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# The Indigenous Child Removal System in Canada: An Examination of Legal Decision-making and Racial Bias

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### Article abstract

*This Indigenous child removal system in Canada has been in operation since the 1950s and has created unprecedented Indigenous child overrepresentation in the child welfare system. While five generations of residential schools and disastrous socio-economic conditions often warrant child welfare involvement, the statistics for Indigenous children in care are so disproportionate that we are called to examine key factors that have created and sustain the system. While history provides a contextual frame for these statistics, examining legislation and legal decision-making in Indigenous child welfare cases sheds light on how legal and racial factors contribute to ongoing Indigenous child removals from families and culture. This article is a call for the Indigenous child removal system to be overhauled and suggests that the recommendations of the Truth and Reconciliation Commission final report can guide us in how that can be achieved.*

## An Interdisciplinary Journal

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# The Indigenous Child Removal System in Canada: An Examination of Legal Decision-making and Racial Bias

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## Abstract

*This Indigenous child removal system in Canada has been in operation since the 1950s and has created unprecedented Indigenous child overrepresentation in the child welfare system. While five generations of residential schools and disastrous socio-economic conditions often warrant child welfare involvement, the statistics for Indigenous children in care are so disproportionate that we are called to examine key factors that have created and sustain the system. While history provides a contextual frame for these statistics, examining legislation and legal decision-making in Indigenous child welfare cases sheds light on how legal and racial factors contribute to ongoing Indigenous child removals from families and culture. This article is a call for the Indigenous child removal system to be overhauled and suggests that the recommendations of the Truth and Reconciliation Commission final report can guide us in how that can be achieved.*

## Introduction

This article presents a focused critique of the Indigenous child removal system in Canada to provide an historical overview as well as to examine some of the key factors that sustain Indigenous child overrepresentation in the child welfare system. The statistics for Indigenous children in care are so disproportionate and the apparatus' that underpin Indigenous child welfare so complex, that we have to examine how the system developed as well as asking what are the factors that sustain this system? The article begins with brief historical framing to contextualize the alarming, Indigenous child welfare statistics and to provide the backdrop for a discussion of how legislation and legal decision-making buffer and serve to justify ongoing State removal of Indigenous children. To this end, the legal precedent established in the Supreme Court of Canada case *Racine v Woods* (1983) is critiqued, and the legal test of "the best interest of the child" is also scrutinized. The article concludes with a challenge regarding how culture is assessed in Indigenous child welfare cases. The goal of this article is to disrupt the Indigenous child removal system by analyzing how legislation and policies, and cultural/racial bias play out in the removal of Indigenous children in Canada.

## Historical Context

In Canada, federal and provincial policies and legislation evolved to deal with the “Indian Problem” through assimilation as a necessary precursor to land and resource acquisition. Programs and policies that furthered the ongoing assimilation project included the reserve system, the residential school system, and the child welfare system. According to O’Shaughnessy (1994), “[w]ardship was the legal arm of the assimilative-genocidal policy of forced removal of Aboriginal children from their families and nations” (p. 70). The consequences of successive assimilation schemes, exacerbated by inequitable funding for health and social services to First Nations people, have been devastating to Indigenous populations in Canada, resulting in a legacy of social chaos that is evident in cities and First Nation communities. Over a decade ago Bennett, Blackstock and De La Ronde (2005) summarized Indigenous conditions this way:

As a result, the socio-economic problems today are so pervasive for First Nations peoples that a 1996 internal Department of Indian and Northern Affairs study found that if the United Nations Human Development Index were applied to First Nations living on reserve they would rank 79th and 80th in the world while at the same time, Canadians as a whole, are ranked number one in the world. (p. 7)

Although the authors were reporting on the UN Index from 1996, the disparities remain. The Community Well-being Index (INAC, 2011) revealed that of the “bottom” 100 communities in Canada rated on dimensions of education, income, labour force participation, and housing, 96 were First Nation communities. Similarly, the UN Special Rapporteur James Anaya (2015) observed that there had been no reduction in disparities between Indigenous people and other Canadians since 2004 (p.7).

## The Scope of Indigenous Child Welfare

The intense involvement of the child welfare system in Indigenous life emerged concurrently with the deterioration of Residential Schools in the 1950s. The transfer of responsibility for child welfare from federal to provincial control and the introduction of federal funding transfers through the Canada Assistance Plan in 1966 (Graham, Swift, & Delaney, 2008) allowed provinces to invest more resources into child welfare matters, leading to exponential growth in the Indigenous Child Welfare (Sinclair & Grekul, 2012).

By the 1970s, one in three First Nation children was separated from their families by adoption or fostering (Fournier & Crey, 1997), with Indigenous children making up 44% of all the children in care in Alberta, 51% in Saskatchewan, and 60% in Manitoba (McKenzie & Hudson, 1985, p.126). Currently, child in care statistics are even more alarming. Although Aboriginal children make up just 7% of the child population in Canada, they account for 48% of all foster children (Statistics Canada, 2013). Further, according to Turner, “three-quarters (76%) of Aboriginal foster children lived in the four Western provinces... In Manitoba and Saskatchewan, 85% or more of foster children were Aboriginal children” (Turner, 2016).

The high levels of children-in-care in the four western provinces skew the national data, which suggests that Indigenous children comprise 30-40% of children in care (Bennett et al., 2005). Gough, Trocmé, Brown, Knoke and Blackstock (2005) observed that assimilation policies led to higher incidents

of child removal and the overrepresentation of Indigenous children in care because Indigenous children were placed at twice the rate of non-Indigenous children, primarily due to socioeconomic conditions, alcohol abuse, neglect, criminal activity, and cognitive impairment.<sup>2</sup> The increase in children in care continues unabated with First Nations children spending over 60 million nights, or the equivalent of more than 180,000 years, in foster care between 1989 and 2012 (Blackstock, 2016).

The exact numbers of Indigenous children placed in permanent alternative care during the 60s Scoop is not yet known, although research is currently underway (see Sinclair, 2016). In 1996, Indian Affairs (INAC) statistics (the A-list or Adoption List) tell us that 11,123 First Nations children (Canada, Erasmus, & Dussault, 1996, p. 48) were apprehended and subsequently adopted, primarily into non-Indigenous homes in Canada, the United States, and around the world between the years of 1960 and 1985 (Sinclair, 2007b). The list does not account for children who were not Status Indians according to the Indian Act, or who may have been status but were not recorded as such in the interests of promoting their “adoptability” by non-Indigenous families. “Métis” and “non-Status” Indigenous children may have been considered more socially desirable by potential adoptive parents (Sinclair, 2007b).

The intense increase in Indigenous child welfare apprehensions and relinquishments caused alarm in Indigenous communities and raised an outcry by Indigenous political leaders who argued that the removal of Indigenous children constituted genocide as per the Convention on the Prevention and Punishment of the Crime of Genocide, to which Canada is a signatory. The convention notes that genocide refers to “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” including item 2(e) which is “[f]orcibly transferring children of the group to another group” (UN General Assembly, 1948). A public inquiry on the mass adoption of Indigenous children was conducted in Manitoba and a report was released in 1985. The report author, Justice Edwin Kimelman, condemned adoption practices in Manitoba, highlighting the fact that incomplete, inaccurate, and misleading information in child welfare files was the order of the day. The report stated, “...the Chairman [Kimelman] now states unequivocally that cultural genocide has been taking place in a systematic, routine manner” (Kimelman, 1985, p. 51).

Kimelman’s report led to an immediate moratorium on Indigenous adoption in Manitoba, which was followed, albeit informally, in other provinces. Ultimately his report altered adoption practices, and in Saskatchewan, for example, policies were developed that required the consent of families and First Nation band leadership to the adoption of Indigenous children. At that time, “best interest of the child” evolved to include cultural considerations for Indigenous children. The “best interest of the child” is a legal construct used to guide child welfare decision-making.

## The Best Interests of the Child

The “best interests of the child” criteria are set out by each province’s legislation in assessing situations for Indigenous children in alternative care and for custody cases. Manitoba, for example, requires that consideration be given to the child’s “cultural, linguistic, racial and religious heritage,” (The Child and Family Services Act of 1985, 2013) while BC has a comprehensive list of “special Indigenous

<sup>2</sup> See also Trocmé, Knoke & Blackstock, 2004.

considerations” (Family Law Act of 2011, 2016). Saskatchewan, by contrast, has no specific Indigenous or cultural consideration requirements.<sup>3</sup> Compounding the generally cursory attention given to culture in “best interest of the child” policies in the legal arena, precedence is being given to the notions of attachment and bonding over cultural considerations, to the detriment of Indigenous children and communities. The context of the attachment argument appears to have taken a foothold with Justice Bertha Wilson’s finding in the leading case on Indigenous adoption, *Racine v. Woods* (1983), which implied that there is an inverse correlation between attachment and the importance of culture in a child’s life. Justice Wilson stated,

In my view, when the test to be met is the best interests of the child, the significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes.

Park (2003) observed that the case has been criticized for its lack of cultural relevance and “for producing an unfair result that is dismissive of First Nations culture” (p. 53). Nevertheless, the argument is currently being applied to children in foster care situations and the assumption that bonding (or attachment) supersedes culture is being relied upon in case after case with increasing regularity and without challenge to the veracity of the argument.<sup>4</sup> For example, Justice L’Heureux-Dube, in *Catholic Children’s Aid Society of Metropolitan Toronto v. M. (C.)* (1994), summarizes this notion in the interest of the child:

In considering the question of “the best interests of the child,” the child’s psychological attachment to her foster family may be, in our case and probably many others, the factor most important. (2 SCR, 165, p. 201)

However, Justice Wilson made two problematic assumptions in her decision. First, she assumed that bonding supersedes cultural background and gave “longevity of placement” primacy where Indigenous children have been in non-Indigenous care for long periods of time. The inference she made is that bonding occurs on a correlational scale of closeness that is linear and can be measured over time, i.e. the more time in the placement, the closer the bond. However, there is no evidence in research that bonding and attachment increase with time and no research that quantifies bonding levels. In fact, a 2003 study of children of divorce observed that attachment, as an *idea*, is an evolving representation dependent upon the nature of the family environment (Lewis, Feiring, & Rosenthal, 2003). Further research indicates that attachment is actually dependent upon mothering style and can be disrupted or enhanced depending upon the nature of the interaction between mother and child (Egeland & Farber, 1984). Other studies show that securely attached children can transition to insecurity over time. The correlations between attachment “continuity and discontinuity” hinge upon multiple factors including maltreatment, depression, family functioning, and most significantly, *chaotic life experiences* (Weinfield, Sroufe, & Egeland, 2000). Those authors found that attachment is vulnerable in high risk groups, and racial factors as intervening factors could affect family functioning. The research combines to assert the notion that

<sup>3</sup> See The Child and Family Services Act of 1989-90 (Saskatchewan). Chapter C-7.2 of the Statutes of Saskatchewan. §§ 1-83 (2014) at <http://www.qp.gov.sk.ca/documents/english/statutes/statutes/C7-2.PDF>

<sup>4</sup> See *Tearoe v. Sawan* (1993), *Catholic Children’s Aid Society v. A.V.W.* (2002), *Adoption* (2009), *Adoption* (2012), and *J.G. and R.G. v. Awasis Agency of Northern Manitoba* (2012).

attachment is neither static nor linear. Attachment is very much dependent upon the intrafamilial (within family) context. In a healthy family where maternal interaction with the child is healthy and trustworthy, attachment is strong. In vulnerable contexts where family strife and other risk factors occur, attachment can shift over time. In retrospect, it is interesting to observe that the original attachment to birth parents and family and subsequent removal of children into foster care is not considered. It is very likely that bonding and attachment were already disrupted at the initial removal but this argument is yet to be used to return children their original source of attachment - birth families.

The second assumption in Justice Wilson's statement is that the significance of cultural background and heritage abate over time. However, the literature on transracial adoption indicates that the significance of culture and heritage actually increase over time for foster and adoptive Indigenous children, whether their experiences were positive or negative. Over 98% of the adoptee narratives examined between 2002 and 2007 articulated that the repatriation to Indigenous heritage was an essential and critical aspect of reconstructing identity as young adults (Sinclair, 2007a; see also Carriere, 2010; Carriere, 2005; Maurice, 2000; Kulusic, 2005; Sindelar, 2004). Park (2003) asks the salient question, "do racial needs abate with time?" (p. 56). She points out that racial and cultural needs may actually increase with time as children navigate their identities into adolescence. For children who are members of racialized minorities, the insulation of same-race siblings, families, and communities cannot be underestimated in terms of belonging and a sense of safety in the world. Fogg-Davis (2002) terms the learning of how to navigate the world in a racialized context as *racial navigation*: a skill that is learned within same-race contexts by children who model their coping skills from siblings, parents, and extended community. A theory that racial elements become less important than attachment over time is erroneous in the sense that racialized children carry their "racial element" with them through their lives and culture forms a critical aspect of an individual's identity. According to Wensley (2006):

...no authority is required to make a convincing argument that culture and heritage are significant factors in the development of a human being's most fundamental and enduring attributes... they are the stuff from which a ... person's identity and sense of self are developed. (Wensley 2006 citing *EJT v. PMVP and TVP* (1996) Man. C.A.)

In sum, the literature contradicts Justice Wilson's statement because Indigenous adoptees and foster children who were adopted during the 60s scoop, with very few exceptions, invariably repatriate to their Indigenous families, communities, and culture (Sindelar 2004; Sinclair, 2007a; Native Child and Family Services of Toronto, Stevenato and Associates, & Budgell, 1999). The finding in *Van de Perre v. Edwards* (2001) that *race is a factor in determining the best interests of the child* and should be assessed on a case-by-case basis, augments the challenge to Justice Wilson's findings. Given that identity is a lifelong process and that the majority of adoptees repatriate as young adults, our attention needs to be directed to the fact that "best interests of the child" determinations, for Indigenous and racialized children, should actually consider the "best interests of the child *as adult*." More specifically, since cultural identity takes on increasing significance with adulthood, considerations need to be made so that cultural realities are given consideration when making child welfare decisions for Indigenous and racialized children. Unfortunately, when we examine who is making best interest decisions, we encounter key problematics of bias and ethnocentrism.



## Who Determines Best Interests?

An essential consideration is whether, in a racialized, socio-political milieu, the “best interests of the child” can be determined fairly and equitably by non-Indigenous people. If stereotypes and negative social constructions of Indigenous people are normative, and racism is deeply and unconsciously rooted in the collective Canadian psyche, can a white judge who is tasked to determine a child’s best interest be objective and judicially neutral? More than likely, “best interests of the child” determinations favouring the Euro-Canadian, white, nuclear family as the one most “fit” to raise a child will naturally dominate. In terms of the relevant legislation, this particular concern is confirmed in *R. v. Williams* (1998):

Judicial directions to act impartially cannot always be assumed to be effective in countering racial prejudice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudice to be examined.

Back in 1989, Patricia Monture argued that the judicial system was racist and biased against Indigenous families. Crichlow (2002) cites Monture who stated:

child welfare law is racist in that it applies standards that are not culturally relevant to Aboriginal peoples and which serve to reinforce the status quo. She applies this analysis to the racist bias from which judicial interpretations of the best interests of the child test are reached. (Child Welfare Ideologies section, para. 2)

The challenge we still contend with is to raise awareness of bias where people do not believe bias exists. Here, the aphorism “absence of evidence is not evidence of absence,” can be applied to racism; that is, just because someone says they are not racist or biased, does not mean they actually are not. People who do not experience racism or are blind to it because they do not have direct experience of it may argue that it does not exist. Similarly, if people do not have an intricate understanding of the depth and breadth of Indigenous culture, how can they possibly assess its importance? More than likely, culture would be dismissed and minimized. White privilege and racial prejudice persist unabatedly in racialized societies because those who benefit from that normative racial advantage, often based on racial biases and ethnocentrism, have no cause to interrogate their own or systemic/institutionalized privilege or racism and hence, no cause to engage in any actions that would counter it. Crichlow (2002) highlights just how ingrained Canadian white, middle class normativity is by citing Quebec Family Justice Barakett’s findings in *Isaac v. Lavoie* [sic]: “Life on the reserve is not part of the real world.” Thus, it is not surprising that Justice’s suggestion in *R. v. Williams* (1998) to “err on the side of caution and permit prejudice to be examined” is substantially ignored in Indigenous child welfare cases.

Although the ruling *Racine v. Woods* (1983) has been frequently adopted in child welfare cases as a means to quantify attachment and dismiss cultural background, and is being used repeatedly and successfully in court to permanently place Indigenous foster children into non Indigenous families, the literature and research do not support a notion that attachment/bonding increases with time, nor do they support that cultural significance fades with time. In actuality, the literature and research indicates that the opposite is true in both respects.

Attachment is dependent upon multiple factors and can increase or decrease over time. However, because the courts have set precedents in giving more weight to perceived strength of “bonds” over culture, cases where foster families decide that they want to keep their Indigenous foster child are ending

up before the courts. Indeed, recent discussions with a foster parent and a social worker provide an example that social service agencies and foster families are well aware that the courts can be used to legally acquire Indigenous children. Given the legal precedents that have been set, Indigenous families and communities remain at risk for losing their children because courts are ruling in favour of foster families. The most recent cases indicated that Justice Wilson's assumption about the relationship between length of placement and attachment has been reified and accepted as truth, to the advantage of non-Indigenous foster families who decide they want to adopt their charges; observe the recent Quebec Court of Appeal statement of Bich, JA in 2009 (Adopted, 2009), who casually stated that "*the more time passes, the more the child becomes attached to the foster family.*"

Interestingly, however, it appears that the courts will use whatever argument works to remove Indigenous children from their families. Park (2003) highlighted the case of *H.(D.) v. M. (H.)* (1999) where the Supreme Court ruled that the trial judge had given sufficient consideration to the child's Indigenous heritage and reinstated the previous decision. This had the effect of *removing the Indigenous child from his Indigenous grandfather with whom he had lived for three of his four years* (emphasis added). This case reveals that the attachment argument is obviously a tenuous one and malleable to certain purposes (p. 61).

## The Indigenous Child Removal System

The Indigenous child removal system has an unprecedented scope. If we reflect upon the cultural, language, and family disruption that over 180,000 years of foster care, exacerbated by five generations of residential school trauma, potentially inflicts upon Indigenous children, families, and communities, we should be very alarmed. When these statistics are juxtaposed with the reality that Indigenous people comprise between 4 and 17% of provincial populations and yet up to 85% of all the children in care, our concern should increase exponentially because these numbers are statistically improbable. It may well be true that generations of residential school trauma created the conditions for increased child apprehensions, but it is also likely that systemic and institutionalized structures have emerged that are enabling and encouraging overrepresentation. Critics are arguing that provinces are fostering Indigenous overrepresentation because the financial benefits contribute to income security for those involved in the child welfare system. From speaking with many people working in Indigenous child welfare agencies across the country, I have learned that Provincial Ministries benefit through per capita transfer payments for Indigenous children in care and also receive the per capita child tax benefits for any child who is in the care of the system. An economy, once built, will perpetuate itself. If the Indigenous child welfare system has become an economy and is operating to the benefit of foster parents and mainstream social work infrastructures, the will to disassemble that system will be limited and, indeed, actively resisted. We have to ask ourselves if such a system honours the nation to nation relationship between Canada and First Nations people, entrenched in the Treaty process. More pointedly, we have to ask if such disparate numbers reflects the governments fiduciary relationship with Indigenous people as well as respects the Charter right to protection from discrimination based on ethnicity.

## Conclusion

In 1985, Justice Edward Kimelman stated that the systematic placement of Indigenous children



into non-Indigenous homes amounted to cultural genocide, and this was reiterated by Justice Murray Sinclair in the summary report of the Truth and Reconciliation Commission (2015). Indeed, the first four of 94 Recommendations of the TRC Final Report pertain to Indigenous child welfare reform. The Sixties scoop, it appears, has not come to an end; it has merely taken different forms in the intervening years. Kimelman's 1985 moratorium is being circumvented through permanent guardianship and adoption orders, and perpetuated in a justice system that utilizes the "best interest of the child" test in whatever manner best serves non-Indigenous interests. The quantification of attachment as a strategy for dismissing the significance of Indigenous culture is questionable given the research findings to the contrary and especially the racialized normative context in which "best interest" determinations are made. If the continued scooping of Indigenous children through legal and child welfare agency policy channels is not challenged, the Indigenous child removal system will continue to perpetuate the same cultural genocide that has confronted Indigenous communities since contact and the Indigenous child removal system in Canada will continue unfettered. The Indigenous child removal system must be dismantled immediately and a system put in place that deliberately disrupts the racist and colonial ideological foundations upon which the current system has been built. We can use the Truth and Reconciliation Commission recommendations to create a new system that more accurately reflects equitable nation-to-nation relationships and honours Indigenous children, families, and culture.

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