Report of the Working Group on Customary Adoption in Aboriginal communities

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April 16, 2012

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the Ministère de la Justice
the Ministère de la Santé et des Services sociaux
the Association des centres jeunesse du Québec
the Assembly of First Nations of Quebec and Labrador
the First Nations of Quebec and Labrador Health and Social Services Commission
the Makivik Corporation
the Nunavik Regional Board of Health and Social Services
the Quebec Native Women association
the Grand Council of the Crees (Eeyou Istchee) - Cree Regional Authority
the Cree Board of Health and Social Services of James Bay

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A WORD FROM THE CHAIR

Chairing a working group made up of government and Aboriginal representatives poses a daunting but exciting challenge, as does holding discussions on customary adoption, an institution that has significant family and community dimensions for First Nations and Inuit.

As reflected in this report, our work has met with a measure of success. With regards to the relatively vibrant institution of Aborginal customary adoption, our main challenge was to find an approach that would offer an additional measure of legal certainty to interested persons wishing to benefit from it. Concretely, we had to ensure that the best interests of children was of paramount concern while avoiding these children and their parents being disadvantaged because the family ties and the relationships formed according to their customs are not generally recognized in Québec legislation.

The Working Group members demonstrated a high level of collaboration and a clear commitment to fulfilling the group's mandate, which was not to negotiate the practice of customary adoption but rather to document and analyze it and submit, to the extent possible, a concrete joint solution that meets the needs of Aboriginal people and takes the legal and political issues into account. We believe that we succeeded in identifying measures that would allow these objectives to be met by providing in Québec legislation for effects of Aboriginal customary adoption where the filiation of an adopted child is changed.

Moreover, given that some characteristics of customary adoption differ from one Aboriginal community to the next, the measures proposed had to yield a flexible mechanism for recognizing legal effects of this practice. The solution had to allow the creation of a "link" or "bridge" between this Aboriginal reality and that set out in Québec legislation, particularly in the *Civil Code of Québec.*

As detailed in our conclusions and recommendations, we were able to reach a certain consensus over the course of our work. However, our results are only binding on Working Group members and solely for the purposes of their work within the group. It should also be noted that the report, documents, opinions and recommendations have all been provided without prejudice and shall not prevent any individual, community, Nation or government from making any other claim or assertion in any other context. The Working Group members are in agreement with this statement.

Lastly, the principal documents prepared during our work as well as some of the background documents of general interest submitted by the members have been collected together in digital format and appended to this report.

In closing, the Working Group members would like to thank Me Anne Fournier for her invaluable help in preparing background documents necessary for the carrying out of our mandate, for laying the groundwork for parts I and II of this report, and for her highly relevant input during our work. We would also like to thank the interpreters Guy Demers and Steven Kaal, without whom our discussions would not have been as effective, as well as Annick Laterreur and Mélissa Faucher, for their revision and formatting of the report and attached documents.

Jacques Prégent
Chair of the Working Group
on Customary Adoption in Aboriginal Communities

INTRODUCTION

Few Quebecers have ever heard of Aboriginal customary adoption. It is a topic that receives little media attention, despite its existence in fact and in Aboriginal customary law and that it is practised among Aboriginal families. That said, its occurrence ranges from sporadic in some Nations and communities to frequent in others. Its scope is not limited to Québec insofar as a customary adoption by an Aboriginal community or Nation sometimes extends across borders. Although the approaches, conditions and effects of customary adoption vary from one Nation to the next, certain fundamental elements remain the same. Moreover, this practice of customary adoption among Aboriginal communities distinguishes them from the rest of Québec society and its presence within these Nations is in keeping with their distinctive forms of family and social organization.

The Working Group never lost sight of these findings during its work. Once these findings were made and the Aboriginal reality documented, the challenge was to determine "how" to unequivocally recognize the effects of customary adoption in Québec legislation.

A. Background of the Working Group's Mandate

The Working Group was created following a report produced by the Working Group on Adoption in Québec which was submitted to the government and made public in spring 2007. In its report titled "*Pour une adoption québécoise à la mesure de chaque enfant*", the Working Group noted that statutory adoption rules, which revolved around secrecy and severing the bonds of filiation, no longer met the needs of Québec children or families. It proposed a number of legislative amendments to offer them more options. However, the Working Group refrained from making any proposals regarding Aboriginal customary adoption, to which it devoted only a few pages, and instead recommended that a working group be created to study this matter. As we shall see, the willingness to examine the relevance of recognizing effects of customary adoption within and for the purposes of Québec legislation is not something new.

The Working Group on Customary Adoption was created in March 2008 following discussions with Aboriginal authorities, including the Assembly of the First Nations of Quebec and Labrador (AFNQL), Quebec Native Women Inc. (QNW), the Grand Council of the Crees (Eeyou Istchee) and the Cree Regional Authority (GCC(EI)-CRA), as well as with Makivik Corporation (Makivik).

Chaired by a representative of the ministère de la Justice du Québec (MJQ), the Working Group consisted of 10 representatives: 2 from the MJQ, 2 from the ministère de la Santé et des Services sociaux (MSSS) and 6 from the Aboriginal *milieu*. The latter were represented as follows: 3 from the First Nations, including 2 appointed by the AFNQL and 1 by the Cree Nation, 1 from QNW and 2 from the Inuit Nation, appointed by Makivik and the Nunavik Regional Board of Health and Social Services (NRBHSS). The list of members is provided in Appendix 1.

As provided in its mandate and before the Working Group began its work of analysis and reflection, consultations were held by the Aboriginal communities to document the state of customary adoption in their respective communities. Most of the consultations were held in 2009 and 2010. The last Aboriginal consultation report was submitted to the Working Group in June 2011. The most active period of the Group's collaborative work was from September 2011 to March 2012.

B. The Working Group's Mandate

The Working Group's initial mandate (see Appendix 2) was to "analyze customary adoption within the Aboriginal communities of Québec and to propose the conditions, effects and means that can be put in place in the event that customary adoption practices are recognized in these communities". However, during the course of their work, the members realized the importance of paying special attention to key legal aspects, especially regarding the constitutional division of legislative powers and the main principles pertaining to Aboriginal and treaty rights and to the interest of the child and the protection of children's rights.

Consequently, the objectives of the Working Group leading up to this report became as follows:

- Contextualize the results of the work carried out to document the foundations, nature, characteristics and objectives of customary adoption in Québec, bearing in mind that these descriptions do not purport to freeze or circumscribe custom;
- Situate customary adoption in a global context by way of a sociological and historical analysis as well as in relation to statutory law, by briefly describing the constitutional aspect of this question, and in order to fuel the reflection, describing the nature of this institution among other Aboriginal peoples and the trends observed in the recognition of customary adoption in legislation in Canada and other countries;
- Recommend, in light of the observations and discussions, the best approach, when requested, to the recognition of effects of Aboriginal customary adoption within and for the purposes of Québec legislation, while striving to respect the different characteristics of customary adoption in each community or Nation and taking into consideration the inherent legal challenges of the Canadian Constitution.

C. The Working Group's report

Motivated by the Québec government's commitment to begin a respectful dialogue and its openness to incorporating a relatively innovative form of recognition of effects of Aboriginal customary adoption into its laws, the members of the Working Group took up the challenge with enthusiasm.

Broken down into five parts, this report, which could be groundbreaking in terms of respect for legal pluralism, is the culmination of the Working Group's efforts.

Part I places certain fundamental aspects of customary adoption into context, describing the basic cultural differences in Aboriginal society, families and in some respects, Aboriginal law, in relation to the rest of society, differences that have bearing

on the issue of customary adoption. It delineates the elements that distinguish Aboriginal customary adoption from statutory adoption.

Part II briefly presents the constitutional imperatives required to appreciate and understand the Working Group's approach and orientations. It outlines the situation elsewhere in Canada and in other countries, and explains what steps have and have not been taken for legislative recognition of effects of Aboriginal customary adoption.

Part III presents the findings and views of the First Nations and Inuit following the consultations in their respective communities and discusses the values and issues surrounding the institution of Aboriginal adoption.

Part IV summarizes the findings and affirmations made during the Group discussions within the legal framework and fundamental concepts raised. Aside from the question of the place of customary adoption in Québec legislation, certain issues also put into perspective the place of customary adoption within the youth protection system discussed in this part.

The fifth and last part, which precedes the conclusions and recommendations, proposes a solution for giving customary adoption an unequivocal place in Québec legislation, using a relatively innovative approach that promises a certain alignment between customary and statutory law while respecting the concerns of the parties involved.

PART I

SOCIO-ANTHROPOLOGICAL AND LEGAL PERSPECTIVES[1]

1.1 Different ways of viewing the world, family and society

Every society has its own way of viewing the world. It builds and organizes relationships between individuals based on its own history, desires and ambitions.

In the case of Québec's Aboriginal peoples, certain colonial and post-colonial events disrupted their family and social organization. Although the ramifications of these events persist to this day, customary adoption still exists and forms, among other things, an integral part of Aboriginal claims for greater autonomy in matters involving families and children. It is in this context that the socio-anthropological and legal aspects must be analyzed.

1.1.1 The notion of kinship and the place of children in society

Anthropological studies on kinship show that there is no universal "truth" in this area because a child's place in a family, community or society depends on thoughts and beliefs that lie at the heart of the society concerned. Since every society has its own notion of kinship, it also has its own notion of family life, filiation, education, childcare, child rearing and the interest of the child. For this reason, the Working Group notes the following with regard to Aboriginal societies in Québec:

> Customary adoption takes place in the interest of the child and respecting the child's needs, while taking into account that in the Aboriginal context, the notion of interest includes the interest of the family, of the community and of the Nation, and particularly emphasizes the protection of identity, culture, traditional activities and language.[2]

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[1] This part of our report is limited to certain socio-anthropological and legal perspectives. For example, we do not discuss Canadian sources of law or the place of Aboriginal and treaty rights in positive law. These are briefly discussed in section 2.1. Therefore, by this analysis, we do not mean to suggest that these issues are determined simply by the choices made by different constituents of Québec or Canadian society.

[2] See the 7th affirmation of Part IV.

This appears to accord with the comments made by the Committee on the Rights of the Child in 2009:

> When State authorities including legislative bodies seek to assess the best interests of an indigenous child, they should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group.[3]

In determining the interest of an Aboriginal child, the Committee notes that one must not only take the child's best interest into account but also his cultural and collective rights, which are not in opposition to one another but complementary:

> The Committee considers there may be a distinction between the best interests of the individual child, and the best interests of children as a group. In decisions regarding one individual child, typically a court decision or an administrative decision, it is the best interests of the specific child that is the primary concern. However, considering the collective cultural rights of the child is part of determining the child's best interests.[4]

In mainstream Québec society, as in other industrial societies, the nuclear family is of paramount importance. This means that the ties between children and their natural parents take precedence over any other ties they may have with their immediate or extended family as well as with other people in their environment. This is a fundamental difference between Western and other societies.[5]

The report of the Working Group on Adoption in Québec states that the way children are viewed in Western society can be likened to "privatization of the child's place and value" and children have gradually become "affective capital".[6] Many other societies, including Aboriginal societies, consider that children are a precious gift and

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[3] United Nations. Committee on the Rights of the Child. *General Comment No. 11 (2009): Indigenous children and their rights under the Convention*, 50th sess., Doc. CRC/C/GC/11. January 2009, p. 7, par. 31.

[4] *Ibid.*, p. 7, par. 32.

[5] Lévi-Strauss, Claude. "The Family." In *Man*, *Culture and Society*, by Harry L. Shapiro. New-York: Oxford University Press, 1956.

[6] Québec. Ministère de la Justice and ministère de la Santé et des Services sociaux. Groupe de travail sur le régime québécois de l'adoption (free translation: Working Group on Adoption in Québec). *Pour une adoption québécoise à la mesure de chaque enfant,* under the presidence of Carmen Lavallée. Québec, March 2007, pp. 104-105.

that the responsibility to accompany them to maturity is one that falls on everyone. In this regard, the report cites a passage from the Royal Commission on Aboriginal Peoples (RCAP) that underscores the special place children hold in Aboriginal cultures:

> Children hold a special place in Aboriginal cultures. According to tradition, they are gifts from the spirit world and have to be treated very gently lest they become disillusioned with this world and return to a more congenial place. They must be protected from harm because there are spirits that would wish to entice them back to that other realm. They bring a purity of vision to the world that can teach their elders. They carry within them the gifts that manifest themselves as they become teachers, mothers, hunters, councillors, artisans and visionaries. They renew the strength of the family, clan and village and make the elders young again with their joyful presence.
>
> Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. (*Report of the Royal Commission on Aboriginal Peoples*, 1996, vol. 3, ch. 2, p. 21).[7]

However, State authorities develop their policies based on their own worldview and, in the areas of child protection, education and social services, this has sometimes had undesirable consequences for Canada's Aboriginal peoples. The next subsection will show how this has led Aboriginal peoples to demand greater autonomy over adoption and child services, with customary adoption being central to these demands.

1.1.2 Changes to Aboriginal family and societal structures

During its work, the Working Group on Customary Adoption had numerous discussions on how past events have altered the family life of Québec's Aboriginal peoples, including for example, the placement of children in residential schools (also known as "boarding schools"), the "Sixties Scoop" of Aboriginal children for placement in non-Aboriginal adoptive homes and the application of the *Youth Protection Act.*

[7] *Ibid.*, p. 104.

In the first case, the federal government has acknowledged that it was an assimilationist policy, which consisted in the forcible removal of children from their families, and that it has had a multi-generational impact.[8] Overall, the various policies of colonization, assimilation and expropriation have had a devastating effect on Aboriginal communities across the country, especially in terms of family ties;[9] parents found themselves without school-aged children for the better part of the year, and the latter were repeatedly deprived of their parents, families, language and culture through their integration into the residential schools. The repercussions are still being felt today in the form of family breakdowns, loss of identity and economic difficulties in Aboriginal societies.

In Québec, not long after the residential school era, the first *Youth Protection Act*[10] (YPA) came into force, in 1979, and the Civil Code was amended, in 1982. Both contained provisions on adoption and together strengthened the State's power and its spirit of protectiveness regarding children. Among other things, they abolished private adoptions and entrusted the Director of Youth Protection (DYP) with the responsibility of receiving the general consents required for adoption or of submitting applications for a declaration of eligibility for adoption. In so doing, they ensured that the DYP would be involved in all adoption cases, except intrafamily adoptions by special consent. Moreover, they reflected the dual function of statutory adoption: to provide a method of filiation and a means of protection.

Since then, consultations held in Aboriginal communities have shown that Aboriginal peoples do not view statutory adoption as the preferred means of establishing bonds of filiation.

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[8] Canada. House of Commons. *Official report*, Apology to Former Students of Indian Residential Schools. House of Commons Debates (Hansard), June 11, 2008, by the Prime Minister of Canada.

[9] Tourigny, Marc, et al., "Les mauvais traitements envers les enfants autochtones signalés à la protection de la jeunesse du Québec : Comparaison interculturelle." *First Peoples Child & Family Services* 3, 3 (2007), p. 86.

[10] S.Q., 1977, c. 20.

Moreover, various sources indicate that Aboriginal children in Québec were and remain overrepresented at all stages of the protection process established by the YPA.[11] Under this Act, Aboriginal children also have a higher placement rate outside their family circle than any other group of children.

The overrepresentation of Aboriginal children in child protection services has also been documented elsewhere in Canada, particularly since the study by Patrick Johnston published in 1983.[12] This situation was discussed in the context of the work of the RCAP[13] and is consistently cited by researchers who have studied child protection interventions in Aboriginal families. Like Johnston, a number of people who testified before the RCAP commissioners saw a connection between the "current child protection problems and the repeated interventions of non-Aboriginal governments in the affairs of Aboriginal families," especially during the 1960s and 1970s.

The same connection was made by a contemporary pan-Canadian study which, however, excluded Québec. It found that Aboriginal children, more often than the other groups of children in the study, came from poor families living in difficult housing situations and whose parents themselves were mistreated in childhood and suffer from substance abuse problems.[14] According to authors Bennett and Blackstock:

> […] the forced application of provincial child welfare and protection services among Aboriginal families only exacerbated the devastating effects of colonization on Aboriginal peoples and that persist to this day, particularly on the psychosocial and socioeconomic levels. These social problems include

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[11] See subsection 3.2.3.1.

[12] Johnston, Patrick. *Native Children and the Child Welfare System*. Canadian Council on Social Development Series. Toronto: Canadian Council on Social Development in association with James Lorimer & Co, 1983.

[13] Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples, Vol. 3: Gathering Strength*. Ottawa: Department of Supply and Services Canada, 1996, chapter 2.2.

[14] "Les mauvais traitements envers les enfants autochtones signalés à la protection de la jeunesse du Québec : Comparaison interculturelle", *op. cit.*, note 9, p. 88. See also Blackstock, Cindy, et al. "Child Maltreatment Investigations Among Aboriginal and Non-Aboriginal Families in Canada." *Violence Against Women* 10, 8 (2004).

> poverty, domestic violence, child abuse, criminal behaviour and alcoholism.[15]
> (Free translation)

As for Québec, other authors suggest also that the repeated interventions of public authorities in the lives of Aboriginal children and families have resulted in social upheaval that has disrupted their values and traditional ways of life and affected their living conditions[16]. The *Commission des droits de la personne et des droits de la jeunesse* (CDPDJ) underscored, among other things, in a 2007 report on the Nunavik youth protection services, that:

> The Nunavik population have experienced a numerous of changes that have overturned their traditional lifestyle and triggered a series of social problems that have had serious consequences for some children. […] Government assistance designed to help the Inuit eventually destroyed their semi-nomadic lifestyle and led the population to settle in villages where their subsistence economy was no longer viable. […] The introduction of government-run social services has set aside the traditional methods of support for people experiencing difficulty, but the services have failed to adapt to Inuit culture and realities.[17]

The disruptive effects of State intervention, be it federal or provincial, have led Québec's Aboriginal peoples to demand greater autonomy over adoption and child services. Customary adoption is at the very centre of these demands.

For example, in the early 1980s, the leaders of the Cree communities denounced the difficulties faced by certain of their members due to the application of the YPA. They maintained that the role which had devolved to the State in adoption matters constituted an intrusion into the internal management of Aboriginal families in addition to challenging the application of Cree custom. A special consultation on customary adoption was then held with the Crees, resulting in a working document

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[15] "Les mauvais traitements envers les enfants autochtones signalés à la protection de la jeunesse du Québec : Comparaison interculturelle", *op. cit.*, note 9, p. 86.

[16] *Ibid.*, p. 85.

[17] Commission des droits de la personne et des droits de la jeunesse. *Investigation into child and youth protection services in Ungava Bay and Hudson Bay, Nunavik report, conclusions of the Investigation and recommendations.* April 2007, p. 5.

prepared in 1984[18] in the wake of this consultation whose purpose was to propose amendments to the YPA to the Québec legislator in order to respect and recognize customary adoption in that Act.[19] This document also revealed that the adoption of children according to the procedures of the statutory law did not resonate with Cree communities.[20] Other Aboriginal nations also raised the same issues, but there are few supporting documents in this regard.[21]

The desire expressed by a number of Québec's Aboriginal nations for greater autonomy over the delivery of social services prompted the *Association des Centres jeunesse du Québec* (ACJQ) (Quebec Association of Youth Centres) to study the possibility of the Aboriginal nations eventually taking over their own social services. This possibility was examined in 1985[22] and again in 1995.[23] In both cases, a recommendation was made that the Québec legislature amend its laws to take into

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[18] Cree Board of Health and Social Services of James Bay. *Memorandum - Proposed amendments to the adoption act,* by Abraham Bearskin, Director of Youth Protection. July 31, 1984. The letter was addressed to: All Band Chiefs.

[19] *Ibid.* Original text: "The present document proposes that youth protection act be modified in order that traditional adoption (Band Custom) be legalized."

[20] *Ibid.* We can read: "Past experience, as shown, that the adoption process, in force in the province of Québec since December 1982, is not adopted to the cree way of life and has been rejected. […] Finally, apart from the adoption steps prevailing in the province, which are not understood and or accepted in the cree communities, the legal procedures in an adoption process are in their essence refused by the communities."

[21] For the Inuit community, see the introduction to the report, which contains a retrospective of the documents associated with traditional adoption in Nunavik: Nunavik Regional Board of Health and Social Services. *Traditional Adoption in Nunavik*, by Monica Nashak. Summer 1996. See also Kativik Regional Board of Health and Social Services. *Working Group on Customary Adoption,* by Eli Weetaluktuk, Chairman of the Board. March 18, 1992; Québec. Ministère de la Santé et des Services sociaux. Direction générale de la coordination régionale. *Compte-rendu de la réunion du comité sur l'adoption coutumière Inuit*, held on June 15, 1992, Kuujjuaq and Québec. Ministère de la Santé et des Services sociaux. Direction générale de la coordination régionale. *Convocation et compte rendu de la réunion du comité sur l'adoption coutumière Inuit*, held on March 16, 1993, Québec. The committee met in 1992 and 1993, under the direction of the MSSS, with representatives of Makivik, the NRBHSS, the Registrar of Civil Status and the MJQ.

[22] Association des Centres de services sociaux du Québec. *Les nations autochtones et les services sociaux : vers une véritable autonomie,* Mémoire de l'Association des centres de services sociaux du Québec. October 1985.

[23] Quebec Association of Youth Centres. *Les services sociaux aux jeunes autochtones en difficulté et à leurs familles : Une nécessaire appropriation.* October 1995.

account Aboriginal customary adoption.[24] The Québec government, by way of the MSSS and the Secrétariat aux affaires autochtones, also recommended, in 1986 and in 1988, that "the Civil Code provisions on adoption be amended to recognize customary adoption".[25]

In 1995, the First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC), which had held a consultation with the First Nations concerning application of the YPA in their communities,[26] noted that the First Nations saw the DYP as belonging to "a foreign authority and intervened following a logic which was foreign to them".[27] As well, a brief submitted by the Atikamekw communities raised two particular problems: one concerning the notion of abandonment and the other, concerning adoption. In the first case, the Atikamekws maintained that "when parental responsibilities are shared or transferred",[28] it does not mean that the child has been abandoned within the meaning of the YPA and the Civil Code.[29] In the second, they stated that anyone who assumes parental responsibilities toward a child who is not his own should be involved in all proceedings concerning that child, including his adoption.[30]

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[24] *Les nations autochtones et les services sociaux : vers une véritable autonomie*, *op. cit.*, note 22, pp. 141 and 148; *Les services sociaux aux jeunes autochtones en difficulté et à leurs familles : Une nécessaire appropriation*, *ibid.*, pp. 17 and 25.

[25] Québec. Ministère de la Santé et des Services sociaux. *Les services sociaux dispensés aux autochtones : Orientations du ministère de la Santé et des Services sociaux.* Québec, 1986, p. 39; Québec. Ministère du Conseil exécutif. Secrétariat aux affaires autochtones. *Les fondements de la politique du Gouvernement du Québec en matière autochtone.* Publications du Québec, 1988, p. 34.

[26] First Nations of Quebec and Labrador Health and Social Services Commission. *Telling it like it is, Consultation of the Contents and Application of the Youth Protection and Young Offenders Acts in Communities of the First Nations,* Report and recommendations, 1998.

[27] *Ibid.*, p. 35.

[28] *Ibid.*, p. 71.

[29] Under section 38 of the *Youth Protection Act,* R.S.Q., c. P-34.1, the security or development of a child is considered to be in danger if the child is abandoned, subsection 559 (2) of the *Civil Code of Québec* states that a child whose care, maintenance or education has not in fact been taken in hand by his mother, father or tutor for at least six months is judicially declared eligible for public adoption.

[30] *Telling it like it is, Consultation of the Contents and Application of the Youth Protection and Young Offenders Acts in Communities of the First Nations*, *op. cit.*, note 26, p. 71.

Lastly, the "new" Civil Code of Québec,[31] which came into force in 1994, also had an especially significant impact on Nunavik Inuit by withdrawing authority for registering births from religious authorities and assigning it instead to the public officer in charge of registering acts of civil status, i.e. the Registrar of Civil Status[32] (RCS), who henceforth would be the sole authority permitted to issue birth certificates attesting to the original filiation or adoption of a child.

Consequently, religious authorities, who until then had agreed to record, without further formality, the name of the adoptive parents on baptism certificates in the case of Inuit customary adoption, could no longer do so. And so, in 1995 and in 1996, the Kativik Regional Government (KRG) and the NRBHSS adopted resolutions to implement another process to allow the RCS to issue birth certificates in accordance with customary adoptions.[33] The Nunavik authorities also lobbied the RCS to develop a simple administrative procedure to this effect.[34] In fact, an administrative arrangement, in effect since the mid-1990s, allows individuals to make a declaration of customary adoption, authenticated by representatives of their community. This declaration is then sent to the RCS, which, on the basis of this document, issues a new birth certificate. The doubt raised a few years ago by the Court of Québec as to the validity of this procedure in *M.Q. (In the matter of)*,[35] may, however, lead to a degree of legal uncertainty for Inuit families.

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[31] *Civil Code of Québec*, S.Q. 1991, c. 64 and *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57.

[32] C.C.Q., sec. 103-104. Sec. 152 of the C.C.Q. is an exception to this principle and authorizes a public servant appointed under any Act respecting Cree, Inuit and Naskapi native persons to perform certain duties of the Registrar of Civil Status.

[33] See the brief of Nunavik on the Draft Bill concerning adoption and parental authority: Makivik Corporation, and Nunavik Regional Board of Health and Social Services. *Comments concerning the Draft Bill to amend the Civil Code and other Legislative provisions as regards Adoption and Parental Authority*, comments presented to the Committee on Institutions, National Assembly of Québec. January 2010, pp. 5-6, and Part 3.1 of this report concerning the consultation held in Inuit communities.

[34] This led to the creation of the document titled *Declaration of Inuit Customary Adoption,* which is still used today. (Makivik Corporation. *Form G – Declaration of Inuit Customary Adoption Form.* Nunavik Enrolment Office.)

[35] *M. Q. (In the matter of),* [2005] R.J.Q. 2441 (C.Q.).

1.1.3 The resilience of Aboriginal customary adoption

In 1995, when the ACJQ examined why it was encountering difficulties in applying the YPA in Aboriginal communities, it concluded that it was due to the sociological and cultural imperatives of the distinctive Aboriginal culture:

> One of these obstacles is, of course, language, which is at the very heart of Aboriginal uniqueness. But there is also the general logic that governs the application of laws, which is incongruent with the sociological reality of Aboriginals and to the way they view and experience their social relationships.
> (Free translation)

The Association concluded that there was one common source of, and fundamental reason for, the obstacles encountered in applying the YPA in Aboriginal communities:

> The difference between the reality of Aboriginal communities and nations and that of Québec's and Canada's other citizens.[36]
> (Free translation)

Similarly, the Aboriginal preference for customary over statutory adoptions can be viewed as an expression of their distinct societies and cultures. Over time, this choice of Aboriginal societies became the expression of the resilience of customary adoption.

In Canada, extensive anthropological and sociological research on the issue of Inuit customary adoption attests to its resilience in the northern regions of Québec and Canada.[37] Although such research is less extensive with respect to First Nations,[38]

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[36] *Les nations autochtones et les services sociaux : vers une véritable autonomie*, *op. cit.*, note 22, pp. 8 and 21.

[37] De Aguayo, Anna. *Background paper on customary adoption*. In For seven generations/Pour sept générations, Royal Commission on Aboriginal Peoples Notes. Ottawa: Libraxus Inc., Research reports 80715 – 81235, 1997. January 31, 1995, where the author consider that customary adoption practices within the Inuit in Canada are largely well documented by the anthropologists. For examples: Guemple, Lee. *Inuit adoption*. Mercury Series. Ottawa: Canadian Museum of Civilization, 1979; Guemple, Lee, ed. *Alliance in Eskimo Society*. Proceedings of the American Ethnological Society, supplement. Seattle: University of Washington Press, 1971; Houde, Élizabeth. *L'éponymie et l'adoption dans la tradition inuit du Nunavik : Une mise en scène de l'altérité*. Doctoral's thesis. Québec: Université Laval, Faculty of Social Services, 2003;

there is no doubt as to the resilience of Aboriginal customary adoption across Canada.[39] For example, an article by Cindy L. Baldassi[40] on customary adoption is sufficiently documented to conclude as to its resilience throughout Canada. Of course, the modalities and intensity of customary adoption among Aboriginal peoples vary from one Nation to the next, but it nevertheless remains a contemporary expression of Aboriginal customary regimes in relation to children, which in the case of adoption, involves the child's immediate and extended family.

In Québec, reports recently produced by governmental groups and agencies also clearly attest to the resilience of internal Aboriginal legal regimes relating to adoption.[41] This is especially true in Nunavik, where 2003 statistics show that one child out of five is adopted and that in almost all cases this is through the customary adoption process.[42] The statutory adoption process was used only in a few situations

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Rousseau, Jérôme. *L'adoption chez les Esquimaux Tununermiut (Pond Inlet), Territoires du Nord-Ouest*. Québec: Université Laval, Centre of Northern Studies, 1970; Saladin D'Anglure, Bernard. “Des enfants nomades au pays des Inuit Iglulik.” *Anthropologie et Sociétés* 12, 2 (1988).

[38] A few examples of work done: Blondin, Denis. *Groupes domestiques, adoption et parrainage sur la Moyenne-Côte-Nord du Saint-Laurent*. Québec: Université Laval, Faculty of Social Sciences, 1975; Carriere, Jeanine, and Sandra Scarth. “Aboriginal Children: Maintaining connections in adoption.” In *Putting a human face on child welfare: Voices from the prairies*. Edited by Ivan Brown, Ferzana Chaze, Don Fuchs, Jean Lafrance, Sharon McKay and Shelley Thomas Prokop. Prairie Child Welfare Consortium / Centre of Excellence for Child Welfare, 2007; Carriere, Jeanine. “Promising practice for maintaing identities in First Nation adoption.” *First Peoples Child & Family Review* 3 (2007); Carriere, Jeanine. *Fostering a sense of Identity in Aboriginal Children*. Doctoral's thesis. University of Alberta, Families Studies, 2005.

[39] See the research report titled *Background Paper on Customary Adoption* by Anna De Aguayo for the Royal Commission on Aboriginal Peoples, *op. cit.,* note 37, where it is stated that “customary adoption is described as an institution profoundly entrenched in the way of life of Aboriginal communities in Canada”.

[40] Baldassi, Cindy L. “The Legal Status of Aboriginal Customary Adoption across Canada: Comparisons, Contrasts and Convergences.” *U. B. C. L. Rev.* 39 (2006).

[41] *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, p. 107, quoting a survey made by Makivik and the NRBHSS, 2007; Québec. Santé Québec and Mireille Jetté (dir). *A Health Profile of the Inuit: Report of the Santé Québec Health Survey Among the Inuit of Nunavik, 1992, Vol. 1.* Montréal: ministère de la Santé et des Services sociaux, 1994, p. 64; Pageau, Michel, Marc Ferland and Serge Déry. *Our Children – health status of children aged 0-5 years in Nunavik*. Kuujjuaq: Nunavik Regional Board of Health and Social Services, 2003, p. F-28; *Investigation into child and youth protection services in Ungava Bay and Hudson Bay, Nunavik report, conclusions of the Investigation and recommendations*, *op. cit.*, note 17.

[42] *Our Children – health status of children aged 0-5 years in Nunavik*, *ibid.*, p. F-28; Otis, Ghislain, et al. *Cultures juridiques et gouvernance dans l'espace francophone, Présentation générale d'une problématique*. Paris: Éditions des archives contemporaines, 2010, p. 18.

where the government had already intervened,[43] i.e. the child was under the custody of the DYP. The body of work produced by the Inuit on this topic in the last five years consistently shows that customary adoption has been widely practiced by their members since time immemorial.[44] As for the First Nations, the documents prepared by the QNW,[45] AFNQL and FNQLHSSC[46] as part of the work of the Working Group on Adoption in Québec also confirm the resilience of Aboriginal customary adoption in their communities.

Elsewhere in the world where there are Aboriginal peoples who still practice customary adoption, for instance, in the province of Queensland in Australia, New Zealand, New Caledonia and the United States, legislation and other documents on customary adoption illustrate its resilience, although the way it is viewed, the reasons it is used and its effects may all vary.

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43 *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, p. 107.

44 For example: *Comments concerning the Draft Bill to amend the Civil Code and other Legislative provisions as regards Adoption and Parental Authority*, *op. cit.*, note 33, p. 9; Makivik Corporation, and Nunavik Regional Board of Health and Social Services. *Discussion Paper prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Québec*. October 2010, p. 23. See also Quebec Native Women Inc., and Regroupement des centres d'amitié autochtones du Québec. *Joint presentation concerning the revision of the Youth Protection Act – Is the history of the Aboriginal residential schools in danger of repeating itself?*, presented to Ministère de la justice du Québec and Ministère de la Santé et des Services sociaux du Québec. July 2005; Assembly of First Nations of Quebec and Labrador, and First Nations of Quebec and Labrador Health and Social Services Commission. *Brief on Bill 125 – An Act to amend the Youth Protection Act and other legislative provisions – Final version*, presented to the Committee on Social Affairs. December, 2005; Grand Council of the Crees (Eeyou Istchee), and Cree Regional Authority. *Brief on Draft Bill to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, submitted to Committee on Institutions, National Assembly of Québec. January 2010; First Nations of Quebec and Labrador Health and Social Services Commission. *Draft Bill for the Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority,* comments and recommendations to the Minister of Justice. Wendake, May 2010.

45 Quebec Native Women Inc., and Regroupement des centres d'amitié autochtones du Québec. *Traditional and Custom Adoption in the First Nations,* presented to Working Group on the Québec Adoption System, Department of Justice – Department of Health and Social Services. Kahnawake, February 2007, p. 4.

46 Assembly of First Nations of Quebec and Labrador, and First Nations of Quebec and Labrador Health and Social Services Commission. [u. c.], presented to the Working Group on Adoption in Québec, by Anne Fournier. October 2006, pp. 11-12.

1.2 General characteristics of customary adoptions: a comparative approach

The reality denoted by "customary" or "traditional" adoption practiced in many places around the world by different Aboriginal peoples remains difficult to circumscribe. The definition, purpose, substantive and formal requirements and effects of customary adoption are not homogeneous in either domestic[47] or foreign[48] law. Still, this way of caring for and raising a child exists within certain boundaries that can be discerned. To this end, this section uses an integrated approach to present the similarities and differences between the Aboriginal and statutory forms of adoption.

1.2.1 Different ways of viewing adoption

The very concept of adoption and its symbolic function differ depending on the society in which it occurs. The overview of Aboriginal customary adoptions and statutory adoptions that is presented here emphasizes the particular characteristics of each, not in order to oppose one to the other, but simply to identify their respective characteristics, while at the same time noting the evolutive nature of the former.

In Québec, statutory adoption is both an institution of filiation[49] and of child protection.[50] In the first case, it gives the child a new bond of filiation while in the

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[47] See Fournier, Anne. *Overview of the current situation with regard to the Aboriginal Custom adoption in Canada, and particularly in Québec*. April 2009 and "The Legal Status of Aboriginal Customary Adoption across Canada: Comparisons, Contrasts and Convergences", *op. cit.*, note 40, p. 70.

[48] Fournier, Anne. *Adoption coutumière autochtone : Volet international*, document produced for the Working Group on Customary Adoption in Aboriginal communities. June 2010.

[49] Roy, Alain. *Droit de l'adoption – Adoption interne et internationale*. Bleue, 2nd ed. Montréal: Wilson & Lafleur, 2010, p. 1; Lavallée, Carmen. *L'enfant, ses familles et les institutions de l'adoption. Regards sur le droit français et le droit québécois*. Montréal: Wilson & Lafleur, 2005, pp. 1-10.

[50] Goubau, Dominique, and Françoise-Romaine Ouellette. "L'adoption et le difficile équilibre des droits et des intérêts : le cas du programme québécois de la « Banque mixte »," *McGill Law Journal* 51, 1 (2006); Goubau, Dominique, and Claire O'Neill. "L'adoption, l'Église et l'État : les origines tumultueuses d'une institution légale." In *L'évolution de la protection de l'enfance au Québec : des origines à nos jours*, by Renée Joyal. Québec: Presses de l'Université du Québec, 2000, p. 97, where the authors state that adoption is "an alternative to long-term placement". Along the same line with regard to the changing situation of adoption in Québec, see *Droit de*

second, it may consist of, as in other Western jurisdictions such as the United States and England,[51] one permanent life plan option that may be offered to children in care for whom a return to their families is no longer possible.

In contrast, Aboriginal customary adoption does not necessarily involve a process of filiation and even less so, a protective process for abandoned children.

When analyzed in non-Western societies, be they Aboriginal, African or Middle Eastern, for example, the institution of adoption can be part of a process that seeks to meet the needs of the child and give him what he needs until he reaches adulthood,[52] but it is not necessarily part of a filiation process.[53] These societies often allow and encourage the temporary or permanent transfer of children, which can be likened to giving a gift or to a mutual exchange.[54] But use of the terms "gift" or "exchange" in no way means that children are viewed as property that adults can haggle over as they see fit; this act must be placed in the cultural context of the society in which it takes place. The rhetoric of Western statutory systems seeks to remove such concepts as they are associated with property rather than individuals or children.[55] This contrast is a concrete manifestation of a certain degree of cultural relativism.

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l'adoption – Adoption interne et internationale, *ibid.*, pp. 11-14, which is similar to a child protection measure.

[51] *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, p. 18.

[52] Similar to a child protection measure.

[53] *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, pp. 103-105; Lallemand, Suzanne. *La circulation des enfants en société traditionnelle. Prêt, don, échange.* Connaissance des hommes. Paris: L'Harmatthan, 1993; Scotti, Daria-Michel. *D'un monde à l'autre? Quelques questions à propos d'adoption traditionnelle.* Genèvre, October 2008; Fonseca, Claudia. "Circulation d'enfants ou adoption : les enjeux internationaux de la filiation adoptive." *Droit et cultures* 38, 2 (1999); Fonseca, Claudia. "La circulation des enfants pauvres au Brésil : une pratique locale dans un monde globalisé." *Anthropologie et sociétés* 24, 3 (2000); Fine, Agnès. "Regard anthropologique et historique sur l'adoption. Des sociétés lointaines aux formes contemporaines." *Informations sociales* 2, 146 (2008); Dahoun, Zerdalia K. S. *Adoption et cultures : de la filiation à l'affiliation.* Santé, Sociétés et Cultures. Paris: L'Harmattan, 1996; Cadoret, Anne. *Parenté plurielle : Anthropologie du placement familial.* Nouvelles Études Anthropologiques. Paris: L'Harmattan, 1995. A work headed by Isabelle Leblic is especially englightening concerning the different ways of viewing kinship and adoption: Leblic, Isabelle, ed. *De l'adoption. Des pratiques de filiation différentes.* Anthropologie. France: Presses universitaires Blaise Pascal, 2004.

[54] *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, p. 103.

[55] Ouellette, Françoise-Romaine. "Adopter, c'est donner." In *De l'adoption. Des pratiques de filiation différentes*, *op. cit.*, note 53, p. 284.

For Aboriginal peoples, the sharing or transfer of parental responsibilities does not mean that the child is abandoned or that a change in filiation is necessarily being sought. And, even the “gifting” of a child does not mean abandonment, unlike situations that engage the YPA.[56] It is more akin to situations of intrafamily adoption by special consent;[57] although it must be pointed out that the concept of “family” in Aboriginal customary law and Aboriginal societies is not necessarily equivalent to its legal definition, especially within the meaning, for example, of the Civil Code. Generally, this concept of family is more all-encompassing in Aboriginal society, extending to include intracommunity[58] and intercommunity customary familial ties.

So, when the Europeans, and later anthropologists, witnessed this “totally natural”[59] way of taking care of a child, unfamiliar to them until then, they used the term “adoption” to describe their observations:[60]

> "Adoption" was the term used by anthropologists when trying to understand and define aspects of the child rearing practices of people from kinship-based societies. Although the term proved useful in helping westerners make sense of the transfer of children amongst extended family and close friends on a longterm basis, it has also become a stumbling block when

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[56] See the decision *Deer v. Okpik*, [1980] 4 C.N.L.R. 93 (Q.C.S.).

[57] C.C.Q., sec. 55. See also, in the report following the introduction and the references to this historical way of doing things in Aboriginal society: Québec. Ministère de la Santé et des Services sociaux. *Adoption in Quebec, Provincial Committee report in the context of the Plan of Action on Family Policy*. December 1991.

[58] See the research document of the Kativik Health and Social Services Council (now the NRBHSS). *Inuit Traditional Adoption Consultation Document,* undated, developed by Makivik, which analyzes the similarities between legal and customary adoption.

[59] See *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, p. 110, quoting the joint report of QNW and the RCAAQ, *L'adoption traditionnelle et/ou coutumière chez les autochtones*. (English version available: *Traditional and Custom Adoption in the First Nations*.)

[60] The writings of James Morrisson on French Polynesia in his *Journal* in 1792 attest to this: “When a man adopts a friend for his son […] the boy and his friends exchange names and are ever after looked as one of the family, the new friend becoming the adopted son of the boy’s father (Morrison, 1966: 156)”, in De Monléon, Jean-Vital. “L'adoption en Polynésie française et les métropolitains : de la stupefaction à la participation.” In *De l'adoption. Des pratiques de filiation différentes*, *op. cit.*, note 53, p. 49. In his thesis, Paul Z. Ban reports the statements made by an anthropologist during a symposium in Oceania: “From an anthropological point of view, Vern Carrol […] raises the difficulty of identifying a particular cultural practice in the Pacific as “adoption” when the act of labelling the practice defines it in terms of the Western notion of adoption”, in Ban, Paul Z. *The Application Of The Queensland Adoption Act 1964 - 1988 To The Traditional Adoption Practice of Torres Strait Islanders*. Master's thesis of Social Work. University of Melbourne, 1989, p. 28.

government services have tried to understand and regulate the practice.

Of course, use of the term "adoption" makes it easier for non-natives to understand because it evokes a concept familiar to them. However, it also tends to lead to an inaccurate understanding of what the expression "customary adoption" really means for Aboriginal peoples. In Western societies and cultures, adoption is an institution that usually has an impact on the child's filiation, either by way of additive filiation in the case of simple adoption or a new filiation in the case of full adoption.[61] Under these circumstances, ethnocentric bias invariably insinuates itself when trying to understand the underlying reality of customary adoption, a situation that may lead to misunderstandings.[62]

Special attention must thus be paid to the differences between the two, in order to avoid equating Aboriginal practices to domestic or international statutory adoptions.

Thus, the Adoption Council of Canada describes customary adoption as: "form of adoption specific to aboriginal peoples, taking place within the aboriginal community and recognizing traditional customs".[63] Other documents published on the subject,[64]

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[61] This is then a simple adoption and a full adoption; the latter can be either open or closed.

[62] Some legal experts submit that customary adoption is more akin to what civil and common law traditions designate as child custody or a child in care. See "The Legal Status of Aboriginal Customary Adoption across Canada: Comparisons, Contrasts and Convergences", *op. cit.*, note 40, p. 70. Québec author Alain Roy says that customary adoption "amounts to nothing more than delegation of parental authority": *Droit de l'adoption – Adoption interne et internationale*, *op. cit.,* note 49, p. 19. Note that Justice Oscar d'Amours uses the expressions *customary custody* and *Indian customary adoption* interchangeably: *Protection de la jeunesse – 760*, J.E. 2006-760 (C.Q.). See also Boulanger, François. *Enjeux et défis de l'adoption. Étude comparative et internationale*. Paris: Économica, 2001.

[63] Adoption Council of Canada, "Adoption glossary".

[64] *Brief on Draft Bill to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, *op. cit.*, note 44; Quebec Native Women Inc., *Complementary Research on Traditional and Customary Child Care Practices/Adoption within Aboriginal Communities in Quebec,* presented to Working Group on Customary Adoption in Aboriginal Communities. Kahnawake, August 2010; *Comments concerning the Draft Bill to amend the Civil Code and other Legislative provisions as regards Adoption and Parental Authority*, *op. cit.*, note 33; *Draft Bill for the Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, comments and recommendations to the Minister of Justice, *op. cit.*, note 44 and Secretariat of the Assembly of the First Nations of Quebec and Labrador. *Letter to the Honourable Kathleen Weil*, by Ghislain Picard, Chief of the AFNQL. February 17, 2010. Reports from

both of a legal nature[65] and from other disciplines,[66] define customary adoption as a way of taking care of and raising a child, by a person who is not the child's biological parent, in accordance with the practices and customs of the child's community. From this perspective, the child can be entrusted to adoptive parents at any time in his life, regardless of his age, although in Nunavik, this is usually done at birth.[67]

Following their consultations, the Aboriginal members or representatives of the Working Group defined customary adoption as follows:

For the Inuit:

> The practice of customary adoption has always been prevalent in the Nunavik Inuit society, and continues to date. Originating from reasons varying from family necessity, social regulation or spiritual considerations, the gifting of children occurred throughout the ages while the Inuit culture considered its youth as of paramount importance. The core values of caring, loving, gifting, historically surrounding any adoption process, are still of high significance for the elders and for the Inuit population in general.[68]

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government bodies or agencies: *Investigation into child and youth protection services in Ungava Bay and Hudson Bay, Nunavik report, conclusions of the Investigation and recommendations*, *op. cit.*, note 17; *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6; British Columbia. Ministry of Children and Family Development; Northwest Territories. Department of Health and Social Services, Protective Services, Adoption Services. *Custom Adoption – Adoption Commissioners and the Aboriginal Custom Adoption Recognition Act*.

[65] Lomax, Bill. "Hlugwit'y, Hluuxw'y – My Family, my Child: The Survival of Customary Adoption in British Columbia." *Canadian Journal of Family Law* 14, 2 (1997); House, Jeannie. "The Changing Face of Adoption: Challenge of Open and Custom Adoption." *Canadian Family Law Quarterly* 13 (1996); "The Legal Status of Aboriginal Customary Adoption across Canada: Comparisons, Contrasts and Convergences", *op. cit.*, note 40; Smith, Ashley. "Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Save or Lose our Children?" *Canadian Journal of Family Law*, 25, 2 (2009); Fiske, Jo-Anne. "From Customary Law to Oral Traditions: Discursive Formation of Plural Legalisms in Northern British Columbia, 1857 – 1993." *B. C. Studies* 115/116 (Autumn/Winter 1997/98).

[66] "Promising practice for maintaing identities in First Nation adoption", *op. cit.*, note 38; *Inuit adoption, op. cit.,* note 37; "Alliance in Eskimo Society", *op. cit.*, note 37; *L'éponymie et l'adoption dans la tradition inuit du Nunavik : Une mise en scène de l'altérité, op. cit.,* note 37; *L'adoption chez les Esquimaux Tununermiut (Pond Inlet), Territoires du Nord-Ouest*, *op. cit.,* note 37; "Des enfants nomades au pays des Inuit Iglulik", *op. cit.*, note 37.

[67] *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.,* note 6, p. 107; *Comments concerning the Draft Bill to amend the Civil Code and other Legislative provisions as regards Adoption and Parental Authority, op. cit.,* note 33, p. 10.

[68] *Discussion Paper prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Québec*, *op. cit.,* note 44, p. 5.

For the AFNQL and the FNQLHSSC:

> Adoption takes place naturally, without any legal procedure. The child keeps the same social identity and stays connected to his/her biological parents and origins. Custom adoption may be either on a temporary or long-term basis. Historically, this type of adoption was established to address several needs: passed down through tradition, this type of adoption was used to relieve parents of their child-rearing obligations, create a complex family network and broaden the network of partners for economic purposes.[69]

For the QNW and for the Regroupement des centres d'amitié autochtones du Québec (RCAAQ):

> It is a matter of a practice that takes place over time in which an Aboriginal parent confides their child to a person that they trust, so that they can take care of the child and ensure his/her education, while taking on parental responsibilities in a temporary fashion or for an indeterminate period, when the parent is unable to assume this function on his/her own. This way of doing things is commonly accepted in the Aboriginal communities and takes place in a natural fashion within the extended family (grandparents, uncles, aunts, cousins, etc.) in order to allow the parents to share their family responsibilities when they feel unable to fully assume these responsibilities. This practice however allows the parents to maintain a connection with the child.[70]

For the Crees of Eeyou Istchee, like most Aboriginal peoples:

> Customary adoption is by nature an open adoption, i.e. an adoption in which the biological parents still have access and contact to the child being raised and cared for by the adoptive parents. However, customary adoption has always been an informal consensual process between Cree families with the

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[69] Excerpt from *Draft Bill for the Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, comments and recommendations to the Minister of Justice, *op. cit.*, note 44, produced by the FNQLHSSC. It was taken up in First Nations of Quebec and Labrador Health and Social Services Commission. *Consultation report and Recommendations on Customary and/or Traditional Adoption Among the First Nations of Quebec*, presented to the Québec Working Group on Traditional Adoption. June 2011, p. 7.

[70] *Consultation report and Recommendations on Customary and/or Traditional Adoption Among the First Nations of Quebec*, *ibid.*, p. 7.

> support of the community and its entities, usually a verbal process with no written documentation.[71]

For a more general definition for Canada as a whole, Bill Lomax writes in the *Canadian Journal of Family Law:*

> Custom Adoption is the cultural process Aboriginal peoples have used from time immemorial to transfer rights and obligations of parenting a child to an adoptive parent. It is clear that customary adoption, by its nature, varies in requirements from nation to nation, but some fundamental factors are common to most, if not all nations.
> […]
> The major factors of customary adoption are then, first, that the adoption is based on necessity and second, that the child is protected and cared for by the adoptive parents.
> […]
> […] there are five major factors involved in customary adoption:
> a) necessity of the adoption;
> b) protection and care of the child by the adoptive parents;
> c) consent of natural and adopting parents;
> d) voluntariness of the placement of the child with the adopting parents; and the
> e) natural and adoptive parents must be native or entitled to rely on native custom.[72]

Despite the local and regional disparities observed in Québec and in Canada,[73] there exists a solid core of elements that characterizes and distinguishes Aboriginal customary adoption from statutory adoption: it is a consensual process that usually takes place between members of the immediate or extended family, although it may also involve people close to these families such as friends or members of the community, and through which a child is entrusted to the care of adults who wish to take care of him as if he were their own.

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[71] *Brief on Draft Bill to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, *op. cit.*, note 44. This document is one of those that constitute the schedule 4 of the *Consultation report and Recommendations on Customary and/or Traditional Adoption Among the First Nations of Quebec*, *ibid.*

[72] "Hlugwit'y, Hluuxw'y – My Family, my Child: The Survival of Customary Adoption in British Columbia", *op. cit.*, note 65.

[73] "The Legal Status of Aboriginal Customary Adoption across Canada: Comparisons, Contrasts and Convergences", *op. cit.*, note 40, p. 70.

Many of the characteristics of customary adoption observed in Québec or in Canada are also reflected in the work of researchers who have studied Aboriginal customary adoption in other regions of the world. For example, in Australia's Queensland province, where customary adoption is widespread[74] and is still practiced[75] by Torres Strait Islanders Aboriginals,[76] it is made up of a wide spectrum of practices that come into play following an arrangement between close relatives or good friends.[77] University of Melbourne researcher Paul Ban, who wrote his thesis on traditional adoption practiced by Torres Strait Islanders Aboriginals, defines it as follows:

> "Adoption" is a widespread practice that involves all Torres Strait Islander extended families in some way, either as direct participants or as kin to "adopted" children. "Adoption" takes place between relatives and close friends where bonds of trust have already been established.[78]

For the Maoris of New Zealand, customary adoption is also still alive and well, and consists of giving a child to another family to be raised by its members.[79]

In New Caledonia, adoption is traditionally divided into two categories: the "little adoption of friendship" (or fosterage), which is very widespread and happens through a simple transfer of the child without changing his personal status, and customary adoption (or "Popa èpo") which, in contrast, involves the child's total integration into his host family, including a change in name and the status of the child. This kind of

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[74] Ban, Paul Z. "Australia's Indigenous minority – Torres Strait Islanders." *Secretariat of National Aboriginal and Islander Child Care Newsletter* (October 2008), p. 14; World Congress on Family Law and Children's Rights. *The Law of Customary adoption: A Comparison of Australian and Canadian Approaches to its Legal Recognition*, by the Honourable Alastair Nicholson. Halifax, August 2009, p. 6.

[75] "Australia's Indigenous minority – Torres Strait Islanders", *ibid.*, p. 38.

[76] In the French version of the report, the geographical region was translated in French.

[77] Ban, Paul Z. "The right of Torres Strait Islander Children to be raised within the customs and traditions of their Society", quoted by the Honourable Alastair Nicholson in *The Law of Customary adoption: A Comparison of Australian and Canadian Approaches to its Legal Recognition*, *op. cit.*, note 74, p. 5.

[78] Excerpt of the Paul Z. Ban's thesis, in *The Law of Customary adoption: A Comparison of Australian and Canadian Approaches to its Legal Recognition, ibid.,* p. 5.

[79] New Zealand. Law Commission. *Adoption and its Alternatives: A Different Approach and a New Framework (report 65*). Wellington, septembre 2000, pp. 73-74.

adoption is governed entirely by custom and is registered in the civil status of particular rights.[80]

In the United States, section 366.24 of California's *Welfare and Institutions Code* provides that:

> (a) For purposes of this section, «tribal customary adoption» means adoption by and through the tribal custom, traditions, or law of an Indian child's tribe. Termination of parental rights is not required to effect the tribal customary adoption.[81]

1.2.2 Reasons for and substantive and formal requirements of customary and statutory adoption

In Québec, statutory adoption generally responds to the needs of children with no established bonds of filiation, those with no father or mother or who are in the care of their parent's spouse, as well as those in the care of the DYP. It also meets the needs of people planning a domestic or an international adoption.

Statutory adoption, whether domestic or international, can only take place in the interest of the child and under conditions established by law, which for children domiciled in Québec, require, among other things, the child's consent if aged 10 or over and that of his parents or tutor; otherwise a judicial declaration of eligibility for adoption is required. Consent may be general or special.[82]

Special consent is given in favour of a specific person, who can only be one of the people expressly mentioned by law, i.e. the spouse of the father or mother, the child's ascendant, a relative of the child in the collateral line to the third degree, or the

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[80] Groupe d'information et de soutien des immigrés. *Les droits de l'enfant Outre-Mer,* in the appendix of the report, presented to Committee on the Rights of the Child, France, September 2007. For the complete Convention: United Nations. Committee on the Rights of the Child. *Consideration of reports submitted by States Parties under article 44 of the Convention – Third and fourth periodic reports of States Parties due in 2007 (France)*, CRC/C/FRA/4*, February 2008.

[81] *Tribal Customary Adoption*, A.B. 1325 (Stats. 2009, ch. 287), which introduce section 366.24 of the *Welfare and Institutions Code*. Note this law mainly focuses on youth protection and adoption in California and sets out that customary adoption is an option as a permanent life plan.

[82] C.C.Q., sec. 555.

spouse of such an ascendant or relative. Since the DYP does not get involved in intrafamily adoptions by special consent, the prevalence of this method of adoption is difficult to measure. In the case of an adoption by general consent, the DYP is charged with receiving the consents and undertaking, along with the adopters, the judicial process of adoption.[83] While an ascendant of the child, or the child himself if he is aged 14 or over,[84] may submit the application for a judicial declaration of eligibility for adoption, it is rare that it is not the DYP which does so.[85] In practice, this happens especially when "a child's care, maintenance or education has not been taken in hand by his mother, father or tutor for at least six months"[86] since this situation is equated with abandonment of the child. For children domiciled outside Québec, the adoption, must, with the agreement of the DYP, either be granted by judicial decision in Québec or granted abroad and then judicially recognized by a Québec court. Lastly the DYP is responsible, in all cases where it is involved, for evaluating the parenting abilities of the adopters before the adoption.

The statutory adoption process for a child domiciled in Québec involves two additional legal steps: the child's placement by court order in the adopters' home and an adoption judgment following the placement, which must be a minimum of three to six months. If applicable, the judgment will be sent to the RCS, which will issue a new birth certificate to reflect the new filiation, as though the previous filiation had never existed.

Thus, Aboriginal customary adoption differs from statutory adoption in several respects, notably as regards to the reasons it is used, its lack of formality and the absence of State or judicial intervention.

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[83] Its exclusive responsibility pursuant to sec. 32, par. 1 (g) of the YPA.

[84] C.C.Q., sec. 560.

[85] *Pour une adoption québécoise à la mesure de chaque enfant, op. cit.,* note 6, p. 9: "The responsibility of having a child declared adoptable falls, in principle, on the Director of Youth Protection, who must then take reasonable measures to ensure the child is adopted" (free translation).

[86] C.C.Q., subsection 559 (2).

First, there are many situations that lead to Aboriginal customary adoption (see Part III) and, more often than not, there is no value judgment regarding the parents' behaviour.[87] Aboriginal customary adoption does not require the child to have first been abandoned,[88] as may be the case in some statutory adoptions. Rather, it may generally be understood from the perspective of the "gift" of a child, and is therefore a positive rather than a reactive intervention, as may be the case in a statutory adoption for protection purposes. Examples of reasons for customary adoption include a biological parent with health problems, a difficult family situation and a mother who is too young and who voluntarily decides to entrust the care of her child to a person of her choosing. The parent is not abandoning the child but acting responsibly and with maturity by asking someone else to take care of the child[89] (see subsections 3.1.2.2. and 3.2.7 in this regard).

Further, customary adoption differs from statutory adoption in that it usually requires no formality[90] and is completed by a simple verbal exchange[91] between the people in the "adoption triangle," i.e. the natural parents, the adoptive parents and the child with the requisite maturity, and by the fact of entrusting the child to the

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[87] As these different sources attest: *Pour une adoption québécoise à la mesure de chaque enfant, op. cit.,* note 6, p. 112; "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences", *op. cit.,* note 40, pp. 72-75; Leblic, Isabelle. "Circulation des enfants et parenté classificatoire paicî (Ponérihouen, Nouvelle-Calédonie)", in *De l'adoption. Des pratiques de filiation différentes*, *op. cit.,* note 53, p. 81; Pérouse De Montclos, Marie-Odile, et al. "Lien social et processus d'attachement chez l'enfant adopté en milieu kanak." *La psychiatrie de l'enfant* 44, 1 (2001), p. 233. Concerning the lack of connection between the abandonment of the child and customary adoption, see paragraphs 463 (French Polynesia) and 478 (New Caledonia) in the document titled *Les droits de l'enfant Outre-Mer*, *op. cit.*, note 80.

[88] As attested in *Deer v. Okpik*.

[89] "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences", *op. cit.,* note 40, pp. 72-76. The report *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.,* note 6, cites a few examples from page 104: prevention of infanticide, compensation for demographic imbalance, orphan adoption, the re-balancing of the gender ratio among children, manipulation and power strategies, network of an exchange of services, etc.

[90] *Discussion Paper prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Québec*, *op. cit.*, note 44, p. 9; *Brief on Draft Bill to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, *op. cit.*, note 44.

[91] The Inuit of Nunavik state it clearly in *Discussion Paper prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Québec*, *op. cit.,* note 44, p. 9. For the Cree, see subsection 1.2.1, where is quoted the *Brief on Draft Bill to amend the Civil Code and other legislative provisions as regards adoption and parental authority.*

adopters. Professional intervention is not usually sought, whether from a social worker, psychologist, lawyer or judge.[92]

However, with regards to the conditions surrounding the consent of the people involved and the child's interest, customary adoption resembles statutory adoption, although in the Inuit community, parental consent can be given before or upon the child's birth. Aboriginal peoples stress the fact that in Aboriginal society, the notion of the child's interest encompasses the interest of the family, the community and the Nation and seeks notably to protect its identity, culture, traditional activities and language. Furthermore, apart from court involment, it is akin to statutory adoption by special consent because it is a collaborative project between the birth family and the adoptive parents, it concerns the immediate or extended family and there is no intervention by the DYP.

1.2.3 The effects of adoption

1.2.3.1 The effects of statutory adoption

The effects of statutory adoption are permanent and expressly provided by law.

Currently, the only form of adoption in Québec is full adoption, which creates a new filiation that replaces the previous one, has an effect on parental authority and usually involves a name change for the child.[93]

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[92] Because it is a process that usually only involves the people and families concerned, one can conclude that the intervention of a third party is not required. This is expressly stated in the following information leaflet: Northwest Territories. Department of Healt and Social Services, Children and Family Services Division, Adoption Services. *A Handbook for NWT Aboriginal Custom Adoption Commissioners*. February 2009. However, it is also possible in today's context that an entity of the Nation or community be involved in some respects. For example, see subsection 3.2.9 Additionnal Cree Considerations.

[93] C.C.Q., sec. 577. An upcoming reform will propose a new form of adoption, one that does not sever the previous bond of filiation. For more details see the Draft Bill: *An Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, 2009.

Although the rules for consent and eligibility in relation to adoption are those in effect in the child's place of domicile, the rules governing the effects[94] of the adoption are determined by the laws of the adopter's place of domicile.[95] Consequently, whether the adoption involves a child domiciled in Québec or outside Québec, his original filiation will always be replaced by the new filiation, and the child will no longer belong to his natural family, subject to the prohibitions associated with marriage or civil union.[96] Once granted, the adoption will create the same rights and obligations in the adoptive family as filiation by blood and terminate the effects of the previous filiation.[97] As such, the adopted child and the birth parent will lose their rights and be released from their duties to each other while for the adoptive parents, the change in filiation will come with all the rights associated with parental authority and "guardianship" ("tutorship" in the Civil Code) of the child.

Moreover, anonymity, already mandatory in the administrative and judicial process of the adoption, continues after the judgment with the confidentiality of the original birth certificate and records, which are sealed, subject to the possibility of a reunion provided the parties involved agree beforehand. A reform announced by a 2009 draft bill titled *Draft Bill for the Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority* would replace this rule of disclosure of personal information on prior consent with a principle of disclosure unless the person vetoes contact.

The same draft bill also would propose a new form of adoption without dissolution of the original bond of filiation, which would be maintained for identity purposes and allow the names of the parents of origin to remain on the child's birth certificate.

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[94] *Droit de l'adoption – Adoption interne et internationale, op. cit.,* note 49. The effects of the adoption are described on pp. 121-128.

[95] C.C.Q., sec. 3092.

[96] C.C.Q., sec. 577.

[97] C.C.Q., sec. 578 and 579 al. 1.

In most of the foreign jurisdictions previously mentioned, statutory adoptions produce similar effects to those in Québec today.

For example, in Australia's Queensland province, the law states that once an adoption judgment is rendered, the child no longer belongs to his natural family; he becomes the child of his adoptive parents and they become his parents.[98] In New Zealand, statutory adoption has a similar effect in terms of filiation and assignment of name,[99] which can be the original name or that of the adopter, as well with respect to impediments to marriage and incest.[100]

The civil law of France applies to its Overseas Communities,[101] although with certain adaptations. In the case of a full adoption, a new filiation replaces the original.[102] In the case of a simple adoption, which gives the child an additional filiation, it "creates a filiation with the child's adoptive family but the adopted child retains certain rights in respect of his natural family" (free translation).[103] The adopted child usually keeps his first name[104] and his birth certificate, to which the name of the adopters is simply added in the margin.[105]

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98 *Adoption Act 2009*, Act No 29, sec. 214 et 215.

99 *Adoption Act 1955*, Act No 93, sec. 16.

100 *Ibid.*, par. 16 (2)(b) *a contrario.*

101 Guadeloupe, Martinique, Reunion, French Guyana and Mayotte (since the referendum of March 29, 2009) are departments and regions governed by section 73 of the Constitution (Constitution of October 4, 1958, concerning the *Loi constitutionnelle de la république française*). Consequently, the laws and regulations of the French capital automatically apply to them but some adaptation is permitted, i.e. they may be empowered to set their own rules in their territories on certain matters. The status of persons is one matter expressly excluded from this special power. French Polynesia, Saint-Pierre et Miquelon, Wallis-et-Futuna, Saint-Martin and Saint-Barthélemy are Overseas Communities governed by sections 73 and 74 of the Constitution. New Caledonia has special status (*sui generis*) and sections 76 and 77 of the Constitution apply to this Oversea Community. New Caledonia will gain full independence following a referendum in this regard that will be held between 2014 and 2018. In the meanwhile, state powers are gradually being transferred.

102 *Code civil français*, sec. 356.

103 *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.,* note 6, p. 78. See section 364 of the *Code civil français*, which stipulates: "The adopted shall continue in his natural family and shall there retain all his rights, namely, his hereditary rights" (free translation).

104 *L'enfant, ses familles et les institutions de l'adoption. Regards sur le droit français et le droit québécois*, *op. cit.,* note 49, p. 31; *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.,* note 6, p. 78.

105 *Code civil français,* sec. 363 par. 2.

In jurisdictions where full adoption exists as in Québec, the fact that the adoption records are confidential makes a possible return to the original family unlikely for the child, and indeed this is the main goal of this type of adoption: to sever all ties between the child and his biological parents so that he can fully assimilate into his new family and eliminate all risk of their interfering in the child's new life. However, in the United States for instance, the laws of California,[106] Oklahoma,[107] Minnesota[108] and South Dakota,[109] depending on whether the adoption is *open*[110] or more or less *closed*,[111] allow contact to be maintained between the child and his natural family.

So, it may be seen that the various statutory adoption regimes examined clearly share a certain number of common characteristics:

- The adoption is intended to have permanent effects;
- Parental authority is transferred to the adoptive parents;
- The child's new filiation replaces his original filiation in the case of full adoption or is added to it in the case of simple adoption or adoption without severance of the original filiation;
- The name of the adopted child is usually changed.

1.2.3.2 Effects of customary adoption

The uniformity of statutory regimes contrasts with customary adoptions whose effects may not only vary from one region of the world to the next but also among Aboriginal communities right here in Québec. The effects of customary adoption,

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[106] *Welfare and Institutions Code*, sec. 7660-7670.

[107] Okla. Stat. Tit.10 § 7505-6.5, cl. (B). Biological grandparents may, in certain cases, be allowed to keep contact with the child.

[108] Minn. Stat. Tit. 259 § 59 (2011).

[109] S. Dak. Laws Ch. 25, § 6-17.

[110] *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, pp. 33-34. See also Goubau, Dominique, and Suzanne Beaudoin. "Adoption « ouverte » : quelques enjeux et constats." *Service social* 45, 2 (1996).

[111] See "Adoption « ouverte » : quelques enjeux et constats", *ibid.*, pp. 52-55. See also the "Adoption glossary", *op. cit.*, note 63, at "Openness in adoption".

passed on orally or by tribal codes in other States are, unlike statutory regimes, variable and may sometimes appear more complex.

For example, within the tribal territories of California, tribal authorities have exclusive jurisdiction over their members, and the codes that were examined[112] do not provide that a customary adoption automatically extinguishes the rights of the biological parents.[113]

In New Caledonia, when customary law applies to the adoption, the "adopted child always takes the surname of the adopter",[114] and although the child is fully assimilated into his adoptive family, this in no way means that the ties with his natural family are severed.[115]

In Québec, customary adoption has variable effects, as demonstrated through the consultations held in Aboriginal communities. It seems that Aboriginal customary adoption in Québec offers the people involved a variety of parental or quasi-parental relationships. That said, for the Aboriginal members of the Working Group, customary adoption has the effect of transferring parental authority to the adoptive parents. It can also create a new bond of filiation that replaces or is added to the previous filiation without, however, in the latter case, necessarily extinguishing previous rights and obligations. Lastly, it is not secret and sometimes it is even open in order to maintain emotional ties with the original family. And, in principle, the child is informed of the reasons for his adoption, according to custom.

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[112] Here is a non-exhaustive list of the terms used: Informal Adoption or Traditional adoption (*Mont. Confederated Salish and Kootenai Tribes Laws*, Tit. III, § 2, Customary adoption Code); Customary adoption (*Minn. White Earth Band of Ojibwe Code,* Tit. 4a § 11); Tribal Custom Adoption (*Okla. Cheyenne-Arapacho Tribal Code*, Tit. II, § 11, Family relations).

[113] For example: *Mont. Confederated Salish and Kootenai Tribes Laws*, Tit. III, § 2 (Children); *S. Dak. Sisseton-Wahpeton Sioux Tribe Code*, Ch. 38 (Juvenile Code); *S. Dak. Rosebud Sioux Tribe Code*, Tit. 2, § 2 (Adoption); *Okla. Cheyenne-Arapacho Tribal Code*, Tit. II, § 11 (Family relations); *Okla. Pawnee Tribe Code*, Tit. III, § §11-16 (Civil Procedure); *Minn. White Earth Band of Ojibwe Code*, Tit. 4a § 11 (Final Order for Customary Adoption).

[114] Sec. 39, *Délibération n° 424 du 3 avril 1967 relative à l'état civil des citoyens de statut particulier*, J.O.N.C., April 27, 1967, p. 360.

[115] More specifically, see paragraph 478 of the document titled *Les droits de l'enfant Outre-Mer, op. cit.*, note 80.

However, save for a few exceptions, these effects of Aboriginal customary adoption are not generally recognized in Québec legislation.[116]

1.3 Problems caused by the non-recognition of the effects of Aboriginal customary adoption in the law as a whole

The absence of express recognition of effects of customary adoption in Québec legislation, save for a few exceptions, creates administrative and legal[117] difficulties[118] for parents who adopt a child in customary form as well as for the adopted child, particularly with respect to the identity of the child in cases where a new filiation is created and with respect to the exercise of parental authority.

Since under the Civil Code, a person who customarily adopts a child is not recognized as a "parent" or the "holder of parental authority," the child, from a statutory perspective, is considered to be under the care and responsibility of a third party. For example, under Québec and Canadian legislation, only parents, tutors or holders of parental authority can consent to medical care, give permission for a school or extracurricular activity or complete a passport application for the child. Yet for the adoptive parents, as well as their families and the entire community, these are responsibilities they feel they have the right to assume. In this regard, Professor Ghislain Otis, in a 2010 article, specifically mentions the difficulties encountered by the Inuit families of Nunavik due to the absence of recognition of legal effects of customary adoption and hence, the ineffectiveness of statutory law in this regard.[119]

The Civil Code recognizes that the care, supervision and education of a child can be delegated to a third party. The announced reform on adoption and parental

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[116] See section 2.2 which presents examples of legislative recognition.

[117] *Consultation report and Recommendations on Customary and/or Traditional Adoption Among the First Nations of Quebec, op. cit.*, note 69, pp. 5, 6, 8; *Discussion Paper prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Québec, op. cit.,* note 44, pp. 11-14; *Complementary Research on Traditional and Customary Child Care Practices/Adoption within Aboriginal Communities in Quebec, op. cit.*, note 64, pp. 13-14.

[118] *Cultures juridiques et gouvernance dans l'espace francophone, Présentation générale d'une problématique, op. cit.*, note 42, ch. 2, p. 28.

[119] *Ibid.*, p. 28.

authority even goes so far as to propose the sharing and delegation of all parental duties. However, in cases where the effect of the customary adoption is to also give the child a new filiation, the Civil Code does not recognize this fundamental change in the relationships of the people concerned. As such, the natural parents remain, within the literal meaning of the Civil Code and for other legal and administrative purposes, the sole holders of parental authority and the parents of the child, despite the change effected by the rules of Aboriginal custom.

1.4 The search for legislative recognition of effects of customary adoption

Without getting into a debate on legal pluralism, on the rights recognized and protected by the Constitution or on the validity of the procedure put in place by the RCS for Inuit adoptions, suffice it to say that in the interest of greater legal certainty and transparency and in the interest of the children and their parents, it would be appropriate to clearly reflect the current *de facto* situation and the will of the various parties involved.

It is with this in mind that the Working Group carried out its mandate and came up with proposals to recognize effects of customary adoption in Québec legislation.

The documents produced by the Aboriginal members during the Group's work indisputably demonstrate their desire to see effects of Aboriginal customary adoption clearly recognized in statutory law.[120] They feel that it is up to Aboriginal peoples to determine, as has been the case since time immemorial, what constitutes a customary adoption and the effects that should be recognized. What they seek is a means by which these effects would be recognized and applied by the State authorities and by

[120] In *Complementary Research on Traditional and Customary Child Care Practices/Adoption within Aboriginal Communities in Quebec*, *op. cit.*, note 64, p. 13, QNW mentioned that "the majority of respondents seem favorable to a legal recognition of customary adoption in order to bestow the adoptive parents with the ability to exercise parental authority." The *Consultation report and Recommendations on Customary and/or Traditional Adoption Among the First Nations of Quebec*, *op. cit.*, note 69, p. 9, mentioned that the goal of their collaboration with the work of this group is to "clarify the effects of customary adoptions for purposes of Québec legislation." Some Nations believe that customary adoption is already recognized in statutory law. For example, see subsection 3.2.1.

third parties: a means through which they could communicate to Québec authorities and those of neighbouring territories and provinces[121] all the information required for them to officially record customary adoptions so they can produce, for application of legislation, the intended legal effects.[122]

In fact, the Inuit and First Nations have been seeking recognition of customary adoption from governmental authorities for the last 30 years. The first tangible evidence of such requests for recognition from the Québec authorities dates back to the early 1980s. Although only a handful of documents exist to support the assumption that these requests were motivated by the legislative reforms on child protection and family rights that took place between the end of 1970s and the mid 1990s, a qualitative analysis of these documents justifies this conclusion.

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[121] The Aboriginal members of the Working Group discussed the issue of Québec sharing the necessary information to ensure that the other provinces and territories are informed of the effects of customary adoption. See recommendation 14 of the *Consultation report and Recommendations on Customary and/or Traditional Adoption Among the First Nations of Quebec*, *op. cit.*, note 69, p. 16. The Nunavik authorities spoke of a “reciprocal agreement” with Labrador and Nunavut. See the *Discussion Paper prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Québec, op. cit.,* note 44, pp. 13-14.

[122] See recommendations of the *Consultation report and Recommendations on Customary and/or Traditional Adoption Among the First Nations of Quebec*, *op. cit.,* note 69, pp. 15-17. See also the *Discussion Paper prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Québec, op. cit.,* note 44, p. 12.

PART II
CUSTOMARY ADOPTION IN CANADIAN AND FOREIGN LEGISLATION: DIMENSIONS

The second part of this report discusses the Canadian provinces and territories as well as foreign jurisdictions that have elected to take legislative measures to expressly and unequivocally recognize legal effects of Aboriginal customary adoptions. We begin by underscoring, with regards to Québec, the need to respect the division of legislative powers between the Canadian Parliament and the provincial legislatures, as well as the constitutionally protected rights of Aboriginal people.

2.1 Constitutional imperatives

2.1.1 Division of legislative powers

The legislative powers conferred on the provincial legislatures and on the federal Parliament are exercised within their respective jurisdictions as established by the *Constitution Act, 1867.*[123] Notably, the federal Parliament has exclusive power regarding "Indians"[124] and lands reserved for Indians while the provinces may make laws in relation to "civil rights," which include adoption, filiation and youth protection.

Without going into detailed presentation of the subject, suffice it to say that the Constitution does not prevent the Québec legislature from taking Aboriginal distinctiveness into account in its legislation insofar as it deals with matters of provincial jurisdiction. Therefore, its legislation will be constitutionally valid if its true object deals with a matter within its jurisdiction, even if the legislation incidentally touchs matters of the other legislative authority within the limits permitted by the

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[123] *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3, sec. 91-95.

[124] *Ibid.*, sec. 91 (24). With regards to the inclusion of the Inuit within this jurisdiction, see *Re Eskimos*, [1939] S.C.R. 104.

Constitution.[125] This could be the case, for example, of legislation that deals with youth protection and that has an incidental effect on “Indians,” provided it does not impair their “Indianness”.[126]

2.1.2 The constitutionally protected rights of Aboriginal peoples

The legislative powers conferred on the provincial legislatures and on the federal Parliament are exercised subject to the constitutionally protected rights of Aboriginal peoples.[127]

Since 1982, existing rights of Aboriginal peoples – Aboriginal and treaty rights – have been protected by section 35 of the *Constitution Act, 1982:*

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
> (3) For greater certainty, in subsection (1) “treaty rights"” includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Consequently, as soon as customary adoption is qualified as an Aboriginal or treaty right, any incompatible legislative provision, federal or provincial, becomes constitutionally ineffective.[128]

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[125] Other complex nuances on the topic were not taken into account, for example, the effect of section 88 of the *Indian Act*.

[126] Regarding “core of Indianness”, see *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585.

[127] For an analysis of this issue, see Otis, Ghislain. “La protection constitutionnelle de la pluralité juridique : le cas de « l’adoption coutumière » autochtone au Québec.” *Revue générale de droit* 41, 2 (2011).

[128] *Constitution Act, 1982*, sec. 52.

2.2 Canadian dimensions[129]

Two federal statutes that apply specifically to Aboriginals expressly recognize customary adoption. The *Indian Act*[130] provides that children adopted according to Indian custom have the same rights as those who are "legally adopted".[131] Similarly, the *Cree-Naskapi (of Quebec) Act*[132] states that children adopted according to Cree or Naskapi custom have the same rights as children adopted according to the laws of the province or recognized by the province and are considered "children" for the purposes of succession.[133] However, despite the fact that Inuit are within its jurisdiction, the federal Parliament has not legislated with respect to them or their customs.

In Québec, with regards to Sections 3, 24 and 30 of the *James Bay and Northern Quebec Agreement (JBNQA)* and in Sections 3 and 15 of the *Northeastern Quebec Agreement* (*NEQA*), the legislator has adopted provisions on the legal effects of customary adoption only in the following three statutes[134] implementing these agreements and in related regulations thereunder:[135]

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[129] For a more detailed analsyis of the methods of recognizing Aboriginal customary adoption in Canada, see Fournier, Anne. "L'adoption coutumière autochtone au Québec : quête de reconnaissance et dépassement du monisme juridique." *Revue générale de droit* 41, 2 (2011) and *Overview of the current situation with regard to the Aboriginal Custom adoption in Canada, and particularly in Québec*, *op. cit.*, note 47.

[130] R.S.C. 1985, c. I-5.

[131] *Ibid.,* section (2)(1), where the definition of "child" includes a legally adopted child and a child adopted in accordance with Indian custom.

[132] S.C. 1984, c. 18.

[133] *Ibid.*, sec. 174, see the definition of "child".

[134] *An Act respecting Cree, Inuit and Naskapi Native persons*, R.S.Q., c. A-33.1, sec. 14:

> Adoption for purposes of this Act is that of a minor and is effected in conformity with the laws relating to adoption in force in Canada or in conformity with Cree or Naskapi customs.

An Act respecting hunting and fishing rights in the James Bay and New Québec territories, R.S.Q., c. D-13.1, sec. 19:

> […] The word "family" is used in a broad sense and means persons allied or related by blood, or by legal or customary marriage or adoption. […]

An Act respecting income security for Cree hunters and trappers who are beneficiaries under the Agreement concerning James Bay and Northern Québec, R.S.Q., c. S-3.2, sec. 1. (repealed in 2002.)

[135] Regulation respecting eligibility for the benefits of the Agreement concerning James Bay and Northern Québec, R.R.Q., c. C-67, r. 1, par. 1(i); Regulation respecting eligibility for the benefits of the Northeastern Québec Agreement, R.R.Q., c. C-67.1, r. 1, par. 1(a).

- *An Act respecting Cree, Inuit and Naskapi Native persons*;
- *An Act respecting hunting and fishing rights in the James Bay and New Quebec territories*;
- *An Act respecting Income security for Cree hunters and trappers who are beneficiaries under the Agreement concerning James Bay and Northern Quebec.*

Outside Québec, the British Columbia legislature and the three Canadian territories have given general recognition, each in their own way, to Aboriginal customary adoption.

2.2.1 The Northwest Territories and Nunavut

The first legislative intervention outside Québec took place in the Northwest Territories.

During the 1960s and 1970s, hundreds of judgments were rendered[136] in the Northwest Territories on the question of the validity or recognition of the legal effects of Aboriginal customary adoption in statutory law. These were invariably favourable.[137] And as was the case for marriage, it was decided that Aboriginal adoptions produced the same effects as if they had taken place in accordance with statutory law. Consequently, even if customary marriage or adoption did not satisfy the substantive and formal requirements of statutory law, it did not prevent them from producing effects therein. This recognition of customary adoption was, however, only partial, as once the Court had declared that it was in fact such an adoption, it gave it the same effects as those given to any other adoption. This was therefore only a first and small

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[136] Justice Morrow wrote that during his 10 years on the bench in the Northwest Territories, he handed down over 400 decisions giving customary adoption the same effect as if it had taken place according to statutory law: Morrow, William G. *Northern Justice: The Memoirs of Mr Justice William G. Morrow.* Edited by William H. Morrow. Toronto: Osgoode Society for Canadian Legal History and the Legal Archives Society of Alberta, 1995.

[137] For examples: *Re Katie's Adoption Petition*, (1962) 38 W.W.R. 100 (N.W.T.T.C.); *Re Beaulieu's Adoption Petition*, [1969] N.W.T.J. No. 4; *Re Tucktoo et al. and Kitchooalik et al. (sub nom. Re Deborah*), [1972] N.W.T.J. No. 23; *Re Wah-Shee*, [1975] N.W.T.J. No. 10; *Re Tagornak Adoption Petition*. See also: Zlotkin, Norman K. "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases." *C.N.L.R.* 4, 1 (1984).

step towards acknowledgment of difference, since the effects of customary adoption were equated to the effects of statutory adoption.

It was only in the mid-1990s that the Northwest Territories legislature enacted the *Aboriginal Custom Adoption Recognition Act*.[138] Under this statute both adoption regimes can coexist in the Northwest Territories: a special regime reserved for Aboriginals and a general regime applicable to all children.[139] Its purpose, set out in the preamble, is clear:

> […] And desiring, without changing aboriginal customary law respecting adoptions, to set out a simple procedure by which a custom adoption may be respected and recognized and a certificate recognizing the adoption will be issued having the effect of an order of a court of competent jurisdiction in the Territories so that birth registrations can be appropriately altered in the Territories and other jurisdictions in Canada.

The recognition process under this particular statute does not call for legal proceedings and therefore takes place outside the courtroom. An adoption commissioner appointed by the Minister of Health and Social Services[140] gathers, with a view to issuing a certificate recognizing the adoption, the information[141] mentioned in section 2 (2) of the Act:

> a) with respect to the child, the name given at birth and the current name, date of birth and adoption, place of birth, sex and the names of the mother and father, so far as is known;
> b) a statement by the adoptive parents and any other person who is, under aboriginal customary law, interested in the adoption that the child was adopted in accordance with aboriginal customary law.

This information is provided by the person who adopted the child according to Aboriginal custom[142] and who wishes to obtain a certificate attesting to the adoption.

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[138] *Aboriginal Custom Adoption Recognition Act*, S.N.W.T. 1994, c. 26 (In force September 30, 1995); *Aboriginal Custom Adoption Recognition Regulation*, R-085-95 (In force September 30, 1995).
[139] *Adoption Act*, S.N.W.T. 1998, c. 9.
[140] *Aboriginal Custom Adoption Recognition Act*, sec. 6.
[141] *Ibid.*, subsection 3 (1).
[142] *Ibid.*, subsection 2 (1).

The application is therefore submitted to the commissioner after and not before the adoption. In other words, the role of the commissioner is not to allow the customary adoption to take place but rather to record it as having occured. It also bears mentioning that neither the Act nor the regulation requires obtaining the consent of the parents of origin or that they appear before the commissioner. According to the terminology used in statutory law, this is an *ex parte* procedure.

The commissioner has the power to approve[143] or refuse[144] the application for the certificate recognizing the adoption. If satisfied with the information received, the commissioner completes and sends the certificate recognizing the customary adoption to the court clerk.[145] This simple filing gives the certificate the value of an order of the Supreme Court of the Northwest Territories.[146] A certificate so filed is sent to the Registrar General of Vital Statistics, who proceeds to change the registration of the child's birth.[147]

It should be noted that this statute is silent on the possibility of recourse to contest the commissioner's decision. That said, an application for judicial review before the relevant state authority always remains a possibility.[148]

The Act is also silent on the effects of these customary adoptions. The Court has already ruled that the effects of such an adoption are determined by custom.[149] Consequently, the rules provided by the general regime concerning the effects of adoption are of no help. The preamble also states that the effects of the adoption are governed by custom, but the Act itself does not provide for any process or mechanism to collect and record the details of these effects, which are also not mentioned in the

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143 *Ibid.*, subsection 3 (2).
144 *Ibid.*, subsection 3 (4): "This would be the case if the commissioner felt that the information provided was incomplete or was not convinced that the child had been adopted according to Aboriginal customary law."
145 *Ibid.*, par. 3 (2)(a) and (b).
146 *Ibid.*, sec. 4.
147 *Ibid.*, sec. 1 and 5 and *Vital Statistics Act*, S.N.W.T. 1988, c. V-3, subsection 13 (2.1).
148 *Bruha v. Bruha*, [2009] N.W.T.J. No. 51.
149 *S. K. K. v. J. S.* [1999] N.W.T.J. No 94.

certificate recognizing the customary adoption. Nevertheless, the preamble states that the purpose of the certificate is "so that birth registrations can be appropriately altered in the Territories and other jurisdictions in Canada", thus providing a means for these effects to be recorded in the provinces and territories concerned.

In 1999, the Northwest Territories were split in two to create Nunavut.[150] All the statutes then in force in the Northwest Territories also became the independent statutes of Nunavut, until such time as Nunavut replaced them. Regarding adoption, Nunavut made no changes to the statute or its regulation such that the same legislative provisions still apply today in Nunavut and in the Northwest Territories.

2.2.2 The Yukon

A few years ago, the Yukon proceeded to reform its child and family law, leading to the enactment, in 2008, of the *Child and Family Services Act.*[151] This Act contains general provisions in respect of the court involvement,[152] the best interests of the child and certain special factors that must be considered in the case of Aboriginal children.[153]

The new law also contains a provision dealing specifically with "custom adoption",[154] stating that a person may apply to the Supreme Court of Yukon for a declaration that there has been an adoption "in accordance with the customs of a First Nation." While the general adoption regime expressly provides for all the effects of adoption,[155] those of a custom adoption are determined on a case by case basis by the court. In fact, section 134 of the Act provides that the court may, but is under no obligation to, declare that the adoptive parents are henceforth the parents of the child,

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150 *Nunavut Act*, S.C. 1993, c. 28.
151 *Child and Family Services Act*, S.Y. 2008, c. 1 (In force April 30, 2010).
152 *Ibid.*, sec. 118.
153 *Ibid.*, sec. 4 (2): "If a child is a member of a First Nation, the importance of preserving the child's cultural identity shall also be considered in determining the best interests of the child."
154 *Ibid.*, sec. 134.
155 *Ibid.*, sec. 125.

who is therefore the child of the adoptive parents. The Court also has the power, by relying on Aboriginal custom, to make further declarations as to the rights and responsibilities arising from the custom adoption, including the rights and responsibilities of the birth parents, adoptive parents and the person adopted. This means, on the one hand, that the relationship between the child and his parents of origin can survive a custom adoption and, on the other, that parental responsibilities can be shared by the adoptive and parents of origin.

2.2.3 British Colombia

British Colombia is the only province that has formally and generally recognized the legal effects of customary adoption in statutory law by incorporating this recognition into its adoption law. This province therefore has two adoption regimes within the same law.

Specifically, the British Colombia legislature chose to amend its general adoption law in 1996[156] to expressly address Aboriginal customary adoption:

> 46 (1)
> On application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.
> (2)
> Subsection (1) does not affect any aboriginal rights a person has.

The criteria used by the court to be able to conclude that the case at bar involves a customary adoption are those developed in Northwest Territories decisions over the years, before the legislature intervened in the mid-1990s, and that are found, notably, in *Re Tagornak Adoption Petition*[157] and *In the Matter of the Adoption of a Female Child*:[158]

[156] *Adoption Act*, R.S.B.C., 1996, c. 5.
[157] *Re Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T.C.S.).
[158] *In the Matter of The Adoption of A Female Child*, [1998] 4 C.N.L.R. 7 (B.C.S.C.).

1) There is consent of natural and adopting parents.
2) The child has been voluntarily placed with the adopting parents.
3) The adopting parents are indeed native or entitled to rely on native customs.[159]
4) The rationale for native custom adoptions is present.
5) The relationship created by custom must be understood to create fundamentally the same relationship as that resulting from an adoption order under the *Adoption Act*.

The third element is to be noted here because it has the effect of expressly allowing an Aboriginal child to be adopted in a customary fashion by a non-native or a Métis, provided these persons respect Aboriginal custom and are accepted by the community or band concerned as one of their own.

There are two noteworthy issues regarding this recognition provision. First, the very wording of its first paragraph raises doubt as to the court's power to give effect to a customary adoption. The legislator used the term "may" and not "shall".[160] Does this mean that the court has discretionary power with respect to recognizing a customary adoption? Put another way, when the court hears a case involving customary adoption, does it have an obligation to give it the same effect as any adoption granted under the Act? Opinion is divided on this question.[161] Second, opinions would surely be just as divided regarding a province's legislative authority to establish the effects of customary adoption in its legislation, unless the province's intent was not to legally prescribe such effects but simply to give them the same scope in statutory law as that conferred by Aboriginal custom.

Another important aspect of the Act is that the provincial court,[162] when considering an application for a custom adoption of a child in continuing custody,[163]

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[159] *Ibid.,* where the judge expressly discusses this aspect in paragraphs 12 and 13.
[160] "The Legal Status of Aboriginal Customary Adoption across Canada: Comparisons, Contrasts and Convergences", *op. cit.*, note 40, pp. 88-89.
[161] *Ibid.*
[162] *Child, Family and Community Service Act,* R.S.B.C., 1996, c. 46, sec. 1, states that the Provincial Court has jurisdiction in child protection matters.

will require the consent of the Director of Child Protection before the adoption may be recognized.[164]

Finally, the general purpose of the Act[165] and factors useful in determining the best interest of the child[166] must be taken into account in all adoption projects, including customary adoption. It bears mentioning that in the case of an Aboriginal child, the preservation of the child's cultural identity must be considered when evaluating his best interests.[167]

2.3 Customary adoption in foreign legislation

The research conducted by the Working Group in the course of its mandate was limited to Australia, New Zealand, Papua New Guinea, New Caledonia and the United States. Of these, only the last three have a system for recognizing Aboriginal customary adoption.

Australia and New Zealand, whose systems most resemble ours, do not recognize the legal effects of customary adoption in their statutes. In the first case, the legislator nevertheless recognizes its existence in the law and specifies the elements to be considered to evaluate the interests of an Aboriginal child. In the second case, it is expressly stated that it does not have legal effect.[168]

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[163] *Ibid.*, sec. 1, see "continuing custody order".

[164] As indicated in British Columbia's *Practice Standards and Guidelines for Adoption*: British Colombia. Ministry for Children and Families, Adoption Branch. *Practice Standards and Guidelines for Adoption.* 2001, pp. 1-7.

[165] *Adoption Act*, sec. 2: "The purpose of this Act is to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests."

[166] *Ibid.,* sec. 3 (2): "If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests."

[167] *Ibid.*

[168] *Adoption Act 1955*, sec. 19.

2.3.1 Australia (Queensland)

The research on Australia was limited to the province of Queensland, situated in the Northeastern part of the country,[169] where it seems that until 1988, the practice followed by public officials responsible for acts of civil status was to recognize the legal effects of customary adoptions when such a request was made. Justice Alastair Nicholson of the Family Court of Australia pointed out during a conference in Halifax in 2009, the similarities between this practice and that of the office of the RCS of Québec:

> Strangely enough this non recognition did not present a particular problem until 1988, because the relevant Queensland government officials had a practice of recording customary adoptions as lawful adoptions if requested to do so. However, that practice then ceased and since 1989 the Torres Strait Islander communities have unsuccessfully lobbied the Queensland government for recognition. I was interested to note that officials took a similar approach in Québec, until that practice also met with disapproval.[170]

Problems only began to occur in Queensland when this practice was terminated and the courts were called to rule on cases involving inheritance rights, the authority required to consent to specific activities for the child and other decisions involving the child.

In the late 1990s, the Queensland government showed willingness to formally recognize Aboriginal customary adoption in order to resolve the problems caused by its legislative non-recognition[171] but abruptly changed course and the question has since not been reconsidered.

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[169] *Lara v. Marley*, [2003] FamCA 1393, par. 39.

[170] *The Law of Customary adoption: A Comparison of Australian and Canadian Approaches to its Legal Recognition*, *op. cit.,* note 74, p. 13.

[171] *Ibid.*, p. 15.

2.3.2 New Zealand

The issue of the recognition of customary adoption (*whangai placement*) in New Zealand is especially interesting because it was in fact legally recognized until 1909, i.e. until the *Native Land Act* was passed. Thereafter, it was given no effect unless the adoption was registered with the Native Land Court[172] before the 1909 law came into force. Following the adoption of the *Native Lands Amendment Act* of 1931, Maori customary adoption was no longer given statutory recognition, and in order to avoid any legal challenge in this regard, the legislature made sure to clearly express its intent in another legislative intervention in 1955.[173]

2.3.3 Papua New Guinea

Papua New Guinea is a country with roughly six million inhabitants, a population similar in size to Québec's. However, this is where the similarities end since more than 800 languages are spoken in this land, including 600 Papuan tongues and 200 Melanesian tongues. If we accept that language is a key component of a culture, then it follows that Papua New Guinea is home to a multitude of cultures, all of which have learned to coexist and interact, especially since the country's independence in the mid-1970s.

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[172] *Native Land Act 1909*, Act No 15, sec. 161. The information come from the *Adoption and its Alternatives: A Different Approach and a New Framework (report 65*), *op. cit.,* note 79, p. 27.

[173] *Adoption Act 1955,* sec. 19: "Adoptions according to Maori custom not operative (1) No person shall hereafter be capable or be deemed at any time since the commencement of the Native Land Act 1909 to have been capable of adopting any child in accordance with Maori custom, and, except as provided in subsection (2) of this section, no adoption in accordance with Maori custom shall be of any force or effect, whether in respect of intestate succession to Maori land or otherwise. (2) Any adoption in accordance with Maori custom that was made and registered in the Maori Land Court before the 31st day of March 1910 (being the date of the commencement of the Native Land Act 1909), shall during its subsistence be deemed to have and to have had the same force and effect as if it had been lawfully made by an adoption order under Part 9 of the Native Land Act 1909."

Custom[174] plays an important role within the Papua New Guinea legal system[175] given that it is one of the foundations of the law, along with the Constitution[176] and the common law, as it stood at the date of independence. These three sources constitute the underlying law of Papua New Guinea, as it appears in the wording of the *Underlying Law Act.*[177] This Act is a post-colonial[178] type of law, which makes customary law the common law of general application within the entire legal system.

At least two other laws show the special role custom plays within the country's legal system and institutions: the *Customs Recognition Act 1963*[179] and the *Adoption of Children Act 1968.*[180] Under the first statute, the courts must take custom into account in all cases involving the custody and adoption of a child, unless the court deems that doing so would result in an injustice, would not be in the public interest[181] or would affect the welfare of a child under 16 years of age and that consequently, application of the custom would not be in the interest of the child.[182] The second statute addresses both the general and customary adoption regimes. In the first case, i.e. full adoption, the effects are expressly stated. In the second, the law sets out the necessary conditions for recognizing a customary adoption and for granting a certificate[183] that the adoption has been so made. This certificate is issued by the Local Court, which is a native authority. Finally, the law defers to custom for

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[174] Custom is defined in schedule 1, section 1.2.2 of the *Constitution of the Independent State of Papua New Guinea*: "The customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial." We can found a similar definition of the custom in the *Underlying Law Act 2000*, Act No 13, sec. 1.

[175] Perhaps we should be talking about "legal systems" instead.

[176] *Constitution of the Independent State of Papua New Guinea*, Papua New Guinea Consolidated Legislation, c. 1.

[177] *Underlying Law Act 2000*, sec. 3.

[178] Ottley, Bruce L. "Reconciling Modernity and Tradition: PNG's Underlying Law Act." *Reform* 80, (Autumn 2002).

[179] *Customs Recognition Act 1963***,** Papua New Guinea Consolidated Legislation, c. 19.

[180] *Adoption of Children Act 1968*, Papua New Guinea Consolidated Legislation, c. 275.

[181] *Customs Recognition Act 1963*, par. 3 (1)(a) and sec. 6.

[182] *Ibid.*

[183] The *Certificate as to Customary Adoption* is reproduced in the *Adoption of Children Regulation 1969*, Papua New Guinea Consolidated Legislation, c. 275.

determining the effects of customary adoption.[184] It is therefore up to the Local Court to indicate on the certificate of customary adoption the rights of access to the child and any other terms and conditions applicable to the situation, as the case may be.

2.3.4 New Caledonia

New Caledonia has a unique legal system that rests on personal rather than territorial jurisdiction[185] due to accords regarding its interim status until it gains full independence sometime between 2014 and 2018.

Under this system, people whose personal status is Kanak customary civil status, are governed by custom for civil matters. As a result, there are two civil law legal systems whose application depends on the individual's ethnocultural identity: the customary system, reserved for the indigenous Kanak people, and the general system of law (*jus commune*) applicable to everyone else.

2.3.5 United States

In the United States, tribal governments, with their authorities and institutions, generally have exclusive jurisdiction[186] in all matters concerning the adoption of a Native child who resides in (or is domiciled on) federally recognized tribal territories. In this regard, certain tribal codes expressly recognize customary adoption.

Outside tribal territories, state laws and a federal law on child protection apply to Native children.

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[184] *Adoption of Children Act 1968*, subsection 53 (2).

[185] For the difference between "personal" and "territorial" jurisdiction and on the remark on resorting to "personal pluralism" in certain matters, including adoption, see Otis, Ghislain, and Geneviève Motard. "De Westphalie à Waswanipi : la personnalité des lois dans la nouvelle gouvernance crie." *Les Cahiers de droit* 50, 1 (2009). See also *Cultures juridiques et gouvernance dans l'espace francophone, Présentation générale d'une problématique, op. cit.,* note 42, chapters 1 and 2; Otis, Ghislain. "Territorialité, personnalité et gouvernance autochtone." *Les Cahiers de droit* 47, 4 (2006).

[186] *Indian Child Welfare Act,* sec. 1911.

The federal *Indian Child Welfare Act of 1978*,[187] whose purpose was to resolve the overrepresentation of Native American children in child protective services and their disproportionate rate of placement outside their family setting, applies to all state authorities dealing with a case involving a Native child who is a member of or eligible for membership in a federally recognized Native tribe and who resides off tribal territory. This Act establishes the minimum conditions to respect in disputes arising from application of a state law concerning the custody of such a child, including his placement in foster care or preadoptive placement. In the event the provisions of the Act and state law conflict, the provisions of the Act prevail, as provided therein.[188]

Consequently, a situation with the same set of facts could result in different treatment depending on whether the child is Native. This is necessary in cases where, otherwise, the state law would not distinguish between the situation of a Native and non-Native child.

The primacy of this federal law has slowly led some U.S. states to adapt their child protection system to the special needs of Natives. An example is California, whose general child protection and adoption legislation (the *Welfare and Institutions Code*)[189] imposes a full adoption regime where the adopted child (Native or non-Native) sees his ties with his natural family, culture, way of life and traditions completely severed. This is often at odds with the notions and values of the Aboriginal people. To address these contradictions and to meet the objective of the federal legislation, California finally implemented special legislative provisions for the adoption of Native children in order to unequivocally offer another option to these children's life projects, i.e. customary adoption.[190]

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[187] *Indian Child Welfare Act of 1978* 25 U.S.C. §§ 1901-63 (1978).
[188] *Indian Child Welfare Act*, sec. 1915.
[189] Cal. *Welfare and Institutions Code* (2010).
[190] Juvenile Law: *Tribal Customary Adoption*. See also the *Welfare and Institutions Code*, sec. 366.24: "For purposes of this section, "tribal customary adoption" means adoption by and through the tribal custom, traditions, or law of an Indian child's tribe. Termination of parental rights is not required to effect the tribal customary adoption."

2.4 Models to draw from

The socio-historical and political context of New Caledonia makes for a unique situation since two different civil legal systems coexist: the general system of law for individuals whose civil status is governed thereunder and the Kanak customary system for those possessing Kanak customary status. The issue of state recognition of the legal effects of customary adoption in this country is different than in Québec, whose legislative power is subject to constitutional constraints.

Then there is Papua New Guinea. Although the cultural context of its indigenous people is quite different from that of Québec or Canada, we can still draw inspiration from that country's model of customary adoption certificates which are linked to the registration of adoptions. The Papua New Guinean customary adoption certificate attests to the effects of this type of adoption and other conditions that may apply. If such a model is possible in a context where hundreds of indigenous and non-indigenous cultures co-exist, it seems plausible that this could also be the case in Québec.

Closer to home, there is the model of the Northwest Territories and Nunavut, where an adoption commissioner issues, on request, a certificate of recognition of customary adoption without hearing the persons concerned and without judging the interests of the child or the merits of the adoption. In our view, this model appears useful.

PART III

THE ABORIGINAL CONSULTATIONS AND THEIR RESULTS

This part presents, beyond the consultations and their results, additional perspectives and elements regarding customary adoption set forth by the Aboriginal representatives, which are not binding on the other members of the Working Group.

3.1 Presentation of the results of the consultation held in Inuit communities

3.1.1 Consultation methodology

For the purpose of the consultation required under the Working Group's mandate, the Inuit representatives engaged in both a historical and contemporary validation of customary adoption law in Nunavik. This adoption custom, in existence for thousands of years and still prevalent to this day, required calling upon the guardians of the tradition to describe its origins, challenges and future. As such, this consultation was conducted in two phases, one with a directional and confirmatory component involving regional authorities, and the other with a local and aboriginal component involving the elders in a few northern communities selected for this purpose.[191]

Thus, a first forum on customary adoption was held in fall 2009 in the presence of some 40 regional actors appointed by the KRG, the NRBHSS, the Kativik School Board, the Avataq Cultural Institute (Avataq), the Nunavik Landholding Corporations Association and Makivik. The purpose of this forum was to present the work of the Working Group and to define the mandates and objectives sought by the Inuit in developing an appropriate work method. It was agreed to first give priority to the intrinsic values of customary adoption, as conditions for its existence and occurrence.

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[191] 9 out of Nunavik's 14 communities were visited in order to meet with their elders committees (August 12 to 21, 2010: Kangiqsualujjuaq, Kuujjuaq, Tasiujaq, Kangirsuk, Salluit and September 6 to 11, 2010: Puvirnituq, Inukjuak, Umiujaq, Kuujjuaraapik) and 11 other elders were interviewed individually.

Expressing concern about the difficulties confronting their tradition, the Inuit representatives agreed on the need to return to the initial underlying values of adoption as criteria or foundations. Therefore, to prepare for the consultation, the members of the NRBHSS and Avataq boards were asked to lend their support and collaboration in the process. Concurrently, the Inuit representatives in the Working Group met with local actors from the health and social services sectors to discuss certain aspects of the adoption tradition. Finally, in August and September 2010, a questionnaire was distributed to all the parties involved. The answers are presented in this section. During summer and fall 2010, Mrs. Annie Poper, consultant, Pigutjivik Consulting Inc., visited most of the Nunavik communities, interviewing elders and members of the local cultural committees affiliated with Avataq on the principles and core values of the tradition. A second discussion forum on customary adoption was held on September 30, 2010 to present the conclusions of the work and initiatives to the regional organizations, and based on the recommendations arising from these consultations, to help refine the mandate of their Inuit representatives to the Working Group.[192]

We would like to briefly mention that for Makivik,[193] this consultation and recommendation exercise was in line with its role as protector of the collective rights and interests of its members, the Inuit beneficiaries of the JBNQA and the Nunavik Inuit Land Claims Agreement. Active since the mid-1990s in the quest for recognition of Inuit customary adoption in fact and in law, Makivik is diligently working to this end with the NRBHSS, having in this regard and in partnership participated in the work of the Working Group on customary adoption in Québec.[194] During that same period, more specifically in April 2007, the CDPDJ filed a report on the challenges

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[192] *Discussion Paper Prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Quebec*, *op. cit.*, note 44, p. 7.

[193] Created by the *Act respecting the Makivik Corporation,* R.S.Q., c. S-18.1, the corporation has a mandate that encompasses the political, social and economic protection and development of its members. Managed by a board consisting of 16 directors, each of whom represents one of Nunavik's communities, its day-to-day operations are overseen by a five-member executive elected by the Inuit residents of Nunavik.

[194] *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.,* note 6.

confronting Nunavik's Inuit youth.[195] This report led the Government of Québec to make certain commitments at the Katimajiit Conference held in Kuujjuaq in August 2007, including to ensure Inuit participation in the work of this Working Group and providing funding to enable them to hold consultations.

3.1.2 General observations

In terms of results, this recent consultation in Inuit communities (2009 and 2010) produced the same observations as the last consultation effort held in the second half of the 1990s following changes to the birth registration system in the Civil Code. Indeed, it is telling that the definitions, causes, effects and other elements of the customary adoption regime of Nunavik's Inuit cited back then were all reiterated by the stakeholders today, confirming the vibrant and timeless character of this oral tradition. The following pages therefore attempt to present these situations of fact and customary law.

3.1.2.1 The customary adoption law of Nunavik's Inuit: prevalence and status

Customary adoption is still widely practiced by Nunavik's Inuit society today. It is estimated that three out of four babies born in Nunavik will be adopted according to custom. This proportion has remained fairly stable in the last 20 years despite a sharp increase in the territory's population.

[195] *Investigation into child and youth protection services in Ungava Bay and Hudson Bay, Nunavik report, conclusions of the Investigation and recommendations*, *op. cit.*, note 17; Commission des droits de la personne et des droits de la jeunesse. *Nunavik: follow-up report on the recommendations of the investigation into Youth Protection Service in Ungava Bay and Hudson Bay*. June 2010.

ESTIMATED NUMBER OF INUIT CHILDREN ADOPTED ACCORDING TO CUSTOM OVER THE YEARS[196]

79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98
28	34	34	63	51	39	45	51	64	56	61	49	67	52	63	56	40	47	52	60

99	00	01	02	03	04	05	06	07[197]	08	09	10	11
40	28	13	83	82	76	61	74	143	66	36	48	79

In fact, a 1992 survey by Santé Québec revealed[198] that one out of five Inuit newborns is adopted according to custom in Nunavik; 23% of persons over age 15 had been adopted according to custom, in equal proportions of females and males; and 57% of respondents over age 15 had adopted or given up for adoption at least one child according to custom. In the 2003 survey,[199] 33.5% of respondents indicated having been adopted according to custom, showing the prevalence of this tradition throughout the ages.

Adoptions under the customary regime are therefore widespread and the rule rather than the exception since judicial statistics show a very low rate of legal adoptions.[200] It will be recalled that legal adoption is used when a child is at risk or abandoned, whether voluntary or forced, whereas Inuit customary adoption can be

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[196] Extracted from the *Discussion Paper Prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Quebec, op. cit.*, note 44, p. 5. The estimates from 1979 to 2006 were compiled, subject to verification, by Makivik, from various sources (MSSS, JBNQA Beneficiaries Register, Sept. 2001 (rk, Jan02); Pageau, M., Ferland, M., Déry, S. (2003) *Our Children – health status of children aged 0-5 years in Nunavik,Kuujjuaq*, Public Health Directorate, NRBHSS; Québec Director of Civil Status, volumes 2001–2006).

[197] The newly obtained data from the Registrar of Civil Status for 2007 to 2011 are subject to verification.

[198] Québec. Santé Québec and Mireille Jetté (dir). *A Health Profile of the Inuit: Report of the Santé Québec Health Survey Among the Inuit of Nunavik, 1992, Vol. 1*. Montréal: ministère de la Santé et des Services sociaux, 1994.

[199] *Our Children – health status of children aged 0-5 years in Nunavik*, *op. cit.*, note 41, p. F-28.

[200] See the 1990-2011 statistics of jurisdiction 43 regarding judicial records on Inuit legal adoptions. Québec. Ministère de la Justice. Direction régionale des services judiciaires du Nord-du-Québec. *Tableau du nombre de dossiers ouverts - Cour du Québec (Cour itinérante) Chambre criminelle, pénale et de la jeunesse pour les communautés cries et inuites,* see the corresponding years. Québec.

likened to a gift,[201] which consists in giving a child, usually before his birth, to a significant person other than the biological parents. Rooted in the values of love and respect, care and affection, gifting and sacredness, this tradition is consistent with the Inuit customary world that which makes up the identity and very essence of the nation.

The customary adoption regime of the Nunavik Inuit is therefore an integral part of this nation's distinctive culture and, in this regard, unquestionably qualifies as an Aboriginal right that is recognized, affirmed and protected by section 35 of *The Constitution Act, 1982*.[202] The Inuit party also points out that this customary adoption right is, moreover, recognized in the JBNQA and its implementing statutes, as repeated in various sections of the treaty,[203] particularly section 3 on the eligibility for benefits, rights, services and privileges provided for in the Agreement. In this regard, a modification made in 2006 to the Inuit eligibility regime with the addition of the Complementary Agreement No. 18 (CA. 18) changed the eligibility criteria based on biological, marriage or adoption considerations in favour of the notions of affiliation

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[201] See *Deer v. Okpik,* pp. 3–6, where Justice Jean-Paul Bergeron (S.C.J.) likens Inuit customary adoption to "a formula entrenched by centuries of tradition to ensure the child's best interest in the face of life's everyday hardships".

[202] See *Casimel v. Insurance Corporation of British Columbia*, (1993) 106 D.L.R. (4th) 720 (B.C.C.A), and particularly p. 733 by Justice Lambert: "Such a customary adoption was an integral part of the distinctive culture of the Stellaquo Band of the Carrier People (...) and as such, gave rise to aboriginal status rights that became recognized, affirmed and protected by the common law and under s. 35 of the Constitution Act, 1982"; renewing *Re Adoption of Katie E7-1807,* [1961] N.W.T.J. No. 2, described in *Re Tucktoo et al. And Kitchooalik et al.* (supported by the decision *Re Kitchooalik et al.* and *Tucktoo et al.,* [1972] N.W.T.J. No. 23 of the Court of Appeal), *Re Wah-Shee* and *Re Tagornak,* [1983] N.W.T.J. No. 38. We will not delve here into extensive jurisprudence emanating from decisions of the Supreme Court of Canada on the qualification of an Aboriginal right.

[203] Including, notably, sec. 3.1.6 of the JBNQA, where adoption is defined as follows: "The adoption of a child who has not reached the age of majority at the time of the adoption, which adoption was effected pursuant to the laws relating to adoption in any of the provinces of Canada or pursuant to the customs of the Native people in the Territory"; as well as sec. 24.1.11 of the JBNQA on the concept of family, which means the extended family, i.e. persons related by blood or by legal or customary marriage or adoption. Moreover, this being an ancestral right not related to the possession and use of the land as such, it is not contemplated by the extinction clause in this agreement. Indeed, sec. 2.1 of the JBNQA is unambiguous in this regard: "In consideration of the rights and benefits herein set forth in favour of the James Bay Crees and the Inuit of Québec, the James Bay Crees and the Inuit of Québec hereby cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Québec, and Québec and Canada accept such surrender".

with Inuit communities and nation, according to customs. Still, this removal of a specific reference to customary adoption for the Inuit of Nunavik should not be construed as extinction or limitation of this Aboriginal or treaty right. In fact, the negotiations on CA. 18 cannot justly equated to an extinguishment of this adoption right, as the Inuit party never viewed that exercise as affecting their aboriginal right to adoption. For the Inuit of Nunavik, their customary adoption regime is and remains a right duly sanctioned by the Constitution and over which they have full jurisdiction.

3.1.2.2 Principles, foundations and effects of Inuit customary adoption

Although one of the objectives of the consultations was to define the custom of Aboriginal adoption, it quickly became apparent that it would be impossible to find a simple and concise definition. The fact is that this tradition, which involves the essence and very identity of the nations and their constituent members, is based on core elements and intrinsic, diverse and complex principles. In fact, customary law can involve an almost unlimited number of potential quasi-parental relationships between individuals where customary ties and, indeed, adoption is concerned, but also marriage, remarriage, and homonymity, among other concepts.[204] Regarding Inuit children, these customary regimes are links between the various childcare traditions of which customary adoption and customary custody are a part. Modern thinking differentiates these two regimes from Inuit customary law, both in the terminology used and by their contrasting effects. However, it seems that, historically, the outside observer has used a single term, and a single concept to describe these two orders, much like other indigenous nations or communities here and elsewhere.

> In the rigours of artic life, adoption is a social adjustment to spread the children more evenly throughout the community to the benefit of both generations. As such, it operates without legal hindrance, and is often flexible arrangement. One small girl of two had already experienced three mothers: her original unmarried mother, a first adoption, and a subsequent adoption. If her present mother were to go to hospital, she would probably move again. The principle of distributing the

[204] Saladin d'Anglure, Bernard. "Mission chez les Esquimaux Tarramiut du Nouveau-Québec (Canada)." *L'Homme* 7, 4 (1967), p. 97.

> children among households thus acts both to share the blessing of children and also to ensure the best possible survival rate for the population.[205]

To his credit, author and foreign observer William E. Willmott documented and penned this document in 1958 during a short summer internship among Port Harrison's 350 "Eskimos" as part of his graduate studies in sociology and anthropology at McGill University. The extract, however, shows how any observer that is not from the community under study can have an incomplete, biased view, seen from the prism of his own world, and therefore requiring a dose of cultural relativism.

Therefore, we must relativize the distinction made for the purpose of this report between the concepts of customary child care and of adoption for the Inuit of Nunavik. Indeed, the consultations, orientations and questionnaires were all designed in light of the latter customary regime with permanent effects on the original filiation, and the need for seing recognized such effects on the civil rights of the adoption triangle's members. Priority was therefore given to the Inuit customary adoption, which was documented and observations hereby presented. This does not mean that a complete picture of the customary regimes for children is thereto made as no studies or work were carried out in the communities on the concept of Inuit customary child care considering its temporary nature and effects. Consequently, due to the mandate of the Working Group and the objectives pursued by the Inuit to this end, we must acknowledge that the presentation in this section is incomplete and is therefore presented without prejudice to the other Inuit customs associated with childhood or other aspects of these customs, particularly with regard to customary child care that presents no severance of or permanent effect on the original filiation.

Nevertheless, elements specific to the tradition of adoption can be identified. Indeed, adoption means agreeing to give one's child to a person or to a couple who will assume all the duties and responsibilities as parents. The adoption, generally agreed

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[205] Wilmott, William E. "The Eskimo Community of Port Harrison, P.Q." *Department of Northern Affairs and National Resources, Northern Co-ordination and Research Centre* 61, 1 (1961), p. 76.

before or when the child is born, has a lasting effect on the original filiation of the child, changing it in favour of the adoptive parents, with all the attendant duties and obligations in both customary and statutory laws. The consensual process is expressed by verbal agreement between the adoptive and biological parents, and is most often initiated when the birth mother is still pregnant with the child, who will be physically entrusted to his adoptive parents as soon as he is born. The terminology shows that the general terms "mother: *anaana*" and "father: *ataata*" will be used by the child to describe his adoptive parents, while another term will be used to refer to the child's "birth mother: *puukuluk".*[206]

In this regard, it is noteworthy to mention the prominent role of the mothers in the adoption especially regarding the consent to the adoption, and which diminishes the say of the biological father to said matter. Moreover, Nunavik's elders explained how grandmothers figured in the adoption process: in the past, the maternal grandmothers played an instrumental role in concluding agreements, which were final and binding as to the choice of adoptive parents, because the grandparents were ultimately responsible for their grandchildren's best care. The changes currently sweeping through the social and family network of Inuit and other societies have changed this traditional involvement of grandparents in customary adoption. However, the first right to the child customarily reserved for the maternal grandmother remains unchanged.

Although flexible in its forms and expressions, Inuit customary adoption has lasting effects. The child is recognized as a member of the adoptive family whose name he bears. He knows his biological parents, although custom does not encourage contact. In fact, by the end of the consultations, the openness of Inuit adoption had been relativized, not as a characteristic of the custom but rather as the outcome of the nature of the communities that make the adoptions known among their members.

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[206] Incidentally, this highly matriarchal custom has no equivalent in Inuktitut for "biological father". It is also interesting to note that "*puukuluk*" seems to be a fairly new word in the Inuktituk vocabulary, since the elders interviewed during the consultation did not remember a word being used in this manner, reinforcing the relative aspect of the open and non-confidential nature of customary adoption, as discussed later in this part.

The historical foundations of the tradition were reconfirmed during the recent consultation and are consistent with the findings of the previous ones, clearly demonstrating the intergenerational transmission of this oral custom. These foundations have been grouped into three causes and justifications:

(1) *Justification: The importance of care and affection.*

Cause: Death of biological parents, or for a family with already too many children, or too many children too close in age, or limited resources or experiencing difficulties.

(2) *Justification: The search for balance.*

Cause: Within a family in the breakdown of tasks that are culturally divided by gender.

(3) *Justification: The child and his central role.*

Cause: Sterility, for childless couples, the child being at the very core of Inuit society. Respondents report that, in many cases, an initial adoption leads to the birth of biological children, which is why the adoptive child is cherished as a benefactor.

These foundations are coupled with the intrinsic values of adoption held dear by the elders as conditions for its existence. They are: *love; respect; affection; the solemn, serene commitment exchanged as part of the adoption; its sanctity; acceptance of the parental obligations with honour and commitment; the maturity of the adopting parents; and childhood itself, crucial for the harmony it provides and the meaning to life it gives families and adopters.*

It is these values and philosophies that make the child the centre of the family in Inuit society. His interest, in every aspect of his Aboriginal life, therefore become pivotal to the process and encompasses considerations about the family, the community and the child's distinctive culture.[207] The concept of interest therefore becomes more demanding and exhaustive, because it necessarily includes these

[207] We can found this paragraph on the interest of the child in his Aboriginal life in Larivière, Mylène. *Le régime coutumier de l'adoption des enfants autochtones : L'exemple du droit des Inuits du Nunavik*. Makivik Corporation. This text will be published by the University of Ottawa Press.

cultural, customary, linguistic, community, family, spiritual and religious elements. In this regard, the philosophies and guiding principles of Inuit society convey a global and organic view of the order of things that are used to define both the personal and collective rights of the members of the child's society. These Aboriginal factors that define the interest of the child are not necessarily inconsistent with statutory standards,[208] which recognize that collective interests, and particularly those of national minorities, can be part of the definition of the interest of the child, creating a bridge between these individual and collective interests. As Kymlicka writes:

> Some critics argue that the conception of human personhood and human needs underlying the doctrine of human rights is culturally biased. More specifically, it is "Eurocentric", and exhibits a European commitment to individualism, whereas non-Western cultures have a more collectivist or communitarian conception of human identity.[209]

Consequently, it is a matter of balancing the rights and interests of individuals and communities,[210] ensuring these individual rights are protected within their society, and asking for a flexible and complementary interpretation of these interests.[211] A respectful appreciation of the relativity of concepts such as the plurality of rights is therefore required to capture the full essence of Aboriginal customary adoption law in general, and the Inuit customary adoption regime in particular.

3.1.2.3 The objectives arising from the consultation

In the search to define objectives for the consultation, the attachment of the Inuit Nation to its adoption custom became clear. The various interviews with the elders revealed this unanimous sentiment, which was also apparent in the two regional

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[208] Notably in the *Convention on the Rights of the Child*, [1992] Can.T.S. No. 3, sec. 3, 20, 21 and 30, in accordance with the principles of protection of the personal and collective rights.

[209] Kymlicka, Will. *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*. New-York: Oxford University Press, 2001, pp. 70–77.

[210] For additional details on this inter-relationship, see: Canada. Canadian Human Rights Commission. *Balancing Individual and Collective Rights: Implementation of section 1.2 of the Canadian Human Rights Act*. Edited by Ruth Bradley-St-Cyr. March 2010.

[211] Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples, Vol. 2: Restructuring the Relashionship, Part one*. Ottawa: Department of Supply and Services Canada, 1996, chapter 3, as for a flexible interpretation of the Charters.

consultation forums. It was therefore essential for the Inuit that the work undertaken by the Working Group seeks to ensure the continuity of this customary law. This observation is closely tied to the current requirements of Québec law, such as its exclusion of the effects of customary adoption on filiation, calling into question the lack of coordination between the regimes. The objectives that has drive the work and the consultations of the Inuits representatives on the Working Group thus necessarily became the search for full recognition, in fact and in law, of the effects of Inuit customary adoption.

As previously pointed out in this report, this was a necessity already expressed by state actors, in 1988, following the development of the "foundations of the Government of Québec's Aboriginal policy" and confirmed again in Inuit society in 1991 by the provincial committee on the family policy action plan:

> The situation is even more alarming when we become aware of the large number of Inuit children who are still affected by this reality (i.e. customary adoption), the attachment the Inuit have for this custom and the reform under preparation for registration of births.[212]

The consultation held for the purposes of this Working Group was therefore a second broad-based effort that followed another special consultation held in 1992-1993 in preparation for important legislative changes to the way civil acts were registered. Indeed, until the 1994 reform of the Civil Code, as briefly discussed in section 1.2, Inuit customary adoptions were attested by simply having parish authorities or trading posts record a mention to this effect in the baptism certificates, for which they were responsible. The changes made by vesting the RCS with this power when the Civil Code was reformed put an end to the proximity between customary practice and the practice followed by public administration representatives.

After the reform, Makivik, together with the NRBHSS, began lobbying the RCS to recognize the effects of customary adoption in the civil acts it records. These efforts

[212] *Adoption in Québec, Provincial Committee report in the context of the Plan of Action on Family Policy*, *op. cit.*, note 57, p. 16.

apparently paid off,[213] with the Registrar forming a working committee on Inuit customary adoption mandated to find possible solutions, suggesting formalities and other guidelines under the Inuit leadership for which the exercise of the RCS' authority would be simplified. The RCS sought firm, official guarantees that would allow it to record, without a shadow of a doubt, customary adoptions in civil acts under its authority.

Consequently, in 1995, the NRBHSS adopted a resolution accepting the establishment of a procedure by which Inuit customary adoption could be recognized. The KRG adopted a similar resolution in 1996, adding that each community may, at its discretion, establish a local advisory committee on adoption to be consulted before confirming customary adoptions. Affidavits were initially used to ratify the procedure and a "*Declaration of Inuit Customary Adoption*" form was subsequently developed for this purpose after local resolutions were endorsed, appointing the president of the landholding corporation and the mayor or secretary-treasurer as attestors to the tradition. This was a way of instituting a simple mechanism, without altering the Inuit customary adoption law, to confirm the occurrence of adoptions with the RCS, as required by the latter.

This administrative arrangement, in effect for over 15 years, takes the form of a *Declaration of Inuit Customary Adoption*. This form is sent to the RCS, which, if duly completely by the child's biological and adoptive parents, signed by the attestors to the tradition, and contains all the required personal information, changes the child's filiation and records the names of the adoptive parents on the child's birth certificate. The declaration is therefore signed by the adoptive and biological parents, and by the elected representatives of the community concerned, who do so to confirm the identity

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[213] Nunavik Regional Board of Health and Social Services. *Customary Adoption - Registration of Births,* by Lizzie Epoo York, Executive Director. April 5, 1996. Letter sent to all the members of his board of directors and to the northern villages, refering to a meeting held on November 9, 1995 between the Nunavik representatives and Guy Lavigne, Registrar of Civil Status, stating his openness to acting according to Inuit customary adoptions based on section 35 of the Constitution but stating that the related documentation would be required to make the changes in the civil registrations.

of the registrants, the veracity of the information and the affiliation of the individuals involved with Inuit society. For the RCS, this customary adoption form serves as proof that an adoption took place according to custom, and the Registrar defers entirely to the assessment of the community authorities. Since the implementation of CA. 18 and the establishment of the Nunavik Enrolment Office (NEO) at Makivik's headquarters in Kuujjuaq, the NEO is the preferred liaison for relaying adoption-related information, including the declaration of adoption, between the members of the adoption triangle and the RCS.

This process seems to respect the objectives established in both past and current consultations, favouring in its exchanges with the government authorities a simple process stemming from oral tradition, without written formality or red tape, except for the declaration of adoption, and with no court intervention in these "open" adoptions, obeying a flexible process but one with permanent effects.

3.1.3 Specific observations

3.1.3.1 The modern world and adaptability

While the Inuit are foundly attached to their custom on adoption and wish to see it continued, they also expressed concern about the modern challenges confronting it on all fronts. They noted new causes and justifications for adoption that are beyond the intrinsic and historical values of their tradition. They are well aware of the ills affecting their society and disrupting their adoption custom. As presented in subsection 1.1.2 on the changes to the Aboriginal family and social structures, the Inuit are suffering the backlash of these colonial and assimilation policies, socioeconomic and isolation problems, and rapid, forced modernization. As the findings of the CDPDJ's last two reports[214] show, the Inuit acknowledge the challenges confronting them.

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[214] *Investigation into child and youth protection services in Ungava Bay and Hudson Bay, Nunavik report, conclusions of the Investigation and recommendations, op. cit.*, note 17; *Nunavik: follow-up*

However, they reject the observation that customary adoption is the underlying reason for these challenges, whereas in fact, this custom "suffers" from them. A classic example is the still recent phenomenon of teenage pregnancy, requiring more frequent recourse to this tradition of care and affection. This new cause, different from the historical justifications, nevertheless shows the flexible, evolving nature of the Inuit tradition, which has been able to respond to the needs of the members of its society. But it also raises legitimate questions within the Inuit society. And, although these members may seek to define other rules and solutions, perhaps even beyond the scope of their customs, this does not signal the end of the pertinence of customary adoption, which is reacting rather than acting on all these social changes. It remains a sovereign right, and it cannot be subordinated to the statutory system simply on the basis of these allegations. And the answer, in the example provided, is rather to offer support to young mothers in communities lacking frontline services and to continue educating them on contraception, birth and parenthood.[215]

Nor should we demand perfection of adoptive parents, regardless of whether a statutory or customary adoption is involved, just as we do not of biological parents. Unfortunately, it is a fact that not all parents succeed in ensuring the safety and well-being of their children, as the reports mentioned earlier sadly remind us. However, the family difficulties in Nunavik are not only found among those who have adopted according to custom. The 2003 Canadian health survey showed that in fact one child out of three (1/3) was adopted according to custom, the same figures reported by Fletcher (1996),[216] who also found that one out of three (1/3) adopted children were in the care of child protective services. An interesting fact is that Québec's 1992 health report found that adopted children had a higher level of education than non-adopted children. It is true that the current living conditions of the Inuit could foster certain

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report on the recommendations of the investigation into Youth Protection Service in Ungava Bay and Hudson Bay, *op. cit.*, note 195.

[215] Archibald, Linda. *Teenage Pregnancy in Inuit Communities: Issues and Perspectives*, work done for Pauktuutit Inuit Women's Association. April 2004, p. 23.

[216] Fletcher, Christopher. *Custom Adoption and Youth Protection in Nunavik*, report prepared for the Ungava Social Services. Kuujjuaq, July 1996, summary and pp. 40–41 providing a quantitative conclusion to the cases analyzed.

changes in the custom practices. However, such changes can only be instituted by and for the Inuit of Nunavik, something everyone had agreed on by the end of the consultation within the Inuit *milieu*.[217]

It was suggested during the discussion forums that an expert committee be formed of representatives of the regional organizations concerned to attempt to define general principles, appropriate mechanisms, minimum rules or confirmations of adoption that – it was emphasized – are respectful of this tradition. A parallel can be drawn with CA. 18, where the Inuit communities were given the authority to regulate application of the new eligibility criteria. Searching to recognize members who are affiliated, associated with or who identify with their community – an entirely new way to doing things, which contrasts with the known custom of adoption - the local enrolment committees now refer to all manner of documents, guides, policies and other forms created by Makivik, following the ratification of CA. 18 in order to carry out the mandate of these committees, as well as those of the regional enrolment office and the Enrolment Review Committee.[218] For the Inuit, in a reaffirmation of its already stated willingness concerning adoption, this would involve suggesting practices and adjustments, without setting this evolving and vibrant Aboriginal right in stone, at the end of specific, targeted consultations that should be held in the near future. Naturally, this reflection will be carried out without prejudicing this Aboriginal Inuit right and the special recognition enshrined in statutes and treaties.

3.1.3.2 Customary adoption without borders

The consultation also led to an interesting observation about Inuit customary adoption involving extraterritorial issues. Canada's Inuit live in different provinces and territories. Sharing historical, linguistic, family and ancestral ties, the Inuit of

[217] See the last recommandation of the *Discussion Paper Prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Quebec*, *op. cit.*, note 44.

[218] These guidelines, mechanisms and processes are electronically appended for information purposes (*Form G – Declaration of Inuit Customary Adoption Form*, *op. cit.*, note 34).

Nunavik, Nunavut,[219] Labrador (Nunatsiavut) and the Northwest Territories (Inuvialuit) face complex administrative barriers when attempting a customary adoption among themselves.

As far back as December 1991, the aforementioned provincial committee decided that these adoptions without borders should be a priority and require sensitivity and positive action from the Government of Québec to regulate the situation of the children involved.[220] Based on this observation that arose from the various consultations, the Working Group will make a special recommendation in this regard.

3.1.4 Specific conclusions

3.1.4.1 Full recognition of the effects of Inuit customary adoption in fact and in law

Through the ages, and more markedly since the latest major changes to the civil status regimes of the Civil Code, the Nunavik Inuit have consistently demanded full consideration of their customary adoption right within and for the purposes of Québec legislation. This is because with the exception of the implementing statutes of the JBNQA, the effects of customary adoption are not incorporated or accommodated in Québec legislation. Although for the Inuit part, customary adoption exists in its own right, due to its distinctive customary law, recognized and protected by the Constitution, practical legal recognition of its effects in Québec laws is still desirable. The fact is that legal consequences are required for the members of the adoption triangle, who are supposed to enjoy the civil and statutory rights, statuses, advantages and benefits in accordance with their customary status in fact and in law.[221] The Government of Québec has an obligation to take positive action, within its jurisdiction,

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[219] These ties were recognized by the *Nunavik Inuit Land Claims Agreement*, signed on December 1, 2006, which recognized the rights and ownership of the Nunavik Inuit in the marine region and islands under Nunavut's jurisdiction.

[220] *Adoption in Quebec, Provincial Committee report in the context of the Plan of Action on Family Policy*, *op. cit.*, note 57, p. 17: "Theses cases, which occur very often, are extremely complicated to manage legally and still continue regularly".

[221] The consultations found countless such problems involving parental authority, filiation, legal identity, succession and eligibility for various legal or statutory plans.

regarding the civil status of individuals[222] and their filiation, without making Aboriginal customary law subordinated on its own law. Indeed, the line between government recognition of, and interference in, an Aboriginal right can be very fine.

In this case, and as reiterated in the report's recommendations, the Working Group proposes that this recognition be included in the Civil Code in order to give legitimacy to the actions of the RCS following an adoption recognized as such according to the custom of the Inuit. The RCS would then simply respond to the notification, without taking a position on compliance with the custom, leaving this aspect solely up to the Aboriginal *milieu* concerned. This proposal is similar to the administrative procedure already in place between the RCS and the Nunavik Inuit, and this community appreciation is also provided for to some extent in the *Indian Act*, whereby the Registrar only takes note of the customary adoption attested by the individuals and authorities concerned.

This proposal requires no special law or court decree to incorporate the civil effects of customary adoption into Québec laws and is in keeping with the request repeatedly expressed during the consultations for a simple process that is respectful of customary law. It also does not require the intervention of the DYP when an Inuit customary adoption takes place, and as such reiterates that the causes and justifications of these two institutions are different. It is important to point out that customary adoptions do not fall within the application framework of the YPA. These different concepts may occasionally converge when a child adopted by customary adoption is reported to be at risk, in which case the adoptive family is involved, and then both regimes, which are otherwise not connected, come into play. This interaction is indicated in the Inuit's consultation report and is repeated in this report in the recommendation regarding the YPA.

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[222] Some may argue that children adopted according to custom are being discriminated against if they are deprived of the full enjoyment of their civil rights in accordance with their status under customary law (C.C.Q., sec. 1).

Not surprisingly, the statements made by the Inuit Nation at the end of its consultation are the same as the conclusions drawn by the members of the provincial committee (1991) and, in a spirit of history and continuity, the latter recommendations are presented, as follows:

- That the MSSS respect commitments made in 1986 and resumed in 1988 by the government in its policy and see to development of legislative provisions in view of full recognition of customary adoption;
- To implement the first recommendation, that the MSSS and the MJQ develop, as soon as possible and in close collaboration with the Inuit people, a flexible mechanism with the goal of sanctioning (or ratifying) customary adoptions by a local authority, instead of requiring systematic recourse to the court;
- That the ministries concerned find a simple and efficient means to confirm adoptions made in the past to permit correction of registries of civil status in view of establishing conformity with the actual family status of all natives adopted in the traditional manner;
- That the ministries concerned negotiate agreements with the other provinces and territories to facilitate recognition of customary adoption between Québec natives and those outside Québec.[223]

3.1.4.2 Implementation and the status quo

The third recommendation of the provincial committee (1991) responds to a particular concern of the Nunavik Inuit, expressed in the discussion paper drafted for the purpose of the Group's work. This paper states that the Inuit are reaffirming their commitment to develop an Inuit regime to standardize the modern-day implementation of its customary adoption law and that any legislative amendment proposed must respect this law, independently of the internal regulatory exercise. Given that current or future legislation "[…] relating to adoptions had not pre-empted the field so as to disallow custom adoptions",[224] the effects of past and current Inuit customary

[223] *Adoption in Québec, Provincial Committee report in the context of the Plan of Action on Family Policy, op. cit.*, note 57, p. 17.
[224] *Re Kitchooalik et al. And Tucktoo et al.*

adoptions will have to be recognized in civil law. It is therefore suggested that the use of the Inuit declaration of customary adoption be continued to this end.

3.1.4.3 The need for the involvement of the Inuit Nation in the legislative amendment process

Given the rules governing the division of powers, the type of rights involved and the inherent limits to provincial intervention in this matter, it is clear that any effort to amend the law to give effect to Aboriginal customary adoption in general and Inuit in particular will require the participation of the Aboriginal nations concerned, beginning with the representatives of the Nunavik Inuit.

This is precisely what Makivik and the NRBHSS told the members of the Committee on Institutions of the National Assembly following the presentation of the draft bill on adoption and parental authority.[225] It is understood that, in keeping with these demands, the involvement of the Nunavik Inuit will be solicited for potential work on the legislative amendments or for any implementation of the recommendations of this report.

3.1.4.4 Administrative and financial support

The involvement of the Nunavik Inuit will also be required for implementing these recommendations. In fact, and although the preliminary commitments of the Inuit representatives are to establish an Aboriginal authority as suggested in this report, these implementations will require sustained efforts by the Aboriginal communities, particularly and at their discretion, in terms of consultation and the development of Aboriginal regimes and mechanisms to reflect a modern expression of Aboriginal governance in these matters. The corollary to this Aboriginal project will be to guarantee adequate support, development and, in some respects, funding – responsibilities devolved to both the provincial and federal government authorities – to

[225] *Comments concerning the Draft Bill to amend the Civil Code and other Legislative provisions as regards Adoption and Parental Authority, op. cit.,* note 33.

ensure the success of this interface and regulatory project. Fulfilling these conditions will ensure positive results to the Inuit commitments and actions.

3.2 Perspectives of the First Nations Representatives: Customary Adoption, the Results of the Consultations and the Processes and Outcomes of the Working Group

This part describes the methodology and provides the results of the First Nations' consultations on customary adoption.[226] It also summarizes the views of the First Nations as regards the steps needed to address the practical problem of clarifying effects of customary adoptions within and for the purposes of provincial legislation to facilitate their recognition by Québec (and federal) administrative authorities.[227]

This part is provided on behalf of the First Nations representatives of the Working Group. This includes representatives of the AFNQL and the FNQLHSSC (for 10 Nations and 43 communities); the GCC(EI)-CRA; the Cree Board of Health and Social Services of James Bay (CBHSSJB) and QNW.

Internal consultations of the First Nations (including the Crees and QNW) served to guide the participation of their representatives in the deliberations of the Working Group. Consequently, this part revisits key elements of the FNLQHSSC's report[228]

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[226] For purposes of simplicity, reference is made to "customary adoption", although First Nations often use the term "traditional adoption" as well. This was frequently the case in the First Nations' consultations described below. There are no directly equivalent words for these French and English terms in First Nations' languages.

[227] The Cree parties assert that Cree customary adoption is an Aboriginal right enshrined as a treaty right though the JBNQA. As such, it enjoys constitutional recognition and affirmation under section 35 of the *Constitution Act, 1982.* The Crees also assert that Cree customary adoption is already recognized as having legal effects pursuant to the JBNQA and the legislation which implements it. Please refer to Cree section at subsection 3.2.9, and the *Brief on Draft Bill to amend the Civil Code and other legislative provisions as regards adoption and parental authority, op. cit.*, note 44, submitted by the Crees to the Committee on Institutions.
Note that as regards customary adoption, the Naskapi of Kawawachikamach assert Aboriginal rights and treaty rights under the *Northeastern Quebec Agreement* (1978) (NEQA) and that these rights are protected under section 35 of the *Constitution Act, 1982*. These rights are reflected in part in federal and provincial legislation (see section 2.2) such that, in the view of the Naskapi, their situation bears similarities to that of the Crees.

[228] *Consultation report and Recommendations on Customary and/or Traditional Adoption Among the First Nations of Quebec, op. cit.*, note 69.

tabled in June 28, 2011, (FNQLHSSC Report) which provides a more detailed account of the consultation and its results.

It also includes a section provided by the Cree representative on the Working Group on behalf of the GCC(EI)-CRA and the CBHSSJB.

Further perspectives of the Cree Nation and QNW may respectively be found in the Cree text appended to the FNQLHSSC Report and the report made on behalf of QNW,[229] dated August 2010, also appended to the FNQLHSSC report.

3.2.1 Basis of First Nations' Participation

The comments, materials, reports, consultation results, affirmations and recommendations made or referred to in this chapter on behalf of the First Nations of Québec, through the representatives of the AFNQL, the FNQLHSSC, the QNW and the GCC(EI)-CRA and the CBHSSJB are provided for the sole purpose of the work of the Working Group. For the First Nations representatives, the primary goal of their involvement in this Working Group is to facilitate the recognition of legal effects of customary adoption within and for the purposes of Québec legislation.

Specifically, the comments, materials, reports, consultation results, affirmations and recommendations of the above-mentioned parties in this chapter, and in other Working Group documents and processes:

- are without prejudice to the rights, jurisdiction and legal positions of these parties with respect to customary adoption, including with respect to related Aboriginal and treaty rights;
- do not define, limit, fix or freeze the content and practice of customary adoption, which by its nature varies among Aboriginal Nations and communities and may change over time to respond to new realities.

[229] *Complementary Research on Traditional and Customary Child Care Practices/Adoption within Aboriginal Communities in Quebec*, *op. cit.*, note 64.

Given that First Nations have developed conceptions and definitions of customary adoption over many generations which differ from those of the Civil Code, subject to First Nations consent being specifically given in the future, they do not hereby consent in any way to the unilateral and detailed definition of customary adoption and its regulation in the Civil Code or any other provincial statute or regulation.

3.2.2 Overview of Customary Adoption

The characteristics of customary adoption were summed up by the AFNQL and the FNQLHSSC in the following manner:

> […] This form of custody, in which a child is cared for by a relative, is rather common. Adoption takes place naturally, without any legal procedure. The child keeps the same social identity and stays connected to his/her biological parents and origins. Custom adoption may be either on a temporary or long-term basis. Historically, this type of adoption was established to address several needs: passed down through tradition, this type of adoption was used to relieve parents of their child-rearing obligations, create a complex family network and broaden the network of partners for economic purposes.[230]

For their part, QNW and the RCAAQ define the concept of traditional adoption as follows:

> It is a matter of a practice that takes place over time in which an Aboriginal parent confides their child to a person that they trust, so that they can take care of the child and ensure his education, while taking on parental responsibilities in a temporary fashion or for an indeterminate period, when the parent is unable to assume this function on his own.
>
> This way of doing things is commonly accepted in the Aboriginal communities and takes place in a natural fashion within the extended family (grandparents, uncles, aunts, cousins, etc.) in order to allow the parents to share their family

[230] Quoted in *Draft Bill for the Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, comments and recommendations to the Minister of Justice, *op. cit.*, note 44, p. 5, referring to *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, p. 109, quoting a presentation made by the FNQLHSSC during a symposium organized by the *Conseil de la famille et de l'enfance*.

responsibilities when they feel unable to fully assume these responsibilities. This practice however allows the parents to maintain a connection with the child.

The traditional adoption practice in the Aboriginal setting does not mean that the child is being abandoned by his biological parents, but rather that the child is being entrusted to other members of the community so that they can fully assume the child's development while maintaining connections with his identity, culture, Aboriginal traditions and language.[231]

3.2.3 The Colonial Process, the Survival of Customary Adoption and Section 35 Rights

Along with the other members of the Working Group, the First Nations representatives recommend legislative action by Québec in order to facilitate the recognition of effects of Aboriginal customary adoptions within and for the purposes of the Civil Code. They also recommend changes to the *Youth Protection Act*. However, the understanding of the First Nations' may differ in certain respects from the approach reflected in the preceding chapters of this report.

Accordingly, it is essential to properly situate this core recommendation in the context of the First Nations' view of:

- the negative impact of the colonial process and of federal and provincial laws and policies on the ability of First Nations to protect, and exercise authority with respect to, their families and children;
- the survival and continuity of customary adoption as a contemporary reality;
- the hierarchy of sources of law and the proper relationship between customary law jurisdiction and rights as recognized and affirmed under section 35 of the *Constitution Act, 1982* (Section 35) and the statutory law of a province, such as the Civil Code.

[231] Quoted in *Draft Bill for the Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, comments and recommendations to the Minister of Justice, *op. cit.*, note 44, p. 5, referring to *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, p. 110 quoting *L'adoption traditionnelle et/ou coutumière chez les autochtones*, pp. 4-5, produced by QNW and RCAAQ in 2007 (see *Traditional and Custom Adoption in the First Nations*).

In the view of the First Nations, these three strands of history, contemporary reality and legal situation all point in the same direction: respect for the living institution and right to customary adoption and recognition of its effects within and for the purposes of Québec legislation, in the interest of First Nations' children. This will allow Québec, in partnership with First Nations, to innovate and to take a leadership role in the respect for these rights in a manner that favours reconciliation of Aboriginal realities with those of provincial legal and administrative systems.

3.2.3.1 The Colonial Process and the Impact of Federal and Provincial Policies and Laws

Before the arrival of the Europeans in North America, the First Nations were sovereign and organized societies that had developed political systems as well as their own social structures and laws and such customary laws were presumed to continue despite the assertion of European sovereignty.[232] Over the course of the centuries following contact with Europeans, the laws and self-governing jurisdiction of First Nations regarding family, children, identity, culture and language were progressively ignored, denied and marginalized by European colonial powers, even though such First Nations laws and jurisdiction were not extinguished.

The more recent history of First Nations' interactions with the federal and provincial levels of government with respect to the care and upbringing of children has also been difficult.[233]

The values and practices of First Nations regarding the care and upbringing of children were severely modified by the influence of religious orders, the reserve system, Indian agents and the *Indian Act*. The imposition of Indian residential schools on First Nations, as well as the coming into effect of the *Youth Protection Act* in Québec

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[232] See for example Chief Justice John Marshall in *Worcester v. State of Georgia,* (1832) 31 U.S. 530, pp.542-543 and 548-549; *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313 per Judson J. at p. 328 and Hall J. at pp. 383-385; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at pp.1052-1056; and *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, par. 9-10.

[233] As developed at section 1.2 and subsection 3.2.6.

in the late 1970s, brought major detrimental changes from a social standpoint, causing First Nations parents to experience disempowerment and a sense of losing their responsibility with respect to the care and upbringing of their children.[234]

Under federal and provincial laws and policies, large numbers of First Nations' children were removed from their communities and placed in foster care and put up for adoption. This was the case in the period of what is known as the "1960s scoop", in reference to the widespread removal of First Nations' children by governmental authorities from their families and their displacement to distant, non-Aboriginal families.

Even today, the disturbing reality is that Aboriginal children are vastly overrepresented among those who are under the orders of the youth protection system, placed in foster care (often in non-Aboriginal homes away from their communities).[235] Furthermore, in an even more recent development, the "superficially

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[234] Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples, Vol. 1*: *Looking forward Looking back*. Ottawa: Department of Supply and Services Canada, 1996, especially chapters 6 and 10, and *Report of the Royal Commission on Aboriginal Peoples, Vol. 3: Gathering Strength*, *op. cit.*, note 13, especially part 2 of chapter 2.

[235] See discussion and references in subsection 1.1.2. The FNQLHSSC described the situation in the following terms in its *Draft Bill for the Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, comments and recommendations to the Minister of Justice, *op. cit.*, note 44:

"In non-agreement First Nations communities[1] in Quebec, more than one in ten children is subject to protection measures from provincial authorities under the Youth Protection Act.[2]

[…]

The overrepresentation of First Nations children in Canada's child welfare system is a long-established fact.[3] In Quebec, according to FNQLHSSC estimates, the number out-of-home placements are eight times higher for First Nations children than for non-Aboriginal children, a proportion that was still growing in 2008.[4]"

fn 1: First Nations communities not covered by the James Bay and Northern Quebec Agreement (Northern Quebec Cree and Inuit) or by the Northeastern Quebec Agreement (Naskapi).

fn 2: In 2005/2006, 10,943 placement files were recorded for a population of 11,372 youths aged 0 to 18. These files concerned 1005 children, i.e. 10% of children in Quebec Aboriginal communities (excluding Cree and Inuit communities), for a total of 191,309 days of placement. (Quantum Table on the Tripartite Agreement on Child and Family Services – number and percentage of children placed into care in Quebec, 2002/07, INAC).

fn 3: In 2005, the number of Aboriginal children in the care of child welfare agencies across Canada was three times higher than the number of children placed in Indian Residential Schools at the height of their operations: Assembly of First Nations, Leadership Action Plan on First Nations Child Welfare, 2006, p. 1. Online:
http://www.afn.ca/cmslib/general/afn_child_final.pdf.

neutral"[236] time limits on foster care and the requirement of permanent life plans imposed by provincial law bring *de facto* risks of First Nations' children being frequently adopted into non-Aboriginal homes (pursuant to the provincial regime) outside of their communities and consequently becoming permanently cut off from their family, extended family and heritage.[237] Whichever of these various paths is followed, the removal of children threatens and disrupts the life of First Nations, communities, families and the children themselves, because it creates a situation in which it is no longer possible to transmit culture, language and identity from one generation to the next. Furthermore, a very high percentage of First Nations children subjected to such "culturally–foreign" adoptions suffer breakdown of the adoption, which results in their eventually leaving their adoptive homes and manifesting social issues that affect their adoptive families and their families of origin, as well as their own sense of identity and well-being.[238]

3.2.3.2 The Survival and Continuity of Customary Adoption

Despite the challenges over several centuries of the colonial process and of more recent federal and provincial law and policy, Aboriginal customary jurisdiction and law have endured and customary adoption has been, and still is practised, among the First Nations of Québec. The continued existence and importance of customary adoption to First Nations is clearly reflected in the results of the consultation, as discussed more fully in section 3.2.8 of this part below.

From 1995 to 2001, the number of children from First Nation communities placed in out-of-home care increased by 71%: Trocme, N. & Chamberland, C. (2003) "Re-Involving the Community: The Need for a Differential Response to Rising Child Welfare Caseloads in Canada" in *Community Collaboration and Differential Response: Canadian and International Research and Emerging Models of Practice*. Ottawa, ON: Child Welfare League of Canada, pp. 32-63.
fn 4: FNQLHSSC, Information document, *Placement of First Nations of Quebec Children: Status of the Situation*, July 11, 2008. In Quebec, on average, nearly 12% of Aboriginal children are placed in out-of-home care for a period of one day or more; 30.57% of them are 5 or under."

[236] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, p. 1110: "Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests."

[237] *Youth Protection Act*, especially ss. 4 *in fine*, 53.0.1, 57, 91.1.

[238] Bertsch, Maria, and Bruce A. Bidgood. "Why is Adoption Like a First Nations' Feast?: Lax Kw'alaam Indigenizing Adoptions in Child Welfare." *First Peoples Child & Family Review* 5, 1 (2010), especially p. 97.

Such adoptions occur within and among First Nations in the province. They also occur within and among First Nations across provincial, territorial and international boundaries which were created, and imposed upon First Nations, by colonial powers.

In fact, as a result of the social, cultural and individual difficulties that First Nations have experienced in relation to youth protection and adoption matters for decades, they have sought changes in provincial legislation to reflect the reality of customary adoption and to facilitate the recognition of its effects for the purposes of Québec legislation.[239] Notably, First Nations, such as the Crees who have been responsible for their own adoption and youth protection matters from the coming into force of the *Youth Protection Act*, have experienced and called attention to difficulties in the application of that Act and other adoption-related legislation in the First Nations context since the 1980s. They have asserted the need to accommodate the cultural distinctiveness of First Nations, including with respect to customary adoption.

Customary adoption is one aspect of the cultural and social distinctiveness of First Nations with respect to children. Among First Nations, a child is not treated as being separate from his[240] family and community. For First Nations people, the perception is that the child's identity and his attachment to his language and culture are related to the entire community and Nation.

3.2.3.3 Section 35: Pre-colonial Social Structures and Laws to Present Day Customary Adoption

The protection of families, children, identity, culture and language, as well as of self-government jurisdiction of First Nations over these matters, lie at the heart of the existing Aboriginal and treaty rights recognized and affirmed under Section 35.[241] It is important to note that treaty rights include rights that exist by way of land claim

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[239] See subsection 1.1.2.
[240] In this part, the use of the masculine implicitly includes the feminine.
[241] *Constitution Act, 1982*, section 35. See p. 40.

agreements or may be so acquired.[242] Furthermore, for First Nations, customary law jurisdiction and rights regarding matters such as adoption are also part of historic treaties in Québec, and are therefore further protected under Section 35.[243]

The final report of the RCAP, co-chaired by former National Chief of the Assembly of First Nations Georges Erasmus and the Honourable René Dussault of the Québec Court of Appeal is instructive on these matters.[244]

The Commissioners were very clear as to the source and nature of the inherent right of self-government:

> […] We consider that, as a matter of existing Canadian constitutional law, Aboriginal peoples in Canada have the inherent right to govern themselves. This legal right arises from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied. This status was recognized and given effect in the numerous treaties, alliances and other relations negotiated with the French and British Crowns. This extensive practice gave rise to a body of customary law that was common to the parties and eventually became part of the general law of Canada.
>
> In 1982, the inherent right of Aboriginal self-government was recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty-protected right. As a result, it is now entrenched in the Canadian constitution […].[245]

In particular, the RCAP considered family life and related matters to be part of the core jurisdiction of Aboriginal self-government:

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242 For example, the JBNQA and the NEQA. See *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557 and the Cree additional considerations in subsection 3.2.9.

243 For example, the Murray (Huron) Treaty (1760) (also referred as Murray Treaty, 1760 or Murray Treaty of Longueuil, 1760): "(…) being allowed the free Exercise of their Religion, their Customs, and Liberty of trading (…)." The full text can be consulted in *R. v. Sioui*.

244 *Report of the Royal Commission on Aboriginal Peoples, Vol. 2: Restructuring the Relationship, Part one*, *op. cit.*, note 211, pp. 175-214 and recommendations 2.3.4, 2.3.5 and 2.3.6 on the inherent right of self-government as an existing Aboriginal and treaty right under Section 35; *Report of the Royal Commission on Aboriginal Peoples, Vol. 3: Gathering Strength*, *op. cit.*, note 13, chapters 1 and 2 (section 4.1 and recommendations).

245 *Report of the Royal Commission on Aboriginal Peoples, Vol. 2: Restructuring the Relationship, Part one*, *op. cit.*, note 211, p. 175.

> The subjects addressed in this volume — family life, health and healing, housing, education and cultural policy — all fall within what we identified (in Volume 2, Chapter 3) as the core jurisdiction of Aboriginal self-government. These core matters have a direct impact on the life, welfare, culture and identity of Aboriginal peoples.[246]

The Commissioners dealt specifically with the exercise of self-governing jurisdiction as regards adoption:

> With the advent of self-government, Aboriginal nations will be in a position to make their own family law. Indeed, they can proceed with initiatives in this area now, since family law falls within the core of Aboriginal self-governing jurisdiction. While their customary laws in some areas have continuing validity under section 35(1) of the Constitution, in other areas they have been pre-empted by federal or provincial laws. It seems likely, therefore, in view of the fundamental importance of family and family relationships, that Aboriginal people will wish to have their own laws in place as soon as possible. There would seem to be particular urgency in this regard concerning laws and policies affecting children — laws on apprehension, custody and adoption, for example — as well as other areas with an impact on children, including their quality of life and personal security, parental responsibilities with regard to support and maintenance, protection from violence, and property and inheritance. As Aboriginal people have told us, their children are their future.[247]

Finally, the RCAP made unequivocal recommendations regarding these matters:

> **3.2.10**
> Federal, provincial and territorial governments promptly acknowledge that the field of family law is generally a core area of Aboriginal self-governing jurisdiction, in which Aboriginal nations can undertake self-starting initiatives without prior federal, provincial or territorial agreements.
>
> **3.2.11**
> Federal, provincial and territorial governments acknowledge the validity of Aboriginal customary law in areas of family law,

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[246] *Report of the Royal Commission on Aboriginal Peoples, Vol. 3: Gathering Strength*, *op. cit.*, note 13, p. 2.
[247] *Ibid.*, p. 81.

such as marriage, divorce, child custody and adoption, and amend their legislation accordingly.

3.2.12
Aboriginal nations or organizations consult with federal, provincial and territorial governments on areas of family law with a view to
(a) making possible legislative amendments to resolve anomalies in the application of family law to Aboriginal people and to fill current gaps;
(b) working out appropriate mechanisms of transition to Aboriginal control under self-government; and
(c) settling issues of mutual interest on the recognition and enforcement of the decisions of their respective adjudicative bodies.

3.2.13
With a view to self-starting initiatives in the family law area or to self-government, Aboriginal nations or communities establish committees, with women as full participants, to study issues such as
[…]
(c) factors to be considered in relation to the best interests of the child, as the principle is applicable to Aboriginal custody and adoption; […][248]

The direct legal effects of Aboriginal custom regarding marriage have been recognized by the Courts of Québec since at least the time of Confederation.[249] First Nations consider that First Nations' customary adoption and jurisdiction over the subject matter are part of the law of Canada and Québec and are recognized and affirmed under the Constitution. First Nation and Inuit customary adoption have been treated as having direct legal effects by various courts both before and after the advent of Section 35.[250]

[248] *Ibid.*, pp. 86-87.
[249] See *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75; aff'd sub nom. *Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266, which recognized marriage under Cree custom in the partition of an estate for the purposes of the *Civil Code of Lower Canada.* This case remains valid from a jurisprudential perspective. For instance, the judgment was cited as "the leading case, and a most remarkable authority in this field" in *Casimel v. Insurance Corporation of British Columbia*.
[250] See notably: *Re Adoption of Katie E7-1807*; *Re Beaulieu's Adoption Petition*; *Re Kitchooalik et al. and Tucktoo et al.*; *Re Tagornak*; *Casimel c. Insurance Corp. of British Columbia*, recognition of Aboriginal customary adoption as an existing right under sec. 35 for the purpose of obtaining survivor benefits under a the provincial Crown automobile insurance statute ("I conclude that

In the view of First Nations, jurisdiction and rights which are directly recognized and affirmed in this way must be respected and applied, and take precedence over any inconsistent law by virtue of the status of the Constitution as the supreme law of Canada.[251]

Further, due to the constitutional entrenchment of Aboriginal rights, title and treaty rights, and the division of powers whereby Parliament and not the National Assembly has exclusive jurisdiction over Indians, in the view of First Nations, the province is limited in its ability to legislate in ways that affect or infringe on First Nations' customary adoption.[252]

3.2.4 International law and customary adoption rights and jurisdiction

Consideration of the reality of customary adoption, of the constitutional protection for customary adoption rights and jurisdiction and of the recommendations of the First Nations concerning legislative action by the province, must be placed in the broader context of rights flowing from international instruments, notably:

- The *International Covenant on Civil and Political Rights* which provides for the right of all peoples to self-determination and to freely pursue their social and cultural development,[253] recognizes the family as the natural and fundamental group unit of society and provides that it is entitled to protection by the society

there is a well-established body of authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of application of the principles of the common law and the provisions of statute law to the persons whose status is established by the customary adoption."); *M.R.B. (In the Matter of),* [2002] 2 C.N.L.R. 169 (C.Q.), recognition of adoption in accordance with Cree custom.

[251] Sec. 52 (1) provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[252] See "La protection constitutionnelle de la pluralité juridique : le cas de « l'adoption coutumière » autochtone au Québec", *op. cit.*, note 127, which summarizes the important legal realities of limits on provincial legislative authority. However, as long as the provincial legislation does not purport to define the conditions and effects of customary adoption, Québec may be able to facilitate the recognition of legal effects of these adoptions within and for the purposes of Québec legislation and administration, which is a primary goal of First Nation participation in the Working Group.

[253] *International Covenant on Civil and Political Rights*, Can. T.S. 1976, No. 47, sec. 1.

and the State,[254] and provides that minorities, which includes Aboriginal peoples,[255] are not to be denied the right to enjoy their culture, religion and language in their own community.[256]

- The *United Nations Declaration of the Rights of Indigenous Peoples* which provides, for indigenous peoples, the same right of self-determination and to freely pursue their social and cultural development;[257] the right to autonomy or self-government in internal and local affairs;[258] the right to maintain and strengthen distinct legal, social and cultural institutions;[259] the right to live in freedom and security, and not to be subject to forcible removal of their children to another group;[260] the right to belong to their community or nation in accordance with the traditions and customs of the person's community or nation;[261] the right to participate, through their own representatives, in decision-making in matters that would affect their rights, with a view to obtaining their prior consent;[262] the right to determine their own identity and membership;[263] the right to maintain their distinctive customs and procedures, including juridical systems or customs;[264] and the right to maintain relations, including for social purposes, across borders.[265]
- The *United Nations Convention on the Rights of the Child* which notably provides that the best interests of the child shall be a primary consideration in

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[254] *Ibid.*, sec. 23.
[255] As reflected in Paré, Mona. "L'adoption coutumière au regard du droit international : droits de l'enfant *vs* droits des peuples autochtones." *Revue générale de droit* 41, 2 (2011).
[256] *International Covenant on Civil and Political Rights*, sec. 27.
[257] *United Nations Declaration on the Rights of Indigenous Peoples*, Can. T.S. 2010, sec. 3.
[258] *Ibid.*, sec. 4.
[259] *Ibid.*, sec. 5 and 20.
[260] *Ibid.*, sec. 7 (2).
[261] *Ibid.*, sec. 9.
[262] *Ibid.*, sec. 18 and 19. As stated by Professor Mona Paré, in "L'adoption coutumière au regard du droit international : droits de l'enfant *vs* droits des peuples autochtones", *op. cit.*, note 255, these provisions regarding self-determination and the duty to consult Aboriginal peoples clearly protect the practice of customary adoption. They impose positive and negative obligations on governments, as they require that they respect Aboriginal traditions, ensure that Aboriginal peoples are given the means to respect their traditions and are being consulted on legislation that may affect their rights.
[263] *United Nations Declaration of the Rights of Indigenous Peoples*, sec. 33.
[264] *Ibid.,* sec. 34.
[265] *Ibid.,* sec. 36.

all actions concerning children;[266] States shall respect the responsibilities and rights of parents or where provided by local custom, the extended family or community;[267] when a child needs to be removed from his or her family environment, due regard must be given, to the desirability of continuity of care in a child's upbringing and to in the child's ethnic, religious, cultural and linguistic background;[268] and, indigenous children have a right not to be denied the right to enjoy their culture, religion and language, in community with the other members of his group.[269]

In application of these provisions of the *United Nations Convention on the Rights of the Child*, Canada has issued reserves and statements of understanding. With respect to the section 21[270] regarding the considerations that should apply to adoptions, Canada states that its application cannot be inconsistent with Aboriginal customary forms of care.[271] For sections 4 and 30,[272] Canada states that implementing such rights for an Aboriginal child must be done with due regard for the right of the Aboriginal child, in community with other members of his group, to enjoy his own culture, religion and language.[273]

Thus, the First Nations point out that Canada has specifically committed itself to respecting customary adoptions and to ensuring that rights of Aboriginal children to their culture and identity are fully taken into account and duly recognized in adoption proceedings.

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[266] *United Nations Convention on the Rights of the Child*, sec. 3.
[267] *Ibid.,* sec. 5.
[268] *Ibid.,* sec. 20.
[269] *Ibid.,* sec. 30.
[270] *Ibid.,* sec. 21.
[271] On March 9, 2010, Canada issued reserves and statements of understanding on section 21 of the *United Nations Convention on the Rights of the Child*.
[272] *United Nations Convention on the Rights of the Child*, sec. 4 and 30.
[273] On March 9, 2010, Canada issued reserves and statements of understanding on sections 4 and 30 of the *United Nations Convention on the Rights of the Child*.

These international obligations have important practical implications for customary adoption in Québec and the matters under consideration by the Working Group:

- Canadian federal common law[274] of Aboriginal rights, constitutional instruments, rights and protections for customary adoption, as well as domestic statutes (which include those of Québec), must be interpreted and applied so as to conform to the values and principles of customary and conventional international law. This applies equally to the executive, legislative and administrative branches of the Québec government.
- When matters of customary adoption are considered by courts, administrative tribunals and government officials, they are required to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations.

In the course of our work, the members of the Working Group referred to international obligations as regards children. The First Nations representatives note that such obligations require consideration in context of the full range of fundamental human rights set out in these international instruments, as summarized above. In the view of the First Nations representatives, these rights provide additional protections regarding the Aboriginal and treaty rights of First Nation individuals, Nations and communities with respect to customary adoption. Beyond the right to define, regulate and practice customary adoption, these rights also include an individual's right to belong to his indigenous community, a communal collective interest to have that individual remain as one of its members and a communal collective right to decide through the Nation's and community's institutions, the future of a child belonging to the particular indigenous community.

[274] *Roberts v. Canada*, [1989] 1 R.C.S. 322.

3.2.5 Facilitating the Recognition of Legal Effects of Customary Adoption within and for the Purposes of Québec Legislation

As addressed in the preceding part, other Canadian jurisdictions such as British Colombia, the Northwest Territories, Nunavut and Yukon have amended their legislation, making it more in accord with the constitutional reality regarding customary adoption jurisdiction and rights.

In the existing state of affairs in Québec, when adoption is necessary, First Nation families are faced with a choice between two options, neither of which is satisfactory for their needs.

Proceeding by adoption under the general regime of the Civil Code means accepting the complete dissolution of the family bond (filiation), confidentiality of birth-family identity and a Court-centred process that may result in a First Nations child being first placed with, and then adopted by, a family which is often located outside of his community, Nation and culture. Plenary adoption under the Civil Code often takes the child far away from all that is familiar to him, breaks the family bond and is cloaked in confidentiality. Under this regime, adopted First Nations' children may never even know their First Nations' identity, and may remain unaware of their Indian status and that they have Aboriginal and treaty rights and benefits. In short, the rules regarding adoption as they currently exist in the Civil Code go against the fundamental principles of customary adoption among First Nations.

On the other hand, while proceeding by way of customary adoption avoids these consequences, it can bring many practical problems due to the current failure of the administrative authorities to recognize its legal effects. Without a Québec birth certificate (act of birth) or other official provincial document or process attesting that a child has been duly adopted through customary adoption, customary adoptive parents repeatedly encounter legal and administrative obstacles. These may include such things as difficulties in obtaining a passport, obstacles to consent for international travel, school registration, consenting to medical care, securing social and financial

benefits, deciding on funeral arrangements and establishing status as the beneficiary of an estate and the owner of property.

First Nations' children who are customarily adopted generally remain within their communities. First Nation customary adoptions are open, verbal and usually conserve the social identity and original family ties of the adopted child, while creating new relationships of responsibility, authority and attachment between the child and the adoptive parents and family. The adopted children remain connected to their culture, language and traditional activities, and accordingly, their sense of identity is preserved.

When these two approaches to adoption are compared, it seems clear to the First Nations representatives that the Civil Code regime is often more likely to cause significant detrimental impacts on the child's life and well-being. It is arguably a much more drastic measure in comparison to customary adoption.

In view of the above, the central objective of First Nations' participation in the Working Group was to rectify the practical problems encountered as a result of the lack of clarity which they face when dealing with Québec government entities and third parties who do not generally recognize the legal effects flowing from First Nations' customary adoptions, while these effects are recognized by First Nations and understood as being a matter of Aboriginal rights and treaty rights.

The goal of the First Nations representatives is thus to facilitate the unequivocal recognition of legal effects of customary adoption within and for the purposes of the Civil Code of Québec in order to clearly ensure their recognition by administrative authorities, institutions, courts and third parties. The challenge is to find the best way to clarify the effects of customary adoptions for the purposes of Québec provincial legislation in order to avoid these legal and administrative obstacles, without changing the fundamental nature of this First Nations' institution and the right of First Nations to govern their own affairs in this regard. The technique chosen in order to achieve this result is to have effects of First Nations customary adoption unequivocally

recognized within and for the purposes of the Civil Code through legislative amendments providing, upon the attestation of a designated First Nations' competent authority that a customary adoption has occurred, for the modification of provincial acts of civil status and the issuance of a new birth certificate.

3.2.6 The Interest of a First Nations Child

As set out in the following part, on the basis of our work, the members of the Working Group note and affirm that:

> Customary adoption takes place in the interest of the child and respecting the child's needs, while taking into account that in the Aboriginal context, the notion of interest includes the interest of the family, of the community and of the Nation, and particularly emphasizes the protection of identity, culture, traditional activities and language.

This conception of the interest of the child is an omnipresent reality for First Nations communities and families. As such, ensuring that it is not compromised is an important consideration in the choice of measures as regards the recognition of effects of customary adoption within and for the purposes of Québec legislation. For example, and in accord with the recommendations of the Working Group, respect for this holistic view of the interest of the child is best ensured by a Civil Code regime:

- under which effects of customary adoption are recognized upon attestation of customary adoptions by a competent Aboriginal authority, without review by provincial authorities as to whether or not there has been an adoption according to custom, its conditions and effects;
- that respects the authority of First Nations communities and families to make determinations regarding the adoption of their children in order to keep them in their communities, to preserve the child's First Nations identity and to protect culture, traditional activities and language;
- that allows for the preservation of pre-existing bonds of filiation, where this is part of a First Nations' custom;
- that allows for ongoing rights and obligations between the parents of origin and the adopted child, where this is part of a First Nations' custom.

First Nations are also of the view that where First Nations children are concerned, the notion of the best interest of the child as set out in section 33 of the Civil Code[275] and in section 3 of the *Youth Protection Act*[276] would have to be understood in terms of a holistic view of the child's best interests, and that these provisions must be read in the light of the broad First Nations' conception of the interest of the child as explained above. At all times, the rights of the child and the characteristics of First Nations communities and Nations must be respected[277].

As discussed above, in the view of First Nations, these rights include the rights to First Nations' identity, culture, language and traditional activities in community with the other members of the Nation, community and extended family group, as well as the right to respect for the jurisdiction and rights of his community and Nation regarding matters of family, children and customary adoption, all of which First Nations consider to be protected under Section 35.

It is useful to provide some background. The insistence of First Nations on Section 35 rights with respect to customary adoption and the welfare of children may be understood in the context of the unfortunate history of First Nations interactions

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[275] C.C.Q., sec. 33:

> 33. Every decision concerning a child shall be taken in light of the child's interests and the respect of his rights.
> Consideration is given, in addition to the moral, intellectual, emotional and physical needs of the child, to the child's age, health, personality and family environment, and to the other aspects of his situation.

[276] *Youth Protection Act*, sec. 3, is essentially identical to C.C.Q., sec. 33:

> 3. Decisions made under this Act must be in the interest of the child and respect his rights.
> In addition to the moral, intellectual, emotional and material needs of the child, his age, health, personality and family environment and the other aspects of his situation must be taken into account.

[277] In accordance with the requirement of the *Youth Protection Act*, sec. 2.4 (5)(c):

> 2.4. Every person having responsibilities towards a child under this Act, and every person called upon to make decisions with respect to a child under this Act shall, in their interventions, take into account the necessity
> […]
> (5) of opting for measures, in respect of the child and the child's parents, which allow action to be taken diligently to ensure the child's protection, considering that a child's perception of time differs from that of adults, and which take into consideration the following factors:
> […]
> *(c)* the characteristics of Native communities.

with the state in "child protection" matters. Accordingly, for First Nations, the interest of the family, of the community and of the Nation must be integral considerations to the consideration of the best interests of a child, with particular emphasis on the protection of identity, culture, traditional activities and language.

The European or Western concept of the nuclear family does not necessarily coincide with the social and cultural reality of First Nations. The child is an integral member of the community, and as such, he has an important role to play therein. The family, immediate and extended, continues to be the main institution in Aboriginal society. In addition, for an accurate picture of this reality, the community must also be considered as an important part of the equation.

Mainstream adoption processes, whereby large numbers of First Nations children have been removed from their families and their communities and then entrusted to non-Aboriginal families, have undermined First Nations family order. This is well documented in an extensive literature, as noted, for instance, by Maria Bertsch and Bruce A. Bidgood:[278]

> In Canada, Aboriginal adoption has a long and tumultuous history which has historically been known for taking Aboriginal children away from families and communities. A vast majority of these adopted Aboriginal children grew up with little connection to their birth family or their culture. No sooner had the residential "schools" begun to close their doors, then Aboriginal families and communities were subjected to a wave of state-initiated child apprehensions during the "60's scoop." The term "60's scoop" was coined to describe the seemingly random apprehensions of 'Indian children' by Provincial social workers who, on the slightest pretext, literally scooped children from reservations in order to 'save' them from poor living conditions (Timpson, 1995). Keewatin (2004) was more gracious in describing the "60's scoop" as "a clash in ideologies and adoption practices [which] contributed to Aboriginal children being taken from their homes" (p. 27). There was a belief that Aboriginal families were inferior and unable to care for their children; over 11,000 children were

[278] "Why is Adoption Like a First Nations' Feast?: Lax Kw'alaam Indigenizing Adoptions in Child Welfare", *op. cit.*, note 238.

> removed and placed in non-Aboriginal homes from the 1960s to the 1980s (Snow & Covell, 2006).

In his article entitled "A Commentary against Aboriginal to non-Aboriginal Adoption",[279] Kenn Richard explains that the "notion of the best interest of the child" must be linked to the best interests of the community where First Nations' children are involved, because it is through this collective approach that the sense of identity is best passed on. He describes it in this way:

> The notion of the child and her best interests, as separate and distinct from her family, community and culture, is one that has its roots in the individualist orientation of European culture. Here the child is seen as a discrete unit and her relationships are measured in accordance with the degree to which they are harmful or helpful to her well-being and welfare. This view stands in contrast to the world views of tribal societies, including First Nations in Canada. Within the tribal world view, individuals, while acknowledged and valued, are contextualized within families, communities and cultures. Here the best interests of a child are inexorably linked to the best interests of the community and vice versa.
> […]
> For the child, the collective approach not only nurtures but also provides a clear identity and a sense of belonging. This is a critical indicator of successful adjustment in adult life. Anglo European ideology, on the other hand, may consider culture and community as a factor but its fundamental linkages to the child's best interests are often superseded by considerations more compatible with their world views.

Furthermore, in the Ontario report entitled *Children First*,[280] culture is described as the foundation which is required to reduce the overrepresentation of Aboriginal children in the child placement system:

> There is a strong correlation between culture and identity. Identity is a sense of self, whether in a family, a community or the larger environment, that is interconnected, yet independent of one another.

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[279] Richard, Kenn. "A Commentary Against Aboriginal to non-Aboriginal Adoption." *First Peoples Child & Family Review* 1, 1 (2004), pp. 102-103.

[280] Ontario. Ministry of Children Youth Services. *Children First*, by John Beaucage, Aboriginal Advisor, presented to the Honourable Laurel Broten. Minister of Children and Youth Services. July 2011, p. 11.

Author Philip Lynch states in his work *Keeping Them Home: The Best Interest of Indigenous Children and Communities in Canada and Australia* that the survival of First Nations and their ability to maintain the identity are clear indicators that culture is inseparable from identity:

> […] The positing of First Nations and Aboriginal identity and the tenacious survival of First Nations and Aboriginal cultures strongly demonstrates that culture is inseparable from the identity, vision and survival of First Nations and Aboriginal peoples.
> […]
> As First Nations and Aboriginal communities are robbed of their children, both the children and the communities are robbed of their futures. When First Nations and Aboriginal children are removed from their homes and communities:
>
>> The traditional circle of life is broken. This leads to a breakdown of the family, the community and breaks the bonds of love between the parent and the child. To constructively set out to break the Circle of Life is destructive and is literally destroying native communities and Native cultures.[281]

This is just a sampling from the extensive literature which has been produced on this subject.[282]

It is in view of this broader social and historical context that the AFNQL and the FNQLHSSC took the position, in the course of their participation in the work of the Québec Working Group on Adoption,[283] that the placement of Aboriginal children outside their community is contrary to the best interests of the children.[284]

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281 Lynch, Philip. “Keeping Them Home: The Best Interest of Indigenous Children and Communities in Canada and Australia. ” *Sydney Law Review* 23, 4 (2001), pp. 513 and 518.

282 See for example: Kline, Marlee. “Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations.” *Osgoode Hall Law Journal* 30, 2 (1992), p. 375; Carasco, Emily F. “Canadian Native Children: Have Child Welfare Laws Broken the Circle?” *Canadian Journal of Family Law* 5 (2010), p. 111.

283 *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, pp. 113-114.

284 The report *Pour une adoption québécoise à la mesure de chaque enfant*, *op. cit.*, note 6, p. 113, referred in turn to the revised brief of the AFNQL and FNQLHSSC on Bill 125 presented to the Committee on Social Affairs, December 16, 2005. (*Brief on Bill 125 – An Act to amend the Youth Protection Act and other legislative provisions – Final version*, *op. cit.*, note 44, pp. 7, 11 and 26.)

Similarly, the QNW and the RCAAQ maintained that "the best interests of the Aboriginal child are to be able to remain among their own people in their own community in order to protect their status, their language and their culture".[285]

As set out in the QNW Complementary Research Report, reinforcement of the identity of First Nations children and the protection of their status, language and culture are of great significance to their health and well-being. To this day, customary adoption forms part of the customary law of First Nation communities and they regard its preservation as essential for the overall well-being of their children, their families and their communities. Additionally, it assists in overcoming the negative impacts of colonization, notably as imposed through the policies of the *Indian Act*.

Please also refer to the Cree section of this part with respect to the interests of the child.

For all these reasons, the conception of the interest of the child in the broad context of family, community, Nation, identity, culture, traditional activities and language, as noted and affirmed by the Working Group, must guide the choice of measures as regards the recognition of effects of customary adoption within and for the purposes of Québec legislation.

3.2.7 Consultation of First Nations on Customary Adoption

In February 2009, work was initiated on the first phase of the consultation process regarding customary adoption as practiced among the First Nations.

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[285] *Complementary Research on Traditional and Customary Child Care Practices/Adoption within Aboriginal Communities in Quebec, op. cit.*, note 64, p. 16. See also *Joint presentation concerning the revision of the Youth Protection Act – Is the history of the Aboriginal residential schools in danger of repeating itself?*, *op. cit.*, note 44, submitted on July 2005 to the Committee on Social Affairs on the study of Bill 125, pp. 4-8.

It is essential to clearly understand the view of the First Nations with respect to the purpose of the consultations as initially proposed in the context of the development of the mandate of the Working Group. The consultation process was not about confirming whether or not customary adoption is practised today. For First Nations, there was never any question as to the existence of this institution. Rather, the consultations sought to document the contours and range of the current exercise of First Nation rights respecting customary adoption to assist in shaping the most appropriate and useful legislative measures by the province.

For this purpose, the FNQLHSSC sent out a first questionnaire to all of the health and social services directors in the First Nations' communities of Québec, asking them to identify a minimum of five individuals likely to know the customary adoption practices of their communities and Nation. The aim was to have the identified individuals assist in organizing focus groups in the communities. A substantive questionnaire was then developed in order to appropriately tailor the interviews.

In the winter of 2010, it was underlined to the communities that the results of the consultation would be central in the determination of reference points and parameters to guide the recognition of effects of customary adoptions within and for the purposes of the Civil Code and other provincial legislation.

A total of 93 completed questionnaires were received from the following First Nation communities: Ekuanitshit (1), Unamen Shipu (2), Nutashkuan (3), Kitcisakik (2), Barriere Lake (1), Listiguj (1), Kitigan Zibi Anishinabeg (1), Kahnawake (1), Mashteuiatsh (1), Kawawachikamak (1), Odanak (1), Viger (1), Wolf Lake (1), Uashat/Maliotenam (5), Opitciwan (1), Wemotaci (1), Kahnehsatake (1), Wendake (1), Akwesasne (1), Gesgapegiag (1), Wapmagoostui (12), Mistissini (16), Eastmain (5), Nemaska (3), Waskaganish (10), Waswanipi (6), Wemindji (5) and Chisasibi (8).

In order to garner more in-depth information, in-person consultations were organized in six communities that provided a positive response to the invitation of the

FNQLHSSC: Wendake, Uashat/Maliotenam, Mashteuiatsh, Pikogan, Lac Simon, Kitisakik, Manawan, Wemotaci and Ekuanitshit. There were a total of approximately 60 participants, including Elders, other community members, adoptive and biological parents of adopted children, and even children who were adopted in a customary fashion. In addition, elders of the Cree Nation from the communities of Wemindji, Chisasibi and Mistissini were consulted in order to better interpret the responses from the Cree communities.

Analysis of the results indisputably confirmed that customary adoption is still practiced in First Nations communities. Moreover, it revealed a certain shared understanding among First Nations of what is meant by customary adoption, even though these different First Nations may not necessarily associate with each other directly on such matters.

Research carried out by the QNW revealed that the parents “do not abandon their children; they instead ask other people to take care of them during periods when they are unable to do so for various reasons”.[286]

The reasons for which a child is entrusted to someone other than the biological parent vary from one community to the next and especially from one situation to another. Factors such as death, difficult family situations, poverty, the mother’s young age, infertility, alcoholism, substance abuse, the need to access special health services and traditional customary rules of adoption of the eldest male child by the grandparents are among the elements that may be considered by a biological parent when he willingly entrusts his child to another person that he has freely chosen, in accordance with the traditions or customs of his community.

Customary adoption is an unwritten practice that has been transmitted from generation to generation in First Nations communities. The actual terminology

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[286] See *Complementary Research on Traditional and Customary Child Care Practices/Adoption within Aboriginal Communities in Quebec, op. cit.*, note 64.

"*traditional"* or *"customary adoption"* is not necessarily used in the First Nation communities, especially not in their Aboriginal languages. Instead of specifically referring to the term "adoption", reference is often made to, "providing for a child", "taking care of a child," "being responsible for a child," "accompanying a child into adulthood," "educating a child", "a child living among others" and sometimes even "giving a child".

Notwithstanding its diverse nature, the consultations show that customary adoption invariably make the best interests of the child a primary consideration, with the understanding that the situation of the child must be considered in the broader context. Thus, customary adoption takes place in the interest of the child and respecting the child's needs, while taking into account that in the First Nation context, the notion of interest includes the interest of the family, of the community and of the Nation, and particularly emphasizes the protection of identity, culture, traditional activities and language.

For instance, according to testimony received in an Algonquin community, customary adoption still exists and does not correspond with the characteristics of the Québec adoption regime. Rather, customary adoption is a matter of giving a child and providing supportive care and attention that ensures proper development as he grows to be an adult, while always maintaining an emotional bond between the child and his biological parents. Thus, the notion of "giving" a child must be understood as entrusting one's child to a person in whom the parent has complete confidence. Indeed, among First Nations, the idea of children belonging to a family is not the same as it may be in the case of nuclear families. Rather, children are gifts of the spirits and it is consequently impossible to give away a child who does not belong to us. The First Nations concept of "giving" a child refers to sharing ones responsibilities and obligations toward the child with another person so as to ensure that the child can grow and develop to adulthood in complete safety, surrounded by loving family. Overall, great importance is placed on the upbringing and education of the child, who often develops pride in the fact that he has affiliations with two families (e.g. two mothers, two fathers).

Customary adoptions thus create new family connections between the adopted child and adoptive parents, even where existing family ties between the child and his biological parents are maintained. In this sense, from a civil law perspective, it can be said that the child may have new or additional family connections or bonds of filiation as a result of customary adoption.

An Elder from Lac Simon mentioned during the consultation on this issue:

> Children are gifts from the spirits. It is important to care for them greatly. A mother cannot make a greater gift than recognizing that for a certain period of time, she is not the person in the best position to provide adequate care for her child and to ensure all of the security that child needs in order to fully develop, and therefore deciding to choose another person that she trusts completely in order to accompany the child towards adulthood.

As practised, customary adoption is open and non-confidential, as are most customs among the First Nations. For example, according to testimony received in Wemotaci, it was specified that a child should be informed of the reasons why he was customarily adopted in order to avoid feelings of rejection.

The consultations indicated that the value systems from one First Nation community to the next are quite similar. Not only are the children greatly respected, there is also a lot of gratitude towards adoptive parents.

Furthermore, the basic contours of customary adoption are also quite similar across the communities. Notably, and subject to the practical difficulties often encountered in their interactions with administrative entities, adoptive parents strive to assume parental authority in such matters as consent for health care, school registration, passport applications, compensation in the event of a death of a child, inheritance rights and otherwise.

Moreover, in two communities it was reported that even in cases of mainstream adoption, the adoptive parents accept the maintenance of emotional connections as well as contact between the child and his biological family living in the same

community, without even being aware that this is in contradiction with the regime of the Civil Code of Québec, under which the parent and child relationship connection is considered to have been severed.

The consultations also revealed widespread frustration with respect to administrative entities and procedures that failed to recognize and give effect to customary adoption. This often occurred when customary adoptive parents were forced to interact with governmental entities in official functions. The need for increasingly frequent off-reserve travel and ever-increasing health problems are examples of situations which cause First Nations people to have to interact with such administrative authorities outside of their communities. These types of situations often lead to undue complications and obstacles for those involved in customary adoptions, who often face refusal by such entities which do not consider them to be "legal" parents, despite the fact that this is the case according to their customary law.

Despite the fact that in a customary adoption situation the relationship between a biological parent and the child continues to be important for both the child and the parent after the adoption has taken place, customary adoptive parents have all of the responsibilities in terms of caring for the child. This remains true even if the child continues to have contact with his biological parents.

In anticipation of possible amendments to the Civil Code, various community members who were consulted specified that the names of both the biological parents and the adoptive parents should appear on the new birth certificate in order to ensure that the child will be able to also be aware of his original filiation without having to perform research once he has reached adulthood.

Also, consultation respondents consistently proposed that First Nations' authorities make the administrative link with provincial authorities to notify them when a customary adoption has been registered with the First Nations authority and a new birth certificate is sought. An underlying assumption is that the specific criteria

for customary adoptions are internal matters for the First Nations and an adoption would be confirmed by an authority designated by the community or Nation.

In summary, the following specific points notably emerged from the consultations:

a) Customary adoption still exists in the First Nation communities of Québec.

b) Such adoptions primarily occur locally within communities, but also occur between First Nation communities of the same Nation within Québec and across its boundaries. On occasion, these adoptions may occur between different Nations.

c) Customary adoption takes place in the interest of the child and respecting the child's needs, while taking into account that in the First Nation context the notion of interest includes the interest of the family, of the community and of the Nation, and particularly emphasizes the protection of the identity, culture, traditional activities and language of the child.

d) Customary adoption is consensual, involving at least the consent of the parents of origin, the adoptive parents and, where appropriate, the child.

e) The terminology used to designate and to describe what constitutes customary adoption varies from one community to another and from one Nation to another.

f) There are also variations in the conditions and effects of customary adoption among First Nations.

g) Given the cultural and linguistic divergence between the notions of adoption under Québec legislation and under customary law, First Nations do not make a clear-cut distinction between customary child care and customary adoption in the way that Québec legislation differentiates custody and adoption.

h) For First Nations there is a range of customary adoption situations that create new family bonds, and the specific effects may vary by First Nation. In most cases, there is no severance of existing family ties further to a customary adoption. For customarily adopted children, sentiments of family ties with both the biological and the adoptive parents are strong and important for the child's growth and well being.

i) In customary adoption, parental authority and parental responsibility lies with the adoptive parents.
j) Current provincial administrative procedures impede the exercise of First Nations' customary adoption as the ongoing reflection of existing Aboriginal rights, title and treaty rights, self-governing jurisdiction and customary law.

3.2.8 First Nations' Foundational Affirmations and Recommendations

Along with the other members of the Working Group, the First Nations representatives agree with the findings, affirmations and recommendations of the Working Group as set out in last part of this report.

Nonetheless, First Nations consider that it is useful to mention the foundational affirmations and recommendations that were agreed upon among the First Nations representatives as the basis for achieving a common position with the other members of the Working Group:

Considering that Aboriginal customary adoption is an expression of First Nations self-determination, self-government and jurisdiction over families, children, identity, culture and language;

Considering that customary adoption and jurisdiction in these matters are rights of Aboriginal peoples recognized and affirmed under the section 35 of the *Constitution Act, 1982* and enjoy further protection under instruments of international law;

Considering that customary adoption does not depend for its existence and legal force on recognition in federal or provincial legislation;

Considering, without prejudice to the foregoing, that recognition of effects of customary adoptions within and for the purposes of the *Civil Code of Québec* and other legislation may have practical advantages for parents and children;

It is recommended that the following principles and requirements govern legislative and administrative initiatives to facilitate the recognition of effects of First Nation customary adoptions within and for the purposes of the legislation of Québec:

1. Any such legislative and administrative initiatives or measures shall not define or fix the parameters of customary adoption, except with the specific consent of First Nations.

2. Customary adoption, and, whether such an adoption has occurred, are matters for each First Nation or community.

3. First Nations or communities may, at their discretion, adapt or develop customary adoption to conform to their needs, values and culture and to respond to new social realities.

4. Customary adoption takes place in the interest of the child and respecting the child's needs and overall well-being, which includes the interests of the family, of the community and of the Nation, with particular regard for maintaining connections to the child's family, community, Nation, identity, culture, traditional activities and language.

5. Customary adoption is a consensual, community and family-based process that includes the consent of the parents of origin, the adoptive parents and, as applicable, the child.

6. In most cases of contemporary practice of customary adoption, the adoptive parents are 18 years old or older.

7. Customary adoptions shall not be subject to assessment by, or any decision of, any provincial authority, including the Director of Youth Protection and the Courts, unless specifically designated by a First Nation.

8. First Nation customary adoption is open and not confidential.

9. Where a new Québec act of birth is sought, customary adoptions shall be notified by First Nation or community authorities to the Registrar of Civil Status.

10. Each Nation or community shall be responsible for indicating to the Québec government the identity of the authority that will carry out the above-mentioned function of notification.

11. The notification of adoption by the First Nation or community shall notably include:
    - the given and surname(s) of the adopted child after adoption;
    - an attestation that the adoption was carried out according to custom, including that it was decided in the light of the particular child's best

interests and rights, that the necessary consents were given and that the child is in the care of the adoptive parents;
  - whether in addition to the new family bond (filiation) between the adopted child and the adoptive parents, the adoptive child's bond of filiation with the parents of origin is to be maintained for certain purpose and that this will be reflected in the child's new birth certificate; and
  - in cases where filiation with the parents of origin is maintained, whether or not, as between the adopted child and the parents of origin, there will be ongoing rights, interests and obligations, the modalities of which will have to be jointly determined, if this is in accordance with the custom of the Nation or community.

12. In due partnership with First Nations, the Civil Code of Québec should be amended in view of the preceding by the addition of general, simple and flexible provisions for the recognition of effects of customary adoptions and a requirement that the Registrar of Civil status issue a new birth certificate in accordance with the notification of the First Nations' competent authority.

13. That the legislative and administrative changes regarding the facilitation of the recognition of the effects of customary adoptions be accompanied by appropriate transitional and implementation measures, including:
    - Appropriate funding for planning, training and implementation measures by First Nations for the new regime of interaction with Québec concerning customary adoption;
    - Funding also for community-level awareness campaigns; and
    - Implementation measures and administrative guidance for Québec government entities, including the Registrar of Civil Status, the health care network, educational authorities and any other body or institution whose collaboration is required, to ensure compliance with the legislative and administrative changes.

14. Québec shall inform the other provinces and territories as well as the Government of Canada of the scope and effects of customary adoption in the laws of Québec and, as applicable, take the necessary measures in collaboration with First Nations and communities so that the effects of such adoptions are recognized outside of Québec.

15. All policy and administrative measures as well as legislative drafting instructions ("orientations") and draft legislative measures regarding the facilitation of the recognition of the effects of customary adoptions shall be subject to prior special close collaboration with, and the consent of, the First Nations.

16. Without restricting the foregoing, First Nations must be directly involved in the preparation of any draft bill or bill relating to customary adoption. First Nations' participation in any process before a committee of the National

Assembly or other general public consultation processes shall not be sufficient to satisfy this requirement.

17. Any legislative changes regarding the clarification of the legal effects of customary adoptions must comply with and be without prejudice to the Aboriginal and treaty rights of the First Nations, including any treaty-implementation legislation, and provide that in the case of any conflict or inconsistency with those rights, the Aboriginal and treaty rights shall prevail to the extent of the conflict or inconsistency.

3.2.9 Additional Cree Considerations

3.2.9.1 Introduction

The situation of the Cree Nation among the First Nations of Québec is distinctive by virtue, among other things, of the Aboriginal rights of the Crees recognized as treaty rights in the JBNQA. The JBNQA is legislatively applied through provincial and federal implementing legislation[287] while the organization of health and social services contemplated by Section 14 of the JBNQA, as interpreted by Québec, is implemented in an *Act respecting health services and social services for Cree Native persons*.[288] For these reasons, it was agreed that a Cree representative would be appointed as a First Nations member of this Working Group, in addition to the other First Nations representatives of the QNW and the AFNQL.

This representative participated in the processes of the Working Group on behalf of the CBHSSJB and the GCC(EI)-CRA.

3.2.9.2 Background: the Grand Council of the Crees (Eeyou Istchee), the Cree Regional Authority and the Cree Board of Health and Social Services of James Bay

The GCC(EI) is the political body that represents the approximately 17,000 Crees of Québec.

[287] *An Act approving the Agreement Concerning James Bay and Northern Québec*, R.S.Q., c. C-67, the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32 and other legislation such as the *Act respecting Cree, Inuit and Naskapi Native persons*.

[288] R.S.Q., c. S-5.

The CRA was established by provincial legislation further to the signing of the JBNQA as the administrative arm of the Cree Nation. The CRA is governed by the Council of the CRA, which is composed of the Chiefs of the Cree communities and one other elected representative from each community, in addition to the Chairman and Vice-Chairman elected by and from among the Cree members. It has multiple responsibilities including with respect to Cree governance and other matters as decided by its Council.

The CBHSSJB was created pursuant to Section 14 of the JBNQA, the *Act respecting Health Services and Social Services*[289] and Québec Order-in-Council 1213-1978. It has the powers and functions of a "regional council" and is responsible for the administration of appropriate health services and social services for all persons normally resident or temporarily present in Region 18.[290] It maintains an establishment belonging to the categories of: a local community service centre, hospital centre, social service centre and reception centre.[291] The CBHSSJB offers services in general medicine, social services, youth protection, public health, home care and dentistry in each Cree community.[292] Recently, the CBHSSJB also established a Public Health Directorate that manages public health programs in the territory.

Over the years, the Cree Nation has concluded agreements with both the federal and provincial governments, most notably the JBNQA signed in 1975 with Canada and Québec (modified by numerous complementary agreements), the *Agreement Concerning a New Relationship* between the Government of Québec and the Crees of

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[289] S.Q. 1971, c. 48.

[290] JBNQA, sec. 14.0.2 and 14.0.3; *Act respecting health and social services for Cree Native persons*, sec. 51; *Order in council concerning the delimitation of the territory of the region 10B, the institution of a Board of Social Services in this region and the operation of the Chashasipich Hospital of Fort George* [free translation], O-C. 1213-1978, April 20, 1978.

[291] JBNQA, sec. 14.0.9; *Act respecting health and social services for Cree Native persons*, sec. 51 and 64; *Order in council concerning the delimitation of the territory of the region 10B, the institution of a Board of Social Services in this region and the operation of the Chashasipich Hospital of Fort George* [free translation], *ibid.*

[292] Cree Board of Health and Social Services of James Bay: www.mednord.org/en/index.html

Québec signed in 2002 (also referred to as the *Paix des Braves*), the *Agreement Concerning a New Relationship* between Canada and the Cree of Eeyou Istchee signed in 2008 and the *Eeyou Marine Region Agreement* signed in 2011. Furthermore, the Crees and the Government of Québec signed the *Framework Agreement on Governance in the Eeyou Istchee James Bay Territory* in May 2011 with the intent of concluding a Final Governance Agreement in 2012. These agreements create a unique political and legal environment in the Eeyou Istchee territory.

3.2.9.3 The Participation of the Crees in the Customary Adoption Working Group

In view of the particular situation of the Cree Nation and its current involvement in legal proceedings relating specifically to customary adoption matters,[293] the Crees provide this text to supplement that prepared in collaboration with the other First Nations representatives.

The Aboriginal and treaty rights of the Crees of Eeyou Istchee (Crees) in relation to Cree customary adoption matters and the personal and territorial jurisdiction of the Crees with respect thereto (Cree Adoption Rights and Jurisdiction) are paramount and take precedence over any inconsistent legislation, regulation or instrument, including any procedure or agreement, and any amendment thereto (Legislation), concerning these matters. Any Legislation concerning adoption matters insofar as it applies to the Crees is subject to and shall be construed in a manner consistent with Cree Adoption Rights and Jurisdiction.

The participation of the Crees, including any comments, reports or materials provided by the Crees in the context of Customary Adoption Working Group processes, including this report, shall be construed in a manner consistent with Cree Adoption Rights and Jurisdiction. This participation is without prejudice to any position that the Crees may take or support in any context, including legal proceedings,

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[293] *Adoption - 09201*, [2009] R.J.Q. 2217, discussed in more detail below.

negotiations or representations, in relation to Cree customary adoption and related matters.

It is relevant to mention that in January 2010, the GCCEI-CRA presented a brief in relation to a draft bill entitled *An Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority* tabled by the Minister of Justice on October 6, 2009 (Draft Bill).

This GCCEI-CRA brief (Cree Brief), which can be found as an appendix to the report of the FNQLHSSC, stated that the adoption regime of the Civil Code and other legislation, as it may be amended from time to time, cannot take precedence over the constitutionally protected right of the Crees to customary adoption and the jurisdiction of the CBHSSJB over the legal or customary adoption of Crees, wherever they are, as set out in the JBNQA.

The Cree Brief essentially states that while the Crees have the required jurisdiction, rights and responsibilities to deal with adoption matters affecting Crees through the JBNQA and related legislation, for the purposes of clarifying this jurisdiction, and these rights and responsibilities, with third parties, it may nevertheless be useful to modify the provisions of the Civil Code to facilitate the recognition of the effects of customary adoptions.

In addition to being annexed to the aforementioned report of the FNQLHSSC, this brief was previously tabled to the Working Group.[294] Furthermore, on multiple occasions, the Cree representatives drew the Working Group's attention to the particular situation of the Crees with respect to their treaty rights to customary adoption by virtue of the JBNQA and the legal effects of same.

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[294] Specifically at the January 2010 meeting of the Working Group.

As reiterated to Working Group members, this is to affirm that Cree Adoption Rights and Jurisdiction cannot be affected by unilateral changes to Legislation, including any changes to the Québec adoption regime.

As mentioned by Cree representatives to the Working Group, any such Legislation relating to the Québec adoption regime which affects Cree JBNQA rights requires Cree consent, in which case a distinct process between Québec and the Crees would be required. Such a process could possibly lead to an agreement to amend the JBNQA, and consequently, to amend relevant legislation.

As demonstrated by their extensive participation in the work of the Working Group, the Crees are open to engaging in a process with Québec, either in the context of the modifications to the adoption regime in the Civil Code and other Legislation, or in a distinct process, to give further legislative and administrative effect to the JBNQA and Cree Aboriginal and Treaty rights with respect to customary adoption as well as with respect to Cree jurisdiction regarding adoption matters for Cree beneficiaries, wherever they may be.

3.2.9.4 Background: The James Bay and Northern Québec Agreement and Cree Customary Adoption

The JBNQA of 1975 is the first modern treaty in Canada. It includes numerous sections and over 450 pages of text, in addition to a number of Complementary Agreements developed over the years.

With respect to social services and adoption, and as then Minister Ciaccia stated in 1975 in the “Philosophy of the Agreement” of the JBNQA, the inhabitants of Québec's North had to be able to benefit from health services and the JBNQA responded to these needs. The JBNQA provides structures to do so, including through provisions relating to the recognition of a Cree health and social services board having powers regarding adoption matters.

At that time, Minister Ciaccia insisted upon Québec's position to "protect the traditional culture and economy of the native peoples", asserting that "we are giving cultural minorities the chance of collective survival".

At the time the JBNQA was signed, the legal context was clear: customary adoption was recognized as an Aboriginal right by the courts,[295] as were the legal effects stemming from such Aboriginal rights. The Crees understood that their Aboriginal rights to customary adoption were recognized by the JBNQA treaty. The other parties to the JBNQA were well aware of the state of the law, and the position of the Crees, at the time.

The inclusion in the JBNQA of this Aboriginal right only rendered the proof thereof less cumbersome. It did not change the extent of the legal effects of these customary adoptions.

3.2.9.5 Legal Effect of the JBNQA Treaty

Following the signature of the JBNQA and the undertakings contained therein,[296] both the Governments of Canada and Québec enacted legislation to implement it.[297] Both the Québec statute and the federal statute provide that the JBNQA is approved, given effect and declared valid and provides that in the case of their inconsistency with other legislation, they shall take precedence.[298]

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[295] See preceding part of this First Nations section citing numerous cases of the recognition of the legal effects resulting from custom.

[296] JBNQA, sec. 2.5.

[297] Including the *Act approving the Agreement concerning James Bay and Northern Québec* and the *James Bay and Northern Quebec Native Claims Settlement Act.*

[298] Sec. 6 of the *Act approving the Agreement concerning James Bay and Northern Québec* specifically provides that, in case of inconsistency with any other legislation, the former, and by extension the JBNQA, prevails. Sec. 8 of the *James Bay and Northern Quebec Native Claims Settlement Act* also provides for its precedence and, by extension, that of the JBNQA, over any inconsistent legislation.

Section 3 of the JBNQA provides for the right of Cree beneficiaries to choose between adopting a child under the laws relating to adoption or pursuant to the customs and traditions of the Crees, as set out in its paragraph 3.1.6.

In cases where Cree customary adoption is available and where a Cree member wishes to proceed with an adoption through this process, this customary adoption must take precedence over the rules of Civil Code, as provided for in the JBNQA, the *Constitution Act, 1982*, the *Act approving the Agreement concerning James Bay and Northern Québec*, the *James Bay and Northern Quebec Native Claims Settlement Act* and the *Act respecting health services and social services for Cree Native persons*, discussed above.

For the Crees (and for most First Nations peoples, as evidenced through the consultations discussed in this report), customary adoption is by nature an open adoption, i.e. an adoption in which the family of origin and biological parents still have access and contact with the child being raised by the adoptive parents. Customary adoption has always been a consensual process between Cree families with the support of the community, and in certain cases its entities. It is usually a verbal agreement with no written documentation.

3.2.9.6 Legal Proceedings Involving Cree Customary Adoption Matters

In August 2009, the GCCEI, the CRA, the CBHSSJB and its Director of Youth Protection were granted intervener status by the Québec Court of Appeal in adoption proceedings involving a child, a Cree beneficiary of the JBNQA.[299]

This matter is currently before the Court of Québec (Youth Division).[300]

In this matter, a non-Cree Director of Youth Protection of another jurisdiction placed a Cree infant in a non-Cree mixed bank family living in the an area outside of

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[299] *Adoption - 09201.*
[300] *Ibid.*

Eeyou Istchee (Cree territory) while her siblings were returned to this territory. According to the administrative system at the time, mixed bank families were chosen with the objective of having infants adopted. Therefore, the mother contested the proceedings in view of its consequences: 1) the breaking of her bond of filiation with the infant; and 2) the likelihood that the Cree infant be adopted by this non-Cree mixed bank family.

From the Crees' perspective, the GCCEI-CRA, the CBHSSJB and its Director of Youth Protection had no choice but to intervene in these proceedings in an attempt to ensure the CBHSSJB Director of Youth Protection take over the situation of the Cree infant for her to be returned to the Cree family living in Eeyou Istchee who traditionally adopted her while the infant was placed in the non-Cree mixed bank family. Since the opposing parties refused to negotiate, the Crees had no choice but to litigate the matter, which required a considerable expenditure of Cree resources.

The GCC(EI)-CRA, the CBHSSJB and its Director of Youth Protection were successful in obtaining a judgment from the Québec Court of Appeal granting the intervention of these parties on August 21, 2009. Among other things, the interveners were given the right to address the following issues:

- Is customary adoption a right recognized by the JBNQA, thereby rendering it a treaty right guaranteed by section 35 of the Constitution Act, 1982, or is it a right otherwise recognized by Québec law, in light of the applicable domestic and international law?
- Would customary adoption, if recognized as such, supersede the provisions of the Civil Code of Québec and other general laws in matters of adoption and would it preclude the institution or continuation of proceedings seeking a declaration of eligibility for adoption of a beneficiary child under the JBNQA, assuming that the child in question has been validly adopted in accordance with custom?
- Taking into account the provisions of Chapter 14 of the JBNQA and of the Act respecting health services and social services for Cree Native persons, R.S.Q., c. S-5, was the adoption of the child in question subject to the jurisdiction of

another Director of Youth Protection or that of the CBHSSJB and its Director of Youth Protection and must the application for declaration of eligibility for adoption be dismissed if it happens not to have been filed by the proper person or entity?

The following is a brief summary of the Cree parties' arguments in relation to these questions,[301] which is clearly relevant to the current discussion regarding customary adoption matters.

3.2.9.7 Cree Position Regarding Customary Adoption

In these adoption proceedings, the Crees maintain that customary adoption and the related Aboriginal rights, as applicable to the Crees, are outlined in the JBNQA.[302] The Crees argue that, as such, customary adoption is an Aboriginal right confirmed by the JBNQA treaty (thus now also a treaty right)[303] within the meaning of the *Constitution Act, 1982*,[304] and is thereby constitutionally recognized, affirmed and protected.

The Cree parties assert that the JBNQA[305] provides for the right of Cree beneficiaries to choose between adopting a child under the general laws relating to adoption or pursuant to the customs and traditions of the Cree people in the territory contemplated by the JBNQA.

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[301] These arguments are a summary of the position of the Cree parties in *Adoption - 09201*. This summary is to present the position of the Cree parties in this case, which at the time of writing, is under consideration by the Court of Québec (Youth Division). It is intended to provide an overview of certain Cree positions in this case which are relevant to the considerations of the Working Group and to this report.
Please note that certain elements of this position are specific to these proceedings. This summary does not include every argument made before the courts. It is only intended to give the reader a general idea of the Crees' position with respect to the jurisdiction of the CBHSSJB and customary adoption as provided for in the JBNQA, as important context for the participation of the Crees in this Working Group.

[302] JBNQA, sec. 3 and 30.

[303] Including as provided for in JBNQA, sec. 3.1.6 and 30, the *Act respecting Cree, Inuit and Naskapi Native persons*, and the *Cree Naskapi (of Québec) Act,* sec. 174.

[304] *Constitution Act, 1982*, sec. 35.

[305] JBNQA, sec. 3.

Further, the Cree parties submit that it is the right of all Crees to benefit from such customary adoption, where available, over an adoption process pursuant to the laws relating to adoption in the province of Québec, where it has been customarily determined notably that such adoption is in the best interest of the child.

In cases where Cree customary adoption is available and where a Cree beneficiary wants to proceed with an adoption through such process, the rules of such customary adoption apply. Further, in cases of conflict or inconsistency, these customary adoption rules take precedence over the rules of provincial legislation, as contemplated by the JBNQA and the two provincial and federal laws that respectively approve, give effect and declare valid the JBNQA.[306]

In addition, the Cree parties advance that a customary adoption carried out between a Cree beneficiary and a Cree customary adoptive family with the assistance of the CBHSSJB:

- is valid under Cree customs and domestic and international law;
- is constitutionally protected;
- creates legal effects well beyond the limited scope of eligibility for benefits under the JBNQA; and
- prevents a Cree child from being declared eligible for adoption under the laws relating to adoption in the province of Québec if the child has already been customarily adopted.

In view of the above, it is the Crees' position that customary adoption applies in the circumstances of this contested adoption matter and takes precedence over the adoption provisions of the Civil Code and of the *Youth Protection Act.*[307]

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[306] *Act approving the Agreement concerning James Bay and Northern Québec* and *James Bay and Northern Quebec Native Claims Settlement Act.*

[307] R.S.Q., c. P-34.1.

3.2.9.8 Jurisdictional and Constitutional Issues

In addition to its territorial jurisdiction,[308] the Crees maintain that the JBNQA[309] provides that the CBHSSJB is responsible and has personal jurisdiction for the administration of appropriate health services and social services for all persons normally resident in Region10B (now Region 18), whether inside or outside such region[310] and all persons temporarily present in this region.[311]

In cases where the CBHSSJB has jurisdiction, the Crees assert that such jurisdiction should be exercised to the maximum extent possible and take precedence over the rules of provincial legislation, the whole in conformity with the JBNQA and its provincial and federal implementing legislation.[312]

According to the Crees in this adoption matter, the jurisdiction of the CBHSSJB and the relevant Cree rights are consequently legislative and constitutional rights. Over 35 years after the conclusion of the JBNQA in 1975, the CBHSSJB assumes and administers a large variety of health and social services both in Cree territory (Eeyou Istchee) and outside of these areas, including with respect to the placement and adoption of children.

In this matter, the Cree parties argue that:

- as reflected in the JBNQA,[313] it was the intention of all parties that future (*i.e.* post-1975) health and social programs and services be applied to the fullest extent possible by the CBHSSJB, including all matters within the scope of the *Youth Protection Act*,[314] which have a direct incidence on adoption matters;

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[308] JBNQA, subsection 14.0.5.
[309] JBNQA, subsections 14.0.3 and 14.0.10.
[310] JBNQA, subsections 14.0.5 and 14.0.10.
[311] JBNQA, subsection 14.0.5.
[312] JBNQA, sec. 3 and 14; *Act approving the Agreement concerning James Bay and Northern Québec*; *James Bay and Northern Quebec Native Claims Settlement Act.*
[313] JBNQA, subsection 14.0.20.
[314] R.S.Q., c. P-34.1.

- also reflected in the JBNQA,[315] it was the intention of all parties that all health and social services in Cree territory ultimately fall under the authority of the CBHSSJB and that such responsibility should be achieved in an orderly and deliberate manner;
- the Director of Youth Protection for the CBHSSJB has legal jurisdiction and authority over all Cree beneficiaries, whether inside or outside Region 10B, with respect to the adoption of a child of such a person and any matters related thereto, in accordance with the JBNQA;[316]
- the Act *respecting health services and social services for Cree Native Persons*[317] confirms the right to choose the institution which will deliver the social services;
- the *Youth Protection Act*[318] confirms the jurisdiction of the Director of Youth Protection of the CBHSSJB to deal with the situation of a child covered by the JBNQA, as the term "child and youth protection centre" in the *Act respecting Health and Social Services*[319] also means "social service centre" as contemplated by the *Act respecting health services and social services for Cree Native Persons*[320] and this also has a direct incidence on adoption, including customary adoption, matters;
- in accordance with the JBNQA,[321] the Government of Québec took the necessary legislative measures to ensure the implementation of the section in the JBNQA regarding Cree health and social services[322] notably through the *Act respecting health services and social services for Cree Native Persons*[323] and the amendments to the *Youth Protection Act*,[324] which include customary adoption.

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[315] JBNQA, subsection 14.0.25.
[316] JBNQA, sec. 3 and 14.
[317] *Act respecting health services and social services for Cree Native persons*, subsection 1 (j) and sec. 6, 51 and 64.
[318] *Youth Protection Act*, sec. 1(b), 31, 32 and 71.
[319] R.S.Q., c. S-4.2.
[320] R.S.Q., c. S-5.
[321] JBNQA, subsections 2.5, 2.17, 14.0.28 and 14.0.29.
[322] JBNQA, sec. 14.
[323] R.S.Q., c. S-5.
[324] R.S.Q., c. P-34.

Given the above, it is the Crees' position in this adoption matter that the jurisdiction of the CBHSSJB applies and takes precedence over incompatible jurisdictional provisions of the *Act respecting Health and Social Services*[325] and of the *Youth Protection Act*,[326] the whole in conformity with Cree Aboriginal and treaty rights and the two provincial and federal laws that approve, give effect to and declare valid the JBNQA[327] to the extent necessary to resolve the conflict or inconsistency.

3.2.9.9 International Law Arguments

In addition to the above-mentioned legislative and constitutional arguments, the Cree parties also made reference to rights flowing from international instruments, which are substantively similar to many of the positions articulated in the preceding section of the First Nations' text and therefore do not need to be repeated here.

In this matter, the Cree parties argued that these types of international law positions are applicable to both the jurisdictional and constitutional issues arguments at issue and to their customary adoption arguments.

3.2.9.10 Status of the Matter

At the time of writing, these issues have been pleaded by all the parties and related written notes and authorities have been filed with the Court, but no decision has yet been rendered. The trial has taken a heavy toll on Cree resources and on the families involved.

This demonstrates the importance of acting promptly and appropriately to address issues relating to the effects of customary adoptions. These issues can only be addressed through a fundamental respect of Aboriginal and treaty rights protected by

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[325] R.S.Q., c. S-4.2.

[326] R.S.Q., c. P-34.1.

[327] *Act approving the Agreement concerning James Bay and Northern Québec* and *James Bay and Northern Quebec Native Claims Settlement Act.*

section 35 of the *Constitution Act, 1982* and the reconciliation principle which is derived from it.

3.2.9.11 Cree Affirmations and Recommendations

In view of the particular situation of the Crees and Cree Adoption Rights and Jurisdiction discussed above, at this time the positions and recommendations of the Crees for the purposes of this report are as follows:

- The CBHSSJB has the jurisdiction to recognize and administer Cree customary adoption matters, and to liaise with relevant provincial and federal governmental authorities to ensure the administrative-legal recognition of the effects of Cree customary adoptions. However, should there be a decision to transfer this "jurisdiction" to another Cree entity, consent shall be sought from the appropriate Cree entity or entities.
- The standards, processes and effects applicable to Cree customary adoption will be determined by the Crees to facilitate interaction between the Crees and provincial administrative entities.
- Subject to the appropriate and adequate allocation of resources, such an adapted Cree customary adoption regime will be based on the following principles:
    - the best interest of the child is of primary importance to the Crees, and Cree customary adoption takes place in the interest of the child and respecting the child's needs and overall well-being, which includes the interests of the family, of the community and of the Cree Nation, with particular regard for maintaining connections to the Cree Nation, the child's family, community, identity, culture, traditional activities and language;
    - Cree customary adoption is a consensual process that requires the consent of the parents of origin, the adoptive parents and, as applicable, the child;
    - Cree customary adoptive parents are 18 years old or older; and
    - the Cree entity identified or established to recognize and administer Cree customary adoption matters (in the event that it is not the CBHSSJB) will be responsible to provide the required assistance to ensure respect for the

above, including professional assistance and traditional Cree forms of assistance, and will attest to the relevant provincial administrative entity that these principles were respected for these types of customary adoptions.

- Such a Cree adapted customary adoption regime may specify how the legal effects thereof will be implemented in conjunction with Québec authorities.
- Québec will recognize the effects of such adapted customary adoptions further to receiving notification from the CBHSSJB or the relevant Cree entity in the event that it is not the CBHSSJB (e.g., Québec authorities will register such an adoption and will provide the necessary administrative and legal measures to ensure that its effects are duly recognized).
- This adapted customary adoption regime shall be subject to, and construed in a manner consistent with, Cree Adoption Rights and Jurisdiction.

PART IV
SUMMARY OF DISCUSSIONS AND RESULTS

Despite the complexity of the legal and political issues involved, the Working Group's discussions were especially interesting because, from a socio-anthropological perspective, they touched on a fundamental aspect of society, i.e. the family. The family structure in Aboriginal communities is generally different from that of the dominant culture's in that the extended family is omnipresent and, despite the numerous socioeconomic challenges of these communities, a strong family support system exists. This first observation laid the foundation for the discussions and helped orient our pursuit of solutions.

As to customary adoption itself, the Working Group had to consider its social dimension, as well as its politically and legally charged nature. As a first step, it was recognized that the consultations, research and discussions all testify to the resilience of customary adoption as a means for a person who is not the biological parent to ensure the care and upbringing a child without necessarily creating a bond of filiation between them. Then, it was agreed that the institution of customary adoption, together with its conditions, its effects and the reasons for its use are, above all, matters for the First Nations and Inuit. The group also agreed that if Québec were to eventually amend its legislation as proposed in this report, it would in no way be intended to neutralize, limit, extinguish or replace this fundamental principle.

Therefore, the issue was essentially to determine, if such amendments were to be made, how to respect this imperative while unequivocally and broadly recognizing certain legal effects of customary adoption in Québec legislation, all without undermining this institution and while respecting the limits of the constitutional framework. The Working Group had to then agree on the scope of such recognition and its essential components. Due to the effect on the daily lives of the people concerned, especially children, the goal became to find a simple, effective legislative technique for such recognition, so as to give them greater legal certainty with regard to their rights and mutual obligations, their relationships with third persons and their

access to benefits and services provided under private or public regimes in Québec or elsewhere.

Taking into account the anthropological and legal analysis, as well as the observations from the Aboriginal consultations, the Working Group agreed on parameters which reflect a consensus overall. These parameters, a combination of observations and, at times, conclusions drawn from discussions on certain Aboriginal practices in Québec, gradually evolved over the course of our work, becoming the guidelines that helped us to reach the conclusions and to make the recommendations included at the end of this report. These fundamental elements provide a relatively complete picture of the relevant considerations:

- Aboriginal customary adoption has always existed and it still exists;
- customary adoption involving Québec Aboriginal Nations and communities transcends the territorial boundaries of Québec and Canada and, accordingly, gives rise to complex inter-jurisdictional challenges;
- it is up to Aboriginal Nations or communities, and not the Québec legislature, to determine the conditions applicable to customary adoption for their respective *milieu*;
- Aboriginal Nations or communities may, at their discretion, adapt or develop their customary adoption regimes in accordance with their needs, traditions and customs and also to respond to new social realities;
- customary adoption regimes remain evolutive and any adaptations or clarifications brought by Aboriginal nations and communities or by the Québec legislature, do not freeze customary adoption in any way;
- the consultation of First Nations has not revealed that they make a distinction between customary child care and customary adoption, while the consultation of the Inuit shows such a distinction, notably in relation to the rupture of the bond of filiation;
- customary adoption takes place in the interest of the child and respecting the child's needs, while taking into account that in the Aboriginal context, the notion of interest includes the interest of the family, of the community and of the Nation, and particularly emphasizes the protection of identity, culture, traditional activities and language;

- customary adoption is a consensual act, involving, at a minimum, the consent of the biological parents, the adoptive parents and, if appropriate, the child;

- customary adoption in Québec is not subject to either an assessment by the director of youth protection or to a Court decision;

- to facilitate the recognition of legal effects of customary adoption within and for the purposes of Québec legislation*:
  - it is up to each Aboriginal Nation or community, as the case may be, to provide for a mechanism for their respective *milieu* by which, among other things, a competent authority, on request, confirms to Québec authorities that a customary adoption has taken place;
  - this competent authority, which may be an individual or an institution, is designated by the Aboriginal Nation or community wishing to provide for its own mechanism, and notice thereof is provided to the Minister who takes cognizance of it and so informs the Québec institutions accordingly;
  - this competent authority is distinct from the members of the adoptive triangle (i.e., parents of origin, adoptive parents and child);

- to facilitate the recognition of legal effects of customary adoption within and for the purposes of Québec legislation*, the effects of customary adoption should be recognized in the *Civil Code of Québec* and in other Québec legislation, notably with respect to filiation and parental authority;

- it should be recognized in the *Civil Code of Québec* that it is up to the Aboriginal authorities to confirm if a customary adoption has taken place;

- legislative amendments should be made to recognize, where applicable, that a pre-existing bond of filiation is maintained, contrary to the current rule in the *Civil Code of Québec* that the bond is ruptured;

- new birth certificates may be issued to facilitate the recognition and integration of legal effects of confirmed customary adoptions within and for the purposes of Québec legislation*, as this is a preferred means for establishing filiation;

- Québec should make the other provinces and territories, and the Government of Canada, aware of the scope and effects of customary adoption within and for the purposes of Québec legislation*, and, as needed, take the necessary measures in collaboration with the concerned Aboriginal Nations or communities, to ensure that all the effects of such adoption are recognized outside of Québec and, conversely, to recognize the customary adoptions of children residing outside of Québec;

- any drafting instruction or proposed legislative amendment regarding customary adoption be subject to prior consultation and collaboration between the Québec authorities and the representatives of the relevant Aboriginal Nations and communities;

- any legislative amendment concerning customary adoption must comply with Aboriginal and treaty rights;

- the effects of the federal and provincial legislation implementing treaties be considered;

- the relevant provincial and federal authorities should take correlative measures in relation to the changes to Québec legislation regarding customary adoption, particularly with respect to: the support of; interactions with; development of; financing of; and the implementation of, the Aboriginal mechanisms;

- in the case of the situation of an Aboriginal child being taken in charge by the director of youth protection, customary adoption should be an option within the framework of the permanent life plan of a child and that the *Youth Protection Act* should be modified accordingly.

[* Please note that parties to the *James Bay and Northern Québec Agreement* and the *Northeastern Québec Agreement* maintain that the legislation implementing these agreements recognize the legal effects of Aboriginal customary adoption.]

These various considerations may be grouped under six general topics:

1) Constitutional imperatives;
2) The presence of Aboriginal customary adoption and the role and responsibility of each community or Nation to determine the reasons, conditions and effects of this practice for their respective collectivities;
3) The desired type and scope of recognition in the overall body of Québec legislation and any associated mechanisms;
4) The need for, and feasibility of, inter-jurisdictional recognition of customary adoption;
5) The place of customary adoption in youth protection matters;
6) Administrative measures and their funding.

4.1 Constitutional imperatives

The legal considerations regarding the division of legislative powers, the protection of the rights of Aboriginal peoples and of children's rights, guaranteed by the Constitution or under international instruments, as well as the political implications, were all taken into account in the discussions on potential solutions.

Although points of view differed at times and on certain matters depending on the concerns of the organizations represented, consensus was ultimately achieved.

From the outset, the discussions had to respect the constitutional division of legislative powers. It was further agreed that the Working Group should not attempt to determine whether Aboriginal customary adoption of a given Nation or community is protected by section 35 of the *Constitution Act, 1982*[328] since doing so risked derailing our work. In this regard, Part III of this report presents the views of the Inuit and of the First Nations, including the Crees and QNW, on the place of customary adoption in the Canadian constitutional order. The Working Group also took into account the previously referred to decision of the British Columbia Court of Appeal in the *Casimel* case,[329] and noted that a customary adoption case related to the JBNQA is currently before the Québec courts.[330] The Cree perspective on this particular case is presented in Part III of this report.

It was therefore agreed that in light of the legal issues at play, Québec's legislative room to manoeuvre would be limited if it attempted recognition in its legislation in a general fashion of legal effects of customary adoption. The fact is that the existence of customary adoption and its social significance in Aboriginal law do not hinge on recognition by federal or Québec legislative authorities. It is up to the Aboriginal Nations or communities to define and adapt customary adoption at their

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[328] *Casimel v. Insurance Corporation of British Columbia*. For instance, the British Colombia Court of Appeal cited *Connolly c. Woolrich* (1867) as the leading case.
[329] See subsection 2.1.2.
[330] See notes 293 and 299.

discretion and based on their needs, traditional values and changing social realities. And, viewed from a positivist perspective, it is up to the legislatures to give it a place in their legislation.

Consequently, all of the approaches explored to meet the expectations of Aboriginal communities and Nations, the government and other bodies had to take these legal considerations into account. It is thus possible that the selected approach would not meet certain of these expectations, but it should nevertheless provide a balance between the values furthered by Aboriginal custom, jurisdiction and rights, and the limits of Québec's legal intervention with respect to this matter.

4.2 Customary adoption in Aboriginal society

4.2.1 Rationale and conditions

Customary adoption does not mean a child has been abandoned and, when it involves creating a new bond of filiation, it is generally viewed from the perspective of the "gift"[331] of a child. Unlike in the regime of statutory adoption, the transfer of parenting responsibilities that typically comes with a customary adoption, customary child care or any other customary form of sharing these responsibilities does not mean the child is abandoned or that a new filiation is necessarily being sought for the child.

Besides this common aspect of Aboriginal customary practices, and despite the varying nature of the particular conditions of customary adoption in Aboriginal Nations or communities, other equally fundamental elements were also found to be relatively consistent: for example, considerations relating to the interest of the child and the protection of the child's rights, the consensual nature of the transfer of the child and the lack of formality and administrative or legal intervention.

[331] "Gifting" a child is understood in the broader sense of the word described in subsection 1.2.1.

Indeed, the findings of the Aboriginal consultations highlight the importance of existing unwritten rules based on intrinsic family and community values that confirm the primacy of the child's interests in the customary adoption process. These rules require that the parties involved in the decision making always keep this concern firmly in mind. The fact is that customary adoptions take place in the best interests of the child and in the respect of the child's needs, while taking into account that in the Aboriginal context, the notion of the child's interests includes the interest of the family, of the community and of the Nation, and particularly emphasizes the protection of identity, culture, traditional activities and language. This observation is a question of common sense and the Aboriginal representatives stressed that this notion is consistent with fundamental values taken into consideration in the customary adoption process.

Children play an important role in all societies, but for Aboriginal communities and Nations they are at the heart of a community system that to this day is essential to the cohesion of the social structure and to ensuring a balance between families and their communities. This finding is well documented both here and in other countries with relatively sizeable Aboriginal populations. It is also reflected in certain noteworthy legislation on the subject, such as the U.S. federal law on the protection of Indian children, the *Indian Child Welfare Act*,[332] which recognizes that tribal councils have a direct interest with respect to children and therefore confirms, from the Aboriginal perspective, that the child is sacred and is a resource that belongs to the entire tribal council.

Another established fundamental element is that of a consensual family and group process, supported by the community and sometimes certain of its entities. Indeed, custom requires, at a minimum, the consent of the parents of origin, the adoptive parents, and depending on his age or level of maturity, the child. Community rules are also followed in relation to the giving of consent, which although unwritten, nevertheless structure and permeate the entire consent-based process.

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[332] See subsection 2.3.5.

Aboriginal customary adoption occurs simply through a verbal agreement and usually without any other formality. Similar to an intrafamily statutory adoption,[333] it does not require an assessment by an expert or the DYP. It is a joint project involving the family of origin and the adoptive parents, who are most often members of the immediate or extended family or members of the community. However, unlike a statutory adoption, it is carried out without any judicial involvement.

The practice of customary adoption essentially respects a customary consensus that usually leaves the decision making to the families involved and does not entail any assessment or decision by "authorities" outside of the customary process. Although it was reported that today, caseworkers or community organizations of the Aboriginal community or Nation may occasionally give advice or express opinions, they are not usually involved in the final decision made according to custom. In short, Aboriginal custom assigns a key role to the families, who are supported by the community, which either approves or simply does not oppose the adoption. For all intents and purposes, there is no additional assessment or judgment by other authorities.

For Aboriginal peoples, it is clear that this reality would not be any different if customary adoption were to be generally recognized in Québec legislation, unless a given Aboriginal Nation or community specifically and expressly provides for such involvement. For instance, the Crees could allow for the involvement of their social services alongside their customary process. Although this possibility was contemplated during the discussions, the participants reiterated that it would be problematic to legislate intervention by administrative or judicial authorities in a customary practice that is foreign to them and that in addition, such an exercise would be too formal, cumbersome and complex for the members of the adoption triangle. Constitutional considerations were also raised in this regard. All of this was taken into consideration in the contemplation of possible approaches to the recognition of effects of customary adoption.

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[333] See subsection 1.2.2.

4.2.2 Legal effects

With respect to effects of Aboriginal customary adoption, the consultations held in Québec's Aboriginal communities revealed that they vary between communities and Nations and that they offer the people concerned various types of parental or quasi-parental relationships.

When no new bond of filiation is created, the effect is, in some respects, akin to a parental delegation of the custody, supervision and upbringing of the child. On the other hand, when the filiation changes, the effect is similar to that of a statutory adoption, as it currently exists in Québec (full adoption) or to what was proposed in the 2009 draft bill that sought to reform adoption and parental authority (adoption without severing ties) or to that of simple adoption, a legal form of adoption available in France and Belgium.

The consultations and discussions brought to light certain distinctive features specific to the First Nations and to Inuit. Firstly, the Inuit make a clear contemporary distinction between customary child care and customary adoption while the consultations carried out in First Nations communities did necessarily reveal such a clear distinction.[334] Secondly, for the Inuit, adoption creates, in principle, a new filiation, while this is not always the case for the First Nations; the consultations revealed that for First Nations the child's filiation may sometimes change, and in other cases, it may remain intact. In the latter case, the child's family setting changes but the bond of filiation is not severed with the family of origin, with the result that the child can return to that family, which occasionally happens. In such cases, the effects are temporary or of an indeterminate duration whereas when a new filiation is involved, the intention is for them to be permanent.

[334] Without deciding the issue, it is interesting to note that through their effects, some forms of customary adoptions can sometimes resemble the concepts of guardianship (tutorship) or delegation of parental authority found in Québec law.

For the Inuit, adoption means completely severing the original bond of filiation, much like a full adoption under the Civil Code. The adoption creates, in the adoptive family, the same rights and obligations as filiation by blood and extinguishes all of the effects of the previous filiation bond. Therefore, the adopted child and the original parent lose their rights and are released from their obligations towards each other while the adoptive parents assume all of the prerogatives associated with parental authority.

For the First Nations, when a new filiation is created, it can be substitutive, like full adoption, or additive, like filiation without dissolution or simple adoption. In the latter case, in addition to maintaining the pre-existing filiation to which the new bonds of filiation are added, depending on the custom, the rights and obligations between the adoptee and his original parent may be maintained, which singularly distinguishes it from statutory adoption.

Further, unlike statutory adoption, for both Inuit and for First Nations customary adoption is not confidential. It is relatively public and the adoptive parents, along with other people in the community, know the identity of the child's parents of origin. Similarly, the adopted child will know his original parents, or at the very least, know who they are, regardless of the effects of the adoption on his filiation in light of the particular context of the adoption.

In addition to these fundamentals, the consultations revealed other complementary elements, which although of a secondary nature, are nevertheless relevant in a context where societies are confronted with new realities. For example, the Working Group noted that the biological and adoptive parents are usually of the age of majority and that the adoptive parents are of Aboriginal descent, although they can also be from a mixed ethnic background. In the latter case, it was pointed out that it is up to the Aboriginal community to determine the rules regarding membership of individuals in the Nation. Also, this is becoming increasingly a question of current concern, and the Aboriginal Nations or communities will undoubtedly have the opportunity to consider it in other forums.

Finally, although an ancestral practice, customary adoption continues to evolve. It was therefore agreed that the current rules described in this report are not frozen in time, and in the same way, any amendments to Québec legislation regarding customary adoption cannot define, change or "freeze" this custom.

In this regard, the presentation made in Part III by the Inuit representatives mentions that regional Inuit organizations are planning on developing a modern customary adoption "regime". It would take account of the values that guide the Inuit in the practice of their custom, and of modern challenges, as well as of the issues identified at the meetings that led to the publication of their consultation report. However, such a regime would not "freeze" their custom in relation to adoption. Rather, after careful consideration, the Inuit may set out custom adoption practices or guidelines deemed to be acceptable to the whole of their society. The First Nations representatives indicated being receptive to this approach and its relevance and believe that certain First Nations may be interested in undertaking such an exercise.

4.3 Recognition and scope of effects of customary adoption within Québec legislation

The general Québec legislative recognition of customary adoption or its effects in Québec legislation arises as part of wider Aboriginal claims for greater autonomy in matters related to family and children stemming notably from past events, such as laws that have affected family and societal organization in Aboriginal communities. Aboriginal demands in this regard may be explained by the distinctiveness of their cultures, which lead certain of them to have greater recourse to customary adoption rather than to statutory adoption, which is foreign to them.

General and explicit legislative recognition of effects of customary adoption may not be necessary when the effects are temporary and resemble a delegation of parental responsibilities that does not need to be formalized and makes no changes with respect to filiation. However, the members agree that where customary adoption includes a change of filiation, this effect could be reflected in the Civil Code, which already provides for the effects of statutory adoption and the issuance of a birth

certificate recognizing that adoption. However, this integration should occur without equating customary adoption to statutory adoption or modifying the institution of customary adoption and in accordance with all of the current and future distinctions and variations in Aboriginal customs.

Accordingly, the Working Group felt that the preferred avenue was to issue a new birth certificate confirming the new filiation and, where applicable, the continuation of the pre-existing filiation, with or without associated rights and obligations, which would cover all the legal effects related to filiation and parental authority.

The suggestion that a new birth certificate be issued by the RCS generated discussion about the possibility of Aboriginal Nations or communities establishing a competent authority (an individual or an institution), distinct from the adoption triangle, that would be responsible for attesting to the RCS that a customary adoption has taken place. Acting at the request of the adoptive parents or the adopted child, the authority would attest not only to the child's adoption, but also to the fact that it occurred in accordance with the custom, including that it was carried out in the interest of the child and with the consent of those concerned.

Evidently, such an authority does not necessarily exist in Aboriginal customary law at the moment, but the general recognition of effects of customary adoption in Québec legislation implies a need for an official link between the RCS and each Nation or community seeking to make use of this recognition.

Clearly, the procedure used to attest to a customary adoption should not pertain to practices that have no impact on filiation or on the identity of the person having parental authority, nor apply to those persons not wishing to make use of the mechanism of attestation and issue of a new birth certificate. It would therefore be without prejudice to the "pure" customary adoption regime, which would continue in parallel with full effect and all its inherent characteristics and modalities. This procedure of attesting to a customary adoption, followed by the issuance of a new

birth certificate, would not be unlike mechanisms used in other jurisdictions where there is no judicial involvement, such as in the Northwest Territories and Nunavut.[335]

Finally, as Aboriginal Nations or communities are free to adapt their adoption regimes, it would be up to each of them to develop and decide upon an attestation procedure or internal process that reflects their own values and to which other complementary elements could be added as needed.

Obviously, it would be up to interested Aboriginal Nations and communities to promote among their members the merits of this process which would enable them to obtain a new act of civil status to reflect their customary status and, incidentally, that would undoubtedly serve to facilitate their interactions with government and third parties.

Furthermore, as was evident from the consultations, any proposed solution should respect the non-confidential nature of customary adoption.

4.4 Customary adoption outside Québec

The Working Group believes that once amendments have been made to the Civil Code, Québec, in conjunction with the relevant Aboriginal Nations and communities, should also take the necessary steps to have effects of customary adoption recognized outside the province. Accordingly, Québec must raise awareness among the other provinces and territories, and the federal government, regarding the scope and effects of this type of customary adoption in Québec law.

It is also recognized that customary adoption of children extends beyond Québec's borders. Under Inuit custom, children are often adopted by people living in Nunavut or Labrador and, conversely, children from these regions are adopted by people living in Québec. Similar situations can also arise with the Innu of

[335] See subsection 2.2.1.

Newfoundland and Labrador, the Crees of Ontario, the Mi'gmaqs of the Maritimes and the United States as well as the Mohawks of Ontario and the United States.

Recognition by Québec of customary adoption of children domiciled outside Québec, but in Canada, is a possibility to be considered, as long as provincial and territorial jurisdiction would be respected. However, in the case of children living in provinces that do not recognize customary adoption practiced in their territory or in cases of children living outside Canada, the solution would be more challenging, particularly in consideration of international obligations and the rules of private international law. As the Working Group is not in a position to examine these complex matters, members agreed to suggest that the government and Aboriginal Nations and communities find another avenue for analysing and considering these issues.

4.5 Customary adoption and youth protection

It is important to remember from the outset that customary adoptions are not based on the same premises as adoptions carried out in situations covered by the YPA. However, customary adoption is an option that merits consideration in that it would offer the DYP the possibility, in creating a life plan, of supporting a customary adoption in cases where a child is unable to return to his family of origin.

This option would respect the child's Aboriginal identity and customs. In fact, the Working Group believes that it would meet both the individual and collective needs of children of Aboriginal communities or Nations that practice customary adoption, by respecting their interests and their rights while providing long-term stability and taking into consideration the "characteristics of Native communities"[336] as provided in the YPA. Moreover, the Working Group believes that if customary adoption is expressly recognized in the Civil Code and in an act of civil status corresponding to this situation, it could become a privileged means of strengthening family and community solidarity even further than is presently the case.

[336] *Youth Protection Act*, sec. 2.4 (5)(c).

Further, the purpose of customary adoption would not be to avoid DYP intervention, but rather to serve as a full-fledged alternative in the range of life plan choices that are considered whenever the DYP takes charge of the situation of a child in need of protection.

In this spirit, over the course of its work, the Working Group reiterated that the objectives of the YPA constitute an essential safety net for all children.

4.6 Participatory, administrative and financial measures

Customary adoption is above all a matter of Aboriginal governance and jurisdiction, and it is only fitting that Aboriginal communities and Nations be involved in the proposed changes. The Working Group recommends that any drafting instructions or proposed legislative amendments regarding customary adoption be subject to prior consultation and collaboration between Québec authorities and representatives of the First Nations and Inuit.[337]

Further, the general recognition of legal effects of customary adoption in the Civil Code would not be without administrative and financial impact. There will be a financial costs for Aboriginal communities and Nations associated with establishing a mechanism for attesting to customary adoptions, including the designation of an Aboriginal authority and additional measures to complement the new process, such as consultations with the communities and Nations concerned and recurring information campaigns that would be required to educate parents and children about these new options. Although these measures would essentially be undertaken by Aboriginal communities and Nations, Québec could provide financial support to facilitate orderly planning of the new recognition system and the harmonious development of the interface between Québec and Aboriginal authorities.[338]

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[337] Where the proposed legislative changes would affect rights conferred under the JBNQA and the NEQA, the modalities for amending these agreements should also apply.

[338] In this regard, see the legislative proposals drawn up by Working Group members and described in Part V, and, specifically, the proposals pertaining to sections 543.1 and 565.1 with respect to

Similar participation by the federal government would also demonstrate the importance that it attaches to the rights of Aboriginal peoples, to their self-government, to their well-being and social development, and to the preservation of their traditions.

These structural and financial needs may also be inferred as flowing from the responsibilities that the State and Aboriginal authorities will have to assume given the process proposed by the Working Group. Essentially, a designated Aboriginal authority would need to attest to customary adoptions and be the body responsible for keeping Québec authorities informed. This would, presumably, require human, technical and technological resources.

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the conditions for recognizing foreign decisions, in which the designated Aboriginal authority would exercise its jurisdiction.

PART V
PREFERRED SOLUTIONS

The general recognition of effects of customary adoption within and for the purposes of Québec legislation did not appear to be a priority in the case of such adoptions where the effects are only temporary, and comparable to a delegation of parental responsibilities without modification of filiation. Considering this, the Working Group focused on finding solutions with respect to customary adoptions involving new filiation (family) bonds.

Given the varied nature of customary adoption, the Working Group sought a simple, effective solution that would create a bridge between statutory law and Aboriginal custom and expressly recognize its effects without undermining its nature, purposes, conditions or effects.

The members of the Working Group agreed that issuing a new birth certificate, supported by a document attesting to the customary adoption, was the approach to be recommended. This conclusion was arrived at given the convergent characteristics of customary and statutory adoption, namely the creation of a new bond of filiation, the intention that this bond be permanent, the transfer of parental authority to the adoptive parents and, where applicable, a change in the child's name.

Similarly, the fundamental principles of customary adoption, which notably include the interest of the child and the consent of those concerned, are not unlike the fundamental principles of statutory adoption, such that it would be possible to contemplate, as a solution, to bring them closer together. The same would apply to the non-confidential nature of customary adoption, especially since the reforms planned for statutory adoption demonstrate more openness in this respect than previously existed.

On the other hand, divergent characteristics of customary adoption and statutory adoption as the latter currently exists, notably adoption without severing the pre-

existing bond of filiation and the potential for maintaining certain rights and obligations between adoptive children and their parent(s) of origin, required more creativity to ensure that effects of customary adoption are clearly reflected in legislation and in dealings with authorities and third parties. Thus was born the idea of including mention of any pre-existing bonds of filiation that would be maintained in accordance with certain customs on the new birth certificate; this is also one of the changes that had been planned for statutory adoption in the announced reforms. The same would apply to rights and obligations that subsist with the family of origin under custom, in certain cases, although this would be the exception and not the rule.

Finally, attaching the new measures to the rules governing filiation and acts of civil status in the Civil Code would respect both Aboriginal customs and constitutional constraints.

Accordingly, to ensure general recognition, not regulation, of effects of customary adoption within its legislation, the Québec legislature could provide for attestation of the adoption on request, in an official, authentic document, such as a birth certificate issued by the RCS. Such a document would have the advantage that it would be unequivocally recognized by provincial and other authorities, as well as by third parties. The Civil Code, which governs acts of civil status and provides for the issuance of a new birth certificate in the case of statutory adoption, could be amended to include the case of a customary adoption when it gives rise to a new bond of filiation.

Given that the RCS has no direct knowledge of adoptions or the people involved, which is information that it has to enter in the registry, and in the absence of a statutory or Court decision regarding a customary adoption, another authority would have to provide the necessary information to the RCS. In the view of the Working Group, this authority would have to be designated by the Aboriginal Nation or community seeking to have recourse to this form of recognition. At the request of the adopted child or an adoptive parent, the authority could attest that a customary adoption had taken place, after ensuring that the adoption was in accordance with

custom, notably that the required consents were validly given, that the adoption was in the child's interest, and that the child had been entrusted to the adoptive parent.

The designation of this "Aboriginal" authority, which could be an individual or an institution, distinct from the members of the adoption triangle, would be notified to the government authorities by the Aboriginal community or Nation in question so that the RCS could easily recognize those authorities empowered by the various communities and Nations.

The information conveyed by these authorities would be purely declaratory in nature and there would be no mandatory prior assessment or decision by any court or institution whatsoever, unless a community or Nation so required. Under the scenario retained by the Working Group, the Aboriginal authority itself would not make an adoption-related decision; it would simply issue an attestation that the adoption had occurred on a date specified by the Aboriginal authority.

Upon receipt of the information from the designated authority, the RCS would prepare a new birth certificate, including statements and mentions from the original certificate. In the case of an adoption that maintained a prior bond of filiation, the bond and the fact that it predated the adoption would also be stated on the certificate, and the birth certificate would show that the child was adopted, whether the previous bond was severed, and where applicable, the particular legal effects of that adoption under the specific custom applicable to it.

In sum, this process would achieve the primary goal agreed upon by the Working Group, i.e. to facilitate a general recognition of legal effects of customary adoption within and for the purposes of Québec legislation, notably with respect to filiation and parental authority and, where applicable, with respect to the maintenance of rights and obligations for the family of origin.

The proposed process, which we believe takes into account constitutional constraints, is not intended to be either mandatory or limiting of the customary

adoption regime or for the individuals who wish to participate in a customary adoption. Rather, it is intended to respond to the desire for a mechanism that allows, where required for certain adoptions, the alignment of the *de facto* and the legal situation, particularly as regards filiation and parental obligations. As a result, the participation of communities and Nations or their members would be strictly optional: they could participate in the process to facilitate recognition of the effects of customary adoptions for administrative and legal purposes, or they could proceed by custom alone, with no involvement by a designated authority. As the process would not interfere with the domain of custom, being of another nature, customary adoptions and related effects in customary adoption law would remain whole and substantive.

As customary adoption involving Aboriginal Nations and communities of Québec transcends Québec's borders, provisions would also be required to address the adoption of a child domiciled outside Québec but within Canada by parents domiciled in Québec. Such provisions would be needed to recognize, specifically, that the designated authority of the Québec Aboriginal community or Nation, supported by a legal document issued under the laws of the child's territory or province of residence, could confirm to the RCS that the child was adopted in accordance with custom. The intention of the Working Group is that relying on a legal document issued by the child's province or territory of residence would respect the jurisdiction of other governments over their populations.

However, the Working Group is aware that the problem of cross-border customary adoptions involving governments outside Canada or provinces that do not recognize these adoptions is not resolved, and asks that this aspect be given further consideration.

Finally, given that youth protection issues are a relatively sensitive matter within Aboriginal society, there was a strong reaction by both Aboriginal representatives and those of youth centres to discussions of these issues in relation to customary adoption.

However, in light of the discussions, the members are of the view that, in the event of customary adoption-related amendments to the Civil Code, changes to the YPA would also be warranted so that the officials responsible for making a decision with respect to an Aboriginal child could also consider customary adoption as an option where the return of the child to his family is not feasible.

Within these parameters, certain Working Group members explored possible amendments to the Civil Code and the YPA. This led to the tangible development of rules that appear both respectful of Aboriginal rights and of Québec's jurisdiction over civil matters. The results of this work are included in Appendix 3 of the report. However, it should be noted that these legislative proposals, or certain of them, were not approved by all members of the Working Group, given the mandates and areas of expertise of some members, although the group did agree that, overall, they reflect the proposed solutions. These proposals could also be subjected to expert analysis by Aboriginal and governmental authorities.

CONCLUSION AND RECOMMENDATIONS

The members of the Working Group had multiple objectives that informed the preparation of this report. Their work allowed them to do much more than to simply appreciate customary adoption as a mere social reality of Aboriginal Nations and communities. This customary institution is also a valuable asset, not only for these communities and Nations, but for Québec as a whole as well.

Going beyond just the study of a social and cultural practice, the members of the Working Group were also able to share and consider historical, anthropological, political and legal perspectives on Aboriginal customary adoption, and to identify possible approaches to meeting the expectations and needs of the populations who practice customary adoption.

It must be recognized that the family is at the centre of any society, and it is sometimes sorely tested during difficult economic times and periods of social transformation. For Aboriginal societies, the past actions of various authorities have certainly not facilitated the development of customary adoption. However, its survival clearly demonstrates its resilience. Furthermore, it is a concrete contemporary expression of the uniqueness of Aboriginal cultures.

In light of the consultations by the First Nations and the Inuit, the research conducted and the exchanges and discussions among the members of the Working Group for the preparation of this report, a summary of the Working Group's findings was developed to provide context for its recommendations; both of which are set out below:

1.1 Aboriginal customary adoption has always existed and it still exists;

1.2 customary adoption involving Québec Aboriginal Nations and communities transcends the territorial boundaries of Québec and Canada and, accordingly, gives rise to complex inter-jurisdictional challenges;

1.3 it is up to Aboriginal Nations or communities, and not the Québec legislature, to determine the conditions and the effects of customary adoption for their respective *milieu*;

1.4 customary adoption takes place in the interest of the child and respecting the child's needs, while taking into account that in the Aboriginal context, the notion of interest includes the interest of the family, of the community and of the Nation, and particularly emphasizes the protection of identity, culture, traditional activities and language;

1.5 customary adoption is consensual, involving at a minimum the consent of the biological parents, the adoptive parents and, if appropriate, the child;

1.6 customary adoption in Québec is not subject to either an assessment by the director of youth protection or to a Court decision;

1.7 customary adoption has different effects according to the customs of the communities or Nations, notably, with respect to the family of origin, that ties, rights and obligations may or may not subsist;

1.8 the consultations carried out over the course of the work of the Working Group show that among the Inuit a new bond of filiation is created for an adopted child, which is not always the case among the First Nations;

1.9 the consultations carried out among the First Nations did not reveal the existence of a clear-cut distinction between customary child care and customary adoption whereas the consultation carried out among the Inuit revealed such a distinction;

1.10 Aboriginal Nations or communities may, at their discretion, adapt or develop their customary adoption regimes in accordance with their needs, traditions and customs and also to respond to new social realities;

1.11 Québec legislation* rarely mentions customary adoption and this situation creates problems, both for the individuals concerned and for the administrative authorities, particularly with respect to the exercise of parental responsibilities;

1.12 since the early 1980s, Aboriginal peoples have sought the recognition of legal effects of customary adoption within and for the purposes of Québec legislation*;

1.13 the Québec authorities have already recommended in the past that the *Civil Code of Québec* be amended in order to recognize customary adoption;

1.14 in the case of the situation of an Aboriginal child being taken in charge by the director of youth protection in accordance with the law, customary adoption should be an option within the framework of the permanent life plan;

1.15 any legislative amendment concerning customary adoption must comply with, and is without prejudice to, Aboriginal and treaty rights;

1.16 the federal and provincial legislation implementing treaties must be considered;

1.17 customary adoption regimes remain evolutive and any adaptations or clarifications brought by Aboriginal nations and communities or by the Québec legislature, do not freeze customary adoption in any way.

Finally, having completed its work and taking in consideration these various elements, the Working group, recommends:

2.1 to facilitate the recognition of legal effects of customary adoption within and for the purposes of Québec legislation*, particularly with respect to filiation and parental authority, such be recognized in the *Civil Code of Québec* and in other Québec legislation;

2.2 this recognition be effected, in particular, through the issuance of a new act of birth, as the preferred means for establishing filiation;

2.3 the *Civil Code of Québec* recognize, as applicable, that a pre-existing bond of filiation is maintained, contrary to the current rule in the *Code* that the bond is ruptured and, where permitted by custom, that a customary adoption may maintain rights and obligations between the adopted child and a parent of origin;

2.4 the legislation provide*:
2.4.1 that it is up to Aboriginal Nations or communities to determine whether a customary adoption has taken place and they may

provide a mechanism for the involvement of an Aboriginal authority, for their respective *milieu*, which is competent for these purposes;

2.4.2 that, in such a case, the competent authority, which may be an individual or an institution, be designated by the Aboriginal Nation or community and that notice of this designation be provided to the Minister of Justice who takes cognizance thereof and advises the relevant Québec authorities accordingly;

2.4.3 that this competent authority be distinct from the members of the adoptive triangle (parents of origins, adoptive parents and child);

2.4.4 that on request, the competent authority attests to the Québec authorities that a customary adoption has taken place when it creates a new bond of filiation, mentioning in particular the exchanges of consent, the effects of the adoption on filiation and the fact that the child has been entrusted to the adoptive parents;

2.4.5 that both the attestation of the competent authority and the new act of birth mention whether or not the bond of filiation has been dissolved and, as applicable, the specific effects of the customary adoption;

2.5 customary adoption must not be subject to an assessment by the director of youth protection or a court decision;

2.6 the law facilitate the recognition of effects of customary adoption* of children domiciled in Canada but outside Québec by Aboriginal adoptive parents domiciled in Québec;

2.7 the *Youth Protection Act* recognize, in cases where the situation of an Aboriginal child has been taken in charge by the director of youth protection, that customary adoption pursuant to the *Civil Code of Québec* is an option in the context of the development of a permanent life plan for the child;

2.8 with the goal of ensuring legislative coherence, all necessary amendments be made to other Québec legislation for the purposes of consistency;

2.9 any orientation or proposed legislative amendments regarding customary adoption:

2.9.1 respect the Canadian constitution and Aboriginal and treaty rights, and that the recognition of the effects of customary adoption within and for the purposes of Québec legislation* be without prejudice to and not affect such rights;

2.9.2 take into account the effects of provincial and federal legislation which implement treaties;

2.9.3 be subject to prior consultation and collaboration between the Québec authorities and the representatives of the relevant Aboriginal nations and communities;

2.10 once the legislative amendments have been made, Québec make the other provinces and territories, and the Government of Canada, aware of the scope and effects of customary adoption in Québec legislation and, if applicable, that Québec take the necessary measures in collaboration with the Aboriginal Nations or communities, to ensure that all the effects of such adoption are recognized outside of Québec and, conversely, to recognize the customary adoptions of children domiciled outside of Québec but within Canada;

2.11 the Québec government continue discussions with the Aboriginal Nations and communities to identify possible ways to facilitate the recognition of the effects of customary adoption of Aboriginal children domiciled outside Québec and Canada by adoptive parents domiciled in Québec, in accordance with Aboriginal custom;

2.12 the relevant provincial and federal authorities take correlative measures in relation to the changes to Québec legislation with respect to: the support of; interactions with; development of; financing of; and the implementation of, the Aboriginal mechanisms that will be associated with the recognition of effects of customary adoption within and for the purposes of Québec legislation*.

[* Please note that parties to the *James Bay and Northern Québec Agreement* and the *Northeastern Québec Agreement* maintain that the legislation implementing these agreements and other related Acts and regulations recognize legal effects of Aboriginal customary adoption.]

ABBREVIATIONS TABLE

AFNQL...........	Assembly of First Nations of Quebec and Labrador
Avataq	Avataq Cultural Institute
CA. 18	Complementary Agreement No. 18
CBHSSJB	Cree Board of Health and Social Services of James Bay
CDPDJ...........	Commission des droits de la personne et des droits de la jeunesse
Civil Code	Civil Code of Québec
DYP	Director of Youth Protection
FNQLHSSC	First Nations of Quebec and Labrador Health and Social Services Commission
GCC(EI)-CRA .	Grand Council of the Crees (Eeyou Istchee) and the Cree Regional Authority
JBNQA...........	James Bay and Northern Québec Agreement
KRG...............	Kativik Regional Government
Makivik	Makivik Corporation
MJQ...............	Ministère de la Justice du Québec
MSSS.............	Ministère de la Santé et des Services sociaux
NEQA.............	Northeastern Québec Agreement
NRBHSS	Nunavik Regional Board of Health and Social Services
QNW..............	Quebec Native Women
RCAAQ	Regroupement des centres d'amitié autochtones du Québec
RCAP	Royal Commission on Aboriginal Peoples
RCS	Registrar of Civil Status
YPA................	Youth Protection Act

BIBLIOGRAPHY

The documents marked with an asteris* are on electronic support.

Articles

Baldassi, Cindy L. "The Legal Status of Aboriginal Customary Adoption across Canada: Comparisons, Contrasts and Convergences." *U. B. C. L. Rev.* 39 (2006), pp. 63-100.

Ban, Paul Z. "Australia's Indigenous minority – Torres Strait Islanders." *Secretariat of National Aboriginal and Islander Child Care Newsletter* (October 2008), p.14. (www.snaicc.asn.au/_uploads/rsfil/02537.pdf)

Bertsch, Maria, and Bruce A. Bidgood. "Why is Adoption Like a First Nations' Feast?: Lax Kw'alaam Indigenizing Adoptions in Child Welfare." *First Peoples Child & Family Review* 5, 1 (2010), pp. 96-105.

Blackstock, Cindy, Nico Trocmé, and Marlyn Bennett. "Child Maltreatment Investigations Among Aboriginal and Non-Aboriginal Families in Canada." *Violence Against Women* 10, 8 (2004), pp. 901-916.

Carasco, Emily F. "Canadian Native Children: Have Child Welfare Laws Broken the Circle?" *Canadian Journal of Family Law* 5 (2010), pp. 111-138.

Carriere, Jeanine. "Promising practice for maintaing identities in First Nation adoption." *First Peoples Child & Family Review* 3 (2007), pp. 46-64.

Carriere, Jeanine, and Sandra Scarth. "Aboriginal Children: Maintaining connections in adoption." In *Putting a human face on child welfare: Voices from the prairies.* Edited by Ivan Brown, Ferzana Chaze, Don Fuchs, Jean Lafrance, Sharon McKay, and Shelley Thomas Prokop. Prairie Child Welfare Consortium / Centre of Excellence for Child Welfare, 2007.

Fine, Agnès. "Regard anthropologique et historique sur l'adoption. Des sociétés lointaines aux formes contemporaines." *Informations sociales* 2, 146 (2008), pp. 8-19.

Fiske, Jo-Anne. "From Customary Law to Oral Traditions: Discursive Formation of Plural Legalisms in Northern British Columbia, 1857 – 1993." *B. C. Studies* 115/116 (Autumn/Winter 1997/98), pp. 267 - 288.

Fonseca, Claudia. "Circulation d'enfants ou adoption : les enjeux internationaux de la filiation adoptive." *Droit et cultures* 38, 2 (1999), pp. 136-167.

Fonseca, Claudia. "La circulation des enfants pauvres au Brésil : une pratique locale dans un monde globalisé." *Anthropologie et sociétés* 24, 3 (2000), pp. 53-73.

Fournier, Anne. “L’adoption coutumière autochtone au Québec : quête de reconnaissance et dépassement du monisme juridique.” *Revue générale de droit* 41, 2 (2011), pp. 703-731.

Goubau, Dominique, and Claire O'Neill. “L'adoption, l'Église et l'État : les origines tumultueuses d'une institution légale.” In *L'évolution de la protection de l'enfance au Québec : des origines à nos jours*, by Renée Joyal. Québec: Presses de l'Université du Québec, 2000.

Goubau, Dominique, and Françoise-Romaine Ouellette. “L'adoption et le difficile équilibre des droits et des intérêts : le cas du programme québécois de la « Banque mixte »”, *McGill Law Journal* 51, 1 (2006).

Goubau, Dominique, and Suzanne Beaudoin. “Adoption « ouverte » : quelques enjeux et constats.” *Service social* 45, 2 (1996), pp. 51-72.

House, Jeannie. “The Changing Face of Adoption: Challenge of Open and Custom Adoption.” *Canadian Family Law Quarterly* 13 (1996), pp. 333-363.

Kline, Marlee. “Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations.” *Osgoode Hall Law Journal* 30, 2 (1992), pp. 375-425.

Lévi-Strauss, Claude. “The Family.” In *Man, Culture and Society*, by Harry L. Shapiro. New-York: Oxford University Press, 1956.

Lomax, Bill. “Hlugwit’y, Hluuxw’y – My Family, my Child: The Survival of Customary Adoption in British Columbia.” *Canadian Journal of Family Law* 14, 2 (1997), pp. 197-215.

Lynch, Philip. “Keeping Them Home: The Best Interest of Indigenous Children and Communities in Canada and Australia.” *Sydney Law Review* 23, 4 (2001), pp. 501 - 542.

Otis, Ghislain. “La protection constitutionnelle de la pluralité juridique : le cas de « l’adoption coutumière » autochtone au Québec.” *Revue générale de droit* 41, 2 (2011), pp. 567-609.

Otis, Ghislain. “Territorialité, personnalité et gouvernance autochtone.” *Les Cahiers de droit* 47, 4 (2006), pp. 781-814.

Otis, Ghislain, and Geneviève Motard. “De Westphalie à Waswanipi : la personnalité des lois dans la nouvelle gouvernance crie.” *Les Cahiers de droit* 50, 1 (2009), pp. 121-152.

Ottley, Bruce L. “Reconciling modernity and tradition: PNG's Underlying Law Act.” *Reform* 80 (Autumn 2002), pp. 22-25, 70-71.

Paré, Mona. “L'adoption coutumière au regard du droit international : droits de l'enfant *vs* droits des peuples autochtones.” *Revue générale de droit* 41, 2 (2011), pp. 611-654.

Pérouse De Montclos, Marie-Odile, Marie-Emanuelle Ducamp, and Blandine Ridel. “Lien social et processus d’attachement chez l’enfant adopté en milieu kanak.” *La psychiatrie de l’enfant* 44, 1 (2001), pp. 233-265.

Richard, Kenn. “A Commentary Against Aboriginal to non-Aboriginal Adoption.” *First Peoples Child & Family Review* 1, 1 (2004), pp. 101-109.

Saladin d'Anglure, Bernard. “Des enfants nomades au pays des Inuit Iglulik.” *Anthropologie et Sociétés* 12, 2 (1988), pp. 125-166.

Saladin d'Anglure, Bernard. “Mission chez les Esquimaux Tarramiut du Nouveau-Québec (Canada).” *L'Homme* 7, 4 (1967), pp. 92-100.

Smith, Ashley. “Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Save or Lose our Children?” *Canadian Journal of Family Law* 25, 2 (2009), pp. 297-367.

Tourigny, Marc, et al. “Les mauvais traitements envers les enfants autochtones signalés à la protection de la jeunesse du Québec : Comparaison interculturelle.” *First Peoples Child & Family Services* 3, 3 (2007), pp. 84-102.

Wilmott, William E. “The Eskimo Community of Port Harrison, P.Q.” *Department of Northern Affairs and National Resources, Northern Co-ordination and Research Centre* 61, 1 (1961).

Zlotkin, Norman K. “Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases.” *C.N.L.R.* 4, 1 (1984).

Monographs

Boulanger, François. *Enjeux et défis de l'adoption. Étude comparative et internationale*. Paris: Economica, 2001.

Cadoret, Anne. *Parenté plurielle : Anthropologie du placement familial*. Nouvelles Études Anthropologiques. Paris: L'Harmattan, 1995.

Dahoun, Zerdalia K. S. *Adoption et cultures : de la filiation à l’affiliation*. Santé, Sociétés et Cultures. Paris: L’Harmattan, 1996.

Guemple, Lee. *Inuit adoption*. Mercury Series. Ottawa: Canadian Museum of Civilization, 1979.

Guemple, Lee, ed. *Alliance in Eskimo Society*. Proceedings of the American Ethnological Society, supplement. Seattle: University of Washington Press, 1971.

Johnston, Patrick. *Native Children and the Child Welfare System*. Canadian Council on Social Development Series. Toronto: Canadian Council on Social Development in association with James Lorimer & Co, 1983.

Kymlicka, Will. *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*. New-York: Oxford University Press, 2001.

Lallemand, Suzanne. *La circulation des enfants en société traditionnelle. Prêt, don, échange*. Connaissance des hommes. Paris: L'Harmattan, 1993.

Lavallée, Carmen. *L'enfant, ses familles et les institutions de l'adoption. Regards sur le droit français et le droit québécois*. Montréal: Wilson & Lafleur, 2005.

Leblic, Isabelle, ed. *De l'adoption. Des pratiques de filiation différentes*. Anthropologie. France: Presses universitaires Blaise Pascal, 2004.

Morrow, William G. *Northern Justice: The Memoirs of Mr Justice William G. Morrow*. Edited by William H. Morrow. Toronto: Osgoode Society for Canadian Legal History and Legal Archives Society of Alberta, 1995.

Otis, Ghislain, et al. *Cultures juridiques et gouvernance dans l'espace francophone, Présentation générale d'une problématique*. Paris: Éditions des archives contemporaines, 2010.

Roy, Alain. *Droit de l'adoption – Adoption interne et internationale*. Bleue, 2nd ed. Montréal: Wilson & Lafleur, 2010.

Others

Archibald, Linda. *Teenage Pregnancy in Inuit Communities: Issues and Perspectives*, work done for Pauktuutit Inuit Women's Association. April, 2004.

* Assembly of First Nations of Quebec and Labrador, and First Nations of Quebec and Labrador Health and Social Services Commission. *Brief on Bill 125 – An Act to amend the Youth Protection Act and other legislative provisions – Final version*, presented to the Committee on Social Affairs. December 2005.

* Assembly of First Nations of Quebec and Labrador, and First Nations of Quebec and Labrador Health and Social Services Commission. [u. c.], presented to the Working Group on Adoption in Québec, by Anne Fournier. October 2006.

Association des Centres de services sociaux du Québec. *Les nations autochtones et les services sociaux : vers une véritable autonomie,* Mémoire de l'Association des centres de services sociaux du Québec. October 1985.

Ban, Paul Z. *The Application Of The Queensland Adoption Act 1964 - 1988 To The Traditional Adoption Practice of Torres Strait Islanders*. Master's thesis of Social Work. University of Melbourne, 1989.

Blondin, Denis. *Groupes domestiques, adoption et parrainage sur la Moyenne-Côte-Nord du Saint-Laurent*. Québec: Université Laval, Faculty of Social Sciences, 1975.

British Colombia. Ministry for Children and Families Development, Adoption Branch. *Practice Standards and Guidelines for Adoption*. 2001. (www.cf.gov.bc.ca/adoption/pdf/adopt_stand.pdf)

Canada. Canadian Human Rights Commission. *Balancing Individual and Collective Rights: Implementation of section 1.2 of the Canadian Human Rights Act*. Edited by Ruth Bradley-St-Cyr. March 2010.

Canada. House of Commons. *Official report*, Apology to Former Students of Indian Residential Schools. House of Commons Debates (Hansard), June 11, 2008, 15 h 15. (www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3568890&Mode=1&Parl=39&Ses=2&Language=E)

Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples, Vol. 1: Looking forward Looking back*. Ottawa: Department of Supply and Services Canada, 1996.

Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples, Vol. 2: Restructuring the Relationship, Part one*. Ottawa: Department of Supply and Services Canada, 1996.

Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples, Vol. 3: Gathering Strength*. Ottawa: Department of Supply and Services Canada, 1996.

Carriere, Jeanine. *Fostering a sense of Identity in Aboriginal Children*. Doctoral's thesis. University of Alberta, Families Studies, 2005.

Commission des droits de la personne et des droits de la jeunesse. *Investigation into child and youth protection services in Ungava Bay and Hudson Bay, Nunavik report, conclusions of the Investigation and recommendations*. April 2007.

Commission des droits de la personne et des droits de la jeunesse. *Nunavik: follow-up report on the recommendations of the investigation into Youth Protection Service in Ungava Bay and Hudson Bay*. June 2010.

* Cree Board of Health and Social Services of James Bay. *Memorandum - Proposed amendments to the adoption act,* by Abraham Bearskin, Director of Youth Protection. July 31, 1984.

De Aguayo, Anna. *Background paper on customary adoption*. In *For seven generations/Pour sept générations*, *Royal Commission on Aboriginal Peoples Notes*. Ottawa: Libraxus Inc., Research reports 80715 – 81235, 1997. January 31, 1995.

* First Nations of Quebec and Labrador Health and Social Services Commission. *Consultation report and Recommendations on Customary and/or Traditional Adoption Among the First Nations of Québec*, presented to the Québec Working Group on Traditional Adoption. June 2011.

* First Nations of Quebec and Labrador Health and Social Services Commission. *Draft Bill for the Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority,* comments and recommendations to the Minister of Justice. Wendake, May 2010.

First Nations of Quebec and Labrador Health and Social Services Commission. *Telling it like it is, Consultation of the Contents and Application of the Youth Protection and Young Offenders Acts in Communities of the First Nations,* Report and recommendations, 1998.

Fletcher, Christopher. *Custom Adoption and Youth Protection in Nunavik*, report prepared for the Ungava Social Services. Kuujjuaq, July 1996.

* Fournier, Anne. *Adoption coutumière autochtone : Volet international*, document produced for the Working Group on Customary Adoption in Aboriginal communities. June 2010.

* Fournier, Anne. *Overview of the current situation with regard to the Aboriginal Custom adoption in Canada, and particularly in Québec*. April 2009.

* Grand Council of the Crees (Eeyou Istchee), and Cree Regional Authority. *Brief on Draft Bill to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, submitted to Committee on Institutions, National Assembly of Québec. January 2010.

Groupe d'information et de soutien des immigrés. *Les droits de l'enfant Outre-Mer,* appendix of the report presented to Committee on the Rights of the Child. France, September 2007.
(www.gisti.org/IMG/pdf/CRC.C.FRA.4.Add.1_fr.pdf)

Houde, Élizabeth. *L'éponymie et l'adoption dans la tradition inuit du Nunavik : Une mise en scène de l'altérité*. Doctoral's thesis. Québec: Université Laval, Faculty of Social Sciences, 2003.

Kativik Health and Social Services Council. *Inuit Traditional Adoption Consultation Document*.

Kativik Regional Board of Health and Social Services. *Working Group on Customary Adoption,* by Eli Weetaluktuk, Chairman of the Board. March 18, 1992.

Larivière, Mylène. *Le régime coutumier de l'adoption des enfants autochtones : L'exemple du droit des Inuits du Nunavik*. Makivik Corporation.

* Makivik Corporation. *Form G – Declaration of Inuit Customary Adoption Form*. Nunavik Enrolment Office.

* Makivik Corporation, and Nunavik Regional Board of Health and Social Services. *Comments concerning the Draft Bill to amend the Civil Code and other Legislative provisions as regards Adoption and Parental Authority*, comments presented to the Committee on Institutions, National Assembly of Québec. January 2010.

* Makivik Corporation, and Nunavik Regional Board of Health and Social Services. *Discussion Paper prepared by the Inuit Representatives to the Working Group on Traditional Adoption Practices in Québec*. October 2010.

New Zealand. Law Commission. *Adoption and its Alternatives: A Different Approach and a New Framework (report 65)*. Wellington, September 2000.

Northwest Territories. Department of Healt and Social Services, Children and Family Services Division, Adoption Services. *A Handbook for NWT Aboriginal Custom Adoption Commissioners*. February 2009.

Northwest Territories. Department of Health and Social Services, Protective Services, Adoption Services. *Custom Adoption - Adoption Commissioners and the Aboriginal Custom Adoption Recognition Act*. (www.hlthss.gov.nt.ca/pdf/brochures_and_fact_sheets/children_and_youth/2002/custom_adoption.pdf)

Nunavik Regional Board of Health and Social Services. *Customary Adoption - Registration of Births,* by Lizzie Epoo York, Executive Director. April 5, 1996.

Nunavik Regional Board of Health and Social Services. *Traditional Adoption in Nunavik*, by Monica Nashak. Summer 1996.

Ontario. Ministry of Children Youth Services. *Children First*, by John Beaucage, Aboriginal Advisor, presented to the Honourable Laurel Broten. Minister of Children and Youth Services. July 2011.

Pageau, Michel, Marc Ferland, and Serge Déry. *Our Children – health status of children aged 0-5 years in Nunavik*. Kuujjuaq: Nunavik Regional Board of Health and Social Services, 2003.

Quebec Association of Youth Centres. *Les services sociaux aux jeunes autochtones en difficulté et à leurs familles : Une nécessaire appropriation.* October 1995.

Québec. Ministère de la justice. Direction régionale des services judiciaires du Nord-du-Québec. *Tableau du nombre de dossiers ouverts - Cour du Québec (Cour*

itinérante) Chambre criminelle, pénale et de la jeunesse pour les communautés cries et inuites, see the corresponding years. Québec.

* Québec. Ministère de la Justice and ministère de la Santé et des Services sociaux. Groupe de travail sur le régime québécois de l'adoption (free translation: Working Group on Adoption in Québec). *Pour une adoption québécoise à la mesure de chaque enfant,* under the presidence of Carmen Lavallée. Québec, March 2007. (www.justice.gouv.qc.ca/francais/publications/rapports/pdf/adoption-rap.pdf)

Québec. Ministère de la Santé et des Services sociaux. *Adoption in Québec, Provincial Committee report in the context of the Plan of Action on Family Policy*. December 1991.

Québec. Ministère de la Santé et des Services sociaux. Direction générale de la coordination régionale. *Compte-rendu de la réunion du comité sur l'adoption coutumière Inuit*, held on June 15, 1992, Kuujjuaq.

Québec. Ministère de la Santé et des Services sociaux. Direction générale de la coordination régionale. *Convocation et compte rendu de la réunion du comité sur l'adoption coutumière Inuit*, held on March 16, 1993, Québec.

Québec. Ministère de la Santé et des Services sociaux. *Les services sociaux dispensés aux autochtones : Orientations du ministère de la Santé et des Services sociaux*. Québec, 1986.

Québec. Ministère du Conseil exécutif. Secrétariat aux affaires autochtones. *Les fondements de la politique du Gouvernement du Québec en matière autochtone*. Publications du Québec, 1988.

Québec. National Assembly. Bill n° 125 – *An Act to amend the Youth Protection Act and others legislatives provisions*, Journal des débats (Hansard) of the National Assembly, 37th legislature, 2nd session, June 14, 2006, Vol. 39, no 44, 12 h, 7th par.

* Quebec Native Women Inc. *Complementary Research on Traditional and Customary Child Care Practices/Adoption within Aboriginal Communities in Quebec,* presented to Working Group on Customary Adoption in Aboriginal Communities. Kahnawake, August 2010.

* Quebec Native Women Inc., and Regroupement des centres d'amitié autochtones du Québec. *Joint presentation concerning the revision of the Youth Protection Act – Is the history of the Aboriginal residential schools in danger of repeating itself?*, presented to Ministère de la justice du Québec and Ministère de la Santé et des Services sociaux du Québec. July 2005.

* Quebec Native Women Inc., and Regroupement des centres d'amitié autochtones du Québec. *Traditional and Custom Adoption in the First Nations,* presented to Working Group on the Québec Adoption System, Department of Justice – Department of Health and Social Services. Kahnawake, February 2007.

Québec. Santé Québec and Mireille Jetté (dir). *A Health Profile of the Inuit: Report of the Santé Québec Health Survey Among the Inuit of Nunavik, 1992, Vol. 1*. Montréal: ministère de la Santé et des Services sociaux, 1994.

Rousseau, Jérôme. *L'adoption chez les Esquimaux Tununermiut (Pond Inlet), Territoires du Nord-Ouest*. Québec: Université Laval, Centre of Northern Studies, 1970.

* Secretariat of the Assembly of the First Nations of Quebec and Labrador. *Letter to the Honourable Kathleen Weil*, by Ghislain Picard, Chief of the AFNQL. February 17, 2010.

Scotti, Daria-Michel. *D'un monde à l'autre? Quelques questions à propos d'adoption traditionnelle*. Genèvre, October 2008.
(www.espace-adoption.ch/puma/pdfs/article_d__un_monde___l__autre.pdf)

United Nations. Committee on the Rights of the Child. *Consideration of reports submitted by States Parties under article 44 of the Convention – Third and fourth periodic reports of States Parties due in 2007 - France*. CRC/C/FRA/4*, February 2008.
(www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions)

United Nations. Committee on the Rights of the Child. *General Comment No. 11 (2009): Indigenous children and their rights under the Convention.* 50th sess., Doc. CRC/C/GC/11. January 2009.

World Congress on Family Law and Children's Rights. *The Law of Customary adoption: A Comparison of Australian and Canadian Approaches to its Legal Recognition*, by the Honourable Alastair Nicholson. Halifax, August 2009.

Table of treaties and agreements

International treaties

Convention on the Rights of the Child, Can.T.S. 1992, No. 3
Convention:
(www2.ohchr.org/english/law/crc.htm)
Reservations and interpretation declarations made by Canada*:*
(www.pch.gc.ca/ddp-hrd/docs/treat-trait/un-eng.cfm#article7)

International Covenant on Civil and Political Rights, Can.T.S. 1976, No. 47

United Nations Declaration on the Rights of Indigenous Peoples, Can.T.S. 2010

Agreements / Treaties

Murray (Huron) Treaty (1760)

James Bay and Northern Québec Agreement (JBNQA), November 11, 1975

Northeastern Québec Agreement (NEQA), January 31, 1978

Nunavik Inuit Land Claims Agreement, December 1st, 2006

Statutes (including draft bills, regulations, orders)

Canada

Cree-Naskapi (of Quebec) Act, S.C. 1984, c. 18

Indian Act, R.S.C. 1985, c. I-5

James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32

Nunavut Act, S.C. 1993, c. 28

The Constitution Act, 1867, 30 & 31 Victoria, c. 3

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11

British Columbia

Adoption Act, R.S.B.C., 1996, c. 5

Child, Family and Community Service Act, R.S.B.C., 1996, c. 46

Québec

An Act approving the Agreement Concerning James Bay and Northern Québec, R.S.Q., c. C-67

An Act respecting Cree, Inuit and Naskapi Native persons, R.S.Q., c. A-33.1

An Act respecting health services and social services, R.S.Q., c. S-4.2

An Act respecting health services and social services, S.Q. 1971, c. 48

An Act respecting health services and social services for Cree Native persons, R.S.Q., c. S-5

An Act respecting hunting and fishing rights in the James Bay and New Québec territories, R.S.Q., c. D-13.1

An Act respecting income security for Cree hunters and trappers who are beneficiaries under the Agreement concerning James Bay and Northern Québec, R.S.Q., c. S-3.2

An Act respecting the implementation of the reform of the Civil Code, S.Q. 1992, c. 57

An Act respecting the Makivik Corporation, R.S.Q., c. S-18.1

Civil Code of Québec, S.Q. 1991, c. 64

Civil Code of Québec, R.S.Q., c. C-1991

Order in council concerning the delimitation of the territory of the region 10B, the institution of a Board of Health and Social Services in this region and the operation of the Chashasipich Hospital of Fort George [free translation], O-C. 1213-1978, April 20, 1978

Regulation respecting eligibility for the benefits of the Agreement concerning James Bay and Northern Québec, R.R.Q., c. C-67, r. 1

Regulation respecting eligibility for the benefits of the Northeastern Québec Agreement, R.R.Q., c. C-67.1, r. 1

Youth Protection Act, R.S.Q., c. P-34

Youth Protection Act, R.S.Q., c. P-34.1

Youth Protection Act, S.Q., 1977, c. 20

Northwest Territories

Aboriginal Custom Adoption Recognition Act, S.N.W.T. 1994, c. 26

Aboriginal Custom Adoption Recognition Regulation, R-085-95

Adoption Act, S.N.W.T. 1998, c. 9

Vital Statistics Act, S.N.W.T. 1988, c. V-3

Yukon

Child and Family Services Act, S.Y. 2008, c. 1

Australia – Queensland

Adoption Act 2009, Act No. 29

United States

Cal. *Welfare and Institutions Code* (2010)
(law.justia.com/codes/california/2010/wic.html)

Indian Child Welfare Act of 1978 25 U.S.C. §§ 1901-63 (1978)

Minn. Stat. Tit. 259 § 59 (2011)

Minn. White Earth Band of Ojibwe Code, Tit. 4a § 11

Mont. Confederated Salish and Kootenai Tribes Laws, Tit. III, § 2

Okla. Cheyenne-Arapacho Tribal Code, Tit. II, § 11

Okla. Pawnee Tribe Code, Tit. III, § §11-16

Okla. Stat. Tit.10 § 7505-6.5, cl. (B)

S. Dak. Laws Ch. 25, § 6-17

S. Dak. Rosebud Sioux Tribe Code, Tit. 2, § 2

S. Dak. Sisseton-Wahpeton Sioux Tribe Code, Ch. 38

Tribal Customary Adoption, A.B. 1325 (Stats. 2009, ch. 287) (www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1301-1350/ab_1325_bill_20091011_chaptered.pdf)

France and New Caledonia

Code civil français

Constitution du 4 oct. 1958 relative à la Loi constitutionnelle de la république française

Délibération n° 424 du 3 avril 1967 relative à l'état civil des citoyens de statut particulier, J.O.N.C., April 27, 1967

New Zealand

Adoption Act 1955, Act No. 93

Native Land Act 1909, Act No. 15

Papua New Guinea

Adoption of Children Act 1968, Papua New Guinea Consolidated Legislation, c. 275 (www.paclii.org/pg/legis/consol_act/aoca1968191/)

Adoption of Children Regulation 1969, Papua New Guinea Consolidated Legislation, c. 275

Constitution of the Independent State of Papua New Guinea, Papua New Guinea Consolidated Legislation, c. 1 (www.paclii.org/pg/legis/consol_act/cotisopng534/)

Customs Recognition Act 1963, Papua New Guinea Consolidated Legislation, c.19 (www.paclii.org/pg/legis/consol_act/cra1963242/)

Underlying Law Act 2000, Act No. 13

Table of Cases

Canada

Adoption – 09201, [2009] R.J.Q. 2217 (C.A.)

Bruha v. Bruha, [2009] N.W.T.J. No. 51

Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313

Casimel v. Insurance Corporation of British Columbia (1993), 106 D.L.R. (4th) 720 (B.C.C.A.)

Connolly v. Woolrich (1867), 17 R.J.R.Q. 75

Deer v. Okpik, [1980] 4 C.N.L.R. 93 (Q.S.C.)

Director of Youth Protection – 760, J.E. 2006-760 (C.Q.)

In the Matter of The Adoption of A Female Child, [1998] 4 C.N.L.R. 7 (B.C.S.C.)

Johnstone v. Connolly (1869), 17 R.J.R.Q. 266

Mitchell v. Minister of National Revenue, [2001] 1 S.C.R. 911

M. Q. (In the matter of), [2005] R.J.Q. 2441 (C.Q.)

M. R. B. (In the Matter of), [2002] 2 C.N.L.R. 169 (C.Q.)

Paul v. British Columbia (Forest Appeals Commission), [2003] 2 S.C.R. 585

Quebec (Attorney General) v. Moses, [2010] 1 S.C.R. 557

R. v. Sioui, [1990] 1 S.C.R. 1025

R. v. Sparrow, [1990] 1 S.C.R. 1075

Re Adoption of Katie E7-1807 [1961], N.W.T.J. No. 2

Re Beaulieu's Adoption Petition, [1969] N.W.T.J. No. 4

Re Eskimos, [1939] S.C.R. 104

Re Katie's Adoption Petition, (1962) 38 W.W.R. 100 (N.W.T.T.C.)

Re Kitchooalik et al. And Tucktoo et al., [1972] N.W.T.J. No. 23 (C.A.)

Re Noah Estate, [1961] N.W.T.J. No. 3

Re Tagornak, [1983] N.W.T.J. No. 38

Re Tagornak Adoption Petition, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.)

Re Tucktoo et al. And Kitchooalik et al., [1972] N.W.T.J. No. 21

Re Wah-Shee, [1975] N.W.T.J. No. 10

Roberts v. Canada, [1989] 1 R.C.S. 322

S. K. K. v. J. S., [1999] N.W.T.J. No. 94

United States

Worcester v. State of Georgia, (1832) 31 U.S. 530

Australia

Lara v. Marley, [2003] FamCA 1393

Internet links

Adoption Council of Canada, "Adoption glossary"
(www.adoption.ca/glossary)

Cree Board of Health and Social Services of James Bay
(www.mednord.org/en/index.html)

British Columbia, Ministry of Children and Family Development
(www.mcf.gov.bc.ca/adoption/custom_adoption.htm)

Royal Commission on Aboriginal peoples, *Report of the Royal Commission on Aboriginal peoples*, volumes 1 to 5
(www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html)

APPENDIXES

APPENDIX 1

MEMBERS	
Bobbish, James Chairman Cree Board of Health and Social Services of James Bay	**Lachapelle Bordeleau, Marie-Ève** Justice Coordinator Quebec Native Women Inc.
Davreux, Maryse Director of Youth Protection - Montérégie Direction de la protection de la jeunesse Centres jeunesse de la Montérégie	**Larivière, Mylène** Lawyer Makivik Corporation
Ducharme, Monique Lawyer Direction des affaires juridiques Ministère de la Justice	**McKenzie, Réal** Chief Innue Band Council of Matimekosh-Lac-John
Dufour, Marie-Josée Direction des jeunes et des familles Ministère de la Santé et des Services sociaux	**Prégent, Jacques** Lawyer Bureau des affaires autochtones Ministère de la Justice
Gray, Richard Social Services Manager First Nations of Quebec and Labrador Health and Social Services Commission	**Watkins, Jennifer** Director / Inuit Values and Practices Nunavik Regional Board of Health and Social Services

Note: For professional reasons, the following members of the Working Group representing Aboriginal organizations were replaced during the course of the work: Sarah Carrière and Lisa Mesher for the NRBHSS, John Martin for the AFNQL, Ellen Gabriel and Kateri Vincent for QNW, and Dianne Reid for the CBHSSJB.

We would also like to acknowledge the cooperation of the individuals invited to the consultations, who participated in the discussions and added enriching insight to our work: Martine Côté, Franklin Gertler, Matthew Sherrard and Julie Picard, lawyers.

Thank you for your invaluable collaboration.

APPENDIX 2

WORKING GROUP ON CUSTOMARY ADOPTION IN ABORIGINAL COMMUNITIES

MANDATE AND OBJECTIVES

The mandate of the working group will be to analyze customary adoption within the Aboriginal communities of Québec and to propose the conditions, effects and means that can be put in place in the event that customary adoption practices are recognized in these communities.

The objectives of the working group will be to:

- present customary or traditional adoption practices in Québec;
- survey trends in the legal recognition of customary adoption in the main countries having an Aboriginal population;
- define the foundations, the nature, the characteristics and the objectives of customary adoption in Aboriginal settings in Québec;
- recommend, if deemed appropriate, the scenarios or hypotheses seeking to recognize customary adoption within the context of the statutes of Québec.

To carry out its work properly, the working group will take into account the conclusions resulting from consultations held beforehand by two (2) committees including one representing the First Nations and the other, the Inuit population. The main responsibility of these committees will be to adequately document the current practices in the communities by taking into account the issues initially identified by the working group.

COMPOSITION

The working group chaired by the Ministère de la Justice will be made up of ten persons:

- two representatives appointed by the MJQ, including the chairperson and secretary;
- two representatives appointed by the MSSS, including a representative of the Association des centres jeunesse du Québec;
- six representatives of Aboriginal communities: three (3) from the First Nations appointed by the Assembly of First Nations of Quebec and Labrador, including one (1) representative from the Cree Nation, one (1) representative from "Québec Native Women Inc." association and two (2) from the Inuit population appointed jointly by Makivik Corporation and the Nunavik Regional Board of Health and Social Services.

Regarding these representatives, it is recommended that the designated individuals have a certain expertise in relation to the subject matter.

TIMETABLE

The working group shall submit its report to the Minister of Justice not later than nine (9) months following the tabling of the reports of the consultation committees.

APPENDIX 3

LEGISLATIVES PROPOSALS, ABORIGINAL CUSTOMARY ADOPTION

The proposals are in bold type

CIVIL CODE OF QUÉBEC (R.S.Q., c. C-1991)
REGISTER AND ACTS OF CIVIL STATUS
129. The clerk of the court that has rendered a judgment changing the name of a person or otherwise altering the status of a person or any particular in an act of civil status gives notice of the judgment to the registrar of civil status as soon as it acquires the authority of a final judgment (*res judicata*). The notary who executes a joint declaration dissolving a civil union gives notice of the declaration without delay to the registrar of civil status. **The authority which issues an Aboriginal customary adoption certificate notifies it without delay to the registrar of civil status.** The registrar of civil status then makes the required entries in the computerized copy of the register to ensure the publication of the register.
132. A new act of civil status is drawn up, on the application of an interested person, where a judgment changing an essential particular in an act of civil status, such as the name or filiation of a person, has been notified to the registrar of civil status or where the decision to authorize a change of name or of designation of sex has become final. **The same applies when an Aboriginal customary adoption certificate is notified to the registrar of civil status.** To complete the act, the registrar may require the new declaration he draws up to be signed by those who could have signed it if it had been the original declaration. The new act is substituted for the original act; it repeats all the statements and particulars that are not affected by the alterations **and, in the case of an adoption that preserves a pre-existing bond of filiation, those relating to that filiation, specifying their prior existence.** In addition, the substitution is noted in the original act.
132.0.1. The Aboriginal customary adoption certificate sets out the name and sex of the child, the place, date and time of birth and the date of the adoption, the name, date of birth and the place of domicile of the father and the mother of origin and those of the adoptive parents and, if applicable, the new name given to the child. **It mentions that the adoption took place in keeping with the applicable Aboriginal custom and states whether a pre-existing bond of filiation is dissolved or maintained. If according to custom, an adoption maintaining a bond also leaves rights and obligations subsisting between the adopted child and an original parent, the certificate also makes mention of this, specifying those that are maintained.** **The certificate indicates the date when it is made, as well as the name, capacity and place of residence of its author and the latter's signature.**

132.1. Where a child domiciled outside Québec is adopted by a person domiciled in Québec, the registrar of civil status draws up the act of birth on the basis of the judgment rendered in Québec, the decision judicially recognized in Québec or any other act notified to the registrar which, under the law, produces the effects of adoption in Québec.

The clerk of the court notifies the judgment to the registrar of civil status as soon as it becomes *res judicata* and, where applicable, attaches the decision or the act thereto.

The clerk of the court also notifies to the registrar of civil status any certificate the clerk issues under the Act respecting adoptions of children domiciled in the People's Republic of China.

The Minister of Health and Social Services notifies to the registrar of civil status the certificate issued by the foreign competent authority and the declaration containing the name chosen for the child transmitted to the Minister under the Act to implement the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (chapter M-35.1.3), unless the Minister has applied to the court for a ruling under the second paragraph of section 9 of that Act. Where applicable, the Minister also notifies the certificate drawn up by the Minister under the same section to attest to the conversion of the adoption.

The authority that issues an act of recognition of an Aboriginal customary adoption notifies it without delay to the registrar of civil status, attaching the act recognized. If the act was issued by a court, the clerk notifies it as soon as the judgment has become final and encloses the act recognized.

136. Where the registrar of civil status makes a notation in an act as a result of a judgment, he enters, in the act, the object and date of the judgment, the court that rendered it and the number of the court record.

In any other case, he makes the necessary notations in the act to allow retrieval of the altering act. **In the case of an Aboriginal customary adoption which preserves a pre-existing bond of filiation, this information is also indicated in the new act of birth. Where according to the certificate or act of recognition of the customary adoption, the adoption also leaves rights and obligations subsisting between the adopted child and an original parent, this is also mentioned in the new act of birth, with a reference to the altering act. A copy of the altering act may, in the latter case, be issued to any interested person.**

Section VII Issuance of Aboriginal Customary Adoption Certificates by Competent Authorities

152.1 For the purposes of register entries or cancellations, the Minister of Justice informs the registrar of civil status of a list, to be maintained by the Minister, of the authorities competent to issue Aboriginal customary adoption certificates and which specifies for each authority the date on which it became competent or ceased to be competent.

The Aboriginal community or Nation that designated a competent authority is responsible for informing the Minister without delay of any case of disqualification, removal or death so that the appropriate cancellations may be made to the list and register.

ADOPTION

543.1. Conditions of adoption according to any Québec Aboriginal custom that is in harmony with the principles of the interest of the child, respect for his rights and the consent of the persons concerned may be substituted for the conditions prescribed by law. Unless otherwise stipulated, sections I, II and IV do not apply to an adoption made further to such a custom.

Such an adoption which, according to custom, creates a bond of filiation between the child and the adoptive parent is attested, at the request of either of them, by the competent authority of the Aboriginal community or Nation of either the child or the adoptive parent. The authority issues a certificate attesting to the adoption after having satisfied itself that it took place according to custom, particularly that the required consents were validly given, that the adoption is in the interest of the child and that the child is in the care of the adoptive parent.

The authority competent to attest to the adoption is a person or body domiciled in Québec, designated by the Aboriginal community or Nation in an act notified to the Minister of Justice. Where called upon to act, the competent authority cannot be a party to the adoption.

565. The adoption of a child domiciled outside Québec must be granted abroad or granted by judicial decision in Québec. A judgment granted in Québec is preceded by an order of placement. A decision granted abroad must be recognized by the court in Québec, unless the adoption has been certified by the competent authority of the State where it took place as having been made in accordance with the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

The Aboriginal customary adoption of a child domiciled outside Québec but in Canada that, according to custom, creates a bond of filiation between the child and an adoptive parent domiciled in Québec may be recognized, at the request of one of them, if the adoption is confirmed by a juridical act issued by virtue of the applicable law in the State of the place of domicile of the child. This recognition may either be made judicially or by the authority competent to issue an Aboriginal customary adoption certificate for the community or Nation of the adoptive parent.

565.1. An authority called upon to recognize a juridical act of an Aboriginal customary adoption other than a court judgment verifies whether the act meets the requirements for recognition of foreign decisions, without entering into an examination of the merits. Where applicable, the authority enters on the act of recognition the same statements and notations as on an Aboriginal customary adoption certificate, and its signature.

574.1. A court called upon to recognize a juridical act of Aboriginal customary adoption verifies whether it meets the requirements for recognition of foreign decisions, without undertaking an examination of its merits. Where applicable, the court issues an act of recognition bearing the same statements and notations as an Aboriginal customary adoption certificate, and the signature of the judge who rendered the decision.

577. Adoption confers on the adopted person a filiation **that is successive to** his or her original filiation.

The adopted person ceases to belong to his or her original family, subject to **a pre-existing bond of filiation being maintained and** any impediments to marriage or a

civil union.

578.1. If the parents of an adopted child are of the same sex and where different rights and obligations are assigned by law to the father and to the mother, the parent who is biologically related to the child has the rights and obligations assigned to the father in the case of a male couple and those assigned to the mother in the case of a female couple. The adoptive parent has the rights and obligations assigned by law to the other parent.

If neither parent is biologically related to the child, the rights and obligations of each parent are determined in the adoption judgment**, Aboriginal customary adoption certificate or the act or judgment recognizing an adoption.**

579. When adoption is granted**,** the effects of the preceding filiation cease. **Accordingly, the adopted person and the original parent lose their rights and are discharged from their obligations with respect to one another. The** tutor, if any, **also** loses his or her rights and is discharged from his or her duties regarding the adopted person, save the obligation to render account. **The same applies when the adoption is attested by an Aboriginal customary adoption certificate, subject to any provisions to the contrary specified therein that are in keeping with Aboriginal custom.**

Notwithstanding the foregoing, a person's adoption of a child of his or her spouse does not dissolve the bond of filiation between the child and that parent.

581. The recognition of a decision granting an adoption produces the same effects as an adoption judgment rendered in Québec from the time the decision granting the adoption was pronounced outside Québec.

The recognition by operation of law of an adoption as provided for in the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption produces the same effects as an adoption judgment rendered in Québec from the time the decision granting the adoption is pronounced, subject to section 9 of the Act to implement the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

The recognition of an Aboriginal customary adoption that has taken place outside Québec but in Canada produces the same effects as an Aboriginal customary adoption certificate as of the date of adoption mentioned therein.

YOUTH PROTECTION ACT (R.S.Q., c. P-34.1)

4. Every decision made under this Act must aim at keeping the child in the family environment.

If, in the interest of the child, it is not possible to keep the child in the family environment, the decision must aim at ensuring that the child benefits, insofar as possible with the persons most important to the child, in particular the grandparents or other members of the extended family, from continuity of care, stable relationships and stable living conditions corresponding to the child's needs and age and as nearly similar to those of a normal family environment as possible. Moreover, the parents' involvement must always be fostered, with a view to encouraging and helping them to exercise their parental responsibilities.

If, in the interest of the child, returning the child to the family is impossible, the decision must aim at ensuring continuity of care, stable relationships and stable living

conditions corresponding to the child's needs and age on a permanent basis. **All options available under the law, including Aboriginal customary adoption contemplated by the Civil Code where it is practiced by the child's community or Nation, are to be considered.**

57.2 The purpose of the review is to determine whether the director shall
(a) maintain the child in the same situation;
(b) propose other measures of assistance for the child or his parents;
(c) propose measures of assistance to the parents with a view to returning the child to his parents;
(d) refer to the tribunal, in particular, for an order of foster care for a period determined by the tribunal;
(e) apply to the tribunal to be appointed tutor, to have a person he recommends appointed as tutor or to replace the tutor of the child;
(f) act with a view to causing the child to be adopted **or give his consent to an Aboriginal customary adoption contemplated by article 543.1 of the Civil Code;**
(g) put an end to the intervention.

When he puts an end to an intervention and if the situation requires it, the director must inform the child and the child's parents of the services and resources available in their community and the conditions of access to those services and resources. He must, if they consent, direct them to the institutions, bodies or persons best suited to assist them and forward the relevant information on the situation to the service provider. He may, where applicable, give them advice for the selection of the persons or bodies that may accompany and assist them in the action they undertake.

The second paragraph applies when a child whose security or development is in danger reaches 18 years of age.

71.3.5. Except for the second paragraph of section 71.9 and section 71.10, this division does not apply to Aboriginal customary adoption of a child domiciled in Canada recognized pursuant to article 565 of the Civil Code.

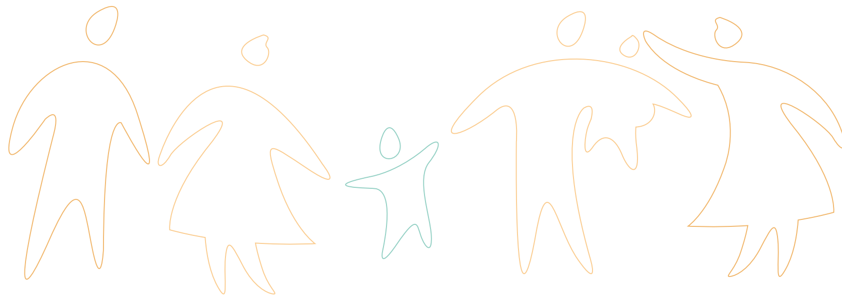
71.9. Where the adoption of a child domiciled outside Québec is to be granted in Québec, the director shall take charge of the child and see to the child's placement. The director shall intervene in accordance with the terms and conditions determined by regulation.

In urgent or seriously problematic circumstances, the situation of a child who is the subject of **an application** for **the** recognition of **a** decision granting an **application** made abroad **or for the recognition of an Aboriginal customary adoption of a child domiciled in Canada** may be referred to the director by the court or by any person acting in the child's interest. The director shall take charge of the situation of the child and see that the necessary measures provided by law for the child's protection are carried out.

95.0.1. If a child is declared eligible for adoption, all inconsistent conclusions in the order issued for the child's protection become inoperative after the expiry of the time limit for filing an appeal from the judgment declaring the child eligible for adoption.

However, if the child's parents consent to the adoption, any inconsistent conclusions in the order issued for the child's protection become inoperative when the order to place the child is issued **or, in the case an Aboriginal customary adoption, by a decision of the court on the application of the director, once the new act of birth is drawn up by the registrar of civil status.**

Customary Adoption



Québec

Secrétariat de l'Assemblée des Premières Nations du Québec et du Labrador

Secretariat of the Assembly of the First Nations of Quebec and Labrador

Société Makivik
Makivik Corporation

FAQNW