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Frozen in perpetuity: ‘abandoned embryos’ in Canada

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Abstract The matter of ‘abandoned embryos’ arises when surplus IVF embryos are frozen and stored for later use. If the fertility clinic or storage facility in question does not have clear direction about what to do with these embryos, and/or payment for storage ceases, and/or the embryo providers cannot be reached, the embryos raise an ethical and practical challenge. On the one hand, there is a commitment to respect the autonomy of embryo providers to determine what should happen to their frozen embryos. On the other hand, there are weighty reasons why fertility clinics and storage facilities do not want responsibility, potentially in perpetuity, for other people’s frozen embryos. This article examines the matter of ‘abandoned embryos’ – the emergence of the term, its use in policy and law, and its implications in the Canadian case. We demonstrate that despite an intricate legislative framework, there are important gaps that leave fertility clinics and storage facilities in the tenuous position of discarding ‘abandoned embryos’ without clear authorization, or storing them indefinitely. We argue that clarity in consent procedures coupled with flexible time limits on embryo storage provide an approach that can best serve the interests of all involved.

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Introduction

On 30 November 2012, the British Columbia Women’s Centre for Reproductive Health ceased operations. At the time, the Centre had frozen human sperm and embryos in storage for more than 1200 people. While preparing to close its doors

and afterwards, staff at the Centre tried to contact all persons with sperm and embryos in storage to ascertain their wishes regarding transfer to another fertility clinic or discard. The staff made hundreds of telephone calls, sent letters by registered mail, issued second mailings to alternate addresses for letters that were returned to sender,

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and hired a skip tracer to track individuals. The Centre also petitioned the British Columbia Supreme Court for an order permitting the sperm and embryos in storage to be discarded. A Court order was granted validating the Centre's authority to discard the frozen sperm and embryos (*Lam v University of British Columbia* 2013 BCSC 2142). With this decision in hand, the staff made a final effort to reach those with sperm or embryos in storage in order to be able to act on their wishes, and then discarded what materials remained.

The uncertainty experienced by the British Columbia Women's Centre for Reproductive Health about what to do with the sperm and embryos stored in their fertility clinic was unique because of the circumstances precipitating decision-making – namely, closure of the clinic. In important respects, however, this uncertainty is commonly experienced by fertility clinics and storage facilities in jurisdictions without legislated time limits, as they struggle to understand the scope of their obligations regarding what have been described as 'orphaned embryos' or more commonly 'abandoned embryos'. These are embryos placed in storage by people who are now 'lost to follow-up' – people who have completed or dropped out of fertility treatment, stopped paying storage fees, and are not able to be contacted by the clinic or storage facility to confirm or provide wishes regarding the future use or discard of frozen embryos no longer wanted for 'own' reproductive use.

In the literature, a range of terms is used to describe various options for using or discarding embryos. For example, the term 'disposition' is often used to refer to options that include both using embryos and discarding them. 'Transfer' often refers to making use of embryos for one's own reproductive purposes, or the reproductive purposes of others, but can also refer to donation to research. Embryos being discarded are often described in terms of 'destruction' or 'disposal.' For clarity, we differentiate between ways of 'using' embryos (which include own reproductive use, third-party reproductive use, improving assisted reproduction procedures, providing instruction in assisted reproduction procedures, and research) and 'discarding' embryos when no such use is to occur before the embryos are destroyed.

This article proceeds in four parts. First, we provide a history of how the term 'abandoned embryos' came into common parlance and identify its contemporary scope, focusing on the Canadian case. Although the term rarely appears in official public policy or law, it continues to be used by professional medical associations (ASRM, 2013; O'Neill and Blackmer, 2015), in popular media (Blackwell, 2013; Kirkey, 2013) and by clinicians (Elford et al., 2004) in Canada, the United States, the United Kingdom, and elsewhere. Second, we trace the introduction of the current regulatory framework in Canada governing embryo use. We show how this framework anticipates the need for clear directives for the future use of embryos in storage, but does not include any provisions for discarding unused embryos. Third, we briefly review Canadian case law relevant to the question of how 'abandoned embryos' should be handled. Finally, we conclude that legally valid written instructions in consent forms regarding the use or discard of frozen embryos should be respected (i.e. acted upon), and that those instructions should be constrained by clear legislated time

limits on embryo storage. In jurisdictions that do not have a legislated limit on embryo storage, this approach can best serve the interests of all concerned parties – persons with embryos in storage, fertility clinics and storage facilities.

The emergence of 'abandoned embryos'

Fertility clinics around the world have untold numbers of human embryos in storage. Typically, this is because more embryos are created in a stimulated IVF cycle than can safely be transferred, and the embryos that are not transferred are often frozen for possible future use (Goswami et al., 2015; Karpin et al., 2013). Ideally, when embryos are frozen for later use, clear written instructions regarding future 'own use', 'use by others', and possibly eventual discard are obtained from the person(s) for whom the embryos were created (who may or may not be the providers of the sperm or eggs, as when donor gametes are used to create the embryos in question). In some instances, however, there are embryos in storage for a good length of time – placed there by people who are now 'lost to follow-up' – for which clear written instructions about using or discarding their embryos are either missing or incomplete. These embryos pose an ethical and practical problem for fertility clinics and storage facilities (Baylis, 2015; Blackwell, 2013; Kirkey, 2013). On the one hand, there is the commitment to respect autonomy and recognition of the responsibilities (if not rights) of individuals and couples to determine what should happen to their frozen embryos. On the other hand, there are practical and weighty reasons why fertility clinics and storage facilities do not want legal and financial responsibility, potentially in perpetuity, for other people's frozen embryos.

It appears that the term 'abandoned embryos' was first used in 1983, not long after the first use of frozen embryos to achieve a live birth. In 1981, an American couple, Elsa and Mario Rios, were treated at Queen Victoria Medical Centre in Melbourne, Australia. A number of IVF embryos were created using anonymous sperm. Several of the embryos were transferred in the hope of establishing a pregnancy and two were frozen for later reproductive use. The initial transfer did not result in a pregnancy and, before the couple could use the frozen embryos in a second attempt, Elsa and Mario died in a plane crash. In the aftermath, a number of media reports discussed the fate of these embryos, speculating as to whether any children born of them might be entitled to their estate. One widely published Associated Press article quoted Margaret Tighe, then-president of an Australian anti-abortion group, as stating that 'it is terrible that human beings are allowed to be produced in laboratories, frozen, and then abandoned and allowed to die' (Kentucky New Era, 1984; New York Times, 1984). This appears to be the first use of 'abandoned' to describe embryos, thereby seeking to anthropomorphize embryos in storage in order to argue that their discard would be tantamount to abortion and, in the same line of argument, tantamount to killing a living being. Use of the term 'abandoned' (like 'orphaned') also served to equate embryos to children in a way that vilifies those who do not use the embryos they create to initiate a pregnancy. Indeed, the terms 'abandoned embryos' and 'orphaned embryos'

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