

A Critical Study of Canadian Intercountry Adoption Law:
Canada's International Legal Obligations, the Best Interests of
the Child Principle, and Family Reunification

by

Krishna Kaur Dhaliwal

A thesis submitted in conformity with the requirements
for the degree of Master of Laws

Faculty of Law
University of Toronto

© Copyright by Krishna Kaur Dhaliwal 2020

A Critical Study of Canadian Intercountry Adoption Law: Canada's International Legal Obligations, the Best Interests of the Child Principle, and Family Reunification

Krishna Kaur Dhaliwal

Master of Laws

Faculty of Law
University of Toronto

2020

Abstract

This thesis critically examines Canadian intercountry adoption law in light of international children's rights commitments, the best interests of the child framework, and the principle of family reunification. Relying on theories that immigration and citizenship are tools and objects of social closure, this thesis will explore how immigration and citizenship programs are used by the state to reproduce ideal citizens and families to support the nation-building project. This thesis will review the history of adoption and child migration in Canada, explore critiques of intercountry adoption, and consider the non-legal factors that impact the practice. It will then critically consider the Hague Adoption Convention and the legislative, policy, and common-law framework for intercountry adoption in Canada. To conclude, this thesis will recommend areas that would benefit from future study, in order to better safeguard the best interests of the child and promote family reunification.

Acknowledgments

I am grateful to my supervisor, Professor Audrey Macklin, for her patience, flexibility, and guidance throughout this project. I could not have completed this thesis without her feedback and unwavering encouragement.

I am also grateful for the generous financial support provided by the Social Sciences and Humanities Research Council of Canada, the University of Toronto Faculty of Law, and the University of Toronto School of Graduate Studies.

Thank you to my mentors and colleagues at Larlee Rosenberg, Barristers & Solicitors, who have taught me so much about advocacy, fairness, and the law. I am lucky to be at a firm that has nurtured my interest in immigration, provided countless opportunities to learn and grow as a lawyer, and supported me in so many ways while I pursued this degree.

I am also thankful to the many families I have encountered in my practice, who have shared with me the intimate and complicated realities of cross-border family building, and inspired me to think critically about family reunification in Canada.

Finally, thank you to my own family, by blood and by choice, who have shown me the resilience of love and kinship.

Table of Contents

Table of Contents	iv
Chapter 1: Introduction	1
1 Statement of Research Question	1
2 Relevance of Research Question.....	1
3 Summary of Chapters.....	7
Chapter 2: Theoretical Framework	9
1 Sociolegal Studies	9
2 Citizenship as Social Closure.....	10
2.1 Residency, Immigration, and Citizenship.....	10
2.2 The Territorial State: Border Control as External Closure	13
2.3 The Nation-State: Political and Social Participation as Internal Closure	14
3 Nation-Building and Access to Citizenship Status	16
3.1 Ideal Citizens	18
3.2 Ideal Families.....	23
3.2.1 Worthy Families.....	25
3.2.2 Unworthy Families.....	27
4 Review of Existing Literature	41
Chapter 3: What is Intercountry Adoption?.....	45
1 The Historical Context of Intercountry Adoption.....	45
1.1 The Origins of Intercountry Adoption in Canada.....	45
1.1.1 The History of Adoption Law in Canada.....	46
1.1.2 The History of Child Migration in Canada	53
1.1.3 The Origins of Intercountry Adoption Programs in Canada.....	58
1.2 Intercountry Adoption Stereotypes	63

1.3 Critiques of Intercountry Adoption.....	67
1.3.1 Child Trafficking	67
1.3.2 Global Inequality	70
1.3.3 Feminism and Critical Race Theory	73
1.3.4 Intercountry Adoption Scandals – Case Studies	76
2 Factors Outside Canadian Law and Policy that Influence Intercountry Adoption	84
2.1 Political and Diplomatic Issues Between Countries Involved in Intercountry Adoption..	84
2.2 Socioeconomic and Political Issues Within Countries Involved in Intercountry Adoption	85
2.3 The Role of Adoption Agencies in Intercountry Adoption	85
Chapter 4: The Hague Adoption Convention	88
1 Historical Origins of the Hague Adoption Convention	88
2 The Hague Adoption Convention Requirements	92
Chapter 5: The Law and Policy Framework for Intercountry Adoption in Canada	98
1 Provincial Responsibilities in Intercountry Adoptions	98
2 Foreign Government Responsibilities in Intercountry Adoption.....	105
3 Federal Government Responsibilities in Intercountry Adoption	110
3.1 Citizenship	111
3.2 Sponsorship.....	116
3.3 IRCC’s Discretionary Decision Making and Administrative Law	123
3.4 Summary	126
Chapter 6: Analysis of Major Themes in Common-Law Intercountry Adoption Decisions at the Federal Level.....	133
1 Adoptions Completed Outside Canada Must Be in Accordance with the Laws of the Foreign Jurisdiction.....	134
2 Adoptions Must Create a Genuine Parent–Child Relationship.....	136
3 Adoptions Must Sever the Pre-Existing Parent–Child Relationship	138

4 Primary Purpose of the Adoption.....	146
5 Summary	149
Chapter 7: Conclusion.....	151
Bibliography	157

Chapter 1

Introduction

1 Statement of Research Question

This thesis will critically examine Canadian intercountry adoption law. It will do so in light of the objectives of the international Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption¹ (the “Hague Adoption Convention”), the best interests of the child approach to child welfare issues, and the principle of family reunification.

This thesis will rely on theories that position immigration and citizenship status as tools and objects of social closure, which control and constraint membership in the Canadian community. Immigration and citizenship programs are thus used to distinguish ideal citizens and ideal families from unworthy citizens and unworthy families, in support of the nation-building project. By considering how Canadian intercountry adoption legislation, policy, and case law reinforce a specific understanding of what a genuine adoptive parent–child relationship must look like, we can uncover what kinds of families Canadian intercountry adoption law deems unworthy, and reflect on how to improve our framework in order to better promote the best interests of the child and family reunification.

2 Relevance of Research Question

Recent census data indicates that Canada’s family composition trends are changing, such that we are seeing an increase in diversity across many axes, and an increase in non-traditional family structures. For example, the number of same-sex couples in Canada is rapidly increasing.² Statistics show that between 2006 and 2011, same-sex couple families increased by 42.4% in

¹ *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 29 May 1993, 32 ILM 1139 (entered into force December 1996) [*Hague Adoption Convention*].

² Statistics Canada, *Same-Sex Couples in Canada in 2016* (Ottawa: Census Program, 2017), online: <<http://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016007/98-200-x2016007-eng.cfm>>.

Canada.³ There are also more single-person households and single-parent families than ever before, with young two-parent families becoming less common.⁴ Importantly, Canada's birth rate is also declining. Canadians are having fewer biological children, and they are doing so at increasingly later stages in life.⁵

According to Statistics Canada, Canada's overall fertility rate has been falling since 2009, with women aged 25 to 29 in particular having fewer children.⁶ The average age of mothers when they have their first child has been steadily increasing since the mid-1960s.⁷ There has been some fluctuation, but generally speaking, Canada has not been able to sustain its population level via domestic childbirth for nearly 50 years. Whereas in 1971, there were 2.1 children for every Canadian woman, in 2016 there were only 1.6 children for every Canadian woman.⁸ This means that we now have more Canadians who cannot and who choose not to have biological children, than we have ever had before.

These changes in how people are choosing to build their families and the broad trend of "low fertility" means that Canada is becoming increasingly reliant on other methods of population maintenance. Generally speaking, the largest source of new Canadians is not the birth of new children, but rather immigration. Statistics indicate that roughly two-thirds of our population

³ Russell Sabio, "The Changing Face of the Canadian Family (Infographic)" *Huffington Post* (05 September 2016), online: <https://www.huffingtonpost.ca/2016/05/09/stats-canada-infographic_n_9786816.html>.

⁴ Monique Scotti, "The Canadian household is changing: More single dads, more same-sex parents, fewer young families" *Global News* (2 August 2017), online: <<https://globalnews.ca/news/3641761/census-canada-single-dads-same-sex-parents-young-families/>>.

⁵ Statistics Canada, *Fertility: Fewer Children, Older Moms* (Ottawa: Census Program, 2017), online: <<https://www.statcan.gc.ca/pub/11-630-x/11-630-x2014002-eng.htm>> [*Older Moms*].

⁶ Statistics Canada, *Fertility: Overview, 2012 to 2016* (Ottawa: Census Program, 2018), online: <<https://www150.statcan.gc.ca/n1/pub/91-209-x/2018001/article/54956-eng.htm>>.

⁷ *Ibid.*

⁸ Statistics Canada, *Older Moms*, *supra* note 5; Sheryl Ubelacker, "Canada's fertility rate continues to put pressure on immigration" *The Star* (08 February 2017), online: <<https://www.thestar.com/news/canada/2017/02/08/canadas-fertility-rate-continues-to-put-pressure-on-immigration.html>>.

growth can be attributed to the arrival of immigrants.⁹ As immigration increases, ethnocultural and linguistic diversity is increasing as well.¹⁰ The most recent census data indicates that Chinese, East Indian, and Filipino ancestry are now surpassing European ancestry in the list of the 20 most common ethnocultural backgrounds for Canadians.¹¹ All of this means that we now have a more ethnically, culturally, and linguistically diverse population.

A heavy reliance on skilled worker-based immigration may help Canada sustain its population, but it does not help the Canadians who cannot or choose not to have biological children, but nevertheless wish to expand their families. Accordingly, one might assume that in light of Canada's changing demographic landscape, there would be an increase in the number of families interested in alternative pathways to parenthood, such as assisted reproduction and adoption. In the case of assisted reproduction, reports suggest that interest in it is growing.¹² This is so despite how expensive assisted reproduction generally is,¹³ and despite legal restrictions in Canada prohibiting purchasing human reproductive material and paying for gestational surrogacy,¹⁴ which put assisted reproduction out of reach for many families, particularly same-

⁹ Ubelacker, *ibid.*

¹⁰ Statistics Canada, *Ethnic and Cultural Origins of Canadians: A Portrait of a Rich Heritage* (Ottawa: Census Program, 2017), online: <<http://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016016/98-200-x2016016-eng.cfm>>.

¹¹ *Ibid.*

¹² See e.g., Tracey Bushnik, Jocelynn L Cook, A Albert Yuzpe, Suzanne Tough & John Collins, "Estimating the Prevalence of Infertility in Canada" (March 2017) 27:3 Human Reproduction 738.

¹³ A cycle of in vitro fertilization costs approximately \$10,000 to \$15,000 in Canada, and most couples need multiple cycles in order to successfully conceive: Government of British Columbia, "In Vitro Fertilization for Infertility" *Health Link BC* (21 November 2017), online: <<https://www.healthlinkbc.ca/health-topics/hw227379>>. Many couples also do not have access to health insurance coverage to help pay for such treatments: Monique Scotti, "Paying to treat infertility: Coverage varies widely across Canada" *Global News* (15 November 2016), online: <<https://globalnews.ca/news/3059988/paying-to-treat-infertility-coverage-varies-widely-across-canada/>>.

¹⁴ Government of Canada, "Prohibitions related to purchasing reproductive material and purchasing or selling in vitro embryos" *Health Canada* (18 July 2013), online: <<https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction/prohibitions-purchasing-reproductive-material-selling-vitro-embryos.html>>. See also *Assisted Human Reproduction Act*, SC 2004, c 2, ss 6, 7; "Law against paying egg donors drives couples to US" *CBC News* (30 April 2007), online: <<https://www.cbc.ca/news/canada/law-against-paying-egg-donors-drives-couples-to-u-s-1.637528>>; Alison Motluk, "What should be done about Canada's assisted reproduction laws?" *The Globe and Mail* (13 April

sex couples who need access to sperm and eggs, and people who cannot afford the high cost of processes such as in vitro fertilization. One might also assume a corresponding increase in the number of families looking at adoption as a possibility.

With respect to domestic adoption, there are actually fewer children being placed for adoption than there have been in previous decades, due to factors such as increased access to birth control and abortion services, as well as reduced social stigma for single mothers.¹⁵ Some say that there is also increasingly a preference towards placing Indigenous children, who make up a large proportion of the children in government care,¹⁶ with relatives or families who come from the same cultural background, in light of concerns about loss of culture after the Sixties Scoop.¹⁷ Domestic adoption is also not necessarily cheaper than other alternatives to natural childbirth—privately adopting a local infant can cost upwards of \$60,000 in Canada.¹⁸ Infants and young children can be difficult to adopt domestically, as children often spend years in foster care before becoming adoptable, and as the wait times for adoption are lengthy, meaning children age as they wait to be placed with families.¹⁹ In 2014, 40% of the children available for adoption in

2018), online: <<https://www.theglobeandmail.com/opinion/article-what-should-be-done-about-canadas-assisted-reproduction-laws/>>.

¹⁵ Laura Kane, “Changes to adoption policies internationally force Canadian agencies to shutter, leaving couples in limbo” *The Globe and Mail* (11 April 2019), online: <<https://www.theglobeandmail.com/canada/article-changes-to-adoption-policies-internationally-force-canadian-agencies/>>.

¹⁶ In British Columbia, one adoption agency estimates that Indigenous children make up approximately 50% of children in government care. See “Adoption FAQs” *Adoptive Families Association of BC* (accessed 14 May 2019), online: <<https://www.bcadoption.com/adoption-faqs>> [“Adoption FAQs”].

¹⁷ Kane, *supra* note 15. See also Jennifer Fowler, “Creator of Sixties Scoop adoption program says it wasn’t meant to place kids with white families” *CBC News* (20 March 2018), online: <<https://www.cbc.ca/news/indigenous/creator-of-sixties-scoop-adoption-program-says-it-wasn-t-meant-to-place-kids-with-white-families-1.4584342>>; Patrick Johnston, “Revisiting the ‘Sixties Scoop’ of Indigenous Children” *Policy Options* (26 July 2016), online: <<https://policyoptions.irpp.org/magazines/july-2016/revisiting-the-sixties-scoop-of-indigenous-children/>>.

¹⁸ “Adoption FAQs”, *supra* note 16.

¹⁹ See Rosa Marchitelli, “‘Broken’ adoption system leaves children stranded despite couple ready to adopt” *CBC News* (29 June 2015), online: <<https://www.cbc.ca/news/canada/broken-adoption-systems-leaves-children-stranded-despite-couple-ready-to-adopt-1.3128069>>; Lori Niles-Hoffman, “Want to adopt a child in Ontario? Good luck with the paperwork” *National Post* (17 September 2014), online: <<https://nationalpost.com/opinion/lori-niles-want-to-adopt-a-child-in-ontario-good-luck-with-the-paperwork>>.

British Columbia were over the age of 12,²⁰ and many children actually age out of the public care system before they are able to find families to care for them.²¹ Many of the children available domestically also have unique needs like health problems, psychological issues, and disabilities that make them more difficult to care for, and therefore less desirable in the eyes of some prospective adoptive parents.²²

If assisted reproduction and domestic adoption are too challenging, what other options exist for families hoping to raise children, where biological reproduction is not possible? Historically, many Canadians, as well as other families in the developed Western world, have sought children from overseas via intercountry adoption. In many cases, there have been a higher number of infants available from countries overseas than there are domestically. It would also make sense that families with ethnocultural, linguistic, and familial connections to countries outside Canada would be interested in adopting children from those countries. However, the rate of successful intercountry adoptions is actually declining in Canada, and is in keeping with a recent global downward trend after several decades of increase.²³ Reports indicate that whereas in 2012, 1,379 adopted children were brought to Canada from other countries through adoption, there were only 793 in 2016,²⁴ and 636 in 2018,²⁵ a nearly 50% decrease in only six years. Is it that families are no longer interested in adopting children from overseas, or do other factors contribute to the decline in successful intercountry adoption?

²⁰ “Adoption agency urges families to consider adopting teens” *CBC News* (02 November 2015), online: <<https://www.cbc.ca/news/canada/british-columbia/adoption-teens-agency-1.3300452>>.

²¹ *Ibid.*

²² See Jasmine Budak, “Canada’s Most Unwanted” *The Walrus* (19 December 2012), online: <<https://thewalrus.ca/canadas-most-unwanted/>>.

²³ Peter Selman, “The Global Decline of Intercountry Adoption: What Lies Ahead?” (July 2012) 11:3 *Social Policy and Society* 381.

²⁴ Kathleen Harris, “International Adoptions Decline Dramatically in Canada” *CBC News: Politics* (20 August 2017), online: <<https://www.cbc.ca/news/politics/international-adoptions-canada-decline-1.4253698>>.

²⁵ “New board vows to keep struggling adoption agency open” *CBC News* (26 April 2019), online: <<https://www.cbc.ca/news/canada/british-columbia/struggling-victoria-adoption-agency-elects-new-board-that-intends-to-keep-it-open-1.5112727>>. Specifically, this article states that there were 453 children brought to Canada via intercountry adoption applications leading directly to citizenship, and 183 intercountry adoption applications leading to permanent residency.

In Canada specifically, adoption agencies are facing closure due to the decline in intercountry adoption. Family Services of Greater Vancouver announced in October 2018 that it would close its adoption agency as of November 2018, due to the drop in international adoption numbers.²⁶ The organization's vice president, Jessica Denholm, stated that restrictions in other countries have contributed to the decline in intercountry adoption, as have improved living conditions and reduced stigma against children born outside of wedlock in other countries.²⁷ Importantly, Ms. Denholm said that the demand for intercountry adoption has not decreased, and that the high cost of intercountry adoption is not necessarily a deterrent for interested families. Instead, she cites a "supply issue" as the primary problem.²⁸

Choices Adoption and Pregnancy Counselling in British Columbia also announced in April 2019 that it would cease providing services, and specifically cited the decline in international adoptions as the primary reason why.²⁹ The British Columbia Children's Minister, Katrine Conroy, has connected the global downward intercountry adoption trend with the idea that countries are now preferring to keep children "within their own cultures", suggesting that adoptable foreign children are in short supply due to decisions made by foreign states.³⁰ In contrast with this, the former board chair of Choices, Jane Cowell, has instead focused on how governmental decisions made within Canada impede successful intercountry adoptions, referencing the recent decision by the Canadian federal government to temporarily stop issuing visas to children adopted from Japan.³¹ The Canadian government has previously made similar

²⁶ Bethany Lindsay, "Drop in international adoptions forces closure of BC Agency" *CBC News* (18 October 2018), online: <<https://www.cbc.ca/news/canada/british-columbia/drop-in-international-adoptions-forces-closure-of-b-c-agency-1.4867026>>.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ "Vancouver Island's only adoption agency closes doors" *CBC News* (11 April 2019), online: <<https://www.cbc.ca/news/canada/british-columbia/vancouver-island-s-only-adoption-agency-closes-doors-1.5095082>>.

³⁰ *Ibid.*

³¹ *Ibid.* See also "Couple brings adopted baby from Japan home to B.C. after months of delay" *CBC News* (26 June 2018), online: <<https://www.cbc.ca/news/canada/british-columbia/couple-brings-adopted-baby-from-japan-home-to-b-c-after-months-of-delay-1.4723517>>.

decisions to disallow intercountry adoptions from specific countries altogether, including Pakistan.³²

Neither Ms. Denholm, Ms. Conroy, nor Ms. Cowell connected the decline in intercountry adoptions with a lack of interest in adopting children from overseas. Instead, they focused on how Canadian and foreign law and policy constrain access to intercountry adoption. As intercountry adoption is intensely regulated by Canadian provincial governments, the federal government, and foreign governments—with overarching guidance from international law—it is surely the case that legal and policy decisions by all governments involved impact the feasibility of intercountry adoptions.

3 Summary of Chapters

Chapter 1 of this thesis summarizes the research project and explains why it is an important subject to explore. Chapter 2 reviews the theoretical framework this thesis operates within, provides a broad overview of how Canada's immigration system filters ideal citizens and families from unworthy citizens and families, and situates this project within existing intercountry adoption and family immigration literature. Chapter 3 explains what intercountry adoption is, by reviewing how adoption law developed in the Western world, describing the history of child migration to Western countries, and exploring how Canada developed cross-border adoption programs. Chapter 3 also summarizes some of the common criticisms that are made of intercountry adoption as a practice, and looks at how factors beyond Canadian law and policy can influence the feasibility of intercountry adoptions. Chapter 4 addresses the Hague Adoption Convention by exploring its historical origins and analyzing its text, while Chapter 5 provides an overview of the Canadian legislative and policy framework for intercountry adoption by laying out the requirements imposed by provincial governments, foreign governments, and the federal government. Chapter 6 analyzes the major themes that emerge from intercountry adoption case law at the federal level, and discusses important cases from the Immigration Appeal Division of the Immigration and Refugee Board, the Federal Court of Canada, and the

³² Shanifa Nasser, "How Canada barred adoptions from Muslim countries—and used Shariah law to do it" *CBC News* (29 October 2018), online: <<https://www.cbc.ca/news/canada/adoptions-kafalah-pakistan-canada-ban-muslim-1.4855852>>.

Federal Court of Appeal. Chapter 7 summarizes the role played by Canada's intercountry adoption legislation, policy, and case law in our nation-building project, and considers how the current framework reinforces a hierarchy that privileges a traditional and nuclear understanding of what a genuine parent-child relationship should look like. Chapter 7 will also suggest several directions for future study that may promote a broader and more meaningful approach to promoting the best interests of the child and family reunification in intercountry adoption cases.

Chapter 2

Theoretical Framework

1 Sociolegal Studies

The starting place for this thesis is the realm of sociolegal studies. Unlike legal formalism, the sociolegal approach understands that law must be understood in relation to its social context. The law is created, interpreted, and applied by the people who engage with it, including lawyers, decision makers, law enforcers, and citizens. These legal actors cannot help but be influenced by the societies they live in and the lives they live. Their experiences, circumstances, language, beliefs, and opinions colour how they create, interpret, and apply the law. In other words, law and its application cannot ultimately be objective, because those who interact with it will always perceive it in light of “their individual histories and social positioning”.³³ If we wish to understand how the law actually works in society, we must endeavour to understand the “shaping influence of the social, economic, psychological, and linguistic practices which, while never being explicitly recorded or acknowledged, underlie the law’s explicit functioning”.³⁴ This thesis examines how the state recognizes and regulates families, and specifically examines the body of law and policy that has developed to help decision makers conduct assessments about whether adoptive relationships are legitimate enough to warrant an immigration benefit. Though categories of legitimate familial relationships can be defined by law, assessments about the genuineness of these relationships are very much influenced by social and cultural understandings of what makes a “real” family. Accordingly, it will be necessary to proceed from the assumption that the law does not function as a closed system, but rather is a construction that exists in conversation with society. Thus, this thesis is rooted firmly in the sociolegal tradition.

³³ Daphna Hacker, *Legalized Families in the Era of Bordered Globalization* (New York: Cambridge University Press, 2017) at 65, citing Alan Hunt, *Explorations in Law and Society* (New York: Routledge, 1993).

³⁴ Richard Terdiman, trans, “Translator’s Introduction” in Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” (1987) 38:5 *Hastings LJ* 805 at 807.

2 Citizenship as Social Closure

This thesis also proceeds from the assumption that immigration systems that offer the formal status of citizenship to some and deny it to others operate as a form of social closure.³⁵

Contemporary sovereign states utilize citizenship status as a mechanism by which to create the categories of “insiders” and “outsiders”, and to assign individuals to one or the other category. Insiders have full membership in the group, whereas outsiders do not. Membership, in turn, entails a number of entitlements and responsibilities, which vary from state to state. With respect to rights, membership as a citizen gives you the right to enter the physical borders of a state, and will also dictate what kinds of benefits you will have once you get there, including access to social services, state protection, and the ability to vote and run for public office in democratic countries. With respect to responsibilities, membership as a citizen can mean that you are required to participate in military service, participate in democratic processes by voting, serve on juries, and generally respect the laws of the country. Membership as a citizen also has less tangible implications. For an individual, citizenship status can have an impact on feelings of identity and belonging,³⁶ whereas for a state, regulation of citizenship can be used as a tool in the nation-building project.³⁷

2.1 Residency, Immigration, and Citizenship

Though there is often significant overlap between people who have full citizenship status and people who are simply residents in a territory, formal citizenship does not map directly on to residency—there can be citizens living outside of a country, as well as people living within the geographic territory of a country who are not citizens. Furthermore, in the Canadian context, immigration and citizenship are legislated and regulated separately. People who immigrate may eventually become citizens, but many do not, and most people obtain citizenship without ever

³⁵ For more on the subject of social closure, see Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (New York: University of California Press, 1978) at 43–46.

³⁶ See Sheila L Croucher, *Globalization and Belonging: The Politics of Identity in a Changing World* (Maryland: Rowman & Littlefield, 2018); Stephen Castles & Alastair Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (New York: Routledge, 2000).

³⁷ See Chapter 2, Part 3 below.

going through an immigration program. For instance, people born in Canada obtain citizenship automatically, and people who are eligible for citizenship-by-descent must apply for proof of their citizenship, and need not apply to immigrate.

In Canada, immigration and citizenship are governed by different legislation. The laws dealing with Canada's immigration programs—the *Immigration and Refugee Protection Act* (“IRPA”)³⁸ and the *Immigration and Refugee Protection Regulations* (“IRPR”)³⁹—govern access to temporary resident status (meaning status as a visitor, student, or worker in Canada) and permanent resident status (meaning status as a non-citizen long-term resident who can live, study, and work in the country). Canada's *Citizenship Act*⁴⁰ and *Citizenship Regulations*⁴¹ deal with how to obtain citizenship through birth, descent, or naturalization, as well as how to lose citizenship and resume citizenship if it was previously lost.

To understand the difference between temporary residents, permanent residents, and citizens, their relative rights can be mapped on a continuum. Temporary residents would fall on one end, with the least number of rights and the greatest number of restrictions placed on them. Temporary residents, by definition, are allowed to be in Canada for a limited duration of time and for a specific purpose, and if they violate the terms of their entry, they can be removed from Canada.⁴² Those in Canada under a study permit are generally restricted to studying at the educational institution identified on their study permit, and are only allowed to work for a limited number of part-time hours to support themselves while they study.⁴³ Similarly, those in Canada under a work permit are only allowed to work for the employer listed on their work permit,

³⁸ *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

³⁹ *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

⁴⁰ *Citizenship Act*, RSC 1985, c C-29 [Citizenship Act].

⁴¹ *Citizenship Regulations*, SOR/93-246 [Citizenship Regulations].

⁴² IRPR, *supra* note 39, s 183; IRPA, *supra* note 3838, ss 29–30.

⁴³ Government of Canada, “Work off campus as an international student” *Immigration, Refugees and Citizenship Canada* (04 June 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/work/work-off-campus.html>>.

unless they have been issued an open or occupation-specific work permit, and are not permitted to engage in long-term study.⁴⁴ Visitors, meanwhile, are not allowed to enter the local labour market or attend educational programs longer than six months.⁴⁵

In the middle of the continuum would be permanent residents, who have more rights than temporary residents, but still face some restrictions. Permanent residents have the right to live, work, and study anywhere in Canada, as long as they meet certain ongoing requirements, including an obligation to reside here for at least two out of every five years, and can also be removed from Canada if they engage in criminal activity or misrepresentation.⁴⁶ Permanent residents generally receive the same social benefits that Canadian citizens receive, but do not have access to the same political rights, as they cannot vote, run for political office, or hold government jobs that require high-level security clearance.⁴⁷

At the far end of the continuum would be Canadian citizens, who are able to access the full breadth of social and political rights in Canada, including participating in democratic governance and the right to enter, live, study, and work in Canada with no ongoing residency requirement. Though citizens are of course also subject to Canada's domestic laws, including criminal laws, citizens cannot be deported for violating federal laws like temporary residents and permanent residents can be.⁴⁸

⁴⁴ Government of Canada, "Types of work permits" *Immigration, Refugees and Citizenship Canada* (24 October 2018), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/permit/temporary/work-permit-types.html>>.

⁴⁵ *IRPR*, *supra* note 39, s 183.

⁴⁶ See *IRPA*, *supra* note 38, ss 27–28;

⁴⁷ Government of Canada, "Understanding Permanent Resident Status" *Immigration, Refugees and Citizenship Canada* (28 January 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/pr-card/understand-pr-status.html>>.

⁴⁸ Note that in Canada, citizens can sometimes have their citizenship stripped from them, and if that is done, they will revert to non-citizens who then may be expelled. In Canada, citizenship can be revoked from an immigrant if he or she obtained citizenship via false representation, fraud, or knowingly concealing material circumstances. It can also be revoked if a person who is a dual citizen of Canada and another country is convicted of terrorism, high treason, or spying, or if a person served as a member of an armed group of another country that was engaged in conflict with Canada. Importantly, if the revocation of citizenship will render a person stateless (i.e., if they do not have concurrent citizenship in another country), Canada's international obligations will prevent it from being able to proceed with citizenship revocation. For more on this topic, see Government of Canada, "Revocation of

With respect to both geographic borders and political–social borders, immigration and citizenship status is the mechanism through which states can engage in the practice of closure.

2.2 The Territorial State: Border Control as External Closure

In *Citizenship and Nationhood in France and Germany*, Rogers Brubaker discusses the ways in which modern states are legitimized both in terms of geographic borders and in terms of the concept of sovereignty.⁴⁹

The territorial state has an interest in controlling “the flow of persons across its borders”,⁵⁰ as its power is tied to spatial realities. As the entities that govern and the agents of state business are generally located within the geographic boundaries of the state, states are able to most effectively exercise authority over those physically present within its territory, and are less able to exercise control over those who are living outside its physical borders.⁵¹ As those living within the geographic territory of a state by and large constitute its workers and tax payers, are the ones making claims against the state, and are the ones the state can most easily access and oversee as its “objects of administration”, the movement of people into and out of the physical borders of a state unavoidably relates to its interests and responsibilities.⁵² In this way, control over geographic borders is a critical way in which states manifest their legitimacy and power.

Citizenship” *Immigration, Refugees and Citizenship Canada* (08 December 2017), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/acquisition-loss/revocation.html>>.

⁴⁹ Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge: Harvard University Press, 1992) at 25.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* However, an important caveat to the idea that states are able to most effectively govern within their own geographic territory is the idea of “migrating borders”: see Ayelet Shachar, “Bordering Migration/Migrating Borders” (2019) 37:1 *Berkeley Journal of International Law* 93, where Shachar explores how prosperous countries have reinvented borders such that border regulation no longer needs to take place at the “cartographic frontiers”, and instead can “seep inward” and “stretch outward”. With respect to how border regulation stretches outward beyond a state’s physical territory, Shachar discusses how countries like the USA and Canada station immigration and border officers at airports and visa offices overseas to operate pre-clearance systems and make visa determinations. Developments like this permit governments to exercise a great deal of authority over individuals located outside the territorial state.

⁵² Brubaker, *supra* note 49 at 25.

Border control functions as a way for states to engage in social closure against non-citizens—individuals who are seeking entry, but who do not possess full membership. While citizens generally cannot be denied entry to their own country, non-citizens can be denied entry for any reason a state sees as appropriate. For instance, in Canada, individuals who the government sees as posing a potential risk because they have previously engaged in criminal activity,⁵³ organized crime,⁵⁴ human or international rights violations,⁵⁵ or terrorism⁵⁶ can be denied entry to our physical territory. Similarly, individuals who the government thinks may pose a health risk—either because they have medical conditions that may pose a burden on our public healthcare system,⁵⁷ or because they have a serious illness that could spread to others⁵⁸—can be denied entry. Non-citizens who pose a threat for these kinds of reasons can also be expelled via deportation from a country if they are already within its borders, whereas citizens generally cannot be removed from the country of their citizenship (unless they are stripped of their citizenship first).⁵⁹

2.3 The Nation-State: Political and Social Participation as Internal Closure

In addition to geographic borders, states are also legitimized through the concept of sovereignty. As Brubaker explains, almost all modern states are nation-states, and derive their sovereign power from this self-understanding:

[Modern states] claim to derive state power from and exercise it for (and not simply over) a nation, a people. A state is a nation-state in this minimal sense insofar as it claims (and is understood) to be a

⁵³ See *IRPA*, *supra* note 38, s 36.

⁵⁴ *Ibid*, s 37.

⁵⁵ *Ibid*, s 35.

⁵⁶ *Ibid*, s 34.

⁵⁷ *Ibid*, s 38(1)(c).

⁵⁸ *Ibid*, ss 38(1)(a), 38(1)(b).

⁵⁹ See *supra* note 48.

nation's state: the state, "of" and "for" a particular, distinctive, bounded nation. For present purposes, the manner of distinctiveness is immaterial, the fact of distinctiveness alone essential. . . . modern states [are] bounded nation-states—states whose telos it is to express the will and further the interests of distinctive and bounded nations, and whose legitimacy depends on their doing so, or at least seeming to do so.⁶⁰

A state's authority to govern itself therefore arises from the premise that the state contains a nation—a particular group of people—and the state has a responsibility to represent the will and interests of that nation. The particular features and goals of the nation will vary from state to state (as will the homogeneity of those who comprise the nation, as some are ethno-nationalist and others are not), but the "bounded-ness" or "nation-ness" of the citizenry is a consistent feature of contemporary statehood.

Benedict Anderson explored the concept of "nation-ness" in his book *Imagined Communities: Reflections on the Origin and Spread of Nationalism*.⁶¹ For Anderson, nationalism is difficult to precisely define, but obviously present, as we recognize nations as being distinct from one another, and as we witness phenomena such as individuals being willing to die for their nation. Anderson argues that nations are social constructs, and ultimately function as "imagined communities", where even though individual members may not personally know other individual members, they share some baseline affinity and a common sense of membership in the same group.⁶² Therefore, in addition to being a physical and territorial entity, the state is also an imagined entity—an idea of the shared identity of the citizenry.

Social closure can therefore happen internally, as well, against those who are deemed not to have full membership in the imagined community of the nation-state. Non-members can be denied the ability to engage in the social and political activities that members participate in together. Again, citizenship status is the mechanism through which this form of internal social closure occurs.

⁶⁰ Brubaker, *supra* note 49 at 28.

⁶¹ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

⁶² *Ibid.*

Only citizens have a claim to full political and social participation. Generally speaking, only citizens of a country are able to vote in democratic jurisdictions and hold public office. Many jurisdictions also prohibit non-citizens from accessing certain state services and benefits. Because of this, though non-citizen residents of a territory may find themselves impacted in significant ways by political and social factors, they generally are not able to directly participate in decision-making regarding such issues—unless and until they obtain citizenship status.

3 Nation-Building and Access to Citizenship Status

There are generally multiple ways to access citizenship status in a country—whereas some individuals obtain citizenship in a state via ascription (i.e., due to having been born in that geographic territory or being a descendent of a citizen), others must go through the processes of immigration and naturalization in order to become citizens.

Importantly, as explained by Brubaker, citizenship operates as an instrument of closure—it is the mechanism through which membership is determined and enforced—but it is also in and of itself an object of closure.⁶³ Citizenship is not equally accessible to all—for those who are not ascribed citizenship at birth or who cannot access citizenship by descent, citizenship must be applied for through immigration and naturalization programs, and only those who are deemed by the state to meet the program’s requirements can complete the process to become full citizens. Thus, through immigration and naturalization programs, states are able to engage in the nation-building project by controlling to some extent who can belong to their “imagined community”. The contours and details of a country’s immigration and citizenship programs will therefore be instructive for understanding who the state views as an ideal candidate for full membership. This section will explore how the Canadian state, through our immigration and citizenship systems, attempts to produce an ideal type of citizen, as well as an ideal type of citizen family.

While some countries do not facilitate immigration and naturalization at significant levels, others

⁶³ Brubaker, *supra* note 49 at 23.

have come to rely significantly on incoming migrants, Canada included.⁶⁴ Indeed, Canada has built a reputation around the fact of incoming migration—we are often referred to as a “nation of immigrants” (Indigenous Canadians notwithstanding),⁶⁵ are recognized for our approach to multiculturalism,⁶⁶ and are frequently cited as having had a consistently high level of immigration throughout most of our history as a country.⁶⁷ Audrey Macklin calls Canada a “normative immigration country”, meaning Canada is a settler society that “positively extol[s] immigration as constitutive of the nation” and “is in the business of selecting parents of future citizens”.⁶⁸ Whereas a non-normative immigration country may still admit high numbers of migrants (and would likely prefer temporary instead of permanent immigration),⁶⁹ it will do so out of obligation and expediency, rather than out of a desire to bring individuals in who will eventually become full participating members of society.

Canada, as a historically normative immigration country, has endeavoured to control the composition of its nation through its immigration and naturalization programs, which have changed substantially over the decades. For example, until the enactment of the *Canadian Citizenship Act* of 1977, there was a preference for migrants coming from Britain and other part of the Commonwealth in the naturalization process—a preference that went away as the British

⁶⁴ Nicholas Keung, “Immigration key to Canada’s economic growth, study says” *Toronto Star* (03 May 2019), online: <<https://www.thestar.com/news/gta/2019/05/03/immigration-key-to-canadas-economic-growth-study-says.html>>.

⁶⁵ See e.g., Jack Jedwab, “Is Canada a Nation of Immigrants?” *Huffington Post* (31 March 2016), online: <https://www.huffingtonpost.ca/jack-jedwab/is-canada-a-nation-of-immigrants_b_9579348.html>.

⁶⁶ “How did multiculturalism become so central to Canada’s identity?” *CBC Radio* (22 February 2019), online: <<https://www.cbc.ca/radio/thesundayedition/the-sunday-edition-for-february-24-2019-1.5029453/how-did-multiculturalism-become-so-central-to-canada-s-identity-1.5029456>>; Erna Paris, “Canada’s multiculturalism is our identity” *The Globe and Mail* (27 April 2018), online: <<https://www.theglobeandmail.com/opinion/article-canadas-multiculturalism-is-our-identity/>>.

⁶⁷ Government of Canada, “Backgrounder—Facts in Canada’s Immigration History” *Immigration, Refugees and Citizenship Canada* (27 June 2011), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/news/archives/backgrounders-2011/facts-canada-immigration-history.html>>.

⁶⁸ Audrey Macklin, “From Settler Society to Warrior Nation and Back Again” in Jatinder Mann (ed), *Citizenship in Transnational Perspective* (Cham: Palgrave Macmillan, 2017) 285 at 286.

⁶⁹ *Ibid.*

Empire declined and as a new self-understanding of Canada's national identity took hold.⁷⁰ Though there have been many incidences of discriminatory law and policy in Canada's immigration history that should not be forgotten,⁷¹ Canada has benefited from immigration programs that are largely inclusive,⁷² and has cultivated immigration program criteria that do not explicitly require migrants to belong to any particular ethnic, racial, cultural, or religious group. One consistent feature of Canada's immigration and naturalization system since the mid-20th century is our points-based immigration program. As a settler society, we have a long history of bringing in migrants, both temporary and permanent, for the purpose of economic development, and our points-based immigration system is one way in which we have done this.

3.1 Ideal Citizens

In recent years, an emphasis has been placed on Canada's declining birth rate and growing population of aging retirees,⁷³ with the suggestion being that we must necessarily turn to immigration in order to ensure we have enough people working here and paying taxes to keep our society functioning. Accordingly, proponents of this view suggest we must focus on attracting highly skilled and highly educated individuals who will be able to contribute the most

⁷⁰ See Jatinder Mann, "The Redefinition of citizenship in Canada, 1950s-1970s" in Jatinder Mann, ed, *Citizenship in Transnational Perspective* (Cham: Palgrave Macmillan, 2017) 97.

⁷¹ Three of the most commonly cited examples of Canada's discriminatory immigration history include the Komagata Maru incident of 1914 (where South Asian immigrants hoping to settle in Canada were refused entry and unable to leave the boat they travelled on), the Chinese head tax (and eventual exclusion of Chinese immigrants altogether until 1948), and the exclusion of Jewish immigrants from the 1920s until after WWII. See Government of Canada, "The Komagata Maru Incident of 1914" *Parks Canada* (07 August 2016), online: <<https://www.canada.ca/en/parks-canada/news/2016/08/the-komagata-maru-incident-of-1914.html>>; Andrea Yu, "The enduring legacy of Canada's racist head tax on Chinese-Canadians" *Maclean's* (01 March 2019), online: <<https://www.macleans.ca/society/the-enduring-legacy-of-canadas-racist-head-tax-on-chinese-canadians/>>; Debra Black, "Canada's immigration history is one of discrimination and exclusion" *Toronto Star* (15 February 2013), online: <https://www.thestar.com/news/immigration/2013/02/15/canadas_immigration_history_one_of_discrimination_and_exclusion.html>.

⁷² Yasmeen Abu-Laban, "Building a New Citizenship Regime? Immigration and Multiculturalism in Canada" in Jatinder Mann, ed, *Citizenship in Transnational Perspective* (Cham: Palgrave Macmillan, 2017) 263 at 263.

⁷³ Government of Canada, "Immigration, Refugees and Citizenship Canada Departmental Plan 2018–2019" *Immigration, Refugees and Citizenship Canada* (20 December 2018), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/departmental-plan-2018-2019/departmental-plan.html>> [IRCC Departmental Plan 2018-2019].

economically.⁷⁴

The idea that immigration must be regulated with reference to economic needs has existed in Canadian immigration discourse for decades. For example, in May of 1947, then-Prime Minister William Lyon Mackenzie King stated the following before the House of Commons:

The government will seek by legislation, regulation and vigorous administration, to ensure the careful selection and permanent settlement of such numbers of immigrants as can advantageously be absorbed in our national economy...⁷⁵

Canada's points-based immigration system—where potential immigrants are evaluated based on a rubric that allots points based on how much an individual will be able to contribute to Canada economically—was one of the first points-based immigration programs in the world, and responded to Prime Minister Mackenzie King's call for "careful selection".⁷⁶

The points-based immigration program falls into the category of "economic immigration", which Canada's Federal immigration department, Immigration, Refugees and Citizenship Canada ("IRCC") describes as a category for migrants who are "selected based on their ability to become economically established in Canada".⁷⁷ In its current iteration, points are allotted for an applicant's education level, English and French language ability, amount and type of work experience, arranged employment, age, and ability to integrate and settle in Canada. The points-

⁷⁴ *Ibid.*

⁷⁵ Canada, Parliament, *House of Commons Debates* (01 May 1947).

⁷⁶ Adam Donald, "Immigration points-based systems compared" *BBC News* (01 June 2016), online: <<https://www.bbc.com/news/uk-politics-29594642>>.

⁷⁷ Government of Canada, "Permanent resident program: Economic classes" *Immigration, Refugees and Citizenship Canada* (18 June 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/economic-classes.html>>. Arguably, the way in which Canadian permanent immigration programs are divided into economic and non-economic classes creates a false dichotomy between economically beneficial immigrants, and economically neutral or harmful immigrants. If an economic immigrant is someone who is likely to become economically established in Canada, one may assume that immigrants in other categories are not likely to become economically established, furthering the narrative that non-economic immigrants are a "drain" on our system. Nevertheless, these immigration categories should be understood in terms of the primary reason for issuing permanent resident status to the individual—for economic immigrants, the primary reason is economic, whereas for family immigrants, the primary reason is family reunification, and for refugees, the primary reason is humanitarian.

based immigration system has never expressly indicated that certain ethnic and racial groups are preferred, and indeed, to many, its creation symbolized the end of overtly racist and discriminatory immigration practices in Canada, as it relied on an apparently objective set of questions about applicants' backgrounds and abilities.⁷⁸

That being said, the points-based system has always favoured applicants who are deemed more likely to integrate and adapt to life in Canada—those who are already employed or who will easily become employed upon arrival, those who have already studied or worked in Canada, those with close family members already living in Canada, and those who already speak our national languages with some fluency. It is clear that many people, for example those who have been unable to access higher education, and those who do not already speak English or French, will struggle to be seen as strong potential economic contributors within the scope of this program. Meanwhile, people from Western countries and former colonies are more likely to speak English and French, and those from wealthier developed countries are more likely to have had access to higher-level education and job opportunities, making them stronger candidates in this system. This more subtle form of discrimination along the lines of integration and adaptation was intentionally built into the points-based immigration program when it was created in 1967.⁷⁹

It is interesting to note that decades before it was created, the question of how the state could legitimately discriminate against incoming migrants was on the minds of Canadian legislators, as the rest of Prime Minister Mackenzie King's address to the House of Commons in May of 1947 reveals:

With regard to the selection of immigrants, much has been said about discrimination. I wish to make quite clear that Canada is perfectly within her rights in selecting the persons whom we regard as desirable future citizens. It is not a "fundamental human right" of any alien to enter Canada. It is a privilege. It is a matter of domestic policy.... There will, I am sure, be general agreement with the view that the people of Canada do not wish, as a result of mass immigration, to make a fundamental alteration in the character of our population. Large-scale immigration

⁷⁸ Triadafios Triadafilopoulos, "Dismantling White Canada: Race, Rights, and the Origins of the Points System" in Triadafios Triadafilopoulos, ed, *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective* (New York: Springer, 2013) 15 at 15.

⁷⁹ *Ibid.*

from the Orient would change the fundamental composition of the Canadian population.⁸⁰

Subsequent Canadian legislators in the 1960s, when the points-system launched, described the way in which the program was rightfully discriminatory in a more understated manner, and without subtle ethno-cultural and racial reference to the “character of our population” or “composition of the Canadian population”. For example, former Deputy Minister George Davidson wrote the following in a memorandum:

There may still be some tendency towards discrimination in the administrative application of the Regulations...through the fact that we recognize, for example, the greater difficulties that are faced by a West Indian who tries to find employment in Canada, as compared to a Western European. This may justify and even require a somewhat more exacting interpretation of adequacy in terms of skills and settlement arrangements in the case of the West Indian, since we know for a fact that the cards will be stacked against him to some extent in Canada, and that therefore he needs more skills or more resources if he is to have an even chance with the others. This kind of discrimination, in my opinion, can be justified and defended.⁸¹

Davidson’s framing suggests that the motivation for having these built-in preferences in the points-based immigration system is not so that the state can ensure that incoming migrants do not disrupt the ethno-cultural and racial homogeneity of Canada, but rather is for the benefit of migrants themselves—these preferences will ensure that those who score highly will be more likely to succeed in Canada.

This line of thinking reveals how the preferences of the points-based immigration program are the product of assumptions about what potential migrants should be able to accomplish, as the program is anticipatory in nature—immigration status in this stream is issued before the individual actually comes to Canada to make the contribution Canada is hoping for. Once an individual obtains permanent residency, IRCC cannot impose restrictions regarding what kind of employment he or she engages in, or what language he or she speaks. Once an individual becomes a full-fledged citizen, IRCC cannot even control whether he or she remains resident in

⁸⁰ *Supra* note 75.

⁸¹ Library and Archives Canada, *Memorandum to the Minister from the Deputy Minister* (21 January 1963), RG 76, Vol 778, File 537-7, Part 14.

Canada. Recent studies have suggested that many immigrants who enter Canada through our points-based immigration system have actually encountered significant obstacles when trying to adapt to life and work here.⁸² Along similar lines, immigrants who enter Canada via non-economic streams are subsequently found to still contribute economically and adapt to life here.⁸³

In any case, whether or not the points-based immigration system is a reliable method of determining who will achieve economic success, Canada's government has not wavered from the perspective that the points-based system is a boon to our society. In its most recent annual departmental plan, IRCC stated that the "majority of spaces for immigration will continue to be devoted to successful Economic Class applicants, continuing Canada's plan to sustain a growing economy."⁸⁴

Looking back over the last several decades, the vast majority of immigrants have entered Canada under the category of economic immigration, with family sponsored immigrants, refugees, and other immigrants trailing behind.⁸⁵ In this way, we can see that Canada has set economic

⁸² See e.g., Jeffrey G Reitz, "Closing the Gaps Between Skilled Immigration and Canadian Labor Markets: Emerging Policy Issues and Priorities" in Triadafios Triadafilopoulos, ed, *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective* (New York: Springer, 2013) 147; Gulay Ugur Goksel, *Integration of Immigrants and the Theory of Recognition: "Just Integration"* (Cham: Palgrave Macmillan, 2018) at 105-144. See also, Leah Hendry, "I didn't come here to live this kind of life': Skilled immigrants on desperate hunt for jobs in Quebec" *CBC News* (25 September 2018), online: <<https://www.cbc.ca/news/canada/montreal/quebec-immigration-skilled-workers-election-1.4833739>>.

⁸³ See e.g. Lori Wilkinson & Joseph Garcea, "The Economic Integration of Refugees in Canada: A Mixed Record?" *Transatlantic Council on Migration* (April 2017), online: <<https://www.migrationpolicy.org/research/economic-integration-refugees-canada-mixed-record>>; Peter Shawn Taylor, "How Syrian refugees to Canada have fared since 2015" *Maclean's* (21 May 2019), online: <<https://www.macleans.ca/news/canada/how-syrian-refugees-to-canada-have-fared-since-2015/>>; Garnett Picot, Yan Zhang & Feng Hou, "Labour Market Outcomes Among Refugees to Canada" *Statistics Canada* (11 March 2019), online: <<https://www150.statcan.gc.ca/n1/pub/11f0019m/11f0019m2019007-eng.htm>>.

⁸⁴ IRCC Departmental Plan 2018-2019, *supra* note 73.

⁸⁵ See Government of Canada, "Admission Category and Applicant Type (46), Period of Immigration (7), Age (12) and Sex (3) for the Immigrant Population Who Landed Between 1980 and 2016, in Private Households of Canada, Provinces and Territories, 2016 Census - 25% Sample Data" *Statistics Canada* (17 June 2019), online: <<https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=110557&PRID=10&PTYPE=109445&S=0&SHOWALL=0&SUB=0&Temporal=2017&THEME=120&VID=0&VNAMEE=&VNAMEF=undefined&>>.

immigration as its largest immigration category, and has tied Canada's economic and demographic needs to this immigration category. Does this, in turn, mean that Canada's ideal citizen is one who would score highly in the points-based immigration rubric, where perceived potential economic contribution is prioritized? In theory, allocating the highest number of spaces to the category of economic immigration clearly shows the state's efforts at nation-building. The state has a preference for a certain type of immigrant, and by extension, the state has a preference for who can eventually access citizenship status. That being said, it is important to note that the state's attempt to control who can have access to citizenship by constructing immigration criteria is frustrated by the reality of families.

3.2 Ideal Families

As Audrey Macklin has explained, a closer examination of immigration numbers reveals that though the highest number of immigrants enter Canada as permanent residents through the category of economic immigration, not all immigrants in that category are selected based on their perceived ability to contribute economically.⁸⁶ A large proportion of the people entering Canada through the category of economic immigration are actually accompanying family members and dependents of primary applicants—namely spouses and children—who are able to immigrate by virtue of their familial relationship with the principal applicant whose points were assessed. This means that if you add together the number of accompanying family members in economic immigration streams and the number of immigrants who are sponsored to immigrate by relatives, the majority of immigrants to Canada are actually immigrating on the basis of family relationships, and not their perceived ability to contribute economically. In other words, however much the state may wish to control access to citizenship by constructing the criteria for the ideal citizen, there is a lack of congruity between the ideal criteria the state determines, and the state's actual ability to produce this type of citizen.

We can therefore see that one way in which the state is constrained is the fact that applicants for permanent residency are able to bring their spouses and dependent children under the age of 22

⁸⁶ Audrey Macklin, "Freeing Migration from the State: Michael Trebilcock on Migration Policy" (2010) 60 *University of Toronto Law Journal* 315 at 345.

with them, and these spouses and children may not be people who would score very highly in the points-based system independently. General admissibility requirements prevent many “undesirable” immigrants like people with serious criminal records and people with costly or contagious illnesses from entering Canada as accompanying family members, but admissibility requirements cannot control very much else about which family members can come to Canada. We cannot control the education level, English or French language ability, employment prospects, or skill level of accompanying family members. This is because Canada tells potential immigrants that in addition to wanting immigration to support our economic goals, we also care about keeping families together. In paragraph 3(1)(d) of *IRPA*, the objectives of Canada’s immigration legislation clearly state that family reunification is one of the purposes of the Act,⁸⁷ so the government cannot outright prohibit the sponsorship of foreign national relatives by Canadian citizens and permanent residents or the inclusion of accompanying family members when individuals immigrate themselves.

Indeed, one could argue that the bar for admission is lowered—or at least different—when it comes to immigration premised on kinship ties. For example, general admissibility requirements are actually relaxed for people immigrating through the family sponsorship category, as can be seen by the fact that medical inadmissibility generally does not apply to people who are sponsored by a spouse or parent,⁸⁸ though it does apply to parents, grandparents, and other relatives, and people who are accompanying primary applicants in economic immigration programs.⁸⁹ Similarly, whereas immigrants in economic streams have to either demonstrate that they have sufficient settlements funds available based on their family size, or alternatively that they have already secured employment in Canada prior to becoming permanent residents,⁹⁰ immigrants coming to Canada as sponsored children or spouses do not need to demonstrate a

⁸⁷ *IRPA*, *supra* note 38, s 3(1)(d).

⁸⁸ *Ibid*, s 38(2)(a).

⁸⁹ *Ibid*, s 38(1).

⁹⁰ *IRPA*, *supra* note 38, s 76(1)(b); Government of Canada, “Proof of funds – Skilled Immigrants (Express Entry)” *Immigration, Refugees and Citizenship Canada* (28 February 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/documents/proof-funds.html>>.

certain level of income or savings, and instead must simply demonstrate that their family will be self-sufficient and that they will not rely on social assistance (and if they do go on social assistance within three years of being sponsored, their sponsor will be responsible for reimbursing the government).⁹¹ Thus, Canada has both a clear preference for immigrants who are deemed to be economically valuable, and a concurrent inability to apply their preferred assessment criteria to all incoming family members.

3.2.1 Worthy Families

This does not mean that families are not regulated by Canadian immigration law and policy. The state is able to regain some amount of control over accompanying and sponsored family members by controlling the definition of “family” and by controlling how genuine family relationships are assessed. Law and policy determine what kinds of familial relationships attract an immigration benefit, and how genuine familial relationships are to be assessed by immigration officers. The family members who can be included on a primary applicant’s immigration application are limited to spouses, who can be spouses via marriage or via common-law status, dependent children, who at the time of writing must be under the age of 22 and who must not have spouses of their own, and the dependent children of dependent children.⁹² Older dependent children who have a mental or physical condition that renders them unable to be self-sufficient can also be included.⁹³ In rare cases, *de facto* family members can be included in some primary applicants’ immigration applications as dependents, but generally, these cases are limited to the realm of refugee- and humanitarian-based immigration.⁹⁴

With respect to sponsorship of family members, the types of recognized familial relationships are

⁹¹ *IRPA*, *supra* note 38, s 39.

⁹² Government of Canada, “Glossary” *Immigration, Refugees and Citizenship Canada* (27 June 2019), online: <<http://www.cic.gc.ca/english/helpcentre/glossary.asp#d>>. See in particular the definitions provided for “accompanying family member”, “dependent”, and “dependent child”.

⁹³ *Ibid.*

⁹⁴ Government of Canada, “The humanitarian and compassionate assessment: De facto family members” *Immigration, Refugees and Citizenship Canada* (11 July 2017), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-facto-family-members.html>>.

broad, but still relatively limited. Subsection 12(1) of *IRPA* states the following:

A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent, or other prescribed family member of a Canadian citizen or permanent resident.⁹⁵

Spouses, both married and common-law, children, and parents are eligible to be sponsored, provided they meet other legal and policy requirements as determined by the government. Subsection 117(1) of *IRPR*, the immigration regulations, prescribes the following other family members as eligible for sponsorship: conjugal partners (individuals who have spouse-like relationships with their sponsor, but who cannot get married or cohabit with their sponsor due to reasons outside their control, such as same-sex couples living in a country that criminalizes same-sex relationships);⁹⁶ grandparents;⁹⁷ siblings, grandchildren, nieces, and nephews who are orphaned, under the age of 18, and who do not have spouses;⁹⁸ and children under the age of 18 who will be but have not yet been adopted in Canada.⁹⁹ There is additionally one final family sponsorship category: if a sponsor in Canada does not have any family members in any of the aforementioned categories who are either already permanent residents or citizens of Canada or who are living outside of Canada and could be sponsored, a sponsor can apply to sponsor any other relative who would otherwise not qualify, like a married sibling over the age of 18.¹⁰⁰ This category is colloquially called the “Lonely Canadian” family sponsorship category, as it would only apply to “lonely” individuals who have no other eligible family in Canada or outside Canada. Functionally, it is very difficult to actually use the Lonely Canadian category, as it is rare for a potential sponsor to have no one in or outside Canada who falls into any of the

⁹⁵ *IRPA*, *supra* note 38, s 12(1).

⁹⁶ *IRPR*, *supra* note 39, s 117(1)(a).

⁹⁷ *Ibid*, s 117(1)(d).

⁹⁸ *Ibid*, s 117(1)(f).

⁹⁹ *Ibid*, s 117(1)(g).

¹⁰⁰ *Ibid*, 117(1)(h).

prescribed family categories.¹⁰¹

3.2.2 Unworthy Families

For the most part, it is very difficult to sponsor anyone other than a dependent child under the age of 22 or a spouse, due to how family sponsorship programs are constructed by the government, and due to how infrequently potential sponsors will actually be able to fit their other relatives into the prescribed categories. For example, the spaces available in the parent and grandparent sponsorship program in Canada are far outnumbered by the number of people interested in sponsoring parents and grandparents, as the government has implemented low caps on how many applications they will accept.¹⁰² In addition, there are not very many individuals in Canada who have orphaned minor siblings, nieces, nephew, and grandchildren who they could or wish to sponsor instead of closer relatives like siblings.

Family-based immigration has periodically been treated with antipathy throughout Canada's history of immigration programing. A full longitudinal study of how the family class has developed is beyond the scope of this project, but there are several notable examples of how this category has been intermittently restricted. One example is how the Assisted Relative Class was abolished by the Canadian government in 2002. The Assisted Relative Class once enabled sponsors in Canada to support the immigration applications of a broad array of relatives beyond the nuclear family unit, including aunts and uncles, nieces and nephew, siblings, adult children,

¹⁰¹ Recent litigation has further illuminated how restrictive this category is, as the Federal Court has stated that what is meant by having no other family members who could be sponsored in one of the prescribed categories, is that there must not be any living relatives in any of the other prescribed categories. In *Bousaleh v Canada (Minister of Citizenship and Immigration)*, 2018 FCA 143, the Applicant argued that his living parents, who would likely be deemed medically inadmissible due to health conditions, were not family members eligible to be sponsored as their application would not be approved, and therefore the Applicant should be able to sponsor his married adult sibling. However, the Court determined that this was not the kind of scenario that the Lonely Canadian category was intended to address, and that if a family member who would fit into another prescribed category is living but unwilling to immigrate or unable to immigrate due to admissibility issues, they are still to be understood as eligible to be sponsored, cutting off the potential sponsor's ability to sponsor another non-prescribed relative.

¹⁰² Maura Forrest, "Here's what you need to know about the immigration sponsorship program that was only open for 10 minutes" *The National Post* (29 January 2019), online: <<https://nationalpost.com/news/heres-what-you-need-to-know-about-the-immigration-sponsorship-program-that-was-only-open-for-10-minutes>>.

and grandchildren.¹⁰³ Now, it is usually not possible to sponsor these kinds of relatives. Another example is how the age limit for dependent children has fluctuated over the years. Currently, children under the age of 22 can be sponsored or brought to Canada as accompanying dependents, but the cut-off was lowered to 18 by the then-Conservative federal government between 2014 and 2017 in order to reduce the number of adult children accompanying their parents to Canada.¹⁰⁴ Finally, the treatment of the parent and grandparent sponsorship program over the previous decade is worth noting. In 2011, the Conservative federal government froze the program, and stopped accepting applications altogether in order to address the processing backlog. The government cited concerns about protecting taxpayers from the expenses of admitting elderly migrants, and encouraged parents and grandparents to instead apply for super visas, which are long-term visitor permits that do not enable access to public healthcare or employment in Canada. When the parent and grandparent sponsorship program reopened in 2014, the Conservative government implemented more stringent financial criteria, and implemented a cap of only 5,000 applications annually.¹⁰⁵ The cap was increased by the subsequent Liberal government to 10,000 in 2017,¹⁰⁶ and to 20,000 in 2019, but the spots available in the program are still far exceeded by demand, leaving many families frustrated.¹⁰⁷

These kinds of limitations bring the following question into relief: In addition to wanting to produce ideal individual citizens by controlling who qualifies to immigrate, does the state also wish to produce ideal citizen families by controlling which relatives can accompany primary

¹⁰³ Shauna Labman, “Private Sponsorship: Complementary or Conflicting Interests?” (2016) 32:2 *Refuge* 67 at 69.

¹⁰⁴ Government of Canada, “Dependent Children” *Immigration, Refugees and Citizenship Canada* (18 December 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/dependent-children.html>>.

¹⁰⁵ “Canada accepting 5,000 parent, grandparent sponsorship applications” *CBC News* (02 January 2014), online: <<https://www.cbc.ca/news/politics/canada-accepting-5-000-parent-grandparent-sponsorship-applications-1.2481803>>.

¹⁰⁶ Kathleen Harris, “95,000 sponsors vie for 10,000 spots in lottery to bring parents, grandparents to Canada” *CBC News* (27 April 2017), online: <<https://www.cbc.ca/news/politics/lottery-parents-grandparents-immigration-1.4086527>>.

¹⁰⁷ Kathleen Harris, “Online applications to sponsor family immigrants hit limit in less than 11 minutes” *CBC News* (28 January 2019), online: <<https://www.cbc.ca/news/politics/ircc-parent-grandparent-sponsorship-filled-2019-1.4995806>>.

applicants and be sponsored?

3.2.2.1 Excluded Family Members

An examination of the exclusions listed in *IRPA* suggests that the state does attempt to control which kinds of family can benefit from kinship-based immigration. Beyond the usual admissibility examinations for criminality, organized crime, medical concerns, and financial ability, subsection 117(9) of *IRPA* states that the following family members cannot be sponsored: spouses and conjugal partners under the age of 18 (even if there was parental consent to a marriage);¹⁰⁸ partners of sponsors who have already sponsored a different spouse or conjugal partner and are still within the timeframe of their three-year undertaking (even if they have subsequently separated from or divorced their previous partner);¹⁰⁹ polygamous or bigamous partners of sponsors (even if the spouses are all aware and consenting);¹¹⁰ and spouses who were married in proxy marriages where one or both spouses were not physically present at the marriage ceremony (even if the couple has proceeded to have a spousal relationship that otherwise appears genuine).¹¹¹ We can see, through this list, that Canada's family immigration system is not equally available to all kinds of families. For instance, a family from a country where polygamy is culturally accepted would face barriers if they openly disclosed their familial arrangement. A couple coming from a country where it is acceptable for people under the age of 18 to be married would also face barriers. Similarly, a couple who had a proxy marriage due to cultural customs or because of travel limitations would face barriers if they tried to submit a spousal sponsorship application. Even if there was genuine spousal interdependence and love between the people in these types of relationships, their sponsorship applications would likely be refused.

¹⁰⁸ *IRPR*, *supra* note 39, s 117(9)(a).

¹⁰⁹ *Ibid*, 117(9)(b).

¹¹⁰ *Ibid*, 117(9)(c).

¹¹¹ *Ibid*, 117(9)(c.1).

3.2.2.2 Paragraph 117(9)(d) of *IRPR* – Undisclosed Family Members

Another example of how Canada's immigration system prohibits certain family members from being sponsored can be found in paragraph 117(9)(d) of *IRPR*.¹¹² This provision states that family members who were not declared and examined on their sponsors' immigration applications face a lifetime sponsorship ban. This provision applies to family members who were alive at the time their sponsor immigrated to Canada. The government's reasons for implementing this provision include that visa officers need to have all relevant information about family members in order to make determinations regarding an applicant's admissibility and eligibility, and that applicants need to be encouraged to provide full disclosure in order to "enhance the overall integrity of Family Class immigration, and to protect the health, safety, and security of Canadians."¹¹³ Paragraph 117(9)(d) has attracted much criticism from proponents of family reunification, as it has historically not been sensitive to the reasons why individuals may fail to disclose family members on their immigration applications.¹¹⁴ In practice, this provision commonly applies to individuals dealing with complex circumstances and family dynamics, including refugees from conflict areas who may not know whether their relatives are alive, people who are estranged from their relatives and do not know their whereabouts, people who have living children they are unaware of, and people who fear disclosing family members, because these family members may render them inadmissible. In Canada, pursuant to section 42 of *IRPA*, a primary applicant can generally be denied permanent resident status if they have an inadmissible family member, whether that family member will accompany them to Canada or not.¹¹⁵ Lifetime sponsorship bans can result from innocent mistakes where an applicant simply

¹¹² *Ibid*, s 117(9)(d).

¹¹³ Government of Canada, "Public Policy to facilitate the immigration of certain sponsored foreign nationals excluded under paragraph 117(9)(d) or 125(1)(d) of the Immigration and Refugee Protection Regulations" *Immigration, Refugees and Citizenship Canada* (11 July 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/excluded.html>> [117(9)(d) Public Policy].

¹¹⁴ See Canadian Council for Refugees, *Excluded Family Members: Brief on R.117(9)(d)* (May 2016), online: <<https://ccrweb.ca/sites/ccrweb.ca/files/excluded-family-members-brief-may-2016.pdf>>.

¹¹⁵ *IRPA*, *supra* note 38, s 42. See also Government of Canada, "Humanitarian and compassionate: Inadmissibility of family members (A42)" *Immigration, Refugees and Citizenship Canada* (12 March 2018), <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins->

forgets to include a family member or update an application when their family composition changes, as well as intentional misrepresentation regarding family members. One recent assessment determined that 90% of 117(9)(d) cases did not involve intentional fraud, but rather misunderstandings and tragic family circumstances.¹¹⁶

Until recently, the only available remedy for individuals facing a lifetime sponsorship ban due to paragraph 117(9)(d) is a request for humanitarian and compassionate consideration. Subsection 25(1) of *IRPA* permits applicants to request an exemption from any applicable criteria or obligations of the Act if it is justified by humanitarian and compassionate considerations relating to the applicant. Under this section, visa officers are directed to consider the best interests of any children directly affected by the decision in addition to the circumstances of the applicant. These determinations are highly discretionary, and if refused, there is no right to appeal for these types of applications.¹¹⁷ Humanitarian and compassionate applications generally require relatively complex legal and factual submissions to be made (and often require applicants to retain a lawyer or consultant to make these arguments on their behalf), and can dramatically lengthen application processing times.¹¹⁸ With respect to how effective humanitarian and compassionate arguments are, Liew, Balasundaram, and Stone have stated that humanitarian and compassionate arguments only provide relief in approximately half of 117(9)(d) cases.¹¹⁹

In 2019, the Canadian government announced that it would launch a pilot project between September 2019 and September 2021 to facilitate the processing of certain sponsored family members who would otherwise be excluded under paragraph 117(9)(d). This pilot program would apply to spouses and dependent children whose sponsors obtained permanent residence as

[manuals/permanent-residence/humanitarian-compassionate-consideration/processing/dealing-with-inadmissibility/inadmissibility-family-members-a42.html>.](#)

¹¹⁶ Jamie Liew, Prasanna Balasundaram & Jennifer Stone, “Troubling Trends in Canada’s Immigration System via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers” (2017) 26 J L & Soc Pol’y 112 at 113.

¹¹⁷ See Canadian Council for Refugees, *supra* note 114 at 7.

¹¹⁸ *Ibid.*

¹¹⁹ Liew, Balasundaram & Stone, *supra* note 116 at 113.

refugees, protected persons, or who were themselves sponsored as family members for permanent residence. The family members being sponsored cannot have made their sponsor ineligible or inadmissible in the class that the sponsor applied for permanent residency through, and the language of the policy states that officers “may” grant exceptions for prescribed individuals, suggesting that officers ultimately still have the discretion to allow or not allow sponsors’ applications.¹²⁰ Arguably, this change means that paragraph 117(9)(d) is still restrictive and punitive for many potential sponsors, as it does not include individuals who have obtained permanent residency outside the refugee, protected person, and family sponsorship streams, for those who wish to sponsor relatives other than spouses or dependent children, and sponsors who failed to disclose family members who would have made them inadmissible. The importance of continuing to maintain the integrity of Canada’s immigration system was specifically cited in the government’s announcement of this pilot project, and the government further stated that they wished to address only “the most vulnerable populations” and not everyone impacted by paragraph 117(9)(d), in order to minimize “program integrity risk”.¹²¹ At the end of the pilot project, the government intends to review its effects before deciding whether it should continue.

The nature of the policy exemption brings into question how much of a difference it will actually make. The wording of the policy suggests that it is still up to the discretion of individual officers whether to allow exemptions from paragraph 117(9)(d). It also applies to only a narrow segment of potential sponsors impacted by 117(9)(d). Presumably, applicants citing this policy will still need to provide fulsome factual and legal submissions that will likely require the assistance of counsel, and applicants cannot assume that their applications will be approved.

It is unclear whether paragraph 117(9)(d) does anything to add to the other existing protections against fraud and abuse in our immigration system. Individuals who would be banned from sponsoring relatives under this provision would likely also be found inadmissible due to misrepresentation, which is prohibited by subsection 40(1) of *IRPA*. Permanent residents, foreign

¹²⁰ 117(9)(d) Public Policy, *supra* note 113.

¹²¹ *Ibid.*

nationals, and their family members can be stripped of their status in Canada and rendered inadmissible for a period of five years due to misrepresentation if they have directly or indirectly misrepresented or withheld a material fact relating to a relevant matter (such as the existence of a family member) that induced or could have induced an error in the administration of *IRPA*.¹²² This means that in addition to the lifetime sponsorship ban imposed by paragraph 117(9)(d), a potential sponsor who fails to disclose a relative may also lose their own status in Canada, which would automatically make them ineligible as a sponsor. In practice, the government often concurrently applies both subsection 40(1) of *IRPA* and paragraph 117(9)(d) of *IRPR* to the same cases, so that individuals are effectively facing double punishment and are forced to both defend their own status and their family members' sponsorship applications. Similarly, citizens affected by paragraph 117(9)(d) may also find themselves subject to citizenship revocation proceedings, as pursuant to subsections 10(1) and 10.1(1) of the *Citizenship Act*, citizenship can be revoked if an individual obtained citizenship by false representation, fraud, or knowingly concealing material circumstances.¹²³ Arguably, the integrity of our immigration system is already effectively protected by our misrepresentation provisions, which apply broadly and can impose serious punitive measures.

Jamie Liew characterizes paragraph 117(9)(d) as akin to an absolute liability offence, which means that “one can be held liable . . . without determining either fault or whether reasonable care was taken”.¹²⁴ Historically, in other areas of law, absolute liability is rarely used. In criminal law, there are concerns that absolute liability offences can violate the *Canadian Charter of Rights and Freedoms*, as they essentially do not allow accused persons to make a defence if it has been established that they committed the act in question. In tort law, absolute liability only applies to “ultrahazardous” activities—situations where legislators and courts want to unequivocally discourage risky behaviour that can cause serious damage. As Liew states, outside these rare circumstances, it is difficult to see the utility (or legality) of an absolute liability

¹²² *IRPA*, *supra* note 40 at s 40(1).

¹²³ *Citizenship Act*, *supra* note 42, ss 10(1), 10.1(1).

¹²⁴ Jamie Chai Yun Liew, “The Ultrahazardous Activity of Excluding Family Members in Canada’s Immigration System” (2016) 94:2 *Canadian Bar Review* 281 at 296.

offence in the immigration context, particularly in light of the fact that family reunification is an expressly stated goal of our immigration system, and when there are other ways to deal with misrepresentation and non-disclosure.¹²⁵

3.2.2.3 Genuineness Assessments

Paragraph 117(9)(d) results in non-disclosed family members being unable to fit into the family class category. Beyond determining whether a certain type of familial relationships fits into one of the prescribed categories that are deemed acceptable for family immigration purposes, there is an additional layer of scrutiny in the form of the genuineness assessment. In cases where primary immigration applications are including accompanying dependent family members with them in their application, these relationships generally have to be shown to be legitimate, and not primarily for the purpose of obtaining an immigration benefit. In other words, it must be demonstrated that the relationship is not a fraudulent one entered into for the purposes of facilitating a visa. Arguably, for accompanying family members, the scrutiny is not particularly rigorous—for married couples, a marriage certificate is generally sufficient, children can rely on birth certificates, and common-law spouses can demonstrate at least one year of cohabitation. These individuals are generally not interviewed by immigration authorities, or asked for additional proof to support that their relationships are real.

In the family sponsorship context, however, the level of scrutiny is much higher. Beyond legal status documents like birth certificates, marriage certificates, and household registers, people seeking to sponsor family members for immigration have to provide a lot more material.¹²⁶ For

¹²⁵ *Ibid* at 296-303; 308.

¹²⁶ See Government of Canada, “Sponsor your spouse, common-law partner, conjugal partner or dependent child – Complete Guide (IMM 5289)” *Immigration, Refugees and Citizenship Canada* (03 July 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5289-sponsor-your-spouse-common-law-partner-conjugal-partner-dependent-child-complete-guide.html>>; Government of Canada, “Sponsorship of adopted children and other relatives — The sponsor’s guide (IMM 5196)” *Immigration, Refugees and Citizenship Canada* (10 May 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5196-sponsorship-adopted-children-other-relatives-sponsor.html>>; Government of Canada, “Guide 5772 - Application to Sponsor Parents and Grandparents” *Immigration, Refugees and Citizenship Canada* (17 July 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5772-application-sponsor-parents-grandparents.html>>.

spouses, this includes proof they have visited one another and continued contact via phone, mail, and electronically if they are not cohabiting at the time of the application; proof that they live at the same address if they are cohabiting at the time of the application; proof that they share finances, household expenses, and bills; proof that they have declared one another as spouses on official documents like insurance paperwork, bank accounts, and government identification; and proof that other friends, family, and the general public recognize them as spouses in the form of reference letters, photographs, and social media screenshots. Sponsorships of biological children and parents typically require fewer but similar kinds of materials to show interdependency and that the relationship predated the time of the immigration application, in order to demonstrate that it was not a relationship that was entered into for the purposes of facilitating a visa and contravening the usual immigration requirements. Sometimes, DNA tests can be ordered to prove biological ties between parents and children, and visa officers can also request that sponsors and applicants in all types of family sponsorship applications attend in-person interviews, where questions about the history of the relationship, the reasons for coming to Canada, and any other questions the officer sees fit to inquire about, can be asked. Interviews are most common in spousal sponsorship cases.

Whereas accompanying family members of primary applicants in economic immigration streams can generally rely on third party documentation to sufficiently prove their relationships, applicants in the family sponsorship stream generally have to provide significantly more documentation. This brings into question why officers treat the relationships between primary applicants and their dependents in non-family sponsorship streams with deference, but treat the relationships between sponsors and sponsored family members with scrutiny. In the case of accompanying family members, the primary applicant will usually need to demonstrate a reason other than familial ties for needing to immigrate—if they are immigrating under a humanitarian category, they will need to demonstrate a need for protection or relief, and if they are immigrating under an economic category, they will need to demonstrate that they will be able to contribute economically. In other words, the genuineness of the familial relationship is a corollary issue to be dealt with after the primary matter of economic establishment or need for protection is considered. However, in family sponsorship applications, the familial relationship itself is the primary matter to be assessed, and forms the basis of the sponsored person's application to immigrate.

3.2.2.4 Biological Family vs. Chosen Family

On inspection, another pattern emerges when considering which families the state deems unworthy, where relationships based on biology—those between biological parents and children, or between siblings—are usually less onerous to prove as genuine, whereas relationships based on choice—those between parties who are not biologically related, but rather choose to enter into a certain type of relationship, like spouses or adoptive parents and children—require much more documentation and third-party evidence to prove as genuine. In addition to the usual evidence submitted to prove the genuineness of relationships, including photographic evidence, birth certificates, marriage certificates, and support letters, if there are doubts about whether a relationship between a parent and child is genuine, the family can submit to a DNA test, which is treated as irrefutable evidence that the individuals in question are parent and child.¹²⁷ A DNA test would be treated as proof of genuineness even if a parent were neglectful toward their child, even if a parent was not involved directly with raising a child, and even if a child did not have feelings of love and care toward their parent. DNA tests function as trump cards, and will immediately clarify for a decision maker whether a relationship should be understood as being “real”.

DNA tests are described by IRCC as an option of “last resort” when genetic relationships need to be proven, after other evidence has already been reviewed but there are still doubts about genuineness.¹²⁸ Accordingly, it is usually families who have struggled to provide other kinds of evidence who are subject to DNA testing. This would include refugee families who may not have access to personal documentation because they have had to flee or because their documents have been destroyed, and people from developing countries where there may not be infrastructure in place to provide reliable identity and vital statistics documents like identity cards with security features and verified household registers.¹²⁹

¹²⁷ Government of Canada, “DNA Testing” *Immigration, Refugees and Citizenship Canada* (23 January 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/dna-testing.html>> [DNA Testing].

¹²⁸ *Ibid.*

¹²⁹ Canadian Council for Refugees, “DNA Tests: A Barrier to Speedy Family Reunification” (October 2011), online: <<https://ccrweb.ca/files/dnatests.pdf>> at 1 [CCR DNA Report].

DNA tests are meant to be non-invasive (i.e., based on saliva samples), and ideally, samples should be taken from the child in question and both of his or her biological parents, as it is apparently more difficult to conduct a DNA test between a child and its father only, than it is to conduct a DNA test between a child and both parents.¹³⁰ If a visa officer would like a DNA test conducted, they must send a letter to the applicant informing them that they have the option of submitting to a DNA test, but that they will not be forced to undergo one. The Canadian government does not pay for DNA tests—applicants must arrange for a test to be conducted by an accredited agency, and pay for the test themselves, which can be quite costly.¹³¹ If an applicant chooses not to undergo a DNA test, the decision maker will surely be left with doubts about the genuineness of the relationship, as a DNA test would only be requested if the other evidence provided is determined to be insufficient. Presumably, it will also be open to a decision maker to draw a negative inference regarding genuineness if an applicant is unwilling to undergo a DNA test.¹³²

If there are doubts about whether a relationship between two spouses is genuine, there is no equivalent biological proof of legitimacy that can be provided. For biological family relationships, there is a truth originating directly from the body that permits decision makers to avoid reckoning with the complex reality of how human beings manage family relationships. Interestingly, DNA tests are sometimes used in an indirect way to demonstrate the genuineness of non-biologically related individuals. For instance, DNA tests are sometimes requested in the context of spousal sponsorship applications to determine whether a sponsor and applicant are actually the genetic parents of children together.¹³³ DNA tests have also been used in the context of intercountry adoption sponsorship cases, to determine whether an adoptive parent is actually a biological relative like an aunt or uncle, even though DNA testing for relationships other than

¹³⁰ DNA Testing, *supra* note 127.

¹³¹ CCR DNA Report, *supra* note 129 at 5.

¹³² See e.g., *Punia v Canada (Citizenship and Immigration)*, 2011 CanLII 88084 (CA IRB).

¹³³ CCR DNA Report, *supra* note 129 at 7.

those between parents and children are not as reliable.¹³⁴

The fact that visa officers see DNA tests as so trustworthy—even when they are not being used to directly prove a relationship between a sponsor and applicant—suggests an anxiety about modes of truth in the context of assessing family relationships. Photographs, birth certificates, marriage certificates, and support letters can be indicative of genuineness, but not in the same way that DNA testing can provide a deeper truth about which families are “real” enough to be worthy of the privilege of reuniting in Canada.

Undoubtedly, many families face difficulty meeting the genuineness requirements in family immigration applications. Newly married couples may not have had the chance to open joint bank accounts and combine their utility and other bills yet. Indeed, many loving and committed couples may not wish to join their finances at all, and prefer to keep separate bills and living expenses. Queer and same-sex couples may not be accepted by their communities and may not be able to show that their relationships are publicly recognized if they have unsupportive families or if they have not yet told their families about their relationships. Couples who are non-monogamous but nonetheless committed to one another may worry that questions about non-monogamy could be asked in the context of a visa interview, and an officer may see this as a sign that the relationship is not genuine.¹³⁵ Whereas a DNA test can provide final, unquestionable proof when there are doubts about relationships based on biology, there is no equivalent trump card for relationships based on choice.

3.2.2.5 Accompanying Family of Temporary Residents

In addition to family members who are accompanying primary applicants in permanent residence applications, and family members being sponsored for permanent residence through the family class, family members can sometimes accompany primary applicants who are coming to Canada as temporary students and workers.

¹³⁴ *Ibid.*

¹³⁵ For more on the topic of monogamy and genuineness, see *De Rosa v Canada (Citizenship and Immigration)*, 2012 CanLII 61483 (CA IRB) at paras 147-48.

For international students in Canada, if they are attending an educational program at a public post-secondary institution, a private college-level school or CEGEP in Quebec, or a private post-secondary institution that has been authorized to award degrees under provincial legislation,¹³⁶ they have the option of bringing accompanying dependent spouses—both common-law and married—and accompanying dependent minor children with them. For temporary foreign workers, if they have secured employment in Canada as a high-skilled worker for six months or longer, they can also bring their spouse and dependent minor children with them to Canada.¹³⁷ Spouses can obtain open work permits that will expire in concert with the primary applicant's study permit or work permit, and children can obtain authorization to attend public grade school for the same duration of time.¹³⁸

Importantly, international students at private institutions that cannot grant degrees, including most private ESL programs in Canada, and temporary foreign workers who are employed as “low skilled” workers in non-caregiving occupations are not permitted to bring accompanying spouses with them to Canada. The ban on low skilled workers bringing accompanying family members extended to temporary foreign workers in caregiving occupations as well until changes to Canada's caregiver program were announced in 2019. Child caregivers and home support workers for the ill and elderly are now also able to bring spouses and dependent children with them to Canada.¹³⁹

The logic behind this restriction is likely related to the fact that most low skilled temporary foreign workers in Canada do not have many pathways to permanent residency. Whereas high

¹³⁶ Government of Canada, “Help your spouse or common-law partner work in Canada” *Immigration, Refugees and Citizenship Canada* (10 October 2019), online: < <https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/work/help-your-spouse-common-law-partner-work-canada.html>>.

¹³⁷ Government of Canada, “Types of work permits for your situation” *Immigration, Refugees and Citizenship Canada* (05 May 2019), online: < http://www.cic.gc.ca/english/work/apply-who-permit-result.asp?q1_options=1i&q2_options=2d>.

¹³⁸ *Ibid.*

¹³⁹ Government of Canada, “Home Child Care Provider Pilot and Home Support Worker Pilot: About the process” *Immigration, Refugees and Citizenship Canada* (19 September 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/caregivers/child-care-home-support-worker/no-experience-about.html>>.

skilled workers can generally qualify under our economic immigration programs, low skilled workers' work experience typically does not count towards economic immigration programs. One exception to this is for caregivers, who have a dedicated application stream for permanent residency. Accordingly, unless a low skilled migrant worker in Canada can qualify for permanent residency via family sponsorship, or a humanitarian or refugee application, it is unlikely that they will be able to remain in Canada permanently. The lack of permanent immigration options for low-skilled workers is by design—as explained in Part 3.1 of this thesis, Canada's immigration system has a built-in preference for high skilled and highly educated migrants. If a low skilled migrant worker is unlikely to be permitted to remain in Canada permanently, it makes sense that the government would want to discourage actions that would promote long-term settlement, including being able to bring spouses and children. If a low skilled migrant worker's family remains outside of Canada, they may be more likely to leave Canada to reunite with their family, instead of trying to remain in Canada without authorization.

3.2.2.6 Summary

Thus, we can see that there are certain families that Canada does not want to reunite. In the aforementioned examples, the state is attempting to control what kinds of families settle here, and what kinds of family relationships are permissible for future citizens entering the immigration system—as far as the Canadian government is concerned, the ideal Canadian would not engage in polygamy, would not practice underage marriage, would ensure that their family is economically self-sufficient and interdependent, would not engage in proxy marriage, and would have the support and recognition of their community and family. Thus, our nation-building project, as evidenced by how we have delineated the contours of our immigration programs, involves not only trying to reproduce a certain type of individual citizen subject, but also a certain type of citizen family. In the words of Megan Gaucher, who has explored how the Canadian state uses the framework of conjugality to identify legitimate spousal relationships in the immigration context,

[i]n the case of family reunification, it is not simply a case of individuals sponsoring individuals; it is about the state producing and maintaining the ideal family unit through the provision of citizenship.... My primary claim is that the Canadian state has had and continues to have a vested interest in the

privileging of conjugal families for immigration purposes.¹⁴⁰

For Gaucher, conjugality is the “point of access” in our immigration programs, and it is the area where we see how differently the state treats domestic families who are already Canadian citizens, and families who are hoping to be reunited in Canada—as she terms, “inside families” and “outside families”.¹⁴¹ The state is limited in its ability to control how domestic citizens build and sustain their families. For instance, the government cannot control whether a Canadian citizen couple decides to engage in non-monogamy, or wishes to keep their financial lives entirely separate. Similarly, the government cannot force Canadian citizen children to become self-sufficient once they turn 19 or 22 years of age. Setting out categories of permissible relationships and assessing relationships for genuineness provides an opening for the government to exercise some degree of control over families where all parties are not already Canadian citizens. For instance, during a spousal sponsorship interview, if it is determined that one partner in a couple has engaged in an extramarital sexual relationship without the other’s knowledge, this can be grounds for a refusal on the basis of non-genuineness.¹⁴² Gaucher’s exploration of this issue is limited to the context of spousal relationships, and she acknowledges that the intersection of citizenship and family is an understudied area in Canada.¹⁴³ This thesis intends to expand on the work that has been done to date exploring how the Canadian state tries to produce ideal family forms through its intercountry adoption process.

4 Review of Existing Literature

Intercountry adoption has been a rich area of study in areas outside of legal scholarship. In particular, much has been written in the fields of psychiatry, psychology, social work, and sociology, looking at how intercountry adoption impacts outcomes for internationally and trans-

¹⁴⁰ Megan Gaucher, *A Family Matter: Citizenship, Conjugal Relationships, and Canadian Immigration Policy* (Vancouver, UBC Press, 2018) at 10.

¹⁴¹ *Ibid.*

¹⁴² See *supra* note 135.

¹⁴³ Gaucher, *supra* note 140 at 19.

racially adopted children, in areas such as social skills,¹⁴⁴ education,¹⁴⁵ health,¹⁴⁶ and identity.¹⁴⁷ Such work is important when discussing intercountry adoption, as it can help us to understand the kinds of conditions that are more likely to lead to successful cases where children are well-integrated, happy, and healthy in their adoptive families and as adults. Historical and data-driven work has also been done, looking at patterns of intercountry adoption around the world, exploring why some countries sent children abroad while others received them, and exploring why successful intercountry adoption has been declining in recent years.¹⁴⁸ This work is also important and helpful for understanding the historical trajectory of intercountry adoption, and the various factors that can constrain and enable it globally.

The present thesis will be focusing on Canadian intercountry adoption from a law and policy perspective. Studies of the intercountry adoption laws and policies implemented in other countries that have historically been significant “receiving” states for intercountry adoptions

¹⁴⁴ See e.g., Natalia Barcons, Neus Abrines, Carme Brun, Claudio Sartini, Victoria Fumado & Diana Marre, “Social Relationships in Children from Intercountry Adoption” (May 2012) 34:5 *Children and Youth Services Review* 955; Jesus Palacios, Carmen Moreno & Maite Roman, “Social Competence in Internationally Adopted and Institutionalized Children” (2013) 28:2 *Early Childhood Research Quarterly* 357.

¹⁴⁵ See e.g., Tony Xing Tan & Linda A Camras, “Social Skills of Adopted Chinese Girls at Home and in School: Parent and Teacher Ratings” (October 2011) 33:10 *Children and Youth Services Review* 1813; Bo Vinnerljung, Frank Lindblad, Anders Hjern, Finn Rasmussen & Monica Dalen, “School Performance at Age 16 Among International Adoptees: A Swedish National Cohort Study” (July 2010) 53:4 *International Social Work* 510.

¹⁴⁶ See e.g., Frank Lindblad, Gunilla Ringback Weitof & Anders Hjern, “AHDH in International Adoptees: A National Cohort Study” (January 2010) 19:1 *European Child & Adolescent Psychiatry* 37; Frank C Verhulst, Monika Althaus & Herma JM Versluis-Den Bieman, “Problem Behaviour in International Adoptees: I. An Epidemiological Study” (January 1990) 29:1 *Journal of the American Academy of Child & Adolescent Psychiatry* 94; Dana E Johnson, “Long-Term Medical Issues in International Adoptees” (2000) 29:4 *Pediatric Annals* 234; Femmie Juffer & Marinus H Van IJzendoorn, “Behaviour Problems and Mental Health Referrals of International Adoptees: A Meta-Analysis” (2005) 293:20 *JAMA* 2501.

¹⁴⁷ See e.g. Jo Daugherty Bailey, “A Practice Model to Protect the Ethnic Identity of International Adoptees” (2007) 10:3 *Journal of Family Social Work* 1; Jayashree Mohanty, Gary Keokse & Esther Sales, “Family Cultural Socialization, Ethnic Identity & Self-Esteem” (2006) 15:3-4 *Journal of Ethnic & Cultural Diversity in Social Work* 153; Elizabeth A Suter, “Negotiating Identity and Pragmatism: Parental Treatment of International Adoptees’ Birth Culture Names” (2012) 12:3 *Journal of Family Communication* 209.

¹⁴⁸ See e.g., Peter Selman, “The Rise and Fall of Intercountry Adoption in the 21st Century” (August 2009) 52:5 *International Social Work* 575; Peter Selman, “Trends in Intercountry Adoption: Analysis of Data from 20 Received Countries, 1998-2004” (September 2006) 23:2 *Journal of Population Research* 183; Kathy S Stolley, “Statistics on Adoption in the United States” (Spring 1993) 3:1 *The Future of Children* 26; Claudia Fonseca, “An Unexpected Reversal: Charting the Course of International Adoption in Brazil” (October 2002) 26:3 *Adoption & Fostering* 28.

have been conducted, such as in the United States,¹⁴⁹ Australia,¹⁵⁰ and the United Kingdom.¹⁵¹ These studies refer to legislation, reported court decisions, and case studies to assess whether the intercountry adoption laws and policies implemented by these countries conform with the objectives of the Hague Adoption Convention, and recommend changes to domestic processes that will better achieve Hague Adoption Convention objectives.

To date, no Canadian study exists. The work that has examined provincial and federal intercountry adoption law and policy in Canada is outdated and not comprehensive. For instance, Lovelock explores the history of intercountry adoption in Canada since WWII, but does not focus on legal issues.¹⁵² Daniel¹⁵³ and Dorrow & Lepatsky¹⁵⁴ briefly suggest that legal changes could be made to better promote the best interests of the child in Canadian intercountry adoptions. However, this work cannot account for the significant developments in Canadian intercountry adoption law over the last decade. The more recent work done in this area does not apply a critical lens. Battista & Jordan¹⁵⁵ provide a useful survey Canadian intercountry adoption

¹⁴⁹ Mary Landrieu & Whitney Reitz, “How Misconceptions About International Adoption Lead to a Violation of Human Rights Against Unparented Children” (2014) 22 *Tulane Journal of International and Comparative Law* 341; David Smolin, “The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals” (2005) 35:403 *Seton Hall L Rev* 494; Joan Heifetz Hollinger, “Intercountry Adoption” (2004) 8:1 *Adoption Quarterly* 41; Karen Smith Rotabi & Judith L Gibbons, “Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?” (2012) 21 *Journal of Child and Family Studies* 106.

¹⁵⁰ Celica Bojorge, “Intercountry Adoptions: In the Best Interests of the Child?” (2002) 2:2 *QUTLJJ* 266; Denise Cuthbert, Ceridwen Spark & Kate Murphy, “‘That was Then, but This is Now’: Historical Perspectives on Intercountry Adoption and Domestic Child Adoption in Australian Public Policy” (September 2010) 23:3 *Journal of Historical Sociology* 427.

¹⁵¹ Peter Hayes, “Deterrents to Intercountry Adoption in Britain” (2000) 49:4 *Family Relations* 465; Anita Gibbs, “‘Having to Adopt Children Twice is not in the Children’s Best Interests’: A Reflective Case Study Analysis of Intercountry Adoption Policy in the UK” (2011) 33:3 *J Soc Welfare & Fam L* 267.

¹⁵² Kirsten Lovelock, “Intercountry Adoption as a Migratory Practice: A Comparative Analysis of Intercountry Adoption and Immigration Policy and Practice in the United States, Canada, and New Zealand in the Post WWII Period” (2000) 34:3 *International Migration Review* 915.

¹⁵³ Pam Daniel, “Intercountry Adoption and Intercountry Adoption Services” *Canadian Issues* (Spring 2006) 57.

¹⁵⁴ Sara Dorrow & Terry Lepatsky, “Intercountry Adoption: An “Exceptional” Form of Immigration?” *Canadian Issues* (Spring 2006) 61.

¹⁵⁵ Michael Battista & Kelly D Jordan, *Canadian Family and Immigration Law: Intersections, Developments and Conflicts* (Toronto: Carswell, 2015).

legislation and case law, but their work is intended to guide lawyers navigating the system as it stands. It does not draw conclusions about whether Canadian intercountry adoption law is consistent with international law objectives, does not examine the reasons for and impact of the Canadian government's regulation of intercountry adoptive families, and does not state if and how Canadian intercountry adoption law should change. Finally, Collard¹⁵⁶ looks specifically at adoption law and immigration law, arguing that Canadian laws are too restrictive, but her analysis is limited to cases of intrafamily adoption in Quebec.

Some work has been done in recent years that applies a critical lens to family immigration issues, though it does not explicitly focus on the issue of intercountry adoption. For example, Megan Gaucher, cited above, in her book *A Family Matter*, critically examines how the state regulates conjugal relationships, and how Canada's immigration and citizenship system provides an opening for the state to produce and maintain a certain type of ideal couple.¹⁵⁷ Gaucher frames the issue in part as being about two different standards—one standard for how the state can regulate relationships between people who are already living in Canada with legal immigration status or citizenship, and a different (and more strict and regressive) standard for how the state can regulate relationships between Canadians and their non-Canadian family who wish to be reunited with them in Canada. Gaucher's work provides an important framework for this thesis, as she demonstrates the understudied nature of family-based immigration, highlights how family immigration is used by governments to further certain political goals, emphasizes the privileging of "nuclear family" models in family sponsorship, and explores how family immigration is ultimately an unruly category that immigration officials have consistently wrestled with throughout Canada's history as an immigrant-receiving nation. This thesis intends to further expand on the analytical groundwork laid by Gaucher, and explore how adoptive relationships are treated by Canadian immigration authorities.

¹⁵⁶ Chantal Collard, "The Transnational Adoption of a Related Child in Quebec, Canada" in Laura Briggs & Diana Marre, eds, *International Adoption: Global Inequalities and the Circulation of Children* (New York University Press: New York, 2012).

¹⁵⁷ Gaucher, *supra* note 140.

Chapter 3

What is Intercountry Adoption?

1 The Historical Context of Intercountry Adoption

1.1 The Origins of Intercountry Adoption in Canada

Intercountry adoption engages two primary matters: The recognition of parent–child relationships between children and adults who are not biologically related, and the regulation of how and when children can be moved across international borders. Historically, the legal definition of adoption developed and crystalized during a period of significant social change in the Western world, and was influenced by the burgeoning understanding that children are different from adults, and that society has a responsibility to meet children’s unique needs. This growing child-centric approach meant that the question of what was in the best interests of a child became the primary concern in child welfare and child placement matters in domestic law. That being said, social understandings of what constitutes a child’s best interests have changed significantly since the formalization of child placement law, and some ideas that once guided child placement decisions are now understood as having been harmful to children and their communities.

The history of child migration in the Western world has a similarly complex history. Many of the children who were the first to travel alone to countries like Canada and Australia in the 19th and 20th centuries were removed from deplorable conditions in the British Isles with the understanding that their impoverished families could not provide for their needs. However, instead of being placed with different families who could better provide for them, these children were largely sent abroad as indentured labourers, where they were frequently mistreated.

The historical origins of both formal adoption and child migration in the West thus demonstrate an ambivalent approach to children’s rights. While there was, in a broad sense, concern about children living in inadequate and substandard conditions within Western countries, this concern often unfolded in problematic ways that sometimes worked to harm children further. Intercountry adoption, which involves both adoption and child migration, is thus rooted in this complicated history.

1.1.1 The History of Adoption Law in Canada

The practice of children being cared for by people who are not their biological parents is not new. Around the world, practices such as fostering, step-parenting, guardianship, and caring for the children of relatives have existed since ancient times, and have been done for reasons ranging from poverty to a desire to strengthen social bonds between families.¹⁵⁸ That being said, the contemporary form of adoption that exists in the Western world is a relatively modern development. In the contemporary Western adoption framework, a child's legal ties to his or her biological parents are severed and replaced with legal ties to adoptive parents after the completion of a "best interests of the child" analysis concludes that a child will be better off with the adoptive parents.¹⁵⁹

Agencies such as the New York Society for the Prevention of Cruelty to Children (established in 1875), the American Humane Association (established in 1877), and the Toronto Humane Society (established in 1887) began to take an organized and methodical approach to child welfare in North America in the late 1800s.¹⁶⁰ Prior to this, cases of child abuse, neglect, and

¹⁵⁸ For instance, in the Bible there are accounts of guardianship/adoption arrangements, including Moses, who was raised by the Egyptian royal family, and Esther, who was raised by her cousin Mordecai. The Code of Hammurabi from 1754 BCE likewise mentioned the social practice of adoption: Peter Conn, "The Politics of International Adoption" Origins: Current Events in Historical Perspective (January 2008) 1:4, online: <<https://origins.osu.edu/article/politics-international-adoption>>.

¹⁵⁹ For a general definition of adoption in Canada, see Halsbury's Laws of Canada (online), Infants and Children, "Custody, Access and Adoption: Adoption: Effect of Adoption Order" (II.6.(4)) at HIC-68 "Child of Adoptive Parent" (2018 Reissue) [footnotes omitted]:

Once an adoption order is made, subject to appeal or the expiration of the time limit for commencing an appeal, the adopted child becomes the child of the adoptive parent and the adoptive parent becomes the parent of the adopted child. In addition, the adopted child ceases to be the child of the person who was his or her parent before the adoption order was made, and that person ceases to be the parent of the adopted child, except where the person is the spouse of the adoptive parent. All support obligations of the original parents cease upon the event of an adoption.

Exceptions. An exception to the separation between respective families occurs where property rights are vested before the adoption order. In that case, the applicable laws are those in effect at the time when the property is to be transferred. Birth relationships continue to exist for purposes of the laws relating to incest and the prohibited degrees of marriage. This exception takes on practical import with "open" adoptions and legislatively permitted disclosure of adoption information.

¹⁶⁰ Nico Trocme, Tonino Esposito, Jennifer Nutton, Valerie Rosser & Barbara Fallon, "Child Welfare Services in Canada" in Lisa Merkel-Holguin, John D Fluke & Richard D Krugman, eds, *National Systems of Child Protection:*

abandonment were dealt with sporadically via criminal enforcement and the occasional apprehension of a vulnerable child by the state.¹⁶¹ When child welfare charities were created, they took a more coordinated and systematic approach to ensuring the well-being of children. Child welfare groups lobbied governments to implement laws and regulations to protect children and to recognize their inherent vulnerability, worked with governments to establish children's courts, and helped to formalize social work as a profession.¹⁶² Eventually, many child welfare organizations obtained the legal power necessary to remove children from homes they deemed to be unsuitable and make decisions about where to place children instead.¹⁶³

These changes in how the law dealt with children's issues coincided with a shift in social attitudes towards childhood in the West. Before the late 19th century, children in lower- and middle-class families were thought of in primarily pragmatic terms and were expected to demonstrate their economic utility by engaging in domestic and wage labour. Education was not mandatory, and paediatric medicine had not yet been established. High rates of infant and child mortality were a normal part of life, and the death of an infant or young child was "a minor event, met with a mixture of indifference and resignation".¹⁶⁴ By the late 19th and early 20th centuries, these attitudes had changed. Compulsory public education was implemented across many Western countries,¹⁶⁵ as were laws restricting child labour.¹⁶⁶ Laws were also implemented to recognize that children cannot be held accountable for criminal activity in the

Understanding the International Variability and Context for Developing Policy and Practice (Cham: Springer International Publishing, 2019), 27 at 33.

¹⁶¹ John E. B. Meyers, "A Short History of Child Protection in America" (2008) 42:3 Family Law Quarterly 449 at 449-51.

¹⁶² *Ibid* at 452-53.

¹⁶³ *Ibid*.

¹⁶⁴ Viviana A. Zelizer, *The Changing Social Value of Children* (Princeton, NJ: Princeton University Press, 1994) at 24.

¹⁶⁵ See Ming Zhang, "Time to Change the Truancy Laws? Compulsory Education: Its Origin and Modern Dilemma" (2004) 22:2 Pastoral Care in Education 27.

¹⁶⁶ See Hugh D Hindman, ed, *The World of Child Labor: An Historical and Regional Survey* (New York: Routledge, 2009).

same way as adults.¹⁶⁷ Childhood was increasingly recognized during this period in the West as a unique time during which young people had needs and capacities different from those of adults. As explained by historian Karen Dubinsky [citations removed]:

The more adult society seemed “bleak, urbanized and alienated,” wrote British historian Hugh Cunningham, the more childhood appeared as a garden, “enclosing within the safety of its walls a more natural way of life.” Vivian Zelizer calls this the “sacralized” child; excluded from the cash nexus, children became instead objects of sentiment.¹⁶⁸

So as social attitudes towards children moved from apathy to reverence, adults were understood as having obligations to provide for children’s needs, ensure their safety, and give them care and material support that would allow them to grow into healthy and productive adults.

Accordingly, during the late 19th and early 20th centuries, Western jurisdictions began developing formal laws to deal with the legal implications of adoption, which had been an informal practice until that time.¹⁶⁹ These new laws viewed adoption from the perspective of child welfare—adoptive parents must be equipped to care for an adoptive child, and the state needed to approve the adoptive parent–child relationship before it could become a legal reality.¹⁷⁰ In other words, in order for an adoptive child to be entitled to the usual legal implications of a parent–child relationship—including the right to be materially supported and the right to inherit—a representative of the government, such as a judge or social worker, must decide whether the relationship between the prospective parent and child meets a certain standard. This assessment process eventually became what we now refer to as the “best interests of the child” test in child

¹⁶⁷ See Kate Bradley, “Juvenile Delinquency and the Evolution of the British Juvenile Courts, c 1900-1950” *History in Focus* (October 2008), online: <<https://archives.history.ac.uk/history-in-focus/welfare/articles/bradleyk.html>>.

¹⁶⁸ Karen Dubinsky, “Babies Without Borders: Rescue, Kidnap, and the Symbolic Child” (2007) 19:1 *Journal of Women’s History* 142 at 144.

¹⁶⁹ The US state of Massachusetts was the first North American jurisdiction to implement adoption legislation in 1851. In Canada, New Brunswick implemented adoption laws in 1873, and Nova Scotia in 1896. See Veronica Strong-Boag, “Interrupted Relations: The Adoption of Children in Twentieth-Century British Columbia” (2004) 144 *BC Studies* at 5 at 6.

¹⁷⁰ Conn, *supra* note 15858.

placement matters. What exactly constitutes the best interests of the child varies between jurisdictions¹⁷¹ and has changed over time,¹⁷² but it has consistently attempted to centre the needs and rights of minors over those of other parties involved.

The understanding that state intervention may be necessary in order to protect children from abuse and neglect undoubtedly led to the improvement of many children's living circumstances. However, we do not need to look very far into Canada's history to see examples of how the best interests of the child framework led to problematic outcomes at times. Even in the present day, there isn't always consensus about what is in a child's best interests.

The most obvious example in Canadian history of how child welfare rhetoric paradoxically resulted in harm to children is the treatment of Indigenous youth during much of the 19th and 20th centuries. The idea that it would be in the best interests of Indigenous children to take them away from their traditional cultures, languages, and religions led to the mass placement of Indigenous children into residential schools between the 1870s and 1990s, where we now know they faced widespread abuse and neglect.¹⁷³ The idea that it would be in the best interests of Indigenous children to remove them from their Indigenous families and communities, and instead place them with families in non-Indigenous communities led to what we now call the 60s Scoop. Between the 1950s and 1980s, approximately 20,000 Indigenous children were "scooped up" and fostered or adopted by primarily middle-class Caucasian families in Canada, resulting in the loss of legal Indian status, disconnection from cultural identity, and a lack of information about and contact

¹⁷¹ For instance, in British Columbia, the best interests of the child are enunciated in a non-exhaustive manner in the *Adoption Act*, RSBC 1996, c 5, s 3, where there is a specific direction to consider a child's indigenous heritage: "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." In contrast, the *California Family Code* at section 3011 does not comment on the importance of recognizing a child's cultural heritage, but does specifically state that a best interests of the child analysis requires consideration of "[t]he habitual or continual illegal use of controlled substances, the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances by either parent."

¹⁷² For example, British Columbia's current adoption legislation has been in force only since 1995. Prior to this, there were no specific directives to consider the cultural background of an aboriginal child (which was likely a contributing factor to the very large number of indigenous children who were placed with non-indigenous families). See Strong-Boag, *supra* note 1699 at 13–14.

¹⁷³ Sierra Bein & Maria Iqbal, "Canada's Residential Schools Were Houses of Pain, but Survivors Want These Buildings to be Saved" *The Globe and Mail* (30 September 2019), online: <theglobeandmail.com/canada/article-canadas-residential-schools-were-houses-of-pain-but-survivors-want/>.

with biological family members.¹⁷⁴

From today's vantage point, we understand how the best interests of the child framework that was used to remove Indigenous children from their families and communities was influenced by a settler colonial desire to force Indigenous children to assimilate to Western cultural norms.¹⁷⁵ Two of Canada's Prime Ministers—Stephen Harper and Justin Trudeau—have made formal apologies to Canada's Indigenous peoples and have publicly acknowledged the harm that was done to children in the name of these policies.¹⁷⁶ Adoption law in Canada today largely recognizes that it is important for children to maintain a connection to their cultural heritage,¹⁷⁷

¹⁷⁴ Margaret Philip, "The Land of Lost Children" *The Globe and Mail* (21 December 2002), online: <<http://www.fact.on.ca/news/news0212/gm021221a.htm>>.

¹⁷⁵ See generally Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 *Osgoode Hall Law Journal* 375.

¹⁷⁶ "PM cites 'sad chapter' in apology for residential schools" *CBC News* (11 June 2008), online: <<https://www.cbc.ca/news/canada/pm-cites-sad-chapter-in-apology-for-residential-schools-1.699389>>; Catherine McIntyre, "Read Justin Trudeau's apology to residential school survivors in Newfoundland" *Maclean's* (24 November 2017), online: <<https://www.macleans.ca/news/canada/read-justin-trudeaus-apology-to-residential-school-survivors-in-newfoundland/>>.

¹⁷⁷ Presently, the child welfare legislation in most Canadian provinces contains specific reference to the importance of preserving Indigenous children's cultural identity. See e.g., *Adoption Act*, RSBC 1996, c 5, s 3(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." Another example of this shift in perspective can be found in the Federal Government's Bill C-92, which received Royal Assent in June 2019, and gives jurisdiction over Indigenous child welfare directly to Indigenous communities themselves. See Government of Canada, "An Act respecting First Nations, Inuit and Metis children, youth and families: Background" *Indigenous Services Canada* (28 February 2019), online: <<https://www.canada.ca/en/indigenous-services-canada/news/2019/02/an-act-respecting-first-nations-inuit-and-metis-children-youth-and-families.html>>, where the following language is used [emphasis added]:

The Bill seeks to **preserve children's connection to their family, community and culture**. As such, it would provide an order of preference for placement of an Indigenous child when apprehension is in the best interest of that child, as follows:

- one of the child's parents;
- another adult member of the child's family;
- an adult who belongs to the same Indigenous group, community or people;
- an adult who belongs to an Indigenous community or people other than the one to which the child belongs, and
- any other adult.

This Bill stresses that **Indigenous siblings should be kept together** when it is in their best interest.

The Bill seeks to ensure that **Indigenous children in care keep strong emotional ties with their family and stay connected to their communities and culture**. For example, the Bill would establish an ongoing obligation to re-assess the possibility for an

and there has been a shift towards encouraging open adoptions and giving adoptees more access to information about their origins.¹⁷⁸

Outside the example of Indigenous child welfare, other ideas about what is best for children have changed dramatically over the decades. Whereas same-sex couples and homosexual individuals were once prohibited from adopting children because it was thought to be best for children to be raised in a heteronormative environment, LGBTQ+ individuals and couples are now legally permitted to adopt children in Canada.¹⁷⁹ Similarly, whereas it was once preferred to match adoptees with adoptive parents of the same racial background, mixed-race adoptive families are much more common in Canada today.¹⁸⁰

Indigenous foster child to reside with one of the child's parents or an adult member of his or her family. It would also provide that when Indigenous children are not placed with a member of their family, their attachment and emotional ties to their family are to be promoted.

It is worth noting that this legislation has been criticized by some Indigenous groups for not giving funding directly to First Nations, but rather to provincial governments, and it has been alleged that it will not ultimately lead to fewer apprehensions of Indigenous children. See e.g., "First Nations chiefs call for protests to oppose Indigenous child welfare bill" *CBC News* (08 May 2019), online: <<https://www.cbc.ca/news/canada/edmonton/bill-c-92-first-nations-alberta-edmonton-1.5127025>>.

¹⁷⁸ For more on why provincial authorities have started to recognize the importance of adoptees having access to information about their biological families, see Caroline Plante, "Quebec moves toward more open adoptions" *Montreal Gazette* (06 October 2016), online: <<https://montrealgazette.com/news/quebec/quebec-moves-toward-more-open-adoptions>>; "Nova Scotia shifts from its hard-no stance on open adoption records" *CBC News* (21 March 2019), online: <<https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-adoption-records-1.5065463>>. For more on the potential benefits of open adoption and the reasons why adoption agencies in Canada have begun encouraging them, see Tracy Sherlock & Lori Culbert, "Adoption series: Open adoptions tricky but rewarding" *Vancouver Sun* (01 July 2016), online: <<http://www.vancouversun.com/life/Adoption+series+Open+adoptions+tricky+rewarding/11198914/story.html>>:

Today, the vast majority of adoptions in B.C. include contact with the birth parents, whether the children come from the foster care system or a local mother who wants to place her baby with another family.

Open adoptions can be complicated and tricky, but experts agree they are beneficial. Children grow up knowing their biological family did not abandon them and maintain ties to their cultural roots. This can also be psychologically helpful to the birth parents who, while perhaps not healthy enough to raise the children, can still be a part of their lives.

¹⁷⁹ See "First openly gay man to legally adopt in Canada hopes new memoir will boost adoptions" *CBC News* (28 December 2018), online: <<https://www.cbc.ca/news/canada/toronto/david-mckinstry-rebel-dad-adoption-gay-1.4960463>>.

¹⁸⁰ See Karen Balcom & Karen Dubinsky, "Babies across borders" *The Globe and Mail* (13 October 2005), online: <<https://www.theglobeandmail.com/opinion/babies-across-borders/article1125013/>>.

Through these examples, we can see how the best interests of the child analysis in adoption law is a dynamic one that has responded to changes in society and culture. It is also important to recognize that there is still no consensus about what exactly the best interests of the child standard should be in every adoption case. It is meant to be a contextual analysis that involves the weighing of multiple factors against one another on a case-by-case basis, but there continues to be disagreement about issues such as whether living in an Indigenous community should be the paramount consideration above all others in Indigenous child welfare cases.¹⁸¹ Furthermore, many of the factors that lead to children being placed for adoption by biological parents or to children being apprehended from biological parents by authorities, such as poverty, mental illness, addiction, domestic violence, lack of access to housing, and disability largely remain unaddressed by our child welfare systems. So the best interests of the child framework as it currently operates permits decision makers in child placement matters to remove children from parents facing social barriers like poverty and homelessness, without addressing the underlying systemic inequalities that put parents in those positions.¹⁸²

Thus, we can see how adoption law developed in the Western world as a response to a growing recognition that children have unique rights that must be acknowledged and addressed. That being said, the best interests of the child framework that is implemented in child placement decisions has a troubled history. The idea that children's needs should come first in any adoption assessment, while certainly a step forward, has also meant that adoption is influenced significantly by changing social and cultural understandings about how children should be parented and what families should look like.

¹⁸¹ See “Indigenous heritage doesn’t overrule other factors in adoption, says BC court” *CBC News* (08 August 2017), online: <<https://www.cbc.ca/news/canada/british-columbia/indigenous-heritage-adoption-august-2017-1.4239794>>; Amber Bernard, “Best interest of the child needs to be re-defined, before passing Bill C-92 says child advocate” *APTN National News* (11 April 2019), online: <<https://aptnnews.ca/2019/04/11/best-interest-of-the-child-needs-to-be-re-defined-before-passing-bill-c-92-says-child-advocate/>>.

¹⁸² See Judith Mosoff et al, “Intersecting Challenges: Mothers and Child Protection Law in BC” (2017) 50:2 *UBC L Rev* 435; Angela Sterritt, “Indigenous kids largely apprehended because of poverty, says former child protection worker” *CBC News* (21 November 2017), online: <<https://www.cbc.ca/news/canada/british-columbia/indigenous-children-largely-apprehended-because-they-dont-have-access-to-basic-resources-1.4412441>>.

1.1.2 The History of Child Migration in Canada

Religious organizations and children's charities have been involved in sending disadvantaged children abroad for several hundred years. Prior to the establishment of formal intercountry adoption, such organizations arranged for large numbers of children to travel alone to foreign countries. This early child migration to Canada took place largely outside the context of legal adoption, and arguably, was conducted without prioritizing the best interests of the child as we understand them today.

The first significant influx of child migrants to Canada took place between the 1860s and the 1930s. It is estimated that over 100,000 "home children" from the United Kingdom were sent to live with English speaking families during this period of time.¹⁸³ It is estimated that approximately 35,000 of these home children were placed with Canadian families through a single British charity started by a man named Thomas Barnardo, an Irish-born philanthropist and evangelical Christian who operated numerous homes in the United Kingdom for destitute and orphaned children—called "Barnardo Homes"—starting in the late 1800s. Dr. Barnardo's ethics have been frequently criticized, as he allegedly removed children from their homes without their families' fully informed consent,¹⁸⁴ provided subpar care to these children,¹⁸⁵ and admitted to staging before and after photographs of children to exaggerate the idea that these children had been rescued from poverty.¹⁸⁶ Barnardo eventually began participating in migration programs that sent English-speaking British children ranging in age from 4 to 16 to live with families in places like Canada, New Zealand, Australia, South Africa, and Zimbabwe.¹⁸⁷ During this time,

¹⁸³ Katie Daubs, "A timeline of Barnardo's and other child emigration programs" *The Star* (19 June 2015), online: <<https://www.thestar.com/news/insight/2015/06/19/a-timeline-of-barnardos-and-other-child-emigration-programs.html>>.

¹⁸⁴ Blake Morrison, "The Doctor's Children" *The Independent* (11 June 1995), online: <<https://www.independent.co.uk/arts-entertainment/the-doctors-children-1585899.html>>.

¹⁸⁵ *Ibid.*

¹⁸⁶ Mark Oliver & Zeta McDonald, "The echoes of Barnardo's altered imagery" *The Guardian* (03 October 2002), online: <<https://www.theguardian.com/society/2002/oct/03/advertising.childprotection>>.

¹⁸⁷ Government of Canada, "Barnardo's Homes" *Library and Archives Canada* (27 September 2019), online: <<https://www.bac-lac.gc.ca/eng/discover/immigration/immigration-records/home-children-1869-1930/home->

the Industrial Revolution led to difficult living conditions for many young people in the United Kingdom, with widespread lack of housing, poor sanitation, overcrowding, and illness. Some children who were sent abroad were orphans, some were removed from their families by Barnardo's agency, and others were sent abroad by their own families, who hoped the children would have access to opportunities and a better life in the colonies.¹⁸⁸

Importantly, though some of these children may have been sent abroad by their families with the hope that their circumstances would be improved, decisions about where these children would go to live were not made with a children's rights-centred approach. These children were not sent abroad as adoptees who would be cared for and loved by new families—instead, they were sent abroad to provide inexpensive labour on farms and in workhouses in the British colonies, where there was a high demand for English-speaking workers. The decision to send home children from the United Kingdom to the colonies was primarily an economic decision. Their birth families and birth countries could not sufficiently provide for their needs, and the British government was looking for ways to reduce the burden on the domestic social welfare system. In the colonies, there were labour shortages and abundant farmland, so local governments agreed to participate in these migration schemes with the hope of increasing settlement.

When parents agreed to give up their children to the agencies that would arrange for their placement overseas, they legally forfeited their parental authority to the agencies. Upon arriving in Canada, the home children would generally go to a distribution centre until they were placed with a family. Families in the colonies who were seeking farmhands and domestic labourers would pay a small fee to the agencies, and in turn the families would receive a child who essentially was an indentured servant. These children sometimes were permitted to attend school, and in a few cases were eventually formally adopted by their Canadian families.¹⁸⁹ Most children, however, faced hardship, cruelty, and neglect, and were decidedly not treated as members of the families they were sent to live with. Home children faced social stigma, and

children-guide/Pages/barnardo-homes.aspx>; Tom Symonds, "The child abuse scandal of the British children sent abroad" *BBC News* (26 February 2017), online: <<https://www.bbc.com/news/uk-39078652>>.

¹⁸⁸ *Ibid.*

¹⁸⁹ Daubs, *supra* note 183.

many of these children suffered serious psychological, physical, and sexual abuse, with many dying directly as a result of their treatment,¹⁹⁰ and some others committing suicide.¹⁹¹

By the 1920s, concerns were growing in Canadian society about the ethics of this child migration system. There were allegations that the agencies sending children abroad did not perform sufficient vetting of the families receiving the children in Canada, that they did not perform checks on the children after they were placed with the families, and that they did not have an adequate system to keep records of children who were abused or mistreated.¹⁹² There was also pushback from the growing labour movement in Canada about unfair and unsafe working conditions for home children.¹⁹³ After an MP from Winnipeg, Manitoba said that Canada was “bringing children into Canada in the guise of philanthropy and turning them into cheap labour”,¹⁹⁴ more people became aware of what was happening to home children in Canada, and there were growing calls to end these labour-based child migration programs. By the Great Depression, the majority of these programs stopped sending children to Canada,¹⁹⁵ age restrictions were placed on children immigrating to Canada without their families,¹⁹⁶ and child labour regulations were implemented.¹⁹⁷ Some have estimated that 10-12% of the Canadian

¹⁹⁰ Symonds, *supra* note 187; Daubs, *supra* note 183; Christopher Reynolds, “Dozens of ‘British home children’ lie forgotten in Etobicoke cemetery” *The Star* (27 February 2016), online: <<https://www.thestar.com/news/gta/2016/02/27/dozens-of-british-home-children-lie-forgotten-in-etobicoke-cemetery.html>>.

¹⁹¹ Paul Henderson, “British Home Children: B.C. women reflect on shameful period in Canadian history” *Maple Ridge-Pitt Meadows News* (28 September 2019), online: <<https://www.mapleridgenews.com/news/british-home-children-b-c-women-reflect-on-shameful-period-in-canadian-history/>>.

¹⁹² Tom Ford, “Hard lives for home children” *Winnipeg Free Press* (27 June 2011), online: <<https://www.winnipegfreepress.com/opinion/analysis/hard-lives-for-home-children-124582324.html>>.

¹⁹³ Kenneth Bagnell, “British Home Children” *The Canadian Encyclopedia* (05 March 2009), online: <<https://www.thecanadianencyclopedia.ca/en/article/immigrant-children>>.

¹⁹⁴ Ford, *supra* note 192.

¹⁹⁵ *Ibid.*

¹⁹⁶ Bagnell, *supra* note 193.

¹⁹⁷ Ford, *supra* note 192.

population are descendants of home children from the United Kingdom.¹⁹⁸ The Canadian government has not yet issued a formal apology to former home children or their descendants.

The next wave of child migrants to Canada did not arrive until after World War II. Until 1965, the Canadian immigration system explicitly privileged English-speaking migrants from former colonies over those coming from non-Commonwealth countries, and also essentially prohibited unaccompanied minors from travelling to Canada for purposes other than relative adoption.¹⁹⁹ For many minority groups, immigration quotas and restrictions were in place that prevented large groups from arriving to Canada at the same time. One such group that faced immigration restrictions was the Jewish people. Anti-Semitic immigration caps led to only 5,000 Jewish migrants being accepted into Canada between 1933 and 1945.²⁰⁰ At the onset of World War II, the MS St. Louis, a ship carrying approximately 900 Jewish refugees, was turned away from Canadian shores due to exclusionary immigration policies, after being similarly turned away from Cuba and the United States of America. When the ship was forced to return to Europe, some passengers were accepted for settlement in Britain, but most passengers ended up in Nazi concentration camps, where 254 ultimately died.²⁰¹ Descendants of those involved in setting up Canada's discriminatory immigration system at that time have since apologized for this humanitarian failure,²⁰² as has Canadian Prime Minister Justin Trudeau.²⁰³

¹⁹⁸ Megan Benedictson, "'She never saw her parents': Descendants of poor, British children shipped to Canada to mark somber anniversary Sunday" *CTV News* (25 September 2019), online: <<https://winnipeg.ctvnews.ca/she-never-saw-her-parents-again-descendants-of-poor-british-children-shipped-to-canada-to-mark-somber-anniversary-sunday-1.4610698>>.

¹⁹⁹ Ninette Kelly & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) at 315, 328-29.

²⁰⁰ Maham Abedi, "Canada apologizes for turning away Jewish refugees in 1939—why that matters" *Global News* (07 November 2018), online: <<https://globalnews.ca/news/4630464/canada-justin-trudeau-jewish-refugees-apology/>>.

²⁰¹ Terry Glavin, "Canada was warned of the coming Holocaust. We turned away 900 Jewish refugees, anyway." *Macleans* (12 May 2018), online: <<https://www.macleans.ca/history/canada-was-warned-of-the-incoming-holocaust-we-turned-away-900-jewish-refugees-anyway/>>.

²⁰² "Canadian clergy apologize to 'Voyage of the Damned' survivors" *CBC News* (06 November 2000), online: <<https://www.cbc.ca/news/canada/canadian-clergy-apologize-to-voyage-of-the-damned-survivors-1.227709>>.

²⁰³ Abedi, *supra* note 200.

After the MS St. Louis was prevented from docking in Halifax, a Jewish advocacy group called the Canadian Jewish Congress began organizing and lobbying the Canadian government to change their restrictive immigration policy towards Jewish people. The government eventually relented and issued an Order in Council that permitted 1,123 Jewish war orphans to be resettled in Canada in 1947. By 1948, immigration restrictions were further relaxed in light of the post-war demand for workers, and many more Jewish migrants arrived.²⁰⁴ The orphans who arrived in Canada in 1947 were quickly placed with Jewish foster families in different cities, and were entirely supported by the funds raised by the Canadian Jewish Congress. Most of the orphans were teenagers, and these foster home arrangements often did not last long. The orphans frequently faced discrimination from both Jewish and non-Jewish Canadians, struggled to settle into their new homes, and had limited supports in place, despite having experienced extremely traumatic events. Many of the older orphans quickly left their foster homes to find jobs in cities with larger Jewish communities like Toronto and Montreal, while some of the younger children ended up being formally adopted by their foster families.²⁰⁵ In addition to the Jewish war orphans of 1947, some British children were evacuated during World War II and were sent to live with Canadian families as well. These so-called “guest children” were only temporary migrants, and went back to Britain at the conclusion of the war.²⁰⁶

Guest children and Jewish war orphans were the exception rather than the rule when it came to Canada’s attitude towards taking in disadvantaged and endangered children during and shortly after World War II. In the words of historian Lori Chambers:

²⁰⁴ Government of Canada, “Jews” *Library and Archives Canada* (25 March 2019), online: <<https://www.bac-lac.gc.ca/eng/discover/immigration/history-ethnic-cultural/Pages/jewish.aspx>>.

²⁰⁵ Michael Fraiman, “A Fresh Start: The Story of Canada’s Postwar Jewish Orphans” *The Canadian Jewish News* (28 March 2018), online: <<https://www.cjnews.com/perspectives/features/the-story-of-1123-orphans-who-came-to-canada-after-the-holocaust>>. See also “‘Nothing has changed in 80 years.’ Says Holocaust survivor” *CBC News* (02 November 2018), online: <<https://www.cbc.ca/news/canada/nova-scotia/holocaust-survivor-maxwell-smart-canada-1.4889077>>; Jessica Murphy, “Jewish war orphans reunite in Montreal” *The Star* (27 October 2008), online: <https://www.thestar.com/news/canada/2008/10/27/jewish_war_orphans_reunite_in_montreal.html>.

²⁰⁶ Lori Chambers, *A Legal History of Adoption in Ontario, 1921-2015* (Toronto: University of Toronto Press, 2016) at 137, citing Tarah Brookfield, *Cold War Comforts: Canadian Women, Child Safety and Global Insecurity* (Waterloo: Wilfrid Laurier University Press, 2012) at 136-37, citing Geoffrey Bilson, *The Guest Children: The Story of British Child Evacuees Sent to Canada during World War II* (Saskatoon: Fifth House, 1988).

All of the British and Jewish children who were brought to Canada as evacuees or refugees were admitted under exceptional conditions and rules that bypassed normal immigration procedures. During and after the experience with the Jewish refugee children, “the federal government was wary about setting precedents regarding Canada’s obligation to the world’s children” since bringing unaccompanied children into the country was viewed as “a potentially expensive proposition.”²⁰⁷

The experiences of these children echo in some ways those of the British home children in earlier decades. Under the guise of benevolence, these children were brought to live with Canadian families, but their migration took place outside the context of formal adoption, and these children generally struggled to find acceptance as full members of the families they lived with.

1.1.3 The Origins of Intercountry Adoption Programs in Canada

The practice of formally adopting foreign children became more common in Canada during the mid-20th century post-WWII period, particularly after incidents of war and civil unrest left many young people without parents who were willing or able to care for them in their home countries, and left many countries unable to provide for their citizens generally. The growing criticism of Canada’s restrictive policies towards displaced people led to liberalization of immigration laws, with left-leaning politicians like M. J. Coldwell, leader of the Cooperative Commonwealth Federation (a predecessor of the New Democratic Party), voicing support for the resettlement of war orphans via adoption specifically:

[B]ring a child into this country, and place that child in a good Canadian home, because there are homes that are seeking children for adoption. The child could be brought up in a Canadian home, in a Canadian environment and then would become a first-class citizen of our country.²⁰⁸

Increasing social acceptance of adoption as a way to deal with infertility also contributed to the

²⁰⁷ *Ibid* at 137, citing Tarah Brookfield, *Cold War Comforts: Canadian Women, Child Safety and Global Insecurity* (Waterloo: Wilfrid Laurier University Press, 2012) at 193.

²⁰⁸ Canada, Parliament, *House of Commons Debates* (26 May 1954).

growth of both domestic and intercountry adoption in the mid-20th century in Canada.²⁰⁹ The majority of prospective adoptive parents during this time were middle class White families, and as conventional social work practices encouraged the “matching” of adoptees to adoptive parents based on race, culture, and appearance, there were not enough healthy White babies to meet the new demand.²¹⁰ In response to this shortage, some adoption agencies started to place non-White children—primarily Black and Indigenous children—with White adoptive families—namely, the Montreal Children Service Centre, who led the transracial adoption trend in North American during the 1960s.²¹¹

As the practice of transracial and transcultural adoption became more common, adoption agencies across the country began to receive inquiries regarding the feasibility of adopting children who were abandoned or orphaned as a result of civil and international conflicts around the world.²¹² As the Cold War simmered, and as immigration policies in Western countries liberalized due to post-WWII labour shortages and cultural shifts, Western countries including Canada became interested in the idea of rescuing orphans from Communist countries as a way to demonstrate the failings of Communism and Western superiority. During the 1960s, immigration laws were amended in Canada to allow for the intercountry adoption of a relatively small number of refugee and orphaned children from Hong Kong and Korea by European– and Chinese–Canadian families, echoing the earlier Jewish war orphan resettlement project from the late 1940s, with the notable difference being that these children were all formally adopted by Canadian families.²¹³

As the Vietnam War continued, it produced an increasing number of orphaned and abandoned Vietnamese and mixed-race children born out of relationships between Western soldiers and

²⁰⁹ Tarah Brookfield, “Maverick Mothers and Mercy Flights: Canada’s Controversial Introduction to International Adoption” (2008) 19:1 *Journal of the Canadian Historical Association* 307 at 311.

²¹⁰ *Ibid.*

²¹¹ *Ibid* at 311-12. See also Dubinsky, *supra* note 168.

²¹² Brookfield, *supra* note 209 at 312.

²¹³ *Ibid* at 314.

Vietnamese women. Many of these children were absorbed into their extended families, but poverty and instability eventually led to children needing to be placed in orphanages funded by churches, the US military, and international aid organizations.²¹⁴ The challenges faced by Vietnamese orphans gained substantial media attention in Canada, and led to an increase in the number of Canadian families interested in adopting from Vietnam. However, the ongoing conflict made it difficult for adoption agencies and social workers to cooperate with local authorities in Vietnam and navigate local adoption traditions.²¹⁵

Eventually, political pressure from a group of Canadian mothers who wished to adopt Vietnamese orphans led to more government attention on the issue, and eventually led to the establishment of several Canadian adoption programs for Vietnamese children.²¹⁶ The adoption agencies doing the majority of this work were private agencies started by the mothers leading the movement to adopt Vietnamese children. These women were not professionally trained social workers, but their agencies assisted families with navigating and complying with Canadian and Vietnamese adoption and migration laws, and assessed prospective adoptive families for suitability via interviews and home studies.²¹⁷

The group of Canadian mothers promoting international adoption were met with some backlash, primarily from professional social workers and government officials who worked in the area of child welfare. They alleged that these mothers were not licensed social workers, and that their lack of education and professional experience could lead to errors in judgment, like the misidentification of children as orphans. Critics also pointed out that permitting more intercountry adoption may reduce interest in domestic adoption, and thus worsen prospects for local children in care.²¹⁸ Nevertheless, there was a sustained interest in intercountry adoption

²¹⁴ *Ibid.*

²¹⁵ *Ibid* at 314-15.

²¹⁶ *Ibid* at 318.

²¹⁷ *Ibid* at 318-19.

²¹⁸ *Ibid* at 320.

from war-torn countries like Vietnam, Cambodia, and Bangladesh during the late 1960s and early 1970s.²¹⁹ Provincial and Federal governments expressed concern about the lack of oversight over the actions of private adoption agencies, and whether all domestic and foreign laws and regulations were being met in each case.²²⁰

When Communist forces won the wars in Vietnam and Cambodia in April 1975, international adoption advocacy culminated in Operation Babylift, where approximately 3,000 children and babies were evacuated from the region and brought to live with adoptive families in North America.²²¹ Canadian Provincial and Federal governments willingly participated in this project. The children whose travel was fast-tracked had already been screened by adoption agencies, and the public concern about the fate of these children under a Communist regime outweighed concerns about the cost and other implications of this mass removal of children from the region.

However, in the subsequent weeks, months, and years many in the United States and Canada criticized Operation Babylift. There were numerous allegations that evacuated children were not actual orphans (and it was subsequently discovered that some were not in fact orphans²²²), questions were raised about whether it was ethical to raise children outside of their birth cultures, and concerns grew about whether intercountry adoption as a practice was simply another form of Western imperialism.²²³

By 1977, largely motivated by these kinds of concerns, the Canadian Federal government established the National Adoption Desk, which functioned as a central registry that coordinated and tracked intercountry adoptions, and helped to liaise between Provincial adoption authorities

²¹⁹ *Ibid.*

²²⁰ *Ibid* at 322.

²²¹ Cassandra Szlarski, “Forty year on, Vietnam war orphans look back on Canadian adoption” *Macleans* (16 April 2015), online: <<https://www.macleans.ca/news/world/forty-years-on-vietnam-war-orphans-look-back-on-canadian-adoption/>>.

²²² “Boy taken out of Vietnam during Operation Babylift wasn’t actually an orphan” *Windsor Star* (06 May 2015), online: <<https://windsorstar.com/news/boy-taken-out-of-vietnam-during-operation-babylift-wasnt-an-orphan>>.

²²³ Brookfield, *supra* note 209 at 325-27.

and Federal immigration authorities. A ban on intercountry adoption was not feasible, as there was significant ongoing interest in the practice amongst Canadian middle-class families. The Department of External Affairs hoped the National Adoption Desk would at least eliminate the need for private adoption agencies in international adoptions, but by this time, the private adoption agencies had become popular and cultivated a “personal touch” that the government agency lacked.²²⁴

As the years progressed, war and humanitarian crises continued around the world. The birth rate also continued to fall in Canada, and an age imbalance became apparent in the population. In 1988 and 1990, the Canadian Employment and Immigration Advisory Council make a recommendation that the Federal government take steps to make intercountry adoption easier, in order to increase the overall proportion of young people in the country.²²⁵ More countries began participating in intercountry adoption programs with Canada, working primarily with private adoption agencies to find placements for children. For example, during the reign of China’s one-child policy, many Westerners adopted abandoned female infants and children with disabilities from Chinese orphanages.²²⁶ Large numbers of children were adopted from African countries including Ethiopia and South Africa from the 1980s to the and early 2000s after widespread famine, war, and disease ravaged the continent.²²⁷ Similarly, during the 1990s, many former Soviet countries in Eastern Europe and conflict-ridden Latin American countries began permitting intercountry adoption by Western parents.²²⁸ Provincial governments responded by increasing the regulation and oversight of private adoption agencies in Canada, which now must

²²⁴ *Ibid* at 327.

²²⁵ Lovelock, *supra* note 152 at 933.

²²⁶ Elizabeth Bartholet, “International Adoption” in Lori Askeland, ed, *Children and Youth in Adoption, Orphanages, and Foster Care* (Westport: Greenwood Publishing, 2005) 107 at 109.

²²⁷ Hilary Whitman, “African adoption should be discouraged ‘at all costs,’ group says” *CNN News* (31 May 2012), online: <<https://www.cnn.com/2012/05/29/world/africa/africa-child-adoption/index.html>>; Anthony Mitchell, “Ethiopia Puts Its Young Up For Adoption” *The Washington Post* (02 January 2005), online: <<https://www.washingtonpost.com/archive/politics/2005/01/02/ethiopia-puts-its-young-up-for-adoption/5c51dcc4-bef7-4020-a95b-cbf96cac9917/>>.

²²⁸ See Anne Collinson, “The Littlest Immigrants: Cross-Border Adoption in the Americas, Policy, and Women’s History” (2007) 19:1 *Journal of Women’s History* 132 at 132.

be licensed in order to provide services and must be staffed by licensed social workers.²²⁹

Federal governments responded by signing on to international children's rights instruments that outlined standard processes for intercountry adoptions, and by creating specific immigration programs for adopted children.²³⁰

1.2 Intercountry Adoption Stereotypes

Unsurprisingly, because of these complex historical origins, there is a lingering stereotype that intercountry adoptions involve mainly White Western families adopting children from poorer countries, racialized countries, or countries that have experienced civil unrest and natural disasters. Historian Laura Briggs has written about this trope, and has specifically looked at how exposure to images of suffering and impoverished children impacted transracial and intercountry adoption in the West.²³¹ Briggs explored how media depictions of children in countries like China, Vietnam, Eastern Europe, and Ethiopia from the 1950s onwards reinforced Western interest in intercountry adoption as form of humanitarian intervention, and how it contributed to cultural and political narratives about "Third World" children needing to be rescued.

Many contemporary films and television programs depict intercountry adoption in a manner that perpetuates this stereotype. For example, in ABC's US television series *Modern Family*, same-sex couple Cam and Mitch adopt their daughter Lily from an orphanage in Vietnam.²³² In HBO's television and film franchise, *Sex and the City*, character Charlotte and her husband Harry adopt their daughter, also named Lily, from an orphanage in China.²³³ In Fox's television sitcom *Arrested Development*, this stereotype of intercountry adoption is satirized when Lucille

²²⁹ See e.g., *Adoption Regulation*, Alta Reg 187/2004, s 3(1), which outlines the requirements in Alberta for private adoption agencies to obtain licenses to operate in the province.

²³⁰ Lovelock, *supra* note 152 at 938

²³¹ Laura Briggs, "Mother, Child, Race, Nation: The Visual Iconography of Rescue and the Politics of Transnational and Transracial Adoption" (2003) 15:2 *Gender & History* 179.

²³² See "What ABC's *Modern Family* Can Teach Us About Adoption" *Adoptions with Love* (06 December 2017), online: <<http://adoptionswithlove.org/adoptive-parents/modern-family-adoption>>.

²³³ See Catherine Ceniza Choy, *Global Families: A History of Asian International Adoption in America* (New York: New York University Press, 2013) at 3.

and George Bluth decide to adopt a Korean child in order to make themselves appear more charitable and altruistic.²³⁴

In real life, celebrities like Angelina Jolie, Madonna, Meg Ryan, and Mia Farrow have attracted abundant media attention for their intercountry adoptions, with some praising the choice to parent “less fortunate” children born abroad, while others criticize the trend of “baby buying” and the treatment of babies adopted via intercountry adoption as accessories used by the wealthy elite to demonstrate their altruism.²³⁵

In reality, there are many different kinds of families who have adopted children from abroad for many different reasons, and this complicates the stereotypical narrative surrounding who is creating the demand for intercountry adoptions. Part of what drives interest in intercountry adoption is the challenges involved with domestic adoption in Canada. Intercountry adoption is undoubtedly a complex and often expensive process, but it permits prospective adoptive parents to cast a wider net and explore a broader set of available children.

For instance, many prospective adoptive parents hope to adopt a young child or an infant, as many believe that adopting a younger child promotes more parental bonding and healthier socialization in adoptees.²³⁶ Because of the limited number of babies and young children available for adoption domestically, this can lead to families seeking infants abroad, where they

²³⁴ Denise Martin, “Catching Up With Arrested Development’s Annyong Bluth” *Vulture* (06 May 2013), online: <<https://www.vulture.com/2013/05/reminiscing-with-arrested-developments-annyong.html>>.

²³⁵ See e.g., Luchina Fisher, “Black Babies: Hollywood’s Hottest Accessory?” *ABC News* (31 March 2009), online: <<https://abcnews.go.com/Entertainment/story?id=7218470&page=1>>; “White Celebrities Who Have Adopted Black Children” *The Root* (26 January 2015), online: <<https://www.theroot.com/white-celebrities-who-have-adopted-black-children-1790868498>>; Donna Freydkin, “When stars adopt, the world notices” *USA Today* (01 April 2013), online: <<https://www.usatoday.com/story/life/people/2013/04/01/nia-vardalos-instant-mom-celebrity-adoption/2028381/>>; “The biased picture of intercountry adoption in the media” *International Social Service – International Reference Centre for the Rights of Children Deprived of their Family* (November–December 2006), online: <http://www.iss-ssi.org/2007/Resource_Centre/Tronc_DI/documents/Edito200611-12ang.pdf>.

²³⁶ See Isolde Motley & Susan Caughman, “Choosing Which Age Group to Adopt” *Adoptive Families*, online: <<https://www.adoptivefamilies.com/how-to-adopt/baby-adoption-vs-older-child-adoption/>>; Brooke Schuldts, “Adopting Older Children: What You Need to Know” *Parents*, online: <<https://www.parents.com/parents-magazine/parents-perspective/adopting-older-children-what-you-need-to-know/>>.

may be available in greater numbers.²³⁷ Whereas at one point in history, many of the children who were available for adoption domestically were infants who were given up for adoption shortly after birth, today, many of the children who are available for adoption domestically are older children whose legal ties to their biological parents have been severed after lengthy child apprehension proceedings with child welfare authorities. Changing cultural attitudes to single motherhood and increased access to birth control and abortion have made infant adoption less prevalent in the Western world, and some have posited that poverty is now the leading reason why older children are apprehended from their birth families.²³⁸

Other prospective adoptive parents feel equipped to only adopt one child, but find that many of the children available in the domestic child welfare system have siblings. Domestic adoption programs generally encourage placing and adopting sibling groups together, and some have implemented subsidies to promote this, as further alienation from existing family can be damaging for adoptees.²³⁹

Many prospective adoptive parents similarly feel ill-equipped to care for children who may have mental or physical conditions and disabilities, particularly in light of the lack of available social support and resources in many parts of the country. Unfortunately, many of the children who grow up in Canada's child welfare system have diagnoses for conditions like attachment disorder and fetal alcohol spectrum disorder, which can impact development in a myriad of ways, and cause prospective adoptive parents to explore other options outside the domestic system.²⁴⁰

Other prospective parents are themselves immigrants or from immigrant families with strong ties to other countries, and may wish to adopt a child of the same ethnicity. Though domestic

²³⁷ Arti Patel, "What You Should Know About Adoption in Canada" *Huffington Post* (27 February 2017), online: <https://www.huffingtonpost.ca/2017/02/27/adoptions-in-canada_n_15041916.html>.

²³⁸ Budak, *supra* note 22; Sterritt, *supra* note 182.

²³⁹ See e.g., Catholic Children's Aid Society of Toronto, "Financial Assistance for Adoption and Legal Custody of Sibling Groups and Children 10 Years and Older" *Toronto CCAS* (2019), online: <<https://torontoccas.ca/index.php/en-ccast/page/financial-assistance-for-adoption-and-legal-custody-of-sibling-groups>>.

²⁴⁰ Budak, *supra* note 22.

adoption agencies are no longer required to practice race-, culture-, and ethnicity-based “matching” between adoptive parents and adoptees, some critics of transracial adoption argue that children will adjust better and develop in a healthier manner if they are raised by parents who share the same racial, cultural, and ethnic roots as them, and many prospective adoptive parents would prefer to adopt children who look like them.²⁴¹ The racial, cultural, and ethnic makeup of the children in the domestic child welfare system is not reflective of Canadian society at large—Indigenous and Black children continue to be overrepresented,²⁴² and this may also cause prospective adoptive parents in Canada to look to their own countries of origin when searching for children to adopt.

Finally, in many cultures, it is common for children to be placed under the guardianship of extended family members who may be better positioned to provide for them, for economic, health, and other reasons. This permits children to remain within the broader family context, and enables children to maintain ties with their biological parents more easily than if they were adopted by strangers. This leads some families to engage in intrafamily or kinship-based intercountry adoption, where children are adopted by relatives such as grandparents, aunts, uncles, siblings, and cousins who live in different countries.²⁴³

On the ground, adoption is a complex social phenomenon. Parents are motivated to search for children abroad for many different reasons. This does not erase the fact that intercountry adoption has a problematic history, however. Critiques of intercountry adoption as a practice based on White or Western “saviour” stereotypes are grounded in legitimate concerns arising from the sometimes-troubled history of international child migration. As Laura Briggs has argued, intercountry adoption has played a role in

²⁴¹ See e.g., Leslie Doty Hollingsworth, “International Adoption among Families in the United States: Considerations of Social Justice” (2003) 48:2 *Social Work* 209.

²⁴² See e.g., Ontario Human Rights Commission, “Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare” (2018), online: <http://www.ohrc.on.ca/sites/default/files/Interrupted%20childhoods_Over-representation%20of%20Indigenous%20and%20Black%20children%20in%20Ontario%20child%20welfare_accessible.pdf>.

²⁴³ See e.g., S.D. Ryan et al, “Kinship Adoption and The Associated Outcomes Among Children And Their Adoptive Families” (2010) 32:12 *Children and Youth Services Review* 1631.

[directing] attention away from structural explanations for poverty, famine and other disasters, including international, political, military and economic causes. It mobilises ideologies of 'rescue', while pointing away from addressing causes.²⁴⁴

In the next section, this thesis will explore in greater depth some of the common criticisms of intercountry adoption.

1.3 Critiques of Intercountry Adoption

Despite the sustained interest in intercountry adoption, there are nevertheless important criticisms that can be made of the practice that are worth reviewing here. Rather than focusing on the motivations of individual families, these critiques situate intercountry adoption within a broader political landscape that engages issues of power, profit, hierarchy, and disparity. Though an in-depth review of the many critiques of intercountry adoption is outside the scope of this project, reviewing some of the significant themes and exploring examples of intercountry adoption scandals from Guatemala, China, and Haiti can help elucidate some of the reasons why not everyone supports the practice.

1.3.1 Child Trafficking

The most frequently cited concern regarding intercountry adoption is its relationship to child trafficking. For as long as intercountry adoption has been practiced in the West, there have been concerns about how to guard against the selling or trading of children for nefarious purposes. The term child trafficking is generally used in human rights discourse to address situations where children are taken from their homes and coerced into forced labour, sexual exploitation, and marriage, but the term is also used to address improper and unethical adoptions. Child trafficking is defined by the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, which supplements the United Nations Convention against Transnational Organized Crime, as being

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of

²⁴⁴ Briggs, *supra* note 231 at 180.

the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.²⁴⁵

The use of the word “exploitation” indicates that some harm beyond simply exchanging money must take place in order for an international adoption to constitute child trafficking. In terms of what this harm would be, if a child is taken from his or her birth family and subsequently sold into prostitution or enslaved under the cover of an adoption, the harm to the child is obvious and the situation can uncontroversially be identified as trafficking. However, if a child is taken from his or her birth family and placed in a new home with ostensibly loving parents, it is less obvious how this could constitute harm to the child and fall into the category of child trafficking.

To understand how such a scenario could constitute child trafficking, we must examine how the child in question is being treated unfairly or otherwise harmed. To do this, we can turn to David M. Smolin, who uses the image of an upright triangle to explain the ways in which the parties involved in adoptions are fundamentally and permanently interrelated. In Smolin’s framework, at the top of the triangle is the child, at one bottom corner is the child’s birth family, and at the other bottom corner is the child’s adoptive family.²⁴⁶ The child is at the top of the triangle because he or she is the central factor that links the two other parties involved, which represents how the child’s best interests cannot be considered without reference to the other parties in the triad. For Smolin, the contemporary legal form of adoption wherein ties to the biological family are severed and fully replaced with ties to the adoptive family is a legal fiction. He points to the countless narratives of adoptive children longing to discover their biological roots as representative of the ongoing tether adoptive children feel connects them to their families and countries of origin.²⁴⁷ In light of this, the image of the triangle helps us to see how the adopted

²⁴⁵ *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* 15 November 2000, UN General Assembly resolution 55/25, Article 3.

²⁴⁶ David M Smolin, “Intercountry Adoption as Child Trafficking” (2002) 39:2 Valparaiso University Law Review 281 at 284, citing E. Wayne Carp, *Adoption in America: Historical Perspectives* (Ann Arbor: University of Michigan Press, 2004) at 1, 19; Arthur D Sorosky et al, *The Adoption Triangle: Sealed or Open Records: How They Affected Adoptees, Birth Parents, and Adoptive Parents* (New York City: Doubleday, 1978), which also use the image of a triangle or triad to represent the three parties involved in adoptions.

²⁴⁷ *Ibid* at 285.

child's interests necessarily engage those of both the biological and adoptive parents, even if there are only legal ties to the adoptive family. As Smolin explains:

An adoption built upon a severe deprivation of the rights of the birth family, for example, intrinsically harms the child as well, because of the child's profound and permanent connection to her birth family. The same can be said about all of the other members of each triad. Thus, to the degree that adoption seriously harms a triad member, the child also is harmed. From this perspective, the only kind of adoption that can serve the "best interests of children" is adoption that honors all triad members. Of course this does not mean that all triad members receive everything they demand, but it does mean that attempts to save children at the expense of the dignity and well-being of birth or adoption families or nations are inherently flawed. Ethical adoption, therefore, is adoption that respects the dignity and rights of all triad members.²⁴⁸

If any party in the triad experiences harm, the child will also experience a corresponding harm. For instance, if the removal of the child is done without the biological family's fully informed consent, the birth family is deprived of access to their child, and the child in turn will be deprived of access to people with whom he or she shares a biological connection; his or her cultural, linguistic, and religious heritage; and information about his or her health and medical history. If the child discovers that his or her biological family did not provide fully informed consent to the adoption, he or she may experience further emotional and psychological harm, as they imagine the alternate life they could have had. Such situations, in addition to more obvious cases of child abuse and neglect, can also be understood as trafficking.

Anxiety about child trafficking in the field of intercountry adoption comes from fears that intercountry adoption can lead to the commodification of children, and that the commodification of children can in turn incentivize unethical adoptions for profit. The critique is essentially that intercountry adoption encourages the establishment and promotion of economies centred around the buying and selling of children as products. When children are treated as products that can be bought and sold, the original compassion-based motivation for adoption becomes distorted, and parties involved can become motivated by market logic and the desire for financial profit. These strong economic incentives can then lead some to give up their own children in exchange for payment, perhaps without a full understanding of the consequences, and can lead others to steal

²⁴⁸ *Ibid.*

children, lie to birth parents, or otherwise coerce families into participating in intercountry adoptions.²⁴⁹

1.3.2 Global Inequality

Another category of criticism against intercountry adoption is grounded in analyses considering the economic inequalities between “sending” and “receiving” intercountry adoption countries. Much work has been done exploring intercountry adoption patterns and exploring the differences between countries that send children abroad via intercountry adoption and countries that receive children via intercountry adoption, particularly focusing on economic disparities between what are variously identified as the Global North and South, First and Third World, and developed and developing nations.²⁵⁰

The origins of intercountry adoption as a practice speak to a recognition of this disparity. In a post-World War II and post-Cold War world, many countries found themselves with large numbers of orphaned and impoverished children who they struggled to provide for. During this time, Western countries warmed up to adoption as a legitimate form of family building, and a culture of “child saving” developed as comparatively well-off Western families opened their homes to children from poorer and less stable countries.²⁵¹ Many children today are still placed for adoption due to poverty and birth families’ and countries’ inability to provide for basic needs. Lack of economic opportunity, lack of social mobility, and lack of social safety nets in many developing countries mean many birth families see no option other than adoption when faced with the economic realities of their lives. We can therefore see how intercountry adoption has

²⁴⁹ See generally Katherine Herrmann, “Reestablishing the Humanitarian Approach to Adoption: The Legal and Social Change Necessary to End the Commodification of Children” (2010) 44:3 Family Law Quarterly 409; Shurlee Swain, “What price a child? Commodification and Australian adoption practice 1850-1950” (2018) 23:1 The History of the Family 1; Stephanie Petrie, ““Commodifying” Children: The Impact of Markets in Services for Children in the United Kingdom” (2015) 6:2 International Journal of Child, Youth and Family Studies 275.

²⁵⁰ See e.g., Peter Selman, “The Movement of Children for International Adoption: Developments and Trends in Receiving States and States of Origin, 1998-2004” in Diana Marre & Laura Briggs, eds, *International Adoption: Global Inequalities and the Circulation of Children* (New York: New York University Press, 2009) 32; Claudia Fonseca, “Transnational Connections and Dissenting Views: The Evolution of Child Placement Policies in Brazil” in Diana Marre & Laura Briggs, eds, *International Adoption: Global Inequalities and the Circulation of Children* (New York: New York University Press, 2009) at 169.

²⁵¹ Brookfield, *supra* note 209.

historically functioned as a transfer of individual children from the Global South to the Global North, where these children are likely to have access to a better standard of living and experience less poverty.²⁵²

Promoters of intercountry adoption tend to focus on this individual impact, arguing that if intercountry adoption can lead to improved outcomes for specific children, it is a net benefit—in other words, the more disadvantaged children we take out of impoverished countries with child care problems, the better.²⁵³ However, some critics of intercountry adoption argue that we must expand our analysis beyond the outcomes for individual children and look at how intercountry adoption can impact an adoptees' birth country, as well.²⁵⁴ What impact does removing a child from an impoverished country have on the country itself?

Some have argued that intercountry adoption diverts resources from domestic child welfare systems in sending countries. In many developing and impoverished countries, the fees paid to social workers, lawyers, judges, and other adoption professionals working on intercountry adoptions could go a long way towards directly providing care to needy children.²⁵⁵ If people motivated by the plight of vulnerable children simply gave money to families and orphanages instead of adopting a child, more people could probably be helped with the same amount of investment.

Some critics also argue that this diversion of energy and resources away from domestic efforts and towards intercountry adoption actually serves to undermine the cultivation of improved

²⁵² Damien Ngabonziza, "Moral and Political Issues Facing Relinquishing Countries" (1991) 15:4 *Adoption & Fostering* 75 at 76.

²⁵³ Judith Masson, "Intercountry Adoption: A Global Problem or Global Solution?" (2001) 55:1 *Journal of International Affairs* 141 at 149. See also Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* (Boston: Houghton Mifflin, 1993).

²⁵⁴ John Treseliotis, "Intercountry Adoption: Global Trade or Global Gift?" (2000) 24:2 *Adoption and Fostering* 45 at 46.

²⁵⁵ *Ibid.*

domestic child welfare systems.²⁵⁶ If the solution to child poverty is simply to send poor children away, what need is there for a robust internal social safety net to address the problem? In some ways, intercountry adoption lines up well with the emphasis on privatization apparent in neoliberal and capitalist ideologies. Instead of advocating for an adequate level of state-funded care for all children, intercountry adoption programs encourage individualized solutions to systemic problems, and hinge on the hope that charitable individuals will rescue vulnerable children from poverty and lack of opportunity.

When adopted children leave their countries of birth for more developed nations, they will go on to create lives for themselves in their new homes. An adopted child will speak the language of their adoptive country, get educated in their adoptive country, make friends in their adoptive country, start a career in their adoptive country, and are likely to start their own family in their adoptive country, too. The roots intercountry adoptees grow in their new homes are strong. Though some adoptees do choose to eventually visit or move back to their countries of birth,²⁵⁷ it is difficult to imagine that this is a common occurrence across all intercountry adoptees. So while individual children benefit from improved living conditions and access to more opportunities, it is difficult to see how these benefits directly filter back to adoptees' birth countries.

Other scholars have examined the implications of emigration from poor countries against the backdrop of globalization, capitalism, and neoliberalism. For instance, economist Branko Milanovic has argued that though labour migration can be a positive step towards lessening global inequality, as it gives members of poorer states access to higher wages, it would be counterproductive to permit labour migrants to obtain full citizenship in more developed countries. Milanovic's position is that if labour migrants do not return to their home countries, their home countries will not be able to benefit from the capital and skills those labour migrants

²⁵⁶ Suzanne Hoelgaard, "Cultural Determinants of Adoption Policy: A Colombian Case Study" (1998) 12:2 Intl J of L, Policy & the Family 202.

²⁵⁷ Maggie Jones, "Why a Generation of Adoptees Is Returning to South Korea" *New York Times Magazine* (14 January 2015), online: <<https://www.nytimes.com/2015/01/18/magazine/why-a-generation-of-adoptees-is-returning-to-south-korea.html>>.

gained abroad.²⁵⁸

Many disagree with Milanovic's view that permanent migration from poor countries to wealthy countries does little to improve global inequality, but elements of his arguments continue to be applied to intercountry adoption discourse. Some point to the ways in which adoption-based economies have developed in some countries as emblematic of how developing countries can become dependent on the Western funds received via intercountry adoption.²⁵⁹ Critics suggest this is simply a modern form of imperialism, where developing nations are exploited for their children rather than for their natural resources and cheap labour.²⁶⁰

1.3.3 Feminism and Critical Race Theory

Finally, there are concerns about intercountry adoption that are grounded in feminist and critical race theory.²⁶¹ With respect to feminist concerns, some have argued that intercountry adoption primarily implicates women, and reproduces and reinforces negative stereotypes about who is and is not capable of "good" mothering. Without delving into the conditions that lead women to give away their biological children, the birth mothers in the usually poorer and racialized countries producing intercountry adoptees are seen as "bad" mothers incapable of providing their children with a good life, and the adoptive mothers in the usually wealthier Western countries are seen as "good" mothers who are rescuing unwanted babies.²⁶² Moreover, some have pointed to restrictions that exist in many sending and receiving countries involved in intercountry adoptions that prohibit single people, older people, disabled people, poor people, and queer people from

²⁵⁸ Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Cambridge: Harvard University Press, 2016). See also Branko Milanovic, "There is a trade-off between citizenship and migration" *Financial Times* (20 April 2016), online: <<https://www.ft.com/content/2e3c93fa-06d2-11e6-9b51-0fb5e65703ce>>.

²⁵⁹ Kenneth J Herrmann Jr & Barbara Kasper, "International Adoption: The Exploitation of Women and Children" (1992) 7:1 *Affilia* 45 at 49-50.

²⁶⁰ *Ibid* at 55.

²⁶¹ See e.g., Twila L Perry, "Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory" (1998) 10:1 *Yale JL & Feminism* 101.

²⁶² Susan E Barrett & Carol M Aubin, "Feminist Considerations of Intercountry Adoptions" (1990) 10:1-2 *Women & Therapy* 127 at 134.

adopting as representative of how intercountry adoption can perpetuate heteronormative and patriarchal stereotypes about “good” families.²⁶³

Other feminist critiques of intercountry adoption argue that it exacerbates the inequality between the least and most privileged women, as the birth mothers “lose” and adoptive mothers “gain” children.²⁶⁴ In order for Western families to continue to obtain children through intercountry adoption, these disparities must persist. As legal academic Twila Perry has said:

The imbalance in the circumstances of the two women involved in international adoptions presents a troubling dilemma: in a sense, the access of affluent white Western women to children of color for adoption is often dependent upon the continued desperate circumstances of women in third world nations.²⁶⁵

For critics like Perry, the goal should not be simply to find ways to more easily facilitate intercountry adoptions to help vulnerable children. Rather, Perry’s feminist perspective suggests that we should be analyzing the power differentials between birth and adoptive families, and working towards a world where women who give their children up for adoption, both domestically and internationally, are not doing so because of oppressive circumstances like poverty and the social disapproval of single motherhood.²⁶⁶

With respect to criticisms of intercountry adoption that focus more on race and associated issues of culture, language, and religion, it has long been argued that transracial and intercountry adoption displace and damage children by removing them from the cultures, traditions, languages, and religions of their birth countries. Furthermore, some argue that White parents are

²⁶³ See e.g., US Department of State – Bureau of Consular Affairs, “China”, online: <<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/China.html>>, under the heading “Who Can Adopt”. China’s intercountry adoption program has numerous restrictions for adoptive parents, including age restrictions, income requirements, health and fitness requirements, and prohibitions against LGBTQ+ individuals adopting. Notably, prohibitions like this do not only exist in non-Western countries. In parts of the USA, private faith-based adoption agencies can also refuse to place children with queer parents: Daniella Diaz, “Adoption agencies could refuse same-sex couples under measure OK’d by House panel” *CNN Politics* (12 July 2018), online: <<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/China.html>>.

²⁶⁴ Herrmann & Kasper, *supra* note 257.

²⁶⁵ Perry, *supra* note 261 at 105.

²⁶⁶ *Ibid* at 107.

not equipped to raise non-White children in a world where racial difference has very real implications.²⁶⁷ For instance, adult transracial and transcultural adoptees sometimes speak of the difficulties they experienced growing up outside of their birth countries and without a connection to their birth culture, and experiencing racism and feelings of not belonging that their White adoptive parents struggled to address.²⁶⁸

Other critics go further and argue that transracial and intercountry adoption is not only problematic because it may have negative impacts on individual children, but also because it is harmful for entire communities. For instance, the National Association of Black Social Workers (“NABSW”), a professional organization based in the USA, released a policy statement in 1972 against the permanent placement of Black children with White families, arguing that Black families were being systematically discriminated against and screened out during adoption placement determinations, and that this led to the breakdown of Black families and communities in the USA.²⁶⁹ Representatives of the NABSW have further said that “[w]e view the placement of Black children in White homes as a hostile act against our community. It is a blatant form of race and cultural genocide”, suggesting that removing Black children from Black communities leads to the breakdown of Black culture altogether.²⁷⁰

Finally, there are concerns that commodifying children in intercountry adoption markets means that some children will be highly prized (for instance, healthy babies and White babies), while others will be devalued based on race, class, and disability status, among other factors. To give an example, in Canada, some provincial adoption agencies have partnered with a Florida-based adoption agency called Adoption by Shepherd Care, which is licensed and accredited to facilitate Hague Adoption Convention adoptions out of the United States of America. Adoption by

²⁶⁷ Barrett & Aubin, *supra* note 262 at 131.

²⁶⁸ See Jones, *supra* note 257.

²⁶⁹ National Association of Black Social Workers, “Position Statement on Trans-Racial Adoptions” (September 1972), online: <[https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_\(b\).pdf](https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_(b).pdf)>.

²⁷⁰ Rita J. Simon & Howard Alstein, “The Relevance of Race in Adoption Law and Social Practice” (2014) 11:1 Notre Dame Journal of Law, Ethics & Public Policy 171 at 172, citing *Barriers to Adoption: Hearings Before the Senate Committee on Labor and Human Resource*, 99th Cong 213 (1985).

Shepherd Care has drawn criticism for its “sliding scale” adoption fees, where white babies tend to be significantly more expensive to adopt than mixed race or black babies.²⁷¹ Critics have pointed to this as an example of how intercountry adoption can succumb to problematic market rationalities, where children can be bought and sold at prices dictated by demand.

1.3.4 Intercountry Adoption Scandals – Case Studies

In the following three case studies, we will explore how intercountry adoption programs have led to problematic outcomes in the past, in order to better understand the concerns outlined above. While by no means a comprehensive account of every intercountry adoption scandal that taken place since the practice became popular in the West, these case studies will enable us to understand the need to regulate intercountry adoption processes, both within countries and on an international level.

1.3.4.1 Guatemala

In Guatemala, a civil war raged from approximately 1960 to 1996, and during this time, there was widespread violence, poverty, and instability, particularly targeting Indigenous Guatemalans of Mayan ancestry. Children in the country were not spared from the violence and were frequently tortured, murdered, and apprehended, with the genocidal logic being that killing and removing Indigenous children would help to wipe out the next generation of Indigenous Guatemalans.²⁷² One tactic used by government forces was the mass abduction of Indigenous Guatemalan children after their villages were destroyed. Agents of the government and others would pick up surviving children and either make them available for overseas adoption in government-run orphanages, or more commonly, sell them to people working in the private international adoption sector.²⁷³

²⁷¹ Donna Carreiro, “Canadian parents paying less to adopt African American babies” *CBC News* (20 October 2014), online: <<https://www.cbc.ca/news/canada/manitoba/canadian-parents-paying-less-to-adopt-african-american-babies-1.2805227>>.

²⁷² Karen Dubinsky, *Babies Without Borders: Adoption and Migration Across the Americas* (New York City: New York University, 2010) at 105.

²⁷³ *Ibid.*

In 1977, the Guatemalan Congress permitted adoptions to take place without the need to go to before a judge—private lawyers and middlemen could arrange adoptions for hefty fees, with essentially no oversight.²⁷⁴ Thus, a flourishing commercial adoption market developed, where many thousands of Guatemalan children were adopted by families in the United States of America, Canada, and Europe. Whereas formal adoptions through the Guatemalan orphanages would take several years to process, private Guatemalan adoptions took as little as six months, and cost between \$10,000 and \$40,000, with most of that money going directly to the private adoption brokers.²⁷⁵ The six month timeline was possible because of the lack of proper vetting—checks were not done to ensure children were genuine orphans, and many children from Indigenous communities lacked formal identification documents like birth certificates, so their parentage and other biographical details could not be established, and would often be fabricated instead.²⁷⁶ Ordinary people facing poverty and a severe lack of economic opportunity found they could make an income by participating in baby-selling schemes to meet the Western demand for adoptable children. Sometimes, people would outright steal children from homes and quickly sell them to adoption facilitators, and others would concoct elaborate lies to convince families to part with their children. For instance, it was common for families to fall victim to scams wherein they would be told their child had been awarded a scholarship and needed to leave home to study.²⁷⁷ In some cases, extreme poverty led to women knowingly selling their own children to adoption brokers.²⁷⁸ These kinds of problematic adoptions steadily rose in Guatemala from the 1970s onwards, and surged upon the formal end of the civil war in 1996, culminating in approximately

²⁷⁴ Rachel Nolan, “Destined for Export: The Troubled Legacy of Guatemalan Adoptions” *Harpers Magazine* (April 2019), online: <<https://harpers.org/archive/2019/04/destined-for-export-guatemalan-adoptions/>>.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ Marc Lacy, “Guatemala System is Scrutinized as Americans Rush In to Adopt” *The New York Times* (05 November 2006), online: <<https://www.nytimes.com/2006/11/05/world/americas/05guatemala.html?mtrref=www.google.com&gwh=76FA8ADCE88324A6DC3E557C80E016AA&gwt=pay&assetType=REGIWALL>>.

29,000 adoptions by parents in the United States of America alone.²⁷⁹

Today, it is difficult to ascertain how many Guatemalan adoptions were conducted improperly and illegally, as the record keeping was poor, and many documents were falsified. In 2008, Guatemala banned intercountry adoption, after mounting pressure from international and domestic human rights activists alleging rampant corruption and lack of regulation.²⁸⁰ Many of the children who were adopted during this period are now adults, who express complex feelings about their origins and have tried to find their birth families.²⁸¹ Some of the lawyers and brokers who participated in these adoptions have since been criminally prosecuted, but the majority of people have not faced consequences.²⁸²

1.3.4.2 Haiti

In Haiti, approximately 300,000 children live in orphanages, despite the fact that it is estimated that 80% of those children are not actual orphans and have at least one living parent. These children are often placed in orphanages by their own families, who are too impoverished to care for them, and see institutionalization as the only option to keep their children alive. Importantly, while some parents who have placed their children in facilities understand that adoption is a possibility and view it as a way to provide their children with a better life, many other parents do not actually intend to relinquish their parental roles, and hope to eventually have their children returned to them once their economic situation is improved.²⁸³

²⁷⁹ David Crary, “For many US adoptees from Guatemala, a complicated legacy” *The San Diego Union Tribune* (06 September 2015), online: <<https://www.sandiegouniontribune.com/sdut-for-many-us-adoptees-from-guatemala-a-complicated-2015sep06-story.html>>.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ Lisa Cohen, “How traffickers exploit children in Haiti’s orphanages” *CNN* (02 March 2018), online: <<https://www.cnn.com/2017/11/20/health/haiti-orphanages/index.html>>; Georgette Mulheir, “Thousands of children are living in orphanages in Haiti—but not because they are orphans” *The Independent* (25 June 2015), online: <<https://www.independent.co.uk/voices/comment/thousands-of-children-are-living-in-orphanages-in-haiti-but-not-because-they-are-orphans-10345063.html>>.

Poverty, and the resulting pressure families feel to place their children in orphanages, have been prevalent in Haiti for many decades, but were exacerbated by the 2010 earthquake, which devastated infrastructure in the country and left many Haitians homeless. After the earthquake, the ensuing chaos led to government instability, the loss of countless state records, and the loss of many individuals' identity documents. While this was happening, Western aid workers from humanitarian organizations, charities, and churches descended on the country to provide assistance.

This confluence of circumstances proved to be a recipe for child trafficking. In the aftermath of the earthquake, many family members were separated from one another. Children who were living in orphanages were sometimes discovered by foreign aid workers and assumed to be actual orphans in imminent danger as food insecurity and disease began to spread. The lack of documentation to ascertain the identities and backgrounds of these institutionalized children meant that it was easy for them to be swept up in efforts to remove vulnerable children from the country.²⁸⁴

These efforts were spearheaded primarily by Church-affiliated foreign aid workers, who among other actions successfully lobbied the Obama administration in the United States to lift the usual visa requirements and admit 1,150 unaccompanied Haitian minors into the country, without documentation to prove that they were legally available for adoption.²⁸⁵ During this chaotic period, a group of 10 American citizens working for a Christian Baptist church-based charity called New Life Children's Refuge were arrested in Haiti after they were discovered trying to take 33 Haitian children into the Dominican Republic, where they would be placed in an orphanage and made available for intercountry adoption. The aid workers did not have any documents with them to demonstrate that the children were legally available for adoption or that they were actual orphans, and the leader of the cohort was eventually convicted of arranging the

²⁸⁴ John Seabrook, "The Last Babylift" *The New Yorker* (03 May 2010), online: <<https://www.newyorker.com/magazine/2010/05/10/the-last-babylift>>.

²⁸⁵ Chambers, *supra* note 206 at 145.

unlawful travel of minors.²⁸⁶

Public concern began to mount as evidence grew that the proper steps were not being taken to ascertain the backgrounds of Haitian children, and that efforts to locate living relatives within Haiti were not being exhausted before children were permitted to leave the country. In response, the US government ended the short-lived resettlement program, many Canadian provinces temporarily prohibited Haitian adoptions, and Haiti itself tightened restrictions on intercountry adoptions.²⁸⁷

As orphanages began to empty in Haiti, some people began to see an opportunity for financial gain and started seeking out children to refill the orphanages. Child traffickers began simply taking unaccompanied minors and placing them in facilities, while others persuaded and lied to children's families in order to get them to agree to place them in orphanages. Some children would be adopted by foreigners for a fee, while others would languish in poorly run institutions. The orphanages would solicit donations from Westerners, who eagerly provided funds, expecting the money would help provide care to needy children. Unfortunately, little of this money went towards caring for children, who tended to live in squalor and would frequently be forced to do manual labour at the facilities.²⁸⁸ Reports indicate that while adoptions from Haiti to developed Western countries have dramatically declined in recent years as a result of legal restrictions, the soliciting of children for the purposes of placement in orphanages has increased and become a central part of the Haitian economy. Currently, efforts are underway in Haiti to encourage foster parent placements instead of orphanage placements, in order stop orphanages from using children to request donations.²⁸⁹

²⁸⁶ Joseph Guyler Delva, "Americans arrested taking children out of Haiti" *Reuters* (30 January 2010), online: <<https://www.reuters.com/article/us-quake-haiti-arrests/americans-arrested-taking-children-out-of-haiti-idUSTRE60T23I20100130>>.

²⁸⁷ Chambers, *supra* note 206 at 145; Kathyn Westcott, "Protecting Haiti's children from 'cowboy adoptions'" *BBC News* (01 February 2010), online: <<http://news.bbc.co.uk/2/hi/americas/8491981.stm>>.

²⁸⁸ Cohen, *supra* note 283.

²⁸⁹ *Ibid.*

1.3.4.3 China

From 1980 to 2016, in an effort to curb population growth, the Chinese government implemented restrictions on how many children couples could have, with most families being restricted to just one child. Women reportedly underwent forced abortions and sterilizations, families attempted to hide illicit and undocumented children from government authorities, and cultural preferences for males and children without disabilities led to high numbers of abandoned female and disabled infants in Chinese orphanages.²⁹⁰ The availability of adoptable children eventually turned China into the lead source country for intercountry adoptions for most of the 1990s and 2000s.²⁹¹

Chinese adoption regulations require that everyone interested in adopting from China—whether a Chinese citizen or a foreigner—must meet certain criteria regarding age, health, financial ability, relationship status, and sexual orientation, must be physically present in China to complete the adoption there, and must make a financial contribution to the orphanage facilitating the adoption.²⁹² The requirement that the adoptive family must pay fees to the orphanage meant that domestic adoptions were often not feasible. Chinese citizens could rarely afford the substantial sums, whereas it was more likely that families in the West could.²⁹³

It has been argued that the Chinese adoption framework was devised to promote intercountry adoption over domestic adoption, due to the government's overpopulation concerns. It has also been argued that the Chinese government permitted such a high number of intercountry adoptions because it proved to be a reliable source of income into the country. In 2019, documentarian Nanfu Wang released the film *One Child Nation*, which explores China's one child policy and the intercountry adoption industry that grew out of it. In the film, Wang follows stories of Chinese families who felt compelled to give up their children, but also speaks to

²⁹⁰ Anna Fifield, "Beijing's one-child policy is gone. But many Chinese are still reluctant to have more" *The Washington Post* (04 May 2019), online: <https://www.washingtonpost.com/world/asia_pacific/beijings-one-child-policy-is-gone-but-many-chinese-are-still-reluctant-to-have-more/2019/05/02/c722e568-604f-11e9-bf24-db4b9fb62aa2_story.html>.

²⁹¹ Chambers, *supra* note 206 at 142-43.

²⁹² *Ibid* at 143-44.

²⁹³ *Ibid*.

investigators who are taking a closer look at how so many Chinese children actually ended up in orphanages.²⁹⁴ While it was certainly true that many families could not keep their second and subsequent children without fear of government reprisal, and while it was also true that many female and disabled infants were willingly given away, the documentary suggests that the backgrounds of many other so-called orphans in China were murkier.

Because orphanages stood to profit from each intercountry adoption they facilitated, and because there was significant ongoing demand for Chinese babies in the West, there was an incentive to process as many adoptions as possible, and to keep a steady flow of children moving through the international adoption system. Orphanages and adoption brokers reportedly engaged in ethically dubious practices—without any government intervention—to take children and babies away from their birth families, including the outright kidnapping of children, who would then be listed as abandoned in official government paperwork.²⁹⁵ It has also been reported that Chinese government officials seized babies during this time without the consent of their birth families, and would forcefully remove children when families could not pay the exorbitant penalty fees associated with having more than one child.²⁹⁶ Many international adoptees who were born in China, along with their adoptive parents, have begun investigating their origins in light of these reports, and investigators are available to assist with locating adoptees' birth families in China.²⁹⁷

In the 2000s and 2010s, China underwent rapid development that led to improved economic conditions for many and an expanding middle class. This meant that a greater number of Chinese

²⁹⁴ Isabel Crabtree, “*One Child Nation* Explores China's One-Child Policy—and Offers a Familiar Warning” *Esquire Magazine* (23 November 2019), online: <<https://www.esquire.com/entertainment/movies/a29894018/nanfu-wang-one-child-nation-documentary-amazon-prime/>>.

²⁹⁵ *Ibid.*

²⁹⁶ Sharon LaFraniere, “Chinese Officials Seized and Sold Babies, Parents Say” *The New York Times* (05 August 2011), online: <https://www.nytimes.com/2011/08/05/world/asia/05kidnapping.html?_r=1&scp=1&sq=longhui&st=cse&mtrref=undefined&gwh=AF02369629EEB6398467D05FEE75657D&gwt=pay&assetType=REGIWALL>.

²⁹⁷ See e.g., Vibeke Venema, “Jenna Cook: The adopted girl claimed by 50 birth families” *BBC News* (24 March 2017), online: <<https://www.bbc.com/news/magazine-37024334>>. See also “Research China”, a website for an investigation service operated by Brian Stuy, who himself is the adoptive father of three girls from China: *Research China*, online: <<https://www.research-china.org/>>.

citizens are now able to afford adoption fees. This, along with the formal elimination of the one-child policy in 2016, have meant that there has been a shift away from intercountry adoption in China in recent years. Fewer families feel pressured to place children for adoption now that it is legal to have multiple children, more families are able to afford to care for multiple children, and there is greater access to sex-selective abortion for those who have a preference for males.²⁹⁸

The examples of Guatemala, Haiti, and China show us that intercountry adoption is vulnerable to criticism on the grounds that it can be susceptible to, and in some cases encourage, child trafficking and the unethical treatment of birth mothers. Western demand for adoptable children can lead to the commodification of babies and children, particularly in economically struggling areas, where adoption brokers may be looking to profit, and governments might be inclined to look the other way. Beyond the three examples given, there are many more cases of the unethical removal of children from their homes, and the proliferation of for-profit adoption that relies on unscrupulous methods. In light of these scandals, many of the countries that have been historically significant sources countries for intercountry adoption have implemented restrictions on intercountry adoption, and some have prohibited it altogether.²⁹⁹ Correspondingly, Canada, along with other Western countries, also engages in the temporary and indefinite suspension of intercountry adoptions from certain countries where there may be concerns about adoption procedures.³⁰⁰ Moreover, the significance of these adoption scandals also contributed to the development of international adoption standards and protocols, culminating in the Hague Adoption Convention, which will be explored in greater detail in Part 3 of this chapter.

²⁹⁸ John Leland, “For Adoptive Parents, Questions Without Answers” *The New York Times* (16 September 2011), online: < <https://www.nytimes.com/2011/09/18/nyregion/chinas-adoption-scandal-sends-chills-through-families-in-united-states.html?mtref=www.google.com&gwh=F01B554F7488EABC11365D6CE95E1FD6&gwt=pay&assetType=REGIWALL>>.

²⁹⁹ For instance, at the time of writing, Argentina, Benin, Bhutan, Myanmar, Cabo Verde, Comoros, The Democratic Republic of Congo, Ethiopia, Ghana, Grenada, Iran, Iraq, Kenya, Kuwait, Laos, Maldives, Mozambique, Pakistan, Paraguay, Russia, Saudi Arabia, Senegal, Swaziland, Tajikistan, and Tanzania have all implemented partial or full bans on intercountry adoptions by Canadians. See Government of Canada, “Countries with suspensions or restrictions on international adoptions” *Immigration and Citizenship* (29 August 2018), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadians/adopt-child-abroad/restrictions.html>> [IRCC Intercountry Adoption Suspensions].

³⁰⁰ See *ibid*, which at the time of writing lists Cambodia, Georgia, Guatemala, Liberia, and Nepal as countries for which Canadian provinces and territories have implemented intercountry adoption prohibitions.

2 Factors Outside Canadian Law and Policy that Influence Intercountry Adoption

The declining trend of intercountry adoptions worldwide can be attributed to a variety of different factors. In this thesis, I intend to explore how Canadian intercountry adoption law and policy regards intercountry adoption with suspicion, and how this has contributed to the decline in successful Canadian intercountry adoptions. However, it is worth noting that intercountry adoption is a complex global process that is influenced by many factors outside domestic law and policy, and that my analysis must be understood within this broader global context.

2.1 Political and Diplomatic Issues Between Countries Involved in Intercountry Adoption

Undoubtedly, the availability and ultimate success of intercountry adoptions will depend on a wide array of factors. One such factor is the ways in which “sending” and “receiving” states interact with one another politically and diplomatically.

For instance, in 2013, Russia banned same-sex couples from adopting Russian children. Russia also passed laws banning single applicants from countries recognizing same-sex marriage from adopting Russian children.³⁰¹ Critics of Russia’s decision characterized it as part of Russia’s diplomatic response to a US law passed in 2012 addressing human rights abuses in Russia.³⁰² In this way, Russia used its intercountry adoption policy as a way to send a diplomatic message to western countries, and contributed to the decline in successful intercountry adoptions, as same-sex couples and citizens of countries recognizing same-sex marriage can no longer receive Russian children via adoption.

³⁰¹ Government of Canada, “Archived – Notice – Important notice regarding adoptions from Russia” *Immigration, Refugees and Citizenship Canada* (15 November 2013), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadians/adopt-child-abroad/restrictions.html>>.

³⁰² “How Russian law affects Canadians trying to adopt orphans” *CBC: The Current* (02 November 2017), online: <<https://www.cbc.ca/radio/thecurrent/the-current-for-november-2-2017-1.4382427/how-russian-law-affects-canadians-trying-to-adopt-orphans-1.4382469>>. In 2012, the US government passed the *Magnitsky Act*, which permits the US government to sanction those it deems to have committed human rights abuses, allowing the US to prevent entry to those individuals and freeze their assets. It was developed after a Russian tax accountant named Sergei Magnitsky died while imprisoned by Russian authorities after investigating large-scale tax fraud allegedly committed by Russian tax officials.

2.2 Socioeconomic and Political Issues Within Countries Involved in Intercountry Adoption

The socioeconomic and political landscapes of “sending” countries can also variously enable or obstruct intercountry adoptions.³⁰³ One reason that is sometimes cited for the decline in intercountry adoptions in recent years is that many of the countries that have traditionally been significant “sending” countries have become more developed and socially progressive.³⁰⁴ This means that some of the common reasons why birth mothers would have felt pressure to give up their children—such as poverty and stigma against single motherhood—are no longer as compelling as they once were.

For instance, in South Korea, which in 1985 sent 1.3 of every 100 children abroad through intercountry adoption,³⁰⁵ attitudes towards unwed mothers have softened, and the government has made it more difficult for children to be abandoned without birth mothers having to go through a registration process.³⁰⁶ Similarly, whereas Chinese orphanages were once full of children who were given up in secret due to China’s one child policy, the relaxing of China’s population control measures—along with China enacting increasingly strict rules about who can adopt Chinese children—has led to fewer children being available for intercountry adoption.³⁰⁷

2.3 The Role of Adoption Agencies in Intercountry Adoption

Intercountry adoption is also impacted by the practices of adoption agencies, both in sending and receiving countries. Adoption agencies can be public or private entities, and employ social

³⁰³ Andrew C Brown, “International Adoption Law: A Comparative Analysis” (Fall 2009) 43:3 *International Lawyer* 1337.

³⁰⁴ MK Menon, “Why Do Some Countries Not Allow International Adoption” *Adoption* (15 August 2018), online: <<https://adoption.com/why-countries-not-allow-international-adoption>>.

³⁰⁵ Kevin Voigt & Sophie Brown, “International adoptions in decline as number of orphans grows” *CNN* (17 September 2013), online: <<http://www.cnn.com/2013/09/16/world/international-adoption-main-story-decline/index.html>>.

³⁰⁶ Menon, *supra* note 304.

³⁰⁷ Voigt & Brown, *supra* note 305.

workers, lawyers, and other professionals to help adoptive parents navigate domestic and intercountry adoption programs. For example, in British Columbia, there are four bodies that can legally facilitate adoptions: The Ministry of Children and Family Development, which is a branch of the provincial government; licensed private adoption agencies, of which there are presently only two; Indigenous adoption services, which operate in First Nations communities; and a non-profit foundation called Wendy's Wonderful Kids, which is associated with the US-based Dave Thomas Foundation for Adoption.³⁰⁸ All adoption facilitators need to be licensed by the provincial government and must process adoptions in accordance with provincial law.³⁰⁹ The Ministry of Children and Family Development focuses on placements for children living in the province, Indigenous adoption services focus on placements for indigenous children, and Wendy's Wonderful Kids focuses on placements for children within their broader family networks. Intercountry adoptions are only facilitated by the Adoption Centre of BC, which is located in Kelowna, and Sunrise Family Services Society, which is located in North Vancouver.³¹⁰ In other provinces, there are more private agencies that are licensed to facilitate intercountry adoptions, like in Ontario, where there are 12 agencies.

These licensed private adoption agencies are responsible for vetting prospective adoptive parents, conducting home studies, ensuring prospective adoptive parents have completed all educational and training requirements, and helping families connect with children outside Canada when they have not already chosen a particular child. Many Canadian adoption agencies have formed partnerships with orphanages and adoption agencies in other countries, and have developed streamlined processes for matching children to families in a Hague Adoption Convention-compliant manner. For instance, in Ontario, The Children's Bridge is a licensed adoption agency advertising adoption programs for South Korea, Thailand, China, India,

³⁰⁸ Adoptive Families Association of BC, "Adoption Representatives" *BC Adoption* (2019), online: <<https://www.bcadoption.com/node/571>>.

³⁰⁹ Adoptive Families Association of BC, "Adoption Agencies" *BC Adoption* (2019), online: <<https://www.bcadoption.com/adoption-agencies>>.

³¹⁰ *Ibid.*

Zambia, and the USA.³¹¹ Similarly, in British Columbia, Sunrise Family Services Society advertises intercountry adoption programs for Thailand, Kazakhstan, Haiti, the USA, South Korea, Bulgaria, India, and Latvia.³¹²

Social workers at these agencies may prefer that families adopt children through these existing programs, where they already have scrutinized the relevant overseas orphanages and agencies, rather than embark on adoptions from unfamiliar countries whose rules may be more difficult to navigate. This means that prospective adoptive families will find greater institutional support for certain kinds of intercountry adoptions, and will not have as much exposure to adoptable children in countries that adoption agencies are less familiar with. This too can influence how intercountry adoption unfolds.

³¹¹ The Children's Bridge, "Countries at a Glance", online: <childrensbridge.com/adoptionprograms/countries-glance/>.

³¹² Sunrise Family Services Society, "New Programs and Space Available", online: <https://www.sunriseadoption.com/new-programs-and-space-available>>.

Chapter 4

The Hague Adoption Convention

1 Historical Origins of the Hague Adoption Convention

The Hague Adoption Convention is a multilateral treaty that sets standards and requirements for intercountry adoptions amongst signatory states. Intercountry adoptions that comply with the Hague Adoption Convention are recognized as legitimate and valid amongst participating countries. This means that the adoption orders are recognized and accepted, and the adopted children are permitted to be transferred to the country of the adoptive parents. The Hague Adoption Convention was drafted in the early 1990s by the Hague Conference on Private International Law and was entered into force in 1995. Currently, 96 countries, including Canada, have ratified it.³¹³

The Hague Adoption Convention was not the first attempt to regulate and set standards for cross-border adoption on an international level. In 1957, just as the Cold War-era interest in intercountry adoption was growing, a group of European adoption experts began meeting to discuss the phenomenon of intercountry adoption. These meetings culminated in a seminar, which was held in Leysin, Switzerland in 1960. 80 adoption workers, administrators, and legal experts attended, as did representatives from organizations including the United Nations, International Social Services, the International Union of Child Welfare, the Council to Europe, and the Hague Conference on Private International Law. Following the seminar, a report was released in 1961, which recommended twelve principles for ethical cross-border adoptions.³¹⁴ The “Leysin Principles”, as they came to be known, emphasized that the best interests of the child should be the paramount consideration in any cross-border child placement case, and also introduced the idea of subsidiarity, which discourages intercountry adoption whenever there is a

³¹³ Nigel Cantwell, “The Best Interests of the Child in Intercountry Adoption” *UNICEF Office of Research* (2014), online: <<https://www.unicef-irc.org/publications/712-the-best-interests-of-the-child-in-intercountry-adoption.html>>.

³¹⁴ Lovelock, *supra* note 152 at 917-18.

domestic placement available for a child.³¹⁵ Though the conclusions articulated by the 1960 European Seminar on Intercountry Adoption were meant to serve as guidelines for adoption workers and did not themselves constitute law, they formed the basis for subsequent attempts to regular intercountry adoption by international bodies.

The next major attempt to address intercountry adoption in the international sphere took place in the late 1980s, as intercountry adoption became more prevalent and as children's rights emerged as a topic of international concern. Media stories about declining birth rates in the West and the inadequate care many orphaned and institutionalized children were receiving in countries like Romania and China were juxtaposed with media stories about child trafficking and intercountry adoptions gone wrong.³¹⁶ This tension between the increasing demand in the West for babies via intercountry adoption and the many troubling reports about improperly completed intercountry adoptions led to a strong push to clearly identify what rights children should be afforded.

In 1986, the United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children was adopted by the United Nations General Assembly ("UN Child Welfare Declaration"). This declaration emphasized the best interests of the child as the primary consideration in fostering and adoption matters, and stated that children should first be cared for by their own biological parents and family, and if this is not possible, there should be domestic fostering and adoption systems in place. The UN Child Welfare Declaration asserted that intercountry adoption should only be considered if there are no domestic remedies available.³¹⁷

In 1989, the United Nations Convention on the Rights of the Child ("UNCRC") was drafted and added to the international dialogue regarding intercountry adoption.³¹⁸ The UNCRC outlines

³¹⁵ *Ibid* at 918.

³¹⁶ *Ibid* at 930-33.

³¹⁷ UN General Assembly, *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally*, Session 41, Res 85, 3 December 1986.

³¹⁸ United Nations General Assembly, *United Nations Convention on the Rights of the Child*, Session 44, Res 25, 20 November 1989. See also Government of Canada, "Rights of Children" *Canadian Heritage* (14 November

basic rights that all children in signatory countries should have, including the right to know and be cared for by your parents,³¹⁹ the right to live with your parents in the same country,³²⁰ the right to be protected from kidnapping,³²¹ and the right to have alternate care and protection via adoption or fostering if living with your birth family is not possible or safe.³²² The UNCRC directly addresses the matter of intercountry adoption in Article 21, which states that intercountry adoption “may be considered as an alternative means of [a] child’s care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child’s country of origin”, that intercountry adoptees must “enjoy safeguards and standards equivalent to those existing in the case of national adoption”, and that international adoption placement “does not result in improper financial gain for those involved in it”.³²³ Canada ratified the United Nations Convention on the Rights of the Child in 1991.

Thus, the UN Child Welfare Declaration and the UNCRC echo the earlier Leysin Principles, insofar as they centre the needs and interests of children before all other considerations, formalize the subsidiarity principle, and suggest a reluctance to endorse intercountry adoption as a practice. Despite these attempts to curb intercountry adoption in favour of domestic placements, the demand for foreign-born children actually grew in Canada and other Western nations during the early 1990s.³²⁴ In light of this, it became apparent that intercountry adoption needed to be regulated in a more specific and direct manner, and in 1993, the Hague Adoption Convention was drafted. The Hague Adoption Convention was drafted with the participation of 66 countries, of which approximately half were traditional sending countries in intercountry adoptions and half were traditional receiving countries. Nearly all countries that were engaging

2017), online: <<https://www.canada.ca/en/canadian-heritage/services/rights-children.html>>, which summarizes Canada’s children’s rights obligations in reference to the various international conventions we are party to.

³¹⁹ *Ibid* at Article 9.

³²⁰ *Ibid* at Article 10.

³²¹ *Ibid* at Article 11.

³²² *Ibid* at Article 21.

³²³ *Ibid*.

³²⁴ Chambers, *supra* note 206 at 141.

in intercountry adoption during this period participated in the process of drafting and approving the Hague Adoption Convention.³²⁵ Canada participated in the drafting process and signed the convention in 1994. The Federal government ratified the convention in 1996, and all of Canada's provincial governments ratified the convention in the following years.³²⁶

Perhaps due to the fact that there was robust participation from countries that were willingly engaging in intercountry adoption, the Hague Adoption Convention functioned as more of an endorsement of the practice than any of the previous international instruments dealing with cross-border adoption.³²⁷ The preamble, while stating that “each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin”, also acknowledges that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin”.³²⁸

Hague Adoption Convention goes on to specify three objectives. The first objective is to establish processes to ensure that intercountry adoptions take place in the best interests of the child and with respect for children's fundamental human rights. The second objective is to establish a system of cooperation among signatory states in order to prevent child trafficking. The third objective is to secure recognition of properly completed intercountry adoptions amongst signatory states, so that adoption orders are recognized and immigration can be facilitated.³²⁹ The Hague Adoption Convention also sets out the responsibilities of sending and receiving countries in intercountry adoptions, and describes what steps need to be taken in order to determine if a child is suitable for adoption and if prospective parents are suitable as well.³³⁰ Like all international instruments, the fact that a country has signed it does not mean that its

³²⁵ Jennifer A Ratcliff, “International Adoption: Improving on the 1993 Hague Convention” (2010) 25:1 Maryland Journal of International Law 336 at 341.

³²⁶ Lovelock, *supra* note 152 at 938.

³²⁷ *Ibid*; Ratcliff, *supra* note 325 at 341-42.

³²⁸ Hague Adoption Convention, *supra* note 1 at Preamble.

³²⁹ *Ibid* at Article 1.

³³⁰ Lovelock, *supra* note 152 at 939.

provisions become legally binding—all signatory states must ratify the Hague Adoption Convention and implement its requirements locally via domestic law and policy in order for them to have effect.

2 The Hague Adoption Convention Requirements

The following are the primary responsibilities that the Hague Adoption Convention allocates to sending countries in intercountry adoptions:

- Ensuring that the child is suitable and available for adoption;³³¹
- Ensuring that there are no domestic placement options available, and that intercountry adoption would be in the child’s best interests;³³²
- Ensuring that anyone whose consent is necessary for the adoption has been adequately counselled about the legal effects of the adoption;³³³
- Ensuring that the biological parents’ consent to the adoption is given after the child’s birth, and is given freely and without inducement via payment or other compensation;³³⁴ and
- Ensuring that the child is given an opportunity to provide their opinion, wishes, and consent, if their age and level of maturity warrant their participation.³³⁵

With respect to receiving countries, the primary responsibilities listed in the Hague Adoption Convention are as follows:

- Ensuring that the prospective adoptive parents are eligible and appropriate;³³⁶
- Ensuring that the prospective adoptive parents have received any counselling that may be

³³¹ Hague Adoption Convention, *supra* note 1 at Article 4(a).

³³² *Ibid* at Article 4(b).

³³³ *Ibid* at Article 4(c)(1).

³³⁴ *Ibid* at Article 4(c)(2)-(4).

³³⁵ *Ibid* at Article 4(d).

³³⁶ *Ibid* at Article 5(a).

necessary;³³⁷ and

- Ensuring that the adopted child will be able to enter and live in the receiving country once the adoption and immigration processes are completed.³³⁸

There are also general requirements that apply to both sending and receiving states. These include the following:

- Participating countries must designate central authorities to deal with intercountry adoption matters;³³⁹
- Central authorities must cooperate and share information with each other in order avoid obstacles whenever possible and meet the objectives of the convention;³⁴⁰
- Central authorities must take measures to prevent improper financial or other gain related to intercountry adoption;³⁴¹
- Central authorities must actively take steps to collect, preserve, and exchange information about children and prospective adoptive parents, with a view to facilitating and expediting adoptions;³⁴² and
- If a central authority wishes to delegate any intercountry adoption duties to an agency, the agency must pursue non-profit objectives (meaning only “reasonable” professional fees may be collected), be directed and staffed by qualified people, and be supervised by the central authority.³⁴³

The Hague Adoption Convention goes on to describe what steps central authorities in sending

³³⁷ *Ibid* at Article 5(b).

³³⁸ *Ibid* at Article 5(c).

³³⁹ *Ibid* at Article 6.

³⁴⁰ *Ibid* at Article 7.

³⁴¹ *Ibid* at Article 8.

³⁴² *Ibid* at Article 9.

³⁴³ *Ibid* at Articles 10-11, 32.

and receiving states have to take to meet the requirements above, including what kinds of documents, reports, and approvals need to be exchanged by all participating parties. There are also provisions that address what central authorities should do when all of the requirements are not met in an intercountry adoption, including withdrawing children from pending adoptions, arranging alternate placements for children, and arranging for the return of children who have been improperly removed from their birth countries.³⁴⁴

On its face, the Hague Adoption Convention represents a step forward towards global recognition of children's rights. The measures it requires sending and receiving countries to take help to ensure that adoptions are completed with a child-first perspective, while still being attentive to the rights of birth families. Nevertheless, the Hague Adoption Convention has been criticized by those who believe it does not do enough to meet children's needs and prevent improper adoptions, as well as those who believe it unnecessarily complicates cross-border adoption to the detriment of children in need of families.

For instance, some have criticized the Hague Adoption Convention for failing to address some of the concerns about intercountry adoption that have been voiced by scholars and activists. Social worker and academic Leslie Doty Hollingsworth has pointed out that the Hague Adoption Convention does not directly address the matter of preserving intercountry adoptees' cultural identities, and suggests that this gap may mean that questions of parental cultural competency in cases of transracial and transcultural adoption go unanswered within the present framework.³⁴⁵ Seonaid Abernethy, a New Zealand-based academic, has also explored the complex matters of culture and identity in the context of intercountry adoption. She has argued that the Hague Adoption Convention framework is ill-suited to capturing the nuances of how many cultures, including indigenous cultures, approach questions of kinship, identity, and child-rearing by forcing a Western and legalistic model onto communities that may not share those

³⁴⁴ *Ibid* at Article 21.

³⁴⁵ Leslie Doty Hollingsworth, "Does the Hague Convention on Intercountry Adoption Address the Protection of Adoptees Cultural identity? And Should It?" (2008) 53:4 Social Work 377.

understandings of what a legitimate familial relationship is.³⁴⁶ Meanwhile, Lisa Hillis has argued that the Hague Adoption Convention does not do enough to preserve the rights of homosexuals to adopt children internationally, as it permits contracting states to discriminate against same-sex couples and queer people who could be loving and capable adoptive parents.³⁴⁷ The Hague Adoption Convention has also been criticized for not doing enough to directly address the issue of child trafficking. Though it does say that adoptions should not be motivated by financial gain, it does not outright ban the exchange of money for children (it simply says agencies must pursue non-profit objectives), it does not require signatories to investigate or punish child traffickers, and it does not expressly prohibit private adoption (where trafficking is more likely to take place as there is less direct government oversight).³⁴⁸

On the other side, the Hague Adoption Convention has been criticized for unnecessarily restricting, delaying, and complicating intercountry adoption, to the detriment of children waiting for permanent families. One of the most vocal critics of the Hague Adoption Convention is Harvard Law professor Elizabeth Bartholet, herself an international adoptive parent to two children from Peru. Bartholet has argued that the message underpinning the Hague Adoption Convention is that children should not live in institutions or temporary foster care placements, but rather should live with permanent families, be they local or foreign, as early as possible.³⁴⁹ For Bartholet, the benefits of intercountry adoption far outweigh the risks, and intercountry adoption is a key way to realize children's fundamental human right to live with a permanent family.³⁵⁰ She has argued that the Hague Adoption Convention does not do enough to promote

³⁴⁶ Seonaid Abernethy, "Intercountry Kinship Adoptions: Limits to The Hague Convention on the Protection of Children and Intercountry Adoption" (2010) 5:1 *Kōtuitui: New Zealand Journal of Social Sciences* 26.

³⁴⁷ Lisa Hillis, "Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?" (1998) 6:1 *Indiana Journal of Global Legal Studies* 237.

³⁴⁸ Gina M Croft, "The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2005) 33:3 *Georgia Journal of International and Comparative Law* 621 at 635. See also Ratcliffe, *supra* note 321 at 348-49.

³⁴⁹ Elizabeth Bartholet, "The Hague Convention: Pros, Cons, and Potential" in Robert L Ballard et al, eds, *The Intercountry Adoption Debate: Dialogues Across Disciplines* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2015) 239 at 239-40 ["Pros, Cons, and Potential"].

³⁵⁰ Elizabeth Bartholet, "Advocating for the Child's Human Right to Family" (2017) 109 *Adoption Advocate* 1.

the facilitation of intercountry adoption, has functioned to restrict the practice, and has not been proven to actually provide better protection for children and birth families.³⁵¹ Specifically, she has said that the inclusion of the subsidiarity principle has caused sending countries to hold children in institutions and orphanages indefinitely while authorities explore potential domestic placements, even when there are eager foreign potential adoptive parents waiting.³⁵² She has also argued that the requirement that all contracting countries establish a central authority for adoptions is simply not feasible for many of the impoverished sending countries that would most benefit from participating in intercountry adoption. According to Bartholet, this has resulted in the suspension of many adoption programs that previously processed successful cross-border adoptions.³⁵³

The language of the Hague Adoption Convention has also been criticized for being vague and prone to misinterpretation. Bartholet cites a lack of clarity regarding the role of private adoption agencies under the Hague Adoption Convention framework as one example of this vagueness, as some have argued that compliance with the Hague Adoption Convention means that there is no place for private international adoption, whereas others see the Hague Adoption Convention as permitting private adoptions.³⁵⁴ Bartholet also points to confusion regarding what the subsidiarity principle means in the Hague Adoption Convention, as some have understood it to mean that any domestic placement (whether permanent adoption or temporary fostering) is preferable to an intercountry adoption, whereas others believe that intercountry adoption should be preferable to any domestic placement except for a permanent domestic adoption.³⁵⁵ The Hague Adoption Convention is also silent on the question of how to deal with countries who are not able to implement its requirements. This absence of direction means that receiving countries tend to simply stop processing adoptions from non-compliant countries, and there is limited

³⁵¹ Bartholet, “Pros, Cons, and Potential”, *supra* note 349 at 241.

³⁵² *Ibid* at 242.

³⁵³ *Ibid* at 243.

³⁵⁴ *Ibid* at 242. See also Peter Hayes, “The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention” (2011) 25:3 International Journal of Law, Policy and the Family 288.

³⁵⁵ Bartholet, “Pros, Cons, and Potential”, *supra* note 349 at 243.

guidance on how the international community can help non-compliant countries become compliant.³⁵⁶ Finally, many of the key terms in the Hague Adoption Convention are not defined, which has led to confusion and differing interpretations. For example, there is no explanation of what “reasonable compensation” would be for adoption facilitators, nor is there an explanation regarding what exactly “non-profit objectives” are.³⁵⁷ The Hague Adoption Convention also does not explain what criteria should be in place when determining the adoptability of children, which has led to different standards in different jurisdictions.³⁵⁸

Overall, while the Hague Adoption Convention provides a promising foundation for ethical cross-border adoption, it is an imperfect convention. Ultimately, the responsibility falls on individual states to implement laws and policies that comply with the spirit of the Hague Adoption Convention by ensuring children can access stable and loving families in other countries, while preventing child trafficking and the mistreatment of birth families.

³⁵⁶ *Ibid* at 244.

³⁵⁷ Lovelock, *supra* note 152 at 940-41.

³⁵⁸ *Ibid* at 941.

Chapter 5

The Law and Policy Framework for Intercountry Adoption in Canada

In light of the template provided by the Hague Adoption Convention, many countries spent years drafting and redrafting domestic legislation and policy to address intercountry adoption processes. In federal countries like the United States and Canada, where different levels of government have jurisdiction over different parts of the intercountry adoption process, it has been particularly challenging to implement consistent processes that comply with the Hague Adoption Convention. In Canada specifically, provincial and federal governments are implicated in intercountry adoption, as provinces have authority over family law matters, including adoption, while the federal government has authority over immigration, which is the final step in the process to bring a child home.

For Canadian families, intercountry adoptions require coordination between their province's adoption laws and policies, federal immigration laws and policies, and the laws and policies that govern cross-border adoption in the foreign countries in which these children are born, as adoptions must be vetted by all three authorities. Provincial and federal governments must ensure their decisions are consistent with the objectives of the Hague Adoption Convention, to which Canada is a party. Foreign governments must also ensure their decisions are consistent with the objectives of the Hague Adoption Convention if they are signatories. Importantly, in Canada, prospective adoptive parents are not limited to adopting children from sending countries that have signed and ratified the Hague Adoption Convention. While there are rules in each province that dictate what kinds of intercountry adoptions the province will accept for processing, Canadians can adopt children from countries that have not signed and ratified the Hague Adoption Convention. The following subsections will review the responsibilities that provincial governments, the federal government, and foreign governments have in processing intercountry adoption cases.

1 Provincial Responsibilities in Intercountry Adoptions

Provincially, the intercountry adoption legislation is substantively very similar across jurisdictions in Canada, as each province has ratified the Hague Adoption Convention and

implemented its requirements via provincial legislation and regulation.³⁵⁹ Provincial intercountry adoption legislation requires that a number of steps be taken by provincial authorities to ensure that prospective adoptive parents are capable of parenting the children they hope to adopt.

Generally, the first step in an intercountry adoption is for prospective adoptive parents to work with a provincially licensed adoption agency to complete the background check, home study, and adoptive parent training and education processes. The adoption agencies that facilitate intercountry adoptions in Canada are all privately operated and facilitate adoptions for children who are not in the government child welfare system. These adoption agencies typically process the following types of intercountry adoptions:

- Adoptions from countries that are members of the Hague Adoption Convention;³⁶⁰
- Adoptions from countries that are not members of the Hague Adoption Convention but nevertheless have established set procedures for adoptions that the province deems to be compliant with the Hague Adoption Convention;³⁶¹
- Adoptions from countries that are not members of the Hague Adoption Convention and that the province cannot guarantee are compliant with the Hague Adoption Convention;

³⁵⁹ The provincial legislation dealing with intercountry adoption consists of the following Acts and Regulations in each province and territory: *Intercountry Adoption Act*, 1998, SO 1998, c 29; *Adoption Act*, 2013, SNL 2013, c A-3.1, ss 42–49; *Adoption Act*, RSBC 1996, c 5, ss 48–57; *Adoption Regulation*, Alta Reg 187/2004, ss 26–32; *Adoption Regulation*, BC Reg 291/96, ss 31–33 [BC Adoption Regulation]; *Child and Family Services Act*, SY 2008, c 1, ss 135–136; *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, ss 92–105; *Intercountry Adoption (Hague Convention) Act*, RSPEI 1998, c I-4.1; *Intercountry Adoption (Hague Convention) Act*, RSY 2002, c 121; *Intercountry Adoption (Hague Convention) Act*, SNWT 1998, c 19, as duplicated for Nunavut by s 29 of the Nunavut Act, SC 1993, c 28; *Intercountry Adoption (Hague Convention) Act*, SNWT 1998, c 19; *Intercountry Adoption Act Regulations*, 1998, O Reg 200/99; *Intercountry Adoption Act*, SNS 1998, c 15; *The Adoption Act*, SM 1997, c 47, CCSM c A2, ss 69–72(2); *The Intercountry Adoption (Hague Convention) Act*, SM 1997, c 52, CCSM c A3; *The Intercountry Adoption (Hague Convention) Implementation Act*, SS 1995, c I-10.01.

³⁶⁰ See e.g., Government of British Columbia, “Intercountry Adoption Fact Sheet 5” *Ministry of Children and Family Development* (June 2013), online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/births-and-adoptions/adoption/intercountry-adoption/fact_sheet_5.pdf>. See also Government of Alberta, “International Adoption” *Alberta Adoption Services* (2019), online: <<https://www.alberta.ca/international-adoption.aspx#toc-1>>.

³⁶¹ *Ibid.*

and³⁶²

- Intercountry intrafamily adoptions involving stepparents and other relatives.³⁶³

There are generally provincially issued practice standards available to serve as a guideline on how social workers should work with and advise prospective international adoptive parents, and adoption agencies must provide their services in a manner that is consistent with provincial legislation and regulations, which generally set out requirements for what home studies must address. In North America, many adoption agencies use a home study format called the Structured Analysis Family Evaluation, or SAFE family assessment, which is a standardized evaluation model that relies on questionnaires, home inspections, reference letters, and interviews to assess parenting ability.³⁶⁴ To understand what typically goes into a home study, in British Columbia, subsection 3(1) of the *Adoption Regulation* mandates that the following questions must be asked by a social worker in a home study report:

- (a) how the prospective adoptive parents' reasons for adopting a child might affect their ability to meet the needs of the child;
- (b) whether there is or was drug or alcohol use on the part of the prospective adoptive parents, or any member of the household of the prospective adoptive parents, that might limit their ability to protect, nurture and care for the child;
- (c) whether the prospective adoptive parents, or any member of the household of the prospective adoptive parents, have had a child in their care that was found to be in need of protection;
- (d) how the physical and mental health of the prospective adoptive parents impacts on their ability to meet the needs of the child;

³⁶² *Ibid.* These adoptions are sometimes referred to as “private intercountry adoptions” (despite that all intercountry adoption in Canada is private), because they are facilitated privately in the sending country as well, as the adoptees are not in government care.

³⁶³ *Ibid.*

³⁶⁴ SAFE Home Study, “Structured Analysis Family Evaluation (SAFE)”, online: <<http://www.safehomestudy.org/SAFE/SAFE-Overview.aspx>>.

- (e) whether the prospective adoptive parents' life experiences might limit or strengthen their ability to parent a child who is added to the family through adoption;
- (f) the developmental, social and behavioral progress of any other child or children of the prospective adoptive parents that relates to the prospective adoptive parents' ability to understand, accept and meet the needs of a child and the compatibility between the child or children in the home and the child to be adopted;
- (g) the prospective adoptive parents' understanding of the child's cultural, racial, linguistic and religious heritage and their willingness to help the child appreciate and integrate that heritage;
- (h) the prospective adoptive parents' attitude about facilitating communication or maintaining relationships with the child's pre-adoption family or with any other person who has established a relationship with the child;
- (i) the prospective adoptive parents' ability to provide stable and continuous care of the child;
- (j) a description of the prospective adoptive parents' personalities, interests and values in order to identify the personal factors that may be helpful or limiting in meeting the needs of the child to be adopted;
- (k) the results of a criminal record check that are relevant to the ability of the prospective adoptive parents to protect, nurture and care for the child;
- (l) the results of a prior contact check that are relevant to the ability of the prospective adoptive parents to protect, nurture and care for the child;
- (m) the results of a medical report from a health care provider attesting to

the prospective adoptive parents' mental and physical health;

(n) any other factors that are relevant to the best interests of the child;

(o) a recommendation as to the prospective adoptive parents' ability to parent a child by adoption.³⁶⁵

The background check and home study processes typically involve multiple meetings between the prospective adoptive parents and a social worker at the adoption agency. In addition to asking the kinds of questions listed above, reference letters, financial documents, and police clearances are required, as is a medical exam. If there are indications of health complications, reports from specialists like psychiatrists may also be requested. Identity and vital statistics documents are inspected, including birth certificates, marriage certificates, divorce certificates, and guardianship orders. The social worker may interview other children and relatives who are already a part of the family, and there will be at least one inspection of the home where the prospective parents plan to live with the adoptee. Families generally need to be able to demonstrate that they have a safe, clean, and sufficiently spacious home for the child to live in, and should be able to demonstrate they have adequate financial resources available to them to care for the child.³⁶⁶ Home studies in intercountry adoptions are generally valid for a one year period,³⁶⁷ and since intercountry adoptions can take several years to process, it is not unusual for prospective adoptive parents to have to provide updates to keep the social worker apprised of their circumstances.

Prospective adoptive parents generally also have to undergo workshops and classes on issues like child development, differences between adoptive and biological parenting, and transracial and transcultural adoption in order to meet the provincial adoption requirements. For instance, in British Columbia, subsections 3(2) and 3(3) of the *Adoption Regulation* require the following:

³⁶⁵ BC Adoption Regulation, *supra* note 359, s 3(1).

³⁶⁶ For a list of steps that must be taken in Ontario's adoption home study and background check process, see Adoption Council of Ontario, "Adoption Homestudy" *Adoption* (2019), online: <<https://www.adoption.on.ca/adoption-homestudy>>.

³⁶⁷ See e.g., BC Adoption Regulation, *supra* note 359, s 3(5).

3(2) In addition to the requirements of subsection (1), a home study of the prospective adoptive parents must include an educational component that prepares the prospective adoptive parents for all of the following:

- (a) separation and loss issues respecting the pre-adoption parents, the prospective adoptive parents and the child to be adopted;
- (b) the difference between adoptive and non-adoptive parenting;
- (c) adoption as a life-long process and how it affects child and adult development;
- (d) the impact of the child's life experiences;
- (e) if applicable, inter-racial and cross-cultural adoption.

3(3) If the prospective adoptive parents have applied to adopt a child with special needs, the educational component under subsection (2) must address the specific issues related to the special needs of the child.³⁶⁸

In practice, prospective adoptive parents in British Columbia are required to take a 12-part Adoption Education Program, which addresses the requirements listed in the regulations, and which is available to take online or in person.³⁶⁹

Once the background check, home study, and educational components are complete, the adoption agency will submit the prospective adoptive parents' dossier to the provincial Director of Adoption, whose office will constitute the central authority in that province per the Hague Adoption Convention requirements, and who will work for the provincial government's family and child welfare ministry. The Director of Adoption will review the dossier to ensure that the

³⁶⁸ *Ibid* at 3(2), 3(3).

³⁶⁹ BC Representative for Children and Youth, "Finding Forever Families: A Review of the Provincial Adoption System" (June 2014), online: <https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/rcy_adoptionsreport2014_final.pdf> at 12.

legislative requirements are met and that the prospective adoptive parents are suitable to receive a child. Once the Director of Adoption approves the prospective adoptive parents, their office will forward the adoption file to the central authority in the sending country. The Director of Adoption, provincial adoption agency, and central authority in the child's country of origin will then communicate back and forth to ensure that all required checks and consents have taken place. Once all parties have agreed to the adoption, the provincial Director of Adoption will issue a document called a "Hague Adoption Convention Letter of Approval", or a "Letter of No Objection", which will be sent to the central authority in the child's country of origin, as well as to the federal government's immigration department, IRCC. In some cases, final adoption orders will be issued by the child's country of origin, and in other cases, final adoption orders will be issued by the court in the Canadian province where the child is destined.

Thus, we can see how the province acts as the first line of inspection and enforcement for Canadians hoping to build their families via intercountry adoption. Indeed, the provincial evaluation processes used to ascertain suitability function similarly to the family-based immigration restrictions discussed earlier in Chapter 2, Part 3. By scrutinizing prospective adoptive parents, the province is able to control who can build their family via adoption and what adoptive families should look like.

Presumably, impoverished applicants, homeless applicants, applicants with serious physical and mental health issues, and applicants with criminal histories will struggle to pass the assessment process. Few would disagree that someone who would be unable to provide basic necessities like shelter, food, and emotional support to a child should be prevented from adopting. However, the fact that social workers can also inquire broadly about the lifestyles of prospective adoptive parents is noteworthy, as it brings up the question of what kinds of lifestyles may be seen as inappropriate in the adoption context. Would a couple who believes in corporal punishment have an acceptable lifestyle? Would a polyamorous couple have an acceptable lifestyle? Would a sex worker have an acceptable lifestyle? Would a casual drug user have an acceptable lifestyle? The broad investigative abilities of provincial adoption facilitators also highlights the difference between how biological families and adoptive families are scrutinized by the state. While biological families are also subject to child welfare and child apprehension laws, social workers do not conduct home studies and interviews with pregnant couples to recommend their parental suitability prior to giving birth.

Undeniably, the suitability criteria used by adoption professionals in Canadian provinces have changed over time to keep step with changing cultural attitudes. For instance, whereas same-sex couples were once thought to be inappropriate adoptive parents, they are now eligible to apply, and whereas transracial and transcultural adoption was once discouraged, it is now permitted when adoptive parents can demonstrate they will take steps to maintain the adoptee's connection to their birth culture. What has not changed, however, is the fact that provinces participate in the nation building project by controlling who qualifies to adopt internationally. By studying how the provinces conduct their suitability assessments, we can see how it functions as a point of access for the state to control the formation of "outside families".

2 Foreign Government Responsibilities in Intercountry Adoption

The responsibilities of foreign governments sending children abroad via intercountry adoption will depend on whether the country is a member of the Hague Adoption Convention. If the sending country has ratified the Hague Adoption Convention, the central authority will be responsible for determining which children are available to be adopted by foreigners after confirming no domestic adoption placements are available, and for collecting information about the child's background, if available. If a potential adoptee's biological parents or other guardians are alive, the central authority will also be responsible for ensuring their consent to the adoption is properly received and recorded. Once the central authority in the adoptee's country of origin has confirmed the child in question is properly available for adoption, it will issue a "Certificate of Conformity" to the central authority in the receiving country to confirm that the Hague Adoption Convention requirements have been met.

For sending countries that are not members of the Hague Adoption Convention, government processes and responsibilities vary dramatically. Some countries that are not formal signatories to the Hague Adoption Convention follow similar processes and have similar requirements for intercountry adoption, while others do not. In any case, if a Canadian family is seeking to adopt a child from a non-Hague Adoption Convention country, the central authority in the Canadian province will nevertheless seek to ensure that the adoption does not violate the Hague Adoption Convention. The Canadian provincial central authority will do this by requesting information and assurances from the sending country. In response, the sending country's government will

communicate which steps, if any, have been taken to vet the adoption, and the receiving country's provincial authority will then decide whether to approve the adoption.

As stated above, the final adoption order will sometimes be issued in the child's country of origin, and sometimes issued in the Canadian province where the child is destined. In cases where the legislation in the child's country of origin permits guardianship orders prior to an official adoption order, the prospective adoptive parents can apply to bring the child to Canada under a temporary visa and apply to their province's court for an adoption order. Typically, however, the adoption order will be issued by the government in the child's country of origin prior to the child being permitted by IRCC to come to Canada.

Some countries that send children abroad via intercountry adoption try to control who ends up as an adoptive parent, as the Hague Adoption Convention permits sending countries to implement restrictions on prospective adoptive parents as well, including age restrictions, prohibitions on same-sex couples or disabled individuals adopting, and income requirements.³⁷⁰ Some adoption programs have also implemented requirements that adoptive parents demonstrate an ethnic or ancestral connection to the child's birth country. For instance, Romania, which is a Hague Adoption Convention signatory, will only permit intercountry adoption by adoptive parents who are Romanian citizens or by adoptive parents who are within the fourth degree of kinship to the adoptee.³⁷¹ Nigeria, which is not party to the Hague Adoption Convention, only permits adoptions by Nigerian citizens, meaning intercountry adoption would only be feasible for non-resident Nigerians living abroad.³⁷² While financial, medical, and age requirements for adoptive families seem to be an attempt to ensure children will be effectively cared for, requirements that adoptive families meet a certain ethnic profile are implemented for more complex reasons. Being removed from your country and culture of birth is a necessary part of cross-border adoption, and

³⁷⁰ See e.g., *supra* note 263.

³⁷¹ Government of the United States of America, "Romania Intercountry Adoption Information" *US Department of State* (2019), online: <<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Romania.html>>.

³⁷² Government of the United States of America, "Adoption in Nigeria" *US Department of State* (2019), online: <<https://ng.usembassy.gov/u-s-citizen-services/adoption/adoption-in-nigeria>>.

ethnic requirements for adoptive families can be viewed as a response to this reality. It may be that sending countries believe it would better protect a child's best interests to maintain a connection to their birth culture, but it may also be that sending countries simply wish to exercise control over the future identities of adoptees. While it may not be possible to keep adoptees within the physical borders of their birth nation, it is possible to ensure that adoptees end up within the broader diasporic national community of their birth nation.

It is often stated that adoptions from non-Hague Adoption Convention countries do not have the same level of procedural safeguards in place, because receiving countries will not know exactly what steps have taken place prior to the sending country stating that the child is adoptable. While it may be true that signing the Hague Adoption Convention demonstrates a country's awareness of and intention to comply with international requirements, it does not mean that adoptions from signatory countries are categorically more reliable. Provincial authorities can refuse to acknowledge adoptions when they have reason to believe the Hague Adoption Convention has been contravened, and in practice, provincial authorities suspend adoptions regularly from countries that both are and are not signatories to the Hague Adoption Convention. At the time of writing, there are five countries that Canadian provinces and territories have suspended adoptions from, and of these five countries, three are party to the Hague Adoption Convention and two are not.³⁷³

With respect to countries that have signed and ratified the Hague Adoption Convention, all Canadian provinces and territories have suspended adoptions from Guatemala and Georgia because it has been determined that their intercountry adoption systems are not yet fully compliant with international requirements, and there are resulting concerns about potential child trafficking.³⁷⁴ Cambodia is banned as a source country in all provinces apart from Quebec for

³⁷³ IRCC Intercountry Adoption Suspensions, *supra* note 299.

³⁷⁴ *Ibid.* See also Government of British Columbia, "Intercountry Adoption Alerts: DRC, Russia, Pakistan, Nepal, Liberia" *Ministry of Children and Family Development* (May 2019), online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/births-and-adoptions/adoption/intercountry-adoption/ica_alerts_non-hague_countries.pdf> [BC Intercountry Adoption Alerts].

the same reason.³⁷⁵ It is also worth noting that since 2006, British Columbia has refused to process some adoptions from China, which is a Hague Adoption Convention signatory. Because Chinese law does not permit Chinese citizens who are also Canadian permanent residents to access China's intercountry adoption process, some Chinese-Canadians end up conducting domestic Chinese adoptions. The steps taken in domestic Chinese adoptions are different from what the Hague Adoption Convention requires, and thus the British Columbia government refuses to recognize them as legitimate intercountry adoptions.³⁷⁶

With respect to countries that have not signed and ratified the Hague Adoption Convention, all provinces and territories have suspended adoptions from Nepal and Liberia, due to concerns about falsified documentation, lack of financial accountability, and the uninformed consent of birth families.³⁷⁷

These examples suggest that whether a country has signed and ratified the Hague Adoption Convention is not a reliable indicator of whether the country is actually following Hague Adoption Convention requirements. In addition to the five countries facing provincial and territorial adoption suspensions, there are presently 25 additional countries where Canadians cannot adopt children.³⁷⁸ Of these 25, seven are contracting parties to the Hague Adoption Convention: Benin, Cabo Verde, Kenya, Paraguay, Russia, Senegal, and Swaziland. Some of these countries have prohibited intercountry adoption because they have not yet been able to implement all of the Hague Adoption Convention requirements for adoption, and others have prohibited intercountry adoption for diplomatic and political reasons.

One country that is on the Canadian government's list of countries that restrict adoptions by

³⁷⁵ *Ibid*; IRCC Intercountry Adoption Suspensions, *supra* note 299.

³⁷⁶ Government of British Columbia, "Intercountry Adoption Alerts: China, Cambodia, Guatemala" *Ministry of Children and Family Development* (September 2013), online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/births-and-adoptions/adoption/intercountry-adoption/china_cambodia_guatemala.pdf>.

³⁷⁷ *Ibid*; BC Intercountry Adoption Alerts, *supra* note 374.

³⁷⁸ IRCC Intercountry Adoption Suspensions, *supra* note 299.

Canadians is Pakistan, which is not a party to the Hague Adoption Convention.³⁷⁹ Despite the fact that the Canadian government website frames this as a prohibition by Pakistan, reports have suggested that the circumstances leading to the prohibition originated in Canada. The Canadian government stated in 2013 that “Pakistani law allows for guardianship of children, but does not recognize our concept of adoption.”³⁸⁰ Concerns about Pakistan’s definition of adoption are rooted in the country’s Shariah law-based legislation, and the fact that in Pakistan, one form of child placement that is practiced is kafala, which is similar to guardianship in the Western world. Kafala allows a child to be placed with another family, and gives the new family guardianship rights and responsibilities over the child. Kafala does not, however, completely sever all legal ties between a child and his or her biological family. Because of this, many have said that kafala is not equivalent to the Western notion of adoption and is more akin to a temporary fostering arrangement.³⁸¹ Others have argued that this is a misinterpretation of the legal effect of kafala, and that kafala can in fact result in permanent child placements.³⁸² For instance, a spokesperson for Pakistan’s High Commission in Ottawa has stated that the Western form of adoption is in fact possible in Pakistan and that “[t]he concept of ‘adoption’ as legally understood in Canada is covered by the ‘Guardians and Wards Act 1890’”.³⁸³ Ultimately, there is no consensus about whether Pakistan’s approach to child placement is in line with Canada’s definition of adoption, and it appears that Canada has not accepted Pakistan’s explanation, as adoptions from Pakistan and many other Islamic countries that permit kafala are still not possible.

The above examples highlight how the feasibility of completing an adoption in a country cannot be neatly mapped on to whether the country is or is not a party to the Hague Adoption

³⁷⁹ *Ibid.*

³⁸⁰ Government of Canada, “Archived—Notice—Adoptions from Pakistan” *Immigration, Refugees and Citizenship Canada* (01 July 2013), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/adoptions-pakistan.html>>.

³⁸¹ Brian Hill & Megan Robinson, “Canada’s ban on adoptions unjustified, Pakistan says; leaves family desperate for change” *Global News* (09 August 2019), online: <<https://globalnews.ca/news/5731362/canadas-ban-adoptions-pakistan-family/>>.

³⁸² *Ibid.*

³⁸³ Nasser, *supra* note 32.

Convention. Countries have complex motivations for allowing or disallowing their children to be sent abroad, different reasons for signing or not signing the Hague Adoption Convention, and different interpretations of the legal effects of adoption. International law can be helpful insofar as it can provide a “best practices” guide to ethical intercountry adoption, but ultimately, as with all international law, there are problems with enforcing compliance and with ensuring all parties share a common understanding of the issues at play.

3 Federal Government Responsibilities in Intercountry Adoption

After the child’s country of origin and province of destination have signed off, the last step in an intercountry adoption is to finalize the child’s immigration status in Canada. This is done by applying to IRCC for either permanent resident status or citizenship status for the child. An IRCC officer will apply tests set out in the federal immigration legislation, with guidance from internal manuals and policy statements, in order to determine whether the child should be permitted to live permanently in Canada. Federally, the legislation currently provides two pathways for adoptive parents: the citizenship route and the sponsorship route.³⁸⁴ When one or both adoptive parents are Canadian citizens at the time the child is adopted, they will usually be able to choose whether to use the citizenship or the sponsorship route. If both parents are permanent residents, or if one parent is a permanent resident and one parent is a foreign national at the time the child was adopted, then the sponsorship route must be used. Parents must also go through the sponsorship route if they are subject to the first generation limit to citizenship by descent (i.e., if they are Canadian citizens by descent who were themselves born outside of Canada).³⁸⁵

³⁸⁴ The federal legislation dealing with the immigration stage of intercountry adoptions consists of the following Acts and Regulations: *IRPA*, *supra* note 38; *IRPR*, *supra* note 39; *Citizenship Act*, *supra* note 40; *Citizenship Regulations*, *supra* note 411.

³⁸⁵ See Government of Canada, “Changes to citizenship rules 2009 to 2015” *Immigration, Refugees and Citizenship Canada*, online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-citizenship/act-changes/rules-2009-2015.html>>. In 2009, Canadian citizenship legislation was amended such that citizenship can only be passed down to the first generation born outside of Canada to Canadian citizen parents. Subsequent generations born outside Canada can no longer obtain citizenship by descent.

3.1 Citizenship

The citizenship route grants Canadian citizenship directly to the adopted child after completing a two-step process, wherein first the adoptive parents' Canadian citizenship and ability to pass it on is confirmed, and then the adoption is assessed to determine if it is valid for the purposes of receiving citizenship by descent. Subsection 5.1(4) of the *Citizenship Act* sets out the requirements for Canadian citizens who wish to pass their citizenship status on to their adopted children. Essentially, this subsection requires that in most cases, at least one of the adoptive parents must be a Canadian citizen who was either born in Canada or obtained citizenship by naturalization. In other words, the provision that restricts access to citizenship by descent to the first generation born outside of Canada applies to adopted children as well.³⁸⁶ Because intercountry adoptees are always born outside of Canada, this restriction is particularly salient to their circumstances. If an intercountry adoptee's adoptive parents are citizens by descent who were born outside of Canada, the adoptee will not be able to apply for a direct provision of citizenship under this section. Furthermore, if an intercountry adoptee does obtain citizenship by descent, he or she will not be able to pass Canadian citizenship on to any of his or her children who are born outside of Canada, as these children will constitute the second generation born abroad. Importantly, the citizenship by descent restrictions do not apply to naturalized Canadian citizens whose children are born outside of Canada. If a naturalized Canadian citizen gives birth to or adopts a child outside of Canada, he or she will be able to pass their citizenship directly on to the child. There are also exemptions to the first generation limit for some applicants whose parents or grandparents were Canadian citizens employed outside of Canada by the Canadian Armed Forces, the federal public administration, or the public service of a province or territory at the time the applicant was born.³⁸⁷

Subsection 5.1(1) of the *Citizenship Act* sets the following requirements for the second part of the citizenship application process for intercountry adoptees:

³⁸⁶ *Citizenship Act*, *supra* note 40, s 5.1(4).

³⁸⁷ Government of Canada, "Citizenship process—Intercountry adoption: Why can apply" *Immigration, Refugees and Citizenship Canada* (19 February 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadians/adopt-child-abroad/processes/choose-process/citizenship/eligibility.html>>.

- (a) The adoption must be in the best interests of the child;
- (b) The adoption must create a genuine relationship of parent and child;
- (c) The adoption must comply with the laws where the adoption took place and the laws in the country where the adoptive parents reside;
- (d) The adoption cannot occur in a manner that circumvents the legal requirements for international adoption; and
- (e) The adoption cannot be entered into primarily for the purpose of acquiring an immigration or citizenship benefit.³⁸⁸

To determine whether these requirements are met, citizenship officers are directed by the policy guidelines to section 5.1 of the *Citizenship Regulations*,³⁸⁹ which sets out the following additional factors to consider:

- (a) For adoptions that are finalized in Canada for children who were previously residents of countries that are party to the Hague Adoption Convention:
 - Did the adoptive parents' provincial authority provide approval of the adoption in writing?
 - Did the adoption permanently sever the pre-existing legal parent–child relationship between the adoptee and his or her biological parents?
- (b) For adoptions that are finalized in Canada for children who were previously residents of countries that are not party to the Hague Adoption Convention:
 - Did the adoptive parents' provincial authority provide approval of the

³⁸⁸ *Citizenship Act*, *supra* note 40, s 5.1(1).

³⁸⁹ Government of Canada, “CP 14: Grant of Canadian Citizenship for Persons Adopted by Canadian Citizens” *Immigration, Refugees and Citizenship Canada* (11 June 2015), online: <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/cp/cp14-eng.pdf>> at 18-20 [CP 14].

adoption in writing?

- Did the adoptee's biological parents provide their free and informed written consent to the adoption?
- Did the adoption permanently sever the pre-existing legal parent–child relationship between the adoptee and his or her biological parents?
- Is there evidence that the adoption was completed for the purpose of child trafficking or undue gain?
- Was the child eligible for adoption in accordance with the laws where the child was previously living?

(c) For adoptions that are finalized outside of Canada for children who were previously residents of countries that are party to the Hague Adoption Convention:

- Did the central authority in the child's birth country and the adoptive parents' provincial authority both provide their approval of the adoption in writing?
- Did the adoption permanently sever the pre-existing legal parent–child relationship between the adoptee and his or her biological parents?

(d) For all other adoptions, i.e., adoptions that are finalized outside of Canada for children who were previously residents of countries that are not party to the Hague Adoption Convention:

- Did the adoptive parents' provincial authority approve a home study and provide its approval of the adoption in writing?
- Did the adoptee's biological parents provide their free and informed written consent to the adoption?
- Did the adoption permanently sever the pre-existing legal parent–child relationship between the adoptee and his or her biological parents?

- Is there evidence that the adoption was completed for the purpose of child trafficking or undue gain?
- Was the child eligible for adoption in accordance with the laws where the child was previously living?³⁹⁰

These questions are meant to help citizenship officers assess whether adoptions meet the requirements of subsection 5.1(1) of the *Citizenship Act*, and “the presence or absence of any one or more of these factors would not automatically result in the approval or refusal of an application for a grant of Canadian citizenship.”³⁹¹ Overall, officers are encouraged to make a contextual assessment and consider a broad array of factors. That being said, if the questions listed in section 5.1 of the *Citizenship Regulations* are answered negatively, citizenship officers have the discretion to refuse the application, as a negative answer may mean that one of the hard requirements enumerated in subsection 5.1(1) of the *Citizenship Act* is not met. IRCC’s policy guidelines contain detailed information on how to assess these factors, how to record concerns and decisions in IRCC’s internal file management system, and how to correspond with applicants, other federal government departments, provincial governments, and foreign authorities when necessary.³⁹²

As can be seen, the federal government essentially reviews the steps previously taken by the provincial government and the foreign government with the aim of ensuring overall compliance with the Hague Adoption Convention. Adoptions of children from Hague Adoption Convention signatory countries require the least amount of scrutiny by IRCC. This is because the steps taken in the country of origin and province of destination are prescribed by the Hague Adoption Convention, and IRCC will therefore be able to presume compliance. For adoptions from non-Hague Adoption Convention countries, however, more proof has to be provided in order to ensure that the adoption did not contravene international requirements.

³⁹⁰ *Citizenship Regulations*, *supra* note 41.

³⁹¹ CP 14, *supra* note 389 at 21.

³⁹² *Ibid.*

At the time of writing, IRCC states that on average, citizenship applications take 12 months to process.³⁹³ The application processing fee for citizenship applications for minor adoptees is \$100.³⁹⁴ Many adoptive parents prefer this option as it is a more direct way to the end goal of full citizenship status in Canada. Though direct grants of citizenship for minor adoptees can require a lot of supporting documentation, adoptees applying under this stream are exempt from some of the usual immigration requirements. Exemptions include the fact that they do not have to undergo immigration medical examinations (which can be costly and challenging to arrange in some less developed and remote areas), the fact that they are exempt from the usual criminal and security requirements, and the fact that they are not required to take the citizenship oath. Furthermore, adoptive parents who apply directly for citizenship for adoptees are not required to be living in Canada or required to undertake to live in Canada, which provides them with greater flexibility.³⁹⁵

Conversely, there are some reasons why adoptive parents may not wish to apply directly for citizenship for their adopted child. The most significant reason is that adoptees will be subject to the first generation limitation to citizenship by descent.³⁹⁶ Some parents also have concerns about the impact of obtaining Canadian citizenship on any other citizenships the adoptee may hold. While Canada recognizes and permits dual citizenship, many other countries do not, so when some adoptees become Canadian citizens, they must forfeit their birth country citizenship. Accordingly, some adoptive parents wait until their child is old enough to decide for themselves which citizenship they would prefer to hold. There is some risk to doing this, however, as citizenship status protects individuals from deportation. If an intercountry adoptee remains a permanent resident into adulthood and is subsequently criminally convicted, they may face deportation back to their birth country. Finally, another downside is that if a citizenship

³⁹³ Government of Canada, “Check Processing Times” *Immigration, Refugees and Citizenship Canada* (04 December 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/application/check-processing-times.html>> [IRCC Processing Times].

³⁹⁴ Government of Canada, “Fee List” *Immigration, Refugees and Citizenship Canada* (29 November 2019), online: <<https://www.cic.gc.ca/english/information/fees/fees.asp#citizenship>>.

³⁹⁵ Battista & Jordan, *supra* note 155 at 172.

³⁹⁶ *Ibid.*

application for an adopted child is refused, the adoptive parents will not be able to file an appeal.³⁹⁷ The only recourse for a refused citizenship application is a judicial review in Federal Court. Whereas in an appeal, a decision maker can overturn a negative decision and substitute it for a positive one, a successful judicial review can only result in the application being sent back to be redetermined, which means it is possible that the application could be refused again on different grounds. This would lead to a lengthier and more expensive process to correct an unfair or unlawful refusal.

The ability of intercountry adoptees to access citizenship by descent was only made possible relatively recently, when legislative changes to the *Citizenship Act* were implemented in 2007. On 23 December 2007, Bill C-14, *An Act to Amend the Citizenship Act (Adoption)* came into force, which made it possible for some adoptees to obtain citizenship directly without having to obtain permanent resident status first.³⁹⁸ Prior to this, all intercountry adoptees—even those adopted by Canadian citizens—had to apply to immigrate under the Family Class as sponsored relatives. Biological children, meanwhile, have always had access to citizenship by descent if they are born to Canadian citizen parents, subject to the first generation limit, which was implemented in 2009.³⁹⁹

3.2 Sponsorship

The sponsorship route requires that an intercountry adoptee is first sponsored for permanent resident status before he or she is eligible to apply for citizenship. The sponsorship process is also a two-step process. First, the adoptive parents must apply to be sponsors, and if they qualify, the adoption is then assessed to determine whether the adoptee qualifies for permanent residence as a member of the Family Class. If the sponsorship application is approved, once the child becomes a permanent resident, he or she can then immediately apply for citizenship under

³⁹⁷ *Ibid* at 172-73.

³⁹⁸ Government of Canada, “History of citizenship legislation” *Immigration, Refugees and Citizenship Canada* (06 July 2015), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/overview/history-legislation.html>>.

³⁹⁹ *Ibid*.

subsection 5(2) of the *Citizenship Act*, which has different requirements than the citizenship application for adoptees applying under section 5.1 of the *Citizenship Act*. Subsection 5(2) does not implement a residency requirement for applicants, and also does not require the applicant to demonstrate the legitimacy of their adoption again.⁴⁰⁰ Though citizenship can be applied for immediately after an adoptee becomes a permanent resident, some adoptive parents delay applying for citizenship for their adopted children after the sponsorship process. This is because some parents wish to wait until their children are old enough to decide for themselves whether to become full citizens, which may mean forfeiting the citizenship of their birth country.

The requirements for adoptive parent sponsors are listed in sections 130 and 133 of *IRPR* as follows:

- Sponsors must be Canadian citizens or permanent residents;
- Sponsors must be at least 18 years old;
- Sponsors who are permanent residents must reside in Canada throughout the sponsorship process, while sponsors who are Canadian citizens must undertake to reside in Canada upon approval of the application;
- Sponsors must not be subject to removal orders;
- Sponsors must not be in a penitentiary, jail, reformatory, or prison;
- Sponsors must not be convicted of certain violent crimes and crimes against family members;
- Sponsors must not be in default of an undertaking, a support payment, or any other obligation ordered by a court;
- Sponsors must not be in default of an immigration debt referred to in subsection 145(1) of *IRPA*;

⁴⁰⁰ *Citizenship Act*, *supra* note 40 at s 5(2).

- Sponsors must not be undischarged bankrupt; and
- Sponsors must not be in receipt of social assistance for a reason other than disability.⁴⁰¹

If a couple is applying to sponsor an adopted child, they can choose to apply as co-sponsors, in which case they both must meet the sponsorship requirements, or they can choose one person to be the sponsor, in which case only that individual will need to meet the requirements.⁴⁰²

Sponsors do not need to demonstrate that they meet a minimum necessary income in order to sponsor an adopted minor child who has no children of their own, but the sponsorship undertaking does require sponsors to promise that they will support the child from the day the child becomes a permanent resident until either 10 years have elapsed or the child turns 25, whichever is earlier. If sponsors are not able to do this and the child becomes reliant on public assistance, sponsors must pay back whatever funds the child uses before the expiry of the undertaking period.⁴⁰³

If the sponsors intend to complete the adoption of their child in Canada, the following requirements, listed under paragraph 117(1)(g) of *IRPR*, must be met in order for the child to qualify under the Family Class:

- The adoption must not be entered into primarily for the purpose of acquiring any status or privilege under *IRPA*;
- If the child's birth country is a Hague Adoption Convention signatory, the central authority in the child's birth country and the central authority in the province of destination must both approve of the adoption in writing per the Hague Adoption Convention requirements;
- If the child's birth country is not a Hague Adoption Convention signatory, the following

⁴⁰¹ *IRPR*, *supra* note 39 at ss 130, 133.

⁴⁰² *Ibid*, s 132(5).

⁴⁰³ *Ibid*, ss 132(1)(a)(iii), 132(1)(b)(ii).

factors must be demonstrated:

- The child was legally available for adoption in their birth country;
- There is no evidence that the intended adoption was for the purpose of child trafficking or undue gain; and
- The province of destination must approve of the adoption in writing.⁴⁰⁴

The best interests of the child are not specifically listed as a requirement in this provision, which may initially seem like a significant omission, but makes more sense in light of the fact that children coming to Canada under paragraph 117(1)(g) of *IRPA* have not yet been adopted. For prospective adoptees coming to Canada pursuant to this provision, the best interests of the child analysis will take place at several different times. IRCC will only approve applications for prospective adoptees when both the sending country and receiving province have signed off on the arrangement, and in order for both parties to sign off, the best interests of the child must first be considered. For sending countries that have signed the Hague Adoption Convention, they must engage in a best interests of the child analysis before deeming the child adoptable. If the sending country is not a signatory to the Hague Adoption Convention, the Canadian provincial authority will still only approve the adoption if they find it conforms with the Hague Adoption Convention, including the best interests of the child requirement. As well, when the prospective adoptive parents apply for an adoption order in their province of residence, the superior court in that province will consider the best interests of the child again.⁴⁰⁵ IRCC's internal policy guidelines emphasize that "[t]he best interests of the child test must be met to respect Canada's international obligations in regards to the rights of the child in all cases", including adoptions from non-Hague Adoption Convention countries and cases where the adoption will be completed in Canada,⁴⁰⁶ so the best interests of the child requirement is inescapable, even if it is not

⁴⁰⁴ *Ibid*, s 117(1)(g).

⁴⁰⁵ Battista & Jordan, *supra* note 155 at 158.

⁴⁰⁶ Government of Canada, "OP 3: Adoptions" *Immigration, Refugees and Citizenship Canada* (2015), online: <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/op/op03-eng.pdf>> at 28 [OP 3].

specifically listed in paragraph 117(9)(d) of *IRPR*. Notably, IRCC’s policy guidelines also state that “[f]or most cases, the adoption is completed in the child’s country of origin, and an adoption order is issued in that country”, so this provision is not used often.⁴⁰⁷

If the sponsors already completed the adoption in the child’s birth country, the following requirements, listed in subsections 117(2) and 117(3) of *IRPR*, must be met in order for the child to qualify under the Family Class:

- The adoption is in the best interests of the child pursuant to the Hague Adoption Convention, meaning the following factors must be demonstrated:
 - A competent authority conducted or approved a home study of the adoptive parents;
 - The child’s birth parents gave their free and informed consent to the adoption;
 - The adoption created a genuine parent–child relationship;
 - The adoption was in accordance with the laws of the sponsor’s place of residence and the province of destination has approved of the adoption in writing;
 - If the child’s birth country is a Hague Adoption Convention signatory, the central authority in the child’s birth country and the central authority in the province of destination must both approve of the adoption in writing per the Hague Adoption Convention requirements;
 - If the child’s birth country is not a Hague Adoption Convention signatory, there must be no evidence that the adoption was for the purpose of child trafficking or undue gain; and
- The adoption was not entered into primarily for the purpose of acquiring any status or

⁴⁰⁷ *Ibid* at 29.

privilege under *IRPA*.⁴⁰⁸

One additional requirement for sponsorships of adopted children is listed under section 118 of *IRPR*, which states that sponsors must provide a statement in writing confirming that they have obtained information about the medical condition of the child.⁴⁰⁹

At the time of writing, statistics regarding the average processing times for sponsorship applications of adopted minors are not available, as they have not been posted by IRCC.⁴¹⁰ In practice, however, these applications generally take at least one year to complete, and often take longer than that.⁴¹¹ Processing times can vary significantly based on which visa office is processing the application, and the level of complexity of the application. The application processing fee for sponsorship applications for minor adoptees is \$150, which is slightly higher than the fee for citizenship applications. If an adoptee wishes to apply for citizenship after receiving permanent resident status in Canada, they will have to pay the additional \$100 citizenship application fee for minors, and they will have to wait for the citizenship application to be processed, which on average takes an additional 12 months.⁴¹² Families will also have to make arrangements for the child to undergo an immigration medical exam during the sponsorship process. The fee for this exam varies depending on the doctor, but is typically in the range of \$300 to \$400. This means that the sponsorship pathway for adoptees is more expensive and ultimately takes longer than the citizenship pathway.

Some adoptive parents nevertheless prefer to use the sponsorship route. By first applying for permanent resident status, adoptive parents can secure their child's right to live in Canada without the child losing citizenship in a birth country that does not recognize dual citizenship. As stated earlier, this is important for families who wish to preserve the adoptee's ability to choose

⁴⁰⁸ *Ibid*, ss 117(2), 117(3).

⁴⁰⁹ *Ibid*, s 118.

⁴¹⁰ IRCC Processing Times, *supra* note 393.

⁴¹¹ This is based on the writer's own experience working on sponsorship applications for adopted minors.

⁴¹² IRCC Processing Times, *supra* note 393.

which citizenship they keep once they come of age. Some adoptive parents may also wish to use the sponsorship route because it will mean the adoptee will be a naturalized Canadian citizen as opposed to a Canadian citizen by descent. This will mean that the adoptee's ability to pass on citizenship by descent to a child born outside of Canada will not be impacted by the first generation limitation. Finally, some families will prefer to use the sponsorship route because family sponsorship decisions can usually be appealed at the Immigration and Refugee Board, unlike citizenship decisions, which can only be judicially reviewed at the Federal Court of Canada.

In addition to the fact that the sponsorship stream is usually more time consuming and more expensive, there are other drawbacks to applying under this stream. The primary one is the requirement that permanent residents must maintain residency in Canada throughout the sponsorship process. Ordinarily, this is not a particularly onerous requirement, as permanent residents have a residency obligation anyways, which they must meet in order to maintain their own permanent resident status. However, in the case of intercountry adoptions, residency obligations can be more challenging, due to the amount of travel many adoptive parents are required to do. Parents adopting children from abroad generally have to make multiple trips to the child's birth country. During these trips, parents liaise with adoption workers in the foreign state, are matched with a child, and may need to appear in court to obtain an adoption order. Some sending countries also require that adoptive parents live in the jurisdiction for a certain amount of time, often with the adoptee, before the adoption order will be finalized.⁴¹³ As well, many parents wish to spend time bonding with the adoptee prior to returning to Canada, particularly if the child is living in an orphanage or other institution. This means there are many factors pulling adoptive parents who are permanent residents away from Canada, at least temporarily, which can prove problematic in light of the requirement that sponsors continuously live in Canada while awaiting an immigration determination. Citizens who are sponsoring an adoptee do not have to live in Canada throughout the immigration processing period, but do have

⁴¹³ For example, Mexico requires that non-citizens adopting Mexican children engage in a one- to three-week pre-adoption trial period, and recommends that adoptive parents be prepared to spend at least three months in Mexico overall to complete the various steps required. See US Department of State – Bureau of Consular Affairs, “Mexico”, online: <<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Mexico.html>>, under the heading “Who Can Adopt”.

to commit to resuming residency in Canada once the child's application is approved. Compared to the citizenship stream, this gives citizen parents who are sponsoring their adopted children less flexibility post-adoption, as they must be prepared to return to Canada right away.

3.3 IRCC's Discretionary Decision Making and Administrative Law

It is important to note the discretionary nature of immigration and citizenship decision making at the federal level. In Canada, immigration and citizenship law is administrative, which means that the tests embedded in the federal legislation and regulations are applied by immigration and citizenship officers, who are given discretionary powers that enable them to make decisions that are supported factually and are deemed to be reasonable. Officers apply legislative and common-law tests, and refer to operational instructions and policy guidelines that supplement and add detail to the legal requirements.⁴¹⁴ Generally speaking, applicants must meet the legal requirements of the category in which they are applying, or their application will be refused.

In cases where an intercountry adoption is refused by an officer at the immigration or citizenship stage, adoptive parents will either be able to file an appeal before the Immigration and Refugee Board's Immigration Appeal Division ("IAD"), or file a judicial review at the Federal Court of Canada. For citizenship applications for adoptees, there is no administrative appeal mechanism available, so the only option for refusals is judicial review. In a judicial review, the applicant asks a Federal Court judge to review an IRCC officer's or tribunal member's decision, and determine whether it was made fairly and reasonably in light of the evidentiary record. In a judicial review, a court cannot substitute its own judgment for that of the officer or tribunal—in cases where a court finds that there was a lack of procedural fairness or an unreasonable decision, the court is typically limited to sending the case back to be redecided by a different decision maker. Importantly, in immigration law, the Federal Court generally treats visa officers and immigration tribunal members with substantial deference. This means that though the

⁴¹⁴ See Government of Canada, "IP 2: Processing Applications to Sponsor Members of the Family Class" *Immigration, Refugees and Citizenship Canada* (2011), online: <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/ip/ip02-eng.pdf>>; Government of Canada, OP 3, *supra* note 405; Government of Canada, "Permanent resident program: Non-economic classes" *Immigration, Refugees and Citizenship Canada* (2018), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes.html>>.

threshold for judicial intervention will vary amongst different kinds of immigration cases, judges are generally reluctant to intervene in immigration decisions and set a relatively high bar for intervention, due in part to the highly specialized nature of immigration decision making.⁴¹⁵

For sponsorship applications for adoptees, in addition to judicial review, parents are often able to appeal refusals at the IAD. Successful IAD appeals replace negative decisions made by immigration officers with positive decisions made by tribunal members, and are therefore a more direct way to remedy an incorrect or unfair IRCC refusal. Subsection 67(1) of *IRPA* gives the IAD jurisdiction to allow appeals in the following circumstances:

- 1) When the original decision was wrong in law, fact, or mixed law and fact (meaning the original decision was legally or factually incorrect);
- 2) When the original decision did not observe the principles of natural justice (meaning the original decision was procedurally unfair); and
- 3) When there are sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case, taking into account the best interests of any child who is directly affected by the decision.

Reasons 1 and 2 are similar to the reasons why judicial reviews can be granted, while reason 3 is what makes the IAD a unique and often preferable venue to seek relief in intercountry adoption cases. Reason 3 enables the IAD to consider humanitarian and compassionate (“H&C”) factors, which, pursuant to sections 25 and 25.1 of *IRPA*,⁴¹⁶ are special considerations that allow

⁴¹⁵ For more regarding the nature of deference in the context of immigration law and in other administrative areas, see Joseph Robertson, Peter Gall & Paul Daly, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future* (Markham: LexisNexis, 2014); Matthew Lewans, *Administrative Law and Judicial Deference* (Portland: Hart Publishing, 2016). As well, note the pending case of Alexander Vavilov, the Canadian-born son of Russian spies whose Canadian citizenship was stripped in 2013 via an administrative decision of the Registrar of Citizenship. Vavilov’s case was heard by the Supreme Court of Canada in December 2018 in a joint appeal, and a decision is pending at the time of writing. The Court is expected to revisit the vexed question of administrative standard of review, and comment on the nature of deference in citizenship and immigration law specifically. For more on the Vavilov case, see Audrey Macklin, “Audrey Macklin on the Supreme Court of Canada’s Administrative Law ‘Trilogy’” *Paul Daly: Administrative Law Matters* (14 December 2018), online: <<https://www.administrativelawmatters.com/blog/2018/12/14/audrey-macklin-on-the-supreme-court-of-canadas-administrative-law-trilogy/>>.

⁴¹⁶ *IRPA*, *supra* note 38 at ss 25, 25.1. See also, Government of Canada, “Humanitarian and compassionate considerations: Assessment and processing” *Immigration, Refugees and Citizenship Canada* (11 July 2017), online:

applicants to overcome the fact that they may not meet the legal requirements of a particular immigration category. H&C determinations are based on the degree of hardship a negative decision would inflict on the parties involved in the matter, and special attention must be paid to any hardship children may face.⁴¹⁷

That being said, appeal rights are circumscribed in some adoptee sponsorship cases. Subsection 63(1) of *IRPA* states that “A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.”⁴¹⁸ However, section 65 of *IRPA* states that for appeals under subsection 63(1), the IAD “may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.”⁴¹⁹ The effect of this provision is to prohibit access to appeals based on H&C factors whenever an adoptee is deemed not to be a member of the Family Class. As explained above, membership in the Family Class depends on whether the adoption meets the Hague Adoption Convention requirements, so if an IRCC officer refuses an application because the adoption does not meet the Hague Adoption Convention standard, the adoptee will not be a member of the Family Class. Similarly, if an application is refused because an adoptive parent is found not to meet the requirements for sponsors, they will also be subject to section 65 of *IRPA*. Such families will not be permitted to make H&C arguments to overcome deficiencies in their applications, and will therefore only be able to appeal refusals based on legal and factual errors, and procedural fairness concerns. This renders the powers of the IAD in these kinds of cases similar to those of the Federal Court, though the IAD can still overturn and replace decisions, unlike the Federal Court.

One consequence of the administrative law backdrop against which intercountry adoption

<<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing.html>>.

⁴¹⁷ *Ibid.*

⁴¹⁸ *IRPA*, *supra* note 38, s 63(1).

⁴¹⁹ *Ibid.*, s 65.

immigration decisions are made is that refusals can be difficult and costly to overcome. Families must navigate multiple levels of decision making, and are not always afforded a right of appeal, though they can access the judicial review system. Even in cases where a judicial review is successful and a case is sent back to be redetermined, it is still possible that an IRCC officer will issue another refusal, albeit with a more robustly supported set of reasons influenced by the Federal Court's comments. This complex legal and procedural system can be daunting, particularly for families who have already invested substantial time and money into the intercountry adoption process.

3.4 Summary

Overall, the way that intercountry adoptions are assessed in sponsorship applications is substantively very similar to how intercountry adoptions are assessed in direct citizenship applications. In both the citizenship and permanent residence schemes, the primary questions that must be deliberated are:

- 1) Whether the adoptive relationship was entered into primarily for the purpose of acquiring an immigration benefit;
- 2) Whether the adoption created a genuine parent–child relationship;
- 3) Whether the adoption was conducted legally in the place where it took place and in Canada; and
- 4) Whether the adoption was conducted in the best interests of the child in light of the Hague Adoption Convention objectives.

In cases where the sending country is a party to the Hague Adoption Convention, the standard written approvals from the central authorities in the sending country and province of destination will generally suffice as evidence. In cases where the sending country is not a party to the Hague Adoption Convention, additional proof that the Hague Adoption Convention's core requirements have been met is usually required. The Canadian federal government will take steps to ensure that international standards for intercountry adoption have not been violated, regardless of whether the sending country is party to the Hague Adoption Convention and regardless of where the adoption will be finalized. If the sending country is a party to the Hague Adoption

Convention it may make the process go smoother, but the underlying legal test that the Canadian federal government applies will be the same.

That being said, one significant difference between the citizenship and sponsorship processes is how the adoptive parents are assessed. In applications for citizenship under section 5.1 of the *Citizenship Act*, the only real requirement for adoptive parents is that they demonstrate that at least one of them is a Canadian citizen, and that they are not subject to the first generation limitation to citizenship by descent. Adoptive parents who apply to sponsor their child for permanent residence, however, have a longer list of criteria to meet. Sponsors must not be subject to removal orders or be imprisoned, and are subject to a criminality assessment. Sponsors must also demonstrate that they have not defaulted on any previous immigration debts, undertakings, or support payments ordered by a court. There are also financial requirements that sponsors are not undischarged bankrupts and that they do not receive social assistance for reasons other than disability. Sponsors who are permanent residents have even more requirements to meet than sponsors who are citizens, as demonstrated by the additional obligation for permanent resident sponsors to reside in Canada throughout the sponsorship process.

Adoptive parents who go through the sponsorship process may be permanent residents or citizens, and their adopted children will become permanent residents. Adoptive parents who apply directly for citizenship for their adopted children are citizens themselves and their children will become citizens. Therefore, the sponsorship process engages permanent residents, while the citizenship process does not.

Undoubtedly, permanent residents in Canada have fewer rights, more obligations, and experience a higher level of ongoing scrutiny than citizens do. While citizens have an unqualified right to enter and live in Canada after any time spent abroad, permanent residents have a residency obligation. While citizens have the right to vote in Canadian elections, permanent residents do not. And while citizens have a right to pass citizenship on to their adopted children (provided the adoption itself is valid), permanent residents must first demonstrate that they qualify as sponsors and have an ongoing connection to Canada in order to bring their adopted children here.

It is helpful at this point to return to the idea that citizenship functions as both an instrument and

object of social closure, discussed in detail earlier in Chapter 2, Part 2. Citizenship is the line along which full membership in the national community is determined, and not everyone has equal access to citizenship. States use immigration and citizenship laws as a tool in the nation building project, as these laws allow governments to control, as much as possible, who should have membership—both provisional membership as a permanent resident, and full membership as a citizen.

Rogers Brubaker has used the image of two concentric circles to explain the relationship between and relative roles of citizenship and immigration. Immigration laws that govern who can access the social and economic rights that come with permanent resident status form the outer ring, while citizenship laws that govern who can gain full social, economic, and political membership in a state form the inner ring.⁴²⁰ While much work has been done over the last several decades exploring the diminishing value of full citizenship status in light of the fact that long-term and permanent residents in many countries now have robust rights,⁴²¹ formal citizenship is nevertheless a “thin but resilient guardrail” in the words of Audrey Macklin.⁴²² Catherine Dauvergne has also argued that rather than becoming obsolete, formal citizenship is shifting, taking on new meanings, and multiplying inclusions and exclusions, and in doing so, is becoming a “place to counter the myth of the powerless state”.⁴²³

The outer circle in Brubaker’s image is where most of the “dirty work” of exclusion and closure happens.⁴²⁴ Applications for permanent residence are complicated, expensive, and time

⁴²⁰ Rogers Brubaker, “Membership without Citizenship: The Economic and Social Rights of Noncitizens” in Rogers Brubaker, ed, *Immigration and the Politics of Citizenship in Europe and North America* (Lanham: University Press of America, 1989) 145 at 160-61 [“Membership without Citizenship”].

⁴²¹ See e.g., Christian Joppke, “The Inevitable Lightning of Citizenship” (2010) 51:1 *European Journal of Sociology* 9; Brubaker, “Membership without Citizenship”, *supra* note 420; Saskia Sassen, *Losing Control?: Sovereignty in the Age of Globalization* (New York: Columbia University Press, 1996).

⁴²² Audrey Macklin, “Exile on Mainstreet: Popular Discourse and Legal Manoeuvres Around Citizenship” in Law Commission of Canada, ed, *Law and Citizenship* (Vancouver: UBC Press, 2006) 22 at 24.

⁴²³ Catherine Dauvergne, “Citizenship with a Vengeance” (2007) 8:2 *Theoretical Inquiries in Law* 489.

⁴²⁴ *Ibid* at 493, citing Catherine Dauvergne, “Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics” (2000) 24 *Melbourne University Law Review* 280.

consuming, and there are opportunities for officers to refuse these applications on many grounds, including medical, security, criminal, and financial. Citizenship applications, particularly applications for citizenship by descent, do not contain as many hurdles or opportunities for refusal.⁴²⁵ As Dauvergne explains:

The messy policing of the national boundary by inquiring into debt and disease, criminality and qualifications, is left to migration law. Most prosperous contemporary states would not tolerate a citizenship regime that excluded individuals from naturalizing because of having a child with an intellectual disability, being poor, or dropping out of high school.⁴²⁶

There are many more reasons why individuals can be denied permanent residency and have their permanent residency revoked, compared to the grounds upon which citizenship can be denied and revoked.⁴²⁷ Similarly, in order to “pass on” permanent resident status to a relative, the sponsor, the sponsored person, and the familial relationship will be vigorously scrutinized. Citizenship status can only be passed directly on to children who are not subject to the first generation limitation, but passing it on does not require investigating the circumstances of the parent to the same extent. For adopted children, both the sponsorship and citizenship processes are more complex, as the adoption itself has to be assessed and deemed valid, but generally speaking, the fact of a parent’s citizenship is usually sufficient for citizenship by descent, whereas the fact of a parent’s permanent residence is insufficient to pass on permanent resident status to a family member. In light of this, it follows that the right of a permanent resident to obtain status for their adopted children is more restricted than a citizen’s. Simply put, the legal and substantive distinctions between citizenship and permanent residency persist and can be recognized in the two pathways IRCC offers for migrant adoptees.

This difference is particularly interesting in light of how the direct citizenship route for adopted children was only made available in 2007 after Bill C-14 received Royal Assent. Prior to that, all adopted children had to be sponsored by their adoptive parents and would have to become

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid* at 495.

⁴²⁷ *Ibid.*

permanent residents before they could apply for citizenship.⁴²⁸

In the House of Commons Hansard transcripts between 2006 and 2007 when Bill C-14 was being debated, Members of Parliament from all parties emphasized that the point of the legislation was to eliminate the distinction between how children born abroad to Canadian parents and children adopted abroad by Canadian parents are treated. For instance, the Honourable Monte Solberg, who was then a Conservative Member of Parliament, made the following comment at the Bill's second reading:

At present there is a difference in the way we treat children adopted overseas by Canadians and those who are born overseas to Canadians. A child born to Canadians overseas receives Canadian citizenship by birth. An adopted child must first get permanent residence before citizenship. The families who have opened their hearts to these children certainly do not make that distinction and neither do we. This legislation streamlines the process for families. It augments the fairness of our system as a whole. It has the support of Canadians across the country.⁴²⁹

Members of Parliament from the Liberal Party, the Bloc Quebecois, and the New Democratic Party all voiced similar approvals of the proposed amendments. Overall, members of all parties applauded parents for adopting children in need from abroad and emphasized the importance of facilitating this form of family building for Canadians. The Honourable Jay Hill from the Conservative Party said the following:

[T]his is an extremely important issue not only for adoptive children and adoptive families, but for our country. With our declining birth rate we need to rely increasingly on immigration to ensure we have the necessary citizen base

⁴²⁸ Some intercountry adoptees never apply for citizenship. Some adoptees choose not to become citizens in order to retain their birth citizenship if that country does not recognize dual citizenship. Other adoptees and adoptive parents simply fail to do so due to misinformation or a lack of understanding that permanent residency is not the same as citizenship. One example that falls into the latter category is that of Adam Crapser, a South Korean adoptee who grew up with two separate abusive adoptive families in the USA, neither of which applied for his citizenship. Adam Crapser was deported back to South Korea in 2016 at the age of 41, leaving behind his wife and children in the USA, due to several criminal convictions. Similarly, Phillip Clay, also a South Korean adoptee to the USA, was deported back to South Korea in 2012 after being criminally convicted. Mr. Clay suffered from mental illness, and ultimately committed suicide after his deportation. See Choe Sang-Hun, "Deportation a 'Death Sentence' to Adoptees After a Lifetime in the U.S." *The New York Times* (02 July 2017), online: <<https://www.nytimes.com/2017/07/02/world/asia/south-korea-adoptions-phillip-clay-adam-crapser.html>>.

⁴²⁹ Canada, Parliament, *House of Commons Debates* (13 June 2006).

for the future of our country.⁴³⁰

Along a similar line, Liberal Member of Parliament Omar Alhabra said the following:

There are countless Canadians who are choosing to adopt children who were born abroad, and they are choosing this route for a variety of reasons. Many are building their families. Others choose to adopt abroad to rescue children from very difficult situations in order to provide them with a hopeful and promising life. Canada should work to reduce any existing obstacles that adoptive parents may be facing in their attempts to build upon their family. The very act of adoption and welcoming a new member to a family is a noble act.⁴³¹

Bill C-14 received unanimous support across all political parties, and during discussions about the Bill, members of all parties spoke of intercountry adoption in very positive terms—as a noble act, and as something necessary in light of Canada’s declining birth rate. Members of all parties emphasized that adopted children should not be discriminated against in their ability to access citizenship.

Elected representatives and the general public may have viewed intercountry adoption positively prior to 2006, and Canadians have certainly engaged in formal intercountry adoption since the Cold War era, but until 2006, there seemed to be a lack of political will to address the inequality between birth children and adopted children in the citizenship sphere. So while this legislative amendment was undoubtedly a positive step towards recognizing the legitimacy of adoptive relationships, the fact that it took approximately half a century to implement reveals Canada’s long history of skepticism towards non-biological parenting.

Although adoptees now have the right to access citizenship by descent, there are other examples of Canada’s reluctance to extend the same citizenship rights that biological children have to non-biological children. For example, children who are born outside of Canada via surrogacy do not have access to citizenship by descent if they do not share a genetic link to their Canadian citizen parent. These children must be sponsored for permanent residency, and cannot apply for a direct grant of citizenship in the same way that adopted children can. This position was affirmed by the

⁴³⁰ Canada, Parliament, *House of Commons Debates* (01 June 2007).

⁴³¹ *Ibid.*

Federal Court of Appeal in 2014 in the case *Canada (Citizenship and Immigration) v Kandola*, where the Court said that a genetic link is required in order to pass on citizenship in assisted human reproduction cases.⁴³²

At the time of writing, IRCC's internal guidelines regarding surrogacy and citizenship state that "[t]he existence of a genetic parent—someone whose child contains their genetic information—is what current citizenship policy relies on to determine who can receive citizenship by descent."⁴³³ In light of the 2007 changes to the *Citizenship Act* for adoptees, this statement appears inaccurate. The Court in *Kandola* even acknowledged that IRCC's approach to surrogacy may implicate Charter concerns, as it "would create an unequal treatment between children of Canadian citizens depending on the manner in which they are conceived", echoing statements made by Members of Parliament when Bill C-14 was being debated.⁴³⁴ Nevertheless, this continues to be IRCC's approach to surrogacy cases.

In the next chapter, this thesis will explore some of the common legal issues that arise in intercountry adoption case law, in light of the legislative and regulatory framework outlined in this section.

⁴³² *Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85 at para 73 [*Kandola*].

⁴³³ Government of Canada, "Who is a parent for citizenship purposes where assisted human reproduction (AHR), including surrogacy arrangements, are involved" *Immigration, Refugees and Citizenship Canada* (26 March 2014), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/administration/identity/who-parent-purposes-where-assisted-human-reproduction-including-surrogacy-arrangements-involved.html>>.

⁴³⁴ *Kandola*, *supra* note 432 at para 75.

Chapter 6

Analysis of Major Themes in Common-Law Intercountry Adoption Decisions at the Federal Level

Decision making responsibility for intercountry adoption cases falls on foreign governments, provincial governments, and the federal government. Due to the sheer number of countries and cases, analyzing the common-law decisions of foreign states is beyond the scope of this project. With respect to provincial common-law judgments, it is possible for adoptive parents to dispute provincial decisions in courts—both decisions by the provincial central authority not to approve foreign adoptions, and decisions by provincial superior courts not to issue adoption orders.⁴³⁵ That being said, the goal of this thesis is to explore the immigration and citizenship aspects of intercountry adoption in Canada, and so the following chapter will focus on common-law decisions of intercountry adoption cases at the federal level.

As explained above in Chapter 5, the federal laws governing intercountry adoption fall under the umbrella of administrative law. If an intercountry adoption case is refused by IRCC, adoptive parents have the right to seek either an appeal at the IAD or a judicial review of the refusal at the Federal Court. That being said, not all adoptive families facing an IRCC refusal will have access to the IAD as an appeal venue, and judicial reviews at the Federal Court are limited in scope and costly to complete. Because of this, overcoming an IRCC refusal may not be within the realm of possibility for some adoptive families. As well, many judicial reviews and appeals of intercountry adoption cases are not reported or otherwise made available to the public. For instance, if an intercountry adoption case is initially refused by IRCC, and a family files a judicial review, it is possible that the family and the Department of Justice lawyer dealing with

⁴³⁵ Because most intercountry adoptions are issued outside of Canada, there aren't many reported provincial common-law decisions dealing with intercountry adoption. That being said, when cases are reviewed by provincial superior and appeal courts, some issues that arise in common-law intercountry adoption decisions are similar to the kinds of issues that arise at the federal level. For instance, the Ontario Court of Appeal considered the primary purpose of an application for an adoption order in *Re: Rai*, 1980 CanLII 1644 (ON CA). In this case, an uncle sought to adopt his niece from Guyana, who was present in Canada on a visitor's visa. Part of the Court's judgment dealt with whether the primary purpose of the adoption was to regularize immigration status. Other provincial common-law decisions regarding intercountry adoption deal with issues of jurisdiction and residency, including *Re: C.T.A.*, 2010 ONSC 2222, where the Court considered whether the prospective adoptee was a resident of Ontario, which is a prerequisite for adoption orders issued in that province. For a deeper analysis of provincial common-law decisions regarding intercountry adoption, see Battista & Jordan, *supra* note 152 at 151-228.

the case will reach a settlement prior to an actual hearing taking place, meaning there will be no decision from the Court. Because of these realities, it is difficult to know the extent to which the intercountry adoption decisions that are reported by the IAD and the Federal Court actually represent how IRCC approaches these cases on the ground.

There are many reasons why intercountry adoption cases can be refused, ranging from relatively minor technical issues regarding improperly completed forms and other documentary deficiencies, to more fundamental issues dealing with how intercountry adoption law in Canada should be interpreted. Rather than undergoing a full review of all reported intercountry adoption cases at the IAD and Federal Court, or relying on information about IRCC decision making gleaned from Access to Information Requests, which are typically difficult to obtain and incomplete, this thesis will highlight some of the common substantive themes that arise in intercountry adoption cases at the federal level.

1 Adoptions Completed Outside Canada Must Be in Accordance with the Laws of the Foreign Jurisdiction

For intercountry adoption cases in both the citizenship and permanent residency streams, one of the requirements is that adoptions completed outside of Canada must be in accordance with the laws of the country where they take place. This means that Canadian decision makers are often in a position where they must interpret the laws of another country to determine whether adoptions conform to those laws.

In *Kisimba v Canada (Minister of Citizenship and Immigration)*, which was heard by the Federal Court in 2008, Justice Beaudry clarified that for adoptions completed outside of Canada, the onus is on the family to provide proof that the adoption is legally valid, as IRCC will not always assume this to be the case, particularly when the child's country of origin is not a party to the Hague Adoption Convention.⁴³⁶ *Kisimba* dealt with an adoption finalized in the Democratic Republic of Congo, which is not a signatory to the Hague Adoption Convention, and thus the deciding IRCC officer was unable to rely on the standard form of approval letters from the

⁴³⁶ *Kisimba v Canada (Minister of Citizenship and Immigration)*, 2008 FC 252 [*Kisimba*].

family's province of residence and the central authority in the Democratic Republic of Congo. The *Kisimba* decision therefore highlights the fact that though intercountry adoptions from countries that are not party to the Hague Adoption Convention may be possible, families attempting them may encounter difficulties in documenting the legality of their adoption orders.

Sometimes, proving that an adoption order is legal comes down to technical issues like problems with translation and other documentary deficiencies. Such issues can come up in adoptions from countries that both have and have not signed the Hague Adoption Convention. For instance, the 2012 IAD case, *Zhang v Canada (Minister of Citizenship and Immigration)*, dealt with a relative adoption by an uncle of his niece in China. China is a signatory to the Hague Adoption Convention, but the documents Mr. Zhang provided to IRCC were not properly translated and were difficult to understand. The IRCC officer was not convinced that all legal requirements had been met in China based on the evidentiary record, and thus refused the application, and this refusal was upheld by the IAD.⁴³⁷

Other times, understanding what the law actually is in a foreign jurisdiction can be challenging when the country has a different legal system compared to Canada, and when civil unrest makes it difficult to access records of official legislation. In *Kenne v Canada (Minister of Citizenship and Immigration)*, which was decided by the Federal Court in 2010, there were differing opinions regarding whether Cameroon permits full adoptions rather than only guardianship arrangements. After reviewing several legal opinions analyzing Cameroonian law, which had been submitted in the initial application, the Court determined that full adoption was possible in Cameroon.⁴³⁸ In *Lee v Canada (Minister of Citizenship and Immigration)*, which was decided by the IAD in 2003, IRCC refused an intercountry adoption sponsorship case because of concerns about adoption laws in Myanmar, where the adoption was completed. Myanmar is not a party to the Hague Adoption Convention, and has faced significant civil upheaval since it obtained independence from Britain in 1948. On appeal, both the adoptive father and the Minister were unable to obtain copies of Myanmar's adoption legislation. Eventually, the Minister

⁴³⁷ *Zhang v Canada (Minister of Citizenship and Immigration)*, 2012 CarswellNat 6328 (IAD).

⁴³⁸ *Kenne v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1079.

commissioned a legal opinion letter from a lawyer in Myanmar, and it was determined that Myanmar's laws do not permit intercountry adoption, and the refusal was upheld.⁴³⁹

Lee brings up the question of what to do when an adoption has been completed that seems to go against a jurisdiction's laws. In *Sinniah v Canada (Minister of Citizenship and Immigration)*, which was a Federal Court decision from 2002, the Court stated that the best evidence of legality is a final adoption order issued by a court.⁴⁴⁰ Principles of international comity suggest that Canada should respect foreign judgments without redeciding them, unless there is clear evidence of fraud. This was affirmed by the Federal Court in *Boachie v Canada (Citizenship and Immigration)* in 2010, which stated that it is not open to an IRCC decision maker to consider whether a valid adoption order issued by a foreign court conforms to that country's legislation.⁴⁴¹ In the 2012 case *Singh v Canada (Minister of Citizenship and Immigration)*, the Federal Court distinguished between adoption orders issued by foreign courts, and adoption deeds or contracts, which are usually drafted privately by adoptive and birth parents with the assistance of lawyers. Unlike court-issued adoption orders, when an adoption was arranged privately without the involvement of a judge, it is open to IRCC decision makers to scrutinize whether the adoption complies with foreign legislation.⁴⁴²

2 Adoptions Must Create a Genuine Parent–Child Relationship

Another common reason why an intercountry adoption case can be refused by IRCC is that the adoption does not create a genuine parent–child relationship that fully replaces the previous one between the child and his or her biological parents. The common-law test for assessing the legitimacy of parent–child relationships in the immigration and citizenship context can be traced back to the 1995 case of *De Guzman v Canada (Minister of Citizenship and Immigration)*, which

⁴³⁹ *Lee v Canada (Minister of Citizenship and Immigration)*, 2003 CarswellNat 4892 (IAD).

⁴⁴⁰ *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 822.

⁴⁴¹ *Boachie v Canada (Minister of Citizenship and Immigration)*, 2010 FC 672 [*Boachie*].

⁴⁴² *Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1302.

was decided prior to the establishment of *IRPA* and *IRPR*, but is still referenced by the IAD and Federal Court. In this case, the court set out the following list of non-exhaustive factors for identifying genuine parent–child adoptive relationships:

- The motivations of the adoptive parents;
- The motivations of the biological parents;
- How much authority the adoptive parents have over the adoptee;
- Whether the adoptive parents’ authority replaces that of the biological parents;
- Whether the adoptee continues a relationship with his or her biological family after the adoption;
- Whether the adoptee is treated differently than any biological children the adoptive parents may have;
- Whether the adoptive parents had a relationship with the adoptee prior to the adoption;
- Whether there have been changes in entitlements, records, and other legal recognitions of the adoptive parent–child relationship since the adoption took place; and
- What kinds of arrangements have been made since the adoption with respect to caring and providing for the child.⁴⁴³

Subsequent cases encouraged decision makers to take a contextual approach to assessing adoptive relationships, and to consider additional things like how geographical separation may impact the ability of adoptive parents and children to build their relationships,⁴⁴⁴ the degree and

⁴⁴³ *De Guzman v Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm LR (2d) 28 (IAD) at para 14.

⁴⁴⁴ *Jeerh v Canada (Minister of Citizenship and Immigration)*, 1999 CarswellNat 849 (FC); *Pabla v Canada (Minister of Citizenship and Immigration)*, 2000 CarswellNat 2958 (FC).

type of contact between adoptive parents and children;⁴⁴⁵ whether adoptive parents send money and gifts to adoptees;⁴⁴⁶ and the overall composition of the adoptive and biological families.⁴⁴⁷

The case law in this area also emphasizes the idea that assessments of adoptive parent–child relationships must be forward-looking, insofar as decision makers should acknowledge that adoptive relationships will develop and grow stronger over time, and may not be fully formed at the time a sponsorship application is submitted.⁴⁴⁸

3 Adoptions Must Sever the Pre-Existing Parent–Child Relationship

The question of whether an adoption creates a genuine parent–child relationship between the adoptee and adoptive parents is closely related to the question of whether the adoption severs the previous parent–child relationship between the adoptee and his or her biological parents.

Cases of orphan adoption focus more the new relationship between the adoptive parents and adoptee, as it is generally clear that the pre-existing relationship between the child and his or her biological parents has ended, either because the biological parents have died or because their whereabouts are unknown and the child is living in an institution. However, cases of relative adoption and cases where the child’s biological parents are still alive tend to focus more on the nature of the pre-existing biological parent–child relationship.

For instance, in *Kisimba*, discussed above, after the sponsor’s brother in the Democratic Republic of Congo passed away, she adopted two of his children. The children’s biological mother was still alive and cared for the children in the Democratic Republic of Congo while the sponsorship application was being processed. The children were interviewed, and stated that they

⁴⁴⁵ *Roos v Canada (Minister of Citizenship and Immigration)*, 2009 CarswellNat 5395 (IAD).

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.*

⁴⁴⁸ See e.g., *Hurd v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 719; *Perera v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1047; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2001 FCT 1198.

still saw their biological mother as their real mother and did not know very much about the sponsor, who they had minimal direct contact with, despite the fact that the sponsor sent money and gifts to the children. The biological mother was found to have consented to the adoption in order to give her children access to a better education, but continued her daily emotional and physical responsibilities to the two children. Ultimately, the application was refused on the basis that the parent–child relationship was not genuine, and the refusal was upheld by the IAD and the Federal Court.⁴⁴⁹

In contrast to *Kisimba*, in *Boachie*, where the sponsor adopted her niece, the Federal Court identified the following factors as demonstrative of a genuine parent–child relationship:

- The child lived with the sponsor’s mother, and considered the sponsor to be her real parent;
- The sponsor had been financially supporting the child; and
- The sponsor provided evidence that she was infertile and unable to have biological children.

In both *Kisimba* and *Boachie*, the sponsor provided financial support to the adoptee, but did not live with the adoptee and did not provide daily care to the adoptee. There were multiple factors at play in both cases—in *Kisimba* there was evidence that the adoption was at least in part motivated by a desire to provide better educational opportunities to the children and the adoptive parents already had grown biological children, whereas in *Boachie*, there was evidence that the adoption was motivated by the sponsor’s inability to get pregnant. As well, the children in both cases were old enough to be interviewed and to express their feelings about their adoptive and biological parents, with the children in *Kisimba* expressing that they saw the sponsor as their aunt, while in *Boachie* the child thought of the sponsor as her mother.

⁴⁴⁹ *Kisimba*, *supra* note 436.

Nevertheless, the two decisions suggest a somewhat inverse relationship between severing the biological parent–child tie, and creating a genuine adoptive parent–child tie.⁴⁵⁰ If an adoptee continues to have a strong relationship with his or her biological parent after an adoption, this may result in the adoptive parent appearing less genuine. For example, the fact that the children in *Kisimba* continued their attachment to their birth mother was in itself a negative factor in the assessment, but was also important because it brought the nature of the children’s relationship with the sponsor into question.

Another case that explores the connection between severing the biological parent–child tie and creating a genuine adoptive parent–child tie is *Hussien v Canada (Minister of Citizenship and Immigration)*, a 2006 IAD case. The IAD member identified the following factors as indicative of a genuine parent–child relationship between the adoptive father and the two adoptees, who were 15 and 18 years old and the sponsor’s biological niece and nephew:

- The adoptive father was well-informed of the circumstances of both children;
- The adoptive father was responsible for making decisions on behalf of the children since their biological father died, including decisions that went against the wishes of the children’s biological mother, who was still alive, including not permitting the adopted daughter to be married and not permitting the adopted daughter to undergo female circumcision;
- The adoptees had knowledge about their adoptive father’s life and work;
- The adoptive father supported the adoptees financially;
- The adopted daughter expressed that she considered the adoptive father as her true parent; and

⁴⁵⁰ Battista & Jordan, *supra* note 155 at 200.

- The adopted children were treated equally to the adoptive father's other biological children.⁴⁵¹

In *Hussien*, the children had an ongoing relationship with their biological mother (and in the daughter's case, still lived with the biological mother), but the member acknowledged that due to the age of the children, it would be unfair to expect them to end their relationship with her. They had already been raised into their teenaged years by their biological mother, and the Member stated that it was "more important that they have accepted the appellant as their father and regard his counsel and authority as paramount to that of their biological mother."⁴⁵² *Hussien* thus adds nuance to the question of how to demonstrate that a biological parent has been replaced by an adoptive parent: If an adopted child still has a relationship with his or her biological parent, the adoptive parent's authority must clearly replace that of any living biological parent. *Hussien* also suggests that it would not be reasonable to expect a teenaged adoptee to cut all ties with his or her living biological parents.

A similar scenario was considered by the Federal Court in the citizenship case of *Adejumo v Canada (Minister of Citizenship and Immigration)*.⁴⁵³ In this case, the applicant adopted her niece in Nigeria, and subsequently applied for the niece's citizenship. The applicant was the child's paternal aunt, and she made all major decisions regarding education and healthcare for the child after the child's biological mother passed away. The child's father was still alive and considered himself to be a father figure, though he was not living with the child or directly caring for the child. The citizenship application was initially refused by IRCC, with the citizenship officer stating that "a genuine parent-child relationship could not be developed between aunt and niece as long as the natural father's relationship continued."⁴⁵⁴ At the Federal Court, Justice Harrington considered the slightly different language in the English and French versions of subparagraph 5.1(3)(a)(ii) of the *Citizenship Act*. Whereas in English, the "the pre-existing legal

⁴⁵¹ *Hussien v Canada (Minister of Citizenship and Immigration)*, 2006 CanLII 52318 (IAD) [*Hussien*].

⁴⁵² *Ibid* at para 34.

⁴⁵³ *Adejumo v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1485 [*Adejumo*].

⁴⁵⁴ *Ibid* at para 6.

parent–child relationship” must be severed, in French, “tout lien de filiation préexistant” (roughly meaning all parent–child ties) must be severed.⁴⁵⁵ Ultimately, Justice Harrington granted the application for judicial review and sent the case back to be redetermined, stating that “the more restrictive wording of the English version must be favoured”.⁴⁵⁶ Justice Harrington referenced IRCC’s internal Operational Bulletin 183, which specifically states that “[w]hile the natural parent should no longer be acting as a parent after the adoption has taken place, an ongoing relationship and contact with the natural parent and extended family may still occur.”⁴⁵⁷

Operational Bulletin 183 goes on to say that evidence that biological parents in relative adoption cases consent to the adoption and “fully comprehend the effects of a full adoption” should be a positive factor.⁴⁵⁸ Thus, *Adejumo* clarifies that the primary consideration in these cases should be whether the biological parent’s legal authority over the child has ceased. Other evidence regarding an ongoing biological parent–child connection may be relevant in the contextual analysis, but will not by itself be determinative if the adoptive parents can demonstrate that they have clear decision-making power on behalf of the child.

These cases raise the question of what kinds of parental relationships IRCC permits adoptees to have. A closer look at Operational Bulletin 183 reveals a section addressing open adoptions, which states the following:

In an open adoption, interaction between the adoptive child or family and the natural family can vary in frequency and type of contact; it may include regular correspondence, telephone calls, or visits. In the case of older children adopted through an open adoption arrangement, the adopted child may have emotional attachments to one or more natural relatives with whom ongoing contact may be in the best interest of the child. While in an open adoption the adopted child may interact with his

⁴⁵⁵ *Ibid* at para 10 [emphasis in original].

⁴⁵⁶ *Ibid* at para 12.

⁴⁵⁷ Government of Canada, “Operational Bulletin 183 – February 8, 2010” *Immigration, Refugees and Citizenship Canada* (25 March 2010), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2010/183-february-8-2010.html>>.

⁴⁵⁸ *Ibid*.

or her natural parents to varying degrees, the legal parent-child relationship with the former parents must be severed.⁴⁵⁹

This suggests that open adoptions are permissible in the sponsorship and citizenship contexts, provided that biological parents do not have ongoing legal authority over adoptees. It also acknowledges that ongoing contact with biological family members can sometimes be in the best interests of the child.

This attitude aligns with developments that have been made over the last several decades in domestic adoption systems in Canada and other Western countries. Countless studies have concluded that open adoption can be beneficial for adoptees, and open adoptions are now encouraged whenever possible by provincial adoption agencies in Canada.⁴⁶⁰ In open adoptions, adoptees are given information about and have contact with their birth families, and though it may sometimes be confusing for the child and difficult for the birth and adoptive families to manage, it is understood to promote a healthier situation overall for the adoptee. Traditionally, it is key in open adoptions for adoptive families to set boundaries regarding how much and what kind of access birth families have, and birth families are often likened to extended relatives in these scenarios—more like aunts and uncles than additional parents.⁴⁶¹ Open adoptions, like closed adoptions, are thus premised on the idea that adoption must replace birth parents with adoptive parents, and even if birth parents have contact, the authority of the adoptive parents must clearly be paramount.

Some families practice forms of child rearing that do not neatly line up with the idea that in order to be legally recognized, a new parent's authority must replace a previous parent's authority. For

⁴⁵⁹ *Ibid.*

⁴⁶⁰ See e.g., Adoptive Families Association of BC, "What is Open Adoption?" *BC Adoption* (2019), online: <<https://www.bcadoption.com/resources/articles/what-open-adoption/>>; Adoption Council of Ontario, "Focus on the Child: Openness in Adoption from Foster Care – A Guide for Assessment and Planning" *Adoption Council of Ontario* (April 2016), online: <https://www.adoption.on.ca/uploads/File/Focus_on_the_child_Open_adoption_planningFINAL.pdf>.

⁴⁶¹ Lisa Milbrand, "Open Adoption is the New Norm and Here's What It's All About" *Parents Magazine*, online: <<https://www.parents.com/parenting/adoption/facts/what-is-open-adoption/>>; Ashley Feters, "The Hardship of a Very Open Adoption" *The Atlantic* (02 February 2019), online: <<https://www.theatlantic.com/family/archive/2019/02/rock-needs-river-open-adoption/581851/>>.

instance, some families engage in more communal styles of parenting, where multiple adults have parent-like relationships with children, like on some kibbutzes in Israel⁴⁶² and in some indigenous communities.⁴⁶³ As well, in some jurisdictions, including in British Columbia, Newfoundland, and Ontario, governments have acknowledged the possibility of a child having more than two legal parents. Instead of courts replacing one parent with another parent via adoption orders, they can add additional legal parents via legal declarations of parentage in order to formalize communal parenting arrangements.⁴⁶⁴ Scenarios where families may seek legal recognition of more than two parents include:

- Stepparenting arrangements, where instead of replacing a birth parent, a stepparent is added as an additional parent;⁴⁶⁵
- Couples who use surrogates or rely on genetic material from donors, when the surrogate or donor also wishes to actively parent the child;⁴⁶⁶
- People in polyamorous relationships who wish to collectively raise a child together;⁴⁶⁷ and

⁴⁶² Karin Laub, “Communal Living: Kibbutz Life Gets New Look” *Los Angeles Times* (18 October 1987), online: <<https://www.latimes.com/archives/la-xpm-1987-10-18-mn-15102-story.html>>.

⁴⁶³ Kline, *supra* note 175 at 411.

⁴⁶⁴ “Adoption and Declarations of Parentage” *Nelligan o’Brien Payne*, online: <<https://nelliganlaw.ca/service/family-law/adoption/declarations-parentage/>>.

⁴⁶⁵ June Carbone & Naomi Cahn, “Parents, Babies, and More Parents” (2017) 92:1 *Chicago-Kent Law Review* 9 at 18.

⁴⁶⁶ Verity Stevenson, “Quebec families with more than 2 parents fight for recognition” *CBC News* (12 May 2018), online: <<https://www.cbc.ca/news/canada/montreal/quebec-families-with-more-than-2-parents-fight-for-recognition-1.4659522>>.

⁴⁶⁷ Michael MacDonald, “3 adults in polyamorous relationship declared legal parents by N.L. court” *CBC News* (14 June 2018), online: <<https://www.cbc.ca/news/canada/newfoundland-labrador/polyamorous-relationship-three-parents-1.4706560>>.

- Extended families and groups of friends who wish to collectively raise a child together.⁴⁶⁸

Cases such as *Kisimba* suggest that this kind of arrangement may be what some adoptive families prefer.⁴⁶⁹ In order to best provide for a child's needs, some families may wish to add an additional legal parent to the family without removing all parental authority and responsibility from the birth parents. *IRPA*, *IRPR*, the *Citizenship Act*, the *Citizenship Regulations*, and IRCC's internal policy manuals do not specifically address whether these kinds of non-nuclear parenting arrangements would be recognized under the current family sponsorship and citizenship-by-descent framework. Presumably, however, they would not be recognized, as decisions like *Kisimba* demonstrate IRCC's reluctance to recognize the "adding" of a parent without the corresponding "removal" of a parent. Canada's family sponsorship and citizen-by-descent frameworks are set up for families comprised of one or two legal parents with biological or traditionally adopted children.

Questions about ongoing ties to birth parents are more likely to come up in intercountry adoption cases involving open adoptions, relative adoptions, and communal parenting arrangements. Accordingly, these types of non-traditional families are more likely to be scrutinized and refused on the basis that the biological parent-child relationship has not been fully replaced by the adoptive parent-child relationship. While families who are already living in Canada are free to set up their families as they wish and increasingly have the right to have non-traditional parenting arrangements recognized by the law, families hoping to be reunited in Canada do not have this luxury. This inconsistency suggests a two-tiered approach to the state's willingness to recognize family structures. There is one standard for those already in Canada, and another for families hoping to be reunited here, echoing Gaucher's argument that IRCC's assessment of familial relationships functions as an opportunity for the state to reproduce preferred family structures.

⁴⁶⁸ "Why One Married Couple and Their Friend Formed a 3-Parent Family" *WBUR* (06 November 2017), online: <<https://www.wbur.org/hereandnow/2017/11/06/three-parent-family>>.

⁴⁶⁹ *Kisimba*, *supra* note 436.

4 Primary Purpose of the Adoption

The final theme that this paper will explore is the issue of primary purpose. In order for an intercountry adoption file to be approved by IRCC, the primary purpose of the application cannot be to facilitate an immigration or citizenship benefit for an adoptee.⁴⁷⁰ Concerns about the primary purpose of an adoption are often tied to concerns about whether there is a genuine parent–child relationship between the adoptee and adoptive parents, as a finding that the adoptive relationship is not legitimate is often connected to a finding that it was completed for a collateral purpose. This requirement is particularly interesting in the context of intercountry adoption, because many families are motivated to adopt children in foreign countries at least in part because they wish to improve a child’s standard of living by relocating the child to Canada.

In *Smith v Canada (Citizenship and Immigration)*, a 2014 Federal Court case, Ms. Smith’s application for citizenship by descent for her adopted granddaughter, Shana-K, was refused due to a finding that the primary purpose of the adoption was to facilitate a citizenship benefit.⁴⁷¹

Ms. Smith had been in regular contact with Shana-K in Jamaica and supported her financially between 2000 and 2007. Shana-K arrived in Canada as a visitor in 2007, and disclosed to Ms. Smith that she had been sexually abused in Jamaica since the age of 8. This prompted Ms. Smith to seek permanent custody of the child via adoption in 2008, which Shana-K’s biological parents consented to. IRCC refused the application, finding that the adoption was one of convenience, completed primarily “for the purpose of providing Shana-K with a better quality of life in Canada.”⁴⁷² At the Federal Court, Justice Kane said:

I do not share the officer’s view that the intention to provide a better quality of life can only mean one thing—that the adoption is to acquire a status or privilege in Canada, meaning that it is intended to circumvent the statutory requirements.⁴⁷³

⁴⁷⁰ There is also a primary purpose requirement in spousal sponsorship applications. For more on the primary purpose test in that context, see Gaucher, *supra* note 140 at 121-54.

⁴⁷¹ *Smith v Canada (Citizenship and Immigration)*, 2014 FC 929.

⁴⁷² *Ibid* at para 22.

⁴⁷³ *Ibid* at para 56.

Justice Kane went on to say that the IRCC officer did not consider all of the evidence. There was evidence submitted in the application that addressed the longstanding relationship between Ms. Smith and Shana-K, and Ms. Smith said she would return to Jamaica with Shana-K if the application were refused, because raising Shana-K was her responsibility. Justice Kane allowed the application for judicial review, and finished her judgment by saying:

Ms. Smith's goal of providing a better quality of life for Shana-K is also a legitimate goal and is clearly one of the purposes for pursuing the adoption, but the Officer's finding that this intention leads only to the conclusion that the adoption was entered into to circumvent the requirements of IRPA or the Citizenship Act is not supported by the evidence on the record and is not reasonable.⁴⁷⁴

Smith thus stands for the idea that wanting to provide a better quality of life for a child in Canada can be a valid reason why someone completes an intercountry adoption, and does not necessarily mean that an adoption is an adoption of convenience.

Importantly, the desire to provide a child with a better life must take place within the context of a broader desire to be a legal parent to a child. In *Canada (Minister of Citizenship and Immigration) v Dufour*, a 2014 Federal Court of Appeal decision, Justice Gauthier defined adoptions of convenience in the following manner:

Adoptions of convenience are limited to situations where the parties (the adoptee or the adopter) have no real intention to create a parent-child relationship. They are adoptions where appearances do not reflect the reality. They are schemes to circumvent the requirements of the Act or of the Immigration and Refugee Protection Act, S.C. 2001, c. 27. If there is a true intention to create a parent-child relationship and this relationship is in the best interests of the minor child, it cannot normally be concluded that the adoption is entered into primarily to create a status or a privilege in relation to immigration or citizenship.⁴⁷⁵

Dufour clarifies that if there is a real parent-child relationship between the adoptee and the adoptive parent, and the adoption is in the best interests of the adoptee, it would be highly unusual to find that the adoption is one of convenience. When read in conjunction with *Smith*,

⁴⁷⁴ *Ibid* at para 65.

⁴⁷⁵ *Canada (Citizenship and Immigration) v Dufour*, 2014 FCA 81 at paras 55-56 [*Dufour*; emphasis added].

Dufour demonstrates that the common-law definition of adoptions of convenience is closely tied to whether the parent–child relationship is genuine.

Wanting to give a child access to the opportunities and standard of living available in Canada is only acceptable if the parent–child connection between you and the child is clear at the time the sponsorship or citizenship application is submitted. If the parent–child connection is not clear between you and the adoptee at the time the application is submitted, a desire to bring the child to Canada may be viewed by IRCC as a strategy to circumvent normal immigration channels. By returning to the case of *Kisimba*, this becomes clear. In *Kisimba*, Justice Beaudry dismissed the judicial review and upheld the determination that the parent–child relationship was not genuine. The fact that the adoptees’ biological mother consented to the adoption “because she wished her children to have a better education” was identified as a negative factor, in light of how the children did not view the sponsor as their true mother.⁴⁷⁶

Justice Beaudry concluded his dismissal in *Kisimba* by praising the sponsor “for her continuing financial effort in support of these two young people”.⁴⁷⁷ This sentiment echoes statements made by Members of Parliament in the House of Commons when Bill C-14 was being debated, like the comment by then Member of Parliament Omar Alghabra, who applauded parents who “choose to adopt abroad to rescue children from very difficult situations in order to provide them with a hopeful and promising life.”⁴⁷⁸ It is difficult to see how moving to Canada would not be in the best interests of a child who would otherwise live in poverty, with limited access to education, healthcare, and opportunities. Still, some children—like the niece and nephew in *Kisimba*—are being denied the opportunity to do something that would be in their best interests because they cannot prove the existence of a very specific kind of relationship.

The contrast between *Kisimba* and *Smith* brings to mind the idea discussed above in Chapter 4, Part

⁴⁷⁶ *Kisimba*, *supra* note 436 at para 12.

⁴⁷⁷ *Ibid* at para 24.

⁴⁷⁸ *Supra* note 431.

2 that IRCC should view intercountry adoptions in a forward-looking manner.⁴⁷⁹ Timing is clearly relevant in intercountry adoption cases, because decision makers can still regard adoptions with skepticism when the bond between the adoptee and adoptive parent is not yet fully developed at the time the application is submitted, despite the fact that the Federal Court acknowledged that adoptive relationships will grow stronger over time. The adoptive mother in *Kisimba* wanted to provide a better life for the adoptees, just like the adoptive mother in *Smith*, but because the adoptive mother in *Kisimba* was not able to demonstrate a convincing mother–child relationship at the time the sponsorship application was submitted, her application was refused.

5 Summary

If a prospective adoptive parent wishes to “rescue” a child from abroad via intercountry adoption, they must be prepared to prove that their relationship with that child is “worthy of access to Canadian borders”.⁴⁸⁰ Worthiness, in turn, is determined based on factors like the legality of the adoption order, the strength of the adoptive parent–child relationship, the severance of the birth parent–child relationship, and the primary purpose of the adoption.

These factors, enumerated in the legislative and policy framework and explored in the case law, are derived from a specific understanding of what genuine parenting looks like. Only mothers and fathers count as true parents, and a true parent’s decision-making authority over a child must trump anyone else’s. A genuine parent supports his or her child financially, knows about the child’s life, and is emotionally invested in the child’s well-being. Whereas the desire to provide the best possible lifestyle for a child flows naturally from a parental relationship, if someone who does not fit the traditional parent mould wishes to bring a child to Canada in order to access a better quality of life, this is seen as cheating the system and undeserving of the right to family reunification.

In addition to the themes explored in this chapter, there are other important questions that emerge from the case law. For example, there are cases exploring the question of lock-in dates, and what

⁴⁷⁹ *Supra* note 448.

⁴⁸⁰ Gaucher, *supra* note 140 at 152.

happens if an adoptee is adopted before the age of 18 but the sponsorship or citizenship application is not decided until after the adoptee turns 18.⁴⁸¹ There are also cases that consider the issue of what it means for a child to be “legally available for adoption” in his or her home country.⁴⁸² An exploration of provincial adoption case law would also reveal interesting legal issues, including questions about what it means to be a “resident” for the purposes of qualifying for an adoption in a particular province.⁴⁸³ These cases would be a rich area for future study, but are beyond the scope of the present thesis.

⁴⁸¹ See e.g., *Al-Shikarchy v Canada (Minister of Citizenship and Immigration)*, 2007 CarswellNat 6002 (IAD); *Ghazimoradi v Canada (Minister of Citizenship and Immigration)*, 2008 CarswellNat 2364 (IAD); *Lidder v Canada (Minister of Employment and Immigration)*, 1992 CarswellNat590 (FCA).

⁴⁸² See e.g., *Vaganova v Canada (Minister of Citizenship and Immigration)* 2006 CarswellNat 4192 (IAD); *Bhanot v Canada (Minister of Citizenship and Immigration)*, 2002 CarswellNat 3904 (IAD); *Shaibon v Canada (Minister of Citizenship and Immigration)*, 2008 CarswellNat 4295 (IAD).

⁴⁸³ See e.g., *Re: K*, 1978 CarswellOnt 338 (ONCA); *Re: Rai*, 1980 CarswellOnt 1305 (ONCA); *Re: A(CT)*, 2010 ONSC 2222.

Chapter 7

Conclusion

There are numerous hierarchies and preferences embedded in Canada's intercountry adoption law and policy. Whereas the legal tests meant to assess adoptive relationships in IRCC's intercountry adoption sponsorship and citizenship streams are substantively very similar, permanent resident sponsors are scrutinized to a greater extent than citizens who hope to pass citizenship on to their adopted children. As well, compared to applications for permanent residency, IRCC's citizenship-by-descent stream for international adoptees is faster, less expensive, and contains fewer opportunities for refusal. By comparing IRCC's sponsorship and citizenship schemes for adoptees, we can see that the right of Canadian citizens to build their families via cross-border adoption is more protected than that of Canadian permanent residents to do the same. Another historical preference reveals itself when we appreciate that children adopted by Canadian citizens only gained the right to access citizenship-by-descent in 2007. Prior to this, biological children born abroad and adoptees born abroad were treated in starkly different ways, with biological children having a greater entitlement to citizenship than adopted children.

Further hierarchies become apparent when we examine common-law approaches to intercountry adoption in Canada at the Federal Court and the IAD. Adoption orders that are issued by a foreign court are generally viewed with greater deference than adoptions that are arranged privately. As well, it is important to consider how decision makers assess whether the new adoptive parent-child relationship fully replaces the previous biological parent-child relationship. A review of the case law addressing this issue shows that adoptees who still have a relationship with their biological families, adoptees who are adopted by relatives in Canada, and adoptees who are in open adoption arrangements are more likely to have the legitimacy of their adoptions questioned. Moreover, it is difficult to see how families who practice non-traditional and non-nuclear forms of family-building—like communal child-rearing and having more than two legal parents—would fit into IRCC's intercountry adoption scheme. While non-traditional forms of family-building are being increasingly recognized by domestic family law systems in Canada, our family immigration system seems reluctant to provide similar recognition. Finally, though the desire to provide a better life for a disadvantaged child via intercountry adoption has been praised by politicians and judges in Canada, not all needy children have been found to be

deserving of the right to join family members in Canada. It is only when the desire to “rescue” a child takes place within the context of a traditional, nuclear parent–child relationship that it is viewed positively. Otherwise, there is a risk that this intention will be construed as an attempt to circumvent proper immigration channels.

These hierarchies and preferences demonstrate how Canadian intercountry adoption law plays a role in our nation-building project. While the state is limited in its ability to control how people already in Canada choose to build their families and manage their intimate relationships, family immigration programs provide an opportunity for the state to impose standards on families hoping to reunite in Canada, creating what Gaucher calls a “hierarchy of legitimate relationships”.⁴⁸⁴

The fact that there are discrepancies between what kinds of familial relationships are permitted to exist and legally recognized domestically and what kinds of familial relationships are permitted and recognized in the immigration context brings to mind the question of why the state has an interest in preventing some children from immigrating to Canada via intercountry adoption. Undoubtedly, few would deny that identifying and stopping child trafficking is an important reason to scrutinize international adoptive families. But the fact that some cases are still viewed suspiciously by IRCC when there are no child trafficking concerns suggests that there are other considerations at play as well. The Hague Adoption Convention directs signatory states to regulate intercountry adoption in a way that promotes the best interests of the child. But was it truly in the best interests of the children in *Kisimba* to be denied the chance to live with their aunt in Canada? Why were decision makers so preoccupied with the fact that the adoptees still considered their biological mother to be their true mother, even when everyone seemed to agree that the children would benefit from the aunt’s financial support and ability to provide access to a better education in Canada? What potential harms are we countering by preventing these kinds of family arrangements from attracting an immigration benefit?

Child migration generally and intercountry adoption specifically have always played a role in furthering Canada’s political and practical goals. Early waves of children were sent here to fill a

⁴⁸⁴ Gaucher, *supra* note 140 at 178.

need for cheap labour, and formal intercountry adoption programs were set up partly as a way to demonstrate superiority over struggling communist states during the Cold War. More recently, Members of Parliament who advocated for the 2007 changes to the *Citizenship Act* cited our declining birth rate and need to sustain our population as reasons why we should facilitate intercountry adoptees' access to citizenship-by-descent. Today, there are still reasons to see intercountry adoption as a positive and necessary practice, despite the criticisms that have been levied against it. We have a declining birth rate in Canada,⁴⁸⁵ assisted human reproduction is difficult to access for many Canadians,⁴⁸⁶ and there is a lack of babies available for adoption domestically.⁴⁸⁷ In light of these realities, why do we not allow more children to immigrate in order to live with Canadian families with whom they have kinship ties, particularly when studies have shown that immigration at a younger age promotes better integration and better long-term educational outcomes?⁴⁸⁸ Are there security concerns about admitting children to Canada as adoptees?⁴⁸⁹ Are there fears that adoptees will subsequently be abandoned by their adoptive

⁴⁸⁵ See Statistics Canada, *Older Moms*, *supra* note 5.

⁴⁸⁶ For more on the challenges of accessing assisted human reproduction in Canada, see the articles listed here: "Addressing the Gaps in Canada's Assisted Reproduction Policy" *Policy Options* (15 April 2019), online: <<https://policyoptions.irpp.org/magazines/april-2019/addressing-the-gaps-in-canadas-assisted-reproduction-policy/>>.

⁴⁸⁷ Patel, *supra* note 237.

⁴⁸⁸ See e.g., Miles Corak, "Age at Immigration and the Education Outcomes of Children" *Statistics Canada* (October 2011), online: <<https://www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2011336-eng.pdf?st=2NSmEufM>>; Sander Gerritsen, Mark Kattenberg & Sonny Kuijpers, "The Impact of Age at Arrival on Education and Mental Health" *CPB Netherlands Bureau for Economic Policy Analysis* (January 2019), online: <<https://www.cpb.nl/sites/default/files/omnidownload/CPB-Discussion-Paper-389-The-impact-of-age-at-arrival-on-education-and-mental-health.pdf>>; New Zealand Immigration, "The Settlement Outcomes of Migrant Youth" *Ministry of Business, Innovation & Employment* (September 2017), online: <<https://www.mbie.govt.nz/dmsdocument/2835-settlement-outcomes-migrant-youth-bibliography-pdf>>.

⁴⁸⁹ The idea that intercountry adoption will allow child terrorists to infiltrate our borders was quickly rejected during the House of Common debates about Bill C-14. During one discussion, the Chair asked the following:

Of course, you hear so much about terrorism today and of adoptions of convenience. Is there any evidence you can point to of terrorists wanting to bring children into Canada through adoption and the citizenship process, or anything like this, that has come before you or you might be aware of?

Mark Davidson, then-director of citizenship, responded by saying:

The short answer is no. The slightly longer answer is that the vast majority of these cases are the classic Canadian family adopting minor children, under four or five years, and the vast majority of those cases are processed very expeditiously. There is no evidence there is a problem. The challenging cases tend to

families and become the responsibility of the state?⁴⁹⁰

Ultimately, the reason for our restrictive approach to intercountry adoption is likely tied to Canada's complex relationship with kinship-based immigration as a concept. As explained above in Chapter 2, the majority of immigrants coming to Canada actually qualify to immigrate by virtue of their familial relationships, either as accompanying family members or as sponsored family members.⁴⁹¹ Family reunification is also specifically listed as one of the objectives of our immigration system in *IRPA*.⁴⁹² Nevertheless, Canada has a restrictive approach to kinship-based immigration. It is at best challenging and at worst impossible to sponsor relatives beyond the nuclear family unit. For those who can sponsor or bring their relatives with them to Canada, spousal relationships and parent–child relationships must match the government's strict definitions of what genuine relationships look like.

We can see how calls to restrict family-based immigration have been used as a political tool by looking to recent statements made by President Trump in the United States. The Trump regime has referred to kinship-based immigration in pejorative terms, calling it “horrible chain migration” and saying it poses a threat to Americans.⁴⁹³ In Canada in 2013, then-Minister of Citizenship and Immigration Jason Kenney spoke of parent and grandparent sponsorship in a

involve older children where there is some evidence of concerns about adoptions of convenience. But in terms of security or criminality concerns for adoptees, there are absolutely none.

See Canada, Standing Committee on Citizenship and Immigration, *Evidence* (19 June 2006).

⁴⁹⁰ It is unclear whether there is a problem with adopted children being abandoned by their families after immigrating. It is difficult to find information about this as once the children become permanent residents or citizens, the situation would be treated no differently from a domestic child welfare matter. In any case, this concern was not expressed when Bill C-14 was being debated.

⁴⁹¹ *Supra* note 86.

⁴⁹² *IRPA*, *supra* note 38 at s 3(1)(d): “The objectives of this Act with respect to immigration are... to see that families are reunited in Canada”.

⁴⁹³ Nick Miroff, “Family ties drive US immigration. Why Trump wants to break the ‘chains.’” *The Washington Post* (02 January 2018), online: <https://www.washingtonpost.com/world/national-security/how-chain-migration-became-a-target-in-trumps-immigration-agenda/2018/01/02/dd30e034-efdb-11e7-90ed-77167c6861f2_story.html>.

similar way, calling for “practical limits on Canada’s generosity”.⁴⁹⁴

On some level, the state is anxious about what will happen if unrestricted family-based immigration was permitted. Scholars have explored the issue of Canada’s restrictive family immigration category from various vantage points. Some have argued that modern neoliberal states view the family as an “undesirable grouping of dependents”.⁴⁹⁵ This idea is apparent in Jason Kenney’s attempts to curb parent and grandparent immigration based on the premise that older immigrants are a burden on the welfare state. Others have considered how family immigration was impacted by broader security concerns in a post-9/11 world.⁴⁹⁶ Gaucher argues that underlying these various frameworks of analysis is the state’s desire to police membership in the national community via immigration and citizenship regimes in order to construct ideal citizens, and by extension, ideal families.⁴⁹⁷ If the state allowed any kind of kinship tie to form the basis of an immigration application, it would lose its ability to “reproduce the nuclear family unit” by controlling which migrant families deserve full membership and which ones do not.⁴⁹⁸ In a way, every non-economic immigrant who is not selected via Canada’s points system represents a loss of state control over membership. Limiting what kinds of familial relationships warrant an immigration benefit is one way the state can try to regain some control.

Ideas that warrant future exploration and study include the possibility of intercountry fostering systems, wherein instead of only recognizing full adoption, we allow other kinds of guardians to sponsor and care for children in Canada when it would be in the child’s best interests. Aunts, uncles, siblings, and grandparents in Canada may be well-positioned to provide for children in need who are born abroad.

⁴⁹⁴ Meagan Fitzpatrick, “Don’t bring parents here for welfare, Kenney says” *CBC News* (10 May 2013), online: <<https://www.cbc.ca/news/politics/don-t-bring-parents-here-for-welfare-kenney-says-1.1351002>>.

⁴⁹⁵ Gaucher, *supra* note 140 at 7.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid* at 8.

⁴⁹⁸ *Ibid* at 8-9.

Similarly, it may be beneficial to explore the possibility of legally recognizing that a child can have more than two legal parents. In order to protect the best interests of the child, it may not always be necessary to cut off the biological parent–child connection and replace it with a new one. For adoptees in open adoption arrangements, who still wish to have a relationship with their biological family, it may benefit them to allow them to maintain a legal as well as emotional connection to their birth country and family.

Finally, in terms of procedural issues, it may be beneficial to eliminate the requirement that permanent residents must reside in Canada throughout sponsorship process. This requirement typically leads to lengthy family separations that are difficult for adoptive parents as well as adoptees.

As Gaucher has identified,

If family is about interdependency and care, then we must recognize that what constitutes family is broader than we admit. The complexity of care and the translation of this complexity to the development of our personal relationships warrant attention in citizenship discourse.⁴⁹⁹

If we are to adopt an approach to international child welfare that is truly in line with the best interests of the child framework and that truly enables family reunification, we must be prepared to think of kinship, family, and care in broader and more inclusive terms.

⁴⁹⁹ Gaucher, *supra* note 140 at 180.

Bibliography

International Instruments

Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, United Nations General Assembly, Session 41, Res 85, 3 December 1986.

Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 29 May 1993, 32 ILM 1139 (entered into force December 1996).

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 15 November 2000, UN General Assembly resolution 55/25, Article 3.

United Nations Convention on the Rights of the Child, United Nations General Assembly, Session 44, Res 25, 20 November 1989.

Canadian Legislation

Adoption Act, 2013, SNL 2013, c A-3.1.

Adoption Act, RSBC 1996, c 5.

Adoption Regulation, Alta Reg 187/2004.

Adoption Regulation, BC Reg 291/96.

Assisted Human Reproduction Act, SC 2004, c 2.

Child and Family Services Act, SY 2008, c 1.

Child, Youth and Family Enhancement Act, RSA 2000, c C-12.

Citizenship Act, RSC 1985, c C-29.

Immigration and Refugee Protection Act, SC 2001, c 27.

Immigration and Refugee Protection Regulations, SOR/2002-227.

Intercountry Adoption (Hague Convention) Act, RSPEI 1998, c I-4.1.

Intercountry Adoption (Hague Convention) Act, RSY 2002, c 121.

Intercountry Adoption (Hague Convention) Act, SNWT 1998, c 19.

Intercountry Adoption (Hague Convention) Act, SNWT 1998, c 19, as duplicated for Nunavut by s 29 of the Nunavut Act, SC 1993, c 28.

Intercountry Adoption Act Regulations, 1998, O Reg 200/99.

Intercountry Adoption Act, 1998, SO 1998, c 29.

Intercountry Adoption Act, SNS 1998, c 15.

The Adoption Act, SM 1997, c 47, CCSM c A2.

The Intercountry Adoption (Hague Convention) Act, SM 1997, c 52, CCSM c A3.

The Intercountry Adoption (Hague Convention) Implementation Act, SS 1995, c I-10.01.

Government Documents

Barriers to Adoption: Hearings Before the Senate Committee on Labor and Human Resource, 99th Cong 213 (1985).

BC Representative for Children and Youth, “Finding Forever Families: A Review of the Provincial Adoption System” (June 2014), online: <https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/rcy_adoptionsreport2014_final.pdf>.

Canada, Parliament, *House of Commons Debates* (01 May 1947).

Canada, Parliament, *House of Commons Debates* (26 May 1954).

Canada, Parliament, *House of Commons Debates* (13 June 2006).

Canada, Parliament, *House of Commons Debates* (01 June 2007).

Canada, Standing Committee on Citizenship and Immigration, *Evidence* (19 June 2006).

Garnett Picot, Yan Zhang & Feng Hou, “Labour Market Outcomes Among Refugees to Canada” *Statistics Canada* (11 March 2019), online: <<https://www150.statcan.gc.ca/n1/pub/11f0019m/11f0019m2019007-eng.htm>>.

Government of Alberta, “International Adoption” *Alberta Adoption Services* (2019), online: <<https://www.alberta.ca/international-adoption.aspx#toc-1>>.

Government of British Columbia, “In Vitro Fertilization for Infertility” *Health Link BC* (21 November 2017), online: <<https://www.healthlinkbc.ca/health-topics/hw227379>>.

Government of British Columbia, “Intercountry Adoption Alerts: China, Cambodia, Guatemala” *Ministry of Children and Family Development* (September 2013), online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/births-and-adoptions/adoption/intercountry-adoption/china_cambodia_guatemala.pdf>.

- Government of British Columbia, “Intercountry Adoption Alerts: DRC, Russia, Pakistan, Nepal, Liberia” *Ministry of Children and Family Development* (May 2019), online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/births-and-adoptions/adoption/intercountry-adoption/ica_alerts_non-hague_countries.pdf>.
- Government of British Columbia, “Intercountry Adoption Fact Sheet 5” *Ministry of Children and Family Development* (June 2013), online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/births-and-adoptions/adoption/intercountry-adoption/fact_sheet_5.pdf>.
- Government of Canada, “Admission Category and Applicant Type (46), Period of Immigration (7), Age (12) and Sex (3) for the Immigrant Population Who Landed Between 1980 and 2016, in Private Households of Canada, Provinces and Territories, 2016 Census - 25% Sample Data” *Statistics Canada* (17 June 2019), online: <<https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=110557&PRID=10&PTYPE=109445&S=0&SHOWALL=0&SUB=0&Temporal=2017&THEME=120&VID=0&VNAMEE=&VNAMEF=undefined&>>.
- Government of Canada, “An Act respecting First Nations, Inuit and Metis children, youth and families: Backgrounder” *Indigenous Services Canada* (28 February 2019), online: <<https://www.canada.ca/en/indigenous-services-canada/news/2019/02/an-act-respecting-first-nations-inuit-and-metis-children-youth-and-families.html>>.
- Government of Canada, “Archived – Notice – Important notice regarding adoptions from Russia” *Immigration, Refugees and Citizenship Canada* (15 November 2013), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadians/adopt-child-abroad/restrictions.html>>.
- Government of Canada, “Archived—Notice—Adoptions from Pakistan” *Immigration, Refugees and Citizenship Canada* (01 July 2013), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/adoptions-pakistan.html>>.
- Government of Canada, “Backgrounder—Facts in Canada’s Immigration History” *Immigration, Refugees and Citizenship Canada* (27 June 2011), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/news/archives/backgrounders-2011/facts-canada-immigration-history.html>>.
- Government of Canada, “Barnardo’s Homes” *Library and Archives Canada* (27 September 2019), online: <<https://www.bac-lac.gc.ca/eng/discover/immigration/immigration-records/home-children-1869-1930/home-children-guide/Pages/barnardo-homes.aspx>>; Tom Symonds, “The child abuse scandal of the British children sent abroad” *BBC News* (26 February 2017), online: <<https://www.bbc.com/news/uk-39078652>>.
- Government of Canada, “Changes to citizenship rules 2009 to 2015” *Immigration, Refugees and Citizenship Canada*, online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-citizenship/act-changes/rules-2009-2015.html>>.

- Government of Canada, “Check Processing Times” *Immigration, Refugees and Citizenship Canada* (04 December 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/application/check-processing-times.html>>.
- Government of Canada, “Citizenship process—Intercountry adoption: Why can apply” *Immigration, Refugees and Citizenship Canada* (19 February 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadians/adopt-child-abroad/processes/choose-process/citizenship/eligibility.html>>.
- Government of Canada, “Countries with suspensions or restrictions on international adoptions” *Immigration and Citizenship* (29 August 2018), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadians/adopt-child-abroad/restrictions.html>>.
- Government of Canada, “CP 14: Grant of Canadian Citizenship for Persons Adopted by Canadian Citizens” *Immigration, Refugees and Citizenship Canada* (11 June 2015), online: <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/cp/cpl4-eng.pdf>>.
- Government of Canada, “Dependent Children” *Immigration, Refugees and Citizenship Canada* (18 December 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/dependent-children.html>>.
- Government of Canada, “DNA Testing” *Immigration, Refugees and Citizenship Canada* (23 January 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/dna-testing.html>>.
- Government of Canada, “Fee List” *Immigration, Refugees and Citizenship Canada* (29 November 2019), online: <<https://www.cic.gc.ca/english/information/fees/fees.asp#citizenship>>.
- Government of Canada, “Glossary” *Immigration, Refugees and Citizenship Canada* (27 June 2019), online: <<http://www.cic.gc.ca/english/helpcentre/glossary.asp#d>>.
- Government of Canada, “Guide 5772 - Application to Sponsor Parents and Grandparents” *Immigration, Refugees and Citizenship Canada* (17 July 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5772-application-sponsor-parents-grandparents.html>>.
- Government of Canada, “Help your spouse or common-law partner work in Canada” *Immigration, Refugees and Citizenship Canada* (10 October 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/work/help-your-spouse-common-law-partner-work-canada.html>>.
- Government of Canada, “History of citizenship legislation” *Immigration, Refugees and Citizenship Canada* (06 July 2015), online: <<https://www.canada.ca/en/immigration->

refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/overview/history-legislation.html>.

Government of Canada, “Home Child Care Provider Pilot and Home Support Worker Pilot: About the process” *Immigration, Refugees and Citizenship Canada* (19 September 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/caregivers/child-care-home-support-worker/no-experience-about.html>>.

Government of Canada, “Humanitarian and compassionate considerations: Assessment and processing” *Immigration, Refugees and Citizenship Canada* (11 July 2017), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing.html>>.

Government of Canada, “Humanitarian and compassionate: Inadmissibility of family members (A42)” *Immigration, Refugees and Citizenship Canada* (12 March 2018), <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/dealing-with-inadmissibility/inadmissibility-family-members-a42.html>>.

Government of Canada, “Immigration, Refugees and Citizenship Canada Departmental Plan 2018–2019” *Immigration, Refugees and Citizenship Canada* (20 December 2018), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/departmental-plan-2018-2019/departmental-plan.html>>.

Government of Canada, “IP 2: Processing Applications to Sponsor Members of the Family Class” *Immigration, Refugees and Citizenship Canada* (2011), online: <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/ip/ip02-eng.pdf>>.

Government of Canada, “Jews” *Library and Archives Canada* (25 March 2019), online: <<https://www.bac-lac.gc.ca/eng/discover/immigration/history-ethnic-cultural/Pages/jewish.aspx>>.

Government of Canada, “OP 3: Adoptions” *Immigration, Refugees and Citizenship Canada* (2015), online: <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/op/op03-eng.pdf>>.

Government of Canada, “Operational Bulletin 183 – February 8, 2010” *Immigration, Refugees and Citizenship Canada* (25 March 2010), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2010/183-february-8-2010.html>>.

Government of Canada, “Permanent resident program: Economic classes” *Immigration, Refugees and Citizenship Canada* (18 June 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/economic-classes.html>>.

Government of Canada, “Permanent resident program: Non-economic classes” *Immigration, Refugees and Citizenship Canada* (2018), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes.html>>.

Government of Canada, “Prohibitions related to purchasing reproductive material and purchasing or selling in vitro embryos” *Health Canada* (18 July 2013), online: <<https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction/prohibitions-purchasing-reproductive-material-selling-vitro-embryos.html>>.

Government of Canada, “Proof of funds – Skilled Immigrants (Express Entry)” *Immigration, Refugees and Citizenship Canada* (28 February 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/documents/proof-funds.html>>.

Government of Canada, “Public Policy to facilitate the immigration of certain sponsored foreign nationals excluded under paragraph 117(9)(d) or 125(1)(d) of the Immigration and Refugee Protection Regulations” *Immigration, Refugees and Citizenship Canada* (11 July 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/excluded.html>>.

Government of Canada, “Revocation of Citizenship” *Immigration, Refugees and Citizenship Canada* (08 December 2017), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/acquisition-loss/revocation.html>>.

Government of Canada, “Rights of Children” *Canadian Heritage* (14 November 2017), online: <<https://www.canada.ca/en/canadian-heritage/services/rights-children.html>>.

Government of Canada, “Sponsor your spouse, common-law partner, conjugal partner or dependent child – Complete Guide (IMM 5289)” *Immigration, Refugees and Citizenship Canada* (03 July 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5289-sponsor-your-spouse-common-law-partner-conjugal-partner-dependent-child-complete-guide.html>>.

Government of Canada, “Sponsorship of adopted children and other relatives—The sponsor’s guide (IMM 5196)” *Immigration, Refugees and Citizenship Canada* (10 May 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5196-sponsorship-adopted-children-other-relatives-sponsor.html>>.

Government of Canada, “The humanitarian and compassionate assessment: De facto family members” *Immigration, Refugees and Citizenship Canada* (11 July 2017), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-facto-family-members.html>>.

- Government of Canada, “The Komagata Maru Incident of 1914” *Parks Canada* (07 August 2016), online: <<https://www.canada.ca/en/parks-canada/news/2016/08/the-komagata-maru-incident-of-1914.html>>.
- Government of Canada, “Types of work permits for your situation” *Immigration, Refugees and Citizenship Canada* (05 May 2019), online: <http://www.cic.gc.ca/english/work/apply-who-permit-result.asp?q1_options=1i&q2_options=2d>.
- Government of Canada, “Types of work permits” *Immigration, Refugees and Citizenship Canada* (24 October 2018), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/permit/temporary/work-permit-types.html>>.
- Government of Canada, “Understanding Permanent Resident Status” *Immigration, Refugees and Citizenship Canada* (28 January 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/pr-card/understand-pr-status.html>>.
- Government of Canada, “Who is a parent for citizenship purposes where assisted human reproduction (AHR), including surrogacy arrangements, are involved” *Immigration, Refugees and Citizenship Canada* (26 March 2014), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/administration/identity/who-parent-purposes-where-assisted-human-reproduction-including-surrogacy-arrangements-involved.html>>.
- Government of Canada, “Work off campus as an international student” *Immigration, Refugees and Citizenship Canada* (04 June 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/work/work-off-campus.html>>.
- Government of the United States of America, “Adoption in Nigeria” *US Department of State* (2019), online: <<https://ng.usembassy.gov/u-s-citizen-services/adoption/adoption-in-nigeria>>.
- Government of the United States of America, “Romania Intercountry Adoption Information” *US Department of State* (2019), online: <<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Romania.html>>.
- Library and Archives Canada, *Memorandum to the Minister from the Deputy Minister* (21 January 1963), RG 76, Vol 778, File 537-7, Part 14.
- Miles Corak, “Age at Immigration and the Education Outcomes of Children” *Statistics Canada* (October 2011), online: <<https://www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2011336-eng.pdf?st=2NSmEufM>>.
- New Zealand Immigration, “The Settlement Outcomes of Migrant Youth” *Ministry of Business, Innovation & Employment* (September 2017), online: <<https://www.mbie.govt.nz/dmsdocument/2835-settlement-outcomes-migrant-youth-bibliography-pdf>>.

Ontario Human Rights Commission, “Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare” (2018), online: <http://www.ohrc.on.ca/sites/default/files/Interrupted%20childhoods_Over-representation%20of%20Indigenous%20and%20Black%20children%20in%20Ontario%20child%20welfare_accessible.pdf>.

Sander Gerritsen, Mark Kattenberg & Sonny Kuijpers, “The Impact of Age at Arrival on Education and Mental Health” *CPB Netherlands Bureau for Economic Policy Analysis* (January 2019), online: <<https://www.cpb.nl/sites/default/files/omnidownload/CPB-Discussion-Paper-389-The-impact-of-age-at-arrival-on-education-and-mental-health.pdf>>.

Statistics Canada, *Ethnic and Cultural Origins of Canadians: A Portrait of a Rich Heritage* (Ottawa: Census Program, 2017), online: <<http://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016016/98-200-x2016016-eng.cfm>>.

Statistics Canada, *Fertility: Fewer Children, Older Moms* (Ottawa: Census Program, 2017), online: <<https://www.statcan.gc.ca/pub/11-630-x/11-630-x2014002-eng.htm>>.

Statistics Canada, *Fertility: Overview, 2012 to 2016* (Ottawa: Census Program, 2018), online: <<https://www150.statcan.gc.ca/n1/pub/91-209-x/2018001/article/54956-eng.htm>>.

Statistics Canada, *Same-Sex Couples in Canada in 2016* (Ottawa: Census Program, 2017), online: <<http://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016007/98-200-x2016007-eng.cfm>>.

US Department of State – Bureau of Consular Affairs, “China”, online: <<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/China.html>>.

US Department of State – Bureau of Consular Affairs, “Mexico”, online: <<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Mexico.html>>.

Case Law

Adejumo v Canada (Minister of Citizenship & Immigration), 2011 FC 1485.

Al-Shikarchy v Canada (Minister of Citizenship and Immigration), 2007 CarswellNat 6002 (IAD).

Bhanot v Canada (Minister of Citizenship and Immigration), 2002 CarswellNat 3904 (IAD).

Boachie v Canada (Minister of Citizenship and Immigration), 2010 FC 672.

Bousaleh v Canada (Minister of Citizenship and Immigration), 2018 FCA 143.

Canada (Citizenship and Immigration) v Dufour, 2014 FCA 81.

Canada (Citizenship and Immigration) v Kandola, 2014 FCA 85.

Canada (Minister of Citizenship and Immigration) v Khosa, 2001 FCT 1198.

De Guzman v Canada (Minister of Citizenship and Immigration) (1995), 33 Imm LR (2d) 28 (IAD).

De Rosa v Canada (Minister of Citizenship and Immigration), 2012 CanLII 61483 (CA IRB).

Ghazimoradi v Canada (Minister of Citizenship and Immigration), 2008 CarswellNat 2364 (IAD).

Hurd v Canada (Minister of Citizenship and Immigration), 2003 FCT 719.

Hussien v Canada (Minister of Citizenship and Immigration), 2006 CanLII 52318 (IAD).

Jeerh v Canada (Minister of Citizenship and Immigration), 1999 CarswellNat 849 (FC).

Kenne v Canada (Minister of Citizenship and Immigration), 2010 FC 1079.

Kisimba v Canada (Minister of Citizenship and Immigration), 2008 FC 252.

Lee v Canada (Minister of Citizenship and Immigration), 2003 CarswellNat 4892 (IAD).

Lidder v Canada (Minister of Employment and Immigration), 1992 CarswellNat590 (FCA).

Pabla v Canada (Minister of Citizenship and Immigration), 2000 CarswellNat 2958 (FC).

Perera v Canada (Minister of Citizenship and Immigration), 2001 FCT 1047.

Punia v Canada (Citizenship and Immigration), 2011 CanLII 88084 (CA IRB).

Re: C.T.A., 2010 ONSC 2222.

Re: K, 1978 CarswellOnt 338 (ONCA).

Re: Rai, 1980 CanLII 1644 (ON CA).

Roos v Canada (Minister of Citizenship and Immigration), 2009 CarswellNat 5395 (IAD).

Shaibon v Canada (Minister of Citizenship and Immigration), 2008 CarswellNat 4295 (IAD).

Singh v Canada (Minister of Citizenship and Immigration), 2012 FC 1302.

Sinniah v Canada (Minister of Citizenship and Immigration), 2002 FCT 822.

Smith v Canada (Citizenship and Immigration), 2014 FC 929.

Vaganova v Canada (Minister of Citizenship and Immigration) 2006 CarswellNat 4192 (IAD).

Zhang v Canada (Minister of Citizenship and Immigration), 2012 CarswellNat 6328 (IAD).

Scholarly Texts

Andrew C Brown, “International Adoption Law: A Comparative Analysis” (Fall 2009) 43:3 International Lawyer 1337.

Anita Gibbs, “‘Having to Adopt Children Twice is not in the Children’s Best Interests’: A Reflective Case Study Analysis of Intercountry Adoption Policy in the UK” (2011) 33:3 J Soc Welfare & Fam L 267.

Anne Collinson, “The Littlest Immigrants: Cross-Border Adoption in the Americas, Policy, and Women’s History” (2007) 19:1 Journal of Women’s History 132.

Arthur D Sorosky et al, *The Adoption Triangle: Sealed or Open Records: How They Affected Adoptees, Birth Parents, and Adoptive Parents* (New York City: Doubleday, 1978).

Audrey Macklin, “Exile on Mainstreet: Popular Discourse and Legal Manoeuvres Around Citizenship” in Law Commission of Canada, ed, *Law and Citizenship* (Vancouver: UBC Press, 2006) 22.

Audrey Macklin, “Freeing Migration from the State: Michael Trebilcock on Migration Policy” (2010) 60 University of Toronto Law Journal 315.

Audrey Macklin, “From Settler Society to Warrior Nation and Back Again” in Jatinder Mann (ed), *Citizenship in Transnational Perspective* (Cham: Palgrave Macmillan, 2017) 285.

Ayelet Shachar, “Bordering Migration/Migrating Borders” (2019) 37:1 Berkeley Journal of International Law 93.

Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

Bo Vinnerljung, Frank Lindblad, Anders Hjern, Finn Rasmussen & Monica Dalen, “School Performance at Age 16 Among International Adoptees: A Swedish National Cohort Study” (July 2010) 53:4 International Social Work 510.

Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Cambridge: Harvard University Press, 2016).

Catherine Ceniza Choy, *Global Families: A History of Asian International Adoption in America* (New York: New York University Press, 2013).

Catherine Dauvergne, “Citizenship with a Vengeance” (2007) 8:2 Theoretical Inquiries in Law 489.

- Catherine Dauvergne, "Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics" (2000) 24 Melbourne University Law Review 280.
- Celica Bojorge, "Intercountry Adoptions: In the Best Interests of the Child?" (2002) 2:2 QUTLJ 266.
- Chantal Collard, "The Transnational Adoption of a Related Child in Quebec, Canada" in Laura Briggs & Diana Marre, eds, *International Adoption: Global Inequalities and the Circulation of Children* (New York University Press: New York, 2012).
- Christian Joppke, "The Inevitable Lightening of Citizenship" (2010) 51:1 European Journal of Sociology 9.
- Claudia Fonseca, "An Unexpected Reversal: Charting the Course of International Adoption in Brazil" (October 2002) 26:3 Adoption & Fostering 28.
- Claudia Fonseca, "Transnational Connections and Dissenting Views: The Evolution of Child Placement Policies in Brazil" in Diana Marre & Laura Briggs, eds, *International Adoption: Global Inequalities and the Circulation of Children* (New York: New York University Press, 2009) 169.
- Damien Ngabonziza, "Moral and Political Issues Facing Relinquishing Countries" (1991) 15:4 Adoption & Fostering 75.
- Dana E Johnson, "Long-Term Medical Issues in International Adoptees" (2000) 29:4 Pediatric Annals 234.
- Daphna Hacker, *Legalized Families in the Era of Bordered Globalization* (New York: Cambridge University Press, 2017) at 65, citing Alan Hunt, *Explorations in Law and Society* (New York: Routledge, 1993).
- David M Smolin, "Intercountry Adoption as Child Trafficking" (2002) 39:2 Valparaiso University Law Review 281.
- David Smolin, "The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals" (2005) 35:403 Seton Hall L Rev 494.
- Denise Cuthbert, Ceridwen Spark & Kate Murphy, "'That was Then, but This is Now': Historical Perspectives on Intercountry Adoption and Domestic Child Adoption in Australian Public Policy" (September 2010) 23:3 Journal of Historical Sociology 427.
- E. Wayne Carp, *Adoption in America: Historical Perspectives* (Ann Arbor: University of Michigan Press, 2004).
- Elizabeth A Suter, "Negotiating Identity and Pragmatism: Parental Treatment of International Adoptees' Birth Culture Names" (2012) 12:3 Journal of Family Communication 209.

- Elizabeth Bartholet, “Advocating for the Child’s Human Right to Family” (2017) 109 *Adoption Advocate* 1.
- Elizabeth Bartholet, “International Adoption” in Lori Askeland, ed, *Children and Youth in Adoption, Orphanages, and Foster Care* (Westport: Greenwood Publishing, 2005) 107.
- Elizabeth Bartholet, “The Hague Convention: Pros, Cons, and Potential” in Robert L Ballard et al, eds, *The Intercountry Adoption Debate: Dialogues Across Disciplines* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2015) 239.
- Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* (Boston: Houghton Mifflin, 1993).
- Femmie Juffer & Marinus H Van IJzendoorn, “Behaviour Problems and Mental Health Referrals of International Adoptees: A Meta-Analysis” (2005) 293:20 *JAMA* 2501.
- Frank C Verhulst, Monika Althaus & Herma JM Versluis-Den Bieman, “Problem Behaviour in International Adoptees: I. An Epidemiological Study” (January 1990) 29:1 *Journal of the American Academy of Child & Adolescent Psychiatry* 94.
- Frank Lindblad, Gunilla Ringback Weitoft & Anders Hjern, “AHDH in International Adoptees: A National Cohort Study” (January 2010) 19:1 *European Child & Adolescent Psychiatry* 37
- Geoffrey Bilson, *The Guest Children: The Story of British Child Evacuees Sent to Canada during World War II* (Saskatoon: Fifth House, 1988).
- Gina M Croft, “The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (2005) 33:3 *Georgia Journal of International and Comparative Law* 621.
- Gulay Ugur Goksel, *Integration of Immigrants and the Theory of Recognition: “Just Integration”* (Cham: Palgrave Macmillan, 2018).
- Halsbury’s Laws of Canada (online), Infants and Children, “Custody, Access and Adoption: Adoption: Effect of Adoption Order” (II.6.(4)) at HIC-68 “Child of Adoptive Parent” (2018 Reissue).
- Hugh D Hindman, ed, *The World of Child Labor: An Historical and Regional Survey* (New York: Routledge, 2009).
- Jamie Chai Yun Liew, “The Ultrahazardous Activity of Excluding Family Members in Canada’s Immigration System” (2016) 94:2 *Canadian Bar Review* 281.
- Jamie Chai Yun Liew, Prasanna Balasundaram & Jennifer Stone, “Troubling Trends in Canada’s Immigration System via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers” (2017) 26 *J L & Soc Pol’y* 112.

- Jatinder Mann, "The Redefinition of citizenship in Canada, 1950s-1970s" in Jatinder Mann, ed, *Citizenship in Transnational Perspective* (Cham: Palgrave Macmillan, 2017) 97.
- Jayashree Mohanty, Gary Keokse & Esther Sales, "Family Cultural Socialization, Ethnic Identity & Self-Esteem" (2006) 15:3-4 *Journal of Ethnic & Cultural Diversity in Social Work* 153.
- Jeffrey G Reitz, "Closing the Gaps Between Skilled Immigration and Canadian Labor Markets: Emerging Policy Issues and Priorities" in Triadafios Triadafilopoulos, ed, *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective* (New York: Springer, 2013) 147.
- Jennifer A Ratcliff, "International Adoption: Improving on the 1993 Hague Convention" (2010) 25:1 *Maryland Journal of International Law* 336.
- Jesus Palacios, Carmen Moreno & Maite Roman, "Social Competence in Internationally Adopted and Institutionalized Children" (2013) 28:2 *Early Childhood Research Quarterly* 357.
- Jo Daugherty Bailey, "A Practice Model to Protect the Ethnic Identity of International Adoptees" (2007) 10:3 *Journal of Family Social Work* 1.
- Joan Heifetz Hollinger, "Intercountry Adoption" (2004) 8:1 *Adoption Quarterly* 41.
- John E. B. Meyers, "A Short History of Child Protection in America" (2008) 42:3 *Family Law Quarterly* 449.
- John Treseliotis, "Intercountry Adoption: Global Trade or Global Gift?" (2000) 24:2 *Adoption and Fostering* 4.
- Joseph Robertson, Peter Gall & Paul Daly, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future* (Markham: LexisNexis, 2014).
- Judith Masson, "Intercountry Adoption: A Global Problem or Global Solution?" (2001) 55:1 *Journal of International Affairs* 141.
- Judith Mosoff et al, "Intersecting Challenges: Mothers and Child Protection Law in BC" (2017) 50:2 *UBC L Rev* 435.
- June Carbone & Naomi Cahn, "Parents, Babies, and More Parents" (2017) 92:1 *Chicago-Kent Law Review* 9.
- Karen Dubinsky, "Babies Without Borders: Rescue, Kidnap, and the Symbolic Child" (2007) 19:1 *Journal of Women's History* 142.
- Karen Dubinsky, *Babies Without Borders: Adoption and Migration Across the Americas* (New York City: New York University, 2010).

- Karen Smith Rotabi & Judith L Gibbons, "Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?" (2012) 21 *Journal of Child and Family Studies* 106.
- Katherine Herrmann, "Reestablishing the Humanitarian Approach to Adoption: The Legal and Social Change Necessary to End the Commodification of Children" (2010) 44:3 *Family Law Quarterly* 409.
- Kathy S Stolley, "Statistics on Adoption in the United States" (Spring 1993) 3:1 *The Future of Children* 26.
- Kenneth J Herrmann Jr & Barbara Kasper, "International Adoption: The Exploitation of Women and Children" (1992) 7:1 *Affilia* 45.
- Kirsten Lovelock, "Intercountry Adoption as a Migratory Practice: A Comparative Analysis of Intercountry Adoption and Immigration Policy and Practice in the United States, Canada, and New Zealand in the Post WWII Period" (2000) 34:3 *International Migration Review* 915.
- Laura Briggs, "Mother, Child, Race, Nation: The Visual Iconography of Rescue and the Politics of Transnational and Transracial Adoption" (2003) 15:2 *Gender & History* 179.
- Leslie Doty Hollingsworth, "Does the Hague Convention on Intercountry Adoption Address the Protection of Adoptees Cultural identity? And Should It?" (2008) 53:4 *Social Work* 377.
- Leslie Doty Hollingsworth, "International Adoption among Families in the United States: Considerations of Social Justice" (2003) 48:2 *Social Work* 209.
- Lisa Hillis, "Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?" (1998) 6:1 *Indiana Journal of Global Legal Studies* 237.
- Lori Chambers, *A Legal History of Adoption in Ontario, 1921-2015* (Toronto: University of Toronto Press, 2016).
- Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 *Osgoode Hall Law Journal* 375.
- Mary Landrieu & Whitney Reitz, "How Misconceptions About International Adoption Lead to a Violation of Human Rights Against Unparented Children" (2014) 22 *Tulane Journal of International and Comparative Law* 341.
- Matthew Lewans, *Administrative Law and Judicial Deference* (Portland: Hart Publishing, 2016).
- Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (New York: University of California Press, 1978).
- Megan Gaucher, *A Family Matter: Citizenship, Conjugal Relationships, and Canadian Immigration Policy* (Vancouver, UBC Press, 2018).

- Michael Battista & Kelly D Jordan, *Canadian Family and Immigration Law: Intersections, Developments and Conflicts* (Toronto: Carswell, 2015).
- Ming Zhang, "Time to Change the Truancy Laws? Compulsory Education: Its Origin and Modern Dilemma" (2004) 22:2 *Pastoral Care in Education* 27.
- Natalia Barcons, Neus Abrines, Carme Brun, Claudio Sartini, Victoria Fumado & Diana Marre, "Social Relationships in Children from Intercountry Adoption" (May 2012) 34:5 *Children and Youth Services Review* 955.
- Nico Trocme, Tonino Esposito, Jennifer Nutton, Valerie Rosser & Barbara Fallon, "Child Welfare Services in Canda" in Lisa Merkel-Holguin, John D Fluke & Richard D Krugman, eds, *National Systems of Child Protection: Understanding the International Variability and Context for Developing Policy and Practice* (Cham: Springer International Publishing, 2019) 27.
- Ninette Kelly & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998).
- Pam Daniel, "Intercountry Adoption and Intercountry Adoption Services" *Canadian Issues* (Spring 2006) 57.
- Peter Hayes, "Deterrents to Intercountry Adoption in Britain" (2000) 49:4 *Family Relations* 465
- Peter Hayes, "The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention" (2011) 25:3 *International Journal of Law, Policy and the Family* 288.
- Peter Selman, "The Global Decline of Intercountry Adoption: What Lies Ahead?" (July 2012) 11:3 *Social Policy and Society* 381.
- Peter Selman, "The Movement of Children for International Adoption: Developments and Trends in Receiving States and States of Origin, 1998-2004" in Diana Marre & Laura Briggs, eds, *International Adoption: Global Inequalities and the Circulation of Children* (New York: New York University Press, 2009) 32.
- Peter Selman, "The Rise and Fall of Intercountry Adoption in the 21st Century" (August 2009) 52:5 *International Social Work* 575.
- Peter Selman, "Trends in Intercountry Adoption: Analysis of Data from 20 Received Countries, 1998-2004" (September 2006) 23:2 *Journal of Population Research* 183.
- Richard Terdiman, trans, "Translator's Introduction" in Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38:5 *Hastings LJ* 805.
- Rita J. Simon & Howard Alstein, "The Relevance of Race in Adoption Law and Social Practice" (2014) 11:1 *Notre Dame Journal of Law, Ethics & Public Policy* 171.

- Rogers Brubaker, "Membership without Citizenship: The Economic and Social Rights of Noncitizens" in Rogers Brubaker, ed, *Immigration and the Politics of Citizenship in Europe and North America* (Lanham: University Press of America, 1989) 145.
- Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge: Harvard University Press, 1992).
- S.D. Ryan et al, "Kinship Adoption and The Associated Outcomes Among Children And Their Adoptive Families" (2010) 32:12 Children and Youth Services Review 1631.
- Sara Dorrow & Terry Lepatsky, "Intercountry Adoption: An "Exceptional" Form of Immigration?" Canadian Issues (Spring 2006) 61.
- Saskia Sassen, *Losing Control?: Sovereignty in the Age of Globalization* (New York: Columbia University Press, 1996).
- Seonaid Abernethy, "Intercountry Kinship Adoptions: Limits to The Hague Convention on the Protection of Children and Intercountry Adoption" (2010) 5:1 Kōtuitui: New Zealand Journal of Social Sciences 26.
- Shauna Labman, "Private Sponsorship: Complementary or Conflicting Interests?" (2016) 32:2 Refuge 67.
- Sheila L Croucher, *Globalization and Belonging: The Politics of Identity in a Changing World* (Maryland: Rowman & Littlefield, 2018).
- Shurlee Swain, "What price a child? Commodification and Australian adoption practice 1850-1950" (2018) 23:1 The History of the Family 1.
- Stephanie Petrie, ""Commodifying" Children: The Impact of Markets in Services for Children in the United Kingdom" (2015) 6:2 International Journal of Child, Youth and Family Studies 275.
- Stephen Castles & Alastair Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (New York: Routledge, 2000).
- Susan E Barrett & Carol M Aubin, "Feminist Considerations of Intercountry Adoptions" (1990) 10:1-2 Women & Therapy 127.
- Suzanne Hoelgaard, "Cultural Determinants of Adoption Policy: A Colombian Case Study" (1998) 12:2 Intl J of L, Policy & the Family 202.
- Tarah Brookfield, "Maverick Mothers and Mercy Flights: Canada's Controversial Introduction to International Adoption" (2008) 19:1 Journal of the Canadian Historical Association 307.
- Tarah Brookfield, *Cold War Comforts: Canadian Women, Child Safety and Global Insecurity* (Waterloo: Wilfrid Laurier University Press, 2012).

- Tony Xing Tan & Linda A Camras, "Social Skills of Adopted Chinese Girls at Home and in School: Parent and Teacher Ratings" (October 2011) 33:10 *Children and Youth Services Review* 1813.
- Tracey Bushnik, Jocelynn L Cook, A Albert Yuzpe, Suzanne Tough & John Collins, "Estimating the Prevalence of Infertility in Canada" (March 2017) 27:3 *Human Reproduction* 738.
- Triadafios Triadafilopoulos, "Dismantling White Canada: Race, Rights, and the Origins of the Points System" in Triadafios Triadafilopoulos, ed, *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective* (New York: Springer, 2013) 15.
- Twila L Perry, "Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory" (1998) 10:1 *Yale JL & Feminism* 101.
- Veronica Strong-Boag, "Interrupted Relations: The Adoption of Children in Twentieth-Century British Columbia" (2004) 144 *BC Studies* at 5.
- Viviana A Zelizer, *The Changing Social Value of Children* (Princeton, NJ: Princeton University Press, 1994)
- Yasmeen Abu-Laban, "Building a New Citizenship Regime? Immigration and Multiculturalism in Canada" in Jatinder Mann, ed, *Citizenship in Transnational Perspective* (Cham: Palgrave Macmillan, 2017) 263.

Newspaper and Magazine Articles

- "'Nothing has changed in 80 years.' Says Holocaust survivor" *CBC News* (02 November 2018), online: <<https://www.cbc.ca/news/canada/nova-scotia/holocaust-survivor-maxwell-smart-canada-1.4889077>>.
- "Adoption agency urges families to consider adopting teens" *CBC News* (02 November 2015), online: <<https://www.cbc.ca/news/canada/british-columbia/adoption-teens-agency-1.3300452>>.
- "Boy taken out of Vietnam during Operation Babylift wasn't actually an orphan" *Windsor Star* (06 May 2015), online: <<https://windsorstar.com/news/boy-taken-out-of-vietnam-during-operation-babylift-wasnt-an-orphan>>.
- "Canada accepting 5,000 parent, grandparent sponsorship applications" *CBC News* (02 January 2014), online: <<https://www.cbc.ca/news/politics/canada-accepting-5-000-parent-grandparent-sponsorship-applications-1.2481803>>.
- "Canadian clergy apologize to 'Voyage of the Damned' survivors" *CBC News* (06 November 2000), online: <<https://www.cbc.ca/news/canada/canadian-clergy-apologize-to-voyage-of-the-damned-survivors-1.227709>>.

- “Couple brings adopted baby from Japan home to B.C. after months of delay” *CBC News* (26 June 2018), online: <<https://www.cbc.ca/news/canada/british-columbia/couple-brings-adopted-baby-from-japan-home-to-b-c-after-months-of-delay-1.4723517>>.
- “First openly gay man to legally adopt in Canada hopes new memoir will boost adoptions” *CBC News* (28 December 2018), online: <<https://www.cbc.ca/news/canada/toronto/david-mckinstry-rebel-dad-adoption-gay-1.4960463>>.
- “How did multiculturalism become so central to Canada’s identity?” *CBC Radio* (22 February 2019), online: <<https://www.cbc.ca/radio/thesundayedition/the-sunday-edition-for-february-24-2019-1.5029453/how-did-multiculturalism-become-so-central-to-canada-s-identity-1.5029456>>.
- “How Russian law affects Canadians trying to adopt orphans” *CBC: The Current* (02 November 2017), online: <<https://www.cbc.ca/radio/thecurrent/the-current-for-november-2-2017-1.4382427/how-russian-law-affects-canadians-trying-to-adopt-orphans-1.4382469>>.
- “Indigenous heritage doesn’t overrule other factors in adoption, says BC court” *CBC News* (08 August 2017), online: <<https://www.cbc.ca/news/canada/british-columbia/indigenous-heritage-adoption-august-2017-1.4239794>>.
- “Law against paying egg donors drives couples to US” *CBC News* (30 April 2007), online: <<https://www.cbc.ca/news/canada/law-against-paying-egg-donors-drives-couples-to-u-s-1.637528>>.
- “New board vows to keep struggling adoption agency open” *CBC News* (26 April 2019), online: <<https://www.cbc.ca/news/canada/british-columbia/struggling-victoria-adoption-agency-elects-new-board-that-intends-to-keep-it-open-1.5112727>>.
- “Nova Scotia shifts from its hard-no stance on open adoption records” *CBC News* (21 March 2019), online: <<https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-adoption-records-1.5065463>>.
- “Vancouver Island’s only adoption agency closes doors” *CBC News* (11 April 2019), online: <<https://www.cbc.ca/news/canada/british-columbia/vancouver-island-s-only-adoption-agency-closes-doors-1.5095082>>.
- “White Celebrities Who Have Adopted Black Children” *The Root* (26 January 2015), online: <<https://www.theroot.com/white-celebrities-who-have-adopted-black-children-1790868498>>.
- “Why One Married Couple and Their Friend Formed a 3-Parent Family” *WBUR* (06 November 2017), online: <<https://www.wbur.org/hereandnow/2017/11/06/three-parent-family>>.
- Adam Donald, “Immigration points-based systems compared” *BBC News* (01 June 2016), online: <<https://www.bbc.com/news/uk-politics-29594642>>.

- Alison Motluk, “What should be done about Canada’s assisted reproduction laws?” *The Globe and Mail* (13 April 2018), online: <<https://www.theglobeandmail.com/opinion/article-what-should-be-done-about-canadas-assisted-reproduction-laws/>>.
- Amber Bernard, “Best interest of the child needs to be re-defined, before passing Bill C-92 says child advocate” *APTN National News* (11 April 2019), online: <<https://aptnnews.ca/2019/04/11/best-interest-of-the-child-needs-to-be-re-defined-before-passing-bill-c-92-says-child-advocate/>>.
- Andrea Yu, “The enduring legacy of Canada’s racist head tax on Chinese-Canadians” *Maclean’s* (01 March 2019), online: <<https://www.macleans.ca/society/the-enduring-legacy-of-canadas-racist-head-tax-on-chinese-canadians/>>.
- Angela Sterritt, “Indigenous kids largely apprehended because of poverty, says former child protection worker” *CBC News* (21 November 2017), online: <<https://www.cbc.ca/news/canada/british-columbia/indigenous-children-largely-apprehended-because-they-dont-have-access-to-basic-resources-1.4412441>>.
- Anna Fifield, “Beijing’s one-child policy is gone. But many Chinese are still reluctant to have more” *The Washington Post* (04 May 2019), online: <https://www.washingtonpost.com/world/asia_pacific/beijings-one-child-policy-is-gone-but-many-chinese-are-still-reluctant-to-have-more/2019/05/02/c722e568-604f-11e9-bf24-db4b9fb62aa2_story.html>.
- Anthony Mitchell, “Ethiopia Puts Its Young Up For Adoption” *The Washington Post* (02 January 2005), online: <<https://www.washingtonpost.com/archive/politics/2005/01/02/ethiopia-puts-its-young-up-for-adoption/5c51dcc4-bef7-4020-a95b-cbf96cac9917/>>.
- Arti Patel, “What You Should Know About Adoption in Canada” *Huffington Post* (27 February 2017), online: <https://www.huffingtonpost.ca/2017/02/27/adoptions-in-canada_n_15041916.html>.
- Ashley Fetters, “The Hardship of a Very Open Adoption” *The Atlantic* (02 February 2019), online: <<https://www.theatlantic.com/family/archive/2019/02/rock-needs-river-open-adoption/581851/>>.
- Bethany Lindsay, “Drop in international adoptions forces closure of BC Agency” *CBC News* (18 October 2018), online: <<https://www.cbc.ca/news/canada/british-columbia/drop-in-international-adoptions-forces-closure-of-b-c-agency-1.4867026>>.
- Blake Morrison, “The Doctor’s Children” *The Independent* (11 June 1995), online: <<https://www.independent.co.uk/arts-entertainment/the-doctors-children-1585899.html>>.
- Branko Milanovic, “There is a trade-off between citizenship and migration” *Financial Times* (20 April 2016), online: <<https://www.ft.com/content/2e3c93fa-06d2-11e6-9b51-0fb5e65703ce>>.

- Brian Hill & Megan Robinson, "Canada's ban on adoptions unjustified, Pakistan says; leaves family desperate for change" *Global News* (09 August 2019), online: <<https://globalnews.ca/news/5731362/canadas-ban-adoptions-pakistan-family/>>.
- Brooke Schuldt, "Adopting Older Children: What You Need to Know" *Parents*, online: <<https://www.parents.com/parents-magazine/parents-perspective/adopting-older-children-what-you-need-to-know/>>.
- Caroline Plante, "Quebec moves toward more open adoptions" *Montreal Gazette* (06 October 2016), online: <<https://montrealgazette.com/news/quebec/quebec-moves-toward-more-open-adoptions>>.
- Cassandra Szlarski, "Forty year on, Vietnam war orphans look back on Canadian adoption" *Macleans* (16 April 2015), online: <<https://www.macleans.ca/news/world/forty-years-on-vietnam-war-orphans-look-back-on-canadian-adoption/>>.
- Catherine McIntyre, "Read Justin Trudeau's apology to residential school survivors in Newfoundland" *Macleans* (24 November 2017), online: <<https://www.macleans.ca/news/canada/read-justin-trudeaus-apology-to-residential-school-survivors-in-newfoundland/>>.
- Choe Sang-Hun, "Deportation a 'Death Sentence' to Adoptees After a Lifetime in the U.S." *The New York Times* (02 July 2017), online: <<https://www.nytimes.com/2017/07/02/world/asia/south-korea-adoptions-phillip-clay-adam-crapser.html>>.
- Christopher Reynolds, "Dozens of 'British home children' lie forgotten in Etobicoke cemetery" *The Star* (27 February 2016), online: <<https://www.thestar.com/news/gta/2016/02/27/dozens-of-british-home-children-lie-forgotten-in-etobicoke-cemetery.html>>.
- Daniella Diaz, "Adoption agencies could refuse same-sex couples under measure OK'd by House panel" *CNN Politics* (12 July 2018), online: <<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/China.html>>.
- David Crary, "For many US adoptees from Guatemala, a complicated legacy" *The San Diego Union Tribune* (06 September 2015), online: <<https://www.sandiegouniontribune.com/sdut-for-many-us-adoptees-from-guatemala-a-complicated-2015sep06-story.html>>.
- Debra Black, "Canada's immigration history is one of discrimination and exclusion" *Toronto Star* (15 February 2013), online: <https://www.thestar.com/news/immigration/2013/02/15/canadas_immigration_history_one_of_discrimination_and_exclusion.html>.
- Denise Martin, "Catching Up With Arrested Development's Annyong Bluth" *Vulture* (06 May 2013), online: <<https://www.vulture.com/2013/05/reminiscing-with-arrested-developments-annyong.html>>.
- Donna Carreiro, "Canadian parents paying less to adopt African American babies" *CBC News* (20 October 2014), online: <<https://www.cbc.ca/news/canada/manitoba/canadian-parents-paying-less-to-adopt-african-american-babies-1.2805227>>.

Donna Freydkin, “When stars adopt, the world notices” *USA Today* (01 April 2013), online: <<https://www.usatoday.com/story/life/people/2013/04/01/nia-vardalos-instant-mom-celebrity-adoption/2028381/>>.

Erna Paris, “Canada’s multiculturalism is our identity” *The Globe and Mail* (27 April 2018), online: <<https://www.theglobeandmail.com/opinion/article-canadas-multiculturalism-is-our-identity/>>.

First Nations chiefs call for protests to oppose Indigenous child welfare bill” *CBC News* (08 May 2019), online: <<https://www.cbc.ca/news/canada/edmonton/bill-c-92-first-nations-alberta-edmonton-1.5127025>>.

Georgette Mulheir, “Thousands of children are living in orphanages in Haiti—but not because they are orphans” *The Independent* (25 June 2015), online: <<https://www.independent.co.uk/voices/comment/thousands-of-children-are-living-in-orphanages-in-haiti-but-not-because-they-are-orphans-10345063.html>>.

Hilary Whitman, “African adoption should be discouraged ‘at all costs,’ group says” *CNN News* (31 May 2012), online: <<https://www.cnn.com/2012/05/29/world/africa/africa-child-adoption/index.html>>.

Isabel Crabtree, “*One Child Nation* Explores China's One-Child Policy—and Offers a Familiar Warning” *Esquire Magazine* (23 November 2019), online: <<https://www.esquire.com/entertainment/movies/a29894018/nanfu-wang-one-child-nation-documentary-amazon-prime/>>.

Isolde Motley & Susan Caughman, “Choosing Which Age Group to Adopt” *Adoptive Families*, online: <<https://www.adoptivefamilies.com/how-to-adopt/baby-adoption-vs-older-child-adoption/>>.

Jack Jedwab, “Is Canada a Nation of Immigrants?” *Huffington Post* (31 March 2016), online: <https://www.huffingtonpost.ca/jack-jedwab/is-canada-a-nation-of-immigrants_b_9579348.html>.

Jasmine Budak, “Canada’s Most Unwanted” *The Walrus* (19 December 2012), online: <<https://thewalrus.ca/canadas-most-unwanted/>>.

Jennifer Fowler, “Creator of Sixties Scoop adoption program says it wasn’t meant to place kids with white families” *CBC News* (20 March 2018), online: <<https://www.cbc.ca/news/indigenous/creator-of-sixties-scoop-adoption-program-says-it-wasn-t-meant-to-place-kids-with-white-families-1.4584342>>.

Jessica Murphy, “Jewish war orphans reunite in Montreal” *The Star* (27 October 2008), online: <https://www.thestar.com/news/canada/2008/10/27/jewish_war_orphans_reunite_in_montreal.html>.

- John Leland, “For Adoptive Parents, Questions Without Answers” *The New York Times* (16 September 2011), online: <<https://www.nytimes.com/2011/09/18/nyregion/chinas-adoption-scandal-sends-chills-through-families-in-united-states.html?mtref=www.google.com&gwh=F01B554F7488EABC11365D6CE95E1FD6&gwt=pay&assetType=REGIWA LL>>.
- John Seabrook, “The Last Babylift” *The New Yorker* (03 May 2010), online: <<https://www.newyorker.com/magazine/2010/05/10/the-last-babylift>>.
- Joseph Guyler Delva, “Americans arrested taking children out of Haiti” *Reuters* (30 January 2010), online: <<https://www.reuters.com/article/us-quake-haiti-arrests/americans-arrested-taking-children-out-of-haiti-idUSTRE60T23I20100130>>.
- Karen Balcom & Karen Dubinsky, “Babies across borders” *The Globe and Mail* (13 October 2005), online: <<https://www.theglobeandmail.com/opinion/babies-across-borders/article1125013/>>.
- Karin Laub, “Communal Living: Kibbutz Life Gets New Look” *Los Angeles Times* (18 October 1987), online: <<https://www.latimes.com/archives/la-xpm-1987-10-18-mn-15102-story.html>>.
- Kathleen Harris, “95,000 sponsors vie for 10,000 spots in lottery to bring parents, grandparents to Canada” *CBC News* (27 April 2017), online: <<https://www.cbc.ca/news/politics/lottery-parents-grandparents-immigration-1.4086527>>.
- Kathleen Harris, “International Adoptions Decline Dramatically in Canada” *CBC News: Politics* (20 August 2017), online: <<https://www.cbc.ca/news/politics/international-adoptions-canada-decline-1.4253698>>.
- Kathleen Harris, “Online applications to sponsor family immigrants hit limit in less than 11 minutes” *CBC News* (28 January 2019), online: <<https://www.cbc.ca/news/politics/ircc-parent-grandparent-sponsorship-filled-2019-1.4995806>>.
- Kathryn Westcott, “Protecting Haiti's children from 'cowboy adoptions'” *BBC News* (01 February 2010), online: <<http://news.bbc.co.uk/2/hi/americas/8491981.stm>>.
- Katie Daubs, “A timeline of Barnardo’s and other child emigration programs” *The Star* (19 June 2015), online: <<https://www.thestar.com/news/insight/2015/06/19/a-timeline-of-barnardos-and-other-child-emigration-programs.html>>.
- Kevin Voigt & Sophie Brown, “International adoptions in decline as number of orphans grows” *CNN* (17 September 2013), online: <<http://www.cnn.com/2013/09/16/world/international-adoption-main-story-decline/index.html>>.
- Laura Kane, “Changes to adoption policies internationally force Canadian agencies to shutter, leaving couples in limbo” *The Globe and Mail* (11 April 2019), online: <<https://www.theglobeandmail.com/canada/article-changes-to-adoption-policies-internationally-force-canadian-agencies/>>.

- Leah Hendry, “I didn't come here to live this kind of life': Skilled immigrants on desperate hunt for jobs in Quebec” *CBC News* (25 September 2018), online: <<https://www.cbc.ca/news/canada/montreal/quebec-immigration-skilled-workers-election-1.4833739>>.
- Lisa Cohen, “How traffickers exploit children in Haiti’s orphanages” *CNN* (02 March 2018), online: <<https://www.cnn.com/2017/11/20/health/haiti-orphanages/index.html>>.
- Lisa Milbrand, “Open Adoption is the New Norm and Here’s What It’s All About” *Parents Magazine*, online: <<https://www.parents.com/parenting/adoption/facts/what-is-open-adoption/>>.
- Lori Niles-Hoffman, “Want to adopt a child in Ontario? Good luck with the paperwork” *National Post* (17 September 2014), online: <<https://nationalpost.com/opinion/lori-niles-want-to-adopt-a-child-in-ontario-good-luck-with-the-paperwork>>.
- Luchina Fisher, “Black Babies: Hollywood’s Hottest Accessory?” *ABC News* (31 March 2009), online: <<https://abcnews.go.com/Entertainment/story?id=7218470&page=1>>.
- Maggie Jones, “Why a Generation of Adoptees Is Returning to South Korea” *New York Times Magazine* (14 January 2015), online: <<https://www.nytimes.com/2015/01/18/magazine/why-a-generation-of-adoptees-is-returning-to-south-korea.html>>.
- Maham Abedi, “Canada apologizes for turning away Jewish refugees in 1939—why that matters” *Global News* (07 November 2018), online: <<https://globalnews.ca/news/4630464/canada-justin-trudeau-jewish-refugees-apology/>>.
- Marc Lacy, “Guatemala System is Scrutinized as Americans Rush In to Adopt” *The New York Times* (05 November 2006), online: <<https://www.nytimes.com/2006/11/05/world/americas/05guatemala.html?mtrref=www.google.com&gwh=76FA8ADCE88324A6DC3E557C80E016AA&gwt=pay&assetType=REGIWALL>>.
- Margaret Philip, “The Land of Lost Children” *The Globe and Mail* (21 December 2002), online: <<http://www.fact.on.ca/news/news0212/gm021221a.htm>>.
- Mark Oliver & Zeta McDonald, “The echoes of Barnardo’s altered imagery” *The Guardian* (03 October 2002), online: <<https://www.theguardian.com/society/2002/oct/03/advertising.childprotection>>.
- Maura Forrest, “Here's what you need to know about the immigration sponsorship program that was only open for 10 minutes” *The National Post* (29 January 2019), online: <<https://nationalpost.com/news/heres-what-you-need-to-know-about-the-immigration-sponsorship-program-that-was-only-open-for-10-minutes>>.
- Meagan Fitzpatrick, “Don’t bring parents here for welfare, Kenney says” *CBC News* (10 May 2013), online: <<https://www.cbc.ca/news/politics/don-t-bring-parents-here-for-welfare-kenney-says-1.1351002>>.

- Megan Benedictson, “‘She never saw her parents’: Descendants of poor, British children shipped to Canada to mark somber anniversary Sunday” *CTV News* (25 September 2019), online: <<https://winnipeg.ctvnews.ca/she-never-saw-her-parents-again-descendants-of-poor-british-children-shipped-to-canada-to-mark-somber-anniversary-sunday-1.4610698>>.
- Michael Fraiman, “A Fresh Start: The Story of Canada’s Postwar Jewish Orphans” *The Canadian Jewish News* (28 March 2018), online: <<https://www.cjnews.com/perspectives/features/the-story-of-1123-orphans-who-came-to-canada-after-the-holocaust>>.
- Michael MacDonald, “3 adults in polyamorous relationship declared legal parents by N.L. court” *CBC News* (14 June 2018), online: <<https://www.cbc.ca/news/canada/newfoundland-labrador/polyamorous-relationship-three-parents-1.4706560>>.
- Monique Scotti, “Paying to treat infertility: Coverage varies widely across Canada” *Global News* (15 November 2016), online: <<https://globalnews.ca/news/3059988/paying-to-treat-infertility-coverage-varies-widely-across-canada/>>.
- Monique Scotti, “The Canadian household is changing: More single dads, more same-sex parents, fewer young families” *Global News* (2 August 2017), online: <<https://globalnews.ca/news/3641761/census-canada-single-dads-same-sex-parents-young-families/>>.
- Nicholas Keung, “Immigration key to Canada’s economic growth, study says” *Toronto Star* (03 May 2019), online: <<https://www.thestar.com/news/gta/2019/05/03/immigration-key-to-canadas-economic-growth-study-says.html>>.
- Nick Miroff, “Family ties drive US immigration. Why Trump wants to break the ‘chains.’” *The Washington Post* (02 January 2018), online: <https://www.washingtonpost.com/world/national-security/how-chain-migration-became-a-target-in-trumps-immigration-agenda/2018/01/02/dd30e034-efdb-11e7-90ed-77167c6861f2_story.html>.
- Patrick Johnston, “Revisiting the ‘Sixties Scoop’ of Indigenous Children” *Policy Options* (26 July 2016), online: <<https://policyoptions.irpp.org/magazines/july-2016/revisiting-the-sixties-scoop-of-indigenous-children/>>.
- Paul Henderson, “British Home Children: B.C. women reflect on shameful period in Canadian history” *Maple Ridge-Pitt Meadows News* (28 September 2019), online: <<https://www.mapleridgenews.com/news/british-home-children-b-c-women-reflect-on-shameful-period-in-canadian-history/>>.
- Peter Shawn Taylor, “How Syrian refugees to Canada have fared since 2015” *Maclean’s* (21 May 2019), online: <<https://www.macleans.ca/news/canada/how-syrian-refugees-to-canada-have-fared-since-2015/>>.
- PM cites ‘sad chapter’ in apology for residential schools” *CBC News* (11 June 2008), online: <<https://www.cbc.ca/news/canada/pm-cites-sad-chapter-in-apology-for-residential-schools-1.699389>>.

- Rachel Nolan, “Destined for Export: The Troubled Legacy of Guatemalan Adoptions” *Harpers Magazine* (April 2019), online: <<https://harpers.org/archive/2019/04/destined-for-export-guatemalan-adoptions/>>.
- Rosa Marchitelli, “‘Broken’ adoption system leaves children stranded despite couple ready to adopt” *CBC News* (29 June 2015), online: <<https://www.cbc.ca/news/canada/broken-adoption-systems-leaves-children-stranded-despite-couple-ready-to-adopt-1.3128069>>.
- Russell Sabio, “The Changing Face of the Canadian Family (Infographic)” *Huffington Post* (05 September 2016), online: <https://www.huffingtonpost.ca/2016/05/09/stats-canada-infographic_n_9786816.html>.
- Shanifa Nasser, “How Canada barred adoptions from Muslim countries—and used Shariah law to do it” *CBC News* (29 October 2018), online: <<https://www.cbc.ca/news/canada/adoptions-kafalah-pakistan-canada-ban-muslim-1.4855852>>.
- Sharon LaFraniere, “Chinese Officials Seized and Sold Babies, Parents Say” *The New York Times* (05 August 2011), online: <https://www.nytimes.com/2011/08/05/world/asia/05kidnapping.html?_r=1&scp=1&sq=longhui&st=cse&mtref=undefined&gwh=AF02369629EEB6398467D05FEE75657D&gwt=pay&assetType=REGIWALL>.
- Sheryl Ubelacker, “Canada’s fertility rate continues to put pressure on immigration” *The Star* (08 February 2017), online: <<https://www.thestar.com/news/canada/2017/02/08/canadas-fertility-rate-continues-to-put-pressure-on-immigration.html>>.
- Sierra Bein & Maria Iqbal, “Canada’s Residential Schools Were Houses of Pain, but Survivors Want These Buildings to be Saved” *The Globe and Mail* (30 September 2019), online: <theglobeandmail.com/canada/article-canadas-residential-schools-were-houses-of-pain-but-survivors-want/>.
- Terry Glavin, “Canada was warned of the coming Holocaust. We turned away 900 Jewish refugees, anyway.” *Macleans* (12 May 2018), online: <<https://www.macleans.ca/history/canada-was-warned-of-the-incoming-holocaust-we-turned-away-900-jewish-refugees-anyway/>>.
- Tom Ford, “Hard lives for home children” *Winnipeg Free Press* (27 June 2011), online: <<https://www.winnipegfreepress.com/opinion/analysis/hard-lives-for-home-children-124582324.html>>.
- Tracy Sherlock & Lori Culbert, “Adoption series: Open adoptions tricky but rewarding” *Vancouver Sun* (01 July 2016), online: <<http://www.vancouversun.com/life/Adoption+series+Open+adoptions+tricky+rewarding/11198914/story.html>>.
- Verity Stevenson, “Quebec families with more than 2 parents fight for recognition” *CBC News* (12 May 2018), online: <<https://www.cbc.ca/news/canada/montreal/quebec-families-with-more-than-2-parents-fight-for-recognition-1.4659522>>.

Vibeke Venema, “Jenna Cook: The adopted girl claimed by 50 birth families” *BBC News* (24 March 2017), online: <<https://www.bbc.com/news/magazine-37024334>>.

Other Online Material

“Adoption and Declarations of Parentage” *Nelligan o’Brien Payne*, online: <<https://nelliganlaw.ca/service/family-law/adoption/declarations-parentage/>>.

“Adoption FAQs” *Adoptive Families Association of BC* (14 May 2019), online: <<https://www.bcadoption.com/adoption-faqs>>.

“Addressing the Gaps in Canada’s Assisted Reproduction Policy” *Policy Options* (15 April 2019), online: <<https://policyoptions.irpp.org/magazines/april-2019/addressing-the-gaps-in-canadas-assisted-reproduction-policy/>>.

“Research China”, a website for an investigation service operated by Brian Stuy, who himself is the adoptive father of three girls from China: *Research China*, online: <<https://www.research-china.org/>>.

“The biased picture of intercountry adoption in the media” *International Social Service – International Reference Centre for the Rights of Children Deprived of their Family* (November–December 2006), online: <http://www.iss-ssi.org/2007/Resource_Centre/Tronc_DI/documents/Edito200611-12ang.pdf>.

“What ABC’s Modern Family Can Teach Us About Adoption” *Adoptions with Love* (06 December 2017), online: <<http://adoptionswithlove.org/adoptive-parents/modern-family-adoption>>.

Adoption Council of Ontario, “Adoption Homestudy” *Adoption* (2019), online: <<https://www.adoption.on.ca/adoption-homestudy>>.

Adoption Council of Ontario, “Focus on the Child: Openness in Adoption from Foster Care – A Guide for Assessment and Planning” *Adoption Council of Ontario* (April 2016), online: <https://www.adoption.on.ca/uploads/File/Focus_on_the_child_Open_adoption_planningFINAL.pdf>.

Adoptive Families Association of BC, “Adoption Agencies” *BC Adoption* (2019), online: <<https://www.bcadoption.com/adoption-agencies>>.

Adoptive Families Association of BC, “Adoption Representatives” *BC Adoption* (2019), online: <<https://www.bcadoption.com/node/571>>.

Adoptive Families Association of BC, “What is Open Adoption?” *BC Adoption* (2019), online: <<https://www.bcadoption.com/resources/articles/what-open-adoption>>.

Audrey Macklin, “Audrey Macklin on the Supreme Court of Canada’s Administrative Law ‘Trilogy’” *Paul Daly: Administrative Law Matters* (14 December 2018), online:

<https://www.administrativelawmatters.com/blog/2018/12/14/audrey-macklin-on-the-supreme-court-of-canadas-administrative-law-trilogy/>>.

Canadian Council for Refugees, *DNA Tests: A Barrier to Speedy Family Reunification* (October 2011), online: <https://ccrweb.ca/files/dnatests.pdf>>.

Canadian Council for Refugees, *Excluded Family Members: Brief on R.117(9)(d)* (May 2016), online: <https://ccrweb.ca/sites/ccrweb.ca/files/excluded-family-members-brief-may-2016.pdf>>.

Catholic Children's Aid Society of Toronto, "Financial Assistance for Adoption and Legal Custody of Sibling Groups and Children 10 Years and Older" *Toronto CCAS* (2019), online: <https://torontoccas.ca/index.php/en-ccast/page/financial-assistance-for-adoption-and-legal-custody-of-sibling-groups>>.

Kate Bradley, "Juvenile Delinquency and the Evolution of the British Juvenile Courts, c 1900-1950" *History in Focus* (October 2008), online: <https://archives.history.ac.uk/history-in-focus/welfare/articles/bradleyk.html>>.

Kenneth Bagnell, "British Home Children" *The Canadian Encyclopedia* (05 March 2009), online: <https://www.thecanadianencyclopedia.ca/en/article/immigrant-children>>.

Lori Wilkinson & Joseph Garcea, "The Economic Integration of Refugees in Canada: A Mixed Record?" *Transatlantic Council on Migration* (April 2017), online: <https://www.migrationpolicy.org/research/economic-integration-refugees-canada-mixed-record>>.

MK Menon, "Why Do Some Countries Not Allow International Adoption" *Adoption* (15 August 2018), online: <https://adoption.com/why-countries-not-allow-international-adoption>>.

National Association of Black Social Workers, "Position Statement on Trans-Racial Adoptions" (September 1972), online: [https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_\(b\).pdf](https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_(b).pdf)>.

Nigel Cantwell, "The Best Interests of the Child in Intercountry Adoption" *UNICEF Office of Research* (2014), online: <https://www.unicef-irc.org/publications/712-the-best-interests-of-the-child-in-intercountry-adoption.html>>.

Peter Conn, "The Politics of International Adoption" *Origins: Current Events in Historical Perspective* (January 2008) 1:4, online: <https://origins.osu.edu/article/politics-international-adoption>>.

SAFE Home Study, "Structured Analysis Family Evaluation (SAFE)", online: <http://www.safehomestudy.org/SAFE/SAFE-Overview.aspx>>.

Sunrise Family Services Society, "New Programs and Space Available", online: <https://www.sunriseadoption.com/new-programs-and-space-available>>.

The Children's Bridge, "Countries at a Glance", online: <childrensbridge.com/adoption/programs/countries-glance/>.