

ARTICLE

RETURNING TO FIND MUCH WEALTH: IDENTIFYING THE NEED FOR A REVISED JUDICIAL APPROACH TO ABORIGINAL KINSHIP IN BRITISH COLUMBIA

By Kisa Macdonald*

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INTRODUCTION

This article explores how the Canadian legal system might recognize the kinship relationships of Aboriginal children.¹ First, I will briefly introduce the concept of kinship. Next, I will outline how the federal and provincial governments have enacted decisions about Aboriginal kinship. I will then explain how the courts have interpreted this legislative framework, significantly narrowing the statutory, as well as common law, obligations to act in the best interests of Aboriginal children, families, and communities. I will also discuss rationales that could inform a new approach to kinship. Finally, I will show how a Gitksan narrative may provide the appropriate legal principles and remedies to recognize and restore kinship.

I. IMPORTANCE OF ABORIGINAL KINSHIP

A thorough description of Aboriginal kinship would explain the unique, diverse and complex nature of kinship structures and outline the breadth of circumstances in which kin-

* Kisa Macdonald has a broad range of interests in the law, including: child protection, immigration, employment, family law and personal injury. She is currently working as a research assistant for the Canadian Centre for Elder Law, a national non-profit dedicated to exploring the particular legal issues, which affect older Canadians. This article was written during her third year as a law student at the University of Victoria. She would particularly like to thank John Borrows, Val Napoleon and Jane Smith for sharing their knowledge of indigenous legal systems with her.

1. This paper will provide an analysis of whether the courts ought to recognize an Aboriginal right to maintain kinship. My legal research has also been a journey of the heart, as I have sought to understand the underlying causes of the breakdown and loss of kinship bonds. While writing, I have been aware of the tragic losses experienced by Aboriginal families. I have held to the hope that the legal system will choose to take a new approach to custody and adoption decisions about Aboriginal children. I am hopeful that there will be an opportunity for government and judicial decision-makers to recognize the unique identity, language, culture and kinship that are intrinsic to the lives of Aboriginal children.

ship obligations occur. Unfortunately, this article does not allow room for a comprehensive examination of the many distinct Aboriginal kinship systems that exist within Canada. Instead, I will provide specific examples of how Aboriginal kinship is a significant theme in narrative, common law reasoning, and contemporary art.

A. Restoration of Kinship in Narrative

The antamahlaswx narrative about the origin of Gitanmaax provides an example of kinship's centrality to an indigenous society.² This is the story of the beginning of *Gitanmaax*:

A young girl, the daughter of a chief, became ubin (pregnant). No one knew who the father was. The young girl did not know who the father was either. Each night she climbed a ladder that the servants put up for her and after she climbed up the ladder was taken away, so no one could get to her and she could not get out. Yet each night a handsome young stranger would come to her.

Her father, the chief, was very angry and the Gitxsan were afraid. The chief ordered the Gitxsan to pack their belongings and load up the canoes. They were going to abandon the young girl. The handsome young man had disappeared.

The young girl wept as she watched the canoes disappear around the bend in the river. Her mother had left her food and given her hurried instructions on how to deliver her babies when the time came. They did not know that she was going to have triplets.

Her food supply ran out. She sat on the banks of the 'Xsan thinking she could easily slip into the water. Who would know and who would care. It was at this time the babies decided to be born. She knew she had to eat to keep up her strength and feed her babies. She held her three tiny babies and wept.

In the Gitxsan culture, in times of great distress, Uun ts'iits' (a supernatural being) comes from the earth, to help. Uunts'iits' appeared before the weeping mother and instructed her to take strips of bark from the birch trees and make torches. Uun ts'iits' explained that the girl must then place the torches along the riverbank. The light would attract fish and she could spear them. The grateful young mother gave the Uun ts'iits' her earrings in payment and the Uun ts'iits' disappeared.

Each night the mother would bundle her babies together and leave them in the longhouse and she would go to the river to fish. She became strong and confident and soon she had many salmon hanging in the smokehouse. Her children grew very quickly and soon were a help to her. They hunted and trapped small animals, they fished and they picked berries.

2. Val Napoleon, *Ayook: Gitksan Legal Order, Law and Legal Theory* (PhD dissertation, University of Victoria Faculty of Law, 2009) [unpublished] at 272 [Napoleon]. "Gitxsan means people of the River of Mist. Salmon has always been the source of wealth for the *Gitxsan*; *Gitanmaax* means People who harvest salmon by torchlight. The first village of *Gitanmaax* was located by the banks of the 'Xsan (Skeena River).

The mother explained to her children that their people had moved away because she did not know who their father was. She instructed her children and taught them about the land. Many years passed and her father, the chief, forgot his anger. He sent out his warriors to fetch the bones of his daughter so that he could mourn her. The warriors returned with astonishing news. The chief's daughter and his three grandchildren were alive and well.

The chief and his people returned to the first Gitanmaaxs to find a woman with much wealth in the smokehouses. A great feast was held to celebrate the reunion and Gitxsan names were given to the children.³

It is important to note the process by which kinship relationships are restored in this *Gitanmaax* narrative. When the kinship relationships break down, *Uun ts'iits'* provides strength and practical wisdom to the forsaken woman and children. After many years, when the broken kinship bonds are restored, the community hosts a great feast to recognize the reunification. In the kinship restoration process, each child is given a *Gitxsan* name.

B. Recognition of Kinship at Common Law

Increasingly, the common law has utilized the principles of Aboriginal kinship to determine appropriate legal remedies.⁴ For example, in *Forsythe v. Collingwood Sales Ltd.*⁵ the courts in British Columbia were able to use the kinship system of Wet'suwet'en to resolve a conflict and determine a remedy. The judicial references to "kinship" generally denote spiritual principles, social ordering and intergenerational inheritance of social legitimacy (e.g. family history, regalia, stories, songs and names).⁶

C. Loss of Kinship in Art

The systemic loss of kinship, which has been the experience of many Aboriginal people over the past decades, has been expressed in Aboriginal art. For example, Alex Janvier's *Blood Tears*,⁷ provides a personal account of the losses incurred during the artists' education at a residential school.⁸ On the back of the painting, Janvier has inscribed a list of losses experienced during his education: loss of childhood, language, culture, customs,

3. *Ibid.* at 272-73. See also: Mary Jane Smith, *Placing Gitxsan Stories in Text: Returning the Feathers*. *Guuxs Mak'am Mik'Aax*, (PhD Dissertation, University of Victoria Faculty of Law, 2004) [unpublished].

4. Napoleon, *supra* note 2 at 166. See also Mary Clark, *In Search of Human Nature* (London: Routledge, 2002) at 8-16. The application of kinship obligations to the determination of appropriate legal remedies is a broad topic, the details of which will vary between Aboriginal societies.

5. *Forsythe v. Collingwood Sales Ltd.*, [1988] B.C.J. No. 683 (C.A.). In this case, the British Columbia Court of Appeal upheld the trial judge's decision to award damages to the plaintiff, who had been wrongfully detained on charges of shoplifting, in order to pay the costs of a shame feast.

6. Richard Daly, *Pure Gifts and Impure Thoughts* (Paper presented at the Ninth International Conference on Hunting and Gathering Societies, Heriot-Watt University, Edinburgh, September 2002), online: University of Aberdeen <<http://www.abdn.ac.uk/chags9/1daly.htm> at 7>.

7. Alex Janvier, *Blood Tears*, 2001, Acrylic on linen [*Blood Tears*].

8. The federal government established Residential Schools for the education of Aboriginal children, a regime which lasted from 1831 until 1998. For a detailed account of the losses incurred see: Marlene Brant Castellano, Linda Archibald & Mike DeGagné, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Aboriginal Healing Foundation, 2008) online: Keewaytinook Okimakanak <<http://media.knet.ca/node/3522>> [Castellano et al.].

parents, grandparents and traditional beliefs. He notes that the policy of isolating children from their parents, extended family, community, language and culture resulted in many “broken bodies” and “broken spirits.”⁹

The detrimental effect of government decisions, which caused Aboriginal children to lose their familial relationships, cultural knowledge and traditional languages has since been politically acknowledged¹⁰ and legally addressed in a settlement agreement.¹¹

II. POLITICAL DECISIONS ABOUT ABORIGINAL KINSHIP

Historically, legislative decisions have significantly deterred Aboriginal peoples from maintaining kinship relationships. Three aspects of government policy have impaired Aboriginal kinship relationships: Residential Schools, child protection and adoption.¹² The federal government has, through statute, permitted the removal of Aboriginal children from their families and communities by implementing the Residential Schools program. In more recent years, provincial governments have dismantled the kinship ties between Aboriginal children and their communities through the application of child protection and adoption policies. Recently, the government of British Columbia has attempted to ameliorate the loss of kinship through amendments to child protection and adoption legislation.

A. Residential Schools: Removing Kinship for Education

In 1920, the federal government used its constitutional authority¹³ to make a significant legislative change. Under the *Indian Act*,¹⁴ government officials were given the power to forcibly remove Aboriginal children from their parents in order to attend Residential Schools. The legislation also made parents who chose to hide their children, in order to prevent them from attending Residential Schools, punishable by law.¹⁵ The rationale for forcibly removing children was based on the mistaken belief that an Aboriginal child’s education would be more effective if the school severed daily contact with their families.¹⁶ Parliament’s intent was to remove children from the influence of their parents and elders,

9. *Blood Tears*, *supra* note 7.

10. On June 11, 2008, the government of Canada recognized the widespread losses experienced by Aboriginal children, families and communities in a formal apology. See: *House of Commons Debates*, No. 110 (11 June 2008) at 1519 (Hon. Peter Milliken).

11. *Residential Schools (Re)* 96 A.C.W.S. (3d) (Alta. Q.B.). Approximately \$1.9 billion has been awarded to students who lived at a residential school for their “common experience.” A former student is generally eligible to receive \$10,000 for the first school year and \$3,000 for each additional school year. See: Residential Schools Settlement, online: Indian Residential Schools Class Action Settlement <http://www.residentialschoolsettlement.ca/english_index.html>.

12. Castellano *et al.*, *supra* note 8.

13. *The Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*The Constitution Act, 1867*]. Section 91(24) allows the federal government to pass legislation regarding “Indians and Lands reserved for the Indians.”

14. *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*].

15. *Indian Act*, *ibid.* See also Castellano *et al.*, *supra* note 8 at 24.

16. Castellano *et al.*, *supra* note 8 at 23-25.

preventing the transmission of Aboriginal culture, language and custom.¹⁷ Although recent policy reports, settlement agreements and apologies indicate a political intention to remedy the negative effects of Residential Schools, the federal government has not yet utilized its constitutional power to introduce legislation that would explicitly recognize the importance of Aboriginal kinship.¹⁸

Because of the lack of federal legislation to adequately define a right to maintain Aboriginal kinship, provincial governments have been able to enact provincial legislation that allows government officials to remove Aboriginal children from their parents and communities.¹⁹

B. Child Protection: Removing Kinship for Safety

In the 1960's, the government of British Columbia implemented a child protection policy that resulted in the permanent removal of numerous Aboriginal children from their families and communities.²⁰ In recent years, the number of Aboriginal children in government care has remained high.²¹ In recognition of the significant percentage of Aboriginal children in long-term care, the government in British Columbia has introduced a statutory requirement for courts to consider the interests of the Aboriginal community. The *Child, Family and Community Services Act* ("CFCSA")²² explicitly states that a court must consider the following factors when determining the best interests of an Aboriginal child:

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17. *Ibid.* at 23-25. The purpose of the Residential Schools was to instill a Euro-Canadian identity in Aboriginal children. The Crown's explicit objective was to "remove the Indian from the child." As a result, Residential Schools implemented detrimental policies such as forbidding the use of Aboriginal languages, cutting children's hair and physically punishing children for observing customary practices. Although public perception of Residential Schools policies has significantly changed since 1831, there are modern-day accounts of Aboriginal children being denied the right to express their heritage or practice customs. A recent example occurred in a school in Thunder Bay, Ontario where a teacher's aide cut an Aboriginal child's hair without permission, denying his ability to participate in an indigenous dance. For the details of this event, see: "Thunder Bay mom wants answers after teacher's aide chops off son's hair" *CBC News*, (21 May 2009), online: <http://www.cbc.ca/canada/toronto/story/2009/05/21/thunder-bay-hair.html>.
 18. In 1996, the federal government received a commissioned report on the plight of Aboriginals in Canada. See the *Report of the Royal Commission on Aboriginal People* (Ottawa: Royal Commission on Aboriginal People, 1996). In 1998, the government issued a statement on reconciliation: *Gathering Strength: Minister of Indian Affairs and Northern Development, Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 2000). Only in 2006, however, did the federal government sign the *Indian Residential Schools Settlement Agreement*. See *supra*, note 11. Finally in 2008, the federal government explicitly recognized the injustices caused by the residential school policy in an *Apology to the First Nations of Canada*. See *House of Commons Debates*, No. 110 (11 June 2008).
 19. *Re Adoption Act* (1974), 44 D.L.R. (3d) 718 (B.C.C.A.) at para. 1. Farris C.J. writes that "the [British Columbia] *Adoption Act* does apply to Indians subject to the provisions of the *Indian Act*." On this basis, the Court allowed a petition by non-Indian parents to adopt an Indian child. This decision was affirmed in *Natural Parents v. British Columbia (Superintendent of Child Welfare)*, [1976] 2 S.C.R. 751. There has not been a further constitutional challenge to provincial legislation concerning child protection and the adoption of Aboriginal children. It remains to be determined by the courts whether a right to kinship, or a right to retain cultural heritage, is included in the existing rights of Aboriginals affirmed in s. 35 of the *Constitution Act, 1982*, c. 11, Schedule B (U.K.) [*Constitution Act, 1982*].
 20. Castellano *et al.*, *supra* note 8 at 80.
 21. Darcie Bennett and Lobat Sadrehashemi, *Broken Promises: Parents Speak About B.C.'s Child Welfare System*, (February 2008), online: [Pivot Legal Society <http://www.pivotlegal.org/Publications/reportsbp.htm>](http://www.pivotlegal.org/Publications/reportsbp.htm) [*Broken Promises*]. In 2006, over 9,271 children were living in foster care, more than half of whom are Aboriginal.
 22. *Child, Family and Community Services Act*, R.S.B.C. 1996, c. 46 [CFCSA].

- (2) This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

...

- (f) the cultural identity of aboriginal children should be preserved;

...

- 3(b) aboriginal people should be involved in the planning and delivery of services to aboriginal families and their children;

...

- 4(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.²³

In addition to these statutory provisions, the provincial government recently signed a *Recognition and Reconciliation Protocol*,²⁴ which explicitly states as a policy objective, increasing the involvement of Aboriginal communities in the care of at-risk children. As will be discussed in more detail below, despite a clear legislative and political intent to consider the interests and needs of Aboriginal communities, the courts have chosen to apply these statutory requirements narrowly. As such, the current judicial approach towards the protection of Aboriginal children has resulted in a lack of recognition of kinship.

C. Adoption: Removing Kinship for... Good?

The government of British Columbia has attempted to recognize the interests of the Aboriginal community in maintaining kinship when one of its children is adopted. Under s. 7 of the *Adoption Act*,²⁵ an Aboriginal community must be consulted before a child is placed for adoption. Further, an adoption order does not affect a child's statutory rights embodied in Aboriginal status.²⁶ The courts may also legally recognize customary adoptions.²⁷ Significantly, although the legislation provides for adopted children to initiate contact with their families and communities, there is no explicit mention of the Aboriginal community's right to maintain a relationship with the child.

As will be discussed below, the courts have failed to adequately consider the views of the Aboriginal communities regarding adoption, have allowed a child's Band membership to

23. There are also statutory provisions for Aboriginal organizations to be notified of custody hearings and interim plans. See: *CFCSA, ibid.* at ss. 33.1, 35, 36 and 39.

24. *Recognition and Reconciliation Protocol on First Nations Children, Youth And Families* (30 March 2009), online: Ministry of Children and Family Development, <http://www.mcf.gov.bc.ca/publications/Recognition_Reconciliation_Protocol.pdf>. The Minister of Children and Family Development and delegates of the "First Nations Leadership Council" (which includes the First Nations Summit, Union of BC Indian Chiefs and the BC Assembly of First Nations) entered into "a shared vision under the *New Relationship*, which includes respect for each others' laws and responsibilities."

25. *Adoption Act*, R.S.B.C. 1996, c. 5 [*Adoption Act*].

26. *Ibid.* at s. 37(7).

27. *Ibid.* at s. 46.

be removed, and have significantly limited the scope of custom adoption.²⁸ For now, it is important to keep firmly in mind that the provincial government has attempted to ameliorate the negative effects of permanently removing children from their community by enacting legislation that requires the courts to consider Aboriginal kinship.

D. Summary of Legislative Approaches to Aboriginal Kinship

Legislative decisions that have defined the parameters of Aboriginal kinship within the Canadian legal system reveal two distinct approaches. The first approach assumes that the Crown is entitled to make decisions on behalf of Aboriginal children, families and communities. This approach is informed by the protectionist assumption that the government is primarily responsible for ensuring that an Aboriginal child receives a certain standard of education, physical protection and daily care. The second approach assumes that the Crown must consult and consider the views and interests of the community when determining the best interests of an Aboriginal child.

As will be seen below, the courts have generally adopted the first approach, assuming that the appropriate role of the legal system is to protect vulnerable children regardless of the cultural damage that “protection” might inflict. A more progressive approach to Aboriginal kinship could include detailed consideration the needs of Aboriginal children in the context of their communities. This contextual approach would recognize the social importance of maintaining, strengthening and restoring kinship relationships.

III. JUDICIAL APPROACH TO ABORIGINAL KINSHIP

The courts have narrowly interpreted the statutory and common law obligations placed on the Crown to act in the best interests of Aboriginal children, families and communities. To follow are examples of how the courts in British Columbia have chosen not to recognize Aboriginal kinship in each of the above-noted contexts: Residential Schools, child protection, and adoption.

A. Residential Schools: Narrowing Relationship

*Their children will be as in days of old,
and their community will be established before me;
I will punish all who oppress them.*
– Jeremiah 30:20²⁹

The courts in British Columbia have considered whether the federal government’s decision to remove children from their parents, in order to attend Residential Schools, was a

28. Although the courts have allowed an adopted Aboriginal child’s Band membership to be revoked by a Band that controls its own membership. See: *G. (J.-G., Re)*, [2000] 4 C.N.L.R. 104 (C.Q.), affirmed (2001), 2001 Carswell Que 3112 (Que. C.A.).

29. After much deliberation, I decided to incorporate scripture into my paper in recognition of the emotional, physical and spiritual wounds experienced by Aboriginal children and their communities as a result of the conduct of the Crown and the Church. As will be discussed in this section of the paper, the Crown and the Church were found to have breached their statutory duties (but not their fiduciary obligations) towards Aboriginal children who attended the Residential Schools. Jeremiah 30:20 is considered by some Biblical scholars to be a prophetic declaration of healing and spiritual restoration to a nation suffering from wounds that were once deemed too extensive to be properly healed.

breach of the Crown's fiduciary obligations.³⁰ In both *W.R.B. v. Plint* ("*Plint*")³¹ and *F.S.M. v. Clarke* ("*Clarke*")³² the British Columbia Supreme Court found that the Crown had not breached its fiduciary obligation to act in the best interests of Aboriginal children.

The plaintiffs, who had each attended Residential Schools as children, claimed that the Crown breached its fiduciary duties in the following ways: a) it removed them from their families and communities; b) it deprived them of family love and guidance, community support and the knowledge of their language, culture, customs and traditions of their nation; and c) it placed them in an environment where they were subjected to racial epithets, physical abuse and intolerable living conditions.³³ In *Plint*, Brenner C.J. summarized the claim for a breach of fiduciary duty as follows:

As against both Canada and the Church, the plaintiffs allege a breach of fiduciary duty in operating a residential school whose students and residents were systematically subjected to abuse, mistreatment, and racist ridicule and harassment, particulars of which include:

- a) isolation from family and community;
- b) prohibition of the use of Native language and the practice of Native religion and culture;
- c) use of racist epithets, sexual and physical violence, physical beatings, abuse, degradation and humiliation as forms of discipline, training or punishment;
- d) creation of an environment of coercion and fear; and
- e) overcrowded and inhuman residence conditions.³⁴

In *Clarke*, the Court cited two other decisions of the British Columbia Supreme Court: *K.L.B. v. British Columbia* ("*K.L.B.*")³⁵ and *C.A. v. Critchley* ("*Critchley*")³⁶ to the effect that: "everyone charged with responsibility for the care of children is under a fiduciary duty towards such children."³⁷ As a result, the key legal issue became whether the Crown had breached its fiduciary obligations owed to Aboriginal children in Residential Schools.

30. The *Constitution Act, 1867*, *supra* note 13, was brought into effect after Residential Schools were established and does not explicitly protect the rights of Aboriginal peoples. The statutory provision regarding existing Aboriginal and treaty rights was introduced in s. 35 of the *Constitution Act, 1982*, *supra* note 19. To date, the federal and provincial courts have not considered whether kinship is considered an existing Aboriginal right.

31. *W.R.B. v. Plint*, 2001 BCSC 997 (QL) [*Plint* cited to QL].

32. *F.S.M. v. Clarke* [1999] 11 W.W.R. 301 (B.C.S.C.) [*Clarke* cited to W.W.R.].

33. *Ibid.* at paras. 233-34.

34. *Ibid.* at para. 234.

35. *K.L.B. v. British Columbia* (1996), 66 A.C.W.S. (3d) 262 (B.C.S.C.).

36. *C.A. v. Critchley* (1997), 35 B.C.L.R. (3d) 234 (S.C.) (QL) [*Critchley* cited to QL]. For an interesting case comment on the *Critchley* decision see Clea Parfitt & Melinda Munro, "Whose Interests Are We Talking About?: A.(C.) v. *Critchley* and Developments in the Law of Fiduciary Duty", (1999) 33 U.B.C. L.Rev. 199.

37. *Critchley*, *supra* note 36 at para. 18.

In both *Clarke* and *Plint*, the Court had relied on *Critchley* to narrow the “ever-widening application of the principles of fiduciary duty.”³⁸ In that case, the Court reasoned that the fiduciary obligations of the Crown could only be breached where there was dishonesty, intentional disloyalty or personal advantage taken in a relationship of trust or confidence.³⁹ The court then found that the Crown’s conduct in implementing and facilitating the residential school was not dishonest, intentionally disloyal or to the Crown’s advantage.⁴⁰ Brenner C.J. stated in *obiter* that the residential school policy was badly flawed, but reasoned that,

Even a badly flawed policy does not necessarily equate to a breach of fiduciary duty in law. It is only when the flawed policy contains within it the necessary indicia of dishonesty or disloyalty that the breach of fiduciary cause of action is engaged.⁴¹

A number of concerns emerge from this judicial approach. First, the Court did not provide a legal definition of what could satisfy the dishonest or disloyal elements of the *Critchley* test. The Court’s finding that the plaintiffs had not met the burden under the *Critchley* test, insofar as they had failed to establish that the Crown was intentionally disloyal, implies a problematic definition of “disloyalty.”⁴² The political decision to forcibly remove Aboriginal children from their parents contains an element of inherent disloyalty because the Crown intentionally infringed the reasonable expectations of those parents. The statutory right for Aboriginal peoples to maintain kinship is not explicitly stated in Canadian law. However, Aboriginal peoples may have a constitutional right to maintain decision-making power about kinship. The *Constitution Act, 1982*, states that the Aboriginal rights in the *Royal Proclamation of 1763* (“*Royal Proclamation*”)⁴³ cannot be adversely affected by the *Canadian Charter of Rights and Freedoms* (“*Charter*”):⁴⁴

The guarantee in this *Charter* of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

- a) any rights or freedoms that have been recognized by the *Royal Proclamation* of October 7, 1763; and
- b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.⁴⁵

38. The courts in *H.(J.) v. B.C.*, [1998] B.C.J. No. 2926 (S.C.) (QL) and in *EDG v. North Vancouver School District No. 44*, 2001 BCCA 226 (QL) held that the requirement for fiduciary obligations only arose in situations in which the party behaved with dishonesty or intentional disloyalty. In both of these cases, the courts found further that *Critchley* requires that a fiduciary breach can only be found if the fiduciary takes advantage of a relationship of trust or confidence for his or her own direct or indirect personal advantage.

39. *Plint*, *supra* note 31 at paras. 244 and 246.

40. *Ibid.* at para. 247. In *W.R.B. v. Plint*, 2003 BCCA 671 (QL), the British Columbia Court of Appeal found that the trial judge did not err in dismissing the claim for breach of fiduciary duty and reasoned that the loss of culture and limitation claims were not properly pleaded and could not be raised at this stage.

41. *Plint*, *supra* note 31 at para. 248.

42. *Ibid.* at para. 247.

43. *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*].

44. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

45. *Constitution Act, 1982*, *supra* note 19 at s. 25.

Importantly, Aboriginal peoples considered the *Royal Proclamation* to be a declaration that the Crown would “protect their interests, and not allow them to be interfered with, especially, with regard to their land use and means of livelihood.”⁴⁶ The expectation that the lives of Aboriginal families would not be interfered with was also encoded in the two-row wampum belt, which represents the agreement of respect and autonomy between the Crown and Aboriginal communities. Assuming that the forced removal of children from their families would endanger the means of livelihood of the Aboriginal communities, the judicial reasoning that no disloyalty occurred during the implementation and facilitation of Residential Schools significantly ignores the historical basis of the Crown-Aboriginal relationship.⁴⁷

Secondly, the explicit purpose of the Residential Schools policy, which was to eradicate the influence of Aboriginal culture, language and custom, should be subject to modern constitutional principles. The British Columbia Supreme Court’s unwillingness to consider the legal validity of “badly flawed policy” stands in direct contrast to the reasoning in *Eldridge v. British Columbia (Attorney General)* (“*Eldridge*”)⁴⁸ and *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* (“*Auton*”),⁴⁹ in which the Supreme Court of Canada thoroughly analyzed whether the British Columbia government’s policy decision to cut health care funding breached s. 7 and s. 15 of the *Charter*. The government’s “badly flawed” policy decisions about Residential Schools and health care funding both had a detrimental effect on a minority group in Canada. As such, the courts should have applied constitutional principles in order to assess the validity of the government’s Residential Schools’ policy.

The counter-argument can be made that the *Charter* should not be applied retroactively to pre-1982 government decisions. However, the social and legal impacts of the residential school policy reverberate to this day. More importantly, new government decisions about Aboriginal children and families continue to be introduced. As such, the judiciary should be more aggressively assessing ongoing government decisions involving Aboriginal children and families in light of the *Charter*.

Finally, in *Plint*, the BC Supreme Court found that the Crown was in breach of its statutory duty to perform due diligence for the plaintiffs.⁵⁰ The finding that the Crown did not breach their fiduciary duty to act in the best interests of Aboriginal children, but did breach the statutory standard of care to provide special diligence, may indicate that the principle of fiduciary duty is being overshadowed by the principles of tort law. In an attempt to maintain

46. John Borrows, *Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation*, (1994) 28 U.B.C. L. Rev. 1 at 45. See also John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch. (Vancouver: UBC Press, 1997) 155; John Borrows, “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission” (2001) 46 McGill L.J. 615; Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

47. “Statement at Meeting of Ministers, Ottawa, 20-21 March 1986” in *Assembly of First Nations, Our Land, Our Government, Our Heritage, Our Future* (Ottawa: A.F.N., September 1990) at 18. The Statement reads: “As Indian First Nations we have an inherent right to govern ourselves. We have had this right from time immemorial (i.e., centuries before the arrival of the Europeans) and this right exists today. Neither the Crown in the right of the United Kingdom nor of Canada delegated the right to be self-governing to the First Nations. It existed in Canada long before Canada itself was a nation.” The inherent right of North American Indians to sovereignty was first recognized by the Two-Row Wampum in 1650, and later, by the Royal Proclamation of 1763 which speaks of “The several Nations or Tribes of Indians with which we are connected ...” and by subsequent treaties. The purpose was not to give rights to the First Nations but to give rights to the European settlers.

48. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (QL).

49. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 (QL).

50. *Plint*, *supra* note 31 at para. 259.

a distinction between fiduciary obligations and the principles of tort or contract law, the Court has created a common law test that makes fiduciary obligations significantly harder to breach. The eventual outcome of creating a higher threshold to show that there was a breach in a fiduciary relationship may be that fiduciary obligations become obsolete.

The significantly flawed judicial treatment of the experiences of Aboriginal children at Residential Schools highlights the need for the common law to provide more consideration to indigenous legal principles. Unfortunately, the existing common law approach to the Crown's fiduciary relationship with Aboriginal families has not been limited to the experience of Residential Schools.⁵¹ The courts have also failed to adequately define the Crown's obligations in situations in which Aboriginal children are removed from their parents and placed in child protection and adoption programs.

B. Child Protection: Reforming Families

Felicia Wale burst out in tears when the child protection worker told her that the government was not going to give back her two daughters. Two weeks after her 21-month-old son, Jor-el Macnamara, died while in government care, she could not understand why her worker believes her children were better off under government supervision.⁵²

The courts in British Columbia have applied a limited interpretation of the statutory requirement to consider an Aboriginal child's cultural heritage before allowing the permanent removal of a child from the care of her parents. To illustrate this, I will provide an analysis of two cases, which involve applications by extended family members to obtain custody of an Aboriginal child. First, I will discuss the unfairness of the Director of Child Protection's actions toward a child's grandparents in *N.M. v. J.M.*⁵³ Then I will discuss the evidentiary burden faced by a family with a history of violence and excessive drinking in *N.P. v. British Columbia* ("*N.P. v. B.C.*").⁵⁴ The following legal issues loom large in the jurisprudence regarding the removal of children from their families: 1) whether extended family members can obtain custody; 2) to what extent the court should consider the views of a community; and 3) how heavily the courts must weigh the importance of cultural heritage.

i. Grandparents' Kinship Rights

In *N.M. v. J.M.*, the British Columbia Provincial Court dismissed an application by the Director for a continuing custody order and granted custody to the child's maternal grandparents. This case is illustrative for two reasons: first, it is one of the rare decisions as the result of which grandparents are given custody of the child; and second, the social worker's

51. *Ibid.* at para. 247. It would be interesting to consider whether the outcome of these cases would be different if the lack of dishonesty, intentional disloyalty or personal advantage arguments were available as possible defense arguments, or mitigating factors, rather than requirements for the establishment of a breach.

52. Robert Matas, "Tragic consequences" *The Globe and Mail* (20 June 2009), online: [The Globe and Mail <http://www.theglobeandmail.com/news/national/british-columbia/tragic-consequences/article1190221/story.html>](http://www.theglobeandmail.com/news/national/british-columbia/tragic-consequences/article1190221/story.html).

53. *N.M. v. J.M.*, [1999] B.C.J. No. 1652 (Prov. Ct.) (QL) [*N.M.* cited to QL].

54. *N.P. v. British Columbia* (*Director of Child, Family and Community Services*), [1999] B.C.J. No. 470 (S.C.) (QL) [*N.P. v. B.C.* cited to QL].

decision to remove the child from his home raises significant concerns about the lack of judicial review of the use of discretion.⁵⁵

In June 1997, a three-year-old boy was removed from the care of his grandparents. The boy's removal from his grandparents' care was the direct result of a medical practitioner's failure to adequately consult with the family. The child's mother, who was not the primary caregiver, had begun to experience depression and thoughts of suicide. She sought medical advice from Dr. McKinnon, who admitted her to psychiatric care.⁵⁶ Dr. Kinnon mistakenly believed that the grandparents were not prepared to care for the child. The Public Health Nurse and a Band Councilor were consulted about removing the child from his grandparents' care.⁵⁷ Unfortunately, Dr. McKinnon did not consult the grandparents themselves. Further, the grandparents were led to believe that the child was being taken for a visit to Tsay Keh with his mother. Instead, the mother was admitted to hospital and the child was placed in foster care.⁵⁸

During the three years that the boy was in foster care, he was diagnosed as having moderately severe attention deficit hyperactivity disorder, fetal alcohol effect, developmental delays, sleep disorder, expressive speech delay, oppositional defiant disorder and suspected post-traumatic stress disorder. To treat these conditions, the child was prescribed Ritalin and clonidine.⁵⁹

On October 28, 1998, sixteen months after the boy was removed from his grandparents' care, the Director of Child Protection applied for a continuing custody order. During the custody hearing, three witnesses testified that returning the child to the grandparents might not be in the child's best interests. First, the foster mother described the child as "wild, undisciplined, extremely hyperactive, impulsive and suffering from a sleep disorder."⁶⁰ Second, a pediatrician diagnosed the child as "a high needs child with a moderately severe attention deficit hyperactivity disorder and fetal alcohol effect, developmental delays and a sleep disorder as well as expressive speech delay, an oppositional defiant disorder and suspected post-traumatic stress disorder."⁶¹ Finally, a child psychologist described the child as

55. There are conspicuously few cases involving custody of children by grandparents. This appears to be the leading case in British Columbia. Unfortunately, it is ten years old and does not seem to have been followed.

56. *N.M.*, *supra* note 51 at para. 3. The child's mother was just 15 when her child was born; her parents were the primary caregivers. The time period between the removal of the child and this court decision is two years. Studies show that children need certainty in their attachment with primary caregivers during the first six years of their lives. A lack of certainty can result in significant developmental delays. In recognition of this, the federal, provincial and municipal governments have participated in a long-term research-based project, which seeks to mitigate the negative effects of poverty and emotional distress in the lives of children who are under the age of six. The "Success by Six" initiative is coordinated and funded by the United Way of Canada, a national non-profit organization. Aboriginal Engagement Coordinators associated with the program have been assigned to regions throughout the province. Details about it can be found at: "Aboriginal Engagement," online: Success By Six <<http://www.successby6bc.ca/aboriginal-engagement>>.

57. *N.M.*, *supra* note 51 at paras. 1, 4 and 5. Importantly, the Band Councilor John McCook testified that he had no recollection of being consulted by Dr. McKinnon and would certainly not have said the grandparents could not care for the child. He testified that the grandparents were devoted to all their grandchildren. The Band supported the grandparents' application for custody of the child.

58. *Ibid.* at para. 5.

59. *Ibid.* at para. 7.

60. *Ibid.*

61. *Ibid.* at paras. 7, 18 and 19. The child pediatrician had prescribed Ritalin and clonidine for the child. At the initial continuing custody trial, she raised concerns that the grandparents would not conscientiously administer the medication. She also raised concerns that the child would be emotionally disturbed if he was returned to the grandparents.

“one of the most destructive and impulsive children tested.”⁶² Despite these diagnostic testimonies, Ramsay Prov. Ct. J. noted that the boy did not exhibit these negative patterns of behaviour before he was unexpectedly removed from his grandparents and placed in foster care and granted a three-month continuing custody order on the condition that the child return to his grandparents. He also imposed terms of supervision.⁶³ Despite this order, the Director did not return the boy to his grandparents.⁶⁴

On May 26 and 27, 1999, two years after the boy was removed from his grandparents’ care, the Director applied for another continuing custody order. The Director expressed some concerns about the grandparents’ drinking.⁶⁵ However, the Director’s primary concern was that the grandparents were not “persons that can be entrusted with administering the child’s medication.”⁶⁶ The Provincial Court found that the Director relied on “anticipatory concerns” when, contrary to the terms of the previous continuing custody order, the child was not returned to his grandparents.⁶⁷

Auxier Prov. Ct. J. held that the benefits of the child being with his family should take precedence over the willingness of the foster family to administer care and medication or the Director’s ability to provide speech therapy.⁶⁸ The Court heavily weighed the benefits of the permanent, unconditional acceptance offered by the grandparents. The child’s desire to be with his grandparents and the importance of preserving his cultural identity were also accorded significant consideration.⁶⁹ Thus, in accordance with the statutory obligation to consider the child’s Aboriginal community ties, the Court chose to return the child to his grandparents.

There are a number of areas of weakness in this process. First of all, the statutory requirements, set out in s. 16 of the *CFCSA*, which requires the Director to make an assessment about whether a child is in need of protection and to report the outcome of that assessment to the primary caregivers or to “any other person necessary ...to ensure the child’s safety and wellbeing” and in s. 35 of the *CFCSA*, which requires the Director to provide the court with an interim plan of the “steps taken to preserve the child’s aboriginal identity” and to

62. *Ibid.* at para. 7.

63. *Ibid.* at paras. 2, 7 and 8.

64. *Ibid.* at para. 15.

65. *Ibid.* at paras. 21-25. Testimony was given that drinking occurred at the grandparents’ home after they had been served notice of the Director’s second attempt to obtain a continuing custody order. The grandparents had expected the child to be returned to them. The Director required that the grandparents attend residential treatment. The grandparents testified that employment and family responsibilities would make it difficult to attend residential treatment. Expert evidence was also provided that residential treatment would not be appropriate. The Court found that the key factor motivating the grandparents’ drinking was “their sense of being defeated.” The Court also accepted that the grandparents had made a commitment to sobriety, shown significant strength in remaining sober during difficult circumstances, and were able to receive adequate support from work colleagues and friends to maintain sobriety.

66. *Ibid.* at paras. 19, 26, 32, 33, 34 and 42. The child’s pediatrician had prescribed Ritalin and clonidine. The grandparents were of the opinion that the child did not have behavioural problems prior to his removal from their home. They therefore opposed the prescription of this medication. The Public Health Nurse expressed concerns about the administration of medication without the grandparents’ consent. She suggested that the grandparents work with the child’s teacher to assess the appropriate administration of medication. The court held that the terms of custody did not necessitate an order requiring the grandparents to administer medication.

67. *Ibid.* at para. 15.

68. *Ibid.* at paras. 35 and 36.

69. *Ibid.* at paras. 37 and 40.

explain the less disruptive measures considered before removing the child, were not met.⁷⁰ No evidence was proffered to support the assertion that the child was in need of protection while in the grandparents' care.⁷¹ Further, the child was removed from his grandparents without notice and without adequate consultation with the child's family. Second, the Director was able to ignore the terms of the initial judicial order to return the child to his grandparents. Third, the decision to administer medication to the child, without the consent of his primary caregivers or consultation with members of the child's community, was not addressed. Finally, there is a significant human concern that was recognized but not remedied by the courts: the grandparents' emotional distress as a result of the deprivation of custody. Although the court order was a "success" for the grandparents, there were two years where the child's wellbeing and development were significantly disrupted. The loss of security, the emotional and financial cost imposed by the judicial process and the emotional distress experienced by the community were not remedied.

The experience of this Aboriginal family, deprived of a care-giving relationship with a young grandchild without legal cause, raises an important issue: should the courts be able to provide a remedy to a family that suffers a loss because of the illegal conduct of government decision makers? As in the cases of Residential Schools abuse, the Court did not thoroughly address the profound way in which the decisions of the state have detrimentally impacted the seized child and his family. Although the Court's reasoning assesses the best interests of the child, there is no remedy provided for the losses incurred by the family as a result of government misconduct.

An informed common law approach would seek to understand and apply indigenous legal principles in order to compensate the shame, loss and harm experienced by the family. Later in this paper, I will suggest how Aboriginal narrative contains the legal principles and remedies to properly restore the integrity of families. This new approach would allow for judicial assessment of "badly flawed" discretionary decisions and provide a remedy where illegal actions have severely damaged the wellbeing and security of Aboriginal families.

ii. Substance Abuse in Families

To elaborate on how the court applies the principle of "anticipatory concerns," which were raised by the Director in *N.M. v. J.M.*, I have chosen a similar custody application from the same Aboriginal community:⁷² *N.P. v. B.C.* involves an appeal by an uncle seeking custody of two children who had been apprehended from their home because of their parents' excessive drinking and incidents of violence. The children's uncle submitted that the trial judge had not given adequate weight to the importance of Aboriginal heritage and the need to preserve the children's cultural identity.⁷³ The appellant also submitted that the Court placed too much emphasis on the drinking patterns of the parents.⁷⁴ Finally, the appellant asked the Court to interpret the statutory principles, set out in ss. 2-4 of the *CFCSA*,

70. *Ibid.* at para. 7. *CFCSA*, *supra* note 22 at ss. 16 and 35.

71. *Ibid.* at para. 8.

72. *N.M.*, *supra* note 51, and *N.P. v. B.C.*, *supra* note 52, both involved applications for custody of children from the Kwadacha Nation (home of the Tsek'ene people). The principal settlement in the Nation's territory is Fort Ware, located approximately 570 km north of Prince George, British Columbia.

73. *N.P. v. British Columbia*, *supra* note 52 at para. 2. The appellant relied on s. 4(2) of the *CFCSA*, *supra* note 22.

74. *Ibid.* note 52 at para. 4. The appellant argued that the learned trial judge placed undue emphasis on the drinking patterns of the family.

in light of evidence that Aboriginal children experience significant feelings of disconnection from their Aboriginal roots by the time the long-term care of the Director ends.⁷⁵ The important legal issue in *N.P. v. B.C.* was to what extent the Court should weigh the history of substance abuse, and anticipatory concerns about the children's future safety because of that substance abuse, against the need to consider Aboriginal kinship relationships.

The trial judge relied on the facts of the drinking incident to dismiss the appellant's application.⁷⁶ In recognition of the need to maintain Aboriginal kinship, the trial judge had ordered the following terms of access: at least one month in the summer, at least half of the spring break holiday, one-half of every Christmas holiday, access visits in Mackenzie or in Fort Ware at the expense of the Director and telephone access at the expense of the Director.⁷⁷

In reviewing the trial judge's decision, Chamberlist J. of the British Columbia Supreme Court reasoned that, "where there is a real apprehension of risk then the paramount concerns of safety and security will generally outweigh any concerns about the preservation of cultural identity."⁷⁸ He relied upon this reasoning to uphold the trial judge's finding that, because of excessive drinking, there was a "real possibility" of harm to the children.⁷⁹ As a result, the application for custody of the children was dismissed.

The Court has determined that the paramount consideration should be the safety of children. This reasoning follows the plain language of s. 2 of the *CFSDA*, which states: "the safety and well-being of children are the paramount considerations." In assessing the safety of the children, however, the Court has chosen to allocate heavy weight to all *possible* harms. As a result, Aboriginal children have been removed from their communities because the family has failed to convince the Court that they have addressed some potential risk.

Although this judicial approach is proactive, in the sense that it protects children from unsafe circumstances, it presents a legal dilemma for Aboriginal families and communities. The Court's practice of heavily weighing an anticipated harm places an extremely high burden of proof on the Aboriginal community. *N.P. v. B.C.* is an example of the plight faced by many Aboriginal families. If a history of substance abuse exists, the court will choose to ignore the good (i.e. child-care support from within the Aboriginal community) and emphasize the bad (i.e. previous incidents of alcohol abuse). There is no consideration of whether community resources for treatment are available or the extent to which an applicant has been personally involved in excessive drinking or violence that may be taking place elsewhere in the extended family.

In comparison with the common law approach, the antamahlaswx narrative deals explicitly with both the breakdown and the restoration of kinship. In the narrative, the difficult experiences of the abandoned mother are transformed into a situation where the family becomes prosperous and the children are able to receive adequate education, nourishment and care. Whereas the common law approach seeks to protect children by permanently removing them from the family, an indigenous law approach would look for the practical

75. *Ibid.* at para. 5. Mavis Henry, former Deputy Superintendent for Aboriginal Children and Aboriginal Services, and Chief Emil McCook, then Chief of the Kwadacha Band, both provided evidence.

76. *Ibid.* at paras. 28 and 29. The drinking party incident occurred in 1998. As a result of this incident, S.M. suffered stab wounds to her leg and was treated at hospitals in MacKenzie and Prince George, British Columbia.

77. *Ibid.* at para. 30.

78. *Ibid.* at para. 43.

79. *Ibid.* at para. 45.

solutions (e.g. provision of basic resources) to resolve the circumstances faced by the family. Later in this paper, I will discuss the principles that could be implemented to begin recognizing and cultivating “the good,” by providing a long-term plan of care for the wellbeing of Aboriginal children and by allocating resources to Aboriginal communities, rather than presuming that a policy of forcible removal should prevail.

C. Adoption: Removing Identity

At that time I will gather you; at that time I will bring you home.
– Zephaniah 3:20⁸⁰

The jurisprudence in British Columbia provides some possibility that custom adoption could be recognized as an existing Aboriginal right under s. 35 of the *Constitution Act, 1982*.⁸¹ The judicial treatment of Aboriginal adoption raises two important legal issues: 1) whether custom adoption may be recognized⁸² and 2) to what extent the court must weigh the interests of an Aboriginal community in approving an adoption.

First, the courts in British Columbia have recognized the existence of custom adoptions in some situations.⁸³ For example, in *Casimel v. ICBC* (“*Casimel*”), the Court recognized custom adoption in the context of an application for a civil remedy.⁸⁴ Despite the decision in *Casimel*, the judicial approach to custom adoption has not recognized other forms of custom adoption (e.g. open adoptions, common law adoption, elder adoption, etc.).

Second, the “duty to consult” the Aboriginal community has not been consistently upheld. For example, in *C.D. v. P.B.*,⁸⁵ the Court disregarded evidence available from elders in the community. Without an explicit right to maintain kinship with a child, the community is able to participate in the adoption process, but not able to determine its outcome.

D. Summary of Judicial Approach to Aboriginal Kinship

The current judicial interpretation places paramount importance on a child’s safety, with-

80. Historically, many Aboriginal adoptions were influenced by an underlying assumption that a child would be better off in a white, Christian home. The effects of this policy have been, in many ways, similar to the effects of Residential Schools as it reflects a prejudicial bias against Aboriginal families. In contrast to this adoption-as-severance policy, I chose to incorporate this scripture because it reflects the concept that a child always be retrieved by a caregiver and returned to their home.

81. See Bill Lomax, “Hlugwit’y, Hluuxw’y –My Family, My Child: The Survival of Customary Adoption in British Columbia” (1997) 14 Can. J. Fam. L. 197 at 206.

82. In addition to the legal issues, there are procedural issues with respect to facilitating the reunification of adopted children and their kinship communities. Unfortunately, a fuller consideration of whether Aboriginal children are adequately informed of their statutory rights, whether the Aboriginal community is provided with the resources to facilitate reunification and whether open adoptions are enforceable are beyond the scope of this article. I will, however, briefly touch on these points in discussing the policy objectives of a new judicial approach.

83. Cindy Baldassi, “The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences” (2006) 39 U.B.C. L. Rev. 63. See also Kisa Macdonald, “Customary Adoption in British Columbia: Recognizing the Fundamental Differences” (2009) 14 Appeal 17.

84. *Casimel v. ICBC* (1993), 106 D.L.R. (4th) 720 (B.C.C.A.) (QL).

85. *C.D. v. P.B.*, 2006 BCSC 1515 (QL).

out giving adequate weight to the interests or needs of the child's community.⁸⁶ A common theme recurs throughout the above-mentioned cases: the discretionary powers allocated to government officials (e.g. social workers) ill-serve the need of Aboriginal communities to find solutions to situations involving mental health, substance abuse and poverty.

IV. PRINCIPLES FOR A NEW APPROACH

The pre-emptive approach of the court, together with the government policy of intervention and removal, has resulted in a continuation of permanent, widespread displacement of children from their communities. Unsatisfied with the social consequences of this outcome, I will suggest four policy objectives that could inform a new judicial approach: 1) recognizing social conditions; 2) supporting a caregiver; 3) reuniting kinship; and 4) providing resources.⁸⁷ As will be seen, the courts must consider the social need to provide support and facilitate reunification of families when determining the long-term placement of Aboriginal children.

A. Recognizing Social Conditions

*She sat on the banks of the 'Xsan thinking she could easily slip into the water.
Who would know and who would care.*

The issue of despair, identified by the Court in *N.M. v. J.M.*, is an emotional reality for many Aboriginal families. The first branch of a new judicial approach should consider the social hardships faced by many caregivers.⁸⁸ Aboriginal children, in particular, often live in circumstances of violence, alcoholism and extreme poverty.⁸⁹ The case law reveals that the court will recognize instances of substance abuse and violence in cases concerning the protection of children. However, it is difficult for the court to accurately identify the extent of substance abuse. It is equally difficult for the court to order a remedy that would facilitate treatment.

The Gitksan narrative, at the beginning of this paper, speaks openly of the hardship of a young, single mother's life. It provides an accurate portrayal of the bleak circumstances she faces. The courts should likewise be able to recognize and weigh the hardship of Aboriginal families.

86. In weighing the best interests of the child, the courts have maintained an underlying assumption that the appropriate role of the Crown is to intervene in the lives of Aboriginal families. This is protectionist in the sense that the Crown assumes control of the situation, disciplining Aboriginal families, rather than considering the long-term social consequences of their intervention and acting in the best interests of Aboriginal society.

87. These four policy objectives are found in the Gitksan narrative given at the beginning of this paper. Ideally, the courts would adopt a new line of legal reasoning that adequately measures the practices of the Crown. This "new approach" is not so new, as it would be analogous to the courts' approach to judicial review processes and criminal sentencing practices. For example, in immigration law, the discretionary decision of a visa officer about whether a family can enter Canada can be reconsidered when adequate written reasons for refusing a visa are not given, or when a material fact is not properly considered. I am curious as to why the courts do not take a similar approach to the procedural fairness of decision makers who are responsible for removing children from their families. Likewise, there is no judicial consideration of the disproportionate number of Aboriginal children in the child welfare system.

88. See *British Columbia Aboriginal Child Care Society*, online: Aboriginal Child Care Society <<http://www.acc-society.bc.ca>>.

89. See *Broken Promises*, *supra* note 21.

Judicial consideration of the hardship faced by Aboriginal families could be achieved in a way that is analogous to the sentencing provisions applied to Aboriginal inmates, which require that judges pay “particular attention to the circumstances of aboriginal offenders.”⁹⁰ In other words, the courts could take into consideration the fact that Aboriginal communities have a disproportionate number of children taken from the care of their families. The courts could then, in recognition of the unique rights of Aboriginal children, apply specific legal principles to address this social disparity. Currently, the number of Aboriginal children in the provincial government’s care is estimated at roughly 4,600.⁹¹ This statistic is particularly alarming given the relatively small proportion of the provincial population that is Aboriginal.⁹² Another alarming trend to take into consideration is the high incidence of suicide among Aboriginal youth.⁹³

The current legal approach that looks to remove Aboriginal children from their family, without an accurate assessment of the circumstances faced by that family, does not provide an adequate resolution of the social conditions that may be found in Aboriginal communities. A revised legal approach would find a way of recognizing the correlation between the social factors of despair, suicide, substance abuse and the high rate at which Aboriginal children are apprehended.

B. Supporting a Caregiver

She became strong and confident and soon she had many salmon hanging in the smokehouse. Her children grew very quickly and soon were a help to her. They hunted and trapped small animals, they fished and they picked berries.

The mother explained to her children that their people had moved away because she did not know who their father was. She instructed her children and taught them about the land.

The second policy objective of a new approach towards decisions about Aboriginal children should be to provide an opportunity for a caregiver to gain strength, confidence, and prosperity. The Gitksan narrative tells of the responsibilities of a caregiver to tell stories, instruct and teach about the land. The path to restoring the caregiver’s role is spiritual: *Uun ts’iits* (supernatural being) comes to the weeping mother to help, teaching her how to effectively fish so that her children receive proper care. In other words, support is provided from beyond the caregiver’s own resources.

90. *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2 (e). See also *R. v. Gladue*, [1999] 1 S.C.R. 688.

91. *Broken Promises*, *supra* note 21.

92. Statistics Canada, *Aboriginal identity population by age groups, median age and sex, 2006 counts, for Canada, provinces and territories*, (Ottawa: Statistics Canada, 2008), online: Aboriginal Peoples Highlight Tables, 2006 Census <<http://www12.statcan.ca/english/census06/data/highlights/aboriginal/index.cfm?Lang=E>>. The total population of British Columbia is 4,074,385. The Aboriginal population in British Columbia is 196,075. The North American Indian population in the province is 129,580, the Metis population is 59,445 and the Inuit population is 795. The non-Aboriginal population in British Columbia is 3,878,310.

93. Health Canada, *Acting on What We Know: Preventing Youth Suicide in First Nations* (Ottawa: Health Canada, 2005) online: First Nations, Inuit and Aboriginal Health <http://www.hc-sc.gc.ca/fniah-spria/pubs/promotion/_suicide/prev_youth-jeunes>. Between 1987 and 1992, in British Columbia, First Nations youth (aged 15-24) had 108.4 suicides per 100,000 persons, while during the same period non-Native youths (aged 15-24) had 24.0 suicides per 100,000. First Nations youth in B.C. therefore have a suicide rate 4.5 times that of non-Native youth.

The current approach to child protection and adoption emphasizes the need for a child's immediate safety. There is little recognition of the need for support to be provided to the child's caregiver.⁹⁴ A revised legal approach would consider the fiduciary obligations of the Crown towards Aboriginal caregivers, recognizing that the best place for a child is with his family. It would also recognize that a child's safety may also be determined by a number of other contributing factors including: the ability to provide food, shelter, clothing, nurture, acceptance and affirmation to a child.⁹⁵ Like the experience of the weeping mother, a child's safety is best protected when the child's caregiver has the opportunity to bring about positive changes, utilizing unique Aboriginal knowledge and skills to support, nurture and educate.⁹⁶

In practical terms, a judicial approach that supports the caregiver would need to utilise all the individuals subject to kinship obligations, such as grandparents, other extended family members and community leaders, in order to assist in raising the child. Rather than focusing on the dysfunction of the family or imposing onerous requirements (e.g. requiring, as the Director of Child Services did in *N.M. v. J.M.*, that caregivers attend a distant residential treatment program, regardless of whether employment and family responsibilities make that attendance impossible), the Director would need to show that appropriate measures have been taken to provide adequate support to the family. Appropriate support could include mediation, in-home assistance or the involvement of public health services.⁹⁷ For example, in *N.M. v. J.M.*, the public nurse had a long-standing relationship with teachers, the grandparents, the Kwadacha Band and the medical community, which enabled her to provide a realistic assessment of the caregivers' ability to ensure the child's health. This assessment stands in stark contrast to the child's pediatrician who feared that the grandparents would simply disregard her prescribed course of treatment. The case clearly showed how a system that relies on community-based support services is more likely to be effective than the adversarial, lengthy and costly process of forcibly removing a child and resolving the custody matter in the courts.

C. Reuniting Kinship

Many years passed and her father, the chief, forgot his anger. He sent out his warriors to fetch the bones of his daughter so that he could mourn her. The warriors returned with astonishing news. The chief's daughter and his three grandchildren were alive and well.

The third aspect of a new legal approach would recognize the importance of facilitating family reunification. A proactive approach to reunification would ensure that adopted children are aware of their rights to pursue relationship with their biological families and to maintain Aboriginal status. There would also be a broader judicial recognition of custom-

94. For a feminist critique of the (lack of) support available to mothers in the adoption process, see Katrysha Bracco, "Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child" (1997) 35 Alb. L. Rev. 1035.

95. In *N.M.*, *supra* note 51, the B.C. Provincial Court recognized that the child received "unconditional acceptance" from his grandparents and that such acceptance was significantly lacking in his foster care experience.

96. For a theoretical approach that also considers the concepts of transformation, universalism and the acceptance of different perspectives and physiological experiences see Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42 McGill L.J. 91.

97. In other areas of family law (e.g. where a couple has separated, is seeking to reach a custody agreement or wants to divorce), the courts require the parties to have made attempts to reconcile prior to bringing the matter to court.

ary adoption and open adoption principles, which allow for continual contact between the biological parents and adoptive family.

A more innovative approach towards Aboriginal kinship would devolve responsibility for child welfare and adoption services to the First Nations.⁹⁸ The legal issue that would need to be resolved is whether s. 35 of the *Constitution Act, 1982* includes an existing right to maintain Aboriginal families.⁹⁹

D. Providing Resources

The chief and his people returned to the first Gitanmaaxs to find a woman with much wealth in the smokehouses.

The final objective of a revised approach to Aboriginal kinship would be to recognize the need for Aboriginal families to be able to access support services and to benefit from more expedient, solution-oriented decisions about the care of their children.¹⁰⁰ As a general rule, out of deference to Parliament, the Supreme Court of Canada has not been willing to order the federal or provincial governments to take on positive obligations to expend resources. As a result, it is likely that the government, rather than the courts, would need to implement an appropriate resource strategy.¹⁰¹

A possible step forward would be for the federal or provincial governments to implement an alternative dispute-resolution system, which would employ the expertise of persons in

98. The Carcross Tagish, Kwanlin Dun, Ta'an Kwach'an and Kluane First Nations have recently commenced a constitutional challenge against the child welfare policies of the Yukon government. See: "Yukon First Nations Want Control over Child Welfare" *CBC News* (17 July 2009), online: CBC News <<http://www.cbc.ca/canada/north/story/2009/07/17/yukon-child-welfare.html>>.

99. As explained in the discussion above regarding the potential constitutional analysis of Residential Schools, First Nations may have legal grounds under s. 25 and s. 35 of the *Constitution Act, 1982* to claim an existing right to maintain kinship relationships. For an elaboration of how this would apply to British Columbia, see Ardith Walkem, *Calling Forth Our Future: Options for the Exercise of Indigenous Peoples' Authority in Child Welfare* (2002), online: Union of B.C. Chiefs <http://www.ubcic.bc.ca/files/PDF/UBCIC_OurFuture.pdf>.

100. Patrick Macklen, "Aboriginal Rights and State Obligations," (1997) 36 Alb. L. Rev. 97. This article investigates the nature and scope of Canada's constitutional obligations towards Aboriginal people. More specifically, the author explores the question of whether or not constitutional recognition of Aboriginal rights imposes a positive obligation on governments in Canada to provide economic or social benefits to Aboriginal people. He examines the arguments on both sides and argues for a middle path which would require governments to provide some benefits in certain circumstances. Whether or not a particular social or economic benefit is required by s. 35(1) of the Canadian Constitution would depend on whether or not it is integral to the protection of one of the purposes or interests served by constitutional recognition and affirmation of Aboriginal rights in general. These purposes or interests include respect for Aboriginal identity, territory and sovereignty. In addition, domestic fiduciary obligations and international human rights documents support the view that federal, provincial, and territorial governments ought to provide certain social and economic benefits to Aboriginals.

101. The urgent need for a more collaborative, supportive approach to the care of Aboriginal children was brought to my attention while researching this paper. On July 29, 2009, the B.C.'s Representative for Children and Youth issued a report on an incident involving the illegal apprehension of an Aboriginal child. The social worker in question did not have statutory authority to remove the child. The reason for the child's apprehension was poor housing conditions, not the parent's inability to care for the child. Rather than providing assistance to those parents, the social worker moved the child to a foster home located off of the reserve. Subsequently, the child was permanently injured while in foster care. See Lindsay Kines, "B.C.'s child watchdog says injured baby should never have been in care: advocate" *Times Colonist*, (29 July 2009), online: Times Colonist <<http://www.timescolonist.com/life/child+watchdog+says+injured+baby+should+never+have+been+care+advocate/1839748/story.html>>.

the community who have knowledge about the care and resources available to families.¹⁰² The revised approach could involve a tribunal process, which would be analogous to the way the legal system handles human rights complaints, refugee hearings or employment standards inquiries. Each of these tribunals has a review procedure that aims to resolve conflicts in a way that is timely, remedial and fair. A review panel could involve expert members from the health care, addictions treatment, non-profit organizations and Aboriginal communities. Rather than leaving the removal decision solely to the discretion of a social worker and arriving at a subsequent custody decision only after a lengthy wait, the tribunal process would be focused on the immediate problems of the family. A tribunal may also be able to order restorative measures in situations where an individual has been mistreated or harmed.

The allocation of resources for a tribunal would likely mean significant savings in legal fees for the family fighting removal. The outside-the-court model would also be more likely to provide Aboriginal families with restorative outcomes. For example, a panel of experts are more likely to be able to direct a young couple to alternative housing funds or to provide suitable addictions counselors, as they are more closely integrated into the governmental bureaucracy and have experience working in Aboriginal social services. Ideally, the tribunal system would allow experts from both Canadian and Aboriginal societies to exercise problem-solving skills in a transparent fashion, while identifying both the short-term needs and long-term goals of a family. The hope would be to facilitate collaborative, constructive decisions that take into account various sources of knowledge and ensure the best interests of the child.

V. LEGAL REMEDIES FOR RESTORING ABORIGINAL KINSHIP

A great feast was held to celebrate the reunion and Gitksan names were given to the children.

The Gitksan narrative provides two remedies for establishing a child's kinship rights: hosting a feast and giving the child a name. Within the Gitksan House system, there are two types of adoption feasts: adoption of an individual (*ts'ilimdoogamnidiit*) and adoption of a whole family (*dimk'aphlwilp*). In addition, citizenship among the Gitksan is managed by the giving of names.¹⁰³

As mentioned earlier in this paper, the common law is beginning to apply indigenous legal principles to determine appropriate legal remedies. In order for kinship to be adequately recognized, the Canadian legal system will need to gain an understanding of the applicable customary processes. Each Aboriginal community will have their own narratives and customs, which provide protocols for the restoration of Aboriginal kinship. Therefore, a common law system that intends to uphold kinship will need to be adapted to each community's cultural norms.

102. See Cindy Blackstock and Nico Trocmé, "Community-based Child Welfare for Aboriginal Children: Supporting Resilience through Structural Change" (2004), online: Centres of Excellence for Children's Well-Being <<http://www.cecw-cepb.ca/publications/576>>.

103. Napoleon, *supra* note 2. Gitksan citizenship and adoption laws are distinct from Band membership guidelines as per the *Indian Act*, *supra* note 14.

CONCLUSION

Throughout this article, I have argued for a revised legal approach to Aboriginal kinship, which recognizes both the unique interests of Aboriginal children, as well as the cultural norms of their communities.

Although the federal government recently offered political recognition of the historical losses experienced by Aboriginal children, this recognition has not yet resulted in statutory reform. Likewise, the Court has not yet considered whether Aboriginal children, families, and communities have a constitutional right to maintain kinship.

The statutory reforms implemented by the British Columbia government, which intended to protect the unique interests of Aboriginal children and attempted to recognize the decision making power of Aboriginal communities, continue to be narrowly interpreted by “front-line” government decision makers. As such, the practical application of the law continues to result in limited consideration of the needs of Aboriginal children to maintain kinship relationships and little — or no — consultation with Aboriginal caregivers.

I have suggested that an appropriate judicial approach would seek to incorporate four principles found in a Gitksan narrative, namely: recognizing social conditions, supporting the caregiver, reuniting kinship, and providing resources. I have also shown that narrative provides at least two remedies for recognizing and restoring kinship.

Future developments of Canadian law will need to implement culturally appropriate mechanisms from which government workers and the Courts may make informed decisions concerning the care of Aboriginal children. It is my hope that future legal reforms create practical legal tools, either by statute or in the common law, that explicitly recognize the inherent interest that an Aboriginal child has in maintaining kinship and allow practical consideration of the legitimate concerns of Aboriginal communities.