

**ABORIGINAL CHILDREN AND THE DISHONOUR OF THE CROWN:
HUMAN RIGHTS, 'BEST INTERESTS' AND CUSTOMARY ADOPTION**

by

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Abstract

Central to the relationship between Canada and Aboriginal children is transgression: the systematic removal of these children from their families in order to eliminate Aboriginality from them, and from their society. Fundamental legal and moral issues are implicated: the sovereignty of the Crown, legality versus legitimacy, the nature of customary law, the legacy of colonialism, and the human rights of children and of minority groups.

A constitutional enactment at Confederation created the ‘legal’ power to remove decision making authority from Aboriginal people, and then to actually remove their children by law. This power was first used to place the children in residential schools as part of the colonial project to eliminate Aboriginal culture. It extended into the child protection arena, which has different purposes but arguably the same effect. This use of constitutional authority is examined and found to be contrary to the principles of Canadian constitutionalism.

Alternative legal approaches are examined: a ‘principle of continuity’ of customary laws, international recognition of the rights of Indigenous peoples, and positive obligations of the Canadian state, the ‘honour of the Crown’.

Custom adoption is a widespread tradition among Aboriginal peoples; it is demonstrated to be the means whereby Aboriginal societies address the safety of their children. Given that this practice has been recognized as an existing Aboriginal right, I explore the thesis that full recognition of a right to engage the customary practice may provide a route to address this fundamental violation.

The research undertaken leads to the conclusion that custom adoption includes a decision making process; it is actually the exercise of a customary law jurisdiction. I argue that the authority of this jurisdiction should be explicitly recognized within a pluralist Canada. Related issues are discussed: the 'best interests of the child', respective sovereignties, reconciliation, individual and collective goals, and interface between jurisdictions.

The failure by Canadian society to comprehend the linkage between the removal of Aboriginal children and the human rights of those children as members of Aboriginal society has done enormous damage. A concrete act of reconciliation is required, by law and by honour.

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Terminology

The terminology used to identify people or peoples who are of a heritage indigenous to North America and to Canada is not entirely consistent in this document. There is a political context in which these words are being used, and that context is currently very much in flux. That being the case, the best I can do is outline the thinking which has guided my choice of words.

I have most often used ‘Aboriginal’ as the general term to encompass all of the categories of peoples who are indigenous to the territories which now constitute Canada. I use this term because it is most widely used within the mainstream Canadian legal context, as the signifier of inclusion of a variety of groups which have, or have had different levels of recognition: Indians, First Nations, Eskimo, Inuit and Métis, as examples. The Constitution of Canada since 1982 specifically confirms that all of these indigenous groups, and all of the diverse groups within these groups, are included within the meaning of ‘aboriginal’ in that document.

I capitalize Aboriginal, unlike its usage in the Constitution, because to me it signifies an over-riding nationality or ‘peoplehood’ held in common by the constituent nations and individuals indigenous to the territories of Canada. It seems analogous to Canadian, or Hungarian, or Chinese: it is more like a title, an identity-bundle, than an adjective.

At the international level, the term ‘Indigenous’ plays a parallel role as a peoplehood designation for peoples throughout the world who are indigenous to territories which were subsequently occupied and colonized by peoples foreign to those territories. When used in

that sense, as a title, it is capitalized in this thesis. When it is used as an adjective it is not capitalized, although sometimes this line is not easy to draw. While it is foreseeable from the current literature that ‘Indigenous’ will replace ‘Aboriginal’ as the most appropriate self-designation in use in Canada, I have stayed with ‘Aboriginal’ because of its current widespread use within the Canadian legal context.

I use other terms when it seems appropriate given the time period or the sources under discussion. For example, ‘Indian’ is associated with the time of European contact and colonization, and subsequently was ascribed a very particular legal meaning in colonial and constitutional documents. ‘Native’ came into more common usage in the 1960s through into the 1980s, a time when there was growing awareness that there was a problem with the Euro-Canadian definition of the original inhabitants as ‘Indians’. From the 1990s, different groups among the Aboriginal peoples have been asserting their separate conceptions of self in group titles. Those who were other-designated as ‘Eskimo’ now self-designate as Inuit, Inuvialuit or other national titles. Those who were other-designated as ‘Indian’, or whose heritage is of those peoples even if the Canadian state did not include them among the holders of the status of ‘Indian’, now self-designate as First Nations.

This is the framework I have roughly followed in the terminology of the thesis.

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Introduction

This thesis is about Aboriginal children as the contested site between the child protection authority imposed by the Canadian state and the child raising authority removed from the Aboriginal peoples of Canada. Both of these societies make claim to be the rightful bearers of authority and responsibility with respect to the safety and well-being of Aboriginal children. The claim of Canada is founded in the sovereignty of the Crown and the rule of law. The strength of that claim is reinforced by the status quo, the fact that decision making authority with respect to the children of Aboriginal peoples has been held by the Canadian state since Confederation. The claim of Aboriginal peoples is that the basis of this status quo is an historic injustice which has left an enduring perception of the inferiority of Aboriginal families and way of life, and which is rooted in and perpetuated by the legal framework of the Canadian state. Their alternative claim is founded in the existence of systems of customary law with respect to family relations and child raising which existed prior to the assertion of Crown sovereignty and which continue to exist and ought to be recognized as Aboriginal rights within the legal landscape of Canada.

‘Custom adoption’ is the name used in Euro-Canadian literature and jurisprudence to describe a widespread tradition among Inuit and First Nations peoples which is a central practice with respect to the raising of their children. I am arguing here that a full understanding of the meaning and scope of this customary practice, which has been recognized by the Canadian courts as an Aboriginal right both under the common law and within the provisions of the Canadian constitution, leads to the identification and assertion of

a deeper sort of Aboriginal right: a decision making process with respect to the safety and well-being of Aboriginal children.

The practice of custom adoption was first officially recognized in Canada in 1961 as a means by which alternative familial status can be created.;¹ it is now well established that custom adoption is an Aboriginal right which creates status recognized by Canadian courts for certain purposes. Canadian courts have not, however, looked at what custom adoption is from the point of view of its function within Aboriginal society.

Although the constitutional test to identify Aboriginal rights begins by deciding the exact nature of the right being claimed, the analysis by the courts focuses on the interaction between the Aboriginal custom and Euro-Canadian law rather than the role of the customary practice in Aboriginal society. This thesis argues that a review of the anthropological literature, as well as an examination of the facts of the custom adoption court cases, reveals that what is referred to as ‘custom adoption’ by Euro-Canadian society is in fact a practice which was traditionally and still is invoked in Aboriginal societies when there is a question about the most appropriate parenting arrangement to ensure that a child will be properly cared for. It is much more than an indigenous way of doing adoption; it is a complex institution by which a variety of alternative parenting arrangements, permanent or temporary, may be put in place to address the needs of children and families in Aboriginal communities.

¹ *Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 286, 38 W.W.R. 100 (N.W.T. Terr. Ct.) [*Re Katie* cited to D.L.R.].

If it can be demonstrated that custom adoption is the traditional practice by which Aboriginal societies addressed the safety and well-being of their children, and given that this practice has been recognized by the Canadian courts as an Aboriginal right both at common law and within the meaning of s. 35 of the Constitution, does it follow that there is an Aboriginal right to engage the customary law and practice where there is an issue about the safety and well-being of an Aboriginal child? This is the fundamental research question explored in this thesis.

This is not an abstract question, nor does it lend itself to a simple answer. ‘Responsibility’ and ‘authority’ are words which carry great normative weight, and which are also attached to particular legal notions. A resolution of the claim to rightful responsibility lies in an analysis of the dynamics between the Canadian system of positivized law and the Aboriginal system of customary law. With respect to rightful authority the question is about jurisdiction. Ultimately this thesis will culminate in an exploration of two key legal notions: the concepts of ‘law’ and ‘custom’, and the interface of differing jurisdictions. The factual and theoretical groundwork for the discussion of these concepts will be laid in the first three chapters.

The narrative account of the historical relationship between the Canadian state and Aboriginal families and children presented in Chapter One demonstrates an initial transgression on the part of the Canadian state: a policy of systematic removal of children into residential schools as an intentional project designed to undermine the strength of Aboriginal families and to break the transmission of Aboriginal culture and values to the next generation. This was a cornerstone of a larger strategy to undermine the existence of

Aboriginality itself, and to mark it as inferior and unworthy. The policy of removal of children created a dynamic of colonial dominance/colonized inferiority which became embedded in the culture and mindset of decision makers, and continues to find expression today in the severely disproportionate level of removals of Aboriginal children in the name of child protection.

I identify five elements from the material in Chapter One which carry forward and inform the subsequent chapters:

- The fact that ‘Indians’ were singled out at Confederation and given a constitutional status as a ‘head of power’ of the federal government. This human group was thereby made completely subject to governmental edict, which provided the ‘legal’ framework whereby Aboriginal people could be governed as a colony within Canada;
- The policy of the federal government during the first 80 years of the Canadian nation to eliminate Aboriginal peoples as a recognizable cultural group in Canada. Placement of Aboriginal children in residential schools, away from their homes and communities, was intended to prevent the transmission of Aboriginal culture and to control the socialization of the children, so that they would no longer be Aboriginal people;
- The continuing pattern of child removal from the 1960s to the present day under the rubric of child protection. While child protection has a different articulated purpose than did the residential schools, the numbers removed have vastly exceeded the reach of the residential schools. During the several decades when to be removed typically meant complete separation from family and Aboriginal community – for several years if not

forever – these removals continued the pattern of diminishment of Aboriginal identity and culture;

- The ongoing operation of internalized colonial attitudes in the field of child welfare. The colonial dynamic of dominance/inferiority manifests itself in the modern child welfare context in the total control of decision making authority by the dominant society and the corresponding devaluing of the character and qualities of Aboriginal society. Justification for the high levels of removal of Aboriginal children, which continues in the 21st century, is rooted in the view of dominant society that it is in the best interests of these children to remove them from the inferior circumstances of their families;
- The failure on the part of Canadian society to comprehend or to even consider the linkage between the removal of Aboriginal children and the collective/human rights of those children as members of Aboriginal society. The human right of the Aboriginal child to develop to maturity in the context of Aboriginal life is an integral aspect of the right of existence of Aboriginal peoples.

I conclude at the end of Chapter One that there is a historical and moral foundation for the claim of Aboriginal peoples to resume the decision making authority removed from them at Confederation.

In Chapter Two, the exploration of the relationship between the Canadian state and Aboriginal peoples moves into the realm of the legal. A constitutional enactment was employed to create the ‘legal’ power for the state to remove decision making authority from Aboriginal people, and then to actually remove their children by law. The legitimacy of this use of constitutional authority is examined at the outset of the second chapter; I argue that it

was and is contrary to the principles of imperial and Canadian constitutionalism. I then examine three alternative legal approaches which also emphasize the distinct status of Aboriginal people but in a positive frame. I look at the imperial doctrine that affirms the continuation of the customary laws of colonized people, then at recognition in international law of the rights of human groups and particularly Indigenous peoples, and end by discussing obligations of the Canadian state which arise out of its fiduciary relationship to Aboriginal peoples. I assert that all of these approaches point toward a return to recognition of the decision making authority of Aboriginal people.

A review of the case law in Chapter Three confirms that recognition of customary laws and practices in the realm of family relations has been continuous and that there is a recognized Aboriginal right to exercise the practice of customary adoption. However, the jurisprudence on Aboriginal rights since the inclusion of s. 35 in the 1982 Constitution has directed the courts' attention to particular, singular customs or practices rather than to the context of the societies within which these practices operate. I argue that the correct question to ask in order to identify the nature of an Aboriginal right is: what is the role of this practice in Aboriginal society? With respect to custom adoption, an examination of the actual nature of this practice leads by necessary implication to the conclusion that it includes a decision making process; custom adoption is actually a process of planning for the care and well-being of children. As such, it is the exercise of a customary law jurisdiction.

In Chapter Four the diverse strands of this study come together in the context of a detailed examination of two key legal conceptions: the notions of 'law' and 'custom', and the concept

of ‘jurisdiction’ as a recognized sphere of authority. I argue that the law/custom binary framework sets up a contest, with law as the pre-determined winner. But the question of which legal order has rightful responsibility to resolve issues about the safety and well-being of Aboriginal children is not about the relative merits of a system of customary law or a system of Western positive law. It is about two legal orders which originate in very different normative traditions about family relations and the raising of children. Here I argue that the Canadian state, in its claim to continue to hold this responsibility as of right, stands judged by its actual practices in relation to this population of children.

Turning to the question of spheres of authority, I argue that the decision making process inherent in the practice of custom adoption should be explicitly recognized as a rightful jurisdiction within a pluralist Canada. The recognition of such a jurisdiction would raise issues which must be addressed; the discussion in this section of Chapter Four includes the applicability of the ‘best interests of the child’ test in an Aboriginal jurisdiction, legal pluralism and respective sovereignties, implications of concepts of reconciliation, a focus on putting children before political goals, and a very brief exploration of how this jurisdiction might be exercised.

In concluding, I argue that the full recognition of custom adoption as a customary law jurisdiction is both a constitutional entitlement arising from the historical relationship between the Crown and Aboriginal peoples, and also an action to be taken by the Canadian state by way of reparation or remedy, a concrete act of reconciliation between the Canadian state and Aboriginal children and families.

The status quo, that is the continued holding by the state of decision making authority with respect to the children of Aboriginal peoples, cannot be justified for many reasons which form the subject of this thesis. The power to remove a child from the care of his or her family is an awesome power; the decision to remove a child from the care of family carries an awesome responsibility. The deepest values and commitments of a society are in play around this act: sources of authority, spirituality, sense of time and location within the larger world, the identity of the 'person' and 'child', the structure and constitutive basis of 'family', constraints on the exercise of power, and structural norms about duty and responsibility. When one society chooses to take upon itself this power and responsibility with respect to the children of another society, as the Canadian state has done with the children of Aboriginal peoples, that society must be prepared to account for its actions.

The facts which inform this thesis demonstrate that the Canadian state has shown, consistently and relentlessly, a cruel carelessness in the exercise of duties it has assumed with respect to Aboriginal children. The governing institutions of the country have repeatedly failed to act in the best interests of these children. It is long past time to correct this historic injustice and to honour the autonomy, capacity and decision making authority of Aboriginal peoples with respect to the safety and proper care of their children.

Chapter 1 Who Will Raise Aboriginal Children?

Assuming care and control over the lives of Aboriginal children became an explicit policy of the colonial and Canadian state in the mid-to-late 19th century. The nature and operation of this assumption of control will be demonstrated in this chapter, in which I explore significant aspects of the relationship between the state and Aboriginal children, along with Aboriginal families and communities, since before Confederation until the present day. I argue that the colonial policy was designed to be a powerful intervention into the lives of the indigenous inhabitants of Canada, to bring them under control firstly and then to re-shape their social identity and ultimately their political identity so that they could be incorporated into Canadian society. Reclaiming care and control over the lives of their children is a fundamental project of the Aboriginal peoples of Canada as the Canadian nation advances onward in the 21st century.

This account is presented primarily as a chronological narrative, in order to try to capture the feel of the driving forces at work as the story unfolds. It begins with a section on colonial policy, which sets the stage for the legal relationship formalized in the constituting document of Canada, the *British North America Act, 1867*, wherein “Indians, and lands reserved for the Indians” was designated as a responsibility, or ‘head of power’, within and under the constitutional jurisdiction of the new federal government of the Dominion of Canada.²

² *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24), reprinted in R.S.C. 1985, App. II, No. 5 (*British North America Act*) [BNA/*Constitution Act, 1867*].

The next section examines the role of residential schools, an institution established for the express purpose of removing Aboriginal children from their families so that they could be assimilated into Euro-Canadian society. This brings the story up to the 1950s, when legislative changes were made to authorize the transfer of responsibility for both education of 'Indian' children and for services related to the general welfare of 'Indian' families and children from federal to provincial jurisdiction. Although the residential schools continued to operate for another thirty years, the policy goals of the institutions of Canadian government regarding Aboriginal children began to be expressed in terms of the 'welfare' of the children.

The removal of Aboriginal children for 'child protection' purposes became a prominent phenomenon in the 1960s, but the research sources emphasize that this pattern had become a major social concern in mainstream Canada by the 1980s when the scope and associated impacts of this new form of removal of Aboriginal children had been recognized. A new state strategy of integration began in the mid-1980s during which, increasingly, the delivery of services to Aboriginal children and families was delegated from the provincial authorities to Aboriginal Child and Family Services agencies. It was becoming apparent towards the end of the 1990s that this strategy was not yielding the kinds of results which had been hoped for; at the same time other forces were bringing about significant change in the general focus and methodology of child protection law and practice in Canada. At the turn of the 21st century, new approaches were initiated to try to understand and respond to the continuing 'over-representation' of Aboriginal children in the child protection system.

In the last section of the chapter, I review this rather complex account and identify themes which have emerged. I argue that these themes establish linkages between a continuous pattern for over 130 years of the removal of Aboriginal children from their families, and the continuous existence of practices and attitudes rooted in the colonial assumption that Aboriginality is alien and inferior, and should cease to be an identifiable element in the Canadian polity.

1.1 The Constitutional Regime – “Indian” as ‘Other’

1.1.1 Background – Colonial Policy

The first step in assuming care and control over Aboriginal children (and families) by the state was to require school attendance; this meant that if parents and family were to maintain meaningful contact with their children they had to stay in a community around the school, thus beginning to give up their traditional way of life.³ This happened as part of a general move to get the ‘Indians’ out of the way of the incoming settlers; after the final war for control of North America was decided when the British/Canadians defeated the Americans to end the War of 1812, the First Nations peoples were no longer valued either as partners in the fur trade or as allies in the recurring wars. In both the American colonies and British North America the focus turned to “occupy, populate and develop the countryside. Henceforth, the Indians stood in the way of that enterprise.”⁴

³ For example see *infra* note 12, wherein the Executive Council of Lower Canada in 1837 recommended the establishment of schools, with penalties imposed upon families which did not send their children to attend the schools.

⁴ Boyce Richardson, *People of Terra Nullius: Betrayal and Rebirth in Aboriginal Canada* (Vancouver: Douglas & McIntyre, 1993) at 52.

This was a significant shift in the relationship between the colonial authorities and First Nations peoples in British North America. Since 1755, during the early stages of the war with France, relations with North American Aboriginal peoples had been governed by the need for Britain to ensure that the colonies would not interfere with the interests of their important First Nations military allies. One of the mechanisms used to achieve adequately respectful and consistent relations between colonies and First Nations was the establishment in 1755 of an Indian Department within the government in Britain, with a Superintendent of Indian Affairs, responsible for “political relations with Indian people, protection from traders, boundary negotiations, and the enlistment of Indian people during times of war.”⁵ The orientation of British military policy towards recognizing the importance of alliances with First Nations peoples was subsequently made express in the *Royal Proclamation of 1763*,⁶ which officially confirmed the commitment of the Crown towards protecting certain interests of Aboriginal peoples in North America and which constituted the foundation for British imperial law in North America which still stands today, recognized in both American and Canadian law.

In 1828 Major-General H.C. Darling wrote the first official report for the British authorities about Indian conditions in Canada. He “recommended that Indians should be collected “in considerable large numbers” and settled in villages; they should be provided with “religious

⁵ David T. McNab, *Research Report on the Royal Proclamation of 1763 and British Indian Policy, 1750-1794* (Ottawa: Ministry of Natural Resources, 1979) discussed and cited in Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (Vancouver: UBC Press, 1995) at 73.

⁶ *Royal Proclamation of 1763*, George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1.

improvement, education and instruction in husbandry”, and helped with “housing, rations, and necessary seed and agricultural implements.”⁷ His recommendations were accepted by the British authorities, and in 1830 the responsibility for administration of relations with North American Indians was transferred from the military authority to the civil authorities in Britain. British Secretary of State Sir George Murray announced this new direction by noting that earlier policies had failed to change the way of life of the Indians “from a state of barbarism” and that the settlers tended “to regard the natives as an irreclaimable race, and as inconvenient neighbours whom it was desirable ultimately wholly to remove.”⁸ The Indian allies had become the Indian problem.

The British civil authorities, newly charged with responsibility for Indian policy, were actively considering new directions between 1830 and 1850. In 1837, the House of Commons established a Select Committee on Aborigines which was:

appointed to consider what measures ought to be adopted with regard to the Native Inhabitants of Countries where British Settlements are made, and to the neighbouring Tribes, *in order to secure for them the due observance of Justice and the protection of their Rights*: to promote the spread of civilization among them, and to lead them to the peaceable and voluntary reception of the Christian religion.⁹

Before presenting specific recommendations, the Select Committee considered the general nature of the policy approach to be adopted:

⁷ Journals of the Legislative Assembly of Canada (8 Vic. March 20, 1845) “Appendix EEE, Report on the Affairs of the Indians of Canada, 1844-45 Section II: Past and Present Condition of the Indians”, cited in Richardson, *supra* note 4 at 53 (Richardson notes that this Appendix lacks page numbers).

⁸ Journals of the Legislative Assembly of Canada, *ibid.*, “Appendix EEE”, cited in Richardson, *ibid.* at 54.

⁹ U.K., H.C., “Report of the Select Committee on Aborigines”, c. 425 in *Sessional Papers*, (1837) 7, 1 cited in Armitage, *supra* note 5 at 4, n. 2 [emphasis added].

One of the two systems we must have to preserve our own security, and the peace of our colonial borders; either overwhelming military force with all its attendant expense, or a line of temperate conduct and of justice towards our neighbours ... The other alternative is extermination.¹⁰

Armitage adds that “[t]he reference to extermination referred to the killing of aboriginal men, women and children that had occurred in many parts of the British Empire. In the Caribbean, Newfoundland and Tasmania all but a remnant of the resident aboriginal peoples had been murdered.”¹¹ While it may be considered a mark of progress that the committee of parliamentarians in 1837 chose not to adopt the extermination alternative, it is instructive that it was an identified option.

One item of correspondence, originating from the Executive Council in Quebec City in 1837 and forwarded with approval to the Colonial Secretary by the Earl of Gosford, governor in chief of Lower Canada, dealt with the education of First Nations children:

Believing it however to be incumbent on the State to prepare the younger generation of Indians for another and more useful Mode of Life, the Committee [Committee of the Executive Council, Québec City, 1836] would earnestly press upon His Majesty’s government the necessity of establishing Schools among them in which the Rudiments of Education shall be taught ...

But though in natural Capacity, in Docility, and the Faculty of Observation, the Indians do not yield to any Race of Men ... a considerable Time must probably elapse before Ancient Habits and Prepossessions can be so far broken through that they become sensible to the Benefits of such Training for their Children. *It may therefore be necessary to make it a condition of their continuing to receive Presents either for themselves or to their families, that they should send their Children to such Schools:* and it may be hoped that the Clergy will lend their Aid in recommending and enforcing the Measure, as a

¹⁰ *Ibid.* at 44, cited in Armitage *ibid.* at 5.

¹¹ Armitage, *ibid.* at 5.

necessary Part of any Plan for assimilating the Indians as much and as soon as possible to the rest of the Inhabitants of the Province.¹²

The comment from the Executive Committee of Lower Canada that it was hoped that the Clergy might lend their aid in this endeavor dovetailed nicely with the thinking of the House of Commons Select Committee on Aborigines. In their report in 1837 they note:

In the foregoing survey we have seen the desolating effects of unprincipled Europeans with Nations in a ruder state. There remains a more gratifying subject – the effect of fair dealing and of Christian instruction upon heathens. True civilization and Christianity are inseparable: the former has never been found, but as a fruit of the latter.¹³

The Select Committee Report went on to note that they had been presented with glowing reports of the success of Christian conversion in the context of a residential school setting. Church historian J.W. Grant posits that this proposed new direction “inaugurated a new era in Indian missions, marked by the centrality of residential schools to which young people would be removed from parental influence in the hope that they would become effective emissaries of Christian civilization among their people.”¹⁴

The notion of the need to remove First Nations children from the influence of their parents and their home environment was one of the major themes in the recommendations of a

¹² U.K., H.C., “Report of the Committee of the Executive Council ... respecting the Indian Department, Québec City, 1837,” cited in *Correspondence Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839* (Dublin: Irish University Press, 1969) [*Correspondence Returns*] at 253-297, cited in *ibid.* at 75. The quote is from a dispatch sent from the Earl of Gosford, governor of Lower Canada, to Lord Glenelg, the Colonial Secretary at Downing Street, London [emphasis added].

¹³ U.K., H.C., “Report of the Select Committee on Aborigines, 1837”, *supra* note 9 and in *Correspondence Returns, ibid.* at 44, cited in Armitage, *ibid.* at 76.

¹⁴ John Webster Grant, *The Moon of Wintertime: Missionaries and the Indians of Canada in Encounter since 1534* (Toronto: University of Toronto Press, 1984) at 86, cited in *ibid.* at 77.

commission of inquiry which took place a few years later. The Bagot Commission of 1844 reported that “Indian parents had too much influence on their children, so a system of “labour or industrial” schools should be created, where the children could live all the time.”¹⁵ Each of the original colonies of British North America (Upper and Lower Canada and the Maritimes) developed legislation which dealt with the extension of existing education services to Indian children, and in 1857 the Assemblies of Upper and Lower Canada enacted legislation making education a requirement for Indian males seeking enfranchisement; “[t]his is one of the very early legislative expressions of a State policy of assimilation by education.”¹⁶

1.1.2 Confederation: Distinct Constitutional Status of ‘Other’

At Confederation (1867), jurisdiction over “Indians, and lands reserved for the Indians” was vested in the federal government of Canada by section 91(24) of the *British North America Act*.¹⁷ No other human group was singled out in the Constitution and designated as an object of the authority and jurisdiction (known as a ‘head of power’) of one of the levels of government. The other heads of power describe the functional areas of responsibility of governance, such as Regulation of Trade and Commerce (s. 91(2), Sea Coasts and Inland Fisheries (s. 91(12), Bankruptcy and Insolvency (s. 91(21)). With respect to this group, and no

¹⁵ Richardson, *supra* note 4 at 56.

¹⁶ Jacqueline Jago, *Genocide, Culture, Law: Aboriginal Child Removals in Australia and Canada* (LL.M. Thesis, University of British Columbia, 1998) [unpublished] at 41, discussing *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S.C. 1857 (20 Vict.), c. 26, s. 15 [*Gradual Civilization Act*]. Enfranchisement was only an option for Indian males, but if a husband was approved for enfranchisement and thereby ceased to be ‘Indian’ this status was also extended to his wife and children.

¹⁷ *BNA/Constitution Act 1867*, *supra* note 2.

other person or persons in society, the federal government was given the constitutional authority to govern every aspect of their lives.

It is also noteworthy that a government power is established over this group without establishing any restraints or parameters regarding the exercise of that power.¹⁸ The material which follows demonstrates that this legal domination extends so far as to have enabled the government to create the ‘Indian’ as a derivative person, a creature of statute, whose attributes can be granted or removed at the will of the government and who has no legal recourse or status outside of the parameters created for Aboriginal inhabitants by the government. Effectively, ‘Indians’ were made wards of the state.

1.2 Establishing Decision Making Authority Over Aboriginal Children

1.2.1 The Residential Schools – A Fundamental Attack on the Cultural Survival of Aboriginal Peoples

The federal jurisdiction over “Indians, and lands reserved for the Indians” took legislative expression in the first *Indian Act*, enacted in 1876.¹⁹ Almost immediately, Member of Parliament Nicholas Davin was appointed to study and report back “on the working of Industrial Schools ... in the United States and on the advisability of establishing similar institutions in the North-West Territories of the Dominion”.²⁰ In his report, Davin supported

¹⁸ See discussion of this subject in Jago, *supra* note 16 at 40.

¹⁹ *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876 (39 Vict.), c. 18 [*Indian Act*, 1876].

²⁰ *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 333 [RCAP, vol. 1].

the development of schools for ‘Indians’ in Canada which would be similar in principle to the industrial boarding schools in the U.S. “Children, he advised, should be removed from their homes, as ‘the influence of the wigwam was stronger than that of the [day] school’, and be ‘kept constantly within the circle of civilized conditions’.”²¹ Following on this report the federal government entered into formal partnership with church authorities to institute a federal system of residential schools.²²

The story of the residential schools has been explored in depth by many sources, probably most comprehensively by the *Royal Commission on Aboriginal Peoples*.²³ Although it is not the focus of this research, it is not possible to understand the issues facing First Nations’ children and families in the present without a basic understanding of the residential schools as both policy and reality.

For the purposes of this paper, the most important policy aspect of the residential schools was their intended role as an instrument of social engineering to accomplish enforced assimilation. This policy was founded on the belief that removal of Indian children from the

²¹ Sir John A. MacDonald Papers, volume 91, “Report on Industrial Schools for Indians and Half-Breeds”, (14 March 1879), Ottawa, National Archives of Canada (MG 26A) pp. 35428-45 [Davin Report], cited in *ibid.* at 334 note 6.

²² The churches in Ontario, the North-West Territories and B.C. had proceeded on their own prior to the Davin Report to open residential schools for First Nations children.

²³ *RCAP*, vol. 1, *supra* note 20 c. 10 at 333-409. Other sources include: Suzanne Fournier & Ernie Crey, *Stolen From Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver: Douglas & McIntyre, 1998) at 47-80; John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986* (Winnipeg: University of Manitoba Press, 1999); Ken Halvorson, *Indian Residential School Abuse Claims: A Lawyer’s Guide to the Adjudicative Process* (Toronto: Thomson Carswell, 2005).

influence of their parents and the life of their communities, and placement in an environment where they would be re-socialized and Christianized was the fundamental tool by which to achieve the elimination of the Indians as separate peoples within North America.

Amendments to the *Indian Act* in 1880 established the Department of Indian Affairs [DIA]²⁴, and in 1886 further amendments provided for the establishment of schools for Indian children off the reserves, and authorized strong penalty provisions up to imprisonment for failing to send one's children to school, and for "the arrest and conveyance to school, and detention there, of truant children and of children who are prevented by their parents or guardians from attending, ..." ²⁵ Another new section in the 1886 amendments specifically authorized the establishment of industrial or boarding schools for Indian children, with provisions to enforce attendance.²⁶ This was reinforced by amendments in 1894 which extended the penalties for refusal to send children to school specifically to industrial or boarding schools off the reserves, and introduced a regulatory regime whereby the DIA would operate the schools both on and off reserve.²⁷

²⁴ *An Act to Amend and consolidate the laws respecting Indians*, S.C. 1880, c. 28 [*Indian Act, 1880*].

²⁵ *The Indian Advancement Act*, R.S.C. 1886, c. 44, s. 137(2).

²⁶ *Ibid.*, s. 138.

²⁷ S.C. 1894, c. 32, s. 11 amended the *Indian Act* by adding two new sections dealing with the extension of the powers to secure compulsory attendance of children at school, and specifically authorizing the DIA to establish or declare industrial or boarding schools, and to empower "justices or Indian agents" to commit "children of Indian blood" to be kept at these schools until they reached the age of 18. These new sections appear as ss. 9, 10 and 11 in R.S.C. 1906, c. 81 [*Indian Act 1906*].

Official comments by DIA officials over the years confirm the view that the purpose of the residential schools was to accomplish assimilation by first removing the children from the influence of their parents and then detaining them within a system of education which was primarily focused on the erasure of Indian culture from the Indian child. For example, Indian commissioner Edgar Dewdney reported to the House of Commons in 1891:

When those children go to school for a few hours and then return to their wigwams or houses, there is not much chance to improve them. The sooner we can close the day schools and send the children to the boarding schools, the sooner we will be able to do something with them.²⁸

A few years later, in 1899, senior DIA official Hayter Reed reported that teachers and staff were directed “to employ every effort ... against anything calculated to keep fresh in the memories of the children habits and associations which it is one of the main objects of industrial education to obliterate.”²⁹ Duncan Campbell Scott, who rose to become the Deputy Superintendent General of the Department of Indian Affairs, is generally considered to have been the most powerful official in the DIA during the first three decades of the 20th century. He expressed the policy of the government as follows:

The policy of the Dominion has always been to protect the Indians, to guard their identity as a race and at the same time to apply methods which will destroy that identity and lead eventually to their disappearance as a separate division of the population.³⁰

Thus the policy of the government with respect to the Aboriginal population was both dual and duplicitous: to deal with the ‘Indians’ in a protective manner while simultaneously

²⁸ *House of Commons Debates*, (1891) at 1741, cited in Jago, *supra* note 16 at 46.

²⁹ *RCAP*, vol.1, *supra* note 20 at 335.

³⁰ Duncan C. Scott, *Handbook of Canada* (Toronto, 1924) at 19, cited in Mariana Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland & Stewart, 1991) at 115.

working towards the extinction of Aboriginal identity and full assimilation of Aboriginal people.

I conclude this discussion of the policy related to residential schooling with the overview summary provided in the *Report of the Royal Commission on Aboriginal Peoples*: “It was a policy designed to move communities, and eventually all Aboriginal peoples, from their helpless ‘savage’ state to one of self-reliant ‘civilization’ and thus to make in Canada but one community – a non-Aboriginal, Christian one.”³¹

With respect to the rhetoric of dealing with ‘Indian’ peoples in a protective manner, the reality of the practices associated with the residential schools is by now well known. The government and the churches moved forward quickly, beginning in the last decade of the 19th century in their program to develop these schools, but from the beginning the schools were funded at a very minimal level. The buildings themselves were inadequate and not maintained, which resulted in damp, cold and unhealthy living conditions. To this inadequate physical environment was added a nutritionally deficient diet for the children, and overcrowding. Conditions were rife for health problems and many children died of tuberculosis or other communicable diseases which could sweep through this vulnerable population.³² It was not only the physical health of the children which was placed at risk. Subjected to routine brutal acts of discipline, forbidden to use their own language or to communicate with their siblings, cut off from contact with their parents and anything

³¹ *RCAP*, vol.1, *supra* note 20 at 333.

³² *Ibid.* at 353-365.

familiar, many children were desperately unhappy. This desperation manifested in individual or group acts of attempted or achieved suicide, and in many attempts to escape the schools and return home which also resulted in severe physical injury or even death for many children.³³

In the first decade of the 20th century a physician, Dr. Bryce, reviewed the health situation of the students in some of the schools; he examined the health records of 1537 children from 15 schools and found a death rate of 24 per cent.³⁴ A lawyer who was retained by the Anglican Synod to review Dr. Bryce's report advised the Synod in 1907 that the deaths were so clearly attributable to the failings of the administration of the schools that in his opinion the DIA was "near to manslaughter."³⁵ Duncan Campbell Scott in a briefing for a new Minister in 1918 noted, "fifty per cent of the children who passed through these schools did not live to benefit from the education which they had received therein."³⁶

It is instructive to compare this description of the reality experienced by the children in the residential schools with the rhetoric of the proponents of the schools, which continued unabated. The Annual Report of the DIA in 1911 presented that "Aboriginal children had to be rescued from their "evil surroundings," [and] isolated from parents, family and

³³ *Ibid.* at 365-374.

³⁴ *Ibid.* at 357.

³⁵ Anglican Church of Canada, General Synod Archives, S.H. Blake File, G.S. 75-103, 1907 Report, cited in *ibid.* at 357-358 and see *infra* note 160.

³⁶ Duncan C. Scott, "Indian Affairs, 1867-1912" in Adam Shortt and Arthur G. Doughty, eds., *Canada and its Provinces: A History of the Canadian Peoples and their Institutions by One Hundred Associates* (Toronto: Glasgow, Brook, 1914) vol. 7 at 615, cited in *ibid.* at 357.

community,”³⁷ and in correspondence to the Minister in 1912 the Archbishop of St. Boniface asserted that the Indian children must be “caught young to be saved from what is on the whole the degenerating influence of their home environment.”³⁸

The abuses and atrocities involved in the histories of residential schooling have been well documented. Many specific instances have now been the subject of litigation and have been either proven or admitted by individuals or by the Canadian government.³⁹ It is impossible to ascertain with certainty how many children went through the system because proper records about student numbers were not kept. It is known that the number of schools reached its peak of 80 in 1931,⁴⁰ and that in the year 1945 when the system was in full swing there were 9,149 students in the residential schools.⁴¹

Although the impact of this experience on several generations of Aboriginal children and their families has been officially acknowledged by the Canadian authorities, a gulf continues to exist between Aboriginal society and Canadian society about remedy and reconciliation

³⁷ 1911 Annual Report of the Department of Indian Affairs at 273, cited in *ibid.* at 339 [footnotes omitted].

³⁸ Correspondence to the Minister from the Archbishop of St. Boniface (30 November 1912), National Archives of Canada (RG 10, vol. 6039, file 160-1, MR C 8152) cited in *ibid.* at 338 [footnotes omitted].

³⁹ These include serial instances of physical and sexual abuse, punishing children for speaking their native language by sticking needles in their tongues, general severe levels of physical punishment. This subject is covered in detail in *RCAP* vol.1 at 365-376. For other sources, see the website of the Truth and Reconciliation Commission of Canada [TRC] at <<http://www.trc.ca>>.

⁴⁰ *RCAP*, vol.1, *supra* note 20 at 335.

⁴¹ *Ibid.* at 345.

for this historic injustice.⁴² In response to mounting numbers of law suits launched in the late 1980s and the 1990s by survivors of the residential schools, the Department of Indian and Northern Development [DIAND] of the government of Canada explored the possibility of taking an alternative dispute resolution [ADR] approach to the settlement of these claims, as an alternative to but not a negation of the possibility of court hearings. It was believed that this type of approach would be less adversarial, faster, more economically efficient and more humane for First Nations claimants. The ADR program was officially launched in November of 2003, but was subjected immediately to such fierce criticism by the claimants that it was ordered to be reviewed by a panel of experts operating under the auspices of the Assembly of First Nations.

From the outset, a fundamental difference existed about the element of cultural loss:

“[a]lthough 90 percent of the claimants cited cultural loss in their claims, the federal government would not provide compensation for this critical aspect of the residential school experience because cultural loss is not recognized as a legal cause of action, and no case law currently exists.”⁴³ Other criticisms included a narrow focus on sexual and physical abuse and an adjudicatory approach to establish such a claim, the absence of focus on the harms done as a result of the government policy of alienation of the children from their families and

⁴² The source for the information to follow is Paulette Regan, “An Apology Feast in Hazelton: Indian Residential Schools, Reconciliation, and Making Space for Indigenous Legal Traditions” in Law Commission of Canada, ed., *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 40.

⁴³ *Ibid.* at 46.

communities, and the complete lack of involvement of Indigenous people in the design of the ADR process, which was viewed as having many flaws.⁴⁴

In response to both the AFN report⁴⁵ and also a critical report prepared by the Canadian Bar Association⁴⁶, the House of Commons Standing Committee on Aboriginal Affairs and Northern Development [AAND] decided to look into the effectiveness of the ADR program.⁴⁷ Several witnesses gave testimony. There is one particular account that is very revealing of the continuing different perspectives of First Nations survivors of the residential school experience and the Canadian authorities. Ms. Flora Merrick, an eighty-eight year old elder, described her reaction to having her claim for compensation awarded and then subsequently appealed by the government:

I cannot forget one painful memory. It occurred in 1932 when I was 15 years old. My father came to the Portage la Prairie residential school to tell my sister and I that our mother had died and to take us to the funeral. My little sister and I cried so much, we were taken away and locked in a dark room for about two weeks. After I was released from the dark room and allowed to be with the other residents, I tried to run away to my father and family. I was caught in the bush by teachers and taken back to the school and strapped so severely that my arms were black and blue for several weeks. After my father saw what they did to me, he would not allow me to go back to school after the school year ended.

⁴⁴ *Ibid.* at 47.

⁴⁵ Assembly of First Nations, “Assembly of First Nations Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools”, November 2004, online: Assembly of First Nations <<http://www.afn.ca>>.

⁴⁶ Canadian Bar Association, “The Logical Next Step: Reconciliation Payments for all Residential School Survivors”, February 2005, online: <<http://www.cba.org/CBA/Sections/pdf/residential.pdf>>.

⁴⁷ House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 38th Parl. 1st Sess. (15 February 2005).

I told this story during my ADR hearing, which was held at Long Plain in July 2004. I was told that my treatment and punishment was what they called “acceptable standards of the day.” I was raised in a close and loving family before I was taken away to residential school, and being strapped until I was black and blue for weeks and being locked in a dark room for two weeks, is barbaric. I was told that my experience did not fit into the rigid categories for being compensated under the ADR. However, the adjudicator ... awarded me \$1,500. The federal government appealed to take even this small award from me.⁴⁸

I have chosen this account not because it is about atrocity but because it is about what the government of Canada in 2004 considered, and essentially acknowledged, to be the everyday and ‘acceptable’ kind of staff behaviour and discipline that was inflicted upon First Nations children in these schools. There was to be no compensation paid for regular, ‘acceptable’ brutality and cruelty.

A settlement was reached, and a redress payment (the ‘Common Experience Payment’) was offered to all former students of the schools in recognition of the various features of that experience which were simply a given. While what this entails is not articulated in the Settlement Agreement, I suggest based upon the nature of the claims that were being settled and what is known of what went on in the schools, that it includes brutal discipline, forcible alienation from family and community, enforced loss of language and spiritual practices and devaluation of cultural values and cultural identity. Claims of more specific forms of abuse such as physical or sexual abuse would have to be dealt with on an individual basis based upon something other than these factors.⁴⁹

⁴⁸ *Ibid.* cited in Regan, *supra* note 42 at 56.

⁴⁹ The Terms of Settlement documented an Agreement reached in 2005/2006 between Canada, Representatives of Plaintiffs, the Assembly of First Nations, and the governing bodies of the Anglican Church of Canada, the Presbyterian Church in Canada, the United Church of Canada and Roman Catholic Entities. The Agreement in

1.2.2 Transition of Authority over Aboriginal Children from Federal to Provincial Jurisdiction

Although much of the literature regarding the removal of Aboriginal children from their homes seems to suggest that there was a clear distinction between the placing of children in the residential schools which began to wind down in the 1950s, and the removal of children for child protection purposes which began to accelerate in the 1960s, it appears on a closer reading of the details that the distinction was not so clear.

There was an upswelling of interest and activity in Canada with respect to social policy in general in the years immediately after the Second World War;⁵⁰ this reflected the rising promise of social work to provide new solutions for intractable social problems, and a new awareness perhaps arising out of the war experience of the need to advance the rights of minority groups in society. As part of this trend a Special Joint Committee of the Senate and House of Commons was struck in 1946 to consider changes to the *Indian Act*⁵¹ and to the general administration of Indian affairs. Of the 137 briefs submitted to the Joint Committee

Principle acknowledges that “harms and abuses were committed” in the residential schools and that “the parties desire a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools” and “promotion of healing and reconciliation.” Part of the Agreement was the commitment to establish a Truth and Reconciliation process. The Settlement Agreement is available online at <http://www.residentialschoolsettlement.ca/settlement.html>.

⁵⁰ Patrick Johnston, *Native Children and the Child Welfare System* (Toronto: James Lorimer & Company for Canadian Council on Social Development, 1983) at 2.

⁵¹ Indian and Northern Affairs Canada, *The Historical Development of the Indian Act* (Internal Reference Paper) (Ottawa: Indian and Northern Affairs Canada, Treaties and Historical Research Centre, Policy, Planning and Research Branch, 1978) at 132 [*Development of Indian Act*]. The terms of reference for the Special Joint Committee specifically directed them to “investigate and report” on several items in particular, one of which was the “operation of Indian day and residential schools”.

by Aboriginal groups, 126 dealt with schooling.⁵² A Joint Submission from the Canadian Welfare Council and the Canadian Association of Social Workers put the issue of child welfare services for First Nations children on the legislators' agenda, but from a new slant. The 1983 Johnston report for the Canadian Council on Social Development [CCSD] discusses this brief:

Native Peoples were not provided with services comparable in quality to those available to other Canadians. Referring to the role of the Indian agent in adoption, the brief said that "the practice of adopting Indian children is loosely conceived and executed and is usually devoid of the careful legal and social protection afforded to white children," and as wards of the federal government, "Indian children lack the protection afforded under social legislation available to white children in the community." The practice of placing neglected children in residential schools was also condemned. The brief concluded that the best way to improve this situation was to extend the services of provincial departments of health, welfare and education to the residents of reserves.⁵³

Changes were made to the *Indian Act* in 1951⁵⁴ which addressed both education and welfare services, with one significant difference. In the case of education, section 113(b) of the revised Act authorized the federal government to make financial agreements with provincial governments, or other educational authorities, to allow Indian children to attend public or private schools. In the case of welfare services, including services to children and families, section 87 of the revised Act (now s. 88) makes provincial laws of general application applicable to Indians provided that they are not inconsistent with the *Indian Act*. While the

⁵² Jago, *supra* note 16 at 66.

⁵³ Canadian Welfare Council and Canadian Association of Social Workers, "Joint Submission to the Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act" (Ottawa: Canadian Welfare Council, 1947) at 3, 6, cited and discussed in Johnston, *supra* note 50 at 3.

⁵⁴ *Indian Act*, S.C. 1951, c. 149, ss. 113(b) and 87.

new section 87 (88) allowed for the extension of provincial welfare and health services to Indians on reserve,⁵⁵ it did not provide for any funding arrangements to purchase such services or reimburse the provinces for providing them. This launched a squabble over jurisdiction and funding which still continues,⁵⁶ to the detriment of those First Nations people on reserves who have needed access to services. In practice, what this tended to mean was that from the 1950s to well into the 1980s, especially in provinces with fewer resources, there would be no preventive or supportive services available for First Nations families, but only child removal in severe situations.

Patrick Johnston reports that until the 1950s, if children were in need of alternative care, either the extended family would step in, or the federal Indian agent might intervene to place the child with another family on the reserve or adopt the child out in some instances, or to send the child to live in the residential school.⁵⁷ The decision of the federal government in the years immediately following World War II to move towards integration of Indian

⁵⁵ One of the issues which this new section was designed to address was the ongoing problem of jurisdiction with respect to the welfare of Indian children on reserves; while responsibility for child welfare is a matter of provincial jurisdiction, the responsibility for “Indians, and lands reserved for the Indians” falls to the federal government under s. 91(24) of the *BNA/Constitution Act, 1867*, *supra* note 2.

⁵⁶ This issue continues to this day: a legal proceeding commenced with a Complaint to the Canadian Human Rights Commission in 2007 is still underway in 2011 at the Canadian Human Rights Tribunal [CHRT], on the basis that child protection services for children on reserve are not equal to services for other Canadian children because they are funded at a lower level, and because of jurisdictional disputes between governments and various departments within government. Parties in the CHRT proceedings are the Complainants First Nations Child and Family Caring Society and the Assembly of First Nations, supported by the Canadian Human Rights Commission; and the Respondent Attorney General of Canada (Representing the Minister of the Department of Indian Affairs and Northern Development Canada). The Chiefs of Ontario and Amnesty International are on the record as Interested Parties. A Ruling by the Chair of the CHRT on 2011/03/14 to dismiss the Complaint is under appeal to the Federal Court of Canada; the Ruling is cited as 2011 CHRT 4 and the online source for decisions of the Tribunal is <<http://www.chrt-tcdp.gc.ca>>.

⁵⁷ Johnston, *supra* note 50 at 2.

children into provincial school systems, and to get out of the business of separate residential schools, was not able to be immediately implemented; one of the factors which made this transition difficult was the increasing use of the schools as a placement resource for children who were identified as needing to be removed from their homes for reasons related to their welfare.⁵⁸

Apparently, the residential schools were used to a fairly significant extent as a resource for Aboriginal children who were in difficult family circumstances or had behavioural problems. One author reports that, as early as 1939, “most of the 135 inmates of Spanish...came from broken homes; some were orphans; others were committed to the institution as punishment for some misdemeanor; and a few were enrolled by their parents in order to receive some education and training.”⁵⁹ A study of one of the residential schools in Saskatchewan reported:

almost 60% of pupils admitted in Saskatchewan in 1965-66 were there for social rather than purely educational reasons (Caldwell 1967: 62-64), since, in the absence of federal child welfare services for Indian children, residential schools had been used for a variety of social development purposes, including that of resolving situations where children were deemed to be in need of protection (Caldwell 1967: 66).⁶⁰

H.B. Hawthorn also noted in his comprehensive review of the situation of Indians in Canada in 1966 that children who might be defined as ‘children in need of protection’ were being sent to live in the residential schools, and that in general the situation regarding child welfare

⁵⁸ Jago, *supra* note 16 at 66/67.

⁵⁹ Basil Johnston, *Indian School Days* (Toronto: Key Porter, 1988) at 19.

⁶⁰ George Caldwell, *Indian Residential Schools: A Research Study of the Child Care Programs of Nine Residential Schools in Saskatchewan* (Ottawa: Canadian Welfare Council and the Department of Indian Affairs and Northern Development, 1967) at 62-66, cited in Noel Dyck, *Differing Visions: Administering Indian Residential Schooling in Prince Albert 1867-1995* (Halifax: Fernwood for Prince Albert Grand Council, 1997) at 78.

services for Indian families “varies from unsatisfactory to appalling”.⁶¹ A confidential Departmental report in 1966 provided an estimate that 75% of children in the schools were “from homes which, by reason of overcrowding and parental neglect or indifference, are considered unfit for school children.”⁶²

In discussing this evolving role for residential schools, commentators have noted that there were no corresponding changes with respect to staff training or allocation of financial resources to the schools to meet the responsibilities of this role.⁶³ Jago notes that the tragic results of a combination of inadequate funding and lack of skilled supervision in a situation of the enforced institutionalization of children had already been documented in DIA departmental reports since the early 1900s.⁶⁴ It is not difficult to extrapolate to realize how much more potent were the possibilities of dire consequences when the population of children became increasingly vulnerable, inasmuch as in increasing numbers they were the children of deceased or dysfunctional parents, children who had suffered abuse or neglect at home, or children who had been removed from home for reasons other than parental failure but who nevertheless were in the care of the authorities and not able to access whatever support their families might be able to provide. Yet the resources made available to the schools by the federal government and the churches continued to be minimal, and it is a

⁶¹ Canada, Department of Indian Affairs and Northern Development, *A Survey of the Contemporary Indians of Canada: a Report on Economic, Political, Educational Needs and Policies in Two Volumes*, vol. 1, by H.B. Hawthorn, ed. (Ottawa: Indian Affairs Branch, 1966) at 327 [*Hawthorn Report*].

⁶² INAC file 40-2-185, volume 1, “Relationships Between Church and State in Indian Education”, 26 September 1966, cited in *RCAP*, vol. 1, *supra* note 20 at 349.

⁶³ See for example Jago, *supra* note 16 at 68; *RCAP* vol. 1, *supra* note 20 at 349-352, 372-379.

⁶⁴ *Ibid.* at 69.

matter of public record that many known instances of physical and sexual abuse in residential schools occurred in the post-1955 years. The federal government did not formally end its partnership with the churches to operate the system of residential schools until 1969, at which time there were still 52 functioning residential schools; within the next 10 years all but 12 of those had been closed.

Recognition of the extent of removal of Aboriginal children from their families because of child welfare concerns which occurred under federal jurisdiction was buried within the overall scheme of the residential schools; this type of removal became explicit when the jurisdiction for child welfare with respect to Aboriginal families and children was transferred to the provinces.

1.2.3 Removal of Aboriginal Children for ‘Child Protection’ Purposes

As the nightmare of the residential schools was winding down, First Nations families became subject to provincial jurisdiction over child protection, which was the beginning of what is referred to as the ‘60s scoop’, the removal of large numbers of Aboriginal children from their homes by provincial authorities, often resulting in these children being placed with distant non-Aboriginal families and losing contact entirely with their families and home communities.

The 1983 Johnston/CCSD report provided the first comprehensive documentation of the provincial and national picture of the place of First Nations children in the child welfare

system.⁶⁵ Over a period of two years, Johnston gathered information from officials of all of the provincial, territorial and federal government departments and also from conversations and interviews with participants in the child welfare system. While he cautions about the paucity of reliable data about Aboriginal children in care in the 1950s and 1960s, he uses as an example statistics compiled by the province of British Columbia: in 1955 less than 1% of the children in the care of child welfare authorities in B.C. (29 children) were of Indian ancestry, by 1964 that percentage had increased to 34.2% (1446 children).⁶⁶

Johnston describes one conversation on the subject of the rapid rise in the number of Aboriginal children in the care of child welfare authorities in B.C between 1955 -1965:

One longtime employee of the Ministry of Human Resources in B.C. referred to this process as the “Sixties Scoop.” She admitted that provincial social workers would, quite literally, scoop children from reserves on the slightest pretext. She also made it clear, however, that she and her colleagues sincerely believed that what they were doing was in the best interests of the children. They felt that the apprehension of Indian children from reserves would save them from the effects of crushing poverty, unsanitary health conditions, poor housing and malnutrition, which were facts of life on many reserves.”⁶⁷

⁶⁵ Johnston, *supra* note 50 and see the reference to this report in Armitage, *supra* note 5 at 117-119. Prior to Johnston’s report there was no national source of data on Aboriginal children and child welfare; Johnston gathered the best data available from each of the provinces and territories as well as the federal government in order to build a national profile but noted at 24-26 that there was no consistency in definitions among these jurisdictions and that many of them could provide only estimates.

⁶⁶ John A. MacDonald, “The Spallumcheen Indian Band By-Law and its Potential Impact on Native Indian Child Welfare Policy in British Columbia” (April 1981) [unpublished paper, School of Social Work, University of British Columbia] at 6-7, cited in Johnston, *ibid.* at 23.

⁶⁷ *Ibid.* at 23. This conversation is footnoted in the Johnston report as “In conversation with the author, September 1981.”

Another first person account is provided by Andrew Armitage, who describes a special project in 1963, when he was a child protection social worker sent from Victoria to develop plans for 40 (mostly First Nations) children in foster care in a small city in northern B.C.:

The typical pattern of removal was that there would be an allegation of risk to the child from a third party living near the community, often a school teacher or a police officer. The social worker would arrive and make limited inquiries before deciding that the safety of the child required that alternative parenting be found. The children were then moved to Ft. St. John, some 300 or more miles from their homes (there were no closer foster home resources). Once in Ft. St. John, it was difficult if not impossible for the overworked social workers to plan for the return of the children to their parents. As a result, the children often languished in foster homes for up to three years without any plan being made for their future. ... None of the foster parents of these children were First Nations, and neither First Nations language nor culture was considered in making placements.⁶⁸

When the transfer of authority for services for First Nations children from the federal to the provincial jurisdiction began to be put in place, recommendations for consultation with and participation by First Nations community leadership were not followed.⁶⁹ The upwards jump of numbers of Indian children coming into care which characterized the 1960s continued. Johnston observes that a “phenomenal increase in the number of Native children being

⁶⁸ Armitage, *supra* note 5 at ix/x. Armitage brings a multi-faceted perspective to his research. In 1963, in the early days of the ‘Sixties Scoop’, he was a frontline child welfare social worker in B.C.; in 1986 as changes were being implemented to increase the involvement of First Nations participation in the child welfare system he was appointed the superintendent of family and child services in B.C., and in 1995 at the time of publication of his research he was Associate Professor and Director of the School of Social Work at the University of Victoria.

⁶⁹ *Ibid.* at 115, citing as an example the 1966 federal *Hawthorn Report*, *supra* note 61 which included a Recommendation 65 as follows: “When Children’s Aid Societies extend their services to Indian reserves, the appointment of Indians to the Boards of Directors should be sought, and consultations between the societies and the Band Councils should be encouraged”.

apprehended from their families and taken into the care of child welfare authorities”⁷⁰ coincided with the signing of federal – provincial agreements regarding child welfare services for First Nations families, which occurred during the early and mid-1960s. By the early 1980s in some provinces more than a majority of all children in care were Aboriginal.⁷¹

Having noted that the statistics available in 1980 must be used with caution,⁷² certain facts still emerge clearly from the data in the Johnston/CCSD report. The final comparison year was 1979/80,⁷³ at which time the percentage of status Indian children being placed in care was more than 4.5 times the comparable rate for all children in Canada.⁷⁴ Placement rates of

⁷⁰ Johnston, *supra* note 50 at 23. Comparing Status Children in Care per 1000 Status Children, the figures increased from 34.3 in 1966 to 62.9 in 1976, and stayed close to that level (60.2) until 1980. By comparison, in 1979 the number of non-Aboriginal children in care per 1000, by province, ranged between 6.3 and 13.4. The rate of placement in care in the 10-year period therefore almost doubled for Status Indian Children, and in 1980 it ranged between 4.5 to 9.5 times the comparable rate for non-Aboriginal children.

Looking at Status Children adoptions per 1000 Status Children births, the figures increased from 18.4 in 1966 to 66.5 in 1976 and peaked at 81.1 in 1980 before beginning to decline. The rate of placement for adoption therefore more than quadrupled between 1966 and 1980. These figures are drawn by the author from Armitage, *supra* note 5, Tables 5.3, 5.4 and 5.6 at 116-119.

⁷¹ Johnston, *ibid.* at 24.

⁷² *Ibid.* at 25, and see 54: in general the reference point is to status Indian children because they are by definition a known, registered and therefore quantified element, unlike other Aboriginal children.

⁷³ *Ibid.* at 55. Johnston is drawing from two different sources for his figures and they are therefore not accurate for the identical moment in time; the figures for Status Indian children (from Indian and Northern Affairs Canada) are dated to December 31, 1979 and for All Children in Canada figures (from Statistics Canada) are dated to June 1, 1980.

⁷⁴ *Ibid.* at 55-57. Table 31(at 56) demonstrates that 4.6% (7,364 children) of all status Indian children aged 0-19 were in care as of March 31, 1980 when the national rate for all children in care was .96%. Table 30 (at 55) shows that in 1979/80 there were 160,135 Status Indian children aged 0-19 years and a total population of 7,864,500 children aged 0-19 years across Canada. Table 30 also shows status Indian children as a percentage of all children for each province and territory. The figure is 1.1% or less for Ontario and all provinces to the east, it is 2.9% and 3.5% for Alberta and British Columbia respectively, it is 7.7% and 8.3% for Manitoba and

Aboriginal children in non-Aboriginal foster families at that same general time ranged between 66 and 90% in different provinces.⁷⁵ Of those Aboriginal children who were placed for adoption between 1977-1981, on average 75% went into non-Aboriginal homes.⁷⁶

With respect to adoptions, it is interesting to note that the province of Quebec is an exception; although relatively few Aboriginal children were placed for adoption in the 5 year period ending in 1981 the majority of them were adopted into Aboriginal families, and among the Cree and Inuit of the province only one child from each of these peoples was placed with a non-Aboriginal family over the five-year period. The CCSD Report attributes this to “the prevalence and provincial acceptance of the practice of custom adoption... which has been an integral feature of Cree and Inuit life.”⁷⁷

The Armitage study emphasizes the extent to which the adoption process differed for Aboriginal children than for their non-Aboriginal counterparts, and also provides a comprehensive overview of the impact of the child welfare system:

This program operated, principally, without the voluntary consent usually required in the non-aboriginal community. Typically, children would be

Saskatchewan respectively, and rises to 16.4% and 18.7% for the Yukon and Northwest Territories. Nationwide, status Indian children were 2.0 % of all children aged 0-19 years in 1979/80.

⁷⁵ *Ibid.* at 57. This conclusion is drawn from review of the statistics from each of the provinces and territories for placement rates of Native children with Native or non-Native foster families. For example Table 9 on page 36 shows that in Alberta in 1981 78.3% of Native children in foster care were in non-Native foster homes. In B.C. numbers were not available but officials estimated that 2/3 of the Native foster children were in non-Native foster homes (at 26). In 1981 in Saskatchewan, where Native children in care constituted between 62.8% and 66.8% of all children in care between 1976-1981, 91.5% of Native foster children were in non-Native foster homes (at 37).

⁷⁶ *Ibid.* at 59.

⁷⁷ *Ibid.* at 47.

removed from their parents at birth, be declared children in care, and then the provincial child welfare agency would apply to the court to waive adoption consent. Placements were then made with non-aboriginal families.⁷⁸

... The number of children permanently removed from First Nations families should be added to the number of children in care in order to understand the total impact of the child welfare system. In the late 1970s and early 1980s, one in seven status Indian children were not in the care of their parents at any one time, and as many as one in four status Indian children were spending at least some part of their childhood years away from their parents' homes.⁷⁹

It is interesting to compare these numbers with the numbers of children and families impacted by the residential schools. The researchers of the Royal Commission on Aboriginal Peoples, while cautioning that no certain figures are available and that the number of schools and students varied significantly over the life of the system, advance a best estimate based on a review of all available information that approximately one in six status Indian children attended the residential schools.⁸⁰ This confirms that the numbers of children removed was very similar as between the residential schools and the child welfare system into the early 1980s.

The CCSD Report concluded that there were three major factors contributing to the failure of the child welfare system with respect to Aboriginal children: the federal-provincial jurisdictional dispute, profound cultural differences between Canadian and Aboriginal societies, and pervasive poverty among Aboriginal people. Johnston demonstrates that federal officials were informed that the federal-provincial

⁷⁸ Armitage, *supra* note 5 at 115. Based on Table 5.4 at 116, the percentage of status Indian children adoptees placed into non-Native families was 74% in 1965, 85% in 1970, 82% in 1975, 64% in 1980 and 64% in 1985 (author's calculations).

⁷⁹ *Ibid.* at 116.

⁸⁰ *RCAP* vol. 1, *supra* note 20 at 388. The source for this statement is found in *RCAP* note 15 at 388-89.

jurisdictional dispute was a factor in the overall failure of the child welfare system to act in the best interest of Native children and their families and communities. A draft memorandum prepared for the federal Cabinet in 1981 describes existing services for ‘Indian’ children and families as “grossly inadequate by any recognized standard”,⁸¹ and also suggests that the situation at that time was in violation of the United Nations *Declaration of the Rights of the Child* to which Canada was a signatory.⁸² Johnston concludes that in Canada “the protection afforded by the state has been denied to some children and families for no other reason than that they are Indian” and “it is impossible to state that this particular form of discrimination is not still occurring in some parts of Canada in 1982.”⁸³

The role of cultural difference as a contributing factor to the high rate of removal of Aboriginal children by the child welfare system is also documented in the CCSD Report. It is Johnston’s observation that “[m]ost people who work in the child welfare field ... have little understanding of the profound differences in childrearing practices and beliefs that

⁸¹ Johnston, *supra* note 50 at 67 n. 4 which is footnoted as follows:

Draft memorandum to Cabinet, July 1981: Experience has revealed social factors which must be considered in designing and administering child welfare services to Indian people. Several of these factors have been catalogued ...

-Indian people residing on reserves do not have access to statutory child welfare and preventive social services comparable to other citizens.

-the several basic arrangements to meet the needs of Indian children and families lack a significant preventive thrust, that is they do not strive to meet the needs of children in their parental homes and do not support wholesome family life.

-services to children and families in Indian communities have been grossly inadequate by any recognized standard.

⁸² *Ibid.* at 67.

⁸³ *Ibid.* at 67. And see discussion above about the suggestion that this same issue of discrimination continues today, at note 56 and accompanying text.

distinguish Native from non-Native people.”⁸⁴ Significant differences include the belief that all members of the family have a major role and responsibility in the raising of children, and that the broader community also participates and has a legitimate voice. Aboriginal culture values relationships more than material objects, and in general sees the individual in a very different light than does European society, highlighting the relational and collective nature of life.⁸⁵ These fundamental cultural differences can have a serious impact on the assessment of family functioning:

Native people have a distinct and unique value system manifest in customs and traditions that have been passed down from generation to generation.... Therein lies the potential for difficulty. A system of child welfare is based on certain beliefs held by members of the dominant culture. Those beliefs evolve into normative standards of child rearing and define which practices should be considered good or bad, proper or improper. A problem arises if one set of standards is applied to a group with a different set of norms. Several observers have suggested that this is precisely what has happened to Native people, ... A different approach to child rearing may have resulted in Native people receiving inappropriate and, perhaps, even discriminatory treatment by the child welfare system.⁸⁶

Johnston provides some examples of this; one is that the approach to child rearing which models appropriate behaviour but does not impose ‘right’ behaviour on the child (or punish ‘wrong’ behaviour) is “invariably and incorrectly labeled as permissive”⁸⁷ and “may be

⁸⁴ *Ibid.* at 68. The kind of differences he refers to include giving children a more privileged position which precludes the use of corporal punishment; using adult role-modeling to socialize and using humour, teasing, public disapproval to discipline; giving children more independence and autonomy to assess how they feel about a situation rather than telling them what is right or wrong.

⁸⁵ *Ibid.* at 68-70. Johnston is reflecting information from a wide variety of sources most of which were written fairly contemporaneously with his report or within the preceding 5-10 years. These sources are documented in his footnotes 5-22 at page 80, the Notes to Chapter Three of Johnston’s report.

⁸⁶ *Ibid.* at 71.

⁸⁷ *Ibid.* at 74.

mistakenly interpreted as neglect.”⁸⁸ Other issues related to the application of standards that are culturally determined include the interpretation of non-specific concepts such as ‘adequate supervision’ or ‘unfit circumstances’, as well as the failure of Aboriginal people to understand the rules of the formalized child welfare system.⁸⁹

The third major factor identified as causative is poverty; this factor is not unique to Aboriginal families but had been generally recognized in a 1979 report of the National Council of Welfare as being a “fundamental characteristic of the child welfare system.”⁹⁰ Standards in the child welfare field “often refer to tangible, material conditions, such as the number and size of bedrooms and bathrooms. By inference, if you cannot afford to provide the requisite number of bathrooms, you are not as capable and competent a parent.”⁹¹ Noting the confluence in Aboriginal families of widespread deep poverty⁹² and of a cultural system in which material possessions are not highly valued, Johnston concludes that “some Native children may have come into care primarily because their parents were poor or perceived to be poor, and, therefore, judged to be inadequate as parents.”⁹³

⁸⁸ Ann Metcalf, “A Model for Treatment in a Native American Family Service Centre” (Oakland, California: Urban Indian Child Resource Centre, 1978) at 10, cited in *ibid.* at 74 n. 30.

⁸⁹ *Ibid.* at 73/74.

⁹⁰ *Ibid.* at 75 n. 33, footnoted as “National Council of Welfare, *In the Best Interests of the Child* (Ottawa: 1979), p. 2”.

⁹¹ *Ibid.* at 75.

⁹² *Ibid.* at 75. The author states at his n. 34 that this conclusion is supported by a recent government report: Canada, Department of Indian and Northern Affairs, *Indian Conditions: A Survey* (Ottawa, 1980).

⁹³ *Ibid.* at 76.

Two additional factors were identified by Aboriginal participants in the CCSD study as contributing to the high levels of removal: alcohol abuse,⁹⁴ and the deleterious impact of the residential school experience on the current generation of parents, who are the children of a generation many of whom were removed from their homes as children and raised in the residential schools.⁹⁵ This reflects the awareness within the Aboriginal community of the ways in which the breakdown of personal capacity in response to the life circumstances imposed upon them was itself being transmitted from one generation to the next.

In concluding his thoughts, Johnston presents an overview of the impact of the child welfare system up to the early 1980s:

Obviously some Native children have needed and benefitted from the assistance provided by child welfare programs. But many, too many, have suffered. The damage done has been extensive. Many Native children have suffered psychologically from their involvement in the child welfare system. The experience has increased their sense of alienation and the degree of confusion about their personal and cultural identity. Some have suffered even more. It is no exaggeration to suggest that some Native children have died, either through neglect because the help their families needed was not available or by their own hands because of the inadequacy of the assistance that was provided.

Children have not been the only victims. It is a bitter irony that a system that is designed to protect children and support families has served to weaken Native family life inestimably. And, in so doing, because the family had traditionally been the primary social unit in Native communities, it has also damaged a distinct way of life.⁹⁶

⁹⁴ *Ibid.* at 76-77. Johnston also notes a study (Mary Charlotte McMullen, "Preserving the Indian Family" (1981) 2:6 Children's Legal Rights Journal 32 at 33) which indicates a tendency among social workers investigating allegations of child welfare concerns involving alcohol abuse by caregivers to report comparable levels of alcohol abuse as indicative of parental neglect for Aboriginal caregivers and not for non-Aboriginal caregivers.

⁹⁵ *Ibid.* at 77-78.

⁹⁶ *Ibid.* at 123/124.

I have referred extensively to this Report for two reasons. The first is that it is the only source of statistical information available covering the period from the 1950s to the 1980s. The other is that virtually every major theme identified in this report is a continuing problem now, 30 years later. This points to the intractability of the problems, but also to the need to deeply re-consider the dynamics of the status quo and the options for change.

1.2.4 The Operation of Internalized Colonial Attitudes within Child Protection

Critical scholarship from the early 1980s suggests that it may be impossible to fully understand the dynamics of the status quo between Aboriginal peoples and the child protection system without giving proper place to the historical context in which those dynamics took shape. The work of Pete Hudson who was the Associate Director of the School of Social Work of the University of Manitoba in 1980, and his colleague Brad McKenzie, advances a theory that the relationship of Aboriginal peoples to the child welfare system is entirely congruent with the defining elements of colonialism.⁹⁷ Their literature review regarding the over-representation of Aboriginal children in care revealed that quite universally this was assumed to be attributable to family failure among the Aboriginal population.⁹⁸ They also identify “a common analytical commitment to a consensus model of society and of race relations. Approaches based on this interpretation of social reality focus attention on the members of the minority group and require them to become adapted to, and

⁹⁷ Pete Hudson & Brad McKenzie, “Child Welfare and Native People: The Extension of Colonialism” (1981) 49(2) *The Social Worker* 63.

⁹⁸ *Ibid.* at 64.

thus assimilated within, the dominant group.”⁹⁹ These authors articulated an alternative analysis which focuses on the ways in which the child welfare system “has been, and continues to be, involved as an agent in the colonization of native people. It is argued that this view provides a more complete understanding of the current failures in the native child welfare field.”¹⁰⁰

Firstly, they note that the child welfare system has now taken the lead, following in the footsteps of the residential school system, in a pattern of separating Aboriginal children from their families and cultural communities for long periods of time, sometimes permanently. Secondly, they identify three prominent characteristics of the colonial process and analyze the operation of the child welfare system with respect to these characteristics:

1. Power and the authority to make decisions are located within the dominant society. The authors note that, in the exercise of this decision making authority, the actors in the child welfare system “deny the existence of formal or informal political and social structures within the local community.”¹⁰¹
2. The traditions, way of life and culture of the colonized people are devalued; this “involves the belief that the colonizer is the sole bearer of a valid culture.”¹⁰² The impact of the past practices of the Canadian state designed to sever the transmission of family and cultural traditions from parent to child is recognized:

⁹⁹ *Ibid.* at 64.

¹⁰⁰ *Ibid.* at 65.

¹⁰¹ *Ibid.* at 65.

¹⁰² *Ibid.* at 65.

[T]he transmission of knowledge and patterns of child care have been so severely interrupted, that many native communities have had great difficulty in re-establishing patterns of community care or substitute care. This development results in a culturally biased perception of native families and communities as impoverished, primitive, socially disorganized, and as generally unsuitable environments for children. ...

This devaluation of native culture has enabled the dominant society and child welfare authorities to justify the maintenance of control over definitions of adequate standards of child care ... Such definitions, especially in their attention to material standards, have contributed to a further bias against native people.¹⁰³

3. The colonial state creates an interactive relationship between colonizer and colonized which becomes internalized and shapes the perceptions of both parties:

Current examples of the interactive relationships include the not uncommon response of retreat into alcoholism by the mother of an apprehended child. This despairing response ... confirms original perceptions of inadequacy ... the ongoing process of removing children from community and culture has systematically contributed to the internalization of perceptions among the colonized which stress the inferiority and inadequacy of their own community and culture. ...¹⁰⁴

The colonialism analysis as applied to the child welfare system ultimately asserts that the rubric of the protection of children has replaced the overt policy of forcible assimilation in justifying the continuing “unilateral actions to remove large numbers of children from circumstances which are regarded by the dominant group as being inferior.”¹⁰⁵

The notion of perceived inferiority is also emphasized by Andrew Armitage in his observations about the nature of child protection removals. Armitage concludes that by the

¹⁰³ *Ibid.* at 66.

¹⁰⁴ *Ibid.* at 66.

¹⁰⁵ *Ibid.* at 66.

1970s provincial child welfare agencies had “succeeded the residential schools as the preferred care system for First Nations children.”¹⁰⁶ Discussing the differences between these two systems, he notes that the child welfare system was not purposefully designed to rupture the transmission of Aboriginal culture to the children, but argues that in a different way it served that purpose more successfully than the schools did:

In many ways, the child welfare system put First Nations children under more pressure to assimilate than did the residential school system. In the residential school First Nations children had the companionship of their peers, the annual return to their home communities and parents, the daily presence of many other First Nations peoples, and the knowledge that this was an experience that their parents had undergone. In addition, they knew that they were there because they were First Nations children. These familiar sources of support were not available in the child welfare system. The children were isolated from each other, usually losing contact even with their brothers and sisters.

They were caught in the system not because they were First Nations children, but because their parents had been judged by social workers and a court to have treated them in an abusive or negligent manner. There was no promise of return to their home communities and people. Immense pressure was put on them to forget all those things which made them First Nations persons. No wonder that the records of First Nations children in foster homes and adoption homes contain repeated stories of the attempts of the children to scrub the brown colour off their skins. ...

The Indian Act, 1876, and the Indian affairs administration it produced, had the colonial and racist objective of ensuring that future generations of First Nations peoples would fit into a Christian civilization. In the mid-twentieth century child welfare system, most of the policymakers, social workers, foster parents, and adoptive parents would have rejected that objective. However, they simply made the assumption that the mainstream Canadian world was the only world worth having. Most wanted only the best for First Nations children.¹⁰⁷

¹⁰⁶ Armitage, *supra* note 5 at 120.

¹⁰⁷ *Ibid.* at 120.

Lead by the CCSD Report, and bolstered by alternative voices from within social work such as those discussed here, there was in the early 1980s a developing consensus that one of the changes needed was endorsement by Canada and the provinces of a principle of Aboriginal involvement in and responsibility for child welfare services to Aboriginal families.

1.2.5 Changes in Direction

The identification of the failures of the child protection system with respect to Aboriginal children, documented at the beginning of the 1980s by the Johnston report and other sources,¹⁰⁸ precipitated action by both the federal and provincial governments to make changes. One of the significant initiatives was the development of agreements between the two levels of government and Aboriginal agencies (tri-partite agreements) to authorize and fund the agencies to exercise aspects of the child protection jurisdiction, so that services would be more culturally appropriate. The delegation of authority to Aboriginal agencies under this arrangement proceeded quickly. In 1981/82 only 11 such agreements were in place; by 1987/88 this type of service delivery was in place on a somewhat ad hoc basis for 184 bands across Canada.¹⁰⁹ At that point a moratorium was declared, and in 1989 the Department of Indian Affairs and Northern Development [DIAND] released a discussion paper which proposed limits upon the scope and resourcing of any future First Nations service agreements, and specifically stipulated that provincial legislation and standards

¹⁰⁸ See for example the section on Child Welfare Law found in British Columbia, *Report of the Royal Commission on Family Law* (Victoria: Queen's Printer 1976); Manitoba Tripartite Committee, *Manitoba Indian Child Welfare Sub-Committee Report* (Winnipeg: Government of Manitoba 1980).

¹⁰⁹ Armitage, *supra* note 5 at xi. At that time there were a total of 592 bands in Canada.

would have to be followed in these service agreements.¹¹⁰ This document was the basis for the formal establishment in 1990 of the First Nations Child and Family Services Program within DIAND, as a support for the First Nations agencies which were beginning to take responsibility for service delivery to on-reserve First Nations families and children. Provincial funding was also being put in place for services to off-reserve children.

The Assembly of First Nations (AFN) and other First Nations voices and organizations by the early 1990s were pushing for (and to some extent assuming) the notion of the tripartite native child care agreements as a transitional step towards the goal of full indigenous jurisdiction with respect to Aboriginal children. A significant document which emerged in the early 1990s was the separate report of the Aboriginal Committee [*Liberating Our Children*] which was part of a review of Family and Children's Services legislation in British Columbia.¹¹¹ In the letter of transmittal addressed to the Minister, the Aboriginal panel members succinctly state their conclusion:

Regardless of the reasons for the present problems we face, the solutions can only be found by our Nations and communities accepting these problems as theirs, and your government recognizing that the method of resolving these problems must be ours. Your government must relinquish responsibility for resolving our problems, and support our Nations and communities as they identify and implement their own solutions.¹¹²

¹¹⁰ Department of Indian Affairs and Northern Development, *Indian Child and Family Services Management Regime: Discussion Paper* (Ottawa: Department of Indian Affairs and Northern Development, 1989), cited in Armitage, *supra* note 5 at 126.

¹¹¹ Community Panel, Family and Children's Services Legislation Review in British Columbia, Report of the Aboriginal Committee, *Liberating Our Children, Liberating Our Nations: Report of the Aboriginal Committee, Community Panel, Family and Children's Services Legislation Review in British Columbia* (Victoria: Community Panel, 1992) [*Liberating Our Children*].

¹¹² *Ibid.* at v.

The approach of this report suggests that, for some of the Aboriginal leadership, the phase of delegated authority was to be a short stop on the way towards something else, perhaps segregation, perhaps partnership.

It is important to note that the nature of the delegated services is entirely within the authority and discretion of the provincial governments. The First Nations Child and Family Services agencies are authorized to administer aspects of the child protection legislation of their province of residence; they do not have autonomous judgement about how to intervene to support families or to protect children. Their role is to deliver services to Aboriginal people in a culturally appropriate manner, within the parameters and standards of Euro-Canadian law. They do not have the authority to provide services in accordance with the traditional values and approaches of Aboriginal societies.

That being said, steps were taken in the 1980s and early 1990s to include protection for Aboriginal culture within the framework of child protection legislation. The extent and content of legislative amendments differ somewhat between the provinces, but recognition of this issue exists to some degree in all jurisdictions. In British Columbia, as an example, the legislation begins with a set of Guiding Principles, which includes a general statement that “kinship ties and a child’s attachment to the extended family should be preserved if possible” and then a stronger specific provision that “the cultural identity of aboriginal children should be preserved”.¹¹³ This is followed by a section on Service delivery principles, which provides that “aboriginal people should be involved in the planning and delivery of services to

¹¹³ *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, ss. 2(e)-(f) [CFCSA].

aboriginal families and their children”.¹¹⁴ Regarding a key concept, the legislation provides that in any determination of the ‘best interests’ of a child, a decision maker must consider “the child’s cultural, racial, linguistic and religious heritage”,¹¹⁵ and then more specifically states that for an aboriginal child “the importance of preserving the child’s cultural identity must be considered in determining the child’s best interests.”¹¹⁶ There are also provisions establishing for notice of child protection legal proceedings to be provided to the appropriate Aboriginal organization from a child’s community,¹¹⁷ and provisions for priority of placement within extended family or Aboriginal community if an Aboriginal child is removed from parental care.¹¹⁸

The third type of initiative which was introduced in some jurisdictions is the use of dispute resolution or decision making processes which are less adversarial, and more respectful of the role of family and community in developing plans for the safety and proper care of children. Again using British Columbia as an example, since the mid-1990s both Child Protection Mediation and Family Group Conferencing have been available for all families, but are deemed particularly appropriate in situations involving Aboriginal people.¹¹⁹ The

¹¹⁴ *Ibid.*, s. 3(b).

¹¹⁵ *Ibid.*, s. 4(1)(e).

¹¹⁶ *Ibid.*, s. 4(2).

¹¹⁷ *Ibid.*, ss. 33.1(4), 34(3) and other parallel sections for different types or stages of hearings.

¹¹⁸ *Ibid.*, s. 71(3).

¹¹⁹ The most significant distinction between these approaches is that Child Protection Mediation focuses on facilitating in-depth communication between parents and social worker, whereas Family Group Conferencing [FGC] gathers the extended family to work together to develop a plan for the safe care of the child(ren), which

Ministry also supports some First Nations which have developed programs using their traditional practices, such as ‘circles’, to address child protection issues.

From the early 1980s through to the mid-1990s there was hope that the effects of these initiatives to create greater responsiveness in the system for Aboriginal children and families might create a turning point. The research cited or compiled by Armitage in the early 1990s demonstrates that many of the indicators of the unrelenting increases in removals and adoptions of Aboriginal children which had characterized the period from the 1960s to 1980 began to stabilize or to decrease during this period.¹²⁰

However, other events were underway in the mid-to-late 1990s which had major impacts in the general arena of child protection services in Canada. In British Columbia the review of Family and Children legislation and services, of which the *Liberating Our Children* Report formed a part,¹²¹ was sideswiped by a high profile media event, the death of 5 year old Matthew Vaudreuil at the hands of his mother in circumstances where mother and child had been involved with and supervised by the Ministry’s child protection services since the birth of the boy.

The subsequent Inquiry under the direction of Provincial Court Judge Thomas Gove recommended sweeping changes in the organization, focus and methodology of the child

must then be accepted by the social worker. FGC has its roots in the Maori culture of New Zealand, and is congruent with the traditions of many Aboriginal cultures.

¹²⁰ Armitage, *supra* note 5, and see *supra* note 70 regarding available data suggesting a shift beginning in the early 1980s, and note 138 *infra* discussing the proportions of on-reserve children in care at different times.

¹²¹ *Supra* note 111.

protection system, with an overall thrust towards the primacy of the ‘best interests of the child’ as the governing standard for decision making, and strong criticism of the perceived priority given to keeping families together at the expense of the well-being of their children, which presumably had lead to the death of Matthew Vaudreuil.¹²² Within the next couple of years, similar instances of high profile media coverage of injury or death of children in other provinces while they were ‘known to’ the child protection authorities raised similar concerns and recommendations.

1.3 Aboriginal Children and the State – An Ongoing Tragedy

1.3.1 New Data, Old Story: “Over-Representation”

Within this context, in 1995 the Child Welfare League of Canada convened a consultation of experts in the field of child welfare, one of the results being the recognition of the complete dearth of national information about the extent and nature of ‘child maltreatment’ in Canada. Health Canada supported an initiative to establish a comprehensive source of national data on the incidence and characteristics of child abuse and neglect. A team of researchers led by Dr. Nico Trocmé developed the research framework for the *Canadian Incidence Study [CIS] of Reported Child Abuse and Neglect*, and implemented it in 1998 as the beginning of a system of periodic data collection and analysis.¹²³

¹²² Gove Inquiry into Child Protection in British Columbia, *Report of the Gove Inquiry into Child Protection in British Columbia: A Commission of Inquiry into the adequacy of the services, policies and practices of the Ministry of Social Services as they relate to the apparent neglect, abuse and death of Matthew John Vaudreuil/Thomas J. Gove, Commissioner* (Victoria BC: The Inquiry, 1995) [*Gove Inquiry*].

¹²³ *Canadian Incidence Study of Reported Child Abuse and Neglect: Final Report* by N. Trocmé *et al.* (Ottawa: Minister of Public Works and Government Services Canada, 2001) [*CIS-1998*]. Information about background and methodology is at xi-xiv. The Canadian Incidence Study (CIS) is designed to gather comparable data every

The first study under the new research framework [*CIS-1998*] used a representative sample (from 51 selected sites) of investigations which were carried out in 1998 dealing with children between the ages of 0-15 years.¹²⁴ The resulting data established an estimated national rate of substantiated abuse of 9.7 cases per thousand children in Canada.¹²⁵ The research methodology tabulates the types of maltreatment identified as the major concern by the investigating child protection worker, with an option to identify the primary concern and up to two additional concerns.¹²⁶ The study also collects data on such items as placements in out-of-home care, circumstances of families, characteristics of children and characteristics of primary caregiver.

In the analysis of this first round of the study, there was not a major emphasis on drawing comparisons between Aboriginal and non-Aboriginal children. However, in 2004 the CIS

five years from child welfare sources across the country concerning the investigation and substantiation of reported maltreatment of children. The methodology is to develop a representative sample of Child Welfare Service sites across Canada, and to track all the investigations for each of those sites which occur in a three month period in the year of study; weighted national estimates are then derived from this sample. Data is from child welfare workers' assessments and decisions made during investigations of reported child maltreatment. It is noted by the research team that this is a major point of vulnerability of the study inasmuch as the decisions of the social workers cannot be independently verified.

¹²⁴ N. Trocmé *et al.*, "Major findings from the Canadian incidence study of reported child abuse and neglect" (2003) 27 *Child Abuse and Neglect* 1427 at 1429 ["Major Findings CIS-1998"] .

¹²⁵ *Ibid.* at 1431, Table 1: 45% of reports investigated were substantiated, a further 22% remained suspected but not confirmed, 4% were identified as intentionally false reports and 29% were unsubstantiated.

¹²⁶ *Ibid.* at 1431-32. The worker could choose from 22 possible forms of maltreatment, which were sub-categories of 4 major types: physical abuse, sexual abuse, neglect or emotional maltreatment (this category includes exposure to domestic violence). Among the substantiated cases, the incidence breakdown for these four categories are:

1. Physical abuse	primary 23%	secondary 2%	total 25%
2. Sexual abuse	primary 9%	secondary 1%	total 10%
3. Neglect	primary 38%	secondary 8%	total 46%
4. Emotional Maltreatment	primary 23%	secondary 14%	total 37%

research team worked in conjunction with Cindy Blackstock, the Executive Director of First Nations Child and Family Caring Society of Canada, to begin to examine the *CIS-1998* data, along with other sources of information, from the perspective of concern for the welfare of Aboriginal children.¹²⁷

The research confirms that the trend for the child welfare system to remove disproportionate numbers of Aboriginal children from their homes is still a matter of major concern. In the years 2000-2002 Aboriginal children were less than 5% of the total population of Canadian children and yet they were 30-40% of the children and youth placed in out-of-home care.¹²⁸ The number of on-reserve children placed in out-of-home care was reported to have grown by 71.5% between 1995 and 2001.¹²⁹

The study compares placement rates in out-of-home care for Aboriginal and non-Aboriginal children and finds:

Aboriginal children were formally placed in out-of-home care at more than twice the rate of non-Aboriginal children (9.9% vs. 4.6%)... Informal

¹²⁷ The material which follows is from Gough P., Trocmé N., Brown I., Knoke D. and Blackstock C., "Pathways to the overrepresentation of Aboriginal children in care - CECW Infosheet 2005#23E" (Toronto: University of Toronto, Centre of Excellence for Child Welfare [‘CECW’], 2005), online: < www.cecw-cepb.ca/infosheets>, ["Pathways to overrepresentation Infosheet"]. This document is based upon a peer-reviewed article by Trocmé N., Knoke D., & Blackstock C., "Pathways to overrepresentation of aboriginal children in Canada's child welfare system" (2004) 78:4 Social Services Review 577. CECW is one of several Centres of Excellence for Children's Well-Being under the auspices of Public Health Agency Canada.

¹²⁸ C. Farris-Manning & M. Zandstra, *Children in Care in Canada: A Summary of Current Issues and Trends with Recommendations for Future Research* (Ottawa: Position Paper, Child Welfare League of Canada, 2003) cited in *ibid.* at 1.

¹²⁹ B. McKenzie, "Block Funding Child Maintenance in First Nations Child and Family Services: A Policy Review" (Winnipeg: Unpublished manuscript, Kahnawake Shaktiia'takenhas Community Services, 2002) cited in *ibid.* at 1.

placements, such as placing the child with grandparents or other kin, were more than three times higher for Aboriginal children. ... a total of 25% of Aboriginal children were removed or were being considered for removal from their homes, compared with 10.4% of non-Aboriginal children.¹³⁰

Significant differences between Aboriginal families and non-Aboriginal families which could be implicated in higher placement rates were identified in two fields of the research: the socio-economic conditions of the families (such as lower income, unsafe housing, multiple moves) and the issues facing the primary caregiver (such as alcohol abuse or cognitive impairment, experience of maltreatment as a child, involvement in the criminal justice system). The research team concludes that “broader social problems that undermine parents’ abilities to care adequately for their children”¹³¹ will need to be addressed as part of any strategy to reduce the numbers of Aboriginal children going into out-of-home care.

In preparation for the second round of the Canadian Incidence Study scheduled for 2003, adjustments were made to the CIS data collection instruments to enable better analysis of the situation for Aboriginal children. The number of sites participating in the study was increased, including eight additional First Nations Child and Family Services Societies.

As was mentioned earlier in this chapter, significant changes occurred between 1998 and 2003 for all families which interact with the child welfare system,¹³² following very high profile tragedies for children in which the failures of the system were prominent. One

¹³⁰ *Ibid.* at 2. These comparisons are drawn at the stage of initial investigation of suspected child maltreatment.

¹³¹ *Ibid.* at 2.

¹³² See note 115 and accompanying text.

response was a new emphasis on ‘best interests of the child’ as a paramount principle to guide decision making; another was a major shift in child welfare practice towards a model based on risk assessment, which had already been instituted in England and other European countries and the United States. This shift has been associated with a substantial increase in child protection activity in other jurisdictions, and the *CIS-2003* figures¹³³ confirm that trend for Canada to quite a startling degree. The number of investigations per 1,000 children almost doubled, from 21.5 in 1998 to 38.3 in 2003, and the national incidence rate of substantiated maltreatment (excluding Quebec) more than doubled, from 9.7 per 1,000 children to 21.7 per 1,000 children.¹³⁴

An in-depth study of the *CIS-2003* data was undertaken to compare children of Aboriginal heritage with non-Aboriginal children “in an effort to better understand some of the factors contributing to the over-representation of First Nations children in the child welfare system in Canada, and specifically in out-of-home care.”¹³⁵ Significant distinctions appear when comparing data, for First Nations [FN] children and other [non-FN] children, on categories of

¹³³ Public Health Agency of Canada, *Canadian Incidence Study of Reported Child Abuse and Neglect-2003: Major Findings* by N. Trocmé *et al.* (Ottawa: Minister of Public Works and Government Services Canada, 2005) [*CIS-2003*].

¹³⁴ *Ibid.* at 3. The Executive Summary of *CIS-2003* attributes this increase to three factors: the changes in substantiation practices related to the introduction of risk assessment models, the new tendency to investigate all siblings rather than just those subject to a report and a new awareness among professionals dealing with children, incorporated into legislation in some jurisdictions, of the impact on children of exposure to domestic violence and of emotional maltreatment.

¹³⁵ N. Trocmé *et al.*, *Understanding the overrepresentation of First Nations children in Canada’s child welfare system: An analysis of the Canadian incidence study of reported child abuse and neglect (CIS-2003)* (Toronto: Centre of Excellence for Child Welfare, 2005) at 1 [*Mesnmimk Wasatek Report*]; this study is summarized in N. Trocmé *et al.*, “A comparison of First Nations and non-Aboriginal children investigated for maltreatment in Canada in 2003-CECW Infosheet 2008#66E” (Toronto: University of Toronto, Faculty of Social Work, 2008) [“Comparison Infosheet”].

substantiated maltreatment and incidence of out-of-home placement. The differences for FN and non-FN children, characterized by primary category of substantiated maltreatment for *CIS-2003* are:

1. Physical abuse	FN 10%	non-FN 27%
2. Sexual abuse	FN 2%	non-FN 3%
3. Neglect	FN 56%	non-FN 25%
4. Emotional maltreatment	FN 12%	non-FN 15%
5. Exposure to domestic violence	FN 20%	non-FN 30% ¹³⁶

This data demonstrates that all types of maltreatment except neglect are reported at a higher level of substantiation for non-Aboriginal children; this is most notable with respect to physical abuse and exposure to domestic violence. In over half of the cases where maltreatment is substantiated for First Nations children, the primary concern is neglect.

For purposes of the CIS, neglect is defined as “situations in which children have suffered harm, or their safety or development has been endangered as a result of the caregiver’s failure to provide for or protect them.”¹³⁷ It is important to note that the criteria for substantiated maltreatment in the CIS studies “do not require the occurrence of harm,”¹³⁸ and that ‘endangerment’ which is included in the CIS definition is actually a ‘risk of harm’ standard. This is significant because the assessment of risk is a very subjective enterprise, and one of the limitations of the CIS methodology noted by the research team is that “the

¹³⁶ “Comparison Infosheet”, *ibid.* at 2. Also note from *CIS-2003*, *supra* note 133 at 16 that a difference appears in the list of categories of maltreatment in the *CIS-2003*; Exposure to Domestic Violence is set up as a fifth major category because it presented as such a large proportion when treated as a sub-category of Emotional Maltreatment in *CIS-1998*.

study is based on assessments provided by the investigating social workers, which could not be independently verified.”¹³⁹ It is specifically noted in the Introduction to the *CIS-1998*

Final Report that:

[d]efinitional differences can have considerable impact on reported rates. For example, in the U.S. *National Incidence Study* (1991), estimates of the annual rate of reported neglect were three times higher when the definition of physical neglect was expanded beyond the harm standard to include cases in which there was a substantial risk of harm,” and further that “in practice, judgements about child maltreatment are shaped by a complex array of changing community interests and values.”¹⁴⁰

The conclusion to be drawn here is that the category of maltreatment which is most often invoked with respect to Aboriginal children, neglect, is particularly vulnerable to subjective judgements in its application. Within that category, the type of neglect most often substantiated in Aboriginal families is physical neglect, meaning failure to care and provide in ways which are often incidents of poverty, such as inadequate clothing or nutrition. Unhygienic dangerous living conditions, which can include such circumstances as overcrowding, infestations, faulty electrical systems or other building defects, can also often be attributed to poverty. It is also noteworthy that differing approaches to ‘supervision’ in

¹³⁷ *Mesnmimk Wasatek Report*, *supra* note 135 at 28. The sub-categories of neglect are described at 29-31: lack of supervision leading to physical harm or risk of physical harm, lack of supervision leading to sexual harm or risk of sexual harm, physical neglect (failure to care and provide eg. inadequate clothing or nutrition, unhygienic dangerous living conditions), abandonment (parent deceased or unable to exercise custody), and then four very specific omissions for a caregiver: educational neglect, medical neglect, failure to provide psychological treatment and permitting criminal behaviour. In 2003 for First Nations children the most common form of substantiated neglect (at p. 31) was physical neglect at 22%, followed by failure to supervise putting physical safety at risk at 16% and abandonment at 9%.

¹³⁸ *CIS-1998*, *supra* note 123 at 7.

¹³⁹ *Mesnmimk Wasatek Report*, *supra* note 135 at 21.

¹⁴⁰ *CIS-1998*, *supra* note 123 at 3.

Aboriginal and non-Aboriginal cultures was one of the significant issues identified in the review conducted by Patrick Johnston.¹⁴¹

The other arena for significant distinction between Aboriginal children and others is that of incidence of out-of-home placement. Referring to the comparison above showing primary categories of maltreatment for First Nations and non-Aboriginal children, common sense might suggest that the non-Aboriginal children, because of their higher exposure to physical abuse and violence, have a profile of substantiated maltreatment which would more likely lead to removal from home than does the profile of the First Nations children.

However, the incidence of out-of-home placement differs very highly in the opposite direction between these two groups of children. The *CIS-2003* found that 16% of First Nations children with substantiated maltreatment were removed from home into a formal child welfare placement (foster care, group home or residential/secure treatment) and another 13% were placed in informal kinship care. For non-Aboriginal children, the comparable figures are 7% into formal child welfare placement and 4% into informal kinship care. Therefore, in total “29% of First Nations children experienced a change of residence during or at the conclusion of the initial substantiated maltreatment investigation”, in comparison with 11% of non-Aboriginal children.¹⁴² The rate of removal for First Nations children is 2.5 times the rate for non-Aboriginal children.

¹⁴¹ Johnston, *supra* note 50 and see notes 85-89 and accompanying text.

¹⁴² “Comparison Infosheet”, *supra* note 135 at 3.

The research team focused on these variable rates when conducting more in-depth analysis. They found that First Nations status ceased to be a significant predictor for the decision to substantiate a report of maltreatment when all of the other variables – maltreatment characteristics, child characteristics, household factors and caregiver functioning - were controlled for; in other words, if all was equally bad, the maltreatment would be substantiated equally. However, with respect to the decision to remove a child from their home, First Nations status remained a statistically significant predictor despite controlling for all other variables.¹⁴³

This means that, all other issues being equal, First Nations status alone can predict whether or not a child will be removed from the home. That this is true for child protection removals in 2003 is disheartening to say the least. It also appears to confirm that the removal of First Nations children by the state for discriminatory or unjustifiable reasons is a continuing phenomenon in the Canadian child welfare system.

1.3.2 Federal Support for the First Nations Family and Child Services Program

A recent internal evaluation by Indian and Northern Affairs Canada [INAC] of the First Nations Child and Family Services Program¹⁴⁴ considers the ten-year period from 1996/97 to 2005/06. During that time, the number of on-reserve children in care aged 0-18 years

¹⁴³ *Mesnmimk Wasatek Report*, *supra* note 135 at 12.

¹⁴⁴ Indian and Northern Affairs Canada, Departmental Audit and Evaluation Branch, *Evaluation of the First Nations Child and Family Services Program, Project 06/07* (Ottawa: Departmental Document, March 2007) [INAC FNCFS Evaluation].

increased by 67%, while the total population of on-reserve children in that age bracket rose by only 11.3%. The result is that the percentage of on-reserve children who are in care as a percentage of the total population of on-reserve children rose from 3.7% to 5.8%,¹⁴⁵ an increase of almost 57%.

It is clear that whatever level of improvement may have been achieved in the hopeful years of the mid-1980s to the mid-1990s has more than stalled: there is a significantly higher proportion of First Nations on-reserve children in care now than there were in 1980 or in 1996. The trend of a disproportionate level of removal of First Nations children from their homes continues to the present day.

The INAC evaluation points to federal government policy as one of the direct causes of this ongoing discriminatory application of the law with respect to Aboriginal children:

- “The program’s funding formula, Directive 20-1, has likely been a factor in increases in the number of children in care ... because it has had the effect of steering agencies towards in-care options: foster care, group homes and institutional care because only these agency costs are fully reimbursed.”¹⁴⁶

¹⁴⁵ *Ibid.* at 14. By comparison, I estimate that between 1980 and 1996 the shift in percentage of on-reserve children in care was from approximately 3.3% to 3.7%, an increase in the range of 12%. The figure of 3.3% in 1980 is calculated (roughly) from Johnston’s report, *supra* note 50 and with reference to *supra* note 74, that 4.6% of status Indian children were in care that year. Johnston’s figures included an extra year’s worth of children because his range was children aged 0-19, as opposed to the current range of 0-18; and also he does not distinguish between status children on- and off-reserve. In 1980 the percentage of Status Indian children living off-reserve averaged just below 30% (Johnston Table 33 at 58). Therefore a very rough estimate would be that in 1980 3.3% of on-reserve status children were in care.

¹⁴⁶ *INAC FNCFS Evaluation*, *supra* note 144 at ii and see detailed explanation at 4/5.

In its recommendations, the report includes:

- “correct the weakness in the First Nations Child and Family Services Program’s funding formula , which encourages out-of-home placements for children when least disruptive measures (in-home measures) would be more appropriate. ...”¹⁴⁷

Subsequent to this internal evaluation, all management and resource aspects of the First Nations Child and Family Services Program were reviewed as part of the Report of the Auditor General of Canada to the House of Commons in May 2008.¹⁴⁸ The *Auditor*

General’s Report provides background information which includes the following statement on federal policy:

In 1990, a First Nations child welfare policy was approved by the federal government. This policy promoted the development of culturally appropriate child and family services controlled by First Nations for the benefit of on-reserve children and their families. Under the policy, a First Nations agency must obtain its mandate from the province and provide child welfare services in accordance with provincial legislation and standards. The policy also recognizes the need to ensure that the services delivered on reserves are culturally appropriate and reasonably comparable with those delivered off reserves in similar circumstances.¹⁴⁹

¹⁴⁷ *Ibid.* at iii, Recommendation 2.

¹⁴⁸ Office of the Auditor General of Canada, *May 2008 Report of the Auditor General of Canada*, Chapter Four, First Nations Child and Family Services Program, Indian and Northern Affairs Canada (Ottawa: Minister of Public works and Government Services Canada, 2008) [*Auditor General’s Report*].

¹⁴⁹ *Ibid.* at 7-8 para. 4.6.

The Report acknowledges the linkages of both historical experiences (particularly the residential school system) and socio-economic conditions to the issues facing many Aboriginal families.¹⁵⁰ It also presents a summary of some of the issues raised with the Auditor General in meetings with First Nations representatives. Excerpts include:

Jurisdiction. First Nations maintain that they have never surrendered their right to care for their children. These rights extend to all members of a First Nation, whether they live on or off reserves.

Legislation. First Nations consider that they have limited input into provincial child welfare legislation. Some provincial standards can be obstacles to providing culturally appropriate child welfare services, which can result in the placement of First Nations children out of their communities.

Program design. ... the INAC program does not have the flexibility to move funds between operations of an agency and services to children in care. ... at times, this forces agencies to take children in care in order to access funds to provide the required services.¹⁵¹

The Auditor General also notes the position of the federal government that child welfare for all children is the jurisdiction of the provinces, and that the sole responsibility of the federal government is to provide funding for reasonably comparable programs and services for children living on reserves.¹⁵²

It appears that the federal government has taken a very hands-off approach with respect to their support for the First Nations Child and Family Services Program. The Auditor General found that there is no linkage between the requirement that agencies provide services in accordance with provincial legislation, and INAC's funding formula for the agencies.¹⁵³ The

¹⁵⁰ *Ibid.* at 8-9 para. 4.10.

¹⁵¹ *Ibid.* at 9, Exhibit 4.1 Challenges Facing First Nations children and families.

¹⁵² *Ibid.* at 11, para. 4.17.

¹⁵³ *Ibid.* at 19, para. 4.50.

formula has not been significantly updated since its inception in 1988; this failure “has had a significant impact on the child welfare services provided to some First Nations children, as the formula does not take into account any costs associated with modifications to provincial legislation or with changes in the way services are provided.”¹⁵⁴ Alberta and B.C. reported to the Auditor General that First Nations agencies were not providing the services they should under provincial standards because they were not funded to provide those services. “In those cases, for example, there were indications that some on-reserve First Nations children were not receiving prevention or in-home services and were instead being placed into care.”¹⁵⁵ The funding formula also is not responsive to the actual work and demands of the agencies, the wide variations in need for services or numbers of children in care.¹⁵⁶

It seems that the policies of the federal government continue, in practice, to foster the removal of Aboriginal children from their families.

1.4 Best Interests, Worst Results

The story of the significant events which have occurred in the dynamic between the Canadian state and the Aboriginal family and society is a story of actions justified as being in the ‘best interests’ of the children involved but seen, in retrospect, as having had disastrous effects which have been playing out now for more than 130 years. From this account, certain themes

¹⁵⁴ *Ibid.* at 20, para. 4.51.

¹⁵⁵ *Ibid.* at 15, para. 4.35.

¹⁵⁶ *Ibid.* at 20, para. 4.52.

emerge which identify the ways in which the removal of Aboriginal children has been part of the project to undermine Aboriginality and to mark it as distinct and unworthy in the Canadian polity. These themes are outlined here as a bridge between the account of the removal of Aboriginal children, and an in-depth examination of related questions of social and legal theory which are the subject of the next chapter of this thesis.

1.4.1 Distinct Constitutional Status of ‘Other’

The fact that “Indians, and lands reserved for the Indians”¹⁵⁷ were singled out at Confederation and given distinct constitutional status as one of the ‘heads of power’ of the federal government is critical for all else that has followed. No other group of persons identifiable by its history, culture or race is made, by definition and as a collectivity, the subject of a constitutional head of power, either provincial or federal.

Underlying this is a legal presumption of incompetence or incapacity applied to ‘Indians’ en masse. If legal incapacity was imposed by the government on any group today, it would be a gross violation of human rights. Having been imposed upon ‘Indians’ in 1867, it provided the legal framework whereby Aboriginal people could be governed as a colony within Canada, and whereby the ‘rule of law’ could be used to remove Aboriginal children from their families in order to control the process of their socialization. Inasmuch as this legal framework continues, the colonial status remains intact within the constitutional regime of Canada.

¹⁵⁷ *BNA/Constitution Act 1867, supra* note 2, s. 91(24).

1.4.2 Fundamental Attack on the Cultural Survival of Aboriginal Peoples

Scholars have pointed out that this form of “internal colonialism”¹⁵⁸ was part of the process of state formation in colonies such as Australia, New Zealand and Canada where the colonists were also settlers.¹⁵⁹ Settler-colonists were not solely motivated by a desire to obtain access to commercially valuable resources; they also wanted to control and contain the indigenous population, and eventually ‘neutralize’ its way of life, so that they, the settler population, could live undisturbed in their own culture.

There can be no doubt that the goal of the federal government was the enforced assimilation of Aboriginal peoples into the mainstream Canadian polity, and that the residential schools were intended to rupture the transmission and therefore the survival of Aboriginal culture. The deep ambivalence at the heart of the colonial state about their Aboriginal charges is evidenced in all of the reports and literature about the residential schools. The result of this ambivalence was a set of widely divergent behaviour in the treatment of the children: elements of kindly paternalism, elements of harsh brutality and atrocity, all within an overriding aura of inhumanity and neglect, of culpable negligence.¹⁶⁰

¹⁵⁸ Armitage, *supra* note 5 at 227 uses this language; the concept of indigenous peoples as a colony within another state appears in many other works. See e.g. Robert van Krieken, “Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation” (2004) 75 *Oceania* 125 at 144; Robert Yazzie, “Indigenous Peoples and Postcolonial Colonialism” in Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 39.

¹⁵⁹ This concept is explored in depth in the article by Australian scholar Robert van Krieken, *ibid.* at 137-143.

¹⁶⁰ P.G. Osborn, *A Concise Law Dictionary*, 5th ed. (London: Sweet & Maxwell, 1964) s.v. “manslaughter”. ‘Manslaughter’, the analogy used to describe the actions of the DIA regarding the death rate among the children, see *supra* note 35, is the offence of causing death, not with malice aforethought but with carelessness or recklessness as to the consequences of one’s actions, an act of ‘culpable negligence’.¹⁶⁰

Some would argue that this is a benevolent interpretation of the animus behind the residential schools. In each of the reports reviewed in this research, one of the viewpoints expressed was that the actions of the federal government and the churches constituted cultural genocide. This is a matter of fierce legal debate which will not be discussed for the purpose of this paper. Here, it is important only to note the basic framework in which the issue of cultural genocide arises when considering the forced placement of children into residential schools and later massive removals for purposes of adoption. Genocide is defined as the “denial of the right of existence of entire human groups,”¹⁶¹ and one of the five acts prohibited under the *Genocide Convention* is “[f]orcibly transferring children of the group to another group.”¹⁶²

The concept of cultural genocide is invoked to capture the devastating impact of the removal of generations of children, which has been justified by an ongoing belief that the Aboriginal way of life is unworthy. This belief has become, in its effect, an intention to eliminate the culture of Aboriginal people and thereby to eliminate the right of existence of Aboriginal people – not their right to live, but their right to exist as Aboriginal people, to live according to their own cultures, traditions, customs and laws. Conceptually, this notion is the subject of very thoughtful analysis by Australian scholar Colin Tatz, who distinguishes between the motivation of the actor and the intent of the actions actually taken: he concludes that the acts

¹⁶¹ GA Res. 96(I), UN GAOR, 1947, UN Doc. A/64/Add.1 [“Resolution 96(I)”].

¹⁶² *Convention on the Prevention and Punishment of the Crime of Genocide* art. 2(e), Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [*Genocide Convention*].

taken demonstrate that “child removers clearly intended that these children would cease to be Aboriginal.”¹⁶³

1.4.3 A Continuing Pattern of Child Removals in the Name of Child Protection

The tip of the iceberg of the impacts of the residential school experience began to appear in the 1940s and 1950s when significant numbers of children - now the succeeding generation of those who were raised in the residential schools - began to be ‘placed’ in the residential schools expressly because of family breakdown.¹⁶⁴ This phenomenon became a flood after the *Indian Act* was amended to authorize the application of provincial child welfare laws to ‘Indians’. The terms of inclusion into the wider system were clear: leave these inferior circumstances and become one of us. We want the best for you.

In 2011, the availability of data is better than it has ever been and the reality is dismal. The Auditor General of Canada estimates that it is eight times more likely for a ‘status Indian’ child to be removed from his or her home than a non-Aboriginal child.¹⁶⁵ There are now approximately 27,000 Aboriginal children in out-of-home care, three times the number that were in the residential school system at its height.¹⁶⁶ Research analysis reveals that after controlling for all major variables, the feature of First Nations identity is a significant

¹⁶³ Colin Tatz, *With Intent to Destroy: Reflecting on Genocide* (London: Verso, 2003) at 140.

¹⁶⁴ See *supra* notes 57-62 and accompanying text.

¹⁶⁵ *Auditor General’s Report*, *supra* note 148 at 10, para. 4.12.

¹⁶⁶ The source for the number of students registered in the residential schools at the height of the system (1948) is *RCAP*, vol. 1, *supra* note 20 at 349 (9,368 children); the comparison between that number and the number of

predictor of a decision in favour of out-of-home placement. The child protection system continues to remove Aboriginal children from their homes because they (or their homes) are Aboriginal.

1.4.4 Internalized Colonial Attitudes Continue to Operate in the Field of Child Welfare

There is a strong focus in the literature on the dynamics and interactional nature of colonialism to describe the internalized attitudes which are implicated in the discussion about the ‘over-representation’ of Aboriginal children in the child welfare system. On the part of the colonizer, who in this context is those who continue to hold the power of decision making in the realm of child welfare, the dynamic of colonialism reveals itself in the ongoing assumption that the condition for participation or responsibility by Aboriginal people with respect to the safety and well-being of their children is that they must function in a Euro-Canadian context. The standards to be applied, the governing legislation, the definition of family, the criteria for decision making must all be governed by the Euro-Canadian norm.

1.4.5 Failure to Consider the Linkage Between Removal of Aboriginal Children and Their Collective/Human Rights as Members of the Aboriginal Collective

Discourse about rights in the Eurocentric context is generally framed as a tension between the two main rights-bearers: the individual, who has human rights as well as legal rights, and

Aboriginal children in the care of the state under the rubric of child protection was first noted in an article by the Executive Director of the First Nations Child and Family Caring Society: Cindy Blackstock, “First Nations Child and Family Services: Restoring Peace and Harmony in First Nations Communities” in K. Kufeldt & B. McKenzie, eds., *Child Welfare: Connecting Research, Policy and Practice* (Waterloo: Wilfred Laurier University Press, 2003) 331 at 331.

the state which has rights of sovereignty. The missing actor in this paradigm is the collectivity, the group as an identifiable entity with characteristics which both encompass and are constitutive of its members, and which has a framework of inter-relationship among its members.¹⁶⁷

The legal foundations of collective rights will be discussed at more length in Chapter Two of this thesis. At this stage, it is adequate to note that the “claim that groups are entitled as of right to self-preservation is gaining recognition both domestically and in international law.”¹⁶⁸ It is also useful to note here again that genocide, regardless of the specific methodology involved, is in essence “a denial of the right to existence of entire human groups ...”¹⁶⁹ Commentators have noted the difference between an action directed against individuals because they are vulnerable as members of a devalued group, and an action directed at individuals for the purpose of attacking the existence of the group.¹⁷⁰

¹⁶⁷ For a discussion of theories or models of ‘groupness’ see Darlene Johnston, “Native Rights as Collective Rights: A Question of Group Self-Preservation” (1989) 2 Canadian Journal of Law and Jurisprudence 19, at 22-24.

¹⁶⁸ *Ibid.* at 25.

¹⁶⁹ “Resolution 96(I)”, *supra* note 161 and accompanying text.

¹⁷⁰ One of the most significant commentators on this subject was Raphael Lemkin, who first articulated the concept of ‘genocide’ in his 1944 work, Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace, 1944), cited in Van Krieken, *supra* note 158 at 134:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the social and political institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the

The purposeful goal that a child ‘cease to be Aboriginal’ or the ongoing colonial assumption that the best interests of the Aboriginal child require that s/he be removed from the inferior circumstances of home and community, both of which have the effect of severing for that child the opportunity to grow into Aboriginal selfhood, is as much an assault on the human rights of that child as it is on the collective rights of the Aboriginal peoples. I argue that the Aboriginal child has a human right to live and be nurtured in the context of Aboriginal life; this right of the child is an inseparable aspect of the right of existence of Aboriginal peoples.

1.5 Conclusion

This Chapter establishes a historical and moral foundation in support of the claim of Aboriginal peoples to exercise authority with respect to the lives of their children and to resume the decision making power which the Canadian settler-colony explicitly removed from them at Confederation, and has declined to relinquish to this day.

Faced with the presence of Aboriginal societies within the territories they wanted to include in their new nation, the settler-colonists had decisions to make. They decided, unilaterally, to incorporate the Aboriginal people and their territories into Canada. Then they had somehow to deal with the distinct culture of this people, and their longstanding distinct relationship with the Crown. The legal approach they chose was to preserve the status of ‘distinct’, but to invoke the assertion of sovereignty and the rule of law to strip that status of all of its

individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group. (1944: 79)

connotations of autonomy and Crown commitment, and replace it with incapacity and Crown wardship.

In the next chapter I interrogate the legitimacy of the use of constitutional authority to accomplish this transgression. I then discuss alternative legal norms which return to the notion of ‘distinct’ as an honourable designation, rather than a badge of inferiority and shame.

Chapter 2 'Otherness' and 'Recognition': Considerations of Legality, Legitimacy and the 'Colony Within'

The authority and responsibility to raise their children is one of the central aspects of the existence of autonomous and self-sustaining societies. The previous chapter demonstrated that there is an historical and moral foundation in support of the claim of Aboriginal peoples to resume the decision making power which was removed from them at Confederation, and in particular to exercise authority with respect to the lives of their children. In this chapter, I explore issues of law and theory which suggest that the transgression of the settler-state in its dealings with the Aboriginal family was a legal injustice as well as a moral violation. The government of Canada not only used the rule of law to remove the decision making power with respect to the children of 'Indians', it also relied upon the rule of law to actually remove the children and take them into the care of Euro-Canadian society as a primary methodology to try to extinguish Aboriginal culture as a presence within the Canadian polity.

The extinguishment of Aboriginality was a primary project for the new government of the settler-colonist nation. Five themes were identified from the historical narrative in the preceding chapter, which describe ways in which the removal of Aboriginal children was central to that project. These themes demonstrate that the Canadian state has at its foundations a fundamental moral violation, the systematic and intentional removal of children as a means to undermine the integrity of their families and culture. This transgression, ostensibly authorized by the rule of law, was perpetrated by the settler-state in order to try to eliminate the existence of Aboriginal culture from within its midst. It created a

legacy of dominance/inferiority between the state and Aboriginal families which continues to operate in decision making about Aboriginal children.

In this chapter I interrogate the status quo, the fact that the Canadian state has been the locus of decision making authority regarding the safety and well-being of Aboriginal children since Confederation. I do this by exploring four lines of inquiry with respect to this historic injustice:

- constitutional legitimacy: was the designation of this group as uniquely subject to governmental powers a legitimate exercise of constitutional authority?
- continuation of customary law: did vestiges of the pre-existing legal systems of Aboriginal societies survive the efforts to remove decision making authority from them?
- the right of existence of the human group: is the international law concept of the right of existence of the human group applicable to the situation of Aboriginal peoples in Canada?
- the honour of the Crown: does the Crown have obligations to Aboriginal peoples related to the removal of decision making authority from them at Confederation?

Before embarking on this endeavor, I note that this discussion focuses on Aboriginal peoples generally in its consideration of theory; this is because there is little attention among scholars of constitutional and Aboriginal law to the realm of children and families. Given the devastating impact of the removal of their children on the life of Aboriginal communities and societies, I find this surprising. I can think of no other aspect of life more important to the capacity of Aboriginal peoples to sustain their way of life than to raise their children within

the traditions and values of their forefathers, yet by and large this is not a major item in the discourse of Aboriginal rights. That in itself may be an indicator of the degree to which the shift in jurisdiction over Aboriginal children from the residential schools to child protection has succeeded in painting the pattern of ongoing removal of children as evidence of family failure rather than of a continuing operation of colonial attitudes. In a land claims dispute the drums roll in the courtroom and Aboriginal pride and dignity prevail; in a child protection dispute the Aboriginal parent normally stands alone, in shame, against the powers of the state.

2.1 The Legitimate Exercise of Constitutional Authority

There is deep repugnance within liberal democracies to the notion of a human group being legally defined as lacking in capacity and inferior. And yet this is precisely what was intended and accomplished by ascribing to Aboriginal peoples the distinct constitutional status of ‘Other’, naming this human group in law as being totally subject to the unlimited power of the government of Canada. This act of lawmaking encompassed the first two identified characteristics of a colonialist system: it established that full decision making power with respect to ‘Indians’ would rest with the Canadian state and it devalued and cast as inferior the peoples called ‘Indians’. The dominance/inferiority dynamic of a colonialist relationship is thus inscribed in the founding constitutional documents of Canada.¹⁷¹ It remains today in these documents, and is thereby embedded in the structures of Canadian constitutionalism.

¹⁷¹ *BNA/Constitution Act, 1867*, s. 91(24), *supra* note 2.

The first question to be explored is whether the act of naming this human group as uniquely subject to governmental authority within the Canadian constitution was and is a legitimate exercise of constitutional authority.

2.1.1 Theory of Unwritten Constitutionalism

Constitutionalism is a phenomenon of the modern era whereby the power of those who govern is made subject to an overriding framework of law which describes or asserts those values which are of supreme importance for the particular society in question;

“constitutionalism implies the subjection of state power, including legislative power, to law.”¹⁷² There is a growing literature about written and unwritten constitutions and, by implication, about the nature of constitutionalism. Behind this is the question germane to this research: is there a notion within constitutionalism of rights or limits by which the makers of a constitution or the implementers of a constitution may be constrained, or the provisions of a constitution may be assessed for their legitimacy? This question is raised by the concept of “unwritten constitutionalism”, which can be characterized as the common law of constitutional interpretation.

Indeed, the notion of implied rights which form an integral, albeit hidden, part of a constitutional framework clearly finds its origins in early common law decisions with respect to the judicial interpretation of legislation. For example, in 1609 in *Dr. Bonham’s Case*, Sir

¹⁷² Mark D. Walters, “Written Constitutions and Unwritten Constitutionalism” in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008) 245 at 247 [Walters, “Unwritten Constitutionalism”].

Edward Coke CJ held that legislation must be declared void if it was found to be “against common right and reason, or repugnant”.¹⁷³

In his recent article on “Unwritten Constitutionalism”, Mark Walters traces the evolution of the common law conception of unwritten law. Sir John Doderidge (writing in the 17th century) described the common law as a “discourse of reason”: a ‘legal’ method of reasoning would be employed to lead to the truth by moving back and forth between abstract propositions of law and the specific problems of the application of that law, with a goal of thereby achieving “coherence” between the abstract and the particular in legal decisions.¹⁷⁴ Doderidge asserted that the law is thus the product of this discourse of reason. Another expression he used for the ‘coherence’ he described was “equality of reason”: “Cases different in circumstances, may be nevertheless compared to each other in equality of Reason; so that of like Reason, like Law might be framed.”¹⁷⁵ The concept of the common law as a ‘law of reason’ encompasses provision for exception; where positive laws affected individuals unequally, it was incumbent on the judiciary to invoke another aspect of unwritten law, the judicial commitment to equity.¹⁷⁶ This law of reason, encompassing a notion of the equitable and equal application of reason, is the unwritten common law

¹⁷³ *Dr. Bonham’s Case* (1609), 8 Co. Rep. 113b (C.P.) at 118a, 77 E.R. 646, cited in Thio Li-ann, “Westminster Constitutions and Implied Fundamental Rights” [2009] Singapore J. Leg. Studies 406 at 416, n. 59.

¹⁷⁴ Sir John Doderidge, *The English Lawyer, Describing A Method for the managing of the Lawes of this Land* (1631) at 241, cited in Walters, ‘Unwritten Constitutionalism’, *supra* note 172 at 251-253.

¹⁷⁵ *Ibid.* at 244, cited in Walters, *ibid.* at 253.

¹⁷⁶ *Ibid.* at 210, cited in Walters, *ibid.*

principle which is fundamental to the interpretation or application of the declared law (whether that declared law be derived from enacted statutes or from case precedents).

Moving into the realm of constitutionalism, then, the issue is how a constitution, which is the supreme and overarching law of the land, will be interpreted and applied. There are two major schools of thought on this question.

For those who hold the view that a constitution is something of a sacred document, canonical in nature as an expression of the vision of the people for their nation, the interpretation of that textual expression should be strictly limited; the values of the judiciary or other external values or principles cannot be permitted to bypass or supplant the words of the elected representatives of the people. From this point of view, “unwritten” constitutionalism is suspect and illegitimate inasmuch as it undermines the democratic authority of the constitution. There are others who advocate a theory of unwritten constitutionalism which originates in the perennial question of what is ‘law’, and more specifically what is the solution to the dilemma that arises when the authorized lawmakers in a society pass legislation which is inconsistent with the espoused values which are foundational to the concept of ‘lawfulness’ within that society.¹⁷⁷

¹⁷⁷ This paragraph is a highly condensed summary of a very complex discussion among legal theorists. The work of Jeremy Waldron is an example of a strong version of the view that the interpretive authority of the judiciary should be strictly limited: see Jeremy Waldron, “Do Judges Reason Morally?” in Huscroft, *supra* note 172, 38 or Jeremy Waldron, “Precommitment and Disagreement” in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge UK: Cambridge University Press, 1998) 271. A couple of sources for comparative discussion of the various views on this subject can be found in Larry Alexander, “Constitutions, Judicial Review, Moral Rights, and Democracy: Disentangling the Issues” in Huscroft, *supra* note 172, 119 and Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge UK: Cambridge University Press, 2004) at 102-126.

Within the community of legal theorists there is a school which specifically supports a judicial jurisdiction to impose minimal standards which must be honoured if constitutional provisions are to be considered legitimate. This is not a new theme. Commentators at different times have articulated this in different ways – Dicey wrote of a “spirit of legality,”¹⁷⁸ Fuller considers the “implicit demands of legal decency,”¹⁷⁹ Dyzenhaus proposes the standard that all decisions be “consistent with constitutional commitments.”¹⁸⁰ All support the notion that unwritten constitutionalism includes a jurisdiction for judicial safeguarding of fundamental values constitutive of what I am calling ‘lawfulness’, and others identify as the rule of law or legality.

Walters posits that the search for coherence or for the ‘equality of reason’ is “a form of due process that respects individual equality through minimizing arbitrariness within state power ... the common law conception of unwritten law is related to the value of legality or the rule of law that defines the minimal instantiations of equality and due process...that law must honour if it is to be *law*.”¹⁸¹ I also draw here on the work of contemporary legal theorist

¹⁷⁸ A.V. Dicey, *Introduction to the Law of the Constitution*, 8th ed. (London: Macmillan & Co., 1923) [but note First Edition was published in 1885] at 409: “Parliamentary sovereignty...is exercised in a spirit of legality”, and “[p]owers...which are conferred or sanctioned by statute, are never really unlimited, ...from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land...”

¹⁷⁹ Lon L. Fuller, *Anatomy of the Law* (New York: F.A. Praeger, 1968) at 92 discusses the relationship between the “implicit demands of legal decency” and the interpretation of provisions of a constitution.

¹⁸⁰ David Dyzenhaus, “The Incoherence of Constitutional Positivism” in Huscroft, *supra* note 172, 138 at 148-149: “the ultimate commitment of a legal order ... is the commitment of all public decisions to be fully justified, where part of that requirement is that the decisions are shown to be at least consistent with constitutional commitments and, preferably, as advancing the project of a progressive realization of such commitments.”

¹⁸¹ Walters, “Unwritten Constitutionalism” *supra* note 172 at 256 [emphasis in original].

T.R.S. Allan, who argues that a commitment to equality and due process is fundamental to the “unwritten principles of liberal constitutionalism” and that “adherence to legality... defines a court’s quintessential constitutional duty.”¹⁸²

I accept the notion that both the provisions of a constitution and the legislative regimes within that constitutional framework depend for their legitimacy upon adherence to the standard of legality, what I have referred to as ‘lawfulness’. Those who are internal to and subject to a constitutional regime must have a route by which to call that regime to account, in the name of the law. This is actually the essence of constitutionalism, the authority of law to shape and limit the parameters of the exercise of power. The theory discussed above advances the particular content of the heritage of the common law in this respect: that the principles fundamental to the lawful exercise of constitutional authority in the common law are the equality (and equitable application) of reason, and due process.

Based upon this analysis, I argue that the doctrine of unwritten constitutionalism provides a valid framework for interrogating the legitimacy of the treatment of Aboriginal peoples within the constitutional scheme of Canada. The next step in this analysis is to look specifically at the Canadian authorities on the concept of unwritten constitutionalism, and on the general question of the lawful exercise of constitutional authority.

¹⁸² T.R.S. Allan, “Constitutional Justice and the Concept of Law” in Huscroft, *supra* note 172, 219 at 223.

2.1.2 Unwritten Constitutionalism in Canada

2.1.2.1 Text and Interpretation

The founding constitutional document for Canada, the *BNA/Constitution Act, 1867*¹⁸³ was an Act of the United Kingdom [U.K.] Parliament designed to establish a basic framework for governance of the new nation which would be “similar in principle to that of the United Kingdom.”¹⁸⁴ The Supreme Court of Canada undertook a comprehensive review of the Canadian constitutional regime in the *Reference re Secession of Quebec*.¹⁸⁵ The judgement, delivered by a unanimous Court, begins by confirming that the Constitution of Canada includes, as well as the constitutional texts listed in s. 52(2) of the *Constitution Act, 1982*,¹⁸⁶ other rules both unwritten and written, and “the global system of rules and principles which govern the exercise of constitutional authority”.¹⁸⁷ The Court states that these rules and principles are necessary to deal with issues “which are not expressly dealt with by the text of the Constitution”, and that they “emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.”¹⁸⁸ One of the glaring omissions from the text of the Constitution is any statement of the purpose or limits of the powers granted to the federal government in s. 91(24) with

¹⁸³ *Supra* note 2.

¹⁸⁴ *Ibid.* at preamble.

¹⁸⁵ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (LexUM), 161 D.L.R. (4th) 385 [*Secession Reference* cited to S.C.R.].

¹⁸⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁸⁷ *Secession Reference*, *supra* note 185 at para. 32, quoting from *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 874, 34 Nfld. & P.E.I.R. 1 [*Patriation Reference*].

¹⁸⁸ *Secession Reference*, *ibid.* at para. 32.

respect to “Indians, and lands reserved for the Indians”, given that this ‘head of power’ unlike all of the others deals with an identified human group among the inhabitants of Canada.

Looking first to the text of the Constitution, the Court explains that the purpose of the above-noted provision in the preamble was to “emphasize the continuity of constitutional principles, including democratic institutions and the rule of law; and the continuity of the exercise of sovereign power transferred from Westminster to the federal and provincial capitals of Canada.”¹⁸⁹ Thus the Supreme Court of Canada has affirmed that the constitutional principles which were operative in the United Kingdom in 1867 were effectively incorporated “by reference” in the preamble.¹⁹⁰ The Court devotes several paragraphs of the decision to discussing the nature and significance of these rules and principles:

Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text, they are the vital unstated assumptions upon which the text is based.¹⁹¹

... certain underlying principles infuse our Constitution and breathe life into it. ... it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.¹⁹²

¹⁸⁹ *Ibid.* at para. 44.

¹⁹⁰ *Ibid.* at para. 44 and paras. 49-54; see specifically para. 53 “the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference” and further that the preamble “invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional texts.” (para. 53, quoting from the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1977] 3 S.C.R. 3 at para. 104, 156 Nfld. & P.E.I.R. 1 [*Provincial Judges Reference*]).

¹⁹¹ *Ibid.* at para. 49.

¹⁹² *Ibid.* at para. 50-51.

... observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a “living tree”, to invoke the famous description in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. ... Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.¹⁹³

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations ... which constitute substantive limitations upon government action. ... The principles ... are also invested with a powerful normative force, and are binding upon both courts and governments.¹⁹⁴

This jurisprudence makes clear that at the time of Confederation the meaning and application of the constitutional powers transferred from Westminster to the new governments in Canada were defined and limited by the common law constitutionalism of the United Kingdom.

This confirms firstly that there were at Confederation and are now legal constraints upon the exercise of powers under the Canadian Constitution, and that the doctrine of unwritten constitutionalism as described in Part 2.1.1 of this chapter is applicable to the assessment of the legitimacy of the treatment of ‘Indians’ within the constitutional scheme of Canada. It is interesting to note that, in the *Secession Reference*, the Court refers to “legitimacy as distinguished from ... formal legality.”¹⁹⁵ Clearly s. 91(24) was passed by the appropriate authorities and is formally ‘legal’,¹⁹⁶ but does it also pass the test of legitimacy? The Court in

¹⁹³ *Ibid.* at para. 52.

¹⁹⁴ *Ibid.* at para. 54.

¹⁹⁵ *Ibid.* at para. 47.

¹⁹⁶ Agreement upon terms of Confederation were developed in conferences of the political leaders of the colonies in British North America (East and West Canada, Nova Scotia and New Brunswick) and were finalized at a meeting in London with imperial officials in 1867. The agreement was formalized in the *British North America Act, 1867*, *supra* note 2, a statute of the United Kingdom which created the legal framework for the Dominion of Canada including s. 91(24) which vested jurisdiction over “Indians, and lands reserved for the Indians” in the new federal government.

this decision notes that “Our law’s claim to legitimacy also rests on an appeal to moral values, ... It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.”¹⁹⁷ They also note that “[a]t its most basic level, the rule of law ... provides a shield for individuals from arbitrary state action.”¹⁹⁸

The Court also discusses another set of underlying constitutional principles relevant to this question, that of the protection of minorities¹⁹⁹ and explicit protection for the rights of Aboriginal peoples.²⁰⁰ All of these principles are considerations in assessing the legitimacy of the actions of the Canadian government with respect to the treatment of the indigenous inhabitants of the territories incorporated into Canada.

2.1.2.2 Historical Context

The Court directs us to look to the historical context, along with the text and interpretations of the Constitution, in considering the applicability of unwritten rules and principles to a specific exercise of constitutional authority. It is unquestionable that the relationship between the Crown and Aboriginal peoples had shifted significantly in the period leading up to Confederation. Through the 18th century and into the first decades of the 19th century, the Crown continued to deal with the First Nations as allies and as autonomous peoples. The

¹⁹⁷ *Ibid.* at para. 67.

¹⁹⁸ *Ibid.* at para. 70.

¹⁹⁹ *Ibid.* at paras. 79-81.

²⁰⁰ *Ibid.* at para. 82.

representative of the Crown in British North America had a direct relationship with the Aboriginal peoples, separate from the relationship of the Crown with the colonists; there was an implication of equality of status in relationship to the Crown between the colonists and the indigenous inhabitants.²⁰¹ However, as was discussed in the previous chapter,²⁰² after military alliance with the indigenous nations was no longer required, the responsibility for relations with ‘Indians’ at Westminster was transferred from military to civilian governors, which precipitated a shift in British North America also.

There was awareness in Westminster that the governments of the settler-colonies were ill-positioned to deal with ongoing relations with the indigenous nations because there were fundamental conflicts between the settlers and the indigenous inhabitants.²⁰³ Nevertheless, in 1860 local responsibility for Indian Affairs transferred from Westminster to the Province of

²⁰¹ Having reviewed evidence of the history of Aboriginal – Crown relations in the 18th and 19th centuries, the Ontario Court of Appeal concluded as follows:

[T]wo fundamental tenets of the Crown’s policy towards First Nations remained constant until 1860. First and foremost, dealings between the English Crown and First Nations were viewed as involving relations between sovereign nations to be governed by agreements or treaties made by the English Crown and the First Nations. Relations with the First Nations were an imperial concern to be administered primarily through the exercise of the royal prerogative. Like all imperial policies, Indian policy was formulated in England and those responsible for the implementation of it in North America reported to Crown officials. Indian affairs were no concern of the colonial legislatures.

See *Chippewas of Sarnia v. Canada (Attorney General)*, 2000 CanLII 16991 at para. 51 (ON C.A.), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135.

²⁰² See *supra* notes 7- 8 and accompanying text.

²⁰³ For further discussion, see *RCAP* vol.1, *supra* note 20 at 273-274: “The British parliamentary select committee looking into Aboriginal issues had warned in its 1837 report against entrusting the management of Aboriginal relations to the local legislatures in the British colonies, fearing a conflict of interest between the duty of protection and that of responding to the desires of their electors...”

Canada.²⁰⁴ The first legislative definition of “Indian” appeared in statutes of the Province of Canada,²⁰⁵ and that jurisdiction also enacted provisions with respect to enfranchisement,²⁰⁶ education²⁰⁷ and reserve lands²⁰⁸ prior to Confederation. However, the act of treaty making continued, and remained within the domain of the Westminster government and the Crown.²⁰⁹ The ultimate relevant legal authority continued to be the U.K. courts,

²⁰⁴ *Development of Indian Act*, *supra* note 51 at vii.

²⁰⁵ *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, S. Prov. Canada 1850 (13 & 14 Vict.), c. 42 and *An Act for the Protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S. Prov. Canada 1850 (13 & 14 Vict.), c. 74. See *RCAP* vol. 1, *supra* note 20 at 269-270: “Both 1850 land protection acts defined the term ‘Indian’, for purposes of residency on the protected reserve land base, for the first time in Canadian history, introducing the notion of race [Indian blood] as the deciding factor.” A subsequent amendment in 1851 narrowed the entitlement to status and residency rights further by attaching it to the male line and excluding the female line, which was another imposed rule change which had significant impact on the Aboriginal societies. These basic aspects of the definition of ‘Indian’ were carried forward into the federal legislation after Confederation.

²⁰⁶ The scheme for enfranchisement, which was available for ‘Indian’ males over 21 who could meet certain criteria, and would thereby become enfranchised and no longer be an ‘Indian’, a change in status which would then enure to his wife and children, was established in 1857 by the *Gradual Civilization Act*, *supra* note 16.

²⁰⁷ As was discussed in Chapter One, *supra* notes 12-16 and accompanying text, the Province of Canada had enacted legislation about the education of ‘Indians’ prior to Confederation, and had partnered with the churches in the early establishment of residential schools.

²⁰⁸ With respect to legislation in the Province of Canada dealing with reserve lands, *An Act Respecting the Management of the Indian Lands and Property*, S. Prov. Canada 1860 (23 Vict.), c. 151 [*Indian Lands Act*] gave authority for ‘Indian’ lands and Indian affairs generally to an official of the Province, a chief superintendent of Indian affairs. It is reported in *RCAP* vol. 1, *supra* note 20 at 273 that “Indians in the Canadas who were aware of the transfer of responsibility for Indian affairs from the imperial Crown to the Province of Canada generally opposed it, preferring to manage their own affairs than to be managed by the colonial government, which they distrusted and feared...”

²⁰⁹ See *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others*, [1982] 2 All E.R. 118 (C.A.) at 125-126, [1982] Q.B. 892 [*Secty for Foreign and Commonwealth Affairs-1982* cited to All E.R.].

administering the law of the “British colonial empire”,²¹⁰ the imperial arm of the common law.

Clearly, it was not considered outside of the realm of legality, or lawfulness, in 1867 to assert sovereignty over a people and their territory and to designate them as a colonized people, which was the essence of the enactment of s. 91(24) of the *BNA/Constitution Act, 1867*.²¹¹ However, these acts were not taken in a vacuum; the prior history of relations between the Crown and the Aboriginal peoples is part of the historical context which is to be considered in assessing the lawful character of this enactment, and any limitations or obligations which may be attached to it by the operation of relevant underlying constitutional principles.²¹²

Given that the preamble to the legislation incorporated continuity of the rule of law, and of the exercise of sovereign power, the question arises: would it have been lawful for the Parliament of the United Kingdom in 1867, absent the intervening new government, to have created a ‘colony within’, to have designated a defined human group amongst the inhabitants of the colonies of North America as completely subject to governmental authority in every aspect of its existence? Could they have simply ignored two centuries of history with that human group and purported to legislate a clean slate as if that history, which included treaties, Crown commitments and promises, trade agreements, military alliances, did not exist? It is indeed arguable that such an approach measured by the standards of the time

²¹⁰ *The Queen v. Symonds* (1847), [1840-1932] N.Z.P.C.C. 387(S.C.) at 393 [*Symonds*].

²¹¹ *Supra* note 2.

²¹² See *Secession Reference*, *supra*, note 185 at paras. 32, 54, 70-71 and 82.

would have been of questionable legitimacy. It offended the notion of equality of reason or basic equity, which is fundamental to the concept of legality, and certainly did not include any element which could be described as ‘due process’. It was essentially the imposition, without notice or recourse, of a state of complete legal incapacity upon a group of human beings to whom the Crown had significant existing legal and moral commitments.

I argue that the occasion of the transfer of authority from Westminster to Ottawa created an opportunity for the new political leadership in Ottawa to evade the obligations of the Crown and to strip the indigenous inhabitants of British North America of the entitlements of lawful relations which had been an integral part of their relationship with the Crown since before 1763, and which persisted in the years immediately prior to Confederation. At the beginning of the 1860s the Aboriginal peoples held a status in relationship to the Crown which was represented as being similar in nature, or at least equal in stature, to that of the European colonists. Yet the settler-colonists, in concert with the Parliament of the United Kingdom (acting in its capacity as the imperial Parliament), created a new federal government which would represent all of the participant colonies in the exercise of the kinds of powers which had formerly been exercised on behalf of British North America by the U.K. Parliament: defence, immigration, criminal law, for example. This new ‘national’ level of government would purport to assume the responsibility and obligations formerly wielded by the U.K. Parliament in the name of the Crown – but in the case of the ‘Indians’, the government was to have absolute authority unlimited by any of the obligations or constraints which had been either promised by the Crown or required by the imperial common law.

It was in this atmosphere that the Canadian nation was founded. With respect to the ‘Indians’ of British North America, the Crown specifically did not extend English law or Canadian law over them. Instead, it created them by law as a separate and distinct category of people, not governed by provincial legislation which was to be the source of general civil administration for all Canadians, but governed instead by constitutional enactment making them fully subject to the unlimited lawmaking authority of the federal government. Federal legislation (the *Indian Act, 1876*)²¹³ was then enacted creating a regime of law and governance which applied only to them. They were given no vote or voice with respect to this governing regime, and no ultimate authority at any level inasmuch as any decisions made within the scheme of the *Indian Act* were subject to the approval of, and could be over-ridden by the federal government. They were not citizens of Canada, they could not vote, they could not be enfranchised except through a special process which applied to nobody else – they were a distinctly disempowered human group characterized by complete legal incapacity.

I note here that it would have been appropriate and in keeping with the historical relationship between the Crown and Aboriginal peoples if this human group had either not been incorporated into Canada, or perhaps had been designated as a group bearing a right to internal autonomy among the peoples populating the territories which could be included within the new nation. The issue is the status which was accorded to this group. After a long history of relationship with the Crown during which the Aboriginal peoples were treated as autonomous peoples, offered the protection of the Crown and proclaimed in the *Royal*

²¹³*Indian Act, 1876, supra* note 19.

Proclamation to be entitled to the benefits of “our Justice”, suddenly this group was completely subject to the authority of this new federal government.

2.1.3 Conclusion – and Consequences

The instance of transfer of power became an opportunity for the settler-colonists to seize political control over the lives of the indigenous inhabitants, without their consent or even their knowledge. It was this unilateral transformation of status, by constitutional enactment, which authorized the settler-colonists to enact legislation which would enable the use of ‘law’ to exert control over the families and children of the Aboriginal peoples. I argue that this use of the legislative authority was outside of and contrary to the principles of constitutionalism which prevailed in the U.K. at the time of Confederation, and which were incorporated by reference into the constitutional regime of Canada. Scrutiny of the legitimacy of these acts must be undertaken bearing in mind not only specific principles but also the general framework articulated by the Supreme Court, that the principles may create “substantive legal obligations ... which constitute limitations upon government action.” They also bear strong persuasive force at the normative level and are “binding upon both courts and governments.”²¹⁴

This illegitimate exercise of constitutional authority to accomplish the unilateral transformation of the status of the ‘Indian’ inhabitants, the act described at the conclusion to Chapter One as the bestowal of the distinct status of ‘Other’ upon this human group as part of

²¹⁴ *Secession Reference*, *supra* note 185 at para. 54.

the constitutional framework of Canada, offends the principles of constitutionalism at several levels. It is an exercise of state power which is completely arbitrary although the target is a human group rather than an individual or individuals; it offers no notion of equality between the members of this human group and any other individual inhabitant or group of inhabitants, and no notion of equity as a mediating factor between this human group and the powers of the state. The imposed state of legal incapacity denied to this group one of the most fundamental aspects of constitutionalism, the ability to call upon the law to require the governing regime to account for its actions.

With reference to the Canadian jurisprudence on the principles of constitutionalism, I particularly note the irony of the caution issued by the Supreme Court of Canada that the claim to legitimacy of the constitutional regime “also rests on an appeal to moral values”.²¹⁵ In this case the authority of the constitutional regime was utilized to create a ‘legal’ framework for a moral violation. The rule of law, meant to be a shield, was used as a club. I argue that these acts were illegitimate in 1867 according to the constitutional principles which existed at that time, and the continued existence of this situation within the constitutional framework of Canada is illegitimate now.

The question, of course, is how to address this fundamentally unjust status quo. When the federal government issued a discussion paper in 1969 proposing that all of the laws and practices which created legal distinctions between ‘Indians’ and other Canadians be

²¹⁵ *Ibid.* at para. 67, see discussion at *supra* notes 201-203 and accompanying text.

eliminated, the response of the Aboriginal peoples was resoundingly negative.²¹⁶ The complicated truth here is that s. 91(24) of the *BNA/Constitution Act 1867*, together with the *Indian Act* and the treaties, do confirm that Aboriginal peoples have a unique legal status within the Canadian constitutional framework, and a unique relationship to the Crown. The legal distinctions between ‘Indians’ and other Canadians do confirm that Aboriginal peoples hold a distinct status in Canada; the distinctions are not based upon race, but upon their prior status as sovereign peoples and their history of respectful relations with the Crown. The fact that Canada has confiscated this status, subjected it to the ownership and control of the state, has not defeated the will of Aboriginal peoples to achieve the recognition within Canada that they view as their birthright.

The next three sections of this chapter will investigate alternative legal approaches which advance a different kind of distinct recognition for Aboriginal peoples in Canada. I introduce a doctrine of the imperial common law that affirms the continuation of the customary laws of colonized people; this doctrine will be explored more fully in the discussion of customary adoption in Chapter Three. I then trace the emerging development of norms in international law in support of the right of existence of the human group and particularly the rights of Indigenous peoples. The chapter concludes with an examination of state obligations towards Aboriginal peoples consonant with the notion of the honour of the Crown.

²¹⁶ See discussion below in section 2.3.3 of this chapter, at notes 259-261 and accompanying text.

2.2 Continuation of Customary Law

It is of note that there was some divergence between written and unwritten constitutional law at the founding of Canada, which is to say a divergence between the legislative authority and the judicial authority. The jurisprudence of the courts in Canada, post-Confederation, affirmed that the assertion of the law of England, subsequently succeeded by the law of Canada, had not displaced a fundamental principle of imperial common law which assumed the continuation of the local laws and customs of indigenous peoples who were in a state of colonization. Thus, at the same time as the political authorities were acting to eliminate Aboriginal institutions of governance and decision making, the courts continued to affirm the efficacy of traditional customary practices to create status which would be recognized in Canadian law.

Madame Justice McLachlin of the Supreme Court of Canada affirmed this principle in her dissenting reasons in 1993 in *R. v. Van der Peet*: “The history of the interface of Europeans and the common law with aboriginal peoples is a long one. ... running through this history, from its earliest beginnings to the present time is a golden thread – the recognition by the common law of the ancestral laws and customs [of] the aboriginal peoples...”²¹⁷ This “principle of continuity” provides that “in inhabited territory acquired by conquest or secession, Parliament or the Crown could abrogate or alter local law, but until this power was

²¹⁷ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 263 (LexUM), 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.].

exercised, local laws, institutions, customs, rights and possessions remained in force.”²¹⁸ The conceptual device by which this ‘continuity’ operated is that local law which was in force anywhere in the British Empire was incorporated as part of the law of the British Empire and was enforced as such.²¹⁹ Although there is consistent case law dating back to 1066 in support of this doctrine of continuity, there were certainly judicial voices opposed to the recognition within British law of the “laws and customs of non-Christian, non-European peoples”,²²⁰ and there was an overriding judicial discretion to test customary law against the normative scheme of the common law and to refuse to enforce customs deemed to be outside of the bounds of moral justice.

Two other observations about the operation of the principle of continuity are of particular relevance to this study. Firstly, it could create a version of legal pluralism: often two legal regimes were operating side by side, one for the settlers and one for the original inhabitants of a colonized territory – and often ongoing creative compromises were developed as these two regimes interacted.²²¹ This is a doctrine which has existed dating back to the *jus gentium* of the Roman Empire; it enabled an imperial rule of law which could accommodate situations of profound cultural difference. Secondly, and also dating back to the ancient empires of

²¹⁸ Mark D. Walters, “The “Golden Thread” of Continuity – Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*” (1999) 44 McGill L.J. 711 at 715 [Walters, “Continuity”].

²¹⁹ This contrasts with the approach of the U.S. courts, which recognized an ongoing limited tribal sovereignty and therefore “applied Aboriginal custom not as elements of American law, but pursuant to private international law as elements of foreign legal systems.” *Ibid.* at 718.

²²⁰ *Ibid.* at 721.

²²¹ See e.g. Jeremy Webber, “Relations of Force and Relations of Justice: the Emergence of Normative Community Between Colonists and Aboriginal Peoples” (1995) 33 Osgoode Hall L.J. 623 at 626-627 [Webber, “Normative Community”].

Rome and the Middle East and continuing throughout the history of the British Empire, it has been recognized that the principle of continuity is particularly appropriate in the realm of family relationships, which involve deeply foundational practices of distinct peoples.²²²

By the nineteenth century there were many advocating, or judging, in opposition to the doctrine of continuity on the basis that “the customs of tribal peoples were “barbarous,” “savage” or “uncivilized” and incapable of recognition at common law.”²²³ There was a period of a little over a century during which this doctrine was out of favour with the judiciary of the imperial settler-colonist states (Canada, Australia, New Zealand), but Walters observes that this “is now regarded as a detour from proper common law principles.”²²⁴

The complicated relationship at Confederation between the Crown, the Parliament of the U.K., the new federal government of Canada and the legislatures of the provinces of Canada (being the former colonies) was analyzed at some length by the Court of Appeal for the U.K. in 1982, at the time of the ‘patriation’ of the Constitution of Canada. Lord Denning states that up until the 20th century,

it was a settled doctrine of constitutional law that the Crown was one and indivisible. The colonies formed one realm with the United Kingdom, the whole being under the sovereignty of the Crown. The Crown had full powers to establish such executive, legislative and judicial arrangements as it thought fit. In exercising these powers, *it was the obligation of the Crown (through its representatives on the spot) to ensure that the original inhabitants of the country were accorded their rights and privileges according to the customs*

²²² See discussion below in Chapter Three, at text accompanying notes 314-320.

²²³ Walters, “Continuity”, *supra* note 218 at 721.

²²⁴ *Ibid.*

*coming down the centuries, except in so far as these conflicted with the peace and good order of the country or the proper settlement of it.*²²⁵

This analysis expands the basis for the earlier conclusion that, in trying to deprive the Aboriginal peoples of all legal capacity and status, the new government of Canada acted outside of the legitimate limits of constitutional authority. The historic relationship of the Crown to the Aboriginal inhabitants, which included an obligation to recognize and continue at least certain aspects of their laws and customs, was not honoured. However, as was stated earlier, on this matter the government and the courts diverged. There is a continuous line of court decisions dating back to 1867 in which the courts do confirm the operation of Aboriginal customary laws and practices to alter or create familial status which the Canadian legal system will recognize. This will be explored in depth in the next chapter, which looks at Aboriginal rights in general and Aboriginal custom adoption in particular.

2.3 The Right of Existence of the Aboriginal Human Group

2.3.1 The Nature of Group Rights

One of the hopes of Aboriginal peoples with respect to the new provisions of the 1982 constitutional initiative²²⁶ was that this constituted a formal endorsement by the Canadian state of the validity of their longstanding claim for recognition of their collective rights as peoples. From their perspective, these collective rights are in fact human rights; a speaker for

²²⁵ *Secty for Foreign and Commonwealth Affairs-1982, supra* note 209 at 123 [emphasis added].

²²⁶ Referring specifically to the inclusion in the *Constitution Act, 1982* (*supra* note 186) of s. 35(1) which recognizes and affirms Aboriginal and treaty rights, and s. 25 which intends to create some level of shield or balance for the collective Aboriginal or treaty rights in relationship to the individual-based rights of the general constitutional scheme.

the Inuit Committee on National Issues while addressing the First Ministers Conference in 1983 stated: “In our view, aboriginal rights can also be seen as human rights, because these are the things we need to continue to survive in Canada.”²²⁷

A philosophical tension between human rights, which are generally perceived to be rights of the individual, and collective or minority rights, which are held by some sort of group, has been a fairly entrenched assumption in the liberal Western discourse of individual-centric notions of rights. Historically, the ‘individual rights’ ideology has posited that the nature of rights claimed by a collectivity, such as a religious group or a cultural/national group or a defined social class, are such that these claims of right pose a threat to the individual autonomy of members of the group.²²⁸ For example, the right of a religious group to teach their religious beliefs, or to employ only people who adhere to their religious beliefs, may interfere with the individual rights claimed by a person who is homosexual and is also a member of that religious group.

In domestic rights regimes, the answer to this dilemma has tended to be the limiting of the concept of collective rights to the individual rights of all of the members of the group, exerted together. A discourse has developed which poses this tension as reflecting a primary

²²⁷ Canada, *First Ministers’ Conference on Aboriginal Constitutional Matters; Unofficial and Unverified Verbatim Transcript*, March 15, 1983, Vol. 1, p. 130 (with minor corrections approved by the speaker), cited in Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984).

²²⁸ See e.g. Darlene Johnston, *supra* note 167 at 26; Massimo Iovane, “The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations” (2007) 14 *Int’l J. on Minority and Group Rights* 231 at 231-232; Charles Taylor, “The Politics of Recognition” in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25 at 55.

difference in the vision of the nature of the person in society, as either the autonomous, free, rights-bearing individual of the modernist ideal whose personal goal and freedom is to pursue their own good as long as they do not thereby prevent others from doing the same, or an alternative vision of the person in society as the connected, interdependent member of a communitarian group, who finds identity and the good in pursuing in interaction with others the collective goals shared by the members of the group.²²⁹

While there is truth to the existence of these two visions or models, I argue that the tension between individual and collective rights cannot be understood separate from the concept of dominant/minority status. The early work in this field looked at the concept of ‘groupness’: does a group have qualities separate from the qualities of its individual members? Clearly, at least at some levels, it does. The law in Western society recognizes the status and rights of a group as distinct from its members in many arenas: corporate law, partnership law, law of not-for-profit societies all deal with forms of group organization which are not only recognized but privileged in Canada. More in the social or civic realm, the ‘family’ is another legally recognized and supported group, as is ‘citizens’. It appears that it is then not the quality of groupness which poses difficulty, but rather the type of rights which the group seeks to claim. When the purpose of a group is to carry out the approved activities of the dominant Western liberal society, that society is prepared to recognize the status of the group. The difficulty arises when the group seeks to carry out activities which set its members apart from the dominant society in certain fundamental ways.

²²⁹ See for example Darlene Johnston, *supra* note 167 at 19-22; Jago, *supra* note 16 at 21-23.

Ultimately, the justification for a concept of group rights is that the group does hold certain attributes or carry out certain functions which an individual in isolation does not, and cannot. For example, a group can have a kinship structure,²³⁰ it can have socialization processes to teach common values to children,²³¹ it can hold rituals and ceremonies to celebrate events of spiritual significance.

A notable aspect of these activities described as the characteristics of groups is that they are also the characteristics of society at large. The point here is that, for the members of a dominant culture, society at large is their group – the group qualities that are fundamental to them, related to such things as identity, language, ethics, or worldview are not in issue, they are a given and they are therefore ‘backgrounded’ because they are readily available, to be supported or ignored or opposed as a matter of individual choice. And so the right of the individual is within the context of his or her group, it is the right in a given cultural framework to be able to express one’s personhood without interference by the larger group, which is most probably the nation-state.

However, for the members of a minority culture, the dominant struggle, that which is foregrounded, is the survival of the alternative cultural framework of their group, the framework within which those individuals can express full personhood. What is framed as a

²³⁰ See for example *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978), a decision dealing with a kinship system supported by the invocation of tribal sovereignty, and an individual member of the tribe who sought gender equality.

²³¹ See for example *Wisconsin v. Yoder* 406 U.S. 205 (1972), dealing with conflict between Amish socialization and mandatory education.

tension between individual rights and collective rights is often mischaracterized; it may actually be a contest between the 'rights' (or perhaps powers) of the dominant group and of the minority group. Domestic human rights, for example, are in fact the values of the dominant culture, expressed as the limits and obligations of that culture, presenting as the state, in interaction with its member individuals.

The Canadian state did not set out to eliminate individual 'Indian' persons, it set out to eliminate Aboriginality, to break the transmission of Aboriginal culture to future generations, to 'convert' the 'Indian' people to the ways of Euro-Canadian culture and thereby to change their status from Aboriginal to Canadian. In order for the minority individuals in this circumstance to protect their personhood, they must protect the existence and sanctity of the minority group. Thus minority rights are of a fundamentally different quality than are individual rights, and this distinction gets lost in the discussion of the tension between the two. In either a dominant or a subservient group, the individual may seek to dissent and to have the right to do so, but within the dominant space a minority group individual may need to seek first and foremost to protect the existence of the threatened minority group as the repository of individual identity, spirituality, ethics and worldview. So, in order to protect or assert personhood, the member of a majority culture will seek individual rights but the member of a minority culture will seek group rights, most particularly the right of the group to survive and sustain its specific and normative characteristics, which could be called the right of 'peoplehood'.²³²

²³² James (Sa'ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing, 2008) at 25-27.

Liberal thinkers who are cognizant of the need to recognize minority issues in modern multicultural societies have theorized about new dimensions to the traditional rights paradigm.²³³ One of the influential thinkers in this area is Charles Taylor, who has foregrounded the importance of ‘recognition of distinctness’ as a crucial element in the development of identity in a multicultural context - that in order to honour the dignity of the individual members of a culturally distinct human group, the collective identity of that group must be acknowledged and protected.²³⁴

Taylor gives practical content to the idea that minority rights, or the rights of a human group, are different in nature than individual rights, discussing the role of the state with respect to each of these types of rights. Liberalism posits that, in order to protect the human rights of the individual, the requirements are that the state not discriminate among its people, that it be neutral about conceptions of the good and non-interfering with respect to the choices an individual may make about how to live their life. Taylor asserts that, whereas the focus on universal dignity requires non-discrimination, a focus on recognition and honouring of difference requires that the state consciously distinguish between its citizens in order to support minorities to resist the pressure to assimilate into the majority culture. Continuing in this vein, the state is also called upon to recognize in its policies and practices the public good of the sustaining and flourishing of minority cultures, and so to take positive steps in support of the collective nature of cultural difference. With respect to non-interference, this

²³³ See for example Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); Jago, *supra* note 16 at 25-30; Jurgen Habermas, “Struggles for Recognition in the Democratic Constitutional State”, trans. by Shierry Weber Nicholsen, in Gutmann, *supra* note 228, 107.

²³⁴ Taylor, *supra* note 228 at 64-75.

will be in reference not to individual life choices but to appropriate opportunities for collective decision making: the cultural institutions of the minority human group such as family, spiritual communities, schools and civil associations would be granted a significant degree of autonomy by a state committed to the recognition and support of distinct cultural groups.²³⁵

2.3.2 Group Rights in International Law: From Prohibiting Genocide to Protecting Diversity

On the urgent practical level, however, it is in the realm of international law that minority groups and Indigenous peoples have sought change in order to protect their right to existence. The primary conception of human rights which emerged post-1945, as the work of the United Nations got underway, was characterized by a universalist notion of human rights and fundamental freedoms, which flows from an affirmation of the inherent dignity of the human person. These core principles appear in the Preamble to the *Charter of the United Nations* (1945)²³⁶ and are codified in the 1948 *Universal Declaration of Human Rights*.²³⁷ These documents, and the more recent *Vienna Declaration and Program of Action* which was adopted by the U.N. World Conference on Human Rights in 1993,²³⁸ express the classic

²³⁵ *Ibid.* at 85-120.

²³⁶ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [*UN Charter*].

²³⁷ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [*Universal Declaration*].

²³⁸ United Nations World Conference on Human Rights, *Vienna Declaration and Program of Action*, UN Doc. A/CONF.157/24 (Part 1) at 20 (1993) [*Vienna Declaration*].

liberal vision of human rights as the universal right of the person as the “central subject”²³⁹ of notions such as equal entitlement to fundamental rights and freedoms. As Iovane notes, “[b]y and large, ‘first generation’ human rights, which are codified in international treaties, are designed to protect the freedom of every person by preventing attacks on his or her physical and/or psychological integrity.”²⁴⁰

The one notable exception to this individual-centric vision of human rights protection at the international level in the post-war period was a resolution condemning genocide which was passed unanimously at the First Session of the General Assembly,²⁴¹ and the subsequent *Genocide Convention*,²⁴² both of which refer to the protection of the right of existence of the “human group”.²⁴³ “Resolution 96(I)” affirmed:

*Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.*²⁴⁴

²³⁹ *Ibid.* at Preamble.

²⁴⁰ Iovane, *supra* note 228 at 235.

²⁴¹ “Resolution 96(I)”, *supra* note 161.

²⁴² *Genocide Convention*, *supra* note 162.

²⁴³ See Chapter One, *supra* notes 161-163, 168-170 and accompanying text. It is the intention of destruction, by means of physical or mental harm or coerced family disruption, focused against the human group identifiable by nationality, race, religion or ethnicity which distinguishes genocide from ordinary criminality against the individual.

²⁴⁴ “Resolution 96(I)”, *supra* note 161 [emphasis added].

The legal framework in which the concept of genocide emerges with respect to the removal of children is found in Article 2(e) of the *Genocide Convention*,²⁴⁵ which reads as follows:

Art. 2: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...
(e) Forcibly transferring children of the group to another group.

This Convention, which was adopted unanimously by the United Nations in December, 1948 was the legislated expression of the earlier resolution condemning genocide. I argue that, read together, these two documents establish a norm within international law that the coerced removal of the children of one human group into the authority and ‘care’ of another society is among the most serious acts of aggression which can be undertaken against the right of existence of a human group.

Within the spirit of postmodernism, beginning in the late 1960s there have been increasing challenges to the concept of universality in the forum of international human rights. One of the areas of challenge has centered on the linked concepts of cultural relativism and value pluralism.²⁴⁶ These concepts posit that norms are not absolute or natural, but are rooted in specific cultures, with their associated behaviours, beliefs and ways of knowing; there is not a correct or universal norm against which all others are to be measured. If different cultures are simply a fact, rather than a state of development (or underdevelopment) then the characteristics of distinct cultures are context-dependent. The idea of value pluralism, as

²⁴⁵ *Genocide Convention*, *supra* note 162, art. 2.

²⁴⁶ The discussion which follows draws upon the detailed discussion of this subject in the Iovane article, *supra* note 228 at 235-245.

articulated by Isaiah Berlin in the 1960s,²⁴⁷ asserts that the many distinct values which co-exist are not just more or less correct expressions of one supreme value; they are several, they may be equally valid and in some cases the differences between them are characterized by Berlin as “incommensurable” and the individual must simply be free to choose. There is no right answer.

The fear that cultural relativism and the positing of value pluralism would undermine the effectiveness of the work being done in international human rights precipitated much international debate. The interesting direction which seems to be emerging from this favours the incorporation into the international human rights lexicon of new categories, such as cultural rights and rights for minority groups and Indigenous peoples. The focus in the postmodern era on cultural specificity and the recognized validity of some of the challenges to universality, tempered by the demonstration of the powerful role that the norms of universal human rights can play in the international arena, appears to have led to a more nuanced appreciation of the potential for interrelationship across cultural difference. In fact, there is a developing trend towards a positive human rights obligation to “protect cultural diversity as a means of enhancing the freedom of each individual, and of permitting the full development of his or her identity.”²⁴⁸

²⁴⁷ I. Berlin, “Two Concepts of Liberty” in *Four Essays on Liberty* (London: Oxford University Press, 1969), cited by Iovane, *ibid.* at 237.

²⁴⁸ Iovane, *ibid.* at 248.

2.3.3 Extending Group Rights to Indigenous Peoples

There is no doubt that one of the influences which moved the international human rights community to re-think the issue of minority rights was the determined efforts of a network of Indigenous people which arose informally within the conference circuit of international organizations, and which established a home base for itself under the auspices of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter the Sub-Commission), an arm of the U.N. Commission on Human Rights. The rather remarkable story of the gradual gathering of representatives of Indigenous peoples from around the world, and of what was involved for them in learning to operate within the processes of the U.N. to ultimately achieve the goal of a United Nations General Assembly Declaration²⁴⁹ is recounted by one of the Canadian participants, James (Sa'ke'j) Youngblood Henderson, in *Indigenous Diplomacy and the Rights of Peoples*.²⁵⁰ The following account draws heavily on Henderson's presentation.

For the Indigenous representatives, the story begins with a historical background of colonization, legitimized by an ideology of Eurocentrism,²⁵¹ and its ongoing presence and impact in the collective and individual lives of their peoples. The idea discussed in Chapter One of this paper, of the ways in which colonialism creates an interactive system which

²⁴⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Annex, Agenda Item 68, UN Doc. A/61/L.67 and Add. 1(2007) [*Declaration R.I.P.*].

²⁵⁰ Henderson, *supra* note 232.

²⁵¹ For discussion of the character of Eurocentrism as an ideological system, see Henderson, *ibid.* at 15-22.

reinforces and internalizes the colonizing dynamic of dominance/inferiority,²⁵² is central to the continuing impact of colonialism, as is the notion of “cognitive imperialism”,²⁵³ the assumed normativity of Eurocentric thinking and methodologies by the colonized.

The first challenge for Indigenous peoples in the forum of the international community was recognition. In the past, although the League of Nations did have awareness of the need for formal protection of minorities,²⁵⁴ application for member status by Aboriginal nations (the Haudenosaunee people in 1923 and the Maori people in 1925) had been refused, on the basis that their status was ‘domestic’ in nature and therefore not within the mandate of the League.²⁵⁵ The British Commonwealth was formalized in 1931 on the basis of affirming self-determination for the former British colonies, but this did not extend to the peoples of the ‘colonies within’ some of those former colonies, such as Canada, New Zealand and Australia.²⁵⁶ The United Nations was initially no more receptive. The General Assembly in 1960 issued the *Declaration on the Granting of Independence to Colonial Countries and*

²⁵² See *supra* notes 101-105 and accompanying text.

²⁵³ Battiste, *supra* note 158 at xvii.

²⁵⁴ After World War I, the League of Nations inserted protection for minorities into many of the documents establishing the new nations or protectorates which resulted from the breakup of several of the old order empires. These were motivated less by a positive impulse toward minority groups than by the awareness of the role that the oppression of minorities had played and could play in the outbreak of war. See Carol Weisbrod, *Emblems of Pluralism: Cultural Differences and the State* (Princeton NJ: Princeton University Press, 2002) at 119-120.

²⁵⁵ Henderson, *supra* note 232 at 24.

²⁵⁶ *Ibid.* at 27.

*Peoples*²⁵⁷ which condemned colonialism and supported the right of decolonization and the right to choose self-determination, but again this process did not generally include the ‘Indigenous populations’ living within the boundaries of the new or existing nations.²⁵⁸

The impact of the failure of the United Nations to consider the situation of Indigenous peoples in the decolonization initiative was compounded for ‘Indians’ in Canada by other U.N actions in the early 1960s to promote the elimination of racial discrimination.²⁵⁹ Canada ratified the *Convention on the Elimination of All Forms of Racial Discrimination*, and one of their immediate acts taken to comply with it was to issue a “White Paper”, the *Statement of the Government of Canada on Indian Policy*.²⁶⁰

Based upon the premise that the whole constitutional and legislative regime distinguishing Indians from other Canadians was an instance of distinction on the basis of race, the intention of the Trudeau government was to begin a process to dismantle all of it, including the *Indian Act*, collective title to reserve lands and generally any distinction in law between Indians and other Canadians. There was an enormous level of protest from First Nations people, which brought to the fore in the public policy sphere that, regardless of the racism which had

²⁵⁷ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1541(XV), UN GAOR, 15th Sess., (1960).

²⁵⁸ Henderson, *supra* note 232 at 27.

²⁵⁹ *Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res. 1904 (XVIII), UN GAOR, 18th Sess., (1963) and the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969) [*CERD*].

²⁶⁰ Canada, Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen’s Printer, 1969).

developed in Canada as part of the legacy of colonialism, First Nations viewed their separate legal status as something like a remnant repository of their heritage as autonomous peoples in a distinct relationship to the Crown: “They stated that Indians should not be looked on as a race, but as peoples with distinct heritages and cultures recognized by treaties.”²⁶¹ The White Paper was withdrawn by the government in 1970, and the whole debate was a significant factor in stimulating a re-assessment of the situation of Aboriginal peoples in the Canadian polity.

Also in the mid-1960s, at the United Nations the principles which had been enunciated in the *Universal Declaration of Human Rights*²⁶² in 1948 were empowered by what are known as the Human Rights Covenants: the *International Covenant on Economic, Social and Cultural Rights*²⁶³ and the *International Covenant on Civil and Political Rights*,²⁶⁴ as well as the *Optional Protocol to the International Covenant on Civil and Political Rights*.²⁶⁵ Article 1 in each of the Covenants provides as follows: “All peoples have the right of self-determination.

²⁶¹ Henderson, *supra* note 232 at 33.

²⁶² *Universal Declaration of Human Rights*, *supra* note 237.

²⁶³ *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3rd January 1976, accession by Canada 19 August 1976) [ECOSOC]. This Covenant was adopted by the General Assembly as GA Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) 49.

²⁶⁴ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 August 1976) [CCPR]. This Covenant was adopted by the General Assembly as GA Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) 52.

²⁶⁵ *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 302 (entered into force 23 March 1976, accession by Canada 19 August 1976 [Optional Protocol]. This Protocol was adopted by the General Assembly as GA Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966) 59.

By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

This provision established the right of self-determination as a human right of a collective nature within international law; however, in order to come within this jurisdiction a collectivity must be recognized as a ‘people’, which was a status that would prove to be elusive for ‘Indigenous populations’. In response to the efforts of the network of Indigenous representatives to raise this issue, a Special Rapporteur was appointed in 1972 by the Sub-Commission (on the Prevention of Discrimination and Protection of Minorities of the U.N. Commission on Human Rights) to undertake a “study on the problem of discrimination against indigenous populations”. The resulting *Martinez Cobo Study*, which did not come out until 1982,²⁶⁶ documented the deeply disadvantaged circumstances of Indigenous populations within nation-states throughout the world.

Discussing this period, Henderson describes his perception of the situation for the Indigenous representatives:

The Indigenous diplomacy movement in the UN was a response to the failures of the member nations – both the colonizer states and the decolonized states – to recognize Indigenous human rights, end racial discrimination, and decolonize Aboriginal peoples. ... We sought to understand why the Labour Conventions, the Human Rights Covenants or the Declaration and Conventions of UNESCO had never been used to protect us. In these international systems we found we were invisible; we were neither minorities

²⁶⁶ José R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, E/CN.4/Sub.2/1986/7/Add.1 (1987) is the cite for Parts I and II, Part III (Conclusions and Recommendations) is cited at E/CN.4/Sub.2/1986/7/Add. 4 (1987) [*Martinez Cobo Study*].

nor peoples. We were ghost peoples, hidden, like our languages and cultures, by the concept of the nation-state.²⁶⁷

As a result of the findings of the *Martinez Cobo Study*,²⁶⁸ and of complaints of human rights violations which were being placed before the U.N. Human Rights Committee by Indigenous representatives,²⁶⁹ the U.N Commission on Human Rights created a Working Group on Indigenous Populations (hereinafter the Working Group) in 1982, as a sub-group of the Sub-Commission.²⁷⁰

The first task of the Working Group was for the Indigenous peoples from all over the world to agree among themselves on the text of an Indigenous declaration which would express the vision of many distinct Indigenous peoples and traditions, and would also speak to the wider international community and reflect the founding documents of the U.N human rights regime, the Human Rights Covenants. This process took 11 years, between 1982 and 1994.

Henderson describes the depth of the challenge for the framers of the draft document:

The Indigenous declaration was more a framework for existing rights than a bid to create new ones; it was a document of recognition and interpretation. Indigenous traditions are different from the languages of the United Nations and of the Eurocentric systems of law in nation-states. Indigenous legal traditions tell us how we are to conduct ourselves. [distinguishing from telling

²⁶⁷ Henderson, *supra* note 232 at 34-35.

²⁶⁸ *Supra*, note 266.

²⁶⁹ Henderson, *supra* note 232 at 37-40 reports that Aboriginal individuals and organizations from Canada began to take violations of human rights to the U.N. Human Rights Committee under the *Optional Protocol* after Canada ratified the Human Rights Covenants in 1976.

²⁷⁰ Henderson, *ibid.* at 47-48 reports that at a first meeting, 14 Indigenous organizations were represented of which only 2 were based outside of North America. By the ninth session, there were more than 70 delegates of whom 2/3 were from Latin America, the Pacific, the Soviet Union, South and Southeast Asia. By the end of the tenure of the Working Group, more than 2,500 delegates were attempting to attend.

people what they must not do] ... Indigenizing the Covenants required us to extend Indigenous legal traditions to comprehend how a self-determining people or individual would behave. This was the implicit spirit and intent of Indigenous legal traditions. The drafting process had to articulate new teachings to help guide peoples whose traditions had been damaged by colonialism, and to help displace their rage.²⁷¹

The major point of conflict between the Indigenous representatives and the nation-states was over the concept of ‘peoples’; if the ‘indigenous populations’ were included in that category, they would be entitled to the human rights set out in the Covenants, including the right of self-determination which was very controversial. The 1993 *Vienna Declaration*²⁷² did not use the terminology of ‘Indigenous peoples’, but did make a strong statement recognizing the inherent dignity of Indigenous people, and “declared that states should, in accordance with international law, take concerted positive steps to ensure respect for all the human rights and fundamental freedoms of Indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures, and social organization.”²⁷³ It also recommended that the mandate of the Working Group continue, to complete the work on a draft Declaration.

The *Draft Declaration on the Rights of Indigenous Peoples* was completed in 1994²⁷⁴ and was approved by the Sub-Commission in 1995. The Human Rights Committee took the

²⁷¹ Henderson, *ibid.* at 51-52.

²⁷² *Vienna Declaration*, *supra* note 238.

²⁷³ Henderson, *supra* note 232.

²⁷⁴ *Discrimination Against Indigenous Peoples: Draft Declaration on the Rights of Indigenous Peoples*, UN ESCOR, Comm. on H.R., Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Agenda Item 14, U.N. Doc. E/CN.4/1995/2 E/CN.4/Sub.2/1994/56, 28 Oct. 1994 at art. 43.

unusual step, in response to lobbying efforts by concerned nation-states, of setting up a Working Group on the Draft Declaration (hereinafter WGDD).²⁷⁵ In 1995, the year that the WGDD was established, on the occasion of the First International Day of the World's Indigenous People, Dr. Erica-Irene Daes, a human rights expert who chaired the Working Group, made an impassioned statement to the Sub-Commission in support of the *Draft Declaration*:

It is of particular satisfaction to me that the draft Declaration on the Rights of Indigenous Peoples truly reflects the values, beliefs and aspirations of the peoples concerned. More than that, it has come to be regarded, by indigenous peoples themselves, as their own. ... The members of the Working Group have been inspired by indigenous peoples, they have dared to be visionary, in the true original spirit of the United Nations. ... The United Nations strengthened the struggle of colonized peoples by recognizing their right to be free, long before they were free. It bolstered the struggle of people in authoritarian states for democracy by recognizing the legitimacy of their dreams, decades before the Cold War came to an end. ... We must remain true to this tradition of giving hope for justice.

We must insist that the draft Declaration on the Rights of Indigenous Peoples be adopted in substantially its present form, without deleting the principles which are central to indigenous peoples' hope for true justice. I refer, in particular, to the equal right of all peoples, including indigenous peoples, to self-determination.²⁷⁶

Impasse developed in the WGDD and continued through the first ten years of its existence. In 2004, in debates on the creation of a second International Decade of the World's Indigenous People, the Commission on Human Rights passed a resolution of concern about the deeply disadvantaged circumstances of Indigenous people around the world and the persistent

²⁷⁵ For a discussion of the response of the Indigenous representatives to this step, see Henderson, *supra* note 232 at 67.

²⁷⁶ Erica-Irene A. Daes, "First International Day of the World's Indigenous People"; statement made to the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the Occasion of the First International Day of the World's Indigenous People, Geneva, 9 August 1995, cited in Henderson, *ibid.* at 64-69.

reports of violations of their human rights.²⁷⁷ The General Assembly, in proclaiming the Second International Decade, included in the resolution a re-affirmation of the need for all states to take positive action to advance the human rights of Indigenous people, and urged the WGDD to bring forward a final *Draft Declaration* as soon as possible.²⁷⁸ This was accomplished in 2006, when the WGDD agreed to accept the Draft Declaration substantially as written, clearing the road for approval by the Human Rights Council. The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the U.N. General Assembly in 2007,²⁷⁹ with only four votes against: Canada, Australia, New Zealand and the United States.²⁸⁰ This document clearly confirms that, for purposes of international law, Indigenous peoples are recognized as ‘peoples’ who hold human rights as such, including the right of self-determination, as provided in the Human Rights Covenants.

The General Assembly, in the preamble to the *Declaration*, recognizes “in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child.”²⁸¹ There are a few Articles of the *Declaration* which also bear particularly upon the subject of this paper:

²⁷⁷ CHR resolution 2004/62 of 21 April 2004; see UN ESCOR, 2004, Supp. No. 3, UN Doc. E/2004/23, Chap. II, s.A.

²⁷⁸ *Second International Decade of the World's Indigenous People*, GA Res. 59/74, UN GAOR, (2005).

²⁷⁹ *Declaration R.I.P.*, *supra* note 249.

²⁸⁰ The *Declaration*, *ibid.*, has subsequently been endorsed by all four of the countries which voted against it; Canada announced its decision to endorse on November 12, 2010.

²⁸¹ *Ibid.* at preamble.

Article 7 provides at subsection 2:

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8 provides:

Subsection 1: Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

Subsection 2: States shall provide effective mechanisms for prevention of, and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of forced assimilation or integration; ...

Article 18 provides:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 34 provides:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 46 provides some contextual provisions for interpretation:

Subsection 1: Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

Subsection 3: The provisions set forth in the Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

I conclude that the international community has achieved a level of clarity which has not previously existed in support of a norm which protects the right of existence of Aboriginality, recognizes the 'peoplehood' of Indigenous nations and belatedly acknowledges the distinct contribution of Indigenous peoples within the human community. Canada has now endorsed the *U.N. Declaration on the Rights of Indigenous Peoples*, and has acceded to the Human Rights Covenants which clearly apply to Aboriginal peoples; Canadian courts are cognizant of international law norms in the interpretation and application of domestic law. The *Constitution Act, 1982*²⁸² does acknowledge the collective nature of aboriginal and treaty rights and confirms that these are recognized and affirmed within Canadian constitutionalism.

Much as there is concern in the Canadian nation-state about the practical implications of this direction, there is acknowledgement of an emergent norm which enshrines the right of existence of human groups as a fundamental value. This acknowledgement charges the nation-state with some level of obligation which certainly includes non-destruction but arguably includes a more positive element of recognition and support for the sustaining and flourishing of culturally distinct human groups. It is my view that this norm is entirely congruent with the unwritten common law principle of 'equality of reason' or basic equity, and with the 'principle of continuity' with respect to the ancestral laws and customs of Aboriginal people. It reflects an awareness that a 'colony within' amounts to a fundamental violation of the human rights of a defined human group within the nation-state: the impacts of the dominance/inferiority dynamic of colonialism, compounded by the removal of land,

²⁸² *Supra* note 186.

resources and children, are devastating to the ability of the members of a distinct cultural group to survive as whole people.

The extremely ambivalent response of the Canadian state to these developments in international law attests to the deep roots of resistance to de-colonization within the national framework, but also to a deepening awareness that there are serious wrongs to be righted. This is a real source of dissonance for the Canadian polity about who we are as a nation, which creates the potential for movement in new directions such as are examined in the upcoming chapters of this study.

2.4 The Honour of the Crown

The belated but welcome recognition of national obligation towards the peoples of the ‘colony within’ raises another fundamental aspect of Canadian and imperial constitutionalism: the honour of the Crown.²⁸³ I argued in the first section of this chapter that the occasion of transfer of authority at Confederation from the U.K. to the new Dominion of Canada was utilized to bypass the obligations created by the history and doctrine of lawful relations which had characterized the relationship between the Crown and the Aboriginal inhabitants of British North America.²⁸⁴ One instance of the level of obligation assumed by

²⁸³ The chapter on Crown Obligations in J. Borrows & L. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 3rd Edition (Markham: LexisNexis Canada, 2007) at 435-543 has been a valuable source for the discussion which follows on the honour of the Crown and fiduciary obligation.

²⁸⁴ See text above in Chapter Two accompanying notes 211- 213.

the Crown was documented in the *Royal Proclamation of 1763*,²⁸⁵ which was characterized by Lord Denning in 1982 as “equivalent to an entrenched provision in the constitution of the colonies in North America. It was binding on the Crown ‘so long as the sun rises and the river flows’.”²⁸⁶ This doctrine was originally recognized in the context of treaty-making, in which ‘Indian title’ to lands was ceded to the Crown in exchange for various promises.

Since the enactment of s. 35(1) of the *Constitution Act, 1982* which recognizes and affirms treaty and aboriginal rights, Supreme Court jurisprudence has made clear that the honour of the Crown is always of fundamental importance with respect to these rights, and perhaps in a more general sense in Crown-Aboriginal relations. An example is to be found in the decision of Cory J. in *R. v. Badger* in 1996:

[T]he honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of “sharp dealing” will be sanctioned.²⁸⁷

The concept of the honour of the Crown is also the foundation of the line of cases which began with *Guerin*²⁸⁸ which discusses the fiduciary nature of the Crown-Aboriginal relationship. The significance of this decision was that it clarified “that the nature of the Crown’s obligation to aboriginal peoples is fiduciary, hence, legal rather than merely

²⁸⁵ *Supra* note 6.

²⁸⁶ *R. v. Secty for Foreign and Commonwealth Affairs-1982*, *supra* note 209 at 129-130.

²⁸⁷ *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41(LexUM), [1996] 2 C.N.L.R. 77 [*Badger* cited to S.C.R.].

²⁸⁸ *Guerin v. R.*, [1984] 2 S.C.R. 335; [1984] 6 W.W.R. 481 [*Guerin* cited to S.C.R.] (LexUM).

political or moral”.²⁸⁹ The basis of a fiduciary relationship is that one party, the fiduciary, holds an equitable obligation to the other, the beneficiary, because of an interaction in which:

[t]he beneficiary reposes trust and confidence in the honesty, integrity and fidelity of the fiduciary and relies upon the other’s care of that trust. Fiduciary law exists to protect those who trust in the ability of others, whether voluntarily or out of necessity, from having that trust abused.²⁹⁰

Because it arises out of a particular relationship or interaction, fiduciary obligation is said to be “*situation-specific*”,²⁹¹ and because of its equitable nature a fiduciary obligation demands high moral standards in its performance.²⁹²

In *Guerin*,²⁹³ Dickson J. for the Court emphasizes that the key to the demanding nature of the fiduciary obligation is that the fiduciary is given full power to act, with discretion to decide what is in the best interests of the beneficiary. When the Supreme Court in *Sparrow*²⁹⁴ first considered the scope of s. 35(1) of the *Constitution Act, 1982*,²⁹⁵ the Court relied on *Guerin* to support its assertion that as a “general guiding principle for s. 35(1) ... the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples ... and contemporary recognition and affirmation of aboriginal rights must be defined in light of this

²⁸⁹ Leonard I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 3 [*Parallel Paths*].

²⁹⁰ Borrows & Rotman, *supra* note 283 at 447.

²⁹¹ *Ibid.* at 451 [emphasis in original].

²⁹² *Ibid.* at 453.

²⁹³ *Guerin*, *supra* note 288 at 384.

²⁹⁴ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R.(4th) 385 [*Sparrow* cited to S.C.R.] (LexUM).

²⁹⁵ *Supra* note 186.

historic relationship.”²⁹⁶ The Court further refined the jurisprudence on the fiduciary obligation in 2002 in *Wewaykum*: “The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.”²⁹⁷

This latter proposition, of the need for supervision of the discretionary control assumed by the Crown over the lives of Aboriginal peoples, certainly supports the notion that a gross moral breach of the honour of the Crown exists with respect to its dealings with Aboriginal children. It also supports further consideration of the legality of the actions of the Crown, and of the responsibility of the Crown to repair the trust which has been so grievously breached. As was stated at the outset of this chapter, the government of Canada not only used the rule of law to remove the decision making power with respect to the children of ‘Indians’, it also removed the children and took them into the care of Euro-Canadian society as a primary method by which to extinguish Aboriginal culture as a presence within the Canadian polity.

The international community through the mechanism of the *Genocide Convention*,²⁹⁸ reinforced by the *United Nations Convention on the Rights of the Child*²⁹⁹ and the *United*

²⁹⁶ *Sparrow*, *supra* note 294 at 1108.

²⁹⁷ *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 79 [*Wewaykum*].

²⁹⁸ *Supra* note 162.

²⁹⁹ *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990, accession by Canada 28 May 1990) [CRC].

Nations Declaration on the Rights of Indigenous Peoples,³⁰⁰ has indicated its consensus that the coerced removal of children from their human group and into the care of another human group is numbered among the most destructive actions that can be taken towards both the children, and the ongoing existence of that human group. I argue that the decision making authority with respect to the care and well-being of Aboriginal children, which was taken from Aboriginal peoples by the power of the rule of law, has been used against the best interests of both Aboriginal children and Aboriginal peoples in breach of fiduciary duty, and that the honour of the Crown is called upon to restore the decision making authority of Aboriginal peoples with respect to the care of their children.

2.5 Conclusion

In the Western legal tradition, the finding of a legal violation raises the issue of remedy. I argue at the conclusion to the first part of this chapter that the acts taken at Confederation to remove decision making authority from Aboriginal peoples were contrary to the principles of constitutionalism which existed then, and the ongoing existence of the legal framework by which that action was authorized is contrary to current constitutional principles. There has been a legal violation, and the injustice continues with respect to the children of Aboriginal peoples inasmuch as the Canadian state continues to assert the power to dictate the worldview which must inform the notions of the safety and well-being of Aboriginal children.

³⁰⁰ *Supra* note 249, Article 7.2.

As will be discussed further in Chapter Four, there is a complex web of legislation, Memoranda of Understanding and contractual relationships in place to ensure that any Aboriginal body which is given authority in this area will be governed by Eurocentric standards.³⁰¹ This is precisely the nature of the dominance/inferiority relationship which is correctly labeled ‘colonial’, and which is at the heart of the moral and legal breach asserted in this paper: the illegitimate imposition of incapacity upon members of the human group designated as ‘Indians’, the negating of the decision making authority which rests within family and community institutions in any organized society, and the creation of a ‘legal’ framework within which the children of that group can be removed from the inferior circumstances of their families and be raised within a context of non-Aboriginality.

The recognition of the fundamental importance to societies of their customary laws and practices with respect to community institutions, and especially family relations and child raising, is the normative root of the ‘principle of continuity’ which was discussed in Part 2.2 of this chapter. The current developments in international law regarding the right of existence of the human group and in particular the struggle for Indigenous peoples to attain recognition for their ‘peoplehood’ also emphasize the dawning recognition in the larger human community of the need to protect and honour the diversity of our constituent human groups. In addition, the well-established equitable doctrine of fiduciary obligation challenges the Canadian state to make amends for its lack of care and inhumanity in its dealings with the vulnerable children of the Aboriginal peoples.

³⁰¹ This is discussed below in Chapter Four, *infra* notes 583-588 and accompanying text.

It is my assertion that, in the face of this sort of continuing injustice, the remedy called for is not apology and compensation of some sort for damage done, but rather a decision that the aberrant behaviour should cease, and be replaced by a regime which is respectful of the rights of the aggrieved peoples, and which restores to them any rights or powers which have been unlawfully denied. From this perspective, the discussion of custom adoption as a route to an alternative avenue for ensuring the safety and well-being of Aboriginal children is, in part, about remedy. Chapter Three will explore the idea of custom adoption as an Aboriginal right which, if examined from the perspective of its role in Aboriginal society, can be characterized as the operation of a customary law jurisdiction. The thesis then goes on in Chapter Four to an in-depth examination of those two key concepts, customary law and jurisdiction, to arrive at a more nuanced understanding of the promise and challenge offered by the recognition of customary law as the appropriate locus of jurisdiction with respect to the safety and well-being of the children of Aboriginal peoples.

Chapter 3 Aboriginal Rights, Customary Law and the Authority to Care for Children

I argued in Chapter Two that Confederation, the occasion of the transfer of authority from the U.K. to the new nation of Canada, was utilized to strip the Aboriginal inhabitants of the entitlements which were guaranteed to them as part of the history of lawful relations which had been integral to the Crown – Aboriginal relationship. The unilateral transformation of the status of Aboriginal peoples from pre-Confederation treaty partners to post-Confederation wards of the new federal government, without legal capacity or vote or voice was contrary to the principles of U.K. constitutionalism which were inherited by the Canadian state. This illegitimate exercise of constitutional authority was the basis by which the state acquired the ‘legal’ power to remove from Aboriginal families and communities the parental responsibility for their children, and ultimately to remove generations of children.

At the same time, however, decisions were made in the courts which reflected judicial respect for the principle of continuity – the continuing recognition of the laws and customs of the indigenous peoples, to the extent that they had not been specifically abrogated within the colonial context. This is particularly evident in a line of cases dealing with the recognition of the validity of marriage and adoption according to Aboriginal custom. The trail of Canadian cases on Aboriginal custom adoption begins in the 1960s with decisions in the context of the common law that the exercise of this element of customary law has been continuous within Aboriginal families and communities, is effective to create alternative familial status and is included among the unwritten laws recognized within Canada.

In the same general time period, in the 1970s, the struggle of the Nisga'a people of northern B.C. since Confederation culminated in recognition of the concept of Aboriginal title by the Canadian courts.³⁰² This was a significant factor in initiating 40 years of developing jurisprudence, and constitutional reform, with respect to Aboriginal rights. These two streams of jurisprudence dealing with fundamental aspects of Aboriginal identity, the relationship of the community to their children and to their traditional territories, were brought to a somewhat uncomfortable convergence when provision for the recognition and affirmation of 'aboriginal and treaty rights' became officially constitutionalized by the inclusion of s. 35(1) in the *Constitution Act, 1982*.³⁰³

In this chapter I review this jurisprudence, and related literature, from two perspectives. First, Part 3.1 explores the development of judicial thinking on the general subject of the recognition of Aboriginal rights within the new constitutional regime. This discussion demonstrates that the Court has had a greater level of comfort about the application of s. 35 to rights associated with the uses of the traditional territories (prior occupancy) than to rights arising out of the authority of organized Aboriginal societies (prior autonomy or sovereignty). In Part 3.2, I look specifically at custom adoption as a recognized Aboriginal customary right. Through a review of anthropological literature, and Court decisions, this section demonstrates that this traditional practice is rooted in kinship relations and is a complex organizing institution of Aboriginal society very different in nature than the Euro-

³⁰² *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, 33 D.L.R. (3d) 145 [*Calder* cited to S.C.R.].

³⁰³ *Constitution Act, 1982*, *supra* note 186.

Canadian concept of adoption. I propose that it is suggestive of a deeper sort of Aboriginal right: a customary law jurisdiction with respect to the care and well-being of children.

3.1 Foundations for the Recognition of Aboriginal Rights

3.1.1 Colonial Recognition of Aboriginal Customary Law

The common law doctrine of Aboriginal rights finds its source in the recognition that the Aboriginal peoples were a prior presence in North America: "... the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."³⁰⁴ Recent scholarship highlights that this 'presence' consisted of autonomous and sovereign peoples and may be more correctly characterized as prior sovereignty, which supports a more comprehensive claim than does prior occupancy.³⁰⁵ The Supreme Court of Canada has characterized the established customs, practices and usages of the organized societies of Aboriginal peoples as "pre-existing systems of aboriginal law".³⁰⁶ The obligation of the Crown to recognize and respect, for certain purposes, the rights which inhered to the peoples and institutions of these societies was confirmed by the *Royal Proclamation, 1763*,³⁰⁷ and subsequently became the subject of a long line of litigation in the courts of the United States, British North America and subsequently Canada.

³⁰⁴ *Calder*, *supra* note 302 at 328.

³⁰⁵ For example, see Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stan. L. Rev.* 1311 at 1333-1335 [Macklem, "Distributing Sovereignty"].

³⁰⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 114, 153 D.L.R.(4th) 193 (LexUM) [*Delgamuukw* 'w cited to S.C.R.].

³⁰⁷ *Royal Proclamation, 1763*, *supra* note 6.

The evolution of judicial thinking on this subject as it was developing in the 19th century can be found in three decisions of then Chief Justice Marshall of the U.S. Supreme Court;³⁰⁸ *Worcester v. State of Georgia*³⁰⁹ (1832) expresses the conclusions of Marshall's thinking. Because this judgement has been cited by the Supreme Court of Canada as an authoritative expression of the law and of British policy³¹⁰ for what was then British North America, and would become Canada within 35 years, I will quote at some length:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws...³¹¹

This principle [the 'principle of discovery'], acknowledged by all Europeans, ... gave to the nation making the discovery... the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; *not one which could annul the previous rights of those who had not agreed to it*. It ... could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.³¹²

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, ... The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by

³⁰⁸ *Johnson v. McIntosh* (1823) 8 Wheaton's Rep., 543; *Cherokee Nation v. Georgia* (1831), 30 U.S. (5 Pet) 1; *Worcester v. State of Georgia* (1832), 31 U.S. (6 Pet.) 515 [*Worcester*].

³⁰⁹ *Worcester, ibid.*, online: FindLaw <<http://caselaw.lp.findlaw.com/us/31/515.html>> [*Worcester* cited to 31 U.S. 515].

³¹⁰ *R. v. Van der Peet*, *supra* note 217 at para. 37.

³¹¹ *Worcester, supra* notes 308 and 309 at 542-43.

³¹² *Ibid.* at 544 [emphasis added].

subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.³¹³

The beginnings of Canadian-based jurisprudence related to the recognition of Aboriginal legal rights is found in a decision of the Superior Court of Lower Canada, which was released on July 9, 1867, nine days after Confederation. In *Connolly v. Woolrich*,³¹⁴ Mr. Justice Monk dealt with the validity of a marriage according to Indian (Cree) custom between a Christian white man born in Montreal and a Cree woman; they had subsequently lived together for almost 30 years and had 6 children. The family all moved to Montreal after 28 years had passed, and in the second year there Mr. Connolly with the support of the church disavowed the legality of his custom marriage and married Julia Woolrich. The oldest son of the first marriage subsequently sued for his portion of a half-share of his father's estate.

In deciding the fundamental question, the legality of the marriage according to Aboriginal custom, Monk J. first considers whether the existence of either British law or French law, inasmuch as it could be said to govern the Europeans who inhabited the territory where the marriage occurred, would negate the 'lawfulness' of this alleged marriage. He poses a question, and answers it:

[W]ill it be contended that ... the laws and usages of the Indian tribes were abrogated; that they ceased to exist, when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left

³¹³ *Ibid.* at 547.

³¹⁴ *Connolly v. Woolrich*, (1867) Lower Can. Jur. 197, 17 R.J.R.Q. 75 [*Connolly* cited to R.J.R.Q.]; aff'd (sub nom. *Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Qc. Q.B.) [*Johnstone* cited to R.J.R.Q.].

in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives.³¹⁵

He then specifically considers the content and implications of the Hudson's Bay Charter of 1670:

It did not apply to the Indians, nor were the native laws or customs abolished or modified, and this is unquestionably true in regard to their civil rights. It is easy to conceive, in the case of *joint occupation* of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. ... The Charter did introduce the English law, but did not, at the same time, make it applicable generally or indiscriminately; *it did not abrogate the Indian laws and usages. The Crown has not done so. Their laws of marriage existed and exist under the sanction and protection of the Crown of England ...*³¹⁶

He confirms the legality of the Aboriginal customary marriage and concludes that the subsequent Christian marriage was a nullity. In arriving at this conclusion, Mr. Justice Monk undertook an exhaustive review which confirmed a legal tradition of the recognition of customary law since ancient times, particularly with respect to family relations.

As was discussed in Chapter Two Part 2.2, the law with respect to the colonies of the British Empire (the 'imperial common law') honoured the 'principle of continuity' which affirmed that the laws and customs of the original inhabitants of a colonized territory would be recognized and enforced by the common law unless the colonial authority chose by way of specific legislative action to abrogate the local law.³¹⁷ One of the important justifications for this doctrine was that it enabled a continuous rule of law despite circumstances of profound

³¹⁵ *Ibid.* at 84.

³¹⁶ *Ibid.* at 95 [emphasis added].

³¹⁷ See Walters, "Continuity" *supra* note 218 and accompanying text.

cultural difference. When, as in Canada, Britain asserted sovereignty over non-Christian peoples, the result of this principle could be the existence of two parallel legal systems, one for the settlers and one being the continuation of the local law of the original inhabitants. Even if English law was eventually extended over the local community by legislation, elements of the local law and custom would often continue to be recognized and persist as part of the extended sovereign law.³¹⁸ In the case of Aboriginal societies, elements of their local law were recognized by the English common law in the colonial courts, and to that extent the common law “may recognize elements of Native self-government.”³¹⁹ Walters notes that this was particularly true with respect to laws regarding family relations.³²⁰

3.1.2 Canadian Recognition of Aboriginal Customary Law: Family Relations

The theory that the operation of the ‘principle of continuity’ in the courts of Canada lead to common law application of elements of customary law on issues of family relations is supported by a review of the jurisprudence. Among the earliest of these cases is *Nan-E-Quis-A-Ka*³²¹, an 1889 decision of the Court of Appeal of the Northwest Territories dealing with the question of whether the evidence of a wife by native custom marriage was admissible in criminal proceedings against her husband. The Court notes that the laws of England as they

³¹⁸ *Ibid.* at 719: examples include Wales and Ireland after conquest.

³¹⁹ *Ibid.* at 720.

³²⁰ *Ibid.* at 728.

³²¹ *R. v. Nan-E-Quis-A-Ka*, (1889) 1 Territories Law Reports 211 (C.A.) [*Nan-E-Quis-A-Ka*].

existed at 15th July 1870 now governed the Northwest Territories,³²² and considers whether the ‘Indian’ population is therefore governed by the laws of England respecting the solemnization of marriage:

The Indians are for the most part unchristianized: they yet adhere to their own peculiar marriage custom and usage. ...I know of no Act of the Parliament of the United Kingdom or of Canada, except as hereinafter stated, which affects in any way these customs or usages. The Ordinance Respecting Marriage, chapter 29 Revised Ordinances (1888) does not in my opinion affect the question. The conclusion I have arrived at is that a marriage between Indians by mutual consent and according to Indian custom since 15th July, 1870 is a valid marriage...³²³

Justice Wetmore notes that there are frequent references in the *Indian Act*³²⁴ and in the amending Act³²⁵ to the marital relationship, to the status of husband and wife, to widows, and to illegitimate children. He concludes that “these expressions were intended to apply to all Indians, Pagans and Christians alike. If so *they amount to a statutory recognition of these marriages according to Indian custom in the Territories.*”³²⁶

Thus, in an example of the common law conception of unwritten law, the Court of Appeal concludes that in 1889 the references in the *Indian Act* to the marital relationship must be interpreted to constitute a statutory recognition of Aboriginal customary law.³²⁷

³²² *The North-West Territories Act*, R.S.C. c. 50, s. 11.

³²³ *Nan-E-Quis-A-Ka*, *supra* note 321 at 215.

³²⁴ *Indian Act*, R.S.C. 1886, c. 43.

³²⁵ S.C. 1887, c. 33.

³²⁶ *Nan-E-Quis-A-Ka*, *supra* note 321 at 216 [emphasis added].

³²⁷ This is a case which has been referred to and cited many times. It was followed in an 1899 decision of the lower court in the Territories in a case in which a Blood Indian was convicted based upon native custom marriages of the offences of polygamy and entering into conjugal union with more than one person at the same

The situation regarding custom marriage among the ‘Eskimo’ peoples (as the Aboriginal peoples of the Arctic were then called, now referred to as Inuit and Inuvialuit) was thoroughly reviewed by the Territorial Court of the Northwest Territories in 1961 in the case of *Re Noah Estate*.³²⁸ Justice Sissons found that the recent amendment to the *Northwest Territories Act*³²⁹ to provide that laws of general application in the Territories are applicable to Eskimos was not effective to accomplish a sweeping authorization for the Territorial Government to abrogate, abridge or infringe the vested rights of the Eskimo people.³³⁰ He ruled that this could be accomplished only with clear legislative expression of intent, and that Parliament had not legislated so as to have that effect. He concludes by finding that a custom marriage “*was a legal marriage under the laws of the Northwest Territories*”,³³¹ thus confirming the recognition of Aboriginal customary law within the rubric of the common law.

time, contrary to the Criminal Code of Canada: *R. v. Bear's Shin Bone* (1899), 4 Territories Law Reports 173, 3 C.C.C. 329 (S.C.). The *Nan-E-Quis-A-Ka* decision was at the centre of legal argument in a criminal case in the B.C. Supreme Court in 1921, again regarding the issue of the competence of a witness. Mr. Justice Gregory decided that the evidence of the wife by custom marriage was not admissible: *R. v. Tom Williams* (1921), 37 C.C.C. 126 (B.C.S.C.). In a decision of the B.C. Court of Appeal in the case of *Yew v. A.G.B.C.* (1923), [1924] 1 D.L.R. 1166 at 1184 Martin J.A. confirms the ongoing application of the 1867 decision in *Connolly* with respect to the validity of custom marriage.

³²⁸ *Re Noah Estate* (1961), 32 D.L.R. (2d) 185, 36 W.W.R. 577 (N.W.T.T.C.) [*Re Noah* cited to D.L.R.].

³²⁹ *Northwest Territories Act*, R.S.C. 1952, c. 331 as amended by S.C. 1960, c. 20, s. 2 [*N.W.T. Act, 1952*] by adding s. 17(2) as follows: “(2) All laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories.”

³³⁰ *Supra* note 328 at 203.

³³¹ *Ibid.* at 206 [emphasis in original].

In the 1960s, case law in Canada regarding native custom adoption begins to appear,³³² most of the initial cases originating in the Northwest Territories and dealing with both Indian and Inuit families. In the same year as the *Re Noah Estate* case, Sissons J. also ruled for the Territorial Court in *Re Katie's Adoption Petition*.³³³ He again held that the *Northwest Territories Act*,³³⁴ and the legislation of general application of the time concerning adoption,³³⁵ did not abrogate Inuit customs and that custom adoptions were included among adoptions “made according to the laws of the Territories.”³³⁶ The *Re Katie* case was followed by Morrow J. of the Territorial Court in 1969 in *Re Beaulieu's Petition*;³³⁷ this judgement also notes the provision of the *Indian Act* which recognizes Indian custom adoption for purposes of intestate succession.³³⁸ These two cases place custom adoption within the same framework as custom marriage – that as a matter of unwritten law as well as positive law this aspect of Aboriginal customary law is recognized as being ‘lawful’, within the framework of Territorial and Canadian laws.

³³² Although the earliest recorded Canadian decision dealing with custom adoption dates to 1961 (see notes 333-336 *infra* and accompanying text), cases from other jurisdictions confirm the longstanding common law recognition of this Aboriginal custom. See for example *Hineiti Rirerire Anani v. Public Trustee of New Zealand* (1919) [1920] A.C. 198, [1840-1932] N.Z.P.C.C. 1 (P.C.) [*Hineiti Rirerire Anani* cited to A.C.].

³³³ *Re Katie*, *supra* note 1.

³³⁴ *N.W.T. Act*, *supra* note 329.

³³⁵ *Child Welfare Ordinance*, N.W.T.O. 1961 (2nd Sess.), c. 3, Part IV.

³³⁶ *Re Katie*, *supra* note 1 at 690.

³³⁷ *Re Beaulieu's Petition* (1969), 3 D.L.R. (3d) 479, 6 C.N.L.C. 22 (N.W.T.T.C.) [*Re Beaulieu* cited to D.L.R.].

³³⁸ *Indian Act*, R.S.C. 1952, c. 149, s. 48(16).

In 1972 in *Re Deborah*,³³⁹ a case in which an Inuit custom adoption was challenged by the natural parents who wished to have their child returned to them, Morrow J. looked in more depth at the legal issues which are raised by custom adoption. He noted that native people constituted two-thirds of the population of the Northwest Territories, and that their practice of custom adoption was well known when the ordinances regulating adoption were passed, and yet there was no language in the ordinances which disallowed non-complying adoptions.³⁴⁰ He concluded by relying upon common law authority dating back to 1559 which holds that the legal recognition of longstanding “customs” applies unless Parliament specifically acts to alter it.³⁴¹ The Court of Appeal of the N.W.T. affirmed the decision,³⁴² and thereby became the first appellate court in Canada to recognize custom adoption.³⁴³

While not all courts agreed on these matters,³⁴⁴ by the early 1970s there was a significant body of case law affirming that Aboriginal customs related to marriage and adoption which had been practiced by Aboriginal peoples “as far back as living memory goes”³⁴⁵ had not been displaced by the assertion of British/Canadian law, and were effective to define family

³³⁹ *Re Deborah*, 27 D.L.R. (3d) 225, [1972] 3 W.W.R. 194 (N.W.T.T.C.) [cited to D.L.R.].

³⁴⁰ *Ibid.* at 234-235. Custom adoption would be included as an adoption which did not comply with the ordinance.

³⁴¹ *Ibid.* at 235 relying on *Anon.*, Case LXX (1560), Jenk. 220, 145 E.R. 151.

³⁴² *Re Deborah*, [1972] 5 W.W.R. 203; 28 D.L.R. (3d) 483 (N.W.T.C.A.) [*Deborah (C.A.)* cited to D.L.R.].

³⁴³ This information is from a paper by Norman Zlotkin, “Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases”, reproduced at [1984] 4 C.N.L.R. 1.

³⁴⁴ For example, in *R. v. Cote* (1971) 5 C.C.C. (2d) 49, the Saskatchewan Court of Appeal decided that a native custom marriage did not operate to make the evidence of a spouse inadmissible.

³⁴⁵ This quote originates in *Anon.*, *supra* note 341 and was cited in *Deborah (C.A.)*, *supra* note 342 at 488.

status for at least certain legal purposes. The legal recognition of these customs as being authoritative was anchored in jurisprudence and constitutional documents and practices dating back to the mid-18th century.

3.1.3 The Shift from Common Law Rights to Constitutional Rights

While the common law doctrine of Aboriginal rights was applied throughout the early and middle years of the 20th century as required, primarily to address issues of family status as described above and as a defence in issues related to the regulation of hunting and fishing, this doctrine was not seriously examined again at the senior judicial level until the *Calder*³⁴⁶ case in 1973.

This case represented the culmination of the struggle of the Nisga'a people of northern B.C., since the entry of B.C. into Confederation, to assert their view that they had never ceded their right to the possession and use of their traditional lands to the Crown, and that they therefore held an Aboriginal title right which had not been extinguished either before or since Confederation. They were successful in the assertion of the existence of Aboriginal title,³⁴⁷ giving new life to the common law doctrine of Aboriginal rights.

³⁴⁶ *Calder*, *supra* note 302.

³⁴⁷ The Court, however, divided on the question of extinguishment.

The *Calder* case was one of the factors³⁴⁸ which caused the federal government to re-think its position on the rights of Aboriginal people in Canada. One of the most significant results of that process was the inclusion in the *Constitution Act, 1982*³⁴⁹ of several provisions which deal specifically with Aboriginal rights, most notably section 35(1) which states simply: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

A series of cases followed, through which the Supreme Court of Canada has incrementally developed its thinking about the relationship between the rights of Aboriginal people which originate in their prior presence as autonomous peoples in North America, and the circumstance that those peoples now live in a society which has assumed and asserted sovereignty over both Indian lands and Indian people. This assertion of Crown sovereignty has been accepted as a given by the Supreme Court of Canada in all of its decisions, but certainly the implications of it are up for interrogation. I argued earlier that there are strong reasons to challenge the lawfulness of an assumption of sovereignty which purported to bypass the existing obligations and commitments of the Crown. The general issue of the nature of sovereignty as it was theorized in the nineteenth century will arise again in Chapter Four. For purposes of this chapter, it is sufficient to note that conceptions of sovereignty form the backdrop to all of the discussion of constitutional Aboriginal rights.

³⁴⁸ Other significant factors were the response of Aboriginal peoples to the 1969 White Paper on Indian Policy, see *supra* note 260 and accompanying text, and also international attention because of complaints brought by Aboriginal peoples of Canada under the *Optional Protocol*, see *supra* notes 265 and 269.

³⁴⁹ *Constitution Act, 1982*, *supra* note 186.

The Supreme Court first turned its mind to the meaning of section 35(1) of the *Constitution Act, 1982* in the 1990 decision in *Sparrow*.³⁵⁰ A unanimous Court notes that historically the British policy of respect for certain traditional rights of the Aboriginal peoples existed in the context of an assumption that sovereignty and legislative power was held by the Crown. They describe s. 35(1) as signifying an element of change with respect to that unquestioned sovereignty, and quote with approval from an academic discussion of the section: “Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”³⁵¹

The Court decides that the meaning of the constitutional obligation to ‘recognize and affirm’ existing³⁵² Aboriginal and treaty rights should be interpreted in light of two principles: first, because it is a constitutional guarantee of rights, s. 35(1) should be given “a generous, liberal interpretation”,³⁵³ and secondly the honour of the Crown requires that “the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples.”³⁵⁴ They state that the words of s. 35(1) “incorporate the fiduciary relationship and ... so import some

³⁵⁰ *R. v. Sparrow*, *supra* note 294.

³⁵¹ *Ibid.* at 1105-1106 citing Noel Lyon, “An Essay on Constitutional Interpretation” (1988), 26 Osgoode Hall L.J. 95 at 100.

³⁵² *Ibid.* at 1091-1093. The Court found that, if an Aboriginal right or a treaty right had existed and had not been extinguished prior to 1982, it is an “existing” right within the meaning of s. 35(1) and would henceforth be constitutionally protected.

³⁵³ *Ibid.* at 1106.

³⁵⁴ *Ibid.* at 1108.

restraint on the exercise of sovereign power”.³⁵⁵ This interpretive principle is thus substantive in nature: it implies that there is a quality inherent in the Crown-Aboriginal relationship which has been imported into the constitutional recognition of Aboriginal and treaty rights and which circumscribes the theoretically absolute power of Crown sovereignty. The Court asserts that, in practical terms, it is the fiduciary duty, the obligation on the federal government of “a high standard of honourable dealing with respect to the aboriginal peoples of Canada”,³⁵⁶ which situates the limit between the exercise of Crown sovereignty and the rights of Aboriginal peoples.

Although the government continues to hold the powers to legislate or regulate, if their action interferes with the exercise of an Aboriginal right they are required to justify the interference.³⁵⁷ The Crown must establish that the government in question had a valid legislative objective³⁵⁸ and that the interference is no more than is necessary in order to achieve that objective.³⁵⁹ Above and beyond that, the standard of justification requires that the Crown must demonstrate that the imposition of the infringement is consistent with the honour of the Crown in its obligation to recognize and affirm Aboriginal rights: “the responsibility of the government vis-à-vis aboriginals must be the first consideration in

³⁵⁵ *Ibid.* at 1109.

³⁵⁶ *Ibid.* at 1109.

³⁵⁷ *Ibid.* at 1109.

³⁵⁸ *Ibid.* at 1113.

³⁵⁹ *Ibid.* at 1119.

determining whether the legislation or action in question can be justified.”³⁶⁰ This obligation was also described by the Court as effecting “a measure of control over government conduct and a strong check on legislative power. ... it does hold the Crown to a substantive promise.”³⁶¹

In 1996 in *Van der Peet*,³⁶² the Supreme Court had its first opportunity to consider what would be required to establish the existence of an Aboriginal right. Chief Justice Lamer on behalf of the majority of the Court presents a test which would govern the identification of Aboriginal rights protected by s. 35(1):

In order to fulfil the purpose underlying s. 35(1) – ie., the protection and *reconciliation* of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions – the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must ... aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.³⁶³

Given that Lamer C.J. here describes the purpose of s. 35(1) as “the protection and reconciliation of the interests” arising from prior presence, it is interesting to look at his earlier discussion of a doctrine of reconciliation, in a decision before he became the Chief Justice. *Sioui*³⁶⁴ was a case in which the accused First Nations men, charged with lighting

³⁶⁰ *Ibid.* at 1114.

³⁶¹ *Ibid.* at 1110.

³⁶² *Van der Peet*, *supra* note 217.

³⁶³ *Ibid.* para. 44 [emphasis added].

³⁶⁴ *R. v. Sioui*, [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427 [*Sioui* cited to S.C.R.].

fires in a Provincial Park contrary to the regulations, relied on a treaty dating back to 1760 which permitted their ancestors the right to engage in ceremonial rites. They defended themselves on the basis that provincial laws are not applicable if actions are taken pursuant to a treaty right.³⁶⁵ In the discussion as to whether these rights can be exercised in the park, one can see the early formulation of the thinking of Justice Lamer, which later appears full-blown in *Van der Peet*, about the need to reconcile the interests and rights of the Aboriginal people with the sovereignty of the Crown.³⁶⁶ It is apparent in *Sioui*, more than in his later polished presentation of this doctrine in *Van der Peet*, that Chief Justice Lamer's concept of reconciliation is premised on the assumption that the sovereignty of the Crown governs and supersedes the rights of Aboriginal peoples. This concept of reconciliation will be discussed in more depth in Chapter Four, in the context of a query as to why a reconciliation approach to resolving the issues between Canada and the Aboriginal peoples is problematic.

The test referred to in the quote above has become known as the 'integral to the distinctive culture' test: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal people claiming the right."³⁶⁷ The judgement then discusses the factors to be considered in the application of this test. First emphasizing that courts must take into account the perspective of Aboriginal peoples themselves, Lamer C.J. is quick to circumscribe his statement by noting that any

³⁶⁵ This exemption is provided in the wording of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5, which begins with the words "Subject to the terms of any treaty ..." which qualifies the general applicability of provincial laws to Indians.

³⁶⁶ *Sioui*, *supra* note 364 at 1071.

³⁶⁷ *Van der Peet*, *supra* note 217 at para. 46.

definition of an Aboriginal right must also be “in terms which are cognizable to the non-aboriginal legal system.”³⁶⁸ He then goes on to identify three questions which must be answered in order to establish an Aboriginal right:

- What is the precise nature of the right which is being claimed? The suggested analysis here is threefold: what action is claimed to be taken pursuant to an aboriginal right, what type of governmental regulation prevents or limits such an action, what traditional activities are relied upon to establish the right being claimed?³⁶⁹
- Was the practice, custom or tradition in question of central significance to the distinctive culture of the Aboriginal society? Was it a defining feature?³⁷⁰
- Is there evidence which shows continuity between the traditional activities which were central to the Aboriginal society in the pre-contact period and the current activities which are claimed as an Aboriginal right?³⁷¹

Given that the jurisprudence on s. 35(1) rights was at its early stages in this case, it is important to note that there are two extensive dissenting judgements. Madame Justice (as she then was) McLachlin’s analysis of the purpose of s. 35(1) is both more pragmatic and more far-reaching than that of the majority, as illustrated in the following excerpts:

³⁶⁸ *Ibid.* para. 49.

³⁶⁹ *Ibid.* para. 51-54. The threefold analysis proposed by the Court to determine the precise nature of the right being claimed has come to be known as the ‘*Van der Peet* factors’: an impugned action, the offended law or regulation, the claimed traditional practices.

³⁷⁰ *Ibid.* para. 55-59.

³⁷¹ *Ibid.* para. 60-67.

*[S]. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishments. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.*³⁷²

To summarize, a court approaching the question of whether a particular practice is the exercise of a constitutional aboriginal right under s. 35(1) must adopt an approach which: ... above all, is true to the position of the Crown throughout Canadian history as trustee or fiduciary for the first peoples of this country. ... We apply the common law, but the common law we apply must give full recognition to the pre-existing aboriginal tradition.³⁷³

Justice McLachlin's analysis adds significant factors to the potential scope of s. 35(1) rights.

Firstly, it situates the origins of Aboriginal rights in a pre-existing legal order, which is itself recognized at the constitutional level and is presumed to have the capacity to create rights which continue to exist unless legally extinguished. Secondly, the obligation on the Crown with respect to 'reconciliation' is legal or substantive in nature because it incorporates the fiduciary relationship, the source of the "high standard which the law imposes on the Crown".

The most profound criticism leveled in the other dissenting opinion deals with the meaning of the 'integral to the distinctive culture' test. Justice L'Heureux-Dubé asserts strongly that the test should not focus on a particular practice or custom, but rather on the 'distinctive culture' in which the specific practices are engaged. She says that "the emphasis should be on

³⁷² *Ibid.* para. 230 [emphasis added].

³⁷³ *Ibid.* para. 232.

the significance of these activities to natives rather than on the activities themselves,”³⁷⁴ and notes the contrast between the ‘frozen rights’ approach of the majority, and a ‘dynamic rights’ approach which would foster “contemporary relevance”³⁷⁵ rather than historical preservation.

The *Van der Peet* decision established the framework for the interpretation of s. 35(1) Aboriginal and treaty rights. As the Court moved forward in this vein to deal with other cases, the concerns identified in the dissenting reasons were further developed and amplified by numerous commentators.³⁷⁶

Two prominent scholars have gone back to the foundations of the common law doctrine of Aboriginal rights, and have found the s. 35 jurisprudence wanting in comparison. In *The Golden Thread of Continuity*,³⁷⁷ which examines the treatment of Aboriginal customs at common law and under s. 35 of the *Constitution Act, 1982*, Mark Walters concludes that the Court has moved away from the foundational principles of the common law by deciding to protect the distinctiveness of cultural practices rather than the pre-existence of autonomous self-regulating societies with comprehensive laws and practices. The main difficulty that

³⁷⁴ *Ibid.* at para. 157.

³⁷⁵ *Ibid.* at para. 172.

³⁷⁶ See for example Chilwin Chienhan Cheng, “Touring the Museum: A Comment on *R. v. Van der Peet*” (1997) 55 U.T. Fac. L.R. 419; Russel Lawrence Barsh & James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997), 42 McGill L.J. 993; John Borrows & Leonard I. Rotman, “The *Sui Generis* Nature of Aboriginal Rights: Does It Make A Difference?” (1997) 36 Alta. L. Rev. 9 [Borrows & Rotman, “*Sui Generis* Aboriginal Rights”].

³⁷⁷ Walters, “Continuity”, *supra* note 218.

John Borrows³⁷⁸ identifies is that “Aboriginal is retrospective. It is about what was, ‘once upon a time’, central to the survival of a community, not necessarily about what is central, significant, and distinctive to the survival of these communities today.”³⁷⁹ The decision to root Aboriginal rights in pre-contact practices is in effect a decision to freeze Aboriginal culture, to not honour the right and need for Aboriginal communities to change and develop in accordance with their circumstances. As Borrows argues, “[i]t is a good thing the rights of other Canadians do not depend on whether they were important to them two or three hundred years ago.”³⁸⁰ Borrows prefers the approach of the common law, which begins from a starting point of organized societies with laws and customs, and which recognizes that laws and customs must develop and change over time.

A major theme identified by these commentators and the dissenting judgements is that the concept of Aboriginal rights adopted by the majority of the Court focuses on singular activities and does not identify as central the obligation of the Crown to honour the laws and customs of the pre-existing autonomous Aboriginal societies. This obligation has been demonstrated to be a fundamental principle of the common law heritage, which may have fallen through the cracks in the shift from common law rights to constitutional rights. The subject matter of this thesis, an inquiry into Aboriginal rights related to the raising of children, falls into this stream of jurisprudence which is thus identified as situated outside of

³⁷⁸ J. Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” in *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) 56 [Borrows, “Frozen Rights”].

³⁷⁹ *Ibid.* at 60. He notes that significant developments in Aboriginal practices occurred in response to, and in interaction with the European settlers, and that these practices should be included within the protected rights.

³⁸⁰ *Ibid.* at 68.

the focus of the *Van der Peet* test for defining the sort of Aboriginal rights which will be protected by s. 35. I explore this issue quite fully in the section below.

3.1.4. Rights Originating with the Recognition of Pre-Existing ‘Organized Societies’

I asserted in the opening paragraphs of this chapter that by the 1970s it was evident that there were two strands of jurisprudence dealing with recognition of Aboriginal rights, one more associated with ‘prior occupancy’(of territories) and the other with ‘organized societies’. This is not a clean distinction, but as a generalization the former manifests itself more as activities whereas the latter is more about processes: of social interaction, of decision making, of levels and sources of authority, and of systems of law. These are functions more internal to the Aboriginal society whereas activities such as hunting and fishing are carried out in a more external setting.

It is interesting to observe that the jurisprudence which I call the ‘organized societies’ stream, as manifested in the family relations cases, seems to have actually been historically (as the theory of the ‘principle of continuity’ suggests) subject to a more constant and favourable pattern of recognition by the courts than was the ‘prior occupancy’ stream. This may reflect that the circumstances where ‘occupancy’ issues came to the courts were situations of conflict between the activities undertaken by Aboriginal peoples pursuing the traditional uses of their territories, and the rules of Canadian society which regulate those sorts of activities. The realm of family relations, on the other hand, or Aboriginal systems of interaction and social authority, were less likely to come to the attention of the Canadian authorities in a conflict scenario. Asking the courts to recognize that a relationship constitutes marriage or

that a child is the child of a different set of parents does not involve a challenge to or confrontation with the laws of the dominant society. This is the realm of the private, whereas the more external activities are in the realm of the public.

I argue that until the enactment of s. 35(1) of the Constitution, the courts were fairly comfortable with their role supervising the ‘organized societies’ issues of which family relations is a prominent subset. A significant shift occurred post-1982, when it became clear that ‘organized societies’ thinking was emerging within the public realm and leading towards rights of self-government – or to a challenge to the applicability of child protection laws to Aboriginal children living on reserve, as will be discussed in Part 3.2 of this chapter.

I do not for purposes of this thesis review the ‘prior occupancy’ jurisprudence, but I now turn to a review of some of the ‘organized societies’ cases, for the purpose of demonstrating that there is significant reluctance on the part of the courts to venture very far into that realm.

R. v. Sioui³⁸¹

The findings of Lamer J. in this decision from 1990 are of interest with respect to the recognition of pre-existing autonomous societies:

I consider that ... we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations. ... This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. The papers of Sir William Johnson

³⁸¹ *Sioui*, *supra* note 364.

(*The Papers of Sir William Johnson*, 14 vol.), who was in charge of Indian affairs in British North America, demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians.³⁸²

Further into his discussion, he notes that it was the policy of the British to treat the Indian nations with respect and generosity, and they “allowed them autonomy in their internal affairs, intervening in this area as little as possible.”³⁸³

R. v. Pamajewon³⁸⁴

After deciding the *Van der Peet* case, which dealt with fishing rights, the Supreme Court of Canada in the same year (1996) issued a judgement in a case which dealt directly with a claim framed as a right of self-government. In *Pamajewon*, a criminal prosecution, a defence was proffered which posited that gambling activities on a reservation were encompassed within a protected s. 35(1) Aboriginal right to manage the use of reserve lands as an aspect of a right of self-government. Lamer C.J. rejects the characterization of “a broad right to manage the use of ... reserve lands” as being excessively general, and relies on the ‘*Van der Peet* factors’ to arrive at an “appropriate level of specificity”.³⁸⁵ There is also a general comment by Lamer C.J. that “[a]boriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case.”³⁸⁶ This is

³⁸² *Ibid.* at 1052-53.

³⁸³ *Ibid.* at 1055.

³⁸⁴ *R. v. Pamajewon*, [1996] 2 S.C.R. 821, 27 O.R. (3d) 95 [*Pamajewon* cited to S.C.R.] (LexUM).

³⁸⁵ *Ibid.* at para. 27. With respect to the *Van der Peet* factors, see note 369 and accompanying text.

³⁸⁶ *Ibid.* at para. 27.

a succinct and spare decision which suggests strongly that a general claim to self-government will not be welcomed by the Court.

Delgamuuk'w v. British Columbia³⁸⁷

The Supreme Court again looked at s. 35(1) Aboriginal rights, including a possible claim in the nature of self-government, in 1997 in the *Delgamuuk'w* decision, in which Lamer C.J. wrote the decision for the majority. *Delgamuuk'w* deals with Aboriginal title, a subset of Aboriginal rights. Noting that one of the sources for the legal recognition of Aboriginal title is the acknowledgement of the prior occupation by the Aboriginal peoples of the lands of North America, the Court adds that the other source is “the relationship between common law and the pre-existing systems of aboriginal law.”³⁸⁸

There is also reference in this judgement to the aboriginal systems of governance, which is a significant affirmation of the authoritative nature of the societal organization of Aboriginal peoples. However, the Supreme Court concluded that there was not a proper factual foundation for the self government claim, and it was referred back for a new trial. Chief Justice Lamer’s comments emphasize the difficult conceptual issues and extreme complexity that would be involved in the recognition of a right of self government.³⁸⁹

³⁸⁷ *Delgamuuk'w*, *supra* note 306.

³⁸⁸ *Ibid.* at para. 112-115; the specific quote is at para. 114.

³⁸⁹ *Ibid.*, at para. 170-171.

Mitchell v. M.N.R.(Minister of National Revenue)³⁹⁰

In 2001 in *Mitchell* the Supreme Court again turned its mind to a situation where the Aboriginal right claimed was not related to lands or resources, but to the organized features of an Aboriginal society. The majority decision is that of now Chief Justice McLachlin:

This case raises the issue of whether the Mohawk Canadians of Akwesasne have the right to bring goods into Canada from the United States for collective use and trade with other First Nations without paying customs duties. Grand Chief Michael Mitchell claims that his people have an aboriginal right that ousts Canadian customs law. The government replies that no such right exists, first because the evidence does not support it and second because such a right would be fundamentally contrary to Canadian sovereignty.³⁹¹

Chief Justice McLachlin begins with a general overview of the nature of Aboriginal rights, and presents clearly her view of the inter-relationship between Aboriginal and non-Aboriginal legal systems:

... aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered ... or, (3) the government extinguished them.³⁹²

Because one of the responses of the government to this claim was the assertion of 'sovereign incompatibility', McLachlin C.J. addresses it briefly, in circumstances where she has already decided that the claimant has failed to establish the factual basis for the existence of the Aboriginal right claimed. She says that the jurisprudence to date has "affirmed the doctrines of extinguishment, infringement and justification as the appropriate framework for resolving conflicts between aboriginal rights and competing claims, including claims based on Crown

³⁹⁰ *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 [*Mitchell*].

³⁹¹ *Ibid.* at para. 1.

³⁹² *Ibid.* at para.10.

sovereignty.”³⁹³ She chooses not to address the merits of the ‘sovereign incompatibility’ doctrine where it is not required.

However, Binnie J. (Major J. concurring) does address this at some length. One of the things he notes is the position of the Crown that “such a claim goes beyond the sort of economic or cultural activity or land-based interest that the courts have previously recognized under s. 35(1).”³⁹⁴ In advancing this position, the Crown is noting the distinction, drawn earlier in this chapter, between the stream of jurisprudence recognizing rights based upon uses of territories and that stream recognizing rights based upon prior organized societies, and is asserting that the former type of right is more appropriate to be recognized under s. 35(1) than is the latter.

Justice Binnie notes that he is not talking here about “the compatibility of internal aboriginal self-government with Canadian sovereignty.”³⁹⁵ Rather, it is the international aspect of this case which he is addressing. *Mitchell* again demonstrates the discomfort or concern of the Court about claims originating from the prior existence of organized societies with their own laws and customs, characterized by Binnie J. as “the much larger and more complex claim of First Nations in Canada to *internal* self-governing institutions.”³⁹⁶ Even though the Court in *Pamajewon* has declared that claims in the nature of self-government are the same as any other s. 35(1) claim, the Court’s commentary in the above cases belies that assertion.

³⁹³ *Ibid.* at para. 63.

³⁹⁴ *Ibid.* at para. 72.

³⁹⁵ *Ibid.* at para. 73.

³⁹⁶ *Ibid.* at para. 169 [emphasis in original].

Campbell v. AG BC/AG Canada & Nisga'a Nation³⁹⁷

Roughly concurrent in time with the *Mitchell* decision of the Supreme Court of Canada, Williamson J. of the B.C. Supreme Court rendered his decision in another very interesting case concerning a self-regulatory or governance aspect of Aboriginal rights; this was a law suit brought by the Leader of the Opposition in the Legislative Assembly of B.C., challenging the validity of the Nisga'a Nation Final Agreement/Treaty. The plaintiffs applied for a declaration that portions of the *Nisga'a Final Agreement Act* of both the B.C. Legislative Assembly³⁹⁸ and Parliament³⁹⁹ are unconstitutional to the extent that they purport to allocate legislative power to the governing body of the Nisga'a Nation.⁴⁰⁰ Mr. Justice Williamson, after a review of the history of relations between the parties leading up to the finalization of the Treaty,⁴⁰¹ summarizes the core positions of the parties to this case:

The heart of this argument is that any right to such self-government or legislative power was extinguished at the time of Confederation. Thus, the plaintiffs distinguish aboriginal title and other aboriginal rights, such as the right to hunt or to fish, from the right to govern one's own affairs. They say

³⁹⁷ *Campbell v. AG BC/AG Canada & Nisga'a Nation et al*, 2000 BCSC 1123, (2000) 189 D.L.R. (4th) 333, 79 B.C.L.R. (3d) 122 [*Nisga'a Nation*].

³⁹⁸ *Nisga'a Final Agreement Act*, S.B.C.1999, c. 2.

³⁹⁹ *Nisga'a Final Agreement Act*, S.C. 2000, c. 7.

⁴⁰⁰ *Nisga'a Nation*, *supra* note 397 at paras. 5-8: After several years of negotiations, representatives of B.C., Canada and the Nisga'a Tribal Council concluded a Final Agreement in 1998 (*Nisga'a Final Agreement*, S.B.C. 1999, c. 2, Schedule, in force May 11, 2000) which states in Section 1 that it is a "treaty and land claims agreement within the meaning of Sections 25 and 35 of the *Constitution Act, 1982*." It states further in Sections 22 and 23 that "it is a full and final settlement in respect of the aboriginal rights, including aboriginal title, of the Nisga'a Nation" and that it "exhaustively" sets out the s. 35 rights of the Nisga'a Nation." This Agreement was ratified by the Nisga'a people, the enabling settlement legislation was passed by Parliament and the B.C. Legislative Assembly and this document by its terms then became an effective "Nisga'a Treaty" in May, 2000 at which time the Tribal Council ceased to exist and the Nisga'a Nation came into being as the legal embodiment/representative of the Nisga'a people.

⁴⁰¹ *Ibid.* at paras. 19-31.

that in 1867, when the then *British North America Act, 1867* (now called the *Constitution Act, 1867*) was enacted, although other aboriginal rights including aboriginal title survived, any right to self-government did not. All legislative power was divided between Parliament and legislative assemblies...⁴⁰²

The defendants ... take the position that ... to give the Nisga'a land in fee simple and the right to hunt and fish in a larger area are empty gestures if the Nisga'a have no power to establish rules about the use of that land and those rights. They say that such rules are the very essence of self-government.⁴⁰³

Justice Williamson engages in a review of the granting and division of powers in the *British North America Act* (now the *Constitution Act, 1867*),⁴⁰⁴ and observes that this “did not interfere with the royal or executive prerogative to negotiate treaties with aboriginal nations”⁴⁰⁵ and it did not “terminate the development of the common law, law binding upon citizens and enforceable by the courts. ... In short, long before the 1982 enactment of s. 35, aboriginal rights formed part of the unwritten principles underlying our Constitution.”⁴⁰⁶ After a review of relevant decisions from 1892⁴⁰⁷ and 1982⁴⁰⁸ of the Justices of Appeal in England, Williamson J. concludes that the “unique relationship between the Crown and

⁴⁰² *Ibid.* at para. 59.

⁴⁰³ *Ibid.* at para. 61.

⁴⁰⁴ *BNA/Constitution Act, 1867*, *supra* note 2.

⁴⁰⁵ *Nisga'a Nation*, *supra* note 397 at para. 69.

⁴⁰⁶ *Ibid.* at para. 70.

⁴⁰⁷ *Ibid.* at para. 75, referencing *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437.

⁴⁰⁸ *Ibid.* at para. 75, referencing *Secretary of State for Foreign and Commonwealth Affairs-1982*, *supra* note 209.

aboriginal peoples, then, is an underlying constitutional value”⁴⁰⁹ which exists outside of the internal division of powers in the federal structure of Canada. This aspect of the decision, the protection of Aboriginal rights as an unwritten principle which existed at the time of Confederation, and the “unique relationship” between the Crown and Aboriginal peoples as an underlying constitutional value, is certainly concomitant with the discussion on constitutionalism in Chapter Two.

Justice Williamson observes that the common law has a long history of recognizing the legal force of ‘custom’, which was equated with aboriginal laws by Lord Denning in *R. v. Secretary of State for Foreign and Commonwealth Affairs*: “These customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community.”⁴¹⁰

In response to submissions that s. 35 does not encompass elements of self-government, he states:

The plaintiffs...submit...that s. 35 cannot be used to create a new order of government inconsistent with the sovereignty of Parliament and the Legislative Assembly and the exclusive distribution of legislative powers to those institutions.

I do not find these submissions persuasive. The plaintiffs accept that s. 35 gives constitutional protection to aboriginal title to land...they say that such a claim includes not only aboriginal title but the right to occupy and use the land for traditional activities. On the face of it, it seems that a right to aboriginal title, a communal right which includes occupation and use, *must of necessity*

⁴⁰⁹ *Ibid.* at para. 80.

⁴¹⁰ *Ibid.* at para. 85, citing from *Secretary of State for Foreign and Commonwealth Affairs - 1982*, *supra* note 209 at 123.

*include the right of the communal ownership to make decisions about that occupation and use ...*⁴¹¹

Justice Williamson finds some support in the reasons in *Delgamuuk'w*⁴¹² for judicial recognition that decision-making power can be an included element of an Aboriginal right. He notes that the reasons of the Chief Justice in *Delgamuuk'w* acknowledge “pre-existing systems of aboriginal law”⁴¹³ as one of the foundations for Aboriginal title, and also acknowledge that the collective nature of Aboriginal title dictates that some form of community decision making is required in order to manage the lands which are subject to Aboriginal title.⁴¹⁴ In conclusion, Williamson J. states:

The right to aboriginal title “in its full form”, including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by s. 35.⁴¹⁵

⁴¹¹ *Ibid.* at paras. 112-115 [emphasis added].

⁴¹² *Delgamuuk'w*, *supra* note 306.

⁴¹³ *Ibid.* at para. 126.

⁴¹⁴ *Ibid.* at paras. 115, 166.

⁴¹⁵ *Nisga'a Nation*, *supra* note 397 at para. 137. By way of historical context, Williamson J. reviews the origins and intentions of s. 35. He includes the following information in his judgement:

At the 1983 conference, [a meeting of First Ministers required by a temporary provision of the *Constitution Act, 1982* to discuss business still outstanding] transcripts of which are in evidence, the then Prime Minister said that one matter for the meeting was the “identification of rights” to be included in s. 35. He went on to say that: “...the heart of the matter, the crux of our efforts to improve the condition of our aboriginal peoples and strengthen their relationships with other Canadians, is found within the set of issues concerning aboriginal government.” (para. 174)

Twelve years later in December of 1995, in another document in evidence, the federal government published a policy statement entitled *Aboriginal Self-Government: the Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. That policy statement said, at p. 3, that: “The Government of Canada recognizes the inherent right of self-government as an existing aboriginal right under s. 35 of the *Constitution Act, 1982*.” (para. 175)

Justice Williamson thus decides that the legislation and the Nisga'a Treaty are constitutionally valid.⁴¹⁶ The comprehensive analysis in this decision advances the contention that the recognition of Aboriginal 'custom' by the Canadian courts encompasses the notion that a decision making power may be a necessary component of the exercise of Aboriginal rights founded in the prior existence of 'organized societies'.

3.1.5 The Scope of Aboriginal Rights – What Direction?

Obviously having considered some of the criticisms or difficulties which had emerged in the ten years since *Van der Peet*,⁴¹⁷ the Supreme Court reviewed some aspects of the previous jurisprudence when they had the opportunity to again consider a claim of Aboriginal rights in the *Sappier*⁴¹⁸ case. Justice Bastarache wrote for the majority, with brief concurring reasons by Binnie J. The Crown had appealed against the acquittal of three Respondents who had successfully argued, in defence of unlawfully cutting timber on Crown lands, that they possessed an Aboriginal right to harvest timber for personal use.

The Court explains that the focus in the *Van der Peet* test on a specific pre-contact practice is intended to situate that practice within the life of a particular Aboriginal community, as a way of properly defining the distinctive way of life of that community and thereby the nature

⁴¹⁶ The appeal of this decision did not proceed because the plaintiff subsequently became the Premier of B.C., but it has not been over-ruled and has been cited in several cases.

⁴¹⁷ *Van der Peet*, *supra* note 217.

⁴¹⁸ *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, 309 N.B.R. (2d) 199 [*Sappier*].

of the claimed right.⁴¹⁹ Mr. Justice Bastarache then introduces a new element into the description of the purpose of s. 35:

*Section 35 recognizes and affirms existing aboriginal and treaty rights in order to assist in ensuring the continued existence of these particular aboriginal societies. The exercise of the right to harvest wood for domestic uses must be tied to this purpose. ... It is a right that assists the society in maintaining its distinctive character.*⁴²⁰

Another area of confusion which had arisen from *Van der Peet* is whether a universal human practice, such as eating to survive, can form the basis of an Aboriginal right claim. The Court clarifies that the fact of eating would not be a distinctive practice, but the “traditional *means* of sustenance, meaning the pre-contact practices relied upon for survival” may be shown to be integral to the distinctive culture, and that in fact the “jurisprudence weighs in favour of protecting the traditional means of survival of an aboriginal community.”⁴²¹

Justice Bastarache turns next to the question of the meaning of ‘distinctive culture’, and acknowledges that the decision in *Van der Peet* has been severely criticized with respect to this concept. While the intention of the Court was to capture the element of ‘aboriginal specificity’ which is the basis for “granting special constitutional protection to one part of Canadian society,”⁴²² the critical scholarship has suggested that the language connotes a stereotypical view of aboriginality which may extend to “racialized stereotypes of

⁴¹⁹ *Ibid.* at para. 24.

⁴²⁰ *Ibid.* at para. 26 [emphasis added].

⁴²¹ *Ibid.* at paras. 37-38.

⁴²² *Ibid.* at para. 42, quoting from *Van der Peet*, *supra* note 217 at para. 20.

Aboriginal peoples.”⁴²³ The Court refers with approval to Madame Justice L’Heureux-Dubé’s dissenting reasons in *Van der Peet*: “the ‘distinctive aboriginal culture’ must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands.”⁴²⁴ Accepting this focus on prior occupation by the organized Aboriginal societies, Bastarache J. continues:

The focus of the Court should therefore be on the *nature* of this prior occupation. *What is meant by “culture” is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits.* The use of the word “distinctive” is meant to incorporate an element of aboriginal specificity.⁴²⁵

With respect to continuity between pre-contact practice and aboriginal right, the Court presents a summary statement: “Although the nature of the *practice* which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal community, the nature of the *right* must be determined in light of present-day circumstances.”⁴²⁶ Applying these legal principles, and taking care not to “freeze the right in its pre-contact form,”⁴²⁷ he finds that an Aboriginal right has been established, which has not been extinguished, and is a valid defence to the charges against the Respondents.

⁴²³ Borrows & Rotman, “*Sui Generis* Aboriginal Rights”, *supra* note 376 at 36, cited in *Sappier*, *supra* note 418 at para. 45.

⁴²⁴ *Van der Peet*, *supra* note 217 at para. 159.

⁴²⁵ *Sappier*, *supra* note 418 at para. 45 [emphasis added].

⁴²⁶ *Ibid.* at para. 48. The Court again quotes with approval from the dissenting opinion of L’Heureux-Dubé J. in *Van der Peet*, *supra* note 217 at para. 172: “aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live.”

⁴²⁷ *Ibid.* at para. 48.

Having reviewed the various issues raised and dealt with in this decision, I conclude that the foremost purpose of the Court⁴²⁸ was to use this relatively straightforward Aboriginal rights claim to take the opportunity to correct, clarify and strengthen the prevailing legal standard for the establishment of an existing Aboriginal right which will be protected by s. 35(1) of the *Constitution Act, 1982*. There is a clear statement that the constitutional mandate of s. 35(1) is to ensure “the continued existence of these particular aboriginal societies” and that the rights are features which “assist the society in maintaining its distinctive culture.”⁴²⁹

The statement by Bastarache J. quoted on the previous page⁴³⁰ expresses a different and more sophisticated view of what is encompassed in the inquiry about the pre-contact way of life: “their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits.” This is a focus on methods of managing life, teaching values to children, making decisions in accordance with the norms of Aboriginal culture – the kinds of undertakings essential to the existence of autonomous societies. It suggests on behalf of the Court greater openness for the recognition of Aboriginal rights rooted in the elements of life which flow from the fact of pre-existing autonomous societies, which is a positive development. No element of life is more fundamental to the continuing existence of Aboriginal societies, in their full vigour as a living culture, than the capacity of these

⁴²⁸ *Ibid.*, this is essentially a unanimous judgement of the Court; Binnie J. concurs on all matters except to insert some thoughts about the distinction between trade internal to the community and commercial trade. So, this case is a good statement of the views of the present Court now that they have almost 20 years of experience with s. 35(1).

⁴²⁹ *Ibid.* at para. 26.

⁴³⁰ *Ibid.*, see text associated with *supra* note 425.

societies to exercise their distinctive values and their rightful authority in tending to the care and well-being of their children.

3.2 ‘Custom Adoption’ as an Aboriginal Right

The early decisions dealing with custom marriage present the earliest recognition by the courts in Canada that ancestral practices of Aboriginal people to do with family relations continued to be exercised and were recognized as creating rights which were “cognizable to the non-aboriginal legal system.”⁴³¹ The later cases concerning custom adoption assume and continue to recognize that rights recognized by the Canadian legal system flow from this practice.⁴³² The remainder of this chapter focuses on the nature of custom adoption, and specifically whether the recognition of this customary practice opens the door to a deeper sort of Aboriginal right, rooted in the pre-existing legal systems of organized Aboriginal societies.

3.2.1 Customary Adoption – What Is the Nature of the Right?

In a case not long after the enactment of s. 35(1), *Re Family and Child Service Act of B.C.*,⁴³³ the Aboriginal parents of J.I. brought an application:

to determine whether or not ‘aboriginal rights’ as referred to in s. 35(1) of the *Constitution Act, 1982* include the right to full responsibility for the care and

⁴³¹ *Van der Peet*, *supra* note 217 at para. 49.

⁴³² See *supra* note 332 regarding common law recognition of custom adoption; although the first reported Canadian case appears in 1961 there are prior Commonwealth decisions to the level of the Privy Council.

⁴³³ *Re Family and Child Services Act of B.C. and an Application Relating to the Child J. I.* [1990] 4 C.N.L.R. 14 (Prov. Ct. of B.C.) [*Re FCSA*].

upbringing of aboriginal children. Putting it otherwise, it is argued that s. 35 precludes the application of the *Family and Child Service Act, 1980*, S.B.C. 1980, c. 11 for British Columbia to the aboriginal children of natives residing upon reserves within British Columbia.⁴³⁴

Judge Gordon of the Provincial Court makes it clear in his reasons that he is mindful of the context in which this application has been advanced, and is abreast of contemporary legal and social developments regarding Aboriginal rights. He nevertheless rules against the applicants on this question. It is interesting to examine the elements of the judgement in light of the developments in the case law since this decision in 1990.

As discussed earlier in this chapter, the *Van der Peet*⁴³⁵ decision established the test with respect to the identification of those Aboriginal rights which are constitutionally protected by s. 35(1); the first step is to define the precise nature of the right being claimed. The difficulty in the analysis in *Re FCSA* begins here. After considering the case law with respect to Section 88 of the *Indian Act*, and deciding that laws of general application such as the *FCSA* do apply to Aboriginal people in the absence of any applicable reason for exemption, the Court says:

The only question remaining is *whether or not the right to apprehend and place in foster care children 'in need of protection' constitutes an aboriginal right* as referred to in s. 35(1) of the *Constitution Act*.

In this case it has been argued on behalf of the boy's parents that the right to raise their own children is critical to the right of natives to retain their own history and culture. The right is essential to the continual regeneration of the native community. As such it is argued the right to raise their young is the most important of all aboriginal rights. There is no doubt that if the native culture is to survive, native people must have control over the raising of their

⁴³⁴ *Ibid* at 15.

⁴³⁵ *Van der Peet*, *supra* note 217.

own children. But this fact does not necessarily make the right to apprehend and provide for children ‘in need of protection’ an aboriginal right.⁴³⁶

But surely if the ‘impugned act’ is the assertion of a right to care for the needs of this child within the resources and traditions of the Aboriginal community, then the right does not consist of taking over authority under the statute but rather of relying, in place of that statutory authority, upon a traditional custom which has from time immemorial been practiced within the Aboriginal culture as a way of addressing the needs of children who would otherwise not be properly cared for. By defining the Aboriginal right as the right to exercise authority under a non-Aboriginal statute, the Court doomed the application to failure.

This characterization highlights the risk of the court sliding into complete Eurocentricity by conducting the *Van der Peet* analysis on the assumption that the action to be taken – in this case, to apprehend and place in foster care – is that which corresponds to the norm of Euro-Canadian society. This diminishes the Aboriginal right to a request to affirm and carry out the Euro-Canadian norm, rather than to assert the existence and authority of the norm of their own culture. This Court failed to understand the significance of the direction in *Van der Peet* to consider the perspective of the Aboriginal peoples themselves in coming to the proper characterization of the nature of the Aboriginal right.

Later in the *FCSA* judgement, the Court reviews the evidence provided by an ethnologist:

It was her evidence which clearly established the Shuswap had lived in this area for between five and eight thousand years before arrival of the white man

⁴³⁶ *Re FCSA*, *supra* note 433 at 21 [emphasis added].

and that throughout they enjoyed the benefits of a functioning, intact society complete with institutions or mechanisms necessary to ensure the smooth functioning and survival of the group. These institutions and mechanisms included...dispute resolution mechanisms necessary to maintain social order. As an example of the last mentioned, Dr. Boelscher stated that children in need of protection or of intervention were generally considered the responsibility of the extended family. In previous days where there was no extended family or where a dispute arose, the Chief, along with his council of elders, stepped in to determine how the situation was to be dealt with. The raising of children was considered a tribal responsibility”⁴³⁷ ...

With this type of evidence available, it would not be difficult to satisfy the factors to be considered in order to establish an Aboriginal right, as summarized by McLachlin C.J. in

Mitchell:

the claimant is required to prove: (1) the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right; (2) that this practice, custom or tradition was “integral” to his or her pre-contact society in the sense it marked it as distinctive; and (3) reasonable continuity between the pre-contact practice and the contemporary claim.⁴³⁸

Two other points of law raised by the trial judge have been addressed in subsequent case law.

The first is the opinion that all of the governing authority in Canadian society is divided between the federal and provincial governments; this argument has been authoritatively dealt with in British Columbia in the *Nisga’a Nation*⁴³⁹ decision of the B.C. Supreme Court. The second is the view that the right to determine if children are in need of protection, and the power to implement appropriate remedies, is an authority vested in every viable society and is therefore not exclusive to Aboriginals and is not an Aboriginal right. This argument is addressed by Lamer C.J. in *Van der Peet* as follows:

⁴³⁷ *Ibid.* at 21-22.

⁴³⁸ *Mitchell*, *supra* note 390 at para. 26.

⁴³⁹ *Nisga’a Nation*, *supra* note 397 at para. 62-82.

A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims that a practice, custom or tradition is *distinctive* – “distinguishing, characteristic” – makes a claim that is not relative; the claim is rather one about the culture’s own practices, customs or traditions....It is a claim that this tradition or custom makes the culture *what it is*.⁴⁴⁰

This point is again emphasized in *Sappier* where the Court states that the particular means whereby an Aboriginal people traditionally carry out a universal task can be exactly what is meant by the concept of ‘integral to the distinctive culture’.⁴⁴¹

This reasoning goes right to the heart of the issue: the point is not that only Aboriginal people look after their children, but that Aboriginal cultures have historically had a set of values about the role of the child, and the relationship of the child to its parents and family and larger community which has governed *how* they raise their children. These values, and the customs and practices which developed in accordance with these values, were integral to the ancestral society in the sense that they were one of the fundamental means by which the core worldview of that society, the repository for them of identity, beliefs, and sense of place in life was expressed and transmitted to the next generation.

The recognized and ongoing practice of custom adoption provides a clear and convincing answer to two of the three questions in the test established in *Van der Peet*: this practice has been confirmed in the jurisprudence as being of central significance to the distinctive Aboriginal cultures, and as evidencing the continuity necessary between the pre-contact

⁴⁴⁰ *Van der Peet*, *supra* note 217 at para. 71[emphasis in original].

⁴⁴¹ See *Sappier*, *supra* note 418 at paras. 37-38, discussed above in the text accompanying note 421.

practice and the contemporary claim. It is the first question, the precise nature of the right, which is the problematic element under the *Van der Peet* test.

The issue of whether native custom adoption creates legal rights in British Columbia such that a parent by way of custom adoption can be a “dependent parent” for purposes of insurance benefits under the *Insurance (Motor Vehicle) Act* was before the B.C. Court of Appeal in 1993 in the case of *Casimel v. I.C.B.C.*⁴⁴² The judgement of the Court was delivered in the period of time after the B.C. Court of Appeal had decided *Delgamuuk’w*⁴⁴³ but before the decision of the Supreme Court of Canada on the appeal of that decision had been delivered. After reviewing the various positions taken by the B.C. Appeal Justices in their decision in *Delgamuuk’w*, Lambert J.A. states on behalf of a unanimous Court in *Casimel*:

I think that the conclusion which should be drawn from the decision of the court in *Delgamuukw v. The Queen* is that none of the five judges decided that aboriginal rights of social self-regulation had been extinguished ...

Of course, if the aboriginal right had not been extinguished before 1982, it is now recognized, affirmed and guaranteed by s. 35 of the *Constitution Act, 1982*, not in its regulated form but in its full vigour, subject to the *prima facie* infringement and justification tests set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075.⁴⁴⁴

Having concluded that there was no blanket extinguishment of the general category of “rights of social self-regulation”, Lambert J.A. proceeds to review the case law with respect

⁴⁴² *Casimel v. Insurance Corporation of B.C.*, 1993 CanLII 1258 (BC C.A.), 106 D.L.R. (4th) 720 [*Casimel* cited to CanLII].

⁴⁴³ *Delgamuukw v. British Columbia*, (1993) 30 B.C.A.C. 1, 104 D.L.R. (4th) 470 (B.C.C.A.) [*Delgamuukw BCCA*].

⁴⁴⁴ *Casimel*, *supra*, note 442 at para 24-25.

specifically to custom adoption. After considering all of the cases mentioned earlier in this paper, as well as two more recent cases, *Re Wah-Shee*(1975)⁴⁴⁵ and *Re Tagornak*(1983)⁴⁴⁶, he states:

I conclude 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.⁴⁴⁷

Lambert J.A. completes his review by looking at the question of whether any law or statute might operate to limit or to extinguish the rights related to Aboriginal custom adoption.

Regarding the impact of provincial laws of general application, he notes:

Adoption was not known at common law. It is a creation of statute. The first *Adoption Act* in British Columbia was passed in 1920 as S.B.C. 1920 c. 2. There is nothing in that Act or in any amendment to that Act or in the present *Adoption Act*, R.S.B.C. 1979 c.4, as amended, which could be thought to have qualified or regulated either before or after the constitutional amendment of 1982, *the right of aboriginal people to continue their custom of adoption* in accordance with the customs, traditions and practices which form an integral part of their distinctive culture.⁴⁴⁸

Mr. Justice Lambert also notes that the definition of “child” in s. 2(1) of the federal *Indian Act* was amended in 1985 so that it includes: “a child adopted in accordance with Indian custom,”⁴⁴⁹ which confirms that the federal legislation does not “abrogate the status

⁴⁴⁵ *Re Wah- Shee*, (1975) 57 D.L.R. (3d) 743, 8 C.N.L.C. 626 (N.W.T.S.C.) [*Wah-Shee* cited to D.L.R.].

⁴⁴⁶ *Re Tagornak*, (1983) 50 A.R. 237, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.) [*Tagornak* cited to C.N.L.R.].

⁴⁴⁷ *Casimel*, *supra*, note 442 at para. 42.

⁴⁴⁸ *Ibid.* para. 44 [emphasis added].

⁴⁴⁹ *Indian Act*, *supra* note 365, s. 2(1).

conferred by Indian customary adoptions.”⁴⁵⁰ He then holds that the Appellants had become the parents of the deceased person by custom adoption, and that:

customary adoption was 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), and as such, *gave rise to aboriginal status rights that became recognized, affirmed and protected by the common law and under s. 35 of the Constitution Act, 1982.*⁴⁵¹

I understand from this that the Court concluded that Aboriginal people have a right to continue to engage in the practice of custom adoption, which is effective in Canadian law to confer or establish the status of persons in familial relationship to one another. The *Casimel* decision has not been over-ruled, and was cited with approval in the decision of the B.C. Supreme Court with respect to the constitutionality of provisions of the Nisga’a Treaty.⁴⁵²

I conclude that custom adoption, in a somewhat generic sense, is a traditional practice of Aboriginal people in Canada, and in British Columbia, recognized at common law both before and after 1982 and which can, with a proper evidentiary foundation regarding the custom of a specific people, be found to constitute an Aboriginal right within the meaning of s. 35(1) of the *Constitution Act, 1982*.

The more difficult question is the one which has been pushed to the forefront of Aboriginal rights jurisprudence by the decision in *Van der Peet* – what is the precise nature of the Aboriginal right being claimed? This is the first step in the test set out by the Court, and the

⁴⁵⁰ *Casimel*, *supra* note 442 at para. 50.

⁴⁵¹ *Ibid.* at para. 52-53 [emphasis added].

⁴⁵² *Nisga’a Nation*, *supra* note 397 at paras. 106 -111.

answer to it is critically important, as was demonstrated in the *Re FCSA* case discussed above.⁴⁵³

The jurisprudence on custom adoption has tended to focus on its efficacy – does it create a status which will be recognized by the non-Aboriginal legal system? I suggest that the reason for this focus is simple: for custom adoption, as for other practices such as fishing out of season, the Canadian legal system begins its consideration from the perspective that there has been an impugned or irregular interaction with mainstream Canadian society. In the case of custom adoption, some person is asserting that they hold a family status which was created outside the parameters known to Euro-Canadian society, an irregular status. Thus, in the “three factors which should guide a court’s characterization of a claimed aboriginal right: ... the *Van der Peet* factors of the impugned action, the governmental action or legislation with which it conflicts, and the ancestral practice relied on”⁴⁵⁴ – the court operates on the assumption that you begin to characterize the right by defining how it operates in conflict or dissonance with non-Aboriginal society, rather than by how it operates in Aboriginal society.

This is another version of the dynamic discussed above, at the beginning of Part 3.2, regarding the approach of the Court in the *Re FCSA* case: the tendency to consider the issues within the framework of dominant society. Again, this analysis fails completely to understand the implications of the point initially made by Lamer C.J. in *Van der Peet*: that

⁴⁵³ *Re FCSA*, *supra* note 433 and see note 436 and following two paragraphs of accompanying text.

⁴⁵⁴ *Mitchell*, *supra* note 390 at paras. 15 and 19.

courts must take into account the perspective of Aboriginal people themselves.⁴⁵⁵ If the goal is to affirm as a right the protected capacity of Aboriginal societies to continue to operate, at least in some aspects of life, in accordance with the fundamental framework of their own cultures, which existed prior to the assertion of dominance by European culture and which have continued and evolved since that time, then it is the meaning and operation within Aboriginal society of their fundamental institutions and approaches which must be understood in order to ascertain the nature of the right.

I am proposing that the query about the precise nature of the Aboriginal rights associated with the practice of custom adoption should begin with the question: what role does custom adoption play in Aboriginal society?

3.2.2 The Role of ‘Custom Adoption’ in Aboriginal Society: Ethnographic Literature

The comprehensive review of ethnographic and related literature on customary adoption undertaken for the Royal Commission on Aboriginal Peoples describes a very complex institution which exists in a variety of iterations in Aboriginal societies across south-of-the-Arctic Canada.⁴⁵⁶ In general terms, anthropologists note that “adoption plays a major role in

⁴⁵⁵ See *supra* note 368 and accompanying text.

⁴⁵⁶ Anna de Aguayo, “Background Paper on Customary Adoption”, CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997). This paper, dated January 31, 1995 is found in the section of the CD-ROM entitled “Public Policy and Aboriginal Peoples 1965-1992.” This is an electronic document which is not paginated, but references are provided to Sections of the text to facilitate access to footnoted material. This research specifically focuses on the practices among non-Arctic peoples because there is a widely known and analysed body of ethnographic literature with respect to customary adoption among Arctic Aboriginal peoples. One of de Aguayo’s initial observations is of the lack of

the written and oral traditional law of most, if not all, societies.” Indigenous adoption is defined as “not solely an institution of parenthood but a broader one involving the change in or creation of kinship ties.”⁴⁵⁷ As such, it is a means of reinforcing a very significant aspect of the structure of indigenous societies.

In the Western tradition, an early demonstration of the use of adoption to create kinship relations to further the aims of society is provided by the Roman emperors, who in many instances adopted appropriate young males to become their successors, passing over their biological sons.⁴⁵⁸ The English term “adoption” is derived from the Roman origins, carrying the connotation of ‘option’ or ‘choice’ with respect to kinship.⁴⁵⁹ It is interesting to note that some of the current concepts of Western adoption which are seen to be problematic both by Aboriginal people and by advocates for adoption reform are derived from the Roman rules of adoption: that the child becomes the child of the adopter and is no longer in any sense the

substantial ethnographic research available respecting this practice in non-Arctic Canada. It is mentioned in studies regarding other aspects of Aboriginal life, but is not the actual focus of study, as it is for the Arctic communities. She expresses surprise and disappointment, given that customary adoption is a “cultural universal” among indigenous peoples all over the world and is known to be prevalent in Canadian Aboriginal communities. See Section 2 Extent of the Literature.

⁴⁵⁷ *Ibid.* This material is quoted from the author’s comments in Section 3 Customary Adoption: General Literature Review (i) Defining Terms.

⁴⁵⁸ Christopher Bagley, “Adoption of Native Children in Canada: A Policy Analysis and Research Report” in Howard Altstein and Rita J. Simon, eds., *Intercountry Adoption: A Multinational Perspective* (New York: Praeger, 1991) 55-79, cited in Aguayo, *ibid.* Section 3 (ii) Adoption As A Universal Institution.

⁴⁵⁹ Aguayo, *ibid.* also in Section 3(ii) discussing the work of Jack Goody, “Adoption in Cross-Cultural Perspective”, *Comparative Studies in Society and History*, Vol. II, 55-78, 1969; *Webster’s Third New International Dictionary of the English Language*, 1986, s.v. “adoption” was also a source here [*Webster’s*].

child of its biological parents, and that there is a complete and irreversible change of familial status.⁴⁶⁰

This historical root was nourished by the social history in England and North America in the nineteenth century, which initially emphasized adoption primarily as a means to facilitate inheritance thus requiring a complete change of familial status. The developing Victorian social welfare movement, which placed a new focus on ‘needy, illegitimate or orphaned’ children and on the shame associated with those circumstances, resulted in the ‘clean break’ theory which still tends to govern adoption practice in Canada.⁴⁶¹ The literature indicates that this differs significantly from customary adoption practices: “[i]n most societies, adoption is only conducted between families who trust and know each other and whose ties are made even closer following the arrangement.”⁴⁶²

The earliest reporting of the practice of ‘native’ customary adoption by European sources is found in reports from missionaries back to their church leaders as far back as the 17th century.⁴⁶³ Among Aboriginal societies in Canada, there were originally five forms of

⁴⁶⁰ *Ibid.*, Aguayo discussing Goody, *ibid.*

⁴⁶¹ *Ibid.*, Section 3 (iii) Legislative Adoption.

⁴⁶² *Ibid.*, Section 3 (iv) Role of Classificatory Kin, citing the work of several anthropologists: Jack Goody, *supra* note 459; Esther Goody, “Forms of Pro-Parenthood: The Sharing and Substitution of Parental Roles” in J. Goody, ed., *Kinship* (London: Cox and Wyman Ltd., 1971) 331-345; D. Lee Guemple, *Inuit Adoption*, Mercury Series No. 47, Canadian Ethnology Service (Ottawa: National Museums of Canada, 1970); Dianna J. Shomaker, “Transfer of Children and the Importance of Grandmothers Among the Navajo Indians” in *Journal of Cross-Cultural Gerontology*, Vol. 4, No. 1, 1-18.

⁴⁶³ *Ibid.*, Section 5 Ethnographic Examples (i) Sub-Arctic and Eastern Woodlands Region.

customary adoption identified in the ethnographic literature.⁴⁶⁴ Two forms continue in extensive use as an internally authoritative practice for the creation of alternative parenting arrangements, either permanent (Jural Adoption) or temporary (Fosterage).⁴⁶⁵ It is worth noting that these are terms applied by anthropologists to name these alternatives, not by Aboriginal peoples, and they of course reflect a Eurocentric language use which is not helpful in this analysis.

The situations in which these general forms of custom adoption may be called into play are diverse. Examples drawn from the literature include:

Childless couples or those whose children have grown will be given a child. A teenager might move in with a grandparent to provide needed services. Relatives will decide that a particular family needs help with a child and will assume custody of that child, rarely without the full agreement of the parents. A mother working away from home might leave her infant with a relative for a period of time, knowing that the child will have the same care, love and security that she herself would provide.⁴⁶⁶

Three key features identified as characteristic of both of these types of custom adoption are: that the alternative parenting arrangements generally involve close relatives and certainly not strangers; that the needs of the adults involved are considered along with the needs of the child; and that it is considered to be very important that both families are actively involved in

⁴⁶⁴ Three of these five forms are not relevant to this study. Economic and Political Adoption, which involved kinship relations but generally not at the level of parent-child, have almost completely disappeared. The practice of Mourning Adoption, reported to be a very effective and widespread ritual of mourning, is still practiced among more traditional Aboriginal societies and may involve the kinship relations of children but is not specifically germane to this study.

⁴⁶⁵ *Ibid.*, Section 4 Customary Adoption: The Canadian Pattern.

⁴⁶⁶ *Ibid.*

setting up the arrangement, that three-way contact continues (i.e. both families and the child) and that the needs of the biological family are a valued part of the process.

Important points of comparison between permanent and temporary arrangements are as follows:

- a) kinship status is changed in a permanent arrangement but not a temporary;
- b) a temporary arrangement may be changed into a more permanent form if the families are in agreement that this would be best for the child;
- c) both usually occur between close kin, and ties between the two families usually continue for both types of arrangement.⁴⁶⁷

While the motivation for a form of customary adoption may be the need of a child for alternative parenting because of concerns about safety or adequate care, customary adoption is based upon an inclusive overview of the well-being of the whole family. For example, in the language of the Slavey people nieces and nephews would be called ‘daughters’ by their aunts and uncles, who would in turn be thought of in the classificatory relationship of ‘parent’ by their nieces and nephews. If one of those children needed an alternative parenting arrangement they could rely on that pre-established level of ‘parent’ relationship; similarly if one of those adults suffered an injury and needed someone in the home for a period of time to assist them with daily needs they could call upon their ‘sons’ and ‘daughters’.⁴⁶⁸

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*, Section 5(i), *supra* note 463.

Among the Round Lake Weagamow [Oji-Cree people], anthropologist Black-Rogers reported what s/he called a “Fosterage Belief System,” a version of a Mourning Adoption in which a child would spend several months in the home of a family member who had endured the loss of a loved one, in accordance with a belief or world view that having a young person in the home assists an older person to cope with a death.⁴⁶⁹

A period of time living with another family member is, in some societies, a regular part of the upbringing and education of a child. For example, among the Tsimshian people adolescent boys would spend a few years living in the house of their mother’s brother, who would be of the same Clan as the boy and could teach him the stories and traditions of his Clan and lineage; “[t]he maternal uncle taught him to be a hunter, a warrior and a family man in the tradition of their Clan.”⁴⁷⁰ The ethnographic literature confirms the importance of ancestor lineage as a necessary component of identity, needed to assist a maturing young person with major cultural or spiritual elements in life, such as feasts or ceremonial events, as well as entitlement to access to the traditional resources of the family group such as hunting grounds. This is one of the reasons that permanent adoption involves the assumption by the adoptee of the full lineage of the adopting family.⁴⁷¹ Interviewees in an anthropological study

⁴⁶⁹ *Ibid.*, Section 5(i), citing Mary Black-Rogers, “Fosterage and Field Data: The Round Lake Study, 1989” in William Cowan, ed., *Papers of the 21st Algonquian Conference* (Ottawa: Carleton University Press, 1989) 51-71.

⁴⁷⁰ *Ibid.*, Section 5 (iii) Northwest Coast Region, citing Lillian Petershoare, “Tlingit Adoption Practices, Past and Present” in *American Indian Culture and Research Journal* Vol. 9, No. 2, 1-32 at 14.

⁴⁷¹ Although the child assumes the full lineage of the adopting family, this does not imply that the relationship of the child with the birth family is ruptured or terminated. The clarity of distinction between family relationship and family status is an interesting aspect of custom adoption in comparison with Euro-Canadian adoption.

of adoption in one First Nations band⁴⁷² identified the damaging effects to the long term identity of a First Nations child caused by removing him or her from knowledge of and nurturing within their kinship group.

Having reviewed the related ethnographic literature, author Aguayo presents some summary observations.⁴⁷³ She notes that among indigenous peoples it has long been recognized that households need children as much as children need homes, and customary adoption is responsive to the full circle of needs, or issues of well-being, which is put into play in arrangements for alternative parenting. This indigenous institution has historically been utilized to ensure that children could be properly cared for, adults who needed youthful assistance in the tasks of daily life had that support, the task of teaching young persons the spiritual and traditional knowledges was assigned, and children had trusting relationship with a wide range of adults and other young people all functioning within a web of obligations and responsibilities to each other.

The giving of a child by way of permanent adoption to a childless couple is a mix of obligation and gift, the taking in of a child in need whether on a temporary or permanent basis is also both obligation and gift, the general sharing of responsibility for children among the households of a kinship group is a way of life reflective of a deeply held worldview; all of these acts strengthen and affirm the ties of kinship and also the locus of the kinship group

⁴⁷² Elizabeth Anne Nordlund, *Adoption in the Seabird Island Band* (M.A. thesis, University of British Columbia, Department of Anthropology, 1992) [unpublished] at 99-116.

⁴⁷³ The following material draws on Aguayo, *supra* note 456 at Section 6 Additional Theoretical Considerations.

as the primary site of individual identity and social authority. Customary adoption “reformulates our sense that a single household is the proper locus of child-rearing.”⁴⁷⁴

The Aguayo study notes that both permanent and temporary forms of custom adoption continue to be very robust practices in contemporary Aboriginal communities, and can be seen to be evolving to deal with changing circumstances. The traditional distinct divisions in some Aboriginal societies between maternal and paternal lineages, and their respective roles in the raising of the child, for example, are difficult to honour when families move to an urban setting, and therefore different practices with respect to kin categories are emerging. Also, if a customary adoption must for some reason be ‘legalized’ in the Canadian courts, the divesting of the birth family which occurs in that venue may create legal distinctions which impact upon the actual relationships between the families. This interaction between customary adoption and the dominant Canadian legal system, and the threat it poses to maintaining the integrity of customary adoption as a distinctly Aboriginal instantiation of customary law, is the subject of much discussion and concern.⁴⁷⁵

The examination of the nature of this Aboriginal custom highlights some deep differences between Aboriginal and Western notions of what is constitutive of the individual and of the family – and of the meaning of ‘adoption’. The ‘clean break’ theory of Western adoption, which is being interrogated but still continues to dominate adoption practice, is deeply

⁴⁷⁴ *Ibid.*, Section 6.

⁴⁷⁵ See e.g. Cindy Baldassi, “The Legal Status of Aboriginal Customary Adoption across Canada: Comparisons, Contrasts and Convergences” (2006) 39 UBC Law Review 63 at 87-100; Aguayo, *ibid.* Section 7 Directions of Change and Section 8 Conclusion.

antithetical to the fundamental premises of customary adoption, especially the notion that the interests of the biological family and the adoptive family are in opposition to one another, and that the child can have only one parental household, the new adoptive one.⁴⁷⁶ Particularly with respect to adoptions that occur in the context of the child protection system, the state through the legal system will act to close off the relationship of the child to their biological family. This emphasis on artificially creating immediate ‘permanence’ for the child may be at the cost of the long term needs and interests of the child.⁴⁷⁷

An understanding of the role of the kinship system, and of customary adoption as an organizing institution of Aboriginal families and society is generally missing from the case law and from the interaction between the Canadian state and Aboriginal children and families. Indeed, it has been observed that in some cases situations that state authorities have labeled ‘neglect’ or ‘lack of supervision’ by a parent, such as children living in someone else’s home, or parents not knowing exactly where their children are, have been in fact the operation of customary adoption.⁴⁷⁸

⁴⁷⁶ Several jurisdictions in Canada have taken steps towards openness with adoption records, although in general the right to confidentiality remains an option if one of the parties to the adoption so chooses. There is also increased responsiveness in the mainstream adoption system for up-front open adoptions, at the request of the parent parties. However, ‘open adoption’ may not result in ongoing openness after the adoption has been legally completed. For an in-depth discussion comparing custom adoption to adoptions in the mainstream system, see the article by Cindy Baldassi, *ibid.* especially at 66-76 and 92-96.

⁴⁷⁷ See Gillian Calder, “ ‘Finally I Know Where I am Going to be From’: Culture, Context and Time in a Look Back at *Racine v. Woods*” in Kim Brooks, ed., *Justice Bertha Wilson: One Woman’s Difference* (Vancouver: UBC Press, 2009).

⁴⁷⁸ See e.g. Fournier & Crey, *supra* note 23 at 82, 93-94; Sonia Ruth Harris, *The Road Back From Hell? First Nations, Self-Government and the Universal Goal of Child Protection in Canada* (LL.M. thesis, University of British Columbia, 1997) [unpublished] at 42-45.

3.2.3 The Role of Custom Adoption: Review of Jurisprudence

One of the unfortunate consequences of the focus in the jurisprudence on the status rights flowing from custom adoption, rather than its purpose, is that the historic cases have a paucity of discussion about why the adoption took place. In 1961 in *Re Katie*,⁴⁷⁹ the first of the reported custom adoption decisions, Sissons J. discusses the demographics of the Northwest Territories, the many reasons why the requirements of the Ordinance dealing with adoption are completely unreasonable for most of the ‘Eskimo’ population, and the general merits of recognition of custom adoption:

[A]lthough 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. ... These applications to the Court are made 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.⁴⁸⁰

But as for the reasons for the adoption, he says only that the natural parents “did not and do not want the child, and Noah and Keeatchuk did and do want her.”⁴⁸¹

Justice Morrow of the N.W.T. Territorial Court in 1969 in *Re Beaulieu*,⁴⁸² travelled to Fort Rae to hold a full hearing on the distinct practices of custom adoption in that community.

Morrow J. reports:

⁴⁷⁹ *Re Katie*, *supra* note 1.

⁴⁸⁰ *Ibid.* at 687- 688.

⁴⁸¹ *Ibid.* at 689.

There was general consensus that for as far back as could be remembered the system of adoption by custom among their people had been practiced and was respected in much the same way as with the Eskimos. As part of the inquiry the full facts surrounding the custom adoption of the infant...were gone into. Accordingly I am satisfied that adoptions by Indian custom are as effective as if made under Part IV of the *Child Welfare Ordinance*⁴⁸³ and a declaratory order to that effect shall go.⁴⁸⁴

He also notes that the *Indian Act* at that date (1969) specifically recognized children adopted by Indian custom,⁴⁸⁵ but no information is provided in the decision about the reason for the adoption, although this evidence did form part of the hearing.

Re Deborah is an exception. As was discussed earlier,⁴⁸⁶ the Court in that case was required to consider the question of the meaning of custom adoption in greater depth because the natural parents wanted to reclaim their child after a period of several years. At the trial level, the Territorial Court heard evidence about both the particular adoption and also about the role of custom adoption in the Spence Bay community. Commenting on the evidence about custom adoption from a longtime resident of Spence Bay, and referring also to his own experience in the Court, Morrow J. makes the following remarks:

⁴⁸² *Re Beaulieu*, *supra* note 337.

⁴⁸³ *Child Welfare Ordinance*, *supra* note 335.

⁴⁸⁴ *Re Beaulieu*, *supra* note 337 at 481.

⁴⁸⁵ *Indian Act*, R.S.C. 1952, c. 149, s. 48(16) as am. by S.C. 1956, c. 40, s. 13 to read: “(16) In this section “child” includes a legally adopted child and a child adopted in accordance with Indian custom.” This section applied only to intestate succession; the meaning of “child” in the general definition section 2(1) of the *Indian Act* remained as including only “a legally adopted Indian child” until 1985 when the *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1) as am. by S.C. 1985, c. 27, s. 1(1) was changed to read “2(1) “child” includes a child born in or out of wedlock, a legally adopted child and a child adopted in accordance with Indian custom.”

⁴⁸⁶ *Re Deborah*, *supra* note 339 and accompanying text.

It seems clear from this evidence and in fact from the evidence given by all the parties that there is a very well-defined custom governing adoptions among the Eskimo people. *Rebecca said there is supposed to be a reason in each case. In her case the reason is clear. 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 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 ...

I have gone outside the actual testimony in the present case and referred to my own experience as a Judge to emphasize the degree of importance that custom adoptions occupy in their culture. *In my observation, which goes back some 12 years, I would say this is the most outstanding characteristic of their culture and appears to outrank marriage and hunting rights.*⁴⁸⁷

His decision was upheld at the Court of Appeal.⁴⁸⁸ In the appellate judgement, the Court also emphasizes the significance of evidence which was given at trial concerning the practice of custom adoption, and confirms the importance of this practice to the safety and survival of Inuit children.

The *Re Wah-Shee*⁴⁸⁹ decision is of interest because none of the factors of urgency or difficulty in complying with the existing Ordinance were present. The husband was a member of the Dogrib band; his wife was Caucasian but had become also an accepted member of the Dogrib community. They had already adopted one child under the Ordinance, but petitioned the Court for an Order approving this adoption by way of native custom. The reason for this as noted by the Court was that it was their view that the adoption laws were in

⁴⁸⁷ *Ibid.* at 229 [emphasis added].

⁴⁸⁸ *Re Deborah (C.A.)*, *supra* note 342.

⁴⁸⁹ *Wah-Shee*, *supra* note 445.

conflict with the values of the Dogrib people, for example, by creating the artificial situation where the natural mother is not supposed to know about her child. In this case, the reason for the adoption was presented: “The child is James Jason Wah-Shee’s niece. Her parents have acknowledged the custom adoption. From the point of view of the natural parents the reason for the adoption is their poverty and the fact that this child was their 10th.”⁴⁹⁰

The Supreme Court of the N.W.T. in 1983 in *Re Tagornak*⁴⁹¹ reviewed the development of the law concerning recognition of custom adoption. No information is provided about the reason for the adoption, but there is a statement of the basic elements which are required in order for a Court to confirm that a custom adoption has occurred:

Having reviewed the authorities, certain concepts emerge. The Court’s role is declaratory, certifying that an adoption by native custom has indeed taken place. Some of the criteria which the Court will apply to the case before it are:

- 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 adoption is present in this case as in *Re Deborah* above.⁴⁹²

The Court notes at the end of this judgement that it is bound not only by precedent but also now by s. 35(1) of the *Constitution Act, 1982*.

Some of the circumstances which have been described in the line of cases from the Northwest Territories may not seem applicable within the southern Canadian provinces.

⁴⁹⁰ *Ibid.* at 745.

⁴⁹¹ *Tagornak*, *supra* note 446.

⁴⁹² *Ibid.* at 187.

However, a review of some more recent cases and literature from British Columbia and other provinces reveals the same theme: that custom adoption takes place in a wide variety of situations in which the needs of a child can best be met by being raised by someone other than the parent, whether that be a member of the extended family or another member of the community. In *Casimel*,⁴⁹³ the adoptive parents were actually the grandparents who took on the parental role because their daughter abandoned her child. In confirming the status of ‘parent’ conferred by custom adoption in this case, the Court of Appeal of British Columbia also concludes that custom adoption is a right protected by s. 35 of the Constitution. In *Michell v. Dennis and Dennis*⁴⁹⁴ the child had initially been apprehended by the Superintendent of Child Welfare and then a custom adoption by the mother’s sister took place which was found to be in accordance with the custom of the Carrier people when a mother could not care for her children.

Soon after the *Casimel* decision, the *Adoption Act* in British Columbia was amended to include a provision authorizing the court to recognize that an Aboriginal custom adoption has occurred, and has the effect of an adoption under the *Act*.⁴⁹⁵ This provision was first judicially considered in 1998 by Grist J. of the B.C. Supreme Court; when called upon to make an order pursuant to the new provision,⁴⁹⁶ he relies upon the four factors set out as criteria in *Re Tagornak* discussed above. Turning to the fourth factor, the requirement that

⁴⁹³ *Casimel*, *supra* note 442.

⁴⁹⁴ *Michell v. Dennis and Dennis*, [1984] 2 W.W.R. 449 (B.C.S.C.)

⁴⁹⁵ *Adoption Act*, R.S.B.C. 1996, c. 5, s. 46

⁴⁹⁶ *In the Matter of the Adoption Act, 1996 and In the Matter of Female Child B.C. Birth Registration No. 1994-09-040399*, 1998 CanLII 5839 (B.C. SC), [1998] 4 C.N.L.R. 7 [*Re Adoption Act 1996* cited to CanLII].

the “rationale for native custom adoption is present,”⁴⁹⁷ the Court reviews evidence given by Carrier elders of examples of situations where children were placed for custom adoption.

Those mentioned include the child of a mother who died of TB, a child whose mother was hospitalized for an extended period (this child was given to a caregiver until the mother was well), children who were raised by aunts or grandparents after the death of their mothers, and a child of a woman who began drinking heavily after her marriage broke down. After listing these examples, Grist J. states: “*Some of these child placements appear to more closely resemble fostering arrangements* which may not bring about the changes in status we would recognize as inherent to an adoption.”⁴⁹⁸ Having made this observation, Grist J. found that in the case he was considering the relationship created by custom adoption was not inconsistent with the provisions of the statute, and he made an Order recognizing the efficacy of the adoption.

A decision of the Supreme Court of Prince Edward Island, *Tuplin v Indian and Northern Affairs Canada*,⁴⁹⁹ relies upon anthropological evidence confirming custom adoption as a continuing ancestral practice of the Mi’kmaq culture, and also upon evidence from a respected Mi’kmaq elder:

Noel Knockwood is a status Indian. He is a member of the Mi’kmaq Nation and belongs to the Indian Brook First Nation. He was born on a reserve and now resides in Dartmouth, Nova Scotia. Mr. Knockwood is the Sergeant-at-

⁴⁹⁷ *Tagornak*, *supra* note 446 at 187.

⁴⁹⁸ *Re Adoption Act 1996*, *supra* note 496 at para. 17 [emphasis added].

⁴⁹⁹ *Tuplin v. Indian and Northern Affairs Canada*, 2001 CanLII 89 (P.E.I.S.C.), (2001), [2002] 207 Nfld. & P.E.I.R. 292, [2002] 1 C.N.L.R. 350 [*Tuplin* cited to CanLII]

Arms in the Nova Scotia House of Assembly. Within the Mi'kmaq community he is an elder. He is a life member of the Grand Council, which is the governing body of the Mi'kmaq Nation. *Mr. Knockwood spoke of the importance of custom adoption to Mi'kmaq people – of each person requiring identity, culture, language, a way of life – and of the practice having been present since ancient times. ...*⁵⁰⁰

This evidence speaks to reasons for the practice of custom adoption which may be viewed from a non-Aboriginal standpoint as being less tangible, but are quite central from within the Aboriginal worldview: to make sure that each child is raised in a situation where he or she can be given identity, culture, language, and a way of life.

3.2.4 The Role of Custom Adoption: A Re-Appraisal

The foregoing review of the factual content from the leading cases on custom adoption, in concert with the earlier summary discussion of the ethnographic literature concerning this institution of Aboriginal societies, very strongly supports the notion that if you look behind the custom adoption to its purpose, you find a means by which Aboriginal communities addressed many types of situations in a variety of ways in order to ensure that all of their children would be properly cared for. Some of the examples in the cases suggest that the arrangements made in accordance with the customary practices do not always look like what the Euro-Canadian legal system calls 'adoption'. This has been acknowledged by the Court in some instances, such as the comment from Grist J. quoted above that "Some of these child placements appear to more closely resemble fostering arrangements."⁵⁰¹ However, for the limited purpose of the Court to confirm that a custom adoption has occurred and that status

⁵⁰⁰ *Ibid.* at paras. 38-41 [emphasis added].

⁵⁰¹ *Re Adoption Act 1996*, *supra* note 496, see note 498 and accompanying text..

has been conferred thereby, there has been no need to understand the significance of what they have in fact been seeing. The Euro-Canadian understanding of the meaning of the term ‘adoption’ may in fact obscure our ability to see the role of this custom in Aboriginal cultures.

In the anthropological study of adoption referred to earlier, interviews were conducted with Band members who had experience of four kinds of alternative parenting arrangements: foster care, closed legal adoption, open adoption and custom adoption.⁵⁰² In the introduction to the interview results with respect to custom adoption, author Nordlund discusses the difficulties with terminology raised by this concept:

[t]he meaning of the word “adoption” has been imposed on the Seabird Island culture. There is no appropriate English word to describe “custom” practices. The words “adoption, guardianship, fostering, and stewardship” all have meanings that are entrenched in the English language, but do not adequately describe the child welfare actions of the band.

On Seabird Island, some people refer to “custom” adoption when they talk about their adoption experiences. This term is not exclusive to one kind of process; it is used to cover a number of child protection actions taken by the band members when a child’s parents can not care for them for a period of time. These actions include short term and long term care by one or more extended family members, followed by a return to the birth parents or permanent care by an extended family member. The band experiences of “custom” adoption therefore are varied, but the welfare of the child remains the basic concern.⁵⁰³

In her concluding chapter, Nordlund provides a summary of the results of her field work. With respect to “custom” adoption, she focuses on the contrast for outcomes between this option and the other options of closed or open adoption or foster care:

⁵⁰² Nordlund, *supra* note 472.

⁵⁰³ *Ibid.* at 88-89.

Band members, fortunate to be “custom” adopted, retain their Indian identity, ethnicity and status. They suffer less psychological trauma because they maintain contact with their birth family, adoption family and the band. “Custom” adoption allows extended family members to retain their roles as care givers. ... the right to “custom” adopt means the right to survive as Indian people.⁵⁰⁴

This analysis of the reports by Band members echoes the testimony of the elder in the hearing of the Supreme Court of P.E.I.⁵⁰⁵ and again emphasizes the centrality of these issues to the formation and existence of Aboriginal identity.

It has become clear that the Aboriginal practice of custom adoption differs significantly from the Euro-Canadian understanding of adoption. The common law heritage with respect to adoption was the subject of review in the case of *McNeil v. MacDougal*,⁵⁰⁶ a 1999 decision of the Alberta Court of Queen’s Bench regarding a claim of a *de facto* adoption. The Court considers the question of whether the petitioner has status to claim as a “child” of the deceased, and refers to the common law authorities, as follows: “As pointed out by Haultain C.J.S. in the case of *Burnfiel v. Burnfiel*, [1926] 2 D.L.R. 129 at p. 134, 20 S.L.R. 407: “An adopted child is an artificial creation unknown to our law. He is not a “child” in any sense of that term as used in our law.”⁵⁰⁷ The Court then refers to the authorities:

Halsbury’s Laws of England, vol. 5, 4th ed. (reissue) (London: Butterworth’s, 1993) at 647 para. 1021 states very clearly that adoption is not known at common law, it is a creature of statute:

⁵⁰⁴ *Ibid.* at 163.

⁵⁰⁵ *Tuplin*, *supra* note 499 at note 500 and accompanying text.

⁵⁰⁶ *McNeil v. MacDougal*, 1999 CanLII 945 (Alberta Q.B.), (1999) [2000] 256 A.R. 289 [cited to CanLII].

⁵⁰⁷ *Ibid.* at para. 21.

1021. Common law and equity. *At common law the rights, liabilities and duties of parents are inalienable, and adoption, in the sense of the transfer of parental rights and duties in respect of a child to another person and their assumption by him, is unknown.* Statute now provides that a person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf, but the making of any such arrangement does not affect any liability of the person making it which may arise from any failure to meet any part of his parental responsibility for the child concerned. *It follows from these provisions that, as a matter of English law, it is only the making of an adoption order which will be effective to transfer a child as a matter of law from one family group to another.*⁵⁰⁸

This review of the common law authorities presents a very different conception of the notion of parental rights and duties than does the foregoing review of the nature of custom adoption.

At the risk of oversimplification, as well as essentialism, on the issue of responsibility for the care of children, we have on the one hand a society in which the parent is both fully entitled to and also fully burdened with the responsibility for care of the child; this responsibility and burden cannot be divested except by order of the Court which then requires that the parent fully divest as if he or she were no longer the parent of that child. On the other hand there is a society which sees the duty of the parent as being to ensure that the child is cared for, whether within their own home or within the home of an extended family member or a member of the wider community. The child is a child of their people, not only of their parent, and as much as it is the duty of the parent to care for the child, it is also the duty of parent and family (and perhaps community) to recognize when it would be best that the child be cared for by someone other than the parent.

⁵⁰⁸ *Ibid.* at para. 22 [emphasis added, footnotes omitted].

I argue that it is the practice of exercising this choice, of determining how the child can best be raised so that it can be cared for, given the necessities of life and also given such ‘intangibles’ as identity, culture, language, and the way of life of the people, that has been labeled ‘custom adoption’. In fact, the cases and other literature reveal that sometimes the exercise of this choice results in a relationship similar to what the mainstream legal system calls adoption, but sometimes other types of arrangements not characterized by permanency are chosen.

In her significant study published in 2006, author Cindy Baldassi grapples with definitions.⁵⁰⁹

She notes that there are:

many ways in which custom adoption diverges considerably from statutory adoption as traditionally practiced in Canada. Some researchers and legal commentators in fact insist that most custom adoption is not really adoption as we might usually define it in Canada, but is instead more like guardianship in the common and civil law traditions. The continuing relationships custom adoptees often maintain with members of their birth families seem to be the main reason for this belief, along with the fluidity and occasionally temporary nature of some custom arrangements. Certain Aboriginal groups also make clear distinctions between temporary and permanent child care plans, or between transfers of parental rights and shared parenting. Custom adoption as traditionally practiced is not necessarily permanent.⁵¹⁰

Even where the choice for the child does establish a permanent alternative parenting relationship, there are significant differences from the Euro-Canadian concept of adoption.⁵¹¹

⁵⁰⁹ Baldassi, *supra* note 475.

⁵¹⁰ *Ibid.* at 70-71.

⁵¹¹ *Ibid.* at 83, 92-94, 97-98.

As has been noted by numerous indigenous scholars, trying to describe a fundamentally different concept using the language of the dominant society is itself an experience of the domination or distortion of the alternative concept by the mainstream power to define. I am asserting that adoption, in the sense of a permanent alternate parenting arrangement, is only one of the possible outcomes, or practices, of the exercise of an Aboriginal customary right which is not necessarily adoption but is rather a process of planning for the care and well-being of children.

3.2.5 Reconceiving the Aboriginal Right

Whether we say that custom adoption includes a wide variety of possible arrangements, or we say that what the legal system has identified as custom adoption is only one example of the outcomes which may be produced as a result of a broader underlying right which has to do with making plans for the care of children, may not be important. Either way, the point is that the mainstream legal system has long recognized and affirmed the operation, or at least the results, of a customary law jurisdiction among Aboriginal peoples whereby alternative parenting arrangements are made for Aboriginal children, whether temporary or permanent. I am proposing that the custom adoption process by which alternative familial status may be created in accordance with Aboriginal custom, a process which is recognized as an Aboriginal right both at common law and pursuant to the Constitution, is the exercise of a customary law jurisdiction with respect to the care and well-being of children.

It is the element of ‘process’ which is critical to this discussion; I argue that this element has been established in the review of the court decisions dealing with custom adoption. In order

to attain the requisite comfort level to certify that a custom adoption has occurred, and to therefore confirm the creation of altered familial status, the courts in Canada since 1983 have followed the lead of the Northwest Territories in requiring evidence that the factors enumerated in *Tagornak* are present:

- 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,
- d) that the rationale for native custom adoption is present...⁵¹²

Prior to 1983, Mr. Justice Morrow had noted in *Re Deborah*, a decision subsequently affirmed on appeal, that there are always “good sense” reasons for these adoptions.⁵¹³

The *Tagornak* requirements and the discussion in *Re Deborah* are examples which reflect a tacit acknowledgement by the Courts that custom adoption involves a process, that judgment must be exercised, that decisions must be made. The significance of this is made more manifest with the knowledge that in fact the outcome of this process is not always a permanent arrangement. It may be temporary substitute parenting, similar to the mainstream concept of foster care; it may involve the creation of new kinship ties which do not alter the natural parenting arrangement but do formally create new kin-based obligations which represent a permanent commitment for both the ‘adoptee’ and the kinship group which is extending the kinship tie.⁵¹⁴

⁵¹² *Tagornak*, *supra* note 446 at 187.

⁵¹³ *Re Deborah*, *supra* note 339, see quote at note 487.

⁵¹⁴ Anna de Aguayo, *supra* note 456, see notes 469-474 and accompanying text.

The mainstream legal system has consistently recognized that this customary adoption decision making process results in at least one outcome which is of legal efficacy. I assert that it is time to explicitly acknowledge that the operation of that process, the assumption of authority to make decisions about the care of children and thereby to produce outcomes which will be legally recognized as a matter of right, is also encompassed within the Aboriginal right, is arguably the actual locus of the Aboriginal right.

In *Casimel*, the B.C. Court of Appeal places the right of custom adoption within the general rubric of “aboriginal rights of social self-regulation.”⁵¹⁵ Another relevant precedent is the discussion by Williamson J. in *Nisga’a Nation* in which he states that, as a matter of necessary logic, the need to make decisions in order to activate or manage the right of Aboriginal title points to the inclusion of institutions of decision making as a necessary component of that right.⁵¹⁶ These precedents are helpful guides to a conceptual understanding of the place of the rights under discussion, but they are not needed in order to establish the legitimacy of the claim to such rights.

The existence since pre-contact times of the continued operation of Aboriginal customary law with respect to the care and well-being of children, as evidenced and recognized by the common law honouring of the practice of custom adoption, is the foundation for the recognition by the Canadian legal system that this customary law jurisdiction existed, it

⁵¹⁵ *Casimel*, *supra* note 442 at para. 24. and see notes 444-451 and accompanying text.

⁵¹⁶ *Nisga’a Nation*, *supra* note 397, see notes 410-415 and accompanying text.

exists, and arguably could claim to exist “under the sanction and protection of the Crown”⁵¹⁷ as it did in 1867. Two legal notions which bear closer examination are encompassed by this statement: one is ‘customary law’ and the other is ‘jurisdiction’. This is the subject of the next chapter.

⁵¹⁷ *Connolly*, *supra* note 314, see quote at note 316.

Chapter 4: Custom Adoption: the Exercise of a Customary Law Jurisdiction

Ultimately, this paper revolves around two questions:

- What set of rules or values should be applied in resolving issues about the safety and well-being of Aboriginal children, those of the Canadian legal order (state law) or those of the Aboriginal legal order (customary law)?
- What is the proper locus of authority (jurisdiction) for decision making about the care of Aboriginal children, the institutions of Canadian society or of Aboriginal society?

In the first section of this chapter the focus is on the historical juxtaposition of customary law and state law. I explore the relationship of the fundamental values of a society to the legal order of that society. I outline classical theoretical conceptions of sovereign law and customary law and explore the reluctance of the Canadian courts to recognize rights which claim to include a power of decision making. This leads into a discussion of a relatively emergent line of legal theory, which conceptualizes customary law as the framework of fundamental values of a society and is of central significance in any legal system.

The second section of the chapter assumes that an interface exists between Aboriginal and Canadian jurisdictions. I argue that there is tacit recognition of the decision making authority which is an inherent aspect of custom adoption. The challenge to the Canadian state, and legal system, is to explicitly acknowledge the existence and authority of this Aboriginal jurisdiction. The removal of decision making power from the institutions of Aboriginal societies was required in order to break their capacity to maintain themselves as 'organized

societies’; the relinquishing of state decision making power in order to restore the rightful authority of these institutions seems to be beyond the Canadian imagination. Canada is clearly a sovereign nation, but it is also a pluralist nation. Many jurisdictions, many sites of authority co-exist within Canada with relative equanimity, as will be discussed below. Why is recognition of a jurisdiction for the Aboriginal legal order such a challenge?

As part of the discussion, I provide commentary about certain issues which are implicated in the recognition of such a jurisdiction. These include the ‘best interests of the child’ as the governing standard for decisions about children, the interplay between legal pluralism and notions of sovereignty, discussion of the relative merits of a reconciliation approach or a ‘parallel streams’ approach, and an exploration of a purported dichotomy between the rights of the individual Aboriginal child and the political goals of the Aboriginal collectivity. This is followed by an overview of some of the ways in which a recognized jurisdiction for Aboriginal customary law with respect to children might be exercised. Here I distinguish this concept from the current trend towards delegation of child protection authority as the approved means by which Aboriginal people may participate in the existing child protection jurisdiction.

4.1 Customary Law

In Chapter Two I discussed the historical recognition within the imperial common law of the customary laws and practices of peoples over whom colonial power was asserted.⁵¹⁸ The

⁵¹⁸ See above in Chapter Two, Part 2.3.

review of the jurisprudence undertaken in Chapter Three confirms that recognition of customary laws and practices in the realm of family relations has been a consistent pattern in the Canadian courts, and that there is a recognized Aboriginal right to continue the practice of customary adoption. In order, however, to consider how customary law might be recognized and affirmed as operable within Aboriginal communities in the 21st century, an updated and current examination of the dynamic between the Canadian positivized law system and a system of customary law is necessary.

The *Indian Act* of 1876⁵¹⁹ began the process of consolidation of the authority of the settler-state of Canada over the indigenous inhabitants in several ways. Chapter One focused on the use of this legislation to ‘legalize’ the removal of Aboriginal children from their families, and the placement of these children into residential schools. Another very powerful intervention by this legislation into the basic structures of authority within Aboriginal societies was the determinants of “status” – the assumption by the state of the legal authority to define who would be a member of the constituted group called ‘Indian’, and who would not hold such status – and what the attributes of membership would be. The assumption of the power to assert this level of authority over the indigenous inhabitants was certainly concomitant with the physical devastation of Aboriginal peoples in British North America due to disease, loss of lands and depletion of traditional food sources, but was also buttressed by shifts in both legal theory and social policy which occurred in Britain in the latter half of the nineteenth century.

⁵¹⁹ *Supra* note 19.

An overview of this shift is presented by P.G. McHugh in his recent work on *Aboriginal Societies and the Common Law*:

It was in that period [latter half of the nineteenth century] that both systems [Anglo-American common law and international law] packaged the notion of sovereignty into a doctrinal and positivized form. It was also during this period that law became a more brutal instrument of the social policy of the settler-state...designed both to make aboriginal land available for settlement and to end the 'backward' tribalism. Through the nineteenth century the idea of law had moved from the classical reason-based form to the positivist one emphasizing law's basis in sovereign will.⁵²⁰

The work of Austin⁵²¹ expressed a new theory of sovereignty which reflected the imperial dominance of Britain and the Crown. He asserted that all laws emanate from the superior authority of the sovereign, to whom all members of society must be either subjects or dependents.⁵²² His theories specifically addressed the failure of a prototypical tribal society to function within a framework which would entitle or enable it to lay claim to sovereignty. Whereas he saw the defining and necessary quality of a sovereign society as being "general and habitual obedience to a certain and common superior" which was the ultimate source of sovereign authority, Austin described the governance of a tribal society as being qualitatively different:

The so-called laws which are common to the bulk of the community, are purely and properly customary laws; that is to say, laws which are set or imposed by the general opinion of the community, but which are not enforced by legal or political sanctions.⁵²³

⁵²⁰ P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (New York: Oxford University Press, 2004) at 149.

⁵²¹ John Austin, *The Province of Jurisprudence Determined* (1832, reprinted edition, London: Weidenfeld and Nickelson, 1955), discussed in McHugh, *ibid.* at 150-152.

⁵²² See discussion in McHugh, *ibid.* at 151-152.

⁵²³ *Ibid.* at 151, citing Austin, *supra* note 521.

Austin's views became widely accepted among British and colonial authorities, including the idea that customary laws are inferior to 'positivized' laws, those which emanate from the sovereign and carry the imprimatur of proper legal and political authority.

McHugh presents an interesting theory, that the juxtaposition of legally-defined Indian 'status' (the demonstration of the takeover by the state of the authority to define membership in the Aboriginal polity), with culturally-defined Aboriginal 'identity' was a central site of conflict for control of the existence of Aboriginality. He describes an ongoing "interplay...between law as an instrument of cultural transformation and the actual, non-compliant behavior of aboriginal people resolutely clinging to their customary means of identity."⁵²⁴ He thus emphasizes the primary nature of the conflict between law and custom, for both the state and Aboriginal peoples. Clearly, in the context in which this conflict arose, the dynamic of colonialism prevailed: the power of decision making was appropriated by the sovereign-sourced law, and customary law was assigned to the realm of subservient and irrelevant.

The review of jurisprudence in Chapter Three demonstrates that this mindset continues to be the fundamental conceptual framework within the Canadian legal system. The judicial decisions applying s. 35(1) are all premised upon an understood or given context of the sovereignty of the Crown, which includes the supremacy of the Crown's legal system. The requirement articulated in *Van der Peet*, that Aboriginal rights must be 'cognizable to' the Canadian legal system, insists that claimed rights can only be 'recognized' if they are of such

⁵²⁴ *Ibid.* at 218.

a nature that they can be incorporated within the common law; the common law as the dominant or sovereign system must be able to define and contain them. Custom can be recognized to the extent that it can remain subservient to law, that the central dynamic of authority between the settler-state and the Aboriginal peoples of Canada remains intact.

This is as far as recognition has been extended in the current situation where Aboriginal rights are construed by the courts as a negative right, that is, as an assertion of very specific circumstances in which an Aboriginal person is entitled to exemption from the otherwise operable application of laws of 'general applicability'. As long as the recognized Aboriginal rights are confined to specified activities or practices or customs (in the sense in which the common law of England recognized custom as a certain pattern of behavior which has existed in an enduring form since time immemorial), then the court on behalf of Canadian society can put brackets around them. In some ways it would be more accurate to define them as Aboriginal defences – to legal penalties regarding hunting, fishing, cutting timber, failing to be a documented family member.

It is the aspect of the inclusion of a decision making process and power which shifts the nature of the activity in question from a containable specific exception to an unpredictable active process which may not be 'cognizable' because its outcome cannot be certain, cannot be controlled. This process and power is the operation of a system of law, of Aboriginal customary law.

I argue that the 19th century thinking exemplified by Austin continues to be the basis for a ‘qualitative’ distinction between Canadian positivized law and customary law: both are systems of law or legal orders, but one is elevated by the sovereign authority of the state and the other is “so-called laws.”⁵²⁵ This distinction is posed in many ways: formal/informal; State/non-State; uniform/local; legislation/practices; comprehensive/simple; textual/oral; laws/customs. As with many of the binary conceptual frameworks created in the context of a society rooted in adversarialism, the second descriptor is tainted by the inference of lesser or inferior. In an adversarial society, when qualities are placed in this framework, contest is assumed; one will succeed, the other will not. So it is with law/custom.

Current scholarship posits a much more complex relationship between *custom* law and *made* law.⁵²⁶ An apt metaphor may be the warp-and-weft interrelationship between the law rooted in the norms lived in a society, and the law drawn or abstracted from those norms and shaped to either reinforce them, regulate them or change them. The whole cloth of a normative system, a system of law and governance, consists of the weaving together of these strands in an ongoing flow of intersections which creates textures and blocks, or threads, of colour which may (or may not) be reflective of the fabric of the society. Within Euro-Canadian law, this dynamic is seen in the interplay between the textual law encoded by legislators, the practices of the public and of institutions as they live with that law in the context of daily life,

⁵²⁵ See discussion of Austin, *supra* note 523 and accompanying text.

⁵²⁶ In an early draft of an article soon to be published, “Custom made – for a Non-Chirographic Critical Legal Pluralism” (not yet published, on file with the author and presented in workshop format at the 2010 Annual Conference of the Canadian Law and Society Association), Roderick A. Macdonald uses the juxtaposition of custom (law) and made (law) to enter into a discussion about the limitations of a legal system which exalts the authorized *word* over the interactive normativity of human life.

and the interpretation or application of the law by the adjudicators. The idea that the practices of the society sit centrally in that flow, feeding material into both the process of encoding and the process of interpretation/application, and in turn being shaped by those processes, is at the heart of a line of legal theory which has emerged in the past few decades.

Drawing on the work of Lon Fuller dating back to 1969, in which Fuller argued the primary significance of customary law within a legal system,⁵²⁷ Jeremy Webber discusses his understanding of the centrality of customary law:

Law is grounded, fundamentally, in the practices of particular societies. All law, even legislation, finds its meaning in interpretive relationship to these practices. To understand law is to understand norms' relationship to the web of human interaction in a given society.⁵²⁸

Thus, the focus is not on how law is made, in the sense of the authorizing institutions in a society, but on how the normative culture of the life practices in any human society finds expression in, and is expressive of the customary law in that society. In other words, customary law is revealed by a widely-held “perception that an action is obligatory,”⁵²⁹ it is about the implicit rules by which people govern their conduct in relation to each other.⁵³⁰ Webber does not discount the need for processes in society which will decide between or about competing norms, but this issue is secondary to the issue of the relationship between the normative content of customary law and the practices of society.

⁵²⁷ Lon L. Fuller, “Human Interaction and the Law” (1969) 14 Am. J. Juris. 1.

⁵²⁸ Jeremy Webber, “The Grammar of Customary Law” (2009) 54 McGill L.J. 579 at 581 [Webber, “Customary Law”].

⁵²⁹ *Ibid.* at 584.

⁵³⁰ *Ibid.* at 584.

How the law is made does not create important distinctions, it is the cultural distinctions between societies at the normative level which can create fundamental difference between legal orders. For example, if a society operates in the framework of a ‘fundamental normative choice’ which denies full personhood to women, as was the case in Canada until 80 years ago,⁵³¹ or which grants status to animals as bearers of rights as is the case in the society of the James Bay Cree,⁵³² their legal orders will reflect these choices, and may thus be very different from another legal order in substantive content even if their mechanisms to formalize or identify ‘legal’ norms were to be identical. Values, fundamental concepts such as the identity of ‘person’, are the normative conceptual foundation, the customary law which exists and which arises when legal orders from differing cultures must interact – their areas of substantive difference come into play, their “different visions of human relationships.”⁵³³ Jeremy Webber suggests that the origins of Aboriginal rights can be seen in the creative accommodations that were made between the legal orders of the indigenous inhabitants of the British North America territories and the military and colonist authorities, at the time prior to Confederation when these two societies were on a more equal footing and respect was accorded, of necessity, to the customary law of the Aboriginal peoples.⁵³⁴

⁵³¹ In what became known as the ‘Persons’ case, the Supreme Court of Canada in 1928 considered a reference as to whether ‘persons’ qualified to be appointed to the Senate included women, and decided that it did not. This decision is reported at [1928] S.C.R. 276. The women who had initiated this action appealed the decision of the S.C.C. to the Privy Council of the United Kingdom, which was at that time still the ultimate legal authority for the Canadian judicial system. The decision was reversed by the Privy Council in *Edwards et al v. Attorney General for Canada*, [1930] A.C. 124.

⁵³² Webber, “Customary Law”, *supra* note 528 at 596-597.

⁵³³ *Ibid.* at 604.

⁵³⁴ Webber, “Normative Community”, *supra* note 221.

Following the theory that customary law is the normative framework which is constitutive of and constituted by the practices of a society, the significant conclusion to be drawn is that any decision to be made about the ‘recognition’ of customary law, as an inherent root aspect of custom adoption, is not a choice or contest between law and custom, one of which is qualitatively superior to the other and deserves to govern over the other, but is rather an encounter between the customary law of two cultures with very different normative traditions regarding family relations.

The question does not call for an analysis of the claim of custom to be a legal system on par with the Western notion of a legal system, the question calls for an analysis of the moral claim of the Canadian state to entitlement: to continue to assert its norms regarding children and families because they are superior, to be better able to understand and define and provide that which is in the best interests of Aboriginal children than are the persons and institutions of authority within Aboriginal culture. And, because the encounter is between the customary law of the two cultures, the analysis must be founded at the level of the actual normative practices of Canadian society, the ways that the claimed superior authority operates in relation to the daily existence of the children of the Aboriginal peoples.

The detailed review of the relationship between the Canadian state and Aboriginal children undertaken in Chapter One argues strongly that the actual practices of the Canadian state with respect to the care and well-being of Aboriginal children evidence a deplorable and continuing lack of care and failure of responsibility on the part of the state. The discussion in Chapter Two asserts that the claim of Aboriginal peoples to resume decision making power

with respect to their children has a foundation in law as well as history and morality. I observe that the ideology of colonialism appears to have placed the Canadian state in an antithetical relationship to the best interests of the children of Aboriginal peoples. There is no basis in the lived experience of these generations of children to support an assumption, either moral or legal, which would privilege the law of the Canadian state over customary law at the level of substantive content.

Recent developments in the realm of international law, particularly the *United Nations Declaration on the Rights of Indigenous Peoples*⁵³⁵ also point toward a principle of recognition of customary law. The aspirations of this Declaration contribute an element of international suasion in support of the claim of the Aboriginal peoples of Canada to resume powers of decision making with respect to the lives of their children.

4.2 The Interface between Canadian Jurisdiction and Indigenous Jurisdiction with Respect to the Care and Well-Being of Aboriginal Children

The concept of jurisdiction infers that customary law operates, or is exercised, within a *recognized* sphere of authority.⁵³⁶ The question yet to be answered is whether the Canadian legal system will take the final step to ‘recognize and affirm’ jurisdiction as an inherent aspect of the right and practice of custom adoption.

⁵³⁵ *Declaration R.I.P.*, *supra* note 249.

⁵³⁶ *Webster’s*, *supra* note 459, s.v. ‘jurisdiction’: “(a) legal power, right or authority to hear and determine a cause considered either in general or with reference to a particular matter: legal power to interpret and administer the law in the premises; (b) authority of a sovereign power to govern or legislate: power or right to exercise authority; (c) the limits or territory within which any particular power may be exercised: sphere of authority”.

I argue that the equal and equitable application of reason supports a conclusion that decision making authority with respect to the care and well-being of Aboriginal children is the root of the practice of custom adoption. It is contrary to reason to recognize a decision, creating an alternative arrangement for parenting for a child, without recognizing that the process whereby that decision is made cannot be severed from the decision, and is necessary to the legitimacy which is the basis for recognition of the decision. This decision making authority is the jurisdiction of Aboriginal customary law.

The foundation for this claim of jurisdiction for customary law originates in the prior sovereignty of the Aboriginal nations, which includes the existence of systems of law; these systems of law were operating prior to contact and continued to operate both separate from and in interaction with colonial systems of law from the time of contact through to the mid-nineteenth century.⁵³⁷ Despite the efforts of the new government after Confederation to eliminate the systems of law and governance of the Aboriginal peoples, the courts continued to recognize the operation of customary law with respect to family relations.

The shift required here, from Aboriginal right as a specific exemption from ordinarily applicable laws to Aboriginal right which includes a decision making sphere of authority is at the heart of serious critique of the current position of the Canadian authorities, both legal and political, on s. 35(1) rights. Looking at a broader claim than is under discussion here, the

⁵³⁷ See Webber, “Normative Community”, *supra* note 221.

recognition of an inherent right of Aboriginal self-government, Professor Patrick Macklem

notes:

[t]he “special political rights and responsibilities” sought by Aboriginal peoples are *jurisdictional in nature* and involve elements of sovereignty and governance over individuals, groups and territory. Indian government means more than the conferral of special rights to engage in particular activities: it also involves rights to determine how, when, where and by whom such activity can occur, and the possibility that such decisions will be made in ways that conflict with nonindigenous political values, such as equality of individuals.⁵³⁸

There is a significant body of theory, of which Macklem’s work is an example, which argues that Indigenous people are distinguishable from other non-majority cultures within Canada because of their prior presence and prior sovereignty in these territories, and are entitled to recognition of a form of internal sovereignty or autonomy with respect to certain aspects of life critical to their cultural survival as distinct peoples.⁵³⁹ The *United Nations Declaration of the Rights of Indigenous Peoples* also lends support to this recognition.⁵⁴⁰

I do not address this broad claim in this thesis, but I do draw on the work done to advance it. I focus very specifically on the considerations relevant to the child protection jurisdiction, for two reasons: because the Supreme Court has given a very strong message that claims for Aboriginal rights must be framed at an appropriate level of specificity, and because the

⁵³⁸ Macklem, “Distributing Sovereignty”, *supra* note 305 at 1355.

⁵³⁹ See for example John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, *supra* note 378 at 138-141 (in Chapter 6: “‘Landed’ Citizenship: An Indigenous Declaration of Independence”); Pekka Aikio & Martin Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku/ Åbo Finland: Institute for Human Rights, Åbo Akademi University, 2000); Curtis Cook & Juan D. Lindau, eds., *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (Montreal & Kingston: McGill-Queen’s University Press, 2000).

⁵⁴⁰ *Declaration R.I.P.*, *supra* note 249, many of the *Articles* deal with aspects of internal autonomy.

jurisprudence related to custom adoption does stand alone and does address an area of socio-legal practice which is somewhat unique even within the context of the Canadian legal system. Any discussion of the locus of authority for decision making about the care and well-being of children implicates a panoply of interests and values which are both complex and deeply challenging. While it is beyond the scope of this study to address the full range of these issues, certain of them must be acknowledged at least for comment.

4.2.1 ‘Best Interests of the Child’ as the Governing Standard for Decisions About Children

There are those who would argue against recognition of jurisdiction because it could theoretically permit a system which is not built around the ‘best interests of the child’ as the ultimate governing standard; this would fly in the face of both the jurisprudence of the Supreme Court of Canada and a strongly entrenched principle of international law.

The *United Nations Convention on the Rights of the Child*⁵⁴¹ is virtually universally supported, including its provision that “In all actions concerning children, whether undertaken by ... social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁵⁴²

However, the international law literature recognizes that the reason for this widespread acceptance is the indeterminate nature of the standard; the ‘best interests of the child’ is

⁵⁴¹ *CRC*, *supra* note 299. The United Nations Children’s Fund, UNICEF, reports on its website that only the United States and Somalia have not ratified this Convention, online: <http://www.unicef.org/crc>.

⁵⁴² *Ibid.*, Article 3(1).

interpreted to mean very different things in different parts of the world.⁵⁴³ I anticipate that any argument about ‘best interests’ within a customary law jurisdiction would not be about the applicability of the test, but about the authority of the customary law jurisdiction to define or apply that standard in a manner inconsistent with the jurisprudence of the mainstream Canadian legal system.

In Canada, the ‘best interests’ test tends to focus on the child as an individual separate from its family and its social context,⁵⁴⁴ and in fact may carry an inference that the interests of child and family are necessarily adversarial. There may also be an assumption that children must be protected from the implication that they somehow ‘belong’ to their parent(s), and perhaps also to the cultural group of which the family is a part.⁵⁴⁵ The meaning of ‘best interests’ in a contest between a plan for custom adoption and a plan for a state-sponsored adoption placement was at the heart of a trial decision in a B.C. case concerning the applicability of provincial adoption laws to Aboriginal children.⁵⁴⁶ In his reasons, the trial

⁵⁴³ See for example Sonja Starr & Lea Brilmayer, “Family Separation as a Violation of International Law” (2003) 21 Berkeley J. Int’l L. 213 at 225; Philip Alston, “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” (1994) 8 Int’l. J.L. & Fam. 1 .

⁵⁴⁴ See for example Marlee Kline, “Child Welfare Law, “Best Interests of the Child” Ideology and First Nations” (1992) 30(2) Osgoode Hall Law Journal 375; Calder, *supra* note 477.

⁵⁴⁵ The concept of ‘belonging’ – with its diverse implications of ownership, appropriate connection, attachment, integrality - becomes a deeply contested idea when one thinks about children.

⁵⁴⁶ *Re Birth Registration No. 67-09-022272* , 8 C.N.L.C. 24, [1974] 1 W.W.R. 19 (B.C.S.C.). In 1973, a trial judge of the Supreme Court in B.C. decided that he could not make an adoption order with respect to an Aboriginal child because the nature of the adoption laws would result in the child losing his status under the Indian Act. This decision was reversed by the B.C. Court of Appeal, reported at *Re Adoption Act*, 8 C.N.L.C. 29, (1974) 44 D.L.R.(3d) 718 (B.C.C.A.). The subsequent appeal to the Supreme Court of Canada, reported at

judge acknowledged that this was a case where the practice of native custom adoption and the *Adoption Act* of the province were in conflict:

The natural parents have had difficult lives. They do not propose to take the boy into their own immediate family ... but instead propose that he be raised by an aunt. This lady and her husband testified that they were willing and anxious to undertake the duty. They have impressive credentials as foster parents, and in my opinion showed themselves to be admirable and suitable people in every way. ...

I am much indebted to certain prominent native people who attended the hearing at my request as friends of the Court, to inform me as to tribal custom in the matter of adoption, and family relationships generally. ... I am of the view that native custom, speaking very generally (for there are slight differences between those of one people and another), recognizes a form of adoption: the rearing of children was and is not the exclusive responsibility of the parents, though they have primary rights and duties. Grandparents, uncles and aunts share this responsibility to a great extent. In native society, originally matrilineal, it is usual nowadays for grandmothers and aunts to take in and rear children when their parents, for one reason or another, cannot themselves do so. ... It brings about something very close to our notion of adoption: a notion which is common to all legal systems, West Coast native custom as well as our Roman derived law.

Those who gave evidence, as well as the Court's own advisers, were all of the opinion that there was potential danger to a native child being brought up in a white family, particularly when he reached the later stages of adolescence. I can readily appreciate this view: it is based on perfectly sound ideas of the effects of heredity and is not a matter merely emotional or racial. Instances abound where such persons have in the past experienced difficulty in establishing racial identity in their maturity.

However, there is another view. One must not forget the effects of environment upon personality; and I have on this point the evidence of Dr. Rasmussen, the family doctor of the petitioners, who has attended the child all his life, is well acquainted with his immediate family, and who struck me as

Natural Parents v. Supt. Of Child Welfare, 8 C.N.L.C. 35, (1975) 60 D.L.R.(3d) 148, [1976] 2 S.C.R.751 (LexUM) [*Natural Parents* cited to D.L.R.] was not successful.

The issue for the higher Courts turned on the interpretation of s. 88 of the Indian Act; at neither the Court of Appeal nor the Supreme Court of Canada did the majority decision address the finding by the trial judge that the plan to have the Aboriginal child adopted by his white foster parents, with whom he had been residing for 5 years, was preferable to the plan of the natural parents to have the child placed for custom adoption with his aunt, who was acknowledged to be a perfectly adequate parent.

not only a learned, but a sensible physician. Dr. Rasmussen, while not discounting heredity, made a strong case for an intelligently imposed environment being largely determinative of the direction of personality growth – and I am in no doubt at all as to the capabilities and intentions of the petitioners in this regard. They are as likely as any people to succeed in equipping this child with the strong character of which he will stand in need in the future.

*This is a case, then, where the claims of native custom and the Adoption Act of the Province come into conflict, or where heredity and environment clash as concepts. This conflict can only be resolved in the light of the best interests of the child himself. He must be considered as an individual, not a part of a race or culture.*⁵⁴⁷

While these reasons indicate that the trial judge undertook an honest search into the possibility of native custom adoption in a situation where the length of the foster placement was a powerful factor to be balanced, they also indicate that in the end he chose to resolve the conflict between the Aboriginal custom and the Euro-Canadian custom with reference to a primary Euro-Canadian value, the notion that an individual exists *qua* individual, not as part of any race or culture. There could be no clearer demonstration than appears in the italicized words above of the concurrence in the mind of the adjudicator between his own culturally-specific values and the meaning that he ascribes to ‘best interests of the child.’

This is actually one of the strongest arguments in favour of Aboriginal jurisdiction: that the meaning of the ‘best interests’ test is a matter of interpretation by the decision maker in authority, and interpretation is a culturally bound exercise. Mary Ellen Turpel, in a commentary on the *Charter* and cultural difference, issues a stinging challenge to the

⁵⁴⁷ *Natural Parents*, *ibid.* at 767-769, Martland J. quoting from the reasons of the trial judge [emphasis added]. The Court decided in favour of adoption by the foster parents. See *ibid.* for citations for trial and appeal decisions.

authority of the Canadian courts given their failure to account for cultural difference in the process of legal interpretation:

Sensitivity to cultural difference is sensitivity to the limitation of the capacity to know. ... The larger significance of cultural difference, in my view, is the extent to which it reveals a lack of interpretive authority in legal reasoning and decision-making and the extent to which it problematizes the rule of law as one particular cultural expression of social life.⁵⁴⁸

There are many nations in the world which operate under a different understanding about how children develop and what is best for them than does the majority culture of the Euro-North American nations. In these countries the ‘best interests’ test carries a different set of inferences, and this case demonstrates that it could also be applied differently if it were to be applied by an Aboriginal authority in Canada.

This example brings us back to the fundamental question: will the Canadian legal system surrender the decision making power with respect to the interpretation of the ‘best interests’ of Aboriginal children in deference to an ‘existing’ customary law jurisdiction with respect to the care and well-being of Aboriginal children? The proposal is not to petition for delegation of jurisdiction by the Canadian legal order, but rather to invite the Canadian legal order to acknowledge the existence of jurisdiction in the Aboriginal legal order on this particular question, to explicitly recognize another layer within the legal pluralism which already exists in Canada.

⁵⁴⁸ Mary Ellen Turpel, “Aboriginal Peoples and the Canadian ‘Charter’: Interpretive Monopolies, Cultural Differences”, (1989-1990) 6 Canadian Human Rights Yearbook 3 at 25, reprinted in Anthony J. Connolly, ed., *Indigenous Rights* (Farnham: Ashgate, 2009) 573.

4.2.2 Legal Pluralism and Respective Sovereignities

The practice of legal pluralism – of having more than one legal order operating within the territories and population groups and subject areas of responsibility which comprise the Canadian state – is not a new concept in Canada, as demonstrated by the varying jurisdictions between the federal and provincial governments and the civil law and common law systems.⁵⁴⁹

Legal pluralism is inherent in a federated national framework; in 1885 the British constitutional authority A.V. Dicey wrote of federalists that they “must desire union, and must not desire unity.”⁵⁵⁰ Carol Weisbrod makes the link between pluralism, federalism and multiple sovereignties:

Conceptions of pluralism and federalism can take several forms. Some forms rely on the idea of sovereignty, noting that it can be located in groups other than the state. These versions fit well with the way we view Indian tribes...whose functioning can be seen in terms of nonstate but statelike authority and law. In these versions of federalism, an individual seems to belong to two sovereign groups: ...state and tribe.⁵⁵¹

⁵⁴⁹ The right of the population group comprised primarily of the descendants of the French settlers to maintain the civil law system as the legal order within the new Province of Quebec was condition precedent to their entry into Confederation, and was guaranteed in the *BNA/Constitution Act, 1867*. Sections 91 and 92 of that Act establish that either the federal or provincial levels of government will have authority with respect to discreet subject areas of responsibility.

⁵⁵⁰ A.V. Dicey, “Federal Government”, (1885) 1 *Law Quarterly Review* 80 at 81, cited in Weisbrod, *supra* note 254 at 39.

⁵⁵¹ Weisbrod, *ibid.* at 30.

Weisbrod refers here to the U.S. framework in which there has always been recognition of a domestic sovereignty which inheres to Native American indigenous peoples.⁵⁵² However, the point she makes is equally relevant for Canada, that a state can be a carrier of both external (international) and internal (domestic) sovereignties,⁵⁵³ and that the claim of Aboriginal peoples is to a statelike authority which includes a lawmaking capacity,⁵⁵⁴ but which does not aspire to formal independence from Canada.⁵⁵⁵

Within a pluralistic framework, a jurisdiction for Indigenous customary law sits side by side with a majority legal jurisdiction, or with a few other ‘cultural’ legal jurisdictions, in many nations in the world. The common law tradition is followed and applied in several of these multi-jural nations.⁵⁵⁶ The recognition and affirmation of a customary law jurisdiction with

⁵⁵² This status has been confirmed in American jurisprudence since at least the decisions of Chief Justice Marshall in the early nineteenth century, see *supra* note 308.

⁵⁵³ For other discussion of the concept of internal sovereignty, see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 119-124 [Macklem, *Indigenous Difference*].

⁵⁵⁴ Here again cultural difference can create significant barriers to understanding: in the modern Eurocentric world the state and law are virtually synonymous. The fundamental quality of positive law is that it is created and authorized by the appropriate (sovereign) mechanisms of the state. Thus there is cultural dissonance for a Eurocentric mind confronted with the idea of nonstate lawmaking capacity; this is part of the European intellectual origin of the inferiority of customary law.

⁵⁵⁵ There are no doubt elements within the Aboriginal population in Canada who do aspire to formal independence, but the voices of the political and academic leadership among Canada’s Aboriginal peoples call for an internal sovereignty in which their peoples would be both full citizens of Canada and also belong to a people which has a certain recognized autonomy within the Canadian framework.

⁵⁵⁶ See for example India, which has historically had spheres of authority for both Muslim and Hindu law and is now exploring avenues for jurisdiction for its large indigenous population: Apoorv Kurup, “Tribal Law in India: How Decentralized Administration is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better” (2008) *Indigenous L. J.* 87; also several Commonwealth countries of Africa such as Nigeria include an indigenous customary law jurisdiction: Remigius N. Nwabueze, “The Dynamics and Genius of Nigeria’s Indigenous Legal Order”, (2002) 1 *Indigenous Law Journal* 153.

respect to Aboriginal children is a change which can be made in Canada from a functional point of view. The question is, finally, one of will.

The decision at the time of the conquest of the French colony in North America not to impose English law, subsequently formalized by constitutional provision guaranteeing the continuation of the French-origin civil law system within the Province of Quebec, reflects a respect for an element of sovereignty in the conquered colony of a sister European state which was never extended to Aboriginal peoples. This is precisely where the interrogation of the legitimacy of the removal of decision making authority from Aboriginal peoples finds its locus: upon what basis was it decided that the recognition which had previously been accorded to the prior and existing sovereignty or autonomy of the Aboriginal peoples would henceforth cease to exist?

The earlier discussion of the work of legal theorist John Austin describes his assertion, which became widely accepted in British and colonial society, that the very nature of Aboriginal society – its tribalism, its system of customary laws, its lack of a single unquestioned power to whom all the citizenry would submit – disqualified it from eligibility to be included among the sovereign societies. In a word, Aboriginal society was seen to be inferior, and should rightly therefore be dominated and disempowered until its people could be assimilated and their culture eradicated. On the large scale, it has been argued that this ascribing of lesser status to the existence of Aboriginal peoples and the concomitant withdrawal of respectful relations between two sovereigns is the normative breach which justifies a call for a new

constitutional regime in Canada which would re-distribute sovereignty to remedy this founding injustice embedded in Canadian constitutionalism.⁵⁵⁷

In the more limited scope of this study, the call is to step back from the illegitimate taking of decision making authority regarding family relations which occurred in the context of Confederation in the name of sovereignty, and to acknowledge that the jurisdiction of Aboriginal customary law in this realm of life has been exercised continuously and has never been legitimately abrogated. It has continued to operate at the community level, and the Canadian legal system has declared the decisions flowing from that process to be effective; it is a jurisdiction to be recognized and affirmed as one of the legitimate spheres of legal authority in a pluralist Canada.

4.2.3 Reconciliation or Parallel Streams?

In theorizing its relations with Aboriginal peoples since Confederation, the Canadian state has moved from forced assimilation through a universalizing ‘offer’ of integration and onward into its present focus on recognition of Aboriginals as bearers of ‘distinctive’ cultures with whom reconciliation should occur. There are two problems with this approach.

Firstly, there are two quite different connotations to the meaning of ‘reconcile’ within the English language, and the Supreme Court has not been completely transparent about its use of this word. Chief Justice Lamer in *Van der Peet* states that the concept of reconciliation is inherent within the purpose of s. 35(1):

⁵⁵⁷ Patrick Macklem, *supra* note 553 at 7, 235.

[W]hat s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; *the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.*⁵⁵⁸

His description of the Aboriginal societies in this passage implies an acknowledgement of their prior sovereignty, in the sense of autonomous peoples in organized societies with their own distinctive practices, traditions and cultures. He proposes that the kind of substantive rights which would be recognized and affirmed under the provision of the constitutional section would be such as would advance the purpose of reconciling this prior autonomy/sovereignty with the sovereignty of the Crown. What does that mean?

As was noted earlier, Lamer J. (prior to becoming Chief Justice) wrote a judgement on behalf of the Court in the 1990 *Sioui* case where he clearly articulates his doctrine of reconciliation with respect to the Crown-Aboriginal relationship (it being in that case a treaty relationship):

[I]t has to be assumed that the parties to the treaty... intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand. Protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is in my opinion the most reasonable way of reconciling the competing interests. ... Defining the common intent of the parties on the question of territory in this way makes it possible to *give full effect to the spirit of conciliation, while respecting the practical requirements of the British.* ... The Hurons, for their part, were only asking to be permitted to continue to carry on their customs on the lands frequented to the extent that those customs did not interfere with enjoyment of the lands by their occupier.⁵⁵⁹

⁵⁵⁸ *Van der Peet*, *supra* note 217 at para. 31.

⁵⁵⁹ *Sioui*, *supra* note 364 at 1071-1072.

Here, Lamer J. makes it clear that he operates on the assumption that the interests of the Crown (that is, the British) were dominant over the interests of the Hurons, and that ‘conciliation’ was a spirit shared by the parties (a normative value) whereas only the British had ‘requirements’ (substantive content). In this case, as in *Van der Peet*, he is using ‘reconcile’ to describe a relationship of domination whereby the interests of the Crown are sovereign over those of the Aboriginal societies but will accommodate those lesser interests where possible.

This would follow one of the dictionary meanings of ‘reconcile’: “to cause to submit to or accept: bring into acquiescence with (*reconciled* to hardship)”. This stands in contrast to an alternative dictionary meaning: “to restore to friendship, compatibility, or harmony” or “ADJUST, SETTLE (*reconciling* differences)”.⁵⁶⁰ The concept of reconciliation enunciated by the Court is not appropriate, inasmuch as it is promoting a process of domination rather than a substantive stance of mutuality or respectful relations;⁵⁶¹ it creates a space for Aboriginal peoples to stand only if those who are really in authority choose not to stand there. ‘Reconciliation’, as it is presently used by the Supreme Court of Canada, retains all authority in the Crown. As such, I argue that it undermines the integrity of the *Constitution Act, 1982*; it removes any sense of authoritative content from the kind of rights which are

⁵⁶⁰ Webster’s, *supra* note 459, s.v. “reconcile”.

⁵⁶¹ See for example Regan, *supra* note 42 at 61-67; Val Napoleon, “Who Gets to Say What Happened? Reconciliation Issues for the Gitksan” in Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 176 at 176-179, 186-187.

recognized under s. 35(1), making clear that these rights do not imply any commitment to the holder.⁵⁶²

The second critical response to an approach based upon reconciliation is that the current Western notion of reconciliation demands no action from one perceived to be a wrongdoer, other than a sincere apology which should then precipitate forgiveness, and thereby reconciliation. Indigenous voices are advocating a more restorative concept of reconciliation. For example, in an article on the discourse of treaty rights, Professor Rebecca Tsosie proposes a vision of reconciliation which includes two aspects.⁵⁶³ The first stage is “reconstructing the relationship” which involves the acknowledgement of wrongdoing and the making of a commitment to set the relationship right; this stage could include statements of apology and response.⁵⁶⁴ This is a prelude to a stage of “reparations”, concrete steps taken by the state to address the “material, economic, social, and political changes necessary to overcome the past injustice.”⁵⁶⁵ This would include recognition of the collective rights necessary to maintain the distinctive culture of an Aboriginal people, including recognition of a level of separate political identity – internal sovereignty, autonomy or a right of self-determination – which existed as part of the historical Crown-Aboriginal relationship and should be restored to ‘overcome the past injustice.’ Other authors have advanced similar

⁵⁶² On the doctrine of reconciliation and Aboriginal rights, see Minnawaanagogiizhigook (Dawnis Kennedy), “Reconciliation Without Respect? Section 35 and Indigenous Legal Orders” in Law Commission of Canada, *supra* note 42, 77 at 100-103.

⁵⁶³ Rebecca Tsosie, “Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights” (2000) 47 U.C.L.A. L. Rev. 1615, reprinted in Connolly, *supra* note 548 at 363.

⁵⁶⁴ *Ibid.* at 1664-1668.

⁵⁶⁵ *Ibid.* at 1664, and see 1668-1669.

notions of what reconciliation might look like from an Aboriginal perspective and it usually includes an element of what I have referred to as ‘parallel streams,’⁵⁶⁶ or separate recognized jurisdiction. From this perspective, the acknowledgement by Western authorities that the autonomous institutions of Aboriginal culture provide a distinct and valuable contribution which enriches not only their societies but the wider national and global spheres⁵⁶⁷ would itself be an act of reconciliation.

This same emphasis on the need for a parallel relationship for Aboriginal peoples, with respect to the care of their children, appears in several sources. For example, the Report of the Aboriginal Committee of the B.C. review process on family and child welfare legislative reform in the early 1990s includes this message: “Finally, as our Nations rewrite their own family law to meet our contemporary needs, ...the laws of our Nations must have paramountcy over your laws as they apply to our children.”⁵⁶⁸ A similar recommendation, of the need to provide the authority and resources which will enable Aboriginal peoples “to develop their own child welfare services outside the framework of existing provincial

⁵⁶⁶ See for example Union of B.C. Indian Chiefs, *Calling Forth Our Future: Options for the Exercise of Indigenous Peoples’ Authority in Child Welfare* by Ardith Walkem (Vancouver: Union of B.C. Indian Chiefs, 2002) at 7-8, 76; John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 239-241.

⁵⁶⁷ For example, see discussion of the recognized contributions of indigenous peoples in the realm of international law, and in particular to the “model of global pluralism” in James Anaya, “Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law” (2006) 22 Wash. U.J.L. & Pol’y 107 and James Anaya, “Indigenous Law and Its Contribution to Global Pluralism” (2007) 6:1 Indigenous Law Journal 3.

⁵⁶⁸ *Liberating Our Children*, *supra*, note 111 at viii. See also accompanying text.

legislative schemes” is the conclusion reached by Marlee Kline in her work on the subject of child welfare law and First Nations.⁵⁶⁹

The call for an understanding of reconciliation which demands both apology and remedial action is, as was said earlier, restorative in focus; in this context it is about restorative recognition of the dignity and capacity of the Aboriginal family. It is acknowledgement that the jurisdiction to make decisions about how best to meet the needs of individuals in families, including the best interests of children, inheres to familial and social institutions of the Aboriginal peoples which have historically and continuously borne the responsibility and authority to address these needs within the cultural framework of their people.

4.2.4 Putting Children Before Collective Political Goals

A concern that recognition of an Aboriginal jurisdiction will put children at risk, and specifically that it will put the collective political goals of Aboriginal peoples ahead of the best interests of their children, raises interesting and difficult issues.

The most primary fact about children is that for many years they are not adults – they begin life in a state of total dependency upon their parent(s) and/or other caregivers, and move through a long process of development during which a high degree of dependency continues and then begins to shift towards increasing independence. One of the features of this

⁵⁶⁹ Kline, *supra* note 544 at 424.

dependency is that “children do not choose their groups”.⁵⁷⁰ As a result, whichever group they are dependent upon has enormous influence over what they will experience and who they will become. Their process of becoming is relational in nature; the conceptual autonomous individual is a long time in the making.

In a very thoughtful feminist discussion of a relational concept of autonomy, Jennifer Nedelsky notes that the literal meaning of ‘autonomy’ is “governed by one’s own law”, and that therefore the process of becoming autonomous is:

to come to be able to find and live in accordance with one’s own law. I speak of “becoming autonomous” because I think it is not a quality one can simply posit about human beings. We must develop and sustain the capacity for finding our own law, and *the task is to understand what societal forms, relationships, and personal practices foster that capacity*. ... The idea of “finding” one’s law is true to the belief that even what is truly one’s own law is shaped by the society in which one lives and the relationships that are a part of one’s life. “Finding” also permits an openness to the idea that one’s own law is revealed by spiritual sources, that our capacity to find a law within us comes from our spiritual nature. From both perspectives, the law is one’s own in the deepest sense, but not made by the individual; the individual develops it, but in connection with others; it is not chosen, but recognized.⁵⁷¹

This provides an interesting perspective on the relationship between the process of socialization and the sources of authority, in the deepest sense of the word, which inform and guide the person. In the context of this study, this relational theory provides another window of understanding as to why the process of Aboriginal children coming to maturity within the culture of their people is so central to both the continuing cultural existence of Aboriginality

⁵⁷⁰ Weisbrod, *supra* note 254 at 159; this brief quote is from a chapter dealing specifically with “Children and Groups: Problems in Fact and in Theory.” Weisbrod is an interesting source because her areas of expertise include both pluralism and family law.

⁵⁷¹ Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” 1 Yale J.L. & Feminism 7, at 10 [emphasis added].

and also the ‘best interests’ of the Aboriginal child: that it is only in interaction with and relation to the “social forms, relationships and personal practices” of family and community within Aboriginal culture that a child with his or her inherent individuality can find his or her own law and can become an autonomous Aboriginal person. This corresponds with the argument made in Chapter One that the Aboriginal child has a human right to live and be nurtured in the context of Aboriginal life, and that this right is an inseparable aspect of both the best interests of the child and the right of existence of Aboriginal peoples.⁵⁷²

It is a misapprehension to suggest that the goal of the survival of the Aboriginal collectivity is a goal which is somehow in competition with or a threat to the best interests of the Aboriginal child. This is an example of the capacity of a binary framework – best interests of the child/survival of the group – to promote an adversarial ‘contest’, and thereby to obstruct a deeper level of integrative thought or analysis. As was noted in Chapter Two, ‘recognition of distinctness’ has been identified as a critical element in the development of identity for members of non-majority cultures, and in international human rights law there is a developing awareness that the honouring of cultural difference is a necessary condition for “the freedom of each individual and of permitting the development of his or her identity.”⁵⁷³

The recognition of Aboriginal jurisdiction does not put Aboriginal political goals ahead of the best interests of their children. I argue that the political contest, which is between Aboriginal societies and the state, not between these societies and their children, has been

⁵⁷² See above, Chapter One at Part 1.4.5.

⁵⁷³ See *supra* note 248 and accompanying text.

made central to the arena of decision making about Aboriginal children by the state, to the detriment of the children. A clear recognition of Aboriginal jurisdiction will allow, for the first time since Confederation, a focus on the needs of these children and their families which is *not* governed by larger political strategies.

One of the factors which is identified as problematic for the Aboriginal peoples in Canada, both by Aboriginal sources and by non-Aboriginal observers, is that their internal discourse about issues of customary law, traditions of justice, community authority is severely impacted and distorted by the colonialist framework within which they live, which creates a constant need to defend against or explain to or make a claim in a manner ‘cognizable by’ the dominant society.⁵⁷⁴ Within the context of one’s own group, there is an inevitable tension between individuals or dissident groups and those in authority. One of the problems identified within Aboriginal societies is that because they are required, in order to maintain their society, to face vigilantly outward, they have not had the necessary focus on these internal issues of justice and decision making. The recognition of a protected sphere of authority for the critically important realm of the care and well-being of children, by diminishing the impacts of the larger colonial political struggle, will create a space within which these societies can focus on their children,⁵⁷⁵ and on the governance issues which will

⁵⁷⁴ See for example: Gordon Christie, “Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions” (2007) 6:1 Indigenous L. J. 13 at 18, 26-27; Bruce G. Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* (Lincoln: University of Nebraska Press, 2001) at 11-23.

⁵⁷⁵ Macklem, “Distributing Sovereignty”, *supra* note 305 at 1348: “Sovereignty’s value lies in the fact that it creates a space in which a community can negotiate, construct and protect a collective identity. Sovereignty, simply speaking, permits the expression of collective difference.”

arise in the exercise of this jurisdiction, such as the politics of decision making. This is not a negative, this will be a positive development.

I will briefly comment on one other aspect of the notion that recognition of a customary law jurisdiction will put children at risk. One of the major observations in an in-depth study of the use of the restorative justice model in Aboriginal communities in the area of criminal law is that successful implementation of this sort of community-based intervention requires strong and healthy communities, with resources that most Aboriginal communities do not have because of the impacts of generations of social and material dispossession.⁵⁷⁶ A similar concern could be expressed about the generational history of familial breakdown, and the concomitant impact on the capacity of Aboriginal families and communities to take responsibility for their children. On one level, I dismiss this concern as yet another face of the colonial mentality.

However, on another level, I concur that the devastating impacts on Aboriginal families which have been wrought by the past 150 years are overwhelming, and that all available resources are needed to engage with this task. This was expressed by the Aboriginal Committee of the B.C. legislative review process when it noted that the mainstream society must supply resources needed to heal the wounds suffered.⁵⁷⁷ It is fundamentally important that the Canadian state not forsake its obligation to restore, in fact its commitment to this

⁵⁷⁶ Jane Dickson-Gilmore & Carol La Prairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005) at vii-x.

⁵⁷⁷ *Liberating Our Children*, *supra* note 111 at viii.

work of reparation needs to deepen, while simultaneously accepting that the framework for authority must change.

This shift in authority will not be easy. There is no doubt that many committed individuals at all levels of the state system are acutely aware of the vulnerable circumstances of Aboriginal children, and have a strong sense of both professional and personal responsibility, and of societal obligation, to protect these children. Every player, from the beginning social worker to the Justices of the Supreme Court of Canada, is imbued with a sense that it is their role to determine and protect the best interests of these children. Indeed, at the judicial level, the *parens patriae* jurisdiction claims for the sovereign legal system a universal power to intervene on behalf of children.⁵⁷⁸ The recognition of Aboriginal jurisdiction will not displace either the commitment or the obligation of mainstream Canadian society; it will instead properly place those professional and social resources under the auspices of the rightful locus of authority for decision making about the safety of vulnerable children in the Aboriginal societies. It does not say that the input, expertise and resources are not needed and are not helpful, it simply confirms that the authority to make the determinative decisions is properly within the jurisdiction of Aboriginal customary law.

⁵⁷⁸ This is an ancient jurisdiction originally invoked by the Court of King's Bench on behalf of mentally incompetent adults, and continuing to the present day with respect to a power in the Superior Courts to supervise or protect the interests or safety of children. For example, this was invoked by Mr. Justice La Forest in his decision in *B.(R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315 at 374(LexUM), 21 O.R. (3d) 479.

4.2.5 Exercise of the Jurisdiction

The *Natural Parents* case referred to earlier decided very definitely, if not clearly, that the generally applicable provincial laws, and specifically the child protection legislation and adoption legislation, do apply to Aboriginal children by virtue of s. 88 of the *Indian Act*.⁵⁷⁹ That section provides within its wording an exemption in situations where an action by an ‘Indian’, which would ordinarily be judged to be contrary to a provincial law, is the subject of a treaty which provides a right for the Indian parties to that treaty to engage in that action. Because the treaties between the Crown and Aboriginal peoples did not historically deal with family relations or the welfare of children, there have not been claims that custom adoption is a protected practice because it is a treaty right.

Custom adoption has been recognized firstly as a common law Aboriginal customary right, and then subsequently as a right recognized and affirmed in accordance with s. 35(1) of the *Constitution Act, 1982*. Each of these claims has been dealt with by the Canadian courts on a case by case basis, and there is no reason to suggest that this practice will or must change. What this thesis does advocate is that in each of these cases the court should acknowledge that in finding that a custom adoption has taken place and has created an alternative familial status which will be recognized for legal purposes, the court has also by necessary implication recognized that a customary law jurisdiction has been exercised. One of the definitions discussed earlier noted that ‘jurisdiction’ may be confined only to the matter at

⁵⁷⁹ *Natural Parents*, *supra* note 546.

hand,⁵⁸⁰ and so on a case by case basis the advocacy for a finding of jurisdiction may continue to be singular. These findings will strengthen an assertion of the jurisdiction of Aboriginal customary law in a case such as *Natural Parents* (trial level) where a Court is deciding between a parental proposal for custom adoption for their child and a state proposal for foster placement or state-based adoption.

In such a case, where the Aboriginal collectivity in some form, whether as extended family or as community institution, seeks to make the argument that Aboriginal jurisdiction exists to exercise the practice of custom adoption, the ability to demonstrate that this customary law jurisdiction is actively exercised in their community in situations where there is concern about the safety or well-being of a child will be significant. For these reasons, it is important to continue, or to resume, the exercise of this jurisdiction at the community level,⁵⁸¹ and to utilize the provisions of s. 35(1) as a defence or a right to exemption, in keeping with the limited concept of the *Van der Peet* vision of Aboriginal rights.

To the extent that the provincial child protection legislation is invoked to prevent the practice of custom adoption, it infringes upon Aboriginal rights and this infringement must be justified.⁵⁸² Although clearly the child protection legislation has a valid legislative objective, the imposition of the legislative scheme in order to prevent the implementation of a lawful alternative which would meet the needs of the child involved will arguably create difficulties

⁵⁸⁰ See *Webster's*, *supra* note 459.

⁵⁸¹ Walkem, *supra* note 566 at 78, Recommendation 3.2.

⁵⁸² This discussion refers to the doctrine of justification originally established in *Sparrow*, *supra* note 294 and see accompanying text.

for the state on the justification questions: whether the restrictions imposed by the legislation are the minimal ones necessary to obtain that legislative objective, and whether the infringement of this particular Aboriginal right is consistent with the honour of the Crown in its duty to preserve ‘the integral and defining features of aboriginal societies.’ It is not difficult to establish that the honour of the Crown is in tatters on the question of the care and well-being of Aboriginal children.

Another place where the argument for the jurisdiction of customary law may serve a useful purpose is in negotiations with governments about the delegation of the child protection authority. It is problematic that what is being delegated is the exercise of authority under the non-Aboriginal legislation, with its deeply embedded Euro-Canadian assumptions about children and families. Serious reconsideration is needed about the nature of the authority which Aboriginal communities require to really exercise their right to care for their children in the full meaning for them of those words.

It is interesting to consider the implications of the recent decision of the Supreme Court of Canada in the *NIL/TU’O* case in this context.⁵⁸³ The majority judgement is decided on the basis that, for the Aboriginal Child and Family Services agencies (known as ‘Delegated

⁵⁸³ *NIL/TU’O Child and Family Services Society v. B.C. Government and Service Employees Union*, 2010 SCC 45, [2010] 2 S.C.R. 696 (LexUM) [*NIL/TU’O*]. The question at issue was whether the employees of an Aboriginal agency, which operates on the basis of delegated authority from the government of B.C. to provide services to Aboriginal children and families, are with respect to labour relations under the jurisdiction of the provincial government, which has constitutional authority for services related to the care and well-being of children and families, or of the federal government which has authority for ‘Indians’. Although the legal issue centred on labour relations, the references in the text above to the holdings of the S.C.C. are findings of fact, which presumably stand regardless of the legal issue.

Agencies’), the nature of their day-to-day operations is to provide child and family services as part of the “provincial regulatory regime.”⁵⁸⁴ The Supreme Court really nails this down: the agencies are accountable to the directors appointed under the province’s legislation and must provide services in compliance with the requirements and principles set out in the legislation, specifically including provisions defining the “best interests of the child”.⁵⁸⁵ As the Court then notes, “[w]hen a director and the agency disagree as to a child’s safety or placement or as to the provision of services, the director’s decision is paramount. The director is also empowered to revoke, unilaterally, the agency’s delegated authority.”⁵⁸⁶ The Court concludes that the agency operates “pursuant to authority that is delegated, circumscribed and supervised by provincial officials.”⁵⁸⁷

Clearly, the delegation of authority under the provincial child protection legislation does not grant any ‘sphere of authority’ for Aboriginal customary law. It improves the sensitivity of service provision, and agencies can and do provide additional services not required under the legislation, but it absolutely does not recognize Aboriginal jurisdiction, or Aboriginal rights, or a qualitatively distinct Aboriginal society which has a fundamentally different orientation to the care and well-being of children. Once again, in answer to the question of which legal order will govern the lives of Aboriginal children and families, the system of delegated authority says that Euro-Canadian law maintains all decision making authority. Aboriginal

⁵⁸⁴ *Ibid.* at para 38.

⁵⁸⁵ *Ibid.* at paras 26-28.

⁵⁸⁶ *Ibid.* at para 31.

⁵⁸⁷ *Ibid.* at para 38.

people can participate in the jurisdiction which has authority for the care and well-being of their children only if they agree to accept the dominant framework of Eurocentric values and law, and exercise no independent authority. The delegation process is structured to ensure that there will be no elements of “Indianness” in the delivery of services to Aboriginal children and families.⁵⁸⁸

In this context, it is noteworthy that ‘permanency planning’, one of the central principles of the Euro-Canadian system of child protection, was deemed inappropriate as a practice goal for Aboriginal families by the Project Manager of the Champagne/Aishihik Child Welfare Pilot Project. This was an early project in which an Aboriginal authority was enabled to exercise the ‘social work’ aspect of jurisdiction, with a greater degree of independence than is presently authorized under the delegation process. The Evaluation of the Pilot Project, carried out by a team from the University of Victoria, describes quite a different approach:

A second characteristic of the Champagne/Aishihik approach to practice has been identified as an intermittent flowing care pattern in which children can move from parents to relatives to [native] foster home and back again. Such a care pattern seems to be in direct opposition to the concept of permanent planning. While never required by legislation in Canada, the permanent plan construct has been influential in guiding and directing practice in child welfare.⁵⁸⁹

⁵⁸⁸ *Ibid.* The position of the management of the NIL/TU’O Child and Family Services agency was that the nature of their work, providing child welfare services to First Nations children and families, was within the federal jurisdiction because the services were provided by “uniquely Aboriginal means”[para. 8]. The S.C.C. rejected this position, relying upon the findings in notes 584-587, as well as other issues of constitutional interpretation.

⁵⁸⁹ Faculty of Human and Social Development, University of Victoria, *Champagne/Aishihik Child Welfare Pilot Project Evaluation and Recommendations* by Andrew Armitage *et al.* (Victoria BC: University of Victoria, 1988) at 24 (this was an internal report which is on file with the author but may not be generally available).

The Aboriginal organization instead provided services characterized by the social science professionals on the evaluation team as “preventive maintenance”.⁵⁹⁰ This concept regards substitute care as being necessary for some children at particularly stressful times. Substitute care is viewed as part of the continuum of service, not as a situation to be avoided at all costs:

The preventive maintenance approach to preventive services requires that service boundaries are permeable so that families can easily enter, leave and re-enter. The emphasis of the service program is on “being there”, providing continuity and services as a resource to the family rather than providing a time limited, goal oriented service and closing the case.⁵⁹¹

Although this is only one example, it demonstrates in a very concrete way that the differing visions of the nature of the family-child relationship in Aboriginal culture and Euro-Canadian culture have major significance for decisions about how to support families and ensure the safety and well-being of children.

Some of the Delegated Agencies express the view that they could act more effectively to ensure the safety and well-being of the children in their communities if they were enabled in the context of the delegated child protection authority to function according to their cultural understanding of the care of children and the functioning of families, rather than being constrained by the legislation and authority of the provincial government.⁵⁹² Again, a recognition of customary law jurisdiction at the negotiating table regarding the terms of

⁵⁹⁰ *Ibid.* at 28.

⁵⁹¹ Mary Anne Jones, *A Second Chance for Families* (New York: Child Welfare League of America, 1985) at 143 cited in *ibid.* at 29.

⁵⁹² This statement reflects conversations held by the author with several officials of Delegated Agencies in British Columbia between 2006 and 2008, when the author was providing consulting services with respect to the development and administration of community projects designed to provide alternative dispute resolution approaches to child protection issues for First Nations children and families.

reference for the Delegated Agencies could open the door to an appropriate level of autonomy for these Agencies to operate in ways that are in keeping with the Aboriginal values of their clients and communities.

It is of course also open to the Aboriginal leadership and the representatives of the Crown to take an affirmative approach and negotiate a treaty-based framework for the formal recognition of this customary law jurisdiction, including pathways for implementation. There is precedent for this in the *Nisga'a Nation* treaty;⁵⁹³ it is clearly within the realm of possibility. Such a model is inherently more appropriate than that of an improved version of delegated authority inasmuch as it would encompass not only service delivery but the full spectrum of legal jurisdiction. The treaty relationship involves the level of mutual recognition and respect which is properly reflective of the historic relations between Aboriginal peoples and the Crown, and which also symbolizes and establishes the framework for respectful relations between these distinct but partner jurisdictions.

⁵⁹³ This treaty, see *supra* note 400, provides at s. 89 that the Nisga'a Government has the authority to make laws with respect to the safety and well-being of children on Nisga'a Lands, provided that the standards are comparable to provincial standards. In the event of inconsistency, laws passed under the authority of s. 89 prevail over federal and provincial laws. Section 93 retains the application of provincial law regarding the reporting of child abuse, and s. 90 retains a power in the province to act to protect a child in an emergency, and then refer the matter to the Nisga'a Government. For full text of this treaty, see *Nisga'a Final Agreement* on the website of Indian and Northern Affairs Canada, online: www.ainc-inac.gc.ca.

Conclusion: Revisiting the ‘Best Interests’ Concept

It has been demonstrated that the removal of Aboriginal children from their families, in order to control the process and content of their socialization and to rupture the intergenerational transmission of Aboriginal culture, was acknowledged to be a primary strategy by which Aboriginality would be eradicated from the new nation of Canada. It has also been demonstrated that the forcible removal of children from a cultural group and delivering them into another culture to be raised is one of the most serious actions that can be initiated to destroy the cultural existence of the parent cultural group. In circumstances where the intent to destroy is clear, it is an action which may constitute genocide.

Using the removal of the children of a society to try to break that society is an act which epitomizes moral cruelty and violation of trust. When that act is carried out under the rubric of the rule of law, I argue that the society which has perpetrated that act is normatively estopped from asserting a claim to continue to hold legal jurisdiction with respect to the care and well-being of that society of children. Despite many acknowledgements of the tragedy which has befallen Aboriginal children at the hands of the Canadian authorities, and many attempts by people of good will among the Canadian authorities to bring about significant changes for the benefit of Aboriginal children, the overview in Chapter One documents the ongoing highly disproportionate levels of removal of Aboriginal children by the Canadian state. This attests to the continuing pattern of breach of the human right of these children to exist within a culture of Aboriginality. The fundamental dynamic of the refusal to relinquish the determinative authority of Euro-Canadian cultural values to define who the children

should be continues, as does the necessary corollary, the insidious persisting belief in the inferiority of the capacities and circumstances⁵⁹⁴ of the prototypical Aboriginal family and society.

In this context, it is appropriate to think of the recognition of customary adoption not only as an entitlement arising from the historical relationship between Aboriginal peoples and the Crown and confirmed by s. 35(1) as a constitutional obligation, but also as an action which the Canadian state is urged to take by way of reparation or remedy for its past and continuing failure to respect and honour the dignity and capacity of the families and institutions of the Aboriginal peoples, and the authority of the jurisdiction of customary law in the realm of family relations.

And yet, this is all about the care and well-being of children. In their dependency, in their long period of relational development, in their reliance on others to create an environment for them in which they are in a framework of safety and can grow into themselves, they are a unique constituency in any society. This is a reason that the study of this Aboriginal right has been considered on a stand-alone basis, separate from wider issues such as a general right of self-government. Because ultimately, both explicit and unwritten constitutionalism will prevail and a decision about the recognition of a customary law jurisdiction to make

⁵⁹⁴ I note the corrective message of Patricia Monture-Angus with respect to the ‘circumstances’ of the Aboriginal peoples; see Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood, 1995) at 13-14: “Disadvantage is a nice soft comfortable word to describe dispossession, to describe a situation of force whereby our very existence, our histories, are erased continuously right before our eyes. Words like disadvantage conceal racism.”

decisions about the care of Aboriginal children will have to address some understanding of ‘best interests’.

The concept of the ‘best interests of the child’ is a Western concept which has developed quite recently as part of the evolution of Western thought about children. For centuries, the child in law was the property of the parent (actually, for many centuries s/he was the property of the father and the inclusion of the mother in the concept of parent is also fairly recent), and the parent had substantial powers, and substantial protection from any outside interference in the exercise of those powers, to govern the life of their child as they saw fit. The recognition of the child as a separate human being, not an item of property, was a nineteenth century development. The concept of ‘best interests of the child’ was created and required in that particular and culturally specific context, to establish as legal standard that the focus of legal and governmental decisions about children, and ultimately also parental decisions about children, should not operate on the notion of child as ‘chattel’, but should consider the interests of the child separately from the interests or rights of the parent. This move to break the property connection between parent and child represented a significant shift within Western society.

But the literature about custom adoption, and about Aboriginal families, informs us that the private property relationship is not at the heart of the family in Aboriginal culture. Whatever the ‘best interests’ test may mean with respect to Aboriginal children, it simply does not carry the same conceptual rationale for Aboriginal people as it does in Western society. This

is the substance of the idea of the ‘grammar of customary law’⁵⁹⁵: that the words of positive law carry embedded within them a customary law meaning which is specific to the cultural practices of their society.

Be that as it may, it is a test which is here to stay for the foreseeable future, based upon its central place in both international and domestic family law.⁵⁹⁶ Given that, it is a concern that the factors to be considered in a determination of ‘best interests’, provided by legislation or alluded to by the courts, do not include the human rights of the child. The human right of the Aboriginal child to develop into ‘selfhood’ within the context of Aboriginal life is a recurring theme in this thesis, as is the fundamental connection of that right to the ‘best interests’ of the Aboriginal child.⁵⁹⁷ Reference to the standards established in international human rights law for the children of Indigenous peoples would open the door to consideration of some of the complex issues which have arisen in this thesis with respect to the interplay between the inherent individuality of the child and the human right of the Aboriginal child to live and be nurtured in the context of Aboriginal life. There have been several instances discussed here which have demonstrated that, for Aboriginal children in Canada, the ‘best interests’ ideology has been used to authorize or justify actions taken by the state which have resulted

⁵⁹⁵ Webber, “Customary Law”, *supra* note 528.

⁵⁹⁶ In international law, this concept is enshrined in the *U.N. Convention on the Rights of the Child*, *supra* note 299 at Article 3. The decision of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1993] 3 S.C.R. 46, 216 N.B.R. (2d) 25, 177 D.L.R. (4th) 124 [*G.(J.)*], confirms the commitment in domestic law to this standard as the fundamental framework for making decisions about the welfare of children in Canada, and this phrase appears in provincial child protection legislation across Canada.

⁵⁹⁷ See Part 1.4.5 in Chapter One, Part 2.4 in Chapter Two, and text accompanying *supra* note 504 in Chapter Three and *supra* notes 570-571 in Chapter Four.

in negative treatment; this suggests that the ‘best interests’ of Aboriginal children may be better served by a human rights approach to this determination.

The United Nations Committee on the Rights of the Child has highlighted that particular attention is needed with respect to the implementation of the *Convention on the Rights of the Child* in the special circumstances of Indigenous children; in order to provide some direction to State governments on this issue the Committee has developed and published a ‘General Comment’ dealing with the rights of Indigenous children.⁵⁹⁸ There are several sections dealing with the application of the ‘best interests’ concept (paragraphs 30-33 and 46-48):

[T]he best interests of the child is conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights (para. 30)

State authorities...should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group ...” (para. 31)

Maintaining the best interests of the child and the integrity of indigenous families and communities should be primary considerations in ...social services ... affecting indigenous children (para. 47)

In States parties where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed ... to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity (para. 48)

One of the significant aspects of this document is that, in contrast to the ideology of the ‘best interests’ standard, which tends to infer that the state is the protector of the ‘best interests’ of Aboriginal children against the selfish interests of their parents and the Aboriginal collectivity, this document gives a clear message that it is the State parties which pose a

⁵⁹⁸ United Nations Committee on the Rights of the Child, *General Comment No. 11 (2009) Indigenous children and their rights under the Convention*, 50th Session, Geneva, January 2009.

significant threat to the rights of Indigenous children, and also that the State party is obligated to take special measures to respect and protect these rights.

As stated earlier, decisions about the recognition of the existing jurisdiction of Aboriginal customary law with respect to the safety and well-being of Aboriginal children do ultimately come down to the best interests of Aboriginal children. Not abstracted, autonomous virtual children, but the fully embedded, relational-dependent, engaged children of the Aboriginal peoples. It is time for the Canadian polity to admit that we have been and continue to be unable to recognize and honour Aboriginal children in their world; we want them to leave their ‘inferior’ circumstances. Instead, we need to recognize that in order for these children to ‘find their own law’, to grow into autonomous adults, they need to interact with the “societal forms, relationships, and personal practices”⁵⁹⁹ which will foster in them the wisdoms and ways of the cultural heritage of their peoples.

What relationship do we seek to have between the Aboriginal peoples and the Canadian state with respect to the care and well-being of Aboriginal children? From Confederation to the present day, Canada has chosen domination and control. It is time to recognize that those values and norms which are most appropriate and helpful to make decisions which are in the best interests of Aboriginal children are the values of their parents and families and societies, the foundational concepts which inform Aboriginal customary law and are informed by it. It is time to recognize the sovereignty and decision making authority of Aboriginal peoples

⁵⁹⁹ Nedelsky, *supra* note 571 and accompanying text.

which they must exercise in order to ensure, finally, the safety and proper care of their children.

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