

DIFFERENT APPROACHES TO INCORPORATING INDIGENOUS LAW THROUGH LEGISLATION

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GOVERNMENT OF NUNAVUT

ADOPTION

Aboriginal Custom Adoption Recognition Act (Nunavut)

Whereas aboriginal customary law in Nunavut includes law respecting adoptions;

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

Aboriginal Custom Adoption Recognition Act (Nunavut)

(2) A person applying for a certificate must provide the following information to the custom adoption commissioner:

- (a) with respect to the child, the name given at birth and the current name, date of birth and of adoption, place of birth, sex and the names of the mother and father, so far as is known;
- (b) a statement by the adoptive parents and any other person who is, under aboriginal customary law, interested in the adoption that the child was adopted in accordance with aboriginal customary law.

...

6. The Minister may appoint as custom adoption commissioners, one or more persons who, in the opinion of the Minister, have a knowledge and understanding of aboriginal customary law in the community or region in which they reside.

Report of the Standing Committee on Legislation (Northwest Territories)

“the amendment...of the *Vital Statistics Act* [included in the original *Aboriginal Custom Adoption Recognition Act Bill*] did not hold with the spirit and intent behind aboriginal custom adoption”

“the spirit of custom adoption promotes association of the natural parents and the adopted child”

Quotes from the report of the Standing Committee on Legislation on Bill 2, *Aboriginal Custom Adoption Recognition Act* found on page 732 of the Northwest Territories Hansard dated November 3, 1994.

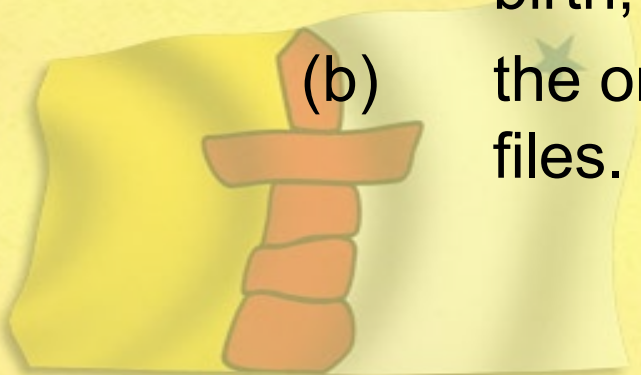


Vital Statistics Act (Nunavut)

(2.1) Where, at the time of the registration of a custom adoption or at any time after that, there is in the office of the Registrar General a registration of the birth of the person adopted, the Registrar General, on production of evidence satisfactory to the Registrar General of the identity of the person, shall cause

- (a) the substitution of a new registration of the birth that is in accordance with the facts contained in the certificate recognizing the custom adoption and that includes the names of the birth parents as set out in the original registration of birth; and
- (b) the original registration to be withdrawn from the registration files.

(emphasis added)

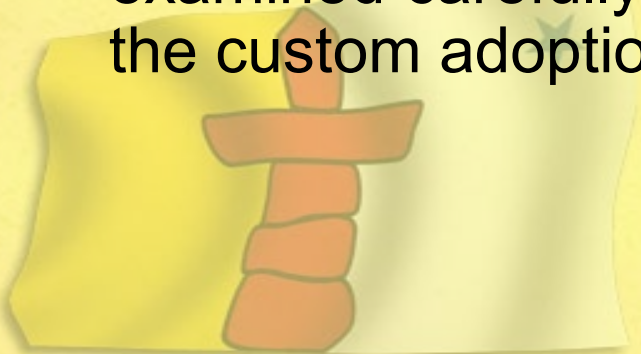


S.K.K. v. J.S., [2002] NJ No 3 (Nunavut Court of Justice)

Based upon the oral history of Elders, the evidence of others and the legal rights and obligations, there are two classifications of custom adoption:

Traditional or pure custom adoption where biological and adoptive parents meet and there is a clear indication of an intention and an agreement to adopt the child – 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)**. The terms of the agreement must be examined carefully to determine if right to apply for child support continues after the custom adoption.

(emphasis added)



S.K.K. v. J.S., [2002] NJ No 3 (Nunavut Court of Justice)

Pragmatic or practical custom adoption where someone undertakes the care of a child because neither parent is willing or able to care for the child. There is no agreement or intention between the biological parents and the caregiver. The caregiver does not take on the rights, responsibilities and obligations for the child from the biological parents. **The biological parents continue to have rights, responsibilities and obligations to the child and cannot take advantage of the goodwill of the caregiver. 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.**

(emphasis added)



Nunavut Law Review Commission

With the strong presence of kinship between natural parent and adopted child, this is more difficult to pinpoint whether the adoptive parent assumes 'legal parentage' over the child upon birth... The common practice is that the child has 'two' sets of parents and 'two' sets of families.

(Recommendation of the Nunavut Law Review Commission on aboriginal custom adoption, p. 14)

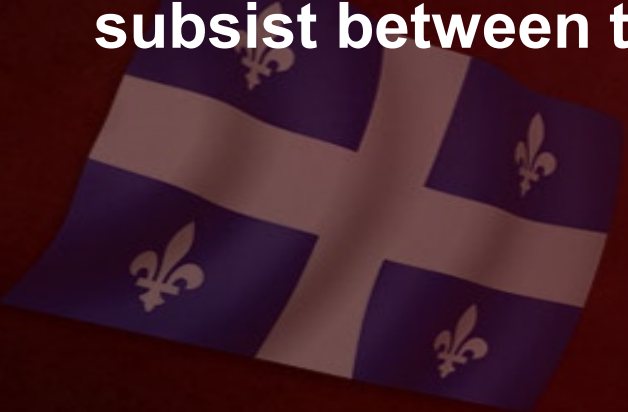


Civil Code of Québec

132.0.1. An Aboriginal customary adoption certificate states the name and sex of the child, the place, date and time of birth, the date of the adoption, the names, **dates of birth and places of domicile of the father and mother of origin and of the adopters** and, where applicable, the new name given to the child.

It mentions that the adoption took place in accordance with applicable Aboriginal custom and, where applicable, mentions the recognition of a pre-existing bond of filiation, and **specifies any rights and obligations that subsist between the adoptee and his parent of origin.**

(emphasis added)



Civil Code of Québec

543.1. Conditions of adoption under any Québec Aboriginal custom that is in harmony with the principles of the interest of the child, respect for the child's rights and the consent of the persons concerned may be substituted for conditions prescribed by law. In such cases, unless otherwise provided, the provisions of this chapter that follow, except Division III, do not apply to an adoption made in accordance with such a custom.



An Act respecting First Nations, Inuit and Métis children, youth and families (Canada)

Whereas Parliament affirms the need

to respect the diversity of all Indigenous peoples, including the diversity of their laws, rights, treaties, histories, cultures, languages, customs and traditions,
to take into account the unique circumstances and needs of Indigenous elders, parents, youth, children, persons with disabilities, women, men and gender-diverse persons and two-spirit persons,
to address the needs of Indigenous children and to help ensure that there are no gaps in the services that are provided in relation to them, whether they reside on a reserve or not,
to eliminate the over-representation of Indigenous children in child and family services systems, and
to enact legislation for the benefit of Indigenous children, including First Nations, Inuit and Métis Nation children;



*An Act respecting First Nations, Inuit and Métis children, youth
and families*
(Canada)

Whereas the Government of Canada is committed

to working in cooperation and partnership with Indigenous peoples to support the dignity and well-being of Indigenous children and youth and their families and communities, as well as the achievement of their full potential, and to respecting, strengthening and building on the accomplishments of Indigenous peoples in this regard,

to achieving reconciliation with First Nations, the Inuit and the Métis through renewed nation-to-nation, government-to-government and Inuit-Crown relationships based on recognition of rights, respect, cooperation and partnership, and

to engaging with Indigenous peoples and provincial governments to support a comprehensive reform of child and family services that are provided in relation to Indigenous children;

*An Act respecting First Nations, Inuit and Métis children, youth
and families*
(Canada)

10 (1) The best interests of the child must be a primary consideration in the making of decisions or the taking of actions in the context of the provision of child and family services in relation to an Indigenous child and, in the case of decisions or actions related to child apprehension, the best interests of the child must be the paramount consideration.

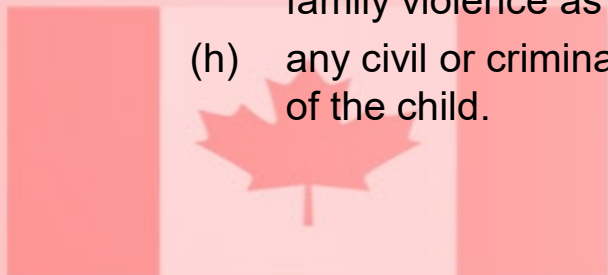


An Act respecting First Nations, Inuit and Métis children, youth and families (Canada)

Factors to be considered

10 (3) To determine the best interests of an Indigenous child, all factors related to the circumstances of the child must be considered, including

- (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.



*An Act respecting First Nations, Inuit and Métis children, youth
and families*
(Canada)

20 (3) Sections 21 and 22 apply only in respect of an Indigenous group, community or people on whose behalf an Indigenous governing body

- (a) entered into a coordination agreement; or
- (b) has not entered into a coordination agreement, although it made reasonable efforts to do so during the period of one year after the day on which the request is made.

21 (1) A law, as amended from time to time, of an Indigenous group, community or people referred to in subsection 20(3) also has, during the period that the law is in force, the force of law as federal law.

*An Act respecting First Nations, Inuit and Métis children, youth
and families*
(Canada)

Application to Indigenous children — exception

23 A provision respecting child and family services that is in a law of an Indigenous group, community or people applies in relation to an Indigenous child except if the application of the provision would be contrary to the best interests of the child.



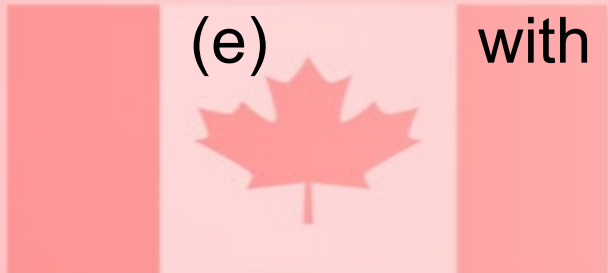
An Act respecting First Nations, Inuit and Métis children, youth and families

(Canada)

Priority

16 (1) The placement of an Indigenous child in the context of providing child and family services in relation to the child, to the extent that it is consistent with the best interests of the child, is to occur in the following order of priority:

- (a) with one of the child's parents;
- (b) with another adult member of the child's family;
- (c) with an adult who belongs to the same Indigenous group, community or people as the child;
- (d) with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or
- (e) with any other adult.



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(Canada)

Priority to preventive care

14 (1) In the context of providing child and family services in relation to an Indigenous child, to the extent that providing a service that promotes preventive care to support the child's family is consistent with the best interests of the child, the provision of that service is to be given priority over other services.

Prenatal care

(2) To the extent that providing a prenatal service that promotes preventive care is consistent with what will likely be in the best interests of an Indigenous child after he or she is born, the provision of that service is to be given priority over other services in order to prevent the apprehension of the child at the time of the child's birth.

