Mother?
*A Portrait of Legal Motherhood in Canada*

by

Régine Tremblay

A thesis submitted in conformity with the requirements for the degree of Master of Laws

Graduate Department of Law

University of Toronto

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What characteristics make a *legal mother*? The thesis explores some of the gendered differences in establishing legal parentage. It defends that there is no adequate conception or definition of legal motherhood in Canada. Indeed, the conception of legal motherhood is elusive or reiterates the problematic association between biological motherhood and legal motherhood. The logical leap between a biological situation and a legal status creates two main problems. First, the elusiveness of motherhood as a legal category tends to strengthen gendered assumptions in legal parentage, and it is especially burdensome on women. Second, given the fact that no guidance is provided to decision makers, the vesting of motherhood is often subjected to an evaluation of a woman’s sexuality, sexual choices, or sexual preferences. There is a need to put forward a comprehensive analysis of legal parentage; a gender and sexuality neutral concept of stratified legal parenthood.
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**INTRODUCTION**

What is motherhood? Is it merely a biological reality? Is legal motherhood different from natural or biological motherhood? Are mothering, motherhood, parentage, parenting, and parenthood various realities and words to describe a unique truth? Motherhood has sexual and gender components, but does legal motherhood have to be understood in gendered terms? What roles do sex, gender, intention and biology play in determining who will be the mother of a child? Moreover, why are these questions relevant today?

My thesis is that there is no adequate conception or definition of legal motherhood in Canada. Indeed, the definition of legal motherhood, when there is one, is elusive or reiterates the problematic association between biological motherhood and legal motherhood. The logical leap between a biological situation and a legal status creates two main problems. First, the elusiveness of motherhood as a legal category tends to strengthen gendered assumptions in legal parentage, and it is especially burdensome on women. Legal motherhood is exclusive at its core. Second, given the fact that no guidance is provided to decision makers, the vesting of motherhood is often subjected to an evaluation of a woman’s sexuality, sexual choices, or sexual preferences. Thus, the current understanding of motherhood is rooted in the State’s conception of what constitutes appropriate or acceptable sexual behavior for a woman, and what constitutes a productive and adequate use of her body and her sexuality. What kind of sexual behavior does legal motherhood presume? Sexual behaviors taking place in ‘heterosexual, nuclear, monogamous, preferably married until death do us part’ settings. The aim of my project is to demonstrate how law reflects and constitutes values and notions of adequate gender roles and sexual behaviors through legal motherhood. To prove my point, I will provide an in-depth study of the concept of “mother”. I am particularly interested in challenges to the traditional
conceptions of motherhood and the not-so-obvious determination of who is the mother of a child. Legal motherhood should be understood differently from the biological reality of giving birth for the purpose of my analysis. It will be described and analyzed as a site of sexual politics and ethics. The thesis incidentally proposes a different understanding of parenthood. Indeed, I try to demonstrate how legal motherhood cannot do the work, because it already relies on to many problematic sexual and gender assumptions. The conclusion will suggest a stratified understanding of legal parenthood, not relying on the classical male-female or father-mother dichotomies. Nor would this new conception have to be understood as binary. It should be fluid, multiple and gender-neutral.

Depending on the historical period, various elements have been used in evaluating who can be a legal mother. What characteristics make a legal mother? What criteria does a woman have to fulfill to be a legal mother? The thesis will explore some of the gendered differences in establishing legal parentage. Why can it be complex to be a legal mother for women not giving birth to a child? Why is the threshold to meet to be a legal father sometimes so stupendously low? While many would argue that the evolution is a simple shift from the central importance of biology to the importance of intention and social parenting, is not at all clear that the this movement applies in the same way to men and women. The only common thread running through concepts of motherhood is the ongoing regulation of women and women’s sexuality.

The present analysis is relevant today for many reasons. Reproductive technologies are becoming more and more complex, but the meaning and definition of “mother” is often taken for granted. The law therefore does not have the tools to resolve new and complex parenting situations, and the concept of “mother” now varies considerably from one Canadian province to
the other, creating inconsistencies. Furthermore, motherhood – and incidentally fatherhood and parenthood – and its conception in law are worth studying because the new models of adult relationships expose the inherent limits of the current legal regime. Legal concepts are facing new challenges as a result of transforming social settings and the reform of institutions that were once monolithic. The problems caused by a gendered understanding of parenthood, its impacts on women and on women’s sexual choices will be highlighted throughout the discussion.

There is need a to put forward a comprehensive analysis of motherhood in law, regardless of the tradition from which we come (especially in Canada). This is the reason why I propose to take a comparative approach. Moreover, Québec’s recent reform of filiation has tremendous implications for our conception of legal parenthood – and especially motherhood – and it must be looked at closely. Legal motherhood impacts everybody and affects many fields of law. Everyone has a mother. Some women will be mothers. Sexual politics affect men and women, fathers and mothers, sons and daughters. Social fathering is well recognized, it is not so for social mothering. Paternity and fatherhood are understood as different, it is not so for maternity and motherhood. All these questions have to be examined from a legal perspective.

This thesis will however focus primarily on the moment where a woman is vested with legal motherhood, or when a woman asks to be recognized a legal mother. This choice allows investigating the biology / intent dichotomy and its differentiated impact on men and women. As such, I will not study the articulation of the status of legal mother, with the privileges and duties it entails, but only the attribution of the said status. For example, even if they reveal how legal

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1 For example, marriage is not only understood solely as the union of one man and one woman (see *Halpern v. Canada*, [2003] O.J. No. 2268) and the definition of ‘spouse’ includes same-sex spouse (see *M. v. H.*, [1999] 2 S.C.R. 3.
motherhood is established through gender and sexual politics, issues about custody, access, welfare law, labor law, taxation, are beyond the scope of this analysis.

The thesis uses a number of approaches. Theoretically, it adopts a feminist perspective. Various waves of feminism and their impacts on legal motherhood and sexuality are explored, especially in chapter one, but also throughout the thesis. Given the importance I wanted to give to fluid gender and sexual identities when I began researching and writing, I thought queer theory would be the cornerstone of my theoretical framework. In a brave new world, legal motherhood would equal legal parenthood. I believed queer theory was the solution to reach this goal of legal neutrality vis-à-vis gender and sexuality. While it would be ideal to reach a new conception of legal parentage in Canada, we are a long way from this ideal. I now realize that the descriptive nature of my enterprise, that of analyzing legal motherhood in current Canadian legislation and decisions, makes relying heavily on queer theory a struggle. Indeed, the current understanding of legal motherhood is profoundly gendered. In most provinces, while family models changed, the legislation stagnated. As a consequence, a lot of the critiques and comments that first come to mind are influenced by dominance feminism. Even when really innovative solutions are put forward – for example Québec’s parental project and the possibility of having two mothers ‘by blood’ – the law’s perspective on motherhood is still deeply intertwined with traditional conceptions, and misconceptions about sexuality and gender. However, when critiques, innovations and new conceptions are suggested, I try to raise points sensitive to gender and sexual neutrality. The everlasting debate about biology and intent is a recurrent theme as it proves how there is no common thread in the vesting of motherhood at law, except this idea of gendered assumption about parenthood and sexual politics. Sexual politics and gender affect – even if it is in various ways – every woman.
The two main ideas I want to highlight – namely the elusive or absent definition of legal motherhood and the problematic association between biological and legal motherhood – and their two correlative consequences – the room it creates for value judgments and a hierarchy of sexualities, and the ubiquity of gendered assumptions in legal parenting, both creating exclusion – are explained in three parts. The first part explains the myths and ideologies of motherhood in the current legal and social literature. The aim is to demystify concepts taken for granted, such as sexuality and reproduction, and their impact on the construction of a “mother identity”. I suggest that the “mother identity” relies on myths and constructs, but that the law should be careful when integrating such elements into a normative order. Various ideologies regarding motherhood, and legal motherhood are described. The second part stands as a detailed explanation of the constitution of the mother status through the examination of various pieces of legislation. In other words, I will study motherhood in the eyes of the legislative process questioning the interaction between biology and intent and the uncertainty about what a mother is, uncertainty created by the simplistic words used to portray a complex reality. To illustrate law’s construction of motherhood in this chapter, I will study main provincial statutes and their definitions of mother, and the related concepts of birth, parent, etc. Part three portrays motherhood in the judicial discourse. It analyzes two types of situations where the absence of definition of legal mother creates problems: being a second parent in the artificial insemination context, and surrogacy issues in Québec. It reiterates the problems raised in the previous sections about the lack of a good notion of legal mother and its direct consequences on people, especially women. It also indicates that there is a hierarchy of sexualities. Moreover, the review will expose how there is no unified conception of motherhood in courts and how this leaves room for illegitimate gendered assumptions. Further,
the very same issues are ruled on in opposite ways, depending on which of women’s sexual behaviors judges are ready to accept.

The conclusion sums up the previous parts (legislature and judges), and emphasizes the sexual politics and gendered assumptions underlying legal motherhood. It also speculates as to why this reality has remained largely unquestioned. Its central question is this: What if the sexual politics and gendered assumptions behind legal motherhood were to disappear? What if the legal system were willing to pause and put forward a conception of legal motherhood different from biological motherhood? What if the fictional character of legal parentage were possible for men, in as much as women? It also suggests that motherhood and fatherhood should not be legal boxes or categories, and that the words chosen to portray a legal status should be carefully chosen, since every word comes with its own historical and cultural associations. A concept of “stratified parenthood” should be put forward instead. Stratified because different persons should have different kinds of obligations with regard to a child, and parenthood because the notion should be gender-neutral. Moreover, this understanding of parenthood would allow many individuals to have different roles in a child’s life.
CHAPTER 1 – THE CONSTRUCTION OF THE “MOTHER” IDENTITY

The construction of this thing called motherhood is complex and manifold. It is important to be aware of the social and legal content of the concept of motherhood. Motherhood varies according to eras; it is intertwined with particular cultural representations, historical events, and influenced by disciplines such as psychology, sociology, philosophy, and anthropology. This first chapter is an attempt at drawing a global picture of motherhood. It first explores what reproduction, sexuality and sex represent. Why is the frontier between those realities and experiences blurry? Is motherhood only about reproduction? How much is it about sexuality and how much is it about reproduction? What exactly is reproduction, and what would be an accurate conception of sex and sexuality for the present purpose? Could legal mothering be something else, unconnected to merely biological considerations? Or, more accurately maybe, should legal motherhood be understood as separated from biological imperatives such as gestation, birth and expulsion?

I begin by considering how today’s idea of motherhood has emerged. To do so, I will argue that the current understanding of motherhood is the product of constructs, which represent institutionalized myths. I will explain what a myth represents and how it is different from a construct. A few myths and constructs of motherhood will be studied. Myths are crucial because they represent factual or biological determinations or postulates. As such, they are at the roots of the problematic association between legal and biological motherhood. The nature of myths and constructs will highlight how sexuality operates as a nexus of power, to use Foucault’s words, when it comes to motherhood. I will suggest that the constructs are overflowing with sexual politics vis-à-vis women. Constructs are myths injected with social and legal power.
Furthermore, the constructs can be read through different lenses. In my analytical scheme, these lenses are ideologies about motherhood. I will try to depict motherhood through various lenses – ideologies – such as dominance feminism, cultural feminism, and queer theory. The purpose of this exploration of motherhood is to highlight how the legal conception and understanding of what constitute a mother at law relies on an erroneous premise: biology. The over-reliance on biology is one of the reasons why legal motherhood is poorly conceptualized and defined. Furthermore, if biology is the cornerstone of legal motherhood, this obviously promotes gendered assumptions. Parenthood, and especially motherhood, are flexible, multidimensional, and closely related to gender and sexuality, and to their expression and control. The myths, constructs and ideologies will shed the light on the blatant sexual politics of motherhood. The chapter closes by asking whether a complex and nuanced understanding of human gender and sexuality could change the current understanding of legal motherhood, and by extension, parenthood. How could this sensitivity to sex change the legal understanding of motherhood?

**Reproduction, Sex and Sexuality**

*Reproduction*

For the purpose of this analysis, reproduction is the process by which human beings create other human beings, notwithstanding the mechanism they elect to do so. It has also been called production and has changed historically. According to Mary O’Brien, human reproduction is the starting point of feminism. Reproduction is historical, and the “freedom for women to choose

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parenthood is a [significant] historical development”. Reproduction is a woman’s thing, it is part of what a woman is. O’Brien alleges that there is a difference between biological reproduction and reproduction. On the one hand, biological reproduction “is a natural process with which human reason can only deal from the standpoint of natural science”. So under biological reproduction, one has to turn to biology or anatomy. On the other hand, she also admits that reproduction represents “reflections of a change in productive relations” and that family – it is possible to infer the same about motherhood - is a historical development. Thus, reproduction can be understood as “praxis and consciousness. Like production, reproductive activity is basic to the formation of consciousness and image of the self, of our own role in the propagation of our race, the formation of history and social life”. In other words, it is possible to extend O’Brien’s ideas to say that law and biology do not necessarily need to be in line. What O’Brien frames as reproduction *tout court* is, in my opinion, social reproduction. Social reproduction is used “to signal the social nature of procreation and/or population processes in general”. For feminists, reproduction is not only biological; it is social.

The equation between biological and social reproduction has flaws, so does the equation between biology and legal motherhood. As reproduction and social reproduction as conceptual tools or concepts have not been studied that much, I found myself struggling to find sources and materials for this part of this analysis, even if reproduction is central to motherhood. Biological reproduction is a fact. However, social reproduction is a construct. Indeed, as Simone de Beauvoir observed, “il y a des femelles animales qui puisent dans la maternité une complète

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6 *Ibid.* at p. 36.
autonomie; pourquoi la femme n’a-t-elle pas réussi à s’en faire un piédestal”.\textsuperscript{9} There are anthropological\textsuperscript{10} and historical\textsuperscript{11} examples of a different relationship between biological reproduction and social reproduction. Such an investigation would be beyond the scope of the present analysis, but it is important to be aware that social reproduction and biological reproduction are two different things, that somehow merged. As Nancy Chodorow indicates, “theorists have either ignored or taken as unproblematic [the] sphere of social reproduction, despite its importance and the recognition by some theorists, such as Engels, of its fundamental historical role”.\textsuperscript{12} Engels, according to Chodorow, also claims that reproduction relies on kinship rules. For the purposes of this thesis, it is possible to extend his idea to parentage or parenthood rules. Furthermore, Chodorow suggests that, according to her understanding of Engels, the fact that reproduction was relying on kinship rules “does not mean that the relations of production were based entirely on biological and affinal ties”.\textsuperscript{13} It is important to challenge the prevalent assumption stating “the structure of parenting is biologically self-explanatory”.\textsuperscript{14} Not only is reproduction not necessarily tied to biology, but motherhood and especially legal motherhood cannot be justified only by this postulate, as law supports and promote certain values and institutions. Biological reproduction and social reproduction tend to merge when it comes to legal motherhood – which is a more social category; yet it is reduced to a biological category.

\textsuperscript{9} Simone de Beauvoir, \textit{Le deuxième sexe. Tome 1(Les faits et les mythes)} (France : Gallimard, 2008) at p. 113
\textsuperscript{10} Claude Lévi-Strauss, \textit{Les structures élémentaires de la parenté}, 2\textsuperscript{nd} ed (Berlin; New York : Mouton de Gruyter, 2002). In this anthropological masterpiece, Lévi-Strauss proposes a model of structural relationships between family members relying on association preferences (rules about who may or may not be a family members) and modalities (symmetrical or asymmetrical marriage). He also studies the relation between nature and culture, and biology and social components (see esp. Chapter 1). On dual organization in family settings (see Chapter 6). A look at Bronislaw Malinowski’s \textit{oeuvre} could be useful but it is beyond my knowledge.
\textsuperscript{11} Simone de Beauvoir, \textit{supra} note 9 at pp. 111 and ff.
\textsuperscript{13} \textit{Ibid.} at p. 12.
\textsuperscript{14} \textit{Ibid.} at p. 13.
It could be argued that a few decades ago, the archetype of a socially valuable and reproductive unit was the housewife/breadwinner heterocentric, married, nuclear family. Today, the materialization of the productive unit is different, and this is why reproduction at law is so interesting. If reproduction were merely about copulation, egg and sperm, its impact at law would be minimal. Productive relations allow contextualization, and are helpful to demonstrate the sexual politics underlying motherhood. A productive relation is merely another way to conceptualize, I believe, a legally legitimate relationship status, or reproduction model. When studying productive relations in family law, one also thinks about the changing meanings of family and the diversification of household’s models. A household is a productive unit, and it can be defined “as those who have de facto entered into long-term income-pooling arrangements [...] [and it] entails some set of mutual obligations, although no particular set is included in the definition”. 15 When it comes to parenthood, a productive unit can be a single mom choosing to intentionally have a baby on her own, a blended family, a lesbian couple, a gay male couple. 16 In a not so distant past, it was impossible to conceive that a productive unit could be a gay couple, as homosexuality was not only a sin, it was also a crime. For different reasons, a lesbian couple would not have been characterized as a productive unit either. 17 Lesbian invisibility is an

16 For a jurisprudential example: Adoption – 09367 2009 QCCQ 16815 in which the court recognized a gay male couple could be parents, even if a surrogacy agreement took place.
17 See the concept of social infertility and section 8(1)(a) and (b) of Victoria’s Infertility Treatment Act 1995, Act No. 63/1995 (Version incorporating amendments as at 28 April 2005) precising “(1) A woman who undergoes a treatment procedure must— (a) be married and living with her husband on a genuine domestic basis; or (b) be living with a man in a de facto relationship”. 

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historical fact, as is legal incomprehension of lesbian relationships. Even now, “homosexuality is still very much “other’”, and this homo-apprehension is noticeable in courts. Historically, for various reasons or motives, biological reproduction and social reproduction sometimes represent the same reality. However, in recent years, social and biological reproduction do not match, emphasizing how parentalité or parenthood is “everywhere a part of social and cultural management of human reproduction and is intimately interlinked with gender”. Parenthood – and especially legal parenthood – is about something more than merely biology. A key function of law is to establish rules dictating particular human behaviors. As such, there is no real need to equate legal motherhood with expulsion of the fetus or gestation. It is a choice, it has impacts on women, and it now creates inconsistencies. Reproduction is also deeply intertwined with sexuality, and sexuality can be a powerful tool for delineating human behaviors.

Sex and Sexuality

Sexuality must be analyzed carefully and it profoundly influences human interactions. Sex is a site independent of gender and it cannot be merely understood as a biological phenomenon. As Gayle Rubin writes, “sexuality is constituted in society and history, not biologically ordained”. Sexuality should be “understood in terms of social analysis” and there is a “hierarchical system of sexual value[;] marital, reproductive heterosexuals are alone at the top of

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18 A classical example of that can be found in Morrison c. Morrison, [1972] P.E.I.J. No. 48, 2 Nfld. & P.E.I.R. 465. In this case, the judge evaluates pretty inappropriately and intrusively the sexual behaviors of two lesbian lovers. He has to determine whether or not adultery was comitted.
19 Bruce MacDougall, Queer Judgments, Homosexuality, Expression and the Courts in Canada (Toronto: University of Toronto Press, 2001), at p.4.
20 Theme to be explored in chapter 3.
23 Ibid. at p. 277.
the erotic pyramid”.\(^{24}\) It influences law, social management and constructs. “Disputes over sexual behavior often become vehicles for displacing social anxieties, and discharging their attendant emotional intensity. Consequently, sexuality should be treated with special respect in times of great social stress”.\(^{25}\) It is important to dig deeper than sexual essentialism and to be aware of the many meanings of sex and sexuality. “[S]exual essentialism – the idea that sex is a natural force that exists prior to social life”\(^{26}\) - is inaccurate as it posits sexuality as fixed in time and disconnected of its socio-historical context. If sexuality were a mere natural force and reproduction were biological reproduction, this would thesis would end here. Sexuality is “not comprehensible in purely biological terms”.\(^{27}\) Sexuality is more than mere copulatory activity.

Sexuality for the purpose of this analysis should be understood as an array of productive and non-productive desires and sexual conducts, affected by a person’s sex, at a specific time and place in history. The historical period is important to sexuality because the socialization of sex varies a greatly from one period to the other, from one place to the other. Sexuality has to be contextualized. In other words, sexuality is about the sex one is and the sex one practices – *le sexe que l’on est et le sexe que l’on a*. This conception of sexuality – and incidentally gender – goes back to Judith Butler’s brilliant explanation on how gender is a socio-political concept that should be understood as a verb rather than a noun. She argues that gender has more to do with something one does than what he or she is.\(^{28}\) The same intellectual process or reasoning should take place with regards to sex and sexuality. Sexuality is something one does; it is not something one is. Moreover, neither sex nor gender should be conceptualized in a binary fashion and one should be aware of the multitude of possibilities of the combination of the two concepts.

\(^{24}\) *Ibid.* at p. 279.


\(^{26}\) *Ibid.* at p. 275.

\(^{27}\) *Ibid.* at p. 276.

Rubin affirms that a theory of sex identifies, explains, denounces and describes erotic injustice and sexual oppression. The relation between motherhood and sexual oppression must be scrutinized. Sex or sexuality – I will use the two words interchangeably – is also about power. As Foucault revealed:

> on a souvent tenté de réduire tout sexe à sa fonction reproductrice, à sa forme hétérosexuelle et adulte, et à sa légitimité matrimoniale, [ceci] ne rend pas compte, sans doute, des multiples objectifs visés, des multiples moyens mis en œuvre dans les politiques sexuelles qui ont concerné les deux sexes, les différents âges et les diverses classes sociales.

Sex is indeed complex. Sex also is speculative, ideal and internal. It is a form and a content; as it shapes behavior in as much as it allows for internalization, thus individualization. Even if it is personal, it also is public enough to represent a way to control individuals – a classic example of that would be the socialization of reproductive behavior. As Halley rightly points out, reporting Foucault’s theory, “modern sexuality (...) produced sex desire and fostered a profusion of sexual discourses”. This sexual discourse is necessarily articulated around the three building blocks of norm, knowledge and subjectivity. The sexual discourse of motherhood will later be explored, using mostly the ideologies related to this woman’s status and its impacts at law. Legal motherhood is a site where “the “naturalness” of heterosexuality, marriage and the nuclear family is socially constructed and perpetuated”. The gender impact of parenthood and motherhood has been heavily documented, but it is also important to consider the impact of sexuality on these legal categories.

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30 Michel Foucault, *Histoire de la sexualité 1. La volonté de savoir* (France: Gallimard, 1994) at p.136-137.
31 Janet Halley, *infra* note 61 at p. 133.
Sexuality, understood as a “valuable and serious” concept or theory is fairly recent, and is not universal. From a temporal perspective, it is fair to say that sexuality does not mean the same thing to me as it did to my grandmother. Sexuality constantly changes in meaning.

“Looking for sex (...) in history, one might look for reproduction, which might be regarded as hard evidence that sex took place in the past”. It is important to acknowledge sexuality’s history. Foucault’s ‘history of the present’ permits to sensitively study the importance of sex.

“Writing a history of the present means writing a history in the present; self- consciously writing in a field of power relations and political struggle”. Sexuality and reproduction once were inseparable. Sexuality – well the “good” kind – was aimed at creating new human beings, in a particular context (marriage, etc). Sex and reproduction – no matter how one wants to define it – can now be split. Law can also be made in the present. However, sexuality is complex as it largely remains private and hidden, it constantly changes in meaning, and it still represents a nexus of power.

It has been argued over and over that family, thus family law, is the central mechanism for the regulation of domestic life. Legal motherhood could be portrayed as the central mechanism for the regulation of a woman’s sexual life. I previously re-affirmed how sex is about relations of power, and power structures. Sexuality has often been used to explain and analyze situations located at the borders, like prostitution, deviant sexual conducts, pornography and homosexual conducts. However, sexuality can also be useful as a theoretical framework to depict general

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34 Catharine MacKinnon, supra note 33 at p. 271.
norms and everyday situations, like motherhood. Indeed, legal motherhood reflects heterosexual-nuclear-monogamous-married sex. Legal motherhood is an undefined concept rooted in biological assumptions, thus reinforcing gender roles and hierarchy of sexual behaviors. ‘Mother’ as an identity has implications that should be unfolded and carefully analyzed. Reproduction. Sex. Sexuality. Motherhood. Motherhood is about reproduction. This assumption is hazardous when understood only at a first-degree level, because “being a mother [...] is not only bearing a child – it is being a person who socializes and nurtures”. Motherhood is indeed about reproduction, but it is possible to choose the meaning of “reproduction” to promote certain values and norms, as the split between biological and social reproduction reflects. Motherhood is also about sexuality. However, there is nothing obvious about what exactly sexuality and reproduction represent. The same cannot be said without precautions from a legal perspective. In other words, sexuality – understood as an array of desires and practices emanating from a gendered individual – always plays a role in legal motherhood and reproduction. That does not mean that someone needs to have sex to reproduce, but that someone’s sexuality can be used as a factor in asserting the legal disposition of this said person to reproduce, and be a legal mother, or a mother *tout court*. Hence, motherhood can now be understood as distinct from sexuality, notably but not exclusively because “new reproductive technologies expand[ed] the ways babies are made” and adoption is now a possible reproductive option. Legal motherhood, thus, represents a site where a specific sexual discourse is deployed. As Foucault so eloquently puts it, sex represents “une économie du plaisir, mais dans un régime ordonné de savoir”.

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36 Nancy Chodorow, *supra* note 12 at p. 11.
38 Michel Foucault, *supra* note 30 at p. 93.
Sexuality was once conceptualized as appropriation (women were legally conceptualized as property). Through a feminist lens, O’Brien wrote thirty years ago that “for men, sexuality is the basis of a free appropriative right, a power over women and children and a power over time itself”39. Male dominance over women and children is a historico-legal fact. Sexuality may no longer be about such simple appropriation, but it is still an important source of power and gender imbalance. The history of sexuality is more burdensome for women. In the sections that follow, I use both feminist and queer lenses to explore the way in which sexuality has been deployed to construct motherhood. This exploration seeks to question why there is no legal definition of motherhood, or if there is one, why it is elusive and exclusive. Moreover, it examines the problematic association between biological motherhood and legal motherhood.

**IDENTITY: MYTHS, CONSTRUCTS, AND IDEOLOGIES**

The purpose of this section is to argue that myths – expressions of natural phenomena (biological motherhood) – become constructs when they produce social consequences (women’s otherness and subordination, or the regulation of sexuality). It also shows how the interaction between sexuality and reproduction has always been complex for women. Law, especially in using legal motherhood, reinforces constructs and amplifies their social consequences, in legitimizing and establishing constructs as norms, without carefully analyzing how myths play a role in the norm. Law relies on internal norms, while sociology, for example, is concerned with external observations about facts.40 Law cannot be contingent on natural phenomena. The so-called “natural” is misleading. As Marcela Iacub argues in her book *L’Empire du ventre. Pour*
Myths and Constructs about Motherhood

From a strictly linguistic perspective, a myth is usually defined as a « traditional story of ostensibly historical events that serves to unfold part of the worldview of a people or explain a
practice, belief, or natural phenomenon”. It represents a popular belief about a phenomenon of a so-called natural origin. In everyday language, myth is relevant as it could be seen as the origin of the mother identity, since motherhood is, after all, a point of view regarding a natural phenomenon. In literature, some writers label themselves as mythologists. According to the famous French writer, mythologist and semiologist Roland Barthes, « le mythe est une parole ».

It is a message, a communication system. Moreover, the fundamental characteristic of a myth is to be appropriate. The myth does not pretend to hide anything. It is just a means with which to transpose history as nature, and to create a discourse. Paternity and fatherhood represents two possibly distinct realities. However, it seems “natural” to assume that maternity and motherhood represent or describe the same situation. Paternity can merely describe a genetic or blood tie, a sperm link. A paternity test does not necessarily grant a legal title. The interaction between the words motherhood and maternity is different, as no word is available to describe solely the genetic tie – or another biological tie – between a woman and a baby. This lexical gap is a consequence of the myth as discourse.

Myth is a structure present in law as well. It has various functions and creates certain problems. As Peter Fitzpatrick explain in *The Mythology of Modern Law*, “[m]yth is made to correspond with the static and closed in meaning and social ordering”. A myth then suggests a natural order. “It sets limits by blocking off explanation of things as they really may, or may not

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42 http://www.answers.com/topic/myth, s.v. <myth>.
46 See *Johnson v. Calvert* (1993) 5 C.4th 84, 19 C.R.2d 494, 851 P.2d 776. In this case, the court held that the Uniform Parentage Act may be used to determine a mother-child relationship “insofar as practicable,” using the elements of determination relevant for father-child relationship. The “genetic consanguinity” can be a basis for finding maternity and paternity.
be: in this was they are means for legitimating social practices”. 48 As Fitzpatrick points out, “[t]he very idea of myth typifies ‘them’”. 49 For the present purpose, *them* is women. Myths exemplify otherness, but are creative of identity at the same time. At law, myths also represent the quintessence of the nature versus culture debate. In the world of myths, everything is “natural” and no explanations for natural or obvious phenomena are needed. Motherhood, and the mother identity are full of myths. Yet, legal motherhood should not be.

*Psychopathia Sexualis,* Richard Freiherr von Krafft-Ebing’s notable study of human sexual behavior, is filled with examples of myths about womanhood, women’s sexuality and motherhood. The necessity to have children to have a satisfying sexual life and the hypothesis that sexual life of women ends once they cannot reproduce anymore are two examples:

Au point de vue psychologique, la femme, à la fin de sa vie sexuelle, après la ménopause, tout en étant moins bouleversée, présente néanmoins un changement assez notable. Si la vie sexuelle qu'elle vient de traverser a été heureuse, si des enfants sont venus réjouir le cœur de la mère au seuil de la vieillesse, le changement de son individualité biologique échappe à son attention. La situation est tout autre quand la stérilité ou une abstinence imposée par des conditions particulières ont empêché la femme de goûter les joies de la maternité. 50

In *Psychopathia Sexualis* – 1886 – sexuality and reproduction represented the same reality for women. The principles stated are in line with the ideas that women are natural givers, “mothers are the quintessential model of altruistic motherhood”, 51 and that it is immoral to separate child rearing from childbirth. 52 It is an important dimension of the construction of the identity of mother, and legal mother as it fosters the sexual assumptions in legal motherhood. The legislation

48 Ibid. at p. 24 [notes omitted].
49 Ibid. at p. ix.
is built around these assumptions, as Chapter 2 will expose. The valorization of the altruistic model will be exposed in Chapter 3, especially with regards to surrogacy cases. As with the automatic equation between sexuality and reproduction for women, the discussion about the conception of sexuality in the Civil Code of Québec in Chapter 3 will demonstrate how old sexual assumptions are still present in Canadian law.

Myths about motherhood are numerous, and mostly appeal to nature. A few examples are: “traditional wisdom says: Women are naturally trapped in the childbearing function / Women therefore cannot participate in social life on equal terms (...)”\textsuperscript{53} “motherhood is understood as “the natural, desired and ultimate goal of all ‘normal’ women”(Stanworth 1987:14); in other words, a woman must be a mother before she will be considered “a mature, balanced, fulfilled adult”(Wearing 1984:72)”\textsuperscript{54} motherhood “is biologically self-explanatory”,\textsuperscript{55} women are mothers because they have always been: it is called bioevolution. It is natural that women mother, so they ought to mother. Is it natural for women to act as nurturers? “Women’s mothering, then, is seen as a natural fact. Natural facts, for social scientists, are theoretically uninteresting and do not need explanation”.\textsuperscript{56} There is a logical leap between the child bearing function, and mothering. Biological reproduction and social reproduction are different. Males and females can mother. Motherhood – and being a mother – could merely be understood as the biological practice of childbirth. But motherhood now means more than that. It is a set of gendered assumptions relying on biological facts. However, legal motherhood ought not to be merely about biological reality, it has to be more than that. Legal motherhood, even if the legislation does not really emphasize it as

\begin{footnotesize}
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  \item[53]Mary O’Brien, \textit{supra} note 2 at p. 20. O’Brien puts those two myths together. However, the second one is closer to a construct, as it represents the social consequence of a biological observation.
  \item[55]Nancy Chodorow, \textit{supra} note 12 at p. 13
  \item[56]\textit{Ibid.} at p. 14
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chapter 2 demonstrates, should remain a legal fiction, as legal fatherhood is. The understanding that motherhood is a fiction would help in reaching adequate decisions in complex cases. At the moment, and cases in chapter 3 about surrogacy particularly emphasize that, legal motherhood and biological motherhood collapse. This creates problem in the vesting of the legal status of mother. Further, surrogacy is not the first situation to challenge the legal assumption that motherhood at law is what motherhood is at biology. Indeed, the first cases of lesbian mothering already exposed how the legal category “mother” is too simplistic. As a matter of fact, in a lot of cases, the biological practice and the social practices will coincide. In such cases, it becomes pointless to prioritize one variable (biology) over the other (social practices). Having said that, in cases at the borders – cases for which the law is ill-suited – the two components do not intersect. In those cases, the social practices ought to weigh more heavily than biology. The stubbornness of the law to locate motherhood by relying on biology is a mechanism aiming at reinforcing gender roles and at promoting certain sexual behaviors, thus trapping women in their reproductive functions.

Another example of myth is the dual family model. The dual family model relies on the observation of a natural phenomenon; it is obviously necessary to have a man’s and a woman’s biological material to reproduce. This natural fact created an image, a discourse, a site of power. However, structures of parenting and social institutions can differ from this factual reality. There are plenty of examples through legal history that force us to think critically about the dual family model, and the mimesis of biological reproduction. An example would be the illegitimate filliation under the Civil Code of Lower Canada. In Québec, until 1980, no filial status was available to children born out of wedlock. The dual heterocentric family model was valuable only in marriage. While the dual heterocentric exclusive family model is often portrayed as a
biological imperative, its importance has fluctuated throughout history. In recent years, the possibility of having two ‘mothers by blood’ in Québec is another example of the relativity of a model rooted in the observation of a biological situation. Indeed, the dual heterocentric family is a construct, rooted in the myth of biological reproduction. Law, however, should focus on social reproduction. Taking social reproduction seriously is especially important at a time were family models are multiplying. Family has been a powerful tool in promoting certain sexual behaviors and particular gender roles. Myths producing social and legal consequences – when they are injected with a power relation – are constructs. What exactly is a construct, and how is it relevant to the present purpose?

A construct is a product of ideology, history, or social circumstances. I like to think of a construct as a myth injected by a special power relation, to speak in a Foucaultian manner. It is an institutionalized myth. The myth becomes a construct when it produces cultural and legal consequences. While the myth is a description of a natural phenomenon, “le concept, lui, est déterminé: il est à la fois historique et intentionnel”. Moreover, “le concept déforme”. Indeed, the concept transforms the myth in what it ought to be or mean in a specific situation. The concept can mean anything, it is adjustable and malleable. For the present purpose, examples of constructs are the automatic equation between womanhood and motherhood, the problematic assumption between biological motherhood and legal motherhood, and the dual opposite-sex family model. These constructs are rooted in mere biological observations; women give birth

57 Merriam Webster, s.v. <construct>
58 Roland Barthes, supra note 43 at p. 226.
59 Ibid. at p. 230.
60 The idea of ‘construct’ and ‘concept’ are really close in my mind. I am aware that ‘concept’ is a problematic structure in a lot of social disciplines (philosophy, sociology, etc), but the full exploration of the meaning of concept and/or construct is beyond the scope of this analysis.
and it takes a man’s and a woman’s genetic material to reproduce. However, it represents a choice as to whether or not to value biological observations.

Nothing in the biological fact that women give birth automatically persuades us that they are caring and that their primordial roles and functions are thus to have children, to take care of children, to stay away from the public sphere (work, etc), etc. “In myriad ways, the entire social arrays (...) produced and managed the conception of women as distinctively embodied around reproductive functions”.\(^{61}\) This happened through power relations. And it has effects and consequences in law, medical science, psychiatry, social sciences, etc. As Simone de Beauvoir explains: “c’est comme Mère que la femme était redoutable; c’est dans la maternité qu’il faut la transfigurer et l’asservir”.\(^{62}\) The biological fact that women bear children has been used to portray her as the other, to limit her actions and to confine her to the private sphere. Furthermore, “courts and legislatures have historically applied a social construct of women as “potential mothers” that restricts more expansive views of women and implicitly coerces women into motherhood roles under the rubric that women who are not mothers are not women”.\(^{63}\) Motherhood as a social institution limits women in what they want to or can be.

Likewise, the biological fact that it takes a man and a woman to reproduce does not justify the legal and social conception of the dual opposite-sex family model. “Identities are contingent and constructed; they are created by normalizing discourses, not nature”.\(^{64}\) The construct exposes the socialization of reproductive behaviors as relying on myths, and producing consequences for

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\(^{62}\) Simone de Beauvoir, *supra* note 9 at p. 284.


\(^{64}\) M.M. Slaughter, “The Legal Construction of Mother” in Martha Albertson Fineman, *supra* note 54 at p. 76.
women. The consequences are not “natural”, but intentional and systemic. A particular identity and understanding of motherhood – motherhood understood as more than the biological reality of giving birth – emerged. It posited “mothers as nurturers and emotional providers and fathers as financial providers, in a gendered breadwinner/homemaker duality”.65 It limited the capacity of women to act in the public sphere, and strengthened the idea of a private sphere. Law reinforced identities through mechanisms such as “l’incapacité de la femme mariée [qui était] [...] d’ordre public” 66, and the common law equivalent of the incapacity of married women. “In all common law jurisdictions, marriage, for women, represented civil death”.67 The same thing happened with the institution of “family”. Family, assimilated as a private sphere, was “an institution that [...] was recognized by law as being as complete in itself as the State government is in itself”.68 The family, relying on the idea of biological reproduction, became an independent and dual entity. Gendered roles and the understanding of family as a private sphere represent constructs rooted in myths, which produce legal consequences.

What Susan Boyd calls the “fear of single women – perhaps especially single mothers”,69 is another expression of the impact of constructs and of the regulation of women’s gendered identity and sexual behaviors. As previously mentioned, it takes a man and a woman to reproduce; it is a biological fact. However, single motherhood “threatens the ideological code of

67 Lori Chambers, Married Women and Property Law in Victorian Ontario (Toronto: University of Toronto Press, 1997) at p. 3.
[family], as well as of heterosexuality”. It challenges the primary family model and basic gender roles. Single mothers are “operating outside the parameters of the patriarchal nuclear family”. The bi-parental norm is rooted in a biological reality, a myth. The myth has been institutionalized as social and legal mechanisms have been deployed to encourage women to experience motherhood within the heteronuclear family model. One of the social consequences of single motherhood was (and maybe still is) stigmatization. The ills of single mothering, to use Boyd’s words, are numerous on children; they lack sexual role models, the general assumption stating “children in single-parent families are liable to experience two or three times as many problems as those in so-called normal families”, etc. There is also a recurring hypothesis presuming that children of single mothers are more likely to commit crimes, or that most single mothers are teenage moms. These assumptions, like many others, understate the importance of other factors such as poverty, lack of support from extended family, lower level of education, marginalization, workplaces and an economic system badly adapted to women with special familial needs, etc. Moreover, it underestimates how law actually created and is still creating a lot of obstacles. Indeed, the historical civil law concept of illegitimate children – also called bâtards (bastards) – was a premium tool is marginalizing children and women in this situation. It could very well be argued that the poverty was a systemic choice, rooted in the legal system. For a long time – until 1966 in Ontario – single mothers and unwed mothers were “singled out as undeserving of social assistance”. The primary focus was on the inadequacy of those women as

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70 Ibid. at p. 53.
71 Ibid. at p. 53.
72 Ibid. at p. 56.
75 Lori Chambers, supra note 67 at p. 8.
mothers, but they also were inadequate sexual citizens.\footnote{76 The expression “sexual citizen” that I will use throughout the thesis is borrowed from Brenda Cossman. On the subject, one must read Brenda Cossman, \textit{Sexual Citizens. The Legal and Cultural Regulation of Sex and Belonging} (Stanford: Stanford University Press, 2007).} It was an obvious way to control women’s sexual behaviors. It could be seen as a punishment for electing to have sex out of wedlock, or not having an exclusive relationship with a man, or any other sexual reality. Prioritizing “heterosexual/married/sex” was a way to discard other expressions of sexuality (no sex, extra-marital sex, multiple partners, same-sex sex). It is no coincidence that these women were not automatically vested with legal motherhood as married women were.

Motherhood represented a key site of power, and resistance. “La mère, avec son image en négatif qui est la femme nerveuse, constitue la forme la plus visible de cette hystérisation”.\footnote{77 Michel Foucault, \textit{supra} note 30 at p. 137.} As Foucault highlighted, there was on one side the virtuous mother with a productive sexual behavior, and on the other side, there was the nervous woman, the hysterical woman, the woman with sexual disorders. “Every society creates or constructs a set of sexual ideals, rules, and possibilities that determine how individual sexual practices may be named and interpreted”,\footnote{78 Estelle B. Freedman, \textit{Feminism, Sexuality, and Politics} (Chapel Hill: University of North Carolina Press, 2006) at p. 107.} and law attaches consequences to these ideals. Chapter 3 will highlight how these sexual ideals play in the vesting of motherhood, especially in \textit{Buist v. Greaves} and \textit{L.B. v. Li.B.}; cases that I use to emphasize the impact of the sex one performs in the vesting of motherhood. Motherhood, legal motherhood and their corollaries are premium tools in controlling women’s sexual behaviors.

Constructs, law, and discourse are creative of peculiar images. “These images serve to coerce women, both penalizing them for corresponding to or failing to correspond to the image invoked by law and by beguiling or ‘con[ing]’ them into believing that certain identities are
natural and inevitable”.

One must be aware how multiple forces intersect to construct phenomena. Other constructs could have been studied, but the main purpose of this exploration is to understand the importance of reproduction, biology and sex in legal motherhood. Legal motherhood is a construct rooted, primarily but not exclusively, in the myth of biological motherhood. There are many ways to interpret constructs, and I will refer to them as ideologies. Ideologies are important as they allow critical thinking about constructs and their consequences.

**Ideologies**

An ideology, for the present purpose, is the content of thinking that is characteristic of a group. In other words, ideologies are ways to interpret legal motherhood. They represent lenses through which jurists – or laypersons – analyze facts, rules, words, situations, myths, constructs, etc. Susan Boyd conceptualizes “ideology” in a slightly different way, especially in the context of motherhood. She believes that the “ideology of motherhood consisted of a set of “common-sense” expectations”.

While this conception is completely valid, common-sense expectations in my theoretical framework are not ideologies per se. Common-sense expectations are constructs, and their interpretations are ideologies. I believe common-sense expectations differ depending on who analyzes the situation. Yet, “ideology explores the process through which meaning is produced (...) Further, ideology explores the relationship between ideas, attitudes and beliefs on the one hand, and economic and political interests on the other”.

It is particularly important to be aware of the role of ideologies in law, legal theory and legal discourse. This section reviews ideologies about legal motherhood of various schools of legal feminism and queer legal theory. It

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80 M.M. Slaughter, in Fineman *supra* 54 note at. p. 73.


offers reflections about the impact of ideologies on the content of the legal category called “mother”, or “motherhood”. It also highlights the conception of sexuality under each ideology. Such ideologies are especially important in a system where no adequate conception of legal motherhood is available, since they communicate various assumptions about sexuality and gender.

According to O’Brien, feminist theory starts with the process of human reproduction.\(^{83}\) Feminism and motherhood have often been posited one against the other. In feminist legal theory, motherhood has primarily been presented as problematic for women, because the *mother status* comes with burdens, dependencies, obligations and responsibilities.\(^{84}\) Being a legal mother has an impact on a woman’s role in the public sphere, on her agency, on equality in the family, etc. Even if motherhood is central to feminism, feminism is so diverse that there are a lot of divergent feminist ideologies about motherhood. I will try to uncover the main arguments of dominant feminism, cultural feminism, third-wave feminism, and also queer theory. I will suggest that all of these ideologies have impacts on legal motherhood, and give a few examples. It will be helpful to keep these ideologies in mind while reading chapter 2 and 3, to see how ideologies shape legislative and judicial choices.

**Dominance Feminism**

The premise of dominance feminism is that the dogmas of male supremacy invade all human institutions and pervade modes of discourse.\(^{85}\) Under this type of feminist thinking, women are victims.\(^{86}\) As MacKinnon writes, “to be in prison is what it is for women to live their

\(^{83}\) Mary O’Brien, *supra* note 2 at p. 8.
\(^{84}\) Martha Albertson Fineman, *supra* note 54 at p. xi.
\(^{85}\) Mary O’Brien, *supra* note 2 at p.16.
everyday lives entirely inside the law”. A lot of legal consequence for women and mothers can be explained by this ideology. Women have long been understood as passive, private and obedient at law. For a long time, women were not legal subjects, neither in civil law, nor in common law. They were, at best, legal objects. “Women have been placed in a passive position in relation to their parental status resulting from the presumed biological inevitability of their reproductive role”. In motherhood’s context, the legal category thus “has been articulated in the contexts of heterosexual monogamous marriage, and the system of patrilineal descent. Maternity in a patriarchal society is what mothers and babies signify to men”. Mother has a second-order role; it is the male’s seed that is crucial. In such a model, women do not have true defining characteristics except being of the female gender, and the very fact that they belong to female gender makes them men’s subordinates. Sexuality under such a conception is intertwined with gender and it is a site of domination. Famous dominance feminist theorists of motherhood are Adrienne Rich92 and Shulamith Firestone.93 Rich is known for her statement that one of the meanings of motherhood is “the institution, which aims at ensuring that that potential - and all women - shall remain under male control”.94 Firestone follows the same path, suggesting women are oppressed because of their sex (not gender...) and

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87 Ibid. at p. 33.
90 Roxanne Mykitituk, supra note 21 at p. 786.
91 Ibid. at p. 786 [notes omitted].
94 Adrienne Rich, supra note 52 at p. 13. Motherhood to Rich is also an invisible institution rooted in nature.
that sex for women is reproduction. The dialectic of sex divided the society in two classes. One sphere is for women in which their primary function is to reproduce. The other sphere is public and economic, and is reserved for men’s activities. There is, under her theory, an essentialism of women as mothers. Moreover, women are held passive (in a patriarchal system) because of biology. Barbara Katz Rothman and Martha Albertson Fineman also contributed to the study of motherhood under patriarchy. Rothman introduces a nuance between patriarchy understood as “the rule of father” and patriarchy understood as “any system of male superiority and female inferiority”. In motherhood context, she claims the difference is important as it creates confusion between social and genetic kinship. It is not solely dominance of man over woman that is problematic; it is the fact that women bear the children of men, giving a supreme social power to the seed. Hence,

To maintain the purity of the male kinship line, men had to control the sexuality of women, and ensure that no other man’s seed entered her body. They had to control her virginity so that she came to the marriage bed unimpregnated. They had to control her in her pregnancy, so that she could not destroy the seed of men.

Motherhood is about male and manly institutions controlling women’s sexual behaviors. Legal motherhood is about insuring that men have their children – through various presumptions, limiting wives’ sexuality. Legal motherhood can hardly be understood as something other than the biological reality of giving birth within marriage, women being a means by which men get successful genetic offspring or progeny. Legal motherhood, under such an ideology, could be filled with mechanisms aiming at ensuring the purity of the male’s seed (virginity for brides, illegitimacy, ban on birth control, etc). Needless to say that single motherhood, step-motherhood

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95 Martha Albertson Fineman, supra note 54.
97 Ibid. at p. 15.
98 Ibid. at p. 15.
99 Ibid. at p. 16.
or co-motherhood do not exactly fit this ideology as they challenge male privileges over reproduction and sexuality.

Cultural Feminism

The general premise of cultural feminism “is the belief that women will be freed via an alternate women’s culture”. While the ideas underlying cultural feminism do not exclude *per se* sexuality as a concept, the current manifestations and forms of cultural feminism can be interpreted as evacuating sexuality, and has even been characterized as “an anti-sex variety of lesbian feminism”. In motherhood’s context, the problematic concept of the ‘ethic of care’ has often been discussed in literature, and theorists – feminists and others – have either strongly agreed or disagreed about it. Cultural feminists, notably Carol Gilligan and Robin West, “maintain that the image of women as “givers” and “nurturers” is real and results from women’s tendency to view the world through relationships and through an existential sense of connection”. Cultural feminism as it is right now does not help at all because it naturalizes roles and does not consider enough the importance of sexuality. Even if this school of thought claims to depart from biological essentialism and does not go as far as proclaiming that the biological tie plays a role in the predisposition of women to adopt certain roles towards children, its does propose that women are more connected to children and are in essence nurturing, and caring. The essentialism could be biological, but is might also be historical, cultural or social.


The nuance is important, as any of these factors, or a combination thereof, produce women as caregivers. The building block of this ideology is that “women are more connected to life than men are because it is women who are the primary caretakers of young children”.\textsuperscript{104} This oversimplification represents a tacit acceptance that women are trapped in the caring images and functions produced by multiple sources (law, pop culture, socio-cultural practices, history, etc). It is unclear whether cultural feminism is cultural. Is it then nature or culture that justifies the unequal treatment between man and woman? Through such a lens, motherhood could then be portrayed as something completely natural, or completely cultural, but typical to women. Relying too heavily on ‘woman’ as a category is problematic. It is hard to know whether biological sex or gender influences motherhood. Motherhood is not necessarily exclusionary as a parentage structure for women – lesbian motherhood could be portrayed as the ultimate version of cultural feminism mothering – but it excludes men. Further, one should have strong reservations towards relying heavily on men and women as unquestioned categories. Cultural feminism’s solution to new family models is uncertain. An example of that could be gestational surrogacy. Cultural feminism provides solutions to binary dilemmas – male vs female... or more accurately man vs woman. What happens when the disagreement is between Woman1(W1) and Woman2(W2), and when the line between nature and culture is blurred. Example: W1 wants a child, but cannot bear baby. W2 likes being pregnant, is altruistic, and would happily accept an extra income. W1 wants biological ties with her child-to-be, so W2 consent to bear W1 and ManY genetic materials. Where is the ‘connection’ with life here? How do the connection thesis and ethic of care articulate in this situation? Both women are women, and both women are connected. How would this situation be analyzed under cultural feminism? However, co-mothering, lesbian motherhood

\textsuperscript{104} Robin West, \textit{Jurisprudence and Gender}, (1988) 55 U Chi. L. V. 1, at p. 16 (previously cited by Devon W. Carbado).
or step-mothering could be explained very well by cultural feminism. But is the automatic association between women and motherhood abilities desirable? Is it natural? Anything described as natural should sound scary after a section on myths and constructs.

**Third Wave Feminism**

Third wave has three key themes: globalization, pop culture, and technology. “Third-wave feminists embraced the ‘fun’, ‘sexy’, and ‘girly’, rejecting the (supposedly) strident, humorless feminism of the 1970s and 1980s, while also taking up the feminist mantle”.\(^{105}\) Identity politics is central to the third wave, even if it has started way before the third wave in the history of feminism. Indeed, the race critique and the sex critique happened in the second wave and just keep evolving in the third wave. It has often been said that “third-wave feminist writing fails to grapple with gender equality or law writ at large”,\(^{106}\) that it does not properly understand either law or gender. Third wave lacks rigor and methodology, and is, in my opinion, deceiving. It is mostly written in first-person narrative, personal, emotional and unconvincing. The third wave is about contradictions and ambivalence. Third wave feminism perspectives on motherhood could be described as extravagantly fluid and flexible. As Crawford points out, “third wave (...) motherhood narratives contribute (perhaps unwittingly) to a mythology of motherhood that earlier feminists sought to dismantle”.\(^{107}\) “Mothering in the third wave calls for, among many things, an admission that feminism is messy, and a concession that this isn’t something we need to fix (...) mothering [is] a site of unusual multiplicity, positionality, opportunity”.\(^{108}\) Third wave feminists presume motherhood “modifies to accommodate the changing cultural landscape of

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\(^{106}\) Ibid.

\(^{107}\) Ibid. at p. 2.

the family”.

Moreover, third wave creates problematic discourses about motherhood. As Bridget Crawford lucidly indicates, “these works pay lip-service to the notion that motherhood should not be the measure of woman’s worth, but they embrace motherhood as the ultimate personal fulfillment”.

Understandings of sexuality and gender are complex and diverse in the third wave, and “third-wave writers are divided on the utility of ‘woman’ as a category”. On the one side, writers are aware of the double standard about sexuality and the specific discrimination about gender. On the other side, they acknowledge that differences between women themselves are as important as differences between men and women. As Crawford writes, third-wave “is stripping gender of its meaning [which] allows third-wave feminist to take a broad approach to defining women’s issues”. Sexuality in the third wave is central. It is completely apart from reproduction (biological and social). Indeed, “third-wave feminism celebrates the centrality of sexual pleasure”. Even if sexuality is central to third-wave feminism, the concept of sexuality in itself and its importance in human interactions and in promoting certain sexual behavior is underestimated. The importance of sexuality in pornography has been more documented than the importance of sexuality in motherhood. Sexuality however remains a subjective experience, rejecting rigid gender roles. Sexuality emerges from the individual, and is not seen as a regulating mechanism emanating from various legal sources. Such a conception of sexuality undermines the fact that sexuality is a nexus of power, especially in legal motherhood.

109 Ibid. at p. 9.
112 Ibid. at p. 119.
113 Ibid. at p. 122.
114 See generally Bridget J. Crawford ibid and supra note 105.
The third wave’s ideas are great, but their expression is deceiving. Feminism theory is a complex and fragmented field and the third wave continues to feed the internal strife, lessening feminism’s power. The emancipating power of feminism is diminished by two realities: the impossibility to grasp the meaning of third wave feminism, and the infusion of so much subjectivity in the theory that it creates, what philosophers would call, a private language; a language only comprehensible by an individual. The third wave’s methodology has to be revised, the core themes have to be restated, and fluid gender identity must be taken seriously. Prefabricated assumptions about motherhood as personal fulfillment are so problematic, since gender equality – and generally sexual equality – have not yet been achieved. Moreover, such a discourse makes the role of biology almost mystical, thus reinforcing myths and constructs, and understate the importance of non-biological motherhood of any kind (lesbian co-mothering, adoption, women opting for surrogates, etc). In essence, some third wave ideas are close to cultural feminism. I believe such images of motherhood are not aimed at gender and sexual equality and sexuality must be understood as something more than mere pleasure. Rather, they perhaps unconsciously reinforce unnecessary dichotomies and undermine any institutional analysis of motherhood. I nonetheless believe that a (methodological and rigorous) legal third-wave feminism could and should emerge.

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115 Thanks to Stefano Mingarelli for suggesting me to have a closer look at Ludwig Wittgenstein, *Philosophical Investigations. 50th Anniversary Commemorative Edition* (Malden, MA: Blackwell Publishing, 2001) at §243-§251. Private language is a language in which the signification is meaningful for a person alone, depending of subjective experiences.
In reaction to all these conceptions of women and feminism, post-feminism, queer feminism and a lot of other kinds of feminisms emerged. Unfortunately, they will not be part of the present argumentation. Let it be said that, all school of thoughts of feminist legal theory shed some light on how “the legal subject is posited, not as the abstract, ungendered creature of the traditional legal imagination but as an ideological construct, endowed with attributes that vary according to context, and compel particular gendered perceptions of the social world”.\footnote{Joanne Conaghan, \textit{supra} note 79 at p. 361. This article is in Brenda Cossman, \textit{Feminist Legal Theory}, Course materials for course no. 93920-11, Harvard Law School, Fall 2003.} Whether or not the legal subject should be understood as a gendered legal category, it is important to acknowledge that some factors or human attributes are used to constrain people to specific roles (gender, biological sex, sexual orientation, etc). While feminist theory’s main focus is gender, queer theory’s cornerstone is sexual orientation, or I would like to suggest, sexuality understood in a broad sense. Is queer theory an answer to the feminist malaise? I have no idea. Yet, queer theory offers new possibilities and ideologies of motherhood, or maybe more accurately, parenthood. Since a lot of queer theory has been done in the opening parts of this chapter about reproduction and sexuality, only a few points on sexuality, legal motherhood and queer theory need to be raised here.

In some respects, queer theory can be seen as the logical step in the development of feminism, because one of its postulates is that “nonoppressive gender order can only come about through a radical change in sexuality, even while they have also begun to argue that sexuality is a partially separate field of inquiry”.\footnote{Michael Warner, “Introduction” in \textit{The Fear of a Queer Planet. Queer Politics and Social Theory}, Michael Warner ed (Minneapolis: University of Minnesota Press, 1993), p. vii, at p. vii.} Its moment of rupture with traditional feminist thinking probably happened with Gayle Rubin’s famous article “Thinking Sex” in the mid-eighties, but is
interaction with feminism is complex. “Queer work (...) wants to be anti-identitarian”.\textsuperscript{118} It is about alterable sexual identification, and it “render[s] sexuality a domain in which sex, gender and power are highly mobile”.\textsuperscript{119} Within queer theory, sexuality is power, but the result is not always structural domination.\textsuperscript{120} Queer theory is important and relevant to the theme explored for a few reasons. First, it questions gender and sex, and allows for a complete restructuration of parenthood, rather than motherhood. Second, the focus on sexuality rather than gender in motherhood exposes a new part of the motherhood saga, or more precisely the parenthood saga. Indeed, I believe that the sexual regulation at law, using the relationship status of individual, has been losing ground in recent years. However, with this dimension of sexual regulation fading, other aspects emerge. It sheds the light on how filiation and parentage are privileged sites of sexual regulation, especially for women. Furthermore, in motherhood’s context, queer theory allows a split between biological reproduction and parenting, a split that is not always obviously possible in feminist legal thinking.

All the ideologies described influence what law is, how it is interpreted and how it transforms. Judges, drafters and decision-makers will rarely state that they adopt a dominance feminist approach or a queer theory approach to solve a legal problem or write a piece of legislation. There are some examples of judges or legislatures using feminist frameworks to reach their conclusions and explain their reasoning.\textsuperscript{121} In motherhood context, and it will be exemplified in chapter 2 and 3, there are a lot of occurrences where legislators and judges reproduce what dominance feminists, cultural feminists or queer theorists vehemently denounce.

\textsuperscript{118} Janet E. Halley, supra note 61 at p. 113.
\textsuperscript{119} Ibid. at p. 113.
\textsuperscript{120} Ibid. at p. 113.
\textsuperscript{121} See R. v. Butler, [1992] 1 S.C.R. 452 for a good example of dominance feminism (whether it is rightly used in reaching the decision is beyond the scope of this analysis) or, to a certain extent, R. v. Ewanchuk, [1999] 1 S.C.R. 330.
Two examples of this assertion are the ratio in *L.B. v. Li.Ba.* and the texture of article 538.2(2) CCQ. In these examples, and in many others, the solution might have been different if the decision-maker would have been aware of the dominance feminist critique that, in the current legal system, motherhood often simply represents what babies mean to men. It is important to think critically about the legislative provisions in chapter 2 and the cases in chapter 3, keeping in mind what are the critiques formulated under each ideology of motherhood. An awareness of the theoretical tensions underlying motherhood as a social phenomenon is crucial to reconceptualize legal motherhood – or parenthood - neutrally and inclusively.

**OF PARENTING, GENDER, SEXUALITY AND LAW**

‘Parent’ is to ‘mother’ and ‘father’ what ‘spouse’ was to ‘husband’ and ‘wife’. There is a need to change the concept or the vocabulary used to portray legal motherhood. Even if some pretend that parenting roles are equal, and that male and female are equal in our society, the very word 'mother' creates an image and a discourse that have a considerable on women, and on people generally. The sex that one bears or practices should not be determinative of his or her legal status as parent. This statement is not a way to create a right to the child, it solely acknowledges that sexuality and gender do not influence parenting abilities. Legal parentage should try to reach a standard of “nonoppressive gender order [which] can only come about through a radical change in sexuality, even while they have also begun to argue that sexuality is a partially separate field of inquiry”. 122 Sexual specifications should be understood as “less stable and identity bound understandings of sexual choices”. 123 Further, it is unfair to rely on biology to create legal obligations. A legal category is a choice; no logical inference need necessarily be

drawn between biological parenthood and legal parenthood. I will now turn to how the fiction of legal motherhood is articulated in Canadian legislation, as it sheds some light on how filiation and parentage are privileged sites of sexual regulation, especially for women. The absence of a legal definition and conception of mother – and its elusive character - reiterates the problematic assumption between biological facts and legal obligations, and leaves too much room for gendered assumptions and value judgment about sexuality.

**CHAPTER 2 – LEGISLATIVE PROCESS**

Legal motherhood is a fiction. While it is easier to notice the fictional and social character of legal fatherhood, legal motherhood should also be understood as a mere legal construct, producing effects on children, women and men. As O’Brien underlines, there is much more to reproduction than meets the narrow biological eye”. The DNA family model is being reinvented. The meanings of ‘biological parent’ and ‘natural parent’ are changing, and so is the legal concept of ‘mother’. At the moment, there is no consensus on the definition of ‘mother’ in Canada. The definition is either absent from the statutes or elusive. It varies from one province to another, and also from one statute to another. Furthermore, the vocabulary used to describe the action of mothering at different stage – gestation, expulsion, later in the child’s life - is inconsistent, imprecise and unclear. Natural mother, gestational mother, birth mother, biological mother, genetic mother, social mother, co-mother, step-mother; the concept of legal mother disaggregates and the legal definitions are losing their meaning. This is largely the outcome of the diversification of reproductive technologies, but it undoubtedly exemplifies how law’s outlook on parenting has changed over the course of recent years. “With the advent of various

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124 See Roxanne Mykitituk, *supra* note 21 at 771.
125 Kristin Tornes, *supra* note 7, at p. 177.
forms of reproductive technology, it is possible for a child to have legal social parents, biological parents, and a birth mother who is neither a legal social nor a biological mother. It is evident that [legislation] has not kept up with reproductive technologies”, or with new social realities. This chapter investigates the many definitions of ‘mother’ or ‘parent’ in provincial and federal statutes concerned with familial interactions. It analyses the many words that law uses to conceive of, construct and define mothers. “The forces of social power are always at war, (...) the task is to resist and unmask the power behind the institutions and discourses that name”. 127

The chapter opens with a few notes about contexts and perspectives on motherhood, the fictional nature of fatherhood, and the theories on the location of parenting at law. I then review provincial and federal legislative definitions and conceptualizations of ‘mother’. When it is impossible because of the lack of a definition, I try to explore other legislative avenues to locate motherhood, such as studying the definition of “parent”, “birth” or “child”. I selected four provinces: Ontario, Alberta, British Columbia and Québec. I decided to analyze these provinces for various reasons. Firstly, Canada’s population as of July 1st, 2009 was of 33,739,900 persons. 128 At that time, the four selected provinces represented 80.14% of the Canadian population, or 27,040,000 persons. 129 There were 13,069,200 persons in Ontario, 7,828,900 in Québec, 4,455,200 in British Columbia and 3,687,700 in Alberta. 130 It is thus logical to use these provinces to draw a picture of the Canadian situation. Also, an important number of cases originate from these provinces, which will allow for higher consistency between chapters 2 and 3. Secondly, the common law provinces selected are pretty representative of the legislative situation

127 M.M. Slaughter, in Fineman supra note 54 at p. 77.
129 Ibid. (my own calculations).
130 Ibid.
elsewhere in Canada. As for Québec, it is an added value to study a civilian regime, and it is also interesting to look at a province where the cultural and social realities are a little bit different. No legislative scheme of any territory will be examined.\textsuperscript{131} In addition, the selected provinces have different statutory approaches to surrogacy.

At a provincial level, the common law statutes selected are the ones dealing with family relations, children-related matters, birth registration, and adoption. In Québec, the \textit{Civil Code of Québec} is the cornerstone of the analysis. At a federal level, I will review only the \textit{Assisted Human Reproduction Act}.\textsuperscript{132} The chapter closes by illustrating the limits and inconsistencies of the current definition of ‘mother’ at law. The legislative inquiry highlights two recurring issues about legal motherhood. First, most of the time, no adequate conception or definition of legal motherhood is provided in the statutes. Second, when there is a definition, it is either elusive or it reiterates the problematic association between biological motherhood – whose current meaning is actually uncertain – and legal motherhood. These issues have, at least, two incidental consequences. On the one hand, the absence of a concept or definition of legal motherhood leaves too much room for gendered assumptions and value judgments about sexuality. On the other hand, legal motherhood is exclusive at its core, and creates undesirable results, thus widening the gap between family life and family law. The practical consequences of the uncertainties observed in the legislation will be scrutinized in chapter 3.

\textbf{Contexts and Perspectives}

\textsuperscript{131} I am unfortunately unfamiliar with the legislation and general cultural and social norms of Canadian territories. The study of legal motherhood in Yukon, North West Territories, Nunavut, etc. would be very interesting, but it is beyond the scope of the analysis.

\textsuperscript{132} \textit{Assisted Human Reproduction Act}, S.C. 2004, c. 2 [\textit{Assisted Human Reproduction Act}].
Historically, biology’s importance in family law and family life has been erratic. It is difficult to draw a coherent picture of DNA’s impact on legal recognition of parenting, and motherhood.

Modern society has moved away from a rigid definition of the family. Illegitimacy has been abolished. [...] Same-sex couples raise loving, healthy families. There has been recognition both by society at large and our legal system that it is the relationship that matters, not the legality. It is the sense of family and bonding between parent and child that is important, not whose DNA is lodged in the child’s cells. One must also bear in mind that the adult-child relationship is central nowadays in locating parenthood, but so is the adult-adult relationship, especially when it comes to motherhood.

Biology and nature have a different impact on the adult-child relationship.

For many years, the questions to ask to locate motherhood were quite simple. At civil law: who expelled the fetus? Mother, mère, mater was “celle qui a mis au monde un enfant”. At common law, gestation and birth were the elements to look for. Also, at a certain moment in Canadian history, the woman also had to be a wife, as the very fact of being born out of wedlock could impeach the legal bond between a woman and “her child”. The traditional determination of the ‘mother status’, especially the initial vesting, was stupendously simple. Things were no different for fatherhood, but the law seemed somehow less concerned about the fictional character of the father-child tie. Law’s reliance on science was minimal - as science was not as developed as it is today - and many presumptions were available, at civil and common law, to

134 Ideas to be explored in chapter 3.
135 “Expulsion” or “accouchement” were the key terms to prove maternity. “Tout le monde sait que la mère d’un enfant est celle qui l’a accouché”: Marcela Iacub, supra note 41 at p. 9.
138 In Québec, see Civil Code of Lower Canada, C.C.L.C., art 218 [CCLC]. For an Ontarian historical perspective, see Lori Chambers, supra note 67.
make sure that the husband was the father.\textsuperscript{139} After all, the only legitimate sexual act was the one between husband and wife – not to mention that it had to be reproductive! Locating fatherhood has become more complex. It now is possible to be a father without any genetic tie,\textsuperscript{140} or intent.\textsuperscript{141} The evolution of legal motherhood has tended to be slower. Legal motherhood is often taken for granted, even at a time where tremendous developments in reproductive technologies happen. A few years ago, the classical biology or intent debate surrounding parenthood would never have been applicable to motherhood. As it turns out, this debate is now relevant to the determination of legal motherhood, and the expulsion criterion is obsolete.

There are two main theories in the determination of legal parentage, and parenthood. One focuses on biology and genes, and the other on intent. Social relationships also play an important role, and this will be reviewed later. It is important to be careful in the analysis of the importance of biology in legal parenthood for many reasons. First, in the vast majority of cases, biology is the obvious means to locate parenthood and motherhood. Second, even if biology’s importance may sound somehow archaic, the advancement of science and the new reproductive technologies are mostly aimed at allowing human beings to transmit their genetic materials to new human beings. If biology was not of core significance, infertility would not be seen as stigma or a disability,\textsuperscript{142} reproductive technology would not be such a flourishing industry, and people would likely not spend thousand of dollars traveling to India implant their genetic materials in

\textsuperscript{139} An accurate example of this would be Bohémier’s article about paternity presumptions under the CCLC: Albert Bohémier (jr), “Maman aime papa, mais qui est papa?” (1963) 13 R.J.T. 206.

\textsuperscript{140} See as an example Cornelio v. Cornelio, 94 O.R. (3d) 213, 65 R.F.L. (6th) 129.


surrogates. While in some instances biological arguments are discredited – a good example of that is the classic case where a man finds out years after birth that he is not the biological dad – biology remains a key element in reproduction, parenting and the legal determination of parenthood. Biology has also transformed to become an uncertain concept. In other words, biology, along with “nature”, could be used to describe a gestational carrier in as much as a genetic donor. The very meaning of biology is uncertain. Finally, biology and genes have an ambiguous role in the legal system. It could be argue that the role of biology and genes also varies lot according to gender in the context of legal parenthood. Biology has a unique meaning for men: sperm. It is not the same thing for women, where both genes and gestation have a biological component. It would be interesting to know whether gestation or genetics would be chosen as determinative of legal parenthood, if law’s desire is to rely on “biology”.

The school of thought that relies on biology argues that parentage is about genetics and nature, or blood connection. Actually, it mimics so-called nature, assuming that the mother and her male-partner – in Québec the presumption applies to female partners as well – are the parents of the child. It reflects, to use Susan Boyd’s words, some sort of “genetic essentialism”, some necessity for a child to “know the “truth” about her genetic origin”. But biology-based motherhood faces problems from within. Is biology about blood and genes, or is it about

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144 Civil code of Québec, S.Q. 1991, c. 64, art. 538.3 and 539. 1 [CCQ].

gestation? Both genetic contribution and gestation criteria promote ideologies about motherhood. Moreover, the importance of biology has to be nuanced as it has been used over the years to promote certain agendas, such as preserving social boundaries,\textsuperscript{146} or giving greater value to some kinds of adult-adult relationships over others (illegitimacy, \textit{filius nullius}, two-parents family model and, more recently, two parents of opposite-sex family model).\textsuperscript{147} In recent years, father’s rights movement and the new private members Bill C-422\textsuperscript{148} with its automatic presumption of equal shared parenting, represent two material examples of developments based on a conception of parenthood

For those who subscribe to the intent theory, intention and action are crucial in becoming a parent. Adoption, for instance, is a traditional example of intentional parenting. The recognition of step parenting, through \textit{in loco parentis} or standing in place of a parent, is another example. The idea is also transferable to other family configurations such as lesbian families, heterosexual families using sperm donor, planned single motherhood, etc. Parental status should be accorded “on the basis of [...] pre-conception intention and post-birth involvement in the daily care of [the] children”.\textsuperscript{149} Susan Boyd highlights that “some authors in literature on surrogacy have argued that the recognition should be given to a person’s intention to be regarded as a parent, and to

\textsuperscript{147} Many examples could be cited here. Angela Cameron’s article on the regulation of the Queer family in Canada exemplifies, using both a case (\textit{D.W.H. v. D.J.R.}, 2007 ABCA 57) and a statute, how certain family models are discredited in Canada. She also shows how gay men are excluded from legal parenting by a federal statute : “Regulating the Queer Family: The Assisted Human Reproduction Act” (2008) 24 Can. J. Fam. L. 101.
\textsuperscript{149} Fiona Kelly, “(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families” (2008-2009) 40 Ottawa L. Rev. 185, at p. 199.
fulfill parental function”. A good example of this would be the Civil code of Québec’s parental project. An intent-based theory of maternity would define the legal mother “as the mother that the parties intended to rear the child, or the commissioning mother”. An easy criticism of intent-based motherhood is that, usually and in most cases, intent is irrelevant in determining motherhood; “it is not a prerequisite for legal parenthood”. These theories about parenting have often been used in relation to fatherhood, but they also have a growing impact on legal motherhood. Theories about legal motherhood are rather flexible and no single rule in locating motherhood can emerge from them, since they are overly contextual and facts-specific.

Law thus creates a peculiar image of motherhood, and “[l]aw is autonomous yet socially contingent”. Fiona Kelly's research gives numerous example of the contradictory nature of law in legal parentage. She indeed discovered how it was difficult for lesbian mothers to find the meaning to give to the sperm donor, “both because of the absence of any legal or social guidance on the issue, as well as the strong social pressure to provide one’s child with a “father””. Law creates a discourse, roles, images that are fed by social practices, and the opposite is also true. Legal maternity’s picture is unclear, but it has been clarified in certain jurisdictions. In the UK, “legal maternity [is] defined by reference to birth”. In Canadian context no reform has yet taken place and many words are used in case law and legislation to expose what is a mother, and

151 Civil code of Québec, S.Q. 1991, c. 64, art. 538.
153 Ibid., p. 623.
154 Peter Fitzpatrick, supra note 47 at p. x.
155 Fiona Kelly, “(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families” supra note 149 at p. 201.
who she is, and when one becomes a mother. There are a lot of uncertainties and the wording is confusing. Natural mother, gestational mother, birth mother, biological mother, genetic mother, social mother, co-mother, etc. are now possibilities. Some other possible labels are genetic donor, gestational carrier and person giving birth. The next pages analyze how these terms are used in the legislation and how motherhood, and parenthood, are conceived of in Canadian statutes. Most of the time, no adequate conception of ‘legal mother’ is available, or if there is a definition it is elusive or does not acknowledge the fictional nature of legal motherhood.

**DEFINITIONS – PROVINCIAL**

**Ontario**

Under Ontario laws, there is no direct definition of “mother.” It is however possible to explore the concept using definitions such as “birth,” “parent,” “birth parent,” and “maternity declaration.” Interestingly enough, the French versions sometime refer to “mère” or “mère de sang”. The four statutes selected are: the *Family Law Act [FLA]*, the *Children Law Reform Act [CLRA]*, the *Child and Family Services Act [CFSA]*, and the *Vital Statistics Act [VSA]*.

**Family Law Act**

The *FLA* regulates matters such as family property, the matrimonial home, domestic contracts, etc. The relevant part for the present purpose – because it looks at the parent-child relationship - is Part III, which deals with support obligations and which defines ‘parent’

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157 By indirect, passive or negative, I mean that the word can only be understood referring to other concept and is not straightforwardly defined in any the statute.
159 *Children's Law Reform Act*, R.S.O. 1990, c. C.12 [*CLRA*].
specifically in terms of those persons who have a support obligation. Under the FLA, the only useful definition is “parent”:

“parent” includes a person who has demonstrated a settled intention to treat a child as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody; (“père ou mère”).

The FLA wants to identify certain adults, typically parents and spouses, as provider of economic resources for dependent family members – generally women and children even if it is generally neutral. It is a policy decision to make the private parties responsible and not the State. With this legislative goal and context in mind, it would be logical to have a broad definition of “parent”, regardless of the consequences it might have. The goal is to locate assets and distribute them to the dependent children. The definition thus is gender neutral and does not impose any limitations as of the number of individuals who can be a parent. The criterion establishing who is a parent under this statute is the “settled intention to treat a child as a child of his or her family”163. It is flexible and could be interpret broadly to include – or exclude – a lot of individuals. Under such a definition, the parent – and mother – status attaches easily, and a stepmother or a co-mother could be a parent. The determination of parentage under the statute is functional164 and concerned with duties and obligations. The formal and symbolic nature of parenthood, and even the privileges it entails, are not part of the picture.

The definition is rather vague and rarely used to locate legal motherhood. It is difficult to find cases where this statute operates to locate the mother, or the stepmother. The definition is descriptive of traditional patterns of dependency, whereby it has typically been men that pay child support rather than women. The definition of “parent” then primarily applies to finding out who

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162 “spouses” and “parents”, see FLA Part III generally, s. 29 “spouse”.
163 FLA, s.1(1) “parent”.
164 Functional in opposition to formal, but not in the sense of functional theories in family law.
the father is, conceptualized as the breadwinner. Such a conception parenting has implications for the mother status, and could introduce inconsistencies with other statutes. It seems to assume the mother and child come systematically together and are dependant on the father. Under such a conception, there is no need for a definition; the mother comes with the child. Biological motherhood is legal motherhood. It oversimplifies the reality of legal motherhood, and does not provide any viable solution for the challenges raised by the various new family models. Further, it undermines the importance of social mothering. Fortunately, the FLA is not the only statute regulating the mother-child tie.

Children Law Reform Act

The CLRA’s focus is the parent-child relationship. It regulates rules of parentage, custody, access, guardianship, etc. The CLRA provides a variety of means to locate fathers, but is of little help in understanding and delineating legal motherhood. The word “mother” is not defined under the act, but the concepts of maternity and motherhood are delineated. The statute proposes concepts such as “maternity declaration”, 165 and “statutory definition of parentage”, 166 but no direct definition of mother. Under the act, “[a]ny person having an interest may apply to a court for a declaration (...) that a female person is the mother of a child”. 167 A declaration of maternity will be issued “where the court finds on the balance of probabilities that the relationship of mother and child has been established”. 168 It is unclear - from the legislation at least - what kind of relationship qualifies as a “mother child relationship”. Further, it is ambiguous whether more than one person can be declared a mother. This definition implies that any female person with an

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165 CLRA, ss. 4(1) and (3).
166 CLRA, s. 12.
167 CLRA, s. 4(1).
168 CLRA, s. 4(3).
interest can apply to have a declaration of maternity, and thus be recognized as a “legal mother”. This criterion of a “mother child relationship” could raise issues in surrogacy, social mothering and co-mothering cases, as it will be explored below. Moreover, it leaves a lot of discretion to judges. Such a vague notion is problematic considering that a double standard often plays a part in the vesting of legal parentage: it is harder to meet the threshold to be declared a mother than a father.\(^{169}\) Indeed, judges are left with little guidance, which leaves too much room for gendered assumptions and prejudices about gender and sexuality in the determination of legal motherhood. The CLRA is obsolete and of little help in facing the new realities of parenting, mothering and reproduction.

On the other hand, when it comes to fatherhood, the CLRA provisions are detailed and do not heavily rely on biology. Section 8 particularly exemplifies the fictional character of legal fatherhood. Indeed sections 4, 5 and 8 of the CLRA:

4. — (1) Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.
(2) Where the court finds that a presumption of paternity exists under section 8 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law.

5. — (1) Where there is no person recognized in law under section 8 to be the father of a child, any person may apply to the court for a declaration that a male person is his or her father, or any male person may apply to the court for a declaration that a person is his child.
(2) An application shall not be made under subsection (1) unless both the persons whose relationship is sought to be established are living.
(3) Where the court finds on the balance of probabilities that the relationship of father and child has been established, the court may make a declaratory order to that effect and, subject to sections 6 and 7, the order shall be recognized for all purposes.

8. — (1) Unless the contrary is proven on a balance of probabilities, there is a presumption that a male person is, and he shall be recognized in law to be, the father of a child in any one of the following circumstances:
1. The person is married to the mother of the child at the time of the birth of the child.

\(^{169}\) The analysis in Chapter 3 highlights these problems. See the analysis in Buist v. Greaves and in Adoption 091.
3. The person marries the mother of the child after the birth of the child and acknowledges that he is the natural father.

5. The person has certified the child's birth, as the child's father, under the Vital Statistics Act or a similar Act in another jurisdiction in Canada.
6. The person has been found or recognized in his lifetime by a court of competent jurisdiction in Canada to be the father of the child. (Emphasis added.)

Since the focus of the legislative analysis is not legal fatherhood, I will not repeat the paternity presumptions for every provinces studied. However, it is useful to bear in mind that they are approximately the same in Ontario, Alberta, British Columbia and Québec. The paternity presumptions, and incidentally legal fatherhood, try to grasp complex ideas and nuances. The same cannot be said of legal motherhood.

Child and Family Services Act
Part VII of the CFSA regulates adoption and proposes definitions of “birth parent”, and “parent”. Under the CFSA, “parent” means

“Parent” in part VII “when used in reference to a child, means each of,

(a) the child’s mother,
(b) an individual described in one of paragraphs 1 to 6 of subsection 8(1) of the Children’s Law Reform Act, unless it is proved on a balance of probabilities that he is not the child’s natural father, [the sections mentioned are the ones on the presumption of paternity]
(c) the individual having lawful custody of the child, [custody is also regulated by the CLRA. Father and mother are entitled to custody under section 20(1), more than a person can have this rights (see 20(3) CLRA), and the key is to act as a parent (see 20 CLRA generally]
(d) an individual who, during the twelve months before the child is placed for adoption under this Part, has demonstrated a settled intention to treat the child as a child of his or her family, or has acknowledged parentage of the child and provided for the child’s support,
(e) an individual who, under a written agreement or a court order, is required to provide for the child, has custody of the child or has a right of access to the child, and
(f) an individual who has acknowledged parentage of the child in writing under section 12 of the Children’s Law Reform Act, but does not include a licensee or a foster parent.

170 CFSA, s. 136(1).
171 CFSA, s. 137.
172 CFSA, s. 137.
and “birth parent” is defined as “a person who satisfies the prescribed criteria; (“père ou mère de sang”). It is pretty unclear, though, what the prescribed criterion is. It probably refers to Part II of the CLRA. For fathers, the prescribed criteria would then be the operation of the paternity presumptions found under section 8 of the CLRA, but it would be impossible for a co-mother to fulfill the requirements, the status being limited to male persons. A few other sections are worthy of mention. Section 137(3) states that “[a] consent under clause (2) (a) shall not be given before the child is seven days old” and 137(8) permits the withdrawal of consent “twenty-one days after the consent is given and where that person had custody of the child immediately before giving the consent, the child shall be returned to him or her as soon as the consent is withdrawn”.

Furthermore, “no person, whether before or after a child’s birth, shall give, receive or agree to give or receive a payment or reward of any kind in connection with, (a) the child’s adoption or placement for adoption”. A person who contravenes these provisions could be imprisoned for up to two years. The wording “payment or reward of any kind” even makes it hard to argue that the sum could be of compensatory nature. With regards to locating legal motherhood, the only helpful sections in the CLRA are the ones about maternity declaration. From these sections, one learns that a mother-child relationship has to be established on the balance of probabilities with a person of the female sex. The “prescribed criteria” to be a “birth parent” or a “mère de sang” under the CFSA remains uncertain.

The CFSA’s recognition of parent-child relationship is symbolic, and formal in comparison to the FLA. CFSA defines “parent” in a different way from the FLA, and the word

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173 CFSA, s. 136(1).
174 CFSA, s. 137(8).
175 CFSA, s. 175.
176 CFSA, s. 176.
177 FLA, s. 4(1).
“mother” is in the act. As I mentioned earlier, under the FLA, a person who does not want to be referred to as a ‘parent’ can fulfill the requirements.\(^{178}\) This seems less likely under the CFSA. There is a vesting of parentage, a moment where an individual becomes a parent, with the obligations, privileges, and duties this entails. Furthermore, in Ontario, provisions on adoption are closely related to the issue of surrogacy and queer parenting. Adoption seems to be the preferred option to be vested with the status of parent, and especially mother.\(^{179}\)

The definition of parent is rather broad, it includes mother, but it is impossible to really figure out who or what “mother” represents. A parent is the “child’s mother”, but is it inclusive of stepmothers? Co-mothers? Social mothers? Gestational mother? Genetic mother? Birth mother? When issues become more complex, there is a lack of adequate legal tools to determine with certainty, and in advance, who the mother is. For example, in a situation where a woman would bear another woman’s egg, this idea of a “birth parent” could be problematic. It could be argued easily that the genetic mother is a birth mother in as much as the gestational mother. Considering, that no contact at all may even take place between the egg donor (likely if she is the one who ultimately wants to parent the child) and the baby, it would be difficult to argue in favor of a mother-child relationship. Legal motherhood under this statute is, once again, taken for granted and no adequate conception or definition is provided. It reiterates the problematic assumption between biological motherhood and legal motherhood, even in a statute about adoption. The lack of a good definition creates a problematic space in which women are likely to

\(^{178}\) See *Cornelio v. Cornelio*, 94 O.R. (3d) 213, 65 R.F.L. (6th) 129 as one of the many examples that could have been mentioned.

\(^{179}\) For an interesting social perspective on adoption in queer settings, one has to read Rachel Epstein “Introduction” in Rachel Epstein, ed, *Who’s Your Daddy? And Other Writings on Queer Parenting* (Toronto : Sumach Press, 2009).
be subjected to gendered assumptions and judgments about their sexuality. Can the OVSA help clarify all the ambiguities surrounding motherhood, and the legal status of mother?

**Vital Statistics Act**

The VSA deals with matters such as registration of births, marriages, deaths, change of name, etc. There is no definition of “mother”, “father”, or “parent” under the VSA. The only term defined is “birth”. The question has been explored in *M.D.R. v. Ontario (Deputy Registrar General)*.\(^{180}\) In this case, the applicants were lesbian parents who sought to include the names of both mothers on the birth certificate. Rivard J. explained, that mother, father and parent “are broad terms that at first blush can refer to either biological parents or social parents. In our cultural lexicon both understandings of the term are common”.\(^{181}\) Even if mother is not directly defined, the VSA proposes that ““birth” means the complete expulsion or extraction from its mother of a fetus that did at any time after being completely expelled or extracted from the mother breathe or show any other sign of life, whether or not the umbilical cord was cut or the placenta attached; (“naissance”)”\(^{182}\). It, thus, is possible to infer legal mother means birth mother. Moreover, ““birth parent”, in relation to an adopted person, means a person whose name appears as a parent on the original registration, if any, of the adopted person’s birth and such other persons as may be prescribed; (“père ou mère de sang”)”\(^{183}\). There is an attempt to limit the concept, but the precisions provided remain obsolete. Rivard J. goes further emphasizing:

> there are no adjectives to elucidate the meaning of terms such as the "relationship of mother" (...). The only textual aid in breaking down the meaning of the terms is the inclusion of the term mother in the definition of birth in s.1 of the VSA: "the complete expulsion or extraction from its mother of a fetus…". *This reference to "mother" does not actually define what is meant by mother.* The definition provides an exhaustive definition of birth. Clearly, the person giving birth is a mother, but it is an error of logic to thereby conclude that all mothers must give birth. In fact, the Respondent has conceded that biologically speaking there can be more than one


\(^{181}\) *Ibid.*

\(^{182}\) *VSA*, s. 1 “birth”.

\(^{183}\) *VSA*, s. 1 “birth parent”.

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mother: gestational and genetic. A genetic mother who uses a surrogate is not involved in the birthing process. However, given that the term mother is included in the definition of birth, it is clear that at least one meaning of mother is birth mother.\textsuperscript{184}

It is unclear when and why the law puts the “mother stamp” on a person in the VSA. The meaning of mother seems to be taken for granted. Biological motherhood is the only option. Thus the association between legal motherhood and biological motherhood is automatic.

It is surprising that no provision on queer parenting can be found under the statutes studied, except the one about adoption. The solution chosen when it comes to queer parenting was to broaden the definition of ‘spouse’. Does that suggest something about Ontario’s way to conceptualize legal motherhood, and parenthood? In my view, it is problematic to rely on the adult-adult relationship to evaluate the parent-child relationship at a time where the heteronuclear-exclusive-married family model is changing. All in all, the Ontario statutes are not clear and leave lots of room for judges to interpret and make value judgments. In \textit{M.D.R. v. Ontario (Deputy Registrar General)} (2006), the judge did reasonably well, but the facts in the case were optimal. Indeed, sperm donors were unknown, the parties were married, and the case was against the Deputy Registrar General for the Province of Ontario. It was not a case involving a possible exclusion or a hierarchy of parental figures, or even a hierarchy of sexual behaviors. Moreover, the judge decided it was not necessary to analyze the \textit{CLRA}, even if it is the act focusing on parent-child relationships. It does not change the fact that, when problematic cases need to be tried, no definition or conception of legal motherhood is available.

Alberta’s statutes tend to be more specific than Ontario's. It probably is related to Alberta’s attitude toward surrogacy and new avenues in human reproduction. Unlike many provinces, Alberta deals with the fact that human reproduction has become a great deal more complex in recent years. However, an exploration of the Family Law Act [FLA], the Child, Youth and Family Enhancement Act [CYFEA], and the Vital Statistics Act [VSA] illustrates how “mother” and its legal meaning are far from obvious, even in a jurisdiction sensitive to new reproductive realities. It further indicates how complex a concept is legal motherhood.

Family Law Act
The FLA is concerned with rules of parentage, guardianship, access, obligations of support, etc. Part I sets the rule for establishing parentage. The FLA proposes a unified conception of “parent” in the province. Indeed, section 7 indicates “unless another enactment provides otherwise, a person who is a parent of a child under this Act is a parent of that child for all purposes of the law of Alberta.” Even it allows some flexibility, it asserts that some consistency is needed between the legal definitions and conceptions of “parent”. Moreover, it is a remarkable statute as it defines “mother”, “father”, and “parent” at the very beginning of the Act, and also contains a few sections on surrogacy and assisted reproduction.
Under the *FLA*, “parent” is defined as “the father or mother of a child”\(^{194}\). Furthermore, unlike other provinces, both the meaning of father and mother are defined in the statute. The drafters of the *FLA* foresaw that litigious issues could arise when it comes to fatherhood, and the act frames a definition of father\(^{195}\) inclusive of adoptive father, biological father, father in an assisted reproduction context\(^{196}\), random sperm donor, all of this in addition to the regular presumptions of parentage\(^{197}\). It is worth mentioning that the word “paternity” is absent from the statute.

The definition of ‘mother’ is multifaceted. It is also nuanced, and tries to embrace various possibilities. Under section 1 (i) of the *FLA*, “mother” means:

(i) unless subclause (ii) or (iii) applies, the person who gives birth to a child,
(ii) in the case of an adopted child, a female person who adopts the child, or
(iii) a female person described in section 12(6);

A variety of factual situations may result in a person being vested with the status of legal mother: giving birth, adopting, and – theoretically at least – being a genetic donor. A genetic donor is defined as “a female person who provides genetic material that is fertilized and implanted in the uterus of a gestational carrier”,\(^ {198}\) and a “gestational carrier” as “a female person in whose uterus the genetic material of a genetic donor is implanted”.\(^ {199}\) A genetic donor has 14 days upon birth to apply to a court to be declared the sole mother of the child.\(^ {200}\) If the court is satisfied that she actually is the genetic donor and the gestational carrier consents, the genetic donor will be declared the mother of the child. There is no “gestational mother”, “biological mother”, “genetic

\(^{194}\) *FLA*, s. 1 (j).
\(^{195}\) *FLA*, s.1 (f).
\(^{196}\) *FLA*, s. 13.
\(^{197}\) *FLA*, s. 8.
\(^{198}\) *FLA*, s. 12(1)a.
\(^{199}\) *FLA*, s. 12(1)b.
\(^{200}\) *FLA*, s. 12(3).
mother” or “birth mother” in the wording of the statute. In Alberta, it seems like one becomes a mother after birth, by operation of the law. It appears, from my understanding, that the gestational carrier will always be the one with the last word on the issue, as no surrogacy agreement can be enforced.\textsuperscript{201} Thus, it is questionable whether this beautifully drafted piece of legislation has any practical and concrete results, since the “person giving birth” – genetically tied or not – will always make the ultimate decision.

On a different note, the \textit{FLA} defines social parenting (“standing in the place of a parent”\textsuperscript{202}). Section 48 defines a person “standing in place of a parent” as:

\begin{quote}
[a] person is standing in the place of a parent if the person
(a) is the spouse of the \textbf{mother or father} of the child or is or was in a relationship of interdependence of some permanence with the \textbf{mother or father} of the child, and
(b) has demonstrated a settled intention to treat the child as the person’s own child.
\end{quote}

The key element is the “settled intention to treat the child as the person’s own child”\textsuperscript{203} and many factors are listed in the act to help judges determine whether or not a relationship of this kind is present.\textsuperscript{204} Gender and/or sexual orientation are not barriers to being legally recognized as a social parent. It is gender neutral as it uses the word “person”, but it goes further, it is also “expressly inclusive”. By expressly inclusive I mean that, not only does the definition allow both genders to be included (gender neutral), the wording permits the express inclusion and conceptualization of women and mothers differently at law. It could be asserted that, stepping back from the idea of archetypal gender roles in marriage and parentage (bread winner / housewife-caregiver), the statute explicitly mentions “mother” and “father” in the definition of social parenting. In my opinion, this drafting helps put in perspective the traditional patterns of dependency whereby only

\begin{flushright}
\textsuperscript{201} \textit{FLA}, s. 12(7).
\textsuperscript{202} \textit{FLA}, s. 48(1).
\textsuperscript{203} \textit{FLA}, s. 48.
\textsuperscript{204} \textit{FLA}, s. 48(2).
\end{flushright}
men pay child support. It helps to construct a new idea of support obligations, and a more accurate conception of legal motherhood.

Formal and functional determinations are made under the same act. In other words, the symbolic vesting of parentage (formal) and the functional determination of who will provide resources for the child (obligations of support) are considerations in the same act. Alberta is a good example of a province with some nuance and flexibility as regards to the problematic equation of biological motherhood and legal motherhood. The definition of legal mother tends to be less exclusive than a traditional definition (giving birth). The very presence of a definition probably helps in limiting gendered assumptions about legal motherhood and prejudices about sexuality.

*Child, Youth and Family Enhancement Act*

The *Child, Youth and Family Enhancement Act* regulates many areas such as intervention services and the licensing of residential facilities. Part II of the *CYFEA* is of particular interest as it deals with adoption. It however has a little less importance in surrogacy situations than it has in Ontario for example, since the *FLA* directly addresses the issue. The act defines “biological mother”, and “biological father”. Biological does not have the same meaning when it is used in combination with mother or with father. A biological father can very well be non-genetically tied with the child. Biological father means: the male person

(i) who is married to the biological mother at the time of the birth of the child,
(ii) acknowledged by the biological mother as the biological father of the child,
(iii) declared by a court to be the biological father of the child, or

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205 *CYFEA*, s. 1(1)c).
206 *CYFEA*, s. 1(1)b.)
(iv) who satisfies a director that he is the biological father of the child;\(^{207}\)

The biological mother is the one giving birth but as mentioned earlier she might not be the genetic mother.\(^{208}\) However, no precisions are available about this issue in the act. It is possible to revoke consent after 10 days,\(^{209}\) and there is no requirement for the child to be a number of days old before he or she can be adopted. The CYFEA is much less sophisticated than the FLA, but since the FLA contemplates and tries to address the complicated situations that can arise from adoption and situations related to new reproductive technologies, this is not of great importance. The two statutes have two different functions, and there is not much overlap.

\textit{Vital Statistics Act}

The last Albertan act defining key parenthood terms is the \textit{VSA}. The definition of birth is the same as under the Ontario \textit{VSA}. However, as previously mentioned, “birth mother” is not used in Alberta’s statutes related to motherhood. The only act using this wording is the Employment Standards Code.\(^{210}\) Alberta’s statutes use the wording “person giving birth”, which makes it possible to argue that the legal status of mother attaches differently in this province.

Alberta’s portrayal of motherhood is nuanced and multidimensional, at least in theory. The words employed are carefully chosen and defined: birth person, genetic donor, gestational carrier, no mention of paternity, etc. The statutes are gender neutral, which also allows recognition of same sex relationships. Surrogacy is mentioned and regulated. There is no mention of altruistic surrogacy though. Even with the specific sections of various acts, it seems that the birth person always has the final say. At least, a choice is made. At a theoretical level, Alberta’s way of conceptualizing legal parentage is different from Ontario, and closer to Québec’s

\(^{207}\) \textit{CYFEA}, s. 1(1)b).
\(^{208}\) \textit{CYFEA}, s. 1(1)c).
\(^{209}\) \textit{CYFEA}, s. 61(1).
perspective. There is a structure and coherence between the two principal statutes, and parenthood must be understood as a unified concept. It is a little bit like civil law because there are two distinct statutes and they establish two exclusive modes of legal parentage; adoption and other forms of legal parentage that could be fictionally described as “natural” or “by blood”.

**British Columbia**

In British Columbia, four statutes make it possible to draw a picture of the concept of motherhood, and parenthood. Unlike Alberta, there is no legislation directly addressing surrogacy issues. The relevant definitions and sections in following acts will be studied: the *Family Relations Act [FRA]*, the *Child, Family and Community Service Act [CFCSA]*, the *Adoption Act [AA]*, and the *Vital Statistics Act [VSA]*.

*Family Relations Act*

The *FRA* deals with topics such as access and custody, matrimonial property, support obligations, etc. Even if the word “mother” is recurrently used in the statute, it is not defined. The only defined term relating to parenthood is “parent” and its meaning is rather obscure. Parent is defined as including:

- (a) a guardian or guardian of the person of a child, or
- (b) a stepparent of a child if
  (i) the stepparent contributed to the support and maintenance of the child for at least one year, and
  (ii) the proceeding under this Act by or against the stepparent is commenced within one year after the date the stepparent last contributed to the support and maintenance of the child.

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211 *Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].*  
212 *Child, Family and Community Service Act, R.S.B.C. 1996, c. 46 [CFCSA].*  
213 *Adoption Act, R.S.B.C. 1996, c. 5 [AA].*  
214 *Vital Statistics Act, R.S.B.C. 1996, c. 479 [VSA].*  
215 *FRA, s. 1(1) “parent”.*
Given the fact that the main characteristic necessary to be a parent seems to be that of being a guardian, what exactly does being a guardian mean? Being a guardian means having the power under section 25.\textsuperscript{216} Section 25 does no more to help in trying to understand what a parent or guardian is. It is merely functional, discussing a child’s estate and being the person’s guardian. Even if it is impossible to understand what a parent, a father\textsuperscript{217} and a mother are under the statute, these words are respectively used 63, 22, and 24 times. This piece is thus a great example of how motherhood can be understood as obvious and unnuanced, while in fact it is far from it. It also reinforces the problematic equation of legal motherhood and biological motherhood and makes legal motherhood exclusive, as only a birth mother can be understood as a mother.

\textit{Child, Family and Community Service Act}

The \textit{CFCSA} regulates matters like family support services and agreements, child protection, children in care, etc. It does not say much more about what a legal mother is. The term “parent” is defined in a minimalist fashion. Under section 1(1), "parent" means:

(a) the mother of a child,  
(b) the father of a child,  
(c) a person to whom custody of a child has been granted by a court of competent jurisdiction or by an agreement, or  
(d) a person with whom a child resides and who stands in place of the child's mother or father but does not include a caregiver or director;

Once again, there is no further definition of “mother” or “father”. Social parenting and step parenting are however gender neutral under this statute. It is nonetheless an oversight that no definition or guidance is provided to locate where, when, how and to whom motherhood attaches under the two major family law statutes in British Columbia.

\textsuperscript{216} \textit{FRA}, s.1(1) “guardian”.  
\textsuperscript{217} Please note that the classical paternity presumptions can be found at section 95(1).
Adoption Act

The Adoption Act says a bit more about concepts and terms related to parenthood. As the title indicates, the Adoption Act regulates adoption matters. Under the act, a “birth mother means “the child's biological mother”\textsuperscript{218} There is no guidance for evaluating what a biological mother is under the statute, which could be highly problematic in surrogacy or equivalent cases. However, as in Ontario, section 14 specifies a 10-day delay before the new-born can be placed in adoption, and section 19(1) permits consent revocation within 30 days. On a different note, the wording of the section on second-parent adoption is gender neutral and co-motherhood is possible.\textsuperscript{219} So far, very little guidance is provided to locate motherhood in complex situations. While some flexibility is required at law, too much flexibility may have negative consequences. In British Columbia, there is no adequate conception or definition of legal motherhood.

Vital Statistics Act

There is no definition for “mother”, “father”, or “parent” under the VSA. The only term defined is “birth”. The definition of birth under the BVSA is classical and relies on the common hypothesis that a mother is giving birth by complete expulsion of a fetus. The exact wording is: “"birth" means the complete expulsion or extraction from its mother (...).\textsuperscript{220} This could be difficult to interpret in a case where a gestational carrier, especially if she is not genetically related to the baby, decides to keep the baby. Once again, this statute is not very helpful in locating motherhood. However, it reinforces traditional assumptions about motherhood: expulsion is the key, thus biological motherhood and legal motherhood are two sides of a same coin.

\textsuperscript{218} AA, s. 1 “birth mother”.
\textsuperscript{219} AA, s. 29.
\textsuperscript{220} VSA, s. 1 “birth”.

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So far, British Columbia is the province where the legal definition and conception of motherhood seem to be the least well defined and delineated. The statutes are of little help in trying to ascertain when the legal mother’s status attaches. The law seems to assume that the “natural” or “biological” reality will always match the legal reality. The absence of a definition and conception of legal motherhood is regrettable because it leaves too much room for prejudices about sexuality and gendered assumptions about legal parenting.

Québec

Québec’s legal framework is different from the three provinces previously studied, and it is inspired by a completely different legal tradition. The core civilian concept is filiation, and it is similar to legal parentage.221 As Pratte wrote, “[l]a filiation est […] la représentation des valeurs sociales et culturelles. Même si elle a la nature comme modèle, elle n’en est pas toujours l’exacte reproduction”.222 How are parenthood, and motherhood conceived and defined in the *Civil code of Québec* [CCQ]? Since the concepts and ideas are a little different in civil law, I will quickly overview legal parentage in civil law settings. Civil law is more conceptual and less definitional. As a result, the methodology of this section differs a little. Concepts and civilian categories are analyzed and the objective remains shedding light on legal motherhood, its articulation, and components. Unfortunately a textual analysis – as I did for the common law provinces – would be nearly impossible.

221 For a recent study about filiation over the years in Québec’s civil law, see Marie-France Bureau, *Le droit de la filiation entre ciel et terre: étude du discours juridique québécois* (Cowansville: Yvon Blais, 2009).

Civil Code of Québec

Throughout the CCQ, “mother” appears 84 times. However, no definition of “mother” (mère) is provided either in the CCQ, or in Private Law Dictionary and Bilingual Lexicons. There is a whole book on family matters in the Code, and a title – divided in two chapters – is devoted to filiation. The first chapter of the book “The Family” is about filiation by blood, and the second chapter is about adoption. Chapter 1.1 deals with the filiation of children born of assisted procreation. There are three possibilities for filial status; filiation by blood, filiation of children born of assisted procreation, and filiation through adoption. The location and the fact that the filiation of children born of assisted procreation it is a “.1 chapter” engender competing understandings about legal parentage. Those competing understandings are not central to the present analysis. It could however be suggested that it symbolically represents a lesser filial status. Article 522 CCQ clarifies that all established filial statuses are equal: “all children whose filiation is established have the same rights and obligations, regardless of the circumstances of birth”. Thus the criticism is non fondée. Filiation can be either maternal or paternal, or “any” combination thereof.

Legal Parentage: General Regime

Under the general regime, filiation is established – and proved – by the act of birth. Article 523(1) CCQ “(...) maternal filiation are proved by the act of birth, regardless of the

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223 Nicholas Kasirer dir. Quebec Research Centre of Private & Comparative Law, Private Law Dictionary of the Family and Bilingual Lexicons (Montreal : Yvon Blais, 1999). This dictionary is a reference in Québec’s private law.

224 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, at 75. Leckey explains briefly the situation and directs the interested reader to sources exploring the question.

225 CCQ, art. 522.
circumstances of the child's birth”. 226 When there is no act of birth, there are three means to prove filiation: uninterrupted possession of status,227 presumptions of paternity228 or voluntary acknowledgement.229

Possession of status is a concept describing the relation between an adult and a child. As such, “(...) 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”.230 Possession of status traditionally has three components:

- l'enfant porte le nom du parent à l'égard duquel il y a possession d'état ;
- l'enfant est entretenu et éduqué par ceux qu'il désigne comme son père et sa mère ou l'un ou l'autre ; il a donc été traité par ses prétendus parents ou son prétendu parent comme leur enfant ;
- il est reconnu notoirement dans son entourage, son milieu, comme l'enfant de celui ou ceux avec lequel ou lesquels on veut établir un lien de filiation (M. (H.) c. L.V. (D.), REJB 2001-24922 (C.S.)).231

There are presumptions of paternity,232 and somehow, of maternity.233 Indeed, articles 525 states:

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.

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.

The presumption is also rebutted in respect of the former spouse if the child born is 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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226 CCQ, art. 523(1).
227 CCQ, art. 523 (2).
228 CCQ, art 525.
229 CCQ, arts 526-529.
230 CCQ, art. 524.
232 CCQ, art. 525.
233 CCQ, art. 538.3.
Since, as will be explained below, a parental project can involve two women, the presumption under art. 538.3 could be in as much a maternity presumption as a paternity presumption:

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.

The presumption is rebutted if the child is born more than 300 days after the judgment ordering separation from bed and board of the married spouses, unless they have voluntarily resumed living together before the birth.

The presumption is also rebutted in respect of 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.

Finally, paternal or maternal filiation can also be voluntarily acknowledged. The acknowledgement of maternity, however, happens rarely, and there is no case law on the matter. Moreover, “la reconnaissance ne lie que son auteur (art. 528 CCQ) et elle ne prendra toute sa valeur que si un tribunal la confirme. Elle peut servir de commencement de preuve dans une instance relative à la filiation (art. 533 et 534 CCQ)”.

Filiation is, and has always been, mostly fictional in Québec. The Legislator, on the basis of public order, discards the idea of a biological “truth”. Filiation’s goal is stability. As such, no one can claim a filiation contrary to the act of birth and the possession of status of a child more than a year after birth.

Legal Parentage: 2002’s Reform and the Parental Project

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234 CCQ, art. 526: “If maternity or paternity cannot be determined by applying the preceding articles, the filiation of a child may also be established by voluntary acknowledgement.”

235 Michel Tétrault, supra note 231.<ref note="on line">.


237 CCQ, art. 530. Of course, the situation is different when the possession of status and birth certificate do not match, and it is the same stability imperative that motivates it. However, after one year, not contestation is possible: CCQ, art 531.
A reform of the law of filiation occurred in 2002. Many observers were critical of the changes that happened, for many reasons. Some of them were: 1) the political climate and the underlying motivations why the traditional edifice of filiation were not optimal for such a fundamental change of the regime;\(^{238}\) 2) it happened too fast and with too little consultation; 3) the debates in the national assembly were somewhat ridiculous;\(^{239}\) and 4) while filiation should be about children’s rights, the reform mutated filiation into an adult privilege.\(^{240}\) On a more positive note, some authors qualified the reform as a “désexualisation de la filiation et du couple parental”\(^{241}\).

The 2002 reform was not the first one to occur. Indeed, “until 1980, the Civil Code of Lower Canada, dating from 1866, knew two kinds of filiation: legitimate and illegitimate”.\(^{242}\) The only filiation having legal consequences was the legitimate filiation. Thus, only children born within wedlock were recognized at law. By extension, the only type of legal motherhood possible was the one of the wife, not the woman. Biology and so-called “naturalness” were not really important, even if it remains a core argument against 2002’s reform. The relationship status was the cornerstone of filiation, for man,\(^{243}\) and woman.

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\(^{238}\) 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 civil union. See Marie-Christine Kirouack, *supra* note 236 at p. 375 and Marie-Blanche Tahon, *Vers l’indifférence des sexes? Union Civile et filiation au Québec* (Montréal: Éditions du Boréal, 2004).

\(^{239}\) Tahon, *ibid.* at pp. 77-88.

\(^{240}\) See generally Marie-Christine Kirouack, *supra* note 236 and specifically at page 428 where she goes as far as saying that the child becomes a commercial good.


\(^{242}\) Robert Leckey, “‘Where the Parents are of the Same Sex’; Quebec’s Reforms to Filiation” *supra* note 224 at p. 64.

\(^{243}\) *Massie v. Carrière,* [1972] C.S. 735: this case is a classic example in Québec’s civil law. In this case, it is obvious that the *amant* is the biological father, not the husband. The judge nonetheless confirmed that the husband was the father. “Il est possible que le jour vienne où le stigmate attaché à la personne de l’enfant illégitime étant enfin disparu, la loi voudra s’attacher à la “vérité” biologique plutôt qu’à la “vérité juridique”. (...) Le tribunal (...) n’a pas à se prononcer sur la preuve offerte par le requérant tendant à prouver la filiation naturelle, cette preuve ayant été en tout état de cause absolument illégale”.

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The parental project is the main addition flowing from the reform. This new mechanism allows in-depth reconceptualization of legal parenthood and motherhood. “A parental project involving assisted procreation exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project”.244 A parental project can happen between an infertile man and his female partner, or between lesbian partners. A parental project is also available for a woman alone. One of the main critiques of the parental project is its lack of formalism. Indeed, while having a child through a parental project generally involves planning and investment, there is no necessity to have a contract, or a written agreement. Mutual consent is the only requirement. The impacts of the parental project245 are manifold.

The parental project allows two women to have a “natural child”. Indeed, the filiation of both mothers can be established by blood. Lesbian families are symbolically and functionally understood as “natural” in the CCQ. The status of the second mother is, technically, secured before birth, and as such, before potential conflicts arise. She can also be on the birth certificate, and she is liable toward the child and the child’s mother if she consented to a parental project, even if she refuses to be on the birth certificate.246 But the conception of legal motherhood is still pretty classical. One of the mothers is the birth mother, the other mother is assimilated to a “father”. Indeed, according to article 539.1 “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”. It is possible to infer from giving birth remains the primary

244 CCQ, art. 538.
245 For a common law perspective on the parental project, see Fiona Kelly, “(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families” supra note 149.
246 CCQ, art. 540: “A person who, after consenting to a parental project outside marriage or a civil union, fails to declare his or her bond of filiation with the child born of that project in the register of civil status is liable toward the child and the child's mother”.

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criterion in locating motherhood. However, with the reform, the CCQ widens the conception of mother, acknowledging that some “natural or blood” mothers are not “birth mothers”. Legal motherhood can be closer to fiction than it has traditionally been. Article 539.1 however remains the object of criticism. Marie-Christine Kirouack suggests the article is irrelevant, as parents are now equal in the eyes of the law. Withal explains that it could be used in the law of successions, when both maternal and paternal lines are represented, the key filiation principle remaining bi-parentality.

The CCQ clarifies the status of the sperm donor in a parental project. Lesbian families are sometimes frustrated at being unable “to invite [the] donor to play a more significant parenting role”. They are often obligated to do so because of the legal vulnerability of the non-biological mother. The CCQ tries to palliate to this problem with article 538.2:

538.2. The contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project.

However, if the 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.

The second part of this article is especially interesting. Sexual intercourse allows a man to have special rights toward the child, notwithstanding the fact that he had no intention at all to be a father. He has to act during the year following the birth of the child. Even with this article, a lesbian non-genetic co-mother has been excluded much later than a year after birth,

247 Marie-Christine Kirouack, supra note 236 at p. 433.
248 Fiona Kelly, “(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families” supra note 149 at p. 208. While her text is about lesbian families mainly in Alberta and BC, I believe it is completely possible to extend her findings to other provinces, even to Québec.
249 This idea will be further explored in chapter 3. Judges sometimes seem to go on a quest in locating a father and vest him with legal parental over the lesbian co-mother. This is likely to happen in all studied provinces, even in Québec, despite article 538.2.
notwithstanding the fact that the male originally consented not to be involved in the child’s life.\textsuperscript{250}

It is unclear why sex rather than intention creates legal parentage and the article is applied inconsistently. The article on the parental project was presented to the National Assembly of Québec on May 21\textsuperscript{st} 2002. The first article proposed suggested that a technical mechanism of fertilization – thus excluding sexual intercourse – was mandatory in order to see the filiation of the spouse recognized.\textsuperscript{251} Two arguments were made during the debates surrounding the proposed bill. The original version of the debate in front of the national assembly descends into burlesque:

Deux madames sont en relation union civile homosexuelle. Ça va? Elles décident d’avoir un enfant. La meilleure manière d’avoir un enfant, c’est d’aller quelque part, de vous draguer et de faire en sorte que, avec la générosité qu’on vous connaît, vous finissez par devenir un générateur implicite, d’avoir une relation sexuelle. Mais l’enfant va rester à l’intérieur du couple – comprenez-moi c’est ce que je veux dire – l’enfant va rester à l’intérieur du couple, même si la procréation s’est quand même faite par une relation sexuelle qui n’étaient... Donc, elle, la personne, ne reconnaîtra plus le géniteur le lendemain, ou quoi que ce soit. Et ça, je ne voudrais pas... Vous comprenez bien? Puisque notre objectif, ici, c’est bien de protéger les enfants...\textsuperscript{252}

Two things follow from this excerpt. It was important not to use “mechanical” or “medically assisted\textsuperscript{253}”, and it was crucial to recognize that when there is a sexual intercourse, the man can claim parenthood a year after the child’s birth, even if he had no intention to be a parent. In my view, the part of the article about sexual intercourse is an excellent example of the confusion between biological parenthood and legal parenthood and of the fact that legal motherhood has heretofore existed within the strictures of a patriarchal system. Further, it seems to foster the idea

\textsuperscript{250} See chapter 3: \textit{L.B. v. Li. Ba.}, 2006 QCCS 591.
\textsuperscript{251} Marie-Blanche Tahon, \textit{supra} note 238 at p. 75.
\textsuperscript{253} An example can be found in California, where they decided to include the idea a medical assistance to procreation. Indeed, semen must be provided by a licensed physician. This is particularly intrusive. A classic case exploring this reality is \textit{Jhordan C. v. Mary K.} (1986) 179 CA3d 386.
of a hierarchy of sexual behaviors, heterosexual sexuality always prevailing over other expressions of sexual desires.

The explanations of Québec’s Minister of Justice in front of the National Assembly confirm the hypothesis that the reason for this article is the non-distinction between biological and legal parentage, when it concerns women. Law does not have a problem with relying on the fictional nature of filiation when it is in men’s interests (re: paternity presumption), but it does have reservations to do so for women.

It is clear from this excerpt that biological and legal parenthood are the same in the Minister of Justice’s mind. Further, the addition was made from a male privilege perspective. It has been modified in order to control women’s bodies and to give over-protection and valuation to the male seed. It promotes ideologies about motherhood and legal motherhood that have been vehemently denounced by dominance feminists: maternity in a patriarchal society is what mothers and babies signify to men. Sperm-link has a higher value than intention. Moreover, it represents another example of a latent hierarchy of sexual behaviors, and of regulation of

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women’s sexual behaviors. It implicitly acknowledges that hetero-sexual reproductive sex entails special privileges. Of course, homosexual sex cannot lead to biological reproduction, but the CCQ acknowledges homosexuality can lead to social reproduction. Why, then, does the CCQ seem to give greater value to heterosexual encounter than to homosexual expressions of sexuality? If a woman decide to have sex with a man, despite the fact that she is in a committed relationship with a woman and that both women decided that they wanted to have a baby together, the only sexuality that counts is the reproductive one. It promotes a bizarre conception of sexuality, intention, intimacy and legal parenting.

It would be interesting to have a situation in which the women would be married... would the presumption of ‘maternity’ of 538.3 win over 538.2(2)? In other words, would biology be considered more valuable than intention in non-heterosexual family planning? Finally, what if a heterosexual couple were in the same situation, due to the man’s infertility? What if this heterosexual couple elected to proceed with a known donor, through sexual intercourse? Can the law conceptualize sexuality as sometime non-exclusive (almost proprietary)? It is interesting to see how very progressive concepts (e.g. the possibility of having two ‘natural’ mothers) run alongside overly traditional understandings of sexuality (e.g. sexuality is reproduction).

On a more positive note, the article clarifies that no filial bond can be created, absent sexual intercourse. The status of the sperm donor, however, reasserts and confirms the bi-parental conception of parenthood in Québec’s civil law. Despite the developments in Ontario on these matters, Québec clearly wants to stick with a maximum of two persons acting as parents.255

This might not be exactly inclusive of new family models.\footnote{One can find plenty examples of this idea throughout the Code, obvious examples being: 532.2, 539.1, 578.1 and title four of the Code on parental authority (597 and ff).} Other new family models included in the Code are single motherhood and gay male parenthood. A woman alone can decide to embark on a parental project. A single man however cannot, neither can two men. Two fathers can only be recognized as parents through adoption,\footnote{On new family models, see Rachel Epstein, ed, \textit{supra} note 179.} as surrogacy conventions are null.\footnote{Second parent adoption 555 CCQ and 546 CCQ “any person of full age may, alone or jointly with another person, adopt a child”.} This might sound “natural” or obvious, but it is not. In a case that unfortunately for the purposes of this analysis did not end up in front of a judge,\footnote{CCQ, art. 541. Chapter 3 will show that they nonetheless happen and that judges do not really know how to deal with them. Children born of surrogacy agreements are subjected to the discretion of the adoption regime.} a gay male couple asked a surrogate to carry their non-identical twins. The two eggs were not those of the surrogate, but those of another woman. Egg1 was fertilized with sperm of gay dad 1, and egg 2 with the sperm of gay dad 2. As such, by operation of the law they all were birth parent. The men were even presumptively the parents of the other twin. But the Code would not have been helpful in this situation, since it is silent about surrogacy.

\textit{Surrogacy}

Surrogacy is not addressed in the Code, it is intentionally left outside law’s realm. Indeed, article 541 affirms “[a]ny agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null”. The situation is regrettable\footnote{I heard of this case on a lecture given by a practitioner in 2009 at McGill. For confidentiality reasons, no name will be mentioned here. Let it only be said that it happened, and could possibly happen again.} as surrogacy happens quite a lot, and is always in the media. Surrogacy creates problems because no conception of legal mother is available under the CCQ. The vast majority of surrogacy cases in Québec concerns heterosexual couples. The willful blindness about this central issue is highly problematic.
Surrogacy agreements happen, and rights cannot be enforced. The very same factual situations end up being decided differently, some judges are sympathetic to altruistic surrogacy, others are not, etc. Surrogacy of course is a hot topic, and a lot of debates and policy decisions will have to be made. The history of Québec civil law shows being shortsighted about a situation, and creating a private unregulated sphere is detrimental both to vulnerable, and less vulnerable legal subject.\textsuperscript{262} No regulation is as much a choice as regulation. The non-regulation of surrogacy – in combination with Québec’s perspective on adoption – sends a message about legal motherhood. In Québec, consent to adoption may be general or special, but special consent can only be given to a family member, or a relative\textsuperscript{263}. It suggests that altruistic intra-familial surrogacy could be a legitimate option, if filiation is established by adoption. But in some instances, this recourse is barred. Even with the reform of filiation, legal parentage remains pretty classical in Québec: it is dual, and it relies on the relationship status of the parents.

An important distinction between Québec and the common law provinces studied is that Québec is the only province where something other than second-mother adoption, or subsequent actions on the part of the non-birth mother, is allowed to secure parental rights and obligations. There is an important conceptual difference between the two ways of vesting motherhood. “Second-parent adoptions “do not address legal parentage at birth. Rather, they require the non-biological mother to take some positive action after [birth]”.\textsuperscript{264} Some might say that there is a symbolic value attached to being a parent from birth. Furthermore, it seems to be easier to secure

\textsuperscript{262} Many examples could be cited here. At the moment, the hot topic is the treatment of unmarried cohabiting couples (\textit{Droit de la famille – 091768}, [2009] J.Q. no 7153, 2009 QCCS 3210). An historical example of this statement could be the problem of domestic violence. The status of the woman in private law has long been a justification for abuses in the privacy of their homes: Régine Tremblay, \textit{supra} note 86.

\textsuperscript{263} CCQ, art. 555.

\textsuperscript{264} Fiona Kelly, “(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families” \textit{supra} note 149 at p. 192.
one’s rights before conflicts arise, and without having to go through administrative procedures. It has even been argued that it is discriminatory to have to undertake expensive procedures to be vested with parenthood in ‘irregular’ situations.\textsuperscript{265} In other words, while second-parent adoption is a great legal mechanism, one parent is still vulnerable \textit{vis-à-vis} the other parent, and also vulnerable within the legal system. As Robert Leckey rightly points out, “the same-sex partner of a child’s parent need not persuade a court that her parenthood serves the child’s best interest, a difficult task where the courts have often sought to ‘control and inhibit alternative sexualities’”.\textsuperscript{266}

\textbf{Definitions – Federal}

Family matters are provincial matters in Canada. The word or concept “mother” can nonetheless be found in many federal statutes such as the \textit{Civil Service Insurance Act},\textsuperscript{267} the \textit{Indian Act},\textsuperscript{268} the \textit{Pension Act},\textsuperscript{269} the \textit{Income Tax Act},\textsuperscript{270} the \textit{Bankruptcy and Insolvency Act},\textsuperscript{271} the \textit{Criminal code},\textsuperscript{272} etc. These statutes are not really relevant because they do not explore the mother-child relationship and the moment where legal motherhood is vested. However, marriage\textsuperscript{273} and trade and commerce\textsuperscript{274} are of federal jurisdiction. \textit{The Divorce Act} is mainly concerned with adult-adult relationships and will not be analyzed here, as the only helpful definition is “child” and it is only helpful in the context of support obligations and custody. The

\begin{footnotes}
\item[265] The question of the discriminatory character of having to undertake expensive procedures to be vested with parenthood in ‘unregular’ situation has been discussed in \textit{K.G.D. v. C.A.P.}, \[2004\] O.J. No. 3508.
\item[266] Robert Leckey, \textit{supra} note 224 at p. 70.
\item[267] \textit{Civil Service Insurance Act}, R.S.C. 1952, c. 49.
\item[272] \textit{Criminal Code}, (L.R., 1985, ch. C-46), s. 223.
\end{footnotes}
symbolic vesting in situations of support obligations is minimal, and the main purposes of these dispositions are functional. Of course, it raises the issue of step-motherhood, but nothing new could be argued, and I already mentioned it when I explored the provincial acts. The *Assisted Human Reproduction Act*\(^{275}\) [AHRA] proposes a few helpful definitions, and it addresses surrogacy.

*Assisted Human Reproduction Act*

The *AHRA* deals with a broad range of reproductive issues, including sperm donation, *in vitro* fertilization, human cloning, DNA manipulation, etc. It also proposes sections dealing with surrogacy. The principles and values protected and secured by the *AHRA* are: the health and well-being of children born through the application of assisted human reproductive technologies, \(^{276}\) protection of women, \(^{277}\) the importance of informed consent \(^{278}\) and non-discrimination on the basis of their sexual orientation or marital status, \(^{279}\) etc. It also clearly states that the “trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition”. \(^{280}\) Other goals are to prevent the commodification of life and the commercialization of women’s reproductive capacities.

The act defines “surrogate mother” as “a female person who — with the intention of surrendering the child at birth to a donor or another person — carries an embryo or fetus that was

\(^{276}\) *AHRA*, art. 2 (a).  
\(^{277}\) *AHRA*, art. 2 (c).  
\(^{278}\) *AHRA*, art. 2 (d).  
\(^{279}\) *AHRA*, art. 2 (e).  
\(^{280}\) *AHRA*, art. 2 (f).
conceived by means of an assisted reproduction procedure and derived from the genes of a donor or donors”\textsuperscript{281}. The definition contemplates gestational and traditional surrogacy. Section 6 prohibits any kind of payment to a surrogate mother and to someone acting as intermediary. Interestingly, a minimum age for surrogate motherhood is specified: “No person shall counsel or induce a female person to become a surrogate mother, or perform any medical procedure to assist a female person to become a surrogate mother, knowing or having reason to believe that the female person is under 21 years of age”.\textsuperscript{282} Moreover, 6(5) of the \textit{AHRA} states “this section does not affect the validity under provincial law of any agreement under which a person agrees to be a surrogate mother”.

Surrogacy is, in a way very close to adoption, but for some reason, we are not socially as shocked by adoption. However, ‘commercial’ adoption is also banned. The \textit{AHRA} bans commercial surrogacy only. Altruistic surrogacy seems possible. It reinforces the idea that women are altruistic and giving, and that motherhood is a gift. It portrays vulnerability in a specific way; vulnerability happens when commerce or trade is involved. The so-called protection of women happens, in this context, in the public sphere, the traditional male sphere... because it is how law is understood; in male terms. Altruistic and intra-familial surrogacy are not conceived as agreements where an imbalance of power can happen. These issues emanate from the private sphere, and they seem to be out of law’s realm. Close attention should also be given to altruistic surrogacy. There are cases where intra-familial surrogacy (altruistic surrogacy) are much more problematic than the commercial ones.\textsuperscript{283} Some countries decided to allow commercial surrogacy, but to ban altruistic surrogacy, especially when surrogacy happens in a

\textsuperscript{281} \textit{AHRA}, “surrogate mother”.
\textsuperscript{282} \textit{AHRA}, art. 6(4).
\textsuperscript{283} See for example \textit{V.V.H. and P.B.H. v. W.L.P.} (1997) 188 N.B.R. (2d) 130 (Q.B.) in which there is a very complex situation between the biological mother of a surrogate (who is an adopted child) and the husband of her biological mother.
familial context.\textsuperscript{284} It would be important to really ask what is vulnerability if the debate surrounding surrogacy focuses on women’s protection. It is also important to think about adoption and surrogacy, and to ask why socially we seem to want to draw a line between the two.

\textit{The Ova-link Questioned – Limits, Changes and Inconsistencies in the Legal Definition of ‘Mother’}

The common premise under the range of provincial and federal laws seems to be that the birth mother is the legal mother, unless the child is adopted. Even authors concerned with new family models assume that the birth mother will be the child’s parent.\textsuperscript{285} The conception of motherhood reiterates the problematic assumption that biological motherhood equals legal motherhood. The conception is exclusive, does not take into account the fictional character of legal parentage and is filled with gendered assumptions. Most of the time it is inadequately defined. Is it a policy decision? Is it because it is a private matter? Is it desirable? Is a unified meaning a realistic option? Or is it impossible for law to really conceptualize legal motherhood? No one can tell, but some sort of consistency and legal reform would be welcome. Even if one would like to stay with the classical criteria of giving birth, the statutes would not work. Indeed, the actual definitions and conceptualization of motherhood leave too much room for discretion and moral judgments in case law. Motherhood is a problematic site for women’s rights. The vesting of motherhood has always been uncertain, but it represents a powerful tool for the state to

\textsuperscript{284} Israel. For a Canadian perspective on altruistic surrogacy, one must read Rakhi Ruparelia, \textit{supra} note 49.

\textsuperscript{285} Fiona Kelly, “(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families” \textit{supra} note 149 at p. 212. In surrogacy cases, it is clear that it poses problems. Generally, now that it is possible to have two mothers on a birth certificate, the issue might seems of lesser importance. However, there is only one parent on the birth certificate or when disputes as to who is intended to be a parent happen before birth, or in a short period after birth, the problem is still of great importance. Further, this equation is also problematic in situation where parents are two men.
promote specific kind of sexual behaviors for women. As an example, the *Ontario Children of Unmarried Parents Act*\(^\text{286}\) and its study by Lori Chambers reflects how unwed mothers were given a lesson in sexual ethics, how they were materially deprived and stigmatized. Obviously, in most cases the birth mother will be the mother and this does not pose any legal problem. *Les familles heureuses ne connaîtront pas le droit.* However, when law is necessary to solve problems and address issues that have major importance for someone’s life and his or her development as a human being, law will be useless. The law does not have the conceptual and theoretical framework to locate motherhood. “Motherhood – once defined by gestation and birth – has with the advent of reproductive technologies become even more fragmented than fatherhood, into its genetic, gestational and rearing aspect.”\(^\text{287}\) Hence, motherhood is not exclusive anymore – one can have more than one mother – nor is it legally necessary – one may have only fathers.\(^\text{288}\) Moreover, it is even possible in Canada to have multiple parents.\(^\text{289}\) There is no need to stick with the rigid ‘legal mother’ category. This ‘mother’ category is unclear, elusive, and exclusive and validates problematic equations of biological facts with legal obligations. It leaves too much room for gendered assumptions and unduly regulates sexual citizens, especially women. The parent-child relationship should not represent a new institution – as the marriage once was - to keep sexual citizens in place and in line. Unfortunately, my sense is that the parent-child relationship is the new institution performing this task. It is unclear whether it is intentional, structural or not. This phenomenon – using legal parentage to keep sexual citizens in line – is observable in Courts. This is the direct result of the uncertainties and inconsistencies found in the

\(^{286}\) An Act Respecting the Protection of Children of Unmarried Parents, S.O. 1921, c. 54.


\(^{288}\) Through adoption, but not necessarily. Since filiation is fictional, in a close future, it is possible to speculate that two men will be allowed to be on a birth certificate. Technically, one could also argue that if the mother is not specify, the spouse of the man on the birth certificate should be the father according to classical paternity presumption. Further, one can also have only a legal father.

statutes, combined with the myths and constructs underlying motherhood and its meanings at law.

**Chapter 3 – Motherhood and the Judicial Discourse**

Judges also have a role in the legal construction of motherhood. Behind every legal interpretation, there are a range of unstated assumptions and moral judgments. When the legislation is as uncertain as it is when it comes to motherhood, judicial interpretation becomes crucial. The previous section exposed how the current conception of ‘mother’ at law is blurry, imprecise, sometimes obsolete and most of the time, uncertain. Many judges point out the need to think about the current definition of legal motherhood, and parenthood. New family models and the absence of an adequate conception or definition of legal motherhood shed light on the “asymmetric, gendered relationship between paternity and maternity in family law”. As with the legislative inquiry, the judicial inquiry will focus on the two recurring issues I want to emphasize – namely the absence of an adequate definition of legal motherhood and the problematic association between legal motherhood and biological motherhood - and their consequences. While the legislative investigation locates the two problems, the judicial perspective illustrates the consequences: gendered assumptions about parenthood, sexual judgments and exclusion.

Decisions often show how the vesting of legal parenthood is gendered. Motherhood is centered on care and biology, or an idea that the system holds of those two concepts. Indeed, as previous chapters discussed, a logical leap operates between gestation and care, because gestation

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291 Roxanne Mykitituk, *supra* note 21 at p. 772.
is understood as natural, and physically and emotionally demanding. Case law then becomes a useful site to analyze legal motherhood, and to ask what exactly is the bigger project behind this core legal category. Case law also has its importance in Québec because – to be frank, even almost a decade later – most jurists do not exactly understand how the new dispositions are supposed to be interpreted. As a result, case law is developing in every direction, and the Code has to be complemented with the use of many judicial principles. The aim of the exploration of Canadian case law is to demonstrate how women, because of their gender and their sexual choices, are subjected to the application by judges of sexual ethics in the vesting of legal motherhood. The fact that the legislation is unclear gives strength to this enterprise, as it leaves room for assumptions and judgments.

Historically, gendered assumptions about motherhood were rooted notably, but not exclusively, in economic reasons. In recent years, the importance of the paternal presence became the new reason to impose unwanted family models on women.292 At law, Susan Boyd explored the reasons and consequences of the discourse based on the ills of the absence of a father, and on the “terrible consequences of fatherlessness for children”.293 In another article, she puts these prefabricated assumptions in perspective, studying the underlying pressures of this discourse.294 Her conclusions, while acknowledging the importance of fathers, demonstrate how women are unjustly demonized.295 Pressures from the fathers’ rights movement and other fathers’ groups

have changed the law in a way that does not line up with social changes. The direct result thus becomes the encounter of even more difficulties for women, and negatives impacts on their family conditions.\textsuperscript{296}

In psychology, a recent study demonstrates without any doubt, that children in lesbian families “were rated significantly higher in social, school/academic, and total competence and significantly lower in social problems, rule-breaking, aggressive, and externalizing problem behavior”.\textsuperscript{297} The bottom line is that there is no real economic, legal or psychological evidence that paternal presence is necessary. “Parenting skills are a function of education and not of sex”;\textsuperscript{298} and value judgments about sex, gender or sexuality should not be determinative in the courts.

The cases selected are primarily from Canada. There are not divided according to their jurisdiction, but according to the images and ideas they suggest about motherhood, sex, gender, and sexuality. Since a part of my hypothesis is that sexual behaviors of women plays a role in the vesting of legal motherhood - in traditional and biologically complex situations – the case law is divided into categories that facilitate highlighting these ideas. A complete review of the case law on the question is, of course, impossible. Every decision represents a choice. The cases are carefully picked for what they can add to my hypothesis – which is that the absence of an

\begin{footnotesize}
\textsuperscript{296} An example of this would be Bill C422 on Equal Parenting. Many observers believe a presumption of equal parenting is not in the best interest of children and women (violence, mobility, reduction of support without reduction of parenting obligations, etc) See for example: Pamela Cross, “CEDAW, family law and women's equality”, February 2010 <on line> : \url{http://pamelacross.blogspot.com/2010/02/cedaw-family-law-and-womens-equality.html}, Barreau du Québec, Projet de loi C-422 – Loi modifiant le Loi sur le divorce (partage égal du rôle parental) et d'autres lois en conséquence, July 15\textsuperscript{th} 2009, Martha Shaffer, “Experiment in Child Custody Reform” in The Law Society of Upper Canada Special Lectures 2006 – Family Law (Toronto: Irwin Law, 2006) at 373.

\textsuperscript{297} Nanette Gartrell and Henny Bos, “US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-years-old Adolescents” 126:1 Pediatrics 1 (July 2010).

\textsuperscript{298} \textit{H. (V.V.) v. P. (W.L.)}, 28 R.F.L. (4\textsuperscript{th}) 344, 188 N.B.R. (2d) 130.
\end{footnotesize}
adequate definition of legal motherhood and the problematic association of legal motherhood with biological motherhood creates gendered assumptions about parenthood, sexual judgments and exclusion all of which have a significant impact on women’s lives. However, all the cases cited are, theoretically, still binding and good law, unless otherwise indicated.

In addition, I have decided to focus on the sexual dimension of legal motherhood. I am nonetheless aware of the many principles, elements and variables underlying legal parenthood. Legal parentage could be portrayed as mainly economical: legal parentage is about securing the child’s economic well being, giving him or her access to, at least, two financial resources. It would be naive not to mention how in recent years, a lot of family law politics focused on “the need to protect the state from financial responsibility”, 299 and how important is the “trend towards privatizing responsibility for the welfare of [family members]”. 300 If legal motherhood was only about economical reasons related to marriage, the gendered nature of legal parenting could obviously be historically justified. It would be harder, but still very possible to defend these ideas today. Indeed, in 2006 in Canada, while never-married women’s earnings were at 95.5% of men’s earnings, the earnings of married women were only at 70.1%. 301 The vesting of legal parentage could also rely on psychological imperatives. I am not a psychologist and do not pretend to be one, but there is an important literature about children’s need for two authoritative figures of opposite sex, or at least about its desirability. Legal parentage also has a biological dimension. The biological dimension is obvious; it is natural to have a father and a mother in reproductive terms, so law ought to match this natural reality. This overly simplified idea

299 Susan B. Boyd and Claire F.L. Young, supra note 294 at p. 43. Privatization of support obligations and the recul of the welfare state have been important themes in family law theory lately. Various eminent jurists have their say on the issue (Susan B. Boyd, Claire F.L. Young, Brenda Cossman, Robert Leckey, etc.).
300 Susan B. Boyd and Claire F.L. Young, supra note 294 at p. 46.
301 Statistics Canada. Table 202-0102. Female-to-male-earnings ratios, by selected characteristics, annual (percent) (table), CANSIM (database), July 25, 2008.
obscures the principle that law is a choice. The best interest of the child (BIC) also plays – theoretically – an important role in parentage. However, it is a complicated concept, and a comprehensive analysis is beyond the scope of this analysis. Finally, there is a social efficiency dimension. Legal parentage keeps citizens in place and in line. It allows an ordering of rights, obligations and duties at a time when the relationship status (read: marriage) can no longer do it. Thus, it could easily be argued that legal motherhood has little to do with sexual politics or the regulation – *encadrement* – of women’s sexual behaviors. One could vehemently defend that the only reason why maternity is vested in the current fashion is for one of the aforementioned criteria. Legal motherhood realistically depends on a combination of these criteria; legal motherhood is intersectional. I made the choice to clarify the intersecting role of sexuality and gender in the vesting of legal motherhood. I did so because parenting is complex and Canadian legislative schemes are unclear. The words used in the legislation are vague and subjected to multiple interpretations, and complicated situations are not addressed. The reader must nonetheless be aware that this reflects a choice that I made.

This chapter is divided in two parts. In each part, I group judgments with relatively similar fact situations. I evaluate if the ratio is coherent, relying on sexual behaviors, gendered assumptions about parenthood, and sometimes ideologies about motherhood. The first part is about being a second-parent in an artificial insemination context. In part two, I investigate the many *visages* of surrogacy in Québec. How does mother as a legal status attach in this context, in a province where there is a legislative ban on surrogacy agreements? To conclude, I will suggest that the lack of a good definition of legal mother is the principal source of the judicial inconsistencies. Further, I will propose that it is important to conceptualize legal parenthood
neutral and non-exclusively, without unnecessary references to sexuality, gender or conjugal relationships.

**BEING THE SECOND PARENT - LESBIAN MOTHERHOOD AND ARTIFICIAL INSEMINATION**

The assisted reproductive technologies have been a starting point in the re-exploration of parenthood, and they represent a catalyst in the restructuring of legal motherhood. Not only have they opened the door to complex biological and genetic possibilities, they also make it possible to highlight how legal motherhood can distance itself from the traditional Latin principle *mater est quam gestation demonstrat.*\(^{302}\) These technologies reveal how legal parenthood, traditionally fatherhood but also motherhood, are about cultural and social management. New reproductive technologies and new social settings allow jurists to revisit concepts that are overwhelmingly taken for granted.

Parentage and filiation represent choices society, law and judges make in the ordering of parent-child relationships. Biological factors play different roles whether one is a man or a woman, whether one fits the hetero-nuclear structure or not, and also whether one respects a pattern of sexually desirable behaviors or not. A first example of blatant sexual politics underlying legal motherhood is the judicial treatment of early cases of artificial insemination (A.I.).\(^{303}\) In the absence of definition or guidance, judges had to make decisions, using various elements they considered legitimate at the time. Stepping back, it is possible to demonstrate how

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\(^{302}\) Albert Mayrand, *Dictionnaire des maximes et locutions latine en droit*, 3\(^{rd}\) ed (Cowansville: Yvon Blais, 1994), p. 295. The French translation would be “la mère est celle que la gestation (et l’accouchement) désigne”, and in English “by gestation the mother is demonstrated”.

\(^{303}\) The first historical occurrence of artificial insemination happened in 1791 in England. At the time, moral, governmental and religious authorities were really concerned by the division of sexuality and reproduction.
a double standard was applied in the attribution of parentage. Being a good mother was and still is complicated, while being a father can be stupendously simple. Furthermore, being a second parent became nearly impossible, when one top of the criterion one has to meet to be a good mother, one does not satisfy the criteria of the heterosexual paradigm. The absence of a good definition of legal mother leads to questionable holding. The fictional character of legal parentage is highly malleable; an in-depth analysis of Low v. Low\textsuperscript{304} and Buist v. Greaves\textsuperscript{305} exposes how, these ideas are articulated in courts. The two decisions have been selected because they happened almost at the same time, in the same province and with factual situations that can easily be compared. They represent a snapshot, fixed in time, of how the fictional character of fatherhood is obvious compared to the fictional character of motherhood. They also show how the absence of a conception of legal motherhood creates problems in courts (gendered assumptions and judgments about sexuality). The reader should be aware that it is not a generalization or a portrait of the situation in current Canadian jurisprudence. Today Buist v. Greaves and L.B. v. Li Ba would probably be decided differently for various reasons. Indeed, it is now possible to register two women on a birth certificate in Canada,\textsuperscript{306} same sex marriage or civil union is legal, second parent adoption is available for same-sex couples, etc. The challenges to legal parenthood and the inadequacy of the conception of legal motherhood have first been raised by lesbian motherhood and a new diversity in family models, and it is the reason why those cases are analyzed here. Further, they expose the importance of sexuality in an analysis of legal motherhood. In the second part about surrogacy, new challenges to the legal conception of motherhood are brought in by new reproductive technologies.

**Low v. Low**

The decision in *Low v. Low* was rendered in Ontario Supreme Court in 1994. At the time, there was a decision directly contemplating the impact of a ‘known absence’ of genetic ties between a child and his or her second parent. There was however, a definition in the *CLRA* of legal fatherhood relying on more than mere biology. Mr. and Mrs. Low met in 1988 and got married on June 21, 1989. The husband told Mrs. Low that he could not conceive a child before they married. Both parties then decided to conceive a child via A.I., and Mr. Low was involved in the process. The child (Karen) was born on April 10, 1990 and Mr. Low left the family home ten days later. Given the complicated circumstances, Mr. Low never cohabited with Karen. He had access for short periods of time until December 1992. At the time of the trial, Karen was four years old. He was willing to pay child support, and his name was on the birth certificate. The question was whether he was the *father* of Karen, notwithstanding the obvious absence of biological or genetic ties in the father-child relationship.\(^{307}\) The judge found the solution in a textual interpretation on section 8 of the CLRA. The available provisions were sections 1, 4, 5 and 8 of the CLRA, as they then were, and the “standing in place of the parent” doctrine of the *Divorce Act*. Mr. Low, however, was seeking a paternity declaration. Thus, the relevant sections were 4, 5 and 8 of the *CLRA*. Section 4 precises any male person may apply to be recognized to be a father of a child. Section 8 lists the paternity presumptions. Indeed, three presumptions were playing in favor or M. *Low*:

\[
(...) \text{there is a presumption that a male person is, and he shall be recognized in law to be, the *father* of a child in any one of the following circumstances:}
\]

1. The person is married to the mother of the child at the time of the birth of the child.
2. . . . . .
3. The person marries the mother of the child after the birth of the child and acknowledges that he is the *natural father*.

\(^{307}\) I say obvious here because paternity presumptions always played as to be sure that the biology met the reality, even if it did not all the time.
5. The person has certified the child's birth, as the child's father, under the Vital Statistics Act or a similar Act in another jurisdiction in Canada.

Furthermore, when no one is recognized in law under section the presumptions of section 8, section 5(1) specifies any male person may apply for a paternity declaration, and be recognized as the legal father where the court find that there is a relationship of father and child. The fictional character of legal fatherhood is obvious, and it helped the judge in reaching his decision. While the texture of the articles are imprecise, the judge stated at paragraph 17:

> [t]he words "natural," "natural parent," "parent," "father," and "natural father," appearing in these sections, are not defined in the legislation. In s. 1(1), the word "natural" appears before the word "parents." In s. 8(1)3, the word "natural" appears before the word "father." The omission of the word "natural" as an adjective in describing "father" in other sections suggests the intention of a meaning broader than mere "biological" father, in those sections.

Thus, legal fatherhood is more than meets the narrow biological eye. Mr. Low had been declared Karen’s father, despite the fact that he had not seen her for two years, and that he never spent more than a few hours with her. The threshold to meet to be a legal parent, more precisely a legal father, in this case was rather low. Furthermore, the fact that there were legal provisions explaining whom a legal father was helped the judge in his reasoning. It seems to me that the result is correct. However, the reasoning of the judge did not contain a lot of details on the relationship between Karen and Mr. Low. There were no psychological evaluation (child distress), or best interest of the child arguments. The judge recognized that Mr. Low acted violently from time to time, but that his anger was normal and understandable. His misconducts were justifiable under such circumstances. In reaching his decision, the judge deployed a particular set of arguments, and the fictional character of fatherhood and paternity played in favor of Mr. Low. A few years later, a very similar situation happened in *Buist v. Greaves*, but between unmarried homosexual parties. Yet, the result was very different, because of the absence of a

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308 *CLRA*, s. 5(3).
309 *Low v. Low*, at para. 17.
good conception of legal motherhood and also because there is an important contrast between legal fatherhood and legal motherhood, even if they should theoretically represent the same relation toward a child. Other factors such as the assumption that legal motherhood is biological motherhood and homo-apprehension in the judicial system also influenced the ratio.

_Buist v. Greaves_

When _Buist v. Greaves_ happened, marriage was not a possible option for Ms. Buist and Ms. Greaves. The parties started dating in 1985, and they, according to the judge, started their relationship only in 1988. They broke up in 1995. They were functionally a couple, a family. During their relationship, they planned for Simon’s birth, together. For greater clarity, Ms. Greaves was the birth mother, and Simon was conceived through A.I.. Ms. Buist cohabited during two and a half years with Simon. She participated in the choices of doctors, schools, baby sitters, etc. She accepted to pay child support and had a significant relationship with Ms. Greaves’ other child (from a previous marriage). She fed and got up at night to care for Simon, but, as the judge reminds the reader in the eighth paragraph, she was not the primary care giver.

Ms. Buist asked to be declared ‘a’ mother of Simon. The principal question was whether Ms. Buist could be declared a “mother of Simon pursuant to section 4 of the _Children’s Law Reform Act_, which provides that:

Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child. (Emphasis added)

Ms. Buist made it clear that she wanted to be named mother in addition to, not in substitution of, Ms. Greaves. She says that the declaration would crystallize her relationship with Simon”.  

The judge’s _regard_ on the situation came about very differently, in spite of the _Low v. Low_ precedent decision in which the second parent non-genetically tied was vested with legal

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310 _Buist v. Greaves_, at paras 33-34.
parenthood. In the absence of a definition, or of presumptions of legal motherhood, the judge decided that the solution lay in a textual analysis. “The use of the definite article “the” indicates that the drafter of the legislation did not consider that more than one person be the mother of a child”. The analysis, while deceiving as it relies only on the presence of a three-letters word (the) and does not considered the possibility that legal motherhood could also be a fiction, is justifiable. Having said that, the judge added that even if it was possible, the requirement of 4(3) – a mother-child relationship - was not met. This affirmation is a good example of the gendered assumptions underlying parenthood; the standard to meet to be a mother was pretty high in Buist in comparison of the standard to be a father in Low. While no psychological evaluation or best interest of the child arguments were submitted in Low v. Low, many such submissions were made in Buist. The judge began her reasons by discussing how the BIC is central to the issue. It is important to state that while Simon’s best interest seemed central, nobody stated out and loud how Karen’s best interest was central in Low. In Low, Karen is virtually absent from the reasoning and no time is spent evaluating the parenting capacities of Mr. Low. The gendered assumptions about parenting, and the double standard in the vesting of legal parenting are not the only way sexuality played a role in Buist v. Greaves.

The judge mentioned that “the sexual orientation of the parties is not relevant to [the] decision”, but a close reading of the decision makes me wonder how much of this assertion is true. In Buist v. Greaves, there is a troublesome amount of remarks about the parties’ professions, sexual affairs and extra conjugal affairs, political allegiances, implication in feminist circles, etc. With respect, I do not believe that such facts should taken into account, and none of these were

311 Buist v. Greaves, at para 35.
mentioned in *Low*. Furthermore, “Ms. Buist lived with Simon’s mother in a relationship that was not committed”. This part is shocking, considering that Ms. Buist and Greaves had been together for 10 years, and that Ms. Buist cohabited with Ms. Greaves and Simon for over 2 years. From what I read in the judgment, Ms. Buist was qualified to be vested with parenthood, but it did not happen. Mr. Low was married 2 years and barely cohabited 10 days with Karen, but his parenting skills were not questioned, neither was Karen’s feelings when she was alone with him. If Ms. Buist had been a man, the result would very likely have been different; if she had been straight, the result would also have been different because the law would have had tools to vest her with legal parenthood (presumptions, etc.). *Buist v. Greaves* reiterated – directly and indirectly - the idea that lesbian motherhood is somehow less valuable than heterosexual motherhood. It is unfortunate, especially at a time when it was even more obvious that society was “inundated with cultural messages that tell lesbians are not capable of mothering, that male parents [are necessary] as role models for (...) children and that children will suffer by abuse, peer ridicule, or becoming gay themselves”. Sadly it also is one of the numerous judgments reminding lesbians how the judicial system can be a problematic space. *Buist v. Greaves* also exposes how the absence of an adequate definition of legal motherhood is problematic, and how legal motherhood can be overly exclusive. Mr. Low was declared second-parent in an A.I. context, Ms. Buist was not. It is however difficult to find a legitimate reason why it happened that way.

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313 *Buist v. Greaves*, at para 35.
Another example of how legal parentage relies on gendered assumptions and how lesbians are reminded that they “are the women who had your children taken from you by ex-husbands, ex-boyfriends, donors, family members, or the State. They assumed they knew better than you what was best for your children because you are a lesbian”

happened in Québec in 2006, went to the Court of Appeal in 2007. As with the two previous examples, it was a case where the determination of the second-parent was central. It is uncertain whether or not it was artificial insemination, however. The example shows how legal motherhood ‘undefined’ is exclusive and how legal motherhood can be used to foster a hierarchy of preferred sexual behaviors for women. Further, it highlights how gendered assumptions are important in legal parentage.

The facts in *L.B. v. Li. Ba.*

are quite complex and they happened before Québec’s major reform of filiation. Li. Ba and L.B. met in 1990 and separated in 1994. They cohabited for four years. Li. Ba. is the birth mother of the child born in 1993 and D.L. is describes has the *amicus donator*. D.L. was the ex-partner of Li. Ba., and they have always been on good terms. It was clear from the beginning, as he stated himself at trial that he would only act as a sperm donor. He did not want to have obligations towards the child. He was in a precarious financial situation, and could not contribute to the child’s education, due to the fact that he was living in British Columbia. L.B. and Li. Ba. planned the child’s birth together and the judge recognized there was a parental project. There were contradictory statements about the way the child was conceived. The first time Li. Ba. tried to get pregnant, L.B. and Li.Ba. paid for D.L.’s plane ticket. He came and spent a few days with the women, days during he provided them with sperm, absent of sexual

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315 Maura Ryan, *ibid.* at p. 31.
intercourse. Unfortunately, it did not work. Li. Ba. later went to Vancouver to try another time. She brought all the necessary artificial insemination material. Li.Ba. and D.L. stated at trial they decided to try via sexual intercourse. L.B. was not aware of this. Nine months later, a baby boy was born. L.B. acted as a second parent, but at the time he was born, she could not sign the birth certificate. She, however, tried to sign the religious documents, as a father would do, but the authority crossed out the term ‘father’ to write ‘godmother’ instead. L.B. had access to the child after the separation, until Li.Ba. decided to prevent her completely from having any access, using various means. D.L. met the child for the first time in 1997. He has seen him almost every year since. D.L. now considers the child his son. When the law of filiation was reformed, D.L. and Li.Ba. decided to use the new CCQ articles to register him as the father of the child and succeeded. L.B. challenged this declaration and asked to be declared a mother of the child born out of a parental project she had with Li.Ba.

Many questions were raised at first instance. The principal questions were: 1) whether article 538 CCQ(parental project) could retroactively be applied to the situation, thus recognizing that L.B. is a mother of the child born in 1993; 2) whether D.L. could use 538.2 CCQ to claim a paternity declaration; 3) if so, until when could he benefit from the regime of 538.2 CCQ given the fact that one theoretically has only a year following child birth to do it. The relevant legislation is as follows:

CHAPTER I.1
FILIATION OF CHILDREN BORN OF ASSISTED PROCREATION

538. A parental project involving assisted procreation exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project.

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. This filiation creates the same rights and obligations as filiation by blood.

538.2. The contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project. **However, if the 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. [Emphasis added.]

As explained in Chapter 2, the act of birth and possession of status are also relevant considerations in determining legal parentage at civil law. It should be reminded that when the baby was born in that case, it was impossible for two women to be registered on the birth certificate.

The judge recognized that there was a parental project between L.B. and Li.Ba. However, he concluded that article 538.2 applied even if “le sentiment de paternité du défendeur est peut-être né un peu tard, mais il a tout de même reconnu son enfant en 1997”\(^{317}\) As such, even if the delay was expired, the fact that there was a sexual intercourse became determinative. The reform was applied retroactively. As such, the D.L. had until October 2002 to claim legal fatherhood. The judge vested him with legal fatherhood even if he had no intention to be recognized as a parent when the child was born (or even 5 years later). Very little is actually known about the child, aside from the fact that he sees D.L. once a year since 1998. The decision went to appeal.

Some interesting new facts came out during the appeal. First, “when the Act instituting civil unions and establishing new rules of filiation was adopted, A[L.B.] told B[Li.Ba.] that she

intended to avail herself of the new provision. Before the Act came into force, B and C[D.L.] obtained a judgment stating that C was the father. A brought an action to have her parental rights recognized but the trial judge dismissed her action”. Second, while the first judge wrote that Li.Ba. and D.L. tried to conceived solely via sexual intercourse, it seems that Li.Ba. actually tried both sexual intercourse and artificial insemination. This being said, the interpretation of the facts must be left to the first judge. The appeal raised essentially two questions, both answered negatively:

1. Did the trial judge commit a palpable and overriding error in concluding that the provision of genetic material that led to the birth of the child occurred by way of sexual intercourse?

2. Did the trial judge misdirect himself in law in finding that C acted lawfully before the coming into must, in the circumstances, accept the drawbacks of the reform whose benefits she claims? 318

As for the first question, the threshold to reverse the factual appreciation of the trial judge was not met. As for the second question, three arguments were raised. First, the trial judge created significant confusion in the present case by recognizing the parental project that she formed with B, thereby giving rise to responsibilities and obligations on her part pursuant to article 540 C.C.Q, but failing to recognize her rights with respect to the child for whom she is supposed to be responsible. In substance, this article provides that a person who has formed a parental project and who fails to declare his or her bond of filiation with the child born of that project is liable toward the child and the child's mother. 319

Second, L.B. argued that “through the retroactive application of article 538.1 CCQ, she has had uninterrupted possession of status sufficient to establish a bond of filiation in respect of the child”. 320 Third, “in the event that the argument regarding sexual intercourse is upheld, the appellant addresses the one-year time period set out in article 538.2, para. 2, C.C.Q”. 321 It is clear

320 Ibid. at para. 62.
321 Ibid. at para. 64.
from the article that such an action must arise within one year of the child’s birth. The delay is short because one of filiation’s pillars is family stability.

The Court of appeal dismissed the appeal, but explained that the reasoning of the first judge was wrong, especially with regards to retroactivity. According to the Court appeal the section on retroactivity:

which aims to facilitate the application of the new rules to the situation of children contemplated in such prior juridical acts, is not an invitation to use the new rules to contest bonds of filiation that were validly established before the coming into force of the 2002 reform. To conclude otherwise would be to find that when the filiation of a child is established either by act of birth or by possession of status, but not by both consistent with each other, such a filiation could be challenged at any time by the application of the new provisions and, more concretely, by the allegation of a parental project, even one that existed relatively long ago. If the legislature had truly intended such an extraordinary consequence, one that appears to be contrary to the interests and rights of children and the principle of stability of filiation, it would have said so in a clear and unequivocal legislative enactment.  

Further, in explaining the impact of retroactivity, the Court stated that

while it is true that the judgment of the Superior Court formally establishing the filiation of C was rendered after the coming into force of the new Act, the fact remains that it was simply following up on a consent to judgment that was legally signed by C and B under the former law. This judgment, which perhaps could have been rendered before the coming into force of the Act, established the filiation claimed retroactively to the birth of the child.

Furthermore, the motive behind the claim of paternity to which C legally consented before the coming into force of the Act may not be accepted as grounds of the irregularity of the judgment to which it led, precisely because of C’s consent.

With respect, the decision, focusing on technicalities such as retroactivity, did not address the real question, the question of legal parentage. Who intended to be the parents and was L.B. a mother of the child? The BIC is not mentioned anywhere. The fact that everybody agreed for many years that D.L. would merely act as a sperm donor is considered trivia. The fact that it was technically impossible for L.B. to be on the birth certificate did not seem to have any weight in

322 Ibid. at para. 74.
323 Ibid. at para. 80-81.
the decision, neither did the fact that D.L. never had any kind of adequate possession of status. The fact that sexual intercourse occurred came in and made the law blurry. Moreover, especially in first instance, the retroactivity was available to D.L., but not to L.B. The absence of definition of mother at law, the gendered assumptions and the double standard in the vesting of parenthood legitimated the exclusion of the lesbian partner, who nonetheless was the second parent. It also demonstrates how, in the absence of a definition, legal motherhood can be exclusive, and used to propose a hierarchy of adequate sexual behaviors. It seems that the court decided that promoting implicitly heterosexual reproduction was the best option, notwithstanding the virtual absence of the ‘father’, and the importance of L.B.’s involvement in the child’s life until the birth mother decided to entirely block L.B.’s access to the child. Finally, this decision exposes how there is a clash between the new and old conceptions of filiation in the Code. A very progressive conception of parentage cohabits with a traditional understanding of sexuality, in which the importance of the male sexual act of impregnation - or possession - can be determinative. On a theoretical level, it reinforces a latent homo-apprehension in family law. The absence of a good conception of legal motherhood and the ubiquitous gendered assumptions underlying legal parenting can also be demonstrated when it comes to questions about surrogacy in Québec.

**The Many Visages of Surrogacy**

This part investigates the many *visages* of surrogacy in Québec. How does mother as a legal status attach to a legal subject in this context, in a province where there is a legislative ban on surrogacy agreements? Do the sex, gender and conjugal statuses of people have an impact on the decisions reached by the courts? Surrogacy emphasizes how courts struggle much more with the fictional character of legal motherhood than they do with the fictional character of legal
fatherhood. The absence of definition of legal motherhood and its elusive nature is at the core of the struggle. Further, the situation reflects the problematic association between legal motherhood and biological motherhood, an association that is expressed differently depending on the sexuality of the woman/women in question. Finally, it illustrates what kind of sexual behavior legal motherhood presumes: sexual behaviors taking place in ‘heterosexual-nuclear-monogamous-preferably married until death do us part’ settings.

There are two types of surrogacy, gestational surrogacy and traditional surrogacy. In gestational surrogacy, the carrier will not have any genetic tie with the baby. The egg will either come from the intended mother or from an egg donor. On the other hand, in traditional surrogacy, the carrier will also provide the egg. On top of that, surrogacy can be intra-familial or more or less commercial. It can be ‘gratuitous’ or pecuniary. It can also be done outside of the jurisdiction of the intended parents, and thus have an international dimension. Some jurisdictions have decided to ban intra-familial surrogacy, others to ban commercial surrogacy. Others have chosen to leave it unregulated and to state that it is against public order. Finally, in some instances, surrogacy is regulated and considered an integral part of a ‘medical tourism’ plan supported by a country.

In Québec, the issue of surrogacy has been particularly uncertain in recent years. The Legislator’s position on the question is one of willful blindness. Surrogacy being against public

324 In Israeli or India.
325 Alberta, Canada.
326 Québec.
327 India.
order, any agreement on the matter is absolutely null.\textsuperscript{328} Indeed, “le contrat de gestation pour le compte d’autrui est illégal au Québec, qu’il soit onéreux ou à titre gratuit”.\textsuperscript{329} Moreover, “a contract is formed by the sole exchange of consents between persons having capacity to contract”,\textsuperscript{330} so oral agreement and written agreement are equally binding. What is central to the existence of a contract is the meeting of the minds. But, “just because the contracts are declared to be absolutely null, does not mean that surrogate mothers do not exist and that their children do not require their filiation to be established”.\textsuperscript{331} Thus, a few decisions have been rendered.

Generally, the issue is dealt with using second parent adoption, but there is a reluctance to do so in some indefinite instances. I will examine three decisions and their contradictory ratios: \textit{Adoption 07219,}\textsuperscript{332} \textit{Adoption 091,}\textsuperscript{333} and \textit{Adoption 09185}.\textsuperscript{334} The first two decisions are of particular interest since the same judge rendered them. Gendered assumptions, problematic associations between law and biology, and judgments on sexuality represent the consequences of the absence of a conception of legal motherhood. Surrogacy is an excellent site for observing the issues.

\textit{Adoption 07219}

\textit{Adoption 07219} happened in 2007. The decision is expeditious and confirms everything the parties asked for. A and B have been together for 6 years. They wanted a child, but B could

\textsuperscript{328}541 CCQ states “Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null.”\textsuperscript{329} \textit{Adoption 091,} 2009 QCCQ 628, at para. 52.
\textsuperscript{330}CCQ, art. 1385.
\textsuperscript{331} \textit{Adoption 091,} 2009 QCCQ 628, at para. 41 (counsel refers to an article by Professor Benoît Moore, "Quelle famille pour le 21e siècle: perspectives québécoises", (2003) Can. J. F. L. 5 at 6; see also Marie-Christine Kirouack, supra note 236; we must therefore bow before the fact that this baby exists and that the problems discussed are obviously not its fault).
\textsuperscript{332} \textit{Adoption 07219,} 2007 QCCQ 21504 [\textit{Adoption 07219}].
\textsuperscript{333} \textit{Adoption 091,} 2009 QCCQ 628 [\textit{Adoption 091}].
\textsuperscript{334} \textit{Adoption 09185,} 2009 QCCQ 8703 [\textit{Adoption 09185}].
not bear children. They asked C, the spouse of B’s brother, if she could bear a child for them. It was a traditional surrogacy situation, meaning the baby was conceived with C’s genetic material. A is the biological father and C is described as the biological mother. Two days after the child was born, they signed the forms relating to second-parent adoption. The question was whether this second-parent adoption was possible and legal. The judge decided it was legal, that the adoption could proceed, and that B was the legal mother of the baby, which I believe is the appropriate ratio. His analysis and reasons are brief, but very interesting. He wrote:

[5] Vu que lors de l'audition du 29 mai 2007, la requérante a livré un témoignage transparent, crédible et émouvant, décrivant d'une manière simple, avec les mots du cœur, l'histoire de cette offre de pure gratuité, de grande générosité de la part de la conjointe de son frère (conjointe depuis plus de 10 ans) à l'effet de procéder par don de sperme de la part du père de l'enfant et de porter l'enfant à terme, en l'associant étroitement à toutes les étapes de la grossesse et de l'accouchement;
[6] Vu l'accord du conjoint de la mère porteuse;
[7] Vu que personne n'a invoqué la nullité de la convention de gestation pour le compte d'autrui (article 541 CCQ) et qu'au contraire, l'entente verbale a été honorée par toutes les parties;
[8] Vu qu'il ne s'agit pas d'une situation de dérive de l'institution de l'adoption justifiant l'intervention du tribunal dans le but de protéger l'enfant[1];
[9] Vu que le tribunal est invité à un acte de foi en souhaitant que l'enfant se considère également comme un beau cadeau lorsqu'il apprendra cet arrangement entre les adultes;

Some of the determinative facts in the issue are the altruism and generosity of this act of pure gratuity performed by C., the fact that her husband agreed, that no one raised 541 CCQ and that the child was a gift, the greatest gift of all. Moreover, C was a member of A and B’s extended family. Before commenting on the importance sexuality and gendered assumptions had in the decision, I will compare Adoption 07219 to Adoption 091. Adoption 091 was written a few years later by the same judge and the issues were somewhat similar. However, the ratio was different.
Adoption 091

Adoption 091 was rendered in 2009. The case was also about a second parent adoption, in a surrogacy context. However, the surrogate was a stranger to the father and intended mother. The intended parents found her on Internet and decided “de faire affaire avec elle”.\textsuperscript{335} The surrogate had already been a surrogate mother. They made an oral agreement and the surrogate received 20 000$ for "inconvenience and expenses". Throughout the pregnancy the intended mother was involved, and in constant communication with the surrogate mother. The intended parents were in the hospital room when the surrogate gave birth. Two days after she gave birth, the surrogate signed a consent form for the adoption. The name of the surrogate was purposely not on the birth certificate. The child had lived with her father and the applicant from the time she was born. A week after she was born, the legal father consented to the adoption of his daughter by his spouse. Here too, as in Adoption 07219, the parties agreed that the applicant should be the legal mother of the child, and no one raised 541 CCQ. The question was whether the adoption could proceed, even if the consent of the father was ‘vitiated’ under such circumstances. It is unclear why the consent would be vitiated by a technically inexistent legal agreement, but it could be argue that it was against public order and not done in good faith. The judge asked, “must one, in the name of a so-called ‘right to a child’, endorse the abuse of the institution of adoption”?\textsuperscript{336} The judge found the father’s consent was vitiates because he knew there was a surrogacy agreement and because the biological mother did not sign the birth certificate.\textsuperscript{337} According to him, “for the Court to give effect to the father's authorization for the adoption of his child would be, under the circumstances, to show wilful blindness and confirm that the end

\textsuperscript{335} Adoption 091, at para. 10.
\textsuperscript{336} Adoption 091, at para. 61.
\textsuperscript{337} I am personally uncomfortable with the fact that it was so important to the ratio, since the birth certificate did not have such an importance in the other decisions, and because it is possible to have an unknown father on a birth certificate.
justifies the means,” especially because there is a ban on surrogacy agreement in Québec. This approach to the issue represents a significant departure from his previous decision in *Adoption 07219*. The judge decided it was impossible to have a second parent adoption. The direct result is that the child has only a paternal filiation. On what basis did the judge make his decision?

The key elements of his reasoning revolve around ideas of public order, and of the idea that it should be prohibited to pay consideration to a female person to be a surrogate mother. The analysis of the judge acknowledges beforehand that the difficulties are the result of the conception, or misconception, of legal motherhood. Indeed, he writes,

44 (...) there is no presumption of maternity in Québec, in that that a woman who gives birth is not deemed to be legally the mother of the child.
45 In the days of the Roman jurist Gaïus, maternity was always certain and paternity doubtful. Even at that time, the legislator had to intervene to ensure that paternity was presumed within the bonds of marriage.
46 For centuries, childbirth was such a natural, easily observable fact, that maternity was taken for granted. This is no longer the case, as several authors have taken pains to point out.

This excerpt reflects how there is actually no conception at all of what a legal mother is in Québec. The judge then later states that maternity - at law - is a fact, while paternity is a matter of opinion. There is real confusion here between legal and biological facts.

While the best interest of the child is sometimes considered in such cases, there is very little mention of it in this decision. When it is mentioned, it is in a rather moralizing tone:

66  Thus, all the steps conceived and carried out illegally would finally lead to a legal result, thanks to the convenient use of the all-purpose criterion of the best interests of the child. This criterion would clean whiter than white, erasing everything that has been done before.
67  The best interests of the child would make it possible for the initiators of the parental project to achieve their goal by granting the applicant, through the

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338 *Adoption 091*, at para. 78.
339 *Adoption 091*, at paras 44-46.
convenient instrument of adoption, the confirmation that in the eyes of the law and society, she is the mother of the child.\footnote{Adoption 091, at paras 66-67.}

Moreover, the judge writes that the decision will not have any impact on the daily life of the child: “whatever the decision of the Court, it can have no impact on the inescapable fact that the child has lived continuously with her father (the only recognized filiation) and his spouse”. The discourse and words of the decision are moralizing. Words such as \textit{deviant}, \textit{reprehensible} and \textit{convoluted} are used in the judgment. The judge affirms on a rather moralistic tone that “à moins de choisir de porter des oeillères, il n’est toutefois pas possible de dis socier la question de la validité de ce consentement des étapes précédentes \textit{concoctées} (...),\footnote{Adoption 091, at para 57.} or that “la main gauche n’a pas toujours intérêt à ignorer ce que fait la main droite”.\footnote{Adoption 091, at para 58.} He talks of “détournement de l’institution d’adoption”\footnote{Adoption 091, at para 61.} and of “mépris des lois”.\footnote{Adoption 091, at para 63.} Such a language highlights how the judge thought the situation was \textit{morally} reprehensible and it makes me feel like he wanted to find a solution to prevent these people to reach their ends.

My point here is not only to expose the value judgments, but also to emphasize how the sexual component played a role in the decision. The judge acknowledged that the absence of a definition of legal motherhood was a bone of contention in the case. As I previously wrote, the direct consequence of this absence of definition is that it leaves too much room for gendered assumptions and value judgments about sexuality. I believe the comparison between \textit{Adoption 091} and \textit{Adoption 07219} reveals that for three reasons. First, the result is different depending on the relationship status of the surrogate. While it is a single woman in \textit{Adoption 091}, it is a married...
woman in *Adoption 07219*. Moreover, the husband of the surrogate consents, and this rebutted the legal presumption of paternity. Second, altruism, gratuity and family justified using adoption – even if the father’s consent was vitiated. This approach provides a vehicle for problematic gendered assumptions about women, mothers and reproduction. Women who mother because it is fulfilling or because a child represents the greatest gift of all are encouraged – in the wording of the studied decision - to do so, even if it is technically as null and void than for the women who chose to do it for money. Moreover, the decision exhibits a problematic conception of vulnerability, valorizing actions taken in the private sphere (family). However, it is impossible to ignore how the so-called private sphere at law has often played a detrimental role in women’s rights issues. Finally, the fact that a paternity presumption would have automatically played in favor of a male spouse and that it is possible to have a deliberately unknown father, but not an unknown mother, indicates, once more, how sexuality plays an important role in the vesting of legal parenthood and how legal parenthood is deeply gendered. Filiation was, in *Adoption 091*, a punishment rather than a legal fiction. After *Adoption 091*, it was unclear whether surrogacy agreements were legal or not in Québec, and what were their consequences.

*Adoption 09185*

*Adoption 09185* came in the aftermath of *Adoption 091*. In *Adoption 09185*, A and B wanted a baby, but A could not bear children. D was the godfather A, and C was the spouse of D. A, B, C and D decided that C would bear the eggs of A, fertilized by the sperm of B. They also all agreed that C would bear twins. The question was whether an intrafamilial adoption could proceed - even if there was obviously a surrogacy agreement - and if it was in line with the decision *Adoption 091*. The judge decided that the adoption could proceed; the situation, in his view was ‘different’ from *Adoption 091*, so the previous ratio was not binding. A and B are the
legal parents of the twins, even if there was a surrogacy agreement. The result is in direct opposition to Adoption 091, especially with regards to the vitiated consent of the father and the non-relevance of the gratuity of the contract. For my purposes, it is more the analysis and justifications that are fascinating, and it illustrates how ‘mother’ is a problematic legal category. The findings are simple; the intended parents are the parents. The man is the legal father because he is the biological father and the presumption of paternity playing in favor of the surrogate’s spouse has been rebutted, and the woman through second parent adoption of her genetic but not gestational child. The core of the analysis relies on the classic – but problematic – assumption that biological parenthood is legal parenthood. Five elements of the judge’s analysis are worth mentioning here. Those five elements points out how the notion of motherhood at law is vague, and leaves room for gendered assumptions, exclusion, and judgments about sexuality.

The first element of the judge’s analysis is the discourse of altruism, gratuity, good faith, “fruit d’une extrême générosité”, and of being “investie de la mission de donner la vie et de faire un cadeau vraiment hors du commun à des personnes de sa famille”. Such a discourse reinforces problematic ideas about womanhood, motherhood and legal motherhood. It does not help question the notion that motherhood is the ultimate personal fulfillment for a woman. It is regrettable that the legal principles are tainted by such misconceptions. Further, it is impossible not to mention how, once again here, the consent of the surrogate’s husband is important and how it awkwardly plays into the conception of legal motherhood. On the one side, in Adoption 091, you have a woman who willingly decided that she would bear a child for someone else. She was under no pressure or influence, and she decided herself to go through the process. No complex medical operation was needed, no superior risk of bearing twins either. She was portrayed almost

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345 Adoption 09185, at para. 14.
as malicious, and the intended mother ended up being penalized (no filial status). On the other side, you have a decision in which the surrogate is portrayed as acting in a celestial manner and all the legal principles fall into place, even if she does not make the decision ‘alone’ and if she puts herself in a riskier situation. It is important to question whether it is actually divine, or if it is not a new private sphere and a new way to trap women in childbearing functions.

The second element is the speculation about ‘who is more a mother than the other’ in the decision and in the commentaries following the decision, even if no definition or conception of legal mother is provided anywhere. Incidentally, it affects the importance of biology in legal parenting. In Adoption 09185, it is written

> en effet, si on accepte facilement que celui dont le sperme a fécondé l’ovule soit inscrit comme "père", un "père biologique" en quelque sorte, pourquoi ne serait-il pas acceptable que celle dont l’ovule a été fécondé soit inscrite comme mère ou "mère biologique" ? La "mère génétique" est certes plus "mère biologique" que la "mère porteuse".

This statement represents a traditional half-truth about parenting. It helped the judge to reach his decision, but should not be seen as good law. Indeed, it could be easily argued that the sperm-link does not automatically impose legal obligations and duties. Legal fatherhood can be a complete fiction depending on many more factors than mere biology. Moreover, saying that a genetic mother is more of a mother than a biological mother when there is no conception of legal mother available is tricky. As one commentator writes,

> dans les faits, la vraie mère de ce dernier, c'est la requérante-adoptante, ce qui n’était pas le cas dans la décision du juge Dubois. En effet, dans cette affaire, la conjointe du père recherchant l'adoption n'avait pas donné son ovule.

Such reasoning is stupendously simple, and does not provide any useful solutions or answers. What if the surrogate was a stranger bearing the real mother’s ova? Or if a family member was

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paid to do it? Would she be the real mother? Such an idea of who a real mother is at law only relies on genetic ties and is definitely exclusive. Moreover, the scope of such a solution is limited now that it is completely possible two have two mothers with biological or genetic ties. It is exclusive because it does not recognize the fictional character of legal motherhood, thus excluding co-mothers, stepmothers, and even adoptive mothers. The absence of a definition and the gendered assumptions about parenting open the door to very creative legal interpretations of article 541 CCQ, an article which bans any type of surrogacy agreement.

The third element revealing how the analysis relies on a set of problematic assumptions is the judicial interpretation of article 541. Article 541 CCQ, theoretically, should not apply because

Dans le présent cas, on pourrait prétendre qu'on n'a pas recours aux forces génétiques de la mère porteuse, la requérante-adoptante ayant fourni l'ovule et le mis-en-cause ayant fourni le sperme et qu'ainsi l'article 541 ne vise pas le cas sous étude ou à tout le moins, rend son application incertaine. L'article 541 devrait être considéré en regard de l'article 538 et de tout le CHAPITRE PREMIER. I, en fonction de la règle de l'interdépendance des dispositions législatives [1]. La lecture attentive des débats de l'Assemblée nationale du Québec [2] sur la question nous permet de constater le flou scientifique et juridique qui existait chez les parlementaires, par exemple lorsque madame Louise Harel déclare: "Alors, une mère porteuse, c'est un apport de forces génétiques" [3]. Ce n'est pas le cas dans la présente affaire.  

While the ‘location d’utérus’ was a preoccupation in Adoption 091, it is not a concern in Adoption 09814. Once again, such an argument would probably not have been raised if the surrogate were a stranger, or if it were a pecuniary contract. The article is nevertheless clear; it does not matter whether it is gratuitous or pecuniary, surrogacy agreements are absolutely null. Furthermore, in some instances, the presence of a surrogacy agreement vitiates the father’s consent, making an adoption impossible in these cases, but not in others. The absence of definition of mother at law

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348 Adoption 09814, at para. 19.
leaves too much room for distorted legal analysis. Which leads to elements four and five: the importance of biology and the best interest of the child.

In the absence of a definition of legal motherhood, the court’s instinct is to rely on biology. However, biology in this situation does not mean anything, as the court acknowledged. Thus, a lot of importance was given to genetic material. Legal motherhood is different from biological motherhood or genetic motherhood; legal motherhood is a fiction. Legal motherhood’s fiction has to be revisited and the importance of genetic materials should not be taken for granted. Favoring genetic ties could make legal motherhood even more exclusive, and it could increase the gendered assumptions in legal parentage. It is especially problematic since the legal system easily assumes the fictional character of fatherhood, but not of motherhood. Finally, the fifth element demonstrating how legal motherhood is a problematic site is the analysis of the BIC, and the relative importance of the maternal filiation. In Adoption 09184, BIC is important to the ratio. The children’s needs are fulfilled, they are in good health, in a loving environment,\(^{349}\) and it is "tout à fait souhaitable de permettre à cet enfant, qui représente l'avenir de notre société, de bénéficier de tous les avantages de sa véritable filiation maternelle".\(^{350}\) After this statement, the judge affirms that Adoption 09184 “diffèrent grandement”\(^{351}\) from Adoption 091, without any further precisions. In Adoption 091, “the best interests of the child, however important a notion it may be, is not a catch-all argument justifying everything and its opposite”.\(^{352}\) Furthermore, the “child is not entitled to a maternal filiation at any cost”.\(^{353}\) The two interpretations are contradictory, and demonstrate that it would be important to have principles and guidelines to solve complex issues.

\(^{349}\) Adoption 09184, para 15.  
\(^{350}\) Adoption 09184, para 24.  
\(^{351}\) Adoption 09184, para 25.  
\(^{352}\) Adoption 091 para 70.  
\(^{353}\) Adoption 091 para 77.
about legal motherhood, or maternal filiation. This could help limit gendered assumptions and inconsistent ratios.

**Mothers? Parents? Family? Law?**

The vesting of motherhood is inconsistent; it depends on judges’ opinions and interpretations of the elusive and imprecise concept of legal motherhood. While the appropriate questions should concern who the parents are, who the acting parents are and who the intended parents are, the law assumes most of the time that - for women at least - the biological reality should match the legal reality. It thus fosters the problematic association between legal and biological motherhood and prevents an in-depth reconceptualization – or even a merely adequate conceptualization – of what legal parentage should be for women. Motherhood is a legal category relying on conceptions, ideologies, myths, and prejudices. The legal discourse creates an ideal of motherhood. As it has been demonstrated, the legislation in Canada is unclear. Legal motherhood is elusive, and exclusive. In the absence of a definition or of principles to guide their decisions, judges’ interpretations become crucial. However, they are left with too much room for gendered assumptions about legal parenting, and also for value judgments about sexuality. Legal motherhood in Canada at the moment sometimes represents more of a moral judgment or a personal opinion than a legal category. It is a site where “the naturalness of heterosexuality, marriage and the nuclear family is socially constructed and perpetuated”. In a time where there is a multiplication of family models and where biological, legal and social reproduction represent different realities, some reflections about the “legal mother category” are necessary. It is impossible for the legal system to function for much longer without an adequate conception of

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legal motherhood. It is not desirable for women to keep an elusive, exclusive and often taken for
granted concept to describe their relation to their children. Giving birth is not always an indicator
of legal maternity. Moreover, since legal parentage now entails equal roles for men and women –
at least theoretically – it would be interesting to speak of legal parents rather than legal father and
legal mother, as it would help the legal system distance itself from ubiquitous gendered
assumptions. The definition of family has changed over time, the definition of marriage has
changed over time, the definition of spouse has changed over time. There is a movement towards
gender and sexual neutrality in Canadian family law. But “can parenting ever be a truly gender-
neutral activity, or is the ideal gender-neutral parent likely to be subverted by socio-economic
realities, by the gendered discourses of motherhood (...), and by the psychological constellations
of masculinities and feminities”?

Further, “we make a mistake if we try to think about parents in isolation from broader
historical and social changes, particularly those concerning the family”. The definition of
family started from “a social group characterized by common residence, economic cooperation,
and reproduction. It includes adults of both sexes, at least two of whom maintain a socially
approved sexual relationship, and one or more children, own or adopted, of the sexually
cohabiting adults”357. Today, a family does not have to include people of both sexes, and it is
possible to be more than two adults and be a family. In addition, it is not necessary anymore to
have children. Reproduction, economic cooperation and residence also have different meanings
now. The family is changing, and the structure of legal parentage is changing also. It is important

355 Andrew Bainham, Shelley Day Sclater & Matin Richards eds., supra note 65 at p.2.
356 Ibid. at p. 1.
357 George Peter Murdock, Social structure (New York: Macmillan, 1949) at p. 1 definition cited during Pr Carol
Rogerson’s family law course.
to think carefully about the institution of legal motherhood. It cannot be taken for granted anymore as the absence of a definition and its elusive character have consequences for women’s lives.

**Conclusion**

Law reflects and constitutes values and notions of adequate gender roles and sexual behaviors through legal motherhood. The traditional conception of legal motherhood is facing important challenges and it is clear that there is a lack of an adequate conception or definition of legal motherhood in Canada. Indeed, the concept of legal motherhood is elusive or reiterates the problematic association between biological motherhood and legal motherhood. The elusive nature of legal motherhood leaves room for gendered assumptions about parenting and a hierarchy of sexualities. It also creates a space where judges can make value judgments about the way women use their bodies, sexuality and reproductive functions: the vesting of legal motherhood is often subjected to an evaluation of a woman’s sexuality, sexual choices, or sexual preferences. Moreover, legal motherhood presumes many problematic elements at a time were reproduction and sex are unfolding. First, it presumes sexual behaviors taking place in ‘heterosexual, nuclear, monogamous, preferably married until death do us part’ settings. However, sexuality is much more complex and diverse than heterosexual sex. Second, it assumes that biological reproduction and social reproduction are the same thing, thus giving too much influence to biology. It is important to keep in mind how biology plays different roles depending on the time period in which one stands. However, sexuality – understood as an array of productive and non-productive desires and sexual conducts, affected by a person’s sex, at a specific time and place in history – is always used as a vector of power in legal motherhood. The
two main ideas I wanted to highlight – namely the elusive or absent definition of legal motherhood and the problematic association between biological and legal motherhood – and their two correlative consequences – the room it creates for value judgments and a hierarchy of sexualities, and the ubiquity of gendered assumptions in legal parenting, both creating exclusion – have been divided in three parts.

In part one, I revisited concepts that are too often taken for granted and their impacts on the construction the mother’s identity, in an attempt at drawing a global picture of motherhood. I argued reproduction is more than biological reproduction; it is also social reproduction. Motherhood, especially legal motherhood is an institution aiming at controlling women. Parenthood is “everywhere a part of social and cultural management of human reproduction and is intimately interlinked with gender”.\(^{358}\) I also studied the meaning of sexuality and its influence as a nexus of power. I proposed that sexuality and reproduction could completely be split, but that both concepts play a role in the vesting of legal motherhood. As a matter of fact, someone’s sexuality can be used as a factor in asserting the legal disposition of this said person to reproduce, and be a legal mother, or a mother *tout court*. The evaluation of sexuality at law is more burdensome on women. Bearing that in mind, I proposed that myths – expressions of natural phenomena (biological motherhood) – become constructs when they produce social consequences (women’s otherness and subordination, or the regulation of sexuality). In legal motherhood’s context, it means that the biological fact that women give birth does not validate their caring nature, otherness and subordination at a social level. Moreover, it means that the fact that it takes a man’s genetic material and a woman’s genetic material to reproduce does not justify the legal and social conception of the dual opposite-sex family model and the

\(^{358}\) Roxanne Mykitituk, *supra* note 21 at p. 774.
consequences it produces. All in all, the goal was to suggest that the mother identity “serve[s] to coerce women, both penalizing them for corresponding to or failing to correspond to the image invoked by law and by beguiling or ‘con[ing]’ them into believing that certain identities are natural and inevitable”.\textsuperscript{359} I then went through different ideologies about motherhood (dominance feminism, cultural feminism, third wave feminism, etc.) and their conception of legal motherhood and sexuality’s importance in motherhood. The first part closed stating that a legal category is a choice and that no logical inference need necessarily be drawn between biological parenthood and legal parenthood.

Part two then reviewed the meaning of the legal category ‘mother’, its definition and conception in Canadian legislation (Ontario, Alberta, British Colombia, Québec, and under the \textit{Assisted Human Reproduction Act}). It also aimed at reaffirming that legal motherhood is a fiction. It exposed that there is no consensus on the definition of ‘mother’ in Canada. The definition is either absent from the statutes or elusive. It varies from one province to another, and also from one statute to another. Furthermore, the vocabulary used to describe legal motherhood is inconsistent, imprecise and unclear. The common premise under the range of provincial and federal laws is that the birth mother is the legal mother, unless the child is adopted. Even authors concerned with new family models assume that the birth mother will be the child’s parent.\textsuperscript{360} The conception of motherhood reiterates the problematic assumption that biological motherhood equals legal motherhood. The conception is elusive, exclusive and filled with gendered

\textsuperscript{359} Joanne Conaghan, \textit{supra} note 79 at p. 361. This article is in Brenda Cossman, \textit{Feminist Legal Theory}, Course materials for course no. 93920-11, Harvard Law School, Fall 2003.

\textsuperscript{360} Fiona Kelly, “(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families” \textit{supra} note 149 at p. 212.
assumptions. The absence of a good definition creates problems in case law and it was what part three’s main concern.

In part three, I studied the impacts of the lack of a good conception of legal motherhood in the case law, with a particular attention given to the sexual dimension of the decisions. Chapter three exposed how there is a double standard in the vesting of legal parenthood – the threshold to meet to be a legal mother is higher for women, especially non-birth mother – and how the legal system struggles to recognize the fictional character of legal motherhood. I chose two groups of decisions to demonstrate the two recurring issues I wanted to emphasize – namely the absence of an adequate definition of legal motherhood and the problematic association between legal motherhood and biological motherhood - and their consequences. The judicial perspective particularly illustrated the consequences: gendered assumptions about parenthood, sexual judgments and exclusion. The two groups of examples chosen were decisions about being the second parent in artificial insemination contexts and on the issues surrounding surrogacy in Québec. Once again, the absence of a good conception of legal motherhood proved to be problematic and to have impacts on women as sexual citizens.

It is important to be aware that sexuality is used as a vector of power in legal motherhood. My hope is that the thesis emphasized how sexuality and gendered assumptions underlie legal motherhood. This reality has remained largely unquestioned. It is important to ask a few questions: how could sexual politics and gendered assumptions behind legal motherhood disappear? What if the legal system was willing to pause and put forward a conception of legal motherhood different from biological motherhood? What if the fictional character of legal

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361 This beautiful expression is from Gayle Rubin.
parentage was possible for women in as much as it is for men? I believe the sexual politics underlying the legal vesting of motherhood is unjustified and should disappear. “Like gender, sexuality is political. It is organized into systems of power, which reward and encourage some individuals and activities, while punishing others”. Legal motherhood is a system of power playing on both sides; it is a category, which interacts with both gender and sexuality. Legal motherhood needs to be re-conceptualized.

The solution lies in a new conception of parenting; a conception of parenting that would be gender neutral and stratified. Legal parenthood should be stratified since different persons should have different kinds of obligations with regards to a child. The dual family model is changing, and legal parentage should find a way to organize optimally parent-child relationships. Legal mother and legal father as legal categories reached their limits. A good example of that is the uncertain status of stepmothers at law. A stratified understanding of legal parenthood would allow many individuals to have different roles in a child’s life. Too often, disputes between adults impair children’s development, and limit contact with significant figure of authority or model. There are different ways of being parents, and they already exist. It is possible to be a step parent, to have more or less than two parents, some lesbian couples who realized that their kids had a common sperm donor raised them as brothers and/or sisters, biological brothers and sisters that live in separated families are also an option and extended family members (godmothers, godfathers, grandparents, etc) or friends are acting as informal parents. They new bill about adoption and parental authority in Québec is another example of creative thinking about family

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362 Gayle Rubin, supra note 22 at p. 309.
relationships. The uncertain status of polygamous marriage and its impact on legal parentage also represents a new challenge. There are different ways of being parents, different obligations, and different duties and responsibilities. It is not all or nothing. Legal parentage should be a fiction seeking to provide the best environment for children to develop. It should not be an institution soaked in gendered assumptions and judgments about sexuality. Such a model would have concrete impacts on women’s experience and children’s lives.

Motherhood and fatherhood should not be legal categories; the only legal concept should be parent. Every word chosen to portray a legal status should be carefully chosen, since every word comes with its own historical and cultural associations. It is important to conceptualize legal parenthood neutrally and non-exclusively, without unnecessary references to sexuality, gender or conjugal relationships. Legal parenting should be neutral to sex and gender, as it is now possible to have both parents of the same-sex, only a parent, etc. Furthermore, in most cases, the legal parents would be the legal mother and the legal father. However, in complex situations, law would have tools to locate legal parenthood in an adequate manner, without unduly relying on biological reality, gendered assumptions and a hierarchy of sexualities: legal parentage should not be an institution aiming at regulating sexual behaviors as marriage once was. Not only would it provide solutions for diverse family models, it would also help finding solutions to the new challenges raised by new reproductive technologies. Indeed, a nuanced and sensitive conception

367 The new Bill is highly controversial and a complete analysis is beyond the scope of the thesis. Let it only be said that it opens the door to ongoing relationships with the biological, but not custodial or primary parents (simple adoption, open adoption and delegation of parental authority are they key features of this bill). Loi modifiant le Code civil et d'autres dispositions législatives en matière d'adoption et d'autorité parentale, Assemblée nationale du Québec, 39e législature, 1ère session and Communiqué de presse : Avant-projet de loi en matière d'adoption et d'autorité parentale - Le gouvernement propose une réforme des règles de l'adoption au Québec, ministère de la Justice, 6 octobre 2009.

368 On this idea, one might want to read Sarah Carter’s historical analysis of marriage as a sexual institution: Sarah Carter, The Importance of Being Monogamous. Marriage and Nation Building in Western Canada to 1915 (Edmonton: The University of Alberta Press, 2008).
of parenting relying many factors (intent, biology, social relationships, BIC) is possible. Dual opposite sex parenting at birth is a biological imperative, but it is not a legal imperative. There are of course dangers and opportunities of this kind of model, in as much as there are advantages. Every relevant factor should be carefully weighted and this could be the subject of a later work. The absence of good conception of legal motherhood is problematic and creates many inconsistencies, but defining legal motherhood might not be the best solution. Indeed, it is law’s conception of parenting that needs to be re-conceptualized and refined.
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