# Family Recoding: Towards a Theory of Relationships of Economic and Emotional Interdependency in the *Civil Code of Québec*

by Régine Tremblay

A thesis submitted in conformity with the requirements
for the degree of Doctor of Juridical Science

Faculty of Law

University of Toronto

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## Abstract

The thesis proposes a different approach to parent-child and conjugal relationships in the *Civil Code of Québec*, an expanded understanding of what is 'familial', the removal of the book 'The Family', and many more elements for a radical, yet simple and in line with civilian principles, theory of relationships of economic and emotional interdependency. It argues the Code should concentrate on relationships of economic and emotional interdependency, irrespective of their form or of their fulfilment of formalities. Their content and qualities should be law's object, hence allowing for a functional account of families and personal lives. It builds upon Justice Abella's hint in her dissenting opinion in *(Quebec) Attorney General v A*: "the history of modern family law demonstrates, fairness requires that we look at the content of the relationship's social package, not at how it is wrapped".[1] These explorations will hopefully put in perspective current debates about the ways in which Quebec family law should be reformed yet another time.

[1] *Quebec (Attorney General) v A*, [2013] 1 SCR 61 para 285.



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# Table of Contents

ACKNOWLEDGMENTS ........ III
TABLE OF CONTENTS ........ IV
CHAPTER 1 ........ 1
1 INTRODUCTION ........ 1
**1.1 Purposes and Risks 7**
**1.2 Background, Place Within Existing Legal Scholarship and Methodologies 17**
**1.3 Thesis Unfolded 27**
CHAPTER 2 ........ 30
2 THE PROLIFERATION OF CONJUGAL RELATIONSHIPS ........ 30
**2.1 The Law of Conjugal Relationships 34**
2.1.1 Formal Conditions ........ 41
2.1.2 Effects ........ 46
2.1.3 Death, Separation from Bed and Board, Nullity, Divorce, Marriage and Dissolution ........ 62
**2.2 A History of Conjugal Relationships in Private Law: From one possibility to many 68**
2.2.1 The *Civil Code of Lower Canada* and the Catholic Church ........ 70
2.2.2 1955-1981: From one Code to the next ........ 73
2.2.3 1981-1994: Family Law Reform and Effects ........ 79
2.2.4 1994 [2002]: More Reforms… ........ 85
**2.3 What Now with Conjugal Relationships 90**
2.3.1 Proposed "Reform" of 2015 ........ 92
2.3.2 Perils and Promises ........ 104
2.3.3 Status, intent, legal entity and the growing importance of relationships ........ 114
CHAPTER 3 ........ 129
3 THE MULTIPLICATION OF CONFIGURATIONS FOR FILIAL RELATIONSHIPS ........ 129
**3.1 The Law of Filiation 131**
3.1.1 Filiation and the Book on Persons ........ 131
3.1.2 Filiation and the Book on the Family ........ 137
3.1.3 Effects of Filiation ........ 155
**3.2 A History of Filial Relationships in Private Law: From one possibility to many 159**
3.2.1 The Civil Code of Lower Canada – Of Natural, Illegitimate, and Legitimate Children ........ 160
3.2.2 1980 – Of Filiation by Blood and Filiation by Adoption ........ 168
3.2.3 1994 – Of Filiation by Blood and Assisted Procreation ........ 178
3.2.4 2002 – Of Filiation of Children Born of Assisted Procreation and DNA ........ 182
**3.3 What Now for Filial Ties 199**
3.3.1 Proposed "Reform" of 2015 ........ 200
3.3.2 Perils and Promises ........ 207
CHAPTER 4 ........ 212
4 TOWARDS A THEORY OF RELATIONSHIPS OF ECONOMIC AND EMOTIONAL INTERDEPENDENCY ........ 212
**4.1 Functional Approach, Functions and Family Law 215**
4.1.1 The Functional Approach to the Family ........ 216
4.1.2 Functions in the Common Law ........ 220
4.1.3 Functions and Quebec's Civil Codes ........ 227



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**4.2 Towards a Theory of Relationships in the *Civil Code of Québec*: 232**
4.2.1 Theories of Relationships: Cossman and Ryder, Law Commission of Canada, and Eekelaar ....233
4.2.2 Relationships of Economic and Emotional Interdependency in the *Civil Code*: Adults Relationships....244
4.2.3 Relationships of Economic and Emotional Interdependency Expanded: Children....252
**4.3 Recoding Relationships: Locating Status and Allocating Effects 268**
4.3.1 Locating status ....270
4.3.2 Allocating effects ....274
**5** CHAPTER 5 .... 282
CONCLUSION .... 282
REFERENCES OR BIBLIOGRAPHY.... 286



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# Chapter 1

## 1 Introduction

Family life is full of codes including, for example, codes of conduct, codes of morals or codes of beliefs. Codes are defined in many ways. They can represent "conventionalized set of principles, rules, or expectations"[2] or "set of principles that are accepted and used by society or a particular group of people".[3] Codes, may be perceived as anchored in *truth* – moral truths, legal truths, social truths, religious truths – but fluctuate according to time, places, legal traditions and perspectives. They represent ideals, values, and goals, to some extent, ideologies. Families and family law follow codes, codes seen as more or less binding. Law also knows many codes. In Quebec civil law, private law is part of a code: the *Civil Code of Québec* and family law belongs in the Civil Code. The Civil Code "reflects the vision that a society has of itself, and of what it wants to be. It covers the life of every citizen, from birth to death. It is the loom on which the social fabric is woven".[4] The Civil Code stands in a particular category in the civilian mind. It is more than a mere law; it affects the legal identity of the province. Its structure and form send a message, it expresses what law is and more. Indeed, it contains rules that are virtually unenforceable, but that carry a strong message about code of conduct, about a vision of the society.[5] The Code is a symbol,[6] it represents Quebec's *droit commun* or *jus commune.*[7] It "really has the spirit of a constitution, because it embodies the ideas around which society is constituted".[8] It has been described as an *oeuvre de commandement*[9] and a social contract: "the

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[2] The Free Dictionary, by Farlex *s.v.* "code". Online (consulted on January 11, 2017).

[3] Cambridge Dictionary, *s.v.* "code". Online (consulted on January 11, 2017).

[4] Gil Rémillard, "Le nouveau Code civil: un véritable contrat social" in Serge Lortie, Nicholas Kasirer & Jean-Guy Belley, eds, *Du Code civil du Québec: contribution à l'histoire immédiate d'une recodification réussie* (Montreal: Thémis, 2005) 283 at 283 [Lortie, *Du Code civil*].

[5] For example, see, in Book I – Persons, art 260 para 2 CCQ or, in Book II – The Family, art 597 CCQ.

[6] Sylvie Parent, "Le Barreau du Québec et la Réforme du Code civil" in Lortie, *Du Code* civil, *supra* note 4 at 433.

[7] Marie José Longtin, "La Réforme du Code civil: la gestion d'un projet" in Lortie, *Du Code civil*, *supra* note 4 at 188.

[8] Jean Carbonnier, "Le Code civil" in Pierre Nora, ed, *Les lieux de mémoire, III. La Nation, 2. Le territoire, l'État, le patrimoine* (Paris: Gallimard, 1986) at 309.



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legislator intended that the *Civil Code of Québec* should reflect the social contract of our liberal, democratic society".[10] The Code is more than normative and as Sylvio Normand has suggested, "the Civil Code is one of those legislative texts whose importance surpasses the particular norms that it contains. It holds a symbolic charge that, although weakened, continues to characterize the law of Quebec".[11] The symbolical power is so strong, that sometimes the *truthfulness* of its content flirts with *truthiness*.[12] The *Civil Code of Québec* is the apex of normativity, idealism and expressionism in law. With such a strong view on what a Code is and stands for, it is interesting to highlight the trajectory of the private law of the family and its relationship to the Code, its relationship with the Code, and to put it in historical context. It allows exploring *other* codes, ranging from social codes to religious codes to policies, influencing its trajectory.

The *Civil Code of Québec* is recent in Quebec legal history. In its more or less current form, it was enacted in 1994 as a result of a process that started in 1955. As part of this process, the province of Quebec enacted the first book of its future modern civil code – "The Family" – in the eighties. The thesis focuses on the period from 1955 until now. 'The Family' was not under the former code, the *Civil Code of Lower Canada* (1866-1994) ["**CCLC**"], at least not as a book. Indeed, under the CCLC, family law followed the French Civil Code, a model that has been described as individualistic,[13] as it does not take into account the family as a whole or the family as a group, but rather focuses on individual rights, duties and obligations. The word 'family' is often absent from civil codes in line with this conception of the family.[14] The

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[9] These words are from Paul-André Crépeau.

[10] Québec, Ministère de la justice, *Commentaires du ministre de la justice*, vol 1 (Quebec: Publications du Québec, 1993) at IX.

[11] Sylvio Normand, "Le Code civil et l'identité" in Lortie, *Du Code* civil, *supra* note 4 at 619.

[12] Truthiness was the 2006 word of the year of the Merriam-Webster dictionary. It has been defined in many ways, one of them being "the quality of seeming or being felt to be true, even if not necessarily true": *English Oxford Living Dictionary*, online: https://en.oxforddictionaries.com/ *s.v.* truthiness (consulted on January 11, 2017).

[13] Ethel Groffier, *La famille personne morale. Avantages et inconvénients*, Comité du droit des personnes et de la famille, Office de Révision du Code civil, 1967; Eric Millard, *Famille et droit public. Recherches sur la construction d'un objet juridique* (Paris: Librairie générale de droit et de jurisprudence, 1995).

[14] Ethel Groffier, *La famille personne morale. Avantages et inconvénients*, Comité du droit des personnes et de la famille, Office de Révision du Code civil, 1967, p 41; Jean Pineau & Marie Pratte, *La Famille* (Montréal: Thémis, 2006) at 1 [Pineau & Pratte].

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emphasis is put upon the individual relationships and their effects between the members of the family, the family not belonging to law. Under the individualistic conception of the family, law is less concerned with the family as a group. Concretely, under the CCLC, marriage, filiation, parental authority were elements of the law of persons and little to no reference was made to the family as an entity. They affected the status of persons. The marriage contract was in a book about the acquisition of property. This reading of 'the family' sends messages about what family is, what is its place in law and how it should be regulated. Marriage came conceptually before the family and created relationships. Law dealt with these relationships and their effects, the only valuable relationship being the one flowing from religious marriage. The entity was not relevant as a whole and marriage modified civil status and property rules. More, for an extended period of time, the marriage relationships had desirable effects only for husbands who were vested with new powers over people (wife and children) and property. What is today known as family law was integrated into other dimensions of private law. It was not about the regulation of the family, but about the regulation of marriage and its consequences.

The *Civil Code of Québec* departed – to a certain extent – from this rather thin, homogeneous and monolithic understanding of the family. The family is now one of the ten books of the Civil Code. Needless to say, "The Family" is part of a *club select*; it is part of a few topics[15] deserving a book in the CCQ. But despite this bold move made in the eighties, many questions remain. Why was the family added as a book? Indeed, is the family a legal entity? A legal notion? An institution? A mere social phenomenon? What are the foundational principles and theoretical underpinnings of this 'new' discipline, this new book of the Code? Are the titles of the book consistent with one another? Are they in line with these foundational principles? What is the general theory underlying family law in the Code? Is family law reform about private law or is it about social policy? Even if some answers are missing, the book, in its form and substance, commands an ideal about what a family is and how it interacts with other elements of life and law. Even if there is a book metaphorically suggesting that all family matters are encompassed in it, massive parts of family lives are not contemplated in the Code at all. More, the Code has a very narrow understanding of "The Family". The Book focuses on formal

[15] Other books are about persons, successions, property, obligations, prior claims and hypothecs, evidence, prescription, publication of rights and private international law.

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conjugal unions (marriage and civil union) and formal relationships to children. As such, cohabiting spouses and *de facto* parents, for example, are not part of "The Family". The code represents a small portion of the actual regulation of families, sometimes addressing relationships between family members, other times with third parties or the State. 'The Family' of the code is regulated around four themes that can, for now, be summarized as formal unions, filiation, obligation of support (for people included in the two previous themes) and parental authority. Can one really say that this is 'The Family' in private law? Are these four titles part of a consistent theory? Do they promote the same goals? Value the same principles? How did Quebec civil law reach a point where 'the family' needed to be included in the *Civil Code of Québec* as a book of its own?

While family law rules can be found outside this book[16] and outside the Code, the Code nonetheless has considerable symbolic and political meaning. The Code proposes an image of the family in private law, an image that may or may not coincide with family regulation in general and experiences of families in particular. It encompasses the core of family regulation when it comes to the interactions between family members themselves, to the private ordering of their intimate lives. Despite the intimate and personal nature of these rules, the State attaches them numerous mandatory effects based on a formalistic view of 'The Family'.

In 1970, Paul-André Crépeau wrote "[à] une époque où, dans tous les domaines, les valeurs sociales et morales sont remises en question, il ne me semble pas inutile de s'interroger sur l'avenir du droit civil canadien".[17] While dated, his statement is still particularly relevant today; at a time when social and moral values are brought into questions, it does not seem useless to reflect on the future of Canadian civil law. His preoccupation was whether civil law has tools to modernize, adapt and meet the needs of a transforming society.[18] This thesis is a plea for the flexibility and adaptability of civil law, in familial matters at a time where it is fair to say, once again, that family law is in transition. To be flexible, civil law has to be careful to select what it promotes and how it does it, especially when it comes to family law. Family law is intimately

[16] To give only one example, see art 1938 CCQ about the right to maintain occupancy.

[17] Paul-André Crépeau, "Préface" in Jacques Boucher & André Morel, eds, *Livre du Centenaire du Code civil (I). Le droit dans la vie familiale* (Montréal: Les presses du l'Université de Montréal, 1970), XIII, XIII.

[18] *Ibid* XIII, XIV.

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intertwined with values, morality and social transformations. But this does not mean a Code cannot adapt to changing realities, or that it has to change all the time. The Code can hold adaptive principles even in a subject as fluctuating as family law. After all, it does so for property, contracts, and more. The thesis thus explores the transformation of family law in Quebec in the civil codes. It offers an alternative reading and hopes to demonstrate how family law rules can be broad, lasting and flexible like the other rules found in the Code. To do so, jurists need to significantly change their approach to the regulation of 'families' in law.

The thesis focuses on 'family law one$^{-}$' and codified private law in Quebec. Scholars have described as 'family law one' basically as what would be found in, amongst other things, a 'modern family law code'.[19] For example, family law one includes rules related to marriage, divorce, parent-child relationships, but excludes immigration law, tax law, youth protection or social law. It may or may not include successions. The thesis however focuses on a narrower view of 'family law one' labeled 'family law one$^{-}$'. It is only about the book 'The Family' and it focuses on some of its parts only. It is concerned with the two principal axes of family law: conjugal relationships and parent-child relationships, and some of their effects. Further, it is important to keep in mind the Code generally regulates the relations between individuals themselves. For example, it provides for duties and obligations between spouses, but is not concerned with benefits or rights third parties grant to spouses based on their status. Quebec is an ideal locus for the study of family law one: family law is in a Code, it is recent, a lot of its principles are modern (for example when it comes to non-heterosexual family forms) and it is bilingual. Quebec is also interesting since the selected period (1955-now) is a pivotal in family law and private law in general. It has witnessed the introduction of 'The Family' to the *Civil Code of Québec* concurrently with the passage from one civil code to the other. As such, the

[19] See Janet Halley and Kerry Rittich, "Critical Directions in Comparative Law: Genealogies and Contemporary Studies of Family Law Exceptionalism" (introduction to the special issue on comparative family law) (2010) 58 American Journal of Comparative Law 753 at 761-62: "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.[…] 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. We can call that Family Law 2, or FL2. In the still-deeper background would then be Family Law 3—FL3—the myriad legal regimes that contribute structurally but silently to the ways in which family life is lived and the household structured, sometimes intentionally, sometimes in ways we could describe as functionally rational, sometimes in the mode of disparate impact or sheer accident or even perversely".

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thesis investigates the advent of a book on family law in the Code and its theoretical impacts. In introducing that book in a time of important social changes, the *Legislateur* somehow disrupted the traditional categories of civilian thought and may have created theoretical inconsistencies, despite best intentions. The Code is now comprised of contradictory theories for "the family" in the Code and the book bends some elements of the law of persons, obligation, and property to a point where they are almost broken.

The exploration here is driven by the desire to propose an alternative way to conceptualize families in the *Civil Code of Québec*. Can civil law pretend to be concerned only about 'the family' when law in general is faced with a plurality of models for families? Is families' law the new option to approach family life or is it too limiting? What makes family law a different discipline, a different legal subject, a book of the Code? Should it be? Is there an alternative understanding to the formal approach the Code sets forth for family regulation? Are the form and the accomplishment of formalities that important to regulate families? There is a strong emphasis on *relationships,* their prevalence and their content or qualities. The thesis narrows in on relationships of economic and emotional interdependency. More precisely, the study is about the transformations of "the family" on three accounts: the number of possible familial relationships in the civil codes, the changes in the nature of these relationships and the fluctuating foundational elements underlying these relationships and their regulation in family law one-. The content and function of relationships should become law's object, and these relationships do not have to be either filial or conjugal. As such, the tale is a tale of multiplication of possibilities for relationships in the code and the impact the proliferation of relationships has for codified family law.

Focusing on family in the Code may be limiting, exclusive and normatively charged. However, it appears to be a privileged way to disrupt and challenge the current regulation of families in Quebec civil law given the symbolic charge held by the Code. The Code has a political and symbolical meaning. While focusing on family law one-, the proposed approach is flexible and abstract enough to include relationships that are not part of the narrow ideal currently conveyed in the book on 'The Family'. Keeping this in mind, the first part of this introduction clarifies the purposes of this thesis and recognizes the significant risks to such a research program. The second part provides some background on Quebec civil law, assesses the necessity of conducting this research and situates it in current legal scholarship. It acknowledges

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the rather original standpoint – outside Quebec, in a common law tradition – for the project. It indicates the methodology underpinning the thesis. The last part of the introduction offers a roadmap to the thesis, an overview of the three core chapters of the thesis.

## 1.1 Purposes and Risks

This thesis is a theoretical exploration and an investigation of Quebec's family law, aimed at both civilian and non-civilian readers. It is about how family law is constructed in and by the Civil Code. The general purpose is to explore, question and analyze the transformations of conjugal and filial relationships, and the evolution of fundamental principles that have, through time, influenced family law in Quebec in one of its primary systems of governance: the civil codes. Do these underlying elements make sense today and should Quebec law be informed by different conceptions? Are they coherent within the architecture of family law? In other words, if "family law" is a system composed of, to borrow Savatier's image, organs, should these organs be animated by the similar fundamental principles? Shouldn't they be consistent and functioning together? Does the normative project of family law in the *Civil Code of Québec* making sense in today's context? Does the Code have tools to adapt and evolve? Is it time for family law to take a break[20] from the normative project put forward in the Code and move towards a different approach, revolving around relationships of economic and emotional interdependency and not on an outdated idea of what is a family in law? What makes familial relationships different and are there other relationships meeting these criteria? How could relationships be recoded to belong to civil law? For family law to adapt and to evolve with time, it is time to approach 'the family' differently.

The general purpose of the thesis is thus divided in three specific goals that can be summarized in three words: history, nature and theory. The first objective is to offer an historical analysis of the transformations to the Civil Codes in Quebec family law from one Code – the Civil Code of Lower Canada (1866-1994) – to another – the Civil Code of Québec (1994- now). More specifically, the period studied ranges from 1955 to 2017 and it focuses on modifications to the civil codes. The story offered is closer to legislative history or codification history. Why

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[20] This expression is borrowed from Janet Halley. See Janet Hally, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2008).

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1955? It marks the date when the reform of the civil code was officially launched, or at least formally. It is also the period that led to the adoption of a book on "The Family" in the code, and the time where family law became somewhat an autonomous discipline in Quebec civil law.[21] Further, the thesis includes the current propositions for reform and reflects on its promises and perils. When it is possible, it highlights in which context the transformations occurred. It showcases possible relationships have multiplied.

The second goal is to question, in light of the historical legislative analysis, the nature of the relationships in family law, evolution and mutation. The transformation and evolution are documented following the current structure of family relationships in Quebec civil law. Conjugal relationships are analyzed first, and then parent-child relationships. Family law relationships have consistently multiplied. The reasons to include or exclude certain relationships have shifted. How do relationships regulated in law have transformed and to what extent have they multiplied? How are the transformations of conjugal and filial ties intertwined? This thesis suggests the transformations of the conjugal relationships in family law one- have not completely followed what has been done when it comes to filial relationships. The evolution of filial ties appears more advanced than the one of conjugal ties, since formalism has somewhat declined in importance. More, even if filial relationships appear to be regulated in a more sensitive way, the underlying principles of filiation in Quebec civil law are contradictory. As such, the book 'The Family' in itself is inconsistent with the other books of the Code and the titles of the book are inconsistent with one another. An alternative theory or reading of family law one- is needed. This leads me to the third specific goal of the thesis.

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[21] When the new book of the Civil Code arrived, monographs and books on family law started burgeoning: Monique Ouellette, "Le nouveau droit de la famille et l'adoption" (1982) 13 RGD 109; Jean Pineau, *Mariage. Séparation. Divorce. L'état du droit au Québec* (Montréal: Les presses de l'université de Montréal, 1976); Renée Joyal-Poupart, *La famille. Notions élémentaires* (Montreal: Thémis, 1973) [Joyal-Poupart]. The number of books devoted to the subject is considerable considering the recent history and the limited population. Before the enactment of the book, 'family law' or rather principles of filiation and marriage were found in general treatises and written by generalists: PB Mignault, *Le droit civil canadien basé sur les 'répétitions écrites sur le Code civil" de Frederic Mourlon avec revue de la jurisprudence de nos tribunaux* (Montréal: C. Théoret, Editeur. Librairie de droit et de jurisprudence, 1895); Gérard Trudel, *Traité de droit civil du Québec. Tome premier* (Montreal: Wilson & Lafleur, 1942) [Trudel, *Traité*]. Pierre Azard & Alain-François Bisson, *Droit civil québécois. Tome I. Notions fondamentales. Famille. Incapacités.* (Ottawa: Éditions de l'Université d'Ottawa, 1971) [Azard & Bisson]. Family law now holds many specialists in Quebec, numerous monographs and specialized books: Michel Tétrault, *Droit de la famille* (Cowansville: Éditions Yvon-Blais, 2010) [Tétrault]; Pineau & Pratte, *supra* note 12; Mireille D Castelli & Dominique Goubau, *Le droit de la famille au Québec*, 5th ed (Québec: Presses de l'Université Laval, 2005) [Castelli & Goubau].

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The third specific goal of this work is to propose a renewed theoretical approach to the regulation of families, or more precisely relationships of emotional and economic interdependency, in the *Civil Code of Québec*. It takes the view it is necessary integrate family law better in the Code and to question heavily policy oriented reforms. Indeed, it is not about whether or not the content of reforms is desirable or undesirable. It rather proposes an alternative reading and demonstrates that what is politically desirable is not always legally sound and suggests that this – rather than the constant changes in family life – might be the reason for the instability of family law one- in Quebec civil law. In other word, it is claimed that one of the reasons why family law reform happens every decade or so in the Civil Code is the tendency to do policy rather than integrate family law properly in the Code, in a consistent way with the other disciplines of the Code. Relationships are important to family law and 'family' as a legal category is too narrow and normatively charged to adapt. 'The Family' has a strong normative content and the Civil Code might have reached a point where it should free itself from limiting and under inclusive ideals. It should be interested in relationships or relations rather than in an undefined idealized group producing little to no effects in law as an entity, yet announcing it does. The renewed theoretical approach is not only about family relationships, but also about relationships *tout court* given the prejudicial content of family as a word, ideal and institution. Relations between persons can be rights, duties, powers, obligations, and so on. The relations produce effects in 'family law', not the familial entity. While the Code already focuses on some kinds of relations when it comes to Quebec civil law, for example marriage and filiation, the choice to regulate certain relations and not others is not clear or consistent. What makes these relationships privileged in law, besides social, historical or religious contingencies, is unclear. Further, there are contradictory theories in the Code when it comes to what 'the family' is in law. The thesis proposes a different narrative and approach to the regulation of 'families' in the *Civil Code of Québec* in light of an in-depth study of relationships.

These three specific goals are entangled with numerous ancillary purposes. The thesis makes some family law in Quebec civil law accessible in English for both civilian and non-civilian readers. Indeed, a special attention is given to the words selected to expose the juridical concepts studied and to make these concepts intelligible for non-civilians. The thesis is not only about translation from French to English or about making civil law in English, it is also about translating civil law to non-civilians to the extent possible. This is important because family law

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in Canada is changing fast[22] and provinces could be looking at one another in order to best meet citizens' expectations. Even if the *Civil Code of Québec* is officially bilingual, very few book length resources are available in English to explain Quebec's family law. Even less so are available in a perspective where the legislative history of family law is briefly explained. Common law scholars nonetheless have shown interest in the reforms and solutions proposed by Quebec.[23] Further, family law is governed by both provincial and federal powers, and many challenges are shared. A second ancillary purpose is to import into the Quebec civilian framework, when it is possible and consistent with its legal tradition, writings and ideas from other legal traditions, mostly common law scholars from the United Kingdom and Australia and civilian scholars from France and Belgium, but also from American academics. Hopefully, this will allow for a dialogue between Quebec and other jurisdictions when it comes to theoretical developments surrounding family law. For example, critical theory[24] and law in context[25] are not part of the intellectual landscape enough in family law legal scholarship in Quebec.[26] The last but not least ancillary purpose is to invite skepticism when it comes to the analysis of the *Civil Code of Québec* and family law generally in the civilian tradition. Being skeptical is essential in family law. Solutions are temporary, justifications are political. Skepticism should transcend borders and legal traditions. Family law is a power tool to promote or stifle behaviours and practices in one of the most intimate spheres of human activity.

A renewed approach to 'family law' is a paradoxical move for family law: to its extreme, the theory of relationships represents the end of 'family law', or at least family law as law knows

[22] One can think of the new *Family Law Act*, SBC 2011, c 25 in British Columbia, and the modifications to the *Children Law Reform Act,* RSO 1990 c C 12 (through Bill 28, *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016) in Ontario.

[23] Fiona Kelly, "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families" (2008) 40 Ottawa L Rev 185, at 188–189; Susan B Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility" (2007) Wind YB Access Just 63.

[24] Stephen Parker & Peter Drahos, "Closer to a Critical Theory of Family Law" (1990) 4 Aust J Fam Law 159 [Parker & Drahos, "Closer"]; Freeman M D A, "Towards a Critical Theory of Family Law" (1985) 38:1 Curr Leg Probl 153 [Freeman, "Towards"].

[25] John Eekelaar, *Family Law and Social Policy* (London: Weidenfeld and Nicolson, 1978) [Eekelaar, *Family Law*].

[26] There are of course notorious exception to this statement: Marie-France Bureau's scholarship about filiation, Robert Leckey's scholarship, Angela Campbell's scholarship, some articles by Alain Roy, for example Céline Le Bourdais, Évelyne Lapierre-Adamcyk & Alain Roy, "Instabilité des unions libres: Une analyse comparative des facteurs démographiques" (2014) 55:1 Rech sociographique 53.

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it now. This concern has materialized in family law theory. Martha Fineman has already argued about the end of family law – family law "arising from the sexual affiliation of two adults".[27] She has suggested, that legal regulation shift from a 'sexually based' to a 'dependency based' family[28] and that marriage be abolished. In her scheme, the dependency-based family relies on the Mother-Child dyad or caretaking.[29] Albeit differently, under the propositions found in this thesis, the same risk of the end of family law occurs. Indeed, if relationships are at the core, family law expands to a point where the normative content of 'family' becomes so broad that 'family' as a word cannot encompass all the possibilities, neither could 'families'. Further, family law becomes detached from the qualities of the individuals triggering the relationships in law, which represents a drastic change for intimate regulation. It turns to the nature of relationships to qualify them and include them in civilian thought. The suggested approach is a result of the observations made in the second and third chapters; reflections related to, amongst other things, the proliferations of relationships and their change in nature, and how the idea of 'status' in family law has transformed in term of relevance and content. Status is still relevant, but it may materialize differently. Indeed, status may be related to a *state* (état), to the *State* and to the recognition of a role in a factual situation, here the role played in a relationship, rather than formal requirements.[30] Conceptualizing 'the family' in this way could infuse the regulation of families, or other intimate/personal relationships, in the Code with consistency. It would also allow 'family law principles' to be integrated coherently in the Code, and not as antiquated rules trapped in a fixed and restrictive book, between foundational and flexible topics such as the law of persons, property, obligations, prior claims and hypothec, to name but a few. It invites civil law to expand its paradigm on the regulation of intimate relationships and to use its classical

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[27] Her ideas arise in a context where she was doing research on single mothers, but they are nonetheless transposable: Martha Albertson Fineman, "Keynote Address - The End of Family Law? Intimacy in the Twenty-First Century" (1994) 5th Consti Drake L Rev 23, 26 [Fineman, "Keynote"]; Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995) [Fineman, *Neutered Mother*].

[28] Fineman, "Keynote", *supra* note 25 at 31.

[29] Note men can be 'Mothers', and 'Child' includes other dependencies. She gives the example of ill and elderly.

[30] This is in direct line with the definition of 'subject of rights'/*sujet de droit*, a foundational concept in private law. "Being or entity considered according to the juridical function or role it plays in a legal relationship" France Allard *et al, Private Law Dictionary and Bilingual Lexicons: Property* (Cowansville: Yvon Blais, 2012) [Allard, *Dictionary: Property*].

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notions to align with the needs of today's families, of today's relationships. This task is not easy in a field blurred by emotions, exceptions, and political choices.

Concretely, the thesis proposes a different approach to parent-child and conjugal relationships, an expanded understanding of what is 'familial', the removal of the book 'The Family' from the Civil Code, and many more elements for a radical, yet simple and in line with civilian principles, theory of relationships of interdependency in the *Civil Code of Québec*. While some suggestions appear drastic, they represent a return to the structure of the *Civil Code of Lower Canada* and an option already prevalent – to some extent, in different ways and contexts – in other civilian jurisdictions.[31] These explorations will hopefully put in perspective current debates about the ways in which Quebec family law should be reformed yet another time. The thesis does not propose a reform of family law in the Code, or in Quebec civil law. Rather, it proposes a theory, an approach, to inform a potential reform. The difference is major. When the *Civil Code of Lower Canada* was modified and before the enactment of the first book of the *Civil Code of Québec,* decades of work and hundreds of people participated in what would be the new 'constitution' of Quebec's society, including its new family law. It was a true collective effort, going beyond any political allegiances.[32] It cost time and money. More recently, the *Comité consultatif sur le droit de la famille* – made of experts – worked for two entire years with little to no economic resources to produce the lengthy and intellectually challenging report they delivered. The work of the president of the *Comité* and its members is commendable. The task was titanic and the conditions to produce it were far from optimal. They went beyond what the Supreme Court asked and nonetheless succeeded in proposing fundamental – yet conservative – changes and a thought-through reform without enough time or money. In this last chapter of the thesis, the goal is not to propose a reform of family law in Quebec or in the *Civil Code*. This task would be impossible and thinking it is possible is dangerous. Someone claiming to do that would completely miss the point of reform, especially reform in family law. Indeed, it would prevent one from participating in a collective effort, a dialogue between people of different views and heterogeneous backgrounds or life experiences, a complicated and enriching negotiation between

[31] In France for example, there is no book on 'The Family' in the Civil Code.

[32] "C'est un travail que nous avons fait au-dessus de la partisanerie. Cela a déjà été dit. Le député de Nicolet-Yamaska l'an souligné aussi". Journal des débats sixième session 31e legislature le vendredi 19 décembre 1980 vol 23 no 26 p. 1263 (M. Herbert Marx)

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experts in various fields, jurists, citizens, politicians, and workers on the ground, citizens and more. The chapter thus proposes an alternative approach, a re-coding, but not a reform. Such an approach holds potential for family law to be flexible and adapt. This research program with various goals involves many risks.

This research bears important risks. First, by focusing on family law one-, it could be said it misses the point about family law altogether. Concentrating on the private law of the family excludes a lot of family law. In recent years, scholars have forcefully demonstrated family law is more than that. It is not only about marriage, divorce and its effects. The family has ramifications in immigration law,[33] housing law,[34] inheritance law,[35] a lot of social laws,[36] and more.[37] One can hardly disagree with this scholarship.[38] As such, to this critique, my response is: patience. If the magic operates, the last chapter will persuade the reader that a strong theory of relationships goes hand in hand with the other laws and other principles affecting the families, and more broadly individuals in the intimate sphere. More, it would allow codified law to adapt and to be flexible to new situations without opening the code for revision each and every time society faces crucial transformations. It is after all what is largely done in the other books of the code. Indeed, property law, the law of persons, obligations have witnessed minor changes and adaptations, but nothing as fundamental in terms of codified modifications as what has been done in family law in 1980, 1994, 2002, and likely in a near future.[39] Other legal subjects rely on a strong theoretical basis. Perhaps because of its recent history, there is a sense family law in Quebec's private law is rather technical and does not benefit from comparably solid theoretical foundations. This has to change and this thesis helps lay the groundwork for this change.

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[33] See for example Donald G Cassell, "Same-Sex Partners and Family Class Immigration: Still Not Equal with Opposite-Sex Partners" (2004) 21:1 Dalhousie Law Journal 203.

[34] In Quebec see art 1938 CCQ.

[35] In Quebec see art 655 CCQ.

[36] Mireille D Castelli, "La notion de famille et son impact en droit social" (1981) 22 C de D 5.

[37] See especially these special issues: (2010) 58:4 American Journal of Comparative Law 751 and the Symposium New Frontiers in Family Law: (2009) Issue 2 Utah L J.

[38] Susan Boyd, "Book Review of Families and the Law: Cases and Commentary by Mary Jane Mossman (2012-2013)" 28 Can J F L 105; Régine Tremblay, "Nicole LaViolette et Julie Audet, L'essentiel du droit de la famille dans les provinces et territoires de common law au Canada, Cowansville, Éditions Yvon Blais, 2014. D'un océan à l'autre…" (2018) Can J F L [forthcoming].

[39] See for example, arts 61 and 71.1 CCQ.

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Second, a group of concrete or practical perils needs to be highlighted. Family law has an undeniable technical dimension. Lots of family law disputes happen at the margin of the law, transactions occur frequently, agreements can or cannot meet legal requirements, only exceptional cases reach the courts,[40] and to complicate the issue, "[a]ll happy families resemble one another; every unhappy family is unhappy after its own fashion".[41] The latter is generally the one most in need of family law. Lived family law is undeniably practical and specific, which could lead some to state there is no need for a theory or an approach to family law. Some could even say that the practicalness of family law renders any need for a theory useless. In Quebec, the practical nature of family law is salient. Debates about theories of regulation or underlying values promoted by family law seem less prevalent since the *Civil Code of Québec* came into force. While some issues retain theoretical attention,[42] the discipline as a whole less so. But even highly practical matters need to be informed by a theory or an approach. Further, outside Quebec, the theoretical aspects of family law is an integral part of thinking about family, lives and law. This is obvious in the broad common law tradition with scholars such as John Eekelaar, Carl E Schneider, Martha Albertson Fineman, John Dewar, Stephen Parker, Janet Halley, Jenni Millbank, Alison Diduck, Susan Boyd, Mary Jane Mossman, Nicholas Bala, Brenda Cossman and more. While differently, the same could be said in the civilian tradition outside Quebec, French scholar Jean Carbonnier being a notorious example.[43] In Quebec mixed jurisdiction, under Quebec recent's Civil Code, there is still a lot of theory to be done even if scholars undoubtedly participate in theoretical reflections. It is essential to acknowledge family law is more than a technical or practical discipline. Family law is about the regulation of behaviours in the most intimate sphere of human activity. This awareness and usage of foreign legal sources bring me to another risk.

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[40] Of course, it is generally true of law in general and not necessarily typical or characteristic of family law.

[41] Leo Tolstoy (Nathan Haskell Dole), *Anna Karénina* (New York: T Y Crowell & Co, 1866) at 5.

[42] One can think of the aftermath of *Quebec (Attorney General) v A*, [2013] 1 SCR 61 (also known as *Eric v Lola*) and the scholarship about autonomy, freedom, solidarity and protection that followed.

[43] Jean Carbonnier, *Flexible droit. Textes pour une sociologie du droit sans rigueur*, 5th ed (Paris: Librairie générale de droit et de jurisprudence, 1983) at 167–224 [Carbonnier, *Flexible droit*]; Jean Carbonnier, *Sociologie juridique*, 2nd ed (Paris: Presses universitaires de France, 2004) at 40–44.

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A third group of risks for the project are those related to comparative law and to the incommensurability of legal traditions.[44] Comparative law holds many perils, perils that have been documented for decades. Alan Watson wrote it is superficial, it is possible to get the foreign law wrong (knowledge and language), it is not systematic, conclusions can be irrelevant, etc.[45] Another concern is to invade a legal tradition and tame it with a foreign understanding of the law. This project should not be seen as be seen as an attempt to tame civil law into common law reasoning or to import common law ideas into civil law without paying attention to the difference between these legal traditions, their specific reasoning methods and more. Rather, it is the dialogue between the two traditions from a theoretical standpoint that is of interest here. More, it is about generating discussions between ideas from scholars of Canadian common law, American common law, UK common law, French civil law and Belgium civil law all concerned with how to regulate family, families, intimate relationships or personal lives. It is not about importing theories for the sake of moving it from one jurisdiction to the next. As a matter of fact, civilist scholars proposed decades ago an understanding of family as relationships.[46] Rather, it is about providing different views on similar situations regulated by rules that can be similar or different, and can remain similar or different. The idea is to study the legislative context leading to Quebec family law as it is today, while being aware of ideas infusing family regulation in general, and explore ways in which a sophisticated civilian approach to family life can adapt or change, according to its own principles, and in respecting its fierce tradition.

In relation to being aware of the risks of importing common law into civil law, it should also be said that the demonstration in the thesis should not be seen as being limited to principal western legal traditions, even if they undeniably dominate the discourse. Being western-

[44] H Patrick Glenn argues against incommensurability. The "boundaries of legal traditions have become more permeable", "domestic sources […] eventually camouflage many distant origins", "State law cannot obliterate previous transfer of legal information", and more see H Patrick Glenn, "Are Legal Traditions Incommensurable" (2001) 49 Am J Comp Law 133 at 139. In the case of Quebec family law, transfers are numerous: think of adoption law that has been imported from Ontario, or the family patrimony (Danielle Burman & Jean Pineau, *Le "patrimoine familial" (projet de loi 146)* (Montréal: Thémis, 1991) at 3–4.

[45] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed (Athens, GA: University of Georgia Press, 1993) 10-15.

[46] Jean Dabin, *La philosophie de l'ordre juridique positif spécialement dans les rapports de droit privé* (Paris: Librairie du recueil Sirey, 1929); Roger Jambu-Merlin, "Quelques réflexions sur le définition juridique de famille" in *Mélanges Guy Flattet*.

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traditions-centric is risky. On the one hand, family law rules reach beyond legal rules and families are regulated by other normative orders that are often as strong as formal law.[47] One of the points of proposing a new approach to the regulation of families or new ways to think about relationships of interdependency is to free – in as much as it is possible – the Civil Code from an homogeneous notion of the family inspired by cultural and religious principles, or contingencies. The approach proposed has the ambition to be applicable to various or even unforeseen situations. It could hopefully resonate with people currently situated at the borders of family law. An approach about relationships hold the potential to sensitively adapt to multiculturalism, plurinationalism and more. Indeed, it is not about who are the subjects of the relationships but rather the relationship itself and its content.

A last risk concerns the concept of neutral treatment. Feminist writer Martha Albertson Fineman comes instantly to mind about the risks of what she coined neutering. In her study of the neutered of 'mother', she develops concepts such as 'gendered life' and 'patriarchal ideology'. While the former "is based on the premise that as a socially and legally defined group, women share the potential for experiencing a variety of situations, statuses, and ideological and political impositions in which gender is currently relevant"[48] the later represents an ideology where, building on Gerda Lerner's definition, Fineman sees patriarchy "as the 'manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general' ".[49] In such a context, inequalities in family law are too pervasive to promote neutrality and neutrality is detrimental to women. As she writes, "neutral treatment in a gendered world of within a gendered institution does not operate in a neutral manner".[50] While her ideas were developed in the US more than two decades ago, they are still relevant here today. The context in which family law takes place makes neutrality

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[47] For two concrete example where religious plays a role, see Pascale Fournier & Régine Tremblay, "Translating Religious Principles into German Law: Boundaries and Contradictions" in Simone Glanert, ed, *Comp Law Engag Transl* (London: Routledge, 2014) 157; Régine Tremblay, "Sans foi ni loi : Appearances of Conjugality and Lawless Love" in *Les apparences en droit civil* (Cowansville: Éditions Yvon-Blais, 2015) 155 [Tremblay, "Sans foi"]. In general, consult this classic, as a whole or at 879 and *ff* : Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law Soc Rev 869.

[48] Fineman, *supra* note 25 at 48.

[49] *Ibid* at 22–23.

[50] *Ibid* at 26.

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utopic, or straight up dangerous. Closer to us, both in term of time and place, Susan Boyd shared similar concerns about neutrality in family law about the new *Family Law Act* of British Columbia.[51] She writes

> gender-neutral legal norms, however, sit uncomfortably next to familial realities that remain stubbornly gendered and unequal in certain respects, particularly because women still assume greater responsibility for domestic labour and childcare. Many feminists challenge calls for equal treatment of fathers and instead propose legal norms that recognize these unequal social relations. Even if the legal norms are gender-neutral on their face, they should include guidelines that direct attention to gendered patterns or they should be interpreted so as to take account of gendered social realities still supported by social and economic structures.[52]

As such, nuances are in order about a theoretical approach in which the dominant principles of family law in the Civil Code would be purportedly gender-neutral. The idea here is not to make family law neutral *per se*. Rather, it is about unifying the underlying principles in civil law as they apply to all. Their effects might nonetheless differ subjectively, but not their theoretical underpinnings. In putting forward a scheme centered on relationships themselves, and in using various mechanisms such as legal presumptions and differentiated effects, it is possible to neutralize the identification of relationships entailing legal effects while adjusting the effects in light of family law's context: a gendered, heteronormative and patriarchal context. Keeping them in mind, the next subpart explains in which background this research takes place, why it is necessary and how it situates itself within – and beyond – current legal scholarship.

## 1.2 Background, Place Within Existing Legal Scholarship and Methodologies

*Background* – Canada is a fascinating locus for the analysis of the family, families and law. All levels of governments – from federal government to municipal governments or administrations – have powers, in various ways, over the family. From a constitutional perspective, the powers of the legislatures of the provinces over property and civil rights[53] and

[51] Susan B Boyd, "Equality: An uncomfortable fit in parenting law" in Robert Leckey, ed, *After Legal Equality. Family, Sex, Kinship* (New York: Routledge, 2015) 42; Susan B Boyd, "Contradictions and Challenges in Canadian Family Law" (2007) 7:1 Thirdspace a Journal of Feminist Theory & Culture.

[52] Boyd, *supra* note 44 at 89–90.

[53] S 92(13), *Constitution Acts,* 30 & 31 Victoria, c 3 (UK).

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the solemnization of marriage in the provinces[54] encompass elements of family law. As such, the provinces have the power to legislate on matters such as parent-child relationships, the economics of the family units, the celebration of marriage, youth protection and more. However, there is an important exception to the jurisdiction of the provinces in family law. The Parliament of Canada has the legislative authority over marriage and divorce.[55] In addition, the coexistence of two dominant legal traditions in Canada makes family law rich, complex and nuanced. Other traditions coexist and are acknowledged[56] to a certain extent, but there is room for improvement. Despite facing similar personal challenges, Canadians are offered different legal solutions. Concretely this means that within a same country, the vast majority of legal rules aimed at ordering family lives vary significantly, despite shared experiences in terms of family lives. Further, with the increased mobility of citizens, family disputes and family matters in general (even when they are consensual) often present externality elements and private international law – or conflict of laws – has to step in. Some variations between legal traditions, or even between provinces of the same legal tradition, are important. Others are trivial. Indeed, sometimes the solutions are the exact same in the end. But, the legal reasoning, the path to reach legal solutions, will be different. Sometimes, it also leads to opposite results.

The thesis, while mindful of the existence of similar concerns in other Canadian provinces, concentrates on the province of Quebec, its private law of civilian tradition and its two last civil codes: the *Civil Code of Lower* and the *Civil Code of Québec*. While Quebec's private law is civilian, it is probably more accurate to consider Quebec as a mixed jurisdiction. As Kenneth Reid explains, "[d]espite the name, a mixed jurisdiction is not merely one in which law is 'mixed' in the sense of being drawn from disparate sources, as indeed law usually is. Rather, the label implies something as to the content of the mixture".[57] A mixed legal system is thus not merely defined as borrowing concepts and rules to both common law and civil law.

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[54] S 92(12), *Constitution Acts,* 30 & 31 Victoria, c 3 (UK).

[55] S 91(26), *Constitution Acts,* 30 & 31 Victoria, c 3 (UK).

[56] Aboriginal traditions are an obvious example. In Quebec, aboriginal traditions in family law are explored almost only in connection with adoption: Carmen Lavallée, "L'adoption coutumière et l'adoption québécoise: vers l'émergence d'une interface entre les deux cultures?" (2011) 41 RGD 655.

[57] *The New Oxford Companion to Law,* sv "mixed jurisdictions". On mixed jurisdictions see Vernon V Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (New York: Cambridge University Pess, 2001); Kenneth G C Reid, "The Idea of Mixed Legal Systems" (2003) 78 Tulane Law Rev 5.

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There is more to it, something undeniably present, yet complex to identify. Further, there are often peculiar political and historical backgrounds to mixed jurisdiction. As Reid strongly asserts:

> [m]ixed jurisdictions were often the products of failed colonialism, when territories originally settled by the Spanish, French, or Dutch fell into the hands of the British or the Americans. If the Dutch had not settled, and then lost, the Cape and Sri Lanka, or the French, Quebec, it would hardly be possible today to speak of a group of mixed jurisdictions.[58]

The particular political context in Quebec contributed to its mixed legal system. Today's context is also feeding the *mixité,* Quebec being surrounded by provinces and states of common law traditions and information being shared faster than it has ever been.

Before turning this history underneath Quebec's particular legal tradition and why its private law is civilian, or mixed, and codified, a note on private law is in order. Within the civilian tradition, it is fair to assert private law has a different understanding and a different echo than in common law jurisdictions. Indeed, while an important scholarship on the nature of private law exists in common law and its answers are complex and plural, there is a common understanding in civil law that private law is the law concerned with the interactions between legal persons, physical persons (human beings) or moral persons (roughly, companies). Mignault writes it is about "des lois qui régissent les interêts *particuliers* dans leur lutte mutuelle".[59] Public law, in opposition, examines relations between legal persons and the State. There is a sharp distinction between private law and public law in Quebec. Private law, under this understanding, is systemically understood as meaning relations between individuals, but not necessarily relations that are beyond the scrutiny of the State. Family law, in many ways, is on the fence between public law and private law. While common law scholars specializing in the nature of private law tend to exclude family law from the core of private law,[60] family law belongs to private law in a civilian mind. Civilians are nevertheless aware the state is involved in private law,[61] but some relationships are categorized as pertaining to purely private law and

[58] *Ibid* at 7.

[59] Mignault, *supra* note 19 at 42.

[60] See Ernest Joseph Weinrib, *The Idea of Private Law*, revised ed (Oxford: Oxford University Press, 2012) or William Lucy, *The Philosophy of Private Law* (Oxford: Oxford University Press, 2007)..

[61] Robert Leckey forcefully denounced the grip of public law over the private law of the family: Robert Leckey, "Family Law As Fundamental Private Law" (2007) 86 Can Bar Rev 69. See also Millard, *supra* note 11.

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others to public law. As such, despite the strong and convincing feminist scholarship devoted to denounce the false dichotomy between the public sphere and the private sphere[62] and some civilian efforts to expose how family law is public,[63] the purpose here is family in private law, in its narrow sense of interactions between individuals. In this thesis, the civilian conceptualization of private law operates. But it does not mean the dichotomy between private law and public law must go unquestioned or worse, that this dichotomy is similar to the dichotomy between the public sphere and the private sphere. Indeed, private law is not beyond the scrutiny of the state and one must be careful: a lot, if not most, of private law belongs to the public sphere. That does not mean it is public law. For the present purposes, private law in familial matters is mostly, but not exclusively, contained in the *Civil Code of Québec*.[64] In its latest version and as a result of a process started in 1955, the code came into force in 1994. But before turning to the history of the civil codes in the province, a few words on the civil law tradition in the province of Quebec are in order.

While the history of civil law in Quebec dates back to 1663-64,[65] it is not necessary to go as far back in time for the present purpose. To summarize, according to Brierley and Macdonald, the dominant legal tradition in the province of Quebec is, roughly, the result of three major decisions:

> [t]he first, decreed by Louis XIV in the latter part of the seventeenth century, was to provide the colony of New France with the elements of an ordered legal system similar to that prevailing in the jurisdiction of the *parlement* of Paris […]. The second was that of the British authorities at Westminster, in 1774, to maintain that body of law for all that relates to "property and civil rights" alongside the major re-adjustment to the balance of the legal system as a consequence of the change of sovereignty 11 years earlier. The third was the decision of the local legislative authority, in 1857, to provide for a Civil Code largely similar in style, structure, and detail to that promulgated in France in 1804, a reform completed in 1866 and accompanied by the enactment in the

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[62] Catharine MacKinnon, "Law in the Everyday Life of Women" in *Women's Lives, Men's Laws* (Cambridge, MA: Harvard University Press, 2007). See also, in general, the classic book Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989).

[63] Millard, *supra* note 11 and Jean Carbonnier, *Le droit non civil de la famille* (Paris: Presses universitaires de France, 1983).

[64] In the thesis, you will encounter the word Quebec written in different ways. The English version of the Civil Code uses Québec in English, while generally one should write Quebec without an accent in English.

[65] John EC Brierley & Roderick A Macdonald, *Quebec Civil Law. An Introduction to Quebec Private Law*, John E.C Brierley & Roderick A. Macdonald, eds. (Toronto: Emond Montgomery Publications Limited, 1993) at 7 [Brierley & Macdonald, *Quebec Civil Law*]. See also, John EC Brierley, "Quebec's Civil Law Codification Viewed and Reviewed" (1968) 14:4 McGill Law J 521.

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> next year of the companion Code relating to practice and procedure in civil matters. The jurisdiction thus entered the federated union of Canada in 1867 with an ordered private law.[66]

The Code referred to in this abstract is the *Civil Code of Lower Canada*. A few words on the *Civil Code of Lower Canada* are relevant to situate the research project. The *Civil Code of Lower Canada* came into force on August 1, 1866[67] as a result of a process launched with the *Act to provide for the Codification of the Law of Lower Canada relative to Civil matters and Procedure.*[68] This act, assented on June 10th, 1857 provided for the appointment of three commissioners and two secretaries[69] and gave them the mandate to

> reduce into on Code to be called the *Civil Code of Lower Canada*, those provisions of the Laws of Lower Canada which relate to Civil Matters and are of a general and permanent character, whether they relate to Commercial Cases or to those of any other nature ; but they shall not include in the said Code, any of the Laws relating to the Seignorial or Feudal Tenure.[70]

They were also asked to follow the general plan of the French Codes[71] and to draft the Code in both 'French and English languages, and the two texts, (…), shall stand side by side".[72] It was in line with one of the primary justification to go forward with the codification: British origin inhabitants could not understand some parts of the law, while other parts, drafted only in English, were not accessible "in the mother tongue of those of French origin".[73] Almost two years later,[74] the Commissioners were appointed. On February 4th 1859 René-Édouard Caron, Charles Dewey Day and Augustin-Norbert Morin began the work on a process that would last seven years. Two secretaries, Joseph Ubalde Beaudry and Thomas Kennedy Ramsay, later to be replaced by Thomas McCord, helped them. After a long process during which one of the Commissioners

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[66] Brierley & Macdonald, *Quebec Civil Law*, *supra* note 63 at 6.

[67] Proclamation of May 26, 1866, Canada Gazette, 1824, at 1877.

[68] Statutes of the Province of Canada, 1857, chapter 43.

[69] S I, *Act to provide for the Codification of the Law of Lower Canada relative to Civil matters and Procedure.*

[70] S IV, *Act to provide for the Codification of the Law of Lower Canada relative to Civil matters and Procedure.*

[71] S VII, *Act to provide for the Codification of the Law of Lower Canada relative to Civil matters and Procedure.*

[72] S XV, *Act to provide for the Codification of the Law of Lower Canada relative to Civil matters and Procedure.*

[73] Preamble, *Act to provide for the Codification of the Law of Lower Canada relative to Civil matters and Procedure.*

[74] The delay is attributable to the refusal of L.H. Lafontaine to act as the president of the Commission, position he was offered by GE Cartier on November 28, 1857. See the helpful chronology made by J.E.C. Brierley: Brierley, "Codification", *supra* note 56 at 581.

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dies, the code came into force on August 1st, 1866. The *Civil Code of Lower Canada* reigned over what would be renamed the Province of Quebec for more than a century. Towards the end of its reign, dissatisfaction about its content was palpable. This dissatisfaction led to an important reform, more accurately to a recodification.

On February 10, 1955 *An Act respecting the revision of the Civil Code*[75] was sanctioned and came into force. The Bill was presented by Prime Minister Maurice Duplessis[76] and stated a general revision of the Civil Code was in order given the length it has been in force, the many changes made and the need to improve private law in the province.[77] This mandate was given to a single jurist, Thibaudeau Rinfret, former chief justice of the Supreme Court of Canada. This act was modified on March 18, 1960[78] essentially to add four codifiers to help poor Thibaudeau Rinfret and to specify the Lieutenant Governor would fix a deadline for a final draft of the new Civil Code.[79] Unfortunately, Thibaudeau Rinfret died in 1962. André Nadeau replaced him and founded the "Bureau de révision du Code civil".[80] André Nadeau was nominated to the Superior Court shortly after, in 1964. The Revision of the Code had a slow start and many challenges occurred during the early years. The feeling of urgency towards the revision of the Code was profound – it is fair to speculate the slow start enhanced this feeling. The task to accomplish was massive. As of 1965, Paul-André Crépeau became the president of the reform process and the Civil Code Revision Office (CCRO) was formed. The recodification finally took off. Paul-André Crépeau formed various expert committees to advise him on every section of the future Civil Code. One of them focused on the law of persons and family law. This Committee prepared what would be the first book of the new civil code to come into force: Book 2 'The Family'. The thesis focuses on the process that led to the adoption of this book and the evolution of this book in time, from 1955 until today.

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[75] SQ 1954-55 (3-4 ElizII), c 47.

[76] Maurice Duplessis was the Prime Minister of the Province of Quebec (1936-39 and 1944-1959). He founded l'Union Nationale, a conservative provincial party. He was conservative and religious and the period where he was in power is called *Grande Noirceur*.

[77] WHEREAS, *An Act respecting the revision of the Civil Code.*

[78] *An Act to Amend the Act respecting the revision of the Civil Code,* SQ 1956-60 (8-9 ElizII), c 97.

[79] See s 1, *An Act to Amend the Act respecting the revision of the Civil Code.*

[80] The Archives of the Civil Code Revision Office, *Timeline*, online: http://digital.library.mcgill.ca/ccro/timeline.php (last consulted on February 9, 2017).

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*Location in current scholarship* – While there is a lot of theory on specific issues in Quebec's family law,[81] there is less scholarship about the theory underpinning the discipline as a whole.[82] Subjects such as the function(s) of family law,[83] the nature of family law,[84] the critical theory of family law,[85] are less popular than they are in the common law. This is especially true under the fairly recent *Civil Code of Québec.* It created an ideological break both in structure and content from what was done before and what is done elsewhere. A lot of family law theory has been produced by and during the Civil Code Revision Office, but since then, less so. To provide an alternative reading, approach or theory for family law as a discipline, scholarship from outside Quebec has proven essential. Many voices inspire the proposed approach to the regulation of families. Four scholars have been particularly enlightening. First, John Eekelaar's approach in his beautiful book *Family Law and Personal Life* has been illuminating. The purpose of his book is "to reflect on values which should inform the system of governance in matters concerning what at this stage one can broadly call family living".[86] It is one of the many results of a brilliant long career in the United Kingdom and a strong commitment to the law in context movement. Second, Brenda Cossman and Bruce Ryder's theory of relationships of economic and emotional dependency between adults in federal law inspired the focus on relationships. It was published in 2000, before the redefinition of marriage in Canada[87] and the enactment of civil union in Quebec. Non-heterosexual couples were at the time left out of federal and provincial

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[81] For a relatively small locus, Quebec as a considerable number of family law experts. Here is a non exhaustive list in alphabetical order: Hélène Belleau (sociology of the family expert), Marie-France Bureau, Angela Campbell, Michelle Giroux, Dominique Goubau, Nicholas Kasirer, Louise Langevin, Carmen Lavallée, Robert Leckey, Brigitte Lefebvre, Albert Mayrand, Benoît Moore, Jean Pineau, Marie Pratte, Alain Roy, Anne Saris, Anne-Marie Savard, Michel Tétrault and more.

[82] There are of course exceptions: Mireille D Castelli, "La notion de famille et son impact en droit social" (1981) 22 C de D 5.

[83] Carl E Schneider, "The Channelling Function in Family Law" (1992) 20 Hofstra Law Rev 495; Alison Diduck, "What is Family Law For?" (2011) 64 Curr Leg Probl 287; Eekelaar, *Family Law, supra* note 23. See in French civil law, Carbonnier, *Flexible droit, supra* note 43.

[84] John Dewar, "The Normal Chaos of Family Law" (1998) 61:4 Mod Law Rev 467; John Dewar, "Family, Law and Theory" (1996) 16:4 Oxf J Leg Stud 725; Mark Henaghan, "The normal order of family law" (2008) 28:1 Oxf J Leg Stud 165.

[85] Freeman, "Towards", *supra* note 22; Parker & Drahos, "Closer", *supra* note 22; Alison Diduck, *Family law, gender and the state* (Oxford; Portland Or.: Hart, 2012).

[86] John Eekelaar, *Family Law and Personal Life* (Oxford: Oxford University Press, 2009) at 7 [Eekelaar, *Personal Life*].

[87] *Halpern et al v Attorney General of Canada et al*, [2003] O.J. No. 2268; s 2, *Civil Marriage Act*, SC 2005, c 33.

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mechanisms regulating the family. Two important concerns in the report are the redefinition of marriage and the creation of a registered domestic partnership scheme.[88] While these concerns were of chief interest in 2000, they are less so now. The theory underlying their proposition remains relevant, despite the proposition of a formal registering scheme, solution set-aside for the present purposes. Third, Martha Albertson Fineman's pledge to the study of dependency and to changing paradigms in family law has been influential.[89] In Quebec family law, Robert Leckey's different voice for family regulation in Quebec, Jean Pineau and Marie Pratte *souci* for history and context, and Alain Roy's proposition to reform family law have contributed to the reflections. Most importantly, the insatiable work of the CCRO's Committee on the Law of Persons and family piloted by Claire L'Heureux-Dubé has been a constant source of inspiration. However, the goal here is mostly to infuse civil law with different perspectives on similar issues, albeit in different contexts. On a different level, the project is building upon Justice Abella's hint in her dissenting opinion in *(Quebec) Attorney General v A*: "the history of modern family law demonstrates, fairness requires that we look at the content of the relationship's social package, not at how it is wrapped".[90]

*Methodologies* – Anchored in the past, written for the present, the thesis has the objective of being part of the future of the regulation of families – and generally relationships of economic and emotional interdependency – in Quebec. The methodology is mixed and it relies on critical theory (including feminism), legislative history, and in a way, comparative law. When necessary, some case law analysis is made, but the focus is more on the transformation to the law as found in the civil codes. Power structures – sexuality and gender – are essential to understand what family law was, what it is now, and what it ought to be. Feminist theory is central to the analysis. The subordination of women was salient in the Code in conjugal relationships, and is still – albeit in a pervasive way – omnipresent when it comes to the regulation of filial relationships.

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[88] Brenda Cossman & Bruce Ryder, *The Legal Regulation of Adult Personal Relationships : Evaluating Policy Objectives and Legal Options in Federal Legislation*, May 1, 2000, prepared for the Law Commission of Canada [Cossman & Ryder, *Adult Personal Relationships*]; Brenda Cossman & Bruce Ryder, "WHAT IS MARRIAGE-LIKE LIKE? THE IRRELEVANCE OF CONJUGALITY" (2001) 18 Can J Fam L 269 [Cossman & Ryder, "IRRELEVANCE OF CONJUGALITY"].

[89] Fineman, *Neutered Mother, supra* note 25 ; Charles B Sears, Law Library & Martha Albertson Fineman, "Progress and Progression in Family Law" (2016) 1; Fineman, "Keynote", *supra* note 25.

[90] *Quebec (Attorney General) v A*, [2013] 1 SCR 61, para 285.

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Hierarchies in conjugal models are perpetuated in the *Civil Code of Québec* and in the proposed reform. Dominant ideologies such as patriarchy and heteronormativity taint family regulation in the civil codes and it has to be emphasized, to be addressed.

Another way to challenge dominant conceptions is to engage with history. More precisely, for the present purpose, to engage with the legislative history of the modifications to the civil codes and the history of family law reform. Otherwise, "[w]e seem destined to perpetuate the old mistakes even if they are cast as 'reforms' ".[91] In a radically different context, Markus Dubber

> portrays legal history not as a subdiscipline of either history or law, but as a mode of *critical analysis of law*". Historical analysis of law, in this light, appears as one mode of critical analysis among others, including, notably, comparative analysis of law, along with economic analysis of law, or philosophical or sociological or ethical analysis of law. Historical analysis of law, in other words, is a mode of legal scholarship, not a subspecies of law (nor of history). It is a comprehensive view of law from a particular critical vantage point: a way of doing law, rather than of doing things with law. Historical analysis of law in this sense is less legal history than historical jurisprudence, less "law and history" than "law as history.[92]

In the thesis, 'history' has a narrow focus, but a critical aim. Indeed, the story is about the legislative modifications to the civil codes in the province of Quebec in family matters. It surveys successive fundamental reforms. More specifically, it is about modifications to the codes having an impact on the relationships contemplated by family law one- and the effects of these modifications from a theoretical standpoint.

Comparative law also flirts with critical analysis. Comparativists have written law is a "*mentalité*"[93] or a "*constellations d'idées sous-jacentes [aux] règles et textes*".[94] What *'constellations d'idées'* inform the regulation of family lives? Can these *constellations d'idées* travel from one jurisdiction to the next, being aware that they materialize in specific social, cultural and historical contexts? The thesis does not compare rules from one jurisdiction to rules

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[91] Fineman, *Neutered Mother, supra* note 27, at 6.

[92] Markus D Dubber, "New Historical Jurisprudence : Legal History as Critical Analysis of Law" (2015) 2:1 Crit Anal Law 1, 2.

[93] Pierre Legrand, "European Legal Systems are not Converging" (1996) 45:1 Int Comp Law Q 52 at 60–64.

[94] Catherine Valcke, "'Droit': réflexions sur une définition aux fins de comparaison" in Pierre Legrand, ed, *Comparer les droits, résolument* (Paris: Presses universitaires de France, 2009) 99 at 100–101.

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from another jurisdiction. In terms of legal rules, it actually focuses on Quebec law only, at different times. Is legal history a form of comparative law? Can the thesis be comparative at all if it is mostly about Quebec? Despite these primary barriers, the thesis is comparative. Comparative law methodology is applied to positive law's transformation and to law from an internal standpoint. To borrow Reimann's idea, "comparative law is a *method* of studying law and a stock of academic knowledge".[95] It says something about personal conceptions of law as something more than positive law, as something up for debate and for change. While it might not be obvious, the thesis has numerous elements of externality. It is written in a common law jurisdiction on purpose. The idea to be immersed in different *constellations d'idées* is important to the project, especially since one of the premises is that ideas developed outside Quebec do not inform Quebec's approach to family law enough. It has been written "no one should claim to be a comparatist without having gone through the painstaking effort of actual in-depth comparison (which includes long periods of exposure to different legal settings) […]".[96] Immersion may influence one's own perception of law. Change and comparison come both from the self and otherness, simultaneously.[97] The idea here is not to go compare with or differentiate from the 'other' but to find what the other tells us about the self, with the dangers it entails. The fourth chapter is probably the one where the comparative enterprise is easier to detect. The thesis generally explores how the family and its members are studied, analyzed, apprehended and understood in various legal jurisdictions, even traditions. Comparison is central "in the processes of shaping understandings".[98] By studying how family law theory deploys in other *constellations d'idées*, the idea is to seize "comparative analysis' potential for sharpening, deepening and expanding the lenses through which one perceives law".[99] Critical theory, legislative history and comparative law all invite skepticism when it comes to positive law, policy and law reform.

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[95] Mathias Reimann, "Comparative law and neighbouring disciplines" in Mauro Bussani & Ugo Mattei, eds, *Cambridge Companion to Comparative Law* (Cambridge: Cambridge University Pess, 2012) 13 at 14.

[96] Mauro Bussani & Ugo Mattei, "Introduction" in Mauro Bussani & Ugo Mattei, eds, *Cambridge Companion to Comparative Law* (Cambridge: Cambridge University Pess, 2012) 3 at 7.

[97] The ideas of the 'other' and the 'self' are also borrowed from Catherine Valcke, who explained it elegantly and persuasively in Catherine Valcke, "Comparative Law as Comparative Jurisprudence -- The Comparability of Legal Systems" (2004) 52:3 Am J Comp Law 713.

[98] Vivian Grosswald Curran, "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives" (1998) 46 Am J Comp Law 657 at 658.

[99] *Ibid*.

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## 1.3 Thesis Unfolded

The thesis is divided in three chapters arguing that relationships in family law have multiplied and should be at the core of the regulation of intimate life in Quebec civil law. The content of the relationships and their qualities matters more than formalities. Similarly, emphasis should be put on relationships and not characteristics associated with the individuals in the relationships. The body of the thesis is divided in three: the proliferation of conjugal relationships (chapter two); the multiplication of configurations for filial relationships (chapter three) and towards a theory of relationships of economic and emotional interdependency in the Civil Code (chapter four). Chapters two and three roughly follow the same structure. Chapter two is about conjugal relationships in the civil codes, their current regulation, legislative history, they underlying principles and proposed reform. It is divided in three parts. The first briefly explains the current regulation of conjugal relationships in the *Civil Code of Québec*. It reveals which relationships matter, how to form them, what are their effects and how to dissolve them. It heavily focuses on the law as expressed in the *Civil Code of Québec*, both in terms of form and content. It provides an introduction to family regulation in Quebec for non-civilian and does not pretend to offer an in-depth analysis. The second part surveys selected modifications done to the civil codes from 1955 until now affecting the regulation of intimate relationships, families and the family. It argues the modifications have allowed for possible relationships in law to multiply, even if they are still quite limited. Further, focusing on the passage from one code to the other, it postulates family law has a discipline has been altered and subsequent modifications have not been made to foster consistency, but to make political statements. The third part focuses on the 'what now' of conjugality. It presents the proposed reform of 2015, addresses its strengths and weaknesses, or proposes alternative suggestions and shifting paradigms. It also represents an occasion to question how elements such as status, intent, 'the family', formality and relationships have interacted in family law through subsequent reforms until today. Chapter three repeats the exercise but concentrate on filial relationships – i.e. parent-child relationships. The first part examines the current regulation of filial ties in the *Civil Code of Québec* and its hybrid nature, between the law of persons and the family. The second part surveys the development of filial relationships from 1955 until today, with an emphasis on their multiplication and their transformation in nature. The last part analyzes current reform proposal, and the underlying elements at play in the establishment of filiation. Building on the second and third chapters and

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on the multiplication of family relationships in the Code, the fourth chapter argues that relationships of a specific nature should be the heart of intimate regulation in Quebec and suggests a recoding of these relationships in the *Civil Code of Québec*. It also presents an alternative theory for the regulation of families in Quebec civil law, a theory where the content and nature of relationships matters more than their respect of formalities, their constitutive members or the respect of socio-historic contingencies.

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# Chapter 2

## 2 The Proliferation of Conjugal Relationships

Under the *Civil Code of Lower Canada*, the regulation of conjugal relationships revolved solely around marriage. The marriage needed to be religious, it was paramount and, for decades, it was the only legal institution creating family ties and producing legal effects. There was no other way to live conjugally in the Code. Marriage conferred rights and duties to the spouses. For example, husband and wife owed each other succor and assistance, the husband owed protection to his wife and was obliged "to supply his wife with all the necessities of life".[100] More, rules were specifically included in the Code to limit the rights of unmarried spouses. Article 768 CCLC is a notorious example: "Gifts inter vivos made in favour of the person with whom the donor has lived in concubinage, or of the incestuous or adulterine children of such donor, are limited to maintenance". In addition to being considered by the Code as strangers, they were also prevented from enjoying rights strangers could enjoy. The times have changed, religion has lost its grip on Quebecers and society has transformed. Marriage has now many meanings and it has been – to a certain extent – "dislodge[d] from its normatively superior status".[101] A new Code came into force, the *Civil Code of Québec*. The definition of marriage itself expanded.[102] The spectrum of conjugal relationships producing legal effects has widened: same-sex marriage, civil partnerships, and more. Society has transformed too. In 2015, 22 400 weddings were solemnized in Quebec compare to over 50 000 in 1970.[103] There is a significant decrease in the number of weddings, despite the growth of the population in general. Indeed, while Quebec's population in

[100] The quote is from art 176 CCLC (1964). For other duties see arts 173 and 174 CCLC.

[101] Katherine M Franke, "Longing for *Loving*" (2008) 76 Fordham L Rev 2685 previously cited in Laura T Kessler, "New Frontiers in Family Law: Introduction" (2009) 11:2 Utah L Rev 275 at 278.

[102] Since 2006, marriage in Canada is defined "for civil purposes, [a]s the lawful union of two persons to the exclusion of all others », s 2, *Civil Marriage Act*, SC 2005, c 33.

[103] Institut de la statistique du Québec, *Le bilan démographique du Québec. Édition 2016,* Gouvernement du Québec, December 2016 at 101.

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1971 was 6 137 305, in 2015 the population reached 8 263 600.[104] The marriage rates decreased from 105/1000 for women 30 years old or less in 1975 to 22/1000 in 2015.[105] This is necessarily accompanied by an increase in *de facto* conjugality rate. Indeed, according to Statistics Canada, "the prevalence of common-law unions in Quebec is one of the defining family pattern in this province".[106] Between 2001 and 2006 only, Quebec witnessed a 20.3% increase of *de facto* families.[107] "Common-law-couple families in Quebec represented 44.4% of the national total".[108] In the province in 2011, "31.5% of census families were common-law couples, higher than the average of the other provinces (12.1%)"[109]. Estimates for 2015 peaked at 36% of *de facto* couples in Quebec.[110] The family forms have drastically changed over the last decades and the *de facto* union is not a marginal phenomenon. Despite these important changes, when it comes to regulating conjugal ties, much of the Civil Code, and specifically its second book, continues to focus on *de jure* unions – namely marriage and civil union. Only formal conjugal relationships produce effects amongst spouses in the *Civil Code of Québec*.

These transformations have led to new realities in law and this part deals with paradigm shifts in the legal regulation of adult intimate relationships for the selected period, i.e. 1955-now. It includes the shifts from a unique conjugality to the multiplication of *conjugalities* and the transformation of how people enter in relationships. Should it have an effect on how law regulates conjugality? It is not so in Quebec private law at the moment. Most importantly, the chapter is about how conjugal relationships in the Code proliferated, despite the Code still

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[104] Institut de la statistique du Québec, *Le bilan démographique du Québec. Édition 2015,* Gouvernement du Québec, December 2015 at 18.

[105] *Ibid* at 106.

[106] 2006 Census: Family portrait: Continuity and change in Canadian families and households in 2006: Provinces and territories: http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-553/p24-eng.cfm (last consulted March 20, 2017).

[107] *Ibid.*

[108] *Ibid.*

[109] 2011 Census: Portrait of Families and Living Arrangements in Canada: http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm (last consulted March 20, 2017).

[110] Bruno Maltais for Radio-Canada, "Union libre ou mariage? La réponse en carte" February 12 2016: http://ici.radio-canada.ca/nouvelle/764927/canadiens-mariage-union-libre-difference-quebec (last consulted March 20, 2017).

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excluding some forms of conjugality. Not only have the relationships multiplied, the *nature* of conjugal relationships has changed. Such changes open the floor for questions about the relevance of regulating adult intimate relationships formally today, or at the very least, about the compulsion to conceive only *de jure* unions as the cornerstone of conjugality in the Code. The history of the regulation of conjugality and its effects leads to questions about the nature of these relationships and the ways in which they have been dealt with in the *Civil Code of Québec.* It questions moves in unstated elements of the regulation of conjugality. In addition to tracing the portrait of the evolution of relationships in law, it tries to identify what makes these relationships special? To borrow Fineman's words why are *de jure* relationships "so 'special' that the state is a necessary partner to [their] formation and dissolution"[111] in Quebec.

From a theoretical standpoint, questioning the nature of conjugal relationships raises numerous questions, such as the role of religion, sexuality, and patriarchy when it comes to rules in the Code. These elements are intertwined. All these systems of power are connected. From a primary religious institution, the conjugal bond has moved towards secularization and 'neutrality' in terms of sexual orientation. Thus, the multiplication of possibilities for conjugal ties is connected with, amongst other things, the multiplication of possibilities for sexuality: unmarried sexuality, same-sex sexuality, women's desires and more. The tale of the multiplication leads to a reflection about the nature of the conjugal ties and raises the eternal question: what is marriage? An institution, a contract, a status or, maybe, something else? Moreover, why marriage and not something else? Perhaps marriage it is just one of the many relationships law deals with because of its nature and content, not its form. A relationship, amongst many, needing a recoding.

What family law is tasked with today is dramatically different from what it was tasked with for generations. It is different from what it was tasked with under the *Civil Code of Lower Canada* starting in 1955. The study of the proliferation of conjugal relationships, their effects and how they are dealt with in the Code expose that even if the task has changed, the Code still relies on the same logic. Building on the current regulation, the history of regulation and the proposed reform, this part argues that relationships have proliferated and changed in nature even if the Code is reluctant to acknowledge it.

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[111] Fineman, *Neutered Mother, supra* note 25 at 24.

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There is something paradoxical to start with conjugal relationships, since it reinforces the idea these relationships come first and that other relationships flow from them. Putting marriage first is also what the structure of the Code does. Quebec scholars and most monographs[112] follow this structure. It is a structure premised on a particular image of the family,[113] where the couple – and ideally the married couple – makes the family. This vision has been critiqued for many reasons,[114] including because it is hetero-normative. Why follow the classical structure and start with conjugality again? It is not to reinforce the traditional idea that family law is built around the marriage and its effects. From a theoretical standpoint, the thesis rather stands at the opposite of the spectrum: family law, following its constant flux, should rather focus on identifying certain kind of relationships rooted in various types of interdependency, whether the relationships are horizontal (i.e. spouses), vertical (i.e. parent-child) or something else (like webs). Taking a step back from marriage or from the child-centric conception of the family would allow two principal changes: a comprehensive and egalitarian scheme for individuals and a more complex understanding of 'family' or relationships of interdependency.

This section is divided in three parts. The first part draws a picture of the regulation of conjugal relationships in Quebec law – and federal law – today. The second part explores the history of conjugal relationships and exposes how the relationships have proliferated over time in civil law. The last part explains the proposed reform for conjugal relationships in Quebec and keeps investigating why the Code prefers some conjugalities to others. It questions what makes conjugal relationships 'special' and suggests it is not their form or their place in the Code. Rather, it is their nature and they are misplaced in the Code. The nature of the relationships has changed and so does the reason why they matter. Yet, the *Civil Code of Québec* did not keep up with the transformations, and it may be because the changing nature of the relationships has not been taken seriously enough.

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[112] For example, Castelli & Goubau, *supra* note 19; Pineau & Pratte, *supra* note 12.

[113] Under the CCLC, in the structure of the Book 'Of Persons' concerned with family matters was title fifth – Of marriage, title sixth – Of separation from bed and board, title seventh – Of filiation, title eighth – Of paternal authority and more. With the family law reform and the new Code the structure changed, but marriage still preceded filiation.

[114] In the common law, see, for example, Fineman's critique of the marital family in Fineman, *Neutered Mother*, *supra* note 25. See also these special issues: (2010) 58:4 American Journal of Comparative Law 751 and the Symposium: New Frontiers in Family Law: (2009) Issue 2 Utah L J.

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## 2.1 The Law of Conjugal Relationships

Family law in Canada is a matter of both federal and provincial powers: the federal government has powers over marriage and divorce, and the provincial legislatures have powers over property, civil rights and the solemnization of marriage.[115] The constitutional question about the legislative powers is still a matter of debate. According to François Chevrette, the complexity of the division of powers results from an historical will of the Parliament of Canada to insure equal treatment, but most importantly to protect religious minorities in Quebec against restrictive provincial laws sanctioned under a Catholic government.[116] As Ian Bushnell puts it, "by placing the jurisdiction with the Dominion, it was also thought that its [referring to the divorce] procurement would be more difficult".[117] Anne-Marie Bilodeau reiterates his hypothesis: "[c]'est probablement à cause de la pratique religieuse catholique des habitants du Bas-Canada qu'on a assigné au Parlement fédéral et non aux provinces la compétence en matière de divorce".[118] Renée Joyal-Poupart describes the separation of powers as 'inusité' (singular or unusual) and due to the religious situation.[119] Sylvio Normand also documented this fear of the Parliament behind the division of powers:

> [a]insi en va-t-il du mariage et du divorce. Ces deux matières constituent d'éventuels sujets d'affrontement entre catholiques et protestants. Ces derniers craignent qu'une fois ces matières incluses dans le Code et reconnues comme relevant de la compétence des provinces dans la future fédération, les catholiques, majoritaires dans la province, interdisent le recours au divorce. La compétence sur ces matières sera donc confiée au Parlement fédéral.[120]

The fear of the federal Parliament turned out to be accurate. Divorces rate were extremely low in the late 19th and early 20th, even if it is difficult with the current data to classify it according to the religious faith of the spouses.[121] The division of powers is still debated, but the fear in which

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[115] See respectively sections 91(26), 92(13) and 92(12) *Constitution Act 1867,* 30 & 31 Victoria, c 3 (UK).

[116] François Chevrette, *Droit consitutionel* (Montréal: Presse de l'université de Montréal, 1982) at 656.

[117] S Ian Bushnell, "Family Law and the Constitution" (1978) 1 Can J Fam Law 202 at 212.

[118] Anne-Marie Bilodeau, "Quelques aspects de l'influence religieuse sur le droit de la personne et de la famille au Québec" (1984) 15 RGD 573, 586-87.

[119] Joyal-Poupart, *supra* note 19 at 4–7.

[120] Sylvio Normand, "Le Code civil et l'identité" in Lortie, *Du Code civil, supra* note 4 619 at 637.

[121] According to Herbert Marx, only four divorces occurred between 1841 and 1866. Assemblée nationale du Québec, Journals des débats, sixième session, 31e legislature, jeudi le 4 décembre 1980 vol 23 no 15 at 642-43.

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it originates is now *dépassée*. The Catholic Church hold has considerably lessened and divorce is now relatively easily accesible. Yet, this central question of the division of powers is a recurring issue when family law reforms take place in Quebec. In 1977, in a note to the foreword of the Draft Civil Code, Paul-André Crépeau, President of the Civil Code Revision Office stated:

> [w]e believed that the problems of the family are first and foremost human problems and that we should not let such an astonishing and artificial distribution of legislative powers – where the search for political compromise loomed larger than the requirements of legal coherence – prevent the formulation of a comprehensive reform of family law. It will be for the competent authorities to solve this problem, either by agreeing to a new distribution of legislative powers or by each of the two authorities enacting the Draft within the uncertain limits of its jurisdiction.[122]

Crépeau confirms his robust belief that the legislative powers about marriage and divorce should have belonged to the province in a later book he wrote about the story of the reform of the Civil Code.[123] Other scholars in the late 60's voiced the same concern.[124] This issue was raised again in 2002, when Quebec enacted the civil union[125] and in 2015 by the *Comité consultatif sur le droit de la famille*. The *Comité* "invite[d] Quebec's government to initiate negotiations with the federal government in order to retrieve all powers over marriage and divorce".[126] According to the *Comité*, "the overlapping rules applicable to spouses is anachronistic, the reasons motivating the founding fathers of the constitution to grant these powers to the federal legislature are

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Divorce rate were in general low in Canada. For example, there were only 558 divorces in Canada in 1921: Statistics Canada: http://www.statcan.gc.ca/pub/11-516-x/pdf/5500093-eng.pdf

[122] Civil Code Revision Office, *Report on The Québec Civil Code,* Volume I (Draft Civil Code) (Quebec: Éditeur officiel du Québec: 1978) at XXXVIII. Available here: http://digital.library.mcgill.ca/ccro/files/CCRO_Report_v1_Draft_Code.pdf

[123] Paul-André Crépeau, *La réforme du droit civil canadien. Une certaine conception de la conception de la recodification 1965-1977* (Montreal: Thémis, 2003) at 39-40.

[124] FJE Jordan, "The Federal Divorce Act (1968) and the Constitution" (1968) 14 McGill Law J 209 at 271; Edith Guilbert, "Mariage et divorce: Compétence bipartite préjudiciable" (1969) 10:1 C de D 43, 49; and more.

[125] Hugo Cyr, "La conjugalité dans tous ses états: la validité constitutionnelle de 'l'union civile' sous l'angle du partage des compétences" in Pierre-Claude Lafond & Brigitte Lefebvre, eds, *L'union civile. Nouveaux modèles de conjugalité…* (Cowansville: Éditions Yvon-Blais, 2003) 193 [Cyr, "La conjugalité"].

[126] Alain ROY (prés), COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales, Québec, Ministère de la Justice du Québec, 2015.* (Québec, 2015) at 125 [COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE].

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outdated".[127] While this might be desirable, one can wonder whether it is going to happen any time in the near future. With these tensions in mind, how does this division in powers materialize in family law and in the province of Quebec?

As per section 91(26) of the *Constitution Act*, the Parliament of Canada has the legislative authority over marriage and divorce. The Federal government has used its powers with parsimony over the years. In terms of legislation, few actions were taken before the *Divorce Act* of 1968. [128] A scholar identified only eight pieces of legislation passed by the Parliament of Canada during the first century of the Confederation, including, for example, acts such as *An Act concerning Marriage with a Deceased Wife's Sister, An Act to make lawful the marriage of a woman to her deceased husband's brother or such brother's son, The Divorce Act* (1925) and *The Divorce Jurisdiction Act* (1930).[129] Following the enactment in 1968 of what is generally called the first *Divorce Act*, the Parliament has used its powers to clarify a few elements of marriage and divorce in law. First, a new *Divorce Act* came into force in 1986. Under the *Divorce Act* (1985), the "breakdown of the marriage" was the sole ground for divorce, breaking with the principles of the former law where a fault was necessary to untie the spouses. Second, in 1990, the Canadian Parliament assented the *Act respecting the laws prohibiting marriage between related persons*.[130] The prohibited degrees obviously existed before that but were dealt with in canon law or provincial statutes.[131] Third, in 2001, the Federal legislature described the substantive law of marriage in the province of Quebec with *A First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law.*[132] This act clarified "[m]arriage requires the free and enlightened consent of two persons to be the spouse of each

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[127] *Ibid*.

[128] Guilbert, *supra* note 106 at 45; Pineau & Pratte, *supra* note 12 at 33–34.

[129] S Ian Bushnell, "Family Law and the Constitution" (1978) 1 Can J F L 202 at 212; Pineau & Pratte, *supra* note at 34, 312–314.

[130] SC 1990, c 46.

[131] *Despatie v Tremblay* (1921), 58 DLR 29, 47 BR 305. For a detailed analysis of the impediments to marriage, see H Albert Hubbard, "Marriage Prohibitions, Adoption and Private Acts of Parliament: The Need for Reform" (1983) 28:2 McGill Law J 177.

[132] SC 2001, c 4.

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other",[133] the minimum age for marriage is sixteen years old[134] and "[n]o person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null".[135] It will be exposed later the overlapping articles of the *Civil Code of Québec* may have triggered this intervention of the federal legislature. In French, one could say the codifiers *ont pris des largesses*! The act, as its long title tells, only targeted Quebec. In 2005 as a result of the various elements including calls for reforms, a few cases and a reference,[136] the Parliament of Canada enacted the *Civil Marriage Act*. This act opened marriage to same-sex couples by modifying the definition of marriage. In Canada, "[m]arriage, for civil purposes, is the lawful union of two persons to the exclusion of all others".[137] Finally, more recently, *Civil Marriage of Non-residents Act*[138] and *An Act to amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make consequential amendments to other Acts*[139] amended the *Civil Marriage Act.* The former "provide[d] that all marriages performed in Canada between non-residents, whether they are of the same sex or of the opposite sex, that would be valid in Canada if the spouses were domiciled in Canada are valid for the purposes of Canadian law even if one or both of the non-residents do not, at the time of the marriage, have the capacity to enter into it under the law of their respective state of domicile"[140] and "establishe[d] a new divorce process that allows a Canadian court to grant a divorce to non-resident spouses who reside in a state where a divorce cannot be granted to them because that state does not recognize the validity of their marriage".[141] The later clarified for the common law provinces and territories elements that were included in Quebec's law in 2001 with the *Federal Law—Civil Law Harmonization Act, No. 1*. Indeed, the *Act to amend the Immigration and*

[133] S 5 *Federal Law—Civil Law Harmonization Act, No. 1,* SC 2001, c 4.

[134] S 6 *Federal Law—Civil Law Harmonization Act, No. 1,* SC 2001, c 4.

[135] S 7 *Federal Law—Civil Law Harmonization Act, No. 1,* SC 2001, c 4.

[136] See *Reference re Same-Sex Marriage*, 2004 SCC 79, *Halpern v. Canada (Attorney general)*, 2003 CanLII 26403 (ON CA), *Catholic Civil Rights League v Hendricks*, 2004 CanLII 20538 (QC CA). On a different but related issue, see *Egan v Canada*, [1995] 2 SCR 513.

[137] S 2, Civil Marriage Act (SC 2005, c 33).

[138] SC 2013, c 30.

[139] SC 2015, c 29.

[140] See Summary, SC 2013, c 30.

[141] *Ibid.*

المنارة للاستشارات
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*Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make consequential amendments to other Acts* provided for a minimum age to contract marriage and "for the legal requirements for a free and enlightened consent to marriage".[142] Beyond these legislative actions, how does the power of the Federal Parliament over marriage and divorce materialize?

In theory, the Federal government is responsible for the substantive law of marriage — also referred to as the essential validity of marriage — and divorce. The substantive conditions of marriage (in French *conditions de fond*) are generally divided in categories, categories varying from one author to the next. Pineau divides them as to natural and sociological conditions,[143] while Castelli and Goubau write about physiological, psychological and sociological conditions.[144] Physiological conditions of marriage are less important than they used to be. Indeed, the difference of sex of the spouses was the principal physiological condition, a condition no longer relevant today. The psychological conditions encompass elements such as the consent of the spouses and the consent of the parents when required, and their correlative issues (error, threats, and more). The existence of a previous marriage and impediments to marriage (prohibited degrees) are examples of sociological conditions.[145] Age is sometimes included in physical conditions, other times in sociological conditions, but it definitely is a substantial condition of marriage. The substantive law of marriage is a matter of federal powers and so is the termination of the marriage bond. Divorce is a matter regulated by the federal parliament, but only the aspects related to the union itself, or the status and ancillary relief. However, the Federal government does not have power over the consequences of a divorce on property. As such, the breakdown of the marriage and corollary relief, such as spousal support orders, are dealt with in the *Divorce Act.* Sections of the *Divorce Act* targeting parents rather than spouses will be mentioned in the next chapter. What, then, is left to the provinces in terms of regulation of conjugal relationships in private law? In short, quite a lot.

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[142] See Summary, SC 2015, c 29.

[143] Pineau & Pratte, *supra* note 12 at 37 *ff*.

[144] Castelli & Goubau, *supra* note 19 at 24–53.

[145] S 5 *Federal Law—Civil Law Harmonization Act, No 1,* SC 2001, c 4. Also, bigamy and polygamy are criminal offences in Canada. The *Criminal Code* refers to these offences as 'Offences to Conjugal Rights'. See sections 290 to 295, *Criminal Code* ((RSC, 1985, c C-46).

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While the provinces do not have legislative powers over substantive conditions — or essential validity — of marriage and divorce, they nonetheless retain most of the regulation of conjugal relationships. Sections 92(12) and 92(13) of the *Constitution Acts* respectively give the provincial legislatures powers, over the solemnization or marriage, and property and civil rights in the province. As such, provinces have the power over what is called the formal requirements to marriage (in French *conditions de forme*). They also have powers over matters relating to property. Concretely, the provincial powers materialize into rules about the solemnization of marriage or the ceremonial requirements, proof of marriage or evidentiary requirements, nullity of marriage to the extent it is not about essential conditions (*conditions de fond*), effects of marriage between spouses during the relationships, rules about division of property, support and more. The Code regulates the content of the relationships of spouses between one another, and to a limited extent, some interactions with third parties. Family law in the Code, when it comes to conjugal unions, only includes couples meeting formal requirements. However, the couple is regulated through other statutes. Thus, conjugal relationships in Quebec caught in the middle of a complicated interplay between federal law and provincial law, in addition to private law, public law and social law. Indeed, when it comes to federal law, for example in the *Income Tax Act,*[146] the *Citizenship Act*[147] or the *Employment Insurance Act,*[148] the law applies or includes couples regardless of their fulfillments of formal requirements. Cohabitation or other qualities of relationships produce effects. The same phenomenon materializes in provincial law.[149] Yet, only formal relationships (or *de jure* relationships*)* are part of Book 2 'The Family', titles 1 and 1.I. Conflicting messages about who is a 'couple' in law are sent to Quebecers. In most interactions the citizens have with law, he or she is lead to believe his or her union is equivalent to marriage. While the symbolic charge of the Code is high, the Code addresses a limited number of issues. They are nonetheless fundamental as rules found in the Code regulate the interaction between the spouses themselves. Articles 365 to 521.19 CCQ contain the regulatory framework for *de jure*

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[146] RSC 1985, c 1 (5th Supp). See also CRA's form RC65 Marital Status Change.

[147] RSC 1985, c C-29. See section 5.

[148] SC 1996, c 23. See section 23.1(1).

[149] For a complete list of provincial statutes including couples on other basis than the fulfillment of formalities, see Conseil du Statut de la Femme, *Avis. Pour une véritable protection juridique des conjointes de fait,* Quebec, Conseil du Statut de la femme, May 2014 at 7-12.

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unions in the Code. In Quebec, the structure of the Code addressing conjugal relationships is as follow:

| **LIVRE 2 DE LA FAMILLE** | **BOOK 2 THE FAMILY** |
|---|---|
| Titre 1 – Du mariage | Title 1 – Marriage |
| Titre 1.1 – De l'union civile | Title 1.1 – Civil Union |

The *Civil Code of Québec* now knows only two kinds of unions for family law one- purposes: the marriage and the civil union. Like marriage, civil union is open to both heterosexual and non-heterosexual couples. The titles contain these chapters, chapter representing matters regulated by the Code:

| **Titre 1 – Du mariage** | **Title 1 – Marriage** |
|---|---|
| Chapitre I – Du mariage et de sa célébration | Chapter I – Marriage and solemnization of marriage |
| Chapitre II – De la preuve du mariage | Chapter II – Proof of marriage |
| Chapitre III – Des nullités de mariage | Chapter III – Nullity of marriage |
| Chapitre IV – Des effets du mariage | Chapter IV – Effects of marriage |
| Chapitre V – Des régimes matrimoniaux | Chapter V – Matrimonial regimes |
| Chapitre VI – De la séparation de corps | Chapter VI – Separation from bed and board |
| Chapitre VII – De la dissolution du mariage | Chapter VII – Dissolution of marriage |
| | |
| **Titre 1.1 – De l'union civile** | **Title 1.1 – Civil union** |
| Chapitre I – De la formation de l'union civile | Chapter I – Formation of civil union |
| Chapitre II – Des effets civils de l'union civile | Chapter II – Civil effects of civil union |
| Chapitre III – De la nullité de l'union civile | Chapter III – Nullity of civil union |
| Chapter IV – De la dissolution de l'union civile | Chapter IV – Dissolution of civil union |

One rapidly realizes only formal unions are part of the Code, or what the scholarship refers to as *de jure* unions in opposition to *de facto* unions. Yet according to numbers provided by the Chambre des notaires du Québec 37.8% of all couples in the province of Quebec are in a *de facto* union.[150] As such, almost half of the couples are left out of 'The Family' of the Code. What is regulated by the Code? The Civil code regulates the formation of *de jure* unions (2.1.1). It addresses the formal conditions of marriage (solemnization), their effects (2.1.2) and their dissolution (2.1.3).

[150] Chambre des notaires, *Tableau recapitulative 2011* based on Statistics Canada, 2011: http://uniondefait.ca/conjointsdefait-tableaucomparatif.php

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### 2.1.1 Formal Conditions

Formal conditions are generally divided in two categories[151]: the formal conditions prior to the *de jure* union and the formal conditions related to the solemnization of the formal union. The principal formal condition prior to marriage is the publication of the marriage. Marriage being a public contract[152], it needs to be, amongst other things, properly advertised. The requirements under the *Civil Code of Québec* for the publication of the marriage are found at articles 368 to 372 CCQ and in the *Rules respecting the solemnization of civil marriages and civil unions*.[153] The publication shall be made using a form found in the schedules of this regulation. It shall contain the name and domicile of each future spouse, their date and place of birth, and be confirmed by a witness.[154] Further, the publication "shall be effected by means of a notice posted up, for 20 days before the date fixed for the marriage, at the place where the marriage is to be solemnized".[155] The formal union then has to be solemnized within three months following the last day of the publication.[156] There are two exceptions to the publication requirements. The first one concerns civil union spouses that want to marry. No publication is necessary as per 368(2) CCQ given the publication already happened before their civil union. After all, the function of the publication -- allowing interested persons to oppose the solemnization of marriage -- was fulfilled at the time of the civil union and it does not appear relevant to do it twice. The second exception is found in article 370 CCQ: "[t]he officiant may, for a serious reason, grant a dispensation from publication". It is unclear what would constitute a 'serious reason'. For example, Castelli and Goubau suggest it could be helpful for people considered married by their families and friends while they are not.[157] Tétrault highlights two

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[151] While the Code does not draw such a distinction, a vast majority of scholars adheres to it. See, Pineau & Pratte, *supra* note 12 at 37 and *ff*; Castelli & Goubau, *supra* note 19 at 54 and *ff*; Michel Tétrault, *Droit de la famille. Le mariage, l'union civile et les conjoints de fait: Droit, obligations et conséquences de la rupture* (Cowansville: Éditions Yvon-Blais, 2010) at 38 and *ff* [Tétrault, *rupture*].

[152] See the wording of art 365 CCQ.

[153] CQLR c CCQ, r 3.

[154] Art 369 CCQ.

[155] Art 368 CCQ.

[156] Art 371 CCQ.

[157] Castelli & Goubau, *supra* note 19 at p 55. Case law does not help clarifying the concept, see *Houle v Directeur de l'État civil*, 2014 QCCS 658 (CanLII).

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other examples: serious illness with imminent death or moving abroad.[158] Documentation intended to the officiant highlights motives must be moral or humanitarian.[159] The publication of marriage or civil union[160] is the principal formality preceding the solemnization of the union. Scholars are rightly critical of this system of publication; it has important limits. Indeed, as Pineau highlights, the marriage could be celebrated away from the future spouses domicile, the publication would then be quite useless in the community.[161] The publication mechanisms are archaic to say the least. Modifications to this publicity system have been enacted in *An Act to amend various legislative provisions to better protect persons* in 2016.[162] The publication should, in a near future, be made on the website of the registrar of civil status. There was another formal condition prior to marriage, but is has been removed from the Code by the same *Act*. Before 2016, the officiant had to inform the future spouses "of the advisability of a premarital medical examination".[163]

Finally, the place where the marriage will be solemnized is relevant as it could have impacts on what laws apply to the union. As such, some scholars add the place where the marriage is solemnized as a formal conditions preceding marriage.[164] The place of solemnization is relevant as it has an important influence on the formal requirements and the effects of the marriage. As per article 3088(2) CCQ, the marriage "[w]ith respect to its formal validity, […] is governed by the law of the place of its solemnization or by the law of the State of domicile or of nationality of one of the spouses".[165] The place of solemnization can be important to identify the matrimonial regime of the spouses, as it is the last resort to identify the law that applies to the

[158] Tétrault, *supra* note 124 at 98.

[159] Guide du célébrant, Directeur de l'État civil du Québec, 2014: http://www.etatcivil.gouv.qc.ca/publications/F0-14-10%20Guide%20du%20celebrant.pdf

[160] Civil union is subject to the same rules, see art 521.3(2) CCQ.

[161] Pineau & Pratte, *supra* note 12 at 86.

[162] S 6, SQ 2016, c 12 states: "Publication shall be effected by means of a notice posted, for 20 days before the date fixed for the solemnization of the marriage, on the website of the registrar of civil status"

[163] Art 368(2) CCQ

[164] Benoît Moore, "Fascicule 14 – Formation du mariage", *Jurisclasseur Québec – Personnes et famille*, December 9, 2015.

[165] Art 3088(2) CCQ.

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spouses.[166] Theses conditions have all been imported to the civil union regime. However, when it comes to formal conditions during the solemnization of the marriage or civil union, there are small differences between the two institutions.

Formal requirements during the solemnization of *de jure* unions pertain to the officiant and the solemnization in itself. Article 366 CCQ specifies who is a competent officiant:

| | |
|---|---|
| Sont des célébrants compétents pour célébrer les mariages, les greffiers et greffiers-adjoints de la Cour supérieure désignés par le ministre de la Justice, les notaires habilités par la loi à recevoir des actes notariés ainsi que, sur le territoire défini dans son acte de désignation, toute autre personne désignée par le ministre de la Justice, notamment des maires, d'autres membres des conseils municipaux ou des conseils d'arrondissements et des fonctionnaires municipaux.<br><br>Le sont aussi les ministres du culte habilités à le faire par la société religieuse à laquelle ils appartiennent, pourvu qu'ils résident au Québec et que le ressort dans lequel ils exercent leur ministère soit situé en tout ou en partie au Québec, que l'existence, les rites et les cérémonies de leur confession aient un caractère permanent, qu'ils célèbrent les mariages dans des lieux conformes à ces rites ou aux règles prescrites par le ministre de la Justice et qu'ils soient autorisés par ce dernier.<br><br>Les ministres du culte qui, sans résider au Québec, y demeurent temporairement peuvent aussi être autorisés à y célébrer des mariages pour un temps qu'il appartient au ministre de la Justice de fixer.<br><br>Sont également compétentes pour célébrer les mariages sur le territoire défini dans une entente conclue entre le gouvernement et une communauté mohawk les personnes désignées par le ministre de la Justice et la communauté. | Every clerk or deputy clerk of the Superior Court designated by the Minister of Justice, every notary authorized by law to execute notarial acts and, within the territory defined in the instrument of designation, any other person designated by the Minister of Justice, including mayors, members of municipal or borough councils and municipal officers, is competent to solemnize marriage.<br><br>In addition, every minister of religion authorized to solemnize marriage by the religious society to which he belongs is competent to do so, provided that he is resident in Québec, that he carries on the whole or part of his ministry in Québec, that the existence, rites and ceremonies of his confession are of a permanent nature, that he solemnizes marriages in places which conform to those rites or to the rules prescribed by the Minister of Justice and that he is authorized by the latter.<br><br>Any minister of religion not resident but living temporarily in Québec may also be authorized to solemnize marriage in Québec for such time as the Minister of Justice determines.<br><br>In the territory defined in an agreement concluded between the Government and a Mohawk community, the persons designated by the Minister of Justice and the community are also competent to solemnize marriages. |

Article 366 has been interpreted broadly. Indeed, anybody can be an officiant – for a civil union or civil marriage obviously – as long as he or she submits a *Request for the Designation of an Officiant of a Marriage or Civil Union* (SJ-893A).[167] For religious marriages, ministers of religion are competent to solemnize marriage, as long as their religious society and the Minister

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[166] Art 3089(2) CCQ.

[167] See: http://www.justice.gouv.qc.ca/english/formulaires/mariage/celebrant-a.htm February 1 2016

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of Justice have authorized them. A religious marriage necessarily entails civil effects, but this basic principle has been challenged in court.[168] Before the solemnization, article 373 of the CCQ asserts that the "officiant ascertains the identity of the intended spouses, compliance with the conditions for the formation of the marriage and observance of formalities prescribed by law". The officiant verifies the spouses are free from any prior bond of marriage or civil union[169] and make extra verifications if the spouses are minor. The officiant can then proceed with the solemnization of the marriage or the civil union.

Marriage should be contracted in front of witnesses and openly.[170] As such, the solemnization of the marriage must be public. Depending of the kind of officiant (e.g. religious, clerk, friend of the family), the place where the union is solemnized will vary. For example, while a marriage in front of a clerk must take place in court,[171] one in front of a minister of religion must be solemnized in places conform to the rituals of the religion[172] and those solemnized by a friend can be solemnized "in any other place agreed upon by the intended spouses. That place shall be in keeping with the solemn nature of the ceremony and be laid out for that purpose".[173] Depending on the place where the marriage is solemnized, special requirements might have to be fulfilled.[174] Obviously, the spouses must be present to the ceremony.[175] The officiant then requests and receives their consents to marry,[176] after he or she

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[168] *Droit de la famille — 16244*, 2016 QCCS 410. See also Michel Morin & Alain Roy, "La célébration du mariage doit respecter les prescriptions du *Code civil du Québec* qu'elle revête ou non un caractère religieux", Opinion, available here: http://michelmorin.openum.ca/blogue/2016/04/05/la-celebration-du-mariage-doit-respecter-les-prescriptions-du-code-civil-du-quebec-quelle-revete-ou-non-un-caractere-religieux-6/celebration_mariage_et_regles_obligatoires_ccq_alain_roy_michel_morin_rev3/. See also http://www.lapresse.ca/actualites/201602/03/01-4947044-remise-en-cause-des-consequences-civiles-des-mariages-religieux.php?utm_categorieinterne=trafficdrivers&utm_contenuinterne=envoyer_cbp

[169] Note there is an exception for people in a civil union deciding to marry: art 373 CCQ.

[170] Art 365 CCQ.

[171] Art 365(1) CCQ. Some exceptions are listed in sections 4 and 5 of the *Rules respecting the solemnization of civil marriages and civil unions*, (Civil Code of Québec (1991, c 64, s 376; 2002, c 6, s 25)).

[172] Art 365(2) CCQ.

[173] S 3, *Rules respecting the solemnization of civil marriages and civil unions*, (Civil Code of Québec (1991, c 64, s 376; 2002, c 6, s 25)).

[174] See *Rules respecting the solemnization of civil marriages and civil unions*, (Civil Code of Québec (1991, c 64, s 376; 2002, c 6, s 25)).

[175] Pineau, *supra* note 12 at 93; Castelli & Goubau, *supra* note 19 at 59.

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read to the spouses their obligations. Indeed, according to article 374(2) of the *Civil Code of Québec* the officiant reads articles of the Code during the ceremony. Here are the articles that have to be read to the spouses and the witnesses:

| **392.** Les époux ont, en mariage, les mêmes droits et les mêmes obligations.<br><br>Ils se doivent mutuellement respect, fidélité, secours et assistance.<br><br>Ils sont tenus de faire vie commune. | **392.** The spouses have the same rights and obligations in marriage.<br><br>They owe each other respect, fidelity, succour and assistance.<br><br>They are bound to live together. |
|---|---|
| **393.** Chacun des époux conserve, en mariage, son nom; il exerce ses droits civils sous ce nom. | **393.** In marriage, both spouses retain their respective names, and exercise their respective civil rights under those names. |
| **394.** Ensemble, les époux assurent la direction morale et matérielle de la famille, exercent l'autorité parentale et assument les tâches qui en découlent. | **394.** The spouses together take in hand the moral and material direction of the family, exercise parental authority and assume the tasks resulting therefrom. |
| **395.** Les époux choisissent de concert la résidence familiale.<br><br>En l'absence de choix exprès, la résidence familiale est présumée être celle où les membres de la famille habitent lorsqu'ils exercent leurs principales activités. | **395.** The spouses choose the family residence together.<br><br>In the absence of an express choice, the family residence is presumed to be the residence where the members of the family live while carrying on their principal activities. |
| **396.** Les époux contribuent aux charges du mariage à proportion de leurs facultés respectives.<br><br>Chaque époux peut s'acquitter de sa contribution par son activité au foyer. | **396.** The spouses contribute towards the expenses of the marriage in proportion to their respective means.<br><br>The spouses may make their respective contributions by their activities within the home. |

Interestingly enough, no mention of the matrimonial regime or the family patrimony is made to the spouses. Only the general duties are contemplated and not a word is said on the financial and mandatory effects of the union. Following these procedures, the officiant declares the spouses married and fulfills his obligations towards the registrar of civil status. The spouses are then married.

Some differences exist for civil unions. Quebec's legislature included civil unions in the Code through *An Act instituting civil unions and establishing new rules of filiation*[177] and legislated on the substance of the union. Whether this was constitutional or not has been

[176] Art 374(1) CCQ.

[177] SQ 2002, c 6.

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debated,[178] given the powers of the federal legislature over marriage and divorce. Civil union was introduced in the Code in 2002, discussed in further detail below. A civil union may take place between two persons of the same or opposite sex, of at least 18 years old.[179] Spouses that were previously married or united by a bond of civil union, except if dissolution or divorce happened or if they marry to one another, cannot contract it. The formality requirements are the same, with necessary modifications.[180] A similar statement could be done for the effects of marriage and civil union. *De jure* unions largely entail the same legal effects, and this is what the next subsection explores.

### 2.1.2 Effects

Marriage has various effects. First, most of the mandatory effects are now found under the fourth chapter of the first title of the second book of the Code (articles 391 and *ff*). Chapter four is divided in four sections:

| **Chapitre IV - Des effets du mariage** | **Chapter IV - Effects of marriage** |
|---|---|
| Section I- Des droits et des devoirs des époux<br>Section II- De la residence familiale<br>Section III- Du patrimoine familial<br>§. De la constitution du patrimoine familial<br>§. Du partage du patrimoine familial<br>Section IV- De la prestation compensatoire | Section I- Rights and duties of spouses<br>Section II- The family residence<br>Section III- Family patrimony<br>§. *Establishment of patrimony*<br>§. *Partition of patrimony*<br>Section IV- Compensatory allowance |

Marriage and civil union have the same effects.[181] Effects of marriage materialize as rights, obligations and duties for the spouses. These rights, obligations and duties are the same for both spouses. Indeed, article 392 CCQ states: "the spouses have the same rights and obligations in marriage". This is also true of civil union spouses as per article 521.6(1) CCQ. Second, the fifth chapter is also about effects of marriage, but a distinction is made between this chapter and the fourth given the fact that some effects found in chapter five are not mandatory. Indeed, when it comes to the effects found in chapter four "[i]n no case may spouses derogate from the

[178] Cyr, "La conjugalité", *supra* note 107 at 193; Christopher B Gray, "'The Essence of Marriage': The Very Idea; Reflection on H. Cyr" (2004) 34:3 RGD 493.

[179] Art 521.1 CCQ.

[180] 521.3(2) CCQ; Pineau & Pratte, *supra* note 12 at 521.

[181] See article 521.5 CCQ and more generally Book 2, Title 1.1, Chapter II.

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provisions of this chapter, whatever their matrimonial regime".[182] For *de jure* unions, the mandatory effects include both pecuniary and non-pecuniary effects. Effects can be either patrimonial or extra-patrimonial. A patrimonial right is defined as a "[r]ight that is susceptible of pecuniary evaluation and has been appropriated so as to be part of a patrimony".[183] An extra-patrimonial right is a "[r]ight that, because of its close association with the person who enjoys it, is not part of his or her patrimony".[184] Defining "patrimony" is difficult and controversial. It lies at the core of the civilian system and is closely related to the notion of legal personality. For the present purposes, patrimony can be understood as the "[u]niversality of property and debts of which a person is titulary or that is appropriated to a purpose recognized by law".[185]

Extra-patrimonial effects of marriage are all mandatory: "in no case may the spouses derogate".[186] They are mostly located in the first section of the fourth chapter of the title of marriage. The chapter is entitled "effects of marriage" and the section "rights and duties of spouses". Extra-patrimonial effects of *de jure* unions technically are: rights, duties, obligations that are not part of a person's patrimony. They are often seen as belonging to morality and scholars tend to assimilate extra-patrimonial effects with moral effects.[187] This assimilation is problematic in many ways – one being the meaning of morality, another being the role of law – and extra-patrimoniality should not be equated with morality without a reflection as to the nature of rights and the impact of morality in law. While it will become obvious they share characteristics of moral duties, they will not be analyzed as such.

The first extra-patrimonial duty[188] spouses owe each other is respect.[189] No definition of respect is found in the Code. Scholars generally agree anything affecting the dignity of one

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[182] Art 391 CCQ. The same is reiterated for civil union spouses at article 521.6(5) CCQ.

[183] Allard, *Dictionary: Property, supra* note 30 *sv* "patrimonial right".

[184] *Ibid sv* "extra-patrimonial right".

[185] Allard, *Dictionary: Property, supra* note 30 *sv* "patrimony".

[186] Art 391 CCQ.

[187] Castelli & Goubau, *supra* note 19 at 95; Anne-Marie Savard, "Fascicule 15 – Droits et devoirs personnels des époux en mariage", *Jurisclasseur Québec – Personnes et famille*, September 15, 2013 at 3.

[188] There is no consistent use of technical terms in family law scholarship when it comes to whether something is a right, an obligation or a duty. It is problematic, but beyond the present purpose.

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spouse, such as cruelty, would amount to disrespect. The second duty is the duty of fidelity. Its content is debatable,[190] and so are its functions in the 21st century. For a few eminent scholars in Quebec, it represents the very essence of marriage.[191] If marriage was about procreation and certainty in descent, this could be said… but even then, stating that fidelity is the essence of marriage betrays a patriarchal understanding of conjugal relationships where the paternal line is paramount. It will come as no surprise the duty of fidelity is the reciprocal element of adultery. The concept of adultery has been defined and studied critically in both common law and civil law.[192] It has also been a motive to scrutinize consenting adults so-called deviant sexuality.[193] Spouses also have a third duty, the duty of assistance. According to Tétrault, "[l]'assistance consiste en le soutien moral, les soins personnels et l'aide occasionnelle dans le travail de son conjoint. En d'autres mots, cela signifie appuyer l'autre époux".[194] Assistance amounts to being supportive in a non-pecuniary way: moral support, help when needed, care when needed, etc. The fourth duty is what civil law used to refer to as 'living together' and now 'share a community of life' or, in French and even in English, to *faire vie commune*. As Nicholas Kasirer beautifully writes, this rather than the obligation of fidelity represents the essence of *de jure* unions in the 21st century.[195] Living together – now sharing a community of life – must not be interpreted literally. Indeed, living together does not mean to cohabit, but rather is a metaphor expressing the shared life of a couple: "[l]a vie commune est une image législative… une image qui évoque tout ce qui unit le couple en droit et dont la cohabitation n'est qu'une banale manifestation".[196] Despite this broad understanding, the obligation of *faire vie commune* is also

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[189] Art 392(2) CCQ.

[190] A famous example of this statement is found in a case from Prince Edward Island's Supreme Court: *Morrison v Morrison,* [1972] PEIJ No 48 [*Morrison*].

[191] Pineau & Pratte, *supra* note 12 at 130; Castelli & Goubau, *supra* note 19 at 98.

[192] Brenda Cossman, "The New Politics of Adultery" (2006) 15 Columbia Journal of Gender and Law 274.

[193] *Morrison, supra* note 190.

[194] Tétrault, *rupture, supra* note 124 at 135.

[195] Nicholas Kasirer, "What is vie commune? Qu'est-ce que living together?" in *Mélanges Paul-André Crépeau* (Cowansville: Éditions Yvon-Blais, 1997) 487 at 494.

[196] *Ibid* at 495.

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related to another rather technical extra-patrimonial obligation of spouses. The fifth obligation is related to the choice of the family residence. Article 395 CCQ states that "the spouses choose the family residence together". The family residence is, in a way, protected by the mandatory regime imposed on *de jure* spouses, but only the choice can be seen as extra-patrimonial, the legal consequences of this choice and the protection attaching to the family residence are rather patrimonial and will be analyzed later. Note the duties contained in the Civil Code mirrors the matrimonial faults as found under the *Divorce Act*,[197] complicating the interplay between provincial and federal powers. Not all effects of *de jure* unions can be categorized as either extra-patrimonial or patrimonial. Some effects of marriage and civil unions can be conceived as hybrid, i.e. sharing elements both patrimonial and extra-patrimonial in character (in French: *mixtes*).

The sixth, seventh, eight and ninth effects of *de jure* unions could be qualified as hybrid as they bear both extra-patrimonial and patrimonial characteristics. Those effects are: duty to succour,[198] the direction of the family,[199] the contribution to the expenses of the household[200] and the representation of the other spouse.[201] The duty of succour is the material or pecuniary counterpart of the duty to assist (assistance). It is an "obligation pécunière qui consiste à fournir au conjoint les ressources nécessaires à la vie".[202] It targets the basics necessities. Some are of the views that this duty is more extensive,[203] hence its qualification as hybrid here. Whether this duty could be seen only as patrimonial is up for debate. Historically, while the duty of succour of the husband was patrimonial, the one of the wife could be seen as closer to an extrapatrimonial duty given the gendered division of labour.[204] The seventh effect is the direction of the family

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[197] For example, the duty of fidelity is the reciprocal of adultery and the duty to respect is the reciprocal of cruelty.

[198] Art 392(2) CCQ.

[199] Art 394 CCQ.

[200] Art 396 CCQ.

[201] Art 398 CCQ.

[202] Pineau & Pratte, *supra* note 12 at 132.

[203] France Allard *et al, Private Law Dictionary of the Family,* 2nd edition (Cowansville: Yvon-Blais, 2016) *sv* "duty of succour" [Allard, *Dictionary: Family*].

[204] For explanations of the different components of the husband and wife duties, see Azard & Bisson, *supra* note 19 at 126–28.

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and appears easier to qualify as hybrid given its two components. The direction of the family is divided in moral and material direction of the family, the former being rather extra-patrimonial and the later patrimonial. Whether this is a freestanding effect or if it actually represents a category of effects including, for example, the choice of the residence, the contribution to the expenses and the representation of the spouses is discussed in Quebec scholarship.[205] This effect has impacts on the family as a whole, including the children, since it includes notions such as parental authority. There is a component concerned with decision-making at large, another concern with asset management. The eighth effect of the marriage, or do not forget, civil union, is the contribution to the expenses of the marriage[206] or of the civil union[207], also referred to as expenses of the household. The contribution to the expenses of the marriage or of the civil union is in between extra-patrimonial and patrimonial effects. The first paragraph of article 396 CCQ refers to the patrimonial dimension and dictates that, "spouses contribute towards the expenses of the marriage in proportion to their respective means". The second paragraph suggests an extra-patrimonial dimension to the expenses of the household, stating "spouses may make their respective contributions by their activities within the home".

Finally, before turning to the patrimonial effects of *de jure* unions, there is a representation mandate found in article 398(1) CCQ, whereby "[e]ither spouse may give the other a mandate in order to be represented in acts relating to the moral and material direction of the family". This representation mandate "is presumed if one spouse is unable to express his or her will for any reason or if he or she is unable to do so in due time".[208] It is related to the contribution to the expenses of the household. A spouse can be authorized by the court to "enter alone into any act for which the consent of the other would be required, provided such consent is unobtainable for any reason, or its refusal is not justified by the interest of the family".[209] When such an authorization is granted, it is "special and for a specified time".[210] It can obviously be

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[205] Pineau & Pratte, *supra* note 12 at 138; Tétrault, *rupture, supra* note 124 at 142 and *ff*.

[206] Art 396 CCQ.

[207] Art 521.6 CCQ.

[208] Art 398(2) CCQ.

[209] Art 399 CCQ.

[210] Art 399(2) CCQ.

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modified or revoked.[211] As it is explained in article 398(1) CCQ, the mandate relates to acts that can be either patrimonial or extrapatrimonial, pecuniary or non-pecuniary, material or moral. This covers most of the extrapatrimonial and hybrids mandatory effects of marriage, effects contained in the first section "rights and duties of spouses" of the chapter 4 "the effects of marriage".

While all these extra-patrimonial or hybrid rights, duties or obligations are clearly stated in the Code, the effects of their infringement in private law are unclear. In general, the Code states that if the "spouses disagree as to the exercise of their rights and the performance of their duties, they or either of them may apply to the court, which will decide in the interest of the family after fostering the conciliation of the parties".[212] Some infringements can lead to the dissolution of the union. For example, disrespect (cruelty) and infidelity (adultery) could be grounds for divorce under the *Divorce Act*[213] or for separation from bed and board under the Civil Code.[214] They likely do not extend to civil union. Generally speaking, the Quebec Court of Appeal decided infringement of such duties or obligations cannot lead to damages.[215] As such, it appears these duties serve a double function: establishing a standard of behaviour and allowing for the dissolution of the union. The latter is now less relevant given the availability of no-fault divorce and the mostly antiquated nature of the separation from bed and board.[216] *De jure* unions also produce important patrimonial or pecuniary, effects.

For the present purposes, only an overview of five principal patrimonial effects is necessary. These effects are once again mandatory and part of the fourth chapter ("effects of marriage") of the first title (marriage) of the book on The Family. They also extend, like the

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[211] Art 399(3) CCQ.

[212] Art 400 CCQ.

[213] S. 8(2)(b), *Divorce Act.*

[214] Art 498 CCQ.

[215] *Racine v Harvey,* 2005 QCCA 879.

[216] Despite being described as antiquated in nature, the separation from bed and board is still used in Quebec civil law. Strangely, it is not used for personal or religious motives, but rather for economical, conflict of laws, jurisdictional or procedural reasons. A practitioner told me it is not rare to see spouses opting for separation from bed and board reconcile. For recent cases, see: *Droit de la famille — 162060*, 2016 QCCS 3942 and *Droit de la famille — 161224*, 2016 QCCS 2397.

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others, to civil union. The idea is not to make in depth analysis, rather it is to inform the reader as to the basic pecuniary consequences of marriage or civil union in the province of Quebec. These effects do not apply to *de facto* unions. But keep in mind everything listed is mandatory, married spouses do not have the choice to opt in or out of the effects. These effects hence have an impact on the reflections surrounding the qualification of marriage, civil union and *de facto* union. Are these relationships contractual or institutional? Is a contract a contract when the parties have no say as to how they will arrange the modalities of their relationships? Why do some relationships modify civil status and not others? Is the nature of *de jure* unions so different from other relationships they are worthy of 'special' legal protection? Before turning to these fundamental questions, it is necessary to analyze and understand the patrimonial effects of *de jure* unions.

The five principal patrimonial effects of *de jure* unions are: the protection of the family residence, the constitution of a family patrimony, the right to claim a compensatory allowance, the right to claim spousal support and a default matrimonial regime. It is paradoxical that these are seen as effects of *de jure* unions as they mostly materialized at the breakdown of the marriage or at the dissolution of the civil union. Indeed, it is when the family collapses that the patrimonial effects occur for the most part. Are they effects of the marriage or civil union, or of their failure? In the discussion that follows, the regime as it applies to marriage will be described, but one should keep in mind these effects apply to both marriage and civil union. The effects are explained following their place in the Code and not their importance.

The first patrimonial effect concerns the family residence and is found in the second section of the fourth chapter of the title on marriage, section entitled "The Family Residence". The relevant rules are in articles 401 to 413 of the Civil Code. Rules about the protection of the family residence apply to civil unions given article 521.6 CCQ. Most are independent of the presence of children; they are an effect of *de jure* unions. A few rules however revolve around children. Indeed, some protections exist for custodian parents in *de jure* unions. A distinction must be drawn between the family residence in itself and the value of the family residence. The rules with regards to the former are in this section of the Code while the latter is part of the family patrimony and is dealt with in the third section of the fourth chapter. This paragraph focuses on the family residence, not its value. Protection to the family residence produces effects

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during and after the *de jure* unions (be it by divorce, dissolution, death of a spouse or nullity). They are described as "exorbitant property/ownership rules".[217] The rules protect the residence and its use (be it owned or leased), and the content of the residence (furniture for example). The family residence must meet certain characteristics to be qualified as such. It will generally be the one chosen by the spouses. The determination of the family residence depends on the intent of the parties.[218] As explained previously, it is an extrapatrimonial effect of *de jure* unions to elect which house will be the family residence.[219] If no choice is made, the second paragraph of article 395 CCQ explains "the family residence is presumed to be the residence where the members of the family live while carrying on their principal activities". The residence must be the principal residence, where the activities of the family take place. Only one residence can meet the requirements, and secondary residences are not included. A declaration is also possible.[220] Once the family residence is identified, protections apply. There are two kinds of protection: acts a spouse cannot make without the consent of the other spouse and peculiar rights on the family residence or its content that can be granted by a court.[221] The regime is rather technical and seeks to protect the materiality of family living. Family living can take place in a rented apartment, a multiplex or a house owned by the parties or one of them and the Code has specific provisions for all these situations. Roughly speaking articles 401 and 402 CCQ provides for what a spouse can or cannot do with regards to certain movable property in the family residence (alienate (sell), hypothecate (more or less the granting of a personal property security), remove). Article 403 CCQ prevents a spouse from subletting or terminating the lease of the family residence if the family lives in a rented place. Articles 404 CCQ concerns immovables with less than five dwellings, while article 405 CCQ is about those with five or more. The protection of dismembered rights is dealt with at article 406 CCQ. For example, if a person has the right to use the house, but is not the owner, protections apply regardless. The form of the right does not matter; it is all about the function of protecting the material life of the family. Articles 409 to 413

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[217] Dominique Goubau, "Fascicule  16 – Mesures de protection de la résidence familiale", *Jurisclasseur Québec – Personnes et famille*, August 11, 2015 at no 1 ["Goubau, "Fascicule 16"].

[218] *Ibid* at no 4.

[219] Art 395 CCQ.

[220] Art 407 CCQ.

[221] Goubau, "Fascicule 16", *supra* note 217 at no 8.

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CCQ put forward the protection regime taking place at the end of *de jure* unions. While minimal – for example, the temporary right to use the residence for the parent with custody only lasts during the proceedings for divorce, dissolution or separation from bed and board[222] – the protections seek to smoothen the transitional period between the unified family and its breakdown. These protections apply to *de jure* couples with at least a child – probably a common child.[223] As such, differences are made between *de jure* and *de facto* spouses, but also between *de jure* spouses with or without children. Why? The best interest of the child has been invoked and the root in the protection in custody orders rather than in the effects of marriage.[224] All in all, these protections are limited and the second patrimonial effect of *de jure* unions has much wider effects; it also represents a bone of contention in Quebec civil law.

The second mandatory patrimonial effect is the creation and partition of a 'family patrimony'. The provisions about the family patrimony are located in the third section ("Family Patrimony") of the fourth chapter of the title on the marriage, at articles 414 to 426 CCQ. The family patrimony applies to civil unions given article 521.6 CCQ. No one can opt-out of the family patrimony, the rules are of public order and the spouses cannot negotiate this part of their marriage contract. The nomenclature is questionable: it is not familial and it is not a patrimony.[225] Indeed, it attaches only to certain families, and it materializes when the said families dislocate (death or dissolution). It is not a patrimony in the proper sense either. Technically, despite how it looks, the family is not a legal entity with a patrimony. For the present purposes, the family patrimony should be understood as a legal entity or even a claim "consisting of certain property of the spouses regardless of which of them holds a right is ownership in that property".[226] It is not about the property of the family through generations. It is a unique inconsistent device aimed at equalizing assets at the breakdown of the marriage. While

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[222] Élise Charpentier et al, *Code civil du Québec. Annotations - Commentaires* (Cowansville: Éditions Yvon-Blais, 2016) at 260–262 (article 410 CCQ) [Charpentier et al, *Annotations*].

[223] According to Charpentier et al, *ibid* some judges found ways to have the protection apply for *de facto* spouses, citing *Droit de la famille – 081740,* 2008 QCCS 3204: *Ibid* at 261–262. While some case law on the matter can be found, it is not a general principle.

[224] For detailed explanations and illustrations, see *Droit de la famille — 3751*, [2000] RDF 745 at paras 10-26.

[225] Ernest Caparros, "Le patrimoine familial: une qualification difficile" (1994) 25 RGD 251 at 254 [Caparros, "Le patrimoine familial"]. See also Burman & Pineau, *supra* note 36.

[226] Art 414 CCQ.

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it claims it is about partition, there is no partition on the legal sense. It is composed, as per article 415 CCQ, of the following property:

> the **residences of the family** or the rights which confer use of them, **the movable property with which they are furnished or decorated and which serves for the use of the household**, the motor **vehicles used for family travel** and the **benefits accrued during the marriage under a retirement plan**. The payment of contributions into a pension plan entails an accrual of benefits under the pension plan; so does the accumulation of service recognized for the purposes of a pension plan.
>
> This patrimony also includes the **registered earnings, during the marriage, of each spouse pursuant to the Act respecting the Québec Pension Plan** (chapter R-9) or to similar plans.
>
> […]
>
> For the purposes of the rules on family patrimony, a retirement plan is any of the following:
>
> — a plan governed by the Supplemental Pension Plans Act (chapter R-15.1) or by the Voluntary Retirement Savings Plans Act (chapter R-17.0.1) or that would be governed by one of those Acts if one of them applied where the spouse works;
>
> — a retirement plan governed by a similar Act of a legislative jurisdiction other than the Parliament of Québec;
>
> — a plan established by an Act of the Parliament of Québec or of another legislative jurisdiction;
>
> — a retirement-savings plan;
>
> — any other retirement-savings instrument, including an annuity contract, into which sums from any of such plans have been transferred.[227]

Are excluded of the family patrimony "[t]he earnings contemplated in the second paragraph and accrued benefits under a retirement plan governed or established by an Act which grants a right to death benefits to the surviving spouse where the marriage is dissolved as a result of death" and the "[p]roperty devolved to one of the spouses by succession or gift before or during the marriage".[228] As such, as a rule of thumb, the family patrimony includes houses and movables of the family, cars (used for and by the family), retirement plans and provincial pensions plan. Needless to say, for most couples, the family patrimony represents the totality of their assets and debts. It materializes only at the end of the *de jure* union. Indeed, the family patrimony is about

[227] My emphasis.

[228] Art 415 CCQ.

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the net value of the selected assets divided between spouses, following various rules, at the breakdown of *de jure* unions. The calculation of the patrimony can be complex and the assets need to be properly qualified and quantified. While renunciation is not possible by marriage contract or during the union,[229] renunciation is possible at the partition.[230] It "shall be entered in the register of personal and movable real rights".[231] It can be made either by a judicial declaration or a notarial act.[232] The partition of the patrimony operates through specific rules found in articles 416 to 426 CCQ and the clock start with the solemnization of the marriage. As such, assets hold prior to the union are not included in the patrimony. Other exclusions include donation or inheritance. The family patrimony is controversial from many standpoints. Citizens, jurists and the public more generally have strong views about the family patrimony; it nonetheless remains one of the most important patrimonial effects of *de jure* union and is of public order.

The third mandatory effect is found in the fourth section ("Compensatory Allowance") of the fourth chapter and is about the right to claim a compensatory allowance. Articles about the compensatory allowance are articles 427 to 430 of the Civil Code. It applies to civil unions given article 521.6 CCQ. The right to claim a compensatory allowance materializes only at the end of the union. Article 427 CCQ explains

> The court, in declaring separation from bed and board, divorce or nullity of marriage, may order either spouse to pay to the other, as compensation for the latter's contribution, in property or services, to the enrichment of the patrimony of the former, an allowance payable in cash or by instalments, taking into account, in particular, the advantages of the matrimonial regime and of the marriage contract. The same rule applies in case of death; in such a case, the advantages of the succession to the surviving spouse are also taken into account.
>
> Where the right to the compensatory allowance is founded on the regular cooperation of the spouse in an enterprise, whether the enterprise deals in property or in services and whether or not it is a commercial enterprise, it may be applied for from the time the cooperation ends, if this results from the alienation, dissolution or voluntary or forced liquidation of the enterprise.

[229] Art 423(1) CCQ.

[230] Art 423(2) CCQ.

[231] Art 423(3) CCQ.

[232] Arts 423(2) and 424 CCQ.

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The compensatory allowance is of public order. It is a claim akin to unjust enrichment in civil law, but with the adaptation made necessary by the conjugal context. Through the years, the Supreme Court of Canada identified the conditions necessary to claim a compensatory allowance.[233] This mechanism is related to the nature of the relationship of the party, but the compensatory allowance of articles 427 and *ff* is only available to *de jure* spouses. However, claims in unjust enrichment remain available to *de facto* spouses.[234] The threshold for unjust enrichment is likely higher than the one for the compensatory allowance.

The fourth effect is located outside of the title on the marriage and inside a title of its own. The obligation of support is the third title of the Book on 'The Family'. In terms of structure, this needs to be emphasized. While most of the patrimonial effects of marriage are in the title on marriage or in the title on civil union, the right to claim support lies elsewhere. It says something as to the nature of the right, a right that is not solely triggered by the accomplishment of formalities between consenting adults. Support obligations reach further than the married couple, but not as far as including *de facto* relationships.[235] Indeed, both spousal and child support are encompassed by articles 585 to 596 CCQ. Not all the articles of this title are relevant for the obligation of support between spouses. Contrary to the other effects where civil union spouses are included by way of reference to the regime, article 585 CCQ includes in its text both married or civil union spouses and reads as follow: "[m]arried or civil union spouses, and relatives in the direct line in the first degree, owe each other support". The obligation of support between spouses is also dealt with in the *Divorce Act* at section 15.2. Hence, there is a jurisdictional overlap when it comes to spousal support.[236] The means and needs analysis

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[233] *Lacroix v Valois*, [1990] 2 SCR 1259; *M (ME) v L (P)*, [1992] 1 SCR 183, *P (S) v R (M),* [1996] 2 SCR 842.

[234] Arts 1493-1496 CCQ. See also Christine Morin, "L'enrichissement injustifié entre conjoints de fait: vers une meilleure prise en compte des situations vécues", in *Droit de la famille en bref, chronique*, n° 9, La Référence, January 2013, Donald M. Hendy and Corina N. Stonebanks, "Strangers at Law? The Treatment of Conjoints de fait in the Civil Law of Quebec and the Development of Unjust Enrichment" (1995) 55 R du B 71 and Robert Leckey, "Unjust Enrichment and De Facto Spouses" (2012) 114 R du N 475-500.

[235] Neither *de facto* conjugal relationships, nor parent-child *de facto* relationships. As a general rule, standing in place of a parent does not trigger support obligation in general civil law. Justice Dalphond's suggests otherwise in *Droit de la famille — 072895*, 2007 QCCA 1640 (CanLII) . at para 87. See *contra Droit de la famille — 161633*, 2016 QCCA 1142 (CanLII) at paras 25-26.

[236] Note the Quebec Courts tend to be shy in using the spousal support advisory guidelines when it comes to evaluate the amount of spousal support. They are facultative and judges have been clear they do not bind them (*GV v CG*,

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prevails in Quebec and so do the factors set fourth in section 15.2(4) of the *Divorce Act.* The objectives remain the same, i.e.

> **(a)** recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> **(b)** apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> **(c)** relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> **(d)** in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.[237]

The state of spousal support in Quebec is a good example of Quebec's *mixité* when it comes to family law. The conceptual bases of the obligation in common law as developed in *Bracklow*[238] are part of Quebec law (contractual, compensatory and non-compensatory). Yet from a civilian perspective, the alimentary nature of the claim is central and makes it peculiar (see section 2.3.2). The interaction between 15.2 of the *Divorce Act* and article 585 of the *Civil Code of Québec* is unclear. Article 585 CCQ merely reinstates what is already provided for in the *Divorce Act.* In addition, contrary to what is done elsewhere in Canada, the Code does not extend the obligation to unmarried couples when the relationships meet certain functional criteria.[239] Finally, the obligation of support is mandatory (*d'ordre public*) and participates to an understanding of 'the family'. It does not apply to *de facto* relationships, departing significantly from what is done in the rest of Canada.[240]

There is another last major patrimonial effect to marriage: matrimonial regimes. Matrimonial regimes are the topic of the fifth chapter of the title of marriage. They are an effect

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2006 QCCA 763; *Droit de la famille — 112606*, 2011 QCCA 1554; *Droit de la famille — 16306,* 2016 QCCA 269). Whether they are used in non-litigious cases is unknown and it would be risky to state whether or not they are used in everyday law without data.

[237] S 15.2 (6) *Divorce Act.*

[238] *Bracklow v Bracklow*, [1999] 1 SCR 420.

[239] See ss 29-30, RSO 1990, c F 3.

[240] See ss 1 "spouse", 3, and 160 and *ff*, *Family Law Act,* SBC 2011, c 25; ss 29-30 *Family Law Act,* RSO 1990, c F3

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of *de jure* spouses and thus apply to civil unions as well.[241] A matrimonial regime is defined as a "[s]et of rules governing patrimonial relations of married spouses, both as between themselves and to third persons".[242] It is basically a contract about who owns and administers property during the marriage and how it is going to be divided at breakdown. It includes the property of the spouses other than property included in the family patrimony. Rules as to exclusions apply (owned prior to marriage, donated or inherited). As Pineau writes, matrimonial regimes are about two things: property and power.[243] The Code now provides explicitly for two types of regimes: the partnership of acquests and the separation as to property. Arrangements are made for couples married under community regimes, the regime that prevailed until 1970.[244] Article 521.8 CCQ refers to a 'civil union regime', but no rules are enacted for this regime. Matrimonial regimes are not, *per se*, a mandatory effect of *de jure* unions since spouses can chose their matrimonial regime within the limits of the law. Indeed, "[a]ny kind of stipulation may be made in a marriage contract, subject to the imperative provisions of law and public order".[245] It is however required to have some regime individually tailored or one of a stock set. When spouses do not elect for a marriage contract, Quebec has a default regime. The default regime is referred to as a legal regime and it is opposed to conventional regime. As such, if the spouses do not have a marriage contract (a conventional regime), they fall into the default regime. This is important as many if not most marrying couples will not know much about the range of regime they might choose or create. The default regime is the partnership of acquests (the legal regime).[246] Note that if spouses chose a conventional regime, the contract must be notarized[247] and fulfill the requirements of publication of rights.[248] Spouses may contract to arrange the financial consequences of their unions as long as it is not against public order. Separation as to property

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[241] Art 521.8 CCQ.

[242] Allard, *Dictionary: Family, supra* note 203 *sv* "matrimonial regime".

[243] Pineau & Pratte, *supra* note 14 at 187.

[244] Art 492 CCQ.

[245] Art 431 CCQ.

[246] Art 432 CCQ.

[247] Art 440 CCQ.

[248] Art 442 CCQ.

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can be elected for by declaration in the marriage contract.[249] The rules of the partnership of acquests and the separation as to property are technical but a brief overview is essential here. The way the money is dealt with during and after a formal union says a lot on what a union is in law and what are the roles of the spouses. Further, the transformation of the effects of marriage is another indicium of the multiplication of relationships and their transformation in nature, as it will be shown in part 2.2.

The partnership of acquests – default regime or legal regime – relies on a conception of *de jure* unions as a common enterprise. It is defined as a

> [m]atrimonial regime which grants each *de jure* spouse equal powers of administration over his or her property during the regime and, on the basis of the characterization of the spouses' respective property as either private or acquests, the right to demand one half in value of the other spouse's acquests at dissolution.[250]

Rules about the partnership of acquests are found in articles 448 to 484 CCQ. The regime is rather sophisticated as displayed by the number of articles devoted to it. It relies on the qualification of the property acquired by the spouses during marriage as either private property or acquests. While at the end of the union the value of the acquests is divided in half, during the matrimonial regime, both spouses have equal power of administration. For some actions, the consent of the other spouse is required. Obviously, property acquired before the union is excluded. The use of the term private property does not exactly represent the expression used in French: *propres. Propres* rather refer to one's own property, thus explaining the specific nature of *propres*. Everything that is not an acquest is a *propre.*[251]Acquests even include "the proceeds of that spouse's work during the regime"[252] and the fruits and income of both acquests and *propres.* Article 450 CCQ explains what

> [t]he private property of each spouse consists of
>
> (1) property owned or possessed by that spouse when the regime comes into effect;
>
> (2) property which devolves to that spouse during the regime by succession or gift, and the fruits and income derived from it if the testator or donor has so provided;

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[249] Art 485 CCQ.

[250] Allard, *Dictionary: Family, supra* note 203 *sv* "partnership of acquests".

[251] Art 449 CCQ.

[252] Art 449(1) CCQ.

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> (3) property acquired by that spouse to replace private property and any insurance indemnity relating thereto;
>
> (4) the rights or benefits devolved to that spouse as a subrogated holder or as a specified beneficiary under a contract or plan of retirement, other annuity or insurance of persons;
>
> (5) that spouse's clothing and personal papers, wedding ring, decorations and diplomas;
>
> (6) the instruments required for that spouse's occupation, saving compensation where applicable.

Everything else is acquest property. It is thus shared in value at the end of the union and, both spouses may use it during the regime, regardless of the title. A spouse may renounce to the partition.[253] Many other technicalities apply and the Code identifies other *propres.* With this brief overview in mind, lets now turn to the Civil Code's other matrimonial regime.

Separation as to property is the other type of matrimonial regime contained in the CCQ. It operates differently since it does not assume marriage is a common venture. This has led some to describe this matrimonial regime as an absence of regime.[254] Indeed, under this regime it is assumed the marriage has no consequence on each spouse's property. The Code contains only a few articles about the separation as to property, mostly articles 485 to 487 CCQ. It is defined as a

> [m]atrimonial or civil union regime which, because it is characterized by the dissociation of the patrimonial interests of the *de jure* spouses, does not result in the division or partition of the spouses' property at dissolution and allows both spouses the independent administration, the enjoyment and the free disposal of his or her property[255]

The regime operates rather easily: if a spouse can prove he or she owns the title to the property it is a *propre*. He or she has the full title and the full administration. For property where the title is not clear, "ownership is presumed to be held by both in undivided co-ownership, one-half by each".[256] This applies when the spouses conventionally elect for separation as to property. Separation as to property can also be juridically sought, regardless of the matrimonial regime chosen by the spouses. Indeed, article 488 CCQ provides "[e]ither spouse may seek separation as to property when the application of the rules of the matrimonial regime proves to be contrary to the interests of that spouse or of the family". Case law has specified when it may be used, but it

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[253] Art 467(2) CCQ. A partition is roughly a division.

[254] Pineau & Pratte, *supra* note 12 at 191.

[255] Allard, *Dictionary: Family, supra* note 203 *sv* "separation as to property".

[256] Art 487 CCQ.

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is rarely invoked.[257] The spouses may agree upon any other matrimonial regime, but separation as to property and the partnership of acquests are the two principal regimes of the *Civil Code of Québec*. Matrimonial regimes are the last patrimonial effect of *de jure* unions in Quebec civil law.

As explained, some effects of marriage and civil union operate both during the union, while others only materialize at the end of the union. These effects of *de jure* unions remain paradoxical. Indeed, for the most part, they could be qualified as effects of the breakdown of the union rather than effects of the union itself. Quebec civil law knows various ways to terminate formal conjugal relationships and they vary according to the type of unions. The next part summarizes them.

### 2.1.3 Death, Separation from Bed and Board, Nullity, Divorce, Marriage and Dissolution

*De jure* unions have various consequences, some materializing during the union others taking full effect at the end of the union. *De jure* unions are unions respecting various formalities and their termination is also subject to formal requirements. Indeed, one cannot just walk away from such a union; positive steps must be taken for the separation to have legal effects. This part analyzes the various ways to legally separate from one's spouse. They are: death, nullity, divorce, separation from bed and board and dissolution (court judgment or notarial declaration). Some of these apply only to marriage and others to civil union, while others are available to both. While the law recognizes many ways to separate, subsection 2.2 will put them all in perspective. The vast array of separation mechanisms is recent. How do they operate today?

The first mechanisms to terminate *de jure* unions are the older ones: the death of one or both spouses and nullity. Death obviously terminates both marriage and civil union. Article 516 CCQ specify death dissolved marriage and article 521.12 states the same thing about civil union.

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[257] Only four cases are available on SOQUIJ and La Référence, one of them being actually relevant: *Droit de la famille — 979*, [1991] R.D.F. 226. Charpentier et al*, supra* note 196 at 345 add two cases: *Lévesque v Fournier*, [1945] CS 390 and *Guay c Leroux*, [1947] CS 214.

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Nullity, while it does not need to be explained in all its details, is another way to terminate *de jure* unions. It obeys the general principles of obligations, principles found at articles 1416 CCQ and following. Nullity will generally follow the general rules of contracts, but scholars have rightly been critical of the rules about nullity found in the book on the family. The rules are at articles 380 to 390 CCQ. Some rules are inconsistent with general law and the number of articles devoted to nullity is rather thin.[258] Whether nullity is rooted in formality defects or substantive defects also matters. Interestingly enough, article 380 CCQ encompasses both necessary conditions (i.e. essential validity) and formal conditions (i.e. celebration). Scholars assert the same: "[l]a nullité du marriage sanctionne le non-respect des conditions de fond et de forme".[259] This is surprising given that the powers of essential validity of marriage are within federal jurisdiction. Quebec scholars, while mindful of the jurisdiction problem, generally justify this 'encroaching' on federal powers in two ways. The first is by interpreting the *Federal Law—Civil Law Harmonization Act*[260] broadly. More precisely, section 4 of the act states "[s]ections 5 to 7, which apply solely in the Province of Quebec, are to be interpreted as though they formed part of the *Civil Code of Québec*".[261] The second is by making a distinction between essential conditions and their sanction. While the conditions are of federal jurisdiction, the effects are of provincial jurisdiction, because the effects of marriage are of provincial jurisdiction.[262] One should also be aware that, as explained below, the essential conditions of marriage were in the Code until 2001 despite the obvious lack of jurisdiction. This being said, general civil law knows two types of nullity: absolute nullity and relative nullity. It roughly can be equated with void and voidable contracts. Whether it is absolutely or relatively null depends of the interests at stake and has influence on whom and for how long one can invoke nullity. Consent is essential to marriage; nullity can be invoked when the consent is vitiated (error, threats, etc.). Any interested person can invoke nullity[263] in the three years following the solemnization of marriage.[264]

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[258] Pineau & Pratte, *supra* note 12 at 105–107.

[259] Tétrault, *supra* note 141 at 108.

[260] No. 1, SC 2001, c 4.

[261] On this theory see Tétrault, *supra* note 141 at 108; Castelli & Goubau, *supra* note 19 at 64; Pineau & Pratte, *supra* note 12 at 105.

[262] Castelli & Goubau, *supra* note 19 at 66.

[263] Art 380 CCQ.

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However there is no time limit to invoke nullity if "public order is concerned, in particular if the consent of one of the spouses was not free or enlightened".[265] The effects of nullity will depend on various elements, but nullity should never have effects on children.[266] If spouses were in good faith at the time of the solemnization of the marriage, the marriage will produce effects despite the nullity.[267] If only one of them was, the spouse in good faith will be allowed to choose whether or not the marriage should have effects.[268] If both were in bad faith, the marriage will not have effect.[269] There is however a thin line between simulated marriage, nullity and divorce. When both spouses are in bad faith and when marriage is simulated, it is unlikely that the court will grant nullity.[270] There is a presumption spouses marry in good faith.[271] For the most part of Quebec civil law though, nullity, alongside death, was the only way to end marriage. Another device was available to *de jure* couples and still is today.

Articles 493 to 515 CCQ govern separation from bed and board, in French: *séparation de corps*. It is defined as an "[a]ttenuation of the marital bond pronounced by a judgment that, without dissolving the marriage itself, relieves the spouses of the obligation to live conjugally".[272] Separation as to bed and board consists of a *relâchement du lien matrimonial.* A

[264] Art 380 para 2 CCQ. This blurs the difference between absolute and relative nullity in civil law and scholars have denounced it. Indeed, relative nullity can generally be invoked only by the person nullity principles protect. See Pineau & Pratte, *supra* note 12 at 107–108; Castelli & Goubau, *supra* note 19 at 68–69. Tétrault, on the other hand, applies principles of general law to reach a different conclusion: Tétrault, *supra* note 141 at 109–115.

[265] Art 380 para 2 CCQ.

[266] Art 381 CCQ.

[267] Art 382 CCQ.

[268] Art 384 CCQ.

[269] Art 383 CCQ.

[270] This point is controversial in both case law and scholarship. Indeed, while one can state the marriage never existed given the absence of consent of the spouses, it is also possible to argue the annulation of the marriage allows the bad faith spouses to benefit fraudulently from advantages they were not entitled to. See Tétrault, *supra* note 124 at 48–72.

[271] Art 387 CCQ.

[272]Allard, *Dictionary: Family, supra* note 203 *sv* "separation from (as to) bed and board".

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tribunal grants it "when the will to share a community of life is gravely undermined".[273] The Code suggests three grounds for the will to share a community of life to be gravely undermined:

> (1) where proof of an accumulation of facts making the continuation of community of life hardly tolerable is adduced by the spouses or either of them;
> (2) where, at the time of the application, the spouses are living apart;
> (3) where either spouse has seriously failed to perform an obligation resulting from the marriage; however, the spouse may not invoke his or her own failure.[274]

It is analogous to divorce but it does not affect the marriage bond: by an operation of the law, the spouses remain married. It has been referred to as the *divorce des catholiques* and recent scholarship mostly sees it has a mechanism used for religious or personal beliefs,[275] antiquated,[276] and accessory.[277] It roughly produces the same effects as a divorce when it comes to property, support, custody, etc. However, there is no requirement of living apart for a year and if the spouses have a draft agreement, they do not have to disclose the requested ground.

Despite statements suggesting separation from bed and board is antiquated, recent case law suggests a more nuanced picture. It has been used for various reasons in the case law and in practice in general. These reasons include a lack of jurisdiction under the *Divorce Act* in cases where the requirements of residence in Canada are not met,[278] the absence of one spouse generally,[279] the possibility for spouses to reconcile, the short length of the union,[280] at the suggestion of a mediator,[281] to save time or modify the date when property is going to be split,

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[273] Art 493 CCQ.

[274] Art 494 CCQ.

[275] Tétrault, *supra* note 124 at 591.

[276] Allard, *Dictionary: Family, supra* note 203 *sv* "separation from (as to) bed and board".

[277] Pineau & Pratte, *supra* note 12 at 288.

[278] See s 3(1) *Divorce Act,* RSC 1985, c 3 (2nd Supp). For example, in *Droit de la famille 162086,* 2016 QCCS 4000, one of the spouses appears to reside and have domicile in Mexico.

[279] *Droit de la famille 161180*, 2016 QCCS 3249.

[280] *Droit de la famille 16211*, 2016 QCCS 4025.

[281] In many cases found, the separation from bed and board appears to have been suggested by a mediator. Whether it is a recurrent and widespread phenomenon needs to be researched, and so does the impact of such a practice when it comes to family breakdown. For example of cases, see *Droit de la famille 161992,* 2016 QCCS 3832; *Droit de la famille 161478,* 2016 QCCS 2898; *Droit de la famille 161224*, 2016 QCCS 1596; *Droit de la famille 16814,* 2016 QCCS 1596.

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and more.[282] Separation from bed and board nonetheless produces a few effects different than divorce. For example, if the spouses resume cohabitation, separation from bed and board ends. This has the effect to restart a family patrimony but not necessarily the matrimonial regime. Moreover, if the spouse or one of the spouses later asked for a divorce, the agreement could be modified, thus affecting the security of contracts. To give one last example, spouses should know it would be impossible to remarry after separation from bed and board. It is not a divorce and it keeps the conjugal bond alive.

The two last ways to end *de jure* unions are divorce and dissolution. Divorce is available to married spouses only, both married religiously and civily. While divorce is addressed in the Civil Code at articles 516 to 521 CCQ, it mostly is within federal jurisdiction. As such, the termination of the marriage bond and some of its effects are encompassed in the *Divorce Act* or the *Civil Marriage Act.* Since the same rules apply throughout Canada, it is unnecessary to go in great detail about the *Divorce Act* and *Civil Marriage Act.* Only a few articles are devoted to divorce in the *Civil Code of Québec*. It has not always been that way. The articles are all found in the seventh chapter of the first title, the title on marriage, chapter entitled “Dissolution of marriage”. It contains two sections, one on general provisions and the other on the effects of divorce. Articles state marriage ends when a spouse dies or when divorce is granted,[283] the *Divorce Act* applies but so do the rules of the *Code of Civil Procedure*,[284] divorce “carries with it the dissolution of the matrimonial regime” from the date of the application,[285] divorce “entails the lapse of gifts *mortis causa*” made by spouses for one another because of the marriage,[286] this does not affect other gifts,[287] and separation from bed and board and divorce have the same effects on children, namely triggering support and custody obligations.[288] As such, while divorce

[282] I am grateful to the participants of the Canadian Bar Association Quebec Branch – Family Law section who generously shared their insights and gave me examples of cases they had during a conference held on October 17, 2016.

[283] Art 516 CCQ.

[284] Art 517 CCQ.

[285] Art 518 CCQ.

[286] Art 519 CCQ.

[287] Art 520 CCQ.

[288] Art 520 CCQ.

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in Quebec has some particularities, for example when it comes to gifts, the small number of articles of the Code devoted to it appears more like a vestige of the past. Many divorces of course take place, but they are regulated by the Federal *Divorce Act* rather than provincial private law or the CCQ.

The dissolution of civil union, however, is specific to Quebec civil law, civil union being unknown to other provinces. Articles 521.12 to 521.19 are about the dissolution of civil union and can be found in the fourth chapter of title 1.1 of the second book. As mentioned above, while civil union has been introduced to provide same-sex partners a way to formalize their conjugal unions, it is available to both opposite-sex and same-sex partners. There are a few ways to terminate a civil union: death of a spouse, marriage, dissolution by a joint notarial declaration, and dissolution by a court judgment.[289] While dissolution by death or marriage operate for different reasons, dissolution by a joint notarial declaration or a court judgment is triggered by the same reasons than the separation from bed and board and, roughly, divorce: when "the will to share a community of life is irretrievably undermined".[290] Dissolution of civil union has the same effects as the dissolution of the marriage when it comes to patrimonial effects and donations.[291] In addition, it does not deprive children "of the advantages secured to them by law of by the civil union contract"[292] and does not affect the duties of the parents towards their children.[293] The Code includes a conventional way to terminate the union when certain conditions are met, which is innovative for civil law and law generally, or at least, law in the books.[294] It is as if it was possible to divorce by contract. Indeed, if the couple seeking

[289] Art 521.12 CCQ.

[290] Art 521.12 para 1 CCQ. The only ground for divorce is the breakdown of the marriage, found at section 8 of the *Divorce Act.* While "breakdown of marriage" and "irretrievably undermined will to share a community of life" are obviously not the same expressions, they nonetheless refer to the same idea.

[291] Art 521.19 CCQ.

[292] Art 521.18 para 1 CCQ.

[293] Art 521.18 para 2 CCQ.

[294] While from a theoretical standpoint a contractual divorce is not possible, it could be said agreements between spouses – through mediation, consensual divorce or else – allows for it to a certain extent. Indeed, the court mostly has a surveillance role and allows for the formal status of the spouses to change. Other aspects of the separation are left to the spouses.

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dissolution has no common child,[295] "the spouse may consent, by way of a joint declaration, to the dissolution of the civil union provided they settle all the consequences of the dissolution in an agreement".[296] The agreement between the spouses is qualified as a transaction, i.e. "a contract by which the parties prevent a future contestation, put an end to a lawsuit […] by way of mutual concessions or reservations".[297] This declaration and the agreement must be done in front of a notary and "recorded in notarial acts *en minute*".[298] In other words, the spouses must go in front of a public officer and have their dissolution and its effects formally registered by the notary. The notary is different in Quebec law. They are public legal officers responsible, generally, for non-contentious matters and are not lawyers. Such steps transform the civil status of the spouses and the Registrar of civil status must be notified.[299] In fact, there are many notification, transmission and publication requirements the notary has to fulfill. They are found at article 521.16 CCQ. If the civil union spouses have a common child or children, they have to dissolve their union by court judgment. They can nonetheless agree about the effects of the dissolution, but the final word will go to a judge.

## 2.2 A History of Conjugal Relationships in Private Law: From one possibility to many

In addition to laying the basics of the regulation of conjugal ties in the *Civil Code of Québec*, the section above has hopefully made one point clear: the book 'The Family' of the *Civil Code of Québec* only knows the formal couple. Conjugality in the code revolves around formality, about whether or not a couple has taken positive steps to formalize their union. The bond between the adult partners and its characteristics does not look like a primary concern in the Civil Code. Indeed, the particular nature of the relationships is not contemplated. Some relationships are part of family law one-, but definitely not all. Family law one- refers here to the study of conjugal and filial bonds and their effect in the second book of the *Civil Code of*

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[295] Art 521.17 para 1 CCQ *a contrario*.

[296] Art 521.13 para 1 CCQ.

[297] Art 2631 CCQ.

[298] Art 521.13 para 2 CCQ.

[299] Art 521.16 CCQ.

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*Québec*, book titled 'The Family'. Indeed, *de facto* relationships entail little to no effects in law when it comes to conjugal ties in the Civil Code, or, rather, when it comes to Titles 1 and 1.1 of the Book 'The Family' in the Civil Code. Yet, conjugal relationships multiplied in many ways and on many levels since 1955. This part traces the multiplication of possibilities for conjugal unions. The analysis explores the proliferation of possible relationships in law – such as religious marriage, civil marriage, civil union – and the transformation of the relationships between the spouses in these unions – for example, the shift from marital authority to moral and material direction of the family by both spouses or the attribution of legal personality to wives. While this may sound obvious, in a not so distant past, legal relations within unions were limited: wives were incapacitated. Intimate unions varied through the times, at first confined to religious marriage exclusively, then, as it will be explained, widening to include various things such as civil marriage, subsequent marriage, civil union, same-sex marriage, *de facto* relationships, and more. Their forms, contents, constituents and effects varied widely. This section surveys how conjugality in Quebec civil law shifted from only marriage, specifically religious marriage, to a wide range of intimate configurations. Further, it analyzes the legal evolution of the relations within unions and explores how the growing place of women as legal subjects contributed to a transformation of the possibilities for conjugality. The scope of the analysis is limited to the Civil Code and to the laws affecting or modifying it more or less directly. The idea is to focus on relationships and the thesis does not pretend to be an exhaustive analysis of all the modifications done in the Code from 1955 until today.

The section is divided in four parts. The first is just a note on the situation of conjugality before 1955. It briefly explores, mostly through secondary sources, statutes and case law, the regulation of conjugality and interaction between law in the code and the Catholic Church's principles. The second part addresses the period of work on what would be the future civil code of the province (1955-1980). The period was transitional, from one Code to the next, and was an incredible opportunity to propose new ideas about the regulation of adult intimate relationships. The third part focuses on the enactment and coming into force of the book on the family and all the modifications that were made before 1994, or before the Code as a whole came into force (1980-1994). This period has witnessed numerous changes when it comes to conjugal unions and their effects. The fourth part focuses on the period following the enactment of the new *Civil Code of Québec*. Special attention is devoted to the modifications made in 2002, reform that

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radically transformed conjugal relationships and, as it will be explained in chapter 3, filial relationships. Not much has been done since 2002 in terms of modifications to the Code itself when it comes to conjugal ties, despite high profile cases.[300] This last part thus includes the period ranging from 2002 to the present.

### 2.2.1 The *Civil Code of Lower Canada* and the Catholic Church

Under the *Civil Code of Lower Canada*, marriage was found under the fifth title of the first book of the CCLC, the book 'Of Persons'. This title was located after the one entitled 'Of Absentees" and before the titles 'Or Separation from bed and board' and 'Of Filiation'. The fifth chapter, 'Of Marriage' was divided in seven chapters:

| **Titre cinquième – Du mariage** | **Title Fifth – Of marriage** |
|---|---|
| Chapitre I – Des qualités et conditions requises pour pouvoir contracter mariage | Chapter I – Of the qualities and conditions necessary for contracting marriage |
| Chapitre II – Des formalités relatives à la célébration du mariage | Chapter II – Of the formalities relating to the solemnization of marriage |
| Chapitre III – Des oppositions au mariage | Chapter III – Of oppositions to marriage |
| Chapitre IV – Des demandes en nullité de mariage | Chapter IV – Of actions for annulling marriage |
| Chapitre V – Des obligations qui naissent du mariage | Chapter V – Of the obligations arising from marriage |
| Chapitre VI – Des droits et des devoirs respectifs des époux | Chapter VI – Of the respective rights and duties of husband and wife |
| Chapitre VII – De la dissolution du mariage | Chapter VII – Of the dissolution of marriage |

The Civil Code referred to the idea of 'contracting marriage' in the very first chapter of the title. The wording is different today, as seen in part 2.1. Authors generally qualified the marriage as a contract.[301] However, marriage had more to do with a sacrament, or a religious rite – not to say a religious imperative – as the proximity between the CCLC and canon law suggests. Many Quebec scholars underlined the similar content of the religious and legal texts.[302] Religion was ubiquitous and marriage was its power tool. Religious actors were entrusted with the function of 'civil' officers. Indeed, one of the most powerful examples of the incorporation of law and

[300] To name only one: *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61.

[301] In Quebec, see Trudel, *supra* note 19 at 365; Mignault, *supra* note 19 at 331. In France, see Marcel Planiol & George Ripert, *Traité pratique de droit civil français. Tome II La famille* (Paris: Librairie générale de droit et de jurisprudence, 1952) at 57. In an incredibly interesting passage, they explain that marriage has been qualified as a contract for a century, but that since the beginning of the XX$^{th}$ century some scholars criticize this qualification, while others prefer to qualify it as an *institution.*

[302] Bilodeau, "Influence religieuse", *supra* note 129; Benoît Moore, "Culture et droit de la famille" (2009) 54 McGill L.J. 257 [Moore, "Culture"]; Hélène Belleau, *Quand l'amour et l'État rendent aveugle : le mythe du mariage automatique* (Quebec : Presses de l'Université du Québec, 2012) [Belleau, *Quand l'amour et l'État*].

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religion was the role of the priest in Quebec. The priests were, amongst other things, the officers of civil status. In the civil law, the idea of 'civil status' refers to a person's status in the eyes of the civil law, including whether they are alive or dead, in a recognized relationship or not. From 1866 to 1968, articles 42, 44, 128 and 129 of the CCLC, while modified a few times, were written so that almost only priests could keep registers of the marriages that were celebrated in the province and, incidentally, grant *status*. This specificity of Quebec's law is striking when compared with France, and cannot be explained by Quebec's distinct legal tradition within Canada. In France, civil status was secularized just after the French Revolution. As such, as of 1792, the registers of civil status were the responsibility of designated civil officers.[303] The situation was far different in Quebec. Priests were responsible for the solemnization of every ritual of life (and law), for maintaining demographic statistics and for the registers of civil status.[304] This means the only way to modify your civil status was to abide by the principles of the Church. Having a civil status meant being baptized in the Church, being married in the Church, and so on. From a common law perspective, it was as if the priest, amongst his other roles, was the Registrar General. The priest was even a matrimonial counselor and offered mandatory wedding preparation services in Quebec. Moreover, the indissolubility of marriage that was stipulated in article 185 of the CCLC, in force from 1866 to 1969, faithfully reflected the doctrine of the Catholic Church found in Romans 7:1-3. Indeed, the concomitance between religious and civil law is obvious under this article. Article 185 read:

| **185.** Le mariage ne se dissout que par la mort naturelle de l'un des conjoints; tant qu'ils vivent l'un et l'autre, il est indissoluble. | **185.** Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble |
|---|---|

while Romans 7:1-3 reads

> Do you not know, brothers and sisters — for I am speaking to those who know the law — that the law has authority over someone only as long as that person lives? For example, by law a married woman is bound to her husband as long as he is alive […]

[303] *Encyclopédie catholique. Répertoire universel et raisonné des sciences, des lettres, des arts et des métiers,* tome onzième (J B Glaire: P. Desbarres, 1840-48) 372.

[304] Bilodeau, "Quelques aspects de l'influence religieuse sur le droit", *supra* note 129 at 579.

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Many other shared principles between religious law and the *Civil Code of Lower Canada* could be highlighted.[305] There was no such thing as subsequent marriage as long as the spouses were both alive. Marriage was a life-long engagement. Cohabitation was not an option. As Duval wrote:

> It is indeed superfluous to describe here the extent to which Christianity confines sexual relations to the institution of marriage. Since for all practical purposes, it would not be possible for another morality to exist other than Christian morality, there would be a conflict between religion and the law as soon as the latter accepted to admit unions outside of marriage.[306]

It was however possible to nullify a marriage. Religious mores were connected to the public regulation of sexual behaviours. It was a method of legitimizing only one form of union – that of marriage".[307] Religion and law were two sides of the same coin and the only possibility for conjugal relationships was religious marriage. As Brigitte Lefebvre writes,

> the only conjugality possible in Quebec private law, occurs around the religious marriage, the only institution having social and legal recognition. The law is intimately tied to the diktats of the religious powers. The Church is thus the only space where marriages are celebrated. […] which preserves the power of the Church.[308]

There was one possibility for conjugality: religious marriage. Subsequent marriages were impossible, and, to make a long story short since the period before 1955 is just briefly mentioned to provide context, within marriage there was no legal relationship between the husband and the wife. Indeed, the legal existence of the wife was suspended during marriage. There was one relationship in terms of possible unions and this relationship was unitary in terms of legal relations within a possible union. This has various effects including the paternal authority/*puissance paternelle*,[309] the *puissance maritale* which materialized in the husband's

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[305] To mention only two examples: age to consent and impediments to marriage. There was quite a debate around impediments to marriage and religious principles for decades in the province of Quebec. See *Despatie v Tremblay* (1921), 58 DLR 29 at 38, 47 BR 305 and Tremblay, "Sans foi", *supra* note 39 at 166–168.

[306] Duval, *Travaux Capitant*, 1957 V. II at 112 previously cited in Daniel Dhavernas, *Les droits des concubins*, Office de révision du Code civil. Comité du droit des personnes et de la famille, Juillet 1969, at 26-27 [Dhavernas, *Les droits des concubins*].

[307] Jocelyne Jarry, *Les conjoints de fait au Québec: Vers un encadrement légal* (Cowanswille : Yvon Blais, 2008) at 145 [Jarry, *Conjoints*].

[308] Brigitte Lefebvre, "L'évolution de la notion de conjoint en droit québécois" in Pierre-Claude Lafond & Brigitte Lefebvre, eds, *L'union civile nouveaux modèles de conjugité et de parentalité au 21e siècle* (Cowansville: Éditions Yvon-Blais, 2003) 3 at 9.

[309] See title preceding art 242 CCLC (1866-1977).

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duty to protect and the correlative duty of obedience of the wife,[310] and the extremely limited powers of wives over property.[311] This retrograde, religious and patriarchal understanding of personal life was bound to change in many ways.

### 2.2.2 **1955-1981: From one Code to the next**[312]

When writing about the recodification that started in 1955, Brierley and Macdonald wrote

> [t]he legislative process by which the recommendations of an expert commission charged with recodifying a social constitution actually come to be enacted is tributary to a number of social and political factors, many of which may have little to do with the merits of the recommendations themselves. Because the modern legislature is a political arena, any proposals for law reform will necessarily be evaluated in the context of partisan policies of the government of the day. Especially in areas as volatile as family […] law — where specialized ministries typically direct the legislative agenda of the Ministry of Justice — considerations of systemic rationality, technique, and form are often sacrificed to substantive outcome.[110]

It is with this in mind the modifications described here should be read. While most of the attention is devoted to what jurists proposed and to how it materialized in positive law, the final outcome is the result of political and contextual choices in a time of change. Keep in mind all this happened in the period of *Grande Noiceur* and its aftermath, the *Révolution Tranquille.* These transformations target the ways in which conjugality move from a unique and unitary understanding to numerous possible unions (relationships) and relations (relationships between the constitutive members of the unions).

When it comes to changes in the Civil Codes, 1955 is a key date. In 1955, the Legislature of the Province of Quebec decided that the *Civil Code of Lower Canada* needed to be revised, to be recodified.[313] After a few years of uncertainty and changes in leadership, the mandate was in the hands of Paul-André Crépeau and the Civil Code Revision Office ("CCRO") to draft a new Civil Code that would "reflect the social, moral and economic realities of today's Quebec; it had to be a body of law that was alive and contemporary, and which would be responsive to the

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[310] Art 174 CCLC.

[311] Art 177 CCLC.

[312] Parts have already been published in a peer-reviewed article: Tremblay, "Sans foi", *supra* note 39.

[313] Paul-André Crépeau Centre for Private and Comparative Law, The Archives of the Civil Code Revision Office, online: <http://digital.library.mcgill.ca/ccro/mandate.php>.

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concerns, attentive to the needs and in harmony with the requirements of a changing society in search of a new equilibrium".[314] The work began in the 1960s and lasted for decades. It ultimately led to the coming into force of the *Civil Code of Québec* in 1994. The Committee on the Law of Persons and Family Law – piloted by the Honourable Claire L'Heureux-Dubé – proposed highly contentious suggestions for reforming conjugality. The CCRO went on to propose them even though they never resulted in positive law. For example, important suggestions about *de facto* unions were made. To begin, the Committee suggested including *de facto* unions in the new Code. This first proposition was to include a definition of '*de facto* consorts' in the Code. The definition read as follows:

| **Définition d'époux de fait** | ***De facto* consorts: definition** |
|---|---|
| **Article 102:** Sont des époux de fait deux personnes de sexe différent qui, sans être mariées l'une avec l'autre vivent ensemble ouvertement comme mari et femme, d'une façon continue et stable. | **Article 102:** Any two persons of opposite sex, not married to each other, who live together openly as husband and wife in a continuous and stable manner, are *de facto* consorts.[315] |

The CCRO included a slightly modified definition of *de facto* consorts:

| **(Livre II, 49(2)):** Dans ce Code, sont époux de fait ceux qui, sans être mariés l'un avec l'autre, vivent ensemble ouvertement comme mari et femme, d'une façon continue et stable. | **(Book II, 49(2)):** In this Code, de facto consorts are those who, although not married to each other, live together openly as husband and wife in a continuous and stable manner.[316] |
|---|---|

In addition to formally including *de facto* unions in the Civil Code, the Committee proposed four important changes in the regulation of this factual situation. First, it suggested that, in adult intimate relationships, interdependency be not associated with a legal status (i.e. being married), but rather be recognized by the nature of the relationship of partners (i.e. whether they lived together). As such, when adults elect to form a 'stable' and 'continuous' union, they should, when possible, have a duty to support each other. The Committee was thus advocating in favour of a functional understanding of adult intimate relationships. Its other propositions were to apply the presumption of paternity to *de facto* male spouses, to extend heirship to *de facto* spouses, and to oblige them to contribute towards the expenses of the household in proportion to their

[314] *Ibid*.

[315] Civil Code Revision Office, Committee on the law on persons and on the family, Part One, XXVI, Montréal, 1974 at 289.

[316] *Draft Civil Code*, Civil Code Revision Office, 1977.

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respective means. While most of these suggestions were ultimately made by the CCRO in its final report, the legislature decided they should not be part of the new Civil Code. The reactions of respected scholars of the time illustrate the negative opinion of some jurists on the matter. For example, Mireille Castelli wrote:

> We will not start impugning motives or morality [of *de facto* spouses]. But what we find to be profoundly abnormal and immoral is that after having rejected marriage, they expect to benefit from certain advantages (in other words, advantages without the disadvantages). It is good *that people take responsibility for their decisions, and that we do not always soften the consequences of their decisions*.[317]

Later in the same article, she added "*de facto* spouses *seem quite wrong to complain*. It was at the moment they decided not to get married that they should have *weighed the consequences of their actions*".[318] While clearly opposed to the proposed modifications, she commented quite neutrally in comparison to others. Even the *Conseil du Statut de la Femme* agreed, at the time, the State should not intervene in adult intimate relationships.[319] In the end, *de facto* unions were not included in the Code. However, a lot of recommendations of the CCRO were followed and changes made in the Code. As a result, a proliferation of relationships is observable in that text.

On June 18, 1964, Quebec National Assembly sanctioned a bill presented by Marie-Claire Kirkland-Casgrain, the first woman elected to what is now known as the National Assembly of Quebec and the first woman appointed minister. The *Act respecting the legal capacity of married women*[320] came into force on July first 1964 and introduced important modifications to the *Civil Code of Lower Canada.* It modified articles in almost every book of the Code (CCLC). The book of persons likely witnessed the most significant changes. Article 177 CCLC, for example, illustrates the crucial changes made to *l'esprit de la loi*:

| | |
|---|---|
| **Art 177 (1931-1964).** La femme, même non commune, ne peut donner ou accepter, aliéner ou disposer entrevifs, ni autrement contracter, ni s'obliger, sans le concours du mari dans l'acte, ou son consentement par écrit sauf (…) | **Art 177 (1931-1964).** A wife even when not common as to property, cannot give nor accept, alienate, nor dispose of property *inter vivos*, nor otherwise enter into contracts or obligations, unless her husband becomes a party to the deed, or gives his consent in writing (…) |

[317] Mireille D. Castelli, "Observations sur la première partie du Rapport de l'O.R.C.C sur la famille" (1975) 16:3 C de D 645, at 664.

[318] *Ibid* at 665.

[319] Quebec, Conseil du statut de la femme, *Recommandations du Conseil du statut de la femme à l'Office de révision du Code civil sur le rapport de la famille (première partie)*, November1975, at 20.

[320] SQ 1964 (12-13 ElizII) c 66.

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| French | English |
|---|---|
| **Art 1977 (1964-1970).** *La femme mariée a la pleine capacité juridique* quant à ses droit civils, sous la seule réserve des restrictions découlant du régime matrimonial. | **Art 1977 (1964-1970).** A married woman has full legal capacity as to her civil rights, subject only to such restrictions as arise from her matrimonial regime. |

While not perfect, allowing legal capacity to married women was a good start. A married womens's legal capacity was nonetheless still limited and article 177 was modified a few years later by the *Act respecting matrimonial regimes*[321] to read as such:

| French | English |
|---|---|
| **Art 177 (1970-1981).** La capacité juridique de chacun des époux n'est pas diminuée par le mariage; seuls leurs pouvoirs peuvent être limités par le régime matrimonial. | **Art 177 (1970-1981).** The legal capacity of each of the consorts is not diminished by marriage. Only their powers can be limited by the matrimonial regime. |

The *Act respecting the legal capacity of married women* brought many changes for family law. "With the gradual emancipation of married women, the legal importance of the family as a perceptible legal entity has likewise been eroded, even if, in practical terms, family meant husband […]".[322] It allowed the wife to "participat[e] with the husband in ensuring the moral and material control of the family" and allowed her to act alone when the husband was unable to make his will known.[323] The wife could also be mandated to represent her husband under certain circumstances[324] and have a different profession than her husband.[325] She was granted many rights and it modified the dynamic of marriage. Indeed, the husband was not the only person capable of having legal relationships with third parties or the State. The wife could also have legal relationships hence reducing the unitary nature of the marriage bond. The marriage bond was at this point composed of more than one relationship. Indeed, it is possible to affirm that first, a legal relationship between the husband and the wife arose, a relationship between two legal subjects. Second, relationships between the wife in the married unit and third parties became possible. This is a starting point in the analysis of the multiplication of possible relationships in law when it comes to conjugality. Other possibilities for relationships materialized during this period.

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[321] SQ 1969 c 77.

[322] Frank Bates, "Does the Family have Legal Functions ?" (1978) 1 Can J Fam Law 455 at 468.

[323] Art 174 CCLC (1964-1981).

[324] Art 178 CCLC (1964-1981).

[325] Art 181 CCLC (1964-1970).

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On November 14, 1968, Quebec sanctioned the *Act respecting civil marriage*.[326] The act came into force on April 1, 1969 and included technical modifications to the Civil Code. Most importantly, it started a paradigm shift, a rupture with the past, when the only option for conjugality was religious marriage. Religious marriage could however have been non-Catholic. The *Act respecting civil marriage* allowed people in the province of Quebec to marry, even if they had no religious affiliation. It introduced civil marriage in the CCLC, a new possibility for unions, a new relationship in family law. As Pierre-Gabriel Jobin wrote, it was all about respecting non-practicing citizens… but it was also an attempt to revalorize marriage.[327] The idea to respect the non-religiously practicing citizen was in sharp contrast with what was done for decades. It happened at the climax of the *Révolution Tranquille* and was in line with the objective of separating the Church from the State.

At the same period, the federal parliament also contributed to the proliferation of possibilities for conjugal relationships by enacting the *Divorce Act*. Remarriage and being divorced became new possibilities for conjugality. For a long time, divorce has been a delicate topic in the province of Quebec, especially for Catholics. Some scholars believed the federal parliament had no right to legislate about divorce.[328] Mignault, in 1895 started the part devoted to divorce in his book by stating that, as a Catholic, he was of the opinion that marriage was indissoluble and that canon law had to prevail.[329] To be clear, the Parliament of Canada has used its powers under 91(26) of the *Constitutional Act* a few times before[330] and divorces were happening in Canada and even in Quebec.[331] Some provinces had divorce laws and divorces

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[326] SQ 1968 (17 ElizII) c 82.

[327] Pierre-Gabriel Jobin, "Loi concernant le mariage civil" (1969) 10:1 C de D 211 at 214–216.

[328] Pineau & Pratte, *supra* note 12 at 313–314. Pineau refers to Loranger, Trudel and Mignault.

[329] Mignault, *supra* note 19 at 551.

[330] 30 & 31 Victoria, c 3 (UK). For example: *An Act concerning Marriage with a Deceased Wife's Sister*, SC 1882, c 42; *Dissolution and Annulment of Marriages Act,* SC 1963, c 10; *Marriage Act*, RSC 1905 c 105; *Marriage and Divorce Act*, RSC 1952, c 176; and more.

[331] For example, in 348 divorces were granted in 1947; 292 in 1948; 350 in 1949; 234 in 1950; 290 in 1951. It is also possible to find statistics on divorce by religious affiliation. These statistics come from Senate Debates, 21st Parliament, 6th Session: Vol. 1 (1952). One can find more for each year in the Official Report of Debates for any given year.

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could be asked on the basis of the wife's adultery or the husband's misconduct.[332] However, on February 1st, 1968 the Parliament of Canada passed the *Divorce Act*.[333] Coming into force on July 1st 1968, this act allowed for a spouse to request the dissolution of marriage on the basis of his or her spouse's both fault and marriage breakdown grounds.[334] The act applied throughout Canada, and obviously in Quebec. The enactment of this law participated in the multiplication of possibilities for conjugal relationships in Quebec law. Indeed, access to divorce allowed for subsequent marriages and being divorced. Conjugality was not necessarily a life-long engagement anymore; it could now be subsequent unions, all meeting formal criteria. From one possible union, conjugality became possible as multiple successive unions.

Other transformations occurred before 1980 in Quebec law. Some of them directly influenced the spectrum of intimate relationships in law, others did so more indirectly. For example, in line with the new legal capacity for wives, Quebec sanctioned on December 12, 1969 *An Act respecting matrimonial regimes*.[335] This law directly affected the nature of relationships within possible unions as it gave wives more power over property and changed the legal matrimonial regime from the community of property to the partnership of acquests. Under the former, the husband was the one responsible to manage and administer property, while the later denotes the idea of a shared administration, a partnership between the protagonists. It granted the 'family' with assets in a way, despite the family not being an entity. Further, modifications made about natural children[336] and parental authority[337] indirectly participated in the increased possibilities for relationships. While the former, albeit timidly, start considering *de facto* unions may produce positive effects in law, the latter was another step towards an equal relationship between husbands and wives. Scholars were shocked by the disappearance of the

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[332] Kristen Douglas, *Divorce Law in Canada* (Ottawa, 2008) at 2.

[333] SC 1967-68, c 24.

[334] S 3, *Divorce Act*, SC 1967-68, c 24.

[335] SQ 1969, c 77.

[336] *An Act to amend the Civil Code respecting natural children* (SQ 1970, c 62). This act allowed for child support between illegitimate parents and children. The obligation was, as it was the case for legitimate children and parents, reciprocal.

[337] *An Act to amend the Civil Code,* SQ 1977, c 72.

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*chef de famille,*[338] but it allowed for the appearance of the other parent in law, a parent that was normally already very present in everyday life. Further, modifications to the CCLC were made in order to 'include' *de facto* spouses in private law. Indeed, former article 768 CCLC "[tenait] pour suspects les concubins, leur interdisait de façon formelle de se faire des donations entre vifs qui dépassaient les besoins alimentaires".[339] This provision prohibiting gifts between unmarried consorts was abrogated in 1980.[340] Whether it was a measure aimed at including unmarried couples in the Code is up for debate. It was rather about not expressly and directly excluding them when it came to a tiny portion of private law: donation or gift. The new first book of the new Code was about to come into force in this climate of change.

### 2.2.3 **1981-1994: Family Law Reform and Effects**

The multiplication of possibilities for conjugal relationships is less obvious in this section since attempts to include *de facto* relationships had been pre-empted by the National Assembly. However, the impacts of the reform and the modifications made to the Civil Code from 1980 to 1994 tell a lot about the underlying theory and policy – or absence thereof – for family law in Quebec civil law. Further radical changes in terms of structure of the Code and effects of formal relationships were introduced in the Code. Quebec also tried to defiantly include divorce and substantive conditions for marriage in its Code. While including a book on the family in the Code was a bold move, its relationship to the other book and the dialogue between its own parts look like an uncompleted task. In addition, family is undefined and no legal qualification attached to it. Is it a legal person? An institution (in the civilian sense)? A contract? Something else? The Legislature did not address these questions but rather focused on its aim of furthering a certain understanding of equality between married spouses.

*An Act to establish a new Civil Code and to reform family law*[341] was sanctioned on December 19, 1980. Throughout the eighties, some articles came into force. Others never made it through. Changes to the *Code of Civil Procedure* were also made necessary by the reform of

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[338] Jean Pineau, "L'autorité dans la famille" (1965) 7:2 C de D 201.

[339] Marcel Guy, "Le Code civil du Québec: un peu d'histoire, beaucoup d'espoir" (1993) 23 RDUS 453, 475.

[340] SQ 1980, c 39, art 35.

[341] SQ 1980, c. 39.

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family law.[342] What came into force was quite different than what was originally proposed by the CCRO, both in term of structure and content. The CCRO proposed the following structure for the book on the family:

| **Livre Deuxième – De la famille** | **Book Two – The Family** |
|---|---|
| Titre premier – Du mariage<br>Titre deuxième – De la filiation<br>Titre troisième – De l'obligation alimentaire<br>Titre quatrième – De l'autorité parentale | Title One – Marriage<br>Title Two – Filiation<br>Title Three – The Obligation of Support<br>Title Four – Parental Authority |

but in the end, the Code looked like this:

| **Livre Deuxième – De la famille** | **Book Two – The Family** |
|---|---|
| Titre premier – Du mariage<br>Titre deuxième – Du divorce<br>Titre troisième – De la filiation<br>Titre quatrième – De l'obligation alimentaire<br>Titre cinquième – De l'autorité parentale | Title One – Marriage<br>Title Two – Divorce<br>Title Three – Filiation<br>Title Four – The Obligation of Support<br>Title Five – Parental Authority |

While most of the articles under the title on divorce never came into force, it nonetheless was sitting in the Code for all to see. The fact the book on family opens with marriage is worth emphasizing. It sends the message that the family starts with marriage. A different message was sent under the CCLC. Marriage came first, then came before filiation, but remember marriage and filiation were found in the law of persons, not family law. Moreover, the pecuniary aspects of marriage were dealt with in the book on the acquisition of property. As of 1980, marriage and filiation, in addition to the obligation of support and parental authority, were part of a book a book on 'family'. This word was used in the CCLC but carried less or perhaps different weight. The CCQ symbolically sent a message about what was a family in the Code, and in private law. When it comes to conjugal relationships, the only family the Code knows is the formal family, the family rooted in marriage.

In terms on the structure of the title on marriage, the CCRO and the National Assembly more or less reached the same conclusion. In order to compare quickly, I will not reproduce the French text.

| **CCRO** | **CCQ (1980)** |
|---|---|
| Chapter I – Promises of marriage | Chapter I – Conditions required for contracting |

[342] *An Act to provide for the carrying out of the family law reform and to amend the Code of Civil Procedure,* SQ 1982, c 17 was sanctioned on June 11, 1982.

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| | |
|---|---|
| | marriage |
| Chapter II – Conditions required for contracting marriage | Chapter II – Opposition to marriage |
| Chapter III – Opposition to marriage | Chapter III – The solemnization of marriage |
| Chapter IV – The solemnization of marriage | Chapter IV – Proof of marriage |
| Chapter V – Proof of marriage | Chapter V – Nullity of marriage |
| Chapter VI – Nullity of marriage | Chapter VI – Effects of marriage |
| Chapter VII – Effects of marriage | Chapter VII – Matrimonial regimes |
| Chapter VIII – Matrimonial regimes | Chapter VIII – Separation as to bed and board |
| Chapter IX – Dissolution of marriage | Chapter IX – Dissolution of marriage |
| Chapter X – Separation as to bed and board, and divorce | |

Apart from the omission of the part on promises of marriage and the inversion of the two last chapters, the structure proposed by the CCRO is the same as the one found in the Civil Code of 1980. Many changes to the content were made: equality between spouses became the guiding principle, protection of the family residence was included in the Code,[343] the age of consent to marriage was increased to 18 years old for both men and women,[344] impediments to marriage were modified,[345] oppositions and nullity requirements were adjusted,[346] and many more technical changes occurred. Modifications made to the rights and duties of spouses illustrate how equality became a primary concern to family law. The changes in the title of the section containing the rules and to the rules themselves expose the new focus on equality.

Under the CCLC the title of the sixth chapter of the fifth title (Of marriage) read as follow:

| | |
|---|---|
| **Chapitre sixième**. Des droits et des devoirs respectifs des époux | **Chapter sixth**. Of the respective rights and duties of husband and wife. |

Note the discrepancy between the English and French texts. While the French version uses "époux" the English version says "husband and wife". The first section of the sixth chapter of the title on Marriage of the CCQ (1980) read as follow:

| | |
|---|---|
| **Chapitre sixième**. Des droits et des devoirs des époux | **Chapter VI.** Rights and duties of spouses. |

The wording of the French and English version has been attuned, but most importantly, rights and duties are not 'respective' anymore, suggesting husband and wife share the same rights and duties towards one another. The content of the articles of the CCQ (1980) is in line with this

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[343] Arts 449 and *ff* CCQ.

[344] Compare arts 115 and 119 CCLC to art 402 CCQ (1980).

[345] Compare arts 124 and *ff* CCLC to art 405 CCQ (1980).

[346] Compare, for example, arts 150, 151 and 153 CCLC with art 429 CCQ (1980).

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modification in the title. Art 441 CCQ (1980) emphasized the spouses "have identical rights and obligations in marriage". A new duty appeared: respect.[347] Further, "each spouse retains his surname and given names"[348] and "the spouses together take in hand the moral and material direction of the family".[349] All these articles are mandatory (*d'ordre public*), meaning it is impossible for spouses to derogate from the principles set forth in the articles.[350] What the sanction is in case of a breach remains unsure and whether couples would really go to court when they cannot decide where the family residence will be is unlikely. But modifications made it clear: on paper the spouses are equal. The Legislator also added that contribution to the marriage expenses may be made by "activity in the home".[351] The compensatory allowance was introduced in order to address the 'historic' power imbalance and injustices for women married under former matrimonial regimes.[352] Despite the legislature's best efforts, years of inequality were still having consequences.[353] Other laws adopted and modified the Civil Code in order to reach equality in family matters.[354] But a major development came a few years later.

On June 22, 1989, the Quebec legislature sanctioned *An Act to Amend the Civil Code of Quebec and Other Legislation in Order to Favour Economic Equality Between Spouses*.[355] This act introduced, amongst other things, the family patrimony and it modified rules about the

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[347] Some authors argued the duty to respect was embedded in the CCLC, that the duty was obvious (see Pineau & Pratte, *supra* note 12 at 130; Castelli & Goubau, *supra* note 19 at 97). With respect, another interpretation is possible. The wife was not a legal person, she was not a legal subject, and she was at most a legal object, almost akin to property. With such an understanding of the relationship between husband and wife, 'respect' is not the first thing that comes to mind.

[348] Art 442 CCQ (1980).

[349] Art 443 CCQ (1980).

[350] Art 440 CCQ (1980).

[351] Art 445(2) CCQ (1980).

[352] Castelli & Goubau, *supra* note 19 at 141–144; Pineau & Pratte, *supra* note 12 at 163–164.

[353] Years of marriage under the separation as to property and work within the household proved to have harsh consequences on women upon divorce.

[354] Laws having an effect of conjugal relationships include *An Act to provide for the carrying out of the family law reform and to amend the Code of Civil Procedure* (SQ 1982, c. 17), *An Act to Amend the Civil Code in Respect of the Indexing of Support Payments* (SQ 1987, c. 105) and *An Act to Amend the Civil Code and the Code of Civil Procedure as to family matters* (SQ 1988, c. 17). Laws affecting the filial bond are voluntarily omitted in this chapter.

[355] SQ 1989, c 55.

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compensatory allowance in the book on the family. The focus here will be on the former. The *ministre déléguée à la Condition féminine* presented the bill on May 15, 1989 and it was sanctioned just over a month later. Elections were coming, it was a political statement, the population was divided and so were jurists.[356] The articles enacted then roughly correspond to what has been explained in part 2.1.2. The practical implications were huge and the Legislator allowed couples married before July 1st 1989 eighteen months to opt out of the family patrimony by notarial act or judicial declaration.[357] If the married spouses took no step, the family patrimony retroactively apply to them. In term of practical impact, for most couples, it meant that pretty much all of their assets and debts were now to be shared equally at the end of the marriage. By introducing the family patrimony, the Legislator also made a bold move from a theoretical standpoint. Whether the consequences were fully contemplated is doubtful. Ernest Caparros – who, the reader should be aware, generally had strong and quite conservative views as the next chapter will show – rightly mentioned that the family patrimony "pren[d], par moments, l'allure d'intrus dans notre ordonnancement codifié".[358] It has little to do with private law – the parties have no say as to the content and application of the device. It is neither a patrimony nor an affectation of property. It is not 'familial' but rather 'marital'. Shall it be a patrimony, it would be a patrimony without a holder… or it would make the legitimate family a legal person. In terms of policy, the message sent was clear: equality is of utmost importance and marriage is a common economic endeavour. But in terms of law, one can have serious doubts as to the road taken to achieve the policy objective… or win the elections. It also sent a strange message about what a family is in theory. On June 22, 1990, another act was sanctioned: *An Act to Amend the Civil Code of Quebec with Respect to Partition of the Family Patrimony and the Code of Civil Procedure*.[359] This act sought to clarify the meaning of art 462.5 of the Code and correct the English version of article 455.1 CCQ.[360] Finally for provincial law, the period from one code to the next is a showcase of the difficult interaction between provincial and federal

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[356] Caparros, "Le patrimoine familial" *supra* note 199 at 253.

[357] S 42, *An Act to Amend the Civil Code of Quebec and Other Legislation in Order to Favour Economic Equality Between Spouses,* SQ 1989, c 55.

[358] Caparros, "Le patrimoine familial" *supra* note 199 at 251.

[359] SQ 1990, c 18.

[360] 34th legislature, 1st session (November 28, 1989 – March 18, 1992) at 2211.

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powers in family law. The Code contained numerous substantive conditions to marry, including for example, the age and consent requirements of the future spouses.[361] They were in the Code for years, but ended up never coming into force.

At the federal level, modifications were made in 1985 to the *Divorce Act*. Modifications concerned various elements, the most important probably being the ones relating to the grounds for divorce. Under the *Divorce Act* (1985), "[s]ection 8 of the Act provides that a divorce may be granted on the ground that there is a breakdown of the marriage; this is established by showing that the spouses have lived separate and apart for at least one year".[362] These changes to the grounds for divorce are referred to the 'no fault' divorce given the breakdown of the marriage can be the result of a one-year separation rather than a matrimonial fault. Note the matrimonial faults are still in the *Divorce Act* and grounds for divorce. The federal parliament also enacted the *Marriage (Prohibited Degrees) Act*[363] in 1990. This act clarifies marriage prohibition between some related persons. More precisely, section 2(2) of the *Marriage (Prohibited Degrees) Act* states "[n]o person shall marry another person if they are related lineally, or as brother or sister or half-brother or half-sister, including by adoption". This act has minimal effect on the multiplication of conjugal relationships in Quebec. However, the modifications to the *Divorce Act* increased access to divorce and continued to allow for the multiplication of conjugal relationships, more precisely subsequent remarriages or *de facto* unions subsequent to marriage for example. These interventions by the federal legislature contributed to the transforming landscape of the regulation of conjugality in the province of Quebec.

The proliferation of relationships from 1980 to 1994 is subtle. However, the period changed the face of family law, made clear equality between the spouses was a primary concern and complicated the theoretical foundations of family law. Family law became a book, marriage became a common enterprise and a 'family patrimony' made its appearance. The marriage was also infused with numerous public order devices leaving the married spouses with no choice as to how to arrange the patrimonial and extrapatrimonial aspects of their relationship.

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[361] Arts 400 and 402 CCQ (1980).

[362] Kristen Douglas, *Divorce Law in Canada* (Ottawa, 2008).

[363] SC 1990, c 46.

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### 2.2.4 1994 [2002]: More Reforms…

1994 was a big year for Quebec civil law. On January 1 1994, the *Civil Code of Québec* came into force as a whole. This represented decades of work. In terms of legislative action, the National Assembly sanctioned Bill 125 on December 18, 1990. After over a thousand modifications,[364] Bill 125 was unanimously adopted on December 18, 1991. The Civil Code came into force a year short of the referendum, on January 1, 1994. Some modifications were made to family law with the coming into force of the new Code.

In terms of structure, while in 1980 the first title of the book on family used to have nine chapters, in the 1994 version of the title, there are only seven chapters:

| | |
|---|---|
| Chapitre 1 – Du mariage et de sa célébration | Chapter I – Marriage and solemnization of marriage |
| Chapitre 2 – De la preuve du mariage | Chapter II – Proof of marriage |
| Chapitre 3 – Des nullités de mariage | Chapter III – Nullity of marriage |
| Chapitre 4 – Des effets du mariage | Chapter IV – Effects of marriage |
| Chapitre 5 – Des régimes matrimoniaux | Chapter V – Matrimonial regimes |
| Chapitre 6 – De la séparation de corps | Chapter VI – Separation from bed and board |
| Chapitre 7 – De la dissolution du mariage | Chapter VII – Dissolution of marriage. |

The Legislator basically combined the three first chapters of the title from 1980 into one, as this table shows in italics:

| **Civil Code (1980)** | **Civil Code (1994)** |
|---|---|
| *Chapter I – Conditions required for contracting marriage* | *Chapter I – Marriage and solemnization of marriage* |
| *Chapter II – Opposition to marriage* | Chapter II – Proof of marriage |
| *Chapter III – The solemnization of marriage* | Chapter III – Nullity of marriage |
| Chapter IV – Proof of marriage | Chapter IV – Effects of marriage |
| Chapter V – Nullity of marriage | Chapter V – Matrimonial regimes |
| Chapter VI – Effects of marriage | Chapter VI – Separation from bed and board |
| Chapter VII – Matrimonial regimes | Chapter VII – Dissolution of marriage. |
| Chapter VIII – Separation as to bed and board | |
| Chapter IX – Dissolution of marriage | |

Obviously, all articles were renumbered in order to fit in the Code as a whole. In terms of content, it is fair to say the most significant changes were made about filial relationships. The ones pertaining to conjugal relationships were less obvious. Celebration requirements remained more or less the same and were smartly and efficiently combined with publication and oppositions to marriage. Probably in order to avoid legislating *ultra vires* the substantive

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[364] According to Gil Rémillard, Minister of Justice in the commentaries to the Civil Code.

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conditions to contract marriage were introduced as celebration requirements. While the former clearly falls under section 91(26) of the *Constitution Acts*, the later falls within section 92(13). This bold move is made obvious by article 373 CCQ (1994), reading as follow:

| | |
|---|---|
| **373.** Avant de procéder au mariage, le célébrant, le célébrant s'assure de l'identité, de l'âge et de l'état matrimonial des futurs époux.<br><br>Il ne peut célébrer le mariage que si :<br>1° Les futurs époux sont âgés d'au moins seize ans, en s'assurant, si les époux sont mineurs, que le titulaire de l'autorité parentale ou, le cas échéant, le tuteur consent à la célébration du mariage;<br>2° Les formalités ont toutes été remplies et les dispenses accordées;<br>3° Les futurs époux sont libres de tout lien matrimonial antérieur;<br>4° L'un n'est pas, par rapport à l'autre, un ascendant, un descendant, un frère ou une sœur. | **373.** Before proceeding with a marriage, the officiant ascertains the identity, age and marital status of the intended spouses.<br>The officiant may not solemnize the marriage unless:<br>(1) the intended spouses are at least sixteen years of age and, in the case of minors, the officiant has ascertained that the person having parental authority or, as the case may be, the tutor consents to the solemnization of marriage;<br>(2) all formalities have been completed and the dispensations, if any, have been granted;<br>(3) the intended spouses are free from any previous marriage bond;<br>(4) neither spouse is, in relation to the other, an ascendant, a descendant, a brother or a sister. |

The age requirement, the absence of previous marriage and the prohibited degrees are all substantive conditions encroaching on federal powers. As a matter of fact, article 373 para 2(3) CCQ (1994) is dealt with in the part about 'offenses against conjugal rights' of *Criminal Code*,[365] the Marriage (Prohibited Degrees) Act regulates prohibited degrees,[366] and the Federal Parliament clarified in 2001 the age requirement with the *Federal Law—Civil Law Harmonization Act, No. 1*.[367] Article 373 CCQ now reads:

| | |
|---|---|
| **373.** Avant de procéder au mariage, le célébrant s'assure de l'identité des futurs époux, ainsi que du respect des conditions de formation du mariage et de l'accomplissement des formalités prescrites par la loi. Il s'assure en particulier qu'ils sont libres de tout lien de mariage ou d'union civile antérieur, sauf, en ce dernier cas, s'il s'agit des mêmes conjoints et, s'ils sont mineurs, que le tribunal a autorisé la célébration de leur mariage.<br>Le mineur peut demander seul l'autorisation du tribunal. Le titulaire de l'autorité parentale ou, le cas échéant, le tuteur doit être appelé à donner son avis. | **373.** Before solemnizing a marriage, the officiant ascertains the identity of the intended spouses, compliance with the conditions for the formation of the marriage and observance of formalities prescribed by law. More particularly, the officiant ascertains that the intended spouses are free from any previous bond of marriage or civil union, except in the case of a civil union between the same spouses, and, in the case of minors, that the court has authorized the solemnization of the marriage.<br>The minor may apply alone for the court's authorization. The person having parental authority or, if applicable, the tutor must be summoned to give his or her advice. |

[365] See ss 290 and *ff*, *Criminal Code,* SC 1990, c 46.

[366] SC 1990, c 46.

[367] SC 2001, c 4.

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While some requirements falling within federal powers are still in the article, it now appears to relate mostly to provincial powers. Other modifications to the content included the delays to invoke nullity. Others changes were minimal. A few years later, *An Act to Amend the Civil Code as regards the obligation of support*[368] was sanctioned (Bill 25). This act came into force on June 20 1996 and it modified the third title of the second book, the one about obligation of support. It does not relate directly to conjugal ties or to filial ties. The aim of the act was to

> restreindre l'obligation alimentaire légale aux parents en ligne directe au premier degré. Il prévoit l'application de la nouvelle disposition aux instances en cours. Il édicte enfin que toute obligation de payer des aliments entre parents autres que du premier degré et résultant d'un jugement cessera d'avoir effet 60 jours après l'entrée en vigueur de la loi.[369]

The goal was to limit the support obligation between ascendant and descendant of first degree only, in direct line. In other words, obligations now exist only between *de jure* spouses, and children and parents. Before Bill 25, grandparents and parents-in-law could be debtors or creditors of alimentary support.[370] As with the other modifications mentioned since the beginning of section 2.2.4, this change to the Civil Code does not showcase a multiplication of possibilities for conjugal relationships. It, at best, shows a shift from an understanding of family as intergenerational to family as being nuclear. Indeed, in limiting obligations of support to first degree ascendant or descendant, it sent a message: not only is the family of the Code the legitimate family – when it comes to conjugal relationships – it is also the nuclear family. But which nuclear families meet the threshold was about to change, given the proliferation of possibilities for conjugality in the newly minted *Civil Code of Québec.*

The second book of the *Civil Code of Québec* was significantly modified less than a decade after the coming into force of the new Code as a whole. The Legislature introduced a new conjugal union in the code after years of pressure from minority groups, in a context where the federal government and the highest courts of the provinces were in the midst of finding solutions

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[368] SQ 1996, c 28.

[369] 35th Legislature, 2nd session (March 25, 1996 - October 21, 1998), Fascicule n°21, May 15, 1996, at 1089.

[370] See art 663 (1980) CCQ and arts 166 and 167 (1866-1969 and 1969-1980) CCLC.

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for same-sex partners.[371] This act was another political statement. On June 8, 2002, Bill 84: *An Act instituting civil unions and establishing new rules of filiation* was sanctioned. This act came into force, for the most part, on July 24, 2001. It was the result of draft legislation introduced by the Minister of Justice Paul Bégin on December 7, 2001. The aim of this draft legislation was to create "an institution, the civil union, for couples of the opposite or the same sex who wish to make a public commitment to live together as a couple and to uphold the rights and obligations stemming from such status".[372] Open to both heterosexual and non-heterosexual couples, civil union was to respond to the impossibility for non-heterosexual partners to marry. It basically reproduced what was in the Code for marriage, with some modifications. The age to consent to civil union is 18 years old and it can be dissolved – if there is no child – via a declaration by notarial act. It created a new civil status, a civil status relying once again on a formal understanding of relationships. Significant modifications were made necessary to the title on filiation, as it is explained in section 3.2.4. Bill 84 introduced two new relationships to the Code: non-heterosexual civil unions and heterosexual civil unions. In term of structure, it introduced a new title as the comparison between the structure of 1994 and 2002 shows:

| **Book Two – The Family (1994)** | **Book Two – The Family (2002)** |
|---|---|
| Title One – Marriage<br>Title Two – Filiation<br>Title Three – The Obligation of Support<br>Title Four – Parental Authority | Title 1 – Marriage<br>Title 1.1 – Civil Union<br>Title 2 – Filiation<br>Title 3 – Obligation of support<br>Title 4 – Parental Authority |

While the change did not only affect family law one-, section 143 of *An Act instituting civil unions and establishing new rules of filiation* modified the *Interpretation Act*[373] in adding this definition:

> s. 61.1 The word "spouse" means a married or civil union spouse.
>
> The word "spouse" includes a *de facto* spouse unless the context indicates otherwise. Two persons of opposite sex or the same sex who live together and represent themselves publicly as a couple are *de facto* spouses regardless, except where otherwise provided, of how long they have been living together. If, in the

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[371] A lot happened from 2001 until 2006: *EGALE Canada Inc. v Canada (Attorney General)*, 2002 BCCA 396; *Halpern v Canada (Attorney general)*, 2003 CanLII 26403 (ON CA); *Ligue catholique pour les droits de l'homme v Hendricks*, 2004 CanLII 76590 (QC CA). All this judicial activity led to the *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79 (CanLII) and ultimately to the *Civil Marriage Act*, SC 2005, c 33.

[372] Explanatory Notes, Bill 84, *An Act instituting civil unions and establishing new rules of filiation,* SQ 2002, c 6.

[373] CQLR c I-16.

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> absence of a legal criterion for the recognition of a *de facto* union, a controversy arises as to whether persons are living together, that fact is presumed when they have been cohabiting for at least one year or from the time they together become the parents of a child.

This definition had the effect of including *de facto* spouses in the definition of spouses in the Code as well, except when they were expressly excluded. As such, even if it did not include them in the second book, it opened a breach for this relationship to be included in the Code.

A few years later, following years of judicial action and activism, the Parliament of Canada modified the traditional definition of marriage. With the 'support' of the Supreme Court of Canada that confirmed is was within its legislative powers and the proposed definition was in line with the *Charter*,[374] the Federal Legislature enacted the *Civil Marriage Act.*[375] In the same spirit as the Quebec Legislature, the aim was to foster the right to equality of non-heterosexual couples. In the *Civil Marriage Act,* "marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others".[376] This new definition confirmed the disassociation of the spheres of influence of religion and law when it came to adult intimate relationships, a movement that started in the late sixties. The act also clarified some substantive requirements to contract marriage, such as consent, age and absence of a previous marriage.[377] It obviously affected the Civil Code; marriage was to be read in light of the new definition. The non-heterosexual marriage thus became a new possibility for conjugality in the Civil Code, a new relationship. In order not to penalize non-heterosexual couples that were in a civil union, Quebec's legislature sanctioned on November 10, 2004 *An Act to amend the Civil Code as regards marriage.*[378] The act came into force the same day and its purpose was

> to allow couples in a civil union to continue their life together as a married couple. It authorizes the officiant to solemnize their marriage despite their civil union, and provides that the marriage dissolves the civil union while maintaining its civil

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[374] *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79 (CanLII).

[375] SC 2005, c 33. See also the preamble of the act making clear the act is enacted following numerous decisions from the provincial courts and the Supreme Court reference.

[376] S 2, *Civil Marriage Act,* SC 2005, c 33.

[377] See ss 2.1, 2.2 and 2.3, *Civil Marriage Act,* SC 2005, c 33.

[378] SQ 2004, c 23.

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> effects, which are considered to be effects of the marriage from the date of their civil union.[379]

For some, marriage has a symbolic charge reaching further than the equivalence when it comes to the effects of unions. This act also contained modifications to the law of persons and to the change in the designation of sex and name. Since then, the family law, when it comes to conjugal ties in the Code has been modified a few times again, directly or less so.[380] Canada still limits union to two persons. In the *Civil Code of Québec*, unions producing effects are limited to *de jure* union, both heterosexual and non-heterosexual, civil and religious. With this story of the multiplication of possibilities for conjugal relationships, let's now turn to the current challenges of conjugal relationships in the *Civil Code of Québec*.

## 2.3 What Now with Conjugal Relationships

In a short time, Quebec private law has witnessed the appearance and proliferation of possibilities for conjugality. In Quebec, the introduction of the civil union put the final nail in the coffin of marriage's monopoly.[381] It also significantly reduced the grip of religious principles as legal norms for dictating the possibility of adult intimate relationships. Religious heterosexual marriage has been dislodged from its unique and superior status.[382] The ideological divide between *de jure* unions and *de facto* unions has been attenuated. Indeed, when it becomes possible for marriage bonds to dissolve, for marriage to be completely secular, or to take place between same sex partners, the institution of marriage is redefined and marriage's content changes. Its features started to be akin to other forms of union and the characteristics of marriages and *de facto* unions – transforming institutions – started converging. Benoît Moore highlights that if

> the *de facto* union remains heterogeneous, it remains so less and less, a large number of *de facto* unions representing a strong functional similarity with

[379] *Ibid* explanatory notes.

[380] For example, *An Act to ensure better consistency between the French and English texts of the Civil Code,* SQ 2016, c 4. See also s 5, *An Act to amend various legislative provisions to better protect persons (modified title)*, SQ 2016, c 12 which remove the advisability of the premarital medical examination.

[381] Civil union was introduced in 2002*:* s 74, *An Act instituting civil unions and establishing new rules of filiation,* SQ 2002, c 6. It created a new form of State approved conjugality. While open to both non-heterosexual and heterosexual partners, its principal aim was to provide an alternative to marriage for same-sex partners.

[382] Katherine M. Franke, "Longing for *Loving*" (2008) 76 Fordham L Rev 2685.

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> marriage. Inversely, marriage also converges with the *de facto* union, especially since it is less homogeneous and stable than before.[383]

While marriage and cohabitation started at the opposite ends of the spectrum, it seems they have met somewhere along the way with the passage of time. From 1955 until now, the civil codes have witnessed a proliferation of relationships within its covers. These relationships nonetheless need to be meet formality requirements in order to be apprehended by the Code. Indeed, despite the opening of possibilities and arguably recognizing the similar nature of relationships, the Code's only family when it comes to conjugal unions is the formal family, the *de jure* family.

In the first part of this chapter (2.1), it has been explained how the *Civil Code* regulates conjugal unions today. It has been shown that the Code has a limited understanding, in its second book, of who is a 'conjugal' family. Indeed, the Code contemplates a few types of unions: marriages (religious or civil, heterosexual or non-heterosexual) and civil unions (heterosexual or non-heterosexual), which as a group can be referred to as *de jure* unions. These unions produce various legal effects, both pecuniary and non-pecuniary. 'The family' of the Code is understood narrowly, despite the prevalence of unmarried cohabitation in Quebec. This limited number of recognized unions in family law one- nevertheless represents an improvement in terms of possibilities for relationships. Indeed, the second part of the chapter has demonstrated relationships multiplied on two principal accounts. First, once religious marriage was the only option, now many options are available – religious marriage, civil marriage, civil union, non-heterosexual marriage or civil union. All these options require formalities and conjugality is not contemplated in the Code because of the nature of relationships, but rather because certain relationships meet formal requirements. This is paradoxical considering the argument of functional equivalence been put forward by non-heterosexual couples to see their unions 'legalized'. Second, relationships within *de jure* unions also proliferated from the moment wives gained legal capacity. Despite this progress, the Code still has a limited understanding of what counts as conjugal relationships. But in recent years, this narrow understanding of conjugality has been challenged.

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[383] Benoît Moore, "Auprès de ma blonde..." in Brigitte Lefebvre & Antoine Leduc, eds *Mélanges Pierre Ciotola* (Montreal: Thémis, 2012) 359 at 361 [Moore, "Auprès de ma blonde"] and "Variations chromatiques: l'union de fait entre noir et blanc" in *Mélanges Adrian Popovici – Les couleurs du droit* (Montreal: Thémis, 2010) at 101-124.

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### 2.3.1 **Proposed "Reform" of 2015**

In this part, the proposed reform of 2015 is described first. To this date, the proposed reform has not triggered any political or legislative action. Second, the perils and promises of the suggestions put forward by the *Comité consultatif* are critically assessed. Last, in light of parts 2.1, 2.2 and 2.3, some thoughts are offered about the underlying elements at play in family law regulation, how they have transformed and the impacts they have on family law theory.

Quebec family law is – yet again – in the midst of propositions for reform. It would be the third major reform in the last 35 years.[384] Family law is probably the book of the Code faced with the most modifications, transformations and reforms. Why? The easy answer is that 'family' changes all the time. But is it the only reason? Following the highly mediatized case of *Quebec (Attorney General) v A*,[385] better known as the Lola case or *Eric v Lola*, it became clear a reform was needed and the judiciary would not be the means to implement fundamental changes in the regulation of families in Quebec. In 2013, following a high-profile case between a billionaire and his former model *de facto* spouse involving, amongst other things an order granting her children, a personal driver, a cook, two maids and over $400,000 a year of child support, the Government of Quebec decided to follow through with the Supreme Court of Canada hint to adjust the law in accordance with the everyday life expectations of Quebecers. *Eric v Lola* represents a textbook example of how decisions from the courts are exceptions having little to do with everyday life and everyday law. Yet, Quebec waited until then to 'take action'. The decision was about the differentiating treatment of *de facto* and *de jure* unions in the *Civil Code of Québec.* The issue was important – in 2012 more than 62 % of 30-34 years old and 40% of 45-49 years old live in *de facto* unions[386] – and complex – the court itself was extremely divided as to the outcome of the case on the questions at stake. Lola claimed she was discriminated against since she could not claim spousal support, compensatory allowance, family patrimony, protection to the family residence and the matrimonial regime. This would have made

[384] Here I refer to the 1980 reform, the 2002 reform and the actual reform. Other important changes happened in 1989 (matrimonial property), 1994 and sporadically but are not described – interestingly – as reform per se.

[385] [2013] 1 SCR 61.

[386] Bilan démographique du Québec, 2012 edition: http://www.stat.gouv.qc.ca/statistiques/population-demographie/bilan2012.pdf#page=89.

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the corresponding articles of the *Civil Code of Québec* unconstitutional. The constitutionality of the articles of the CCQ was confirmed in first instance. On appeal, the Quebec Court of Appeal ruled the articles were constitutional, except for article 585 CCQ, the article about support obligations. Article 585 CCQ was ruled unconstitutional because it violated equality. In a highly divided decision, the Supreme Court of Canada answered the constitutional questions as follows:

> 1. Do arts. 401 to 430, 432, 433, 448 to 484 and 585 of the *Civil Code of Québec*, S.Q. 1991, c. 64, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* ?
>
> Answers: McLachlin C.J. and Deschamps, Abella, Cromwell and Karakatsanis JJ. would answer yes. LeBel, Fish, Rothstein and Moldaver JJ. would answer no.
>
> 2. If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms ?
>
> Answers: LeBel, Fish, Rothstein and Moldaver JJ. would answer that it is not necessary to answer this question. McLachlin C.J. would answer yes. Deschamps, Cromwell and Karakatsanis JJ. would answer that only art. 585 is not justified under s. 1 . Abella J. would answer no[387].

As such, the majority of the court found *de facto* spouses were discriminated against by Quebec's current regime (5 vs 4), but Chief Justice McLachlin decided the infringement was within a reasonable limit.

Against this background, on April 19th 2013, the Minister of Justice Bertrand St-Arnaud (Parti Québécois) announced the creation of a Comité, chaired by Professor Alain Roy (Université de Montréal, Notary) and coordinated by Mtre Renée Madore (Quebec Bar 1989). The Minister of Justice stated

> Depuis la grande réforme du droit de la famille en 1980, la société québécoise s'est transformée. Les dernières années ont été marquées de plusieurs avancées pour les familles, notamment en ce qui concerne le patrimoine familial ainsi qu'en matière d'union civile et de reconnaissance des conjoints de même sexe, mais, ces changements aux lois ont été faits à la pièce. L'heure est venue d'amorcer une réflexion en profondeur sur les orientations de notre législation, pour déterminer si elle répond adéquatement aux besoins des familles d'aujourd'hui[388].

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[387] [2013] 1 SCR 61.

[388] Official press release, April 19, 2013: http://www.fil-information.gouv.qc.ca/Pages/Article.aspx?motsCles=&listeThe=&listeReg=&listeDiff=&type=&dateDebut=2013-04-19&dateFin=2013-04-19&afficherResultats=oui&idArticle=2104197087&lang=en

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In this statement, St-Arnaud acknowledges how much has been done in recent years in term of family law rules, but how changes were made without due consideration to the big picture or without a reform *per se*. This situation calls for a reflection as to the orientation of our laws and whether they meet the needs of today's families. A Comité[389] – rather homogeneous in composition – was put in place, composed of the following experts:

1. Mtre Marie-Josée Brodeur (admission to the bar: 1979);
2. Mtre Dominique Goubau (admission to the bar: 1979) and law professor;
3. Mtre Suzanne Guillet (admission to the bar: 1978);
4. Mtre Christiane Lalonde (admission to the bar: 1983);
5. Mtre Jean Lambert (admission to the Chaire du Notariat: 1969)
6. Mrs Céline LeBourdais, sociologist and sociology professor (PhD 1984);
7. Mrs Anne Roberge, representing the Minister of the Family;
8. Mrs Marie-Christine Saint-Jacques, social work professor (PhD unknown).

The Comité's mandate was two-folded: first evaluate whether family law reform was necessary and second, propose specific recommendation for reform. The first part of the mandate was fulfilled on September 12th 2013 with submission of a preliminary report, the *Rapport sur l'opportunité d'une réforme globale du droit de la famille québécois.* The preliminary report recommended a reform. It also gave a taste of the direction in which the Comité was heading for the fulfilment of the second part of its mandate: the child is the priority, despite the fact the report was announced following a decision concerned with adult intimate relationships. In their opinion, previous reforms had mostly focused on conjugality, while filiation was modified as an effect of the changes affecting conjugality.

The long awaited final report, entitled *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales*, was announced to the press on June 6th 2015, presented on June 8th 2015 and made publicly accessible on the 9th. In terms of timing, the Comité probably wished for a better date. June 8th 2015 was a rainy Monday filled with partial elections crucial to the government in power – the Minister of Justice Stéphanie Vallée tweeted about the elections but not about the report. June 8th 2015 was also in between Mr. Jacques Parizeau's death – former Prime Minister of Quebec, economist, professor and important figure on the political and intellectual scene in Quebec – and the handing in of two controversial bills: Bill 57 - *An Act to enact the Act to prevent and combat hate speech and speech inciting violence and to amend*

[389] It is important to mention this is the composition of the Comité announced by the Minister of Justice. However, for the final report, a Ministerial team has also contributed.

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*various legislative provisions to better protect individuals* and Bill 62: *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for religious accommodation requests in certain bodies* both addressing, amongst other things, the radicalization of youth and the fears of 'terrorist' attacks. The Report thus got popular attention for at best a morning, despite its considerable length – the complete report counts more than 600 pages, even if the recommendations and their explanations are contained in 239 pages – and complexity. At the time of writing, the government's response to the report is still unknown and it is unlikely it will lead to any change. There is skepticism as to whether the proposed reform will ever materialize in legal changes.

The report is the result of 26 full-day meetings.[390] It is divided in three parts: Part 1 offers a brief historical and detailed socio-demographic portrait of familial changes in Quebec; Part 2 is concerned with the six guiding principles of the reform; and Part 3 addresses the orientations of the reform. More attention will be given here to Parts 2 and 3. Part 1 gives a picture of the transformation of the family and families in Quebec and offers a – brief – view on historical developments that have already been surveyed in depth here. Part 1 also offers a lot of statistical information about how family lives have changed, how marriage has eroded, how other kinds of unions have flourished – despite their instability[391] – in what type of family units children are now born, what is the age of first maternity, what is the average income of a household and other characteristics of modern family life, and more. It depicts a throughout analysis of some of the data available, data the Comité evaluated as primordial to family functioning, in light of their priority: the interest of the child.

Part 2 is short – five pages – and it is somewhat deceptive given the previously mentioned importance of exploring the 'mission' of family law and elaborating fundamental principles before implementing a 'reform'. This element is central and was one of the very few things the Minister of Justice mentioned when he created the Comité. The Comité starts this part asking essential questions: What is family law's end? What are its core values and mores? Why family law? What is its aim and which values should it promote? Yet the answers to these

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[390] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 111 at 3.

[391] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 111 at 29 and *ff*. There is something almost pernicious in using data on marriage in comparison to data out of marriage when it comes to the quality of 'stability' in intimate unions.

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fundamental questions and the mission of family law are not detailed in the second part, only a paragraph in Part three briefly addresses the question.[392] What are then the guiding principles of the reform?

The Comité identified six guiding principles. Their relationship with the mission of family law is unclear, but they certainly go hand in hand even if Parts 2 and 3 are not explicitly described as connected by the Comité. The first guiding principle is "the interest of the child and his or her rights". It is, according to the Comité, family law's task to protect and promote children's rights.[393] The second guiding principle of the Comité is "an inclusive and appropriate response to the diversity of couples and families". Under this guiding principle, the Comité acknowledges the tendency of family law to regulate mores and hierarchize conjugal models. Inclusion and flexibility are primordial to the Comité[394] and no one size fits all measure is desirable in their opinion, given the "heterogeneity of conjugal and familial profiles characteristic of Quebec's society".[395] Thirdly, "the child, is a shared responsibility and the origin of interdependency": the child it is said is the fulcrum of the family and the primary source of interdependency no matter the family form.[396] The child thus creates an immutable bond between its parents. As such, "family law must echo this interdependence by submitting parents to legal mechanisms aimed at ensuring a fair contribution to the expenses of the family and adequate protection to the family home".[397] The fourth guiding principle is a recurrent imperative when it comes to Quebec law: "the couple, a space for freedom of choice (autonomy) and freedom of contract". As the Comité acknowledges this guiding principle has been part of Quebec family law since the *Civil Code of Lower Canada*.[398] Autonomy and freedom of contract have been debated a lot in recent years in Quebec and there are various schools of thoughts on

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[392] *Ibid* at 67.

[393] *Ibid* at 3.

[394] *Ibid* at 58-59.

[395] *Ibid* at 59.

[396] *Ibid* at 58.

[397] *Ibid.*

[398] *Ibid.*

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the matter.[399] The principle animated the 1980 reform as well – alongside equality – with the results known today. "Citizens informed about their rights and obligations" – the fifth guiding principle – is also a recurring concern of law reformers. Unfortunately, previous experiences have demonstrated it is complex, and is sometimes not taken seriously by the parliamentarians. Indeed, the same preoccupation emerged in 1980 and 1989. Yet, little to no mechanisms were put in place. The last principle is access to justice in general, but especially in family law.[400] It is with these six principles in mind that the Comité proposed an important number of recommendations and modifications to family law in Quebec, more precisely to the *Civil Code of Québec*. But the Comité is aware of the limits of its mandate.

First, the Comité acknowledges their recommendations are not socially representative and no person, organisation or group has made propositions.[401] The work is the one of a group of scholars, jurists and government officials, and no social actors were consulted.[402] The group of experts did not consult with stakeholders and was not representative of the diversity of communities in Quebec. Second, the eternal problem of the division of powers is avoided. The Report suggests the provincial government should negotiate with the federal parliament to retrieve all powers over marriage and divorce.[403] This proposition sounds unrealistic. Third, the Comité assesses that family law in the Code and family law outside the Code should be consistent. It denounces a "logique de silos".[404] However, despite this statement, it is difficult to see how family inside and outside the Code could match relying on what is proposed. Indeed, a lot of propositions are complicated and not in line with what is already put forward in social law.

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[399] Dominique Goubeau, Ghislain Otis & David Robitaille, "Le spécificité patrimoniale de l'union de fait: le libre choix et ses 'dommages collatéraux'" (2003) 44 C de D 3; Tremblay, "Sans foi" *supra* note 40 ; Hélène Belleau, "D'un mythe à l'autre : de l'ignorance des lois à la présomption du choix éclairé chez les conjoints en union libre" (2015) 27:1 CJWL 1; Louise Langevin, "Liberté de choix et protection juridique des conjoints de fait en cas de rupture : difficile exercice de jonglerie" (2009) 54:4 McGill Law J 697; Benoît Moore, "Culture et droit de la famille: de l'institution à l'autonomie individuelle" (2009) 54 McGill LJ 257; Conseil du Statut de la femme, *Avis. Pour une véritable protection juridique des conjointes de fait,* Publications du Québec, May 2014.

[400] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 111 at 4.

[401] *Ibid* at 5.

[402] *Ibid*.

[403] *Ibid* at 125.

[404] *Ibid* at 6.

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The Comité recommends changes in four regimes, regimes somewhat breaking with the current ordering, or rather understanding, of family law in the Civil Code. The four regimes are labelled as such by the Comité:

> 1. Le régime parental impératif établissant des droits et obligations réciproques entre les parents;
> 2. Le régime conjugal établissant le cadre juridique applicable aux couples;
> 3. Le régime de la filiation centré sur l'enfant;
> 4. Le régime de l'autorité parentale et de l'obligation alimentaire également centré sur l'enfant.[405]

Three of the four regimes put the child front and center, the child being an obvious priority.

Some recommendations are broad. For example, the Comité suggests modifying the structure of the Code. While the structure now looks like this:

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

The Comité proposes to move towards this:

> LIVRE DEUXIÈME - DE LA FAMILLE
> DISPOSITION GÉNÉRALE
> TITRE PREMIER: DE LA FILIATION
> TITRE DEUXIÈME: DE LA CONJUGALITÉ
> TITRE TROISIÈME: DES EFFETS DE LA FAMILLE[406]

Another broad recommendation is to root 'the family' in the presence of a common child. Indeed, as the Comité proposes, "the child [should] be the determining criteria for rights and obligations".[407] The Comité recognizes couples without children could be part of family law in the Code,[408] but for them, their regulation should largely rely on values of autonomy, choice and freedom. Most importantly, the element triggering dependency/interdependency is the presence of a common child.[409] Interestingly, the Comité tries to define 'the family'. Through a general provision opening the book, the Comité says: "*La famille est fondée sur la filiation et la conjugalité*".[410] It could be translated as "the family is built upon filiation and conjugality". This

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[405] *Ibid* at 65-66.

[406] *Ibid* at 65.

[407] *Ibid* at 68.

[408] *Ibid* at 68–69.

[409] *Ibid* at 68.

[410] *Ibid* at 99.

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being said, what does the Comité actually recommend in term of law reform when it comes to conjugal ties?

When it comes to conjugal relationships, the recommendations can roughly be divided in two parts: the '*régime parental impératif'* or the imperative or mandatory parental regime and the '*régime conjugal*' or conjugal regime. These two expressions will be used in the next paragraphs – imperative parental regime and conjugal regime – since no official translation is available yet. The overlap between conjugality and parentage is salient when it comes to the imperative parental regime, but since it is about a bond between adults, it is considered as a mechanism regulating adult-adult relationships for the present purposes. It is included in conjugal ties even if this reading has limits, notably, its reliance on the presence of a child and the possibility for adults in non-conjugal relationships to become parents.

The imperative or mandatory parental regime is a combination of new and old mechanisms. The name is new, but the legal effects are roughly the ones currently in the Code albeit reserved to *de jure* unions. Under the imperative parental regime, the common child is the parent's "shared responsibility".[411] What is innovative, according to the Comité, is that the regime "add[s] a horizontal legal bond between the two parents of a child from his or her birth or adoption".[412] The essence of this new bond is the 'parental status'. The Comité understands 'parent' in the narrow sense of civil law, step-parenting or *de facto* parenting, for example, are mostly excluded. While they mention blended family, for example, they evaluate that it is not the role of the imperative parental regime to address it, but rather the role of the *droit commun*. The parents are here, by the way, referred to as father and mother. The regime, as its name tells, would be mandatory and would address "the effects of conjugal and familial interdependency for parents, during community of life, at breakdown or even if they never shared a community of life".[413] In other words, the matrimonial status of the parents is irrelevant for the imperative parental regime. This new bond is attached with what the Comité calls a '*responsabilité statutaire parentale*',[414] which can be translated for the present purpose as a 'statutory parental

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[411] *Ibid* at 71.

[412] *Ibid* at 71.

[413] *Ibid* at 71.

[414] *Ibid* at 72.

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liability'. This way to conceptualize the tie between the parents is new: the idea to have statutory liability in the Code for parents, liability hopefully independent of a fault, is interesting, to say the least, both practically and theoretically. This new legal bond or this new statutory parental liability would entail various reciprocal rights and obligations. These rights and obligations can be divided in three components. The first component is the contribution to the expenses of the family. The notion encompasses "the necessary expenses to the effective operation of the family".[415] Both parents would have to "contribute towards the expenses of the [family] in proportion of their respective means".[416] The parents may also "make their respective contributions by their activities within the home".[417] Shall the contribution be unequal; a right to compensation at the end of the community of life is contemplated. The second element of the statutory parental liability is the protection and attribution of the family residence (and of movables serving for the use of the household). The Comité proposes to extend the existing provisions to parents of a common child who are sharing a community of life. When the parents separate, the protection of the family residence extends for 30 days. Further, when the child leaves the family residence, the protection measures remain, except if parents opt out. It should be emphasized that what is extended is not the protection of the residence under the family patrimony, thus the value of the assets, but the mechanisms found in articles 401 to 413 CCQ. These mechanisms briefly described in section 2.1.2 are limited in scope and concern provisions about the hypothecation of the residence, subleasing, and the usage of the family residence during the separation procedures. It is conceptualized as an accessory measure to separation. The third measure is probably the most innovative and is called the '*prestation compensatoire parentale*' or the parental compensatory allowance. The parental compensatory would counterbalance the financial disadvantages associated with the caring of a child (in French: "*la compensation des désavantages économiques subis en raison de la prise en charge d'un enfant commun*"[418]). As its name indicates, it would be available to parents and would have nothing to do with their matrimonial status. The Comité insists it is not a pension; it would be a lump sum,

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[415] *Ibid* at 72.

[416] This is the text of art 396 CCQ. Even if art 396 CCQ is about the expenses of the marriage, the wording is mostly the same.

[417] Art 396 CCQ.

[418] *Ibid* at 75.

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to compensate only and specifically for the disadvantages related to the upbringing of a child.[419] This 'personal right of patrimonial nature' would benefit only the parent and would be not be transmissible to heirs or creditors.[420] The conditions for the parental compensatory allowance would slightly differ from the compensatory allowance already found in the Code since 1980, at articles 427 to 430 CCQ. It could be obtained in four situations, two of them targeting disadvantages occurring during the community of life and as a result of taking on a parental role and two others based on the compensation of disadvantages occurring after the separation or in the event where parents never shared a community of life. Under the first hypothesis, there are two possibilities: when the economic disadvantages suffered by the parent acting as a parent is disproportionate[421] and when one of the parents over contributes to the expense of the household.[422] As for the second scenario, a parental compensatory allowance can be requested first if one of the parents in the exercise of his or her parental duties is disinterested, disengaged or in default or breach.[423] This sounds like a slippery slope. An allowance can also be asked for when the child's health requires exceptional parental involvement.[424] The Comité summarizes the principles underpinning the parental compensatory allowance, without regards to which hypothesis applies, as follow:

- It is non-alimentary and strictly compensatory;
- It is limited to economic disadvantages related to the upbringing of a child;
- Proportionality;
- Presumption advantaging the parent in a vulnerable situation;
- Individual responsibility;
- Mitigation of economic disadvantages and available resources of the debtor;
- Guidelines;
- Flexible payment mechanisms;
- Suitable provisional measures.[425]

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[419] *Ibid* at 79.

[420] *Ibid* at 80.

[421] *Ibid* at 80-88.

[422] *Ibid* at 89-90.

[423] *Ibid* at 92-94.

[424] *Ibid* at 95-96.

[425] My translation of the criteria listed at 97-98 of the Report.

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The parental compensatory allowance would have a three years prescription period, except under exceptional circumstances or should be claimed within a year from the death of the parent. The parental compensatory allowance sits in the middle of a measure affecting conjugal relationships and filial relationships. The Comité also suggests significant changes to conjugal relationships only.

Through the conjugal regime, the Comité proposes significant changes to the *Civil Code of Québec.* In its opinion, conjugality relies on two types of unions: marriage and *de facto* union. To be precise, the Comité qualifies it as conjugal *statuses.* As a direct consequence, the Comité advises the abrogation of civil union and proposes to include a definition of spouse in the Code, definition that would read as follow: *"[s]ont des conjoints les personnes liées par le mariage et celles vivant en union de fait* / persons united by marriage and living in a *de facto* relationship are spouses".[426] The principles underlying the regulation of conjugality are – again – freedom, autonomy and choice. As such, the Comité puts forward an opt in/opt out system and clarifies that living together should not be a reason to have a union regulated. The *de facto* union contract should be included in the book on obligations. Without such a contract, *de facto* would not trigger the application of mechanisms such as spousal support, the family patrimony, matrimonial regime, succession, etc. However, *de facto* spouses should be able to claim a compensatory allowance, compensatory allowance that would be renamed 'conjugal compensatory allowance'. The rules would be the same as the rules found in articles 427 to 430 CCQ. *De facto* spouses would pretty much remain in the exact same situation they are now unless they take positive steps to be 'included' in family law. For *de facto* spouses, it is a *status quo.* The Comité does not think the Code should be in line with social laws, but rather that social laws should adjust and follow the codified propositions.[427]

When it comes to marriage, the same principles are put forward: freedom, autonomy and choice. The Comité suggests fundamental changes, many being influenced by whether or not the spouses have common children. Further, the Comité believes a mandatory information session should be taken before marriage. They should get an attestation of attendance and give it to the

[426] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126 at 99. The formulation of the Comité makes it quite difficult to translate.

[427] *Ibid.*

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officer before marriage can be solemnized.[428] The Comité suggests spouses should have complete freedom and choice to opt out of basically all effects of marriage before and during the union – except if they have a common child. Opting out would likely have to meet formal requirements – it should be by notarial act – but how it would materialize is unknown yet. As such, married spouses could opt out from the contribution to the expenses of the household and the protection to the family residence. Given the separation of powers, the Comité suggests keeping spousal support and most duties (or extrapatrimonial effects) as obligatory effects of marriage. In my understanding, support obligations are not extended to *de facto* spouses. The conjugal compensatory allowance would remain a mandatory effect of marriage, one the spouses cannot opt out from.[429] The Comité proposes to abrogate the representation mandate between spouses and the principle according to which spouses are solidarily responsible for the debts incurred for fulfilling the current needs of the family and its exceptions.[430] As for the patrimonial effects of marriage, the Comité recommends significant modifications. Nothing would be *d'ordre public*. If the spouses do not opt out, they would fall under the 'conjugal patrimonial regime'. This regime is the equivalent of the current family patrimony.[431] The conjugal patrimonial regime would be a default regime, or a legal regime. There would be no such thing as matrimonial regimes as known now anymore, breaking with traditional civil law. Partnership of acquests or separation would be, like separation as of property, a conventional regime. One should keep in mind some of the protection would be mandatory through the parental regime described before, the regime applying regardless of the matrimonial status of the spouses. The suggestions of the Comité are bold, not all of the members of the Comité agree with the proposed reform as the two dissenting opinion showcase.[432] Significant alterations to the *Civil Code of Québec* and to civilian reasoning are put forward. The work of the Comité has to be saluted, their audacity and willingness to change Quebec civil law, respected. Their proposed reform nonetheless holds many perils.

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[428] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126, recommendation 2.1.14.

[429] *Ibid* recommendation 2.1.7.

[430] *Ibid* recommendation 2.1.10.

[431] *Ibid* recommendation 2.1.6.3.

[432] See annexes VIII and IX, *Ibid*.

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### 2.3.2 **Perils and Promises**

Whether the proposed reform will ever materialize into modifications to the Civil Code is unknown for the moment. Unfortunately, time passes and it appears unlikely any legislative or political action will take place. The Minister of Justice thanked the Comité for its rigorous work of high quality,[433] but no further action has been taken yet, despite numerous demands. From a theoretical standpoint, it is important to engage with the content of the proposed reform and to debate as to whether or not the Comité's suggestions are sound options for the regulation of families in Quebec. There are plenty of ways to reform family. It is important to engage with them to foster meaningful debate. It is in the spirit of providing an alternative voice part 2.3.2 and 3.3.2 are written. In the event a reform process is launched, it will be important to have a range of voices and critiques informing this process, to improve the regulation of families in Quebec law. In this part, the promises and perils of the proposed reform are evaluated in general, with a specific focus on the ones concerning adult intimate behaviours.

The guiding principles of the Comité are the foundations of the proposed reform. One should remember the reform was triggered by the Supreme Court's decision in *Lola v Eric*, a decision where the regulation of *de facto* conjugality was at stake. As mentioned earlier, the Comité identified guiding principles. The first guiding principle is the most important to the Comité: the interest of the child. The principle organizes the whole report, but such a wide and subjective principle is tricky. The status of the child in law has transformed over the years and the child is now a legal subject.[434] This 'essential consideration' of the Comité traces back to the 1980 and 1991,[435] has an international aspect, rooted in the *Convention on the Rights of the Child*.[436] While the necessity and desirability of the *Convention on the Rights of the Child* are obvious, whether it can be used to justify a reform without further thought than mentioning it

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[433] Ministre Stéphanie Vallée, press release, June 8 2015: [http://www.fil-information.gouv.qc.ca/Pages/Article.aspx?idArticle=2306084090](http://www.fil-information.gouv.qc.ca/Pages/Article.aspx?idArticle=2306084090).

[434] *F (M) v L (J)*, [2002] RJQ 676 (CA).

[435] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126 at 57.

[436] Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

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might be problematic. Unproblematizing the 'interest of the child' is also an issue. As a principle, it takes many forms and is highly malleable, fluctuating according to time, place and context. In Quebec, many examples come quickly to mind: confidentiality in adoption, paternal authority, trends in custody, 'adoption' through the Catholic Church, and more. John Eekelaar, in a different context, invites us to be sceptical about the best interest of the child, building upon examples including the deportation of children of unfit parent between 1850 and 1960 in the United Kingdom; "many genuinely believed they were doing what was best for the children".[437] This is one example out of many. The meaning of 'interest of the child' fluctuates. How it is used too. Does it apply to every aspect of family law? Should it? For example, while it is clear it is a guiding principle for judges in custody orders[438] and adoption,[439] it is less clear it is relevant in the establishment of filiation.[440] To what extent is the interest of the child the primordial priority in spouses' economic arrangements? The modification in the structure of the book reinforces the message: family starts with filiation. Defining the family around the child – again – is hazardous and preoccupying. Focusing solely on the child also leaves behind an important number of family forms and citizens in relationships of economic and emotional interdependency (think of the childless parents,[441] the stepparents, the parents excluded from the family, couples without children, the caregivers, elders in second or third unions, and more) are not – or not enough – accounted for. In addition to being important in the 1980 reform and the legal developments of the late sixties and seventies – one can think of the *Adoption Act* of 1969 or the first version of the *Youth Protection Act* (enacted in 1977 and into force in 1979) – it has been in the jurists' minds throughout the late twentieth century. As J. Coderre wrote in 1965 speaking about adoption but exposing general consideration in family law "il est, je crois, essentiel, d'exposer brièvement les considérations politiques, sociales et morales […]. Au 20ième siècle le point de mire de la famille est l'enfant. Toute législation qui le touche doit être

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[437] Eekelaar, *Personal Life, supra* note 79 at 14.

[438] S 16(8), *Divorce Act* and generally when it comes to parental authority, art 604 CCQ.

[439] Art 543 CCQ.

[440] The Quebec Court of Appeal has been very clear that the rules in themselves were enacted in light of the interest of the child and that it would be ill-advised to supersede to the rules because of the interest of the child. See *Droit de la famille — 111729*, 2011 QCCA 1180 (CanLII) at paras 28-30.

[441] Presentation by Régine Tremblay, "The Childless Parent: Problematizing Reproduction", 2015 Annual Meeting, Law and Society Association, Seattle, May 28-31, 2015.

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conçue dans son intérêt".[442] Family law reforms have focused on the best interest of the child for decades now, with mixed results. Stating upfront the child is the priority is commendable, but it should not cloak others crucial elements of family law.

This understanding of family relations is connected to another aspect of the report: interdependence lies in the presence of a common child and the Comité proposes a new "parental regime". While triggered by the presence of a child, the mechanism is not exclusively about the child and appears much more like a device aimed at regulating adult behaviours. The Comité is clear: it creates a new bond – horizontal bond – between the parents. While it could have been analyzed under filial ties, it seems to belong to conjugal ties: it is a horizontal tie and the obligations arise between adult-partners. The child is the triggering factor of the protected relationship, but he or she is not part of the relationship *per se.* This makes it is not easily classifiable according to codified principle and might be a hint there is something peculiar going on. It has previously been observed that both axes of family law were unified under the CCLC. Family law knew one relationship (the marriage) and filiation was the effect of the marriage and not a relation of its own. The reform of the 1980 operated a partial dissociation between the two axes, filiation becoming an institution on its own and not a mere consequence of marriage. The dissociation is not complete as children born of married parents are still favoured by some articles of the Code. The Comité's propositions when it comes to the parental regime seem to operate a partial reunification of the axes, an unforeseen development, given the traditional understanding of the family such a move conveys. Indeed, "[t]he most significant change affecting definitions of families over the last fifty years has been the gradual uncoupling of socially acceptable sexuality, marriage, parenting and cohabitation".[443] Whether the Comité's propositions are in line with this "uncoupling" is unclear. They rather seem to reinforce the amalgamation of conjugal ties with filial ties.

In addition to prompting a partial reunification of both axes of family law, the parental regime shifts the element triggering a mandatory protection regime from marriage to the

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[442] J Coderre, "Adoption, a critical view of the law" in the WCJ Meredith Memorial Lecture (Montreal: Wilson & Lafleur, 1965) 36.

[443] Meg Luxton, "Changing Families. New Understandings" Vanier Institute of the Family, Contemporary Family Trends, June 2011 at 7.

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common child. Beyond the selected factor, the idea to focus on entry criteria rather than the nature or the qualities of relationships is of concern. It merely changes one factor for another. The Comité rarely reaches further then the foundational ties of family law and does not really analyze the nature of the intimate relationships law regulates in familial context. "[P]lutôt que d'adopter une approche réellement fonctionnelle, il remplace un critère catégoriel (le mariage) par un autre (l'enfant)". The idea to re-center family around the child is not bad or new, and is definitely *à la mode.* Martha Albertson Fineman proposed one of the many ways such an idea can articulate,[444] Merle Weiner elaborated a theory of 'parent-partner status',[445] Ayelet Blecher-Prigat suggested a theory of 'financial obligations between co-parents'.[446] The re-centering of family law around the child has also materialized in numerous family law acts.[447] The idea is worth exploring, but whether it should virtually be the only reason to impose mandatory duties, rights and obligations in the intimate sphere is unlikely. Indeed, what the Comité suggests in not rooted, for example, in a nuanced understanding of care. Rather, it appears to be all about engendering. At least, in its actual form, where dependency is narrowly understood and where vulnerability appears to affect only one person, it should be debated. *Interdependency* – emphasizing the relational aspect of dependency – can take many forms. Limiting the entry criteria without evaluating the nature of relationships or embracing a functional approach appears ill advised. Or, at least, it affects the lasting quality of the proposed changes. It is not exactly an inclusive model.

On an ideological standpoint, the Comité is concerned about diversity and inclusivity. However, despite some openings towards unmarried cohabitation, the reform proposes to change one exclusion criterion for another, namely marriage for a common child. This is a limited understanding of inclusivity, family, interdependency and/or vulnerability. This view of the

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[444] Fineman, *Sexual Family, supra* note 25; Fineman, *supra* note .

[445] Merle Weiner, "Family Law for the Future: An Introduction to Merle H. Weiner's A Parent-Partner Status for American Family Law (Cambridge University Press 2015)" 50 Fam Law Q [forthcoming] and Merle Weiner, *A Parent-Partner Status for American Family Law* (Cambridge: Cambridge University Pess, 2015). Weiner wishes for the State to create a new status of parent-partner involving a few core obligations. The obligation to give care or share shares many elements with the parental compensatory allowance. She suggests it could create a new social role.

[446] Ayelet Blecher-Prigat, "The Costs of Raising Children: Towards a Theory of Financial Obligations Between Co-Parents" (2012) 13:1 Theor Inq Law 179. She also describes the bond as horizontal.

[447] See, for example, s 29, *Family Law Act,* RSO 1990, c F-3.

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family is rather traditional and suggests that the family is anchored in the 'reproducing couple'. The idea of creating an immutable bond between the parents is not new and is akin to the functions performed for years by marriage, for example. It is now presented as being because of the child, instead of other reasons like religion, but it is an iteration of traditional mechanisms in Quebec family law. This understanding of family law is narrow and exclusive. The Comité says, under this second guiding principle, "[f]amily law cannot be used to legitimize one familial model over another".[448] With regards, the regulation of conjugality betrays a hierarchy between marriage and *de facto* union even if it claims not to be. It is important to highlight the bold move the Comité made in suggesting to include *de facto* unions in the Code. It continues in the path started by the CCRO. By choosing opting in for *de facto* unions and opting out for *de jure* unions, the Comité creates a hierarchy.[449] The president of the *Fédération des associations de familles monoparentales et recomposées du Québec* stated the suggestions are "la recette parfait pour augmenter les inégalités".[450] Benoît Moore rightly assesses "c'est la consécration d'un libéralisme conjugal et l'aménagement d'un régime de compensation – mais non de solidarité – parentale". The report "propose en fait un désinstitutionalisation de la famille, une privatisation de la conjugalité qui, si ce n'était des considérations constitutionnelles […] aurait été plus forte encore".[451] This privatization and deinstitutionalisation is not estranged to the values promoted by the Comité.

The most problematic assumption probably lies with the primary values the Comité has selected as central to family life: choice, freedom and autonomy. The Comité promotes a vision of autonomy "in the law of contract is today seen as archaic and fantasmatic".[452] For some reasons, it is not in Quebec's family law… The point here is not that autonomy is good or bad.

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[448] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 124 at 3.

[449] Benoît Moore argues in a convincing manner: "L'essence de la réponse […] est individualiste, permettant essentiellement tout dans le mariage et présumant essentiellement rien dans l'union de fait". He also highlights other elements reinforcing the hierarchy in Benoît Moore, "La consécration de l'autonomie individuelle" Fédération des associations de familles monoparentales et recomposes du Québec, in *Réforme du droit de la famille: La balle est dans le camp du politique!* (September 2015) 40: 1 Bulletin de Liaison 6.

[450] Andrée Normandeau, "La recette parfaite pour augmenter les inégalités" in *ibid* at 2.

[451] Benoît Moore, "La consécration de l'autonomie individuelle" *supra* note 449 at 6.

[452] Benoît Moore, "L'union de fait : enjeux de l'encadrement juridique en droit privé dans un contexte de rupture", dans Alain-Charles Van GYSEL (ed), *Conjugalités et discriminations* (Bruxelles: Anthémis, 2012) 87 at 96.

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Rather, it is that it cannot be taken for granted. In the Report, autonomy is under analyzed and choice is exposed as something easy, simple, and individual. Individuals are understood as self-made, as knowledgeable of the law and making choices accordingly. However, autonomy and choice are notions that have proven to be complicated in family law and to family lives. Outside Quebec, feminist scholars such as Jennifer Nedelsky and Martha Fineman have provided thoughtful visions of 'autonomy'. Nedelsky argued, in the United States context and outside of family law, for a reconception of autonomy in a feminist context. In her opinion, the liberal understanding of autonomy portraying "human beings as self-made and self-making man"[453] is fraught. Indeed, autonomy has a social and an individual component. Indeed, she writes

> First, […] the capacity to find one's own law can develop only in the context of relations with others (both intimate and more broadly social) that nurture this capacity, and second, that the 'content' of one's own law is comprehensible only with reference to shared social norms, values, and concepts.[454]

More autonomy is both "originating with oneself and being conditioned *and* shaped by one's social context".[455] In later works, she kept exploring the concept of relational autonomy.[456] Fineman also unbundles the concept of 'autonomy' and advocates for rethinking autonomy. Not unlike Nedelsky, she suggests "to imagine a new concept of autonomy, one that recognizes that the individual lives within a variety of contexts and is dependent upon them".[457] To her autonomy is a myth and she advises us to ask the following questions: "[W]hat does a resort to the rhetoric of autonomy mask? Whose interests are served when it is invoked?"[458] In Quebec, these questions have not been considered enough in the Report. More, Hélène Belleau's research exposed "[qu'en] dépit des règles de droit qui prévalent, la solidarité volontaire apparait alors

[453] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, thoughts and reflections" (1989) 1:1 Yale J Law Fem 7 at 8 [Nedelsky, "Reconceiving Autonomy"].

[454] *Ibid* at 11.

[455] *Ibid.*

[456] Jennifer Nedelsky, *Law's relations: a relational theory of self, autonomy, and law* (New York: Oxford University Press, 2011).

[457] Martha Albertson Fineman, *The Autonomy Myth. A Theory of Dependency* (New York: The New Press, 2004) at 28.

[458] *Ibid* at 21.

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comme un principe structurant de la vie à deux".[459] Individualistic autonomy is not the only paradigm and data shows couples generally operate under solidarity principles.[460] Autonomy and choice cannot be promoted as central to reform revolving around conjugality without a careful analysis of what they mean, what they promote and what are their effects. In addition, the solution is not either autonomy or solidarity, but rather in a combination of these, and many others, values.

Further, the conception of autonomy put forward in the Report relies on an incomplete picture of the reality, not backed by actual data. The Comité, while proposing mechanisms to educate people, assumes people know family law and act in line with family law rules. This vision may be symptomatic of a certain group of experts, sharing a specific background. The *Conseil du statut de la femme* denounced them, so did social actors and jurists.[461] Data is available. Indeed, the interdisciplinary *Partenariat – Familles en mouvance* lead by Hélène Belleau has been conducting empirical quantitative and qualitative researches and the results are innovative and relevant. Their results consistently display a complex picture where couples are not necessarily knowledgeable of their rights.[462] Before the landmark decision in *Eric v. Lola*, thorough qualitative research exposed that only 23% of de facto spouses in the province knew that it was impossible to claim spousal support on the breakdown of the union. Put differently, a striking 77% of *de facto* spouses did not know their basic rights. The Supreme Court has not considered the data relevant, but only time will tell whether or not this should have been considered with greater interest. It would be interesting to see whether the numbers will change

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[459] Hélène Belleau, "La solidarité conjugale. Analyse des liens d'amour et d'argent au sein des couples" in Hélène Belleau & Agnès Martial, eds, *Aimer compter? Droits Pratiques des Solidarités Conjugales dans les Nouvelles trajectoires Familiales* (Montreal: Presses de l'Université du Québec, 2011) 55 at 57 [Belleau, "Solidarité conjugale"].

[460] Hélène Belleau and discovered that, especially when it comes to managing assets, *de facto* and *de jure* couples mostly act the same. They wrote: "En substance, on s'aperçoit que les couples mariés et les conjoints de fait ne se comportement pas différemment les uns des autres et ne se perçoivent pas non plus comme différents. Ce sont des couples. Point. On peut bien discourir sur les dérives individualistes de la société, sur l'égoïsme et la peur de l'engagement, l'examen des pratiques nous porte à croire que la vie à deux est encore et toujours synonyme de solidarité. De solidarité économique en tous cas". Delphine Lobet & Hélène Belleau, *L'amour et l'argent: Guide de survie en 60 questions* (Montreal: Les éditions du remue-ménage, 2017), no 15.

[461] *Avis Pour une véritable protection juridique des conjointes de fait* Mai 2014; Fédération des associations de familles monoparentales et recomposes du Québec, in *Réforme du droit de la famille: La balle est dans le camp du politique!* (September 2015) 40: 1 Bulletin de Liaison.

[462] Belleau, *Quand l'amour et l'État, supra* note 300 at 71–78 and 113 and ff.

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in the next few years. However, twenty years of public-awareness campaigns on this issue, as well as high-profile cases, have made little progress in raising the general understanding of family law in the general population of Quebec. The current regime creates a confusion in which Quebecers are lead to believe that there is no difference in treatment. Further, whether people choose not to marry for legal reasons, Belleau state such a hypothesis is unfounded.[463] All this invites to critically assess whether autonomy and choice are the only values quintessential values to promote in family law reform. Further, for autonomy, choice and liberty to be meaningful, they must occur in a context where equality is paramount.

In addition to assuming family members are informed and knowledgeable and they choose their conjugal modes – which is unsure at the very least – this choice model presumes family members are equal. Is it possible to state family members are equal? The answer will vary depending whom you ask, but it should never be taken for granted. It feels the Report sometimes takes it for granted. The jurist, especially one with few to no diversity markers, should be incredibly careful stating such a thing without profound questioning of power relations and acknowledgment of social realities. In other words, while it is easy from a dominant status – often educated, informed, dominant religion, socio-economically favoured, straight, white, non-aboriginal, and more – to say family members are equal, is it really the case? Is there data supporting such a statement or aren't there indicia of the opposite? As Belleau writes, "[l]'idéal de la relation conjugale égalitaire et détachée des contraintes sociales s'inscrit dans un paysage social complexe où existent encore aujourd'hui des inégalités structurelles, des rapports de genre au sein des familles et de la société, etc.".[464] In such a context, autonomy and choice may not be the only desirable options. An alternative reading of the regulation of 'the family' is possible. Authors have emphasized the focus should be on solidarity,[465] even to some degree of protection. Family is not about making choices freely for oneself, it is about negotiating complex and, often conflicting, arrangements where different personal interests materialize. It is about

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[463] *Ibid* at 115; Hélène Belleau, "D'un mythe à l'autre : de l'ignorance des lois à la présomption du choix éclairé chez les conjoints en union libre" (2015) 27:1 Can J Women Law 1, 3.

[464] Belleau, "Solidarité conjugale" *supra* note 457 at 57.

[465] *Ibid* ; Fédération des associations de familles monoparentales et recomposes du Québec, in *Réforme du droit de la famille: La balle est dans le camp du politique!* (September 2015) 40: 1 Bulletin de Liaison.

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others and the self, about the State and other forms of pressures or contingencies, about what represents the less unsatisfactory solution.

On a different note, one can wonder whether social laws, both at a provincial and federal level could adapt to such a model. It appears utopian, like revisiting the division of powers is. It is also inconsistent with what is done outside Quebec and within Canada. Most importantly, it does not address an important problem in current family regulation: *le mythe du mariage automatique*. Sociologist Hélène Belleau and her research team have been documenting the *mythe du mariage automatique.*[466] Belleau and her team noticed spouses rarely justified their conjugal status relying on legal principles and *de facto* spouses often believed they benefited from the same advantages *de jure* spouses enjoyed.[467] This myth is fueled by a system too complex to be understood by stakeholders and a weak strategy when it comes to education and dissemination of information. To keep increasing the divide between family law regulation in the Code and outside the Code is undesirable and may nourish the myth. The Comité, while acknowledging the discrepancy does little to nothing to redress it. Quebec's scholars are divided when it comes to whether this actually creates problems and whether citizens are misled by the current state of regulation.[468] In any event, strong information and education campaigns are needed.

Furthermore, even if it is explainable by the difficulty to achieve such a thing for *de facto* spouses, it is deplorable that *de facto* unions are not provided with efficient information mechanisms, as is the case for married spouses (attestation) in the Report.[469] In other words, in deploying educational strategies for married spouses but not for *de facto* spouses, the Comité is reproducing a model in which marriage is of higher value or relevance, and where only married spouses – already in a privilege spot – will get more information. This normative preference of marriage over cohabitation is also evident in the structural changes proposed by the Comité. While the marriage contract would be included in the book on the family, the *de facto* union contract would be included in the book on obligations. Yet both represent agreements about

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[466] Belleau, *Quand l'amour et l'État, supra* note 300.

[467] *Ibid* at 73 and ff.

[468] For example, compare Tremblay, "Sans foi" *supra* note 47 with Goubeau, Otis & Robitaille, *supra* note 397.

[469] Whether notaries are the good persons to take on the job should be debated and should not be the result of lobbyism.

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conjugal arrangements and both have little mandatory effects if no child is involved. The proposed reform creates hierarchies: between *de facto* and *de jure*; between spouses with children and spouses without children; parents/spouses and parents/non-spouses; and more.

From a juridical standpoint, the Comité proposes that conjugality becomes a *status*,[470] a status including both married and unmarried couples. Interestingly, as it will be analyzed in greater detail later, statuses are predefined by the State and have little to do with autonomy and choice. It appears one of the statuses is created without formalities: *de facto* spouse. This is positive as it infuses family law in the Code with a sense of functionalism currently lacking. Indeed, the status would be triggered not by the fulfillment of formalities, but characteristics of the relationship, namely length or procreation. However, one can wonder what the effects of this 'new' conjugal status are when it comes to *de facto* spouses. The only effect for non-parent *de facto* spouses would be the right to claim a compensatory allowance, which is basically a form of unjust enrichment, recourse already available to anyone. It is consistent with the proposition of the Comité about dependency. The only relevant element triggering dependency is a common child. But if no consequence attaches to the status itself, or very little, is it a status or it only bears the name of a status? In order words, a new possible conjugal relationship enters the Civil Code and its recognition does not depend on formality requirements. This is in sharp distinction with the law to date on conjugality in family law one-. But whether it has effects in unclear. A status with no effect is irrelevant.

Other recommendations of the Comité are debatable. It could be said the Comité believes spousal support is a matter of choice. However, the nature of the obligation in civil law tells another story. According to Ethel Groffier, "ce n'est pas l'origine familiale ou non d'une obligation qui donne à l'obligation un caractère alimentaire. C'est sa destination. Sont alimentaires toutes les prestations qui ont pour but d'assurer à une personne besogneuse des moyens d'existence".[471] The nature of the obligation is specific and it not necessarily rooted in its family character but rather on its destination, on the role it fulfills. The obligation has the same source for spouses and parents, yet in the latter it clearly is not about choice. One cannot opt-out of child support, at least in the jurist's mind. Whether child support is actually paid by

[470] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126 at 99.

[471] Ethel Groffier, *L'obligation alimentaire en droit de la famille compare* (1969) at 3; Ethel Groffier, *La famille personne morale. Avantages et inconvénients* (1967).

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the debtor to the creditor is a whole other question. Moreover, the choice of the compensatory allowance is deceptive. The compensatory allowance for married spouses has proven inefficient and the legislator adjusted it when it realizes women's situation was not improving. The compensatory allowance would rely on non-existing guidelines. Creating guidelines is long, complicated and costly. Finally, allowing for opting out of practically everything related to economic arrangements between spouses is a 180 turn from what is made now in Quebec and elsewhere in Canada. What it relies on beside ideological preference is unsure. More data on the economic relationships between spouses would have been interesting to include before making almost everything non-mandatory.

Theoretical and practical perils and promises raise a question: Could a different approach inform the regulation of families or of intimate relationships? Family law and family lives are not only about family breakdowns. More providing citizens with one model or a one-size-fits-all approach relying on *critères catégoriels* limits our understanding of families' lives and families' issues. Family, families and other intimate models are about relationships. Relationships have consistently proliferated in the Code. Relationships are transforming and law should analyze them in light of their content.

### 2.3.3 Status, intent, legal entity and the growing importance of relationships

When it comes to conjugal relationships, many observations arise from the analysis of the transformations of family law one- in Quebec and from the study of the passage from one code to another. What are conjugal relationships in family law one -? Contract? Status? Institution? Civil status? The principal reflections here can be divided in four categories. The first category addresses questions about the importance of status and of what triggers the said status. The second category reveals the inconsistent importance of intent – or even contract – and its change in meaning over time. The third concerns the family in itself, whether it is a legal entity or not, has it been consistent through Quebec civil law's recent history and what are the effects of that. The last category is about relationships. Here I claim the most important element in the regulation of families in Quebec from 1955 until now is the proliferation of relationships producing effects in law. When it comes to conjugal relationships, whether the relationships are included or excluded depends on meeting certain formality requirements. While these relationships used to belong to the law of persons, they now belong to an uncertain category

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standing between the law of person (status) and the law of obligations (intent); 'the family'. However, their nature of their content appears not to be a main concern, and neither is their place in the edifice of the civil code. Moreover, it has always been about whether a relationship qualified, never about what makes relationship 'special' in law. While this might have made sense when social, religious and legal pressures where strong enough to direct adults into one form of conjugality, one type of relationship, it is unsure it is enough in today's context. Further, numerous fundamental concepts are used with fluctuating and relative importance (status, intent, etc.) in regulating conjugal bonds. This part tries to identify what has been at stake in the regulation of conjugality, whether it is consistent and whether it make sense in light of the proliferation of relationships. Is the nature of *de jure* unions so different from other relationships they are worthy of 'special' legal protection? Why? Isn't just a vestige of the past? Similar interrogations will arise in the third chapter – where filial relationships are studied – and the fourth chapter will propose ways in which it is possible to include these relationships in private law. I claim that regulating relationships themselves and not "the family" would increase the Code's consistency and facilitate the interaction with other elements of the regulation of families. All in all, these concerns will exhibit how form and formalism are structuring forces in the current regulation of adult intimate relationships.

*Status and the Law of Persons* – What makes a status a status and why is it important to the regulation of conjugal relationships? Legal persons, as legal entities, have statuses. In the civil law, the idea of 'legal status' refers to a person's status in the eyes of the civil law, including whether they are alive or dead, in a recognized relationship or not. A *statut* is a legal invention still dear to the civil law. *Statut* comes from the latin *stare*, which means to stand. A *statut* is a "body of rules governing the juridical condition of a person".[472]

> "Civil status is the source of numerous rights and obligations, which vary largely as a function of a person's relationship to others within the established institutions of marriage and the family. Its primary purpose has historically been simply to identify the legal person, and to situate him or her in an overall juridical context".[473]

In fact, it creates a juridical condition for a person or a category of persons. This juridical condition entails rights, duties, obligations or privileges only to those benefiting from the said

[472] John EC Brierley & Paul-André Crépeau, eds, *Private Law Dictionary and Bilingual Lexicons* (Cowansville: Éditions Yvon-Blais, 1991) *sv* "*statut*".

[473] Brierley & Macdonald, *Quebec Civil Law*, *supra* note 65 at para 167.

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*statut*. These rights, duties and obligations or else cannot, for the most part, be negotiated. Generally speaking, the law of persons contains rules about status, rules that are so fundamental they cannot be contracted out or be seen as optional. Freedom is rarely part of the equation here. Status may align with the mores of a time – think of the incapacity of the married women or the absence of conjugal status of non-heterosexual partners for example. While it is part of private law, it has an undeniably public component.

When it comes to conjugal relationships, status is quintessential. The status, conjugal status, has consistently relied on fulfilling formal requirements between individuals who could or that the Code deemed fit. Under the *Civil Code of Lower Canada*, the status depended on religious marriage. Back then, law was not concerned with conjugal status, but marital status. Time past and civil marriage, subsequent marriage, non-heterosexual marriage, civil union became options to trigger a conjugal status. In a way, this means that the legitimate family is still alive in the Code. While the legitimate family once was the religiously formal union, the legitimate family now is the formal union *tout court.* Unfortunately, this sends mixed messages on various levels, most importantly by including a fundamental inconsistency within the book 'the family' between title 1 (and 1.I) and title 2. Formalities and 'choice' underline title 1 (and 1.I), while other imperatives are found in title 2 (the same could be said of titles 3 and 4). Further, this situation makes unclear whether 'the family' is about formalities, relationships, an undefined legal entity or else. All this is confusing from a theoretical standpoint.

In a way, status is close to a reading of conjugal relationship as an institution. "Le mariage-institution est une 'structure d'organisation sociale tellement importante que la loi ne remet pas aux parties le pouvoir d'en déterminer toutes les règles".[474] When it comes to status, freedom is out of the equation. Status makes elements (goods, people, or else) out of trade. Status is about extrapatrimoniality. Status is crucial to family law, but it is important for family law to rely on the good or the right status. While status now relies on formalities, the Comité proposed to create a conjugal status including both married and unmarried spouses. For married spouses, the status would be triggered by marriage. The other status could depend on time, the presence of a child and the 'public' nature of the union. Indeed, the Comité proposes to resort to the

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[474] Jean Goulet, "La constitutionnalité du Bill 16: Un essai de détermination du droit substantif en matière de mariage" 6 C de D 3 at 7.

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presumption of section 61.1 of the *Interpretation Act*, but has a nuanced approach about what makes the second conjugal status.[475] One status depends on formalities, the others on functional elements of the relationships. While it is not about the nature of relationship *per se*, it complicates the elements triggering a status and is undeniably a step in the right direction. Paradoxically, under their understanding, not all status entails protection or creates rights. For example, while unmarried spouses could have a conjugal status, without children, their status would have little to no effect. It remains unclear why conjugal status should not rely only on the content of relationships, their nature. Further, the Comité creates a new parental status, a status different from the filial status, but the relationship it creates plays between the adult partners. To this day in the Code, the conjugal status is not granted to unmarried cohabitants. Conjugal status depends on formalities, a certain understanding of contract and publicity. Besides the fact that marriage creates a legal status and is efficient (it has fixed starting and ending dates and it is registered) the major differences between married and unmarried partners today can be seen in five elements previously explained: the family residence (art 401 CCQ), the family patrimony (art 415 CCQ), the compensatory allowance (art 427 CCQ), the partnership of acquests (default matrimonial regime, arts 431 and ff CCQ) and the obligation of support (art. 585 CCQ). In addition to this list, there is no obligation for *de facto* spouses to contribute the expenses of the household, as it is the case for *de jure* spouses (arts 396 CCQ and 521.6 CCQ) and no mandatory duties (fidelity, respect, succor, and al.). These only apply to *de jure* unions. All these mechanisms are now found under the book 'The family'. But it is uncertain whether they belong there given they various legal foundation and the effects they have on law in the Code and life of citizens. They are more effects of a status and spouses have mostly no say about their 'contractual regime'. They also rely on a formal understanding of status, but status could be animated by functional considerations. It should be emphasized that nothing prevents a status to be triggered by something other than a contract. Indeed, the 'conjugal' status could be triggered by a *situation juridique* as long as the *situation juridique* has determined boundaries and content, as it will be explained in chapter 4.

*Intent and the Law of Obligations* – Quebec has a contractual view of the couple: the couple depends on the marriage or civil union contract. Intent has a variable role in the current

[475] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 124 at 104–105.

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regulation of couples in family law one ‑. The scholarly discourse heavily relies on intent, autonomy, choice and freedom. Marriage is portrayed as a contract. Intent is said to be an important part of *de jure* unions but in the current state of regulation it appears difficult to defend the idea that conjugal relationships that are about intent, obligation and contract. Is a contract a contract when the parties have no say as to how they will arrange the modalities of their relationships? The choice part mostly plays on the decision to formalize one union or not. Afterwards, while not being irrelevant, intent is limited in scope. Indeed, the spouses cannot withdraw from most effects of marriage. There is no choice when it comes to the family patrimony, the family residence, spousal support, duties and more. The only choice the spouses are left with is their matrimonial regime. If they do not pick one, the State chooses one for them. Protection attached to *de jure* unions is not about elements that you consent to, it is about effects and mechanisms coming with your civil status because the State decided so. While the entry criterion to conjugal status in family law one ‑ appears contractual, the heavy imperative content of conjugal obligations allows for a questioning as to whether intent or any contractual element is paramount. As such, a contractual view of the family when it comes to conjugal relationships is necessarily incomplete.

It is legitimate to claim marriage is not a contract, or should not be a contract, or rather that conjugality is not a contract. Conjugal ties are not solely about choice. Law does not know why people marry or not. Sociologists identified reasons why people decide to marry or not to marry in Quebec today. It might come as a shock to jurists, but it has not much to do about law. For example, people marry to perform a love ritual, to respect family traditions, to demonstrate commitment, to confirm commitment, to celebrate with friends and family, to ‘protect’ their children.[476] The reasons to marry are diverse and do not seem to be ‘legal’. The same can be said about reasons not to marry. Indeed, people mentioned the cost of the celebration is prohibitive, marriage is a catholic institution not in line with their values, marriage is a step towards divorce, love is enough, and people elected festivities of their own.[477] Belleau also highlights “[l]es situations où la decision de se marier ou non ne fait pas consensus dans le couple semblent être

[476] Belleau, *Quand l'amour et l'État, supra* note 300 at 90–93.

[477] *Ibid* at 92–97.

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relativement fréquentes".[478] Moreover, no matter whether marriage occurs or not, spouses adopt codes of conduct. These codes regroup four components:

> 1. […] la *fiction de la durée*, soit l'idée que la relation est durable et stable […].
>
> 2. [l]e *caractère involontaire* […]. 'Tomber amoureux' ne découle pas d'une décision consciente ou d'un acte de raison […]
>
> 3. Cette fiction de la durée est aussi soutenue par un autre code de conduit lié à l'amour, à savoir que la *relation affective est en constante évolution* et qu'elle doit être investie et réinvestie perpétuellement par un 'enchaînement' de gestes et de paroles qui engagent […]
>
> 4. *L'idée que l'autre ou le couple ont préséance sur les interêts personnels* [...][479]

A majority of spouses adopt these codes notwithstanding the form of their union. These behaviours are at the opposite of how law conceives its legal subjects. It is fair to say the premises of conjugal ties in sociology are far different then the premises of conjugal ties in law. Moreover, they are not in line with a traditional understanding of intent, contract or obligation. There is not only freedom and autonomy; there is also solidarity,[480] altruism, putting the interest of the other before one's own interest. This is in sharp distinction with the understanding of subjective rights animating the *Civil Code of Québec.* The reasons to marry or not to marry are far more complex than an antiquated notion of choice. How people behave is not in line with how private law assumes people are behaving. Even if it were about choice, would this choice be meaningful in law? Choice, to be meaningful should be rooted in a shared decision relying on free and informed consent. The *mythe du mariage automatique* has been previously mentioned. Spouses assume law assimilates *de facto* spouses to *de jure* spouses after a certain amount of time or if there is a common child. *De facto* spouses are not knowledgeable of the private law applying to them. Conversely, it would be interesting to study whether married spouses do know and understand how law affects their conjugal relationships. Perhaps both married and unmarried partners are ignorant of the legal framework. Maybe their 'choice' is not the result of a free and enlightened consent. Law needs to revisit the overemphasis it puts on choice in light of the actual practices and understandings of citizens. Conjugal ties cannot be seen as "an entirely private

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[478] *Ibid* at 97.

[479] Belleau, "Solidarité conjugale" *supra* note 457 at 63–64.

[480] See generally, Lobet & Belleau, *supra* note 458.

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institution between consenting individuals in which the state should have no interest".[481] The state has an interest in regulating conjugality for numerous purposes ranging from reproduction to welfare. This situation where a status is triggered by formalities and where intention is posited as central to the creation of a conjugal status may have an unintended theoretical consequence: personalizing the formal couple, and to a certain extent 'the family' under the first title of the second book.

*The Formal Couple and 'Family Law'* – Is the family an entity in family law one-? Whether 'the family' is an entity in private law has been debated in France and Belgium in the sixties but has not been debated to the same extent in Quebec civil law. Most importantly, such analysis has not been done since the Code has radically changed its understanding and regulation of the family since the eighties. It has somewhat been taken for granted that the family was not an entity, despite the different path Quebec civil law has taken, one could even say despite what the codifiers might have had in mind. Yet, the formal couple – announced by the title of the second book as 'the family' – is central to the regulation of family in the Code and shares features of the personalized family. What is 'the family' in Quebec civil law? The easy answer is: it is a book of the Civil Code, a book sending conflicting messages. This reality is recent – the second book was enacted in the eighties – and the family is, obviously, more than that. On the one hand, 'the family' is not, technically, a legal person, a juridical entity, or a partnership. On the other hand, family is more than the sum of its members. The idea that both members of the family and the group 'the family' are considered by the Code is crucial. If the Code takes into account both the members and the unit, can it be consistent within its second book? More, can the second book be consistent with the rest of the Code? Since the reform of the eighties, two theories of the family seem to coexist in the Code; one mostly focuses on relationships targeting non-pecuniary aspects of family law and the other appears to be interested in a particular group – the formal family – when regulating pecuniary aspects of family law. For the present purposes, these two theories will be named the personalistic theory and the individualistic theory. Under the personalistic theory, the family as a unit has legal personality and the 'family' is greater than the sum of its member. Law regulates a group; as

[481] This is one of the many scholarly views of the contract: Morton J Horwitz, "The History of the Public/Private Distinction" (1982) 130 Univ PA Law Rev 1423 at 1425.

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such the group has rights, duties, obligations the individuals do not necessarily share. There is something more than relations between members under this view of the family. Under the individualistic theory, the family is nothing more than a bundle of individual rights, or a number of relations between members. This dichotomy is close to what Eric Millard proposes in France: personalizing thesis / *thèses personnalisantes* versus the individualistic reading / lecture individualiste.[482] In Quebec, Ethel Groffier speaks of a collective conception / *conception collective* versus an individualistic conception / *conception individualiste.*[483] Is the family a legal person / *personne morale*? Is the family a partnership? Is the family a normative ideal of the Code?

The question whether the family is a legal person attracted little attention in France. It has attracted even less attention in Quebec. It mostly is a scholarly / *doctrinal* debate. The question is nonetheless of primary importance since it informs how to think about the family in law and how to regulate it. Further, attributing legal personhood is an important operation in civil law. As Brierley and Macdonald explains, "[t]he allocation of legal personality and its attributes is a normative endeavour based on social, moral, and ontological reasons".[484] While it is a slightly different question to ask if the family is a legal person or if the family has legal personality, it will be assumed, for the present purposes, that it means the same thing. The idea is to reflect about the legal nature of the family in the *Civil Code of Québec*, not to explore the complexities of legal personality.

The tendency to conceptualize the family as a legal entity probably started in France with René Savatier in the forties.[485] The paradigm under which Savatier writes is dramatically different from today's understanding of the family in Quebec's law and Quebec's society. First, it is in France. The French Civil Code is different from the *Civil Code of Québec* in many ways. The principal difference for this project is that there is no book on the family in the Code. The structure of the French Civil Code is actually almost identical to the structure of the former Civil

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[482] Millard, *supra* note 11 at 34 and ff.

[483] Groffier, *supra* note 11 at 1.

[484] Brierley & Macdonald, *Quebec Civil Law, supra* note 63, para 170.

[485] Groffier, *supra* note 11; Michèle Rivet-Beausoleil, *La société conjugale. Est-il possible de la considérer comme une personne morale?* (1967) at 3.

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Code of the province of Quebec, the *Civil Code of Lower Canada.* Second, for Savatier – even in the 'secular' France – the family meant the legitimate family:

> [l]a famille envisage comme titulaire d'un droit familial est, d'ordinaire, la famille légitime fondée sur le mariage, lequel est précisément l'institution propre à en assurer la solidité et la publicité. La famille légitime seule, en particulier, peut engendrer juridiquement un ménage, avec tous les droits associés à cette construction familiale[486]

This is important to keep in mind in Quebec's context. When Quebec switched from one Code to the other, some commentators were not pleased with the disappearance of the legitimate family and the authoritarian conception of family relationships.[487] Technically, there is no such thing as the legitimate family today in the *Civil Code of Québec*. It is nonetheless interesting to speculate whether the 'legitimate family' still exists in the Code and has transformed into the *formal family*. Indeed, only *de jure* spouses benefit from the Code's protective mechanisms when it comes to pecuniary relationships. Status is still central for law to deploy protection mechanisms. This is not completely transposable to filial relationships. In terms of background, one must also be aware of the influence of Savatier and Carbonnier on Paul-André Crépeau and the CCRO's work generally.[488] Savatier's vision of the family may have influenced the pecuniary dimension of the regulation of spouses in Quebec. Last but not least, this understanding of the family as a legal person is not positive law and does not represent how family law is perceived in Quebec today. To clarify, the family is not a legal entity in the Civil Code. However, 'the family' has a strong normative content. While the family is not conceived as a legal person, it nonetheless shares some interesting characteristics with it. Again, this understanding of the private law of the family should not been seen as what positive law calls for or how family law is understood in Quebec. Rather, it is about claiming that the analysis of this question might not be over yet, given the path Quebec civil law has taken. That being said, why do the authors of the personalistic school of thought believe the family is a legal person?

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[486] René Savatier, "Une personne morale méconnue: La famille en tant que sujet de droit", *ChroniqueXIII - Dalloz* (1939) 49 at 52.

[487] Pineau, *supra* note 333. See also, Ernest Caparros, "Le droit familial de l'avenir. Un rapport de l'Office de révision du Code civil qui laisse la famille sans avenir", *Le Devoir* (1975).

[488] See numerous letters between Crépeau and Savatier here: http://digital.library.mcgill.ca/ccro/search-results.php, more precisely documents C_L_8; DD_L_10; D_L_96; EE_L_6; E_L_30; JJ_L_4; L_L_7; P_L_17; P_L_3; Q_L_18; R_L_16.

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For Savatier, the family is a legal person, a *sujet de droit*, a 'body'.[489] Lots of rights belong to the family and not to its members. The family has interests and goals of its own. He writes: "[i]l y a plusieurs catégories de droit subjectifs qui n'appartiennent, à proprement parler, à aucune personne physique composant une famille, mais à la famille considérée comme corps".[490] The family as an entity holds rights. It has both patrimonial and extrapatrimonial rights – or, roughly, pecuniary and non-pecuniary rights. Extrapatrimonial rights include the family name, the authoritarian rights / *droits de puissance* (such as marital or paternal authority), and more. The authoritarian rights are the reason why the husband can represent the family and act on its behalf.[491] Savatier also mentions pecuniary rights of the family: family heirlooms, family tombs or burial places (*sépultures*), reserved portion in succession (*réserve héréditaire*), the matrimonial regime and all family mechanisms that are found outside of the Code but influence the family.[492] In Savatier's opinion, marriage creates some sort of patrimony. As Ethel Groffier explains,

> Savatier voit la famille personne morale au centre du droit matrimonial. 'Tout mariage a pour conséquence l'établissement d'une sorte de patrimoine particulier, qui est tenu des dettes du ménage inséparable à la vie commune et pourvu de ressources propres destinées à y faire face.[493]

Savatier refers to Jean Carbonnier when it comes time to explain how certain mandatory matrimonial regimes constitute either a patrimony or patrimonial rights of the family. Carbonnier is not the only one defending this understanding.

> Pour Roubier en effet, la personnalité morale de la famille se serait incarnée dans une communauté, régime obligatoire, car si la famille exige d'être traitée comme une entité supérieure aux individus, il faut néanmoins se conformer aux exigences de la technique juridique et lui donner une organisation, un patrimoine, des organes".[494]

In Quebec, the family has something called a *patrimoine* and is an organization included in the Civil Code. The family of the Code shares elements of the personalized family.

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[489] Savatier, *supra* note 479 at 49.

[490] *Ibid*.

[491] *Ibid* at 49–50.

[492] *Ibid* at 50–51.

[493] Groffier, *supra* note 11 at 16 citing René Savatier, *Les métamorphoses économiques et sociales du droit civil d'aujourd'hui,* 3rd ed (Paris: Dalloz, 1964) at 131.

[494] *Ibid* at 18, footnote 20.

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Not everybody agrees with this theory of the family as a legal person. Actually most French classical jurists are opposed to Savatier's, and to a lesser extent Carbonnier's, conception of the family.[495] For Jean Dabin (Belgium), the family cannot be a legal entity. Rather,

> la famille n'exprime qu'un *complexus* de rapports personnels, d'ailleurs nécessaires […] où les liens ne cessent pas de s'établir d'individu à individu, d'époux à épouse, de père et mère à enfants et non d'individu à groupe supérieur doté d'une fin propre formellement distincte de la fin propre de chacun de ses membres.[496]

Further, as Ethel Groffier writes, building on Jean Dabin's scholarship: "[é]tant donné que la famille n'a pas vraiment de but distinct du but de chacun de ses membres, elle ne saurait constituer une personne morale car elle est privée de la nature même de la personnalité morale".[497] Jambu-Merlin, also from Belgium, allies with Dabin: "[e]n réalité, le droit pur envisage peu la famille ou ne le fait que de manière indirecte".[498] According to him, the family does not meet the requirements to have legal personality or to be a legal person.[499] This view prevails in Quebec today.

These debates were transposed into Quebec civil law during the recodification process. Ethel Groffier and Michèle Rivet, both working for the CCRO, produced two distinct and complete opinions about the legal personality of the family or of some of its elements. Michèle Rivet summarizes well the impact of the recognition in positive law of the family as a legal person:

> Disons, en bref, que la reconnaissance de la personnalité morale à la famille:
> - crée une analogie entre cette dernière et une corporation ;
> - permet face aux tiers d'avoir un représentant familial qui peut) par exemple) intenter une action en responsabilité ou y être appelé ;
> - justifie la création d'un patrimoine familial insaisissable dont feraient partie les meubles familiaux) ;
> - justifie l'attribution de la puissance paternelle au père comme représentant de la famille) [...][500]

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[495] Groffier, *supra* note 11 at 19.

[496] Dabin, *supra* note 44 at 358.

[497] Groffier, *supra* note 11 at 29.

[498] Jambu-Merlin, *supra* note 46 at 53.

[499] Jambu-Merlin, *supra* note 44 at 58.

[500] Rivet-Beausoleil, *supra* note 483.

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While both Groffier and Rivet produced detailed analysis on the subject, neither of them were clear as to whether it was desirable to see the family as a legal person in the Civil Code. For Groffier, it is possible to "créer un vêtement juridique qui habillera la famille en la dotant d'une personnalité morale particulière".[501] The question whether it is a suitable solution is left unanswered. There are indicia in the archives of the CCRO that some members thought the family should be an entity, even a legal person.[502] In recent scholarship, Pineau and Pratte state the family "jusqu'à l'institution du *Code civil du Québec* et la réforme de 1980, la famille n'avait nullement la place d'une véritable institution juridique en droit québécois".[503] "Jusqu'à" denotes a contrast between the two eras, a contrast between what was done prior to 1980 and what is done now. Pineau also previously wrote

> Il est assez surprenant de constater, à la lecture du Code civil, que la famille ne tient nullement la place d'une véritable institution juridique alors qu'on s'accorde à la considérer comme un fait social méritant une protection particulière. Non seulement on n'a jamais songé à élaborer un code de la famille, mais encore le mot 'famille' a été banni du vocabulaire législatif jusqu'à une date récente; il fallut attendre 1964 pour le voir apparaître dans les articles 174, 175 et 183, dispositions issues du bill 16 et relatives aux droits et devoirs respectifs des époux.[504]

The steps he described took place in the eighties. More, in a later text and after the reform took place, he added

> "[d]ans le *Code civil du Québec*, institué par une loi sanctionnée le 19 décembre 1980, mais qui se contenta de réformer le droit de la famille, le législateur eut le *souci de s'intéresser à la fois aux membres de la famille et au groupe qui la compose*, tout en tentant de trouver le point d'équilibre entre les protections des droits individuels et *celle des intérêts du groupe familial*".[505]

It is striking not to see more debates about whether the family – or at least the married couple – is a legal entity in current Quebec law since the Legislator devoted a book to the family in the 1980, made the partnership of acquests the legal matrimonial regime in 1970 and most importantly introduced the family patrimony in 1989. Further, debts and contribution to the

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[501] Groffier, *supra* note 13 at 98.

[502] Archival documents (minutes in this case) of the CCRO show experts seriously considered making 'the family' a legal entity: see The Archives of the CCRO, file D/A/038: http://digital.library.mcgill.ca/ccro/search-results.php

[503] Pineau & Pratte, *supra* note 12 at 1.

[504] Jean Pineau, *Mariage, séparation, divorce. L'état du droit au Québec* (Montreal: Les presses de l'Université de Montréal, 1976) 3.

[505] Pineau & Pratte, *supra* note 12 at 2.

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household are part of the regulation of legitimate families in Quebec and the Code includes articles on spouses acting on the behalf of one another… The Quebec Legislator did almost everything Savatier and others suggested would make a family a legal entity, and even more. Yet, the legal nature of 'the family' is taken for granted. Louis Baudouin, in Quebec's context, wrote in 1953:

> […] la famille bien que l'objet d'une règlementation très stricte et très précise, n'était pas aux époques respectives de codification, considérée juridiquement comme un sorte de personne morale distincte de membres qui la composent. Dans la Province de Québec comme en France une certaine évolution s'est produite en ce sens, mais il ne semble pas qu'elle ait encore atteint le niveau souhaitable.[506]

He already highlighted Quebec was going in the direction of the legal personification of the family. It is interesting to wonder what this eminent jurist would think today.

However, the personification of the *de jure* family only applies to conjugal relationships in the Code. The same logic is not extended to *de facto* families and does not apply to filial ties. It is thus possible to argue they are two theories underlying 'the family' in the book 'The Family'. On the one hand, certain conjugal ties suggest the creation of an entity. On the other hand, filial ties are not creative of entity and clearly rely on an understanding of relationships. It will appear less obvious now, since only conjugal ties have been analyzed, but what is promoted under the titles on conjugal relationships is also different from what is promoted under the titles on filial ties. This is so despite the recurring statement the Code is an "oeuvre de cohérence", "un véritable code de la famille au sein du Code civil".[507] Most importantly, by having a book in the Code entitled 'the family' and by almost personalizing some families to the detriment of others, the Code sends messages: 'The family' is a legal entity and 'The family' is in the Code. But 'the family' of the Code is not 'the family' in general and the Code still promotes an antiquated understanding of the family. It is not the legitimate family, but almost. It is the formal family. It is a vestige of an old understanding of the family and family law. It is necessary to "question the assumption that there is, and has been, one single phenomenon that one can call *the* family. Historical, anthropological and contemporary findings show otherwise. This it is essential to start

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[506] Louis Baudouin, *Le droit civil de la Province de Québec. Modèle vivant de Droit comparé* (Montréal: Wilson & Lafleur, 1953).

[507] Assemblée nationale du Québec, Journal des Débats, Sixth session – 31st legislature, Thursday December 4, 1980, Vol 23 – No 5, at 609.

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thinking of families rather than the family".[508] But is starting to think about 'families' really helpful or are 'family' and 'families' too limiting? These thoughts may prevent Quebec law from concentrating on what is essential and what has consistently proliferated: relationships of a peculiar nature. More in Quebec's past, the formal family had functions and the functions where in line with lived experiences. The formal family fulfilled functions and there was no *décalage.* What are these functions now and how are they performed are some of the many questions to be asked.

*Proliferation of relationships with a peculiar content* – Through this chapter, it has been showed that some conjugal relationships have proliferated in the Code. The Code started with only one relationship – the religious marriage – and this relationship was unitary. Indeed, the wife had no legal relationship with third parties. Moreover, the tie between her and her husband was not bilateral. The Code then granted personality to wives, allowed for civil marriage, civil union and non-heterosexual formal relationships (both through marriage and civil union). *De facto* relationships are still not included in the Code. All other relationships have been included on the basis of a functional similarity with marriage. Yet, the reason for a relationship to be considered as a conjugal relationship appears to be the fulfillments of formality. But does it have to be so?

Under the authoritarian model, there was a strong state intervention in terms of 'entry criteria'. In other words, the state was highly interventionist as to who could be a family in the eyes of the law. Yet, once the entry criteria were met, the state entirely disengaged from intervening in the private relationships of the family. This is a tale that transcends dominant legal traditions in Canada.[509] The family was under the authority of the husband. This situation was echoed in the Civil Codes. Under the equality-autonomy model, there is an illusion that entry criteria are wide and that law has diversified its understanding of the 'family'. Under this model,

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[508] Diana Gittins, *The Family in Question* 1985, 1-2 previously cited in David Archard, *The Family: A Liberal Defence* (Basingstoke, Hampshire; New York, NY: Palgrave Macmillan, 2010) at 4.

[509] Jean-Maurice Brisson and Nicholas Kasirer, "The Married Woman in Ascendance, the Mother Country in Retreat: from Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform, 1866-1991" (1996) Man LJ 406; Lori Chambers, *Married Women and the Law of Property in Victorian Ontario* (Toronto: University of Toronto Press, 1997. It is beyond the purpose of this thesis to evaluate whether this statement is accurate with regards to aboriginal traditions.

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equality refers to equality between spouses and to who a spouse can be, while autonomy refers to both the autonomy of the spouses, and the autonomy to enter or not a formal conjugal union. This model is still largely prevailing today and is actively promoted by the Comité.[510] An illusion of equality is created mostly because both different sex and same-sex relationships are contemplated by the Code. Yet, the state is still highly interventionist as to entry criteria and the equality-autonomy model has not reached inclusive entry criteria. There are inequalities between conjugal modes.

The Comité initiated a movement away from form. They propose another *critère catégoriel* – the presence of a common child. Some could say these are two sides of the same coin since marriage has for a long time been mostly about producing children. The Comité also suggest creating a new conjugal status somewhat deprived of effects. To the Comité, interdependence – they rather refer to dependency – should be addressed by law only when common child or children are involved and, building on a choice rhetorical, formal unions still deserve better protection. But what if the content of relationships and the functions they fulfilled in society were to be more important than *critères catégoriels* and formalities? What if it was about specific kinds of interdependencies? Status may not depend on an institutional understanding of marriage or a contractual understanding of marriage. Status may depend on the content, nature and effects of relationships.

Before putting forward such an approach in the fourth chapter, it is necessary to investigate the second type of familial relationships the Code currently contemplates: filial ties. Are the same principles promoted when it comes to filial ties (the second title of the book)? Have filial relationships also multiplied? Is there consistency between the two primary titles of the second book or is the second book doomed to be inconsistent, both from within and with the other books of the Code? The next chapter explores these fundamental issues and many more.

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[510] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 124 at 58; 99 and ff.

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# Chapter 3

## 3 The Multiplication of Configurations for Filial Relationships

In Quebec, parent-child relationships have gone through tremendous changes in the last decades, and the legal landscape dramatically changed from 1955 until now. Their attribution, nature and functions have transformed, their number has also significantly increased. Some new modalities for parent-child relationships have appeared, others have vanished. Until the 1970'a, it is fair to say that filiation as a legal entity in itself was irrelevant; filiation was an effect of marriage and other mechanisms for reproduction were under all kinds of pressures to conform to the dominant model, where heterosexual religious marriage was paramount. Filiation was an unchallenged and unitary notion flowing from a legitimate union between husband and wife. As a legal category, individuals were in or out, privileged or excluded. But possibilities for conjugality have multiplied and filiation had to transform to keep up with these 'new' conjugal relationships. Indeed, while it was relatively feasible for law to conceive filiation merely as an effect of marriage at a time where marriage was ubiquitous, the same cannot be said when the institution of marriage is no longer as central, and when marriage now means different things. The proliferation of possibilities for conjugality made it necessary to adjust law's idea of parent-child relationships. Many observers mentioned adjustments to filiation were necessary for another reason: it was not fair for children to suffer the consequences of the relationship choices made by their parents.[511] The situation has thus changed over the years and filiation has been conceptualized more and more as a legal institution in and of itself in Quebec. Scholars in Quebec called this transformation a *dissociation.*[512] As a result, filiation is no longer exclusively tied to the marital status of the parents and exists outside marriage – it is dissociated, in other

[511] Jean-Louis Baudouin, "Examen critique de la situation juridique de l'enfant naturel" (1962) 12:2 McGill LJ 157 at 158 [Baudouin, "Enfant naturel"; Joan Clark, "La situation juridique des enfants naturels. Deuxième partie" 3:6 RJT 67 at 76.

[512] Pineau & Pratte, *supra* note 12 at 27.

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words, from the formal marital status of the parents. While some advantages are still only available to *de jure* families,[513] there is a broader recognition that filiation is independent from marriage and children are treated equally without regards to their parents' intimate arrangements. More recently, Quebec civil law has made changes in order for children to be equal notwithstanding how they were conceived. Quebec's filiation regime nonetheless still adheres to formal principles and the underlying principles of filiation are gender biased. It could also be said there is no theory supporting the filial regime, sometimes the regime relies on intent, other times formality or even a certain understanding of biology. But what is innovative may be the status 'parent' has more to do with the nature of the relationship than with formal requirements. This is quite different from conjugal relationships.

The historical exploration of the evolution of filial relationships reveals, first, the extent to which the possible relationships between parent and children have multiplied in the Code. Second, the nature of these relationships has changed over time. It also exposes the principles underlying the establishment of filiation are inconsistent. Indeed, the idea of 'the family' found in different titles of the same book of the Code is different, and formality appears to be understood differently when it comes to filiation than when it comes to conjugality. It is argued that the first and second titles of the book 'the family' rely on different understandings of why and what relationships matters. The modifications to the Code are documented in as much as they exposed a proliferation of relationships.

With this in mind, this part has three principal aims: to describe parent-child relationships in Quebec civilian regime (A. Filiation), to expose its legislative history in order to demonstrate how the possibilities for the parent-child relationships have multiplied (B. From one possibility to many), and to describe the proposition for reform and critically assess them in including different solutions to attune civil law with the expectations of citizens and their daily lives (C. What Now with Filiation). Most importantly, the third subpart highlights how the evolution of filial relationships accounts for the difficult interaction between filiation, contract, and the importance of status, albeit a status understood slightly differently. Ancillarily, such a review shows the variation in what is promoted by civil law when it comes to family regulation.

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[513] To name only a few examples, see arts 525, 538.3 and 585 CCQ.

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## 3.1 The Law of Filiation

This section reviews the establishment and content of the parent-child relationships in law in Quebec as of 2017. It first outlines the rules and principles of the book of persons relevant to parent-child relationships, and then explores the principles found in the book on the family. The reason to proceed with current law first is to allow readers unfamiliar with civil law to understand the present-day situation. It explains the rules before assessing what lead to these rules. This method provides the reader with all the tools necessary to appreciate how Quebec got to the point where these rules are threatening the consistency of the Code and promoting a distorted understanding of the family.

### 3.1.1 Filiation and the Book on Persons

Most monographs on Quebec family law start the filiation section with filiation rules found in the book on Family of the Civil Code, mentioning elements of the law of person briefly when addressing technical elements, such as the proofs of filiation.[514] Yet, the rules on filiation found in the book on the family represent only a part of a complex system aimed at individualizing the child in the eyes of the State and defining who is responsible for what towards him or her. An essential part of the law of filiation is found in the first book of the Civil Code, the book on persons. The law of persons is the entry point of a juridical person/*sujet de droit* in private law and is intrinsically related to status/*état*; it heavily influences the law of filiation. As such, to fully understand filiation in the Civil Code, a close look at the book on persons is necessary first. Because of the unintended partitioning effect of a Code, – i.e. the false assumption the book on Family necessarily encompasses everything family-related – too little attention is given to the law of persons in family law.

While the law of persons is an integral part of civil law, it is not obvious that it resonates in common law.[515] What is the law of persons? What is a legal person? Are human beings legal persons within the meaning of civil law? The answer to the latter, of course, is yes. Every human being is a legal person in the civilian sense and both the *Civil Code* and the *Quebec Charter* open

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[514] See for example, Pineau & Pratte, *supra* note 14 at 589 *ff* or Castelli & Goubau, *supra* note 21.

[515] For an example of the quasi inexistence from a theoretical perspective of the law of persons as understood in Civil law in American Law, see David Fagundes, "Note, What We Talk About When We Talk About Persons: The Language of a Legal Fiction" (2001) 114:6 Harvard Law Review 1745.

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stating so.[516] But while it is obvious today, it has not always been. Most importantly, this conceptual notion of a legal person is the foundation of the entire system of private law, and the organizing principle of the new Civil Code and the reform it entailed (1994).[517] The possibilities to enjoy and exercise rights are the two principal components of being a person in civil law.[518] Whereas every human being is a legal person, legal persons are not all human beings. For example, a human is a legal person for the civil law and so is a corporation. A corporation in Quebec civil law is a *personne morale,* a moral person which is generally opposed to a *personne physique,* an individual. A legal person is thus a fiction allowing entities to hold and exercise rights, to have duties, obligations, and more. Legal personality is at the core of private law.

The law of persons in the *Civil Code of Québec* is broad and includes personality rights (right to life, right to the integrity and inviolability of the person, right to the respect of his name, reputation and privacy),[519] children's rights,[520] care,[521] capacity,[522] and "particulars" relating to the status of persons.[523] These particulars include name, domicile, residence, and the effects of absence. In Quebec law, there is an important category of official legal documents called 'acts of civil status', that record and document important changes in the status of persons. These include acts of birth, acts of marriage and civil union, and acts of death. These acts "contain only what is required by law, and are authentic".[524] An authentic act "is one that has been received or attested by a competent public officer in accordance with the laws of Quebec or of Canada, with the formalities required by law. As such, "leur contenu fait preuve à l'égard de tous et qu'ils font foi

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[516] See art 1 CCQ and s 1*, Charter of Human Rights and Freedoms*, CQLR c C-12.

[517] Paul-André Crépeau, "Une certaine conception de la recodification" in Lortie, Serge, Kasirer, Nicholas and Belley, Jean-Guy, eds, *Du Code civil du Québec: contribution à l'histoire immédiate d'une recodification réussie* (Montréal: Thémis, 2005) at 60-64 and Alexandra Popovici, "Trusting Patrimonies" in Remus Valsan, ed, *Trusts and Patrimonies* (Oxford: Oxford University Press, 2016).

[518] Édith Deleury & Dominique Goubau, *Le droit des personnes physiques*, 5th ed (Cowansville: Éditions Yvon-Blais, 2014), para 433 and *ff*.

[519] Art 3 *Civil Code of Québec*, CQLR c CCQ-1991 ["**CCQ**"].

[520] Arts 32-31 CCQ.

[521] Arts 11-26 CCQ.

[522] Arts 153 and *ff* CCQ.

[523] Arts 50 and *ff* CCQ.

[524] Art 107 para 2 CCQ.

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en justice par leur seule production (art. 2813 et 2818 C.c.Q.)".[525] They are, in a way, supreme proofs: they make proofs against all persons and their mere production in courts proves their content. Even more important to notice, "[l]'établissement de l'acte d'état civil n'est donc pas une simple formalité dénuée de tout exercice d'un pouvoir de la part du Directeur de l'état civil".[526] The 'act of birth' is an act of civil status by which a child enters the legal world; it is subject to the jurisdiction of the *Registrar of civil status*, introducing an undeniably public aspect to the otherwise private legal relationship between parents and children envisioned in the Code.

The *Registrar of civil status*, the sole officer of civil status, has the power to draw or to deny drawing an act. The *Registrar of civil status* is quite recent in Quebec history, even if the origins of the civil status/*état civil* reach back to 1621.[527] The acts of civil status used to be administrated in the Province of Quebec – mostly – by religious officials.[528] The coming into force of the *Civil Code of Québec* in 1994 operated a 180°-degree turn. Quebec went from a decentralised and religious system to a centralised and secular system, or as Germain Brière summarized "d'un système essentiellement rattaché à la religion, profondément ancré dans les moeurs et décentralisé à l'extrême, a un système nouveau, purement laïc et fortement centralisé".[529] Today,

> The *Registrar of civil status* is the body from which Québec citizens can obtain official documents related to civil status events—certificates, copies of acts and attestations of birth, marriage, civil union and death. It is under the purview of *Services Québec*, and is headed by the registrar of civil status, the sole public officer of civil status in Québec, whose mandate is provided for in the *Civil Code of Québec*.[530]

The act of birth, like the other acts of civil status, is submitted to the exercise of power of the *Registrar of civil status*; introducing an undeniably public aspect to the otherwise private legal relationship between parents and children envisioned in the Code.

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[525] Deleury & Goubau, *supra* note 517 at para 365.

[526] *Ibid* at para 375.

[527] *Ibid* at para 423.

[528] At first, only Roman Catholic officials could do so. Protestant officials were authorized in 1795 and later, in 1888, officials of any recognized religious authority. At some point, non-religious parents were allowed to register their children through municipalities (*Ibid* at paras 423 and *ff*).

[529] Germain Brière, "Le futur système d'état civil" (1986) 17 RGD 371 at 374.

[530] Website: Registrar of civil status, *About us – Registrar of civil status* (Quebec: Registrar of civil status, 2013), online: http://www.etatcivil.gouv.qc.ca/en/about-us.html.

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Some steps must be undertaken before the *Registrar of civil status* draws up an act of birth. The act of birth extremely roughly corresponds to a birth certificate, and contrary to how it sounds, it is not the act of physically giving birth (deliver). The act of birth has a central role in the establishing of filiation: it "constitue hiérarchiquement la preuve première de filiation".[531] Before explaining its crucial role in filiation, it is important to clarify under what conditions this official document will be issued and to analyze these conditions critically. Persons other than the parents have to take actions before the emission by the *Registrar of civil status* of an act of birth. The Civil Code outlines gender-biased processes. Instead they bear specifically on the woman who gives birth to the child. The process starts at the child's birth. Generally speaking, the person who assists the woman when she delivers is referred to as the accoucheur.[532] It is often a doctor, a mid-wife or a nurse and the attestation cannot be signed by the father or mother of the child.[533] The accoucheur must draw an "attestation of birth"[534] stating "the place, date and time of birth, the sex of the child, and the name and domicile of the *mother*".[535] There will have no mention of any male or other female involved in this document and the woman who gave birth is already referred to as the 'mother'. The existence of this official document is a given: very few scholars question its actuality.[536] Yet, it is recent in its current form and it appeared with the enactment of the *Civil Code of Québec* in 1994. The *Commentaires du Ministre* on article 111 CCQ explicit the 'new' task of the attestation of birth: its purpose is to corroborate the

[531] Deleury & Goubau, *supra* note 517 at para 376.

[532] Note that accoucheur is an English term, see Centre Crépeau, *Guide to the English Terminology in the Civil Code of Québec,* online: http://www.mcgill.ca/centre-crepeau/fr/terminology/guide/accoucheur (last consulted on January 16 2014).

[533] Directive de l'État civil, CCQ 111-1, rules 3 and 4. Available here: http://www.etatcivil.gouv.qc.ca/publications/1133_11445_CCQ_111-1_constat_2011-09-27_finale_pub.pdf

[534] The name "attestation of birth" is not what was proposed by the CCRO. They rather opted for 'attestation of delivery' (Civil Code Revision Office, *Report on the Québec Civil Code, Volume l – Draft Civil Code,* Éditeur officiel du Québec, 1977) at 19 and what is commonly referred to as 'The Yellow Report': Civil Code Revision Office, Committee on the Law on Persons and on the Family, *Report on the Family. Part One*, Montreal, 1974 at 317 [Yellow Report]. The idea of an attestation existed prior to the reform, but had statistical consequences only.

[535] Art 111 CCQ [emphasis added]. Some scholars believe that article 111 CCQ is the foundational element of the mother-child relationship at law. With all due respect, this view minimizes the fact that legal parentage is a legal construct differing from a natural phenomenon.

[536] The situation has become particularly interesting with surrogacy, a clear example of the multiple meanings of biology. It has fragmented maternity in Quebec civil law. For an overview see Régine Tremblay, "Surrogates in Quebec: The Good, the Bad, and the Foreigner" (2015) 27:1 CJWL 94.

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declaration of birth.[537] Yet, the complete picture of the nature and use of the attestation of birth is unclear. Such particulars used to be in devices such as the *Public Health Protection Act*,[538] operating in public law rather than private law. Keeping track of birthing women used to be more statistical in nature and showcase a relationship between the State and the mother. This origin of the attestation belongs to different imperatives and to public law. It is now an extremely gendered measure having effects in private law and contributing to the establishment of maternal filiation only. No particular about a man will ever be listed on the attestation of birth. In addition, the *Commentaires du Ministre* indicated it was deliberated to exclude the particulars related to the 'father'.[539] The relevance of this additional administrative procedure is never questioned because of the confusion between a legal mother and a biological mother.[540] Biology's importance is variable: for women it is important in the filial status, for men it is less so. The biological dimension has not the same role to play with regards to the second parent. No 'proofs' of biological connection will be required. No corroboration is required. Whether it is necessary to biologically connect a woman to a child in order to vest her with filiation is questionable.

In the absence of the "attestation of birth" the Registrar of civil status has the power to conduct an investigation.[541] The procedures are quite invasive and the Registrar is authorized to ask for medical information.[542] When it is impossible to have such information, the parent must send a signed letter explaining why it is impossible to get medical information and two additional declarations from non-family members. These declarations must be made in front of a commissioner for oaths and contain information on occupation, name, moment when last seen the woman pregnant, moment when first seen the baby, etc.[543] Strikingly, the name of the 'father' and his address are also required, compared to what is done on the regular hypothesis.

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[537] "Cet article prévoit d'utiliser le constat afin de corroborer la déclaration": *Commentaires du ministre de la Justice. Tome 1* (Quebec: Publications du Québec, 1993) at 84-85.

[538] *Ibid.* See also Civil Code Revision Office, *Report on the Québec Civil Code,* vol 1 – Draft Civil Code (Quebec: Éditeur officiel du Québec, 1977) at 42.

[539] "[p]ar ailleurs, il ne peut pas non plus constater la filiation à l'égard du père" : *Commentaires du ministre de la Justice. Tome 1* (Quebec: Publications du Québec, 1993) at 85.

[540] See Régine Tremblay, "mère" in Alexandra Popovici and Lionel Smith, eds, *McGill Companion to Law*, online: http://www.mcgill.ca/companion/list/mere (last consulted on December 12 2016).

[541] Directive de l'État civil, CCQ 111-1, rule 2.

[542] *Ibid* rule 5.

[543] *Ibid* rule 6.

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Information on the 'father' is only relevant in this context. In comparison, in the regular scenario, the attestation of birth identifying solely the woman who gave birth is made in two copies: one goes to 'those who are required to declare birth' and the other is sent to the Registrar of Civil Status.[544] Which leads to the second step, the "declaration of birth".

The second step is the declaration of birth. The declaration of birth is a standardized document to be sent to the *Registrar of civil status* within the 30 days of the child's birth. The 'father' and the 'mother' of the child make the declaration.[545] It contains the name, the sex and the place, date and time of birth of the child, his or her parents' names and domiciles.[546] On this document one can be either a 'mother' or a 'father'. The general rule is that "[o]nly the father or mother may declare the filiation of a child with regard to themselves", but there is an exception in the case of spouses by marriage or by civil union: such formally recognized spouses may declare filiation for one another.[547] A *de jure* spouse may declare for his or her spouse if the child is conceived or born during the union.[548] It is different in nature with the attestation of birth in various ways. First, it does not involve a third party: only the 'mother' and the other parent are concerned at this stage. Second, it is solely voluntary: it is a declaration by which one person affirms he or she is the parent of a child. The only requirement, in theory, is intent. In practice, intent has a minimal role – if it has a role at all – for the female who delivered the child. Indeed, if the attestation of birth and declaration of birth do not match, the Registrar of civil status will deliver no act of birth. This requirement affects only one of the two parents, and the question is almost not studied in Quebec scholarship. It has also been used in the past to import of concept of 'fraud' to the act of birth in case law.[549] There is a preoccupation with locating the 'true' mother in the current form of the rules leading to the emission of the act of birth, the strongest proof of filiation in Quebec. The same cannot be said about locating the 'true' father, or more

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[544] Art 112 CCQ.

[545] Art 113 CCQ.

[546] Art 115 CCQ.

[547] Art 114 CCQ.

[548] Art 114 CCQ.

[549] See *Adoption – 091*, 2009 QCCQ 628 and *Adoption – 12464*, 2012 QCCQ 20039. *Adoption – 12464'*s decision went to appeal and was overturned (*Adoption — 1445*, 2014 QCCA 1162).

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accurately, the 'true' other parent. Most importantly, it evacuates a crucial element to filiation, which will unfold in part 3.3: filiation is not a spontaneous and instant legal label.

Relying on the attestation and declaration of birth, the *Registrar of Civil Status* produces an "act of birth". The "act of birth" is an official document establishing, amongst other things, the relationship between a child and his or her parent(s). The registration of birth in Quebec creates a legal status and the "act of birth" is crucial in this sense. Upon the analysis of the documents (attestation and declaration), the *Registrar* will decide whether or not the requirements to issue a birth certificate are met. For the 'mother', it means that the attestation and declaration must match. For the other parent, the issuance of the act of birth will solely depend on the voluntary declaration of birth. This system appears gender neutral, however, it is not. Biology has importance only for the woman who delivers. Intent plays a part only for the other parent. Not only does the biological sex of the parent influence the rules regarding the individualization of the child towards the State and his or her filiation, the matrimonial status also does. Indeed, for woman who delivers outside of a *de jure* union, it is impossible to declare who the other parent of the child is if this other parents decides not to fill the declaration of birth. Finally, it is possible to be either a father or a mother on an act of birth and the Code allows two parents of any combination (i.e. father, father; mother, mother; and father, mother. For both filiation by blood and the filiation of children born of assisted procreation, the Civil Code outlines processes for individualizing the child towards the state that are not gender-neutral. Instead they bear specifically on the woman who gives birth to the child.

### 3.1.2 Filiation and the Book on the Family

While the law of persons plays a determinant role in the establishment of filiation for two out of three types of filiation — the importance of the act of birth is different when it comes to filiation by adoption — rules regarding filiation are for the most part in book two of the Civil Code entitled "The Family" under title two: Filiation.[550] Filiation refers to the legal bond between the child and the parent(s), which entails various rights, duties and obligations for both the parent(s) and the child in Quebec. Generally speaking, one cannot be a parent for the

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[550] The first title is entitled "marriage" and it comes first and says something about the way family law is still thought about in Quebec civil law. Another indicium is that most scholars who wrote monograph followed this structure. Structure sends a message almost as strong as the rules themselves.

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purposes of some laws but not others and on the traditional reading a child can have no more than two parents.[551] A child can have two paternal filiations, two maternal filiations, a maternal and a paternal filiation or only one of them (either maternal or paternal). Filiation is not the observation of a situation of facts, but really an operation of the law.

The title on filiation opens with a central principle: "all children whose filiation is established have the same rights and obligations, regardless of the circumstances of birth."[552] This general provision applies to the only three possible types of filiation as understood today: filiation by blood, filiation of children born of assisted procreation, and filiation by adoption.

The current title on filiation is divided in three chapters: chapter 1 – Filiation by Blood; chapter 1.1 – Filiation of Children Born of Assisted Procreation and chapter 2 – Adoption. It is worth noticing that chapter 1.1 is a ".1" and that it is the only title where children are explicitly mentioned: "*children* born of assisted procreation". In addition, the chapter on adoption is entitled adoption *tout court*, while the two others contain the word filiation. More on the titles and the structure will be said in the next part, where the amendments and modifications to the Civil Code will be studied. Filiation by blood and filiation of children born of assisted procreation operate similarly, while adoption differs.

### Filiation by Blood

Filiation by blood applies in the case of so-called "natural" reproduction. It is the Civil Code's base regime and is the successor of the former legitimate filiation. The chapter on filiation by blood is divided into two sections: proof of filiation / *preuves de la filiation* and actions relating to filiation / *des actions relatives à la filiation*. The only possibilities for proofs and actions are encompassed in the Code. There are four proofs of filiation by blood: act of birth; uninterrupted possession of status; presumption of paternity and voluntary acknowledgement. The strongest and primary proof of filiation by blood is the "act of birth".[553] As explained earlier, the act of birth is crucial, yet the process to have it issued is gender-biased and problematic on many accounts. The second proof of filiation by blood is the uninterrupted possession of status.

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[551] The principle is found in art 532 para 2 CCQ.

[552] Art 522 CCQ.

[553] Art 523 CCQ.

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Possession of status "is established by a combination of facts adequate to indicate the relationship of filiation between the child and his or her parents (arts. 523, 524 C.C.Q.). Such facts include whether the alleged parents treat the child as their own, whether the child is reputed to be theirs and what name the child bears".[554] Uninterrupted possession of status was traditionally relying a Latin trilogy: *nomen* (name), *tractatus* (treatment) and *fama* (reputation).[555] While the Latin words tend to be used less, the three dimensions (name, treatment and reputation) are still the building blocks of a valid uninterrupted possession of status. In essence, the fact of acting parentally publicly from a child's birth can establish the legal bond of filiation under certain circumstances. As Alain Roy describes, the relationship has to appear parental in nature.[556] Uninterrupted possession of status obviously needs to be continuous — *uninterrupted*. It also has to be lasting, generally between 16 and 24 months following the birth of the child.[557] Further, "in the absence of an act of birth, uninterrupted possession of status is sufficient".[558] The act of birth is the strongest proof. It is a title, which has been defined as a "legal basis for a right".[559] In absence of the title, possession is enough. Possession belongs to the realm of facts and functions. While the former is stronger than the latter, their combination generally seals the deal as to who is the right bearer, with the duties and obligations it entails. Indeed, when the act of birth is consistent with the possession of status, no one can claim or contest the filiation of a child.[560] While claiming is about establishing filiation, contesting is about setting a filiation aside.

The third proof of filiation by blood is the presumption of paternity. The presumption of paternity plays in favor of a male *de jure* spouse: only husband or civil union spouses can use this proof.[561] The presumption is found in article 525 of the Civil Code:

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[554] Allard, *Dictionary: Family, supra* note 203 *sv* "possession of status of (a) child".

[555] See, as one of many examples, *Droit de la famille — 1528*, 2015 QCCA 59 (CanLII) at para 21.

[556] Alain Roy, *La filiation par le sang et par la procréation assistée (Art 522 à 542 C.c.Q.)* (Cowansville: Éditions Yvon Blais, 2014) at 34.

[557] *Droit de la famille — 1528*, 2015 QCCA 59 at para 29.

[558] Art 523 para 2 CCQ.

[559] Crépeau *et al.*, *Private Law Dictionary*, 2nd ed (Cowansville: Yvon-Blais, 1991) *sv* "title".

[560] Art 530 CCQ.

[561] Arts 525 and 538.3 CCQ.

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| **525.** L'enfant né pendant le mariage ou l'union civile de personnes de sexe différent ou dans les 300 jours après sa dissolution ou son annulation est présumé avoir pour père le conjoint de sa mère.<br><br>Cette présomption de paternité est écartée lorsque l'enfant naît plus de 300 jours après le jugement prononçant la séparation de corps des époux, sauf s'il y a eu reprise volontaire de la vie commune avant la naissance.<br><br>La présomption est également écartée à l'égard de l'ex-conjoint lorsque l'enfant est né dans les 300 jours de la dissolution ou de l'annulation du mariage ou de l'union civile, mais après le mariage ou l'union civile subséquent de sa mère. | **525.** If a child is born during a marriage or a civil union between persons of opposite sex, or within 300 days after its dissolution or annulment, the spouse of the child's mother is presumed to be the father.<br><br>The presumption of paternity is rebutted if the child is born more than 300 days after the judgment ordering separation from bed and board of married spouses, unless the spouses have voluntarily resumed living together before the birth.<br><br>The presumption is also rebutted as regards the former spouse if the child is born within 300 days of the dissolution or annulment of the marriage or civil union, but after a subsequent marriage or civil union of the child's mother. |
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If neither an act of birth nor uninterrupted possession of status helps in establishing a filiation, one may arise from the presumption of paternity or maternity for the birth mother's formal spouse.[562] Finally, the last proof is voluntary acknowledgement,[563] but it only binds the person who made the acknowledgement. Voluntary acknowledgement of maternity is rarely used, even if available in the Civil Code.[564] To my knowledge, it has never been successfully use to claim a maternal filiation.[565] With filiation by blood, most of the articles in the Civil Code target paternity, given civil law's long held assumption that the woman who delivers is the legal mother.

If the administrative process — or extrajudicial process — fails or if the "act of birth" and "possession of status" do not match, interested parties can contest or claim a filiation judicially. The actions relating to filiation are limited in number, scope and standing, and are found under section two (actions relating to filiation) of chapter one (filiation by blood). A primordial principle is that no one may claim or contest "the status of a person whose possession of status is consistent with his act of birth".[566] This is true even in situations where filiation does not match a biological truth or if a person had no knowledge he was not biologically connected

[562] Arts 525 and 538.3 CCQ.

[563] Voluntary acknowledgement is limited in scope, see arts 526 and 527 CCQ.

[564] Art 527(1) CCQ.

[565] See for example, *Droit de la famille — 072895*, 2007 QCCA 1640 (CanLII) and *F. M. v. G.-Fr. T.*, 2005 CanLII 11113 (QC CS)

[566] Art 530 para 1 CCQ.

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to the child towards whom he is acting as a parent. This sends a message that filiation is a legal construct aimed at specific legal purposes and imperatives such as familial stability, interest of the child and existing affective relations are of greater importance than mere biological truth.[567] While the idea of claiming refers to creating a bond of filiation, contesting targets deleting one already existing. When a filiation is established, one cannot claim a new one without first contesting the existing one. As explained in article 532(2) CCQ, "[i]f the child already has another filiation established by an act of birth, by the possession of status, or by the effect of a presumption of paternity, an action to claim status may not be brought unless it is joined to an action contesting the status thus established." Any interested person may contest the filiation of someone if his or her act of birth is not consistent with his or her possession of status.[568] There is a specific action in contestation for the presumed father called action in disavowal. Such an action aims at rebutting a presumption of paternity "only within one year of the date on which the presumption of paternity takes effect, unless he is unaware of the birth, in which case the time limit begins to run on the day he becomes aware of it".[569] When it comes to rebutting a presumption of paternity, the mother may also contest a filiation during the year following the birth of the child.[570] In general, father, mother, child or interested person can claim or contest the filiation of a child. "Proof of filiation may be made by any mode of proof," but "testimony is not admissible unless there is a commencement of proof, or unless the presumptions or indications resulting from already clearly established facts are sufficiently strong to permit its admission".[571] As such, a threshold must be meet for testimonies to be eligible. What consists of a "commencement of proof" is explained at article 534 CCQ: "commencement of proof results from the family documents, domestic records and papers, and all other public or private writings originating from a party engaged in the contestation or who would have an interest therein if he were alive." Actions in contestation or reclamation of filiation "are prescribed by 30 years from the day the child is deprived of the claimed status or begins to enjoy the contested status" unless

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[567] *Droit de la famille — 07528*, [2007] QCCA 361: [79] (…) Or, en matière de filiation, le législateur a autant que possible favorisé la paix et la stabilité de la famille en faisant primer l'acte de naissance et la possession d'état sur le lien biologique"

[568] Art 531(1) CCQ.

[569] Art 531(2) CCQ.

[570] *Ibid.*

[571] Art 533 CCQ.

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a shorter period is imposed by law.[572] For example, while an action in contestation of status can be made within the 30 years period, an action in disavowal cannot as a one-year period is specified in the Code. Last but not least on the actions relating to filiation, article 535.1 CCQ specifies that, under certain circumstances, a court can order the analysis of a bodily substance to have a genetic profile. A court may draw a negative presumption when someone refuses for unjustified reasons to submit to the analysis.[573] This mechanism is used in actions in contestation or reclamation of status, but cannot be used for other reasons. For example, if a legal father (on the act of birth and with possession of status) learns when the child turns 10 that he is not the biological father, the genetic analysis will not affect his status of parent towards the child. Finally, on filiation by blood, under the chapter of the filiation by blood, actions generally are used with regards to paternal filiation. It is extremely rare, given the interaction between the law of persons and the law of filiation, that an action in contestation or an action to claim is concerned with maternal filiation, despite the gender-neutral appearances of most rules contained in the section. But the Civil Code includes other models for legal families: single-mother-families-by-choice, families of men unable to procreate and two-mother families.

### Filiation of Children Born of Assisted Procreation

The Civil Code's chapter on the filiation of children born of assisted procreation is the result of reforms in 2002, responding to the emergence of new reproductive choices. This regime contains innovative provisions, including ones allowing a woman to be a child's sole legal parent by intention and providing means for two women to establish themselves directly as the mothers of a child born to them by assisted procreation from birth. The Code allows for socially or biologically infertile couples to create families without using adoption mechanisms: sexless reproduction becomes more and more important. This second type of filiation is found under chapter 1.1 of the Civil Code and operates similarly to filiation by blood, with some key modifications some technical, some symbolic. "The legislative drafters took as their point of

[572] Art 536 CCQ.

[573] Art 535.1 CCQ.

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departure the regime of filiation by blood".[574] Under article 538.1 CCQ, there is an equation or a clear reference to filiation by blood:

| **538.1.** La filiation de l'enfant né d'une procréation assistée s'établit, comme une filiation par le sang, par l'acte de naissance. À défaut de ce titre, la possession constante d'état suffit; celle-ci s'établit par une réunion suffisante de faits qui indiquent le rapport de filiation entre l'enfant, la femme qui lui a donné naissance et, le cas échéant, la personne qui a formé, avec cette femme, le projet parental commun.<br><br>Cette filiation fait naître les mêmes droits et obligations que la filiation par le sang. | **538.1** As in the case of filiation by blood, the filiation of a child born of assisted procreation is established by the act of birth. In the absence of an act of birth, uninterrupted possession of status is sufficient; the latter is established by an adequate combination of facts which indicate the relationship of filiation between the child, the woman who gave birth to the child and, where applicable, the other party to the parental project.<br><br>This filiation creates the same rights and obligations as filiation by blood. |
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This chapter 1.1 of the Book on Family revolves around a concept called "parental project involving assisted procreation" (hereinafter parental project). It "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".[575] No formalities are required and the parental project exists only on the basis of the meeting of the minds, prior to the conception of the child. The parental project targets single women, heterosexual couples and lesbian couples. For heterosexual couples, the general hypothesis is that the genetic contributor will be a male, given the absolute nullity of surrogacy agreements.[576] As such, the filiation of children born of assisted procreation targets only certain kind of assisted procreation and is possible only for heterosexual or lesbian couples, or single women. When the genetic contribution is sperm, the assisted procreation does not have to be medically assisted. However, the level of "assistance" asked from the male third party might have an impact on the filiation of the resulting child. Under article 538.2 (2):

> (…) the contribution of genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of the woman who gave birth to the child may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation.

[574] Robert Leckey, "Lesbian Parental Projects in Word and Deed" (2011) 45 RJT 315 at 320.

[575] Art 538 CCQ.

[576] Art 541 CCQ.

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If sexual intercourse occurred, this article stipulates the man can reclaim the resulting child within a year following birth, no matter what was the intent of the parties involved. This article refers only to sperm and has only been invoked in non-heterosexual settings, i.e. against lesbian partners and single women.[577] This one-year delay has been interpreted broadly, especially in the years following the coming into force of the reform.[578] It reflects a narrow understanding of sexuality and exposes how single and lesbian women are captive of a patriarchal understanding of filiation. To sum up the elements of the parental project are: it must exist prior to the child conception, all the parties involved must be aware of their respective roles,[579] a third party to the project is necessary, sexual intercourse allows for special legal actions, and the project can be undertaken by a single woman, or a couple (heterosexual or lesbian).

For the most part, the rules in terms of proofs and actions in the chapter on filiation by assisted procreation are the same as the one for filiation by blood. Some technical modifications were, however, necessary. Two modifications concern the proofs of filiation and one the actions relating to filiation. First, the presumption of paternity needed to be adapted, mostly because the second parent can be a mother. As such, while the principles remain the same, some words were changed in order to be gender neutral:

| **Filiation by blood** | **Filiation of children born of assisted procreation** |
| --- | --- |
| **525.** If a child is born during a marriage or a civil union **between persons of opposite sex**, or within 300 days after its dissolution or annulment, the spouse of **the child's mother is presumed to be the father.**<br>(…)<br>The presumption is also rebutted as regards the former spouse if the child is born within 300 days of the dissolution or annulment of the marriage or civil union, but after a subsequent marriage or civil union **of the child's mother.** | **538.3.** If a child is born of a parental project involving assisted procreation between married or civil union spouses during the marriage or the civil union or within 300 days after its dissolution or annulment, the spouse **of the woman who gave birth to the child is presumed to be the child's other parent.**<br>(…)<br>The presumption is also rebutted as regards the former spouse if the child is born within 300 days of the termination of the marriage or civil union, but after a subsequent marriage or civil union **of the woman who gave birth to the child.** |

[577] See, for example, *Droit de la famille — 111729*, 2011 QCCA 1180 (CanLII); *LB v Li Ba,* 2006 QCCS 591 (CanLII); *Protection de la jeunesse — 084475*, 2008 QCCQ 13902 (CanLII).

[578] *LB v Li Ba*, 2006 QCCS 591 and its appealed decision, *Droit de la famille - 07527*, 2007 QCCA 362.

[579] It need to be clear in the mind of the third party that he will not be the parent of the child. This criterion has led to unhappy endings, given the lousy definition of what a parental project is and the inadequacy of the rules in the law of person. See, for example, *Droit de la famille – 111729,* 2011 QCCA 1180.

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The text and effects of the articles are mostly the same, except the fact the presumption operates in favor of the spouse of the woman who gives birth to the child. This person is not the father, but the "child's other parent". This "other parent" can be either father or a mother. The second modification concerns another mode of proof: the voluntary acknowledgement. This proof is not available to establish the filiation of a child born of assisted procreation, probably because, amongst other things, the intent must precede the conception of the child for the parental project to exist. Another reason is that, according to Castelli and Goubeau, since the act of birth relies on declaration of birth and, in the case of *de facto* partners, such declarations are in fact voluntary acknowledgement. No need then to duplicate the process.[580] Finally, the last modification is found in article 540 CCQ. Even if there is no internal structure to the chapter, it is possible to state that 540 CCQ is more about actions and less about proofs of filiation. Further, in my opinion, it is not an action relating to filiation, but rather an action in liability. Article 540 CCQ provides that a person who does not declare his or her filiation after consenting to a parental project "is liable towards the child and the child's mother". This article became necessary because no biological element could be used to tie an adult to a child if the second parent withdraws from the parental project. Yet, while it is desirable, there is an interesting difference between this and the situation where someone tries to evade his filiation under the chapter on filiation by blood. Article 540 is not about filiation but merely about liability. While filiation creates a legal bond, which entails rights and obligations for both parties, liability is mostly about obligations, here unilateral pecuniary obligations. Article 540 does not allow for the establishment of filiation. In other words, when filiation is established for someone who did not intend to parent in a filiation by blood hypothesis, this person can nonetheless, depending on the circumstances, have powers and rights towards the child, and ultimately have an impact on the child's life. 540 CCQ does not allow for the establishment of filiation. It refers to a fault or a wrongdoing giving right to damages,[581] which are probably alimentary in nature.[582] Some authors are critical of such an important distinction between filiation by blood and filiation of children born of assisted procreation,[583] but there is something interesting with article 540 CCQ,

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[580] Castelli & Goubau, *supra* note 21 at 248.

[581] Jean Pineau & Marie Pratte, *La Famille* (Montréal: Thémis, 2006) at 696-97.

[582] Castelli & Goubau, *supra* note **Error! Bookmark not defined.** at 249-50.

[583] *Ibid* at 250.

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something that could be integrated into filiation by blood. When filiation by blood is recognized 'against' a father's will, the full effects of filiation can follow. It is unclear whether it is always beneficial for a child to have a parent who did not have and does not have the intent to act as such involved in the child's life. This should be explored in depth as it raises many questions, including the disengagement of the State in the economic well being of children and the privatization of support. Finally, in terms of technical modifications, while it is not part of the chapter on assisted procreation, the second parent can fill the declaration of birth and will be on the act of birth.[584] The genetic contributor will not be mentioned on the act of birth and cannot fill a declaration of birth. "Personal information relating to assisted procreation is confidential," [585] but when the health of a person or his or her descendants could be seriously harmed, a court may allow the transmission of information to the medical authority concerned, as per article 542 CCQ. This covers the technical modifications, but other important modifications were also made in 2002.

In addition to the necessary technical modifications, some symbolic changes were made in the Code in 2002. These adjustments are symbolic as they reflect a certain idea of the law more than they produce legal results. Sometimes, they reiterate principles contemplated by pre-existing articles of the Code. The first is found in the second paragraph of article 538.1, reading "[t]his filiation creates the same rights and obligations as filiation by blood". This is symbolic as it only states what is already encompassed by article 522 CCQ and reaffirms equality between children. The same article is also found in the chapter on adoption[586] and is arguably solely aim at reinforcing the image of children as equal notwithstanding their mode of conception, but mostly addressing and dismantling Quebec's not so distant past where various categories of children were present in law. The second difference is found in article 539 CCQ. 539 CCQ provides for two technical changes: the framework surrounding the action in disavowal and the referral to the rules governing actions relating to filiation by blood. The first part of the article nonetheless represents a symbolic and desirable statement with regards to the value and strength of the filiation of children born of assisted procreation. Its first part states: "[n]o one may contest

[584] Art 115 CCQ.

[585] Art 542 CCQ.

[586] Art 578(2) CCQ.

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the filiation of a child solely on the grounds of the child being born of a parental project involving assisted procreation". The third symbolic modification concerns the status and legal label of the second parent: "If both parents are women, the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child"[587]. This is symbolic given the obligations of a father or a mother are largely the same in law, except for a very limited number of articles that could have been individually modified instead.[588] It clearly announces Quebec law is comfortable with same-sex filiation. Last, but not least, article 541 CCQ stipulates "[a]ny agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null". Nullity means that a contract can be set aside [not that it is void in the common law sense]. "The absolute nullity of a contract may be invoked by any person having a present and actual interest in doing so; it is invoked by the court of its own motion. A contract that is absolutely null may not be confirmed".[589] It does not mean the law forbids it but that it cannot be enforced. This article, of course, targets surrogacy. In the context of chapter 1.1, it appears symbolic because it deals with something already dealt with in contract law and it does not provide for any filial rules.[590] This article has appeared in the Code in 1994 and used to be in the chapter about filiation by blood. Articles 1413 and 1416-1417 CCQ are general article of obligations, while the first provides for the nullity of contract that are contrary to public order,[591] articles 1416 and 1417 CCQ precise the nature of the nullity:

| | |
|---|---|
| **1416.** Tout contrat qui n'est pas conforme aux conditions nécessaires à sa formation peut être frappé de nullité. | **1416**. Any contract which does not meet the necessary conditions of its formation may be annulled. |
| **1417.** La nullité d'un contrat est absolue lorsque la condition de formation qu'elle sanctionne s'impose pour la protection de l'intérêt général. | **1417.** A contract is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest. |

[587] Art 539.1 CCQ.

[588] See, for an analysis Benoît Moore, "Les enfants du nouveau siècle (libres propos sur la réforme de la filiation)" (2002) *Volume 176 - Développements récents en droit familial 2002,* 85-86.

[589] Art 1418 CCQ. See also Benoît Moore, "Maternité de substitution et filiation en droit" in Marie Goré et al, eds, *Lib amicorum Mélanges en l'honneur Camille Jauffret-Spinosi* (Paris: Dalloz, 2013) 859 and Régine Tremblay, "Surrogates in Quebec: The Good, the Bad, and the Foreigner" (2015) 27:1 CJWL 94 at 100-102.

[590] Régine Tremblay, "Surrogates in Quebec: The Good, the Bad, and the Foreigner" (2015) 27:1 CJWL 94.

[591] Art 1413 CCQ: "A contract whose object is prohibited by law or contrary to public order is null".

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As such, article 541 is limited in scope and has never been invoked in court to nullify a contract,[592] but it has been invoked to seek to prevent intended parents from obtaining legal recognition through special consent adoption.

Technical and symbolical modifications created a regime of non-heterosexual filiation up to a certain point. 'Natural reproduction' of single woman and lesbian couples are encompassed in chapter 1.1, in addition, of course, to heterosexual couples. In 2002, these rules were innovative, but history has revealed their limits. For example, problems have arisen when it comes to intent and the absence of formalities in the parental project. This issue is also related to the omission to modify the law of persons. Indeed, in the context of a parental project of a single woman, the act of birth will always be 'incomplete' given the absence of a second filiation. Such a parental project can always be contested. This has lead to particularly complex issues, especially upon the death of the mother.[593] Another concern is the narrow understanding of sexuality revealed in the Code and the power of procreative sex. For example, in a case where both sexual and assisted procreation occurred, the intercourse was given all the evidentiary weight. This had the effect to exclude the second mother involved in the parental project. Sexuality, intimacy and the intent to reproduce were obvious from the behaviour of the lesbian couple, but one sexual intercourse has been decisive in establishing filiation.[594] Other limits include the easy slip between the applicable chapter (blood or assisted procreation), surrogacy issues and more. Case law tends to demonstrate the interest of the child born of assisted procreation may be precarious and subject to prejudices about how families are made.[595]

## Adoption

The third type of filiation is filiation by adoption, or adoption *tout court* in the title of the Civil Code. Adoption can involve a child domiciled inside or outside Quebec, but the rules will vary. Even if adoption is a chapter of the Civil Code, its relationship with the *Youth Protection*

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[592] While a few cases went to court, no case to this day was about the enforcement of a surrogacy agreement *per se*.

[593] *Droit de la famille — 111729*, 2011 QCCA 1180 (CanLII).

[594] *LB v Li Ba*, 2006 QCCS 591 and its appealed decision, *Droit de la famille - 07527*, 2007 QCCA 362.

[595] *Adoption – 091*, 2009 QCCQ 628 and *Adoption – 12464*, 2012 QCCQ 20039. *Adoption – 12464*'s decision went to appeal and was overturned (*Adoption — 1445*, 2014 QCCA 1162).

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*Act*[596] should not be occulted. How does the Code regulate adoption, mostly adoption of children inside Quebec today? Adoption produces a new bond of filiation as the result of a judgment made in the best interests of the child.[597] It generally replaces all prior bonds of filiation and cannot be used to confirm one already established otherwise.[598] The Civil Code has made plain since 2002 that same-sex couples may adopt.[599] Adoption is plenary and closed: plenary as it severs pre-existing bonds and closed as there is no information or contact (in theory) between the family of origin and the adoptive family. There are of course exceptions (health, research or study purposes and if the family of origin previously consented).[600] These general principles are the result of Quebec's socio-historical context and are being challenged by people across disciplines.[601] Three paths are possible for adoption: general consent adoption, special consent adoption or declaration of eligibility to adoption. General conditions apply roughly to the three paths. The first general condition is that no child can be adopted without either the consent of his or her family of origin or unless a judge declare him or her as eligible to adoption.[602]

Adoption is not a factual situation and legal steps must be taken for it to proceed. This institution mostly targets minor children. The only scenario where a person over 18 years old may be adopted is when the adopter acted towards the adoptee as his or her parent when he or she was a minor child.[603] Discretionary powers are nevertheless given to the judges if it is in the adoptee's interest to allow the adoption.[604] Other general principles that any person of full age,

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[596] *Youth Protection Act*, CQLR c P-34.1.

[597] Art 543 CCQ.

[598] Art 543(2) CCQ.

[599] Art 578.1 CCQ.

[600] Arts 582-84 CCQ.

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

[602] Art 544 CCQ.

[603] Art 545(1) CCQ.

[604] Art 545(2) CCQ.

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in a relationship or alone may adopt,[605] if there is an 18 years age difference between the adopter and the adoptee.[606] Exceptions are possible: if it "is the child of the spouse of the adopter" or it is in the interest of the adoptee.[607] While the Code does not mention it, Alain Roy highlights how it is not sufficient to be a person of full age. The adopter has to be capable to exercise and enjoy rights, and to be young enough to fulfill long-term parental responsibilities.[608] The last general principle concerns the formalities associated with consent:

| **548.** Les consentements prévus au présent chapitre doivent être donnés par écrit devant deux témoins.<br><br>Il en est de même de leur rétractation. | **548.** Consent provided for in this chapter shall be given in writing and before two witnesses.<br><br>The same rule applies to the withdrawal of consent. |
|---|---|

These requirements of having two witnesses and that the consent must be done in writing reinforce the formal and strict nature of adoption.

General consent adoption is the first path to adoption and is the hypothesis where a parent or parents towards whom the filiation is established consent to the adoption in favor of the Director of Youth Protection. The parent or parent(s) of origin do not choose who will adopt the child and the Director of Youth Protection will select an adoptive family, and may consider suggestions if appropriate.[609] The consent is general, as it is not directed towards an identified individual.

The second path to adoption in Quebec law provides a mechanism for "special consent to adoption".[610] Special, as opposed to general, consent allows the parent to give consent to his or her child's adoption to a designated person. A child's parent may grant special consent for the adoption of his or her child only in favor of certain individuals. It may be given in favor of the parent's spouse by marriage or by civil union. In the case of unmarried cohabitants or *de facto* spouses, they must have lived together for three years in order for one to consent to the other's

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[605] Art 546 CCQ.

[606] Art 547 CCQ.

[607] Art 547(1) and 547 (2) CCQ.

[608] Alain Roy, *Droit de l'adoption: Adoption interne et internationale*, 2nd ed (Collection Bleue) (Montreal: Wilson & Lafleur, 2010) at 43 [Roy, *Adoption*].

[609] *Manuel de référence sur la protection de la jeunesse*, Gouvernement du Québec, 2010 at 54 [*Manuel de référence*].

[610] Art 555 CCQ.

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adoption of his or her child.[611] Other persons include "an ascendant of the child, a relative in the collateral line to the third degree or the spouse of that ascendant or relative".[612] When special consent to adoption take place in favor of a spouse, it "does not dissolve the bond of filiation between the child and that parent,"[613] that parent necessarily being one of the spouses. The Quebec civil law however does not have a clear principle or provision about the consent of the applicant's spouse, as it is the case, for example, under the *Child and Family Services Act.*[614] So far, it has not created problems.

Consent is the first step in both general and special adoption procedure as it makes the child eligible for adoption and triggers the process. The adoptee of ten years of age or more must consent to his or her adoption.[615] Between ten and fourteen years old, a court can grant adoption notwithstanding his or her refusal.[616] For a child older than fourteen years, the refusal to consent is a bar to adoption.[617] Another consent required is the consent of the parents.[618] Everybody who has an established filiation towards the child has to consent,[619] except if the parent is not capable of consenting (death or incapacity) or is deprived of parental authority.[620] A parent under 18 years old can consent alone to the adoption of his or her child.[621]

The third path for adoption is through youth protection and happens through a declaration of eligibility to adoption. It is a measure to protect the child and three requirements must be met and demonstrated to a judge. First, it can happen in four situations asserted at article 559 CCQ:

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[611] *Ibid.*

[612] *Ibid.*

[613] 579(2) CCQ.

[614] S 137 (10), *Child and Family Services Act*, RSO 1990, c C.11.

[615] Art 549 CCQ.

[616] Art 549(2) CCQ.

[617] Art 550 CCQ.

[618] This consent can also be given by a tutor, but I will not explain tutorship for the purpose of the thesis. The consent of the articles about the consent of the parent are at articles 551 and *ff* of the *Civil Code of Québec.*

[619] Art 551 CCQ.

[620] Art 552 CCQ.

[621] Art 554 CCQ.

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| **559.** Peut être judiciairement déclaré admissible à l'adoption: | **559.** The following may be judicially declared eligible for adoption: |
|---|---|
| 1° L'enfant de plus de trois mois dont ni la filiation paternelle ni la filiation maternelle ne sont établies; | (1) a child over three months old, if neither his paternal filiation nor his maternal filiation has been established; |
| 2° L'enfant dont ni les père et mère ni le tuteur n'ont assumé de fait le soin, l'entretien ou l'éducation depuis au moins six mois; | (2) a child whose care, maintenance or education has not in fact been assumed by his mother, father or tutor for at least six months; |
| 3° L'enfant dont les père et mère sont déchus de l'autorité parentale, s'il n'est pas pourvu d'un tuteur; | (3) a child whose father and mother have been deprived of parental authority, if he has no tutor; |
| 4° L'enfant orphelin de père et de mère, s'il n'est pas pourvu d'un tuteur. | (4) a child who has neither father nor mother, if he has no tutor.[622] |

Article 559 paragraphs 1 and 4 are concerned with abandoned child or orphan child. While the English of paragraph 4 is unclear, the French version precises *l'enfant orphelin.* Article 559 paragraphs 2 and 3 are protective measures. The Director of Youth Protection is generally applying for a declaration of eligibility.[623] Second, it is necessary to demonstrate that "it is unlikely that his father, mother or tutor will resume custody of him and assume his care, maintenance or education".[624] This element is presumed,[625] so the burden is on the parent(s) or tutor to demonstrate that they can assume the care of the child.[626] If all this is demonstrated and the judge is convinced beyond the balance of probabilities, the last requirement is the interest of the child.[627] It has to be in the interest of the child to declare the child eligible to adoption. This requirement appeared in 1969[628] and is fundamental to every adoption file in Quebec today.[629]

While the three paths to adoption are different, after their respective first steps are made, their processes are similar. For both general and special consent, all consents can be withdrawn

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[622] The format of the numbering is different between the English and the French in the original version.

[623] *Manuel de référence, supra* note 609 at 58.

[624] Art 561 CCQ.

[625] Art 561 CCQ.

[626] *Manuel de référence, supra* note 609 at 59.

[627] Art 543 CCQ.

[628] *Loi de l'adoption*, SQ 1969, c 64.

[629] See Roy, *Adoption*, *supra* note 608 at considération préliminaire.

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within 30 days.[630] At any moment before the order of placement, a person who gave consent, but did not withdraw it, may "apply to the court to have the child returned".[631] While consent is central to the first and second path to adoption, it is absent from the third path. For eligibility to adoption, there is also a 30-day period to appeal the decision of the judge. Following the 30-day period, an order of placement must be sought in court. A six months placement is then necessary before filling an application for adoption.[632] "The period may be reduced by up to three months, however, particularly in consideration of the time during which the minor has already lives with the adopter before the order"[633] of placement. At the end of the six months, "[t]he court grants adoption on the application of the adopters unless a report indicates that the child has not adapted to his adopting family. In this case or whenever the interest of the child demands it, the court may require any additional proof it considers necessary".[634] This figure illustrates the process:[635]

[630] Arts 557 and 567 CCQ.

[631] Art 558 CCQ.

[632] Art 566 CCQ.

[633] Art 566(2) CCQ.

[634] Art 573 CCQ.

[635] The figure is a translation of a figure that can be found in the *Manuel de reference, supra* note 609 at 65.

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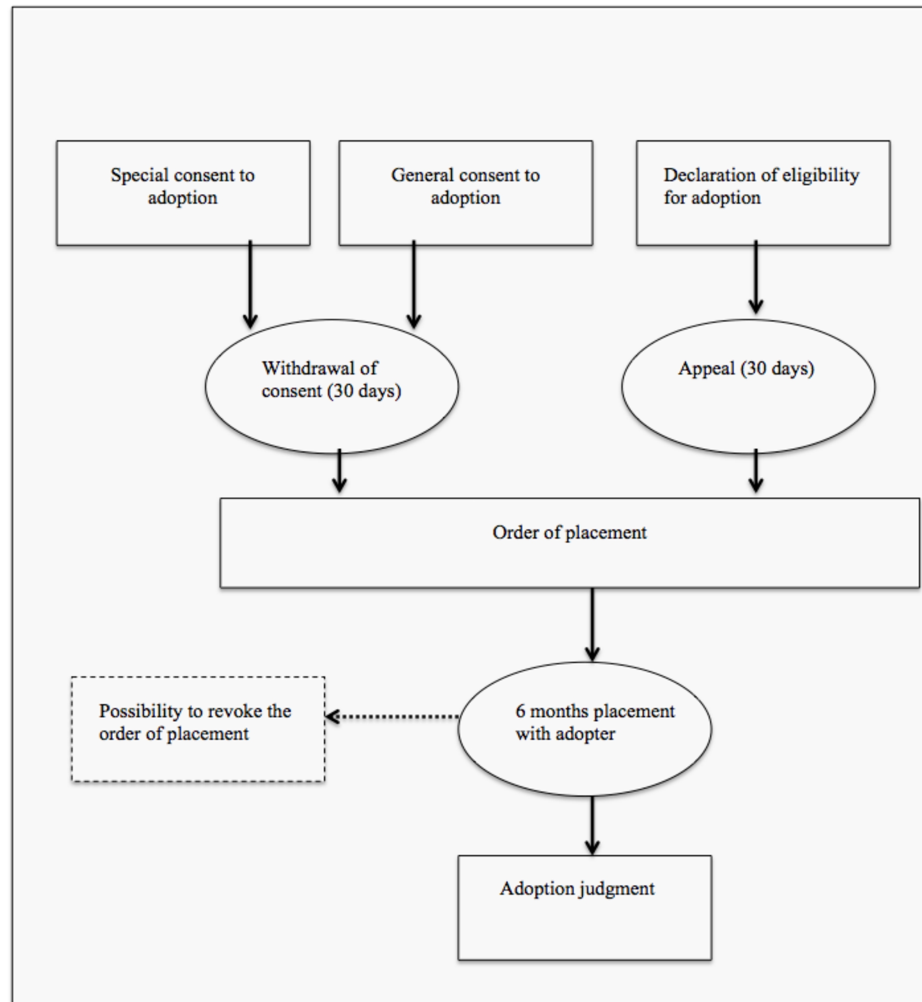


Once the judgment is obtained the adoptive filiation of the child replaces his or her original filiation.[636] Adoption gives rise to the same rights, obligations[637] and duties than any other type of filiation.

The three types of filiation – by blood, of children born of assisted procreation and by adoption – have effects, which materialize in what civil law calls 'parental authority' and support. The next part explores the effects of filiation.

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[636] Art 579 CCQ.

[637] Art 578 CCQ.

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## 3.1.3 Effects of Filiation

Once one is vested with filiation, rights, duties and obligations follows. Generally speaking, the civil law is strict as to who has rights, duties and obligations towards a child and it flows from the formal recognition of an individual as a parent. While it has ramifications in many areas of civil law, the focus here is solely on the effects of filiation from a family law perspective, and, more precisely on a narrow understanding of family that has been described earlier as family law one-. The two principal effects of filiation in civilian family law one-, and in the book on the Family in the Civil Code, are parental authority (Title 4, Book 2 of the Civil Code) and support (title 3, book 2 of the Civil Code). Many other effects could have been listed.[638] The two principal effects in the Book on the Family affect the person of the child and not his or her property. Indeed, rules and principles concerning the property of the child are not in the Book on the Family, but rather in the Book on Persons. These rules and all the other that are not part of Book two will not be addressed here.

### Parental Authority

Parental authority is contemplated in the title 4 of the Civil Code, from articles 597 to 612. It imposes a duty on the child to respect his or her father and mother[639] and lasts until the emancipation of the child or when he or she reaches full age (18 years old).[640] The concept is specific to civil law and has been defined as "[s]et of attributes considered as a whole conferred by law upon a person, as parent, in respect of a minor child".[641] According to Jean Pineau, it represents "the totality of powers and rights with regards to a minor child granted by the law to the father and mother to allow them fulfill their parental duties, to which it is impossible to withdraw or derogate by contract".[642] The parents generally exercise it together,[643] but it can be

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[638] For a recapitulative table of the effects of filiation see François Héleine, *Droit de la filiation, politique législative et arrêts de jurisprudence québécoise,* Civil Code Revision Office (1971).

[639] Art 597 and Nicholas Kasirer, "Honour Bound" (2001) 47 McGill LJ 237.

[640] Art 598 CCQ.

[641] Allard, *Dictionary: Family, supra* note 203 *sv* "parental authority".

[642] Pineau & Pratte, *supra* note 14 at 823. The translation is my own.

[643] Arts 599 and 600 CCQ.

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exercised by only one of the parents[644] or by another person under specific circumstances. When parents separate, they both keep parental authority. Parental authority is made of core components called attributes. In Quebec today, these attributes are: the right and duty of custody, the right and duty of supervision, the right and duty of education, the duty to maintain (which, in the French version, includes two things: *nourrir* and *entretenir*). The management of the child's assets is not a component of parental authority.[645] Notwithstanding their labels, there is a large consensus as to the content of the attributes in Quebec civil law. All the attributes are encompassed in article 599 CCQ:

| | |
|---|---|
| **599.** Les père et mère ont, à l'égard de leur enfant, le droit et le devoir de garde, de surveillance et d'éducation.<br><br>Ils doivent nourrir et entretenir leur enfant. | **599.** The father and mother have the rights and duties of custody, supervision and education of their children.<br><br>They shall maintain their children. |

The first and principal attribute of parental authority is the right and duty to custody. Custody allows parents to decide where the child lives, to have access to the child, and more. Upon breakdown of the family unit, the exercise of right and duty to custody becomes a bit more complex and a parent not having custody still has a say in the decisions made for and about the child.[646] There is thus, despite the same vocabulary, important differences between custody in common law and in civil law and the reader should be aware of it. Custody in civil law has narrower legal effects than custody in common law. The second attribute is the right and duty of supervision. Supervision is the corollary of the right and duty to custody. It is twofold. On the one hand, it is about the protection and safety of the child himself or herself. On the other hand, supervision is also about preventing damage the child could cause to others. A breach of the duty to supervise the child could even lead to extra contractual liability[647], which roughly corresponds

[644] For example, there is a presumption at article 603 CCQ that "[w]here the father or the mother performs alone any act of authority concerning their child, he or she is, with regard to third persons in good faith, presumed to be acting with the consent of the other parent". Also, article 600(2) CCQ stipulates that "If either parent dies, is deprived of parental authority or is unable to express his or her will, parental authority is exercised by the other parent".

[645] See tutorship to minors, arts 177 and *ff* CCQ.

[646] Pineau & Pratte, *supra* note 14 at 856. See also *D W v A G*, [2003] RJQ 1411 (CA); *Droit de la famille – 09746*, 2009 QCCA 623 at para 38.

[647] Art 1459 CCQ.

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to torts with different conceptual standards (in terms of causality for example). The third attribute is the right and duty of education. This attribute is qualified as “d’ordre intellectuel”[648] and encompasses education, civic education, religious education and more.

The fourth attribute of parental authority is the duty to maintain. The duty to maintain differs from support as it is not reciprocal, generally not made in the form of payments, independent of the parents’ wealth, etc.[649] The right to maintain is about fulfilling reasonable material needs of a child. Yet it also shares characteristics with the obligation of support. For example, the obligation of support is of “public order”, and depends on the means and needs of the parties.[650] In the Code, it is not referred to as ‘right and duty’ but as a duty alone: “they [the father and mother] shall maintain their children”.[651] Scholars in Quebec unanimously agree, to my knowledge, the maintenance is part of the attributes of parental authority.[652] With great respect for their opinion, the duty to maintain, which is different from the obligation of support, could be seen differently, not as an attribute of parental authority, but rather as a patrimonial effect of filiation for a few reasons. First and foremost, it survives the deprivation of parental authority. Theoretically speaking, once something is withdrawn, no legal element survives; otherwise it would not be a withdrawal. Yet, when parental authority is withdrawn, the duties to maintain and support obligations continue for the parent with regards to the child. Judges have been clear on that point[653] and the duty necessarily has to survive, as it would otherwise amount, for a parent, to benefit for his or her wrongdoing and lack of parental capacities. Second, contrary to all the other attributes, it cannot be delegated. As a whole parental authority cannot be delegated or withdrawn from, but components of parental authority – attributes – can be delegated or exercised by non-parents.[654] For example, the person having parental authority can delegate supervision. The same cannot be said of the duty to maintain. Third, the duty to

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[648] Pineau & Pratte, *supra* note 14 at 841.

[649] Castelli & Goubau, *supra* note 21 at 310; Pineau & Pratte, *supra* note 14 at 838-839.

[650] Pineau & Pratte, *supra* note 14 at 839-840.

[651] Art 599(2) CCQ.

[652] Pineau & Pratte, *supra* note 14 at 839, Castelli & Goubau, *supra* note 21 at 309; Jurisclasseur Québec, Personne et Famille, Marie-Christine Kirouack, *Fascicule 32 – Les attributes de l’autorité parentale*, Lexis-Nexis, at para 4.

[653] *Droit de la famille – 2592*, [1997] JQ no 5563 (CA).

[654] Art 601 CCQ.

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maintain is not a 'right' of the parent, but a 'duty', only something aimed at the child with no reciprocal right benefiting the parent. This is clear from the wording of the second paragraph of article 599 CCQ. Fourth – and while that might seem of lesser importance it should not be underestimated: structure bears a message in civil law – all the rights and duties are in the first paragraph of article 599 CCQ [see above] but the duty to maintain is separated and stands alone in the second paragraph of the article. The conceptualization of the duty to maintain as an attribute of parental authority in Quebec civil law could be different. The duty to maintain could be seen as a patrimonial effect of filiation, detached from parental authority. It would be interesting to compare with the qualification in other civil law jurisdictions. Whether the duty to maintain expires at the majority of the child is up for debate.

### Support

Support obligations between parents and children are contemplated in both federal and provincial legislation. The federal *Divorce* Act, applicable when parents are married to one another or where there is a "child of the marriage",[655] sets forth support obligation in sections 2 and 15.1. For provincial matters, support for children is rooted in article 585 CCQ, the same article as support between *de jure* spouses. This article provides "[m]arried or civil union spouses, and relative in the direct lines in the first degree, owe each other support". Support is reciprocal and contrary to parental authority, support can be provided to an adult child. Support materializes at the family breakdown and roughly operates the same way it does in common law. Quebec enacted provincial guidelines.[656] In certain circumstances, provincial guidelines apply and in other, federal guidelines apply. Quebec's Court of Appeal confirmed in *Droit de la famille — 139,*[657] the provincial guidelines were not unconstitutional.

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[655] S 2 "child of the marriage" *Divorce Act.*

[656] *Règlement sur la fixation des pensions alimentaires pour enfants Code de procédure civile,* chapitre C-25.01, r.0.4, a 443.

[657] *Droit de la famille — 139,* 2013 QCCA 15.

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## 3.2 A History of Filial Relationships in Private Law: From one possibility to many

While the legal principles surrounding filiation may seem obvious or *natural* today, they are the result of important changes and they are destined to change constantly: what is a family is in constant flux and filiation focuses on the ways in which children are born rather that on the relationships created between adults and children. The law represents an image of filiation that is largely constructed. It results from decades of cultural, social and legal transformations. The purpose of this section is to study how filiation has evolved from one possibility to many, keeping in mind how the multiplication of possibilities for *relationships* between parents and children is not disconnected to the proliferation of relationship types between adults. The tale of the multiplication of parenting models reflects how everything is relative when it comes to filiation in civil law and, despite a strong inclination towards *truth*, *truth* when it comes to family law should not be given too much importance. Truth is a myth: family law is a set of codes bound in time and place.

The unitary model of parent-child relationships was rooted in the importance of marriage as a social, religious and legal institution. Children in Quebec were categorized depending, amongst other things on their parent's sexual behaviours (adulterous, incestuous, illegitimate) and types – or absence thereof – of conjugal unions. As Jean Pineau wrote in 1981 talking about filiation, specifically maternal and paternal filiation: "c'est le marriage qui implique l'indivisibilité".[658] If marriage is the reason underlying the indivisibility of filiation, what happens when marriage is no longer the basis of family law, and family life? Does filiation become divisible as well? The divisibility plays on many levels: divisibility in relation to marriage, divisibility between the parents and more. More, filiation shifted from an effect of marriage where a unique bond was between the married family under the control of the husband and the child to multiple bonds connecting adults and children, notwithstanding the structure of the relations between the adults. In order to exemplify the shift, it is necessary to trace the history of the proliferation of parent-child relationships, its relation to marriage and the underlying elements justifying the evolution of relationships. The legal changes are tackled through legislative modifications and using

[658] Jean Pineau, "Les preuves de la filiation" (1981) 22 C de D 337 at 346.

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secondary materials, such as political debates, doctrine and, minimally, case law. Before turning to the three key moments in Quebec family law of parent-child relationships (1980, 1994, 2002) a few words on the general family law history of Quebec are in order.

### 3.2.1 The Civil Code of Lower Canada – Of Natural, Illegitimate, and Legitimate Children

The *Civil Code of Lower Canada* came into force on August 1st 1866 and has gradually been replaced by the *Civil Code of Québec* in 1994. Under the *Civil Code of Lower Canada*, as mentioned in the previous chapter, there was no book on the family in the Code. Family law nonetheless existed and lived in various books of the Code, mostly in the Book of Persons. Marriage was the fifth title, separation from bed and board the sixth title, filiation the seventh title, and paternal authority the eighth title of the first book of the Code. This structure more or less follows the classical structure of French civil law; the *Code Napoléon* and the current *Code civil* are structured as such.[659] Despite the similarity in structures, social realities differed and so did the underlying assumptions of the law.

Family law under the CCLC functioned upon four assumptions:

> 1. that the "family" was a sub-category of the broader classification "marriage" and that it was impossible to conceive of family relations outside marriage;
>
> 2. that the family was a rigidly patriarchal institution;
>
> 3. that the father exercised almost unfettered power over his children; and finally,
>
> 4. that one of the principal goals of family law was to regulate the property relations between spouses, principally to protect the patrimony of the husband (and of his extended family).[660]

The conceptualization of marriage as the broader category and family as a sub-category is a strong image of how the intimate relationships were conceived and of what mattered in family law. Marriage was a more important category than family, which sends message about the legal,

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[659] To say that it is a classical civilian structure would however be a mistake. Some Civil Codes have books on the family, for exemple the BGB or the Swiss Civil Code. Some others include Family Law in the Law of Persons, the most notorious example being the French Civil Code. Some civil codes do not contain family law, on the strict reading of family law, at all (Russia, Montenegro, etc ). Very interestingly, the first book of the *Codice Civile Italiano* is Libro Primo - Delle persone e della famiglia.

[660] Brierley & Macdonald, *Quebec Civil Law, supra* note 63 at para 22.

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but also social contexts. It was only in marriage that the family happened, at least in law, and other unions were outside of law. Under this paradigm, marriage created the vast majority of legal effects for a family, filiation merely being one of them.

Marriage was quintessential to family relations in law, for some scholars until 1964 'family' was not even part of the vocabulary used in the Civil code. As Jean Pineau wrote: "le mot 'famille' a été banni du vocabulaire législatif jusqu'à une date récente; il fallut attendre 1964 pour le voir apparaître dans les articles 174, 175 et 183, dispositions issues du bill 16 et relatives aux droits et devoirs respectifs des époux". The word family was banned from the law until 1964 according to him, but whether this is accurate is disputable and his statement is likely rather a dramatic overstatement. It certainly needs to be nuanced since family was an important part of the filiation regime. The notion of possession of status since 1866[661] relied on the concept of family and commencement of proof of filiation relied on title-deeds of the family.[662] All in all, while the word was present in the text, the effects of the 'family' as a freestanding institution or discipline were limited until 1980.

In marriage, the family operated under what has been qualified as an 'authoritarian model'.[663] While one can state that various 'authorities' played at different levels – the husband, the Church and the State to name a few – the principal source of authority in the family was the husband. Filiation, was then defined as "the state and condition of a person considered as a child in his relations with his father and mother"[664] or, when it was legitimate, "le lien juridique de parenté qui s'établit entre un enfant et ses auteurs, mariés".[665] In the later definition, it is striking to see filiation was filiation; it was not paternal or maternal. Filiation was about the husband, as seen in articles 227 and ff of the CCLC. It was a bond between a family, under the control of the husband, and the child.[666] Contrary to the current state of the law examined in the previous part,

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[661] Art 230 CCQ.

[662] Art 233 CCQ.

[663] Paul-André Crépeau, "Préface" in Jacques Boucher and André Morel, eds, *Livre du Centenaire du Code civil (I). Le droit dans la vie familiale* (Montréal: Les presses du l'Université de Montréal, 1970) XIII, XXI.

[664] This quote comes from Brierley & Macdonald, *Quebec Civil Law, supra* note 63 at 253 and they use the words of the 1866 codifiers: Codifiers' *Second Report* (1865), 197.

[665] Azard & Bisson, *supra* note 19 at 141.

[666] See, for example, the possession of status found in article 230 CCQ.

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filiation depended on marriage and was divided as to kinds: legitimate, illegitimate (or natural), simple natural (*naturelle simple*), natural adulterine (*naturelle adulterine*), natural incestuous (*naturelle incestueuse*) and, even if absent of the Code, adoptive. Pierre-Basile Mignault, in 1896, referred to the kinds as *classes d'enfants.*[667] In terms of structure, the title on filiation was divided in three chapters: "of the filiation of children who are legitimate or conceived during marriage", "of the evidence of the filiation of legitimate children" and "of illegitimate children" and adoption was dealt with in a statute and not in the Code. The chapters of the Code were the following:

| | | |
|---|---|---|
| C 1 | De la filiation des enfants légitimes ou conçus pendant le mariage | Of the filiation of children who are legitimate or conceived during marriage |
| C 2 | Des preuves de la filiation des enfants légitimes | Of the evidence of the filiation of legitimate children |
| C 3 | Des enfants naturels | Of *illegitimate* children |
| C 3 (1970) | Des enfants naturels | Of *natural* children |

Legitimate filiation was the filiation of children conceived during marriage. Children could also be legitimated by the subsequent marriage of their parents.[668] Depending on the circumstances, children born during marriage but likely conceived out of wedlock could qualify, but there were different theories as to their status and different consequences. The first school of thought relied on the textual analysis of article 222 CCLC,[669] other legislatures and canon law[670] to argue in favor of legitimacy. In canon law, birth in marriage was a basis for legitimacy. The *Code Napoléon*'s first chapter of the seventh title "*De la paternité et de la filiation*" was "*De la filiation des enfans légitimes ou nés dans le Mariage*"; it clearly included children born in marriage. As for article 222 CCLC, which it is not necessary to entirely reproduce here, it referred to "a child born before the one hundred eightieth day of the marriage" which was in line with the theory of legitimacy. The second school of thought preferred the theory of legitimation.

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[667] Pierre-Basile Mignault, *supra* note 21 at 58.

[668] See former article 237 CCLC.

[669] Joyal-Poupart, *supra* note 19 at 76.

[670] Jean Pineau, *Traité élémentaire de droit civil. La famille* (Montreal: Presse de l'Université de Montréal, 1972) at 92 [Pineau, *Traité*].

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According to this theory, the child was not legitimate, but legitimation occurred with the subsequent marriage of his or her parents. For example, Gérard Trudel in his treaty (1942) was categorical: “[l]a filiation légitime dépend de conception beaucoup plus que de la naissance”.[671] For him, conception was central to legitimacy. At the end, both theories recognized the children born in marriage as legitimate, but the distinction between legitimacy and legitimation remained a concern. First, before 1971, it was impossible for an adulterine child to benefit from legitimation;[672] it is thus imprecise to suggest the two theories achieved the same results. Second, while legitimacy started at the birth of the child, legitimation began on the day of the marriage and was not retroactive. While the consequences of the two mechanisms differed, the most important thing was for the child to be legitimate. Legitimate filiation was hierarchically superior and was the only advantageous status for a child. How was legitimate filiation evidenced?

Legitimate filiation was proven by the conception (or birth) of the child during the marriage of his or her parents.[673] The foundational element of filiation was the presumption of paternity of the husband, which was practically irrefutable. Article 218 CCLC stated:

| | |
|---|---|
| **218.** L’enfant conçu pendant le mariage est légitime et a pour père le mari.<br><br>L’enfant né le ou après le cent quatre-vingtième jour de la célébration du mariage, ou dans les trois cents jours après sa dissolution, est tenu pour conçu pendant le mariage. | **218**. A child conceived during marriage is legitimate and is held to be the child of the husband.<br><br>A child born on or after the one hundred and eightieth day after the marriage was solemnized, or within three hundred days after its dissolution, is held to have been conceived during marriage. |

Legitimacy was anchored in marriage and the law presumed a period of conception. The act of birth – in a different fashion then today because there was no Registrar of civil status *per se* and the religious official acted as officers of civil status – and possession of status[674] were evidence of filiation, but the key element was marriage.[675] This led some scholars to argue the marriage

[671] Gérard Trudel, *Traité de droit civil du Québec*, Tome deuxième (Montreal : Wilson Lafleur, 1942) at 62.

[672] See *Civil Code 1866-1980 (with a Supplement 1980-1993). An Historical and Critical Edition*, edited by Paul-André Crépeau and J.E.C. Brierley (Montreal: Chambre des notaires du Québec/SOQUIJ, 1981) at 111.

[673] Joyal-Poupart, *supra* note 19 at 63; Pineau, *Traité*, *supra* note 670 at 98.

[674] Arts 228 and 229 CCLC.

[675] Azard & Bisson, *supra* note 21 at 144.

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demonstrated the intent of the husband to be the father of his wife's child, embracing one of the first forms of intent as a key element in filiation.[676] The husband could *disown* – now replaced by disavowal – the child only within a short delay of 20 days and in a limited number of situations. For example, adultery, absence – within the meaning of civil law[677] – or impotency were not good enough reasons for a husband to disown a child.[678] The wife could never proceed with an action to disown. Legitimate filiation was in in the best interest of the society; it was stable, moral, and represented the cement of society. Other filiations produced various more or less desirable effects, but did not enjoy full legal protection and status.

Illegitimate or natural filiations – the title before article 237 CCLC changed from illegitimate to 'natural children' in 1970[679] – were divided as to kinds. The various kinds allowed for or prohibited certain legal effects. The simple natural filiation was the filiation of a child whose parents were unmarried but who could have been married at the time of birth or conception. It was the best of the available natural filiation. The natural adulterine filiation was for children whose parents (one or both) were married to a third party at the time of the conception of the child. Both simple natural and natural adulterine children could be legitimated by the subsequent marriage of their parents to one another. Note adulterine children had to wait until 1971 for legitimation to be an option.[680] The last type of natural filiation was natural incestuous filiation and depicted the situation where the parents of the child were relatives or allies. Filiation was incestuous when the relationship between the parents was too close for allowing marriage. As a result, no legitimation was possible given the persons were simply not eligible to marry. The effects of natural filiations varied, but need not to be fully fleshed out for the present purposes.[681] One should only have a sense there were multiple variations of treatment

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[676] Joyal-Poupart, *supra* note 19 at 182. She cites Ambroise Colin and Henri Capitant.

[677] An absentee was described at article 86 CCLC : "An absentee, within the meaning of this title, is one who, having a domicile in Lower Canada, has disappeared, without any one having received intelligence of his existence."

[678] See former articles 219-223 CCLC.

[679] See *Civil Code 1866-1980 (with a Supplement 1980-1993). An Historical and Critical Edition*, edited by Paul-André Crépeau and J.E.C. Brierley (Montreal: Chambre des notaires du Québec/SOQUIJ, 1981) at p. 111

[680] *Ibid.*

[681] A reader curious about the various effects of filiation can look at Pineau, *Traité*, *supra* note 670 at 129 and *ff,* Joan Clark, "La situation juridique des enfants naturels" (1952-53) 3 RJT os 14 or Jean-Louis Baudouin, "Examen critique de la situation juridique de l'enfant naturel" (1966) 12 McGill LJ 157.

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between legitimate and illegitimate children, and even within the less desirable category of illegitimate children, some were better off than others. To say that illegitimate children were disadvantaged is an understatement. A common type of filiation in today's eyes was notably absent from the Code.

Adoptive filiation was not part of the *Civil Code of Lower Canada*. While adoption existed before the enactment of statutes,[682] the first adoption law in Quebec came into force in 1924.[683] The equality of treatment between adopted and legitimate children only happened in 1969,[684] and yet some differences remained in succession law. Still today, the documentation of the Barreau du Québec, directed at Bar students, specifies that adoptive children can claim support, expressing albeit unintentionally the shadow of the stigma surrounding adoption in Quebec's history.[685] Adoptive filiation was not a possible filiation under the CCLC as shown by its notorious absence of the seventh title on filiation. The Civil Code of Lower Canada promoted an understanding of filiation where one model was to be followed – the filiation of children conceived during marriage – and other models were to proscribe. There was only one filiation, between a married couple and a child.

The *Civil Code of Lower Canada* had a narrow vision of what filiation consisted of. Further, the legal community was moralistic about the various types of filiations, and actually recognized only one. The scholarship and case law inferred that 'child' or 'parent' in the text of the Code necessarily meant legitimate child and legitimate parent.[686] Other types of filiation were outlaws and other relationships were not recognized. This is one of many reasons why it is possible to speak of a proliferation of filiations, even if many possibilities technically existed before the reform. Only one possibility was 'desirable'. As Renée Joyal-Poupart wrote, "la

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[682] See, for example, Madeleine Ferron & Robert Cliche, *Les beaucerons, ces insoumis suivi de Quand le peuple fait la loi* (Montreal: Hurtubise, 1974)

[683] See Edith Deleury-Bonnet, "Chronique de législation: La loi de l'adoption" (1969) 10:4 C de D 759 and *Loi concernant l'adoption*, SQ 1923-1924, chap 75.

[684] *Ibid,* at 762.

[685] Collection de droit 2014-2015, *Volume 3 - Personnes, famille et successions* (Cowansville: Yvon Blais, 2014) at 219: "L'enfant, même adopté (art 522, 585 et 655 C.c.Q.), a le droit de réclamer des aliments de ses parents[…]"

[686] Baudouin, "Enfant naturel", *supra* note 511 at 169-170.

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légitimité bénéficie de toute les faveurs de la loi".[687] Filiations other than legitimate filiation were highly objectionable and Louis Baudouin went as far as stating natural children and natural parents were rejected from society: "[l]es parents naturels et les enfants naturels sont pour ainsi dire rejetés légalement de la société".[688] In addition to being undesirable, natural and adoptive filiations were also absent from the law in many ways. Joyal in the seventies wrote with disapproval : "[p]arler de "famille naturelle", c'est déjà contredire l'esprit du Code civil. Soucieux de sauvegarder la famille légitime, traditionnellement considérée comme indispensable au maintien de la stabilité et de la paix sociales, le législateur a refusé de tenir compte d'un aspect de la réalité".[689] Jean-Louis Baudouin confirmed that only the legitimate family was part of the legal realm: "[l]e droit civil ne reconnaît à tort ou à raison que la famille légitime en tant qu'entité juridique, parce qu'elle seule offre une certaine garantie de stabilité sociale".[690] Azard and Bisson, in their *Droit civil québécois. Notions fondamentales. Famille. Incapacités* did not even mention natural filiation in the section of their book on family, but in another section of the book on 'hostile situations to the family". [691] This structure sends a clear message of exclusion. Natural children were strangers to their family, and also to their parents.[692] As such, it is fair to say that under the CCLC, there was only one possibility of filiation.

In addition to having only one desirable model of filiation, filiation under the CCLC was indivisible and unitary; it was indivisible from marriage and it attached the married family – under the power of the husband – to a child. One can picture the parent-child bond as such:

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[687] Joyal-Poupart, *supra* note 21 at 63.

[688] Louis Baudouin, Civil Code Revision Office, *Mémoire présenté à la Commission de Réforme du Code civil sur les réformes à entreprendre en ce qui concerne la filiation naturelle simple la filiation adultérine et incestueuse,* (Montreal, December 10 1966).

[689] Joyal-Poupart, *supra* note 21 at 81.

[690] Baudouin, "Enfant naturel", *supra* note 510.

[691] Azard & Bisson, *supra* note 21.

[692] *Ibid* at 269.

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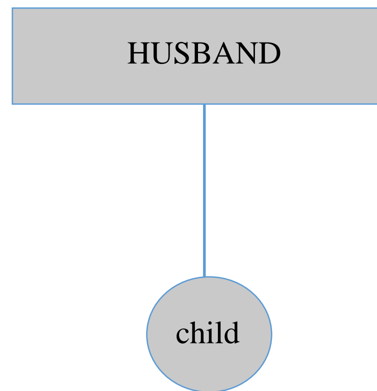
*Figure. 1*




The figure images how the bond was unitary, between a family, composed of husband and wife, and a child. It could explain why, to some authors, there was no such thing as maternal or paternal legitimate filiation either. Paternity, maternity and filiation represented the "trois angles d'une même chose" ,[693] the same thing, but from three different viewpoints. To be legitimate, the filiation needed to have a unit – the marriage – at one of its ends. Numerous scholars highlighted the indivisibility. Indeed, as Pineau wrote "on conçoit mal qu'un enfant puisse être légitime par sa mère sans avoir un père légitime!"[694] The "indisputable basis"[695] of legitimacy was the marriage and filiation was not concerned with the interest of children: the primordial interest was the family and the family was under the authority of the husband (moral, material, economic, and more). The children were under paternal authority, the ancestor of parental authority. In terms of parent-child relationships, the husband was vested with legal parentage pretty much no matter how the child was actually conceived[696] and even when he did not want to.[697] This was an efficient way to channel as much people as possible through the only possible institution of family law: the marriage. Filiation in the Code was one-dimensional, even if other models existed in law and in life.

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[693] Trudel, *Traité, supra* note 21 at 60.

[694] Jean Pineau, *Mariage. Séparation. Divorce. L'état du droit au Québec* (Montréal: Les presses de l'Université de Montréal, 1976) at 184.

[695] To use Jean Pineau's words.

[696] Some exceptions were of course possible, an under certain strict circumstances the husband could disown (*désavouer*) the child: see arts 219, 220, 221, 222 CCLC The delays to disown a child were extremely short and were generally of two months (223 CCLC).

[697] *Massie c Carrière*, [1972] CS 735.

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Many scenarios were left out of the Code, an obvious one being adoption. Adoption transformed the conception of parent-child relationships in Quebec; the adoptive bond of filiation is a legal construct (like the other kind of filiation, only more obvious). It also introduces a new relationship in the Code. As it is the case for legal personality for example, filiation is "a normative endeavour based on social, moral, and ontological reasons, and not determined simply by biological fact".[698] For many reasons – including the fact that science was not developed enough to confirm any kind of ties between two people – the biological aspect of reproduction was not central under the CCLC. The importance of legitimacy and the prejudicial effects of nature alone on filiation demonstrate it. Biological reproduction outside of marriage did not create positive legal effects; natural children enjoyed a lesser status. Today's filiation by blood is also a legal fiction, but its close proximity with natural facts makes its fictive nature unacknowledged by many, especially when it comes to maternal filiation. [699] How did the filiation regime in Quebec shift from legitimate/illegitimate to by blood/adoption? How could the "natural" be transformed from the outlaw to the dominant paradigm? How come religious morality suddenly became irrelevant? Most importantly, in what way have the possibilities for parent-child relationships multiplied from a Code to the other? This, amongst other things, will be the focus of the next subpart.

### 3.2.2 1980 – Of Filiation by Blood and Filiation by Adoption

As explained in the previous chapters, a major reform of Quebec family law happened in the eighties. The book on the family in the *Civil Code of Québec* – the successor of the *Civil Code of Lower Canada* – has been the first book of the new Civil Code to be enacted. Indeed, while the *Civil Code of Québec* itself came into force on January 1st 1994, the second book 'The Family', came into force more than a decade earlier, on April 2nd 1981.[700] Bill 89 entitled *An act to establish a new Civil Code and reform family law*,[701] introduced this revolutionary book. It is

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[698] Brierley & Macdonald, *Quebec Civil Law, supra* note 63 at 170.

[699] Anne-Marie Savard, "Les tensions entre la nature et le droit ; vers un droit de la filiation génétiquement déterminé ?" (2013) 43:1 RGD 5; COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 124.

[700] See Quebec Research Centre of Private and Comparative Law, *The Civil Codes. A Critical Edition*, Paul-André Crépeau with the collaboration of Marie-Andrée Dorais, eds (Montreal: Yvon Blais, 1993) at XIII (preface).

[701] *An act to establish a new Civil Code and reform family law,* SQ 1980, c. 39.

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still today the second book – out of only ten – of the Code. The Book on Family represented a departure from the *Civil Code of Lower Canada* and a bold move given the family in itself is not a legal entity in civil law, it is not defined,[702] and its substance is ever changing. It was "un véritable code de la famille au sein du Code civil".[703] Having a book on the family in the *Civil Code of Québec* is quite recent. According to Brierley and MacDonald, "the new Code was inaugurated with book two, "The Family" (arts 400-659 C.C.Q.)[704], a sector in which immediate modernization of the law was thought most pressing and in which the technical adjustments to the balance of the existing Civil Code of Lower Canada were not extensive".[705] In the eighties, family law was no longer attuned to changing patterns of family life and it became a pressing issue – from a legal and political standpoint – to reform it.

The reform of family law, happened at a time of legal, political and social crisis. Through the 1970s, the penalization of children for the behaviour of their genitors or parents came to be seen as unjustifiable in Quebec civil law.[706] One of the principal preoccupations of the reformers was to make sure the distinction between legitimate and illegitimate children vanished. "[U]ntil April 2nd 1981, the legal status of a child depended on the matrimonial status of his or her parents",[707] situation described as unfair by many[708] and as a result of a strict religious understanding of the marriage. During the seventies, "[a]mendments were made to grant certain rights to natural children. This was a first step towards the recognition of the equality of children,

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[702] Allard, *Dictionary: Family supra* note 203 introduction.

[703] National Assembly, Journal des débats sixième session 31e legislature, jeudi 4 décembre 1980 vol 23 no 15 at p. 609

[704] The 1980 version of the Book on Family included articles on divorce. Today, it has the particularity of not addressing divorce, which is more a politico-historic accident that a statement on the structure of the law. However, it is, to my knowledge, one of the only civil codes with this specificity.

[705] Brierley & Macdonald, *Quebec Civil Law, supra* note 63 at para 80.

[706] Baudouin, "Enfant naturel", *supra* note 511.

[707] Pineau & Pratte, *supra* note 21 at 587.

[708] Baudouin, "Enfant naturel" *supra* note 510; Joan Clark, "La situation juridique des enfants naturels. Première partie." 3:5 Rev Jurid Thémis 14; Clark, *supra* note 510. See also Civil Code Revision Office, *Report on the Québec Civil Code. Volume I – Draft Civil Code*, Éditeur officiel du Québec, 1977, at XXIX [CCRO, *Draft Civil Code*]; See also Civil Code Revision Office, *Report on the Québec Civil Code. Volume II – Commentaries Books 1 to 4*, Éditeur officiel du Québec, 1977 at 111 [CCRO, *Commentaries Books 1 to 4*].

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irrespective of the circumstances of their birth",[709] but it was not enough and the reform of the eighties made a strong statement, completely reversing the legal paradigm of parent-child relationships. The reform was organized other three guiding principles: "legal equality of consorts",[710] "abolition of all discrimination between illegitimate and legitimate children"[711] and "protection of the interest of children in all decisions concerning them".[712] Changes were necessary to achieve these goals and law was criticized.

The situation before the reform was intense enough to have the Legislature taxed by experts of *immobilisme*, of lacking social realism, of legal puritanism, or of lacking any legislative policy when it comes to the family.[713] Echoing today's discourse about the reform of family law, experts were hoping to gain jurisdiction on marriage and divorce. On the political front, patriation was in the air and separatism was a recurring issue at the National Assembly. Provincial elections were in the background; elections that would change Quebec's destiny no matter the result. The social context was transforming, with a significant increase of children born out of wedlock, divorce, unmarried cohabitation, and more. Tensions were palpable, the Church was losing its grip on the population and the economy was shifting, with the industrialisation and urbanisation going on. The reform of family law was part of a bigger transformation of Quebec's legal landscape.

Many changes in the CCLC occurred while the experts were thinking about what to do with family law in the new Code, before the reform of the eighties came into force. For example, adultery became a ground for divorce when invoked by wives,[714] married women gained legal

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[709] *An Act to amend the Civil Code respecting natural children*, Statutes of the Province of Québec, 1970, chapter 62.

[710] There is more than one interpretation of what 'consort' means. First and foremost, the CCRO was concern with equality between husband and wife. However, it is important to note that the CCRO included *de facto* spouses in their definition of 'consort'. While history shows that a different path was taken, the CCRO had a broad conception of consorts, including unmarried cohabitants or *de facto* spouses. For example, see CCRO, *Draft Civil Code*, *supra* note 708 at 63 or 107.

[711] CCRO, *Commentaries Books 1 to 4, supra* note 708 at 111-112.

[712] *Ibid* at 112.

[713] Baudouin, "Enfant naturel" *supra* note 511; Daniel Dhavernas, *Les droit des concubins,* Office de révision du Code civil, 1969 and François Heleine, *Rapport concernant les droits et obligations qui naissent de la vie maritale hors mariage,* Office de révision du Code civil, 1971.

[714] *An Act to amend the Civil Code*, SQ 1954-55 (3-4 ElizII), c. 48.

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capacity,[715] civil marriage became possible in the province,[716] natural children were granted certain rights,[717] paternal authority became parental authority,[718] and more. These urgent amendments offer a glimpse at the changes in the family dynamics, both from within the family and from outside the family. The relationships of power between husband and wife were evolving; the place of women outside the family was transforming, as well and the importance of marriage and its effects. A real shift in Quebec's society was taking place. In a climate of change, the process to modernize family law was launched as part of a bigger project: reforming the complete Civil Code in order to promote renewed legal and social values.

The 1980 reform in family law is one of the results of a process that started in the 1955, as explained in the previous chapters. Paul-André Crépeau formed various expert committees to advise him on every section of the future Civil Code, one of them being the Committee on the Law of Persons and Family Law. The Committee on the Law of Persons and Family law objective was, according to its final report,

> d'accorder le droit de la famille aux valeurs nouvelles de la société québécoise. Il a voulu en particulier concrétiser, dans les textes juridiques, l'égalité des époux et assurer à tout enfant, quelles que soient les circonstances de sa naissance, des droits pléniers à l'égard de ses auteurs et de la famille de ces derniers.[719]

This final report was handed in to the President of the CCRO, Paul-André Crépeau, in 1974 by Claire L'Heureux-Dubé (president of the Committee), John E.C. Brierley, Ethel Groffier-Atala, Albert Mayrand, Roland Milette and Denyse Fortin. The Committee changed a lot between the time the report was handed in and its formation, in 1965. The report submitted was the result of a long and rigorous process, hundreds of research papers and more than 200 meetings in plenary committee. The Committee really tried to reach to the public and make it participated, with mixed results.[720] The report contained both conservative and innovative ideas for filiation.

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[715] *An Act respecting the legal capacity of married women*, SQ 1964 (12-13 ElizII), c. 66.

[716] *An Act respecting civil marriage*, SQ 1968 (17 ElizII), c. 82.

[717] *An Act to amend the Civil Code respecting natural children,* SQ 1970, c. 62.

[718] *An Act to amend the Civil Code,* SQ 1977, c. 72.

[719] Yellow Report, *supra* note 534 at i.

[720] Brierley & Macdonald, *supra* note at 90-91. Many opinions were nonetheless sent to the Committee and can be consulted at digital.library.mcgill.ca/ccro/index.php.

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Different actors suggested many changes once the report was made public. In the next paragraphs, the shift from one code to another is detailed.

The structure of the Code changed dramatically from one code (CCLC) to the other (CCQ). In the new Code, title three (Filiation) of the book two (The Family) had two chapters, "Filiation by blood" and "Adoption":

| Structure under the CCLC | Structure under the CCQ (1980) |
|---|---|
| Book First: Of Persons<br>Title Seventh: Of filiation<br>Chapter I: Of the filiation of children who are legitimate or conceived during marriage<br>Chapter II: Of the evidence of filiation of legitimate children<br>Chapter III: Of illegitimate (natural (1970)) children | Book Two: The Family<br>Title Three: Filiation<br>Chapter I: Filiation by blood<br>Section I: Proof of filiation<br>Section II: Actions relating to filiation<br>Section III: Effects of filiation<br>Chapter II: Adoption<br>Section I: Conditions for adoption<br>Section II: Order of placement and adoption judgment<br>Section III: Effects of adoption<br>Section IV: Confidentiality of adoption files |

The first chapter was divided in three sections: "Proof of filiation",[721] "Actions relating to adoption" and "Effects of filiation". The first section, "proof of filiation", was divided in three subsections: title and possession of status, presumption of paternity[722], and voluntary acknowledgement. These mechanisms roughly operated as they do today. The second section, the one about actions, was divided in two sections: disavowal and contestation of paternity and claim and contestation of status. Actions relating to filiation contained innovative provisions concerning artificial insemination. Indeed, articles 586 and 588 CCQ (1980) provided that disavowal or contestation of paternity or filiation on the sole basis of conception through artificial insemination was impossible. This addition to the Code is interesting in many ways. It foresees changes in how people build families. However, these new ways of forming families were within the heterosexual paradigm. They indicated the metaphorical meaning of blood to filiation by blood. It is obvious artificial insemination created no blood-ties with the father in a narrow scientific sense. These two articles are indicating blood is to be understood broadly, when

[721] In the French version, proof was in plural form.

[722] The Civil Code Revision Office suggested a different structure and started with the presumption of paternity. Pineau explains this was all done rather quickly and it is impossible to know why it was done this way. See Jean Pineau, "Les preuves de la filiation" (1981) 22 C de D 337 at 338–339 [Pineau, "Preuves"].

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the family is traditional: a man, a woman and their offspring. The third and last section of the first chapter contained only one article and read as follow:

| **594 (1980).** Tous les enfants dont la filiation est établie ont les mêmes droits et les mêmes obligations, quelles que soient les circonstances de leur naissance. | **594 (1980).** All children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth. |
|---|---|

It is unclear why this article landed there. To some extent it seems to insist on the equality of status between children, natural, legitimate and adoptive. The fact that this article came just before the chapter on adoption sent the message that adoptive children – newcomers in the Code – enjoyed the same rights and obligations. Filiation by blood represents a multiplication of relationships when compared to filiation under the CCLC. Indeed, filiation by blood encompasses the former natural and legitimate filiation. The new Code introduced another relationship.

The second chapter was about adoption. Before the reform, adoption provisions were found in the *Adoption Act*.[723] Adoptive filiation was of a lesser status; it was not in the Code. Note it was however included in the French Civil Code. The exclusion of adoption from the Code is Quebec specific and not 'civilian specific'. Adoption has it specific history and underlying principles. As Carmen Lavallée explained, it is both a filial institution and a child protection mechanism.[724] It has been used to legitimate children's status, was open only to person of similar faiths, etc. The rights of adoptive children differed, and, like natural children they were treated unequally. In the spirit of the reform, adoption was included in the Code to insure children were treated equally 'regardless if their circumstances of birth'. The chapter on adoption in the Code was divided in four sections: conditions for adoption, order of placement and adoption judgment, and effects of adoption and confidentiality of adoption files. The structure of the Code changed substantially. Various bills were proposed, and some modified adoption in the Code in the period ranging from 1980 to 1994, but they do not need to be

[723] The *Adoption Act* was basically a translation of the adoption act from Ontario. The framework for adoption appears closer to common law than civil law.

[724] Rapport du groupe de travail sur le régime québécois de l'adoption, Carmen Lavallée chair, *Pour une adoption québécoise à la mesure de chaque enfant*, March 30th, 2007 at 10.

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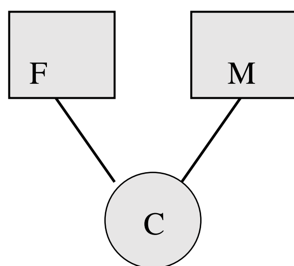
analyzed in details.[725] The introduction of adoptive filiation is another occurrence of the multiplication of possibilities for filiation in Quebec civil law.

These changes had numerous effects, on different levels. Departing from its old categories of natural (illegitimate) and legitimate children, as of 1980 the Code embraced a new model in which 'blood' and adoption represented the dichotomy of filiation. Filiation by blood claimed to be the mirror or so-called natural filiation, yet besides its title, there was no mention of blood or biology within the chapter. What blood means was really metaphorical.[726] The rules contained in the chapter and their structures were built around title, possession, presumption and intent. As of April 2nd 1981, the strongest proof of filiation became the title, known as the act of birth. This is an important departure from the CCLC where the strongest proof of filiation was the presumption of paternity of the husband. Indeed, paternal filiation was not rooted in a matrimonial status anymore, but rather in logic of intent and declaration of paternity. As for the maternal filiation, it could now exist outside marriage. Filiation became maternal or paternal. The very existence of two bonds of filiation – one maternal and one paternal – became possible. From a model like the one drawn on page 173, filial relationships have moved towards a model like this:

*Figure 2.*

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[725] *An Act to amend the Civil Code and other legislation respecting adoption* (SQ 1983, c. 50) ; *An Act respecting adoption and amending the Youth Protection Act, the Civil Code of Québec and the Code of Civil Procedure* (SQ 1987, c. 44) ; *An Act Respecting Adoption and Amending the Civil Code of Quebec, the Code of Civil Procedure and the Youth Protection Act* (SQ 1990, c. 29) ; *Loi modifiant le Code civil du Québec et d'autres dispositions législatives concernant l'adoption internationale*. 34e législature, 2e session, 1992 (never enacted).

[726] See Yellow Report, *supra* note 534 at 26-27. While the dominant model of filiation changed from legitimate to by blood, it is unclear where the "blood" in "filiation by blood" came from. In the new paradigmatic model of filiation, filiation by blood, filiation did not and do not contain any mechanism giving importance to the biological element in filiation. Parliamentary debates included references to blood: "[c]es deux aspects permanents de la famille ne sont pas remis en cause dans notre société, que ce soit ces liens de sang ou d'adoption, qu'on nomme la parenté, ou que ce soit cette institution qui est le marriage".( National Assembly, Journal des débats sixième session 31e legislature, jeudi 4 décembre 1980 vol 23 no 15 at p. 628) Interestingly, in the CCRO's archives, blood is sometimes added in hand writing, as if it just happened to land there.

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Maternal filiation remained an under problematized notion in civil law, as it was conceived as obvious and natural rather than a legal construct. As to the second proof, the possession of status, the wording of the article slightly changed, but did not transform the notion in practice. Under the CCLC, article 230 said:

| | |
|---|---|
| **230**. Cette possession s'établit par une réunion suffisante de faits qui indique le rapport de filiation et de parenté entre un individu et la *famille à laquelle il prétend appartenir.* | **230**. Such possession is established by a sufficient concurrence of facts, indicating the connection of filiation and the relationship between the individual and *the family to which he claims to belong.* |

It has been modified in 1980 to:

| | |
|---|---|
| **573 (1980)**. La possession constante d'état s'établit par une réunion suffisante de faits qui indiquent les rapports de *filiation entre l'enfant et les personnes dont on le dit issu.* | **573 (1980).** Uninterrupted possession of status is established by an adequate combination of facts which indicate the relationship of filiation between the child and *the persons from whom he is said to have issued.* |

Possession of status became concerned with the immediate family and the end of the article went from "the family to which he claims to belong" to "the persons from whom he is said to have issued". Anne-Marie Savard has argued, many years later that this is indicium of the biologization of filiation.[727] On another reading it could also be interpreted merely as a reaction to the past where natural was undesirable… stating clearly it was not a consideration anymore. What is striking is rather the move toward a narrower understanding of family and an individualistic understanding of filiation. While before 1980 the text of the article referred to both filiation and relationship – in French *parenté* – and to the family to which one claims to belong, the post-1980 version sounds more nuclear and individualistic. There is also a difference in perception of belonging to a unit. While the pre-1980 text was rooted in the individual claiming a status – 'an individual' and 'he claims' – the post-1980 is about how someone is perceived by others – passive phrasing and 'he is said'. Technically the constitutive elements of the possession of status nonetheless were the same: *nomen*, *tractatus* and *fama.* In terms of juridical effects or consequences, the wider meaning of the pre-1980 article might be explainable by the fact that, while the natural child could enjoy some legal connection with his or her mother

[727] Anne-Marie Savard, "Les tensions entre la nature et le droit ; vers un droit de la filiation génétiquement déterminé ?" (2013) 43:1 RGD 5 at 21–25.

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and father, he or she was not part of the broader family. Duties and obligations in the legitimate family also spanned beyond the parents with for example, the alimentary support being possible for grandparents, mother and father in law, and more.[728] Possession of status, while transforming on various accounts, remained in the Code and gained weight as a proof of filiation. It also continued to be an element of the *verrou* – lock – of filiation: the principle according to which, if the title and the possession to the child match, the filiation is impossible to contest or claim.

The last modifications concern the presumption of paternity and its delays. Under the CCLC, the presumption of paternity – strongest proof of filiation – applied to children *conceived* during marriage. In the book on the family, being legitimate is no longer relevant, but the presumption of paternity remained. The child only needed to be born during the marriage, not conceived, and the delays expanded from 180 days to 300 days. In terms of delays, the delay for the disavowal of a child also expanded from 20 days to a year. All these modifications foster an understanding that intent rather than blood matters to filiation; the presumption of paternity depends on a status and is unrelated to biology, further the 300 days delay does not reflect biological reproduction. The presumption of paternity became – while still available only to *de jure* couples – a proof of filiation like the others.[729] While the CCRO proposed that the presumption of paternity remained the first proof of filiation and that it opened the chapter on filiation,[730] the National Assembly decided to make it a proof like the others, after the act of birth and the possession of status. This was more in line with one of the primary principles underlying the reform: all children are equal no matter how they were conceived. Voluntary acknowledgement had been moved as another proof to filiation by blood – strangely given its former use mainly for natural children and limited scope – and more.

While much more could be said on technical modifications, what is important here is to underline the major shifts in the paradigm of filiation. From a nature that was illegitimate and from blood than meant nothing in terms of family law, blood – notwithstanding its actual meaning – became the new foundational element on which the legal family is built. As Jean-

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[728] See Jean Pineau, *Traité élémentaire de droit civil. La famille* (Montreal: Presse de l'Université de Montréal, 1972) at 158-59 and articles 166 and *ff* CCLC.

[729] This has been questioned by the scholarship of the time: see Marie Pratte, "Les nouvelles règles relatives à la filiation" (1982) 13 RGD 159.

[730] Yellow Report, *supra* note 534 at 303 and *ff* and CCRO, *Commentaries Books 1 to 4, supra* note 708 at 185.

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Louis Baudouin wrote in the sixties, blood was not a legal mechanism to insert a child in the family: "[c]ar en dépit du lien de sang qui relie le bâtard à ses père et mère, la relation juridique de père ou de mère à enfant ne s'insère pas dans le cadre de la famille".[731] Family used to be legally constructed by and around marriage and nature was of lesser status. With the reform, marriage has been almost completely evacuated from the rules of filiation. While nature was on April 1st 1981 blamable, on April 2nd 1981 blood – and for a lot of scholars *naturalness* or *nature* – became the new paradigm, alongside with adoption, described by an author of the time as the "*sang [créé]* par le bénéfice de la loi",[732] as blood created by law.

As such, with the eighties reform, a 180 degree turn is made and the outcast – the natural child – became the normative model. However, filiation by blood was not about nature, but rather about broad understanding of blood, as portrayed by the irrelevance of biological proofs. The shift is major, yet it is difficult to find primary documentation detailing – besides the idea of a clean break with an old model where natural was bad – the reason to choose this new dichotomy in filiation. An author sums up in one sentence what might be a clue: "Pour ce qui est de la loi, nous 'bénéficions' uniquement du discours politique que nous trouvons dans le *Journal des Débats*, tenu dans le cadre de la Commission permanente de Justice, le lundi 15 décembre 1980: il était environ 21h15 lorsque le sujet fut abordé et 23h lorsqu'il fut épuisé : sans doute est-ce la raison pour laquelle le débat nous éclaire si peu".[733] The new principles of the Code were also revolutionary on other levels.

The change in paradigm is a starting point for the multiplication of possible – or desirable – relationships between parents and children when it comes to ties of filiation and to types of filiation. In terms of ties, and this is rather conceptual, one can picture filiation before the 1980 as a tie between a unit under the control of the husband and a child. The mother had little to no power on the child, and if the unit was not a married couple, then the bond was outside of law. As mentioned earlier, and paraphrasing Gérard Trudel, paternity, maternity and filiation were three angles to the same thing. With the eighties reform, the idea of a preferred unit started to erode and the power imbalances between the parents lessened, for example with the

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[731] Baudouin, "Enfant naturel", *supra* note 511 at 167.

[732] Hervé Roch, *L'adoption dans la province de Québec*, (Montreal: Wilson Lafleur, 1951) at 21 citing Laurent.

[733] Pineau, "Preuves", *supra* note 722 at 338.

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transformation of paternal authority into parental authority. As such, the 1980 reform allowed for a first kind of multiplication of parent-child ties. In the new Code, paternal filiation was a bond and maternal filiation was another bond. Both could exist independently – theoretically at least – in law. Before the eighties, filiation was either legitimate or illegitimate and obviously, one could not have a legitimate and illegitimate filiation! In terms of types, while before 1980 only one relationship was desirable – legitimate filiation – after 1980, more possibilities were envisioned. Filiation by blood, encompassing both the former natural and legitimate filiations is an example of multiplication of types of filiations. In addition, adoptive filiation entered in the Code, thus adding another type of filiation in the *Civil Code of Québec*. Even within the category of 'blood-natural-biological' filiation the number of possible relationships between adults and children started slowly and discretely to enlarge. Artificial insemination – while most definitely not a type of filiation then – nonetheless appears in the text of the Code. Ideas of indivisibility and unity of filiation started to fade away. Filiation became an institution of its own, alongside marriage, not a consequence of marriage. As Eekelaar rightly highlights albeit in a different legal tradition, "[t]he removal of birth within marriage as the controlling device for family succession has emptied marriage of its most significant legal function, the consequences of which have not yet been fully understood".[734] The strong commitment to separate the status of the child from the way he or she has been conceived is commendable. It dissociated the two principal relationships of family law. Yet, the reform of the eighties did not completely achieve one of its primary goals: to separate the way the child was conceived and his or her status in law. With the coming into force of the Code as a whole in 1994, family law kept transforming, and rather then pursuing this goal, it maladroitly reiterated, under a new paradigm of naturalism, the importance of the way the child was conceived.

### 3.2.3 1994 – Of Filiation by Blood and Assisted Procreation

The *Civil Code of Québec* as a whole and in its more or less current form came into force on January 1st, 1994. While most of the work in terms of family law reform had been done in the eighties – both in family law and matrimonial property law (remember the family patrimony) –

[734] Eekelaar, *Personal Life, supra* note 84 at 62.

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the Legislature nonetheless seized the opportunity – with Bill 125[735] – to complete the work already started.[736] The Legislator added rules about new reproductive realities, changed the order of a symbolic article and 'fixed' the English version on the article on the possession of status.

The structure of the Code thus changed again in 1994 as shown by the bold italics in this table:

| Structure under the CCLC (pre 1980) | Structure under the CCQ (1980) | Structure under the CCQ (1994) |
|---|---|---|
| Book First: Of Persons<br>Title Seventh: Of filiation<br>Chapter I: Of the filiation of children who are legitimate or conceived during marriage<br>Chapter II: Of the evidence of filiation of legitimate children<br>Chapter III: Of illegitimate (natural (1970)) children | Book Two: The Family<br>Title Three: Filiation<br>Chapter I: Filiation by blood<br>Section I: Proof of filiation<br>Section II: Actions relating to filiation<br>Section III: Effects of filiation<br>Chapter II: Adoption<br>Section I: Conditions for adoption<br>Section II: Order of placement and adoption judgment<br>Section III: Effects of adoption<br>Section IV: Confidentiality of adoption files | Book Two: The Family<br>Title ***Two***: Filiation<br>***General Provision***<br>Chapter I: Filiation by blood<br>Section I: Proof of filiation<br>Section II: Actions relating to filiation<br>Section III: ***Medically assisted procreation***<br>Chapter II: Adoption<br>Section I: Conditions for adoption<br>Section II: Order of placement and adoption judgment<br>Section III: Effects of adoption<br>Section IV: Confidentiality of adoption files |

One of the most fundamental changes that occurred in 1994 is the enactment of provisions about medically assisted procreation in the Code. More than the technical rules about filiation and the clear addition of another modality – rather then possibility since it was, as it will be explained below, type of filiation by blood – for filiation, the modifications expose a certain understanding of parent-child relationships and as a further step in the multiplication of possibilities for parent-child relationships. Articles 538 to 542 CCQ were introduced in the Code as the third section of the first chapter, the chapter on filiation by blood. These articles contained a mechanism, namely the parental project involving assisted procreation, allowing for the creation of a filial bond

[735] Bill 125 led to the sanction, on December 18, 1991, of the *Civil Code of Quebec* (SQ 1991, c. 64).

[736] As Alain Roy writes "le législateur entendait parachever la grande réforme du droit civil qu'il avait amorcée en 1980 en matière familiale": Alain Roy, "L'évolution de la politique législative de l'union de fait au Québec" in Hélène Belleau & Agnès Martial, eds, *Aimer et compter? Droits et pratiques des solidarités conjugales dans les nouvelles trajectoires familiales* (Québec: Presses de l'Université du Québec, 2011) at 101.

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between an intended male parent and his artificially conceived child. The resulting filiation was characterized as 'filiation by blood'. Assisted procreation needed to be made medically and was open only to heterosexual couples, both *de jure* and *de facto.*

While assisted procreation ended up being a section of filiation by blood, it is not what was initially proposed. The first draft of Bill 125 suggested adding medically assisted procreation at the end of the title on filiation as a third chapter, following filiation by blood and adoption.[737] Law is contextual and political and it just happened in the process, despite the strong message sent by the structure of the Code in a civilian mind. Medically assisted procreation became the last section of filiation by blood. The Minister of Justice clearly explained in front of the National Assembly the underlying principle guiding this departure from what has been suggested in Bill 125: "cela vise à faire clairement ressortir l'application des règles édictées au Chapitre de la filiation par le sang aux enfants dont la procréation a été médicalement assistée".[738] As such, by including the children born of medically assisted procreation within the chapter on filiation by blood, the idea was to foster an understanding that the children born of such arrangements were part of the dominant paradigm of reproduction, not that they were the result of biological reproduction. More specifically they belonged to the governing ideal, the one of heterosexual reproduction, and thus, all legal fictions applied. Their filiation was by blood even without 'masculine' blood ties and the motivations behind this move was obvious: make sure that, within, a heterosexual context, the children born of medically assisted procreation were part of the dominant paradigm of filiation. It was important not to create a *jus singulare*[739] of children born of assisted procreation… at the time.

Another modification to foster this understanding was made. Former section three of the first chapter, entitled "Effects of Filiation" and containing only article 594 CCQ (1980) was

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[737] Gouvernement du Québec, *Projet de loi 125 Code civil du Québec. Commentaires détaillés sur les dispositions du projet. Livre II : De la famille. Première ébauche,* Quebec, Ministère de la justice, 1991. [Gouvernement, *Projet de loi 125*]

[738] Index du Journal des débats - Projets de loi 125, 34e législature, 1re session (28 novembre 1989 - 18 mars 1992), Sous-commission des institutions. Fascicule n°7, 5 septembre 1991, pages 243-281.

[739] The expression is from French *Avant projet de loi sur les sciences de la vie et les droits de l'homme* and the article 342.9 of the Code civil (français), which inspired, as shown in the *Commentaires du Ministre* under article 538 CCQ, the articles concerning assisted procreation in the *Civil Code of Québec*.

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renamed and moved. The previous only effect of filiation became the 'new' general provision of the title on filiation, at article 522 CCQ and reads:

| **522 (1994).** Tous les enfants dont la filiation est établie ont les mêmes droits et les mêmes obligations, quelles que soient les circonstances de leur naissance. | **522 (1994)**. All children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth. |
|---|---|

As a result, this article is now the very first article of the second title (Filiation). It sits before all the types of filiation. The reason for moving the article is explicitly mentioned in the parliamentary debates: "cette modification permet, entre autres, de nous assurer que l'enfant issue de la procréation médicalement assistée disposera des mêmes droits et obligations que les autres enfants".[740] This affirmation is important, yet striking. In the 1980s, the article was aimed at clearly leaving behind the old categories of children – legitimate and natural – and confirmed the status of adoptive children. Scholars were convinced that biological filiation was the new norm under the Code.[741] Yet, a reason to move the article was to give blood a broader meaning, a meaning detached from the biological aspect of filiation at a time when the possibilities for parent-child relationships multiplied again. This became necessary with the enactment of a section on medically assisted procreation. This is a strong indicator of how *blood* has been misunderstood and means more than a mere biological substance. The Legislator, foreseeing challenges and tensions used the symbolical article about sameness of treatment not to reinstate that adoptive and *natural* children were equal, but rather to put emphasis on the equality of *natural* and *almost natural* children, under the heteronormative paradigm.

Yet, while this move was made to state blood is a metaphor, a move towards a biologization of filiation was made at the same time. Indeed, a close reading reveals a change in the text of the article. While every modification in the Code is generally tracked and mentioned, the story of this modification is unknown. Possession of status had been modified in 1980 and read like this:

| **573 (1980).** La possession constante d'état s'établit par une réunion suffisante de faits qui indiquent les rapports de filiation entre l'enfant et les personnes dont | **573 (1980).** Uninterrupted possession of status is established by an adequate combination of facts which indicate the relationship of filiation between |
|---|---|

[740] Index du Journal des débats - Projets de loi 125, 34e législature, 1re session (28 novembre 1989 - 18 mars 1992), Sous-commission des institutions. Fascicule n°7, 5 septembre 1991, at 245-6.

[741] Gérard Trudel & Renée Desrosiers de Lanauze, *Code civil du Québec comparé et coordonné au Code civil du Bas-Canada. Livre II. De la famille* (Montreal: SOQUIJ, 1981) at 140-141.

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| on le dit issu. | the child and *the persons from whom he is said to have issued*. |
|---|---|

In 1994, the English version of the possession of status was also modified to

| **524 (1994)**. La possession constante d'état s'établit par une réunion suffisante de faits qui indiquent les rapports de filiation entre l'enfant et les personnes dont on le dit issu. | **524 (1994)**. 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*. |
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The idea to be born from someone makes possession of status a bit more biological than it used to be, even in a chapter on filiation by blood that does not rely on biology.

The enactment of the new Code has never been seen as a reform *per se* in family law, since the principal modifications were done with the coming into force of the book on family in the 1980s. Yet while observers saw in the reform of the eighties a move towards accepting nature, modifications made in the nineties appear to be more concerned about intention and relationships. As Pineau writes, "[a]lors que les règles générales privilégiaient jusqu'à un certain point la vérité biologique, celles liées à la procréation assistée voilaient cette vérité au profit de la volonté et des liens affectifs".[742] While not a reform in itself, a real change of perspective occurred in the Code in only a decade. It altered the comprehension of the rules as social constructs rather than biological mirror, especially for male parents. This may be the result of years of the complicated relation to 'nature' under the CCLC.

### 3.2.4 2002 – Of Filiation of Children Born of Assisted Procreation and DNA

Another reform of the law of filiation occurred in 2002 in Quebec, two decades after the major reform of the eighties. While innovative and presumably thought-through, the reform of filiation somehow got in through the back door. Indeed, the modifications to the *Civil Code* happened through the *Act instituting civil unions and establishing new rules of filiation*.[743] The reform to filiation concurrently occurred with the coming into force of a new and *avant garde* institution allowing same-sex partners to legitimize their unions and to benefit from the same

[742] Pineau & Pratte, *La famille, supra* note 12 at 593.

[743] SQ 2002, c 6.

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advantages – if not more, considering the modes of dissolution[744] – than married partners. Bill 84 thus made quite an impression and was a political statement. But when you add a new conjugal union to civil law, you generally have to make sure to address the situation of their offspring. It transformed the two traditional types of relationships in family law: conjugal and filial relationships. The idea in this section is not to repeat what has been explained in part 3.1.2, since the reform corresponds for the most part to the filiation regime in its current form, but rather to put emphasis on the transition, its underlying principles and aims, and how it included new relationships to the Code.

The image of filial relationships was been transformed in 2002. Many observers were critical of the changes. Criticisms included that the political climate and the original motivations to fundamentally change of the regime and the traditional edifice of filiation were not optimal;[745] that it happened too fast and with too little consultation; that the debates in the national assembly lacked seriousness;[746] and while filiation should be about children's rights, the reform mutated filiation into an adult privilege.[747] On a more positive note, some authors qualified the reform of a "désexualisation de la filiation et du couple parental"[748] and as an opening of possibilities for traditional and non-traditional parenting. While it has been presented as a major reform, it will be shown that the law itself has not been transformed so much. Rather, it is the understanding of filiation and its possible configurations changed.

Once again in 2002, the structure of the Code was altered:

| **Structure under the CCLC (pre 1980)** | **Structure under the CCQ (1980)** | **Structure under the CCQ (1994)** | **Structure under the CCQ (2002)** |
|---|---|---|---|
| Book First: Of Persons | Book Two: The Family | Book Two: The Family | Book Two: The Family |

[744] Art 521.12 CCQ.

[745] According to some, the main purpose of the bill in which filiation was restructured was to allow same-sex partners to enter in a partnership similar to marriage, called a civil union. See Marie-Christine Kirouack, "Le projet parental et les nouvelles règles relatives à la filiation : une avancée ou un recul quant à la stabilité de la filiation?" in *Barreau du Québec, Développements récents en droit de la famille 2005* (Cowansville: Yvon Blais, 2005) at p. 375 and Marie-Blanche Tahon, *Vers l'indifférence des sexes? Union civile et filiation au Québec* (Montréal: Éditions du Boréal, 2004).

[746] Tahon, *ibid* at 77-88.

[747] See generally Marie-Christine Kirouack, *supra* note 745 and specifically at page 428 where she goes as far as saying that the child becomes a commercial good.

[748] *Ibid.*

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| Title Seventh: Of filiation | Title Three: Filiation | Title Two: Filiation | Title Two: Filiation |
| --- | --- | --- | --- |
| Chapter I: Of the filiation of children who are legitimate or conceived during marriage<br>Chapter II: Of the evidence of filiation of legitimate children<br>Chapter III: Of illegitimate (natural (1970)) children | Chapter I: Filiation by blood<br>Section I: Proof of filiation<br>Section II: Actions relating to filiation<br>Section III: Effects of filiation<br>Chapter II: Adoption<br>(…) | General Provision<br>Chapter I: Filiation by blood<br>Section I: Proof of filiation<br>Section II: Actions relating to filiation<br>Section III: Medically assisted procreation<br>Chapter II: Adoption<br>(…) | General Provision<br>Chapter I: Filiation by blood<br>Section I: Proof of filiation<br>Section II: Actions relating to filiation<br>~~Section III: Medically assisted procreation~~<br>***Chapter I.1: Filiation of children born of assisted procreation***<br>Chapter II: Adoption<br>(…) |

The 2002 reform introduced a whole new chapter to the title on filiation: the filiation of children born of assisted procreation. In fact, the section on medically assisted procreation and most of its content existed before 2002, but not as a chapter of its own. The transformation of filiation was rather a necessary effect of the new options available for conjugality than a revolution in itself. It appeared necessary, since a new conjugal form was possible to make sure the offspring of this union also belonged within the legal system. A close look at the transformation exposes what the 2002 reform was all about. It was not about assisted procreation – remember it had been in the Code in different forms since the eighties – or a new kind of filiation; it was about what to do with filiation once same-sex partnerships were possible in law. It nonetheless introduced a new relationship to the Code, non-heterosexual filiation from conception.[749]

The chapter “Filiation of children born of assisted procreation” contained innovative provisions and put forward interesting mechanisms for the establishment of filiation outside of the dominant heterosexual paradigm. It introduced provisions allowing lesbian couples and single women to create family ties ‘by blood’ or from birth even without appearances of biological reproduction.[750] In other words, it made possible for socially or biologically infertile

[749] Same-sex adoption or single adoption was already possible. So was single motherhood by choice and not by choice.

[750] On Quebec’s reforms to filiation see Robert Leckey, “‘Where the Parents are of the Same Sex’: Quebec’s Reforms to Filiation” (2009) 23 International Journal of Law, Policy and the Family 62.

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couples to create families without using adoption mechanisms. Specifically, article 538 of the CCQ was adapted and the “parental project involving assisted procreation” could now include lesbian couples and single women. The parental project used to be open to heterosexual couples only. The reform also was an occasion to reiterate and confirm that same sex adoption was possible in Quebec.[751] The primary objective of the reform was thus to expand the notion of parental project involving assisted procreation. The text of article 538 CCQ changed as follow:

| | |
|---|---|
| **538 (1994).** La contribution au projet parental d’autrui par apport de forces génétiques à la procréation médicalement assistée ne permet de fonder aucun lien de filiation entre l’auteur de la contribution et l’enfant issu de cette procréation. | **538 (1994).** Participation in the parental project of another person by way of a contribution of genetic material to medically assisted procreation does not allow the creation of any bond of filiation between the contributor and the child born of that procreation. |
| **538 (2002).** Le projet parental avec assistance à la procréation existe dès lors *qu’une personne seule ou des conjoints ont décidé,* afin d’avoir un enfant, de recourir aux forces génétiques d’une personne qui n’est pas partie au projet parental. | **538 (2002).** 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 a party to the parental project. |

The first modification to the parental project involving assisted procreation is the elimination of the medical requirement. Indeed, while the wording of article 538 (1994) CCQ made clear assisted procreation could only take place with medical assistance, 538 (2002) CCQ has no such exigency. The second fundamental change is 538 (2002) CCQ targets a person alone and spouses, spouses that can be either *de jure* or *de facto* spouses,[752] either heterosexual or non-heterosexual. The multiplication of filial bonds is apparent: filiation can be ‘unilinear’ and filiation includes now same-sex parents.

In addition to the enlarged scope of the parental project, the reform added four articles (arts. 538.1, 538.2, 538.3 and 539.1 CCQ) and modified three other articles (arts. 539, 540 and 541 CCQ). Article 538.3 CCQ added presumptions of parentality for formal spouses, making Quebec the first province to have the equivalent of a presumption of parentage for second

[751] See Alain Roy, *Droit de l'adoption : adoption interne et international*, 2nd ed (Montreal: Wilson & Lafleur, 2010) at para 25. He explains in a footnote: “Avant 2002, la situation était pour le moins ambiguë. Bien que le Code civil ne prohibait pas expressément l’adoption par deux conjoints de même sexe (et que la Cour d’appel ait reconnu à deux reprises cette possibilité en obiter : *Droit de la famille — 1704*, [1993] RJQ 1 (CA) et *Droit de la famille — 3444*, [2000] RJQ 2533 (CA)), la plupart des observateurs s’appuyaient sur l’économie générale du Code civil pour défendre une conception hétéroparentale de la filiation”.

[752] S 61.1, *Interpretation Act*, CQLR, c I-16.

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mothers.[753] Article 539.1 CCQ clarified the obligations of the second mother at law, but is rather of symbolical value given the similar rights, duties and obligations bearing on fathers and mothers in Quebec civil law. Article 539 and 540 were slightly modified, the former to provide that "[t]he rules governing actions relating to filiation by blood apply with the necessary modifications to any contestation of a filiation established pursuant to this chapter".[754] This article became necessary since assisted procreation has been removed from the chapter on filiation by blood and enacted as a freestanding chapter of the title on filiation. The chapter is however deprived of actions. As for 540, while the responsibility of the person who, after consenting to the parental project, was anchored on not acknowledging the child, the text of the 2002 Code move the liability on the person "failing to *declare* his or her bond of filiation with the child".[755] Acknowledgement and declaration are two different mechanisms and it makes more sense to rely on declaration, given the consensus in scholarship that voluntary acknowledgement is not a proof of filiation by assisted procreation.[756] It is not in the Code either. The other modifications (articles 538.1, 538.2(2) and 541 CCQ) were more fundamental.

Article 538.1 CCQ became necessary for reasons similar to article 539.1 CCQ. Indeed, once filiation of children born of assisted procreation exited the chapter on filiation by blood, some modifications were in order. Yet, even if it is out of filiation by blood, the modifications are mostly aimed at importing the rules and principles of … filiation by blood! Indeed, article 538.1 CCQ states that:

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| **538.1.** La filiation de l'enfant né d'une procréation assistée s'établit, comme une filiation par le sang, par l'acte de naissance. À défaut de ce titre, la possession constante d'état suffit; celle-ci s'établit par une réunion suffisante de faits qui indiquent le rapport de filiation entre l'enfant, la femme qui lui a donné naissance et, le cas échéant, la personne qui a formé, avec cette femme, le projet parental commun.<br><br>Cette filiation fait naître les mêmes droits et | **538.1.** As in the case of filiation by blood, the filiation of a child born of assisted procreation is established by the act of birth. In the absence of an act of birth, uninterrupted possession of status is sufficient; the latter is established by an adequate combination of facts which indicate the relationship of filiation between the child, the woman who gave birth to the child and, where applicable, the other party to the parental project.<br><br>This filiation creates the same rights and obligations |

[753] For more information on the topic and on how it is regulated in Canadian common law, see Kelly, *supra* note 21 at 191.

[754] Art 539 (2002) CCQ.

[755] Art 540 (2002) CCQ.

[756] See for example: Michèle Giroux, "Fascicule 30 – Filiation de l'enfant né d'une procréation assitée," Jurisclasseur Personnes et Famille, August 15 2014 at para 12; Pineau & Pratte, *La famille, supra* note 12 at 693.

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| obligations que la filiation par le sang. | as filiation by blood. |
|---|---|

But why move the section on assisted procreation out of the chapter on filiation by blood? The rules, the proofs, the actions and the effects are almost all the same. Why then take the section out of the general model if not only because the paradigm of filiation changed? Because 'blood' was not associated with heterosexual reproduction anymore? Getting filiation of children born of assisted procreation – the title of the chapter is the only one in which 'children' are involved – out of filiation by blood is rather symbolical and happened when filiation transformed, i.e. when 'unilinear' filiation enters officially the Code[757] and when same-sex filiation becomes possible. It did not happen when assisted procreation entered the Code, years before. But blood in filiation by blood, as explained previously, has a wider meaning than the narrow biological sense and almost nothing in filiation by blood refers to biological conceptions of filiation. It rather is the old understanding of reproduction and sexuality that is apparent in the innovative articles of the Code. Another important modification, the addition of article 538.2(2) betrays the narrow understanding of reproduction in the Code.

The *Code* makes it clear: the contribution of genetic material is not creative of any filial bond for children born of assisted procreation.[758] This was also the case before 2002. Article 538 (1994) CCQ stated:

| **538 (1994).** La contribution au projet parental d'autrui par un apport de forces génétiques à la procréation médicalement assistée ne permet de fonder aucun lien de filiation entre l'auteur de la contribution et l'enfant issu de cette procréation. | **538 (1994).** Participation in the parental project of another person by way of contribution of genetic material to medically assisted procreation does not allow the creation of any bond of filiation between the contributor and the child born of that procreation. |
|---|---|

which basically is what the first paragraph of the article 538.2 CCQ said in 2002:

| **538.2(1) (2002).** L'apport de forces génétiques au projet parental d'autrui ne peut fonder aucun lien de filiation entre l'auteur de l'apport et l'enfant qui en est issu. | **538.2(1) (2002).** The contribution of genetic material for the purpose of a third party parental project does not create any bond of filiation between the contributor and the child born of the parental project. |
|---|---|

and says today:

[757] Let be clear here, it is not because it is explicitly stated in the Code that it is new. Single-parent families existed in fact before the Code included them. There are also important differences to be made between single-parent families by choice and others.

[758] Art 538.2 CCQ.

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| 538.2(1) (2002). L'apport de forces génétiques au projet parental d'autrui ne peut fonder aucun lien de filiation entre l'auteur de l'apport et l'enfant qui en est issu. | 538.2(1) (2002). The contribution of genetic material to the parental project of another cannot be the basis for any bond of filiation between the contributor and the child consequently born. |
|---|---|

Note that a slight change to the English version happened in 2014.[759] The principle however remained the same through the years: contribution of genetic material to the parental project of another does not create a filiation bond. But, there is an important exception to this rule. The second paragraph of article 538.2 CCQ states:

| **538.2** […] Cependant, lorsque l'apport de forces génétiques se fait par relation sexuelle, un lien de filiation peut être établi, dans l'année qui suit la naissance, entre l'auteur de l'apport et l'enfant. Pendant cette période, le conjoint de la femme qui a donné naissance à l'enfant ne peut, pour s'opposer à cette demande, invoquer une possession d'état conforme au titre. | **538.2** […] However, if the contribution of genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of the woman who gave birth to the child may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation. |
|---|---|

This part of the article has not been modified but for a typo (bond was previously written bound).[760] The article portrays sexual intercourse as a catalyst for filiation regardless of intention. Even if there is a parental project between a couple and the contributor is consenting and aware of his role and the project of the couple, if the child is conceived via sexual intercourse the contributor has a year to change his mind. Within the year, the contributor can seek the establishment of his paternity, with all the rights, duties and obligations it entails. This will have the effect of excluding the second parent, which is generally a second mother. History shows the delay is computed rather flexibly and generously, and when both insemination and sexual intercourse happen, it is deemed sexual intercourse was the way the female body was fertilized.[761] As such, sexual intercourse allows a man to have rights toward the child, notwithstanding the fact he had no intention to be a father in the first place and that all the parties agreed.[762] More importantly, someone who intended to parent, the second parent, is discarded. It

[759] IN 2014-05-01.

[760] See art 538.2(2) CCQ (1994).

[761] *LB v Li Ba*, 2006 QCCS 591 and its appealed decision, *Droit de la famille - 07527*, 2007 QCCA 362.

[762] It would be interesting to evaluate whether the consent of the women to sexual intercourse was thus vitiated, with all the legal effects it entails… This was not proposed at the time.

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is unclear why this narrow understanding of sex, rather than intention, creates legal parentage in a filiation regime revolving around intent. The limited weight of intention is particularly striking within a chapter built around intention as the foundational element of filiation. Further, it is the only time where biology is a priority when it comes to establishing male filiation. The foundational element of male filiation is, generally, intent. According to some scholars, article 538.2(2) of the *Civil Code of Québec* is a mere accident that took place during the debates of the Commission des institutions.[763] Why was this article included in the Code? The article has been analyzed by Quebec scholars. For some, 538.2(2) CCQ was a tool for man to avoid their parental responsibilities.[764] For others, it was rather an incursion into lesbian families and a way to reinforce men's powers over women's bodies and preferred family forms.[765] No matter how one wants to read it, "the considerations of systemic rationality, technique, […][were] sacrificed to substantive outcome".[766]

Further, if a man contributes to a project 'unknowingly' or unintentionally – which would amount to a question of proof in court and all the problems and bias it entails when a diversity group is involved – and not via sexual intercourse he might see his filiation established as well. This interpretation is contrary to the discussions that lead the legislator to enact the rules of the parental project. Indeed, one learns from this excerpt, first cited by Michel Tétrault, the Minister intended to put emphasis on the act – the sexual intercourse – rather than the intent:

> Ce que nous voulons, par ces dispositions-là, c'est faire en sorte que, dans certains cas, le lien de filiation soit rompu définitivement et que, dans d'autres cas, il ne le soit pas. Il serait rompu, le lien de filiation, lorsqu'il y aurait médicalement, techniquement insémination des spermes nécessaires à la procréation. Vous aviez donné tantôt, le député de Verdun, *un exemple d'un homme qui se masturbe, qui remet les spermes, et qui sont inséminés, et comme ça. À ce moment-là, nous voulons que le lien soit rompu. La personne sait qu'il est le père, mais nous voulons que ce soit rompu, le lien, qu'il ne puisse pas réclamer la filiation*[767]

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[763] Pierre-Claude Lafond & Brigitte Lefebvre, eds, *L'union civile. Nouveaux modèles de conjugalité et de parentalité au 21ème siècle* (Cowansville: Yvon Blais, 2003) at 343.

[764] Benoît Moore, "Les enfants du nouveau siècle (libres propos sur la réforme de la filiation)" (2002) 176 *Développements récents en droit la Famille* 77 at 92.

[765] Tahon, *supra* note 745.

[766] While they stated that in a different context, it fits well with what happened here: Brierley & Macdonald, *supra* note 65 at para 79.

[767] Journal des débats de la Commission des institutions, 36e législature, 2e session (22 mars 2001 au 12 mars 2003), le mardi 21 mai 2002 - Vol. 37 N° 77.

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In the abstract, the expert clarified that if a man masturbates and give the sperm to a woman, the intent of the Legislature was to prevent filiation between the man and the resulting child. Yet the result of such situation turned out to be unforeseeable.[768] Some claims of the parties in similar situation have been pretty creative.[769] Highly intimate situations pose evidentiary issues, and men's privilege looms large in the judicial system and beyond. Progressive conceptions of the family cohabit with narrow understandings of sexuality in the filiation regime of children born of assisted procreation. People take what they want out of an unfinished regime where no formalities are required and where all matters will be decided around evidence of what happened in the intimacy of the parties…with all the challenges it raises.

Last but not least modifications found in Bill 84: surrogacy and article 541 CCQ. Article 541 CCQ edicts that "[a]ny agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null". All kinds of agreements are encompassed in article 541. Thus the agreement is said to be absolutely null whether it is onerous (for payment) or gratuitous. It does not matter whether the agreement is for procreation or gestation, or whether it is commercial, altruistic, intrafamilial, international, with heterosexual intended parents, with non-heterosexual intended parents, with a single intended parent, or any other variation. Surrogacy is not illegal or unlawful, but the contracts of surrogacy are unenforceable. This article, rather than speaking to the filiation of a child born of a surrogacy arrangement focuses, using the language of the civil law of obligations, on the undertaking made amongst adults. Indeed, nothing is said about the actual way to establish the filiation of the children born of this arrangement. The article is all about contract and nullity. Absolute nullity corresponds roughly to what a common lawyer would call voidness. Absolute nullity requires a court order which voidness, in principle, does not. Declaring a juridical act's[770] absolute nullity is the civil law's strongest sign of disapproval. It is a "[n]ullity arising in the formation of a juridical act which

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[768] For a rather *loufoque* decision around this issue see *FP v PC*, 2005 CanLII 5637 (QC CS), <http://canlii.ca/t/1jx16> consulted on 2015-12-18.

[769] *LO v SJ,* 2006 QCCS 302 (CanLII), <http://canlii.ca/t/1mg06> consulted on 2015-12-18. In this case, the man argued that he ejaculated outside of the woman's body and that the woman afterwards inseminated herself with the sperm that was on her breast.

[770] A juridical act is defined as a "[m]anifestation of intention of one or more persons in a manner and form designed to produce effects in law": France Allard *et al, Private Law Dictionary and Bilingual Lexicons: Obligations* (Cowansville: Yvon Blais, 2003) *sv* "juridical act".

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sanctions the violation of a rule designed to protect the public interest".[771] Absolute nullity and public order are powerful notions in the civilian mind; they lie somewhere between law and morality. The difference between nullity and absolute nullity is important here. The parties to the contract can only invoke nullity or relative nullity.[772] Relative nullity protects individual interests.[773] Absolute nullity can be "invoked by any person having a present and actual interest in doing so; it is invoked by the court of its own motion".[774] Absolute nullity protects general interest. As such the scope and purposes of absolute nullity and relative nullity are significantly different. While one is concerned with an individual interest and the parties to the deal, the other is about more than that. The sanctions of nullity also vary. While some latitude is left to judges when it comes to relative nullity, when a contract is absolutely null it is as if it had never existed. Surrogacy agreements today are part of the second category and are absolutely null, to protect the general interest. Whether the absolute nullity of surrogacy agreements protects the general interest is up for debate. It is not clear why the agreements are absolutely null.

The article about surrogacy agreements preceded the 2002 reform. At first, it is not absolute nullity that was contemplated by the experts. The text of the draft article of 541 CCQ (1991) then numbered 582 read "Procreation or gestation agreements on behalf of another person are null".[775] One learns from the draft Civil Code the sources[776] and commentaries about this article the reasons to introduce such an article in the Code:

> Cet article a pour but de responsabiliser, à l'égard de la mère d'un enfant dont la procréation est médicalement assistée, l'homme qui a consenti à cette procréation médicalement assistée et qui ne reconnaît pas, après sa naissance, l'enfant qui en est issu. Cette disposition sera principalement utile pour les concubins, plutôt que pour les époux, étant donné l'absence de présomption de paternité pour le concubin de la mère d'un enfant dont la procréation est médicalement assistée.[777]

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[771] *Ibid sv* "absolute nullity".

[772] Art 1420 CCQ.

[773] Art 1419 CCQ.

[774] Art 1418 CCQ.

[775] Former art 541 (1991) CCQ.

[776] *Avant projet de loi sur les sciences de la vie*, article 342.11 of the *Code civil français* added through article 11, see Gouvernement, *Projet de loi 125*, *supra* note 737 at article 582.

[777] *Ibid*.

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Very popular at the time, the main concern was with people having children outside the formal bound of marriage. Indeed, the idea behind article 582 was to make unmarried male spouse accountable to the mother of the child conceived through artificial insemination. But how the article would do so remained unclear. It is unclear how it would actually help a surrogate or an intended mother if things went wrong. In one hypothesis, the surrogate wants to keep the child. The female spouse of the unmarried male spouse has no claim whatsoever given the civil law vested motherhood with giving birth. In the other hypothesis, the surrogate hands over the child, but the intended couple is not interested anymore. It is doubtful the intended couple could be forced to keep the child, so the child would either be abandoned by the surrogate or taken care of by her. The only hypothesis where it could be relevant is where the surrogate hands over the child, the intended mother accepts the child, but her unmarried male spouse is not interested anymore. She would then have some sort of claim towards her ex-partner. But all this is highly hypothetical, especially given the requirement that the assisted procreation must be medically assisted. The important thing to notice is that the experts suggested in Bill 125 that surrogacy agreements be null, or in other word, relatively null.

The article was then slightly modified before its adoption in 1994 and the nullity became absolute instead of relative, with the consequences explained above with regards to who can invoke it and why, but not much as to its effects. The reason why the nullity became absolute is unclear. In the parliamentary debates, the debates took place around the article in its null version, not absolute nullity version. Some parliamentarians mentioned that the relevance of the article was minimal since a consensual agreement could never go to court or it could be intrafamilial.[778] Others, including the Minister of Justice, were uncertain about the impact of the nullity or its qualification as relative or null.[779] While the experts had an understanding of the impact of relative nullity, it appears that the Minister of Justice had a different understanding as shown by the following excerpt of the parliamentary debate:

> **M. Rémillard:** On est dans le Code civil et puis ce que nous disons, *c'est qu'à ce moment-là toute la ligne juridique qui découle de la filiation n'existe pas*. Il n'y pas par le fait même cette continuité qui devrait exister normalement comme lien

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[778] Journal des débats de la Sous-commission des institutions, 34e législature, 1re session, (28 novembre 1989 au 18 mars 1992), le jeudi 5 septembre 1991 - Vol. 31 N° 7.

[779] *Ibid.*

المنارة للاستشارات
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juridique pour la mère qui donne naissance à un enfant et qui implique des droits juridiques et pour elle et pour l'enfant. Dans ce cas-ci, il y a donc une limite qui est importante.

[…] Je ne sais pas si Me Ouellette, comme expert, a un autre point de vue ou si on peut comprendre autrement […]

**Mme Ouellette (Monique):** Cependant, si vous me le permettez, j'aurais peut-être une question à poser. Quand on dit que la ligne de filiation est interrompue, j'avais compris qu'en interdisant les contrats de mère porteuse, ce que l'on visait, c'était de rendre inexécutoires ces contrats-là. C'est-à-dire que si la mère porteuse ne veut pas remettre l'enfant, *on ne pourra pas aller devant les tribunaux pour la forcer à le remettre, d'une part, et, si, d'autre part, les parents qui avaient fait ce contrat avec la mère porteuse refusent de prendre l'enfant, on ne pourra pas aller devant les tribunaux pour faire sanctionner*. J'avais compris que c'était ça que ça voulait dire, la nullité du contrat de mère porteuse. Mais la mère porteuse qui a accouché de cet enfant-là, est-ce qu'on va nier qu'elle est la mère de l'enfant? Je veux dire que l'enfant a une mère et que ça va se trouver à être elle par le simple fait de l'accouchement, je crois.

[…]

**M. Rémillard:** Je me suis exprimé peut-être avec des termes incomplets. Je complète en disant tout simplement ce que vient de dire Mme le professeur, que c'est en fonction de la ligne juridique qui existe normalement et qui n'existe plus dans ce cas-là.[780]

One learns from the excerpts the Minister of Justice understood the filial bond was inexistent when a surrogacy agreement. But the expert explains rather that normal rules of filiation will apply. The effect of draft article 582 (1991) was to make the contract unenforceable. The Minister of Justice Commentaries about the new Civil Code of 1994 further confirms this later understanding:

Cet article, de droit nouveau, établit clairement la nullité des conventions de procréation ou de gestation pour le compte d'autrui par lesquelles une personne s'engage envers une autre à engendrer ou à porter un enfant et le caractère absolu de cette nullité, que ces conventions aient été faites à titre gratuit ou à titre onéreux.

Ces conventions étant nulles, les parties ne pourront pas s'en prévaloir ou demander leur exécution. Il a paru contraire à l'ordre public de permettre que la filiation de l'enfant soit déterminée par une convention. Celle-ci étant réputée n'avoir jamais existé, la filiation sera établie suivant les modes de preuve prévus précédemment.[781]

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[780] *Ibid.*

[781] Excerpts from Ministère de la Justice, *Commentaires* du *ministre de la Justice - Le Code civil du Québec* , t 1 (Québec: Les Publications du Québec, 1993).

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Even then, the same crucial question was left unanswered: what is the impact of the nullity on filiation? Babies will be born and the Civil Code cannot criminalize conduct it disapproves of. Why, then, is such an article in the Code?

In 2002, the article was modified again[782] to read as it reads today, i.e. "[a]ny agreement *whereby a woman undertakes* to procreate or carry a child for another person is absolutely null".[783] The analysis of the debate surrounding the adoption of this article shows that the Legislature thought no amendments were made.[784] Yet, while in its old formulation, agreements involving sperm donation were also null under a strict interpretation of 541 (since giving sperm is covered in the notion of procreation even if it has apparently not been contemplated by the Legislator), it is now the surrogate who gets all the attention. The emphasis is on *the woman who undertakes*. This new text put women and surrogates at the forefront.

The article has thus been modified as follow through times, even if it is unclear why:

| | |
|---|---|
| **582 (1991-Projet).** Les conventions de procréation ou de gestation pour le compte d'autrui sont nulles. | **582 (1991-Draft).** Procreation or gestation agreements on behalf of another person are null. |
| **541 (1994).** Les conventions de procréation ou de gestation pour le compte d'autrui sont nulles de nullité absolue. | **541 (1994).** Procreation or gestation agreements on behalf of another person are absolutely null. |
| **541 (2015).** 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. | **541 (2015).** Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null. |

In its current form, the stipulation of surrogacy agreements' absolute nullity is the source of much of the confusion around surrogacy agreements. On one reading of article 541, it refers simply to a surrogacy agreement's unenforceability. On another, associated with characterizations of article 541 as "prohibiting" surrogacy, it indicates that surrogacy is a practice so repugnant to public order that officials must do nothing to condone it. Article 541 blurs the principles governing the establishment of filiation. In my opinion, absolute nullity does not mean that a surrogacy agreement is illegal or unlawful, only that it has no enforceable legal effects. So, how might filiation be established for a child born to a woman acting as a surrogate? Article 541 says nothing about this. This situation creates difficulties for judges who are left with

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[782] *An Act instituting civil unions and establishing new rules of filiation,* LQ 2002 c 6, art 30.

[783] Art 541 CCQ.

[784] Quebec, *Étude détaillée du projet de loi n° 84 - Loi instituant l'union civile et établissant de nouvelles règles de filiation,* 36th legislature, 2nd session (22 May 2002).

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a child, a provision stating that the contract in itself is absolutely null, and nothing to guide them in making the most important decision: what is the child's filiation?

So far, in a case of surrogacy, the establishment of filiation in court has followed a pattern. Most cases occur domestically between a heterosexual couple and a surrogate. The filiation of the intending father, who is often the child's genetic father, is generally established under the general regime of filiation by blood. He is on the declaration of birth and the act of birth. Possession of status will match the official documents. Filiation is established and no one discusses it: even though the specter of absolute nullity hovers over the agreement between the father and the surrogate, paternal filiation is never jeopardized. The establishment of maternal filiation, however, is a mess. Note that in all cases, all the parties agreed as to who were to be the parents and they were not asking the court to solve an issue. Rather, it is a third party (here the State) that prevents the family form to be recognized. This is very unlike private law in a civilian regime, where law is concerned about relationships between parties. As such, the Registrar of Civil Status tends not to deliver an act of birth, since the attestation of birth and declaration of birth do not match. The attestation of birth generally identifies the woman who gave birth, in these cases, the surrogate. Remember, the attestation of birth does not exist for 'father' and only lists the 'mother', not even the child! The declaration of birth states who claims to be the parent or parents, so in a situation of surrogacy it will not mention the surrogate. Or it could temporarily be blank or even mention the intended mother. The declaration could be filled by the surrogate and then all the parties could happily head to court and ask for a "second parent adoption" to proceed. Establishing maternal filiation for the intending mother through adoption by special consent is the prevailing solution to the conundrum of how to recognize her at law. In such cases, special consent requires the consent of the surrogate and of the father, as well as judge's conclusion that the adoption advances the child's best interests. Whatever the exact steps taken and whether documents match or not, the court will have to make a decision about the maternal filiation. Efforts to regularize the filiation of a child born as the result of surrogacy are not always successful. In the face of contrary decisions, the vesting of maternal filiation and the impact of article 541 are uncertain. Scholarship on the issue abound.[785] Case law is also

[785] Moore, *supra* note 587 ; Michelle Giroux, "Le recours controversé à l'adoption pour établir la filiation de l'enfant né d'une mère porteuse : entre ordre public contractuel et intérêt de l'enfant" (2011) Revue du Barreau 509; Marie-

المنارة للاستشارات
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relatively flourishing with a dozen decisions, two of them by the Québec Court of Appeal holding special consent adoption could proceed and that it was in the best interest of the child.[786] Further, even after the Court of Appeal's decision, cases kept going to court. The interaction between the absolute nullity of such contracts and the effects of the nullity on the establishment of filiation is a locus of high disagreement in Quebec law. But why? The motive is generally because law needs to protect women – or some women according to who law believes is vulnerable that the body cannot be commercialized and that filiation cannot be the result of a contract. Of course, all of these reasons can be deconstructed.

The Code addresses a sort of fear of men, especially *homosexual* men, becoming parents and/or exploiting women. For the *Comité du Barreau du Québec,* it looked like a pressing issue. This organization submitted a report in which a recommendation stated that "**aucun droit préférentiel à l'adoption ne soit accordé au conjoint du père biologique** lorsque l'enfant est né à la suite d'une convention de mère porteuse […]".[787] In French, "conjoint du père" refers to male partner. While in some cases the masculine form included the feminine, it would be highly surprising that it is the case here. Surrogacy is a way to create families used by heterosexual, non-heterosexual couples and others and parental fitness is not contingent on sexual orientation. Further, while the law seems to be obsessed with the protection of women, a woman is ignored by the law under its current treatment of surrogacy issues: the intended mother. While a lot of focus is rightly put on the surrogate, the intended mother could also be portrayed as vulnerable. She might be infertile, under hormonal treatments, familial pressures, etc. More, given the territoriality of law, while the idea of protecting domestic woman is salient, Quebec law is much less concerned with the protection of foreigners. This is problematic in a north-south paradigm of vulnerability, exploitation and protection. Surrogacy cannot be reduced to an issue affecting

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France Bureau & Édith Guilhermont, "Maternité, gestation et liberté: Réflexions sur la prohibition de la gestation pour autrui en droit québécois" (2011) 4 Rev droit santé McGill 43.

[786] To name a few: *Adoption—07219*, 2007 QCCQ 21504; *Adoption—091*, 2009 QCCQ 628; *Adoption—09367*, 2009 QCCQ 16815; *Adoption— 10489*, 2010 QCCQ 19971; *Adoption—10329*, 2010 QCCQ 18645; *Adoption—10330*, 2010 QCCQ 17819; *Adoption—09185*, 2009 QCCQ 8703; *Adoption—09184*, 2009 QCCQ 9058; *Adoption—12464*, 2012 QCCQ 20039 (appeal: *Adoption—1445*, 2014 QCCA 1162) ; *Adoption—161*, 2016 QCCA 16.

[787] This has been first flagged in *Adoption 1445* — 2014 QCCA 1162 (CanLII) at para 58. Justice Morissette cites Barreau du Québec. Comité sur les nouvelles technologies de reproduction, *Les enjeux éthiques et juridiques des nouvelles technologies de reproduction* (Montreal: Barreau du Québec, 1988).

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women's well-being and where women need protection without having a look at the big picture. Other women are also left behind.

The title of this section is 'Of Children Born of Assisted Procreation and DNA'. So far, it is fair to say that most of the changes happening during the 2002 reform were relying on intention and involvement in the child's life rather than DNA. This is particularly accurate if someone considers that Bill 84 contained the reform of filiation in Quebec. Yet, DNA also had a part to play in the reform of 2002. Indeed, Bill Projet 50, *Loi modifiant le Code civil et d'autres modifications législatives* introduced another modification to the rules about filiation in Quebec. Through a different act and probably for different reasons, the legislature introduced article 535.1 CCQ:

| | |
|---|---|
| **535.1.** Le tribunal saisi d'une action relative à la filiation peut, à la demande d'un intéressé, ordonner qu'il soit procédé à une analyse permettant, *par prélèvement d'une substance corporelle, d'établir l'empreinte génétique d'une personne visée par l'action.*<br><br>Toutefois, lorsque l'action vise à établir la filiation, le tribunal ne peut rendre une telle ordonnance que s'il y a commencement de preuve de la filiation établi par le demandeur ou si les présomptions ou indices résultant de faits déjà clairement établis par celui-ci sont assez graves pour justifier l'ordonnance.<br><br>Le tribunal fixe les conditions du prélèvement et de l'analyse, de manière qu'elles portent le moins possible atteinte à l'intégrité de la personne qui y est soumise ou au respect de son corps. Ces conditions ont trait, notamment, à la nature et aux date et lieu du prélèvement, à l'identité de l'expert chargé d'y procéder et d'en faire l'analyse, à l'utilisation des échantillons prélevés et à la confidentialité des résultats de l'analyse.<br><br>Le tribunal peut tirer une présomption négative du refus injustifié de se soumettre à l'analyse visée par l'ordonnance. | **535.1.** Where the court is seized of an action concerning filiation, it may, on the application of an interested person, *order the analysis of a sample of a bodily substance so that the genetic profile of a person involved in the action may be established.*<br><br>However, where the purpose of the action is to establish filiation, the court may not issue such an order unless a commencement of proof of filiation has been established by the person having brought the action or unless the presumptions or indications resulting from facts already clearly established by that person are sufficiently strong to warrant such an order.<br><br>The court determines conditions for the sample-taking and analysis that are as respectful as possible of the physical integrity of the person concerned or of the body of the deceased. These conditions include the nature and the date and place of the sample-taking, the identity of the expert charged with taking and analyzing the sample, the use of any sample taken and the confidentiality of the analysis results.<br><br>The court may draw a negative presumption from an unjustified refusal to submit to the analysis ordered by the court. |

Biology's grip needed to be reinforced despite the efforts of Bill 84.

A few bills have also been put forward in recent years to reform adoption, but none of them materialized and came into force.[788]

[788] For an analysis of the various proposals, see Ouellette & Lavallée, *supra* note 599 at 310–327.

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Reproduction has transformed in fact and the law has tried to keep up. With sexless reproduction, a multiplication of possibilities for parent-child relationships is evidenced. In this part, it has been shown that law slowly but surely expanded the possible configurations for parent-child relationships, mostly at birth. One of the biggest developments in Quebec civil law in terms of multiplication of possibilities for parent-child relationships occurred in 2002, in the shadows of same-sex civil unions. As of 2002, filiation, in addition to being by blood, by assisted procreation or adoptive, also became possible for single women (by choice) and for homosexual couples, mostly lesbian couples. This proliferation of possibilities and increasing relevance in legal scholarship and in courts might send a signal that the parent-child relationship is now the foundational tie of family law from a Quebec civil law perspective. Plenty of theoretical reasons also foster this hypothesis: while the bond with a former spouse may be dissolved, the one with a child is more likely to last; while adults can make legal choice for themselves, children generally cannot and are more vulnerable, and as such law's role should be greater; children are dependent; etc. Filiation once relied on a formal status: being married. It appears to now be influenced by various factors, closer to the nature of the relationships than its form. A proliferation of possible relationships occurred. While the Code once included only a unitary conception of legitimate filiation, there are now multiple possibilities for filial relationships: maternal filiation, paternal filiation, single woman filiation by choice, filiation through assisted procreation, non-heterosexual filiation, and more. The underlying elements animating these relationships are unclear, not to say inconsistent. The inconsistency is particularly obvious when it comes to maternal versus paternal filiation as it has been explained in part 3.1.1. The next part questions whether filiation is the new basis for family law, as it is proposed in the *Rapport du Comité consultatif sur le droit de la famille: Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales*. Further, it addresses the promises and perils of the proposed reform and analyzes the underlying elements at play in filial relationships.

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## 3.3 What Now for Filial Ties

Filiation tends to be divided in types, and types have varied with time. It heavily depends on adults' relationships and behaviours. But what are filial ties, what kinds of relationships create the rights, duties and obligations civil law attaches to filiation, and how do they contribute to 'family law' as a consistent discipline? Depending on the historical period studied, various imperatives have been put forward in terms of what constitutes a recognized and productive parent-child relationships in law. For example, under the *Civil Code of Lower Canada*, the imperative was moral and filiation was about religious marriage. With the 1980 reform and the following modifications, it is fair to say the underlying principle was a certain understanding of equality: equality of children and equality of formal unions notwithstanding the sexual orientation of the protagonists. When it comes to the effects it has in filiation only, one could almost state an imperative is the equality of conjugal unions, for the sake of children. In 2016, the *Rapport* of the *Comité consultatif sur le droit de la famille: Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales* under the direction of Professor Alain Roy was one of the many times in recent Quebec civil law history where family law reform was proposed. Despite the lack, to this day, of concrete measures to implement changes suggested by the report, the *Comité* hopes that the *Civil Code of Québec* will be modified, once again. As demonstrated in the previous subsection, it is striking to see how many times filiation, even if it is a codified matter, has changed in a relatively short period of time. In the following section, three elements are addressed. First, a portrait of the 2015 proposed reform of filiation handed by the *Comité* is sketched. Second, observations are offered about the promises and perils of what is suggested in the report. Last, it is argued that the meaning of status when it comes to parent-child relationships has transformed and the importance of 'contract' in these relationships has fluctuated. However, possible relationships, as it is the case for conjugal relationships, have multiplied. This subpart thus questions the underlying elements at play in the regulation of parent-child relationships in Quebec civil law and wonders whether they are consistent in and of themselves and with family law as put forward in the Code.

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### 3.3.1 Proposed "Reform" of 2015

The *Rapport* (Report) of the *Comité consultatif sur le droit de la famille* (Comité) proposes important changes when it comes to filiation and its effects. In addition, the presence of a common child deploys a lot of mechanisms actually intended at adult partners, centering family law on children. These have been described in part 2.3.1. The proposition of the Comité about how to reform filiation are found in the third chapter of the third part of the Report. The fourth chapter addresses the effects of filiation, namely parental authority and support obligations. Proposed changes concern the structure of the Code, the general provision of the title of filiation, the types of filiations, the proof of filiation, the question of the right to know one's origins and the status of stepparents.

When it comes to the structure of the Code, the Comité proposes making filiation the first title of the Book 'The Family'. In civil law, the structure of the Code itself sends a message. Indeed, as it has been explained earlier, under the *CCLC*, there was no book on the family, filiation was part of the Book 'Of Persons' and came after marriage. It was a logical order, filiation being, at the time an effect of marriage. Family became a book in the eighties for unknown reasons, a book opening with marriage and where filiation follows. This structure still prevails today. The idea to open the Book on 'The Family' with filiation is consistent with the preoccupation with the interest of the child and the suggestion what makes a family is the presence of a common child. In addition to changing the orders of the titles, the Comité also revisits the naming and order of the chapters:

| **Current structure** | **Structure proposed by the Comité**[789] |
|---|---|
| Title 2 – Filiation<br>General provision<br>Chapter I – Filiation by blood<br>Chapter I.1 – Filiation of children born of assisted reproduction<br>Chapter II – Adoption | Title 1 – Filiation<br>Chapter I – General provision<br>Chapter II – Types of filiation<br>Chapter III – Proof of filiation |

The Comité proposes to modify the general provision now found in article 522 CCQ, correctly highlighting how the current wording of the general provision suggests only children whose

[789] Translations are my own as the Rapport is only available in French.

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filiation is established are equal, not the others. As such, the Comité recommends adding a 'new' article reading as follows:

| Tous les enfants ont droit à l'établissement de leur filiation dans les conditions prévues au présent titre, sans aucune autre consideration.<br><br>Les enfants dont la filiation est établie ont les mêmes droits et obligations. | Without other considerations, all children have the right to the establishment of their filiation in accordance with the rules contained in this chapter.<br><br>Children whose filiation is established have the same rights and obligations. |
|---|---|

This new article builds on current article 522 CCQ. It also creates a new right for children: the right to have their filiation established. Whether it is a right and what could be the impact of such an addition will be discussed in the next subsection.

The Comité recommends to clearly stating there are three types of filiation and slightly modifying how they are referred to in the Code. The three types of filiation are: the filiation of children born of natural procreation, the filiation of children born of assisted procreation and adoptive filiation.[790] The three types of filiation would be found under the second chapter of the first title and the structure would look like this:[791]

| Chapitre deuxième – Des types de filiation | Chapter Two – Types of filiation |
|---|---|
| Section I – De la filiation des enfants nés de la *procréation naturelle*<br>§ 1 – De l'établissement de la filiation<br>§ 2 – Des actions relatives à la filiation<br>Section II – De la filiation des enfants nés de la procréation assistée<br>§ 1 – Du projet parental avec recours à l'assistance d'un tiers à la procréation<br>§ 2 – De projet parental avec recours à une mère porteuse<br>Section III – De la filiation adoptive | Section I - Filiation of children born of *natural procreation*<br>§ 1 – Establishment of filiation<br>§ 2 – Actions relative to filiation<br>Section II – Filiation of children born of assisted procreation<br>§ 1 – Parental project involving a third party to the procreation<br>§ 2 – Parental project involving a surrogate mother<br>Section III – Adoptive Filiation |

For the first type, the filiation of children born of natural procreation, the Comité wants the Code to be explicit about the foundational elements of the establishment of filiation. On the one hand, maternal filiation is established by the act of giving birth, by delivering a child.[792] On the other hand, paternal filiation depends on the declaration of birth and the possession of status.[793] The establishment of filiation in law and the underlying principles would differ based on the gender

[790] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 124 at 139.

[791] The *Civil Code of Québec* does not use the word 'type' often; only four occurrences can be found.

[792] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 124 at 139, recommendation 3.4.

[793] *Ibid* at recommendation 3.5.

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of the parent. For mothers, filiation is about biology or nature and for fathers it is about intention (declaration) and involvement (possession of status). This is in line with the current twofold foundation of filiation according to the Comité: intention and genetic.[794] For the Comité there is no place for intention when it comes to maternity and the biggest issues or challenges arise with paternity.[795] Further, possession of status is, in the eyes of the Comité, only useful when it comes to establishing paternity, its length should be specified (24 months), and its modalities revisited. The Comité is divided as to what to do with the presumption of paternity. It explores both avenues, maintaining it or removing it. No recommendation is made since the Comité did not agree.[796] However, if the presumption remains in the Code, the Comité affirms it should be extended to *de facto* spouses as well. In addition, voluntary acknowledgement should be removed from the Code. The Comité – led by two male professors – continues to focus on paternal filiation while maternal filiation is portrayed as stupendously simple. The principle according to which filiation cannot be contested if the act of birth and possession of status match would change.[797] Rather, it would apply only to fathers and it would be if the declaration and the possession match. This is a minor change given the fact the act of birth solely rely on the declaration from the father anyway. The Comité proposes change to the other types of filiation as well.

The Comité proposes the filiation of children born of assisted procreation to be the second type of filiation. It would be divided in two subsections: one for the parental project involving a third party to procreate and one for the parental project involving a surrogate mother. The new articles would be in line with the parental project involving assisted procreation as it currently is in the Code, but the Comité adds two specifications. First, the third party needs to be informed and second no formalities are required for the parental project.[798] The establishment of maternal filiation would rely on giving birth – the Comité keeps the attestation and declaration of birth. It would be open to single women, heterosexual couples and lesbian couples. The

[794] *Ibid* at 141.

[795] *Ibid* at 144-145.

[796] *Ibid* at 150.

[797] This principle is found at article 530 CCQ.

[798] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 124, recommendation 3.12.

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establishment of the 'second filiation' would be consistent with what is done for the first type of filiation: declaration and possession of status.[799] The Comité recommends the abrogation of the presumption of parentality.[800] According to the Comité, under this paradigm the 'ultimate' foundation of filiation is either in the genetic ties or the parental project. The Comité mentions that the contribution of the third party could be made through intercourse, but does not address directly 538.2 CCQ.[801] The result remains the same and clarifies that the contribution of genetic material does not make someone a parent. It also recommends to abrogate 540 CCQ and to stick with a maximum of two parents.[802] The Comité would include a second type of assisted reproduction: the parental project involving a surrogate mother. This would be a major change in the Code, since all surrogacy agreements are currently null (absolute nullity). The Comité suggests two guiding principles and six broad orientations for the regulation of surrogacy in the Code. First, a child should never be penalized for the actions of adults and second women acting as surrogate cannot be left behind (protection and dignity).[803] The six orientations are the following: the abrogation of 541 CCQ; women have to be protected and can withdraw from the project at anytime; a child can only have two parents; intended parents are liable if they withdraw; parental project should meet ethical standards; and children should have access to their assisted procreation files and to the information it contains.[804] Keeping these principles in mind, the Comité proposes two roads to regulate surrogacy in the Civil Code. The first road is referred to as administrative and the second judicial. The administrative path would allow the establishment of filiation of a child born through a surrogacy agreement on the basis of a declaration to the Registrar of Civil Status, provided some requirements are met. First, the parental project should be a notarial act and be drafted before the child's conception. Second, the intended parents and the surrogate mother should individually go through a psychosocial evaluation (and an attestation they had one).[805] At the child's birth, an attestation of birth would

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[799] *Ibid* at recommendation 3.14.

[800] *Ibid* at recommendation 3.16.

[801] *Ibid* at 157 and recommendation 3.19.

[802] *Ibid* at recommendation 3.20.

[803] *Ibid* at 170.

[804] *Ibid* at 170-171.

[805] *Ibid* at recommendation 3.21.1.

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still be fulfilled. The surrogate mother should consent in writing in front of two witnesses or in a notarial act. A common declaration of birth would then be filled and sent, alongside the attestation of birth, the psychosocial attestation and the notarized parental project.[806] At all times, the surrogate mother could withdraw her consent. The Comité also foresees situations where death occurs, one parent withdraws, and more. All in all, the requirements are numerous, their costs and delays, unsure yet. The Comité's bet is that people will normally proceed according to what they propose. Being aware of the risks it bears – people tend not to do what law asks them to – they designed another path. The judicial path involves many options (everybody consents, the surrogate withdraw consents, the parents withdraw consent, one of the parent withdraws consent, someone dies, and more), but the Comité summarizes its recommendations as to what rules should come into force in six parts:

> A. The parents and the surrogate mother, or one of them can ask the tribunal to substitute the surrogate mother's filiation with the one of the intended parents within 60 days of the child's birth;
>
> B. If the parental project is revoked after birth, intended parents, or the intended parent withdrawing consent, will be liable towards the child and the surrogate mother;
>
> C. A parental project could be finalized if only one of the parents and the surrogate consent. The other parent would be liable towards the child and the other parent;
>
> D. In the event the surrogate mother dies, is incapacitated or vanishes after birth and before providing consent, the court could make a decision in the best interest of the child;
>
> E. *De jure* or *de facto* incapacity preventing the parental project to succeed amounts to consent withdrawal;
>
> F. If the parental project lapses, the court should apply the rules for the establishment of filiation of a child born through natural procreation.[807]

Many other questions are raised by the Comité, such as the age of the surrogate, the genetic contribution or the requirement of prior pregnancy, but none are deem relevant enough to include in the Civil Code.

The third type of filiation, adoptive filiation, attracts less attention. A few bills have been put forward in recent years, but none of them materialized and came into force.[808] It is important to know an eminent family law professor chaired a working group who published a sensitive and

[806] *Ibid* at 175.

[807] *Ibid* at recommendation 3.21.2.1 at 181.

[808] For an analysis of the various proposals, see Ouellette & Lavallée, *supra* note 599 at 310–327.

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complete report about adoption in 2007.[809] As such, in 2015, the *Comité* believed it was not a good time and place to propose massive changes.[810] The *Comité* nonetheless suggests elements a reform should contain,[811] elements animated by a desire to promote children's interest. The first relates to the fundamental right to know one's origin, something quite popular in Quebec scholarship.[812] Adoption files are currently confidential in Quebec and the Comité suggests lifting confidentiality and allowing information and contact between the adoptee and its family of origin. Second, when it is in the interest of the child, modalities for adoption should be flexible and plenary adoption does not have to be the only solution available. Third, open adoption should be possible when the context allows it.[813] As a matter of fact, there is currently a bill being studied by the National Assembly addressing these questions.[814] Whether it will amount to modifications in the Civil Code is unknown at the moment, since many bills have been introduced in recent years without materializing into law.

In addition to changing the structure and the types of filiation, the Comité proposes to rename the section on 'proofs' of filiation. It suggests they rather are 'modes to establish filiation'. The principal one should be the act of birth and it should have its own chapter.[815] The Comité identifies other elements for reforms: access to assisted procreation files,[816] adding the

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[809] Rapport du groupe de travail sur le régime québécois de l'adoption, Carmen Lavallée chair, *Pour une adoption québécoise à la mesure de chaque enfant*, March 30th, 2007.

[810] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126 at 189.

[811] *Ibid.*

[812] Michelle Giroux, "Entre filiation biologique et filiation parentale, quelle place pour l'identité de l'enfant?" in Myriam Jézéquel & Françoise-Romaine Ouellette, eds, *Les Transformations Familiales aujourd'hui. De quoi vont hériter nos enfants?* (Anjou: Fides, 2015); Michelle Giroux, "Test d'ADN et filiation à la lumière des développements récents: dilemmes et paradoxes" (2002) 32 RGD 865; Marie Pratte, "La filiation réinventée: l'enfant menacé?" (2003) 33 RGD 541; see generally Alain Roy's media appearances. A full list is available here: http://www.chairedunotariat.qc.ca/fr/alainroy.php.

[813] For the details of the recommendation, see COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126 at 189.

[814] Bill 113: *An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information,* adopted in principle on December 2, 2016 and currently awaiting review from the Committee on Institutions.

[815] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126, recommendation 3.32.

[816] *Ibid* at 190-193.

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right to know one's origins to the *Quebec Charter*,[817] and transitional measures. It also proposes changes to the effects of the family.

As previously explained, the book on family currently has four or five titles depending who you ask: 1 marriage, 1.1 civil union, 2 filiation, 3 obligation of support and 4 parental authority. The Comité indicates the book should have three titles: filiation, conjugality and effects of the family. As such, former title 3 and 4 would now be effects of the family. Some modifications to allow the delegation of parental authority to a spouse are contemplated,[818] extending child support and custody to step-parents,[819] not imposing the mandatory parental regime to step-parents,[820] and finally to include in the Code something preventing parent to use corporal punishment.[821]

The report is useful and necessary, and it has started a long awaited conversation in Quebec private law as to what to do with the regulation of families. Many scholars are skeptical as to the measures contained in the report of the Comité.[822] Further, observers do not believe a reform is going to happen despite the urgency of the situation and the message sent by the Supreme Court of Canada in *Eric v Lola.* The Supreme Court recommended addressing the regulation of conjugality, but the Comité decided to address family law in the Code as a whole. It was ambitious. The work of the Comité needs to be saluted, but it is imperative to analyze the promises and perils of their recommendations when it comes to filial ties and to assess where it posits itself in terms of the legislative history of the regulation of families in the civil codes.

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[817] *Ibid* at recommendation 3.33.

[818] *Ibid* at recommendation 4.2.

[819] *Ibid* at recommendation 4.3.

[820] *Ibid* at 216.

[821] *Ibid* at recommendation 4.7. It is highly symbolical and already dealt with elsewhere. It is probably *ultra vires.*

[822] See Benoît Moore, "La consécration de l'autonomie individuelle" Fédération des associations de familles monoparentales et recomposes du Québec, in *Réforme du droit de la famille: La balle est dans le camp du politique!* (September 2015) 40: 1 Bulletin de Liaison 6. See also the Bulletin de Liaison in general.

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### 3.3.2 Perils and Promises

The Comité indicates that significant changes to the filial regime are necessary. All the mechanisms deployed between the parents when there is a common child will not be reviewed and analyzed here since they were in part 2.3.2. The compensatory parental allowance appears more about the regulation of conjugal ties. It spends most time putting forward mechanisms aimed at adults. First, the inadequacy of 'types' of filiation and the biologization of ties is examined. Second, the gendered nature of filiation and the inconsistencies in the foundational elements for filiation are showcased. Third, it is claimed that the reform is conservative and fosters an antiquated understanding of relationships between adults and children. Most importantly, it does not address the content of relationships. Many more elements could have been underlined, but these appear to be most relevant for the present purposes.

Under the CCLC, law knew the filiation of legitimate children, and as legal scholars have written that children born out of wedlock were *sans famille*.[823] With the 1980 reform, a new paradigm was introduced in the Code. Filiation was either by blood or by adoption. Filiation by blood included some articles on assisted procreation in the heterosexual paradigm,[824] and this dichotomy was maintained in the *Civil Code of Québec* in 1994. The Code nonetheless included a complete section about children born of assisted procreation. They were included in filiation by blood, which made sense at the time. When non-heterosexual parenting became possible in 2002, a 'new type' of filiation appeared: "the filiation of children born of assisted procreation". This "type" of filiation was in the Code before 1994, but because as of 2002 it departed from "natural" filiation, the Legislature "created" a new type of filiation. It is possible to argue there are no types of filiation *per se* and their typology depends on social anxieties. Indeed, procreative sex or no procreative sex, the principles underlying filiation remained roughly the same. Further, the legislator did not call them 'types' of filiation. All this appears quite irrelevant to the relationship itself between the parent and the child, and the ways in which this relationship materializes. It risks creating distinctions between situations that are generally similar. More, by

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[823] Clark, *supra* note at 14.

[824] See Bill 89, *Loi instituant un nouveau Code civil et portant réforme du droit de la famille,* c 39 at s 1, especially at "article 588".

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trying to categorize everything instead of focusing on fundamental elements, civil law is not used to its full potential, a potential relying on flexible and abstract rules. It will be hard for such fixed rules to adapt to changing family. As a matter of fact, while other provinces are departing from the two-parents family model,[825] the Comité is clear bi-parentality is the preferred option. This is related to a second major peril of the proposed reform. Instead of highlighting filiation as a construct reaching far beyond biology, blood, genes or *naturalness* the Comité insists 'blood' meaning 'genes' as the foundational of filiation.[826] The Comité goes as far as renaming, in line with Anne-Marie Savard's suggestion, the first type of filiation "*De la filiation d'un enfant né d'une procréation naturelle*/ Filiation of children born of natural procreation. "Procréation naturelle" such a naming biologizes filiation. This is problematic as it makes it hard to understand that filiation is a construct different than biology/gene/nature. But this is consistent with the Comité's reading of blood meaning genes. Blood is a nicer metaphor under current rules. Indeed, "blood is thicker than genes".[827] As Marilyn Strathern explains "reproducing one's own did not literally mean one's genetic material: one's own flesh and blood were family members and offspring legitimated through lawfull marriage".[828] Blood means many things, blood is an image; blood is more than a substance. Blood referred to something way before science could prove whose blood was whose. The Comité standpoint echoes a phenomenon documented by Dreyfuss & Nelkin in an article entitled "The Jurisprudence of Genetics". They demonstrated "there has been a shift from essentially metaphorical uses of genetic concepts to an incorporation of biological principles into the substance of legal doctrine".[829] It is risky to build a filiation regime on a narrow understanding of blood as the Comité does. In current law, "la filiation dite *par le sang*, est bien souvent établie en dehors de tout lien génétique entre un parent

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[825] One can think of the new *Family Law Act*, SBC 2011, c 25 in British Columbia, and the modifications to the *Children Law Reform Act,* RSO 1990 c C 12 (through Bill 28, *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016) in Ontario.

[826] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126 at 141-143.

[827] Janet Carsten, "Substance and Relationality: Blood in Contexts" (2011) 40 Annu Rev Anthropol 19 at 26 citing Sarah Franklin. See also Kaja Finkler, "The Kin in the Gene. The Medicalization of Family and Kinship in American Society" (2001) 42:2 Current Anthropology 235.

[828] Marilyn Strathern, *After Nature: English Kinship in the Late Twentieth Century* (Cambridge: Cambridge University Press, 1992) at 52 previously cited by Finkler, *supra* note 827.

[829] Rochelle Cooper Dreyfuss & Dorothy Nelkin, "The Jurisprudence of Genetics" (1992) 45:2 Vanderbilt Law Review 313, 314

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et son enfant".[830] It is important to keep in mind, "[a]t a time before science could demonstrate the physical truth, parental relationships were necessarily based on […] legal truths. These legal truths were designed to serve social and political ends (…)".[831] Family law and science are two different realms, and legal truths are quintessential to filiation. As Savatier wrote decades ago, "ce n'est pas à la biologie de diriger le droit, mais au droit de diriger l'usage de la biologie. La réalité juridique est plus complexe que la réalité biologique, mais, par là même, plus vraie".[832] The focus on *naturalness* also has the unintended consequence of focusing on *critères catégoriels* instead of the nature of relationships. Further, it posits filiation as something instantaneous, not a relationship built by time, care, and commitment. More, it relays adoption to the sidelines of the debate once again. Reforms of 1980 and 2002 were about not penalizing children for their parent's actions. The proposed reform appears to be doing the same, especially when it comes to surrogacy. But the types of filiation depend precisely on how parents behaved. In typologizing 'filiations' on the basis of how the parents decide to reproduce, "[w]e seem destined to perpetuate the old mistakes even if they are cast as 'reforms'".[833]

The idea to create a right to have one's filiation established has the advantage of promoting a certain understanding of children's interests. It is undeniably in line with the biologization of filial ties and a certain understanding of how families are created. What are the effects of such a right? It appears to omit an important aspect of filiation: filiation is a relationship. What are the consequences of this right to the establishment of filiation on the parties to the relationships? Will it prevent a child to be adopted by a new family? Will it trap children in unfulfilling relationships? Will it increase the already significant workload of child protection services? While it is not ideal, one can always abandon a child. Not all children are the result of love, planning and intimacy. Filiation is a relationship and a careful exercise of balancing rights. The child, while central, is not the only protagonist with rights.

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[830] Marie-France Bureau, *Le droit de la filiation entre ciel et terre: étude du discours juridique québécois* (Cowansville: Éditions Yvon-Blais, 2009) at 67.

[831] Eekelaar, *Personal Life, supra* note 86 at 58.

[832] René Savatier, *Les métamorphoses économiques et sociales du droit civil aujourd'hui*, 3rd ed (Paris: Dalloz, 1964) at 250.

[833] Martha Albertson Fineman, *The Neutered Mother*, 12–203 (1992) at 6.

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The Comité offers a consistent picture of filiation, it is logical, thorough and thought through. The Comité identifies two foundational elements in filiation: blood and intent/*volonté*. They are the same in the first two types of filiation. As such, they are consistent when it comes to the types of filiation. However, they cannot be extended to adoption, which says something about the consistency of the proposed second chapter when it comes to the foundational elements of parent-child relationships has a whole. Adoption ties occur differently, but the nature of the relationship in law is the exact same as the other filial ties. Further, a major inconsistency needs to be emphasized. When filiation targets a birthing woman, the foundational element is biology. Intent is irrelevant.[834] The Comité also advises to keep the attestation of birth. When it is about a father or a second parent, the foundational element is intent, and "c'est bien sûr autour de la filiation paternelle que se situent les grands enjeux du droit de la filiation".[835] Pierre-Basile Mignault made the same argument in 1896.[836] For male parents, biology is largely irrelevant. To the Comité, this way to conceptualize filiation is consistent because the foundations are the same for both types of filiation. But paternal and maternal filiations are not animated by the same underlying elements. Motherhood is about giving birth, while fatherhood is about voluntarily declaring being a child's father. At a time where family law tends to focus on parents rather than father and mother,[837] this understanding of 'consistency' is surprising to say the least. Yet the bond, or the relationships, is the same in law. Paternal and maternal filiations produce the same effects. How can these two opposite foundational elements be considered consistent? To state that maternal filiation is natural is shocking, especially after vigorously arguing that paternal filiation is based on intent, that it is subtle and complex. Law should focus on parents rather than on gendered categories such as father and mother… especially when equality is an underlying element motivating the reform and when there are allegedly no differences between the rights, duties and obligations of fathers and mothers.

Another peril of the reform is the heteronormative and conservative understanding of the family put forward in the report. The recommendations include non-heterosexual couples and the

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[834] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126 at 144.

[835] *Ibid* at 144.

[836] Mignault, *supra* note 21 at 60-61.

[837] For example, see part 3 of the *Family Law Act*, SBC 2011, c 25.

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Comité acknowledges filiation can happen outside of the conjugal paradigm. However, the scheme is meant to work within the heterosexual paradigm. The first striking example is the gendered nature of filiation exposed in the previous paragraph. The Comité does not think about parents, it rather thinks about fathers and mothers. When the Comité illustrates the parental regime, it refers to father and mother.[838] When it illustrates surrogacy it refers to father, spouse and surrogate mother.[839] It provides no mechanism to protect 'second' parents or single mother by choice. Case law has shown these parents are vulnerable.[840] It disregards years of exclusion of non-biological parents and how intent is hard to prove when you are in a situation at the margins. By abolishing the presumption of parentality, the Comité may be removing one of the few mechanisms available to *de jure* second parents. For example, in a hypothesis where the second parent would be excluded by the birth mother (hurdles to access, secrecy about birth and impossibility to fill out a declaration of birth) or the intent of the parties to the parental project were unclear following birth, the second parent could rely on a presumption of parentage, easing his or her evidentiary burden. Now, this option would be unavailable. Also, by emphasizing fathers and mothers over parents, it also sends an exclusionary message to trans parents, non-binary parents or parents who do not identify with these labels. Not everybody is a father or a mother; there are other options. As a matter of fact, there is currently a "[m]otion challeng[ing] the validity of articles 59, 60, 71, 72, 93, 111, 115, 116, 124, 126 and 146 of the *Civil Code of Quebec* ("CCQ") ("impugned provisions"). Plaintiffs argue that the impugned provisions result in the exclusion, prejudice and discrimination of transgender and intersex individuals and their children under both the *Canadian Charter of Rights and Freedoms* and the *Charter of Human Rights and Freedoms*".[841] Further, the report proposes to stick with the two-parent model, a model not necessarily adequate in all situations and an undoubtedly dyadic model of parenting that comes from a heteronormative framework.

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[838] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126 at 71

[839] *Ibid* at 169. I have argued the label "surrogate mother / mère porteuse" is problematic from a legal standpoint as it presupposes the surrogate is a mother, which is not necessarily the case.

[840] *LB v Li Ba*, 2006 QCCS 591 and its appealed decision, *Droit de la famille - 07527*, 2007 QCCA 362; *Droit de la famille — 111729*, 2011 QCCA 1180 (CanLII).

[841] While the final decision has not been rendered yet, one can consults these two interim decisions to have some background on the issue: *Centre for Gender Advocacy v Québec (Attorney General)*, 2015 QCCS 6026 (CanLII) and *Centre de lutte contre l'oppression des genres (Centre for Gender Advocacy) v Québec (Procureure générale)*, 2016 QCCS 5161 (CanLII).

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The proposed reform is consistent, it addresses surrogacy, it clarifies the importance of the declaration of birth, it identifies what are the fundamental elements at stakes when it comes to filiation, it considers stepparents, and more. It initiates necessary debates. It may rely too heavily on notaries and be discriminatory in requiring psychosocial evaluations for certain persons but not others. The same could be said about making some persons liable – the intended parent who withdraws consent – and not others – the biological father not willing to declare paternal filiation. It qualifies parental authority as an effect of the family, while it is probably an effect of filiation. In trying to dissociate the parental status from the conjugal status, the Comité might actually be doing the opposite.[842] Most importantly, not enough attention is devoted to the nature of relationships, their growing number and the importance of status in family law.

# Chapter 4

## 4 Towards a Theory of Relationships of Economic and Emotional Interdependency

Through times, with the coming into force of the book on the family, the *Civil Code of Québec* and subsequent reforms to family law, more and more relationships have been included in the Code. Strikingly, this has happened while the family itself began to hold a special place in legal thought. The arrival of a book on the family in the Code and public order mechanisms had the effect of distorting the perception of 'the family' in the Code and, most importantly, to make it flirt with legal personality. The Code sends a distorted image of 'the family' in law, considering both the entity and its members. Rights, duties and obligations have been included in the book because they gravitated around 'the family', but it is fair to say not enough attention was devoted to their inscription in civil law, in the Code and in the book. The fact that family law in the Code has been reformed almost every decade should be seen as an indication that something peculiar is going on. Law once conceived and regulated the family as a unitary entity despite its legal inexistence *per se*. The family was, at least in law's eyes, homogeneous, under the power of a single individual and of private matters. Under this paradigm, it has been explained

[842] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126 at 69.

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that the Civil Code minimally addressed the family as a unit mostly because there was no need. Only one relationship mattered: the relationship the husband had with his belongings, humans or property. It was hypothesized that 'the family' was not a legal notion in the Code and the Code dealt with one relation of power. Through time, this paradigm has significantly changed. Now, one can hardly consider family in the Code as either unitary, homogeneous or as a single relationship. Yet, whether the family is a 'legal entity' in the Code appears still unsolved from a theoretical perspective. Steps taken since 1980 lead one to believe the family unit supersedes the relationships within that unit. Law, especially in the Code, should go back to what it does and consider *relationships* rather than focusing on a non-legal entity identified as 'The Family'. Most importantly, the Code still hopes to channel behaviour, be normative and rely on a formal account of the family. 'The Family' in the Code, given its history and the values it has promoted, bears a strong normative content that may not be in line anymore with current needs of citizens and with basic legal principles. It is necessary to start exploring alternative reading of 'the family' and to include, in addition to its formal rules, a functional approach to regulating 'families' and relationships of economic and emotional interdependency in the *Civil Code of Québec*.

Building on the two previous chapters where the multiplication and transformation of conjugal and filial relationships have been pointed out, the complicated integration and nature of the family in the Code challenged, and the foundational element of relationships questioned, this chapter proposes to include a functional approach to the family, families and relationships in the *Civil Code of Québec*. The approach tries to be more inclusive and to shift the normative content from 'The Family' to meaningful *relationships*, more precisely relationships of economic and emotional interdependency. The theory of relationships of economic and emotional interdependency attaches legal effects to actual and functional relationships and identifies relevant qualities. This approach proposes to regulate families and relationships relying on functional qualities identified as relevant and to focus on relationships' content. It proposes a formal, organized, flexible and deduction-oriented scheme to address relationships on the basis of their qualities and functions. The idea is not to start from scratch, rather to build upon what is already identified as needing regulation, to assess why it does and to expand it to other situations sharing similar

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qualities and characteristics, or other meaningful characteristics. It is also about allowing relationships meeting formal criteria but not sharing the meaningful content and qualities to withdraw from the scheme. It is about allocating status on something different than the meeting of formal requirements or of identified criteria. This chapter specifically argues the Code should target relationships of emotional and economic interdependency rather than, for example, the presence of a child or the fulfillment of formalities (solemnization of marriage). Old and new relationships can be included in the Code in a consistent manner respecting principles of the law of persons (status), obligations, property and more. Law should concentrate on intimate[843] or privileged[844] relationships of emotional and economic interdependency[845] and their effects. Such an approach would challenge the *Civil Code of Québec* understanding of 'The Family' on many grounds.

By including a theory of relationships of economic and emotional interdependency in the Code, law holds the potential to evolve with time, to adapt to other mechanisms regulating the family and to embrace fluctuating state objectives and citizen needs. Under this approach, there is no need for a book on the family; rather mechanisms affecting intimate relationships should be included in other books, in line with the nature and functions of the mechanisms. The chapter proposes a recoding of relationships of economic and emotional interdependency in the Code. It is not about eliminating the normative project of the regulations of families, but about shifting it towards a different one, one where 'the family' is one of many ways to be interdependent and one where qualities of relationships matter more than their form. In addition, the stance is not about promoting solely autonomy and freedom, but rather a mix of liberty, autonomy, solidarity and protection with all the issues it imports in the scheme. Protection limits freedom and solidarity impedes autonomy. The idea is not to think about these as antipodal, binary or exclusive. It is rather about striking a balance with codified provisions where needs and expectations of citizens are best meet, a balance between protection and liberty, between

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[843] Diduck, 'What for' *supra* note 81.

[844] Eekelaar, *Personal Life supra* note 84.

[845] Cossman & Ryder, *Adult Personal Relationships, supra* note 86; Law Commission of Canada, *Beyond Conjugality. Recognizing and Supporting Close Personal Relationships*, Her Majesty the Queen in Right of Canada, represented by the Minister of Public Works and Government Services, 2001 [LCC, *Beyond Conjugality*].

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solidarity and autonomy. Focusing on relationships allows us to move away from a logic of channelling, a logic of form, a logic where contract is the only basis of conjugal status and title the most important element when it comes to parent-child relationships. It has the potential of clarifying the underlying elements at play when it comes to the establishment of conjugal and filial ties.

The chapter is divided in three parts. The first part explores the possible functions of family law and analyzes the relation between functions and a functional approach. It interrogates whether a functional approach of the family could be consistent with civil law as expressed in the *Civil Code of Québec* in family matters. The second part is devoted to theories of relationships found outside Quebec, theories centred on functions of relationships and content of relationships. The focus is mostly on Eekelaar concept of 'personal life' and Cossman and Ryder's theory of relationships of emotional and economic interdependency, but a few words on the report 'Beyond Conjugality' are included. Then, this approach to relationships of economic and emotional interdependency is applied to civil law, specifically to the *Civil Code of Québec* in family law one- matters. It is then further extended to other relationships, including parent-child relationships and an array of other relationships. It is argued formal rules and formalities-oriented regulation can be improved when combined with a functional approach. The third and last part seeks to recode relationships of economic and emotional interdependency in the *Civil Code of Québec*. In other words, the structure of 'family' protection mechanisms is revisited and rules are recoded in the relevant books (Persons, Obligations, Property and Prior Claims and Hypothecs). It argues that this recoding would increase consistency, and provide flexibility and adaptability to rules concerned with the regulation of intimate lives.

## 4.1 Functional Approach, Functions and Family Law

What are the functions of family law? Are the functions of family different from one jurisdiction to the other? Are they different from one legal tradition to the other? Are these functions exclusive to the unit of 'the family' or do they reach beyond? First, the interactions between the functions of family law, functionalism in family law and the idea of having the family functionally defined in private law are considered. Second, functions of family law in Quebec civilian scholarship are examined. Third, functions in family law scholarship in the common law world are exhibited. It will become obvious the functions of family law have been

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investigated in greater depth outside Quebec. Is there a reason so? Is there a tension between civilian reasoning and a functionally defined family in law? This part provides tentative answers to these questions and sets the groundwork for an argument in favour of including functionalist aspects into the regulation of 'families' and relationships in family law in Quebec.

### 4.1.1 The Functional Approach to the Family

In the common law, many authors have studied the functional approach to family law. The functional approach has been defined as such: "[i]nstead of focusing on the identities and formal attributes of the individuals within a relationship, the functional approach inquires whether a relationship shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs".[846] The functional approach is about *relationships* and their qualities or characteristics. It is an approach "appeal[ing] to those who do not promote one form of committed personal relationship over another but want to allow individuals to choose the form they prefer free of external disincentives".[847] For example, in Canada, it has been a strategy to expand the definition of the family in order to include unmarried cohabitants and same-sex partners.[848] Jenni Millbank even posited that the functional family was developed in Canada in Charter litigation and has been used in other common law jurisdictions over the last twenty years. She explained how the functional family is in line with actual experiences of family, how it is progressive and performative.[849] Indeed, she writes:

> [f]unctional family approaches accord with a core objective of feminist legal scholarship and law reform projects - to centre 'lived lives' rather than a legal doctrine or formal legal categories.' […] By positing law's role as reflecting and assisting actual families' experiences and needs, rather than as encouraging or mandating a particular family form, functional family approaches run directly counter to normative approaches to law such as the so-called 'channelling' purpose of family law.

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[846] NOTE, "Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family" (1991) 104:7 Harv Law Rev 1640 at 1646.

[847] *Ibid* at 1647.

[848] See generally Nicholas Bala, "The evolving Canadian definition of the family: Towards a pluralistic and functional approach" (1994) 8 Int J Law, Policy Fam 293.

[849] Jenni Millbank, "The role of 'functional family' in same-sex family recognition trends" (2008) 20:2 Child Fam Law Q 155.

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Such an approach aligns with lived experiences and refrain from channelling individuals into formal institutions. It has also been documented when it comes to parent-child relationships.[850] Eekelaar associates the approach with “the approach taken by family sociologists in the 1950s and 1960s which analysed the family in terms of the functions which the analysts perceived it to be playing”.[851] The functional family has undeniably been part of family law’s landscape in Canadian common law for a while. The idea of a functional approach to the family has also been an important tool or strategy to reduce the normative conception of the family and has been extensively studied.[852] It has been used as an interpretative method used by judges to achieve certain purposes in family law.[853]

Unfortunately, in Quebec private law, the strategy did not work out as efficiently. It has been used in two appellate court decisions: *Droit de la famille — 139*[854] and *Quebec (Attorney General) v A*.[855] In the former decision, the issue was whether the *Order Designating the Province of Quebec for the Purposes of the Definition “applicable guidelines” in Subsection 2(1) of the Divorce Act (“Order”)*[856] violated section 15 of the Charter. The case involved six appellants divorced from husband with high incomes. The divorced wives claimed, relying on a functional approach,

> that their financial situation has been difficult following the breakdown of their marriages, even though they receive support payments for the children born of the marriage and, in some cases, spousal support. They observe that if the *Federal Child Support Guidelines*[3] ("federal guidelines") applied to their cases, they would receive more generous child support payments than the payments they

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[850] Jenni Millbank, “The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family” (2008) 22:2 Int J Law, Policy Fam 149.

[851] Eekelaar, *supra* note 84 at 27.

[852] William C Duncan, “‘Don’t Ever Take a Fence Down’: The ‘Functional’ Definition of Family - Displacing Marriage in Family Law” (2001) 3 J LAW Fam Stud 57; Kris Franklin, “‘A Family Like Any Other Family:’ Alernative Methods of Defining the Family in Law” (1990) 18 NYU Rev Law Soc Chang 1027.

[853] In the Canadian context, the functional account is generally associated with Charter litigation, especially section 15.

[854] *Droit de la famille — 139*, 2013 QCCA 15 (CanLII). Unofficial translation can be found here: http://canlii.ca/t/fvpgh

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

[856] SOR/97-237, (1997) 131 C. Gaz. II, 1415.

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> currently receive under the *Regulation respecting the determination of child support payments*[4] ("Quebec guidelines").[857]

Substantial differences exist between the guidelines. For example, one of the appellants, Aline, received $8,100 in child support under the Quebec guidelines. However, under the federal guidelines, would have received around $20,000. Yet, the realities and needs of such family were similar. The appellants argued a distinction was made relying on the province of residence; a tricky choice given it was a recognized analogous ground for discrimination.[858] It nonetheless somehow worked in first instance and the *Order* was rules discriminatory. "However, applying the framework followed by the Supreme Court in *R. v. Oakes*, the first judge found that the [*Order*] that incorporates the Quebec guidelines into the federal legislation can be justified in a free and democratic society pursuant to section 1 of the Charter".[859] The Court of Appeal found the *Order* did not infringe section 15 of the *Charter* since the 'province of residence' is not an analogous ground. In the second case, *Quebec (Attorney General) v A*, the reliance on the functional approach was much heavier than *Droit de la famille — 139.* As explained earlier, *Quebec (Attorney General) v A* challenged the differences in treatment between married and unmarried partner in the *Civil Code of Québec.* It focused on the articles found in the book on the family. She summarized the entire issue as a tension between functions and formalities: "[t]he question before us is whether dependent *de facto* spouses in Quebec should be denied access to fundamental legal protections simply because their spousal relationship lacks the formality of a civil union or marriage".[860] The functional approach was prevalent in the dissenting opinion of Justice Abella, as shown by these excerpts:

> [316] As attitudes shifted and the functional similarity between many unmarried relationships and marriages was accepted, this Court expanded protection for unmarried spouses.
>
> […]
>
> [350] There is little doubt that some *de facto* couples are in relationships that are functionally similar to formally recognized spousal relationships. When introducing family law reforms in 1976, the Ontario Ministry of the Attorney

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[857] *Droit de la famille — 139*, 2013 QCCA 15 para 5.

[858] *Droit de la famille — 139*, 2013 QCCA 15 para 48-70.

[859] *Droit de la famille — 139*, 2013 QCCA 15 para 36.

[860] *Quebec (Attorney General) v A*, [2013] 1 SCR 61 at para 285.

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> General acknowledged that the functional characteristics of unmarried relationships justified some protection:
>
> […]
>
> [352] This understanding of the functional similarity of *de facto* unions to marriages, it should be stressed, is shared in Quebec, where the Civil Code Revision Office, in proposing changes to the regime governing *de facto* spouses in 1978, accepted these functional similarities, commenting that "*[d]e facto*unions, though perhaps more tenuous, are often as stable as marriages" (*Report on the Québec Civil Code* (1978), vol. II — *Commentaries*, t. 1, at p. 113).
>
> […]
>
> [356][…]Since many spouses in *de facto* couples exhibit the same functional characteristics as those in formal unions, with the same potential for one partner to be left economically vulnerable or disadvantaged when the relationship ends, their exclusion from similar protections perpetuates historic disadvantage against them based on theirmarital status.

Justice Deschamps also referred to the functional perspective:

> [386] From a functional perspective, all the impugned measures have the effect of protecting married and civil union spouses who are in need following a separation. However, since support and the other protections do not have all the same bases, I find that the Court of Appeal was correct to distinguish support.

But such an approach to family issue failed to modify codified rules, despite the finding that the rules were discriminatory. Resorting to section 15 of the *Charter* did not provide for the expected outcomes.

The strategy has also been evoked in the context of parent-child relationships using the *Quebec Charter.*[861] The *Quebec Charter* is a different tool than the *Canadian Charter.* It is probably closer to Human Rights Codes. It is quasi-constitutional, and addresses private relationships as much as relationships between citizens and the State. Contrary to the *Canadian Charter, Quebec Charter* has sections devoted especially to children.[862] In *Droit de la famille – 072895*,[863] two women lived as a couple from 1988 until 2002, having known each other since 1981. Two children were adopted during their relationships, but given the state of the law back then, only one woman formally adopted the children. The decision was about whether shared custody could be granted. In first instance, it was ruled shared custody could not be granted. The

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[861] *Charter of Human Rights and Freedoms*, CQLR c C-12.

[862] See sections 39, 41 and 42 of the *Quebec Charter*.

[863] *Droit de la famille - 072895*, 2007 QCCA 1640 (CanLII).

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Court of Appeal allowed the appeal and confirmed shared custody was possible even if one of the women was not a legal parent. Justice Dalphond's comments in his concurring opinion are interesting. He wrote:

> [87] En résumé, les filles ont droit à l'attention de l'appelante dans le cadre d'une garde partagée. J'ajoute que l'art. 39 de la Charte me semble leur garantir aussi le droit à des aliments de la part de l'appelante. La combinaison des art. 10 et 39 de la Charte m'amène à conclure que la notion 'in loco parentis' s'applique tant aux couples mariés que non mariés lorsque le conjoint du parent de l'enfant tient dans les faits lieu de deuxième parent pour l'enfant.

Relying on the *Quebec Charter* and using a functional approach, he stated the *in loco parentis* principle applies to both unmarried and married spouses. His comments have been described as *obiter dictum* and likely did not change the interpretation of the *in loco parentis* doctrine in Quebec civil law. He nonetheless used, relying on the *Quebec Charter*, a functional approach to try to expand the interpretation of a rule.

One can think of some theoretical reasons why family law in the Code resists such changes: the role of the judges in civil law, the fact that private law is at stake, the importance of the Code as a symbol of national identity and Quebec's complex identity in general, cooperative federalism, and more. But, functions and a functional approach can inspire legal rules and their drafting in Quebec family law. Nothing prevents codified rules from operating on the basis of functional criteria. A good civil law principle should be abstract and flexible enough to *adapt to a changing society*. The solution resides in the introduction of a functional approach to families and relationships in the articles of the *Civil Code of Québec.*

### 4.1.2 Functions in the Common Law

In the Canadian context, the functional approach to family law has materialized through section 15 of the *Charter*. It is a very specific approach to the functions of the family. In sociology, "broadly speaking, the functionalist perspective has focused on the functions of the family in society and for its members. In other words, it looks at how the family, as an institution, helps in maintaining order and stability in society, and the significance of the family

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for its individual members".[864] This approach has been pervasively used in anthropology and sociology of the family – one can think of George Murdock or Talcott Parsons' work in the US for example.

These reflections around functions and families echo in law. The question whether the family has legal function was raised early on in Canada by Frank Bates.[865] Relying on two sociologists (Ogburn, Murdock) and a legal writer (Llewellyn), Bates enumerated the legal functions of the family. For Ogburn (1938), the family has seven functions for the members of the family, for the family as a group and for society in general. The seven functions are: "the production of economic goods and services, status giving, the education of the young, religious training of the young, recreation, protection and affection".[866] Murdock claimed in 1949 four universal functions for the family: "sexual, economic, reproduction and socialisation".[867] It is interesting to note he split the sexual and reproduction functions. Finally, Bates cites the four functions of Llewellyn: sexual, group perpetuation, economic and personal.[868] Functions of the family have been studied extensively in sociology. In the end, Bates indicates, after an interesting investigation in the Canadian context, it is hard to identify legal functions for the family:

> it is hard to pin down any specifically legal functions which are possessed by the family. Historically, this is explicable on the grounds that family law in common law jurisdictions has tended not to concern itself with either the internal or external dynamics of the family, being almost solely concerned with the formal creation and dissolution of the family group.[869]

The functions of family law have been thoroughly studied in the common law tradition. In an article published in the *Hofstra Law Review* in spring 1992, Carl Schneider identified five principal functions in family law in the United States: a protective function, a facilitative function, an arbitral function, an expressive function and, most importantly, a channelling

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[864] This quote is from an online course in sociology. You can consult the website here: http://vcampus.uom.ac.mu/soci1101/541functionalist_perspective_on_the_family.html

[865] Bates, *supra* note 320.

[866] *Ibid* at 459. He refers himself to William F Ogburn, "The Changing Family" (1938) 19 The Family 139.

[867] *Ibid*. He refers to George P. Murdock, *Social Structure* (New York : Macmillan, 1949).

[868] *Ibid*. He refers to Karl Llewellyn, "Behind the Law of Divorce" (1932) 32 Columbia L Rev 1281 at 1288-1296.

[869] *Ibid* at 476.

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function.[870] The protective function refers to "law's most basic duties […] to protect citizens against harms done by them by other citizens".[871] The protection targets various kinds of harms, both physical and non-physical. This protective function is definitely present in the Civil Code with mechanisms such as the compensatory allowance or the family patrimony. For filial relationships, the best examples would probably be articles 32 and 33 CCQ. Even if these articles are not in the book on the family, the former indicates "[e]very child has a right to the protection, security and attention that his parents or the persons acting in their stead are able to give to him", while the latter emphasizes, "[e]very decision concerning a child shall be taken in light of the child's interests and the respect of his rights". The Civil Code protects parties, *de jure* spouses or children, in family law and this function is in line with what Christine Morin asserted (see below).

Schneider also explains that family law has a facilitative function. This function "offer[s] people the law's services in entering and enforcing contracts, by giving legal effects to their private arrangements".[872] It helps people organize their lives. This function is also fulfilled in the Civil Code. One can think, for example, of the default matrimonial regime. People entering marriage without a contract as to the division of their property upon breakdown will see law's service, to use Schneider's words, in entering a contract. This is also applicable to people choosing to draft a contract when it comes to their matrimonial regime. As per article 431 CCQ, "any kind of stipulation may be made in a marriage contract, subject to the imperative provisions of law and public order". This function also applies to filial relationships and the Civil Code facilitates interaction within the family, even those that are not contractual. An illustration is found in article 525 CCQ: the Code facilitates the establishment of filiation using a presumption for married spouses.

Schneider's third function is called the arbitral function and "help[s] people resolve disputes".[873] The Code has the function of dispute resolution in family law. It encompasses rules people resorts to in order to claim their rights. Even when combine with other ways to solve

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[870] Schneider, *supra* note 81.

[871] *Ibid* at 497.

[872] *Ibid* at 497.

[873] *Ibid* at 497.

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family law issues – such as family mediation for example – the Code still provide for the basic rules to be followed. The fourth function is the expressive function and has two dimensions. The expressive function "works by deploying the law's power to impart ideas through words and symbols".[874] This function has an active and passive dimension. The passive dimension consists in "provid[ing] a voice in which citizens may speak".[875] It is unclear whether Schneider means law has a discursive function or if he means that citizens can 'speak law', for example by going to court, and see their rights respected. He may also suggest something else. It is obvious that the Civil Code 'provide[s] a voice in which citizens may speak". It contains a lexicon of law words for the citizens to use. As for the second dimension of the expressive function of family law, it "alter[s] the behaviour of people the law addresses".[876] Law acts as a guide to transform behaviours. A concrete example would be article 394 CCQ, which provides, "[t]he spouses together take in hand the moral and material direction of the family, exercise parental authority and assume the tasks resulting therefrom". This article was an equality statement at a time when Quebec legislature was concerned with promoting spouses' equality. It also had arbitrative effects.

Finally, according to Schneider, family law has a channelling function: "[i]n the channelling function the law recruits, builds, shapes, sustains, and promotes social institutions".[877] "[L]aw creates or (more often) supports social institutions which are thought to serve desirable end".[878] Schneider adds, "[a]s Berger and Luckmann write, "[i]nstitutions [...] , by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction against the many other directions that would theoretically be possible".[879] Technically, he later explains, "the channelling function is normatively neutral" meaning it could promote anything. The channelling function is not estranged from civil law's model and the channelling function of the Code might even be bigger: the Code set codes Quebecers have to abide by.

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[874] *Ibid* at 498.

[875] *Ibid* at 498.

[876] *Ibid* at 498.

[877] *Ibid* at 496.

[878] *Ibid* at 498.

[879] *Ibid* at 498 [notes omitted].

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Schneider's claims on the key functions of family law have been the subject of considerable debate. The channelling function has been the subject of critique,[880] with some family scholars arguing "the law [family law] should not function to enforce desirable social norms".[881] McClain identified other important functions. She suggests society moved from the channelling function of family law – where family represents an ideal to conform, ideal that she identifies as a sequence of love ➔ sex (marriage) ➔ procreation (baby carriage) – towards a more functional 'definition' or understanding of the family. She names this understanding the "how to assess challenges" now that the ideal is disrupted.[882] She adds family law may pursue the goal of fairness.[883] McCain argues against specific normative and formalistic visions of the family. Law should not channel individuals into particular kinds of family relationships, but it should still reflect some social norms. Functions can be simultaneous and contradicting.

Other scholars have written on the functions of family law, its 'what for'[884], its order[885] and its chaos.[886] For John Eekelaar, in United Kingdom, family law holds three principal functions: a protective function, an adjustive function and a supportive function.[887] He made strong claims about the shift from formalism to functionalism in family law. Despite being criticized for "oversimplify[ing] the diversity of family life",[888] his three functions have influenced the scholarship on the functions of family law in common law, but less so in civil law. The protective function "protect[s] individuals from harm within the family",[889] the adjustive function "provide[s] a machinery for adjusting affairs between individuals when the family unit

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[880] Linda C McClain, "Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law" (2007) 28 Cardozo Law Rev 2133.

[881] Olivia Egdell-Page, "The Concept of Family Law: Understanding the Relationship between Law and Families" (2015) 3:1 North East Law Rev 68 at 73.

[882] McClain, *supra* note 880 at 2135.

[883] *Ibid* at 2174.

[884] Diduck, "What for"*supra* note 81.

[885] Mark Henaghan, "The Normal Order of Family Law" (2008) 28:1 Oxf J Leg Stud 165.

[886] Dewar, *supra* note 82.

[887] Eekelaar, *supra* note 23 at xxviii; Eekelaar, *Personal Life supra* note 84 at 28.

[888] Egdell-Page, *supra* note at 70.

[889] Eekelaar, *supra* note 84 at xxviii.

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ends"[890] and the support function "direct[s] social support to families which are in being".[891] He acknowledges how "family law materials do not easily fit into this framework".[892] Functions may overlap. His functions nicely evoke both intact families and family units ending. In his later work, he developed an idea close to the channelling function of Schneider, before the channelling function of Schneider. Eekelaar coined it 'normative law', a rather paradoxical expression. To him "law may seek to establish, or re-establish, behaviour patterns in conformity with a desire image of society".[893] When family law does that, its task is to spread norms. Similarly Ellman stated that family law is "[i]nstumental, designed to affect people's behaviour in some way that policymakers believe desirable".[894] For Alison Diduck, family law is about allocating 'responsibility for responsibility'. More precisely, "[f]amily law determines the responsibilities of individuals to each other and by extension, the responsibilities of families and the state and the community to each other".[895]

This conception of the role and function of family law could be challenging for civilists, given its resonance in both private and public law. Indeed, from private law perspective, there is a sense individuals manage their relationships amongst themselves. Private law is about horizontal relationships, relationships between legal subjects. Yet, if the relationships are between the State and an individual, the understanding of relationships is closer to public law, the same can be said if the content of horizontal interactions is too heavily regulated. Once again, family law sits uncomfortably between public law and private law. Brenda Cossman, writing for common law but in Canada, proposes something more in line with the traditional classifications of civil law: "family law has always been about the public enforcement of private responsibilities

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[890] *Ibid*.

[891] *Ibid*.

[892] *Ibid*.

[893] John Eekelaar, "Family Law and Social Control" in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence Third Series)* (Oxford: Oxford University Press, 1987) 125, at 126.

[894] See Ira Ellman, "Why Making Family Law is Hard" (2003) 35 Ariz State Law J 699 at 701, previously cited in McClain, *supra* note 58.

[895] Diduck, "What for" *supra* note 83 at 292. See also, Alison Diduck, "Family Law and Family Responsibility" in J Bridgeman, H Keating and C Lind (eds), *Responsibility, Law and the Family* (Abington: Routlege, 2016) 251.

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of individual family members".[896] While the state clearly has a role to play, the responsibilities are from one person to the other, are contained in a horizontal bond. Her article focuses on a specific issue in family law: how "family law is becoming a more important regulatory instrument for the enforcement of private support obligations for economically dependent family members",[897] which is in line with the support function previously mentioned.

Family law's function can also be about power. Family law is about formal and informal control of power. Here, it materializes in three specific ways: power between individual family members (ex. husband over wife), power of one type of family over another type of family (ex. heterosexual married families over other families), and power between the state and the family (ex. the criminalization of marital rape, 'right' to family privacy). Eekelaar first chapter in *Family Law and Personal Life* is entitled "Power".[898] While he identifies many instances where the exercise of power was the main objective, he states, "family law cannot just be about the way these systems of power are exercised".[899] Throughout the book, as Mark Heneghan eloquently writes, " [t]he theoretical framework treads with elegance and compassion that delicate path between giving people the freedom to define their own intimate lives, and protecting people from the harms others may do to them in personal relationships".[900] In his own text, Heneghan thus sum up Eekelaar's thoughts: "[t]he function of law is to constrain the wrongful exercise of power and to leave room for individuals to make free choices in the 'privileged spheres' of their intimate lives".[901] Rob George, building on Rawls and Eekelaar, reaffirms that "the control of power is one way which some scholars conceive of the purpose of family law".[902] It is not family law's function to assert power on people or to entitle one member of the family with powers over others. "Power" may not grasp the basic function of family. Family law – at its most general

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[896] Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatisation Project" in Brenda Cossman and Judy Fudge (eds), *Privatization, Law, and the Challenges to Feminism* (Toronto: University of Toronto Press, 2002, 169 at 169.

[897] *Ibid* at 169.

[898] Eekelaar relies on Foucault (*Surveiller et punir: Naissance de la prison* (Paris: Gallimard, 1993 and *L'histoire de la sexualité* (Paris: Gallimard, 1994), but on several other scholars including Donzelot, Hart, Raz, Dworkin, Mann, and Giddens.

[899] Eekelaar, *Personal Life, supra* note 84 at 7.

[900] Henaghan, *supra* note 885 at 167.

[901] *Ibid* at 180.

[902] Rob George, *Ideas and Debates in Family Law* (Oxford ; Portland Or.: Hart, 2012) at 18.

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level of abstraction – is about balancing the choices of individuals and protecting the unique economic and emotional vulnerabilities of individuals within intimate relationships.

### 4.1.3 Functions and Quebec's Civil Codes

How could the analysis of functions and the functional perspective have effects in Quebec civil law, especially into family law one-? Some specific examples of how functions translate into the second book of the Code have been provided above. In Quebec family law one-, the functional approach family has attracted considerably less attention. As shown above, resorting to section 15 of the *Charter* also had limited results. But the functional approach to the family holds potential to propose new ways to think about intimate interdependency.[903] Family law should aim at fulfilling social needs, content and qualities should be of greater importance than the fulfillment of formalities and rules in the Code should be flexible and capable to adapt.

In Quebec, exploring the functions of family law has never been *à la mode,* but at best peripheral. The functions of family law have been omitted or slightly taken for granted. Depending on when and who looks at them, they can refer to either the functions of the marriage, the functions of the family, but rarely to the functions of family law and never to the functions of familial relationships. Thinking about the functions of family law is the first step towards including a functional account of families and relationships in the Civil Code of Québec.

During its mandate, the CCRO, relying on a text from Elkin,[904] identified three essential functions for what they labelled as 'the institution of the family': "integrating its members in the society, socializing children and stabilizing relationships between man and woman".[905] These are not functions of family law and functions of family law were not mentioned. Years later, in *Droit de la famille. Le mariage, l'union civile et les conjoints de fait: Droits, obligations et conséquences de la rupture,* Michel Tétrault pointed out specific functions *defining* the family.

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[903] Lisa Glennon, "Obligations Between Adult Partners: Moving From Form to Function" (2008) 22 Int J Law, Policy Fam 22; NOTE, *supra* note 846.

[904] They refer to Elkin's text as such: F. Elkin, *La famille au Canada*, April 1964, Congrès canadien de la famille, 8.

[905] Civil Code Revision Office, *Report on The Québec Civil Code,* Volume II (Commentaries, Tome 1, Books 1-4) (Quebec: Éditeur officiel du Québec: 1978) at 109.

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The first function is the reproductive function / *fonction de reproduction.*[906] Family ensures reproduction and the continuity of society. More precisely, he affirms the reproductive function of *marriage* – and not of the family – is less central now that same-sex couples can marry.[907] This assertion is interesting, as scholarship in the late 1800 also revealed this function, within the rhetoric of the 'definition of marriage'. Indeed, P.B. Mignault wrote in 1895 "[o]n peut y reconnaître, par cette définition du mariage, que si la *procréation des enfants* en est la fin principale, elle n'en est pas le but essentiel, unique. La loi y voit encore une société de secours et d'assistance".[908] In his opinion, the principal function of marriage, according to his definition, may be procreation, but it is not its unique or essential goal. Law sees marriage as a society of succour and assistance. There is something more to it than procreation. Brierley and Macdonald also defended, before the definition of marriage expanded and before the enactment of the civil union, that marriage was "not necessarily rooted in the act of procreation, the refusal to extend marital status to same-sex couples is probably due to other, predominantly religious, conceptions of the marriage bond".[909] Other scholars rightly acknowledge the relevance of same-sex reproduction.[910] Same-sex families participate in reproduction. Tétrault's second defining function of the family is the educative function / *fonction d'éducation.* This educative function is about educating children since the family is "the first place where social values and collective behaviours are passed on".[911] The last function underlined by Tétrault is the economic function / *fonction économique.* The economic function consists of "fournir la main-d'oeuvre nécessaire au développement d'un pays, elle est une unité économique essentielle à la consommation".[912] The economic function thus refers to two ideas: reproduction of the workforce, and consumption. Note that neither the CCRO nor Michel Tétrault say that these are the functions of family law.

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[906] Tétrault, *supra* note 19 at 25.

[907] *Ibid*.

[908] Mignault, *supra* note 19 at 331.

[909] Brierley & Macdonald, *Quebec Civil Law supra* note 63 at 235.

[910] See generally, Robert Leckey, "'Where the Parents are of the Same Sex': Quebec's Reforms to Filiation" (2009) 23:1 Int J Law, Policy Fam 62 and Robert Leckey, "Two Mothers in Law and Fact" (2013) 21:1 Feminist Legal Studies 1.

[911] Tétrault, *supra* note 19 at 27.

[912] *Ibid*.

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They rather speak of functions of the family, as a social entity rather than as a legal entity. Principal family law monographs do not address the question of the functions of family law.[913]

Other scholars have approached the question of the functions of family law differently. Christine Morin analyzes the functions of the *Civil Code of Québec* in the family. While it is not about the functions of family law or family law one- *per se* – this is so mostly because she only addresses a small portion of family law – she offers valuable insights on a subject less explored in Quebec. More precisely she examines the role of the Civil Code in conjugal relationships, with regards to the patrimonial aspects of these relationships, reminding us the Civil Code does not allow for the contractualization of the extrapatrimonial dimensions of the marriage bond.[914] Patrimonial and extrapatrimonial effects of marriage have been explained in chapter two. It has also been explained that the Civil Code does not allow for the contractualization of an important portion of patrimonial effects. Morin is particularly interested in the family patrimony. The Code has the "formal role to describe the family" and "the material role to prevent problematic situations".[915] The first role is qualified as *formal* while the second is qualified as *material.* For scholars of the first school of thought

> le Code civil est un ordre formel qui pose les paramètres de l'ordre. Son rôle est de structurer formellement la famille et la société, en vue du bien général. Par conséquent, il doit être pensé en fonction de la majorité, mais il doit laisser les personnes libres de se soustraire aux modèles qu'il propose.[916]

The Code is concerned with the common good and should be in line with the majority's needs. Yet, individuals should be free to withdraw from the models proposed by the Code. The degree of desirable intervention will differ from one scholar to the other, but the Code generally has a "fonction d'orientation des comportements",[917] it guides behaviours. Under the second school of thought,

> le Code civil aurait davantage une fonction d'orientation de la société pour atteindre des objectifs sociaux. Suivant cette représentation, le code ne doit pas être pensé qu'en fonction du bien-être de la majorité de façon générale. Il doit, au

[913] For example, Pineau & Pratte, *supra* note 12; Castelli & Goubau, *supra* note 19.

[914] Christine Morin, "La contractualisation du mariage : réflexions sur les fonctions du Code civil du Québec dans la famille" (2008) 49:4 C de D 527 at 529.

[915] *Ibid* at 531 [my translation].

[916] *Ibid* at 532 .

[917] *Ibid* at 535.

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> contraire, être construit en tenant compte des situations problématiques qu'il permettra de corriger.[918]

Morin describes the Code's two functions as opposed. She states that the second function prevails: the Code orients society and allows for protection of individual from problematic situations. One could extrapolate and affirm that the functions of family law are akin to those of the Civil Code in the family when it comes to patrimonial relationships: express what the family should be, or protect parties and prevent problems. As such, the function of family law would be to propose a model and channel people. For example, the Code by labelling its book 'The Family' and including only *de jure* conjugal unions may be expressing what family should be and allowing people to withdraw from it. On the other hand, when the Code imposes a mandatory mechanism such as the family patrimony to all *de jure* unions, it probably aims at protecting parties and preventing problems. It thus appears unrealistic to state functions are either one or the other.

Robert Leckey has explored the dichotomy between formalism and functionalism in various articles he has written.[919] Most importantly, he has described the tension between form and function in Quebec family law in a report titled *Families in the Eyes of the Law Contemporary Challenges and the Grip of the Past*. He explains the Code has

> different bases for recognizing family relationships. Some rules of family law attach consequences to relationships on a basis that is formal. The classic formal basis for recognizing family relationships are marriage and parentage or filiation. The contrasting bases for recognizing family relationships is functional — namely, that the individuals have functioned similarly to the members of formally recognized family relationships. Recognition of unmarried cohabitation and of sustained conduct as a parent are examples of the functional approach. A functional approach often takes individuals' conduct as an implicit commitment to the relationship.[920]

While functions are not prevalent in the second book of the Code, it cannot be said that they are absent. Certain rules or principles consider individual's conducts as the basis for proving and ultimately establishing certain rights, duties or obligations attached to a particular status.

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[918] *Ibid* at 536.

[919] Robert Leckey, "'Where the Parents are of the Same Sex': Quebec's Reforms to Filiation" (2009) 23:1 Int J Law, Policy Fam 62 and Robert Leckey, "Two Mothers in Law and Fact" (2013) 21:1 Feminist Legal Studies 1.

[920] Robert Leckey, *Families in the Eyes of the Law. Contemporary Challenges and the Grip of the Past* (2009) at 3.

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Quebec family law scholars have not focused explicitly on questions of functions within family law. Yet, there are many ways to identify underlying functions even within a formalist tradition. Indeed, family law one- relies on some functional rules. While these rules generally palliate for defects in formalities, they nonetheless account for functional elements and qualities of relationships. For example, the possession of status of a child is "a means of proving filiation by blood or filiation by assisted procreation. It is established by a combination of adequate facts indicative of the relationships of filiation between the child and his or her parents".[921] This way to prove filiation does not depend on formality but rather on a functional account of a relationship, relationship holding specific qualities developed in case law and scholarship.[922] In addition, it should be said that this approach is not absent from the Code in general.[923] Interestingly enough, formal rules are often preferred to functional rules when it comes to effects on third parties. This is paradoxical in family law because the Code mostly zeroes in on relationships between family members themselves and nonetheless relies on a formal understanding of the family. There is a way in which formal rules may still be seen to be performing functions. For a functional account of the family in the Code to work, a balance between form and function has to be struck.

This analysis of the functions of marriage, the family and family law in Quebec civil law in legal scholarship is rather unsatisfactory. The question is rarely explicitly asked. Maybe it is because the Code has its own functions and since "The Family" is part of the Code, the functions of family law are shared with the general functions of the Civil Code, or even with the functions of law in general. As explained in chapter 2 and especially in part 2.3.3, conjugal relationships are regulated in family law one- based on their fulfillment of formalities. Family law in the Code, as it has been explored in previous chapters, heavily relies on a formal understanding of relationships producing effects in the intimate sphere or the family; the family is not defined functionally and the family is often equated with the couple. Formal conjugal relationships

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[921] Allard, *Dictionary: Family supra* note 203 *sv* "possession of status of (a) child".

[922] *PB v MS,* [2003] RDF 816; *Droit de la famille – 161318,* 2016 QCCS 2584; *Droit de la famille – 142296,* 2014 QCCA 1724; Marie Pratte, "La possession d'état: un mode de preuve méconnu" (1993) 24 RGD 571.

[923] For example, the Code has a functional account of the contract, rather than a formal account: 1385 and ff CCQ. Form is also relevant to contract in some instances: see art 1414 CCQ. In the law of persons, functional accounts are also relevant: see arts 15 "close relative or a person who shows special interest" and 32 "persons acting in their [the parents] stead".

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multiplied, but without the solemnization of a marriage or a civil union, conjugality produces no effect in the second book of the *Civil Code of Québec.* The Code promotes a formalist approach to the regulation of conjugal ties, where *de jure* bonds are heavily regulated and other bonds are not contemplated. The situation produces inconsistencies between how family is regulated in Book II and elsewhere in the Code. But functions can underlie formalism and there is a failure in current Quebec law to make explicit the functions of family law. Cherishing formalism only was convenient. It provided for clear dates, publicity and an illusion of 'consent' or choice to enrol in the protective mechanisms put forward by the State. It allowed for not thinking about the functions fulfilled by these formal ties. Maybe it worked well at a time when Quebec's society was relatively homogeneous, when most people married, and when the only way to have children in the eyes of the law was within marriage. But now, relying on formalism or criteria does not work. It is time to think seriously about the functions performed by relationships notwithstanding their form.

## 4.2 Towards a Theory of Relationships in the *Civil Code of Québec*:

A strong theory of relationships for family law one- in Quebec represents a way to infuse the regulation of families and intimate relationships with a functional approach while respecting the Code's preference for formalism in Quebec law. A theory of relationships allows for a functional account of family ties or even of ties of emotional and economic interdependency in the *Civil Code of Québec.* The Code should regulate specific relationships performing certain identified functions, these relationships can be formal or not. This would be a move towards a functionally defined 'family' and would challenge the dominant understanding of 'formalism'. A theory of relationship is consistent with the demonstration offered in the previous chapters given relationships have multiplied in family law from 1955 until now, but have rarely been analyzed relying on their content. Relationships have been regulated on the basis of their form, but this is only one of various options available in civil law's tools box. It is also important not to forget5 that form performs functions. As Justice Abella wrote in her dissenting opinion in *(Quebec) Attorney General v A*: "the history of modern family law demonstrates, fairness requires that we

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look at the content of the relationship's social package, not at how it is wrapped".[924] This part proposes to build on her advice.

This approach is also mindful of civilian principles. A different way to use the notion of status in family matters reinforces such an approach to family law. 'Status' does not have to be triggered by formal elements only. Status could be triggered by functional elements, or by a *situation juridique* rather than by the accomplishment of 'formalities', formalities that have been equated, rightfully or not, with a contractual understanding of the family for adult relationships and status when it comes to parent-child relationships.

What does a theory of relationships of economic and emotional interdependency look like? What elements, nature or qualities do these relationships hold? What values animate this way of conceiving the regulation of intimacy? Can it be expanded to parent-child relationships? To other kinds of relationships? Cossman and Ryder's and Eekelaar ideas can inspire an alternative approach to intimate relationships in the *Civil Code of Québec.* This part proposes to address these questions and is divided in three parts. First, existing theories of relationships and selected examples of 'family' regulation outside Quebec are presented. Second, it is demonstrated these theories could apply to the *Civil Code of Québec* when it comes to family law one-. Third, it is proposed to expand the functional approach to the theory of relationships of emotional and economic interdependency by proposing qualities and tests to use in determining which relationships matter and which do not. The approach is not flawless and "it reflects the difficulties inherent in building a theory (and practice) that adequately reflects both the social and individual nature of human beings".[925]

### 4.2.1 Theories of Relationships: Cossman and Ryder, Law Commission of Canada, and Eekelaar

The ideas exposed in this part have not been fully discussed and integrated in family law one- in Quebec. Family law is not just about *formal* unions and *formally* recognized offspring. It

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[924] *Quebec (Attorney General) v A*, [2013] 1 SCR 61, para 285.
[925] Nedelsky, "Reconceiving Autonomy", *supra* note 451 at 8.

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is about persons in particular relationships the state decides to promote, foster, and protect. 'The Family' of the Code does not reflect the lived experiences of citizens.[926] It has been shown in chapters 2 and 3 how relationships multiplied: married, same-sex, civil union, blood, adoption, assisted procreation, etc. Yet, numerous other relationships are still absent notably unmarried spouses, and step parenting. It is time for the Code to reach further and to address relationships of economic and emotional interdependency based on their content and qualities. This section reviews three approaches to these relationships.

The first theory is the one developed by Cossman and Ryder in the 2000 report entitled *The Legal Regulation of Adult Personal Relationships: Evaluating policy Objectives and Legal Options in Federal Legislation* [*"Cossman and Ryder's Report"*]. The report, as the title indicates, is about adult relationships in federal law. It was published in 2000, thus before the redefinition of marriage in Canada[927] and the enactment of civil union in Quebec. Non-heterosexual couples were at the time left out of federal and many provincial mechanisms regulating the family. Two important concerns in the report are the redefinition of marriage and the creation of a registered domestic partnership scheme.[928] While these concerns were of chief interest in 2000, they are less now. Cossman and Ryder also report normative shifts. For the present purpose, the more important is that: "[t]here appears to be an emerging consensus in […] society that it is no longer legitimate to promote or discourage adult relationships solely on the basis of their status or formal attributes".[929] The theory underlying their proposition remains relevant, despite the proposition of a formal registering scheme, solution that is set-aside for the present purposes. Cossman and Ryder proposed "regulating adult personal relationships by reference to qualities that are relevant to legitimate state objectives".[930] They specifically name their relevant relationships "relationships of economic and emotional dependence".[931] They

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[926] Belleau, *supra* note 397; Belleau, *Quand l'amour et l'État, supra* note 300; Le Bourdais, Lapierre-Adamcyk & Roy, *supra* note 24.

[927] See *Halpern v Canada (Attorney General)*, 2002 CanLII 42749 (ON SCDC); *Civil Marriage Act,* SC 2005, c 33, preamble and s 2.

[928] Cossman & Ryder, *Adult Personal Relationships, supra* note 86 at vi.

[929] *Ibid* at 20. In Quebec, see COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126.

[930] Cossman & Ryder, *Adult Personal Relationships, supra* note 86, see executive summary.

[931] *Ibid*.

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assert that "the state should promote relational autonomy by avoiding policies that create pressure to abandon relationships of caring and commitment, or that accord preferential status to certain categories of relationships defined without reference to their qualitative attributes".[932] In their lengthy report, they raise numerous questions and propose sensitive answers. They ask: "[i]f two individuals live together in a relationship of economic and emotional interdependence, should they be included within the web of legal regulation, regardless of their "conjugal" status".[933] They explore three principal options for the regulation of conjugal – and to some extent – non-conjugal relationships by the state: marriage, domestic partnership regimes and deemed or ascribed spousal status. Marriage is both under and over-inclusive. It is under-inclusive since relationships possessing the same 'qualitative attributes' can be excluded and it is over-inclusive because it assumes a homogeneous dependency in all marriages. At the time of the report, under-inclusiveness was a substantial issue for same-sex couples. In addition, marriage is not really an option for relationships other than conjugal. They also explore in details its heavy history. It is fair to infer marriage was not their preferred options. Domestic partnership regimes are "registration schemes that establish a civil status parallel to marriage. Such schemes enable partners to formally register their relationships, express their commitment publicly, and voluntarily adhere to some or all of the legal rights and responsibilities conferred on married persons".[934] In their opinion, "that the enactment of a registered partnership scheme at the federal level will promote the values of caring and commitment, equality, autonomy, privacy and security that ought to guide state policy in relation to adult personal relationships".[935] Indeed, they consider that "[r]egistered domestic partners should be added to all federal statutes alongside married spouses and common law partners".[936] It was arguably the best suggestion at the time and given the context. It also is the path Quebec's legislature followed with the enactment of the civil union. However, Cossman and Ryder's proposition was more inclusive than civil union is. Their most innovative suggestion was in relation to the redefinition of ascribed status. They explain their solution as follows:

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[932] *Ibid*.

[933] *Ibid* at 2.

[934] *Ibid* at 129.

[935] *Ibid.*

[936] *Ibid* at 140.

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> [t]he current definition of ascribed spousal status lacks clarity, is still under-inclusive of the range of relationships that might warrant protection, and is potentially unduly intrusive of individual privacy. One option would be to attempt to introduce a new definition of cohabitation or conjugality. While the test would have to retain a functional component, it may be possible to better capture the particular dimensions of personal relationships that give rise to the need for legal recognition, and the allocation of legal rights and responsibilities. In our view, there are two factors that are particularly salient: **economic interdependence and emotional intimacy**. As we have argued elsewhere: It is the combination of **emotional intimacy and economic partnership that creates the unique vulnerability** of spouses to harsh consequences arising on the break down of a lasting relationship. Emotional intimacy is founded on the kinds of trust that tend to prevent people from taking seriously the possibility of economic deprivation if the relationship falters. And a high degree of economic interdependence potentially creates a high degree of economic vulnerability.[937]

More,

> While the precise drafting needs further consideration, we are of the view that the definition should include joint residence, emotional intimacy and economic interdependency. It could be phrased in a number of ways, such as "living together in a close emotional and economic relationship", "living together in an emotionally and economically interdependent relationship" or "living together in a close relationship, characterized by economic interdependency". But, the crux of the definition would be three fold: a shared residential relationship, a close emotional relationship, and an economically intertwined relationship. These three factors capture the basic value that should underlie the legal recognition of adult relationships: the promotion and protection of relationships of care and commitment.[938]

In Quebec today, their proposition could almost be seen as radical and *avant-gardiste*. There are many innovative thoughts and propositions in Cossman and Ryder's report, the primordial being to focus on the qualities of relationships and the state's objectives in regulating them.

It is impossible not to mention Law Commission of Canada's report *Beyond Conjugality. Recognizing and supporting close personal adult relationships [Beyond Conjugality Report]*.[939] Like Cossman & Ryder, the Commission's focus was more on federal law. The Law Commission relied on a new four-step methodology – in French a 'four-questions methodology' – to study meaningful relationships. The four questions are:

> 1. Are the objectives legitimate?
> 2. Do relationships matters?
> 3. Is self-designation possible?
> 4. Is there a better way to include relationships?

[937] *Ibid* at 149-150.

[938] *Ibid* at 164-165.

[939] LCC, *Beyond Conjugality, supra* note 845.

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a. Uniform definition
b. Tailoring definitions[940]

The report builds upon many suggestions made by Cossman and Ryder. In comparison with Cossman & Ryder, the *Beyond Conjugality Report* includes a few thoughts on private law. The Law Commission of Canada acknowledges that contracts are not an adequate, efficient and coherent tool to regulate intimate relationships.[941] Marriage has a heavy past. The Commission analyzes ascription and registration schemes as possibilities to regulate close personal adult relationships. Like Cossman and Ryder, they proposed to go with a registration scheme and an expanded notion of marriage.[942] Qualitative attributes of relationships are central for the Law Commission as well. History now teaches us their recommendations were mostly followed. The definition of marriage was expanded and Quebec enacted what could be equated with a registering scheme: civil union. But it is fair to say the issues surrounding the regulation of close personal relationships, adult interdependency or intimate lives remain unsolved in Quebec family law one- today.

The third approach is the one found in *Family Law and Personal Life* by John Eekelaar (2006). His theory was developed in the British context, but he draws examples from various countries and this makes his theory especially relevant for Quebec civilian, or rather mixed, legal system. John Eekelaar also proposes moving away from family law and focusing on personal law. He writes

> [i]n truth, we are dealing with the role of the law in relation to what is usually referred to as people's 'personal', or 'private', lives. […] It would therefore seem appropriate, and could perhaps be liberating, to abandon the label 'family' law, and replace it with the expression 'personal law'. […] The suggestion here is wider than that: it refers to laws, whether applicable on the basis of a communal allegiance or not, which purport directly to regulate their private life.[943]

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[940] These are the words of the Commission. For a sneak-peak of the four-step methodology see LCC, *Beyond Conjugality, supra* note 845 at 36.

[941] *Ibid* at 115-116.

[942] *Ibid* at 139-140.

[943] Eekelaar, *Personal Life, supra* note 84 at 31.

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He indicates that he refers to "the new era: from family law to personal law". [944] Eekelaar's theory is rooted in many notions and a complex and nuanced understanding of elements at play in regulating people. Only three concepts are going to be explained here to showcase his insightful take on the regulation of family living: open society, privileged sphere and personal law. Open society refers to Karl Popper's notion. It shares characteristics with 'liberal society', but Eekelaar wishes to avoid this "complex political theory".[945] Eekelaar states the concept of 'open society' "is sketched in stark and simple terms, but confronts the deepest political issues".[946] An open society is

> one in which people believe they can make their own decisions for themselves, freed from the belief that their futures are determined by the past. […] in an 'open' society the claims of the group, or its dominant members, to special knowledge about facts or that they have access to a more highly valued morality will never be allowed to go unchallenged.[947]

It is important to emphasize how people are autonomous in an open society. Autonomy is central. However,

> [i]t is a precondition for an open society that the exercise of autonomy by an agent is assumed to be in that agent's interests, and it is a precondition of believing that people have rights to hold that they have a right to achieve competence and articulate their own self-interest.[948]

Eekelaar's definition is in line with the definition of subjective rights in civil law and subjective rights are constitutive of the Civil Code. The Code, rightly or not, mostly relies on subjective rights. The open society is a conceptual ideal somewhat distinct from everyday family law. Yet, it allows freeing a system from certain contingencies, such as the past, morality and dominant groups. If family law in Quebec could only do that when thinking about reforming family law, it would be a fantastic development for the regulation of families. "In open societies […] choices will be accompanied by debate and criticism in the public domain".[949] Eekelaar also rely on the notion of 'privileged sphere'. The privileged sphere is linked with the intimate, the *intime.* The notion of 'privileged sphere' is described as such by Eekelaar

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[944] *Ibid* at 22–31.

[945] *Ibid* at 8.

[946] *Ibid.*

[947] *Ibid* at 8-9. Footnotes omitted.

[948] *Ibid* at 9.

[949] *Ibid* at 87.

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> […] a sphere of personal interaction, whether between adults with one another, or between adults and children, which is privileged in the way I will describe. I have in mind behaviours ranging from everyday communication and modes of dealing with routine events, and the allocation of domestic roles, to emotional interactions, strategies for coping with difficulties and crises, mutual participation in diversionary activities, modes of cares and so on. My claim is that, while individuals of course draw upon moral and social norms in their conduct in these contexts, they should do so free from institutional constraint and censure.[950]

Finally, Eekelaar uses the concept of personal law. He explains

> It would therefore seem appropriate, and could perhaps be liberating, to abandon the label 'family' law and replace it with the expression 'personal law'. In many jurisdictions, especially those which include communities with strongly distinctive religious traditions, 'personal law', or 'personal status law' is used to refer to laws which attach to individuals because of their membership of a religious or ethnic community and which cover matters covered by family law as we understand it. The suggestion here is wider than that: it refers to laws, whether applicable on the basis of an individual's communal allegiance or not, which purport directly to regulate their private life.[951]

This idea of personal law shares elements with what the *Civil Code of Québec* calls the law of persons. Not unlike the law of persons and despite his flexible approach of 'personal law', Eekelaar is categorical: "[t]he personal sphere is privileged, not licensed for irresponsibility".[952] His way to think about the regulation of family living adds to the one of Cossman and Ryder. Both leave aside formality and 'formal definitional categories' and observe law is a complicated balance between freedom and protection between individual. In both approaches, relationships matter. More, for Cossman and Ryder and for Eekelaar "the law should not be solely about controlling human behaviour, but should be about leaving space for people to find their own ways of leading their intimate lives".[953] It is also about ensuring minimal protection, fulfilling legitimate expectations and fostering solidarity.

In Cossman and Ryder, the Law Commission of Canada and Eekelaar's proposals, values are important to approaching the regulation of relationship. Cossman and Ryder acknowledge five values, the Law Commission of Canada focuses on two but includes seven and while Eekelaar states there are five but appears to prioritize only four.

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[950] *Ibid* at 82.

[951] *Ibid* at 31.

[952] *Ibid* at 85.

[953] Henaghan, *supra* note 885 at 181. This quote by Mark Henaghan beautifully sums up the essence of both theories.

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According to Cossman and Ryder, the five relevant values are: care and commitment, autonomy, privacy, equality and security. First, **care and commitment** appear to be related to supportive relationships. Indeed, care and commitment include "[c]aring for another entails a bundle of roles, such as attending to emotional and sexual needs, sharing resources to provide food, shelter and clothing, and providing personal services and guidance to dependants such as children or disabled, elderly or infirm adults".[954] Caring and commitment have a functional dimension; it is about what people "do"[955] in relationships. Parallels can be drawn between this understanding of care and commitment and *support*. Second, **autonomy** is relevant to relationships of economic and interdependence since it allows for "freedom to choose whether and with whom to form intimate relationships".[956] Remember, this was written prior to the opening of marriage to non-heterosexual partners and note that Cossman and Ryder evoke relational autonomy. In Quebec context, autonomy could also refer to the possibility to choose what type of union to live in, without being a stranger towards his or her partner or an outlaw to private law, and autonomy as an individual in a relationship protected by the state. The third value is **privacy**. Privacy refers to many things. It "includes the right to be free from unwarranted state intrusion or interference in intimate spaces".[957] Privacy could appear to belong to public law rather than private law and relationships between individuals, as it shields relationships from unwarranted intrusions by government officials (re: the registrar of civil status) or judges. Indeed, as Cossman and Ryder highlight, it "requires that the state avoid, wherever possible, the establishment of legal rules that cannot be administered effectively without intrusive examinations into, or disclosure of, the intimate details of adult personal relationships".[958] Under a functional account of meaningful relationships, there is a tangible risk of intrusion in citizens' lives. Thus, privacy, even if it sounds mostly associated with public law in the civilian mind, needs to be taken seriously within the Civil Code. Relationships as the one studied are private in nature and belongs in private law. The fourth value is **equality**. Obviously, equality in the report referred to equality of matrimonial statuses, including non-heterosexual

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[954] Cossman & Ryder, *Adult Personal Relationships, supra* note 86 at 30.

[955] *Ibid*.

[956] *Ibid* at 30.

[957] *Ibid* at 32.

[958] *Ibid* at 32.

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unions. Doubts have been mentioned earlier as to the relevance of equality, but Cossman and Ryder give it an interesting twist. To them, "[t]he value of equality also requires the state to be attentive to the potential for exploitation within personal relationships"[959] and they give an excellent example: family property law or what civil law would call matrimonial regimes. This understanding of equality is relevant in private law. Needless to say, the focus should be on substantive rather than formal equality. The last value is **security**. Security is twofold: first, relationships of emotional and economic interdependency "give rise to distinct forms of vulnerability"[960] and second, "[p]ersons in committed relationships reasonably expect the state to provide them with some protection in meeting their needs if they suffer a sudden deprivation of emotional and economic support".[961] In other words, the state has a responsibility to meet reasonable expectations of citizens as to how they are protected when relationships break down. In Quebec law, this way to understand security could not be more on point. Indeed, as of now, conflicting messages are sent to citizens by the state and their reasonable expectations are not met. The state in Quebec does not address inconsistencies between the Code and the other mechanisms aimed at regulating the family. It is thus creating insecurity and is responsible for much confusion as to what people are entitled too. Further, the Civil Code formal regime creates expectations that can only be met for married spouses or civil union spouses. A theory of relationships would take this into account and would improve the ways in which 'the family' is dealt with in the Code.

The Law Commission of Canada also identifies 'values' in the regulation of relationships of economic and emotional interdependence, the most important being **equality** and **autonomy**.[962] Equality is divided in kinds, relational equality and equality within relationships. The former refers to "seek[ing] to equalize the legal status among different types of relationships",[963] while the later has the goal to "overcome unequal distributions of income, wealth and power, much of it based on historic inequality between men and women, or the lack

[959] *Ibid* at 33.

[960] *Ibid* at 34.

[961] *Ibid* at 34.

[962] LCC, *Beyond Conjugality, supra* note 845 at 13-17.

[963] *Ibid* at xi.

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of state support for persons with disabilities".[964] Autonomy is defined as "requir[ing] that the governments put in place the conditions in which people can freely choose their personal relationships".[965] It is suggested that the State should 'remain neutral'. In addition, the report includes values such as **personal security**, **privacy**, **freedom of** conscience and religion, **coherence** and **efficiency**.[966] While "coherence requires that laws have clear objectives, and that their legislative design corresponds with the achievement of those objectives", "the efficiency of a law, policy or program may be measured by how effective it is, for example, in reaching its intended beneficiaries and whether it can be administered without undue costs or delays".[967] All these values should inform a theory of relationships.

There are five values in Eekelaar's perspective on 'personal law': power, friendship, truth, respect and responsibility.[968] **Power** appears to be a value treated differently. It provides for the "background of shifting power relations".[969] While influential on relationships, it might not be profitable to endorse power in the same way the other values are promoted. What's important, as Heneghan writes, is that "[p]ower is taken away from the group identity of 'family', which has significant ideological force supporting it, and given back to the individual person."[970] Giving the power back to the individual is important, but it is also dangerous. Power is rampant in family law. The second value is **friendship**. Eekelaar has a highly sophisticated understanding of what friendship means. What is worthy to mention for our purposes is "that the kernel of this type of relationship lies not in a sense of absence of *any* obligation, but in the belief that the obligation is *inherent, and not externally imposed.* It is voluntarily assumed".[971] In

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[964] *Ibid.*

[965] *Ibid.*

[966] *Ibid* at 13-24.

[967] *Ibid* at xii.

[968] In the reprinted version of his book published in 2009, he includes community. This value will not be examined for now.

[969] Eekelaar, *Personal Life, supra* note 86 at back cover (C4).

[970] Henaghan, *supra* note 885 at 172–173. He refers to another text: Mark Henaghan, "Legally Defining the Family" in Mark Henaghan and Bill Atkins (eds), *Family Law policy in New Zealand,* 4th ed (Wellington, New-Zealand: LexisNexis, 2013) at 307-414.

[971] Eekelaar, *Personal Life, supra* note 84 at 39.

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addition, he develops a concept of friendship plus.[972] **Friendship plus** implies a shared 'life plan' and a 'degree of mutual commitment to a shared life".[973] Such a state could have legal effects such as being the basis for compensation. The third value is **truth**. According to Eekelaar, law constructs new realities. The value of truth plays mostly in parent-child relationships. He uses 'truth' to emphasize "that a genetic link in itself does not establish an interest sufficient to warrant any legal entitlement to begin a relationship".[974] Truth is also intertwined with power and shame. Truth will be important to keep in mind when revisiting relationships with children. The fourth value is **respect** and Eekelaar wants to "argue that the idea of respect is a pivotal value in personal law".[975] He does this including other values such as love, care and nurture, religion, procreation, respecting children, etc. The last value is **responsibility**. Once again, Eekelaar has an erudite conception of responsibility, relying amongst other on Hart and Cane. Eekelaar believes "personal law should emphasize prospective responsibility. These are responsibilities which endure both during and after the relationship ends".[976] This understanding of prospective responsibility could be slightly modified. Indeed, they rather are responsibilities which endure both during and after the *family* ends: relationships last until they have to even if they change in nature.

The approaches share similarities and dissimilarities. Approaches taken together infuse thinking about intimate regulation with ideas that could and should translate into Quebec civil law and in the *Civil Code of Québec.* The three approaches advocate for an expanded understanding of what a family is and suggest focusing on meaningful relationships, keeping in minds norms and principles revolving around these relationships. In addition, they address the transformations of relationships rather than the end of 'the family'. While families break down, relationships often have to be maintained. They strike a balance between competing interests, both when it comes to members of relationships, but also when it comes to the relation between individuals and state intervention. None of them assume 'the family' is something bigger than its

[972] *Ibid* at 49.

[973] *Ibid* at 50.

[974] *Ibid* at 70–71.

[975] *Ibid* at 77.

[976] Henaghan, *supra* note 885 at 179.

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constituents. Cossman and Ryder are unequivocal: qualities of relationships are what law should care about. To them, relationships have to be of 'emotional intimacy and economic partnership'. Eekelaar also focuses on relationships: to him it is time to move towards personal or personal status law. Such ideas should inform a new approach for intimate regulation in the *Civil Code of Québec*: a theory of relationships of emotional and economic interdependency. Such a theory or an approach could be useful in Quebec's private law. It fits well with its history of multiplication of relationships, their transformations, it puts 'rapports de droit' front and center and is in line with core private law concepts. Reliance on emotional and economic interdependency is crucial. It would, however, materialize quite differently in the *Civil Code of Québec.*

### 4.2.2 Relationships of Economic and Emotional Interdependency in the *Civil Code*: Adults Relationships

Quebec's context is ideal to reflect as to how to animate family law with a new approach. It has been stated respectively that there is no theory underlying family law.[977] Rules keep changing to meet certain needs, without any direction or consistency. Family law is becoming more and more inconsistent. The only element making family law stick together in Quebec family law one- is an overreliance on the fulfilment of formalities and not analysis of the functions served by these formalities, and a distorted understanding of the 'contractual' family. Good rules should have the potential to evolve with time and to change in light of citizens' needs. It does not make sense for "family law" to be faced with reform every decade or so. A theory of relationships of economic and emotional interdependency allows for integrating family law rules in the Code in a consistent way and taking a step back from what has been done lately. It allows for starting a paradigm shift as to what matters in the regulation of intimate relationships.

It has been shown in chapters 2 and 3 how relationships multiplied: married, same-sex marriage, civil union, filiation by blood, adoption, assisted procreation, etc. Family law one- has however systematically relied on a formal account of the family to evaluate whether a legal relationship between adult or between adult and children may arise. Relationships are formed

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[977] Pineau & Pratte, *supra* note 14 at 11.

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based in the fulfillment of formalities and the content or qualities of relationships are more or less irrelevant. It would it be desirable to start thinking broadly about the *conditions d'existence* of 'familial' relationships and about the relationship's substantive qualities. Including a functionalist account to the regulation of relationships in the Code while respecting civilian categories and civilian principles could be beneficial. Indeed, it is time for the Code to address relationships of economic and emotional interdependency on the basis of various elements, not the fulfillment of formalities. It however does not mean that formalities should be seen as irrelevant, but that they cannot realistically be the only way to determine whether a relationship is 'familial' or not.

As such, the thesis proposes alternative ideas to regulate adult interdependency. In civilian's minds the state has technically not played a predominant role in organizing relationships between individuals. However, the state obviously influences intimate relationships in the Code. The Code has a whole section on 'private relationships' influenced by State imperatives; the law of persons. The law of persons and the notion of status allows for some rules people cannot contract out of, some rules stronger than unquestioned formalism. More, concepts, general concepts such as public order, limits the autonomy of the parties without creating outcries in the population. Nothing would prevent some limitations to property, priority or obligation law in order to create a space where freedom, autonomy, protection and solidarity can productively cohabit. It would be desirable to approach the notion of status and its effects differently when it comes to family law.

What kinds of relationships of economic and emotional interdependency should the *Civil Code of Québec* protect? How might Cossman and Ryder, the Law Commission and Eekelaar principles translate in the Code? In order to step away from heavy reliance on formality and a narrow understanding of what triggers a status, here a conjugal status or an adult interdependent status, it is proposed to move towards qualitative aspects of relationships. In lines with the values of protection, security and equality, entry criterion based on formal status should not be the only option in the Code. This is, to some extent, in line with what the *Comité consultatif* proposed in its report. Indeed, the Comité proposed[978] to use the definition found under section 61.1 of the

[978] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126, recommendation 2.1.2.1.

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*Interpretation Act* (CQLR c I-16) to broaden the spectrum of conjugal relationships in family law one-:

| **61.1**. Sont des conjoints les personnes liées par un mariage ou une union civile.<br><br>Sont assimilés à des conjoints, à moins que le contexte ne s'y oppose, les conjoints de fait. Sont des conjoints de fait deux personnes, de sexe différent ou de même sexe, qui font vie commune et se présentent publiquement comme un couple, sans égard, sauf disposition contraire, à la durée de leur vie commune. Si, en l'absence de critère légal de reconnaissance de l'union de fait, une controverse survient relativement à l'existence de la communauté de vie, celle-ci est présumée dès lors que les personnes cohabitent depuis au moins un an ou dès le moment où elles deviennent parents d'un même enfant. | **61.1.** The word "spouse" means a married or civil union spouse.<br><br>The word "spouse" includes a *de facto* spouse unless the context indicates otherwise. Two persons of opposite sex or the same sex who live together and represent themselves publicly as a couple are *de facto* spouses regardless, except where otherwise provided, of how long they have been living together. If, in the absence of a legal criterion for the recognition of a *de facto* union, a controversy arises as to whether persons are living together, that fact is presumed when they have been cohabiting for at least one year or from the time they together become the parents of a child. |
|---|---|

Such a definition allows for the recognition of *de jure* and *de facto* spouses and includes the presence of a child as an element triggering conjugal status. Potentially, this would be an option to step away from the superior status traditionally allowed to *de jure* relationships. It suggests that what private law conceives as 'conjugal' should revolve around formalities *and* some qualities of relationships (length, presence of a child, residency). Adult relationships however remain trapped in a logic of conjugality, which is one of many ways to be interdependent. More conjugality may or may not actually materialize in an interdependency status.

To use the Law Commission of Canada and Cossman and Ryder's terminology, the idea is to put forward a scheme of 'ascription,' albeit 'modified ascription'. Formal conjugal relationships would still trigger a status, but they would not be the only way to trigger a 'privileged status'. They would not automatically and without regards to the actual qualities of the relationship trigger a status and produce effects. The idea is not to change religious, cultural or societal habits or to create a space where everything that has been done in the past needs to be deleted or redone. It rather is about bringing consistency to the regulation of intimate relationships and building upon what is already done in the Code. The *conditions juridiques* set forth in section 61.1 of the *Interpretation Act* would slightly need to be expanded and modified. Formal unions – marriage and civil union – would create an interdependent status. *De facto* conjugal relationships meeting certain qualities (length, sharing a community of life, sharing a dwelling, etc.) also would. Note that these relationships would not account for the presence of

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children. It is not because children do not create interdependency, but rather because interdependency occasioned by the presence of a child should be dealt with by refining relationships between adults and children (this will be explained below).

The interdependency status would be presumed for both *de jure* and *de facto* relationships, but the presumption would be rebuttable. The spouses would thus have an ascribed interdependency status. The presumption is a choice aiming at facilitating the work of the party likely to be less powerful. The interdependency status would thus be automatically recognized. But this would not address the actual content of the relationship. As such, it would be possible to prove a spouse was not in a relationship of economic and emotional interdependency, despite the fact he or she was in a conjugal union (*de jure* or *de facto*). To rebut the presumption the spouse would have to prove on the balance of probabilities that the test does not apply to his or her situation.

The test has two steps. First, should the relationship end now, would the socio-affective (emotional) and economic well-being of the spouse assuming he or she was included in a privileged relationship be jeopardized? The notion of "emotional and economic well being" would have to be refined and developed in consultation with specialists of other disciplines; courts to some extent could also shape it. If the answer to this first step is no, the interdependent status does not apply. However, if the answer is yes, one must go to the second step. Would a spouse in a similar situation have legitimate or reasonable expectations that the relationship was one of emotional and economic interdependency? Elements of what makes a relationship of economic and emotional interdependency should be discussed, debated and the result of some sort of interdisciplinary consensus. It should also reflect real life expectations. The elements could be relying on classical civilian concepts such as *tractatus, fama* and actions. In other words, how the person was treated, what image was projected to third parties and what kind of actions were taken that could have led the person to believe they were in a 'privileged relationship' (moving in, having a shared bank account, being a source of emotional support, care, commitment, or else). The idea here is not to propose a reform, but a new way to apprehend relationships in the Code. The approach and the test would have to remain flexible and abstract in order to attune with changing needs of the families and evolve with societal transformations. The test could remain the same but its content would evolve with time. More, qualities of relationships should matter and could be inspired by Cossman and Ryder and Eekelaar's values

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(care and commitment, autonomy, respect, privacy, and more). Such a test could represent a balance between solidarity and protection, and autonomy and freedom. It would also allow for the evaluation of the effects of relationships between the spouses once more information is available, i.e. when the relationship is over, or rather when it transforms in nature.

The vast majority of situations of adult interdependency would be covered with this proposed test. However, if the qualities and content of relationships is what matters, it is essential to be careful not to exclude relationships of emotional and economic interdependency between adults that are not living conjugally. Otherwise it would defy the purpose of looking at the qualities and the content of relationships, of focusing on substantive elements of relationships. As such, adults in relationships of emotional and economic interdependency that are not necessarily perceived as such – because they are not conjugal – could claim an interdependency status. The test would allow for 'non-conjugal' adult relationships of economic and emotional interdependency to be considered equivalent. It could triggered an 'interdependent status' relying on a *situation juridique*, on an accounts of the facts. The same two-steps test would be used, but differently. The person claiming an interdependent status would have to prove, first, that if the relationship were to end (or transform) now, his or her socio-affective (emotional) and economic well-being would be jeopardized. Second, he or she would have to prove a person in a similar situation would have legitimate or reasonable expectations that the relationship was one of emotional and economic interdependency. Policy decisions and a dialogue should be started to decide what are the elements relevant to Quebec society and to experts of various fields. But the general rules and wording should remain flexible and abstract enough to adapt with time and changing needs.

The aims of this model are to start a conversation, engage in a much needed paradigm shift in Quebec family law one-, increase consistency, attune law with citizens expectations and provide the flexibility necessary to an ever-changing field of law. The effects of the interdependent status are going to be explored later, in part 4.3 and it will become clearer why such an approach has the potential to increase consistency, inscribe family law in private law and step away from family law exceptionalism. To sum up before giving concrete examples, the principal elements of this different approach are as follow:

- Married or civil union spouses are presumed to be in a interdependent status;

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- *De facto* spouses are presumed to be in a interdependent status;
- A conjugal status may or may not be a interdependent status;
- Conjugal status is not the only *situation juridique* triggering an interdependent status;
- Adults in other types of relationships should be able to claim an interdependent status;
- The content, qualities and substantive elements of the relationship matter, not necessarily whether the relationship meets formal requirements;
- A two-steps test is offered and adapts depending on the situation. The test can be summed up as follows:
    1. Should the relationship end (or transform), would the socio-affective (emotional) and economic well-being of the person assuming he or she was included in a privileged relationship be jeopardized?
    2. If so, would an adult in a similar situation have legitimate or reasonable expectations that the relationship was one of emotional and economic interdependency?

With this in mind, here are a few concrete examples of how such an approach would work in different situations. First, let's use a known and exceptional fact pattern: *Eric v Lola.* Here are the basic facts as summarized by the Supreme Court:

> A and B met in A's home country in 1992. A, who was 17 years old at the time, was living with her parents and attending school. B, who was 32, was the owner of a lucrative business. From 1992 to 1994, they travelled the world together several times a year. B provided A with financial support so that she could continue her schooling. In early 1995, the couple agreed that A would come to live in Quebec, where B lived. They broke up soon after, but saw each other during the holiday season and in early 1996. A then became pregnant with their first child. She gave birth to two other children with B, in 1999 and 2001. During the time they lived together, A attempted to start a career as a model, but she largely did not work outside of the home and often accompanied B on his travels. B provided for all of A's needs and for those of the children. A wanted to get married, but B told her that he did not believe in the institution of marriage. He said that he could possibly envision getting married someday, but only to make a long-standing relationship official. The parties separated in 2002 after living together for seven years.[979]

Eric and Lola would be presumed to be in a relationship of emotional and economic interdependency. Since Eric's position is now well known, it is fair to assume that he would try to withdraw from the relationship of emotional and economic interdependency. Step one:

[979] *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 S.C.R. 61.

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Should the relationship end (and not transform in nature) now, would the socio-affective (emotional) and economic well-being of Lola be jeopardized? Eric would have to demonstrate the answer to this is no, for example by proving that Lola has a place to live and minimal income to fulfill her basic needs, that she would have moved to Canada anyway, that she could maintain a standard of living, etc. [these elements would likely be determined by the legislature and the courts after a consultation process and a few decisions, but for the sake of the demonstration, speculation is necessary]. If the answers to this is 'no', the test stops here and Eric and Lola can be treated as strangers towards one another in private law. In other words, there would be no interdependency status resulting of their relationship. Step two: If the answer is yes, it becomes a question of legitimate expectations of the parties. Did Lola have reasonable or legitimate expectations that the relationship+ was one of economic and emotional interdependency? Once again, the criteria would need to be selected by more people that the author of this thesis, but could include questions such as: did the parties had a 'life plan', shared or access to bank account, etc. The criteria should be functional, flexible and not necessarily chosen by looking at what was done in marriage. The idea is not to compare but to find where interdependency lies and how it affects spouses economic and emotion decisions. For example, the idea for Eric would be to demonstrate using *tractatus*, *fama* and actions that the parties were not interdependent. It would be important for this test to be likely to be met; otherwise freedom and autonomy are not promoted. However, solidarity and protection would necessitate the threshold to be in line with expectancies of citizens, mirroring the message sent in other regulatory frameworks and aware of the ever-growing privatization of support combined to the shrinking of the welfare state.

Let's now repeat the exercise using another situation of interdependency. Jane and Mary are non-heterosexual conjugal partners living into what would be called a traditional union. Jane is a homemaker. Mary is a breadwinner. They have two children, and Jane assumes primary care. Since the kids are older now, she has a flexible part-time job. They have a common bank account. Mary assumes most of the expenses. Jane manages their budget and is responsible for the chores. They are not married for personal reasons and have not made a contract because they loved each other. They always considered they were in a partnership, in a common venture. After fifteen years of living together, they mutually agree to terminate their relationship. They are *de facto* spouses so there is a presumption that they indeed were in a relationship of emotional and

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economic interdependency. Neither Mary nor Jane wants to withdraw from the interdependent status. Not everybody will challenge his or her status. If the effects are known, realistic and proportional, it is fair to assume people will accept to have rights, duties and obligations towards one another.

Mark and Sara are DINKs (double income no kid). They behave as a couple, share a place they rent, both have incomes, split bills pro-rata, and more. They have been together for seven years. They are in a situation of intimacy, share economic and emotional aspects of their lives. However, they may not be in a situation of interdependency where the transformation of the relationship would jeopardize their well-being and where they had legitimate expectations that the relationships was one of economic and emotional interdependency. Like Mary and Jane they agree as to their interdependency status. However, they agree that their well-being is not jeopardized and that they are not interdependent. Mark and Sara will continue their life separately.

This scheme would also apply to relationships outside of the 'conjugal' paradigm. For these relationships, no presumption of interdependent status would be available. The test would remain the same, but the burden would fall, obviously, on the person claiming to be in such a privilege relationships. Let's use an example found in the Beyond Conjugality Report, modify it a bit and apply the test.

> We are thirty-six-year-old twin sisters who have never been married or had children and who live together… Our lives are inextricably linked: aside from being related and having known each other all of our lives, we have co-habited continuously for the last seventeen years (since leaving our parental home), rely on each other for emotional support, and are entirely dependent on each other financially – we co-own all of our possessions and share all of our living expenses. A more stable relationship cannot be found. Yet, because we are sisters, rather than husband and wife, and because we are not a couple in a presumably sexual relationship, we are […] a multitude of […] advantages constructed upon sexist and heterosexist ideas about what constitutes meaningful relationships. We find this situation incredibly frustrating.[980]

Unfortunately, the proposed approach would not ease the frustration of the women in the example as it does not apply to federal law, public law, social law or more generally because it is not concerned with relationships with third parties. However, in the hypothesis where the twin

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[980] LCC, *Beyond Conjugality, supra* note 845 at 119.

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sisters would see their partnership ends, would it be possible for them or one of them to claim an interdependent status in light of the description they provided? Obviously, it is not an issue if, despite the transformation of their partnership, they remain in good terms and agree to still support each other as they had expectations that it would work that way. But, if the sisters' understanding of what they could reasonably expect from one another diverge, then the test could help. Step one: Should the relationship end (and not transform in nature) now, would the socio-affective (emotional) and economic well being of the sister claiming status be jeopardized? Given the situation they described to the Law Commission, it is likely that the answer to this first question would be yes. Assuming both sisters see the description of their partnership as accurate, elements such as cohabitation (i.e. having nowhere to live), explicit emotional support (emotional distress), financial dependency (economic difficulties) would weigh in strongly in favour a 'yes' to the first question. If all this were to end, the well-being of the sister claiming and interdependency status would be jeopardized. Step two: Did she have reasonable or legitimate expectation that the relationship was one of economic and emotional interdependency? Based on their collaboration, on the actions of the parties, of their expressed intentions and other criteria still to be determined, the sister claiming status would have to prove on the balance of probabilities that her expectations were legitimate or reasonable. The interdependency status would thus rely on qualitative elements of relationships, not their fulfillment of formalities or their resemblance with an idealized and apparently homogeneous 'conjugal status'. It put forward a different understanding of relevant intimate statuses in the Code. While it is not its primary purpose, this way of conceptualizing allows for more than one relationship to be meaningful.

### 4.2.3 Relationships of Economic and Emotional Interdependency Expanded: Children

As seen in chapter 3, possibilities for parent child relationships have multiplied. Despite this blooming of possible legal relations between adults and children, Quebec family law one-remains formal and under inclusive in its approach to meaningful relationships between adults and children. In some ways, it relies on the fulfilment of formalities. In other, formalities may be

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lacking.[981] While it is not as salient and obvious as it is for adult relationships, there is a reliance on formalities given the importance of the act of birth and the necessity to be a formal parent. But the path to get the act of birth is different depending on who is a parent and on how the child was conceived. The underlying elements at play are somewhat inconsistent. The binary logic underlying filiation also displays a preference for a formal rather than a functional account of meaningful relationships in law. The status/contract debate plays out quite differently when it comes to parent-child relationships and there is a theoretically inconsistent fear of the 'contractual' filiation. This contributes to making the principles animating the Book on the family inconsistent: for adult interdependency, the only thing that matters is the contractual understanding of the union, but contractualizing filiation would be a shame. This part proposes a different approach to regulating parent-child relationships, an approach infusing civil law with consistency and flexibility. The approach is also rooted in a functional account of meaningful relationships and in the importance of interdependency statuses. As with adult relationships, it builds on already existing principles, but indicates how qualities of relationships should matter over their form, or rather the fulfillment of formalities.

Theories of relationships analyzed previously remain useful. Cossman and Ryder were aware parent-child relationships are at the core of current family law. They however clarified that "the regulation of relationships between children and parents or other adults is beyond the scope of this study".[982] It was obviously beyond their mandate, but it remains a primary concern for 'family law'. Parent-child relationships were also beyond the mandate of the Law Commission of Canada in its *Beyond Conjugality Report.* It is also important to keep in mind both proposals concern public law for the most part, not private law and definitely not private law as expressed in the *Civil Code of Québec*. Eekelaar, however, is closer to private law and reflects upon parent-child relationships in many chapters of *Family Law and Personal Life.*[983] The claim is not that relationships between adults are similar or that the State should regulate them in same way it regulates adult interdependency. Scholars have rightly expressed concerns about such an amalgamation. Eekelaar, for example, writes "parent-child relationships should in

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[981] See generally Robert Leckey, "Lesbian Parental Projects in Word and Deed" (2011) 45 Rev Jurid Themis 315.

[982] Cossman & Ryder, *supra* note 87, s preface.

[983] Eekelaar, *supra* note, ch 4,5.

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principle always be open to observation"[984] and, relying on David Archard's scholarship, he states "unlike intimate partners, children have no choice in the relationship; it is not a relationship between equals".[985] Rather, parent-child relationships are also relationships of emotional and economic interdependency, that they could operate on the basis of a 'modified ascription model' and that in some cases a functional account of relationships would be desirable. Relationships between adults and between adults and children are different, but it does not mean they cannot be regulated on the basis of coherent and consistent principles. This part first explores and reveals inconsistencies in the nature and typology of parent-child relationships in current family law one – in Quebec. Second, it proposes a functional account of relationships of economic and emotional interdependency between adults and children.

Rules of filiation in Quebec private law have been explained in details in the third chapter. The nature – i.e. the inherent or main elements or characteristics of something – of filiation rules changes depending on whether it is paternal or maternal filiation. The nature of paternal and maternal filiation differs despite the fact that they entail similar rights, powers, duties and obligations. The fundamental element underlying paternal filiation is *volonté,* while it is a certain understanding of biology when it comes to maternal filiation. It is a certain understanding of biology because Quebec civil law focuses on giving birth – i.e. delivery – as the materialization of biology. It could have been the genetic connection to the child or even something else, but it is not the case. Biology and nature have fluctuating meanings. These different foundations for filiation are largely left unquestioned by mainstream legal scholarship and promoted by prominent scholars. But it means the Code is stuck with gender biased rules. These gender biased rules are showcased in the Code in various ways, two of which retained our attention: the different path to get an act of birth and possibility for a woman to declare who is the 'father'.

First, when it comes to filiation by blood or through assisted procreation, as per article 111 CCQ and ff, the birth mother needs to be identified as such by a third party and her information needs to be transmitted alongside to the declaration of birth to the Registrar of civil

[984] *Ibid* at 84.

[985] *Ibid* at 90 [notes omitted].

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status. This is necessary for an act of birth to be drawn. It is so important that the attestation matches the declaration and reflects 'biology' that in the event where no attestation is available, the Registrar of civil status has guidelines authorizing officer to inquire, to request health documents, to require a letter explaining the reasons why certain documents may not be available, to ask for testimonies under oath of two witnesses and more.[986] This appears quite out of proportion compared to what is asked for paternal filiation. Indeed, the father field on the act of birth will be drawn relying on the declaration of the father, or rather of the man declaring paternal filiation to the State. He may or may not be the biological father and law disregards this fact. Paternal filiation relies on the intent to be a father. This betrays an important problem with how filiation is conceived and operates in Quebec family law one-. Paternity is a legal construct that may or may not match a biological situation. However, there is no place for 'filiation as a legal construct' when it comes to maternal filiation. Maternal filiation has to mirror biological facts. This requirement that the attestation and declaration of birth have to corroborate when it comes to maternal filiation is relatively new and was introduced with the reform of the Registrar of civil status and the *Civil Code of Québec* in 1991. Before, such corroboration was not necessary and attestations of birth belong to public health law.[987] Attestation of birth had a different weight, and Germain Brière flagged this issue in 1986. Indeed, when it was proposed for the attestations of birth produced under the *Loi sur la protection de la santé publique* to be transferred to the Registrar of civil status, Brière noted that

> les déclarations de naissance […] faites en vertu de la *Loi sur la protection de la santé publique* acquerraient ainsi une autorité qu'elles n'ont pas actuellement ; exigées essentiellement pour des fins démographiques, ces déclarations consitueraient désormais, vu leur integration partielle au register de l'état civil, des moyens de preuves de l'état des personnes. Dans la situation actuelle, ces déclarations ne constituent certainement pas, […] un mode normal de preuve de l'état civil […].[988]

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[986] These guidelines are available in French only and can be found here: http://www.etatcivil.gouv.qc.ca/publications/DIR-B%20Absence%20de%20constat%20de%20naissance%20sign%C3%A9%20par%20un%20m%C3%A9decin%20ou%20une%20sage-femme_2014-05.pdf . See also article 131 CCQ.

[987] Québec, Ministère de la justice, *Commentaires du ministre de la justice*, vol 1 (Quebec: Publications du Québec, 1993) at article 111

[988] Germain Brière, "Le futur système d'état civil" (1986) 17 RGD 371 at 388.

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The attestation of birth was statistical[989] and demographical. It should still be seen as such. It is curious that it produces effects on the law of persons, effects that are disproportionate for women. The attestation of birth should be abolished as it only targets women and is the reason why the foundational elements of filiation (women = biology and men = will/intention) still depend on gender. Further they are inconsistent. Only the declaration is relevant. It will be shown later how this understanding of filiation could provide a solution to the difficult questions surrounding surrogacy in Quebec family law one-.

This is related to a second issue surrounding the difference between maternal and paternal filiation. It is possible for a man not to declare he is the father. In this case, if the parents were unmarried, the mother cannot declare the man as the father of the child.[990] While it does not mean the mother has no recourse to see the paternity established, it definitely means that there are hurdles to have paternity recognized. But it would be difficult for a woman not to declare her filiation towards the child, especially given the existence of the attestation of birth and the presumption found in article 117 CCQ. This leads us to a last concern, blank fields on acts of birth and their qualification by tribunals. While blank father field are possible – Quebec estimated around the number around 5% over the last 30 years but in 2015 it was 2.7%[991] – there is no such a thing as an unknown mother. It is also important to highlight the presence of a father on the act of birth, does not account for its actual commitment. More, some fields are left blank by choice, single motherhood by choice being an explicit option when it comes to filiation. The filiation remains open to challenge but it is beyond the present purposes. However, what is interesting is that, in certain instances, judges have equated a non-declaration by a birth mother to fraud.[992] This would never be said of a non-declaration of paternity. Filiation rules are still highly gendered. Male privilege also looms large in the context of lesbian parental projects[993]

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[989] Michèle Rivet, "Le rapport sur l'état civil de l'Office de révision du Code civil" (1974) 15 C de D 871 at 873.

[990] Art 114 CCQ.

[991] Institut de la statistique du Québec, *Le bilan démographique du Québec | Édition 2016* (Quebec: Gouvernement du Québec, 2016) at 48.

[992] *Adoption – 091*, 2009 QCCQ 628.

[993] This problem is caused by article 538.2(2) CCQ. See generally, Régine Tremblay, *Mothers? A Portrait of Legal Motherhood in Canada*. LLM thesis, University of Toronto, 2010.

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and surrogacy cases.[994] More, these gender biased rules may be a reason why Quebec family law one- refuses to think in terms of parent rather than mother/father despite the fact they entail the same effects once established. This has created significant hurdles for trans parents.[995]

Another example of difference in the nature of filiation rules is directly related to the second book of the *Civil Code of Québec*'s overreliance or formalities and formal rules. *De facto* partners are not provided with the same tools to see their filiation established than *de jure* partners. In other words, unmarried couples do not benefit from the same rules married couples do. This manifests in two ways and may have negative consequence for certain parents and children. First, in the law of persons, as mentioned above, while married parents can declare for one another, unmarried parents cannot declare filiation but for themselves.[996] Second, there is no presumption of paternity or parentage for unmarried parents. To a certain extent, not only does the Civil code rely on a formal understanding of relationships when it comes to relationships between parents and children, it could also be hypothesized that the underlying premises of filiation will differ depending on which parent you are (the birthing parent or the other). If you are a 'second-parent' in a *de facto* relationship, there are fewer rules or legal tools available for you in order to see your filiation established. To be clear, it does not mean you will not see your filiation established. However, it is likely to necessitate more legal interventions or actions, and thus cost more. In some cases, it could even discourage people to take action.

These examples are not the only one where a formal understanding of the family prevails despite the lived experiences and the actual relationships at play. *De facto* parents differ from *de facto* partners. While the former label applies to adults acting in fact as parents – stepparents or significant adult figures – the later refers to unmarried couples. *De facto* parents – some could say parents *in loco parentis* but it is preferable not to use this expression given its uncertain

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[994] When it comes to surrogacy, while the paternal filiation is never challenged, the maternal filiation has been highly scrutinized by courts. See generally, Tremblay, "Surrogates in Quebec" *supra* note 535.

[995] While the final decision has not been rendered yet, one can consults these two interim decisions to have some background on the issue: *Centre for Gender Advocacy v Québec (Attorney General)*, 2015 QCCS 6026 (CanLII) and *Centre de lutte contre l'oppression des genres (Centre for Gender Advocacy) v Québec (Procureure générale)*, 2016 QCCS 5161 (CanLII).

[996] Art 114 CCQ.

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existence in civil law,[997] its meaning in the context of the *Divorce act* and its existence as a common law doctrine[998] – are completely left out of the second book, except for one provision about adoption of an adult child. This does not mean they are absent from the Code. Indeed, the Code includes them in article 33, Civil Code's article on the child's interests, which is roughly the civilian equivalent of the best interest of the child. Yet, as they are not formally recognized they have little to no rights, while they may voluntarily assume duties and obligations. The *Comité* also shares some thought on *de facto* parents. The *Comité* explains that when it comes to parental authority, law already contains mechanisms allowing for delegation of parental authority.[999] However, such mechanisms should only apply when the other parent exercises parental authority alone. The *Comité* asserts that otherwise it could be prone to conflicts. The *Comité* also suggests extending the principles developed in *Chartier* to unmarried stepparents, for both support and custody. However, the *Comité* proposes something innovative and much more interesting for what it calls "spouse who did not act *in loco parentis*".[1000] The *Comité* would include a presumption in article 611 CCQ for these 'parents' to maintaining 'personal relationships' with the child if it is in his or her best interest.[1001] This is undeniably a step in the right direction. Overall, the recommendations remain trapped in a logic where only conjugal bonds could have such an effect, and where biparentality should be promoted. It is important to note that all this discussion is not made in the part of the report on filiation, by in a stand-alone part. As such, neither the Code nor the *Comité* take into consideration the diversity of possible relationships of emotional and economic interdependency between adult and children. As a consequence, filiation is trapped in a binary and exclusive model. It is an all or nothing approach. It is mostly formal and this creates issues for blended family, pluriparental families, certain forms of adoption, and more.

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[997] Benoît Moore, "La notion de ' parent psychologique ' et le Code civil du Québec" (2001) 103 R du N 115 *contra* Dalphond's concurring opinion at para 87 of *Droit de la famille - 072895*, 2007 QCCA 1640 (CanLII).

[998] *Chartier v Chartier*, [1999] 1 SCR 242.

[999] COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 111 at 207-210.

[1000] *Ibid* at 215.

[1001] *Ibid* at 215-216.

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There is a second broad category of issues showcasing the inconsistencies in the nature of filial rules. The *Civil Code of Québec* has witnessed an increasing number of possible and productive relationships between adults and children. While at first the only desirable option was legitimate filiation – the quintessence of a formally accounted for family – the Code has gradually experienced the addition of filiation by blood, filiation of children born of assisted procreation and adoption. In addition, filiation is not unitary anymore; it is not between a familial unit and a child, but between an individual and a child. Yet, until now, while some elements of filiation flirt with a functionalist account of relationships – possession of status being an obvious example – relationships between adults and children have consistently been included in the Code relying on a formally accounted for family. Most importantly, the nature of filial rules varies depending on the 'type' of filiation. Depending on the type of filiation at stake, the underlying principles animating filiation will differ. Some rules are status oriented, status being understood as 'meeting formal requirements' or being 'natural', and others rules are intent based. These competitive underlying principles animating filial rules showcase in the artificial typology of relationships found in the Code. This is particularly striking since the effects of the relationships are largely similar. Law has a narrow understanding of parent-child relationships, despite the fact that the relationships, once formally recognized and classified, share similar qualities and characteristics.

The history of filial relationships in the Code betrays the absence of a consistent conceptual model for filial relationships. As soon as possible relationships between parents and children started multiplying, the Code somewhat disorganized itself. Elements underlying filiation by blood became mostly biology for women and mostly intent for men. In some cases, biology matters for men too.[1002] While there is a common sense that contractualizing filiation is wrong, it is how the Code understands filiation of children born of assisted procreation. When reforms to the rules about filiation are contemplated, rules about adoption are generally not addressed. These signals about the inadequacy of filial rules should not be left unaddressed.

The evolution of the structure of the Code is also puzzling and suggests the lack of a solid foundation to the edifice of filiation. It has been explained in part 3.2 that, for the most part, the

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[1002] Art 535.1 CCQ.

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structure of the Code has fluctuated not because of actual changes in the nature of relationships, but because of changes as to political views on the family and its members in law. For example, it is often stated that the parental project and assisted procreation were introduced in the Code in 2002. However, the parental project was in the Code as early as in 1994 and articles dealing with assisted procreation were even found in the 1980 version of the book on family. At that time, it was clear that it was filiation by blood as it was only available in situations mimicking so-called natural reproduction, heterosexual reproduction. As such, it is not so much that the parental project appeared in 2002, but rather that the legal *imaginaire* was struck by the political fight 'won' in 2002 by – mostly – lesbian parents and single mothers by choice, by people resorting to non-heterosexual reproduction to create their families. Given the distance taken from the 'natural' model, this type of filiation has been removed from the chapter 'Filiation by blood' and included in a chapter of its own. The reason provided by parliamentarians to include children born of assisted procreation in filiation by blood from roughly the eighties until 2002 however remained the same: equality in treatment between children. In the next paragraphs, an alternative understanding of the regulation of parent-child relationships is offered, an understanding where, amongst other things, the qualities of the actual relationships matter. The scheme is consistent with what has been proposed to regulate adult intimate relationships; an approach relying on existing principles combined with a theory of relationships of economic and emotional interdependency. It is also a model in which it is possible to claim an interdependency status on the basis of a functional account of meaningful relationships.

There are three types of filiation in the CCQ: filiation by blood, filiation of children born of assisted procreation and adoption. Paternal and maternal filiations are dichotomized and there is a 'secondary' filiation in hypothesis of assisted reproduction. A child can only have one or two parents. There is no other option for meaningful relationships between parent and children. The *Comité* proposes natural procreation, assisted procreation and adoption. Concerns have been expressed above about the label 'natural' filiation. It has been reported in previous parts that between 1955 and now, important changes in paradigm occurred in the law of filiation. The first was from a dichotomy where legitimate was opposed to illegitimate, to one were blood was opposed to adoption. There was another shift in paradigm when filiation became possible for non-heterosexual partners and single mother by choice. Blood – which is obviously a metaphor – became heterosexual, even if assisted procreation existed already within the chapter on blood.

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Debates have taken place between this new dichotomy between blood and assisted procreation, while adoption reform has taken place on its own, with limited success. However, all these ties are filial, have the similar role in law and share qualities. To the law, these bonds have roughly the same content and they produce like effects. While in life these relationships share similarities and dissimilarities, in law they are understood as similar. These bonds in law could all be seen as equivalent, and they should operate on the basis of consistent principles. As such, a new reading on the existent dichotomies needs to be put forward. Too much attention has been devoted to 'types' and 'forms' of relationships between parents and children, but their qualities and content have never really been depicted as relevant. Private law is about the relationships between the child and the parent. Filiation should not be seen as something extremely sophisticated. It should not be overly turned into typologies and invested with anxieties about how families are conceived. What is important for codified rules is to have a certain level of abstraction, flexibility and consistency. Relationships of emotional and economic interdependency provide that.

Filiation is an interdependency status. Instead of favouring types of filiation: maternal, paternal, by blood, of children born of assisted procreation and adoption, the Code should provide a spectrum with two already known categories: reproduction and adoption. The point is not about who and how someone reproduces, but about the fact that there is a child and the child is in relation with a parent. This relation is modulated by law. In other words, since both paternal and maternal filiation are possible and entailing the same effects there are no reason to distinguish them and how the child is conceived is irrelevant in law, again, because the legal effects and content of are the same regardless. Such a reading of filiation focuses on relationships between adults and children in and of themselves.

First, no distinction should be made between maternal and paternal filiation. There is no reason to promote gender-biased understanding of filiation, and to trap women in their reproductive functions. The law of filiation provides for legal constructs and not for mere biological facts. Mothers and fathers have the same rights, duties, powers and obligations. The effects of these relationships are the same. There is no sound reason to propose opposite foundational elements, i.e. biology and intent. Intent/*volonté* should be the focus. The opposite seems harder to justify, both theoretically and practically. If 'biology' or 'nature' – what ever these mean – were to become the elements promoted, law would be of limited use and numerous

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situations where there is a functional parent-child relationships without a biological component would be excluded. One can think of adoption or assisted reproduction for example. In an article on the impact of biology and science on civil law, Jean-Louis Baudouin wrote in 1970 : "[l]a science médicale dit, la science juridique constate et déduit des faits constatés les conséquences juridiques qui s'imposent".[1003] As he wrote, law is not merely about facts; it is about attaching legal consequences to facts. Otherwise, there would have no need for law and one would rely solely on science. From a practical perspective, if rules were about biology and were similarly burdensome on men and women, it would mean that all male parents involved in reproduction should do a paternity test, or that all non-biological parents would be automatically disqualified including adoptive parents and parents forming families through assisted reproduction.

How would this filiation not anchored in gender materialize? As the *Comité* suggested, proofs of filiation should be renamed "modes d'établissement". These *modes d'établissement* would remain mostly the same, namely act of birth, possession of status, presumption and acknowledgement.[1004] But some modifications are necessary. First, requirements of corroboration between the attestation of birth and the declaration of birth should disappear. This would allow for the declaration of birth – presumably the manifestation of intent for both male and female parents – to be the basis of filiation for all parents falling under the chapter 'filiation by reproduction'. Private law focuses on relationships between individuals. If the State wants to keep an attestation of birth for statistical or demographical purposes as it was done before, it should not influence relations in private law, as it is not its purpose. In addition, the possibility to declare the other parent should be possible. Possession of status would remain roughly the same device. It is probably a good idea to suppress the name requirement, in line with what the *Comité* proposes. The length of the possession of status should remain flexible and be evaluated by judges, *au cas par cas*. Care could be added to the constitutive elements of *tractatus* (treatment). More importantly, a reflection on the important qualities of possession of status should be launch. To be meaningful, possession of status has to be understood as a period of time during which a relationships with peculiar characteristics emerge. Filiation does not crystalize at birth; it

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[1003] Jean-Louis Baudouin, "L'incidence de la biologie et de la médecine moderne sur le droit civil" (1970) 5:2 RJT 217 at 225.

[1004] The *Comité* suggests to remove voluntary acknowledgement. See COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *supra* note 126 at recommendation 3.8.

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is the result of many things including intention, a formal status (act of birth) and behaviour between an adult and a child. Administratively, it can be seen as crystalizing at birth to facilitate interactions with the State (health, tax, social benefits), but not in private law and not if the functional approach to the family and to relationships is taken seriously.

More, presumptions available to heterosexual and non-heterosexual *de jure* spouses should be extended to *de facto* spouses. However, it should be clear that a 'conjugal union' between the parents is not mandatory, nor relevant. Presumptions would just be available to help in some situations. There would have a new feature to the *modes d'établissement*: both voluntary and involuntary acknowledgement would be contemplated. Voluntary acknowledgement is limited and scope and probably overlaps with the "tardy declaration" found at article 130 para 2 CCQ. It could be interesting to evaluate whether voluntary acknowledgement could have more effects than it currently does, as seen in chapter three. What would be innovative, though, is the inclusion of involuntary acknowledgement as a *mode d'établissement.* This mechanism could be inspired by current article 540 CCQ and allow for responsibility and identity, without parental authority. This *mode d'établissement* would include DNA testing and negative inferences (535.1 CCQ) and it could be resorted to in order to tie an adult to a child. In general, intention would remain the constitutive element of filiation and would have to be distinguished from mere biology and responsibility in parenting. Further, the lock of filiation found in article 530 CCQ would remain be relevant. If possession and title match, no claim or contestation can be made. It should however be clear that in some cases (parental project), the lock is active even if there is only one parent on the act of birth. In such a situation, the act of birth is not deemed incomplete. Further, it would not mean that any other relationships between an adult and a child is impossible in law. Civil law should aim to reach beyond biparentality when it is necessary, when there are multiple relationships of interdependency. This will be explained below.

Second, relying on these new imperatives and rules, the structure of the title on filiation should be modified. There is no use to categorize the types of filiation depending on how a child was conceived. It does not make sense for many reasons; the legal ties have the same effects, a child could have a 'blood/natural' filiation combine to an 'assisted' one, and it confuses the foundational elements of filiation by distinguishing them depending on the gender of the parents or means elected to procreate. As such, civil law should start working with a different dichotomy: reproduction and adoption, or filiation by reproduction and filiation by adoption.

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How the child is conceived is irrelevant. Assisted reproduction used to be part of filiation by blood and the theoretical foundations of this choice were stronger than the one at play now. This alternative spectrum would feature a residual category. In civil law, a residual category is a way to include all possible situations but for one in a category. For example, 'movable' is a residual category. It means, "all property, if not qualified by law, is movable".[1005] Property is either movable or immovable. As such, reproduction would become a residuary category including relationships of interdependency that are not adoption. This is a choice, based on an opposition that has animated Quebec civil law since the eighties. Adoption is a form of reproduction, social reproduction, but it appears impossible to have only one type of filiation for now. This does not mean it is not what civil law should aspire too. Since the content, qualities, functions and effect of adoption and other filial bonds are similar, there is a strong argument to be made towards having a single category.

This being said, the residual category leads us to a third essential element for a different approach to filiation in the Code. Reproduction and adoption trigger an interdependency status. While the former is both formal and functional as previously seen, the latter is generally speaking formal. But other meaningful relationships between adults and children should also lead to an interdependency status. Indeed, if relationships share the same content, functions and qualities they should have similar legal effects. While the exact qualities relevant to the status need to be fully examined, one can think of some emotional and economic aspects that should be prioritized: care, support, education, involvement, etc. Can a test similar to the test for adult interdependency be used? Some adjustments need to be made, but it is possible. There are obviously differences to highlight between relationships between adults and relationships between adults and children. Archard identifies a few of these differences: a relationships between a parent and a child "is one between an independent superior and a dependent subordinate" [1006] and "lovers and friends are chosen, whereas a child does not choose its parents".[1007] While this may oversimplify choice and dependency – i.e. the circle of life may

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[1005] Art 907 CCQ.

[1006] David Archard, *Children: Rights and Childhood* (London: Routledge, 1993) at 124 (cited in Eekelaar, *Personal Life*].

[1007] *Ibid.*

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render older parents as vulnerable as children and not everyone marry or not marry by choice – Archard identify some differences. They may resonate more in public and social law than in private law and are framed in an argument about privacy, as Eekelaar explains.[1008] The biggest difference is that children are dependent and vulnerable. As Eekelaar writes "[a]ll actions between parents and children must in principle be open to scrutiny because of children's vulnerability and harm to exploitation".[1009] Here again, even if they are part of private law too, exploitation and harm resonate with public law logic, with a form a protection that is not currently conceptualized as being part of the Civil Code *per se*. In private law, adults – especially in a scheme where intention is central – choose, through their actions, to have or build relationships with children. Sometimes, adults do not choose. Children likely never chose, but there are mechanisms to protect their interest beyond private law. Some relationships are more fulfilling than others, but when relationships are catastrophic and detrimental to the well being of children, social and public law come into play. State intervenes and tries to prevent harm to vulnerable parties, here children. This does not mean relationships between adults and children automatically disqualify from private law and from an interdependency status. These relationships remain relationships of interdependency or dependency having emotional and economic aspects.

As with adult interdependency the proposed scheme builds on existing rules and allows for claiming an interdependency status. It is possible to assume the current formal scheme fulfills functions but that some relationships could be included on the basis of reproducing the same characteristics and others, depending on how intimate lives will evolve in the coming decades. As such, as it has been proposed for adult relationships, the scheme for parent-child relationships builds upon current rules found in the *Civil Code of Québec.* However, in contradistinction with adult relationships, it would not be possible to opt-out. As seen in chapter three and above, the rules of filiation are different depending on the types of filiation and on whether the parent is a birthing women or not. However, generally speaking, the 'regular' rules rely on a mixture of title and possession. Title relies on the act of birth. This thesis proposes to have title rely on declaration of birth and to allow conflicting declarations to be adjudicated in front of a judge.

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[1008] Eekelaar, *Personal Life, supra* note 84 at 90.

[1009] *Ibid.*

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Detailed modifications have been suggested above, but what is innovative here is that it would be possible to claim a parent-child or adult-child interdependency status on the basis of functional similarity with these rules. This would provide for a functional account of 'families' and meaningful relationships in the Code. It would be a step towards a theory of relationships of economic and emotional interdependency for parent-child relationships in the Code. While form and actual rules remain important, other relationships could be included on the basis of being functionally equivalent with current recognized relationships. Relationships would be included if a situation of economic and emotional interdependency status arises. It is important to point out the interdependency status can play out during a relationship too. As such, an interdependency status would be triggered by the classical dyad of title and possession of status. However, in the event where there is no title, a person could, relying on modified possession of status, claim an interdependency status. To claim an interdependency status, the child or the adult (or both) in the relationship would need to demonstrate that they meet the requirements for modified possession of status. Modified possession of status would different from possession of status on several accounts. Traditional possession of status relies on *tractatus* (treatment), *fama* (reputation) and *nomen* (name). It generally needs to start from birth and be uninterrupted. It length is variable, but it normally ranges between 16 and 24 months.[1010] Modified possession of status would not include *nomen* and would not necessarily start from birth. In some instances where a parent is trying to exclude another parent, maybe it could start before birth. In cases where meaningful adults arrive later in a child's life, it could start later. The length of possession of status would likely need to be modified. Proposing a length without data and expertise about how meaningful relationships are formed is not a good idea. It is beyond our expertise. But a meaningful dialogue with attachment or relationships' specialists should be undertaken in order to determine how long modified possession of status should last. Once modified possession of status is established, the same test as the test used for adults could apply. However, given the fact the child is likely always the vulnerable party to the relationship, the test should always be done from his or her standpoint. First, should the relationship end (or transform), would the socio-affective (emotional) and economic well-being of the child be jeopardized? Second, if the answer to the question is yes, would a child in a similar situation have legitimate or reasonable expectations

[1010] *Droit de la famille — 1528*, 2015 QCCA 59 at para 29.

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that the relationship was one of emotional and economic interdependency? The best way to explain how these new rules would play out is likely through examples.

The first example is the ‘regular’ hypothesis. The filiation of a child born of a man and a woman in an intimate relationship would be established using mostly existing rules. Both the man and the woman would fill a declaration of birth and would send it to the Registrar of civil status. The Registrar would draw an act of birth. One can assume for the purposes of this example the parents would meet the requirements for possession of status. This child’s filiation could not be contested or claimed. It will be explained later this does not mean another relationship of interdependency could not arise. All in all, for the vast majority of situations, the proposed rules would not change anything.

Relationships with a child born through a surrogacy agreement is the second example. The example has two sub examples: a scenario where everyone agrees as to who are the child’s parent and one where someone disagrees. In a scenario where everyone agrees, the intended parents would both declare birth and meet the requirements for possession of status, with the consequences it entails. In a scenario where the surrogate and the intended mother disagree as to who will be the parent of the child, the surrogate, the intended mother and the intended father would declare birth specifying there is a contestation as to who are the parents of the child. The Registrar of civil status would not issue an act of birth until the filiation is established in court, as it is already done when filiation is litigious. It would be the judges’ task, as it is currently the case when there is an issue, to declare who are the child’s parents. He or she would do so relying on filial rules and the child’s interests. The judgement would notify the Registrar of civil status in order to have an act of birth issued.

So far, the examples have relied on traditional rules when it comes to parenting from birth, albeit slightly modified. The third example is the example where a stepparent claims an interdependency status. As such, different rules would apply. The stepparent would need to demonstrate he or she has modified possession of status. To do so he or she would need to prove that, during a period of time to be determined, he or she treated the child as a parent (*tractatus*) and third parties thought or knew this person was acting like a parent to the child (*fama*). Once this is done, the test would apply. Should the relationship end (or transform), would the socio-affective (emotional) and economic well-being of the child be jeopardized? Second, if the answer

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to the question is yes, would a child in a similar situation have legitimate or reasonable expectations that the relationship was one of emotional and economic interdependency? If so, an interdependency status exists and the relationship between the adult and the child should be understood as a parent-child relationship, a filiation by reproduction. This could be done while one of the parent of the child and the stepparent are still together and it would not exclude the other parent. Length and criteria for modified possession of status should be carefully selected as interdependency relationships would provide a status and entail effects. Effects would be broader than support obligations, but could be lesser than parental authority.

### 4.3 Recoding Relationships: Locating Status and Allocating Effects

Where do these relationships and interdependency statuses fit in the Code? And what are their effects? This part proposes to recode relationships of interdependency in the *Civil Code of Québec* and their effects. It argues is time to 'take a break' from 'the family' as a normative project in the Code. It should be made clear the family is not a legal entity. More the image of the family projected by the Code differs substantially from lived experiences of people in Quebec. It is also not in line with other mechanisms regulating families' lives. Principles found in the Book on the family are inconsistent and are overly reliant on a formal understanding of family living. The book on the family bends rules to make them look like they are integrated in the edifice of the Code, but they do not respect basic civil law principles. For example, it is obvious that the family patrimony is not a patrimony and that rules surrounding marriage contracts are not exactly consistent with the rules on obligations. Most importantly, the rules are not about actual relationships and their qualities, but about entry criteria met by a relationship, regardless of the actual qualities and content of the relations. This means that citizens in the exact same situation when it comes to the qualities and nature of their relationships are treated differently in private law, often despite being similarly treated in other contexts. Now, one of the entry criteria is being married or in a civil union which makes family law exclusive, rigid and not adaptive. For parent-child relationships, formal rules are still very present despite the changes that were made in the last decades to include other kinds of relationships. Only formal parents – listed on the act of birth, the ones having a title – are recognized as parents.

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The book on the family was probably a historical and contextual necessity. It was a political choice. But to assure family law survives beyond this period of socio-political changes, it must be integrated better in private law and in the *Civil Code of Québec*. Family law principles should be flexible and abstract enough to evolve with time, to adapt to new realities and to be consistent with other fundamental principles found in the *Civil Code of Québec*. The members of the Committee on the law of persons and family law was aware of this risk faced by the book on the family even in the eighties.[1011] This part advocates there should be no book on the family in the Code. Family should be better integrated in the Code between elements that are so fundamental that they cannot be contracted out, elements that can be the object of a contract, limitations to ownership rights or claims / *créances*, and more. Such a recoding would improve consistency, clarify what a family is and what it is not, and would allow for including a functional account of families and relationships in the CCQ. It would make clear that the family is not a legal entity, it is a group of relationships, relationships of economic and emotional interdependency. The key to consistency to the present purposes is to consider relationships of economic and emotional interdependency as triggering the interdependency status explained in the previous part.

For such an approach to work, some recoding is necessary. The recoding is important. Structure sends a message sometime as strong as the rules in a civil code. The recoding has the effect to counteract ideas prevalent and criticized in family law theory, such as family law is "peripheral to the heart of law", "the periphery of private law", "ambiguously situated in an area that is neither entirely private nor entirely public", and family law is of a "policy-oriented essence, which makes family law local and contingent".[1012] In carefully inscribing relationships and families in the Code, it sends a strong message that 'family matters' are an integral part of private law in Quebec. Interdependency statuses have been identified. They now first need to be properly recoded and, second, for statuses to be meaningful, their effects must be fleshed out.

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[1011] See Claire L'Heureux-Dubé, "La famille – relations d'ordre personnel" in *Codification : Valeurs et langage. Actes du colloque international de droit civil comparé* (Montreal: Conseil de la langue française, Université McGill, Université de Montréal, 1985) at 201 and Edith Deleury and Michèle Rivet, *La première tranche de la Réforme du droit de la famille par l'O.R.C.C.*, April 23, 1975 at 1.

[1012] These expressions are from Maria Rosaria Marella, "Critical Family Law" (2011) 19 Am UJ Gend Soc Pol'y L 721.

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This part is about locating statuses coherently in the Code and allocating their effects (rights, duties, obligations, responsibilities, some would add powers).

### 4.3.1 Locating status

In Quebec family law one-, statuses have consistently been triggered by formalities and by a formal account of how relationships can be integrated in the Civil Code. Despite this narrow understanding of meaningful relationships, both parent-child and adults' relationships have multiplied from 1955 until today. The tension between status and contract has also occupied family law for quite a while now, even if these notions encompass different meaning in civil law than they do in common law. The law of persons is undeniably associated with the notion of status. A status entails certain effects a legal subject is not free to contract out of. However, and contrary to what family seems to hold dear, a status does not depend solely on the accomplishment of formalities, of a contractual logic or of an institution. All this, and more could trigger a status. Indeed, nothing prevents a factual situation from triggering a status. A status, here an interdependency status, should be triggered by the qualities of a relationship. After all, a civil status is the "ensemble des qualités inhérentes à la personne, que la loi prend en considération pour y donner des effets"[1013] or "[d]ans une acception large, l'état de la personne s'entend de l'ensemble des qualités de la personne que la loi prend en considération pour y attacher des effets juridiques".[1014] The relationship in itself should be the reason why law regulates the persons in it. This would foster a certain understanding of what relationships are meaningful and why, and it would provide law with enough abstraction and flexibility to adapt while remaining consistent. These relationships should be animated by ideals such as freedom and autonomy, but also protection and solidarity. A delicate balance should be struck, a balance meeting citizens' expectations. While work would need to be done in order to evaluate what are the said expectations, it is nonetheless possible to propose a framework to include these

[1013] Léon Roy, *De la tenue des registres de l'état civil dans la province de Québec* (Montréal: Imprimé par Thérien frères, 1959).

[1014] Deleury & Goubau, *supra* note 517 <online>.

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relationships in the Civil Code. This framework starts with a recoding of 'the family' and relationships in the Code.

This recoding does not claim to be exhaustive. It represents a starting point to launch a discussion as to how relationships of economic and emotional interdependency could be included in the Civil Code in order to provide abstraction, inclusivity and flexibility and consistency to deal with intimate relationships in private law.

The best way to highlight proposed modifications to the structure of the Code is through tables. When explanations are necessary, they can be found under the tables. Modifications are provided in italics. As it has been the case throughout the entire thesis, they are available in both French and English.

| Livre 1 – Des personnes<br>Titre 1 – De la jouissance et de l'exercice des droits civils<br>Titre 2 – De certains droits de la personnalité<br>Titre 3 – De certains éléments relatifs à l'état des personnes<br>Titre 4 – De la capacité des personnes | Book 1 – Persons<br>Title 1 – Enjoyment and Exercise of Civil Rights<br>Title 2 – Certain Personality Rights<br>Title 3 – Certain Particulars Relating to the Status of Persons<br>Title 4 – Capacity of Persons |
|---|---|

Nothing would change when it comes to the titles of the first book. In terms of structure, it is only logical to include interdependency statuses there as it is the part of the code concerned with the status of persons. In addition, it is in line with what was done prior to the eighties in Quebec and what is still done in the French Civil Code.

Modifications would take place in the third title of the first book. It would now look like this:

| Titre 3 – De certains éléments relatifs à l'état des personnes<br>Chapitre I – Du nom<br>Chapitre II – Du domicile et de la résidence<br>Chapitre III – De l'absence et du décès<br>*Chapitre IV – Des relations d'interdépendance entre adultes*<br>*Chapitre V – Des relations d'interdépendance entre adultes et enfants*<br>*Chapitre VI – De l'autorité parentale*<br>*Chapitre VII – De l'obligation alimentaire*<br>Chapitre VIII – Du registre et des actes de l'état civil | Title 3 – Certain Particulars Relating to the Status of Persons<br>Chapter I – Name<br>Chapter II – Domicile and Residence<br>Chapter III – Absence and Death<br>*Chapter IV – Relationships of Interdependency between Adults*<br>*Chapter V – Relationships of Interdependency between Adults and Children*<br>*Chapter VI – Parental Authority*<br>*Chapter VII – Obligation of Support*<br>Chapter VIII – Register and Acts of Civil Status |
|---|---|

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Again, except for the new headings, this is in line with the former structure of the Code. It is only logical to include these relationships in the book on persons as they represent elements that from which one cannot contract out. These elements are out of trade, extrapatrimonial, and profoundly intertwined with the self, the legal subject, the legal person. More, it should be clear the family is not a legal entity nor a legal person. As such, it is misleading to have a Book on the Family and special effects attached to 'the family'. Private law deals with families, people and relationships. More, it is about relationships of interdependency.

In addition, the breakout of the two new chapters would now look like this:

| *Chapitre IV – Des relations d'interdépendance entre adultes* | *Chapter IV – Relationships of Interdependency between Adults* |
|---|---|
| *Section I – Relations conjugales* | *Section I – Conjugal Relationships* |
| *§1. Mariage* | *§1. Marriage* |
| *§2. Union civile* | *§2. Civil Union* |
| *§3. Union de fait* | *§3.* De Facto *Union* |
| *§4. Absence d'interdépendance* | *§4. No Interdependency* |
| *Section II – Autres relations* | *Section II – Other Relationships* |
| *Chapitre V – Des relations d'interdépendance entre adultes et enfants* | *Chapter V – Relationships of Interdependency between Adults and Children* |
| *Section I – Relations filiales* | *Section I – Filial Relationships* |
| *Disposition générale* | *General Provision* |
| *§1. Reproduction* | *§1. Reproduction* |
| *§2. Adoption* | *§2. Adoption* |
| *§3. Effets* | *§3. Effects* |
| *Section II – Autres relations* | *Section II – Other Relationships* |

In chapter four, under the first section, the subsection on marriage would include the current articles about marriage and the solemnization of marriage, proof of marriage, nullity of marriage and extrapatrimonial rights and duties of spouses. It would also include separation from bed and board. Similarly, the rules on the formation of civil union, the effects of civil unions and the dissolution of civil union would be found under the second subsection. Whether nullity of civil union should stay in the Code should be debated. Nullity's purpose has fluctuated with time and is generally associated with the history of marriage. Whether it is of use when it comes to civil union should be analyzed. As a matter of fact, no case law on the matter is available in Quebec even if articles 521.10 and 521.11 have been in the *Civil Code of Québec* for more than fifteen years now. The third subsection would provide a definition of *de facto* unions and would make clear this kind of union is similar to marriage and civil union, and triggers an interdependency status. The fourth subsection would contain the test explained in the previous part. It would provide for spouses conjugal unions that are not relationships of economic and emotional

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interdependency to contest the interdependency status. The second section (Section II – Other relationships) would allow for adults in a relationship of economic and emotional interdependency that is not conjugal to claim an interdependent status. To do so, the adult should meet the requirements of the test set forth in part 4.2.2 of this thesis.

In chapter five, the focus would be on adult-child or parent-child relationships. The section would open on a general provision about the equality of children regardless of their circumstances of birth, but it would not include a right to have one's filiation established (see above part 3.3.2). The rules explained in part 4.2.3 would be found under these subsections and it would, roughly, look like this

| *Section I – Relations filiales* | *Section I – Filial Relationships* |
|---|---|
| *Disposition générale* | *General Provision* |
| *§1. Reproduction* | *§1. Reproduction* |
| *Modes d'établissement* | Modes d'établissement |
| *Déclaration* | *Declaration* |
| *Règles générales* | *General rules* |
| *Déclarations conflictuelles* | *Conflicting declarations* |
| *Possession* | *Possession* |
| *Règles générales* | *General rules* |
| *Possession modifiée* | *Modified possession* |
| *Présomption* | *Presumption* |
| *Reconnaissance volontaire* | *Voluntary Acknowledgement* |
| *Reconnaissance involontaire* | *Involuntary Acknowledgement* |
| *Actions* | *Actions* |
| *Règles générales* | *General rules* |
| *Règles particulières à la reproduction assistée (de tous les types)* | *Rules specific to assisted reproduction (of any kind)* |

The second subsection, on adoption, would mostly use the current rules, rules that have just been modified.[1015] As to the third subsection, the section on the effects of filial relationships, it would include the mandatory effect of filiation: maintenance. It has been explained above why maintenance does not have to be understood as an attribute of parental authority (see 3.1.3). The second section of chapter five would target other relationships and would allow for claiming an interdependency status as described in part 4.2.3. It would also include an article on how reproduction is a residual category. The rules about the act of birth found in the first book would

[1015] *An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information.* Full reference not available yet. The Bill has been assented on June 16, 2017.

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need to be modify to make clear that there is no need for corroboration between the attestation of birth and the declaration of birth, and to root the act of birth in the declaration of birth for all parents.

The book on persons would contain three last chapters, two of which would be moved from the former book on the family and one already in the book on persons. Chapter VI would be on parental authority, Chapter VII on the obligation of support associated with interdependent statuses and the last chapter, Chapter VIII would remain unchanged, but for the modifications to the articles on the act of birth, and be entitled 'Register and Acts of Civil Status'.

### 4.3.2 Allocating effects

It is one thing to have the relationships of economic and emotional interdependency located in the Code, but for a status to be meaningful, it has to entail legal effects. What would be the effects of interdependency statuses in the *Civil Code of Québec*, and what would be the consequences of such an understanding of the regulation of intimate life? This part first allocates the effects of interdependency statuses and include them in the current mechanisms found in the Code. Mandatory effects are explored first, and effects one can opt out from or opt in are described after. Effects are proposed here, but would need to be subjected to an important discussion. To make clear the thesis does propose a reform, but promotes a new understanding or approach to the regulation of families and relationships, only already existing effects of the family are included. They are, however, expanded to be applicable to interdependency statuses, or relationships of economic and emotional interdependency. If others effects were to be included, they would need to be included following consultation with stakeholders. The idea is only to showcase how a theory of relationships of economic and emotional interdependency fits nicely in the Code and holds many promises. Second, it asserts the consequence such an understanding on four accounts: the consistency within the Code; the shift in the normative project of the regulation of intimate life, the consistency with law outside of the Code and other practical and theoretical advantages.

Mandatory effects would include, in addition to the extrapatrimonial rights and duties associated with interdependency statuses, the obligation of support, parental authority, prior claims on identified property (family patrimony), compensatory allowance and restrictions to ownership rights or lease agreements (family residence). What is now understood as the marriage

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or civil union contract effects would be part of nominates contracts. To be consistent, it should at least be named a conjugal contract. In terms of recoding the effects, some would be found in the book on persons, with the consequences it entails. Other effects or devices would be found in the book in which they belong.

The first group of mandatory effects of relationships of economic and emotional interdependency concern parent-child or adult-child relationships. Parental Authority – would roughly remained untouched, but would be relocated in the first book, the book on persons. It would only make sense to have parental authority and tutorship in the same book as they are, to a certain extent, two sides of the same coin. Maintenance as it has been explained above in section should be seen as a mandatory effect of filiation. This would clarify that even if parental authority is withdrawn, maintenance obligations last. In addition, reflections as to whether other adults can claim the rights, duties, obligations and powers coming with parental authority should be made. It would remain possible to delegate parental authority but some thoughts should be given to the possibility to share parental authority between more than two adults. While moving parental authority in the book on persons may seem questionable, it is justifiable when one analyzes the current articles about parental authority and its nature. The current title on parental authority contains sixteen articles. These articles mostly target extrapatrimonial elements of the relationship between a child and an adult. For example, articles 597, 598 and 602 provides for illustrations of the extrapatrimonial nature of parental authority. They read as follow:

| | |
|---|---|
| **597**. L'enfant, à tout âge, doit respect à ses père et mère.<br><br>**598**. L'enfant reste sous l'autorité de ses père et mère jusqu'à sa majorité ou son émancipation.<br><br>**602**. Le mineur non émancipé ne peut, sans le consentement du titulaire de l'autorité parentale, quitter son domicile. | **597**. Every child, regardless of age, owes respect to his father and mother.<br><br>**598**. A child remains subject to the authority of his father and mother until his majority or emancipation.<br><br>**602**. No unemancipated minor may leave his domicile without the consent of the person having parental authority. |

Respect at article 597 CCQ is undoubtedly extrapatrimonial, so is authority found in article 598 CCQ or the possibility to leave his or her domicile (art 602 CCQ). In addition, it is obviously impossible to 'opt out' or contract out of parental authority. More, it used to be found in the first book of Code, especially when is was seen as a *puissance.* A *puissance* amounted to authority granted by the state to an individual so that this individual had powers over other human beings,

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children or women. It should be said that a power is generally a prerogative used to act in the interest of another. While it has – gladly! – changed today, it remains, in nature, extrapatrimonial and attached to the status of persons. In terms of nature, parental authority is about powers and duties.[1016] It is mandatory and extrapatrimonial; it only makes sense to find it in the first book. The other mandatory effect of filiation would be the obligation of support. Since it applies both to adult-child and adults relationships, it will be analyzed below.

The second group of mandatory effects is related to relationships of economic and emotional interdependency between adults. As the proposed structure of the first book shows, conjugal unions should now be comprised of both *de jure* and *de facto* unions. The definition of *de facto* spouse could be in line with what is done outside of the Code in order to foster consistency between the law inside the Code and outside of the Code. This would be a solution to the *mythe du mariage automatique* coined by Hélène Belleau and explained above. Effects of marriage, civil union and *de facto* union would be found in the first book of the Code. As such, rights and duties of spouses (art 392 CCQ), name (art 393 CCQ), moral and material direction of the family (art 394 CCQ[1017]), choice of residence (art 395 CCQ), contributions to the expenses of the household (art 396 CCQ). Article 397 CCQ, providing that

> [a] spouse who enters into a contract for the current needs of the family also binds the other spouse for the whole, if they are not separated from bed and board.
>
> However, the non-contracting spouse is not liable for the debt if he or she had previously informed the other contracting party of his or her unwillingness to be bound

would probably need to be included in the book on obligations or in the title on the common pledge of creditors (articles 2644 and ff). Discussions with specialists on such matters would be required but it is easy to imagine that it could be properly and consistently recoded. Articles 398

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[1016] Even if she was referring to the former *puissance paternelle,* Groffier wrote “La puissance paternelle était définie par la doctrine québécoise récente comme ‘l’ensemble des pouvoirs que la loi accorde aux père et mère sur la personne de leurs enfants mineurs pour leur permettre de remplir leurs devoirs de parents’(footnotes omitted)” : Ethel Groffier, “De la puissance paternelle à l’autorité parentale” (1977) 8:2 RGD 223 at 223. Thinking of the *puissance paternelle* or *autorité parentale* in terms of powers and duties and its attibutes in terms of right and duty is theoretically sound. We should imitate our predecessors and be careful when it comes to words and qualifications.

[1017] Article 394 would likely need to be modified to remove the reference to “parental authority”. Conjugal and filial relationships should be seen independently. While at some point, *puissance maritale* had conjugal and filial connotation, it is time to operate a divide.

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and 399 CCQ, concerned with the mandate or representation powers, could nicely fit in the current chapter on the mandate, chapter IX of the second title (nominate contracts) of the fifth book (obligation). Article 400 CCQ, about the possibility for spouses to apply to the court when they "disagree as to the exercise of their rights and the performance of their duties" could be found in different places in the Code, but the first book could be a fit. Finally, the compensatory allowance rules should be integrated to the section on unjust enrichment, with the necessary modifications interdependency status trigger.

When it comes to the family residence and the family patrimony, it is important to ask what exactly articles 401 to 426 CCQ are about and who should they apply to? Are the articles about a limitation to the right of ownership? Claims? Prior claims? Limitations to leases? The answer is likely all of the above. As such, a careful evaluation of the nature of the mechanisms should be made so that they can be integrated where they actually belong in the Code. First, the articles on the family residence limits the legal prerogatives of an owner when it comes to the family home and movable property serving for the use of the household. Specifically, it prevents one of spouse from, "without the consent of the other, alienate, hypothecate or remove from the family residence the movable property serving for the use of the household".[1018] It would be logical to include theses provisions in the book on property. There is also an article about preventing subleasing or lease termination without the consent of the other spouse.[1019] These articles should be integrated to the law of obligations, more precisely in title on nominate contracts and the section about special rules for leases of dwellings. Second, as explained in part 2.2.3, scholars in Quebec have been critical of the nature and qualification of the family patrimony. While it is primordial to balance economic disadvantages at the end of a conjugal relationship, it should not be done through the family patrimony in its current form because this device does not respect civilian basic principles when it comes to the law of persons, the law of obligations, debtor/creditor law and property law. The articles on the family patrimony are about determining the value of a bunch of assets that have likely profited during a union and splitting it in value "regardless of which [of the spouses] holds a right of ownership"[1020] in it. For Caparros,

[1018] Art 401 CCQ.

[1019] Art 403 CCQ.

[1020] Art 414 CCQ.

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the family patrimony was a *créance égalisatrice,* a claim at the end of the marriage or a matrimonial regime, specifically an imperative secondary regime (*régime matrimonial legal impératif*).[1021] He was so theoretically opposed to the family patrimony that he qualified it as a "virus décodificateur".[1022] He wrote that "[u]ne connaissance et une compréhension insuffisantes de notre ordonnancement juridique codifié permettrait d'expliquer que le législateur ait senti le besoin de créer une nouvelle section dans ce livre II du *Code civil du Québec* […]".[1023] If it is a claim, it should be codified accordingly. If it is a matrimonial regime, it should be codified as such and be found in the book on obligations. While one can be ideologically opposed to Caparros or Pineau, their legal analyses of the nature and qualification of the "family patrimony" are generally impeccable. It is an incredible richness for civil law to be abstract, flexible and coherent enough so that conservative and liberal views of the family can be found in the analysis of the same legal devices. Further, the scope of these devices also needs to be revisited. Are these mechanisms reaching too far, for example in including pension plans? Are they including too little? This question goes beyond the purpose of this thesis, the thesis does not propose a reform, but a new way to think about the family and interdependency in family law. Empirical research about expectations of citizens and about effects of these mechanisms should be undertaken before suggesting any modifications the current regime. Discussions about the mechanisms should reach beyond a narrow understanding of choice and autonomy, and take into account the many aspects of family and personal lives, the many faces of interdependency. More, as it has been explained in part 2.1, these effects are currently the effects of the legitimate family, and that the presence of common children do not matter. Interdependency does not matter. Given the angle in which family and personal lives are understood for the purposes of this thesis, needless to say that this overreliance on formality to the detriment of the actual content of the relationships needs to be challenged. Do these mechanisms relate to interdependency status between adults, between adults and child, or more?

Last but not least in terms of mandatory effects; obligations of support. The obligation of support generally targets both adult-child and adults relationships. It would be extended to all

[1021] Caparros, *supra* note 224 at 266-67.

[1022] *Ibid,* at 267.

[1023] Caparros, *supra* note 224 at 254.

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adult relationships of economic and emotional interdependency, and to all adult-child relationships of economic and emotional interdependency. The possibility to claim it would thus be open to all, but this does not mean that everybody would be entitled to support. Support would remain subjected to the guidelines when it comes to children and would rely on a means and needs analysis for other relationships. It would be moved to the first book, the book on persons. While the nature in civil law of the obligation of support tends to be under documented and under analyzed, especially since the new Code came into force, Tétrault writes "[l]'obligation alimentaire est l'expression du concept d'interdépendance et de solidarité entre certains membres de la famille".[1024] But now that the content of family has expanded and since it is proposed to move towards relationships of interdependency, what makes an obligation alimentary? Groffier - citing Pélissier – rightly suggested in 1969 " [c]e n'est pas l'origine familiale ou non d'une obligation qui donne à l'obligation un caractère alimentaire. C'est sa destination. Sont alimentaires toutes les prestations qui ont pour but d'assurer à une personne besogneuse des moyens d'existence".[1025] Obligations of support are made to support individuals in precarious positions. They origin from relationships based on *solidarité* and *interdépendance.* There are some conceptual hurdles when referring to ideas about support obligations from France or from text published before divorce was possible. Support obligations used to materialize in a quite different context and to have a different scope.[1026] More, the nature of support obligations is complex in civil law, but nothing prevents them from attaching to interdependency status when and if need be. These obligations are attached to the person, to the self. They are rooted in a specific type of relationships. The form of these relationships matters less than their content. Of course, they raise policy and social concerns, but from a private law perspective, it would be sound to attach them to relationships of economic and emotional interdependency. These relationships are, in their very nature, about solidarity and interdependency. Support obligations should be seen as something one cannot contract out of.

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[1024] Michel Tétrault, "L'obligation alimentaire : une définition et la portée de la notion d'aliments" in *Droit de la famille, Volume 2 – L'obligation alimentaire* (Cowansville : Yvon Blais, 2011).

[1025] Ethel Groffier, *L'obligation alimentaire en droit de la famille comparé* (Montréal, 1969) citing Jean Pélissier, *Les obligations alimentaires* (Paris, 1961) at 58.

[1026] An analysis of the transformation of the articles in the CCLC and the CCQ shows how the obligation has fluctuated. At some point, the wife was not included in the article, but the mothers-in-law and father-in-law were. Compare arts 165, 166, 167 CCLC to 633 CCQ (1980) to 585 CCQ (1996) and current article 585CCQ.

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This mandatory effect of interdependency statuses should be located in the first book of the Code.

The last element to address is the marriage or civil union contract. As explained above, Quebec has a default regime – the partnership of acquests – applicable to all *de jure* spouses who did not elect for another type of contract to regulate the pecuniary consequences of their unions. If one is to take the relationships of economic and emotional interdependency seriously the default regime should apply to *de facto* conjugal relationships too. Some adjustments to the rules should maybe be made, but if the content of relationships matter, there is no reason to apply this default regime only to formal conjugal unions. However, these contracts should likely be limited to conjugal relationships, but for exceptional situations and circumstances. It is possible to speculate that non-conjugal adults in interdependency relationships have – generally – no expectation of property division and may not be part of a common economic enterprise. The scope of the default regime might also need to be revisited and alternative options should remain in the Code. On a different note, whether a default regime is a contract in the situation of default matrimonial regime should be debated. Under the *Civil Code of Lower Canada*, matrimonial covenants were found in the chapter after the chapter on obligations in the third book, the book entitled “of the acquisition and exercise of rights of property”. Articles about conjugal contracts should be recoded in the book on obligations, and arrangements made to properly include default regimes. The actual content of these rules should be determined by the various stakeholders and expert as part of an interdisciplinary enterprise. One should keep in mind not to act only in a reactionary fashion, and learn from the past experiences of matrimonial regimes reforms.[1027]

What are the broad consequences of such a way to understand families, individuals and relationships of economic and emotional interdependency? Consequences have been highlighted throughout the thesis, but a short summary cannot hurt. First, such a theory would increase consistency within the Code. The book on the family distorts basic principles about property, persons and obligations. It uses a terminology often inadequate and navigates between core concepts in an approximate manner. Status, intent and formalities are used in inconsistent ways, but the very nature of a Code – rigorous, ordered, etc. – leads jurists to believe the book on the

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[1027] See Danielle Burman, “Politiques législatives québécoises dans l’aménagement des rapports pécuniaires entre époux: d’une justice bien pensée à un semblant de justice - un juste sujet de s’alarmer” (1988) 22 RJT 149.

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family somehow makes sense. It does not. More, it could even lead to believe that the family is a legal entity, something it is absolutely not. An approach narrowing in on relationships of economic and emotional interdependency, as it has been accounted for earlier, infuses the Code with consistency since it builds upon the notion of status, its mandatory and optional effects. It respects the principles of the law of persons, property, obligations and more. It unifies what is at stake in establishing status. It focuses on the nature of relationships, not their form. Family should free itself of prejudices and constructs about the form of meaningful relationships and focus on their content. Second, a theory of relationships of economic and emotional interdependency shifts the normative project of the regulation of intimate life. Having a part of the Code called "The Family" is limitative and operates on a problematic assumption about what a family is and why it matters in private law. "The Family" is bound to change over and over again. People experiences fluctuate. Law regulates these relationships because of their particular nature and their specific challenges. 'Family' relationships hold the potential to be detrimental is pernicious ways. Family law is about a particular kind of interdependency, but nothing prevent this particular kind of interdependency to materialize in other settings and law should be sensitive to that. Private law should not favorise a model of intimate organization over the other, especially if and when the relationships operate similarly and the effects are equivalent. It should not stifle fulfilling relationships on the basis of what an ideal family model should be. Third, such an approach would increase consistency between law outside of the Code and the Code. There is an important gap between conception of the family in social law, public law and private law. Focusing on relationships of interdependency could narrow the gap in many ways. The most obvious at attempting to narrow the gap is including *de facto* relationships – between adults, but also between adults and children – in the Code. It would not solve all the issues, as some relationships would still not be recognized and others will be recognized for the purposes of certain laws but not others, but it would be a step in the right direction. Lastly, there are other theoretical advantages. A theory of relationships of economic and emotional interdependency provides flexibility and abstraction. As such, it holds the real potential to adapt with time, through changing social practices and evolving judicial intervention. It also helps reaching a balance between exceptional and regular situations. An approach focusing on relationships of economic and emotional interdependency hold the potential to be transformative to family law in the *Civil Code of Québec*.

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# 5 Chapter 5
# Conclusion

Quebec family law one- has been in constant flux during the period studied (1955-2017). Family law has witnessed a recodification, transformations in nature, and proliferations of relationships. Some relationships have been included in the Code – one can think of *formal* same-sex unions or children born out of wedlock – while others have yet to be considered as relevant – *de facto* unions for example. For decades, reforms were made and numerous changes occurred in family law without giving necessary attention to the big picture. The regulation of families and intimate ties in the *Civil Code of Québec* is nonetheless, again, in the midst of modifications and transformations. At the time of writing this conclusion, a new bill has just been adopted and will modify the Civil Code again, this time with regards, mostly, to adoption.[1028] Pressures are being made for the Government to address to issue of the regulation of surrogacy.[1029] The status of *de facto* spouses is a bone of contention. It is likely changes are going to happen in a near future. One can speculate as to whether these changes will be made with attention devoted to family law as a whole and to the nature of the relationships family law address, or if it is just going to target a specific issue.

Family law is also in *décalage* with lived experiences of citizens and families. It does not meet their expectations. The Civil Code draws lines to regulate groups, but these lines are not necessarily the ones seen by the people they regulate. A report of the *Partenariat Familles en Mouvance* from June 2017 showcases how big the gap between law and life is when it comes to families, specifically when it comes to conjugal unions and pecuniary aspects of the

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[1028] Bill 113, *An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information*, 2017 C 12.

[1029] See for example, "Mères porteuses: le Québec doit réformer son droit familial", July 28, 2016: http://ici.radio-canada.ca/nouvelle/795307/meres-porteuses-inde-jugement-quebec-droit-famille-couple-homosexuel (last consulted July 24, 2017).

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relationships.[1030] The findings of the report are welcome and data on these questions was sadly lacking. The report exposes how couples – especially couples in *de facto* unions – do not know how law applies to them.[1031] It is the third empirical study lead by Hélène Belleau exemplifying the *mythe du mariage automatique.*[1032] Actually, it shows that both married and unmarried spouses ignore the consequences of their "choice".[1033] More, the differences between *de jure* and *de facto* unions, especially when it comes to managing assets, are minimal in real life, even if law assumes these unions function differently. The report shows how the form of the union does not influence how people share resources.[1034] It also provides empirical data on the "choice" to marry or not to marry. Not surprisingly, the reasons provided by the spouses were not legal.[1035] The report makes it hard for law makers to hide behind under-problematized notions of choice, freedom and autonomy and offers long awaited data of crucial importance to family law reform in Quebec.

In Quebec family law one-, statuses have consistently been triggered by formalities and by a formal account of how relationships can be integrated in the Civil Code. The law of persons is associated with the notion of status. A status entails certain effects a legal subject is not free to contract out of. However, and contrary to what family seems to hold dear, a status does not depend solely on the accomplishment of formalities or on a contractual logic. The contractual view of the family is incomplete and has reached its breaking point. It is time to go further and meaningfully engage with relationships of economic and emotional interdependency, relationships that have many facets and can be properly integrated in Quebec civil law, as this thesis has exemplified. Indeed, a status should ultimately depend on the qualities of certain relationships and its attributes. A status, here an interdependency status, should be triggered by the qualities of a relationship. The relationship in itself should be the reason why law regulates

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[1030] Hélène Belleau, Carmen Lavallée and Anabelle Seery, *Unions et désunions conjugale au Québec : Rapport de recherche. Première partie : le couple, l'argent et le droit,* Institut national de la recherche scientifique, 2017.

[1031] *Ibid.* Part 7, 66.

[1032] *Ibid* at 4.

[1033] *Ibid* at 67.

[1034] *Ibid* at 8

[1035] *Ibid.*

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the persons in the relationships to foster a certain understanding of which relationships are meaningful. It is time for family law to reach beyond formalities and to integrate a functional account of meaningful relationships in the Code.

In order to address these and other challenges, this thesis put forward a different approach to 'the family', families and relationships in the *Civil Code of Québec*; a theory of relationships of economic and emotional interdependency. To do so it offered a history of the evolution and multiplication of conjugal and filial ties, and described the proposed reform currently in the air. Through this survey of 'family law' relationships in the *Civil Code of Québec*, attention has been devoted not only to demonstrate they increased in numbers, but how they also transformed in nature. Afterwards, it proceeded to put forward a different understanding of "the family" as *relationships* of a particular nature. This allowed for a functional account of the family and of relationships. The thesis suggests that certain relationships trigger interdependency statuses and that these statuses should be law's focus. It then recoded the relationships of economic and interdependency in the Code and allocated their effects.

In a subtle way, this thesis wanted to confront 'family law exceptionalism". Family law exceptionalism materialized quite strongly in Quebec, especially with the 1980 reform. Family law exceptionalism refers to the idea that family law is 'different' from private law in general; it is special, exceptional. It constructs family law as "an area that is neither entirely private nor entirely public".[1036] Family law is seen as "peripheral to the heart of the *law*, conceived as the object of legal science".[1037] It has been described in critical theory, comparative law and beyond.[1038] Hasday, building on Fineman, Teitelbaum and Halley & Rittich summarizes family law exceptionalism:

> Many narratives about family law describe the field as distinctly set off from other areas of the law, so that legal rules and presumptions in force elsewhere do not apply or are actually reversed within family law. For instance, one scholar has explained that "[s]ociety has devised special laws to apply to the family" and observed that " 'family law' can be thought of as a system of exemptions from the everyday rules that would apply to interactions among people in a non- family

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[1036] Marella, *supra* note at 721.

[1037] *Ibid.*

[1038] Janet Halley and Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism," (2010) 58 Am J Comp L 753. See the volume in general.

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> context, complemented by the imposition of a set of special family obligations."[1] Another scholar has recounted that "[l]egal, social, and popular discourse all agreed that the principles of family operation were not part of, and were necessarily different from, those found in other legal and social enterprises."[2] Two more scholars "start with the observation that family and family law are often treated as occupying a unique and autonomous domain— as exceptional."[3] [1039]

It is fair to say family law in Quebec followed a movement where family is seen as exceptional, and it has not been quite challenged.[1040] Family law was included in the Code, became animated by its own 'special' or exceptional principles, different from other codified law and inconsistent with basic private law elements (status, contract, ownership, and more). Even more so given the uncertain nature of the family itself since the coming into force of the 'family patrimony' and other mechanisms not estranged from legal personhood. But family law does not have to be 'exceptional' or peripheral. It can be fundamental private law.[1041] It can be integrated in a general legal system and not be an 'inner legal system'. It can be respectful of civilian principles and be recoded. A theory of relationships of economic and emotional interdependency operates within a private law system.

This projects obviously has limits. It does not pretend to be a reform, but rather is a new approach to "the family" in Quebec civil law, specifically in the *Civil Code of Québec*. It does not build on strong empirical data and is not the result of consultations with experts and stakeholders. It did not address elements beyond family law one-, such as successions for example. It aims was to provide a different way to think about "the family" in the Code, a way that has the potential to transform, adapt, be inclusive and include elements of autonomy, choice and freedom, but also solidarity and protection.

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[1039] Jill Elaine Hasday, *Family Law Reimagined* (Cambridge, MA: Harvard University Press, 2014) at 15. For greater clarity, here are her footnotes: [1] refers to Martha Albertson Fineman, "What Place for Family Privacy?" (1999) 67 Geo Wash L Rev 1207, 1207 [2] refers to Lee E. Teitelbaum, "Placing the Family in Context" (1989) 22 UC Davis L Rev 801 at 801 and [3] refers to Janet Halley and Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism" (2010) 58 Am J Comp L 753 at 754.

[1040] Fernanda G Nicola, "Family Law Exceptionalism in Comparative Law" (2010) 58 Am J Comp Law 777 at 790 [footnotes omitted].

[1041] Robert Leckey, "Family Law as Fundamental Private Law" (2007) 86 Can Bar Rev 69. Answering Young, Leckey explains that family law is not a matter of charter litigation and is pure private law. Hence it is a provincial matter.

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