First Peoples Child & Family Review
An Interdisciplinary Journal Honouring the Voices, Perspectives, and Knowledges of First Peoples through Research, Critical Analyses, Stories, Standpoints and Media Reviews

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Volume 10, numéro 1, 2015

Special Issue: Custom Adoptions

URI : https://id.erudit.org/iderudit/1077180ar
DOI : https://doi.org/10.7202/1077180ar

Aller au sommaire du numéro

Éditeur(s)

First Nations Child and Family Caring Society of Canada

ISSN

1708-489X (imprimé)
2293-6610 (numérique)

Découvrir la revue

Citer cet article

di Tomasso, L. & de Finney, S. (2015). A Discussion Paper on Indigenous Custom Adoption Part 2: Honouring Our Caretaking Traditions. *First Peoples Child & Family Review*, *10*(1), 19–38. https://doi.org/10.7202/1077180ar

Résumé de l'article

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A Discussion Paper on Indigenous Custom Adoption Part 2: Honouring Our Caretaking Traditions

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Abstract

This paper forms Part 2 of a two-part discussion paper. Part 1 outlined a short history of adoption in Canada, examined the impact of forced, closed, and external adoptions on Indigenous adoptees and families, and traced the move toward more open statutory adoptions and greater cultural continuity in adoptions. Having zeroed in on the entangled histories of adoption and colonization in Part 1, here we explore traditional and contemporary practices of Indigenous custom adoption and caretaking. We first recount Western understandings and impositions, then feature Indigenous perspectives that centre spiritual and ceremonial protocols, values regarding child well-being and community connectedness, and the importance of kinship and customary forms of caretaking. We consider both the promises and complexities involved in designing and implementing custom adoptions, and the urgent need for adequate, equitable funding and supports to ensure their feasibility and sustainability. Finally, we highlight the resurgence of Indigenous authority over child welfare within a context of Indigenous self-determination and self-governance.

Key words: adoption, Indigenous child welfare, custom adoption, permanency planning, customary law, Indigenous self-determination

Introduction

Custom adoption, also known as *customary*, *cultural*, or *traditional adoption*, refers to practices of caretaking that have always taken place in Indigenous communities. Custom adoption is "much more than an Indigenous way of doing adoption; it is a complex institution by which a variety of alternative parenting arrangements, permanent or temporary, may be put in place to address the needs of children and families in Aboriginal communities" (Trerise, 2011, p. 2). We begin our discussion by acknowledging that the concept of custom adoptions is both loaded and contested. Indigenous languages typically have

no equivalent word for *adoption* because Indigenous ways of caring for children do not estrange children from their birth families, communities, and cultures (Bertsch & Bidgood, 2010). Adoption is typically conceptualized in relation to the Euro-Western nuclear family—a kinship form that does not exist in Indigenous communities. The very words *custom* and *adoption* are English-language, Euro-Western concepts that are difficult to translate into Indigenous languages and worldviews. In many ways, these Eurocentric concepts cannot capture the powerful spirit, deep relationality, and inherent diversity of Indigenous caretaking values and practices.

Despite the limitations of English-language terminology, the customary caretaking practices we refer to in this paper (and in this special issue) under the broad banner of custom adoption are rooted in Indigenous worldviews, including, and perhaps most importantly, the honouring of children as sacred gifts. Whatever they are called, these practices are well known to Indigenous Peoples the world over (Arsenault, 2006; Baldassi, 2006; Carrière, 2005; Keewatin, 2004; Quebec Native Women Inc., 2007, 2010) and warrant further exploration. As we discussed in Part 1 of this discussion paper, historic and contemporary realities of the adoption of huge numbers of Indigenous children into non-Indigenous homes has resulted in many Indigenous people and communities understandably viewing adoption with suspicion (de Finney & di Tomasso, 2015). However, custom adoption presents Indigenous alternatives to the wholesale separation of families and communities that has been perpetrated throughout colonial settler states through enforced residential schooling and the apprehension of children through child welfare interventions. Many Indigenous communities, child and family serving agencies, and, to some degree, provincial and territorial adoption policies are beginning to recentre customary caretaking practices and protocols. Still, much work remains to be done.

Our purpose is not to provide a definitive approach to custom adoption, but rather to highlight its intricacies and foreground the need for a resurgence of customary laws and systems in raising Indigenous children. Broadly, our aim is to explore what has been written to date on traditional and contemporary practices of custom adoption. Indigenous perspectives and experiences of custom adoption are, of course, of paramount relevance to this review; however, non-Indigenous scholars in the fields of anthropology and legal studies have produced most of the literature on the subject.

In Part 1 of our discussion paper, "Severed Connections – Historical Overview of Indigenous Adoption in Canada," we introduced Canada's history of damaging adoption and child welfare policies that were aimed at dismantling Indigenous families. We examined the impact of forced, external, and closed adoptions on Indigenous adoptees and traced the move toward more open statutory adoptions and greater cultural continuity in adoptions. Now, in Part 2, we turn our focus to custom adoption. First, we look at practices of Indigenous custom adoption, both through recounting Western understandings and impositions, and from Indigenous perspectives. Next, we summarize jurisprudence on custom adoption, beginning with a glance at international case studies and ultimately focusing on the legislative landscape in Canada. Finally, we describe the resurgence of Indigenous authority over child welfare within a context of Indigenous self-determination and self-governance. Here we highlight both the promises and complexities involved in designing and implementing such programs and the urgent need for adequate, equitable funding for them.

What is Custom Adoption?

No singular, concise definition of and approach to Indigenous custom adoption exists. Custom adoption is a broad term used to refer to the traditions, practices, and customs of diverse Indigenous communities. Acknowledging this diversity is critical to understanding the complexity of custom adoption policy, practice, and research, and is therefore central to designing programs and services that support custom adoptions. In the context of contemporary child, youth, and family service delivery and governance, the practices and traditions of customary caretaking and adoption that have always existed in distinct communities need to be recentred and reinterpreted. This entails honouring and reinvigorating ancient traditions, and addressing the challenges inherent in balancing provincial and federal policies with First Peoples' self-determination and customary laws. Yet, custom adoption remains a drastically underresearched focus in adoption research. In Canada, Indigenous Nations, organizations and delegated agencies seeking to support custom adoptions and permanency planning lack information about how to integrate such frameworks into their current programs and policies. Complicating their task, the purposes and protocols of custom adoption vary from one community to the next, and current provincial and territorial adoption policies do not begin to fully integrate the customary cultural practices of distinct First Peoples—even though such practices would strengthen the provision of adoption services and serve the best interests of Indigenous children, families, and communities. These complexities warrant further exploration. This section considers some of the broad definitions of custom adoption that have shaped our understanding and informed evolving recognition of these practices in Canada.

The Royal Commission on Aboriginal Peoples (Government of Canada, 1996) commissioned a background paper on custom adoption in 1995. After reviewing all available ethnographic literature on the topic, the paper's author concluded that customary adoption in Canada could be understood as "transactions in kinship" that reflect economic contexts and cultural values. Custom adoptions rarely occur outside the extended family but function within a network of *generalized reciprocity* (i.e., preexisting relationships of sharing and support) to reinforce existing family ties (De Aguayo, 1995, p. 2).

In purpose and practice, custom adoptions and other customary care arrangements differ in four important ways from non-Indigenous statutory adoptions:

1. They rarely involve strangers and often involve relatives or kin.
2. They are not about parenthood, but about kin relationships that concern the entire community.
3. In addition to the needs of the child, they consider the needs of adults and relatives, such as siblings.
4. Birth and adoptive families develop an agreement together. The birth family's needs are important, and contact between both families and the child is encouraged. (Trerise, 2011)

Scholars who have studied this practice emphasize that adoption is rarely about severing ties; instead, it is aimed at strengthening family, kin, and community relationships (Baldassi, 2006; De Aguayo, 1995; Keewatin, 2004; MacDonald, Glode, & Wein, 2005; Trerise, 2011).

Custom adoption was traditionally practiced for a number of reasons that extend well beyond the Euro-Canadian model wherein children are "given up" because their parents cannot take care of them. While statutory adoption is marred by a history of disconnection, forced assimilation, secrecy, and shame, custom adoption has served a number of important purposes in Indigenous societies. According to the limited information generated on this topic, traditional custom adoptions included five broad types: political, economic, mourning, permanent, and temporary[1] (Trerise, 2011, p. 170). In 1948, McIlwraith (cited in Carrière, 2005) documented mourning adoption in Bella Coola, BC, where babies who were believed to be reincarnations of community members who had recently passed on would be given to the families of the deceased. Keewatin (2004) notes that mourning adoption was also practiced by the Blackfoot, the Plains Crow, the Plains Ojibwe, and the Winnebago (p. 19).

Temporary and permanent adoptions occurred for a plethora of reasons. For instance, Keewatin reports that the Tlingit of the Northwest Coast would send their 10-year-old boys to live with their maternal uncle to learn clan lineage (Keewatin, 2004). Child rearing was often viewed as "a reason to live," and Elders gained respect for raising children (Baldassi, 2006). Grandparents among the Blood people would often raise one of their grandchildren because "closeness between Elders and grandchildren" exposed children to the same values the child's parents were raised by (Smith, 2009, p. 15). In Haida custom, a woman who was unable to bear children could approach any of her sisters and ask for a child to raise (Smith, 2009). Several other reasons might precipitate a custom adoption: parents might desire more gender balance in the family or wish to forge social alliances with others; children are considered gifts, so receiving a child through adoption could provide honour and prestige to the adoptive parents; birth parents were unable or did not wish to raise a particular child at that time (because they had too many young children, were not prepared to care for twins, were ill, etc.); or, in rare cases, a child wanted to choose its own parents (Baldassi, 2006, p. 74). Custom adoptions were frequently practiced to benefit people other than the child's birth parents, and in some communities protective measures were built in to allow for reclaiming an adoptee if the adoptive parents subjected the child to abuse (Baldassi, 2006).

Among the Haida, a potlatch and sometimes a pole raising would be held to celebrate a custom adoption, and the adopted child would maintain close ties with the birth family (Smith, 2009). In Nuu-chah-nulth communities, the adoptive family gave a naming feast so that the child would be associated with the adoptive family from that moment forward (Smith, 2009). Nordlund (1993), in her master's research on custom adoption with the Stó:lo and Thompson people of Seabird Island in BC's upper Fraser valley, observed that traditional adoption was informal and verbal in nature, with no exchange of money or gifts. It entailed full inheritance of dances, masks, names, and property of the adoptive family, and was recognized by the community, who played a key role in socially and symbolically constructing the adoptive parents' roles. In such adoptions, the child knew who the birth parents were and could choose to have a relationship with them, but the birth parents did not interfere in the child's upbringing (pp. 13–14). Nordlund (1993) also highlights that customary care arrangements could involve the child moving from one relative's home to another.

1 Elsewhere in the literature, permanent custom adoption is referred to as *jural* and temporary as *fosterage* (De Aguayo, 1995). Once again, it is important to highlight that these words are grounded in Euro-Western legal terminology.

Despite variation in specific customs and practices, Trerise (2011) draws from De Aguayo's work to explain that custom adoption was historically utilized:

> to ensure that children could be properly cared for, adults who needed youthful assistance in the tasks of daily life had that support, the task of teaching young persons the spiritual and traditional knowledges was assigned, and children had trusting relationships with a wide range of adults and other young people all functioning within a web of obligations and responsibilities to each other. (Trerise, 2011, p. 173)

Customary care arrangements do not always unfold without a sense of loss and rupture. For example, an Elder in the NONG SILA research (de Finney, Johnson, Coverdale, & Cowan, forthcoming) shared that her daughter was given to her sister through a customary adoption that included cultural practices and ceremonies. When the daughter grew up and had children of her own, the Elder was heartbroken when the children called her "Auntie" rather than "Grandma." She shared that her experience was shaped by grief and a significant sense of secrecy that she felt she could never address in her community, despite the fact that the adoption was culturally grounded and that she maintained close contact with all of her relatives in her community. We heard similar stories from other Elders in other communities during the course of our research. They are important reminders to resist the over-simplification and romanticizing of these approaches and instead seek out realistic, holistic understandings.

Referencing Benet's 1976 research, Keewatin (2004) underlines that while adoption was considered an aberration in Euro-Canadian culture, it was the norm in many Indigenous cultures. Among Inuit in Nunavik, for example, 2003 statistics show that one in five children were adopted, and most of those adoptions were customary ones; "the statutory adoption process was used only in a few situations" (Working Group on Customary Adoptions in Aboriginal Communities, 2012, p. 17).

In one of only a few first-person narratives of custom adoption recounted by Indigenous adopters or adoptees, Keewatin shares his story as an adoptee in his master's thesis. He writes:

> I am of Cree ancestry and was born in 1962. At the age of 18 months, I was given to my present parents who are also of Cree ancestry. My natural family and my adoptive family were not related by blood, but they were from the same region in Saskatchewan.... The arrangement was made between them to have me raised by my adoptive family.... My extended family also practiced custom adoption.... Within this extended family, eight of the grandchildren were given at birth to families who were better able to care for the child, or who wanted a child. These children have been raised in the homes that they were given to at birth, but all of the children move freely among the homes. There has never been any legal intervention, and all extended family members accept and are comfortable with the agreements. (p. 5)

This description highlights the flexibility of custom arrangements and the freedom of movement among various homes. This kind of fluidity is still very much the norm in many Indigenous families. For example, a Gitxsan woman who lives in Tseshaht territory in Port Alberni with her husband shared that they took over raising his nephew as a teenager because he didn't want to move when his mother found a new job. Her husband explained, "His roots are planted here. It's my responsibility as he is my eldest sister's son and in our culture, he is my son. More importantly he became an older brother to [our kids] to a degree.

We also took in my aunt for awhile as she was my father's closest sister, would be like my mother." Also, for two months every year, the couple's "summer daughter" (who is the same age as their daughter and is the great-granddaughter of the same aunt who lived with them) comes to live with them while her mother goes to live with other family members (Mike and Renee Watts, personal communication, September 2014).

The literature explored in this section strongly attests to the diversity and complexity of Indigenous custom adoptions and reflects the way these practices are rooted in particular conceptions of children, families, homes, communities, and relationships. Next, we discuss custom adoption as rooted in worldview.

Custom Adoption as Rooted in Worldview

When speaking of custom adoption, it is important to consider how Indigenous worldviews conceptualize childhood, parenthood, relationship, and community in ways that stand apart from Western notions of rights, attachment, permanency, and the "best interests of the child." Three of the values that inform the practice of custom adoption are explored below: honouring children; kinship; and fluidity.

Honouring Children

Much of the literature on custom adoption references De Aguayo's (1995) observation that Indigenous people believe that homes need children as much as children need homes. Children are seen as sacred gifts and are made to know that they are important (Keewatin, 2004). Leroy Little Bear (2000) asserts that children, from birth, are objects of kindness and love from a large circle of kin and friends. Roger Paul, a member of the Passamaquoddy Tribe in the United States and the Maliseet Nation in Canada, shared the following regarding children's place in society:

> When children are born, they are born into the community. The community is responsible for protecting and nurturing all children. There is no word in our language that is equivalent to "nuclear family." There is no defined line of who is the parent. Children are seen as real people, not property. Parents are whatever adults are around the child at the time. Children are welcome wherever they go in the community, so they are always at home. Young boys are called "qoss" to show they belong to the community, and young girls are called "tos." These are terms that show affection and communicate belonging. Our children understand through our words, our body language, and how we treat them and each other that they are loved and have a place among us. (Morrison, Fox, Cross, & Paul, 2010, p. 113).

Paul's description says much about the values that inform custom adoption.

In Nordlund's (1993) study with the Seabird Island Band in the Upper Fraser Valley of BC, one Elder shared his experience of non-Indigenous people questioning his commitment to raising his grandchild: "I've got some white friends say, 'What are you doing with all these children? Why do you look after them?' Well it's our job. It's what we're put on earth for ... children. That's the only resource we have, you know.... We got to keep it going. Our love for our children is a big part of it" (p. 91). In another study on urban Indigenous customary care, an Elder shared that she was always taught to "put another potato in the pot" and that "we just take in the children, it's what we do, we would never turn away a

child, it's not our way" (de Finney, Johnson, Coverdale & Cowan, forthcoming). Indigenous worldviews tend to honour and value children as gifts and resources that are meant to be shared to promote community strength, bonding, and caring (Bertsch & Bidgood, 2010). Later in the paper, we explore the significant contemporary constraints on these values, such as high rates of poverty, lack of housing, and intergenerational trauma.

Kinship vs. Attachment and the "Best Interests of the Child"

Little Bear (2000) describes kinship as a "spider-web of relations" that includes humans and the natural world and necessitates complex arrangements of rights and obligations that surpass the boundaries of Western notions of the nuclear family. Western attachment theory, for example, was not developed through research with Indigenous people and does not reflect their worldview. In Carrière's (2005) work with Indigenous adoptees, she uses the term *connectedness* as an alternative to attachment. Connectedness represents "a broader grounding in a person's total environment" (p. 31), including family, community, the natural world, and the spiritual.

Attachment theories are often employed by the courts to determine a child's "best interests" based on the notion that the main objective of the child welfare system is preserving continuity of care with a primary caregiver (Richard, 2004). It is crucial to understand that Indigenous cultures conceptualize "best interests" altogether differently (Kline, 1992): the best interests of the wider community are often inextricably linked to the best interests of individual children (Bunting, 2004). Justice William Morrow, a strong supporter of custom adoptions in his tenure as a judge in the Northwest Territories, wrote the following in regard to Inuit custom: "The original inhabitants of Northern Canada have attained this goal [of the child's best interests], they have practiced it over the years without any need to have it written down. It is by custom alone" (cited in Baldassi, 2006, pp. 77–78). In other words, traditional Indigenous custom care arrangements have historically operated in the child's best interests.

As previously mentioned, adoption practices based on kinship relations as opposed to individual rights do not require a severing of ties. The Supreme Court of the Navajo Nation in the United States speaks powerfully to how the values explored in this section come together in custom adoption: Navajo law is not concerned with terminating parental rights or creating legalistic parent/child relationships; "those concepts are irrelevant in a system which has obligation to children that extends beyond the parents" (Atwood, 2008, pp. 47–48). When parents are unable to look after a child, the child is adopted by family members in arrangements that may be temporary or permanent, depending on the circumstances. Under Navajo law, custom adoption is "informal and practical" and based on "community expectation founded in religious and cultural belief" (pp. 47–48).

Fluidity vs. Permanency

Permanency is a key child welfare concept. It is important to note, however, that Indigenous perspectives on caretaking differ significantly from mainstream Western notions of permanency. For example, caretaking arrangements in Indigenous communities tend to be fluid and flexible. Writing about the American context, Atwood (2008) states that "while tribes often endorse the concept of achieving

permanent family placements as a child welfare goal, many tribes do not accept the Anglo-American permanency option of severance and adoption and instead prefer a less absolute form of adoption than that mandated under state law" (p. 45).

Morrison, Fox, Cross, and Paul (2010) stress that at the heart of permanency lies one's sense of belonging, which they define as a set of interdependent relationships with family, community, tribe, and the land itself. The rich possibilities that custom adoptions open up render the subject of permanency planning integral to any discussion of custom adoption, and di Tomasso and de Finney explore it in detail in "Creating Places of Belonging: Expanding Notions of Permanency with Indigenous Youth in Care" (2015).

We see that Euro-Western and Indigenous worldviews conceptualize child, family, and community well-being very differently. The following section examines how legal systems have attempted over time to reconcile themselves to the idea and practice of Indigenous custom adoptions.

The Evolution of Jurisprudence[2] Regarding Custom Adoption

This section looks at legal custom adoptions in three settler states (i.e., states whose existence hinges on "the elimination of Indigenous peoples, politics and relationships from and with the land") (Wolfe, 2006, cited in Snelgrove, Dhamoon, & Corntassel, 2014, p. 8): Australia, the United States, and Canada.

Australia

Despite the prevalence of custom care arrangements among Australia's Indigenous Peoples, no legal recognition is currently given to these practices under Australian law; Nicholson (2009) notes:

> No Australian case has addressed this issue and the conventional view has been that the law does not recognise customary adoption. Strangely enough this non recognition did not present a particular problem until 1988, because the relevant Queensland government officials had a practice of recording customary adoptions as lawful adoptions if requested to do so. However, that practice then ceased and since 1989 the Torres Strait Islander communities have unsuccessfully lobbied the Queensland government for recognition. (p. 13)

Nicholson adds that "officials took a similar approach in Quebec, until that practice also met with disapproval" (p. 13). One explanation for the lack of legal recognition of customary adoptions in both jurisdictions may be found here:

> One of the problems about discussing [customary adoptions] is the use of the word "adoption," which does not adequately describe these customary practices. It does however tend to obfuscate and confuse the discussion because once customary adoption is correlated with statutory adoption, various misconceptions arise. In particular, recognition of the customary practice tends to attract the current modern criticism of statutory adoption, which leaves legislators unwilling to deal with it. (Nicholson, 2009, p. 5)

2 The term *jurisprudence* is used throughout this section to describe "the course of court decisions" (Merriam-Webster Online, 2014).

According to Paul Ban, an Australian scholar who has studied customary adoption in the Torres Strait, the term *adoption* was used "by anthropologists when trying to understand and define aspects of the child rearing practices of people from kinship-based societies. Although the term proved useful in helping westerners make sense of the transfer of children amongst extended family and close friends on a long-term basis, it has also become a stumbling block when government services have tried to understand and regulate the practice" (2008, cited in Nicholson, 2009, p. 5).

The United States

The *Indian Child Welfare Act* (ICWA), passed by the US Congress in the 1970s, was drafted in response to increasing recognition that cultural bias had caused Indigenous children to be removed from parents characterized as unfit due to extreme poverty or the interpretation of alternative caretaking arrangements by child welfare authorities as neglectful (Atwood, 2008). The Act affirms Indigenous courts' central role in child welfare matters and requires that before a child is removed, authorities show that "*active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful" (Atwood, 2008, p. 10, emphasis in original). ICWA also articulates that in adoption cases, the child should be placed with a family member, tribal member, or another Indian family—in that order (Atwood, 2008).

Unfortunately, the emphasis on the preservation of family, community, and culture under ICWA was compromised by the *Adoption and Safe Families Act* (ASFA) passed in 1997. As Atwood (2008) explains, AFSA responded to the perception that children were spending too much time in foster care in the name of family reunification; it represents a shift from parental rights to a best interests of the child paradigm. Under AFSA, permanency hearings must be held one year after the child is removed "and the state ... must petition to terminate parental rights if a child has been in state care for 15 of the past 22 months" (Atwood, 2008, pp. 19–20). Atwood (2008, citing Cross & Fox, 2005) argues that "the accelerated move toward termination of parental rights in ASFA may conflict with tribal worldviews. When a child's parents are unavailable or incapacitated, many tribes endorse a communal response of shared childrearing—through kinship lines, clans, villages, and other relational bonds" (pp. 30–31). While still maintaining that adoption constitutes the ideal permanency plan, the *Fostering Connections to Success and Increasing Adoptions Act* (FCSIAA) of 2008 states that kinship guardianship is an appropriate arrangement when family reunification and adoption are deemed impossible; the act explicitly authorizes assistance for this type of guardianship arrangement (Atwood, 2008). Atwood concludes that "through such time-honored arrangements as kinship guardianships, open adoptions, and customary or traditional adoptions, state courts may be able to satisfy the Indian child's need for familial security in a placement that comports with the child's tribal heritage" (pp. 58–59).

From this brief look at American adoption legislation, we can see that custom adoption practices interface with mainstream systems in complex ways and are subject to the evolution of both jurisprudence and policies of dominant, non-Indigenous society. Next we look at the Canadian legal picture.

Canada

Legal recognition of custom adoption in Canada varies in degree, with the Northwest Territories and Nunavut having the most amenable legal frameworks and British Columbia making more headway than other provinces in this area. Although child welfare and adoption fall under provincial jurisdiction, rulings and policies passed at the federal level, or in a different province or territory, can impact jurisprudence across the country. Additionally, child and family services on reserve typically fall under federal jurisdiction and funding formulas, which can complicate the process of provincial authority over adoptions (Sinha & Kozlowski, 2013).

Court cases pertaining to Indigenous custom adoption emerged in the 1960s, when decisions found that "this element of customary law has been continuous within Indigenous families and communities, is effective to create alternative familial status and is included among the unwritten laws recognized within Canada" (Trerise, 2011, p. 123). In many court cases, the recognition of custom adoption is based on the principle of continuity, which asserts that if the practice of a specific customary law was continuous prior to contact with Europeans and has not been specifically struck down in Canadian courts, then the law will be recognized (Trerise, 2011). Section 35(1) of the *Constitution Act, (1982)* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Several rulings since 35(1) illustrate the many tensions that arise when a mainstream, non-Indigenous legal system attempts to delineate and determine what constitutes an existing Indigenous right.

In *R* v. *Van der Peet*, which established criteria and tests that are still in use today for determining the validity of Indigenous rights, Justice Lamer concluded (among other things) that "the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans" (cited in Trerise, 2011, p. 138). As dissenting judges McLachlin and l'Heureux-Dubé pointed out at the time, the emphasis on preexisting Indigenous tradition was articulated at the expense of the contemporary relevance of Indigenous practices. Borrows (2002), in his critique of the test laid out in *Van der Peet*, writes, "Chief Justice Lamer has now told us what Aboriginal means. Aboriginal is retrospective. It is about what was, 'once upon a time' central to the survival of a community, not necessarily about what is central, significant, and distinctive to the survival of these communities today" (p. 60). As Borrows argues, customary caretaking practices are adaptive rather than static. They hold potential to provide an invaluable resource to address contemporary realities such as the Indigenization of child and family services.

Before we summarize important Canadian rulings on custom adoption, it is important to note that many custom adoptions are not documented, which makes it impossible to know to what extent traditional caregiving or kinship arrangements are being practiced both in provinces and territories that legally recognize custom adoption and in those that do not. Furthermore, the diversity of practices of custom adoption adds an additional layer of complexity to the task of thoroughly considering how adoption is enacted in Indigenous communities. Cases that bring the issue of custom adoption to the legal fore often centre around instances where one or more parties involved in a caretaking arrangement that had been made years earlier approaches the court to overturn the agreement, perhaps in order that legal benefits and inheritances can be conferred to family members.

Re Deborah (1972) was such a case, and it set an important precedent by recognizing custom adoption as an essential part of Inuit social structure. Relying on the principle of continuity explored above, Justice Morrow upheld the adoption and remarked, "In my observation ... I would say [adoption] is the most outstanding characteristic of their (Eskimo) culture and appears to outrank marriage and hunting rights" (*Re Deborah*, cited in Trerise, 2011, p. 178).

A second significant ruling, also in the Northwest Territories, came out of the *Re Tagornak* adoption petition case in 1983. Importantly, the court established its role as declaratory, meaning that it would not judge if and when a custom adoption had taken place, but would legally certify the existence of custom adoption (Nicholson, 2009). Justice Marshall laid out four criteria necessary for the court to recognize a custom adoption: (1) that both natural and adopting parents consented; (2) that the child had been voluntarily placed with the adopting parents; (3) that the adopting parents were Indigenous or entitled to rely on Indigenous custom; and (4) that the rationale for Indigenous custom adoption was present in the case (cited in Nicholson, 2009, p. 18).

Shortly after *Re Tagornak*, in 1985, Indian status was allowed to be passed down to children through custom adoption (Smith, 2009). Then, in 1994, the Northwest Territories passed the *Aboriginal Custom Adoption Recognition Act*, which gives formal legal recognition to custom adoptions. Nunavut took on the legislation when it became a separate territory in 1999. In both the Northwest Territories and Nunavut, the families involved in a custom adoption need only file a one-page form with the local custom adoption commissioner, who then verifies the information and sends the application to the court for approval (Baldassi, 2006). Families do not need to visit court, nor do child welfare authorities perform a home study.

The context is very different in the rest of Canada. British Columbia, for example, only began conferring rights through custom adoptions in 1995 when it revised the law pertaining to adoption (Smith, 2009). The case that precipitated the recognition of custom adoption in BC was *Casimel* v. *ICBC* (Baldassi, 2006; Lomax, 1997; Nicholson, 2009; Trerise, 2011), which concerned whether a parent through custom adoption could be listed as a dependent on their child's insurance policy. In *Casimel*, Justice Lambert (cited in Trerise, 2011) concluded that "a well-established body of authority" existed in Canada to justify the court's recognition of the status conferred by customary adoption.

After *Casimel*, BC amended its *Adoption Act* to state, in section 46(1), that "the court may recognize that an adoption of a person effected by the custom of an Indian band or Aboriginal community has the effect of an adoption under the Act." Further, Section 46(2) provided that 46(1) "does not affect any aboriginal rights that a person has." Baldassi (2006) explains that although custom adoption was officially recognized through this legislation, the province requires a court hearing involving affidavits and other materials before the adoption can be legally approved, and the word "may" in the legislation also leaves room for the court to rule on whether a custom adoption has taken place (Baldassi, 2006, p. 88). This tension between legal recognition of custom adoption and the traditions that inform the practice will continue to underscore the intricacy of custom adoption policy and implementation.

This brief review of relevant legislation paints a picture of a complex, emergent landscape. The next section highlights how Indigenous organizations are reclaiming custom adoption for their children and families.

Indigenous Child and Family Agencies and Custom Adoption

Since the early 1980s, many Indigenous communities in Canada have actively sought to take back responsibility from government to care for their own children. Communities have an important role to play in supporting the ongoing connectedness of a child to community and family. Some bands have culturally adopted adoptive families into their community; some provide language and cultural classes and events for the whole family; some Indigenous agencies travel with families to the child's community and set up open adoption meetings with the extended family. All of these approaches fall under a customary caretaking banner because they work to facilitate more flexibility, creativity, and opportunities to follow good practices that are community centred and culturally congruent. They strengthen relationships and provide opportunities to address gaps and tensions openly before they threaten an adoption placement. They also follow customary law and strengthen access to land as well as governance and resurgence—goals that are at the very centre of these discussions. Unfortunately, while these approaches work well, they too often fall outside the scope of legal adoption policies and funding formulas. However, we can learn a great deal from the experiences of Indigenous agencies and organizations that have collaborated with communities to pioneer approaches to custom adoption. Below we look at some of their promising strategies.

Promising Strategies

One example of a community that reclaimed traditional protocols to develop a custom adoption program is Yellowhead Tribal Services Agency (YTSA) in Alberta. In the mid-1980s, the chiefs of the Yellowhead Tribal Council became concerned at the number of children who had been taken from their communities and placed in government care (Peacock & Morin, 2010). The chiefs, Elders, and community members envisioned an organization that would work to keep children in their communities. As a result, YTSA was developed (Peacock & Morin, 2010) and it now provides a range of community-based child and family services to the four member communities (the Enoch Cree, Alexis Nakota Sioux, O'Chiese, and Sunchild First Nations). The custom adoption program that YTSA developed, and the lessons they learned in the process, are highlighted by Jeannine Carrière in another article in this special issue. Here, we want to highlight some of the strategies the agency employed to develop its groundbreaking program. These include consultation with community Elders; placing ceremony and ceremonial protocols that support the adoption process at the heart of the program; centring the sacredness of children; and acting within a spirit of openness at every stage of the adoption process.

Consultation with Community Members, Particularly Elders

Elders are the keepers of wisdom and knowledge surrounding custom adoptions (Keewatin, 2004), and tapping into their knowledge in the design of custom adoption programs is a matter of urgency. Nevertheless, engaging with Elders to learn this knowledge takes time and care. For example, YTSA's custom adoption program took several years to develop because the agency was committed to taking the time required to consult with Elders and gather knowledge about custom adoption ceremonies. Other organizations have also done extensive research and community consultation as a first step in developing

custom adoption and cultural permanency practices (see, for example, the NONG SILA model, de Finney, Johnson, Coverdale, and Cowan, forthcoming). Often organizations create committees of community members to guide policies and practice pertaining to adoptions. For example, Lalum'utul' Smun'eem (LS) Child and Family Services on Vancouver Island instituted an adoption committee to replace the BC government's exceptions committee, which exists to sign off on adoptions of Indigenous children into non-Indigenous homes. The LS committee's role includes the following:

- provide cultural guidance in the development and implementation of our cultural ceremonies,
- support the implementation of adoption policy and protocol,
- support program development by providing cultural context,
- consider recommendations for adoption made by LS social workers, and
- provide support to the adoption team for the adoption plans, suggest alternative plans, and make recommendations for follow-up by LS social workers. (Lalum'utul' Smun'eem Child and Family Services, n.d.).

A similar model entitled NONG SILA Adoption Council is being explored by Surrounded by Cedar Child and Family Services, a delegated agency in Victoria, British Columbia (de Finney et al., forthcoming.)

Ceremonial Protocols

Ceremony and ceremonial protocols that support the adoption process are at the heart of many custom adoption programs. YTSA, for example, consulted extensively with community Elders to earn the right to conduct the custom adoption ceremony. The agency began by following the traditional practice of offering Elders tobacco; in return, the Elders gave the agency the teachings of the medicine wheel to enable them to develop "a holistic and culturally sound program based on traditional teachings for children to experience cultural connections" (Peacock & Morin, 2010, p. 75). Keewatin (2004) explains that Elder Bluestone Yellowface had been given the custom adoption ceremony by her people, and YTSA made a formal request for this knowledge. Elder Bluestone Yellowface offers important knowledge about the power of ceremony:

> Ceremonies are very important.... It was something that was very important that had been lost. If it hadn't been lost, none of those kids would have been apprehended and adopted out and taken away. Our people forgot how to take in their nephews and cousins and grandchildren into their houses. We lost it. Children were very much a part of the societies and tribes.... Then we wonder, why did all those children disappear? Why are people drinking and leaving our children? Because we've lost the power the ceremonies have. We have lost that power because we didn't maintain the ceremonies that we were supposed to. It kept our families safe.... And with the power that's in this ceremony, we will start being able to hang onto those children and keep our children in our community. (Keewatin, 2004, pp. 65–66)

Custom adoption ceremonies hold potential to bring whole communities together under a process of spiritual purpose and ceremonial sacredness to support the community's children and families.

Centring the Sacredness of Children

The custom adoption programs developed by both YTSA and LS hold the sacredness of children at their centre. In the case of YTSA the child is viewed, not as the parents' responsibility, but as a member of a caring community that plays an important role in affirming the child's cultural identity and the adoptive family's role (Keewatin, 2004, p. 44). A custom adoptee and adoptive father through the YTSA program, Keewatin (2004) shares his perspective on the traditional practice of custom adoption:

> We know that [my adopted daughter] is a gift from the Creator. Adoption is not about possession. We and her natural family have only borrowed her from the Creator. She chose us and we are responsible for giving her love and kindness and teaching her. If we are true in our hearts and our minds then she will choose to have a strong bond with us. We don't earn that bond just because we call ourselves her parents. (p. 74)

Given the sacredness of children to Indigenous people, LS aims, as part of its stated goals as a delegated agency with the authority to arrange custom adoptions, honouring "the cultural, spiritual, and holistic needs" of children placed for adoption and ensuring that "adoptive families are selected who will keep the children connected to their family, extended family, community, and culture" (Lalum'utul' Smun'eem Child and Family Services, n.d.).

A Spirit of Openness

The YTSA program was designed to thrive within a spirit of openness: Birth parents had a say in who adopted their child and they played a continuing role in their child's life. In a similar spirit of openness, LS has involved community members, leaders, and Elders in the services they provide (Lalum'utul' Smun'eem Child and Family Services, n.d.). In two cases Cowichan children were adopted into non-Indigenous homes; LS brought these families into the community and is deeply involved in supporting them to maintain cultural connectedness for and with their children (Lalum'utul' Smun'eem Child and Family Services, n.d.). LS also plays the very important role of supporting the development and implementation of cultural plans for children at the moment they are taken into care so as to maintain crucial cultural links (Lalum'utul' Smun'eem Child and Family Services, n.d.).

Programs Must Be Funded, and Other Caveats

Layers of caveats emerge in the implementation of broad policies regarding custom adoption. For example, ministry adoption teams may lack the understanding and connections with community members to pursue and implement custom adoption protocols. Few Indigenous agencies have delegated adoption mandates; therefore, they often become excluded from the adoption process once a child in their care is transferred back to the government authority when an adoption process begins. Furthermore, even delegated agency staff may not have knowledge of custom adoption values and traditions. Many delegated agencies are now embarking on researching, documenting, and reviving past customs and cultural ways of taking care of their children and youth.

Another critical conversation in custom adoption is the need to expand prevention and family reconnection for families who have lost their children to child welfare interventions. Trocmé, Knoke, and Blackstock (2004) question how much families are being called to account for systemic and structural factors such as poverty and poor housing that are considered to put children at risk, and to what extent child welfare services are committed and able to support community development efforts that would address the causal agents of child risk. Embedded as they are within a colonialist worldview, mainstream child welfare systems in Canada are complicit in dispossessing Indigenous people of their children and, by extension, their cultures. Supporting Indigenous communities to reinvigorate Indigenous caretaking practices—and, if and when it is asked for, providing legal recognition—is a means to acknowledge and redress, in part, historical and ongoing injustices (Trerise, 2011). However, Trocmé et al. stress the need for these community development approaches to be rooted in cultural ways of knowing that call on ancestral approaches to parenting and child rearing that have sustained First Nations children through the continued ravages of colonization.

Custom adoption is just one component of the much larger issue of Indigenous governance and part of the broader struggle for Indigenous communities' right to completely self-govern, not only child protection matters, but the full spectrum of child and family services. Recognizing these rights would entail supporting the balance between traditional cultural approaches and contemporary enactments of these traditional practices. It would also require provincial and territorial governments to relinquish control over child welfare to Indigenous communities. The provinces, however, remain overwhelmingly reluctant to relinquish control in this arena. Even in BC, which has recognized Aboriginal adoption since 1996, the practice still falls under governmental jurisdiction, with delegated Aboriginal agencies often having to push very hard for substantive control over their own processes. BC started the process of delegating provision of child welfare services to Indigenous service organizations in the 1990s. In 2014, delegated agencies across the province are in various stages of assuming responsibility for child welfare services; however, only a few of these agencies are able to provide "full child protection, including the authority to investigate reports and remove children" (Province of British Columbia, 2013b, para. 4). As Smith (2009) points out, delegated agencies still must comply with provincial and territorial legislation, regulations, and standards. In other words, Indigenous agencies are expected to follow rules which they had very little role in writing. This limitation has important implications for customary adoption practice and policy, since custom adoptions are grounded in the unique traditions of distinct Indigenous communities and it is difficult to generalize these diverse teachings through overarching provincial policy frameworks.

With increased urbanization, another topic gaining saliency for growing numbers of children is that their community may be too far away to access. Connections to community, culture, and land are central to customary care (de Finney & di Tomasso, 2015). Yet another layer of complexity is revealed if we imagine how urban and off-reserve agencies work to accommodate the needs of an urban child with roots in more than one First Nation or Indigenous community, and/or with other backgrounds. Indigenous children increasingly come from mixed backgrounds, and these backgrounds may include racialized/ethnic minority communities who may also have Indigenous teachings and/or who have and want to maintain their own cultural traditions, languages, and community connections. This reality troubles the traditional Native/White binary conversation in adoptions and complicates everything from cultural planning, to open agreements, to custom protocols, to family conferencing, to reconnection efforts, and so on.

Funding and jurisdictional arrangements further complicate matters. Indigenous families in Canada find themselves navigating a "legislative framework in which the federal government has responsibility for funding on-reserve health and social services for Status First Nations people while the provinces and territories fund these services for all others" (Sinha & Kozlowski, 2013, p. 1). Provincial, territorial, and federal bodies frequently engage in protracted negotiations around responsibility and jurisdiction that have devastating consequences for individual children who require quick and decisive action. Evaluations of on-reserve child welfare services point to persistent federal underfunding, especially of Indigenous child welfare agencies (Sinha & Kozlowski, 2013). It is imperative that Indigenous child welfare agencies in Canada receive fair and adequate funding to develop and run custom adoption programs. Yet, Indigenous child welfare agencies receive significantly less funding than provincial agencies for doing the same work (Smith, 2009). As Carrière (2005) writes, "This situation is the bitter irony; INAC will provide funding to First Nation agencies to *remove* children from their homes, but will not support services that keep families together" (p. 23). Carrière (2005) further emphasizes that in the context of the widespread poverty experienced by Indigenous communities in Canada, "it is no longer realistic to expect extended families and First Nation community members to take in children out of the goodness of their hearts" (p. 130). Governments should never be allowed to set up delegated Indigenous agencies to fail by inadequately resourcing their programs, or by funding an Indigenous child in care at a lower rate than a non-Indigenous child. Custom adoption is not about offering basic, minimal services and solutions, but about appropriately investing in locally developed, culturally safe programs that stand a chance at restoring wellness to communities that are reeling from the effects of sustained assaults on their spirits, bodies, families, governments, and territories. Indigenous agencies and communities need resources to consult with their people in search of creative, culturally based, and flexible responses to the complexities and inequities explored in this review.

Conclusion: Honouring Our Own Caretaking Traditions

This discussion paper has demonstrated that custom adoptions have always been practiced for a variety of reasons by Indigenous Peoples across what we now call Canada, and around the world. Despite differing reasons for, and outcomes of, custom adoptions, the many variations all prioritize kinship relationships, community wellness, balance, and community belonging. The question now at the top of our minds is, how do we continue to use these traditions in the context of ongoing colonialism in a child and family services landscape shaped by increasingly urbanized communities and changing demographics (including more and more mixed children and families), emerging political and economic challenges including poverty, lack of housing, changes to the *Indian Act*, tensions between pan-Aboriginal models and community-specific teachings, and a host of other factors that shape Indigenous Peoples' realities today?

Honouring the inherent distinction and sovereignty of individual Indigenous Nations requires us to avoid overly determined answers to these questions. Instead, we might consider what can be gained *and* lost through the legal recognition of custom adoption. Baldassi (2006) points out that legal recognition should not work to conflate custom with statutory adoption because the result "can be a rather thin version of customary law, stripped of some of its core aspects" (p. 64). Furthermore, as Atwood (2008) points out, legal recognition may require codifying and institutionalizing customs that, by their very nature, were

meant to be not only flexible and organic, but intimately connected to the sacred. We are reminded of the dangers of institutionalizing sacred spiritual practices that nurture kinship and nationhood.

Honouring sacred caretaking traditions requires a radical shift in child welfare and adoption practice, policy and research. As De Aguayo wrote in 1995 as background to the Royal Commission on Aboriginal Peoples, "grasping the underlying complexity of customary adoption demands a philosophical change in Western concepts of the family. Customary adoption challenges the belief that biology is at the heart of parent-child relationships. It also reformulates our sense that a single household is the proper locus of child-rearing" (p. 31). Roger Paul sums it up well when he says, "Today the adoption process may be necessary to live within two worlds. But paperwork isn't necessary to be a part of a community. Children will feel welcome where they are loved. Paper doesn't make it real" (Morrison et al., 2010, p. 114).

Customary caregiving provides a map for caring for children in time-honoured ways. Nothing is more fundamental to the strength, well-being, and continuing existence of Indigenous communities than our capacity to live our values and traditions and to exercise our right to care for our children in the ways we have always cared for them.

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