

"The Adoption Information Disclosure Act: Inside the Legislative Process"

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Bill 183, which became the *Adoption Information Disclosure Act* (2005), is a unique piece of legislation, created through the interactions of many different elements of Ontario's political system. Its intended purpose was to allow adult adopted persons and birth parents to obtain certain documents that contain identifying information (the names) of their birth parents or children given up for adoption. It also promised to protect those who did not want a relationship by allowing all parties to put a "no contact" notice on their files.¹ Bill 183 was many years in the making and enjoyed widespread support in the Legislative Assembly. Yet the end result of the process was somewhat unexpected. This popular, long-debated legislation was struck down by the Ontario Superior Court of Justice as unconstitutional. The debate on Bill 183 and adoption disclosure was highly asymmetrical, with motivated and well-organized groups working to make adoption records completely open. The opposition to opening records was by contrast not organized, and largely made up of individuals who wanted to maintain their privacy and who therefore would not oppose the legislation publicly.

The purpose of this paper is not to debate the merits of different adoption information disclosure regimes, but to analyse the process by which Bill 183 was formulated, amended and passed, and to shed light on some of the interesting questions it raises about our legislative process. The *Adoption Information Disclosure Act* would have changed the law retroactively, opening all past records except in exceptional cases, and made Ontario the most open jurisdiction in Canada for adoption records. The lack of a "disclosure veto" to allow all parties to keep their past records sealed if they chose to was the most controversial aspect of the legislation, the only aspect to which the Information and Privacy Commissioner objected, and the reason the legislation was quashed by the Court. A veto was not included because the debate on adoption disclosure in Ontario was relatively one-sided in favour of a high degree of openness, especially in the preceding years and initial stages of formulating the legislation.

There were several central actors who interacted in the creation and debate on Bill 183. The Liberal government under Dalton McGuinty decided to bring forward the legislation, which was sponsored by Sandra Pupatello, Minister of Community and Social Services. Marilyn Churley, a Member for the New Democratic Party (NDP), had been campaigning for years from the backbenches, both while in government and in opposition, for greater openness in Ontario's adoption records, including bringing forward numerous Private Members' Bills (PMBs) on the subject. Several interest groups had also been campaigning for years, all on the side of greater openness. The Information and Privacy Commissioner of Ontario, Ann Cavoukian, commented extensively on the Bill, criticizing it for impinging on privacy protections and then suggesting a disclosure veto for all adoptions that took place before the legislation was enacted. Members of Provincial Parliament (MPPs) were integral to the process of debating the Bill in the House, debating and amending it when it was sent to the Standing Committee on Social Policy, and of course, voting to pass it. Finally, the judicial system became involved when three adult adoptees and a birth father brought a legal challenge against the legislation to the Ontario Superior Court and Justice Belobaba struck it down.

Ontario began sealing adoption files in 1927. The reasons for the move to secrecy are unclear, but Baldassi speculates they may have been to protect the child and birth mother from psychological harm and the social stigma of illegitimacy. Baldassi argues that lobbying to reopen adoption records intensified in the 1970s for several reasons. First, the numbers of adoptions skyrocketed between 1946 and 1970 and were secret, so by 1970 there was a large

¹ Ministry of Community and Social Services, "Ontario Government Moving Adoption Disclosure Laws Into the 21st Century," Press release, 29 March 2005.

group of adult adoptees that did not have access to the identities of their birth parents. Second, by the 1970s the social stigma surrounding adoptions had decreased. Finally, there were more stories in the media about the “need to know” the identity of one’s birth parents in order to have a complete sense of identity.²

The most visible and straightforward driving force behind Bill 183 is the McGuinty government and Minister of Community and Social Services Sandra Pupatello. On March 29, 2005 Minister Pupatello introduced Bill 183 to the legislature, announcing that the government was preparing to overhaul Ontario’s adoption disclosure laws.³ Though Pupatello introduced the legislation it was not initiated as a personal priority of hers. Adoption disclosure had not been an issue covered in the formal Liberal campaign documents during the 2003 election, so when Pupatello asked Ministry staff to begin work on a bill, it seemed to them to be “out of the blue.”⁴ Of working with Pupatello, Marilyn Churley said, “We had to start from scratch with her” because she had not been involved with the issue previously.⁵

These interviews would certainly seem to suggest that adoption disclosure was not an initial priority of the government or the Minister, but rather something Pupatello became personally committed to only after being pushed by outside lobbies. Indeed, when introducing the bill Pupatello thanked the “tireless advocates” from the adoption community who had met with her and worked for many years to open adoption records.⁶ She also paid special homage to Marilyn Churley, who she credited with being able “to make this issue very personal for all of us as well.”⁷

Marilyn Churley was instrumental to the introduction and development of Bill 183 because of her many years of advocacy within the Legislature. Churley was personally devoted to the issue of opening adoption records. A birth mother who gave up a son for adoption, Churley had tried for years to locate her adult son. She was eventually successful, despite Ontario’s closed records system, but remained committed to changing the law.⁸

Since 1994, eight PMBs have been introduced to the Ontario Legislature on the subject of adoption disclosure and of these, Churley sponsored five. Three of Churley’s bills passed 2nd reading, gaining support in principle, and were referred to Committee for hearings. One, Bill 77, was ordered for 3rd reading but died on the order paper.⁹ Churley’s bills were similar in substance to Bill 183. They included rights for both adopted persons and birth parents to access identifying information and a contact veto.¹⁰ Churley describes her efforts as, “I think there’s an adage that if at first you don’t succeed, try, try again, and I tried and I tried.”¹¹

² Cindy Baldassi, “The Quest to Access Closed Adoption Files in Canada: Understanding Social Context and Legal Resistance to Change,” *Canadian Journal of Family Law* 21 (2004): 226-231, 241, 244.

³ Ontario, *Official Reports of Debate (Hansard)* (29 March 2005).

⁴ Non-political staff at the Ministry of Social Services have asked that they only be cited on a not-for-attribution basis. Ministry staff were able to produce a bill with relative speed because some initial work had already been done in terms of discussion and internal analysis when Marilyn Churley had brought forward her PMBs.

⁵ Marilyn Churley, interview by author, Toronto, ON, 30 April 2008.

⁶ Ontario, *Official Reports of Debate (Hansard)* (29 March 2005).

⁷ Ibid.

⁸ Ontario, *Official Reports of Debate (Hansard)* (26 April 2005).

⁹ Susan Swift, “Background Information on Bill 183 – Adoption Information Disclosure Act, 2005,” Memorandum to the Standing Committee on Social Policy, (Toronto: Ontario Legislative Library, 17 May 2005).

¹⁰ Ibid.

¹¹ Ontario, *Official Reports of Debate (Hansard)* (26 April 2005).

While Churley's record may appear unimpressive, Private Member's Bills are notoriously difficult to get past all three readings and into law, particularly those bills of a substantive nature. R.R. Walsh's statistical survey of PMBs in Canadian Parliament from 1994 – 2000 found that very few become law. Walsh found that out of 1,042 PMBs introduced during that period, 65 (6.2 percent) were adopted at 2nd reading, and only 18 (1.7 percent) became law. In addition, of those 18, 7 changed the names of electoral districts, 2 were declaratory, and 9 were substantive and made a change to the statutory law of Canada.¹² The fact that three of Churley's bills passed 2nd reading and one was ordered for 3rd reading suggests that they were relatively successful and enjoyed relatively widespread support as PMBs.

The impact of Churley's advocacy and the debate on her PMBs was to gradually build support amongst legislators. Churley spent a lot of time along with people from the adoption community to educate MPPs, brought the issue forward frequently to keep it visible, found people in the media who were willing to write about it, and located experts to discuss issues such as the prevalence of genetically-inherited diseases.¹³ She believes that all her work publicly and behind the scenes "started to normalize" formerly contentious issues such as the retroactive nature of her bills.¹⁴ Churley's extensive and effective support for open adoption records from within the Legislature contributed to the one-sided initial framing of Bill 183. "I also know from discussing the issue with most of the members by now and sending them letters and my personal story that there is widespread support for this legislation, and has been for a long time," said Churley on the impact of her work.¹⁵ She had worked for years to change the opinions of Ontario's legislators and she created a volume of support that coalesced around the new government bill.

In addition to creating this general atmosphere of support, Churley pushed the Liberal government to introduce a government bill and worked with the government to draft it once they had committed. When the Liberal Party was in opposition, then Opposition Leader Dalton McGuinty signed a letter saying that he would support adoption disclosure legislation if the Liberals became the government.¹⁶ Churley was frustrated that after the 2003 election the new Liberal government did not move forward on the issue of adoption disclosure.¹⁷ During Question Period in November 2004, Churley read from that letter and called on Premier McGuinty to open adoption records. McGuinty replied that "The member opposite has some real history connected with this issue. I do not for a moment doubt her sincerity and commitment to this issue... We're going to move forward with this."¹⁸ In addition, Churley "kept hounding" Minister Papatello, who made a meeting with Churley and decided to bring the issue forward.¹⁹ When Papatello subsequently began work on a bill, "I and the people in the adoption community were very involved in drafting the bill."²⁰ In Marilyn Churley, advocates of open adoption records had a determined ally within the Legislature, who re-framed the debate in favour of greater openness. Like so many Private Members' Bills, Marilyn Churley's bills were not

¹² R.R. Walsh, "By the Numbers: A Statistical Survey of Private Members' Bills," *Canadian Parliamentary Review* 25, no. 1 (2002).

¹³ Churley, interview.

¹⁴ Ibid.

¹⁵ Ontario, *Official Reports of Debate (Hansard)* (26 April 2005).

¹⁶ Churley, interview.

¹⁷ Ibid.

¹⁸ Ontario, *Official Reports of Debate (Hansard)* (22 November 2004).

¹⁹ Churley, interview.

²⁰ Churley, interview.

successful in the Legislature. However, they were able to shift the debate and garner enough attention that the idea was picked up and brought forward as a government bill.

Interest groups advocating greater openness in adoption records worked for many years to shift the debate on adoption disclosure. Normand Cherry calls interest groups “extremely useful sources of information for ministers and the government.”²¹ He notes that “When the government proposes new legislation or regulations, particularly when it takes the trouble to submit its proposal to public consultation through parliamentary committee, a pulse-taking process ensues.”²² The government, when it took the pulse of the adoption community, found widespread support for opening adoption records. However, the degree of support may have been overestimated due to the organizational structures in the adoption community and the desire of some members of the community to remain anonymous.

There are a number of groups in the adoption community organized to assist with the search for birth parents or adopted children, including Parent Finders and Adoption Support Kinship.²³ Others are organized around advocating for the rights of the child and favoured the adopted person’s “right to know” above a birth parent’s “right to privacy”. These include Defence for Children International Canada, Ontario Association of Children’s Aid Societies, FASworld Toronto, and Bastard Nation: The Adoptee Rights Organization.²⁴ A couple of support groups for birth mothers, Birthmothers for Eachother and the Canadian Council of Natural Mothers, also testified to support greater openness.²⁵ Birth mothers in these organizations would not have been those seeking to protect their privacy, as they were willing to publicize their identities as birth mothers by being part of these organizations. Finally, there are a number of umbrella organizations that lobby for openness in adoption records such as the Adoption Council of Ontario and the Coalition for Open Adoption Records (COAR).²⁶ All of these organizations testified at the Committee hearings on Bill 183 to support greater openness.

These pre-existing organizational structures within the adoption community are naturally inclined to be in favour of opening adoption records, because they are largely made up of individuals who are searching or who tend to identify with the adopted person’s “right to know”. Karen Lynn of the Coalition for Open Adoption Records suggests that they were well organized, with different groups working together “constantly” and “across the country”.²⁷

Conversely, there exist no organized lobby groups of birth mothers or adopted persons who wish to remain anonymous. The very nature of advocating for anonymity severely limits the ability to organize. Information and Privacy Commissioner Cavoukian argued before the Committee that “they don’t have organized groups. There aren’t organizations who can file submissions, who can speak on behalf of the bill, who can appear here, who can write to MPPs.”²⁸ Cindy Baldassi, in her article “The Quest to Access Closed Adoption Files in Canada,” notes that birth mothers who do not want reunions “are at a disadvantage when facing the very

²¹ Normand Cherry, “Parliamentarians: Lobbyists or Instruments of Lobbyists?” *Canadian Parliamentary Review* 20, no. 3 (1997).

²² Cherry.

²³ Ontario, Standing Committee on Social Policy, *Official Reports of Debate (Hansard)* (18 May 2005, 19 May 2005).

²⁴ *Ibid.*

²⁵ Ontario, Standing Committee on Social Policy, *Official Reports of Debate (Hansard)* (19 May 2005).

²⁶ *Ibid.*

²⁷ Karen Lynn, President, Canadian Council of Natural Mothers, interview by author, Toronto, ON, 16 May 2008.

²⁸ Ontario, Standing Committee on Social Policy, *Official Reports of Debate (Hansard)* (18 May 2005).

public advocates of open adoption records.”²⁹ The London Coalition of Adoptive Families, made up largely of adoptive parents, was the only interest group to speak before the Committee advocating for less openness than Bill 183 proposed. The Coalition sought protection for adopted persons who were taken from their birth parents due to a history of violence, but favoured the concept of greater openness in general.³⁰

While organizations like COAR were leading the fight for openness, individuals who sought privacy largely worked on their own. Joy Cheskes, who started a website³¹ in an attempt to gather information and organize lobbying against Bill 183, found it challenging to even make people aware of the legislation. “We weren’t organized,” she says, “because most of us were just living our lives.”³² She found that it was a huge challenge to oppose the legislation “when you’re working against a well-organized lobby group that has a really good friend at the Legislature [Marilyn Churley].”³³ Clayton Ruby argues that compared to the efforts of interest groups like COAR, “We were out-organized by miles.”³⁴

Another useful source of information for examining the lobby effort of various groups is the records of the Standing Committee on Social Policy, which received over 100 submissions from individuals and groups that were then forwarded to the MPPs on the Committee. These submissions took the form of emails and letters, which I have classified broadly. I found 71 in favour of Bill 183 or amendments that would provide for even greater openness in adoption records, 27 that were not in favour of Bill 183 or were in favour but called for more privacy protections, and 5 that were ambivalent or did not address the issue of openness.³⁵ There were 2 additional submissions that could not be forwarded to the members of the Committee because they were submitted anonymously. It is standard Committee practice to forward only those submissions that have a name associated with them, because if there is no name there is no way to judge their veracity.³⁶ Both anonymous submissions were from birth mothers who did not want their identities to be revealed.

The submissions to the Committee reveal several interesting ways in which the debate on this legislation was asymmetrical. Submissions in favour of greater openness far outnumber those in favour of less openness, suggesting that those in favour of more openness were larger in number, more active, or both. The majority of submissions in favour included a list of specific requests for amendments that were the same, suggesting an organized letter-writing campaign. For example, many letters closed with the phrase “Bill 183 must be kept retroactive and there should be NO disclosure veto.” None of the submissions advocating less openness bore the characteristics of a letter-writing campaign, indicating a lack of any formal organization. Finally, the 2 anonymous submissions suggest a tiny minority of people who were against openness but were unwilling to come forward. Their attempt at advocacy was ineffective because the Committee members never read their submissions. The Committee Clerk’s office also received several phone calls that opposed the legislation, which were not catalogued or

²⁹ Baldassi, 249.

³⁰ Ontario, Standing Committee on Social Policy, *Official Reports of Debate (Hansard)* (18 May 2005).

³¹ www.disclosureveto.ca

³² Joy Cheskes, interview by author, Toronto, ON, 29 May 2008.

³³ *Ibid.*

³⁴ Clayton Ruby, interview by author, Toronto, ON, 15 May 2008.

³⁵ Submissions to the Standing Committee on Social Policy. Sessions 38-1 and 38-2 (2005).

³⁶ Anne Stokes, Committee Clerk, Standing Committee on Social Policy, interview by author, Toronto, ON, 21 April 2008.

presented to the Committee because the individuals would not appear before the Committee or put their name on a written submission.³⁷

The debate was not entirely one-sided because the Information and Privacy Commissioner, Clay Ruby and other individuals came forward to advocate for greater privacy protections, however, the general impression was of far greater support for retroactive openness with as few limits as possible. At the Ministry of Community and Social Services, staff were under the impression that there were far more people who favoured openness over privacy. Committee Clerk Anne Stokes noted that since the issue had been raised in Private Members' Bills before, there was a general sense that all of the issues had been discussed already.³⁸ The fact that Minister Papatello did not appear before the committee was an indication of how uncontroversial the bill was.³⁹ Clay Ruby argues that all the previous organizing by interest groups was important because it "created the impression that it's all one way."⁴⁰ Gradually, and after the Privacy Commissioner had spoken out against the bill and her opposition was in the press, a few more people who were against the legislation began to come forward.⁴¹ However, because this shift came after the bill was already in the Committee stage, it was perhaps less likely that the bill would be amended. There was already a great deal of will to proceed, and the government may have viewed overhauling the bill as backing down.

The most vocal and well-publicized critic of Bill 183 was the Information and Privacy Commissioner of Ontario, Ann Cavoukian. She was involved in meetings with Minister Papatello while the Bill was being drafted, and subsequently critiqued the Bill in press releases, Committee hearings, and the media. She felt strongly that it was her duty to advocate for privacy protections, particularly because so many people who sought privacy were unwilling to come forward themselves. Cavoukian says that this legislation, had it held up in court "would have been my biggest defeat...it would have broken my heart."⁴² In an interview with Cavoukian, she stressed that she was not opposed to the idea of openness. Her concern was that the Bill would be retroactive, opening the records of individuals who thought that they would be sealed forever. Many of these people wrote to her, often anonymously, asking for help and she became personally committed to making sure their views were heard. Cavoukian said of these people, "I was their only voice. They had no other way of getting their message out. I had such a weight on my shoulders. It was a very difficult, unique situation."⁴³

Though Cavoukian had been a part of the Ministry's initial round of meetings when developing the Bill, the Ministry did not incorporate her initial criticisms. However, when she introduced Bill 183 to the Legislature, Minister Papatello thanked Cavoukian, saying, "our privacy commissioner, Ann Cavoukian – was extraordinarily helpful in the development of this bill. The back and forth between our offices has led to a much better proposed bill."⁴⁴ During her conversations with the Minister, Cavoukian had said that she supported the Bill with one change – it needed a disclosure veto provision for those records that would be opened

³⁷ Stokes, interview.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ruby, interview.

⁴¹ Stokes, interview.

⁴² Ann Cavoukian, Information and Privacy Commissioner/Ontario, interview by author, Toronto, ON, 30 April 2008.

⁴³ Ibid.

⁴⁴ Ontario, *Official Reports of Debate (Hansard)* (29 March 2005).

retroactively. Says Cavoukian: “I honestly thought they were going to put in a disclosure veto because we had extensive consultations with them and we told them that we couldn’t support this Bill without it.”⁴⁵ Ministry staff did not call Cavoukian to say that they were not putting a disclosure veto into the Bill, and so Cavoukian was “just stunned” when Bill 183 was presented to the Legislature without one.⁴⁶ Furthermore, she thought the Minister’s comments suggested that the office of the IPC supported Bill 183 as presented, and her implied support resulted in Progressive Conservative Leader John Tory supporting the Bill.⁴⁷ PC member Cameron Jackson’s comments in the Legislature support that interpretation. He says that “the presentation in the House on the day it was tabled implied that the privacy commissioner, in some fashion, was supporting the legislation. I just felt that was politically inappropriate and unnecessary.”⁴⁸

After Bill 183 was introduced without a veto provision, Cavoukian began to advocate in every way she could to have it changed. She sent out a press release on March 29, the same day the bill was introduced, saying “Going from this day forward, with everyone aware of the rules, I am in favour of openness in adoptions. But retroactively changing the rules and exposing the identities of birth parents who entered into the adoption process in an era when secrecy was the norm can have major repercussions.”⁴⁹ Her office produced seven press releases in total on the issue of adoption disclosure, including one that she was able to get signed by all of the Information and Privacy Commissioners across the provinces, territories, and federal jurisdiction.⁵⁰ She and Assistant Commissioner Ken Anderson also published opinion pieces in the newspaper to argue their case.⁵¹ She also telephoned John Tory, who after speaking with her for 10 minutes, reversed his position.⁵²

Cavoukian appeared before the Standing Committee on Social Policy during public hearings to argue her case and read a sampling of the letters she had received from individuals concerned about the legislation. John Tory requested that she be given more time to speak than the standard 10 minutes. She was initially granted 15 minutes, and after listening to the first part of her presentation, the Committee granted her an additional 15 minutes.⁵³ Cavoukian told the Committee, “I’m here to speak for the countless others who cannot. I’m here to speak for those whose voices have not yet been heard and who will be heard through me.”⁵⁴ She spoke in particular on behalf of birth mothers, who she argued had at least sometimes been promised confidentiality when placing their child for adoption.⁵⁵ In addition, she filed a substantial written submission and written submissions on behalf of the IPCs for British Columbia, Canada and later Newfoundland and Saskatchewan. Though Cavoukian received more time to make her case to the Committee than any other single presenter, if we accept her contention that she was standing in place of many individuals who could not come forward, then the individuals seeking privacy protection still received less time in the hearings than those favouring openness.

⁴⁵ Cavoukian, interview.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ontario, *Official Reports of Debate (Hansard)* (26 April 2005).

⁴⁹ Information and Privacy Commissioner/Ontario, “Making adoption bill retroactive will break promises and invade privacy of thousands of Ontarians,” Press Release, 29 March 2005.

⁵⁰ Information and Privacy Commissioner/Ontario, “Canadian Commissioners Unanimous In their Condemnation of Ontario’s Adoption Disclosure Bill 183 – Privacy Right Must Be Preserved,” Press Release, 8 June 2005.

⁵¹ Ann Cavoukian and Ken Anderson, “Fair play for Ontario’s adoptees,” *National Post*, 8 April 2005, A22.

⁵² Cavoukian, interview.

⁵³ Ontario, Standing Committee on Social Policy, *Official Reports of Debate (Hansard)* (18 May 2005).

⁵⁴ Ibid.

⁵⁵ Ibid.

One reaction of the government and interest groups to Commissioner Cavoukian's strong criticism was to question her authority to comment on this type of legislation. Jeffrey Graham Bell examines the more general issue of the appropriate role of officers of the legislature, which he labels "agents of parliament" (APs). He addresses the argument that the accountability powers exercised by APs are "an affront to the principle of responsible government" because APs are not elected.⁵⁶ Bell argues that APs exercise political influence, whereas elected officials exercise power in choosing how to respond to directions from them.⁵⁷ In this case, the government did not respond to the Commissioner's attempt at influence and so exercised its power.

The specific contention against Cavoukian's comments was that adoption laws were not part of her jurisdictional area. Brian Macdonald of Parent Finders Inc. wrote a letter to the Speaker of the House to "formally request investigation" of Cavoukian's public statements on Bill 183. The letter argues that "the Commissioner is specifically barred from acting in this area" though it concedes that "the Commissioner may comment on any pending legislation." It questions the Commissioner's authority to issue press releases, appear in the media, and "dominat[e]" committee hearings.⁵⁸ The Chair of the Standing Committee on Social Policy responded to this letter by writing that "the role of the Committee in conducting public hearings...is to gather as much information as possible, including divergent opinions, to assist the members in developing their own analysis... It was in this spirit that the Privacy Commissioner was invited to appear before the Committee."⁵⁹

Minister Papatello, in her leadoff speech during the second reading debate, also cast doubt on the role of the IPC. "When developing this legislation, we did consult with the Information and Privacy Commissioner, Ann Cavoukian. We did this even though records relating to adoption fall outside the privacy commissioner's jurisdiction...Her role does fall outside of this mandate where adoptions are concerned but we very much respect her opinion."⁶⁰ However, Papatello added that "It is her role to vet and study every single aspect of anything that has something to do with privacy issues." These comments, spoken in the same speech, would seem to contradict one another. Perhaps they were intended to cast some doubt without confronting too directly an officer of the Legislature. Cavoukian's reaction to the Minister's statements on the role of the IPC is that they were "dead wrong".⁶¹ It is her job, she says, "to comment independently on privacy implications of proposed legislation."⁶² It would seem that Papatello and Cavoukian do essentially agree on her role, but choose to emphasize and phrase their opinions differently.

Commissioner Cavoukian was very public and active in carrying out her role as an officer of the Legislature because the government did not respond to her initial concerns in private meetings. It is perhaps an indication of how successful Marilyn Churley and the various interest groups had been at making their case that the government chose not to include a disclosure veto,

⁵⁶ Jeffrey Graham Bell, "Agents of Parliament: A New Branch of Government?" *Canadian Parliamentary Review* 29, no. 1 (2006).

⁵⁷ Ibid.

⁵⁸ Brian Macdonald, Letter to the Hon. Alvin Curling, Speaker of the House, 2 June 2005, Submissions to the Standing Committee on Social Policy, Queen's Park, Toronto.

⁵⁹ Mario Racco, Letter to Brian Macdonald, 8 June 2005, Submissions to the Standing Committee on Social Policy, Queen's Park, Toronto.

⁶⁰ Ontario, *Official Reports of Debate (Hansard)* (26 April 2005).

⁶¹ Cavoukian, interview.

⁶² Ibid.

as Cavoukian privately then publicly advised. Donald Hamilton argues of legislative officers in Alberta that “The response by the government to the Officers’ recommendations or reports is perhaps one measurement of the success of independent Officers.”⁶³ He also notes that in Alberta few of the IPC’s orders are sent for judicial review, and because of their success in “quietly” carrying out their functions, the public is not very aware of much of the work of legislative officers.⁶⁴ Clay Ruby argues that it was “very unusual” for the government to ignore the Privacy Commissioner because usually the fear of her public opposition is enough to at least motivate them to make a compromise.⁶⁵ Because there was no behind-the-scenes compromise, Commissioner Cavoukian made her opposition public.

From her comments about acting as a voice for those adoptees and birth mothers who did not want to come forward, we can infer that Cavoukian saw it as part of her role to correct some of the asymmetry in advocacy created by this unique situation. Cavoukian was advocating on behalf of privacy rights but also on behalf of a minority group that was not politically active or influential. It is an interesting question whether representing groups that are not politically influential is a role of officers of the Legislature generally. The Ombudsman and Auditor General both at times address issues where there are not organized advocacy groups, but it is certainly not a general rule.

Perhaps a better explanation is that officers of the Legislature advocate for specific areas of knowledge expertise, rather than for particular groups, politically active or not. Their advice is intended to be apolitical and independent, thus rising above the debate amongst interest groups. In the sense that officers are expert and independent, they do perhaps correct for asymmetries in the political debate created by well organized vs. unorganized groups. In this case, the IPC balanced some of the asymmetry in this debate by advocating for privacy protections, which were not well represented by any interest group. Clearly Bill 183 was a unique case and it is somewhat difficult to draw definitive general conclusions from it.

Bill 183 enjoyed tremendous support in the Legislature and across political parties. At first and second reading, the leaders of all three political parties supported it. As a government bill it was guaranteed majority support in the Legislature, but the NDP was also strongly in favour because Bill 183 was so similar to the Private Members’ Bills Marilyn Churley had brought forward previously. Churley spoke for the NDP at first reading saying, “I want to say to her [the Minister] today that I thank her very much for moving forward.”⁶⁶ The PCs were divided but many voted for Bill 183 at second reading. According to PC member Norm Sterling the first reaction of the PC caucus to the new legislation was “to support it”.⁶⁷ Cameron Jackson spoke a first reading, saying, “Minister, I just want to say that the PC caucus and our new leader, John Tory, will be pleased to work with you in making this the most effective legislation anywhere in the world.”⁶⁸ At second reading in May 2005 Bill 183 passed by 71 votes to 12.⁶⁹

The Bill was amended in Committee to increase privacy protections, but the Committee would not add a full disclosure veto. Concerns about Crown Wards in particular, who might

⁶³ Donald Hamilton, “The Role of the Legislative Officers in Alberta,” *Canadian Parliamentary Review* 30, no. 1 (2007).

⁶⁴ Ibid.

⁶⁵ Ruby, interview.

⁶⁶ Ontario, *Official Reports of Debate (Hansard)* (29 March 2005).

⁶⁷ Norm Sterling, MPP, Carleton--Mississippi Mills, interview by author, Toronto, ON, 27 May 2008.

⁶⁸ Ontario, *Official Reports of Debate (Hansard)* (29 March 2005).

⁶⁹ Ontario, *Official Reports of Debate (Hansard)* (3 May 2005).

have been taken away from violent birth parents, prompted the Committee to add a provision allowing both adult adoptees and birth parents to prevent disclosure if they could prove it was necessary to “prevent sexual harm or significant physical or emotional harm.”⁷⁰ Norm Sterling, who took part in the Committee’s clause-by-clause debate, says the Committee decided to “compromise...but it was a bad compromise.”⁷¹ The amendments in Committee indicate that the debate was beginning to shift due to the arguments for privacy protection, but openness was still the dominant concern as the onus would be on the applicant to argue that there would be harm if their information were released.

By the time Bill 183 got to third reading in the fall of 2005 it had become more controversial due to the comments of the IPC and others. Speaking at the third reading debate John Tory said, “I voted in favour of this bill on second reading. I voted in favour of this bill because that is the stage at which one votes for approval in principle...It was only...when the privacy commissioner telephoned me one day to talk about some of her concerns and observations about this legislation” that he changed his mind.⁷² During the third reading debate PC MPP Cameron Jackson also cautioned that “most of the legal opinion – in fact, we did not get a single legal opinion that said that this legislation would be sustained on appeal. With all of that evidence, why is it that this government is proceeding with a bill that we’ve got clear legal evidence will be struck down?”⁷³ However, in spite of this more strident PC opposition, Bill 183 passed third reading with a significant majority of 68 to 19.⁷⁴

After its strong approval in the Legislative Assembly, vocal endorsements from interest groups, and a promise to be the most progressive adoption disclosure legislation in the country, the *Adoption Information Disclosure Act* was struck down by the Ontario Superior Court of Justice. Thus the final element in the legislative process was, in this case, the judicial system. Lawyers Clayton Ruby, Caroline Wawzonek and Stacey Stevens brought a pro bono *Charter* challenge to the Court on behalf of several adoptees and a birth father who did not want their records opened.

It is difficult to know how much consideration the government gave to the possibility of a *Charter* challenge when drafting and amending the legislation. Clayton Ruby spoke at the Committee hearings along with his only client at the time, Denbigh Patton. He told the members of the Committee that if the bill went through without a disclosure veto provision, he would be challenging the legislation in Court. “I am going to court if this does not pass with the amendment that Ms. Cavoukian says is wise and that I say is required,” he told the Committee.⁷⁵ He even outlined the grounds on which he would make his challenge: “security of the person”, section 8, and section 15 of the *Charter*.⁷⁶

The Committee members did seem somewhat receptive to his presentation. Cameron Jackson said, “We have not received any legal opinions that the government may have received with regard to this legislation...I’d just have that information sought for the benefit of the committee.”⁷⁷ Ruby thinks that during his presentation the Committee paid close attention and

⁷⁰ *Adoption Information Disclosure Act, 2005*, S.O. 2005, s. 9.

⁷¹ Sterling, interview.

⁷² Ontario, *Official Reports of Debate (Hansard)* (31 Oct. 2005).

⁷³ Ontario, *Official Reports of Debate (Hansard)* (31 Oct. 2005).

⁷⁴ Ontario, *Official Reports of Debate (Hansard)* (1 Nov. 2005).

⁷⁵ Ontario, *Official Reports of Debate (Hansard)* (18 May 2005).

⁷⁶ *Ibid.*

⁷⁷ Ontario, Standing Committee on Social Policy, *Official Reports of Debate (Hansard)* (18 May 2005).

did have grave doubts about the bill's constitutionality.⁷⁸ He suggests that the Committee did not amend the Bill because the government members were whipped.⁷⁹

I have not had access to any legal advice the Ministry may or may not have had. It is impossible that the Ministry had no legal advice because it is lawyers who carry out legislative drafting. As a matter of course, it would be common to obtain a legal opinion. Two outside legal opinions were submitted to the Committee that did not support Bill 183⁸⁰ and Cameron Jackson did say in debate that the legal opinions he had heard did not support it. However, individuals in the Ministry have also suggested to me that it is quite common for new legislation to face threats of legal action. The prospective challenge to Bill 183 would not necessarily have been seen as unusual or a matter of particular urgency.

This legal challenge was affected by the asymmetry in organizing ability that was so unique to the issue of adoption disclosure. Ruby sought out additional applicants for the case, but could only find adult adoptees and one birth father that were willing to come forward. He wanted to have a birth mother in order to represent that group as well, but could not find one who would join the case, because birth mothers who were seeking to protect their privacy were inherently unwilling to come forward.⁸¹ Joy Cheskes, one of Ruby's applicants, worked to raise money to pay for expert witnesses at the trial. She had no organized groups to draw on for fundraising and instead used a mailing list of about 60 people she had established using her website.⁸² Ruby says that the government had a much stronger slate of expert witnesses, because there had been much more research and lobbying over the years that was in favour of greater openness.⁸³

On September 19, 2007 justice Belobaba ruled that the *Adoption Information Disclosure Act* was unconstitutional and declared it invalid and of no force and effect. Commissioner Cavoukian says, "Ultimately, I felt completely vindicated by judge Belobaba's remarks," which "elevated privacy to a new level."⁸⁴ In his decision, Belobaba commented on the role of the judiciary:

I have come to this conclusion after much deliberation. No judge takes lightly his or her responsibility as a "constitutional umpire." No judge is eager to find that a law enacted by a democratically-elected majority is unconstitutional and must be set aside. But our system of government is not based on majority-rule alone. Ours is a constitutional democracy with an entrenched *Charter of Rights and Freedoms* that is intended primarily to protect individuals and minorities against the excesses of the majority. Included within the *Charter's* ambit of protection are the applicants, who are part of a small minority of adoptees and birth parents that wish to protect their privacy. They have every right to do so. The applicants have established that their right under s. 7 of the *Charter*

⁷⁸ Ruby, interview.

⁷⁹ Ibid.

⁸⁰ See for example, Bruce Parry, "Re: Submissions on Bill 183 – *Adoption Information Disclosure Act 2005*," 22 July 2005, Standing Committee on Social Policy, exhibit 1/08/207, filed on 14 Sept. 2005.

⁸¹ Ruby, interview.

⁸² Cheskes, interview.

⁸³ Ruby, interview.

⁸⁴ Cavoukian, interview.

has been breached and the government has failed to justify this breach under s. 1.⁸⁵

There is certainly an important role for the judiciary in our democratic system, which in its own unique way contributes to the process of creating legislation by taking away those elements that violate the *Charter*. Not unlike the independent officers of the legislature, judges are meant to provide expert information on the law that is independent of the political debates, which as I have demonstrated, can be dominated by the arguments that are best organized or presented with the greatest determination.

In researching this paper I searched for a central focus. Would this be a paper about interest groups? Or perhaps the policymaking options available for a determined backbench MPP? Would I write on the role of independent officers of the Legislature such as the Information and Privacy Commissioner? Or how the Legislative Assembly could pass, with great support and little debate, an unconstitutional Bill? I eventually hit on the idea of “asymmetry” and the protections against it built into our legislative system and constitutional structure. In the legislative process for Bill 183, one can see the influence on policy direction that highly motivated and well organized advocates can wield, especially in the face of unorganized and even invisible opposition.

But if there is a broader implication here, it is that policy is not a static thing that appears from nowhere, conceived of in a back room and floating unchanging through the legislative process and into law. The legislative process is dynamic and can be pushed and moulded and moved by many different actors. Organized and dedicated interest groups can put their items on the government agenda, as can determined backbench MPPs. Independent policy experts like the Privacy Commissioner with their strong public credibility have tremendous influence, if not power. Finally, the legal system is available for individual citizens to directly challenge the decisions of their elected representatives, and change legislation.

⁸⁵ *Cheskes v. Ontario (Attorney General)*, 2007 CanLII 38387 (ON S.C.).

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