Creative Conflicts: Shaping the Law on Surrogacy and Assisted Reproduction in Québec and Canada

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Résumé

Ce mémoire ce veut, d'une part, un aperçu de l'état du droit au Canada et au Québec sur la maternité de substitution et la procréation assistée. J'examine la dissonance entre ces pratiques et les interdictions criminelles en vertu de la *Loi sur la procréation assistée*, le vide réglementaire laissé par la décision de la Cour suprême dans le *Renvoi relatif à la Loi sur la procréation assistée* et que les provinces hésitent à remplir, ainsi que la discordance avec laquelle les lois sur la filiation sont façonnées dans les provinces dans le contexte de contrats de mères porteuses. D'autre part, ce mémoire se veut une critique de l'emprise qu'à, au Québec, le droit de la famille sur la question des mères porteuses et de l'étroitesse avec laquelle les notions d'autonomie et de consentement sont utilisées par les juristes en la matière. En dépit du fait d'être la seule province avec un cadre juridique sur la procréation assistée, les juristes et le législateur Québécois négligent de tisser des liens entre ce cadre et le discours juridique en droit familial sur la maternité de substitution. En effet, dans le discours juridique en droit familial, les mères porteuses sont des sujets juridiques abstraits et leur réalité est pratiquement omise dans l'analyse juridique faite par les tribunaux en matière d'adoption au Québec. A mon avis, un point de vue plus holistique est nécessaire à l'élaboration de nouvelles lois et politiques sur la procréation assistée et la maternité de substitution. Je propose l'utilisation des cadres théoriques *Against family law exceptionnalism* et celui de la *Relational theory* comme outils d'analyse pour élargir la discussion sur le sujet, particulièrement, la théorie relationnelle de Jennifer Nedelsky: ses idées mettent de l'avant la complexité des sujets humains et de leurs relations, une complexité qui me semble primordiale à considérer dans l'analyse juridique de conflits créatifs (*creative conflicts*), tels que ceux emmenés à l'aube de la procréation assistée et la maternité de substitution.

Mots clés : mères porteuses, procréation assistée, santé, Québec, Canada, autonomie, consentement, droit civil, droit de la famille, Relational theory, Against family law exceptionalism, théories féministes, conflits créatifs

Abstract

This memoir is, on one hand, an overview of the state of the law in Canada and Québec on surrogacy and assisted reproduction. I discuss the dissonance between the practice of surrogacy and assisted reproduction in the country and the current criminal prohibitions under the *Assisted Human Reproduction Act*, the regulatory vacuum left by the Supreme Court's decision in *Reference re Assisted Human Reproduction Act*, which the provinces are reluctant to fill, as well as the incongruity with which parentage laws are being shaped in the provinces where surrogacy arrangements are involved. On the other hand, this memoir is also a critic of the hold family law has had on the issue of surrogacy in Québec and of how narrow the concepts of autonomy and consent are in the language of civil legal thought on the issue. Despite being the sole province with a legal framework on assisted reproduction, Québec has poorly connected this framework to family law's discourse on surrogacy. Indeed, surrogates have been, for the most part, studied as abstract legal subjects within an atomistic liberal perspective in family law and practically omitted under the legal analysis afforded by Québec adoption courts. I argue that a more holistic point of view is necessary in the shaping of new laws and policy on surrogacy and assisted reproduction. I propose *Against Family Law Exceptionalism* and *Relational Theory* as analytical tools to broaden the discussion on the subject. I highlight Jennifer Nedelsky's relational theory particularly, as her ideas underscore the complexity of human subjects and relationships, a complexity which I argue is primordial for jurists to consider when examining creative conflicts.

Keywords: surrogacy, assisted reproduction, health, Québec, Canada, autonomy, consent, civil law, family law, Relational Theory, Against Family Law Exceptionalism, Feminist Theories, creative conflicts

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Abbreviations

AHRA *Assisted Human Reproduction Act*

APA *Act respecting clinical and research activities relating to assisted procreation*

APR *Regulation respecting clinical activities related to assisted procreation*

AHRC *Assisted Human Reproduction Canada*

AFLA *Alberta Family Law Act*

ARTs *Artificial/Assisted Reproduction Technologies*

BCFLA *British Colombia Family Law Act*

CCQ *Civil Code of Québec*

CCP Civil Code of Procedure

CHA *Canada Health Act*

CATR *Canadian Assisted Reproductive Technologies Registry*

CEST *Commission de l'éthique en science et en technologie*

CFAS *Canadian Fertility and Andrology Society*

CPSA *College of Physicians and Surgeons of Alberta*

CPSS *College of Physicians and Surgeons of Saskatchewan*

FLE *Family Law Exceptionalism*

RAMQ *Régie de l'assurance maladie du Québec*

RCNRT *Royal Commission on New Reproductive Technologies*

SOGC *Society of Obstetricians and Gynaecologists of Canada*

YPA *Youth Protection Act*

Thank you,

Pascale Fournier, for your continued presence, support and motivation.

Introduction

My research started with an interest on surrogacy's legal standing in Québec and Canada. In part one, I outline Canadian policy on surrogacy and assisted reproduction. The numerous gaps between the practice of surrogacy and the current legal framework respecting assisted reproduction in Canada are evident. There are multiple perspectives that could be taken to examine the matter both at a national and international level and the gendered nature of the issue was one that caught my attention first.

Where women's bodies and health are concerned, it is striking how civil law scholarship in Québec have not undertaken the task of examining egg donation, surrogacy and infertility from a holistic viewpoint. Moreover, the practice of surrogacy is analysed mainly from a contractual and adoption point of view and the civil law's discourse on the topic is polarized: the debate bounces back and forth between those who agree with the practice because "women" as a category, are autonomous in principle, versus those who believe "women" should be protected from the potential of exploitation. In Québec jurisprudence, the issue has been examined in the context of adoption cases, where courts have been debating between *public order* considerations and the *interests of the child*, choosing the latter as the driving principle on the matter. I briefly outline and analyse this jurisprudential debate in part five.

I found that the concept of autonomy, as it is debated by civil law doctrine in Québec, offers a narrow perspective: autonomy is limited to the legal notion of consent, which in itself, is polarized (consent in family law versus consent in contract law). Indeed, civil scholarship in the province has omitted the medical reality of assisted reproduction in its discourse on consent, which is important, as surrogates are (albeit not always) subjected to assisted reproduction techniques. Moreover, the notion of *public order* in civil law, although it is examined existing civil doctrine and jurisprudence on the matter, does very little, if not much, to account for the relationship between these two realities.

Thus, surrogacy and assisted reproduction are interrelated and very dynamic areas which are continuously developing. Jurisprudence and legislation on these matters are still in their embryonic stage both in Québec and Canada and this leaves room for a lot of creativity. Therefore, in my view, scholarship on surrogacy needs to be broader and explore the

connections and the contributions legal thought can make on the issue. On this note, I found that two schools of thought, *Against Family Law Exceptionalism* (AFLE) and *Relational Theory*, can make very important contributions.

Both schools encourage connection rather than separation. Whereas the first explores more legal and conceptual connections, the second accounts for human relationships and contextual analysis in the law and takes a comprehensive approach on autonomy. Much could be said about the general incoherence between civil law and social/fiscal regimes in the province of Québec, but that topic is not addressed in this paper. My main focus remains the disjunction between civil law and legislation on assisted reproduction, particularly where the relationship between autonomy and consent is concerned, as well as how these concepts are viewed and discussed (and not discussed) in the law and in legal scholarship.

I found Jennifer Nedelsky's framework on relational autonomy to be particularly interesting, as it explores the relationship between humans' inner (mind/body) reality and the law. Indeed, in part six, I take a close look at her framework and explore her idea of a legal subject as multi-faceted and creative. Her contribution is relevant because it widens the liberalist notion of autonomy, releasing it from the strains of consent and independence. Drawing on the work of health sociologists, I go on to briefly examine how consent is merely a restrictive and institutionalized form of autonomy even within the areas of medicine and biotechnology. I use Christine Koggel and Susan Sherwin's relational frameworks together with Ivan Illich's on conviviality to place medical consent in perspective.

1. The Canadian Federal Policy on Surrogacy and Artificial Reproduction Technologies

Pursuant to the decision of the Supreme Court in 2010,[1] the regulation of assisted reproduction in Canada falls within the purview of provincial jurisdiction, except where prohibited activities are concerned. The commercialization of surrogacy and egg donation are prohibited activities in Canada, pursuant to the *Assisted Human Reproduction Act* (AHRA).[2] Most provinces have not set up a comprehensive legal framework regulating the practice and research in the area of assisted reproduction activities, except for Québec. When it comes to parentage issues affected by surrogacy arrangements, Alberta, British Colombia, Nova-Scotia, Newfoundland (and Labrador) and Québec have established legislation; in other provinces, policymaking has essentially been left to the courts. In this part, I will briefly lay out the constitutional underpinnings of Canada's assisted reproduction laws, as well as examine the AHRA commercial prohibitions which have been poorly enforced to this day. My goal is to sketch a general picture of the national legal discourse on assisted reproduction.

1.1 A Constitutional Dissonance: The Division of Powers

In *Reference re Assisted Human Reproduction Act,*[3] the Supreme Court of Canada decided that assisted reproduction should be regulated by provinces and territories, for most aspects, and as such, it struck down many provisions of the AHRA[4] that it deemed unconstitutional. The initial intention behind the enactment of the AHRA was to have a comprehensive national legal framework consisting of regulatory and criminal provisions overseeing research and practice in the area of assisted reproduction.[5]

Following the Supreme Court judges' analysis of the AHRA, four judges deemed it was valid because its pith and substance sought to prohibit negative practices regarding assisted procreation, while four deemed it did not fall within federal jurisdiction because its main scope was to regulate health services. The ninth judge, Justice Cromwell, held that sections 10, 11, 13, 14 to 18, 40 (2), (3), (3.1), (4) and (5), and 44 (2) and (3) were invalid pursuant to the

[1] *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457 [*Reference Re AHRA*]
[2] *Assisted Human Reproduction Act,* SC 2004, c 2, s 12 [*AHRA*]
[3] *Supra* note 1
[4] *AHRA*, *supra* note 2
[5] Erin Nelson, *Law, Policy and Reproductive Autonomy* (Oxford: Hart Publishing 2013) at p. 257. [Nelson]

Constitution Act, 1867[6] because they "are best classified as relating to the establishment, maintenance and management of hospitals, property and civil rights in the province and matters of a merely local or private nature in the province."[7] These sections have been repealed. Sections 5 to 9 and 12,[8] which regulate prohibited activities pertaining to sex-selection, cloning and surrogacy agreements, and which also prohibit the purchase or sale of gametes and/or embryos were not. Since 2012, when the federal government announced the closing down of Assisted Human Reproduction Canada (AHRC),[9] Health Canada is in charge of administering the provisions still in force in the AHRA and the Minister of Health retains inspection powers to enforce the parts of the act that regulate criminal prohibitions.[10]

Canadian legal scholars who are prominent in the field generally seem to express uncertainty as to the AHRA's future, both with respect to regulatory and criminal aspects of the legislation.[11] Respecting the regulatory aspects, scholars have pointed to the argument made by the Royal Commission on New Reproductive Technologies (RCNRT)[12] as to the pertinence of the federal power to legislate for peace, order and good government, in matters of genuine national

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[6] 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5

[7] *Supra* note 1 at para 287

[8] Section 12 is not yet in force: *AHRA, supra* note 3 at 12; Jocelyn Downie, Timothy Caulfield & Colleen M. Flood, eds, *Canadian Health Law and Policy*, 4th ed (Markham, Ont.: Lexis Nexis Canada 2011) at 331. [Downie &Flood, *Canadian Health Law 2011*]

[9] Assisted Human Reproduction Canada (AHRC) was the agency formerly in charge of administering assisted reproduction under the *AHRA*; Nelson, *supra* note 5 at 256, 258; Francoise Baylis & Jocelyn Downie, "The Tale of Assisted Human Reproduction Canada: A Tragedy in Five Acts" (2013) 25:2 CJWL 183 at 201 [Baylis & Downie, "A Tragedy in Five Acts"]

[10] Nelson, *supra* note 5 at 258

[11] Downie & Flood, *Canadian Health Law 2011, supra* note 8 at 334: "The practical impact of the Supreme Court's decision remains to be seen. References are advisory judicial opinions and, as such, are not binding on the government. While these decisions are ordinarily treated just as any other judicial opinion, no specific remedial action is recommended or demanded by the Court's decision. Thus, and bearing in mind that the majority of the AHR Act is not in force, unless and until the federal government takes action in response to the Supreme Court's decision, the Act remains the law on assisted reproduction in Canada"; Nelson, *supra* note 5 at 259

[12] Laura Neilson Bonikowski, "The Royal Commission on New Reproductive Technologies" *The Canadian Encyclopedia* (2 February 2012) online: http://www.thecanadianencyclopedia.ca/en/article/new-reproductive-technologies-royal-commission-on/: The Royal Commission on New Reproductive Technologies was established by the Canadian government in 1989. "Its mandate was to investigate 'current and potential medical and scientific developments related to new reproductive technologies' in order to consider their 'social, ethical, health, research, legal and economic implications and the public interest, and recommend what policies and safeguards should be applied'. The Commission's final report, delivered in November 1993, was entitled *Proceed with Care* and contained 293 recommendations."

concern,[13] which has been one of the foundations for federal intervention in health care, alongside criminal power and conditional funding.[14] Where the AHRA's criminal prohibitions are concerned,[15] the same scholars refer to the comments made by Supreme Court Justices Lebel and Deschamp that 'ethics, morality, safety and public health' concerns in the area of new health technologies, alone, do not warrant regulation on the basis of the federal criminal law power.[16] Since the Supreme Court's decision,[17] the regulation of assisted reproduction in Canadian common law provinces remains fragmented,[18] and the federal prohibition on commercial surrogacy has barely been enforced.[19]

1.2 A Dissonant Federal Power: Theory without Practice

1.2.1 The *Assisted Human Reproduction Act*'s Prohibition, in Theory

The Royal Commission on New Reproductive Technologies' report *Proceed with Care* issued concerns about the practice of surrogacy before the AHRA was drafted. The Commission was in charge of examining "the implications of new reproductive technologies for women's reproductive health and well-being, the causes treatment and prevention of male and female infertility, various reproductive and related technologies, social and legal arrangements, the status and rights of people using or contributing to reproductive services and the economic ramifications of these technologies."[20] The report was criticized on several grounds. Where legal reasoning is concerned, scholars argued it was not being clear what types of criminal sanctions were recommended[21] and that it failed to account for already existing legal remedies,

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[13] Nelson, *supra* note 5 at 259 n 186; Downie & Flood, *Canadian Health Law 2011*, *supra* note 8 at 334, n 222; Alana Cattapan, "Rhetoric and Reality: 'Protecting' Women in Canadian Public Policy on Assisted Human Reproduction" (2013) 25:2 Can. J. Women & L. 202 at 206 [Cattapan]

[14] Cattapan, *supra* note 13 at 206

[15] Commercial surrogacy is prohibited pursuant to section 6 *AHRA*

[16] Nelson, *supra* note 5 at 259 ; Downie & Flood, *Canadian Health Law 2011*, *supra* note 8 at 333

[17] *Supra* note 1

[18] Downie &Flood, *Canadian Health Law 2011,* supra note 8 at 334

[19] Cattapan, *supra* note 13 at 204; See part 1.2.2, below, for more on this topic

[20]Jocelyn Downie, Timothy Caulfield & Colleen M. Flood, eds, *Canadian Health Law and Policy*, 2nd ed (Toronto: Butterworths 2002) at 381. [Downie &Flood, *Canadian Health Law 2002*]

[21] Patrick Healy, "Statutory Prohibitions and the Regulation of New Reproductive Technologies" (1995) 40:4 McGill L.J. 905 at 915 [Healy]: "The Commission is unclear as to the nature of statutory prohibitions. In several instances it suggests that conduct be prohibited 'under threat of criminal sanction'. In others it identifies conduct that should be 'subject to prosecution'. In yet other instances it urges that specified forms of conduct just be 'prohibited' or that specified activities 'not be permissible'. Thus, it is not clear why some forms of activity should be made the object of criminal prohibition and others the object of a different type of statutory prohibition. Nor is it clear what is meant by 'criminal' sanction."

which it should have, before suggesting new ones.[22] Moreover, respecting the Commission's economic mandate, Professor Lorna Weir[23] and Jasmin Habib[24] brought to light the fact that the report did not account for the "alliance between, on the one hand, the health care system, and, on the other, research biomedicine, biotechnology and the pharmaceutical industry."[25] The Commission considered that surrogacy constitutes a violation to human dignity and the dignity of reproduction, as it commodifies women and children: it compromises the surrogate's autonomy and psychosocial health and it risks causing 'contentious filial connections' which could harm the child's self-perception.[26] The Commission considered reproductive technologies as a matter of national concern that should be dealt with by the federal branch of criminal law, as well as under the branch of peace order and good government.[27] As for the argument about national concern, the Commission's report has been criticized for being

[22] Lorna Weir & Jasmin Habib, "A Critical Feminist Approach to the Report of the Commission on New Reproductive Technologies" online: (1997) 52 SPE at 143 online: <http://spe.library.utoronto.ca/index.php/spe/issue/view/536> [Weir & Habib]: "The legal reasoning of Proceed with Care has gained it little respect among lawyers. Many of its recommendations would involve the creation of new criminal offenses/the use of criminal law powers. Thus, the Commission argued that medical procedures performed on a pregnant woman against her will for the purported benefit of the fetus should be criminalized. However, such activities can already be dealt with through present assault legislation; moreover the Charter of Rights and Freedoms affords another level of protection through its guarantees for the security of the person; this alternative legal strategy is nowhere discussed. The Report repeatedly fails to consider existing law or other remedies before it leaps to new uses of criminal law powers. Nowhere, for instance, does the Report discuss the appropriateness of criminalizing research activities."

[23] Lorna Weir is professor of sociology at York University (Toronto). She specializes in health and social theory.

[24] Jasmin Habib is an associate professor at the University of Waterloo

[25] Weir& Habib, *supra* note 22 at 144-145: "Its main section on the economics of assisted human reproduction contains precisely one recommendation. This is to suggest further study of patents. Yet the text never explains the significance of contemporary changes in patent law for the development of property claims to genetic resources. The chapter entitled 'Commercial Interests and New Reproductive Technologies', is arguably the worst in the entire Report. The Commission interpreted very restrictively its mandate to examine the economics of the technologies, limiting its field of inquiry to Canadian companies and Canadian subsidiaries of multinationals. The text does not place Canadian developments in an international context, thereby creating the impression that Canada is a cosy, self-determining nation-state."

[26] Angela Campbell "Law's Suppositions about Surrogacy against the Backdrop of Social Science" 43 :1(2012) Ottawa L. Rev. 29 at 44-45. [Campbell, "Law's Suppositions"]

[27] Canada, 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 18 cited in Françoise Baylis, "The Regulation of Assisted Human Reproductive Technologies and Related Research: A Public Health Safety and Morality Argument" (2006) Expert Opinion at 4: "We reject the argument that new reproductive technologies as a general matter should continue to be subdivided into component parts and left to the provincial legislatures, or delegated to self-governing professional bodies, for regulation on a province-by province or even an institution-by-institution basis. Considering the overarching nature, profound importance, and fundamental inter-relatedness of the issues involved, we consider that federal regulation of new reproductive technologies – under the national concern branch of the peace, order, and good government power, as well as under the criminal law, trade and commerce, spending, and other relevant federal constitutional powers – is clearly warranted."

unconvincing on the matter: the fact that human reproduction issues are interrelated "does not lead to a conclusion in law that '[n]ew reproductive technologies possess a conceptual and practical integrity and distinctiveness'. It certainly does not allow the assertion that 'reproduction is easily distinguishable from other matters of human health'."[28] According to Professor Angela Campbell,[29] the legislative debates show two main concerns behind the enactment of section 6 of the AHRA: one is (1) protecting Canadians from the potential harms of commercial surrogacy while at the same time (2) supporting citizens in the choices they make on family-building.[30]

Pursuant to the AHRA, surrogacy and egg donation are allowed, but their commercialization is illegal in Canada. Sections 6, 7, 8, 9 and 12 of the AHRA were not struck down by the Supreme Court in 2010[31] and are the main provisions regulating surrogacy and egg donation in the country. Section 12 is not yet in force. The Act implicitly recognizes surrogacy agreements while asserting that the validity of such agreements falls within the purview of provincial jurisdiction.[32] A "surrogate mother" is defined as "a female person who — with the intention of surrendering the child at birth to a donor or another person — carries an embryo or foetus that was conceived by means of an assisted reproduction procedure and derived from the genes of a donor or donors."[33] The Act establishes 21 years as the minimum age for which a woman can act as a surrogate mother.[34] The combined action of sections 6 and 60 of the AHRA criminalizes the payment to a "female person" acting as a surrogate mother,[35] as well as paying third-parties to arrange for surrogate services and advertising such activities.[36] Section 7

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[28] Healy, *supra* note 21 at 918

[29] Angela Campbell is a researcher and professor in the areas of family law, health law, criminal law, successions law and feminist legal studies, currently the Associate Dean of Graduate Studies at McGill Law

[30] Campbell, "Law's suppositions", *supra* note 26 at 45

[31] See part 1.1, above

[32] *AHRA, supra* note 4, s 6(5): "This section does not affect the validity under provincial law of any agreement under which a person agrees to be a surrogate mother."

[33] *AHRA*, *supra* note 2, s 3

[34] *Ibid*, s 6(4)

[35] *Ibid,* s 6(1)

[36] *AHRA*, *supra* note 2, ss 6 (2) (3), 60: "6 (1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid. (2) No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services. (3) No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it.
(4) No person shall counsel or induce a female person to become a surrogate mother, or perform any medical procedure to assist a female person to become a surrogate mother, knowing or having reason to believe that the female person is under 21 years of age (5) This section does not affect the validity under provincial law of any

prohibits the purchase, or offering to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor,[37] as well as the purchase or sale or advertisement of purchase or sale of in vitro embryos.[38] In each case, penalties range from $500,000 or to imprisonment for a term not exceeding ten years, or to both on conviction on indictment; or $250,000 or to imprisonment for a term not exceeding four years, or to both for a summary conviction.[39]

Moreover, section 12 AHRA prohibits the reimbursement of expenditures, except in accordance with regulations and with receipts. During legislative debates in the House of Commons, back in May 2002, Mr. Rob Merrifield, a Member of Parliament for Yellowhead at the time, supported the banning of commercial surrogacy and suggested reimbursements should be tightly regulated in order to avoid the abuse of the practice, pursuant to the Health Committee's recommendations.[40] However, as we speak, article 12 AHRA has not yet entered into force and the regulations pertaining to the article's purpose have yet to be adopted, which renders reimbursement for surrogacy and egg donation a murky issue according to Professors Downie & Baylis:[41] "There is considerable confusion about when, how much and for what, a surrogate mother […] can be legally reimbursed with or receipts."[42] Since the enactment and entering into force of the AHRA in 2004, its enforcement has remained very weak[43] and there is a lack

agreement under which a person agrees to be a surrogate mother 60. A person who contravenes any of sections 5 to 7 and 9 is guilty of an offence and (a) is liable, on conviction on indictment, to a fine not exceeding $500,000 or to impris- onment for a term not exceeding ten years, or to both; or (b) is liable, on summary conviction, to a fine not exceeding $250,000 or to imprison- ment for a term not exceeding four years, or to both."

[37] *AHRA*, *supra* note 2, s 7(1)

[38] *Ibid*, ss 7 (2) (a) (b)

[39] *Ibid*, s 60

[40] *House of Commons Debates,* 37th Par1, 1st Sess, No 188 (21 May 2002) at 11540 (Rob Merrifield): "The health committee also heard compelling testimony recommending great caution in the regulation of surrogacy. We support the banning of commercial surrogacy and we share the committee's concern that the reimbursement for so-called allowable expenses could be abused by inflating expenses. The committee took these concerns seriously, recommending limits on the expenses for which reimbursements would be made. However we will be calling for tighter language in the reimbursement provisions to ensure that compensation for expenses does not become a de facto commercial transaction."

[41] Jocelyn Downie is a researcher in the areas of health law and policy, ethics and professional responsibility, health law, health care policy, bioethics, professional responsibility and public policy analysis. She is a professor and the Associate Dean of Graduate Studies at the Schulich School of Law, Dalhousie University; Francoise Baylis is a professor and holds the Canada Research Chair in Bioethics and Philosophy at Dalhousie University's Faculty of Medecine.

[42] Françoise Baylis *&* Jocelyn Downie "Wishing doesn't make it so" (17 December 2013) online: Impact Ethics Forum: <https://impactethics.ca/2013/12/17/wishing-doesnt-make-it-so/>

[43] Cattapan, *supra* note 13 at 217-219; Baylis & Downie, "Wishing doesn't make it so", *supra* note 42

of consensus among scholars and policy-makers on whether the commercialization of surrogacy and the purchase of gametes should still be prohibited in Canada.

1.2.2 The Prohibition's Weak Enforcement and Institutional Failures

Following the Supreme Court of Canada's decision in 2010,[44] Assisted Human Reproduction Canada (AHRC), the agency which had been charged with overseeing assisted human reproduction in Canada under the AHRA in 2004, lost most of its powers. However, it maintained the power to administer, inspect and enforce in relation to sections 5 to 9 and 12 of the AHRA, which included "the prohibition on the purchase, offer to purchase, or advertising for purchase of gametes and embryos and the provisions with respect to the regulation of reimbursements for gametes, embryos, and surrogacy and the implementation and enforcement of these sections", as well as the activities provided at sections 24(1) b) c) d) f) h).[45] In 2012, the AHRC was abolished and its remaining powers and responsibilities with respect to compliance, enforcement and outreach, were handed to Health Canada.[46] According to Downie & Baylis, "the AHRC could have been more proactive with respect to its responsibility to promote the enforcement of the Act [...] the AHRC had the power to advise the minister of the imperative for Health Canada to introduce regulations. There is no evidence that the AHRC provided such advice to the minister."[47] According to Professor Nelson, "few who are familiar with the history of the ART regulation in Canada were surprised by the decision to wind down AHRC […] the agency was beleaguered by controversy and opposition."[48]

Although the AHRAs prohibitive provisions regarding surrogacy and egg donation still stand, only one surrogacy case was tried to date, so the measures have not really been enforced in the country.[49] Indeed, in 2013, 27 charges were brought against Leia Picard, an Ontario surrogacy consultant, and her company, for illegally purchasing sperm, eggs and surrogacy services. This

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[44] *Reference Re AHRA, supra* note 1
[45] Baylis & J. Downie, "A Tragedy in Five Acts," *supra* note 9 at 198-199
[46] *Ibid* at 201
[47] *Ibid* at 194
[48] Nelson, *supra* note 5 at 258; Erin Nelson is a professor at the University of Alberta Faculty of Law. She teaches tort law, health care ethics and the law, and law & medicine.
[49] Cattapan, *supra* note 13 at 217-219

was the first conviction under the AHRA.[50] Mrs. Picard pleaded guilty and was charged 60 000$ for violating sections 6 and 7 of AHRA. According to Professors Françoise Baylis and Jocelyn Downie, along with creating more confusion, the Picard case causes concern because it could encourage the commercialization of surrogacy agreements for three reasons : one (1) is that the penalty suffered by Picard was so low that the professors worry it could be interpreted as a license for conducting business, another (2) is that the case will "entrench the view that reimbursement is currently legal" and third (3) Health Canada has not adopted a reimbursement policy.[51]

The professors have stated that although Health Canada claims to have a policy on reimbursements, no such policy has actually been made public, apart from vague information posted online.[52] Furthermore, Health Canada's position has not been subject to parliamentary scrutiny or a RIAS evaluation, nor has the Joint Committee for the Scrutiny of Regulations reviewed it. This, according to the professors "represents an avoidance of democratic accountability and compounds the vulnerability of Canadians who provide and access assisted human reproduction. It should not be tolerated."[53] According to the Professors, the Supreme

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[50] Cattapan, *supra* note 13 at 217-219; Tom Blackwell, "Illegal purchase of sperm, eggs and surrogacy services leads to 27 charges against Canadian fertility company and CEO," The National Post (15 February 2013), online: <http://news.nationalpost.com/2013/02/15/illegal-purchase-of-sperm-eggs-and-surrogacy-services-leads-to-27-charges-against-canadian-fertility-company-and-ceo/> [Blackwell, "Illegal Purchase"]

[51] Baylis & Downie, "Wishing doesn't make it so"*, supra* note 42: "There is much to be concerned about with this case, not the least of which is the small financial penalty. Indeed, the penalty is so low that others involved in similar activities might just consider fines a "cost of doing business"[…] we worry that this case will be taken as permission for individuals to set up businesses to facilitate the commercialization and commodification of human eggs and surrogacy – precisely what the *AHRA* was intended to prevent. The *AHRA* stipulates that "trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition." […] we worry that the case (through the "Agreed Statement of Fact") will entrench the erroneous view that reimbursement is currently legal. If this happens, then the police will not charge, and crown attorneys will not prosecute, those who provide reimbursements to women for their eggs or for surrogacy (as long as they are careful in their record-keeping). This could happen despite the fact that any reimbursement is illegal under the *AHRA* until s12 comes into force. Furthermore, given that there is no official Health Canada policy (that we know of), there is no guidance as to what specific expenses might be permissible reimbursements" [emphasis added].

[52] Françoise Baylis & Jocelyn Downie, "Transnational Trade in Human Eggs: Law, Policy and (In)Action in Canada"(2013) 41:1 J Law Med Ethics 224 at 232 [Baylis & Downie, "Transnational Trade in Human Eggs"]; Françoise Baylis, Jocelyn Downie & Dave Snow, "Fake it Till you Make it: Policymaking and Assisted Human Reproduction in Canada" (2014) 36:6 JOGC 510 at 511-512 [Baylis, Downie & Snow, "Fake it Till you Make it"]; Alison Motluk, "The Human Egg Trade: How Canada's Fertility Laws Are Failing Donors, Doctors, and Patients," *The Walrus* (April 2010), online: <http://thewalrus.ca/the-human-egg-trade/> [Motluk, "The Human Egg Trade"]

[53]Baylis, Downie & Snow "Fake it Till you Make it", *supra* note 52 at 512

Court's decision in 2010 had nothing to do with Health Canada's failure to promptly regulate, albeit claims that it did.[54]

While Professors Baylis & Downie are of the opinion that reimbursements are illegal because section 12 is not in force, Drummond & Cohen[55] argue: "[all eight justices of the Supreme Court in the *Reference* case[56] held the view that] while the AHRA may seek to criminalize the commercialization of reproductive activities, it does not seek to prohibit the reimbursement of actual expenditures. In light of these positions, [we] respectfully disagree with Downie and Baylis's analysis […] although section 12 of the act is not currently in force, it remains relevant for the purposes of understanding the scheme of the act as a whole."[57] According to Drummond & Cohen, Health Canada's policy is available online.[58] I visited the said site in April and May of 2015 and again in September 2015.[59] Although surrogacy was presented as an option for couples alongside egg donation, there was nothing on the page regarding a federal reimbursement policy or specific reimbursement regulations. There was however a rubric stating the following: "Under the *Assisted Human Reproduction Act*, you cannot buy (or advertise to buy) sperm or eggs from a donor or a person acting on behalf of a donor. You also cannot buy (or advertise to buy) the services of a surrogate. You can reimburse a donor or surrogate for actual expenses they have related to the donation or pregnancy."[60] The site was no longer available when I tried to visit it in September. However, on another site, Health Canada has posted more comprehensive information regarding which transactions constitute reimbursements versus the ones that are disguised payments.[61]

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[54] Baylis & Downie, "A Tragedy in Five Acts", *supra* note 9 at 190,192, 194, 199

[55] Professor Susan G. Drummond teaches at Osgoode Hall Law School. She specializes in the areas of legal anthropology, comparative law, civil law, family law, as well as wills and estates; Sara R. Cohen is a lawyer and partner at D2Law LLP in Toronto. She is also the founder of Fertility Law Canada. Her practice is dedicated to fertility law.

[56] *Reference re AHRA*, *supra* note 1; See part 1.1, above

[57] Susan G. Drummond & Sara R. Cohen, "Eloquent (In) Action: Enforcement and Prosecutorial Restraint in the Transnational Trade in Human Eggs as Deep Ambivalence about the Law"(2014) 26:2 CJWL 240 at 212 [Drummond & Cohen, "Eloquent (In)Action"]

[58] *Ibid* at 211, n 17; "Using Donors or Surrogates" (2 April 2013) at Government of Canada online: <http://www.healthycanadians.gc.ca/health-sante/pregnancy-grossesse/donor-donneur-eng.php> (last visited on May 15th, 2015) [Gov of Can Online, "Donors or Surrogates"]

[59] *Ibid*

[60] Gov of Can Online, "Donors or Surrogates", *supra* note 58

[61] "Prohibitions Related to Surrogacy" in "Payment to Surrogate Mothers" at Health Canada online: <http://www.hc-sc.gc.ca/dhp-mps/brgtherap/legislation/reprod/surrogacy-substitution-eng.php> (last viewed May 15th 2015) [Health Canada Online, "Prohibitions Related to Surrogacy"]: "A surrogate mother can be repaid for

1.2.3 The Future: Killing the Prohibition?

Criminalization in the area of reproductive science has been criticized for being too strict in an area that is constantly changing and requires flexible and adaptable regulations.[62] It has also been accused of driving certain practices underground[63] and it has been argued that it should be "reserved for areas in which there is a strong social consensus."[64] The use of absolute criminal prohibitions has also been criticized of not balancing individual autonomy with the intrinsic risks that come with using reproductive technology.[65] Others have highlighted the ambiguities of the criminal prohibitions in the AHRA, particularly the interplay of sections 7 (purchase of gametes), 12 (reimbursements) and 61 (penalty for contravening section 7) and have generally raised questions regarding the stability of the prohibitions as policy.[66]

Furthermore, despite that the AHRA stipulates that it aims to make women's health and well-being a priority,[67] its prohibitive approach on commercialization has been criticized for ignoring empirical evidence on women's actual motivations and experiences as surrogates.[68] In *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate*

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out-of-pocket costs directly related to her pregnancy and usually a receipt is needed. Examples include costs for: maternity clothes, travel for medical appointments, and medications. A surrogate mother may also be repaid for loss of work wages if a doctor certifies, in writing, that bed rest is necessary for her health and/or the health of the embryo or fetus. Indirect and disguised payments are illegal under the AHR Act. They could include paying a surrogate mother's: mortgage credit card bills or school tuition."

[62] Canadian Bar Association, National Health Law and Family Law Sections, "Submission on Draft Legislation on Assisted Human Reproduction" (2002) 10:2 Health L.R. 25 ; Timothy Caulfield, "Clones, Controversy and Criminal Law" (2001) 39:2 Alta. L. Rev. 335; Angela Campbell, "A Place for Criminal Law in the Regulation of Reproductive Technologies" (2002) 10 Health LJ at 86 [Campbell, "A Place for Criminal Law"]

[63] Alison Harvison Young & Angela Wasunna, "Wrestling with the Limits of Law" (1998) 6 Health L.J. 239; Healy, *supra* note 21; Cattapan, *supra* note 13 at 206

[64] Campbell, "A Place for Criminal Law", *supra* note 62 at 80

[65] Downie & Flood, "Canadian Health Law 2011", *supra* note 8 at 383

[66] Drummond & Cohen, "Eloquent (In)Action", *supra* note 57 at 207, 210, 213-214: "[…] the criminal prohibitions contained in sections 5-7 and 9 were conceded by the prime challenger, the Attorney General of Québec, to be validly enacted pursuant to the federal criminal law power. As a result, the Supreme Court of Canada never scrutinized these prohibitions for their constitutional soundness. Can these criminal prohibitions, having avoided judicial scrutiny and now standing exposed in the ploughed field of the AHRA, be regarded as stable social policy?"

[67] *Supra*, note 4, ss 2(c) (f)

[68] 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 [Busby & Vun, "The Handmaid's Tale"]

Mothers" Professor Karen Busby[69] and Delaney Vun,[70] argue that, at the time the AHRA was drafted, empirical evidence from the USA and Britain did not suggest surrogates felt exploited or psychologically vulnerable.[71] However, the Royal Commission on New Reproductive Technologies based its analysis on the feminist current[72] in the USA and Canada at the time and decided commercial surrogacy should be prohibited because of the potential it could exploit women's emotional, physical and economical vulnerabilities.[73] In *Law's Suppositions about Surrogacy against the Backdrop of Social Science,*[74] Angela Campbell reviews the above-mentioned feminist perspectives on the issue, including the more recent claims made by Québec scholars Louise Langevin and Marie-France Bureau.[75] While she agrees that the legislator did not account for surrogate's experiences at the time the AHRA was enacted and these real life experiences can be enriching to legal discourse, she refrains from taking a stance on whether the AHRAs prohibition should be maintained, arguing instead that amendments should depend on what the legislator's objectives are.[76]

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[69] Professor Busby is the director of the University of Manitoba Centre for Human Rights Research Initiative, her research and teaching interests include constitutional law, in particular human rights and equality law, civil procedure and administrative law. Where equality law is concerned, Professor Busby's research has focused on the discriminatory impacts of laws regulating sex, gender, sexuality and violence.

[70] Delaney Vun is a lawyer at Fillmore Riley, in Winnipeg, Manitoba. She practises primarily in the areas of corporate, commercial, real estate, condominium, and wills and estates law.

[71] Busby & Vun, "The Handmaid's Tale", *supra* note 68 at 16, 40

[72] *Ibid* at 16, n 6 (For the list of feminists who argued against commercialized surrogacy in the USA and Canada)

[73] *Ibid* at 16, 40

[74] *Supra* note 26

[75] Louise Langevin, "Réponse jurisprudentielle à la pratique des mères porteuses au Québec : Une difficile réconciliation" (2010) 26:1 Can J Fam L 171 [Langevin, "Réponse jurisprudentielle"] (Louise Langevin is a Professor at the University of Laval Faculty of Law, her areas of interest include Feminist theory, women's rights, discrimination, sexual harassment, contract law, tort law, violence against women and human rights. She maintains that surrogacy practice has the potential to exploit women whether it is commercial or altruistic but calls for strictly regulating the practice instead of prohibiting it); Marie-France Bureau & Édith Guilhermont, "Maternité, gestation et liberté: Réflexions sur la prohibition de la gestation pour autrui en droit Québecois" (2011) 4:2 McGill JL & Health 43 [Bureau& Guilhermont, "Maternité, Gestation et Liberté"] (Marie-France Bureau is a professor at the University of Sherbrooke, her areas of interest include Family Law, Rights and Freedoms, the History of Law, Jurilinguisitics, Comparative Law and Health Law and Policy. Edith Guilhermont holds a doctorate in private law and criminal sciences from the University of Perpignan (2006). She is a lecturer at the Université de Sherbrooke faculty of law since 2008. The authors argue for a liberal stance on surrogacy in Québec. For more about their article see part 5.3, below)

[76] Campbell, "Law's Suppositions", *supra* note 26 at 34-35: "This article refrains from taking a blunt normative stance, and it does not direct federal or provincial lawmakers to revisit the law in this area. Instead, it offers insight into the way in which legal and political discussions about surrogacy at the federal and provincial levels, particularly in Quebec, fail to reflect the motivations and experiences of women who choose to become surrogates. Whether this observation offers a basis for legal social realities, this article may substantiate their reform In contrast, if these laws pursue some other objective-for example, protecting the integrity and dignity of children conceived by surrogacy, or communicating that the practice is morally flawed-the discussion here would not necessarily yield

Erin Nelson points to the fact that, despite making claims about the importance of human dignity and human rights, the AHRA does not place importance on reproductive autonomy. She criticizes the fact that women's health and well-being are treated as a "uniform, neatly calculable quantity[77]" which does not distinguish the multifaceted needs of women involved in ARTs.[78] In her view "the [AHRAs] declaration about women's health and well-being adopts a potentially paternalistic stance, as an oversight body could conceivably take the view that women's health and well-being is best safeguarded by a restrictive regulatory approach, and thereby harm the health and well-being of infertile women under the guise of protecting those very interests."[79] In reality, according to Alana Cattapan,[80] the AHRA's ban on commercial reproductive practices has been detrimental to women's interests, despite the intentions to make women's health a priority: the AHRA's prohibition on commercial egg donation has not protected women from exploitation and/or the risks of experimental procedures conducted without informed consent.[81] Indeed, where the Royal Commission's argument on preventing exploitation is concerned, banning pay for eggs does not remove the possibility that women feel compelled to donate by non-pecuniary factors such as family and social pressure. The same arguments have been made by Louise Langevin and Rakhi Ruparelia,[82] where surrogacy is concerned. Furthermore, the physiological harms and risks associated with egg donation for which the Royal Commission expressed concern have not been eliminated with the ban on commercialization. Rather, they have been "pushed away from public scrutiny."[83]

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a call for amendments to existing surrogacy rules. This paper reform will depend on the goal of our surrogacy laws. If such laws aim to mirror"

[77] Nelson, *supra* note 5 at 261; About Erin Nelson see *supra*, note 48

[78] *Ibid* at 261: "An approach that serves the needs and interests of some women in their own health and well-being might leave the needs of others unmet. The well-being of an infertile woman might be best fostered by facilitating unrestricted access to all ARTs, while that of a potential egg-donor might demand a more restricted approach."

[79] *Ibid* at 262

[80] Alana Cattapan online <http://arcattapan.ca/>

[81] Cattapan, *supra* note 13 at 210-213 (On how the *AHRA* commercial prohibition fails egg donors)

[82] Langevin, "Réponse Jurisprudentielle", *supra* note 75; Rakhi Ruparelia, "Giving Away the Gift of Life" (2007) 23 Can. J. Fam. L. 11 (Rakhi Ruparelia is an associate professor at Faculty of Law of University of Ottawa. Her research interests include torts, criminal law, critical race theory, and feminist legal theory)

[83] Cattapan, *supra* note 13 at 212-214: "Rather than have open and forthright relationships between egg donors, parents-to-be, doctors, and clinic staff, donors and intended parents have had to establish the terms of their agreements in an aura of illegality likely to discourage women from returning to the clinics where they donated when com- plications arise or unwilling to speak out if and when any mistreatment occurs.49 Experts in this field have suggested that left to the unregulated grey market, donors are more likely to experience harm by going without the support services they need."

Several scholars like Downie & Baylis, Erin Nelson and Drummond & Cohen, recognize that Canadians are involved in the transnational egg trade.[84] The fact of the matter is, gamete donors are insufficient the country, so Canadians seek providers from other jurisdictions and they pay for the eggs: "the legality of using an out of country service to help commit an act that is illegal in this country isn't quite so clear."[85] According to Drummond & Cohen, the activities referred to at section 7 AHRA should not be regulated by criminal law and "the thriving cross-border traffic suggests not that we extend Canadian law to events happening outside of our borders but, rather, that we rethink domestically the import of this traffic."[86] Downie & Baylis don't suggest removing the commercial prohibition; instead, they argue the AHRA should be more tightly enforced and suggest that the federal government should promote national self-sufficiency in order to counteract the transnational market's potential attractions.[87]

Their argument for self-sufficiency is that Canada should find ways to promote the increase of altruistic egg supply in the country, all the while finding strategies to decrease the demand for eggs. The scholars' aim is to reduce and ultimately eliminate the involvement of Canadians in the commercialization of human eggs and transnational trade on human reproductive materials. They cite a few strategies which could help increase the supply of oocytes in Canada: (1) the legal uncertainty surrounding egg donation reimbursements can act as a deterrent for potential egg donators. Clarifying what is legally reimbursable pursuant to sections 7 and 12 AHRA would encourage women who otherwise would not donate. (2) Clearer provincial parentage laws protecting the interests of egg donors. Indeed, the fact that the rules vary from province to province and are not always clear leaves room for uncertainty where parental rights and responsibilities are concerned. (3) They also suggest paying more attention to egg providers' long-term health and well-being, notably, by creating professional guidelines or laws that ensure women have access to their medical record, obtain proper follow up, which is not yet the case.[88] (4) Lastly, providing education about egg donation to the public. The scholars also look at

[84] Nelson, *supra* note 5 at 298; Baylis & Downie, "Transnational Trade in Human Eggs", *supra* note 52 ; Françoise Baylis & Jocelyn Downie, "Achieving National Altruistic Self-Sufficiency in Human Eggs for Third Party Reproduction in Canada, (2014) 7:2 Int J Fem Approaches Bioeth 164 [Baylis &Downie, "National Altruistic Self-Sufficiency"]; Drummond& Cohen, "Eloquent (In)Action", *supra* note 57 at 220

[85] Motluk, "The Human Egg Trade*", supra* note 52*;* Nelson, *supra* note 5 at 298

[86] Drummond & Cohen, "Eloquent (In)Action", *supra* note 57 at 228

[87] Baylis & Downie, "Transnational Trade in Human Eggs", *supra* note 52; Baylis & Downie, "National Altruistic Self-Sufficiency", *supra* note 84

[88] Baylis & Downie, "National Altruistic Self-Sufficiency", *supra* note 84 at 171-177

strategies to decrease the demand for oocytes in the country. They suggest creating "(1) programs and policies to prevent some types of social infertility, as well as programs and policies to prevent (and, where possible, treat) medical infertility; (2) support for child-free living, as well as support for alternative ways of family making (e.g., adoption); (3) public awareness campaigns on the harms of transitional trade in eggs; (4) and a firm commitment to enforcement of the AHR Act prohibition on the purchase of eggs."[89]

In Angela Campbell's view, despite the fact that criminal legislation does take more time to change, a term for legislative review of the AHRA can be implemented.[90] She also notes that administrative bodies are not accountable to the public, whereas the Parliament is. She argues that the values at stake in reproductive science are important enough to warrant a prohibitive framework because the impacts extends beyond the users and providers and that such a framework is useful insofar as it conveys a powerful social message.[91]

On her part, Roxanne Mykitiuk[92] highlights how health care governance is being privatized in Canada, due to the impact of globalization, particularly in the areas of genetics and assisted reproduction. She argues that Canada's role in health care is shifting from a protective model to a regulatory one, whose aim is to foster the biotech industry and self-regulation. In other words, the government is transferring its responsibility for public health to private industries and in the process, we are changing our definition of health and disease: "Health Canada acknowledges that its regulatory system is shifting away from a model where assessments are made in- house towards one, which it calls a "networked" model, including universities and industry […] and the "Canadian state's autonomy in relation to international trade and the demands of multinational companies is shrinking […] Health is increasingly being regulated as a commodity rather than as a public good, and health care as a business rather than as a public service."[93]

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[89] *Ibid* at 171, 177-180

[90] Campbell "A Place for Criminal Law", *supra* note 62 at 87

[91] *Ibid* at 96-99

[92] Roxanne Mykitiuk is an assistant professor of law at Osgoode Hall Law School, York University. She teaches in the areas of disability law, bioethics, health law and family law.

[93] Roxanne Mykitiuk, "The New Genetics in the Post Keynesian State" (*The Gender of Genetic Futures: The Canadian Biotechnology Strategy, Women and Health Proceedings of a National Strategic Workshop held at York University, February 11-12, 2000*), available online at http://ssrn.com/abstract=1745124 [Mykitiuk, " The New Genetics"]

It should be noted that, on June 2nd, 2014, Mr. Dean Del Mastro introduced Bill C-607, *An Act to Amend the Assisted Human Reproduction Act*, on June 2nd, 2014. Essentially, his proposition is to amend the AHRA in order to allow paid surrogacy contracts and services. According to him, it is hypocritical for Canada to recognize commercial surrogacy agreements which have been concluded abroad, while prohibiting the practice on Canadian territory. In his opinion, the bill he proposes would be helpful to Canadian families.[94]

In sum, while the constitutional conflict regarding the AHRA has created a space for scholars to question the systemic features of surrogacy and artificial reproduction's prohibitive policy, it has also left a regulatory vacuum in the hands of the provinces, which I turn to next.

2. The Regulation of Artificial Reproduction Technologies in Canadian Provinces

As I have examined above, the regulation of assisted reproduction falls within the scope of provincial jurisdiction, except for the commercial prohibition sanctioned by the AHRA. Besides Québec, who legislated on the matter in 2010, Canadian provinces do not have a comprehensive regulatory framework specific to the practice of and research in assisted reproduction.[95] Some scholars do not believe most provinces will spend time and money for a public debate on something that "will be relevant to such a narrow group of practioners."[96] However, some are optimistic that governments and the professions' regulators will cooperate in order to create a legal framework.[97] Indeed, the Society of Obstetricians and Gynecologists of Canada (SOGC) and the Canadian Fertility and Andrology Society (CFAS) have issued joint policy statements on ethical issues in assisted reproduction.[98] As pointed out by Erin Nelson, the said joint policy

[94] *House of Commons Debates*, 41st Parl , 2nd Sess, No 094 (2 June 2014) at 1355 (Hon Dean Del Mastro): "This bill is very important. As I started researching this, I had personal experience with the issue. Very good friends of mine went through challenges as a result of not being able to conceive children, and today they have a wonderful family. Thousands of Canadian families struggle in this regard today, and sections 61, 62, and 63 of the Assisted Human Reproduction Act prohibit payment to a surrogate mother or payment for services related to surrogacy. At the same time, there is real hypocrisy, as we recognize these contracts when Canadians venture across the border to the United States or elsewhere around the world. This is a pro-family bill. It would help families to have children of their own, to have their own families. I hope the bill finds support in all quarters of this House. It is time we moved to put these changes in place" [emphasis added]

[95] Juliet Guichon, Ian Mitchell & Christopher Doig "Assisted Human Reproduction in Common Law Canada after the Supreme Court of Canada Reference: Moving beyond Regulation by Colleges of Physicians and Surgeons" (2013) 25:2 CJWL at 323 [Guichon et al.]

[96] Nelson, *supra* note 5 at 259; Downie & Flood, "Canadian Health Law 2011", *supra* note 8 at 334

[97] Nelson, *supra* note 5 at 259; "Canadian Health Law 2011", *supra* note 8 at 334

[98] Nelson, *supra* note 5 at 260

only covers certain aspects of assisted reproduction; surrogacy is one of the issues covered, as well as the medical and genetic screening of sperm, oocyte and embryo providers.[99] While the SOGCs guidelines are available free of charge to the public online,[100] on the CFAS website, the clinical practice guidelines are only accessible to members.[101] In Alberta and Saskatchewan, the College of Physicians and Surgeons (CPSA & CPSS) established medical practice guidelines to oversee the practice of ARTs.[102]

Erin Nelson examined at the current regulatory void in Canada from the angle of women's reproductive autonomy. She acknowledges feminist concerns about reproductive technologies, namely the fact that they "were introduced into clinical practice without ever being subjected to comprehensive safety and efficacy studies."[103] In her opinion, reproductive autonomy requires striking a balance between protecting women and encouraging their autonomy.[104] She argues that despite the fact the AHRA statement of principles asserts women's health and well-being as important and requiring protection,[105] the legislation attributes little importance to individual choice in reproductive decision making and it "prioritizes the interests of potential children over those of actual women."[106] As such, the professor maintains that AHRA "adopts a potentially paternalistic stance."[107] She claims that it is not realistic to leave research and clinical practice of ART unregulated by the state, that, whether it is private or public, regulation is inevitable: there will always a gatekeeper of sorts controlling access to reproductive technologies and reproductive autonomy will be affected regardless of which type of regulatory model is

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[99] "Joint Policy Statement: Ethical Issues in Assisted Reproduction" (1999) 21 Journal of Obstetrics and Gynaecology Canada at 1, 3-12, 39-41, Canadian Fertility and Andrology Society online: <https://www.cfas.ca/index.php?option=com_content&view=article&id=1116&Itemid=686 >; About Erin Nelson, see *supra*, note 48

[100] "Clinical Practice Guidelines", The Society of Obstetricians and Gynaecologists of Canada online: <http://sogc.org/clinical-practice-guidelines/> (Last visited on October 12th, 2015; The archived guidelines exceptionally require a member login)

[101] "Clinical Practice Guidelines", The Canadian Fertility and Andrology Society online: <https://www.cfas.ca/index.php?option=com_content&view=article&id=1116&Itemid=686> (Last visited October 12, 2015. A login is required in order to access the content of the CFAS).

[102] Guichon et al., *supra* note 95 at 317

[103] Nelson, *supra* note 5 at 263

[104] *Ibid* at 261-263

[105] *AHRA, supra* note 4, s 2 (c): while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies

[106] Nelson, *supra* note 5 at 262

[107] *Nelson, supra* note 5 at 262

implemented.[108] Setting aside the question of whether the state should regulate morality, Nelson claims that ARTs treatments have public implications as well and that state regulation has its benefits, such as: quality control, public knowledge, accountability and data collection.[109]

Nelson is not a proponent of the self-regulatory model which places exclusive regulatory power in the hands of medical professionals. In her opinion, besides constituting a fragmented approach, this type of model would clearly incur potential conflicts of interests and leave too much power in the hands of the few.[110] As for public regulation, Nelson points out that the choice lies between direct government control or indirect control through an independent body. Her stance leans toward the latter, while recognizing that finding a proper balance between the body's accountability and transparency and accounting for public opinion is central.[111] Basing her analysis on the UK and Australian regulatory models, the professor argues that a combined "professional and public approach is not only the most practical means of accomplishing thoughtful and appropriate regulation of ARTs, it also seems the most likely contender for a regulatory model that will properly respect reproductive autonomy."[112]

Juliet Guichon[113] & al., have also maintained that professional guidelines are not sufficient, mainly because of the potential conflict of interest doctors could face[114] and because the colleges have not really set up firm guidelines on values, as was suggested by the Royal Commission on New Reproductive Technologies:[115]

> [S]elf-regulation is necessary but not sufficient: many of the policy decisions are social, economic and ethical rather than medical, and a regulating body reflecting other perspectives is needed […] [f]ailure to create legislation or to establish a [regulatory body] is, in fact, a policy—and one that would not be in the best interest of Canadians in the long term. In the absence of social policy in this area, the market will decide what is used and what is available.[116]

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[108] Nelson, *supra* note 5 at 264
[109] *Ibid* at 271
[110] *Ibid* at 266-267
[111] *Ibid* at 266-269
[112] *Ibid* at 270
[113] Juliet Guichon is an assistant professor in the Department of Community Health Sciences at the University of Calgary. Her research areas include law and ethics, consent, autonomy, assisted human reproduction, religion and health care, end of life etc.
[114] Guichon et al., *supra* note 95 at 317, 336; Nelson, *supra* note 5 at 265
[115] Guichon et al., *supra* note 95 at 317, 323- 325
[116] Patricia Baird, "New Reproductive Technologies: The Need to Ensure That Uses in Canada Are Safe, Effective and in the Public Interest" (1994) 151:10 Canadian Medical Association Journal 1439 at 1440 cited in Guichon et al., *supra* note 95 at 324

Guichon suggests common law provinces could use Québec's legal framework as a model because it has a strong value statement and is equipped with clear enforcement measures.[117] In Québec, assisted reproduction is regulated by the *Act respecting clinical and research activities relating to assisted procreation*[118] (APA) (and associated regulation[119]). Essentially, the Act seeks to ensure the quality practice of assisted reproduction, consistent with safety and ethical standards.[120] It defines assisted procreation activities as follows:

> [A]ny support given to procreation by medical or pharmaceutical techniques or laboratory manipulation, whether clinical, to create a human embryo, or in the field of research, to improve clinical procedures or acquire new knowledge.
> The following activities are targeted in particular: the use of pharmaceutical procedures to stimulate the ovaries; the removal, treatment, in vitro manipulation and conservation of human gametes; artificial insemination with a spouse's or a donor's sperm; preimplantation genetic diagnosis; embryo conservation; embryo transfer in women.
> However, the surgical procedures to restore normal reproductive functions in a woman or a man are not targeted.[121]

Since August 2010, pursuant to the APA, all women of childbearing age from Québec have been admissible to the province's assisted procreation program, which was covered by public health care for up to three IVF cycles[122]. The APA does not preclude surrogates from benefiting from the program but it is silent regarding the handling of surrogacy cases. So, in practice, based on

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[117] Guichon et al., *supra* note 95 at 331-333

[118] CQLR c A-5.01 [*APA*]

[119] *Regulation respecting clinical activities related to assisted procreation*, CQLR c A-5.01, r 1 [*APR*]

[120]Québec, Ministère de la santé et des services sociaux, *Rapport sur la mise en œuvre de la Loi sur les activités cliniques et de recherche en matière de procréation assistée* (October 2013) at 4: " [La Loi a pour but] d'encadrer ces activités de manière à assurer une pratique de qualité, sécuritaire et conforme à l'éthique. Elle a également pour but de favoriser l'amélioration continue des services dans ce domaine"

[121] "Tout soutien apporté à la reproduction humaine par des techniques médicales ou pharmaceutiques ou par des manipulations de laboratoire, que ce soit dans le domaine clinique en visant la création d'un embryon humain ou dans le domaine de la recherche en permettant d'améliorer les procédés cliniques ou d'acquérir de nouvelles connaissances. Sont notamment visées les activités suivantes: l'utilisation de procédés pharmaceutiques pour la stimulation ovarienne; le prélèvement, le traitement, la manipulation in vitro et la conservation des gamètes humains; l'insémination artificielle avec le sperme du conjoint ou le sperme d'un donneur; le diagnostic génétique préimplantatoire; la conservation d'embryons; le transfert d'embryons chez une femme. Toutefois, les procédés chirurgicaux qui visent à rétablir les fonctions reproductrices normales d'une femme ou d'un homme ne sont pas visés" [official translation].

[122] Québec, Health and Welfare Commissioner, *Summary Advisory on Assisted Reproduction in Québec* (June 2014) at 14 [Québec Summary Advisory Report 2014]: "Unlike most other provinces and countries that provide publically funded ART procedures or treatments, very few criteria limiting access to the program have been defined in Québec. No precise reproductive age is specified in the act or its associated regulations, which leaves room for interpretation and medical judgment. In the absence of eligibility criteria, services are available both to couples diagnosed as infertile and to single women and same-sex couples"; *Health Insurance Act*, CQLR c A-29, ss 3 e), 69 c) 2); *APR, supra* note 119, s 9; *Regulation respecting the application of the Health Insurance Act* , CQLR c A-29, r. 5, ss 34.3-34.6; Québec, *Programme Québecois de procréation assistée*, online : <http://www.sante.gouv.qc.ca/programmes-et-mesures-daide/programme-quebecois-de-procreation-assistee/admissibilite/> (last viewed in August 2015);

their internal guidelines, certain fertility clinics have refused surrogates, whereas others have not[123]. Section 9 of the APA provides that the Minister of Health and Social Services can bring the matter before a competent body, such as the Health and Welfare Commissioner, to request an opinion if a matter poses fundamental social or ethical questions for society.[124]

In November 2014, the Minister of Health and Social Services presented *Bill n°20 An Act to enact the Act to promote access to family medicine and specialized medicine services and to amend various legislative provisions relating to assisted procreation,*[125] which removed public health insurance coverage for assisted reproductive services, except for artificial insemination. The amendments made to the APA by Bill 20 do not include anything that is surrogate-specific[126]. Initially, the Bill set age requirements for in vitro fertilization (18-42 years)[127] but social controversy on the issue led the minister to amend the requirements, choosing instead to leave it to medical practioners to decide whether a woman's age is medically appropriate for assisted procreation.[128] The Bill does provide that those forming the *parental project* and who risk compromising the security or the development of the future child, must be subjected to psychosocial evaluation.[129] The *parental project* is a concept that was coined in 2002 and appears in the *Civil Code of Quebec's*[130] (CCQ) chapter on the filiation (parentage) of children born of assisted reproduction.[131] I examine provincial parentage laws as they relate to surrogacy in the next section.

3. Parentage Laws and Surrogacy Arrangements in Canadian Provinces

As we speak, provincial family law frameworks regarding parentage are not always coherent with one another and courts have played a particularly prominent role in the development of

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[123] Québec, Conseil du statut de la femme, Avis, "Mères Porteuses: Réflexion sur les enjeux actuels" (2016) online at <www.placealegalite.gouv.qc.ca> [The Council's Advisory 2016].

[124] Lorsqu'une activité de procréation assistée soulève des questions éthiques et sociales sur des enjeux fondamentaux qui concernent la société québécoise, le ministre peut saisir un organisme compétent, notamment le Commissaire à la santé et au bien-être, afin d'obtenir un avis [official translation]

[125] Projet de Loi no 20, *Loi édictant la Loi favorisant l'accès aux services de médecine de famille et de médecine spécialisée et modifiant diverses dispositions legislatives en matière de procréation assistée*, 1st Sess, 41st Leg, Québec, 2014 (Came into force on November 10th, 2015) [*Bill 20*]

[126] See the comments of Minister Barrette, in part 7.2, below

[127] *Bill 20, supra* note 125, Part II, cl 3

[128] *Bill 20*, *supra*, note 125, cl 10; See part 7.2, below for more on this topic

[129] *Ibid*, cl 10.2; The Council's Advisory 2016, *supra* note 123

[130] *Civil Code of Québec*, CQLR c C-1991[CCQ]

[131] *Ibid,* arts 538, 538.1, 538.2, 538.3, 539- 540

parentage policy in the context of surrogacy arrangements.[132] Indeed, the existing parentage rules relevant to ARTs and surrogacy are sparse and their application is murky.[133] Some jurisdictions only have parentage rules relating to gamete providers, others for surrogates as well.[134] Moreover, the enforceability of surrogacy arrangements varies from province to province. Most provinces do not have parentage laws applicable specifically to surrogacy arrangements and that is why parentage issues in this area are mainly left to the courts.[135]

In Manitoba, where the *Vital Statistics Acts*[136] provides for same-sex parents situations, there is no legislation specifically targeting surrogacy and litigation has not been progressive in the area.[137] The *Child Status Act*[138] in Prince Edward Island precludes surrogacy by stating that birth mother is the mother, regardless of whether she is the genetic one.[139] In Ontario, there is no legislation respecting parentage in surrogacy cases, but surrogacy occurs and it remains to the discretion of family law courts whether to make a parentage declaration or not.[140] Saskatchewan's legislation does not recognize parentage for surrogacy cases but, in 2011, a court granted two gay men parentage. The surrogate was not genetically tied to the child.[141] In New Brunswick there is no parentage legislation specific to surrogacy. A declaration for parentage was allowed by the Court of the Queen's Bench in 2010,[142] the child was genetically tied to the intended parents who were heterosexual.[143] Another declaration of parentage was

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[132] Dave Snow, "Surrogacy and Parentage Policy in the Canadian Provinces: Gradual Permissiveness and Creeping Judicialization" (Paper prepared for the International Political Science Association World Congress July 19-24, 2014, Montreal, QC) online at http://paperroom.ipsa.org/papers/paper_37831.pdf [Snow, "Creeping Judiciliazation"]; Audrey L'Espérance, "Quand la justice tisse des liens : La (re)construction de la filiation dans les décisions portant sur la procréation assistée au Canada" (2012) 31:2 Politique et Sociétés 67; Nelson, *supra* note 5 at 338

[133] Nelson, *supra* note 5 at 338

[134] *Ibid* at 338; *Droit de la famille 151172*, 2015 QCCS 2308 at paras 48-56 [*Famille 151172*]

[135] *Famille 151172*, *supra* note 134 at paras 48-56

[136] CCSM, c V60, s 3(6); Nelson, *supra* note 5 at 338

[137] Snow, "Creeping Judicialization", *supra* note 132 at 16; Nelson, *supra* note 5 at 338-339

[138] RSPEI 1988, c C-6

[139] Snow, "Creeeping Judicilization", *supra* note 132 at 17

[140] Snow, "Creeping Judicialization", *supra* note 132 at 18-19; *D. (M.) et al.* v. *L. (L.) et al.* [2008] O.J. No. 907; *A. (A.)* v. *B. (B.)* [2007] O.J. No. 2, 150 C.R.R. (2d) 110

[141] *W.J.Q.M.* v. *A.M.A.* 2011 SKQB 317

[142] *W. (J.A.)* v. *W. (J.E.)* 2010 NBQB 414

[143] Snow, "Creeping Judicialization", *supra* note 132 at 21

made just recently in *M (M.A.)* v *M (T.A.),*[144] where the Court of the Queen's Bench considered the *Family Services Act*[145], and the *Children's Law Reform Act*[146] in its analysis.

To date, five provinces have parentage legislation pertaining to surrogacy specifically: Newfoundland (and Labrador), Alberta, Nova-Scotia, British Colombia and Québec. In Newfoundland (and Labrador), pursuant to section 5(6) of the *Vital Statistics Act,*[147] a Court order must be issued under the *Adoption Act*[148] or the *Children's Law Act*[149] in order for the registrar to inscribe intended parents. The order can be sought before birth.[150] In Alberta, surrogacy contracts are unenforceable. The assumption is that the child's parents are the surrogate and genetic father. The *Alberta Family Law Act* (AFLA)[151] permits parentage transfer, for which an application must be made within 30 days of the child's birth (declaration of parentage), so long as at least one of the intended parents is genetically related to the child. The Pre-birth surrogate agreement consent to the transfer cannot be used by surrogate as a post-birth consent but it can be used as consent by a non-genetic parent. Because the parentage transfer occurs post-birth, it is not considered a contract, which would be unenforceable.[152] In Nova-Scotia, pursuant to section 5 (2) of the *Birth Registration Regulations,*[153] a court "may make a declaratory order with respect to the parentage of the child if all of the following apply: (a) the surrogacy arrangement was initiated by the intended parents; (b) the surrogacy arrangement was planned before conception; (c) the woman who is to carry and give birth to the child does not intend to be the child's parent; (d) the intended parents intend to be the child's parents; (e) one of the intended parents has a genetic link to the child". Section 5(2) c) suggests that if a surrogate wants to keep the child, she can.[154]

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[144] 2015 NBQB 145
[145] S.N.B. 1980, c. F-2.2
[146] R.S.O. 1990, c. C.12
[147] SNL 2009, c V-6.01
[148] SNL 2013, c A-3.1
[149] RSNL 1990, c C-13
[150] Snow, "Creeping Judicialization", *supra* note 132 at 14-15
[151] *Family Law Act*, SA 2003, c F-4.5
[152] *Ibid,* ss 7, 8.1, 8.2; Snow, "Creeping Judicialization", *supra* note 132 at 11-12; Nelson, *supra* note5 at 339-341
[153] N.S. Reg. 390/2007
[154] Snow, "Creeping Judicialization", *supra* note 132 at 16

In *Rypkema,*[155] which was the first parentage case in the context of a surrogacy agreement in British Colombia, the Director of Vital Statistics had refused to register the genetic mother as the birth mother. The genetic parents petitioned the Supreme Court of British Columbia requesting a declaration of parentage in favour of the intended parents. The court found that, in as much as courts can make a declaration of paternity, they also have jurisdiction to make a declaration of maternity[156] and it granted the application for a declaration of parentage in favour of the intended parents. The *Rypkema* case was later applied by the British Colombia Supreme Court in *N. (B.A.)* v. *H. (J.).*[157] In this case, the intended parents, the surrogate and the egg donor petitioned the court for a declaration of parentage in favour of the intended parents of twins which were conceived in vitro with an egg donor's ovum. Although nothing in the *Vital Statistics Act*[158] provided for parentage in the case of surrogacy agreements at the time,[159] the agency had developed particular guidelines which, upon evidence provided to the court, had been respected by the petitioners.[160] Given that and given the reasons in the *Rypkema* case, the judge granted the application. These two cases were the cornerstone of the legislative amendments brought to the *British Colombia Family Law Act* (BCFLA) [161] in 2011.[162]

Pursuant to the BCFLA, surrogacy contracts are valid and they can be used as evidence in court if a dispute arises post-birth.[163] The intended parents are the parents, provided a pre-birth agreement was formalized in writing and that the surrogate relinquished her parentage rights therein. Immediate post- birth parental registration is permitted, without having to go to court. The province permits parentage transfer to more than two parents when a surrogate is involved, unlike in Alberta where it is restricted to two.[164] Indeed, in February 2014, Della Wolf Kangro

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[155] *Rypkema* v. *British Columbia*, 2003 BCSC 1784

[156] *Ibid* at para 29: "While there is no B.C. case addressing the issue on this application, in O'Driscoll v. McLeod (1986), 10 B.C.L.R. (2d) 108 (B.C. S.C.), Huddart L.J.S.C. (as she then was) held that the court had jurisdiction to make binding declarations of paternity. I conclude that the court must also have jurisdiction to make binding declarations of maternity."

[157] 2008 BCSC 808 [*NBA* v *HJ*]

[158] R.S.B.C. 1996, c. 479

[159] *NBA* v *HJ*, s*upra* note 165 at para 11: "I cannot find a provision in the Vital Statistics Act which explicitly authorizes the making of the declaration sought"

[160] *Ibid* at paras 15-17

[161] *Family Law Act*, SBC 2011, c 25 [*BCFLA*]

[162] Snow, "Creeping Judicialization", *supra* note 132 at 8

[163] *BCFLA*, *supra* note 161, ss. 27, 29- 31

[164] Snow, "Creeping Judicialization", *supra* note 132 at 12-13 ; Nelson, *supra* note 5 at 340-341

Wiley Richards, became the first baby in British Colombia with three parents on her birth certificate: a lesbian couple and their male friend.[165]

In Québec, the CCQ provides the general rules respecting parentage (filiation). In its Book II, entitled "The Family", at Title II, the code currently provides three types of filiation: filiation by blood,[166] filiation of children born by assisted procreation[167] and adoption.[168] Article 522 provides that "all children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth." In the next sections I take a general look at each of type of filiation instituted by the CCQ in order to situate surrogacy and assisted procreation within the province's existing filiation framework.

3.1 The *Code Civil du Québec* on Filiation, Assisted Procreation and Surrogacy

3.1.1 Filiation by Blood

Filiation by blood is regulated at articles 523-537 CCQ. The first section of Chapter I[169] defines and establishes paternal and maternal filiation and section 2 regulates actions that can be taken to contest or claim filiation.[170] Generally speaking, filiation is established by the act of birth,[171] or if there is no act of birth,[172] by uninterrupted possession of status.[173] The constitutive elements of the latter were developed by jurisprudence.[174] Indeed, it is notable to mention that despite the title "filiation by blood," the genetic links with the child is not the sole element

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[165] Abigale Subdan, "Vancouver baby becomes first person to have three parents named on birth certificate in B.C." The National Post (February 2014)**,** online: http://news.nationalpost.com/2014/02/10/vancouver-baby-becomes-first-person-to-have-three-parents-named-on-birth-certificate-in-b-c/
[166] *CCQ*, *supra* note 130, arts 523-537
[167] *Ibid*, arts 538-542
[168] *Ibid*, arts 543-584
[169] *Ibid*, arts 523-529
[170] *Ibid*, arts 530-537
[171] *Ibid*, arts 111-112, 523
[172] *Ibid*, art 523
[173] *Ibid,* art 524: Uninterrupted possession of status is established by an adequate combination of facts which indicate the relationship of filiation between the child and the persons of whom he is said to be born
[174] *Droit de la famille — 1528*, 2015 QCCA 59; *Droit de la famille 151830*, 2015 QCCS 3458; *Droit de la famille 142570*, 2014 QCCS 4936; *Droit de la famille 141481*, 2014 QCCS 2878; *Droit de la famille 14250*, 2014 QCCS 545; *Droit de la famille 14138*, 2014 QCCS 280; *Droit de la famille 122257*, 2012 QCCS 4037; *Droit de la famille 12395*, 2012 QCCS 751; *Droit de la famille 12405*, 2012 QCCS 758; *Droit de la famille 114134*, 2011 QCCS 7076; *Droit de la famille 112052*, 2011 QCCS 3520; *Droit de la famille 102895,* 2010 QCCS 5262; *Droit de la famille 093345*, 2009 QCCS 6298; *Droit de la famille 091637*, 2009 QCCS 3098; *Droit de la famille 091522*, 2009 QCCS 2917; *Droit de la famille 091688*, 2009 QCCS 3420; *Droit de la famille 091137*, 2009 QCCS 2216; *Droit de la famille 092070*, 2009 QCCS 3934; *Droit de la famille 081552*, 2008 QCCS 2888;

considered in establishing filiation pursuant to these rules. The will to be a parent (*volonté individuelle*) is also considered. In other words, even when a person is not related to the child by blood, signing a declaration of birth,[175] or satisfying the possession of status criteria are factors that work towards establishing filiation.[176] Generally, filiation by blood applies to situations where children have been conceived naturally, or by way of homologous assisted procreation.[177] For reasons we will see below, filiation by blood has also been interpreted by legal scholars to apply in the context of surrogacy arrangements.

3.1.2 The Filiation of Children born from Assisted Procreation: Surrogacy Excluded

i- Assisted Procreation: the Parental Project

The filiation of children born of assisted procreation is regulated by articles 538 to 542 CCQ. Pursuant to 538 CCQ, a *parental project* involving assisted procreation "exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project[178]." The article was introduced with the enacting of the *Act instituting civil unions and establishing new rules of filiation* in 2002.[179] For 538 CCQ to take application, two elements need to be satisfied: (1) a person alone or spouses mutually consent to have a child using (2) the genetic material of another person who is *not* part of their parental project. Indeed, 538 CCQ generally does not recognize a filiation between the genetic contributor and the child, except in the case provided for at article 538.2 CCQ, where contribution is by way of sexual intercourse.[180] Furthermore, the article only applies to heterologous assisted procreation. In other words, the filiation of a

[175] Art 113 CCQ
[176] Arts 111-117, 523-524 CCQ; Québec, Ministère de la justice, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales* by the Comité consultatif sur le droit de la famille (June 2015) at 141-142,145-147 [Roy Report]: "En permettant qu'une simple déclaration de naissance ou une possession constante d'état serve de base à l'établissement d'un lien de filiation, sans égard au facteur génétique, le législateur québécois en a toutefois décidé autrement. Bien qu'un tel lien de filiation puisse, à certaines conditions précises, être contesté en justice sur la base d'une preuve génétique, le Québec a clairement fait le choix d'attribuer à la volonté individuelle un rôle fondamental en matière de filiation. Tantôt fondée sur le sang, tantôt fondée sur la volonté, la filiation constitue donc, en droit québécois, un heureux mélange des genres".
[177] Alain Roy, "Commentaires sur l'article 538 du C.c.Q" in *Commentaires sur le Code civil du Québec*, (Yvon Blais, May 2014) (La Référence) at 3 [Roy Comments on 538CCQ]
[178] Art 538 CCQ
[179] *Loi instituant l'union civile et établissant de nouvelles règles de filiation*, SQ 2002, c 6; Roy Report, *supra* note 176 at 23
[180] *Droit de la famille — 114134*, 2011 QCCS 7076; *Droit de la famille — 10190*, 2010 QCCS 348
Droit de la famille - 081450, 2008 QCCS 2677 ; *F. P.* c. *P. C.*, 2005 CanLII 5637

child born from heterosexual partners who conceived through artificial insemination using their own gametes (homologous assisted procreation) is not covered by 538 CCQ but rather, it is regulated by articles 523-537 CCQ (filiation by blood), even if medical assistance was necessary in conceiving.[181] However, the situation in which lesbian couples (married or in a civil union) or single heterosexual women that choose a sperm donor who willingly relinquish their filiation to the child,[182] is covered by article 538 and it is considered assisted procreation, whether medical intervention was necessary or not.[183] Although bimaternal filiation is possible pursuant to 538 CCQ, bipaternal filiation is not. I take a look at the reasons why in the following section.[184]

ii- No Contracts for Wombs: Article 541 of the *Code Civil du Québec*

Pursuant to article 541 CCQ, "any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null."[185] Article 541 CCQ is located in the chapter of the code which regulates the filiation of children born of assisted procreation,[186] and it is a public order rule which dictates the general interest of society. What does absolute nullity mean in the context of a surrogacy contract?

In May 2002, during the parliamentary debate regarding *Bill no 84*, *An Act instituting civil unions and establishing new rules of filiation,*[187] the enacting of article 541 CCQ was not contentious among the members of parliament: rather, it was expressed that 541CCQ was the recovery of a pre-existent article, whose substance everyone had agreed on.[188] Back in 1993,

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[181] Roy Comments on 538 CCQ, *supra* note 177; *Adoption 12464*, 2012 QCCQ 20039 [*Adoption 12464*]; *Adoption 10329*, 2010 QCCQ 18645 ; *Adoption 10330*, 2010 QCCQ 17819 ; *Adoption 10539*, 2010 QCCQ 21132; *Adoption 09185*, 2009 QCCQ 8703 [*Adoption 09185*]; *Protection de la jeunesse 084475*, 2008 QCCQ 13902; *Droit de la famille 151172*, *supra* note 134; *Droit de la famille 141951*, 2014 QCCS 3811; *S.M.* c. *St.G.*, 2006 QCCS 2376; *L.O.* v. *S.J.*, 2006 QCCS 302; *F. P.* c. *P. C.*, 2005 CanLII 5637; *A. D.* c. *Québec* (Administrative Tribunal), 2004 CanLII 42983 (QC CS); *P.-O. C.* c. *J.-F. L.*, 2004 CanLII 40524 (QC CS); *Droit de la famille 07528*, 2007 QCCA 36; *Droit de la famille 07527*, 2007 QCCA 362

[182]Roy Comments on 538 CCQ, *supra* note 177 at 4-5

[183] Arts 538.2, 538.3, 538.4, 539.1 CCQ; Roy Report, *supra* note 176 at 23; Roy Comments on 538CCQ, *supra* note 177 at 2-3; Michelle Giroux, "Le recours controversé a l'adoption pour établir la filiation de l'enfant né d'une mère porteuse : entre ordre public contractuel et l'intérêt de l'enfant" (2011) 70 R du B 509 at 531-532 [Giroux]

[184] Roy Report, *supra* note 176 at 23; Roy Comments on 538CCQ, *supra* note 177 at 4

[185] Toute convention par laquelle une femme s'engage à procréer ou à porter un enfant pour le compte d'autrui est nulle de nullité absolue [official translation]

[186] In Book II, Title II, Chapter 1.1, Arts 538-542 CCQ

[187] Québec, 2002 (assented to 8 June 2002), SQ 2002, c 6

[188] Québec, National Assembly, *Journal des débats*, 36e Leg, 2nd Sess, No 78 (22 May 2002)

Étude détaillée du projet de loi n° 84 - *Loi instituant l'union civile et établissant de nouvelles règles de filiation:*

the Minister of Justice stated that the purpose of 541 CCQ was prohibiting the establishment of a child's filiation via a contract:

> This new article clearly establishes the nullity of procreation or gestation agreements by which a person commits to another to generate or carry a child and the absolute nature of such invalidity, whether these agreements are made gratuitously or for consideration. Since these agreements are invalid, the parties will not be able to rely on them, nor request their execution. It has been deemed contrary to public order to allow the child's parentage to be determined by an agreement. Said agreements are deemed to never have existed and parentage shall be established according to the modes of proof provided above.[189]

Therefore, the Minister's comments appear incoherent insofar as the institution of pre-birth parental projects has been allowed since 2002.[190] Professors Michèle Giroux and Benoit Moore,[191] as well as the *Commission de l'éthique, de la science et de la technologie*, interpret the Minister's comments on 541 CCQ as meaning that the maternal and paternal filiation of a child cannot be established via a surrogacy contract but rather, by the act of birth, as provided by article 523 CCQ,[192] and that according to Québec law, maternal filiation is, in principle, attributed to the woman who gives birth (*mater semper certa est).*[193] In other words, the chapter of the code which regulates filiation by blood[194] applies to surrogacy cases: pursuant to those rules, the woman giving birth is deemed the mother and is the one that should appear on the attestation and declaration of birth.[195]

Le Président (M. Dion): Adopté. Alors, on passe à l'article 541. M. le ministre.**M. Bégin:** Est-ce qu'il y a un amendement? Non. Alors:«541. Toute convention par laquelle une femme s'engage à procréer ou à porter un enfant pour le compte d'autrui est nulle de nullité absolue.»Il ne s'agit pas d'un nouveau texte, il s'agit de la reprise d'un texte qui est déjà existant. Et je pense que tout le monde partage ce point de vue.**Mme Lamquin-Éthier:** Nous partageons. **M. Gautrin:** Je pourrais faire toutes sortes de...**Mme Lamquin-Éthier:** Non. Tu te retiens. Tu en meurs d'envie, mais tu demeures coi. **Le Président (M. Dion):** Alors, l'article 541 est-il adopté? **M. Bégin:** Adopté.

[189] Québec, Ministère de la Justice, "Commentaires du Ministre de la Justice: Le Code civil du Québec: Un mouvement de société", Tome 1 (Québec: Publications du Québec, 1993) at 327 [my translation]

[190] Article 538 CCQ; Giroux, *supra* note 183 at 532; Benoit Moore "Maternité de Substitution et filiation en droit Québecois" in Mélanges en l'honneur de Camille Jauffret-Spinosi (Paris : Editions Dalloz) 2013 at 864 [Moore]

[191] Michèle Giroux is a professor at the Civil Law Section of the Faculty of Law of the University of Ottawa, where she teaches family law, bioethics and public health law. She is currently focusing her research on issues related to assisted human reproduction, including the right to know one's origins and surrogacy. She has been a member of the Quebec Bar since 1989. Benoit Moore is a professor at the Faculty of Law of Université de Montréal, where he teachers obligations. He is the holder of the *Chaire Jean-Louis Beaudoin en droit civil*.

[192] Art 523 CCQ: "paternal filiation and maternal filiation are proved by the act of birth, regardless of the circumstances of the child's birth. In the absence of an act of birth, uninterrupted possession of status is sufficient."

[193] The *mater est quam gestatio demonstrat* and *mater sempre certa est* principles; Giroux, *supra* note 183 at 522; Bureau & Guilhermont, "Maternité, Gestation et Liberté, *supra* note 75 at 49; Moore, *supra* note 190 at 867-868

[194] Arts 523-538 CCQ

[195] Arts 111-114 CCQ

Nothing in the rules on the filiation of children born of assisted procreation[196] explicitly permits the transfer of filiation from a surrogate mother to an intended mother or an intended gay father. Thus, the *parental project* under 538 CCQ was not enacted with the purpose to include surrogate arrangements. Because surrogacy contracts are deemed unenforceable,[197] couples engaging in surrogacy agreements have not been considered as forming a *parental project* pursuant to 538 CCQ. The result is that the filiation of children born from surrogacy agreements has been contentious in the province.[198] However, the adoption of children born from surrogacy agreements has been allowed by the Court of Appeal of Québec which, in 2014, held that the child's best interests (*l'intérêt de l'enfant*) should take precedence over the general interests of society (*l'ordre public*).[199] The decision was followed by one case[200] so far and distinguished by another.[201]

If 541 CCQ did not exist, the enforceability of surrogacy contracts might have been debated within a different perspective in Québec courts[202]. What they have had to examine so far, is whether the filiation of children born from surrogate agreements is transferable to the intended parent after birth, through adoption, despite 541CCQ. I will examine the two main cases in Québec on the issue but first, I would like to draw particular attention to *Family Law Exceptionalism* (FLE) and its counterpart *Up Against Family Law Exceptionalism* as important schools of thought for the discourse on surrogacy and ARTs in Québec. In my opinion, these theoretical frameworks are relevant to the abovementioned Québec adoption cases. Indeed, adoption jurisprudence has formed the basis of the debate in Québec's civil law on surrogacy to date.

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[196] Arts 538-542 CCQ
[197] Art 541 CCQ
[198] *Adoption 1445*, 2014 QCCA 1162 [*Adoption 1445*]; *Droit de la famille 151172*, *supra* note 135; *Adoption 1549*, 2015 QCCQ 7955 [*Adoption 1549*]; *Adoption 1342*, 2013 QCCQ 4585; *Adoption 12464*, *supra* note 181; *Adoption 10329*, 2010 QCCQ 18645; *Adoption 10330*, 2010 QCCQ 17819; *Adoption 10539*, 2010 QCCQ 21132; *Adoption 09367*, 2009 QCCQ 16815; *Adoption 09558*, 2009 QCCQ 20292; *Adoption 09184*, 2009 QCCQ 9058; *Adoption 09185*, 2009 QCCQ 8703; *Adoption 091*, 2009 QCCQ 628 [*Adoption 091*]; *Adoption 07219*, 2007 QCCQ 21504; Moore, *supra* note 188; Langevin, "Réponse jurisprudentielle", *supra* note 75; Giroux, *supra* note 182; Bureau & Guilhermont, "Maternité, Gestation et Liberté", *supra* note 75; Jean-Louis Baudoin & Catherine Labrusse Riou, "Produire L'Homme: de quel droit? Étude Juridique et éthique des procréations artificielles" (Paris: Presses Universitaires de France, 1987)
[199] *Adoption 1445, supra* note 198
[200] *Droit de la Famille 151172*, *supra* note 134
[201] *Adoption — 1549*, *supra* note 198
[202] *A contrario* 538.2; art 541 CCQ

4. Family Law Exceptionalism

4.1 A Short History

In her 1983, *The Family and the Market*, *A Study of Ideology and Legal Reform,*[203] Frances Olsen[204] looks at market and family ideologies in the nineteenth and twentieth century as well as their relationship to women and feminism in the United States. Essentially, she questions the premise on which social reforms for women have been built by deconstructing the popular understanding of the market/family divide. In her opinion, the dichotomy should be transcended if it is to benefit society. She re-examines the premise that family is a private issue and the market is a public one. She argues that both family and market are private insofar as they are both part of civil society, in opposition to the state, which is public.[205] With that in mind, she compares the arguments of the proponents as well as the critics of the *laissez-faire* (noninterventionist) ideology respecting family and the market.[206] Among these, Olsen highlights Robert Hale's argument from his 1923 article, *Coercion and Distribution in a Supposedly Noncoercive State.*[207] In a nutshell, his argument highlighted the fallaciousness of *laissez-faire* ideology insofar as the "systems advocated by professed upholders of laissez-faire were in reality permeated with coercive restrictions of individual freedom [and] government neutrality was an impossibility."[208] Furthering her reflection, Olsen draws on feminist literature and John Dawson's work on undue influence law from the mid twentieth century[209] to substantiate the argument that the ideal of individual freedom was present in both family and market but that whether *laissez-faire* applied to either sphere, the state is never a neutral agent. Thus, freedom of choice was (is) really freedom to coerce, both in market relations and in family

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[203] Frances E. Olsen, "The Family and the Market, A Study of Ideology and Legal Reform*"*(1983) 96: 7 Harv L Rev 1497 [Olsen]

[204] Professor Frances Elisabeth Olsen teaches feminist legal theory, dissidence & law, family law, and torts at UCLA and is an important member of the school of feminist legal theory.

[205] Olsen, *supra* note 203 at 1501

[206] *Ibid* at 1501-1511

[207] (1923) 8 Polit Sci Q 470

[208] Olsen, *supra* note 203 at 1508

[209] John Dawson, "Economic Duress - An Essay in Perspective" (1947) 45 Mich. L. Rev. 253 at 266 cited in Olsen, *supra* note 203 at 1511: "On the one hand, doctrines of undue influence were attempting to "free" the individual by regulating the pressures that restricted individual choice; on the other hand, theories of economic individualism aimed at an entirely different kind of freedom, a freedom of the "market" from external regulation. It was not yet fully recognized that the freedom of the "market" was essentially a freedom of individuals and groups to coerce one another, with the power to coerce reinforced by agencies of the state itself."

relations: "The parallel [of the work about undue influence law] with nineteenth century family law is striking. Family law doctrine aimed at "freeing" the individual members of a family from external regulation. Feminists argued, however, that this freedom was essentially a freedom of husbands to coerce wives, "with the power to coerce reinforced by agencies of the state itself."[210] Janet Halley[211] and Kerry Rittich[212] also draw from Robert Hale's 1923 *Coercion and Distribution in a Supposedly Noncoercive State to* build their framework on what they call the foreground and background rules in family law.[213] The scholars illustrate how the market/family distinction partook in the creation of family law (domestic relations) as an exceptional field in the United States.[214] "The construction of the legal order to render the family and its law distinctive, special, other, exceptional" is what they call Family Law Exceptionalism (FLE).[215] The scholars seek to reveal the distributive effects which exist within marital relationships as well as "between its members and the rest of the world."[216] Halley and her colleagues have called their project *Up Against Family Law Exceptionalism.*[217] While Halley's material delves deep into the historical roots of the market/family divide to reveal how family law formed and became an exceptional field in the USA,[218] Rittich's work places the family in the context of the global economy and development.[219]

In *What is Family Law, A Genealogy, Part I*[220] Halley takes a particular look at how classical legal thinkers redefined marriage in the middle of the nineteenth century, a transformation which

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[210] Olsen, *supra* note 203 at 1512

[211] Janet Halley is the Royal Professor of Law at Harvard Law School. Her interests include: family law, comparative family law, gender and the law, gender in transnational law, queer theory in legal studies, critical legal studies, sexuality and the law.

[212] Kerry Rittich is a professor at the Faculty of Law and the Women's and Gender Studies Institute at the University of Toronto. She teaches and writes in the areas of international law and international institutions, law and development, human rights, labour law, and critical and feminist theory.

[213] Janet Halley & Kerry Rittich, *"Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism"* (2010) 58 Am. J. Comp. L. 753 at 761 [Halley&Rittich].

[214] Halley & Rittich, *supra* note 213; Janet Halley, "What is Family Law, A Genealogy, Part I" (2011) 23 Yale J.L. & Human 1 at 3 [Halley, "A Genealogy Part I"]; Janet Halley, "What is Family Law, A Genealogy Part II" (2011) 23 Yale J.L. & Human. 189 [Halley, "A Genealogy Part II"].

[215] Halley, "A Genealogy Part I", *supra* note 214 at 3

[216] Halley& Rittich, *supra* 213 note at 764

[217] *Ibid* at 753

[218] Halley, "A Genealogy, Part I", *supra* note 214; Halley, "A Genealogy Part II", *supra* note 214

[219] Kerry Rittich, "Families on the Edge, Governing Home and Work in a Globalized Economy" (2010) 88 N.C.L. Rev. 1527; Kerry Rittich, "Black Sites: Locating the Family and Family Law in Development" (2010) 58 Am. J. Comp. L. 1023.

[220] Halley, "A Genealogy, Part I", *supra* note 214

caused the birth of the modern legal family. In the late nineteenth century, the locus of production shifted away from the household, distinguished spheres began to take form for men (the world) and women (the home).[221] Marriage gradually ceased being defined as contract: "This double transformation-of the law of husband and wife into the law of marriage, and of marriage from contract to status, marked the separation of the law of familial intimacy from the law of productive labor."[222] According to Halley, the market/family distinction that resulted remains "a latent but structural element of the legal curriculum and the legal order" today. She argues that the drive to systemize and structure the law stemmed from German legal thought and spread on a global scale through the advent of colonialism and global capitalism.[223] Particularly, drawing from Ducan Kennedy's work in, *Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought,*[224] Halley examines how

[221] Olsen, *supra* note 203 at 1499, 1501: "In the early nineteenth century, as men's work was largely removed to the factory while women's work remained primarily in the home, there came to be a sharp dichotomy between "the home" and "the [workaday] world." This dichotomy took on many of the moral overtones developed in the theological dichotomy between heaven and earth. Often the home was referred to as "sacred," and home life was celebrated as the reward for which men should be willing to suffer in the earthly world of work. The family and home were seen as safe repositories for the virtues and emotions that people believed were being banished from the world of commerce and industry. The home was said to provide a haven from the anxieties of modern life - "a shelter for those moral and spiritual values which the commercial spirit and the critical spirit were threatening to destroy."

[222] Halley, "A Genealogy Part I", *supra* note 214 at 2-3: "Contract, quasi-contract, and tort became the law of everyone-the faceless individual of liberalism-while the law of marriage became the law of special persons, incapacitated to varying degrees from contract: the wife and the child across the board or nearly so, and the husband in his role as a husband... The market was the family's opposite: rational, individualistic, free, and morally neutral. In my genealogy, each side of this market-family pair got its legal, social, and ideological clarification from the idea that the other was its opposite. With Kerry Rittich, I call this "family law exceptionalism" ("FLE"), the construction of the legal order to render the family and its law distinctive, special, other, exceptional"; Halley& Rittich, *supra* note 213 at 756-757.

[223] Halley, "A Genealogy, Part I", *supra* note 214 at 55-56; Duncan Kennedy, "Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought" (2010) 56 Am. J. Comp. L. 811 [Kennedy]; Fernanda G. Nicola, "Family Law Exceptionalism in Comparative Law" (2010) 58:4 Am. J. Comp. L 777. [Nicola]

[224] Kennedy, *supra* note 223

Frederich Carl von Savigny's family/patrimony distinction,[225] or what she and Rittich call "The Savignian Pattern"[226] influenced the status/contract distinction in American law.[227]

Savigny, an elite German jurist and professor, was an important figure in Classical Legal Thought, as well as a proponent of the German Historical School. He lived from 1779 to 1861.[228] According to him, the law found its origins in an organic and unconscious process driven by the people (*Volksgeist*) but he also espoused the idea of the law as systemic.[229] In *System of Modern and Roman Law,* Savigny draws a distinction between potentialities (the market) and the family, basing himself on the dual nature of human beings: according to him, humans are both complete and incomplete. Men are completed by their relationship with the greater whole (women and children), in a cycle of reciprocal necessity.[230] Market relationships were different as they were marked by self-sufficiency, each individual being a whole in himself. He also drew a distinction between relations that are necessary (natural) and ones that were arbitrary. Simply put, the latter attribute was associated market relations because, according to him, they are not required naturally, whereas family relations are organic.[231] That being said, Savigny's conception of private law marked a distinction between market relations and family relations.

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[225] *Ibid*

[226] Halley, "A Genealogy Part I", *supra* note 214 at 70; Halley & Rittich, *supra* note 213 at 757, 770: "The Savignian pattern not only insisted on a strong family law/ contract law distinction; it made contract law and family law differentially *comparative.* In Savigny's family/contract dichotomy, the rules of contract law were universal (they should be the same every- where), but the rules of family law were necessarily local (because they made manifest the spirit of the people). It was in the nature of contract law to *become the same everywhere* and in the nature of family law to *differ from place to place.* This formulation bears an uncanny resemblance to what we see in actual colonial legal orders of the nineteenth century, as the European colonizer repeatedly imposed its own commercial law (and criminal, procedural, and other bodies of law adjunct to an ever-less mercantilist and ever-more capitalist colonial enterprise) and left the law of marriage, divorce, and parentage to persist under what then became local or 'customary' law ".

[227] Halley "A Genealogy Part I", *supra* note 214 at 57-71

[228] Kennedy, *supra* note 223 at 813-814

[229] *Ibid* at 812

[230] *Ibid* at 814-815

[231] Kennedy, *supra* note 223 at 815-819

4.2 "De-Exceptionalizing Family Law": Looking Beyond the Market/Family Divide

Halley & Rittich draw on the Savignian Pattern[232] to describe FLE's normative and descriptive (lexical) manifestation in liberalized societies' legal scholarship and academia.[233] Essentially, their aim is to show that, in certain cases, deconstructing FLE, or "de-exceptionalizing family law"[234] in an effort to put the contract law/family law duality "back into contiguity"[235], to place the family in the market context,[236] can be "socially beneficial for any human persons, groups, causes or ideas."[237] They suggest family law should reconnect with areas of the law that have traditionally related to the market. Their premise is that "while the liberal legal order's market is patently and shamelessly distributive, market/family ideology masks the distributive functions of the household much as it masks those same functions in the market." [238] Drawing on Robert Hales work,[239] the scholars distinguish between what they call "foreground" (Family Law 1 or FL1) and "background rules" (FL2 to FL4[240]) of family law[241]. As they put it, "Family Law 1-FL1-is what you will find in a modern family law code, course, bar exam, or casebook. It comprises marriage and its alternatives: divorce, parental status, and parental rights and duties; in some countries it includes inheritance and in others, for interesting reasons, it does not."[242] Background rules are the ones which, prima facie, have no connection with family law but can have a permeative effect on family nonetheless.[243] The authors suggest the existence of a feedback loop between the background and foreground:

> [I]f you wanted to understand how law contributes to the ways in which actual family and household life is led by actual people, you would never stop [at FL1]. You would immediately look for the explicit family-targeted provisions peppered throughout substantive legal regimes that seem to have no primary commitment to maintaining the distinctiveness of the family-regimes ranging from tax law to immigration law to bankruptcy law.[244]

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[232] Halley & Rittich, *supra* note 213 at 757, 770
[233] *Ibid* at 765: "FLE, as it became consolidated in the late nineteenth century, is a liberal idea. We see it almost everywhere today, but that is in part because of the political and economic liberalization from Europe to East Asia, and the globalization of market ideas and practices generally"
[234] *Ibid* at 755,770
[235] *Ibid* at 758
[236] *Ibid* at 770
[237] *Ibid* at 770
[238] *Ibid* at 755
[239] See part 4.1, above
[240] Halley& Rittich, *supra* note 213 at 761-763
[241] *Ibid* at 761
[242] *Ibid* at 761
[243] Halley & Rittich, *supra* note 213 at 761
[244] *Ibid* at 761

The authors also highlight the fact that "significant parts of the legal order in which family life is worked out are designed and enforced by non-state entities"[245] and these norms constitute background rules affecting family dynamics.

Jill Elaine Hasday[246] also analysed the family/market distinction. She argues that FLE manifests itself through court decisions as well as legal scholarship's perception and depiction of family law as separate from the market. She cites the refusal to enforce interspousal domestic services contracts as well as the refusal to recognize human capital as community property in divorce cases as examples. Indeed, according to her, jurisprudence in the United States is replete with cases where courts refuse to recognize human capital as community property, based on the argument that marriage is not a commercial partnership.[247] Hasday highlights that the market/family narrative contradicts reality, which is that courts have enforced numerous economic agreements made before and during marriage, which were geared toward managing the distribution of property and assets: prenuptial and postnuptial agreements.[248] She also cites other economic agreements within the family, for example "express or implied contracts between siblings for domestic services", which the courts have normally enforced, as well as cases where courts have compelled economic transactions within families.[249]

4.3 The Localist Narrative

Whereas localist approaches to family law stress the local nature of family, Halley and Rittich remind readers that the international realm also has an influence on shaping the family. Indeed, when it comes to infertility for example, they highlight the fact the phenomenon has caused

[245] *Ibid* at 763
[246] Jill Hasday is a professor at the University of Minnesota Faculty of Law, she teaches and writes in the fields of anti-discrimination law, constitutional law, family law, legal history, and national security law
[247] Jill Elaine Hasday, *Family Law Reimagined* (Cambridge: Harvard University Press, 2014) at 70-75
[248] *Ibid* at 75-82
[249] *Ibid* at 82-86

family to become increasingly transnational market-driven unit.[250] Hasday examines the localist narrative[251] in the USA and argues it is an impediment to coherent policy-making:

> Narratives grounded on the assumption of family law's exceptionalism significantly overstate family law's separation from ordinarily applicable legal principles, divert the attention of lawmakers and jurists, and misshape the decisions they make. The narratives encourage reliance on categorical generalizations about family law's supposed differentness, rather than focused analysis of specific policy choices.[252]

According to her, FLE acts as a premise on which family is strongly construed as a local field of the law (i.e. state regulated) in the USA. She claims that the localist narrative has contributed to concealing the existence of federal family law and also, that it has been selectively applied to certain fields of federal jurisdiction, to the exclusion of others. She employs examples from the judiciary[253] as well as at the legislative[254] levels which support her theory that localism has huge weight among scholars, judges and lawmakers in the USA, all the while, in actuality, federal laws which are relevant to family issues abound:[255] "[…] the localist story about family law simply misdescribes the field, masking the scope and even the existence of federal family law."[256] She also reveals how, despite claims that it does not want to interfere with family law, the Supreme Court of the United States has, through its constitutional decisions and through its creation of family federal common law.[257] Ultimately, her aim is to illustrate that the localist narrative can and should be transcended.[258]

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[250] Halley & Rittich, *supra* note 213 at 766: "Is infertility a condition to be endured, or are there options-think assisted reproduction or transnational adoption, for example-that subject decisions about family creation to the logic of supply and demand on the market? As these examples reveal, household decisions on these questions may be far from purely "local" in their effects; instead, they increasingly involve economic actors across national boundaries."

[251] For more on family law localism: Courtney G. Joslin, "Federalism and Family Status"(2015) 90 Ind. L.J. 787; Courtney G Joslin, "The Perils of Family Law Localism"(2014-2015) 48 U.C.D. L. Rev. 623; Meredith Johnson Harbach, "Is the Family a Federal Question" (2009) 66 Wash. & Lee L. Rev. 131

[252] Hasday, *supra* note 247 at 16

[253] *Ibid* at 21-26 (She looks at how the premise is applied by the Supreme Court's Federalism as well as Diversity Jurisdiction Jurisprudence)

[254] *Ibid* at at 26-38 (She examines how the localist premise is applied to the *Violence Against Women Act* (VAWA) and the *Defense of Mariage Act)*

[255] *Ibid* at 45-59

[256] *Ibid* at 39, 60

[257] *Ibid* at 40-44

[258] *Ibid* at 17-20, 60

The localist narrative Hasday refers to is also present in comparative family law scholarship, particularly where harmonization issues are concerned.[259] FLE was present in twentieth century comparative law. In the first half of the century, in their search for universal rules, comparative lawyers formed two competing schools of thought: social-purpose functionalism and positive-sociology functionalism. Social-purpose functionalists were skeptic about the possibility of harmonizing family law because in their opinion, it was the product of local culture and morals (localist narrative). Therefore, they focused on harmonizing market rules, which to them, were more likely to converge due to their scientific and objective nature.[260] While recognizing the market/family divide, positive-sociology functionalists did not cast aside family law. Instead, they examined its pluralities within a social science framework.[261] Specifically, after World War II, human rights and gender equality caused thinkers to analyze the family from an international perspective and encourage harmonization goals within comparative law projects.[262] The question of harmonizing family law is still present in scholarship today.[263] In Europe for example, the issue has divided thinkers in two camps: the ones who argue that family law is not harmonizable throughout Europe due to its intrinsically cultural and local nature, whereas others see common cultural elements in families across Europe as grounds for harmonization.[264]

5. Family Law Exceptionalism in Québec's Legal Discourse on Surrogacy

In my opinion, FLE has been predominant in civil law discourse on surrogacy: first of all, up to date, Québec civil law scholarship has analysed surrogacy arrangements mainly from the point of view of the province's adoption jurisprudence and filiation rules.[265] Second, despite generally recognizing that family realities are changing,[266] civil thought in the province has not really bridged the gaps between the CCQ and other legislative frameworks and/or non-state rules

[259] Nicola, *supra* note 223; Philomila Tsoukala, "Marrying Family Law to the Nation" (2010) 58:4 Am. J. Comp. L 873 [Tsoukala]
[260] Nicola, *supra* note 223 at 794
[261] *Ibid* at 798
[262] *Ibid* at 779,781
[263] Robert Leckey, "Harmonizing Family Law's Identities"(2002) 28:1 Queen's LJ 221; Tsoukala, *supra* note 260 [Leckey];
[264] Tsoukala, *supra* note 259
[265] *Droit de la Famille- 151172, supra* note 134 at para 39
[266] Roy Report, *supra* note 176; Bureau & Guilhermont, *supra* note 75

which are directly or indirectly involved in surrogacy arrangements, such as the province's law on assisted reproduction[267]. Thirdly, according to civil legal scholarship in Québec, the issue for women revolves around a narrow definition of autonomy: that of consent. Not only is the definition of autonomy tightly circumscribed to a legal definition but the reality of assisted reproduction and the medical definition of consent are barely accounted for[268].

5.1 Québec's Adoption Framework in Short

The *Civil Code*[269] and the *Youth Protection Act* (YPA)[270] regulate matters pertaining to adoption in Québec. The Court of Québec (Youth Division) and the Director of Youth protection are both involved in the institution of adoption in the province.[271] Full adoption (*adoption plénière*) is the only type of adoption available.[272] As opposed to simple adoption, which does not result in the disappearance of the original parentage link, full adoption, breaks parentage

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[267] Alain Roy, "Le nouveau cadre juridique de la procréation assistée en droit québécois ou l'œuvre inachevée d'un législateur trop pressé" (2005) 23 L'Observatoire de la Génétique online www. ircm.qc.ca/bioethique/obsgenetique [Roy, "Œuvre inachevée d'un législateur"]: "Curieusement, le législateur n'a pas modifié les dispositions relatives aux contrats de mère porteuse, lesquels demeurent toujours illicites. Ainsi, aux termes de l'article 541 C.c.Q., «[t]oute convention par laquelle une femme s'engage à procréer ou à porter un enfant pour le compte d'autrui est nulle de nullité absolue». […] Nul besoin d'être devin pour en prédire l'abrogation à plus ou moins court terme. En effet, en premier lieu, il est possible que les couples gais, qui ne peuvent avoir d'enfants que par l'intermédiaire d'un jugement d'adoption, se considèrent lésés par rapport aux couples de lesbiennes et cherchent à faire tomber l'interdiction en invoquant le droit à l'égalité garanti par l'article 15(1) de la Charte canadienne des droits et libertés (12). Qui plus est, la nouvelle Loi [fédérale] concernant la procréation assistée et la recherche connexe (7) servira sans doute de point d'appui à cette abrogation dans la mesure où elle n'interdit nullement le recours aux mères porteuses mais ne fait qu'en prohiber la rétribution."

[268] *Ibid*: "[Les dispositions de *Loi instituant l'union civile et établissant de nouvelles règles de filiation*] ont été adoptées dans un contexte orienté par les aspirations égalitaires des couples de même sexe. Pourtant, au-delà de l'homoparenté, la procréation assistée soulève des enjeux sociaux extrêmement importants sur lesquels le législateur québécois ne s'est pas donné le recul nécessaire. La procréation assistée constitue une problématique en soi, qui aurait mérité un débat élargi, où l'ensemble des questions éthiques et juridiques susceptibles d'en résulter auraient pu être abordées. Pensons notamment à la finalité de l'institution: la procréation assistée aurait-elle dû demeurer une alternative mise à la disposition des couples infertiles seulement ou fallait-il vraiment, comme le législateur québécois l'a fait, l'ériger en une véritable option? Et que dire du couple hétérosexuel fertile qui voudra s'en prévaloir afin de «bonifier» le bagage génétique d'un enfant et des risques de marchandages auxquels la filiation se voit désormais exposée, dans un contexte de procréation 'amicalement assistée'?"

[269] Arts 543-582 CCQ

[270] *Youth Protection Act*, CQLR c P-34.1, ss 32(g) (h); 71-72; 95.0.1; 132 (f); 135.1; 135.1.1, 135.1.2 [YPA]

[271] Arts 37,432-442 CCP; *Courts of Justice Act*, CQLR, c T-16, art 83(4); Alain Roy, *Droit de l'adoption : adoption interne et internationale*, 2e éd., (Montréal: Wilson & Lafleur, 2010) at paras 6-12 online at : <http://edoctrine.caij.qc.ca/wilson-et-lafleur-livres/18/2018864029> [Roy, "Droit de l'adoption"]

[272] Cited in Roy, "Droit de l'adoption", *supra* note 271 at para 16; Québec, Ministre de la Santé et des Services sociaux et au ministre de la Justice, *Pour une adoption québécoise à la mesure de chaque enfant, rapport du groupe de travail sur le régime québécois de l'adoption*, presided by Carmen Lavallée (March 30th, 2007) at 77-92 [Lavallée Report].

definitively.[273] Adoption is also closed in Québec (*adoption fermée*), meaning that both adopting and biological parents do not disclose their identities to one another.[274] There are scholars in Québec that have not only questioned the province's monolithic framework, they have also argued for children's right to have knowledge of their biological origins (both in the adoption context and in cases where gamete providers are involved).[275]

Pursuant to article 543 CCQ, adoption can only take place in the *interest of the child* and on the *conditions prescribed by law*. The interest of the child is measured *in concreto* (meaning in relevance to the adoption procedure) and on a case by case basis.[276] The Court hearing the adoption case is normally expected to examine the interests of the child not only in the present but for the future as well.[277] It should be noted that, according to Alain Roy, scholars in Québec have agreed that the interest of the child *in concreto* is a principle of interpretation and is not meant to supersede the conditions prescribed by law in adoption cases.[278] Québec adoption courts[279] have had to weigh the child's interests *in concreto* against the public order rule

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[273] Roy, "Droit de l'adoption", *supra* note 271; Lavallée Report, *supra* note 272 at 78

[274] Roy, "Droit de l'adoption", *supra* note 271 at paras 14-15

[275] Roy, "Droit de l'adoption", *supra* note 271 at para 16; Lavallée Report, *supra* note 272 at 77-92; Michèle Giroux, "Le droit fondamental de connaître ses origines biologiques", in Tara Collins, Rachel Grondin & al., *Rights of the Child. Proceedings of the International Conference* (Montréal : Wilson & Lafleur, 2008) at 353 -390 [Giroux, "Rights of the Child Conference"]; Giroux, *supra* note 183 at 524; Marie-France Bureau, Edith Guilhermont, "Le droit de connaître ses origines : chronique d'une réforme annoncée" (2014) 73 R du B 597 [Bureau& Guilhermont, "Droit aux origines"]

[276] Roy, "Droit de l'adoption", *supra* note 271 at para 17,

[277] *Ibid* at para 17

[278] *Ibid* at para 18: "The interest of the child *in concreto* alone cannot justify adopting him. As stated in Article 543 CCQ, adoption can only take place in the child's interest and conditions provided by law. With these conditions, the legislature closely regulates the adoption process so as to prevent any diversion. The 'conditions provided for by law' cannot be set aside under the pretext that the adoption is in the interest of the child who is the object of the adoption procedure. […] Subordinating the conditions of the law to the child's interest would be to remove the legal safeguards underlying the adoption process. However, these guarantees were specifically established to protect all against abuses of all kinds. The child which is the object of the adoption procedure is not the sole beneficiary of these conditions; it is rather children as a whole (or the principle of the child's interest *in abstracto*) that justify their existence" [my translation]; Jean Pineau & Marie Pratte, "La famille" (Montréal, Éditions Thémis, 2006) at 713; Carmen Lavallée, "L'enfant, ses familles et les institutions de l'adoption. Regards sur le droit français et le droit québécois" (Montréal:Wilson & Lafleur, 2005) at 412 : "Il est toutefois nécessaire de rappeler que l'intérêt concret constitue un élément d'interprétation et qu'il ne peut, à ce titre, contredire une règle de droit […]. L'intérêt concret de l'enfant n'est pas une norme de droit autonome en soi, elle est une règle d'interprétation qui suppose la légalité du processus" cited in Roy, "Droit de l'adoption" *supra* note 271 at para 18, n 126

[279] *Adoption 1445*, *supra* note 198; *Adoption 1549*, *supra* note 198; *Adoption 1342*, 2013 QCCQ 4585; *Adoption 12464*, 2012 QCCQ 20039; *Adoption 10329*, 2010 QCCQ 18645; *Adoption 10330*, 2010 QCCQ 17819; *Adoption 10539*, 2010 QCCQ 21132; *Adoption 09367*, 2009 QCCQ 16815; *Adoption 09558*, 2009 QCCQ 20292; *Adoption 09184*, 2009 QCCQ 9058; *Adoption 09185*, 2009 QCCQ 8703; *Adoption 091*, *supra* note 198; *Adoption 07219*, 2007 QCCQ 21504;

encapsulated by article 541 CCQ in cases where surrogates were involved. Next I look at how two important cases in the province to date dealt with the issue.

5.1.1 The Court of Québec: Surrogacy Agreements as Offending Public Order

In *Adoption 091,*[280] a Court of Québec case, Judge DuBois refused to grant the application for the adoption of a child that was the fruit of a surrogacy agreement. He was asked to determine whether the consent for adoption was valid. According to Judge DuBois, the consent was vitiated because it was part of a plan which was illegal, and thus, pursuant to 543 (1) CCQ, it should not be allowed because adoption can only take place "in the conditions prescribed by law":

> With respect for the contrary opinion, the Court considers that the conditions prescribed by law extend far beyond formal, procedural respect for the consent to adoption given by the father in the particular context of a specific parental project revealed by the evidence. Admittedly, in the present case, no one will dispute that the father, the only declared parent, could legitimately sign a special written consent before two witnesses in favour of the adoption of his child by his spouse with whom he has cohabited for over six years (art. 555 *C.C.Q.*). Unless one chooses to wear blinders, however, it is not possible to dissociate the question of the validity of this consent (Exhibit R-2) from the preceding steps concocted by this couple in carrying out their parental project. The consent was vitiated because it formed part and parcel of an illegal undertaking and was contrary to public order. This is not a matter of procedural law, but of substantive law […] The evidence shows that this consent (Exhibit R-2) forms part of a whole. It is merely the logical continuation of the same carefully planned parental project, in short, a colourable way of giving effect to this contractual agreement "by creating legal consequences to something that is prohibited by law.[281]

I have meant to emphasize on the judge's choice of words in his analysis of the effects of 543 CCQ as it is not clear what he is referring to when he says "[…] all the steps chronologically following the decision to recruit a surrogate mother, in contempt of existing laws and in the

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[280] *Supra*, note 198

[281] *Adoption 091*, *supra* note 198 at paras 55- 59: "Avec respect pour l'opinion contraire, le Tribunal estime que les conditions prévues par la loi vont bien au-delà du respect formel et procédural du consentement à l'adoption ici effectué par le père dans le contexte particulier d'un projet parental concret révélé par la preuve. Certes, dans la présente affaire, personne ne contestera que le père, seul parent déclaré, pouvait légitimement signer comme prévu un consentement spécial, par écrit et devant deux témoins, en faveur de l'adoption de son enfant par sa conjointe avec qui il partage sa vie depuis plus de six ans (article 555 C.c.Q.). À moins de choisir de porter des œillères, il n'est toutefois pas possible de dissocier la question de la validité de ce consentement (pièce R-2) des étapes précédentes concoctées dans la réalisation du projet parental de ce couple. Ce consentement est vicié parce qu'il est partie prenante à la démarche illégale et contraire à l'ordre public. On ne parle pas de droit procédural, mais de droit substantif […] La preuve montre que ce consentement (pièce R-2) fait partie d'un tout. Il n'est que la suite logique et prévue de ce même projet parental soigneusement planifié bref, une manière détournée de donner effet à cette entente contractuelle en faisant produire des conséquences juridiques à ce qui est prohibé par la loi" [official translation][emphasis added].

margins of the law [all the] steps conceived and carried out illegally would finally lead to a legal result, thanks to the convenient use of the all-purpose criterion of the best interests of the child."[282] I wonder whether: (1) he is asserting that surrogacy contracts are illegal, as he does indeed use the words "illegal" and "prohibited by law" when referring to such undertakings[283] or whether (2) he is referring to the intentional omission of the surrogate mother's name in the birth declaration, or whether (3) he considers the "payment for inconvenience and expenses"[284] as contrary to sections 6 (1) AHRA[285] and 135.1, 135.1.3[286] of the *Youth Protection Act* (YPA)[287] or 541 CCQ or (4) all of the above. Section 135.1 YPA provides that "whether the placement or the adoption takes place in Québec or elsewhere and whether or not the child is domiciled in Québec, no person may (a) give, receive or offer or agree to give or receive, directly or indirectly, a payment or a benefit either for giving or obtaining a consent to adoption, for finding a placement or contributing to a placement with a view to adoption or for obtaining the adoption of a child".

Judge DuBois' reasons can be construed to mean that consent to adoption which is given in circumstances contrary to article 541 CCQ invalidates the said consent, thus interpreting the effects of 541 CCQ as extended to affect the child's filiation.[288] Professor Michèle Giroux does not agree with Judge Dubois's reasons in *Adoption 091*[289]. In her opinion, article 543CCQ should be read to mean only conditions of the law prescribed by the rules pertaining to adoption.[290] She suggests that Judge DuBois' reasons are relevant insofar as, in the case at bar,

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[282] *Adoption 091*, *supra* note 198 at paras 63, 66
[283] *Ibid* at paras 52, 59
[284] *Ibid* at para 48
[285] *Ibid*
[286] YPA, *supra* note 270 , s 135.1.3: "Every person who contravenes a provision of any of sections 135.1, 135.1.1 and 135.1.2 is guilty of an offence and is liable (a) to a fine of $10,000 to $100,000 in the case of a natural person or to a fine of $25,000 to $200,000 in the case of a legal person, for a contravention of paragraph a or b of section 135.1 or a contravention of section 135.1.1 or 135.1.2; (b) to a fine of $2,500 to $7,000 for a contravention of paragraph c of section 135.1."
[287] *Supra*, note 270
[288] Giroux, *supra* note 183 at 528-529; Moore, *supra* note 190 at 871
[289] Giroux, *supra* note 183 at 535-538
[290] *Ibid* at 528, 537: "Le juge DuBois estime en effet «que les conditions prévues par la loi vont bien au-delà du respect formel et procédural du consentement à l'adoption [...] ». Elles exigent que le processus ayant mené à l'adoption respecte les exigences de l'ordre public et des « lois existantes […] Selon le Juge DuBois, on ne peut « ériger une cloison étanche entre les articles du Code civil du Québec traitant de l'adoption (articles 543 et suivants C.c.Q.) et ceux traitant de la filiation des enfants nés d'une procréation assistée (articles 538 et suivants C.c.Q. [...] Contrairement à ce que décide le juge DuBois, l'article 543 C.c.Q. ne devrait donc pas être lu de façon à englober des exigences législatives autres que celles se rapportant directement à l'adoption. Le premier alinéa de l'article

the parent's bad faith and the absence of the surrogate's name on the declaration of birth is a violation of the child's right to know one's parents pursuant to section 7 of the *Convention on the Rights of the Child.*[291] Benoit Moore's opinion is similar to Giroux's insofar as he too distinguishes between the rules of contractual obligations and the rules of adoption. He argues that the nullity of surrogacy contract should not affect adoption, that the interests of the child should prevail[292]. The DuBois decision was followed in two cases to date.[293]

Indeed, *Adoption 12464,* in 2012, Judge Wilhelmy of the Court of Québec ruled against a placement order for adoption. In the judge's opinion, allowing the placement order would mean allowing the intended parents to get away with circumventing the CCQ rules on adoption: the surrogate mother's special consent for adoption[294] was vitiated according to the court, because the intended parents infringed section 135.1 YPA.[295] In the second case, *Adoption 1549,* in 2015, Judge Thibault of the Court of Quebec ruled against a placement order for adoption on grounds similar to those in *Adoption 091,* despite the existence of the Court of Appeal precedent which considered the *interests of the child* as predominant factor in its analysis and ruling.[296] The court distinguished the facts in the case at bar from the ones in *Adoption 1445*.[297] Indeed,

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543 C.c.Q. se lit ainsi : « L'adoption ne peut avoir lieu que dans l'intérêt de l'enfant et aux conditions prévues par la loi ». Le terme *conditions* réfère sans aucun doute à celles de l'adoption. Or, celles-ci sont exprimées au chapitre du Code civil sur l'adoption que complète la *Loi sur la protection de la jeunesse*."

[291] *The Convention on the Rights of the Child,* 20 November 1989, Treaty Series, vol. 1577 (entered in to force 2 September 1990); Giroux, *supra* note 183 at 524, n 41

[292] Moore*, supra* note 190 at 873: "le droit […] doit bien cibler l'objectif qu'il recherché. Refuser l'adoption de l'enfant revient à faire peser sur l'enfant le comportement de ces parents. Si détournement de l'adoption il y a, c'est le fait des parents et non des enfants. La sanction doit se limiter à eux et c'est pourquoi, l'intérêt de l'enfant exige que l'adoption soit dissocié de la nullité du contrat"

[293] *Adoption 1549*, *supra* note 198; *Adoption 12464*, *supra* note 181

[294] Art 555 CCQ: "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."

[295] At paras 25, 62: "le tribunal doit conclure que 7 900 $ ont été versés à madame C et 2 000 $ à la « donneuse d'ovule », à titre de rémunération […] Le consentement spécial donné par la mère inscrite au certificat de naissance de l'enfant, madame c'est devenu l'instrument par lequel le père et son épouse ont contourné les prohibitions législatives existantes, et fait partie d'une démarche illégale et contraire à l'ordre public, visant à faire produire de façon détournée des conséquences juridiques à ce qui est prohibé par la loi et les autorités compétentes pourront mettre en œuvre les dispositions pénales applicables, si elles le jugent approprié."

[296] *Adoption 1445*, *supra* note 198

[297] *Adoption 1549, supra* note 198 at paras 17-18 : "Dans cette décision, la Cour d'appel réfère à plusieurs jugements qui ont été prononcés par les tribunaux depuis 2007 sur le sujet. À l'exception de l'affaire Adoption – 091où la filiation maternelle de l'enfant n'était pas établie, l'ensemble des décisions citées par la Cour d'appel présentent sensiblement la même trame factuelle, c'est-à-dire que la mère porteuse ou la mère génétique est reconnue comme mère sur le certificat de naissance de l'enfant et donne un consentement spécial à l'adoption en faveur du conjoint

because of the absence of the surrogate's name on the declaration of birth and because surrogacy contracts are void pursuant to 541 CCQ, Judge Thibault reasoned that "the surrogate may not be compelled to execute the agreement made with the intended parents and give them the child. The child's parentage is to be determined according to general rules of filiation and the child has as mother, the woman who gave birth and whose name should have been declared to the Director of Vital Statistics."[298]

Part of the ambiguity surrounding surrogacy contracts in Québec may reside in the fact that altruistic surrogacy is legitimized by Canadian federal law, thus creating confusion between illegality and absolute nullity in Québec.[299] Indeed, the AHRA does not criminalize the woman's intention to 'abandon' the child she carries to term[300]. In the Court of Appeal case *Adoption 1445,*[301] Judge Morissette considers it important to note that the trial judge erred in finding that the surrogate was remunerated for her work, because the evidence simply suggested she was reimbursed for costs. According to him, it is important to highlight this, given the prohibitions at provisions 6 AHRA and 135.1 YPA. However, he emphasizes that "it is the task of the competent authorities to see to the sanction of illegal acts under the AHRA, not that of the court hearing the application for the order of placement of the child"[302]. In the next section, I turn to the Court of Appeal's decision more specifically.

5.1.2 The Court of Appeal: Adoption Procedures as Immune to Surrogacy Agreements

In *Adoption 1445,*[303] the Court of Appeal of Québec had to review a decision in virtue of which the Québec Court (Youth Division) denied an application for an order of placement for adoption

ou de la conjointe du père. La décision de la Cour d'appel est rendue dans une situation de fait différente de celle soumise au Tribunal."

[298] *Adoption 1549, supra* note 198 at para 26: "N'oublions pas que l'article 541 du Code civil du Québec déclare nulle les conventions de gestation. En conséquence, la mère porteuse ne peut être contrainte d'exécuter la convention intervenue avec les parents d'intention et leur remettre l'enfant. La filiation de l'enfant doit être déterminée selon les règles générales de filiation et l'enfant a comme mère la femme qui lui a donné naissance et dont le nom devrait avoir été déclaré au directeur de l'état civil. Elle peut exécuter volontairement la convention et donner un consentement valide à l'adoption ou non".

[299] *Adoption 1445 supra* note 198 at para 59 (Judge Morissette cites the Commission de l'éthique de la science et de la technologie's comments)

[300] See part 1.2.1, above

[301] *Supra* note 198

[302] *Ibid* at para 68

[303] *Supra* note 198

based on the same arguments as Judge DuBois in *Adoption 091*.[304] The facts at hand were slightly different from the *Adoption 091* case. Woman "A" could not have children. As a last resort, and as suggested by her doctor, she and her partner have a child "X" with the help of surrogate "C" and an egg donor. In this case, the intended parents had also paid the surrogate. According to the Court of Québec, they thus infringed section 135.1 of the YPA.[305]

While the Québec Court used the reasoning employed by Judge DuBois in *Adoption 091* and refused to authorize the adoption, the Court of Appeal differed. According to Judge Morissette's reasons, the couple did not infringe section 135.1 of the YPA because the evidence did not show that they gave the surrogate mother "consideration" or "remuneration" within the meaning of section 6 AHRA but rather, reimbursed the surrogate for the expenses incurred:

> On the other hand, it is true that under paragraph 135.1(*a*) of the *YPA*, to "give, receive or offer or agree to give or receive, directly or indirectly, a payment or a benefit either for giving or obtaining a consent to adoption" constitutes an offence punishable by a heavy fine under section 135.1.3 of the same statute. But these are penal provisions that should be interpreted accordingly, and the preposition "for" has a causal connotation. Unless we extrapolate from clues that amount to vague presumptions of fact at most, there is nothing in the evidence heard at trial (and especially, nothing in the testimony of the appellant, B or C) justifying an assumption or, *a fortiori*, a finding that payment was offered, given or received *for* giving or obtaining a consent to adoption.[306]

Furthermore, the judge noted that based on the legislator's structural choices regarding article 541 CCQ location, more specifically the fact that the article was never placed in Chapter II ("Adoption") of Title II of Book II of the *Civil Code*, means that it did not constitute a "condition prescribed by law" within the meaning of article 543 CCQ.[307] He raised the fact that section 607 of the CCQ, which later became the current 555 CCQ,[308] was not modified to prohibit the

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[304] *Ibid*
[305] *Supra* note 198
[306] *Adoption 1445*, *supra* note 198 at para 25: "[I]l est vrai qu'aux termes du paragraphe 135.1 a) de la *LPJ* « donner, recevoir, offrir ou accepter de donner ou de recevoir… un paiement… pour donner ou obtenir un consentement à l'adoption » constitue une infraction punissable d'une lourde amende en vertu de l'article 135.1.3 de la même loi. Mais il s'agit ici de dispositions pénales qui doivent s'interpréter en conséquence et la préposition *pour* est revêtue d'une connotation causale. Or, sauf par extrapolation et à partir d'indices ayant valeur, tout au plus, de vagues présomptions de fait, rien dans la preuve entendue en première instance (et surtout, rien dans les témoignages de l'appelante, de B et de C) ne permet de supposer, ni *a fortiori* de conclure, qu'un paiement ait été offert, donné ou reçu *pour* donner ou obtenir un consentement à l'adoption."
[307] *Ibid* at paras 70
[308] *Supra* note at 294

adoption of surrogate children.[309] After giving an overview of the pertinent case law and citing doctrine, the judge stated that he agreed with Judge Tremblay's ruling in *Adoption 09185*[310] and held that article 541 CCQ's ambit does not extend to affect the establishment of filiation through adoption. In the Court's opinion, a surrogacy contract is null (invalid) insofar as its enforcement is not possible by any of the parties to the agreement.[311] In this case, enforcement was not an issue: the surrogate mother C did not intend on keeping the child and the intended parents wanted child X at birth. In other words, the court distinguished between the direct effects (binding nature) and the indirect effects (in this case, the adoption of child X by woman A) of the surrogacy contract.[312] The application for the order of placement of the child was granted. In a recent judgment, in *Droit de la famille 151172,*[313] the Superior Court followed the Court of Appeal's reasoning.[314] I look at that judgment in more detail in the next section.

5.2 The Case of *The Child's Interests* v. *Public Order*

In the debate surrounding surrogacy agreements, scholars and judges alike have viewed the matter by opposing the principle of the child's best interests in adoption against the public order considerations which are implicitly enshrined in article 541 CCQ[315]. As such, dichotomy

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[309] *Adoption 1445*, *supra* note 198 at para 58

[310] *Adoption 09185, supra* note 181

[311] *Adoption 1445, supra* note 198 at paras 52, 54: "La notion d'ordre public a certes un champ d'application nécessaire dans ce domaine : ainsi, la marchandisation ou chosification de la personne humaine est une tendance à laquelle le droit doit résister. Mais invoquer cette notion d'ordre public venue du droit des obligations dans le contexte précis d'un dossier comme celui-ci lui prête une portée qu'elle n'a pas – elle n'a pas ce caractère souverain et péremptoire. Et elle ne peut servir à contrecarrer la volonté de parents adoptifs qui, avec transparence et dans le respect des lois sur l'adoption, ont voulu avoir recours aux ressources de la science médicale pour que soit procréé un enfant, leur enfant, et qu'il lui soit donné une famille. À mon sens, voilà aujourd'hui l'état des choses et du droit." [emphasis added]

[312] *Adoption 1445*, *supra* note 198 at para 61

[313] *Supra* note 134

[314] *Droit de la famille 151172, supra* note 134 at para 111: "La Cour d'appel dans l'affaire Adoption - 1445 et de nombreuses autres autorités doctrinales citées préalablement établissent que des conventions de mère porteuse sont conclues non seulement au Québec, mais aussi à l'étranger par des citoyens canadiens. S'il est clair qu'un tribunal ne pourrait donner effet à une telle convention en vertu de l'article 541 C.c.Q., un tribunal peut intervenir afin de statuer sur la filiation des enfants nés à la suite de ces conventions".

[315] Giroux, *supra* note 183 at 531: "On considère généralement que l'objet de cette entente contrevient à l'ordre public de direction, puisqu'il serait contraire à certaines valeurs sociales, jugées fondamentales. Portant à la fois sur le corps de l'enfant et sur celui de la mère porteuse, qui met à la disposition d'autrui ses «fonctions reproductrices», l'entente se heurterait notamment au principe de l'indisponibilité du corps humain. Elle porterait aussi atteinte au principe de l'indisponibilité de l'état des personnes, la mère porteuse renonçant de façon anticipée à sa qualité et à ses droits de mère et les parties ayant comme objectif de manipuler l'état de l'enfant en fonction de leurs désirs."

persists in civil law discourse on surrogacy. Indeed, Jean Pineau & Marie Pratte[316], Giroux[317] and Moore[318] have stated that the interests of the child should take precedence over public order, a reasoning which is in line with the approach taken by Judge Morissette in *Adoption 1445*.[319] Others, like Professor Alain Roy,[320] have sometimes placed more weight on public order considerations[321].

In this debate, taking a distance from the FLE framework is particularly relevant, as it is what has created the splintered view on the matter in the first place. In my opinion, public order and children's interests do not need to be mutually exclusive views, especially where assisted reproduction and surrogacy are concerned. Pineau & Pratte's analyses are circumstantial in approach, which is practical given that most surrogacy cases in Québec have been examined in

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[316] Marie Pratte is a professor of law at the Université d'Ottawa. Her research interests include family law, children's law, and human rights. Jean Pineau is a retired law professor (l'Université Laval, l'Université de Montréal). He was one of four members of the committee tasked with reforming the Quebec Civil Code.

[317] *Supra*, note 183; Professor Giroux is cited by Judge Morissette in *Adoption 1445*, *supra* note 198 at para 63: "L'absence de lien maternel à l'acte de naissance nous semble, comme nous l'avons indiqué plus haut, une différence digne de mention. Comme le droit civil québécois ne reconnaît que l'adoption plénière, cette dernière mettant fin à la filiation d'origine (art. 577 C.c.Q.), prononcer l'adoption dans ce contexte empêche techniquement l'enfant de rechercher ses origines. Le jugement Dubois a pour effet de ne pas priver l'enfant de ce droit. Le juge aurait-il été plus enclin à prononcer l'adoption si la mère porteuse avait déclaré sa maternité à l'égard de l'enfant? Difficile à dire, car il insiste surtout sur l'illicéité de la convention pour justifier sa décision et sur ce point, nous différons d'opinion. Il reste que dans les autres décisions où la mère porteuse a déclaré sa maternité, l'adoption a par la suite été prononcée. Cela incitera peut-être (du moins nous voulons bien le croire) les mères porteuses à déclarer leur maternité et à ne pas 'frauder la loi'".

[318] *Supra*, note 190; Professor Moore is cited by Judge Morissette in *Adoption 1445*, *supra* note 198 at para 60: "Refuser l'adoption de l'enfant revient à faire peser sur l'enfant le comportement des parents. Si détournement de l'adoption il y a, c'est le fait des parents et non celui des enfants. La sanction doit se limiter à eux et c'est pourquoi, l'intérêt de l'enfant exige que l'adoption soit dissociée de la nullité du contrat."

[319] *Adoption 1445*, *supra* note 198 at para 52

[320] Alain Roy is a professor at the Faculty of Law at University of Montreal and Associate Researcher at the Chair of Notaries. He focuses his research and teaching activities in the areas of family law (patrimonial and pecuniary), children's rights and youth protection.

[321] *Adoption 1445*, *supra* note 198 at para 57: "[…] [I]l nous paraît difficile d'admettre que l'on puisse contourner la règle de l'article 541 C.c.Q. au moyen de l'adoption, règle qui, est-il utile de le souligner, repose sur des considérations d'ordre public qui n'ont rien d'anodin. Comme l'écrit la professeure Giroux : « [c]'est la commercialisation de la pratique et les valeurs en jeu – protection de la femme contre l'exploitation, refus de chosification de l'enfant et plus globalement, l'intérêt général de la société – qui forcent les législateurs à intervenir ». On ne saurait non plus se rabattre sur le principe du meilleur intérêt de l'enfant pour se soustraire à la prohibition législative et justifier l'adoption. L'adoption, rappelons-le, ne peut avoir lieu que dans l'intérêt de l'enfant *et aux conditions prévues par la loi*. Avec respect pour l'opinion contraire, nous ne pouvons admettre l'interprétation suivant laquelle ces conditions ne renvoient qu'aux seules règles matérielles et procédurales contenues au chapitre de l'adoption. À notre avis, elles renvoient plutôt à l'ensemble des dispositions à travers lesquelles le législateur exprime son attachement à des valeurs qu'il croit justifiées par l'intérêt des enfants en général. En ce sens, on ne peut croire qu'un projet d'adoption qui repose sur un montage que le droit ne reconnaît pas pour les raisons susmentionnées ne respecte pas les conditions de la loi et ne peut en conséquence être accueilli par le tribunal."

the context of adoption. However, their analysis tightly circumscribes the angle of approach on the issue: not only does it look at it *a posteori*, i.e. once the child is already born, but it also fails to recognize that the interests of the child *in abstracto* have much in common with other principles underpinning public order and the general interest of our society[322].

What is also interesting to note, is that the said principles are drawn from separate legal fields: family law on the one hand (children's interests) and the theory of obligations on the other (public order). Indeed, it seems the refusal to validate surrogacy contracts encapsuled at 541 CCQ stems from the legislator's refusal to accept contracts on filiation as well as contracts on the human body (the principle of non-availability of the human body).[323] This dichotomy between family law principles on the one hand and obligations on the other (i.e. private versus public) can be traced back to Savigny's dualistic vision of contracts and family law.[324] Surely, avoiding the objectification of women and children is a principle that can work in line with children's best interests. In the case of surrogacy-born kids, the dichotomy has worked to complicate their interests by making their filiation uncertain in adoption cases.[325]

In the recent Superior Court decision[326] which follows the reasons of Judge Morissette in *Adoption 1445*, the question at bar was whether the recognition of a decision rendered in Pennsylvania would be contrary to public order pursuant to article 3155 CCQ.[327] The article provides that "a decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases: […] (5) the outcome of a

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[322] Pineau & Pratte are cited by Judge Morissette in *Adoption 1445*, *supra* note 198 at para 52: "Un enfant est né; un couple a voulu sa naissance et est à l'origine de sa conception; sa mère biologique, par ailleurs, l'a mis au monde dans le but de l'abandonner. Quel objectif doit-on poursuivre? Protéger l'intérêt de l'enfant en cause en permettant la consécration juridique d'un lien affectif? Ou imposer à cet enfant, au nom du respect de l'ordre public et de la logique juridique, une vie écartelée entre son véritable père, une mère qui le rejette, et une autre personne qui agit comme deuxième parent sans en avoir le statut? Ne doit-on pas, dans cette situation, préférer la protection de l'intérêt immédiat de l'enfant plutôt que le respect de l'intérêt général? Il faut, selon nous, tolérer le recours à l'adoption en faveur de la conjointe du père, dans la mesure où, évidemment, la mère porteuse y aura consenti. Pourrait-elle donner un consentement spécial? L'article 555 C.c.Q. ne prévoit évidemment pas spécifiquement cette hypothèse et il n'a certainement pas été rédigé pour régler cette situation. Il permet néanmoins un consentement spécial en faveur du conjoint du père ou de la mère de l'enfant; si donc la paternité est établie en faveur de l'homme qui espérait recueillir cet enfant, la mère porteuse pourrait, selon la lettre de la loi, donner un consentement spécial en faveur du conjoint ou de la conjointe du père. Il faut, nous semble-t-il, et cela dans l'intérêt de l'enfant, privilégier cette interprétation, même si, pourtant, cette possibilité favorise le détournement de la loi."

[323] See part 3.1.2 at n 189, above; Moore, *supra* note 190 at 863

[324] See part 4.1, above

[325] See parts 3.1 and 5, above

[326] *Droit de la famille 151172, supra* note 134

[327] *Ibid* at para 24

foreign decision is manifestly inconsistent with public order as understood in international relations." The Court of Common Pleas of Adams County in Pennsylvania, USA, had declared the applicants as child X's parents. The applicants appeared on the child's American birth certificate. The surrogate mother was an American citizen. One applicant was a Québec citizen and the other was a permanent resident. In response to the prosecutor's argument that the applicants should have petitioned the Québec Court in order to obtain an order of placement for adoption, the Court affirmed that "it is difficult to conclude that [obtaining special consent to adoption] is the only legal way to recognize the filiation of a child born to an agreement surrogate mother, while many neighbouring jurisdictions of Quebec provide for the issuance of a parentage declaration, either before birth or immediately after[328]". The Court also refused the prosecutor's argument that filiation cannot be subject to contracts in Québec. The judge argued that the parental project at article 538CCQ[329] allows contracts on filiation. The applicants request for recognition of the American decision was granted,[330] as the judge did not deem it to be contrary to public order.[331] Although the proceedings in this case took place outside Québec's adoption courts, public order remained a decisive concept in the analysis and the importance of the interests of the child as principle was reaffirmed. However, the Court outrightly rejects the argument that filiation matters cannot be contractual ones, thereby possibly opening up a door to breaking the family/contract divide in Québec.

Professor Marie-France Bureau[332] and Edith Guilhermont's[333] have looked at the issue of surrogacy outside the adoption context. They adopt a critical approach to the public order rule at 541 CCQ, from a liberal point of view[334]. However, as I will show in the next section, their view is also nested in an FLE perspective.

[328] *Supra* note 134 at para 107
[329] *Supra*, note 178; For more on 538 CCQ also see above, part 3.1.2
[330] *Droit de la famille 151172, supra* note 134 at paras 124-128
[331] *Ibid* at para 112
[332] *Supra*, note 75
[333] *Ibid*
[334] See part 1.2.3, above

5.3 A Look Outside the Adoption Box: Reproductive Autonomy at the Intersection of Liberal Feminism and FLE in Québec

The unavailability of the human body is the concept which discourages the commercialization of the human body, its elements or its products. The commercialization of surrogacy practice is prohibited by the AHRA in Canada but surrogacy arrangements per se are not.[335] In Québec, article 541CCQ has sometimes been labelled as a prohibition by scholars and judges alike[336], although, strictly speaking, it is not comparable to the criminal prohibition in the AHRA.[337] Rather, it is a refusal to legally recognize contracts on surrogacy.[338] Scholars who disagree with article 541 CCQ, do so because they consider that it ultimately acts against the interests of the newborn child by rendering filiation uncertain[339] and it also lends to a perceived victimization of the surrogate.[340]

According to Professor Marie-France Bureau and Edith Guilhermont, what a woman chooses to do with her body is a private matter, not a public one. In their opinion, the concept of human dignity has been applied in too prohibitive a fashion, instead of encouraging individual liberties.[341] They argue that the intention of parties to a surrogacy contract is not commercialization because the money is divested in the parental project.[342] Moreover, in line with what Barbara Katz Rothman[343] would call an "economic ideology,"[344] they argue that compensation can enhance female autonomy: in their opinion, attaching a fee to reproductive capacities can lend to society's valuing 'feminine tasks'.[345] At the same time, they argue that

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[335] See part 1.2.1 above; *AHRA, supra* note 2, ss 5, 6(5)
[336] See parts 5 to 5.1.2, above
[337] Moore, *supra* note 190 at 862; *AHRA*, *supra* note 2, ss 6(1)-(4)
[338] Moore, *supra* note 190 at 863
[339] Bureau & Guilhermont, "Maternité, Gestation, Liberté", *supra* note 75 at 52-54,58; Moore, *supra* note 190 Giroux, *supra* note 183
[340] Bureau & Guilhermont, "Maternité, Gestation, Liberté", *supra* note 75 at 67-69; Moore, *supra* note 190; Giroux, *supra* note 183
[341] Bureau & Guilhermont, "Maternité, Gestation, Liberté", *supra* note 75 at 74-76
[342] *Ibid* at 68
[343] Barbara Katz Rothman is a professor of Sociology at the City University of New York, she is published in both popular and scholarly circles and her topics are interdisciplinary and international <http://www.barbarakatzrothman.com/>
[344] Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: W.W. Norton& Company, Inc., 1989) at 51 [Rothman]
[345] Bureau &Guilhermont, "Maternité, Gestation, Liberté", *supra* note 75 at 69-70

exploitation should be curtailed by regulation.[346] They do not, however, propose a regulatory framework.[347]

I agree with the scholars that surrogates should be heard, in order to concretely understand their justifications for acting as surrogates, before making assumptions that they are being exploited.[348] I also agree that the legislative foundations of 541 CCQ in Québec are ideological but I do not agree that they should be discarded completely.[349] For example, in my view, the authors go too far when they state that the *mater semper certa est* principle is irrelevant.[350] It is still a reality for women who give birth without ARTs and/or a third party, despite the fact that families are changing, *mater semper certa est* remains relevant and I would not discard the principle outright. As a matter of fact, the principle according to which the birth mother is the mother by law is not abandoned but is rather reinforced throughout the Roy Report's recommendations.[351] Specifically, with respect to surrogacy arrangements, the committee has recommended that the surrogate maintain the right to change her mind and keep the child once he/she is born.[352] The committee goes so far as to suggest a surrogate cannot relinquish this right up until the child is born, making it a public order rule.[353]

Second, the scholars' conception of an autonomous reproductive woman is incomplete. Indeed, their perspective is grounded on the experiences of those women who have been pregnant before becoming surrogates and who claim that they love being pregnant.[354] Second, their arguments about reproductive autonomy revolve around the surrogate's reality, discounting for the infertile woman and the egg provider.

Third, their analysis is "symmetrically flawed"[355] insofar as it keeps the discourse of autonomy within the "private versus public" dichotomy. Indeed, they view the contractual notion of

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[346] Bureau &Guilhermont, "Maternité, Gestation, Liberté", *supra* note 75 at 69-70
[347] *Ibid* at 69-70
[348] *Ibid* at 71
[349] *Ibid* at 45
[350] *Ibid* at 52-54
[351] Roy Report, *supra* note 176 at 144, 159
[352] *Ibid* at 175-176: "Comme le prévoit la première orientation retenue, la mère porteuse pourra, après l'accouchement, décider de garder l'enfant malgré les termes du projet parental convenu. Le simple fait pour elle de ne pas signer la déclaration de naissance commune fera présumer de sa décision de garder l'enfant. »
[353] *Ibid* at156-158, 170-171, 175, 178, 183-184, 188; See part 5.4 below
[354] Bureau & Guilhermont, "Maternité, Gestation, Liberté", *supra* note 75 at 45, 50, 69-70
[355] Jean L. Cohen, "Regulating Intimacy, A New Legal Paradigm" (New Jersey: Princeton University Press, 2004) at 196

consent as the key to female reproductive autonomy and make no account for Québec's legislative framework on ARTs or other norms in examining the issue. The legislation on ARTs in Québec does not prohibit women from using ARTs or being surrogates, rather, it has encouraged it through public funding of ARTs for the past 5 years.[356] In reality, the practice of surrogacy has resulted in murky statements by courts in adoption procedures where children's filiation is concerned.[357] Children's best interests have been examined by scholarship and the Court of Appeal of Québec has ruled in favour of their interests. Therefore, there is a gap in Québec between ARTs regulation and family law and the disappointment, in my view, is that civil law scholarship does not provide a comprehensive account of the situation.

Paradoxically therefore, Bureau & Guilhermont argue for the liberalization of surrogacy practice in a society where ARTs techniques are up and running.[358] They state that what a woman *chooses* to do with her body is a private matter. However, insofar as there is nothing stopping women from using ARTs to become surrogates in Québec, we do not see how their argument contributes to the advancement of the issue. This choice the authors are referring to, is not limited to and should not solely be examined as consent within the "private versus public dichotomy", but it should also be examined in the context of the women's relationship with the medical system and the biotech industry. In the case of surrogacy, going beyond family law framework and offering a wider perspective on the notion of consent would be beneficial to women's reproductive autonomy, specifically where women's long-term reproductive health is concerned and where competing transnational commercial interests are a reality. Even though the province of Québec has publicly funded ARTs in the past 5 years, the enactment of Bill 20,[359] has removed public coverage of IVF treatments and this raises questions as to who will absorb the cost for ARTs in surrogacy agreements[360]. Clearly, artificial reproduction does not appear to be a medically necessary[361] treatment in the eyes of the government of Québec at this point in time and this contextual element is crucial to women's reproductive autonomy.

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[356] See part 2, above and part 7.2, below for more information on assisted reproduction in Québec
[357] See parts 5.1.2 and 5.1.3, above
[358] Bureau & Guilhermont, "Maternité, Gestation, Liberté", *supra* note 75 at 48
[359] See part 2, above and part 7.2, below for more about *Bill 20*
[360] See Minister Gaétan Barette's comments below, at part 7.2
[361] See sections 7.1 for more on medical necessity

I do recognize that legal scholars might have felt re-examining the exploitation versus autonomy debate necessary, but I think it is quite clear at this point in time, that in certain instances surrogacy may be exploitative and in other cases it may not be. Arguing about it won't change the reality of it. And it is not a black and white reality. Attempting to stand for autonomy in the absolute or against exploitation in the absolute is not very practical, in my opinion. Professor Louise Langevin[362] has a more nuanced approach as she recognizes that the practice of surrogacy in society, whether commercial or altruistic, can be both a source of power for certain women, as it can be a source of exploitation for others.[363] Assuming the legal community is aware of these polarities and their respective consequences, preventing the objectification and exploitation of women and children is an ideal that should not be forgotten by the law and the same can be said for women's autonomy. So, in my opinion, the question is: is the law really doing women or anyone a favour by interpreting the legal issue solely from family law/adoption perspective? Second, how and to which degree can the law in Québec intervene to keep the abovementioned ideals in balance?

In my opinion, civil scholarly and jurisprudential discourse in Québec has provided a fragmented theoretical framework for surrogacy and assisted reproduction to date. Much of it has focused on the debate between protecting children's interests, versus the general interests of society (public order rule at 541 CCQ). The courts have looked at the issue within the adoption context: the Court of Appeal has recently privileged children's interests on the issue but the scope of this decision seems unclear. Moreover, the notion of consent, when briefly examined by scholarship was analyzed from an FLE perspective and fails to account for the multifaceted dynamics of surrogacy and assisted reproduction. The Roy Report[364], which was issued in June 2015, examines the issue from a more comprehensive perspective, where filiation is concerned. However, the nexus with the international and biomedical aspects of surrogacy (ARTs) remains quite poorly explored.

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[362] S*upra,* note 75
[363] Langevin, "Réponse jurisprudentielle", *supra* note 75 at 194, 197-198
[364] Québec, Ministère de la justice, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales* by the Comité consultatif sur le droit de la famille (June 2015) [Roy Report]

5.4 The Roy Report

5.4.1 Distinct and Protective Rules for Surrogate Assisted Procreation

In June of this year, in a report to the minister of Justice of Québec,[365] jurists under the presidency of Professor Alain Roy have suggested an altogether new framework which would officially recognize the filiation of children born from surrogacy arrangements, while distinguishing between different types of parental projects in the CCQ chapter dedicated to filiation rules. Essentially, according to the committee's recommended framework, the subsection governing third party assisted procreation (currently 538 CCQ) should be distinct from the one on surrogate assisted reproduction.[366] Moreover, unlike third party assisted reproduction, reproduction with medical assistance, whereby the gametes of the parents are used,[367] would still be governed by the same filiation rules as natural reproduction by blood (currently 523 CCQ-537 CCQ)[368].

Whereas no formal conditions are currently required by parties in order to prove third party assisted reproduction and none should be implemented according to the committee[369], a protective approach has been recommended for surrogate assisted reproduction, for children and surrogates' best interests.[370] Indeed, women and children are presumed the vulnerable ones in the framework recommended by the committee; in fact, they are referred to as "vulnerable persons" in the report,[371] It appears the aim of this protective approach is to preserve surrogates' dignity and protect their right to change their minds in the event they choose to keep the child.[372] However, the committee does not consider that a woman who has never given birth would be particularly different or more vulnerable as a surrogate than one who has.[373]

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[365] Roy Report, *supra* note 176
[366] *Ibid* at 156, 157
[367] *Ibid* at 155
[368] See above, parts 3.1 for an overview of the current rules on filiation in Québec
[369] Roy Report, *supra* note 176 at 157-158
[370] *Ibid* at 170, 178 (Two channels have been suggested by the committee to establish a child's filiation under a surrogate assisted reproduction framework: the notarial act *en minute* or the judicial route)
[371] *Ibid* at 183, 188
[372] *Ibid* at 171
[373] Roy Report, *supra* note 176 at 183-184

5.4.2 Mater Semper Certa Est

Mater semper certa est is reinforced throughout the committee's recommendations.[374] Specifically, with respect to surrogacy arrangements, the committee recommends that the surrogate maintain the right to change her mind and keep the child once he/she is born.[375] The committee goes so far as to suggest a surrogate should not be obliged to relinquish this right up until the child is born, making it a public order rule.[376] On another note, the committee considers parental responsibility primordial: it recommends that intended parents who abandon the parental project and refuse the newborn should be liable to compensate the surrogate, as well as pay an obligation of support to the other intended parent (if he or she keeps the child) or whoever chooses to adopt the child.[377]

5.4.3 Genetics and Biparentality

The committee makes it clear that, rather than genetics, pre-birth intent to be a parent is what matters in establishing filiation of children born from assisted reproduction. Indeed, according to its recommendations, intended parents using surrogate assisted procreation should not be obliged to contribute their gametes, according to the committee. Moreover, pursuant to the committee's recommendations, being a genetic contributor is not a sufficient ground to claim filiation and the committee suggests prohibiting the recourse to such claims. It also stresses the importance of pre-birth intent among the parties involved and suggests that intended parents should be required to obtain the gamete contributor's informed consent prior to engaging in the act of creating a child with third party assistance. Moreover, biparentality would remain the rule, as it has been up to date.

In light of all of the above, it appears that the public order concern at 541 CCQ is not entirely without merit, whether for the interests of child or to counter the objectification of human bodies

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[374] Roy Report, *supra* note 176 at 144, 159

[375] *Ibid* at 175-176: "Comme le prévoit la première orientation retenue, la mère porteuse pourra, après l'accouchement, décider de garder l'enfant malgré les termes du projet parental convenu. Le simple fait pour elle de ne pas signer la déclaration de naissance commune fera présumer de sa décision de garder l'enfant."

[376] *Ibid* at 175

[377] *Ibid* at 177: "Le Comité n'entend pas pour autant exonérer les parents d'intention de toute forme de responsabilité. Bien au contraire, tout parent d'intention qui refusera de donner suite au projet parental sera tenu à une obligation alimentaire à l'égard de l'enfant et devra réparer le préjudice occasionné à la mère porteuse, indépendamment de la filiation qui pourrait par ailleurs lui avoir été attribuée en vertu des règles relatives à la procréation naturelle"; The *Conseil du statut de la femme* has adopted the same opinion, see below, part 7.2

and reproduction. In my view, the Roy report reflects those concerns. However, it remains that autonomy in the medical context, as well as individuals' relationship with the medical system and the booming transnational reality of the reproductive market, have not been explored comprehensively. There is also a failure to account for the multiple female realities involved in ARTs, such as the infertile woman and the egg donor. That is why, in the next section, I look at *Relational Theory*. I think it can really contribute by enrich the legal discourse on surrogacy and artificial reproduction in Québec and Canada where the liberal conceptions of choice and autonomy are concerns in a multi-institutional, multi-player context.

6. Relational Theory

A pivotal concept in the discourse about surrogacy arrangements is autonomy. Tightly related to the concept of autonomy is the concept of freedom. In the 1970s, radical feminists like Canadian born Shulamith Firestone, maintained that biology was the root cause of the sex class system discrimination and argued that through man's control of nature, humanity could free itself of inequality.[378] Similarly, in Simone de Beauvoir's theory of women's self-determination, the body is perceived as enemy as she "wants to be like man […] and sees no other possibility but to establish dominance of the head within the female body."[379] Thus, for certain feminists, controlling pregnancy generally became a means to autonomy and freedom: reproductive technology, through contraception and abortion,[380] became an important symbol for women's emancipation.[381]

Professor of sociology and ecofeminist[382] Maria Mies is the founder of the Women and Development Programme at the Institute of Social Studies in The Hague, Netherlands and has

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[378] Philippe Deschamps, *L'Utérus, la technique et l'amour*, *l'enfant de l'ectogenèse* (Paris:Presses Universitaires de France, 2008) at 116; R. A. Sydie, *Natural Women, Cultured Men: A Feminist Perspective on Sociological Theory*, (UBC Press, 2011) at 144; Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?* (1992) 68 Ind. L. J. 205 at 211-212 [Lieber]; Maria Mies &Vandana Shiva, *Ecofeminism*, (Halifax: Fernwood Publishing, 1993) at 188 [Mies & Shiva]; Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution*, (New York: Bantham Books, 1971); Denise Thompson, *Reading Between the Lines: A Lesbian Feminist Critique of Feminist Accounts of Sexuality* (Spinifex Press, 1991)

[379] Mies & Shiva, *supra*, note 378 at 224-226: "[Beauvoir] maintains the dualistic and hierarchical split between life and freedom/self-determination, between nature and culture, between spirit and matter. She maintains alienation from the body, especially from the female body which, according to her, hinders self-determination (transcendence). Our body is our enemy. Thus, she does not question this split, European man's project, particularly since the Enlightenment, as the prerequisite for freedom and emancipation "

[380] Nelson, *supra*, note 5 at 32

[381] Lieber, *supra* note 378 at 205

[382] Mies & Shiva, *supra* note 378 at 6, 13: "Ecofeminism […] grew out of various social movements-the feminist, peace and the ecology movements- in the late 1970s and 1980s. Though the term was first used by Francoise

been active in the women's movement and in women's studies since the late 1960s. According to Mies, feminists who see reproductive technologies as a means to women's emancipation today are sustaining the same view as Firestone and Beauvoir. She invites her readers to think critically about the relationship between body, mind and autonomy, the fundamental symbol of emancipation and freedom for feminists, as it is applied to women in the context of reproductive technologies.[383] Her analysis reveals feminism's involvement in splitting women's selves from their very own bodies.[384]

In the same vein, Professor Barbara Katz Rothman's[385] describes "motherhood as the embodied challenge to liberal philosophy." According to her, liberal society cannot deal with motherhood. Liberal society's facets (capitalism, the economic and technology ideologies) work against the interests of mothers insofar as women's reproductive capacities are perceived as resources in the world-machine.[386] The analyses afforded by Rothman and Mies are important insofar as they highlight the flipside of liberal claims for reproductive autonomy, revealing its complications and imperfections, leading us to a more comprehensive view of autonomy and questioning how much of it or which facets of it are really helpful in empowering women: "our bodies may be ours, but given the ideology of patriarchy and capitalism, the bodies of mothers are not highly valued."[387]

The concept of autonomy is important in feminist theory and has been a pivotal one in reproductive discourse. In my opinion, where surrogacy and artificial reproduction are

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D'Eaubonne it became popular only in the context of numerous protests and activities against environmental destruction[…]An ecofeminist perspective propounds the need from a new cosmology and a new anthropology which recognizes that life in nature (which includes human beings) is maintained by means of cooperation, and mutual care and love. Only in this way can we be enabled to respect and preserve the diversity of all life forms, including their cultural expressions, as true sources of our well-being and happiness[…] This effort to create a holistic, all-life embracing cosmology and anthropology, must necessarily imply a concept of freedom different from that used since the Enlightenment […] This involves rejecting the notion that Man's freedom and happiness depend on an ongoing process of emancipation from nature, on independence from, and dominance over natural processes by power of reason and rationality"

[383] Mies & Shiva, *supra* note 378 at 227

[384] *Ibid*: "[O]ur female nature is more and more seen as a handicap from which bio-technical experts must liberate us, either through pro- or anti-natalist technology […] women's liberation becomes the result of technical progress and no longer means the transformation of patriarchal man-woman relations […] quick technical fixes have freed men more than ever from responsibility for the consequences of sexual intercourse and have imposed on women a new determination by other, a new heteronomy […]"

[385] *Supra,* note 343; For more on Rothman's views see part 7.4, below

[386] Rothman, *supra* note 344 at 48-61

[387] Rothman, *supra* note 344 at 73

concerned, Québec civil law has not examined the notion as comprehensively as it could. Relational theorists have sought to expand the liberalist understanding of autonomy by examining it in the context of human relationships. The next section will focus on contributions from contemporary feminist scholars Jennifer Nedelsky,[388] Susan Sherwin,[389] Susan Dodds[390] and Christine Koggel.[391]

6.1 On Autonomy and the Law

6.1.1 Nedelsky on Autonomy and Rights

In my opinion, Professor Jennifer Nedelsky has contributed to bridging the mind/body, culture/nature dichotomies which are brought to light by Maria Mies, as well as in contextualizing autonomy within the power dynamics outlined by Barbara Katz Rothman[392]. Indeed, by deeply questioning the political and legal western conceptions of autonomy and the human legal subject, I find that Nedelsky's work has been helpful in addressing the limits inherent to the liberal rights discourse which has been applied to legal thought on surrogacy and assisted reproduction in Quebec.

According to Professor Nedelsky, feminism has an equivocated relationship with liberalism: on the one hand it demands selfhood for women and on the other, it rejects individual rights language and assumptions.[393] In her view, the relationship between rights and democracy has been one of tension that needs redefining[394] and constitutionalism should work to balance the tension between individual rights and democracy, not simply protect the former from the

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[388] Professor Nedelsky teaches at the University of Toronto Faculty of Law. Her research and publications have focused on feminist theory, theories of judgment, american constitutional history and interpretation, and comparative constitutionalism.

[389] Susan Sherwin is a University Research Professor Emerita at Dalhousie University and a Fellow of the Royal Society of Canada. She researches and teaches feminist theory and health ethics, and is interested in the intersection of these two fields.

[390] Susan Dodds is a professor of philosophy, the Dean of the Faculty of Arts and the Deputy Provost at the University of Tasmania, Australia. Her research explores the intersections of ethics, political philosophy, moral psychology, feminist theory and public policy.

[391] Christine Koggel is a professor of philosophy and a graduate supervisor at Carleton University. She was the Harvey Wexler Professor of Philosophy and Co-Director of the Center for International Studies Bryn Mawr College. Her main research and teaching interests are in the areas of moral theory, practical ethics, feminism, and social and political theory. Her most recent research is in the area of development ethics.

[392] *Supra*, note 343; See above, at part 6 and below, at part 7.4 for more on Rothman's view

[393] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale J.L. & Feminism 7 at 8 [Nedelsky, "Reconceiving Autonomy"]

[394]Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1:1 Rev Const Stud 1.at 4 [Nedelsky, "Reconceiving Rights"]

latter.[395] She also rejects the pure democracy critique: democracy is not the sole value in our society nor should it be.[396] According to her, the mutability of values needs to be recognized.[397] She affirms that feminism must retain autonomy as a value, while rejecting the liberal definition of it. She also rightfully points out that combining self-determination and social construction has been a problem common to communitarians and feminists.[398] In her opinion, feminists must find their own language, definition of autonomy.[399]

To Nedelsky, autonomy is relational and essentially it means finding one's own law. As such, the concept should be rescued from 'the confines of liberalism':[400] "the idea that there are commands that one recognizes as one's own, requirements that constrain one's life, but come from the meaning or purpose of that life, captures the basic connection between law and freedom-which is perhaps the essence of the concept of autonomy."[401] Indeed, she draws a parallel between our perception of rights and autonomy, that autonomy is seen as synonymous with independence, or separation. According to her, it is relationship, not separation that makes autonomy possible. With this shift in focus, interdependence becomes central in politics.[402] In other words, by viewing rights as relational, "the problem of individualism is radically transformed."[403]

The vision of autonomous individual as isolated, the idea of separation or "erecting a wall" is a pathology according to her: she argues that the dichotomy between autonomy and the collectivity is grounded in the concept of property which "literally and figuratively provides the necessary walls."[404] She argues that North American political tradition has "identified freedom

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[395] *Ibid* at 4, 5, 8
[396] *Ibid* at 6
[397] *Ibid* at 4
[398] Nedelsky, "Reconceiving Autonomy", *supra* note 393 at 8
[399] *Ibid* at 8,12
[400] *Ibid* at 11
[401] *Ibid*
[402] Nedelsky, "Reconceiving Rights", *supra* note 394 at 8: "The whole conception of the relation between the individual and the collective shift: we recognize that the collective is a source of autonomy as well as a threat to it […] the constitutional protection of autonomy is then no longer an effort to carve out a sphere into which the collective cannot intrude, but a means of structuring the relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined. The first thing to note in this reformulation is that it becomes clear that the relation between autonomy and democracy is not simply one of threat and tension- just as the relation between autonomy and the collective is not simply a matter of threat. Autonomy means literally self-governance and thus requires the capacity to participate in collective as well as individual governance."
[403] *Ibid* at 14
[404] Nedelsky, "Reconceiving Autonomy", *supra* note 393 at 12

and autonomy with the private sphere [bounded by property], and posed them in opposition to the public sphere of state power."[405] The illusion in liberal theory's dichotomies of "state/individual," "public/private," "politics/market," is in associating freedom and autonomy with the "individual", "private", "market" part of the dichotomy:[406] "Because reality has never corresponded to these neat oppositional categories, there is no need to choose between them. Freeing ourselves from misleading categories and false choices opens the possibility for individual autonomy in the context of collectivity"[407] Interestingly, instead of property as a symbol of autonomy, Nedelsky suggests childrearing.

6.1.2 Property Law and Reproductive Technology

In fact, Professor Nedelsky argues that the law of property is not an appropriate legal category for dealing with reproductive technology, or what she calls *new forms of potential life.*[408] She outlines how complex the choosing of a legal category is and argues that examining the choice from the *rights as relationships* framework enables us deal with the normative conflicts which are brought about by the advent of reproductive technology,[409] as it "facilitate(s) the task of

[405] *Ibid* at 15-17
[406] *Ibid* at 18
[407] *Ibid* at 19
[408] Jennifer Nedelsky, "Property in Potential Life?" (1993) 6 Can. J. L. & Jurisprudence 343 at 343 [Nedelsky, "Property in Life"]
[409] Nedelsky, "Property in Life", *supra* note 408 at 344: "There is no one concept, such as property, which is intrinsically appropriate or inappropriate. The choice must be based on judgements about the probable consequences of different concepts and there are various ways of framing those judgments […]The underlying problem of choosing a legal category is thus twofold: first we must determine the norms and objectives we think are primary and then we must make judgements about the category(ies) which will best foster them […] And the problem lies not only in choosing among conflicting normative positions, but in predicting the consequences of different legal regimes."

prediction."[410] She outlines the dual nature of the conflict among feminists[411] but also the ways in which other normative approaches conflict.[412]

Ultimately, the property framework as a model for issues respecting reproductive technology can be used as a means to foster the value of autonomy but also, on the other hand, as a means to foster exploitative and destructive relationships.[413] Nedelsky points to this dilemma specifically where women and children are concerned: There are those who advance property as a model for *new forms of potential life because* they argue it will foster women's autonomy by allowing them to market their bodies and body products and those who argue that commodifying women's bodies and body products will exacerbate the socio-economic problems and alienation women already face respecting their bodies.[414] Moreover, she asserts that property as a framework risks sharpening the focus on children as designable and acquirable commodities. In Nedelsky's opinion, the autonomy which is sought within the context of uncontrolled markets is "inevitably an unequal autonomy"[415] and, the choosing of a legal

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[410] *Ibid* at 345

[411] Nedelsky, "Property in Life", *supra* note 408 at 344: "The answer to [which framework is most appropriate] will affect some of the most basic concerns of feminism: the objectification of women; the economic exploitation of women; the denigration of human reproduction and the treatment of women as "baby-making machines"; women's alienation from their bodies; the commodification and destruction of human values. On the positive side there are the issues of empowerment of women, genuine autonomy for women, equality, respect and priority for children and the nurture they require. This paper offers a means of determining whether property is the optimal legal concept for meeting these concerns and fostering these values"; also at p. 346-348: "The standard argument is that autonomy will be enhanced for two groups of women: (1) women seeking to use NRTs to have children genetically related to them or their spouses and sometimes to carry and give birth to children; and (2) women who might want to provide what the first group of women want, for either altruistic or financial reasons. There is the conventional "market" argument that clear property entitlements are necessary for a flourishing market in "reproductive material," which would maximize opportunities for poor women and resources for "demanders" (the economistic term for the first group) […] However, feminism embraces forms of autonomy which are much less oriented to the market. For example, there is a set of pressing problems raised by NRTs that fall under the heading of medicalization…From another perspective, however, treating a woman's body and/or potential life as property would exacerbate the oppression women are already subject to-in particular, their exploitation, the commodification and objectification of their bodies, and their own alienation from their bodies…The fear, of course, is that by treating potential life as property, women will be treated even more as "baby-making machines."

[412] *Ibid* at 346: people from normative perspectives in direct opposition to one another advocate the notion that women have a form of property in their bodies—in ways that may readily be applied to ownership of stages of potential life.

[413] *Ibid* at 346: "Of course, competing claims of property as the engine of exploitation and property as the vehicle for autonomy are found throughout debates over property. Which claim is more persuasive, and the ways the claims may be linked, must be examined in the context of the particular form of property at issue. My arguments here do not dispose of this dispute for property in general. Rather they show the kinds of questions, the kinds of inquiry into patterns of relationship, that will help resolve it."

[414] *Ibid* at 348-349

[415] *Ibid* at 350: "I think the short answer is that in a market economy where property is a primary means to autonomy, it is inevitably *unequal* autonomy. Since people's economic resources will be unequal, the use they can make of

category to deal with the advent of reproductive technologies is really a question about core values.[416]

The professor advances Rosalind Pollack Petchesky's[417] argument suggesting that the property paradigm can be redefined to benefit women: a conception of property that does not seek to advance commodification, exploitation or alienation. However, this same argument is mitigated by the question as to which extent property is likely to actually take on a new meaning and whether or not it will encourage feminist values.[418] Indeed, although Nedelsky concurs with Petchesky's theory, she asserts that reconceiving property is a long up-hill battle that she is ready to climb in already existing areas of law where the framework is traditionally being applied. However, she is sceptic about embarking on such an enterprise in new areas such as reproductive technology.[419]

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property rights in their bodies or potential life will also be unequal. There are good arguments to suggest that a property regime for potential life will actually exacerbate the inequalities to which women are already subject. Although poor women will have an additional resource to "market," they are likely to be paid at minimal rates, facilitating their exploitation by wealthy women and men […] The choice of property as a legal framework will entail a choice of a particular vision of autonomy, one which has inequality embedded in it".

[416] Nedelsky, "Property in Life", *supra* note 408 at 351: ""[E]ven if it were conceded that treating potential life as property would enhance women's power, and even if one accepted the arguments that it would particularly enhance the power of the most disadvantaged women," those arguments alone cannot be dispositive. We must still ask whether it is worth acquiring what is treated as power in our society at the cost of other basic values. In addition to focusing on issues of commodification and alienation, feminists have asked us to reexamine our basic conceptions of power, autonomy, and liberty. The forms of power, autonomy, and liberty that would be promoted by property rights in potential life may not be the forms of those values that we actually want to promote"

[417] Rosalind Pollack Petchesky is a Distinguished Professor of Political Science at Hunter College, City University of New York and founder of the International Reproductive Rights Research Action Group

[418] *Ibid* at 352-353: "Rosalind Pollack Petchesky offers an especially compelling argument that claiming women's bodies as their property is a central tool in *overcoming* commodification, alienation and exploitation. She urges "rethinking the meanings of self-ownership and thereby pluralizing the meanings of property in a direction of permeability, interdependence, communality...it is imper- ative that feminists reclaim 'self-ownership' as a concept of privacy against arbitrary bodily usurpation [...] The question is what is the likelihood that vesting women33 with legal property rights in stages of potential life will foster the values she (and many other feminists) care about? What are the chances that it will mitigate rather than exacerbate the problems of alienation, commodification, and exploitation? [...] Petchesky herself acknowledges that all the prevailing norms work against her project: "Of course, in a world where the language of social need and common ownership is rapidly disappearing in the universal babel of the market, this [her project of redefining property] would mean practically turning the world upside down." And the norms within the legal world are even clearer. The fact is that almost all the cases that courts have experience with, and past opinions they rely upon, treat property in the context of market transactions that presuppose economic inequality and take as starting presumptions exclusivity and unqualified alienability. The framework within which they work is not the possible one Petchesky outlines, but the currently dominant one shaped by norms of economic inequality, commodification, an autonomy-market nexus, and individualistic conceptions ofrights and liberties."

[419]Nedelsky, "Property in Life", *supra* note 408 at 354, 355: "I think the underlying argument is that all we can know for sure at this stage is that we need the "space" to recreate meanings; we cannot know what the new meanings should look like until we have begun to dislodge the old […] in my own view, the potential benefits of, say, disrupting conventional images of women's maternal nature by creating a thriving market for women's property in

Using her *rights as relationships* framework, Nedelsky points to the main relationships which, in her opinion, should be kept in mind in advancing a legal framework for potential life: (1) "Relationships of respect and appreciation for children" (2) "Relationships of respect for women and honouring of their reproductive capacities and labour" (3) "Relations of equality, between people of all classes and backgrounds as well as between men and women" and (4) "We also need to pay attention to the conditions that foster people's capacity to form caring, responsible and intimate relationships with each other-as family members, friends, members of a community, and citizens of a state."[420] Regarding the relationships of respect for women, Nedelsky's central concern is autonomy. She claims that feminists generally agree that autonomy fosters respect for women but that the concept's significance differs among them and that there exists a tension that could be dispelled if the focus shifted away from free market exchange as the driver of autonomy's development and sustenance.[421] Furthermore, she suggests that analyzing the free-market conception of autonomy can lead to a better understanding of the relationships it encourages as well as facilitate the choice of which relationships a given legislative framework should foster.[422] Indeed, as Professor Nedelsky eloquently illustrates, the language of property sometimes "fails to capture what we actually care about" in certain situations[423].

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potential life seem highly speculative and intrinsically questionable. The potential damage seems far clearer, more likely, and seriously destructive."

[420] Nedelsky, "Property in Life", *supra* note 408 at 355

[421] *Ibid* at 356: "My general point has to do with autonomy. Achieving respect and equality for women will require enhancing women's autonomy. Almost all feminists agree on that. But, as we have already seen, there are different visions of what autonomy consists in and what will promote it there often seems to be a tension between the desire to enhance individual women's scope for choice, control, or autonomy, on the one hand, and meeting collective goals such as equality for all women or optimal conditions for children, on the other. These tensions generally arise out of the vision of autonomy that underlies and emphasizes the exercise of autonomy through market exchange. If we shift our attention to what makes it possible for everyone's capacity for autonomy to flourish and develop, some of the tension will disappear or be recast. The kinds of relationships […] The tension arises in some instances because autonomy is simply postulated as a human faculty, and claims about the market as a suitable, or even crucial, vehicle for the exercise of autonomy proceed without inquiry into what actually makes human autonomy possible."

[422] *Ibid* at 357: "My general claim is, then, that when we spell out the patterns of relationships entailed in a given conception of autonomy-such as the conventional autonomy market nexus-we will be much better able to evaluate the desirability or persuasiveness of that conception. Similarly, we can best assess which predictions of the consequences of legal rules or categories are more persuasive if we look to the particular relationships a legal regime is claimed to foster."

[423] *Ibid* at 357-362: Nedelsky relays cases where property was used as a category for potential life: In *Del Zio v. Presbyterian Hospital,* unreported, 74 Civ. 3588 (U.S. Dist. Ct., S.D.N.Y. April 12. 1978). 42, the hospital destroyed a culture without the knowledge and/or consent of the potential parents, so they sued for damages,

6.1.3 Nedelsky's Multidimensional-Self: A More Human Legal Subject

Nedelsky not only questions the liberal conception of autonomy and property, but the very subject of these rights: the legal subject, the *rational agent*. Her argument is that rights can be better understood with a fully embodied conception of the self. She proposes the *multidimensional self* as a more appropriate conception than the *rational agent* conception which has been held by liberal political and legal discourse.[424] She postulates that one of the reasons the *rational agent* has been useful in these areas is because it enables the expression of fundamental equality:[425] "It may seem that people need a way to see each other not in terms of the obvious multitude of differences among them, but as equal rights bearers, and in that sense identical to and interchangeable with one another […] The abstracted self thus captures the core equality and identity of people as rights bearers.[426]" However, Nedelsky probes deeper to illustrate that "protecting people and allowing them to thrive" as well as "institutionalizing core values of a society" requires the acknowledgement of a more complex conception of the self,

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claiming the culture was their property. Nedelsky highlights how emotional attachment is key and should not be overlooked : "The sense that the potential life they created (with the technical assistance of the hospital) "belongs" to them reflects, I think, the idea that the Del Zios did and should feel a sense of attachment to that potential life. It issued from their bodies, they cared deeply (presumably) about what happened to it, they hoped to be able to nurture it in Mrs. Del Zio's body so that it could develop into a baby, whom they would continue to nurture. To destroy the culture without their knowledge or consent was to violently disregard this sense of attachment. And to offer no legal protection against such disregard is to say that, as a society, we do not think it matters whether such attachment (as well as the risk, pain, and stress born of the hope for that attachment) is respected. It probably makes sense to stipulate through legislation that such cultures cannot be destroyed without the consent of the couple involved in their creation 3 But the reason is not that they "own" the culture, but that we think that, as a society, we should honour and protect the sense of attachment they feel. If we did not, we would show a failure to respect people in the feelings that both constitute part of their humanity and which we think are essential for an optimal society. Respect for such feeling is almost certainly necessary to the relations of respect and appreciation of children and respect and honouring of women's reproductive capacities[...] In each case, as with the *Del Zio* story, if we look closely at what is actually at stake, we will find that the analogies with property are superficial." She also looks at *York* v. *Jones* 717 F.Supp. 421 (E.D. Va. 1989) and Davis v. Davis [1990] U.S.L.W. 2205 (Tenn. App.), reversing (1989) WL 14095 Tern.Cir.)

[424] Jennifer Nedelsky, "Law's Relations: A Relational Theory of Self, Autonomy, and Law" (Oxford University Press, 2012) at 159 [Nedelsky, "Law's Relations"]: "My argument is that the prevailing stripped down image of the "rational agent" of both law and political theory is unnecessarily and destructively narrow. In particular, it neglects or obscures the affective, embodied, and relational nature of human self-hood. And the abstractness obscures the particularity. An optimal language for legal and political discourse would direct our attention to these dimensions of our humanness […] the best language for autonomy is not independence, self-determination, or control—despite their common associations with autonomy. The language I propose is autonomy as part of the capacity for creative interaction—which includes the capacity for self-creation".

[425] *Ibid* at 160 (By this, Nedelsky means "equal moral worth"): "Philosophers often use the term "equal moral worth" to capture this idea (meaning of inherently equal value, not equally moral in the sense of equally virtuous). I will use both "equal moral worth" and "inherent equality" to distinguish this fundamental equality from the (sometimes natural) inequalities of capacity as well as from practical inequalities in social relations."

[426] *Ibid* at 160

one which is in accord with and does not undercut core values, autonomy being one such value.[427] She postulates that although equal moral worth (here the "rational agent" is not to be confused with formal equality[428]) may comprise the first ground for our claims as right-holders,[429] this conception should be elaborated by taking into account substantive claims (human characteristics and context).[430] According to the Professor, treating rational agency as a purely formal claim on which to base equality and rights claims is misleading.[431]

Furthermore, she argues that the "rational agent" is a conception of self which ignores the body/mind relationship.[432] The complexities of the body/mind relationship[433] offer a conception of autonomy to Nedelsky and that is what she means when she refers to *embodied autonomy*: she uses our earthly material reality to rethink autonomy and conclude that it is essentially about constructive relationships (both large and small scale) not independence, separation or control:[434] "Our selves are not just embodied in the sense of being encased in our bodies. Our selves are fully embodied, in the sense that our bodies are constitutive, interactive dimensions of a whole. "[435]

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[427] Nedelsky, "Law's Relations," *supra* note 424 at 160: "Neither objective can be optimally pursued if the stripped-down picture of the individual is actually misleading in ways directly related to those values, such as the nature of autonomy and the conditions under which it can flourish."

[428] *Ibid* at 161

[429] *Ibid* at 162

[430] *Ibid* at 162: "The starting point of formal equal moral worth is, thus, necessary, but not sufficient. The second component is attention both to actual human characteristics and to particular contexts in order to know what it would take to give effect to equal moral worth, to actually treat every person as inherently equal […] I think a central part of the problem in the tradition of liberal legalism has been the move to an intermediate step: the assertion of rational agency as that which constitutes our identity as equals and thus forms the basis for our claims as rights bearers".

[431] *Ibid* at 162: "The treatment of rational agency as the core of equality and the foundation for rights claims has caused problems precisely because it is not a purely formal claim; it asserts certain properties as the ones relevant to rights while denying the significance of others. In particular, as many feminists have argued, it denies the relevance of our embodied nature, of emotion or affect and the differences and individual particularities that both our bodies and our feelings make manifest. The problem lies both with the conception of reason, as radically disconnected from the body and affect, and with the conception of agency or autonomy"

[432] *Ibid* at 162-163: "The core subject of the dominant legal and political theory is the rational agent—whose rationality and agency alone are what really matter, what entitle him or her to rights. And neither rationality nor agency is conceptualized as integrally connected to the body or to affect."

[433] Jennifer Nedelsky, "Meditations on Embodied Autonomy", (1995) 2 Graven Images 159 at 159: "The complexity, paradoxes and tensions of the mind/body relationship reveal and illuminate analogous difficulties in conceptualizing human autonomy" [Nedelsky, "On Embodied Autonomy"]; Nedelsky, "Law's Relations", *supra* note 425 at 277-306;

[434] Nedelsky, "Law's Relations", *supra* note 425 at 299

[435] *Ibid* at 306

In her discussion about relinquishing control,[436] Nedelsky draws on Susan Wendell's work on bodily suffering.[437] In her analysis, she refers to "attentiveness without resistance."[438] This "attentiveness without resistance" is very similar to the state of receptivity or mindfulness she refers to in her theory on judgement. Nedelsky draws on Hannah Arendt's theory of judgement.[439] Arendt herself was influenced by Kant's *Critique of Judgement*, wherein he examines aesthetic judgement and formulates the concept of *enlarged mentality*.[440] Nedelsky argues that *enlarged mentality* requires relational autonomy[441] and that it is this autonomy which makes judgement genuine.[442] Moreover, in her opinion, receptivity (which is not mentioned in

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[436] *Ibid* at 277-306

[437] Nedelsky, "On Embodied Autonomy", *supra* note 433 at 159 : "Susan Wendell reminds us that the feminist embrace of the body, the rejection of the mind-body split with its denigration of the female as body, has served an important function; but it has glorified the body as a site of pleasure and connection, without taking seriously the ways in which the body is a source of pain and incapacity"; Nedelsky, "Law's Relations", *supra* note 424 at 285: "[Susan] Wendell wants feminists to not only face the inevitability of sickness and pain but also to think differently about the kind of control we can exercise over these phenomena. We need to attend to the ways in which even positive approaches to responsibility for our health can lead to an oversimplified picture which has control at its center—with disturbing overtones of both infinite optimism and fault and failure. Trying to figure out the optimal way of conceptualizing responsibility for our health is a way of exploring the seeming paradoxes of our autonomy as embodied beings who participate in creating ourselves and our world but control neither"

[438] Nedelsky, "Law's Relations", *supra* note 424 at 286

[439] Jennifer Nedelsky, "The Reciprocal Relation of Judgement and Autonomy: Walking in Another's Shoes and Which Shoes to Walk In" in Jocelyn Downie & Jennifer J. Llewellyn, eds, *Being Relational, Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) [Nedelsky, "Judgement & Autonomy"]; Jennifer Nedelsky, "Receptivity and Judgement" (2011) 4:4 Ethics & Global Politics at 231-254; Jennifer Nedelsky, "Judgement, Diversity, and Relational Autonomy" in Ronald Beiner & Nedelsky, eds, *Judgement, Imagination and Politics* (Boston: Rowman& Littlefield Publishers Inc., 2001) 103 at 106: "Autonomous judgement requires attending to the perspectives of others" [Nedelsky, "Judgement, Diversity and Relational Autonomy"].

[440] Nedelsky, "Judgement, Diversity and Relational Autonomy", *supra* note 439 at 106: "What enables us to make judgments which are not merely idiosyncratic statements of preference, what puts us in a position to 'woo the consent of others', is our capacity for 'enlarged thought'."

[441] *Ibid* at 110: "On this account, taking the standpoints of actual others is not the antithesis of autonomous judgement, but its basic condition. This is a way of thinking about judgement as both inherently social and as autonomous-the kind of autonomy possible in the empirical, social realm."

[442]Nedelsky, "Judgement, Diversity and Relational Autonomy", *supra* note 439 at 106-110: "Arendt shares the Kantian objective of seeing the link between the perspectives of others and judgement that is autonomous, that can transcend the inevitable limitations of one person's experience, interests and inclinations […]The ability to think in the place of others makes it possible for us to liberate ourselves from the "subjective private conditions", that is, as Arendt says "from the idiosyncrasies which naturally determine the outlook of each individual in his privacy and are legitimate as long as they are only privately held opinions, but which…lack all validity in the public realm. And this enlarged way of thinking, which as judgement knows how to transcend its own individual limitations, on the other hand cannot function in strict isolation or solitude; it needs the presence of others 'in whose place' it must think, whose perspectives it must take into consideration, and without whom it never has the opportunity to operate at all […] the process of enlarged mentality must not be confused with deference"; Nedelsky, "Receptivity and Judgement' *supra* note 439 at 233: "For Arendt, judgment requires, or one might say entails, autonomy. The very meaning of the term involves the exercise of autonomous judgment. It is the capacity of each person to make her own judgments that can free one from the power of public opinion and enable her to form judgments and make

Arendt's account of judgement), is necessary for the formation of *enlarged mentality*: "in order to take the perspective of another, one must be open to it, one must adopt a stance of receptivity. To exercise judgment, one must temporarily adopt the stance of non- judgment that characterizes receptivity.[443]" According to Nedelsky, receptivity can come in many forms. She discusses mindfulness as constituting one such form (mindfulness through meditation and mindfulness through the everyday awareness we place in our thoughts and actions).[444] Besides highlighting the antithetical natures of judgment and mindfulness and illustrating how they intersect, Nedelsky imagines how they can be relevant to not only personal but political change as well.[445] Indeed, instead of equating autonomy and responsibility with control, she espouses the idea that "what we have is a creative capacity to interact."[446]

The body, being the part of ourselves that challenges our autonomy, is the part which, according to Nedelsky, disturbs North American culture.[447] From the abovementioned observations, Nedelsky posits two things: the first is that by denying these aspects of the self and misunderstanding the nature of reason and autonomy, the rights discourse is fallacious.[448]

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good decisions even when the existing canon of concepts seems unable to capture the nature of a new phenomenon. (Arendt called this latter capacity 'thinking without banisters.') It is the autonomous nature of these capacities that make them genuine judgment, and it is this exercise of autonomy that provides the 'freeing' quality of true judgment."

[443] Nedelsky, "Receptivity and Judgement", *supra* note 439 at 233

[444] *Ibid* at 234

[445] *Ibid* at 235- 236: "[B]oth the exercise of Arendtian judgment and the practice of mindfulness enable the ability to perceive novelty and to respond creatively, again, unfiltered (or at least less filtered) by the habits of trying to fit everything into a routinized conceptual framework. Freedom, creativity, and clear seeing and thinking are all linked to this capacity to recognize novelty and bring forth novel responses from ourselves. From the perspective of both practices, transformation, whether personal or political, stops seeming like a mountain to scale with vast effort and resources, and appears more like an inevitability that requires attentive, receptive, responsible interaction […] the capacity for the enlarged mentality and judgment enables us to freely, creatively respond to the inevitably changing world around us […] this breaking free from misguided habits of thought that distort our perceptions, leads to and is part of a deeper freedom: mindfulness enables one to become 'free from the prison of habitual mental affliction and suffering'."

[446] Nedelsky, "Law's Relations," *supra* note 424 at 291

[447] *Ibid* at 163: "Our bodies pose a tacit threat to the dominant image of autonomy as independence, as being unilaterally in control of our lives. It is in part our embodiment that makes us inevitably and obviously dependent on others. In sickness and death we are forced to recognize both our need for others and our ultimate lack of control. I think it is this dependency and inherent lack of control that, in North American culture, breeds a fear, distaste, and hostility to all things bodily. The visions of freedom from necessity, the ultimate image of autonomy, falter in the face of the sick or dying body."

[448] *Ibid* at 164: "I want to point to a particular way of seeing this image as entailing a misunderstanding of reason, which, in turn, distorts the understanding of autonomy. Since the value of autonomy is so central to rights, and the rational agent is treated as the subject of rights, if we misunderstand the nature of reason and autonomy, it is unlikely that we will be able to develop an adequate conception of rights."

Nedelsky draws on Antonio Damasio's theory[449] to show that emotion is indeed an important component of reasoning and autonomy. The second is that the "rational agent" has been used "to exclude women and other subordinated groups who are associated with affect and the body."[450]

Thus, to Nedelsky, autonomy is a facet of creative interaction, together with attention, receptivity, and response, to name a few.[451] Just as she distinguishes relational autonomy from independence,[452] she prefers to use the term *creative interaction* or *interactive self-creation* rather than *self-determination*[453] because it "offers a more helpful way of thinking about a wide variety of problems posed by the realities of our interdependence."[454] Indeed, noting the existing dilemma which exists between the realities of autonomy and interdependence within unequal power relations,[455] she offers *interactive self-creation* as a concept that can facilitate reflection and action on the issue.[456] As such, Nedelsky's conception of autonomy, in its most basic as

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[449] *Ibid* at 165-166: "Damasio's work has intriguing implications for the feminist project of making the body an integral part of our conception of the self rather than a source of contingency, particularity, and difference—to be set aside when identifying the human essence that founds the contemporary commitment to equality and rights. After all, if the core capacities for reason and autonomous decision making cannot be well understood without their connection to affect and the body, it hardly seems appropriate that our conception of the self should exclude or ignore these components. Once we bring in the body, we must confront difference. The justification for leaving the body aside was to find some core commonality that was truly universal, unvaried and free of contingency. If law, political theory, and institutional design fully incorporated a sense of human beings as embodied, it would be much harder to ignore bodily differences such as sex, age, and mental and physical abilities."

[450] *Ibid* at 164

[451] *Ibid* at 166

[452] *Ibid* at 167: "Independence captures something about what we value in autonomy; it suggests that one can make one's life choices for oneself, free of the constraint or control that dependence on another can bring. The problem is that this vision of freedom misses the reality that the capacity for autonomy can only develop and thrive when fostered by constructive relationships[…] The capacity for autonomy can wither or thrive through one'slife, and those who value autonomy must not simply posit it as a human characteristic but also inquire into the conditions for its flourishing. And we can only understand those conditions when we understand how relationships shape the development of our core capacities in ways that make interdependence a basic fact of life—throughout our lives; For more on the subject see: Nedelsky, "Reconceiving Autonomy", *supra* note 393

[453] Nedelsky, "Law's Relations" *supra* note 424 at 167

[454] *Ibid* at 168: "The problem with the term "self-determination" (and many conceptions of autonomy that deny or ignore its relational nature) is that it presumes or implies that the nature of our "selves" is entirely a matter of our choice. And, conversely, a common objection to "communitarian" thought is that it so overstates the constitutive nature of human embeddedness in community, that it leaves no room for choice, for genuine autonomy."

[455] *Ibid* at 169: "How does one respect and promote both individual and community agency while acknowledging the power and constraints of the larger context?"

[456] *Ibid:* "The problem of understanding individual autonomy and responsibility in the context of oppressive power relations (which, as Sarah Hoagland reminds us, is the norm rather than the exception) is a matter of both strategic political action and reflection on the language, the concepts that can facilitate both understanding and action. I think the concept of autonomy as part of a capacity for creative interaction offers a path for working through both the theoretical and practical debates. At the theoretical level, the context of creative interaction highlights both the genuinely creative and inevitably interactive dimensions of all our exercises of autonomy. It thus directs our

well as its relational sense, is a component of human creative potential.[457] Moreover, according to her, "the language of creative interaction […] invites inquiry into interaction with one's body as part of the process of self-creation [and] an approach to autonomy as part of the capacity for creative interaction of relational, embodied selves is well suited to the central problem of difference."[458]

Regarding diversity, Nedelsky asks herself whether "the multidimensional self and its capacity for creative interaction replace rational agency as the ground for equality."[459] She posits that applying the "rational disembodied agent" status to traditionally subordinated groups of society (women, working class and racialized people etc) is not as suitable as it seems.[460] Indeed, the Professor asserts that the legal concept rejects components of our human selves (affect, body, relational) which do in fact exist and that these must "go somewhere else, in their attribution.[461]" If these cannot be recognized fully within a legal conception of self, then "no amount of 'inclusion' in traditional rational agency will provide an adequate framework for rights or law: "[462]

> If rational agency is truly the basis for equal moral worth, then those who do not have it lose their equal status. The capacity for creative interaction is broader and more flexible. Certainly even newborns have it, and any state of impaired capacity allows for some form of creative interaction. Nevertheless, there are variations within the actual capacities for creation as well as within the role of autonomy in those capacities that arise not only with age and infirmity but also with the conditions of people's lives. It is a basic part of my conception of autonomy that it is not static, that it requires constructive relationships, and that throughout one's life it can wither or thrive depending both on the kinds of initiatives one takes and on the conditions one finds oneself in. Given this variation, my conception of autonomy cannot be the core grounding of claims for rights: the core claim of equal moral worth does not vary; autonomy does. Autonomy as part of creative interaction is an improvement over traditional rational

attention to the constraining as well as enabling dimensions of circumstance without underplaying the core capacity for creation."

[457] *Ibid* at 170: "Thus I intend a language that is true both to the miraculous (and ordinary) human capacity for creation and to its inherently relational and thus contingent qualities. Conceptualized in these terms, as part of the capacity for creative interaction, autonomy is shaped by the structures of relations, including power relations with which any individual interacts, but it cannot be reduced to or deduced from those relations."

[458] *Ibid* at 172: "This issue is best understood by contrasting my conception of autonomy with the traditional rational agency. By excising the body and affect from the essence of the rights-bearing self, the multiplicity of differences among people is removed as well. Conversely, when the conceptions of reason and autonomy have the body and affect integrated into them, the differences that both make manifest become central. The realities of differences in abilities and in emotional states—as well as the relational differences of power and status— are no longer presumed to be marginal to the issues of equal rights; they appear as integral to the full particularity of the subject of those rights."

[459] *Ibid* at 186

[460] *Ibid* at 187

[461] Nedelsky, "Law's Relations", *supra* note 424 at 187

[462] *Ibid* at 187

> agency in many ways. But both are substantive, empirical concepts whose variation among human beings means that neither can ground a universal claim of equality.[463]

Furthermore, she goes on to show how the "relational dimension of the multidimensional self" can make an advantageous contribution to legal analysis in the area of responsibility and that it can "both improve and complicate legal analysis of responsibility."[464] Indeed, she asserts that the relational approach espouses a more complex notion of autonomy, thereby making the concept of responsibility more complex.[465] Using battered women who kill their husbands as an example, Nedelsky illustrates how the contemporary liberal conception of autonomy has caused the legal system to inadequately respond to the issue of responsibility where the battered woman syndrome is concerned.[466] She points to the fact that, besides certain exceptions, the common law presumes the existence of autonomy and agency, as judges don't usually delve deep into what it means for an action to be "one's own."[467] She does not mean to say that personal and legal responsibility are the same or should be. In the case of the battered woman syndrome she suggests that despite there being a personal responsibility for a woman to leave or change a destructive relationship, a woman should not be held legally at fault for remaining in one and the issue of how autonomous she really was when killing her batterer becomes not

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[463] *Ibid* at 187, 188

[464] Nedelsky, "Law's Relations", *supra* note 424 at 173

[465] *Ibid*

[466] *Ibid* at 173, 175-183: "It is important to inquire carefully, not only prospectively into what will foster autonomy but also retrospectively into the kind of autonomy, say, a particular accused woman had and why. The difficult reality for everyone is that we cannot control all the circumstances that foster or undermine our creative capacities, even though we have a responsibility to optimize them […] While it seems to be the case that this expert testimony has made a difference in courts' capacities to understand why a woman might stay in an abusive relationship, the danger has been that the accused woman then comes to be seen simply as a victim. Her agency disappears, even if the facts are that she had made prior efforts to leave and had employed many strategies to protect herself and her children. The passive, helpless victim is a stereotype available for casting the woman as not responsible for her situation or for her actions. Indeed, there are interesting arguments that even the psychological experts who testify in court end up drawing on these stereotypes."

[467] Nedelsky, "Law's Relations" *supra* note 425 at 173-174: "To those sympathetic to a relational approach this picture of autonomy as contingent, shifting, and variable may look self-evident. But when we turn to the law, we can see a logic behind treating autonomy as a presumption, something to be ordinarily assumed as a characteristic of human actors. It might appear that the law has to assume autonomy, because it is necessary for all forms of legal responsibility. When a legal system is based on a conception of the person as a rational agent who can be held responsible for his actions, then justice and legitimacy seem to require a link between autonomy and responsibility […] While legal analysis often uses the term "agency," I think it is fair to say that it is actually autonomy and not just agency that the law usually presumes for the purposes of assigning responsibility […] the law recognizes exceptions to and constraints on autonomy, but unless one can show that one falls within one of the exceptions, autonomy will be assumed for the purposes of assigning responsibility."

only one of degrees and circumstance[468] but it leads one to question to which extent institutions and society are also responsible for the issue.[469] Therefore, a relational approach to the battered woman syndrome poses two challenges, one being the law and the judiciary's limited view on autonomy, another being society's institutional failures where helping battered women is concerned.[470]

6.1.4 Susan Sherwin: Distinguishing Autonomy and Agency

Like Jennifer Nedelsky, Susan Sherwin has taken issue with the concept of autonomy being simplistically equated with individualism and independence and has advanced a definition which takes human interdependence and social context into account:[471] "I reoriented my approach to autonomy in the 1990s and sought to develop a relational understanding of the concept […] I sought a way to retain the value of appeals to autonomy as a way of reducing oppression without accepting its baggage as a concept that sustains the ideals of individualism."[472]

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[468] *Ibid* at 182: "In the long run, I think cases such as these are best treated as cases where the degree of the impairment of autonomy should determine the degree of responsibility."

[469] Nedelsky, "Law's Relations" *supra* note 425 at at 181, 183-184: "As I have said, an approach to autonomy that looks to both the influence of personal relationships and societal structures is necessary to understanding the harm that battering does to autonomy and thus to determining the kind of responsibility that should be assigned to women who have killed their batterers […] But that there is a personal responsibility to try to leave or transform destructive relationships, but the exercise of that responsibility is so complex and so dependent on circumstances and support beyond the control of the individual woman that the law should not (as Canadian law does not) try to assign any fault for being in a battering Relationship […] Battering is a social phenomenon (otherwise the courts would not have been able to recognize a battered women's syndrome) that has been sustained by patterns of behavior by police, prosecutors, judges, neighbors, friends, and family, which together constitute a long-standing failure to protect women from intimate partner violence (and, indeed, violence generally). It is possible for women to become enmeshed in abusive relationships only because of a wide set of institutions, behaviors, and beliefs that are beyond the control of any individual woman. The attention to the social structure of relationships keeps this larger framework in view and thus helps to make clear why, for legal purposes, there can be no individual responsibility for being in a battering relationship."

[470] *Ibid* at 181: "In at least two different ways, a relational approach poses a major challenge. Initially, I thought that most "battered women" cases were about impaired autonomy and that the reason the discussion of the reasonableness of the self-defence lacked clarity was that judges were ill-equipped to articulate conceptions of partial autonomy— as opposed to an on/off conception. I now think, though, that in most of the leading cases the problem lies in the unwillingness to directly confront the external reality, the institutional failure that makes the woman's actions reasonable. That is a different kind of challenge."

[471] Susan Sherwin, "Relational Autonomy and Global Threats", in Jocelyn Downie and Jennifer J. Llewellyn, eds, *Being Relational, Reflections on Relational Theory and Health law* (Vancouver: UBC Press, 2012) at 13-14 [Sherwin, "Autonomy and Global Threats"].

[472] *Ibid* at 15

For a long time, her approach focused on autonomy in the context of health and bioethics exclusively:[473] "I sought to make central ways in which systemic patterns of oppression affect people's experiences with respect to health matters and health care."[474] She introduced the distinction between the concepts of autonomy and agency.[475] According to her, a person has agency insofar as she makes a rational choice, however, she is autonomous when provided with options that are not the result of systemic oppression, in other words, when "background conditions" are empowering and "meaningful options" are available.[476]

I appreciate Sherwin's distinction between agency and autonomy. However, I find her definition of autonomy too narrow: both her definitions are based on the relations of the individual to the outside world. Instead, I prefer Nedelsky's because she exposes the inherent complexities of what it means to be a human being. Her definition is dynamic and really highlights not only the individual's relationship to the outside world, but with him/herself. Susan Dodds also developed a fuller view of autonomy, but it is not as comprehensive as Nedelsky's, in my view.

6.1.5 Susan Dodds: Accounting for "Autonomy Competency"

Susan Dodds presents an account of the radical, liberal and cultural feminist theories and their contributions to the notion of autonomy in bioethics.[477] She discusses how each theory in itself is not a sufficient to challenge the mainstream concept of autonomy in bioethics but that their complementarity can be useful.[478] Dodds then takes a particular look at Suzan Sherwin's theory

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[473] *Ibid* at 16
[474] *Ibid*
[475] Sherwin, "Autonomy and Global Threats," *supra* note 471 at 17
[476] *Ibid* at 17-19
[477] Susan Dodds, "Choice and Control in Feminist Bioethics" in Mackenzie, Catriona & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (New York: Oxford University Press, 2002) 213 at 218-223 [Dodds]: "The liberal feminist approach is consistent with the bioethical focus on respecting autonomy through recognition of informed choice[…][It] assumes that health-care decision making occurs in a social vacuum […] Radical feminist contributions to bioethics demand an awareness of the effects of race, class, gender, ability and sexual orientation in the distribution of power in a context of medical care, rather than a narrow construed understanding of autonomous choice[…][it] however, contains some inconsistencies. For example, the account of patriarchy that supports the radical feminist mistrust of medical technology is not similarly applied to governmental institutions that are called on to protect women […] The cultural feminists' care focus gives us an awareness of the relationships between people and the ways these relationships are affected by health care"
[478] *Ibid* at 218, 222: "I think that each of these three approaches contributes to a general critique of the conception of autonomy found in bioethics […] At the same time, all three contain significant limitations because they fail to adequately challenge the equation of autonomy with informed consent, thus failing to draw women out of the

on relational autonomy which, in her opinion, offers a "more complex understanding of autonomy than the one described in mainstream bioethics literature"[479]. Although she agrees with Susan Sherwin that the dominant conception of autonomy in bioethics does not account for the eradication of oppression,[480] she argues that accounting for oppression or gender is not enough, that the ability to make rational choices is a limited description of autonomy, "autonomy competency"[481] should be taken into account.[482]

Although, as I mentioned previously, I find Sherwin's definition of autonomy too narrow, I do find her public ethics project to be a noteworthy development. Together with Catherine Koggel's relational account on inequality, it constitutes an interesting framework from which to view assisted reproduction and surrogacy.

6.2 Sherwin& Koggel: Global Public Ethics in a Power-Driven World

6.2.1 Susan Sherwin: Toward a Global Public Ethics

Recently, Sherwin has undertaken the task of examining relational autonomy from a wider perspective,[483] using it to create a new ethics project which she calls *public ethics.*[484] In her opinion, traditional ethics systems are insufficient to tackle today's global issues.[485] She argues that ethical matters are interconnected and need to be taken into account at the intersection of various individuals as well as human organizations: "I claim that we need a new approach to ethics that is capable of discussing the interconnections of moral responsibilities for many different types of agents (that is, agents of many levels of human organization […] the ethics we need now must operate on multiple levels of human organization simultaneously[486] […] an

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tension between accepting a conception of autonomy understood as choice, independent of the etiology of the choice, or rejecting the value and significance of personal autonomy for women […] An adequate understanding of autonomy in health care will need to offer an alternative account of autonomy, one that incorporates the liberal, radical and cultural feminist critiques."

[479] Dodds, *supra* note 477 at 223

[480] *Ibid* at 224

[481] *Ibid* at 226: "[A]n adequate understanding of autonomy in health care must not be restricted to an examination of the exercise of autonomy through choice but must also encompass and understanding of the ways in which autonomy is developed or, in Diana Meyers' terms, the ways in which the array of 'autonomy competencies' are fostered, shaped and potentially thwarted."

[482] *Ibid* at 225-228

[483] Sherwin, "Autonomy and Global Threats," *supra* note 471 at 20-25

[484] *Ibid* at 23

[485] *Ibid* at 20-21

[486] *Ibid* at 21

"ethic of multi-layered responsibilities."[487] She also argues that ethicists should not be concerned so much with applying universal rules across various contexts but more with assigning specific responsibilities where they are actually needed.[488] Sherwin sees a connection between *public ethics* and health care, whereby the latter is both a model and an example of the former.[489]

She refers to Iris Marion Young[490]'s work on social connection theory (global markets and social injustice)[491] as guidelines for her *public ethics* project.[492] Young used sweat shops to illustrate the interwoven responsibilities involved in social structures, the complex background conditions within which various agents act on the global stage and she set four parameters to help determine when agents should take responsibility to change a given problematic: power, privilege, interest and collective ability.[493] Sherwin does not elaborate but she asserts that she wants to widen her theory of relational autonomy so it encapsulates global social structural issues.

6.2.2 Christine Koggel: Accounting for Power in Equality Analysis

Christine Koggel maintains that relational theory offers a more comprehensive view for equality analysis than does Amartya Sen's[494] *capabilities approach to equality analysis*.[495] She suggests

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[487] *Ibid* at 25

[488] Sherwin, "Autonomy and Global Threats," *supra* note 471 at 21

[489] *Ibid* at 24: "[I]n public health, there are many levels of responsibility that are interrelated with responsibilities at other levels, including those of individuals. Public health is, then, both an instance of, and a model for, what I have in mind for the complex, multi-layered responsibilities of public ethics. In both arenas, there are moral responsibilities at every level of human organization regarding how we are to behave, individually and collectively. Ethics must help us learn to see these interconnections and provide guidance on the appropriate kinds of responsibility in complex cases. The new ethics must provide guidance to agents at all levels of organization to help them to recognize and take up the appropriate responsibilities if we are to avoid worsening climate change, environmental degradation, growing poverty, threats of war or terrorism, a serious pandemic flu and so on."

[490] Iris Marion Young was a political philosopher and a professor of Political Science at the University of Chicago

[491] Sherwin, "Autonomy and Global Threats," *supra* note 471 at 218-223

[492] *Ibid* at 29-32

[493] Sherwin, "Autonomy and Global Threats," *supra* note 471 at 29-30

[494] Amartya Sen is Thomas W. Lamont University Professor and Professor of Economics and Philosophy, at Harvard University. His research has ranged over social choice theory, economic theory, ethics and political philosophy, welfare economics, theory of measurement, decision theory, development economics, public health, and gender studies. He has won the Nobel Prize in Economics.

[495] Christine M. Koggel, "A relational Approach to Equality: New Developments and Applications" in Jocelyn Downie & Jennifer J. Llewellyn, eds *Being Relational-Reflections on relational theory and health law* (Vancouver: UBC Press, 2012) at 66-70 [Koggel]; "Sen's Capability Approach" online: The Internet Encyclopaedia of Philosophy <http://www.iep.utm.edu/sen-cap/>: "The Capability Approach was first articulated by the Indian economist and philosopher Amartya Sen in the 1980s, and remains most closely associated with him. It has been employed extensively in the context of human development, for example, by the United Nations Development Programme, as a broader, deeper alternative to narrowly economic metrics such as growth in GDP per capita. Here

shifting the focus of equality analysis from the individual to relationships instead and that power's role in personal, local, institutional, national, and global relationships needs to be accounted for."[496] Koggel's perspective on equality and democracy challenges the liberal view.[497] Her account is not strictly about income inequality, it stretches far wider than that to encompass the range of power dynamics involved in shaping one's democratic voice as well. For example, she agrees with Amartya Sen that public participation in policy "is a crucial part of the exercise of democracy and responsible social choice"[498] but highlights the fact that "Sen defends the importance of having a voice in public debate at the same time as he fails to acknowledge the very institutional norms and structures that bar some from having a say."[499] More importantly, she goes on to state that "this lack of recognition reflects a failure to confront and question existing norms and structures that make some voices easy to ignore or hard to hear and understand."[500]

I find Koggel's statement about democracy and inequality very significant in the context of assisted reproduction and surrogacy. Indeed, the power that biotechnology and medicalisation have in 21st century's popular culture and consciousness are overlooked by family law scholarship in Québec. In the next section, I briefly look at what Ivan Illich, health sociologists and other scholars have to say about our relationship to medicine and technology.

'poverty' is understood as deprivation in the capability to live a good life, and 'development' is understood as capability expansion."

[496] Koggel, *supra* note 495 at 68-69, 71: Sen's account captures "the interconnectedness of kinds of inequalities and the need for a detailed, contextual account to capture them. Its richness in providing an informational base that demands context-specific attention has implications for theory and for policy […] Yet […] Sen's complex, contextual and integrated account of equality does not go far enough. Its focus is still too exclusively on individuals and on the goal of enhancing their agency so that they can live lives that they have reason to value. It does not delve sufficiently deep to question the actual relationships assumed by, and embedded in, institutions and structures or how these can entrench inequalities that are difficult to understand and to remove […] As broad as [Sen's] account of inequalities is it does not cover those inequalities that are shaped by relationships (and the institutional norms embedded in them) that one is powerless to exit, challenge or change."

[497] *Ibid* at 71, 76: "On a relational approach, liberal theory's cherished notions of autonomy, justice, or equality are not relinquished, but, instead, they are reinterpreted […] mainstream liberal understandings of equality as having the opportunity to compete in a free market, to have property, and to have one's negative rights of non-interference upheld are expectations and norms that are not universal-they are challenged in non-Western parts of the globe. We need to be able to understand the relationship of power that have allowed liberal assumptions about the virtues of the market and of capitalist structures to dominate conceptions of equality, justice, development, human rights and globalization itself."

[498] Koggel, *supra* note 495 at 73

[499] *Ibid* at 74

[500] *Ibid* at 74

6.3 Weighing in Power: Medical Nemesis, Technology and Autonomy

6.3.1 Medical Nemesis and Autonomy

I chose to include this section because I think it speaks to how medical and biotechnical power is a crucial factor to weight in a relational analysis of autonomy in assisted reproduction and surrogacy. One must keep in mind that when medical decisions are made regarding new technologies and procedures at an institutional level, these decisions are left into the hands of professionals and their institutions and that they hold a form of power that an individual's consent and/or agency at a clinical or systemic level, can barely face up to. Health sociologists recognize this.[501] Another interesting point made in health sociology is that the medicalization of reproduction[502] and childbirth strips away the human component of the experience, making it a medical and technical one instead.[503] Just like Nedelsky points to the law's limited view of its subject as a purely rational one,[504] health sociologists also point to the fact that medicine fails to take the person, as a whole, into account.[505] It has also been recognized that medical knowledge is not always value free: medicine is not always used to benefit patients but its associated industries instead and vice-versa.[506]

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[501] Anne-Marie Barry& Chris Yuill, *Understanding the Sociology of Health, An Introduction*, 2nd ed (London: SAGE Publications Ltd, 2008) at 34-51 [Barry & Yuill]

[502] *Ibid* at 53-57: "Medicalisation is used to describe a tendency to explain behaviour and experiences in medical terms […] it is particularly helpful to think of medicalisation as the way in which specific behaviours or conditions are given medical meanings and thus medical practice becomes the appropriate vehicle for their elimination and control. In this way, the apparently natural process of reproduction is defined as a medical condition requiring expert knowledge, treatment and intervention. Prior to the widespread dominance of biomedicine, Oakley argues, the main healers in society were lay women. Childbirth occurred at home. There was no systematic medical care during pregnancy. Institutions grouping pregnant and labouring women as 'patients' along with the sick did not exist. It was not until the eighteenth century that childbirth became increasingly technical and appropriated by male medical practitioners. The opportunity to study pregnancy and childbirth was facilitated by the use of hospitals to care for women […] [Reissman] suggests that this process of medicalisation resulted in a fundamental change to the nature of childbirth: "the meaning of childbirth for women was transformed from a human experience to a medical technical problem […] the problem of pregnancy management as [the doctor] has defined it, discounts the importance of the whole person […] an essential element of the concept of medicalisation can thus be understood as the transformation of human experiences into medical and technical one [where] personal and social implications of medical treatment are rarely considered."

[503] *Ibid* at 53-60

[504] See part 6.1.3, above

[505] Ann Oakley, "From Walking Wombs to Test-tube Babies" in M Standworth, ed, *Reproductive Technologies: Gender, Motherhood and Medecine* (Cambridge: Polity, 1987) at 52 [Oakley]; Barry& Yuill, *supra* note 501 at 57

[506] Barry& Yuill, *supra* note 501 at 35-51; Jerome P. Kassirer, *On the Take: How Medecine's Complicity with Big Business can Endanger Health* (Oxford University Press, 2005) ; Jennie Jacobs Kronenfeld, ed, *Technology, Communication, Disparities and Government Options in Health and Health Care Services*, Research in the Sociology of Health Care, vol 32 (Emerald Books, 2014)

As Ivan Illich[507] notoriously theorized, medicine can cause harm: both at a clinical and a cultural level. *Clinical iatrogenesis* "literally means harm caused by doctors [and] in its most literal sense, […] the harmful consequences of medical intervention"[508]. This phenomena is acknowledged by the medical profession.[509] He defined *cultural iatrogenesis* as a social dependence on medicine as an institution.[510] "According to Illich, this dependence is itself a form of sickness that undermines good health of autonomous human beings."[511] Indeed, *medical nemesis* is Illich's concept for the idea that the institution of medicine perpetuates more medically-induced harm.[512] Illich claimed that "people no longer take responsibility for their own health problems and the diagnosis of their symptoms […] that medical practice sponsors sickness […] reinforcing a morbid society that encourages people to become consumers of curative, preventative, industrial and environmental medicine. "[513] I view this statement as supportive of Nedelsky's point about the importance of mind/body relationship: Western culture is too focused on the mind and up until recently, it has outright rejected the body as a source of intelligence for human beings.[514] Indeed, Illich's thought about individual autonomy and institutions contains features common to Nedelsky's conception of autonomy and creativity, especially her account of the multifaceted self and creative interaction.[515] By rejecting the body, western culture has lost touch with a part of our human selves and with nature. In my view, albeit not directly, Nedelsky and Illich's theories have a lot in common with ecofeminist thought regarding science and capitalism's relationship with nature.[516] Illich was an advocate for what

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[507] Ivan Illich was an Austrian philosopher and critic of modern western institutions and industrial productivity
[508] Barry & Yuill, *supra* note 501 at 37; Armstrong, David. *Outline of Sociology as applied to Medecine*, 5th ed (London: Arnold, 2003) at 134 [Armstrong]
[509] Armstrong, *supra* note 508 at 34
[510] Barry& Yuill, *supra* note 501 at 37: "Illich also uses the concept to draw our attention to our cultural dependence on medicine and medical practitioners, such that we do not seek alternative explanations or alternative remedies for ill health"; Armstrong, *supra* note 508 at 135
[511] Armstrong, *supra* note 508 at 135: "Increasing the quantity of health services creates more need and encourages greater use, which in turn is met by increasing resources […] a vicious circle of need generating demand and requiring yet more resources-which engenders more need-is created."
[512] Barry& Yuill, *supra* note 501 at 38
[513] Barry& Yuill, *supra* note 501 at 37; Ivan Illich, "The Epidemics of Modern Medicine", in N. Black & al. (eds), *Health and Disease: A Reader* (Milton Keynes: Open University Press, 1993) [Illich, "The Epidemics of Medicine"]
[514] *Supra* note 447
[515] See part 6.1.3, above
[516] See part 6.1, above; Jytte Nhanenge, *Ecofeminism: Towards Integrating the Concerns of Women, Poor people, and Nature into Development* (Lanham, MD: University Press of America, 2011) at 165-166, 174, 189: "Science in general, and the discipline of economics in particular, together with their manifestations in technology, have

he called *conviviality*, which he described as the opposite of industrial productivity, or the state of a mere consumer: "I intend it to mean autonomous and creative intercourse among persons, and the intercourse of persons with their environment; and this in contrast with the conditioned response of persons to the demands made upon them by others, and by a man-made environment."[517] In other words, he aspired to a society in which individuals were creative and autonomous enough to use institutional tools rather than be controlled by them.[518] In his view, industrial productivity would eventually lead to a crisis characterized by human beings' loss of the capacity to shape their own needs.[519] He was clearly an ardent proponent of human creative potential and argued that liberation from industrial productivity and institutions was possible in a post-industrial convivial society.[520] Although his philosophy has been criticized as utopic,[521] his ideas about creativity, autonomy and the spiraling negative effects of medical intervention should definitely be kept in mind by laymen, policy-makers and scholars alike in the context of decision-making about surrogacy and assisted reproduction technologies.

6.3.2 Technology and Autonomy

I would like to come back to Christine Koggel's theory about inequality and power and the idea of democracy as having a voice.[522] In light of what I just mentioned above, it is my view that

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dominated and exploited women, Others, and nature […] It can be difficult clearly to perceive dualism and its domination in science. The major reason is that society teaches people that science is a universal and objective knowledge system. Modern societies have based all their social, educational, political, economic, and cultural institutions on science. Hence, people have no non-dualised, non-dominating, and alternative knowledge system to compare with […] The new economic and scientific order, which emerged in the 16th and 17th century Europe, would have lasting consequences for women and nature. Its chief ideology was to connect women and nature with the concept of passivity, while men related to activity and control in production and reproduction. Hence, women and nature was to submit themselves to the control of experimental method and technological advance […] Western perception of reality, including their meaning-structure, their language use, and their definition of identity are all framed in relations to dualism, hierarchy, domination, and control. Socialization has deeply integrated these values into the modern way of thinking."

[517] Ivan Illich, *Tools for Conviviality* (1973) at 11

[518] Ivan Illich, *La convivialité* (Paris: Éditions du Seuil, 1973) at 43: "Une société conviviale est une société qui donne à l'homme la possibilité d'exercer l'action la plus autonome et la plus créative, à l'aide d'outils moins contrôlables par autrui"; Yao Assogba, "Ivan Illich: Essai de synthèse" (1979) 26 Critères 217 at 9 [Assogba]: "Donc, dans une société conviviale, l'homme contrôle l'outil, c'est-à-dire que l'individu a le plein droit d'utiliser uniquement l'outil dont il a besoin, pour produire seulement ce dont il a besoin. Bref, dans la société conviviale, l'individu utilise l'outil pour satisfaire ses besoins tant comme producteur que comme utilisateur."

[519] Assogba, *supra* note 518 at 12: "L'homme n'est plus définissable en tant que tel parce qu'il n'est plus capable de modeler ses propres besoins par l'emploi plus ou moins compétent des outils que lui fournit sa culture. Il y a donc une crise."

[520] *Ibid* at 11-15

[521] Armstrong, *supra* note 508 at 137; Assogba, *supra* note 518 at 22-23

[522] See above, part 6.2.2

where surrogacy and assisted reproduction are concerned, medical, biotechnical and commercial institutions have the power to make decisions that will affect us all, whether we choose to use assisted reproduction technologies or not. Indeed, biotechnology does not contribute to assisted reproduction needs exclusively. That is why I think Illich's thought is so relevant here: we should use institutional tools, not be controlled by them.[523] In my view, as individuals, our power to decide to which extent biotechnology will take over our lives as an institution should not be so limited and a line needs to be drawn somewhere. The question is, who will draw it and how? Decision-making about policies on assisted reproduction should account for these issues, if they are to be truly democratic decisions. Moreover, I think that at an individual level, one's increased mind/body awareness could make for more autonomous and creative individuals, less dependent on the medical system or any system for that matter.

Andrew Feenberg's[524] philosophy about the nature of our Selves and its relationship with technology (technology-society relationship) is relatable to Illich's view on humans' dependency on institutions, as well as Koggel's view about power and democracy. He argues: "What human beings are and will become is decided in the shape of our tools no less than in the action of statesmen and political movements. The design of technology is thus an ontological decision fraught with political consequences. The exclusion of the vast majority from participation in this decision is profoundly undemocratic."[525]

While the progress of biotechnology and its complicity with medical intervention can cause the doubts and questions I have raised above, it is also a chance for those who want to use their voice to do so. Creating one's own power, or as I like to look at it, finding one's inner power,

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[523] Assogba, *supra* note 518 at 9

[524] Andrew Feenberg holds the Canada Research Chair in the Philosophy of Technology in the School of Communication at Simon Fraser University in Vancouver. His main interests are philosophy of technology, continental philosophy, critique of technology and science and technology studies.

[525] Andrew Feenberg, *Transforming Technology, A Critical Theory Revisited* (Oxford University Press, 2002) at 3; Haim Harari, "Technology might endanger democracy", Edge online <http://www.edge.org/response-detail/23835>; UNESCO "*Science and Democracy, a Social Perspective"* World Conference on Science, Hungary 1999, online <http://www.unesco.org/science/wcs/abstracts/II_10_democracy.htm>, (last consulted on July 26th, 2015): "Given the complexity of scientific knowledge and its rapid pace of change, science implies a growing asymmetry of knowledge between the experts and the general public, and between scientists and policy makers. This asymmetry creates a variety of problems both in the relations between professional experts and their clients, and in setting policy making priorities with regard to major areas, such as health, environment, energy, economic growth, social development."

can cause meaningful social change. I think this is what Illich meant when he imagined *convivial reconstruction."*[526] So in my view, his vision was not entirely Utopic.[527]

6.4 Relational Theory and FLE: Enriching Legal Discourse on Surrogacy and Assisted Reproduction in Québec Civil Law

Relational Theory can be such an enriching contribution to legal discourse on surrogacy and assisted procreation in Québec and Canada, especially in counterbalancing FLE. Halley and Rittich's *Against FLE* is not feminist per se but it recognizes that family law has evolved into an isolated field that needs reconnecting and needs to transcend certain dichotomies. Ultimately, both theories encourage ideological relationships (holistic perspectives in law), but relational theorists are, in my opinion, more sensitive to the complexity of human nature and the realities of human relationships and the law. This is significant where reproduction is concerned: in my view, there is nothing more intimate than one's body as well as the relationships involved in conceiving another human being.

As feminists, Sherwin and Nedelsky recognize the value of autonomy for women but also see the inherent limits that come with the atomistic liberal view. In seeking to transcend traditional feminist dichotomies, (public versus private, man versus woman, state versus individual), *relational autonomy* generally forces thinkers and policymakers across disciplines to adopt a more holistic analytical framework: "[B]y analyzing the network of relationships in which one is situated we obtain a more coherent and accurate understanding of what can enhance but also hinder an agent's capacity to make choices and determine the course of his or her life than if we understand agents as best able to know and pursue their own interests free from the interference of others."[528] It also forces institutions to be more cognizant of our complexity as human beings.

At a more systemic level, and this is also primordial in my opinion, Sherwin's *public ethics* and Koggel's relational account on equality compel lawmakers and jurists to examine surrogacy and assisted reproduction in an even wider context, to see the relationships that exist or that may exist between the practice and other areas of human organization and behaviour, for example:

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[526] Illich, "Tools for Conviviality," *supra* note 517 at 11

[527] *Ibid* at 14: "A modern society bounded for convivial living, could generate a new flowering of surprises far beyond anyone's imagination and hope. I am not proposing a Utopia, but a procedure that provides each community with the choice of its unique social arrangements."

[528] Koggel, *supra* note 495 at 71

the ever increasing role of technology in human behaviour and its relationship with the global economy, nature (the environment) and politics.

7. Relationships in Surrogacy and Assisted Reproduction in Québec and Canada

Surrogates are usually involved in at least two types of relationships: one is with intended parents, the other, with medical professionals and related institutions, such as the biotech and pharmaceutical industries. Legal scholarship and jurisprudence in Québec, especially family law, has not looked at women's relationship with the health care system, nor the lack of power individuals face in reproductive decision-making within the ARTs context, which in my view, are relevant considerations. Professor Erin Nelson, who has published numerous articles in the area of health care, ethics and the law, [529] stresses the fact that "reproductive autonomy means different things to women and to men" and that women experience reproductive technologies differently than men do.[530]

She suggests a w*oman-centered* policy model which places women's bodily integrity at the core of reproductive discourse and highlights the need to incorporate equality and social justice concerns into the policy's conception of reproductive autonomy.[531] Indeed, like the Relational Theorists, Professor Nelson exposes liberal theory's "radically individualized agents"[532] as antithetical to substantive equality and admits that the focus on autonomy tends to marginalize other important values.[533] Nelson advocates a contextualized view of autonomy within liberal theory.[534] In other words, policy makers should develop a contextualized conception of autonomy, one that completes the atomistic and abstract autonomy devised by traditional liberalism. According to her, the chooser is not isolated from the context within which he/she makes his/her decision.[535] As such, in her view, negative liberty (or choices without state interference) is not enough. Similarly to Roxanne Mykitiuk, she notes the fact that, in healthcare settings, respecting autonomy is equated with obtaining informed consent, that it has come to mean giving the individual several health care choices and is essentially equated with a

[529] About Erin Nelson see *supra*, note 48; See parts 1.2.2, 1.2.3 & 2, above for Nelson's view on the regulation of assisted reproduction in Canada
[530] Nelson, *supra* note 5 at 66
[531] *Ibid* at 57,64, 67-69
[532] *Ibid* at 22
[533] *Ibid* at 21
[534] *Ibid* at 30
[535] Nelson, *supra* note 5 at 48

consumer choice: there has been a shift, especially in the USA, from a medical model to a business model in healthcare.[536] She posits that reproductive autonomy requires looking beyond informed consent: it directs us explicitly to consider the social, institutional and policy contexts that play a role in shaping reproductive decisions.[537]

Nelson's framework remains a practical, non-essentialist, non-monolithic approach similar to relational ones: while recognizing that women bear the costs of reproduction,[538] her ambition is not determine whether ARTs are fundamentally right or wrong for women in general.[539] Instead, she recognizes that women's autonomy is not absolute or atomistic, does not exist in a vacuum, nor is the exercise of such autonomy a purely independent act, cast from the reality of interrelatedness, society and its components: "Women make reproductive decisions within a network of relationships […] [their] ability to be autonomous in reproductive decision making depends on their level of reproductive health, as well as the accessibility of reproductive health services and the structure of the health care system."[540] In the following section, I briefly examine the surrogacy and assisted reproduction from a contextual and relational point of view: I take a look at the values which underlie the Canadian health care system as well as the intersecting realities of egg donors, surrogates and the infertile within the Canadian and Québec health care context.

7.1 The Canadian Health Care System

> The health system is a well-established structure in social relations, it plays a strategic social and economic role in society and its activities have ramifications beyond the health sector as such. The health care system comprises three distinct features: social, economic and political.[541] [It] is not an autonomous structure: it is a social policy whose evolution is closely linked to economic and social development. Therefore, to locate a national system of health compared to other national systems, one must understand the principles of government intervention associated with it.[542]

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[536] *Ibid* at 20, 21; Mykitiuk, *supra* note 92
[537] *Ibid* at 50
[538] *Ibid* at 57, 66, 68
[539] *Ibid* at 69
[540] *Ibid* at 56, 59
[541] Nicole F. Bernier, *L'environnement politique de la santé, Théorie et pratique* (Québec: Les Presses de l'Université de Laval, 2011).at 40-41 [Bernier]: " Le *Health-Care State* tient compte du fait que le système de santé est une structure bien ancrée dans les rapports sociaux, qu'il joue un rôle social et économique stratégique dans la société, et que ses activités ont des ramifications bien au-delà du secteur de la santé en tant que tel."
[542] *Ibid* at 57: "Le système de santé n'est pas une structure autonome: c'est une politique sociale dont l'évolution est associée étroitement au développement économique et social. De ce fait, pour situer un système national de santé par rapport à d'autres systèmes nationaux, il faut connaitre les principes d'intervention gouvernementale qui lui sont associés."

The principles underlying the Canadian Welfare State are based on the market ethos of individualism and self-sufficiency, similar to other Anglo-Saxon models[543] like Australia, New-Zealand, Great-Britain and the USA.[544] The provinces have jurisdiction over health care administration, although not exclusively[545]. Indeed, the Federal government has the power to fund provincial health care measures, incumbent upon the respect, by the given province, of the principles in the *Canada Health Act*[546] (CHA) which are*:* public administration (i.e. insurance system for medically necessary care), universality (i.e. that all insured residents should hold the right to the same coverage in a given province), comprehensiveness (i.e. that all "medically necessary"[547] acts should be covered by the province's program), portability (i.e. coverage across provinces) and accessibility (i.e. not stopping people with limited means from using Medicare).[548]

As a liberal structure, alongside providing basic public funding in particular instances, for those who are most vulnerable,[549] Canada promotes the development of parallel and complimentary

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[543] *Ibid* at 58

[544] *Ibid* at 60

[545] Marchildon, Gregory P. & al., *Les études de la Commission Romanow,* vol 3: *La gouvernance du système de santé canadien* (Ottawa: Les Presses de l'Université d'Ottawa, 2004) at 33; Bernier, *supra* note 541 at 64, 66

[546] R.S.C., 1985, c. C-6 [CHA]; Colleen M. Flood, "Litigating Health Rights in Canada, A White Knight for Equity?", in Flood, Colleen M. & Aeyal Gross, *The Right to Health Care at the Public/Private Divide: A Global Comparative Study* (Cambridge University Press, 2014) at 84 [Flood]: "The CHA has an in-built mechanism for enforcing the principle of accessibility, mandating dollar-for-dollar withholding of federal funding to provinces that allow extra billing or user fees. For every dollar patients or private insurers are billed for medically necessary care, the federal government must withold a dollar from the transfer payment to the relevant province […] Drafted to protect a system of public health care originating in the 1960s, the CHA focuses entirely on health care delivered by physicians and in hospitals."

[547] Flood, *supra* note 546 at 79; Cathy Charles, & al. "Medical Necessity in Canadian Health Policy: Four Meanings and . . . a Funeral?" (1997) 75: 3 Milbank Q 365; "Medically Necessary, What is it and who decides?" (July 2002) Commission on the Future of Healthcare in Canada, online: <http://www.cfhifcass.ca/Libraries/Romonow_Commission_ENGLISH/Discussion_Paper_Medically_necessary_What_is_and_who_decides.sflb.ashx>, last viewed on August 20th, 2015. ("Medically necessary" is a concept found in the *Canada Health Act* but the CHA does not provide a precise legal definition, making its meaning rather complex and dynamic.)

[548] Bernier, *supra* note 541 at 66-67; Flood, *supra* note 546 at 84

[549] Bernier, *supra* note 541 at 59: Les programmes publics Canadiens et Québecois "ont été conçus non pas pour permettre aux individus de maintenir leur niveau de vie en cas de difficulté temporaires mais, plus modestement, pour leur fournir un soutien de base, une aide de dernier recours, lorsqu'ils se trouvent sans ressources. Autrement dit, les programme publics canalisent les ressources pour venir en aide aux personnes déjà vulnérables, mais ne tentent pas de prévenir leur misère. "

private systems.[550] For example, since the Supreme Court ruling in *Chaoulli,*[551] in 2005, dual health insurance coverage has become a possibility in Québec.[552] After the Supreme Court's decision, the province enacted legislation allowing patients to contract for insurance for elective knee, hip, and cataract surgery performed outside the public system (i.e. private specialized medical centers known as SMCs and specialized affiliated medical centers known as SMCAs).[553] Ever since, many more doctors have opted out of the public system to work in SMCs.[554] However, it appears that "the true state of commercial privatization of Québec's healthcare system remains largely unknown."[555] Although generally speaking, Canadian provinces are said to take a liberal approach to health policy, Québec distinguishes itself in that its policies are closer to its European counterparts than to the USA.[556] Considering the dynamic complexity of the health-care state's sociological, economic and political objectives, it has been argued that it is not realistic to expect an optimal respect of the principles promoted by the CHA.[557] Moreover, it is not clear what constitutes "medical necessity" according to the CHA in Canada: the term is used in the CHA but is not defined.[558] For a medical act to fall under public coverage in Québec, it must be a medically necessary one. When it is not, it "is largely left to the free market to determine who has access, leading to serious inequalities in access and quality of care […] these limits […] are compounded by disparities in the regulation of care across the private/public divide. For reasons that are unclear, provincial regulators have mostly focused their attention on guarding patient safety within the realm of publicly financed care, making comparatively little effort to regulate privately financed care."[559] With the entering into

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[550] *Ibid* at 60
[551] *Chaoulli* v. *Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35
[552] Bernier, *supra* note 541 at 70; Howard A., Palley, Marie-Pascale Pomey & Owen B. Adams, *The Political and Economic Sustainability of Health Care in Canada, Private-Sector Involvement in the Federal Provincial Health Care System* (Amherst, NY: Cambria Press, 2012) at 77-86 [Palley& al.]
[553] Palley &al., *supra* note 552 at 86
[554] *Ibid* at 87
[555] *Ibid*
[556] Bernier, *supra* note 541 at 62, 63
[557] *Ibid* at 50
[558] *Supra*, note 547; CHA, *supra* note 546 at s 2: "hospital services means any of the following services provided to in-patients or out-patients at a hospital, if the services are medically necessary for the purpose of maintaining health, preventing disease or diagnosing or treating an injury, illness or disability, namely [...]" [my emphasis]
[559] Flood, *supra* note 546 at 80-81

force of *Bill 20*, infertility treatments enter a grey zone in Québec, as they will no longer be fully covered by *Medicare*, except for artificial insemination and fertility preservation.[560]

7.2 Québec's Health Care Coverage and Assisted Reproduction Technologies

It has been argued that the introduction of universal coverage for ARTs treatments in Québec in 2010 was merely a political decision which essentially sought to create a public market for private clinics.[561] Indeed, when universal coverage for infertility treatment was introduced in Québec, the decision was criticized by professional orders (gynaecologists & obstetricians) who argued that women's health would be jeopardized because of the lack of resources and the risk of multiple pregnancies.[562] The decision was also criticized for creating an additional burden on a health care system which already had a hard time meeting its basic objectives[563].

In November 2014, the Québec Minister of Health and Social Services presented *Bill 20,* which addresses access to health care, and proposes changes in the area of ARTs.[564] Besides obtaining a lot of media coverage for stirring controversy among family doctors and specialists regarding its quota system and fines which were set to increase access to health care,[565] the bill was also

[560] See part 2, above
[561] Bernier, *supra* note 541 at 51
[562] "Procréation assistée gratuite, un choix irréfléchi", *Le Soleil* (14 July 2010), online: <http://www.lapresse.ca/le-soleil>; Bernier, *supra* note 541 at 49
[563] *Ibid*
[564] *Bill 20*, s*upra*, note 125; See above, part 2 for more about the bill
[565] "Projet de loi 20: la grogne s'installe chez les médecins", *La Presse* (26 March 2015), online: <http://www.lapresse.ca>; "Quebec won't invoke closure on Bill 20 before National Assembly breaks for summer", *The Montreal Gazette* (11 June 2015), online: http://montrealgazette.com/news/quebec-wont-invoke-closure-on-bill-20-before-national-assembly-breaks-for-summer

been criticized by FEMEN[566] and pro-choice advocates[567] who said it would limit access to abortion for women. The Health Minister, Gaétan Barrette denied the latter claims.[568]

In February 2016, after the passing and enactment of *Bill 20*, the *Conseil du statut de la femme* (the Council)[569] made a public statement and issued its opinion on the practice of surrogacy in Québec.[570] Despite being opposed to surrogacy for several years[571], the Council opined that,

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[566] "My uterus, my priority: Topless protester interrupts Quebec minister's press conference", *The National Post* (30 April 2015), online: <http://news.nationalpost.com/news/canada/canadian-politics/my-uterus-my-priority-topless-protester-interrupts-quebec-ministers-press-conference> ("The protester shouted "No to Bill 20!" and "My uterus, my priority!" before being taken away by security guards." FEMEN is a radical feminist protest group founded in Ukraine in 2008. A FEMEN protester interrupted a news conference by the Minister of Culture of Québec in April, 2015).

[567] "After the government trashed a report that Quebec would limit access to abortion, Anne-Marie Messier, the director of a gynaecological non-profit clinic, wasn't reassured", *The Montreal Gazette* (26 March 2015), online: http://montrealgazette.com/news/quebec/barrette-denies-bill-20-will-threaten-womens-access-to-abortion: "[Anne-Marie Messier, director of a non-for-profit gynecology clinic said that] family planning and access to abortions are fundamental — the No. 1 priority when it comes to equality between men and women […] They are important enough to deserve a mention (in the bill) saying how the government will protect women's rights to direct access to contraceptive services and abortion […] Bill 20 would impose a patient load on doctors rising up to 1,512 per year in some cases. If they fall short of their goal, doctors' paycheque could be reduced up to 30 per cent. A draft of the bill's regulations counts some activities toward the quota, including abortions. One abortion equals one patient, for a maximum of 504. In other words, if a doctor is required to take on 1,512 patients and performs 200 abortions, they would have to be responsible for 1,312 patients. Messier told Le Devoir that this wasn't enough to carry out the 25,000 abortions performed in Quebec each year on average."

[568] Geoffrey Vandeville, "Barrette denies Bill 20 will threaten women's access to abortion" The Montreal Gazette (March 26th, 2015), online: <http://montrealgazette.com/news/quebec/barrette-denies-bill-20-will-threaten-womens-access-to-abortion>

[569] The *Conseil du statut de la femme* online at https://www.csf.gouv.qc.ca/ [the Council]: "The Council on the Status of Women is a government agency which has been active since 1973. With the objective of achieving equality between women and men, it has the dual task of advising the Minister and the Government of Quebec on any subject related to equality and respect for the rights and status of women and to provide relevant information to women and the public"[my translation].

[570] Some of the views expressed by the Council, namely, in its press release, are similar to the views expressed in the Roy Report, *supra* note 176 (see above, part 5.4 for more on the Roy Report); "Communiqué – Le Conseil du statut de la femme estime qu'il faut protéger les mères porteuses et les enfants", (February 17 2016), online: <https://www.csf.gouv.qc.ca/article/2016/02/17/communique-le-conseil-du-statut-de-la-femme-estime-quil-faut-proteger-les-meres-porteuses-et-les-enfants/ >[Communiqué CSF 2016]: "Based on its research, the Council believes that reform is needed. A framework should be provided for women who wish to bear a child for another person and have access to assisted reproduction treatments, as well as for the intended parents. The Council wants the intended parents to bear the financial responsibility of the surrogate mother and the child in case of abandonment of the project, which is currently not provided for in Québec law. A surrogate mother should be able to remain the legal mother of the child if she wants and this right should not be constrained by the terms of a contract. The Council also recommends that intended parents be recognized as the legal parents of the child in cases where the surrogate voluntarily surrenders their child" [my translation].

[571] Communiqué CSF 2016*, supra* note 570: "In the spring 2014, following criticism surrounding the coverage by the province of fertility treatments received by surrogate mothers, the government gave the Council a mandate to study the issue. Throughout its history, the Council has repeatedly addressed this topic at a time when knowledge of the phenomenon was very limited and the Quebec courts had not yet had to rule on specific cases. The findings in recent studies on the subject worldwide, as well as various judgments of the courts of Quebec, led the Council to update its thinking" [my translation].

although it does not encourage surrogacy practice and strongly disregards commercial surrogacy, a legal framework should be put in place in order to protect women and children involved, because the practice constitutes a reality in our society today[572]. It also issued fifteen recommendations[573]. The Council recognized certain issues that are involved when being a surrogate that is subjected to assisted reproduction techniques: it opined that surrogates are not sufficiently informed that they have the right to control the treatments which are administered on their pregnant body:

> All pregnant women have some rights, whether they bear a child for another person or not. Thus, a surrogate mother could always refuse medical treatment (art. 11 C.C.Q.) and any medical intervention aimed at the foetus she is carrying. However, surrogates do not necessarily know their rights. They could therefore sometimes comply with conditions that they have no obligation to comply with. According to the Council, it is necessary for surrogate mothers to be informed of their fundamental rights regarding their bodies, so that at all times, they retain their decision-making autonomy[574].

It also highlighted the fact that *Bill 20* did nothing to address surrogate issues in the APA[575] as well as the fact that, based on their own internal guidelines, certain fertility clinics in Québec offer assisted reproduction to surrogates, whereas others do not[576]. Fortunately, the Council's view on consent is shaped by concerns for ethics and equality and is not limited to a purely contractual matter of "choice", in a strict civil law sense. Instead, it views consent as a continuum, as a fundamental principle that is ongoing and must be ensured to the surrogate throughout her process:

> That said, the presence of a 'choice', although it may appear rational in the circumstances, does not guarantee the ethics of practice […] Indeed, it is important to also consider other important factors, including potential violations of surrogates' physical and psychological integrity. To determine whether a practice meets certain ethical standards, our thinking must not therefore be limited to considering the presence of a choice but also extend to the content of that choice (what did the surrogate mother agree to). In other words, the Council considers that the presence of free and informed consent is essential, but not sufficient, for the practice

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[572] The Council's Advisory 2016, s*upra*, note 123.
[573] *Ibid*, at 135-143 for a detailed account of the fifteen recommendations, or see *supra,* note 567 for a summary; Essentially, the Council recommends that: the Québec government should actively pressure the Federal government to prevent and punish commercial surrogacy nationally, as well as prevent any form of its practice by Canadian nationals abroad, i.e. that Canada should refrain from encouraging reproductive tourism; that the surrogate's legal right to be the child's mother should be protected in the province; that research should be conducted on surrogates; that intended parents should be held financially responsible toward the child and the surrogate, should they abandon the project; that, besides parentage issues, legal reform on parental projects involving surrogates should focus on consent as an issue, and ensure that surrogates are properly informed about their rights before, during and after their pregnancy.
[574] The Council's Advisory 2016, *supra* note 123 at 86-87 [my translation]
[575] See below, the last paragraph of this section
[576] The Council's Advisory 2016, *supra* note 123 at 108-109

> to be ethically acceptable… the Council does not conceive of autonomy just as initial consent, but as a fundamental principle that must be observed through the entire process.[577]

The Council did not, however, delve into details about the power dynamics between the biotech industry, the medical field and protecting patients' best interests. The Council made its recommendations about assisted reproduction prior to the enactment of *Bill 20* in a brief for the National Assembly's special hearings held in February and March 2015.[578] It highlighted the distinct parts of the bill: the first being access to health services and the second being assisted reproduction, stating that both are of great concern to the Council because of their major impact on the lives of Québec women.[579] In that brief, the Council outlined the importance of frontline medical services for women in the province, as they are generally the caregiver in the family, they generally have a longer life span, they use health services more frequently and have specific reproductive needs.[580] Moreover, the Council argued that in the current system, too much emphasis is placed on practising in hospital environments, whereas home-based health care should be encouraged among physicians.[581] Where ARTs are concerned, the Council generally agreed with what was initially tabled in *Bill 20*, with certain exceptions: (1) the council suggested the age limit of 42 years for IVF should only apply in the public setting and (2) that deciding which fertility treatment sequence is most appropriate should be left to the doctors to decide on a case by base basis.[582] The Council also recommended the following: (1) that doctors should be obliged to record their data regarding all ART procedures (not only IVF)[583] and that they should produce a yearly statement, (2) that a national evaluation should be conducted every three years,[584] (3) that more control should be placed in instances where ART practices occur outside procreation centers since the lack of expertise seems to be increasing the occurrence of

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[577] *Ibid* at 36 [my translation]
[578] *Briefs tabled under the order to the committee 'Special consultations and public hearings on Bill 20'* online: <http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/CSSS/mandats/Mandat-29201/memoires-deposes.html> (the site was last visited on August 11th, 2015)
[579] Québec, Conseil du statut de la femme, *Mémoire sur le projet de loi n° 20, Loi édictant la Loi favorisant l'accès aux services de médecine de famille et de médecine spécialisée et modifiant diverses dispositions législatives en matière de procréation assistée* (February 2015) online: < https://www.csf.gouv.qc.ca/wp-content/uploads/memoire_projet_loi20.pdf > [The Council's Memoir 2015].
[580] *Ibid* at 11
[581] The Council's Memoir 2015*, supra* note 579 at 12
[582] *Ibid* at 26: Although the Council recognizes that "IVF is generally used when less invasive treatments have not worked. This is a guideline that makes sense to meet in the vast majority of cases".
[583] *Ibid* at 31
[584] *Ibid* at 27

ovarian hyper stimulation (OHS) cases as well as multiple births,[585] (4) that the province should invest in infertility prevention[586] and (5) that public coverage for IVF should available for segments of the population with lower income.[587]

Although the Minister made certain amendments and repealed the section of the bill which limited access to in vitro fertilization for women to 42 years of age, he maintained the section which limits public coverage to artificial insemination and fertility preservation.[588] Therefore, the enactment of *Bill 20* removed public health insurance coverage for in vitro fertilization. Instead, patients will be eligible to receive a tax credit.[589] Patients will still be able to choose between a private or public clinic, but in both cases they will have to pay for non-covered services.[590] The bill does not mention surrogates. According to the Council, when he was asked about the issue during a press conference on November 28th 2014, the Health Minister Barette said: "The issue of surrogacy is not yet resolved […] surrogates currently have access to programs under the same conditions [than others] […] it is the fertility of the mother [carrier] that must be demonstrated, it is her income that is considered in the calculation of the refundable tax credit.[591]"

7.3 Intersecting Medical "Conditions": Egg Donors and Surrogates

[585] *Ibid* at 28-29: Pursuant to the *APR* in Québec, ovarian stimulation and artificial insemination can be conducted in any medical facility (i.e it does not need to be a procreation center as defined by the law at section 11 *APA*). Bill 20 has not changed this situation, see *APA*, *supra* note 118, s 11; *APR*, *supra* note 119, s 16.

[586] *Ibid* at 29

[587] *Ibid* at 31

[588] Quebec National Assembly, "Committee Stage", *Amendments Adopted* online: <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-20-41-1.html> (last viewed on August 10th, 2015); "Quebec health care law amendments broaden access to IVF", *CTV News Montreal* (26 May 2015), online: <http://montreal.ctvnews.ca/quebec-health-care-law-amendments-broaden-access-to-ivf-1.2391544> [CTV News May 2015]

[589] The Council's Advisory 2016, *supra* note 123 at 108; CTV News May 2015, *supra* note 588; "New Quebec health bill to restrict IVF treatments, impose quotas for family doctors" *CBC News* (28 November 2015), online: <http://www.cbc.ca/m/touch/canada/montreal/story/1.2853715> .

[590] "Sherbrooke et Québec n'auront pas leurs cliniques de FIV", *Le Devoir* (11 December 2014), online: <http://www.ledevoir.com/societe/sante/426394/procreation-assistee-sherbrooke-et-quebec-n-auront-pas-leurs-cliniques-de-fiv>

[591] The Council's Advisory 2016, *supra* note 123 at 108-109 [my translation]: "However, the minister specified that the situation could change depending on the findings of the Roy Report on family law, which was not yet published at the time of his declaration. The Council also considers that IVF treatments received by surrogates should not be covered by the tax credit, since this could be interpreted as a form of encouragement to the MPA by the Quebec government" [my translation]

Before making general claims about women's autonomy regarding their bodies, it is important to examine the health care context in which women are actually making decisions about their reproduction. The AHRA explicitly recognizes that women's bodies are uniquely affected by ARTs technology and that their well-being must be ensured.[592] Despite this principled statement, there is no comprehensive health-related policy regarding ARTs in Canada, as the matter has been relegated to provincial authorities since the Supreme Court's decision in 2010.[593] As I mentioned previously,[594] Québec has developed a regulatory framework for ARTs,[595] while the rest of Canadian provinces are essentially relying on medical practice guidelines issued by associations. In Alberta, for example, the College of Physicians and Surgeons of Alberta issued a *Standard & Guideline* on IVF in 2011.[596] Although these standards are enforceable under provincial legislation,[597] I would like to point out that they are only relevant to IVF procedures, leaving other ARTs procedures out.

Where egg donation is concerned, it is important to note that women generally go through a physically demanding process, the realities of which, at the time of consenting to the procedure, are often ignored.[598] Health problems may arise several years after the egg retrieval, but these are usually not accounted for, especially since doctors generally do not follow up with the donors, except in severe cases like OHSS (ovarian hyperstimulation syndrome).[599] In Québec, for example, where ARTs policy is the most comprehensive in Canada, assisted procreation

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[592] *AHRA*, *supra* note 2, s 2

[593] *Reference Re AHRA*, *supra* note 1; See above, part 1

[594] See part 1, above

[595] Informed consent is regulated at ss 19- 20 of the *APR, supra* note 119

[596] "In Vitro Fertilization Standards and Guidelines" (2011) online: <http://www.cpsa.ab.ca/Libraries/Pro_QofC_Non-Hospital/NHSF_IVF_Standards_-_December_2011.pdf>

[597] "Standards of Practice: Standards of professional behaviour and ethical conduct expected of all physicians registered in Alberta" *College of Physicians and Surgeons of Alberta*, online: <http://www.cpsa.ab.ca/Resources/StandardsPractice.aspx>: "The *CPSA Standards of Practice*, along with the *CPSA Code of Conduct* and the *Code of Ethics*, outline the minimum standards of professional behaviour and ethical conduct expected of all physicians registered in Alberta. Specific standards are supplemented with Advice to the Profession, which supports physicians in implementing the standards in their practice. Standards of practice are enforceable under the *Health Professions Act* and are referenced in complaints resolution and discipline hearings. Any proposed new or amended standards are subject to a formal consultation process."

[598] Alison Motluk, "Your eggs, my uterus, shared motherhood," *The Globe and Mail* (April 1 2008), online: <http://www.theglobeandmail.com/life/parenting/your-eggs-my-uterus-shared-motherhood/article597091/>; Alison Motluk, "Is egg donation dangerous?" "Is egg donation dangerous?", *Maisonneuve* (21 January 2013), online:< http://maisonneuve.org/article/2013/01/21/egg-donation-dangerous> [Motluk, Egg donation dangerous?]; Claire Burns, "We are egg donors," Impact Ethics Online Forum (11 July 2013), online: <https://impactethics.ca/2013/07/11/we-are-egg-donors/ > [Burns]

[599] Motluk, "Egg donation dangerous?", *supra* note 598

centers must file a report to the Minister of Health on a yearly basis, however, the *Regulation respecting clinical activities related to assisted procreation*[600] does not explicitly require reporting back on fertility treatment side-effects.[601] Moreover, clinics reporting to the *Canadian Fertility and Andrology Society* (CFAS) do so on a voluntary basis. According to investigative journalist Alison Motluk, the *Canadian Assisted Reproductive Technologies Registry* (CARTR), a database managed by the CFAS, is not complete when it comes to reporting long-term effects on patients.[602] Moreover, the CFAS has refused to make clinic success rates public.[603]

One egg donor expresses her experience as follows: "To me, the lack of care for the women who provide the eggs for someone else's fertility treatment is the single most frightening aspect of the fertility industry. The second is that, for the most part, the prospective egg providers are not made aware of the fact that there is no after-care. If more women egg providers would speak up, "we are people, not merely vendors", then these processes would have to change to account for our health considerations."[604] Motluk poses an important question: if no one in Canada is tracking the health of egg donors, then what are doctors telling women about the risks of the practice?[605] Indeed, many questions remain unanswered for these women, for example, whether fertility is affected by egg retrieval and whether there is an increased risk in cancer or premature

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[600] *APR*, s*upra* note 119, s 27

[601] *Ibid:* "The annual report sent to the Minister by a centre for assisted procreation must contain and be accompanied, where applicable, by the following information and documents:(1)the name of the centre;(2)the state of the accreditation;(3)the number of patients, the type and number of treatments administered;(4)the distribution of treatments for each person and each of the centre's clinical activities;(5)the number of multiple pregnancies and their type, in particular twins and triplets;(6)detail about the type, state and quantity of biological material transferred to a physician or another centre, including the name of the physician or centre, the person in charge and the purpose for which the material was transferred; and(7)the number of persons per sector of activity."

[602] Motluk, "Egg donation dangerous?", *supra* note 598: "There are many reasons why CARTR data on donor-adverse events may not be complete. For one thing, it's not common practice for fertility doctors to formally follow up with donors after a procedure, unless the women are specifically at risk of OHSS. Several physicians told me that they simply invite donors to get in touch if there's a problem. Some women do so, but others may have already left town, or they're told by brokers not to contact doctors directly. Health concerns can also turn up weeks, months or even years after the donation. By that point, it's not clear if they're related, so some donors don't mention these issues to their fertility doctors. Without deliberate follow-up, doctors may not be aware of what goes wrong after the fact."

[603] Tom Blackwell, "The fertility clinic guessing game: Canadians have no way to find out success rates of pricey IVF treatments", *The National Post* (22 June 2014), online: http://news.nationalpost.com/health/the-fertility-clinic-guessing-game-canadians-have-no-way-to-find-out-success-rates-of-pricey-ivf-treatments> [Blackwell, "The Guessing Game"]

[604] Burns, *supra* note 598

[605] Motluk, "Is egg donation dangerous?" *supra* note 598

menopause that comes with undergoing these procedures.[606] Moreover, Lupron, a drug which is active on the Canadian market[607] and which has been approved for treatment of prostate cancer and endometriosis,[608] is being used to suppress ovulation during multiple egg extraction procedures, despite its effects being unknown: is this true informed consent for women?[609]

It has also been pointed out that doctors performing ART procedures are in a conflict of interest, as they must serve opposing needs: on the one hand, manage the health risks of the egg donor (too many eggs retrieved can cause severe complications like OHSS), and on the other, provide for the infertile patient who needs as many eggs as possible to have a child.[610] Where surrogates are concerned, the picture is not rosier:

> The rates of pregnancy-induced high blood pressure, pre-eclampsia (hypertension with protein in the urine), gestational diabetes and hysterectomies are all several times higher for women carrying twins or more. And multiple pregnancies are made much more likely by IVF. Evidence even suggests that pregnancy involving donated eggs — almost always the case with contract surrogacy – is more likely to trigger hypertension or post-partum hemorrhage. Sally Rhoads-Heinrich, a consultant who helps bring together surrogates and intended parents, said she has seen an increase in serious complications among her mothers lately, possibly because their average age is getting older as demand outstrips the supply of younger women. One suffered a cardiac arrest while giving birth in Saskatchewan in 2013, another developed a blood clot in her lungs and two others lost their wombs; all are unable to have more children, said the owner of Surrogacy in Canada Online.[611]

Nancy, an Ontarian mother of five, expressed that although she supports the practice of surrogacy, she felt neglected and used in the process: "Did I feel like an employee? Damn straight I did, like a piece of trash. They used me and just threw me away like I was nothing."[612] She said women are not sufficiently informed about the medical risks of being a surrogate. In her case, carrying triplets for a couple led her into a medically induced coma and resulted in the

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606 *Ibid*; "Can egg donation cause cancer?" (13 November 2015) (blog) online: We Are Egg Donors <http://weareeggdonors.com/category/advocacy-tips/>

607 Research I conducted on the "Drug Product Database", Health Canada online: < http://webprod5.hc-sc.gc.ca/dpd-bdpp/dispatch-repartition.do?lang=eng> (last viewed in august 2015)

608 "Product Monograph", Health Canada online: <http://webprod5.hc-sc.gc.ca/dpd-bdpp/info.do?code=63321&lang=eng>

609 Judy Norsigian, "Egg donation dangers", online at: <http://www.councilforresponsiblegenetics.org/ViewPage.aspx?pageId=103>

610 Motluk, "Is Egg donation dangerous?" *supra* note 598

611 Tom Blackwell, "This Ontario surrogate wanted to help another woman have a child, but the decision nearly killed her", *The National Post* (October 15 2015), online: <http://news.nationalpost.com/health/this-ontario-surrogate-wanted-to-help-another-mom-have-kids-it-was-a-decision-that-nearly-killed-her>[Blackwell, "Ontario Surrogate"]

612 Tom Blackwell, "Ontario Surrogate," *supra* note 611

retrieval of her uterus and early menopause: "Once you become a surrogate and something goes wrong, there's no support, there's no support for you whatsoever."[613]

There is generally a "need for much broader and transparent patient education procedures, particularly as they relate to the higher rates of risky twin and triplet births resulting from multiple embryo transfers or the use of ovarian induction and stimulation with IUI."[614] Dr. Renate Klein, a professor, activist and researcher in the areas of international feminism, reproductive medicine and feminist ethics, insightfully points out the irony of seeking surrogacy as a remedy to infertility: "infertility can be very sad but we need to also understand that many women are pushed into surrogacy because of IVF failures (more income for IVF clinics)."[615] Indeed, in the USA, the *Advanced Fertility Center of Chicago* reported that embryo transfers have been successful in only about 25% of cases, the success rate varies depending on the mother's age.[616] It has also reported that IVF failure is related to egg quality. In other words, when a women's IVF procedure does not work, using her embryo in a surrogate will most likely not work either because it is the quality of the eggs that determines how well the embryo "sticks" to the uterus. The uterus itself is not the main problem.[617] It should be noted that numbers vary across clinics in Canada, however, unlike in the USA, women do not have access to an independent source to consult individual clinic success rates (as I mentioned above, the CFAS does not disclose individual-clinic results).[618]

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[613] *Ibid*

[614] Miriam Zoll,"ART Ethics and Health Risks in the Unregulated Market" Impact Ethics Online Forum (25 April 2014) online: <https://impactethics.ca/2014/04/25/art-ethics-and-health-risks-in-the-unregulated-market/>; Jennifer Damelio & Kelly Sorensen, "Enhancing Autonomy in Paid Surrogacy" (2008) 22:5 Bioethics 269. at 271; The Council's Memoir 2015, *supra* note 579 at 28-29.

[615] Renate Klein, "Baby Gammy has shown the need for debate on surrogacy", *The Age* (20 August 2014), online: <http://www.theage.com.au/comment/baby-gammy-has-shown-the-need-for-debate-on-surrogacy-20140819-105pfx.html>

[616] "Implantation Failure", *Advanced Fertility Center of Chicago* online: <http://www.advancedfertility.com/ivf-implantation-failure.htm>

[617] *Ibid*: "When IVF does not work after numerous attempts - switching the uterus is not likely to result in success. However, the egg donation experience teaches us that switching to eggs from a young egg donor would be very likely to be successful. This tells us that the problem is not the uterus but is the egg quality. Therefore, it works when we switch to different eggs from a young woman […] This is not to say that the sperm and the uterus are not sometimes contributing factors in the IVF success equation. However, the sperm and the uterus are relatively minor factors as compared to the major factor of egg quality."

[618] Blackwell, "The guessing game", *supra* note 603

Given the above and taking into considerations the experiences egg donors and surrogates have lived, I question to which extent physician guidelines and a privately held database like CATR (which is held by a group whose aim is to ensure fertility experts' interests) constitute sufficient measures to ensure women's long-term reproductive health care interests in Canada. In the province of Québec, the statute regulating ARTs[619] does not account for surrogate and egg donor issues per se, nor does it maintain a long-term vision for the protection of women's health in practice: just like in the case of egg donors, nothing in the statute or its associated regulations obliges centres for assisted procreation to track and collect data on long-term health impacts of fertility treatments on surrogates.[620]

In my view, debate on surrogacy in Québec is still too narrow. Seemingly, civil law has been evolving separately from the framework on artificial reproduction in the province. All in all, legal thought in Québec may be responding too slowly to the practical reality of surrogacy and ARTs: egg donors and surrogates are consenting to fertility treatments in a fragmented policy context which lacks accountability and oversight. Despite the fact that both the APA[621] and the AHRA stipulate that Canada holds women's health as a priority,[622] much is left to be done on this front.[623] Indeed, it has come to the attention of the Québec *Health and Welfare Commissioner* that "there is an urgent to need to introduce monitoring and governance

[619] *APA, supra* note 118
[620] Québec Summary Advisory Report 2014, *supra* note 122 at 35, 40: "Ongoing monitoring of long-term clinical and psychosocial outcomes is required because of a number of factors, including the state of knowledge on the risks associated with assisted reproduction, the potential for prenatal risk factors having very long-term impacts, and the rapid changes in ART practices. The scientific literature clearly indicates that obstetrical risks and certain other risks for women and children are higher with assisted reproduction than spontaneous conception [...] It is essential to continuously monitor the costs and risks associated with assisted reproduction in order to inform and be accountable to the public […] There is an urgent to need to introduce monitoring and governance mechanisms in order to acquire a wide perspective on the entire field of practice and its development, identify unusual practices or phenomena, and follow the clinical, psychological, ethical, and social consequences of assisted reproduction, including long-term impact."
[621] *APA*, *supra* note 118, s 1: "This Act recognizes the necessity of preventing infertility and promoting reproductive health and is designed to protect the health of persons and more particularly the health of women who resort to assisted procreation activities that may be medically required and of children born of such activities, whose filiation is then established according to the provisions of the Civil Code. For that purpose, the object of this Act is to regulate clinical and research activities relating to assisted procreation in order to ensure high-quality, safe and ethical practices. The Act is also designed to encourage the ongoing improvement of services in that area."
[622] *AHRA*, *supra* note 2, s 2 (*c*): "while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies."
[623] Québec Summary Advisory Report 2014, *supra* note 122 at 35

mechanisms in order to acquire a wide perspective on the entire field of practice and its development, identify unusual practices or phenomena, and follow the clinical, psychological, ethical, and social consequences of assisted reproduction, including long-term impact. In the field, the lack of mechanisms for standardizing practices has resulted in a diversity of medical and psychosocial practices that could be accentuated by competition among clinics and potential conflicts of interest."[624] Moreover, is the removal of public coverage on artificial reproductive technology procedures in Québec (Bill 20) really a move that considers reproductive health a priority?

As Professor Erin Nelson has stated: "[…] The fact that comprehensive research into the safety of ARTs was not conducted prior to their introduction into clinical practice illustrates that concerns over health outcomes for women and children take second place to the march of progress in ART practice."[625] Women in Québec and across the country are entitled to more.

7.4 Social "Conditions": Infertility and Sexual Orientation

"Social systems create our wants as surely as they create the ways in which we meet them."[626] I would like to start by pointing out the above statement by Rothman[627], which elegantly highlights an important feedback loop regarding reproductive policy. Particularly, when it comes to ARTs, I think it is important to reiterate that infertility is not solely an objective medical condition, it is also a complex social issue and so is its treatment. Besides the fact that not only biology, but sexual orientation is increasingly a reason for seeking out ARTs, the severity of infertility as a medical condition is relative, as it is based on the perceptions and goals of the woman experiencing it.

In *Recreating Motherhood,* Barbara Katz Rothman proposes a theoretical framework that creates a distinction between infertility as a disability, infertility as impairment and infertility as handicap.[628] The first is a social concept, the second a medical one, and the third, is a concept which exists at the intersection of socio-medical and environmental factors. That is to say, the

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[624] *Ibid* at 38-39
[625] Nelson, *supra* note 5 at 49; About Erin Nelson see *supra*, note 48
[626] Rothman, *supra* note 344 at 141
[627] About Barbara Katz Rothman, *supra* note 343
[628] Rothman, *supra* note 344 at 143

inability to ovulate, to conceive and to gestate (disability) is lived differently, depending on how a woman's goals are defined, as well as the societal resources available to her in meeting the said goals.[629] In other words, where a reproductive disability may become a real handicap for one woman it may constitute a mere impairment for another. Ultimately, then, the condition touches upon a woman's identity more or less severely depending on her reality. It is no secret that the identity of women as child-bearers has carried heavy weight throughout history. The irony of it is that childbearing is perceived by some as an obstacle to women's emancipation today, just as it was decades ago, despite years of feminist pursuits. Today, women delaying their childbearing activities in order to obtain an education and pursue careers oftentimes have to deal with infertility. In that sense, infertility is not solely a medical condition for women, it is also a social one. Moreover, unless one considers one's sexual orientation to be a disability or an illness, it can hardly be argued that access to ARTs constitutes "medical necessity" for the LGBT community, in the technical sense of that term.

I share the opinion of those who argue that, to a certain extent, infertility in women can be decreased by preventative social-policy. Indeed, the choice to postpone childbirth is made in a societal context which does not encourage women to have children at an early age[630] and this choice is facilitated by the presence of ARTs as an option. Dr. Roger Pierson, a leading Canadian researcher in ovarian physiology has supported this view: "If we were to suddenly stop ART and say, 'We're going to support women having children in their early 20s,' I would say that most of the infertility issue would go away […] we have to come to a better understanding of our biological imperatives, and our social expectations."[631] In other words, better social policy could make it possible for educated working women to have children at a fertile age.

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[629] *Ibid* at 144

[630] Rothman*, supra* note 344 at 146-147; Marie-Ève Lemoine, "Toward a Public Health Approach to Infertility: The Ethical Dimensions of Infertility Prevention" (2013) 6:3 Public Health Ethics 287 at 292 [Lemoine].

[631] Sharon Kirkey, "Infertility on the Rise in Canada: Study," *The National Post* (15 February 2012) online: http://news.nationalpost.com/health/infertility-on-the-rise-in-canada-study> [Kirkey]

Much needs to be learnt about the pervasiveness of infertility in Canada, although we do know that it is on the rise and so is the use of ART.[632] In Québec, before the ART program was put into place, infertility prevention was viewed as a wise investment choice by several interest groups including civil associations and even the *Commission de l'éthique en science et en technologie* (CEST)[633] and the *Conseil du statut de la Femme.*[634] In Québec, the APA does stipulate the importance of infertility prevention,[635] yet initiatives have not been taken on the matter in the province.[636] In his 2014 detailed report regarding the ART program, the *Health and Welfare Commissioner* stated that, should a national policy aiming at prevention be put in place, it could easily be integrated in already existing health prevention initiatives which aim at sensitizing and informing the public.[637] In my opinion, it is regretful that the Commissioner chose not to address the issue of prevention in detail.[638]

Although the exact amount of preventable causes of infertility is generally unknown, it appears that they are numerous and many of them are general public health concerns: smoking, sexually transmitted infections, exposure to environmental toxins and chemicals, eating disorders, excessive alcohol as well as caffeine intake, stress and wireless internet and phone use, as well as cancer treatment,[639] just to name a few.[640] "The existence of ARTs speaks to the importance placed by our society on genetic relatedness, and is evidence of our tendency to medicalize social problems."[641] Therefore, in my view, besides trying to manage ART, provincial

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[632] Tracey Bushnik & al. *"*Estimating the Prevalence of Infertility in Canada*"* (2012) 27:3 Hum Reprod 738.
[633] Québec, Health and Welfare Commissioner, *Avis détaillé sur les activités de procréation assistée au Québec* (2014) at 3, 8, 9 [Québec Avis Détaillé 2014]
[634] The Council's Memoir 2015, *supra* note 579 at 29
[635] *APA*, *supra* note 118, s 1: "This Act recognizes the necessity of preventing infertility and promoting reproductive health and is designed to protect the health of persons and more particularly the health of women who resort to assisted procreation activities that may be medically required and of children born of such activities, whose filiation is then established according to the provisions of the Civil Code."
[636] Québec Avis détaillé 2014, *supra* note 633 at 9
[637] Québec Avis détaillé 2014, *supra* note 633 at 9
[638] *Ibid* at 9: "Le Commissaire a choisi de ne pas approfondir ces questions dans la mesure où de nombreux autres correctifs au programme ont retenu son attention".
[639] The American Cancer Society, "Fertility and Women with Cancer," online : <http://www.cancer.org/treatment/treatmentsandsideeffects/physicalsideeffects/sexualsideeffectsinwomen/fertilityandwomenwithcancer/fertilityandwomenwithcancertoc>
[640] Lemoine, *supra* note 630 at 288-289
[641] Nelson, *supra* note 5 at 49

authorities in Québec and across Canada should be quicker at investing in a proactive approach by encouraging infertility prevention and research for women.[642]

By "facilitating" women's lives when it comes to reproduction, ARTs are contributing to the fragmentation of the biological mother-identity. Dr. Al Yuzpe, co-founder of the *Genesis Fertility Centre* in Vancouver, one of the largest in-vitro-fertilization clinics in Canada has accounted to the fact that "people are much more likely today to report difficulty conceiving than they would have been in the past, [when] there wasn't much we could do for them."[643] The *Society of Obstetricians and Gynaecologists of Canada* has stated its concern as to women overestimating technology's capacity to help them get pregnant once they are ready.[644] The Quebec *Health and Welfare Commissioner* has expressed the same view.[645]

[642] Rothman, *supra* note 344 at 133, 145; Nelson, *supra* note 5 at 51
[643] Kirkey, *supra* note 631
[644] *Ibid*
[645] Québec Avis Détaillé 2014, *supra* note 633 at 9

Conclusion

Canadian law on assisted reproduction and surrogacy has been ambivalent for a long time now. Although the AHRA does not prohibit surrogacy and egg donation per se, it maintains a contradictory stance: in theory, there is an intention to protect women and children from exploitative commercial practices, but in reality, the prohibitions have not been enforced and nothing has been done to encourage Canadians to keep these practices within our national borders. This murky and fragmented stance at the national level has done nothing to make things easier for the provincial legislatures and governments in the country, indeed, provinces have been reluctant to enact legislation on assisted reproduction and parentage laws in surrogacy cases are not coherent in the country.

Relational theory and *Against Family Law Exceptionalism*'s contributions are important to consider in the legal discourse on surrogacy and assisted reproduction. Particularly in Québec civil law, the province on which I focused, these schools of thought bring to the surface the legal and human relationships and conflicts that are at the intersection of these matters. While *Against Family Law Exceptionalism* contributes to brushing a fuller picture of legal interconnections between family law and other areas of law, particularly respecting the notion of consent, *Relational theory* highlights the limitations of using institutionalized forms of consent as a substitute for autonomy.

Nedelsky and Illich's reflections on human autonomy, institutions and the law are very important to keep in mind no matter which hat we are wearing: that of the legal scholar, the lawyer or of the independent citizen. As I see it, they remind us that institutions of law and medicine are imperfect ones, as they are not fully equipped to reflect human autonomy at its fullest: consent is institutional, just as the law has its definition of consent, so does medicine. Their contributions are especially important because they encourage individuals to use their creative power to derive change from conflictual and institutional relationships. Indeed, shedding light on relationships and adjacent conflicts creates a deeper and more comprehensive perspective on how the outside world (technology/institution/law) can curtail and/or advance our inside world as human beings (individual autonomy and creativity) and vice-versa. As such,

the brighter side of the picture is that conflicts brought up by the advent of assisted reproduction and biotechnologies are an opportunity for creativity and change both at an individual and collective level.

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