

Office of the Child and Youth Advocate

Submission on the Adoption Act 2013 Review

April 2020



Introduction

The Office of the Child and Youth Advocate is mandated to protect, advance and represent the rights of children and youth in Newfoundland and Labrador. As a Statutory Officer of the Legislature, the Child and Youth Advocate is empowered by law to act independently in carrying out her duties to advocate for children's rights. Mandated functions include individual and systemic advocacy, investigations and reviews, and public education. The Office of the Child and Youth Advocate operates from a rights-based perspective and in accordance with the **United Nations Convention on the Rights of the Child (UNCRC)**. It is within this context that this submission is presented in response to the Department of Children, Seniors and Social Development's public request for input into the review of the **Adoption Act**.

United Nations Convention on the Rights of the Child

The **United Nations Convention on the Rights of the Child** is a comprehensive child rights framework that supports children's development and wellbeing. This is the most broadly endorsed human rights treaty in the world. Canada ratified the **UNCRC** in 1991 with written support from all jurisdictions. The four guiding principles of the **UNCRC** are:

1. Non-discrimination – all rights apply to all children without exception
2. Best interests of the child – this must be the first consideration in all decisions affecting children
3. Life, survival and development – all children have the right to live and survive, and to develop to the maximum degree possible
4. Participation – all children have the right to be heard and to participate in decisions affecting them in a way that is reflective of their age and developmental level

A child's voice is crucial to help in determining best interest of the child. Article 12 of the **UNCRC** specifically recognizes a child's right to participate in decisions impacting them. This means that there must be an active process whereby children can be informed, have opportunity to express their views, and have these views considered. It must be meaningful input and not token participation, or passive offers of participation.

Adoption is about children's wellbeing and their right to have a home and family. The best interest of the child is a central principle and right in the **UNCRC** and which should guide all laws, policies and programs for children. In cases of adoption, consideration of a child's best interest includes respect for a child's right to family ties (Article 9), the right to an identity (Article 8), privacy (Article 16), the right to be heard (Article 12), and the

right to be connected to their own culture (Article 30). Additionally, Article 20 asserts that when children are temporarily or permanently unable to be with their family, due regard must be given to ensure alternative care maintains continuity of their cultural identity.

The Office of the Child and Youth Advocate proposes that any changes to the current **Adoption Act** reflect a child rights perspective and must consider how children's rights and interests will be affected both directly and indirectly. In this regard, a child rights impact assessment would be particularly valuable.

Participation and Engagement

Unlike the previous review of the provincial adoptions legislation when government sought public and stakeholder input, the Department of Children, Seniors and Social Development did not provide a discussion guide for this review. The online questionnaire contained a secure portal with specific questions for those with direct involvement in an adoption process. These questions were not visible to the public. Additionally, the public-facing questions for online feedback provided a very short list of general questions. While this may potentially be seen to offer opportunities for a broader discussion, it may also serve the opposite effect so that only those who are very knowledgeable about the topic will be able to engage. This is very much a public policy issue and opportunities for meaningful public engagement are important.

It is unclear how or if young people have been engaged in this review process. If this has not been separately considered with a focused plan to appropriately and meaningfully engage young people who are directly knowledgeable about adoptions processes, then **this consultation exercise should not be considered complete until young people's voices have been heard and considered.**

Pre-Adoption Openness Agreements

Openness Agreements are agreements that provide for maintaining some degree of contact between adopted children, their birth families and other individuals with whom the child may have a significant prior relationship (Department of Children Seniors and Social Development, 2014). Openness agreements are commonly found in adoption legislation throughout Canada. This is an important advocacy issue because youth have contacted the Office of the Child and Youth Advocate with concerns about these agreements not being kept and honoured.

The current legislation supports openness agreements between a prospective adoptive parent of a child and:

- a. a birth parent of that child;
- b. a relative of that child;
- c. a person significant to that child; and
- d. a prospective adoptive parent or adoptive parent of a birth sibling of that child.

An openness agreement is a “good faith” agreement in Newfoundland and Labrador, with no legal remedies to enforce mutually agreed upon conditions. Adoption legislation in some provinces and territories such as Nova Scotia, New Brunswick and the Yukon contain provisions to resolve disputes arising under openness agreements (Nova Scotia Government, 2017, New Brunswick 1980 & Yukon Government 2008).

Openness in adoption has many benefits for children. It enables them to maintain relationships with their birth family, and their siblings who may live in different homes. It enables them to maintain cultural and community connections. When openness agreements are in the best interest of the child, there is a responsibility to honour them.

Article 9 of the **UNCRC** speaks to a child’s right to their family ties. Openness in adoption supports this right. Additionally, Article 12 of the **UNCRC** asserts a child’s right to be heard and have adults take them seriously. Current adoption policy supports this right as it acknowledges that children over 12 must agree to an openness agreement (Department of Children Seniors and Social Development, 2014). However, without a remedy to ensure commitment to this agreement, this policy falls short. There is no accountability to children when they have concerns. This is unacceptable. This is an area in legislation where children’s rights need better protection.

Proposal 1:
Establish dispute resolution provisions regarding commitments to openness agreements which also include clear direction for meaningful participation of the adopted child/youth

Privacy

Children have a right to privacy pursuant to Article 16 of the **UNCRC**. This includes the protection of their personal data and information. Governments have a responsibility to protect this right.

Various approaches exist throughout the country in efforts to recruit prospective adoptive parents. One of these tools is online recruiting. In some jurisdictions, websites are used to support matching between prospective adoptive parents and children. This practice is known by terms such as online profiling or photo listing. Some websites include pictures and descriptions of children, complete with personality traits, developmental challenges, physical attributes, and personal interests. Others have public profiles but have no identifying information or pictures, and use fictitious names. Some limit access to children's profiles to approved prospective adoptive parents only, while others are public-facing.

Sharing a child's personal data online, particularly an extremely vulnerable child, has many significant risks. These include potential exploitation, misuse, and unintended use of the images. There is little that can prevent a child's image being copied and shared when it has been posted (Adoption Council of Ontario, 2015). This practice can also make a child vulnerable to unintended contact from individuals who may have caused them harm.

The Office of the Child and Youth Advocate cannot conceive of a situation where publicly advertising children for adoption does not jeopardize their right to privacy and other protections. All discussions, applications, screening, and matching must happen between the prospective family and the social worker. The Province is strongly encouraged to maintain the provisions in Section 80 of the current adoptions legislation which prohibit advertising of children who are available for adoption.

Proposal 2:

Maintain the current legislative provision which prohibits children from being publicly advertised for adoption in any strategy for recruiting adoptive parents.

Custom Adoptions

Custom adoption is “...the cultural practices of Aboriginal peoples to raise a child, by a person who is not the child’s parent, according to the custom of the First Nation and/or Aboriginal community of the child.” (Poitras & Zlotkin, 2013). Many Indigenous families and communities have this long-standing practice when parents are unable to be the primary caregiver. This is also known as traditional adoption. Actual practices vary throughout Canada, with five jurisdictions having supporting legislation.

Article 30 of the **UNCRC** provides special consideration for an Indigenous child’s right to practice their own culture, language, and religion. Article 8 sets out a child’s right to their identity. Furthermore, Article 20 speaks to the importance of continuity in a child’s upbringing. This relates to the right to grow up in their community, and enjoy the benefits of their culture and language.

It is important to recognize that there have been significant legislative developments and public policy recommendations in recent years which lend support to custom adoptions.

In **A Long Wait for Change** (2019), the Office of the Child and Youth Advocate addressed issues for Inuit children in the child protection system. Key findings and recommendations included the importance of including the voices of Inuit young people in decisions affecting them, the critical aspect of Inuit culture in decision-making for Inuit children, and the requirement for Inuit people to be at the forefront in developing changes to how child welfare services are delivered to their children and families. These are relevant considerations for a review of the **Adoption Act**.

While Newfoundland and Labrador’s current adoption legislation does not identify a specific approach for Indigenous children, the **Children, Youth and Families Act** (2018) provides important language and foundational support for the rights of Indigenous children by recognizing the importance of preserving cultural identity, and keeping children with their families and communities where safe to do so.

The **Truth and Reconciliation Commission** (2015) examined the residential school legacy in Canada and made specific calls to action relating to permanency planning for Indigenous children. An enduring legacy of the residential school system was the removal of children from their families without any steps to maintain their culture and identity. Many of these children were adopted in non-Aboriginal homes. The Commission’s final report called for national standards for Aboriginal child apprehension and custody cases to include principles that would take the residential school legacy into account in decision-making, and prioritize culturally appropriate permanency plans for these children. This is important because adoption is often a consideration in permanency planning when children cannot return to their parents.

At the federal level, the **Act Respecting First Nations, Inuit and Metis Children, Youth and Families** (formerly Bill C-92) came into force January 1, 2020. The **Act** sets out criteria for determining the best interest of the Indigenous child in Section 10. The legislation speaks to placements for Indigenous children in Section 16 and identifies priorities for placements. It speaks to the importance of considering other family members in placement decisions, and taking customs and traditions into account. There is significant focus on the child's right to maintain connections to their language, culture, and community.

The **National Inquiry into Missing and Murdered Indigenous Women and Girls** examined the root causes of violence against Indigenous women and girls. **Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls** (2019) made 231 individual calls for action. Call to action 12.6 advocates "Child welfare services prioritize and ensure that a family member or members, or a close community member, assumes care of Indigenous children". This is important to the current adoptions legislation review because it speaks to the best interest of an Indigenous child to be cared for according to the customs of their family and community.

Proposal 3:

Recognize custom or traditional adoptions in Indigenous communities and:

- **Require the best interests of the Indigenous child is the paramount consideration**
- **Require meaningful participation to ensure an Indigenous child's voice is heard**
- **Require meaningful collaboration with all Indigenous groups**

Potential Restriction on the Mandate of the Office of the Child and Youth Advocate

The Office of the Child and Youth Advocate is mandated by law to protect, advance and investigate concerns about child and youth rights in Newfoundland and Labrador. There are clear legislative provisions with respect to confidentiality requirements and broad powers to compel the production of information or evidence in a matter being investigated by the Advocate. Therefore section 37 of the **Adoption Act** may certainly inhibit the Advocate's ability to obtain information necessary to carry out the statutory mandate in investigations should access to this information be required. It may also curtail the Advocate's ability to advocate on behalf of specific adopted children and youth.

Proposal 4:

Include language that ensures full access to information on all matters being investigated or advocated by the Child and Youth Advocate, including adoptions-related information

Informed Consent

Section 19 in the **Adoption Act** addresses the important issue of consent. It is interesting that section 22(1)b references "informed consent" while other references in the legislation indicate "consent". This is important from a professional practice and ethics perspective. Informed consent reflects a robust and fully informed discussion with the client about the implications of providing their consent. It requires plain language. It requires a discussion of their rights and obligations. As a consideration, "informed consent" could either be referenced throughout the legislation, or could be included in Section 2 in the definitions.

Proposal 5:

Clarify language in the legislation and in any supporting regulations and policy to stipulate consent to mean and require informed consent

Conclusion

As of September 30, 2019, the Department of Children, Seniors and Social Development reported that there were 140 children identified for adoption in Newfoundland and Labrador. These children need and have a right to permanent homes with loving families. All children do. The Office of the Child and Youth Advocate has heard direct concerns about delays in practices and procedures that interfere with the adoption process. This includes applicant processing and finalization delays, as well as court delays. Every effort must be made to streamline and expedite the adoptions process. This promise was made with the 2013 legislation, but further attention is needed. Plans to move forward and advance the lives of these young people must offer meaningful opportunities for their engagement and input. This is in their best interest. This is their right.

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