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STATUTORY RECOGNITION OF INDIGENOUS CUSTOM ADOPTION: ITS ROLE IN STRENGTHENING SELF-GOVERNANCE OVER CHILD WELFARE

Celeste Cuthbertson*

ABSTRACT

This article critically examines the statutory recognition of Indigenous custom adoption in Canada. Settler state recognition of custom adoption in each province and territory is discussed and the possibility of conflation between custom adoption and settler state adoption is highlighted. The author argues that statutory regimes have a role in strengthening Indigenous self-governance over child welfare so long as the conflation of diverse practices is rejected, and recognition is accompanied by control and support.

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INTRODUCTION

Indigenous custom adoption is an exercise of self-governance over child welfare. It is the application of Indigenous customary law, on Indigenous land, by and for Indigenous people. There is an urgent need to strengthen self-governance over child welfare, informed by the current Indigenous child welfare crisis. One can begin to define and understand Indigenous custom adoption by recognizing divergent ideas of family as well as the basic structure and effects of settler state adoption. Settler state recognition of custom adoption in each province and territory is discussed, with particular attention paid to the deleterious effects of conflating custom adoption and settler state adoption. Statutory regimes have a role in strengthening Indigenous customary law so long as the conflation of diverse practices is REJECTED, and recognition is accompanied by community control and support from government bodies. Robust statutory recognition of Indigenous custom adoption requires legislation that respects custom adoption as an exercise of self-governance, with its effects determined by Indigenous communities and custom.

THE CURRENT INDIGENOUS CHILD WELFARE CRISIS

The urgent need to strengthen self-governance over child welfare must be understood in the context of the current Indigenous child welfare crisis. A culturally incompatible, inadequately funded system has been imposed on Indigenous communities for decades. The current system is informed by historical and ongoing colonialism. There is “a linear path from colonization through to the Indian Residential Schools to the Sixties Scoop to today's over-representation of Aboriginal children in care.”¹ There are three times more Indigenous children in child welfare care today than there were at the height of residential schools.² Child welfare justifies the assertion of control over Indigenous communities through interventions into Indigenous families. These

¹ Peter Choate & Gabrielle Lindstrom, “Parenting Capacity Assessment as Colonial Strategy” (2017) 37 Can Fam LQ 45 at 47.

² *Ibid* at 56.

interventions are “merely more recent iterations of colonial strategies of removal, abuse, and theft, not only of Indigenous children, but of their culture and land.”³

Government attempts to involve Indigenous communities in settler state child welfare have had minimal success. First Nations child and family services agencies were developed to keep Indigenous children in their communities; however, these agencies’ efforts have been stifled by a lack of control and funding.⁴ These agencies operate under provincial child welfare legislation and receive funding from the federal government. The funding they receive is twenty-two percent less than their government counterparts.⁵ Agencies have little opportunity to create and implement their own solutions when they must “operate within a legal straitjacket.”⁶

There is hope that the recent *First Nations Child and Family Caring Society* decision will provoke government action that recognizes the urgent need for self-governance over child welfare.⁷ In the 2016 decision, the Canadian Human Rights Tribunal found that First Nations children and families living on reserve are discriminated against in the provision of child and family services by Aboriginal Affairs and Northern Development Canada (“AANDC”).⁸ The Tribunal’s decision states that AANDC’s “design, management and control of the [First Nations Child and Family Services] Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves.”⁹ The Panel found “these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system.”¹⁰

³ Lara di Tomasso & Sandrina de Finney, “A Discussion Paper on Indigenous Custom Adoption Part 1: Severed Connections - Historical Overview of Indigenous Adoption in Canada” (2015) 10:1 *First Peoples Child & Family Rev* 7 at 7 [di Tomasso & de Finney, “Part 1”].

⁴ Cindy Blackstock, “Residential Schools: Did They Really Close or Just Morph into Child Welfare?” (2007) 6 *Indigenous LJ* 71 at 74.

⁵ Ashley Smith, “Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Save or Lose Our Children?” (2009) 25 *Can J Fam L* 297 at 351-352.

⁶ Blackstock, *supra* note 4 at 74.

⁷ *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, 83 CHRR D/207.

⁸ *Ibid* at para 473.

⁹ *Ibid* at para 458.

¹⁰ *Ibid* at para 459.

In addition to finding discrimination, the panel ordered AANDC to cease its discriminatory practices and take measures to redress and prevent them.¹¹

Although there have already been several compliance orders issued against the government which have not been followed,¹² this finding of discrimination by the Canadian Human Rights Tribunal remains a powerful tool in demanding Indigenous self-governance over child welfare. The settler state child welfare system is failing Indigenous children and families. Armed with this decision, Indigenous communities can continue their fight for increased self-governance over child welfare.

DIVERGENT IDEAS OF FAMILY

Divergent ideas of family inform the differences between the settler state child welfare system and the ways in which Indigenous communities govern their own child welfare. While many Indigenous worldviews value extended kinship, the Canadian settler state perceives the ideal family form as the heteronormative nuclear family.¹³ Dominant ideologies of family and mothering are integrated into the settler state child welfare system, while Indigenous beliefs and practices are devalued.¹⁴ Generally, within the settler state conception of family, childrearing is considered the task of the individual mother, who must be a self-sufficient primary caregiver requiring minimal assistance.¹⁵ Any difficulties in childrearing are attributed to personal deficiencies of the ‘bad mother’ which provides a justification for state intrusion.¹⁶

¹¹ *Ibid* at para 481.

¹² *Re First Nations Child and Family Caring Society of Canada and Canada (Attorney General)*, 2016 CHRT 10, 83 CHRR D/266; *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 7, 2017 CarswellNat 1792; *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14, 86 CHRR D/294.

¹³ Lara di Tomasso & Sandrina de Finney, “A Discussion Paper on Indigenous Custom Adoption Part 2: Honouring Our Caretaking Traditions” (2015) 10:1 *First Peoples Child & Family Rev* 19 at 20 [di Tomasso & de Finney, “Part 2”].

¹⁴ Marlee Kline, “Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women” (1993) 18 *Queen’s LJ* 306 at 318.

¹⁵ *Ibid* at 328.

¹⁶ *Ibid* at 319-320.

In stark contrast to this, Indigenous children must be understood as being raised within a community: “any assessment that sees a parent in isolation of that will be deficient and is only assessing one small part of the support system.”¹⁷ The participation of extended kin in childrearing is often insufficiently recognized by the settler state.¹⁸ The role and contributions of extended family are obscured in favour of an individualized parenting assessment.¹⁹

Concentrating on the individual parent also fails to recognize that their difficulties have roots in historical and ongoing practices of colonialism.²⁰ The focus on individual ‘bad mothers’ “effectively blames First Nation women for the effects of social ills that are largely the consequence of this history and present.”²¹ This means settler state child protection does not differentiate between circumstances a parent can change and factors beyond their control. Neglect is a particularly insidious ground in this regard. While Indigenous children are less likely than non-Indigenous children to be reported to child protection authorities for abuse and exposure to domestic violence, they are twice as likely to be reported for neglect.²² This overrepresentation is attributed to caregiver poverty, poor housing, and substance misuse.²³ Indigenous children are being removed from their families due to manifestations of systemic inequality beyond their parents’ control. Child protection assessments within the settler state system operate as “a repetitive circle where risk is assessed based upon current expressions of colonialism.”²⁴

Many Indigenous worldviews emphasize community involvement in dealing with factors outside the individual parent’s control.²⁵ Rather than considering poverty a reason to remove a child, it can act as “a signal to society to redistribute resources.”²⁶ Multiple caregivers are a common way Indigenous children receive support and connect to their communities.²⁷ Instead of removing children from

¹⁷ Choate & Lindstrom, *supra* note 1 at 53.

¹⁸ Kline, *supra* note 14 at 331.

¹⁹ *Ibid* at 332.

²⁰ *Ibid* at 318.

²¹ *Ibid* at 321.

²² Blackstock, *supra* note 4 at 75.

²³ *Ibid*.

²⁴ Choate & Lindstrom, *supra* note 1 at 52.

²⁵ Blackstock, *supra* note 4 at 73.

²⁶ *Ibid*.

²⁷ Choate & Lindstrom, *supra* note 1 at 54.

their homes because of perceived personal deficiencies of their parents, caregiving responsibilities are shared between community members in a way that acknowledges root causes and systemic challenges. While the settler state understands the family as an atomistic unit, many Indigenous worldviews favour a communal understanding. The use of extended kin in childrearing does not demonstrate deficiencies in Indigenous families, it demonstrates the ongoing resilience of Indigenous communities.²⁸ When Indigenous communities govern their own child welfare, their ideas of the family and traditional caregiving practices can be honoured.

SETTLER STATE ADOPTION

It is important to acknowledge that many Indigenous children remain in institutional or long-term foster care with little prospect of adoption.²⁹ While the statistics for long-term foster care for Indigenous children have skyrocketed, the statistics for transracial adoptions have plummeted.³⁰ Even if the child does receive an adoption placement, the rate of Indigenous adoption “breakdowns” (the child leaving the home before the age of majority) is currently at ninety-five percent.³¹ This breakdown rate has largely been attributed to “feelings of loss, shame, disconnection, and abandonment surrounding identity and kinship”, particularly when placed in non-Indigenous homes.³²

Settler state adoption has, until recently, meant a forced, external, and closed process.³³ Closed adoptions of Indigenous children into non-Indigenous families “effectively ruptured the transfer of ancestral knowledge, culture, and language.”³⁴ These severed connections have inter-generational impacts.³⁵ Now, Canada is seeing a move towards more open adoption procedures and regimes.³⁶

²⁸ *Ibid* at 50.

²⁹ Raven Sinclair, “Identity Lost and Found: Lessons from the Sixties Scoop” (2007) 3:1 *First Peoples Child & Family Rev* 65 at 68.

³⁰ *Ibid*.

³¹ Smith, *supra* note 5 at 332.

³² di Tomasso & de Finney, “Part 1”, *supra* note 3 at 11.

³³ *Ibid* at 9.

³⁴ *Ibid* at 10-11.

³⁵ *Ibid* at 11.

³⁶ Cindy L. Baldassi, “The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts, and Convergences” (2006) 39 *UBC L Rev* 63 at 99.

However, the important distinction must be made between open records and open adoption.³⁷ Open records focus on information disclosure, while open adoption emphasizes maintaining connection with the birth family. The important distinction between these two concepts is often obfuscated.

There is now also increased awareness of the importance of cultural planning for Indigenous adoptees, but cultural planning carries the risk of reduction and essentialism.³⁸ While cultural planning can be a useful tool, stereotypical cultural planning may “amplify disconnection and shame in foster and adoptive placements by trivializing the child’s Indigenous culture and disregarding diversity within and among Indigenous societies.”³⁹

INDIGENOUS CUSTOM ADOPTION

Indigenous custom adoption is often conflated with settler state adoption, but there are significant differences between the two which must be understood. Settler state adoption severs family ties. The adoption process terminates the birth parents’ legal rights and obligations and assigns them to new parents.⁴⁰ Settler state adoptions are intended to be permanent.⁴¹

Self-governance is strengthened through the resurgence of Indigenous customary law. Custom adoption must be defined by Indigenous communities. To assist comprehension of how custom adoption differs from settler state adoption, some common characteristics must be defined. Custom adoption should be understood from within Indigenous worldviews and their ideas of the family. In this section, settler state recognition of custom adoption is discussed and the potential to conflate custom adoption with settler state adoption is highlighted and cautioned against.

³⁷ Jeannine Carriere & Sandra Scarth, “Aboriginal Children: Maintaining Connections in Adoption” in Ivan Brown et al, eds, *Putting a Human Face on Child Welfare: Voices from the Prairies* (Regina: Prairie Child Welfare Consortium/Centre of Excellence for Child Welfare, 2007) 203 at 212.

³⁸ di Tomasso & de Finney, “Part 1”, *supra* note 3 at 13.

³⁹ *Ibid* at 14.

⁴⁰ Baldassi, *supra* note 36 at 66-67.

⁴¹ Quebec, *Report of the Working Group on Customary Adoption in Aboriginal Communities*, (Quebec: Government of Quebec, 2012) at 33 [*Working Group Report*].

Defining and Understanding

Indigenous custom adoption is a broad term referring to caregiving practices of diverse Indigenous communities.⁴² Custom adoption is also known as customary, cultural, or traditional adoption.⁴³ The term ‘adoption’ is imperfect; Indigenous languages typically have no equivalent word since Indigenous caregiving practices do not sever children from their birth families and communities.⁴⁴ Some Elders find the term unacceptable due to the connotation of permanent removal of children from their communities.⁴⁵ Although a loaded and contested term, custom adoption is intended to convey “Indigenous alternatives to the wholesale separation of families and communities that has been perpetrated throughout colonial settler states.”⁴⁶ The term has been useful for settler state comprehension, but has also become a stumbling block when inaccurate understandings of custom adoption infuse government recognition.⁴⁷ Special attention must be paid to the differences between settler state adoption and custom adoption to prevent inaccurate understanding and conflation of the two practices.⁴⁸

Indigenous custom adoption differs from settler state adoption in four important ways. Four important features of Indigenous custom adoption include:

1. They often involve kin and rarely involve strangers;
2. They are about kin and community relationships rather than parenthood;
3. The needs of the children, adults, and relatives are all considered; and

⁴² di Tomasso & de Finney, “Part 2”, *supra* note 13 at 20.

⁴³ *Ibid* at 19.

⁴⁴ *Ibid* at 19-20.

⁴⁵ Marilyn Poitras & Norman Zlotkin, “An Overview of the Recognition of Customary Adoption in Canada” (Saskatoon: Saskatchewan First Nations Family and Community Institute Inc., 2013) at 24.

⁴⁶ di Tomasso & de Finney, “Part 2”, *supra* note 13 at 20.

⁴⁷ *Working Group Report*, *supra* note 41 at 21-22.

⁴⁸ *Ibid* at 22.

4. Agreements are developed jointly by the birth and adoptive families, with continued contact between all parties encouraged.⁴⁹

Rather than severing ties, custom adoption strives to strengthen relationships.⁵⁰

Custom adoption is utilized in diverse circumstances for myriad reasons. Although some arrangements may become permanent out of necessity, the concept of permanency is not emphasized.⁵¹ Custom adoptions are frequently a temporary form of reciprocal caregiving.⁵² A variety of alternative parenting arrangements may be put in place to address the needs of children, families, and the community.⁵³ They may be used to ensure children are adequately cared for and receive traditional knowledge from elders and community members.⁵⁴ The birth family is temporarily relieved from childrearing responsibilities and the child will be able to receive support and provide assistance in the adoptive home. Fundamentally, it is “a positive rather than a reactive intervention.”⁵⁵ The Indigenous child and a wide web of community members cultivate trusting relationships and gain greater understanding of reciprocal care and community responsibility.⁵⁶

Federal Legislation: The Indian Act and Bill C-92

The federal *Indian Act* defines ‘child’ as including “a legally adopted child and a child adopted in accordance with Indian custom.”⁵⁷ Children adopted through either process can be granted official Indian status.⁵⁸ This recognition of custom adoption in the definition section has not been interpreted as providing any additional adoption rights that would give rise to federal paramourcy over provincial legislation.

Bill C-92: *An Act respecting First Nations, Inuit and Métis children, youth and families* (the “Act”) was tabled in the House of Commons on April 29, 2019. It

⁴⁹ di Tomasso & de Finney, “Part 2”, *supra* note 13 at 21.

⁵⁰ *Ibid.*

⁵¹ Poitras & Zlotkin, *supra* note 45 at 23-24.

⁵² di Tomasso & de Finney, “Part 2”, *supra* note 13 at 21.

⁵³ di Tomasso & de Finney, “Part 1”, *supra* note 3 at 15.

⁵⁴ di Tomasso & de Finney, “Part 2”, *supra* note 13 at 23.

⁵⁵ *Working Group Report*, *supra* note 41 at 29.

⁵⁶ di Tomasso & de Finney, “Part 2”, *supra* note 13 at 23.

⁵⁷ *Indian Act*, RSC 1985 c 1-5, s 2(1).

⁵⁸ Baldassi, *supra* note 36 at 87.

received royal assent on June 21, 2019 but is not yet in force. The purpose of the Bill is to “affirm the rights and jurisdiction of Indigenous peoples in relation to child and family services and to set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children.”⁵⁹

Clause 9 provides that the *Act* is to be administered in accordance with the principles of the best interests of the child, cultural continuity, and substantive equality. Clause 11 provides that child and family services are to be administered in a manner that:

- a) Takes into account the child’s needs, including with respect to his or her physical, emotional and psychological safety, security and well-being;
- b) Takes into account the child’s culture;
- c) Allows the child to know his or her family origins; and
- d) Promotes substantive equality between the child and other children.⁶⁰

Clause 4 reads “[F]or greater certainty, nothing in this Act affects the application of a provision of a provincial Act or regulation to the extent that the provision does not conflict with, or is not consistent with, the provisions of this Act.”⁶¹ It is not entirely clear how conflicts and inconsistencies between provincial law, Indigenous law, and the *Act* will be defined and resolved. Clause 22 provides that where a conflict or inconsistency exists between the *Act* or provincial legislation regarding child and family services and the laws of an Indigenous group, the law of the Indigenous group prevails. However, this paramountcy of Indigenous law is curtailed by clause 23, which dictates that if the Indigenous law would be contrary to the best interests of the child, it does not apply. Clause 10 enumerates the factors to be considered in determining the “best interests of Indigenous child.” These include:

⁵⁹ Canada, Department of Justice, “Bill C-92: *An Act respecting First Nations, Inuit and Métis children, youth and families*”, (29 April 2019), online: <<https://www.justice.gc.ca/eng/csj-sjc/pl/charte-charte/c92.html>>.

⁶⁰ Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, 1st Sess, 42nd Parl, 2019, cl 11, (assented to 21 June 2019), SC 2019, c 24.

⁶¹ *Ibid*, cl 4.

- a. The child's cultural, linguistic, religious and spiritual upbringing and heritage;
- b. The child's needs, given the child's age and stage of development, such as the child's need for stability;
- c. The nature and strength of the child's relationship with his or her parent, the care provider and any member of his or her family who plays an important role in his or her life;
- d. The importance to the child of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs;
- e. The child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- f. Any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs;
- g. Any family violence and its impact on the child, including whether the child is directly or indirectly exposed to the family violence as well as the physical, emotional and psychological harm or risk of harm to the child; and
- h. Any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Subclause 10(4) indicates that these factors, to the extent possible, are to be interpreted in a manner consistent with the laws of the Indigenous group to which the child belongs.⁶² This provides at least some assurance that the Legislature's conception of the best interests of the child will not override those of the child's community.

When Bill C-92 was first made public in February 2019, Assembly of First Nations national Chief Perry Bellegarde offered his praise of it. However, several First Nations chiefs in B.C., Alberta, Saskatchewan, and Ontario have since criticized the Bill, fearing that it fails to respect the First Nations' sovereignty.⁶³

⁶² *Ibid.*, cl 10(4).

⁶³ "First Nations chiefs call for protests to oppose Indigenous child welfare bill", *CBC News* (8 May 2019), online: <www.cbc.ca>.

One major concern is that it does not provide for any commitment to fund existing First Nations child and welfare services. It also perpetuates the ineffective tripartite funding discussions between provincial governments, the federal government, and Indigenous communities which have previously resulted in “jurisdictional hot-potato” whereby both federal and provincial governments fail to provide funding to Indigenous communities.⁶⁴ Also lacking are provisions regarding mechanisms to ensure federal and provincial compliance with the legislation and regulations as well as a system for data collection and reporting, which would be essential to determining whether or not the new legislation is in fact effective in achieving its purpose of lowering apprehension rates.⁶⁵ Pam Palmater wrote in an article of April 5 that the *Act* risks “continuing the status quo.” She critiques that “what is offered is delegated authority under federal jurisdiction, which is conditional on agreement with the provinces.” She further elucidates that First Nation jurisdiction and laws in relation to child welfare are limited extensively by the legislation, severely diminishing its potential to truly recognize First Nations’ inherent right to self-government.⁶⁶

While the effect of the *Act* is yet to be seen, several provinces and territories have already recognized custom adoption in various ways. The impact of these various forms of recognition is surveyed below. As indicated above, as long as the provincial and territorial statutory regimes are not in conflict with or inconsistent with the federal *Act*, they remain operative.

Northwest Territories

The Northwest Territories was the first jurisdiction to recognize custom adoption through legislation. Prior to statutory recognition, families sought recognition from the courts. Much of the early jurisprudence on custom adoption is from the Northwest Territories, starting in 1961 with the Territorial Court decision *Re Katie’s Adoption Petition*.⁶⁷

⁶⁴ Naiomi Walqwan Metallic *et al.*, “Special Report—An Act Respecting First Nations, Inuit and Métis Children, Youth and Families: Does Bill C-92 Make the Grade?” *Yellowhead Institute* (21 March 2019), online: <<https://yellowheadinstitute.org/bill-c-92-analysis/>>.

⁶⁵ *Ibid.*

⁶⁶ Pamela Palmater, “Bill C-92’s Indigenous child welfare act risks continuing the status quo” (5 April 2019) *rabble.ca* (blog), online: <<http://rabble.ca/blogs/bloggers/indigenous-nationhood/2019/04/bill-c-92s-indigenous-child-welfare-act-risks>>.

⁶⁷ *Re Katie’s Adoption Petition*, [1961] NWTJ No. 2, 32 DLR (2d) 686.

In *Re Katie's Adoption Petition*, Justice Sissons recognizes “adoptions in accordance with Indian or Eskimo custom” as having the same effect as an adoption made under the *Child Welfare Ordinance*.⁶⁸ Justice Sissons states that “although there may be some strange features in Eskimo adoption custom which the experts cannot understand or appreciate, it is good and has stood the test of many centuries and these people should not be forced to abandon it.”⁶⁹ He explains that these applications are made to the court “because the white man says there should be an adoption order, and because it is well to have something of court record establishing the adoption and proving it for purposes of family allowances, school registration, succession, and to avoid dispute or question.”⁷⁰

In the 1972 Territorial Court decision *Re Deborah E4-789*, Justice Morrow describes custom adoption as “the most outstanding characteristic of their culture and appears to outrank marriage and hunting rights.”⁷¹ Justice Morrow explains that there is always a reason for custom adoptions “based on good sense”, providing examples ranging from ill health or lack of caregiving capability of the birth mother to the desire of extended kin to raise a child.⁷² He says “the white culture could learn a lot from these customs - the Eskimos have what we are trying to legislate.”⁷³

The “good sense” of custom adoption was incorporated into Justice Marshall’s precedential summary in the 1983 Northwest Territories Supreme Court decision *Re Tagornak*.⁷⁴ Justice Marshall lists criteria to be applied by the court when a custom adoption case comes before it:

- a) that there is consent of natural and adopting parents; b) that the child has been voluntarily placed with the adopting parents;
- c) that the adopting parents are indeed native or entitled to rely on native custom; and d) that the rationale for native custom adoptions is present in this case as in *Re Deborah*.⁷⁵

⁶⁸ *Ibid* at 687.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* at 688.

⁷¹ *Re Deborah E4-789*, [1972] 3 WWR 194 at para 19, (*sub nom Re Tucktoo and Kitchooalik*) 27 DLR (3d) 225.

⁷² *Ibid*.

⁷³ *Ibid*.

⁷⁴ *Re Tagornak*, [1984] 1 CNLR 185 at para 12, 23 ACWS (2d) 469.

⁷⁵ *Ibid*.

Custom adoption was recognized by statute in 1995 when the *Aboriginal Custom Adoption Recognition Act* (“*ACARA*”) came into force.⁷⁶ This statutory model is an administrative model with a registration system as opposed to a judicial model.⁷⁷ After gathering biographical details about the child and statements from the adoptive parents and any other interested person, an adoption commissioner issues a certificate recognizing the adoption.⁷⁸ This recognition does not allow custom adoptions to take place, it only records that they have occurred.⁷⁹ The preamble describes the purpose of the *ACARA* as “desiring, without changing aboriginal customary law respecting adoptions, to set out a simple procedure by which a custom adoption may be respected and recognized.”⁸⁰

The Northwest Territories Supreme Court discusses the effect of a custom adoption registration in the 2015 decision *Tinqui v Nitsiz̄a*.⁸¹ Justice V.A. Schuler states that while the *ACARA* “provides a means of recognizing a custom adoption; it does not specify the consequences of such adoptions.”⁸² However, she explains that the status of parent and child are clearly contemplated by the act. Section 2(2)(b) of the act requires “a statement by the adoptive parents,” and the prescribed form of custom adoption certificate under section 3(2) refers to the child having been adopted by the adoptive parents “as their child” in accordance with Aboriginal customary law.⁸³ Custom adoption is understood by this legislation as creating a parent-child relationship, making the consequence of custom adoption registration a change in parent and child status.

The *ACARA* has a role in strengthening Indigenous self-governance over child welfare. Moving away from the conflation with settler state adoption seen in early jurisprudence, the *ACARA* sets out a simple procedure to respect and recognize custom adoption without changing customary law. To provide legal consequences to the registration of custom adoptions, the court has interpreted

⁷⁶ *Aboriginal Custom Adoption Recognition Act*, SNWT 1994, c 26 [*ACARA*].

⁷⁷ Poitras & Zlotkin, *supra* note 45 at 45.

⁷⁸ *ACARA*, *supra* note 76, ss 2(1), 2(2).

⁷⁹ *Working Group Report*, *supra* note 41 at 44.

⁸⁰ *ACARA*, *supra* note 76, Preamble.

⁸¹ *Tinqui v Nitsiz̄a*, 2015 NWTSC 71, 266 ACWS (3d) 119.

⁸² *Ibid* at para 20.

⁸³ *Ibid*.

custom adoption certificates as changing parent and child status. While this interpretation is typically in line with how Indigenous communities understand the effects of custom adoption, attention must be paid to Indigenous peoples' own understanding of their customary laws. It is important that the court defers to Indigenous communities' understanding of custom adoption and its effects by maintaining family ties and rejecting the requirement of permanency. To respect customary law and custom adoption as an exercise of self-governance over child welfare, application of the *ACARA* must fulfil its purpose to respect and recognize custom adoption and refrain from prescribing legal consequences without involving Indigenous communities.

Nunavut

When Nunavut was established in 1999, all Northwest Territories legislation then in force became the independent statutes of Nunavut.⁸⁴ Nunavut has not chosen to change the *ACARA*.⁸⁵ The same registration system applies in the Northwest Territories and Nunavut. Nunavut has the highest incidence of custom adoption in Canada.⁸⁶ From 2008 to 2015, eighty-five to ninety-nine percent of total annual adoptions were custom adoptions registered under the *ACARA*.⁸⁷

The 2002 Nunavut Court of Justice decision *K (SK) v S (J)* was the first opportunity for Nunavut to interpret and apply the recognition legislation.⁸⁸ The court heard evidence from Elders about the tradition of custom adoption and how the process has become “diluted” as a result of “rapid cultural changes taking place in Northern communities.”⁸⁹ Justice B.A. Browne described the common indicators of custom adoption that differentiate it from settler state adoption, including the continuing relationship between the birth parents and the child, and the possibility of the child returning to them.⁹⁰ The substance of a custom adoption is the intention of the two sets of parents and their agreement regarding

⁸⁴ *Working Group Report*, *supra* note 41 at 45.

⁸⁵ Duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28.

⁸⁶ Baldassi, *supra* note 36 at 64.

⁸⁷ *A (I) (Guardian of) v K (S)*, 2017 NUCJ 5 para 18, 277 ACWS (3d) 552 [A (I)].

⁸⁸ *K (SK) v S (J)*, 2002 NUCJ 2, 170 ACWS (3d) 846.

⁸⁹ *Ibid* at paras 15, 24, 46.

⁹⁰ *Ibid* at para 51.

childrearing responsibilities.⁹¹ Justice B.A. Browne explains custom adoption as “part of the community process - an informal way a community looks after itself.”⁹²

The 2017 Nunavut Court of Justice decision *A (I) (Guardian of) v K (S)* provided an opportunity to “draw stark attention to continuing issues presented by the application of *ACARA*.”⁹³ In this case, all parties agreed the Custom Adoption Certificate in question “should be vacated on the basis that the fundamental concept of procedural fairness of notice to interested parties was breached.”⁹⁴ Due to a misunderstanding, a paternal grandmother applied for and was wrongly issued a Custom Adoption Certificate for her infant granddaughter.⁹⁵ The Custom Adoption Commissioner was unable to contact either the mother or the maternal grandparents “because she did not have sufficient minutes on her cell phone to call them.”⁹⁶ As explained by Justice S. Cooper, procedure for the Commissioner to follow is not provided in the *ACARA* or its regulations, and the Custom Adoption Commissioner’s Manual is “nothing more than a guide to filling out forms.”⁹⁷ Lack of procedure, training, and resources (evidenced by reliance on personal funds for telephone charges) were highlighted in this case.⁹⁸ Justice S. Cooper echoes recommendations made by the Nunavut Law Reform Commission regarding custom adoption: standardized policy, increased documentation, and notice to interested parties and written consents are all needed.

Nunavut’s interpretation and application of the *ACARA* has been promising for strengthening self-governance over child welfare. The court recognizes the effects of custom adoption as distinct from settler state adoption, not requiring sameness for recognition. Custom adoption is understood as part of the way a community looks after itself. The jurisprudence also highlights the urgent need for increased support and funding to ensure application of the

⁹¹ *Ibid* at para 17.

⁹² *Ibid* at para 38.

⁹³ *A (I)*, *supra* note 87 at para 75.

⁹⁴ *Ibid* at para 69.

⁹⁵ *Ibid* at paras 4-6.

⁹⁶ *Ibid* at para 8.

⁹⁷ *Ibid* at para 39.

⁹⁸ *Ibid* at para 44.

ACARA is successful. Robust statutory recognition is only the first step. Standardized procedure, training, and resources must accompany statutory recognition.

British Columbia

Prior to British Columbia's statutory recognition of custom adoption, the 1993 BC Court of Appeal decision *Casimel v Insurance Corp. of British Columbia* determined that custom adoption was a section 35 Constitutional right.⁹⁹ The custom adoption at issue was considered "an integral part of the distinctive culture of the Stellaquo Band of the Carrier People (though, of course, other societies may well have shared the same custom or variations of that custom)."¹⁰⁰

British Columbia gave statutory recognition to custom adoption in 1996 through a provision in its *Adoption Act*.¹⁰¹ The provision provides a judicial model, as opposed to an administrative model.¹⁰² Section 46(1) states, "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."¹⁰³

This provision was first interpreted and applied in the 1998 BC Supreme Court decision *Re British Columbia Birth Registration No. 1994-09-040399*.¹⁰⁴ Justice Grist uses the four factors set out in the 1983 Northwest Territories Supreme Court decision *Re Tagornak* as the criteria for declaration of an adoption by Aboriginal custom:

- a) that there is consent of natural and adopting parents; b) that the child has been voluntarily placed with the adopting parents;
- c) that the adopting parents are indeed native or entitled to rely on native custom; and d) that the rationale for native custom adoptions is present.¹⁰⁵

⁹⁹ *Casimel v Insurance Corp. of British Columbia*, [1993] BCWLD 2373, 106 DLR (4th) 720.

¹⁰⁰ *Ibid* at para 52.

¹⁰¹ *Adoption Act*, RSBC 1996, c 5, s 46.

¹⁰² Poitras & Zlotkin, *supra* note 45 at 45.

¹⁰³ *Adoption Act*, *supra* note 101, s 46(1).

¹⁰⁴ *Re British Columbia Birth Registration No. 1994-09-040399*, [1998] 4 CNLR 7, 45 RFL (4th) 458 [*Birth Registration*].

¹⁰⁵ *Ibid* at paras 11, 22.

Justice Grist interprets recognition under this provision as requiring that “the relationship created by custom must be understood to create fundamentally the same relationship as that resulting from an adoption order under Part 3 of the *Act*.”¹⁰⁶ The BC Supreme Court discusses this fifth “fundamentally the same relationship” criteria in the 2000 decision *Prince v Canada*.¹⁰⁷ Justice Meiklem explains that while the recognition provision “does not require proven symmetry between the effects of adoption by aboriginal custom adoption and adoption under the Act as a prerequisite for the declaration contemplated, the Court must obviously be satisfied that it is recognizing an adoption already effected, and not creating a fundamentally different relationship or status.”¹⁰⁸ To satisfy the court that custom adoption has created “fundamentally the same relationship”, the applicant will have to establish “both the nature of the custom generally, and that the adoption of the applicant pursuant to that custom was effected.”¹⁰⁹

BC’s recognition of custom adoption is problematic in its conflation of Indigenous custom adoption with settler state adoption. The effects of custom adoption frequently differ from those generated by settler state adoption. Two of the most significant differences are that custom adoption rarely severs family ties and permanency is not emphasized.¹¹⁰ Settler state adoption and custom adoption will not always “create fundamentally the same relationship.”¹¹¹ The interpretation in *Prince* provides some nuance by not requiring “proven symmetry” between the effects of custom adoption and settler state adoption, but then affirms the “fundamentally the same relationship” language.¹¹² Recognition that fails to incorporate differences between the two forms of adoption does not adequately respect custom adoption as an exercise of Indigenous self-governance over child welfare. This sameness requirement also contradicts early jurisprudence recognizing custom adoption as a section 35 Constitutional right. Indigenous communities must be able to determine the effects of custom adoption as distinct from settler state adoption.

¹⁰⁶ *Ibid* at para 15.

¹⁰⁷ *Prince v Canada*, 2000 BCSC 1066 paras 38-40, 97 ACWS (3d) 1148 [*Prince*].

¹⁰⁸ *Ibid* at para 38.

¹⁰⁹ *Ibid* at para 40.

¹¹⁰ Poitras & Zlotkin, *supra* note 45 at 23-24.

¹¹¹ *Birth Registration*, *supra* note 104 at para 15.

¹¹² *Prince*, *supra* note 107 at paras 38-40.

Yukon

Yukon recognized custom adoption in 2008 through a provision in the *Child and Family Services Act*.¹¹³ This statute provides a judicial model, as opposed to an administrative model.¹¹⁴ Section 134(1) states: “On application, the court may declare that there has been an adoption of a person in accordance with the customs of a First Nation.”¹¹⁵ As a result of the custom adoption, the court may declare child and parent status, and “further declarations as to rights and responsibilities as a result of the custom adoption, including the rights and responsibilities of the birth parents, adoptive parents or the person.”¹¹⁶ These further declarations are made by relying on Indigenous custom.¹¹⁷ There is not yet any reported jurisprudence interpreting or applying this provision in the legislation.

Yukon’s recognition of custom adoption appears more promising than the recognition in BC’s legislation and jurisprudence. Instead of conflating Indigenous custom adoption and settler state adoption, this provision acknowledges and provides for recognition of Indigenous custom adoption’s distinct effects. Recognition of custom adoption is not contingent upon it being functionally equivalent to settler state adoption. The court is not limited to declarations of effects that mirror those of settler state adoption. It is significant that this legislation provides for continuing rights and responsibilities of birth parents, which does not sever family ties as in settler state adoption. This provision has the potential, depending on its interpretation and application in future jurisprudence, to strengthen Indigenous self-governance over child welfare.

Nova Scotia

Nova Scotia added a provision to the *Children and Family Services Act* in 2015 to recognize custom adoption.¹¹⁸ A judicial model is provided, as opposed to an administrative model. As stated in section 78A(1), “Upon application, the court

¹¹³ *Child and Family Services Act*, SY 2008, c 1, s 134 [CFSA].

¹¹⁴ Poitras & Zlotkin, *supra* note 45 at 45.

¹¹⁵ *CFSA*, *supra* note 113, s 134(1).

¹¹⁶ *Ibid*, ss 134(2), 134(3).

¹¹⁷ *Working Group Report*, *supra* note 41 at 46.

¹¹⁸ *Children and Family Services Act*, SNS 1990, c 5, s 78A.

may recognize that an adoption of a person in accordance with the custom of a band or an aboriginal community has the effect of an adoption under this Act.”¹¹⁹ There is not yet any reported jurisprudence interpreting or applying this section of the act.

Similar to the BC provision, Nova Scotia’s recognition conflates Indigenous custom adoption with settler state adoption. Custom adoption will rarely have the same effect as settler state adoption due to its commonly observed characteristics of maintaining family ties and rejecting the requirement of permanency. The term ‘may’ could enable this provision to be interpreted in a manner that recognizes fundamental distinctions between Indigenous custom adoption and settler state adoption. Since the court has the discretion to recognize that custom adoption has the effect of adoption under the act, it may also have the discretion to recognize custom adoption as having distinct effects. However, because of where ‘may’ is located in the provision and how BC’s similar provision has been interpreted in BC jurisprudence, it is more likely that custom adoption will either be recognized as having the effect of adoption under the act or will not be recognized at all. Statutory recognition that requires custom adoption to mirror settler state adoption does not adequately respect the practice as an exercise of Indigenous self-governance over child welfare.

¹¹⁹ *Ibid*, s 78A(1).

Ontario

Ontario's revised *Child, Youth and Family Services Act* recognizes customary care.¹²⁰ Customary care is defined in this legislation as “the care and supervision of a First Nations, Inuk or Métis child by a person who is not the child’s parent, according to the custom of the child’s band or First Nations, Inuit or Métis community.”¹²¹ This legislation provides customary care subsidies to the person caring for the child upon declaration by the band or community of the customary care arrangement.¹²² In child protection proceedings, a society “shall make all reasonable efforts to pursue a plan for customary care for a First Nations, Inuk or Métis child.”¹²³ The purposes provision states that “First Nations, Inuit and Métis peoples should be entitled to provide, wherever possible, their own child and family services.”¹²⁴

Ontario's revised legislation may be a powerful tool for strengthening Indigenous self-governance over child welfare. The purposes provision explicitly acknowledges self-governance over child and family services. Recognizing customary care acknowledges the often temporary nature of custom adoption, which does not result in severed family ties. The provision of customary care subsidies is an important support in ensuring Indigenous communities have the financial resources to exercise self-governance over child welfare.

Quebec

Quebec recognized custom adoption in 2017 through the assent to Bill 113, *An act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information*.¹²⁵ The effects of Aboriginal customary adoptions are recognized “when carried out according to a custom that is in harmony with the principles of the interest of the child, the protection of the child’s rights and the consent of the persons concerned.”¹²⁶ Aboriginal customary adoption certificates are issued by “a person or body domiciled in Quebec and designated by the

¹²⁰ *Child, Youth and Family Services Act*, SO 2017, c 14, Sched 1 [CYFSA].

¹²¹ *Ibid*, s 2(1).

¹²² *Ibid*, s 71.

¹²³ *Ibid*, s 80.

¹²⁴ *Ibid*, s 1(2).

¹²⁵ Bill 113, *An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information*, 1st Sess, 41st Leg, Quebec, 2017 (assented to 16 June 2017), SQ 2017, c 12.

¹²⁶ *Ibid*, Explanatory Notes.

Aboriginal community or nation.”¹²⁷ The competent authority must not be a party to the adoption.¹²⁸ An Aboriginal customary adoption certificate states biographical information about the child, the family of origin, and the adopters.¹²⁹ The certificate will also specify any rights and obligations that subsist between the adoptee and their parent of origin.¹³⁰ Conditions under Aboriginal custom may also be substituted for conditions for suppletive tutorship: the temporary delegation of parental authority to another family member.¹³¹

The Cree Nation responded favourably to the adoption of Bill 113 in their press release, underlining its support for the collaborative approach to drafting this legislation.¹³² The collaborative approach resulted in amendments to the bill, including measures to recognize temporary customary adoptions.¹³³ As stated by Dr. Matthew Coon Come, then Grand Chief of the Grand Council of the Crees (Eeyou Istchee) and Chairman of the Cree Nation Government, “Bill 113 begins to harmonize provincial adoption legislation with Cree Aboriginal and treaty rights in relation to adoption matters and reflects the rights of Indigenous Nations to govern affairs regarding their children.”¹³⁴

Quebec’s recognition of custom adoption is an encouraging development. Drafted in consultation with Indigenous communities, the legislation supports self-governance over child welfare.¹³⁵ It recognizes the temporary and more permanent manifestations of custom adoption and the continuing rights and obligations of the family of origin. The competent authority to issue Aboriginal customary adoption certificates are designated by Indigenous communities, providing them some control over custom adoption recognition procedures. The effects of custom adoption are determined by Indigenous custom, not by conflation with settler state adoption. Depending on future interpretation and

¹²⁷ *Ibid.*, s 7.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, s 3.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, s 10.

¹³² Grand Council of the Crees, Press Release, “Cree Nation Welcomes Customary Adoption into Quebec Legislation” (16 June 2017), online: *Cree Nation Government*, <<https://www.cngov.ca/wp-content/uploads/2018/03/gceci-cng-press-release-june-16-2017-cree-nation-welcomes-customary-adoption-into-quebec-legislation.pdf>>.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Working Group Report*, *supra* note 41 at 4.

application, Quebec's statutory recognition may be effective in strengthening Indigenous self-governance over child welfare.

Remaining Provinces

The remaining provinces do not recognize custom adoption in their legislation.

New Brunswick's *Family Services Act* discusses adoption of Aboriginal children in the context of disclosure and retaining Aboriginal rights.¹³⁶ There is no mention of custom adoption.

PEI's *Adoption Act* makes no mention of Aboriginal children, nor custom adoption.¹³⁷ The *Child Protection Act* makes many references to the adoption of Aboriginal children, including in the context of notice to bands in child protection proceedings and best interests of the child.¹³⁸ However, there is no mention of custom adoption in this legislation.

Alberta's *Child, Youth and Family Enhancement Act* includes many provisions regarding adoption of Aboriginal children.¹³⁹ Cultural connection plans are emphasized but there is no mention of custom adoption.¹⁴⁰

Manitoba's *Adoption Act* only references Aboriginal children in the context of disclosure of pre-adoption birth registrations.¹⁴¹ There is no mention of custom adoption. *The Child and Family Services Authorities Act* does not recognize custom adoption but the preamble states "the development and delivery of programs and services to First Nations, Metis and other Aboriginal people must respect their values, beliefs, customs and traditional communities."¹⁴²

Saskatchewan's *Child and Family Services Act* provides for Aboriginal child welfare agreements.¹⁴³ The minister may enter into an agreement with a band for

¹³⁶ *Family Services Act*, SNB 1980, c F-2.2.

¹³⁷ *Adoption Act*, SPEI 1992, c 1.

¹³⁸ *Child Protection Act*, SPEI 2000, c 3 (2nd Sess.), ss 2(2)(j), 12(3.1), 12(3.2), 13(7), 13(8), 18.1(1)(b), 18.1(2)(b), 24(1.2), 27(1)(a.1), 27(1.1), 27(2)(a.1), 30(2), 32(2), 32(3), 35(1)(b), 37(2), 37(4), 39(2)(b).

¹³⁹ *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, ss 2(p), 52(1)(1.3), 56(1)(1.2), 57.01, 58.1(g), 63(1)(f), 63(3)(e), 70(1)(2.1), 71.1, 74.4(1).

¹⁴⁰ *Ibid*, s 63(1)(f).

¹⁴¹ *The Adoption Act*, SM 1997, c 47, s 107.5(1).

¹⁴² *The Child and Family Services Authorities Act*, SM 2002, c 35.

¹⁴³ *The Child and Family Services Act*, SS 1989-90, c C-7.2, s 61.

the administration of the act as an agency or for the exercise by the agency of those powers of the minister pursuant to the act.¹⁴⁴ There is no other reference to Aboriginal children and no mention of custom adoption.

Newfoundland and Labrador's *Adoption Act* states that it shall be read and applied in conjunction with the *Labrador Inuit Land Claims Agreement Act*, with this agreement having precedence in the event of conflict or inconsistency.¹⁴⁵ There is no other reference to Aboriginal children and no mention of custom adoption. The *Children and Youth Care and Protection Act*¹⁴⁶ and *Children's Law Act*¹⁴⁷ replicate the Labrador Inuit rights provision, but again make no further reference to Aboriginal child and no mention of custom adoption.

Strengthening Self-Governance Over Child Welfare

Above all, custom adoption is a matter of Indigenous governance and jurisdiction.¹⁴⁸ It is the application of Indigenous law on Indigenous land, by and for Indigenous people. It is "an expression of First Nations self-determination, self-government and jurisdiction over families, children, identity, culture and language."¹⁴⁹ While custom adoption does not depend on recognition in legislation for its existence, recognition of its effects has practical advantages for parents, children, and communities.¹⁵⁰ Robust statutory recognition strengthens self-governance over child welfare. Statutory recognition supports the resurgence of Indigenous customary law. Self-governance is strengthened when the conflation of diverse practices is rejected, and recognition is accompanied by control and support.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Adoption Act*, SNL 2013, c A-3.1, s 3.

¹⁴⁶ *Children and Youth Care and Protection Act*, SNL 2010, c C-12.2, s 3.

¹⁴⁷ *Children's Law Act*, RSNL 1990, c C-13, s 5.1.

¹⁴⁸ *Working Group Report*, *supra* note 41 at 135.

¹⁴⁹ *Ibid* at 103.

¹⁵⁰ *Ibid.*

Resurgence of Indigenous Customary Law

Custom adoption is part of the resurgence of Indigenous customary law. It is the rejection of the imposition of colonial laws and the assertion of an Indigenous community's own customary laws and practices. Custom adoption is informed by various Indigenous worldviews, which often value extended kin and community responsibility. Instead of blaming individual parents for personal deficiencies, Indigenous caregiving practices acknowledge root causes and systemic difficulties. Rather than severing ties and emphasizing permanency, custom adoption strengthens community relationships and allows for temporary arrangements. Indigenous communities use their own laws to govern their own children-and-kin relations.

While custom adoption does not depend on recognition for its existence, recognition is a valuable tool in asserting self-governance. As explained by the prominent Indigenous scholar John Borrows, "Indigenous legal traditions will more positively permeate our societies if their power is acknowledged by official state and community institutions."¹⁵¹ Governments and courts should "help create the conditions for the more explicit implementation of Indigenous legal traditions and community values."¹⁵² The settler state should not be at the centre of Indigenous law resurgence, instead it should supplement work being done in Indigenous communities.¹⁵³ It is at the discretion of Indigenous communities to define and adapt custom adoption to respond to their traditional values and current needs.¹⁵⁴ It is the task of legislatures to give it a place in legislation.¹⁵⁵

In the absence of formal recognition, Indigenous custom adoptions exist in a liminal space. Custom adoptions have always taken place in Indigenous communities, but their undefined legal status within Canadian law has resulted in uncertainty, leading to undue complications and obstacles.¹⁵⁶ The settler state has routinely failed to recognize the participation of extended kin in childrearing as an expression of self-governance over child welfare.¹⁵⁷ Without recognition of

¹⁵¹ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 178.

¹⁵² *Ibid* at 180-181.

¹⁵³ *Ibid* at 179.

¹⁵⁴ *Working Group Report*, *supra* note 41 at 125-126.

¹⁵⁵ *Ibid* at 126.

¹⁵⁶ *Ibid* at 101.

¹⁵⁷ Kline, *supra* note 14 at 331.

Indigenous forms of caregiving, the settler state justifies its intrusion into Indigenous communities through child protection rationales. Properly understood as an alternative to settler state child protection, statutory recognition of custom adoption can prevent state intrusion into Indigenous communities that are employing their own means of caring for their children. Statutory recognition of custom adoption provides “an additional measure of legal certainty.”¹⁵⁸

Conflation of Diverse Practices Must Be Rejected

Recognition which conflates custom adoption with settler state adoption must be rejected. Further, reduction of diverse custom adoption practices in different Indigenous communities to a flattened essentialist form is an impoverished recognition. If statutory recognition requires custom adoption to mirror the effects of settler state adoption, it strips it of the fundamental characteristics that make it an alternative to the incompatible settler state regime. Requiring assimilation to the settler state regime does not respect custom adoption as an exercise of Indigenous self-governance over child welfare.

British Columbia and Nova Scotia are two examples of statutory recognition which conflate custom adoption with settler state adoption. Legislation in both provinces recognizes custom adoption as having “the effect of an adoption under this Act.” The jurisprudence in BC goes further in interpreting this provision by stating custom adoption must “create fundamentally the same relationship” as settler state adoption.¹⁵⁹ These provisions do not understand custom adoption as a process unique from settler state adoption. Recognition is permitted so long as Indigenous caregiving mirrors the existing statutory regime. These recognition provisions fail to recognize and respect custom adoption as self-governance. Effects of custom adoption must be defined by Indigenous communities and understood from their worldviews.

Yukon and Quebec are two examples of more promising statutory recognition. Yukon’s legislation does not limit court declarations to effects that mirror those of settler state adoption and provides for continuing rights and responsibilities of the birth parents. Quebec’s legislation also allows for

¹⁵⁸ *Working Group Report*, *supra* note 41 at 1.

¹⁵⁹ *Birth Registration*, *supra* note 104 at para 15.

continuing rights and obligations of the family of origin and recognizes the temporary and more permanent manifestations of custom adoption. These examples of statutory recognition are more robust in their recognition of custom adoption as an exercise of self-governance, with its effects determined by Indigenous communities and custom.

Statutory recognition must also understand the diversity of custom adoption practices. The effects of custom adoption vary among Indigenous communities.¹⁶⁰ The risk of reduction and essentialism accompanies statutory recognition. Custom adoption is an exercise of self-governance which will manifest itself differently depending on the particular Indigenous community and custom.

Consultation with Indigenous communities is required to prevent both the conflation of custom adoption with settler state adoption and the reduction of diverse custom adoption practices to a flattened essentialist form. The objective of consultation is not to negotiate but to document and analyze.¹⁶¹ Documenting the specific custom adoption practices in diverse Indigenous communities assists in crafting appropriate and beneficial legislation.¹⁶² Any proposed legislation for custom adoption recognition must be subject to prior consultation and collaboration between government authorities and representatives of relevant Indigenous communities.¹⁶³

Quebec's collaborative approach to drafting their legislation is an encouraging example of placing consultations at the forefront of statutory recognition. Quebec's Working Group on Customary Adoption in Aboriginal Communities held consultations with Indigenous communities to discuss values and issues surrounding custom adoption.¹⁶⁴ The results of the consultations were "central in the determination of reference points and parameters to guide the recognition of effects of customary adoptions within and for the purposes of the Civil Code and other provincial legislation."¹⁶⁵ As discussed in the press release

¹⁶⁰ *Working Group Report*, *supra* note 41 at 129.

¹⁶¹ *Ibid* at 1.

¹⁶² *Ibid* at 97.

¹⁶³ *Ibid* at 135.

¹⁶⁴ *Ibid* at 6.

¹⁶⁵ *Ibid* at 97.

from the Cree Nation, the collaborative approach to drafting this legislation resulted in amendments that better reflected distinct forms and effects of custom adoption.¹⁶⁶ Other legislatures should follow Quebec's collaborative approach in creating robust statutory recognition of custom adoption which strengthens Indigenous self-governance over child welfare.

Recognition Must Be Accompanied by Control and Support

Settler state recognition can play an important role in strengthening self-governance, but it must be accompanied by support and ceded control. There can be a fine line between government recognition and government interference.¹⁶⁷ Custom adoption does not require settler state recognition for it to exist. The role of the settler state must remain limited to after-the-fact recognition. Recognition cannot be co-opted as a way of interfering with Indigenous communities and altering their customary law. As explained by John Borrows, "Governments and courts should not be trusted with more power than is necessary to create a sphere of recognition and enforcement."¹⁶⁸ Custom adoption is an exercise of self-governance and Indigenous communities must remain in control at all stages of the process.

After recognition has been written into legislation, judicial interpretation and application can be an insidious form of interference with Indigenous custom. The formal implementation of Indigenous customary law by the courts must not undermine work being done in Indigenous communities.¹⁶⁹ Judicial interpretation of the effects of custom adoption must be informed by Indigenous custom and determined by Indigenous communities. It is particularly important that the judiciary is educated about the differences between custom adoption and settler state adoption to ensure the risk of conflating them is minimized.

The choice of statutory model also has implications for the risk of judicial interference. While the judicial model uses the judiciary to determine whether a custom adoption has occurred and what its legal effects are, the administrative

¹⁶⁶ Grand Council of the Crees, *supra* note 132.

¹⁶⁷ *Working Group Report*, *supra* note 41 at 71.

¹⁶⁸ Borrows, *supra* note 151 at 179.

¹⁶⁹ *Ibid.*

model with a registration system minimizes the role of the judiciary.¹⁷⁰ The Northwest Territories, Nunavut, and Quebec are examples of the administrative model of statutory recognition. The judiciary still has a role in interpreting the recognition provisions, but it does not operate as gatekeeper. The administrative model is more accessible and less expensive for Indigenous communities and emphasizes their control over the recognition process.

An additional measure of control is the choice of who issues a custom adoption certificate. Quebec's legislation provides a promising example by allowing the competent authority to issue an Aboriginal customary adoption certificate to be "designated by the Aboriginal community or nation."¹⁷¹ This choice in designation works to ensure that the competent authority is well informed about custom adoption, understanding it as an exercise of self-governance, with its effects determined by Indigenous communities and custom.

It is also essential that statutory recognition of custom adoption is accompanied by support. Financial support is required to ensure that Indigenous communities can exercise their inherent right to self-governance.¹⁷² When an Indigenous family customarily adopts a child, they are not provided with financial support to care for the additional child in their household.¹⁷³ This financial support must be provided. Along with financial support for individual families who customarily adopt, broader support is required for development of Indigenous regimes and mechanisms which may be required to implement a modern expression of self-governance over custom adoption.¹⁷⁴ A lack of resources, such as housing shortages and poor living conditions, also impacts the ability of Indigenous communities to exercise self-governance over child welfare. Financial support is the joint responsibility of the provinces and the federal government.¹⁷⁵ It is crucial that recognition is accompanied by financial support.

The Ontario legislation provides one example of financial support accompanying statutory recognition. Upon declaration by the Indigenous band

¹⁷⁰ Poitras & Zlotkin, *supra* note 45 at 45.

¹⁷¹ Bill 113, *supra* note 125, s 7.

¹⁷² *Working Group Report*, *supra* note 41 at 73-74.

¹⁷³ Poitras & Zlotkin, *supra* note 45 at 27.

¹⁷⁴ *Working Group Report*, *supra* note 41 at 73.

¹⁷⁵ *Ibid.*

or community of a customary care arrangement, a customary care subsidy is made available to the person caring for the child.¹⁷⁶ This provision acknowledges the ongoing support required beyond mere recognition. Other provinces, territories, and the federal government should follow the example of Ontario and provide financial support to Indigenous families and communities exercising self-governance over child welfare.

Sufficient funding of the statutory recognition process is also necessary to ensure that the integrity of custom adoption is not undermined by improper recognition. The Nunavut case *A (I) (Guardian of) v K (S)* highlights the need for adequate funding to ensure application of recognition legislation is successful.¹⁷⁷ In *A(I) (Guardian of) v K(S)*, due to inadequate resources and training, a Custom Adoption Certificate was issued when a custom adoption did not actually occur.¹⁷⁸ All parties to the litigation agreed there had been a misunderstanding regarding the custom adoption, and the certificate should be vacated since the Custom Adoption Commissioner did not provide notice to the interested parties.¹⁷⁹ The statutory recognition process cannot strengthen self-governance over child welfare if it is not adequately funded and administered.

CONCLUSION

In the sphere of child welfare, Canada has already facilitated multiple regimes that have torn Indigenous families apart and perpetuated the destructive chokehold of colonialism. In the words of Cindy Blackstock, “Reconciliation to me is about not having to say sorry a second time.”¹⁸⁰ It is time, then, that Canada adverts to the wisdom that Indigenous communities themselves hold in relation to child welfare. Custom adoption is an Indigenous alternative to the failing settler state child welfare system. It is a rejection of imposed colonial laws, which are incompatible with Indigenous worldviews and their ideas of the family. Custom

¹⁷⁶ *CYFSA*, *supra* note 120, s 71.

¹⁷⁷ *A (I)*, *supra* note 87 at para 44.

¹⁷⁸ *Ibid* at paras 4-6.

¹⁷⁹ *Ibid* at para 69.

¹⁸⁰ Interview of Cindy Blackstock by Amnesty International Canada [nd], *Amnesty Canada* (blog), online: <<https://www.amnesty.ca/blog/reconciliation-means-not-having-to-say-sorry-a-second-time-conversation-with-cindy-blackstock-f>>.

adoption fundamentally differs from settler state adoption by maintaining family ties and rejecting the requirement of permanency. The role of statutory recognition in strengthening self-governance over child welfare depends heavily on whether the recognition conflates custom adoption with settler state adoption. Custom adoption must be respected as an exercise of self-governance, with its effects determined by Indigenous communities and custom. When the conflation of diverse practices is rejected and recognition is accompanied by control and support, statutory recognition strengthens the resurgence of customary law and self-governance over child welfare.

Custom adoption is only one aspect of larger self-governance goals. It is “part of the broader struggle for Indigenous communities’ right to completely self-govern.”¹⁸¹ Statutory recognition of custom adoption is not enough. Further recognition of the inherent right to self-governance is necessary for ongoing reconciliation. Robust statutory recognition of custom adoption may be used as a tool for Indigenous communities in demanding further recognition of self-governance in other areas.

¹⁸¹ di Tomasso & de Finney, “Part 2”, *supra* note 13 at 33.

