McGill Law Journal — Revue de droit de McGill

UNDERSTANDING INNU NORMATIVITY IN MATTERS OF CUSTOMARY "ADOPTION" AND CARE

*Sébastien Grammond and Christiane Guay**

This article presents the preliminary results of a research project on care and customary "adoption" in the Innu Uashat mak Mani-Utenam community of northeast Québec. From a legal pluralist perspective, the authors used a biographical method to understand the workings of the *ne kupaniem / ne kupanishkuem* Innu legal institution, which can be compared in certain respects to adoption in Western legal systems. The authors present certain characteristics of this institution in order to expose the limits of bills that seek to recognize "Aboriginal customary adoption" in Québec law. Innu "adoption" stems from an agreement between the concerned persons, which can crystallize gradually, which never breaks the original filial link, and which does not immediately create a new filial link. In theory, this type of adoption is not permanent. As such, a Québec law that only recognizes Aboriginal adoptions that create a new filial link runs the risk of either being ineffective, or of distorting the Innu legal order.

Le présent article rend compte des résul- tats préliminaires d'un projet de recherche qui porte sur la garde et l'« adoption » coutumière au sein de la communauté innue d'Uashat mak Mani-Utenam, dans le nord-est du Québec. Dans une perspective de pluralisme juridique, les auteurs ont employé une méthode biogra- phique pour comprendre le fonctionnement de l'institution juridique innue du *ne kupaniem/ne kupanishkuem*, que l'on peut comparer, à cer- tains égards, à l'adoption des systèmes de droit occidentaux. Les auteurs présentent ici cer- taines caractéristiques de cette institution, afin de faire apparaître les limites des projets de loi qui visent à reconnaître l'« adoption coutumière autochtone » en droit québécois. L'« adoption » innue découle d'une entente entre les personnes concernées, qui peut se cristalliser graduelle- ment, qui ne brise jamais le lien de filiation d'origine et qui n'entraîne pas immédiatement la création d'une nouvelle filiation. En principe, cette forme d'adoption n'est pas permanente. Or, une loi québécoise qui ne reconnaîtrait que des adoptions autochtones qui créent un nou- veau lien de filiation risquerait soit d'être ineffi- cace, soit de déformer l'ordre juridique innu.

* Sébastien Grammond is a Professor at the Faculty of Law (Civil Law Section) of the University of Ottawa. Christiane Guay is a Professor in the Department of Social Work at the *Université du Québec en Outaouais*. The research project to which this article relates is part of the research partnership entitled *État et cultures juridiques autochtones : un droit en quête de légitimité*, under the direction of Professor Ghislain Otis, which is funded by the Social Sciences and Humanities Research Council of Canada.

Citation: (2016) 61:4 McGill LJ 885 — Référence : (2016) 61:4 RD McGill 885

Introduction

The phenomenon that anthropologists refer to as "child circulation" exists in every society in various forms and under different names, such as adoption, custody transfer or fosterage[1]. In the case of Aboriginal peoples, the human stakes inherent in this phenomenon are amplified by colonial issues: the State regulates child circulation in a manner that leads to negative consequences for Aboriginal communities. Whether pursuant to the youth protection system or to the rules on adoption, the State claims the right to remove Aboriginal children from the family and to determine the orientation that best suits the interests of the children. Where such a measure is implemented, the child in question is often placed with a non-Aboriginal foster family. The devastating impacts of this system on Aboriginal peoples were recently recalled by the Truth and Reconciliation Commission, which asserted that "Canada's child welfare system has simply continued the assimilation that the residential school system started"[2].

This article presents the preliminary results of a research project seeking to identify alternative means of ensuring the security and development of Aboriginal children. More specifically, this project deals with the recognition of Innu law in matters which Western legal scholars refer to as custody and the customary adoption of children. In collaboration with Uauitshitun, the social services centre of the Innu community of Uashat mak Mani-Utenam, in northeastern Québec, we sought to understand how, today, these issues were subject to Innu norms, independently of any attempt on the part of Québec law to regulate them. Our ambition is that these Innu norms will enable the resolution of problem situations without requiring the involvement of the Québec system.

Our research project is not complete; however, we deemed it useful to already publish certain preliminary results and observations on the mindsets and attitudes that must be changed in order to ensure an adequate recognition of Innu norms regarding the custody and adoption of children. Hence, after having recalled the principal dimensions of State interference in

---

[1] See Suzanne Lallemand, "Adoption, fosterage et alliance" (1988) 12:2 Anthropologie et Sociétés 25.

[2] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*: *Summary of the Final Report of the Truth and Reconciliation Commission of Canada,* Montréal, McGill-Queen's University Press, 2015 at p. 138.

Innu families (I) and setting out the general outline of our research methodology (II), we will analyse how certain rules in Québec law stand in the way of the recognition of certain Innu norms that we have tentatively established (III).

I. State Interference in Innu Family Relations

State interference in Innu families first and foremost occurs through the application of the Québec youth protection system. Such a system also exists in other Canadian provinces[3] and, in its variegated forms, in other Western countries. Its goal is to prevent significant harm that parents could inflict on their children. To this end, State-appointed agencies can subject parents to supervisory measures or, if there is no other alternative, remove a child from his or her family setting and place the child with a foster family or in an institutional home. Where returning the child to his or her original family appears to be impossible, adoption of the child is one of the solutions considered.

In Canada, youth protection falls under provincial jurisdiction. The various provincial systems were not designed with the circumstances, the culture or the normativity of Aboriginal peoples in mind. Starting in the 1950s, as part of a federal policy to better integrate Aboriginals with the rest of population, the provinces applied their systems to Aboriginal peoples. This interference resulted in the massive removal of Aboriginal children from their families and communities. During the 1960s and 1970s, many of these children were adopted by non-Aboriginal families. This was referred to as the "sixties scoop"[4]. In point of fact, since then, Aboriginal children are overrepresented at all stages of the youth protection system[5]. For instance, in Québec, a study conducted on the basis of data from 2007–2008

---

[3] See, e.g., *Children and Family Services Act*, R.S.O. 1990, c. C.11. See generally Nicholas Bala et al., eds., *Canadian Child Welfare Law: Children, Families and the State*, 2nd ed., Toronto, Thompson Educational, 2004.

[4] See Patrick Johnston, *Native Children and the Child Welfare System*, Ottawa, Canadi- an Council on Social Development, 1983, ch. 2.

[5] See also Vandna Sinha et al., *Kiskisik Awasisak: Remember the Children—Understanding the Overrepresentation of First Nations Children in the Child Welfare System*, Ontario, Assembly of First Nations, 2011, online at: <cwrp.ca/sites/default/files/publications/en/FNCIS-2008_March2012_RevisedFinal.pdf>.

showed that Aboriginal children are 5.51 times more likely to be placed than non-Aboriginal children[6].

This situation has far-reaching repercussions on Aboriginal families and communities. An Aboriginal child that is placed is not only removed from his or her family; he or she is also deprived of access to his or her culture, mother tongue and community[7]. Quite often, an Aboriginal child placed in a non-Aboriginal foster home will experience racism growing up[8]. Once they reach adulthood, many Aboriginal children placed outside their original community seek to return but then run the risk of being perceived as strangers.

The interference of the State of Québec in Aboriginal family relations also results in the exclusion of Aboriginal normativity regarding child circulation. This phenomenon is especially acute in Québec, where the judges and the various actors in the youth protection system have a generally very negative view of "customary adoption". It is often suspected of being contrary to the best interests of the child, which only State law and interference by youth protection services would allegedly be able to safeguard[9]. Hence, Québec judges usually refuse to recognize the validity or legal value of customary adoption[10], although there are precedents

---

[6] See Alexandra Breton, Sarah Dufour and Chantal Lavergne, "Les enfants autochtones en protection de la jeunesse au Québec : leur réalité comparée à celle des autres enfants" (2012) 45:2 Criminologie 157 at p. 166. This overrepresentation in Québec was long denied. In this respect, see also Christiane Guay and Sébastien Grammond, "À l'écoute des peuples autochtones? Le processus d'adoption de la "loi 125"" (2010) 23:1 Nouvelles pratiques sociales 99 at pp. 108–09.

[7] See Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commis- sion on Aboriginal Peoples: Gathering Strength*, Vol. 3, Ottawa, Canada Communication Group, 1996 at p. 26. For an overview of the consequences of this placement on Aboriginal children who are adopted, see Grace Atkinson, "Adoption Practices: A First Nation Perspective" in Jeannine Carrière, ed., *Aski Awasis/Children of the Earth: First Peoples Speaking on Adoption*, Black Point (N.S.), Fernwood, 2010, 37.

[8] See in particular Raven Sinclair (Ótiskewápíwskew), "Identity or Racism? Aboriginal Transracial Adoption" in Raven Sinclair (Ótiskewápíwskew), Michael Anthony Hart (Kaskitémahikan) and Gord Bruyere (Amawaajibitang), eds., *Wícihitowin: Aboriginal Social Work in Canada*, Black Point (N.S.), Fernwood, 2009, 89 at p. 100.

[9] See, e.g., Daniel Bédard, "L'adoption traditionnelle chez les Inuits : quelques aperçus" in Tara Collins et al., ed., *Droits de l'enfant : Actes de la Conférence internationale/Ottawa 2007*, Montréal, Wilson & Lafleur, 2007, 405; Québec, Commission des droits de la personne et des droits de la jeunesse, *Nunavik: Report, conclusions of the investigation and recommendations*, Québec, 2007 at pp. 7–8, 78.

[10] See Carmen Lavallée, "L'adoption coutumière et l'adoption québécoise : vers l'émergence d'une interface entre les deux cultures?" (2011) 41:2 RGD 655 at pp. 671– 81 (in this article, the author analyses several Québec decisions relating to

in decisions from the courts of other provinces[11]. At most, a customary adoption is sometimes referred to as a fact situation taken into account by the judge in making an order[12].

Aboriginal peoples in Québec have long been asking for recognition of customary adoption and other forms of normativity in relation to child custody[13]. Since 1994, an agreement between the Registrar of Civil Status and Innu communities allows for the registration of adoptive parents on birth certificates where a customary adoption has taken place. The courts have, however, cast some doubt as to the lawfulness of such an agreement[14]. More recently, three bills were tabled in the National Assembly to authorize the recognition in Québec law of Aboriginal "customary adoption"[15]. Two of these bills died on the order paper as a result of elections being called. At the time of writing, the third is being studied.

One of the obstacles hampering the recognition process is Québec legal practitioners' lack of familiarity with Aboriginal legal systems. Basically, it is said that it is difficult to recognize that which one does not know. According to Carmen Lavallée, "[TRANSLATION] requests made by Aboriginal communities in order to obtain recognition of their adoption practices force them to better define them"[16]. The task is all the harder for First Nations (such as the Innu) since research on customary adoption has been chiefly focussed on the Inuit[17]. Aboriginal peoples are essentially required to make

---

customary adoption situations). See also *Adoption — 1212*, 2012 QCCQ 2873 at paras. 466–506, [2012] RJQ 1137.

[11] See Cindy L. Baldassi, "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts, and Convergences" (2006) 39:1 UBC L Rev 63 at pp. 81–87.

[12] See, e.g., *Protection de la jeunesse — 111977*, 2011 QCCQ 7589 at para. 5 (accessible on CanLII).

[13] See Anne Fournier, "L'adoption coutumière autochtone au Québec : quête de reconnaissance et dépassement du monisme juridique" (2011) 41:2 RGD 703 at p. 707.

[14] See *X (Dans la situation de)*, 2006 QCCQ 9875 at para. 18, [2006] RJQ 2513; *Droit de la famille — 133412*, 2013 QCCS 6080 at paras. 30–34 (accessible on CanLII).

[15] Bill 81, *An Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, 2nd Sess., 39th Leg., Québec, 2012; Bill 47, *An Act to amend the Civil Code and other legislative provisions as regards adoption, parental authority and disclosure of information*, 1st Sess., 40th Leg., Québec, 2013; Bill 113, *An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information*, 1st Sess., 41st Leg., Québec, 2016 [Bill 113].

[16] Lavallée, *supra,* note 10 at p. 661.

[17] See *ibid* at p. 664.

their law intelligible to the dominant society, failing which the latter will continue to ignore it[18].

II. Innu Law as an Alternative

In the same vein as many other Aboriginal communities facing the repercussions of the youth protection system, Uashat mak Mani-Utenam is looking for alternatives. One potential solution is found in section 37.5 of the *Youth Protection Act*[19]. This provision authorizes the Government of Québec to enter into an agreement with Aboriginal communities for the establishment of a parallel youth protection system, which may be subject to different rules than those set out in the Act.

With a view to preparing for the negotiation and implementation of such an agreement, Uauitshitun (the social services centre of Uashat mak Mani-Utenam) asked us to undertake research on certain Innu practices, specifically parental practices, customary adoption and healing practices on the territory. This article will only deal with the project relating to customary adoption, which aims to highlight the existence, and to analyse the contents, of Innu adoption practices in effect at Uashat mak Mani-Utenam and to determine which legal and institutional frameworks promote a coordination internormativity[20] between the Innu and the State legal order. In other words, an Innu youth protection system can be based on an Innu knowledge base. Actions taken in respect of Innu children can therefore be in keeping with the distinctive features of Innu society, values and history.

---

[18] Incidentally, the Government of Québec has conducted investigations and consultations with respect to the customary adoption process within First Nations (see Québec, Ministère de la Justice, *Report of the Working Group on Customary Adoption in Aboriginal Communities*, Bibliothèque et Archives Nationales du Québec, 2012, online at: http://www.justice.gouv.qc.ca/english/publications/rapports/pdf/rapp_adop_autoch_juin2012-a.pdf). For another example of a recognition conditional upon a disclosure of the substance of Aboriginal law, see Sébastien Grammond, "L'appartenance aux communautés inuit du Nunavik : un cas de réception de l'ordre juridique inuit?" (2008) 23:1–2 RCDS 93 [Grammond, "L'appartenance"].

[19] CQLR, c. P-34.1.

[20] See Ghislain Otis, "Cultures juridiques et gouvernance : cadre conceptuel" in Ghislain Otis et al., eds., *Cultures juridiques et gouvernance dans l'espace francophone : Pré- sentation générale d'une problématique*, Paris, Éditions des archives contempo- raines, 2010, 3 at p. 22, who asserts that pluralism of coordination exists "[TRANSLATION] where the interaction between the legal orders takes place under the auspices of cooperation, balance or coordination rather than subordination".

Our perspective is that of legal pluralism[21], which means that we consider that laws exist in each society, even if they take on different forms. Hence, law is not only made up of written laws or decisions handed down by State courts, it also consists of norms that regulate the social life of Aboriginal peoples. John Borrows has shown that these norms may originate from various sources, including not only sacred or natural sources, such as stories describing the creation of the world or the interaction between human beings and their environment, but also human sources, such as ceremonies or deliberative processes or customary law in the strict sense, namely a constant practice that is deemed to be compulsory[22].

That being said, the occasional use of the word "tradition" to describe Aboriginal legal systems must not make it sound like these systems are stuck in the past. As Patrick Glenn has clearly shown, tradition is not impervious to change[23]. We are interested in those norms that govern today's Innu family. We are not seeking to implement the approach set by the courts to identify ancestral rights based on practices that were in effect a long time ago[24]. In this sense, we recognize that indigenous legal systems are dynamic, that is to say that the content of Aboriginal norms is liable to evolve, either by way of an express decision made by an Aboriginal authority or by way of some sort of tacit deliberation which, according to Jeremy Webber, characterizes custom as a source of law[25].

---

[21] For an introduction to this theoretical perspective, see Jacques Vanderlinden, "À la rencontre de quelques conceptions du pluralisme juridique" (2005) 7 RCLF 303; Ghislain Otis, eds., *Méthodologie du pluralisme juridique*, Paris, Karthala, 2012; Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law*, Toronto, Carswell, 2013 at pp. 30–35, 367–91.

[22] See John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 RD McGill 629; John Borrows, *Canada's Indigenous Constitution*, Toronto, University of Toronto Press, 2010. See also Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 RD McGill 579.

[23] See H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed., Oxford, Oxford University Press, 2014 at pp. 23–25.

[24] For instance, the ruling in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 DLR (4th) 289, has often been criticized for its outdated view of Aboriginal cultures. See, in particular, Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 RD McGill 993; Michael Asch, "The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*" (2000) 5:2 R études const 119; Ronald Niezen, "Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada" (2003) 18:2 RCDS 1; Neil Vallance, "The Misuse of "Culture" by the Supreme Court of Canada" in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada*, Vancouver, UBC Press, 2006, 97.

The legal sphere is therefore one of the places where the historical action of Aboriginal peoples can take place. In sociology, historical action is the conscious action of the members of a society to direct the historical development of that society[26]. According to Thibault Martin, Aboriginal peoples are no less capable thereof than any other society. They do not, in a passive and deterministic fashion, suffer the influence of Western society. Rather, through their actions, they seek to alter the course of events and to create a form of modernity that is consistent with their interests, culture and values[27].

In order to complete this project successfully, we followed the biographical approach, based on the telling of each participant's life story in connection with the theme under study. This approach allows the researcher to avoid imposing his or her theoretical framework or worldview, since the participant is entirely free to slant the contents and form of his or her conversation as he or she wishes. Indeed, it is up to the participant to decide what to deliver to the researcher, and how. In addition, this method allows the participant to speak, affords him or her legitimacy, that is to say that it recognizes that the participant possesses knowledge and expertise from which new knowledge can be drawn. Finally, the biographical approach has the advantage of not decontextualizing the practices on which the research is focussed and of taking into account the time dimension, that is to say the history of colonization and its repercussions on the reality under study[28].

We therefore recorded stories of experience with a dozen or so participants from Uashat mak Mani-Utenam by way of non-directive interviews. The interview plan was divided into three major themes: the socio-cultural aspects in relation to the original community, the significant events

---

[25] Webber, *supra,* note 22. In the matter of *Adoption — 1212*, *supra,* note 10 at paras. 472–506, the Court of Québec ruled that a Cree customary adoption had not taken place, since the adoptive parents had been selected by the Cree Health and Social Services Council as opposed to the birth parents. This judgment can be analysed as a refusal to allow the Cree legal order to evolve.

[26] See Guy Rocher, *Introduction à la sociologie générale*, 3rd ed., Montréal, Éditions HMH, 1992 at p. 379.

[27] See Thibault Martin, "Pour une sociologie de l'autochtonisme" in Natacha Gagné, Thibault Martin and Marie Salaün, eds., *Autochtonies : Vues de France et du Québec*, Québec, Presses de l'Université Laval, 2009, 431 at pp. 445–47. For a concrete illustration of evolution of an Aboriginal legal order, see Grammond, "L'appartenance", *supra,* note 18.

[28] For greater detail, see Christiane Guay and Thibault Martin, "Libérer les mots : pour une utilisation éthique de l'approche biographique en contexte autochtone" (2012) 14:1 Éthique publique 305.

of the participant's personal path in life and aspects regarding his or her experience as an adoptee or adopter. The stories were transcribed verbatim, and then put in narrative form. They were then validated with the participants. These stories represent "[TRANSLATION] a type of analysis that is just as relevant and legitimate as the analysis performed by the researcher"[29]. A reading thereof is replete with valuable teachings regarding customary adoption and the reality in which it takes place. That being said, the stories are also subjected to data treatment by the researchers with a view to condensing them based on an analytical grid devised in an iterative manner in light of the research questions and a preliminary reading of the tales. Subsequently, the research results are subjected to a community consultation with a view to obtaining a consensus as to Innu normativity regarding adoption. At that time, it is possible to resort to the methodology developed by the Indigenous Law Research Unit at the University of Victoria[30] in order to extract the indigenous law based on life stories, current practices, traditional tales or legends[31].

One must specify, at this juncture, what our notion of "law" and "Innu law" is. Québec legal practitioners usually have a positivist concept of law. In this view, the law is made up of a set of rules pre-determined by the authorities recognized as having the power to decree them (or to "posit" them, hence the legal expression of "positive"). These authorities include the National Assembly, municipal councils, certain regulatory agencies, etc. In some cases, according to the common law tradition, the courts may also participate in the definition of what the law is.

On the other hand, such a concept is wholly useless in traditional Innu society, where there were no specialized authorities tasked with decreeing laws or handing down judgments. This does not mean Innu society is lawless or devoid of norms. Rather, Innu normativity does not follow the same form of law as in Western societies, so much so that there is no expression in the Innu language to translate the word

---

[29] Christiane Guay, "La prise en compte des discours narratifs autochtones dans le développement des connaissances", 46:1 Recherches amérindiennes au Québec [to be published in 2016].

[30] See Hadley Friedland and Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead LJ 16.

[31] For examples of traditional stories or legends, see Marie-Jeanne Basile and Gerard E McNulty, eds., *Atanúkana : Légendes montagnaises*, Québec, Centre d'Études Nordiques de l'Université Laval, 1971; Rémi Savard, *La Forêt vive : Récits fondateurs du peuple innu*, Montréal, Boréal, 2004.

"law"[32]. As in the case of other Aboriginal peoples, Innu normativity is not necessarily made up of rules, prohibitions, powers or duties, but rather emphasizes values and their conveyance, as well as dispute resolution processes[33].

The use of the term "law" to describe this form of normativity is not dictated by any purportedly objective definition. Instead, it is a choice that aims to ensure a more egalitarian dialogue between the normative traditions of the two societies examined. Indeed, Innu normativity is of no less value, and does not deserve lesser recognition, just because it does not have the same form as Western positive law. This choice is also consistent with Article 34 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which asserts the right of indigenous peoples to promote, develop and maintain their "juridical systems or customs"[34].

Moreover, one must also refrain from the temptation of looking to Innu law for norms of general application that would apply to individuals without any possibility for adaptation. As we shall see below, Innu law in matters of adoption is characterized by the very broad freedom given to individuals to reorganize their family relations. Under such circumstances, a legal study cannot disregard the manner in which individuals usually exercise their freedom[35].

III. Overcoming Hurdles to the Recognition of Innu Law

The issue of the potential recognition of Aboriginal customary adoption could be raised quite soon enough if a bill to that effect were once again tabled before the National Assembly. Even if that were not the case, it is worthwhile reflecting already about the hurdles resulting from differences in structure and content between the Québec and the Innu legal systems as concerns family relations. This exercise might allow for potential solutions to emerge that do not require the involvement

---

[32] See Jean-Paul Lacasse, *Les Innus et le territoire : Innu tipenitamun*, Québec, Septentrion, 2004 at pp. 23, 47, 71.

[33] See Law Commission of Canada, *Justice Within: Voices of Indigenous Legal Traditions*, Ottawa, 2006 at pp. 4–6. For an example of an explicit recognition of values, see the *Wildlife Act*, SNu 2003, c. 26, s. 8.

[34] GA Res. 61/295, Off. Doc. UN GA, 61st Sess., Supp. No. 49, UN Doc. A/RES/61/295 (2007) 1.

[35] One can draw a parallel, in this respect, with studies focussing on the usual contents of certain types of contracts: although individuals may derogate from these usual contents, such a study nevertheless informs the reader on the nature of legal relations in society or in the relevant field of activities.

of the legislator or that might form part of an Innu youth protection system. Whatever its practical repercussions may be, such an analysis will also allow certain theoretical challenges to emerge relating to the fostering of a dialogue that is mindful of two legal orders that are so different.

Hence, we will, in turn, present three features of Québec law: the fact that issues of filiation and adoption are deemed to be public policy matters (A); the permanent nature of adoption or, in youth protection matters, the search for permanent solutions (B); and the fact that the State intervenes as the compulsory guardian of the best interests of the child (C). We will show how each of these features is to be found in the terms for recognition of Aboriginal customary adoption that were proposed in Bill 113. Finally, we will illustrate, using our preliminary results, how these features of Québec law cannot be transferred to Innu law and how insisting on these features is harmful to the application or recognition of Innu law.

A. Filiation and Adoption, Matters of Public Policy

The *Civil Code of Québec* ("CCQ") contains a set of rules regarding filiation[36] and adoption[37]. These rules allow for a determination of who the father and mother of a child are, for proof of paternity where is has not been declared and for change of filiation by way of adoption. The information regarding a person's filiation must be recorded in a register maintained by a State official, namely the Registrar of Civil Status, who has sole authority to issue certificates evidencing a person's filiation. Once filiation has been established, certain rights and obligations flow from the Code, specifically as regards parental authority, the duty to pay alimony or estates.

One feature of these rules is that they leave little room for the exercise of individual choices. On the contrary, the dominant ideology underlying these provisions of the Code is that legal filiation is intended to reflect biological reality[38], even if the reforms made in 2002 regarding assisted procreation and LGBT parenting have somewhat relaxed this principle. Hence, civil status is a "matter of public policy" or is "unavailable", meaning that individuals cannot agree, for instance by way of contract, to change a person's filiation or, in any other

---

[36] See Art. 523–37 CCQ.

[37] See Art. 543–84 CCQ.

[38] See Marie-France Bureau, *Le droit de la filiation entre ciel et terre : étude du discours juridique québécois*, Cowansville (Qc), Yvon Blais, 2009 at pp. 5, 53–55.

way, to transfer a child from one family to another. This principle is so deeply engrained in the mindset of legal experts that it is not even expressly set out in the relevant provisions of the Code[39]; they must be inferred instead[40].

Similarly, private adoptions or adoptions by way of contract are prohibited. A court must intervene (Art. 566 CCQ) and the Code sets out the procedure to be followed. The rigidity of this principle is even reinforced by criminal punishment: section 135.1 of the *Youth Protection Act*[41] elevated to the status of a criminal offence the adoption of a child contrary to the applicable legislatives provisions. As the Court of Appeal recently underscored in a decision: " If the only requirement to obtain adoption [...] was consent, then there would be a total absence of judicial control over such adoptions, and filiation would risk becoming an amorphous if not volatile legal institution"[42]. The public policy nature of filiation and adoption is therefore closely associated with the involvement of the courts, which represent the power of the State, in order to approve any amendment of civil status.

This principle is reflected in the provisions of Bill 113, which was intended to guarantee recognition of Aboriginal customary adoptions [43]. This Bill proposed to add to the Code several provisions regarding this recognition; Article 543.1 is the centrepiece thereof:

> **543.1.** Conditions of adoption under any Québec 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.
>
> 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

---

39 See generally Book II of the CCQ on Family.

40 There is a corollary in Art. 2632 CCQ, which provides that no transaction may be made with respect to the status of persons.

41 *Supra,* note 19.

42 *Adoption — 152*, 2015 QCCA 348 at para. 98 (accessible on CanLII).

43 Bill 113, *supra,* note 15.

> 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[44].

Certain components of this provision reiterate, although in milder fashion, the main consequences flowing from the principle that civil status is a matter of public policy. Hence, Article 543.1 would provide that "an authority that is competent" for each Aboriginal community must certify a customary adoption after making sure of the existence of certain conditions required by Québec law or Aboriginal "custom"; this certificate must be forwarded to the Registrar of Civil Status, who must amend the filiation of the child accordingly. More fundamentally, Article 543.1 presupposes that there is such a thing as an institution in Aboriginal law called "adoption" and that has the effect of creating bonds of filiation. Article 132.0.1, which would govern the contents of a certificate of Aboriginal customary adoption, also assumes that "adoption" would take place at a specified "date" that must be declared and entered on the Civil Status Register.

These features, however, differ from those we were able to observe in Innu law. Indeed, our main finding is that Innu law is based on individual freedom to restructure one's family relations in a manner which, ultimately, but not in all cases, may lead to the creation of new bonds of filiation. In particular, Innu law recognizes the freedom of individuals to come to an understanding to entrust the custody of a child to persons other than its biological parents. As one participant stated: "The agreement between us is that I leave her my daughter to raise". In the majority of cases, the persons are the grandparents of the child (often, the mother still lives with her parents), but it may also be other more or less remote relatives or, sometimes, unrelated persons.

Let us stress from the outset that the Innu do not use the term "adoption", but rather that of "care" to describe this reality. As one participant put it:

> Customary adoption doesn't exist, it doesn't resonate, it is not in our language; I don't even know what word to use in Innu to define it. I dare not say *lend* the child to the elder or *keeping it some time* when there are family problems between the mother and the grandmother.

The term "adoption" is generally used to refer to a legal adoption in accordance with Québec law. In the Innu language (*innu aimun*), children who are adopted (or cared for by someone else) are

---

[44] *Ibid*, s. 10.

designated by the terms *ne kupaniem* (in the masculine) and *ne kupanishkuem* (in the feminine), which literally mean "a child cared for temporarily". That said, despite the use of these concepts, in many cases, people speak of children they care for as being their own children and they do not make this terminological distinction.

Since traditional Innu society did not have any hierarchical authority, such agreements are made between the persons in question and do not require the involvement of any third party. Today, such agreements are entered into without any involvement on the part of state authorities and in the absence of any official requirements, even if, in some cases, the parents ultimately choose to carry out a legal adoption or to resort to guardianship in order to facilitate interaction with Québec institutions. No one spoke to us about a "competent authority" in this respect within the community, despite what appears to be contemplated in Bill 113.

All the participants describe these transfers as an informal, paperless process, resulting from an agreement or a consensus among the parties involved. Contrary to some Aboriginal nations in British Columbia, there is no adoption ceremony[45].

In some cases, it is even difficult to determine the precise timing of the agreement between the parties. Hence, one participant who was experiencing personal hardship at the time of the birth of her child asserted that she left her child with her sister on weekends. When her problems worsened, she and her sister ultimately agreed that the child would be better off with her sister. Adoption, in this case, is a *de facto* situation that crystallizes gradually. Another participant even said that, as far as one of her daughters was concerned, the adoption happened "automatically", which suggests that the parties' wishes are not expressed at a specific point in time but rather progressively.

In short, even if non-Innu people often refer to it as a customary adoption, the Innu legal institution of *ne kupaniem/ne kupanishkuem* does not mirror an adoption in Québec law. It does not have the same features. Although the desire to ensure its recognition in Québec law is laudable, the techniques proposed to this end would have the effect of adding rigidity to an institution, which purports to be flexible.

---

[45] See Atkinson, *supra,* note 7 at p. 48.

B. The Search for Permanence

In current Québec law, an adoption breaks the original bonds of filiation and it is confidential[46]. It is highly final, in the sense that an adoption, as opposed to guardianship or wardship, is considered a permanent change in filiation, which can only be changed again by a new adoption of the same child, which is a rare, if not non-existent, phenomenon. The rules governing adoption therefore seek to guarantee permanence in the new circumstances of the child by wholly breaking off bonds with the original family.

The law governing youth protection seeks to achieve the same objectives. Basing itself on the theory in psychology called attachment, the *Youth Protection Act* was amended in 2007 to reduce the "bandying about" of children between various foster families and to set minimum placement periods, following which a permanent solution must be found[47]. Within Aboriginal communities, one of the effects of this mindset is to increase resort to adoption or placements in non-Aboriginal foster families until the child comes of age[48]. In addition, youth protection orders may require contacts between the child and his or her original family to be supervised or may, in certain exceptional cases, prohibit such contact altogether[49].

Although it forms part of a broader reform that would acknowledge certain forms of adoption that would give some recognition to original filiation, the recognition of customary adoption proposed in Bill 113 nevertheless still pursues the goal, at least implicitly, of ensuring that the Aboriginal child has a new permanent filiation. As mentioned above, Article 543.1 would only recognize "adoptions" that create new bonds of filiation at a set date. There is no provision for a termination of such an "adoption".

In Innu law, agreements with respect to the care of a child do not displace original filiation. These agreements are not confidential; the small size of the communities would, in any event, make any such confidentiality illusory. The child still knows who his or her biological parents are and will usually continue to maintain contact with them. In fact,

---

46 See Art. 577, 582 CCQ.

47 See Laurence Ricard, "L'évolution récente de la conception de l'enfant dans le droit québécois : l'exemple de la *Loi sur la protection de la jeunesse* et des récents projets de loi en matière d'adoption" (2014) 44:1 RDUS 27 at pp. 39–40.

48 See Guay and Grammond, *supra,* note 6 at p. 105.

49 See *Youth Protection Act*, *supra,* note 19, s. 91.

it is quite possible that the maintenance of contact with the original family may be considered to be a compulsory rule that restricts the freedom of the parties to restructure their family relations. This rule is illustrated by the tale of one participant to whom the Director of Youth Protection (DYP) proposed a life plan for a child she had been caring for for some time. She stated that she accepted, adding however that she had told the DYP that she would never accept a contract prohibiting any contact with the birth mother. This would, therefore, be a case where an Innu actor apparently insisted on the rules of "her" legal order prevailing.

Do these agreements create new bonds of filiation? The words used by the participants to describe kinship, as well as their statements on the relative significance of biological family relations and social parenting, lead to the conclusion that, with the passage of time, very strong emotional ties are created and the child can consider himself or herself to be a full-fledged member of the adoptive family. He or she may refer to his or her adoptive parents as being his or her "real parents" or call the adoptive mother "Mommy". In certain cases, the child will use words such as "Mommy" to refer both to his or her biological mother and his or her adoptive mother, with variations reflecting the degree of contact with each. In other instances where contact with the original family is more frequent, the child may continue to use the term "grandparents" to describe those who raised him or her, explaining: "I rather saw them as my parents; I never called them Daddy and Mommy because I knew they were my grandparents, but they were the ones doing the parenting"[50]. Ultimately, it appears that the persons involved in each situation attempt to combine the (French) vocabulary of terms of kinship to describe nuances in their own circumstances and the relationship between biological parents and social parents. Hence, one participant stated: "In the end, I had two mommies: my aunt and my mother". Finally, one adoptive mother referred to herself as "mémère" with her adoptive children whereas she used the term "môman" to refer to their biological mother.

One participant asserted that the prohibition on incest would apply equally to the natural and adopted children of the same family, which tends to show that true bonds of filiation flow from the institution of *ne kupaniem/ne kupanishkuem*, at least where it lasts for a long time. However, one should stress that this issue does not arise frequently, since most adoptions take place within an extended family, resulting in uncles and aunts of the adopted child becoming his or her brothers and sisters. Other tales also allude to the principle

---

50 May 2014 (authors' file).

of equal treatment of natural and adopted children, which tends to show that certain adoptions create true bonds of filiation.

Contrary to adoption in Québec law, agreements with respect to the care of children or adoption are considered to be temporary. The return of the child to his or her original family is considered to be a normal, if not desirable, event. However, in most cases, this return is left up to the child and it was found that the child often tended to return to his or her adoptive family after a brief stay with his or her original family. Other children refused outright to return, even if urged by the adoptive mother. In point of fact, our findings were that adoptions were more permanent than the statements of the participants seemed to imply.

In brief, what one may refer to as "customary adoption" in Innu law is much more fluid than an adoption under Québec law, even if it may lead to the creation of true bonds of filiation. The creation of these bonds, however, does not take place at a specified moment in time; rather, it crystallizes gradually. Theoretically, it is temporary and reversible, although a child that has stayed a long time within the bosom of his or her adoptive family will often refuse to return to his or her original family. This flexibility will no doubt stand in the way of its recognition under Québec law, since it will be difficult to determine the "date of adoption", or the time as of which one can state that new bonds of filiation have been created. The participants we met simply do not approach the issue in these terms.

C. The State as Guardian of the Best Interests of the Child

For several decades, the child's best interests have become the overarching principle that informs all legislation with respect to children. Article 33 CCQ provides that "Every decision concerning a child shall be taken in light of the child's interests", a statement that is echoed in section 3 of the *Youth Protection Act*[51]. This includes decisions regarding adoption, which, theoretically, cannot be made taking into account the interests of the parents or the community, but only those of the child. Yet, it has been observed that Québec law on filiation, including adoption, is increasingly making room for the wishes of adoptive parents to have children and has incidentally be criticized for this reason [52]. The safeguarding of the best interests of the child is no doubt the main reason that can be relied on when seeking to rationalize the public policy nature of filiation and of

---

[51] *Supra,* note 19.

[52] See Marie Pratte, "La filiation réinventée : l'enfant menacé?" (2003) 33:4 RGD 541.

adoption: if the State is intervening between individuals and prohibiting private agreements, it is to ensure that parents are not making decisions based only on their personal interests, to the detriment of their children's. Thus, the State evaluates adoptive families[53] and, in youth protection matters, foster families, to ensure their ability to raise children.

Bill 113 would reiterate the gist of this principle, by requiring that the Aboriginal authority certifying a customary adoption make sure, "in light of an objective appraisal, that the adoption is in the interest of the child"[54]. It is difficult not to see in this requirement for an "objective" appraisal an expression of distrust on the part of Québec youth protection authorities towards customary adoption. The Bill would also add section 71.3.2 to the *Youth Protection Act*, which would prohibit the issue of any Aboriginal customary adoption as of the time the Director of Youth Protection receives a report on a child, except in the event of the Director's consent. Such a provision would, in practice, subject customary adoption to the youth protection system.

These restrictions on the recognition of customary adoption assume that the latter does not guarantee the best interests of the child in question. Is this in fact the case? Instead, our preliminary results highlight the fact that Innu law contains procedures that allow for the consideration of the best interests of the child. Hence, parents entrust the care of their child to another person chiefly because they themselves take cognizance of their inability to care for them adequately, often due to personal problems (alcohol or drug use, teenage motherhood, etc.), to the death of one of the parents, sometimes also because it is difficult to bring a very young child into the woods, or for employment-related or education-related reasons. One participant described this situation as follows:

> [S]ometimes it is precisely because the child's parents are aware of their inability to adequately care for him or her that they decide to place him or her with people who will better be able to do so. A mother cannot give what she does not have. Sometimes, she does not have the requisite health or psychological balance to raise the child adequately. It is an act of love and humility to admit one's inability to care for one's child. It is often because the mother is not able to care for herself that she acts this way.

---

[53] The legal basis for this practice is unclear. Bill 113 would add to the CCQ a new Article 547.1, which would provide this explicitly (see Bill 113, *supra,* note 15, s. 13).

[54] *Ibid*, s. 10.

It appears that these reasons justifying a transfer of custody represent one way to give concrete effect to the child's best interests principle. In this respect, the institution of *ne kupaniem/ne kupanishkuem* would somehow represent a manner for Innu society to ensure the protection and welfare of its children.

Moreover, the participants assert that the transfers of the child between his or her original family and adoptive family take place in keeping with the wishes of the child. In point of fact, the child's autonomy and respect for his or her decisions[55] represent important values, as emerged from our interviews. They are related to the broader principle of non-interference, which is common to many Aboriginal societies[56]. Pursuant to this principle, it is inappropriate to prescribe a course of conduct or to criticize the actions of another person; a certain amount of deference is therefore necessary when one seeks to influence the conduct of another.

This is especially apparent in the case of a return to the original family, as discussed above. This return often takes place at the end of childhood or at the beginning of adolescence and the child is then in a position to assess what is most suitable, which no doubt explains the fact that many children prefer to remain with their adoptive family. Even where children are younger, their parents will take into account the preferences of the child: for example, where a child of tender years reacts poorly to a return to his or her original family, the original parents take note thereof and return the child to the family that cared for the child for some time. One participant described the circumstances of her "adoption" by her grandparents in the following manner:

> When I was born, my parents lived with my grandparents. When I was one year old, they got their house and moved, taking me with them, but, apparently, I kept returning to my grandmother's. When my grandparents saw that I did not want to leave with my true parents, I stayed with my grandparents. I even believe that I was the one to ask my grandmother to adopt me!

One participant claims to have "decided" to stay with her adoptive parents, even though she was only a few months old at the time. Even if this seems implausible, it reflects the Innu's belief in the autonomy and decision-making power of the child. We even witnessed a case of an eight year-old girl, who, upon seeing youth protection services arrive, herself arranged her own adoption by her aunt.

---

[55] See Christiane Guay, "Les familles autochtones : des réalités sociohistoriques et contemporaines aux pratiques éducatives singulières" (2015) 141 Intervention 17 at pp. 23–25.

[56] See Lacasse, *supra,* note 32 at pp. 58–60.

Whatever one may think of a child who cannot yet speak making a choice or expressing his or her wishes, these assertions no doubt reflect the main concern of Innu parents for the welfare of children. Stating that a one year-old child has decided to stay with his or her grandparents is nothing short of acknowledging that the best interests of the child require that the latter remain with the grandparents. The debate on the child making a choice and on the parents abiding by that choice is, therefore, in point of fact, a debate on the best interests of that child.

One of the fears sometimes voiced when the suggestion is made to recognize Aboriginal customary adoption is that the latter not be carried out exclusively in the parents' interests as opposed to those of the child. This issue revolves around the motives for the adoption. Yet, the grounds mentioned by most participants are related to the values of sharing and mutual aid. In this sense, adoptive parents care for children in order to help the original parents who are unable to do so (whether due to personal problems resulting from alcohol or drug addiction, a parent moving away for employment or educational purposes, even the death of one of the parents, etc.) and in order to help the children themselves. One participant claims that mutual aid is one of the greatest values that inform her life and that it was handed down to her by her grandmother, who raised her. The significance attaching to sharing and mutual aid is compatible with the results of existing research conducted on the Innu[57].

Based on research conducted on site at the outset of the 1970s, Robert Lanari asserted that adoption among the Innu resulted from the "social duty to give back", within a general system of reciprocity. In this sense, adoption allegedly enabled adopters to enhance their social status; it would also allow infertile couples to have children[58]. According to Lanari, adoption was chiefly designed for the benefit of adopters. However, the stories we have collected make no mention of such motives. Some participants refer to the existence of a tradition whereby a woman gave her firstborn to her own mother. The tale of one parti- cipant, who was the eldest of her siblings and raised by her grandparents, might be consistent with this tradition, although the participant made no mention of it. Aside from this exception, no participant was adopted for this reason and this tradition was referred to as being a thing of the past.

---

[57] See *ibid* at pp. 56–57, 78–80.

[58] Robert E. Lanari, *L'adoption chez les Amérindiens Montagnais-Naskapis, North West River Labrador*, Master's thesis in anthropology, Memorial University in Newfoundland, 1973 at pp. 141–45.

Therefore, we can see that the Innu legal institution of *ne kupaniem/ne kupanishkuem*, it its own way, ensures the consideration and protection of the best interests of children. It is therefore unwarranted to exclude the application thereof outright in those situations falling under the Québec youth protection system.

Conclusion

The preliminary results of our research already allow us to take note of the originality of the Innu legal institution of *ne kupaniem/ne kupanishkuem*, that non-Innu persons call customary adoption, and of its irreducibility to an adoption under Québec law. Indeed, at the risk of grossly oversimplifying, one could assert that Innu customary adoption is a gradual process, based on a tacit or explicit agreement between the original and adoptive parents, that may or may not lead to the creation of additional bonds of filiation, but never to a severance of the original bonds of filiation.

Even if the tabling of various bills with a view to ensuring recognition of customary adoption under Québec law is laudable, the tendency to seek an equivalent of an adoption under Québec law and to set conditions in order to guarantee compliance with the best interests of the child leads to a system that risks rendering such recognition illusory or forcing Aboriginal peoples to change their laws with respect to family relations so as to make them consistent with the interface that Québec law will provide. Will the Innu want to embark on the latter path? That is a matter for them to decide.

Other avenues of resolution can, however, be contemplated. It is not necessary to make customary adoption fit into the mould of Québec adoption governed by the Civil Code. One could, in this respect, follow the model of ancestral rights to land. The latter do not fall within the categories of the Civil Code in matters of property rights. Instead, they are overlaid on the rules of the Code and even take precedence over the latter due to their constitutional protection. Hence, the rules of Québec law are required to adapt to the existence of ancestral rights, and not the other way around. In family matters, that would mean that concepts such as parental authority or guardianship (wardship) could be resorted to to reflect the Innu legal institution of *ne kupaniem/ne kupanishkuem* where the latter does not, or does not yet, result in the creation of new bonds of filiation.