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**The Law of Customary Adoption:
A Comparison of Australian and Canadian Approaches to
its Legal Recognition**

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This paper will discuss the differing Australian and Canadian approaches to the customary law of their Indigenous peoples with specific reference to the issue of customary adoption. It also has wider relevance to the differing approach to Indigenous people generally in both countries, with some provinces of Canada adopting an approach that is more in accordance with human rights norms than the Australian approach.

Customary adoption in Australia is largely confined to the group of Indigenous people known as Torres Strait islanders, who inhabit the islands of the Torres Strait between Australia and Papua New Guinea.

It is beyond the scope of this paper to discuss adoption practices amongst mainland Aboriginal people beyond saying that they do not practice the type of formal giving of children that occurs amongst Torres Strait islanders that will be discussed in this paper. However, it can also be said that like the Torres Strait Islanders, their customary law in relation to these matters is not recognised by Australian law.

However there is a factor relating to them that militates against the recognition of customary adoption, because of the unfortunate history of taking (usually mixed race) children from their Aboriginal mothers and adopting them out into white families. This has produced an antipathy to adoption amongst mainland Aboriginal people, with the result that Torres Strait Islanders are very much on their own in seeking recognition of their customary adoption practices.

Before I turn to discuss the definition of customary adoption it is helpful to first say something about the Torres Strait Islands and the people who inhabit them.

There are some 15 inhabited islands in the Torres Strait with a total population of about 6000 people, of whom about half live on Thursday Island, which is the administrative centre of the islands. There are at least two distinct language groups in the islands and the normal method of communication across the groups is Torres Strait Kriol, which is a type of Pidgin. The islands are widely separated geographically and consist of a group of mountainous rocky outcrops in the east centred on the island of Mer (Murray Island), which is arguably the

centre of Torres Strait island culture, coral atolls in the centre, low lying swampy island to the north and scrubby islands similar to the Australian mainland to the west. Travel between islands is by small boat or by air for those who can afford it.

Ethnically the Islanders are of Melanesian background with close ties to the people of Papua New Guinea. The northern islands, Boigu and Saibai, are only a few kilometres from the Papua-New Guinea coast and there is much interchange between the peoples of the Torres Strait and Papua New Guinea. Customary adoption is a common practice that receives legal recognition in Papua New Guinea.

Because of the Islands' geographical location there are also some Pacific Islander and Japanese ethnic influences, the latter due to the pearling industry and some intermarriage between Islanders and the white and Indigenous mainland population.

Historically the Islanders were maritime and trading people with a fearful reputation as warriors prior to the advent of Christianity in the late 19th Century. Since they had an existing monotheist religion, they readily accepted Christianity and remain devout Christians and religion is still a powerful influence over their lives.

The islands became part of Australia by unilateral acts of Britain and the Parliament of Queensland at a time when Queensland was an independent Colony of Britain. The process was described in the leading Australian case of *Mabo v Queensland no 2* as follows:

"10. Ultimately, the proposal to extend the maritime boundaries of Queensland to include the Murray and Darnley Islands was adopted by the Colonial Office and, on 10 October 1878 at Westminster, Queen Victoria passed Letters Patent "for the rectification of the Maritime Boundary of the Colony of Queensland, and for the annexation to that Colony of (certain) Islands lying in Torres Straits, and between Australia and New Guinea". The Murray Islands lay within the maritime boundary mentioned in the Letters Patent.

*11. The Letters Patent authorized the Governor of Queensland by Proclamation -
"to declare that, from and after a day to be therein
mentioned, the said Islands shall be annexed to and form
part of Our said Colony. Provided always that Our said*

Governor issues no such Proclamation as aforesaid until the Legislature of Our said Colony of Queensland shall have passed a law providing that the said Islands shall, on the day aforesaid, become part of Our said Colony, and subject to the laws in force therein. Provided also that the application of the said laws to the said Islands may be modified either by such Proclamation as aforesaid, or by any law or laws to be from time to time passed by the Legislature of Our said Colony for the government of the said Islands so annexed."

The Queensland Legislature passed the requisite law (The Queensland Coast Islands Act of 1879) and, on 21 July 1879 at Brisbane, the Governor of Queensland by Proclamation declared -

"that from and after the first day of August, in the year of our Lord one thousand eight hundred and seventy-nine, the Islands described in the Schedule (which followed the Letters Patent and the Act) shall be annexed to and become part of the Colony of Queensland, and shall be and become subject to the laws in force therein."¹

Prior to World War 2, islanders were forbidden from settling on the Australian mainland and could not even move from island to island without a permit from Queensland Government officials. This, while constituting an unfortunate example of the way Indigenous people were treated at that time, became something of an unintended benefit, in that it meant that they were spared the large scale dislocation from family and traditional lands that was suffered by so many of the mainland Indigenous people.

Following World War 2 they became free to move and an estimated 45,000 now live on the mainland, mainly in the State of Queensland but also in other parts of Australia. They maintain close contact with the home islands however and frequently return for cultural events and continue to practice island culture, including customary adoption. They are the smallest distinct Indigenous group in Australia and have accordingly had difficulty achieving the same degree of recognition accorded to mainland Indigenous people.

What is Customary Adoption?

One of the problems about discussing this issue is the use of the word “adoption”, which does not adequately describe these customary practices. It does however tend to obfuscate and confuse the discussion because once customary adoption is correlated with statutory adoption, various misconceptions arise. In particular recognition of the customary practice tends to attract the current modern criticism of statutory adoption, which leaves legislators unwilling to deal with it.

For example in Australia the following figures indicate the startling decline in statutory adoption. The peak year for adoptions in Australia was 1971-2, when there were over 9000 adoptions, whereas by 2004-5 there were 65 local adoptions and some 434 inter-country adoptions.² The following assessment by Paul Ban, an Australian scholar who has studied customary adoption in the Torres Strait over many years, is apt:

“‘Adoption’ was the term used by anthropologists when trying to understand and define aspects of the child rearing practices of people from kinship-based societies. Although the term proved useful in helping westerners make sense of the transfer of children amongst extended family and close friends on a long-term basis, it has also become a stumbling block when government services have tried to understand and regulate the practice.”³

(a) The Australian Context

Paul Ban has provided a useful modern description of customary adoption amongst Torres Strait islanders. He describes it as follows:

“‘Adoption’ is a widespread practice that involves all Torres Strait Islander extended families in some way, either as direct participants or as kin to ‘adopted’ children. ‘Adoption’ takes place between relatives and close friends where bonds of trust have already been established. Some of the reasons for the widespread nature of ‘adoption’ include⁴

- *To maintain the family bloodline by adopting (usually) a male child from a relative. This is linked to the inheritance of traditional land in the islands.*
- *To keep the family name by adopting a male child from a relative or close friend into the family.*
- *To give a family who cannot have a child due to infertility the joy of raising a child. A married couple may give a child to either a single person or another couple. ‘Relinquishment’ is not restricted to single parents.*

- *To strengthen alliances and bonds between the two families concerned.*
- *To distribute boys and girls more evenly between families who may only have children of one sex.*
- *To replace a child who had been adopted out to another family – this may occur within extended families.*
- *To replace a child into the family once a woman has left home so that the grandparents would still have someone to care for.*

The underlying principle of Torres Strait Islander ‘adoption’ is that giving birth to a child is not necessarily a reason to be raising the child. The issue of who rears the child is dependent on a number of social factors, such as those listed, and is a matter of individual consideration by the families involved. Children are never lost to the family of origin, as they have usually been placed with relatives somewhere in the family network.

The main characteristics of Torres Strait Islander ‘adoption’ are (Ban 1989:38);

- *It provides a sense of stability to the social order and is seen as having a useful social function*
- *It is characterised by the notions of reciprocity and obligation between the families involved*
- *It generally occurs within the wider network of the extended family and carries with it the intention of permanency*
- *It occurs frequently but can have an element of instability and fragility sometimes leading to its dissolution*
- *The arrangements for the care of the child are usually made between the birth parent (s) and the receiving parent(s) during the course of the pregnancy.’⁵*

Customary adoption is now known amongst Islanders as *Kupai Omaskir*. A decision that I gave in relation to a customary adoption case contains a further discussion of the practice⁶. I said:

“The concept of giving children runs deep in Torres Strait Island culture and the practice is extremely widespread, as can be seen in this case where most of the participants have been traditionally adopted.

The western concept of adoption does not fully cover this practice, which has a spiritual or cultural relevance that is not relevant in western adoptions.”

I continued:

“Importantly it is not the Court, but the parties and the community that determine that a traditional adoption has taken place. As I see it, the Court’s role is simply to recognise that fact and make orders accordingly in the best interests of the child or the children concerned.”

I then expressed the view that it was not for the Court to conclude that a traditional adoption had occurred but rather the community, because the issues before me had to be determined under a law that did not recognise traditional adoptions.

On reflection I think that this view was only partially correct. It was correct in the sense that it is the traditional community that originally determines whether there should be a customary adoption and puts that process into effect. It now seems to me that if there is a dispute as to whether a traditional adoption has occurred in the context of a family law case where the best interests principle is to be applied, it is a relevant matter for the judge to determine this as an issue of fact as part of the process of determining what order would be in the child’s best interests. It would not be determinative of that issue but might be highly relevant to it. This would not however be the case if customary adoptions were to be recognised by law. In such a case, a court might well be called upon to determine whether a customary adoption has taken place without regard to the best interests principle, as has occurred in Canada.

I continued with the judgment in a way that seems to reflect that view when I said:

“An understanding of Torres Strait Island custom, and particularly the practice of Kupai Omaskir, is nevertheless relevant to the determination of this case and in assessing the actions of the people involved. In particular it explains why the giving of a child by his/her biological parents to another couple is much more acceptable in a Torres Strait Island context than it would be in the wider community.”

This case involved parties from two different islands and expert evidence was called from each. I then discussed the expert evidence:

Mr Bann (an elder from Iama or Yam Island) said that in relation to the Island community, the handing over by a biological parent is a permanent arrangement. The child so adopted is not meant to know the identity of his or her natural parents until he or she is 21. At that time the child can acknowledge the biological parents as his/her parents or continue to acknowledge them as uncles, aunts etc.

Following adoption the natural parents have nothing to do with the child as parents, and the accepting parents become the child's real parents in every sense.

He said that when the child is "given" pursuant to a traditional adoption, it is usually to members of the extended family of the givers. This enables the maintenance of blood connections. He said that when a woman is single the decision to give a child is hers and not that of the father, but that this is not the case if the couple are living together as husband and wife, when it becomes a joint decision. He said that de facto relationships are now given greater recognition in this regard than would have been the case in the past.

He said that when a promise is made to give a child it is binding. If a dispute arises, the Iama Council will become involved and will endeavour to help the parties reach agreement. In earlier times he said that this role would have been undertaken by the Elders of the particular Island community.

He also said that culturally, a caretaker arrangement for children could be undertaken that was not a traditional adoption. This was usually done when the biological parents were having particular difficulties and needed some assistance for a time.

He said that if such an arrangement continued for a long time, the child would have a choice as to with which he/she wished to live, but that the biological parents would be recognised as the child's real parents. He said that in such circumstances the biological parents would usually meet the cost of care for the child.

I then discussed the evidence of Mr Aken, an Elder of the Kaurareg People who was authorised to speak on behalf of their Council of Elders.

"He said that Kerrnge law binds the Kaurareg People. When a couple cannot look after their own child, it is not unusual for them to give the child to extended family members. At that point inheritance rights stop and the obligation transfers to the new parents.

However, there is a complex system of regaining inheritance through the next generation, which is not relevant to the issues in this case, but appears to differ from the arrangements recognised by the Iama people.

He said that traditionally those contemplating a traditional adoption would do so by arrangement through the Council of Elders, but they did not always do so. Like Mr Bann, he agreed that culturally it was possible to have arrangements for the long term care of a child that did not amount to traditional adoption.

He said that in such circumstances the child would know who their biological parents were and would retain respect for them as parents. He said that he himself had been brought up pursuant to such an arrangement. He said that among his people when a child was born to unmarried persons, the sex of the child would determine who took the decision to give the child, in the case of a boy the father and in the case of a girl, the mother.

He said that once a traditional adoption was completed, the customary practice was that the giving parent would step aside and would have little contact with the child that had been given.

He also spoke of the importance of the kinship system, with younger siblings paying respect to older ones, and of the difficulty of the younger sibling refusing a request from an older one.

It can be seen from the above account that there are subtle differences between different areas of the Torres Strait and different peoples in relation to this practice. This was confirmed by Mr Bani (another senior elder) who gave general evidence as to the practice throughout the Torres Strait, and pointed out that there were significant differences between Meriam culture in the east and the culture in the Western Islands. Mr Bani said that so far as works of scholarship were concerned relating to Torres Strait culture, the 1897 scientific party from Cambridge University headed by Dr A Haddon remained the most significant scientific source of historical information.⁷ He also confirmed that, apart from traditional adoption, arrangements were frequently made for temporary custodianship of children, which were not subject to any particular rules beyond mutual agreement.”

(b) The Canadian Context⁸

There are a long line of cases where customary adoption has been considered by the Canadian courts. The following comments by Browne J in the Nunavit Court of Justice usefully describe the practice as it exists among the Inuit peoples of Canada:

“Families living in camps needed to have children to assist with the work and with the challenges of life in family camps and to carry on the name of a particular family. Therefore, custom adoption would take place if a couple were childless, unable to bear children or had many children die young or in childbirth. There was (is) a belief that having a child in the family would stop that chain of events from occurring again.

[17] To initiate discussion about an adoption, either the adoptive or biological parents would approach the other. Sometimes, but not as often, a camp leader was involved in the initial discussions about an adoption. The substance of the adoption was the intention of the two sets of parents and the agreement by them that the child would be raised by the adoptive parents rather than the biological parents. Generally, the agreement was for the benefit of the adoptive parents and not the child (as with non-custom adoptions) or the biological parents. In the context of the family camp the biological parents would be confident that the child would be well cared for by the adoptive parents. Without exception there was an expectation or a reservation in the tradition of the adoption that the child would be raised with full knowledge of the identity of biological parents and with the understanding of all the parties that if anything happened to the adoptive parents (who were in many cases one generation older than the biological parents) the biological parents would step in and resume the care of the child or young adult.

[18] An unspoken but clearly understood and accepted tradition was that a maternal grandmother would often practically and on a day-to-day basis take over the care of the first biological grandchild and raise that child as part of the older family.

[19] Custom adoption would usually take place within a family group, grandparents or extended family, aunts and uncles, people from the same area with similar habits, behaviour and knowledge, that families would be capable of sharing on a familiar basis.

[20] In the custom adoption tradition, we are told it would be unheard of or unlikely that someone would become pregnant without a partner or knowledge of paternity. In that event there might be an adoption to another family if the mother’s family could not care for the child, but with no expectation of assistance from the father. Once a child arrives in this world, as one Elder eloquently described, “it would be cared for as a child regardless of its paternity.”

[21] Another important tradition is the communal sharing of the raising of any child in the traditional family camps. In many camps a community did raise a child and that involved the sharing of responsibilities, sharing of food and resources. The issues of maintenance or child support for specific children and specific responsibility of any particular person to another did not often arise. People would

help others who were in need. Adoptive parents would not ask for help, but biological parents might help if they saw the adoptive parents were in need of some assistance. If there were issues of responsibility that would arise between individuals within a camp, then the traditional methods of social conflict resolution would be implemented through family discussion and, finally, Elders involvement.

[22] The Inuit tradition of sharing and communities working together to provide for the community is a strong and continuing tradition.

THE TRADITION HAS CHANGED

[23] As with anything in life, change is inevitable. All of the Elders relate that the tradition of custom adoption has changed. Some of the changes impacting the tradition are that girls are having too many babies, the girls are not always in couples and they are too young when they are having their children. The part of the tradition that is continuing is that grandmothers are taking care of their grandchildren but the community-based responsibility and the support previously provided by the biological parents and extended family unit is not as strong in supporting the custom adoption as in the past.

[24] The Elders have described the process of custom adoption as being “diluted.” Now there are lots of adoptions going on beyond the close-knit extended family. Custom adoption now seems to be a way for biological parents to pass on children that they are not able or not interested in raising. Therefore, sometimes now the custom adoption is done for the benefit of the biological parents and not the adoptive parents. If a child’s parents are too young to have children, then the Grandparents assist with the decision to adopt and where the child should be placed. We often, now, see grandparents struggling to raise their grandchildren to keep them in the family. Perhaps the changes were best described by Mr. Erkloo, “Custom adoption used to be out of love – it used to be a cooperative effort – not like now.”

There are remarkable similarities between the practice of customary adoption so described and that of the Torres Strait Islanders. Other Canadian cases make it clear that there are also similarities with the customary adoption practices of Aboriginal people of Western Canada.

One notable difference with the Torres Strait Islander approach is that of keeping the adoption secret from the child involved until maturity. However the fact of the adoption is not secret as between the family group and in that sense is open. Again however this practice is also changing, not least because official

requirements for parental consent are likely to make the child aware of his/her parentage at an earlier stage.

Legal Recognition of Customary Adoptions

It is in this area that there is a sharp distinction between the laws of the two countries, although, as I will suggest, it may be that Canadian jurisprudence could be applied in Australia to produce similar results.

In Australia at present no recognition is given to Indigenous customary adoption practices and the various legislatures have consistently failed to take any action to grant such recognition.

Indeed it was not until the landmark decision of the High Court of Australia in *Mabo v Queensland*⁹ in 1991 that any recognition was given to Indigenous customary law at all. That was a case involving Indigenous land rights and interestingly enough the plaintiffs were all from the Island of Mer in the Torres Strait. Prior to this decision, Australia had been regarded as *terra nullius* prior to white settlement. Mabo overturned this doctrine and recognised Indigenous land rights in respect of unalienated land.

However the principles of *Mabo* went further than that as the following passage from the majority judgment of Brennan J, with whom Mason CJ and McHugh J agreed, indicates:

“The incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants, provided those laws and customs are not so repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld: Idewu Inasa v. Oshodi, [1934] A.C. 99 (J.C.P.C.)”

The above passage was cited with approval by the Court of Appeal of British Columbia in Casimel’s case, which was a case concerning customary adoption as supporting a view that *“the fact that the acquisition of rights on death and marriage is specifically mentioned is an indication that rights arising from status may properly be determined by the laws and customs of the aboriginal people in question.”*¹⁰

As I understand it, this case represents something of a high water mark amongst Canadian cases concerning customary adoption. If the view expressed by the Court of Appeal of British Columbia is correct, then it may be that customary adoption is entitled to recognition in Australian law provided that it does not conflict with statute law such as that governing adoption.

However to date no Australian case has addressed this issue and the conventional view has been that the law does not recognise customary adoption. Strangely enough this non recognition did not present a particular problem until 1988, because the relevant Queensland government officials had a practice of recording customary adoptions as lawful adoptions if requested to do so. However, that practice then ceased and since 1989 the Torres Strait islander communities have unsuccessfully lobbied the Queensland government for recognition. I was interested to note that officials took a similar approach in Quebec, until that practice also met with disapproval.

As part of this lobbying process, I was approached by representatives of the Torres Strait Islander community in the early 1990's in my then capacity as Chief Justice of the Family Court of Australia to see whether there was anything that the Court could do to assist. I visited the Torres Strait and held discussions with many community leaders and came to the view that there was an option available for the court to be of assistance.

This involved the adaptation of the family law process to enable the receiving families of traditional adoptions to apply for parenting orders from the Family Court. A Practice Direction was issued to deal with these cases. Ordinary principles applied including the best interests principle, which sometimes does not sit well with customary adoption.

A common feature of both Canadian and Australian customary adoptions when considered by a Court is that they have invariably already taken place, sometimes years before. It has been said in Canadian cases that there is therefore no room for the operation of the best interests principle, because since they are recognised by the law in Canada, it is no longer relevant to look at best interests which were never considered in a formal sense or possibly at all when the traditional adoption took place.

This is because, unlike western style adoptions, the customary adoption is an established fact and may have been in place for years before the matter comes to

court. It may involve for example adoption by a grandmother, who is far too old to physically care for the child and no-one expects her to do so.

It is therefore somewhat unreal to take a best interests approach, but we were required by law to do so. In practice it did not present a significant obstacle, usually because time had established that the arrangement was in the child's best interests and it would in any event have been unthinkable to reverse the process, particularly because no one would have taken any notice of our orders had we attempted to do so.

It was the normal practice to appoint at least two local Islander elders to sit with the judge as assessors, to ensure that what was being presented to the court was a traditional adoption in accordance with local custom. This I believe was a valuable practice, not only symbolically but as a real check on the *bona fides* of the application

We did however require police reports to be obtained and a report from a court counsellor as to the suitability of each arrangement. The court also employed Indigenous family consultants, including a well respected Torres Strait Islander woman, who assisted with each application.

By 1999 I was able to report to the Annual Judges Meeting as follows:

The practice has been given no legal recognition under Australian law, which is of great concern to Torres Strait Islanders and carries with it practical difficulties in relation to inheritance, proof of identity and the need for children to obtain parental consent to certain activities and decisions. In recent years, following discussions between Torres Strait Island Elders and representatives of the Court, the Family Court of Australia has facilitated the making of residence orders and orders conferring sole parental responsibility upon the couple or person receiving the child pursuant to these traditional arrangements, and I have issued Practice Directions to assist this process.

A residence order does not amount to an adoption order, and can of course be subsequently revoked or varied in appropriate cases. It does, however, have the advantage of recording such arrangements and obviating some of the practical difficulties involved in non recognition of the practice by conferring parental responsibility upon the receiving parents.

The court has now made some hundreds of such orders. Features are that they are made with the consent of all relevant parties that can be ascertained; before such orders are made a report is prepared by a Court Counsellor with the

assistance of an indigenous Court family consultant; and the Judge hearing the matter normally sits with one or more Elders as assessors to ensure that what is being recognised is a traditional adoption.”

By the late 1990's it appeared that the Queensland Government was prepared to accept the need for a legislative solution to recognise customary adoption to the point that legislation was prepared and was about to be introduced. Then suddenly and without explanation it was withdrawn and nothing has happened since. Submissions were made by the Islanders to a Queensland Government Parliamentary Select Committee on Surrogacy which were supported by Paul Ban and myself. However that Committee, while recommending that voluntary surrogacy arrangements no longer be a crime in Queensland, did not address the issues raised.

I am hoping to arrange for a public seminar to be conducted in Australia in 2010 under the auspices of Children's Rights International to again place the issue before those interested and we are hopeful that the Canadian example will assist in that process.

Legal Recognition of Customary Adoption in Canada

There are a number of pieces of legislation relevant to customary adoption in Canada. The *Constitution Act 1982* reads “*The existing Aboriginal and treaty rights of the Aboriginal people of Canada are hereby recognised and affirmed.*”

The Federal *Indian Act 1985*¹¹ granted official Indian status to children ‘adopted in accordance with individual custom’.

Only two provinces have formally recognised customary adoptions, namely British Columbia and Nunavut, together with the Northwest Territories.

British Columbia

In Casimel's case Lambert J, with whom the other members of the British Columbia Court of Appeal concurred, referred to the earlier decision of the Court of Appeal in *Delgamuukw v. The Queen*¹² and in particular to part of his own judgment in that case where he said:

The Gitksan and Wet'suwet'en peoples had rights of self-government and self-regulation in 1846, at the time of sovereignty. Those rights rested on the customs, traditions and practices of those peoples to the extent that they formed an integral

part of their distinctive cultures. The assertion of British Sovereignty only took away such rights as were inconsistent with the concept of British Sovereignty. The introduction of English Law into British Columbia was only an introduction of such laws as were not from local circumstances inapplicable. The existence of a body of Gitksan and Wet'suwet'en customary law would be expected to render much of the newly introduced English Law inapplicable to the Gitksan and Wet'suwet'en peoples, particularly since none of the institutions of English Law were available to them in their territory, so that their local circumstances would tend to have required the continuation of their own laws. The division of powers brought about when British Columbia entered Confederation in 1871 would not, in my opinion, have made any difference to Gitksan and Wet'suwet'en customary laws. Since 1871, Provincial laws of general application would apply to the Gitksan and Wet'suwet'en people, and Federal laws, particularly the Indian Act, would also have applied to them. But to the extent that Gitksan and Wet'suwet'en customary law lay at the core of their Indianness, that law would not be abrogated by Provincial laws of general application nor by Federal laws, unless those Federal laws demonstrated a clear and plain intention of the Sovereign power in Parliament to abrogate the Gitksan or Wet'suwet'en customary laws. Subject to those overriding considerations, Gitksan and Wet'suwet'en customary laws of self-government and self-regulation have continued to the present day and are now constitutionally protected by s.35 of the Constitution Act, 1982.

This is a powerful statement of law that arguably applies with equal force in other provinces of Canada and also in Australia.

On the issue of customary adoption his Honour concluded:

“Custom has always been recognized by the common law and while at an earlier date proof of the existence of a custom from time immemorial was required, Tindal C.J. in Bastard v. Smith (1838), 2 Mood. & R. 129 at 136, 174 E.R. 238, points out that such evidence is no longer possible or necessary and that the evidence extending "as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom" is all that is now required. Such proof was offered and accepted in this case.

41 In Re Wah-Shee (1975), 57 D.L.R. (3d) 743 and in Re Tagornak (1983), 50 A.R. 237 the Supreme Court of the Northwest Territories declared adoption by aboriginal custom to be valid, notwithstanding that in each case one of the adopting parents was caucasian.

42 I conclude that there is a well-established body of authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of application of the principles of the common law and the provisions of statute law to the persons whose status is

established by the customary adoption. That body of authority is entirely consistent with all of the reasons for judgment of the members of this court in Delgamuukw v. The Queen as those reasons discuss the jurisprudential foundation for aboriginal rights in British Columbia.”

Following *Casimel’s* case¹³ the legislature of British Columbia enacted amendments to adoption legislation which provided in s 46 (1) of the Adoption Act 1995 that the court **may** recognise that an adoption of a person effected by the custom of an Indian band or Aboriginal community has the effect of an adoption under the Act. SS 2 provided that the preceding sub section did not affect any aboriginal rights that a **person** has. (Emphasis added)

This legislation has been criticised by Baldassi on the grounds first, of the uncertainty surrounding the use of the word may as to whether it is permissive or mandatory and secondly, as to the ambiguity of the use of the word ‘person’ that does not make it clear whether the reference is to the person adopted or the adoptive or giving parents.¹⁴

In *B.C. Birth Registration No 1994-09-040399*¹⁵ Grist J, after considering factors stated by Marshall J in *Re Tagornak Adoption Petition*¹⁶ (discussed subsequently) added a fifth factor that was also followed by Meiklem J in *Prince v Julian* to the effect that:

“In addition to these factors, I would add that it appears important to the process of recognition of customary adoption, that the relationship created by custom must be understood to create fundamentally the same relationship as that resulting from an adoption order under Part 3 of the Act.”

This has been in my view rightly criticised by Baldassi who comments:

“Analysis shows that some people are interpreting custom adoptions as valid under the adoption statute only when they come close to replicating those in the rest of the statute – in severing birth family ties and officially recognizing one nuclear family with only two parents, erasing the birth parents from the legal picture.”¹⁷

To do this is to negate the whole purpose of the recognition of traditional adoption, involving as it does the recognition of a law and legal system that is different from the system brought to countries like Australia and Canada by the European colonists.

Northwest Territories and Nunavut

In the North West Territories the *Aboriginal Custom Adoption Recognition Act*, S.N.W.T. 1994 c. 26 gave formal legal recognition to customary adoptions. This legislation was carried over into Nunavut when it became a separate province in 1999.

However, earlier cases in the Northwest Territories recognised the legality of customary adoption as forming part of the common law.¹⁸

In *Re Tagornak Adoption Petition*¹⁹ Marshall J. reviewed the same cases and stated:

“Having reviewed the authorities, certain concepts emerge. The Court’s role is declaratory, certifying that an adoption by native custom has indeed taken place. Some of the criteria which the Court will apply to the case before it are:

a) that there is consent of natural and adopting parents;

b) that the child has been voluntarily placed with the adopting parents;

c) that the adopting parents are indeed native or entitled to rely on native custom; and

*d) that the rationale for native custom adoptions is present in this case.*²⁰

Baldassi points out that:

Nunavut and the Northwest Territories both have legislation setting out procedures for formalizing customary adoptions under territorial law²¹ This statute followed years of judicial decisions that “legalized” adoptions by custom without the need for families to go through the usual statutory requirements of standard adoption legislation.²² Most adoptive parents wanted court recognition of their family status so they could obtain benefits for the child and register him in school, etc.

Alberta

There is no provision for the legal recognition of customary adoptions in Alberta *per se*. However there is an innovative programme directed towards this end. Baldassi comments:

“The much-publicized Open/Custom Adoption Program at the Yellowhead Tribal Services Agency (YTSA) developed as part of the attempt to reclaim control over child welfare services and keep children in their First Nations communities. Adoptions still involve the usual statutory requirements such as home studies, but

the social workers are Indigenous, and the court hearing to finalize the adoption usually takes place in conjunction with a customary adoption ceremony¹

The imposition of criminal background checks and other common law adoption necessities does not agree with any documented Indigenous legal traditions of adoption. I previously commented that “[t]his program, while no doubt an improvement over previous state child welfare actions, is not the same as the right to Aboriginal custom.”

However, she comments that members of the community are currently satisfied with the present rate of progress and she says that these views should be respected.²³

Although there are moves in some other provinces such as Saskatchewan and Yukon to provide some form of recognition of customary adoption, I am unaware of any legislation having been introduced elsewhere.

Conclusions

Although the picture in Canada is much more optimistic for recognition of customary adoptions than is the case in Australia, the Canadian situation is far from perfect and highlights some of the difficulties of legislating in this area.

I nevertheless consider that legislation would be the preferred option for recognition, but the need for careful drafting is crucial and the temptation must be resisted to produce a result which simply equates customary adoption with statutory adoption and imposes the requirements of the latter upon the former as seems to have happened in British Columbia.

For Australia, the decision in *Casimel’s* case when read in conjunction with *Mabo* provides a possible alternative to legislation and at least leaves open the possibility that litigation may still provide an avenue for the achievement of a degree of recognition of this customary practice. This is important, for the continued neglect of the culture of the Torres Strait islanders by successive Australian Federal and State Governments is yet another unfortunate episode in Australia’s treatment of its Indigenous peoples.

It is to be hoped that Australia’s recent indication that, contrary to the position taken by the Howard Government, it now supports the UN *Declaration on the*

*Rights of Indigenous Peoples*²⁴ will act as a catalyst for the reconsideration of the issue of legal recognition of customary adoptions in the Torres Strait. A number of the Articles of that Declaration are relevant to the present issue, but the following would appear to be the most apposite:

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due

recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 34

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

These Articles singly and/or in combination provide an ample basis for legislation recognising traditional adoption practices amongst Torres Strait Islanders.

An interesting question arises as to whether this should be State or Federal legislation. As a result of the powers conferred on it by the amendment to the Constitution effected by the 1967 Referendum, the Federal Government would clearly have power to legislate in this area. The provisions of the UN Declaration would also provide an additional source of power, as and when Australia does accede to the Declaration.

On the other hand issues of adoption are traditionally State matters. This may not have the force that it otherwise would if it is conceded, as I think that it should be, that the tag 'adoption' is only one of convenience and that Kupai Omaskir should not be equated with adoption in the State legal sense.

It is also true that not only do the Torres Strait Islands form part of Queensland, but most people of Torres Strait Island descent live in that State. However there are substantial populations elsewhere and Queensland legislation would not necessarily apply to them. In order to cover the field therefore, there would need to be complementary State and Territory legislation in other States and the Territories, or alternatively Federal legislation.

My own view is that a useful first step would be for Queensland to legislate in the area in the hope that either the Federal Government, or the other States and the Territories would follow in due course. This tortuous process has taken long enough and it would be very unfortunate if it was to be further delayed by the seeking of a common agreement between the States and Territories.

Apart from the other arguments that support Queensland taking this step, the accession by the Australian Government to the UN Declaration provides a powerful further argument for the taking of this action.²⁵

¹ *Mabo and Others v. Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1

F.C. 92/014 Per Brennan J. His Honour's judgement contains a detailed account of the events that led up to this annexation and the relevant events that followed it so far as the governing of the islands was concerned.

² <http://www.aihw.gov.au/publications/cws/aa04-05/aa04-05.pdf>

³ Ban P "The Right of Torres Strait Islander Children to be raised within the customs and traditions of their Society." Submission to Queensland Government Joint Select Committee on Surrogacy 2008

⁴ Ban P (1989) *Traditional Adoption Practice of Torres Strait Islanders and Queensland Adoption Legislation* Master of Social Work thesis University of Melbourne

⁵ Ban P *ibid* submission to Queensland Government etc at 3-4

⁶ *L and L v M and S*; (Family Court of Australia, unreported judgment delivered 19 December 2003 per Nicholson CJ)

⁷ Reports of the Cambridge Anthropological Expedition to Torres Straits; Cambridge University Press 1904 Volume V at 151-2

⁸ In my discussion of Canadian Customary law I have drawn heavily upon and am indebted to two articles by Cindy L Baldassi; .Baldassi, Cindy L., The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences. University of British Columbia Law Review, Vol. 39, p. 63, 2006. Available at SSRN: <http://ssrn.com/abstract=963046> and The Uses of Legal Pluralism in Protecting the Legal Status of Indigenous Customary Adoption 2007

⁹ *Mabo v Queensland* (1992) 175 CLR 1.

¹⁰ *Casimel v Insurance Corp of British Columbia*, 1993 CanLII 1258 (BC C.A.)

¹¹ R.S.C. 1985, c.1-5, ss. 2,6.

¹² , [1993 CanLII 4516 \(BC C.A.\)](#), [1993] 5 W.W.R. 97.

¹³ *Casimel v. Insurance Corp. of British Columbia* *Supra*

¹⁴ See B.C. Birth registration No. 1994-09-040399 (Re), [1998] 4 C.N.L.R. 7 and discussion in Baldassi *Aboriginal Customary Adoption* (*supra*) at 88-91

¹⁵ *Ibid* n11

¹⁶ [1984] 1 C.N.L.R. 185 (N.W.T.S)

¹⁷ *Ibid* *The Uses of Legal Pluralism etc* at 20

¹⁸ *Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 686, 38 W.W.R. 100 (N.W.T. Terr. Ct.); *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479, 67 W.W.R. 669 (N.W.T. Terr. Ct.); *Re Tucktoo et al. and Kitchoalik et al. (sub nom. Re Deborah)* (1972), 27 D.L.R. (3d) 225 at 229, [1972] 3 W.W.R. 194 (N.W.T. Terr. Ct.), *aff'd* (1972), 28 D.L.R. (3d) 483, [1972] 5 W.W.R. 203 (N.W.T.C.A.); *Re Tagornak Adoption Petition*, (1983) 50 A.R. 237, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.); *C.A.D. v. V.G.*, [1992] N.W.T.R. 236, [1992] N.W.T.J. No. 53 (N.W.T.S.C.).

¹⁹ [1984] 1 C.N.L.R. 185 (N.W.T.S)

²⁰ As cited by Meiklem J in *Prince & Julian v. HMTQ et al*, 2000 BCSC 1066 (CanLII)

²¹ The *Aboriginal Custom Adoption Recognition Act*, S.N.W.T. 1994, c. 26 was carried over in its entirety when Nunavut became a separate territory in 1999.

²² *Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 686, 38 W.W.R. 100 (N.W.T. Terr. Ct.); *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479, 67 W.W.R. 669 (N.W.T. Terr. Ct.); *Re Tucktoo et al. and Kitchoalik et al. (sub nom. Re Deborah)* (1972), 27 D.L.R. (3d) 225 at 229, [1972] 3 W.W.R. 194 (N.W.T. Terr. Ct.), *aff'd* (1972), 28 D.L.R. (3d) 483, [1972] 5 W.W.R. 203 (N.W.T.C.A.); *Re Tagornak Adoption*

Petition, (1983) 50 A.R. 237, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.); *C.A.D. v. V.G.*, [1992] N.W.T.R. 236, [1992] N.W.T.J. No. 53 (N.W.T.S.C.).

²³ An extremely useful discussion of customary adoption from an Indigenous perspective and in Alberta can be found in Darin Keewatin, *An Indigenous Perspective on Custom Adoption* (M.S.W. thesis, University of Manitoba, 2004) [unpublished]

²⁴ Accessed at <http://www.un.org/esa/socdev/unpfii/en/drip.html>

²⁵ Note the discussion concerning this issue in Jane Zurnamer's paper *Why is the Legal Recognition of Torres Strait Islander Customary Adoption Law required to Adequately protect the Rights of Torres Strait Islander Communities and Families? A reflection on Australia's Human Rights Obligations* (as yet unpublished paper lodged as part of LLM course, Faculty of Law, University of Melbourne 2009).