



Recognition of Effects of First Nations Customary Adoption in and for the Purposes of Quebec Legislation

Committee on Institutions, National Assembly of Quebec
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AFNQL/FNQLHSSC Brief on Bill 113
An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information



Assembly of First Nations
Quebec-Labrador



FIRST NATIONS OF QUEBEC
AND LABRADOR HEALTH
AND SOCIAL SERVICES
COMMISSION



Brief submitted jointly by the Assembly of First Nations Quebec-Labrador (AFNQL) and the First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC)

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DESCRIPTION OF THE ORGANIZATIONS

Assembly of First Nations Quebec-Labrador

The AFNQL was created in May 1985 and is the site of periodic meetings of the chiefs of 43 First Nations communities of Quebec and Labrador. The AFNQL holds four Chiefs' Assemblies each year, at which it receives its various political mandates.

Mission and objectives

- Affirmation and respect of the rights of the First Nations
- Recognition of First Nations governments
- Increased financial autonomy for First Nations governments
- Development and training of the public administration of the First Nations
- Coordination of the First Nations decision-making mechanism
- Representation of positions and interests in the public space (e.g., forums)
- Definition of strategies to advance common positions
- Ensuring recognition of First Nations cultures and languages

First Nations of Québec and Labrador Health and Social Services Commission

The FNQLHSSC is a non-profit organization that is responsible for supporting the efforts of the First Nations of Quebec to plan and deliver culturally appropriate and preventive health and social services programs, among other things.

Mission

The mission of the FNQLHSSC is to promote the physical, mental, emotional and spiritual well-being of First Nations and Inuit people, families and communities, which includes improving access to comprehensive and culturally-adapted health and social services programs designed by First Nations organizations that are recognized and sanctioned by local authorities, at the same time respecting their respective cultures and local autonomy. The FNQLHSSC also assists interested communities in setting up, developing, and promoting comprehensive health and social services and programs that are adapted and designed by First Nations organizations.



SUMMARY OF KEY POINTS

This is the brief of the Assembly of First Nations Quebec- Labrador (AFNQL) and of the First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC) on the customary adoption aspects of Bill 113, *An Act to amend the Civil Code and other legislative provisions as regards adoption, and the disclosure of information*.

Customary adoption has always existed and is a First Nations reality today. It is a resilient social institution that supports and protects children, parents and families, without the involvement of courts and youth protection authorities. Custom adoptions are part of First Nations self-governing jurisdiction and rights as regards children and families. It is protected against legislative infringement by section 35 of the Constitution. Provincial authority to affect customary adoption is also limited by the division of powers. In addition, legislation must respect the international rights of indigenous peoples.

The AFNQL and the FNQLHSSC support Bill 113 because it does not attempt to codify, standardize or modify customary adoption, but rather ensures that effects of adoptions carried out under customary laws are reflected within and for the purposes of provincial legislation. Bill 113 uses the practical mechanism of certification of customary adoptions by First Nations competent authorities and the issue of Quebec acts of birth. This will facilitate the recognition of effects of customary adoptions by Quebec (and federal) authorities.

Customary adoption should not be viewed through the lens of social crisis and youth protection. It is an independent legal institution. Nonetheless, the reality is that an unacceptably high proportion of First Nations children and families live under the authority of the director of youth protection (DYP), so Bill 113 must address the interface between customary adoption and the *Youth Protection Act*.

By reason of the success of the Working Group on Customary Adoption, both the process that led to Bill 113 and the content of the legislation, though not perfect, set a high standard for collaboration between First Nations, Quebec Native Women, the Crees, the Inuit and the Government of Quebec. The AFNQL and the FNQLHSSC support Bill 113, but certain changes are necessary. Notably, the AFNQL and the FNQLHSSC recommend modifying Bill 113:

- to refer to “First Nations and Inuit,” rather than “Aboriginal,” customary adoption;
- to respect the fact that where First Nations customary adoption involves a new bond of filiation, the child does not cease to belong to her/his family of origin and to avoid making the end of a pre-existing bond of filiation and accompanying rights and obligations as between the child and the parent of origin the default position;
- so that where a child is under the orders of the DYP and the certification of a customary adoption by the competent authority consequently requires first receiving the opinion of the DYP, that function can be delegated to First Nations social services personnel;
- so that general provisions on the involvement of the DYP in adoptions are clearly made inapplicable to customary adoptions, except where specifically agreed through the collaboration in the development of Bill 113.

Bill 113 addresses customary adoptions that involve the creation of new bonds of filiation and may not apply easily to First Nations customary adoption or care where there is no new filiation. In such cases, First Nations law nonetheless determines the nature and effects of the relationship and delegation of parental authority may be a helpful option.

Customary adoption is practiced across boundaries. Bill 113 only provides for cases where the customary adoption takes place in another province or territory and is evidenced by a juridical act. No provision is made for customary adoptions elsewhere in Canada where there is no legal recognition, and no provision whatsoever is made for international customary adoptions. As agreed by the Working Group, these matters must now be the subject of discussions, collaboration and legislative changes.

With necessary adjustments, the National Assembly can adopt Bill 113 with confidence. The recognition of effects of customary adoptions in and for the purposes of Quebec legislation will serve to strengthen First Nations families and ensure that children and parents do not suffer by reason of their identity.



INTRODUCTION

This is the joint brief of the Assembly of First Nations Quebec- Labrador (AFNQL) and of the First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC) on Bill 113, *An Act to amend the Civil Code and other legislative provisions as regards adoption, and the disclosure of information*.

The current Bill 113 was preceded first by Bill 81, *An Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority* (2d. Sess., 39th Leg.), introduced on June 12, 2012, by Justice Minister Jean-Marc Fournier of the then Liberal government. However, with the dissolution of the National Assembly on August 1, 2012, to allow for a general election, the 39th legislature ended, all committee work ceased and all bills died on the order paper.

Bill 47, *An Act to amend the Civil Code and other legislative provisions as regards adoption, parental authority and disclosure of information* was the second predecessor, introduced on June 14, 2013, (1st Sess., 40th Leg.) by Justice Minister Bertrand St-Arnaud of the then Parti Québécois government. However, with the dissolution of the National Assembly on March 5, 2014, to allow for a general election, the 40th legislature ended, all committee work ceased and all bills died on the order paper.

In accordance with the recommendations of the Working Group on Customary Adoption in Aboriginal Communities (Appendix A to this brief) and with the practice that prevailed for Bill 81 and Bill 47, the detailed drafting of Bill 113 involved a significant degree of collaboration with the AFNQL and FNQLHSSC and the other First Nations and Inuit members of the Working Group. Such a collaborative process is essential in order to respect First Nations rights. It is also necessary to avoid political and legal disputes.


In this regard, the AFNQL and the FNQLHSSC note that some aspects of the collaboration were rushed, especially in the summer and fall of 2016.¹ In addition, the unexpected parallel development and tabling of Bill 99, *An Act to Amend the Youth Protection Act and other provisions* (1st Sess. 41st Leg.), as well as addition of new concepts and provisions specifically regarding the effects of adoption on filiation, rights and obligations between the adoptee and the family of origin and adoptions in a transboundary context as part of the amendments to the Civil Code and to the *Youth Protection Act* found in Bill 113 have created some ambiguity and raised some new concerns for the AFNQL and the FNQLHSSC.

The AFNQL and the FNQLHSSC underline that First Nations participation in the Working Group on Customary Adoption in Aboriginal Communities and support for Bill 113 (and its predecessors, Bills 81 and 47) was and is for the very practical purpose of the recognition of effects of customary adoption within and for the purposes of Quebec legislation and administrative processes. This participation and support is strictly without prejudice to the rights, jurisdiction and legal positions of First Nations as regards customary adoption. Bill 113 is not a delegation of authority to First Nations. The National Assembly should not and cannot attempt to regulate the institution of customary adoption. The content of the proposed legislation does not define, limit, fix or freeze the content and practice of customary adoption, which by its nature varies among First Nations and communities and may change over time to respond to new realities.

Respect for customary adoption as a core element of the life and culture of First Nations families and communities and its application as a matter of Aboriginal and Treaty rights and self-government is essential. Quebec's legislation must be carefully crafted to avoid overstepping the limits of constitutional authority as regards the division of powers (*Constitution Act, 1867*) and the recognition and affirmation of Aboriginal rights (*Constitution Act, 1982*). The AFNQL and the FNQLHSSC are confident that all remaining concerns can be cleared up, including, as necessary, through changes to Bill 113.

¹ See in this regard the media release of the AFNQL on October 6, 2016 "The AFNQL applauds the collaboration between the provincial government and First Nations for two bills and calls for this practice to become routine in all files concerning First Nations"
<http://www.cssspnql.com/nouvelles-media/unique/2016/10/06/'apnql-souligne-la-collaboration-entre-le-gouvernement-provincial-et-les-premi%C3%A8res-nations-dans-deux-projets-de-loi-et-demande-qu'elle-devienn-pratique-courante-dans-tous-les-dossiers-qui-les-concernent>





In this context, the AFNQL and the FNQLHSSC recommend the enactment of Bill 113 because it is the culmination of a collaborative process that sets a high standard for cooperation and reconciliation between First Nations and the Government of Quebec and because the resulting legislative proposals largely achieve the desired purpose, namely recognition of effects of First Nations customary adoption in and for the purposes of Quebec legislation. At the same time the AFNQL and the FNQLHSSC note that Bill 113 addresses customary adoptions that involve the creation of new bonds of filiation and may not apply easily to First Nations customary adoption or care where there is no new filiation. In such cases, First Nations law nonetheless determines the nature and effects of the relationship and in addition delegation of parental authority may be a helpful option. These matters can be the subject of future discussions, collaboration and legislative changes if required.

Though the adoption and implementation of this legislation has been much too slow in coming and aspects of the collaboration have been rushed, the AFNQL and the FNQLHSSC call on the Government of Quebec to extend the new collaborative approach to shaping policy and drafting legislation to other areas of mutual concern, including notably as regards territory, natural resources, governance and administration of justice.

BACKGROUND

The Path to Recognition of Effects of Customary Adoption in and for the Purposes of Quebec Legislation

Customary adoption has always existed and continues today as part of the law of the First Nations of Quebec and as a natural part of the life of their families and communities. It is a resilient and contemporary First Nations social institution that supports and protects their children, parents and families.

Since at least the 1980s, the First Nations of Quebec have asked for action by the National Assembly to ensure the clear and effective recognition of effects of customary adoption in and for the purposes of Quebec legislation and Quebec's public administration.² The AFNQL and the FNQLHSSC were instrumental in the creation in 2008 of the Working Group on Customary Adoption.

In 2012, acting by consensus, that multiparty group of Quebec government and youth centre officials and representatives of First Nations and Inuit produced the *Report of the Working Group on Customary Adoption in Aboriginal Communities*.

The long-sought change in Quebec legislation is almost a reality. The First Nations recommend legislative action without further delay by Quebec in order to facilitate the recognition of effects of customary adoptions within and for the purposes of the Civil Code of Quebec.

² The history of calls from First Nations, Inuit, the Association des Centres jeunesse du Québec, and even the Secretariat aux Affaires autochtones and the MSSS, for legislative change to take into account customary adoption, going back to the early 1980s, is briefly reviewed in the *Report of the Working Group on Customary Adoption in Aboriginal Communities*, April 6, 2012, sections 1.1.2 and 1.4 ("Report of the Working Group"), available at http://www.justice.gouv.qc.ca/English/publications/rapports/pdf/rapp_adop_autoch_juin2012-a.pdf



Bill 113 Must Be Viewed in Its Full Social and Legal Context

Full appreciation of the requirement that the legislation to be enacted strike a delicate balance requires consideration of indispensable elements of context, notably as developed in the Report of the Working Group. The Report should be carefully considered in its entirety. The Conclusions and Recommendations are Appendix A to this brief. The AFNQL also asks that particular attention be paid to “Perspectives of the First Nations Representatives” as set out in part 3.2 of the Report.³

The legislators of Quebec, and those commenting on and seeking amendments to the proposed legislation, should avoid the grave error of analysing the policy context and the proposed legislation on the basis of abstract and superficially neutral principles. Modifications to the consensus of the Working Group, no matter how well intentioned or seemingly needed for reasons of drafting or Quebec administration, cannot be taken lightly. Instead, a proper understanding of the historical and contemporary social and legal context is essential so that the legislation is not modified in such a way that its effect is to interfere with, regulate and modify the institution of customary adoption. In particular, legislation that affects First Nations children, parents and families, especially as regards the core matter of adoption, cannot be proposed and analysed without constantly keeping in view:


- The reality that, despite centuries of erosion and denial, custom adoption continues under the laws of First Nations.⁴ First Nations children who are customarily adopted generally remain within their communities. First Nations customary adoptions are open, verbal, and consensual and always put the interests of the First Nations child first. Formalism, including psychosocial assessments and court procedures are foreign to customary adoption. But this does not mean that First Nations and communities are without institutions and structures to ensure that customary adoptions are in the interests of the child. Adoptions 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. 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 by colonial powers and imposed upon First Nations.
- The dismal record of non-First Nations governments and institutions regarding the care and protection of children, parents and families. Such state interventions are always said to be in order to protect the interests of children. But we cannot forget the devastating history of residential schools and the 1960s scoop. And we cannot ignore the vast overrepresentation today of First Nations children under the authority of the Director of Youth Protection and removed from families and communities into foster care and non-First Nations adoption.⁵
- That custom adoptions are part of the self-governing jurisdiction and rights, now constitutionally protected under section 35 of the *Constitution Act, 1982* against extinguishment and from infringement by federal and Quebec legislation.⁶

³ See pp. 74-106

⁴ Report of the Working Group, section 3.2.7 (pp. 97-103) and FNQLHSSC, Consultation Report and Recommendations on Customary and/or Traditional Adoption Among the First Nations of Quebec, June 28, 2011 (included as part of the CD-ROM document collection accompanying the Report of the Working Group).

⁵ See discussion and references in the Report of the Working Group, subsections 1.1.2 and 3.2.3.1. Fresh work on this matter indicates that overrepresentation begins at the assessment stage, where the rate per 1,000 children is 4.4 times higher for First Nations children than for non-Aboriginal children. This disparity increases with each stage of the process, reaching a peak at the placement stage (7.9 times higher) and the recurrence stage (9.4 times higher). See: FNQLHSSC, 2016, *Analyse des trajectoires des jeunes des Premières Nations assujettis à la Loi sur la protection de la jeunesse. Volet 3: Analyse de données de gestion des établissements offrant des services de protection de la jeunesse* [in press]

⁶ Report of the Working Group, section 3.2.3.3 (pp. 81-84).

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- That provincial legislative authority to legislate regarding and affect customary adoption is also limited by the division of federal-provincial legislative powers, and especially the exclusive federal authority to make laws in relation to the matter of Indians under section 91(24) of the *Constitution Act, 1867*.⁷
 - That Quebec legislation and administrative practice must respect international law protection for the rights of peoples and especially indigenous peoples,⁸ and that under the *United Nations Convention on the Rights of the Child*, as it applies in Canada, the application of laws concerning families, children and adoption cannot be inconsistent with First Nations customary forms of care and must respect the right of the Aboriginal child, in community with other members of his group, to enjoy his own culture, religion and language.⁹



⁷ Report of the Working Group, section 4.1 (pp. 125-126). The Supreme Court has underlined that relationships within Indian families and reserve communities, matters indispensable to cultural survival, are for purposes of the federal-provincial division of powers of the very essence of the federal exclusive legislative jurisdiction under s. 91(24) of the *Constitution Act, 1867*: *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, par. 61.

⁸ Most notably, the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁹ Report of the Working Group, section 3.2.4 (pp. 85-88).



AFNQL AND FNQLHSSC SUPPORT FOR BILL 113

As documented in the Report of the Working Group, other Canadian jurisdictions such as British Columbia, the Northwest Territories, Nunavut and Yukon have amended their adoption legislation, making it more in accord with the social and constitutional reality regarding Aboriginal customary adoption jurisdiction and rights.

However, in the existing state of affairs in Quebec, when adoption is necessary, First Nations families are faced with a choice between Civil Code adoption and customary adoption, neither of which may be satisfactory for their needs.¹⁰ The modest but important objective of First Nations in supporting Bill 113 is to remedy the practical problems encountered as a result of the lack of clarity which children and parents face when dealing with Quebec 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 legislative challenge is to find the best way to make the legal effects of customary adoptions clear, without changing the fundamental nature of this First Nations' institution and the right of each First Nation to govern itself in this regard.

Quebec, in partnership with First Nations, has an opportunity to become a leader in respect for First Nations rights as regards customary adoption. First Nations children, parents and families can enjoy the constitutionally protected institution of Aboriginal customary adoption, while at the same time enjoying equality in access to the benefits of identity, as well as to education, social, health and other governmental services, without discrimination or disability by reason of being a member of a First Nation and having family relations governed by First Nations customary adoption.

The AFNQL and the FNQLHSSC support Bill 113 insofar as it does not attempt to codify, standardize or modify customary adoption, but rather ensures that effects of adoptions carried out under the customary laws of First Nations are reflected within and for the purposes of provincial legislation. Concretely, Bill 113 uses the mechanism of the issue of Quebec acts of birth to facilitate the recognition of effects of customary adoptions by Quebec (and federal) institutions and administrative authorities.

Both the process that led to Bill 113 and the resulting content of the proposed new legislative provisions, though not perfect, set a high standard for collaboration between First Nations, Quebec Native Women, the Crees, the Inuit and the Government of Quebec. What occurred, except perhaps in the last few months, was far more than mere consultation. Rather, there was collaboration from the strategic planning stage to working on draft legislative provisions in French and English versions. First Nations representatives, officials and legal counsel worked side-by-side with representatives of Inuit, and government officials, as well as Quebec's expert legislative draftsman, to make carefully considered consensus findings and recommendations.¹¹ The debate was robust and not always harmonious.

As stated in Part V of the Report of the Working Group under the title "Preferred Solutions":
"...the Working Group sought a simple, effective solution that would create a bridge between statutory law and First Nations custom and expressly recognize its effects without undermining its nature, purposes, conditions or effects." The balance, wisdom and viability of the findings and recommendations of the Working Group are reflected in the fact that with only relatively minor differences, three governments have brought forward bills in the National Assembly for the recognition of effects of customary adoption in and for the purposes of Quebec legislation, using the model proposed by the Working Group, namely recognition of effects of Aboriginal customary adoption through an attestation and the issue of a new act of birth.


In this context, the AFNQL and the FNQLHSSC urge the enactment of Bill 113 with modest changes. The AFNQL and the FNQLHSSC consider that the recognition of effects of customary adoptions in and for the purposes of provincial legislation will benefit children and families and strengthen the fabric of First Nations communities.

The dealings of First Nations and the Government with respect to customary adoption over many years, and particularly the work of the Working Group, carry the implied undertaking to move forward with appropriate legislation. Quebec has an

¹⁰ Report of the Working Group, section 3.2.5 (pp. 89-91)

¹¹ Report of the Working Group, pp. 143-147. Reproduced as Appendix A to this brief.





opportunity to be a North American and international leader in the recognition of effects of customary adoptions without denaturing the Indigenous institution. Failure once again to act, on the basis of competing interests, legalistic arguments or political issues, would ignore the significance of customary adoption for First Nations and would amount to a failure of forward-looking vision. Failure to move forward now would deprive First Nations families and another generation of children, already under severe strain, of the full benefits of the option of customary adoption and the recognition of their First Nation civil status in their dealings with the statutory regimes and institutions of Quebec.

Recommendation #1:

The AFNQL and the FNQLHSSC recommend the immediate enactment and coming into force of Bill 113, with the necessary modest adjustments to the proposed Civil Code and Youth Protection Act provisions concerning customary adoption.

RESPECT FOR SELF-IDENTIFICATION

Bill 113 uses the umbrella designation “aboriginal” (“autochtone” in French) throughout in referring to customary adoption of First Nations and of Inuit. This allows for relative simplicity of drafting and does have some logic given that the term is used in s. 35 of the *Constitution Act, 1982*. However, self-identification is a fundamental right and the AFNQL and the FNQLHSSC wish to underline that “aboriginal” is a generic term with little resonance. The peoples, Nations and communities represented by the AFNQL and the FNQLHSSC prefer terminology that respects the identity and the diversity of the nations of Quebec. It is therefore recommended to employ the terms “First Nations and Inuit.”

Recommendation #2:

The AFNQL and the FNQLHSSC recommend that the term “aboriginal” (“autochtone” in French) be replaced throughout Bill 113 and especially in the phrase “aboriginal customary adoption” by the terms “First Nations and Inuit” and “First Nations and Inuit customary adoption.”

THE PROPOSED CIVIL CODE AMENDMENTS

A Practical Response to a Real Problem

For the AFNQL and the FNQLHSSC, the provisions of Bill 113 amending the *Civil Code of Quebec* and the *Youth Protection Act* with respect to the recognition of legal effects of Aboriginal customary adoptions in and for the purposes of Quebec legislation are a balanced response to a real problem, and should be treated as such by all concerned. The members of the National Assembly should adopt this legislation. It will protect rights and provide very real benefits to children, parents, families, communities and First Nations.

After decades of effort, Bill 113 simply provides a practical, real-world response to a serious problem for First Nations children and families. By providing a legislative bridge it will ensure that children adopted according to Aboriginal custom, and their parents, are afforded, in the eyes of the laws and administration of Quebec, status and rights equal to that enjoyed by other children and parents, whether or not adopted.

First Nations face very real social problems and the application of the general Civil Code regime of adoption, even if well-intentioned, does not provide an adequate response for children, families and communities. The AFNQL and the FNQLHSSC





hope that the impact of Bill 113 will be to support customary adoption as a culturally adapted institution that serves children, parents, families, communities and First Nations.

No proposed legislation is perfect. There are areas where First Nations would prefer that the legislation as proposed use language and concepts that involve less intrusion by the National Assembly into the domain of First Nations.

In fact, judged in terms of intrusion, First Nations consider the provisions of Bill 113 to be at the maximum limit (and in some cases potentially beyond) of acceptable and constitutionally viable legislative action by the National Assembly as regards customary adoption.¹² Constitutional imperatives require the National Assembly to respect and protect the exercise of First Nations rights to customary adoption. Any attempt to limit, define and regulate customary adoptions would be contrary to the letter and spirit of the international instruments and norms that guide legislation and government action in Quebec. It would also violate Aboriginal rights and title and Treaty rights guaranteed under section 35 of the *Constitution Act, 1982*. Additionally, such changes would likely overstep provincial jurisdiction under the division of powers established by sections 91 and 92 of the *Constitution Act, 1867*. Succumbing to the temptation to attempt intrusive regulation of customary adoptions could well result in a successful court challenge, with all the negative impacts that would follow.

In addition to the overall support of the AFNQL and the FNQLHSSC for Bill 113 as a package, First Nations nonetheless consider changes to the Bill to be necessary regarding the effects of adoption on filiation and the rights and obligations between the adoptee and the family of origin in the case of First Nations customary adoption.

The AFNQL and the FNQLHSSC also favour further collaboration and legislation after Bill 113 is passed and has come in force to give children more complete benefit of certain aspects of the practice of customary adoption as it exists and not addressed in a satisfactory manner in Bill 113. These further concerns relate to First Nations customary adoptions across internal Canadian boundaries, which are only partially addressed under Bill 113. Furthermore, the Bill does not address effects in and for the purposes of Quebec legislation of customary adoptions across the Canada-U.S. boundary.

Recognizing Effects of Customary Adoption in Quebec's Legislation

Bill 113 addresses the goal of recognizing effects of customary adoption in and for the purposes of Quebec legislation primarily by amending Book Two "The Family" of the Civil Code. Specifically, the key new provisions will be in Title Two "Filiation" and more specifically in Chapter II, "Adoption" to be renamed "Filiation by Adoption."


New Article 543.1 C.C.Q. would give effect in large measure to the consensus conclusions and recommendations of the Working Group. It is at the heart of the reform proposed in Bill 113. It provides:

"543.1. Conditions of adoption under any Quebec Aboriginal custom that is in harmony with the principles of the interest of the child, respect for the child's rights and the consent of the persons concerned may be substituted for conditions prescribed by law. In such cases, unless otherwise provided, the provisions of this chapter that follow, except Division III, do not apply to an adoption made in accordance with such a custom.

Such an adoption which, according to custom, creates a bond of filiation between the child and the adopter is, on the application of either of them, attested by the authority that is competent for the Aboriginal community or nation of either the child or the adopter. However, if the child and the adopter are members of different nations, the adoption is attested by the authority that is competent for the child's nation or community.

¹² Though the AFNQL and the FNQLHSSC do not share all of the opinions he expresses regarding customary adoption rights, Professor Otis offers a helpful overview of the very real constitutional constraints that must be respected: G. Otis, "La protection constitutionnelle de la pluralité juridique : le cas de l'adoption coutumière autochtone au Québec" in G. Otis, ed., *L'adoption coutumière autochtone et les défis du pluralisme juridique* (PUL, Ste-Foy: 2013), pp.125-157.





The competent authority issues a certificate attesting the adoption after making sure that it was carried out according to custom, in particular that the required consents were duly given and that the child is in the care of the adopter; the authority also makes sure, in light of an objective appraisal, that the adoption is in the interest of the child.”

By virtue of the first part of Article 543.1, it may be seen that in accord with the consensus recommendations of the Working Group, the technique chosen is to create a legal bridge by providing for the substitution of the conditions under an Aboriginal custom for the conditions for adoption in the general law, always provided that the Aboriginal custom is in harmony with the principles of:

- the interest of the child,
- respect for the child's rights, and
- the consent of the persons concerned.

The process is set in motion once the application is filed by the child or the adopter to the competent authority that makes the required verifications and issues a certificate attesting to the adoption.

Article 543.1 sets out important protective principles that must be respected. Of course, as affirmed by the consensus findings and recommendations of the Working Group, Aboriginal customary adoptions are always required to be in the interest of the child and to respect the child's rights; they are consensual.

Furthermore, the AFNQL and FNQLHSSC underline that in the case of customary adoptions, there are also other formal and informal structures and institutions in place that act as additional safeguards, many of which do not exist for children adopted under the general regime of the Civil Code. For example, life in First Nations communities is not anonymous. Extended family, community members and leaders will know of the proposed adoption and all those concerned. First Nations have membership registers, health and social services and are covered by youth protection. Daycare facilities and schools are small and the teachers know the situation of the children.

It is also important to note that for First Nations there is not a clear-cut distinction between customary child care and customary adoption. However, under Article 543.1 only customary adoptions that create a new family bond of filiation can be attested to by the competent authority for the purposes of the provision of a new act of birth. The new regime of course does not prevent or affect “pure” customary adoptions that may or may not involve a change of filiation and that take place without any certificate from a competent authority and do not result in the issue of a new act of birth by the registrar of civil status.

In the view of the AFNQL and the FNQLHSSC, Article 543.1 represents a careful compromise. On the one hand, it meets the concern that the important effects of adoption resulting in the issue of new act of birth are reserved for cases that fulfill minimum conditions. On the other hand, it is largely successful in avoiding involving the National Assembly in the regulation of the substantive conditions and internal process of customary adoption of First Nations.

The second clause of the first paragraph of Article 543.1 provides:

“...In such cases, unless otherwise provided, the provisions of this chapter that follow, except Division III, do not apply to an adoption made in accordance with such a custom.”

In view of the results of the consultations carried out by the FNQLHSSC on customary adoption among First Nations and the consensus findings, conclusions and recommendations of the Working Group, it may easily be seen the Bill needs a provision like the second clause of the first paragraph of Article 543.1. Unadjusted, the adoption regime of the Civil Code would notably be incompatible with:

- the right of First Nations or communities to determine whether a customary adoption has taken place and its effects;
- the possibility of preserving pre-existing bonds of filiation and rights and obligations between the child and the parents of origin;
- respect for the broad First Nations conception of the interest of the child;
- the informal, family centred, non-confidential nature of First Nations customary adoptions that occur without psychosocial assessment under the *Youth Protection Act* and without judicial involvement .

Note that the AFNQL and the FNQLHSSC consider that Article 543 of the Civil Code cannot apply to First Nations customary adoption. Article 543 provides:

“543. No adoption may take place except in the interest of the child and on the conditions prescribed by law.

No adoption may take place for the purpose of confirming filiation already established by blood.”

As indicated, First Nations customary adoption takes place in the interest of the child and Article 543.1, as it would be introduced under Bill 113, would provide important protections in this regard. But all of the provisions of the Civil Code have to be read together and in harmony with the constitutional framework. Here, this means that when referring to “adoption,” Article 543 cannot be taken to be referring to First Nations customary adoption and cannot have the effect of subjecting all such adoptions to the “conditions prescribed by law.” The whole purpose of the regime of which Article 543.1 would be the centrepiece is that where a customary adoption is to be attested to, leading to the issue of a Quebec birth certificate, different conditions would be substituted for “the conditions prescribed by law” mentioned in Article 543. More fundamentally, reading Article 543 as applying directly to regulate the conditions of First Nations customary adoptions would likely violate the limits on Quebec’s legislative powers flowing from the constitutional division of powers and protection of Aboriginal and Treaty rights.

Effects on Identity, Family Bonds and Rights and Obligations

For the general regime of adoption, one of the major innovations of Bill 113 will be that adoption may be coupled with recognition of pre-existing bonds of filiation in cases where it is in the interest of the child to protect a meaningful identification with the parent of origin while nonetheless terminating their respective rights and obligations.


New Article 577 would establish the principle for adoptions in general, that adoption confers on the adoptee a filiation that succeeds the person’s pre-existing filiations. It also provides that though there may be recognition of the adoptee’s pre-existing bonds of filiation, he ceases to belong to his family of origin.

Further, new Article 577.1 would confirm that under the general law, upon adoption, the effects of the pre-existing filiation and all associated rights and obligations cease.

Article 577.1 would establish that the same would apply in the case of Aboriginal customary adoption, subject to any provision to the contrary in accordance with the custom and specified in the certificate of customary adoption from the Aboriginal competent authority. This same presumed cessation of rights and obligations, subject to recognition of a pre-existing bond of filiation and the specifying of any rights and obligations that subsist, is also reflected in articles 132.0.1 and 132 regarding the mentions in an Aboriginal customary adoption certificate and the content of a new act of birth to be drawn up by the registrar of civil status upon receipt of such a certificate.

These provisions represent a certain degree of legislative intrusion on customary adoptions and the AFNQL and the FNQLHSSC consider that this is a key area where adjustments to Bill 113 are required. There are two issues:





First, in the Working Group's work there was no such presumption. The language used made room for both the maintenance and the severance of the bond of filiation and for it to be specified that rights and obligations subsist between the adopted child and a parent of origin. This is reflected in the Working Group's consensus recommendations that:

"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:

2.4.5 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;"¹³

As revealed by the consultations conducted by the FNQLHSSC in preparation for the Working Group's work, this kind of language, which allows both possibilities, is better suited to the reality of First Nations customary adoptions than the Bill 113 language "with recognition of a pre-existing bond of filiation." In the view of the AFNQL and the FNQLHSSC, such language is not required to achieve the purpose of the legislation. The argument that the Civil Code must use the same language and concepts for the amendments to the general law of adoption, allowing for the first time the recognition of a pre-existing bond of filiation for purposes of identification alone, and with respect to First Nations additive filiation, is unconvincing. In fact, using the same language for different concepts is confusing and inappropriate. The continuity of pre-existing relations is a part of the customary law of First Nations and should not be subject to a presumption of severance under Bill 113.

Second, as discussed above, Article 577 would provide:

"577. Adoption confers on the adoptee a filiation which succeeds the person's pre-existing filiations.

However, in the case of an adoption by the spouse of the child's father or mother, the new filiation only succeeds the established filiation, if any, with the child's other parent.

Although there may be recognition of the adoptee's pre-existing bonds of filiation, he ceases to belong to his family of origin, subject to impediments to marriage or civil union."

In the view of the AFNQL and the FNQLHSSC, the underlined language "ceases to belong to his family of origin" is unnecessary and should be avoided. For all relevant legal purposes, the cessation or maintenance of a pre-existing filiation and the continuation or end of rights and obligations would be clear under Article 577.1 and from the certificate of customary adoption (Article 132.0.1) and from inclusion of the mentions therein as regards filiation and rights and obligations in the new act of birth (Article 132). The maintenance of a sense of belonging to the land, to the people and to the immediate and extended family for your whole life has special significance for First Nations. Given the history of state adoption and child welfare regimes in the destruction of First Nations family ties, the AFNQL and the FNQLHSSC feel that this language should be removed from proposed Article 577 or that it should be made to clearly not apply with respect to First Nations customary adoptions. This could be achieved through appropriate changes mentions in Articles 543.1 or 577.1.

¹³ *Report of the Working Group*, pp. 145 and 146 (reproduced in Appendix A to this brief).





Recommendation #3:

The AFNQL and the FNQLHSSC recommend that Bill 113 be amended:

- *to clarify that the notion of “cease to belong to the family of origin” in proposed Article 577 does not apply with respect to First Nations customary adoptions; and*
- *to provide that there be no presumption of severance or of continuation of pre-existing bonds of filiation and of subsistence or not of rights and obligations between the adoptee and a parent of origin and that these simply be matters to be specified in the certificate of customary adoption and reflected in the new act of birth.*

Transboundary Customary Adoptions

Experience, geography and the consultations carried out by the FNQLHSSC for the purposes of the Working Group on customary adoption all clearly confirm that customary adoption involving First Nations children and parents transcends the territorial boundaries of Quebec and of Canada. By reason of important family and community relationships that cross boundaries, First Nations children to be adopted, birth parents and the most appropriate adoptive parents may be caught in an inter-jurisdictional no-man’s land. This is not just a matter of theory. Members of First Nations have experienced undesired separations from their adoptive children or parents and long delays in establishing or resuming a normal family life.

The First Nations have always made clear that a complete response to recognition of effects of customary adoptions must include the adoptions that straddle modern political boundaries. However, the Report of the Working Group and Bill 113 only address these concerns in a very partial way. Customary adoptions with transboundary ramifications occur and will continue to occur within single Nations and between Nations. Failure to fully address this reality denies First Nations the benefit of recognition by Quebec of the legal effects of an important aspect of a social and community institution that benefits children and families.

Here is what the Report of the Working Group stated on the subject:


“4.4 Customary adoption outside Quebec

The Working Group believes that once amendments have been made to the Civil Code, Quebec, 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, Quebec 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 Quebec law.

It is also recognized that customary adoption of children extends beyond Quebec’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 Quebec. Similar situations can also arise with the Innu of 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 Quebec of customary adoption of children domiciled outside Quebec, 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.”





It is in this context that Bill 113 would add new Article 565.2 C.C.Q. to provide for recognition in Quebec of effects of Aboriginal customary adoptions in other provinces and territories of Canada, but only in cases where the adoption is confirmed by a juridical act issued under the applicable law of the jurisdiction in question. It reads:

“565.2. An Aboriginal customary adoption of a child domiciled outside Québec, but in Canada, which creates a bond of filiation between the child and an adopter domiciled in Québec may be recognized in Québec if the adoption is confirmed by an act issued under the applicable law in the State of the child’s domicile. The adoption may be recognized either by the court or by the authority that is competent to issue customary adoption certificate for the adopter’s community or nation.”

By virtue of new Article 574.1 and Article 132.1, the competent authority recognizing an act evidencing an Aboriginal customary adoption of a child domiciled outside Quebec, but in Canada, may add all of the same mentions as in a certificate of customary adoption. This means that it may include recognition of a pre-existing bond of filiation and of rights and obligations as between the adoptee and a parent of origin. In this context, the AFNQL and the FNQLHSSC make the same recommendation for modification of Bill 113 as is set out in the second bullet point of **Recommendation #3** above.

Turning back to Article 565.2, the AFNQL and the FNQLHSSC do not agree that the recognition of effects of Aboriginal customary adoptions can or must be restricted in this way, that is by requiring a juridical act for custom adoptions in other parts of Canada and providing no mechanism at all for customary adoption outside of Quebec of a child domiciled in Quebec and for cases of international customary adoption.

Recommendation #4:

The AFNQL and the FNQLHSSC recommend the immediate commissioning of appropriate research and formation of a working group to study the issue of transboundary Aboriginal customary adoptions within Canada and internationally and to make proposals to facilitate and recognize effects of such adoptions in and for the purposes of the legislation of Quebec, including providing for the recognition of such adoptions without need of a juridical act.





HARMONIZING AND ADAPTING EXISTING POLICIES AND PROGRAMS WITH THE RECOGNITION OF EFFECTS OF CUSTOMARY ADOPTION

Bill 113 must be brought into effect and applied in a manner that takes into account existing provincial policies and programs. The AFNQL and the FNQLHSSC wish to focus on two programs in particular: the Québec Parental Insurance Plan (QPIP) and provincial child allowances (child assistance and the supplement for handicapped children).

Currently Inuit customary adoption parents are eligible for QPIP, but that is not the case for First Nations customary adoption families. With the recognition of effects of customary adoption, it is essential to give First Nations customary adoption parents the same access to these programs. Transferring provincial parental allowances to customary adoption parents is labour intensive. The institution of customary adoption is unknown throughout most of the Quebec network, which complicates matters for customary adoption parents. That means a simple transfer process and the necessary instructions for Quebec government workers regarding the impacts of the recognition of effects of customary adoption are essential to implementing Bill 113.

Recommendation #5:

The AFNQL and the FNQLHSSC recommend that relevant ministries harmonize and adapt their programs, policies, directives and ministerial guidelines in accordance with Bill 113 to offer children and parents in situations of customary adoption access to allowances and other benefits as well as services that are at least equal to the access offered to other Quebecers and Inuit in situations of adoption or customary adoption.





CUSTOMARY ADOPTION AND YOUTH PROTECTION

Support for customary adoption is part of a strategy to reinforce social institutions, and relying on them improves the lives of First Nations children and families. Customary adoption should not be viewed through the lens of social crisis and the intervention of youth protection authorities. Customary adoption is an independent institution that does not hinge on or even relate directly to youth protection. Nonetheless, the reality is that an unacceptably high proportion of children and families live under the authority of the DYP. As stated in the *Report of the Working Group on Customary Adoption in Aboriginal Communities*:

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" 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.

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.¹⁴

In this context, the AFNQL and the FNQLHSSC consider the addition to section 2.4 par 5c) *Youth Protection Act* and new articles 71.3.1 and 71.3.2 proposed under Bill 113—negotiated at the last minute between the representatives of First Nations, the Crees and Inuit and officials of Justice Québec and the MSSS—to be a step in the right direction. These provisions are balanced and respectful of Aboriginal customary adoption and the recognition of its effects in and for the purposes of Quebec legislation.

The addition at the end of section 2.4 would make consideration of Aboriginal customary adoption part of the general principles and children's rights set out in chapter II of the YPA to be taken into account by all decision-makers under the YPA. The addition provided for in Bill 113 is underlined below:

"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, including Aboriginal customary adoption".

Bill 113 would also introduce new Division VII.1 "Special Provisions" to the YPA. New s.71.3.1 would require the DYP to consider Aboriginal customary adoption as contemplated in Article 543.1 CCQ. New section 71.3.2 would provide that where a

¹⁴ Report of the Working Group, section 4.5 (pp. 134-135)



child is under the orders of the YPA no customary adoption certificate may be issued without receiving the written opinion of the director regarding the interest of the child and the respect of his rights and that to this end, the director and the competent authority may exchange what would otherwise be confidential information.

The AFNQL and the FNQLHSSC note a further matter as regards the application of these new provisions. In their brief on Bill 99¹⁵, the AFNQL and the FNQLHSSC requested that section 32 of the YPA be amended to make agreements under section 37.5 of the YPA more accessible to First Nations communities. As stated by the AFNQL and the FNQLHSSC:

“[N]o agreement under YPA section 37.5, which allows for the creation of a special youth protection program, has yet been signed, even though this section of the YPA was introduced in 2001. Of course, interim agreements or partial transfers of responsibility are possible, but it seems that this has been insufficient to convince communities to get involved in a cumbersome administrative process. In addition to the assessment of child protection reports, the delegation of responsibilities contemplated in section 32 [...] could make agreements under YPA section 37.5 more manageable by establishing intermediate levels for the transfer of responsibilities adapted to the wishes and capacities of the different First Nations communities. Such an amendment would have positive effects at the clinical level, since the adaptation and training of community practitioners could take place gradually. In financial terms, the increase in the cost to the FNCFS would be progressive and more predictable. The length of the negotiations leading to the signing of an agreement under section 37.5 would be considerably shortened, since major responsibilities would already have been transferred and the exercise of these responsibilities would have become routine.


Moreover, after an exhaustive analysis of various models for the transfer of responsibility for youth protection services by First Nations in Canada, the United States, New Zealand and Australia, Libesman concluded in 2004 that a collaborative partnership between governments and First Nations organizations predicated on the delegation of powers and the recognition of the First Nations' self-determination and rights is fundamental. Such a collaboration is indeed indispensable to the development of culture-based youth protection services and must also be reflected in legislative changes such as the one proposed by the AFNQL and the FNQLHSSC below.” [Footnotes omitted]

The AFNQL and the FNQLHSSC take the opportunity presented by the submission of Bill 113 and the amendment to section 32 to repeat their request for a greater transfer of responsibility to FNCFS personnel. In situations where the notice provided in new section 71.3.2 of the YPA may be delegated by the DYP, it must be transferred to a member of the personnel of a First Nations community, given the cultural aspects intrinsic to customary adoption.

In addition, Bill 113 introduces a new chapter on adoption (chapter IV.0.1) to the YPA. The AFNQL and the FNQLHSSC insist that it must be clear that this chapter will not apply to customary adoptions. These provisions were never discussed during the drafting of Bill 113, unlike the other sections of the YPA specifically addressing adoption. Many sections of this chapter cannot be applied to customary adoption. However, the AFNQL and the FNQLHSSC are concerned that there is ambiguity because the YPA does not clearly exclude chapter IV.0.1 from being applied to customary adoption. Given the inclusion of provisions specifically addressing customary adoption in the context of youth protection in new sections 71.3.1 and 71.3.2 of the YPA, the rules of statutory interpretation suggest that these sections take precedence over chapter IV.0.1. However, a certain amount of ambiguity remains. Applying these provisions of chapter IV.0.1 to customary adoption would clearly infringe on Aboriginal and treaty rights and would be contrary to the comments made in this brief regarding transboundary customary adoption.

This last point requires some explanation. As seen, in the amendments to the Civil Code under Bill 113, new Article 565.2 would make limited provision for transboundary customary adoption of a child from elsewhere in Canada outside of Quebec. For all other aspects of recognition in and for the purposes of the legislation of Quebec of the effects of First Nations customary adoption in the transboundary context, the clear understanding is that more discussions, collaboration and development of appropriate legislation is required. The result is that new chapter IV.0.1 “Adoption” of the YPA, and especially its provisions

¹⁵ The AFNQL and the FNQLHSSC (2016). *La culture : un élément essentiel pour le mieux-être des Premières Nations*, p. 11.



regarding transboundary adoptions, as well as the sections under the new heading Division II "Provisions Regarding the Adoption of a Child Domiciled Outside Québec" cannot apply to First Nations customary adoption.

Recommendation #6:

The AFNQL and the FNQLHSSC recommend that Bill 113 be modified:

- *So that the amendment adding new subparagraph (h.1) to section 32 YPA accommodate the provision by the personnel of a First Nations child and family services agency of the opinion contemplated in new section 71.3.2 YPA. Accordingly, after the amendments already contemplated in Bill 113 and with the further amendments now proposed, in its relevant parts s. 32 would be as follows:*

32. The director and the members of his staff authorized by him for that purpose have the following exclusive duties:

[...]

(h) to apply to the tribunal for a declaration of eligibility for adoption;

(h.1) to give the authority that is competent to issue an Aboriginal customary adoption certificate the opinion required under section 71.3.2;

[...]

Despite the first paragraph, the director may, if the director considers that the situation warrants it, authorize, in writing and to the extent the director specifies, a person who is not a member of the director's staff to assess a child's situation and living conditions as provided for in subparagraph b of the first paragraph if the person is

(a) a member of the personnel of an institution operating a child and youth protection centre;

(b) a member of the personnel of an institution operating a rehabilitation centre for young persons with adjustment problems; or

(c) a member of a Native community designated by the director within the scope of an agreement between an institution operating a child and youth protection centre and the Native community.

Authorization granted to a person mentioned in subparagraphs (a) and (b) of the second paragraph who is not a member of the director's staff is valid only for the purposes of the assessment and not for the purpose of deciding whether the child's security or development is in danger. The director may withdraw the authorization at any time.

Authorization granted to a person mentioned in subparagraph (c) of the second paragraph who is not a member of the director's staff is valid only for the purposes of subparagraphs (b), (c), (d), (e), (f) and (h.1) of the first paragraph. The director may withdraw the authorization at any time.

[...]

- *To make explicit that new chapter IV.0.1 "Adoption" and Division II "Provisions Regarding the Adoption of a Child Domiciled Outside Québec" of the Youth Protection Act proposed in Bill 113 do not apply to First Nations customary adoptions contemplated in articles 543.1 and 565.2 CCQ and that these matters should be the subject of further discussions, collaboration and as appropriate further Quebec legislation.*





CONCLUSION

Customary adoption under the laws of First Nations in Quebec has always existed and will continue. It is a living reality and an important institution for children, parents, families and communities.

First Nations customary adoptions are open, verbal and consensual, and always put the interests of the First Nations child first. Formalism, including psychosocial assessments and court procedures, are foreign to customary adoption. But this does not mean that First Nations and communities are without institutions and structures to ensure that customary adoptions are in the interests of the child.

First Nations customary adoptions 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. 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 by colonial powers and imposed upon First Nations.

Customary adoption is a matter of Aboriginal rights and title, Treaty rights and First Nations' jurisdiction and it is recognized and affirmed under section 35 of the *Constitution Act, 1982*. As such, customary adoption is already part of the law applicable in Quebec.

However, it is important that children and parents whose relations are governed by customary adoption do not suffer disability and inequality regarding their status and rights in dealing with the Quebec and federal governments and with other bodies. Since the 1980s, the First Nations have sought action on this issue.

Consequently, as with Bill 81 and Bill 47, the AFNQL and the FNQLHSSC support the adoption of Bill 113, with necessary modest adjustments in order to finally ensure the unequivocal recognition of effects of customary adoptions in and for the purposes of Quebec's legislation. Bill 113 addresses a practical problem by providing for a link between First Nations and the Registrar of Civil Status so that the parents and children whose relations are determined by customary adoption can obtain a birth certificate for the purposes of the laws of Quebec.

There were of course certain difficulties and frustrations along the way and too many years have gone by. Nonetheless, the process ultimately leading to Bill 113 sets a new standard for real collaboration and involvement of First Nations in the detailed development of Quebec legislation. And the proposed legislation itself is balanced and carefully crafted with a view to the desired result of creating a legislative bridge, without involving the National Assembly in overstepping its legislative authority in light of the federal division of powers and the constitutional entrenchment of Aboriginal and treaty rights.

After attending to the responsibility of making modest but necessary adjustments to the Bill, the members of the National Assembly can adopt this proposed legislation with confidence. The measures proposed as regards the recognition of effects of customary adoptions in and for the purposes of Quebec legislation will serve to strengthen families and advance the interests of First Nations children and their parents and their rights not to suffer disability by reason of their First Nations identity.





RECOMMENDATIONS

Recommendation #1:

The AFNQL and the FNQLHSSC recommend the immediate enactment and coming into force of Bill 113, with the necessary modest adjustments to the proposed Civil Code and Youth Protection Act provisions concerning customary adoption.

Recommendation #2:

The AFNQL and the FNQLHSSC recommend that the term “aboriginal” (“autochtone” in French) be replaced throughout Bill 113 and especially in the phrase “aboriginal customary adoption” by the terms “First Nations and Inuit” and “First Nations and Inuit customary adoption.”

Recommendation #3:

The AFNQL and the FNQLHSSC recommend that Bill 113 be amended:

- *to clarify that the notion of “cease to belong to the family of origin” in proposed Article 577 does not apply with respect to First Nations customary adoptions; and*
- *to provide that there be no presumption of severance or of continuation of pre-existing bonds of filiation and of subsistence or not of rights and obligations between the adoptee and a parent of origin and that these simply be matters to be specified in the certificate of customary adoption and reflected in the new act of birth.*

Recommendation #4:

The AFNQL and the FNQLHSSC recommend the immediate commissioning of appropriate research and formation of a working group to study the issue of transboundary Aboriginal customary adoptions within Canada and internationally and to make proposals to facilitate and recognize effects of such adoptions in and for the purposes of the legislation of Quebec, including providing for the recognition of such adoptions without need of a juridical act.

Recommendation #5:

The AFNQL and the FNQLHSSC recommend that relevant ministries harmonize and adapt their programs, policies, directives and ministerial guidelines in accordance with Bill 113 to offer children and parents in situations of customary adoption access to allowances and other benefits as well as services that are at least equal to the access offered to other Quebecers and Inuit in situations of adoption or customary adoption.

Recommendation #6:

The AFNQL and the FNQLHSSC recommend that Bill 113 be modified:

- *So that the amendment adding new subparagraph (h.1) to section 32 YPA accommodate the provision by the personnel of a First Nations child and family services agency of the opinion contemplated in new section 71.3.2 YPA. Accordingly, after the amendments already contemplated in Bill 113 and with the further amendments now proposed, in its relevant parts s. 32 would be as follows:*

*32. The director and the members of his staff authorized by him for that purpose have the following exclusive duties:
[...]*





*(h) to apply to the tribunal for a declaration of eligibility for adoption;
(h.1) to give the authority that is competent to issue an Aboriginal
customary adoption certificate the opinion required under section 71.3.2;
[...]*

Despite the first paragraph, the director may, if the director considers that the situation warrants it, authorize, in writing and to the extent the director specifies, a person who is not a member of the director's staff to assess a child's situation and living conditions as provided for in subparagraph b of the first paragraph if the person is

- (a) a member of the personnel of an institution operating a child and youth protection centre;*
- (b) a member of the personnel of an institution operating a rehabilitation centre for young persons with adjustment problems; or*
- (c) a member of a Native community designated by the director within the scope of an agreement between an institution operating a child and youth protection centre and the Native community.*

Authorization granted to a person mentioned in subparagraphs (a) and (b) of the second paragraph who is not a member of the director's staff is valid only for the purposes of the assessment and not for the purpose of deciding whether the child's security or development is in danger. The director may withdraw the authorization at any time.

*Authorization granted to a person mentioned in subparagraph (c) of the second paragraph who is not a member of the director's staff is valid only for the purposes of subparagraphs (b), (c), (d), (e), (f) and (h.1) of the first paragraph. The director may withdraw the authorization at any time.
[...]*

- *To make explicit that new chapter IV.0.1 "Adoption" and Division II "Provisions Regarding the Adoption of a Child Domiciled Outside Québec" of the Youth Protection Act proposed in Bill 113 do not apply to First Nations customary adoptions contemplated in articles 543.1 and 565.2 CCQ and that these matters should be the subject of further discussions, collaboration and as appropriate further Quebec legislation.*





APPENDIX A

Report of the Working Group on Customary Adoption in Aboriginal Communities, April 6, 2012, pp. 143-147 available at http://www.justice.gouv.qc.ca/English/publications/rapports/pdf/rapp_adop_autoch_juin2012-a.pdf


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; these purposes;

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.]







Assembly of First Nations
Quebec-Labrador



FIRST NATIONS OF QUEBEC
AND LABRADOR HEALTH
AND SOCIAL SERVICES
COMMISSION