Immigration and Adoption of Children under *Kafálah*: A judicial journey

Julie RANGER, Valérie SCOTT and Denise HELLY

Abstract

*Kafálah* (the commitment to voluntarily take care of the maintenance, education and protection of a minor in Muslim law countries) is an emerging legal issue in Québec that has repercussions on its immigration and adoption systems. *Kafálah* does not sever biological bonds of filiation. Therefore, children under *Kafálah* who attempt to immigrate to a country that only recognizes plenary adoption (which on the contrary severs biological bonds of filiation) or people attempting to adopt them face many legal difficulties. That is the current situation in the province of Québec. This article provides an overview of the current adoption and immigration laws applicable in Québec and explains their interaction with the notion of *Kafálah* by providing a concrete jurisprudential illustration. The authors suggest possible solutions by looking at the following notions: the best interest of the child, foreign law and international agreements, and finally, reasonable accommodation.
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1. Introduction

In recent decades, adoption laws have significantly evolved to better address the needs of children and further protect their interests. Similarly, national and international systems have been implemented for the protection of orphaned and/or abandoned children. For example, in 1993, the Hague Conference on International Law adopted the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter the Hague Convention on Adoption). The purpose of this convention was to address the "dramatic increase in international adoption since the late 1960’s to such extent that intercountry adoption had become a worldwide phenomenon involving the migration of children over long geographical distances and from one society and culture to another". The Hague Convention on Adoption was drafted in the broad sense of providing the international community with the legal tools necessary to handle the increase. While many considered it to be a major improvement in the field of adoption, it was nonetheless criticized by those who believed that intercountry adoption was not always in the best interest of the child. Indeed, in reac-

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1. Support for this research was provided by a grant from SSHR in 2007 entitled “Différence de valeurs et de normes. Des pratiques familiales musulmanes selon des juges au Canada, en Espagne et au Royaume Uni.” The authors would like to express their gratitude to professor Alain Roy who provided a great support throughout this journey as well as to professor Pascale Fournier for her help. The authors also wish to thank Carle Evans for her help with the grammar. The views expressed in this article are those of the authors and do not reflect those of their employers.

2. One of the main reports leading to the adoption of the Hague Convention of May 29th on Protection of Children and Co-operation in respect of Intercountry Adoption was done by J.H.A. van Loom. In his report, he underlines that child trafficking represents the main form of abuse in intercountry adoption. Reader can refer to David M. Smolin, “Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption” (June 2010), online: Hague Conference on Private International Law <http://www.hcch.net/upload/wop/adopt2010id01e.pdf>.


5. Some argue that the procedures of the Hague Convention on Adoption have encumbered the process with additional delays and hurdles which have resulted in a decrease in the number of international adoptions. Others argue that the Hague
tion to the enactment of the Hague Convention on Adoption, the 1989 United Nations Convention on the Rights of the Child (hereinafter CRC)6 states in its article 21 that “intercountry adoption may be considered as an alternative means of a child’s care if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child’s country of origin”.7 Currently, intercountry adoption is not only criticized by many, but is also prohibited in some countries. For example, Afghanistan, Saudi Arabia, Bangladesh, Egypt, Pakistan, Iran, Iraq, Morocco, and Algeria prohibit adoption as defined by the Hague Convention on Adoption.8 The prohibition is generally based on an interpretation of the Qur’an9 and a particular definition of the concept of family, the latter being regarded as a matrimonial union between a man and a woman from which children, preferably males, are born to ensure continuity of the patriarchy.10 In this context, the fiction of adoption, breaking the bonds of filiation and generating new bonds, would distort the traditional notion of family.11 However, this does not mean that Muslim law countries that prohibit adoption do not care for abandoned or orphaned children;
indeed, other mechanisms ensure that the rights of those children are respected. One of these mechanisms is Kafalāh. The latter is defined under Algerian law as the “commitment to voluntarily take care of the maintenance, the education and the protection of a minor, in the same way that a father would do for his son”.12 In Bangladesh or Pakistan, it is known as “guardianship”. Although the position of Muslim law and the rules of Kafalāh can vary depending on the country, as can the branch of Muslim law that prevails, the integration of customary practices13, and the fact that the child under Kafalāh is an orphan or has been abandoned, what mainly characterizes Kafalāh is that it does not sever filial ties with the biological family as does plenary adoption.14

The distinctions between these two mechanisms are significant enough that it is difficult to attempt any reconciliation. For example, a person living in a country party to the Hague Convention on Adoption, wishing to “adopt” a child from a country that only allows Kafalāh, will most probably face a conundrum of difficulties. This is the situation that currently prevails in Québec,


13. Pearl and Menski 1998, supra, note 9 at 29-32 and 408 where the authors mention that some scholars, including themselves, argue that adoption is allowed under Muslim law. At para 33: “In South Asian laws, adoption among Muslims is legally possible under certain circumstances”; see also Women Living under Muslim Laws, “Knowing our Rights: Women, Family, Laws and Customs in the Muslim World”, (2006) online: Women Living Under Muslim Laws <http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/knowing%20our%20rights/kor_2006_en.pdf> at 232-234, mentioning that certain countries have been influenced by Hindu practices or customary laws and now practice adoption. The authors refer to certain parts of Pakistan, Indonesia and Sri Lanka; Kamran Hashemi, Religious Legal Traditions, International Human Rights Law and Muslim States (Leiden: Martinus Nijhoff, 2008) at p. 24: in some Islamic communities of South Asia, adoption is practiced as an act towards which religion is indifferent. [Hashemi]

14. Generally, a child under Kafalāh retains his family name and still inherits from his biological parents. Kāfil (name given to the person taking charge of the child) can provide by will that a maximum of one third of the Kāfi’s assets go to his child under Kafalāh unless consent from the other heirs is obtained. However, these rules can vary depending on the country. For further readings on Kafalāh and its legal effects see A. Quiñones-Escamez et al., “Kafala y adopción en las relaciones hispano-marroquíes”, (2009) online: Fortalecimiento y Modernizacion de la Administracion de Justicia en Marruecos <http://www.fiiapp.org/uploads/publicaciones/kafala_y_adopcion.pdf> [A. Quiñones-Escamez]; Shabnam Ishaque, “Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in the Context of a Child’s Right to an Identity”, (2008) 22 Intl JL Pol’y & Fam. 393; Pearl and Menski 1998, supra, note 9.
Canada. Thus, the following case, relating to the story of “X”, clearly portrays these difficulties. X is a Canadian citizen of Moroccan descent who has been trying since 2007 to get a child he took under Kafálah in Morocco (“Y”) to come and live with him and his wife in Québec. After many years, X was finally able to sponsor the child in 2011.

The authors’ goal is to present a comprehensive overview of the subject and to explore possible avenues that might offer a solution to the current situation prevailing in the province of Québec. This article first describes the very unique journey of X. X has attempted immigration as well as adoption procedures in all available fora. It is therefore an interesting case, as it provides us with an extensive overview of the difficulties surrounding a case of Kafálah in the Québec immigration and adoption processes. It also brings to light the difficulties faced by judges who find themselves in a legal “cul-de-sac” although they might be sympathetic to the cause.

The key aspects of adoption law, immigration law, and foreign law pertaining to the adoption of children under Kafálah in Québec have not, to the best of the authors’ knowledge, been presented in public literature. Thus, the article goes on to explain the current adoption and immigration framework that X faced in Québec, taking into account the impact of Canadian federal laws due to the country’s constitutional structure. The authors then go on to suggest possible solutions to the problem of Kafálah regarding adoption in Québec. According to the authors, bilateral agreements with Muslim law countries such as Morocco and changes to legislation would be the most viable solutions. However, the article also explores three other avenues that could potentially lead to a solution: the mandatory proof of the foreign law, the child’s interest as a determining factor and the possibility of granting reasonable accommodation.

The article focuses only on the situation in Québec because, in recent years, it is the Canadian province that has produced the most jurisprudence on the matter.

15. The reader can refer to the Secrétariat à l’Adoption internationale’s website (the secretary for international adoption) to read their section on adoption and Kafálah where they underline the impossibility to adopt a child under Kafálah: <http://www.adoption.gouv.qc.ca/fr_adoption_kafala.phtml>.
2. The judicial journey of X

Adoption procedures are largely confidential and the anonymity of the parties is very important, therefore, out of respect for the parties, we will use “X” and “Y” to refer to the claimant and the child of whom he is the caretaker under Kafálah. The facts stated in this article were taken from published decisions. It is also noteworthy that for several procedures, X was not represented by an attorney, therefore, a number of the arguments he put forward have no legal basis.

X is, as mentioned above, a Canadian citizen originally from Morocco. He married a Moroccan national in 1989 and the latter came to live with him in Canada, therefore both of them have dual citizenship. On October 2, 2006, X and his wife took Y, an abandoned Moroccan child, under their care and obtained a Kafálah from a first instance court in Morocco. On October 10, 2006, the court authorized X and his wife to give Y their family name. On October 23, 2006, X made Y his heir and three days later, on October 26, 2006, the above court allowed Y to leave the country and to live permanently outside of the Kingdom of Morocco. Afterwards, X entrusted his brother-in-law, who lives in Morocco, with the care of Y as he initiated procedures for both the immigration of Y and for his adoption under Québec law.

2.1 Immigration procedures undertaken by X

X undertook immigration procedures for Y in both the federal and provincial jurisdictions. On September 12, 2007, Citizenship and Immigration Canada (CIC) declared itself satisfied that Y met all applicable admissibility criteria. The application then

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17. Some of the decisions were not published.
20. A c. Québec, supra, note 19 at para. 5.
21. Adoption – 08581, supra, note 18 at paras. 16-17.
22. Adoption – 08581, supra, note18 at para. 18.
25. MS v. Quebec (Procureur général), 2009 QCCS 3790 at para. 24, [2009] R.D.F. 644, [MS 2009]. There is no indication in the decision as to which procedure the federal government declared itself “satisfied” of. However, the decision mentions that it was the form IMM1344 that was received by the Québec immigration authorities.
followed the regular course of events and went on to the Direction de l'immigration familiale et humanitaire (Government of Québec) (DIFH) who rejected it on September 25, 2007. The DIFH applied the federal definition of “dependent child” and concluded that Y was neither a “dependent child” nor a member of the family according to the Regulation Respecting the Selection of Foreign Nationals. The DIFH further outlined that Y was not an “adopted child” under the law of Québec because his file did not contain a “non-opposition form” for his adoption from the Health and Social Services Minister of Québec. Following the DIFH’s decision, X filed a request for administrative review of this decision by the Tribunal Administratif du Québec (the Administrative Tribunal of Québec-TAQ). The latter rendered its decision on May 28, 2009, confirming the DIFH’s position. The administrative judge underlined that there was no adoption decision in the claimant’s file and therefore, Y was not an adopted child according to

from the federal immigration authorities. This form is used by the federal authorities to determine if the person who wishes to sponsor a dependent child qualifies to be a sponsor. At this stage, the identity of the child does not even need to be known, such that there can be no problem caused by a Kafaláh order. After the federal government declares itself “satisfied” that the applicant fulfills the criteria to be a sponsor, the case proceeds to the Québec government. For more information about the sponsorship process, see Citizenship and Immigration Canada, “Sponsorship adopted children and other relatives – The Sponsor’s guide (IMM 5196 Temp)”, Citizenship and Immigration Canada (7 June 2012), online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/information/applications/guides/5196ETOC.asp>.

26. According to article 14 of the Canada-Québec Accord Relating to Immigration and Temporary Admission of Aliens, (5 February 1991) [Canada-Québec Accord]: “Canada has sole responsibility for the establishment of selection criteria for family class immigrants and Québec shall be responsible for the application of the criteria, if any, with respect to such immigrants destined to Québec”. Therefore, the definitions of “family member” and “dependent child” found in the Regulation respecting the selection of foreign nationals, CQLR, c. I-0.2, r. 4 [Qc RSFN] are the same as those found in the Canadian regulation. Because Québec is in charge of applying the federal definition, it can rule on whether or not a child is part of the family reunification class. The notions of “dependent” child” and “family member” are explained further in the text in the section about immigration law. Basically, a dependent child is the biological child or the adopted child of the parent and a family member is a spouse, the dependent child of the person or his/her spouse and/or the dependent child of a dependent child. The dependent child is not a child under tutorship or guardianship.

27. Letters of non-opposition are essential in the adoption and immigration procedures. In Québec, the Secrétariat à l’adoption internationale, an entity within the Health and Social Services Ministry, is responsible for delivering those letters. See Citizenship and Immigration Canada, “OP 3 – Adoptions” Citizenship and Immigration Canada <http://www.cic.gc.ca/english/resources/manuals/op/op03-eng.pdf>; Qc RSFN, supra, note 26, art. 24.1; Immigration and Refugee Protection Regulation, SOR/2002-227, art. 117(1)(g)(iii)(B) [CAN Immigration Reg].

28. MS 2009, supra, note 25 at para. 27.
the immigration laws. X responded to this decision by filing a request for judicial review of the decision by the Superior Court of Québec. At the time of writing, the matter may still be pending.

Simultaneously, X initiated procedures requesting that the Superior Court recognize Y as his dependent child according to the immigration laws of Québec, to grant him parental authority over Y and to designate him as Y’s legal tutor. In the event that the first motion would be dismissed, X also introduced a motion for a ruling that the provisions preventing him from living with Y are unconstitutional. On February 3, 2011, Judge André Denis rendered his decision. He underlined his sympathy, but pointed out that the case could not be resolved by the judicial system and he called upon the political and administrative authorities to study the case again in light of his judgment.

2.2 Adoption procedures undertaken by X

Since it first appeared that the immigration of Y would only be possible if he was considered an “adopted child”, X also undertook adoption procedures under Québec law. Thus, X attempted two different adoption procedures: first, by seeking the recognition of the Kafâlah decision as an adoption decision and second, by requesting an order of placement for Y in order to adopt him afterwards.

With respect to his first procedure, X obtained recognition by the Québec Superior Court of the decision rendered in Morocco that gave him a Kafâlah for Y. Judge Carole Julien based her decision on articles 3155 to 3163 of the Civil Code of Québec (C.C.Q.), which lay out the rules for the “Recognition and enforcement of foreign decisions” by Québec courts. In her judgment dated May 4,
2007, Judge Julien recognized the Moroccan decision granting X and his wife the Kafálah of Y as well as the Moroccan decision allowing them to travel and live abroad with Y. She did not, however, recognize these said decisions as equivalent to an adoption decision. Finally, Judge Julien declared the decisions enforceable in Québec and ordered a provisional execution notwithstanding appeal, therefore allowing the decisions to be effective immediately. Sadly, the judge did not elaborate on how they should be executed.

On May 4, 2007, with this decision in hand, X asked for the execution of the judgment rendered by Judge Julien. Then, on July 24, 2007, the Court of Québec – youth division declared that it did not have the jurisdiction to order the execution.

X then filed a motion for recognition of an adoption decision based on Judge Julien’s May 4, 2007 judgment. Once again, X’s motion was dismissed at the Court of Québec – youth division by Judge Mireille Allaire on October 4, 2007.

X filed a third demand in his quest to obtain the adoption of Y through the recognition of the decisions rendered in Morocco. On May 13, 2008, Judge Robert Proulx came to the conclusion that X had failed to demonstrate that the Moroccan decisions were equivalent to an adoption decision respecting Québec’s regulations on adoption.

On May 14, 2008, X tried a different strategy and filed yet another adoption claim, this time asking the tribunal to grant him an order of placement for Y. The main difference between the two procedures, as it will be explained below, is that the first one is the international adoption procedure (through the recognition of a foreign adoption procedure) and the second one is the internal procedure (through the order of placement). Most of the time, the

36. Art. 497 C.C.P. Usually when an appeal is regularly brought, it suspends execution of the judgment.
37. As mentioned in a previous footnote, if a child under guardianship/tutorship is not considered a dependent child, how can a judgment allowing the child Y to come and live in Québec be enforced?
38. This decision was not published and we were denied access to it because of the confidential nature of the adoption procedures. This procedure is mentioned in Carole Julien’s decision: MS 2009, supra, note 25 at para. 16.
39. We did not have access to these two decisions of the court of Québec – youth division. This is why we do not discuss the substantive reasons in these decisions.
40. Adoption – 08581, supra, note 18 at para. 54.
distinction rests on the domicile of the child as it is considered an international adoption when the child is domiciled outside Québec and an internal adoption procedure when the child is domiciled in the province. If granted, the internal adoption procedure would allow X to adopt Y after a certain period of time (normally 6 months). However, this procedure was suspended as X went back to Morocco in order to obtain a ruling by a Moroccan tribunal (Ordonnance 63/08, November 19, 2008) recognizing that Y’s residence was in Québec and demanding that his situation be regularized by his Kâfil.41 The idea behind the quest for this new ruling was to help X demonstrate that Y’s residence, for the purpose of the adoption, was undoubtedly in Québec. Upon his return to Canada, X filed a motion with the Québec Superior Court to have this last ruling recognized and made enforceable in the province. The motion was again heard by Judge Carole Julien of the Superior Court on April 2, 2009 and her decision was rendered on July 13, 2009. Judge Julien recognized the ruling, made it enforceable in Québec and ordered its provisional execution.42 Unfortunately, she once again omitted to indicate how the child’s situation was to be regularized.

Following the aforementioned ruling, the suspended adoption placement procedure for Y resumed. On October 20, 2010, Judge Robert Proulx of the Court of Québec ruled against an order placing Y with the claimant X and his wife. In his decision, the judge expressed great empathy for the petitioner, but concluded that the adoption laws in Québec prevented him from granting the order of placement. The judge further underlined that, for the purposes of his adoption, the domicile of Y was in Morocco43 and therefore, the child was subject to the rules of international adoption. Unfortunately, because Morocco does not allow adoption44, no valid consent for the adoption of the child could be given45 and the latter might never be admissible for adoption in his country of origin, let alone be adopted by X. Granting the adoption would give Y a new filiation and the latter would be unrecognized by Moroccan

42. MS 2009, supra, note 25 at paras. 95-98.
43. Adoption – 10100, 2010 QCCQ 10528 at para. 74 [Adoption 10100]. In derogation to Québec’s common general law (Art. 80 of the C.C.Q). For further explanations, see the section about the adoption legislation of this article.
44. Art. 149 Code de la famille et ses textes d’application, BO No. 5358 du 6/10/2005 [Code de la famille Marocain]: “L’adoption (Attabani) est juridiquement nulle et n’entraîne aucun des effets de filiation parentale légitime”.
45. Code de la famille Marocain, supra, note 44 at para. 105.
law which disallows the breaking of biological filiation and the creation of new ties.\textsuperscript{46}

X decided to appeal Judge Proulx’s judgment and was successful at the Québec Court of Appeal on June 15, 2011.\textsuperscript{47} Unanimously, the Court of Appeal granted X Y’s placement in order for Y to be adopted by X and his wife. The Court further ruled that for immigration purposes, Y was the dependent child of X and his wife. Judge Vezina, writing for the Court, invoked several reasons to justify the Court’s order of internal placement for adoption. First, he sought to explain why the Court did not require the biological parents’ consent to plenary adoption. Since an illegitimate child has no paternal filiation under Moroccan law and since Y’s biological mother abandoned him (a reason for a finding of deprivation of parental authority), Judge Vezina came to the conclusion that the tutors could themselves consent to their own request to adopt the child X. He further ruled that the Moroccan authorities had allowed the adoption of Y in Québec and implicitly gave their consent through the \textit{Kafálah} order, the authorization to travel with Y to Québec, and their request for the child’s status to be regularized in Québec.

Following this, Judge Vezina entered into a more political discussion. He underlined that, in his opinion, the case of X and his wife is not an international adoption procedure per se, but rather the result of two distinct procedures: one carried out in Morocco in their capacity as Moroccan citizens and another in Québec in their capacity as Canadian citizens. The Moroccan authorities gave X and his wife the \textit{Kafálah} of Y because they were Moroccan citizens and satisfied all of the requirements under Moroccan law. Judge Vezina argued that just like any Québec parent would expect the Moroccan authorities to respect an adoption order pronounced in Québec, X and his wife could expect the Québec authorities to respect the Moroccan decision and make it enforceable in Québec. Judge Vezina opined that the C.C.Q. should not be applied in a way that would deprive an individual of the rights pertaining to his citizenship of origin. Judge Vezina also underlined that flexibility should be shown in applying the C.C.Q. when it is obvious that the claimants are in good faith, when the procedures have been conducted in the best interest of

\textsuperscript{46} \textit{Adoption – 10100}, supra, note 43 at para. 86.
\textsuperscript{47} \textit{Adoption – 11117}, supra, note 16.
the child and when the overall objectives of the law have been respected.

The conclusions of the Court of Appeal seem to be limited to this particular case because, as Judge Vezina mentioned, the case is so marginal that the chances of the decision creating a precedent are slim. Judge Vezina concluded that even if a precedent was created, it would only be for a short time since the legislator has heard numerous recommendations pertaining to the Draft bill to amend the Civil Code and other legislative provisions as regards adoption and parental authority. The draft bill did not introduce a solution to this specific situation, but the bill that followed did. Indeed, Bill 81 introduces an interesting new rule at its article 35:

35. The Code is amended by inserting the following articles after article 564:

564.1 A minor child domiciled in a State whose laws prohibit or do not recognize adoption or placement for adoption may not be adopted in Québec unless

(1) the child has no established bonds of filiation with either his or her father or mother, or both the child's father and mother are deceased;

(2) the child is in the care of a public youth protection authority in that State;

(3) a competent judicial authority in that State has established a form of tutorship for the child's benefit by entrusting the child to the adopter;

48. Adoption – 11117, supra, note 16 at para. 94.
49. Draft Bill for the Act to amend Civil Code and other legislative provisions as regards adoption and parental authority – Draft Bill, 1st Sess., 39th Leg., Quebec, 2009, art. 10(3). As of August 2012, the Draft Bill had become a Bill: An Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority, 2nd Sess., 39th Leg., Quebec, 2009 [Bill]. However, since elections were started in the province of Quebec and were held on September 4, 2012 the Bill was abandoned. On June 14th 2013, Minister St-Arnaud introduced a new version of the Bill (Bill 47 An Act to amend the Civil Code and other legislative provisions as regards adoption, parental authority and disclosure of information) [Bill 2] that does not contain an equivalent to article 35 mentioned above. We will need to see how the bill evolves but for now, the adoption of certain children under Kafálah would not be allowed
50. Bill, supra, note 49, art. 35.
(4) the child’s definitive transfer outside that State has been authorized by a competent authority;

(5) that State or the competent territorial unit has been designated by the Government on the recommendation of the Minister of Health and Social Services; and

(6) any other condition determined by regulation by the Minister of Health and Social Services has been met.

This article could be interpreted so as to allow children under Kafálah to be adopted in Québec if all of the aforementioned conditions are respected. As can be seen, the article appears to address the situation of children that have been abandoned by their parents, for example when both are deceased or because the child was born out of wedlock and the mother abandoned the child due to social stigma. Because the child is now in the care of the state, the issue of parental consent to plenary adoption is uncontentious. As to the state’s consent, it is implicitly required under this article since the state of origin must authorize the transfer of the child. This is a very interesting solution that would solve many cases of Kafálah, with the exception of those that are intra-familial. In the particular case of Y, it is unclear whether this new disposition could have made a difference because, although Y was abandoned by his mother, we do not know if there was an established filiation with her and therefore, whether or not the new legislation could have applied to his case. Many questions remain however as to how this new disposition would be applied in Québec. For example, how would the immigration regulations be applied? Would the child be adopted once he or she was in the territory of Québec? If so, would the federal government be necessarily involved?

In the end, many questions remain: How will other cases involving children under Kafálah be treated by Québec Courts? Will other children be considered adoptable in Québec or, as underlined by the Court of Appeal, was the case of Y a “marginal” one? Will the government of Québec change its adoption legislation to issue non-opposition letters, necessary for children under Kafálah to be adopted in Québec? If not, what other options are open to a Kâfil? What is the extent of the Court’s responsibility?

In the two following sections, the authors explain current immigration and adoption legislation in order to understand the dynamic that exists between the two systems and the reasons why
it was so difficult for Y to be adopted by Québec residents and/or to be considered a «dependent child” for immigration purposes.

3. Legal systems

For a child under Kafálah to immigrate to Québec, he or she needs to satisfy the requirements of both the adoption laws of Québec and the immigration laws of Québec and Canada.

3.1 Adoption Law in Québec

3.1.1 Preliminary remarks about the adoption system in Québec

Adoption in Québec is governed by the Civil Code of Québec (hereinafter, C.C.Q.) and the Youth Protection Act. It is also regulated by two international conventions: the Convention on the Rights of the Child (hereinafter CRC) ratified by the Canadian government on December 13, 1991 with the provinces’ approval, and the Hague Convention on Adoption that came into effect in Québec on February 1, 2006. The type of adoption that is currently recognized in Québec is plenary adoption. The latter severs biological bonds of filiation and creates new bonds with the adoptive family.

As previously mentioned, there are two different adoption regimes in Québec: the regime governing internal adoption for children domiciled in Québec and the regime governing international adoption, for children domiciled abroad. In both cases, the C.C.Q. indicates that the adoption must be done in the child’s best interest and under the conditions prescribed by law. Under the

51. Youth Protection Act, CQLR, c. P-34.1 [Youth Protection Act].
52. C.R.C., supra, note 6 at 3.
55. Art. 577 C.C.Q.
56. Art. 543 C.C.Q. (Some examples of the requirements of the law: conditions concerning the adopter; the rules governing the consent of the biological mother and father; etc. Claire Bernard & Danielle Shelton, Les personnes et les familles, t. 1, 2e ed. (Montréal: Adage, 1995) at 1 [Bernard & Shelton]).
regular C.C.Q. regime, the domicile of the unemancipated minor is the domicile of his tutor. Most cases of Kafálah in Québec raise the issue of the child’s domicile as the Kuffal argue that being the tutors of the child under Kafálah, the adoption procedure should be an internal one. They also argue that, as tutors, they can consent to the adoption of the child. If a Court accepts such an argument, the law of the country of origin and the Québec provisions on international adoption are at risk of being overruled. In an attempt to resolve this issue, certain judges in Québec came to the conclusion that a child can have two domiciles: one where the child exercises his civil rights and one for the purpose of his adoption. While one case exemplifies a legitimate exception to such a proposition, the authors are of the opinion that the country of origin should be considered the domicile of the child for the purpose of his adoption. This idea is supported by the rules laid out in the Hague Convention on Adoption, as those rules were intended to strengthen the rights and duties of both countries involved in the international adoption process.

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57. Art. 80 C.C.Q.
59. Kuffal is plural for Kâfil.
61. See e.g. Droit de la famille – 3403, supra, note 60; A.B.M., supra, note 60; Adoption (En matière d’), 2006 QCC 8524, [2006] R.J.Q. 2286 (C.Q.) [Adoption 2006].
62. In Adoption 2006, supra, note 61, a Kafalah was granted to the Kuffal for a child in 1996 in Algeria. In 2002, the Kuffal and the child under Kafálah immigrated to Québec. In 2006, they filed to adopt the child according to Québec law. The government argued that, for the purpose of her adoption, the domicile of the child X remained in Algeria and, therefore, the adoption was subject to the rules of the international procedure. However, the court ruled that the child was admissible for adoption through the internal procedure. The court underlined that the child and her Kuffal had always had the same domicile in contrast to other traditional international adoptions. Moreover, the court determined that, for the purpose of her adoption, the domicile of the child X had validly changed and was now Québec. The court declared the child admissible for adoption under the internal procedure.
63. Adoption 2006, supra, note 61 at para. 32. See for example ss. 2 and 16 of the Hague Convention on Adoption, supra, note 3. Notably, s. 2 provides that the “Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin." Under s. 16, it is the state of origin that must determine the adoptability of the child. Therefore, even when the child now resides in the receiving state and will be adopted there, the rules of the state of origin continue to apply to the determination of adoptability. A fortiori, one could argue that a change of domicile through legal fiction should not be a way to avoid the application of the rules of the state of origin.
3.1.2 Québec’s adoption regimes

The next sections give an overview of both adoption regimes (internal and international) emphasizing the differences between the two.

3.1.2.1 Internal adoption

If the child is domiciled in Québec, the Court must ascertain whether valid consent to his adoption was given by the child’s mother and father or tutor or make sure that the child has been declared legally eligible for adoption.\(^64\) In cases where valid consent was given, the Court grants an order of placement for the child in favour of his adoptive family, a necessary step if the child is domiciled in Québec.\(^65\)

The adoption may only take place if the child has lived six months or longer with his adoptive parents.\(^66\) At the end of this period, an application for adoption is filed and ultimately, an adoption judgment is rendered.\(^67\)

3.1.2.2 International procedure

If the child is domiciled outside Québec, the adoption procedure differs depending on whether or not the Hague Convention on Adoption\(^68\) was ratified by the child’s country of origin.

The adoption can either be pronounced in Québec or in the country of origin of the child if the country of origin is not party to the Hague Convention on Adoption (Morocco, for instance\(^69\)). The process will depend on the country of origin’s law. In any case, the basic requirements remain the same: the adoption arrangements must be made by a body certified by the Minister of Health and Social Services in accordance with the Youth Protection Act unless

\(^{64}\) Art. 544 C.C.Q.
\(^{65}\) Bernard & Shelton, supra, note 56 at 7.
\(^{66}\) Art. 566 C.C.Q.
\(^{67}\) Art. 573 C.C.Q.
\(^{68}\) Hague Convention on adoption, supra, note 3.
\(^{69}\) Morocco is not part of the Hague Convention on Adoption, supra, note 3. Nor are most Muslim countries from which children under Kafaláh come (ex: Algeria, Pakistan, Bangladesh). For a list of the Convention’s member states see: <http://www.hcch.net/index_en.php?act=conventions.status&cid=24> (last consultation: July 29th 2010).
an order from the Minister published in the *Gazette officielle du Québec* provides otherwise\footnote{Art. 564 C.C.Q. and *Youth Protection Act*, supra, note 51 at para. 2.} and the adopter must undergo a psychological assessment as specified by the conditions in the *Youth Protection Act*.\footnote{Art. 563 C.C.Q. and *Youth Protection Act*, supra, note 51.}

If the law of the country of origin requires that the adoption be granted in Québec, the adopter must apply for an order of placement as it is the case for internal adoption (jointly with the Director of Youth Protection).\footnote{*Youth Protection Act*, supra, note 51, art. 825 C.C.P.; *International Adoption Regulation*, CQLR, c. P-34.2, r. 0.01 and Alain Roy, *Le droit de l’adoption au Québec* (Montréal: Wilson & Lafleur, 2006) at 99 [Roy].} The court will need to ensure that the applicable domestic and foreign rules are respected. Domestically, the C.C.Q. requires the Court to verify that the prescribed consent has been validly given by the biological parents of the child or, if they are both deceased, by the tutor of the child.\footnote{Art. 553 C.C.Q.} This consent must have been given for the purpose of a plenary adoption.\footnote{Art. 568 C.C.Q.} At the end of the six-month probation period\footnote{Art. 566 C.C.Q.}, an application for adoption is filed and, ultimately, an adoption judgment may be rendered.

On the other hand, if the foreign law requires that the adoption be granted in the child’s country of origin, the adoption decision will need to be recognized in Québec.\footnote{Art. 565 C.C.Q.} In addition to ensuring that all of the aforementioned basic requirements are fulfilled, the Court will have to ascertain that the rules concerning “consent to adoption and eligibility for adoption have been observed\footnote{Art. 574 C.C.Q.} and that consent has been given for the purpose of a plenary adoption (i.e. an adoption resulting in the dissolution of the pre-existing bond of filiation between the child and his family of origin). Once recognition is granted, the foreign adoption judgment has the same effect as a decision rendered in Québec as of the moment it was rendered.\footnote{Art. 581 C.C.Q.}

Article 3092 C.C.Q. stipulates that the parents’ consent and the admissibility criteria of the child for adoption are those pro-
vided by the law of the child’s domicile. Therefore, if the child’s country of origin does not recognize or allow for intercountry plenary adoption, the parents’ consent cannot be validly given.

The most common argument put forward by Québec governmental authorities in past Kafálah cases was that Morocco did not allow adoption. The case of Y seems to contradict this apparent prohibition on adoption. Indeed, the last Moroccan decision clearly states that the Moroccan Court recognized that the child’s residence was in Québec and called for regularization of the child’s status in Québec. The Court did not provide any details as to what it meant by “the necessity for the child’s status to be regularized”. Notwithstanding this lack of clarity, the authors argue that it would be naïve to believe that the Moroccan authorities were unaware that plenary adoption was and still is the only adoption regime in Québec and therefore, by commanding the regularization of Y’s status, they implicitly allowed for his adoption.

This last point illustrates not only how ambiguous the application of Moroccan law is on the issue of international adoption, but also how much foreign law expertise is needed, as will be discussed below. For present purposes, it shows the ambiguity of the last decision from the Québec Court of Appeal in the case of X and Y. As mentioned previously, the Court’s opinion was that it was not an international adoption case, but rather the result of two parallel procedures in Moroccan and Québec law that required harmonization. Even if they were to agree with the Court of Appeal on this qualification, the authors doubt that harmonization can be accomplished in such a way. Since the Moroccan decision was clearly one of Kafálah, the applicable adoption procedure was the procedure for non-members of the Hague Convention on Adoption. To obtain internal placement for adoption in such cases, consent for plenary adoption must have been given. In the case at bar, the Court relied on the consent of the tutors as Kuffal and

79. Art. 3092 C.C.Q.
81. Adoption – 10100, supra, note 43 at para. 45.
82. Adoption – 11117, supra, note 16.
83. Adoption – 11117, supra, note 16 at paras. 80-84.
84. Art. 568 C.C.Q.
on the implied consent from the Moroccan authorities. With respect to the Court of Appeal’s decision, the authors do not understand how the Court concluded that the Kuffal could consent to the adoption in this case. The proper moment to examine the issue of consent to plenary adoption should be before the grant of Kafálah. It is the Moroccan authorities acting as guardians of the abandoned child before the Kafálah order who may or may not consent. Even if one accepts that the tutors could consent, according to article 3092 C.C.Q., foreign law applies in the matters of consent and adoptability. Therefore, proof that the consent to international plenary adoption is valid under Moroccan law by either tutors or legal authorities must be shown in any case.

Instead of resolving that issue, the Court of Appeal invoked in a bundle of fundamental human rights, immigration law, accrued rights pertaining to citizenship, as well as good faith in order to justify their flexible interpretation of the adoption laws in this very specific case. Overall, it seems that the Court was very careful not to create a precedent. Although they can sympathize with the Court in regards to the difficult dilemma they faced, the authors believe that the decision falls short of offering a permanent solution in Québec that successfully addresses the immigration and adoption situations of children under Kafálah.

### 3.2 Immigration Law

#### 3.2.1 Federal Immigration Law

Canadian citizens or permanent residents of Canada, with a child under Kafálah who is not already on Québec territory, typically argue that the child is part of their family and qualifies under the immigration class of family reunification. The immigration law for family reunification is under both federal and provincial jurisdiction. In 1991, Ottawa and Québec signed the Canada – Québec Accord relating to immigration and temporary admission of aliens where it was decided that:

14. Canada has sole responsibility for the establishment of selection criteria for family class immigrants and Québec shall be

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85. Adoption – 11117, supra, note 16 at paras. 59-76 and 91.
86. Adoption – 11117, supra, note 16 at paras. 77-90.
responsible for the application of those criteria, if any, with respect to such immigrants destined to Québec.

The federal government is therefore solely responsible for determining who is a “family member” and the Québec government is responsible for applying the federal definition when selecting its immigrants. The definition of “family member” can be found at article 12 (1) of the Immigration and Refugee Protection Act (hereinafter IRPA). 88

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident. (Emphasis added by the authors)

For further specification as to who is a “child”, one has to look at the Immigration and Refugee Protection Regulation (hereinafter Regulation) 89 where section 7 lists the people who can apply as family members, under section 12 of the Act, for permanent resident status. Included in the notion of “family” are both the dependent child of the sponsor and the child that will be adopted in Canada by the sponsor. The first article of the Regulation defines “dependent child”:

“dependent child”, in respect of a parent, means a child who

(a) has one of the following relationships with the parent, namely,

(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or

(ii) is the adopted child of the parent; and (emphasis added by the authors)

(b) is in one of the following situations of dependency, namely,

(i) is less than 22 years of age and not a spouse or common-law partner,

89. CAN Immigration Reg, supra, note 27.
(ii) has depended substantially on the financial support of the parent since before the age of 22 – or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner – and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.\footnote{CAN Immigration Reg, supra, note 27, s. 1 (definitions).}

Therefore, to be considered as a “dependent child”, one needs to be the biological child of his parents or the adopted one. The Regulation defines adoption as:

\textbf{Interpretation – adoption}

(2) For the purposes of these Regulations, “adoption”, for greater certainty, means an adoption that creates a legal parent-child relationship and severs the pre-existing legal parent-child relationship. (emphasis added by the authors)\footnote{CAN Immigration Reg, supra, note 27, s. 3.}

The Regulation also stipulates that, to be considered a “child to be adopted”, the child needs to fulfill the following requirements:

- the child is under 18;

- if the country where the child is from is not part of the\textit{ Hague Convention on Adoption}, the child must have been placed for adoption in his country of residence or be legally available for adoption and the competent authorities of the province of destination\footnote{In Québec, the Minister of Health and Social Services acts as the central authority responsible for the application of the\textit{ Hague Convention on International adoption}} must have stated in writing that they do not object to the adoption. (emphasis added by the authors)
Once again, the interpretation of the word “adoption” is the one found in the definition section of the aforementioned Regulation. The Regulation specifies that the adoption, to be legitimate, must be done in the “best interest of the child”. Article 117(3) of the Regulation lays out the circumstances in which the Canadian government will consider that an adoption was performed in the best interest of the child:

– “before the adoption, the child’s parents gave their free and informed consent to the child’s adoption [...]”

– “the adoption was in accordance with the laws of the place where the adoption took place [...]”

Therefore, under the current state of Canadian immigration law, a child under Kafálah cannot be considered a “dependent child” because Kafálah does not break the pre-existing legal parent-child relationship nor does it create a new filiation. The child under Kafálah is thus not an adopted child according to the federal legislation.93 For the same reason, a child under Kafálah cannot legally be considered a child “to be adopted” since his country of origin does not allow for adoption.

Despite the apparent impossibility for a child under Kafálah to qualify under the federal immigration rules for family reunification, the Court of Appeal underlines that the immigration of children under Kafálah had been granted in the past. The Court of Appeal’s judgment94 of June 2011 refers to two decisions.95 These two decisions emphasize that, under federal legislation, if the province of destination issues a letter of non-opposition, the letter constitutes proof that the adoption is not solely intended to acquire an immigration status and that the requirements of the federal immigration rules for sponsorship are met.96 Other examples confirm this interpretation of the federal legislation. For instance, in British Columbia, one adoption agency was able to obtain a letter of non-opposition from the provincial authorities through the Québécois “Secrétariat à l’adoption internationale” (Act to implement Hague Convention on Adoption-Qc, supra, note 54, s. 2).

93. ISS – Fact sheet, supra, note 12.
94. Adoption – 11117, supra, note 16.
96. Adoption – 11117, supra, note 16 at para. 78.
for a Kafālah case from Morocco. With this letter in hand, the adoption agency was able to get the federal government to agree to the immigration of the child under Kafālah. The agency argued (successfully, it seems) that if the biological parents and/or the responsible authorities in the country of origin signed documents explaining that the child is to be adopted in British Columbia and if they were informed correctly of the consequences, there is no breach of section 48 of the British Columbia Adoption Act and therefore, a letter of non-opposition can be issued. To the authors’ knowledge, it seems like an isolated practice for adoptions from Morocco and therefore, it will be interesting to see if the federal government continues to accept these letters of non-opposition in similar cases.

3.2.2 Québec immigration law

As for the adoption process in the province of Québec, the Act respecting immigration to Québec provides the applicable regulations. As mentioned above, the Québec government is responsible for the application of criteria adopted by the federal government. Therefore, conclusions reached under federal immigration law pertaining to the possibility of sponsoring a child under Kafālah further apply to Québec immigration laws. However, there are two potential exceptions to this: first, the possibility of issuing a letter of non-opposition and second, the special immigration procedure put in place by the Québec government.

The Québec government could issue a letter of non-opposition, similar to what their British Columbia counterparts have done. Such a letter could possibly be considered as evidence that all federal immigration requirements have been met. The authors would like to emphasize the word “possibly”, as it is not

97. Sunrise Adoption (Vancouver, British Columbia, http://www.sunriseadoption.com) has an adoption program for children from Morocco. As of September of 2011, they had only done one case.
98. Adoption Act, R.S.B.C. 1996, ch. 5, s. 48(2)(d). With this reasoning, it seems that BC does not have the same understanding of “valid consent”. Indeed, Québec understands the notion of “valid consent” as obtaining a consent that would also be valid in the country of origin. In opposition, it seems that BC understands “valid consent” as the informed consent of the parents and/or competent authorities. As long as the parties understand what they are saying yes to, the consent is valid even if adoption is not permitted in the country.
100. See recent decisions of the CISR: Shaibon and Ghazimoradi, supra, note 95.
clear that the Québec government would be respecting the international rules on adoption by allowing the adoption of children that could not otherwise be adopted due to a prohibition on adoption in their country of origin. The CRC is clear: when adoption is necessary or desirable, the consent must have been given with proper knowledge of its consequences.\textsuperscript{101} However, the CRC also implies that every decision involving a child must be made with the child’s interests in mind and reaffirms that the family represents the most fundamental unit.\textsuperscript{102} Therefore, in a case like Y’s, one may ask: what is the extent of the Québec authorities’ international responsibilities in cases where an abandoned child (like Y) wishes to be reunited with his “adopting” Kuffal in Québec. This raises further questions: should the interest of the child and his right to family reunification override the provisions of the Civil Code? Who is responsible for giving valid consent to the adoption of the child? As mentioned earlier, the rules of Kafálah differ from one country to another or under the various branches of Muslim law. The authors argue that any possible ground for distinction between children under Kafálah in terms of who may or may not be adopted and enter another country should be based on the type of Kafálah involved (Kafálah for orphans and abandoned children versus intrafamilial Kafálah). In situations where biological parents are still present in the child’s life, the adoption of children under Kafálah should not be allowed in order to protect the rights of biological parents and prevent child trafficking. However, the authors believe that in the case of an orphaned or abandoned child, the consent of the governmental authorities, whether explicit or implicit (as in the case of Y), should be sufficient to allow the province of destination to submit a letter of non-opposition.

On a related note, since 2008, children under Kafálah living with a family admissible for permanent immigration to Québec can immigrate along with their family. In \textit{Note sur les procédures d’immigration – Traitement des demandes visant des enfants sous tutelle (Kafálah)}\textsuperscript{103}, the Direction des politiques, des programmes

\textsuperscript{101} C.R.C., supra, note 6 at s. 21(a).
\textsuperscript{102} C.R.C., supra, note 6 at s. 3(1) and Preambule.
\textsuperscript{103} Ministère de l’immigration et des communautés culturelles, “\textit{Note sur les procédures d’immigration – Traitement des demandes visant des enfants sous tutelle (KAFALA)}” Publications du Québec – Notes sur les procédures d’immigration (19 décembre 2008) online: <http://www2.publicationsduQuébec.gouv.qc.ca/dynamicSearch/telecharge.php?type=7&gpiType=N&file=NPI2008-014.pdf&eq=36870> [NPI 2008-14]. One interesting thing to note with this partic-
et de la promotion de l’immigration – Services conseils aux candidats à l’immigration (part of the Ministère de l’immigration et des communautés culturelles) states that a child under Kafálah accompanying a foreign national admissible for permanent immigration can immigrate with that foreign national. The rationale behind this provision is that, in most cases, the child under Kafálah has been living with the same family for many years. Therefore, it would be absurd to separate the child from his de facto family. However, this process is not instantaneous and certain conditions must be met, as every case is evaluated independently. Among these conditions, the child must be 18 years old or younger, be fatherless and motherless or have unknown parents, have been given to the care of his Kāfil (or Kuffal) by a ruling of the court and must have lived with his caretaker(s) for long enough to have created a family-like relationship. The Kuffal must also satisfy certain conditions: they must be at least 18 years older than the child, one or both of the Kuffal must be from the same country of origin as the child, they must have obtained common tutorship of the child by a court ruling (except if the Kāfil is single) and taken the commitment to have the tutorship decision recognized by a Québec tribunal within 90 days of their arrival in Québec. Once the child is in the province, the Kafálah decision will be recognized and the applicants will be granted tutorship of the child.

This procedure answers the Court of Appeal’s concerns in the case of Y. The Québec government respects the rights of its candidates for immigration which originate from their citizenship of origin. However, like many other children, Y was not part of this particular immigration category since his Kuffal were not candidates to permanent immigration; they were already Québec residents at the time they applied for his Kafálah. As previously mentioned, the authors argue that, if need be, exceptions should be based on the status of the child and the type of Kafálah at issue (Kafálah for abandoned and orphaned children versus intra-familial Kafálah) rather than on the immigration situation of the

104. NPI 2008-14, supra, note 103 at 3.
105. NPI 2008-14, supra, note 103 at 3.
106. Adoption – 11117, supra, note 16 at para. 82.
**Kuffals.** Granting the immigration of children under *Kafálah* could lead to problems the Québec government already faces in other *Kafálah* cases. For instance, there seems to be no reason to deny the adoption of a child under *Kafálah* once he is domiciled in Québec. However, if this child’s biological parents are still present in his life, his adoption could infringe on their rights as the biological parents and go further against their initial consent to the *Kafálah*.

In the last section of this article, the authors examine possible solutions that could be implemented.

### 4. Possible solutions

As previously stated, the Québec Court of Appeal’s last decision in Y’s case offers no permanent solution and the Court took great care to specify that this case was to be considered as “marginal” and should not constitute a precedent. Therefore, one should identify other possible solutions to solve the issue at hand. The authors will now explore four possible solutions:

- Political and legislative action
- The mandatory proof of foreign law in court
- The best interest of the child as a determining factor in *Kafálah* cases
- Granting a reasonable accommodation

#### 4.1 Political and legislative action

In an ideal world, the Canadian federal government, the provincial authorities as well as the representatives of countries from which children under *Kafálah* originate would meet to discuss the issue. They would find common ground on solutions that could be incorporated in either a multilateral treaty or a number of bilateral treaties. Such agreements could, for instance, provide a con-

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107. *Droit de la famille – 3403, supra*, note 60; *A.B.M, supra*, note 60; and *Adoption 2006, supra*, note 61 are the three cases where courts allowed a child under *Kafálah*, residing in Québec to be adopted. Those cases are explained in different sections of this article.

108. *Adoption – 11117, supra*, note 16 at para. 94.
version procedure similar to the procedure under the *Hague Convention on Adoption*, but this time as between *Kafálah* and adoption. Under the *Hague Convention on Adoption*, if adoption only exists in a simple form in the country of origin, it can be converted into a full or plenary adoption in the receiving country under two conditions. The first condition is that the law of the receiving country must permit the conversion. The second condition is that a special consent to full or plenary adoption from parents, institutions or authorities, as well as from the child if he or she is old enough, must be given.\(^{109}\) Bilateral treaties with countries that only recognize *Kafálah* are already in the process of being approved: Belgium\(^ {110}\) and Italy\(^ {111}\) are currently in the process of reaching such an agreement with Morocco. Under the projected treaty between Italy and Morocco, a *Kafálah* can be converted into a simple adoption under Italian law, provided that the adoption does not sever the filiation links with the biological family and preserves the original name and nationality of the child.\(^ {112}\) Morocco has made a compromise in this case by accepting the creation of a new filiation bond for the child under *Kafálah*. Another solution for Canada could be for all parties to agree on an ad hoc set of measures applicable for children under *Kafálah*. This process could help assuage the fears of the Canadian and provincial authorities regarding the *Kafálah* process.

Among these safeguards, countries of origin such as Morocco and Bangladesh would have to clearly indicate if they would allow conversion of *Kafálah* in the country of reception, and if so, to what extent (i.e. plenary adoption, simple adoption, special guardianship, etc.). However, this method could appear as evidence of cultural imperialism since it requires Muslim countries to authorize the conversion of a Muslim institution into a Western one. However, such a criticism ignores the fact that said countries could legitimately, clearly, and legally refuse intercountry adoption.\(^ {113}\) The advantage of this solution is that it ensures that the

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113. C.R.C., supra, note 6, s. 20(3) recognizes *Kafálah* as a legitimate way of caring for children deprived of family as an alternative to adoption.
biological parents’ consent and international rules are not violated by the country of reception. It would also allow Canada and Québec to ask for certain safeguards to ensure that children under *Kafálah* are not victims of child trafficking.

Unfortunately, such treaties, according to the authors, have little hope of becoming a reality for many reasons. Firstly, the number of children under *Kafálah* in Canada or who request a right of entry into the country remains low.114 Secondly, religious accommodation is currently a hot topic in Canada, therefore the negotiation of a treaty solely devoted to resolving problems created by a provision from the Qur’an would certainly incur negative press for the government. Similarly, it is politically delicate for the countries of origin to engage in such a process, as it allows or facilitates adoption or placement of children from developing countries abroad.115 Finally, it has historically been difficult for the ten provinces to come to an agreement with the Canadian federal government and it would be impossible to deal solely with a province such as Québec due to federal jurisdiction in determining who is a “family member” for immigration purposes.116

A second solution could be to amend the adoption procedures in Québec to incorporate a special regime for children under *Kafálah*. This solution seems more feasible since the Québec government already took important steps to pass such legislation. The amendments to the *Civil Code* proposed by the previous

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114. Helly *et al.*, 2011, *supra*, note 58, at 1067-1068 mentions that 20 files were examined under the immigration trial project between 1999 and 2000. Eight cases of *Kafálah* reached the Québec courts between 1997 and 2007 and no cases were found in Ontario over the same period.


117. *Bill*, *supra*, note 49.
government in 2012 and mentioned above would have allowed children from countries that do not allow adoption (including children from Muslim law countries) to be adopted in Québec if all the conditions set out in the article are met. As mentioned previously, the Bill 47, introduced in June 2013, does not contain such amendment. If the bill is adopted as is, there will be no change to the current system. It will be interesting to see if the current bill is amended or adopted in its current form.

One other solution would be to create a guardianship regime allowing children to come into Quebec without breaking previous bonds of filiation. Such a regime would require collaboration with the Canadian government, which would need to integrate such a regime into its immigration laws in order to let children enter under this new status. Notwithstanding the government’s decision, the regime created would not need to be solely designed or destined for children under Kafālah. Both levels of government have the latitude to create a more general regime that would address all social changes that already pressure a system that only allows plenary adoption.

Indeed, the realities of adoption have changed dramatically since the 1960s. From a time where single pregnant women were stigmatized and secretly abandoned their newborns, adoption has evolved to become a multifaceted reality. Adopted persons include children who are older and already have significant ties with their families of origin as well as children adopted by the new partner of a divorced parent and even children adopted from abroad by a member of their family living in Canada. These are situations in which it is arguably not in the best interests of the child to sever filiation ties with their biological family. In the same vein, one can add an adopted child’s right to know his origins.

118. Such a regime once existed in the federal legislation. The section about tutorship was introduced in 2002 by the federal government but never came into force and was finally repealed in 2005. The federal government justified the repeal by saying that the provinces and territories were not able to provide the required approval for the legislation to be effective. For more information, the reader can refer to: The 2005 Government of Canada, Department of Citizenship and Immigration, “Regulations Amending the Immigration and Refugee Protection Regulations, Regulatory impact analysis statement”, available in the Canada Gazette, Part 1, January 2005.

Consequently, Québec could follow the United Kingdom’s footsteps. In 2002, they adopted a special guardianship regime as a middle ground institution between plenary adoption and foster care. Special guardianship is very similar to Kafálah as it does not sever the filial ties with the biological parents who retain the right to consent to an adoption and to a change of name.\textsuperscript{120} As mentioned above, in order for those children to immigrate, the federal government’s involvement would be necessary.

Political and/or legislative action is, in the authors’ opinion, the best solution. Such provisions would guarantee the respect of domestic and foreign law and safeguard the interest and security of the children. However, if Bill 47 is adopted in its current form the system will not change and therefore, we can ask: what can be done? Three main avenues will be explored in the next sections: the mandatory proof of the foreign law, the importance of acting in the best interest of the child and the possibility for the claimant to ask for reasonable accommodation.

### 4.2 Foreign law: what does it really say?

#### 4.2.1 The ambiguity of Moroccan law and the case of Y

In all of the decisions concerning Y, there is only one mention of an opinion pertaining to Moroccan law and written by a Moroccan lawyer.\textsuperscript{121} That being said, the proof that Moroccan law allows adoption outside of its borders was never established. Leaving

\textsuperscript{120} By amendment to the Children Act 1989, the Adoption and Children Act 2002, c. 38 modified the Children Act 1989, c. 41 [C.A. 1989]. The new regime entered into force in 2005. Guardians, relatives, custodians or foster parents of a child can apply for a special guardianship order (s. 14A\((5)\) C.A. 1989). Such an order gives the special guardians almost exclusive parental responsibility (s. 14 C\((1)\) C.A. 1989). Biological parents retain the right to consent to adoption, to change the child’s surname, and to remove the child from the United Kingdom for more than three months (s. 14C\((3)(4)\) C.A. 1989). Special guardianship orders can be modified or cancelled, but only when significant changes in circumstances warrant it, unless the child himself demands it (s. 14D) C.A. 1989). Special guardians are also eligible to receive help and support from the government, for example counselling, financial support, mediation regarding contacts between the child and his biological family and respite care: S. 14F of the C.A. 1989; The Special Guardianship Regulations 2005, No. 1109, s. 3. See generally Department for Education and skills, “Your guide to Special Guardianship: A new option for children in need of permanent families”, 2005, at 6, online: Department for Education <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFES%20202030%20202005>.

\textsuperscript{121} Adoption – 11117, supra, note 16 at para. 85.
Québec judges the task of taking judicial notice of Muslim law is inadvisable due to its complexity. Indeed, it has its own sources and methods of interpretation. With regards to the international adoption procedure of Y, the prohibition does not seem clear. Moroccan judicial and administrative authorities granted Kafálah to the Kuffal that resided abroad on a permanent basis and authorized them to travel with the child to their country of residence. Thus, one can argue that the granting authorities and the judge implicitly (if he knew that the Kâfil resided abroad) approved the adoption of Y in Québec. Indeed, as previously mentioned, Morocco is very proactive in trying to resolve the legal conundrum in which children under Kafálah find themselves when immigrating to countries that only recognize adoption; as mentioned above, it is in the process of negotiating treaties with Italy and Belgium. This indicates two important things: first, Moroccan authorities are not closed-minded about adoption. Second, they allowed a child to immigrate to a country while well aware that adoption was the only institution available to regularize his status in that country. However, a 2003 ministerial instruction in Morocco orders judges to determine if a bilateral treaty with the foreign country permits the Kafálah regime or ascertain, through the issuance of a certificate from the foreign authorities, that the child's legal status will be stable in the receiving country. In light of this, it is interesting to note how the judgment obtained by X in Morocco simply indicated that X had to regularize the status of the child; the judge carefully avoided using the word adoption.

To add to the complexity, on September 19, 2012, the Moroccan government published a “circulaire” that asked state lawyers to ensure that the prospective Kâfil or Kuffal reside in Morocco and, if not, to recommend that the judge reject the demand for a Kafálah. This recommendation applies to foreigners that do not reside in Morocco but does not seem to apply to Moroccans living abroad (X’s case). It is not clear, however, whether or not the

122. For the judge to take judicial notice of the foreign law, it must be pleaded. The general rule specifies that if the foreign law is not pleaded, Québec law applies (art. 2809 C.C.Q.).
123. A. Quiñones-Escamez, supra, note 14, at 248 and 249.
124. We could not find a link to the “circulaire” in English. Even in French, the following link comes from a Swiss organization: <http://www.ejpd.admin.ch/content/dam/data/gesellschaft/adoptionsherkunftslaender/ld-marokko-rundschreiben-justizminister-f.pdf>.
“circulaire” is mandatory and whether or not it is the equivalent of a law.

The complexity of Muslim law is better understood by breaking it down, as it is internally divided into two branches, the Sunni and Shia branches, as well as into different schools. That being said, the perspectives on adoption or its effects can vary from one school to another. Furthermore, Muslim law, which is largely unwritten and whose foundations consist of a limited number of verses from the Qur’an, sometimes integrates customary practices that allow adoption. In a similar vein, many scholars argue that adoption is allowed under Muslim law but under a different name (such as guardianship/Kafálah) or that adoption can be Sharia-compliant. They seem to adopt a functional approach or to use a different definition of the concept that is closer to simple adoption. For example, in Brunei, there is a law

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125. Pearl and Menski 1998, supra, note 9 at 29-32 and 408 where the authors mention that some scholars, including themselves, argue that adoption is allowed under Muslim law.

126. Pearl and Menski 1998, supra, note 9 at 3: only 80 verses of the Qur’an refer to legal topics.

127. Pearl and Menski 1998, supra, note 9 at para. 33: “In South Asian laws, adoption among Muslims is legally possible under certain circumstances”; see also Women Living under Muslim Laws, “Knowing our Rights: Women, Family, Laws and Customs in the Muslim World”, (2006) online: Women Living Under Muslim Laws <http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/knowing%20our%20rights/kor_2006_en.pdf> at 232-234, mentioning that certain countries have been influenced by Hindu practices or customary laws and now practice adoption. The authors refer to certain parts of Pakistan, Indonesia and Sri Lanka; Hashemi, supra, note 13 at p. 24: in some Islamic communities of South Asia, adoption is practiced as an act towards which religion is indifferent.

128. For such an argument, see Shaheen Sardar Ali, “A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law. Law Reform and Children’s Rights in Muslim Jurisdictions”, in UNICEF, Protecting the World’s Children – Impact of the Convention on the Rights of the Child in Diverse Legal Systems (Cambridge: Cambridge University Press, 2011), at 155: “I would therefore argue that the verses of the Quran cited here nowhere negate the idea of adoption as such; in fact, time and again Muslims have been exhorted to share the responsibility of child rearing and supporting children, orphans, the needy and so on”. Later, the author argues that adoption does take place under the conceptual framework of Kafálah.

129. For such an argument, see Arshad 2010, supra, note 9 at 184.

130. For such an argument, see Jamila Bargach, Orphans of Islam. Family, Abandonment, and Secret Adoption in Morocco (Lanham: Rowman & Littlefield, 2002) at 7-8: “While a legally oriented Eurocentric definition of adoption denies, in general, the Muslim world its share and contribution to this phenomenon because of a religious prohibition, this study reveals a large and complex set of practices by tracking different forms of adoption (the gift of care or Kafálah, secret adoptions, and customary adoptions), their understandings, realities, convergence and mutations. These Moroccan forms of adoption align them-
on the “Islamic Adoption of Children” which, despite its name, does not provide for adoption in the true sense of the word, but rather for guardianship/Kafálah. Therefore, it is very important to provide guidance to Québec judges in their appreciation of foreign law.

4.2.2 Introduction of foreign law in the court

The general rule pertaining to the proof of foreign law is found in article 2809 C.C.Q.: “Judicial notice may be taken of the law of other provinces or territories of Canada and of that of a foreign state, provided it has been pleaded...” This means that the choice of applicable law must be pleaded and/or that foreign law must be proven as a fact. Otherwise, the forum law applies. In adoption matters, this rule contradicts Québec’s obligations under the Hague Convention on Adoption.

Indeed, articles 568 and 574 C.C.Q. arguably create an exception to article 2809 C.C.Q. They stipulate that a court called to recognize an adoption made outside Québec or to grant an order of placement must ensure that the rules respecting the consent and the eligibility of the child to adoption have been observed. However, for author Léo Ducharme, the rule in article 2809 C.C.Q. remains applicable in the case of adoption decisions pursuant to the 2000 judgment from the Court of Appeal pertaining to Kafálah. In this decision, in which a couple had obtained the Kafálah of four Moroccan children, all living with them in Québec and whom they wanted to adopt, foreign law was neither pleaded nor proven. This led the judges, who were not convinced that Moroccan law prohibited the adoption of children outside of

131. Chapter 206, Islamic Adoption of Children, BLRO 8/2010. Adoption is defined as bringing up, maintaining and educating a child like one’s own, but without becoming the natural parent of the child (s. 2(1)). Grant of property by will is limited to one third (s. 12), and the adopted child remains the child of his natural parents and retains his original name (s. 17).

132. Art. 2809 C.C.Q.


134. Art. 574 C.C.Q.


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its borders, to send the case back to the lower court judge in order for him to grant an order of placement for the adoption.\textsuperscript{137} For Ducharme, this ruling means that, even in adoption cases, foreign law is a fact that needs to be proven and must be pleaded for the judge to take it into consideration.

Professor Alain Roy\textsuperscript{138} argues, however, that in international adoption matters, the court needs to require proof of foreign law in order to respect the wording of articles 568 and 574 C.C.Q. and the goals of the international adoption regime, which emphasize respecting the law of the child’s country of origin. If the court was to ignore these rules and apply Québec law, it would violate Québec’s obligations under the \textit{Hague Convention on Adoption}.

Moreover, article 3092 C.C.Q. provides that consent to the eligibility of a child for adoption is determined by the law of his domicile.\textsuperscript{139} This is an essential rule for anyone wanting the Québec decision to be enforceable in the child’s country of origin, a very important matter to the process of stabilizing the child’s personal status.\textsuperscript{140} In this regard, Roy’s interpretation requiring proof of foreign law in all cases is, in the authors’ opinion, the one to follow. If the judge does not require the parties to prove the applicable law in the child’s country of origin, he may render an adoption judgment which is inapplicable in said country of origin. Furthermore, the adoption could be pronounced in violation of the rights of the biological parents, who might not have agreed to it or to its specific legal effects.\textsuperscript{141} Therefore, the authors argue that future rulings on the issue of \textit{Kafálah} in Québec should be accom-

\begin{footnotesize}
\textsuperscript{137.} Droit de la famille – 3403, supra, note 61, at paras. 52-64.
\textsuperscript{138.} Supra, note 72 at 99-100.
\textsuperscript{139.} Art. 3092 C.C.Q.
\textsuperscript{140.} Gérald Goldstein, “Une lecture critique des règles relatives à l’adoption en droit international privé québécois” Revue du Barreau (2010) [Goldstein].
\textsuperscript{141.} Under ss. 7, 8 and 9 of the C.R.C., supra, note 6, the child has a right to know and be cared for by his parents, to preserve his identity and family relations as recognized by law and without unlawful interference and not to be separated from his parents against their will. These sections have been interpreted as also conferring rights on the biological parents so as to preserve their family life in case their consent was not adequately given to full/plenary adoption. Equally, under s. 21 C.R.C., Canada shall ensure that adoption is permissible in view of the child’s status concerning his parents and that informed consent to adoption was given. This includes the obligation to determine legal adoptability, which forms the basis for the severance of filiation ties. See Sylvie Vité and Hervé Boéchat, “Article 21. Adoption” in André Alen et al., ed., \textit{A Commentary on the United Nations Convention on the Rights of the Child} (Leiden: Martinus Nijhoff, 2008) at 26, 37-39.
\end{footnotesize}
panied by mandatory proof of the applicable law in the child’s country of origin. Such proof would allow more consistency in judgments on Kafálah.

One case in Québec shows, however, the difficulties which Québec judges confront even when provided with expert evidence on foreign law regarding Kafálah. In Dans la situation d’ABM\textsuperscript{142}, the aunt and uncle of a child from Pakistan wished to adopt him. At the time of the motion, the child had been living with them in Québec for two years. The biological parents had signed a document entitled “Adoption Deed” in which they expressly consented to the “adoption” of their child, but mentioned that he could still inherit from them. Other official documents revealed that the aunt and uncle were only named guardians of the child. The judge heard contradictory expert evidence on Pakistani law and concluded that a guardianship order and permission to travel abroad with the child equated to consent to full/plenary adoption, and that a foreign adoption ruling, if granted by Québec, would be recognized in Pakistan. If the “implied consent” argument accepted by the judge seems interesting, this decision may still be criticized for its partial reading of the expert evidence of foreign law. Indeed, the evidence put before the court indicated that the word “adoption” in Pakistani documents is often used to designate guardianship. The judge also attempted to explain the fact that the child could still inherit from his biological parents under the “Adoption Deed” as an act of pure generosity, ignoring the fact that this is a traditional legal effect of guardianship. The judge also accepted without question the proposition that Pakistani courts would recognize the Québec adoption decision if the child was ever returned to Pakistan. The latter is doubtful since adoption is prohibited under Pakistani law.\textsuperscript{143} Moreover, the decision allowed plenary adoption of the child without proof of the informed consent of the parents, who were still alive, known and capable of exercising their rights. This decision thus shows that mandatory proof of foreign law is certainly part of the solution, but does not guarantee that adoption of children under Kafálah would be granted, nor does it guarantee the respect of the biological parents’ consent. In all cases, it shows the courts’ willingness to respect foreign law, religion and culture.

\textsuperscript{142} A.B.M., supra, note 60.
\textsuperscript{143} For example, Jordanian authorities testified in a case in the United Kingdom to the effect that an adoption order of a child under Kafálah would not be recognized in Jordan: See A. Quiñones-Escamez supra, note 14 at 175.
4.3 The interest of the child as a determining factor

Article 33 C.C.Q. is clear: “Every decision concerning a child shall be taken in light of the child’s interests and the respect of his rights”. The interest of the child can be divided in two broad categories: the interest in abstracto (general principles regarding children’s interests) and the interest in concreto (interest of a child in a particular situation). Under Québec law, article 543 C.C.Q. provides that the in concreto interest of the child is an insufficient basis upon which to grant an adoption. Indeed, the in abstracto interest of the child, rooted in the legal requirements of international adoption (and internal adoption) must also be satisfied. This position seems to be in accordance with Québec’s obligations under international instruments such as the CRC. For instance, Article 3-1 of the CRC requires that the interest of the child (in concreto) be the primary consideration in any decision concerning a child. The rules regulating adoption in the CRC (articles 20 and 21) exist to safeguard the in abstracto interest of the child. Therefore, even if the in concreto interest of the child is fundamental to an adoption decision, it is not sufficient in itself to grant the adoption.

Despite these limitations, the interest of the child remains a fundamental principle that should always guide decisions concerning children. In this matter, the case of Y and his Kâfi X was difficult. The Québec adoption and immigration authorities argued for the in abstracto interest of the child by asking the court to fully apply the legal provisions pertaining to international adoption applicable in Québec. Judge Vezina of the Court of Appeal opined that if the procedures initiated in both Québec and Morocco were not made in good faith and in the best interest of the child, the Court would have had to decide otherwise. Indeed, the adoption procedure would have had to systematically respect all requirements of the international adoption regime. However,
the case at bar allowed for more flexibility. The Court’s approach certainly differs from a strict interpretation of article 543 C.C.Q. The Court of Appeal’s judgment brings Québec closer to the situation in several European countries where breaking the strict conditions of the law is expressly allowed when the decision is made in the interest of the minor. For example, in Germany and Belgium, as in Québec, it is generally the foreign law which applies when determining adoptability. In Germany, however, the judge is expressly authorized to apply German law with respect to the matter if it is in the interest of the minor. Before the Court of Appeal’s ruling, other courts had interpreted article 33 C.C.Q. in such a way that the interest of the child was not sufficient in itself to grant the adoption; the conditions set out by law also had to be met. It will be interesting to see future Kafálah cases and analyze whether the Court of Appeal’s reasoning is followed. In the authors’ opinion, a middle ground position which equally considers the underlying concerns of the adoption laws of Québec, the Kafálah procedure of Morocco, and the in concreto interest of the child would best serve future cases of Kafálah.

4.4 Providing reasonable accommodation

In the decision M.S c. Québec (Procureur général), Judge Carole Julien suggests that the immigration laws in Canada and Québec are a source of indirect discrimination against Canadians of the Muslim faith. Indirect discrimination occurs in situations where a generally applicable neutral rule has a discriminatory effect on a particular group of people by imposing obligations or restrictive conditions. Because their religion prohibits them from adopting a child, Québec residents of Muslim faith can only take a child under Kafálah. By doing so outside of Canada, they are not able to sponsor the child for immigration purposes. Therefore, a law neutral in appearance – “no Canadian can sponsor a child under tutorship” – could be discriminatory to Québec residents of Muslim faith for whom tutorship is the only option. Since the Court of Appeal’s solution in the case of Y was ad hoc, it is interesting to analyze the current laws to further establish if, as Judge Julien suggests, they would be susceptible to a constitutional

151. Ibid. at para. 88.
152. A. Quiñones-Éscamez supra, note 14 at 177 and 181.
challenge and whether reasonable accommodation constitutes a valid option to resolve \textit{Kafálah} issues in Québec.

When a person claims that a law is discriminatory towards them, two approaches are possible for claimants: first, political pressure can be put on the government in order to obtain accommodation under the law and/or, second, claimants can bring their case to court. Confronted with such demands, the Court has two options: completely invalidate the law or perform a judicial rewording. Invalidating the law can be problematic as the law might be reasonable towards a majority of persons (such as the immigration laws in our particular example). Similarly, multiple demands from minority groups would overwhelm the legislative system which is not structured to legislate by exception. The other option, judicial rewording, is more manageable and seems more appropriate in a case like X’s. There are three methods of judicial reformulation that are well established in constitutional law: reading down (reduces the range of the norm), reading out (limits the invalidity of the law to its unconstitutional effect(s)), and reading in (broadens the range of the norm). Judicial rewording allows for the accommodation of minority rights. The problem with judicial rewording is that it can give the judicial branch powers usually reserved for the legislative branch and therefore distort the separation of powers between the two. In order to respect said separation, the judicial branch must be careful when rewording and must remain as close as possible to the original text. In her decision, Judge Julien suggests a reading in of the immigration rules to include children under \textit{Kafálah} in the definition of “dependent child”. The authors believe this could constitute “reasonable accommodation”.

\begin{footnotes}
\footnote{156. Woehrling 97-98, supra, note 155 at 358.}
\footnote{157. Woehrling 97-98, supra, note 155 at 358.}
\footnote{158. Woehrling 97-98, supra, note 155 at 358.}
\footnote{159. Woehrling 97-98, supra, note 155 at 358-359.}
\footnote{160. Woehrling 97-98, supra, note 155 at 359.}
\footnote{161. Woehrling 97-98, supra, note 155 at 359.}
\footnote{162. MS 2009, supra, note 25 at paras. 78-79.}
\end{footnotes}
4.4.1 What is “reasonable accommodation”?

The Commission des droits de la personne et des droits de la jeunesse defines reasonable accommodation as the judicial obligation derived from the right to equality, applicable in a case of discrimination that consists of modifying a norm applicable to all, by granting differential treatment to a person who would otherwise be penalized by the integral application of the universal norm. There is no reasonable accommodation in cases of excessive constraints. As author Woehrling underlines, the duty to accommodate in Québec (but also in Canada) was developed as the proper remedy for indirect discrimination. With respect to indirect discrimination, “the right to reasonable accommodation exists mainly in the area of employment and with respect to the provision of services, goods and facilities”. The duty to accommodate has evolved in such a way that it now also applies to governmental entities and legislation. Over time, the court further expanded the duty to accommodate to matters pertaining to religious rights. The duty to accommodate religious minorities when it is reasonable to do so flows from both the right to equality (article 15 of the Charter of Rights and Freedom, hereinafter the Charter) and the freedom of religion (article 2a of the Charter) and it “imposes on the legislature and on bodies enacting regulations an obligation to accommodate the special needs of minorities in order to allow religious practices that would otherwise be prohibited or hindered by the effect of neutrally phrased and applied legislation”. Parallelism exists between these two constitutional rights and on many occasions the Supreme Court of Canada has not hesitated to use them interchangeably. Indeed, the norms that limit freedom of religion unevenly affect certain groups’ beliefs or convictions. In this sense, one could say that they are discriminatory. However, the contrary is also true: a norm that is discriminatory toward certain convictions or beliefs will, in most cases, limit freedom of religion.

164. Labelle et Icart 2007, supra, note 163.
165. Woehrling 97-98, supra, note 155 at 325.
166. Woehrling 97-98, supra, note 155 at 325.
167. Woehrling 97-98, supra, note 155 at 325.
168. Woehrling 97-98, supra, note 155 at 370-375.
169. Woehrling 97-98, supra, note 155 at 384.
170. Woehrling 97-98, supra, note 155 at 384.
171. Woehrling 97-98, supra, note 155 at 384.
Freedom of religion was first defined by the Supreme Court Judge Dixon in the case *Big M Drug Mart*. The definition put forward by Judge Dixon was greatly inspired by the UN’s definition found in the *International Covenant on Civil and Political Rights*. The definition stipulates that everyone has the right to believe, express, and practice whatever they believe without coercion. Freedom of religion is not unlimited as it stops where preservation of the security, order, health, and fundamental rights of others start. Freedom of religion is not unlimited, just as reasonable accommodation is not. Limits on the government’s duty to accommodate are set out at article 1 of the Charter which provides that no accommodation is necessary if the legislation (as adopted) is the least detrimental way to achieve an important social objective. In the same vein, what has been commonly referred to as the “Oakes test” (from the *R. v. Oakes* decision) in Canadian jurisprudence is the test used to determine if a discriminatory norm can be justified in a free and democratic society. The test is divided into three main questions: Is the rule as a whole a rational way to pursue the government’s legislative objective? Can this legislative objective be met in another, less infringing way? Is there proportionality between the negative and the positive impacts of the norm?

In recent years, the Supreme Court of Canada has ruled on two important decisions pertaining to freedom of religion: *Alberta v. Hutterian Brethren of Wilson Colony* (2009) and *Multani v. Commission scolaire Marguerite-Bourgeoys* (2006). The *Hutterian* case involved a Hutterite community’s challenge to an Albertan regulation requiring drivers to have a valid picture of themselves on their driver’s license. The objective behind the requirement is to allow for facial identification of most of Alberta’s residents in order to prevent identity theft. The Hutterites sincerely believe that the second commandment prohibits them from having their photograph willingly taken. Certain members of the

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community need a driver’s license in order to attend to the needs of the community and therefore, need to have their photograph taken. Thus, they challenged the regulation. The majority of the Supreme Court found that the restrictions imposed were justifiable in a free and democratic society and did not grant the accommodation requested by the Hutterian community.

The Multani case involved a young orthodox Sikh from Québec who asked for the right to wear his Kirpan (symbolic metal knife) at school. School authorities had allowed the young Multani to wear his Kirpan on the condition that he wear it in a very specific way that reduced the chances of the Kirpan accidentally hurting someone. However, the school board refused to allow him to continue to do so after his Kirpan fell in the school yard on the basis that article 5 of the school’s code of conduct prohibited the carrying of weapons and other dangerous objects. The school board’s decision was challenged and the judicial procedures went all the way to the Supreme Court. The Supreme Court reinstated the agreement that the school had taken with Multani’s parents which allowed him to wear his Kirpan to school in a specific way.

These two cases arose in different contexts: the laws that were contested were different; the rights argued for were different, as was the nature of the accommodations requested. The constitutional challenge of immigration laws would also arise in a different context and raise different questions. Typically, the courts have been reluctant to invalidate immigration laws. Indeed, immigration law is often perceived as one of the main prerogatives of the state. One of the fundamental principles of immigration law is that non-citizens have no absolute right to enter or remain in the country. However, in the case laid out by Judge Julien, the claimant would not be the child under Kafálah but the Kāfil who already is a Canadian citizen. Therefore, in a case about Kafálah and immigration laws, two main questions arise: is the desire to have a child a right, and if it is, is it important enough that an accommodation be made with respect to the relevant immigration laws? Finally, the claimant must prove in any reasonable accommodation case that he sincerely believes that his religion prohibits adoption and therefore, that Kafálah is the only way to take care of a child and raise him as his own.

181. Multani, supra, note 180 at para. 4.
Therefore, in opposition to what Judge Julien wrote, the authors believe that it is not certain that reasonable accommodation could be granted in a similar case. Moreover, it is not clear that reasonable accommodation is the best solution to this problem. Indeed, as opposed to reasonable accommodation, legislative intervention would allow the rules to be designed in the best interest of children, satisfy the demands of claimants and be universal to all.

5. Conclusion

Immigration cases concerning children under *Kafálah* or guardianship will most likely increase in future years. Indeed, in the first quarter of 2011, three out of the five main countries of origin of immigrants to Québec were countries where plenary adoption is restricted or prohibited. In recent years, some steps have been taken to address this issue; there was a trial project under which children under *Kafálah* could be sponsored in the family reunification class; there were many cases of children under

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184. A request for access to public information was made by the authors to the Ministère de l’immigration et des communautés culturelles and the Ministère de la santé et des services sociaux responsible for the Secrétariat à l’Adoption Internationale. The following information was obtained. The project was conducted by Citizenship and Immigration Canada, the Ministère des relations avec les citoyens et de l’immigration (now Ministère de l’immigration et des communautés culturelles) and the Secrétariat à l’Adoption Internationale. The project was designed to allow the immigration of children under *Kafálah* under the family reunification class. At that moment, the federal regulation included a disposition granting the right of children under tutorship to be considered a part of the sponsor’s family. This disposition was not in force at that moment and was repealed since there was no publicity made for this temporary program designed to test the feasibility of allowing children under tutorship (mostly children under *Kafálah*) to immigrate to Quebec. Between 1999 and 2003, 20 files of children under *Kafálah* were examined, 14 of them were accepted, 4 were declined (all from Morocco) and 2 were still being processed. By the end of the program in 2004, 10 more files had been opened. Children who were allowed to enter Canada under the family reunification category were not allowed to be adopted once on Quebec territory. Among the reasons mentioned to end the program was the lack of reliable procedure for granting *Kafálah* in some of the countries, the possibility of illegal activities linked to the process (child trafficking, monetary incentives, kidnapping, etc.), the need for a lot of human and financial resources to process the demands (in relation to the extensive knowledge needed to understand the different procedures for granting *Kafálah* in the different countries). There were also disadvantages for the sponsor and the child under *Kafálah* who...
Kafálah brought before different Québec Courts; and, finally, there was the presentation of Bill 81 – An Act to amend the Civil Code and other legislative provisions regarding adoption and parental authority on June 13, 2012, which would have brought considerable changes to the adoption regime in Québec. Unfortunately the new bill (Bill 47 introduced in June of 2013) does not go as far. The legal situation is still unclear and the main victims remain the children themselves. One may ask how the situation should be resolved. It seems that the most desirable option would be the legislative changes proposed by the Québec government that would allow children that have no filiation or are orphaned, under the conditions prescribed by law, to be adopted in Québec even if they come from countries prohibiting adoption. However, one may see the legislative changes to the adoption regime as a way to bypass Québec’s obligations from the Hague Convention on Adoption. Others might also see these new rules has being discriminatory against Québécois of Muslim faith since it forces them to adopt a child even when their religion prohibits it. Therefore, the authors believe that the second most suitable solution would be for Canada and the provinces to negotiate an agreement with Morocco as well as other Muslim law countries in order to establish a legal process (for example a guardianship regime) allowing children under Kafálah to live with their Kuffal in Québec and in the rest of Canada without having to adopt the child. Unfortunately, the political incentive to do so appears low as cases such as these are still considered marginal.

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could not obtain the Canadian citizenship because the child was not adopted. It was then impossible for the Kâfil to change the name of the child under Kafálah according to article 60 of the C.C.Q. A final disadvantage was the impossibility for the Kâfil to have access to different social programs reserved for parents with biological or adopted children. The committee responsible for the program finally recommended the termination of the program.