

6-1-2009

## Does Donating Sperm Give the Right to Withdraw Consent? The Implications of In Vitro Fertilization in the United Kingdom and Canada

Porsha L. Cills

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

 Part of the [Comparative and Foreign Law Commons](#), [International Law Commons](#), and the [Medical Jurisprudence Commons](#)

---

### Recommended Citation

Cills, Porsha L. (2009) "Does Donating Sperm Give the Right to Withdraw Consent? The Implications of In Vitro Fertilization in the United Kingdom and Canada," *Penn State International Law Review*: Vol. 28: No. 1, Article 5.  
Available at: <http://elibrary.law.psu.edu/psilr/vol28/iss1/5>

This Comment is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

# Does Donating Sperm Give the Right to Withdraw Consent? The Implications of In Vitro Fertilization in the United Kingdom and Canada

Porsha L. Cills\*

## Table of Contents

I.	INTRODUCTION.....	112
II.	EXPLANATION OF IN VITRO FERTILIZATION TREATMENTS.....	113
III.	LEGISLATIVE HISTORY.....	115
	A. <i>United Kingdom</i> .....	115
	B. <i>Canada</i> .....	121
	1. AHR Act—Section 8 (Consent to Use).....	123
	2. Canada’s Regulatory Procedures for Federal Acts.....	124
	3. Purpose of Section 8 (Consent to Use) Regulations.....	125
IV.	OTHER INTERNATIONAL POLICIES.....	126
V.	REVIEW OF LEADING CASES FROM THE UNITED KINGDOM AND CANADA.....	129
	A. <i>United Kingdom Case</i> —Evans v. United Kingdom.....	129
	B. <i>Canada Case</i> —Caufield v. Wong.....	131
	C. <i>Differences Between Evans and Caufield</i> .....	132
VI.	THE FUTURE OF IN VITRO FERTILIZATION LEGISLATION.....	133
	1. Is the Legislation Gender Neutral?.....	134
	2. Possible Solutions for Fair Legislation.....	135
VII.	CONCLUSION.....	136

---

\* Juris Doctorate Candidate, The Dickinson School of Law of the Pennsylvania State University, expected May 2010; Bachelor of Arts, University of Michigan, awarded May 2005. I would like to thank Professor Robert E. Rains for his assistance with my topic selection. A special thank you to Ashley Clark, Penn State Dickinson Law 2010, Michelle Jackson, and Landen Zackery for all their support throughout law school. Finally, this comment is dedicated to my parents, Ludin and Barbara Cills, for their endless support and encouragement.

## I. INTRODUCTION

Infertility is defined as the inability to become pregnant after a year of regular unprotected sexual intercourse.<sup>1</sup> It is estimated that up to one in eight Canadian couples experience infertility.<sup>2</sup> Thus, for many couples that want to start a family, the dream of having children is not easily realized.<sup>3</sup> Many of these couples turn to assisted reproductive technology (ART), like in vitro fertilization (IVF),<sup>4</sup> to increase the probability that they will conceive a child. In fact, the twenty-five IVF centers of Canada experienced live births from 8,278 IVF treatment cycles in 2006.<sup>5</sup>

The United Kingdom and Canada are the sole leaders in regulating the use of assisted human reproductive treatments.<sup>6</sup> Each has undertaken legislative action to regulate the increasing use of these treatments.<sup>7</sup> However, both countries still face questions regarding the current legal right of parties to withdraw consent before the completion of an assisted reproductive procedure.<sup>8</sup> This comment addresses the injustice of that legal right. Section II explains the medical procedure associated with in vitro fertilization treatments. Section III focuses on the development of the legislative history that considered the social, ethical, and legal implications of assisted human reproduction in the United Kingdom and

---

1. See Keith Alan Byers, *Infertility and In Vitro Fertilization A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 266 (1997).

2. Health Canada, Assisted Human Reproduction Procedures Covered by the Act, <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/legislation/proc-tech-eng.php> (last visited Jan. 31, 2009) [hereinafter Assisted Human Reproduction Procedures Covered by the Act].

3. See Byers, *supra* note 1, at 266-67.

4. In vitro fertilization is an invasive process that requires "hormonal stimulation of ovaries to produce eggs, the retrieval of eggs using a needle, fertilization of eggs with collected sperm in a lab dish, and transfer of one or more resulting embryos to a woman's uterus." *E.g.*, Assisted Human Reproduction Procedures Covered by the Act, *supra* note 2.

5. Canadian Fertility and Andrology Society, *Human Assisted Reproduction 2008 Live Birth Rates for Canada*, Dec. 15 2008, [http://www.cfas.ca/index.php?option=com\\_content&view=article&id=211%3Ahuman-assisted-reproduction-2008-live-birth-rates-for-canada&catid=929%3Apress-releases&Itemid=460](http://www.cfas.ca/index.php?option=com_content&view=article&id=211%3Ahuman-assisted-reproduction-2008-live-birth-rates-for-canada&catid=929%3Apress-releases&Itemid=460)

6. DEPARTMENT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT, 2006, Cm. 6989, at 1, *available at* [http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh\\_073098](http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_073098) (follow "Download Review" hyperlink); Health Canada, Assisted Human Reproduction Internationally, <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/general/international-eng.php> (last visited Oct. 5, 2008).

7. See Human Fertilisation and Embryology Act 2008, 2008, c. 22 (U.K.); Assisted Human Reproduction Act, 2004 S.C., ch. 2 (Can.); Human Fertilisation and Embryology Act 1990, 1990, c. 37 (U.K.).

8. See *Evans v. United Kingdom*, App. No. 6339/05, Eur. Ct. H.R. 6339/05(2007); *Caufield v. Wong*, [2005] A.B.Q.B. 290 (Can.), *available at* 2005 AB.C. LEXIS 485.

Canada. Section IV describes assisted human reproduction legislation in other countries. Section V explores the legal right to withdrawing consent through a review of current case law in both the United Kingdom and Canada. Section VI focuses on the future of in vitro fertilization legislation and proposes solutions to correct current injustices, while Section VII provides a concise conclusion on issues that need to be addressed in future assisted human reproduction legislation.

## II. EXPLANATION OF IN VITRO FERTILIZATION TREATMENTS

The purpose of in vitro fertilization is to allow an infertile couple the opportunity to conceive and bear children by enhancing the probability of conception.<sup>9</sup> Infertility may occur for a variety of reasons, including differences in age, use of particular medications, physical diseases, or chronic diseases.<sup>10</sup> The traditional in vitro fertilization case involves an “infertile couple seeking assistance to successfully unite the man’s sperm with the woman’s ova/egg.”<sup>11</sup>

Before the process of in vitro fertilization can start, a woman must engage in a two-week regime of daily drug injections.<sup>12</sup> The injections simultaneously prepare the woman’s ovaries and cause eggs to mature.<sup>13</sup> These treatments often result in pain, bloating, and mood swings.<sup>14</sup> In addition, the woman also has to undergo daily blood tests and ultrasound examinations.<sup>15</sup> The tests are essential for the doctor to monitor the ovaries and remove the eggs at the right time.<sup>16</sup> The physician can remove the eggs either by a laparoscopic procedure or by an ultrasound procedure.<sup>17</sup> After the completion of these initial steps, the physician can start the process of in vitro fertilization.<sup>18</sup> The in vitro fertilization process is described as a

---

9. See Byers, *supra* note 1, at 266-67.

10. *Id.* at 268.

11. *Id.* at 274.

12. Larry Thompson, *Fertility with Less Fuss*, TIME, Nov. 14, 1994, at 79, available at <http://www.time.com/time/magazine/article/0,9171,981788-1,00.html>.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Doug Brown, *Childless See New Hope In Vitro*, L.A. TIMES, Oct. 6, 1985, at 1, available at 1985 WLNR 927873. (“Laparoscopic egg retrieval is a form of surgery in which an incision is made in the woman’s naval area and a small telescope or laparoscope is inserted through the incision to bring the ovaries into view. In contrast, ultrasound guided egg retrieval is done without surgery. A woman is given local anesthesia and physicians use ultrasound to guide them as they insert specially designed needles through the abdomen to find and remove eggs from the ovary.”)

18. Byers, *supra* note 1, at 273-82.

method of fertilizing human ova outside the body by collecting the mature ova and placing them in a dish with a sample of spermatozoa. After the ova are allowed to incubate over a period of 48 to 72 hours, the fertilized ova are injected into the uterus through cervix. The procedure for the fertilized ova to implant takes 2-3 days.<sup>19</sup>

Once the embryos are transferred, the couple must wait to see if any of the embryos implant themselves on the walls of the woman's uterus.<sup>20</sup>

Traditionally, in vitro fertilization involves transferring only three embryos.<sup>21</sup> The remaining unused embryos are frozen, destroyed, or donated at the discretion of the couple.<sup>22</sup> Cryopreservation, a freezing technique that preserves the embryos, is advantageous in that it allows the couple to use the embryos at a later date should the first attempt not result in pregnancy.<sup>23</sup> Additionally, cryopreservation allows the embryos to be stored for later use in the event the woman is not capable of producing eggs or experiences a decline in the quality and quantity of eggs.<sup>24</sup> Furthermore, cryopreservation may also be useful in the event a woman is rendered sterile from undergoing treatments such as chemotherapy.<sup>25</sup> By already having embryos available for later use, the woman avoids the discomfort of having to undergo intensive drug treatment, and any additional laparoscopic or ultrasound procedures.<sup>26</sup> Thus, in vitro fertilization combined with cryopreservation is an effective option for infertile couples.<sup>27</sup>

However, it is important for couples to assess the risks involved with in vitro fertilization procedures.<sup>28</sup> Some of the common complications associated with in vitro fertilization treatments are the failure of the treatment, the risk of multiple pregnancies, the risk associated with egg collection, and the possibility of ectopic pregnancy.<sup>29</sup>

---

19. *Id.*; see, e.g., Assisted Human Reproduction Procedures Covered by the Act, *supra* note 2.

20. Byers, *supra* note 1, at 273-82.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Byers, *supra* note 1, at 273-82.

26. *Id.*

27. *Id.*

28. Human Fertilisation and Embryology Authority Frequently Asked Questions About Treatment, <http://www.hfea.gov.uk/2567.html> (last visited Aug. 27, 2009).

29. *Id.*; National Library of Medicine and the National Institute of Health Medline Plus, Ectopic Pregnancy, <http://www.nlm.nih.gov/medlineplus/ency/article/000895.htm> (last visited Feb. 7, 2009) (explaining that women who have in vitro fertilization have an increased risk of developing an ectopic pregnancy, which occurs when the baby starts to form outside the uterus, such as in the fallopian tube).

### III. LEGISLATIVE HISTORY

In addition to facing the constant risks associated with procedures, the further development of assisted reproductive technology<sup>30</sup> must continually confront a range of social, legal, and ethical problems.<sup>31</sup> While views and opinions differ widely, both the United Kingdom and Canada have been the pioneers of regulating assisted reproductive technology.<sup>32</sup>

#### A. *United Kingdom*

Since 1978, when the world's first baby was born through in vitro fertilization,<sup>33</sup> the United Kingdom has been regarded as a leader in assisted reproduction technology and embryonic research.<sup>34</sup> The 1978 birth triggered a governmental study on the legal, social, and ethical issues arising from the use of assisted reproductive technology.<sup>35</sup> In 1982, the British government established a Committee of Inquiry into Human Fertilization and Embryology chaired by philosopher Baroness Mary Warnock.<sup>36</sup> The Committee published the Warnock Report in 1984,<sup>37</sup> which strongly advocated the need for active monitoring and

---

30. Assisted reproductive technology is a general term referring to the methods used to achieve pregnancy by artificial or partially artificial means. CDC Reproductive Health Assisted Reproductive Technology, <http://www.cdc.gov/ART/> (last visited Nov. 1, 2008). The Centers for Disease Control and Prevention (CDC) has termed assisted reproductive technology to include "all fertility treatments in which both eggs and sperm are handled." *Id.* The process involves "surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman." *Id.*

31. DEPARTMENT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT, 2006, Cm. 6989, at 1, *available at* [http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh\\_073098](http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_073098) (follow "Download Review" hyperlink).

32. *Id.*; Assisted Human Reproduction Internationally, *supra* note 6.

33. *See* Byers, *supra* note 1, at 273 ("The origins of in vitro fertilization date back to 1965 when Dr. Robert Edwards and Dr. Patrick Steptoe first showed that it was possible to fertilize an isolated human egg. The first birth, Louise Joy Brown, took place in England in 1978.")

34. DEPARTMENT OF HEALTH, HUMAN TISSUE AND EMBRYOS (DRAFT) BILL, 2007, Cm. 7087, at v; Byers, *supra* note 1, at 273.

35. DEPARTMENT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT, 2006, Cm. 6989, at 1, *available at* [http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh\\_073098](http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_073098) (follow "Download Review" hyperlink).

36. JOINT COMMITTEE, HUMAN TISSUE AND EMBRYO (DRAFT) BILL FIRST REPORT, 2006-7, H.C. 630-I, H.L. 169-I, *available at* <http://www.parliament.the-stationery-office.com/pa/jt200607/jtselect/jtembryos/169/16904.htm>.

37. *Id.*

regulation in this area.<sup>38</sup> As such, the British Parliament passed the Human and Embryology Act (“1990 Act”) in 1990.<sup>39</sup>

The 1990 Act implemented many of the Warnock Report Recommendations.<sup>40</sup> It provided a legislative framework for the creation of human embryos outside the body, the use of human embryos in medical treatments and research, the use of donated gametes and embryos, and the establishment of the Human Fertilization and Embryology Authority (“HFEA”).<sup>41</sup> The HFEA became fully operational in August of 1991<sup>42</sup> and was responsible for licensing and monitoring assisted reproduction treatment.<sup>43</sup>

Since its passage, the 1990 Act has undergone a series of modifications.<sup>44</sup> The original 1990 Act prohibited licensed clinicians from disclosing identifying information about a patient’s treatment to anyone except the patient.<sup>45</sup> In 1992 Parliament passed the Human Fertilization and Embryology (Disclosure of Information) Act 1992<sup>46</sup> to

---

38. See DEPARTMENT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT, 2006, Cm. 6989, at 2, available at [http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh\\_073098](http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_073098) (follow “Download Review” hyperlink) (noting that the Committee also saw the need for an authority independent of the Government and relevant professions, with both executive and advisory functions, including the licensing of IVF treatment or the use of donated sperm, eggs, or embryos).

39. Human Fertilisation and Embryology Act 1990, 1990, c. 37 (U.K.). See DEPARTMENT OF HEALTH, HUMAN TISSUE AND EMBRYOS (DRAFT) BILL, 2007, Cm. 7087; DEPARTMENT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT, 2006, Cm. 6989, available at [http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh\\_073098](http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_073098) (follow “Download Review” hyperlink); JOINT COMMITTEE, HUMAN TISSUE AND EMBRYO (DRAFT) BILL FIRST REPORT, 2006-7, H.C. 630-I, H.L. 169-I, available at <http://www.parliament.the-stationery-office.com/pa/jt200607/jtselect/jtembryos/169/16904.htm>.

40. See DEPARTMENT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT, 2006, Cm. 6989, at 2, available at [http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh\\_073098](http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_073098) (follow “Download Review” hyperlink); JOINT COMMITTEE, HUMAN TISSUE AND EMBRYO (DRAFT) BILL FIRST REPORT, 2006-7, H.C. 630-I, H.L. 169-I, available at <http://www.parliament.the-stationery-office.com/pa/jt200607/jtselect/jtembryos/169/16904.htm>.

41. JOINT COMMITTEE, HUMAN TISSUE AND EMBRYO (DRAFT) BILL FIRST REPORT, 2006-7, H.C. 630-I, H.L. 169-I, available at <http://www.parliament.the-stationery-office.com/pa/jt200607/jtselect/jtembryos/169/16904.htm>. See Human Fertilisation and Embryology Authority, <http://www.hfea.gov.uk/en/272.html> (last visited Oct. 8, 2008).

42. See Human Fertilisation and Embryology Act 1990 § 5.

43. See *id.* § 8; JOINT COMMITTEE, HUMAN TISSUE AND EMBRYO (DRAFT) BILL FIRST REPORT, 2006-7, H.C. 630-I, H.L. 169-I, available at <http://www.parliament.the-stationery-office.com/pa/jt200607/jtselect/jtembryos/169/16904.htm>.

44. JOINT COMMITTEE, HUMAN TISSUE AND EMBRYO (DRAFT) BILL FIRST REPORT, 2006-7, H.C. 630-I, H.L. 169-I, available at <http://www.parliament.the-stationery-office.com/pa/jt200607/jtselect/jtembryos/169/16904.htm>.

45. 211 PARL. DEB., H.C. (6th ser.) (1992) 1153.

46. *Id.*

lift the prohibition on disclosure. This act allowed licensed clinicians to disclose information about treatment to those associated with the treatment, the patient's general practitioner, or anyone specifically authorized by the patient.<sup>47</sup> In 2004, Parliament agreed on the Human Fertilization and Embryology Authority (Disclosure of Donor Information) Regulations, which allows donor-conceived children to access the identity of their sperm, egg, or embryo donor upon reaching the age of eighteen.<sup>48</sup>

While the 1990 Act created a foundation and instilled public confidence in the use of assisted reproductive technology, the law failed to consider changes in reproductive technology.<sup>49</sup> As a result, the United Kingdom Department of Health undertook a review of the 1990 Act in 2005.<sup>50</sup> Following the Government's public consultation review<sup>51</sup> of the 1990 Act, the Government presented a White Paper in December of 2006.<sup>52</sup> The White Paper set out proposals for changes to the 1990 Act, including the establishment of the Regulatory Authority for Tissue and Embryo.<sup>53</sup> The Government's principal aim in the White Paper was:

47. *Id.*

48. The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations, 2004, S.I. 2004/1511 (U.K.); see JOINT COMMITTEE, HUMAN TISSUE AND EMBRYO (DRAFT) BILL FIRST REPORT, 2006-7, H.C. 630-I, H.L. 169-I, available at <http://www.parliament.the-stationery-office.com/pa/jt200607/jtselect/jtembryos/169/16904.htm>.

49. DEPARTMENT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT: A PUBLIC CONSULTATION (2005), available at [http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH\\_4123863?IdcService=GET\\_FILE&dID=10005&Rendition=Web](http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_4123863?IdcService=GET_FILE&dID=10005&Rendition=Web); see JOINT COMMITTEE, HUMAN TISSUE AND EMBRYO (DRAFT) BILL FIRST REPORT, 2006-7, H.C. 630-I, H.L. 169-I, available at <http://www.parliament.the-stationery-office.com/pa/jt200607/jtselect/jtembryos/169/16904.htm>.

50. REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT: A PUBLIC CONSULTATION, *supra* note 49, at 3 (explaining that the consultation document seeks public views on whether and how the Human Fertilisation and Embryology Act might be updated).

51. The factors that led to the government review were "the development of new procedures and technologies in assisted reproduction, international developments in the standards that clinics have to meet, possible changes in public perceptions and attitudes on complex ethical issues, and the need to ensure the continued effectiveness of regulation." *Id.* at 6.

52. DEPARTMENT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT, 2006, Cm. 6989, available at [http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh\\_073098](http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_073098) (follow "Download Review" hyperlink); DEPARTMENT OF HEALTH, HUMAN TISSUE AND EMBRYOS (DRAFT) BILL, 2007, Cm. 7087, at v; Stephen Young, *By Command of Her Majesty: An Introduction to the Command Papers of the United Kingdom*, 92 LAW. LIBR. J. 81, 83-84 (2000). "Command Papers is an umbrella term that often encompasses White Papers. A White Paper is a statement of government policy. White Papers should be viewed as proposal's by the government for legislative action." Young, *supra*.

53. DEPARTMENT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT, 2006, Cm. 6989, available at <http://www.dh.gov.uk/en/>



[t]o ensure legitimate medical and scientific applications of human reproductive technologies can continue to flourish, to promote public confidence in the development and use of human reproductive technologies through effective regulatory controls applicable to them, and to secure that regulatory controls accord with better regulation principles and encourage the best regulatory practices.<sup>54</sup>

In 2007, the British Government published the Human Tissue and Embryo (Draft) Bill for the purpose of pre-legislative scrutiny by a Parliamentary Committee.<sup>55</sup> The purpose of the draft bill was to thoroughly test and debate the bill before it was introduced in Parliament.<sup>56</sup> In November 2007, the name of the Bill changed to the Human Fertilization Embryology Bill and it was introduced to Parliament.<sup>57</sup> The Bill was in Parliament for a year, during which it was subject to consultation, scrutiny, and Parliamentary debate.<sup>58</sup> On November 13, 2008, The Human Fertilization and Embryology Act 2008 received Royal Assent and became a law.<sup>59</sup>

*Human Fertilization and Embryology Act 2008*—The Human Fertilization and Embryology Act 2008 (“2008 Act”) is a “landmark piece” of legislation.<sup>60</sup> The 2008 Act is necessary to reflect the technological advances and changes in societal attitudes that have taken place since the 1990 Act.<sup>61</sup> The purpose of the 2008 Act is to amend the existing legislation for assisted human reproduction and make changes to

---

publicationsandstatistics/publications/publicationspolicyandguidance/dh\_073098 (follow “Download Review” hyperlink). The creation of the Regulatory Authority for Tissue and Embryo (RATE) would replace the Human Fertilisation and Embryology Authority and the Human Tissue Authority. The purpose of RATE is to establish a single source of authoritative guidance on all issues relating to the use of all human tissues and regulatory practices in these related areas. *Id.* at vi.

54. *Id.* at 5.

55. DEPARTMENT OF HEALTH, HUMAN TISSUE AND EMBRYOS (DRAFT) BILL, 2007, Cm. 7087, at vi.

56. *Id.*

57. 696 PARL. DEB., H.L. (5th ser.) (2007) 139, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldhansrd/text/71108-0001.htm#07110855000002>.

58. Human Fertilisation and Embryology Act 2008: Department of Health—Publications, [http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Actsandbills/DH\\_080211](http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Actsandbills/DH_080211) (last visited Jan. 29, 2009).

59. Human Fertilisation and Embryology Act 2008, 2008, c. 22 (U.K.).

60. DEPARTMENT OF HEALTH, CONSULTATION ON REGULATIONS TO IMPLEMENT THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008 2 (2009), available at [http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH\\_092465](http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_092465) (follow “Download consultation document” hyperlink).

61. *Id.*

the regulation and licensing of the use of embryos in research and therapy.<sup>62</sup> The key provisions of the 2008 Act are to:

(1) ensure that all human embryos outside the body—whatever the process used in their creation—are subject to regulation; (2) ensure regulation of “human-admixed” embryos created from a combination of human and animal genetic material for research; (3) ban sex selection of offspring for non-medical reasons. This puts into statute a ban on non-medical sex selection currently in place as a matter of HFEA policy. Sex selection is allowed for medical reasons—for example a serious disease that affects only boys; (4) recognize same-sex couples as legal parents of children conceived through the use of donated sperm, eggs, or embryos. These provisions enable, for example, the civil partner of a woman who carries a child via IVF to be recognized as the child’s legal parent; (5) retain a duty to take account of the welfare of the child in providing fertility treatment, but replace the reference to “the need for a father” with “the need for supportive partnering” – hence valuing the role of all parents; (6) alter the restrictions on the use of HFEA-collected data to help enable follow-up research of infertility treatment.<sup>63</sup>

While these provisions amend the 1990 Act, the main features of the existing model of regulation have been retained.<sup>64</sup>

The 2008 Act is divided into three parts.<sup>65</sup> Part One includes amendments to the 1990 Act.<sup>66</sup> Part Two replaces existing provisions under the 1990 Act to determine legal parenthood for future assisted human reproduction cases.<sup>67</sup> Part Three of the 2008 Act makes miscellaneous and general provisions.<sup>68</sup> The provisions of the 2008 Act are planned to roll out in stages.<sup>69</sup> Currently, the goal is to implement the

62. Human Fertilisation and Embryology Act 2008: Department of Health—Publications, *supra* note 58; OFFICE OF PUBLIC SECTOR INFORMATION, EXPLANATORY NOTES TO HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008 (2008), [http://www.opsi.gov.uk/acts/acts2008/en/ukpgaen\\_20080022\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts2008/en/ukpgaen_20080022_en_1.htm).

63. Human Fertilisation and Embryology Act 2008: Department of Health—Publications, *supra* note 58; Human Fertilisation and Embryology Authority, The Human Fertilisation and Embryology Act 2008, <http://www.hfea.gov.uk/en/1752.html> (last visited Jan. 29, 2009) [hereinafter HFEA 2008 Act]; *see* Human Fertilisation and Embryology Act 2008, 2008, c. 22 (U.K.).

64. EXPLANATORY NOTES TO HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008, *supra* note 62.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. CONSULTATION ON REGULATIONS TO IMPLEMENT THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008, *supra* note 60; HFEA 2008 Act, *supra* note 63.

majority of the provisions in October 2009, with the provisions relating to parenthood in Part Two beginning in April 2009.<sup>70</sup>

The amendments in Part One reflect the changes in social attitudes and scientific developments.<sup>71</sup> For instance, the new definition of embryo<sup>72</sup> no longer assumes that an embryo can only be created by fertilization.<sup>73</sup> The new definition brings the term up to date with technologies that have been developed since the enactment of the 1990 Act.<sup>74</sup>

Part one also includes amendments to the formalities of consent and withdrawal of consent.<sup>75</sup> Under the 2008 Act, written consent must be signed by the consenting parties in order to store or use embryos.<sup>76</sup> The requirement also provides that parties unable to give written consent because of incapacity may direct another person to sign on their behalf in the presence of a witness.<sup>77</sup> This allowance of proxy consent creates a mechanism to allow storage of embryos in cases where an individual lacks the capacity to give consent, either through mental or physical incapacity.<sup>78</sup> The 2008 Act also requires that all notices of withdrawal of consent to the storage and/or use of embryos be made in writing and be signed by the person withdrawing consent.<sup>79</sup> After notice is served to the fertility clinic storing the embryos, a 12-month “cooling off period” goes into effect.<sup>80</sup> The 12-month “cooling off period” is intended to allow the parties time to attempt to resolve any differences between them, either privately or through the courts.<sup>81</sup>

---

70. CONSULTATION ON REGULATIONS TO IMPLEMENT THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008, *supra* note 60; HFEA 2008 Act, *supra* note 63.

71. EXPLANATORY NOTES TO HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008, *supra* note 62.

72. An embryo is defined as a live human embryo, which does not include human admixed embryos, and “references to an embryo include an egg that is in the process of fertilization or is undergoing any other process capable of resulting in an embryo.” Human Fertilisation and Embryology Act 2008, 2008, c. 22, § 1 (U.K.). A human admixed embryo is an embryo that contains both human and animal material. Mark Henderson, *Q&A Human Fertilization and Embryology Bill*, THE TIMES, Mar. 26, 2008, <http://www.timesonline.co.uk/tol/news/politics/article3606523.ece>.

73. Human Fertilisation and Embryology Act 2008 § 1; EXPLANATORY NOTES TO HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008, *supra* note 62.

74. EXPLANATORY NOTES TO HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008, *supra* note 62; *see* Human Fertilisation and Embryology Act 2008 § 1.

75. EXPLANATORY NOTES TO HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008, *supra* note 62; *see* Human Fertilisation and Embryology Act 2008 § 13.

76. *See* sources cited *supra* note 75.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* sources cited *supra* note 75.

### B. Canada

Canada's response to assisted reproduction technology has been similar to the United Kingdom. In 1989, the Canadian government established the Royal Commission on New Reproductive Technologies ("Royal Commission") in response to the growing use of reproductive technologies.<sup>82</sup> The Royal Commission's mandate was "to examine current and potential scientific and medical developments related to reproductive technologies"<sup>83</sup> in order to consider their "social, ethical, health, research, legal and economic implications and the public interest, recommending what policies and safeguards should be applied."<sup>84</sup> The Royal Commission's final report, delivered in 1993, was entitled *Proceed with Care*.<sup>85</sup> *Proceed with Care* included 293 recommendations, some of which banned certain activities, such as creating human clones and animal-human hybrids.<sup>86</sup>

Following the Royal Commission's report, the Minister of Health placed a voluntary moratorium on nine controversial issues, "including sex selection, human embryo cloning, and the buying and selling of eggs, sperm, and embryos."<sup>87</sup> In 1996, an advisory committee was established to help monitor compliance with the moratorium.<sup>88</sup> Later that year, the government introduced Bill C-47, the *Human Reproductive and Genetic Technologies Act*.<sup>89</sup>

Bill C-47<sup>90</sup> was heavily criticized because it focused on prohibited activities instead of establishing regulations for activities that were

82. The Royal Commission is comprised of members from the fields of medicine, law, religion, and anthropology under commission chair Dr. Patricia Bond. ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, *PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES 1* (1993).

83. *Id.* at 2.

84. *Id.* at 3.

85. *Id.* at 1.

86. See Assisted Human Reproduction Act, S. C-6, 37th Parl., 3rd Sess. (Can. 2004), available at [http://www.parl.gc.ca/common/bills\\_ls.asp?Parl=37&Ses=3&ls=c6](http://www.parl.gc.ca/common/bills_ls.asp?Parl=37&Ses=3&ls=c6); see also Health Canada, A Chronology of the Assisted Human Reproduction Act, <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/general/chronolog-eng.php> (last visited Oct. 3, 2008) ("The Royal Commission recommended the federal government ban certain activities, such as human cloning, creating animal-human hybrids and commercial surrogacy, and establish an independent regulatory body to govern permissible assisted human reproduction activities.").

87. *Regulating Assisted Human Reproduction*, CBC NEWS, [http://www.cbc.ca/news/background/genetics\\_reproduction/rgtech.html](http://www.cbc.ca/news/background/genetics_reproduction/rgtech.html) (last visited Oct. 3, 2008); see S. C-6; A Chronology of the Assisted Human Reproduction Act, *supra* note 86.

88. A Chronology of the Assisted Human Reproduction Act, *supra* note 86; see S. C-6.

89. See sources cited *supra* note 88.

90. Human Reproductive and Genetic Technologies Act, H.C. C-47, 35th Parl., 2nd Sess. (Can. 1996).

allowed under the prescribed conditions of the Bill.<sup>91</sup> Although the House of Commons Standing Committee on Health approved the Bill, the Bill died on the Order Paper<sup>92</sup> when Parliament was dissolved for an election in the spring of 1997.<sup>93</sup>

In 2000, Health Canada, the department of health for Canada,<sup>94</sup> consulted with stakeholders and representatives from provincial and territorial governments in preparation of moving forward with draft legislation on assisted human reproduction.<sup>95</sup> In 2001, the Minister of Health presented a legislative proposal concerning assisted human reproduction to the House of Commons Standing Committee on Health.<sup>96</sup> The Committee reviewed the legislation and issued a report with recommendations.<sup>97</sup> In response to the Report, the Minister of Health introduced Bill C-56, the Assisted Human Reproduction Act, to the House of Commons in 2002.<sup>98</sup> Bill C-56 would “establish a legislative and regulatory framework to address issues relating to assisted human reproduction and research involving the in vitro embryo.”<sup>99</sup> Both the House of Commons and the Senate passed the proposed legislation.<sup>100</sup> On March 29, 2004, the Assisted Human Reproduction Act (“AHR Act”) received Royal Assent and became law.<sup>101</sup> Many provisions, which dealt with controlled and prohibited activities of the Act, came into force in April 2004; however, the key provision regulating consent did not come into effect until December 2007.<sup>102</sup> There are also some remaining provisions of the Act that will come into effect in later stages.<sup>103</sup>

---

91. S. C-6; *see* H.C. C-47.

92. The Order Paper is a “document that gives deliberations of the Senate and lists items of business currently before it.” Senate of Canada, Order Paper and Notice Paper, <http://www.parl.gc.ca/38/1/parlbus/chambus/senate/orderpaper/ord-E.htm> (last visited Feb. 7, 2009).

93. S. C-6; A Chronology of the Assisted Human Reproduction Act, *supra* note 86.

94. “Health Canada is the Federal department responsible for helping Canadians maintain and improve their health, while respecting individual choices and circumstances.” Health Canada, <http://www.hc-sc.gc.ca/ahc-asc/index-eng.php> (last visited Nov. 3, 2008).

95. A Chronology of the Assisted Human Reproduction Act, *supra* note 86.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. On October 28, 2003, the House of Commons passed Bill C-13 (formerly Bill C-56). On March 3, 2004, the Senate passed Bill C-6 (formerly Bill C-13). A Chronology of the Assisted Human Reproduction Act, *supra* note 86; Assisted Human Reproductive Act, H.C. C-13, 37th Parl., 2nd Sess. (Can. 2002).

101. *See* sources cited *supra* note 100.

102. *Id.*

103. *Id.*

The Assisted Human Reproduction Act includes both prohibitory and regulatory aspects.<sup>104</sup> The AHR Act prohibits many practices, including human cloning and the use of in vitro embryos, for any purpose other than human creation or improving instruction in assisted human reproduction procedures. The Act also prohibits using assisted human reproduction for sex selection, the sale of human ovaries and sperm, and combining human and animal DNA.<sup>105</sup> Further, the AHR Act protects the health and safety of Canadians who use assisted human reproduction, and establishes the Assisted Human Reproduction Agency of Canada (“AHRC”).<sup>106</sup> The AHRC is the regulatory agency established to license, monitor, and enforce the AHR Act.<sup>107</sup>

### 1. AHR Act—Section 8 (Consent to Use)

One of the core principles of the AHR Act is a provision requiring informed consent by the donor on whether or not to reproduce.<sup>108</sup> Section 8 of the AHRA upholds the principal of free and informed consent by stating:

(1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose. (2) No person shall remove human reproductive material from a donor’s body unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose. (3) No person shall make use of an in vitro embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose.<sup>109</sup>

The purpose of Section 8 is to manage the risk of harm that could occur if reproductive materials or in vitro embryos were used without consent.<sup>110</sup>

---

104. Assisted Human Reproduction Act, 2004 S.C., ch. 2 (Can.).

105. *Id.*

106. The AHRC was established on January 12, 2006. A Chronology of the Assisted Human Reproduction Act, *supra* note 86.

107. Assisted Human Reproduction Act ch.2.

108. Assisted Human Reproduction (Section 8 Consent) Regulations SOR/2007-137 (Can), available at <http://www.gazette.gc.ca/archives/p2/2007/2007-06-27/html/sor-dors137-eng.html>; see Health Canada, Backgrounder Section 8 (Consent) Assisted Human Reproduction Act, <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/legislation/section-article-8-bk-eng.php> (last visited Nov. 5, 2008).

109. Assisted Human Reproduction Act, 2004 S.C., ch. 2, § 8 (Can.).

110. Assisted Human Reproduction (Section 8 Consent) Regulations SOR/2007-137 (Can).

## 2. Canada's Regulatory Procedures for Federal Acts

Most of the prohibitions of the Assisted Human Reproduction Act came into force on April 22, 2004.<sup>111</sup> However, Section 8 of the AHR Act was implemented later.<sup>112</sup> It was the last prohibition to be brought into force<sup>113</sup> because it was the only one that required the development of the AHRC.<sup>114</sup>

Section 8's regulation was necessary to enforce the prohibitions of the Assisted Human Reproduction Act. Canada's regulatory policy also requires that all regulations made under a federal act meet the following requirements:

(1) Initiation of public consultations; (2) conception and drafting of proposed regulations as well as other documents that constitute the regulatory submission package, such as the Regulatory Impact Analysis Statement (RIAS); (3) review by the Department of Justice; (4) Ministerial approval for prepublication; (5) consideration by the Regulatory Affairs and Orders in Council Secretariat (RAOIC) at Treasury Board; (6) prepublication of the proposed regulations and RIAS in Canada Gazette, Part I and comment period; (7) parliamentary review of proposed regulations; (8) analysis of comments received and departmental preparation of final proposal; (9) final review by the Department of Justice; (10) Ministerial approval for publication; (11) consideration by Treasury Board; (12) approval by the Governor in Council and registration by the Clerk of the Privy Council; (13) publication of final regulations and RIAS in Canada Gazette, Part II; (14) coming into force of regulations; (15) parliamentary review by the Standing Joint Committee on the Scrutiny of Regulations.<sup>115</sup>

The regulations for Section 8 met the requirements by pre-publishing regulatory proposals in the Canada Gazette in 2005.<sup>116</sup> The House of

---

111. Backgrounder Section 8 (Consent) Assisted Human Reproduction Act, *supra* note 108.

112. Backgrounder Section 8 (Consent) Assisted Human Reproduction Act, *supra* note 108; Health Canada, Assisted Human Reproduction at Health Canada Frequently Asked Questions, <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/faq/index-eng.php> (last visited Aug. 27, 2009).

113. Section 8 of the Assisted Human Reproductive Act became effective on Dec. 1, 2007. Assisted Human Reproduction Act, S. Bill C-6, 37th Parl., 3rd Sess. (Can. 2004).

114. Backgrounder Section 8 (Consent) Assisted Human Reproduction Act, *supra* note 108.

115. Assisted Human Reproduction at Health Canada Frequently Asked Question, *supra* note 112.

116. Backgrounder Section 8 (Consent) Assisted Human Reproduction Act, *supra* note 108.

Commons and the Senate then reviewed the regulatory proposals.<sup>117</sup> Comments from stakeholders, parliamentary committees, and provincial and territorial representatives were also considered in the final Section 8 regulations.<sup>118</sup> These comments were published in the Canada Gazette on June 27, 2007, and made effective on December 1, 2007.<sup>119</sup>

### 3. Purpose of Section 8 (Consent to Use) Regulations

The regulations specify the prohibitions under the Assisted Human Reproduction Act.<sup>120</sup> The Section 8 regulations also focus on the “use” of consent and specifically address the need for written consent to use human reproductive material for the purpose of (1) creating an embryo; (2) removing human reproductive material posthumously to create an embryo; and (3) using an in vitro embryo for any purpose.<sup>121</sup> The regulations’ focus on informed consent indicates a desire to protect the rights of in vitro embryo donors and the well-being of children conceived with assisted human reproductive technology.<sup>122</sup> The regulations also serve societal interests in protecting human dignity in reproduction and associated research.<sup>123</sup>

More importantly, the regulations containing the prohibitions address two commonly disputed topics: the use of remaining embryos and withdrawing consent.<sup>124</sup> As noted above, after in vitro fertilization, there are generally remaining embryos that are not needed.<sup>125</sup> The remaining embryos may be stored, donated, or destroyed.<sup>126</sup> However, the regulations are clear on the requirement that couples—married or not—must agree on what to do with the remaining in vitro embryos.<sup>127</sup> The only exception is in the event of the death of a spouse or partner. In

117. *Id.*

118. *Id.*

119. *Id.*

120. Assisted Human Reproduction (Section 8 Consent) Regulations SOR/2007-137 (Can).

121. Health Canada, AHR Regulations for Section 8 Consent to Use Questions and Answers, <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/legislation/section-article-8-eng.php> (last visited Nov. 5, 2008).

122. Assisted Human Reproduction (Section 8 Consent) Regulations SOR/2007-137 (Can).

123. *Id.*

124. Assisted Human Reproduction Canada, Information Sheet: Regulations under Section 8 of the AHR Act Regarding Consent to Use, <http://www.ahrc-pac.gc.ca/doc.php?did=6&lang=eng> (last visited Nov. 5, 2008).

125. Information Sheet: Regulations under Section 8 of the AHR Act Regarding Consent to Use, *supra* note 124.

126. Byers, *supra* note 1, at 280.

127. Information Sheet: Regulations under Section 8 of the AHR Act Regarding Consent to Use, *supra* note 124.



that case, the surviving spouse/partner may unilaterally decide the fate of the remaining in vitro embryos.<sup>128</sup> Additionally, the regulations allow a withdrawal of consent for those who have provided a “consent to use” and then decide against the use of their eggs, sperm, or in vitro embryos.<sup>129</sup> The withdrawal of consent is permitted as long as it is in writing and is received by the person, clinic, physician, or researcher that will be using the eggs, sperm, or in vitro embryo before specific timelines.<sup>130</sup> However, a notice to withdraw consent will not be honored if it is received after the eggs, sperm, or in vitro embryos have been used.<sup>131</sup> Section 8’s attention to both of these areas illustrates its importance to the Assisted Human Reproduction Act.<sup>132</sup>

#### IV. OTHER INTERNATIONAL POLICIES

The United Kingdom’s Human Fertilization and Embryology Act and Canada’s Assisted Human Reproductive Act are two of the world’s most comprehensive legislation initiatives in the area of assisted human reproduction.<sup>133</sup> Both pieces of legislation illustrate the growing problems of infertility and the increasing reliance on assisted human reproduction in both the United Kingdom and Canada.<sup>134</sup> However, the legislation in both of these countries has drawn on the practices and experiences of other countries to shape their laws.<sup>135</sup> As a result, it is important to also look at how other countries are addressing assisted human reproduction.<sup>136</sup> Specifically, this comment will briefly review the policies of Italy and the United States, as well as several of the United States’ individual state laws.<sup>137</sup>

*Italy.* Until recently, Italy was perhaps the European country that did the least to regulate assisted reproductive technology.<sup>138</sup> Prior to

---

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. See Assisted Human Reproduction Act, 2004 S.C., ch. 2, § 8 (Can.); Assisted Human Reproduction (Section 8 Consent) Regulations SOR/2007-137 (Can); Information Sheet: Regulations under Section 8 of the AHR Act Regarding Consent to Use, *supra* note 124.

133. Assisted Human Reproduction Internationally, *supra* note 6.

134. *Id.*

135. *Id.* (stating that Canada’s Assisted Human Reproduction Act “draws on the best practices and experiences from other countries, yet is uniquely Canadian).

136. *Id.*

137. Italy and the United States were selected because of their notable laws relating to in vitro fertilization consent, storage, and rights of embryos.

138. Colin Rasmussen, *Canada’s Assisted Human Reproduction Act: Is it Scientific Censorship, or a Reasoned Approach to the Regulation of Rapidly Emerging Reproductive Technologies?*, 67 SASK. L. REV. 97, 111 (2004).

2004, Italy had no laws, controls, or regulations to govern the more than 100 private clinics that were performing various fertilization procedures on patients.<sup>139</sup> On February 19, 2004, the legislative gap was filled when the Italian Parliament enacted law 40/2004, which regulates medically assisted reproduction (“MAR”).<sup>140</sup> The law limits the use of MAR procedures to “stable heterosexual couples who live together and are of childbearing age.”<sup>141</sup> Law 40/2004 bans single parents, same-sex couples, women beyond childbearing age, and carriers of genetic diseases from using the MAR technologies.<sup>142</sup> Law 40/2004 also bans the use of sperm or eggs donated from a third party in MAR procedures.<sup>143</sup>

Additionally, law 40/2004 forbid the freezing of embryos for later use, including after a spouse died.<sup>144</sup> The new law forced a number of existing frozen embryo storage facilities to shut down.<sup>145</sup> In fact, the law only allowed three eggs to be fertilized at one time and all of the eggs had to be transferred to the womb at the same time.<sup>146</sup> The legislation also forbade any manipulation or usage of the early human embryo other than for the purpose of implanting it into the woman.<sup>147</sup> Therefore, research and experimentation on embryos was only allowed for clinical treatments in the interest of the health and development of the embryos.<sup>148</sup> In other words, research on human embryos, such as cloning and stem cell derivation were prohibited.<sup>149</sup> Due to Italian policymakers’ conservative stand on medically assisted reproduction, many Italian couples traveled to other European countries to seek treatment.<sup>150</sup>

*The United States.* Unlike Italy, the United States currently does not have national legislation to address assisted human reproduction procedures.<sup>151</sup> The only federal law concerning assisted reproduction is the Fertility Clinic Success Rate and Certification Act of 1992.<sup>152</sup> Under

139. *Id.*

140. Andrea Boggio, *Italy Enacts New Law on Medically Assisted Reproduction*, 20 HUM. REPROD. 1123, 1153-57 (2005), available at <http://humrep.oxfordjournals.org/cgi/content/full/20/5/1153>.

141. Assisted Human Reproduction Internationally, *supra* note 6.

142. Boggio, *supra* note 140, at 1153-57; Assisted Human Reproduction Internationally, *supra* note 6.

143. Boggio, *supra* note 140, at 1153-57.

144. *Id.*

145. Assisted Human Reproduction Internationally, *supra* note 6.

146. *Id.*

147. Boggio, *supra* note 140, at 1153-57.

148. *Id.*

149. Assisted Human Reproduction Internationally, *supra* note 6.

150. Boggio, *supra* note 140, at 1153-57.

151. Assisted Human Reproduction Internationally, *supra* note 6.

152. *Id.*

this Act, fertility clinics are required to report pregnancy success rates.<sup>153</sup> These rates are published by the Center for Disease Control.<sup>154</sup>

However, some states have imposed their own legislation to regulate assisted human reproduction procedures.<sup>155</sup> For example, Louisiana has taken the lead in promoting the view that frozen embryos have individual rights.<sup>156</sup> The Louisiana law defines human embryos as an in vitro fertilized human ovum “comprised of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child.”<sup>157</sup> The Louisiana law assigns a legal identity with rights to the human embryos, regardless of whether the embryos are in the lab or the womb.<sup>158</sup> Since the law recognizes the viable embryo as a “juridical person,” embryos are protected from intentionally being destroyed.<sup>159</sup> However, if after 36 hours in an unfrozen state there is no development, an embryo must be deemed unviable and subsequently destroyed.<sup>160</sup>

Louisiana’s juridical standard, when applied to disputes arising between donating parties, considers the “best interest of the in vitro fertilized ovum.”<sup>161</sup> The implication of this provision is that the embryo should be thought of as a child, since the “best interest” test is traditionally used in custody disputes regarding born children.<sup>162</sup> Further, the statute raises constitutional issues because it prohibits patients from choosing to discard their unused embryos or donate them for research.<sup>163</sup>

The assisted human reproduction regulations of Italy and Louisiana are quite restrictive compared to those of the United Kingdom and Canada. The prohibitions in Italy and Louisiana will often cause couples to seek assisted human reproductive procedures in other countries, like the United Kingdom and Canada, which do not subject them to such

---

153. *Id.*

154. *Id.*

155. *Id.*

156. LA. REV. STAT. ANN. § 9:121 (1996).

157. *Id.*

158. Posting of Jessica Arons to Science Progress Blog, <http://www.scienceprogress.org/2007/10/sex-lies-and-embryos/> (Oct. 16, 2007). Jessica Arons is the Director of the Women’s Health and Rights Program and a member of the Faith and Progressive Policy Initiative at the Center for American Progress. *Id.*

159. LA. REV. STAT. ANN. § 9:129 (1996).

160. *Id.*

161. *Id.*

162. Posting of Jessica Arons to Science Progress Blog, *supra* note 158.

163. *Id.*

strict regulations.<sup>164</sup> Couples may also look to countries that have no legislation governing assisted human reproductive procedures.<sup>165</sup>

## V. REVIEW OF LEADING CASES FROM THE UNITED KINGDOM AND CANADA

Even though both the United Kingdom's Human Fertilization and Embryology Act and Canada's Assisted Human Reproductive Act provide a comprehensive approach to regulating assisted human reproduction, both countries have faced cases involving the withdrawal of consent during the process of assisted human reproduction.<sup>166</sup> As a result, the holding of each case has helped to shape the current law of the country, as well as provide insight to future assisted reproduction issues that may arise.<sup>167</sup>

### A. *United Kingdom Case—Evans v. United Kingdom*

*Evans v. United Kingdom* was a key case of the European Court of Human Rights.<sup>168</sup> The background of the *Evans* case began in 2000 when Natalie Evans ("Evans"), and her partner, Howard Johnston ("Johnston") visited a fertility clinic.<sup>169</sup> Due to their difficulty conceiving a child naturally, the couple sought infertility treatments.<sup>170</sup> During their appointment, doctors found pre-cancerous tumors in both of Evans' ovaries.<sup>171</sup> Evans' ovaries would have to be removed, leaving her infertile.<sup>172</sup>

In a subsequent consultation, the couple was informed of the possibility of in vitro fertilization.<sup>173</sup> Since in vitro fertilization was the

164. Assisted Human Reproduction Internationally, *supra* note 6. Strict regulations may lead to couples considering the procedure in another country. See Boggio, *supra* note 140, at 1153-57; Posting of Jessica Arons to Science Progress Blog, *supra* note 158.

165. See Assisted Human Reproduction Internationally, *supra* note 6 (noting Japan and Singapore have no legislation governing assisted human reproductive activities, such as in vitro fertilization).

166. See DEPARTMENT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT, 2006, Cm. 6989, at 1, available at [http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh\\_073098](http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_073098) (follow "Download Review" hyperlink); see also Assisted Human Reproduction Internationally, *supra* note 6 (providing an overview of other countries addressing assisted human reproduction).

167. See *Evans v. United Kingdom*, App. No. 6339/05, Eur. Ct. H.R. 6339/05(2007); *Caufield v. Wong*, [2005] A.B.Q.B. 290 (Can.), available at 2005 AB.C. LEXIS 485.

168. *Evans*, Eur. Ct. H.R. 6339/05.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Evans*, Eur. Ct. H.R. 6339/05.

only fertility treatment offered by this clinic, freezing Evans' unfertilized eggs would not be an option for the couple.<sup>174</sup> With the growth of the tumor, in vitro fertilization remained the couple's only available option.<sup>175</sup>

Evans and Johnston agreed to proceed with the in vitro fertilization treatment.<sup>176</sup> During this time, Johnston reassured Evans that they were going to remain together, that he wanted to be the father of her child, and that she did not need to consider freezing her eggs.<sup>177</sup> Thereafter, in accordance with the Human Fertilization and Embryology Act 1990 ("Act"),<sup>178</sup> Evans and Johnston signed consent forms for in vitro fertilization treatment and were informed that either could withdraw consent before the embryos were implanted into Evans' uterus.<sup>179</sup>

In 2002, the relationship between Evans and Johnston ended.<sup>180</sup> Johnston notified the clinic of their separation and withdrew his consent to continue the storage of the embryos he had created with Evans.<sup>181</sup> Since the Act provides that frozen embryos can be stored or implanted only with the consent of both gamete providers,<sup>182</sup> the withdrawal of Johnston's consent meant that Evans could not use his sperm to conceive or continue storing the embryos.<sup>183</sup> Further, the Act required that the existing embryos be destroyed even though they represented Evans only chance of becoming a genetic parent.<sup>184</sup> In response to Johnston's withdrawal of consent, Evans commenced legal proceedings in order to prevent the destruction of the embryos and obtain a declaration allowing her to proceed with the implantation, even without Johnston's consent.<sup>185</sup>

The Court held that Johnston was entitled to withdraw his consent anytime before the implantation of the embryos.<sup>186</sup> The Court's rule estopped Evans from continuing storage of the embryos created by Johnston and her.<sup>187</sup> In addition, the Court's holding affirmed the policy of the Act, which was to ensure continued consent of both parties from

---

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Human Fertilisation and Embryology Act 1990, 1990, c. 37, § 12, sched. 3 (U.K.).

179. *Evans*, Eur. Ct. H.R. 6339/05.

180. *Id.*

181. *Id.*

182. Human Fertilisation and Embryology Act 1990 c. 37, at sched. 3.

183. *Evans*, Eur. Ct. H.R. 6339/05.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

the beginning to the end of in vitro fertilization treatments.<sup>188</sup> The court also emphasized that the provisions of the Human Fertilization and Embryology Act are applicable to all patients undergoing in vitro fertilization treatment, regardless of the patient's sex.<sup>189</sup>

*B. Canada Case—Caufield v. Wong*

In Canada, *Caufield v. Wong*<sup>190</sup> is the only decision regarding in vitro embryos between a non-married couple.<sup>191</sup> *Caufield* involved two friends, Catherine Caufield (“Caufield”) and Allan Wong (“Wong”).<sup>192</sup> The two were former lovers that never lived together or made a commitment to a long-term relationship.<sup>193</sup> As an act of their friendship, Wong agreed to donate his sperm so Caufield could become pregnant.<sup>194</sup> After two failed attempts, Caufield became pregnant with twins through the process of in vitro fertilization.<sup>195</sup> After the birth of the twins, the remaining four fertilized embryos were kept in storage under both Caufield and Wong's name for future use at an infertility clinic in Toronto, Ontario.<sup>196</sup> The clinic charged a \$300 annual storage fee for the unused embryos, which was paid by Caufield.<sup>197</sup>

Caufield asked the clinic to release the embryos to her for future attempts at pregnancy.<sup>198</sup> Wong refused to consent to the release of the remaining embryos to Caufield and informed the clinic not to release the embryos to Caufield.<sup>199</sup> As a result, Caufield brought suit to obtain possession of the remaining fertilized embryos.<sup>200</sup>

The Court held that Wong was the father of the children created using the in vitro fertilization process, but he had no legal right to the decision-making power over the remaining embryos.<sup>201</sup> According to the

---

188. *Evans*, Eur. Ct. H.R. 6339/05; see Human Fertilisation and Embryology Act 1990, 1990, c. 37, § 12, sched. 3(U.K.).

189. *Evans*, Eur. Ct. H.R. 6339/05.

190. *Caufield v. Wong*, [2005] A.B.Q.B. 290 (Can.), available at 2005 AB.C LEXIS 485.

191. Gerald Chipeur, Stephanie Chipeur & Lauren Lackie, *Commentary: Updated Approach Needed on Reproductive Technology Law*, THE LAWYERS WEEKLY, Sept. 21, 2007, available at <http://www.lawyersweekly.ca/index.php?section=article&articleid=541> (referencing the *Caufield* case as Canada's only decision the disposition of in vitro embryos as between a couple).

192. *Caufield*, [2005] A.B.Q.B. 290.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Caufield*, [2005] A.B.Q.B. 290.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

court, Wong's decision to assist Caufield in conceiving children was an unqualified gift.<sup>202</sup> He donated his sperm knowing that Caufield could use the fertilized embryos as she chose.<sup>203</sup> Further, the Court ordered that the remaining embryos be returned to Caufield and that she use them as she wished.<sup>204</sup> The Court's holding deprived Wong of the opportunity to decide whether the embryos would ever be used by Caufield or him, together or as individuals.<sup>205</sup>

### C. *Differences Between Evans and Caufield*

One of the distinguishing factors between *Evans* and *Caufield* is the timing of the decisions. *Evans* was decided in 2007, and was used to reaffirm the principles of the 1990 Act.<sup>206</sup> On the other hand, *Caufield* was decided in 2005, only a year after the Human Reproductive Act became law in Canada.<sup>207</sup> The decision in *Caufield* to not honor the withdrawal of the man's consent to use the embryos prompted the Canadian legislation to develop new regulations concerning the consent to use human reproductive material.<sup>208</sup> As a result, in 2007, the Section 8 (consent to use) prohibitions came into effect under the Assisted Human Reproductive Act.<sup>209</sup> It is possible that the Section 8 prohibition might have recognized Wong's legal right to withdraw consent and have the remaining embryos destroyed because of the lack of consent to use the embryos.

The other difference between *Evans* and *Caufield* involves the facts of the cases. *Caufield* involved a situation where the woman had previously conceived and given birth to children with the use of the male's sperm through the process of in vitro fertilization.<sup>210</sup> The court's decision was based on the determination that the donated sperm was an unqualified gift to Caufield.<sup>211</sup> Conversely, *Evans* was fighting for her first chance to use the embryos created by Johnston and herself.<sup>212</sup> The fact that Caufield had previously conceived using the embryos at issue

---

202. *Caufield*, [2005] A.B.Q.B. 290.

203. *Id.*

204. *Id.*

205. Chipeur et al., *supra* note 191.

206. *Evans*, Eur. Ct. H.R. 6339/05.

207. *See Caufield*, [2005] A.B.Q.B. 290.

208. *Id.*

209. A Chronology of the Assisted Human Reproduction Act, *supra* note 86.

210. *See Caufield*, [2005] A.B.Q.B. 290.

211. *Id.*

212. *Evans*, Eur. Ct. H.R. 6339/05.

clearly impacted the decision in her case and distinguishes her case from that of Evans.<sup>213</sup>

## VI. THE FUTURE OF IN VITRO FERTILIZATION LEGISLATION

The United Kingdom and Canada already have comprehensive legislation surrounding assisted human reproductive technology. However, new legislation must be enacted to keep pace with advances in both technology and scientific theory. The United Kingdom has already taken progressive steps with the enactment of the Human Fertilization and Embryology Act 2008.

Canada, on the other hand, is still lagging behind in reproductive technology legislation.<sup>214</sup> One of the problems with the current Assisted Human Reproduction Act is that its two primary goals were to prevent the commodification of human reproduction material and ban human cloning both for reproduction and research.<sup>215</sup> However, the current provisions of the Assisted Human Reproduction Act do not provide substantive regulations to achieve either of these goals. Furthermore, there are still provisions that have not come into effect under the AHR Act. Even with the implementation of the other provisions, the AHR Act does little more than to “legislate what is already the status quo in Canada, namely that in vitro fertilization procedures are allowed and the remainder are not.”<sup>216</sup>

The final problem with the Assisted Human Reproduction Act is that it is logically inconsistent.<sup>217</sup> Critics suggest that “if one determines that in vitro fertilization, which results in the destruction of most of the embryos created for that purpose, is acceptable, then creating embryos for research should be equally permissible.”<sup>218</sup> Although the Act may still fail to accept this notion, the Act could still be able to maintain its ban on human cloning while allowing any surplus of in vitro fertilized embryos to be used for research purposes.<sup>219</sup> The other inconsistency in the Act is that the law bans embryo research, while the leading legal association in Canada, the Canadian Bar Association, considers

---

213. See *Caufield*, [2005] A.B.Q.B. 290 (stating that Wong’s decision to assist Caufield in conceiving children was an unqualified gift, and thus he had no legal right to the decision-making power over the remaining embryos).

214. Rasmussen, *supra* note 138, at 128.

215. *Id.* at 128-29.

216. *Id.* (explaining that the primary goals of the Assisted Human Reproduction Act were already the norm in Canada. Before the Act was put into legislation Canada allowed in vitro fertilization procedures and disallowed anything involving the clone or commodification of human reproductive materials).

217. *Id.*

218. *Id.*

219. Rasmussen, *supra* note 138, at 128-29.



experimentation upon embryos as both appropriate and desirable.<sup>220</sup> The key concern with this inconsistency is that by “failing to allow appropriate embryo research on spare in vitro fertilized embryos, Canada will fall behind in the development of new therapeutic approaches derived from embryo and stem cell research.”<sup>221</sup> The mistakes of past legislation, such as that in Canada leads me to believe that certain key elements must be reviewed prior to new legislation being signed into law. Those key elements include reviewing whether the legislation is equally fair to both men and women and presenting possible solutions to allow women not to depend on a man’s consent to complete the assisted reproductive process.

### 1. Is the Legislation Gender Neutral?

In reviewing new assisted human reproduction legislation, one question that must be asked is whether the legislation is equally fair to both men and women. *Evans* was a highly emotive case that involved a fight for the right to be a mother and the right to embryos. However, the court reached a decision that took into account the right of a man to control the use of his sperm and a man’s choice to decide with whom to have children. It is hard to feel justice was served in the *Evans* decision when biologically the sexes can never be equal.<sup>222</sup> For instance, men have the opportunity to be fathers even when they are octogenarians and beyond.<sup>223</sup> Furthermore, from the point of view of the welfare of the child, it is hard to argue that the woman should be denied a chance to have her own child because of the man’s withdrawal of consent.<sup>224</sup> Clearly, if the child had been allowed into the world, the child would have been very much wanted, loved, and provided for.<sup>225</sup>

The rights of a woman undergoing in vitro fertilization should also be compared with natural conception. If the woman was to naturally conceive, then it would be her choice to keep the child, and her partner would not have the power to make her act one way or another. However, under the assisted human reproduction legislation in both Canada and the United Kingdom, a man can withdraw consent at any time before

---

220. *Id.*

221. *Id.*

222. *Equal Rights Ends Up in One More Unequal Wrong*, SENTINEL (Stoke, UK), Apr. 14, 2007, at 8, available at 2007 WLNR 7145522.

223. *Id.* (emphasizing the differences in “biological clocks” between men and women).

224. *Id.*

225. *Id.*

implantation and cause the embryos to be destroyed.<sup>226</sup> Neither law recognizes that a couple's choice to proceed with the invasive process of in vitro fertilization is a hard decision.<sup>227</sup> "When both parties have signed on the dotted line in the first place," one party should not be able to back out and revoke consent.<sup>228</sup>

## 2. Possible Solutions for Fair Legislation

What is the solution to protect women who expect men not to withdraw consent? Some would argue that there should be a separate provision in the legislation for women facing medical problems that could destroy their fertility.<sup>229</sup> The requirement would mandate that women in these circumstances freeze their eggs.<sup>230</sup> In addition, it would alleviate the need of consent from men and still give women the opportunity to genetically reproduce a child of their own. However, a provision like this would still not guarantee women the chance to genetically reproduce a baby.<sup>231</sup> Until recently, egg freezing was rarely successful because ice crystals would form inside the frozen eggs causing the extraordinarily delicate cellular structure to shatter.<sup>232</sup> These problems were finally overcome when the first baby (born in the UK) survived the freezing and fertilization process to enter the world in 2002.<sup>233</sup> Since then, there have only been three other babies born in the UK using this method.<sup>234</sup> Similarly, in Canada, Health Canada is reviewing the science and safety issue of freezing women's eggs for future use, and would require that the reproductive technology be licensed.<sup>235</sup> If Health Canada's review suggests that the science is still risky there may be a limit on the number of Canadian clinics licensed to provide the service.<sup>236</sup> Even with a limited number of clinics, freezing

---

226. See Human Fertilization and Embryology Act 2008, 2008, c. 22 (U.K.); Assisted Human Reproduction Act, 2004 S.C., ch. 2 (Can.); Human Fertilisation and Embryology Act 1990, 1990, c. 37 (U.K.).

227. See *Equal Rights Ends Up in One More Unequal Wrong*, *supra* note 222; Thompson, *supra* note 12.

228. See sources cited *supra* note 227.

229. See Gill Swain, *I've Put My Eggs on Ice*, DAILY MAIL, Aug. 21, 2007, at 47 (UK), available at 2007 WLNR 16259007.

230. See *id.*

231. See *id.*

232. *Id.*

233. *Id.*

234. Swain, *supra* note 229, at 47.

235. Carolyn Abraham, *Health Canada Plans to Regulate Egg Freezing*, Mar. 31, 2009, <http://www.theglobeandmail.com/life/article755293.ece>.

236. *Id.*

and storing the eggs would allow the eggs to be the sole property of the woman and gives her sole rights to any decisions regarding the eggs.<sup>237</sup>

Another option to cure the current inequalities in legislation is to allow women to list the male assisting in the in vitro fertilization as a sperm donor.<sup>238</sup> By listing the man as a sperm donor, the parties would enter into a legally binding contract before conception that relieves the man of all custody rights and child support for the child.<sup>239</sup> This contract would be different from a contract between two people who conceived the children through intercourse because it would be entered into before conception.<sup>240</sup> This option would align with the rationale of anonymous donors not having any rights or responsibilities for the children created in assisted human reproduction using their sperm.<sup>241</sup> It will also remedy the dependence on consent from the other party to implant the embryo.<sup>242</sup> Since the man would be free of all financial and legal responsibilities for the child, there would be no reason to withdraw consent.<sup>243</sup> Even though the man would not have the option to withdraw consent, the outcome would still be fair because he would lack any responsibility for the child.<sup>244</sup>

## VII. CONCLUSION

When it comes to fertility, biologically this is a hard battle for women to win.<sup>245</sup> Inequalities will continue to remain in assisted human reproductive legislation as long as there is a requirement of dual consent at the point of implantation and an allowance of consent withdrawal to terminate the procedure.<sup>246</sup> Women can only hope that the advances in technology and research on embryos leads to alternatives that will give them the control to genetically reproduce on their own terms.

---

237. Swain, *supra* note 229, at 47.

238. See *Ferguson v. McKiernan*, 940 A.2d 1236,1245-47 (Pa. 2007) (considering whether a Pennsylvania sperm donor has to pay child support payments for the children resulting from his donation).

239. *Id.*

240. *Id.* at 1246 (stating “in the case of traditional sexual reproduction, there simply is no question that the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires).

241. *Id.*

242. *Id.*

243. See *Ferguson*, 940 A.2d at 1244-47.

244. *Id.*

245. See *Equal Rights Ends Up in One More Unequal Wrong*, *supra* note 222.

246. *Id.*