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Do Children's "Best Interests" Matter When Tracing Their Filiation in Quebec Civil Law ?

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Article abstract

This essay offers a commentary on the intersection between the best interests principle and the law of filiation in Quebec. It highlights the tension between best interests and the positive law of filiation, highlighting the implications for those most vulnerable in family law disputes who have been central to Professor Goubau's scholarship. The analysis here is premised on a review of four relatively recent decisions handed down by Quebec courts, each distinct in its context. The first considers circumstances of assisted procreation or "parental projects" that result in more than two prospective parents ; the second addresses intercultural adoption contexts ; the third examines determinations of filiation where a child's birth ensues from a surrogacy agreement ; and the fourth explores how the law deals with stepparent-stepchild relationships. In each context, a judgment is featured to explore how the law intersects with the best interests principle. While none of the judgments are intended to be representative of the state of the law in a given area, each offers an example to illustrate how courts negotiate tensions between the positive law and the best interests principle. While judges will have varying degrees of discretion in different contexts to consider this principle, they acknowledge the tension and seek to reconcile it in a manner that at once foregrounds children's interests while also correctly applying and interpreting relevant legal authorities.

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Do Children's "Best Interests" Matter When Tracing Their Filiation in Quebec Civil Law?

Angela CAMPBELL*

This essay offers a commentary on the intersection between the best interests principle and the law of filiation in Quebec. It highlights the tension between best interests and the positive law of filiation, highlighting the implications for those most vulnerable in family law disputes who have been central to Professor Goubau's scholarship. The analysis here is premised on a review of four relatively recent decisions handed down by Quebec courts, each distinct in its context. The first considers circumstances of assisted procreation or "parental projects" that result in more than two prospective parents; the second addresses intercultural adoption contexts; the third examines determinations of filiation where a child's birth ensues from a surrogacy agreement; and the fourth explores how the law deals with stepparent-stepchild relationships. In each context, a judgment is featured to explore how the law intersects with the best interests principle. While none of the judgments are intended to be representative of the state of the law in a given area, each offers an example to illustrate how courts negotiate tensions between the positive law and the best interests principle. While judges will have varying degrees of discretion in different contexts to consider this principle, they acknowledge the tension and seek to reconcile it in a manner that at

* Professor of Law, McGill University. The author is grateful for the research support provided by McGill University and for the excellent research and editing assistance of Shona Moreau as well as for the comments of two anonymous reviewers whose recommendations improved this work.

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In accordance with the journal's language rules, the use of the masculine form alone is intended to make the text easier to read and, depending on the circumstances, it is inclusive of both women and men.

once foregrounds children's interests while also correctly applying and interpreting relevant legal authorities.

Cet essai propose un commentaire sur l'intersection entre le principe de l'intérêt supérieur et le droit de la filiation au Québec. Il met en évidence la tension entre l'intérêt supérieur et le droit positif de la filiation, en soulignant les incidences pour les personnes les plus vulnérables dans les litiges en droit de la famille, qui ont été au centre de la recherche du professeur Goubau. L'analyse présentée ici est fondée sur l'examen de quatre décisions rendues relativement récemment par des tribunaux québécois, chacune étant distincte dans son contexte. La première porte sur les circonstances de la procréation assistée ou des « projets parentaux » qui donnent lieu à plus de deux parents potentiels ; la deuxième traite de contextes d'adoption interculturelle ; la troisième examine les déterminations de la filiation lorsque la naissance d'un enfant découle d'une entente de maternité de substitution ; et la quatrième explore l'engagement du droit dans les relations entre beaux-parents et beaux-enfants. Dans chaque contexte, un jugement est présenté pour explorer la façon dont le droit recoupe le principe de l'intérêt supérieur. Bien qu'aucun des jugements ne se veuille représentatif de l'état du droit dans un domaine donné, chacun d'eux offre un exemple qui illustre la façon dont les tribunaux négocient les tensions entre le droit positif et le principe de l'intérêt supérieur. Bien que les juges jouissent d'une certaine marge de manœuvre dans différents contextes pour prendre en compte ce principe, ils reconnaissent la tension et cherchent à la concilier d'une manière qui met en avant l'intérêt de l'enfant tout en appliquant et en interprétant correctement les autorités juridiques pertinentes.

Este ensayo plantea realizar un comentario sobre un punto común que existe entre el principio del interés superior y el derecho de filiación en Quebec. Se hace hincapié en la tensión que existe entre el interés superior y el derecho positivo de la filiación y se resaltan las incidencias en las personas más vulnerables en los litigios de derecho familiar, las

cuales han sido fundamentales en la investigación llevada a cabo por el profesor Goubau. El análisis que aquí se presenta se basa en el estudio de cuatro decisiones que han sido dictadas recientemente por tribunales quebequenses, las cuales, en su contexto, son claramente distintas unas de otras. La primera trata sobre las circunstancias de la procreación asistida o « proyectos de paternidad » que han dado lugar a más de dos padres potenciales ; la segunda trata sobre los contextos de adopción intercultural ; la tercera estudia las determinaciones de la filiación cuando el nacimiento de un hijo resulta de un acuerdo de subrogación de maternidad, y la cuarta explora el alcance de la ley en las relaciones entre padrastros e hijastros. En cada contexto se presenta una decisión dictada con el fin de examinar cómo se coteja la ley con el principio del interés superior. Si bien ninguna de estas decisiones pretende ser representativa del estado del derecho en un ámbito determinado, cada una proporciona un ejemplo con el que se ilustra cómo dirimen los tribunales las tensiones que existen entre el derecho positivo y el principio del interés superior. Si bien los jueces gozan de un cierto margen de maniobra en diversos contextos para tomar en cuenta este principio, reconocen la tensión existente, e intentan conciliarla, de tal manera que prevalezca el interés superior del menor al aplicar e interpretar adecuadamente los principios legales pertinentes.

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It is an honour to be invited to contribute to this collection paying tribute to an esteemed colleague and true fixture in the world of family law and the law of persons. Throughout his career, Professor Dominique Goubau advanced juridical approaches to the family in Quebec in the most progressive of ways, often through a transnational and comparative

lens. His writings and teachings have prompted judges, practitioners and scholars to reflect critically on difficult questions related to themes such as vulnerability and dignity, and how both of these might be furthered or compromised by how the law intervenes in family life and family relationships[1]. In this regard, Professor Goubau has consistently centred children, inviting us to foreground the principle, enshrined in both international[2] and domestic law[3], that the child's best interests are the foremost consideration in all decisions affecting them.

While family law scholars will be well versed in the "best interests" principle, we are also familiar with the tension that arises when the application of positive law counters the result that a best interests analysis might yield. Professor Goubau himself has spoken to such circumstances in his writings[4]. Under Quebec family law, these circumstances are most prone to arise in situations where a child's filiation is put into question and where the *Civil Code of Quebec* maps parental status to one or more individuals who may seem less well placed than others to serve that same child's best interests.

This essay offers a commentary on the intersection between the best interests principle and the law of filiation in Quebec. It highlights the tension between best interests and the positive law of filiation, highlighting the implications for those most vulnerable in family law disputes who have been central to Professor Goubau's scholarship. The analysis here is premised on a review of four relatively recent decisions handed down by Quebec courts, each distinct in its context. The first considers circumstances of assisted procreation or "parental projects" that result in more than two prospective parents ; the second addresses intercultural

1. See Dominique Goubau and Martin Chabot, "Blended Families and Multi-Parenthood : the Difficulty of Adapting the Law to Contemporary Families", (2018) 59 *C. de D.* 889 (hereinafter "Goubau & Chabot Multi-parenthood"). See also Dominique Goubau, "Dignity in Canadian Law, a Popular but Ambiguous Notion", in Brigitte Feuillet-Liger and Kristina Orfali (eds.), *The Reality of Human Dignity in Law and Bioethics*, Cham, Springer, 2018, p. 191.
2. See *Convention on the Rights of the Child*, November 20, 1989, UNTS, art. 3 (entered into force on September 2, 1990, accession by Canada on December 13, 1991).
3. See *Civil Code of Quebec*, L.Q. 1991, c. 64, art. 33.
4. See Goubau & Chabot Multi-parenthood, *supra*, note 1 ; Dominique Goubau, "Biomedicine and Parentage Law in Canada : Between Boldness and Restraint", in Brigitte Feuillet-Liger, Thérèse Callus and Kristina Orfali (eds.), *Reproductive Technology and Changing Perceptions of Parenthood around the world,* Brussels, Bruylant, 2014, p. 223.

adoption contexts ; the third examines determinations of filiation where a child's birth ensues from a surrogacy agreement ; and the fourth explores how the law deals with stepparent-stepchild relationships. In each context, a judgment is featured to explore how the law intersects with the best interests principle. While none of the judgments are intended to be representative of the state of the law in a given area, each offers an example to illustrate how courts negotiate tensions between the positive law and the best interests principle. While judges will have varying degrees of discretion in different contexts to consider this principle, they acknowledge the tension and seek to reconcile it in a manner that at once foregrounds children's interests while also correctly applying and interpreting relevant legal authorities.

1 Parental Projects and Plural Parenthood

Quebec civil law is clear that two is the maximum number of people who can hold the formal status of "parent" of a child. Despite changes in other jurisdictions[5], our legislature has thus far refrained from extending parental rights to three or more people. In 2002, Quebec established itself as a progressive player in the western legal landscape by enacting family law reforms that recognized the "parental project" and clarified filiation in situations involving gamete donation and assisted reproduction[6]. While these amendments stretched the law of filiation to reflect changing family forms in Quebec, they stopped short in some notable ways. For instance, while the *Code,* as of 2002, recognized the possibility for a parental project to be established by one person alone—hence, the potential for

5. See *Children's Law Reform Act*, R.S.O. 1990, c. C.12, ss. 9, 11 and 13. (hereinafter "CLRA"), where four parents can be recognized without a court order (s. 9) – but more can be recognized with a court order (s. 13 or s. 11). This is a response to *A.A.* v. *B.B.*, 2007 ONCA 2, a 2007 Ontario Court of Appeal decision, which permits multiple individuals to be listed on a child's birth certificate in Ontario under specific circumstances. See also *Family Law Act,* S.B.C., 2011, c. 25, ss. 29 and 30 (hereinafter "BCFLA"), which allows donors to be listed as additional parents if the parents sign a written agreement prior to conception in British Columbia. See also Marie Pratte, "La filiation réinventée : l'enfant menacé ?" (2003) 33 *R.G.D.,* 541. Also, Benoît Moore, "La notion de « parent psychologique » et le *Code civil du Québec*", (2001) 103 *R. du N.* 115.

6. See Régine Tremblay, "Quebec's Filiation Regime, The *Roy Report*'s Recommendations, and the « Interest of the Child »", (2018) 31 *Can. J. Fam. L.* 199. See also Robert Leckey, "The Practices of Lesbian Mothers and Quebec's Reforms", (2011) 23 *CJWL* 579. See also, Robert Leckey, "« Where the Parents Are of the Same Sex » : Quebec's Reforms to Filiation", (2009) 23 *Int. JL Pol'y & Fam* 62. See also, Angela Campbell "Conceiving Parents Through Law", (2007) 21 *Int. JL Pol'y & Fam* 242.

solo parenthood — or two people together, it offered no hint of openness to plural parenthood (or "*pluri-parentalité*[7]").

This state of affairs has not changed in the two decades that have since passed. Even within the framework of the most recent family law reform proposal, when filiation-related provisions were being discussed prior to their removal from the Bill, the Minister of Justice declined to expand filiation beyond two parents[8]. In so doing, he demurred from an opportunity to draw on the experiences of common law provinces that have opened parenthood to four or more people in assisted reproduction contexts[9], in preference for a more orthodox approach to the law in this domain.

Consequently, Quebec courts continue to be bound by the recognition of no more than two parents, even when evidence suggests that a child's best interests might warrant an alternate conclusion. Such instances offer a rich site for exploring distinctions between formal and functional parenthood (or *parenté* and *parentalité*) respectively, as per judgments rendered by courts of first instance and appellate courts in *Droit de la famille — 191677*[10].

In the case at hand, three adults vied for recognition as the parents of a young child. Shortly after the child was conceived, all three parties

7. See CCQ, art 538.2, which states : "The contribution of genetic material to the parental project of another cannot be the basis for any bond of filiation between the contributor and the child consequently born. However, if the contribution of genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of the woman who gave birth to the child may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation."

8. See *An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*, L.Q. 2022, c. 22 (hereinafter "*Bill 2*"). The Quebec Minister of Justice Simon Jolin-Barrette commented on October 21, 2021 – following the tabling of *Bill 2* – at a press conference that [TRANSLATION] "The literature and studies do not show that it is preferable for a child to have more than two parents. [...] For us, it is very clear that the family unit consists of only two parents" ; ASSEMBLÉE NATIONALE, *Archives des travaux et activités parlementaires : Activités de presse*, Québec, Assemblée nationale, 2021, [Online], [www.assnat.qc.ca/fr/video-audio/archives-parlementaires/activites-presse/AudioVideo-91739.html] (September 11, 2022). Of note, the government removed from the bill all provisions pertaining to filiation prior to its enactment.

9. To name a few, see CLRA, *supra*, note 5, ss. 9-13 ; BCFLA, *supra*, note 5, ss. 29 and 30 ; and lastly, see *CC (Re)*, 2018 NLSC 71, which is not an assisted reproduction context but does accord recognition to three parents.

10. *Droit de la famille – 191677*, 2019 QCCA 1386.

signed an agreement in which they stated their desire to share the child's "physical, emotional, and financial support[11]". As such, the three parties had created a parenting plan and determined their respective roles in the child's life. The birth registration named two parents : the child's birthmother and her partner (L.) at the time of the child's birth. Under the parenting plan, M. who was a biological parent, although his name did not appear on the child's birth registration, would also share in the child's upbringing and support. Later, the couple (birthmother and L.) separated and filed for divorce. The couple signed an interim consent agreement regarding their joint exercise of parental authority, excluding the child's biological father, who had previously been involved in the child's upbringing. Being excluded from this interim consent agreement, M. responded by filing an application for recognition of paternity.

In rendering judgment, Morrison J. wrestled with the constraints imposed by positive law, noting that he was forced to choose between L. and M. as the child's parent. The filiation of the child's birthmother being uncontested, Morrison J. acknowledged Quebec law's limitation of parental status to no more than two people. In his mind, this restricted a court's ability to consistently render a decision in a child's best interests, including in the case at hand :

> [translation] In the opinion of the undersigned, the impossibility of a child having more than two parents is problematic in light of the social reality of 2018. In this case, with due regard to the contrary view, the best interests of minor child X. would require that the law allow for the recognition of her reality that, emotionally and socio-economically, she has always had three parents[12].

Given that triparentality (or pluriparentality) is not recognized in Quebec, the judge reluctantly ordered M. to replace L. as the child's second parent. As biological truth must prevail, the Superior Court granted the biological father's application to have the birth certificate amended to include the names of both biological parents[13].

The Court of Appeal of Quebec saw matters differently. Writing for the Court, Kasirer J.A. (as he then was) took the view that this case did

11. *Id*., para 12 (our translation).
12. See *Droit de la famille – 18968*, 2018 QCCS 1900, para 37. Morrisson J. states in French : "De l'avis du soussigné, l'impossibilité qu'un enfant ait plus de deux parents pose problème eu égard à la réalité sociale de 2018. En l'espèce, avec égard pour l'opinion contraire, le meilleur intérêt de l'enfant mineure X. requerrait que la loi permette la reconnaissance de sa réalité, soit que sur les plans émotionnel et socio-économique, elle a effectivement toujours eu trois parents."
13. It should be noted that after the separation, M. and the birthmother shared joint custody of the child, while L. had limited access rights to the child.

not require the court to venture onto the terrain of plural parenthood[14]. Rather, the claims in question could be justly addressed through a focus on functional rather than formal parenthood. Kasirer J.A. thus distinguished between the concepts of *parentalité,* i.e., the ability to be recognized as holding functional rights and responsibilities associated with filiation and parenthood, and *parenté*, i.e., the formal legal status of filiation and parenthood. A major consequence of that distinction would be that, unlike a parent holding formal parental status, a person holding a functional or de facto parental role would not have legal rights and obligations *vis-à-vis* a child, which would be relevant in situations such as inheritance upon intestacy and making decisions for a child regarding matters such as health care and education.

For the Court of Appeal, the evidence was sufficient to show that the child's birthmother and L.—both of whose names appeared on the child's birth registration—had created a parental project within the meaning of article 538 of the *Civil Code*. As such, M. could not be recognized as a father and was instead considered as a "third party" *vis-à-vis* the child, insofar as positive law was concerned. His claim to filiation thus failed. For the Court of Appeal, this outcome was not counter to the child's best interests, the latter more appropriately addressed in relation to questions regarding parental authority[15] than filiation.

The Court of Appeal hence offers a more restrained analysis of the facts than did the trial judge. Unlike Morrison J., Kasirer J.A. refrains from casting plural parenthood as Quebec's *lex feranda* and instead states that the positive law in its current state provides the requisite guidance to determine filiation questions in contexts of assisted procreation. And, whereas the trial judge had found a discussion about the best interests of the child essential to the analysis, the Court of Appeal warned against this. Not only had there been no factual evidence adduced in the first instance as to the interests in the child central to the case at hand, but *de jure,* the issue could not be opened. In Quebec, the law of filiation does not invite the courts to engage in a best interests analysis except in cases

14. *Droit de la famille – 191677*, *supra*, note 10.

15. See CCQ, article 599, which in keeping with civil law tradition, defines parental authority as "the rights and duties of custody, supervision, and education of their children", as well as the obligation to maintain their children. See also Educaloi, "Parental Authority : Rights and Responsibilities of Parents", (2022) *The Law by Topic*, [online], [www.educaloi.qc.ca/en/capsules/parental-authority-rights-and-responsabilities-of-parents/] (September 11, 2022).

involving filiation by adoption[16]. The Court cites Professor Goubau's work as a leading authority on the risk of confusion between parental functions and filiation if the courts were to inject a best interests inquiry into cases like this one, in which they have to decide questions of filiation[17].

Imagining a case with slightly different facts, which matched those presented to the Court of Appeal for Ontario in *AA v. BB*[18] some 15 years prior, provides an intriguing thought experiment for Quebec jurists specializing in family law. Whereas no evidence was presented in *Droit de la famille — 191677* about whether tri-parenthood would serve the child's best interests, in *AA v. BB,* the evidence was clear that the child recognized all three prospective parents as such. Furthermore, unlike the Quebec judgment discussed here, in *AA v. BB,* the motion for recognition of a third parent was not challenged. Accordingly, the Court of Appeal invoked its *parens patriae* jurisdiction[19] granted under the law of equity to recognize that the child had three parents – a decision that was codified by statute nearly a decade later[20].

A Quebec court presented with facts akin to those in *AA v. BB* would likely find itself in a delicate position. Operating within the traditions of civil law, the judge would not have access to equitable relief[21]. Even otherwise, the *parens patriae* jurisdiction could only be correctly invoked in the presence of a legislative "gap" or oversight that undermined a child's best interests. Through recent family law reform initiatives, Quebec legislators may have had the opportunity to consider the possibility of allowing formal recognition of three or more parents for one child[22]. Even though they eliminated all provisions pertaining to filiation from the final text, the preliminary negotiated text, which did address this issue, suggested they would reject such recognition.

16. This being said, change might be on the horizon. See *Droit de la famille – 22865*, 2022 QCCS 1928. Barin J., in this filiation case employs the best interests provision of article 33 CCQ to loosen the watertightness of the filiation lock that appears to be provided by article 530 CCQ.
17. *Droit de la famille – 191677, supra*, note 10, para. 169.
18. See *A.A. v. B.B.*, *supra*, note 5.
19. See *Winnipeg Child and Family Services (Northwest Area)* v. *G. (D.F.)*, [1997] 3 SCR 925 for information on a court's *parens patriae* jurisdiction.
20. See CLRA*, supra*, note 5, ss. 9–11.
21. But note *Droit de la famille – 072895*, 2007 QCCA 1640, par. 87, where the Quebec Court of Appeal's majority invoked a common law doctrine of *in loco parentis* to justify the award of custody to a woman who had acted in the place of a parent to the children concerned.
22. See Bill 2, *supra*, note 8.

In such a situation, the options available to a Quebec court would be somewhat more restricted. A judge would be largely bound by a positivist analysis with little discretion to engage in a best interests analysis, even if such an analysis could yield an outcome seemingly more favourable to the child concerned[23]. This outcome is the one Morrison J. seems to lament in his trial judgment rendered in *Droit de la famille — 119627*. One might imagine that the challenge for a judge faced with preponderant evidence indicating that filiation as determined by law is misaligned with what is in the child's best interests. Rendering judgment could be experienced by the judge as running counter to the obligation — also set by law in Quebec — to give priority to a child's best interests in matters that affect the said child[24]. One might plausibly counter that judicial consistency yields stability in determining filiation and that this furthers children's best interests at a general societal level. Legal certainty and clarity as well as predictability in the courts' application and interpretations of the law will help families make informed decisions about the prospect of litigation, which is always tumultuous for the parties at hand and third parties, even when the outcomes are those desired[25]. In the same way, there will be contexts where the law's rigidity may stand to compromise children's dignity. This is potentially so where the facts might demonstrate that a child's best interests are furthered by the formal recognition of more than two parents[26]. Conversely, it might also be the case where the law recognizes the filiation of those who expressly disavow their children[27].

2 Intercultural Adoption

Cases involving intercultural adoption, notably those that centre the status of Indigenous children, have raised fraught questions about how the

23. At the same, it is pertinent to note that Quebec judges, like judges in other provinces, participate in the construction of law, especially in the context of Canadian bijuralism, where the influence of the courts in equity cannot be denied. This remains so even if equitable doctrines do not apply in the civil law tradition.
24. See CCQ, article 33.
25. See Alain Roy, "Revue de la jurisprudence 1994-2019 en droit de la famille : entre conservatisme et audace judiciaires", (2020) 122 *R. du N.* 1, pp. 19-23.
26. It is important to note that the *Commission citoyenne sur le droit de la famille* (2018) does not take position on the issue, and that the Minister of Justice's decision not to include the issue in the first Bill 2 may be a result of this. See Comité consultatif sur le droit de la famille, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales*, Québec, Ministère de la Justice du Québec, 2015, p. 62 (hereinafter "Roy Report").
27. See *Droit de la famille – 20572*, 2020 QCCA 585. See also *Droit de la famille – 09358*, 2009 QCCA 332.

best interests principle ought to be interpreted in adjudicating applications to declare children eligible for adoption. Well before the Truth and Reconciliation Commission filed its report[28], Justice Wilson rendered what is today perceived by some as a controversial, if not regrettable, judgment in *Racine v. Woods*[29]. The case concerned a child named Leticia Woods who was born in 1976 to a First Nations mother with addiction challenges, who was deemed unable to care for her. Leticia was apprehended by the Children's Aid Society of Central Manitoba and placed in the foster care of Sandra Ransom (later Racine). After a couple of years, the Racines petitioned to adopt the child against the birthmother's wishes and were successful petition. Upholding the declaration of adoption in favour of the Racines, the Supreme Court concluded that the significance of cultural background and heritage diminishes over time. Some scholars have subsequently argued that this decision did not appear to be in the best interests of the child, as Leticia spent much of her adolescence in group care and later testimony indicated that her untethered Indigenous identity was a struggle[30].

More than two decades later, *Racine* retained its grip on cases that centred questions about the adoption of Indigenous children outside of their communities, particularly where such children are understood as "abandoned" by their birth parents. In *J.K.*[31], the Court of Appeal was called upon to review a decision to refuse to declare an Indigenous child eligible for adoption. The child had been in the care of a woman (S.) essentially from birth. Initially, S. cared for both the child and the latter's mother, who gave birth at age 15. Within two years, however, the birthmother had repeatedly run away, and the child was subject to consecutive orders that placed her in S.'s care. Just before the child turned 5, the Director of Youth Protection sought to declare her eligible for adoption, so that S. could adopt her. An adoption following the declaration of eligibility involves a two-step process : (1) assessing whether the child's circumstances meet the conditions to be declared eligible for adoption[32] and (2) establishing

28. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future : Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, Winnipeg, The Truth and Reconciliation Commission of Canada, 2015.
29. *Racine* v. *Woods*, [1983] 2 SCR 173. See Peter Choate and others, "Rethinking *Racine v Woods* from a Decolonizing Perspective : Challenging the Applicability of Attachment Theory to Indigenous Families Involved with Child Protection", (2019) 34 *CJLS* 55.
30. See P. Choate and others, *supra*, note 29, p. 59.
31. See *Directeur de la protection de la jeunesse* c. *J.K.*, 2004 CanLII 60131 (QC AC) (hereinafter "*J.K.*").
32. See CCQ, art. 559–560.

whether the declaration serves the child's best interests. In the case at hand[33], the applications judge had no difficulty determining that the first of these requirements had been met. The judge wrestled, however, with the second requirement. In this regard, he focused on the child's Indigenous identity and ultimately concluded that her adoption by S. would not serve her best interests, as this would result in her losing her Algonquin identity.

At the appeal level, the Director of Youth Protection successfully contested this ruling and the child was therefore declared eligible for adoption. In rendering judgment, the Court of Appeal cited *Racine*[34] to emphasize that identity is but one factor to be considered in determining the best interests of an Indigenous child. Moreover, the importance ascribed to cultural heritage will be mitigated where the child has formed psychological bonds with the prospective adopting parents over time, where she has been disconnected from her birth family, and where the prospective adopting family "substituted itself — by the passage of time and by judicial declarations for her original community[35]".

For the Court of Appeal, then, Justice Bonin of the first instance was mistaken to have "entirely consecrated" his analysis of the child's best interests to the question of cultural identity[36]. While the child's Indigenous heritage merits consideration, it cannot stand alone as the sole or predominant consideration for a court in assessing what will best serve a child's interests in the context of a placement for adoption[37].

While *J.K.* and *Droit de la famille — 191677* deal with two distinct contexts, they both provide examples of binary decisions that courts have had to make in determining a child's filial status, forcing tough

33. See *J.K.*, *supra*, note 31, para. 6.
34. *Racine* v. *Woods*, *supra*, note 29.
35. See *J.K.*, *supra*, note 31, para. 12 (our translation). See also, in relation to adoption and the best interest of the child : Anne-Marie Savard, "L'établissement de la filiation à la suite d'une gestation pour autrui : le recours à l'adoption par consentement spécial en droit québécois constitue-t-il le moyen le plus approprié ?", in Christelle Landheer-Cieslak and Louise Langevin (eds.), *La personne humaine, entre autonomie et vulnérabilité : Mélanges en l'honneur d'Édith Deleury*, Montreal, Yvon Blais, 2015, p. 589 ; Michelle Giroux, "Le recours controversé à l'adoption pour établir la filiation de l'enfant né d'une mère porteuse : entre ordre public contractuel et l'intérêt de l'enfant", (2011) 70 *R. du B.* 509, 532 ; and Groupe de travail sur le régime québécois de l'adoption, *Pour une adoption québécoise à la mesure de chaque enfant*, Québec, Ministère de la Justice, 2007, pp. 104–105.
36. See *J.K.*, *supra*, note 31, para. 7.
37. There is an interesting parallel to draw here with the Supreme Court of Canada's decision in *Van de Perre* v. *Edwards,* 2001 CSC 60 and this court's assessment of how race should be treated in custody cases.

choices and outcomes potentially adverse to children's best interests[38]. In *Droit de la famille — 191677*, the Court had to determine who, between two adults — both of whom had signalled their intention to care for the child —, would be the latter's "second parent"[39]. Recognizing one of them would have the automatic effect of depriving the other of the possibility of claiming formal parental status. Likewise, in *J.K.,* the Court was bound to decide in absolute yes-or-no terms whether the child could be placed for adoption, the effect of which would lead either to the preservation or the severance of the child's formal connection to her birthmother. As in *Droit de la famille — 119677*, there was no room for compromise or discretion to recognize both prospective parents as the child's mother. And, while relatively recent amendments to the CCQ[40] create some potential to preserve an Indigenous child's legal connection to their birth family following an adoption, this is possible only in the case where the adoption occurs in accordance with Indigenous legal traditions. Accordingly, the potential to sustain ongoing connections to one's birth family and home community is far less likely to be realized in situations where an Indigenous child has been taken into care and placed for adoption through state youth protection interventions, as was the case in *J.K.*[41].

A consideration of the specific fact pattern in *J.K.*, much as in *Racine*, will result in an understanding of why a court might find it reasonable to declare a child eligible for adoption. But zooming out and examining these cases through a wider lens illuminates their broader implications. Adoptions like those in *Racine* and *J.K.* can be traced to intensely misguided state policies that removed Indigenous children from their homes, families and communities over decades, resulting in incalculable losses that will take generations to restore. Confronting this reality honestly through processes grounded in a commitment to Indigenous reconciliation conjures up the critical question of how judgments like those set out here both reflect

38. It is of note that the *J.K.* case represents the state of the law prior to the adoption of the provisions on customary adoption in the *Civil Code of Quebec*. The CCQ was amended to permit both customary adoption and adoption with symbolic recognition of original parentage. In particular, under article 543.1 of the CCQ, conditions of adoption based on any Quebec Indigenous custom that is consistent with the principles of the child's best interests, respect for the child's rights, and the consent of the parties involved may be substituted for legal conditions.
39. *Droit de la famille – 191677*, *supra*, note 10, para. 49 (our translation).
40. See Bill 113, *An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information*, L.Q. 2017, c. 12.
41. See CCQ, art. 577 and 577.1.

and advance colonial policies and their ongoing presence and legacies[42]. Examining these judgments from this vantage point prompts an alternate best interests analysis compared to the one undertaken in *Racine* and *J.K.* It instead compels us to look beyond the individual child whose case is presented before a court to the broader systemic issues and consequences of intercultural Indigenous adoption[43]. It further requires acknowledgement that social and juridical interpretations of "the best interests of the child", will change over time.

3 Surrogacy

Quebec law struggles with recognizing parental relationships created through surrogacy arrangements. Since 1993, article 541 of the *Civil Code* clearly states that contracts for surrogacy services are null, as they offend public order[44]. Surrogacy nevertheless persists in Quebec as a social

42. See Peter Choate and others, "Sustaining Cultural Genocide – A Look at Indigenous Children in Non-Indigenous Placement and the Place of Judicial Decision Making – A Canadian Example" (2021) 10 *Laws* 59, pp. 2-10 (hereinafter "Choate, 2021"). See also, Peter Choate, "The Call to Decolonize : Social Work's Challenge for Working with Indigenous Peoples", (2019) 49 *British Journal of Social Work* 1081 ; and Cindy Blackstock, "The Complainant : The Canadian Human Rights Case on First Nations Child Welfare", (2016) 62 *McGill LJ* 285, pp. 312–315.

43. See Carmen Lavallée, *L'enfant, ses familles et les institutions de l'adoption : Regards sur le droit français et québécois*, Montréal, Wilson & Lafleur, 2005, pp. 263–270. In this text, Professor Lavallée discusses the potentially conflicting meanings of the child's interest depending on whether it is conceptualised as *in abstracto* or *in concreto*. Simply put, the child's interests are defined *in abstracto* as being related to the spirit of legislative reforms rather than their interpretation, whereas the child's interests are established *in concreto* when the courts are tasked with determining what is more suitable for the specific child involved in a given situation.
See also the recent single and coauthored works of Robert Leckey, which prompt a reflection on the need for Indigenous self-governance over child welfare rather continuous reform of existing legislative structures, anchored as they are to colonial worldviews and institutions : Robert Leckey and others, "Indigenous Parents and Child Welfare : Mistrust, epistemic injustice, and training" (2022) 31 *Soc & Leg Stud* 559 ; and Robert Leckey, "Child Welfare, Indigenous Parents, and Judicial Mediation", (2022) 49 *JL & Soc'y* 151.

44. See Angela Campbell, "Law's Suppositions about Surrogacy against the Backdrop of Social Science", (2012) 43 *Ottawa L Rev* 29, 50. See also, Kevin Lavoie and Isabel Côté, "Navigating in Murky Waters : Legal Issues Arising from a Lack of Surrogacy Regulation in Quebec", in Vanessa Gruben, Alana Cattapan and Angela Cameron (eds.), *Surrogacy in Canada : Critical Perspectives in Law and Policy*, Toronto, Irwin Law, 2018, pp. 88-107. *Bill 2* (*supra*, note 8) proposed significant reforms to recognize and regulate surrogacy, but these didn't come to pass.

reality[45]. In light of this, prospective or "intended" parents in Quebec who had made agreements with a person willing to carry a child for them have, in some cases, deployed Quebec's adoption rules in their efforts to give juridical effect to their parental aspirations[46]. The way this typically played out is as follows : a couple and a surrogate agree that the latter will carry an implanted embryo created with the sperm of a male intending parent and the ovum of either his spouse or a donor. Following the birth, the surrogate commits to relinquishing the child and consenting to an adoption by the biological father's spouse (or common-law spouse, article 555 CCQ). This is permissible pursuant to Quebec law under the special consent to adoption regime[47].

In their decisions over a decade, Quebec courts had been inconsistent as to whether such agreements should be given judicial effect by allowing applications for special consent adoption by the spouse of the biological father of a child born to a surrogate[48]. In most instances, an applications judge would consider factors related to the good faith of the parties concerned, whether the agreement appeared commercially or altruistically motivated, and the legislative intent underlying the framing of surrogacy as contrary to public order[49].

The Court of Appeal of Quebec changed this course in its 2014 decision in *Adoption — 1445*[50]. Overturning the decision of Wilhelmy J., who had

45. See Stefanie Carsley, "Reconceiving Quebec's Laws on Surrogate Motherhood", (2018) 96 *Can Bar Rev* 120, p. 130.
46. See Louise Langevin, "La Cour d'appel du Québec et la maternité de substitution dans la décision Adoption – 1445 : quelques lumières sur les zones d'ombre et les conséquences d'une « solution la moins insatisfaisante » ", (2015) 49 *RJTUM* 451 ; See also, Régine Tremblay, "Surrogates in Quebec : The Good, the Bad, and the Foreigner", (2015) 27 *CJWL* 94 ; Benoît Moore, "Maternité de substitution et filiation en droit québécois", in Sandrine Mozaine (ed.), *Liber amicorum : Mélanges en l'honneur de Camille Jauffret-Spinosi,* Paris, Dalloz, 2013, p. 859 ; Suzanne Zaccour, "Justice contractuelle, notariat et gestation pour autrui", (2017) 3 *R.J.E.U.M.* 61 ; M. Giroux, *supra*, note 35 ; and A.-M. Savard, *supra*, note 35.
47. See CCQ, article 555, which provides that special consent adoption is permitted "only in favour of an ascendant of the child, a relative in the collateral line to the third degree or the spouse of that ascendant or relative ; it may also be given in favour of the spouse of the father or mother. However, in the case of *de facto* spouses, they must have been cohabiting for at least three years."
48. See S. Carsley, *supra*, note 45, pp. 134–137. Between 2009 and 2014, the courts "were" inconsistent. However, in her text, Carsley shows that in recent jurisprudence following *Adoption – 1445*, 2014 QCCA 1162, they are now quite consistent.
49. See *Adoption – 07219*, 2007 QCCQ 21504 ; *Adoption – 091*, 2009 QCCQ 628 ; *Adoption – 09185*, 2009 QCCQ 8703 ; and *Adoption – 09558*, 2009 QCCQ 20292.
50. *Adoption – 1445*, *supra*, note 48.

rejected an application for adoption in a surrogacy context on the basis that the intending parents had acted in a manner that circumvented the law, the Court of Appeal's analyses drew the child's interest into sharper focus. For Morissette J.A., the issue of whether money had exchanged hands between the surrogate and the intending parents was inconsequential to the analysis a court must undertake when called upon to determine whether a child's filiation by adoption — here, by special consent — ought to occur. As Morissette J.A. explains, the best interest analysis to be the determining factor : [TRANSLATION] "A decision on an order of placement for adoption must be made in accordance with the provisions of the law and in the best interests of the child (and not from the perspective of the persons who have entered into an assisted reproduction agreement)[51]".

Morissette J.A. also offered an alternate interpretation to article 541 CCQ, which contrasted with the position that article 541 prohibits surrogacy. In his view, which appears to be the current legal position in Quebec, article 541's ambit is limited to rendering surrogacy agreements unenforceable. It does not, however, outright bar the conclusion of such agreements, and the presence of such an agreement does not necessarily obstruct the recognition of the intending parents' filial status where that status is sought through adoption procedures that are recognized under the *Civil Code*.

Thus, in matters of adoption in relation to surrogacy, two questions are usually fundamental : the first is whether the birth parent gives consent to relinquish parental status and place the child for adoption, and the second is whether the adoption would serve the child's best interests[52]. In *Adoption — 1445*, the facts established at trial allowed the Court to answer both questions in the affirmative.

The focus on best interests within the Court of Appeal's reasons is both expected and curious. Expected because the case dealt with adoption. As noted, while the *Code* generally does not direct courts to consider best interests in matters of filiation[53], courts must undertake this analysis in

51. See *Id*, para. 17.
52. However, there are an increasing number of exceptions to this rule. See *Adoption – 161*, 2016 QCCA 16 ; and more recently, *Adoption – 21301,* 2021 QCCQ 7351 ; two situations where the surrogate's consent was not required because she was not declared the child's parent, and only the intended father's consent was required.
53. It is worth noting, however, the proposed surrogacy provisions discussed in *Bill 2* (*supra*, note 8), which were ultimately omitted from the final version of the law, included a requirement to conduct a Best Interest of the Child analysis in the event that the court needs to determine the child's filiation.

adoption contexts. Hence, the Court of Appeal's emphasis on the child here was correct from a juridical standpoint.

The centring of best interests is also curious, given the court's decision to lean on article 522 of the *Civil Code*[54] in its analysis. This provision establishes that, regardless of the circumstances of a child's conception or birth, they have the same rights and obligations *vis-à-vis* their parents where their filiation is established. This legal principle is crucial in situations where children's filiation and entitlements as heirs might have depended — or be understood as dependent — on the marital status of their parents[55]. But its relevance to a decision where filiation was in question is less clear. For Morissette J.A., applying article 522 yielded the result that the adoption should be authorized. He stated :

> [translation] [..] for the reasons stated above, that granting the order of placement for adoption of the child X. is, as Professor Moore so aptly expressed it, the least unsatisfying solution. It is very certainly that which best serves the interests of the child X., in compliance with articles 33 and 543 *CCQ*. Since her birth, she has been living with her father, her elder brother (son of the same father and three years older than her) and the appellant (her father's spouse). This family unit, which currently includes her half-brother Y. and the appellant, is the only one she has ever known. C., whose name appears on the child X.'s birth certificate, has never had the slightest intention to exercise any parental authority whatsoever over the child she gestated[56].

The justice concluded his judgment by stating that, in situations of adoption, [translation] "it is the interests of the child that must prevail, not the circumstances of the child's birth[57]".

The reach of *Adoption – 1445*, with its focus on best interests, appears restricted. Any surrogacy case that does not meet the parameters of special consent adoption[58] would not lend itself to a best interests analysis. Outside

54. See CCQ, article 522 ; which states : "All children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth."
55. Dominique Goubau, Ghislain Otis and David Robitaille, "La spécificité patrimoniale de l'union de fait : le libre choix et ses « dommages collatéraux »", (2003) 44 *C de D* 3, pp. 13 and 37.
56. See *Adoption – 1445*, *supra*, note 48, para. 66.
57. See *Id*, para. 69.
58. Pursuant to CCQ, article 555, special consent adoption is only recognized where an adoption application is brought by someone with a particular legal relationship to a child or the child's birth parent. It provides : "Consent to adoption may be general or special ; special consent may be given only in favour of an ascendant of the child, a relative in the collateral line to the third degree or the spouse of that ascendant or relative ; it may also be given in favour of the spouse of the father or mother. However, in the case of *de facto* spouses, they must have been cohabiting for at least three years."

of such circumstances, the strict terms of article 541 CCQ apply, leaving the courts unable to enforce the terms of a surrogacy agreement, even if this would further the interest of the child or children concerned[59].

Quebec's family law jurists might accept that filiation analyses cannot and should not put into question the best interests of the child, save for situations where adoption is raised. In this regard, one might reasonably presume that in other filiation contexts, i.e., filiation by blood and filiation by assisted procreation, the legislator's framing of positive law will have integrated the children's overarching best interests in a just and appropriate manner. However, contemporary social realities of the family — which increasingly include the societal acceptance of surrogacy arrangements — challenge the taxonomy of filiation and its categories set out in the *Civil Code*. Depending on the circumstances, the same set of facts could give rise to claims of filiation by blood, by assisted procreation, or even by adoption. The persuasiveness and success of such claims will depend in large part on the relationships of the parties concerned with one another and with the child[60]. And yet, a court will be limited in the extent to which it can entertain arguments relating to best interests, as these pertain only in adoption contexts. All of this might be cogent in situations where the law's application yields a result that seems to align with the child's best interests and the centring of their dignity, as was arguably the case in *Adoption – 1445*. This may, however, strike practising and academic jurists alike as less equitable where outcomes that result from the *Code*'s strict application diverge from those that a best interests analysis would yield[61].

4 *In loco parentis*

A fourth and final context that merits underlining in this commentary departs to some extent from the strict parameters of filiation to explore the legal status of those who have quasi-parental roles, rights and responsibilities. *In loco parentis* is a legal doctrine with limited application in civil law. In the majority of instances, a person *in loco parentis* has

59. I must qualify this with the possible exception brought on by *Bill 2* (*supra*, note 8), which recognizes trans parents (and thus trans "parentage") in the rewriting of CCQ, art. 111 and 115. This, however, has yet to be judicially tested.

60. See as mentioned, *Droit de la famille – 22865*, *supra*, note 16.

61. See Andréanne Malacket, "Maternité de substitution : quelle filiation pour l'enfant à naître ?", (2015) 117 *R du N* 229, pp. 236–239. See also M. Giroux, *supra*, note 35 ; and A.-M. Savard, *supra*, note 35 ; L. Langevin, *supra*, note 46 ; R. Tremblay, *supra*, note 46 ; B. Moore, *supra*, note 46 ; and S. Carsley, *supra*, note 45.

assumed a parental role toward the child. The *in loco parentis* doctrine is frequently applied to relationships between stepparents and stepchildren. Once a partner's relationship with the other partner's child is established and legally recognized as *in loco parentis*, their roles and responsibilities are comparable to those of other parents, including the right to apply for custody or parenting time and the payment of child support. In *Chartier v. Chartier*[62], the Supreme Court of Canada established a broad application of the doctrine. However, in *V.A. c. S.F.*[63], the Court of Appeal of Quebec limited the scope of Chartier to a narrow reading of section 2(2) of the *Divorce Act*[64]. In other words, in most cases, the parent *in loco parentis* must be married to the child's parent in order for a support obligation to be imposed on the spouse's child[65]. Additionally, the evidence required to establish that the appellant's intent to act *in loco parentis* must be clear, unequivocal and unambiguous[66].

Quebec courts have thus traditionally adopted an austere approach to the *in loco parentis* doctrine, construing and applying it narrowly. This approach is eminently reasonable given that the doctrine's roots are foreign to Quebec private law. As the *Civil Code* makes no mention of *in loco parentis*, family law judges in the province have been conventionally loath to invoke the doctrine to extend parent-like rights and obligations to a child's stepparents. The doctrine's application is restricted to contexts where parental rights are determined by the *Divorce Act*. As seen in *V.A. c. S.F.*, however, judges have generally remained steadfast to the principle that the *in loco parentis* doctrine is restrictively interpreted and sparingly applied in Quebec :

> [translation] Our *Civil Code* provides for this obligation between spouses and first-degree relatives, i.e., between parents and children, but has never incorporated the concept of '*in loco parentis*' into the Code as such.

62. *Chartier* v. *Chartier*, [1999] 1 SCR 242.
63. *V.A.* c. *S.F.*, 2000 CanLII 11374 (QC AC).
64. *Divorce Act*, R.S.C. 1985, c. 3, s. 2(2).
65. It is important to note that there might be a slim opening for more application for this doctrine, as in an *obiter dictum* penned by Dalphond J.A., in *Droit de la famille – 072895*, 2007 QCCA 1640, the Quebec Court of Appeal suggested that the concept could also apply to a parent *in loco parentis* in a de facto union. In *Droit de la famille – 102247*, 2010 QCCA 1561, the Quebec Court of Appeal, authored by Vézina J., granted shared custody of a child to the child's mother's spouse, with whom the child had resided since birth. In doing so, the Court referred, among other things, to the concept of *in loco parentis*.
66. See *Droit de la famille – 102247*, *supra,* note 65, para. 22.

> Divorce, on the other hand, falls within the exclusive legislative competence of the Federal Parliament. It is only as an ancillary measure in divorce matters that the federal government exercises ancillary jurisdiction in matters of support. Section 2(2) of the *Divorce Act* formally introduces the concept of "*in loco parentis*". It is therefore, in matters of support, and this is said with due regard for the contrary opinion, an exceptional measure, which adds to civil law and which, in my opinion, must be interpreted like any another exception, that is to say restrictively and not liberally[67].

A constrained application of the *in loco parentis* doctrine in Quebec family law makes sense given our province's positive law framework. Yet this conventional approach can — as in other scenarios examined in this paper — undermine the best interests of the child who is at the heart of a dispute. In many cases where *in loco parentis* claims are filed — whether by or against a child's stepparent — the application of the doctrine would serve the child's best interests. This could, for instance, allow the court to grant to a stepparent who has cared for the child parenting time with that child. It could also give effect to alimentary obligations on the part of the stepparent that would serve the child's needs. In light of this, one could easily imagine that interpreting the *in loco parentis* doctrine in a manner that prioritizes a stepparent's intent could be at odds with the best interests principle.

Furthermore, Quebec's approach draws a sharp distinction — as it does in other domains of family law — between the rights of children whose parents are married versus those whose parents live as unmarried, *de facto* spouses[68]. The doctrine applies only in cases where a child's parent and stepparent married, and later divorced. Outside of such contexts, there appears to be minimal juridical foundation for relying on *in loco parentis* to

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67. See *V.A.* c. *S.F.*, *supra*, note 63, par. 13 and 14, (our translation of: "Notre Code civil prévoit cette obligation entre époux et parents au premier degré, donc entre parents et enfants, mais n'a jamais incorporé au Code, comme tel, le concept « *in loco parentis* ». Le divorce, de son côté, relève de la compétence législative exclusive du Parlement fédéral. Ce n'est qu'à titre de mesure accessoire en matière de divorce que le pouvoir fédéral exerce une compétence accessoire en matière alimentaire. L'article 2(2) de la *Loi sur le divorce* introduit formellement le concept de *in loco parentis*. Il s'agit donc, en matière alimentaire, et ceci dit avec égards pour l'opinion contraire, d'une mesure exceptionnelle, qui ajoute au droit civil, et qui, à mon avis, doit être interprétée comme toute exception, c'est-à-dire de façon restrictive et non de façon libérale.")

68. The justice outcomes for children whose parents are married versus *de facto* spouses has been the subject of extensive discussion and debate in Quebec, that has not as of yet resulted in a legislative amendment. See *Quebec (Attorney General)* v. *A*, 2013 SCC 5. See also, Robert LECKEY, "Cohabitation Law in Quebec: Confusing, Incoherent, and Unjust" (forthcoming in 2022, date written: March 8, 2022) *Hous J Intl L*; Roy Report, *supra*, note 26.

extend rights and obligations to the stepparent-stepchild relationship. The only exception is now the passage of Bill 2, which amended article 611, an article that previously outlined grandparents' special rights and provided a presumption of their relationship. The amended article now also permits such relationships to be maintained under the same conditions with the ex-spouse of the child's father, mother or other parent, if this person is significant to the child. This previous distinction was arguably disconnected with a cardinal principle in the law of filiation set out in article 522 and the allowances set out in article 114 of the *Civil Code of Quebec*, to the effect that "[a]ll children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth[69]". This being said, it is worth noting Justice Dalphond's concurring opinion in *Droit de la famille—072895*[70], where he appears to extend the *in loco parentis* doctrine liberally, drawing on Quebec's *Charter of Human Rights and Freedoms* to rationalize his findings:

> [translation] [T]he girls are entitled to the attention of the appellant in the context of shared custody. I would add that section 39 of the Charter seems to me to guarantee them the right to support from the appellant as well. The combination of sections 10 and 39 of the Charter leads me to conclude that the concept of 'in loco parentis' applies to both married and unmarried couples where the spouse of the child's parent is in effect the second parent of the child[71].

Dalphond J.A.'s reasoning here may open the door to the possibility of *in loco parentis* claims beyond divorce litigation, although it is crucial to note that *Droit de la famille—072895* was a judgment focused on the custody/parenting time interests of a woman who played an active coparenting role. This is distinct from the prototype *in loco parentis* case in family law, which involves claims for child support against unwitting defendants.

It is against this juridical backdrop that the Superior Court of Quebec heard *Droit de la famille—153071*[72]. The litigation involved a typical *in loco parentis* case in family law: a man who played a "father-like" role

69. CCQ, article 522.
70. See *Droit de la famille – 072895, supra*, note 21.
71. See *Id*, para. 87 (emphasis is ours and our translation from the following: "Les filles ont droit à l'attention de l'appelante dans le cadre d'une garde partagée. J'ajoute que l'article 39 de la *Charte* me semble leur garantir aussi le droit à des aliments de la part de l'appelante. La combinaison des articles 10 et 39 de la *Charte* m'amène à conclure que la notion «*in loco parentis*» s'applique tant aux couples mariés que non mariés lorsque le conjoint du parent de l'enfant tient dans les faits lieu de deuxième parent pour l'enfant".)
72. *Droit de la famille – 153071,* 2015 QCCS 5688.

in the life of his wife's child from a prior relationship was the subject of a claim for child support at the time of the divorce. For reasons already discussed, an orthodox approach to *in loco parentis* would have prompted equivocation or hesitancy with respect to extending alimentary obligations to the defendant. However, Granosik J.'s decision departs from convention and offers an analysis that accentuates the best interests principle, ascribing to it as much weight as a stepparent's intent, the latter usually considered of predominant importance in such cases. He thus finds that parental intent is just one of the factors to be considered in such contexts, and, cites *Chartier v. Chartier* to the effect that "[t]he interpretation that will best serve children is one that recognizes that when people act as parents toward them, the children can count on that relationship continuing and that these persons will continue to act as parents toward them[73]". Furthermore, Granosik J. widened the application of the doctrine to situations where the child's biological parent continued to play a role in the child's life, a factor that has typically been deemed as lending itself to a judicial finding that a stepparent would not have stood in a parent's place[74].

Ultimately, *Droit de la famille — 153071* provides a further example of a judicial analysis that strives to balance a child's best interests with positive law, even where the latter would appear to limit a judge's discretion to consider the former. While dealing with an issue that falls outside of the formal filiation context[75], the judgment sheds light on the challenge for the courts to render decisions in cases where applicable legal authorities would direct outcomes regarding parental status, rights and obligations that seem contrary to a child's best interests. In such cases, the courts might attempt to reconcile these apparently competing pressures. In this case, Granosik J. does so by extending the *in loco parentis* doctrine to a set of facts that were not evidently conducive to the doctrine's application. The outcome is palatable from the perspective of the child's dignity and interests, aiming to sustain — even if only financially — a relationship that existed between the child and stepparent prior to the divorce. It could thus

73. See *Chartier* v. *Chartier*, *supra*, note 62, para. 32.

74. Other factors outlined by the court in *Chartier v. Chartier* (*supra*, note 62), include the child's integration into extended family, financial provision, community representations regarding responsibility for the child, and the nature of the child's relationship with the legal parent; Bastarache J. in *Chartier* notes that for all intents and purposes the stepdad was the stepchild's father, her biological dad having all but disappeared from her life since a very young age.

75. Though now, the legislature passed *Bill 2* (*supra*, note 8), and CCQ, article 611, now permits, under certain conditions, relationships to be maintained with the ex-spouse of the child's father, mother, or other parent, if this person is significant to the child.

be aligned with best interests as an overriding principle. Just the same, it could be viewed as misaligned with the strict tenets of Quebec positive law, recognizing that although civil law jurisprudence on the *in loco parentis* doctrine has evolved since *V.A.* c. *S.F.*, the legislative stance on the issue in question has not changed.

Conclusion

This essay has drawn on four judicial decisions rendered by Quebec courts to explore intersections between the law of filiation in Quebec and the principle of "the child's best interests" in family law. It draws its inspiration from Dominique Goubau's scholarly commitment to centring the dignity of vulnerable actors in family law systems and disputes. The analysis herein has sought to consider when and how the positive law and the best interests principle could be said to conflict, and whether and how such conflict might be conceptually reconciled from a judicial standpoint.

As shown throughout this essay, a best interests analysis — while ostensibly primordial to family law cases — is not a magic wand that a court can wave to design any outcome that it deems suitable in family law litigation involving children. For example, a best interests analysis does not permit a court to extend the positive law of filiation, even when the application of the latter seems to yield an incorrect or inappropriate outcome. Framed in a juridically transsystemic way, best interests in civil law cannot be deployed to obtain equitable relief. Hence, even if it seems that a child's dignity would be best served if the three or more people functioning as that child's parents were formally recognized as such, Quebec law is clear that *parenté* is a status reserved to a maximum of two people. Likewise, a stepchild who stands to benefit from the extension of the *in loco parentis* doctrine to his or her case will find a court loath to apply that doctrine based on best interests alone, as the court will also look for evidence of a stepparent's intentions. And an intending parent who contracts for surrogacy might rely on a best interests claim to seek recognition of their filiation only where the conditions for special consent adoption are met[76]. Beyond such parameters, filiation in

76. See CCQ, article 555. Stepparents and relatives are permitted to adopt with "special consent" under this provision. Typically, under the "general adoption" system, birth parents have no say in who adopts their children, and the adoption completely severs their parental ties. A birth parent is permitted to maintain their parental relationship while their spouse adopts the child under this "special permission" clause. When an intended father is listed on the birth certificate, the parties must file for a special

surrogacy contexts has not been recognized based on the best interests of the child[77].

Moreover, even when applicable to matters of filiation, the best interests principle will not necessarily further justice outcomes. Notably, best interests analyses have historically been central to judicial decisions over decades in the country. For example, they have been used to justify the removal of Indigenous children from their communities and their subsequent placement in and adoption by settler families. Viewed through western social, historic and legal frames, such decisions might be understandable when considered on an individual basis. Yet a broader, relational perspective would examine how these judgments at once connect to and result from colonial policies that, over generations, targeted the removal and assimilation of Indigenous children. Such an analysis forces us to confront incredibly difficult questions about the deployment of the best interests principle in family law within this historical context, and its nefarious consequences[78].

There is no doubt that Quebec's family law jurists and scholars have much work left to do as we continue to forge ahead in exploring the opportunities and challenges presented by the notion of the child's

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consent adoption to allow the surrogate to transfer her parental rights to the intended father's spouse. See also, S. Carsley Carsley, *supra*, note 45, pp. 130–132, which provides an in-depth description of the full process.

77. See *Adoption – 1873*, 2018 QCCQ 1693, para. 23. The court concluded that the public order regime established by the legislature cannot be disregarded in the interest of the child. Ms. C, the surrogate in this case, did not sign a special consent to the adoption, as required by the *Civil Code of Québec*. Because the intended parents owed her money, the American surrogate refused to consent to the adoption once more, under the requirements set out by CCQ, article 555. The parties' contract was recognized as valid and enforceable by the Chancery Court of Nashville in Tennessee. However, according to article 543 CCQ, adoption can take place only if it is in the best interests of the child and under the conditions specified by article 555 CCQ, which was the case here. As a result, the adoption was annulled. See also, *Droit de la famille – 212386*, 2021 QCCS 5233, para. 7-12. In this more recent case, the court refused to allow for a special consent adoption because the intended mother and intended father were unmarried and had not cohabited for 3 years. Though it is important to note that the court was willing, however, to provide the intended mother some rights, even if she could not establish a bond of filiation with the child, on the basis that this would be in the best interests of the child.

78. There have been some efforts to rectify some of these injustices. Specifically, in the Quebec context, the CCQ was amended to permit both customary adoption and adoption with symbolic recognition of original parentage. Under CCQ, article 543.1, conditions of adoption based on any Quebec Indigenous custom that the Quebec government deems consistent with the child's best interests, respect for the child's rights, and the consent of the parties involved may be substituted for legal conditions.

best interests, particularly in filiation contexts. Yet the legions of students and colleagues who have been trained by and/or have collaborated with Dominique Goubau are up to this task. We have benefited from the opportunity to learn from a model of intellectual curiosity, perseverance, humility and excellence, from someone whose work has greatly enhanced outcomes for families and their most vulnerable members throughout Quebec society. For this, we are most grateful.