

ARTICLE

EXPANDING THE ROLE OF CULTURE IN BRITISH COLUMBIA'S ADOPTION SCHEME

Michael M.J. Choi*

CITED: (2015) 20 Appeal 43

INTRODUCTION

Adoptive parents, government agencies, lawmakers, and courts continue to wrestle with the difficult question of how a child's cultural or racial heritage should be integrated into the Canadian adoption system. Canadian courts have generally taken one of two approaches in an effort to manage the complexities involved in identifying and accommodating children's cultural needs. Some have adopted a singular, monolithic perspective of culture as a natural consequence of biological heritage.¹ Others have refrained from engaging the question at the judicial level, leaving the matter to the case-by-case discretion and policies of adoption agencies, government departments, and adoption agreements, with only a small nod towards culture's potential impact on the best interests of the child.

While the current British Columbia *Adoption Act* (the "Act")² requires specific consideration of the importance of cultural preservation in the adoption of Aboriginal children, the expansion of positive duties placed on all adoptive parents may substantially benefit adopted children from other cultural or racial groups. Drawing from the experience of the cultural planning processes already mandated in the adoption of Aboriginal children, such measures would ideally address an adopted child's potential cultural needs and ensure that a more even standard is applied in all adoption cases. In arguing for this position, I will proceed by examining the current legislative structure's treatment of adoption and culture, making a case for the need for reform, and concluding with suggestions for possible implementations.

PART I. MULTIPLE STANDARDS

Under section 3(2) of the current Act, adoption applications concerning Aboriginal children specifically make consideration of "the importance of preserving the child's cultural identity" mandatory.³ For adoptions generally, the Act lists "cultural, racial, linguistic and heritage" as a "relevant factor" in determining the best interests of the child under section 3(1)(f).⁴ These multiple standards create a risk of culture being subsumed in the overall assessment. As the Act presently stands, adopted Aboriginal

* Michael M.J. Choi is a graduate of the University of Victoria, Faculty of Law (JD 2014). He is currently an articulated student at Pryke Lambert Leathley Russell LLP in Richmond, British Columbia. He would like to thank the APPEAL editorial team and Gillian Calder, University of Victoria, for their assistance with this article.

1 Fareen L. Jamal, "Cultural Fluency for Family Lawyers" (2012) 31:2 Can Fam LQ 203 at 209.

2 *Adoption Act*, RSBC 1996, c 5.

3 *Ibid*, s 3(2).

4 *Ibid*, s 3(1)(f).

children are governed under one standard, while all other adoptions fall under a second, generalized standard. The Act's Adoption Regulation (the "Regulation")⁵ stipulates that prospective adoptive parents must undertake studies on the child's cultural, racial, linguistic and religious heritage as well as the potential impact of "inter-racial and cross-cultural adoption";⁶ however, these provisions fall short of the "preservation" standard required for adoptions of Aboriginal children.

The high standard imposed for the adoption of Aboriginal children is a necessary legal recognition of their particular needs and the importance of their ties to Aboriginal culture. For Aboriginal children adopted by non-Aboriginal parents, the statutory standard is a policy tool aimed at facilitating the children's access to their historical roots and encouraging the preservation and continuance of Aboriginal cultures generally. While culture is a critical consideration in the development of adopted children from other countries or regions, their originating cultures may continue to exist and proceed apace. In those circumstances, emphasis falls more on the individual child's development. In contrast, Aboriginal cultures do not have a source or base in another country where they may persist: these cultures are indigenous to Canada, and their preservation and continuance must be treated as domestic responsibilities.

This distinction is one point of separation between children adopted from Aboriginal heritage within Canada and those adopted from other countries. However, it is unclear why a sharp dividing line has been established between them at the statutory level in dealing with the impact of culture on childhood development. Adopted children of other cultural, racial, linguistic, or religious backgrounds do not benefit from the more rigorous statutory expectation, which may be detrimental to their development according to growing evidence of the importance of cultural education and understanding for adopted children generally. The Act and the Regulation impose consideration of a child's cultural heritage as a "relevant factor" when adoption orders are created, but the specific parameters of future plans regarding this factor are left to broad discretionary grounds and are thus vulnerable to uneven implementation. The standard of "consideration" under the Act, left unqualified, is insufficient to address properly the potential psychological needs of adopted children.

This is not to say that the current scheme is insufficiently prepared to consider culture in determining the child's best interests. An assessment of the prospective adoptive parents' "willingness to help the child appreciate and integrate [their cultural, racial, linguistic and religious] heritage" is a mandatory part of the pre-placement assessment process.⁷ The *Practice Standards and Guidelines for Adoption*⁸ used by the British Columbia Ministry for Children and Families Adoption Branch mandates awareness of and sensitivity to the child's cultural heritage throughout its procedures, as do the *Child, Family and Community Service Act*⁹ and the *Hague Convention on Intercountry Adoptions*,¹⁰ the latter of which is incorporated by reference under Part 4, Division 2 of the Act. Rather, my contention is that the distinction that *requires* a cultural preservation plan and approval in the case of Aboriginal children being placed with non-Aboriginal adoptive parents but only *considers* it in determining the placement of other adopted

5 *Adoption Regulation*, BC Reg 291/96.

6 *Ibid*, ss 3(1)(g), 3(2)(e). See also *ibid*, ss 4(1)(a)(ii), 4(1)(e)(ii).

7 *Ibid*, s 3(1)(g).

8 British Columbia, Ministry for Children and Families Adoption Branch, *Practice Standards and Guidelines for Adoption*, (Victoria: Ministry for Children and Families Adoption Branch, 2001) [*Practice Standards*].

9 *Child, Family and Community Service Act*, RSBC 1996, c 46.

10 *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May 1993.

children¹¹ should be abolished. Instead, a uniform standard set at the higher level should prevail for all adoptions.

PART II. THE NEED FOR REFORM

Reform of these standards will require a concerted effort on multiple fronts. Courts must be given sufficient discretion and information to assess properly the situations and needs of the child and the adoptive parents in creating adoption orders. Government agencies and private parties involved in the adoption process must be provided with sufficient support. Such reforms must, at all points, be informed by information and research pertinent to all stages of the adopted child's life.

As a result of their adopted and racialized status, transracial adopted children face significant challenges as they grow into later childhood, adolescence, and beyond, especially in cases where the parents are visibly of a different race than the child.¹² The potential socio-psychological issues adopted children already face are compounded in the development of transracial adoptees by experiences of race- or culture-based discrimination, hostility, and overt racism. These negative experiences lead to a high risk of feelings of “belittlement, anger, and alienation”¹³ and may have other severe consequences. Studies have suggested “that substantial numbers of children in transracial placements have become increasingly maladjusted as they grow older[,] with higher than average rates of suicide and mental health problems”.¹⁴

Currently, the role and impact of culture in the determination of the best interests of the child is largely treated in a diminished capacity in Canadian courts. Cultural considerations are discussed by the courts in transracial adoption cases, but judicial discourse has, on occasion, treated cultural planning in a reductive manner or as being of secondary importance, at least in comparison to more easily quantifiable and demonstrable factors, such as income levels, housing situations, and other socio-economic resources.

In *Re Adoption Act and Infant Female #99-0733*,¹⁵ which concerned the adoption of a Canadian child of mixed Greek and Egyptian heritage, Justice Paris determined the adoptive parents to be “virtually ideal” based on the following analysis:

[T]hey appear to be well suited to adopt the child. They are native-born British Columbians of Italian ancestry. They are university educated with a combined annual income of over \$80,000. They are regular church goers.

11 *Practice Standards*, *supra* note 8 at 1-8.

12 For some examples, see Derek Kirton et al, “Searching, Reunion and Transracial Adoption” (2000) 24:6 *Adoption & Fostering* 6; Ruth McRoy & Amy Griffin, “Transracial Adoption Policies and Practices: The US Experience” (2012) 36:3-4 *Adoption & Fostering* 38; Jayashree Mohanty & Christina E Newhill, “Asian Adolescent and Young Adult Adoptees’ Psychological Well-Being: Examining the Mediating Role of Marginality” (2011) 33:7 *Children and Youth Services Review* 1189; and Colleen Butler-Sweet, “‘A Healthy Black Identity’: Transracial Adoption, Middle-Class Families, and Racial Socialization” (2011) 42:2 *Journal of Comparative Family Studies* 193.

13 M Vashchenko et al, “‘Just Beyond my Front Door’: Public Discourse Experiences of Children Adopted from China” (2012) 49:1-2 *Am J Community Psychol* 246 at 247.

14 Mark Anderson, “Protecting the Rights of Indigenous and Multicultural Children and Preserving their Cultures in Fostering and Adoption” (2014) 52:1 *Family Court Review* 6 at 18. See also Margaret A Keyes et al, “Risk of Suicide Attempt in Adopted and Nonadopted Offspring” (2013) 132:4 *Pediatrics* 639.

15 *Re Adoption Act and Infant Female #99-0733*, 2000 BCSC 65 (available on CanLII). Although this decision was subsequently overturned on appeal, the Court of Appeal took no issue with the trial judge's findings and conclusions quoted above: see *Re British Columbia Birth Registration No ###*, 2000 BCCA 109 (available on CanLII).

They both have large extended families to whom they are close. He is 40 and she is 35 years of age, they have been married for over eight years and evidently their marriage is solid. They have tried to have children of their own, including with medical assistance, but have been unsuccessful.¹⁶

The adoptive parents' age, education, income, religious beliefs and habits, and marital relationship were all considered to be salient factors that informed the analysis. Culture, however, received only a brief nod in recognizing "ancestry", which did not provide insight into any cultural support to be tendered to the child. While the adoptive parents may certainly have been willing to provide such support, the court's lack of interest in this matter is troubling. The decision appears to suggest that the child's immediate well-being is the primary scope of the court's analysis, and that cross-cultural heritage will not present challenges once the child has been subsumed into the adoptive parents' cultural processes or the perceived dominant Canadian culture.

Despite the Supreme Court of Canada's recognition in *Van de Perre v Edwards* that "evidence regarding the so-called 'cultural dilemma' of biracial children [...] is relevant and should always be accepted",¹⁷ the view put forward in *Racine v Woods* that "the significance of cultural background and heritage as opposed to bonding abates over time"¹⁸ continues to live on in courts across Canada.¹⁹ Although it is reasonable that factors such as financial ability should remain foundational considerations in determining the suitability of adoptive parents, judicial emphasis on material resources risks treating cultural awareness and accommodation as second-tier factors. Amending the enabling legislation to raise culture to a foremost consideration, as it is in the case of Aboriginal adoptees, would significantly mitigate this risk and ensure that culture is given appropriate treatment.

In this area of the law, the courts have preferred a general strategy of risk management and minimization: in determining the best interests of the child, judicial analysis focuses heavily on determining where the child is exposed to the least amount of quantifiable risk.²⁰ The necessity of addressing the child's pressing and imminent requirements may explain why courts have been reluctant to engage with murkier issues of culture and the later development of the child. The impact of culture on a person's development may take decades to manifest fully. When there is no immediate, measurable, and inevitable risk attached to a factor's omission or reduction, as can potentially be the case with culture, such a factor is more likely to be relegated to a position of lesser relevance in the overall decision, on grounds of vagueness or potential inapplicability.

When approving an adoption order, the court will understandably focus on ensuring that the child's observable, immediate, and pressing needs are met: food, shelter, caring parents, and medical attention as required. However, given that adoption orders have a permanent and lifelong impact on the individuals involved, courts should ideally also consider the adoptive parents' plans to accommodate a child's cultural needs, both in childhood and in later years. Adoption orders should not be made with an artificial dividing line in mind, where on one side the court and lawmakers ensure that risks to

16 *Ibid* at para 18.

17 *Van de Perre v Edwards*, 2001 SCC 60 at para 40 (available on CanLII).

18 *Racine v Woods*, [1983] 2 SCR 173 at 187 (available on CanLII).

19 See *Re DH*, 2013 ABPC 283 (available on CanLII); *Re RRE*, 2011 SKQB 282 (available on CanLII); and *Adoption – 1212*, 2012 QCCQ 2873 (available on CanLII).

20 See *Re British Columbia Birth Registration No 1999-59-017333*, 2011 BCSC 830 (available on CanLII); *CD v PB*, 2006 BCSC 1515 (available on CanLII); and *Director and AM*, 2005 BCPC 672 (available on CanLII).

the child's physical health are minimized, but beyond which the parents and the adopted child bear the responsibilities and risks that come with age-based or later development.

Furthermore, the *Racine v Woods* view that the importance of culture abates over time is a myopic and outdated understanding of culture's impact on psychological development that has been refuted by modern scholarship.²¹ The prevailing opinion in studies of transracial adoptions is now that the opposite proposition is closer to the truth: while infants and very young children may show little understanding of race or appreciation of its consequences, transracial adoptees become increasingly aware of the impact of racial or ethnic differences on their relationships with others and on themselves as they grow older.²²

While the importance of race and culture may or may not diminish over time in terms of the child's relationship with the parents during childhood, as was believed in *Racine v Woods*, research indicates that these factors grow substantially more significant over the course of the child's entire lifetime. Consequently, the assessment of the adoptive parents' suitability must be made with a view of the child's future, and adoptive parents must anticipate the potential impact and risks associated with the child's potential future awareness of his or her cultural and racial heritage from the very early stages of their relationship with the adopted child. There must be planning to manage and minimize the impact of such negative experiences on the child's development and also clear recognition by all parties of the child's intersectional position and "complex identity"²³ as both a transracial person and an adoptee. Integration of these considerations at the statutory level would ensure that the issue is thoroughly considered in all transracial adoption cases.

PART III. WAYS FORWARD

While mandatory cultural planning processes appear to have been, on the whole, successful in easing the adoption process for Aboriginal children and have been recognized as "a feature of a successful model of caring for Indigenous children in permanent ways",²⁴ these measures have not been expanded to apply to transracial adoptions generally. Instead, the determination of the best interests of the child in transracial or multiracial child adoption cases continues to proceed in a piecemeal fashion that may fail to capture adequately the importance of cultural values over the course of the adoptee's life.

The most apparent solution to these risks would be to extend the cultural planning process to all adoptions. Measures enacted in accordance with a "preservation" requirement such as the Act's section 3(2) for Aboriginal children, extended broadly, would require parents to assess and formulate plans for a child's needs by going beyond the basic, mandatory considerations to actual strategic planning. The statutory framework for this higher standard is already in existence and operational; applying it to all adoptions would, in

21 See FE Aboud, "The Formation of In-Group Favoritism and Out-Group Prejudice in Young Children: Are They Distinct Attitudes?" (2003) 39:1 *Developmental Psychology* 48.

22 See NS Huh, "Korean Adopted Children's Ethnic Identity Formation" in KJS Bergquist et al, eds, *International Korean Adoption: A Fifty-Year History of Policy and Practice* (New York: Haworth Press, 2007) 79 and J Triseliotis, "Intercountry Adoption: In Whose Best Interests?" in M Humphrey and H Humphrey, eds, *Inter-Country Adoption: Practical Experiences* (London: Routledge, 1993) 119.

23 I borrow this term from Beatriz San Roman's study of transracial adoptees in Spain and the difficulties they experience in negotiating the "trans" nature of their physical, other-racialized bodies and their cultural sense of self: see Beatriz San Roman, "'I Am White ... Even if I Am Racially Black' 'I Am Afro-Spanish': Confronting Belonging Paradoxes in Transracial Adoptions" (2013) 34:3 *Journal of Intercultural Studies* 229.

24 Jeannine Carriere, *You should know that I trust you... Cultural Planning, Aboriginal Children and Adoption Phase 2* (Victoria: University of Victoria, 2010) at 15.

many ways, be treading familiar ground. While many adoptions are already likely to involve significant planning devoted to this end by willing and proactive adoptive parents in conjunction with government agencies, a statutory framework and a regimented policy would ensure that all adopted children benefit from such measures.

Resource availability, however, must be considered in any expansion of duties placed on adoptive parents, both for the adoptive parents as well as for the administrative and judicial frameworks. Fully addressing this matter is outside the scope of this paper, but I wish to acknowledge here that there are many obstacles to the successful expansion of the cultural planning process. Significant expenditures by the courts and especially the relevant government agencies would likely be required if more oversight was involved in an application's approval. Identifying appropriate support networks for adoptees who originate from countries with little representation in Canada may be disproportionately difficult or costly, particularly in rural areas. Furthermore, the current adoption process is already a long, expensive, and often fraught experience for all parties involved; increasing assessment requirements may exacerbate these existing issues and introduce new delays.

Adoptive parents would likewise face increased costs if the adopted child required special counselling or initiatives to accommodate their cultural needs, including the cost of programs, travel, language training, and other relevant activities. Parents who would otherwise be found fit may, if culture were made a governing consideration, fail to meet the standard of expectation through no fault of their own. Geographical or demographic limitations may inhibit prospective parents' ability to adopt transracial children simply because they live in a place where the child's culture could not be cultivated in a social context: of Canada's six million visible minority people, 70% reside in Toronto, Montreal, or Vancouver.²⁵ It is possible that adoptive parents in urban centres would be disproportionately found to be more suited for adoption than those outside of Canada's largest cities. Prospective parents may be unduly penalized if they reside in a Canadian city or town that cannot meet a higher standard in providing the adoptee with access to cultural resources.

A more intermediate proposal is to reinforce the education received by prospective adoptive parents during their initial assessment and pre-approval stages. Although information about the adopted child's cultural or racial background is already an important part of the adoption process for parents, further emphasis should be integrated into the training and home study portions of the adoption preparation process to raise awareness of the unique problems transracial adopted children may face as members of visible minorities in Canada. Experiences and needs vary in meaningful ways between generations of immigrants, and these issues may be exacerbated by the child's lived experience as an adoptee.²⁶ A visit to the child's country of origin may be a valuable experience, but it is equally, if not more, important to ensure that the adoptive parents are prepared to guide the adopted child through the difficult experiences of coping with racism, discrimination, and otherness at home.

25 Statistics Canada, *Immigration and Ethnocultural Diversity in Canada*, (Ottawa: StatCan, 2011) at 4.

26 See generally Rubén G Rumbaut, "Ages, Life Stages, and Generational Cohorts: Decomposing the Immigrant First and Second Generations in the United States" (2004) 38:3 *International Migration Review* 1162; Msia Kibona Clark, "Identity Among First and Second Generation African Immigrants in the United States" (2008) 6:2 *African Identities* 169; Karthick Ramakrishnan, "Second-Generation Immigrant? The '2.5 Generation' in the United States" 85:2 *Social Science Quarterly* 380; and Bic Ngo, "Beyond 'Culture Clash': Understandings of Immigrant Experiences" (2008) 47 *Theory Into Practice* 4.

CONCLUSION

There is no clear answer to the question of how culture should be factored into adoption processes. While there is little doubt that culture plays a crucial role in the emotional and psychological development of transracial adopted children, culture's intangible and variable nature makes it difficult for courts accustomed to a quantifiable risk-management model to integrate it properly into decisions. Furthermore, the vast discrepancies in the availability of cultural resources across Canada may present obstacles to the formation of a uniform standard that does not unduly penalize those who reside outside of the major metropolitan centres.

Whatever the logistical difficulties involved, the need for change is clear. Transracial adopted children continue to face disproportionate challenges due to inadequate social and emotional support networks as they grow into adulthood and wrestle with difficult questions of identity, race, and culture. While adoptive parents no doubt make their best efforts to care for their children, the courts, government agencies, and lawmakers have an instrumental authority in creating that family relationship. They cannot absolve themselves of the responsibility to ensure that the child's best interests are met, not only at the time of the adoption and immediately afterwards, but over the course of that child's growth. Difficulty is not an excuse for inaction and, as indicated in this analysis, Canada's adoption system is in need of action.