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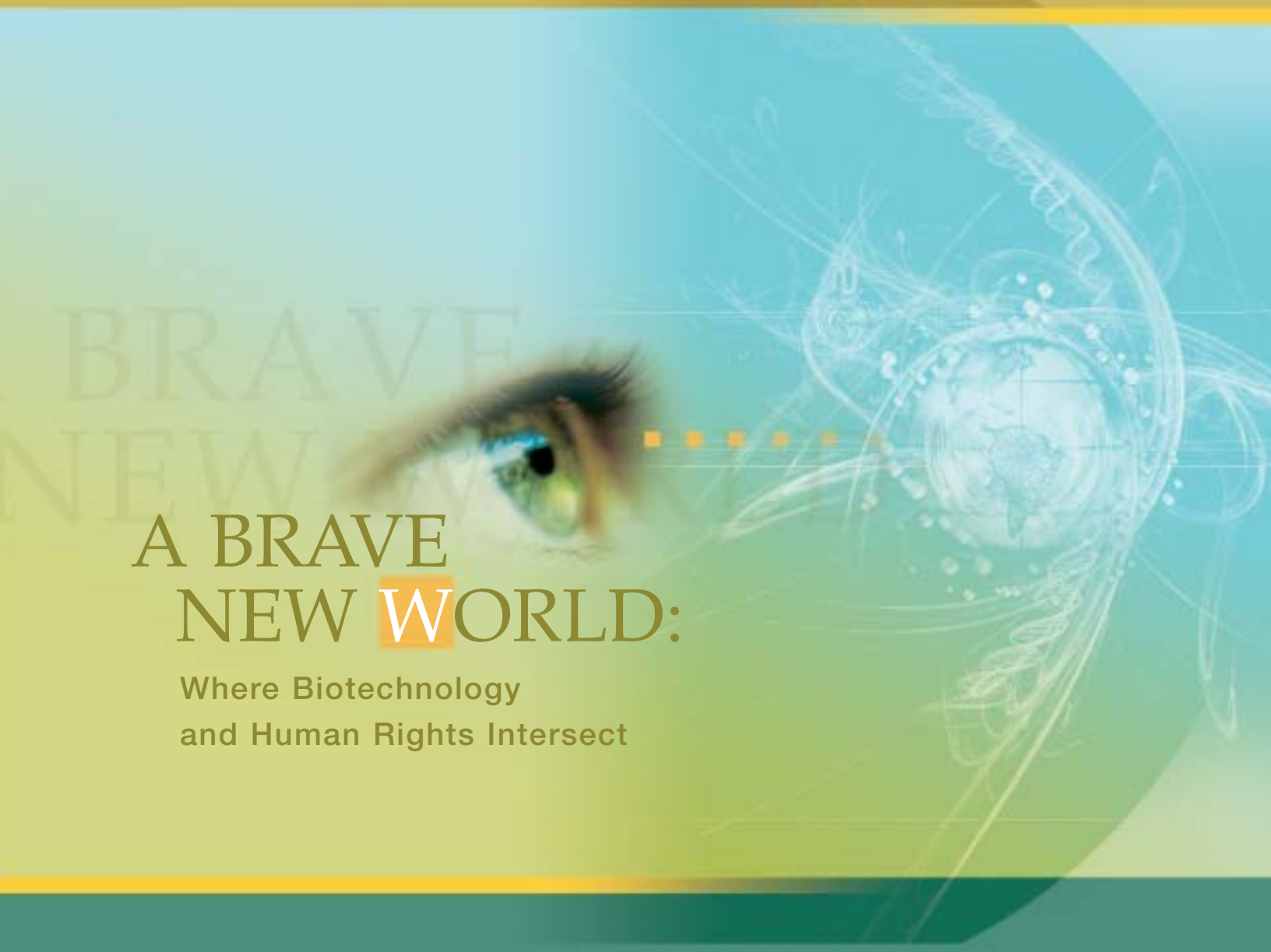

A BRAVE NEW WORLD:

Where Biotechnology and Human Rights Intersect

Chapter 2

Assisted Human Reproduction

Canada

A Brave New World: Where Biotechnology and Human Rights Intersect

July 2005

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Chapter 2

A BRAVE NEW WORLD

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Assisted Human Reproduction

Katherine van Heugten and Judy Hunter

2.1 Introduction

> *More than any other scientific advancement, from the smallpox vaccine to the artificial heart, the techniques of medically assisted conception inspire an ongoing public debate on what attitude to adopt concerning these new powers over human reproduction.*[1]

In the later part of the last century, scientific advances made it possible to separate the fertilization of an ovum with sperm from the act of sexual intercourse. These advances were, and still are, important given that infertility affects a significant portion of our society. A recent estimate suggests that eight to twelve percent of couples suffer from some form of infertility.[2]

Assisted human reproduction ("AHR") has provided those individuals or couples, who would not otherwise be able to conceive a child through intercourse, or who are unable to carry a child to term, with options to create a family using their own genetic material or the genetic material of a donor. AHR has also provided those who can conceive naturally, but who are at risk of passing on a genetic disorder, the opportunity to avoid this risk. However, these new technologies have not developed without criticism. AHR has raised many profound legal, ethical and social issues ranging from health concerns surrounding the short- and long-term effects of fertility interventions, to concerns respecting the commercialization of life and the resulting impact on human dignity.

Given the large number of issues surrounding AHR, two chapters will be dedicated to the subject. Chapter 2 will identify and discuss human rights issues related to AHR generally, while chapter 3 will identify and discuss the human rights issues that arise from the application of AHR technologies to the *in vitro* embryo, such as pre-implantation genetic diagnosis, research involving *in vitro* embryos and somatic cell nuclear transfer (cloning for reproductive purposes).

Each chapter will describe the science involved, as well as the Canadian and international human rights contexts. Thereafter, the various human rights issues will be identified and analyzed within the existing domestic and international frameworks and, where appropriate, within a comparative contexts. Finally, gaps in the current domestic legislative and policy framework will be identified.

This paper will examine the international and comparative legal frameworks prior to the Canadian legal framework, as the former has the potential to inform the interpretation of Canadian law. Furthermore, the rapidly evolving nature of the subject matter and the lack of human rights discourse in relation to AHR in Canada compelled the authors to draw on other areas of the law, such as contract and tort law, to inform the human rights analysis.

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1 B.M. Knoppers & S. LeBris, "Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues" (1991) 17 Am. J. L. and Med. 329.

2 R. Cook, B. Dickens & M. Fathalla, *Reproductive Health and Human Rights* (Oxford: Oxford University Press, 2003) at 11. See also Health Canada http://www.hc-sc.gc.ca/english/media/releases/2002/2002_34bk4.htm (date accessed: February 13, 2004).

2.2 Background

2.2.1 The Science

The term AHR encompasses many activities, including, therapeutic insemination ("TI"), *in vitro* fertilization ("IVF"), gamete intra-fallopian transfer ("GIFT") and intra-cytoplasmic sperm injection ("ICSI").

Therapeutic Insemination

Therapeutic insemination includes both artificial insemination ("AI") and donor insemination ("DI"). TI, whether using sperm from a husband, partner, known or anonymous donor is a simple procedure that uses a syringe to place sperm into a woman's vagina.

Medical indications for DI include azoospermia (absence of living sperm in the male partner's semen), oligospermia (scarcity of sperm in the male partner's semen) or the presence of a genetic disease in the male partner's sperm. Women who would like an offspring, but who do not have a male partner, may also use DI.

In Canada, donor sperm is available from sperm banks or fertility clinics. Donors are carefully screened and all donated sperm must be quarantined and must undergo comprehensive testing.[3]

***In vitro* Fertilization**

IVF is a multi-step procedure that involves the stimulation of a woman's ovaries using hormonal treatment in order to produce a number of eggs, the surgical retrieval of eggs from the ovaries, fertilization of the mature eggs with sperm in a Petri dish, and transfer of the resulting embryo(s) into a woman's uterus. Usually, no more than four embryos are transferred per cycle. If there are more embryos available that are required for transfer, these embryos may be cryopreserved or 'frozen' for later use.[4] If these embryos are not later used for reproductive purposes, they may be discarded, donated to another individual or couple, or donated for research use.

IVF is used where the male has poor sperm function or a low sperm count, where the woman's fallopian tubes are blocked or when a risk of passing on a genetic disorder exists.

IVF has been in use since 1978 when the world's first 'test-tube' baby, Louise Brown, was born in the United Kingdom ("U.K."). It is estimated that since 1978, approximately 1 million babies have been born worldwide using IVF.[5]

Gamete Intra-Fallopian Transfer

In GIFT, egg retrieval is accomplished in the same way as in IVF. However, after retrieval, the eggs and sperm are injected into the fallopian tube to allow fertilization to occur in vivo, as opposed to *in vitro*, where fertilization occurs in a Petri dish.[6] GIFT is no longer widely practiced.

Intra-Cytoplasmic Sperm Injection

ICSI is currently the most common method of IVF. It consists of injecting a single sperm into an egg with a microscopic needle. If fertilization occurs, the resulting embryo is transferred to a woman's uterus.[7] This treatment is employed where there appears to be poor sperm function or a low sperm count, where a woman's fallopian tubes are blocked or when there is a risk of passing on a genetic disorder.[8]

2.2.2 The Canadian Context

During the 1980s, scientific advances in the area of reproductive technologies and a growing awareness of the legal, ethical and social issues related to reproductive technologies prompted individuals and groups in Canada to pressure the federal government to examine the complex issues related to these technologies. In response to this pressure, the federal government appointed the Royal Commission on New Reproductive Technologies in

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3 See *Processing and Distribution of Semen for Assisted Conception Regulations*, S.O.R./96-254. Online at: http://laws.justice.gc.ca/en/F-27/SOR-96-254/text.html (date accessed: February 11, 2004).

4 Cryopreservation is the process by which embryos are frozen indefinitely in liquid nitrogen. For an explanation of cryopreservation see K. LaGatta, "The Frozen Embryo Debate Heats Up: A Call for Federal Regulation and Legislation" (2002) 4 Fl. Coastal L.J. 99; E. Jackson, *Regulating Reproduction: Law, Technology & Autonomy* (Portland: Hart Publishing, 2001).

5 "Meeting celebrates IVF Birthday" *Nature* http://www.nature.com/nsu/030721/030721-13.html (date accessed: July 25, 2003).

6 Jackson, *supra* note 4.

7 *Ibid.*

October 1989.[9] The mandate of the Royal Commission was quite broad. In addition to the task of examining the current and potential scientific and medical developments related to new reproductive technologies, it was also mandated to consider: (1) the impact of the technologies on society as a whole, (2) their impact on identified groups within society, such as women and children, and (3) the ethical, legal, social, economic and health implications of the new technologies.[10]

After an extensive consultation process with citizens, the scientific and medical communities and the social science community, the Royal Commission released its Final Report in 1993, which included 293 recommendations. Three categories of recommendations were made specifically to the federal government: (1) recommendations regarding the need for criminal legislation to set boundaries around the use of new reproductive technologies, (2) recommendations on establishing and operating a National Reproductive Technology Commission, and (3) recommendations specific to federal departments, such as Health Canada.[11]

The government's final response to the Royal Commission is the recently passed legislation *An Act respecting assisted human reproduction and related research*[12] ("AHR Act"). It is the result of significant consultation with the public, stakeholders and the legal and scientific community. The Act is based on the federal criminal law head of power in s. 91(27) of the *Constitution Act*, *1867*.[13] To a large extent, it is patterned after the U.K.'s *Human Fertilisation and Embryology Act 1990* ("HFE Act").[14]

The primary objectives of the proposed legislation are to ensure the health and safety of those using AHR by regulating acceptable practices; to ban certain unacceptable practices based on health and safety, and moral and ethical concerns; and to ensure that AHR research involving the *in vitro* embryo is conducted within a regulated environment.[15]

The Act contains a number of prohibited activities including, but not limited to, human cloning for any purpose; sex selection of an embryo for a reason other than medical; germ-line alteration; creating human/non-human combinations for reproductive purposes; commercial surrogacy and selling or buying human *in vitro* embryos.[16]

The Act also sets out a number of controlled activities, including, but not limited to, the collection, alteration, manipulation or treatment of any human reproductive material for the purpose of creating an embryo; the storage, handling and use of human reproductive material intended to create an *in vitro* embryo; and the licensing of facilities carrying out those controlled activities.[17]

The Act also contains other notable features, such as a privacy scheme that applies to personal health reporting information obtained by a licensed AHR facility and the creation of the AHR Agency of Canada.[18]

The Parliament of Canada passed *An Act respecting assisted human reproduction and related research* on March 11, 2004. The Act received Royal Assent on March 29, 2004.

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9 The Royal Commission produced a comprehensive report entitled *Proceed with Care: Final Report of The Royal Commission on New Reproductive Technologies* (Ottawa: Government Services Canada, 1993).

10 *Ibid.* at 2.

11 *Ibid.* at 1022.

12 *An Act respecting assisted human reproduction and related research*, Third Session, Thirty-seventh Parliament, 52-53 Elizabeth II, 2004 (passed 12 March 2004 and certain sections proclaimed in force on April 22, 2004). The Act is the reinstated version of Bill C-13, *An Act respecting assisted human reproduction and related research*, 2nd Sess., 37th Parl., 2002 (Second Reading in Senate). The *AHR Act* has a long Parliamentary history as follows: Bill C-13 died on the Order Paper when Parliament was prorogued on November 12, 2003. By a motion adopted on February 10, 2004, the House of Commons reinstated Bill C-13, renumbered as Bill C-6, at the same stage as it had been when the previous session was prorogued. Bill C-13 was originally introduced as Bill C-56, *An Act respecting assisted human reproduction* in the 1st Sess., 37th Parl. (2nd reading 28 May 2002) but died on the Order Paper when Parliament was prorogued on September 16, 2002. A motion was adopted on October 7, 2002, which reinstated Bill C-56, renumbered as Bill C-13, at the same stage as it had been when the previous session was prorogued. Bill C-56 was a recreation of Bill C-47 which died on the Order Paper when an election was called in 1997.

13 *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

14 *Human Fertilisation and Embryology Act 1990* (U.K.), 1990, c. 37 [hereinafter HFE Act].

15 Health Canada http://www.hc-sc.gc.ca/english/media/releases/2002/2002_34bk1.htm (date accessed: February 13, 2004).

16 See *Assisted Human Reproduction Act*, Clauses 5 – 9 for a complete list of prohibited activities.

17 See *Assisted Human Reproduction Act*, Clauses 10 – 13 for a complete list of controlled activities.

18 *Assisted Human Reproduction Act*, Clauses 14 – 19 and Clauses 21 – 39.

2.2.3 The Comparative Context

Throughout this chapter, legislation, jurisprudence and policies in relation to AHR from several countries will be examined. Various reasons exist for canvassing the AHR activities in these countries. For example, some countries share our common law tradition, such as the U.K., while other countries share similar constitutional human rights guarantees, such as the United States ("U.S."). The laws of some countries are canvassed to illustrate unique approaches to regulating AHR activities.

Several countries have implemented legislation respecting AHR. For instance, the U.K. has had legislation in place since 1990, which, among other things, established the world's first national regulatory body to oversee AHR activities.[19]

Legislation dealing with bioethics has been in place in France since 1994. In 2002, the French National Assembly undertook to revise this legislation to address activities such as cloning, and embryonic stem cell research.[20]

Three Australian jurisdictions have legislation respecting IVF.[21] In April 2002, the various Australian governmental bodies agreed to develop legislation, which has since been adopted, that would apply across the country to ban certain practices involving the embryo that are deemed unacceptable.[22]

In the U.S., there is no national regulatory scheme for AHR-related activities.[23] Rather, legislation varies among states, with only a few states, such as California, having fairly comprehensive legislation respecting AHR, while most others do not.

2.3 Human Rights Issues Related to AHR

Issues

As mentioned above, three distinct issues will be discussed in this chapter. First, access to AHR services will be discussed. Equality rights, the right to reproductive autonomy, the right to health and the right to benefit from scientific advancement will be explored in relation to access to AHR services. Second, the human rights implications relating to children born following the use of AHR technology will be analyzed from both the perspective of the offspring and the donor of reproductive material. Finally, the human rights issues relating to the dispositional authority over the *in vitro* embryo will be explored. The legal status of the *in vitro* embryo will be examined to determine whether it has any rights. The rights of donors of reproductive material vis-à-vis the *in vitro* embryo and the rights of recipient couples vis-à-vis the *in vitro* embryo will also be analyzed.

2.4 Issue 1: Access to AHR Services

Principles of Non-Discrimination in Relation to Access to AHR Services

In the context of access to AHR, several human rights issues arise, including whether AHR services should be available to everyone, whether they should be publicly funded, and whether the state can limit access to AHR services on the basis of economic considerations, age, marital status, likelihood of success, HIV status, etc. Limitations in relation to access to AHR services on such grounds as age and sexual orientation have been the subject of litigation outside of Canada.

Currently in Canada, AHR services are provided to individuals or couples in either exclusively private clinics or

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19 *Supra* note 14.

20 Three pieces of legislation respecting bioethics have been in place since 1994.
(1) Loi nº 94-654 du 29 juillet 1994: Loi relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prenatal *bioéthique*.
(2) Loi nº 94-630 du 25 juillet 1994 : Loi modifiant le livre II bis du code de la santé publique relatif à la protection des personnes qui se prêtent à des recherches biomédicales. Loi dite loi Huriet.
(3) Loi n°94-653 du juillet 1994 : Loi relative au respect du corps humain.
Revisions to these laws are expected to receive final approval in the French Senate in the spring.

21 The three Australian jurisdictions that have enacted legislation are Victoria, South Australia and West Australia.

22 Two pieces of legislation have been enacted: (1) *Research Involving Human Embryos Act 2002* and (2) *Prohibition of Human Cloning Act 2002*. Online: http://www.health.gov.au/nhmrc/embryo/ (date accessed: February 13, 2004).

23 Health Canada, http://www.hc-sc.gc.ca/english/media/releases/2002/2002_34bk7.htm (date accessed: February 13, 2004).

private clinics affiliated with a hospital. In either case, individuals or couples undergoing AHR treatment pay for all of the costs incurred. The only exception is in the province of Ontario, where public funding is provided for certain AHR services on an extremely limited basis.[24]

Although no official reports exist detailing instances of discrimination respecting access to AHR services in Canada, there are anecdotal reports of discrimination, particularly on the basis of marital status and sexual orientation.[25]

In the U.S., a blind woman has recently sued a fertility clinic in Colorado alleging discriminatory practices after the clinic refused to continue treating her unless she could demonstrate that she was able to care for a child on her own.[26] Anecdotal reports also exist in the U.S. claiming discrimination on the basis of age, marital status and sexual orientation.

In the U.K., access to AHR procedures is also an issue. Access to National Health Service funded AHR treatment is largely dependant on place of residence, as regional health authorities can set different criteria respecting who is eligible and what services will be funded. Essentially, what has developed is a 'postcode lottery' for treatment.[27] In 1999, the U.K. government announced that it would seek to develop a national strategy for access to AHR to eliminate the postcode lottery system. A draft report was released in August 2003, but guidelines have yet to be formally implemented.[28]

In addition to place of residence, marital status and sexual orientation are potential barriers to accessing AHR services in the U.K. The *HFE Act* states that fertility clinics must take into account "the welfare of any child who may be born as a result of treatment, including the need of that child for a father."[29] Therefore, when considering treatment, clinics must bear in mind that single or lesbian women would be bringing a child into the world without a father. The *HFE Act* provision also requires that the general welfare of any resultant child be considered. Factors such as age, as well as medical conditions, such as HIV or AIDS may play a role in the decision to provide treatment to particular patients.

Discrimination with respect to access to AHR services has been the subject of litigation in both the U.K. and Australia. In the U.K. in *R. v. Sheffield Health Authority, ex parte Seale*,[30] the health authority had set the upper age limit to receive IVF treatment at 35 for publicly funded treatment under the *National Health Services Act*, 1977, due to budgetary constraints and the likelihood of success in patients under 35. Consequently, the claimant, a 37-year-old woman, was denied treatment. The Court held the simple fact that a service was provided did not deny the Sheffield Health Authority the ability to set the circumstances under which the service would be provided, nor did it entitle an individual to demand treatment. The decision to take age into account was held not to be irrational given that success of the treatment decreased with age, and the financial balancing required to provide the service as determined by the legislation.[31]

In *McBain v. State of Victoria*,[32] Dr. McBain challenged the provision in the *Victoria Infertility Treatment Act*, which provided that a woman must either be married or be living with a man in a de facto relationship, on the basis that it discriminated against single women contrary to the *Commonwealth Sex Discrimination Act*. The Court held that there was a conflict and declared that the specific provision of the *Victoria Infertility Treatment Act* was invalid to the extent of the inconsistency.

Also in Australia, a similar decision was reached in *Pearce v. South Australia Health Commission et al.*,[33] where the Court held that the *Reproductive Technology Act* of South

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24 Services are only covered in Ontario if both of the patient's fallopian tubes are blocked. However, the services available are not unlimited and other restrictions exist. To date, this policy decision to fund only AHR services for certain individuals has not been challenged on the basis of equality to access AHR services.

25 *The AHR Act* provides specific mention in clause 2(e) that persons seeking AHR services must not be discriminated against.

26 CBSNews.com "Blind Woman Suing Fertility Clinic" http://cbsnews.com/stories/2003/11/08/health/main582566.shtml (date accessed: December 5, 2003).

27 *Supra* note 4 at 197.

28 K. Horsey, "Access to IVF" BioNews website http://www.bionews.org.uk/update.lasso?storyid=1752 (date accessed November 12, 2003).

29 *Supra* note 14 at s. 13(5).

30 (1994) 25 BMLR 1 (Queen's Bench Division).

31 Note that in this case, publicly funded treatment was at issue.

32 [2000] FCA 1009 (Federal Court of Australia).

33 (1996) SASR 486 (Supreme Court of South Australia).

Australia conflicted with the *Commonwealth Sex Discrimination Act*.[34]

A review of the above jurisprudence suggests that if the state is going to provide access to AHR services, it must be done on an equitable basis in accordance with relevant domestic and international human rights law.

The Extent of the States' Obligation in Relation to Access to AHR Services

Another significant issue in relation to access to AHR services is whether the state has a positive obligation to provide access to such services. Three fundamental questions will be examined. First, does a right to reproductive autonomy exist? Second, does a right to health care exist? And finally, does a right to benefit from scientific progress exist?

2.4.1 The Right to Reproductive Autonomy

International Law

There are no specific references to AHR in any international instruments. However, several international instruments set out rights with respect to the family. The *International Covenant on Civil and Political Rights* ("ICCPR")[35] states that "the family is the natural and fundamental unit of society" and sets out the right of men and women of full age to marry and found a family.[36] The *Convention on the Elimination of All Forms of Discrimination Against Women* ("CEDAW")[37] requires States Parties to ensure that women enjoy the right to decide on the number and spacing of their children, as well as the right to access information and education to allow them to meaningfully exercise the right.[38]

The interpretation of these rights, particularly as they relate to AHR, has been varied. For example, some commentators have argued that the text of the provisions relating to family, coupled with the Travaux Préparatoires of both treaties suggest that the rights enunciated were not meant to impose a positive obligation on states to assist in reproduction, but rather were intended to relate to individuals who have a physiological capacity to reproduce.[39] This position is supported by general comment 19, produced by the Human Rights Committee, which states "the right to found a family implies, in principle, the possibility to procreate and live together."[40]

In contrast, others have argued that the obligation of States Parties to ensure individuals enjoy the rights outlined in the above treaties places an obligation upon states to facilitate the right to reproduce, even by artificial means.[41]

Given that the issue of a right of access to reproductive technologies has not been addressed at the international level by any human rights body, it is unclear how the provisions of the ICCPR and the CEDAW would be interpreted in relation to the issue.

France

The French courts have recognized the right to reproductive autonomy. In *Parpalaix c. Centre d'etude et de Conservation du Sperme*,[42] the Court was asked to determine the status of sperm that had been donated by a deceased man. In its discussion of a person's reproductive material, the Court noted that "sperm is the genetic expression of a person's fundamental right to create life or refrain from bearing children."[43]

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34 Note that in these Australian cases, public funding was not at issue.

35 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976), [hereinafter ICCPR]. Canada is a party to the ICCPR.

36 *Ibid.* at Article 23.

37 *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981), [hereinafter CEDAW]. Canada is a party to the CEDAW. This Convention was the product of over thirty years of work by the UN Commission on the Status of Women. The Convention reaffirms the equality rights of women and essentially establishes an international bill of rights for women. Civil rights, the legal status of women and reproductive rights are dealt with in detail. The Convention also outlines an agenda for action by states to guarantee the enjoyment of the rights set out in the Convention. The implementation of the Convention is monitored by the Committee on the Elimination of Discrimination Against Women.

38 *Ibid.* at Article 16(1)(e).

39 M.K. Eriksson, *Reproductive Freedom in the Context of International Human Rights and Humanitarian Law* (London: Kluwer Law International, 2000) at 194.

40 GC No. 19/38 on Article 23 of the ICCPR, UN Doc. CCPR/21/rev.1/Add.2 at para 5.

41 *Supra* note 39 at 194.

42 [1984] Trib. Gr. Inst. Creteil, August 1, 1984, Gazette du Palais (G.P.), Sept. 15, 1984.

43 G.A. Katz, "*Parpalaix c. CECOS: Protecting Intent in Reproductive Technology*" (1998) 11:3 Harvard J. L. & Tech. 683 at 686.

United States

In the U.S., the right to reproductive autonomy (more commonly known as procreational autonomy in the U.S.) is grounded in the privacy and liberty interests of the Fourteenth Amendment to the U.S. Constitution.[44] The U.S. courts have held that the right consists of both the right to reproduce and the right not to reproduce.[45]

In *Skinner v. Oklahoma*,[46] one of the early cases regarding reproductive rights, the U.S. Supreme Court struck down a state law that required sterilization of felons who were convicted of multiple crimes involving moral turpitude. The Court held that "marriage and procreation were fundamental to the very existence and survival of the race" and were to be considered "basic civil rights."[47] The Court thus characterized the right to procreate as a fundamental right.

This position was confirmed in *Eisenstadt v. Baird*,[48] where the Supreme Court held that, "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so affecting a person as the decision whether to bear or beget a child."[49]

In *Griswold v. Connecticut*,[50] the right not to procreate was clearly established when the Court upheld the right of married couples to use contraceptives. The Court noted that the fundamental right of privacy included child-bearing decisions and that such decisions ought to be free from unjustified governmental intrusion. The right to use contraception was later extended to non-married individuals in *Carey v. Population Services International*.[51]

Finally, in the landmark decision of *Roe v. Wade*,[52] the U.S. Supreme Court stated that the fundamental right of privacy includes procreation, as well as the decision to terminate a pregnancy.[53] These decisions, at the very least, establish the right to reproduce by natural means without state interference.[54]

The U.S. courts have also discussed reproductive autonomy in cases involving AHR, specifically in the context of disputes over frozen *in vitro* embryos, which will be discussed later in this chapter. In this context, the Tennessee Supreme Court has reaffirmed that, "the right of procreational autonomy is composed of two rights of equal significance — the right to procreate and the right to avoid procreation."[55]

With respect to the right to procreate using technologically assisted means (i.e. AHR), two recent cases from U.S. lower courts provide some insight into whether reproductive rights in the U.S. extend to AHR.

In *Baby M*, [56] a surrogate mother refused to give up the child she was carrying, thereby breaching the contract between her and the intended parents. The Supreme Court of New Jersey held that the contract violated public policy and stated, "the right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that."[57]

Two years later, the U.S. District Court for the Northern District of Illinois in *Lifchez v. Hartigan*,[58] held that the Illinois foetal anti-experimentation statute was

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44 Section 1 of the Fourteenth Amendment of the U.S. Constitution states: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

45 For an excellent summary of the U.S. jurisprudence see: G.J. Annas, "The Impact of Medical Technology on the Pregnant Woman's Right to Privacy" (1987) 13 Am. J. L. and Med. 213.

46 316 U.S. 535 (U.S. S.C. 1942).

47 *Ibid.* at 541.

48 405 U.S. 438 (U.S. S.C. 1972).

49 *Ibid.* at 453.

50 381 U.S. 479 (U.S. S.C. 1965).

51 431 U.S. 678 (U.S. S.C. 1977).

52 410 U.S. 113 (U.S. S.C. 1973).

53 *Ibid.* at 152 ,153.

54 E. Price Foley, "Human Cloning and the Right to Reproduce" (2002) 65 Alb. L. Rev. 625; C. Kalebic, "Symposium on Cloning: The Constitutional Question of Cloning Humans: Duplication or Procreation? An Examination of the Constitutional Right to Procreate" (1998) 8 s. Cal. Interdis. L.J. 229.

55 *Infra* note 193.

56 *In the Matter of Baby M, A Pseudonym for an Actual Person*, 109 N.J. 396 (Supreme Court of New Jersey 1988).

57 *Ibid.* at 448.

58 735 F. Supp. 1361 (U.S. District Court Northern District of Illinois 1990).

unconstitutional on grounds of vagueness and impermissible intrusion on a woman's right of privacy. Referring to IVF techniques, the Court stated, "[e]mbryo transfer is a procedure designed to enable an infertile woman to bear her own child. It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."[59]

Although the U.S. courts have acknowledged a right to reproduce and the corresponding right not to reproduce, this recognition of the existence of the right to reproductive autonomy has not been translated into a positive obligation on the government to provide AHR services to individuals.

Canada

There are no explicit references to reproductive rights in the *Canadian Charter of Rights and Freedoms* ("*Charter*"), nor does any Canadian jurisprudence exist stating that a right to reproduce is a basic human right. However, the liberty component of s. 7 of the *Charter* has been interpreted by the Supreme Court of Canada ("SCC") to protect a woman's reproductive autonomy. This concept of reproductive autonomy was first recognized in the context of abortion rights.

In 1988, Justice Wilson, writing on her own behalf in *R. v. Morgentaler*,[60] held that the liberty interest in s. 7 included the right to make "fundamental personal decisions without interference by the state."[61] This right included the right to decide whether or not to have an abortion, and as such it was "one that will have profound psychological, economic and social consequences for the pregnant woman."[62] As a result, Wilson J. found that the *Criminal Code* abortion provision at issue was an unjustifiable violation of the right to liberty under s. 7. However, given the impact the provision had on access to and availability of therapeutic abortions, the majority of the Court held that the provision was unconstitutional based on the security of the person component of s. 7.

This interpretation of the liberty interest has subsequently been adopted by the SCC in various contexts including the parental right to make decisions regarding the medical care of children; and the denial of legal aid to a parent in a wardship proceeding.[63]

In *E. (Mrs.) v. Eve*,[64] a mother applied to the court for permission to have her mentally incompetent adult daughter undergo non-therapeutic sterilization. The SCC held that, given the grave intrusion on the individual's rights, parens patriae jurisdiction should never be used to authorize non-therapeutic sterilization. It was also argued before the Court that based on the common law and the fundamental right to reproduce and the corresponding right not to reproduce, which stems from s. 7 of the *Charter*, a U.S.-style substituted judgment test should be adopted. The Court was unwilling to opine as to whether the liberty component of s. 7 protects a fundamental right to reproduce or not reproduce. Rather, the Court concluded that s. 7 was inapplicable in this case because the individual's mother as opposed to the state sought the sterilization. Of significance in this case is the Court's recognition that reproductive decisions are of a serious and deeply personal nature and therefore may qualify as a fundamental personal decision worthy of *Charter* protection.

Reproductive autonomy has also been considered in the child welfare context. In *Winnipeg Child and Family Services v. G. (D.F.)*,[65] the SCC was asked to determine whether a child-welfare agency could place a pregnant woman with a glue-sniffing addiction into the custody of a hospital to protect the developing fœtus. A majority of the SCC

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59 *Ibid.* at 1376.

60 [1988] 1 S.C.R. 30.

61 *Ibid.* at para. 230.

62 *Ibid.* at para. 241.

63 *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *New Brunswick (Minister of Health and Community Services v. G.(J.)*, [1999] 3 S.C.R. 46. See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 and *Godbout v. Longueuil (City)*, 1997 3 S.C.R. 844.

64 [1986] 2 S.C.R. 388.

65 [1997] 3 S.C.R. 925. For commentary on this case see: M. Randall, "Pregnant Embodiment and Women's Autonomy Rights in Law: An Analysis of the Language and Politics of Winnipeg Child and Family Services v. G. (D.F.)" (1999) 62 Sask. L. Rev. 515; T. Caulfield & E. Nelson, "*Winnipeg Child and Family Services v. G.* (D.F.): A Commentary on the Law, Reproductive Autonomy and the Allure of Technopolicy" (1998) 36 Alta. L. Rev. (No. 3) 799; F. Baylis, "Dissenting with the Dissent: *Winnipeg Child and Family Services v. G.* (D.F.)" (1998) 36 Alta. L. Rev. (No. 3) 785.

rejected the assertion that such action would be justifiable under tort law or *parens patriae* authority. The majority held that a fœtus should not be recognized as a legal person due to the potential interference with the mother's liberty interest. The Court stated that, in the context of tort law, if a duty of care was owed by a mother to her fœtus it could create a situation of conflict between the mother as an autonomous individual and her developing child, with resulting negative consequences for the mother.

In sum, the Canadian jurisprudence dealing with reproductive autonomy indicates that individuals have a right to be free from interference by the state with respect to fundamental personal decisions. It is highly likely that the decision to reproduce would qualify as a fundamental personal decision of the sort contemplated by the SCC. As a result, the liberty interest contained in s. 7 would likely be engaged if the state attempted to prevent an individual from making a personal decision to reproduce.

Discussion

Elements of a right to reproductive autonomy can be seen in the domestic, international and comparative human rights instruments and their corresponding jurisprudence. In the context of abortion and family planning, reproductive autonomy is quite well developed. The concept of a right to reproductive autonomy has not yet been applied to AHR in Canada or at the international level, and only peripherally in the U.S. in the context of fœtal anti-experimentation laws.

Whether the concept of reproductive autonomy translates into a positive right of access to AHR services remains to be answered. Interference with a fundamental personal decision, such as in *Morgentaler*,[66] where the *Criminal Code* placed restrictions on access to abortion services, is substantially different than calling on the state to take action or provide assistance to enable one to fulfill a personal desire.[67] As one commentator suggested, "a right not to be prevented from having a child would not entail the right to be provided with a child."[68] To date, there is no jurisprudence in Canada to suggest that the state has an obligation to assist individuals in exercising their right to reproductive autonomy. In the U.S., the same is true as the jurisprudence speaks of a right to be free from state interference and the right to submit to medical treatment, as opposed to the right to request state-funded services to exercise the right to reproduce.

2.4.2 The Right to Health

International Law

There are several international human rights instruments that refer to a "right to health". The right to health is clearly not a right to be healthy per se. Rather, the right encompasses a range of health-related benefits, including but not limited to health care, education, child and maternal health, and environmental health.

The first express mention of the right to health is in the *Universal Declaration of Human Rights* ("UDHR"), which provides that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services…."[69]

Article 12 of the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR")[70] is considered to be the most authoritative statement on the right to health. It explicitly recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[71] The obligation on States Parties is one of progressive realization in light of available resources. The Covenant sets out the following steps for States Parties "to achieve the full realization of this right":

a. The provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child;

b. The improvement of all aspects of environmental and industrial hygiene;

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66 *Supra* note 60.

67 M. Evans, "A Right to Procreate?" in D. Evans (ed.), *Creating the Child* (London: Kluwer Law International, 1996) 127 at 129.

68 *Ibid.* at 129.

69 GA Res. 217 (III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948), Article 25(1) [hereinafter UDHR].

70 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [hereinafter ICESCR]. Canada is a party to the ICESCR.

71 *Ibid.* at Article 12.

c. The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

d. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.[72]

The UN Committee on Economic, Social and Cultural Rights has examined the scope of the right to health in its general comment on the right.[73] Although the views of the Committee are not binding, they are an indication of how the body responsible for the application of the ICESCR interprets the right to health.

The general comment outlines four elements — availability, accessibility, acceptability and quality — to realize the right to health. Availability relates to the quantity of services, facilities and adequately trained personnel. Accessibility refers to four criteria, including non-discrimination, physical and economic accessibility and access to health-related information. Acceptability encompasses respect for medical ethics, cultural sensitivity and principles of confidentiality. Quality refers to the scientific and medical appropriateness and quality of health services and facilities.[74]

The general comment also imposes three types of obligations upon states. The obligation to respect is largely a negative obligation, which requires states to refrain from action that would interfere with the enjoyment of the right to health. The obligation to protect requires states to take measures to ensure third parties do not interfere with the right to health. The obligation to fulfil requires States Parties to ensure the realization of the right through various means, including legislative, administrative, budgetary and judicial measures.[75]

In relation to women and the right to health, the general comment specifies a need to develop and implement comprehensive national strategies to promote women's health as a means to eliminate discrimination against women.[76] To this end, the comment indicates that national strategies should include measures to prevent and treat diseases affecting women and policies to provide access to health care, including sexual and reproductive services. Reproductive health is also mentioned with respect to the efforts States Parties should undertake to eliminate discrimination against women.[77] Although "sexual and reproductive health" is mentioned in the general comment, in particular in relation to articles 12.2(a) and 12.2(c),[78] no mention is specifically made of AHR. The following definition of reproductive health is provided in the general comment:

> Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth.[79]

Although the Committee's general comment has made strides to improve States Parties' understanding of the scope and content of the international human right to health, the parameters of the right remain unclear. The U.N. Commission on Human Rights has appointed a Special Rapporteur to further explore and promote the right.[80]

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72 *Ibid.* at Article 12.2(a).

73 Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, UN ESCOR, 2000, UN Doc. E/C.12/2000/4, CESCR [hereinafter General Comment 14].

74 *Ibid.* at para. 12.

75 For a summary of the general comment or other literature respecting the international right to health see: S.D. Jamar, "The International Human Right to Health" (1994) 22 S.U.L. Rev. 1; V.A. Leary, "the Right to Health in International Human Rights Law" (1994) 1 Health and Human Rights 25; A.R. Chapman, "Conceptualizing the Right to Health: A Violations Apporach" (1998) 65 Tenn. L. Rev. 389; L. Smith, "Section IV(b): The Right to Health" in K.E. Mahoney & P. Mahoney (eds.), *Human Rights in the Twenty-first Century: A Global Challenge* (London: Martinus Nijhoff Publishers, 1993); E.D. Kinney, "The International Human Right to Health: What does this Mean for our Nation and World?" (2001) 34 Ind. L. Rev. 1457; A.R. Chapman, "Core Obligations Related to the Right to Health" in A.R. Chapman & s. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (New York: Intersentia, 2002).

76 *Supra* note 73 at para 21.

77 *Ibid.* at para 21.

78 *Ibid.* at paras. 14, 16.

79 *Ibid.* at para 15.

80 Paul Hunt, a renowned human rights scholar was appointed Special Rapporteur by the U.N. Commission on Human Rights by Resolution 2002/31. In his preliminary report, Paul Hunt identified three primary objectives for his three year mandate: (1) to promote – and encourage others to promote – the right to health as a fundamental human right; (2) to clarify the contours and content of the right to health; and (3) to identify good practices for the operationalization of the right to health at the community, national and international level.

In the *Convention on the Rights of the Child* ("CRC"),[81] the right to health as enunciated in the ICESCR was specifically reiterated in relation to children. In addition, States Parties must take appropriate measures with respect to children's health issues such as lowering infant and child mortality and fighting disease and malnutrition, among other things.[82]

Other international instruments, to which Canada is a party, also refer to non-discrimination in relation to the right to health. In the *International Convention on the Elimination of All Forms of Racial Discrimination* ("CERD"),[83] States Parties undertake to prohibit and eliminate racial discrimination in all forms and to guarantee the right of everyone, without distinction, the enjoyment of the right to public health and medical care.[84] In the CEDAW, States Parties agree to take appropriate measures to eliminate discrimination against women in relation to health care. In particular, states must ensure equal access to health care services, with specific emphasis on pre- and post-natal care.[85] Arguably, these principles of non-discrimination in relation to reproductive services would extend to accessing AHR services.

Several regional conventions, to which Canada is not a party, such as the *European Social Charter*,[86] the *African Charter on Human and Peoples' Rights*[87] *and the Council of Europe's Convention on Human Rights and Biomedicine*,[88] and international bodies, such as the World Health Organization, also recognize a right to health.[89] Further, many States' constitutions include a right to health, including South Africa, the Netherlands, Italy and Hungary.[90]

The international human right to health enunciated in the ICESCR has not been referred to in Canadian jurisprudence respecting access to health care services. Consequently, it is uncertain how a Canadian court would address such a claim and whether such a right would be used to interpret domestic law in a manner that imposes a positive obligation on the state.

Canada

The *Charter* does not contain an explicit 'right to health' or 'right to health care'. However, attempts have been made to use both ss. 7 and 15 of the *Charter* as a basis to claim that the government has a positive obligation to provide or fund particular medical treatments. Given that health care is currently widely accessible in Canada, it is not surprising that a large body of Canadian jurisprudence asserting a right to health does not exist. Nevertheless, it is not difficult to foresee the number of *Charter* claims alleging a right to health increasing as health care costs continue to rise and pressure on federal and provincial budgets continue to escalate.

Application of the Charter in the Health Care Context

The SCC has stated that not all activity in the health care context constitutes governmental action. In *Stoffman v. Vancouver General Hospital*,[91] the Court found internal hospital management issues such as the mandatory retirement policy for doctors were not subject to *Charter* review. Such decisions were not subject to government control pursuant to legislation governing hospitals in the province, and consequently, the hospital was not part of the 'government'.

The issue of *Charter* application was revisited in 1997 *in Eldridge v. British Columbia (Attorney General)*,[92] when the

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[81] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990) [hereinafter CRC]. Canada is a party to the CRC.

[82] *Ibid.* at Article 24.

[83] *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195 (entered into force 4 January 1969) [hereinafter CERD]. Canada is a party to the CERD. Under this Convention, States Parties pledge, among other things:
- To prohibit racial discrimination by individuals, groups, etc.
- To not engage in any act or practice of racial discrimination against individuals, groups of persons or institutions and to ensure public authorities and institutions refrain from any such acts or practices.
- Not to sponsor, defend or support racial discrimination by persons or organizations.
- To review policies and laws which create or perpetuate racial discrimination.

[84] *Ibid.* at Article 5(e)(iv).

[85] *Supra* note 37 at Articles 11.1(f), 12.

[86] *European Social Charter*, 18 October 1961, 529 U.N.T.S. 89 (entered into force 26 February 1965).

[87] *African Charter on Human and Peoples' Rights*, 27 June 1981, (1982) 21 I.L.M. 58 (entered into force 21 October 1986).

[88] *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, 4 April 1997, E.T.S. No. 164 (entered into force 1 December 1999).

[89] *WHO Constitution*, (1948) 14 U.N.T.S. 186, preamble.

[90] B. Toebes, *The Right to Health as a Human Right in International Law* (Oxford : Intersentia, 1999) at 82, 201, 208.

[91] [1990] 3 S.C.R. 483.

[92] [1997] 3 S.C.R. 624.

SCC was asked to determine whether the *Charter* applied to the actions of a hospital. In particular, the issue in this case was the lack of interpretation services for the deaf in the public health care system. Although the Court previously found that hospitals were private and not government entities, it made a distinction between matters of internal management and delivery of patient care. The provision of medically necessary services by a hospital was found to be a means of delivering a social program under provincial legislation, and thus, fell within the scope of governmental action. Given this conclusion, the *Charter* applied. This decision is particularly significant to *Charter* application in the health care setting because of the Court's willingness to look at the action or activities of the entity in question and whether or not it was fulfilling a governmental objective.[93]

Charter application has not been a significant issue in the existing jurisprudence on the right to health care because claimants have generally challenged legislation allocating resources, which clearly constitutes government action.

Section 7 and the Right to Health

Claimants have attempted to use, most often unsuccessfully, s. 7 to challenge policies relating to the framework of the health care system, such as allocation of billing numbers and private health restrictions.[94] In addition, claimants have suggested that s. 7 includes a right to health care.

In *Fernandes v. Manitoba (Director of Social Services, Winnipeg Central)*,[95] the plaintiff submitted that the denial of funds for him to be cared for at home infringed his s. 7 *Charter* rights because without the care, he would be forced to live in a hospital. The Court held that s. 7 does not protect the plaintiff's desire to live in a certain setting or to have a particular style of living.

In *Ontario Nursing Home Association v. Ontario*,[96] an assertion that an inadequate level of provincial funding to nursing homes violated the right to security of the person was rejected. The Court held that s. 7 did not address property rights or guarantee 'additional benefits' to enhance s. 7 rights.

Similar reasoning was employed in *Brown v. British Columbia*,[97] where the Court held that the provincial government's decision not to fully subsidize the costs of certain drugs used to treat HIV/AIDS did not violate the claimant's s. 7 rights. The Court held that s. 7 does not guard against economic deprivations nor does it provide benefits that would enhance the life, liberty or security of the person.

In *Chaoulli v. Québec (Procureure générale)*,[98] the plaintiffs claimed that the prohibition of parallel private health care insurance violated their s. 7 rights. The trial judge found that s. 7 does not protect pure economic rights. However, rights related to s. 7 rights, that have an incidental economic component, may be protected. With respect to the scope of the rights protected by s. 7, the trial judge stated:

> First, it is clear that the purpose of the *Charter* is not to protect purely economic rights. Second, it must be recognized that there is a body of opinion within the Supreme Court that would extend the scope of s. 7 to guarantee greater autonomy to individuals and, in parallel, would prevent undue interference by the state in people's personal choices. The door is thus not closed to recognition of certain rights intimately tied to and inseparable from the right to life, liberty and security of the person. This will mean some measure of protection for rights known as "ancillary economic rights".[99]

Although the trial judge concluded that there was a deprivation of the applicants' right to life, liberty and security of the person, the deprivation was found to be in accordance with the principles of fundamental justice. The Quebec Court of Appeal dismissed the claimants' appeal.[100] With respect to s. 7, the Court was of the opinion that it was inapplicable on three grounds. First,

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93 For an excellent discussion of the case law respecting *Charter* application see: M. Jackman, "The Application of the Canadian *Charter* in the Health Care Context" (2000) 9 Health L. Rev. No. 2, 22.

94 See *Re Mia and Medical Services Commission of British Columbia* (1985) 17 D.L.R. (4th) 385 (B.C.S.C.); *Waldman v. British Columbia (Medical Services Commission)* (1999) 177 D.L.R. (4th) 321. But see *Rombaut v. New Brunswick (Minister of Health and Community Services)* (2001) 240 N.B.R. (2d) 258 (N.B.C.A.).

95 (1992) 78 Man. R. (2d) 172 (Man. C.A.).

96 (1990), 72 D.L.R. (4th) 166 (Ont. H.C.J.).

97 (1990), 66 D.L.R. (4th) 444 (B.C.S.C.).

98 [2000] J.Q. No. 479 (Sup. Ct.).

99 *Ibid.* at p. 89 of the English translation prepared by the Translation Service at the Ministère de la Justice du Québec.

100 [2002] J.Q. No. 759 (Quebec C.A.) leave to appeal to SCC granted [2002] S.C.C.A. No. 280.

the right to enter into a contract, which was prohibited by the provisions in question, was an economic right that was not fundamental to the life of a person. Second, to make out a s. 7 violation, the claimants must prove a real or potential and imminent deprivation of the right, which is this case, was not demonstrated. Finally, the Court held that s. 7 could not be used to challenge the correctness of a policy option. This case will be heard by the SCC in the near future.

As the above jurisprudence illustrates, Canadian courts to date have rejected the notion that the rights enunciated in s. 7 of the *Charter* include a right to a specific type of health care.[101]

Section 15 and the Right to Health

In the context of health care, there are two categories of cases where s. 15 has been raised. The first consists of cases where health care services that are generally available to all are denied to a particular group; while the second category involves cases where there is a refusal to fund a particular treatment required for a specific group of individuals.[102]

The leading Canadian case in the first category is *Eldridge v. British Columbia (Attorney General)*.[103] In this case, the plaintiffs challenged the decision of the province to refuse funding for interpretation services for the deaf as part of the insured medical services available in the province. The SCC found that there was a s. 15(1) violation because the decision not to fund interpretation services effectively deprived deaf residents the opportunity to benefit equally from provincial health care services. Significantly, the Court rejected the province's budgetary justification in the s. 1 analysis. It held that to deny equal access to services that are generally available to everyone did not constitute a minimal impairment of an individual's right to equality pursuant to s. 15(1), particularly when the cost of the service was a very small fraction of the total provincial health care budget.[104]

With respect to the actual substance of health care coverage, the Courts have generally resisted questioning government decisions made with respect to the scope of coverage. For example, the s. 15(1) claim in *Brown v. British Columbia*,[105] where the provincial government refused to completely fund a particular drug used by persons living with HIV/AIDS, was unsuccessful.

Similarly, the challenge by an infertile couple with respect to a provincial decision not to fund particular types of AHR techniques in *Cameron v. Nova Scotia*[106] was also unsuccessful. In this case, the provincial government decided IVF and ICSI treatments were not 'medically required' services and therefore excluded them from the provincial insurance plan. The majority of the Court found that infertility was a disability and that "denial of these procedures, on the ground that they are not medically necessary, created a distinction based on the characteristic of infertility."[107] Further, this distinction perpetuated the view that infertile people are less worthy of value. With respect to the s. 1 analysis, the majority of the Court discussed the role of the government and the distribution of social benefits, stating that:

> In the face of tremendous pressures upon them, they must be "accorded some flexibility" in apportioning social benefits among the vast number of competing procedures and the conditions of patients that call for them. The policy makers require latitude in balancing competing interests in the constrained financial environment. We are simply not equipped to sort out the priorities. We should not second guess them, except in

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101 For a summary of the jurisprudence respecting ss. 7 and 15 and health care see: T. Friesen, "The Right to Health Care" (2001) 9 Health L.J. 205; T.A. Caulfield, "Wishful Thinking: Defining 'Medically Necessary' in Canada" (1996) 4 Health L. J. 63; B.F. Windwick, "Health-Care and Section 7 of the *Canadian Charter of Rights and Freedoms*" (1994) 3 Health L. Rev. No. 1 20; A.L. Karr, "Section 7 of the *Charter*: Remedy for Canada's Health Care Crisis? (Part I)" (2000) 58(3) The Advocate 363; Commission on the Future of Health Care in Canada, *How Will the* Charter of Rights and Freedoms *and Evolving Jurisprudence Affect Health Care Costs*, (Discussion Paper) by D. Greschner, 2002.

102 B. von Tigerstrom, "Human Rights and Health Care Reform: A Canadian Perspective" in *Health Care Reform and the Law in Canada Meeting the Challenge* (Edmonton: The University of Alberta Press, 2002) 157 at 171.

103 *Supra* note 92.

104 See also *J.C. v. Forensic Psychiatric Service Commissioner* (1992), 65 B.C.L.R. (2d) 386 (B.C.S.C.) where access to a particular part of the institution was denied to the plaintiff on the basis of gender and budgetary concerns. In this case, the Court found a violation of s. 15(1) and refused to accept justification on the basis of budgetary restrictions. See also C.P. Manfredi & A. Maioni, "Courts and Health Policy: Judicial Policy Making and Publicly Funded Health Care in Canada" (2002) 27(2) Journal of Health Politics, Policy and Law 213.

105 *Supra* note 97.

106 (1999), 177 D.L.R. (4th) 611 (N.S.C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 531.

107 *Ibid.* at 654.

> clear cases of failure on their part to properly balance the *Charter* rights of individuals against the overall pressing objective of the scheme under the Act.

To use the words of Sopinka J. … "it would be unrealistic for this Court to assume that there are unlimited funds to address the needs of all. We must necessarily show considerable deference to the decision makers in this exercise.[108]

Ultimately, the majority found that the violation of s. 15(1) was saved by s. 1. The exclusion of the two procedures was rationally connected to the need to control limited funding and to ensure the safety and efficiency of such treatments. Further, the rights of the claimants were minimally impaired, since other treatments were available. Finally, the effects of the exclusion were outweighed by the benefits of responsible distribution of health care resources.

The opposite result was reached in *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*.[109] The claimants, minors with autism and their parents, submitted that the denial of early intensive behavioural intervention used to treat autism by the provincial health authority violated both ss. 7 and 15(1) of the *Charter*. The British Columbia Court of Appeal found a s. 15(1) violation. The province's narrow interpretation of medicare legislation resulted in a failure to make appropriate accommodations for the health-care needs of autistic children. This failure to accommodate the already disadvantaged position of these children resulted in differential treatment, based on the enumerated group of mental disability. With respect to s. 1, the Court agreed with the trial judge and held that the violation was not justified. Although, not every refusal to fund treatment for a health care problem can be seen as discrimination, the failure to consider funding treatment for the claimants constituted a statement that the mental disabilities suffered by them are less worthy of treatment. In regards to the allocation of health care resources, the Court stated that it will not always defer to the legislature when compliance with the *Constitution* is at stake, particularly in this case, when the potential expenditure of resources was not extraordinary.[110] This case will be heard by the SCC in the near future.

A fundamental question in these types of cases is the extent to which the government will be able to rely on budgetary constraints in the justification analysis, particularly as the SCC has stated that only in rare cases will costs serve as an appropriate justification under s. 1 of the *Charter*.[111] Also at issue is the government's ability to allocate limited resources to address the health needs of Canadians. In *Cameron*, where the Court found that the violation was minimally impaired given that funding was available for some infertility treatments, there was a clear recognition of the economic realities and their impact on justifying violations of *Charter* rights, whereas in Auton, where no treatment was funded, the Court was clear that economics do not always trump the rights guaranteed in the *Charter*. This is an evolving area of the law and to date, the answer to this issue remains unresolved.

2.4.3 The Right to Benefit from Scientific Progress

The Canadian *Charter* does not contain a reference to a right to benefit from scientific progress. The concept of science-related rights was first articulated in article 27(1) of the UDHR, which served as a model for article 15(1) of the ICESCR. Article 15(1) states:

> The States Parties to the present Covenant recognize the right of everyone:
>
> a. To take part in cultural life;
>
> b. To enjoy the benefits of scientific progress and its applications;
>
> c. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[112]

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[108] *Ibid.* at 667.

[109] [2002] B.C.J. No. 2258 (B.C.C.A.), leave to S.C.C. granted [2002] S.C.C.A. No. 510.

[110] *Ibid.* at paras. 57 – 59.

[111] *Singh v. Canada*, [1985] 1 S.C.R. 177; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at paras. 281–285; *New Brunswick (Minister of Health and Community Services v. G. (J.)*., *supra* note 62 at para 100. For a detailed discussion of s. 1 and health care see: A.L. Karr, "Section 7 of the *Charter*: Remedy for Canada's Health-Care Crisis? (Part II)" (2000) 58(4) The Advocate 531.

[112] *Supra* note 70 Article 15(1).

Article 15(1)(b) of the ICESCR is most relevant to the issue of access to reproductive technologies.[113] At the outset, it should be noted that there is very little literature examining the scope of this right or the obligations on states that flow from this right. Further, there is no reference to this article in Canadian jurisprudence.

One academic has identified the following four core elements of article 15(1)(b) based on an examination of the text of the provision and the corresponding travaux Préparatoires. First, the right to benefit from scientific progress is dependent on the existence of other freedoms, such as free speech, freedom of association and assembly and freedom to access information. Second, the phrase 'to enjoy the benefits' suggests that the right should involve socially beneficial science, as opposed to harmful scientific applications. Third, the enjoyment of the right should be consistent with equality standards enunciated in article 3 of the Covenant. Finally, scientific benefits cannot be enjoyed in states where science has not made progress without the cooperation of the international community.[114]

However, even in the ICESCR the right to benefit from scientific progress is not unlimited. Article 15 contains three related rights that have the potential to conflict. The most notable possible conflict is the tension between the right to benefit from scientific progress and the right to intellectual property rights. It has been suggested that the placement of these rights within the same article reflects the drafter's intention for the rights to be balanced against each other. Some academics have also suggested that to be consistent with a human rights approach the creator's rights should be conditional on contributing to the common good of society.[115]

With respect to access to scientific advancement, one commentator has argued that it is unrealistic to interpret this provision to mean that every person has the right to benefit from every new scientific advancement, particularly in light of the state's budgetary constraints. Further, this author suggests that the general right to benefit from research results does not translate into a specific right to access those specific benefits.[116]

Interestingly, the right to benefit from scientific advancement has not been widely used in the effort to gain access to pharmaceuticals in the fight against HIV/AIDS.[117] Instead, the focus has been on the right to health.

Given the lack of jurisprudence and the general lack of attention to the right to benefit from scientific progress, it is unclear how a Canadian court would respond to an argument that an individual is entitled to access treatment or new technology based on this right. This is particularly so given the inherent balancing that is called for based on a reading of the entirely of article 15 of the ICESCR, coupled with the fact the right to benefit from scientific progress does not expressly exist in Canadian law.

2.4.4 Conclusion

At the present time, there appears to be no concrete obligation on states to fund or provide access to AHR services, either domestically or internationally, in relation to the right to reproductive autonomy, the right to health or the right to benefit from scientific progress. Clearly, refraining from interfering with access to AHR is quite different than actually providing AHR services as a right.

However, if the state regulates AHR activities, the extent to which the state can limit access becomes an issue in which human rights would play a very active role. For example, if the state enacted legislation prohibiting single women, lesbian women or women over a certain age from accessing AHR services, the principles of equality would certainly be engaged. Generally, if a service is regulated,

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113 There are also benefit-sharing provisions in the *Convention on Biological Diversity*, 5 June 1992, 31 I.L.M. 818 (entered into force 29 December 1993) and in the *Universal Declaration on the Human Genome and Human Rights*, *1997*, G.A. Res. 53/152, 53rd Sess. (1998).

114 R.P. Claude, "Scientists' Rights and the Human Right to the Benefit of Science" in A.R. Chapman & s. Russell (eds.), *Core Obligations: Building a Framework for Economic*, *Social and Cultural Rights* (New York: Internsentia, 2002) at 255.

115 Z. Lazzarini, "Making Access to Pharmaceuticals a Reality: Legal Options Under TRIPS and the Case of Brazil" (2003) 6 Yale H.R. & Dev. L. J. 103; Committee on Economic, Social and Cultural Rights, Discussion Paper submitted by A.R. Chapman, "Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)" UN ESC, 24th Sess., UN Doc. E/C.12/2000/12 (2000).

116 L. Shanner, "The Right to Procreate: When Rights Claims Have Gone Wrong" (1995) 40 McGill L.J. 823.

117 But see Z. Lazzarini, *supra* note 115, where she does use Article 15 of the ICESCR to argue a right to access pharmaceuticals. This argument is not generally presented with respect to pharmaceuticals, perhaps because of the reference to intellectual property rights within the same article.

it must be done in an equitable fashion. Although, when public funds are used to provide the service, limits may be acceptable given the particular circumstances.

Private and public clinics providing fertility treatments have an obligation to provide their services in accordance with provincial human rights statutes, which prohibit discrimination. Public clinics providing fertility treatments would be required to provide services in accordance with the *Charter.*

2.5 Issue 2: Access to and Disclosure of Information and the Implications for Offspring and Donors of Reproductive Material

Artificial insemination using donor sperm has been practiced by individuals and couples for decades. More recently, the science has developed to allow the use of donated ova and *in vitro* embryos. The discussion will focus mainly on sperm donation, since to date it has been the most prevalent.

The practice of donation of reproductive materials raises significant legal, ethical and moral issues, one of which is the tension between the interests of donors to retain their anonymity and the right of children conceived using donated reproductive materials to know their genetic heritage and the identity of the donor.[118]

2.5.1 The Situation in Canada

Secrecy respecting a donor offspring's conception and genetic origin was often the rule in the past and remains commonplace today. The secrecy around donor offspring is reminiscent of the veil of secrecy that existed around adoption in the past and still does today to a certain extent. Even if donor offspring are told of how they were created, there is often little or no information available about the donor, making it difficult if not impossible for children to learn about their medical history or genetic heritage.

The *Assisted Human Reproduction Act*, described earlier in this chapter, addresses these concerns in a number of ways. Donors will no longer been anonymous to the fertility clinic or the regulatory system. Both the licensee and the regulatory agency created under the Act will be required to retain records containing identifying medical information respecting donors, users and offspring. Prior to accepting a donation of sperm, ova or an *in vitro* embryo, a licensee (clinic or physician) will have to collect and retain the required health reporting information about the donor.[119]

Under the Act, access to the non-identifying medical information regarding the donor will be available to those persons who are considering using a donor's genetic material to create a family or to a person created from the donor's genetic material. However, the identity of the donor will not be disclosed without the donor's written consent.[120] The *Assisted Human Reproduction Act* ensures that parents of children created using donated reproductive material and the children themselves will have access to medical (including genetic) information, while simultaneously respecting the wishes of the donor not to disclose his or her identity.

2.5.2 The Situation in Other Countries

In the mid 1980s, Sweden became the first country to grant mature donor offspring the right to obtain identifying information about their sperm donor.[121] The information that must be provided to the 'mature child' includes the identity of the donor, as well as information relating to the donor, such as physical features. Austria also allows donor offspring to obtain information about sperm donors.[122]

The Australian state of Victoria enacted legislation in 1995 that grants children born as a result of gamete donation and their offspring the right to access both identifying and

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[118] We would like to acknowledge Elaine Menard, Counsel, Human Rights Law Section for her valuable assistance and comments on this portion of the chapter.

[119] *Assisted Human Reproduction Act*, clause 14. Health reporting information is defined in clause 3 of the Act as "the identity, personal characteristics, genetic information and medical history of donors of human reproductive material and *in vitro* embryos, persons who have undergone assisted reproduction procedures and persons who were conceived by means of those procedure."

[120] *Assisted Human Reproduction Act*, clauses 15, 18.

[121] C. Gottlieb et al., "Disclosure of donor insemination to the child: the impact of Swedish legislation on couples' attitudes" (2000) 15(9) Human Reproduction 2052.

[122] Note that Swedish and Austrian laws only apply to sperm donors.

non-identifying information.[123] The legislation also provides donors and recipients of donated gametes and *in vitro* embryos the right to access non-identifying information about each other. The donors or recipients may only access identifying information in relation to the donors and recipients respectively, with the consent of the other party.

A dual system exists in Iceland where donors can choose to donate anonymously or non-anonymously.[124] While in some countries, such as France, Norway and Denmark, children born as a result of donation are not allowed access to any information about their biological parents.[125]

No legislation exists in the U.S. respecting the release of donor information to the resultant offspring. Rather, professional associations, such as the American Society for Reproductive Medicine, have produced recommendations and guidelines addressing the release of donor information.[126] Some sperm banks in the U.S. do offer non-anonymous donor insemination programs, whereby identifying information may be released to a donor offspring upon request at age 18.[127]

In the U.K., the regulatory body created pursuant to the HFE Act collects basic information from donors. This information includes the name, place of birth, date of birth, height, weight, ethnic group, eye colour, skin colour, and hair colour. Information is also collected about the donor's occupation, religion and interests, although the amount of information collected under these categories is left to the discretion of the donor. Under the current U.K. legislative scheme, the donor offspring cannot be given information that would identify the donor. However, individuals are entitled to find out at age 16 whether they may be related to someone they intend to marry. At age 18 individuals are entitled to find out whether their birth was a result of treatment using donated reproductive material.[128]

In 2002, the U.K. government undertook a consultation process on this issue, which was followed by a statement from the government indicating that 'new plans' would be formulated to allow donor offspring to find out more information about their donor once further research is completed.[129] Recently, the U.K. government announced that a change in the law is planned which would allow children born as a result of sperm, eggs or embryos donated after April 2005 to access the identity of their donor when they reach the age of 18. The earliest 18 year olds will be able to access this information is in 2023.[130]

2.5.3 Arguments For and Against the Disclosure of Donor Information

Advocates and opponents of donor anonymity agree that non-identifying medical and genetic information should be disclosed to offspring. However, the release of identifying information remains a controversial issue.

Proponents of a non-anonymous donation scheme cite the emotional void felt by donor offspring caused by not knowing the donor's identity. Further, knowing the identity of the donor contributes to the development of the donor offspring's sense of identity and connection to their biological history.[131] Proponents also note that knowing the identity of the donor could assist in preventing incestuous relationships. This is particularly significant because, in the absence of guidelines or regulations, a donor could be a biological parent to numerous children within a given geographical area who do not realize they are half-siblings.[132]

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123 *Infertility Treatment Act 1995.*

124 L. Firth, "Gamete donation and anonymity: The ethical and legal debate" (2001) 16(5) Human Reproduction 818.

125 *Ibid.*

126 See American Society for Reproductive Medicine, 2002 Guidelines for Gamete and Embryo Donation, http://www.asrm.org/Media/Practice/practice.html#Guidelines (date accessed: November 26, 2003).

127 For example: The Sperm Bank of California has been open since 1982 and children conceived using sperm from this bank who have since reached the age of 18, have contacted their biological fathers.

128 HFE Act, *supra* note 14. See the relevant background paper prepared by the HFEA online at: http://www.hfea.gov.uk/PressOffice/Backgroundpapers/Eggdonation.

129 Donor Information Consultation: Providing information about gamete or embryo donors, DoH, 2002; Government Press Release on donor-conceived children, issued January 2003, http://www.pm.gov.uk.

130 "British sperm, egg donors to lose anonymity" *CBC News* (21 January 2004), online: http://www.cbc.ca/stories/2004/01/21/sperm_donors040121 (date accessed: February 13, 2004).

131 M.L. Shanley, "Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs" (2002) 36 Law & Soc'y Rev. 257; J. Johnston, "Mum's the Word: Donor Anonymity in Assisted Reproduction" (2002) 11 Health L. Rev. No. 1 151.

132 K.E. Koehler, "Artificial insemination: In the Child's Best Interest?" (1996) 5 Alb. L. J. Sci. & Tech. 321.

One of the most often cited reasons to retain some level of anonymity in gamete donation is to encourage donation. Donors are reluctant to have their identities disclosed because they are fearful of being found legally responsible for any resultant child. It has been suggested that a non-anonymous donation system would result in a significant shortage or even a complete lack of donors.[133] However, this has not been the case in Sweden. After a non-anonymous system was introduced in Sweden, the number of donors initially went down, but thereafter returned to normal rates of donation.

The Royal Commission on New Reproductive Technologies identified a decrease in the number of donors as a problem in its report and recommended that legislation be adopted in the provinces to ensure that a donor's rights and responsibilities of parenthood are severed by the act of sperm donation.[134]

To date, only Quebec, Newfoundland and the Yukon have taken legislative action to clarify the legal status of sperm donors such that they cannot be found in law to be a parent. For example, Quebec's *Civil Code* clearly provides that there is not a bond of filiation between the contributor of genetic material and the resulting child. However, in Newfoundland and the Yukon, an ovum or *in vitro* embryo donor could be found to be a parent in law. In the remaining provinces and territories, it is possible that a sperm, ovum or *in vitro* embryo donor could be found in law to be the parent of a child created with his or her reproductive material, with a legal obligation to provide support. Alberta is in the process of updating and consolidating various provincial statutes dealing with family law matters. Parentage in the context of surrogacy and artificial insemination is included in the new legislation, which has yet to come into force.

Those in favour of retaining an anonymous system also argue that anonymity protects the recipient family from unwanted emotional or legal intrusions by the gamete or *in vitro* embryo donor.[135] In addition, secrecy also protects and preserves the bond between the offspring and the parent that is not biologically related to the child.[136]

2.5.4 Children Born as a Result of Donated Reproductive Material and the Right to Know One's Genetic Heritage

International Law

Articles 7(1) and 8 of the *Convention on the Rights of the Child* ("CRC") have been referred to as the authority for a child's right to know his or her genetic heritage at international law.[137]

Article 7 states:

1. The 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.

2. 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.

Article 8 states:

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.

2. 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-establish speedily his or her identity.

Although both articles 7 and 8 can be interpreted to support a variety of arguments or positions respecting the rights of children, it is important to understand the origin of the provisions so as to inform their interpretation. The primary

133 Johnston, *supra* note 131.
134 *Supra* note 9 at 467.
135 *Supra* note 120.
136 Johnston, *supra* note 131.
137 *Supra* note 39 at 199.

goal of article 7 was to address the problem of children's statelessness by immediately requiring a child to be linked to his or her parents.[138] Article 8 was developed as a means of reuniting separated families, and was particularly devised to address military actions in Argentina where newborn babies were taken from their parents at birth and given to couples that supported the military regime.[139]

Article 7 of the CRC

The word 'parent' is not defined in the article or anywhere else in the CRC. The lack of clarity resulting from the absence of a definition has led some countries to enter reservations or declarations to try to set out the parameters of their understanding of the word, particularly as it relates to adoption or TI.[140]

There are two potential interpretations of the term 'parent' in article 7(1) as it relates to donors of reproductive material. On the one hand, the term 'parent' could refer to the person(s) who made the decision to have and raise the child using donated reproductive material as opposed to the person who donated the reproductive material. On the other hand, the term 'parent' could include one's genetic parents, one's birth parents and one's psychological parents (individuals who may have cared for the child for a significant period of time). The latter has been accepted as a reasonable interpretation of this article of the CRC by the authors of the UNICEF Implementation Handbook.[141]

It is important to note the inclusion of the qualification 'as far as possible' and the exclusion of any reference to the 'best interests of the child' in article 7(1). An examination of the travaux Préparatoires reveals that in an earlier version of the article, the phrase 'as far as possible' did not appear. It was included after concerns were raised that an unrestricted right to know one's parent could not be applied in all circumstances. For instance, certain states noted that their domestic legislation permitted 'secret adoptions' where adopted children did not have the right to know the biological parent's identity.[142]

With respect to the lack of a reference to the 'best interests of the child', during the drafting of the article a proposal was put forward to include the phrase, however, it was rejected. The authors of the UNICEF Implementation Handbook suggest that the phrase 'as far as possible' contained in article 7(1) is stricter and less subjective than the phrase 'best interests of the child' and implies that if possible, children are entitled to know their parents, even if it is not in their best interests.[143] However, the authors do acknowledge that given the nature of the CRC as a whole, particularly the recognition in article 3 that the best interests of the child shall be a primary consideration,[144] a child could be prevented from knowing his or her parent if it would cause definite harm in an extreme circumstance. The authors also note that in relation to a child's knowledge of their origin, what is in the best interest of the child may change over time, particularly as the child grows older.[145]

The authors of UNICEF's Implementation Handbook have identified three situations where the right to know one's parent may not be able to be realized. First, where it is not possible to identify the parent; second, where the mother refuses to identify the father; and finally, where the state determines that the parent's identity should not be revealed (e.g. secret adoption & TI).[146] The authors note that this final situation appears to limit the child's right to know his or her genetic parents unnecessarily and points to countries such as Sweden and Austria to illustrate that non-anonymous systems do work.[147] Further,

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138 J. Fortin, *Children's Rights and the Developing Law*, (London: Butterworths, 1998) at 314.

139 *Ibid.*

140 For example, Czech Republic, CRC/C/2/Rev.8, p. 28 and Poland CRC/C/2/Rev.8, p. 35.

141 R. Hodgkin & P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, (New York: United Nations Children's Fund, 2002) at 117.

142 For example, the U.S., the former German Democratic Republic and the former U.S.S.R.

143 *Supra* note 141 at 117.

144 Article 3(1) of the CRC states that:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Note that the provision states the best interests of the child shall be *a* primary consideration as opposed to *the* primary consideration. The *travaux préparatoires* indicates that an earlier draft stated the best interests of the child shall be *the* paramount consideration. However, concerns were expressed with this wording, particularly given that other parties might have equal or even superior legal interests in some cases and that in some situations, competing interests, such as the interests of justice and society at large, may have equal or greater importance compared to the interests of the child.

145 *Supra* note 141 at 118.

146 *Ibid.* at 119.

147 *Ibid.* at 118.

the phrase 'as far as possible' implies that if the possibility exists for donor identification, the child should be allowed to know his or her biological parents.

The Committee on the Rights of the Child has expressed concern in the past regarding the potential conflict that exists between article 7(1) and state policies that allow sperm donors to remain anonymous.[148] Although persuasive, there is considerable debate with respect to how much emphasis should be placed on the Committee's views.

Article 8 of the CRC

Article 8 of the CRC, includes the following three components as part of a child's identity: nationality, name and family relations. The references to nationality and name are generally well-understood concepts, while the phrase "family relations as recognized by law" is not defined in the CRC and does not appear to have a precise meaning. Whether article 8 provides a foundation to argue that a donor offspring has the right to know his or her genetic parent turns on the meaning of 'family relations'.

'Family relations' has several possible interpretations, particularly given that 'family' is defined differently in different cultures. It could be argued that 'family relations' should be interpreted narrowly, given the facts that gave rise to the development of article 8. As mentioned above, the provision was drafted in response to the situation where newborn children were forcefully separated from their parents. In the context of donor offspring, the genetic parent willingly donates reproductive material knowing that he or she will likely never know the resultant offspring. The donor is not forced or coerced to donate.[149]

Conversely, the authors of the Implementing Handbook have interpreted the phrase 'family relations' as recognizing that the identity of a child encompasses more than child's immediate family.[150] In addition, the authors note that children have a capacity to embrace a number of relationships, which is often not acknowledged. Consequently, knowing the identity of the biological parent is not necessarily in conflict with the best interests of the donor offspring or adopted child.

An examination of the Travaux Préparatoires reveals that in the drafting stage, a representative from Mexico urged that more exacting language should be used in article 8(1) to define the States Parties' commitments. In particular, the representative suggested that the biological elements of the identity should be included in the provision.[151] However, this suggestion was not incorporated into the provision.

In sum, there appears to be little consistency with respect to the manner in which the obligations under the CRC have been interpreted. Some State Parties to the CRC have not changed their legislation regarding anonymous donations, whereas others have done so citing the CRC as the impetus. For example, in its efforts to ensure that the obligations set out in the CRC are fulfilled, Austria amended its donor legislation such that donations of sperm may no longer be anonymous.[152]

In Australia, the South Australia Council on Reproductive Technology has recently prepared a discussion paper regarding access to identifying information regarding donors of reproductive materials. In it, the authors found that legislative and regulatory instruments that blocked access to identifying information pertaining to donors appeared to contravene article 8 of the CRC, in particular the phrase "some or all of the elements of his or her identity."[153] The authors of the paper suggested that, given this phrase, the biological aspects of one's identity should

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148 *Ibid.* at 119.

149 The fact that donors are not forced or coerced to donate is likely true for sperm donors. However, it is less obviously so with egg donors. There are some concerns surrounding the subtle coercion of egg 'donors' who have no way to access IVF services but to 'donate' their eggs. Two arrangements are currently in use. *Egg giving* is an arrangement where a woman seeking IVF goes through one cycle in which her eggs are retrieved and then donated. The woman then goes on to have another cycle for her own benefit at a reduced cost. *Egg sharing* is an arrangement where a woman seeking IVF undergoes one cycle in which her eggs are retrieved. Some of these eggs are used for her benefit, and some are donated to another woman. The woman donating her eggs receives a reduction in the cost of IVF. On December 1, 2003, the HFEA issued a statement to the effect that egg giving should no longer be practiced. See online at: http://www.hfea.gov.uk/PressOffice/Archive/1070272120 (date accessed: February 11, 2004).

150 *Ibid.* at 125.

151 S. Detrick, ed., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (London: Martinus Nijhoff Publishers, 1992).

152 *Supra* note 39 at 200.

153 South Australia, "Conception by Donation: Access to identifying information in the use of donated sperm, eggs and embryos in reproductive technology in South Australia" Discussion Paper by the South Australian Council on Reproductive Technology, April 2000.

not be withheld from a child conceived using donated reproductive material.

It is difficult to determine exactly how much latitude these provisions give a State Party to restrict access to the identity of one's biological parents. Clearly, if a right does exist, it is not absolute. There are some circumstances, such as when a parent is dead, where it is not possible for a child to know his or her parent. Moreover, there appears to be no consensus amongst States Parties in interpreting the relevant rights contained in the CRC with respect to children born using donated reproductive materials.

With respect to the CRC's effect in Canada, the SCC and the Quebec Court of Appeal have stated that international human rights law, including the CRC, whether incorporated into domestic law or not, may serve as a tool for interpreting domestic legislation, as well as for the judicial review of administrative action.[154]

European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Court has considered article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("the Convention"), which contains the right to private and family life, in relation to access to personal information.[155] Significantly, the Court has not defined an individual's right to 'respect for private life' narrowly. Rather, it has stated that it encompasses physical and psychological integrity and may extend to physical and social identity. Moreover, to a certain extent, it may also include the right to establish and develop relationships with other individuals.[156]

In *Gaskin v. U.K.*,[157] the claimant attempted to gain access to his childhood records kept during the time he was in foster care. The Court found that the information contained in the records was highly personal and was likely his primary source of information about his past. Therefore, article 8 of the Convention was engaged. The Court found that 'respect for private life' requires that individuals should be able to access information relating to their identity and that the state should not bar an individual from such information without particular justification. As a result, the Court concluded that right to private and family life had been breached.

However, not every case alleging a breach of private and family life has been successful before the Court. In *Martin v. U.K.*,[158] the claimant attempted to access personal records held by authorities. Although the Court found that article 8 was engaged, it concluded that no positive obligation existed to disclose the information, largely because the disclosure position taken by the authorities was balanced.

Germany

In 1989, the German Constitutional Court concluded that based on the constitutional right to privacy, a child has a right to know the identity of his or her parents.[159] This right to privacy is not absolute and can be limited through regulations, as long as the regulations are proportionate and are not enacted for an unconstitutional purpose. On the basis of this limited definition of the right to privacy, the anonymous donation of reproductive materials is prohibited.[160]

U.K.

In the U.K., a test case was recently brought to obtain non-identifying information and identifying information (a limited amount of information was sought only by one claimant) concerning sperm donors.[161] Both claimants, an adult born before the *HFE Act* was enacted, and a child born after the *HFE Act* was passed into law, were

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154 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Reference Re: Bill C-7 respecting the criminal justice system for young persons*, [2003] Q.J. No. 2850. (Quebec C.A.).

155 Article 8 of the Convention states:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

156 *Niemietz v. Germany*, (1992) 16 EHRR 97 at para. 29.

157 1989) 12 EHRR 36.

158 (1996) 84 D & R 169.

159 E. Deutsch, "Assisted Procreation in German Law" in D. Evans (ed.), *Creating the Child* (London: Kluwer Law International, 1996) at 337; *supra* note 39 at 200.

160 Deutsch, *ibid.* at 338.

161 *R (on the application of Rose and another) v. Secretary of State for Health and another*, [2002] 3 FCR 731 (Q.B. Administrative Court).

conceived using donor insemination. The plaintiffs claimed that article 8 and, to a limited extent, article 14 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[162] applied.

Whether these rights were engaged was the subject matter of the hearing. After reviewing the various domestic and European decisions relating to article 8, which protects an individual's right to respect for his private and family life and his home, the Court outlined the following general principles:

- Respect for private and family life requires that everyone should be able to establish details of their identity as individual human beings. This includes their origins and the opportunity to understand them. It also embraces their physical and social identity and psychological integrity.

- Respect for private and family life comprises to a certain degree the right to establish and develop relationships with other human beings.

- The fact that there is no existing relationship beyond an unidentified biological connection does not prevent article 8 from biting.[163]

Accordingly, the Court concluded that article 8 was engaged in respect of both identifying and non-identifying information. However, the Court noted that whether article 8 had been breached was an entirely different matter that was not at issue in the case. Following the Court's ruling, the case was suspended pending the outcome of the U.K. government's consultation process regarding the release of donor information to offspring.

Canada

In Canada, legislation and government action must comply with the *Charter*. To the extent that AHR activities do not come within either legislation or government action, the *Charter* may or may not apply.[164] The *Charter* would apply if legislation or regulations interfered with an offspring's ability to learn the identity of his or her biological parent. The *Assisted Human Reproduction Act* allows an offspring to access the identity of the donor, but only with the donor's written consent.

With the passing of the Act, a primary human rights issue is whether the offspring's right to security of the person under s. 7 of the *Charter* is infringed because he or she would not be able to know the identity of the donor without the donor's consent.

There is no jurisprudence in Canada respecting the *Charter* rights of either the offspring or the donor. However, there is a limited amount of jurisprudence respecting adoption. Although similarities and differences have been identified between adopted children and donor offspring, this jurisprudence provides a useful starting point to analyze whether there is a right to know one's biological parent.[165]

The first stage of the s. 7 analysis is to determine whether there has been a deprivation of life, liberty or security of the person, which requires an examination of the impact upon an individual of not knowing the identity of one's biological parent. If so, it must be determined whether that deprivation is in accordance with the principles of fundamental justice.

In *R. v. D.D.W.*,[166] an individual accused of incest argued that the provisions relating to confidentiality in the provincial Adoption Act infringed his security of the person. The accused attempted to gain access to the adoption records of the complainant to prove that he was not the biological father. The Court held that the accused's

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[162] As adopted in Sch 1 of the U.K. *Human Rights Act, 1998*. Article 8 is reproduced above. Article 14 states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[163] *Supra* note 161 at para 45.

[164] But see the *Processing and Distribution of Semen for Assisted Conception Regulations*, *supra* note 3, enacted pursuant to the *Food and Drugs Act*. These regulations govern the collection and distribution of semen.

[165] In its report, the Royal Commission on New Reproductive Technologies outlined some of the differences between adopted children and children conceived through the donation of reproductive materials at as follows:

> When a couple raises an adopted child, neither is biologically related to that child; when a couple raises a DI child, only one of them is the biological parent. In adoption, the child already exists and is placed for adoption because the mother is unable to raise the child: in DI situations, the child is conceived deliberately with the intent of nurturing and raising it. Adoption deals with finding a family for an existing child, while DI deals with the deliberate formation of a family by having a child.

[166] [1994] B.C.J. No. 3284 (B.C.S.C.).

security of the person was engaged, but that the provisions in the legislation relating to disclosure were in accordance with the principles of fundamental justice.

In *Ferguson v. Director of Child Welfare et al*.,[167] an adult adoptee sought to learn the identity of her birth mother. The Court held that unless exceptional circumstances existed, beyond the adoptee's natural curiosity, the confidentiality provisions in the legislation must be respected. The Ontario Court of Appeal agreed and also held that s. 7 of the *Charter* had no bearing on the particular provision of the legislation in question.

In contrast, an 18-year-old adoptee was granted access to her adoption file in *Ross v. Prince Edward Island (Supreme Court, Family Division, Registrar)*.[168] At the time of her adoption, the legislation in force did not address the issue of disclosure. The Court found that the adoptee "should have the right to know her heritage" and "neither her natural parents nor her adoptive parents should have the right to keep her uninformed of her background."[169] However, no reference was made to the *Charter* in this decision.

In the very limited (and dated) jurisprudence respecting adoption records, the security of the person component of s. 7 has not been interpreted to include a right to know one's genetic heritage. However, since these cases, the Court has elaborated upon the scope of the right to security of the person, particularly as it relates to one's psychological integrity.

In the criminal context, it is well established that one's security of the person includes one's psychological integrity.[170] In addition, the SCC has recently had the occasion to comment on the scope of the right to security of the person with respect to parents in child protection actions. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)* ("G.(J.)"),[171] the Supreme Court recognized that the right to security of the person protects both physical and psychological integrity and that s. 7 is not limited to purely criminal matters. The Court was careful to make clear that not all state interferences with the parent-child relationship will constitute an infringement of the parent's security of the person. Rather, the state action must have "a serious and profound effect on a person's psychological integrity" and must be more than "ordinary stress or anxiety," which was the case in this instance.[172] One year later the Court applied the reasoning developed in *G.(J).* in *Winnipeg Child and Family Services v. K.L.W.* ("K.L.W."),[173] and concluded that the apprehension of a child placed more than ordinary stress and anxiety on a mother, and consequently the mother's security of the person was engaged. The Court also recognized in *G.(J.)* and *K.L.W.* that given the link between a child's life and parent's life, the child's security of the person may also be engaged if the two are separated.[174]

These above-mentioned child protection cases must be contrasted with other circumstances where the state has interfered with the parent-child relationship yet the parent's security of the person was not engaged, such as when a child was incarcerated or conscripted into the military.[175] This was the case in *Augustus v. Gosset*,[176] where the SCC found that the negligent killing of a child by the state (a police officer) did not engage the parent's s. 7 *Charter* rights. In *G.(J.)*, Lamer C.J. (as he was then) reconciled these conflicting outcomes by distinguishing the impact or 'injury' on the parent. He noted that in child custody proceedings, such as *G. (J.)* or *K.L.W.*, a parent is publicly labelled as unfit or incapable of caring for one's child, which engages that parent's security of the person. Whereas, in the other examples, the killing of one's child by the state or incarceration, the interference by the state with the parent's psychological integrity is not vis-à-vis their role as parents and is not interfering in the intimacies of the parent-child relationship.[177]

This jurisprudence helps to give meaning to a parent's right to security of the person. But in the case of a donor offspring's right to know his or her parents, it is the child's

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167 (1983), 40 O.R. (2d) 294 (Ont. County Court).
168 [1985] P.E.I.J. No. 1 (P.E.I. Supreme Court).
169 *Ibid.* at para. 24.
170 *R. v. Morgentaler*, *supra* note 60; *Rodriguez v. R.*, [1993] 3 S.C.R. 519.
171 *Supra* note 63.
172 *Ibid.* at para. 60.
173 [2000] 2 S.C.R. 519.
174 *Supra* note 63 at para. 76; *ibid.* at para. 12.
175 *Supra* note 63 at para. 63; R.J. Sharpe, K.E. Swinton & K. Roach, *The Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law Inc. 2002) at 184.
176 [1996] 3 S.C.R. 268.
177 *Ibid.* at para. 64.

security of the person that is at issue. Are the above scenarios where the Court has found an infringement of a parent's security of the person applicable to a child's security of the person? With respect to the first scenario of the state making a public declaration of parental fitness, it is difficult to imagine a situation where the state would make a public declaration condemning a child's fitness or role in the parent-child relationship. The second scenario, where the state interferes with the intimacies of the parent-child relationship, is equally inapplicable because in the case of the offspring there is no existing relationship within which the state could interfere.

The Court's unwillingness to define security of the person broadly should also be noted. In *G.(J.)*, Lamer C.J. (as he was then) stated that a broad definition of security of the person would open the government to increased challenges and would lead to the trivialization of a constitutionally protected right. Further, in *Blencoe*, the Court concluded that the type of stress and anxiety suffered by the claimant after a state-caused delay in a human rights proceeding was not the type that should be elevated to "the stature of a constitutionally protected s. 7 right."[178]

While the *AHR Act* allows the disclosure of the donor's identity, with his or her written consent, this may affect the psychological integrity of some offspring. On the other hand, it may cause no stress or anxiety to others.

If a court did find that a child's security of the person was infringed, it would look to the balancing of interests of other parties involved, such as the donor and recipient family, in the analysis of the principles of fundamental justice.

Finally, it must be noted that a broader issue is whether or not s. 7 of the *Charter* extends to infringements that occur outside the sphere of the justice system and its administration. Most recently this issue has been addressed in *Gosselin v. Quebec (A.G.)*.[179] One issue in *Gosselin* was whether the Quebec social assistance scheme in place during the 1980s infringed the s. 7 rights of a class of individuals under the age of 30. The majority found that the implication of the administration of justice, the usual requirement for the engagement of s. 7, was lacking. Although the Chief Justice, for the majority, referred to the statement by former Chief Justice Dickson in *Irwin Toy Ltd. v. Quebec* (A.G.)[180] that s. 7 might protect economic rights fundamental to human survival, her analysis focused on positive versus negative rights. Consequently, the question of whether or not a s. 7 claim must be connected to the administration of justice was left open. Clearly, a definitive answer on this question has yet to come out of the SCC. As a result, whether or not s. 7 rights are engaged at all with respect to the security of the person of a donor offspring would necessarily have to be addressed.

2.5.5 Donors of Human Reproductive Material and the Right to Privacy

International Law

Both the UDHR and the ICCPR contain similar provisions protecting against arbitrary interference with one's privacy, family, home or correspondence.[181] Although not generally referred to specifically in Canadian jurisprudence, these provisions may serve as a useful tool to inform and assist in the interpretation of the privacy rights contained in ss. 7 and 8 of the *Charter*.

U.S.

In California, the issue of a sperm donor's right to privacy was recently challenged. In *Johnson v. The Superior Court of Los Angeles County, et al.*,[182] a six-year-old child who had been conceived by donor insemination was diagnosed with a genetically transmitted kidney disease, linked to the anonymous sperm donor. The evidence revealed that the sperm bank knew of the donor's family history of

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178 *Blencoe*, *supra* note 63 at para. 97.

179 [2002] SCC 84.

180 [1989] 1 S.C.R. 927.

181 Article 12 of the UDHR states:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the ICCPR states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

182 80 Cal. App. 4th 1050 (Court of Appeal of California 2000).

kidney disease, yet continued to use the donor's sperm. The Johnsons sued the sperm bank for breach of contract, fraud and negligence. During discoveries, the recipient family attempted to obtain information from the sperm bank that would have revealed the identity and medical history of the sperm donor in question. The sperm bank refused because such disclosure would have infringed the donor's right to privacy. Using a private investigator, the Johnsons located the individual they believed to be the donor and attempted to compel a deposition and production of documents, which was the particular issue addressed by the Court.

The Court recognized that the sperm donor in question and his family have a constitutional right of privacy, both under the California Constitution and the federal Constitution. Further, the Court acknowledged that an individual's medical history, along with the disclosure of one's identity falls within the established realm of privacy. However, the Court found that the donor's reasonable expectation of privacy was lessened because he donated over 320 samples to the sperm bank. The Court concluded that it was unreasonable for the donor to expect that his medical history and even his identity would not be revealed, given the significant number of donations.

While acknowledging that a right of privacy exists, the Court also noted that the right is not absolute. It must be balanced against other compelling state interests. In this case, the Court found a number of compelling state interests, including protecting the health and safety of children conceived using donated reproductive material. The Court concluded that these interests outweighed the privacy interests of the donor and granted an order to compel the deposition and production of documents by the donor. However, the Court noted that this conclusion did not automatically mean that the donor's identity must be revealed. The Court suggested that the attendees at the deposition could be limited and the transcript could refer to the donor as "John Doe". Further, the identities of the donor's family members were not to be disclosed.

Canada

The *AHR Act* allows offspring access to the identity of the donor only with the consent of the donor. Otherwise, only non-identifying information would be disclosed to the offspring, thereby preserving the donor's anonymity. In a scheme such as this, given that the donor is aware prior to donation that non-identifying information will be disclosed to the offspring and identifying information is only given to the offspring with the consent of the donor, it is unlikely that a donor could allege a breach of his or her right to privacy. However, what would the human rights implications be if legislation were enacted that retroactively abolished donor anonymity? Would a donor be able to claim that such legislation infringed his or her right to privacy?

As mentioned above, there is no Canadian jurisprudence addressing the privacy rights of donors of reproductive material. A review of the general principles of s. 7 and s. 8 of the *Charter* reveals that both the liberty and the security of the person interests may be relevant.[183]

The SCC has recognized that the liberty interest under s. 7 encompasses both the right to physical liberty and the right to make fundamental personal decisions without state interference.[184] The scope of this right to privacy respecting personal decisions is not broadly defined, and is limited to those decisions that "implicate basic choices going to the core of what it means to enjoy individual dignity and independence."[185]

The key question is if legislation were enacted that retroactively required the disclosure of the identity of gamete donors, would the court protect donor's anonymity by characterizing the decision to donate anonymously as a fundamental personal decision thereby attracting *Charter* protection?

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[183] It is likely that as of January 1, 2004 the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) would also apply to fertility clinics collecting and retaining personal information about donors, except in the province of Quebec. Quebec has been exempted from the application of PIPEDA because it has substantially similar legislation in place, namely *An Act Respecting the Protection of Personal Information in the Private Sector*.

[184] *Morgentaler*, *supra* note 60; *B. (R.)*, *supra* note 63; *Godbout*, *supra* note 63; *Blencoe*, *supra* note 63.

[185] *Godbout*, *ibid*, at para. 66; *Blencoe*, *ibid.* at para. 54.

The case law respecting reproductive autonomy provides a useful analogy to determine whether the decision to donate reproductive material should be considered a fundamental personal decision worthy of protection. In *Morgentaler*, although the majority of the SCC decided the case on other grounds, Wilson J., writing on her own behalf, recognized that the decision to have an abortion was a fundamental personal decision that fell within the scope of the liberty interest. The American jurisprudence also deems decisions relating to reproduction as ones deserving of special protection. Although no case law exists on point, the jurisprudence that is available suggests that the interference by the state in the donor's personal autonomy in deciding to donate reproductive material could be considered to be a decision deserving the status of a fundamental personal decision.

A donor's right to security of the person may also be engaged if legislation were passed that allowed the disclosure of a donor's identity without his or her consent. The SCC has recognized that one's security of the person includes psychological integrity. As noted above, the state action "must have a serious and profound effect on a person's psychological integrity."[186]

Sperm donors are thoroughly screened and tested and generally provide sperm banks with multiple donations. Consequently, sperm donors are often a 'biological parent' to several offspring. If offspring were entitled to access the identity of the donor without consent, the donor could suffer some anxiety. Further, it could have significant emotional effects on the donor's family, as well as potential economic implications for the donor if the offspring or their social parent demanded child support.

It is difficult to predict whether a court would find that a donor's right to security of the person is engaged absent a legislative scheme eliminating the anonymous donation scheme. Several factors would need to be considered, for example, whether such a scheme would be put in effect retroactively.

If legislation were enacted that retroactively compelled the disclosure of the identity of donors to third parties, s. 8 of the *Charter*, which protects against unreasonable search and seizure, may also be engaged. The purpose of s. 8 is to protect individuals from unjustified state intrusions upon their privacy.[187] Two primary issues are examined in a s. 8 analysis. First, does the party claiming a s. 8 violation have a reasonable expectation of privacy? Second, is the governmental interference in that expectation of privacy reasonable?

Expectations of privacy arise in different circumstances. However, with respect to personal information, the SCC has recognized that a person may have a reasonable expectation of privacy in information.[188] In *R. v. Plant*, Sopinka J., for the majority, stated:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individuals.[189]

Clearly, any state action that retroactively required disclosure of an individual's identity as a donor of reproductive material to the resultant offspring would engage s. 8 of the *Charter*.

2.5.6 Conclusion

From the above discussion, it is apparent that the interests of children born as a result of AHR and the interests of donors of reproductive material are inter-related and have the potential to conflict. As such, an appropriate balance must be struck between the interests of these parties so as to maximize the benefits of AHR and minimize the possible negative implications of AHR.

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[186] *Supra* note 63 at para. 60.
[187] *Hunter v. Southam*, [1984] 2 S.C.R. 145.
[188] *R. v. Dyment*, [1988] 2 S.C.R. 417.
[189] *R. v. Plant*, [1993] 3 S.C.R. 281 at 293.

2.6 Issue 3: The Status of *In vitro* Embryos

The medical, physical and emotional costs of undergoing IVF treatment are high. Frequently, in order to reduce some of these costs, a number of eggs are surgically retrieved from a woman undergoing treatment and fertilized. However, due to the risks of multiple pregnancies, only a few of the resulting *in vitro* embryos may be transferred into the woman. As discussed earlier, the remaining embryos are generally cryopreserved or "frozen" for future use.[190] To date in Canada, it is estimated that there are over 15,000 frozen *in vitro* embryos in storage across the country.[191] Unfortunately, disagreements can occur over the fate of these frozen embryos, particularly after a couple separates or one partner dies.

In this section, the human rights issues relating to *in vitro* embryos will be examined from different perspectives. First, the position of the donors of reproductive material will be addressed. Second, the perspective of the *in vitro* embryo itself will be discussed.

2.6.1 The Rights of Donors of Reproductive Material and Recipient Couples vis-à-vis a Frozen *In vitro* Embryo

As discussed above, individuals or couples seek out AHR services for a number of reasons. Sometimes both partners are unable to donate reproductive material to contribute to the resultant *in vitro* embryo, other times only one member of a couple can donate reproductive material and still in other circumstances both are able to donate reproductive material to create the resultant *in vitro* embryo. Consequently, a number of situations arise. First, there could be three separate parties involved in the creation of an *in vitro* embryo — two donors of reproductive material and a recipient individual or couple. Second, there could be two separate parties involved — one donor of reproductive material and a recipient couple, one member of the couple who will also donate reproductive material. Finally, there could be only the couple involved in a situation where the couple are both are able to donate their own reproductive material, but simply require AHR services to achieve a successful pregnancy.

To date, there is no case law in Canada respecting disputes between private parties over frozen *in vitro* embryos in relation to any of the above scenarios. However, given the large number of *in vitro* embryos currently in storage in Canada, it is foreseeable that a court could be asked to resolve such a dispute. In addition, there is no jurisprudence respecting the interference of a state with the rights of progenitors, which would more directly engage traditional human rights instruments that regulate the relationship between the state and its citizens.

U.S.

The American jurisprudence relating to disputes between private parties over *in vitro* embryos is varied. Some resolutions of these disputes are based on principles of contract law, while others employ a balancing test between private parties that largely centres on the concept of reproductive or procreational autonomy, namely the right to procreate of one party versus the right not to procreate of the other.

In *Davis v. Davis*,[192] both parties asserted their respective right to procreate and not to procreate based on their constitutional rights to liberty and privacy. In response, the Supreme Court of Tennessee formulated a test whereby the right to procreational autonomy of each party would be balanced. The Court concluded that in most cases, the party seeking to avoid procreation should prevail. However, if the party claiming the right to procreate seeks the frozen *in vitro* embryos for personal use and can demonstrate that he or she does not have any other "reasonable means" of pursuing parenthood, the Court may favour the right to procreate.[193]

Essentially, the Court concluded that when a dispute arises over the disposition of frozen *in vitro* embryos, the prior wishes of the donors as expressed in any prior

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190 Cryopreservation is the process by which embryos are frozen indefinitely in liquid nitrogen. For an explanation of cryopreservation see K. LaGatta, "The Frozen Embryo Debate Heats Up: A Call for Federal Regulation and Legislation" (2002) 4 Fl. Coastal L.J. 99.

191 F. Baylis, et al., "Cryopreserved Human Embryos in Canada and their Availability for Research" (2003) 25(12) Canadian Journal of Obstetrics and Gynaecology 1026.

192 842 S.W. 2d 588 (Supreme Court of Tennessee 1992). Leave to appeal to U.S. Supreme Court refused.

193 *Ibid.* at 604.

agreement should stand. However, if a prior agreement does not exist, the balancing test should be employed.[194]

The Court's use of the 'right to procreate' versus the 'right not to procreate' to resolve this dispute is curious given that the rights found in the U.S. Constitution apply to the interaction between the state and its citizens rather than as between private parties. The Court's balancing of the parties' separate 'interests' in procreating or not procreating appears legitimate, but to use 'rights' language without clarifying the application of the Constitution is confusing.

Although the balancing test developed in *Davis* has been widely accepted, the U.S. courts have inconsistently adhered to prior disposition agreements between couples. For instance, in *Kass v. Kass*,[195] Mrs. Kass sought 'custody' of the couple's frozen embryos for implantation, while Mr. Kass sought to enforce their disposition agreement, which stated that if a dispute arose, the embryos would be donated for research purposes. The Court of Appeals for New York agreed with the Court in Davis and held that in general, prior agreements should be upheld in order to maximize procreative liberty by allowing the sperm and egg donors the authority to determine disposition, which the Court found to be a "deeply personal life choice."[196]

In contrast, in *A.Z. v. B.Z.*,[197] the Supreme Judicial Court of Massachusetts found that a disposition agreement was not binding for several reasons, most notably because it found that the agreement likely did not represent the intent of the donors given the circumstances upon which it was signed. More significantly, the Court stated that agreements requiring "forced procreation" should not be enforceable due to public policy concerns.[198]

A similar result was reached in *J.B. v. M.B.*,[199] where the husband alleged that the couple had entered into an oral agreement to donate any excess *in vitro* embryos to an infertile couple. The Supreme Court of New Jersey held that if a couple wished to enter into a prior agreement a clear written statement of intention was necessary. Given that an enforceable contract did not exist, the Court used the balancing test formulated in Davis. The Court found that since the husband was already a father and was still able to father children, the realization of his right to procreate was not lost. However, the wife's right not to procreate would be permanently extinguished if the *in vitro* embryos were donated to an infertile couple.[200] The Court refused to force the wife to "become a biological parent against her will."[201] Consequently, the wife's right not to procreate prevailed.

Canada

The rights of the donors of reproductive material in relation to the frozen *in vitro* embryos created using their reproductive material may be largely dependent on the status or classification of the *in vitro* embryo. For instance, in the event that frozen *in vitro* embryos were seized by the Crown,[202] and *in vitro* embryos were classified as the "property" of their progenitors, the right to the enjoyment of property and the right not to be deprived of such property except by due process of law contained in the *Canadian Bill of Rights*,[203] would likely be engaged.[204]

Discussion

The disputes discussed above, were in relation to *in vitro* embryos that were created with the reproductive material of the couple that wished to use the *in vitro* embryo for their own use at one point in time.

No case law exists in respect of the situation where a dispute arose over *in vitro* embryos that were not created with reproductive material of the couple that intended to use the resultant *in vitro* embryo. Presumably, the dispute

194 *Ibid.*
195 696 N.E. 2d 174 (N.Y. Court of Appeals 1998).
196 *Ibid.* at 180.
197 725 N.E. 2d 1051 (Supreme Judicial Court of Massachusetts 2000).
198 *Ibid.* at 1058.
199 751 A. 2d 613 (N.J. Super. Ct. App. Div. 2000), aff'd as modified, 783 A. 2d 707 (N.J. 2001).
200 *Ibid.* at 717.
201 *Ibid.*
202 A "seizure by the Crown" is contemplated in clause 50(1) of the *Assisted Human Reproduction Act* whereby an inspector designated under the Act could may seize material, defined as "an embryo or part of one, a fœtus or part of one or any human reproductive material outside the body of a human being, or any other thing", if the inspector has reasonable grounds to believe that the Act has been contravened. Pursuant to clause 50(2), an inspector may direct that the seized material be kept stored in the place where it was seized or removed to another place.
203 S.C. 1960, c. 44, s. 1(a).
204 For the latest decision by the SCC respecting the *Canadian Bill of Rights*, see: *Authorson v. Canada (Attorney General)*, [2003] SCC 39.

between the couple whose reproductive material was not used to create the *in vitro* embryo would be resolved in the same fashion as in the case where the reproductive material used to create the *in vitro* embryo was from the couple that intended to use the *in vitro* embryo.

With respect to the application of traditional human rights instruments to disputes over *in vitro* embryos, if the state were to attempt to regulate or control the use of the *in vitro* embryo created with the couple's reproductive material, the reproductive autonomy rights of the couple would surely be engaged. In addition, in a situation where the *in vitro* embryo was not created with the reproductive material of the couple that intended to use it, it is likely that the couple's right to reproductive autonomy would also be engaged if the state attempted to regulate or control the use of the *in vitro* embryo, regardless of the fact that either one or both of the couple would not be the genetic parents of the *in vitro* embryo.

A final question remains with respect to the rights of the donors of reproductive material who are not the recipient couple. How would a dispute be resolved as between either a sperm donor or an ovum donor and the recipient couple who used the donated reproductive material to create an *in vitro* embryo for their own use? Once again, such a dispute would be between private parties and therefore, traditional human rights instruments would not be directly applicable. It is likely that a resolution to such a dispute would largely be dependant on the consent given by the donor and the contractual arrangement between the donor and the recipient couple, or more likely between the donor and the clinic or medical institution involved.

Conclusion

Disputes over dispositional authority of *in vitro* embryos clearly involve a balancing of interests between the donors. However, human rights instruments, such as the *Charter*, which govern the relationship between the state and its citizens, would not be applicable to purely private disputes between donors. Although, if the state became involved in regulating AHR activities and resulting disputes over *in vitro* embryos, traditional human rights instruments would then be engaged.

From the limited American case law, it appears that the interests of one party not to procreate generally prevails over the interests of the other party to procreate, in the absence of a prior agreement, and sometimes notwithstanding a prior agreement. If a dispute over frozen *in vitro* embryos was to occur in Canada, our courts could look to the American model to fashion a similar test to assist in balancing the competing interests involved or develop a uniquely Canadian approach.

2.6.2 The Legal Status of the *In vitro* Embryo

With respect to the *in vitro* embryo, the first issue that must be addressed is whether or not it has any rights. To determine whether human rights, most importantly the right to life, apply to an *in vitro* embryo, the legal status of the *in vitro* embryo must be examined. There are three viewpoints with respect to the status of the *in vitro* embryo: (1) the embryo as property, (2) the embryo as a sui generis entity deserving special protection, and (3) the embryo as a person.[205]

2.6.2.1 The In vitro Embryo as Property

The property approach considers the *in vitro* embryo as the property of the two individuals whose reproductive material was used to create it or those individuals or couples to whom the *in vitro* embryo was donated for reproductive purposes. Under this approach, principles of ownership would govern the use or disposition of the *in vitro* embryo.[206] Essentially, a property approach would create a scheme of joint authority between either the egg and sperm donor or the recipient couple over the *in vitro* embryo.[207]

Several reports regarding the ethical, legal and social issues pertaining to AHR have rejected the notion that *in vitro*

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[205] E.A. Pitrolo, "The Birds, The Bees, And the Deep Freeze: Is there International Consensus in the Debate Over Assisted Reproductive Technologies?" (1996) 19 Hous. J. Int'l L. 147 at 200; J.F. Daar, "Regulating Reproductive Technologies: Panacea or Paper Tiger?" (1997) 34 Hous. L. Rev. 609 at 634; s. Fiandaca, "*In vitro* Fertilization and Embryos: The Need for International Guidelines" (1998) 8 Alb. L.J. Sci. & Tech. 337 at 360; L. Brandimarte, "Sperm Plus Egg Equals One "Boiled" Debate: Kass v. Kass and The Fate of the Frozen Pre-Zygotes" (2000) 17 N.Y.L. Sch. J. Hum. Rts. 767 at 775; L.B. Andrews, "Regulating Reproductive Technologies" (2000) 21 J. Legal Med. 35.

[206] K.H. Windsor, "Disposition of Cryopreserved Preembryos After Divorce" (2003) 88 Iowa L. Rev. 1001 at 1010.

[207] *Ibid.*

embryos should be treated as property. For instance, in the Report prepared by the Royal Commission on New Reproductive Technologies, the Commission rejected the notion that property concepts be used to determine the disposition of *in vitro* embryos. The Report stated:

> [I]n the Commission's view, reproductive material should never be characterized as property, because terms such as "ownership" and "property" suggest that human zygotes can be treated as objects, which is contrary to principles such as respect for human life and dignity and non-commercialization of reproduction. The Commission therefore believes that the complex issues of control and decisional authority with respect to human zygotes must be addressed in a conceptual framework that makes it clear that they are not "property".[208]

Further, the Commission outlined several potential problems with treating *in vitro* embryos as property. The Commission noted:

> A pure property law regime would give the "owners" of zygotes not only a right of control, but also all the other standard incidents of ownership. For example, owners of property are generally allowed to give property away or sell it, bequeath it to inheritors, destroy it or experiment on it, store it, and share in the profits of research on it. These implications of a pure property law regime for embryos are clearly unacceptable.[209]

Interestingly, many of the activities that are characteristics of a pure property regime identified by the Commission, such as having the authority to destroy, store, inherit or donate an *in vitro* embryo are currently permitted in many countries.

The Waller Report, prepared for the Australian state of Victoria, stated that, "the committee does not regard the couple whose embryo is stored as owning or having dominion over that embryo."[210]

A similar sentiment was reflected in the Demack Report, commissioned by the Australian state of Queensland. The Committee stated that, "it is not acceptable to think of the donors of gametes as having some right of ownership of the gamete."[211]

Finally, the U.K.'s Warnock Committee stated the following with respect to the property approach:

> The concept of ownership of human embryos seems to us to be undesirable. We recommend that legislation be enacted to ensure there is no right of ownership in a human embryo. Nevertheless, the couple who have stored an embryo for their use should be recognised as having rights to the use and disposal of the embryo, although these rights ought to be subject to limitation.[212]

U.S.

Generally, the disposition of *in vitro* embryos by the property approach has not found favour in the U.S. Courts. Although, in a motion to dismiss in *York v. Jones*,[213] which was eventually settled out of court, the Court did appear to accept this approach. In this case, the couple underwent IVF at the defendant clinic in Virginia, with no success. Thereafter, they moved to California and attempted to have their last frozen *in vitro* embryo transferred to a clinic in California. The defendant clinic refused to comply with the request. The couple sued the clinic on the basis of breach of contract and detinue, a cause of action specifically related to property. They had signed a cryopreservation agreement with the Virginia clinic, which gave responsibility for embryo disposition to the couple and also provided that if the couple divorced, the rules of property settlements would govern the disposition of the embryos. The agreement also stated that the clinic would only store the *in vitro* embryos while the couple was active in the IVF program.

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208 *Supra* note 9 at 597.

209 *Ibid.* at 627.

210 Victoria, Committee to Consider the Social, Ethical and Legal Issues arising from *In vitro* Fertilization, (The Waller Committee), Report on the Disposition of Embryos Produced by *In vitro* Fertilization, 1984, at 27.

211 Queensland, Special Committee (The Demack Report), Report to Enquire into the Laws Relating to Artificial Insemination, *In vitro* Fertilization and Other Related Matters, 1984, at 77.

212 United Kingdom, Committee of Inquiry into Human Fertilisation and Embryology (The Warnock Committee), Report of the Committee of Inquiry into Human Fertilisation and Embryology, 1984, at 56.

213 717 F. Supp. 421 (U.S. Dist. Ct. Eastern Dist. Virginia 1989).

The Court took note of the consistent reference to the *in vitro* embryo in the agreement as the "property" of the couple and found that the agreement created a bailment relationship between the couple and the clinic.[214] Given that in a bailment situation, an action in detinue arises automatically upon a demand for the property and a corresponding refusal, the Court denied the motion to dismiss on the basis that the causes of action were proper claims.[215]

The Court employed the property approach in *York v. Jones* so as to allow the egg and sperm donors the dispositional authority over their *in vitro* embryo as against a third party. However, this decision does not assist in disputes where it is the egg and sperm donor who cannot agree on the disposition of their *in vitro* embryo.

This property approach taken in *York v. Jones* is in contrast to *Moore v. The Regents of the University of California*,[216] one of the most well known cases respecting one's property interest in his or her body. In this case, the Supreme Court of California was asked to determine whether Mr. Moore had any property rights in his bodily substances, including sperm, tissues and organs that were removed by or supplied to his physician during a course of treatment for leukemia.

Two issues were before the Court. First, whether the physician breached his fiduciary duty to disclose all relevant information prior to obtaining Mr. Moore's consent. And second, whether the defendants committed the tort of conversion by taking Mr. Moore's property (i.e. his cells) and converting them. The Court had no difficulty in concluding that the physician had breached his duty of disclosure to Mr. Moore. However, the question of conversion raised several issues.

Although the majority conceded that Moore might have "some right to control the use of excised cells,"[217] it held that Moore's rights were better protected by the requirement of an informed consent prior to any medical procedure. Based on their concern regarding the access to such materials for research, the majority held that Mr. Moore could not be said to have any 'property' or 'ownership' rights left in the cells for the purpose of the tort of conversion. However, the majority noted that "we do not purport to hold that excised cells can never be property for any purpose whatsoever."[218]

It is apparent that public policy considerations played a large role in this decision. In particular, the Court was clearly cognizant of the potential negative effect on scientists' access to the necessary raw materials for research if Mr. Moore's tort claim was successful. The constraint on research would have been onerous. Researchers would have to obtain consent from the prior 'owner' of the material and would possibly have to contract with the prior 'owner' to use the material in research and thereafter compensate the prior 'owner' if the research was profitable.[219] Consequently, in the majority's view, the case was best dealt with by assigning liability based on the physician's existing disclosure obligations.

Clearly, employing a pure property approach towards disputes over frozen *in vitro* embryos is fraught with difficulties, including the application of family law respecting the division of property to frozen *in vitro* embryos upon the dissolution of a relationship and the engagement of succession law if one of the donors predeceases implantation. Further, if the property approach was accepted, as a form of pure property, *in vitro* embryos could, and would most likely become the subject of commercial transactions.

2.6.2.2 The *In vitro* Embryo as *Sui Generis*

The view that the *in vitro* embryo is *sui generis* or unique stems from the belief that an *in vitro* embryo is unique and deserves greater respect than other human tissues or organs because of its potential to develop into a human being. However, given that it has not yet achieved of the status of a human being, it occupies an interim status between property and personhood.[220]

This view has been accepted by a number of committees set up to explore issues related to AHR. For example, Canada's Royal Commission on New Reproductive

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214 *Ibid.* at 425.
215 *Ibid.* at 427.
216 271 Cal. Rep. 146 (Supreme Court of California 1990).
217 *Ibid.* at 158.
218 *Ibid.* at 160.
219 *Ibid.* at 154 – 155.
220 Daar, *supra* note 205 at 634.

Technologies stated that "[l]egal rules relating to the zygote and embryo should be designed to ensure that they are treated with respect as a form of potential human life."[221]

The Waller Commission of Victoria and the New South Wales Law Reform Commission have also adopted this interim position. The Waller Commission noted that although an *in vitro* embryo is a unique entity, it is not a person.[222] The New South Wales Law Reform Commission stated that, "it accepts the special status of the embryo, and recognises that its handling — whether for implantation, storage or for research should be a matter of special consideration."[223]

In its discussion on research on embryos, the U.K. Warnock Committee has also stated that, "the embryo of the human species ought to have a special status."[224]

International Law

The only international instrument with a specific reference to *in vitro* embryos is the Council of Europe's Convention on Human Rights and Biomedicine, to which Canada is not a party.[225] This Convention contains a specific provision respecting research on *in vitro* embryos, a topic that will be explored more fully in the following chapter. Article 18 states:

1. Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo.

2. The creation of human embryos for research purposes is prohibited.[226]

The existence of this provision, and its placement following two articles that address the protection of persons undergoing research is noteworthy. It could be argued that if *in vitro* embryos had the status of personhood, there would have been no need to have a separate provision to protect them. However, the inclusion of a specific provision to protect *in vitro* embryos is an indication that although *in vitro* embryos are not persons, their potential to become a human being affords them additional protections, that are traditionally not afforded to property.

U.S.

One of the leading cases involving a dispute over *in vitro* embryos between former partners is *Davis v. Davis*,[227] which was discussed above. At trial, the court accorded the *in vitro* embryo the status of personhood and awarded custody to Mrs. Davis for implantation, which was her intention at the time. The case was appealed and by the time it reached the Tennessee Supreme Court, the couple was divorced and Mrs. Davis wanted them to be donated to an infertile couple, while Mr. Davis wanted to dispose of the *in vitro* embryos.

Having no legislation or disposition agreement to guide it, the Tennessee Supreme Court examined the legal status of a frozen *in vitro* embryo. The Court found that the *in vitro* embryo should not be treated as a form of property nor should it be granted the legal status of a person. Rather, *in vitro* embryos should occupy a special category "that entitles them to a special respect because of their potential for human life."[228] With respect to the interests of the egg and sperm donor, the Court found that they do not have a "true property interest" but rather "an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."[229]

This issue of donated gametes has been considered in the context of a deceased's estate. In *Hecht v. Superior Court of Los Angeles County*,[230] the Court was asked to determine whether the deceased's girlfriend (Ms. Hecht) or his adult children controlled his stored sperm. Prior to his death, the deceased deposited sperm with a sperm bank. A storage agreement was executed providing that, in the event of his death, the sperm would continue to be stored or released either to the executor of his estate, Ms. Hecht

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221 *Supra* note 9 at 627.
222 *Supra* note 210 at 27.
223 New South Wales, Law Reform Commission, Report 58, Artificial Conception Report 2 – *In vitro* Fertilization, (1987) at 27.
224 *Supra* note 212 at 63.
225 *Supra* note 88. Canada is not a party to this Convention.
226 *Ibid.* at Article 18.
227 *Supra* note 192.
228 *Ibid.* at 596.
229 *Ibid.* at 597. The term 'preembryo' is often referred to describe the period from fertilization up to 14 days after fertilization.
230 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

or her physician. The deceased's will assigned all "right, title, and interest" in the stored sperm to Ms. Hecht.

The probate court ordered the destruction of the sperm. However, Ms. Hecht appealed to the Court of Appeal of California, which rejected any reliance on Moore to argue that the deceased had no ownership or possessory interest in his sperm.[231] Instead, the Court, following the decision in Davis, found that the deceased had an interest in his stored sperm, although not governed by "the general law of personal property, [s]perm occupies an interim category that entitles them to special respect because of their potential for human life."[232]

Therefore, the Court held that at the time of death, the deceased had an interest in the nature of ownership, so that he had decision-making authority as to the disposition of the sperm within the scope of public policy set by law.[233] In coming to its conclusion, the Court relied on the American Fertility Society's view that it should be left up to the donors to decide the disposition of gametes and concepti.[234] The Court's decision was also influenced by the American Fertility Society's position respecting *in vitro* embryos which states that they deserve respect greater than that accorded to human tissue, but not the same degree of respect accorded to actual persons.[235]

Three years later, Ms. Hecht was forced to petition the Court of Appeal again in order to secure the release of all of her former partner's stored sperm.[236] This dispute arose out of the property settlement reached by the parties. The Court reaffirmed its earlier position that genetic material is a unique form of "property" and is not subject to division among parties that is inconsistent with the express wishes of the deceased. The Court stated that "[a] man's sperm or a woman's ova or a couple's embryos are not the same as a quarter of land, a cache of cash, or a favorite limousine. Rules appropriate to the disposition of the latter are not necessarily appropriate for the former."[237] As a result, the intent of the sperm donor, even when deceased, controlled the disposition and use of the sperm.[238]

France

The French Courts have also grappled with the legal status of stored sperm and *in vitro* embryos. *In Parapalaix c. Centre d'etude et de Conservation du Sperme*,[239] the French Court characterized sperm as the "seed of life," which is tied to the fundamental liberty of a human being to conceive or not to conceive.[240] As such, the Court concluded that the fate of stored sperm should be decided based on the donor's intent.

Almost a decade later, the French court was faced with the question of the status of *in vitro* embryos in *Mme. O. c. CECOS*.[241] In this case, a couple had *in vitro* embryos stored at the defendant facility. Before transfer, the husband passed away and the facility refused to allow Mme. O to undergo transfer of the *in vitro* embryo. The High Court held that a fertilized embryo was "not a legal entity with respect to the parents."[242] Moreover, *in vitro* embryos were not the joint property of the couple.[243]

At present, the recognition of the *in vitro* embryo as *sui generis* appears to be the most accepted view in the academic literature. This interim position between pure property and full personhood status, according to various academics, accords an appropriate amount of respect to an entity that has the potential to be a human being.[244]

2.6.2.3 The *In vitro* Embryo as a Person

Finally, there is the view that the embryo is a person with full moral standing and an inviolable right to life. For some, this status applies from the moment of conception. For others, this status applies at some specific developmental stage (e.g., appearance of the primitive streak at the 15th day) in which case the embryo achieves full moral standing not at the moment of conception, but when it reaches the specific developmental stage.

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231 *Ibid.* at 279.
232 *Ibid.* at 281.
233 *Ibid.* at 283.
234 *Ibid.* at 282.
235 *Ibid.* at 282.
236 *Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222 (Court of Appeal of California 1997).
237 *Ibid.* at 226.
238 *Ibid.* at 226 – 227.
239 *Supra* note 42.
240 *Supra* note 43 at 686.
241 T.G.I. Rennes, June 30, 1993, J.C.P. 1994, II, 22250, 169.
242 *Ibid.* at 169.
243 *Supra* note 43 at 690.
244 J. Coleman, "Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures" (1996) 27 Pac. L. J. 1331 at 1343.

American Convention on Human Rights

The Organization of American States ("OAS") is a regional organization with membership from South and Central America, the Caribbean, the U.S. and Canada. It is a regional agency within the meaning of Article 52 of the United Nations *Charter*.

In 1969, the OAS Conference on Human Rights adopted the *American Convention on Human Rights* ("*Convention*").[245] The *Convention* is the only international human rights instrument that expressly contemplates protection of the fœtus. Although the U.S. is a signatory, it has not ratified the *Convention*. Canada has neither signed nor ratified the *Convention.*

Article 4(1) of the *Convention* provides:

> Article 4.1
>
> Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

In Article 4(1), the protection of the unborn is qualified by the words "in general." The *Travaux Préparatoires* to the *Convention* indicate that there was strong opposition by some State delegations to a proposal to delete the phrase "in general." It was felt that the right to lawful abortion, which existed in some countries, should not be compromised. The great majority of States were of the view however, that Article 4 should protect the life of the unborn and many of the OAS member States view abortion as a crime.[246]

In contrast to the *Convention*, the *American Declaration of the Rights and Duties of Man* protects the right to life without reference to the moment of conception. The Commission concluded in the Baby Boy case,[247] which challenged U.S. abortion laws, that the fœtus was not protected by the right to life in the *Declaration*, which does not contain the phrase "in general from the moment of conception." Although Article 4 was not at issue, since the U.S. had not ratified the *Convention*, the Commission nevertheless discussed the meaning of the right to life under that provision and the majority noted that the phrase, "in general from the moment of conception" represented a compromise between the pro and anti-abortion positions of OAS member states.[248]

Mexico, upon ratification of the *Convention*, filed an interpretive declaration to the effect that the expression "in general" does not constitute an obligation to adopt, or keep in force, legislation to protect life from the "moment of conception," since this matter falls within the domain reserved to the States.[249]

There is no Canadian legislation that guarantees an embryo or fœtus the right to life. In most western countries, the prevailing view of the moral status of the embryo is that it is *sui generis*, i.e., deserving of respect. Its status is not viewed as equivalent to that of a child, because of the lack of developmental individualism and sentience, as well as the extremely high natural mortality rate of an embryo.

In Canada, the court has held that an *in utero* embryo and a fœtus are not persons under the law and thus have no legal rights. However, once the fœtus is born alive, his or her legal rights crystallize and for certain purposes, such as tort law, the law may recognize that the child existed before birth.

Because the *in utero* embryo and fœtus have no legal rights, they are not considered to have a right to life. However, the state's interest in the fœtus as a potential human being may increase as it develops within the womb. Once the fœtus is viable, which is sometime in the second trimester of the pregnancy (see Justice Wilson in *Morgentaler*), the state may be able to justify interfering with the pregnant woman's rights in order to protect the fœtus and the health of the mother.

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245 *American Convention on Human Rights*, O.A.S. treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82doc.6rev.1 at 25 (1992) http://www.oas.org/juridico/english/treaties.html

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247 http://www.cidh.org/annualrep/80.81eng/usa2141.htm

248 *Ibid.*

249 http://www.oas.org/juridico/english/treaties.html

Based on current case law, an *in vitro* embryo existing as it does outside a woman's body would likely be assigned the same non-person status as an *in utero* embryo and fœtus by a court, and thus be found not to possess any legal rights until after birth. The court would likely find that an *in vitro* embryo does not have a right to life.

Australia

The status of the fœtus in Australia is similar to other common law jurisdictions. *In the Marriage of: F. Husband and F. Wife Injunctions*,[250] the Court held that a "fœtus has no legal personality and cannot have a right of its own until it is born and has a separate existence from its mother."[251] Similar to Canada, the Australian courts have recognized that the fœtus has a contingent interest in tort law. However, the interest only crystallizes once the fœtus is born alive.[252]

U.K.

The fate of frozen *in vitro* embryos has recently been addressed in a highly publicized case in the U.K.[253] Two women sought to use their frozen *in vitro* embryos against the wishes of their former partners, who had withdrawn their consent to the storage and use of the embryos. One of the arguments presented on behalf of the women was that the right to life pursuant to article 2 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*,[254] was applicable to the embryo. Although the claimants conceded that an *in vitro* embryo was not a human being, they argued that an *in vitro* embryo has "special status" deserving protection of a "qualified" right to life under article 2.[255] The Court reviewed the U.K. jurisprudence addressing the legal status of the fœtus, which states that a fœtus, at whichever stage of development, does not have an existence outside of its mother's body and therefore does not have a right to life. Given this case law, the Court found that an *in vitro* embryo also could not be considered to be a person.[256] Further, an *in vitro* embryo could not be considered to have a right to life or a "qualified" right to life.[257]

U.S.

In *Roe v. Wade*,[258] the U.S. Supreme Court held that the word "person" contained in the Fourteenth Amendment to the U.S. Constitution does not include the unborn.[259] However, the Court did recognize the state's interest in protecting the unborn. To this end, the Court formulated the 'trimester approach', which attempted to balance the privacy interests of the mother and the interest of the state in protecting the life of the unborn. Using this approach, during the first trimester of pregnancy, the state may not interfere with a woman's decision to undergo an abortion. However, by the third trimester, the state may interfere quite intensely to preserve the life of the fœtus.[260]

In 1992, the U.S. Supreme Court upheld the principles outlined in *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[261] However, the trimester scheme was replaced by a standard of viability approach. The Court held that the state had a continuing interest in preserving life, which begins at conception and becomes compelling at the stage where the fœtus is viable. Prior to viability, the state may regulate abortion provided that it does not place "an undue burden" on a woman's right to choose to terminate her pregnancy. After the stage of viability, the state may regulate more strictly.[262]

Some U.S. states have passed legislation respecting AHR. However, Louisiana is the only state to grant personhood status to the *in vitro* embryo. In Louisiana, legislation exists that states that *in vitro* embryos are biological

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250 (1989) 13 Fam. L.R. 189 (Fam. Ct. of Australia).

251 *Ibid.* at para. 31. This case reiterated the point made in *Attorney-General ex relation Kerr v. T.* (1983) 1 Qd R 404.

252 *Watt v. Rama*, (1972) VR 353.

253 *Evans v. Amicus Healthcare Ltd and others*; *Hadley v. Midland Fertility Services Ltd and others*, [2003] EWHC 2161 (Fam. Div.).

254 As adopted in the U.K. *Human Rights Act 1998*.

255 *Supra* note 253 at para. 174.

256 *Ibid.* at para. 178.

257 *Ibid.*

258 *Supra* note 52.

259 *Ibid.* at 158.

260 *Ibid.* at 163.

261 505 U.S. 833 (U.S. S.C. 1992).

262 In 2000, the U.S. Supreme Court reaffirmed the principles set out in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* in *Stenberg* v. *Carhart*. In this case, the narrow majority held that the state prohibition on partial birth abortions during the period of non-viability was an undue burden on the woman's right to choose to terminate pregnancy.

human beings entitled to the protections of a "juridical person."[263] Furthermore, as a juridical person, the *in vitro* embryo can sue and be sued. Accordingly, *in vitro* embryos are not the property of physicians, the IVF clinic or the gamete donors. However, the physician or the medical facility storing the *in vitro* embryo, are responsible for the safekeeping of the frozen *in vitro* embryo. The statute also states that *in vitro* embryos should not be intentionally destroyed and should be made available for adoption if the donors rescind their parental rights.[264]

France

In *Mme P. c. La Grave Hôpital*,[265] a storage agreement was executed between a couple and the defendant hospital, which stated that both parties had to consent before implantation occurred. The husband died and the wife argued that the agreement should be disregarded because life began at conception and public policy considerations favoured the implantation of the *in vitro* embryo, a conceived life. The Court held that French law did not recognize frozen *in vitro* embryos as capable of possessing rights.[266] Accordingly, the Court ordered the destruction of the embryos.

Europe

The European Commission on Human Rights has addressed the right to life of the fœtus in two cases. In *X. v. U.K.*,[267] the applicant, a citizen of the U.K., attempted to obtain an injunction to prevent his wife from having an abortion. The U.K. court dismissed the application because an injunction could only be granted to protect a legal right. The Court held that a fœtus had no legal rights until it is born and had a separate existence from its mother. Further, the father had no legal right under U.K. law to prevent the mother from obtaining an abortion.

The father applied to the Commission contending that the U.K. law violated several articles of the *European Convention on Human Rights*, including article 2, which guarantees to "everyone" the right to life. With respect to the reference to "everyone" in article 2, the Commission noted that "both the general usage of the term 'everyone' ('toute personne') in the Convention…and the context in which this term is employed in Article 2…tend to support the view that it does not include the unborn."[268]

With respect to whether "the right to life" applied to only the life of individuals already born or also includes the unborn life of the fœtus, the Commission noted the three available interpretations as: (1) that article 2 does not cover the fœtus at all; (2) that the fœtus has a "right to life," but with implied limitations; or (3) that there is an absolute "right to life" of the fœtus.[269]

The Commission concluded that recognizing the absolute right to life of a fœtus would be contrary to the object and purpose of the Convention.[270] However, it declined to conclude which of the remaining two interpretations was the correct one.

The Commission was faced with similar facts in *R.H. v. Norway*.[271] In this case, the Commission noted that the Austrian Constitutional Court had concluded that article 2 did not protect the unborn, while the German Federal Constitutional Court found that article 2 did protect unborn human beings.[272] Once again, the Commission declined to decide whether article 2 of the Convention protected the fœtus, but stated that it "will not exclude that in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent article 2 protects the unborn life."[273]

Germany

Germany has conferred human status on the *in vitro* embryo in its *Embryo Protection Act*.[274] In the *Act*, human dignity and the right to life are assigned to the human

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263 La. Rev. Stat. Ann. [ss.] 9:121 – 9:133 (1991). For a discussion of the Louisiana law see : T.S. Jost, "Rights of Embryos and fœtus in Private Law" (2002) 50 Am. J. Comp. L. 633.

264 *Ibid.*

265 *CA Toulouse, August 18, 1994, J.C.P. 1995, II, 224072, 301.*

266 *Supra* note 43 at 690.

267 13 May 1980, App. No. 8416/78.

268 *Ibid.* at para. 9.

269 *Ibid.* at para. 17.

270 *Ibid.* at para. 21. See also B.E. Hernandez, "To Bear or Not to Bear: Reproductive Freedom as an International Human Right" (1991) 17 Brook. J. Int'l L. 309 at 333.

271 19 May 1992, App. No. 17004/90.

272 *Ibid.* at para. 26.

273 *Ibid.* at para. 25.

274 *Embryo Protection Act* of 13 December 1990.

embryo from the moment of fertilization. Consequently, the *Act* prohibits the use of *in vitro* embryos for purposes other than their maintenance and survival.[275]

Canada

There is no Canadian jurisprudence addressing the legal status of an *in vitro* embryo. With the recent passing of the *Assisted Human Reproduction Act*, it is likely that the *Charter* will apply to certain AHR activities. The courts would likely look for guidance to the jurisprudence discussing the legal status of the fœtus and whether or not the right to life applies, as guaranteed by s. 7 of the *Charter*, as a starting point.

In *Borowski v. Attorney General of Canada*,[276] Mr. Borowski challenged the abortion provision then in place in the *Criminal Code* on the basis that it infringed the right to life of the fœtus under s. 7 of the *Charter*. The Saskatchewan Court of Appeal concluded that a fœtus is not a person in law. Further, the terms "everyone" in s. 7 and "every individual" in s. 15 of the *Charter* do not include a fœtus, and consequently, the *Charter* was inapplicable.

In *R. v. Demers*,[277] the claimant was convicted of several protest-related offences under the B.C. *Access to Abortion Services Act*. In addition to arguing that the legislation at issue infringed his right to freedom of expression under the *Charter*, Mr. Demers also claimed that the term "everyone" in s. 7 included an unborn fœtus. The B.C. Court of Appeal reviewed the Canadian jurisprudence regarding the legal status of the fœtus and held that "these cases leave no room for this court to entertain the constitutional argument advanced by Mr. Demers."[278] The Court concluded that the right to life does not extend to an unborn fœtus.

Although the SCC has never directly addressed the question put forth in *Borowski* or *Demers*, it has addressed foetal rights in the child-welfare context and in the criminal context.

In *Tremblay v. Daigle*,[279] the legal status of the fœtus was examined under the Quebec *Charter of Human Rights and Freedoms*. In this case, the father of an unborn child attempted to prevent the mother from having an abortion by seeking an injunction. The SCC concluded that a fœtus was not included in the term "human being" found in the Quebec *Charter*.[280] In order to have rights, a fœtus must be born alive.[281]

The Court also had the opportunity to discuss the legal status of the fœtus in *Winnipeg Child and Family Services v. G.(D.F.)*[282] *In this case, the SCC was asked whether tort law or parens patriae* jurisdiction should be extended to allow a court to order the detention and treatment of a pregnant woman to prevent harm to her fœtus. The majority cited the general principle that in Canadian law a fœtus is not recognized as a legal person capable of possessing rights.[283] This principle applied to "all aspects of the law."[284] The Court did recognize that once a child was born alive, the law might acknowledge that the child existed before its birth for limited purposes. However, "any right or interest the fœtus may have remains inchoate and incomplete until the child's birth."[285]

In *R. v. Sullivan*,[286] the accused midwives were charged with criminal negligence causing death to a person after a baby they were attempting to deliver died while still in the birth canal. The Court was asked to determine whether the fœtus in the birth canal was a person within the meaning of the Criminal Code provision in question. The Court found that the fœtus was not a "human being" or "person" and consequently, the accused could not be convicted of the above-mentioned offence.

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275 Goethe-Institut Zentrale, http://www.goethe.dc/kug/buw/fut/thm/en37295.htm (date accessed: November 26, 2003); Pitrolo, *supra* note 206 at 190.

276 (1987), 39 D.L.R. (4th) 731 (Sask. C.A.). Leave to the SCC was granted to this case, but the SCC held that the appeal was moot and that the appellant no longer had standing. Consequently, the SCC decision that it should not exercise its discretion to hear the case.

277 [2003] B.C.J. No. 75 (B.C.C.A.) leave to S.C.C. denied [2003] S.C.C.A. No. 103.

278 *Ibid.* at para. 23.

279 [1989] 2 S.C.R. 530.

280 *Ibid.* at para. 72.

281 See also M. Shaffer, "Foetal Rights and the Regulation of Abortion" (1994) 39 McGill L.J. 58.

282 *Supra* note 65.

283 *Ibid.* at para 11.

284 *Ibid.* at para 11.

285 *Ibid.* at para 15.

286 [1991] 1 S.C.R. 489.

In sum, at the present time in Canada, the law does not recognize a fœtus as a legal person.[287] The result is that a fœtus does not enjoy the human rights protections guaranteed by the *Charter*.

Discussion

To best understand the issues related to the status of an *in vitro* embryo in Canada, one could consider that the building blocks of life exist on a continuum of development. In the AHR context, the sperm and the egg are at one end of the continuum, fusion of the sperm and egg results in an *in vitro* embryo that exists outside of its progenitors, then after transfer and implantation the embryo develops into a fœtus that would not be viable outside the body of a woman, then to a fœtus that would be viable outside the body of a woman, and finally to a baby.

The fundamental problem with the argument that *in vitro* embryos should be accorded personhood status, with all the accompanying legal rights, most importantly the right to life, is that it assigns more protection to the *in vitro* embryo than Canadian and other courts have guaranteed a fœtus.[288] If an *in vitro* embryo were assigned personhood status and consequently the right to life, one could argue that the natural conclusion would be that the *in vitro* embryo has the right to be transferred. However, upon implantation under the laws of most jurisdictions, including Canada, a fœtus that would not be viable outside the body of a woman could be aborted with very little state interference.

In the Canadian context, if one accepts this continuum of development and the applicable jurisprudence discussing the various stages along the continuum, it would follow that since a non-viable fœtus does not attract the status of a legal person, then an *in vitro* embryo also would not attract the legal status of personhood.[289]

However, some commentators have questioned whether it is appropriate to use the jurisprudence relating to the fœtus to draw analogies between the *in vitro* embryo and the fœtus.[290] In the foetal rights jurisprudence, the fœtus is inextricably linked to the mother in a circumstance where the interests of the fœtus and the mother are in conflict and a choice to favour the interests of either the mother or the fœtus must be made. This is not the case where an *in vitro* embryo is concerned because it exists as a separate entity from its progenitors, and consequently there is no imminent conflict of interest. Yet at the present time, an *in vitro* embryo cannot develop into a fœtus and thereafter into a human being without being implanted into a woman. Although a direct conflict of rights does not exist between the *in vitro* embryo and its progenitors at that point along the continuum of development, once it is transferred into a woman's body the rights of the woman are paramount in most jurisdictions and only as the embryo moves towards the other end of the continuum does the state's interest in the developing life become paramount.

Conclusion

It is apparent that the conception of life and the continuum of development play a large role in an individual's or society's view of the entities along that continuum. For example, sperm and eggs, which are at the beginning of the continuum, are openly bought and sold in the U.S., with very little opposition.[291] Whereas *in vitro* embryos are not openly sold in the U.S., even though there is no legislation prohibiting their sale.

Essentially, as the potential for life increases, the desire to protect the developing life also increases. Whether or not human rights instruments will play a role in protecting the potential for life that exists in an *in vitro* embryo is dependant on the legal status of *in vitro* embryo and the enactment of legislation to regulate activities associated with AHR generally, and *in vitro* embryos in particular. The question of the legal status of the *in vitro* embryo remains unanswered. However, at the present time, the most widely accepted approach is that *in vitro* embryos are *sui generis*. At this point in time, human rights would not apply to the *sui generis in vitro* embryo.

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[287] For a summary of the jurisprudence respecting foetal rights see: J.E. Hanigsberg, "Power and Procreation: State Interference in Pregnancy" (1991) 23 Ottawa L. Rev. 36.

[288] Daar, *supra* note 205 at 635.

[289] Windsor, *supra* note 207 at 1009.

[290] Daar, *supra* note 205 at 635.

[291] Note that the AHR Act does not allow for the purchase or sale of gametes or *in vitro* embryos.

2.7 Further Issues to Consider

There is no question that AHR technology will continue to develop and improve. It is also likely that with the increased knowledge of the human genome and its impact on reproduction, along with the reality that infertility is on the rise globally, the number of individuals and couples who require AHR technology or desire to use AHR technology will increase. These future realities present a number of complex questions, including:

- Does a child have the right to have two biological parents of opposite sex?
- Does a child have the right to have a 'normal' or 'natural' genetic origin?
- What does the 'best interest of a child' mean in the context of AHR?
- Do parents have the right to have a child conceived using their own genetic material, even if this means using the genetic material from three biological parents?
- How far can the state regulate such activities?

These questions are multi-dimensional and require analysis from a legal, ethical and social perspective. From a human rights perspective, we must ask whether the current human rights framework adequately addresses the immediate and future issues that have arisen or may arise with respect to AHR.

2.8 Conclusion

The *Charter* and Human rights legislation, such as the *Canadian Human Rights Act,* as well as the various provincial human rights statutes, are applicable to certain aspects of AHR, namely the equitable provision of services.

It is inevitable that disputes will arise with respect to AHR. In addition, the lack of jurisprudence applying human rights principles to AHR currently represents a gap in our understanding of what human rights may be engaged.

Another challenge, as the discussion in this chapter illustrates, is that many of the domestic and/or international human rights engaged in the context of AHR, such as the right to reproductive autonomy, the right to health and the right to benefit from scientific knowledge are not well developed. Moreover, the rights that exist at international law, but have no corresponding right in our domestic law, are difficult to enforce. Even the more developed rights, such as the right to equality or the right to security of the person have not yet or have rarely been applied in the context of AHR. This is not surprising, given that in general, the law lags behind the development of technology.

For the immediate future, it is apparent that the human rights issues related to AHR will require the application of traditional human rights concepts to very non-traditional problems or issues. However, other rights or concepts may emerge to assist in addressing the various issues that arise. For example, the emerging concept of human dignity will likely play a leading role in the future domestic and international discourse on this subject.