# RE KITCHOOALIK ET AL. AND TUCKTOO ET AL. (sub nom. RE DEBORAH E4-789)

(1972), 28 D.L.R. (3d) 483 (also reported: [1972] 5 W.W. R. 203)

Northwest Territories Court of Appeal, Cairns, Johnson and Kane JJ.A., 25 May 1972

(On appeal from judgment of Northwest Territories Territorial Court, reported sub nom. RE TUCKTOO ET AL. AND KITCHOOALIK ET AL., supra p.462)

***Infants -- Adoption -- Custom of adoption among Eskimo people -- Whether adoption by custom still valid -- Canadian Bill of Rights, s. 1(b) -- Child Welfare Ordinance, 1961 (N.W.T.), c. 3.***

**The applicants adopted a daughter of the respondents according to well-established Eskimo custom. The adoption resulted from a lengthy illness of the natural mother which prevented her caring for the child. The adoption was carried out with the consent of the natural father and over the objections of the natural mother. On appeal from an order confirming, the adoption, *held*, the appeal should be dismissed. The adoption custom of the Eskimo people had been recognized by the Court in *Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 686, 38 W.W.R. 100. Existing legislation relating to adoptions had not pre-empted the field so as to disallow custom adoptions which were a necessity of life for the safeguarding of Eskimo children.**

**Moreover, since the adoption took place in the summer of 1959, and the *Canadian Bill of Rights*, 1960 (Can.), c. 44 (now R.S.C. 1970, App. III) was not enacted until 1960, the *Canadian Bill of Rights* could not be applied where the effect of so doing would be to alter the status of a person which had been acquired before the Act became law.**

**[*Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 686, 38 W.W.R. 100; *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479, 67 W.W.R. 669, folld]**

APPEAL from an order of Morrow, J., 27 D.L.R. (3d) 225, [1972] 3 W.W.R. 194, confirming an adoption.

*J. Darryl Carter*, for appellants.
*Dietrich Brand*, for respondents.

The judgment of the Court was delivered by

JOHNSON, J.A.:--This is an appeal from the order of Morrow, J., by which he declared that Deborah "E4-789" was by custom adopted by the respondents.

This appeal raises an interesting and important point of law that has been before the Territorial Court on several occasions but now comes before this Court for the first time.

The question is, to what extent should the Court recognize the Eskimo custom of adoption where those procedures do not conform to those laid down by Ordinances of the Northwest Territories?

The facts are not in dispute and have been summarized by the learned trial Judge [27 D.L.R. (3d) 225 at pp. 227-8, [1972] 3 W.W.R. 194]:

The record shows that Deborah, carrying disc number E4-789, was born at Spence Bay on April 13, 1958. Her two parents, Gideon Kitchooalik (the father) and Rebecca Enooyak (the mother) are both Canadian Eskimos, then of Spence Bay, now of Gjoa Haven, a settlement some 88 miles distant from Spence Bay. The parents were married at Pond Inlet in the Northwest Territories. Gideon Kitchooalik was traditionally a trapper living off the land but some six years ago was ordained an Anglican missionary. In this capacity he makes his home at Gjoa Haven but makes regular trips to Spence Bay to take services there.

The events giving rise to the present case begin about 1959. At this time Gideon and Rebecca were living in a snow house or igloo in Spence Bay. They had four daughters at this time, the youngest being Deborah, one year old. Two of the remaining children were under school age and unable to look after themselves. At this point in time, Rebecca took sick and had to be evacuated to the hospital in Edmonton. She was there two years and eight months.

It was impossible for Gideon to look after the trapline and at the same time the three small children. They were left with different friends, from time to time, but finally, after about six to seven months, the Tucktoo family came to Spence Bay for a holiday. As they were related indirectly Gideon arranged for them to adopt Deborah. The Tucktoos were unable to have children of their own although by the date of this hearing had acquired two more small children by custom adoption.

Rebecca described the situation in the following way:

"I had 4 girls to take care of and at that time my husband was still hunting with the dog team and he was not earning money, you know, he had to earn money to take care of the girls and had to hunt at the same time. The Tucktoos did not have any children of their own. It was a very good chance for her to have a good home and be taken care of properly."

The mother is quite frank in her testimony and makes it clear that "there was no way around it. If he did not do any hunting they can starve". The position she takes is that she continually exhorted her husband by letter to not adopt out the child as she wanted to keep her. Rebecca was asked by counsel if it was "true as far as you are concerned that when Gideon while you were away gave your daughter away, for adoption that is pretty much the only thing he was able to do"? Her answer was "Yes."

There was evidence that placing a child with foster parents was not satisfactory. This was because the foster parents did not feel the same responsibility toward a foster child that they did for their own.

The female plaintiff recovered and rejoined her husband in the north. Although she saw Deborah, she took no steps to recover her until recently. Of the events leading up to these proceedings the learned Judge said [at p. 230]:

The actual repossession of Deborah took place following a visit between the Tucktoos and the natural parents. The facts are not too clear but it seems that Deborah was originally to visit with her natural parents but then as a result of a dispute between Rebecca and Mooselah the child has been retained by the natural parents.

After hearing evidence from the parties as well as expert evidence as to the Eskimo custom of adoption, the learned Judge held the adoption of Deborah by the respondents to be valid notwithstanding the failure to comply with Ordinances of the Northwest Territories dealing with the subject.

The practice of adoption has been common among primitive peoples on this continent. In the *Handbook of American Indians (North of Mexico)*, under the heading of "Adoption" is the following:

An almost universal political and social institution which originally dealt with persons but later with families, clans or gentes, bands and tribes. It had its origin far back in the history of primitive society . . .

To a race which inhabits the barren and frigid wastes surrounding the Arctic Seas adoption is imperative if the young who cannot be properly looked after are to survive. As would be expected, such a practice has, according to the evidence, existed among the Eskimos for a long time. In adoptions, the father as "the boss" of the family had power to place his child for adoption; his wife's consent was not required. This is recognized by the appellant husband. The learned trial Judge quotes the following from his evidence [at p. 228]:

" 'A. At the time when I gave the kid away, it was my kid, and the man is the boss and at the time I figured I had all the say when I gave the kid away, and I find now that I should not have done that.
" 'Q. Yes, but you did answer the question.

" 'A. I would never have given Debbie (Deborah) away for adoption but my wife was in hospital and the kid was sick and I didn't know what to do with it so I gave it away.' "

In 1961 in the case of *Re Adoption of Katie E7-1807*, 32 D.L.R. (2d) 686, 38 W.W.R. 100, Sissons, J., held that adoptions according to the custom of the Eskimo were valid and his judgment was followed by Morrow, J., in *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479, 67 W.W.R. 669, where he held that adoption according to the custom of the Indians should be treated in the same manner.

Considering the almost universality of adoption practice extending back into antiquity, it is strange that it was not recognized by the common law, and it was not until 1926 that the first adoption legislation was enacted in England. No law of adoption became a part of the law of the Territories when the laws of England, as existing on July 15, 1870, were introduced into the Territories by the *Northwest Territories Act* of 1870. The first *Adoption Ordinance* was in 1940. This followed upon the discovery of gold and uranium and the opening up of mines to extract these minerals. Section 2 of that Ordinance reads:

2. Any unmarried person of the full age of twenty-one years or a husband and wife jointly may by petition to a stipendiary magistrate apply for leave to adopt an infant or infants not in the relationship of brother or sister or uncle or aunt by the whole or the half blood of the petitioner or petitioners.

Section 4 reads in part:

4. Save as in this section otherwise provided no order for adoption shall be made without the written consent of

(*c*) the parents of the infant or survivor of them; or the parent, guardian or person having the lawful custody of the infant; or the mother only where the infant is illegitimate;

In 1948 this Ordinance was repealed and replaced by another (1948, c. 35). It is admitted that this adoption took place prior to Christmas 1959, so it would be this Ordinance that existed at the time of this adoption. Section 4 reads in part:

4 (1) A husband and wife each of whom is over the age of twenty- five years may apply jointly to a stipendiary magistrate for leave to adopt an unmarried minor as their child.

(2) A widow or widower over the age of twenty-five years may apply to a stipendiary magistrate for leave to adopt an unmarried minor as her or his child if such unmarried minor was living in the home of the applicant preceding the date of death of the husband or wife of the applicant, as the case may be, but if the unmarried minor was not living in the home of the applicant prior to the death of the husband or wife of the applicant, then the applicant may only apply for leave to adopt an unmarried minor of the same sex as the applicant and who has attained the age of at least eight years and has been maintained for at least two years in the applicant's home as a member thereof.
(3) A single person over the age of twenty-five years may apply to a stipendiary magistrate for leave to adopt an unmarried minor as his or her child if the unmarried minor is of the same sex as the applicant and has attained the age of at least eight years and has been maintained for at least two years in the applicant's home as a member thereof.

One of the requirements of an application under this Ordinance is set out in s. 5 (2):

5 (2) A health certificate from a duly qualified medical practitioner stating that he has examined the physical and mental condition of the applicant and is of opinion that the applicant is not a mental defective and is not suffering from mental illness nor from a communicable disease shall accompany the application.

The question is, did this legislation prohibit the continuation of the practice of adoption in accordance with Eskimo custom? It will be seen that in both the 1940 and 1948 Ordinances the word "may" is used when describing who may make petitions for adoption. This word is usually interpreted as permissive and s. 5(3) of the *Interpretation Ordinance*, R.O.N.W.T. 1956, c. 52, provides that "may" is to be given a "permissive and empowering" meaning. These Ordinances, while providing a relatively simple method, do require an appearance before a stipendiary Magistrate.

By the time the *Katie* case, *supra*, was decided, new and more detailed provisions had been enacted (the *Child Welfare Ordinance*, 1961 (N.W.T.), c. 3, and Part 4, ss. 82 to 108) dealt with adoptions. Sissons, J., in the *Katie* case commented upon various of its provisions, and said that Eskimos, living in the remote areas of the Eastern Arctic, as these parties do, would find it difficult if not impossible to comply with them. I shall refer only to two of these. At pp. 689-90 of his judgment he says:

Section 97 of the *Child Welfare Ordinance* reads:

"97 (1) Unless the adoption order provides that the adopted child retain his surname, the adopted child shall assume the surname of the adopting parent.

(2) In making an adoption order, the judge may, in his discretion, change the christian or given name or names as the adopting parent desires, and thereafter the adopted child is entitled to and is to be known by the name or names so given."

This section does not recognize that ordinarily Eskimos do not have a surname. There are only given names and these usually have a particular and personal significance. The child retains his name on adoption, as a woman retains her name on marriage.

Section 105:

"105(1) Every person who places a child with another person on the understanding that the other person will adopt the child shall, within thirty days after the day on which the child has been so placed, notify the Superintendent of the placement.

(2) Every person who fails to comply with subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $100.00."
. . . . .

Kilipaluk and Nabveyak did not notify the Superintendent of the placement and adoption within 30 days after the day on which the child was so placed.

This is generally an impractical provision so far as Eskimos are concerned. At most points there is no regular mail service and mail goes in or comes out by chance, perhaps once or twice a year. The ordinary Eskimo cannot read or write. The Superintendent is far away. There is usually locally no one in authority, or perhaps within 500 miles, who could be notified, even if such notification would be sufficient.

I have quoted s. 5(2) of the 1948 Ordinance requiring the applicant to produce a certificate of a duly qualified medical practitioner as to his physical and mental health. That provision alone would prevent these people who have no ready access to a doctor from taking advantage of the Ordinance. In the remote areas of the Arctic where most Eskimos live, there is no ready access to a stipendiary Magistrate (or after 1955 to the Territorial Judge) who alone can make an adoption under the Ordinance. It must be borne in mind that adoptions in these areas are often of some urgency. In the present case the child had developed sores and was not getting enough milk. Compliance with the provisions of these Ordinances in the context of the circumstances under which these Eskimos live is almost impossible. I am of the view that it was never intended that these provisions would exclude the well-established custom of Eskimo Adoption. To interpret it otherwise would be to deprive many of these people of a custom that is so valuable to the safety and survival of children where death of a parent is a common hazard of their existence. It would also invalidate a large number of custom adoptions that have been confirmed by the Courts throughout the years.

There is no doubt that adoptions in Eskimo societies are a necessity of life, if certain children are to be safeguarded. In time, as Eskimos are brought more closely into the Canadian community, the necessity to retain custom adoptions will disappear. Until that happens, the Eskimo custom of adoption should be preserved.

It is said that the Court of these Territories cannot recognize or give effect to custom adoptions by the Eskimo. While the *Indian Act*, R.S.C. 1970, c. I-6, recognizes such adoptions by Indians there is no corresponding legislation for Eskimos. From this, it is argued that Parliament did not intend to extend recognition of this practice to these people. Custom has always been recognized by the common law and while at an earlier date proof of the existence of a custom from time immemorial was required, Tindal, C.J., in *Bastard v. Smith* (1837), 2 M. & Rob. 129 at p. 136, 174 E.R. 238, points out that such evidence is no longer possible or necessary and that evidence extending" . . . as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom" is all that is now required. Such proof was offered and accepted in this case.

The *Canadian Bill of Rights*, was pleaded. It was said in the appellants' factum:

The Appellants would not have been ordered to give up their daughter if they had not been Eskimos. They were therefore denied equality before the law by reason of their race, national origin or colour.

Without considering whether this is "discrimination by reason of race" the point can be decided on a narrower ground. As I have said this adoption took place in the summer of 1959. The *Canadian*

*Bill of Rights* was enacted in 1960 [by c. 44 : now R.S.C. 1970, App.III]. That Act, in my opinion, cannot be applied where the effect of doing so would be to alter the status of a person which had been acquired before the *Canadian Bill of Rights* became law.

The order declaring Deborah to have been adopted in December, 1959, in accordance with the Eskimo custom should not be disturbed, and the appeal is dismissed with costs.

*Appeal dismissed*.