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Régine Tremblay

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**QUEBEC'S FILIATION REGIME, THE ROY
REPORT'S RECOMMENDATIONS, AND
THE 'INTEREST OF THE CHILD'**

Régine Tremblay*

This article describes Quebec's filiation regime and explains some of the Roy Report's recommendations to reform parent-child relationships in Quebec. While this report is unlikely to lead to legislative change, it represents an important insight into issues animating family law in Quebec today. The Roy Report anchors filiation and family law to the 'interest of the child', a notion likely different from the best interests of the child in common law. The article offers some critical and comparative analysis of current and proposed rules. It makes this lesser known area of Quebec civil law accessible in English and to common lawyers in Canada. It hopes to promote a conversation between jurists from Quebec and common law jurisdictions, especially those where family law has recently been reformed.

* Assistant Professor at the Peter A. Allard School of Law of the University of British Columbia. This article is inspired by my doctoral research, funded by a SSHRC doctoral award, at the Faculty of Law of the University of Toronto. I would like to thank Susan Boyd, Stefanie Carsley, Alexandra Popovici, and Lionel Smith for their comments, Benjamin McLean for his excellent research assistance, and the editors of the Canadian Journal of Family Law. Special thanks to the external reviewers for their thorough and constructive feedback.

In the civil law tradition, “filiation” denotes the legal relationship between a child and his or her parent(s), which entails various rights, powers, duties, and obligations. To keep up with profound social and technological changes when it comes to creating families, filiation has gone through tremendous transformations in Quebec over the past decades. In the 1970s and 1980s, filiation reforms were made in order to, amongst other things, address the situation of illegitimate children.¹ In 1994, family rules in the *Civil Code of Québec* were modified to include more articles on assisted procreation for heterosexual couples and to clarify the status of children thereby conceived.² This happened at the same time as the coming into force of the ‘new’ civil code in the province.³

¹ For example, *An Act to amend the Civil Code respecting natural children*, SQ 1970, c 62; *An Act to establish a new Civil Code and to reform family law*, SQ 1980, c 39.

² *Civil Code of Québec*, SQ 1991, c 64. In this text, Code, Civil Code, and CCQ are used interchangeably to refer to the *Civil Code of Québec*. While this may appear confusing, the word “article” is used in English to refer to provisions or sections of the Civil Code. Some articles on assisted procreation were found in the 1980 version of the Book on the Family.

³ The *Civil Code* is the result of a process that started in 1955. The book on family law was enacted in the 1980s, before the Code as a whole (1994). Anyone interested in the process can consult the Archive of the Civil Code Revision Office online: <digital.library.mcgill.ca/ccro/index.php> or <www.bibliotheque.assnat.qc.ca/guides/fr/25-le-code-civil-du-quebec-du-bas-canada-a-aujourd-hui>. Alongside with the Code came the *Commentaires du ministre*, an interpretative tool where the Justice Minister commented on every article of the CCQ.

In 2002, changes were made in order to create a space for, and allow legal recognition of, children of non-heterosexual couples and single mothers by choice.⁴ This phenomenon is not unique to Quebec and many Canadian jurisdictions have modified parentage rules to better reflect diverse family experiences and to facilitate the establishment of legal relationships in certain contexts.⁵ However, since 2002 in Quebec, little has happened in terms of family law reform, with the exception of the rules on adoption.⁶ Judges⁷ and the legislature⁸ are under

⁴ *An Act instituting civil unions and establishing new rules of filiation*, SQ 2002, c 6. Only certain families are contemplated in the chapter “Filiation of children born of assisted procreation”. Rules on adoption are more inclusive. *An Act to amend the Civil Code and other legislative provisions*, SQ 2002, c 19.

⁵ Especially in the context of assisted reproduction, but not exclusively. See *Family Law Act*, SBC 2011, c 25 [FLA (BC)] and the *Children’s Law Reform Act*, RSO 1990, c C 12 [CLRA].

⁶ A notable exception to this statement is the legislative activity around rules for adoption: Bill 113, *Loi modifiant le Code civil et d’autres dispositions législatives en matière d’adoption et de communication de renseignements*, 1st sess., 41st leg. (assented June 16 2017), SQ 2017, c 12 [Bill 113]. For a survey of the different bills that were proposed see Françoise-Romaine Ouellette & Carmen Lavallée, “La réforme proposée du régime québécois de l’adoption et le rejet des parentés plurielles” (2015) 60 McGill LJ 295. See also Robert Leckey, “L’adoption coutumière autochtone en droit civil Québécois” C de D [forthcoming].

⁷ Recent surrogacy cases showcase pressures on the judiciary: *Adoption 161*, 2016 QCCA 16; *Adoption 1445*, 2014 QCCA 1162.

⁸ See, for example, Guillaume Bourgault-Côté, “Le Barreau presse Québec de réformer le droit de la famille”, *Le Devoir* (21 October 2016), online : <www.ledevoir.com>.

pressure, and the significant limits of filial rules are becoming increasingly obvious.

An opportunity to revise filial rules arose in 2013, in the aftermath of *Quebec (Attorney General) v A* (also known as *Eric v Lola*).⁹ The Minister of Justice announced the creation of the *Comité consultatif sur le droit de la famille* (“*Comité*”). This *Comité* was to evaluate whether family law reform was necessary in Quebec and, if so, to suggest what it should be. The *Comité* answered affirmatively to the question of reform through a preliminary report a few months later, emphasizing that law respecting both parent-child and conjugal relationships should be reformed.¹⁰ The *Comité* further stated that its recommendations would be animated by a desire to promote the interest of the child, and that the child should be the fulcrum of family law.¹¹ In 2015, the same *Comité* submitted a lengthy and detailed final report (“*Roy Report*”) with several recommendations on reforming family law—including two dissenting opinions—to the Quebec Government.¹² Not much has happened since 2015 and it is unlikely that the *Roy Report* will lead to actual

⁹ *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 [*Quebec v A*].

¹⁰ Comité consultatif sur le droit de la famille, *Rapport préliminaire* (Quebec: Ministère de la Justice, 2013).

¹¹ *Ibid*, at 4–5.

¹² Alain Roy (prés.) 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, 2015) [*Roy Report*]. The report is available in French only. In Quebec, it is often referred to as the *Rapport Roy*.

reform. Nevertheless, the work of the *Comité* is worth analyzing because it offers an interesting portrait of the ideas, constructs, and tensions animating the regulation of parent-child relationships—and family law—in Quebec today.

In the last few decades, observers have argued adjustments to filial rules¹³ are necessary to protect children, promote their interests, and foster their equality.¹⁴ The interest of the child is a key basis of the recommendations proposed in the *Roy Report*. There are, however, substantial risks to such an approach in regulating families, and it is unclear whether the interest of the child should supplant all other interests at stake in family law. When it comes to filiation rules, the “interest of the child” is generally conceived of as an objective and abstract standard, unrelated to a child’s particular context and lived experiences.¹⁵ The interest of the child is embedded in the rules on filiation in the *Civil Code of*

¹³ In this article, the term “filial rules” refers to the legal rules of filiation. It is a deliberate choice not to use parentage or parenthood.

¹⁴ For example, compare Civil Code Revision Office, Committee on the law on persons and on the family, Part One, XXVI, Montréal, 1974 and *Roy Report*, *supra* note 12. However, the two reports have different weight, content and influence. They cannot be compared in scope and importance.

¹⁵ Carmen Lavallée has insightfully analyzed this tension between the interest of the child *in abstracto* and the interest of the child *in concreto* in the context of adoption. For example, while the former inspires legal rules, the latter helps with interpreting legal rules: 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 255–78.

Québec.¹⁶ It is disputable whether the interest of the child, understood as this abstract construct, achieves its goal. Indeed, except when it comes to adoption rules, there is no discretion or concrete assessment of a child's factual situation in the making of a decision about a child's filiation. In the context of the establishment of parent-child relationships, this may be different from the "best interest of the child" principle that is well-known in Canadian common law. Investigating rules about filiation reveals how the "interest of the child" (*l'intérêt de l'enfant*) is reflected in the *Code*. Exploring the interest of the child resonates with some of Judith Mosoff's work. The endeavour is related to some of her interests and preoccupations about children's specific vulnerabilities¹⁷ and the notion of "best interest" for vulnerable parties.¹⁸ This article, however, takes place in a different setting and the "interest of the child" has a meaning that differs, in some aspects, from that of the "best interests of the child".

This article describes Quebec's filiation regime and explains some of the *Roy Report's* recommendations to reform parent-child relationships in Quebec. The article is mostly descriptive in nature, but offers feminist and comparative comments on the current and proposed rules

¹⁶ *Droit de la famille — 111729*, 2011 QCCA 1180; *Droit de la famille — 11394*, 2011 QCCA 319 at para 58.

¹⁷ Here one can think of her work on the vulnerability of children and violence in the familial context: Judith Mosoff & Isabel Grant, "Upholding Corporal Punishment: For Whose Benefit?" (1993) 16 Dal LJ 98.

¹⁸ See Judith Mosoff, "Motherhood, Madness, and Law" (1995) 45:2 UTLJ 107 in general, and at 121ff.

of filiation. Its main purpose is to make civil law, and some parts of the *Roy Report*, available in English to common law lawyers. In general, little English scholarship¹⁹ is available on the subject, impeding meaningful dialogue between Canadian experts. A key goal is to facilitate a conversation between Quebec family law jurists and those from common law jurisdictions, especially jurists from jurisdictions where family law has been recently reformed.²⁰ The first part of this article introduces the filiation rules in the *Civil Code of Québec*. This overview allows for a better understanding of the regime and also offers insight into how the interest of the child is understood in this portion of the *Code*. The second part summarizes some of the *Roy Report*'s recommendations, before critically and comparatively assessing certain limits to filial rules and to these recommendations.

1. AN INTRODUCTION TO FILIATION IN THE *CIVIL CODE OF QUÉBEC*

This part first surveys the relevant rules of filiation as found in the first book of the *Civil Code of Québec*, the book on persons (Part A). Second, it explains the three types of filial rules found in the second book of the *Code*, the book on the family: filiation by blood, filiation of

¹⁹ See e.g. respecting filiation in civil law, Angela Campbell, "Conceiving Parents Through Law" (2007) 21 Intl JL Pol'y & Fam 242; Robert Leckey, "Where the Parents Are of the Same Sex': Quebec's Reforms to Filiation" (2009) 23 Intl JL Pol'y & 62; Robert Leckey, "Two Mothers in Law and Fact" (2013) 21:1 Fem Leg Stud 1.

²⁰ See e.g. *Family Law Act*, SBC 2011, c 25, Part 3 and Bill 28, *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment*, 2nd Sess, 41st Leg, Ontario, 2016 (assented to 5 December 2016), SO 2016, c 23.

children born of assisted procreation, and adoption (Part B).

A. FILIATION AND THE BOOK ON PERSONS

An essential part of the law of filiation is found in the first book of the *Code*, the book on persons. The law of persons is the entry point of a juridical person/*sujet de droit* in private law and is intrinsically related to status/*état*. The law of persons heavily influences the law of filiation. An important category of official legal documents called “acts of civil status” are found in the law of persons. They record and document changes in the status of persons, and include acts of birth, acts of marriage and civil union, and acts of death. The “act of birth” is an act of civil status and does not mean giving birth. It is subject to the jurisdiction of the Registrar of civil status (“Registrar”), introducing an undeniably public aspect to the otherwise private legal relationship between parents and children envisioned in the *Code*.

The act of birth is the primary means to establish filiation.²¹ Some steps must be undertaken before the Registrar draws up an act of birth. The first step is the

²¹ Édith Deleury & Dominique Goubau, *Le droit des personnes physiques*, 5th ed (Cowansville, Que: Yvon-Blais, 2014) at para 376: “constitue hiérarchiquement la preuve première de filiation”. The other means will be seen in the next part. It also flows from art 523(1) CCQ.

“attestation of birth”,²² drawn up by an accoucheur.²³ It states “the place, date and time of birth, the sex of the child, and the name and domicile of the *mother*”²⁴ and contains no particulars on the second parent.²⁵ The second step is the “declaration of birth”, which is a standardized document to be sent to the Registrar within 30 days of the child’s birth. The “father” and the “mother” of the child complete and sign the declaration.²⁶ The document contains the child’s name and sex, the place, date and time of birth, and the child’s parents’ names and domiciles.²⁷ The general rule is that “[o]nly the father or mother may declare the filiation of a child with regard to themselves”, but married or civil union spouses may declare filiation for

²² Art 111 CCQ. The name “attestation of birth” is not what was proposed by the CCRO. They opted for “attestation of delivery”: Quebec, Civil Code Revision Office, *Report on the Québec Civil Code, Volume I—Draft Civil Code*, (Montreal: ORCC, 1977) at 19; Quebec, Civil Code Revision Office, *Report on the Family. Part One*, by the Committee on the Law on Persons and on the Family (Montreal: ORCC, 1974) at 317 [Yellow Report]. The attestation existed prior to the reform, but had statistical consequences.

²³ The person who assists the woman when she delivers is referred to as the accoucheur (doctor, midwife, etc.). See Centre Crépeau, *Guide to the English Terminology in the Civil Code of Québec*, online: <www.mcgill.ca/centre-crepeau/fr/terminology/guide/accoucheur>.

²⁴ Art 111 CCQ [emphasis added].

²⁵ “[p]ar ailleurs, il ne peut pas non plus constater la filiation à l’égard du père”: *Commentaires du ministre de la Justice. Tome 1* (Quebec: Publications du Québec, 1993) at 85. The exclusion of particulars related to the “father” was intended.

²⁶ Art 113 CCQ.

²⁷ Art 115 CCQ.

one another.²⁸ Upon analysis of both documents, the Registrar will decide whether or not the requirements to issue an “act of birth” are met. The “act of birth” is an official document establishing the legal relationship between a child and his or her parent(s).

B. FILIATION AND THE BOOK ON THE FAMILY

There are three ‘types’ of filiation in the Book on the Family. Filiation by blood and filiation of children born of assisted procreation operate somewhat similarly, whereas adoption differs. The filiation title opens with a cardinal principle applicable to the three types: “all children whose filiation is established have the same rights and obligations, regardless of the circumstances of birth.”²⁹ Filiation is generally determined mechanically with no discretion for taking into account what would be best for a particular child, with the exception of the rules on adoption.³⁰ Moreover, filiation is an institution of public order, meaning that it is construed to be diametrically opposed to contractual principles and civil status is *indisponible*.³¹

²⁸ Art 114 CCQ.

²⁹ Art 522 CCQ.

³⁰ See art 543 CCQ. The interest of the child in the context of adoption is subjective and specifically related to the situation of the child who is going to be adopted. More recently, it has been determinative in surrogacy cases (see note 7, above).

³¹ In civil law, status is *indisponible*, it is unavailable. It is not something you can dispose of or contract on. *Indisponibilité* assumes there are higher interests civil law needs to protect. For example, see art 2632 CCQ. See also Dominique Goubau, “Le principe de non-patrimonialité du corps humain au Canada: entre fiction et réalité” in Brigitte Feuillet-Liger & Saïbé Oktay-Özdemir, eds, *La non-patrimonialité du corps*

Filiation by Blood

Filiation by blood applies in the case of so-called “natural” reproduction and is the *Civil Code*’s base regime. The chapter on filiation by blood is divided into two sections: proof of filiation and actions relating to filiation. It sets out the various ways in which parents may be recognized and the factors that judges and administrators will consider in determining who has filial status. There are four possible proofs of filiation: act of birth; uninterrupted possession of status; presumption of paternity, and voluntary acknowledgement. The strongest and primary proof of filiation by blood is the “act of birth”,³² and the process leading to the drawing up of this act has been explained above. The second proof of filiation by blood is the uninterrupted possession of status. It “is established by a combination of facts adequate to indicate the relationship of filiation between the child and his or her parents.”³³ Such facts include whether the alleged parents treat the child as their own, whether the child is reputed to be theirs, and what name the child bears.³⁴ As Alain Roy describes,

humain : du principe à la réalité. Panorama international (Bruxelles: Bruylant, 2017) 243 at 253ff.

³² Art 523 CCQ.

³³ Arts 523, 524 CCQ.

³⁴ France Allard et al, *Private Law Dictionary of the Family*, 2nd ed (Cowansville, Que: Yvon Blais, 2016) *sub verbo* “possession of status of (a) child” [Allard et al, *Dictionary of the Family*]. It is about *nomen, tractatus, and fama*. See e.g. *Droit de la famille — 1528*, 2015 QCCA 59 at para 21.

the relationship has to appear parental in nature.³⁵ It needs to be continuous, for 16–24 months following the birth of the child.³⁶ Article 523 adds that “[i]n the absence of an act of birth, uninterrupted possession of status is sufficient.”³⁷ While the former is stronger than the latter, when the act of birth is consistent with the possession of status, no one can claim or contest the filiation of a child.³⁸ The third proof of filiation by blood is the presumption of paternity, which plays in favor of a male *de jure* spouse, that is, a husband or civil union spouse.³⁹ Finally, the last proof is voluntary acknowledgement,⁴⁰ which is only binding on the person who made the acknowledgement. Voluntary acknowledgement of maternity is rarely used, even if available in the *Civil Code*.⁴¹

Any interested person may contest the filiation of someone if his or her act of birth is not consistent with his or her possession of status.⁴² One cannot claim an

³⁵ 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 34.

³⁶ *Droit de la famille — 1528*, 2015 QCCA 59 at para 29.

³⁷ Art 523, para 2 CCQ.

³⁸ Art 530 CCQ.

³⁹ Arts 525, 538.3 CCQ. Prior to 1980, the presumption of paternity used to be the primary proof of paternal filiation.

⁴⁰ Voluntary acknowledgement is limited in scope, see arts 526–527 CCQ.

⁴¹ Art 527, para 1 CCQ.

⁴² Art 531, para 1 CCQ.

inconsistent filiation without contesting the existing one.⁴³ There is a specific action in contestation for the filiation of a presumed father called “action in disavowal”. Such an action aims at rebutting a presumption of paternity “only within one year of the date on which the presumption of paternity takes effect, unless he is unaware of the birth, in which case the time limit begins to run on the day he becomes aware of it.”⁴⁴ The child’s mother may also seek to rebut the presumption of paternity during the year following the birth of the child.⁴⁵ In general, a father, mother, child, or interested person can claim or contest the filiation of a child. Actions in contestation or reclamation of filiation “are prescribed by 30 years” unless a shorter period is imposed by law.⁴⁶ Last but not least, article 535.1 CCQ specifies that, under certain circumstances, a court can order the analysis of a bodily substance to provide a genetic profile. A court may draw a negative presumption when someone refuses for unjustified reasons to submit to the analysis.⁴⁷

⁴³ As explained in article 532(2) CCQ, “[i]f the child already has another filiation established by an act of birth, by the possession of status, or by the effect of a presumption of paternity, an action to claim status may not be brought unless it is joined to an action contesting the status thus established.”

⁴⁴ Art 531(2) CCQ.

⁴⁵ *Ibid.*

⁴⁶ Art 536 CCQ. Prescription is the equivalent of limitation periods.

⁴⁷ Art 535.1 CCQ.

Filiation of Children Born of Assisted Procreation

The *Civil Code*'s chapter on the filiation of children born of assisted procreation is the result of a 2002 reform. This regime contains innovative provisions, including ones allowing a woman to be a child's sole legal parent by choice and providing means for two women to establish themselves as the child's sole parents from birth, without resorting to adoption. This second type of filiation operates similarly to filiation by blood.⁴⁸

Chapter 1.1 of the book on family revolves around the "parental project involving assisted procreation", hereinafter "parental project". A parental project "exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project."⁴⁹ No formalities are required; the parental project exists on the basis of the parties having an agreement, prior to the conception of the child, regarding who will be the child's parents. While this absence of formalities brings the parental project closer to "natural" reproduction, it opens the door to complex disputes where little evidence is available aside from the testimonies of the parties.⁵⁰ The parental project applies to single women, heterosexual couples, and lesbian couples, and could

⁴⁸ Robert Leckey, "Lesbian Parental Projects in Word and Deed" (2011) 45 RJT 315 at 320. See also arts 538.1, 539(2) CCQ.

⁴⁹ Art 538 CCQ.

⁵⁰ For examples, see Angela Campbell, "Conceiving Parents Through Law" (2007) 21:2 Int JL Pol'y Fam 242, 255–56.

happen through sexual intercourse.⁵¹ However, same-sex male partners are excluded from this chapter of the *Code* since surrogacy agreements are absolutely null in Quebec.⁵² Law does not forbid the construction of the contract, but it cannot be enforced.

When the genetic contribution to a parental project is sperm, the assisted procreation does not have to be medically assisted. However, under article 538.2 para 2, if “the contribution of genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child.”⁵³ This one-year delay has been interpreted broadly, especially in the years following the coming into force of the reform.⁵⁴

In general, the rules in terms of proofs and actions in the chapter on filiation of children born of assisted

⁵¹ Arts 538, 538.2 CCQ.

⁵² Art 541 CCQ. On surrogacy in Quebec, see 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’” (2016) 49:2 RJT 451; 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 intérêt de l’enfant” (2011) 70 R du B 509; Benoît Moore, “Maternité de substitution et filiation en droit” in Marie Goré et al, eds, *Lib amicorum Mélanges en l’honneur Camille Jauffret-Spinosi* (Paris: Dalloz, 2013) 859. On absolute nullity see art 1418 CCQ.

⁵³ *Supra* note 51.

⁵⁴ *LB v Li Ba*, 2006 QCCS 591 and its appealed decision, *Droit de la famille — 07527*, 2007 QCCA 362.

procreation are the same as for filiation by blood. Some technical modifications were, however, necessary. First, the presumption of paternity needed to be adapted and is now a presumption of parentality in Chapter 1.1, because the second parent can be a mother.⁵⁵ The second modification concerns voluntary acknowledgement. This proof is not available to establish the filiation of a child born of assisted procreation, probably because, amongst other things, the intent must precede the conception of the child for the parental project to exist. As well, according to some scholars, the act of birth relies on the declaration of birth and, in the case of *de facto* partners, such declarations are similar to voluntary acknowledgement.⁵⁶ Indeed, they both represent a voluntary declaration of intention to be a parent.⁵⁷ Finally, the last modification is found in article 540 CCQ, which provides that a person who does not declare his or her filiation after consenting to a parental project outside marriage or civil union “is liable towards the child and the child’s mother.” This rule probably became necessary for two reasons: in the context of a parental project of *de facto* spouses, the birth mother cannot declare the filiation of the other parent to the Registrar and no biological element could be used to tie the second parent to a child if she or he withdraws from the parental project.

Although this latter rule is desirable, as it palliates the limits of the law on persons, promotes certainty and

⁵⁵ Compare art 525 CCQ to art 538.3 CCQ.

⁵⁶ Mireille D Castelli & Dominique Goubau, *Le droit de la famille au Québec*, 5th ed (Quebec: Presses de l’Université Laval, 2005) at 248.

⁵⁷ The effects could differ quite a bit, however.

security when it comes to parental project, and provides for additional financial resources for the child, there is an interesting difference between this situation and one where someone tries to evade his filiation under the chapter on filiation by blood. Article 540 is about liability. While filiation creates a legal bond, which entails unilateral powers and duties, in addition to rights and obligations for both parties, liability is mostly about obligations, in this case unilateral pecuniary obligations. As such, when filiation is established for someone who did not intend to be a parent in a filiation by blood scenario, this person can nonetheless, depending on the circumstances, have duties, powers, and rights respecting the child, and ultimately have an impact on the child's life. In contrast, Article 540 CCQ does not allow for the establishment of filiation. It refers to a fault or a wrongdoing giving a right to damages,⁵⁸ which are probably alimentary in nature.⁵⁹ Some authors are—rightly—critical of such an important distinction between filiation by blood and filiation of children born of assisted procreation,⁶⁰ but there is something interesting about 540 CCQ that could be incorporated into filiation by blood rules. When filiation by blood is recognized “against” a father's will, the full effects of filiation could follow. This means the father could have an impact on decision-making when it comes to the child, and, more generally, a direct influence on the child's life.

⁵⁸ Jean Pineau & Marie Pratte, *La Famille* (Montréal: Thémis, 2006) at 696–97.

⁵⁹ Castelli & Goubau, *supra* note 56 at 249–50. In this context, alimentary means “relating to support”: Allard et al, *Dictionary of the Family*, *supra* note 34, *sub verbo* “alimentary”.

⁶⁰ Castelli & Goubau, *supra* note 56 at 250.

Some symbolic changes were also made to the *Code*'s provisions on assisted procreation in 2002. The first is found in the second paragraph of article 538.1 CCQ, reading "[t]his filiation creates the same rights and obligations as filiation by blood." This statement is symbolic as it only states what is already encompassed by article 522 CCQ and reaffirms equality between children.⁶¹ The second is found in article 539 CCQ, providing for two changes: the framework surrounding actions in contestation and the referral to the rules governing actions relating to filiation by blood. The first part of the article represents a symbolic statement with regards to the value and strength of the filiation of children born of assisted procreation. It states: "[n]o person may contest the filiation of a child solely on the grounds of the child being born of a parental project involving assisted procreation."⁶² The rest of the article 539, para 1 CCQ is a rephrasing and adaptation of article 539, para 2 CCQ (1994). The second part of the 2002 version of article 539 displays the connectedness between the two types of filiation. The third symbolic modification concerns the label of the second parent: "[i]f both parents are women, the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child".⁶³ The obligations of a father and a mother are largely the same in law, except for a very limited number of articles that could have been

⁶¹ See also art 578, para 1 CCQ.

⁶² This part of the article is a rephrasing of art 538 (1994).

⁶³ Art 539.1 CCQ.

individually modified instead to take account of the situation of a second mother.⁶⁴

Adoption

The third type of filiation is adoption. Adoption can involve a child domiciled inside or outside Quebec, but the rules will vary accordingly.⁶⁵ It produces a new bond of filiation, resulting from a decision made in the interest of the child.⁶⁶ As such, the rules about adoption are conceptually different from other filiation rules when it comes to the interest of the child. They are animated by a *subjective* understanding of the interest of the child, one in which the actual situation of the child is taken into account. This is closer to the common law notion of the “best interest of the child”. Adoption generally replaces all prior bonds of filiation and cannot be used to confirm a filiation already otherwise established.⁶⁷ The *Code* has made it clear since 2002 that same-sex couples may adopt.⁶⁸ Adoption is plenary and closed: plenary, in the sense that it severs pre-existing bonds, and closed in the sense that there is no information or contact between the family of origin

⁶⁴ See Benoît Moore, “Les enfants du nouveau siècle (libres propos sur la réforme de la filiation)” (2002) 176 *Développements récents en droit familial* 75 at 85–86.

⁶⁵ See Alain Roy, *Droit de l'adoption: adoption interne et internationale*, 2nd ed (Montreal: Wilson & Lafleur, 2010) [Roy, *Adoption*].

⁶⁶ Art 543 CCQ.

⁶⁷ Art 543(2) CCQ. Adoption has been used creatively in the past to “legitimize” children or to exclude a second parent (see, for example, *Droit de la famille—1704*, [1993] RJQ 1, [1993] RDF 727 (CA)).

⁶⁸ Art 578.1 CCQ.

and the adoptive family. There are, of course, exceptions⁶⁹ and actual situations may be different than what law claims. These general principles are the result of Quebec's socio-historical context and are being challenged by scholars across disciplines.⁷⁰ In fact, recent modifications to the adoption regime were made to create space for aboriginal customary adoption.⁷¹

There are different possible paths for adoption: general consent adoption, special consent adoption, or declaration of eligibility to adoption. The first two revolve around consent, while the third is the result of a judicial declaration, but a court decision is always necessary. General conditions apply roughly to all three paths. The first general condition is that no child can be adopted without the consent of his or her family of origin unless a judge declares him or her to be eligible for adoption.⁷² The only scenario where a person over 18 years old may be adopted is when the adopter acted towards the adoptee as his or her parent when the adoptee was a minor child.⁷³ Discretionary powers are nevertheless given to judges if it

⁶⁹ Arts 582–84 CCQ.

⁷⁰ Françoise-Romaine Ouellette & Carmen Lavallée, “La réforme proposée du régime québécois de l’adoption et le rejet des parentés plurielles” (2015) 60:2 McGill LJ 295; Françoise-Romaine Ouellette & Alain Roy, “Prendre acte des nouvelles réalités de l’adoption. Coup d’œil sur l’avant-projet de loi intitulé. Loi modifiant le Code civil et d’autres dispositions législatives en matière d’adoption et d’autorité parentale” (2010) 44:3 RJT 7.

⁷¹ *Supra* note 6.

⁷² Art 544 CCQ.

⁷³ Art 545, para 1 CCQ.

is in the adoptee's interest to allow adoption.⁷⁴ Any person of full age, in a relationship or alone, may adopt,⁷⁵ as long as there is an 18-year age difference between the adopter and the adoptee.⁷⁶ Exceptions are possible: when the adoptee "is the child of the spouse of the adopter" or when adoption is in the interest of the adoptee.⁷⁷ Although not specifically mentioned in the *Code*, Alain Roy points out that it is not sufficient to be a person of full age. The adopter has to be capable of exercising and enjoying rights and young enough to fulfill long-term parental responsibilities.⁷⁸

General consent adoption is the first path to adoption and occurs when a parent or parents towards whom filiation is established consent to the adoption in favour of the Director of Youth Protection. The Director of Youth Protection will select an adoptive family, and may consider suggestions if appropriate.⁷⁹

The second path to adoption in Quebec law provides a mechanism for "special consent to adoption".⁸⁰ Special consent allows a parent to consent to his or child's

⁷⁴ Art 545, para 2 CCQ.

⁷⁵ Art 546 CCQ.

⁷⁶ Art 547 CCQ.

⁷⁷ *Ibid.*

⁷⁸ Roy, *Adoption supra* note 65 at 43.

⁷⁹ Quebec, Ministère de la santé et des services sociaux, *Manuel de référence sur la protection de la jeunesse* (Quebec: Publications du Québec, 2010) at 54 [*Manuel de référence*].

⁸⁰ Art 555 CCQ.

adoption by a designated person. It may be given in favour of certain persons only, for example, the parent's spouse by marriage or by civil union,⁸¹ "an ascendant of the child [or] a relative in the collateral line to the third degree".⁸² When special consent to adoption takes place in favour of a spouse of a parent, it "does not dissolve the bond of filiation between the child and that parent."⁸³

Consent is the first step in both general and special adoption procedures. Adoptees of ten years of age or older have to consent to their adoption.⁸⁴ If a child is between ten and fourteen years old, a court can grant an adoption notwithstanding the child's refusal.⁸⁵ For a child older than fourteen years, the child's refusal stops the adoption process.⁸⁶ Another consent required is that of the parents.⁸⁷ Every parent who has an established filiation towards the child has to consent,⁸⁸ unless the parent is not capable of consenting due to death or incapacity, or is deprived of parental authority.⁸⁹ Deprivation means that the

⁸¹ While also possible for *de facto* spouses, special requirements must be met: *ibid.*

⁸² *Ibid.*

⁸³ Art 579(2) CCQ.

⁸⁴ Art 549 CCQ.

⁸⁵ Art 549(2) CCQ.

⁸⁶ Art 550 CCQ.

⁸⁷ A tutor can also give this consent, but tutorship does not need to be explained here. See arts 551ff CCQ.

⁸⁸ Art 551 CCQ.

⁸⁹ Art 552 CCQ. For a parent under 18 years old, see art 554 CCQ.

prerogatives of the parent are completely or partially suspended.

The third path for adoption, absent parental consent, happens through a declaration of eligibility to adoption. It is a measure to protect the child, and the requirements to be met must be demonstrated to a judge. There is no need, for the purpose of this article, to explain this path in detail.⁹⁰

As previously mentioned, and except when explicitly provided otherwise, all these filial rules were drafted with the interest of the child in mind and the abstract principle is embedded in them.⁹¹ This has been explained by the Court of Appeal:

The best interests of the child underlie, to varying degrees, the rules passed by the legislature governing filiation, . . . It would be an error to add or remove rules or to make new ones on a case-by-case basis in the name of the cardinal principle (the best interests of the child) that is already entrenched in the legislative texts.⁹²

⁹⁰ For more information, see arts 559ff.

⁹¹ This is an unofficial translation of the Quebec Court of Appeal: *Droit de la famille — 11394*, 2011 QCCA 319 at para 58.

⁹² This is an unofficial translation by SOQUIJ. The French version refers to “intérêt de l’enfant” and not “meilleur intérêt de l’enfant”. This is confusing as it suggests it is the same thing as the best interest of the

In other words, technically, the interest of the child is not a criterion that ought to be used to decide a filiation case other than an adoption case. Despite this principle, in recent years, it has become clear that the interest of the child was not necessarily promoted by rules on filiation.⁹³ There are inherent risks to an objective understanding of the interest of the child because such an understanding may or may not be related to the actual situation of a child. When the opportunity for reform presented itself, experts nevertheless made it clear that this abstract conception of the interest of the child should be the primary focus of family law.

2. THE ROY REPORT'S RECOMMENDATIONS AND FILIAL RULES

The rules on filiation have recently attracted more attention than usual. Following the high-profile case of *Quebec v A*⁹⁴ dealing with conjugal relationships, it became clear that the judiciary would not be the means to implement fundamental changes in the regulation of families in Quebec. Against this backdrop, on 19 April 2013, the Minister of Justice announced the creation of a committee, chaired by Professor Alain Roy. The Minister stated:

Since the major reform of family law in the eighties, Quebec's society has transformed.

child in common law, but it is not. It is found in *Droit de la famille — 111729*, 2011 QCCA 1180.

⁹³ For example, the Quebec's recent history of surrogacy and the absence of recognition for step-parents.

⁹⁴ *Supra*, note 9.

Recent years have been marked by many advances for families, . . . but, legislative changes have been made one by one. The time has come to initiate in-depth thinking on our legislation's orientations⁹⁵

As alluded to in the introduction, the *Comité*⁹⁶ was put in place and its mandate was two-fold. The first part of the mandate was fulfilled on 12 September 2013, with the submission of a preliminary report, the *Rapport sur l'opportunité d'une réforme globale du droit de la famille québécois*.⁹⁷ The second part, the final report of the *Comité*, was made available in June 2015. It is impossible to thoroughly summarize its 82 recommendations, more than 600 pages and 1292 footnotes in this short article.⁹⁸ It was the result of 26 full-day meetings.⁹⁹ The work of the *Comité* is colossal, and whether one agrees or not with its orientations and recommendations, it was highly needed and is a masterpiece. The *Roy Report* is divided into three parts: part one offers a brief historical and detailed socio-

⁹⁵ *Roy Report*, *supra* note 12 at 2 [translated by author].

⁹⁶ Although the composition of the *Comité* was announced by the Minister of Justice, a Ministerial team also contributed to the final report.

⁹⁷ Comité consultatif sur le droit de la famille, *Rapport sur l'opportunité d'une réforme globale du droit de la famille québécois* (12 September 2013), online: www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr_francais_/centredoc/rapports/couple-famille/rapp_prelim_CCDF.pdf.

⁹⁸ *Roy Report*, *supra* note 12.

⁹⁹ *Ibid* at 3.

demographic portrait of familial changes in Quebec, part two is concerned with the six guiding principles of the reform, and part three addresses the orientations of the reform. More attention will be given here to part three, especially the aspects concerning filiation.¹⁰⁰

The preliminary report indicated that the child's interests would be prioritized in bringing forward reforms and the interest of the child animates the *Comité's* recommendations when it comes to reforming filiation. But embedding an objective understanding of the interest of the child in the rules may not be in the best interest of all children and it betrays ideals about how families are, or rather, should be, made. Part A, which follows, sketches a portrait of some changes proposed in 2015 by the *Comité* affecting parent-child relationships. It also mentions the dissenting voices in the report, to the extent that they affect filiation. Part B offers an analysis of current filial rules and the recommendations of the *Comité*.

A. FILIATION AND THE ROY REPORT

Generalities

Animated by broad recommendations and guiding principles,¹⁰¹ the *Comité* recommended changes in four

¹⁰⁰ Only some aspects of the imperative parental regime will be explained.

¹⁰¹ (1) Family law must prioritize and reflect the interests of the child and must "promote the child's rights with force and conviction"; (2) family law must respond and adapt to include diverse couples and families; (3) "the child, a shared responsibility and the origin of interdependency"; (4) "the couple, a space for freedom of choice

regimes that would substantially transform the current understanding of family law in the *Code*. The regimes are labelled:

1. The imperative parental regime establishing reciprocal rights and obligations between the parents;
2. The conjugal regime detailing the legal framework applicable to couples;
3. The filial regime centered on children;
4. Parental authority and support obligation regime also revolving around children.¹⁰²

Three of the four regimes put the child front and centre. The *Comité* also suggests modifying the structure of the *Code*. The structure now looks like this:

BOOK 2 – THE FAMILY
TITLE 1 – MARRIAGE
TITLE 1.1 – CIVIL UNION
TITLE 2 – FILIATION
TITLE 3 – OBLIGATION OF SUPPORT
TITLE 4 – PARENTAL AUTHORITY

The *Comité* proposes to move towards this structure:

BOOK 2 – THE FAMILY
GENERAL PROVISION

(autonomy) and freedom of contract”; (5) “citizens informed on their rights and obligations”; (6) access to justice in general, but especially in family law: *Roy Report*, *supra* note 12 at 57–61.

¹⁰² *Ibid* at 65–66 [translated by author].

TITLE 1 – FILIATION
TITLE 2 – CONJUGALITY
TITLE 3 – EFFECTS OF THE FAMILY¹⁰³

Opening the book on the family with filiation would send a strong message about its importance in the *Civil Code*. It is a definitive departure from what has been done for centuries in Quebec.¹⁰⁴

Moreover, for the *Comité*, “the family” appears to be rooted in the presence of a common child. Indeed, it proposes that “the child [should] be the determining criteria for rights and obligations”.¹⁰⁵ As such, the element triggering dependency/interdependency in family law is the presence of a common child.¹⁰⁶ The *Comité* recognizes couples without children could be part of family law in the *Code*,¹⁰⁷ but according to them, their regulation should largely rely on unquestioned values of autonomy and freedom.

Proposed Changes to Filial Rules

When it comes to reforming filiation, the *Comité* proposes to modify the general provision now found in article 522

¹⁰³ *Ibid* at 65.

¹⁰⁴ From 1866 until today, marriage has always come before filiation in the civil codes of the province. Note that from 1866 to 1980 there was no book on the family.

¹⁰⁵ *Roy Report*, *supra* note 12 at 68.

¹⁰⁶ See generally Merle H Weiner, *A Parent-Partner Status for American Family Law* (Cambridge: Cambridge University Press, 2015).

¹⁰⁷ *Roy Report*, *supra* note 12 at 68–69.

CCQ, correctly highlighting that the current wording suggests only children whose filiation is established are equal. As such, the *Comité* recommends adding a 'new' article, reading as follows:

Without other considerations, all children have the right to the establishment of their filiation in accordance with the rules contained in this chapter.

Children whose filiation is established have the same rights and obligations.¹⁰⁸

This article creates a new right for children: the right to have their filiation established. It is unclear what the *Comité* has in mind when stating such a right. Is it desirable to enforce such a right in all situations? Whether it should be a right and what might be the impact of such an addition to the *Code* is uncertain. For example, could it have undesirable effects on single mothers by choice or would it affect the notion of abandonment?¹⁰⁹ In a dissenting opinion in the *Roy Report*, Suzanne Guillet expressed concerns about the formulation of this new

¹⁰⁸ *Roy Report*, *supra* note 12 at 141 [translated by author].

¹⁰⁹ While it is not the best scenario, a parent can always abandon a child. Abandonment is defined as "conduct by which a person forsakes another to whom he or she owes a duty": F Allard et al, eds, *Private Law Dictionary and Bilingual Lexicons*, (Cowansville, Que: Yvon Blais, 2003) *sub verbo* "abandonment".

general provision and the impacts it could have when there is a surrogacy agreement.¹¹⁰

The *Comité* wisely proposes to rename the “proofs of filiation” as “modes d’établissement”.¹¹¹ These “modes d’établissement” differ from the proofs explained above and vary depending on types of filiation. Further, the *Comité* suggests that the *Code* should clearly state that there are three types of filiation and should slightly modify how they are referred to. These three types would be: the filiation of children born of natural procreation, the filiation of children born of assisted procreation, and adoptive filiation.¹¹² For the first type, the filiation of children born of natural procreation, the *Comité* suggests that the *Code* be explicit about the basis of the establishment of filiation. On the one hand, maternal filiation is established by giving birth to a child.¹¹³ On the other hand, paternal filiation depends on the declaration of birth (intent) and the possession of status.¹¹⁴ Possession of status would be only useful when it comes to establishing

¹¹⁰ *Roy Report, supra* note 12 at 593. She refused to subscribe to recommendation 3.1, and to two others (4.4 and 4.5).

¹¹¹ *Ibid* at 144 (recommendation 3.3).

¹¹² *Ibid* at 139. The naming of the types of filiation is inspired by Anne-Marie Savard’s work: Anne-Marie Savard, “Les tensions entre la nature et le droit ; vers un droit de la filiation génétiquement déterminé ?” (2013) 43:1 RGD 5; Anne-Marie Savard, “La filiation et la codification au Québec : une approche psychanalytique” (2005) 46 C de D 411; and her doctoral work.

¹¹³ *Roy Report, supra* note 12 at 144.

¹¹⁴ *Ibid* at 145.

paternity.¹¹⁵ The principle according to which filiation cannot be contested if the act of birth and possession of status match would thus change.¹¹⁶ It would now depend on declaration and possession for male parents only. This leaves little place for intention or actual care when it comes to establishing maternity and, in the *Comité's* opinion, the biggest challenges arise with paternity.¹¹⁷ The presumption of paternity is left untouched because the *Comité* could not agree, but should it stay in the *Code*, it would extend to *de facto* spouses.¹¹⁸ The *Comité* would remove voluntary acknowledgement from the *Code* and specify that it should be seen as mere commencement of proof.¹¹⁹

The second type of filiation is for children born of assisted procreation. It is divided into two subsections: for a parental project involving another person to procreate and for a parental project involving a surrogate. For the first type, the new articles would be in line with the parental project involving assisted procreation as currently found in the *Code*. But the *Comité* adds two clarifications: the other person (donor) needs to be informed about his or her role and, prior to the child's conception, no formalities are required for the parental project.¹²⁰ This means that no

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* at 147 (Recommendation 3.6). Note it would also apply to second-parent in hypotheses of assisted procreation.

¹¹⁷ *Ibid* at 144–45.

¹¹⁸ *Ibid* at 150 (Recommendation 3.7).

¹¹⁹ *Ibid* at 151 (Recommendation 3.8). See above for explanation about voluntary acknowledgement.

¹²⁰ *Ibid* at 158 (Recommendation 3.12).

contract, agreement, or otherwise is required. The *Comité* mentions that the contribution of another person could be made through intercourse and clarifies that the contribution of genetic material does not make someone a parent in any event.¹²¹ This first type of remodeled parental project is open to single women, heterosexual couples, and lesbian couples. The establishment of maternal filiation would again rely upon giving birth. The establishment of a “second filiation” would be consistent with what is done for the first type of filiation: declaration and possession of status.¹²² The *Comité* recommends the abrogation of the presumption of parentage.¹²³ The *Comité* also insists that the marital status of parents should not influence filial rules.¹²⁴ In this spirit, the *Comité* recommends abrogation of 540 CCQ (explained above). Finally, it recommends retaining a maximum of two parents.¹²⁵

The *Comité* would include a second type of parental project, that involving a surrogate, deliberately labelled “*mère porteuse*”.¹²⁶ The *Comité* suggests two guiding principles. First, a child should never be penalized for the actions of adults and, second, women acting as surrogates ought to be protected and have their dignity respected.¹²⁷

¹²¹ *Ibid* at 157, 165 (Recommendation 3.19).

¹²² *Ibid* at 160 (Recommendation 3.14).

¹²³ *Ibid* at 161 (Recommendation 3.16).

¹²⁴ See e.g. *ibid* at 162–163.

¹²⁵ *Ibid* at 166 (Recommendation 3.20).

¹²⁶ *Ibid* at 172.

¹²⁷ *Ibid* at 170.

More, it provides six principles: the abrogation of 541 CCQ; women acting as surrogates have to be protected and can withdraw from the project at any time; a child can only have two parents; intended parents are liable if they withdraw; the parental project should meet ethical standards; and children should have access to their assisted procreation files and to the information contained therein.¹²⁸ The *Comité* proposes two ways to proceed when it comes to surrogacy and there are thus two possible paths: administrative or judicial. The administrative path would allow the establishment of filiation of a child born through surrogacy agreement on the basis of a declaration to the Registrar, provided certain conditions are met. First, the parental project should be a notarial act¹²⁹ drafted before the child's conception. Second, the intended parents and the surrogate mother should individually go through a psychosocial evaluation.¹³⁰ Upon the child's birth, an attestation of birth would be completed. The surrogate must consent in writing in front of two witnesses or in a notarial act to surrender the child.¹³¹ A common declaration of birth would then be filled out and sent to the Registrar, alongside the attestation of birth (listing the

¹²⁸ *Ibid* at 170–71.

¹²⁹ A notarial act is a legal act drafted by a notary, signed in his or her presence, and recorded. Notaries are public legal officers in Quebec. Thus, a notarial act is a formal legal act that is, in effect, registered; it is almost impossible to question its validity after the fact.

¹³⁰ *Roy Report, supra* note 12 at 174 (Recommendation 3.21.1). This is different from what Ontario decided to do, in requiring independent legal advice (*CLRA, supra* note 5, s 10(2)2). However, a notary is not a lawyer, but a public officer, constructed as neutral.

¹³¹ *Roy Report, supra* note 12 at 177–78 (Recommendation 3.21.1.1).

surrogate), the psychosocial attestation, and the notarized parental project.¹³² At all times, the surrogate mother could withdraw her consent.

The judicial path has many variations (for example, everybody consents, the surrogate withdraws consent, the parents withdraw consent, one of the parents withdraws consent, or someone dies), but the *Comité* summarizes its recommendations as to what rules should apply in six parts:

- A. The parents and the surrogate mother, or one of them can ask the tribunal to substitute the surrogate mother's filiation with one of the intended parents within 60 days of the child's birth;
- B. If the parental project is revoked after birth, intended parents, or the intended parent withdrawing consent, will be liable towards the child and the surrogate mother;
- C. A parental project could be finalized if only one of the parents and the surrogate consent. The other parent would be liable towards the child and the other parent;
- D. In the event the surrogate dies, is incapacitated or vanishes after birth and before providing consent, the court could make a decision in light of what is favourable for the child;
- E. *De jure* or *de facto* incapacity preventing the parental project to succeed amounts to consent withdrawal;

¹³² *Ibid* at 175.

- F. If the parental project lapses, the court should apply the rules for the establishment of filiation of a child born through natural procreation.¹³³

These principles create liabilities and posit filiation through natural procreation rules as default rules if problems arise. The *Comité* addresses other questions (age, previous pregnancies, etc.),¹³⁴ being aware of issues relating to the constitutional division of powers. While it is possible to disagree on how surrogacy is included in the *Code* by the *Comité*, their propositions display consistency, are well considered, and initiate a necessary discussion.

The third type of filiation, adoptive filiation, attracted less attention in the report and will not be discussed here. A few bills have been put forward in recent years, and one recently materialized and came into force.¹³⁵

A Note on the Imperative Parental Regime

The *Comité's* recommendations also include the imperative parental regime, a device described as fostering the interest of the child, but taking place between spouses. The regime involves both conjugality and filiation, and is

¹³³ *Ibid* at 181 (Recommendation 3.21.2.1) [translated by author].

¹³⁴ See *ibid* at 179–88 (Recommendations 3.21.2 to 3.21.10).

¹³⁵ See Ouellette & Lavallée, *supra* note 70 at 310–27; See also *Rapport du groupe de travail sur le régime québécois de l'adoption*, Carmen Lavallée, chair, *Pour une adoption québécoise à la mesure de chaque enfant* (30 March 2007). See also *Bill 113 supra* note 6.

triggered by the presence of a common child. While it is not about the establishment of filiation *per se*, it needs to be briefly explained.

Under the imperative parental regime, the common child is the parents' "shared responsibility".¹³⁶ What is innovative, according to the *Comité*, is that the regime "add[s] a horizontal legal bond between the two parents of child from his or her birth or adoption."¹³⁷ The regime is mandatory and addresses "the effects of conjugal and familial interdependency for parents, during a community of life, at breakdown or even if [parents] never shared a community of life,"¹³⁸ regardless of the matrimonial status of the parents. It would create a "responsabilité statutaire parentale",¹³⁹ which can be translated as a "statutory parental liability". Only some aspects of this new imperative parental regime need to be detailed for present purposes.

The imperative parental regime represents a combination of new and old mechanisms. It extends the contribution to the expenses of the family to parents.¹⁴⁰ If the contribution is unequal; a right to compensation is

¹³⁶ *Ibid* at 71.

¹³⁷ *Ibid*. It could be said it is what marriage has been doing for decades.

¹³⁸ *Ibid* at 71. See generally art 392 CCQ; Nicholas Kasirer, "What is vie commune? Qu'est-ce que living together?" in JEC Brierley et al, eds, *Mélanges Paul-André Crépeau* (Cowansville, Que: Yvon-Blais, 1997) 487.

¹³⁹ *Roy Report*, *supra* note 12 at 72.

¹⁴⁰ *Ibid*.

contemplated. Evidentiary issues are to be expected since love tends to cloud expectations with regards to money.¹⁴¹ The imperative parental regime extends the protection and attribution of the family residence (and of movables serving for the use of the household) to parents.¹⁴² The *Comité* also advocates for the creation of a new mechanism, a “prestation compensatoire parentale” or a parental compensatory allowance,¹⁴³ aimed at counterbalancing the financial disadvantages associated with the upbringing of a child.¹⁴⁴ It could be obtained in four situations, two when disadvantages occur during the community of life as a result of taking on a parental role and two based on the compensation of economic disadvantages occurring after separation or in the situation where parents never shared a community of life.¹⁴⁵ The *Comité* summarizes some principles underpinning the parental compensatory allowance, without regard to which situation applies, as follows:

- It is non-alimentary and strictly compensatory;

¹⁴¹ See Delphine Lobet & Hélène Belleau, *L'amour et l'argent: Guide de survie en 60 questions* (Montreal: Les éditions du remue-ménage, 2017); Hélène Belleau, “La solidarité conjugale. Analyse des liens d’amour et d’argent au sein des couples” in Hélène Belleau & Agnès Martial, eds, *Aimer compter? Droits et pratiques des solidarités conjugales dans les nouvelles trajectoires familiales* (Montreal: Presses de l’Université du Québec, 2011) 55.

¹⁴² *Roy Report*, *supra* note 12 at 75.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid* at 79.

¹⁴⁵ *Ibid* at 80–96.

- Proportionality;
- Presumption advantaging the parent in a vulnerable situation;
- Individual responsibility;
- Mitigation of economic disadvantages and available resources of the debtor;
- Guidelines.¹⁴⁶

The parental compensatory allowance sits in the middle of a measure affecting conjugal relationships and filial relationships and locates interdependency in the presence of a common child. This mechanism was not unanimously accepted by the *Comité*. In his dissent, Dominique Goubau discusses the complicated meaning of choice in conjugal settings and the difficult balance between choice and protection in family law. Relying on the same triggering event as the majority—the presence of children—Goubau suggests that the parental compensatory allowance is not the way to go.¹⁴⁷ Rather, he says, the current mechanisms available to *de jure* spouses should extend to *de facto* spouses when children are involved.¹⁴⁸

B. FILIATION AND THE *ROY REPORT*: TAKING A CRITICAL AND COMPARATIVE STANDPOINT

Quebec's current filiation regime has some problematic limits and the *Comité*'s recommendations hold both promises and perils. Relying on current rules and

¹⁴⁶ *Ibid* at 97–98 [translated by author].

¹⁴⁷ *Ibid* at 587.

¹⁴⁸ *Ibid*.

recommendations of the *Roy Report*, this part provides a preliminary comparative and critical analysis. Its goal is not to offer an in-depth analysis, but rather to identify elements to consider when it comes to modifying filial rules and family law rules generally.¹⁴⁹

Firstly, the gendered¹⁵⁰ nature of filiation is blatant in both current rules and the *Roy Report*. With current rules, it is exposed by the requirement that the attestation of birth and declaration of birth should match, but only for some women (women giving birth, it is not required for a second mother). In the *Roy Report*, the issue is highlighted by the different principles underlying maternal and paternal (or second parent) filiation: biology vs. intent. The gendered distinction also is evidenced in the different “modes d'établissement” proposed by the *Comité*. Both in the *Code* and in the *Roy Report*, there is a biologization of filial ties for some women.¹⁵¹ While the intent of men prevails, for most women intent is regarded as secondary.¹⁵² There is an argument to be made against

¹⁴⁹ More details on this can be found in Régine Tremblay, *Family Re-Coding: Towards a Theory of Economic and Emotional Interdependency in the Civil Code of Québec* (SJD Thesis, University of Toronto Faculty of Law, 2018) [unpublished].

¹⁵⁰ In common law, this idea of gendering parent-child relationships has been explored by many. See generally Susan B Boyd, “Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility” (2007) 25:1 Windsor YB Access Just 63.

¹⁵¹ *Roy Report*, *supra* note 12 at 144.

¹⁵² The *Roy Report* is categorical: “Dans la mesure où l'on se refuse à attribuer à la filiation maternelle quelque fondement volontariste que ce soit, il devient illogique” (*ibid* at 146).

promoting opposing underlying principles for maternal and paternal filiation, when their legal nature and effects are similar.¹⁵³ What appears consistent to the *Comité*—that biology is the key for both natural and assisted procreation for women while intent is the key for men—may appear inconsistent to others. It may also have undesirable theoretical impacts. First, it promotes a logic of father and mother, rather than parents. This is in contradiction with what has been done in Ontario for example.¹⁵⁴ Furthermore, it may not be in line with the experiences of transgender or non-binary parents.¹⁵⁵ Second, the gendered nature of filiation unfortunately reinforces a dualist conception of reproduction. This conception, limited to two parents, here again creates a mismatch between Quebec and other provinces in which multiple parents have

¹⁵³ This is not to say that the biological, material and physical aspects of giving birth are not important. This subject is divisive amongst feminist scholars and is beyond the scope of this article.

¹⁵⁴ See the rules of parentage in the *CLRA*, *supra* note 5, s 4ff. Section 4(1) clearly states “a person is the child of his or her parents”.

¹⁵⁵ As a matter of fact, there is currently a motion challenging “the validity of articles 59, 60, 71, 72, 93, 111, 115, 116, 124, 126 and 146 of the *Code of Quebec* («CCQ») («impugned provisions»). Plaintiffs argue that the impugned provisions result in the exclusion, prejudice and discrimination of transgender and intersex individuals and their children under both the *Canadian Charter of Rights and Freedoms* and the *Charter of Human Rights and Freedoms*”: *Centre for Gender Advocacy v Québec (Attorney General)*, 2015 QCCS 6026 at para 2, 347 CRR (2d) 158. See also *Centre de lutte contre l'oppression des genres (Centre for Gender Advocacy) v Québec (Procureure générale)*, 2016 QCCS 5161. One can consult these two interim decisions to have some background on the issue.

become part of the legal landscape,¹⁵⁶ sometimes more than a decade ago.¹⁵⁷

Secondly, thinking about “types” of filiation is limiting and inevitably puts the focus on adult behaviour rather than actual relationships between adults and children. This is paradoxical since in reform after reform, it has been said that law should not penalize children for their parents’ reproductive choices. It also betrays how the interest of the child is not central and how children are subjected to prejudices about how families are made. Yet, current law and the *Roy Report*’s recommendations organize rules according to how a child is conceived (naturally or with assistance). The rules are not about the interests of children or the actual content of meaningful relationships between adults and children; rather they are about adult behaviour and categories of filiation. Anne-Marie Savard writes “chacun des trois modes de filiation devraient en principe être autonome et contenir des règles qui sont exhaustives.”¹⁵⁸ She rightly highlights that such is not the case with current rules. It results in uncertainties and inconsistencies as to what set of rules applies and why. Similarly, types of filiation would arguably not be autonomous if the *Roy Report* were to lead to changes in

¹⁵⁶ *CLRA*, *supra* note 5, ss 9–11 *CLRA*; *FLA* (BC), *supra* note 5, s 30.

¹⁵⁷ *A(A) v B(B)*, 2007 ONCA 2, 35 RFL (6th) 1.

¹⁵⁸ 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, *Mélanges en l’honneur d’Édith Deleury. La personne humaine, entre autonomie et vulnérabilité* (Cowansville, Que: Yvon Blais, 2015) 589 at 604.

the *Code*. Savard suggests, in the context of assisted procreation and surrogacy, it is time for filiation of children born of assisted procreation to become autonomous from filiation by blood.¹⁵⁹ The opposite is also worth considering; going back to the old dichotomy between filiation and adoption, while including specific rules about assisted reproduction, might be desirable. It was the case until the filiation of lesbian parents and single mother by choice filiation were formally included in the *Code* in 2002. While some adjustments to the rules have to be made to address specific vulnerabilities, to state that this type of filiation is a different type of filiation is too strong of a message. This is especially striking considering it operates as filiation by blood does, and deals with a similar relationship in law, i.e. the relationship between a child and a parent. Moreover, when it comes to one of the “types” of filiation, Quebec’s understanding of assisted procreation is different from the wording and conception of “assisted reproduction” in the rest of Canada. The *Roy Report* was an opportunity to engage with the reasons why the *Civil Code of Québec* and the *Roy Report* speak of “assisted procreation”,¹⁶⁰ while the *Family Law Act* (BC) and the *Children’s Law Reform Act* (Ontario), for example, use “assisted reproduction”.¹⁶¹ Reproduction suggests something broader and more complex than procreation, the latter conveying, perhaps, a more biological meaning.

¹⁵⁹ *Ibid* at 619.

¹⁶⁰ It could also be said it is a *faux amis* as assisted reproduction is translated into *procréation assistée* in the *CLRA*.

¹⁶¹ *CLRA*, *supra* note 5, s 1; *FLA* (BC), *supra* note 5, s 20(1).

Definitions also differ.¹⁶² In Quebec, assisted procreation is about using third-party genetic material to conceive,¹⁶³ while in Alberta, British Columbia, or Ontario it means “a method of conceiving a child other than by sexual intercourse.”¹⁶⁴ While both definitions have flaws, the latter perhaps makes more sense.¹⁶⁵

Thirdly, both current rules and the *Roy Report's* recommendations fail to acknowledge that dependency and interdependency are complex and multifaceted notions. When it comes to dependency and interdependency, the *Comité* contends that the regulation of the family in the *Code* should revolve around the presence of a common child, the child being constructed as the determining factor in allocating rights, duties, powers, and obligations. A common child is also the triggering element of interdependency between adults, promoting a traditionalist understanding of relationships between adults, and of relationships between adults and children. It does not provide modern family law with much needed flexibility and does not acknowledge the multifaceted nature of interdependency in the familial context. While it is beyond the purposes of this article, it would also be interesting to think about specific vulnerabilities left unaddressed by current rules and the *Roy Report* (single mothers by choice, lesbian parents, egg donors, intended parents, and others).

¹⁶² Compare art 538 CCQ with “assisted reproduction” in *FLA* (BC), *supra* note 5, s 20(1).

¹⁶³ Art 538 CCQ.

¹⁶⁴ *FLA* (BC), *supra* note 5, s 20(1).

¹⁶⁵ For example, artificial insemination by the sperm of a spouse would be considered filiation by blood.

Meaningfully engaging with vulnerability was an integral part of Judith Mosoff's scholarship and could usefully be taken up in this context of filiation.

CONCLUSION

To conclude, this article first briefly explained current rules of filiation as found in the *Civil Code of Québec*. Second, it summarized selected recommendations of the *Roy Report* when it comes to reforming family law, more particularly the establishment of parent-child relationships. It then provided some preliminary critical analysis of both. Current Quebec filial rules have significant limits. The *Roy Report* is innovative, expertly written, thoughtful, and proposes some solutions to difficult questions revolving around questions of contemporary reproduction, and the regulation of families more generally. Despite all the work that has been put into the *Roy Report*, more than two years have now passed and it is unlikely that it will generate any political action or lead to the actual reform of family law in Quebec. There appears to have been no political will to engage with the report. As time passes, it feels more and more like a missed opportunity.

There is no good answer as to what new filial rules should look like, but they should be the result of broad interdisciplinary consultation and should carefully include recently compiled data on the realities of family lives.¹⁶⁶

¹⁶⁶ Hélène Belleau, Carmen Lavallée & Annabelle Seery, *Unions et désunions conjugales au Québec: Rapport de recherche. Première partie: Le couple, l'argent et le droit* (Institut national de la recherche scientifique: Centre Urbanisation Culture et Société, June 2017). It is

One can be skeptical about the measures contained in the *Roy Report*, the ideals they betray, and the assumptions on which some recommendations are made. Filial rules should be the result of serious engagement with the notions of choice, freedom, autonomy, and most importantly, protection of vulnerable parties, and solidarity¹⁶⁷ in intimate relationships of different kinds. There are strong dissenting voices¹⁶⁸ in Quebec that need to be heard and more diverse stakeholders should be involved. Skepticism is necessary, not only because of proposed specific rules but, perhaps more importantly, because of some general animating principles that need to be addressed by a broad consultation. These include endorsing an objective understanding of the interest of the child and adopting a narrow understanding of interdependency. Both approaches prevent family law from adapting to changing family lives and from engaging with the subjective needs of families and children.

worth mentioning that other parts of this ground-breaking report are awaited and will focus on parent-child relationships and other matters.

¹⁶⁷ See Benoît Moore, “La consécration de l’autonomie individuelle” (2015) 40 :1 Bulletin de liaison de la Fédération des associations des familles monoparentales et recomposées du Québec 6, online : <http://www.fafmrq.org/wp-content/uploads/2015/10/Liaison_septembre2015_HighRes.pdf>.

¹⁶⁸ This was particularly obvious during the Colloque du partenariat de recherche Familles en mouvance, *Vers un nouveau droit de la famille? Discussion autour du rapport du Comité consultatif sur le droit de la famille* (held in Montreal, 9 November 2015). Some presentations can be viewed online: <www.partenariat-familles.inrs.ca/?p=23675>. See also, Bulletin de liaison de la Fédération des associations des familles monoparentales et recomposées du Québec, *supra* note 167.