

2020

Retrospective Removal of Gamete Donor Anonymity: Policy Recommendations for Ontario Based on the Victorian Experience

Alicia Czarnowski

Follow this and additional works at: <https://commons.allard.ubc.ca/can-j-fam-l>



Part of the [Family Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Alicia Czarnowski, "Retrospective Removal of Gamete Donor Anonymity: Policy Recommendations for Ontario Based on the Victorian Experience" (2020) 33:2 Can J Fam L 251.

The University of British Columbia (UBC) grants you a license to use this article under the [Creative Commons Attribution- NonCommercial-NoDerivatives 4.0 International \(CC BY-NC-ND 4.0\) licence](#). If you wish to use this article or excerpts of the article for other purposes such as commercial republication, contact UBC via the Canadian Journal of Family Law at cdnjfl@interchange.ubc.ca

**RETROSPECTIVE REMOVAL OF
GAMETE DONOR ANONYMITY: POLICY
RECOMMENDATIONS FOR ONTARIO
BASED ON THE VICTORIAN
EXPERIENCE**

Alicia Czarnowski*

This paper undertakes a comparative analysis of the gamete-donor anonymity schemes in Ontario, Canada and Victoria, Australia. As of March 1, 2017, Victoria became the first jurisdiction in the world to retrospectively remove gamete-donor anonymity. Conversely, donor anonymity remains protected in Ontario, largely through statutory silence. While many donor conceived individuals are calling for other jurisdictions to follow suit and retrospectively abolish anonymity, an in-depth analysis of Victoria's policy-making process suggests that Ontario should not take a similar course of action. This conclusion is based on the inherent issues with retrospective legislation, the historical differences between the two jurisdictions in overseeing gamete donation, the Victorian government's inconsistent reliance on evidence, and the ill-suited reasoning used to justify Victoria's policy decision. In lieu of enacting retrospective legislation, this paper recommends that Ontario should increase public education and create a voluntary, provincial donor registry. Based on a relational approach, these steps are more conducive to

* Doctoral candidate, Faculty of Law, University of Ottawa. The author would like to thank the anonymous peer reviewers and the journal editors for their helpful comments.

harmonizing the complex, interconnected interests at play and to supporting healthy relationships in whatever form they may take.

INTRODUCTION

As of March 1, 2017, the state of Victoria in Australia was the first in the world to retrospectively remove gamete donor anonymity.¹ This means that individuals who donated their sperm or eggs under a promise of anonymity may now have their identifying information released to offspring born from their gametes, without their consent. Many donor conceived individuals (DCIs) are arguing that donor anonymity should be similarly abolished in Canada.² However, since donor anonymity falls under provincial jurisdiction,³ each province may permit or prohibit different activities. As a result, the subject matter is best understood from a provincial perspective, as opposed to a federal one. This paper focuses on Canada's most

¹ See *Assisted Reproductive Treatment Amendment Act 2016* (Vic), 2016/6.

² See e.g. Fiona Kelly, "Is it Time to Tell? Abolishing Donor Anonymity in Canada" (2017) 30:2 Can J Fam L 173. See also Rebecca Johns, "Abolishing Anonymity: A Rights-Based Approach to Evaluating Anonymous Sperm Donation" (2013) 20:2 UCLA Women's LJ 111 (generally argues that sperm donor anonymity ought to be abolished, as the harms done to DCIs outweigh any interests that the donors or intended parents may have in anonymity); Oliver Hallich, "Sperm Donation and the Right to Privacy" (2017) 23:2 New Bioethics 107 (generally argues that sperm donation identity should be known from the time of conception).

³ See *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 280 (Lebel and Deschamp JJ, concluding on behalf of four justices that, along with other provisions, the information-gathering and privacy-related provisions at ss. 14–18 of the Act lay outside federal jurisdiction) and para 294 (Cromwell J, agreeing that the information-gathering and privacy-related provisions exceeded the "legislative authority of the Parliament of Canada") [*Re AHRA*].

populated province—Ontario.⁴ A comparative framework is used to analyze Victoria’s retrospective donor-anonymity policy in juxtaposition to the current donor-anonymity scheme in Ontario. Based on an in-depth examination of Victoria’s legislative history, this paper argues that a similar course of action should not be followed in Ontario, despite the abundant problems that exist within the province’s current set-up.

Before arriving at this conclusion, this paper will first lay out the legal landscape in both jurisdictions. Currently, in Ontario, donors can choose to be known or to remain anonymous. They can also choose to release their identity once the DCI reaches a specific age.⁵ Since donors have the option to retain their privacy, DCIs often have very little information available to them.⁶ Record-keeping of non-identifying information is inconsistent and piecemeal.⁷ With respect to identifying information, DCIs are relegated to using unofficial, voluntary (and therefore incomplete) registries, or attempting to find their anonymous donors using mail-order DNA kits and

⁴ See “Population Estimates, Quarterly”, online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000901>.

⁵ Vanessa Gruben & Angela Cameron, “Donor Anonymity in Canada: Assessing the Obstacles to Openness and Considering a Way Forward” (2017) 54:3 *Alta L Rev* 665 at 668.

⁶ Vanessa Gruben, “A Number but No Name: Is There a Constitutional Right to Know One’s Sperm Donor in Canadian Law?” in Trudo Lemmens et al, eds, *Regulating Creation: The Law, Ethics and Policy of Assisted Human Reproduction* (Toronto: University of Toronto Press, 2017) 145 at 147–148.

⁷ *Ibid.*

genealogy websites.⁸ The inability to track down donor information can potentially lead to both physical and mental health issues,⁹ making Ontario's current system quite problematic.

Conversely, DCIs in Victoria are able to apply to a Central Register in order to receive identifying information, regardless of when they were conceived or whether their donor was assured anonymity at the time of donation. Donors have no ability to refuse the sharing of their identifying information. However, donors may submit a contact preference stating their preferred method of contact. This can include choosing a *no contact* option that is legally enforceable.¹⁰

In order to determine whether Ontario should take a similar course of action, this paper will briefly summarize the traditional problems associated with retrospective

-
- ⁸ See Emily Chung, Melanie Glanz & Vik Adhopia, "Donor-Conceived People Are Tracking Down Their Biological Fathers, Even If They Want to Hide", *CBC* (25 January 2018), online: <www.cbc.ca/news/technology/sperm-donor-dna-testing-1.4500517>; Elizabeth Payne, "Has the Age of the Anonymous Sperm Donor Ended?", *Ottawa Citizen* (9 June 2018), online: <ottawacitizen.com/news/local-news/dna-testing-has-virtually-brought-an-end-to-anonymous-sperm-donations-its-time-canadas-laws-caught-up-say-donor-offspring>.
- ⁹ See *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656 at para 111 [*Pratten*].
- ¹⁰ See *Assisted Reproductive Treatment Act 2008* (Vic), 2008/76, ss 63C–63G; Austl, Victoria, Victorian Assisted Reproductive Treatment Authority, *The History of Donor Conception Records in Victoria* by Fiona Kelly & Deborah Dempsey (Melbourne: VARTA, 2018) at 8–9 [*History of Donor Conception Records in Victoria*].

legislation (for example, unfairness and lack of notice),¹¹ as well as the historical differences between the two jurisdictions with respect to their oversight of gamete donation, before launching into an in-depth analysis of Victoria's policy decision. In sum, Victoria's decision to retrospectively remove donor anonymity should not be followed because Victoria's policy change was a politicized move, as opposed to an evidence-based decision. The inquiries conducted by the Victorian government collectively led to the conclusion that information should only be released with the donors' consent.¹² The non-consensual, retrospective removal of anonymity only occurred as part of a newly elected government's fulfillment of its election promises.¹³ Moreover, the state's reasoning behind its policy change was ill-suited to the subject matter. Victoria adopted a harm-based approach, which involved pinning the harms affecting DCIs against the potential fears of donors. By contrast, this paper adopts Michelle Taylor-Sands's argument that the matter should be approached from a relational perspective.¹⁴ Relational theory acknowledges the interwoven nature of the interests at stake and is more likely to foster healthy relationships, which the state cannot compel.

¹¹ See e.g. Gruben, *supra* note 6 at 161.

¹² Austl, Victoria, *Inquiry into Access by Donor-Conceived People to Information about Donors: Victorian Government Response* (Melbourne, 2013) at 5 [*Victorian Government Response*].

¹³ Michelle Taylor-Sands, "Removing Donor Anonymity: What Does It Achieve? Revisiting the Welfare of Donor-Conceived Individuals" (2018) 41:2 UNSWLJ 555 at 560–561.

¹⁴ *Ibid.*

The privacy breaches in Victoria are therefore unjustified. However, the current status quo in Ontario is also unarguably problematic. To ameliorate Ontario's situation, this paper will conclude by making two policy recommendations. First, Ontario should increase public awareness and education regarding the importance of information disclosure, in the hopes that donors will come forward voluntarily. Even if donors are unwilling to submit identifying information, they may still be willing to share newly acquired medical information once they are made aware of how crucial this data can be. Second, an official, voluntary, donor registry should be created and maintained by the province, so that DCIs have one specific forum through which they can obtain non-identifying information about their donors. This registry could also oversee the dissemination of voluntarily provided identifying information and help facilitate contact between DCIs and donors, where such contact is mutually desired. In accordance with relational theory, these steps best harmonize the complex interests of the parties at hand.

DONOR ANONYMITY IN ONTARIO

Canada's history with respect to regulating assisted reproduction has been tumultuous. In 1989, the federal government ventured into the territory by assembling the Royal Commission on New Reproductive Technologies (the Commission) to study the social, legal, and ethical implications of assisted reproduction. Along with providing assurances that the federal government had jurisdiction to legislate in the area, the Commission recommended that non-identifying information (i.e., general information that could not reasonably be used to identify an exact person—for example, blood type, birth

year, height, or eye colour) should be disclosed to DCIs, but identifying information (i.e., data that can be used to pinpoint a specific individual—for example, a name, a birth date, an address, or a social insurance number) should be stored but not disclosed, barring “extraordinary circumstances of medical need under strictly controlled conditions.”¹⁵ In arriving at this conclusion, the Commission focused on protecting the choices of intended parents, the presumed negative effect of disclosure on gamete supply, and the ambiguous legal status of known donors at the time.¹⁶

The Commission’s report was released, but no legislation was immediately enacted. Instead, it took the federal government several attempted bills over the course of more than a decade before the *Assisted Human Reproduction Act (AHRA)* was successfully passed. As part of their further evidence-gathering efforts, in 2001 the House of Commons assembled a Standing Committee on Health (the Committee), which recommended the exact opposite of the Commission. It suggested that, in order to be eligible to donate, gamete donors should be required to

¹⁵ Canada, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: RCNRT, 1993) at 445. This quote comes from the Commission’s discussion of sperm donor anonymity, but the same anonymity protection was put forward for egg donors on page 1029 of the Report.

¹⁶ 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 at 100–101. At the time the Report was released, it was unclear whether known donors might incur parental rights and responsibilities under family law legislation, such as custody or support.

consent to the disclosure of their identifying information.¹⁷ The Committee believed that, where donor rights and DCI rights conflicted, the well-being of DCIs ought to be paramount.¹⁸

Ultimately, the Committee's advice was not heeded. Adhering to the Commission's original suggestion, the *AHRA* permitted anonymous gamete donation. The Act created a scheme whereby identifying information about a donor could not be disclosed to gamete recipients or DCIs without the donor's consent.¹⁹ However, non-identifying information could be shared.²⁰ Furthermore, the *AHRA* contemplated the creation of an administrative body, called Assisted Human Reproduction Agency of Canada (AHRC), which would maintain all identifying and non-identifying information, oversee the disclosure of non-identifying information, and process applications from DCIs who wanted to ensure they were not biologically related to potential partners.²¹

Unfortunately, the federal efforts for nation-wide oversight were derailed. Two years after the *AHRA* was passed, the Attorney General of Quebec commenced a reference regarding the constitutionality of multiple sections of the *AHRA*, including the provisions surrounding

¹⁷ See House of Commons, Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December 2001) (Chair: Bonnie Brown) at 21–22 (recommendation 19(a)).

¹⁸ See *ibid* at 1, 21.

¹⁹ See *Assisted Human Reproduction Act*, SC 2004, c 2, s 18(3) [*AHRA*].

²⁰ See *ibid*.

²¹ See *ibid*, ss 17, 18.

donor anonymity.²² Under the *Constitution Act, 1867*,²³ the federal government has jurisdiction over criminal law,²⁴ whereas the provinces maintain jurisdiction over health services.²⁵ Quebec argued that that the governance of reproductive technologies properly fell within the scope of the latter, and as such, the federally-enacted *AHRA* violated the constitutional division of powers.²⁶ In a 4–4–1 split, the Supreme Court of Canada held that several sections of the *AHRA*, including the sections pertaining to donor anonymity, were primarily aimed at regulating a health service. As a result, the provisions were deemed *ultra vires* and were subsequently repealed. The AHRC, having had most of its mandate gutted, was also shut down a few years later.²⁷

Consequently, the law became silent on the issue of donor anonymity. In the absence of any explicit caveats, gamete donor information is not distinguished from patient information acquired in any other medical context. This

²² *Renvoi relatif à la Loi sur la procréation assistée*, 2008 QCCA 1167 [*Renvoi à la Loi sur la procréation assistée*].

²³ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

²⁴ *Ibid*, s 91(27).

²⁵ *Ibid*, ss 92(7), 92(13), 92(16).

²⁶ See *Renvoi à la Loi sur la procréation assistée*, *supra* note 22 at paras 26–27. See also “Bill C-47, An Act respecting human reproductive technologies and commercial transactions relating to human reproduction”, 2nd reading, *House of Commons Debates*, 35-2, No 89 (23 October 1996) at 5623 (Hon Pauline Picard).

²⁷ See Françoise Baylis & Jocelyn Downie, “The Tale of Assisted Human Reproduction in Canada: A Tragedy in Five Acts” (2013) 25:2 CJWL 183 at 201.

means that, in practice, Ontarian gamete donors have three main options concerning the disclosure of their identifying information. First, they can donate their gametes anonymously. If they do, their health practitioners are bound to keep their identifying information private due to contractual provisions and general provincial health privacy laws, which prohibit sharing identifying health information without patient consent.²⁸ However, non-identifying information about the donor may still be disclosed. Second, donors can opt for identity-release donation, wherein they consent to the release of their identity once a DCI reaches a specific age (usually eighteen).²⁹ There are no Canadian statutes in place governing this kind of disclosure. Rather, the identity-release scheme is contractually established. Finally, the donor can be known—in other words, his or her identifying information would be released from the very beginning of the gamete donation process.

Following the reference decision, Ontario has not stepped in to regulate anonymous gamete donation. No provincial registry has been created to oversee the collection or disclosure of donor information. Nor have any specialized regulations been put into place to mandate what information medical practitioners must gather and store when collecting gametes. Nevertheless, gamete donation is continuing to occur. While several sperm banks exist

²⁸ See e.g. *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Schedule A.

²⁹ See Gruben & Cameron, *supra* note 5 at 668.

within Ontario,³⁰ sperm is mostly imported from other countries, like the US.³¹ This is important to note when considering legal reform. Navigating multiple legal regimes creates an additional layer of complexity and could potentially affect the availability of gametes.³²

Many advocates and DCIs have testified to the harms that may result from anonymous gamete donation occurring in an unregulated space.³³ As one example, DCIs with anonymous donors often have no knowledge of their family medical history. This lack of information can delay proper diagnoses.³⁴ Furthermore, awareness of family history may prompt individuals to test for heritable conditions,³⁵ such as genetic markers associated with Huntington's disease or breast cancer linked with the

³⁰ See e.g. “ReproMed - Sperm Bank”, online: *ReproMed* <www.repromed.ca/sperm_bank>; “Why CanAm?”, online: *Can-Am Cryoservices* <www.canamcryo.com/en/why-canam>.

³¹ See Kristy Woudsta, “Sperm Donor Canada: Banks Are Almost Empty of Homegrown Supply” (8 March 2016), online: *Huffington Post* <www.huffingtonpost.ca/2016/03/07/sperm-donor-canada_n_8638488.html>; Daria O’Reilly et al, “Feasibility of an Altruistic Sperm Donation Program in Canada: Results from a Population-Based Model” (2017) 14:8 *Reproductive Health* 1.

³² See Stu Marvel, “‘Tony Danza Is My Sperm Donor?’: Queer Kinship and the Impact of Canadian Regulations Around Sperm Donation” (2013) 25:2 *CJWL* 221 at 227.

³³ See e.g. Johns, *supra* note 2; Hallich, *supra* note 2; Michelle Dennison, “Revealing Your Sources: The Case for Non-Anonymous Gamete Donation” (2007) 21:1 *JL & Health* 1.

³⁴ See Pratten, *supra* note 9 at para 111; Allan E Guttmacher, Francis S Collins & Richard H Carmona, “The Family History—More Important Than Ever” (2004) 351:22 *N Engl J Med* 2333 at 2333–34.

³⁵ See Guttmacher, Collins & Carmona, *supra* note 34 at 2333–34.

BRCA1 and BRCA2 gene.³⁶ While some may argue that genetic testing alone is a viable alternative, all genetic testing is best interpreted in light of family history.³⁷ Moreover, for many heritable conditions that are not associated with specific genetic markers, experts have concluded that family history is often a better predictor.³⁸ Family history is also becoming increasingly important for making day-to-day health decisions that can mitigate the expression of genetic diseases.³⁹ For example, if people are aware of a family history of heart disease, they may be more conscientious of their diets or be more diligent with their exercise regimes. If they know several family members have been diagnosed with colon cancer, they may schedule colonoscopies more regularly.

With respect to psychological health, some DCIs experience sadness, frustration, and anxiety as a result of being unable to obtain information about their donors. One individual described feeling her sense of self “disintegrat[e]” upon learning that she was conceived using donor sperm.⁴⁰ Others have described becoming depressed or obsessed with the lack of information.⁴¹

³⁶ See Cameron, Gruben & Kelly, *supra* note 16 at 109.

³⁷ See Pratten, *supra* note 9 at para 85; Guttmacher, Collins & Carmona, *supra* note 34 at 2334–35.

³⁸ See Pratten, *supra* note 9 at para 85; Brandie Heald, Emily Edelman & Charis Eng, “Prospective Comparison of Family Medical History with Personal Genome Screening for Risk Assessment of Common Cancers” (2012) 20:5 Eur J Hum Genet 547.

³⁹ See Cameron, Gruben & Kelly, *supra* note 16 at 109.

⁴⁰ Pratten, *supra* note 9 at para 51.

⁴¹ See Pratten, *supra* note 9 at paras 38, 45, 55.

Several have voiced a strong desire to locate half-siblings in order to establish a “greater sense of identity and belonging.”⁴² Many worried about unknowingly engaging in intimate relations with genetically-related family members.⁴³ While many DCIs are not negatively impacted by their manner of conception,⁴⁴ secrecy surrounding one’s origins may lead to stress, anxiety, and frustration.

In response to these potential harms, and in light of Ontario’s lack of assistance, many DCIs have taken matters into their own hands. For example, the DCI community has created a resource center called “We Are Donor Conceived,” which connects DCIs with support groups, various networks, and even to a voluntary United States-based Donor Sibling Registry.⁴⁵ The Donor Sibling Registry is an online space where donors and DCIs can register to make mutually desired contact with others who share their genetic origins. Unfortunately, because the Donor Sibling Registry is completely voluntary and unregulated, it is also incomplete.⁴⁶ Some DCIs are taking a different approach to their problem and are attempting to track down their anonymous donors using mail-order DNA

⁴² Jessica Lee, “Sperm Donor Anonymity: A Call for Legislative Reform” (2014) 33:1 Canadian Fam LQ 1 at 6.

⁴³ See *Pratten*, *supra* note 9 at para 100.

⁴⁴ See Tabitha Freeman, “Gamete Donation, Information Sharing and the Best Interests of the Child: An Overview of the Psychosocial Evidence” (2015) 33:1 Monash Bioeth Rev 45 at 48.

⁴⁵ See “We Are Donor Conceived”, online: *We Are Donor Conceived* <www.wearedonorconceived.com>.

⁴⁶ See Lee, *supra* note 42 at 9 (asserting that voluntary record keeping or regulation by the private sector is inadequate).^[11]

kits and genealogy websites.⁴⁷ However, this method will not always result in identifying a donor.⁴⁸ Moreover, this method can be seen as an unwanted intrusion on gamete donors' privacy.⁴⁹

Based on the foregoing, it is clear that Ontario's current regime is inadequately overseeing gamete donation. Many advocates have argued that donor anonymity should be more closely regulated or even abolished entirely.⁵⁰ Since Victoria is the only jurisdiction to have retrospectively removed donor anonymity, examining the state's policy-making experience can provide important insight regarding whether a similar course of action should be taken in Ontario.

DONOR ANONYMITY IN VICTORIA

Victoria's gamete donation scheme stands in stark contrast to Ontario's. As of March 1, 2017, Victoria became the first jurisdiction in the world to retrospectively remove gamete donor anonymity.⁵¹ This section aims to paint a picture of how Victoria's newly instituted scheme operates today. The legislative history and reasoning behind this policy

⁴⁷ See Joyce C Harper, Debbie Kennett & Dan Reisel, "The End of Donor Anonymity: How Genetic Testing is Likely to Drive Anonymous Gamete Donation Out of Business" (2016) 31:6 Human Reproduction 1135 at 1137.

⁴⁸ See *ibid* at 1136–37.

⁴⁹ See Chung et al, *supra* note 8.

⁵⁰ See generally Kelly, *supra* note 2.

⁵¹ See Taylor-Sands, *supra* note 13 at 555.

decision will be examined in greater detail in the proceeding sections.

At present, two separate donor registries exist in Victoria, both of which are managed by the Victorian Assisted Reproductive Treatment Authority (VARTA).⁵² VARTA is a state-funded statutory authority, charged with overseeing assisted reproduction in Victoria.⁵³ The first registry is the Central Register, which houses specific types of information that are prescribed by the *Assisted Reproductive Treatment Regulations 2009*.⁵⁴ This includes information such as: the donor's name, unique donor identifier, date of birth, and place of birth; the donor's height, eye colour, marital status, education, and occupation; the number of children conceived using that donor's gametes; the donor's blood type and any known genetic abnormalities; and the treatment provider's contact information.⁵⁵ The second registry is the Voluntary Register. Any party involved in donor conception may submit an application to the Voluntary Register. The applicant will indicate who they are looking to match with. Information may be shared once a match is made if both parties consent to the release of identifying information. The Voluntary Register may contain such things as

⁵² See VARTA, "Applying to the central and voluntary registries", online: VARTA <www.varta.org.au/information-support/donor-conception/donor-conception-register-services/applying-donor-conception-registers>.

⁵³ See "About VARTA", online: VARTA <www.varta.org.au/about-varta>.

⁵⁴ See *Assisted Reproductive Treatment Regulations 2009* (Vic), 2009/117, Schedule 5 [*Assisted Reproductive Treatment Regulations*].

⁵⁵ See *ibid.*

photographs, updated contact information, personal letters, etc.⁵⁶

Victoria prospectively abolished gamete donor anonymity in 1998.⁵⁷ This meant that any DCIs conceived after 1998 could access all of their donors' identifying information contained in the Central Register once they turned eighteen.⁵⁸ However, any gamete donor who donated post-1998 was made aware of this new regime and so was required to consent to this identity-release as part of the donation process. Various other countries in the world have prospectively abolished anonymous gamete donation in a similar fashion, such as the United Kingdom.⁵⁹

However, Victoria's 2017 amendments took the abolition of anonymity one step further. They extended the right to access identifying information in the Central Register to all DCIs in Victoria, regardless of when they were conceived, and *regardless of whether their gamete*

⁵⁶ VARTA, "The Voluntary Register", online: VARTA <www.varta.org.au/information-support/donor-conception/donor-conception-register-services/donor-conception-registers>.

⁵⁷ The legislation also provided that DCIs conceived between 1988 and 1998 could access their donor's information if the donor consented. This was done through the Voluntary Register, and the ability was later extended to DCIs born before 1988, as well. As a result, the Voluntary Register became accessible to all DCIs, regardless of when they were conceived, so long as all relevant parties consent to the information release. See Taylor-Sands, *supra* note 13 at 557–58.

⁵⁸ See Taylor-Sands, *supra* note 13 at 558.

⁵⁹ See *The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004* (UK), SI 2004/1511.

donor consents to the release of his or her information.⁶⁰ As a result, all Victorian DCIs can now apply to the Central Register in order to receive identifying and/or non-identifying information about their donor once they turn eighteen, or earlier if they have parental consent or if a VARTA counsellor considers them to be sufficiently mature.⁶¹

When a DCI applies to the Central Register to obtain information about his or her donor, the DCI will first be required to go to a free information-and-support session, conducted by a qualified VARTA counsellor. During this session, the DCI is encouraged to fill out a Statement of Reasons, describing their motivations for seeking information and what they hope to gain out of their application in both the short- and long-term. This form is forwarded to the donor in order to help them understand why the DCI is seeking further information.⁶²

In crafting their applications to the Central Register, DCIs may request to receive non-identifying information, identifying information, or both. Before releasing any identifying information, VARTA will use

⁶⁰ Donors can also apply to the Central Register for information about their DCIs.

⁶¹ Parents may apply to access information about their child's donor while the child is still a minor. However, this will only be provided if the donor consents. See VARTA, "Access to information about the donor", online: VARTA <www.varta.org.au/information-support/donor-conception/donor-conception-register-services/access-information-about>.

⁶² See VARTA, "Information and support session", online: VARTA <www.varta.org.au/information-support/donor-conception/donor-conception-register-services/information-and-support>.

best efforts to inform the donor of the DCI's application for information. Where necessary, such efforts may include conducting basic internet and social-media searches, inspecting electoral rolls, perusing name-change databases, looking through the White Pages, examining death indexes, performing land title searches, inspecting probate files and immigration registers, or even contracting third-party search agencies.⁶³ If VARTA is unable to locate the donor after four months, DCIs are provided with their donor's identifying information on two conditions. First, they must undertake not to contact the donor. Second, they must agree to provide VARTA with any subsequent information that they may discover regarding the donor's location.⁶⁴

If VARTA is able to make contact with the donor, the donor and his or her family will be offered free counselling. The donor will also be informed that they may lodge a contact preference form, which permits donors to detail how they would like to be contacted by DCIs. Contact options include, but are not limited to, phone calls, letters, non-identifying e-mail addresses, or attending in-

⁶³ See VARTA, "Searching for the subject of an application" online: VARTA <www.varta.org.au/information-support/donor-conception/donor-conception-register-services/searching-subject> [perma.cc/U832-V5FJ].

⁶⁴ See VARTA, "Information for Donor-Conceived People Conceived from Donations Made Before 1998: Application to the Central Register" (July 2019) at 1, online (pdf): VARTA <www.varta.org.au/resources/information-sheets/making-application-central-register> [perma.cc/XXU9-67S3].

person meetings facilitated by a VARTA counsellor.⁶⁵ The donor may also specify that he or she wants no contact at all.⁶⁶ However, requesting no contact does not prevent the release of their identifying information. The donor's contact preference is legally enforceable, and DCIs must sign an undertaking that they will comply with their donor's contact preference prior to receiving any identifying information from VARTA.⁶⁷ In theory, a donor could take a DCI who disregards the contact preference to court. However, as of the date of writing, no such applications have been filed.

In sum, the Victorian scheme is quite sensitive to DCIs' interests⁶⁸ and provides a safe and reliable way for all DCIs to access information that may be important for

⁶⁵ See VARTA, "The process of donor linking", online: VARTA <www.varta.org.au/information-support/donor-conception/donor-conception-register-services/process-donor-linking> [perma.cc/TV38-4QYS].

⁶⁶ See "Information for Donor-Conceived People Conceived from Donations Made Before 1998: Application to the Central Register", *supra* note 64.

⁶⁷ See *Assisted Reproductive Treatment Act 2008*, *supra* note 10, ss 63C–63G. See also "Information for Donor-Conceived People Conceived from Donations Made Before 1998: Application to the Central Register", *supra* note 64.

⁶⁸ See generally Austl, Vic, VARTA, *Consultation with Donors Who Donated Gametes in Victoria, Australia Before 1998: Access by Donor-Conceived People to Information About Donors* (Report to the Victorian Government) (Melbourne: VARTA, 2013) at 15–17 [VARTA, *Consultation with Donors*]. Notably, some donors expressed support for the retrospective amendments because they believe in the importance of disclosure, and/or because they were interested in obtaining information about their DCIs, themselves.

their physical and psychological well-being. However, the 2017 amendments have been criticized for inadequately protecting gamete donors. For example, lodging a no-contact preference does not prevent online stalking via unregulated social media websites.⁶⁹ Furthermore, if a DCI disregards the no-contact preference, any subsequent legal enforcement will not necessarily undo the harms that may be caused by the initial contact. Many donors have not informed their families that they once donated their gametes and worry that this revelation may disintegrate their family unit.⁷⁰ Even where contact between the donor and the DCI does not occur, the release of identifying information without consent nevertheless violates donors' legitimate expectations of privacy. Lack of contact does not negate the fact that they are no longer anonymous. Many donors only agreed to donate their gametes because they were assured anonymity.⁷¹ They did not suspect that their privacy rights would be retrospectively removed.

ISSUES WITH RETROSPECTIVE LAWS

Much ink has been spilt discussing the problems associated with retrospective laws.⁷² While a thorough examination of

⁶⁹ See Taylor-Sands, *supra* note 13 at 562.

⁷⁰ See VARTA, *Consultation with Donors*, *supra* note 68 at 44.

⁷¹ See *ibid* at 60.

⁷² See generally Elmer A Driedger's discussion of distinction between *retrospective* and *retroactive* in "Statutes: Retroactive Retrospective Reflections" (1978) 56:2 Can Bar Rev 264 at 268–269. There is some confusion concerning the appropriate use of these two terms, and while Driedger distinguishes the two concepts, this distinction has not been applied consistently. As a result, the terms are often used interchangeably. For the sake of uniformity, this paper will use the term

the literature on this topic is beyond the scope of this paper, this section will nevertheless provide a brief overview of one of the main criticisms of retrospectivity: its incompatibility with the rule of law. Despite being a widely respected principle, a precise and concise definition of the rule of law is hard to articulate.⁷³ Broadly stated, the rule of law is a normative concept that all persons should be ruled by law equally. To achieve this, laws should be well-defined, public, stable, and evenly applied.⁷⁴

It is easy to see how retrospective legislation might violate these aspirational characteristics and thereby undermine the rule of law. For example, under the rule of law, a well-functioning legal system should allow people to form reasonable expectations about the legal consequences of their actions. Where such guidance is not provided, citizens cannot make meaningful decisions about their actions. Similarly, where an individual chooses to act based on a reasonable expectation of privacy, but the law is subsequently changed to attach different consequences to the individual's chosen course of action, the basis of their decision-making is gravely undermined.⁷⁵ This is,

retrospective, throughout, to refer to a law that “attaches new legal effects to situations that had occurred entirely or partly in the past.” Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: Lexis Nexis, 2008) at 670, cited in Gruben, *supra* note 6 at 161.

⁷³ See Jeff Yates, Andrew B Whitford & David Brown, “Perceptions of the Rule of Law: Evidence on the Impact of Judicial Insulation” (2019) 100:1 Soc Science Q 198.

⁷⁴ See Charles Sampford, *Retrospectivity and the Rule of Law* (Toronto: Oxford University Press, 2006), ch 2.

⁷⁵ See *ibid*, ch 3.

quite simply, unfair—“it is unfair to establish rules, invite people to rely on them, then change them in mid-stream, especially if the change results in negative consequences.”⁷⁶ This scenario also engages the principle of adequate notice. To be guided by laws, citizens must first be aware of these laws. Of course, an individual cannot have adequate notice of a law that will not be created until several years after they make the decision in question.⁷⁷

Broader, systemic problems can also arise from disregarding the principles that underpin the rule of law. A retrospective law “undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change.”⁷⁸ In other words, because individuals cannot trust that the effect of current laws will not change in the future, the general public confidence in law might be eroded. Such distrust could even extend to the government at large.⁷⁹

Given its potential to attract grave philosophical and practical consequences, the decision to enact retrospective legislation should not be undertaken lightly. These special circumstances arguably heighten the government’s responsibility to rely on solid evidence and airtight reasoning in their decision-making. As a result, if Ontario is to follow Victoria’s course of action with respect to retrospectively removing donor anonymity, it should

⁷⁶ Sullivan, *supra* note 72 at 668, cited in Gruben, *supra* note 6 at 162.

⁷⁷ See Gruben, *supra* note 6 at 162.

⁷⁸ Lon L Fuller, *The Morality of Law*, revised ed (New Haven, CT: Yale University Press, 1969) at 39, cited in Sampford, *supra* note 74 at 58.

⁷⁹ See Taylor-Sands, *supra* note 13 at 562.

only do so if it has thoroughly considered all the benefits and disadvantages that might accompany such a drastic change.

SHOULD ONTARIO FOLLOW SUIT?

This paper argues that Victoria's policy choice to retrospectively remove donor anonymity ought not be emulated by Ontario. To support this thesis, this section will first review the jurisdictions' opposing historical approaches to overseeing gamete donation. It will then conduct an in-depth examination of Victoria's policy decision, arguing that the amendments were not evidence-based. As a result, Ontario should conduct its own research into how de-anonymized gamete donation might affect the various stakeholders prior to taking any legislative action. Finally, this section will argue that Victoria relied on an ill-suited framework of reasoning when arriving at its policy decision. Ontario should avoid using Victoria's harm-based approach and should instead opt to employ relational ethics when considering how to best proceed.

A) CONSIDERING HISTORY

Scholars of comparative law have long since cautioned about the dangers of mindless legal transplantation.⁸⁰ Although there continues to be disagreement concerning the extent to which socio-cultural differences affect the ability to successfully compare, adopt, and adapt different

⁸⁰ See Helen Xanthaki, "Legal Transplants in Legislation: Defusing the Trap" (2008) 57:3 ICLQ 659.

legal regimes,⁸¹ it can nevertheless be informative to consider jurisdictional differences and how these differences may affect the implementation of the amendments in question. While an exhaustive comparison of Victoria and Ontario's legal climates is beyond the scope of this paper, it may be helpful to briefly review the jurisdictions' legal histories with respect to the oversight of gamete donation—and, in particular, to highlight their differences.

As discussed, Ontario has not created any regulations pertaining specifically to donor anonymity. The only relevant piece of legislation that ever touched donors' anonymity rights was section 18(3) of the original *AHRA*, which provided that identifying information about a donor could not be disclosed to gamete recipients without the donor's consent.⁸² In other words, the only law that was ever in place actually protected Ontarian donors' anonymity rights. Though this section was subsequently repealed, no alternative stipulations have been put into place by the Ontario government. Ontario donors therefore continue to enjoy a right to privacy in their identifying information, since the personal information collected during gamete donation is not distinguished from personal information that would be collected for any other medical procedure. While in practice their anonymity may be threatened through DCIs' use of direct-to-consumer DNA testing, like 23andMe, their privacy rights have *always*

⁸¹ See Toby S Goldbach, "Instrumentalizing the Expressive: Transplanting Sentencing Circles into the Canadian Criminal Trial" (2015) 25:1 *Transnat'l L & Contemp Probs* 61 at 93–95.

⁸² See *AHRA*, *supra* note 19, s 18(3).

been upheld by the government, whether explicitly or implicitly.

Ontario has, however, enacted retrospective legislation with respect to adoption. In 2008, an adoption-information disclosure law was passed, enabling adopted adults over the age of eighteen to apply for identifying information through Service Ontario.⁸³ Birth parents can also apply for identifying information if the adopted child is over nineteen.⁸⁴ Similar to Victoria's scheme for gamete donation, parties can file a Notice of Contact Preference indicating how they would like to be contacted.⁸⁵ They can also file a No Contact Notice if they are willing to share identifying information but do not wish to be contacted.⁸⁶ However, unlike the Victorian scheme, if the adoption took place before September 2008, the birth parents and/or adopted adults may submit a Disclosure Veto. This Disclosure Veto would prevent the release of any identifying information.⁸⁷ In other words, if the adoption took place prior to the legislation coming into force, birth parents and adopted individuals are entitled to retain their privacy if they so choose. Therefore, despite being

⁸³ See Bill 12, *An Act to amend the Vital Statistics Act in relation to adoption information and to make consequential amendments to the Child and Family Services Act*, 1st Sess, 39th Parl, Ontario, 2008 (assented to 14 May 2008), SO 2008, c 5 (the amendments); *Vital Statistics Act*, RSO 1990, c V4, s 48.1 (the present-day section providing for disclosure to the adopted person).

⁸⁴ See *Vital Statistics Act*, *supra* note 83, s 48.2.

⁸⁵ See *ibid*, s 48.3.

⁸⁶ See *ibid*, s 48.2–48.5.

⁸⁷ See *ibid*.

retroactive, a clear mechanism for protecting previous promises of privacy is incorporated into the legislation.

Moreover, it does not necessarily follow that the government will extend such a scheme to DCIs. In *Pratten v British Columbia (AG)*, a DCI claimed that her section 15 equality rights had been breached because adopted children in British Columbia had legislated protections that did not extend to DCIs. She also claimed that the practice of anonymous gamete donation violated her section 7 *Charter* right to life, liberty, and security of the person because this section encompassed the right to know her genetic origins. The British Columbia Court of Appeal agreed with the trial judge and dismissed Ms. Pratten's section 7 claim, finding that there was no constitutionally protected positive right to know one's biological origins.⁸⁸ It further overturned the trial judge's holding on the section 15(1) claim and held instead that the adoption-related provisions were protected by section 15(2) of the *Charter*, which precludes using section 15 to strike down legislative schemes that have an ameliorative or remedial purpose targeting another disadvantaged group.⁸⁹ As a result, it was "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."⁹⁰ Leave to appeal

⁸⁸ See *Pratten*, *supra* note 9 at para 316; *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480 at para 7 [*Pratten BCCA*].

⁸⁹ See *R v Kapp*, 2008 SCC 41 at para 41.

⁹⁰ *Pratten BCCA*, *supra* note 88 at para 42.

the case to the Supreme Court of Canada was denied.⁹¹ Notably, because this case was brought in British Columbia, it is not binding in Ontario.

Overall, Ontario gamete donors have never had their privacy rights seriously questioned by either the federal or the provincial government. The story in Victoria is very different. The Victorian government has been overseeing gamete donation for decades. In 1982 it established the Committee to Consider the Social, Ethical, and Legal Issues Arising From In Vitro Fertilization in order to investigate the regulation of assisted reproduction in Victoria.⁹² Based off the committee's findings, the *Infertility (Medical Procedures) Act 1984* came into force in 1988.⁹³ The Act required medical practitioners to collect specific information about gamete donors.⁹⁴ This information was to be stored in a central register. The scheme also provided that DCIs could access their donors' identifying information once they turned eighteen, if the donor consented to this release of information.⁹⁵ In line with this, some fertility-treatment providers began including a special box on their intake forms, asking

⁹¹ *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480, leave to appeal to SCC refused, 35191 (30 May 2013).

⁹² See Austl, Victoria, Law Reform Committee, *Inquiry into Access by Donor-Conceived People to Information about Donors*, Parl Paper No 120 (2012) at 14 [*Inquiry into Access*].

⁹³ *Infertility (Medical Procedures) Act 1984* (Vic), 1984/10163.

⁹⁴ See *ibid* at ss 19ff.

⁹⁵ See Taylor-Sands, *supra* note 13 at 557–58.

whether the donors consented to such identity release.⁹⁶ Some providers even went so far as to only recruit donors who were willing to be known to offspring.⁹⁷ Therefore, as early as 1988, the Victorian scheme was already more concerned with openness than Ontario's legislation is today.

As of January 1, 1998, with the *Infertility Treatment Act 1995*, the Victorian government prospectively ended anonymous gamete donation.⁹⁸ This meant that, going forward, every donor had to consent to identity-release to be eligible to donate. All DCIs conceived after 1998 could therefore obtain identifying information about their donors once they turned eighteen, or at a younger age with their parents' consent.⁹⁹ Once again, this prospective legislation, enacted more than two decades ago, provided Victorian DCIs with far more access to information rights than any Ontarian DCIs currently possess.

Changing attitudes towards donor conception led to the enactment of further amendments in 2015.¹⁰⁰ The main goal of the 2015 amendments was to provide DCIs conceived before 1988 (i.e., those conceived before Victoria entered the legislative sphere at all) with the same access to information that was afforded to DCIs conceived

⁹⁶ See *History of Donor Conception Records in Victoria*, *supra* note 10 at 7.

⁹⁷ See *ibid.*

⁹⁸ See *ibid*; *Infertility Treatment Act 1995* (Vic), 1995/63.

⁹⁹ See Taylor-Sands, *supra* note 13 at 558.

¹⁰⁰ See *ibid* at 558–60.

after 1988 but before 1998.¹⁰¹ To enable this, fertility treatment providers were required submit their relevant, pre-1988 records to the Central Register.¹⁰² However, the legislative scheme provided that donors would have to consent to the release of their identifying information.¹⁰³ In other words, donors who donated under a promise of anonymity any time before 1998 were still able to retain their privacy.

Though donor anonymity was still preserved at this stage, the consultations conducted as part of the evidence-gathering process for the 2015 amendments seriously considered whether anonymity should be retrospectively abolished.¹⁰⁴ The Law Reform Committee called for written submissions and held six separate public consultations, gathering information from a wide array of stakeholders including DCIs, donors, and medical professionals.¹⁰⁵ Extensive public advertising was used to encourage anonymous donors to share their opinions about having their identities revealed.¹⁰⁶ As a result, from as early as 2011, donors were notified that their privacy was being called into question by the government. It was not until the

¹⁰¹ See *History of Donor Conception Records in Victoria*, *supra* note 10 at 8.

¹⁰² See *ibid* at 8–9.

¹⁰³ See Taylor-Sands, *supra* note 13 at 560.

¹⁰⁴ See *Victorian Government Response*, *supra* note 12 at 2, 5–6.

¹⁰⁵ See *Inquiry into Access*, *supra* note 92 at 8.

¹⁰⁶ See VARTA, *Consultation with Donors*, *supra* note 68 at 11.

final set of amendments were passed in 2017 that these rights were retrospectively removed.¹⁰⁷

Understanding Victoria's entire legislative history is important because it demonstrates that the Victorian government did not jump straight from zero oversight to retrospective removal. Rather, over the course of more than three decades, the legislature incrementally and purposefully adjusted its policies. The incremental nature of the reform has resulted in donor information being uniformly collected and stored in one place in Victoria since 1988.¹⁰⁸ As a result, DCIs conceived after 1988 are assured that the government actually possesses a baseline of information about their donors. This is not the case in Ontario. Even if donor anonymity were to be retrospectively removed, many DCIs would sadly discover that pertinent information about their donors was either destroyed, never collected, or held in an international jurisdiction.¹⁰⁹ Therefore, if retrospective legislation were created in Ontario, it could nevertheless be difficult to achieve a fully functioning retrospective system.

Ultimately, this brief review highlights that Ontario and Victoria fall on opposite ends of the spectrum with respect to their historic oversight of gamete donation. If Ontario were to move forward with adopting Victoria's legislative scheme, it could be useful to conduct a more fulsome examination of any other pertinent differences that

¹⁰⁷ See Taylor-Sands, "Removing Donor Anonymity", *supra* note 13 at 561.

¹⁰⁸ See *History of Donor Conception Records in Victoria*, *supra* note 10 at 7–8.

¹⁰⁹ See e.g. Pratten, *supra* note 9 at para 2.

might exist between the two jurisdictions and to further explore how all these distinctions might impact the successful implementation of Victoria's amendments within Ontario.

B) LACK OF EVIDENTIARY SUPPORT

In 2011, the Law Reform Committee for the "Inquiry into Access by Donor-Conceived People to Information about Donors" was assembled by the Victorian government and given a mandate "to consider appropriate measures to reconcile conflicts between the contemporary practice that requires disclosure of information to donor-conceived people, and an historical tradition that did not."¹¹⁰ In other words, the Law Reform Committee was asked how to best address the differences in rights afforded to DCIs, based on their date of conception. At that time, DCIs conceived before 1988 had no legislated rights. DCIs conceived between 1988 and 1998 had the right to access non-identifying information that was stored in the Central Register, as well as the right to access identifying information *if* their donors consented. Finally, DCIs conceived post-1998 had the right to access both identifying and non-identifying information from the register.

In order to determine what course of action the Victorian government ought to take to reconcile these differences, the Law Reform Committee called for written submissions (receiving seventy-seven), and held six different public consultations (hearing from fifty-one

¹¹⁰ *Inquiry into Access*, *supra* note 92 at xvii.

different witnesses).¹¹¹ In total, it heard from a wide array of stakeholders, including “donors, donor-conceived persons, recipient parents, academics, and representatives from government agencies, fertility clinics, medical associations and support groups.”¹¹² Writing over two hundred pages, the Law Reform Committee’s final report on the matter weighed the harms to DCIs against the harms that may befall donors and concluded “that the welfare and interests of persons born as a result of assisted reproductive treatment procedures are paramount.”¹¹³ Based on this conclusion, the Law Reform Committee recommended “that the Victorian Government introduce legislation to allow all donor-conceived people to obtain identifying information about their donors.”¹¹⁴

However, the Law Reform Committee’s report did not initially prove to be all that persuasive. Despite hearing from a variety of key informants, only nine donors were consulted.¹¹⁵ As a result, the Victorian government issued an interim response stating that further information needed to be gathered from donors prior to taking any legislative

¹¹¹ See *ibid* at 8.

¹¹² *Ibid* at xix.

¹¹³ *Ibid* at xviii.

¹¹⁴ *Ibid* at 76.

¹¹⁵ See Austl, Victoria, *Whole of Government Interim Response to the Parliament of Victoria Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors* (Melbourne, 2012) at 2.

action, given how significantly the donors' rights could be impacted.¹¹⁶

VARTA was charged with consulting donors about their opinions on the Law Reform Commission's recommendation.¹¹⁷ In order to recruit donors, it launched an extensive advertising and media campaign, which ran in print and radio for two months.¹¹⁸ Forty-two eligible donors responded, seven of whom had also made submissions to the Law Reform Committee. VARTA acknowledged that:

[b]ecause records of donations are incomplete, the total number of donors is unknown and it is impossible to assess whether these 42 donors constitute a representative sample. However, the diversity of characteristics, the range of opinions, and the inclusion of donors who have not previously made their views known suggest that the results represent more than a narrow segment of donors.¹¹⁹

VARTA used semi-structured interviews to find that more than half of the canvassed donors rejected the Law Reform Commission's recommendation. These donors largely stated that retrospective removal was akin to "a breach of contract and would undermine trust in

¹¹⁶ See *ibid* at 1–2.

¹¹⁷ See VARTA, *Consultation with Donors*, *supra* note 68 at 5.

¹¹⁸ See *ibid* at 11.

¹¹⁹ *Ibid* at 5.

guarantees of privacy and confidentiality as well as government.”¹²⁰ These donors also expressed significant concerns about how the legislative scheme could harm them and their families.¹²¹ One donor described retrospective identity-release as “a dreadful betrayal of an altruistic act.”¹²² Several donors who were themselves willing to be identified nevertheless opposed the recommendation on the basis that it was wrong to retrospectively change the law.¹²³ As a middle ground, about a quarter of interviewed donors proposed increasing efforts to have donors come forward voluntarily, rather than legally compelling them to do so.¹²⁴

In its final report, VARTA did not provide any of its own opinions regarding whether retrospective legislation should be enacted. It merely laid out the evidence that had been gathered from anonymous donors. The Victorian government weighed the new evidence itself and concluded that identifying information should only be released with the consent of the donors.¹²⁵ Based on the evidence, the Victorian government posited that: (1) most donors would consent to releasing their identifying information if they were given the choice to do so; (2) where donors refuse to reveal information, the provision of non-identifying information could still help DCIs

¹²⁰ *Victorian Government Response*, supra note 12 at 4.

¹²¹ See *Consultation with Donors*, supra note 68 at 5.

¹²² *Ibid* at 17.

¹²³ See *ibid* at 19.

¹²⁴ See *ibid*.

¹²⁵ See *Victorian Government Response*, supra note 12 at 5.

overcome many of their identity issues; and (3) even if donors were compelled to disclose their identifying information, there would be no guarantee that the pre-1988 information would be available, complete, or accurate.¹²⁶ Based on these conclusions, the 2015 amendments were created. The 2015 amendments legislated a right for DCIs born before 1988 to access identifying information *if* donors consented to the release. They also created provisions for gathering and securing pre-1988 donor records from fertility providers.¹²⁷ Overall, the Victorian government believed this model respected donors' privacy and choices and acknowledged the context within which donors originally consented.¹²⁸

Only a few months after the 2015 amendments came into force, however, a new government was elected. Without gathering any further evidence, the new government retrospectively removed donor anonymity, thereby fulfilling one of its election promises.¹²⁹ This course of action strongly suggests that Victoria's policy change was a politicized move, as opposed to an evidence-based decision. Even if the newly elected party was acting upon the will of the people, it is potentially problematic to infringe donors' privacy rights due to a political platform, given the serious impacts associated with enacting retrospective legislation.

¹²⁶ See *ibid.*

¹²⁷ See *History of Donor Conception Records in Victoria*, *supra* note 10 at 9.

¹²⁸ See *Victorian Government Response*, *supra* note 12 at 5.

¹²⁹ See Taylor-Sands, *supra* note 13 at 560–61.

Furthermore, it is far less persuasive for Ontario to follow another country's politicized move than it would be for the province to adopt an amendment grounded in sound research. While Victoria's population may largely support the amendments, not much is known about how Ontario citizens feel or how they would like their own government to act. It is difficult to extrapolate Victorians' opinions to Ontarians, considering the vastly different gamete donation cultures that exist between the two jurisdictions. These discrepancies are so stark that, even if Victoria's decision had been based on evidence, it would nevertheless be important for Ontario to canvass its own residents and undertake its own fact-finding processes. Donors here may feel differently than donors there.

This distinction also applies to any evidence that may one day be collected post-amendment, regarding how Victorian donors are actually faring under this new identity-release regime. At present, not enough evidence has been collected to truly understand how the new legislation is affecting the parties involved, including previously anonymous donors and DCIs. This gap in knowledge is likely due to the relatively brief period of time that has elapsed between the time of enactment and the time of writing. Even once this information becomes available, however, it should not be assumed that the same effects would follow in Ontario. The potential impacts of the jurisdictions' different gamete donation histories ought not be thoughtlessly dismissed.

C) ILL-SUITED REASONING

In analyzing the qualitative evidence gathered from donors and DCIs, the Law Reform Commission largely undertook

a harms-based approach.¹³⁰ In sum, it identified the harms that both donors and DCIs were experiencing or could potentially experience and weighed these harms against one another to decide which group ought to be protected by the new legislative scheme. We see direct evidence of this reasoning in the following quote from the Law Reform Committee's report:

While the release of identifying information to donor-conceived people may *potentially* cause discomfort and distress to donors (although this will not always be the case), it is certain that donor-conceived people are *actually* suffering from their lack of knowledge about donors . . . In the Committee's view, the burden of suffering under current arrangements falls predominantly on the donor-conceived person.¹³¹

This type of reasoning, which pitted donors against DCIs, led to the conclusion that the interests of DCIs ought to be paramount.¹³² In turn, this conclusion formed the basis for the Law Reform Committee's recommendation to create retrospective amendments.¹³³ Since the 2017 amendments reflected the Law Reform Committee's recommendation quite precisely, it is assumed that the Victorian government

¹³⁰ See *ibid* at 564.

¹³¹ *Inquiry into Access*, *supra* note 92 at 73–74.

¹³² See *ibid* at xviii.

¹³³ See *ibid* at xvii–xviii.

also adopted the Law Reform Committee's harm-based reasoning as its own.

However, an approach that sets one party against the other fails to appreciate the inter-relatedness of the interests at hand, despite donors and DCIs seeking seemingly opposing results (i.e., being anonymous vs. being identified). Put differently, by focusing on weighted harms and end-outcomes, Victoria's reasoning insufficiently engaged with how relational aspects underpin the interests and well-being of both donors and DCIs. Without considering these relational underpinnings, it can be reductive to conclude that a retrospective identity-release scheme is the most beneficial set-up for DCIs.

DCI interests may "not in fact be promoted in any significant way if the state were to provide the identifying details of a donor who was not open to further information exchange or ongoing contact."¹³⁴ Each DCI's motivation for wanting to identify their donor is unique. As such, some DCIs' needs may be perfectly met by Victoria's existing set-up. However, in other instances, harms resulting from not *knowing* one's donor or not *knowing* one's origins may not be sufficiently quelled by the provision of a name on a paper.¹³⁵ It could be distressing to learn that a donor wants no contact, or to have a contact experience go poorly.¹³⁶

¹³⁴ Nuffield Council on Bioethics, *Donor Conception: Ethical Aspects of Information Sharing* (London: Nuffield Council on Bioethics, 2013) at xxvi [Nuffield Council on Bioethics, *Donor Conception*].

¹³⁵ See Taylor-Sands, *supra* note 13 at 579.

¹³⁶ See *ibid.*

Victoria's weighing-the-harms approach led to the creation of legally enforceable contact preference forms. This mechanism attempts to protect donors from undue interference while still allowing DCIs to identify their donors. However, from a relational perspective, everybody loses when it comes to no-contact preference forms. For DCIs, it can be incredibly stressful to discover that a donor has requested no contact and may leave them with more questions than answers.¹³⁷ In turn, donors are also insufficiently protected by this mechanism. Lodging a no-contact preference does not prevent against "invisible" privacy intrusions—for example, extensive social media following or staging strategic run-ins without making oneself known.¹³⁸ While most DCIs will likely respect the contact preference form, this cannot be guaranteed. In the event that a DCI disregards the no-contact preference, subsequent legal enforcement will not necessarily undo the harms that may have been caused by the initial contact. Overall, this set-up "presents a genuine threat to the relationships between relevant stakeholders, which lie at the heart of donor conception."¹³⁹

This approach neglects the fundamental idea that "donor conception is first and foremost about people . . . 'People', in turn, do not exist in isolation but within a web of relationships with one another."¹⁴⁰ Rather than viewing the stakeholders' interests as falling on opposing ends of a

¹³⁷ See Taylor-Sands, *supra* note 13 at 563.

¹³⁸ See *ibid* at 562.

¹³⁹ *Ibid* at 578.

¹⁴⁰ Nuffield Council on Bioethics, *Donor Conception*, *supra* note 134 at 87.

scale, a better analogy is to that of complex web. Within this web, DCI and donor interests sometimes conflict and sometimes coincide, but are always related to one another.¹⁴¹ In terms of theoretical reasoning, Michelle Taylor-Sands argues that, based on the aforementioned factors, this subject matter is better analyzed using a relational ethics lens, as opposed to a harms-based approach.¹⁴²

Relational ethics considers what actions are ethical or appropriate by analyzing the situation explicitly within the context of the relationships at play.¹⁴³ It recognizes that human connection is a critical aspect of ethics.¹⁴⁴ According to this theoretical framework, an overemphasis on the individual can paint a false picture because it ignores the fundamental interconnectedness of all aspects of life.¹⁴⁵ As such, the goal of relational ethics is to arrive at a “fitting response” which accounts for the relational complexity of the situation, and which is “suitable, balanced, and harmonious.”¹⁴⁶

In terms of its application to donor conception, Michelle Taylor-Sands argues that this framework is more

¹⁴¹ See Taylor-Sands, *supra* note 13 at 577.

¹⁴² See Taylor-Sands, *supra* note 13.

¹⁴³ See Wendy J Austin, “Relational Ethics” in Lisa M Given, ed, *The SAGE Encyclopedia of Qualitative Research Methods*, 2nd ed (Thousand Oaks, CA: SAGE Publications Inc, 2008) 748 at 748–49.

¹⁴⁴ See Diane Konyk & Wendy Austin, “Nursing Under the Influence: A Relational Ethics Perspective” (2012) 19:3 *Nursing Ethics* 380 at 382.

¹⁴⁵ See Austin, *supra* note 143 at 749.

¹⁴⁶ See *ibid* at 748.

appropriate than Victoria's harms-based approach because it enables DCI interests to be

considered alongside those of donors and their families and recipient parents, thereby promoting the very relationships that are at stake in donor conception. A relational model also emphasises the need for a flexible approach to accommodate the longitudinal needs of individuals as their relationships change and evolve over time.¹⁴⁷

The approach is particularly suitable to this subject matter because "many of the interests in donor conception 'arise specifically in the context of the relationships (actual and potential) that may exist between the different parties.'"¹⁴⁸ As a result, relational ethics emphasizes the importance of cultivating healthy relationships between donors and DCIs, as opposed to creating legislative "winners" and "losers."

This paper does not attempt to define or prescribe what constitutes a healthy relationship. Rather, the concept will vary depending on each individual circumstance and can encompass everything from complete ambivalence to close familial bonds. The state cannot compel these healthy relationships (regardless of whether they are close or distant; warm or formal). However, the government can create legislation aimed at enabling or fostering this outcome. Arguably, a scheme that explicitly subordinates

¹⁴⁷ Taylor-Sands, *supra* note 13 at 579.

¹⁴⁸ Nuffield Council on Bioethics, *Donor Conception*, *supra* note 134 at xix, cited in Taylor-Sands, *supra* note 13 at 577.

one party's interests to the other's does not form the best foundation. Instead, the next section attempts to make policy recommendations for Ontario stemming from a relational ethics perspective. These recommendations take into consideration the complex and inter-related interests at hand and are aimed at maximizing improvements for all parties involved while simultaneously fostering a legal environment where healthy relationships can thrive.

POLICY RECOMMENDATIONS

Based on the foregoing, Victoria does not set an appropriate example for Ontario to emulate. Ontario should *not* follow suit and retrospectively remove donor anonymity. It is beyond the scope of this paper to determine whether Ontario should prospectively abolish donor anonymity. Nevertheless, it is apparent that the status quo is insufficiently protecting Ontario DCIs who have already been conceived—i.e., those DCIs who would not benefit from any prospective removal of donor anonymity. Ameliorative action is therefore required and Ontario should learn from Victoria's mistakes by ensuring that any legislative reform is founded on sound empirical evidence and a clear ethical framework.¹⁴⁹

In line with these principles, this paper makes two recommendations aimed at improving outcomes for DCIs in Ontario, without subordinating the interests of gamete donors. These recommendations reflect the limited evidence that is presently available. It would be prudent for Ontario to gather further evidence from experts, key stakeholders, and the general public prior to proceeding

¹⁴⁹ See *ibid* at 578.

with any legislative reform. This paper's recommendations were also crafted using a relational ethics approach. This approach recognizes that the parties' interests are complex, inter-related, and ever evolving. By situating an analysis of the problem within a relational context, the resulting recommendations seek to provide practical improvements for DCIs within a legal environment is that conducive to fostering healthy relationships.

The first recommendation is that Ontario invest increased resources into raising public awareness and education with respect to the physical and potentially psychological importance of disclosing donor information to DCIs. To be clear, many DCIs are not negatively impacted by their manner of conception.¹⁵⁰ However, some have testified to experiencing associated psychological issues,¹⁵¹ and the medical benefits of knowing one's family history can be significant.¹⁵² Furthermore, various key informants have championed the overall benefits of disclosure.¹⁵³ Openness therefore constitutes a laudable goal to pursue within the province.

¹⁵⁰ See Freeman, *supra* note 43 at 48; Joanna E Scheib & Alice Ruby, "Impact of Sperm Donor Information on Parents and Children" (2006) 4:1 Sexuality, Reproduction & Menopause 17 at 17.

¹⁵¹ See Pratten, *supra* note 9 at paras 38, 45, 51, 55.

¹⁵² See *ibid* at paras 85, 11.

¹⁵³ See Ethics Committee of the American Society for Reproductive Medicine, "Informing Offspring of Their Conception by Gamete or Embryo Donation: An Ethics Committee Opinion" (2018) 109:4 Fertility & Sterility 601 at 602; Ken Daniels, "Donor Gametes: Anonymous or Identified?" (2006) 21:1 Best Practice & Research: Clinical Obstetrics & Gynaecology 113 at 124–25; Patricia P

The proposed compromise of encouraging voluntary disclosure was raised by several donors consulted by VARTA.¹⁵⁴ Increasing education and awareness could encourage more donors to come forward voluntarily, which is preferable to legally compelling them to do so.¹⁵⁵ This approach could also facilitate gathering more accurate and up-to-date information, as opposed to providing DCIs with records from fertility clinics that are decades old and usually outdated—a phenomenon which often occurs under the Victorian regime.¹⁵⁶ Moreover, this set-up avoids taking an “all-or-nothing” approach to information disclosure. Donors who feel uncomfortable sharing identifying information can still share newly acquired medical information, which can be pivotal for the physical well-being of DCIs.

This paper advocates for a voluntary, as opposed to a mandatory, information-sharing scheme between donors and DCIs.¹⁵⁷ From a relational perspective, voluntary information sharing is more conducive to fostering healthy

Mahlstedt, Kathleen LaBounty & William Thomas Kennedy, “The Views of Adult Offspring of Sperm Donation: Essential Feedback for the Development of Ethical Guidelines Within the Practice of Assisted Reproductive Technology in the United States” (2010) 93:7 *Fertility & Sterility* 2236.

¹⁵⁴ See *Victorian Government Response*, *supra* note 12 at 4.

¹⁵⁵ See VARTA, *Consultation with Donors*, *supra* note 68 at 19.

¹⁵⁶ See Taylor-Sands, *supra* note 13 at 580.

¹⁵⁷ To be clear, this paper advocates for voluntary information-sharing between donors and DCIs who have already been conceived, as opposed to instituting a mandatory, retrospective information-sharing regime. This paper does not take a position on whether mandatory information-sharing should be instituted prospectively in Ontario.

relationships. However, for a voluntary information-sharing regime to be successful, it is vital that education campaigns be strongly pushed and publicized by the proper authorities, so as to ensure that the requisite knowledge is reaching donors of all ages and backgrounds. In order to see a greater number of donors coming forward, donors need to know that this is an option.¹⁵⁸ It is likely also helpful for them to understand why doing so is important.

This paper's second recommendation is that Ontario should create a voluntary, provincial gamete donor registry. This registry could maintain and manage information disclosure between donors and DCIs. The type of information housed in this registry could include information gathered from fertility clinics, such as donor-DCI pairings (i.e., records detailing which donor's gametes were used to conceive the DCI in question) and non-identifying donor information that could be legally disclosed to the DCI without the donor's consent (for example, blood type, height, medical history, etc.). The registry could also include information that is voluntarily provided by donors themselves, such as up-to-date contact information, newly acquired medical diagnoses, names, photographs, or letters. Similar to what was originally envisioned for AHRC, this provincial registry could oversee and manage the disclosure of this information. It could also process applications from DCIs who wish to ensure that they are not biologically related to potential partners. Finally, this registry could provide free counselling services and facilitate contact between DCIs,

¹⁵⁸ See VARTA, *Consultation with Donors*, *supra* note 68 at 6 (donors suggested using publicity campaigns to raise awareness, believing this would help persuade donors to join the Voluntary Register).

donors, donor siblings, and/or legal parents, where such contact is mutually desired.

Although this paper has been somewhat critical of Victoria's decision to retrospectively remove donor anonymity, many useful lessons can be gleaned from other aspects of Victoria's gamete donation system. Some commendable features include Victoria's implementation of a centralized agency (i.e., VARTA), its standardization of data collection, its public outreach, and its provision of free counselling services. These beneficial features could be incorporated into a voluntary registry in Ontario. Such a model would represent a significant improvement over the current Donor Sibling Registry, which is decentralized, unregulated, under-funded, poorly publicized, and siloed away from relevant provincial authorities and fertility treatment providers.

While these recommendations attempt to create a positive legal environment for gamete donors and DCIs alike, there are some important caveats that come with this paper's proposed scheme. First, these proposed recommendations are only effective if DCIs are actually aware that they are donor conceived. Unfortunately, ample evidence suggests that many DCIs have not been informed of their conceptual origins.¹⁵⁹ Second, because the proposed recommendations are premised on voluntary information sharing, it is unlikely that all donors will be willing to participate. Sadly, this means that some DCIs will continue to struggle with the barriers that are being encountered under the current status quo. Third, it has been argued that a nation-wide registry would be more effective

¹⁵⁹ See *Inquiry into Access*, *supra* note 92 at 99.

than a provincial registry, as the former model promotes increased uniformity and accessibility.¹⁶⁰ However, there has been a considerable lack of appetite for any pan-Canadian or inter-provincial movement,¹⁶¹ and due to the constitutional barriers surrounding the federal government's involvement in this area, it is questionable whether a national system could successfully be implemented. The proposed solution is therefore self-admittedly flawed. However, it is unrealistic to expect a perfect solution to such a complicated and multifaceted problem. In accordance with relational ethics, these recommendations represent a bona fide attempt to harmonize the complex and interconnected interests of the parties involved.

CONCLUSION

In light of Victoria's recent decision to retrospectively remove gamete donor anonymity, this paper compared Victoria's mandatory disclosure regime to Ontario's current system, in order to examine whether it would be prudent for Ontario to enact similar, retrospective legislation. Ultimately, this paper concluded that Ontario should not take a similar course of action. To support its thesis, this paper first discussed the inherent issues surrounding retrospective legislation. Retrospective amendments undermine the rule of law and are largely unfair to the individuals who relied on the old legislation in their decision-making. Certain retrospective enactments can therefore lead to injustice as well as distrust in law and the government at large. Due to these serious problems,

¹⁶⁰ See Gruben & Cameron, *supra* note 5 at 679.

¹⁶¹ See Gruben & Cameron, *supra* note 5 at 671–72.

retrospective laws should only be created if they are founded on solid ethical and evidence-based grounds.

This paper then explored the jurisdictions' different approaches to overseeing gamete donation as well as the evidence used to support Victoria's retrospective amendments. Ultimately, this paper concluded that Victoria's new policy did not reflect the evidence that was collected from key stakeholders. While VARTA's report initially led to the conclusion that identifying information should only be released with the donors' consent, a newly elected government legislated the opposite in order to fulfill an election promise. Moreover, Victoria employed ill-suited reasoning when developing its existing policy framework. Rather than using a relational approach, Victoria weighed the harms to DCIs against the harms to donors. As a result, it created a legislative scheme that was oppositional in nature and therefore uncondusive to supporting healthy relationships.

Through undertaking a relational approach, this paper made two recommendations for Ontario to ameliorate its current regime, in lieu of following Victoria's retrospective tactic. First, this paper suggested that Ontario should increase its efforts to educate the public on the importance of information disclosure in gamete donation. Second, it recommended that an official, provincial donor registry be created in order to help facilitate DCIs' access to important information. While these suggestions do not offer a perfect solution, they represent a bona fide attempt to harmonize the complex interests of the parties at hand. These recommendations facilitate DCIs' access to important information while simultaneously appreciating donors' privacy interests. The

resulting system will hopefully promote collaboration, rather than opposition; education, rather than imposition; and harmony, rather than hierarchy.