mother and father, and even a social mother and father.

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intention to act in fact as a parent (sometimes only after the child is born) is another foundation. In the context of assisted reproductive technology, the situation is quite different, and the intention to become a parent should be the only foundation of legal parenthood. For this reason, legislation pertaining to ART generally does not recognize the donor as a parent. In fact, the law often stipulates that the donor is not the parent.²⁷

In short, legal parenthood can be determined in different ways. In some cases, it is determined by biology, and sometimes, in the case of paternity, by biology combined with other circumstances, including marriage, civil union, or cohabitation with the mother.²⁸ In other cases, legal parenthood will be established by the intention of the person to become a parent.²⁹ These methods of determining parentage allow

²⁷ In the Canadian context, see Canada, *Uniform Child Status Act*, 1992, online <www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u9>. However, uncertainty remains in some provinces where no legislation has been enacted on this issue or where the recommendations of the Uniform Law Conference of Canada have not been universally adopted despite the adoption of some legislation.

²⁸ Penades & Vicente, *supra* note 24 at 968. For more details on these questions in Québec civil law, see Alexandra Obadia, “L’incidence des tests d’ADN sur le droit québécois de la filiation” (2000) 45 McGill LJ 483. See also Giroux, “Test d’ADN et filiation à la lumière des développements récents: dilemmes et paradoxes” (2002) 32 RGD 865.

²⁹ Lacruz Berjedo, *supra* note 24 at 2037; Anne Cadoret, “Constructions familiales et engagement” in Françoise-Romaine Ouellette, Renée Joyal & Roch Hurtubise, eds, *supra* note 8 at 89. The question of whether the intention to become a parent could be the basis of a legal bond of parenthood is necessarily affirmative. This is not a new way of thinking, but has in fact existed since Roman times; it should not lose its effect simply because of new ways of having children, such as through ART. The continued use of this question to determine legal parenthood could indeed be a helpful solution to the problem at hand. We should not forget that the scope of the will to become a parent is

recognition of different societal roles.³⁰ The numerous forms in which families exist today provide an opportunity to broaden the means of determining parenthood³¹ to define new legal categories and to establish more suitable terminology to reflect these new social realities.³² In this article, we attempt to establish that legislative policy ought to respect the importance of establishing an unequivocal parental relationship while also ensuring the right of the child to have access to information about his or her biological origins.³³

The Recognition of the Right to Identity

The International Trend

Currently, the trend in international law is to recognize that the right to identity includes the right to know one's biological origins.³⁴ A model of the express recognition of this right is the

also wider since it has the ability to not only create the legal relationship but also to destroy it, as happens with the case of abandonment.

- ³⁰ Penades & Vicente, *supra* note 24 at 968.
- ³¹ Francisco Blasco Gascó, "Técnicas de reproducción asistida y competencia legislativa autonómica" (1991) 4 *Revista Jurídica de Catalunya* 953 at 963-964. See also Cadoret, *supra* note 29 at 89.
- ³² Francisco Rivero Hernández, "¿Mater semper certa est? Problemas de la determinación de la maternidad en el Ordenamiento Español" in *Anuario de Derecho Civil*, Tomo L, 1997-1, at 17.
- ³³ Eser Albin, MCJ, "La moderna medicina de la reproducción e ingeniería genética. Aspectos legales y sociopolíticos desde el punto de vista alemán" in *Ingeniería Genética y Reproducción Asistida* (Madrid: Edición de Marino Barbero Santos, 1989) at 281-282. In this paper, however, we will only deal with the second question.
- ³⁴ Some international institutions have expressed their worries about the need to respect the right to know one's origins. For example, the Council of Europe's Parliamentary Assembly, 5th sitting

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Universal Declaration of Human Rights for Future Generations (Paris, 22 September 1994), which includes, in Article 4, the right of persons belonging to future generations to know their personal and collective origins, identity, and history.³⁵ Despite the absence of an explicit provision respecting the right of children to their identity in other conventions, a dynamic interpretation that implicitly recognizes this right has been adopted by both the organizations in charge of their application and the literature.³⁶ For example, the *European Court of Human Rights* implicitly recognizes the

Recommendation 1443, 2000, 5.vii, about International Adoption insists that it is a necessity to “ensure the right of adopted children to learn of their origins at the latest on their majority and to eliminate from national legislation any clauses to the contrary” (see Doc. 8592, report of the Social, Health and Family Affairs Committee, rapporteur: Mr. About; Doc. 8626, opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Mrs. Wohlwend; and Doc. 8600, opinion of the Committee on Migration, Refugees and Demography, rapporteur: Mrs. Vermot-Mangold). In a similar way, the Information Document prepared by the Secretariat of the Economic and Social Committee about Children’s Rights Under The European Social Charter (18 November 2005) talks about the right to an identity under the headline “Legal status of the Child” claiming that “there must be a right for an adopted child to know his or her origins (Article 17)”.

³⁵ UNESCO, Executive Board, Session 145 (EX/41), online: < unesdoc.unesco.org/images/0010/001001/100169EO.pdf>.

³⁶ In 1992, the Council of Europe enacted *the Resolution on a European Charter of Rights of the Child* (Resolution A3-0172/92, 8 July 1992, *Official Journal of the European Communities* No C 241/67; 21 September 1992, 67-73). This document states that children have the right to have their identity protected and the right to know about their biological origins. It also lays down the conditions under which such information will be given to children and recognizes the right of having parents or people or institutions to take the place of parents if no parents are available (see Articles 8.10 and 8.11).

right to identity in article 8 of ECHR, within the right to privacy.³⁷

While European instruments can assist in the interpretation of the right to know one's biological origins in Canada,³⁸ the *CRC* is without question the most important document with a binding character in this country and the first to expressly recognize this right.³⁹

³⁷ Although there is no specific judgment on the rights of children born by ART with anonymous donors to know their donors' identity, the evolution of the case law is clearly heading in that direction. The European Court of Human Rights in *X, Y and Z v the United Kingdom* [no 21830/93, [1997] II ECHR] stated, in obiter, that there is not a "shared approach amongst the High Contracting Parties with regard to the manner in which the social relationship between a child conceived by AID and the person who performs the role of father should be reflected in law" and "on the question whether the interests of a child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity" (at para 24). However, since 1997, in *UK R (On the application of Rose and another) v Sec of State for Health and another*, [2002] EWHC (ADMIN)(2002) 3 FCR 731 (QB Administrative Court), judges determined that this remedy was available based on ECHR's precedents. The legislation was subsequently modified accordingly. See Laurence Brunet, "The principle of gamete donor anonymity in its social context. An analysis of the legal theories of identity" (2010) 20:1 *Andrologie* 92. The authors of the previous papers have conducted a detailed analysis of the European case law. For more details, see Giroux, "Le droit fondamental", *supra* note 5 at 371-383 and Mariana De Lorenzi & Véronica Piñero, "Assisted Human Reproduction Offspring and the Fundamental Right to Identity: The Recognition of the Right to Know One's Origins under the European Convention of Human Rights" (2009) 6 *Personalized Medicine* 79.

³⁸ As was demonstrated in Giroux, *ibid.*

³⁹ See Michael Freeman, "The New Birth Right? Identity and the Child of the Reproduction Revolution" (1996) 4 *Int'l J Child Rts* 273 at 283. See our position on the binding character of the *CRC*, *infra* note 40.

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Canadian legislation should be consistent with the values, principles and rights of the *CRC*, to which Canada is a signatory, specifically with respect to the fundamental right to identity.⁴⁰ The *CRC* stresses the transcendental value of identity throughout the text (examples include Articles 2.1, 14, 29, 30), but the right to identity is specifically stressed in paragraphs one of Articles 7 and 8. They read as follows:

Article 7.1: “[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, **as far as possible, the right to know and be cared for by his or her parents.**”

⁴⁰ See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; Anne-Marie Trahan, “Les droits de l’enfant, la Convention des Nations Unies et l’arrêt Baker: une trilogie porteuse d’espoir” in Benoît Moore, ed, *Mélanges Jean Pineau* (Montréal: Thémis, 2003) at 151. All Canadian provinces (except Alberta) ratified the Convention in 1991. For the Government of Québec, see Décret no 91-1676, 9/12/1991. Some scholars consider the *CRC* to be binding in Canada upon ratification. See Brian R Howe, “Implementing Children’s Rights in a Federal State: The Case of Canada’s Child Protection System” (2001) 9 Int’l J Child Rts 361 at 364-365. They argue that even if there is no direct implementation of the Convention through legislation, which is a condition in the Canadian dualist system for implementing international law, there has been an implicit implementation. In fact, in many cases, legislation in Canada already endorses the values and principles espoused in the *CRC*. In that sense, Canada reporting to UN on the Convention on the Rights of the Child (date of first report to UN: June 17, 1994) shows consideration and respect for the values and principles of *CRC*. The Reports are available online in the website of the Human Rights Program, Canadian Heritage, Government of Canada, online: <www.pch.gc.ca/progs/pdp-hrp/>. We are ready to endorse such an approach.

Article 8.1: “**States Parties undertake to respect the right of the child to preserve his or her identity**, including nationality, name and family relations **as recognized by law without unlawful interference.**”⁴¹

In this paper, we will analyze both of these articles, which confirm the recognition of different aspects of identity, such as nationality, name, knowledge of one’s own origins, and parental relationships. We will demonstrate that the notion of identity embedded in the CRC is rich and includes genetic heritage, as well as familial relationships; its premise is that the best interests of children tend to lie in knowing their parents and in being cared for by them. These two articles have the common objective of ensuring that a respect for identity is a fundamental right. While Article 7.1 offers an integral protection of the right to identity by recognizing both its dynamic and static aspects, Article 8.1 reaffirms the State’s duty to protect this right.⁴²

We will discuss how a deeper analysis of these provisions reveals four points. First, Articles 7 and 8 demonstrate that recognition of the rights of children, in general, and of their right to identity, in particular, is always in their best interests. This means that the right to identity and the best interests of the child should not be viewed as

⁴¹ Emphasis added.

⁴² The illustrative character of the enumeration has been defended by Doek, *supra* note 22 at 8, 11-12; Jaime Sergio Cerda, *supra* note 9; Douglas Hodgson, “The International Legal Protection of the Child’s Right to a Legal Identity and the Problem of Statelessness” (1993) 7 *Int’l JL Pol’y & Fam* 255 at 265; and Geraldine Van Bueren, *The International Law on the Rights of the Child - International Studies in Human Rights*, vol 35 (Dordrecht: Martinus Nijhoff Publishers, 1995) at 119.

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irreconcilable. They can be, and indeed are, compatible and complementary.⁴³ While the best interests of the child are the paramount consideration in all cases, recognizing and giving effect to a child's right to identity lies in the child's best interests.

The drafters of the Convention did not consider circumstances involving assisted reproduction technology. However, as Freeman states:

⁴³ Ineta Ziemele, "Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents" in *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2007) at 26-27; Rachel Hodgkin & Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 1998) at 105-106. With respect to the relations between the expression "as far as possible" and "the best interests of the child" principle, there are two different views. While some authors defend the idea that the limitation should be read in accordance with Article 3, others state that it does not refer to the best interests of the child. The risk of subscribing to the first theory is that it is too subjectivist and could deny the right of the child to know his or her own origins. Ziemele explains that although all circumstances need to be weighed, "an absolute prohibition on the right to know biological parents is contrary to the CRC". On the other hand, some authors maintain that Article 7 does not make reference to the best interests of the child and that the expression "as far as possible" "appear[s] to provide a much stricter and less subjective qualification" than the former, and that "[t]he words imply children are entitled to know their parentage if this is possible, even if this is deemed to be against their best interests". An intermediate position, such as the one we are proposing and explained above, states that although there is a close relationship between the best interests of the child and the right to identity, the principle of Article 3 cannot be used as an excuse to refuse the recognition of the right to identity, which is a fundamental right. To interpret the right to identity as against the best interests of the child would be a contradiction.

[I]n other areas where the child's interests conflict with those of others, we treat the child's interests as paramount . . . why not in this context too? . . . Why should we protect the donor at the child's expense? It is yet just another example of a silencing of the child's voice.⁴⁴

In the context of disclosure of genetic heritage, the best interests of the child must again be the primary consideration. That means that "[o]ther considerations such as parental rights or the privacy of the family must be secondary."⁴⁵ The function of Article 3, therefore, is to strengthen the right of the child to know their biological origins even when this right conflicts with parental rights.⁴⁶

Second, the use of the word 'parents' in reference to both the right to know and the right to be cared for can generate some difficulties in interpretation. Even if the word 'parents' in the context of Article 7.1 is used in relation to the right to know, it should be understood as meaning 'progenitors' to refer to those who are involved in the procreation of the child. However, if the term 'parents' is used in relation with the right to be cared for, it should be interpreted to refer to those who are responsible for the care and upbringing of the child after birth.

⁴⁴ Freeman, *supra* note 39 at 283-288, especially 288; Howe, *supra* note 40 at 366, 380.

⁴⁵ Howe, *ibid.*

⁴⁶ Hodgkin & Newell, *supra* note 43 at 113. Thus children's best interests and senses of identity may be sustained without having to deny them knowledge of their origins, for example through 'secret' adoptions or anonymous egg/sperm donations and so forth (see also Article 7, page 106).

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In most cases, the progenitors will also be the parents.⁴⁷ In other circumstances, the best interests of the child warrant a different result, as is the case with adoption (Article 21a)⁴⁸ as well as with assisted reproduction if a donor is used. In the latter circumstance, the CRC guarantees the child's right to know his or her genetic origins ('the progenitors') as well as the right to be cared for by the recipients of the donation ('the parents').⁴⁹

Thirdly, the expression "as far as possible" in Article 7.1 of the CRC, which circumscribes both the right to know and the right to be cared for by the 'parents',⁵⁰ warrants some comment.⁵¹ In our view, the expression "as far as possible"

⁴⁷ This idea and the ones that follow are extensively developed in De Lorenzi, "Familias ensambladas", *supra* note 8 at 6.

⁴⁸ In case of adoption, Article 7.1 should be translated as the right of the child to know his or her biological parents and to be cared for by his or her adoptive parents, and also, when it applies, to know his or her psychological parents. See Hodgkin & Newell, *supra* note 43 at 105, where they assert that the definition of "parents" includes, as well as genetic and birth parents, "the child's psychological parents" as a third category which recognizes the child's right to know the people who had cared for him or her during significant periods of life, such as childhood or infancy.

⁴⁹ Doek, *supra* note 22 at 10-12; Cerda, *supra* note 9 at 117; Lucy Frith, "Gamete Donation and Anonymity. The Ethical and Legal Debate" (2001) 16 Human Reproduction 818 at 820-821. The application of Article 7 to the right of a child to know his or her gamete donor's identity has been upheld by the Austria's Medically Assisted Procreation Act 1992, by the Swiss Constitution, the Western Australia's Select Committee, etc.

⁵⁰ In the same sense, see Hodgkin & Newell, *supra* note 43 at 107.

⁵¹ For more details, see De Lorenzi, "El Desconocimiento del Verdadero Origen," *supra* note 18 at 197-198; De Lorenzi, "¿De dónde vengo?" *supra* note 18 at 804; and Giroux, "Le droit fondamental", *supra* note 5 at 353.

refers only to a circumstance involving a factual impossibility, where the traditional or usual situation contemplated by the regulation is absent. It does not refer to a legal impossibility. In most cases, the child will be conceived via a sexual relationship between two people ('natural' conception) who will both be related to the child, both genetically and biologically and through a social bond. Those two people will become the legal parents and will rear the child. When a child is born outside of these circumstances, it may not be factually possible to give effect to the child's right to know his or her progenitors. There are several potential factual impossibilities.

The first is when the biological parents cannot be identified or located, either because they have voluntarily abandoned the child or because they have been separated involuntarily, by war, catastrophe, or accident. In such a case, it will not be factually possible for the child to know his or her own progenitors, much less be cared for by them.

The situation described above is wholly different from circumstances in which it is impossible for the progenitors to care for the child (when the child is placed for adoption, for example) or when the progenitors donate their gametes without intending to be parents. In these cases, if a registry and certain other measures are in place, it is not factually impossible for children to know the identity of their biological parents or donors, even though these biological parents and donors will not raise them. If the law does not allow for the child to have access to information concerning the donor, it would be a legal impossibility, not a factual one. In our view, a legal impossibility is not an argument that warrants the denial of access to one's own biological origins or a refusal to recognize a fundamental right.

In order to better understand how the phrase "as far as possible" should be interpreted, it is worth considering the legislative history of the CRC and the obligation to interpret

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the CRC “in the light of its object and purpose”, as required by Article 31 of the Vienna Convention.⁵² On one hand, some arguments provide justification for its inclusion in the wording of Article 7.1. Legislative history suggests that the qualification “as far as possible” was included to reassure State parties involved in the drafting process that their national laws allowing secret adoption, abortion, genetic engineering experiments, or anonymous *in vitro* fertilization with donors were in conformity with the CRC.⁵³

⁵² Article 31 (General rule of interpretation) states:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

⁵³ Hodgson, *supra* note 42 at 264-265; Cerda, *supra* note 9 at 116; United Nations, *Legislative History of the Convention on the Rights of the Child*, Volume I, United Nations, Office of the United Nations, High Commissioner for Human Rights, New York and Geneva, 2007 at 378, online: <www.ohchr.org/Documents/Publications/Legislative

However, if one looks at the “object and purpose” of the CRC, it is clear that the intent of the legislator was to recognize an unqualified right to identity.⁵⁴ Enunciated in Article 7, the right to identity was strengthened by the adoption of Article 8.1.⁵⁵ Norway⁵⁶ questioned the necessity of including

Historyrcr1en.pdf>. It is worth viewing the Legislative History of the Convention on the Rights of the Child to see how the German Democratic Republic, the Union of Soviet Socialist Republics, and the United States of America drew attention to the fact that their laws allow “secret adoption” and pointed out that “the right to know one’s parents” could not be applied everywhere. Portugal agreed with those considerations.

⁵⁴ Wilson, *supra* note 15 at 278ff. Article 8 was introduced by the Argentinean delegation in 1985 and it was discussed and finally adopted by the Working Group in 1986 with some changes. The initiative was inspired by the manipulation and suppression of the identity of approximately 500 children after they had been abducted from their biological parents during the Argentinean Military Dictatorship (1976-1983). As a consequence of the approximately 30,000 victims of the “Dirty War”, Argentina has developed different associations, formed by the relatives of disappeared people in order to recover their families and, in the course of the time, the identity of the children abducted from them. The fate of some of the children born in captivity was different, but most children were taken from their mothers and sent to orphanages or abducted by members of the security forces, “appropriated” and registered as biological sons or daughters of their families or of families sympathetic to the security forces. This lamentable history is the reason that Argentina fought so vigorously for the incorporation of Article 8 in the CRC. For more information, visit the websites of “Hijos por la Identidad y la Justicia contra el Olvido y el Silencio” (HIJOS), online: <www.agrupacionhijos.tk>; “Asociación Madres de Plaza de Mayo”, online: <www.madres.org>; and “Abuelas de Plaza de Mayo”, online: <www.abuelas.org.ar>.

⁵⁵ George Stewart, “Interpreting the Child’s Right to Identity in the UN Convention on the Rights of the Child” (1992) 26 Fam LQ 221 at 225.

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Article 8 in the Convention because the true and genuine personal identity of the child was already embodied in other norms within the Convention.⁵⁷ The significance of including Article 8 was stressed by Argentina, which explained that while other articles also refer to this issue, particularly Article 7, they do so only in general terms. The importance of Article 8 lies in the special protection that the State must provide “to the child as soon as possible, when the right of the child to preserve his or her true identity had been violated, and from the distinction made between the child’s true and genuine identity and his or her legal one.”⁵⁸ The absence of statements to the contrary shows, as Stewart emphasizes, that there was “no challenge to the importance of the right under discussion”⁵⁹ and that while the right to know one’s origins is included in Article 7, its preservation (as a sphere of the right to identity) is regulated in Article 8. Hence, the interpretation of both sections in concert with one another could lead only to the recognition of an unqualified right to identity, except if it is factually impossible. Legal impossibility orchestrated by any national legislation is insufficient to deny the right to know one’s identity.

As Doek stated: “the Convention is a living instrument and its interpretation should reflect new developments that may arise in the area of children’s rights.”⁶⁰ Therefore, a dynamic

⁵⁶ The question of Norway was also supported by Netherlands, Canada, the United States, and Austria.

⁵⁷ See United Nations, *Legislative History of the Convention on the Rights of the Child*, *supra* note 53 at 384 (34, 36, 37).

⁵⁸ *Ibid* at 35.

⁵⁹ Stewart, *supra* note 55 at 223.

⁶⁰ Doek, *supra* note 22; Cerda asserts that Article 8 can serve a larger interest than what was considered when it was drafted, *supra* note 9 at 117.

interpretation of Articles 7 and 8, supported by the history of the CRC, confirms the existence of a right to identity. Similarly, Cerda, while defending Article 8, stated the following:

In the future, Article 8 should perhaps be interpreted independently of the author's intentions or motivations. The nature of the new right created by this article will, in fact depend on the development of the legal systems of the countries concerned rather than on the specific phenomenon that initially prompted the sponsoring countries to introduce this new idea.⁶¹

Fourthly, Article 8.1 directs signatory states to regard the right to identity “as recognized by law without unlawful interference”. This recognition of the right to identity should be in accordance with either “national or international law”. The use of this specific wording was interpreted as giving priority to international law where national law is more restrictive than international law.⁶² In other words, national law cannot be more restrictive than, or contrary to, the CRC, which recognizes a right to identity.

THE FUTURE OF THE RIGHT TO IDENTITY: THE RESPONSIBILITY OF THE PROVINCES

Although the provincial and territorial authorities have the responsibility of guaranteeing the right to identity, they have

⁶¹ Cerda, *ibid* at 116-117.

⁶² Van Bueren, *supra* note 42 at 119; Hodgkin & Newell, *supra* note 43 at 114. See also Stewart, *supra* note 55 at 225, who states that, “[elsewhere] in the Convention, where national law [only] is intended, the limitation is explicit”. Stewart cites the examples of Articles 7.2, 12.2, and 20.2.

yet to recognize this right. To illustrate how this question could be dealt with at the provincial and territorial level, in a manner consistent with Canada's obligations under the CRC, we will discuss the civil law of Quebec as well as the law of other Canadian jurisdictions.

The Absence of Recognition in Québec Civil Law

In Québec, the filiation of children conceived through assisted procreation is addressed in Chapter I.1 of Title two (Filiation) of the Civil Code (CCQ). Before considering the specific regulations governing ART, it is worth mentioning some general rules. Among other principles, the best interests of the child principle is said to be central to the decision-making process relating to a child.⁶³ In addition, it is understood to be the prerogative of the parents to decide whether to tell their child that he or she has been conceived through use of a donor.⁶⁴ However, the state should not use this prerogative to

⁶³ Article 33 states that: "every decision concerning a child shall be taken in light of the child's interests and the respect of his rights. Consideration is given, in addition to the moral, intellectual, emotional and physical needs of the child, to the child's age, health, personality and family environment, and to the other aspects of his situation."

⁶⁴ Article 597ff CCQ. See also Monique Ouellette, "The civil code of Quebec and new reproductive technologies" in Research Studies of the Royal Commission on New Reproductive Technologies, ed, *Overview of Legal Issues in New Reproductive Technologies* (Ottawa: Minister of Supply and Services Canada, 1993) at 710. According to the Law Reform Commission of Canada, *Medically Assisted Procreation (Working Paper 65)* (Ottawa: Law Reform Commission of Canada, 1992) at 169, one cannot impose on the parents the duty to divulge the details of their child's origins, as it might be considered an unconstitutional infringement on the fundamental right of parents to make decisions concerning their children. In any case, the respect of such a rule could remain utopian. In a case dealing with adoption, the Court insisted that the adoptive

avoid recognizing the right to identity. Parents have an obligation to respect this fundamental right, and public policies ought to help parents become more conscious of the importance of the right of offspring to know their progenitors.⁶⁵

On the question of ART more specifically, article 538.2 CCQ states that “the contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project”. Donations of gametes and embryos are included in the definition of “genetic material”, provided that the donation is gratuitous in nature, as stated in article 25 CCQ. Furthermore, under Québec civil law, donors bear no legal or financial responsibility for a child born through gamete donation; this differs from the law in other Canadian jurisdictions, as not every province has legislation protecting sperm donors against claims of paternity.⁶⁶ Article 541 CCQ

parents have the implicit duty (even if article 632 CCQ (1980) does not force it) to tell the child about his or her adoptive status, *Droit de la famille* 657, [1989] RJQ 1693 (CQ).

⁶⁵ For instance, in Australia, it is recommended that prospective parents carefully consider accepting donations from relatives:

If clinics provide treatment involving gamete donation from a relative, they must encourage very careful consideration of all relevant issues (in particular, that it is unethical to mislead a child about the identity of his or her genetic parent(s), and that relationships within families can be confused by cross-generational donations).

National Health and Medical Research Council, *supra* note 4, Guideline 6.7.

⁶⁶ Along with Quebec, only Alberta, Newfoundland and Labrador, and the Yukon have such legislation. However, neither Newfoundland and Labrador nor the Yukon has legislation protecting ovum or *in vitro* embryo donors. New Alberta legislation, which came into force

stipulates that surrogacy arrangements are considered to be against public order and are thus void.⁶⁷

With respect to the question of information concerning the origins of a child born through assisted reproduction technology, article 542 CCQ recognizes confidentiality of donor identity as a guiding principle.⁶⁸ It is thus impossible for the donor conceived, under current Québec law, to obtain information relating to the identity of their progenitors. Nevertheless, there is an exception to this rule. Article 542 CCQ *in fine* allows a person born of ART (or descendant of such a person) to search for health information,⁶⁹ if it is to

in December 2008, deals with the parental rights of ovum and *in vitro* embryo donors; see the *Family Law Act*, SA 2003, c F-4.5, s 12. See also Katherine Van Heugten & Judy Hunter, “Assisted Human Reproduction” in Government of Canada, *A Brave New World: Where Biotechnology and Human Rights Intersect* (Ottawa: Minister of Supply and Services, 2005) at 2-18. For more details on other Canadian jurisdictions, see Cameron, Gruben & Kelly, *supra* note 9.

⁶⁷ For more details on surrogacy in Québec, see Michelle Giroux, “Le recours controversé à l’adoption pour établir la filiation de l’enfant né d’une mère porteuse: entre ordre public contractuel et intérêt de l’enfant” (2011) 70 R du B 509. For details on other Canadian jurisdictions, see Karen Busby and Delaney Vun, “Revisiting *The Handmaid’s Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers” (2010) 26 Can J Fam L 13.

⁶⁸ Article 542 CCQ: “Nominative information relating to medically assisted procreation is confidential.”

⁶⁹ Ouellette, *supra* note 64 at 707; Benoît Moore, “Quelle famille pour le XXI^e siècle?: Perspectives québécoises” (2003) 20 Can J Fam L 57 at 70; Édith Deleury, “Le droit de la procréation artificielle au Québec présent et futur” in Claudine Bourg, ed, *L’infertilité Procréation médicalement assistée Adoption, filiation Questions éthiques, psychologiques, juridiques et scientifiques* (Bruxelles: De Boeck-Wesmael, 1992) 104; Pineau & Pratte, *supra* note 24 at 298ff; Jacques Beaulne, “Réflexions sur quelques aspects de la procréation médicalement assistée en droit des personnes et de la famille” (1995)

prevent a serious threat to his or her health. In that situation, non-identifying information may be transmitted to medical authorities, but only through a tribunal.⁷⁰

Therefore, while offspring may eventually obtain some information concerning the donor, it is as a consequence of the right to health, not as a consequence of the right to identity. In fact, according to the strict wording of paragraph two of article 542 CCQ, no information relating to the identity of the donor should ever be divulged to the offspring.

As there is no specific provincial regulation on the collection and retention of information related to ART,⁷¹ one must rely on the ethical standards of each clinic and their decisions as to what information should be kept. While a bill on the topic of assisted reproduction has been adopted in the Québec National Assembly,⁷² it will not change the current

26 RGD 235 at 262. As for the definition of the words “health of a person”, used in article 542 CCQ, it can be interpreted in light of the case law on adoption as including “psychological health”. However, this interpretation is limited, due to the fact that according to article 542 CCQ, the transmission of the health information is to be non-nominative in nature and is to be divulged only to the medical authorities.

⁷⁰ Article 542 CCQ states: “however, where the health of a person born of medically assisted procreation or of any descendant of that person could be seriously harmed if the person were deprived of the information requested, the court may allow the information to be transmitted confidentially to the medical authorities concerned. A descendant of such a person may also exercise this right where the health of that descendant of a close relative could be seriously harmed if the descendant were deprived of the information requested”.

⁷¹ For general rules of Québec civil law on the question, namely the question of privacy, see articles 35ff CCQ.

⁷² Fédération du Québec pour le planning des naissances, *Mémoire de la Fédération du Québec pour le planning des naissances*, presented to

policy on the question of origins. Confidentiality is still the rule.

Legislators have discussed the question of biological origins in Canada and Québec in the context of both adoption and ART.⁷³ Generally, the right of offspring to know their biological origins has been diminished in favour of the rights of donors and parents. Furthermore, when information has been disclosed, it has been justified by health concerns.⁷⁴

Québec, Commission des affaires sociales de l'Assemblée nationale, March 2006; *Journal des débats de la Commission des affaires sociales*, Professor Edith Deleury of Université Laval, testimony, 30 March 2006, vol 39, no 6. Conseil de la famille et de l'enfance, *Avis. Prendre en compte la diversité des familles* (Québec, Conseil de la famille et de l'enfance, 2005). See also Bill 26, *An Act respecting clinical and research activities relating to assisted procreation*, 1st Sess, 39th Leg), Quebec, 2009 (first presented as Bill 89 (adopted in principle 14 April 2005, 2nd Sess, 37th Leg and re-introduced as Bill 23 (1st Sess, 38th Leg). Nevertheless, an important addition has been introduced in section 40, which specifies that information relating to ART should be kept on a permanent basis by people who exercise such activities. This section responds to some of the criticism that has been formulated before the Commission that studied Bill 89.

⁷³ For more details in the province of Québec, see National Assembly, *Journal des débats*, 7 (5 September 1991) at p 254-261, 271, 273; Québec, National Assembly, *Journal des débats*, 30 (5 December 1991) at p 1231-1242; Québec, National Assembly, *Journal des débats*, 33 (10 December 1991) at p 1333-1335. See also discussions on Bill 125 before the Québec National Assembly, where it is assumed that there is such a right in the context of adoption or ART. In contrast with other Canadian jurisdictions, confidentiality in the context of adoption is still the rule in Québec (article 582 CCQ). Article 583 enables an adopted person, under certain conditions, to find his or her parents and article 584 allows an adopted person or a close relative to obtain, under certain conditions, health information.

⁷⁴ See, for example, the wording of article 542 CCQ.

Neither Quebec nor Canada has expressly recognized the right to identity as an autonomous⁷⁵ and fundamental right.⁷⁶ Even if offspring were to win a court challenge asserting a right to know one's origins, either on the basis of a right to physical or psychological health or on the basis of the principle of non-discrimination, as was the case in *Pratten v. British Columbia (Attorney General)*,⁷⁷ it would be preferable

⁷⁵ Due to the complexity of the right to identify, which is typical of the sphere that it regulates, this right has points of contact with several other rights, such as the rights to privacy, to health, to physical integrity, honour, and name, among others, and principles, such as dignity and the free development of the personality, among others. Some of these rights have obtained legal recognition before the right to identity, and their gradual recognition created a system in which these rights comprise aspects of the right to identify. A violation of the right to identity can thus implicate the violation of other rights.

⁷⁶ Elton B Klibanoff, "Genealogical Information in Adoption: The Adoptees Quest and the Law" (1977) 11 Fam LQ 185 at 191. The qualification of the right to identity as a fundamental right existed as early as 1977.

⁷⁷ On the matter of discrimination, the recent case of *Pratten v British Columbia (Attorney General)*, *supra* note 3, is interesting. In this case, Olivia Pratten was conceived via an anonymous sperm donor in 1981. Pratten later went to the doctor who had performed the insemination seeking information about her donor. However, the doctor said he had not been obligated to keep records for a patient for more than six years after the last entry recorded. Therefore, Pratten claimed that the province allowed the destruction of the files, depriving her of basic personal information necessary for her physical and psychological health. The province had enacted the Adoption Act and the Adoption Regulation, whereby information about the biological origins and family history of adoptees was gathered and preserved in order for them to eventually obtain that information. Pratten alleged discrimination against donor offspring, as compared to adoptees. She also made an argument that her rights under section 7 of the Charter, the right to liberty and security, were violated by the province's failure to enact legislation protecting fundamental aspects of their personal autonomy and health, also claiming a right to the

to have a clear policy on the matter.⁷⁸ Governments should not wait until a judicial decision has been issued to react. They should be proactive and legislate on the question as soon as possible. It is the responsibility of the state to do so.

The Responsibility of Canada Under the CRC

The right to identity means that all measures that allow people to know their origins and to form their identities must be taken. This right also entails the obligation of states to respect and guarantee it.⁷⁹ This responsibility is both *passive* and *active*: *passive* in the sense of not interrupting, hiding, or denying any licit act made in favour of the right to identity and not hiding or falsifying any information in relation to it; and *active*, in the sense of removing obstacles and facilitating the means to make the right effective.⁸⁰

identity. The section 7 claim was dismissed. However, on the matter of discrimination under section 15 of the Charter, the court held that the omission of donor offspring from the benefits and protections provided to adoptees under the Adoption Act and Adoption Regulation created a distinction between adoptees and donor offspring. Therefore, the omission of donor offspring from the provisions of the legislation was discriminatory (except for subsections 4(1)(e) to 4(1)(h)). Moreover, the court held that the legislation was perpetuating stereotypes about donor offspring.

⁷⁸ This is what we have argued in the past; see Giroux, “Le droit fondamental”, *supra* note 5 at 353.

⁷⁹ Cerda, *supra* note 9 at 116, states that “under Article 8 it is mandatory for states to respect the right of the child to preserve his or her identity. The purpose of this obligation is to establish an explicit safeguard against the unlawful intervention of the state”.

⁸⁰ See Howe, *supra* note 40 at 364 and Cerda, *supra* note 9 at 116. The responsibility of the states, as Howe shows, has changed due to the rise of new concepts, such as the child as an existing person, and not just as an object of protection. Howe also cites the increasing recognition of the fundamental rights of the child, replacing the

As stated in Article 4 of the CRC, Canada has a duty to undertake “all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.” In particular, upon signing the Convention, the states have three obligations: to supervise the application of the right to identity, to respect it, and to remedy any illegal deprivation of it. While Article 7.2 imposes the first obligation,⁸¹ the other two are stipulated in Article 8 by paragraphs one and two⁸² respectively.⁸³

The Second Report of Canada to United Nations on the CRC (2001) underlines the importance of the CRC in the development and implementation of children’s rights in

paternalistic notion of children’s welfare. “Such a concept of children’s rights is much more demanding of state and parental action than the traditional concept of child welfare. . . . The language of rights works to make the protection of children a more imperative undertaking”. As Cerda maintains, there is a new obligation for the States to provide “a legal mechanism for the reestablishment of the child’s identity”.

⁸¹ Article 7.2 states: States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

⁸² Article 8.2 states: Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

⁸³ For the consequences of the signature of the CRC in Spain, see De Lorenzi, “El Desconocimiento del Verdadero Origen”, supra note 18, especially Chapter VI for discussion of the conflict between the rights of the donor and the offspring and the coherence between the Spanish law and Constitution.

Canada.⁸⁴ Similarly, the Interim Report of the Senate Human Rights Committee (2005) stresses the absence of direct implementation of the CRC into domestic law and the existence of gaps in its implementation: “Canada must begin to take its international human rights treaty obligations more seriously.”⁸⁵

The Committee on the Rights of the Child (UN) (2003) has also expressed concern about the lack of respect shown to the right to know one’s origins, as anonymous births, secret adoptions, and medically assisted reproduction with anonymous donors remain the *status quo* in Canada. For these reasons, the Committee recommended the adoption of Canadian legislation that would respect Articles 7 and 8 of the CRC.⁸⁶ The Canadian Senate Committee on Human Rights

⁸⁴ Canadian Heritage, *Canada’s Second Report on the Convention on the Rights of the Child*, 26 April 2001, online: <www.pch.gc.ca/pgm/pdp-hrp/docs/crc-2001/index-eng.cfm>. See also *Canada’s Third and Fourth Reports on the Convention on the Rights of the Child*, November 2011, online: <www.pch.gc.ca/ddp-hrd/docs/pdf/canada3-4-crc-reports-nov2009-eng.pdf>.

⁸⁵ Canada, Senate, Standing Senate Committee on Human Rights, *Children: The Silenced Citizens. Effective Implementation Of Canada’s International Obligations With Respect To The Rights Of Children* (Ottawa: Senate, 2007) at ix.

⁸⁶ *Concluding observations that the Committee on the Rights of the Child to Canada*, 34th Session, CRC/C/15/Add.215, 27 October 2003, paragraphs 30 and 31, online: <[www.unhchr.ch/tbs/doc.nsf/0/995a15056ca61d16c1256df000310995/\\$FILE/G0344648.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/995a15056ca61d16c1256df000310995/$FILE/G0344648.pdf)>. It is possible to find some examples in the concluding observations that the Committee on the Rights of the Child made to several countries, such as France (36th Session, CRC/C/15/Add.240, 30 June 2004) at paras 23-24, online: <[www.unhchr.ch/tbs/doc.nsf/317ab54d16e0e6aac1256bdd0026bd27/f77a0c288462b9efc1256f33003c8c0a/\\$FILE/G0442428.pdf](http://www.unhchr.ch/tbs/doc.nsf/317ab54d16e0e6aac1256bdd0026bd27/f77a0c288462b9efc1256f33003c8c0a/$FILE/G0442428.pdf)>; Norway (6th Session, CRC/C/15/Add.23, 25 April 1994) at para 10, online: <[www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9fa425c091d1b821412561510038866f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9fa425c091d1b821412561510038866f?Opendocument)>; Denmark (8th

agreed with the UN Committee. In its Report, that Committee stated that “[c]hildren have a right to their own identity - to know who they are - and this right is not always being effectively protected in Canada”⁸⁷ and “that the best interests of the child are not being served by current adoption and donor insemination policies across the country.”⁸⁸ Canadians conceived through the use of donor gametes are entitled to the creation, preservation, and disclosure of their genetic origins and their donors’ identities. It is imperative that provincial and territorial authorities in Canada give effect to this right.

Reform is Needed, to Put Children’s Rights First

The Supreme Court of Canada, in *Renvoi*, decided that action must take place at the provincial level. Hence, provincial

Session, CRC/C/15/Add.33, 15 February 1995) at para 11, online: <[www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ebe7468a5e679788412561510060c3a2?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ebe7468a5e679788412561510060c3a2?Opendocument)>; and Luxembourg (8th Session, CRC/C/15/Add.92, 24 June 1998 at para 11, 29, online: <[www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/62258a94c261c9318025662400376374?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/62258a94c261c9318025662400376374?Opendocument)>. Of the eleven countries that the UNCRC’s Concluding Observations (2003) published as revealing specific reference to donor anonymity in ART, only four forbid the disclosure of the donors (Denmark, France, Greece, and Spain). The other seven (Austria, the Netherlands, New Zealand, Norway, Sweden, Switzerland, and the United Kingdom) have abolished the concealing of donor’s identities. We could also mention Australia (in Victoria in 1998 and in Western Australia in 2004) and Finland (2006). For more information, see Blyth & Farrand, *supra* note 1 at 96ff.

⁸⁷ Canada, Senate, Standing Senate Committee on Human Rights, *supra* note 85 at 113.

⁸⁸ *Ibid* at 110-114. To arrive to this last conclusion, the Canadian Senate Committee collected specialized, technical information that suggests several disadvantages for the health and well-being of children who lack access to their donors’ identities.

legislation⁸⁹ should be modified to ban anonymity in the context of gamete donation where it is currently the rule. For example, article 542 CCQ must be amended to recognize the right to identity.

The recognition of the right to identity requires that information be created, preserved, and then disclosed. As a practical matter, this entails the establishment of a registry as a repository of information.⁹⁰ It also entails the collection of

⁸⁹ For an example of the Quebec provincial legislation on the regulation of assisted reproduction, see *An Act respecting clinical and research activities relating to assisted procreation*, *supra* note 72. See also the existing uniform legislation *Uniform Child Status Act* of April 1992, online: <www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u9>. However, the statute would need to be amended to provide for provinces and territories to record accurately the facts of conceptions and all participants and to ensure a mechanism is put in place for offspring to have access to all documents relevant to their conception and genetic parentage, including medical information. Additionally, it would need to provide for mental health counseling.

⁹⁰ Canada, House of Commons, Standing Committee on Health, *supra* note 7 at 21. In its report on a draft of the *AHRA*, the Committee was astonished by the fact that there was no proof that sperm banks in Canada hold detailed information on donors and on the use of the gametes. This situation has been often criticized; see Ouellette, *supra* note 64 at 707; Canadian Law Reform Commission, *supra* note 64 at 168; and Roxanne Mykitiuk & Elizabeth Sloss, “The Challenge of the New Reproductive Technologies to Family Law” in Royal Commission on New Reproductive Technologies, *Legal and Ethical Issues in Reproductive Technologies: Pregnancy and Parenthood* (Ottawa: Supply & Services, 1993) 339 at 431-432. For more details on the privacy issues in respect of people born through the use of ART, see Eugene Leon Oscapella, “Overview of Canadian laws relating to privacy and confidentiality in the medical context” in Research Studies of the Royal Commission on New Reproductive Technologies, ed, *Overview of Legal Issues in New Reproductive Technologies* (Ottawa: Minister of Supply and Services Canada, 1993) at 231, 232. The Canadian Law Reform Commission was of

current information about the donor, rather than only preserving information on the ultimate recipients of the donated gametes and those to whom they give birth, which is what the now invalid federal legislation aimed to do.⁹¹ The law must also empower and require registry personnel to advise people that they might be genetically related.⁹² Such information can help people avoid incest, especially in the present context, as the number of times a person can donate is unregulated and there could be “overuse” of one particular donor’s gametes. Proper regulation would also limit the number of children conceived by the same donor.⁹³

Other matters under provincial jurisdiction, such as parental authority and birth registration, must also be addressed. Québec has legislated on issues relating to donors

the opinion that information relating to the identity of the parties should be kept separately from the medical file.

- ⁹¹ Section 17 states: the Agency shall maintain a personal health information registry containing health reporting information about donors of human reproductive material and *in vitro* embryos, persons who undergo assisted reproduction procedures and persons conceived by means of those procedures.
- ⁹² It might prove useful to look at the now invalid subsection 18(4) of the *AHRA* on that point.
- ⁹³ Guideline 6.3.1 of Australia’s *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*, *supra* note 4 recommends that: Gametes from one donor should be used in a limited number of families. In deciding the number of families, clinicians should take account of: the number of genetic relatives that the persons conceived using the donation will have; the risk of a person conceived with donor gametes inadvertently having a sexual relationship with a close genetic relative (with particular reference to the population and ethnic group in which the donation will be used); the consent of the donor for the number of families to be created; and whether the donor has already donated gametes at another clinic.

and parental rights and has established, in Article 538.2 CCQ, that they do not have parental rights and responsibilities toward the offspring. Reciprocally, children do not have rights or responsibilities towards donors. Yet not all provinces have done so and should act urgently.⁹⁴ Additionally, despite the fact that it is the prerogative of parents to decide to tell their children the truth about their conception, other methods, like the child's birth certificate and counseling⁹⁵ could be used to facilitate transparency and truth.

⁹⁴ Canada Law Reform Commission, *supra* note 64 at 110-115. In finishing their report, the Committee provided Recommendation 11, which states: "Pursuant to Articles 7 and 8 of the *Convention on the Right of the Child*, the Committee recommends that the federal-provincial-territorial negotiations on adoption proposed in Recommendation 10 should include consideration of access to a biological parent's identity and of the benefits of identity disclosure vetos. The Committee also recommends that Assisted Human Reproduction Canada review the legal and regulatory regime surrounding sperm donor identity and access to a donor's medical history to determine how the best interests of the child can better be served" (see especially 109, 115).

⁹⁵ Eric Blyth, Caroline Jones & Jennifer M Speirs, "The role of birth certificates in relation to access to biographical and genetic history in donor conception" (2009) 17 *Int'l J Child Rts* 207. The Australian *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*, *supra* note 4, states, at Guideline 9.1, that:

To make informed decisions about their treatment, participants in ART need to understand all the procedures involved, including any health risks and psychosocial consequences associated with them. Clinics must give up-to-date, objective, accurate information about treatment options and the procedures involved to all potential participants in ART procedures and discuss it with them. . . .

These rules also take into account the fact that:

Donors and recipients in gamete or embryo donor programs (see Sections 6 and 7) each have complex information needs. Clinics must

Will those conceived by donor gametes under a past regime of secrecy have a right to access information concerning their origins? At first glance, it seems legally difficult to recognize such a right retroactively because of the effect it would have on those who either donated or used donated gametes under the current regime where anonymity is the default.⁹⁶ Nevertheless, more thought should be given to

consider the information needs of both donors and recipients. . . . (Guideline 9.2).

Furthermore, as:

ART involves complex decision making . . . participants may find it an emotional and stressful experience,

that is why:

[c]linics must provide readily accessible services from accredited counsellors to support participants in making decisions about their treatment, before, during and after the procedures. . . . (Guideline 9.3).

Section 18.1 of the *The Infertility Treatment Act 1995* (Vic.) will only allow donor gametes to be used if, before the procedure takes place:
. . .

(c) the woman and her husband, the donor and the spouse of the donor (if any) have received counselling as to its use from a counsellor approved under Part 8 to give counselling about the use of sperm, oocytes or embryos from named donors.

Counseling is also required by the UK *Human Fertilisation and Embryology Act 1990* (UK) 1990, c 37, for the woman (and, if she is being treated together with a partner, for him or her as well) who is using donated gametes or embryos (section 13-6); and to offspring seeking information about their donors (section 31-3) or the specific person whom she or he proposes to marry (section 31-6). It is also required for the providers of gametes or embryos (schedule 3, section 3-1 of the UK Act, as well as by section 46 of the *Human Assisted Reproduction Act 2004*.)

⁹⁶ In the adoption setting, see *Cheskes c Procureur général de l'Ontario*, 2007 CanLII 38387 (ON SC).

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the creation of a voluntary registration system⁹⁷ for those who were conceived prior to the establishment of the registry. This is also the case with respect to ensuring that medical information would be continually updated.

The fundamental right to identity has not yet been effectively recognized. Bearing in mind the international trend to recognize such a right, it is now time to revisit the question and insist upon explicit recognition of this very fundamental right from the children's rights perspective.⁹⁸

CONCLUSION

The international CRC recognizes a right to identity. One important aspect of this right is the right to know one's origins. In recent years, the number of nations that have banned the anonymous character of gamete donations has increased, including nations that once strongly supported such a position. This shift in national legislative policy worldwide has aided the growing recognition of the right to know one's origins in international law and gives a wider effect to this fundamental right.

To date, the rights and interests of adult parties to ART (prospective parents and gamete donors) have been favoured. This privileging of adult interests has been justified by arguments of confidentiality and privacy and buttressed by the established regime surrounding ART in Canada. However,

⁹⁷ *Human Assisted Reproduction Act 2004* (NZ), 2004/92, s 63 and *Human Fertilisation and Embryology Act 2008* (UK), 2008, c. 22, s 24 are good examples. See also Blyth & Frith, *supra* note 5 at 10-11.

⁹⁸ On the necessity on moving towards effective recognition of the rights of the child, see Trahan, *supra* note 40 at 151. See also Howe, *supra* note 40 at 361-382; Allison Harvison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 *Journal of Gender & the Law* 505 at 551; and Wallbank, *supra* note 22 at 262.

given the rise in the right to know one's origins in the international sphere, provincial and territorial law reforms are required to explicitly recognize the right of the child to know his or her biological origins. The current legal system grants donors and parents a choice, while children have none. While donors can take measures to protect their own best interests, children cannot.⁹⁹ This is why it is time to put the child first!

⁹⁹ George J Annas, "Fathers Anonymous: Beyond the Best Interests of the Sperm Donor" (1980) 14 Fam LQ 1 at 11.