



AN OVERVIEW OF THE RECOGNITION OF CUSTOMARY ADOPTION IN CANADA

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Final Report

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EXECUTIVE SUMMARY

Adoption, including shared child care, is a long-standing practice among the Indigenous peoples of Canada. It is an important means of addressing basic issues of family and community membership as well as more profound issues of transferring of knowledge and ceremony in Indigenous societies; it is integral to the distinctive cultures in which customary adoptions are utilized.

Canadian courts have followed two intersecting paths for the recognition and protection of Aboriginal customary laws. Depending on the context, Aboriginal peoples can choose to rely on the common law of custom or seek recognition of their customary laws as constitutionally protected Aboriginal or Treaty rights under section 35 of the *Constitution Act, 1982*. Canadian courts have concluded that custom adoption is a recognized traditional Aboriginal practice. Since 1982, case law has established that Aboriginal rights such as the right to utilize customary adoption cannot be infringed or extinguished unless the Crown can meet the strict test described in this report to justify their acts. A further option is to have custom adoption set out in legislation, which has occurred in a few jurisdictions in Canada, but not yet in Saskatchewan.

If challenged, Aboriginal custom adoption practices would likely be upheld as valid by Canadian courts. However, litigation is an expensive and uncertain route towards the recognition of Aboriginal customary adoptions. For this reason, it may be more desirable to seek statutory changes which clearly recognize Aboriginal customary adoptions, either expressly in provincial legislation or through federal, provincial and First Nation legislation that recognizes First Nations jurisdiction over family, in particular jurisdiction over children, child care and custom adoptions.

Legislative recognition of customary adoptions has lagged behind judicial recognition. Statutory recognition is found only in the Northwest Territories, Nunavut, Yukon, the province of British Columbia, and federally in the *Indian Act*. In Northwest Territories and Nunavut legislation, “custom adoption” is not defined. The legislation does not require home studies and placement approvals by child welfare agencies, or court appearances. Interestingly, placement of an Aboriginal child outside the community requires consultation with an Aboriginal organization. In British Columbia and Yukon, legislation allows courts to recognize customary adoptions but requires a formal court hearing. This requirement may make the customary adoption process more difficult for First Nation persons.

This report recommends that Saskatchewan follow the example of the Northwest Territories and Nunavut in making changes to Saskatchewan’s adoption legislation. For ease of reference, Chart 1 at page 46 compares the most important features of the two basic models used in Canada for statutory recognition of Aboriginal customary adoption.

The authors’ consultations with First Nations Elders and First Nations childcare agency workers made it clear that a narrow focus on adoption, as it is understood in Canadian law, does not match the reality of family and community relationships in First Nations in Saskatchewan. Broader concepts like customary care must be recognized by statute in order to maintain and strengthen family and community ties within First Nations. Foster care within First Nations must also be supported.

This report includes specific recommendations for legislative changes and the joint processes through which they may be achieved. The recommendations are based on general

principles flowing from the research, including the need for legal recognition of Aboriginal concepts of the best interests of children, their families and their communities. The recommendations are general and flexible enough to support recognition of the unique customs and laws of each individual First Nation in Saskatchewan. The report also suggests possible topics for further research and analysis. Although concerns about child welfare and foster care practices in Saskatchewan go beyond the mandate of this project, this report summarizes the information provided during the consultations and make suggestions for future actions to address these important topics.

Finally, the authors would like to thank the Institute for selecting us to participate in this research, the directors, Eleanor Brazeau and Derald Dubois and their staff and Elders and the people who invited us into their communities and homes. We want to be clear that due to the short time frame it was just not possible to go to each community and so we did not hear from any Nakota, Lakota or Dakota people and had only a couple of opportunities to hear from Dene and Salteaux families. The majority of people interviewed were Cree. More work would need to be done to ascertain the practices of the other Nations.

AN OVERVIEW OF THE RECOGNITION OF CUSTOMARY ADOPTION IN CANADA

I. INTRODUCTION

Customary adoption is generally defined as the cultural practices of Aboriginal peoples to raise a child, by a person who is not the child's parent, according to the custom of the First Nation and/or the Aboriginal community of the child¹. These customs are part of traditional legal systems which exist across Canada today within Indigenous families and communities. The question for each First Nation and each family is how are these traditions implemented by First Nations governments in order to maintain the practice and whether or not they need to be recognized by federal or provincial governments. As we shall see there has been some recognition through the Canadian courts for these types of laws and practices.

In 1982, the Constitution of Canada was amended to formally recognize the existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada.² This explicit constitutional recognition protects customary law, both as a Treaty and as an Aboriginal right, and is one step towards fulfilling the demand of Aboriginal peoples for recognition of their own legal systems, including the development of both substantive laws and dispute-resolution mechanisms appropriate to Aboriginal cultures. Each Aboriginal community has its own system of customary laws. The recognition of customary law supports the strength and integrity of Aboriginal communities.

¹ *Aski Awasis/Children of the Earth: First Peoples Speaking on Adoption*, Jean Carrier, Editor, (Fernwood Publishing, Nova Scotia) 2010

² *Constitution Act, 1982*, s. 35, being Sched. B to the *Canada Act 1982* (U.K.) 1982, c. 11.

In this paper we use the term “customary law” to refer to the system of laws, rules, protocols and social relations which are held by members of an Aboriginal community. Such a system could also be described as “traditional law or “indigenous law.” We do not intend to imply a pan-Indigenous model of any particular law. As discussed below, some aspects of Indigenous law are now recognized by the general system of law in force in Canada. However, we generally use the term “Canadian law” to contrast it with Indigenous customary law.

Somewhat ironically, one basis for the current recognition of Aboriginal customary law lies in the ancient common law of England, which provided strong protection for local customary law against general statutory law unless the statute showed a clear and plain intention to abrogate local customary law. In Canada prior to 1982, Aboriginal customary law was recognized and applied by the courts, particularly in the area of family relations. The earliest recognition of customary law often involved situations in which there was no applicable Canadian or English law or in which the application of such law would have been impossible in the circumstances. The ability of Aboriginal customary law to survive the imposition of colonial and later Canadian legal systems has taken on greater importance with the constitutional recognition of existing Aboriginal and Treaty rights in the *Constitution Act, 1982* under Section 35. However, Indigenous people have consistently asserted their rights to determine for themselves, through their own systems, what kinship laws are and how they should apply in their respective Nations.

Adoption is a long-standing practice among the Indigenous peoples of Canada. It is an important means of addressing basic issues of status in Indigenous societies and is integral to the distinctive cultures in which customary adoptions are utilized. In the case of *Re Deborah*, Justice Morrow of the Northwest Territories Territorial Court, described the Inuit practice of adoption as

“the most outstanding characteristic of their culture and appears to outrank marriage and hunting rights.”³

The term “adoption,” as used by western societies, is defined as an arrangement that is exceptional, where a child, who has no caregivers, is permanently placed with a family. Western adoptions were, and in some cases still are, private affairs where the birth parent s’ identity and thus the extended family and clan are hidden. First Nations concept of adoption in communities simply brings a child to the community for the child - there is nothing exceptional or unusual about it and there is no severing of the relationship with the birth parents. The birth parents are acknowledged as having a special and unique gift to contribute to the child that cannot be provided by other community members, so active steps are taken to ensure the child knows his or her parents, extended family and clan .⁴

Each First Nation has its own phrases for these practices. The terms are precise and descriptive for whatever type of customary adoption they are practicing, dependent on who is being adopted and which tradition is being used.⁵

In Canadian law an Aboriginal customary adoption may be defined as the transfer of parental rights and obligations from biological to adoptive parents in a manner which conforms to

³ *Re Deborah* , [1972] 5 W.W.R. 203, (sub nom. *Re Tucktoo and Kitchooalik*), 28 D.L.R. (3d) 483 (N.W.T.C.A.) [cited to W.W.R.], aff’g [1972] 3 W.W.R. 194, 27 D.L.R. (3d) 225 (T.C.) [cited to W.W.R.], at 198 (T.C.).

⁴ Blackstock, C. Submission to the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities. 2010 (<http://www.fncaringssociety.com/sites/default/files/docs/FNCFCSS-Supporting-First-Nations-Adoption-Dec2010.pdf>) See also Quebec, Report of the Working Group on Customary Adoption in Aboriginal communities, Apr. 16, 2012 at 19.

⁵ Each Indigenous Nation has their own phrases/words for these practices. See Quebec, Report of the Working Group on Customary Adoption in Aboriginal communities, Apr. 16, 2012 at 22, where the Report states “Of course, use of the term “adoption” makes it easier for non-natives to understand because it invokes a concept familiar to them.”

the traditional custom of an Aboriginal community but which does not attempt to fulfill the requirements of provincial or territorial adoption legislation.⁶ The non-recognition of customary adoption can have a number of negative legal consequences in addition to the denial of the existence of Indigenous legal systems, and undermining of Indigenous culture; these range from the denial of government benefits to the loss of inheritance and other rights normally enjoyed by other adopted children and adoptive parents in Canada.

Aboriginal customary adoptions - among both Inuit and First Nations - have been recognized judicially in the Northwest Territories, British Columbia and Quebec since 1961. The reasonableness of Aboriginal customary adoptions was most clearly addressed in the case of *Re Deborah*. In that case, Justice Morrow stated:

Looking back over the more than 200 cases that I have heard to date there is no doubt in my mind but that these reasons [for Inuit customary adoptions] are always there and are all based on good sense: the mother had to go to hospital and could not look after the child; this is the third or fourth child in a row and my wife cannot look after it; this is a twin and my wife cannot look after two of the same age; we have lots and the grandmother is lonely and wants this one to look after.⁷

The reasons for adoptions traditionally vary from culture to culture and include: the death of a child, so that the couple or family will then adopt another child; the death of the child's parents; the need for a child to become a caregiver in the adoptive family; the need to teach the child a certain practice or custom in which the adoptive family is expert, so the child is taken on

⁶Zlotkin, N. "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases, [1984] 4 C.N.L.R. 1, at 2.

⁷ *Supra*, note 3 at 198 (T.C.)

by them.

In contrast with the judicial recognition given to Aboriginal custom adoptions, Canadian,

British and American law did not recognize adoptions prior to the passage of adoption legislation. A father had an absolute right of custody of his children against everybody else: he could not enter into a legally binding agreement to deprive himself of custody of his children, and if he purported to do so, he could at any time regain custody of them. The non-recognition of adoption by English law may be contrasted with its recognition in many other legal systems. The earliest known recognition of adoption can be found in the *Code of Hammurabi* from around 2270 B.C. Adoption was also recognized by ancient Greek, Egyptian, Japanese and Hindu law. Roman law, which used adoption as a means of providing an heir for an adopter's family, has been followed in those European countries with civil codes.⁹

Many of the so-called adoptions which did occur in Canada and England prior to the enactment of adoption legislation fell into two categories: private placements and agency placements. A private placement was arranged by the birth and adoptive parents (who were often related to one another), so that a child would have a better opportunity in life. In an agency placement, the birth parents or parent (often an unwed mother) agreed to place a child in an agency's care until the agency could place the child in an appropriate home or situation. Unlike the situation with Aboriginal customary adoptions, neither private placements nor agency placements were enforceable in the courts, unless a judge considered that it was in the best interests of the child that the child not be returned to the birthparents.¹⁰

⁹Durst, D. "Seeking Solutions through Self-Government", in *Aboriginal Self-Government in Canada: Current Trends and Issues*, J.H. Hylton, editor (Purich Publishing, Saskatoon, SK) 1999.

⁹ Zlotkin, *supra*, note 6 at 7.

¹⁰ *Ibid.*

The permanency aspect of non-Indigenous adoption does not have the same value in Indigenous customary care. Based on our research and the discussions we have had with the two

Elder groups, as well as the literature review, there were some permanent adoptions in First Nation communities; however, the focus was always on the child and the extension of family, rather than the removal from the family. This puts the two systems of adoptions at odds and caught in a legal gap when trying to reconcile them. On the one hand, typical Canadian statutory adoptions are private, now with an option to allow birth families access for visitation but with sole parental control, rights of inheritance and determinations upon death to the adoptive family. On the other hand, with customary adoptions there is an extension of family with the actual possibility of more than one mother and father and of joint decision-making and responsibility, and even in some cases, of children moving between homes. When children are gifts from the Creator in one system and wards or dependents in the other, it is obvious that language alone, and the systems of claiming and redistribution of rights and responsibilities around children cannot be reconciled.

Another difference in the notion of adoption generally is that the transfer of care, of family roles and of responsibility, was not limited to children in Indigenous societies. Age, health, and even race, were not prohibitive factors for consideration when adopting new family members, and may even contribute to the need for an alternative family arrangement. This paper focuses on children and the current issues of adoption and fostering arising in First Nation communities, so we did not consider this range of potential adoptees in our research.

Nevertheless it is noteworthy because it highlights a major difference in approach to the care of others and to relationships within family.

PART II LEGAL FRAMEWORK

1. Judicial Recognition of Customary Law by Canadian Courts

Most Canadian cases upholding the application of customary law deal with issues of legal status, such as marriage and adoption. The recognition of customary law by Canadian courts has tended to examine the core of the customary law and its traditional role within the culture of a specific Indigenous nation. Customs regarding marriage and adoption are inextricably linked with such fundamental matters as family relationships and membership in a First Nation. Therefore, the customs in question no doubt meet the “integral to a distinctive culture” test and are protected by section 35(1) of the *Constitution Act, 1982*. This “integral to a distinctive culture” test was established in the *Van der Peet* case from British Columbia and is the test applied in all court cases concerning the establishment of an right.¹¹

Aboriginal Canadian courts
 have also acknowledged that the right to utilize customary laws continues to exist in Canada, at a minimum, for purposes of self-regulation. For example, in the landmark case *Delgamuukw v. British Columbia*, at the British Columbia Court of Appeal, Justice Hutcheon wrote:

The traditions of the Gitksan and Wet’suwet’en societies existed long before 1846 and continued thereafter. They included the right to names and titles, the use of masks and symbols in rituals, the use of ceremonial robes and the right to occupy or control places of economic importance. The traditions, in these kinship societies, also included the institution of the clans and of the Houses in which membership descended through the
 mother and, of course, the Feast system. They regulated marriage and the relations with neighbouring societies.¹²

He went on to state that the right to practice these traditions had not been extinguished.

¹¹*R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289, 4 C.N.L.R. 177 [cited to C.N.L.R.].

¹²*Delgamuukw v. British Columbia*, [1993] 5 W.W.R., [1993] 5 C.N.L.R. 1 (B.C.C.A.) at 270 [*Delgamuukw* cited to C.N.L.R.].

Justice Lambert summarized his opinion on the continued existence of customary law as

follows:

É The Gitksan and Wet'suwet'en peoples had rights of self-government and self-regulation in 1846, at the time of sovereignty. Those rights rested on the customs, traditions and practices of those peoples to the extent that they formed an integral part of their distinctive cultures. The assertion of British Sovereignty only took away such rights as were inconsistent with the concept of British Sovereignty. The introduction of English Law into British Columbia was only an introduction of such laws as were not from local circumstances inapplicable. The existence of a body of Gitksan and Wet'suwet'en customary law would be expected to render much of the newly introduced English law inapplicable to the Gitksan and Wet'suwet'en peoples, particularly since none of the institutions of English Law were available to them in their territory, so that their local circumstances would tend to have required the continuation of their own laws. The division of powers brought about when British Columbia entered confederation in 1871 would not, in my opinion, have made any difference to Gitksan and Wet'suwet'en customary laws. Since 1871, Provincial laws of general application would apply to the Gitksan and Wet'suwet'en people, and Federal laws, particularly the Indian Act, would also have applied to them. But to the extent that Gitksan and Wet'suwet'en customary law lay at the core of their Indianness, that law would not be abrogated by Provincial laws of general application or by Federal laws, unless those Federal laws demonstrated a clear and plain intention of the Sovereign power in Parliament to abrogate the Gitksan and Wet'suwet'en customary laws. Subject to those overriding considerations, Gitksan and Wet'suwet'en customary laws of self-government and self-regulation have continued to the present day and are now constitutionally protected by s.35 of the Constitution Act, 1982.¹³

Justice Macfarlane, speaking for himself and Justice Taggart, further supported the recognition of customary law on kinship, including adoption, when he wrote: "No declaration by this court is required to permit internal self-regulation in accordance with aboriginal traditions, if the people affected are in agreement".¹⁴

In *Casimel v. Insurance Corp. of British Columbia*, a case involving a customary adoption, Justice Lambert pulled together the various judgments of the British Columbia Court of

¹³*Ibid.*, 241.

¹⁴*Ibid.*, 48.

Appeal in the *Delgamuukw* case to conclude that the right to practice customary law still exists

and is protected by section 35 of the *Constitution Act, 1982*.¹⁵ He wrote:

I think that the conclusion which should be drawn from the decision of the court in *Delgamuukw v. British Columbia* is that none of the five judges decided that Aboriginal rights of social self-regulation had been extinguished by any form of blanket extinguishment and that particular rights must be examined in each case to determine the scope and content of the specific right in the Aboriginal society, and the relationship between that right with that scope and content and the workings of the general law of British Columbia affirmed and guaranteed by s.35 of the *Constitution Act, 1982*, not in its regulated form but in its full vigour, subject to prima facie infringement and justification tests leading to a decision about ultimate justification, all as set out in *R. v. Sparrow*.¹⁶

2. Judicial Recognition of Customary Adoption by the Canadian Courts

Canadian courts have followed two intersecting paths for the recognition and protection of Aboriginal customary law. Depending on the context, Aboriginal peoples can choose to rely on recognition through the common law of custom rather than relying on existing legislation, or recognition as constitutionally protected Aboriginal or Treaty rights under Section 35 of the *Constitution Act, 1982*. “Common law” means judge-made law based on past judicial decisions, rather than law set by legislation. Recent case law from the Supreme Court of Canada has the potential to further protect customary law, because consultation is now a constitutional requirement before Aboriginal or Treaty rights can be infringed by government action. Hence, based on case law, a government that wishes to change its adoption legislation would have to carefully examine the impacts of proposed changes on Aboriginal people, discuss the options

¹⁵ *Casimel v. Insurance Corp. of British Columbia*, [1994] 2 C.N.L.R. 22 (B.C.C.A.), rev’g [1992] 1 C.N.L.R. 84, 58 B.C.L.R. (2d) 316 [*Casimel*, cited to C.N.L.R.]

¹⁶ *Ibid.*, 27.

with them, and consider ways to least impact Aboriginal people and all the alternatives to the legislative changes.

Prior to 1982, and the section 35 constitutional protection of existing Aboriginal and Treaty rights, the recognition of Aboriginal customary adoptions by Canadian courts illustrated the use of English common law to protect customs integral to many Aboriginal nations. Aboriginal adoption customs were recognizable in Canadian law because they fulfilled the English common law requirements of valid customs. Today, the right to practice customary adoption is also protected as an existing Aboriginal or Treaty right by section 35(1) of the *Constitution Act, 1982*.

Before Constitutional recognition of existing Aboriginal and Treaty rights, case law considering the validity of Aboriginal customary adoptions addressed two primary legal questions:

- (1) What is the legal basis of the validity of Aboriginal customary adoptions?
- (2) Assuming that Aboriginal customary adoptions were at one time valid within the framework of Canadian law, has their validity been abrogated by legislation?

Both questions were addressed by the British Columbia Court of Appeal in 1993 in the *Casimel* case referred to earlier. That case confirmed that customary adoption was an integral part of the distinctive culture of the Stellaquo Band of the Carrier Nation and that the custom had not been abrogated by legislation prior to the constitutional amendments of 1982. The Court further found that the custom was therefore recognized and protected as an existing Aboriginal right by both the judicially developed common law and the constitutionally legislated Section 35. The case involved the right to death benefits payable to “dependent parents” under the *Insurance (Motor Vehicle) Act* of British Columbia. The trial judge found that a customary adoption in accordance with Carrier customary law had taken place, but dismissed the action on the basis that

the customary adoption gave rise to moral rights and obligations but not to legal rights and obligations. Therefore the adoptive parents of the deceased insured motorist, who were his biological grandparents, were not entitled to be treated as parents for purposes of the Act.

On appeal, one of the issues was whether the adoptive parents were “parents” of their deceased adopted son for purposes of the provincial statute. The Court of Appeal considered previously decided customary marriage and adoption decisions and concluded “that there is a well-established body of authority in Canada for the proposition that the status conferred by Aboriginal customary adoption will be recognized by the courts for the purposes of application of the principles of the common law and the provisions of statute law to the persons whose status is established by the customary adoption.”¹⁷ Justice Lambert examined in detail both provincial adoption legislation going back to British Columbia’s first *Adoption Act* in 1920 and the federal *Indian Act*.¹⁸ He concluded that there was no intention by either the British Columbia Legislature or Parliament to regulate or qualify the right of Aboriginal people to continue their adoption custom in accordance with their customs, traditions and practices which form an integral part of their culture. In other words, there was no evidence of a clear and plain intention to extinguish the Aboriginal right to utilize customary adoptions.

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Criteria for customary adoptions are found in Canadian jurisprudence. In *Re Tagornak* Justice Marshall summarized the elements of the earlier decisions, and produced a list of “some of the criteria which the Court will apply”:

- a) that there is consent of natural and adopting parents;

¹⁷*Ibid.*, 30.

¹⁸R.S.C. 1985, c. I-5.

¹⁹ *Re Tagornak*, [1983] N.W.T.J. No. 38, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.)

- b) that the child has been voluntarily placed with the adopting parents;
- c) that the adopting parents are indeed Aboriginal or entitled to rely on Aboriginal custom; and
- d) that the rationale for Aboriginal custom adoptions is present in this case as in *Re Deborah CA* above.

Canadian courts have found that a valid custom can only be altered or extinguished by legislation that uses explicit language or language which can only be interpreted as extinguishing the custom. Statutory language which is consistent with the continued existence of a custom does not extinguish it. Early adoption legislation in the Northwest Territories and British Columbia, for example, has never expressly extinguished the right to utilize customary adoption, prohibited customary adoption, or used language inconsistent with the continued practice of Aboriginal customary adoption.

Turning now to a consideration of Aboriginal customs as Aboriginal and Treaty rights in Canadian law: prior to 1982 Aboriginal rights could only be extinguished if there was a clear and plain intention by the federal Crown to do so. Furthermore, regulation of a right, in great detail, did not mean that the Aboriginal or Treaty right was extinguished. Since 1982, case law has established that Aboriginal rights cannot be infringed or extinguished unless the Crown can meet the strict test justifying why they would infringe a right, to what extent and whether or they worked with the First Nation to limit that right in any way.

*R. v. Sparrow*²⁰ set out a two-part test to address the question of what constitutes a legitimate regulation of a constitutionally-protected Aboriginal right, from the perspective of the

²⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 111 N.R. 241.

judiciary. First, the statute or governmental action in question must have a valid legislative objective or good legal reason. If a valid legislative objective is found, the second part of the test asks whether the honour of the Crown in its dealings with Aboriginal peoples has been upheld. The special trust relationship and the responsibility of the government towards Aboriginal peoples must be the first consideration in determining whether the legislation or action in question can be justified.

Within the justificatory analysis, there are further questions to be addressed, depending on the circumstances of the case. These include whether there has been as little infringement as possible in order to effect the desired results; whether the Aboriginal group in question has been consulted with respect to the infringement of their rights; and whether, in a situation of expropriation, fair compensation is available. According to *Sparrow*, the justificatory standard may place a heavy burden on the Crown.

Indigenous customary law as recognized through Canadian case law, including its ability to evolve and adapt to modern conditions,²¹ is now recognized as an existing Aboriginal and Treaty right, protected by section 35 of the *Constitution Act, 1982*.

In Nunavut, the courts have divided custom adoptions into two categories: traditional custom adoptions and practical custom adoptions.²² The distinction is based on how the custom adoption is initiated. With traditional custom adoptions, the “biological and adoptive parents meet

²¹Zlotkin, N., “From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada, in C. Bell & R. Paterson (eds.), *Protection of First Nations Cultural Heritage: Laws, Policy and Reform* (Vancouver, University of British Columbia Press, 2009) at 27.

²²*S.K.K. v J.S.*, 2002 CanLII 53332 (NU CJ).

and reach an intention and agreement of adoption.”²³ The court states that “the adoptive parents

take on all the rights, responsibilities and obligations towards the child and those rights, responsibilities and obligations are extinguished vis-à-vis the biological parents (unless the agreement is to the contrary).²⁴ On the other hand, with practical adoptions, “a child is taken to the extended family because the biological parents are unable or not interested in caring for the child.”²⁵ The court states that the “caregiver does not take on the rights, responsibilities and obligations for the child from the biological parents.”²⁶ The court goes on to state that “It may be that if there is a practical custom adoption, the child has more than one set of parents who have legal responsibility for their care.”²⁷ It is important to note that both traditional custom adoptions and practical custom adoptions may be registered by the Custom Adoption Commissioners under Nunavut law.²⁸ This approach may have great relevance in Saskatchewan.²⁹

3. Statutory Recognition of Customary Adoption in Canada

Within the federal jurisdiction, the only legislation with national scope in which customary adoption is addressed is the *Indian Act*.³⁰ The *Indian Act* recognizes customary adoption within its definitional section, which states:

2. (1) In this Act,
“child” includes a legally adopted child and a child adopted in accordance with Indian custom.³¹

²³*Ibid.*, para. 47.

²⁴*Ibid.* para. 52.

²⁵*Ibid.*, para. 47.

²⁶*Ibid.*, para. 52.

²⁷*Ibid.*

²⁸*Ibid.*, para. 53.

²⁹See the “Recommendations” section of this report.

³⁰ *Indian Act*, RSC 1985, c 1-5.

In 1985 the *Indian Act* was amended through Bill C-31 to grant Indian status to children adopted after September 4, 1951.³² This would include children adopted by custom as well as by statute.³³

In provincial jurisdictions, legislative recognition of customary adoptions has lagged behind judicial recognition. Currently, the only statutory recognition is found in the Northwest Territories, Nunavut, Yukon and the province of British Columbia.³⁴

In the Northwest Territories and Nunavut, customary adoption is recognized by legislation, the *Aboriginal Custom Adoption Recognition Act*³⁵ of the Northwest Territories, which also applies in Nunavut.³⁶ “Custom adoption” is not defined and home studies and placement approvals by child welfare agencies are not required. An informational document is submitted by the adoptive and birth families with a local official. That person confirms the information and submits the documentation for court approval. Court appearances are no longer required.³⁷ Interestingly, placement of an Aboriginal child outside the community requires consultation with an Aboriginal organization.

In British Columbia, legislation was passed in 1995 allowing courts to recognize customary adoptions. In that province’s *Adoption Act*, section 46 reads as follows:

³¹ *Ibid.*, s. 2(1).

³² *Ibid.*, s. 6(1)(c.1)(iv).

³³ Relying on the definition of “child” in s. 2(1).

³⁴ See Appendix B.

³⁵ SNWT 1994, c. 26.

³⁶ By operation of the *Nunavut Act*, SC 1993, c.28.

³⁷ See Sissons J.’s memoirs, *Judge of the Far North* (Toronto: McClelland and Stewart, 1968) ch. 28 for his description of the “Fight Over Eskimo Adoption Customs.” Prior to 1976, it was necessary for the adoptive parents and the biological parents to attend an oral hearing in order to obtain a declaration. In 1976, when Tallis J. succeeded Morrow J., oral hearings were no longer required. Instead, adoptive parents were able, through a local government office, to file a petition which was eventually placed before a judge in chambers, who would either grant the declaration or direct a hearing of the petition. The above procedural information is taken from a paper prepared by a researcher with the N.W.T.S.C.: J. Callaghan, *Custom Adoption: The Unique Alternative* (N.W.T.S.C., 1986) [unpublished].

46 (1) On application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.

(2) Subsection (1) does not affect any aboriginal rights a person has.

Unlike in the Northwest Territories and Nunavut, a formal court hearing is required in British Columbia, which may make the process more difficult for First Nations persons. A basic question, which has not been addressed by the courts, is whether the British Columbia approach changes the nature of customary adoptions, in the sense of limiting certain rights and responsibilities that exist in customary law. Yukon has followed the British Columbia approach in requiring a formal hearing before the Yukon Supreme Court.³⁸

In Quebec, Bill 81 was tabled in the National Assembly on June 13, 2012 to recognize customary adoption. As it was not passed when a provincial election was called on August 1, 2012, it will have to be reintroduced.³⁹

³⁸ *Child and Family Services Act* SY 2008, c 1, s. 134.

³⁹ As of January 22, 2013, Bill 81, which would recognize customary adoptions, had not been reintroduced in the National Assembly.

PART III CONSULTATIONS WITH FIRST NATIONS ELDERS

We were invited to meetings with Elders at Sturgeon Lake and Muskowekan First Nations, two of the Agencies within the First Nations Child and Family Services Institute. Several individual one on one interviews were also held at other locations with various Elders from across Saskatchewan. The purpose of meeting with Elders was to get an understanding of the traditions around adoption and the processes and protocols involved with customary adoptions. The time frame was short and it was clear after the interviews that much more research has to be done within each community with the Elders to find the traditional laws of the particular community. We are deeply grateful to the Agencies for arranging the meetings and for the Elders teaching us and taking time to tell us their stories and their knowledge of the traditional care of children. The information they offered was very specific to their Nation and to their family and this Report does not disclose specific details of the Elders' information. Rather generalities were drawn for Report purposes. A recommendation will be to have a study set up to go to each community, follow their protocol and gather their practices so their customary law is available to community people and to the Agency workers to implement. Below is a summary of what we gathered on customary adoption.

Once the work on this Report began it became evident that every Indigenous person we spoke to had a story about adoption, customary care, or taking care of foster children. Everyone has experience with customary care-grandmas and aunts and grandpas and uncles grew up with children in their household that were not their biological children and there was clear mobility

The Elders were very insistent that non-First Nations communities and governments

among extended family members. It was part of the everyday experience of First Nation

families. In talking with us, Elders articulated the goal of recognition of the laws and the practices relating to the customary care of children.

Along with providing information about traditional childcare practices in the communities, the Elders also had many concerns about what happens to children in care in the provincial system, how they are processed, who is watching out for them, what their resources are and what their resources of the family are.⁴⁰ They articulated a need to send out the message that the current situation is not good -that the children from their First Nations are their babies and that they want those children kept within the Nation.

The message is very clear-whatever the traditional law, whatever the family practice, the Elders firmly believe that children are citizens of their First Nation and are a priority. Children should be with family. Ultimately, wherever they are, children should be visited on a regular basis by family members to always ensure strong community bonds and open communication with extended family. This would help maintain and respect kinship laws and traditions. It was said that children are hungry for knowledge of who they are and that this information must be available to them and that they in turn must be available to their home communities and families.

According to the Elders, the concept of “permanency” was not relevant in the context of First Nation childcare situations. In fact, many very senior people had trouble understanding the concept, as it has no place in traditional childcare arrangements. They start instead from the

⁴⁰ Dr. Cindy Blackstock, Executive Director of the First Nations Child and Family Caring Society of Canada is the only one who has done a study on families who have had children removed and Saskatchewan should consider actually replicating that study or designing a new study that would capture the experience of children and families who are removed and compare that to the service they actually receive. See Blackstock, C. *When Everything Matters: A study on Children being removed from their Families in Nova Scotia Between 2003- 2005*, Doctoral Dissertation, University of Toronto 2009.

position that children are loaned to parents by Creator.⁴¹ In the context of this research, to determine who should bring them up, questions are asked: What are the current needs of the child and parents? Who is best able to look after the child or children? This language may be linked in some ways to the common law concept of “best interests of the child”. But the Elders were very clear that loving the child was at the centre of the decision-making. If circumstances changed, then the child’s best interests were reassessed. The child was the centre- there were many stories of children moving from one home with extended family to another and back to mom and/ or dad. It was emphasized that the child was loved by all and, unlike with modern-day foster care, it was not a matter of moving from stranger to stranger. Strangers were not involved in caring for children; it was a familial arrangement. Therefore, with First Nation practices, traditional arrangements for looking after children were not defined as “permanent” but may have ended up being so out of need or necessity or arrangement.

The Elders did not want to use language like “permanent”, “custody”, “short-term”, “long-term” or “guardianship.” They saw these words as the language of the outside child welfare system which has been used too many times to remove children from the community. With some Elders, even the word “adoption” is unacceptable, as “adoption” connotes the

⁴¹ The 1996 *Report of the Royal Commission on Aboriginal Peoples* very eloquently made this point when they wrote at v. 3, p.21:

Children hold a special place in Aboriginal cultures. According to tradition, they are gifts from the spirit world and have to be treated very gently lest they become disillusioned with this world and return to a more congenial place. They must be protected from harm because there are spirits that would wish to entice them back to that other realm. They bring a purity of vision to the world that can teach their elders. They carry within them the gifts that manifest themselves as they become teachers, mothers, hunters, councillors, artisans and visionaries. They renew the strength of the family, clan and village and make the elders young again with their joyful presence.

Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family.

permanent removal of children from families and communities without allowing any further

contact with family. Instead they talked about “love” over and over again. They were very clear that the institutional language around the removal of children was ignoring the fact that children need to know who they are, and that they are loved and they are wanted. There were requests for this type of language to be used within processes surrounding child care today and a belief that this type of language would be part of the path to put First Nations children back into their communities and tied to their families, or, to reduce the number of children going into foster care and adoption outside of that traditional system.

For many Elders, grandparents were the watchful eye of the behavior and safety of the children. They were the ones who, under customary law, had the responsibility to step in to correct problems within the family relationships and restore responsibility and respect for the child and the parent. Extended family was key to the notion of child care, to the point that children might have more than one person they could call “mom” or “dad”. Elders used Cree and Dene terms, phrases and concepts for the raising of a child who was brought into the family, for taking a child to raise, for abandoned children and for children taken to ensure that the child’s needs were met. In fact the term “adoption” was used by some Elders with reluctance. They wanted to use a word from their own language that better reflected the action and the place of the child within the family.

Even the use of the word “family” has the potential to be problematic. In First Nation communities, “family”, due to kinship laws, is going to be much a larger and further-reaching concept than for that of a typical non-Indigenous family. In First Nation societies, children have

relationships with individuals who may come to be known under names like “grandma” or “auntie”, in situations that are limited to many fewer people in a non-Indigenous context.

According to the Elders, there were a number of ways that changes to childcare arrangements, i.e. when a child leaves the home of his biological parents for another home, could be done. There may be an announcement, an exchange of gifts, witnesses, a ceremony or the new caregivers may simply go and get the child. (The latter was more likely when a grandparent took a grandchild from her own daughter or son.) These different ways of taking on the care of a child of another person within the family or community had many areas of overlap. There may be gifting at a ceremony, or an announcement might come after the child was in the extended family for a period of time, and may come within a ceremony, and so on.

Traditional laws dealing with childcare may be thought of as both “private” and “public”. Traditional laws may be considered private to the extent that the decision was made solely within the family. Yet they may be considered public, when witnesses, a community ceremony and gift giving were required. The difference between First Nation and non-Indigenous contexts is that, in a First Nation context, both public and private traditional laws dealing with childcare were understood and recognized as equally binding on community members. In small First Nation communities the distinction between “private” and “public” would not have been easily understood, as private arrangements for care of the child would become publicly known relatively quickly. In larger urban areas, private arrangements might be less visible and less understood.

The people interviewed to date are concerned that “private” extended family arrangements for child care be recognized by both the provincial and federal governments. They would also like these types of private arrangements to be used more frequently than they are currently, because they are a recognition of traditional law which gives families the responsibility

for looking after the children rather than relying on the state. Taking on this type of responsibility was traditionally seen as a good thing to do, as it led to the community truly raising the children and the children knowing that they were connected and fit within that supportive structure. It was pointed out that apprehension and even statutory adoption may work in the short term to protect young children from immediate harm, but this protection breaks down as the children become teenagers and young adults.⁴² Their sense of who they are, the tugging on them between two families and the efforts to find their community, all play into their sense of guilt of having lost something.

There are problems with the current system in that it does not recognize that First Nation families are looking after children within their extended family and are not being paid for this task even though they are clearly taking on the financial responsibility for the child and for maintaining family connections. Although there was a belief expressed that off-reserve foster families often take children for the money, there was also a concern that when a First Nation family takes on the care of an extended family member pursuant to customary law, they are not provided with the financial means to care for the extra children in their household. We were also

⁴² Richard, K., "A Commentary Against Aboriginal to non-Aboriginal Adoption" (2004) 1 *First Peoples Child & Family Review* 101.

told that First Nation foster families are not funded by provincial child welfare agencies to the same extent as non-First Nation families.⁴³

A related issue impacting on the potential availability of family members as foster parents is that of existing criminal records. Having a criminal record is an obstacle to fostering. It should be recognized that many people change and go on healing journeys. Elders told us that people who show the willingness to change their lifestyle and rejoin their community should then be

given a chance to serve as foster parents.

Traditional laws and customs are highly valued by the Elders. Elders believe that traditional practices within the family and community keep the traditional laws and values alive, and thus the community itself, alive. These laws include how to refer to your extended family, who relates to whom and the ways to show respect for those relationships. Traditional ceremonies contribute to kinship relations. Naming, for example, often connected a child to the land and was, in itself, a teaching for the individual and gave signals to the relatives and the community as to the place and role or gifts and talents of the person being named.⁴⁴

Within the province of Saskatchewan, statutory adoptions are private; birth families are not told where the child has been placed and adoptive families are not told which community the child comes from. Thus adoptees usually lose connection with their First Nation community. Even though there may be well-meaning attempts by the adoptive family to expose the child to First Nation culture generally, it is not a link to the family or community that the child comes

⁴³This is the mission of Dr. Cindy Blackstock. She is widely published and in the media regularly in regard to the inadequate funding of First Nation child care agencies when compared with provincial agencies. .

⁴⁴ *Aski Awasis/Children of the Earth: First Peoples Speaking on Adoption*, *supra*, note 1. The stories of Elder Bluestone Yellowface in Darin Keewatin's chapter "Teachings from the Late Elder Bluestone Yellowface" detail some ceremonies, past and present, and the critical role they play in ensuring that children and families are united. The chapter reflects many teachings within our communities as well.

from and, in fact, it may be seen as a form of pan-Indianism, which ignores family and community.

One of the primary effects of adoptions under provincial statute is the question of property and inheritance. Statutory adoptions create permanent arrangements which give property and inheritance rights to children adopted in this manner. When asked about inheritance, several Elders pointed out in strong terms that this is inconsistent with the effect of customary adoptions or childcare arrangements. By customary law, property or rights were transferred to

others through the individuals receiving the property or rights earning the responsibility of ownership or control, which responsibility is then passed on to them by the person in control of such property or rights, as opposed to a right of inheritance merely as a family member. Elders went so far

as to articulate this aspect of statutory adoption as another attack, even though unintended, on customary law. The matter of inheritance may need to be addressed as a separate issue.

The Elders were very insistent that non-First Nations communities and governments, including childcare workers, need to be educated on First Nations' ways and traditional laws and practices. First Nations want to use traditional laws and have them recognized rather than ignored.

Interprovincial issues and questions around jurisdiction were also raised. The current patchwork of policies around children going into care make access to the children, the courts, the paperwork and social services in general very difficult for many First Nations people trying to reconnect family and rebuild community. The Elders told us that traditional childcare should be recognized throughout Canada, as it would send the very simple but important message to the children within the system that someone is looking for them, loves them and that they belong somewhere. As a solution, it was suggested that First Nation jurisdiction, based on the community membership of the parent or parents, would be a way of providing for interprovincial jurisdiction over child welfare by the First Nation.⁴⁵

Residential schools came up in every conversation with the Elders as being very literally linked to the problems today. The forced relocation of children to residential school broke traditional laws and customary practices. Residential school authorities did not recognize

customary care and, if they knew there was no birth parent available, the children were forced to remain at the school over the summer. Thus a large number of children were not connected with extended family, who had a responsibility under customary law to look after them and educate them in First Nation ways.

In addition to the residential school severing familial ties, many Elders noted that there was not just a 1960s “scoop”, but also a 1940s and 1950s scoop. In fact the removal of First Nations children continues to be a problem to this day. Nationally, between the years 1996- 2001 the number of Aboriginal children in care rose 71.5%.⁴⁶ Saskatchewan statistics are consistent with national patterns: Aboriginal children are dramatically over-represented amongst those served by child welfare:

⁴⁶In the United States, tribes have exclusive jurisdiction over the adoption of a Native American child or resides on (or is domiciled on) the reservation. See *Indian Child Welfare Act of 1978*, 25 U.S.C., s. 1911. This federal statute applies to all state authorities dealing with Native American children who are members of federally recognized tribes and who reside off reservation. If the Act and state law conflict, ICWA prevails, per s. 1915.

⁴⁶*Ibid*, page 10. Based on an unpublished report by Brad McKenzie from 2002, based on INAC data.

Aboriginal children are 6-8 times more likely to be placed in foster care than non-Aboriginal children. It is also clear that First Nations registered Indian children make up the largest portion of Aboriginal children entering child welfare care....⁴⁷

Statistics on children in care are closely related to the number of Aboriginal people in custody, 70- 80 %, despite the fact that Aboriginal people only make up 13-15 % of the population of the province.⁴⁸

The bottom line is that the Elders are very worried about First Nations children and have always been. The Elders know that they are often mined for the jewels, the gems that have kept

them alive, functional and thriving in spite of all attempts to ensure the disintegration of the First Nation family and traditional laws through assimilation policies, the taking of children, and legislation which was imposed to restrict their every move. One Elder said she is sick of being examined by agencies and governments and people who want an inside look at how First Nations have survived in spite of the constant attacks against their very beings as Indigenous people. She believes it is the spirit of the person that enables them to survive and which needs to be nurtured and, ultimately, that is not something you can find by dissecting people who have survived the many obstacles in their lives. That spirit which is found in all people must be nurtured and she believes that culture, her culture and her families traditions, are what has done that for her and what is assisting First Nation children who were removed from their families heal from the separation and abuse they faced.

⁴⁷ Galley, V.J. *Summary Review of Aboriginal Over-representation in the Child Welfare System*. Prepared for Saskatchewan Child Welfare Review Panel, July 28, 2010. Found at [www.
http://saskchildwelfarereview.ca/Aboriginal-Over-representation-VGalley.pdf](http://saskchildwelfarereview.ca/Aboriginal-Over-representation-VGalley.pdf).

⁴⁸ Statistics Canada 2006 Census: Analysis Series; Aboriginal People of Canada: A demographic profile. Ottawa, Statistics Canada.

As mentioned earlier, our discussions also showed traditional “adoption” was not limited to children. This paper does focus on children, but we heard over and over again of traditional laws still practiced today, by which adults will adopt each other as sisters, brothers, aunts, uncles and parents or grandparents. This type of custom extends the boundary of family and traditional family roles that are given to the adoptees. However, as arrangements between consenting adults, this type of ‘adoption’ is not the focus of this study and so was not pursued in our discussions with the Elders.

In summary, the various Elders with whom we talked believe that a loving family-

supported by community-will produce a better adjusted child and adult than one raised outside the family and the culture. All want a process by which the community is the first to respond to a child in need of care and, ultimately, that there be a place, a process and a priority to have First Nations children left within, and connected to, the First Nation family and community.

PART IV CONSULTATIONS WITH FIRST NATIONS CHILDCARE AGENCY WORKERS

At the meetings with the Elders, a number of agency workers attended to listen, offer their expertise and experience and to assist in note taking. The workers are often the first point of contact with the child welfare bureaucracy. As well, a few of these workers had firsthand experience with their own families in regard to both the provincial child care system as well as traditional practices, which they were prepared to share with us.

From the information we heard, the agency workers are seen, often, as the hub of dealings with the children, the birth families and the foster and adoptive families as well as the other government agencies. Therefore,

they are often the landing spot for a lot of emotion, anxiety and frustration. The workers who spoke with us and at the Elder meetings articulated their concerns regarding their limits within the child welfare system and their desire for more authority and resources to work within the community to maintain children within that community.

The workers reported the need to have Elders within the system of adoptions to ensure that traditions were followed. This is consistent with the findings of another study that showed that the employees of other Canadian First Nation child welfare agencies were feeling very oppressed in having to impose provincial, colonial rules and practices within their First Nations communities, thus adding to the colonization.⁴⁹

The restrictions on the role of the agency workers were mentioned briefly. These restrictions are multifaceted due to the nature of their work, the multitude of systems at play, and

⁴⁹ Reed, M. "First Nations Women Speak, Write and Research Back: Child Welfare and Decolonizing Stories", *First Peoples Child and Family Review* 2005 Vol 2 (1), 20-40.

their familiarity with the family's history. Families who do not trust the agency or the workers are caught between issues of trust and of practicality. The negative feelings flowing from the history of the childcare system's interaction with First Nations families are often transferred to the agency workers, who are seen to now be a replacement for the typical non-First Nation government agency. However, the family is dependent on the same workers for information about the child or children in the care of the agency, the dates of court hearings, any potential transfers of the children, possible adoption or permanent care orders, and on and on. The workers emphasized that the longer the child is held within the system, away from the family, the harder it is for the family to access the child, for possible alternative First Nations foster or extended family care to intervene, and for the child to retain their family connection.

Some agencies have developed, through agreements, through working relationships, through sheer insistence, a process whereby they are notified of any ongoing issues regarding their nation's children – apprehension, placements, court dates, health issues, and movement within the system. Others are simply not. This is a practice that really needs attention and uniform action to inform the First Nation of the state of its children. It should be mandatory that minimum-to advise the Chief, his or her delegate and the agency of the whereabouts of the children of the Nation

Many people are trying their best to work within or between two or more systems and some are bridging them. A few situations were found or discussed where an individual and a community wanted to use traditions and were doing their best to abide by provincial laws. In one instance the family followed the guidance of an Elder in regard to protocol for customary adoption and at the same time sought the advice of a lawyer to ensure that the legal loopholes

had been closed. In the case of the individual, the adopting family that was asked to take on a

child, followed the traditional way of adoption yet also had witnesses and the birth mother sign affidavits as to the new child care arrangements. In the case of the community, an Alberta judge actually showed up for a formal adoption that followed customary law in the morning and provincial law in the afternoon.⁵⁰

In addition to the internal office and provincial processes, the various laws between jurisdictions can become problematic for the workers as they try to connect family members to children in other provinces. There was a desire to have not only recognition of First Nation laws but also First Nation jurisdiction over the children-no matter where they were and reciprocal enforcement of those laws between provinces.

The agency workers said there are limits as to when an agency can intervene on behalf of a family or child and too great a focus on reaction rather than prevention. Specifically under the current system, agencies and workers cannot intervene unless the child is apprehended. We were told that these limits restrict the power to do preventive work - a power which all people interviewed said should rather be the focus. It was clear that stepping in too early could also be a problem if it was perceived that the agency worker held a bias or had access to limited family information which may or may not be true. The variations in the internal processes followed by the different agencies add to the confusion felt by First Nation clients.

The agency workers themselves expressed the desire for a more positive role; they are often from the community, have personal experience with adoption or foster care or residential school, and know only too well the problems within the system today. Many of the workers rely

⁵⁰ *Aski Awasis/Children of the Earth: First Peoples Speaking on Adoption, supra*, note 1.

on Elders for guidance and they wanted the roles of Elders to be clarified in regard to an articulation of traditional laws.

Further work should be completed with each agency and the workers. They are a valuable resource and have the experience to show where changes are needed and what the changes might be. There is also a need to canvass the work of other agencies. Several people interviewed made reference to experiences they had with the Alberta courts and social services agencies. There was an indication that some people felt they were more informed and better served in that province. Investigation into the actual processes used in Alberta is necessary. The Yellowhead Tribal Services Agency, which works with four Bands in Alberta, is the subject of more than one research report and may offer some insight.⁵¹

⁵¹ *Aski Awasis/Children of the Earth: First Peoples Speaking on Adoption, supra, note 1.*

PART V CONCLUDING COMMENTS

A separate component of child care that is not immediately apparent but which starts to come to light when speaking with Elders is the aspect of communal interdependency upon which many cultural laws are based. This is little understood in the Canadian legal system. A First Nation community becomes involved when a child is apprehended, customary child care/ custom adoption being a layering of family which adds to the lives of all involved, rather than a removal process under child protection laws done in secrecy with ties to past, identity and culture severed to the detriment of child, family and community. As affirmed by the Quebec Working Group on Customary Adoption:

Customary adoption takes place in the interest of the child and respecting the child's needs, while taking into account that in the Aboriginal context, the notion of interest includes the interest of the family, of the community and of the Nation, and particularly emphasizes the protection of identity, culture, traditional activities and language.⁵²

In contrast, statutory adoption laws focus on rights of the adoptive parents rather than the community, the family and the child.⁵³

Our research indicates that the English word “adoption,” as used in Canadian laws, typically refers to a permanent and irreversible change in family relationships that does not always fit the reality of First Nation customs. In First Nation societies, the transfer of responsibility for a child may last for a significant period of time but may not always be permanent. A word we heard frequently from both Elders and agency workers, was “caregiver.” For example, a grandmother or other family member may become a child's caregiver when a

⁵²*Supra*, note 5 at 91.

⁵³ *Aski Awasis/Children of the Earth: First Peoples Speaking on Adoption*, *supra*, note 1.

mother cannot care for a child, but the caregiver may return the child to the mother at a later time. Another common example is a situation in which children may have more than one person, or set of persons, who are responsible for their care. The Elders told us that there are several First Nation terms and concepts for what we are calling “customary care”, and the appropriate term depends on the circumstances in which a First Nation child comes to have needs that place him or her in the homes of extended family or other community members. There may also be other important ways in which family, social and community relations within Indigenous nations are not perfectly translatable into the English language or adequately served by current Canadian law. A more thorough interview process with both the agency workers and Elders of Cree, Sauteaux, Dene, Dakota, Nakota and Lakota nations, will determine what these are and how they are best implemented within the particular First Nation.

The recognition of customary adoption, as the term “adoption” is understood in provincial law, will not solve the central problem articulated by First Nation Elders: the loss of children by First Nation communities. What is needed is the recognition of a more expansive or inclusive concept like “customary care,” to use an English term, or care that may or may not be a permanent arrangement.

As set out in a 2007 report prepared by Quebec Native Women and the Association of Aboriginal Friendship Centres of Quebec:

“Adoption” was the term used by anthropologists when trying to understand and define aspects of the child rearing practices of people from kinship-based societies. Although the term proved useful in helping westerners make sense of the transfer of children amongst extended family and

close friends on a longterm basis, it has also become a stumbling block when government services have tried to understand and regulate the practice.⁵⁴

Nevertheless, the Nunavut approach of recognizing non-permanent arrangements as capable of registration as customary adoptions⁵⁵ might be appropriate for Saskatchewan. Once the adoption is registered it may be easier to argue that adoptive parents deserve recognition and support necessary to meet the needs of the child, something that is not evenly done between Indigenous and non-Indigenous families. Many of the Elders seemed to consider this as a custom adoption.

It is important to note that customary law may also have changed since the time of first contact with Europeans. Indeed, in light of the history of forced removal of children from mothers and families, it has had to evolve to cope with modern day realities. This does not mean that Aboriginal customs should no longer be recognized by Canadian law. The Canadian courts which have recognized Indigenous customary law have also recognized its ability to evolve and adapt to modern conditions.⁵⁶

Aboriginal customs involving important family and community relationships may vary from one First Nation to another and may involve different underlying assumptions or processes of change than provincial and territorial legislation allow for or recognize. A more complex issue may be how to delineate the rights, benefits and responsibilities flowing from a change in status under Aboriginal customary law. For example, should a grandmother who has assumed a

⁵⁴ Quebec, Report of the Working Group on Customary Adoption in Aboriginal communities, Apr. 16, 2012 at 21-22 .

⁵⁵ *S.K.K. v J.S.*, 2002 CanLII 53332 (NU CJ).

⁵⁶ For example, see *Re Tagormak*, [1983] N.W.T.J. No. 38, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.), in which the Court recognized a customary adoption in which the adoptive mother was Inuit and the adoptive father non-Inuit. See also Zlotkin, *supra*, note 23.

caregiver role be entitled to the same benefits as an adoptive parent under statutory law? The effect of customary adoptions and customary care should be a matter for negotiation between the appropriate First Nation representatives and the Province. With customary adoptions, until there is appropriate statutory recognition of Indigenous law OR Indigenous jurisdiction over this area of law, the simplest, initial response may be to follow the example of British Columbia. Its Court of Appeal decision in *Casimel* ensured that equivalent benefits are available under statutory law and customary law where the circumstances and relationships are roughly comparable; in other words, when non-customary rights, benefits or obligations are at issue.

The goal should be recognition of jurisdiction for First Nations to determine for themselves the placement and safe keeping of the children of their nations. The simplest steps forward to accomplish this would be to start with inclusion every step of the way on every child. This will require an in-depth data keeping system and accountability on the part of the provincial government. It will require more financial resources going to maintain families in community. And finally, it will require us all to refocus a system that is based on process, colonization and institutionalization of children to one based on love, affection and family ties. If self-determination and customary law or jurisdiction for First Nations exists anywhere at all, surely it is over its children, the citizens of those nations.

PART VI RECOMMENDATIONS

Based on our meetings with Elders and Child Care Agency workers and on our research, we respectfully submit the following recommendations:

1 Customary Adoption and Customary Care Recognition and Registry

1.1 That *The Adoption Act, 1998*, SS 1998, c A-5.2 be amended to recognize First Nation customary adoptions and customary care arrangements through the creation of a registry system similar to that of the Northwest Territories and Nunavut. We note that *The Adoption Act, 1998* currently recognizes a “simple adoption order,” which is defined in section 2 of that Act to mean:

- “ . . . an order of adoption granted in a jurisdiction other than Saskatchewan that does not necessarily for all purposes:
- (a) terminate all the rights and responsibilities that exist at law between a child and the child’s birth parents; or
 - (b) make an adopted child the child of the adopting parents as if born to them.

However, by section 28(1), First Nation customary adoptions and customary care arrangements would not be recognized in Saskatchewan as “simple adoptions”, as section 28 orders are limited to adoptions “in a jurisdiction outside Canada”.

We also note that customary adoptions are recognized by Canadian common law and that the right to utilize them is protected under section 35(1) of the *Constitution Act, 1982*. However an application for a court order to recognize a customary adoption in Saskatchewan would be very expensive and time-consuming, and would be beyond the means of most First Nation families.

1.2 That the Province of Saskatchewan meet with appropriate First Nations representatives to work out the legal, administrative and financial details of such recognition, including the effects of the recognition of customary adoptions and customary care arrangements. Further, First Nation representatives should have a role in the drafting of the legislative changes and accompanying regulations.

1.3 That the legislative amendments provide that it is up to each First Nation to determine whether a customary adoption or customary care arrangement according to that community's traditional law has occurred, and that each First Nation may provide a mechanism to report customary adoptions or customary care arrangements to the appropriate official.

2. Recognition of First Nation Jurisdiction: Federal

2.1 That there be enacted a federal statute recognizing First Nation jurisdiction over family and child welfare, including adoption. This statute should recognize First Nation jurisdiction over all members of that First Nation, whether residing on or off that First Nation's territory.

2.2 That the Government of Canada meet with appropriate First Nations representatives to work out the legal, administrative and financial details of such recognition. Further, that First Nation representatives have a role in the drafting of this new legislation.

2.3 That First Nations be allowed to decline jurisdiction over family and child welfare if they so choose.

2.4 That sufficient financial resources be allocated by the federal and provincial governments to support First Nation jurisdiction over family and child welfare matters, including adoption.

3 Recognition of First Nation Jurisdiction: Provincial

- 3.1 That Saskatchewan amend the *Child and Family Services Act* to explicitly allow First Nations Child Welfare Agencies to apply the laws of First Nation communities, if the community so wishes. This amendment should recognize that First Nation laws would apply to all members of that First Nation, whether residing on or off that First Nation's territory.
- 3.2 That the Government of Saskatchewan meet with appropriate First Nations representatives to work out the legal, administrative and financial details of the proposed amendment. Further, First Nation representatives should have a role in the drafting of the legislative changes.
- 3.3 That First Nations be allowed to have provincial law apply to family and child welfare matters if they so choose.
- 3.4 That sufficient financial resources be allocated by the provincial and federal governments to First Nations Child Welfare Agencies to enable them to support the changeover to applying laws of First Nation communities.
- 3.5 That each First Nation community be provided with financial assistance to develop mechanisms to determine their own laws.

4. Amendments to the current Child and Family Services Act

- 4.1 Community right to notification to be made mandatory.

The Act should be amended to require that, when First Nation children are taken into care, extended family members and community representatives must be notified in a timely manner. In addition, extended family members and community representatives must be notified of all hearings in a timely manner.

4.2 Customary adoption as part of care plan for child in care of province.

The Act should be amended to require that, when First Nation children are taken into care, that customary adoption and customary care arrangements be given priority when developing a plan for taking care of such children.

5. Amendments to The Adoption Act, 1998.

5.1 Access for extended family members for children in care, even if placed for statutory adoption.

The Act should be amended to require that extended family members have the right to access children in care who have been placed for statutory adoption.

6. Further Research

6.1 Our project was carried out during a short four-month time frame, and it was clear after interviewing Elders that much more research needs to be done with each community and their Elders to find their traditional laws. Further research should be undertaken with each First Nation community in Saskatchewan, which would follow their protocol and gather their law and practices, so that their customary law is available to both community members and Agency workers.

6.2 That the Saskatchewan First Nations Family and Community Institute undertake a further research project to examine the treatment of customary family law in other countries and in international law.

Chart 1

COMPARISON OF STATUTORY MODELS IN CANADA FOR THE RECOGNITION OF ABORIGINAL CUSTOMARY ADOPTION

In Canada, two basic models have been used for statutory recognition of Aboriginal customary adoption. The Northwest Territories and Nunavut utilize a registry system under which local officials in each community are authorized to certify that a customary adoption has taken place. In contrast, British Columbia and Yukon require an application to a court for an order recognizing that a customary adoption has taken place. This chart compares the two models with regard to important characteristics or benefits.

Characteristic or Benefit	NWT and Nunavut	B.C. & Yukon
1 Recognition of Aboriginal customary law	√	
2. Administrative model (registry system)	√	
3. Judicial model		√
4 Ease of access/use	√	
5. Reliance on community-based official to certify customary adoption	√	
6. Customary law used to determine the consequences of customary	√	
7. Legislation is open to recognition of non - permanent placements as customary adoptions	√	
8. Cost efficient	√	

Appendix A

TERMINOLOGY

For the purposes of this report, we have chosen to use the following terminology.

First Nation/First Nations - refers to the original inhabitants of what is now known as Canada, other than the **Inuit**. The terms also exclude **Métis** people.

Indigenous ð refers to all of the original inhabitants of Canada.

Aboriginal ð used when referring to “Aboriginal rights,” “Aboriginal customary law,” or the Aboriginal or Treaty rights now protected by section 35 of the *Constitution Act, 1982*. However, it should be noted that “Aboriginal rights” and “Aboriginal title” are not terms used by First Nations in Canada but are constructs of English and Canadian law.

Canadian law ð refers to the general system of statutes, common law and constitutional law which applies in Canada.

Customary Law ð refers to the system of laws, rules, protocols and social relations unique to each indigenous community. Such systems could also be described as “traditional law” or “indigenous law”.

Common Law ð law based on past judicial decisions rather than law set out in statutes. The common law governs matters not covered by statutes. It also provides guidance on the interpretation of statutes. It is also known as “judge-made law”.

Statute Law –law set out in statutes or Acts (legislation) passed by Parliament or a provincial legislature. The general rule is that statute law prevails over common law, but common law (case decisions) may be relied upon in interpreting the meaning of a statute.

Constitutional Law ð the supreme law of the land. All federal, provincial and territorial legislation must be consistent with the Canadian Constitution, which includes section 35 of the *Constitution Act, 1982*.

Adoption ð in Canadian law, a statutory “adoption” involves a permanent change in relationship between the child, birth parent(s) and adoptive parent(s).

Appendix B

SUMMARY OF LEGISLATIVE PROVISIONS ADDRESSING CUSTOMARY ADOPTION AND CHILD CARE IN CANADA

In Canada there are few places where a province or a Territory has legislation that reflects the reality that there are First Nations customary laws regarding child care and child rearing. This section will list some of the places that have such legislation and provide examples of what the legislation does. It also notes that Quebec is in the midst of examining the process to recognize traditional laws or customary adoption but has not completed that process as of the writing of this Report.

British Columbia

Adoption Act, RSBC 1996, C 5

In particular see sections 7 and 46:

Discussion with aboriginal communities

7 (1) Before placing an aboriginal child for adoption, a director or an adoption agency must make reasonable efforts to discuss the child's placement with the following:

(a) if the child is registered or entitled to be registered as a member of an Indian band, with a designated representative of the band;

(a.1) if the child is a Nisga'a child, with a designated representative of the Nisga'a Lisims Government;

(a.2) if the child is a treaty first nation child, with a designated representative of the treaty first nation;

(b) if the child
is neither a Nisga'a child nor a treaty first nation child and is neither registered nor entitled to be registered as a member of an Indian band, with a designated representative of an aboriginal community that has been identified by

(i) the child, if 12 years of age or over, or

(ii) a birth parent of the child, if the child is under 12 years of age.

(2) Subsection (1) does not apply

(a) if the child is 12 years of age or over and objects to the discussion taking place, or

(b) if the birth parent or other guardian of the child who requested that the child be placed for adoption objects to the discussion taking place.

(3) An adoption agency must make reasonable efforts to obtain information about the cultural identity of a treaty first nation child before placing the treaty first nation child for adoption if the final agreement of the treaty first nation requires these efforts to be made.

Custom Adoptions

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

Yukon

Child and Family Services Act SY 2008, c 1

In particular see section 134:

Custom adoption

134 (1) On application, the court may declare that there has been an adoption of a person in accordance with the customs of a First Nation.

(2) The court may declare that as a result of the adoptive parents; and

(a) the person adopted is the child of the adoptive parents; and

(b) the adoptive parents are the parents of the person adopted.

(3) the court may make further declarations as to rights and responsibilities as a result of custom adoptions, including the rights and responsibilities of the birth parents, adoptive parents or the person adopted.

North West Territories

Aboriginal Custom Adoption Recognition Act S.N.W.T. 1994, C. 26

Aboriginal Custom Adoption Recognition Regulations

See Preamble:

Whereas aboriginal customary law in the Territories includes laws respecting adoptions;

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

2 (1) A person who has adopted a child in accordance with aboriginal customary law may apply to a custom adoption commissioner for a certificate recognizing the adoption.

Alberta

In Alberta several documents refer to the Policy Directive for First Nations Adoptions from 1997 that assisted in the creation of the Yellowhead Tribal Services Agency that has worked for the past decade to implement First Nations culture and custom back into adoption.

Saskatchewan

In Saskatchewan, there is no legislation regarding the recognition or inclusion of customary adoptions. However, under section 61 of the *Saskatchewan Child and Family Services Act*⁵⁷, a Band may enter into an agreement with the Province delegating authority over children to a First Nation Child and Family Service Agency. This was also influenced by the Federation of

Saskatchewan Indian Nations *Indian Child Welfare Support Act*⁵⁸ and as a result of this relationship the First Nations Child and Family Institute was created. The Saskatchewan legislation also has a limited component which includes First Nations governments as persons who are of sufficient interest and therefore may be notified of hearings regarding children:

Persons having sufficient interest

23(1) Subject to subsection (2), where an application for a protection hearing has been made, the court may, on an oral or written request, by an order designate as a person having a sufficient interest in a child:

- (a) a person who, in the opinion of the court, is a member of the extended family;
- (b) where the child is a Status Indian:
 - (i) whose name is included in a Band list; or
 - (ii) who is entitled to have his or her name included in a Band list; the chief of the band in question or the chief's designate; or
- (c) any other person who is not a parent of the child but who, in the opinion of the court, has a close connection with the child.

- Ø Where a request pursuant to subsection (1) is made, the court:
 - (a) may direct the person making the request to notify each parent and the department of the request within any time and in manner that the court considers appropriate; and
 - (b) shall consider the views, if any, of each parent and the department before making an order pursuant to subsection (1).

⁵⁷ *Child and Family Services Act*, SS, 1889-90, c-7.2.

⁵⁸ This Act is referred to in a few places on the internet but the authors were unable to locate it.

③ Where the court makes an order pursuant to subsection (1), the court shall give directions respecting the service of notices on the person designated as a person having a sufficient interest in a child.

(4) A person designated pursuant to subsection (1) as a person having sufficient interest in a child is a party to a protection hearing respecting that child.

The concern with this notice provision is that the court must be requested to designate a person of sufficient interest and so such designation will not be automatically done, thus depriving family and community of having input and possibly reclaiming children who may otherwise be removed from the community.

The Saskatchewan First Nations Prevention Model is the current experiment that is being negotiated. It is to be designed with Aboriginal Affairs and Northern Development and First Nations to ensure a holistic, cultural model of child services for Saskatchewan First Nations. This model will be designed to set up a resources

system that is sensitive to the early signs of children's needs to prevent the full weight of the child welfare system from having to intervene during crises.

Ontario

The Ontario *Child and Family Services Act* has a few provisions that make reference to Aboriginal and First Nations people.⁵⁹

Section 1(2)

5. To recognize that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family. 1999, c. 2, s. 1; 2006, c. 5, s. 1

Section 20.2

Where child is Indian or native person

(2) If the issue referred to in subsection (1) relates to a child who is an Indian or native person, the society shall consult with the child's band or native community to determine whether an alternative dispute resolution process established by that band or native community or another prescribed process will assist in resolving the issue. 2006, c. 5, s.5.

⁵⁹ *Child and Family Services Act* R.S.O. 1990, c. C.11.

Notice to band, native community

(4) If a society makes or receives a proposal that a prescribed method of alternative dispute resolution be undertaken under subsection (3) in a matter involving a child who is an Indian or native person, the society shall give the child's band or native community notice of the proposal. 2006, c. 5, s. 5.

Section 34

What committee shall consider

(10) In conducting a review, an advisory committee shall,

- (a) determine whether the child has a special need;
- (b) consider what programs are available for the child in the residential placement or proposed residential placement, and whether a program available to the child is likely to benefit the child;
- (c) consider whether the residential placement or proposed residential placement is appropriate for the child in the circumstances;
- (d) if it considers that a less restrictive alternative to the placement would be more appropriate for the child in the circumstances, specify that alternative;
- (e) consider the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity; and
- (f) where the child is an Indian or native person, consider the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child's cultural identity. R.S.O. 1990, c. C.11, s. 34 (10).

Section 35

Recommendations

35.(1) An advisory committee that conducts a review shall advise,

- (a) the service provider;
- (b) any representative of the child;
- (c) the child's parent or, where the child is in a society's lawful custody, the society;
- (d) the child, where it is reasonable to expect him or her to understand; and
- (e) where the child is an Indian or native person, a representative chosen by the child's band or native community,

of its recommendations as soon as the review has been completed, and shall advise the child of his or her rights under section 36 if the child is twelve years of age or older.

Section 36 Review

Parties

(4)The parties to a hearing under this section are,

- (a) the child;
- (b) the child’s parent or, where the child is in a society’s lawful custody, the society;
- (c) where the child is an Indian or native person, a representative chosen by the child’s band or native community; and
- (d) any other persons that the Board specifies.

Section 37

Where child an Indian or native person

(4)Where a person is directed in this Part to make an order or determination in the best interests of a child and the child is an Indian or native person , the person shall take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child’s cultural identity. R.S.O. 1990, c. C.11, s. 37(4).

Place of safety

(5) For the purposes of the definition of “place of safety” in subsection (1), a person’s home is a place of safety for a child if,

- (a) the person is a relative of the child or a member of the child’s extended family or community; and
- (b) a society or, in the case of a child who is an Indian or native person, an Indian or native child and family service authority designated under section 211 of Part X has conducted an assessment of the person’s home in accordance with the prescribed procedures and is satisfied that the person is willing and able to provide a safe home environment for the child. 2006, c. 5, s.6(4).

Section 39

Parties

39.(1)The following are parties to a proceeding under this Part:

- 1. The applicant.
- 2. The society having jurisdiction in the matter.
- 3. The child’s parent.
- 4. Where the child is an Indian or a native person, a representative chosen by the child’s band or native community.

Section 47

Child’s name, age, etc.

(2)As soon as practicable, and in any event before determining whether a child is in need of protection, the court shall determine,

- (a) the child's name and age;
- (b) the religious faith, if any, in which the child is being raised;
- (c) whether the child is an Indian or a native person and, if so, the child's band or native community; and
- (d) where the child was brought to a place of safety before the hearing, the location of the place from which the child was removed.

Section 54

Copies of report

(3) At least seven days before the court considers the report at a hearing, the court or, where the assessment was requested by a party, that party, shall provide a copy of the report to,

- (a) the person assessed, subject to subsections (4) and (5);
- (b) the child's solicitor or agent of record;
- (c) a parent appearing at the hearing, or the parent's solicitor of record;
- (d) the society caring for or supervising the child;
- (e) a Director, where he or she requests a copy;
- (f) where the child is an Indian or a native person, a representative chosen by the child's band or native community; and
- (g) any other person who, in the opinion of the court, should receive a copy of the report for the purposes of the case. R.S.O. 1990, c. C.11, s.54 (3).

Section 57

Idem: where child an Indian or a native person

(5) Where the child referred to in subsection (4) is an Indian or a native person, unless there is a substantial reason for placing the child elsewhere, the court shall place the child with,

- (a) a member of the child's extended family;
- (b) a member of the child's band or native community; or
- (c) another Indian or native family. R.S.O. 1990, c. C.11, s. 57 (5).

Section 58

Access order

58. (1) The court may, in the child's best interests,

- (a) when making an order under this Part; or
- (b) upon an application under subsection (2),

make, vary or terminate an order respecting a person's access to the child or the child's access to a person, and may impose such terms and conditions on the order as the court considers appropriate. R.S.O. 1990, c. C.11, s. 58 (1).

Who may apply

(2) Where a child is in a society's care and custody or supervision,

(a) the child;

(b) any other person, including, where the child is an Indian or a native person, a representative chosen by the child's band or native community; or

(c) the society, may apply to the court at any time for an order under

subsection (1). R.S.O. 1990, c. C.11,

s. 58 (2).

Notice

(3) An applicant referred to in clause (2) (b) shall give notice of the application to the society. R.S.O. 1990, c. C.11, s. 58 (3).

Idem

(4) A society making or receiving an application under subsection (2) shall give notice of the application to,

(a) the child, subject to subsections 39 (4) and (5) (notice to child);

(b) the child's parent;

(c) the person caring for the child at the time of the application; and

(d) where the child is an Indian or a native person, a representative chosen by the child's band or native community. R.S.O. 1990, c. C.11, s. 58 (4).

Section 61

Placement of wards

61. (1) This section applies where a child is made a society ward under paragraph 2 of subsection 57 (1) or a Crown ward under paragraph 3 of subsection 57 (1) or under subsection 65.2 (1). 2006, c. 5, s.19 (1).

Placement

(2) The society having care of a child shall choose a residential placement for the child that,

(a) represents the least restrictive alternative for the child;

(b) where possible, respects the religious faith, if any, in which the child is being raised;

(c) where possible, respects the child's linguistic and cultural heritage;

(d) where the child is an Indian or a native person, is with a member of the child's extended family, a member of the child's band or native community or another Indian or native family, if possible; and

(e) takes into account the child's wishes, if they can be reasonably ascertained, and the wishes of any parent who is entitled to access to the child. R.S.O. 1990, c. C.11, s.61 (2).

Notice of proposed removal

(7) If a child is a Crown ward and has lived continuously with a foster parent for two years and a society proposes to remove the child from the foster parent under subsection (6), the society shall,

(a) give the foster parent at least 10 days notice in writing of the proposed removal and of the foster parent's right to apply for a review under subsection (7.1); and

(b) if the child is an Indian or native person,

(i) give at least 10 days notice in writing of the proposed removal to a representative chosen by the child's band or native community, and

(ii) after the notice is given, consult with representatives chosen by the band or community relating to the plan for the care of the child. 2006, c. 5, s.19 (2).

Where child is Indian or native person

(8.1) Upon receipt of an application for review of a proposed removal of a child who is an Indian or native person, the Board shall give a representative chosen by the child's band or native community notice of receipt of the application and of the date of the hearing. 2006, c. 5, s. 19 (2).

Parties

(8.4) The following persons are parties to a hearing under this section:

1. The applicant.
2. The society.
3. If the child is an Indian or a native person, a representative chosen by the child's band or native community.
4. Any person that the Board adds under subsection (8.5). 2006, c. 5, s. 19 (2).

Section 63

Society's obligation to a Crown ward

63.1 Where a child is made a Crown ward, the society shall make all reasonable efforts to assist the child to develop a positive, secure and enduring relationship within a family through one of the following:

1. An adoption.
2. A custody order under subsection 65.2 (1).

3. In the case of a child who is an Indian or native person, a plan for customary care as defined in Part X. 2006, c. 5, s. 21.

Section 64

Others may seek status review

(4) An application for review of a child's status may be made on notice to the society by,

- (a) the child, if the child is at least 12 years of age;
- (b) a parent of the child;
- (c) the person with whom the child was placed under an order for society supervision;
or

(d) a representative chosen by the child's band or native community, if the child is an Indian or native person. 2006, c. 5, s. 22.

Notice

(5) A society making an application under subsection (2) or receiving notice of an application under subsection (4) shall give notice of the application to,

- (a) the child, except as otherwise provided under subsection 39 (4) or (5);
- (b) the child's parent;
- (c) the person with whom the child was placed under an order for society supervision;
- (d) any foster parent who has cared for the child continuously during the six months immediately before the application; and

(e) a representative chosen by the child's band or native community, if the child is an Indian or native person. 2006, c. 5, s.22.

Section 65.1

Notice

(6) A society making an application under subsection (2) or receiving notice of an application under subsection (4) shall give notice of the application to,

- (a) the child, except as otherwise provided under subsection 39 (4) or (5);
- (b) the child's parent, if the child is under 16 years of age;
- (c) the person with whom the child was placed, if the child is subject to an order for society supervision described in clause 65.2 (1) (a);
- (d) the person to whom custody of the child was granted, if the child is subject to an order for custody described in clause 65.2 (1) (b);
- (e) any foster parent who has cared for the child continuously during the six months

immediately before the application; and

- (f) a representative chosen by the child's band or native community, if the child is an Indian or native person. 2006, c. 5, s. 24.

Section 69

Appeal

69. (1) An appeal from a court's order under this Part may be made to the Superior Court of Justice by,

- (a) the child, if the child is entitled to participate in the proceeding under subsection 39 (6) (child's participation);
- (b) any parent of the child;
- (c) the person who had charge of the child immediately before intervention under this Part;
- (d) a Director or local director; or
- (e) where the child is an Indian or a native person, a representative chosen by the child's band or native community. R.S.O. 1990, c. C.11, s. 69(1); 1999, c. 2, s. 35.

Section 71.1

Extended care

71.1 (1) A society may provide care and maintenance to a person in accordance with the regulations if,

- (a) a custody order under subsection 65.2 (1) or an order for Crown wardship was made in relation to that person as a child; and
- (b) the order expires under section 71. 2006, c. 5, s. 28.

Same, Indian and native person

(2) A society or agency may provide care and maintenance in accordance with the regulations to a person who is an Indian or native person who is 18 years of age or more if,

- (a) immediately before the person's 18th birthday, he or she was being cared for under customary care as defined in section 208; and
- (b) the person who was caring for the child was receiving a subsidy from the society or agency under section 212. 2006, c. 5, s. 28.

Section 80

Extension, variation and termination

(4) An application for the extension, variation or termination of an order made under subsection (1) may be made by,

- (a) the person who is the subject of the order;
- (b) the child;

- (c) the person having charge of the child;
- (d) a society;
- (e) a Director; or
- (f) where the child is an Indian or a native person, a representative chosen by the child's band or native community. R.S.O. 1990, c. C.11, s. 80 (4).

Section 116

Copies of report

- (4) The court shall provide a copy of the report to,
- (a) the applicant;
 - (b) the child, subject to subsection (6);
 - (c) the child's solicitor;
 - (d) a parent appearing at the hearing;
 - (e) a society that has custody of the child under an order made under Part III (Child Protection);
 - (f) the administrator of the secure treatment program; and
 - (g) where the child is an Indian or a native person, a representative chosen by the child's band or native community.

Section 136 (Adoption)

Interpretation

136. (1) In this Part,

“birth parent” means a person who satisfies the prescribed criteria; (“père ou mère de sang”)

“birth relative” means,

- (a) in respect of a child who has not been adopted, a relative of the child, and
- (b) in respect of a child who has been adopted, a person who would have been a relative of the child if the child had not been adopted; (“parent de sang”)

“birth sibling” means, in respect of a person, a child of the same birth parent as the person, and includes a child adopted by the birth parent and a person whom the birth parent has demonstrated a settled intention to treat as a child of his or her family; (“frère ou soeur de sang”)

“licensee” means the holder of a licence issued under Part IX (Licensing) to place children for adoption; (“titulaire de permis”)

“openness agreement” means an agreement referred to in section 153.6; (“accord de communication”)

“openness order” means an order made by a court in accordance with this Act for the purposes of facilitating communication or maintaining a relationship between the child and,

- (a) a birth parent, birth sibling or birth relative of the child,
- (b) a person with whom the child has a significant relationship or emotional tie, including a foster parent of the child or a member of the child’s extended family or community, or
- (c) if the child is an Indian or native person, a member of the child’s band or native community who may not have had a significant relationship or emotional tie with the child in the past but will help the child recognize the importance of his or her Indian or native culture and preserve his or her heritage, traditions and cultural identity; (“ordonnance de communication”)

Where child an Indian or native person

(3) Where a person is directed in this Part to make an order or determination in the best interests of a child and the child is an Indian or native person, the person shall take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child’s cultural identity. R.S.O. 1990, c. C.11, s. 136 (3).

Section 141.2

Where child an Indian or native person

141.2 (1) If a society intends to begin planning for the adoption of a child who is an Indian or native person, the society shall give written notice of its intention to a representative chosen by the child’s band or native community. 2006, c. 5, s. 35.

Care plan proposed by band or native community

(2) Where a representative chosen by a band or native community receives notice that a society intends to begin planning for the adoption of a child who is an Indian or native person, the band or native community may, within 60 days of receiving the notice,

- (a) prepare its own plan for the care of the child; and
- (b) submit its plan to the society. 2006, c. 5, s. 35.

Condition for placement

(3) A society shall not place a child who is an Indian or native person with another person for adoption until,

- (a) at least 60 days after notice is given to a representative chosen by the band or native community have elapsed; or
- (b) if a band or native community has submitted a plan for the care of the child, the society has considered the plan. 2006, c. 5, s.35.

Section 144

Notice of decision

(2) The society or licensee who makes a decision referred to in subsection (1) shall,

(a) give at least 10 days notice in writing of the decision to the person who applied to adopt the child or with whom the child had been placed for adoption;

(b) include in the notice under clause (a) notice of the person's right to apply for a review of the decision under subsection (3); and

(c) if the child is an Indian or native person,

(i) give at least 10 days notice in writing of the decision to a representative chosen by the child's band or native community, and

(ii) after the notice is given, consult with the band or community representatives relating to the planning for the care of the child. 2006, c. 5, s. 36

Where child is Indian or native person

(6) Upon receipt of an application for review of a decision relating to a child who is an Indian or native person, the Board shall give a representative chosen by the child's band or native community notice of the application and of the date of the hearing. 2006, c. 5, s.36.

Parties

(9) The following persons are parties to a hearing under this section:

1. The applicant.

2. The society.

3. If the child is an Indian or a native person, a representative chosen by the child's band or native community.

4. Any person that the Board adds under subsection (10). 2006, c. 5, s. 36.

Section 153.6

Who may enter into openness agreement

153.6 (1) For the purposes of facilitating communication or maintaining relationships, an openness agreement may be made by an adoptive parent of a child or by a person with whom a society or licensee has placed or plans to place a child for adoption and any of the following persons:

1. A birth parent, birth relative or birth sibling of the child.

2. A foster parent of the child or another person who cared for the child or in whose custody the child was placed at any time.

3. A member of the child's extended family or community with whom the child has a significant relationship or emotional tie.

4. An adoptive parent of a birth sibling of the child or a person with whom a society or licensee has placed or plans to place a birth sibling of the child for adoption.

5. If the child is an Indian or native person, a member of the child's band or native community who may not have had a significant relationship or emotional tie with the child in the past but will help the child recognize the importance of his or her Indian or native culture and preserve his or her heritage, traditions and cultural identity. 2006, c. 5, s. 40.

Section 162

Transmission of order

(3) Within thirty days after an adoption order is made under this Part, the proper officer of the court shall cause a sufficient number of certified copies of it to be made, under the seal of the proper certifying authority, and shall transmit,

- (a) the original order to the adoptive parent;
- (b) Repealed: 2005, c. 25, s. 15 (3).
- (c) one certified copy to the Registrar General under the *Vital Statistics Act*, or, if the adopted child was born outside Ontario, two certified copies;
- (d) if the adopted child is an Indian, one certified copy to the Registrar under the *Indian Act* (Canada);
- (e) one certified copy to such other persons as may be prescribed. R.S.O. 1990, c. C.11, s. 162 (3); 2005, c. 25, s. 15 (3, 4).

PART X INDIAN AND NATIVE CHILD AND FAMILY SERVICES

Definition

208.In this Part,

“customary care” means the care and supervision of an Indian or native child by a person who is not the child's parent, according to the custom of the child's band or native community. R.S.O. 1990, c. C.11, s. 208.

Designation of native communities

209.The Minister may designate a community, with the consent of its representatives, as a native community for the purposes of this Act. R.S.O. 1990, c. C.11, s. 209.

Agreements with bands and native communities

210.The Minister may make agreements with bands and native communities, and any other parties whom the bands or native communities choose to involve, for the provision of services. R.S.O. 1990, c. C.11, s. 210.

Designation of child and family service authority

211.(1)A band or native community may designate a body as an Indian or native child and family service authority.

Agreements, etc.

(2) Where a band or native community has designated an Indian or native child and family service authority, the Minister,

- (a) shall, at the band's or native community's request, enter into negotiations for the provision of services by the child and family service authority;
- (b) may enter into agreements with the child and family service authority and, if the band or native community agrees, any other person, for the provision of services; and
- (c) may designate the child and family service authority, with its consent and if it is an approved agency, as a society under subsection 15 (2) of Part I (Flexible Services). R.S.O. 1990, c. C.11, s. 211.

Subsidy for customary care

212. Where a band or native community declares that an Indian or native child is being cared for under customary care, a society or agency may grant a subsidy to the person caring for the child. R.S.O. 1990, c. C.11, s. 212.

Consultation with bands and native communities

213.A society or agency that provides services or exercises powers under this Act with respect to Indian or native children shall regularly consult with their bands or native communities about the provision of the services or the exercise of the powers and about matters affecting the children, including,

- (a) the apprehension of children and the placement of children in residential care;
- (b) the placement of homemakers and the provision of other family support services;
- (c) the preparation of plans for the care of children;
- (d) status reviews under Part III (Child Protection);
- (e) temporary care and special needs agreements under Part II (Voluntary Access to Services);
- (f) adoption placements;
- (g) the establishment of emergency houses; and
- (h) any other matter that is prescribed. R.S.O. 1990, c. C.11, s. 213.

Consultation in specified cases

213.1 A society or agency that proposes to provide a prescribed service to a child who is an Indian or native person or to exercise a prescribed power under this Act in relation to such a child shall consult with a representative chosen by the child's band or native community in accordance with the regulations. 2006, c. 5, s. 43.

Section 223

Regulations: Part X (Indian and Native Child and Family Services)

223. The Lieutenant Governor in Council may make regulations for the purposes of Part X,

- (a) exempting an Indian or native child and family service authority, a band or native community or specified persons or classes of persons, including persons caring for children under customary care, from any provision of this Act or the regulations;
- (b) prescribing matters requiring consultation between societies or agencies and bands or native communities for the purposes of clause 213 (h);
- (c) governing consultations with bands and native communities under sections 213 and 213.1 and prescribing the procedures and practices to be followed by societies and agencies and the duties of societies and agencies during the consultations;
- (d) prescribing services and powers for the purposes of section 213.1. R.S.O. 1990, c. C.11, s. 223; 2006, c. 5, s. 48.

Section 226 Every review of this Act shall include a review of provisions imposing obligations on societies when providing services to a person who is an Indian or native person or in respect of children who are Indian or native persons, with a view to ensuring compliance by societies with those provisions. 2006, c. 5, s. 50.

Although the Ontario legislation seems to be thorough, we were unable to determine how reliant the First Nations of Ontario are on this legislation or if there are First Nations law or agencies established to push the boundaries of the provincial process to include Indigenous customary child wellness practices.

Nunavut

Aboriginal Custom Adoption Recognition Act and Regulations

Very much the same as the North West Territories.

Quebec

In Quebec, Bill 81 was tabled in the National Assembly on June 13, 2012 to recognize customary adoption. As it was not passed when a provincial election was called on August 1, 2012, it will have to be reintroduced again.⁶⁰

First Nation Laws and Bylaws

There have been references made to the existence of written First Nations by-laws or Band Council Resolutions or their own laws on traditional adoption in Saskatchewan. Numerous calls were made to ascertain whether or not they do exist and if they are relied on. We did not find

⁶⁰ As of January 22, 2013, Bill 81, which would recognize customary adoptions, had not been reintroduced in the National Assembly.

any information while writing this Report.. However we believe that there are either laws or policies and certainly traditional laws within each Nation upon which they rely in various ways and to various extents. These laws must be discovered in order to make any valuable contributions to a discussion with the Federal or Provincial governments on the subject of recognition of traditional laws/practices.



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