

Dad, Mom — and Mom: The Ontario Court of Appeal's Decision
in *A.A. v. B.B.*

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*On 2 January 2007, the Ontario Court of Appeal released its judgment in A.A. v. B.B. recognizing that a five-year-old boy can legally have two mothers and a father. The case was widely presented as another victory in the struggle for lesbian and gay rights and a fundamental reordering of parental rights and responsibilities. The analysis in this comment suggests that the real significance of the case lies elsewhere. The decision is more rightly situated in the developing caselaw on new methods of conception and parenting. At the same time, because the case is grounded in the exercise of a court's *parens patriae* discretionary jurisdiction, the case simply cannot be read as allowing all children to have more than two parents. This comment will argue that the Court of Appeal's decision in A.A. v. B.B., as sound as the reasoning may be, will likely impact on only a small number of families, despite the fact that many issues raised in that case are at the cusp of changing social and scientific conditions affecting an increasing number of families. Rather, it is time for lawmakers to initiate comprehensive law reform in relation to legal parentage.*

*Le 2 janvier 2007, la Cour d'appel de l'Ontario a rendu sa décision dans l'affaire A.A. c. B.B., qui établit qu'un garçon de cinq ans a légalement le droit d'avoir deux mères et un père. L'affaire a souvent été présentée comme une autre victoire dans le contexte de la lutte pour les droits des lesbiennes et des homosexuels ainsi qu'une réorganisation fondamentale des responsabilités et des droits parentaux. L'analyse dans le présent article propose que la portée véritable du jugement soit tout autre. L'arrêt ferait plutôt partie de l'évolution de la jurisprudence portant sur les nouvelles méthodes liées à la conception et au rôle parental. Par ailleurs, puisque l'affaire est fondée sur l'exercice de la compétence discrétionnaire *parens patriae* des tribunaux, la décision ne peut tout simplement pas être interprétée comme donnant droit à tous les enfants d'avoir plus de deux parents. Le présent texte soutient que le jugement de la Cour d'appel dans*

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l'affaire A.A. c. B.B., malgré le raisonnement logique qui le sous-tend, ne touche qu'un petit nombre de familles, en dépit du fait que plusieurs des questions soulevées dans cette affaire sont sur le seuil des conditions sociales et scientifiques changeantes qui concernent un nombre croissant de familles. Le moment est venu pour les législateurs d'entreprendre une réforme globale du droit portant sur les liens de parenté juridiques.

1. Introduction

On 2 January 2007, the Ontario Court of Appeal released its judgment in *A.A. v. B.B.*¹ The decision featured immediately and prominently in headlines around the world, readers being alerted to the following news: “Court Rules Boy has Dad and 2 Moms;”² “Ontario Court Says Boy Can Have Dad, Mom — and Mom;”³ “Canadian Province Says Child Can Have 2 Moms;”⁴ “Canadá: la Justicia avaló que un nene tenga dos madres y un padre;”⁵ “Canadian Court Rules Lesbian Partner Is a Parent;”⁶ and “Un tribunal canadien reconnaît un père et deux mères à un enfant.”⁷ Media reports suggested that the judgment was a landmark case because it “redefine[d] the meaning of family and examine[d] the rights of parents in same-sex-unions.”⁸

While the decision undoubtedly represents an important development in Ontario family law, this comment will argue that the media portrayal of the significance of the case was somewhat exaggerated. The case was

¹ (2007), 83 O.R. (3d) 561(C.A.) [*A.A. v. B.B. (CA)*], leave to appeal to S.C.C. refused [2007] S.C.J. No. 40 (QL).

² Tim Lai, “Court Rules Boy Has Dad and 2 Moms” *The Toronto Star* (3 January 2007), online: The Toronto Star <<http://www.thestar.com/News/article/167376>>.

³ “Ontario Court Says Boy Can Have Dad, Mom — and Mom” *CBC News* (3 January 2007), online: Canadian Broadcasting Corporation <<http://www.cbc.ca/canada/toronto/story/2007/01/03/twomom-court.html>>.

⁴ Leah Schurr, “Canadian Province Says Child Can Have 2 Moms” *Reuters* (3 January 2007), online: Reuters http://ca.today.reuters.com/news/news Article.aspx?type=topNews&storyID=2007-01-03T223745Z_01_N03408814_RTRIDST_0_NEWS-PARENTS-CA-COL.XML.

⁵ “Canadá: la Justicia avaló que un nene tenga dos madres y un padre” *Clàrin.com* (3 January 2007), online: Clàrin.com <<http://www.clarin.com/diario/2007/01/03/um/m-01338364.htm>>.

⁶ Ian Austen, “Canadian Court Rules Lesbian Partner Is a Parent” *The New York Times* (12 January 2007) A15.

⁷ “Un tribunal canadien reconnaît un père et deux mères à un enfant” *Radio France International* (3 January 2007), online: RFI <<http://rfi.fr/actu/fr/afp/001/mon/070103195836.k8lbbh6t.asp>>.

⁸ Schurr, *supra* note 4.

widely presented as another victory in the struggle for lesbian and gay rights and a fundamental reordering of parental rights and responsibilities. The analysis in this comment suggests that the real significance of the case lies elsewhere.

First, the decision is more rightly situated in the developing caselaw on new methods of conception and parenting than in the context of lesbian and gay rights. In fact, the case turns not on the sexual orientation of the parents, but rather on the applicability of the *parens patriae* jurisdiction and the doctrine of the best interests of the child. The Ontario Court of Appeal rightly provides contemporary content to the *parens patriae* jurisdiction by making it clear that the impact of changing social and scientific conditions has broadened the scope under which the courts may act to fill legislative gaps. Moreover, by confirming that the doctrine of the best interests of the child is relevant to the exercise of a court's jurisdiction to fill legislative gaps, the Court ensures that the *parens patriae* jurisdiction is consistent with both domestic and international doctrines of the best interests of the child.

Second, the Court's decision is narrower in scope than many of its detractors claim.⁹ Because the case is grounded in the exercise of a discretionary jurisdiction which focuses on the interests of a specific child, the case does not set a principled policy in relation to how courts may determine "who is a parent." While litigation reveals that there are legislative "gaps ... that do not contemplate the familial relationships of many parents and children in Canada,"¹⁰ judicial decisions, such as *A.A. v. B.B.*, are unable to fill these gaps in any coherent, consistent and policy driven way. Law reform cannot continue to proceed through *ad hoc* and piecemeal judicial decisions. This comment will argue that the framework governing legal parentage must be reviewed to ensure that it is anchored in policy considerations that reflect the realities of modern parenting.

⁹ Some commentators fear that the decision undermines traditional familial relationships and the best interests of all children. See *A.A. v. B.B. (CA)*, *supra* note 1 (Factum of the Intervener Alliance for Marriage and Family); Ruth A.M. Ross, "Let the Little Children...Three Parent Case Update" *Christian Legal Fellowship* (15 January 2007), online: Christian Legal Fellowship <<http://www.christianlegalfellowship.org/Interventions/Three%20Parent/ThreeParentCaseUpdateFINALFINALFINALfortheWebsite.pdf>>; Valerie Hazlett Parker, "How Many Parents Can a Child Have?" *Christian Legal Fellowship*, online: Christian Legal Fellowship <<http://www.christianlegalfellowship.org/Interventions/Three%20Parent/WhatisaFamily-HazlettParker.pdf>>.

¹⁰ Llana Nakonechny, "The Vital Statistics Act: Only Two Parents Per Child" in County of Carleton Law Association, ed., *14th Annual Institute of Family Law Conference 2005* (Ottawa: County of Carleton Law Association, 2005) 2Bi at 10.

The comment will first review the facts, the legal arguments of the parties and the holdings of the lower and appeal courts before providing a critical analysis of the Court of Appeal's decision. Readers should note that on March 5, 2007, an intervener in the case, the Alliance for Marriage and Family, applied to the Supreme Court of Canada for leave to appeal the decision of the Ontario Court of Appeal.¹¹ On September 13, 2007, LeBel J. ruled that the interveners had no specific interest in the outcome of the litigation and their request for party status was turned down.¹²

2. *The Facts of the Case*

In 1999, two women in a lesbian relationship, referred to by the courts as A.A. and C.C., decided to have a child with the assistance of a long time mutual male friend, B.B. All three agreed that C.C. would become the biological mother of a child fathered by B.B.. The child, a boy, was born in 2001. The courts refer to him as D.D.

Since his birth, both women have acted as the child's primary caregivers; they have responsibility for the day-to-day care and the decision-making. A.A. fully took on a parental role and she has been "a daily and consistent presence"¹³ in the boy's life since his birth. The biological parents support the commitment A.A. has made to her parental role and they "recognize her equal status with them."¹⁴ Moreover, all three parents agreed from the beginning that it was in the child's best interests that the biological father take an active part in the child's life. The biological father therefore remains a permanent part of the child's life through regular visits with the child and the family as a whole.

When the boy was two years old, the non-biological mother made an application for a declaration of parentage under the *Children's Law Reform Act (CLRA)*.¹⁵ Whereas natural parents are automatically recognized as the parents of a child, "independent of whether the child is born within or outside marriage,"¹⁶ a non-biological parent can apply for a declaration of parentage under Section 4(1) of the Act which provides that:

¹¹ *Alliance for Marriage and Family v. A.A.*, [2007] S.C.C.A. No. 161 (Application for Leave to Appeal, Intervener), online: <<http://www.christianlegal.fellowship.org/Interventions/Three%20Parent/SCCAppeal/StatementofFacts%5B1%5D.pdf>>.

¹² *Alliance for Marriage and Family v. A.A.*, [2007] S.C.J. No. 40 (QL) at para. 13.

¹³ *A.A. v. B.B.*, [2003] O.J. No. 1215 (QL) at para. 8 [*A.A. v. B.B. (Application Judge)*].

¹⁴ *Ibid.*

¹⁵ R.S.O. 1990, c. C-12 [*CLRA*].

¹⁶ *Ibid.*, s. 1.

4. (1) Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.¹⁷

By applying for a declaration of parentage, A.A. was seeking to have the court declare that she was a “mother” for all purposes of the law.

3. Arguments of the Parties

a) The Applicant

In her application to the Family Court of the Ontario Superior Court of Justice, A.A. asked the application judge, Aston J., to declare that she is a “parent” of the then two-year-old child. She submitted that this remedy is the only appropriate one as she was seeking a “lifelong immutable declaration of status.”¹⁸ A.A. asked the Court to use statutory interpretation principles to read the *CLRA* “in a manner enabling the order sought.”¹⁹ In the alternative, A.A. argued that the application could be granted through the exercise of the court’s *parens patriae* authority.²⁰

b) The Respondents

The respondents were the natural mother and father who both consented to A.A.’s application before the application judge and the Court of Appeal.

c) The Interveners

The Attorney-General of Ontario chose not to intervene to support the legislation. At the appeal level, the Court appointed an *amicus curiae*, who argued that the application judge had properly interpreted the *CLRA*, but had erred in refusing to grant the application under the court’s *parens patriae* jurisdiction.²¹

The Alliance for Marriage and Family, a coalition of five organizations opposed to the application,²² sought intervenor status before the application judge. Aston J. declined to hear their arguments on the merits since he dismissed the application. On appeal, the Alliance was permitted to intervene and they argued that the application judge properly dismissed

¹⁷ *Ibid.*, s. 4(1).

¹⁸ *A.A. v. B.B. (Application Judge)*, *supra* note 13 at para. 15.

¹⁹ *Ibid.* at para. 12.

²⁰ *Ibid.* at para. 39.

²¹ *A.A. v. B.B. (CA)*, *supra* note 1 at 564.

²² *A.A. v. B.B. (Application Judge)*, *supra* note 13 at para. 45.

the application. In their view, the wording of the *CLRA* does not support the recognition that a child has two mothers and such a declaration cannot be issued under the *parens patriae* jurisdiction of the Court.²³ They argued that the *CLRA* restricts parentage declarations to biological or genetic parents.²⁴

The Court of Appeal also received submissions from other interveners. First, the Ontario Children's Lawyer acted on behalf of the child of the lesbian couple.²⁵ Second, the applicants in a recently decided case, *M.D.R. v. Ontario (Deputy Registrar General)*,²⁶ which raised related issues, also submitted a factum.²⁷

4. Decisions of the Courts

a) *Application Judge, Family Court, Superior Court of Ontario*

After evaluating the child's family situation and relationships with all of his three parents, Aston J. was persuaded that, on its merits, the application did serve the child's best interests and should be granted "if there is jurisdiction to do so."²⁸ The application judge found that the boy "is a

²³ *A.A. v. B.B. (CA)*, *supra* note 1 at 572-73.

²⁴ *Ibid.*

²⁵ *Ibid.* at 564.

²⁶ (2006) 270 D.L.R. (4th) 90 [*M.D.R.*]. The Ontario Superior Court ruled in favour of four lesbian co-mothers who had been unable to register their names on their child's Statement of Live Birth. The court found the *Vital Statistics Act* provisions, which only allows for one mother and one father, to be invalid because they infringed on the *Charter* right to be protected against discrimination based on sex.

²⁷ *A.A. v. B.B. (CA)*, *supra* note 1 at 564.

²⁸ *A.A. v. B.B. (Application Judge)*, *supra* note 13 at para. 9. Before determining the scope of the Court's jurisdiction, Aston J. reviewed the reasons why A.A. would seek a declaration of parentage under the *CLRA* rather than other orders which might be available to her. For instance, under the *Family Law Act*, R.S.O. 1990, c. F-3, s. 1(1), the extended definition of a parent "includes a person who has demonstrated a settled intention to treat a child as a child of his or her family," a definition that clearly applies to A.A. However, such recognition determines only who has an obligation to financially support a child; it would not provide A.A. with the full parental recognition she is seeking. Ontario law has recognized the capacity of same-sex partners to adopt a child; see the *Child and Family Services Act*, R.S.O. 1990, c. C-11, s. 146(4) [*Child and Family Services Act*]. See also *K. (Re)*, [1995] O.J. No. 1425 (QL); 23 O.R. (3d) 679 [*K. (Re)*]. However, an adoption order also terminates other parental relationships. In *A.A. v. B.B.*, the biological father would then cease to be a parent of the child, an undesirable outcome for the family. Finally, Ontario law also recognizes that two or more persons (whether or not they are parents) can be granted "joint custody" and guardianship of a child under the *CLRA*, *supra* note 15, s. 28(1). The Act also does not discriminate on the basis of sexual orientation,

bright, healthy, happy individual who is obviously thriving in a loving family that meets his every need.”²⁹

The judge concluded, however, that a court does not have jurisdiction to grant a declaration of parentage to more than one mother. Aston J. was of the view that the use of the words “the father” and “the mother” in s. 4(1) of the Act, interpreted according to their plain and ordinary meaning, connotes a single father and a single mother. Therefore, the Act does not permit a court to grant a declaration of parentage when a child already has one mother. Since the child in this case already had a natural mother, Aston J. concluded that the Court has no jurisdiction to make an order of parentage in favour of the non-biological mother.

The Court also rejected A.A.’s argument that the application could be granted through the exercise of the court’s *parens patriae* authority which may be applied to rescue a child in danger or to bridge a legislative gap. In Aston J.’s view, only the latter ground was relevant in this case. The application judge concluded, however, that there is no legislative gap. In essence, Aston J. argued that rather than filling a legislative gap, granting a declaration that a child has two mothers would be rewriting legislation and procedure, a role that properly belongs to the legislature. Because the case was seen to involve controversial social policy implications, the judge concluded that “when it comes to creating or shaping social policy, political considerations belong to the legislature.”³⁰ The application was therefore dismissed.

b) Court of Appeal of Ontario

The non-biological mother appealed the lower court’s decision. Rosenberg J.A. delivered the unanimous judgment of the three judge panel.³¹

A.A. repeated the same arguments as those made before the application judge. For the first time, however, she also raised constitutional

providing that “a parent of a child or any other person” may apply for an order respecting custody of or access to the child; see *CLRA, ibid.* s. 21. However, as the Court pointed out, “custody, access and guardianship orders only have legal effect during a child’s minority,” and such orders can be varied; see *A.A. v. B.B. (Application Judge)*, *supra* note 13 at para. 15. A declaration of parentage can only be varied if evidence becomes available that was not available at the previous hearing: *CLRA, supra* note 15, s. 6. Since A.A. is seeking “a lifelong immutable declaration of status,” a joint custody order fails to provide her with the remedy she is seeking.

²⁹ *A.A. v. B.B. (Application Judge)*, *ibid.* at para. 8.

³⁰ *Ibid.* at para. 42.

³¹ McMurty C.J.O. and Labrosse J.A. concurred with Rosenberg J.A.’s reasons for judgment.

arguments, claiming that the *CLRA* violates her rights to equality and fundamental justice under ss. 15 and 7 of the Canadian *Charter of Rights and Freedoms*.³² The Court declined to deal with the *Charter* issues, noting the appellant failed to meet two of the criteria required to permit a party to raise a *Charter* issue for the first time on appeal.³³ First, the Court of Appeal found that the appellant failed to show that her decision not to raise constitutional arguments at trial had not been a tactical one.³⁴ Second, the Court concluded that the *parens patriae* jurisdiction does provide the appellant with a remedy and consequently there is no miscarriage of justice if the Court does not decide the *Charter* issues.³⁵

Having determined that constitutional arguments could not be raised on appeal, Rosenberg J.A. re-examined the court's jurisdiction to grant the sought-after declaration of parentage. The Court of Appeal first reviewed the importance of the remedy from the point of view of A.A. and the couple's child. In doing so, Rosenberg J.A. relied on the submissions of the Children's Lawyer and the *M.D.R.* interveners to highlight the importance of recognizing A.A.'s motherhood under the *CLRA*.³⁶ The Court of Appeal accepted that the declaration of parentage:

- is a lifelong immutable declaration of status;
- allows the parent to fully participate in the child's life;
- requires the declared parent to consent to any future adoption;³⁷
- determines lineage;
- ensures that the child will inherit on intestacy;³⁸

³² *A.A. v. B.B. (CA)*, *supra* note 1 at 565; *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

³³ The prerequisites for when a court will permit a party to raise a *Charter* issue for the first time on appeal were set down by the Supreme Court in *R. v. Brown*, [1993] 2 S.C.R. 918 at 927: "First, there must be a sufficient evidentiary record to resolve the issue. Secondly, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial. Thirdly, the court must be satisfied that no miscarriage of justice will result from the refusal to raise such new issue on appeal."

³⁴ *A.A. v. B.B. (CA)*, *supra* note 1 at 566. In fact, it appears that A.A. gained an advantage by not raising constitutional arguments before the application judge, namely that she was able to proceed with an unopposed application. Since no constitutional arguments were submitted before the lower court, the Attorney-General was not a party to the proceedings and the Alliance was not allowed to argue to the merits of the case. Given that the natural parents did not oppose the granting of the declaration of parentage, A.A. benefited from an unopposed application.

³⁵ *Ibid.*

³⁶ *Ibid.* at 566.

³⁷ Adoption of a child in Ontario requires the written consent of every parent: *Child and Family Services Act*, *supra* note 28, s. 137(2).

³⁸ *Succession Law Reform Act*, R.S.O. 1990, c. S-26, Part II.

- allows the declared parent to obtain an [Ontario Health Insurance Plan] OHIP card, a social insurance number, airline tickets and passports for the child;
- ensures that the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada;³⁹
- allows the declared parent to register the child in school and to assert her rights under various laws such as the *Health Care Consent Act*.⁴⁰

Rosenberg J.A. recognized not only the practical and legal benefits of a declaration of parentage, but also the symbolic value. In support, Rosenberg J.A. cited the views of the twelve-year-old child of one of the *M.D.R.* applicants:

It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everybody else's family.⁴¹

In Rosenberg J.A.'s view, the declaration of parentage is therefore an important remedy from both the parent and the child's points of view.

The Court of Appeal then undertook to interpret the relevant statutory provisions of the *CLRA*. Rosenberg J.A. agreed with the application judge's analysis of the statute, but the Court of Appeal elaborated further on three points relevant to the statutory interpretation of the Act. First, Rosenberg J.A. examined the legislative history and the intention of the Legislature. He suggested that when the *CLRA* was adopted it was progressive legislation intended to place all children on an equal footing by abolishing the concepts of legitimacy and illegitimacy. Rosenberg J.A. added, however, that "the possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar of the scheme" and therefore the "Act does not deal with, nor contemplate, the disadvantages that a child born into a relationship of two mothers, two fathers or as in this case, two mothers and one father might suffer."⁴²

Second, the Court considered the scheme of the Act. Rosenberg J.A. agreed with the application judge that the legislation clearly contemplates that a child can have but one mother and one father. As a result, there is no

³⁹ *Citizenship Act*, R.S.C. 1985, c. C-29, s. 3(1)(b).

⁴⁰ S.O. 1996, c. 2, Sch. A., s. 20(1)(5).

⁴¹ *A.A. v. B.B. (CA)*, *supra* note 1 at 567-68.

⁴² *Ibid.* at 569-70.

legislative jurisdiction to make a declaration in favour of a woman such as A.A. since the child in this case already has one mother.⁴³

Third, the Court examined the extent to which the *Charter* can be used as an interpretive aid. The Court was urged to do so by A.A. and certain interveners. But according to the holding in *Bell ExpressVu Limited Partnership v. Rex*,⁴⁴ the *Charter* principles are of interpretive value only when a statutory provision is subject to differing, but equally plausible, interpretations. Rosenberg J.A.'s view was that no such ambiguity existed in this case and he was therefore in agreement with the application judge in holding that the relevant provisions of the *CLRA* could not be interpreted to grant a declaration recognizing that a child has more than one mother.⁴⁵

The substantive disagreement between the Court of Appeal and the lower court lies therefore in their conclusions on the applicability of the *parens patriae* jurisdiction. The application judge refused to exercise the *parens patriae* authority because he concluded that there was no legislative gap to be filled in this case. The Court of Appeal disagreed, taking the opportunity to review the scope of the inherent power of the court to “rescue a child in danger or to bridge a legislative gap.”⁴⁶

Relying on *Beson v. Newfoundland (Director of Child Welfare)*,⁴⁷ the Court reaffirmed that a legislative gap can be filled by the exercise of the *parens patriae* jurisdiction. The power to do so is broad, the jurisdiction having expanded “under the impact of changing social conditions.”⁴⁸ In the case at hand, Rosenberg J.A. held that the “determination of whether a legislative gap exists ... requires a consideration of whether the *CLRA* was intended to be a complete code and, in particular, whether it was intended to confine declarations of parentage to biological or genetic relationships.”⁴⁹ Disagreeing with both the application judge and the Alliance interveners, the Court of Appeal found that there are legislative gaps created by the *CLRA*.⁵⁰

Such gaps were created as a result of changes in social conditions and attitudes, increased recognition of the value of other types of relationships, and advancements in the science of reproductive technology. Rosenberg

⁴³ *Ibid.* at 570.

⁴⁴ 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 62.

⁴⁵ *A.A. v. B.B. (CA)*, *supra* note 1 at 570-71.

⁴⁶ *Ibid.* at 571.

⁴⁷ [1982] 2 S.C.R. 716.

⁴⁸ *A.A. v. B.B. (CA)*, *supra* note 1 at 571.

⁴⁹ *Ibid.* at 572.

⁵⁰ *Ibid.* at 573-74.

J.A. pointed out that the Act intended to place all children on an equal legal footing and this meant eliminating the distinction between legitimate and illegitimate children. It did not mean legislating in relation to other types of relationships. Indeed, Rosenberg J.A. concluded that the legislature could not have intended to exclude parents whose relationship with their children arises out of new social and family relationships and as a result of reproductive technology: these developments were both beyond the vision of the legislature of the day.⁵¹ Finally, the Court disagreed with the application judge that the legislative gap was deliberately created by the legislature, because the possibility of declarations of parentage for a second mother or father were not foreseeable at the time the *CLRA* was enacted.⁵² Moreover, in *M.D.R.*, the Crown “took the position that the *CLRA* in fact could be interpreted to allow for a declaration that two women were the mothers of a child.”⁵³

More important, the Court underlined the importance of the child’s best interests in the exercise of the *parens patriae* authority. Conscious of the fact that the application judge had held that the child in this case was thriving in his multiple parent family, the Court concluded that it would be “contrary to D.D.’s best interests that he is deprived of the legal recognition of the parentage of one of his mothers.”⁵⁴

Accordingly, the appeal was allowed and a declaration of parentage was issued stating that A.A. is a mother of D.D.

5. Analysis

Given that the case turned on the scope of the *parens patriae* jurisdiction, it is difficult to find fault with the Court of Appeal’s reasoning. Courts have long possessed a supervisory power to intervene and protect children, even without statute law to allow them to do so, based on their residual, common-law-based *parens patriae* jurisdiction. This discretionary power allows courts to make the protection of children and other vulnerable persons the first and single most important concern of the courts.

It is certainly noteworthy that the Court of Appeal used the case to provide contemporary content to the *parens patriae* jurisdiction. The Court of Appeal made it clear that the impact of changing social and scientific conditions has broadened the scope under which the courts may act to fill legislative gaps. For instance, in the case at hand, it was open to the Court

⁵¹ *Ibid.* at 573.

⁵² *Ibid.* at 574.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

to consider advances in reproductive technology and changing social attitudes about families in determining whether legislative gaps existed in the *CLRA*. Since the purpose of the *CLRA* was to provide equality of status to all children, and since it did not confine legal parentage to persons with genetic and biological links to the child, legislative gaps were created as social attitudes and the science of reproductive technology evolved. Having taken into account the contemporary social and scientific realities, the Court of Appeal rightly concluded that children conceived through new reproductive technologies, or who are in multiple or alternative family models, “are deprived of the equality of status that declarations of parentage provide.”⁵⁵

In addition to changing social and scientific factors, the Court of Appeal also clarified that courts must consider the best interests of the child when exercising the power to fill legislative gaps under the *parens patriae* jurisdiction. It is important to recall that the application judge had found as a matter of fact that the child was thriving in the multiple parent family, yet he nevertheless declined to grant the child a legal relationship with a woman who had “fulfilled the role of a parent in every way imaginable.”⁵⁶ Aston J. stated that while “the granting of the application could certainly be perceived to reflect the best interests of this particular child ... [t]hat is not enough to resort to the court’s *parens patriae* jurisdiction.”⁵⁷

The Court of Appeal clearly took a different view. Rosenberg J.A. expressed concern that the application judge gave the *parens patriae* power a scope so narrow that it could result in courts overlooking the best interests of the child. The Court of Appeal stated:

It is contrary to D.D.’s best interest that he is deprived of the legal recognition of the parentage of one of his mothers. There is no other way to fill this deficiency except through the exercise of the *parens patriae* jurisdiction. As indicated, A.A. and C.C. cannot apply for an adoption order without depriving D.D. of the parentage of B.B., which would not be in D.D.’s best interests.⁵⁸

Essentially, the Court of Appeal confirmed that the doctrine of the best interests of the child is relevant to the analysis of both grounds upon which a court may exercise its *parens patriae* jurisdiction: (1) the authority to intervene to rescue a child; and (2) the power to fill a legislative gap. The Court’s perspective on the *parens patriae* jurisdiction is therefore far more

⁵⁵ *Ibid.* at 573.

⁵⁶ *A.A. v. B.B. (Application Judge)*, *supra* note 13 at para. 5.

⁵⁷ *Ibid.* at para. 40.

⁵⁸ *A.A. v. B.B. (CA)*, *supra* note 1 at 574.

consistent with the domestic doctrine of the best interests of the child,⁵⁹ and the international obligation that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child [will] be a primary consideration.”⁶⁰

While the Court of Appeal’s decision is a welcome clarification of the scope of the *parens patriae* jurisdiction, the narrow basis upon which the child in *A.A. v. B.B.* case was granted a legal relationship with a third parent means that the case is not grounded in a broader principle or policy upon which courts may determine “who is a parent” for the purposes of different statutes. Nevertheless, the Court of Appeal cannot be faulted for this shortcoming. One of the striking features of this litigation is that the parties did not originally challenge the *CLRA* as constitutionally flawed. Whereas many other recent landmark cases which redefined the family invoked *Charter* rights,⁶¹ this case turned on issues of statutory interpretation and the doctrine of *parens patriae*. While the decision to avoid constitutional arguments may have been a tactical one on the part of the applicant, as suggested by the Court of Appeal, the result is that the case is of value only to a limited number of families who may find themselves in exactly the same circumstances as D.D.’s family. For instance, as Boyd and Kelly argue, the decision is unhelpful in a situation where a lesbian couple does not choose, unlike the multiple parents in *A.A. v. B.B.*, to put the donor’s name on the child’s birth certificate and the question of the father’s parentage is subsequently contested.⁶²

⁵⁹ The best interests of the child are always paramount in both provincial and federal legislation relating to children. See e.g. *CLRA*, *supra* note 15, s. 19(a), 20(2), 22(1)(ii), 24, 62(4), 67(1); *Child and Family Services Act*, *supra* note 28, s. 1, 37(3), 51.1, 57(1), 57.1(1), 58(1), 59, 62(3), 64(8), 65, 65.1(10), 65.2, 66(1), 69(4), 70(4), 77(1), 80, 81(2), 136, 138, 139, 144(11), 145.1(3), 145.2, 146, 149, 153.1, 153.2(2), 154, 203(2); *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 16(8).

⁶⁰ Canada has ratified the *Convention on the Rights of the Child*, 20 November 1989, Can. T.S. 1992 No. 3, 1577 U.N.T.S. 3 (entered into force 2 September 1990, accession by Canada 13 December 1991). The treaty mandates that all actions concerning children must take paramount consideration of their best interests; see *ibid.*, art. 3(1).

⁶¹ See e.g. *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Vogel v. Manitoba* (1995), 102 Man.R. (2d) 89; *K. (Re)*, *supra* note 28; *Kane v. Ontario (Attorney General)* (1997), 152 D.L.R. (4th) 758 (Ont. Gen. Div.); *M. v. H.*, [1999] 2 S.C.R. 3; *Halpern v. Canada* (2003), 65 O.R. (3d) 161.

⁶² Susan Boyd and Fiona Kelly, “Law Reform for Lesbian Mothers (in a System that Likes to Find Fathers for Children)” in *Mothering in Law: Defending Women’s Rights in 2007 - Conference Papers* (Ottawa: National Association of Women and the Law, 2007) 17 at 18.

The application judge had feared that granting the application would open the door to stepparents, extended family and others who would claim parental status in less harmonious circumstances.⁶³ Aston J. went as far as to say: “If a child can have three parents, why not four or six or a dozen? What about all the adults in a commune or a religious organization or sect? Quite apart from social policy implications, the potential to create or exacerbate custody and access litigation should not be ignored.”⁶⁴ But in reality, the Court of Appeal successfully avoided usurping the legislature’s role in creating or shaping social policy. Because no constitutional values were defined, and the decision was for the most part grounded in the interests of the particular child D.D., this case does not stand as a principled precedent that can be relied upon for the recognition of differently constituted multiple-parent families. As Boyd states, “Any other individuals wishing to be declared a legal parent of a child in similar situations involving non-biological and multiple parentage will have to make separate applications, basing their argument on the child’s best interests.”⁶⁵ While consideration was given to changing social and scientific conditions, this was relevant only in determining the extent to which the courts could exercise an inherent power designed to protect and promote the best interests of the specific child before the court. This case simply cannot be read as allowing all children to have more than two parents.

In a sense though, the narrow ratio is the very problem with the Court of Appeal’s judgment. Rather than provide a principled approach to the question of multiple-parent families, the case is now just another piece of a larger puzzle that has yet to be solved in any Canadian jurisdiction. This is why this comment suggests in the introduction that the extensive media coverage of the case erroneously portrayed the scope of the decision. While many articles describe the judgment as having redefined the family and provided a victory for lesbian and gay couples, the case is more properly situated in a patchwork of judicial decisions relating to the definition of “who is a parent.” Certainly, many lesbian and gay couples are considering having children in part because of the dramatic improvement in the legal protection of sexual minorities in Canada, but *A.A. v. B.B.* does not turn on the sexual orientation of the applicants. As the application judge stated, “[T]his case is not about discrimination based upon gender, sexual orientation or the definition of ‘marriage.’”⁶⁶ Rather, the case has more to do with the increased popularity and availability of

⁶³ *A.A. v. B.B. (Application Judge)*, *supra* note 13 at para. 41.

⁶⁴ *Ibid.*

⁶⁵ Susan Boyd, “Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility” (2007) 25 Windsor Y. B. Access to Just. 63 at 77.

⁶⁶ *A.A. v. B.B. (Application Judge)*, *supra* note 13 at para. 12.

different methods of conception and parental arrangements.

Social and scientific conditions have changed so that a re-examination is required of the basic question of who is a mother and who is a father. New family models are multiplying with the advances in assisted procreation and societal changes. Many couples increasingly turn to reproductive technology to create their families. They use artificial insemination with an unknown or known donor or rely on a gestational carrier or a surrogate mother. Fertility clinics are expanding the techniques by which couples can conceive a child. Social conditions have also had an impact on families. A large number of families with children are now lone-parent families, in most cases headed by women. There has been a rise in blended families, joint custody orders, and a growing recognition of families headed by gay and lesbian persons, whether as lone parents or part of a couple. The growing diversity of Canada's population has resulted in a broader range of cultural constructs of the family, often including increased emphasis on extended family networks.⁶⁷ All these changes have led to a wide range of legal challenges to the definition of legal parentage.⁶⁸

For instance, equality-based challenges have targeted laws which provide mechanisms for the accurate and prompt recording of births. Lesbian parents have sought and gained the right to have two women's names listed on a child's birth certificate.⁶⁹ In *Trociuk v. British Columbia (Attorney General)*,⁷⁰ sections of the British Columbia's *Vital Statistics Act*

⁶⁷ See Rakhi Ruparelia, "Giving Away the 'Gift of Life': Surrogacy and the Canadian *Assisted Human Reproduction Act*" (2007) 23 Can. J. Fam. L. 11 for an analysis of how cultural values impact on surrogacy arrangements.

⁶⁸ For a more comprehensive discussion of several legal challenges, see Boyd, *supra* note 65.

⁶⁹ *Gill v. Murray*, [2001] B.C.H.R.T.D. No. 3; *M.D.R.*, *supra* note 26; *British Columbia (Minister of Health Planning) v. British Columbia (Human Rights Tribunal)*, 2003 BCSC 1112, [2003] B.C.J. No. 1755 (QL). Nova Scotia has recently changed the province's birth registration system to allow the same-sex partner or spouse of the birth parent to be registered as the other parent on the birth registration: "Nova Scotia Birth Certificates Allow Same-Sex Parents," *The Globe and Mail* (20 September 2007), online: http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2F servlet%2F story%2FRTGAM.20070920.wnsbirth0920%2FBNStory%2FNational%2F&ord=21604317&brand=theglobeandmail&redirect_reason=2&denial_reasons=none&force_login=false.

⁷⁰ 2003 SCC 34, [2003] 1 S.C.R. 835. See also *Foster v. Konstantinou*, 2004 ONCJ 138, [2004] O.J. No. 3322 (QL); *Kreklewetz v. Scopel* (2002), 60 O.R. (3d) 187; *Giles v. Beisel*, 2004 SKQB 330, [2005] C.C.S. No. 1681 (Sask. Q.B.); *D.A.G. v. V.G.B.*, 2004 SKQB 330, [2004] S.J. No. 508.

were declared unconstitutional because the statute exposed fathers to the possible arbitrary exclusion of their particulars from their child's birth registration and, consequently, of their participation in choosing the child's surname. In an Ontario case, the fact that a mother could register the birth of a child without identifying the father was challenged when a father was not notified that the mother unilaterally decided to put the child up for adoption.⁷¹ Vital statistics statutes have also been challenged in cases that involved reproductive technologies. In Ontario, a gay father was granted the right to have only his name registered on a birth certificate.⁷² In that case, the man was the biological father of a child born by *in vitro* fertilization. The biological mother was unknown since ova were removed from an anonymous donor, fertilized with the father's sperm, and then implanted into the uterus of a gestational carrier. In *J.R. v. L.H.*, the Ontario Registrar was directed to register a Statement of Birth identifying the applicants J.R. and J.K. as the biological parents of twins born by *in vitro* fertilization to another couple, L.H. (the gestational carrier) and her husband.⁷³

As this comment has outlined, declarations of parentage have been used to establish the legal parenthood of non-biological parents. In *Low v. Low*⁷⁴ and *Zegota v. Zegota-Rzegocinski*,⁷⁵ mothers opposed applications by non-biological fathers of children conceived by assisted donor insemination. They argued unsuccessfully that their former spouses were not fathers of their children except as standing *in loco parentis* for a child support claim.⁷⁶ In *Buist v. Greaves*,⁷⁷ a lesbian mother was unable to obtain a declaration of parentage because she was not biologically or genetically linked to the child; she was however granted access and ordered to pay child support.

Legal parentage can be granted on a presumptive basis. For instance, s. 45(1)(a) of the *CLRA* creates the following legal presumption:

45(1) Unless the contrary is proven on a balance of probabilities, there is a presumption that a man is, and that a man is to be recognized in law to be, the father of a child in any one of the following circumstances:

⁷¹ *D.C. v. W.A.*, [2003] O.J. No. 5119 (QL). See also *D.G.C. v. R.H.G.Y.* (2003), 65 O.R. (3d) 563.

⁷² *K.G.D. v. C.A.P.*, [2004] O.J. No. 3508 (Ont. Sup. Ct.) (QL).

⁷³ *J.R. v. L.H.*, [2002] O.J. No. 3998 (Ont. Sup. Ct.) (QL); see also *Rypkema v. British Columbia*, 2003 BCSC 1784, (2003), 233 D.L.R. (4th) 769 (B.C.S.C.).

⁷⁴ (1994) 114 D.L.R. (4th) 709 (Ont. Gen. Div.).

⁷⁵ [1995] O.J. No. 204 (Ont. Gen. Div.) (QL).

⁷⁶ Nakonechny, *supra* note 10 at 6.

⁷⁷ [1997] O.J. No. 2646 (Ont. Gen. Div.) (QL).

(a) at the time of the child's birth or conception the man was cohabiting with the mother, whether or not they were married to each other.⁷⁸

In *P.C. v. S.L.*,⁷⁹ a similar presumption in a Saskatchewan statute was challenged unsuccessfully by a lesbian mother. She argued that the paternity presumption in the law should be extended to a woman cohabiting with the mother at the time of the child's birth or conception. In a case from British Columbia, a lesbian partner involved in the planning of a child and in the subsequent parenting, was denied the presumption of parentage, but was awarded joint guardianship and access rights.⁸⁰

Finally, the ability of same-sex couples to marry or contract civil unions or registered partnerships raises more concerns about legal presumptions of paternity and maternity. In June 2002, the National Assembly of Quebec passed the *Act Instituting Civil Unions and Establishing New Rules of Filiation*⁸¹ which allows same-sex or opposite-sex couples to enter into a civil union. The rights and obligations created by a civil union are generally the same as those resulting from a marriage. However, specific rules apply to presumptions of parenthood in a civil union.

If a child is born to a lesbian couple in a civil union through assisted procreation, both women are considered the mothers of the child.⁸² Thus, the spouse of the woman who gave birth to the child is presumed to be a mother of the child and she is granted the rights and obligations usually assigned by law to the father.⁸³ However, "if the genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child."⁸⁴ In Quebec, where lesbians in a civil union are concerned, it appears that biology may trump an actual parental relationship. A non-biological gay father, on the other hand, does not even benefit from the limited presumption of parenthood afforded to lesbians. Indeed, gay men who contract a civil union in Quebec are denied any type of parental presumption because Quebec law states that "any agreement whereby a woman undertakes to procreate or carry a child for another person is

⁷⁸ *Supra* note 15, s. 45(1)(a).

⁷⁹ 2005 SKQB 502A, [2005] S.J. No. 744 (Sask. Q.B.)(QL).

⁸⁰ *K.G.T. v. P.D.*, 2005 BCSC 1659, [2005] B.C.J. No. 2935 (B.C.S.C.) (QL).

⁸¹ Bill 84, *Act Instituting Civil Unions and Establishing New Rules of Filiation*, Second Session, 36th Leg., Quebec, 2002 (assented to 8 June 2002).

⁸² Art. 538.3 C.C.Q. See also *Droit de la famille — 07528*, 2007 QCCA 361, J.E. 2007-574 (C.A.) online: <http://www.cch.ca/bulletins/juriste/articles/buc/0607_df1.html>.

⁸³ Art. 539.1 C.C.Q.

⁸⁴ Art. 538.2 C.C.Q.

absolutely null.”⁸⁵ In other words, Quebec law will continue to recognize the parentage of the biological or surrogate mother, regardless of any agreement between the parties to have the child raised by the biological father and his male civil union spouse. For instance, the author was contacted in March 2007 by a Quebec civil servant about the legal status of two gay men who are civil union spouses. The men are parenting a child whose biological mother, a resident of Ontario, acted as a surrogate for the couple. The non-biological father claimed parental leave under Quebec law. Under the new law, his application should have been automatically denied save for the fact that the surrogacy arrangement was effectively and legally carried out in another province, Ontario, where a non-biological father does benefit from a presumption of paternity. It would appear that the new civil union legislation fails to provide a legal solution for this particular set of facts.

The Quebec legislation illustrates the increasing tension between parenthood based on biology and social parenthood. This tension is evident in all the cases described above. In *A.A. v. B.B.*, the question of whether a child can have more than two parents is placed squarely before the courts, but even before this recent decision, the issue of whether a child could have more than two parents or caregivers was already before the courts. Lesbian and gay couples successfully obtained joint custody orders for children they were raising together, and this without ending any relationship the child may have had with a third, biological parent.⁸⁶

Court challenges have led to changes in adoption laws. Gay men and lesbians can now adopt either as single parents, as stepparents or as couples.⁸⁷ Increased support for open adoptions and more liberal access to information about natural parents may in turn raise difficult questions about how adoption laws define and determine legal parentage. In addition, the increased fragmentation of parenthood will translate into disputes about adoption. For instance, in *H.L.W. and T.H.W. v. J.C.T. and J.T.*,⁸⁸ a surrogate/genetic mother refused to consent to the adoption of a child by the wife of the genetic father.

The question of “who is a parent” is increasingly being asked of courts. As Boyd has stated, “Judges are clearly being faced with the challenge of selecting which of sometimes several adults should be named as legal parents, or assigned some rights of parenthood, illustrating the

⁸⁵ Art. 541 C.C.Q.

⁸⁶ See Nicole LaViolette, “Family Affair: Providing Joint Custody for Same-Sex Parents” *Capital Xtra!* (27 January 1995) 13.

⁸⁷ See *K.(Re)*, *supra* note 28.

⁸⁸ 2005 BCSC 1679, [2005] B.C.J. No. 2616 (B.C.S.C.) (QL).

fragmentation of parenthood.”⁸⁹ Litigation has revealed that there are legislative “gaps ... that do not contemplate the familial relationships of many parents and children in Canada.”⁹⁰ Statutes which regulate vital statistics, adoption, parentage, custody, and guardianship do not have a consistent approach to the definition of who is a “parent,” or a “mother” or “father,” often mixing traditional gendered models of parenting with less discriminatory and more alternative familial arrangements. Courts are unable, however, to fill these gaps in any coherent, consistent and policy-driven way. As Boyd suggests, “Canadian judges who are faced with new questions of legal parenthood ... exercise considerable discretion by extrapolating from existing (often old) legislation and precedent on children, parenthood, adoption, and so on.”⁹¹ For instance, in *A.A. v. B.B.*, the Court of Appeal moved to fill a legislative gap but it understandably was not able to consider whether the solution granted to A.A. and her son D.D. is consistent with other statutes, the *Charter*, or with the policy values which ground family law.

The problem is not so much the conclusions of the Court of Appeal in *A.A. v. B.B.* Rather, of concern is the fact that courts should not be solely responsible for shaping the new contours of legal parentage. *Ad hoc* judicial decisions increasingly govern this area of family law, and “[m]ore contested scenarios are bound to produce more ambivalent results.”⁹² As the application judge in *A.A. v. B.B.* suggested:

Polarized views exist concerning the definition of the modern family. Court decisions may sometimes necessarily impact on that debate, particularly where Charter considerations are engaged. However, when it comes to creating or shaping social policy, political considerations belong to the legislature.⁹³

The court in *M.D.R.* made a similar comment: “Redefining the legal concept of parent ... is a job for the legislature, not the court.”⁹⁴ Clearly, current laws do not adequately address the fragmentation of motherhood and fatherhood. Canadian legislators are falling behind social and scientific changes, and children and parents may be paying the price. This is not to suggest that legislatures can always be trusted to enact progressive legislation in this area of family law. What is needed is a comprehensive policy review which provides the public and stakeholders with a

⁸⁹ Boyd, *supra* note 65 at 83.

⁹⁰ Nakonechny, *supra* note 10 at 10.

⁹¹ Boyd, *supra* note 65 at 66.

⁹² *Ibid.* at 84.

⁹³ *A.A. v. B.B. (Application Judge)*, *supra* note 13 at para. 42.

⁹⁴ *M.D.R.*, *supra* note 26 at para. 116.

meaningful opportunity to participate in shaping the legal definition of parenthood.

The increase in litigation in this area may in fact be prompting some provinces to review the issue of legal parenthood. For instance, the Government of British Columbia has “begun a process of comprehensive family law reform and consultation.”⁹⁵ The Ministry of the Attorney-General is reviewing the *Family Relations Act* to ensure the legislation reflects current social values. Phase III of the project, planned for August to December 2007, is to examine the status of children and legal parentage.⁹⁶ But as Susan Boyd and Fiona Kelly caution, “It is... of the utmost importance that proposals for legal change, particularly with regard to issues such as lesbian parenting, be proactively generated.”⁹⁷ The British Columbia process does appear to provide lawmakers and the public with an opportunity to take a serious look at issue of legal parentage. It remains to be seen if this legislative review will in fact yield a coherent set of recommendations for reform.

It is important, however, that any such legislative review take a comprehensive and purposive approach to legal parentage. To do so, law reform projects should consider adopting the analysis and methodology used by the Law Commission of Canada in their report *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships*.⁹⁸ In their examination of the diversity of personal adult relationships, and the many ways the law regulates such relationships, the Law Commission adopted an analysis and methodology that I suggest would be useful as a starting point for law reform initiatives related to legal parentage.

The Law Commission adopted a twofold analysis in their project. First, the Commission suggested that a law reform process must identify the fundamental values and principles that governments need to consider in framing policies. In the Law Commission’s project, equality, autonomy, personal security, and religious freedom were among the values the Commission believed should guide the recognition and support of personal adult relationships.⁹⁹ Identifying the fundamental principles that should be

⁹⁵ Boyd and Kelly, *supra* note 62 at 17.

⁹⁶ Ministry of Attorney-General, Justice Service Branch, Civil and Family Law Policy Office, *Family Relations Act Review: Chapter 1- Background and Context for the Family Relations Act Review* (Victoria: Government of British Columbia, February 2007).

⁹⁷ Boyd and Kelly, *supra* note 62 at 17.

⁹⁸ Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada: 2001).

⁹⁹ *Ibid.* at 13-28.

respected and promoted in the regulation of legal parentage has to be the starting place of any law reform project. Reforms must be guided by fundamental values and principles, including constitutional protected values under the *Charter*. Litigation involving parentage has already started the process by outlining relevant values, including equality and the best interests of the child. In addition, a considerable amount of legal scholarship has been devoted to just this question.¹⁰⁰

Second, it is important to determine the extent to which current laws respect fundamental values and meet policy objectives. The Law Commission used a new methodology for assessing any existing or proposed law that, in their case, employed relational terms to accomplish its objectives.¹⁰¹ In terms of legal parentage, the methodology would assess laws that employ parental relational terms. The Commission's methodology essentially consisted of asking four questions about each law:

- *First Question:* Are the objectives of the law legitimate? If not, should the law be repealed or fundamentally revised?
- *Second Question:* Do relationships matter? If the law's objectives are sound, are the relationships included in the law important or relevant to the law's objectives?
- *Third Question:* If the relationships matter, can individuals be permitted to designate the relevant relationships themselves? Could the law allow individuals to choose which of their close personal relationships they want to subject to the particular law?
- *Fourth Question:* If relationships matter, and self-designation is not feasible or appropriate, is there a better way to include relationships?¹⁰²

The questions could certainly be reformulated to make them specifically relevant to the review of each law that recognizes a child's legal relationships with parents. For instance, this methodology could help determine the extent to which each law should privilege parentage based

¹⁰⁰ See e.g. Boyd, *supra* note 65; Roxanne Mykitiuk, "Beyond Conception: Legal Determination of Filiation in the Context of Reproductive Technologies" (2001) 39 *Osgoode Hall L.J.* 771; Andrew Bainham, Shelley Day Sclater and Martin Richards, eds., *What is a Parent? A Socio-Legal Analysis* (Oxford & Portland, Oregon: Hart Publishing, 1999).

¹⁰¹ Law Commission, *supra* note 98 at 29-30.

¹⁰² *Ibid.* at xii-xiii, 30-34.

on genetic ties, actual caregiving or the intention of an individual “to be regarded as a parent and to fulfill parental functions.”¹⁰³

The approach seems particularly relevant to the issue of legal parentage. Just as with close adult personal relationships, the subject of the Law Commission’s report, legal parenting is regulated by various laws with very different objectives and purposes; consider, for instance, the objectives of vital statistic statutes as compared to adoption laws. The methodology proposed by the Law Commission seems an appropriate way to first identify the public policy values that should ground the regulation of legal parentage; and second, to independently assess each law to determine the extent to which it uses parental relationships in a way that is appropriate and effective in meeting its objectives. For the purpose of illustrating how this methodology might apply to family law and legal parentage, I will use the example of adoption.

In Ontario, upon adoption, a birth parent ceases to be the parent of the adopted child.¹⁰⁴ In *A.A. v. B.B.*, an adoption by the non-biological mother would have terminated the legal relationship between D.D. and his biological father. In addition, the statute provides that “where an order for the adoption of a child has been made..., no court shall make an order for ... access to the child by a birth parent or a member of a birth parent’s family.”¹⁰⁵ Clearly, for multiple parent families, adoption does not currently provide an adequate remedy for establishing parentage with a third parent. Should the law be examined, however, according to the purposive approach developed by the Law Commission and outlined above, with a view to determining the extent to which a birth parent’s legal relationship must cease in order to meet the legitimate objectives of the law, the review may suggest that ending a birth parent’s legal parentage is an unnecessary policy outcome.

I will try to apply the Law Commission’s approach in a summary way to illustrate the kind of analysis such a methodology may yield. Such a law reform project should first determine the fundamental objectives of an adoption law. For instance, let’s assume that a given adoption statute has as its primary purpose to provide a child with new and permanent family ties, as long as this is in the child’s best interest. Given that there continue to be a significant number of children without stable permanent family ties, much to the detriment of their best interests, the objectives of the adoption law would seem legitimate. Having established legitimate objectives, the next step would be to examine whether the establishment of new and

¹⁰³ Boyd, *supra* note 65 at 72.

¹⁰⁴ *Child and Family Services Act*, *supra* note 28, s. 158(2).

¹⁰⁵ *Ibid.*, s. 160(1).

permanent ties requires the severing of the existing legal relationship between a birth parent and a child. In D.D.'s case, adoption by his non-biological mother would have meant permanently ending the parentage of his father, who was in fact playing an important role in the child's life and development. Does this really support the law's objectives? Is this in the best interests of the child? If, however, it is not always necessary to sever an existing parental relationship in order to proceed with an adoption, the question becomes who should make that determination? Could adults agree on whether an adoption should end the relationship between a birth parent and a child? In *A.A. v. B.B.*, the three parents would have surely agreed to proceed with an adoption if it preserved the legal relationship between D.D. and his father. Is the consent of the adults involved sufficient? If not, should the courts be given the responsibility of determining in which cases the relationship between a child and his birth parent should cease to exist? Finally, if a policy review determined that an adoption law should in fact end the legal parentage of a birth parent, is there another way to include the relationship? Could the biological parent, or members of his or her family, be granted access?

It is beyond the scope of this case comment to answer the questions above. I am of the view however that the Law Commission's methodology should guide a policy review dealing with legal parentage. Such a comprehensive assessment will not be achieved by the courts, as they are not in a position to undertake wide-ranging policy reviews. As argued in this comment, the Court of Appeal's decision in *A.A. v. B.B.*, as sound as the reasoning may be, will likely impact on only a small number of families, despite the fact that many issues raised in that case are at the cusp of changing social and scientific conditions affecting an increasing number of families. It is hoped that lawmakers will start taking a serious look at law reform in this area, in as comprehensively a way as possible. The British Columbia process should be watched closely in this regard.

Before concluding the analysis of *A.A. v. B.B.*, one final comment needs to be made about the importance of a declaration of parentage under the *CLRA* for both a child and her parents. Aston J. and Rosenberg J.A. rightly pointed out that this remedy provides the most comprehensive and permanent form of legal parenting for a non-biological parent. It creates a lifelong immutable link between a child and a parent, unlike joint custody orders that apply only to minor children and can be easily varied. It does not terminate other parental relationships or require the consent of an existing parent, both of which are required for adoption orders. It is preferable to the registration process under vital statistics statutes, as such mechanisms create a presumption of parenthood which can be rebutted. In addition, the Court of Appeal, drawing on the submissions made by the

Children's Lawyer and the *M.D.R.* interveners, enumerated the benefits for the parent which include the following: it allows the parent to fully participate in the child's life, including as a decision-maker and caregiver; requires the declared parent to consent to any future adoption; determines lineage; ensures inheritance rights; and grants Canadian citizenship.¹⁰⁶

While the list appears complete, there is one important legal benefit that the courts overlook. Since a declaration of parentage establishes lineage, the child will be able to inherit the ethnic, cultural and linguistic heritage of the non-biological parent. Given that some constitutional rights in Canada are linked to a person's ethnic, cultural, or linguistic background, a child's ancestry is important in determining what constitutional rights a child or their parent may be able to assert.

For instance, minority language education rights in the *Charter* guarantee to certain parents "the right to have their children receive primary and secondary school instruction" in the minority language.¹⁰⁷ In most jurisdictions, education statutes leave it to representatives of the minority, subject only to judicial review, to decide whether one has rights under section 23 of the *Charter* or whether one should otherwise be entitled to have one's children receive instruction in the minority language. Normally, every effort is made to grant access to a child of whom at least one parent claims constitutional rights under section 23 of the *Charter* or at least one parent expresses the desire to integrate the minority community.¹⁰⁸ However, access to instruction in the minority language is very strictly controlled in the province of Quebec. In that province, a declaration of parentage could be, for some families, the only way of securing entitlement to publicly funded instruction in the minority language.¹⁰⁹ Moreover, a child who has as a legal parent a member of a First Nation would also be able to assert "existing aboriginal and treaty rights" based on the lineage of the non-biological parent. While both the application judge and the Court of Appeal made convincing cases that declarations of parentage are enormously significant for both the child and a parent, courts tasked with granting declarations of parentage would be

¹⁰⁶ *A.A. v. B.B. (CA)*, *supra* note 1 at 566.

¹⁰⁷ *Charter*, *supra* note 32, s. 23. See Mark Power and Pierre Foucher, "Les droits linguistiques en matière scolaire" in Michel Bastarache, ed., *Les droits linguistiques au Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2004) at 418-20. The author is grateful to Mark Power for his help in outlining the link between a declaration of parentage and constitutional guaranteed minority language rights.

¹⁰⁸ For instance, regarding Ontario, see *Education Act*, R.S.O. 1990, c. E-2, s. 1; *Abbey v. Essex Board of Education*, (1999), 42 O.R. (3d) 481 (C.A.).

¹⁰⁹ *Charter of the French Language*, R.S.Q. c. C-11, Title I, Chapter VIII. See generally *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238.

well advised to take this important additional consideration into account. The constitutional rights that flow from a declaration of parentage further support the argument made in this comment that legislatures need to clarify the increasingly confusing legal landscape in this area.

6. Conclusion

The Supreme Court has denied the application of the Alliance for Marriage and Family for leave to appeal the decision of the Ontario Court of Appeal in *A.A. v. B.B.* As this comment has argued, a further judicial review of the decision would be unlikely in any case to provide comprehensive answers to the questions raised by changing social and scientific conditions. This is particularly true of the *A.A. v. B.B.* case as it does not turn on constitutional values that might provide guidance to a court on “who is a parent.” The preferred response is for governments to undertake broad and consultative law reform projects that will first identify the principles that should serve as a foundation for legal parentage, and second, examine all relevant statutes to ensure that they do in fact meet policy values that reflect the realities of modern parenting.