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Reforming Quebec's Surrogacy Laws

Stefanie Carsley

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Résumé de l'article

En octobre 2021, le gouvernement du Québec a présenté le Projet de loi 2, qui proposait des réformes importantes aux lois québécoises sur la gestation pour autrui. Le ministre de la Justice du Québec a souligné que ce projet de loi visait à mieux tenir compte des besoins et des réalités vécues par les familles québécoises. Il a également précisé que les dispositions sur la gestation pour autrui visaient à donner la priorité au meilleur intérêt de l'enfant tout en protégeant les droits des personnes porteuses. Cet article analyse les implications des réformes proposées par le Projet de loi 2 pour les personnes porteuses, les parents d'intention et les enfants issus d'une gestation pour autrui. Je soutiens que même si les propositions du Projet de loi 2 contribuaient à légitimer et à réglementer la gestation pour autrui, celui-ci laisse une série de questions importantes sans réponse et pourrait avoir des effets contraires aux objectifs des législateurs.

Le lecteur doit être avisé, qu'une fois terminée la préparation de cet article pour publication, le gouvernement du Québec a déposé le Projet de loi 12 qui apporte quelques modifications mineures aux dispositions du Projet de loi 2, relatives au projet parental impliquant une grossesse pour autrui. Notamment, le Projet de loi 12 précise que la femme ou la personne qui a donné naissance à l'enfant demeure, dans le cas où elle refuse de céder ses droits parentaux après la naissance, le parent légal de l'enfant et que le tribunal ne peut modifier cette filiation. Cependant, compte tenu des similitudes entre les deux projets de loi, les commentaires et critiques que contient cet article demeurent très pertinents et appropriés aux réformes proposées par le Projet de loi 12.

Reforming Quebec's Surrogacy Laws

Stefanie Carsley*

RÉSUMÉ

En octobre 2021, le gouvernement du Québec a présenté le Projet de loi 2, qui proposait des réformes importantes aux lois québécoises sur la gestation pour autrui. Le ministre de la Justice du Québec a souligné que ce projet de loi visait à mieux tenir compte des besoins et des réalités vécues par les familles québécoises. Il a également précisé que les dispositions sur la gestation pour autrui visaient à donner la priorité au meilleur intérêt de l'enfant tout en protégeant les droits des personnes porteuses. Cet article analyse les implications des réformes proposées par le Projet de loi 2 pour les personnes porteuses, les parents d'intention et les enfants issus d'une gestation pour autrui. Je soutiens que même si les propositions du Projet de loi 2 contribuaient à légitimer et à réglementer la gestation pour autrui, celui-ci laisse une série de questions importantes sans réponse et pourrait avoir des effets contraires aux objectifs des législateurs.

Le lecteur doit être avisé, qu'une fois terminée la préparation de cet article pour publication, le gouvernement du Québec a déposé le Projet de loi 12 qui apporte quelques modifications mineures aux dispositions du Projet de loi 2, relatives au projet parental impliquant une grossesse pour autrui. Notamment, le Projet de loi 12 précise que la femme ou la personne qui a donné naissance à l'enfant demeure, dans le cas où elle refuse de céder ses droits parentaux après la naissance, le parent légal de l'enfant et que le tribunal ne peut modifier cette filiation. Cependant, compte tenu des similitudes entre les deux projets de loi, les commentaires et critiques que contient cet article demeurent très pertinents et appropriés aux réformes proposées par le Projet de loi 12.

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MOTS-CLÉS :

Mère porteuse, gestation pour autrui, Québec, droit de la famille, procréation assistée, maternité de substitution, Canada.

ABSTRACT

In October 2021, the Quebec government introduced Bill 2, which proposed significant reforms to Quebec's surrogacy laws. Quebec's Minister of Justice emphasized that Bill 2 was intended to better account for the needs and lived realities of Quebec families. He also specified that its surrogacy provisions aimed to prioritize the best interests of children while also protecting surrogates' rights. This article explores Bill 2's proposed reforms to Quebec's surrogacy laws and their implications for surrogates, intended parents, and the children born through these arrangements. I argue that while Bill 2's proposals would go a long way towards legitimizing and regulating surrogacy arrangements, the bill leaves a series of important questions unanswered and may have effects that run counter to lawmakers' objectives.

The reader should be advised that when this article was being edited and typeset in preparation for publication, the Quebec government re-introduced Bill 2 as « Bill 12 » with some minor modifications to its provisions pertaining to surrogacy. Notably, Bill 12 clarifies that the surrogate will remain the child's legal parent, and a court will not have discretion to modify the child's filiation, in the event the surrogate refuses to give up their parental rights following the birth. However, given the similarities between the two bills, this article's commentary and criticisms remain highly relevant and timely with respect to Bill 12's proposed reforms to Quebec's surrogacy laws.

KEYWORDS :

Surrogate, surrogacy, Quebec, family law, assisted reproduction, Canada.

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INTRODUCTION

In October 2021, the Quebec government introduced Bill 2,[1] which proposed sweeping reforms to the *Civil Code of Quebec*'s book on the family.[2] Bill 2 sought to respond to a decision of the Superior Court of Quebec that invalidated provisions in the *Civil Code* that discriminated against trans and non-binary Quebecers.[3] It also proposed to amend the *Civil Code*'s rules pertaining to filiation (parentage) and to further respond to and regulate surrogacy arrangements in the province.[4] In November and December 2021, the government solicited feedback from stakeholders and held a four-day "special consultation" process

1. *An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*, 2nd Sess, 42nd Leg, Quebec, 2021 (assented to 8 June 2022) SO 2022, c 22 [Bill 2].

2. [CCQ or *Civil Code*]. The bill also proposed changes to parts of the *Civil Code* pertaining to the law of persons and civil status, as well as amendments to 40 other statutes and regulations. See *ibid*.

3. *Centre for Gender Advocacy c Quebec (AG)*, 2021 QCCS 191. See also Antoni Nerestant, "Judge's Ruling on Quebec's *Civil Code* Hailed as a Victory for Trans, Non-Binary People", *CBC News* (29 January 2021), online: <www.cbc.ca/news/canada/montreal/trans-non-binary-rights-ruling-civil-code-quebec-1.5893137>. The Court invalidated the affected provisions and gave the legislature until December 2021 to amend the *Civil Code*. The government introduced Bill 2 just prior to this deadline in late October 2021 but was unable to meet this timeline and received an extension until the end of the legislative session (June 2022). The original version of the bill introduced in October was also highly criticized because it would have required that Quebecers undergo surgery to change their sex designation on their identity documents. See e.g. Samuel Singer, "Quebec Must Reverse Course on Bill 2 and Restore January's Historic Trans Rights Victory", *The Globe and Mail* (2 November 2021), online: <www.theglobeandmail.com/opinion/article-quebec-must-reverse-course-on-bill-2-and-restore-januarys-historic/>; Anne Levesque et al, "A Huge Step Backwards for Trans Rights", *CBA National* (10 November 2021), online: <www.nationalmagazine.ca/en-ca/articles/law/opinion/2021/a-huge-step-backward-for-trans-rights>.

4. See Bill 2, *supra* note 1, s 96. See also Caroline Plante, "Quebec Will Regulate Surrogate Mothers in New Family Law", *La Presse Canadienne* (21 October 2021), online: <www.montrealgazette.com/news/local-news/quebec-will-regulate-surrogate-mothers-in-new-family-law>; François Carabin, "Québec veut baliser l'appel aux mères porteuses dans la loi", *Le Devoir* (22 October 2021), online: <www.ledevoir.com/politique/quebec/641865/reforme-du-droit-de-la-famille-quebec-veut-baliser-l-appel-aux-meres-porteuses-dans-la-loi#:~:text=Fran>; Anne Marie Lecomte, "Droit de la famille: Québec autorisera le recours aux mères porteuses", Radio-Canada (21 October 2021), online: <www.ici.radio-canada.ca/nouvelle/1833417/quebec-reforme-droit-famille-projet-loi-recours-mere-porteuse-jolin-barrette>.

with invited experts and representatives.[5] The government began a clause-by-clause consideration of the bill in May 2022,[6] but was unable to complete this process prior to the end of the legislative session. Ultimately, in June 2022, the government cut from the bill those sections dealing with filiation and surrogacy to allow provisions concerning civil status and gender identity to be enacted before the fall election.[7]

While the government's proposed reforms pertaining to surrogacy did not come to pass, it is worth carefully considering these proposals and their implications. Leading up to the fall 2022 election, the *Coalition Avenir Québec* (CAQ) made clear its intention to carry out these reforms if re-elected,[8] and over the past decade, prior governments have taken steps to initiate similar reforms. Notably, in 2013, the *Parti québécois* created the *Comité consultatif sur le droit de la famille* to evaluate whether the *Civil Code* adequately responds to the needs of Quebec families and to provide recommendations for reform.[9] In 2016, the Quebec Liberal government similarly announced their intention to reform the *Civil Code*'s book on the family and noted that they would

5. Quebec, National Assembly, *Special consultations and public hearings on Bill 2, An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*, Committee on Institutions, 42-2, no 10-13 (30 November to 3 December 2021) [Quebec, Special Consultations]. For commentary on the rushed nature of this consultation process and an argument in favour of splitting the bill to allow for greater time to consider its family law reforms, see Alana Cattapan et al, "Rushing Quebec's Bill 2 Risks Leaving Many Voices Unheard", *CTV News* (14 December 2021), online : <www.montreal.ctvnews.ca/opinion-rushing-quebec-s-bill-2-risks-leaving-many-voices-unheard-1.5707418>.

6. Quebec, Special Consultations, *supra* note 5.

7. See Hugo Pilon-Larose, "Québec remet à plus tard l'encadrement de la gestation pour autrui", *La Presse* (1 June 2022), online : <www.lapresse.ca/actualites/politique/2022-06-01/reforme-du-droit-de-la-famille/quebec-remet-a-plus-tard-l-encadrement-de-la-gestation-pour-autrui.php> ; "Quebec's Bill 2 Without Surrogate Mothers : Opposition Blames Jolin-Barrette", *CTV News Montreal* (2 June 2022), online : <www. montreal.ctvnews.ca/quebec-s-bill-2-without-surrogate-mothers-opposition-blames-jolin-barrette-1.5930621>. The truncated version of the bill received royal assent on 8 June 2022, see Bill 2, *supra* note 1.

8. See Pilon-Larose, *supra* note 7. The Canadian Press, "Quebec Abandons Legislation to Regulate Surrogate Mothers", *CTV News* (1 June 2022), online : <www. montreal.ctvnews.ca/quebec-abandons-legislation-to-regulate-surrogate-mothers-1.5928945>.

9. Québec, Comité consultatif sur le droit de la famille, "Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales" (2015) (Chair : Alain Roy). For commentary on the *Comité*'s proposed reforms, see Stefanie Carsley, "Reconceiving Quebec's Laws on Surrogate Motherhood" (2018) 96 :1 Can Bar Rev 121 [Carsley, "Reconceiving Quebec's Laws"] ; Régine Tremblay, "Quebec's Filiation Regime. The *Roy Report*'s Recommendations and the 'Interest of the Child'" (2018) 31 :1 Can J Fam L 199.

consider the *Comité*'s proposals in making these changes.[10] In drafting Bill 2, Quebec lawmakers drew heavily on the *Comité*'s report, while also taking into account recommendations from a report by the *Conseil du statut de la femme*.[11] Given this history, it seemed almost certain that Bill 2 would serve as a starting point for future reforms to Quebec's surrogacy laws. And indeed, this prediction was correct : when this article was being edited and typeset in preparation for publication, the Quebec government re-introduced Bill 2 as "Bill 12" with some minor modifications to its provisions pertaining to surrogacy. Notably, Bill 12 clarifies that the surrogate will remain the child's legal parent, and a court will not have discretion to modify the child's filiation, in the event the surrogate refuses to give up their parental rights following the birth. However, given the similarities between the two bills, this article's commentary and criticisms remain highly relevant and timely with respect to Bill 12's proposed reforms to Quebec's surrogacy laws.[12]

Quebec's Minister of Justice emphasized that Bill 2 was intended to better account for the needs and lived realities of Quebec families.[13] He also specified that its surrogacy provisions aimed to prioritize the best interests of children and to protect the rights of women who carry them.[14] This article considers to what extent Bill 2's proposed surrogacy reforms, if implemented, would support these objectives. Part I

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10. Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 124 ; Tommy Chouinard, "Québec ouvre la porte à la reconnaissance des mères porteuses", *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>.

11. Minister Jolin-Barette indicated during the special consultations on 30 November 2021, that the *Conseil*'s 2016 recommendations inspired the drafting of Bill 2. See Quebec, Conseil du statut de la femme, *Avis : Mère porteuse : réflexions sur des enjeux actuels* (Quebec : Gouvernement du Québec, 2016) [Conseil du statut de la femme, *Avis*] ; Quebec, National Assembly, *Journal des débats (Hansard) of the Committee on Institutions*, 42-2, Vol 46 (30 November 2021) at 11 :00, online : <www.assnat.qc.ca/en/travaux-parlementaires/commissions/ci-42-2/journal-debats/CI-211130.html#11h> [*Journal des débats* (30 November 2021)].

12. See Bill 12, *An Act to reform family law with regard to filiation and to protect children born as a result of sexual assault and the victims of that assault as well as the rights of surrogates and of children born of a surrogacy project*, 1st Sess, 43rd Leg, Quebec, 2023 (first reading 23 February 2023), art 541.21.

13. He explained that the last major reform to Quebec family law was undertaken in 1980 and that now, 40 years later, the needs and realities of families have changed considerably and reform to Quebec family law is needed. *Journal des débats* (30 November 2021), *supra* note 11 at 10 :00.

14. *Journal des débats* (30 November 2021), *supra* note 11 at 10 :00. See also Office of the Minister of Justice Attorney General of Quebec, News Release, "Les enfants d'abord — Lancement de la réforme du droit de la famille" (21 October 2021), online : <www.quebec.ca/nouvelles/actualites/details/les-enfants-dabord-lancement-de-la-reforme-du-droit-de-la-famille-35562>.

describes the current state of the law in Quebec and draws on empirical research, media reports, and case law to discuss these laws' effects. Part II then discusses Bill 2's proposed reforms to Quebec surrogacy laws[15] and explores their potential implications for surrogates, intended parents, and the children born from these arrangements. I argue that while Bill 2's proposals would go a long way towards legitimizing and regulating surrogacy arrangements, the bill leaves a series of important questions unanswered and may have effects that run counter to lawmakers' objectives.

I. SURROGACY LAWS IN QUEBEC

A. Assisted Human Reproduction Act

Surrogacy arrangements in Canada are governed by the federal *Assisted Human Reproduction Act*.[16] Pursuant to section 6 of the *AHRA*, it is illegal to pay, offer to pay, or advertise to pay a surrogate to carry a child.[17] It is also illegal to pay an intermediary to "arrange for the services of a surrogate mother" and for an intermediary to accept payment for providing these services.[18] The *AHRA* prohibits counselling or inducing women under the age of 21 to become surrogates and forbids performing medical procedures that would enable them to act as surrogates.[19] Individuals or organizations that violate the *AHRA* face potentially severe penalties : up to a $500,000 fine and 10 years imprisonment.[20]

The *AHRA* thus targets intended parents who pay surrogates to carry a child or who pay surrogacy agencies to help them find a surrogate. It also prohibits surrogacy agencies from paying surrogates or from

15. This article focuses on proposed amendments to article 541 CCQ. It does not discuss children's rights to know their genetic origins, which is a substantial topic that merits its own paper. It also does not discuss Bill 2's proposals regarding parental leave where a child is born through surrogacy, or amendments to other statutes and regulations aside from the *Civil Code*. Finally, while it discusses one potential consequence of the government's refusal to recognize more than two parents, a more robust discussion of multiple parent families is beyond the scope of this piece.

16. SC 2004, c 2 [*AHRA*].

17. S 6(1) *AHRA*.

18. S 6(3) *AHRA*. It is also illegal for an intermediary to offer or advertise to provide these services, s 6(2) *AHRA*.

19. S 6(4) *AHRA*.

20. S 60 *AHRA*.

accepting payment to match surrogates with intended parents.[21] It does not, however, punish surrogates who accept consideration for carrying a child.[22] The *AHRA* is also understood not to apply to lawyers or physicians who accept payment for providing legal counsel or medical treatment, provided they do not knowingly assist an underage surrogate or arrange for a surrogate to carry a child for the intending parents.[23]

Although surrogates are expected to engage in surrogacy "altruistically"—without benefitting financially from the arrangement—section 12 of the *AHRA* allows surrogates to be reimbursed for their expenses related to the surrogacy and for lost work-related income during pregnancy.[24] These reimbursements must be made in accordance with the *Reimbursement Related to Assisted Human Reproduction Regulations*, which list the kinds of expenses that are eligible for reimbursement and the procedure that must be followed.[25] Surrogates may, for

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21. "Prohibitions Related to Surrogacy" (5 February 2020), online : *Government of Canada* <www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction/prohibitions-related-surrogacy.html>.

22. This decision was deliberate ; lawmakers worried that criminalizing surrogates' behaviour would exacerbate their vulnerabilities. See especially, Royal Commission on New Reproductive Technologies, *Proceed With Care : Final Report of the Royal Commission on New Reproductive Technologies*, Vol 1 (Ottawa : Minister of Government Services Canada, 1993) at 689–91.

23. For further discussion of the *AHRA*'s criminal prohibitions, see for e.g. Françoise Baylis, "Canada's Prohibition on Payment for Surrogacy, Eggs, and Sperm" (2018) 40 :12 J Obstetrics & Gynaecology Can 1569–70 ; Maneesha Deckha, "Situating Canada's Commercial Surrogacy Ban in a Transnational Context : A Postcolonial Feminist Call for Legalization and Public Funding" (2015) 61 :1 McGill LJ 31 ; Erin Nelson, "Surrogacy in Canada : Toward Permissive Regulation" in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada : Critical Perspectives in Law and Policy* (Toronto : Irwin Law, 2018) 185 ; Angela Campbell, *Sister Wives, Surrogates and Sex Workers : Outlaws by Choice ?* (Farnham, UK : Ashgate Publishing, 2013). See also Stefanie Carsley, *Surrogacy in Canada : Lawyers' Experiences, Practices and Perspectives* (2020) at 19–20 [unpublished], available online : <www.escholarship.mcgill.ca/concern/theses/4x51hq07h> [Carsley, "Surrogacy in Canada"].

24. S 12 *AHRA*.

25. SOR/2019-193 [*AHR Reimbursement Regulations*]. For further discussion of these regulations see Stefanie Carsley, "Regulating Reimbursements for Surrogate Mothers" (2021) 58 :4 Alta L Rev 811 [Carsley, "Regulating Reimbursements"]. For discussion of the development of these regulations and the *AHRA*'s reimbursement model more generally, see Angel Petropanagos, Vanessa Gruben & Angela Cameron, "Should Canada Implement a Flat-Rate Reimbursement Model for Surrogacy Arrangements ?" in Gruben, Cattapan & Cameron, *supra*, note 23, 155. Dave Snow, Françoise Baylis & Jocelyn Downie, "Why the Government of Canada Won't Regulate Assisted Human Reproduction : A Modern Mystery" (2015) 9 :1 McGill JL & Health 1 [Snow, Baylis & Downie, "Why the Government"] ; Louise Langevin, *Le droit à l'autonomie procréative des femmes : entre liberté et contrainte* (Cowansville, Québec : Yvon Blais, 2020) at 206–13 [Langevin, *Le droit à l'autonomie procréative des femmes*].

instance, be reimbursed for costs incurred for medications, travel and accommodation, counselling, legal services, midwifery or doula services, telecommunications, maternity clothes, prenatal exercise classes, grocery costs, child and pet care, and insurance.[26] Surrogates may also be reimbursed for products and services that a health care provider recommends in writing in order to support the pregnancy or to protect the surrogate's health.[27] Pursuant to the *AHRA* and *AHR Reimbursement Regulations*, surrogates are required to pay for these items or services out-of-pocket and provide receipts to be legally reimbursed.[28] In turn, surrogates may be reimbursed for work-related lost income "if a qualified medical practitioner certifies, in writing, that continuing to work may pose a risk to her health or that of the embryo or foetus"[29] and the surrogate provides a written declaration and evidence of lost income in accordance with the *AHR Reimbursement Regulations*.[30]

The *AHRA* was introduced in 2004 in response to concerns about the effects of assisted reproductive technologies on women, children, and Canadian society.[31] Lawmakers and scholars long expressed concern that surrogacy—particularly paid surrogacy—could result in the

26. S 4 *AHR Reimbursement Regulations*.

27. Health Canada has explained that this provision is "intentionally broad" and could include, for instance, the costs of household maintenance, snow clearing, massage therapy or chiropractor services ; see Health Canada, "Guidance Document : Reimbursement Related to Assisted Human Reproduction Regulations" (30 August 2019), s 10, online : *Government of Canada* <www.canada.ca/en/health-canada/programs/consultation-reimbursement-assisted-human-reproduction/document.html>. See also Carsley, "Regulating Reimbursements", *supra* note 25 at 833.

28. S 12 AHRA ; s 6 *AHR Reimbursement Regulations*.

29. S 12(3) *AHRA*.

30. Health Canada, *supra* note 27, ss 8–9.

31. For discussion of the history of the *AHRA*, see e.g. Erin Nelson, "Comparative Perspectives on the Regulation of Assisted Reproductive Technologies in the United Kingdom and Canada" (2006) 43 :4 Alta L Rev 1023 ; Alison Harvison Young, "Let's Try Again … This Time With Feeling : Bill C-6 and New Reproductive Technologies" (2005) 38 :1 UBC L Rev 123 ; Françoise Baylis & Jocelyn Downie, "The Tale of Assisted Human Reproduction Canada : A Tragedy in Five Acts" (2013) 25 :2 CJWL 183 ; Carsley, "Regulating Reimbursements", *supra* note 25.

commodification and exploitation of women and children.[32] They worried that surrogates might be pressured to engage in surrogacy for compensation[33] and that allowing for payment would send an undesirable message about the value of women's labour and would objectify the children born through these arrangements.[34] Lawmakers nonetheless believed that surrogates should be able to help a family member or friend who needs assistance in building their family.[35] Through the *AHRA*, the federal government sought to discourage paid arrangements while nonetheless ensuring that surrogates would not incur financial losses should they decide to act altruistically.[36]

Despite lawmakers' intentions, the *AHRA* has not been fully effective at deterring commercial surrogacy. Currently, there are at least nine for-profit surrogacy agencies operating in Canada[37] and many intended

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32. See e.g. Royal Commission on New Reproductive Technologies, *supra* note 22 at 683–84; Michael J Trebilcock & Rosemin Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective" (1991) 41:4 UTLJ 533; Christine Overall, "The Case Against the Legalization of Contract Motherhood" in Simon Rosenblum & Peter Findlay, eds, *Debating Canada's Future: Views From the Left* (Toronto: J Lorimer, 1991) 210; Diana Majury, "Pre-Conception Contracts: Giving the Mother the Option" (in *ibid* 361). For more recent critiques of this view, however, see especially Alana Cattapan, "Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation" (2014) 29:3 CJLS 361. See also Karen Busby & Delaney Vun, "Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26:1 Can J Fam L 13.

33. See e.g. "Bill C-47, Human Reproductive and Genetic Technologies Act", 2nd Reading, *House of Commons Debates*, 35-1, No 089 (23 October 1996) at 5616–17 (Joseph Volpe); *House of Commons Debates*, 37-2, No 72 (18 March 2003) at 349 (Hedy Fry) [*House of Commons Debates* (18 March 2003)]; Royal Commission on New Reproductive Technologies, *supra* note 22 at 684. For scholarship that advances this argument, see e.g. Majury, *supra* note 32; but see Busby & Vun, *supra* note 32 at 41, 51.

34. See e.g. Royal Commission on New Reproductive Technologies, *supra* note 22 at 684; *House of Commons Debates*, 37-1, No 188 (21 May 2002) at 11523 (Anne McLellan). Some scholars argued that allowing for payment would contravene Canadian social values and would be inconsistent with fundamental values under the *Canadian Charter of Rights and Freedoms* with respect to human dignity and the inviolability of life. See e.g. Angela Campbell, "Defining a Policy Rationale for the Criminal Regulation of Reproductive Technologies" (2002) 11:1 Health L Rev at 26; Françoise Baylis & Alana Cattapan, "Paying Surrogates, Sperm and Egg Donors Goes Against Canadian Values", *The Canadian Press* (2 April 2018), online: <www.theconversation.com/paying-surrogates-sperm-and-egg-donors-goes-against-canadian-values-94197>.

35. *House of Commons Debates* (18 March 2003), *supra* note 33 at 4343 (Jeannot Castonguay), 4349 (Hedy Fry).

36. *Ibid*.

37. These are: ANU Fertility; Canadian Fertility Consulting; Canadian Surrogacy Options; Surrogacy in Canada Online; Proud Fertility; JA Surrogacy; The Life Nest; New Hope Surrogacy; and Canadian Surrogacy Community. See online: <www.anufertility.com>; <www.fertility-consultants.ca>; <www.canadiansurrogacyoptions.com>; <www.surrogacy.ca>; <www.proud-fertility.com>; <www.4usurrogacy.com>; <www.jasurrogacy.com>; <www.thelifenest.com>; <www.newhopesurrogacy.ca>; <www.surrogacycommunity.ca> (all accessed on 26 September 2022).

parents pay these agencies to help them find a surrogate.[38] These agencies' fees vary but are significant ; indeed, some charge intended parents upwards of $20,000 for their services.[39] Some agencies assert that they act in compliance with the *AHRA* by only charging clients after surrogates and intended parents are matched and "only for services other than matching, such as organizing medical and legal appointments, managing money and receipts, and making referrals."[40] Other agencies note that they charge clients to access their resources, but do not perform the matching directly, and instead allow their clients the opportunity to match themselves.[41] It seems, however, that the real reason why these agencies currently operate with impunity is because there is little desire on the part of the Canadian government to monitor or enforce the *AHRA*. To date, there has been only one prosecution under the *AHRA* : in 2013, Canadian Fertility Consultants, an agency based in Ontario, was charged with violating the *AHRA* and received a $60,000 fine.[42] This agency's business only continued to

38. Empirical research in Canada reveals that while some intended parents pursue surrogacy "independently" (i.e. without the assistance of an agency) many work with an agency to be matched with their surrogate. For instance, in a study I conducted with intended parents in 2022, the majority of individuals or couples who participated had paid an agency to help them find a surrogate ; see Stefanie Carsley, "Surrogacy Laws in Canada : Intended Parents' Experiences and Perspectives" [unpublished, study in progress] [Carsley, "Intended Parents' Experiences and Perspectives"]. See also Isabel Côté & Jean-Sébastien Sauvé, "Homopaternité, gestation pour autrui : no man's land ?" (2016) 46 :1 RGD 27 at 37 ; Kévin Lavoie & Isabel Côté, "Navigating in Murky Waters : Legal Issues Arising From a Lack of Surrogacy Regulation in Quebec" in Gruben, Cattapan & Cameron, eds, *supra* note 25, 81 at 87 [Lavoie & Coté, "Navigating in Murky Waters"] ; Samantha Yee et al, "The Experience of Canadian Gestational Carriers (GC) with the Surrogacy Process" (2017) 108 :3 Supplement E298.

39. According to their website, Canadian Surrogacy Community charges $20,000 for their services ; see Surrogacy Community "Costs of surrogacy" online : <www.surrogacycommunity.ca/costs-of-surrogacy/> ; Surrogacy in Canada Online charges clients $8,500 ; see Surrogacy in Canada Online "Costs of surrogacy" online : <www.surrogacy.ca/intended-parents/cost-of-surrogacy.html>. However, many agencies do not list their fees on their website and in recent interviews I conducted with intended parents, several reported that Canadian agencies are now charging intended parents over $20,000 ; see Carsley, "Intended Parents' Experiences and Perspectives", *supra* note 38.

40. Alison Motluk, "After Pleading Guilty for Paying Surrogates, Business Is Booming for This Fertility Matchmaker", *The Globe and Mail* (28 February 2016), online : <www.theglobeandmail.com/life/health-and-fitness/health/business-is-booming-for-fertility-matchmaker-leia-swanberg/article28930242/> [Motluk, "Business Is Booming"].

41. *Ibid.*

42. This case is unreported. But see Public Prosecution Service of Canada, *Annual Report 2013–2014* (Ottawa : Office of the Director of Public Prosecutions, 2014) at para 15 ; "*R v Picard and Canadian Fertility Consulting Ltd* Agreed Statement of Facts", online (pdf) : *Novel Tech Ethics* <www.dal.ca/content/dam/dalhousie/pdf/sites/noveltechethics/AHRA_Facts.pdf>. See also Alison Motluk, "First Prosecution Under *Assisted Human Reproduction Act* Ends in Conviction" (2014)

grow following its owner's conviction, and other agencies have since developed in response to increased demand for their services.[43]

Some Canadian surrogates are also being paid or are benefitting financially from carrying a child. Media reports and empirical research reveal that some surrogates have been reimbursed for the costs of items and services that they do not need, or that they did not incur as a result of their pregnancies.[44] Some surrogates are also encouraged by agencies to fabricate receipts or to collect receipts from friends and family members to justify being paid $2,000–$3,000 per month prior to, during, and following the pregnancy.[45] Some agencies hold the intended parents' money in trust to reimburse surrogates' expenses and pay the maximum amount to surrogates each month, irrespective of the receipts they provide.[46] This situation remains largely unchecked; while Health Canada has the power to audit agencies and intended parents,[47] there is no evidence that any audits have occurred since the *AHR Reimbursement Regulations* were enacted in 2020.[48]

186:2 CMAJ E75; Tom Blackwell, "Canadian Fertility Consultant Received $31k for Unwittingly Referring Parents to US 'Baby-Selling' Ring", *National Post* (15 December 2013), online: <www.nationalpost.com>; Carsley, "Regulating Reimbursements", *supra* note 25 at 817–19.

43. Motluk, "Business Is Booming", *supra* note 40.

44. For example, surrogates might claim for the costs of childcare, maternity clothes, groceries, massage therapy, snow removal, phone and internet, even if they have not incurred these expenses, or would have incurred them irrespective of the surrogacy arrangement; see e.g. Carsley, "Regulating Reimbursements", *supra* note 25 at 826–28; Chris Glover, Chelsea Gomez & Laura Clementson, "Why a Lack of Oversight of Surrogacy in Canada Leaves Some Parents Feeling Taken Advantage of", *CBC News* (3 March 2020), online: <www.cbc.ca>. See also Lavoie & Côté, "Navigating in Murky Waters", *supra* note 38 at 99–100; "Paid Surrogacy Driven Underground in Canada: CBC Report" (1 May 2007), online: *CBC News* <www.cbc.ca/news/technology/paid-surrogacy-driven-underground-in-canada-cbc-report-1.691254>; Samantha Yee, Shilini Hemalal & Clifford L Librach, "'Not my Child to Give Away': A Qualitative Analysis of Gestational Surrogates' Experiences" (2020) 33 Women and Birth E256 (which provides further evidence of payment taking place).

45. Carsley, "Intended Parents' Experiences and Perspectives", *supra* note 38; Glover, Gomez & Clementson, *supra* note 44.

46. *Ibid*.

47. *AHR Reimbursement Regulations, supra* note 25, s 12.

48. These regulations were meant to be introduced shortly after the *AHRA*'s enactment in 2004. In their absence, there was considerable disagreement among scholars about whether it was legal to reimburse a surrogate's expenses, and lawyers developed norms and rules about what ought to be considered a permissible reimbursement. For further discussion, see Carsley, "Regulating Reimbursements", *supra* note 25; Françoise Baylis, Jocelyn Downie & Dave Snow, "Fake It Till You Make It: Policymaking and Assisted Human Reproduction in Canada" (2014) 36:6 J Obstetrics & Gynaecology Can 510 at 511; Snow, Baylis & Downie, "Why the Government", *supra* note 25 at 4–6.

The *AHRA*'s criminal prohibitions have led some Canadian intended parents to go abroad to access surrogacy services in other countries where payment is legal.[49] The *AHRA* has also, paradoxically, made Canada a particularly attractive destination for "international" intended parents seeking to build their families through surrogacy.[50] Many intended parents pursue surrogacy outside of their countries of residence to avoid laws that prohibit surrogacy outright, or that prevent same-sex couples from pursuing surrogacy within their borders.[51] The *AHRA*'s prohibitions on payment, combined with Canada's publicly funded health care system, means that while surrogacy is still expensive in Canada, it is less costly than in the United States where payment is permitted and where a surrogate's health care bills may be borne by the intended parents.[52] Canada is also regarded as a "surrogacy-friendly" or "permissive" jurisdiction for surrogacy because of its parentage laws.[53] In many Canadian provinces—with the notable exception of Quebec—residents and non-residents can be readily recognized as the parents of a child born through surrogacy.[54]

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49. Canadians used to pursue surrogacy in India, Cambodia, Nepal, and Thailand, but in recent years these jurisdictions have prohibited surrogacy for foreigners. Currently, it is common for Canadians to go to the United States and, until recently, Ukraine was a popular surrogacy destination (Russia's invasion of Ukraine in 2022, however, has affected Canadians' ability to pursue surrogacy in that jurisdiction). For further discussion, see Karen Busby & Pamela M White, "Desperately Seeking Surrogates : Thoughts on Canada's Emergence as an International Surrogacy Destination" in Gruben, Cattapan & Cameron, eds, *supra* note 25, 213 at 215 ; Alison Motluk, "Crisis in Ukraine Creates Fears for Canadian Parents Using Ukrainian Surrogates", *The Globe and Mail* (17 February 2022), online : <www.theglobeandmail.com/canada/article-crisis-in-ukraine-creates-fears-for-canadian-parents-using-ukrainian/>.

50. Alison Motluk, "How Canada Became an International Surrogacy Destination", *The Globe and Mail* (7 October 2018), online : <www.theglobeandmail.com/opinion/article-how-canada-became-an-international-surrogacy-destination/> ; Busby & White, *supra* note 49.

51. Busby & White, *supra* note 49 at 216–17.

52. For a breakdown of the potential costs in Canada, see e.g. Glover, Gomez & Clementson, *supra* note 44 ; "Costs of Surrogacy", online : *Canadian Surrogacy Community* <www.surrogacy-community.ca/costs-of-surrogacy/> ; "Cost of Surrogacy", online : *Surrogacy in Canada Online* <www.surrogacy.ca/intended-parents/cost-of-surrogacy.html> ; "Intended Parents FAQ", online : *JA Surrogacy* <www.jasurrogacy.com/intended-parent-faqs>.

53. See especially Dave Snow, "Measuring Parentage Policy in the Canadian Provinces : A Comparative Framework" (2016) 59 :1 Can Public Administration 5. See also Karen Busby, "Of Surrogate Mother Born : Parentage Determinations in Canada and Elsewhere" (2013) 25 :2 CJWL 284 ; Sophia Fantus & Peter A Newman, "Motivations to Pursue Surrogacy for Gay Fathers in Canada : A Qualitative Investigation" (2019) 15 :4 J GLBT Family Studies 342 at 349–50.

54. As will be discussed below, for intended parents to be recognized as the parents of a child born in Quebec, they need to apply for a special consent adoption, which is a more difficult and time-consuming process than that in other provinces. In turn, to apply for the adoption, intended parents must also be Quebec residents. For further discussion see Carsley, "Surrogacy in Canada", *supra* note 23 at 306.

B. Civil Code of Quebec

While the AHRA applies across Canada, Canadian provinces and territories have different rules that apply to determine the parentage (or in Quebec, the filiation) of a child born through surrogacy.[55] The *Civil Code* does not clarify or regulate the filiation of children born through surrogacy. Rather, it simply contains one provision that responds to surrogacy arrangements which states that "any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null."[56] The language of "absolute nullity" communicates that surrogacy agreements pose a threat to public order[57] and may not be enforced.[58] As a result, surrogates and intended parents are not bound by their promises to one another, and their surrogacy agreement cannot determine who will be the child's legal parents. Rather, the child's filiation will be established in accordance with the *Civil Code*'s book on the family, and more specifically pursuant to the rules set out in the chapter on "filiation by blood."[59]

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55. British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, and Prince Edward Island have legislation that clarifies who are the parents of a child born through surrogacy and in what circumstances. Newfoundland and Labrador's *Vital Statistics Act*, SNL, c V-6.01, simply states that the intended parents may be registered if a judge makes a declaratory order or grants an adoption in favour of the intended parents. The Northwest Territories' *Children's Law Reform Act*, RSO 1990, c C.12, indicates that a birth mother's spouse is not presumed to be the child's parent if the birth mother intended to be a surrogate and give up the child to the child's genetic parent and that parent's spouse. New Brunswick's legislation is silent on surrogacy, but courts have allowed for judicial declarations in cases involving surrogacy in order to recognize the intended parents as the child's legal parents: see *MAM v TAM*, 2015 NBQB 145*; W(JA) v W(JE),* 2010 NBQB 414. Nunavut and Yukon's family law and vital statistics legislation are silent on surrogacy, and there have been no published court cases involving surrogacy in these territories.

56. Art 541 CCQ.

57. See art 417 CCQ, which states: "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 Jean-Louis Baudouin et Pierre-Gabriel Jobin, *Les obligations*, 6th ed (Cowansville, Québec: Yvon Blais, 2005) at 416; Régine Tremblay, "Surrogates in Quebec: The Good, the Bad, and the Foreigner" (2015) 27:1 CJWL 94 at 100.

58. See arts 1418 and 1422 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 Baudouin et Jobin, *supra* note 57 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 intérêt de l'enfant" (2011) 70:1 R du B 509 at 532; Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 122.

59. For further discussion, see Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 122–23, 130; Tremblay, *supra* note 57 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; Jean Pineau & Marie Pratte, *La famille* (Montréal: Thémis, 2006) at 683–84; 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

Where a child is born through surrogacy in Quebec, the person who gave birth—the surrogate—is presumed to be the child's legal mother.[60] If an intended father declares himself to be the child's parent to the *Directeur de l'état civil* (registrar of civil status), he can be recognized as the child's father.[61] However, for an intended father's spouse to establish a bond of filiation with the child they are required to apply for adoption. Pursuant to Quebec's regime of "general adoption," Quebecers cannot choose who will adopt their children and the adoption severs both birth parents' filial links to the child.[62] However, article 555 CCQ creates an exception for a child's relatives or stepparents who can adopt the child by "special consent."[63] This provision allows one of the child's legal parents to maintain their filial status, while their spouse adopts the child.[64] Intended parents have thus used article 555 CCQ to enable surrogates to transfer their parental rights to the intended father's spouse.[65]

Christelle Landheer-Cieslak & Louise Langevin, eds, *La personne humaine, entre autonomie et vulnérabilité : mélanges en l'honneur d'Édith Deleury* (Cowansville, Québec : Yvon Blais, 2015) 589 at 605 ; Alain Roy, *La filiation par le sang et par la procréation assistée (arts 522 à 542 CcQ)* (Cowansville, Québec : Yvon Blais, 2014) at 211–16.

60. Pursuant to the maxim *mater semper certa est* "the mother is always certain." For further discussion, see e.g. Benoît Moore, "Maternité de substitution et filiation en droit québécois" in *Liber amicorum : mélanges en l'honneur de Camille Jauffret-Spinosi* (Paris : Dalloz, 2013) 859 at 874 ; Roy, *supra* note 59 at 216–17 ; Marie-France Bureau & Édith Guilhermont, "Maternité, gestation et liberté : réflexions sur la prohibition de la gestation pour autrui en droit québécois" (2010) 4 McGill JL & Health 45 at 50 ; Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 130–31.

61. As will be discussed below, only an intended father can be recognized along with the surrogate because the *Civil Code*'s rules pertaining to filiation by blood only allow for the recognition of one mother and one father (unlike the rules pertaining to filiation by assisted procreation which allow a lesbian couple or single woman to be recognized as the child's sole parents where a donor is used to conceive. These rules do not apply where a child is born through surrogacy). See arts 523ff CCQ. See also Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 123, 131 ; Tremblay, *supra* note 57 at 102.

62. See Tremblay, *supra* note 57 at 97 ; Robert Leckey, "Identity, Law, and the Right to a Dream ?" (2015) 38 :2 Dal LJ 525 at 534 ; Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 132.

63. Art 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.

64. Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 132.

65. Not all surrogacy cases involving special consent adoptions have been published. But for some examples of cases where intended parents and surrogates have been successful at obtaining a special consent adoption, see *Adoption — 07219*, 2007 QCCQ 21504 ; *Adoption — 09185*, 2009 QCCQ 8703 ; *Adoption — 1342*, 2013 QCCQ 4585 ; *Adoption — 1445*, 2014 QCCA 1162 ; *Adoption — 1590*, 2015 QCCQ 10185 ; *Adoption — 1631*, 2016 QCCQ 6872 ; *Adoption — 16119*, 2016 QCCQ 8635 ; *Adoption — 2185*, 2021 QCCQ 1957 ; *Adoption — 21183*, 2021 QCCQ 5102 ; *Adoption — 21366*, 2021 QCCQ 9789 ; *Adoption — 21301*, 2021 QCCQ 7351.

When article 541 CCQ was introduced in 1991,[66] provincial lawmakers were also worried about the potential for surrogacy arrangements to objectify and exploit women and children.[67] Through article 541, lawmakers sought to protect surrogates by clarifying that they could not be compelled to give up the children they carried and would not be bound by any promises in a surrogacy contract regarding their behaviour during pregnancy or reproductive decisions.[68] They aimed to protect children by ensuring that their parentage would not be determined pursuant to an agreement.[69] By using the language of "absolute nullity," lawmakers also communicated their disapproval of surrogacy agreements[70] and hoped to discourage surrogacy arrangements from taking place in the province.[71] They believed that

66. Note that this provision initially stated: "Procreation or gestation agreements on behalf of another person are absolutely null." It was reworded in 2002 as part of a larger set of reforms to Quebec's laws pertaining to assisted procreation. For further discussion of these 2002 reforms, see 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. See also Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 126–27.

67. See e.g. Quebec, National Assembly, *Journal des débats*, 34-1, n° 7 (5 September 1991) [*Journal des débats* (5 September 1991)] at SC1-268–72. See also Angela Campbell, "Law's Suppositions About Surrogacy Against the Backdrop of Social Science" (2012) 43:1 Ottawa L Rev 29 at 50–51; 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 at 537, 539; Bureau & Guilhermont, *supra* note 60 at 65; Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 128–29.

68. In the years leading up to the introduction of article 541 CCQ, the *Conseil du statut de la femme* and the *Barreau du Québec* produced reports that expressed concerns about constraints being placed on surrogates' behaviour and reproductive decisions and about surrogates changing their minds and wishing to keep the babies they carried. Notably, the *Barreau* cited to the *Baby M case*, where a surrogate in New Jersey decided she could not give up the child and litigation ensued. See Quebec, Conseil du statut de la femme, *Les nouvelles technologies de la reproduction: avis synthèse du Conseil du statut de la femme* (Québec: Gouvernement du Québec, 1989) at 20; 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* (Cowansville, Québec: Yvon Blais, 1988) at 31–32; *In the Matter of Baby M*, [1988] 109 NJ 396. See also Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 128.

69. Québec, Commentaires du ministre de la Justice: le *Code civil du Québec*: un mouvement de société, Vol 1 (Québec: Publications du Québec, 1993) at 327.

70. Tremblay, *supra* note 57 at 100; Monique Ouellette, "The *Civil Code of Quebec* and New Reproductive Technologies" in *Proceed With Care: Overview of Legal Issues in New Reproductive Technologies* (Minister of Supply and Services Canada, 1993) at 31.

71. See *Journal des débats* (5 September 1991) 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.*

See also Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 129.

if surrogacy contracts were not binding, surrogates and intended parents would not be willing to enter these arrangements.[72]

Over the past three decades, however, Quebecers have pursued surrogacy and judges have been called upon to determine the filiation of children born through these arrangements. Initially, there was disagreement among Quebec judges and scholars about whether article 541 CCQ should be interpreted as prohibiting surrogacy in Quebec and thus whether intended parents could be legally recognized as the parents of a child born to a surrogate.[73] However, in 2014, the Quebec Court of Appeal clarified that while article 541 states that surrogacy agreements are unenforceable—and thus are not determinative of a child's filiation—intended parents may nonetheless obtain legal recognition by seeking an adoption by special consent.[74] In 2016, the Quebec Court of Appeal also held that if a surrogate decides not to declare her maternal filiation to the *Directeur de l'état civil*—and consequently is not listed on the child's act of birth—only the intended father needs to consent to his spouse adopting the child.[75]

While many intended parents have been successful in obtaining special consent adoptions, this process is time-consuming and expensive. Where a child is born in Quebec it takes between 4–7 months for

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72. See Ouellette, *supra* note 70 at 631, who explained 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 venture." See also Moore, *supra* note 60 at 866, who spoke about article 541 CCQ's "prophylactic" role ; Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 129–30.

73. For detailed discussion of these debates and of the arguments advanced by scholars and judges, see Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 132–34.

74. Justice Morrisette explained that the conditions for the special consent adoption were met as the surrogate agreed to give up her parental rights, and that it is irrelevant to the child's filiation whether the parties acted in accordance with the federal *AHRA* or used their own genetic material to conceive. He found that granting the adoption would be the "least unsatisfying solution" as it would be in the best interests of the child who had been living with the intended parents since birth. See *Adoption — 1445, supra* note 65 at para 54. For commentary on this case, see especially 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 RJT 451.

75. *Adoption — 161*, 2016 QCCA 16. For commentary on this case, see Andréanne Malacket, "Maternité de substitution : quelle filiation pour l'enfant à naître ?" (2015) 117 :2 R du N 229. Since *Adoption — 161*, there have been other instances where surrogates have chosen not to be registered and the court has allowed for the adoption without the surrogate's consent. See e.g. *Adoption — 21366*, *supra* note 65. For broader commentary on Quebec jurisprudence relating to surrogacy, see Michelle Giroux, "Les conventions de procréation ou de gestation pour autrui au Québec : entre solution jurisprudentielle et réforme du droit" in Véronique Boillet et al, eds, *La gestation pour autrui : approches juridiques internationales* (Limal, Belgique : Anthemis, 2018) 125 ; Tremblay, *supra* note 57 ; Carsley, "Reconceiving Quebec's Laws", *supra* note 9.

the adoption to be finalized, and typically intended parents will retain a lawyer to assist with this judicial process.[76] To apply for a special consent adoption, intended parents also need to be Quebec residents and thus must reside in Quebec for at least three months prior to initiating the adoption.[77] The intended parents can take the child into their care following the birth, but the intended parent who is not yet legally recognized will not have the same rights or obligations as their spouse vis-à-vis the child until the adoption is finalized and a new act of birth is issued with both intended parents' names.

Some intended parents are also ineligible to establish a bond of filiation with a child born through surrogacy in Quebec. While opposite-sex couples, single men, and male couples who build their families through surrogacy can be recognized through a special consent adoption, lesbian couples and single mothers by choice cannot unless they are close relatives of the surrogate.[78] The *Civil Code*'s chapter on filiation by blood only allows for a woman who gives birth and a male person to be recognized as the child's parents from the time of birth.[79] If there is no male intended parent, a female intended parent cannot adopt the child pursuant to article 555 CCQ unless she is the surrogate's mother, sister or daughter.[80] Similarly, unmarried spouses who have not cohabited continuously for at least three years also cannot apply to adopt a child born through surrogacy.[81] This was recently confirmed in *Droit de la famille — 212386,*[82] a case where the intended parents had been in a long-term relationship but lived in separate residences. While the court was willing to grant the intended mother shared custody of the child—in recognition of the parties' intentions and behaviour co-parenting the child—it noted that the intended mother could not establish a bond of filiation with the child pursuant to article 555 CCQ.[83]

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76. Intended parents need to wait at least 30 days following the birth to be eligible to obtain an order of placement. The adoption can then only be finalized three to six months following the order of placement. See arts 566–567 CCQ.

77. Carsley, "Surrogacy in Canada", *supra* note 23 at 306–8.

78. See Comité consultatif sur le droit de la famille, *supra* note 9 at 169; Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 141.

79. By contrast, lesbian couples or single mothers by choice can be recognized from birth in non-surrogacy situations but where they used a sperm donor to conceive. See arts 538-539 CCQ.

80. This is because article 555 CCQ allows an ascendant of the child, a relative in the collateral line to the third degree or the spouse of that ascendant or relative to adopt the child.

81. Article 555 CCQ states that "in the case of de facto spouses, they must have been cohabiting for at least three years."

82. 2021 QCCS 5233.

83. *Ibid* at paras 7, 113–27.

In turn, should a surrogate or an intended father who is listed on the act of birth refuse to consent to the adoption, the intended father's spouse will be unable to establish a bond of filiation with the child. This was clarified in *Adoption — 1873*,[84] a case involving a dispute over the payment owed to a surrogate from the United States who helped a Quebec couple build their family.[85] While the surrogate did not wish to parent the twins born through this arrangement, she claimed that the intended parents owed her $9,244.74 under their surrogacy agreement and that she would only consent to the special consent adoption once this was paid.[86] The intended parents argued that they did not owe her further money and brought an application for an order of placement for adoption in Quebec.[87] The court held that the twins' filiation was established with the surrogate and their genetic father and that as a result, both needed to consent to the adoption for the intended father's spouse to be recognized.[88]

By contrast, intended parents in Quebec can potentially obtain legal status within days or weeks of the birth, without obtaining an adoption or legal assistance, if the child is born outside of the province.[89] For instance, in some Canadian provinces, intended parents who are non-residents may register as the child's parents or may obtain a court order

84. 2018 QCCQ 1693.

85. The surrogate lived in Tennessee and the twins were born there.

86. *Adoption — 1873*, *supra* note 84 at paras 55–59.

87. The intended parents maintained that the surrogate had clearly renounced her parental rights to the twins in favour of the twins' intended father, and that she had abdicated her parental authority. As a result, they argued that her consent was unnecessary and that it would be in the twins' best interests to permit the adoption. *Ibid* at paras 24–27. See also Carsley, "Surrogacy in Canada", *supra* note 23 at 53.

88. *Adoption — 1873, supra* note 84 at para 82.

89. I say "can potentially" because this depends on whether the intended parents are recognized on the child's birth certificate or through a judicial order in the jurisdiction where the child was born. If not, they may need to apply for an adoption in Quebec. For cases where the child was born outside of Quebec but where an adoption was nonetheless required, see e.g. *Adoption — 1631, supra* note 65 ; *Adoption — 16199*, 2016 QCCQ 8951 ; *Adoption — 1873, supra* note 84. Some intended parents have also needed to seek judicial recognition of their parental status where their child was born outside of Canada. Notably, in *Droit de la famille — 151172*, 2015 QCCS 2308, a male couple was initially denied paternity benefits by the *Régime québécois d'assurance parentale (*RQAP), because the RQAP claimed that the child's Pennsylvania birth certificate—which identified the intended fathers as the child's parents—did not carry weight in Quebec and that surrogacy was illegal in the province. The court ultimately recognized their parental status ; see Sophie Allard, "Mères porteuses hors Québec : la fin de la confusion ?", *La Presse* (28 September 2015), online : <www.plus.lapresse.ca/screens/f6de70ed-8ae9-4e55-a2f6-bd7a089c0622%7CEaLeKMriB7oL.html>.

declaring them to be the child's parents.[90] Intended parents can then use this birth registration or court order to register the child's birth with the *Directeur de l'état civil* in Quebec.[91] Several Canadian provinces also allow the intended parents to be potentially recognized even if the surrogate fails to give consent. Notably, British Columbia, Saskatchewan, Manitoba, Ontario, and Prince Edward Island's respective family law statutes give judges discretion to determine who will be a child's legal parents in the event of a dispute over parentage.[92] To date, where such disputes have arisen in these jurisdictions, intended parents have been awarded sole custody.[93] Unlike Quebec, in these jurisdictions an intended parent's ability to obtain legal recognition is also not dependent on their spouse providing consent following the birth.

Differences between Quebec's and other provinces' legal regimes have led Quebec to develop a reputation as an undesirable jurisdiction in which to pursue surrogacy. Lawyers and agencies regularly counsel

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90. Residents and non-residents may be registered as the parents of a child born through surrogacy provided certain statutory requirements are met in British Columbia, Ontario, and Prince Edward Island. See *Family Law Act*, SBC 2011, c 25, s 29 [*BC FLA*]; *Children's Law Reform Act*, RSO 1990, c C-12, ss 10–11 [*CLRA*]; *Children's Law Act*, RSPEI 2021, c C-6.1, s 23 [*PEI CLA*]. Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, and Newfoundland and Labrador require intended parents to obtain a judicial order declaring them to be the child's sole parents. While the criteria for obtaining a judicial declaration developed initially through case law, over the past decade several provinces have amended their family law statutes to clarify the requirements that must be met to obtain this judicial declaration. See *Children's Law Act*, SS 2020, c 2, s 62 [*SK CLA*]; *Family Maintenance Act*, CCSM c F20, s 24 [*FMA*]; *Family Law Act*, SA 2003, c F-4.5, s 8.2(1); *Birth Registration Regulations*, NS Reg 390/2007, s 5.

91. See "Insertion of an act made outside Québec into the Québec register of civil status" (1 June 2022), online: *Gouvernement du Québec* <www.etatcivil.gouv.qc.ca/en/insertion-act.html>; art 137 CCQ.

92. *BC FLA, supra* note 90, s 31; *SK CLA*, *supra* note 90, s 62; *FMA, supra* note 90, s 24; *CLRA, supra* note 90, s 10(6); *PEI CLA*, *supra* note 90, ss 23–24.

93. There have been only two reported surrogacy cases outside of Quebec involving disputes over parentage, both in British Columbia. Both involved only interim judgments, where the court found in favour of the intended parents. See *KB v MSB*, 2021 BCSC 1283; *HLW and THW v JCT and JT*, 2005 BCSC 1679. However, interviews I conducted with surrogacy lawyers revealed that there have been other disputes that have arisen in Ontario and British Columbia which were litigated but which ultimately settled or where the judgments rendered were sealed. In each instance where the intended parents sought sole custody, this was ultimately granted by the court, or the surrogate agreed to relinquish her parental rights following mediation or negotiation. Several of these cases were instances where the surrogate refused to relinquish her parental rights or sought to reclaim parentage because of a dispute over the amount of contact she would have with the child, the expenses owed to her, or medical decisions that the intended parents wished to make for the child. See Stefanie Carsley, "Surrogacy in Canada: Lawyers' Experiences and Practices" (2022) 34:1 CJWL 41 at 71–76 [Carsley, "Lawyers' Experiences and Practices"].

intended parents to avoid working with surrogates in Quebec,[94] and surrogates who live in Quebec are sometimes asked to drive over the border to give birth in Ontario to avoid Quebec's family law regime.[95] Some lawyers also include provisions in surrogacy contracts that stipulate that surrogates agree not to travel to Quebec during their pregnancies, to ensure that they do not give birth in the province.[96]

Indeed, while the *Civil Code* makes clear that surrogacy contracts are "unenforceable," Quebecers nonetheless enter into surrogacy agreements prior to conception.[97] In addition to stating who intends to be the child's legal parents, and the kinds of reimbursements the intended parents agree to pay to the surrogate, these contracts often contain provisions about the surrogates' behaviour, medical treatment, food choices, sexual conduct, leisure activities, and reproductive decisions.[98] Some also contain "penalty clauses" that stipulate that in the event the surrogate breaches the agreement, the surrogate will need to repay the expenses paid and will not be entitled to any expense reimbursements moving forward.[99]

The inclusion of these clauses in a contract drafted by a lawyer may mislead surrogates and intended parents into thinking that these agreements could be binding or would be given legal weight in Quebec.[100] Penalty clauses suggest that surrogates could face financial consequences should they, for instance, refuse to transfer their parental rights or refuse to have an abortion—even though the *Civil Code* and prior case law make clear that a judge would be loath to enforce such

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94. Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 63–64; Lavoie & Côté, "Navigating in Murky Waters", *supra* note 38 at 104.

95. Notably, surrogates living in Montréal have driven to Hawkesbury to give birth, while those living in Gatineau or Hull have crossed the bridge to give birth in Ottawa. While a lawyer in Quebec noted that her clients in Montréal no longer need to drive to Hawkesbury since the Court of Appeal's decision in *Adoption — 1445*, *supra* note 65, intended parents who participated in my 2022 study reported that they were still being advised that Quebec surrogates should cross the border into Ontario to give birth. See Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 64; Carsley, "Intended Parents' Experiences and Perspectives", *supra* note 38.

96. Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 63–64.

97. See especially Lavoie & Côté, "Navigating in Murky Waters", *supra* note 38; Carsley, "Lawyers' Experiences and Practices", *supra* note 93.

98. *Ibid*.

99. See Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 67–69; Carsley, "Surrogacy in Canada", *supra* note 23 at 164–69.

100. For further discussion, see Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 69. See also Lavoie & Côté, "Navigating in Murky Waters", *supra* note 38 at 95.

penalties.[101] These agreements may also give surrogates a false sense of security. For instance, should the intended parents renege on their promises—and either refuse to take custody of the child or refuse to reimburse the surrogate's expenses—the contract will provide no protection for the surrogate or the child. [102] The intended parents will not be bound by their promise to take the child into their care or to support the child financially. An intended father might be held liable for child support, but only if he has a genetic connection to the child.[103] In turn, surrogates will be unable to enforce their surrogacy agreements should the intended parents refuse to reimburse their expenses.[104] Surrogates in this situation could refuse to consent to the adoption until they are paid.[105] However, in circumstances where they have already consented to an adoption, or where they have miscarried, they would have no recourse.[106]

As is evidenced by the foregoing discussion, both the federal *AHRA* and the *Civil Code*'s surrogacy laws have not been fully successful in achieving lawmakers' objectives. While federal and provincial lawmakers sought initially to discourage surrogacy arrangements, Quebecers have continued to build their families through surrogacy and commercial surrogacy persists despite the *AHRA*'s criminal prohibitions. In turn, while lawmakers aimed to protect surrogates and the children born through surrogacy, in practice, some children are unable to establish a bond of filiation with the parents who are raising them, and surrogates are afforded little protection in the event intended parents renege on their promises. A lack of regulation over surrogacy agreements has also meant that some surrogates and intended parents may be misled into believing

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101. See *Winnipeg Child and Family Services (Northwest Area) v G (DF)*, [1997] 3 SCR 925; *R v Morgentaler*, [1998] 1 SCR 30; *Tremblay v Daigle*, [1989] 2 SCR 530. See also Stefanie Carsley, "Tort's Response to Surrogate Motherhood: Providing Surrogates With a Remedy for Breached Agreements" (2013) 46:1 UBC L Rev 1 at 8; Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 61.

102. There has been at least one instance of this happening in Quebec. See 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>; Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 138–40.

103. Roy, *supra* note 59 at 216; Comité consultatif sur le droit de la famille, *supra* note 9 at 168; Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 138.

104. Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 139.

105. As was the case in *Adoption — 1873*, *supra* note 84. There have also been cases outside of Quebec where this has arisen; see Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 75–76.

106. For examples of this occurring outside of Quebec, see Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 76–77.

that they are required to abide by the terms of their surrogacy agreements or face legal or financial consequences.

With this context in mind, the following part explores Bill 2's proposed reforms and their potential effects for surrogates, intended parents, and the children born from these arrangements. It considers to what extent these proposed reforms would better account for the needs and lived experiences of Quebecers who seek to build their families through surrogacy, while balancing and supporting surrogates' and children's interests. The next part first provides an overview of Bill 2's proposed changes to article 541 CCQ. It then highlights the most notable aspects of the bill, discusses their implications, and provides recommendations that the government may wish to consider in moving forward with these reforms.

II. PROPOSED REFORMS TO QUEBEC'S SURROGACY LAWS

A. Bill 2's surrogacy provisions

Bill 2 proposed to repeal article 541 CCQ and to introduce a highly regulated regime for surrogacy arrangements.[107] The bill first outlines a series of "general provisions" that would apply to all intended parents who wish to be recognized in Quebec as the parents of a child born through surrogacy.[108] The bill defines a "parental project involving surrogacy" as existing "from the moment a person alone or spouses have decided, before a child is conceived, to resort to a woman or a person who is not a party to the parental project to give birth to the child."[109] It stipulates that surrogates must be over the age of 21,[110] cannot be paid to carry a child,[111] and cannot combine their genetic

107. The applicable changes to art 541 CCQ were set out in s 96 of Bill 2. For the sake of clarity and specificity, I am going to cite to the proposed provisions (arts 541.1, 541.2, etc.).

108. Bill 2, *supra* note 1, arts 541.1–541.6.

109. *Ibid*, art 541.1.

110. *Ibid*.

111. *Ibid*, art. 541.2 states that the "contribution made to the parental project by the woman or the person who has agreed to give birth to a child must be gratuitous" but that the surrogate may be "reimbursed or paid certain expenses determined by government regulation" and may "be compensated, if applicable, for the loss of work income." It also notes that if the surrogate lives outside of Quebec, the laws of that jurisdiction apply regarding reimbursement or payment of expenses and compensation for lost income.

material with that of a blood relative to conceive.[112] These general provisions state that only the surrogate and intended parents may be parties to a surrogacy agreement and that this agreement must be entered into prior to the surrogate's pregnancy.[113] They also note that the surrogate must consent, following the birth, to the intended parents being recognized as the child's sole parents in order for the parental project to be completed.[114] The surrogate's consent needs to be in writing, or it may be "given by a judicial declaration" in the event of proceedings related to the child filiation.[115]

If the surrogate and intended parents have both resided in Quebec for over a year, there are two means through which the intended parents may establish their bond of filiation with the child.[116] The first, which the bill refers to as the "legal establishment of filiation," would allow the intended parents to register as the parents of a child born through surrogacy without going to court.[117] The second, referred to as the "judicial establishment of filiation," would provide courts with the power to recognize intended parents as the child's parents where the conditions for the legal establishment of filiation are not met, but where the general conditions for the surrogacy arrangement have been fulfilled.[118]

To qualify for the "legal establishment of filiation" route, intended parents and surrogates must satisfy two conditions prior to the child's conception.[119] First, surrogates and intended parents need to independently attend an information session with a professional qualified to inform them of the "psychosocial implications of the surrogacy project" and the "ethical issues it involves."[120] Second, following their respective information sessions, intended parents and surrogates must

112. Bill 2, *supra* note 1, art 541.1. It also notes that if more than one child is born from a surrogacy arrangement they cannot be separated.

113. *Ibid,* art 541.3. Presumably, this could be an oral agreement or need not be written with the formalities that would be required for the "legal establishment of filiation," because this general provision applies to all surrogacy arrangements in the province.

114. *Ibid*, art 541.4.

115. *Ibid.* When read alongside articles 541.20, 541.23, 541.24, this provision seems to be saying that the surrogate's consent is required, unless a court determines that the child's filiation should be changed without consent.

116. *Ibid,* art 541.7.

117. *Ibid*, arts 541.10–541.19.

118. *Ibid,* arts 541.20–541.26.

119. The bill refers to these as "prior conditions." See *ibid,* arts 541.10–541.12.

120. *Ibid*, art 541.10.

enter into a written surrogacy agreement by way of a notarial act *en minute*.[121] If these "prior conditions" are met, intended parents would be able to register as parents following the birth, provided their surrogate consents.[122] Surrogates would be required to wait until 7 days have elapsed since the birth before consenting,[123] but need to consent within 30 days of the birth.[124] During this period, intended parents would be permitted to take the child into their care[125] and they would have full parental authority.[126]

If a surrogate refuses to consent or disappears with the child, the surrogate would be recognized as the child's parent.[127] However, the intended parents could apply to court to modify the child's filiation.[128]

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121. *Ibid*, art 541.11.

122. *Ibid,* art 541.15. More specifically, the surrogate needs to consent to "their bond of filiation with regard to the child being deemed never to have existed" and to a bond of filiation being established with the intended parents. See *ibid,* art 541.14.

123. If the surrogate dies before providing consent, or becomes incapable of providing consent, the surrogate's consent is deemed to have been given and the intended parents may still be registered as the child's parents. See *ibid*, art 541.17.

124. *Ibid*, art 541.14. Some commentators have read article 541.14 as allowing surrogates to revoke their consent within 30 days of the birth. See Isabel Côté & Kévin Lavoie, *Faire famille au 21e siècle : éclairages scientifiques pour une réforme du droit de la famille adaptée aux réalités familiales contemporaines*. Mémoire présenté dans le cadre des consultations particulières et des auditions publiques pour le projet de loi nº 2 : *Loi portant sur la réforme du droit de la famille en matière de filiation et modifiant le Code civil en matière de droits de la personnalité et d'état civil* (2021) at 5 [Coté & Lavoie, *Faire famille au 21e siècle*] ; Schirm & Tremblay Avocats, *Dans le meilleur intérêt de nos enfants*, Mémoire présenté à la Commission des institutions dans le cadre des consultations particulières et auditions publiques sur le projet de loi nº 2 (2021) at 2. If read this way, this provision would more closely mirror Quebec's adoption laws—which only allow an order of placement to be granted 30 days following the birth—and would align with recommendations from the *Comité consultatif* to require surrogates to wait 30 days prior to providing consent. See Comité consultatif sur le droit de la famille, *supra* note 9 at 175 ; art 567 CCQ. However, I read Bill 2 differently. The bill requires the surrogate's consent be given within 30 days of the birth, after which the intended parents can bring a claim for a judicial determination of the child's filiation if such consent is not given. However, if the surrogate provides consent after 7 days have elapsed since the birth, but prior to the 30-day mark, Bill 2 seems to allow the intended parents to register as the child's parents without waiting until 30 days have elapsed.

125. Unless the surrogate objects. See Bill 2, *supra* note 1, art 541.13.

126. In other words, they would be given all rights and responsibilities with respect to the child, see *ibid* ; Government of Quebec, "Parental authority", online : *Justice Québec* <www.justice.gouv.qc.ca/en/couples-and-families/parenthood/parental-authority/>.

127. In these situations, the child's filiation would be established pursuant to the "rules of filiation for children born of procreation not involving the contribution of a third person." See Bill 2, *supra* note 1, arts 541.16–541.18. These rules are a proposed modified version of the *Code*'s current rules on filiation by blood. The surrogate, as the person who gave birth, would be presumed to be the child's parent. However, the bill makes clear that the surrogate's spouse would not be presumed to be a parent.

128. Within 60 days of the birth, see *ibid*, art 541.20.

If the intended parents and surrogate have otherwise fulfilled the "general conditions" applicable to a parental project involving surrogacy as well as the "prior conditions" allowing for the legal establishment of filiation, then the court would be given discretion to decide whether or not to recognize the intended parents instead of the surrogate.[129]

If the "prior conditions" for the legal establishment of the child's filiation—in other words, the requirements for independent counselling and a notarized agreement—are not met, the surrogate would similarly be registered as the child's legal parent.[130] In this scenario, the intended parents could also apply to court to be recognized *in lieu* of the surrogate.[131] If the court finds that the "general conditions" for the parental project are met, and the surrogate consents, the court is instructed to change the child's filiation.[132] If, however, the general conditions are met and the surrogate has not consented, the court would be required to confirm the child's filiation with the surrogate.[133] In this situation, the court would only have the power to change the child's filiation if the surrogate has died, has become incapacitated prior to giving consent, or has disappeared with or without the child.[134] By contrast, if the surrogate consents but the "general conditions" are not met—for instance, if the surrogate is not over the age of 21, or was paid—the court would be required to declare the parental project null and dismiss the application.[135]

If the surrogate lives outside of Quebec, the procedure for intended parents to obtain filial status would be different.[136] Intended parents would need to apply to the Minister of Health and Social Services (the Minister) to obtain prior authorization to engage in a parental project involving surrogacy, and to obtain a "certificate of compliance"

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129. The court is instructed to "analyze the situation" and consider the interests of the child, the efforts made to obtain the surrogate's consent and the reasons why this could not be obtained, see *ibid*. Please note: Bill 12 amended this provision such that a court would no longer be given this discretion to modify the child's filiation in a situation where the surrogate has not consented. See Bill 12, *supra* note 12.

130. See Bill 2, *supra* note 1, art 541.21.

131. *Ibid.*

132. *Ibid,* art 541.22.

133. *Ibid.*

134. *Ibid*, arts 541.23–541.24.

135. *Ibid,* art 541.22.

136. *Ibid*, arts 541.27–541.38.

following the birth. The intended parents would then need to apply to court to be legally recognized as the child's parents in Quebec.

For the Minister to authorize a parental project involving surrogacy outside of Quebec, the intended parents must have lived in Quebec for at least a year, one or more of the intended parents must be a Canadian citizen or permanent resident, and if an intended parent is a permanent resident, they must have used their genetic material to conceive.[137] The intended parents must also have attended an information session on the psychosocial and ethical implications of surrogacy,[138] and the surrogate must live in a Canadian province or territory or a foreign state that is designated by the Quebec government as having rules that are not contrary to public order and that safeguard the interests of the child and the surrogate.[139]

If the intended parents obtain this first authorization, they would be required to submit to the Minister their unsigned surrogacy agreement, along with information about their surrogate and other documentation determined by government regulation.[140] If the agreement is found to be compliant, the Minister could then provide them with a second authorization to proceed and the intended parents would be required to file a signed copy of their agreement with the Minister along with other "necessary documents."[141]

After the birth, the intended parents would need to notify the Minister of the birth. The Minister would then ascertain that the project "is compliant as a whole" and could require additional information or

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137. *Ibid*, art 541.28. It is unclear why the government has created these specific requirements. Lawmakers may be seeking to ensure that intended parents have a sufficient connection to Canada and Quebec for their child who is born abroad to have access to benefits such as Quebec health care. This rule may also reflect a desire to ensure that children born abroad will not be stateless but will have access to Canadian citizenship (either by virtue of their parents being citizens or by applying for citizenship on their behalf once they return to Canada through the permanent residency process). However, the rationale for these rules, and particularly for permanent residents using their genetic material to conceive, should be explained by the government. It used to be the case that a child could only obtain Canadian citizenship by descent if at least one of their parents was a Canadian citizen and they were conceived using that parent's genetic material ; however, this policy has changed and still does not explain these proposed rules. See *Caron c Canada (AG)*, 2020 QCCS 2700 ; Stefanie Carsley, "DNA, Donor Offspring and Derivative Citizenship : Redefining Parentage under the *Citizenship Act*" (2016) 39 :2 Dal LJ 525.

138. Bill 2, *supra* note 1, art 541.29.

139. *Ibid*, art 541.31.

140. *Ibid,* art 541.33.

141. *Ibid*.

documentation. If the agreement has been implemented in compliance with the parental project since the last authorization and the child was born in a designated province, territory or state, then the Minister would issue a certificate of compliance. If not, the Minister would be required to inform the intended parents of the reasons for refusal.[142]

The intended parents would then apply to court following the child's birth to be recognized as the child's parents.[143] The judge would be required to verify that the parties have complied with all rules governing parental projects involving surrogacy, that the surrogate consented to give up parental rights and that the Minister issued a certificate of compliance.[144] If the Minister has not issued a certificate of compliance, the judge is to hear the Minister and the parties and may nonetheless recognize the intended parents, if this is for "serious reasons," if the interest of the child requires this, and if the surrogacy project complies with the "general conditions" set out for all surrogacy arrangements.[145]

B. Cross-border arrangements and residency requirements

Bill 2's proposed reforms would make it easier for some intended parents to obtain legal recognition where their child is born through surrogacy in Quebec. By providing some intended parents with the opportunity to be legally recognized without going to court, they would be spared the time and costs associated with needing to obtain an adoption or judicial order. Where intended parents and the surrogate have not met the requirements for a notarized surrogacy contract and independent counselling prior to conception, the judicial establishment of filiation route would nonetheless be available as another option for them to establish their bond of filiation with the child. These new rules would also mean that any intended parents who reside in Quebec would be eligible to obtain recognition through either the legal or judicial establishment of filiation[146]—lesbian couples, single women by choice, and common law spouses who have not cohabited for three years could all be recognized.

142. *Ibid*, art 541.34.
143. *Ibid,* art 541.35.
144. *Ibid*, art 541.37.
145. *Ibid.*
146. Provided their surrogate also lives in Quebec.

However, to benefit from the "legal establishment of filiation" or "judicial establishment of filiation," the intended parents and the surrogate would both need to reside in Quebec. Should Quebec intended parents seek to work with a surrogate who lives outside of the province, they would need to go through a more time-consuming and laborious process than they do now to obtain legal recognition in Quebec. In turn, intended parents would need to live in Quebec for at least one year to be recognized as the parents of a child born to a surrogate in the province through either the legal or judicial process.

In introducing ministerial and judicial oversight over out-of-province arrangements, lawmakers may be seeking to ensure that Quebecers do not circumvent the *AHRA* or *Civil Code*'s provisions by working with a surrogate outside of the province.[147] Lawmakers may also be looking to prevent Quebecers from pursuing surrogacy arrangements in jurisdictions where there is concern that surrogates might be mistreated or might be pressured to engage in surrogacy for financial reasons. Indeed, the Quebec government and the *Conseil du statut de la femme* have long expressed concern about the potential for surrogates in some countries to be exploited or abused.[148]

It seems unlikely, however, that Bill 2 will dissuade Quebecers from working with surrogates outside the province. Intended parents in Quebec will continue to work with surrogates in other jurisdictions—not necessarily to avoid Quebec law, but because the friend, family member, or stranger who has offered to act as a surrogate for them lives outside of Quebec. Intended parents will also likely continue to pursue surrogacy in other provinces or countries if they can more readily be matched with a surrogate—irrespective of whether the Minister authorizes their surrogacy arrangement. Indeed, the bill acknowledges this by allowing judges to nonetheless recognize a bond of filiation between the child and intended parents, even if the Minister has not provided authorization.[149] It is also not clear that the

147. Note that legislative debates on Bill 2 do not provide insight into lawmakers' intentions with respect to these provisions.

148. In 2016, the Quebec government unsuccessfully opposed two special consent adoptions where children were born to surrogates in India and Thailand. The Attorney General argued that the surrogacy agreements in these cases contravened public order because the obligations imposed on surrogates were abusive and commodified women and children. See *Adoption — 1631*, *supra* note 65 ; *Adoption — 16199, supra* note 89. See also Conseil du statut de la femme, *supra* note 11 at 46–50, 137.

149. See Bill 2, *supra* note 1, art 541.37.

government is justified in treating surrogacy arrangements in other Canadian provinces the same as those abroad. While surrogates in Canada can be vulnerable in surrogacy arrangements, empirical research suggests that at least some Canadian surrogates possess more agency and power, and are provided greater protection, than has been traditionally presumed.[150]

Bill 2's residency requirements, in turn, seem to be seeking to prevent intended parents from other countries or provinces from working with Quebec surrogates. Some scholars have argued that international intended parents should be prohibited from working with surrogates in Canada because they should be unable to benefit from the Canadian health care system's scarce resources without paying taxes.[151] They have also suggested that a ban on foreigners would allow Canada to become self-sufficient with respect to assisted reproduction ; in other words, if surrogates in Canada could only work with intended parents who are Canadian residents, intended parents in Canada would no longer need to seek out surrogates outside of the country.[152] However, concerns about access to health care do not explain why Quebec would seek to prevent intended parents from other Canadian provinces from working with surrogates in Quebec. Perhaps in instituting a one-year residency requirement the province is similarly trying to promote "self-sufficiency" within Quebec. However, this approach presumes that surrogates in Quebec will necessarily be willing to act for an individual or couple within the province. It overlooks that Quebec surrogates may wish to act for a friend or relative outside the province or may be seeking to work with intended parents whose values, experiences, and backgrounds make them a suitable match, irrespective of their province of residence. It also seems likely that intended parents from outside the province will continue to work with surrogates living in Quebec. To avoid the one-year residency requirement for intended parents, surrogates will simply continue to travel to Ontario or other provinces to give birth.

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150. Carsley, "Lawyers' Experiences and Practices", *supra* note 93. See also Cattapan, *supra* note 32 ; Busby & Vun, *supra* note 32, who note that there is no evidence suggesting that surrogates in Canada are being exploited.

151. Côté & Lavoie, *Faire famille au 21e siècle*, *supra* note 124 at 9 ; Busby & White, *supra* note 49 at 241.

152. Busby & White, *supra* note 49 at 242.

C. Information sessions and notarized agreements

The requirement that surrogates and intended parents each attend an information session prior to conception could help to better ensure that surrogates and intended parents are making informed, autonomous decisions to enter surrogacy arrangements. While it has become common practice for clinics or agencies to mandate that surrogates and intended parents meet with a counsellor prior to proceeding with embryo implantation, making this a requirement for an expedited parentage process could encourage those surrogates and intended parents who do not work with a clinic or an agency to similarly receive counselling.[153] In turn, it seems prudent to mandate that surrogates and intended parents attend these sessions independently to ensure that the parties can ask the counsellor any questions they have, or raise concerns, without worrying about upsetting the other party.

The utility of these information sessions, however, will depend heavily on their content and the expertise of the professionals involved. It is currently unclear whether these information sessions will be regulated or standardized, or if professionals will themselves decide how best to advise surrogates and intended parents about the "psychosocial implications of surrogacy" and the "ethical issues it raises." In turn, while the bill notes that the professional leading the information session needs to be a member of a professional order designated by the Minister of Justice, it is currently unclear whether these professionals will undergo any specific training, or need to have any knowledge about surrogacy arrangements, prior to giving these sessions. In the absence of further information about how these sessions will be run, it is difficult to assess whether they will in fact be beneficial for surrogates or intended parents.

Requiring parties to enter into a notarized agreement prior to conception could also better ensure that surrogates and intended parents

153. Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 149; Gouvernement du Québec, Commission de l'éthique de la science et de la technologie, *Avis : Éthique et procréation assistée : des orientations pour le don de gamètes et d'embryons, la gestation pour autrui et le diagnostic préimplantatoire* (2009) at 67–68; Carsley, "Surrogacy in Canada", *supra* note 23 at 128.

are properly informed of their legal rights and obligations.[154] Much like the requirement for counselling, however, the potential benefits of this agreement, and the appropriateness of having a single notary drafting and overseeing the contract, will depend on the agreement's content. Bill 2 states that much of the content of the agreement will be determined by future regulations,[155] but notes that the agreement should be drafted (at least initially) in French,[156] should contain some information about the surrogate,[157] and should provide for an amount of money for surrogates' reimbursements and compensation for lost income that will be held in trust by the notary.[158] It also stipulates that any contractual provisions that seek to penalize the surrogate for not providing consent, or that would prevent a surrogate from giving free and enlightened consent are deemed unwritten,[159] and notes that the intended parents cannot seek to reclaim money paid to the surrogate for reimbursement or lost income, even if the surrogate terminates the agreement.[160] It also indicates that only the surrogate can unilaterally terminate the agreement prior to the birth, and clarifies that if the surrogate undergoes an abortion, the surrogacy agreement is terminated without the need to communicate this in writing.[161]

These provisions respond to the concerns outlined above about penalty clauses that may mislead surrogates and intended parents about the weight that would be given to surrogacy contracts. However, without further information about the regulations that will define the substance of these agreements, it is unclear whether these contracts might nonetheless continue to contain clauses about surrogates'

154. The *Barreau du Québec* similarly has pointed out that a contract could help to protect the parties; however, it argued that this should not be mandatory as part of the parentage process. It also noted that the contract should be a document from the state that details the rights and obligations of the parties in the *Code* and in Quebec's *Charter of Human Rights and Freedoms* and that this document should also include a list of prohibited clauses. See Barreau du Québec, *Mémoire du Barreau du Québec : Projet de loi 2 — Loi portant sur la réforme du droit de la famille en matière de filiation et modifiant le Code civil du Québec en matière de droits de la personnalité et d'état civil* (Québec : Barreau du Québec, 2021) at 16–18, online (pdf) : <www.barreau.qc.ca/media/3016/2021-memoire-pl2.pdf> [Barreau du Québec, *Mémoire du Barreau du Québec*].

155. Bill 2, *supra* note 1, art 541.12.

156. It can only be translated into a second language on request by the parties after seeing the French version. See *ibid,* art 541.11.

157. *Ibid,* art 541.12.

158. *Ibid.*

159. *Ibid,* art 541.5.

160. *Ibid,* art 541.2.

161. *Ibid,* art 541.8.

behaviour or reproductive choices. As discussed previously, these kinds of provisions would be clearly unenforceable ; however, surrogates and intended parents could presume they are binding if they are included in a legal document.[162] In the proposed regulations, lawmakers should prohibit the inclusion of these provisions in surrogacy contracts. They should also stipulate that these contracts will only contain provisions about who intends to be the child's legal parents as well as the reimbursements and lost income the intended parents agree to cover.[163] In the event of a dispute, judges might be willing to look at these kinds of provisions as evidence of the parties' intentions.

Surrogates and intended parents should have conversations prior to conception about their intentions and expectations with respect to the surrogate's medical treatment, travel, food choices, reproductive decisions, or the amount of communication and contact between the parties. These conversations can ensure that the parties' expectations are aligned and can prevent future disputes. However, arguably a social worker or a counsellor would be better suited than a lawyer to have these conversations with surrogates and intended parents, and to record their intentions in writing.[164] Professors Isabel Côté and Kévin Lavoie have suggested that an additional mandatory counselling session with both intended parents and the surrogate present would be helpful to encourage the parties to have an open dialogue about their expectations and to develop a harmonious relationship.[165]

The *Barreau du Québec* has questioned whether it makes sense to have a single notary advising both parties, rather than the surrogate and intended parents receiving independent legal advice.[166] They point out that surrogates and intended parents may have conflicting interests and as a result it may be beneficial for each party to retain a

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162. The *Barreau du Québec* similarly noted in their submissions to the government that the contract should be a government document that indicates that these kinds of clauses are not enforceable. However, the *Barreau* also suggested that the parties should be able to personalize the contract by, for instance, indicating that the surrogate wishes to receive photos of the child. See Barreau du Québec, *Mémoire du Barreau du Québec*, *supra* note 154 at 18. See also Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 69.

163. I have previously made this argument, see Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 79.

164. *Ibid*.

165. Côté & Lavoie, *Faire famille au 21e siècle*, *supra* note 124 at 3. See also Québec, Conseil du statut de la femme, *Mémoire sur le projet de loi nº 2* (Québec : Gouvernement du Québec, 2021) at 10 [Conseil du statut de la femme, *Mémoire sur le projet de loi nº 2*].

166. Barreau du Québec, *Mémoire du Barreau du Québec*, *supra* note 154 at 16.

lawyer to draft and negotiate the agreement.[167] M^e^ Marie Christine Kirouack, writing on behalf of the *Association des avocats et avocates en droit familial du Québec*, similarly argued that lawyers, rather than notaries, have the requisite expertise to draft surrogacy agreements.[168] By contrast, proponents of using a notarial act *en minute* have argued that because notaries have an obligation to advise parties in an impartial manner, independent legal advice is not required.[169] They have also suggested that using a notarial act *en minute* would help to address concerns about fraud or forged agreements because there are strict rules around their drafting. The notarial act would thus ensure that parties do not seek to draft a surrogacy agreement following the child's conception or birth to circumvent adoption laws.[170]

The potential utility or appropriateness of involving notaries in the surrogacy process will also depend on how the government regulates surrogacy agreements. If the agreement is ultimately a standard form provided by the government where there is no ability for the parties to negotiate its terms, perhaps the use of a single notary might be adequate to inform the parties of their rights and obligations. However, if there will be room for the parties to negotiate the terms of the agreement—for instance, with respect to the surrogate's expenses—it may be beneficial to have each party retain their own counsel to represent their respective interests.[171] In turn, it is not clear that the involvement of a notary is needed to address concerns about fraud ; requiring that the agreement be drafted or witnessed by lawyers could also arguably assuage these concerns. However, the government could mandate that the parties have the agreement notarized, once it is completed, if they believe this to be beneficial.[172]

Bill 2's proposal to have a notary hold money in trust could also ensure that the surrogate is reimbursed for any remaining expenses following

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167. *Ibid* at 17.

168. Association des avocats et avocates en droit familial du Québec, *Mémoire de l'Association des avocats et avocates en droit familial du Québec sur le Projet loi 2* (2 December 2021), at 27, 65, online (pdf) : <www.assnat.qc.ca/Media/Process.aspx ?MediaId=ANQ.Vigie.Bll.DocumentGenerique_178955&process=Default&token=ZyMoxNwUn8ikQ+TRKYwPCjWrKwg+vlv9rjij7p3xLGTZDmLVSmJLoqe/vG7/YWzz>.

169. Comité consultatif sur le droit de la famille, *supra* note 9 at 173.

170. *Ibid*.

171. This is what happens currently, and the intended parents bear the costs of the surrogate's lawyer ; see Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 54–60.

172. See Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 156.

the birth, or in the event the surrogate miscarries or terminates the pregnancy.[173] It could also potentially help ensure that surrogates do not seek to claim money beyond the amount or kind of expenses agreed to prior to conception. Taking responsibility for reimbursements away from agencies—and mandating that notaries or lawyers[174] hold the intended parents' money in trust—would also potentially ensure greater compliance with the *AHRA*'s prohibitions on payment.

D. Surrogate's consent

The bill's consent provisions also aim to ensure that surrogates are making conscious decisions to relinquish their parental rights, while nonetheless balancing and supporting the intended parents' and children's interests. The requirement that surrogates wait until at least seven days have elapsed following the birth before consenting to sever their bond of filiation seems intended to give surrogates time to recover from the birth prior to signing legal paperwork.[175] During this period, however, intended parents can take the child into their care and they will have authority to make all decisions for the child.[176] In turn, surrogates who do not consent within 30 days of the birth will not necessarily be permitted to maintain their filial status. Rather, as noted previously, the bill affords judges the discretion to potentially modify the child's filiation and recognize the intended parents as the child's legal parents.[177]

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173. See Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 81.

174. The *Barreau* also suggested that lawyers, like notaries, could hold this money in trust; see Barreau du Québec, *Mémoire du Barreau du Québec*, *supra* note 154 at 20.

175. Some have suggested that this waiting period is also intended to give surrogates the ability to reflect on their decision and to potentially "change their mind" and decide to keep the child. See Louise Langevin, *Mémoire sur le Projet de loi n^o^ 2 : Loi portant sur la réforme du droit de la famille en matière de filiation et modifiant le Code civil en matière de droits de la personnalité et d'état civil*, (Québec : Université Laval, 2021) at 7 [Langevin, *Mémoire sur la réforme du droit de la famille*] ; Côté & Lavoie, *Faire famille au 21^e^ siècle*, *supra* note 124 at 5. The *Conseil du statut de la femme* had also previously recommended a period of reflection for the surrogate ; see Conseil du statut de la femme, *Avis*, *supra* note 11 at 139.

176. Unless the surrogate objects, see Bill 2, *supra* note 1, art 541.13.

177. Langevin has suggested that there is an inconsistency in Bill 2 and indeed she is correct that the bill's wording is confusing and should be clarified. However, my reading of the bill differs from hers. She suggests that it is unclear whether a court can modify the child's filiation where the surrogate refuses to consent to give up her parental rights. She explains that lawmakers seem to have intended that the surrogate maintain her parental rights in this situation and cites to Bill 2's "general conditions" which require the surrogate's consent to bring the parental project to completion. However, as noted *supra* note 115, lawmakers have also indicated that a surrogate's consent may be given by a court in judicial proceedings relating to the child's filiation. Read alongside articles 541.20, 541.23 and 541.24, the bill seems to provide judges with discretion to

Commentators on the bill were deeply divided on the appropriateness of these proposed consent provisions. While some felt that the seven-day rule was suitable[178] others disagreed with allowing for a "cooling-off period" following the birth, and stressed that it is paternalistic for the surrogate.[179] Some also suggested that the 30-day delay period—during which the surrogate is asked to provide consent—is long for the intended parents and is inappropriately inspired by Quebec's adoption laws.[180] Experts consulted on Bill 2 also disagreed about whether a judge should have discretion to decide who are the child's parents in the event the surrogate does not consent within 30 days. Some felt that if the surrogate does not consent, the surrogate should remain the child's legal parent.[181] Notably, Professor Louise Langevin argued that an approach that allows the intended parents to be recognized without the surrogate's consent does not adequately recognize the surrogate's connection and contribution to the birth and could lead to exploitation.[182] By contrast, others felt that the intended parents should be automatically recognized following the birth, or that there should be no ability for surrogates to change their minds. [183] They stressed that allowing surrogates to retain a bond of filiation with

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modify the child's filiation even if the surrogate wishes to remain the child's parent. Of course, the court could also decide that the surrogate should maintain a bond of filiation with the child and judges are instructed to determine what is in the child's best interests. This proposed approach mirrors that of several other provinces. See *supra* note 92.

178. See Langevin, *Mémoire sur la réforme du droit de la famille*, *supra* note 175. note as well that some commentators have referred to this as the 8 to 30-day rule, because the surrogate's consent is to be given within this period after the birth.

179. See Line Picard, *Lien de filiation de l'enfant issu d'un projet parental de gestation pour autrui : ma perspective personnelle en tant que femme ayant été gestatrice pour autrui : Projet de loi 2 Loi portant sur la réforme du droit de la famille en matière de filiation* (Québec, 2021) ; Côté & Lavoie, *Faire famille au 21e siècle*, *supra* note 124 at 5.

180. Barreau du Québec, *Mémoire du Barreau du Québec*, *supra* note 154 at 19 ; Picard, *supra* note 179. Quebec's adoption laws provide a birth parent with 30 days in which to revoke consent.

181. Conseil du statut de la femme, *Mémoire sur le projet de loi no 2*, *supra* note 165 at 15 ; Langevin, *Mémoire sur la réforme du droit de la famille*, *supra* note 175 at 7.

182. Langevin, *Mémoire sur la réforme du droit de la famille*, *supra* note 175 at 7.

183. Côté and Lavoie argued that intended parents should be automatically recognized unless the surrogate objects. Line Picard, who had acted as a surrogate, felt that the surrogate should be unable to claim parental status in any circumstances. Sylvie Schirm and Marie-Elaine Tremblay noted that allowing surrogates to change their minds could result in litigation between the surrogate and intended parents and would not be in the child's best interests. Mona Greenbaum, writing on behalf of the *Coalition des familles LGBT+*, argued that the intended parents should be recognized as the child's parents following the birth without giving surrogates a grace period to change their minds. See Côté & Lavoie, *Faire famille au 21e siècle*, *supra* note 124 at 5–6 ; Picard, *supra* note 179 ; Schirm & Tremblay Avocats, *supra* note 124 at 2–3 ; Mona Greenbaum & Coalition des familles LGBT+, *Une réforme du droit familial qui reflète les nouvelles réalités familiales et, avant tout, les besoins des enfants, Mémoire présenté par la Coalition des familles LGBT+ dans le cadre des consultations sur le projet de loi 2* (Québec : Coalition des familles LGBT+, 2021) at 9.

the child would not be in the child's best interests,[184] and also noted that it is rare for surrogates to not consent, and that offering this possibility could result in confusion, conflicts, and potential manipulation by surrogates.[185]

If lawmakers are concerned with ensuring that surrogates are making autonomous, informed decisions, then it seems appropriate to require that surrogates be given some time to recover from labour and delivery before being asked to sign legal paperwork relinquishing their parental rights. The Quebec government may wish to clarify, however, why they have chosen a seven-day waiting period. Ontario similarly decided to institute a seven-day rule,[186] but this has been criticized ; this seven-day period mirrors the amount of time a birth parent in Ontario needs to wait prior to giving up a child for adoption.[187] By contrast, in Manitoba and Saskatchewan surrogates only need to wait two or three days, respectively,[188] while in Prince Edward Island and British Columbia, there is no statutorily defined waiting period following the birth.[189]

If the government wishes to support and balance the interests of surrogates, intended parents, and the children born from these arrangements then it also seems necessary for judges to be given discretion to determine the child's filiation in the event the surrogate does not provide consent. Allowing for the surrogate to automatically maintain a filial link to the child—to the exclusion of an intended parent—does not acknowledge the intended parents' potential physical, genetic, financial and emotional contributions and connections to the child.[190] Laws that allow surrogates to maintain or reclaim parentage

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184. Schirm & Tremblay Avocats, *supra* note 124 at 3 ; Côté & Lavoie, *Faire famille au 21e siècle*, *supra* note 124 at 5 ; Greenbaum, *supra* note 183 at 7–8.

185. Côté & Lavoie, *Faire famille au 21e siècle*, *supra* note 124 at 5–6 ; Picard, *supra* note 179.

186. *CLRA, supra* note 90, s 10(4).

187. See *Child Youth and Family Services Act*, 2017, SO 2017, c 14, s 180(3). I have argued that there are important differences between surrogacy and adoption that might warrant different legal responses ; see Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 150. For the opposite view, see Conseil du statut de la femme, *Avis*, *supra* note 11 at 140 ; Conseil du statut de la femme, *Mémoire sur le projet de loi no 2*, *supra* note 165 at 15 ; Christine Overall, "Whose Child Is This ?" in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada : Critical Perspectives in Law and Policy* (Toronto : Irwin Law, 2018).

188. *FMA, supra* note 90, s 24.1(2) ; *SK CLA, supra* note 90, s 62(4).

189. *PEI CLA, supra* note 90 ; *BC FLA, supra* note 90.

190. As I have argued elsewhere, many intended mothers will have undergone *in vitro* fertilization to create embryos that are used for the surrogate to conceive and thus have contributed

are also based, in part, on the idea that surrogates will bond with the baby during pregnancy and that it would be inappropriate to require surrogates to give up the child, especially where it is their genetic offspring.[191] However, many surrogates do not have a genetic connection to the children they carry,[192] and there have been very few cases where surrogates have wanted to parent these children.[193] Providing surrogates with an unqualified right to maintain their parental status may also have unintended consequences. As discussed in Part I, the one reported case in Quebec where a surrogate refused to give up her parental rights arose because of a dispute over the amount of money owed to the surrogate—not because the surrogate wished to parent the child.[194] It is unclear from the facts whether the surrogate was owed the amount claimed or was seeking to extort further payment from the intended parents. However, in either instance, it is arguably inappropriate for the child's filiation to be used as a bargaining chip in the event of a dispute between the surrogate and intended parents. Bill 2's provisions would still provide judges with the possibility of recognizing the surrogate's bond of filiation with the child. However,

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genetically and physically to the child's creation. The financial burden for intended parents of pursuing surrogacy is also significant. But perhaps most importantly, most intended parents will be extremely emotionally invested in the child. For further discussion, see Carsley, "Reconceiving Quebec's Laws", *supra* note 9 at 144–45.

191. See e.g. Royal Commission on New Reproductive Technologies, *supra* note 22 at 675, 685; Trebilcock & Keshvani, *supra* note 32 at 583–84; Felicia Daunt, "Exploitation or Empowerment? Debating Surrogate Motherhood" (1991) 55 Sask L Rev 415 at 416; but see Overall, *supra* note 187.

192. While some surrogates in Canada engage in traditional surrogacy, and thus use their own eggs to conceive, it has become common for surrogates to use the intended mother's eggs or donated eggs to conceive. For instance, only one participant in my 2022 study with intended parents had engaged in traditional surrogacy; the remaining 34 individuals and couples used their own ova or donated ova or embryos to conceive; see Carsley, "Intended Parents' Experiences and Perspectives", *supra* note 38. By contrast, in Lavoie and Côté's research, 9 of 15 surrogates did not have a genetic connection to the child, while 6 used their own eggs to conceive; see Lavoie & Côté, "Navigating Murky Waters", *supra* note 38 at 87–88.

193. Langevin has argued that the situation where the surrogate changes her mind is likely not as rare as some suggest, but rather that surrogates with negative experiences would not voluntarily participate in research projects; see Langevin, *Mémoire sur la réforme du droit de la famille*, *supra* note 175 at 8. While she is correct that there have been more instances than have been reported in case law—indeed, my research with fertility lawyers uncovered some additional cases—these situations still appear to be exceptional; see Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 71–77.

194. *Adoption — 1873, supra* note 84. Where such cases have arisen in other provinces, they have also rarely been instances where the surrogate wished to parent the child. More commonly, these cases involved disputes over expenses, communication and contact with the intended parents or decision-making for the child; see Carsley, "Lawyers' Experiences and Practices", *supra* note 93.

they would also allow judges to recognize the intended parents in situations where the surrogate does not intend to parent the child, and where recognizing the intended parents would clearly be in the child's best interests.[195]

Of course, asking judges to decide what is in the best interests of the child in the event of a dispute raises additional issues. While the best interests of the child regularly guide judicial decisions in the context of adoptions and custody disputes, it is unclear how a judge would determine the best interests of an infant born through surrogacy in situations where the surrogate wishes to parent the child. Would the court assess who is more financially able to care for the child ? The desirability of the child having a connection to his or her genetic relatives ? The potential effects of having parents in two different households as opposed to one ? Importantly, Bill 2 does not provide judges with the possibility of recognizing three or more parents. Justice Minister Jolin-Barrette explained that (in the government's view) existing literature and studies do not demonstrate that it is preferable for children to have more than two parents.[196] As a result, judges in Quebec would be unable to recognize both intended parents without severing the surrogate's bond of filiation with the child. They would also be unable to recognize the surrogate along with both intended parents, if this were to be in the child's interests.

Bill 2 also does not provide judges with discretion to determine the child's filiation in all circumstances. Recall that the bill states that in the event the "prior conditions" for the legal establishment of filiation—the information session and notarized agreement—are not met, the judge must confirm the child's filiation with the surrogate if the surrogate refuses to consent.[197] In turn, if the surrogate is paid or is under the age of 21, then a court is required to declare the agreement null and dismiss the intended parents' application—even if the surrogate consents to give up parental rights.[198] It is not clear why lawmakers have decided that in these two situations judges should not have discretion

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195. The *Adoption — 1873* case, *supra* note 84, discussed above provides a clear example.

196. See Lecomte, *supra* note 4.

197. By contrast, if the surrogate has died, become incapacitated or disappeared, the court may have the power to change the child's filiation. See Bill 2, *supra* note 1, arts 541.22–541.24.

198. *Ibid,* art 541.22. In this situation, the intended parents could potentially still apply to adopt the child pursuant to article 555 CCQ and the surrogate could transfer parental rights to them through these means. However, it is currently unclear whether this would still be permitted once the province introduces a new surrogacy regime.

to modify the child's filiation. The government may be trying to scare Quebecers into complying with the *AHRA*'s prohibitions on payment and its age restrictions. Quebec lawmakers may also be seeking to ensure that surrogacy remains altruistic within the province even if payment is eventually permitted elsewhere in Canada.[199] However, making the ability for intended parents to establish a bond of filiation with their child contingent on the surrogacy arrangement being altruistic risks penalizing the child for the decisions—or potential errors—of their parents.[200] This approach is also inconsistent with prior jurisprudence from the Quebec Court of Appeal which confirmed that whether a surrogate is paid should have no bearing on the child's filiation.[201] Certainly, there may also be situations where the parties have not met the "prior conditions" for surrogacy arrangements and where it would be in the child's best interests for the court to recognize the intended parents—even if the surrogate refuses to consent.[202] If lawmakers wish to support children's interests, then it seems prudent to provide judges with wider discretion to recognize multiple-parent families and to modify the child's filiation even in situations where the bill's general or prior conditions have not been met. This approach would also be consistent with that of other Canadian provinces, which allow for more than two parent families in surrogacy situations and which provide judges with the ability to make a declaration of parentage in the event of a dispute.[203]

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199. Indeed, there have been recent attempts to reform the *AHRA* and to potentially decriminalize payment. See e.g. "Bill C-404, *An Act to Amend the Assisted Human Reproduction Act"*, 1st reading, *House of Commons Debates*, 42-1, No 303 (29 May 2018) at 1015 (Anthony Housefather); "Bill S-216, *An Act to amend the Assisted Human Reproduction Act*, 1st reading, *Senate Debates*, 43-1, Vol 152, No 10 (20 February 2020); "Bill S-202*, An Act to amend the Assisted Human Reproduction Act"*, 1st reading, *Senate Debates,* 43-2, Vol 152, No 2 (30 September 2020). The language of Bill 2 also suggests that Quebec lawmakers may be seeking to introduce their own regulations pertaining to reimbursements, even though the Supreme Court has made clear that the federal government has jurisdiction to regulate surrogates' expenses; see *Reference re Assisted Human Reproduction Act,* 2010 SCC 61.

200. The *Conseil du statut de la femme* has similarly argued that having the parental project rendered null would not be in the child's best interests and questioned whether this means that the surrogate would be forced to be the child's legal parent. Conseil du statut de la femme, *Mémoire sur le projet de loi n*o *2*, *supra* note 165 at 16. See also Langevin, *Mémoire sur la réforme du droit de la famille*, *supra* note 175, who questioned the effects of rendering the agreement null in these circumstances.

201. *Adoption — 1445, supra* note 65.

202. The *Barreau du Québec* also raised the issue that intended parents of lower socio-economic means may forgo the prior conditions because of the costs associated with creating an agreement. Barreau du Québec, *Mémoire du Barreau du Québec*, *supra* note 154 at 16.

203. See especially, *BC FLA, supra* note 90, ss 30–31; *CLRA, supra* note 90, ss 10–11.

E. Language and terminology

Finally, lawmakers used gender-neutral language in relation to surrogacy, in conformity with the bill's wider reforms relating to gender identity and the law of persons. The bill intentionally avoids using the language of surrogate or surrogate mother (or in French, *mère porteuse*) but instead refers to the surrogate throughout as "the woman or the person who has agreed to give birth to the child"[204] or "who gave birth to the child"[205] but who is "not a party to the parental project."[206] The intended parents are referred to as the "person alone or spouses who formed the parental project."[207] In turn, rather than using "surrogate motherhood" or "*maternité de substitution*," the bill uses "surrogacy" in English and "*gestation pour autrui*" in French.

The language of "woman or person" recognizes that not all individuals who give birth—and by extension not all surrogates—identify as women.[208] However, by using the language of "woman or person" rather than just "person," lawmakers also recognize that surrogacy disproportionately affects women.[209] By avoiding the language of "surrogate mother," "surrogate motherhood," "*mère porteuse*," or "*maternité de substitution*" the bill also acknowledges that surrogates may not identify as "mothers" to the children they carry for intended parents.[210] Finally, by referring to the intended parents as "the person alone or the spouses who formed the parental project" the bill recognizes that intended parents need not necessarily be couples, but can also be single parents by choice.[211]

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204. See e.g. Bill 2, *supra* note 1, art 541.1.

205. *Ibid,* art 541.6.

206. *Ibid,* art 541.1. In French, the surrogate is referred to as *"la femme ou la personne qui a accepté de donner naissance à l'enfant"* or *"qui a donné naissance à l'enfant, mais qui n'est pas partie au projet parental pour donner naissance à cet enfant."*

207. *Ibid*, art 541.1.

208. Indeed, my 2022 study with intended parents confirms that there have been surrogates in Canada who are trans and identify as men ; see Carsley, "Intended Parents' Experiences and Perspectives", *supra* note 38.

209. Some scholars have argued that in using gender-neutral terminology, we are ignoring the ways in which women are, and have historically been, affected by reproduction. See especially Louise Langevin, "De la fragmentation de la procréation à l'effacement des femmes" (2021) 33:2 CJWL 241 at 248–49 [Langevin, "De la fragmentation de la procréation à l'effacement des femmes"].

210. See e.g. Picard, *supra* note 179. For counterarguments, see Overall, *supra* note 187 at 39–40.

211. In recent years, lawyers have reported an increase in single parents who have sought to build their families through surrogacy in Canada. Of the intended parents I interviewed for my most recent project, 2 of the 35 individuals or couples were single men ; see Carsley, "Surrogacy in Canada", *supra* note 23 at 112 ; Carsley, "Intended Parents' Experiences and Perspectives", *supra* note 38.

Some commentators took issue with the language used to refer to surrogates or surrogacy arrangements. Notably, Professor Louise Langevin and the *Conseil du statut de la femme* disagree with the use of "*gestation pour autrui*."[212] Langevin argues that this language does not adequately acknowledge the surrogate's role and the medical risks she undertakes,[213] while the *Conseil* notes that the language of gestation is used in relation to animals and thus potentially dehumanizes surrogates.[214] They both recommend instead that lawmakers use the language of "*maternité pour autrui*"[215] to better acknowledge the role of women in reproduction and the fact that the surrogate carries and brings a child into the world. [216] Langevin also suggests that the government use the terminology "*la mère ou la personne porteuse*"[217] to recognize that the surrogate should still have a right to maintain a bond of filiation with the child following the birth.[218] The *Conseil*, in turn, explained that they prefer the term "*femme porteuse*"[219] as most surrogates are women and typically renounce their role or legal obligations as mothers.[220]

Disagreements over the language to be used in the bill are not surprising. Indeed, scholars have long argued about the appropriateness of different terminology used to refer to surrogates and surrogacy arrangements.[221] However, if Quebec lawmakers wish to account for and reflect the lived experiences of individuals who act as surrogates they would be ill-advised to use the language of "*maternité pour autrui,*" "*mère porteuse*" or "*femme porteuse*" as this terminology would exclude

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212. The literal English translation is "gestation for another."

213. Langevin, *Mémoire sur la réforme du droit de la famille*, *supra* note 175 at 6.

214. Conseil du statut de la femme, *Mémoire sur le projet de loi n*o *2*, *supra* note 165 at 4. See also Maria De Koninck, *Maternité dérobée : mère porteuse et enfant sur commande* (Montréal : Éditions MultiMondes, 2019).

215. In English, "maternity for another," or "mothering for another."

216. Langevin, *Mémoire sur la réforme du droit de la famille*, *supra* note 175 at 6 ; Conseil du statut de la femme, *Mémoire sur le projet de loi n*o *2*, *supra* note 165 at 4.

217. In English, "the mother or the person who carries the child."

218. Langevin, *Mémoire sur la réforme du droit de la famille*, *supra* note 175 at 6.

219. This translates literally as "woman carrier" or the woman who carries the child.

220. Conseil du statut de la femme, *Mémoire sur le projet de loi no 2*, *supra* note 165 at 4.

221. 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, 2016) 274 at 314 ; Majury, *supra* note 32 at 197–98 ; Bureau & Guilhermont, *supra* note 60 at 44 ; Louise Vandelac, "Sexes et technologies de procréation : 'mères porteuses' ou la maternité déportée par la langue" (1987) 19 :1 Sociologie et sociétés 97 ; Conseil du statut de la femme, *Avis*, *supra* note 11 at 17–19 ; Carsley, "Lawyers' Experiences and Practices", *supra* note 93 at 42–43 ; Langevin, *Le droit à l'autonomie procréative des femmes*, *supra* note 25 at 200–204 ; Langevin, "De la fragmentation de la procréation à l'effacement des femmes", *supra* note 209 at 248.

surrogates who do not identify as women.[222] The language of "*maternité*" is currently used elsewhere in the *Civil Code* to refer specifically to women and "*mère porteuse*" and "*femme porteuse*" are similarly insufficiently inclusive.[223] A possible gender-neutral alternative to "*gestation pour autrui*" could be "*procréation pour autrui*."[224] The language of "*procréation*" is commonly used in relation to humans—not animals—and is used in Quebec's laws and regulations pertaining to assisted reproduction.[225]

Lawmakers may also wish to modify the language of the bill to use gender-neutral "short forms" to refer to surrogates and intended parents. The decision to refer to the surrogate as "the woman or the person who has agreed to give birth to the child" throughout the bill makes it very cumbersome and difficult to read. The same can be said about the language used to refer to the intended parents : "the person alone or the spouses who formed the parental project." In both instances, lawmakers could instead use gender-neutral terms and define these at article 541.1. In English, lawmakers could use the term "surrogate"[226] and define this as "the woman or the person, who is not a party to the parental project, but who has agreed to give birth to the child." In French, they could use "*la personne porteuse*" and define this as "*une femme ou une personne qui n'est pas partie au projet parental, mais qui a accepté de donner naissance à l'enfant*." In turn, they could use "intended parent(s)" or "*parent(s) d'intention*" and define this as including one or more individuals who work with a surrogate to build their family.

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222. See *supra* note 208.

223. The *Conseil du statut de la femme* has argued that *maternité* is not necessarily about motherhood but rather about pregnancy and childbirth. See Conseil du statut de la femme, *Mémoire sur le projet de loi n^o^ 2*, *supra* note 165 at 4. However, other sections of the *Civil Code* have used the language of "*maternité*" specifically to refer to motherhood and to women. See e.g. article 527 CCQ which states, "*La reconnaissance de maternité résulte de la déclaration faite par une femme qu'elle est la mère de l'enfant"* or in English, "Maternity is acknowledged by a declaration made by a woman that she is the mother of the child." Bill 2 also proposes to repeal this provision and to replace references to *maternité* and *paternité* with gender-neutral language.

224. The literal English translation is "procreation for another."

225. Arts 538–39 CCQ. *Act respecting clinical and research activities relating to assisted procreation,* CQLR c A-501 ; *Regulation respecting clinical activities related to assisted procreation,* c A-501, r 1.

226. I prefer surrogate over gestational carrier in part because the term gestational carrier does not include "traditional" or "genetic" surrogates who use their own ova to conceive.

CONCLUSION

Bill 2's proposed reforms would better support and protect surrogates', intended parents', and children's interests than Quebec's current regime. Bill 2's rules would allow some intended parents to establish a bond of filiation with their children in a timely manner, and without incurring the costs of going to court. The proposed information sessions and notarized surrogacy agreements could help to better ensure that surrogates and intended parents are advised of their legal rights, while the proposal that a notary hold money in trust could ensure that surrogates and intended parents abide by their promises with respect to the surrogates' reimbursements. The bill's proposed consent provisions would allow surrogates some time to recover from the birth prior to relinquishing their parental rights. They would also potentially allow intended parents to establish a bond of filiation with the child should the surrogate fail to consent, where such recognition would be in the child's best interests. The language used in the bill would also better acknowledge and recognize surrogates' and intended parents' diverse experiences and identities.

However, Bill 2's rules pertaining to out-of-province arrangements would make it more difficult, time-consuming, and costly for some intended parents to establish a bond of filiation with their children born through surrogacy. Bill 2's residency requirements are also likely to continue to push surrogates to travel to Ontario to give birth. Judges may be unable to recognize a bond of filiation between the intended parents and their children—even in situations where surrogates consent to relinquish their parental rights or do not wish to parent the children they carry. The language used in the bill, while well-intentioned, also makes its provisions quite difficult to read and understand.

Lawmakers ought to clarify the content of the required information sessions and notarized agreements, as well as the training that professionals and notaries will need to undergo prior to assisting with parental projects involving surrogacy. They should also better explain and justify the bill's proposed residency requirements and its unique rules that apply where the surrogate lives outside of the province. Bill 2's provisions should be amended to allow judges the discretion to recognize more than two parents where they determine that this would be in the child's best interests. It should also permit judges to

potentially modify the child's filiation to recognize the intended parents even if surrogates are paid, underage, or do not consent to relinquish their parental rights. Lawmakers may also want to use gender-neutral "short forms" in the bill to refer to surrogates and intended parents for clarity and ease of reading. These amendments and clarifications could further strengthen the bill and better support lawmakers' stated objectives with respect to these surrogacy law reforms.