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INDIAN AND INUIT FAMILY LAW AND THE CANADIAN LEGAL SYSTEM

*Bradford W. Morse**

I. *Introduction*

Indian, Metis, and Inuit families across Canada are in a state of crisis. The situation is so serious and the statistics are so alarming that one might be tempted to say that native families are in a state of siege. Although there is always cause for hope, and there have been a few positive developments recently that might fuel some guarded optimism, the stability of native families is crumbling as the social conditions are deteriorating, both within native communities and in urban centers.

It is the basic premise of this article that the destabilization of native families and communities is in large part a result of federal and provincial social services policies, provincial family legislation, and the actions of the Canadian judiciary. The courts, the statutes, and the policies all tend to reflect a common perception, that is, that the native people (the Inuit, Métis, and Indians) are unable to meet adequately their own family needs through their own policies, programs, and laws. An attitude, based on notions of guardianship and superiority, has been adopted by our society in recent decades that has justified, if not necessitated, the intervention of the state and its agents into the native family structure. This action has been well-intentioned but it has been misguided and has had disastrous consequences. The interventionist approach of the social service agencies has been aided by the general lack of regard on the part of the legal system toward the rights of native people and the validity of their traditional family laws.

This article will address several related issues. The discouraging situation in which native families find themselves today will be briefly discussed in terms of its scope and its impact upon Indian, Inuit, and Métis peoples. The second segment will concentrate upon the content of traditional or customary Indian and Inuit law as it is presently understood. The major portion will then be devoted to an analysis of the case law in which it had been argued that Indian or Inuit family law was valid and was to be recognized by the Canadian courts. The possible success of such an

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argument being made under current legislation is also considered. Finally, the article will conclude with some comments on possible future developments in this field.

A substantial amount of public attention has been focused of late upon the increasing political aspirations of native people in Canada for the rights of self-government and self-determination. The constitutional debates have provided a forum for native people to pursue their desire for sovereignty and the recognition of treaty and aboriginal rights. These goals are seen as an essential aspect to the redevelopment and reinforcement of Indian, Inuit, and Métis cultural values and community life. The desire to break the vicious cycle of dependence and achieve these objectives is now beginning to have its effect on family law and the child welfare system with the call for the transfer of control over services, resources, and the law to native people so that they can be created by, controlled by, and accountable to native communities.¹

II. *The Dimensions of the Tragedy*

Native people are suffering from the existence of a major dilemma. Status, or registered, Indians are regarded as being solely within the jurisdiction of the federal government as a result of section 91(24) of the British North America Act.² Although the government of Canada has enacted special legislation, the Indian Act,³ which deals with a number of aspects of Indian life and Indian government, there is no federal legislation that directly addresses the relationship between status Indians and family law. Provincial legislation is generally relied upon to fill this gap by providing general statutes that deal with the law regarding marriage, child welfare, adoption, support, custody, and matrimonial property,⁴

1. See, e.g., Tripartite Task Group on Social Services, "Community Case: Toward Indian Control of Indian Social Services" (unpublished, Dec., 1980, available from the Indian Commission of Ontario).

2. 30 & 31 Victoria, c. 3 (1867).

3. R.S.C. 1970, c. I-6, as amended.

4. This is by virtue of section 88 of the Indian Act, *supra* note 3, which states: "88. Subject to the terms of any treaty and any other Act of Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act." See, e.g., *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, 6 N.R. 491, 60 D.C.R. (3d) 148; *Nelson v. Children's Aid Society*, [1975] 56 D.L.R. (3d) 567 (Man. C.A.); *Re Ranville v. Attorney General*, [1979] 26 O.R. (2d) 271.

while the federal Divorce Act⁵ occupies the field in relation to all divorces. This approach means that legislation is applied to status Indians that is not tailored to meet their particular needs and values but rather is enacted to cover the entire population.

The dilemma continues for status Indians because they are caught within a financial squeeze and jurisdictional conflict. A number of provinces have historically been unwilling to extend child welfare and social services to status Indians for political and administrative reasons. This situation was summarized in a 1967 government-commissioned report as follows:

[T]he special status of Indians, and more importantly the policies and practices which have affixed themselves to that status, have had the effect of placing barriers between an underprivileged ethnic minority and welfare services which they need. The assumption that Indians were "wards" of the federal government, and that reserves were federal islands in the midst of provincial territory has had the unfortunate effect that basic provincial welfare activities have ignored and bypassed reserve Indians. Indians have also been excluded from a number of shared cost programs operated by the provinces which received federal financial support. In general, the major barrier has been the unwillingness of provincial and municipal governments to provide services or expend monies on a minority group regarded as the exclusive responsibility of the federal government.⁶

Although strides have been made in extending provincial services to status Indians over the last few decades, largely as a result of arranging "bill-back," or cost-sharing, agreements with provincial governments, status Indians are still not eligible for all provincial services and benefits.⁷ Some provinces, such as Saskatchewan and Manitoba, have been exceedingly reluctant to provide services in any but life-or-death situations.⁸ The result has been stated in these terms:

The arrangements between the federal and provincial govern-

5. R.S.C. 1970, C.D., as amended.

6. 1, 2, A SURVEY OF THE CONTEMPORARY INDIANS OF CANADA: ECONOMIC, POLITICAL, EDUCATIONAL NEEDS AND POLICIES 316 (Hawthorne ed., Ottawa: Queen's Printer, 1967).

7. See note 1 *supra*.

8. CANADIAN COUNCIL ON CHILDREN AND YOUTH, LEGISLATION RELATED TO THE NEEDS OF CHILDREN (Toronto: Carswell Co. Ltd., 1979), at 107-108.

ments for the provision of child welfare services to status Indian children are remarkably varied and at the level of official policy bespeak tremendous arbitrariness and variability; at the level of actual service delivery the policies of provincial and local child welfare agencies are even more variable and whether services are delivered or not depends on the availability of local resources and the personal judgment of local personnel. These circumstances are likely to hold even in Ontario where there is a formal agreement with the federal government.⁹

The situation in reference to service delivery is less confusing for other native people. The nonstatus Indians and Métis, who number approximately 750,000, have clearly been viewed as a provincial responsibility, whereas the Inuit are serviced by the federal government as a result of their location in the far North.

This dilemma also extends to the type of service delivered where one is available. Native people must accept the existing, professionalized services, if they are available, or none at all. These services focus upon individual problems and fail to understand the connection between the individual, the family, and the community.

Different cultural values also lead to different perceptions of the problem and how to resolve it. This is particularly evident in the child welfare system. The legislation in this field, and the guidelines developed for children's aid staff in implementing it, are very broad and flexible. This can give the professional staff considerable latitude in interpreting specific provisions relating to child neglect in light of their own cultural values and biases. Unfortunately, this can result in culturally insensitive interventions in native families. Roman Komar, advisor to the government of Ontario, has warned child care workers that

they can consciously or unconsciously become the vehicle for the imposition of North American middle-class standards of child care upon people whose social and cultural standards happen to be different. Thus, the poor, immigrants and native peoples seem to be singled out for special attention and it is here that Courts must be vigilant to prevent misuse of the law by agencies.¹⁰

9. H. HEPWORTH, *FOSTER CARE AND ADOPTION IN CANADA* 111 (Ottawa: Canadian Council on Social Development, 1980).

10. R. KOMAR, *MANUAL FOR CLERKS AND STAFF OF THE ONTARIO PROVINCIAL COURTS (FAMILY DIVISION) ON THE CHILD WELFARE ACT, 1978; PART II: PROTECTION AND CARE OF CHILDREN* (Toronto: Ministry of Community and Social Services, 1979).

There is also a tendency for poorer communication with clients and a lower quality of services to result as a further repercussion of cultural misunderstanding. Neil Stuart, in a recent report on the quality of child welfare services delivered to the Indian population of the Sudbury and Manitoulin districts, stated that: "Indians in care are less likely to get specialized services than other children, were more likely to stay in care longer than non-Indian children, and were less likely to be discharged home. Workers on Indian cases were more likely to be less experienced than workers in non-Indian cases."¹¹

Even the most conservative figures, which will omit many Métis and nonstatus Indian children, demonstrate that in "1977 about 20 per cent of all children in care in Canada, that is 15,500 children, were native children."¹² Depending upon one's sources, the rate of status Indian children in the case of child welfare agencies is approximately two¹³ to five times the national average.¹⁴ The statistics in some provinces are frightening. The number of native children in care range as high as 39% in British Columbia to 44% in Alberta to 51.5% in Saskatchewan and 60% in Manitoba.¹⁵ Even in Ontario where the rate is only 9% it does run as high as 19% in northern agencies.¹⁶

These figures are even more startling when one realizes that the divorce rates of status Indians are only one half the national average¹⁷ and the proportion of children released for adoption at birth, or thereafter, by unmarried native women is dramatically less than the general pattern.¹⁸ Despite the fivefold increase in child care expenditures by the federal Department of Indian Affairs and Northern Development (DIAND) over the last two decades,¹⁹ family conditions on reserves are deteriorating. The increase in the federal financial commitment to child care expenses for status Indians has neither minimized this tragedy nor has it provided any tangible benefits to Indian communities.

When native children do come into the care of child welfare

11. N. Stuart, "Study of Child Welfare Services Provided to Indian People in the Sudbury and Mani Districts" (Ottawa, Sept. 1978, unpublished), at 45.

12. *Id.*

13. *Id.* at 112.

14. INDIAN CONDITIONS: A SURVEY 24 (Ottawa: Ministry of Indian Affairs and Northern Development, 1980).

15. Canada Assistance Plan Ann. Rep. 1976-77, at 8.

16. *Supra* note 9, at 115.

17. *Supra* note 14.

18. *Supra* note 9, at 115-17.

19. *Supra* note 14, at 26.

agencies they are usually removed from their own community and their own culture. They are generally placed in nonnative foster homes or group homes at some distance from their own community because there are virtually no such facilities within native communities or under their control.²⁰

The Royal Commission on Family and Children's Law of British Columbia analyzed the situation in these terms:

In applying the policy of apprehension to native children little allowance was made for cultural relativism. Once children were removed they were usually placed in white foster homes or in institutions far from their own homes, where it was difficult to maintain contact with their relatives. At the same time their families felt powerless to deal with the child welfare system.²¹

The Commission further quoted from the report of Professor Doug Sanders to the Law Reform Commission of Canada, where he said:

True, there are some cases of serious neglect of children by Indian parents. The situation of Indians in North America has led to drastic social disorganization in many cases, and often the children are the first to suffer the effects. But often Indian children are taken into foster care through court orders simply because social workers feel they will give the children a better opportunity off the reservation. Some social workers dominate Indian communities so much that the Indians no longer feel it worthwhile to protest the frequent removal of children from homes. . . .²²

Indian, Inuit, and Métis families are isolated from all parts of the legal system, including child welfare legislation and the family courts. The federal government commissioned another study, which stated:

The legal rights of parents concerning their own children appeared to be regarded too casually by the Indian Affairs Branch and by other agencies. Indian people are, for the most part, totally unaware of their rights and responsibilities under child welfare legislation, and in many cases, have become

20. The author has been informed by the Ministry of Community & Social Services of Ontario that there is only one Indian group home in Ontario.

21. ROYAL COMMISSION ON FAMILY AND CHILDREN'S LAW OF BRITISH COLUMBIA, TENTH REPORT, NATIVE FAMILIES AND THE LAW (Victoria: Queen's Printer, 1975), at 5.

22. *Id.* at 5-6.

apathetic to the point where some do not even bother to attend court hearings involving the custody of their own children.²³

When Indian people and communities attempt to resolve the problem of absent or inadequate parents through the traditional approach of the extended family, by which grandparents, aunts, or uncles of a child in need of care step in to raise the child or adopt him or her, they encounter further problems with the children's aid societies. Relatives generally will not qualify for financial assistance as foster parents, and, even if unrelated, the Indian adult who wishes to be a foster or adoptive parent is evaluated according to criteria that emphasize material wealth rather than cultural suitability. Another study commented upon this difficulty by saying that:

[T]he attitudes and practices of child welfare authorities often limit the participation of native people, either in adoption services or in the general provision of all services. In addition, the non-Indian, urban, attitudes of many social workers contribute to a situation where these communities [Indian] are judged to not meet these standards [provincial], the environment is judged unfit, and the children are removed from the home.²⁴

Years of domination and dependency render native parents less likely to contest these actions through the courts. In addition, the procedures for seeking out available services and demanding those services, or their rights, are "alien to traditional native ways of dealing with life."²⁵ This can lead to tragic consequences and misunderstandings on the part of the white professional:

Thus native parents who have had their children taken into care may not make persistent demands for the return of the children or continued contact with them. This can easily be misinterpreted as constituting abandonment, and reinforces whatever negative images were formed about the parents initially. In turn this can reinforce the native sense of futility in making any impact on decisions made by white social workers and white judicial officers.²⁶

23. *INDIANS AND THE LAW* (Ottawa: The Canadian Corrections Association, 1967), at 18.

24. J. Girard, "Background Paper for the Evaluation of Child Welfare Services" (Mar., 1979, unpublished, available from DIAND), at 6.

25. Quotation of M. Jackson and B. Morse, "Summary of Prince George Native People's Conference" (unpublished, 1974), quoted in report at note 21, *supra*, at 16.

26. *Id.*

This conflict in cultures and cultural values is particularly evident in relation to decisions on adoption placements. Indian and Métis children are far less likely to be adopted than other children,²⁷ and, as a result, will stand a greater chance of remaining within the care of the child welfare authorities until reaching adulthood. This often means that native children will endure a number of placements in nonnative foster and group homes during their formative years. Adoption of native children is on the rise, however, as the adoption of status Indian children has increased by almost 500% since 1962.²⁸ This dramatic increase does not mean that these children are returning to native homes as it reflects an increase in adoptions by nonnative parents.²⁹

The net result of these events has been to create a sense of frustration and futility in many Indian, Inuit, and Métis communities. Very little has been done by the child welfare agencies or by the Department of Indian Affairs and Northern Development to mitigate the effect of cultural assimilation or to prevent it entirely. Native people are beginning to discuss this situation as reflecting a policy of cultural genocide. The Royal Commission on Family and Children's Law observed this reaction and commented:

The *Adoption Act* is sometimes viewed as one more weapon employed by white society to destroy the Indian culture. It is seen as a means of taking away the right of Indian bands to take care of their own children and as a means of placing Indian children in white homes where they would lose contact with their own race.³⁰

Indian communities have started to overcome the despair and the pain by beginning to demand changes in the present system.³¹ The Spallumcheen Indian Band of British Columbia has passed its own child welfare law³² so as to assert full control over all decisions relating to child custody proceedings affecting band members. This band is also involved in litigation contesting the

27. *Supra* note 9, at 118-19.

28. *Id.* at 120.

29. See note 14 *supra*; Facts and Figures, Indian Affairs Branch, DIAND, 1962-71; Membership Division, Adoption Unit, Indian and Eskimo Affairs Program, DIAND, 1971-78.

31. See, e.g., the position of the Union of Ontario Indians in *In the best interests of the Indian Child*, 3 ONTARIO INDIAN, No. 4 (Apr., 1980), at 18-24, and the reports of a Union of B.C. Indian Chiefs demonstration in THE PROVINCE, Oct. 14, 1980.

32. By-law No. 2, 1980.

right of the provincial government to apprehend Indian children. These efforts and others give vivid expression to the desire of native people to regain control over their fate and their future so as to strengthen their communities and protect their most precious resource—their children.

One method of reasserting sovereignty involves recognizing the validity of traditional or customary law. There is no question that the indigenous people of what is now called Canada had their own laws and legal institutions. Much of this traditional law is still in existence and is being adhered to, although the general society may not realize it as such. It is easy to label children as illegitimate and parents as unmarried if one is ignorant of Indian or Inuit customary marriage law. Therefore, the rest of this paper will be devoted to examining the nature of traditional Indian or Inuit family law and its position under the general Canadian law.

III. *Traditional Indian and Inuit Family Law*

It is virtually impossible for anyone, especially someone trained in the law, to describe the family laws of the Indian, the Métis, and the Inuit peoples of Canada in other than broad generalities. This writer's information is clearly limited as it is derived only from his personal conversations over the years with native people from across Canada, and from the scholarly writings of anthropologists and others.³³ These latter, secondary sources are incomplete in that virtually no research has been undertaken with regard to the Métis and little work has been done in reference to many Indian nations. The archival and field work which has been completed is, by necessity, very specifically oriented toward a particular community or region. Therefore, one must be cautious in describing traditional family law as any description can easily become an inaccurate representation of legal systems which contained, and still contain, considerable diversity. Therefore, all that can be done in this limited journey into native customary law is to sketch a broad outline of Indian and Inuit laws on marriage,

33. See, e.g., the customary law cases discussed in part IV; R. LANDES, *THE OJIBWA WOMAN* (New York: W.W. Norton & Company Inc., 1971); L. TURNER, *INDIANS AND ESKIMOS IN THE QUEBEC-LABRADOR PENINSULA: ETHNOLOGY OF THE UNGAVA DISTRICT, HUDSON BAY TERRITORY* (Quebec: Presses Comeditex, 1979); D. JENNESS, *THE INDIANS OF CANADA* (5th ed., Ottawa: National Museum of Canada, 1960); L. GUEMPLE, *INUIT ADOPTION* (Ottawa: National Museum of Canada, 1979); E. JOHNSON, *LEGENDS, TRADITIONS AND LAWS, OF THE IROQUOIS, OR SIX NATIONS, AND HISTORY OF THE TUSCARARA INDIANS* (Lockport, N.Y.: Union Printing and Publishing Co., 1881); *INDIANS OF THE NORTH PACIFIC COAST* (McFeat, ed., Toronto: McClelland & Stewart Ltd., 1966).

divorce, adoption, and child rearing. With the foregoing caveat in mind as to the dangers of overgeneralizations, some of the common threads within native family law and the basic areas of divergence will be indicated.

All Indian, Inuit, and Métis people, or "native people," share the strong belief that children are their greatest resource and the most cherished aspect of their society. The children are the most important members of the community and, as a result, their well-being is a collective concern, rather than one of interest only to the nuclear or extended family. All adults in a community consider themselves partially responsible for providing care, affection, and instruction to all children. Gordon Tootossis describes this basic philosophy in these words:

The Indian belief is that if a child is left homeless, or with no one to care for him, then the proper thing to do is to take the child into your home as one of your own. . . . Children on earth are not ours, they are given on loan. As Indian people, we should respect the privilege given to us by the Great Spirit, and do our best to fulfill our obligation, by loving our children and caring for them properly.³⁴

The collective concern for proper care and upbringing of all children is an integral part of the overall cultural outlook of native people. The universe is perceived as a unified whole in which all elements—the seasons, the plants, the animals, and mankind—participate according to the rhythm of nature. The view of the Dene, who are the Indian people of the MacKenzie Valley, has been described in this way:

The love of the Dene for the land is in their tone of voice, a touch, the care for plants, the life of the people, and their knowledge that life as a people stems directly from the land. The land is seen as mother because she gives life, because she is the provider, the protector, the comforter. She is constant in a changing world, yet changing in regular cycles. She is a storyteller, a listener, a traveller, yet she is still, and when she suffers we all suffer with her; and very often in many parts of the world, whether they believe this or not, many people suffer because they have abused their land. She is a teacher, a teacher who punishes swiftly when we err, yet a benefactress who blesses abundantly when we live with integrity, respect her, and

34. Quoted in D. SANDERS, *FAMILY LAW AND NATIVE PEOPLE* (Ottawa: Law Reform Commission of Canada, 1975), at 183.

love the life she gives. We cannot stand on her with integrity and respect and claim to love the life she gives and allow her to be ravaged.³⁵

Another personal account of the Dene philosophy, which is largely shared by all native people, gives this observation:

It seems to me that the whole point in living is to become as human as possible: to learn to understand the world and to live in it; to be part of it; to learn to understand the animals, for they are our brothers and they have much to teach us. We are a part of this world.

We are like the river that flows and changes, yet is always the same. The river cannot flow too slow and it cannot flow too fast. It is a river and it will always be a river, for that is what it was meant to be. We are like the river, but we are not the river. We are human. That is what we were meant to be. We were not meant to be destroyed and we were not meant to take over other parts of the world. We were meant to be ourselves, to be what it is our nature to be.

Our Dene nation is like this great river. It has been flowing before any of us can remember. We take our strength and our wisdom and our ways from the flow and direction that has been established for us by ancestors we never knew, ancestors of a thousand years ago. Their wisdom flows through us to our children and our grandchildren to generations we will never know. We will live out our lives as we must and we will die in peace because we will know that our people and this river will flow on after us.³⁶

This perception of history as a continuing evolutionary flow harmonizes with the appreciation of the earth as the mother or source of all life. Each generation receives the wisdom of all past generations and assumes the continuing relationship with the land, giving respect and love to the earth in return for the earth's generous bounty. The land is the mother of the parents and of the children. There is, thus, an equality between adults and children in their relationship with the natural elements. Native philosophy contains the essential notion that the land must be

35. R. Lamothe, "Statement to the Mackenzie Valley Pipeline Inquiry," reprinted in *DENE NATION—THE COLONY WITHIN* (Watkins ed., Toronto: University of Toronto Press, 1976), at 10-11.

36. Frank T'Seleie, *id.* at 16-17.

preserved as it is in order for the future to be secure. The continuance of the people is linked to the continuance of the land. Therefore, the society places extreme importance upon the future well-being of both. The children and future generations become the means of securing this goal of permanence. Frank T'Seleie, in his address to the Mackenzie Valley Pipeline Inquiry, expressed this philosophy by stating:

We know that our grandchildren will speak a language that is their heritage, that has been passed on from before time. We know they will share their wealth and not hoard it or keep it to themselves. We know they will look after their old people and respect them for their wisdom. We know they will look after this land and protect it and that five hundred years from now someone with skin my colour and moccasins on his feet will climb up the Ramparts (near Good Hope) and rest and look over the river and feel that he too has a place in the universe; and he will thank the same spirits that I thank, that his ancestors have looked after his land well, and he will be proud to be a Dene. . . . It is for this unborn child, Mr. Berger, that my nation will stop the pipeline. It is so that this unborn child can know the freedom of this land that I am willing to lay down my life.³⁷

Since the children are and have always been the hope of the future, it is vital that they absorb all existing knowledge. In the absence, historically, of a sophisticated written communication system, information on all aspects of society, such as history, culture, religion, nature, food preservation and collection, housing, law, and geography, had to be conveyed orally from adult to child. Every adult assumes the role of teaching every child in relationship to all children so that future generations may benefit from his/her knowledge and expertise. Responsibility is allocated among adults on the basis of ability, with elders and grandparents accepting the primary task of educating the young.

Since native people traditionally possessed subsistence economies in which survival depended upon the ability to live off the fruit of the land, a communal approach to food distribution was essential to the sustenance of the very young and the very old. Therefore, there was a further reason underlying the importance placed in children: they were the future suppliers of food to the community. Adults knew that the time would come when their

37. *Id.* at 17.

own personal survival would depend upon the generosity of their children and grandchildren.

Thus, it was additionally important to raise the young to be strong, brave, independent, intelligent, and generous. The native people's belief in the integrity and importance of children causes them to regard children as responsible human beings with minds of their own. This respect for children's independence and free will is reflected in child-rearing practices that have often been misunderstood by commentators over the years as symptomatic of laxness in child rearing and a lack of concern for the welfare of children. The absence of tight discipline and corporal punishment is simply a function of a different attitude toward rearing children, one which, ironically, has attained considerable popularity in North American society in recent years. Generally, all native societies rely upon persuasion and reasoning as the main mechanisms for obtaining respect and obedience from the young. This approach is buttressed by the expression of displeasure and the use of ridicule and public embarrassment as means of enforcing compliance with expected standards of behavior. As a result of the mutual love and respect shared by children and adults in native societies, these techniques are largely successful. Several Indian nations did use corporal punishment as a last resort, but it was used sparingly and was usually imposed by an uncle rather than a parent or grandparent so as not to jeopardize the parent-child bond.

Attitudes toward children historically were affected substantially by the necessities of survival. The native people of the North confronted an environment that demanded good health and endurance on the part of all. The relatively hostile climate and limited food supplies necessitated small communities with restricted populations. Keith Crowe discussed euthanasia and infanticide in the North by saying:

Under such conditions it was always difficult and often impossible for families to support the badly crippled, the mentally disabled, or people whom old age had made infirm. Women had to travel and carry loads through summer flies and winter blizzards. It was almost impossible for them to feed, warm, and carry two infants at the same time.

For all these reasons the population was controlled in the only way possible, by the same means used in ancient Greece and other parts of the world. Abnormal babies, one of twins, unwanted girl babies, were killed at birth by suffocation or exposure to cold. Very old people were sometimes left to die

when their families moved on, and often asked their children to leave them or strangle them.

Such customs were a grim necessity to people without the mental hospitals, orphanages, old folks' homes, and birth control of modern times. When hunger no longer called the tune, they were gladly abandoned.³⁸

Infanticide and euthanasia appear to have been most common among the Inuit as inevitable facets of the arduous life in the Arctic.³⁹

Adoption appears to have been common in all native societies in what is now called Canada. The Inuit particularly maintained a system of adoption that was used with great frequency as a normal element in distributing the care for children within the community. Sanders summarizes the reasons for Inuit adoption as follows:

(a) too many children, (b) children born too close together, (or twins), (c) shortage of food, (d) the disbanding of a household, (e) remarriage, (f) ritual assessment that the child is incompatible with the parents, based upon illness or a difficult childbirth, (g) a response to personal indebtedness, (h) to form alliances, (i) pressure by adoptive parents, or, (j) to give a child to a woman who may be depressed (for example by the birth of a deformed child who is suffocated or exposed). The adopting parents are normally related by blood to the natural parents. The most common adopting parents are uncles and aunts, followed by grandparents and followed by same generation relations.⁴⁰

Baliksi examined the method and the motivation behind the customary adoptions of the Netsilik Inuit and stated:

Couples who did not have children or who wished for more could adopt unwanted children. . . . The strains of nomadic life in this harsh environment were such that a hunter was not very old before he had to rely on his sons to help him in the hunt. Sons were an asset in old age. This was the main motiva-

38. K. CROWE, *A HISTORY OF THE ORIGINAL PEOPLES OF NORTHERN CANADA* (Montreal: McGill—Queen's University Press, 1974), at 24.

39. See A. Balikei, *Female Infanticide on the Arctic Coast*, in M. NAGLER, *PERSPECTIVES ON THE NORTH AMERICAN INDIANS* (Toronto: McClelland and Stewart Ltd., 1972), at 176 *et seq.*

40. *Supra* note 34, at 71. See also W. Willmott, *The Flexibility of Eskimo Social Organization*, in NAGLER, *id.* at 35.

tion behind adoption in Netsilik society. Adoption usually took place at birth and usually involved payment. The adoptive mother fed the child with the mouth-to-mouth technique. Although the request for adoption usually took place before birth, any visitor who heard the cries of an abandoned baby could take it home and adopt it. The adoption of girls can be explained in two ways. First, mothers preferred to keep their boys, leaving mainly girls for adoption. Second, the Netsilik held the belief that the first-born infant of either sex should be allowed to live, because that child's death might bring misfortune to later children. Frequently the first child, male or female, was adopted by the grandmother and raised with particular care. It should be noted that a girl also offered old-age security to her grandmother; the old woman could later reside with her married grandchild.⁴¹

Although all Indian nations appear to have had a system of adoption, it was not always used for the same reasons. Orphans from within the tribe were always adopted by a sibling or the parents of the deceased natural mother and father. The children of defeated enemies were usually placed with families that had lost a member in the fighting. Parents who could not care for a child for any reason would arrange for another member of their extended family or clan to adopt the child. In addition, many Indian nations had a tradition of giving the first born to the grandparents to be raised. This occurred out of respect for the wisdom of the grandparents and the desire to maintain their active involvement in the rearing of children. The presence of children was seen as a sign of wealth and security for the future. A childless couple would usually be given a baby at birth by a sister or brother as a childless woman generally would suffer from despair at her fate. Furthermore, the inability of a woman to bear children could give the husband grounds for divorce and potentially cause her family some embarrassment. Claudia Lewis recounts one incident which came to her attention:

According to her report, the baby was really reared by the grandmother. She could not answer my specific questions about the time and method of toilet training, for instance. "His grandmother taught him. I only fed him and washed his clothes." The extended family group occupied the house until the baby became a boy of six. About that time the second son

41. *Supra* note 39, at 183-84.

married, and the grandparents along with the second son and his wife moved to a new home built with agency help. They took with them the six-year-old boy, to rear him as their own.

I asked the young mother how she felt about having her little boy live with the grandparents. "I don't mind. They treat him well, and they only had two sons." This reply suggests the concept, which I often heard expressed, that grandparents would be lonely if they did not have children with them. As one of the workers in the Indian Office explained it, "The Indians are very generous with their children, you might say. Generous about giving children to people who don't have any. They think it's terrible for people to be without children. They wouldn't think of leaving grandparents without some young children around."⁴²

Marriage laws differ substantially among Indian and Inuit nations. Polygamy appears to have been possible in the majority of Indian and Inuit cultures where wealth and food supplies would permit. That is not to say that it was common, since only chiefs or very successful hunters could provide for the extra dependents involved in having more than one wife. The presence of additional wives, however, was viewed as a strong indication of the wealth and status of the husband.⁴³ A man might take more than one wife if his first was barren or she was becoming too old to fulfill all of her daily tasks. A first wife could easily be much older than her husband if he had married his uncle's widow, as was the Haida custom,⁴⁴ or the widow of a defeated rival from within the tribe.

Marriage procedures also vary substantially from nation to nation. Several native nations use a very simple process in which a man and woman agree to cohabit together as husband and wife. The Dakota have a two-stage process commencing with a trial marriage in which the couple intends to stay together as long as they are satisfied with each other. After a period of several weeks, it is usually commonly accepted that a marriage trial is in progress. If the couple stay together happily, then, after the trial has extended for over a year, the community describes them as

42. C. LEWIS, *INDIAN FAMILIES ON THE NORTHWEST COAST* (Chicago: University of Chicago Press, 1970), at 120.

43. LANDES, note 33 *supra*, at 66-68. See also C. COLDEN, *THE HISTORY OF THE FIVE INDIAN NATIONS OF CANADA* (London: T. Osborne, 1747) (rep'd., Toronto: Coles Publishing Co., 1972), at 12; TURNER, note 33, *supra*, at 25, 106.

44. J. Swinton, *Social Organization of the Haida*, in NAGLER, note 39 *supra*, at 54.

being permanently married. There is no formal process for obtaining parental consent, providing a dowry or presents to her family, announcing the marriage, or solemnizing the marriage with a religious ceremony. Divorce is equally uncomplicated: the couple merely separates.⁴⁵ The Naskapi follow a somewhat similar approach except that the consent of the woman's parents or nearest relatives must be obtained. The suitor generally offers presents to her family to obtain this consent. Since a woman marries prior to reaching puberty, she will comply with the family's desires or be forcibly taken to the home of the husband-to-be.⁴⁶

The marriage law of the Cree requires the suitor to present gifts to the woman's parents and to obtain their initial consent to the marriage. The young couple then go to all the elders of the community with token presents and ask for their blessing. A day-long wedding ceremony is held, which begins with the elders preparing the groom for marriage. He is cleansed with the smoke of burning sweet grass and he then prays with the elders for guidance. A special marriage pipe is given to the man by one of his relatives or an elder and all present smoke this pipe. The marriage ceremony itself is then held in which the young man gives further gifts to the woman's family to show his ability to support his new wife, and to the elders as an expression of respect and gratitude. Burning sweet grass is passed among all of the people present to purify their minds and bodies. A chosen elder then tells the people that the couple are to be married, which is followed by the draping of a marriage blanket around the couple's shoulders by the chief. The bride and groom then eat food from a single plate to indicate that they will share everything in the future.

The wedding ceremony is followed by a marriage feast and dancing, which commences with the marriage dance. This is a circle dance in which everyone holds hands to symbolize the friendship existing within the group and the cycle of existence. The ending of the feast signifies the conclusion of the marriage and the acceptance of it by the entire community. The marriage is expected to be permanent and exclusive, but it can be terminated by a simple separation.

The Inuit groups all appear to require the consent of both partners to the marriage, both sets of parents, and other close relatives. The groom is expected to offer presents to her family to

45. S. Corrigan, *A Note on Canadian Indian Marriage Law*, 4 W. CAN. J. ANTHRO. 17, 19-20 (1974).

46. TURNER, note 33 *supra*, at 106-107.

obtain their consent,⁴⁷ along with a promise to adhere to the "bride-service" custom by which he hunts and fishes for her family for up to a year.⁴⁸ A feast to announce the marriage to the community will follow shortly after the marriage is blessed by the immediate families involved.⁴⁹

Some Indian nations impose legal restrictions upon marriage forbidding marriages within one's family or clan.⁵⁰ The Interior Salish and Carrier Indians entirely prohibit marriage within the bands, as all band members are considered brothers and sisters. This forces people to find spouses in neighboring bands and thereby promotes unity within the Salish and Carrier nations. On the other hand, the Algonquin nations have a tendency toward arranged marriages between first cousins,⁵¹ although this is not always practiced.⁵² The nations of the Iroquois Confederacy also preclude marriage within the clan. Being matriarchal and matrilineal societies, a marriage would be generally arranged by the clan mothers rather than the couple, although the latter could separate at will. A number of Indian nations that did not sanction easy separation permitted the wife to buy a divorce by repaying the bride-price to her husband.⁵³

Métis people were devout Roman Catholics and as such tended to comply strictly with the requirements of the Catholic Church regarding marriage. If at all possible, Métis marriages were solemnized by a priest, although all of the conditions involved in the publication of the banns were not always met.

From the foregoing brief overview of traditional Indian and Inuit family law, one can conclude that the social rules or laws governing family life were known and followed. There are a number of similarities in the legal requirements of the various native nations; there are also many critical differences. It is impossible to delineate a single set of principles adhered to by all native people. The diversity in social organization must be acknowledged and respected in the recognition of customary law

47. *Id.* at 24.

48. CROWE, note 38 *supra*, at 56. The Naskapi also have a custom of bride-service, *id.* at 44.

49. *Re Noah Estate* [1961] 36 W.W.R. 557 (N.W.T.T.C.).

50. E. Sapir, *The Social Organization of the West Coast Tribes*, in NAGLER, note 39 *supra*, at 39-40.

51. CROWE, note 38 *supra*, at 43.

52. LANDES, note 33 *supra*, at 51-56.

53. *See, e.g.*, the discussion of this system in *Rex v. Williams*, [1921] 30 B.C.R. 303 (B.C.S.C.).

by the Canadian legal system and in the planning of any modifications to the existing general family law. Certain values are shared by all of the native societies, but differences in procedure and attitude remain.

IV. *The Canadian Legal System's Response to Native Family Law*

The original inhabitants of Canada have, of course, followed and applied their own laws, which included family laws, since time immemorial. These laws varied from nation to nation, but their presence was universal. Many Indians and Inuit in Canada still continue to follow their traditional matrimonial property, marriage, adoption, child welfare, and maintenance laws; and this is most common today in the North. Unfortunately, the Canadian legal system has not continually recognized the validity of native family law.

In this section, the American position will be briefly described. Next, the limited extant Canadian case law in this area from the preconfederation era to the present time will be discussed. This will be followed by an examination of the current provincial and territorial legislation in force, in order to ascertain the present status of Indian and Inuit family law. The emphasis will be upon marriage and adoption law; however, customary and modern divorce law will receive passing comment.

The American Position

The validity of Indian marriage law in the United States has generally not been questioned by the American courts because of their overall view of Indian law. That is, Indian nations are regarded as having possessed their own inherent sovereignty, at least over internal or domestic matters, since colonization began. The judiciary has continually recognized the validity of Indian law as governing all matters within Indian territories since the decision of the New York State Supreme Court in 1810 in *Jackson ex dem. Gibert v. Wood*.⁵⁴ This approach has been followed on numerous occasions in the United States with the approval of the United States Supreme Court from as early as 1831.⁵⁵

54. 7 Johns. 290 (S. Ct. of N.Y.)(1810).

55. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). For a more detailed discussion of this case and the general issue involved, see B. MORSE, *INDIAN TRIBAL*

The American courts have, on occasion, had the opportunity to consider the validity of Indian marriage law. The first such opportunity was in 1838 in *Fisher v. Allen*,⁵⁶ where the primary issue involved a property dispute over the assignment of a slave as payment of a debt by John Allen. The slave in question had been owned by Allen's wife prior to their marriage and Chickasaw customary law held that the husband did not acquire any interest in his wife's property upon marriage. The Mississippi court upheld the validity of Chickasaw law on marriage and matrimonial property, leaving the wife free of her husband's debt and his invalid assignment.

Choctaw law on marriage and divorce at will was upheld a few years later in *Wall v. Williamson*.⁵⁷ The wife, in this case, had signed a promissory note which the plaintiff wished to collect from her husband, the defendant. The court made its views on traditional Indian law very clear when it stated:

The question yet remained, whether, at the time of this supposed marriage, the laws and usages of the Choctaw tribe had been abolished or superseded; or, whether they composed a distinct community, governed by their own chiefs and laws. It was not pretended, that any statute producing this effect was then passed, and therefore, if lost at all, their local laws must have been lost, in consequence of their living within the territorial limits of the States. It may be difficult to ascertain the precise period of time when one nation, or tribe, is swallowed up by another, or ceases to exist; but until then, there cannot be said to be a merger. It was only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror. The mere acquisition, whether by treaty or war produced no such effect. It may therefore be considered, that the usages and customs of the Choctaw tribe continued as their law, and governed their people, at the time when this marriage was had. The consequence was, that if valid by those customs, it was so recognized by our law.⁵⁸

In light of this opinion, the court upheld the validity of the marriage and would have held the husband liable on the note except

COURTS IN THE UNITED STATES: A MODEL FOR CANADA (Saskatoon: University of Saskatchewan Native Law Centre, 1980), at 3-7.

56. 2 Howard Rep. 611 (1838).

57. 8 Ala. 48, *aff'd* 11 Ala. 826 (1844).

58. *Id.* at 51.

that the judge further recognized the Choctaw law of divorce at will and applied it to this case, rendering the woman a *femme sole*, and, hence, solely liable for her own debts.

This has also been the legal position in the United States regarding mixed marriages that occurred according to customary law. This first such case arose in *Morgan v. McGhee*,⁵⁹ and this view of the prevailing state of the law has generally been followed ever since.⁶⁰

The American position can, thus, be readily summarized by stating that the general principle of the law of conflicts governing the validity of marriages—namely, that if the marriage is in compliance with the *lex loci contractus*, it is valid everywhere—is applicable to marriages which occur in accordance with Indian law in Indian territory. This principle applies as a result of the residual Indian sovereignty that exists within any reservation in which the tribal government retains and exercises this surviving sovereignty. In addition, Indian customary law will govern all other family matters involving Indians who are domiciled and present on the reservation, unless the traditional law has been superseded by recently enacted tribal law. Unfortunately, the Canadian situation is not nearly as clear or as precise.

The Canadian Jurisprudence on Custom Marriages

The Colonial Situation

One of the most immediately striking factors in the response of the Canadian judiciary to the traditional family law of the native people of Canada is its general refusal to define it as “law” in the first place. At best, the courts have referred to “Indian marriages” or “custom marriages,” whereas on other occasions this institution has been called “concubinage” or “cohabitation.” The approach, which is reflected by the wording chosen, is to regard native marriages as being conducted pursuant to customs, traditions, or practices, rather than according to law. This then presents customary marriages as being somehow less important and less durable than Christian marriages that meet modern legal requirements developed in England.

59. 24 Tenn. (5 Hum.) 12 (1844).

60. *Boyer v. Dively Administrator* 58 Mo. Rep. 510 (1875); *Raymond v. Raymond*, 83 F. 721 (1897); *Johnson v. Johnson's Administrator*, 30 Mo. Rep. 72 (1860). For a brief discussion of this particular issue, see H. Foster, *Indian and Common Law Marriages*, 3 AM. INDIAN L. REV. (1975).

Only a handful of cases has come before the Canadian courts concerning Indian or Inuit marriage law. Even fewer cases have raised other aspects of customary family law for judicial consideration. The paucity of judicial experience and the timing of litigation, with the first Canadian case not arising until as late as 1854,⁶¹ may well be responsible for the general attitude of the judiciary. It is interesting to note that this view of customary law did not originally prevail in England or in North America.

Perhaps the best known early example of English opinion toward marriages involving Indians relates to Princess Pocahontas. The only negative thought concerning her marriage to John Rolfe was the feeling that he, as a commoner, might be guilty of treason in forming an alliance with the royal family of Chief Powhatan, father of Pocahontas. Even this factor, however, did not affect the warm reception she received at the royal court on her visit to London in 1616.⁶²

Thus, the initial position of England was not to interfere with marriages between two Indians, and to favor marriages between white colonists and the Indian inhabitants. William Cullen Bryant states that, "Alliances by marriage between the whites and Indians were encouraged and were not infrequent, as it was hoped to establish by such connections more friendly relations with the savages [*sic*]." ⁶³ The validity of these Indian marriages was never questioned by the courts, regardless of where they occurred, as long as they were pursuant to Indian customary practices.

It is important to remember that the many restrictions upon, and preconditions for, valid marriages imposed by law today are of fairly recent vintage.⁶⁴ English marriage practices were once very similar to those under Indian marriage law. "Informal" marriages, or consensual marriages, in which a man and a woman would simply define themselves as married through living together in a conjugal relationship without a prior ceremony conducted by a member of the clergy or the civil authorities, were the

61. *Tranchemontagne v. Monteferrand* (unrep., Oct. 27, 1854, Superior Court of Lower Canada at Montreal, No. 286); referred to by Monk, J., in *Connolly v. Woolrich & Johnson*, [1867] 11 L.C.J. 197, at 249-50.

62. W. BRYANT, *A POPULAR HISTORY OF THE UNITED STATES* (1876 ed.), at 303-304.

63. *Id.* at 305.

64. For a discussion of the history of marriage law in Europe, see *Connolly v. Woolrich and Johnson*, [1867] 11 L.C.J. 197, 215-24. For a more detailed treatment of English marriage law, see J. JACKSON, *THE FORMATION AND ANNULMENT OF MARRIAGE* (2d ed., London: Butterworth, 1969); and P. BROMLEY, *FAMILY LAW*, (5th ed., London: Butterworths, 1969).

general rule. The basic requirements for a valid consensual marriage, or a contract of marriage *per verba de praesenti*, were that it was a voluntary union for life of two people of the opposite sex to the exclusion of all others involving public recognition as husband and wife.⁶⁵ The Roman Catholic Church was the first to require formally a religious celebration under canon law as a necessary precondition to a recognized marriage. This occurred with the passage of the Decree Tametsi by the Council of Trent in 1563.⁶⁶ Prior to this time, canon law merely indicated its displeasure with informal marriages.

The Parliament of England did not move to restrict consensual marriages, which are widely labeled today as "common law marriages," until 1753. The common law position was thus altered by the statute commonly called Lord Hardwicke's Marriage Act.⁶⁷ Even this change was expressly stated as not applying to Scotland or the colonies, nor to the Quakers, Jewish people, or the royal family.⁶⁸ Subsequent English marriage statutes⁶⁹ also had no extraterritorial effect. Furthermore, imposing legislative requirements on top of preexisting religious dogma was not fully accepted and followed even in the nineteenth century, when the *London Times* still carried market prices for wife sales.⁷⁰

Therefore, it is not surprising that consensual marriages between colonists and Indians, or among Indians alone, would not be a subject for judicial consideration before the 1800s in Canada or the United States.

The first Canadian court to be confronted with the question of whether to recognize Indian marriage law was the Superior Court of the Province of Canada in Montreal in 1854. As in many of these cases, the dispute in *Tranchemontagne v. Monteferrand*⁷¹

65. The classic definition of a valid marriage in English law was stated by Lord Penzance in *Hyde v. Hyde*, [1866] L.R. 1 P. & D. 130 at 133, as follows: "I conceive that marriage, as understood in christendom, may . . . be defined as the voluntary union for life of one man and one woman to the exclusion of all others."

66. Foster, *supra* note 60, at 85.

67. 26 Geo. II, c. 33.

68. Foster, *supra* note 60, at 85.

69. See, e.g., Marriage Act, 1823 (U.K.), C. 76 (11 Stats. 695); Marriage Act, 1824 (11 Stats. 706); Marriage Act, 1835 (11 Stats. 710); Marriage Act, 1836 (11 Stats. 711); Marriage Act, 1840 (11 Stats. 726); Marriage Act, 1886 (11 Stats. 745); Marriage Act, 1898 (11 Stats. 758).

70. Mueller, *Inquiry Into the State of a Divorceless Society*, 18 U. PITT. L. REV. 545, 566-72 (1957).

71. *Tranchemontagne v. Monteferrand* (unrep., Oct. 27, 1854, Superior Court of Lower Canada at Montreal, No. 286). This case has apparently escaped the notice of all subsequent courts and commentators.

concerned a property fight between the child of the customary marriage on the one hand and a relative of the white male spouse on the other.

Hugh Faris was married to his wife without any formal ceremony, according to Indian custom. She was described as a half-blood or Métis Indian, but her tribal affiliation was not mentioned. Their daughter's claim to the realty depended solely upon her legitimacy and, hence, upon the validity of the marriage. The court relied upon proof of prolonged cohabitation as well as upon their public reputation as husband and wife to uphold the marriage. Unfortunately, the case was never reported, and one is left presuming the judgment to have been unanimous from the three-member bench without knowing the reasons underlying the court's decision.

Post-Confederation Canadian Law

The next case might well be regarded as the *locus classicus* in the area. It has been continuously considered with the highest respect in later decisions and has received international prominence.⁷² The decision of Justice Monk in *Connolly v. Woolrich & Johnson*⁷³ is indeed a "very able and exhaustive judgment."⁷⁴ William Connolly, a Roman Catholic who was born in Lower Canada in 1786, went to Indian country as a clerk in the service of the North West Company in 1802. He was initially located at Riviere-aux-Rats (or Rat River) in the Rebaska (also called Athabaska) region, which was 300 miles east of the Rockies and 1,200 miles west of the nearest settlement at Red River. In the following year, he married Susanne, the daughter of the local chief, according to Cree custom by which he gave presents to her father to obtain his consent and hers. The granting of consent and the giving of gifts were the sole constituents of Cree marriage law, which required no formal ceremony to validate the marriage, although celebrations and marriage feasts were common.

In 1832 he married Julia Woolrich, his second cousin, without obtaining a divorce from Susanne and while she was present in Montreal. This second marriage subsisted until his death in 1849.

72. For example, see the comments of Foster, *supra* note 60, at 95; and those of W. Beckett, *The Recognition of Polygamous Marriages under English Law*, 48 L.Q.R. 341, 349, 353, (1932). The case is appended in summary form at 369-73.

73. [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253.

74. *The Queen v. Nan-E-Quis-A-Ka*, [1889] 1 Terr. L.R. 211, 213 (per Wetmore, J. on behalf of the court).

Susanne continued to receive financial support until her death in 1862, first from William, and, after his death, from Julia, even though in his will he had left his entire estate to his second wife and their two children.

The plaintiff, son of Susanne, asserted his right to a one-sixth interest (as there were six children) in his mother's estate, which, he argued, comprised primarily one-half of William Connolly's estate. The son argued that his father was domiciled in Lower Canada throughout his life, that there was no marriage contract between his parents, that the marriage according to Cree law was valid and was to be recognized in the Canadian courts, and, therefore, that the community of property regime in existence in Lower Canada applied, giving rise to his mother's one-half share in his father's estate.

Justice Monk was confronted with a wide variety of technical and substantive legal issues in addition to the difficult task of reconstructing an accurate picture of the conditions existing more than sixty years earlier and thousands of miles to the west of Montreal.

Justice Monk examined subsequent developments in the region, and in general, in terms of French and English activities that might have changed this legal picture, but he found the original situation unaltered, with the Cree law subsisting intact. The court was, then, of the view that Cree law governed the marriage rather than the common law and, therefore, that he was not bound by any English decisions. In order to buttress further the correctness of his decision, he canvassed Roman and canon law, civil law, and the law of England concerning consensual marriages. His opinion was that all European law recognized the contract of marriage *per verba de praesenti* in this type of situation. The only difficulty he encountered was the majority decision of the Court of Queen's Bench of Ireland in the *The Queen v. Millis*,⁷⁵ which held a contract of marriage *per verba de praesenti* to be a binding contract but not to constitute a complete marriage in the absence of a religious ceremony. This decision was affirmed by the House of Lords as a result of an equal division among the six law lords who heard the appeal.⁷⁶ Monk, J., asserted that the decision was wrong in law and impractical in

75. [1843-44] 10 Cl. and F. 534; 8 E.R. 844 at 888.

76. [1843-44] 10 Cl. and F. 699; 8 E.R. 844 at 905. JACKSON, note 64, *supra*, at 221, says that the majority view "had no historical justification whatsoever" and that it has been confined as far as possible and restricted to England and Ireland only.

theory as it would have the effect of prohibiting marriages in remote areas, like in Athabaska in 1803.

In Justice Monk's opinion, the law of conflicts principle relating to the recognition of foreign marriages would apply. Under the rule of *lex loci contractus*, in which all nations will accept the validity of a marriage that conforms to the local law of the country of domicile of the parties or the place where the celebration occurs,⁷⁷ compliance with Cree marriage law is the deciding factor, even where only one of the parties is Cree, as no distinction on that point had been created. Justice Monk concluded his comments on Indian law and the British response to it by stating:

There is besides, one answer to all this, and a very plain one. 1st, The supreme authority of the empire, in not abolishing or altering the Indian law, and allowing it to exist for one hundred years, impliedly sanctioned it, and 2nd, The sovereign power in these matters, by proclamation has tacitly acknowledged these laws and usages of the Indians to be in force, and so long as they are in force as a law in any part of the British empire or elsewhere, this Court must acknowledge and enforce them.

This Indian custom or usage is, as regards the jurisdiction of this Court, a foreign law of marriage; but it obtains within the territories and possessions of the Crown of England, and until it is altered, I cannot disregard it. It is competent—it has been competent during the last hundred years, for the parliament of Great Britain to abrogate those Indian laws, and to substitute others for them. It has not thought proper to do so, and I shall not.⁷⁸

On the basis of these conclusions on points of law, the court regarded the plaintiff as legitimate and eligible for a share in his mother's estate. The community of property regime of Lower Canada governed the matrimonial property and decided this issue as William's domicile was always Lower Canada. Thus, the law

77. [1867] 11 L.C.J. 197, 243-49, *aff'd* [1869] 1 R.L. 253. Marriage law was governed by the *lex loci celebrations* in England until the decision in *Scottomayer v. De Barros*, (1877), 3 P.D. 1 (C.A.), in which the Court of Appeal modified the law so that capacity to marry is determined by the parties' *lex loci domicilii* while the formalities to be observed are those required by the *lex loci celebrations*. This distinction would not have affected the validity of the union between William and Susanne.

78. *Id.* at 249.

from different jurisdictions applied to the different legal issues because of the distinction between the status of the marriage and the consequences which flowed from it.⁷⁹ Therefore, the plaintiff was awarded a one-twelfth part of his father's estate, on accounting of the revenue created by the estate since his father's death, and costs.

This was not, however, the end of the matter. The case was apparently inscribed for consideration by the Court of Review of Quebec, but was withdrawn and an appeal was taken instead to the Court of Queen's Bench (Court of Appeal).⁸⁰ A full five-member bench heard the appeal and dismissed it, with Justice Loranger dissenting.

This case was not quite over after the appeal was dismissed, as the defendant Johnson then launched an appeal to the Privy Council. Leave to appeal was granted, causing Connolly to move for the provision by the appellant of new security. This motion was granted on March 9, 1871, by the Court of Queen's Bench.⁸¹ Julia Woolrich's will was also at this time the subject of further litigation.⁸² It appears that the appeal to the Privy Council was ultimately abandoned,⁸³ leaving the Queen's Bench decision undisturbed.

The next opportunity for Canadian courts to consider these issues arose in very similar circumstances to the *Connolly* case.⁸⁴ Once again, the distribution of the assets of an estate of a white male from Lower Canada, who also had been associated with the North West Company in various posts in western Canada for many years, was called into question by a descendent of the testator, Alexander Fraser, and an Indian woman by the name of Angelique Meadows. He had moved to the west in 1788 as part of his employment with the North West Company and remained there until 1801. During this period he fathered three children by Angelique, whom he had allegedly married in accordance with the Indian law of her unknown tribe. It appeared that this mar-

79. *Id.* at 258-63.

80. This is according to Cross, J., sitting as a member of the Court of Queen's Bench in *Jones v. Fraser*, [1886] S.C.R. 327 at 355. Justice Cross was the counsel of record for the defendants in *Connolly v. Woolrich* at trial and on appeal and, therefore, referred to his recollection to correct an apparent inaccuracy in the report of the appeal of the *Connolly* case, at [1869] 1 R.L. 253, at 253, which indicated that the Court of Review also had decided in favor of the Indian marriage.

81. [1872] 16 L.C.J. 100.

82. [1872] 16 L.C.J. 329 (Q.B.).

83. See note 80, *supra*.

84. [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253.

riage occurred sometime in 1788, or early 1789, as the first child of this union was born on December 24, 1789, rendering eyewitness evidence impossible in litigation commencing in 1881. In addition, there were no members of the clergy in this part of the Northwest Territories (or Indian Country as it was then called) until 1817. Therefore, it was impossible for this marriage to be recorded in any civil marriage registers, or to have been celebrated by a priest or minister.

Alexander Fraser returned to Lower Canada in 1801, accompanied by Angélique and by their three children, who were baptized within the year in the presence of Alexander and with the surname of Fraser. The baptismal certificates were available to the court, but they did not expressly state that the children were legitimate, or that the parents were married.

The family settled together in his home at his estate in Rivière-du-Loup. After an unknown period of time, he erected a small house near his own as a residence for Angélique and the children, to which he would pay frequent visits. Subsequently, he moved to another estate of his where he developed a lengthy relationship with one of his servants, Pauline Michaud, who gave him five more children, all of whom were known as illegitimate but who bore his name. Alexander continued to support and visit Angélique until her death in 1833. There were, however, conflicts in the evidence as to the status of Angélique. Several witnesses testified that she was known as Madame Fraser, the wife of Alexander, and that she had been introduced in such fashion by him, while other witnesses denied this. There was, however, some further evidence that she had previously been married to one Letang without any clear proof that the marriage had been dissolved, or that he had died prior to her marriage with Fraser.

Fraser made his will in 1833, in which he divided his estate primarily among his children, but gave a bequest of an annuity to this woman as "Angélique Meadows." Furthermore, upon her death, she was buried in a Roman Catholic cemetery in St. Patrice, whose register recorded her solely as "Angélique, sauvage, native des pays du Nord-Ouest." The evidence supporting a valid marriage conducted in accordance with Indian law and recognized as such by Angélique and Alexander was shaky at best.

The litigation was focused upon the effects of intervening events between the making of the will in 1833 and his death in 1837. During this four-year interval, Fraser sold two of his seigniories for the sum of £15,000 to pay his pressing debts,

which amounted to £5,400, with the balance being invested. These seigniories formed the specific bequest in his will to his daughters of both relationships and, thus, their sale was the subject of a dispute as to whether the sale had revoked the legacy and over what should happen to the balance of the proceeds. The original executors of the estate had apportioned and distributed the £9,600 in 1839 to all the heirs upon their clear agreement on the basis of the amount of total land in the estate allotted to each.

Some forty years then passed before one of the sons of Alexander and his servant Pauline (William Fraser) sued the subsequent curator for an accounting in respect of the way in which the £9,600 was distributed. Angélique's grandson, Thomas Jones, was joined as a defendant. The case, *Fraser v. Pouliot*,⁸⁵ was heard before Chief Justice Meredith of the Superior Court of Quebec in 1881. The primary issue before the court for determination involved the alleged revocation by virtue of the sale of the legacy in favor of the plaintiff.

Justice Ramsay apparently delivered the primary judgment⁸⁶ in the subsequent appeal in which he denied the validity of the marriage strictly on the basis that the evidence necessary to prove the marriage was lacking. After deciding that the doctrine of res judicata did not apply, he went on to say that there was no dispute in law concerning the possession d'état from which a legally valid marriage may be presumed, namely, name, treatment, and repute. The problem was that there was no evidence in this case of the relevant tribal marriage law or even as to whether the marriage had in fact occurred in accordance with it. Furthermore, according to Justice Ramsay, Quebec law presumably governed the marriage because no different law was pleaded by the respondent.⁸⁷ He was willing, possibly, to accept the validity of a consensual marriage; however, the evidence available only proved prolonged cohabitation, but did not establish that the parties regarded this as a marital union for life.⁸⁸ He stated: "Nor am I prepared

85. [1881] 7 Q.L.R. 149.

86. Jones v. Fraser, [1886] 12 Q.L.R. 327, 343-54. Justice Cross, the former counsel of Woolrich in *Connolly v. Woolrich*, [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253, delivered a separate and shorter judgment at 354-61. Dorion, C.J., and Baby, J., concurred without reasons, but it is unclear from the law of reports which of the two judgments they adopted.

87. [1886] 12 Q.L.R. 327, 349. However, Justice Monk took a different view on this point at 333-36.

88. *Id.* at 349-50.

to accept the proposition that the cohabitation of a civilized man and a savage woman . . . gives rise to a presumption that they had consented to be married in our sense of marriage."⁸⁹

Ramsay, J., thought the testimony lacked the substance necessary to prove that Angélique took Alexander's last name and was known as his wife. The presence of separate houses, of a subsequent mistress, and of the way she was named in the will and the baptismal certificates all tended to repudiate this claim. Therefore, the *Connolly* case⁹⁰ could be "very easily distinguished"⁹¹ on the facts. Justice Ramsay clearly was dismayed that the distribution agreement of 1839, "un partage," could be challenged after forty years by someone who had continually benefited financially from it.⁹²

The actual court order in the case most closely resembles the views of Justice Ramsay and it is fairly safe to suggest that his opinion was the majority judgment.

Justice Monk also participated in the appeal and agreed with the majority on all points except the validity of the marriage. He was prepared to rely upon the evidence concerning Indian marriage practices submitted in the former case and apply it to this one. In addition, he believed that the legal presumptions in favor of the validity of marriages and the legitimacy of children should be used by the court here as they were before in *Connolly v. Woolrich & Johnson*,⁹³ especially when no subsequent marriage was celebrated. He was unwilling to infer that the parties accepted polygamous marriages or divorce at will just because they were possible under some tribal laws. Simply put, he viewed the evidence as sufficient, if viewed in a positive light, and the law as being settled in support of the respondent's claim.

This decision was then appealed by Jones to the Supreme Court of Canada where it was unanimously dismissed.⁹⁴

The next case to call Indian marriage law into question was *The Queen v. Nan-e-quis-a-ka*,⁹⁵ which involved the admissibility of evidence from the wife of a man charged with assault causing bodily harm. The accused called two Indian women as witnesses in his defense at trial, both of whom were stated to be his wives.

89. *Id.* at 350.

90. [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253.

91. [1886] 12 Q.L.R. 327, 354.

92. *Id.* at 352-54.

93. [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253.

94. *Jones v. Fraser*, [1886] 13 S.C.R. 342; 12 Q.L.R. 327, 367 *et seq.*

95. [1889] 1 Terr. L.R. 211 (N.W.T. C.A.).

The trial judge heard the evidence of Maggie concerning her marriage for life to the accused, which was the first for either. He concluded that this marriage was legally valid and that she was then neither competent nor compellable as a witness for her husband. The evidence of the second wife was admitted and the trial continued, resulting in Nan-e-quis-a-ka's conviction. Justice Wetmore reserved for the opinion of the Court *en banc* the correctness of his ruling in excluding the evidence of Maggie.

The issue was subsequently argued before a five-member bench and the judgment in support of the ruling was delivered by Justice Wetmore. He adopted the reasoning of Justice Monk in the *Connolly* case⁹⁶ that Indian law governed marriages prior to the reception of English law in the Northwest Territories on July 15, 1870. Therefore, a marriage conducted in compliance with customary law prior to that date was valid.⁹⁷ After noting the legislation that introduced English civil and criminal law into the territories, and the limitation that this occurred only so far as English law was applicable,⁹⁸ he went on to say:

In the first place are the laws of England respecting the solemnization of marriage applicable to these Territories *quoad* the Indian population? *I have great doubts if these laws are applicable to the Territories in any respect.* According to these laws marriages can be solemnized only at certain times and in certain places or buildings. These times would be in many cases most inconvenient here and the buildings, if they exist at all, are often so remote from the contracting parties that they could not be reached without the greatest inconvenience. I am satisfied however that *these laws are not applicable to the Territories quoad the Indians.* The Indians are for the most part unchristianized; they yet adhere to their own peculiar marriage custom and usages. It would be monstrous to hold that the law of England respecting the solemnization of marriage is applicable to them. 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*

96. [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253.

97. [1889] 1 Terr. L.R. 211, 212-14 (N.W.T. C.A.).

98. *Id.* at 214-15, quoting from The Northwest Territories Act R.S.C. 1886, C. 50, S. 11.

consent and according to Indian custom since 15th July, 1870, is a valid marriage, providing that neither of the parties had a husband or wife, as the case might be, living at the time; at any rate so as to render either one, as a general rule, incompetent and not compellable to give evidence against the other on trial charged with an indictable offence.⁹⁹

Justice Wetmore viewed a number of provisions in the Indian Act¹⁰⁰ which refer to the terms "wife," "widow," or "child" as amounting to a statutory recognition of customary marriages.¹⁰¹ For these reasons he was of the view that the first marriage was legally valid and the wife's evidence was properly excluded. It is implicit in this judgment that the second "wife" did not have this same legal status, as there was no question about her testimony being inadmissible.

The Common Pleas Division of the Ontario High Court of Justice had the next opportunity to deal with a case involving a custom marriage. *Robb v. Robb*¹⁰² was another estate case concerning the legacy of John Robb. His will left most of his estate to his son William George Robb and his heirs, unless William died unmarried without legal issue, in which case it would go to the plaintiff, John's widow and executrix. The son moved to British Columbia in 1869, where he married a chief's daughter, Supul-Catle, of the Comox Tribe. This marriage complied with Comox law, as it involved a gift to the chief (the bride-price), followed by a feast in celebration of the marriage, with further presents to her family. The couple then cohabited as spouses and were so regarded until her death, at which time Robb returned to Ontario with his surviving daughter, the infant defendant Sarah. He cared for his daughter, continually spoke of her as his legitimate child, and repeatedly stated that he was legally married to her mother. The testator died in 1886 followed by William two years later. Sarah claimed her father's estate through intestacy, which included the portion left to him under John Robb's will.

Justice Robertson distinguished the trial judgment in *Connolly v. Woolrich*,¹⁰³ which he called "celebrated" and "entitled to the greatest respect,"¹⁰⁴ on the basis that conditions in British Col-

99. *Id.* at 215 (emphasis added).

100. R.S.C. 1886, c. 43, SS. 9, 12, 13, 20, 88, 90 and 93; as amended, S.C. 1887, c. 33, S. 9.

101. [1889] 1 Terr. L.R. 211 (N.W.T. C.A.).

102. [1891] 20 O.R. 591.

103. [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253.

104. [1891] 20 O.R. 591, 595.

umbia in 1869 were considerably different from those in Athabaska in 1803, in that British Columbia had members of the clergy and its own colonial government with magistrates. He felt able to infer that there had been a valid Christian marriage from William's repeated statements that they were legally married in the same manner as if it had occurred in Ontario. Therefore, he could rely upon the legal presumptions in favor of validity, in conjunction with the evidence about consent, reputation, cohabitation, and consummation, to declare it to be a proper marriage, without having to consider its validity as a custom marriage under Indian law. The court did state, however, that the custom marriage would be valid as a consensual marriage, or *sponsalia per verba de praesenti*, under English law.¹⁰⁵ Sarah was declared the legitimate heir of her father and, as such, was entitled to take his share of John's estate.

The next case was based on events also arising in British Columbia, but it is a far less satisfactory judgment.¹⁰⁶ Local Judge Bole was confronted by a lawsuit in which the plaintiff sued as mother and sole next of kin of her son, who had died intestate. She was a Cowichan Indian who had married John Schmidt in 1868 in accordance with the customs of her tribe. They lived together until his death in 1890 and were blessed with one son who received all of his father's property under John's will. The son subsequently died in 1892, unmarried and without any issue, causing the official administrator to seize his property. The plaintiff's claim rested strictly upon the legality of her marriage, a claim that was rejected by the court. Unfortunately, the report of the decision is only two paragraphs long and contains no reasons. It appears from the factual summary that the court was of the view that the colonial law in existence at the time of the marriage required a Christian ceremony, which was alleged to be readily available to the parties. Since none of the leading cases in this area were cited by the court,¹⁰⁷ it can be submitted that this case is of little weight.

This decision was followed the next year by *The Queen v. "Bear's Shin Bone,"*¹⁰⁸ in which the defendant was charged under the Criminal Code with practicing polygamy. He was a Blood Indian who had married two women of the same tribe ac-

105. *Id.* at 599-602.

106. *Smith v. Young*, [1898] 34 Can. L.J. 581 (B.C.S.C.).

107. The only case cited was *Aronegary v. Vaigalie*, 6 A.C. 364, which was distinguished.

108. [1898-1901] 4 Terr. L.R. 173 (1900), 3 C.C.C. 329 (N.W.T.S.C.).

cording to customary law. This judgment also receives only one paragraph in the law reports in which it is indicated that Justice Rouleau convicted Bear's Shin Bone of the charge by holding Indian marriages to be valid pursuant to *R. v. Nan-e-quis-a-ka*.¹⁰⁹

The same court was confronted by another estate case in the same year in *Re Sheran*.¹¹⁰ Sheran had moved to the Northwest Territories in 1874 and settled down with a Piegan Indian woman in 1878, having two children before his death intestate four years later. Mary Brown and he had promised each other that they were husband and wife for life and that neither would have any other spouse. After the christening of their first child, Sheran promised that they would get married in "the white man's way," but this never did occur. Although members of the clergy resided or traveled through the area, Sheran was a Roman Catholic and no priests were available to conduct the ceremony. Since it was admitted by counsel for the children, who sought to enjoy their father's estate, that there had been no customary marriage, the court dealt solely with the case as one involving consensual marriage.

Justice Scott considered the evidence and found it wanting in proving a valid marriage *per verba de praesenti*. He further relied upon *R. v. Millis*¹¹¹ in deciding that the marriage was invalid. The exceptions to this latter case were considered and rejected as the court did not regard the territories as a "strictly barbarous country"¹¹² in 1878, or one where a religious ceremony was impossible for British subjects. The *Connolly*¹¹³ and *Robb*¹¹⁴ cases were readily distinguished on the facts. The net result was that the marriage was held invalid and the children illegitimate, leaving Sheran's sister as the only lawful heir. It is worth noting that implicit in the judgment is the indication that the law is different for a marriage involving at least one British subject from one between two native people.

The decision in *Smith v. Young*¹¹⁵ appears to have been followed in another case in British Columbia in 1906, which has

109. [1889] 1 Terr. L.R. 211 (N.W.T. C.A.). Mr. Justice Rouleau concurred with Wetmore, J., in that decision.

110. [1898-1901] 4 Terr. L.R. 83 (N.W.T.S.C.).

111. [1843-44] 10 Cl. and F. 534; 8 E.R. 844 at 888. See also note 76, *supra*.

112. [1898-1901] 4 Terr. L.R. 83, 91 (N.W.T.S.C.).

113. [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253.

114. [1891] 20 O.R. 591.

115. *Smith v. Young*, [1898] 34 Can. L.J. 581 (B.C.S.C.).

never been reported.¹¹⁶ A male Indian had been charged with bigamy for having a second custom marriage after divorcing his first wife according to Indian law. The Chief Justice directed the jury to acquit the accused after holding that custom marriages were not marriages at all within the meaning of the term in the criminal law.¹¹⁷

Fifteen years passed before the next court case¹¹⁸ arose in which the validity of Indian marriage laws was raised in a manner similar to that in *R. v. Nan-e-quis-a-ka*.¹¹⁹ Justice Gregory was presiding over a murder trial in which the defense objected to the Crown's attempt to call Jennie Williams as a witness. The defense counsel argued that she was neither a competent nor a compellable witness as she was the wife of the accused. Testimony was received on the marriage and divorce by redemption laws of the Kwakiutl Indians of British Columbia, as the accused had been married and divorced according to these laws twice before this customary marriage to Jennie. After hearing legal argument based upon *R. v. Nan-e-quis-a-ka*¹²⁰ and *Bethell v. Hillyard*,¹²¹ the court rendered the following brief judgment excluding the evidence:

I do not think the evidence is admissible, but I think the Crown should ask for a case stated. The matter is one of great importance and should be authoritatively settled. I cannot, in the middle of an assize, and in the middle of the case give the question the consideration which it should have.¹²²

It appears that the Crown did not follow this suggestion, as no further decision was ever reported.

These issues were canvassed once more in British Columbia by the Court of Appeal in *Yew v. Attorney General*,¹²³ only this time in relation to a polygamous marriage celebrated in China. The five-member court unanimously reversed the B.C. Supreme Court

116. The unnamed decision is referred to in a letter dated July 7, 1906, from the Deputy Attorney General of B.C. to an Indian agent, reproduced in SANDERS, *supra* note 34, at n. 550 of chapter 2.

117. *Id.*

118. *Rex v. Williams*, [1921] 30 B.C.R. 303 (B.C.S.C.).

119. [1889] 1 Terr. L.R. 211 (N.W.T. C.A.).

120. *Id.*

121. [1888] 38 Ch. D. 220. For an interesting contemporary comment on this case in relation to *Connolly v. Woolrich*, [1867] 11 L.C.J. 197, see *Pagan Marriage*, 8 CAN. LAW TIMES 132 (1888).

122. *Rex v. Williams*, [1921] 30 B.C.R. 303, 305 (B.C.S.C.).

123. [1924] 1 D.L.R. 1166; 33 B.C.R. 109 (B.C.C.A.).

and held the marriages to be valid for the purposes of exempting the deceased from succession duties. Three judgments were delivered in which each considered the pertinent case law, including Justice Monk's decision in *Connolly v. Woolrich*.¹²⁴ Martin, J.A., specifically stated that it was rightly decided and "should not be lightly disturbed,"¹²⁵ while Justice McPhillips also followed it by declaring that it was "a most erudite judgement which has stood unchallenged and unreversed for half a century and more."¹²⁶

These issues remained dormant, at least as far as the legislators and the courts were concerned, for forty years until the arrival of *Re Noah Estate*,¹²⁷ which was a case of first impression in Canada regarding Inuit marriage law. Noah had died on Christmas Day of 1959 in a fire at a DEW-line site where he worked. He left a small estate, comprised primarily of an insurance policy, and was survived by his wife and daughter. He had married Igah according to the Inuit customary law requirement of a trial marriage, obtaining parental approval, and a public wedding celebration to notify the whole community of this new union. Letters of administration of the estate were granted to the public administrator of the Eastern Arctic in the normal fashion by the Territorial Court before Ottawa intervened to test the effect of a 1960 amendment to the Northwest Territories Act.¹²⁸ This amendment was designed to render all laws of general application in the territories applicable to "Eskimos."

The Department of Northern Affairs and Natural Resources sent an agent from Ottawa to Frobisher Bay armed with a memorandum of argument to advise the court not to travel to the deceased's community. After Justice Sissons stated that he was going anyway, the agent submitted a further argument. Both arguments were described by the trial judge in his memoirs in these graphic terms¹²⁹:

"It was an insult to the court, to the dead man, his wife and child, and to the entire Eskimo race The supplementary argument was simply indecent fantasy, born of ignorance and arrogance. Book dealers have been prosecuted for having on

124. [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253.

125. [1924] 1 D.L.R. 1166, 1184.

126. *Id.* at 1191.

127. [1961] 32 D.L.R. (2d) 185 (N.W.T.T.C.).

128. R.S.C. 1950, C. 331, § 17 as amended by S.C. 1960, c. 20, § 2.

129. [1961] 32 D.L.R. (2d) 185 (N.W.T.T.C.).

their shelves material less obscene This was utterly monstrous. It was crass, cruel, smug and sly I was quoted as saying that no Ottawa bastard was going to tell me ten thousand Eskimos were bastards, and though I'm not sure I said it, it would have expressed my sentiments."¹³⁰

The basic position of the federal government was that Inuit marriages were only valid if performed in keeping with Christian requirements; otherwise they were simply the voluntary liaison of "paramours" and "concubines." The government's perceptions of Inuit practices and morals were clearly disputed by the evidence at trial.¹³¹ Justice Sissons had no difficulty, in light of the extensive evidence given concerning Inuit marriage practices, in finding that Noah and Igah had complied with the requirements of Inuit law. The more controversial issues were whether Inuit law was recognized at English common law and what was the consequence of the enactment of the Marriage Ordinance.¹³²

Sissons, J., briefly traced the old common law position regarding consensual marriages, which simply required consent, permanence, and exclusivity from members of the opposite sex in order to be valid.¹³³ The pre-1870 English marriage legislation was only summarily examined, commencing with Lord Hardwicke's Marriage Act,¹³⁴ because these enactments were expressly limited to England and Ireland and, therefore, were not part of the law received by the Northwest Territories on July 15, 1870. Thus, he was able to conclude that Inuit customary marriages were recognized as valid in the territories, prior to 1870 and subsequent thereto, subject to any federal legislative change.¹³⁵ Justice Sissons was further of the view that the Marriage Ordinance¹³⁶ had not altered the common law concerning consensual and native custom marriages, but rather had created a solemnization process which did not invalidate marriages that suffered from ir-

130. J. SISSONS, *JUDGE OF THE FAR NORTH* (Toronto: McClelland and Stewart Ltd., 1973), at 134-36.

131. [1961] 32 D.L.R. (2d) 185 (N.W.T.T.C.).

132. R.O.N.W.T. 1956, c. 64.

133. [1961] 32 D.L.R. (2d) 185, 197-98 (N.W.T.T.C.). For this determination he relied upon the American authorities of *Fisher v. Fisher*, 165 N.E. 140 (1929) and 55 C.J.S. 816-18.

134. 1753, 26 Geo. II, c. 33.

135. [1967] 32 D.L.R. (2d) 185, 199 (N.W.T.T.C.). In doing so, he relied upon and adapted the principles of several of the Indian customary marriage cases from Canada and the United States.

136. R.O.N.W.T. 1956, c. 64.

regularities or defects in form. Therefore, since that ordinance had not invalidated the marriage, then the 1960 amendment¹³⁷ making the general law applicable to the Inuit could not affect the status of the marriage either.¹³⁸ On the basis of this decision, the court proceeded to order the distribution of the estate equally between widow and child, pursuant to the Intestate Succession Ordinance.¹³⁹ Justice Sissons felt that the latter ordinance did not apply to Indians because of the specific sections in the Indian Act¹⁴⁰ dealing with estates, nor to the Inuit in general as a result of Inuit customary law. He applied it nonetheless to Noah's estate with the rationale that Inuit succession law was not clearly known to the court, and this law had neither experience in conveying money from a deceased's estate nor in applying to someone who had left his community to join the labor force.

The last reported case,¹⁴¹ *Ex parte Cote*,¹⁴² arose in Saskatchewan ten years later in a similar situation to *Rex v. Williams*¹⁴³ and *Regina v. Nan-e-quis-a-ka*.¹⁴⁴ Wilfred Severight was on trial for a criminal offense when the Crown called Barbara Ann Cote as a witness. She refused to testify against the accused on the ground that he was her lawful husband, thereby making her neither a competent nor a compellable witness. Both were treaty Indians who had decided to live together for life as husband wife in 1967, after obtaining their parents' approval. They had no intention of going through any other form of marriage as they were already recognized, on the reserve and by the local Anglican minister, as husband and wife.

The provincial magistrate rejected the contention that they were lawfully married and found her in contempt of court for refusing to testify. An application for a writ of *habeas corpus ad*

137. R.S.C. 1950, C. 331, § 17, as amended by S.C. 1960, c. 20, § 2.

138. [1961] 32 D.L.R. (2d) 185, 203-204 (N.W.T.T.C.). This conclusion, although right in law, was weakened somewhat by the court's reliance upon the mischief rule of statutory interpretation and the Canadian Bill of Rights.

139. R.O.N.W.T. 1956, c. 53.

140. R.S.C. 1970, c. I-6 §§ 45-50.

141. There is, however, a reference to a "Chipaway" (*sic*) case in 1973 or 1974 in which the Alberta courts viewed customary marriage of an Indian couple from the Northwest Territories who had moved to that province, as invalid in Corrigan, *A Note on Canadian Indian Marriage Law*, 4 W. CAN. J. ANTHRO, 17, 22 (1974). This is particularly surprising in light of the curative provision in the Marriage Act, R.S.A. 1970, c. 266, s. 23.

142. [1971] 22 D.L.R. (3d) 353 (Sask. C.A.), *revs'g* [1971] 4 W.W.R. 308; 19 D.L.R. (3d) 486; 3 C.C.C. (2d) 383 (Sask. Q.B.).

143. SANDERS, *supra* note 34, n.550, ch. 2.

144. [1889] 1 Terr. L.R. 211 (N.W.T. C.A.).

subjiciendum was made before the Queen's Bench,¹⁴⁵ which was granted on the basis that it was a valid marriage at common law. Although the court referred to the *Williams*,¹⁴⁶ *Nan-e-quis-a-ka*,¹⁴⁷ and *Noah Estate*¹⁴⁸ cases, it appears that Justice MacDonald did not have the benefit of extensive argument or evidence on the distinction between native custom marriages and the so-called "common law marriages" which happen to involve native people.¹⁴⁹

The decision was unanimously reversed by the Court of Appeal¹⁵⁰ as it regarded the case strictly as one in which a couple had entered a permanent and exclusive matrimonial relationship without proper solemnization, rather than as a customary marriage. Justice Maguire, speaking for the court, stated the following as a relevant fact: "There was no evidence as to any Indian custom of marriage, and thus marriage, according to the custom, is not a factor. I will not consider the validity of such a marriage."¹⁵¹ Therefore, the court only mentioned two of the cases involving native people discussed herein, namely, the *Robb*¹⁵² and *Connolly*¹⁵³ cases (only the trial judgment of the latter case was mentioned by the court, with an improper citation in the Dominion Law Reports version and the statement that it was not available for their perusal).

Justice Maguire reasoned that the only issue before the court was whether these facts constituted a valid marriage under the English common law that was received by Saskatchewan in 1870. He felt it was not necessary to consider the effect of the Marriage Act¹⁵⁴ in light of his negative conclusion on the first point and Cote's admission of noncompliance with the statute. He distinguished all the cases cited by counsel¹⁵⁵ which supported the ap-

145. *Ex parte Cote*, [1971] 3 C.C.C. (2d) 383.

146. SANDERS, *supra* note 34, n.550, ch. 2.

147. [1889] 1 Terr. L.R. 211 (N.W.T.C.A.).

148. [1961] 32 D.L.R. (2d) 185 (N.W.T.T.C.).

149. *Ex parte Cote*, [1971] 3 C.C.C. (2d) 383, 384-86.

150. *Ex parte Cote*, [1971] 22 D.L.R. (3d) 353; *Regina v. Cote*, [1972] 1 W.W.R. 737.

151. *Id.* at 355.

152. [1891] 20 O.R. 591.

153. [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253. It has been cited as [1867] 11 U.C. J. 197 instead of [1867] 11 L.C.J. 197.

154. R.S.S. 1965, c. 338.

155. Reference *re R. v. Coffin*, [1956] S.C.R. 191; (*sub nom*; *Coffin v. The Queen*), [1955] 21 C.R. 333; *Hyde v. Hyde & Woodmansee*, (1866), L.R.I.P. & D. 130; *Doe d. Breakey v. Breakey*, [1846] 2 U.C.Q.B. 349; and *Blanchett v. Hansell* [1944] 1 D.L.R. 799; *aff'g*, [1944] 1 D.L.R. 21.

plicant's position, with the exception of *R. v. Millis*¹⁵⁶ and its subsequent confirmation in England in *Merker v. Merker*.¹⁵⁷ It is unfortunate that the Court of Appeal did not examine more closely the limits of that case, and the legislation upon which it was based, nor consider more fully the pertinent Canadian case law. It is realistic to submit that this case is wrongly decided on the narrow issue posed. Further, the brief description in the judgments of the evidence given at trial seems to indicate that the couple had, in fact, complied with the simple marriage formalities required in the customary laws of the Indians of Saskatchewan.¹⁵⁸

Many of these twelve Inuit and Indian cases that have been canvassed at length are clearly inadequate. Two of the decisions give no reasons at all in rejecting custom marriages,¹⁵⁹ while three more give only brief ones in upholding them.¹⁶⁰ *Ex parte Cote*¹⁶¹ and *Re Sheran*¹⁶² are decided on a noncustom basis, while the court preferred a similar approach in *Robb v. Robb*¹⁶³ although implicit in the judgment is the approval of Indian marriage law. The remaining four do seriously consider the validity of native marriage law. In *Jones v. Fraser*,¹⁶⁴ the appellate courts viewed the evidence as insufficient to establish the existence of a valid marriage under customary law, or chose not to comment on this point.¹⁶⁵ This case simply cannot be regarded as a rejection of Indian traditional family law. Indian and Inuit custom marriages were strongly upheld on solid legal principles in the *Connolly*,¹⁶⁶ *Nan-e-quis-a-ka*,¹⁶⁷ and *Noah Estate*¹⁶⁸ cases.

Therefore, six cases directly support the validity of native marriage law and two more do so indirectly, while only two decisions

156. See notes 86 and 87, *supra*.

157. [1962] 3 W.L.R. 1389.

158. For a brief discussion of Dakota marriage law, see Corrigan, *supra* note 185, at 19-21.

159. *Smith v. Young*, [1898] 34 Can. L.J. 581 (B.C.S.C.), and the case referred to in note 116, *supra*.

160. *Tranchemontagne v. Monteferrand* (unrep., Oct. 27, 1854, Superior Court of Lower Canada at Montreal, No. 286); *R. v. Bear's Shin Bone*, [1898-1901] 4 Terr. L.R. 173 (1900), 3 C.C.C. 329 (N.W.T.S.C.); *Rex v. Williams*, [1921] 30 B.C.R. 303 (B.C.S.C.).

161. [1971] 22 D.L.R. (3d) 353 (Sask. C.A.), *rev'g* [1971] 4 W.W.R. 308.

162. [1898] 4 Terr. L.R. 83 (N.W.T.S.C.).

163. [1891] 20 O.R. 591.

164. [1886] 12 Q.L.R. 327.

165. See the discussion on this case in the text, *infra*.

166. [1867] 11 L.C.J. 197, *aff'd*, [1869] 1 R.L. 253.

167. [1889] 1 Terr. L.R. 211 (N.W.T.C.A.).

168. [1961] 32 D.L.R. (2d) 185 (N.W.T.C.).

given without reasons from British Columbia take the contrary position. Both of these latter cases must be viewed as bad law in light of the statements made by the British Columbia Court of Appeal in *Yew v. Attorney General*.¹⁶⁹ It is not completely possible, however, to assert the present validity of Indian and Inuit marriage laws without a binding ruling on the issue from the Supreme Court of Canada, or an abundance of supporting decisions from the appellate courts across the country. The cases on point are largely from the last century and emanate solely from Quebec, Ontario, British Columbia, and the Northwest Territories. Only the *Noah Estates*¹⁷⁰ decision sustains Inuit custom marriages, and there are no reported cases at all on Indian longhouse¹⁷¹ and Métis marriages. One can neither look to the present Indian Act¹⁷² for a resolution to this problem, nor to DIAND for a consistent and well-defined policy on the matter.¹⁷³ It is here submitted, however, that native marriage laws were once valid as the governing *lex loci* for marriages and because of the impossibility of complying with English legal requirements due to existing conditions. The latter ground can no longer be actively relied upon in the face of modern transportation and communication systems. The former argument, along with a further one founded upon the acceptance of custom and consensual marriages by English and Canadian law, must now be briefly inspected on a provincial and territorial basis to determine if they continue to apply or if they have been overhauled by valid legislation.

Present Canadian Marriage Legislation

The government of Canada has not enacted explicit legislation in relation to marriages involving native people. There are virtually no federal statutory provisions specifically affecting the Métis and Inuit peoples, while the Indian Act is structured on the

169. [1924] 1 D.L.R. 1166; 33 B.C.R. 109 (B.C.C.A.).

170. [1961] 32 D.L.R. (2d) 185 (N.W.T.T.C.).

171. See SANDERS, *supra* note 34, at 51-62. The Quebec Superior Court has considered and rejected the validity of longhouse marriages on the basis that an Indian chief who presides over the ceremony is not a "competent officer recognized by law" as required by Articles 128 of the Civil Code. (*Gabriel v. Curotte and A.G. for Quebec*, unrep. Mar. 3, 1977, No. 05-013721-764). This decision should be restricted solely to Quebec by virtue of the strict statutory requirements in force in that province. In addition, the Court did not consider any of the relevant case law on customary marriages.

172. R.S.C. 1970, c. 1-6.

173. For an excellent discussion of DIAND'S position over the years, see SANDERS, *supra* note 34, at 45-51.

presumption that provincial marriage legislation will apply to status Indians by virtue of section 88 of that Act.¹⁷⁴ On the surface, this appears to be a reasonable assumption in light of the *Lavell* and *Bedard* cases.¹⁷⁵ Putting aside an argument that Indian sovereignty continues to exist and would apply to this area,¹⁷⁶ as that is an issue which goes beyond the scope of this paper, this proposition might be questioned in that provincial statutes governing marriage, although general in nature and not directed in any important way toward native people, have the effect of validating or invalidating Indian marriages. This process in turn governs the registration and involuntary enfranchisement of status Indian women and their children.¹⁷⁷ Therefore, it is arguable that provincial marriage legislation cannot apply if it affects the "Indianness" of a person, as indicated, in reference to other issues, by Justice Dickson in *Kruger & Manuel v. The Queen*¹⁷⁸ and by Chief Justice Laskin in *Natural Parents v. Superintendent of Child Welfare*.¹⁷⁹

The federal government would be within its constitutional authority in enacting native marriage legislation or in amending the Indian Act¹⁸⁰ to recognize custom marriages. This approach has already been implemented for the purposes of dealing with the inheritance of a deceased Indian male intestate under the Indian Estates Regulations,¹⁸¹ and for recognizing children adopted by custom.¹⁸² Furthermore, Indian custom marriages have been sporadically accepted as valid by DIAND in regard to its effects on registration.¹⁸³ Federal legislative action would present a quick resolution to the uncertainty in the law and clarify the position across the country.

Currently, provincial and territorial legislation is being considered as determinative of the validity of customary marriages involving Indian, Inuit, or Métis people. Since none of the applicable statutes specifically void customary marriages, they must be examined individually in terms of how they respond to consen-

174. R.S.C. 1970, c. I-6.

175. Attorney General v. Lavell, Isaac v. Bedard, [1974] S.C.R. 1349, (1973), 38 D.L.R. (3d) 481.

176. For a discussion of this issue, see MORSE, *supra* note 55, at 21-23.

177. R.S.C. 1970, c. I-6 §§ 10-12, 14-16, 48, and 109-10.

178. [1977] 75 D.L.R. (3d) 434 (S.C.C.), at 439-40.

179. [1976] 60 D.L.R. (3d) 148 (S.C.C.), at 154.

180. R.S.C. 1970, c. I-6.

181. C.R.C., c. 954, § 14.

182. R.S.C. 1970, c. I-6 § 48(16).

183. See note 173, *supra*.

sual or irregular marriages as there are substantial differences in approach among the jurisdictions.

All the pertinent statutes across the country are designed so as to establish a procedure for having marriages formally solemnized and to regulate who is given the authority to conduct the wedding ceremony. In Newfoundland, the Solemnization of Marriage Act¹⁸⁴ was revamped in 1974 to transform the former Act,¹⁸⁵ which seemed to make the statutory formalities mandatory and exclusive without containing a curative or saving provision, into one that possesses a required procedure along with a curative provision. Now the Act contains section 44, which reads as follows:

Presumption of Validity of Certain Marriages

44. If the parties to a marriage solemnized in good faith and intended to be in compliance with the Act were not under a legal disqualification to contract the marriage and after such solemnization have lived together and co-habited as man and wife, the marriage shall be deemed to have been validly solemnized, notwithstanding that the person who solemnized the marriage was not authorized to solemnize marriage and notwithstanding any irregularity or insufficiency in the issue of the licence.¹⁸⁶

This provision is very similar to the one in operation in Ontario, which declares:

31. If the parties to a marriage solemnized in good faith and intended to be in compliance with this Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and cohabited as man and wife, such marriage shall be deemed a valid marriage, notwithstanding that the person who solemnized the marriage was not authorized to solemnize marriage, and notwithstanding the absence of or any irregularity or insufficiency in the publication of banns or the issue of the licence.¹⁸⁷

The predecessor of this latter provision had been given a very

184. S. Nfld. 1974, c. 81, as amended, 1975, c. 5; 1975-76, c. 48; and 1977, c. 66.

185. R.S. Nfld. 1970, c. 355.

186. S. Nfld. 1974, c. 81, as amended 1975.

187. Marriage Act, S.O. 1977, c. 42, § 31. It is interesting to note that this Act renders registered Indians exempt from any license fee if both parties are Indians and ordinarily resident on the reserve (§ 16). The lieutenant governor may also appoint a member of a band, who is recommended by the band council, as an issuer of marriage licenses (§ 11(2)).

broad interpretation by the Ontario Court of Appeal in *Alspector v. Alspector*.¹⁸⁸ Therefore, as long as the parties intend the marriage to be a legally valid one, it can be submitted that a native customary marriage is valid in these two jurisdictions.

In Alberta the legislation also validates marriages which suffer from some error, omission, or unintended noncompliance with the statute. Although it empowers the courts to grant a declaration of validity, it does not appear that the validity of the marriage is dependent upon such an order. The relevant section states:

23.(1) A marriage is not invalidated by reason only of a contravention of or non-compliance with this Act

- (a) by the person who solemnized the marriage, or
- (b) by the person who issued the licence for the marriage,

and the Supreme Court may, if satisfied it is proper to do so, declare that the marriage was lawfully solemnized notwithstanding any such contravention or non-compliance.

(2) An application for an order under subsection (1) may be made on petition by

- (a) a party to the marriage, or
- (b) the Attorney General, or
- (c) the Director,

either ex parte or upon such notice as the judge directs.¹⁸⁹

Although the Manitoba curative provision contains several prerequisites for its operation, that section would be sufficient to validate native custom marriages generally. It says:

Validating all marriages after one year between persons not under legal disqualification notwithstanding irregularities.

36. Every marriage heretofore or hereafter solemnized between persons not under a legal disqualification to contract such a marriage shall, after one year from the time of the solemnization thereof, or upon the death of either of the parties before the expiry of that time, be deemed a valid marriage so far as respects the civil rights in the province of the parties or their issue, and in respect of all matters within the jurisdiction of the Legislature, notwithstanding that the clergyman, minister, or other person, who solemnized the marriage was

188. [1957] O.R. 454 at 465.

189. Marriage Act, R.S.A. 1970, c. 226, § 23, as amended.

not duly authorized to solemnize marriages, and notwithstanding any irregularity or insufficiency in the proclamation of intention to intermarry, or in the dispensation thereof, or in the issue of the licence, or notwithstanding the entire absence of either: Provided that the parties after the solemnization lived together and cohabited as man and wife, and that the validity of the marriage has not before such death or prior to the expiry of the said time been questioned in any suit or action; and provided further that nothing in this section makes valid any such marriage in case either of the parties thereto had or has previous to the death of the other and previous to the expiration of the one year contracted matrimony according to law, in which case the validity of the marriage shall be determined as if this section had not been enacted.¹⁹⁰

At the other end of the spectrum lie Saskatchewan and Prince Edward Island. The former had a saving provision which would have been sufficient, but it was repealed in 1966.¹⁹¹ The legislation presently in force there only overcomes irregularities in relation to the proclamation of the intention to marry¹⁹² and the issuance of a license,¹⁹³ neither of which occur in custom marriages. Prince Edward Island also has no provision validating defective marriages; however, the statute also does not require compliance with it for the marriage to be valid in the first place.¹⁹⁴ The legislation in Nova Scotia expressly renders the statutory formalities mandatory and exclusive,¹⁹⁵ with the exception of marriages performed by unregistered members of the clergy¹⁹⁶ or which were celebrated many years ago.¹⁹⁷ New Brunswick does have a rather broad curative provision, but it only applies where there has been a religious ceremony as it states:

28. Every marriage heretofore solemnized in the province in good faith before any clergyman where the parties so married have cohabited together as man and wife shall be deemed to be and is hereby declared valid, notwithstanding any real or supposed want of legal authority in the clergyman to solemnize

190. The Marriage Act, R.S.M. 1970, c. M-50 § 36, as amended.

191. Marriage Act, R.S.S. 1965, c. 338, § 46(1), repealed by S.S. 1966, c. 36, § 6.

192. Marriage Act, R.S.S. 1978, c. M-4, § 18.

193. *Id.*, § 33.

194. Marriage Act, R.S.P.E.I. 1974, c. M-5.

195. Solemnization of Marriage Act, R.S.N.S. 1967, c. 287, § 12, as amended.

196. *Id.*, § 10.

197. *Id.*, §§ 9 and 40.

such marriage, and notwithstanding the want of licence [sic] or publication of banns or the absence of witnesses under which the marriage was solemnized, or any other legal objection thereto, but nothing herein has the effect of confirming or rendering valid a marriage between parties who were not legally competent to enter into a marriage contract by reason of consanguinity, affinity or otherwise.¹⁹⁸

British Columbia, the Yukon Territory, and the Northwest Territories all possess legislation which validates marriages solemnized by an unregistered clergyman if the parties apply to the appropriate official. The statute in British Columbia is representative of the three jurisdictions:

40. (1) Where it is made to appear by statutory declaration to the satisfaction of the Director that a marriage has been solemnized in the province in good faith and intended compliance with this Act by a minister or clergyman who was not duly registered as authorized to solemnize marriage, and in ignorance of the requirements of this Act, and where neither of the parties to the marriage was at the time under any legal disqualification to contract the marriage, and the parties thereafter lived together and cohabited as husband and wife, and where neither of the parties has since contracted valid marriage according to law, and where the validity of the marriage has not been questioned by action in any Court, the Director may by written declaration signed by him declare that the requirements of this Act as to registration of the minister or clergyman shall be waived in respect of that marriage, and that the solemnization of the marriage shall be deemed to be and have been from the date of the solemnization lawful and valid; and, upon publication in the Gazette of a notice by the Director of the making of the declaration, the solemnization of the marriage shall for all purposes be deemed to be and to have been from the date of the solemnization lawful and valid, notwithstanding the fact that the minister or clergyman was not at the time duly registered as authorized to solemnize marriage.

(2) Where a declaration has been made by the Director, and notice thereof has been published under subsection (1) in respect of a marriage, the issue of that marriage shall for all purposes be deemed to be and to have been legitimate from the time of birth; but nothing in this subsection affects any right,

198. Marriage Act, R.S.N.B. 1973, c. M-3, § 28, as amended.

title, or interest in or to property where the right, title, or interest has vested in any person prior to the publication of the notice.¹⁹⁹

These enactments are similar in nature to the one in New Brunswick, except that these three require an application to be made in order to be effective, as they all refer to defects in a marriage that was solemnized in good faith by a minister or clergyman. Professor Sanders has submitted that the former three statutes are sufficient to validate custom marriages while the New Brunswick statute is not.²⁰⁰ It is difficult to understand the rationale for his distinction, as this writer regards them as relatively equivalent, other than for the requirement to invoke the curative provision. It is arguable, however, that all four statutes should be broadly interpreted within the spirit of their overall intentment, which is *not* to invalidate marriages. The policy concern of this type of legislation was addressed by Dr. Lushington in *Cattersall v. Sweetman*²⁰¹ when he stated that:

I am of the opinion that, in any case of doubt, I ought never to pronounce a marriage null and void. In this case I do entertain (to express my opinion in the weakest terms) the gravest doubt as to this act creating a nullity. I think so, firstly, because I find no instance of any words in any Marriage Act being held to import a nullity, if the act did not expressly create a nullity. Secondly, if this interpretation should be at variance with the decisions of other Courts on other matters, it must always be remembered that marriage is essentially distinguished from every other species of contract, either of legislative or judicial determination; that this distinction has been universally admitted; that not only is all legal presumption in favour of the validity and against the nullity of marriage, but it is so on this principle; that a legislative enactment to annul a marriage *de facto* is a penal enactment, not only penal to the parties, but highly penal to the innocent offspring, and therefore to be construed according to the acknowledged rule, most strictly.²⁰²

This reasoning of Dr. Lushington was adopted in *Wylie v. Pat-*

199. Marriage Act, R.S.B.C. 1960, c. 232, § 40, as amended. See also Marriage Ordinance, C.O.Y.T. 1976, c. M-3, § 48; and Marriage Ordinance, R.O.N.W.T. 1974, c. M-5, § 48, as amended.

200. SANDERS, *supra* note 34, at 30-32.

201. [1845] 1 Rob. Ecc. 304.

202. *Id.* at 320-21.

ton²⁰³ by the Saskatchewan Court of Appeal on these terms:

In the present case the Act under consideration while prohibitive, does not declare a nullity or penalize the parties to the marriage, and there is an innocent child to be considered. On the highest grounds of public policy, all legal presumptions are in favour of the validity of a marriage.²⁰⁴

The same approach is evident in a number of the cases previously discussed, such as *Re Noah Estate*,²⁰⁵ and in non-custom marriages by the Ontario and British Columbia courts.²⁰⁶ It is, thus, proper to submit that the courts would either broadly construe these curative provisions so as to validate custom marriages, or interpret each statute as a whole as not affecting the validity of a form of marriage which was valid prior to the reception of English law and largely upheld by the relevant case law ever since. In certain specific cases it may be possible to argue on the evidence before the court that the particular marriage comes within the strict wording of the legislation. This would be feasible if the native custom marriage involved a celebration in the presence of a respected elder. The latter could then be regarded as an unregistered member of the clergy of the traditional religion, as was suggested in *Re Noah Estate*.²⁰⁷

The final jurisdiction of interest is Quebec. The Civil Code²⁰⁸ contains an express provision requiring compliance concerning proper solemnization, which states: "Art. 128. Marriage must be solemnized openly, by a competent officer recognized by law."²⁰⁹

There is no mechanism to avoid fully the consequences of non-compliance with this provision. That is, failure to properly

203. [1930] 1 D.L.R. 747.

204. *Id.* at 752.

205. Note 171, *supra*, at 199-200.

206. See, e.g., *Clause v. Clause*, [1956] O.W.N. 449 (N.C.J.); *Penner v. Penner*, [1947] 4 D.L.R. 879 (B.C.S.C.); *Friedman v. Smookler*, [1964] 43 D.L.R. (2d) 210 (Ont. H.C.); *Peppialt v. Peppialt*, [1916] 30 D.L.R. 1 (Ont. S.C.A.D.), *Kerr v. Kerr*, [1934] 2 D.L.R. 369 (S.C.C.) and *H. Hahlo, Nullity of Marriage*, in 2 *STUDIES IN CANADIAN FAMILY LAW*, ed. by D. Mendes da Costa (Toronto: Butterworths, 1972), 651, at 661-64.

207. [1961] 32 D.L.R. (2d) 185, 202-203 (N.W.T.T.C.).

208. C.C. 1979.

209. *Id.*, ch. IV, of Actions for Annuling Marriage, art. 128. This provision invalidated a longhouse marriage performed by a chief in *Gabriel v. Curotte & A.G. for Quebec* (unrep., Mar. 3, 1977 Que. S.C.). In addition, Article 156 states: "Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the court to decide according to circumstances."

celebrate and solemnize a marriage will render it a nullity. The stringency of this statutory requirement is moderated somewhat in terms of the civil effects of the nullity by the following articles:

Art. 162. Nevertheless, in the case of articles 159 and 160, if there be children issue of two persons who lived publicly as husband and wife, and who are both dead, the legitimacy of such children cannot be contested solely on the pretext that no certificate is produced, whenever such legitimacy is supported by possession of the status uncontradicted by act of birth.

Art. 163. A marriage although declared null, produced civil effects, as well with regard to the husband and wife and with regard to the children if contracted in good faith.

Art. 164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favor of such party alone and in favor of the children issue of the marriage.²¹⁰

These latter provisions, as Sanders suggests,²¹¹ may well be sufficient to cause a custom marriage, although void, to be accepted so as to legitimate the children and confer the status of husband and wife for the purposes of registration under the Indian Act²¹² as status Indians and members of the husband's band.

As a result of this legislative survey, it is possible to summarize the situation across Canada in regard to the validity of custom marriages, as it appears to this writer, in the following manner:

1. Four jurisdictions have curative provisions which should validate custom marriages, namely, Newfoundland, Ontario, Manitoba, and Alberta;

2. Four jurisdictions have saving provisions which are arguably sufficient, namely, New Brunswick, British Columbia, the Yukon, and the Northwest Territories, with the latter three requiring that the provision must be invoked by an applicant in order to be effective;

3. Two jurisdictions have mandatory formal requirements for valid marriages which may be interpreted by the courts to nullify custom marriages, namely, Quebec and Nova Scotia; and

4. Two jurisdictions, Saskatchewan and Prince Edward Island, have neither mandatory requirements nor broad curative provisions and therefore, custom marriages should remain valid

210. *Id.*, arts. 162-164.

211. SANDERS, *supra* note 34, at 25.

212. R.S.C. 1970, c. I-6.

under the case law and be unaffected by the provincial legislation.

Thus, the legal position of Indian and Inuit marriages celebrated in accordance with traditional law is somewhat uncertain and varies across the country. In light of "illegitimacy" rates of four to five times the national average,²¹³ and the evidence of the frequency of custom marriages,²¹⁴ which are often misinterpreted as "common law" marriages, it is apparent that this uncertain and variable situation should be rectified.

Custom Divorces in Canada

It has been mentioned in passing that the odd case has indicated, directly or indirectly, that native custom divorces are valid for the purposes of terminating custom marriages so long as the divorce occurs within the jurisdiction of the native law. Justice Monk seemed tentatively to accept the validity of Cree divorce law, but he restricted it to Indian territory by commenting as follows:

Then it was said, and much insisted on, that one of the incidents of this Cree marriage was, that it might be dissolved at pleasure

How far this is to be regarded as a part of their law of marriage, or merely an abuse of it, tolerated among savages, it is difficult for me to determine. It was argued by Mr. Perkins, in his remarkable reply and summing up of the plaintiff's pretensions in this case, that, admitting the argument of the defendant to the fullest extent, and that marriage among the Indians, or even when between a squaw and a Christian, a European or American, is dissolvable at the will of the husband or of either party—such a concession can have no effect upon this case. If this Cree marriage was dissolvable at pleasure, Mr. Connolly could perhaps have repudiated his Indian wife, had he done so while residing among the Crees, or where such a barbarous usage prevailed. He might have done so then, if he could do so at all—but when he came to Canada that right ceased. At all events, he could not dissolve the marriage of his

213. *Indians Conditions: a survey* (Ottawa: DIAND, 1980), at 204.

214. Corrigan, *supra* note 141 and the evidence of 50% consensual marriages on several reserves in Saskatchewan in *Ex parte Cote*, [1971] 3 C.C.C. (2d) 383 (Sask. Q.B.), at 384.

own free will; he could not repudiate her in Canada, in virtue and in pursuance of this Indian usage.²¹⁵

Justice Gregory, in *Rex v. Williams*,²¹⁶ accepted the validity of two previous custom divorces to the extent of regarding the defendant's third wife, by a custom marriage, as neither a compellable nor a competent witness for the Crown. However, there appears not to be a single case in the Canadian jurisprudence that has upheld a custom divorce when that was the precise issue before the court.

It is at least arguable that divorces pursuant to traditional Indian and Inuit law were once as valid as customary marriages. There is no logical reason for denying their validity after one has recognized custom marriage laws. Even if this was true, one must still consider the impact of the Divorce Act²¹⁷ on custom divorces. Professor Sanders suggests that the federal legislation exclusively occupies the field such that custom marriages should be terminated only by a divorce which complied with the requirements of that Act.²¹⁸ This statute, however, does not contain a section which expressly states that the only way to obtain a divorce within Canada is under that enactment. The Act does contain the following section:

23. (1) The *Dissolution and Annulment of Marriages Act*, the *Divorce Jurisdiction Act*, the *Divorce Act* (Ontario) in so far as it relates to the dissolution of marriage, and the *British Columbia Divorce Appeals Act* are repealed.

23. (2) Subject to subsection 19(3), all other laws respecting divorce that were in force in Canada or any province immediately before the 2nd day of July 1968 are repealed, but nothing in this Act shall be construed as repealing any such law to the extent that it constitutes authority for any other matrimonial cause.²¹⁹

Since subsection (1) lists several specific statutes, it could be contended that the phrase "all other laws respecting divorce" within subsection (2) referred solely to statutes and not customary law or judicial pronouncements thereon. It must be accepted that

215. *Connolly v. Woolrich*, [1867] 11 L.C.J. 197, at 255.

216. [1930] 30 B.C.R. 303 (B.C.S.C.).

217. R.S.C. 1970, c. D-8, as amended.

218. SANDERS, *supra* note 34, at 45.

219. *Supra* note 61, § 23.

this is a tenuous argument and that Professor Sanders's opinion is more likely to reflect the position that would be taken by the Canadian courts. The revival of Indian and Inuit sovereignty, which includes the desire to control all family matters, might influence the judiciary or Parliament to recognize custom divorces.

Custom Adoptions in Canada

The Indian and Inuit peoples have also maintained a system of adoption of children, pursuant to their law, for untold centuries. Customary adoptions have continued unabated since the arrival of settlers from Europe and are still common today, despite the presence of a highly organized child welfare system administered by the provinces. Adoptions that proceed pursuant to native law occur outside of the mainstream of the Canadian legal system and without attention being paid to the formal requirements of provincial adoption legislation. As a result, it is impossible to ascertain exactly where in Canada customary adoptions are being practiced and in what numbers. This writer is aware that the practice is common among the Inuit all across the Arctic and the Indians in most provinces and the territories. Only the courts in the Northwest Territories have had the opportunity to consider formally the legal validity of this process, and even there this issue has arisen just in the last two decades.

The first such occasion offered itself one month after the enactment of the Child Welfare Ordinance²²⁰ in *Re Adoption of Katie E7-1807*.²²¹ The new ordinance contained the following:

Every person who places a child with another person on the understanding that the other person will adopt the child, shall, within thirty days after the day on which the child has been placed, notify the superintendent. Every person who fails to comply with this is guilty of an offence and liable to a fine of not more than \$100.²²²

Justice Sissons commented on the logic behind this legislation in his memoirs by saying:

For an Eskimo this provision was utter nonsense. At most points there is no regular mail service; it goes in or out by chance, perhaps once or twice a year. There is, generally speak-

220. O.N.W.T. 1961, c. 3.

221. [1962] 32 D.L.R. (2d) 686; 38 W.W.R. 100 (N.W.T.T.C.).

222. O.N.W.T. 1961, c. 3, § 105.

ing, no-one in authority locally, or perhaps within five hundred miles, who could be notified. The average Eskimo cannot read or write and it would certainly be difficult for him to notify the superintendent, who is an unexplainable personality far away. . . .

No great intellect was required to predict the mess, and the court predicted it accurately. The intentions of the promoters were also clear, and [they were made evident] in the very next adoption hearing a month later in Frobisher Bay—an application for an Eskimo girl named Katie. . . .²²³

In the *Katie* case,²²⁴ the Territorial Court was presented with an adoption petition by two welfare officers of the Department of Northern Affairs and Natural Resources on behalf of an Inuit couple. The new legislation was not available to the officers when they prepared the petition so that it was not in compliance with the requirements of Part IV of the Ordinance. The couple was not eligible under the Ordinance, which required a certificate of marriage,²²⁵ as they were married pursuant to Inuit customary law. Therefore, the Court could neither simply cure the defective petition nor adjourn the matter for correction. The alternatives available were to reject the petition permanently or to recognize the adoption as valid under Inuit customary law. Justice Sissons examined the legislation and found that it did not reflect the realities of the North or the actual practice that was intended to be followed. One example of this is that the Ordinance required the adopted child to assume the surname of the adopting parents,²²⁶ in spite of the fact that the Inuit at that time did not generally have surnames. The superintendent of Child Welfare was required to certify to the Territorial Court that to his knowledge the applicant was an appropriate parent and in his opinion deserved the adoption order.²²⁷ The superintendent, however, was based in Ottawa and could not properly comply with these conditions personally as he was required to do by the express language of the Ordinance.

The Territorial Court examined the matter and stated that custom adoptions by Indian and Inuit parents were common and they had not been abrogated by federal legislation as a result of the Canadian Bill of Rights. Sissons, J., then proceeded to

223. SISSONS, *supra* note 130, at 142-43.

224. [1962] 32 D.L.R. (2d) 686.

225. O.N.W.T. 1961, c. 3.

226. *Id.*, § 97.

227. *Id.*, §§ 91 and 93(3).

deliver a declaratory order stating that "adoptions 'made according to the laws of the Territories' include adoptions in accordance with Indian or Eskimo custom"²²⁸ such that they had the same effect as if they had been made pursuant to the terms of the Child Welfare Ordinance.²²⁹

In his autobiography, Justice Sissons remarked upon the administrative response to his ruling by saying:

The bureaucrats didn't contest the ruling but sought to ignore it and adoption applications clogged the channels they were supposed to go through. They piled up on desks all over the north. The unnecessary reports put no intolerable strain on the rank-and-file welfare workers who had plenty of other duties. People who complied in every way with the requirements for an adoption order waited years for justice but the bureaucrats could see nothing but beauty in the monster they had spawned and would hear of no changes.²³⁰

The situation became intolerable over the next few years as applications piled up from Inuit adoptive parents who wished the security of a court order and proof of their status so as to satisfy the civil authorities. Sissons, J., recorded his initiatives to resolve the backlog by observing:

By early '65 the backlog was so bad that the superintendent came to Yellowknife and agreed to reduce the number of reports. Ben Sivertz, the new commissioner of the Territories, got some remedial legislation through the territorial council and he approved my plan to go on circuit through the eastern Arctic to register as many adoptions in accordance with Eskimo custom as I could find. I would give each qualified applicant a "declaratory judgment," declaring the adoption to be as good as one under the ordinance. . . .

The court issued more than two hundred declaratory orders in the ten days of the circuit, 76 at Frobisher Bay alone. From this concentration of cases the court gained a rare intensified insight into the place of adoption in Eskimo society. Adoptions are a family and community concern, like marriage. Some customs are surprising to us: grandparents adopting a grandchild to have someone to look after them; an unmarried forty-five-

228. [1962] 32 D.L.R. (2d) 686, 690, referring to the provisions of § 103 of the Ordinance.

229. O.N.W.T. 1961, c. 3.

230. Sissons, *supra* note 130, at 143.

year-old woman adopting a child for company. But in Eskimo society the old look after the young and the young look after the old and each needs the other. I caught glimpses, hundreds of them, of a people in transition. But while they are in transition they need the strength of their traditional customs, which are geared to survival in a harsh land, and these traditions include the ones on adoption.²³¹

Hundreds of Inuit custom adoptions have subsequently been processed in this fashion by Justice Sissons and his successors, Morrow and Tallis, J.J.²³² The procedure of obtaining a declaratory order for custom adoptions has become widespread among the Inuit and accepted by the territorial government and DIAND.²³³ Adoptions made in accordance with Indian law have received the same treatment by the Court, although applications for judicial sanction are less frequent.²³⁴ The validity of Indian custom adoption was upheld on the same grounds as in the *Katie* case²³⁵ in *Re Beaulieu's Adoption Petition*.²³⁶ The wisdom and legal correctness of this approach was later reconsidered and maintained by the Territorial Court²³⁷ and unanimously affirmed by the Court of Appeal.²³⁸

Therefore, the validity of custom adoptions, with or without judicial approval, cannot be doubted in the Northwest Territories.²³⁹ The courts there have developed a procedure and a set of standards which are applied to these applications. The court generally requires all adult parties to the adoption to be Inuit or Indian for it to be considered a custom adoption.²⁴⁰ The only ex-

231. *Id.* at 143-44.

232. Justice Morrow referred to having personally approved of 248 custom adoptions by 1972 in *Re Deborah E4-789*; *Tucktoo et ux. v. Kitchooalik & Enooyak*, [1972] 3 W.W.R. 194; 27 D.L.R. (3d) 225, at 195. SANDERS, note 34, *supra*, at 66, refers to 59 custom adoptions in 1971-72 and 96 more in 1972-73.

233. See the comments of Morrow, J., on the attitude of the superintendent of Child Welfare in *Re Beaulieu's Adoption Petition*, [1969] 3 D.L.R. (3d) 479; 67 W.W.R. 669 (N.W.T.T.C.), at 479.

234. SANDERS, *supra* note 34, at 70.

235. [1962] 32 D.L.R. (2d) 686.

236. See note 233, *supra*.

237. See note 232, *supra*.

238. [1972] 5 W.W.R. 205, 28 D.L.R. (3d) 483.

239. The pertinent legislation has been amended to reflect the acceptance of this procedure in 1972 and again in 1973.

240. See, e.g., *Re Kakfwi* (unrep., Jan. 19, 1970, N.W.T.T.C.), where it is stated that an Indian custom adoption could not be accepted because one of the adoptive parents was a white man who had married the child's mother after the natural father had died.

ception to this stipulation arose in *Re Wah-shee*²⁴¹ where the court accepted the validity of an adoption made pursuant to the customary law of the Dogrib Indians even though the adoptive mother was Caucasian. Justice Morrow was of the belief that Caroline Wah-shee had been fully accepted as a band member by the people of Fort Rae, that she had become a status Indian by virtue of section 11(1)(f) of the Indian Act,²⁴² and that the adoption had been performed in compliance with Dogrib law. It appears that custom adoptions by the Métis have yet to be recognized by the courts of the Northwest Territories or elsewhere.

There have been no reported decisions on custom adoptions in any of the provinces or in the Yukon, although it was mentioned in passing without criticism in *Re Birth Registration No. 67-09-022272*²⁴³ as the objective of the natural parents. It is difficult, then, to determine what is the legal position of custom adoptions in the rest of the country. The approach of the Northwest Territories Supreme Court in judicially confirming custom adoptions through declaratory orders, in spite of noncompliance with the formal requirements of Part IV of the Child Welfare Ordinance,²⁴⁴ has been sanctioned by the Territorial Council by virtue of section 79, which states:

79. Where, in the opinion of a judge hearing a petition for the adoption of a child, it is in the best interests of the child not to require compliance with a provision of this Part, other than subsection 82(1), that is required before an adoption order

241. [1976] 57 D.L.R. (3d) 743 (N.W.T.S.C.).

242. R.S.C. 1970, c. I-6.

243. [1974] 1 W.W.R. 19 (B.C.S.C.), *rev'd sub nom. Re Adoption Act*, [1974] 3 W.W.R. 363 (B.C.C.A.), *aff'd*, [1976] 60 D.L.R. (3d) 148 (S.C.C.). At trial, Justice Tyrwhitt-Drake originally delivered an unreported judgment on Apr. 6, 1973, in which he stated: "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. Many instances of this custom were given (and see also James Sewid, *Guests Never Leave Hungry*, 1969, University of Washington Press). I think it is general, and much in use today. 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." *Id.* at 2-3. Quoted in NATIVE FAMILIES AND THE LAW: TENTH REPORT OF THE ROYAL COMMISSION ON FAMILY AND CHILDREN'S LAW (Victoria: Queen's Printer, 1975), at 37-38.

244. R.O.W.N.T., 1974, c. C-3.

may be made, the judge may waive the provision and make an order of adoption of the child.²⁴⁵

An analysis of adoption legislation in the remaining jurisdictions discloses that the Yukon possesses a permissive provision similar in nature to the operative one in the Northwest Territories. Therefore, custom adoptions in accordance with Indian law should be valid and eligible for judicial confirmation in the Yukon if the adoptive parents were to desire a declaration to that effect.²⁴⁶ The Manitoba statute would be sufficient to confirm custom adoptions if they have been maintained for at least three years as a *de facto* adoption.²⁴⁷ The legislation in place in Ontario contains provisions allowing for adoptions by relatives that can circumvent the normal requirements of the Child Welfare Act.²⁴⁸ Therefore, the court could give its judicial blessing to custom adoptions, at least when the adoptive parents are related to the child by blood, which normally occurs in traditional adoptions. The pertinent statutes in force in Nova Scotia²⁴⁹ and Saskatchewan²⁵⁰ also do not require strict compliance with all their terms in order to obtain a court order of adoption.

The adoption provisions in the remaining provincial enactments all appear to be mandatory and exclusive. Since adoption theoretically did not exist at common law,²⁵¹ although the practice itself was widely known, one cannot look to the common law for assistance. It does seem that native people could not seek judicial approval for custom adoptions under the legislation presently in force in Prince Edward Island,²⁵² New Brunswick,²⁵³ Newfoundland,²⁵⁴ Quebec,²⁵⁵ Alberta,²⁵⁶ or British Columbia.²⁵⁷

245. *Id.*, § 79.

246. Child Welfare Ordinance, C.O.Y.T. 1976, c. C-4, § 67(2).

247. Child Welfare Act, S.M. 1974, c. 30, § 103(1) as amended.

248. Child Welfare Act, S.O. 1978, c. 85, §§ 73(2)(a) and 75(5)(a).

249. Children's Services Act, C.S.N.S., 1979, c. C-13, § 21(1).

250. Family Services Act, R.S.S. 1978, c. F-7, § 51(1)(c), which creates the possibility for otherwise ineligible people of obtaining ministerial authority to adopt.

251. There was no recognition of adoption under English law until the enactment of the Adoption of Children Act, 1926 U.K., c. 29. *See also* 21 Hals., 3d ed., paras. 484 and 485.

252. Adoption Act, R.S.P.E.I. 1974, c. A-1.

253. Adoption Act, R.S.N.B. 1973, c. A-3 as amended.

254. Adoption of Children, S. Nfld. 1972, c. 36, § 4(1) as amended. However, § 13 does approve *de facto* adoptions in existence since 1962 or before that date.

255. Adoption Act, L.R. 1977, c. A-7, § 2, as amended.

256. Child Welfare Act, R.S.A. 1970, c. 45, as amended.

257. Adoption Act, R.S.B.C. 1960, c. 4, as amended.

Nonetheless, it may be possible to assert successfully that native custom adoptions remain valid pursuant to the survival of native law within those jurisdictions as the original native law has never been expressly revoked.

Remedial legislation in some form will probably be useful, if not essential, to permit native people to retain their traditional system of custom adoptions and to obtain judicial approval for this system. The latter clearly provides certainty and security to the adoptive parents and removes any potential difficulties in relation to inheritance, school enrollment, mother's allowance payments, and the provision of other social services.

The Royal Commission on Family and Children's Law of British Columbia recommended to the government of that province that the existing legislation should be amended to expressly recognize custom adoptions.²⁵⁸ The federal government could also clearly resolve this issue by expanding the limited recognition of custom adoptions for inheritance purposes under the Indian Act²⁵⁹ to validate all traditional adoptions by status Indians, or by all native people. Indian and Inuit governments could also assert their sovereignty by enacting their own legislation designed to confirm all adoptions conducted according to customary law.

V. *Conclusions*

A brief glimpse of the tragic social conditions and circumstances affecting the life experience of the Indian, Métis, and Inuit peoples was delineated at the beginning of this article. Although these statistics mask the harsh realities of daily life for the indigenous peoples, they do clearly indicate the magnitude of these events in a way that is finally beginning to gain the attention of Canadian social planners and governmental policy analysts. The Canadian Council on Social Development has embarked upon a two-year project on Indian child welfare and adoption that is intended as a means of promoting public discussion and governmental action in these areas.

The concerns of the native people are also becoming more concentrated and concrete. The Canadian Indian Lawyers Association has organized a conference in each of the last two years on this subject of Indian child welfare to promote the development of new approaches to solving these social and economic pro-

258. See note 21, *supra*, at 37-43.

259. R.S.C. 1970, c. I-6, § 48(16).

blems. More and more Indian communities are addressing these issues directly by delivering their own child welfare programs and/or by enacting their own family laws.²⁶⁰ The assertion of sovereignty by the original peoples will definitely continue to increase and this action will include efforts to control all aspects of law related to family matters. This effort will be largely based on a return to traditional values and legal principles.

This article has addressed only one aspect of the total picture, namely, the degree to which the Canadian judiciary has respected traditional law in the past and is likely to in the future. Although it can be concluded that customary Indian and Inuit law has clearly survived within the common law system, albeit in a sporadic way as its legal effectiveness has varied across the country, one can hope for a brighter future for customary law. The core concepts of Indian and Inuit family law possess great meaning for the indigenous population, and they have much to offer to the rest of Canadian society.

260. *See, e.g.,* Spallumcheen Indian Band of British Columbia By-law No. 3, 1980, entitled, A By-law for the care of our Indian Children.