

# Custom Adoption 101

July 2020

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# What is Custom Adoption?

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 the traditional custom of an Aboriginal community but which does not attempt to fulfill the requirements of provincial or territorial adoption legislation.

# Recognition of Custom Adoption

- Statutory Recognition
  - Nunavut/ NWT: Aboriginal Custom Adoption Recognition Act
  - BC: *Adoption Act*, RSBC 1996, C 5
  - Yukon: *Child and Family Services Act* SY 2008, c 1
  - Quebec: Quebec Civil Code
- Constitution Act, 1982, s. 35
- Indian Act, RSC 1985, C I-5, s. 2(1)
  - “child” includes a legally adopted child and a child adopted in accordance with Indian custom

- 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.

# British Columbia: Adoption Act

- 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.

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.

## Quebec

Aboriginal customary adoption breaks the bonds of filiation, but if provided for by custom, allows certain rights and obligations to remain with the parents of origin, such as the obligation of support; the rules applicable to successions.

The adoption must take place according to Aboriginal custom, and a competent Aboriginal authority must attest the adoption, ensuring that the child's interest and rights are respected, and also that the parents of origin, the adopting parents and the adoptee, if old enough to understand, consent to the adoption.

The competent authority is a person or entity designated by the Aboriginal community or nation. The competent authority can act for one or more communities.

## Constitution Act

- Formally recognizes the existing aboriginal and treaty rights which protects customary laws like custom adoption

## Case Law: Foundational Cases

### RE ADOPTION OF KATIE E7-1807; [1961] N.W.T.J. No. 2

Sissons, J.

**13** The Eskimos, and particularly those in outlying settlements and distant camps, are clinging to their culture and way of life which they have found to be good. These people are in process of cultural change and have a right to retain whatever they like of their culture until they are prepared of their own free will to accept a new culture. In particular, 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 and it should be recognized by the Court.**

**31** Kilipaluk E3-659 and Nabveyak E3-660, his wife, the natural parents of Katie E7-1807, placed the girl with Noah and Keeatchuk on the understanding that they thereby adopted her. Kilipaluk and Nabveyak did not and do not want the child, and Noah and Keeatchuk did and do want her.



**33** This is generally an impractical provision so far as Eskimos are concerned. At most points there is no regular mail service and mail goes in or comes out by chance, perhaps once or twice a year. The ordinary Eskimo cannot read or write. The Superintendent is far away. There is usually locally no one in authority, or perhaps within 500 miles, who could be notified, even if such notification would be sufficient.

**34** It is a shocking provision which makes it a crime for an Eskimo to follow his ancient custom in the traditional way.



**36** I think adoptions "made according to the laws of the Territories" include adoptions in accordance with Indian or Eskimo custom.

**37** The adoption of Katie E7-1807 by Noah E7-877 and Keeatchuk E7-878 took place at birth, on or about August 10, 1960.

**38** This adoption "has for all purposes in the Territories the same effect as an adoption made in accordance with this Part" *i.e.* Part IV of the *Child Welfare Ordinance*.

**39** I am making an order declaring that Katie E7-1807 was adopted by Noah E7-877, of Frobisher Bay, in the Northwest Territories, and Keeatchuk E7-878, on August 10, 1960, and that this adoption is as effective as if made under Part IV of the *Child Welfare Ordinance* and that the said child is and has been from August 10, 1960 the adopted child of the said petitioners and retains the name of Katie E7-1807.



*Re Katie's Adoption*  
Alec Banksland (Peter Aliknak), c. 1928–  
Holman Island, NWT  
Stone  
19 × 12 × 13 cm

## Re Deborah (1972) 1972 CanLII 977 (NWT CA)

- Biological mother went south for medical reasons
- Father maintained trap lines to care for the children
- While the mother was away the child, Deborah, was adopted by relatives who were unable to have their own children
- The biological mother returned to the community
- Over time, the biological parents and adoptive parents had a dispute and the biological parents sought the return of Deborah.

## Re: Wah-Shee, 1975 CanLII 1200 (NWT SC)

Cross-cultural custom adoptions are valid.

- The adoptive mother was non-aboriginal but was a band member and was receiving treaty money.
- Estate of Samuel Corrigan, 2013 MBQB 77
  - Found cross-cultural adoption was not valid.

Re: Tagornak Adoption Petition (1983), 50 A.R.  
237, [1984] 1 C.N.L.R. 185 (NWT SC)

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

## K(SK) v. S(J), 2002 CanLII 53332 (NU C.J.)

- custom adoption usually takes place between members of an extended family;
- a custom adoption is only available to those who are members of the group who have practiced custom over many years;
- custom adoption encourages a continuing relationship between the biological parents and the child; and
- there remains the possibility of the child returning to the biological parent.

## Case Law: NWT/ Nunavut

- R.A., as Guardian ad litem for her minor child, I.A v S.K. and D.K., 2017 NUCJ 5 (CanLII)
  - Premature child born in biological father's home community
  - The family lived with the biological father's family (ie. The grandparents)
  - The child was sent south for medical
  - When child returned the mother and the baby did not continue to live in the biological father's community with the grandparents
  - A custom adoption certificate was issued and registered with the court.
  - The biological mother learned of the custom adoption through Facebook.

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- issues relating to the consent of the biological parents
  - who is entitled to rely on the custom
  - two applications to custom adopt the same child (one by each set of grandparents)
  - custom adoption certificates which recognize the adoption of children who are now adults after the death of an adoptive parent
  - amendments to custom adoption certificates which are substantive in nature
  - the use of social media to seek out prospective adoptive parents

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- Nunavut Law Reform Commission: Procedural Issues
    - Commissioners often spend their own personal funds for expenses such as mailing and telephone charges
    - Commissioners do not have offices
    - Commissioners are not trained
  - Recommendations
    - standardized policy
    - increased documentation
    - notice to interested parties and written consents
    - establishment of Custom Adoption Committees
    - Appeal process

## M.E. v K.M., 2017 NUCJ 18

- Background:
  - The child was the third child of a young mother. At the time of the custom adoption, the biological mother was homeless and unable to care for the child.
  - The biological mother custom adopted the child to a relative who is the respondent in this case.
  - The custom adoption was never registered
  - The biological mother, the child and the adoptive mother all maintained contact
  - The custom adoptive mother had substance abuse issues, there were on going issues in the home with neglect, failure to protect and abusive relationships.
  - The child was eventually apprehended from the adoptive mother.



But for A.M.'s having been the subject of child protection proceedings, it is unlikely M.E. would have commenced a custody application. In my view, an order for interim custody in favour of M.E. would usurp the role of the Director and the child protection proceedings.

# A.S. v. British Columbia (Director Of Child, Family and Community Services)

- Fact Summary

- A Métis child was born in BC and apprehended at birth
- That child had siblings who were also apprehended and since adopted to a non-Métis family in Ontario
- The Métis child was placed in foster care in a Métis home in BC
- The Director proceeded with the usual steps following an apprehension and ultimately were granted permanent custody of the child with the view of placing the child with their siblings in Ontario for the purposes of a statutory adoption.
- The Métis foster parents objected to the relocation of the child to Ontario and alleged that a custom adoption had taken place.

# What Happened in BC?

- Petition #1
  - Sought an order for Interim and permanent guardianship
- Petition #2
  - Made a claim for guardianship pursuant to the Family Law Act and wanted the court to dispense with Director's consent of the adoption again seeking *parens patriae* relief



- Petition #3

- A declaration that the Petitioners have a custom adoption and direct placement rights for the adoption of the Child are entitled to counter the ill-effects and stress the Child will undergo and alienation from her Métis culture if forcibly moved at the current stage of her life from the home she has been in since her birth.

- Petition #4

- A declaration that the Director's consent is not required for the custom adoption to take effect

## Justice Smallwood Decision

[44] There is no requirement for notice stated in the *Act*; the only requirement is that the applicant provide a statement of the adoptive parents and any other person who is, according to aboriginal customary law, interested in the adoption. This has been interpreted as providing some requirement for notice. In *R.A., supra* at para. 69, Cooper J. of the Nunavut Court of Justice vacated a custom adoption certificate “on the basis that the fundamental concept of procedural fairness of notice to **interested parties** was breached.”

# Thanks for Listening

Presented by Stefanie Laurella



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