

# RECONCEIVING QUEBEC'S LAWS ON SURROGATE MOTHERHOOD

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*In September 2016, the Quebec government announced its intention to reform the Civil Code of Québec to recognize and further regulate surrogate motherhood. Quebec's Minister of Justice indicated that in bringing forward these changes, the government will consider recommendations provided in a 2015 report by the Comité consultatif sur le droit de la famille (the Comité). This article explores the history, objectives, and effects of Quebec's current legal responses to surrogacy and examines the strengths and weaknesses of the Comité's proposed reforms. It argues that while the report's proposals would better support and protect surrogate mothers and children born through surrogacy than Quebec's current regime, the Comité's recommendations do not adequately account for intended parents' interests or recognize diverse family forms. It recommends that the Quebec government look to British Columbia's Family Law Act and Ontario's Children's Law Reform Act for further inspiration for how to re-imagine Quebec's surrogacy laws.*

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*En septembre 2016, le gouvernement du Québec a annoncé son intention de modifier le Code civil du Québec de façon à reconnaître et à réglementer plus avant la maternité de substitution. La ministre de la Justice du Québec a indiqué que dans le cadre de l'élaboration de ces modifications, le gouvernement allait tenir compte des recommandations faites en 2015 dans un rapport émanant du Comité consultatif sur le droit de la famille (le Comité). Cet article étudie l'historique, les objectifs et les effets du traitement juridique actuel de la maternité de substitution par la province et examine les forces et les faiblesses des réformes proposées par le Comité. L'auteure y affirme que même si les propositions contenues dans le rapport améliorent, par rapport au régime québécois actuel, le soutien et la protection accordés aux mères porteuses ainsi qu'aux enfants qu'elles ont mis au monde, les recommandations du Comité ne tiennent pas suffisamment compte des intérêts des parents d'intention, ni ne*

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*reconnaissent la diversité des modèles familiaux. L'article recommande que le gouvernement du Québec s'inspire de la Family Law Act de la Colombie-Britannique et de la Loi portant réforme du droit de l'enfance de l'Ontario pour réinventer sa législation en matière de maternité de substitution.*

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## 1. Introduction

Under article 541 of the *Civil Code of Québec* ("*Civil Code*"), surrogacy contracts are "absolutely null."<sup>1</sup> Any verbal or written agreement in which a woman agrees to become pregnant and carry a child for another individual or couple runs counter to public order<sup>2</sup> and may not be enforced.<sup>3</sup> As a

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<sup>1</sup> Art 541 CCQ: "Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null".

<sup>2</sup> See art 1417 CCQ: "A contract is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest." See also Pierre-Gabriel Jobin & Nathalie Vezina, *Jean-Louis Baudouin et Pierre-Gabriel Jobin, Les obligations*, 6th ed (Cowansville, Que: Yvon Blais, 2005) at 416 [Jobin & Vezina]; Régine Tremblay, "Surrogates in Quebec: The Good, the Bad, and the Foreigner" (2015) 27:1 CJWL 94 at 100 [Tremblay].

<sup>3</sup> See arts 1422, 1418 CCQ, which state that a "contract that is null is deemed to have never existed" and a "contract that is absolutely null may not be confirmed." See also Jobin & Vezina, *supra* note 2 at 425; Michelle Giroux, "Le recours controversé à l'adoption pour établir la filiation de l'enfant né d'une mère porteuse: entre ordre public contractuel et l'intérêt de l'enfant" (2011) 70:1 R du B 509 at 532 [Giroux, "Le recours"].

result, neither a surrogate<sup>4</sup> nor a child's intended parents<sup>5</sup> are bound by any terms of their agreement—including who will be recognized as the child's parents following the birth.

As the *Civil Code* does not otherwise respond to surrogate motherhood, default family law rules and presumptions apply to determine a child's parentage (or in civilian terms, a child's filiation).<sup>6</sup> A surrogate is the child's mother by virtue of giving birth<sup>7</sup> and either the surrogate's spouse or an intended father is the child's father.<sup>8</sup> Where an intended father is legally recognized as a parent, his spouse (of the same or opposite sex) may acquire parental status if the surrogate consents, following the birth, to sever her filial ties through a "special consent" adoption.<sup>9</sup>

In September 2016, the Quebec government announced its intention to reform the *Civil Code* to recognize and further regulate surrogacy

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<sup>4</sup> I am using the terms "surrogate" or "surrogate mother" throughout this article for the sake of clarity, as these terms are more commonly used than "gestational carrier". For discussions of different English and French terms for surrogacy and their potential connotations, see e.g. Susan Drummond, "Fruitful Diversity: Revisiting the Enforceability of Gestational Carriage Contracts" in Trudo Lemmens et al, eds, *Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction* (Toronto: University of Toronto Press, 2017) 274 at 314 [Drummond, "Fruitful Diversity"]; Marie-France Bureau & Edith Guilhermont, "Maternité, Gestation et Liberté: Réflexions sur la Prohibition de la Gestation pour Autrui en Droit Québécois" (2010) 4:2 McGill JL & Health 43 at 44 [Bureau & Guilhermont]; Quebec, Conseil du statut de la femme, *Avis: Mère porteuse: réflexions sur des enjeux actuels* (Quebec: Gouvernement du Québec, 2016) at 17–19.

<sup>5</sup> The term "intended parent(s)" is used to refer to individuals or couples who seek the assistance of surrogate mothers to build their families.

<sup>6</sup> See arts 522ff CCQ. See also Tremblay, *supra* note 2 at 96; Louise Langevin, "Réponse Jurisprudentielle à la Pratique des Mères Porteuses au Québec; Une Difficile Réconciliation" (2010) 26:1 Can J Fam L 171 at 177–79 [Langevin]; Jean Pineau & Marie Pratte, *La Famille* (Montreal: Thémis, 2006) at 684 [Pineau & Pratte].

<sup>7</sup> There is one exception to this rule. In January 2016, the Court of Appeal of Quebec held that if the surrogate does not declare herself to be the child's mother to the registrar of civil status *and* the registrar issues an act of birth stating that the mother is "undeclared", then she will not be the child's mother and will not be required to consent to an adoption. See *Adoption—161*, 2016 QCCA 16, EYB 2016-260785.

<sup>8</sup> Typically, an intended father will be legally recognized as he will register himself as the child's parent and will be named on the child's "act of birth". However, should an intended father not be registered as a parent and not take the child into his care (for instance, if the surrogate decides to keep the child or the intended father reneges on his agreement to parent the child), a surrogate's spouse may be presumed to be the child's father. In this instance, a court could declare that an intended father—who used his sperm to conceive—is the child's father, in lieu of the surrogate's spouse. See arts 523–537 CCQ. For further discussion, see Part 2 of this article.

<sup>9</sup> As will be discussed in detail in Part 2 of this article, this is an adoption that is given in favour of one of the child's relatives or the child's parent's spouse.

arrangements within the province.<sup>10</sup> Quebec's Minister of Justice also indicated that in bringing forward these changes, the government will consider recommendations from a recent report drafted by the *Comité consultative sur le droit de la famille* ("the *Comité*").<sup>11</sup> This committee was created in 2013 to evaluate whether the *Civil Code's* book on the family adequately responds to the needs of Quebec families.<sup>12</sup> The *Comité* concluded that it does not,<sup>13</sup> and in June 2015, it released a report providing recommendations for reform.<sup>14</sup> With respect to surrogacy, the *Comité* proposed to repeal article 541 CCQ<sup>15</sup> and to replace it with provisions that clarify the rights and obligations of parties to a surrogacy agreement and the filiation of children born through surrogacy.<sup>16</sup> Through its recommendations, the *Comité* seeks to adapt Quebec law to new conjugal and family realities. It aims to recognize diverse family forms,<sup>17</sup> to support the best interests of children born through surrogacy, and to protect the dignity of women who serve as surrogate mothers.<sup>18</sup>

This article explores the *Comité's* proposed reforms and considers whether they go far enough to address the limitations of Quebec's current regime. It argues that while the report's proposals would better support and protect surrogate mothers and children born through surrogacy, the *Comité's* recommendations do not adequately balance surrogates' and intended

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<sup>10</sup> Tommy Chouinard, "[Québec ouvre la porte à la reconnaissance des mères porteuses](http://www.lapresse.ca/actualites/sante/201609/26/01-5024715-quebec-ouvre-la-porte-a-la-reconnaissance-des-meres-porteuses.php)", *La Presse* (27 September 2016), online: <[www.lapresse.ca/actualites/sante/201609/26/01-5024715-quebec-ouvre-la-porte-a-la-reconnaissance-des-meres-porteuses.php](http://www.lapresse.ca/actualites/sante/201609/26/01-5024715-quebec-ouvre-la-porte-a-la-reconnaissance-des-meres-porteuses.php)>. The government did not specify when a bill will be brought forward or precisely what these changes will look like. There has yet to be any further announcements about these proposed reforms.

<sup>11</sup> *Ibid*; Quebec, Comité consultatif sur le droit de la famille, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales* (Quebec: Ministère de la Justice du Québec, 2015) [*Comité*]. Note that while Éditions Thémis republished the report in 2015, this article refers to page numbers from the original report.

<sup>12</sup> This committee was created in response to the Supreme Court of Canada's decision in *Quebec (AG) v A*, 2013 SCC 5, [2013] 1 SCR 61, also known as *Eric v Lola*. The Court held that provisions of the *Civil Code* that deny *de facto* spouses the same financial rights and obligations as married spouses are constitutional. However, the *Comité's* report points out that the debates surrounding this case brought to light ways in which Quebec families have evolved over the past decades, and indicated that Quebec family law may not adequately reflect social developments. The Minister asked the *Comité* to respond to two questions: "Is it time to revisit and reform Quebec family law? And, if yes, what should these reforms look like, with respect to conjugal relationships and filiation?" See *Comité*, *supra* note 11 at 1–2.

<sup>13</sup> *Ibid* at 3.

<sup>14</sup> The report proposed reforms with respect to conjugal relationships and filiation.

<sup>15</sup> *Comité*, *supra* note 11 at 170.

<sup>16</sup> *Ibid* at 170–88.

<sup>17</sup> *Ibid* at 3.

<sup>18</sup> *Ibid* at 171.

parents' interests or support and recognize different family forms. Part 2 explores Quebec's current legal responses to surrogacy. It discusses article 541 CCQ's history and objectives, presents debates over this provision's scope and interpretation, and reviews recent Quebec jurisprudence. Part 3 examines the implications of Quebec's surrogacy laws for surrogate mothers, intended parents and children born through surrogacy. It argues that while article 541 CCQ was intended to protect women and children, in practice, Quebec's legal framework frustrates these objectives and overlooks intended parents' experiences. Part 4 assesses the strengths and weaknesses of the *Comité's* recommendations and considers alternative models for reform in other Canadian provinces. It recommends that Quebec lawmakers adopt some of the *Comité's* proposals but also look to British Columbia's *Family Law Act*<sup>19</sup> and Ontario's *Children's Law Reform Act*<sup>20</sup> for further inspiration for how to re-imagine Quebec's laws on surrogate motherhood.

In advancing these arguments, this piece complements scholarship that examines the rationales underpinning article 541 CCQ<sup>21</sup> and this provision's effects,<sup>22</sup> and contributes to debates over whether article 541 CCQ ought to be repealed.<sup>23</sup> Scholars have yet to publish any work on the *Comité's* proposed reforms and few have commented on recent Quebec jurisprudence on surrogate motherhood.<sup>24</sup> Most scholarship has focused

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<sup>19</sup> *Family Law Act*, SBC 2011, c 25 [BC FLA]. Note that while British Columbia's FLA was passed on November 23, 2011, the majority of the Act was only brought into force on March 18, 2013.

<sup>20</sup> *Children's Law Reform Act*, RSO 1990, c C-12 [CLRA]. Amendments to the CLRA came into force on January 1, 2017. These reforms updated the CLRA to respond to assisted reproductive technologies and surrogacy.

<sup>21</sup> See especially Bureau & Guilhermont, *supra* note 4; Angela Campbell, "Law's Suppositions about Surrogacy against the Backdrop of Social Science" (2011) 43:1 *Ottawa L Rev* 29 [Campbell].

<sup>22</sup> See e.g. Michelle Giroux, "L'encadrement de la maternité de substitution au Québec et la protection de l'intérêt de l'enfant" (1997) 28:4 *RGD* 535 [Giroux, "L'encadrement"]; Giroux, "Le recours", *supra* note 3.

<sup>23</sup> For arguments in favour of maintaining this provision see e.g. Benoit Moore, "Maternité de substitution et filiation en droit québécois" in *Liber amicorum: Mélanges en l'honneur de Camille Jauffret-Spinosi* (Paris: Dalloz, 2013) 859 [Moore]. For arguments in support of its repeal see e.g. Anne-Marie Savard, "L'établissement de la filiation à la suite d'une gestation pour autrui: le recours à l'adoption par consentement spécial en droit québécois constitue-t-il le moyen le plus approprié?" in Christelle Landheer-Cieslak & Louise Langevin, eds, *La personne humaine, entre autonomie et vulnérabilité: Mélanges en l'honneur d'Édith Deleury* (Montreal: Yvon Blais, 2015) 589 [Savard].

<sup>24</sup> Two scholars have discussed the Court of Appeal of Quebec's 2014 decision *Adoption—1445*, 2014 QCCA 1162, EYB 2014-238289. See Savard, *supra* note 23; Louise Langevin, "La Cour d'appel du Québec et la maternité de substitution dans la décision *Adoption-1445*: quelques lumières sur les zones d'ombre et les conséquences d'une 'solution la moins insatisfaisante'" (2015) 49:2 *RJT* 451. For scholarly commentary on *Adoption—161*,

on whether or not a special consent adoption should be permitted in light of article 541 CCQ<sup>25</sup> and on (now outdated) judicial decisions on this point.<sup>26</sup>

This article also seeks to communicate to an English audience Quebec's legal developments relating to surrogate motherhood.<sup>27</sup> It compares the *Comité's* proposed reforms to British Columbia and Ontario's legislative responses to surrogacy and comments on these provinces' recent reforms. Finally, as Quebec's surrogacy laws not only affect Quebec residents, but all Canadian and international intended parents whose children are born on Quebec soil, this piece aims to inform scholars, lawmakers, and lawyers within and outside Quebec about the current state of the law and potential legislative changes.

## 2. Quebec's Legal Responses to Surrogacy

### A) Article 541 of the Civil Code of Québec

In 1991, Quebec became the first Canadian jurisdiction to introduce legislation responding to surrogacy agreements. When article 541 CCQ came into force on January 1, 1994, it stated: "Procreation or gestation agreements on behalf of another person are absolutely null."<sup>28</sup> In 2002, this provision was reworded as part of a larger set of reforms to Quebec's laws relating to assisted procreation.<sup>29</sup> Today article 541 CCQ reads: "Any

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*supra* note 7, see Andréanne Malacket, "Maternité de substitution: quelle filiation pour l'enfant à naître?" (2015) 117:2 R du N 229 [Malacket]. There currently exists no academic commentary on the most recent decisions of the Court of Quebec: see *Adoption—1631*, 2016 QCCQ 6872, [2016] JQ no 8622 (QL); *Adoption—16199*, 2016 QCCQ 8951, EYB 2016-271413.

<sup>25</sup> See e.g. Savard, *supra* note 23; Moore, *supra* note 23; Giroux, "Le recours", *supra* note 3; Giroux, "L'encadrement", *supra* note 22.

<sup>26</sup> See e.g. Langevin, *supra* note 6; Tremblay, *supra* note 2; Moore, *supra* note 23; Giroux, "Le recours", *supra* note 3.

<sup>27</sup> The vast majority of scholarship on surrogacy in Quebec is written in French. But see Tremblay, *supra* note 2; Campbell, *supra* note 21; Monique Ouellette, "The Civil Code of Quebec and New Reproductive Technologies" in *Overview of Legal Issues in New Reproductive Technologies* (Ottawa: Minister of Supply and Services Canada, 1993) 625 [Ouellette]. Susan Drummond and Karen Busby also discuss provincial responses to surrogacy across Canada and thus discuss briefly Quebec's legal regime. See Drummond, "Fruitful Diversity", *supra* note 4; Karen Busby, "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere" (2013) 25:2 CJWL 284.

<sup>28</sup> See art 541 CCQ (1991).

<sup>29</sup> See Bill 84, *An Act instituting civil unions and establishing new rules of filiation*, 2nd Sess, 36th Leg, Quebec, 2002 (assented to 8 June 2002), SQ 2002, c 6. The CCQ's book on the family was amended to enable lesbian couples and single mothers by choice to register as a child's parent(s), without resorting to adoption, where the child was conceived through gamete donation. See arts 538–539.1 CCQ. For further discussion of these 2002 reforms, see

agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null.”<sup>30</sup>

Article 541 CCQ was introduced in response to concerns about the effects of surrogate motherhood on women, children, and Quebec society. In 1988 and 1989, respectively, the *Comité du Barreau du Québec sur les nouvelles technologies de reproduction* (“Barreau”) and the *Conseil du statut de la femme* (“Conseil”) released reports proposing that surrogacy agreements should not be legally recognized or enforced.<sup>31</sup> These reports expressed concern that surrogate motherhood—particularly, paid surrogacy—would commodify and objectify women’s bodies and human life.<sup>32</sup> The *Barreau* explained that the surrogate’s body would be viewed as a vessel in the production of a baby.<sup>33</sup> In addition, the child would be treated as an object that is created to satisfy intended parents’ wishes to have children and surrogates’ desires to make money.<sup>34</sup>

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e.g. Robert Leckey, “Where the Parents are of the Same Sex’: Quebec’s Reforms to Filiation” (2009) 23:1 Intl JL Pol’y & Fam 62.

<sup>30</sup> While Hansard debates do not provide any explanation for article 541 CCQ’s rewording, Tremblay has suggested that this change may have been intended to clarify this provision’s meaning. The earlier version’s reference to “procreation agreements” may have originally applied to sperm donor agreements and the reforms in 2002 made clear that it was intended to apply solely to surrogacy arrangements. See Tremblay, *supra* note 2 at 100.

<sup>31</sup> Quebec, Barreau du Québec, *Rapport du Comité du Barreau du Québec sur les nouvelles technologies de reproduction: Les enjeux éthiques et juridiques des nouvelles technologies de reproduction* (Montreal: Barreau du Québec, 1988) at 33–34 [Barreau du Québec]; Conseil du statut de la femme, *Les nouvelles technologies de la reproduction: Avis synthèse du Conseil du statut de la femme* (Quebec: Gouvernement du Québec, 1989) [Conseil du statut de la femme]. The Barreau also recommended: penalizing intermediaries—lawyers, doctors and agencies—who assist with these agreements; that article 135.1 of the *Youth Protection Act*, CQLR, c P-34.1 (that prohibits payment in relation to adoption) be applied to surrogacy; that the drafting of surrogacy agreements ought to be declared to be contrary to lawyers’ professional ethics; and that the spouse of the child’s genetic father ought not to have a preferential right to adopt the child (in other words, that a special consent adoption ought not to be permitted).

<sup>32</sup> At the time of the Barreau and Conseil’s reports, the federal government had not yet introduced the *Assisted Human Reproduction Act*, which criminalizes paid surrogacy. Driven by similar concerns about the effects of reproductive technologies on women, children, and families, in 1989, the federal government created the Royal Commission on New Reproductive Technologies to consider how best to respond to assisted procreation, including surrogacy. The Royal Commission’s 1993 report, *Proceed with Care*, recommended making it illegal to pay a surrogate mother compensation. See Canada, Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Supply and Services Canada, 1993); *Assisted Human Reproduction Act*, SC 2004, c 2 at 6 [AHRA].

<sup>33</sup> Barreau du Québec, *supra* note 31 at 31–33.

<sup>34</sup> *Ibid* at 30–31.

Both reports expressed concern about the practical effects of these agreements on women's reproductive autonomy and on the well-being of children born through these arrangements.<sup>35</sup> The *Conseil* noted that surrogacy contracts could curtail women's reproductive choices as women might renounce their rights to accept or refuse to undergo an abortion or medical treatment. Surrogates might also agree to other constraints on their behaviour during pregnancy or labour, especially if they are being paid for their services.<sup>36</sup> These reports explained that surrogacy risks creating traumatic situations for surrogates who bond with the baby while *in utero*. The *Barreau* cited to the *Baby M* case, in which a surrogate in New Jersey experienced psychological distress upon handing over the child, decided that she could not fulfill her agreement, and fled with the baby to Florida.<sup>37</sup> The *Barreau* remarked that surrogacy may lead to disputes and litigation over a child's filiation.<sup>38</sup> It also noted that even where there is no litigation, children might be scarred by knowledge of the circumstances of their births and from having been conceived in order to be "abandoned" by their birth mothers.<sup>39</sup>

Legislative debates and commentary confirm that these concerns inspired article 541 CCQ's enactment.<sup>40</sup> For instance, in discussing this provision's introduction in 1991, then Minister of Justice Gil Rémillard explained that article 541 CCQ was intended to respect the principle that women should be unable to sell their bodies to produce children.<sup>41</sup> Lawmakers were also concerned about the rights of children born through

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<sup>35</sup> Conseil du statut de la femme, *supra* note 31 at 20; Barreau du Québec, *supra* note 31 at 31–32.

<sup>36</sup> Conseil du statut de la femme, *supra* note 31 at 20.

<sup>37</sup> *In re Baby M*, 109 NJ 396, 537 A2d 1227 (1988). While the trial court judge awarded custody to the intended parents, on appeal the Supreme Court of New Jersey held that the agreement contravenes public policy. It invalidated the contract and granted custody of the child to the surrogate and the intended father.

<sup>38</sup> Barreau du Québec, *supra* note 31 at 32.

<sup>39</sup> *Ibid* at 31.

<sup>40</sup> Scholarship also indicates that these concerns inspired article 541 CCQ's enactment. For example, Monique Ouellette notes that article 541 CCQ reflected "the unanimity of the recommendations submitted either during the deliberations of the National Assembly committee or during the preparatory work that led to the enactment of the Civil Code of Québec" and she cites to the *Barreau* and the *Conseil's* respective reports. Ouellette, *supra* note 27 at 630.

<sup>41</sup> Minister Rémillard expressed: "ce que nous voulons faire respecter comme principe, c'est qu'on ne peut pas vendre son corps pour la gestation, pour faire un enfant." See Quebec, National Assembly, *Journal des débats*, 34th Leg, 1st Sess, No 7 (5 September 1991) at SC1-268 [*Journal des débats*]. See also Campbell, *supra* note 21 at 50; Giroux, "Lencadrement", *supra* note 22 at 537, 539; Bureau & Guilhermont, *supra* note 4 at 65.



surrogacy,<sup>42</sup> and noted that a child's civil status ought not to be determined in accordance with an agreement, but rather according to family law rules.<sup>43</sup>

Through article 541 CCQ, the Quebec government expressed its strongest disapproval of surrogacy arrangements.<sup>44</sup> A contract is “absolutely null” (as opposed to “relatively null”) where it poses a threat to public order<sup>45</sup> and where nullity is required to protect general,<sup>46</sup> rather than individual, interests.<sup>47</sup> By using the language of absolute nullity and by refusing to otherwise regulate surrogacy arrangements, lawmakers sent a clear message that Quebec would not condone these agreements.<sup>48</sup>

By stating that surrogacy agreements are absolutely null, lawmakers also aimed to protect surrogates' and children's interests. A contract that is absolutely null is legally unenforceable: it is deemed to have never existed<sup>49</sup> and may not be confirmed.<sup>50</sup> Article 541 CCQ made clear that surrogates could not be compelled to give up a child or to abide by a contract's terms regarding medical treatment, abortion, or conduct during pregnancy. It also clarified that a child's filiation would not be determined by a surrogacy agreement's provisions but rather would be established in conformity with the *Civil Code's* book on the family.

Finally, by rendering surrogacy contracts unenforceable, lawmakers sought to dissuade Quebecers from acting as surrogates or using a surrogate to build their families.<sup>51</sup> It was thought that if intended parents could not be guaranteed that they would be legally recognized as parents, and that if surrogates could not enforce payment, neither party would be willing to take the risk of participating in a surrogacy arrangement.<sup>52</sup>

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<sup>42</sup> Lawmakers noted that children born through surrogacy would be disadvantaged because of the circumstances of their births. See *Journal des débats*, *supra* note 41 at SCI-272. See also Campbell, *supra* note 21 at 50–51.

<sup>43</sup> Quebec, *Commentaires du Ministre de la Justice*, vol 1 (Quebec: Publications du Québec, 1993) at 327.

<sup>44</sup> Tremblay, *supra* note 2 at 100.

<sup>45</sup> *Ibid.*

<sup>46</sup> See art 1417 CCQ.

<sup>47</sup> See art 1419 CCQ.

<sup>48</sup> Ouellette, *supra* note 27 at 631.

<sup>49</sup> See art 1422 CCQ.

<sup>50</sup> See art 1418 CCQ.

<sup>51</sup> See *Journal des débats*, *supra* note 41 at SCI-269, in which Mme Harel spoke of the law's objective to deter surrogacy and M Rémillard explained: “La question des mères porteuses, pour nous, pour le moment en tout cas, dans l'état actuel du consensus social, nous considérons qu'on ne peut pas le permettre. Donc, les conventions de procréation et de gestation pour le compte d'autrui sont nulles”.

<sup>52</sup> Monique Ouellette notes that in introducing article 541 CCQ, “the legislature has wagered that if it eliminates recourse to the courts, few people will risk undertaking such a

Despite lawmakers' intentions, however, article 541 CCQ did not stop Quebecers from engaging in surrogacy. Although there exists limited data on the incidence of surrogacy in Quebec,<sup>53</sup> jurisprudence and empirical research indicate that Quebecers have acted as surrogate mothers and have also sought the assistance of Canadian and international surrogates to build their families.<sup>54</sup> Intended parents have then applied to Quebec courts to obtain parental status through "special consent" adoption.

## B) Filiation by Blood and Special Consent Adoption

Where a surrogate gives birth in Quebec, the child's filiation is first established through general rules and presumptions set out in the *Civil Code's* chapter on "filiation by blood".<sup>55</sup> Maternal and paternal filiation are first proven by the "act of birth",<sup>56</sup> an official document drawn up by the registrar of civil status on the basis of two forms: the "attestation of birth" and the "declaration of

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venture." Ouellette, *supra* note 27 at 631. See also Moore, *supra* note 23 at 866, who speaks about article 541 CCQ as serving a "prophylactic" role.

<sup>53</sup> For discussion of available statistics on surrogacy in Canada and the limitations of this data see Pamela M White, "Hidden from View: Canadian Gestational Surrogacy Practices and Outcomes, 2001-2012" (2016) 24:47 *Reproductive Health Matters* 205; Pamela White, "[Hidden from View: Canadian Surrogacy](#)" (28 September 2016), *Impact Ethics: Making a Difference in Bioethics* (blog), online: <<https://impactethics.ca/2016/09/28/hidden-from-view-canadian-surrogacy/>>.

<sup>54</sup> Since 2007, there have been 15 reported judgments in Quebec involving surrogacy. However, citations in these judgments to unreported cases demonstrate that this reported jurisprudence does not reflect all cases involving surrogacy. Note as well that in cases involving twins, there are separate judgments rendered for each child with the same outcome. In counting fifteen judgments, I counted these pairs of decisions as one case and have only listed one of them here. See *Adoption—07219*, 2007 QCCQ 21504, [2007] JQ no 25020 (QL); *Adoption—091*, 2009 QCCQ 628, EYB 2009-154793; *Adoption—09185*, 2009 QCCQ 8703, [2009] JQ no 19878 (QL); *Adoption—09558*, 2009 QCCQ 20292, [2009] JQ no 23378 (QL); *Adoption—10329*, 2010 QCCQ 18645, [2010] JQ no 29345 (QL); *Adoption—10489*, 2010 QCCQ 19971, [2010] JQ no 30858 (QL); *Adoption—12464*, 2012 QCCQ 20039, [2012] JQ no 22713; *Adoption—1342*, 2013 QCCQ 4585, [2013] JQ no 5134; *Adoption—1445*, *supra* note 24; *Adoption—1590*, 2015 QCCQ 10185, AZ-51199110; *Adoption—1549*, 2015 QCCQ 7955, EYB 2015-257281; *Droit de la famille—151172*, 2015 QCCS 2308, [2015] JQ no 4442 (QL); *Adoption—161*, *supra* note 7; *Adoption—1631*, *supra* note 24; *Adoption—16119*, 2016 QCCQ 8635, [2016] JQ no 10632 (QL); See also Isabel Côté & Jean-Sébastien Sauvé, "Homopaternité, gestation pour autrui: No man's land?" (2016) 46:1 *RGD* 27 (detailing interviews with gay intended fathers in Quebec).

<sup>55</sup> While the *Civil Code* also contains provisions establishing the filiation of children born through assisted procreation (see arts 538–540 CCQ), these apply where a child is born through gamete donation but not through surrogacy. See Pineau & Pratte, *supra* note 6 at 683–84; Alain Roy, *La filiation par le sang et par la procréation assistée* (art. 522 à 542 C.c.Q.) (Cowansville, Que: Yvon Blais, 2014) at 211, 216 [Roy, *La filiation*]; Savard, *supra* note 23 at 605.

<sup>56</sup> See art 523 CCQ.

birth”<sup>57</sup> The attestation is filled out by the physician, nurse, or midwife who assists with the birth (“the accoucheur”)<sup>58</sup> and only contains information about the birth mother and the child.<sup>59</sup> The declaration is completed by the child’s mother or father within 30 days of the birth and asks for the names of up to two individuals who will be registered as the child’s parents.<sup>60</sup> Where these two documents do not match, the registrar may not draw up an act of birth without judicial authorization,<sup>61</sup> but may undertake a summary investigation to obtain additional information.<sup>62</sup> In the absence of an act of birth, maternal and paternal filiation may be proven through uninterrupted possession of status (facts that indicate a parent-child relationship such as who has been caring for the child since the birth).<sup>63</sup> Paternal filiation may also be determined through legal presumptions that recognize the birth mother’s married or civil union spouse as the child’s parent.<sup>64</sup> Alternatively, a child’s filiation may be established through voluntary acknowledgment,<sup>65</sup> or, in the event of a dispute, paternity can be proven through DNA testing.<sup>66</sup>

Pursuant to these rules, an intended father who is listed on the act of birth will be the child’s legal father, but an intended mother or second intended father cannot be recognized as parents. Only the surrogate—as the birth mother—may be the child’s legal mother in accordance with the maxim *mater semper certa est* (“the mother is always certain”).<sup>67</sup> Should an intended mother seek to register herself as the child’s mother, the declaration of birth will not match the attestation of birth and no act of birth will be issued.<sup>68</sup> In addition, as the chapter on filiation by blood only permits the child to have

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<sup>57</sup> See arts 108–117 CCQ.

<sup>58</sup> The English version of the CCQ uses the term “accoucheur”. The accoucheur is required to send one copy to the child’s mother or father and another to the registrar of civil status. See arts 111–112 CCQ. See also Tremblay, *supra* note 2 at 98.

<sup>59</sup> See art 111 CCQ: “An attestation states the place, date and time of birth, the sex of the child and the name and domicile of the mother”.

<sup>60</sup> See arts 113–115 CCQ.

<sup>61</sup> See art 131 CCQ.

<sup>62</sup> See art 130 CCQ.

<sup>63</sup> See arts 523–524 CCQ. Art 524 CCQ states, “Uninterrupted possession of status is established by an adequate combination of facts which indicate the relationship of filiation between the child and persons of whom he is said to be born.” These facts may include, for instance, “whether the supposed parents treat the child as their own, whether the child is reputed to be theirs and what name the child bears.” See France Allard et al, eds, *Private Law Dictionary of the Family and Bilingual Lexicons* (Cowansville, Que: Yvon Blais, 1999). See also Tremblay, *supra* note 2 at 99.

<sup>64</sup> See art 525 CCQ.

<sup>65</sup> See art 526 CCQ.

<sup>66</sup> See art 535.1 CCQ.

<sup>67</sup> See e.g. Moore, *supra* note 23 at 867; Roy, *La filiation*, *supra* note 55 at 216–17; Bureau & Guilhermont, *supra* note 4 at 50.

<sup>68</sup> See arts 130–131 CCQ.

one mother and one father, an intended mother may not declare herself to be the child's second mother along with a surrogate, and an intended father's same-sex spouse may not declare himself to be the child's second father.<sup>69</sup>

Intended parents have therefore sought to obtain legal status through adoption. Under the regime of "general adoption", Quebecers are unable to choose who will adopt their children and the adoption severs completely both birth parents' filial ties.<sup>70</sup> Article 555 CCQ carves out an exception for a child's stepparents or relatives, who may adopt by "special consent".<sup>71</sup> This provision allows one birth parent to maintain their bond of filiation while their spouse adopts the child. In cases involving surrogacy, where an intended father is named on the act of birth, parties have applied for a special consent adoption to enable the surrogate to transfer her parental rights to the intended father's spouse.

Quebec scholars have long disagreed about whether special consent adoptions ought to be allowed in cases involving surrogacy. Some have argued that article 541 CCQ not only renders surrogacy agreements unenforceable, but also prohibits them<sup>72</sup> and prevents judges from authorizing a special consent adoption, even if the surrogate consents to relinquish the child.<sup>73</sup> Pursuant to article 543 CCQ, "No adoption may take place except in the interest of the child and on the *conditions prescribed by law*."<sup>74</sup> Some have suggested that these "conditions" include article 541 CCQ and that allowing for an adoption in relation to surrogacy contradicts a rule of law,<sup>75</sup> runs

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<sup>69</sup> See arts 523–537 CCQ; *Comité*, *supra* note 11 at 169. This contrasts with the chapter on "filiation of children born through assisted procreation" through which a child may have two parents of the same sex. See arts 538–540 CCQ.

<sup>70</sup> See Tremblay, *supra* note 2 at 97; Robert Leckey, "Identity, Law, and the Right to a Dream?" (2015) 38:2 Dal LJ 525 at 534 [Leckey].

<sup>71</sup> Article 555 CCQ states: "Consent to adoption may be general or special; special consent may be given only in favour of an ascendant of the child, a relative in the collateral line to the third degree or the spouse of that ascendant or relative; it may also be given in favour of the spouse of the father or mother. However, in the case of *de facto* spouses, they must have been cohabiting for at least three years".

<sup>72</sup> See Michel Tétrault, *Droit de la famille* (Cowansville, Que: Yvon Blais, 2005) at 1174 [Tétrault].

<sup>73</sup> See Alain Roy, *Droit de l'adoption: Adoption interne et internationale* (Montreal: Wilson & Lafleur, 2010) at 66–67 [Roy, *Droit de l'adoption*].

<sup>74</sup> See art 543 CCQ [emphasis added].

<sup>75</sup> See Carmen Lavallée, *L'enfant, ses familles et les institutions de l'adoption: regards sur le droit français et le droit québécois* (Montreal: Wilson & Lafleur, 2005) at 411; Roy, *Droit de l'adoption*, *supra* note 73 at 66–67.

counter to lawmakers' intentions,<sup>76</sup> and provides a roundabout way of giving effect to an invalid contract.<sup>77</sup>

Other scholars have argued that special consent adoptions are permitted and article 541 CCQ does not affect their validity. Article 541 CCQ ought to be understood as separate from any determination of filiation<sup>78</sup> and the "conditions prescribed by law" only include those conditions set out in the chapter on adoption and do not include article 541 CCQ.<sup>79</sup> They maintain that had lawmakers wished to prohibit special consent adoptions in cases involving surrogacy, they would have done so explicitly<sup>80</sup> and that allowing for an adoption is necessary in these circumstances to protect children's best interests.<sup>81</sup>

In line with existing doctrine, over the past decade some judges have allowed for special consent adoptions, while others refused on the basis that the conditions required for the adoption were not met. Most notably, in *Adoption—091*, Justice Dubois denied an adoption, finding that consent to the adoption was vitiated as it would give effect to a surrogacy agreement that is contrary to public order and prohibited by law.<sup>82</sup> The surrogate in this case had a genetic connection to the child, received \$20,000 from the intended parents,<sup>83</sup> and, on the advice of legal counsel, did not sign the declaration of birth.<sup>84</sup> Justice Dubois took note of these facts and explained that the "conditions prescribed by law" for an adoption go beyond respect for

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<sup>76</sup> Savard, *supra* note 23 at 608. It should be noted that while Savard argues that lawmakers would not have intended for article 555 CCQ to apply in cases involving surrogacy, she agrees with the outcome of allowing for these adoptions to establish the child's filiation with the intended parents. She argues, however, that it would be more appropriate to modify the law to allow for intended parents to obtain parental status through other means.

<sup>77</sup> See Tétrault, *supra* note 72 at 1174.

<sup>78</sup> See Moore, *supra* note 23 at 873.

<sup>79</sup> See Giroux, "Le recours", *supra* note 3 at 528, 537.

<sup>80</sup> *Ibid* at 537; Marie Pratte, "Le nouveau Code civil du Québec: Quelques retouches en matière de filiation" in Ernest Caparros, ed, *Mélanges Germain Brière* (Montreal: Wilson & Lafleur, 1993) at 301–02.

<sup>81</sup> See Pineau & Pratte, *supra* note 6 at 685; Giroux, "Le recours", *supra* note 3 at 535–36, 539–43; Moore, *supra* note 23 at 873; Giroux, "L'encadrement", *supra* note 22.

<sup>82</sup> *Adoption—091*, *supra* note 54.

<sup>83</sup> The parties said that this money was to cover inconveniences and expenses but the judge viewed this as contravening the federal AHRA. The AHRA prohibits paying a surrogate mother compensation but is intended to allow for the reimbursement of a surrogate's expenses. For further discussion of the federal AHRA, see Part 3 of this article. AHRA, *supra* note 32, ss 6, 12; *Adoption—091*, *supra* note 54 at para 15.

<sup>84</sup> *Adoption—091*, *supra* note 54 at paras 19, 21. Their lawyer had advised them that if she did not sign the declaration of birth only the intended father's consent to the adoption would be required. The surrogate nonetheless signed a special consent adoption after the birth.

formal and procedural requirements,<sup>85</sup> and it is impossible to disassociate the question of the validity of the consent to the adoption from prior steps taken by this couple to achieve their parental project.<sup>86</sup> Allowing for the adoption would require the court to show “willful blindness” and would “confirm that the ends justify the means.”<sup>87</sup>

Following this decision, other judges granted special consent adoptions by distinguishing their cases from *Adoption—091*. Justice Dubois’s reasons suggest that the existence of article 541 CCQ, in itself, vitiates consent to the adoption. However, some jurists read this judgment as permitting an adoption where the surrogate is listed on the birth registration and/or where the surrogacy arrangement does not involve compensation.<sup>88</sup> Some noted that the adoption may be permitted where a surrogate is paid or where she is not listed on the birth registration, provided the contract or birth certificate was drafted outside of Canada in a jurisdiction where this is legal.<sup>89</sup> Others explained that allowing for the adoption would give the child his or her “true maternal filiation” by recognizing an intended mother who is caring for the child and who used her own eggs to conceive.<sup>90</sup> Still others reasoned that article 541 CCQ has no bearing on the adoption process or the validity of consent to the adoption, and that allowing for the adoption is not equivalent to giving effect to the agreement.<sup>91</sup> Each of these judges also found that it would be in the best interests of the child to grant the adoption.

### C) Recent Jurisprudence

In June 2014, the Court of Appeal of Quebec clarified in *Adoption—1445* that while surrogacy agreements cannot be enforced, article 541 CCQ does

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<sup>85</sup> *Ibid* at paras 54–55.

<sup>86</sup> *Ibid* at para 57.

<sup>87</sup> *Ibid* at para 78.

<sup>88</sup> Judges pointed to these facts in rendering their decisions. See *Adoption—09185*, *supra* note 54 at para 6; *Adoption—09558*, *supra* note 54 at paras 11–12; *Adoption—10329*, *supra* note 54 at paras 17, 20; *Adoption—10489*, *supra* note 54 at para 16; It should be noted that this reading is not surprising. Two years prior to his decision in *Adoption—091*, Dubois J had allowed for a special consent adoption in a case where the intending mother’s sister-in-law acted as a surrogate using the intending father’s sperm. He explained that no one had invoked article 541 CCQ as the parties were all in agreement and also noted that this was a gratuitous and generous offer on the part of the surrogate mother. See *Adoption—07219*, *supra* note 54 at paras 5–10.

<sup>89</sup> *Adoption—09558*, *supra* note 54 at para 11; *Adoption—1590*, *supra* note 54 at para 45.

<sup>90</sup> See *Adoption—10489*, *supra* note 54 at para 17; *Adoption—09185*, *supra* note 54 at para 17; 525-43-005788-092 (7 January 2010) (CQ Youth Division), cited in *Adoption—1445*, *supra* note 24 at para 43.

<sup>91</sup> *Adoption—1342*, *supra* note 54 at paras 12–14; *Adoption—10329*, *supra* note 54 at para 20.

not affect a child's filiation. Justice Morissette explained that in the case at hand, the conditions for the adoption were met: the surrogate was initially listed on the child's birth registration, and she consented to relinquish her parental rights. He explained that it is irrelevant, both for the purposes of applying article 541 CCQ and for establishing the child's filiation, whether the agreement provided for compensation for the surrogate mother,<sup>92</sup> in contravention of the federal *Assisted Human Reproduction Act*.<sup>93</sup> It also makes no difference whether the intended mother used her own egg to conceive—and has a genetic connection to the child—or used a donor's egg.<sup>94</sup> Allowing for the adoption would be in the child's best interests<sup>95</sup> and would accord with the principle set out in article 522 CCQ that “[a]ll children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth.”<sup>96</sup>

*Adoption—1445* went a long way towards defining the scope and interpretation of articles 541 and 555 CCQ; however, it did not state explicitly whether an adoption is permitted where the birth mother voluntarily withheld her name from the child's declaration of birth and the registrar of civil status issued an act of birth that does not name her as a parent. In April 2015, the Court of Quebec denied an adoption in these circumstances, finding that the surrogate had committed fraud by not declaring her maternal filiation with the child, and that the intended parents had acted illegally and in a manner contravening public order.<sup>97</sup>

In January 2016, the Court of Appeal of Quebec reversed the lower court's decision.<sup>98</sup> In *Adoption—161*, Justice St-Pierre held that there is technically

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<sup>92</sup> *Adoption—1445*, *supra* note 24 at 24. Justice Morissette also held that while section 135.1 of the *Youth Protection Act* makes it a criminal offense to “give, receive or offer or agree to give or receive, directly or indirectly, a payment or a benefit either for giving or obtaining a consent to adoption,” there was no evidence suggesting that the payments were given for obtaining this consent (paras 25–26). From the day of their agreement, all the parties knew that the child would be adopted by A with the consent of B and C and so payment did not induce the surrogate's consent. Moreover, he found it “impossible on the basis of the testimony to find that the payments to the two persons concerned were anything other than the reimbursement of expense or payments made in anticipation of actual expenses” (para 31).

<sup>93</sup> *AHRA*, *supra* note 32, s 6. As will be discussed in more detail in Part 3 of this article, the federal *AHRA* makes it illegal to pay, offer to pay, or advertise to pay a surrogate mother compensation.

<sup>94</sup> *Adoption—1445*, *supra* note 24 at para 62.

<sup>95</sup> *Ibid* at para 66.

<sup>96</sup> *Ibid* at para 68.

<sup>97</sup> *Adoption—1549*, *supra* note 54 at paras 19, 30. See also *Adoption—161*, *supra* note 7 at para 54.

<sup>98</sup> *Adoption—161*, *supra* note 7. For commentary on this case see Malacket, *supra* note 24.

no legal obligation on the part of the surrogate to declare her maternal filiation to the registrar of civil status. She also found that the parties had acted in good faith and had not committed fraud. The declaration filled out by the intended parents corresponded to the reality of their situation; under “mother” it did not say “unknown” but rather “undeclared.”<sup>99</sup> In addition, there was evidence suggesting that the attestation of birth (filled out by the accoucheur) may have been incomplete,<sup>100</sup> and that the registrar did not take steps, pursuant to articles 130 and 131 CCQ, to investigate why the birth mother was not listed on the declaration.<sup>101</sup> Justice St-Pierre explained that neither the surrogate nor the intended father can be held responsible for any omissions by the accoucheur or for the decisions of the registrar of civil status.<sup>102</sup> She also noted that since the registrar of civil status had issued an act of birth with the birth mother listed as “undeclared”, the surrogate was not required to consent to the adoption. Only the intended father’s consent was required pursuant to article 551 CCQ,<sup>103</sup> as he was the sole person named on the act of birth.<sup>104</sup> She allowed the adoption on the basis that this would be in the best interests of the child.<sup>105</sup>

Most recently, in two cases in July 2016, judges of the Court of Quebec allowed for adoptions where twins were born to surrogates abroad in India and Thailand respectively.<sup>106</sup> In both cases, the Quebec government had opposed these adoptions arguing that the surrogacy contracts in these cases contravene public order.<sup>107</sup> The Attorney General argued that the obligations imposed on surrogates in these contracts are abusive, and run counter to principles of human dignity, the non-instrumentalization of women’s bodies, and the non-commodification of children.<sup>108</sup> In one of the cases, *Adoption—16199*, the Attorney General also argued that the adoption

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<sup>99</sup> *Adoption—161*, *supra* note 7 at para 82.

<sup>100</sup> *Ibid* at para 77.

<sup>101</sup> *Ibid* at paras 64, 72, 77, 79.

<sup>102</sup> *Ibid* at para 79.

<sup>103</sup> Article 551 CCQ states: “If the filiation of the child is established with regard to only one parent, the consent of that parent is sufficient.” Some scholars have therefore argued that where only the intended father is listed on the act of birth, the surrogate will not have maternal filiation and will not be required to consent to the adoption. See e.g. Sonia Lebris, “Procréation médicalement assistée et parentalité à l’aube du 21e siècle” [1994] CP du N 133; Langevin, *supra* note 6 at 179.

<sup>104</sup> *Adoption—161*, *supra* note 7 at 49–50. However, despite this finding, the Court nonetheless verified that the surrogate had willingly relinquished her parental rights and had her testify to this effect.

<sup>105</sup> *Ibid* at para 93.

<sup>106</sup> *Adoption—1631*, *supra* note 24; *Adoption—16199*, *supra* note 24.

<sup>107</sup> *Adoption—1631*, *supra* note 24 at para 27; *Adoption—16199*, *supra* note 24 at para 12.

<sup>108</sup> *Adoption—1631*, *supra* note 24 at paras 23–27; *Adoption—16199*, *supra* note 24 at para 13.



should not be permitted because the surrogate did not provide consent in accordance with the conditions prescribed by articles 548 and 551 CCQ.<sup>109</sup>

Both judges found that the adoptions were necessary to support these children's best interests and rejected the Minister's arguments.<sup>110</sup> In *Adoption—1631*, Justice Primeau explained that the parties entered into the agreement openly and in good faith in accordance with the norms of practice in India.<sup>111</sup> She noted that Quebec judges have permitted adoptions where surrogacy arrangements accord with the laws of the child's birthplace—including in two prior judgments involving Indian surrogate mothers.<sup>112</sup> She also found that refusing the adoption would amount to punishing these children because of the circumstances of their births,<sup>113</sup> and would mean that the twins' second father—who has been caring for them since birth—would not have legal status and resulting rights and responsibilities. In *Adoption—16199*, Justice Hamel found that while the surrogate's consent did not accord with the formalities set out in the *Civil Code*, the facts of this case indicate that she voluntarily relinquished her parental rights to the intended parents.<sup>114</sup> He also noted that while he shares the Attorney General's concerns about the implications of abusive surrogacy arrangements and their effects with respect to commodification and dignity, lawmakers ought to address these issues, which cannot be dealt with by courts in the context of adoptions.<sup>115</sup>

Following this line of cases, it is now clear that Quebec judges may grant special consent adoptions despite article 541 CCQ. There is also now substantial precedent indicating that where the surrogate and intended parents agree, following the birth, that the intended parents ought to have parental status, judges ought to grant these adoptions to support these children's best interests. One might therefore suggest that all is well with Quebec's legal regime and that article 541 CCQ ought to be preserved.<sup>116</sup>

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<sup>109</sup> Article 548 CCQ states that consent to an adoption must "be given in writing and before two witnesses" while article 551 CCQ stipulates that "the consent of both parents to the adoption is necessary if the filiation of the child is established with regard to both of them".

<sup>110</sup> *Adoption—1631*, *supra* note 24 at paras 152–60; *Adoption—16199*, *supra* note 24 at paras 130–61.

<sup>111</sup> *Adoption—1631*, *supra* note 24 at paras 130–31.

<sup>112</sup> *Adoption—1590*, *supra* note 54; 525-43-006949-156 (3 June 2015) (CQ Youth Division), as cited in *Adoption—1631*, *supra* note 24 at para 94.

<sup>113</sup> *Adoption—1631*, *supra* note 24 at paras 162–63.

<sup>114</sup> *Adoption—16199*, *supra* note 24 at para 157.

<sup>115</sup> *Ibid* at paras 106–11.

<sup>116</sup> Some scholars have argued that article 541 CCQ should be maintained but special consent adoptions should be allowed. See e.g. Quebec, Commission de l'éthique de la science et de la technologie, *Éthique et procréation assistée: des orientations pour le don de gamètes et*

The following Part will argue otherwise. It will explore the implications of Quebec's legal framework for surrogates, intended parents, and children, and will argue that Quebec's laws do not adequately protect or balance these parties' interests.

### 3. Limitations of Quebec's Legal Framework

#### A) Surrogates' Vulnerabilities

While article 541 CCQ was intended to protect surrogate mothers, in practice it leaves surrogates in a precarious position. Quebec's current regime fails to offer surrogates any protection should one or more intended parents change their minds and refuse to honour their agreement to take the child. This may happen, for instance, if the child is found to have a disability, if the intended parents divorce, or if an intended mother becomes pregnant after the surrogate conceives. The surrogate may be left to care for and pay for the costs of raising a child that she did not intend to keep, while the intended parents might not experience any financial or legal repercussions for their actions.<sup>117</sup> At most, an intended father might be held liable to pay child support, but only if he used his own sperm to conceive.<sup>118</sup>

Although a surrogate in this position might decide to place the child for adoption, surrogates who carefully choose and screen intended parents might feel uncomfortable giving up the child to another couple. Moreover, in Quebec, a surrogate cannot select another set of intended parents to adopt her child, as private adoption does not exist within the province. Instead, a surrogate would be required to consent to a general adoption and the state would choose the adoptive parents. A surrogate who had agreed with the intended parents that she would have a certain degree of contact with the child or updates on the child's development following the birth might not be willing to give up the child for adoption; adoption would completely sever any ties the surrogate has with the child.<sup>119</sup> The adoption records would be sealed such that the surrogate would never know the adoptive parents' identity, and the child would never know the identity of his birth mother, unless she consented for her name to be revealed.<sup>120</sup>

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*d'embryons, la gestation pour autrui et le diagnostic préimplantatoire* (Quebec: Commission de l'éthique de la science et de la technologie, 2009) at xxxi [Éthique et procréation assistée]; Moore, *supra* note 23 at 866.

<sup>117</sup> It should be noted that this issue is not unique to Quebec. See e.g. Stefanie Carsley, "Tort's Response to Surrogate Motherhood: Providing Surrogates with a Remedy for Breached Agreements" (2013) 46:1 UBC L Rev 1.

<sup>118</sup> *Comité, supra* note 11 at 168; Roy, *La filiation, supra* note 55 at 216.

<sup>119</sup> See art 577ff CCQ.

<sup>120</sup> See arts 582–583 CCQ; Roy, *Droit de l'adoption, supra* note 73; Leckey, *supra* note 70 at 534–35. The child may, however, be able to know the identity of the birth mother or to

Article 541 CCQ also enables intended parents to renege on promises to reimburse a surrogate's expenses with impunity. The federal *Assisted Human Reproduction Act* ("AHRA") prohibits paid surrogacy but is intended to allow a surrogate mother to be reimbursed for "an expenditure incurred by her in relation to her surrogacy" in accordance with regulations and if receipts are provided.<sup>121</sup> Health Canada is in the process of developing these regulations<sup>122</sup> and currently there is a lack of clarity as to what expenses are legally permissible. Parties may set out in written surrogacy contracts what expenses the intended parents agree to cover; however, a surrogate in Quebec will be unable to enforce any terms of her agreement with respect to reimbursement of expenses. Should intended parents decide midway through the pregnancy that they do not wish to take the child, or should they take custody but fail to reimburse a surrogate for certain expenses post-partum, the surrogate will have no legal recourse.

These situations are not merely hypothetical. Media reports and empirical research indicate that some intended parents have reneged on their agreements with Canadian surrogates.<sup>123</sup> *Le Journal de Montreal*

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obtain other information if serious harm would come to the adoptee if he or she is deprived of that information. See art 584 CCQ.

<sup>121</sup> *AHRA*, *supra* note 32, s 12. It also notes that a surrogate may be reimbursed for the loss of work-related income during pregnancy, but only if a "medical practitioner certifies, in writing, that continuing to work may pose a risk to her health or that of the embryo or foetus." As the "regulations" mentioned in this provision have yet to be drafted, section 12 of the *AHRA* is technically not in force. However, Health Canada, which is charged with drafting these regulations, notes on its website that reimbursement of a surrogate's expenses is permitted and provides some examples of permissible reimbursements. See "[Prohibitions Related to Surrogacy](https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction/prohibitions-related-surrogacy.html)", *Health Canada*, online: <<https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction/prohibitions-related-surrogacy.html>>.

<sup>122</sup> "[Regulatory Initiative: Development of Regulations under the Assisted Human Reproduction Act—Forward Regulatory Plan 2017–2019](https://www.hc-sc.gc.ca/ahc-asc/legislation/acts-reg-lois/frp-ppr/2017-2019/assisted-human-reproduction-procreation-assistee-eng.php)" (1 April 2017), *Health Canada*, online: <[www.hc-sc.gc.ca/ahc-asc/legislation/acts-reg-lois/frp-ppr/2017-2019/assisted-human-reproduction-procreation-assistee-eng.php](https://www.hc-sc.gc.ca/ahc-asc/legislation/acts-reg-lois/frp-ppr/2017-2019/assisted-human-reproduction-procreation-assistee-eng.php)>; Health Canada, News Release, "[Government of Canada Plans to Introduce Regulations to Support the Assisted Human Reproduction Act](https://www.canada.ca/en/health-canada/news/2016/09/government-canada-plans-introduce-regulations-support-assisted-human-reproduction-act.html)" (30 September 2016), online: <<https://www.canada.ca/en/health-canada/news/2016/09/government-canada-plans-introduce-regulations-support-assisted-human-reproduction-act.html>>. In 2015, Health Canada asked the Canadian Standards Association to develop standards, which it intends to use for the purposes of these regulations. A first draft of these guidelines was released for public consultation in June 2015, and the most recent draft was released in October 2016. See CSA Group, "[Annex A: Reimbursement of expenses for donors and surrogates](https://shop.csa.ca/content/ebiz/shopcsa/resources/documents/Z900_2_1-12EN_Annex_A.pdf)" (2016), CAN/CSA-Z900.2.1-12, online: <[shop.csa.ca/content/ebiz/shopcsa/resources/documents/Z900\\_2\\_1-12EN\\_Annex\\_A.pdf](https://shop.csa.ca/content/ebiz/shopcsa/resources/documents/Z900_2_1-12EN_Annex_A.pdf)>.

<sup>123</sup> For instance, in one case, a British couple separated and told the surrogate in New Brunswick that they would not be coming to take the baby. See Cynthia Vukets, "[Surrogate Mother's Nightmare](https://www.thestar.com/news/canada/2011/09/09/surrogate_mothers_nightmare.html)", *Toronto Star* (9 September 2011), online: <[https://www.thestar.com/news/canada/2011/09/09/surrogate\\_mothers\\_nightmare.html](https://www.thestar.com/news/canada/2011/09/09/surrogate_mothers_nightmare.html)>. See also Tom Blackwell,

reported in 2012 that a Quebec couple told the surrogate they no longer wanted the twins she was carrying, after they became pregnant through *in vitro* fertilization (“IVF”).<sup>124</sup> The intended parents sought the assistance of a surrogate mother to build their family after several failed attempts at IVF. While the surrogate was undergoing fertility treatments, the intended mother decided to start another round of IVF, which at the time was fully-funded by the Quebec government. The intended mother and the surrogate both became pregnant with twins and eight weeks into the surrogate’s pregnancy, the intended parents informed the surrogate that they would not be taking custody of the twins, as they did not wish to have four more children. The surrogate and the intended parents found another couple who wished to adopt the surrogate’s twins, but because Quebec does not permit private adoptions, they were required to lie to ensure that the twins would be placed with the second set of intended parents. They agreed that they would not disclose that the twins were born through surrogacy, but rather the new intended father would say that he was their biological father and that the birth mother had an affair with him.<sup>125</sup> The birth mother could then consent to a special consent adoption in favour of the intended father’s spouse.

## **B) Children’s Filiation**

Despite recent jurisprudence, intended parents still face uncertainty, risks, or potential delays in seeking a special consent adoption. Where a surrogate mother consents to relinquish her parental rights following the birth, intended parents still cannot be certain that they will be afforded state recognition. In the absence of legislation clarifying the filiation of children born through surrogacy, courts continue to be called upon to determine whether to allow for a special consent adoption on a case-by-case basis. Since judges’ decisions regarding whether to allow for the adoption may turn on the facts of a case and assessments of children’s best interests, intended

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<sup>124</sup> “[Couple Urged Surrogate Mother to Abort Fetus Because of Defect](#)”, *National Post* (6 October 2010), online: <[news.nationalpost.com/holy-post/couple-urged-surrogate-mother-to-abort-fetus-because-of-defect](http://news.nationalpost.com/holy-post/couple-urged-surrogate-mother-to-abort-fetus-because-of-defect)>, in which a surrogacy agent reported that there have been at least three cases in Canada in which intended parents reneged on their agreements. Interviews that I conducted with fertility lawyers in Quebec, Alberta, Ontario, and British Columbia revealed that there was a case in Alberta in which international intended parents decided not to take the baby. I conducted these interviews for my doctoral dissertation, which I am currently completing. See Stefanie Carsley, *Surrogate Motherhood in Canada: Exploring Lawyers’ Practices and Perspectives* (DCL Thesis, McGill University, Faculty of Law, 2018) [unpublished] [Carsley, *Surrogate Motherhood*].

<sup>124</sup> Héloïse Archambault, “[Cauchemar d’une mère porteuse](#)”, *Le Journal de Montréal* (6 September 2016), online: <[www.journaldemontreal.com/2012/09/06/cauchemar-dune-mere-porteuse](http://www.journaldemontreal.com/2012/09/06/cauchemar-dune-mere-porteuse)>.

<sup>125</sup> *Ibid.*

parents might not be granted an adoption if the circumstances of their cases differ from those in existing precedents.

Recent case law also raises new questions about the conditions in which an adoption will be permitted or challenged. Following *Adoption—1631* and *Adoption—16199*, it is unclear whether the Quebec government will continue to oppose special consent adoptions in some cases and what facts might trigger these challenges. *Adoption—161* might also generate confusion about the circumstances in which a surrogate will not be recognized as the child's mother and will not be required to consent to a special consent adoption. The facts of this case were unique and it arguably has limited precedential value. As the court noted, the surrogate was not named on the act of birth because of errors or omissions on the part of the accoucheur and registrar of civil status. However, it remains to be seen whether the registrar of civil status will issue other acts of birth that list the birth mother as "undeclared" and whether judges will be willing to dispense with the surrogates' consent in these instances.

The *Civil Code's* book on the family also prevents some intended parents from obtaining parental status if their children are born through surrogacy. Most lesbian couples and single mothers by choice cannot be recognized as a child's parents in surrogacy situations.<sup>126</sup> As noted previously, an intended mother is able to obtain legal recognition through special consent adoption where her spouse and the surrogate both consent to allow her to adopt the child. However, the ability for an intended mother to obtain filial status is contingent upon her having a spouse who is recognized as a parent pursuant to the *Civil Code's* chapter on "filiation by blood". According to these rules, only the woman who carried the child (the surrogate) and an intended father may be named on the act of birth. If there is no intended father, an intended mother cannot be named in his place; only one mother and one father may be recognized simultaneously.<sup>127</sup> Therefore, if a lesbian couple or a single mother by choice were to use a surrogate, only the surrogate would be recognized as the child's parent. The surrogate would only be able to transfer her parental rights to these women-led families if an intended mother is the surrogate's sister, daughter, or mother. Article 555 CCQ allows an ascendant of the child (grandparent) or the child's relative in the third degree (the child's aunt, uncle, brother, or sister) to adopt the child along with his or her spouse. Other lesbian couples and single mothers by choice

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<sup>126</sup> The *Comité's* report indicates that lesbian couples and single mothers by choice will have no recourse. However, I note that "most" will be unable to obtain special consent adoptions because there are some exceptions for relatives that I discuss above. See *Comité, supra* note 11 at 169.

<sup>127</sup> This differs from the chapter on "filiation of children born through assisted procreation", through which a single woman or a lesbian couple may be registered as the parents of a child conceived through sperm donation. See arts 538–540 CCQ.

have no ability to obtain legal recognition where a child is born through surrogacy. Judges will be unable to grant a special consent adoption—even if the surrogate consents and this is found to be in the child's best interests.

Quebec also does not allow more than two intended parents to be recognized. While three or more parent families are still relatively rare across Canada, some intended parents, donors, and/or surrogates may wish to all be recognized as the child's parents and to share parental rights and responsibilities.<sup>128</sup> As will be discussed in Part 4 of this article, British Columbia and Ontario have recently reformed their respective family law statutes to allow more than two parents to be registered as a child's legal parents.<sup>129</sup> In Quebec, however, these multiple-parent families still cannot be recognized.

Laws that preclude some intended parents from obtaining state recognition have important practical effects for children born through surrogacy. Legal recognition of parental status allows a parent to fully participate in a child's life.<sup>130</sup> A parent may register the child for school, make medical decisions, and apply for a Medicare card, social insurance number, passport, and airline tickets for the child.<sup>131</sup> A bond of filiation also aims to ensure that there are adults in place to respond to a child's intellectual, emotional, and physical needs and to support the child's development.<sup>132</sup> It enables the child to inherit from the parent on an intestacy and allows a parent to obtain social benefits such as maternity or paternity leave.<sup>133</sup>

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<sup>128</sup> For example, a lesbian couple in Vancouver who conceived with the help of a male friend were all registered as the child's parents. The child's mothers wanted the child to have a father figure and to know her origins and they agreed that while they would be the child's primary caregivers, the child's father would have a say in important decisions, for instance regarding her education, and would have access rights. See Abigale Subdhan, "[Vancouver Baby Becomes First Person to Have Three Parents Named on Birth Certificate in B.C.](#)," *National Post* (10 February 2014), online: <nationalpost.com/news/canada/vancouver-baby-becomes-first-person-to-have-three-parents-named-on-birth-certificate-in-b-c/wcm/aa2c06d9-2d9f-4281-a3fc-89a63b90e0a1>.

<sup>129</sup> *BC FLA*, *supra* note 19, s 30; *CLRA*, *supra* note 20, ss 10–11.

<sup>130</sup> *AA v BB*, 2007 ONCA 2 at para 14, 278 DLR (4th) 519.

<sup>131</sup> *Rutherford v Ontario (Deputy Registrar General)* (2006), 81 OR (3d) 81 at para 38, 270 DLR (4th) 90 (Ont Sup Ct) [*Rutherford*]; *AA v BB*, *supra* note 130 at para 14.

<sup>132</sup> *Adoption—16199*, *supra* note 24 at para 150.

<sup>133</sup> Quebec jurisprudence illustrates the importance of establishing a filial bond in Quebec for this purpose. In May 2015, a gay couple sought and obtained judicial recognition of their parental status in Quebec after the Régime québécois d'assurance parentale ("RQAP") refused to allow the child's non-biological father to receive paternity leave benefits. The parties had used an American surrogate mother to conceive and negotiated a surrogacy agreement under California law. Both fathers are uniquely identified as the child's parents on the Pennsylvania birth certificate. However, when the biological father's spouse applied for benefits he was told that he did not qualify as he could not produce an act of birth. The

A child's filial status may also have significant psychological and symbolic implications for children and their parents. In *Adoption—16199*, Justice Hamel explains that establishing a bond of filiation benefits the child psychologically as it provides the child with a feeling of security, of belonging and attachment, and a sense of stability.<sup>134</sup> In an oft cited passage, the daughter of a lesbian couple in Ontario explained what it would mean to her to have her two moms legally recognized:

I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this—they take for granted that their parents are legally recognized as their parents. I would like my family recognized the same way as any other family, not treated differently because both my parents are women ... 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.<sup>135</sup>

State recognition of parental status therefore not only confers upon children and parents specific rights and obligations but also communicates an acceptance of different family models and legitimizes these family forms.

### C) Intended Parents' Contributions and Intentions

Quebec's rules pertaining to special consent adoption and filiation by blood also fail to account for intended parents' experiences, contributions, and intentions. Should the surrogate change her mind and no longer wish to transfer her parental rights to the intended parents, an intended mother will not be recognized as the child's mother—even if an intended mother used her own eggs to conceive and has a genetic connection to the child.<sup>136</sup> An intended father may be able to establish a bond of filiation with the child, but he is more likely to be successful if he had used his sperm to conceive.<sup>137</sup> Similarly, should a surrogate agree to give up the child but the intended

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RQAP claimed that their American documents did not carry legal weight in Quebec and the fathers were also told that using a surrogate mother in Quebec is illegal. See *Droit de la famille—151172*, *supra* note 54; Sophie Allard, "Mères Porteuses Hors Québec: La Fin de la Confusion?", *La Presse* (28 September 2015).

<sup>134</sup> *Adoption—16199*, *supra* note 24 at para 153.

<sup>135</sup> See *Rutherford*, *supra* note 131 at 219. See also Joanna Radbord, "Same-Sex Parents and the Law" (2013) 33:1 Windsor Rev Legal & Soc Issues 1 at 9.

<sup>136</sup> As noted previously, pursuant to the rules on filiation by blood, a surrogate is the child's mother unless she consents to the adoption.

<sup>137</sup> Should the surrogate change her mind, she may seek for her spouse to be recognized in lieu of an intended father and may make it difficult for intended parents to have access to the child or to register as the child's parents. Should a surrogate's spouse be recognized as a father, an intended father could contest his paternity. An intended father is most likely to be successful if he has a genetic link to the child because rules on filiation by

father, who is named on the act of birth, refuse to consent to his spouse adopting the child, the child's intended mother or second intended father would be unable to obtain legal status. Such a scenario might arise, for instance, should the intended parents divorce or separate prior to the child's birth.

Quebec's rules around filiation privilege the surrogate's gestational connection with the child and an intended father's genetic connection, but overlook the intended mother's potential physical and genetic contribution to the pregnancy. Today, surrogates often conceive through IVF using embryos created from the intended parents' gametes or donated sperm or eggs. Where an intended mother uses her own eggs to conceive, she is required to undergo an invasive medical procedure to harvest her limited number of eggs and create IVF embryos.<sup>138</sup> This procedure may have adverse health risks and side effects for intended mothers, and in rare instances, could result in potentially life-threatening complications.<sup>139</sup> The embryos that are used to conceive a child with a surrogate mother may also reflect the intended mother's best (and potentially only) chance of having a biological child. Ova become less viable as women age and as a result they are more likely to conceive a child using embryos or eggs that were retrieved or frozen ideally when they were under the age of 35. Women who attempt to retrieve eggs at an older age may also be at higher risk of complications because they will be required to use increased medication to produce them.<sup>140</sup>

An intended mother undertakes IVF treatment and its attendant risks on the understanding that the embryos she is creating will be used to build her family. Like a surrogate, an intended mother who uses her eggs to conceive

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blood are intended to capture a child's biological parents and they do not account for parties' intentions to parent the child.

<sup>138</sup> See Roxanne Mykitiuk & Albert Wallrap, "Regulating Reproductive Technologies in Canada" in Jocelyn Grant Downie, Timothy A Caulfield & Colleen M Flood, eds, *Canadian Health Law and Policy*, 2nd ed (Toronto: Butterworths, 2002) 367 at 415; Stefanie Carsley, "Rethinking Canadian Legal Responses to Frozen Embryo Disputes" (2014) 29:1 Can J Fam L 55 at 87–88 [Carsley, "Rethinking"].

<sup>139</sup> Most notably, the hormones used to stimulate these women's ovaries may result in ovarian hyperstimulation syndrome (OHSS), which affects up to ten percent of women undergoing this treatment. Women who suffer from OHSS produce too many eggs as a result of the fertility medications given to them. The most common side effects are difficulty breathing, weight gain, vomiting, and abdominal pain but OHSS may also result in kidney failure, blood clots, strokes, and death. See e.g. The Practice Committee of the American Society for Reproductive Medicine, "Ovarian Hyperstimulation Syndrome" (2008) 90 Fertility & Sterility S188 at S189. See also Alison Motluk, "'I Thought I Just Had to Sleep It Off': Egg Donor Sues Toronto Fertility Doctor After Suffering Stroke", *National Post* (28 March 2013) A5.

<sup>140</sup> See e.g. James P Toner, "Age = Egg Quality, FSH Level = Egg Quantity" (2003) 79:3 Fertility & Sterility 491. See also Carsley, "Rethinking", *supra* note 138 at 89–90.



contributes in a significant way to the pregnancy and the child's birth. Yet, as noted previously, current laws may prevent intended mothers from obtaining parental status despite their intentions and genetic contributions. Surrogates and intended fathers also have substantial power over intended mothers, as they may preclude these women—who have already undergone IVF treatment and harvested their eggs—from establishing bonds of filiation with their genetic children.

Current laws also do not account for intended parents' financial contribution to the surrogacy process. Surrogacy is prohibitively expensive for most Canadians and reflects a substantial financial investment on the part of intended parents. IVF costs, on average, between \$10,000 to \$15,000 per *in vitro* cycle,<sup>141</sup> and pregnancy is not guaranteed even after completing several cycles. The use of donated gametes may also increase costs; while payment for sperm or eggs is prohibited in Canada,<sup>142</sup> much of Canadians' supply of donated gametes comes from the United States where such payment is legal.<sup>143</sup> Intended parents may also pay for lawyers and counsellors for themselves and for the surrogate, and cover the surrogates' expenses related to the surrogacy. Should a surrogate change her mind and wish to keep the child, she is not legally required to reimburse the intended parents for any expenses paid in relation to her pregnancy—including the costs of IVF and gamete donation. Given the costs associated with this process, in such a situation many intended parents will be unable to initiate new surrogacy arrangements and may not have other opportunities to build their families.

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<sup>141</sup> While Quebec had provided public funding for IVF beginning in 2011, in November 2015 its IVF program was delisted. Currently, Ontario is the only province that is offering funding for IVF treatment, while Quebec and Manitoba offer a tax credit. See Danielle Nerman, "[Low-Cost Fertility Clinic in Calgary Could be Canadian First](#)", *CBC News* (12 May 2016), online: <[www.cbc.ca/news/canada/calgary/calgary-low-cost-fertility-clinic-invocell-1.3579461](http://www.cbc.ca/news/canada/calgary/calgary-low-cost-fertility-clinic-invocell-1.3579461)>; Stefanie Carsley, "Funding in Vitro Fertilization: Exploring the Health and Justice Implications of Quebec's Policy" (2012) 20:3 *Health L Rev* 16; Aaron Derfel, "[Bill 20: IVF no Longer Covered Under Medicare, Private-Clinic Fees Soon to be Regulated](#)", *Montreal Gazette* (11 November 2015), online: <[montrealgazette.com/news/local-news/bill-20-ivf-no-longer-covered-under-medicare-private-clinic-fees-soon-to-be-regulated](http://montrealgazette.com/news/local-news/bill-20-ivf-no-longer-covered-under-medicare-private-clinic-fees-soon-to-be-regulated)>.

<sup>142</sup> *AHRA*, *supra* note 32, s 7.

<sup>143</sup> See e.g. Tom Blackwell, "[Limit Pregnancies by Same Sperm Donor: Fertility Experts](#)", *National Post* (8 September 2011), online: <[nationalpost.com/news/canada/limit-pregnancies-by-same-sperm-donor-fertility-experts/wcm/303ebe6d-2632-42b2-8398-8aa1fddeece9](http://nationalpost.com/news/canada/limit-pregnancies-by-same-sperm-donor-fertility-experts/wcm/303ebe6d-2632-42b2-8398-8aa1fddeece9)>, who noted in 2011 that 95% of the sperm used by Canadian clinics was imported from the United States. For further discussion of cross-border trade in gametes see Jocelyn Downie & Françoise Baylis, "Transnational Trade in Human Eggs: Law, Policy, and (In) Action in Canada" (2013) 41:1 *JL Med & Ethics* 224; Susan G Drummond & Sara R Cohen, "Eloquent (in)Action: Enforcement and Prosecutorial Restraint in the Transnational Trade in Human Eggs as Deep Ambivalence about the Law" (2014) 26:2 *CJWL* 206.

An examination of the effects of article 541 CCQ and Quebec's filiation provisions suggests that the *Comité* is correct in recommending legislative change. Article 541 CCQ does not fully support lawmakers' objectives to protect surrogates' and children's interests, and may run counter to these aims in important respects. Quebec's chapter on filiation by blood and rules on special consent adoption do not support or reflect diverse family forms, and overlook the experiences and contributions of intended parents—particularly intended mothers—who seek to build their families through surrogacy. The following Part explores the *Comité's* recommendations for reform and considers whether they would go far enough to address the limitations of Quebec's current framework.

## 4. Reforming the Civil Code of Québec

### A) The Comité's Report

In its 2015 report, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales*, the *Comité* recommends that article 541 CCQ be repealed and replaced by provisions that clarify who has legal rights and responsibilities for children born through surrogacy. The report proposes that there be two methods through which the intended parents may establish a bond of filiation with the child.<sup>144</sup> The first, an administrative route, would allow intended parents to be named on the child's act of birth without obtaining a court order, where certain requirements are met.<sup>145</sup> The second, a judicial route, would enable a judge to order that the child's filiation be transferred to the intended parents where the requisite formalities for the administrative route have not been fulfilled.<sup>146</sup>

To qualify for the administrative route, the surrogate and intended parents would need to record their "parental project"—in other words, their intentions regarding who will be the child's parents—in a notarial act *en minute*<sup>147</sup> prior to the child's conception. The notarial act would also set out the parties' rights and obligations under Quebec law.<sup>148</sup> Notaries would undertake specific training to ensure that they would be equipped and accredited to deal with surrogacy arrangements and, as will be discussed below, this notarized document would have some binding legal effects.<sup>149</sup>

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<sup>144</sup> *Comité*, *supra* note 11 at 172.

<sup>145</sup> *Ibid* at 172–78.

<sup>146</sup> *Ibid* at 178–79.

<sup>147</sup> The *Notaries Act* defines an act *en minute* as "an act that a notary must deposit and preserve in his or her notarial records, and from which authentic copies or extracts may be issued." See *Notaries Act*, CQLR c N-3, s 35. Currently in Quebec, some documents, such as marriage contracts, must be established by notarial act *en minute*. See art 440 CCQ.

<sup>148</sup> *Comité*, *supra* note 11 at 173.

<sup>149</sup> *Ibid* at 174.

The surrogate and intended parents would also need to meet individually with a professional from a *centre jeunesse* to obtain information about the psychosocial consequences of the parental project and the ethical questions it raises. The requirements for these meetings would be determined by regulations and the notary would be unable to complete the notarial act unless each of the parties produces an attestation, signed by a professional, indicating that they took part in these meetings.<sup>150</sup>

Where the parties involved obtain a notarial act *en minute* and the requisite counselling, and if the surrogate consents to relinquish the child following the birth, the intended parents would be named on the act of birth. The woman who gave birth would still be recognized as the child's mother on the attestation of birth filled out by the hospital. At the time of handing over the child, the birth mother would be required to consent in writing, either before two witnesses or in a notarized document, to give up the child. This document would provide proof that the intended parents are the child's legal parents until which time they are recognized by the state. The intended parents and the surrogate mother would then sign a joint declaration of birth referring to their parental project and expressing their respective consents to this arrangement. This would be given to the registrar of civil status within 30 days of the birth, along with the notarial act.<sup>151</sup> Provided the surrogate does not withdraw her consent within 30 days of the child's birth, the registrar of civil status would then draft the child's act of birth to reflect solely the intended parents' names.<sup>152</sup>

If the requisite formalities for the administrative route are not fulfilled—for instance, if the parental project was not recorded in a notarized document prior to conception—then the surrogate and intended parents would be required to go to court to establish the child's filiation. The parties would need to show that their parental project existed prior to conception to demonstrate that they are not attempting to circumvent Quebec's adoption laws.<sup>153</sup> Unlike the administrative route, the physical relinquishing of the child to the intended parents would not confer on them parental authority.<sup>154</sup> Moreover, the birth mother would need to initially be recognized as the child's legal mother on the act of birth; in other words, the surrogate would need to declare herself to be the child's mother.<sup>155</sup> Within 60 days of the child's birth, the birth mother, the intended parents, or both could apply to the Superior Court for an order that the state recognize the

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<sup>150</sup> *Ibid* at 173–74.

<sup>151</sup> *Ibid* at 175.

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid* at 178.

<sup>154</sup> *Ibid* at 179.

<sup>155</sup> *Ibid* at 178.

intended parents' filiation.<sup>156</sup> If they could prove (through any means) that they had a parental project prior to conception, and if the surrogate and the intended parents all continue to consent following the birth, then the court could grant this application.<sup>157</sup> The judgment would be sent to the registrar of civil status who could substitute the intended parents' names for that of the birth mother on the act of birth.<sup>158</sup>

The report also recommends that the *Civil Code* clarify a surrogate and intended parents' rights and obligations in the event either party reneges on their agreement. Where the surrogate refuses to relinquish her parental rights, or revokes her consent within 30 days of the child's birth, she would still be recognized as the child's mother. The *Comité* explained that concerns about public order dictate that a birth mother cannot sign away her parental rights prior to the birth and that she cannot be subjected to a financial penalty for revoking her original consent. However, the surrogate would be required to reimburse the intended parents for any expenses they had already paid with respect to her pregnancy.<sup>159</sup>

If both intended parents change their minds and decide not to take the child into their care, the report states that neither will be legally recognized as the child's parent. Rather, the birth mother could keep the child or give up the child for adoption. However, the intended parents would not be absolved financially. They would be required to pay child support, even if the child is placed for adoption, and would be liable for any harm or injury caused to the surrogate mother.<sup>160</sup> If only one intended parent changes his or her mind,<sup>161</sup> for instance in the event the intended parents separate or divorce, the parental project could be recognized in favour of one intended parent. The other intended parent would nonetheless be responsible for

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<sup>156</sup> *Ibid* at 179.

<sup>157</sup> *Ibid* at 179–80. However, if the surrogate dies, becomes unable to consent, or disappears prior to signing the joint declaration of birth that would confirm the intended parents' legal status, the file would be transferred to a judge who would make a decision that would be in the best interests of the child (177).

<sup>158</sup> *Ibid* at 180.

<sup>159</sup> *Ibid* at 175.

<sup>160</sup> *Ibid* at 177. It is not clear what would count as injury or harm. It says: "tout parent d'intention qui refusera de donner suite au projet parental sera tenu à une obligation alimentaire à l'égard de l'enfant et devra réparer le préjudice occasionné à la mère porteuse, indépendamment de la filiation qui pourrait ailleurs lui avoir été attribuée en vertu des règles relatives à la procréation naturelle".

<sup>161</sup> The report also notes that if an intended parent dies, disappears, or no longer has the capacity to provide consent following the child's conception, this would be treated as though he/she had changed his or her mind. See *Ibid*.

child support and would also need to remedy any harm caused to their former spouse or partner.<sup>162</sup>

## **B) Examining the Report's Recommendations**

The *Comité's* proposed reforms would address some of the limitations of Quebec's current regime. If implemented, they would clarify the filiation of children born through surrogacy. They would enable lesbian couples and single mothers by choice, who conceived with the assistance of a surrogate, to be legally recognized as mothers. They would create financial consequences for intended parents who renege on their agreements. An intended father also could no longer prevent his spouse from acquiring parental rights by refusing to consent to a special consent adoption.

The creation of a notarial act *en minute* and required counselling could help parties make free and informed decisions to enter these arrangements. The notary could ensure that parties are informed of the legal consequences of their arrangement and their respective rights and obligations. Counsellors could confirm that the surrogate and intended mother are aware of the potential physical and psychological effects of egg retrieval, IVF, pregnancy, or giving up a child. Some Quebec clinics already require that surrogates and intended parents see a fertility counsellor or psychologist prior to beginning IVF or artificial insemination treatment.<sup>163</sup> The *Comité's* proposal could, however, encourage surrogate mothers and intended parents who do not use a clinic that has these requirements, or who use at-home insemination or intercourse to conceive,<sup>164</sup> to obtain legal advice and counselling should they wish to expedite the birth registration process.<sup>165</sup>

As the *Comité* points out, the requirement for a notarial act could also assuage fears of fraud or forged documents. Notarized documents are recognized as authentic and there are strict rules around their drafting. The notarial act would therefore provide the registrar of civil status with solid evidence that the parties had entered into a surrogacy arrangement prior to conception, and that the surrogate had intended to carry the child for the intended parents.<sup>166</sup> It would ensure that intended parents could not

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<sup>162</sup> *Ibid.*

<sup>163</sup> *Éthique et procréation assistée*, *supra* note 116 at 67–68.

<sup>164</sup> This could be the case in traditional, genetic surrogacy, where the surrogate uses her own egg to conceive.

<sup>165</sup> Some Quebecers might choose to forgo the notarial act and counselling because of the costs and formalities involved and instead apply for a judicial order to establish their children's filiation. This is unavoidable as the alternative—not providing a judicial route—could result in some children's filiation not being established because their parents were unaware of these pre-conception requirements.

<sup>166</sup> *Comité*, *supra* note 11 at 173.

enter into a surrogacy agreement with a woman who is already pregnant and circumvent Quebec adoption laws. The notarial act would also provide intended parents and surrogates with a document to remind them of their respective rights and obligations during the pregnancy and following the birth.<sup>167</sup>

Despite these potential benefits, the report's proposals are also vulnerable to some of the same criticisms as article 541 CCQ. The *Comité's* recommendations would continue to prevent intended mothers and some intended fathers from obtaining parental status if the surrogate changes her mind during pregnancy or revokes her consent within 30 days of the birth. An intended father who used his sperm to conceive could be recognized as a parent.<sup>168</sup> However, an intended mother still could not, even if she has a genetic link to the child. An intended father's same-sex spouse would also be unable to obtain legal status. As noted previously in Part 3, these outcomes do not recognize intended parents' experiences and contributions to the pregnancy. Permitting an intended father to establish a bond of filiation with the child while denying an intended mother this ability also arguably amounts to differential treatment on the grounds of sex. Quebec's current laws or the *Comité's* proposed reforms could therefore be subject to a *Charter* challenge in the future.<sup>169</sup>

The proposed 30-day window in which a surrogate can revoke her consent following the birth also does not accord with the report's recommendation to move away from an adoption model in surrogacy cases. This period for revocation mirrors the approach taken in Quebec toward child adoption,<sup>170</sup> and does not account for differences between adoption and surrogacy with respect to the birth mother's intentions and decision-making, which might warrant distinct legal responses. A surrogate mother—unlike a birth mother who places a child for adoption—becomes pregnant with the intention of carrying a child for another individual or couple. It is questionable whether a surrogate ought to be able to revoke her consent in the same manner as a birth mother and for the same period, given this difference.

While the *Comité* states that it is committed to recognizing diverse family forms, its report also still only recommends allowing for single-

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<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid* at 196.

<sup>169</sup> It could be argued that Quebec's laws pertaining to filiation violate section 15 of the *Canadian Charter of Rights and Freedoms* and section 10 of the *Quebec Charter of Human Rights and Freedoms*. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Canadian Charter*]; *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Quebec Charter*].

<sup>170</sup> See art 567 CCQ.

parent or two-parent families. The *Comité* points out that nothing would stop a surrogate and intended parents from using the *Civil Code's* provisions on parental authority to share certain parental responsibilities, without obtaining parental status. It also explains that in its view, there is insufficient evidence that allowing for multiple-parent families would be in a child's best interests.<sup>171</sup>

In addition, the report provides limited information about the content of the notarial act *en minute* and topics that counsellors will need to discuss with surrogacy clients as a prerequisite for the administrative process. As a result, it is difficult to assess whether these requirements would go far enough to ensure that parties are making informed decisions to enter these arrangements. Currently, surrogate mothers and intended parents within and outside of Quebec often go to see lawyers to draft surrogacy contracts and obtain independent legal advice.<sup>172</sup> These agreements' contents vary, but unlike the proposed notarial act *en minute*, they typically contain a variety of clauses that go beyond merely setting out the parties' legal rights and obligations or their intentions regarding the child's parentage. For instance, these agreements may record whether the surrogate would be willing to abort should the fetus be found to have a genetic abnormality. They may indicate how much communication and contact the parties intend to have during and following the pregnancy. They may stipulate whether the surrogate plans to pump breast milk following the birth, how many rounds of IVF the surrogate intends to undergo, or in which hospital or province the surrogate intends to give birth. They often list the expenses intended parents promise to cover on the surrogate's behalf, or the amount of lost wages they will reimburse should the surrogate be required to go on bed rest. Although not legally enforceable, these clauses are intended to set out the parties' intentions and expectations, and to prevent disputes from arising by ensuring that surrogates and intended parents have conversations—prior to conception—about various issues that might arise during pregnancy or following the birth.<sup>173</sup>

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<sup>171</sup> *Comité*, *supra* note 11 at 171.

<sup>172</sup> In part, this is because it has become common practice for fertility clinics to require parties to obtain independent legal advice and draft a surrogacy contract prior to beginning fertility treatments, even if their province's legislation does not contain this requirement. See Carsley, *Surrogate Motherhood*, *supra* note 123.

<sup>173</sup> I obtained data about the content of surrogacy agreements in Quebec, Ontario, Alberta, and British Columbia through interviews I conducted with 26 fertility lawyers in these provinces. See *ibid.* Some lawyers also provide information about the content of surrogacy contracts on their websites or blogs. See e.g. Lisa Feldstein, "[Can I Use My Friend's Surrogacy Agreement?](http://familyhealthlaw.ca/2014/02/05/can-i-use-my-friends-surrogacy-agreement/)" (5 February 2014), *Lisa Feldstein Law Office*, online: <familyhealthlaw.ca/2014/02/05/can-i-use-my-friends-surrogacy-agreement/>.

Under the *Comité's* proposed administrative regime, it seems that these kinds of clauses would not be included in the notarial act *en minute* and it is unclear whether counsellors would be required to raise these topics with surrogates and intended parents. Moreover, while parties would have independent counselling, the report explains that as a public officer, a notary would be legally required to advise all the parties in an impartial way and to verify their respective consents.<sup>174</sup> Given potential power imbalances between surrogates and intended parents, these parties' interests might be better protected by requiring independent legal advice, rather than a single notary to advise both parties. Although requiring independent legal advice would increase costs, it could better ensure that both parties understand their legal rights and obligations and can vocalize any concerns they might have, prior to proceeding. Lawmakers could also stipulate that the intended parents must cover the costs of requiring such independent legal advice, so that the surrogate mother is not out-of-pocket for this expense.

### **C) Considering Alternative Models: British Columbia and Ontario**

In seeking to reform its surrogacy laws, Quebec should adopt some of the *Comité's* recommendations but should also look to British Columbia and Ontario's family law legislation as additional models for reform. Like the *Comité's* proposal, both Ontario and British Columbia have "two-track systems" that enable intended parents to be registered as parents from birth if certain conditions are met, or alternatively permit them to obtain a judicial declaration of parentage. To qualify for the birth registration route under British Columbia's *Family Law Act* ("FLA"), intended parents and surrogates must have created a written agreement, dated prior to conception, that sets out their intentions regarding the child's parentage. Following the birth, the intended parents can be registered as the child's parents provided none of the parties withdrew their consent prior to the child's conception, the surrogate consents in writing to give up the child, and the intended parents take the child into their care.<sup>175</sup> Ontario's revised *Children's Law Reform Act* ("CLRA") also enables intended parents to be registered from birth provided an agreement was in place prior to conception and the surrogate consents in writing to relinquish her parental rights following the birth. Unlike British Columbia, however, intended parents and surrogates must have also received independent legal advice prior to conception and the surrogate is only permitted to consent to give up the child seven days after the birth.<sup>176</sup>

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<sup>174</sup> *Comité*, *supra* note 11 at 173.

<sup>175</sup> BC *FLA*, *supra* note 19, s 29.

<sup>176</sup> *CLRA*, *supra* note 20, s 10.



Both British Columbia and Ontario make clear that any surrogacy agreement the parties sign prior to conception is not to be treated as a binding contract. BC's *FLA* states that this agreement does not constitute valid consent to give up the child following the birth,<sup>177</sup> while Ontario's *CLRA* states explicitly that surrogacy agreements are "unenforceable in law."<sup>178</sup> However, should a dispute arise with respect to the child's parentage, these agreements may be used as evidence of the intended parents' and surrogates' intentions.<sup>179</sup> In such a situation, a judge may decide who the child's parents are and may rely on the agreement as one factor in making this determination.<sup>180</sup> Although these provisions have yet to be interpreted or applied in the event of a dispute, they allow a court to find that intended parents are legally and financially responsible for any children born through their arrangement. They could also permit a court to find that the intended parents are the child's sole legal parents, even if the surrogate changes her mind. This outcome would not result from an order for specific performance of the agreement's conditions, but instead from a judicial declaration of parentage in which the judge would be required to consider the best interests of the child.<sup>181</sup>

Finally, the *FLA* and *CLRA* recognize multiple-parent families where a child is born through surrogacy or gamete donation. In BC, if a surrogate and intended parents wish to be jointly recognized as parents, they may all be registered without obtaining a court order if they drafted an agreement prior to conception that states their intentions regarding the child's parentage. If one or more party dies or pulls out of the agreement prior to conception, the agreement is deemed to have been revoked. However, once the child is conceived, the parties may not revoke their consent and all the parties to the agreement will be the child's legal parents at birth.<sup>182</sup> BC's legislation seems to only allow up to three parents to be recognized without a court order.<sup>183</sup> Ontario went further by allowing for up to four parents to be registered without a court order, providing they created an agreement expressing their

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<sup>177</sup> BC *FLA*, *supra* note 19, s 29(6).

<sup>178</sup> *CLRA*, *supra* note 20, s 10(9).

<sup>179</sup> *Ibid*; BC *FLA*, *supra* note 19, s 29(6).

<sup>180</sup> BC *FLA*, *supra* note 19, s 31; *CLRA*, *supra* note 20, ss 10(6)–10(7).

<sup>181</sup> Although judges always must consider the child's best interests in making declarations of parentage, Ontario's new statute states explicitly that the "paramount consideration by the court in making a declaration ... shall be the best interests of the child." See *CLRA*, *supra* note 20, s 10(6).

<sup>182</sup> BC *FLA*, *supra* note 19, s 30.

<sup>183</sup> I say "seems to only allow" because there is some debate as to whether it could allow for more. See Fiona Kelly, "Multiple-Parent Families under British Columbia's New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting" (2014) 47:2 UBC L Rev 565 at 585 [Kelly]; BC *FLA*, *supra* note 19, s 30.

intentions to be parents prior to conception.<sup>184</sup> It also allows for more than four parents, by court order, to be declared the child's parents.<sup>185</sup>

Ontario and British Columbia's approaches are not immune from criticism. For instance, both have been criticized for not requiring parties to provide proof of an agreement or evidence that the parties received independent legal advice to Vital Statistics to be registered as a child's parents. In the absence of such proof, it is possible that intended parents and surrogates will lie and state that they fulfilled the statutory conditions for birth registration when they have not.<sup>186</sup> Ontario's decision to state that these agreements are "unenforceable" without further clarification may also generate confusion regarding its scope and interpretation. Judges might decide to read this widely such that any provisions in these agreements (and not merely those relating to the child's parentage) are not legally binding.<sup>187</sup> This could mean, like Quebec, that a surrogate would have no recourse to child support or financial compensation if the intended parents renege on their agreement. Ontario's legislation, which requires a surrogate to wait seven days before consenting to relinquish her parental rights, mirrors Ontario's adoption laws,<sup>188</sup> and may result in uncertainty about who has the right to make medical decisions for the child during this period.<sup>189</sup> Finally, it has been argued that British Columbia's provisions allowing for multiple

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<sup>184</sup> *CLRA*, *supra* note 20, s 10.

<sup>185</sup> *Ibid*, s 11.

<sup>186</sup> Fertility lawyer Sara Cohen has also argued that in the absence of further oversight by Vital Statistics, women who are pregnant and who are considering giving up a child for adoption will lie and state that they are surrogates in order to be reimbursed for their expenses and to circumvent adoption laws. Sara Cohen, "[The All Families are Equal Act is Problematic for Surrogacy in Ontario. Here's Why](http://www.fertilitylawcanada.com/1/post/2016/10/the-all-families-are-equal-act-is-problematic-for-surrogacy-in-ontario-heres-why.html)" (10 May 2016), *Fertility Law Canada*, online: <[www.fertilitylawcanada.com/1/post/2016/10/the-all-families-are-equal-act-is-problematic-for-surrogacy-in-ontario-heres-why.html](http://www.fertilitylawcanada.com/1/post/2016/10/the-all-families-are-equal-act-is-problematic-for-surrogacy-in-ontario-heres-why.html)>.

<sup>187</sup> Lawmakers may have intended for this provision to be read more narrowly. The *CLRA* defines a surrogacy agreement as a "written agreement between a surrogate and one or more persons respecting a child to be carried by the surrogate, in which, (a) the surrogate agrees to not be a parent of the child, and (b) each of the other parties to the agreement agrees to be a parent of the child." *CLRA*, *supra* note 20, s 10.

<sup>188</sup> However, unlike mothers who give up their children for adoption, surrogates do not have a 21-day period in which they can revoke their consent.

<sup>189</sup> The *CLRA* states that the intended parents and the surrogate would jointly share parental rights and responsibilities during this time, unless the surrogacy agreement states otherwise. Lawyers Sara Cohen, Cindy Wasser, and Shirley Levitan and social worker Dara Roth Edney each argued before the Standing Committee on Social Policy in October 2016 that this could result in confusion regarding medical decision-making. "Bill 28, All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016", Ontario, Legislative Assembly, Standing Committee on Social Policy, *Official Report of Debates (Hansard)*, 41st Parl, 2nd Sess (17 October 2016) at SP-24–SP-25, SP-29; "Bill 28, All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016",

parent families do not go far enough to support non-normative parenting as they require the intended parents to be married or in a marriage-like relationship, and the third parent to have a genetic or gestational connection to the child.<sup>190</sup>

Ontario and British Columbia are also not the only Canadian provinces or territories to have responded to surrogacy. Alberta, Nova Scotia, Newfoundland and Labrador, and the Northwest Territories have legislation that addresses the parentage of children born through surrogacy.<sup>191</sup> Judges in other provinces have also issued declarations of parentage in favour of intended parents.<sup>192</sup> However, Ontario and British Columbia's legislative responses most closely resemble the *Comité's* recommendations and would also best respond to some of the problems with Quebec's current regime identified in Part 3 of this article. Only British Columbia and Ontario enable intended parents to be recognized without obtaining a judicial declaration of parentage or adoption. British Columbia and Ontario are also the only provinces to allow more than two parents to be recognized and to give judges the discretion to issue a declaration of parentage in favour of the intended parents, should a surrogate change her mind.<sup>193</sup>

Quebec should not seek to adopt these provinces' laws without modification. Transplanting either province's law within Quebec would not be possible or desirable as this would not account for differences between common and civil law systems and traditions. However, British Columbia's and Ontario's legislation can provide helpful inspiration to Quebec

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Ontario, Legislative Assembly, Standing Committee on Social Policy, *Official Report of Debates (Hansard)*, 41st Parl, 2nd Sess, (18 October 2016) at SP-35-SP-36, SP-42.

<sup>190</sup> Kelly, *supra* note 183 at 568.

<sup>191</sup> Alberta's *Family Law Act* and Nova Scotia's *Birth Registration Regulations* set out the conditions in which a judge may make a declaration of parentage in favour of the intended parents. Newfoundland and Labrador's *Vital Statistics Act* simply states that the intended parents may be registered where a judge has made a declaratory order or granted an adoption in favour of the intended parents. The Northwest Territories' *Children's Law Act* clarifies that a surrogate's spouse is not presumed to be the child's father if the birth mother intended to give up the child to the child's genetic parent and that parent's spouse. See *Family Law Act*, SA 2003, c F-45, s 8.2 [AB FLA]; *Birth Registration Regulations*, NS Reg 390/2007, s 5(2) [*Birth Registration Regulations*]; *Vital Statistics Act*, 2009, SNL, c V-601, s 5(6) [*Vital Statistics Act*]; *Children's Law Act*, SNWT 1997, c 14, s 8.1(3) [*Children's Law Act*].

<sup>192</sup> See *M(WJQ) v A(AM)*, 2011 SKQB 317, 339 DLR (4th) 759; *M(MA) v M(TA)*, 2015 NBQB 145, 438 NBR (2d) 372; *W(JA) v W(JE)*, 2010 NBQB 414, 373 NBR (2d) 211.

<sup>193</sup> Alberta's legislation states that while a surrogacy contract is unenforceable it may be used as evidence of parties' intentions, and may therefore be used to find that intended parents are responsible for children born through surrogacy if they seek to renege on their agreement. However, it also states that should the surrogate change her mind she is the child's sole parent, and neither intended parents may be recognized. See AB FLA, *supra* note 191, s 8.1(2)(c), 8.1(3)(c), 8.1(4)(c), 8.2(8)(a)-(c).

lawmakers. Quebec could learn from these provinces' recent reforms and use them to build upon and improve the report's recommendations.

## 5. Conclusion: Recommendations for Reform

Quebec should follow the *Comité's* recommendation to repeal article 541 CCQ. As noted previously, the language of "absolute nullity" communicates lawmakers' condemnation of surrogate motherhood and expresses that the practice of surrogacy threatens public order. If Quebec wishes to support and regulate surrogacy arrangements within the province, this provision cannot stand as currently drafted. Should article 541 CCQ be removed, judges could still rely on provisions in the *Civil Code* around the formation and nullity of contracts to render unenforceable certain aspects of surrogacy agreements.<sup>194</sup> Specifically, they could—and should—find that provisions around a child's filiation, a surrogate's behaviour, or decision-making during pregnancy are not legally binding. A child's filiation ought to be determined pursuant to family law rules, and not through the enforcement of contractual terms.<sup>195</sup> In turn, prior jurisprudence concerning women's reproductive autonomy makes clear that a surrogate cannot be compelled to undergo an abortion, carry a child to term,<sup>196</sup> or be subjected to other restrictions on her behaviour during pregnancy.<sup>197</sup>

Quebec also ought to amend the *Civil Code's* book on the family to clarify the parentage of children born through surrogacy. As the *Comité* suggested, the *Civil Code* ought to enable intended parents to register as a child's parents, without obtaining a judicial declaration or adoption, where certain conditions are met. Quebec should require surrogates and intended parents to obtain counselling and legal advice. However, in the absence of further information about the specific content of the notarial act or of the counselling parties will receive, it is unclear whether the *Comité's* proposal would be preferable to an administrative regime that is modeled on Ontario's, where parties are required to draft a surrogacy contract and obtain independent legal advice. In order to address concerns about fraud, Quebec could require surrogates and intended parents to obtain a notarial act *en minute*; however, it could also simply require that parties have their surrogacy agreements notarized prior to conception.

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<sup>194</sup> See arts 1410–1413, 1416–1426 CCQ.

<sup>195</sup> Nonetheless, as will be explained below, an agreement (or notarial act) should be used as evidence of intentions and should be considered by a judge in determining a child's filiation.

<sup>196</sup> *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385; *Daigle v Tremblay*, [1989] 2 SCR 530, 62 DLR (4th) 634.

<sup>197</sup> *Winnipeg Child and Family Services (Northwest Area) v G(DF)*, [1997] 3 SCR 925, 152 DLR (4th) 193; *Dobson (Litigation Guardian of) v Dobson*, [1999] 2 SCR 753, 174 DLR (4th) 1.

If these conditions are met and the surrogate consents in writing to give up her parental rights following the birth, then the intended parents could be named on the act of birth. The intended parents and the surrogate would need to send the registrar of civil status the notarized document and a declaration of birth form that explains their parental project and provides their consent. Once the surrogate consents to give up the child following the birth, she would be unable to reclaim her parental status and thus the registrar could record the intended parents' names on the act of birth without delay. Where the conditions for the birth registration route are not met, but the surrogate consents to relinquish her parental rights, then the intended parents and the surrogate could apply for a judicial order declaring that the intended parents should be named on the act of birth. As the *Comité* recommends, they would bear the burden of proving that they had a parental project involving surrogacy prior to conception.

Lawmakers should also clarify that in the event of a dispute, surrogacy agreements (or the notarial act) may be used as evidence of parties' intentions with respect to the child's filiation and the reimbursement of a surrogate's expenses. As the *Comité* suggested, intended parents should be financially responsible for any children born from a surrogacy arrangement. Judges in Quebec, like in British Columbia and Ontario, ought to also have the power to make a judicial order where there is a disagreement following conception about the child's filiation. In this case, the surrogacy agreement or notarial act ought to be a factor that a judge can consider, along with the child's best interests. Judges could order that the intended parents, the surrogate, or both be registered as the child's parents or have parental rights or responsibilities, depending on the circumstances of the case. Such a solution is not ideal and is certain to spark disagreement among scholars and stakeholders who believe that either the surrogate or the intended parents should be given sole custody or should be afforded greater certainty regarding who will be a child's parents. However, this article maintains that allowing for judicial discretion would be preferable to the *Comité's* recommendation, which would necessarily preclude all intended mothers and some intended fathers from obtaining legal status should the surrogate change her mind.

Finally, Quebec ought to follow Ontario and British Columbia's lead and recognize multiple-parent families. As in Ontario, up to four parents could obtain legal status through the birth registration route or more than four through the judicial route, provided these parties had all intended to parent the child prior to conception and can demonstrate that this was their intention. These parents also ought to be recognized irrespective of whether they have a genetic or gestational connection to the child. In the event of a dispute over the child's filiation, allowing families to have more than two parents would also enable a judge to award joint custody to a surrogate

and to intended parents should this be determined to be in the child's best interests.

The *Comité's* report provides a thoughtful starting point for much-needed reforms to Quebec's surrogacy laws, but would be strengthened by looking to British Columbia's and Ontario's respective statutes and adopting the above recommendations for reform. These suggestions would better align with the *Comité's* stated objectives, as they would support diverse family forms while balancing surrogate mothers', intended parents', and children's interests.