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# **“RACE IS NOT A DETERMINATIVE FACTOR”<sup>1</sup>: MIXED RACE CHILDREN AND CUSTODY CASES IN CANADA\***

**Susan B. Boyd and Krisha Dhaliwal\*\***

*Statistics suggest that an increase will occur in the number of custody disputes involving mixed race children in Canada. This article considers the extent to which the fact that a child is mixed race factors into child custody determinations, and how courts consider it. It also discusses whether considering a child’s mixed race heritage is helpful in the child-custody context. The article first explains the use of “race” and “culture” in the Canadian context, then reviews the literature on mixed race children and the law, before examining legislation on the “best interests of the child.” The focus of the paper is an analysis of reported Canadian custody cases in which a child’s mixed race heritage was mentioned in the written judgment, both before and after the leading case, Van de Perre v. Edwards. The case-law analysis considers questions such as judicial racism, “race-matching,” and how race and culture are weighed against other factors relevant to a child’s best interests. The conclusion offers suggestions for how courts should deal with custody disputes over mixed race children, based on trends identified in the case law. While racialized parents are not inevitably best suited for primary custody of mixed race children, it is key for any parent seeking custody to*

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<sup>1</sup> *Van de Perre v Edwards*, 2001 SCC 60 at para 39, [2001] 2 SCR 1014 [*Van de Perre*].

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*demonstrate their ability to foster the healthy development of a child's multifaceted identity. More directive legislative language might be useful in order to ensure that at least some judicial attention is paid to race and culture. Finally, taking judicial notice of the relevance of race would also be helpful in acknowledging the persistent existence of racism in Canadian society, as would a more diversified Canadian judiciary.*

## INTRODUCTION

The number of mixed race couples is on the rise in Canada; they constitute 4.6 per cent of all married and common-law couples, up from 2.6 per cent in 1991 and 3.1 per cent in 2001.<sup>2</sup> Although not all couples conceive children and not all children are raised in couples, these statistics suggest that the legal system is likely to see more custody

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<sup>2</sup> See e.g. Statistics Canada, "A Portrait of Couples in Mixed Unions", by Anne Milan, Hélène Maheux & Tina Chui, in *Canadian Social Trends*, Catalogue No 11-008-X (Ottawa: Statistics Canada, 20 April 2010) 70-80; Statistics Canada, "Mixed Unions in Canada", in National Household Survey, Catalogue 99-010-X2011003 (Ottawa: Statistics Canada, 2011) at 4. Roughly half of these couples are made up of one Canadian-born person and one foreign-born person, with Japanese, Latin American, and Black people being the most likely to be in mixed raced unions, and with South Asian and Chinese people (the two largest minorities in Canada) being the least likely to marry outside their groups. See Statistics Canada, "Mixed Unions in Canada", *ibid* at 4-5. The majority of mixed race unions are between one visible minority person, and one non-visible minority person. See *ibid* at 4. Also, the vast majority of mixed race couples live in major metropolitan areas. See *ibid* at 7. Finally, Milan, Maheux & Chui, *supra* note 2, have pointed out that as a whole, racialized men and women are equally likely to be in mixed race unions. However, there are differences within certain subgroups. For instance, men from Arab, West Asian, Black, and South Asian backgrounds are more likely than women from these backgrounds to partner with people outside of their group. Similarly, women from Filipino, Korean, Southeast Asian, Japanese, Chinese, and Latin American backgrounds are more likely than men from these backgrounds to be in mixed race unions. See *ibid* at 17.

disputes involving mixed race children in the future. Some such disputes have, of course, already come before the courts. In such cases, it is sometimes argued that a visible minority parent may be better able to deal with the child’s experiences of racism or that race should at least be a factor that must be considered in determining the best interests of a child.

This article examines the extent to which the fact that a child is mixed race makes a difference, or should make a difference, in the determination of legal disputes about parental rights and responsibilities or custody,<sup>3</sup> and, if so, how. In order to better understand the issues that arise in such cases, we reviewed literature on mixed race children and law, as well as legislation on the best interests of the child. The heart of our study, however, is an analysis of reported Canadian custody cases where a child’s mixed race heritage was mentioned in the written judgment. In our search for both cases and for literature, we included mixed race children with Aboriginal heritage. Some of the cases discussed in this paper do not deal with race directly, but rather with related, but distinct, issues of culture, which include religion and language.

Custody decisions are notoriously difficult and judges struggle to balance the different factors that may be in play in any given case. One question we considered is whether a focus on factors such as stability or a history of care may diminish attention that ought to be devoted to the significance of race, culture, or racism in the child’s life. Although our conclusion suggests that greater account of race in a

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<sup>3</sup> Many jurisdictions have now abandoned the terminology of “custody” and “access” in favour of concepts such as parenting time and parental responsibilities (e.g. *Family Law Act*, SBC 2011, c 25). We use “custody” as a generic term in this article, and we use it to refer to disputes between individuals (usually parents), not between individuals and the state (child protection). The Canadian *Divorce Act*, RSC 1985, c 3 still uses the language of custody and access, as do several provincial statutes.

child's life should be taken in many cases, it should be noted that this field of law also has a history of failing to take account of other important factors, such as gendered inequalities like women's generally greater responsibility for care of children.<sup>4</sup> Another problem is that any judicial emphasis on financial or household stability in a child's life can disadvantage a parent who faces economic challenges but who may nevertheless be a good parent. As Charmaine Williams has argued, any analysis of cases involving mixed race children must use an analytical framework that understands the ways in which race, class, and gender interact and generate complex patterns of advantage and jeopardy.<sup>5</sup> Although the best interests of the child are manifestly the paramount consideration in any custody case, determination of the outcome is not insulated from the filters of race, class, and gender, even if these factors are not explicitly discussed in the judgment.<sup>6</sup>

This article proceeds as follows. We first review our approach to race, culture, and ethnicity and offer a brief analysis of how race and racism are treated in Canada. We then briefly review relevant legislation in Canada and internationally. Next, our case law review begins with a discussion of the leading case in Canada, *Van de Perre v. Edwards*.<sup>7</sup> Our detailed case-law study attempts to isolate various issues that we anticipated might arise in cases involving mixed race children. In particular, we are concerned with how race and culture are weighed against other factors relevant to a child's best interests. We

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<sup>4</sup> Susan B Boyd, *Child Custody, Law, and Women's Work* (Don Mills: Oxford University Press, 2003) [Boyd, *Child Custody*]; Carol Smart & Selma Sevenhuijsen, eds, *Child Custody and the Politics of Gender* (London: Routledge, 1989).

<sup>5</sup> Charmaine C Williams, "Race (and Gender and Class) and Child Custody: Theorizing Intersections in Two Canadian Court Cases" (2004) 16:2 NWSA Journal 46.

<sup>6</sup> Andrea Doucet, "Parental Responsibilities: Dilemmas of Measurement and Gender Equality" (2015) 77:1 J of Marriage and Family 224.

<sup>7</sup> *Van de Perre*, *supra* note 1.

also ask whether judicial racism can be detected on the face of the judgments and whether an essentialist “race-matching” approach is used. In our conclusion, we suggest that judicial notice should be taken of race and racism, and that race and racism should always be at least considered when custody of a mixed race child is at issue. That said, other factors remain key to determining a child’s best interests and we do not suggest that a racialized parent is inevitably better suited to assume primary care or custody of a child.

### APPROACHES TO RACE, CULTURE, AND ETHNICITY

Even though judges often use race and culture interchangeably,<sup>8</sup> for the purposes of this article, we adopt Emily Carasco’s definition of race, which she suggests is conceptually distinct from culture and ethnicity.<sup>9</sup> Whereas culture and ethnicity are based on factors such as kinship and a common sense of belonging, and are more complex, ongoing, and learned, race is based on more immutable external biological factors such as skin colour, the shape of facial features, and other physical characteristics.<sup>10</sup> Despite the fact that racial categorization is widely acknowledged to be arbitrary and unscientific, it has persisted into the present day, along with the attendant social phenomenon of racism.<sup>11</sup> As Minelle Mahtani reminds us, there is an “arbitrary connection between anatomical features and political meaning, where certain physical differences (like skin colour and hair type) have been used to

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<sup>8</sup> See Tammy Wing-Yun Law, “The Race Issue in Custody Law: Is *Van de Perre* Right?” (2003) 21 Can Fam LQ 153 at 154.

<sup>9</sup> Emily F Carasco, “Race and Child Custody in Canada: Its Relevance and Role” (1999) 16 Can J Fam L 11 at 11, 24.

<sup>10</sup> For more commentary on this understanding of race in the context of Canadian child custody law, see Law, *supra* note 8 at 153-54; Annie Bunting, “Complicating Culture in Child Placement Decisions” (2004) 16 CJWL 137 at 141-49.

<sup>11</sup> Carasco, *supra* note 9 at 24-25.

indicate crucial power differentials between individuals.”<sup>12</sup> That is, race is a social construction rather than a biological fact, but that insight does not mean that race, or perhaps more aptly racism, has no consequences in the real world.<sup>13</sup> Specifically in our context, a child’s racial identity or perceived race can play a significant role in her development.<sup>14</sup>

Canadian scholars have revealed that racial hierarchies have been created and reinforced through various policies and laws.<sup>15</sup> In western liberal democracies such as Canada, “whiteness” has long operated as a guiding feature of racial categorization. Who counts as

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<sup>12</sup> Minelle Mahtani, *Mixed Race Amnesia: Resisting the Romanticization of Multiraciality* (Vancouver: UBC Press, 2014) at 23.

<sup>13</sup> *Ibid* at 24.

<sup>14</sup> See Law’s review of social science research, *supra* note 8 at 160ff. See also Roland G Fryer Jr et al, “The Plight of Mixed Race Adolescents” (2012) 94:3 *Rev of Economics and Statistics* 621; Christopher S Ruebeck, Susan L Averett & Howard Bodenhorn, “Acting White or Acting Black: Mixed-Race Adolescents’ Identity and Behavior” (2009) 9:1 *BE J Economic Analysis & Policy* 1; David R Harris & Jeremiah Joseph Sim, “Who Is Multiracial? Assessing the Complexity of Lived Race” (2002) 67 *American Sociological Rev* 614; Grace Kao, “Racial Identity and Academic Performance: An Examination of Biracial Asian and African American Youth” (1999) 2:3 *J Asian American Studies* 223.

<sup>15</sup> See e.g. Constance C Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999). As Law, *supra* note 8, and others point out, Canada does in fact have its own racist history. For instance, our immigration policy has a notably dark past, including the Chinese “head tax” imposed by the *Chinese Immigration Act*, RSC 1885, c 71, as well as Canada’s general historical preference for north European immigrants. See generally Leo Driedger & Shiva S Halli, eds, *Race and Racism: Canada’s Challenge* (Montreal: McGill-Queen’s University Press, 2000) at 7.

white<sup>16</sup> has changed over time,<sup>17</sup> but whiteness as a concept has always “denote[d] the racial chasm that separated [white] groups from ‘Aboriginal peoples,’ the ‘Chinese,’ and ‘Blacks.’”<sup>18</sup> Whiteness, though its definition is mutable, is taken for granted as an unspoken norm. That is, whiteness need not be static in order for other racial

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<sup>16</sup> To make a brief note on nomenclature, this paper will capitalize all terms used to denote racial categories, apart from the term “white.” This follows the practice of many critical race scholars, such as Erica Chung-Yue Tao, who explained the practice as follows, in “Re-defining Race Relations—Beyond the Threat of ‘Loving Blackness’” (1993) 6:2 CJWL 455 at 457: “Language and conventions in writing are integral to internalized colonization. The capitalization of Black and Blackness becomes a disruption in reading, because it breaches the standard way of communicating in textual format. In this way, capitalization of Black represents a perverse usage of the colonizer’s language, and is, therefore, a visual and linguistic subversion of white supremacy. At the same time, capitalizing Black also affirms pride and power in group identity. For example, we say we are Canadians, not canadians. Finally, the word ‘white’ will not be capitalized on the grounds that white and whiteness are the reference points by which all other colours or racially defined groups are measured, named, described, and understood. To capitalize white would be, in effect, to say the obvious and affirm the norm.” See also Backhouse, *supra* note 15 at 8. We will also use the term “racialized” (as opposed to terms such as “person of colour”) to acknowledge that racial categorization results from a social process and is not biologically inherent. Finally, we will use the terms “minority” and “visible minority,” as these are terms that have historically been used in Canadian legislation.

<sup>17</sup> See Backhouse, *supra* note 15 at 9: “Some will argue that the individuals I have designated as ‘white’ probably did not understand themselves as ‘white,’ and preferred to think of themselves as having a particular country of origin. . . . It is true that the racial identity of the dominant white group was splintered in many directions (not unlike the racial identity of other groups), and that multiple subgroups formed distinct rankings (which would themselves shift over time).”

<sup>18</sup> *Ibid.*



identities to be measured in contrast to that norm and “othered” as a result.<sup>19</sup>

The genesis of Canada as a “white” country is tied to our colonial history. Whites began to outnumber the Aboriginal population in the late 1700s and early 1800s, with non-Aboriginals outnumbering Aboriginals by an estimation of ten to one by 1812.<sup>20</sup> Nevertheless, many Canadians view Canada as being relatively untroubled by racism and as having a benign history of race relations, especially when compared to the United States.<sup>21</sup> Alongside some of the more overtly racist practices, for instance against Chinese immigrants,<sup>22</sup> a “melting pot” approach was common in the early twentieth century, suggesting that the Canadian nation was homogenous and that immigrant and ethnic populations should blend into dominant Canadian culture.<sup>23</sup> Yet

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<sup>19</sup> See generally Sherene H Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) [Razack, *Looking*]; Sherene Razack, *Space, Race, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002); Leo Driedger & Angus Reid, “Public Opinion on Visible Minorities” in Driedger & Halli, *supra* note 15, 152 at 158–59; Peggy McIntosh, “White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies” Working Paper No 189, Wellesley College, Centre for Research on Women; Richard Dyer, “The Matter of Whiteness” in Paula S Rothenberg, ed, *White Privilege: Essential Readings on the Other Side of Racism* (New York: Worth, 2002) 89.

<sup>20</sup> Canada, Royal Commission, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 1.6.

<sup>21</sup> See e.g. Razack, *Looking*, *supra* note 19 at 16–17; Williams, *supra* note 5 at 46.

<sup>22</sup> See comments in *supra* note 15.

<sup>23</sup> For a discussion on theories of racial integration, including “melting pot” theories of assimilation and homogenization, see Leo Driedger & Shiva S

despite the practice since the 1970s<sup>24</sup> of affirming the multicultural nature of Canada,<sup>25</sup> the extent to which racial and cultural difference should be recognized or encouraged remains controversial.<sup>26</sup> So too do

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Halli, “Racial Integration: Theoretical Options” [Driedger & Halli, “Racial Integration”] in Driedger & Halli, *supra* note 15, 55 at 55–76.

<sup>24</sup> See *Canadian Multiculturalism Act*, RSC 1985, c 24; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 27 (“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”).

<sup>25</sup> For a critical summary and assessment of Canada’s use of multiculturalism, see Mahtani, *supra* note 12 at 98–111. For recent affirmations of multiculturalism from the Canadian government, see e.g. Canada, Citizenship and Immigration Canada, “Annual Report on the Operation of the *Canadian Multiculturalism Act 2012–2013*” (Ottawa: CIC, 3 February 2014), online: <[www.cic.gc.ca/english/resources/publications/multi-report2013/3.asp](http://www.cic.gc.ca/english/resources/publications/multi-report2013/3.asp)>; Canada, Citizenship and Immigration Canada, “Canadian Multiculturalism: An Inclusive Citizenship” (Ottawa: CIC, 19 October 2012), online: <[www.cic.gc.ca/english/multiculturalism/citizenship.asp](http://www.cic.gc.ca/english/multiculturalism/citizenship.asp)>; Canada, Citizenship and Immigration Canada, “Multiculturalism” Ottawa: CIC, 7 May 2014), online: <<http://www.cic.gc.ca/ENGLISH/multiculturalism/index.asp>>.

<sup>26</sup> See e.g. the controversy surrounding the proposed “Charter of Quebec Values” (Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess, 40th Leg, Quebec, 2013). Bill 60 died on the order paper when the Parti Quebecois lost the 2014 Quebec provincial election to the Quebec Liberal Party. Though many self-proclaimed secular and feminist Quebecers supported the proposed Charter, it was also heavily criticized for being ethnocentric and xenophobic, as it would have prevented public sector employees from wearing “conspicuous” religious symbols or articles of clothing (such as turbans, hijabs, niqabs, or kippahs), which would largely have been worn by racial, cultural, and religious minorities. For more discussion on the proposed Charter and its connection to racial and cultural assimilation, see e.g. Supriya Dwivedi, “Quebec Can Be Perfectly Secular without an Offensive Charter” *The Globe and Mail* (10 September 2013), online: <<http://www.theglobeandmail.com/globe->

the questions of whether racism exists and how to deal with it.<sup>27</sup>

Multicultural policy has been criticized for its inadequacy in achieving antiracist objectives and, indeed, its failure to define “race” or to address racism as a “social relationship of dominance and subordination, created by and engendering structural inequality.”<sup>28</sup> Sherene Razack suggests that the policy of multiculturalism in Canada has aided a transition away from the discourse of race and racism to one of culture and language. This “culturalization of racism” attributes Black “inferiority,” for instance, to factors such as cultural deficiency, social inadequacy, and technological underdevelopment rather than structural forces such as racism.<sup>29</sup> Vrinda Narain has similarly suggested that the focus on cultural difference has diminished attention to structural inequalities such as poverty, unemployment, and racism.<sup>30</sup> When judges deal with disputes over children, the tendency to focus on the individual at the expense of larger structural issues is

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debate/quebec-can-be-perfectly-secular-without-an-offensive-charter/article14214333>; Emmett MacFarlane, “Quebec’s Secular Charter is Clearly Unconstitutional, but Could Still Become Law” *The Globe and Mail* (11 September 2013), online: <<http://www.theglobeandmail.com/globe-debate/quebecs-secular-charter-is-clearly-unconstitutional-it-could-still-become-law/article14241046>>. For a critique of Canadian multiculturalism in practice that predates the Quebec Charter controversy, see Neil Bissoondath, *Selling Illusions: The Cult of Multiculturalism in Canada* (Toronto: Penguin Random House Canada, 2002).

<sup>27</sup> See generally Rakhi Ruparelia, “Legal Feminism and the Post-Racism Fantasy” (2014) 26:1 CJWL 81.

<sup>28</sup> Audrey Kobayashi, “Multiculturalism: Representing a Canadian Institution” in JS Duncan & D Ley, eds, *Place/Culture/Representation* (London: Routledge, 1993) 205 at 221–22.

<sup>29</sup> Razack, *Looking*, *supra* note 19 at 60.

<sup>30</sup> See generally Vrinda Narain, “Taking ‘Culture’ out of Multiculturalism” (2014) 26:1 CJWL 116.

exacerbated due to the need to make a decision in relation to the individuals at issue.<sup>31</sup>

Given these complex and controversial questions, and given the tendency of Canadians to cherish the notion that Canada is a particularly tolerant nation, it is not uncommon for us to maintain silence around issues concerning race and racism or even to deny that racism exists.<sup>32</sup> It would not be surprising to find that some judges (who are still predominantly white in Canada<sup>33</sup>) share this approach and that some may adhere to the (optimistic) notion that Canada is relatively free of racism or is “race blind.” They may be challenged by the suggestion that they should take race and the possibility of racism seriously in their judicial decision making and may genuinely feel they do not know how to do so. They may fall prey to ethnocentrism and unconscious cultural biases.<sup>34</sup> We return to this issue when discussing judicial education in the conclusion.

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<sup>31</sup> See Marlee Kline, “Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women” (1993) 18 Queen’s LJ 306.

<sup>32</sup> Razack, *Looking*, *supra* note 19 at 60–61

<sup>33</sup> It is difficult to find statistics on judicial diversity: see Sonia Lawrence, “Reflections: On Judicial Diversity and Judicial Independence” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 193. But see also Kirk Makin, “Of 100 new federally appointed judges, 98 are white, Globe finds” *The Globe and Mail* (17 April 2012), online: <<http://www.theglobeandmail.com/news/politics/of-100-new-federally-appointed-judges-98-are-white-globe-finds/article4101504>>.

Although the percentage of women judges remains lower than it should be, the paucity of racialized judges is particularly striking, and judicial appointments are clearly failing to keep pace with the number of racialized lawyers in the profession, as well as the number of racialized Canadians. See Rosemary Cairns Way, “Deliberate Disregard: Judicial Appointments under the Harper Government” (2014) 67 SCLR (2d Series) 43.

<sup>34</sup> See Amber Chew, “Judicial Consideration of Culture in Child-Related Proceedings under the *Family Law Act 1975* (Cth)” (2007) 21:2 Austl J Fam L 173 at Part V.

The uncertainty about how to deal with racism in law is illustrated by the controversy that emerged in *R. v. R.D.S.*,<sup>35</sup> a case on reasonable apprehension of bias that began with the criminal trial of a black youth. Judge Corinne Sparks, the first African Nova Scotian to be appointed to the judiciary and the first African Canadian female to serve on the bench,<sup>36</sup> rendered the trial decision. In her acquittal of the youth, who was facing criminal charges for allegedly assaulting a police officer, Judge Sparks suggested racism on the part of the white police officer, and commented on how the police officer's treatment of the youth was "in keeping with the prevalent attitude of the day."<sup>37</sup> Although the lower Courts agreed that there could be a reasonable apprehension of bias on the part of Judge Sparks, the Supreme Court of Canada restored her decision to acquit the youth, and noted that "[a] judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants."<sup>38</sup> The media coverage of this case, as with the *Van de Perre v. Edwards* case discussed below, broke the silence and signalled that uncomfortable conversations about the role of race and racism had arisen.<sup>39</sup>

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<sup>35</sup> [1997] 3 SCR 484, 151 DLR (4th) 193 [*RDS* cited to SCR].

<sup>36</sup> Sharon Melson Fletcher, "Corinne Sparks Biography" *Brief Biographies*, online: <<http://biography.jrank.org/pages/2828/Sparks-Corinne.html>>.

<sup>37</sup> *RDS*, *supra* note 35 at para 4.

<sup>38</sup> *Ibid* at para 115. For more on this controversy, see Richard Devlin & Dianne Pothier, "Redressing the Imbalances: Rethinking the Judicial Role after *R. v. R.D.S.*" (1999-2000) 31 *Ottawa L Rev* 1; Allan C Hutchinson & Kathleen Strachan, "Forum on *R. v. R.D.S.*: What's the Difference? Interpretation, Identity and *R. v. R.D.S.*" (1998) 21 *Dal LJ* 219; April Burey, "Forum on *R. v. R.D.S.*: No Dichotomies: Reflections on Equality for African Canadians in *R. v. R.D.S.*" (1998) 21 *Dal LJ* 199.

<sup>39</sup> See e.g. Jim Bronskill, "High Court Sets Rules on Judicial Bias: Black Judge's Comments Inappropriate but Did Not Cross the Line" *The Ottawa Citizen* (27 September 1997) A3; Joey Thompson, "Teen's Acquittal Prompts Legal Ruling on Racism" *The Province* (10 October 1997) A16; David Vienneau,

Informed by the notions that race, as it is constructed in Western societies, remains a key marker and that it intersects with other factors such as gender and class,<sup>40</sup> we try to take a non-essentialist approach to race in this article. We agree with Carasco that race is deeply relevant to the development of children’s identity and to their future in society, and we also note that Carasco would not make race a singularly determinative factor in a best-interests test.<sup>41</sup> An essentialist approach to race would hold that racial categorization based on skin colour and other aspects of physical appearance indicates other characteristics, such as intelligence, inclinations, and talents.<sup>42</sup> A non-essentialist approach, on the other hand, understands that racial categorization based on physical appearance does not entail any other characteristics, and understands race to have “meaning only as a socially constructed category” that divides people artificially.<sup>43</sup> In the custody context, an essentialist approach might assume that certain negative qualities are associated with particular races and dictate against placement of a child with a parent from that race. Or, an essentialist approach might assume, rather simplistically, that a race-matching approach is most appropriate. That is, placing a racialized child with the parent who has similar skin colour and other physical attributes to the child might be best, since these matching physical attributes could indicate other similar qualities, and thus greater parental suitability. This approach also potentially perpetuates racist stereotyping.<sup>44</sup> As we shall see, some judges have adopted an overly

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“Judge Cleared Over Race Remarks: Top Court Deals with Bias Charge” *Toronto Star* (27 September 1997) A3. See also Williams, *supra* note 5.

<sup>40</sup> Kline, *supra* note 31; Williams, *supra* note 5; Bunting, *supra* note 10.

<sup>41</sup> Carasco, *supra* note 9.

<sup>42</sup> Anna Stubblefield, “Racial Identity and Non-Essentialism about Race” (1995) 21:3 *Social Theory & Practice* 341 at 341.

<sup>43</sup> *Ibid.*

<sup>44</sup> Bunting, *supra* note 10 at 142; Christine Davies, QC, “Racial and Cultural Issues in Custody Matters” (1993) 10 *Can Fam LQ* 1 at 30–31; Ya’ir Ronen,

simplistic and potentially prejudicial race-matching approach.

Before reviewing the jurisprudence on custody and mixed race children, however, we offer an analysis of how legislation on the best interests of the child in Canada and selected other jurisdictions deals with race and culture.

### LEGISLATIVE ANALYSIS

Our search for legislation in Canada and other countries with similar legal systems that addresses race, ethnicity, or culture in the custody context revealed that there is quite a disparity in approach. By no means does all such legislation refer to these factors, and “race” and Aboriginality per se are rarely mentioned.

All Canadian legislation on child custody other than that in Quebec makes it clear that the best interests of the child are the sole or paramount consideration rather than, say, parental interests.<sup>45</sup> For instance, British Columbia’s new *Family Law Act* states that “[i]n making an agreement or order . . . respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.”<sup>46</sup> Some statutes, including British Columbia’s, list numerous factors that are to be considered when determining what is in a child’s best interests, including the very typical language of “all of the child’s needs and circumstances.”<sup>47</sup> These factors include, *inter alia*, the child’s health and emotional well-being, the child’s views, the nature and strength of the relationship

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“Redefining the Child’s Right to Identity” (2004) 18:2 Intl JL Pol’y & Fam 147 at 174.

<sup>45</sup> Quebec’s Civil Code is similar but does not use the “best interests” language per se. It states as follows in Article 33: “Every decision concerning a child shall be taken in light of the child’s interests and the respect of his rights.”

<sup>46</sup> *Family Law Act*, *supra* note 3, s 37(1).

<sup>47</sup> *Ibid*, s 37(2).

between the child and significant persons, the history of the child’s care, the child’s need for stability, and the impact of any family violence.<sup>48</sup> Other statutes do not provide lists that are nearly so detailed. For example, Canada’s federal *Divorce Act* specifies that “the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.”<sup>49</sup> In general, judges have a considerable degree of discretion to consider any factor, such as race or culture, that may be relevant to a child’s best interests, whether or not the statute lists the factor explicitly.

No custody legislation in Canada makes specific reference to race, perhaps due to concerns that this approach might perpetuate racist stereotypes and prejudices.<sup>50</sup> Some do, however, refer to culture. Perhaps as a result, although there is a distinction between race and culture, these two concepts are often blurred in the case law, with judges seeming to prefer to address cultural rather than racial difference. Even so, only six Canadian statutes relevant to custody and access law refer to culture.<sup>51</sup> Where culture *is* mentioned as a factor

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<sup>48</sup> *Ibid.*

<sup>49</sup> *Divorce Act*, *supra* note 3, s 16(8). Sections 16(9) and 16(10) do include particular guidelines on the relevance of past conduct and of maximum contact.

<sup>50</sup> Carasco, *supra* note 9 at 23.

<sup>51</sup> Alberta, Manitoba, New Brunswick, Nova Scotia, the Northwest Territories, and Nunavut list some aspect of culture or heritage as a factor. See *Family Law Act*, SA 2003, c F-4.5, s 18(2)(b)(iii) [*FLA Alberta*]; *Family Maintenance Act*, CCSM, c F20, 39(2.1)(k); *Family Services Act*, SNB 1980, c F-2.2, s 1(g); *Maintenance and Custody Act*, RSNS 1989, c 160, s 6(e); *Children’s Law Act*, SNWT 1997, c 14 s 17(2)(c). The Northwest Territories legislation contains a unique clause in subsection 17(1): “The merits of an application under this Division in respect of custody of or access to a child shall be determined in accordance with the best interests of the child, with a recognition that differing cultural values and practices must be respected in that determination” (*ibid.*).



that merits consideration by judges as one of several factors under the best interests of the child test, it is listed along with language and religion. For example, Alberta's *Family Law Act* directs judges as follows:

- 18(2) In determining what is in the best interests of a child, the court shall
- (b) consider all the child's needs and circumstances, including
    - (iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,<sup>52</sup>

In no Canadian custody statute is Aboriginal status mentioned, in contrast to legislation on child protection and adoption.<sup>53</sup> The difference between child custody legislation and legislation on child protection and adoption may reflect a view that race and Aboriginal status are more important when a child may be removed from a birth family than when a custody dispute between parents is at issue.<sup>54</sup>

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<sup>52</sup> *FLA Alberta*, *supra* note 51.

<sup>53</sup> See e.g. *Child, Family and Community Service Act*, RSBC 1996, c 46, s 2 [BC *CFCSA*]; *Adoption Act*, RSBC 1996, c 5, s 3. This discrepancy figured in the British Columbia case *DH v HM*, [1999] 1 SCR 761, 172 DLR (4th) 305, which involved a mixed race child who had Aboriginal heritage. The best interests test from the BC *CFCSA* was cited by the BC Court of Appeal in a custody determination rather than the test in the BC *Family Relations Act*, RSBC 1996, c 128, s 24(1), which did not refer to Aboriginal status.

<sup>54</sup> See Carol J Rogerson, "Developments in Family Law: The 2001–2002 Term" (2002) 18 SCLR (2d) 335 at 358–59; Eileen M Blackwood, "Race as a Factor in Custody and Adoption Disputes: *Palmore v Sidoti*" (1985) 71 Cornell L Rev 209 at 218–19; Twila L Perry, "Race and Child Placement: The Best Interests Test and the Cost of Discretion" (1990) 29 J Fam L 51. As Bastarache J. stated in *Van de Perre*, *supra* note 1 at para 40, "[t]he adoption and custody contexts may differ because the adopted child will generally cease to have

Turning to countries that share Canada’s legal development from the English common law, we found that legislation in Australia, New Zealand, South Africa, and some American States also uses “culture” as a marker rather than race, listing the child’s or parents’ culture as a factor in the best interests of the child test.<sup>55</sup> Some also refer to a child’s indigenous status. More directive language tends to be used than that which is seen in Canada’s legislation. For example, in New Zealand’s *Care of Children Act*, a principle relevant to the child’s welfare and best interests is that “the child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.”<sup>56</sup> In California, legislation regarding indigenous children directs decision-makers to consider the placement that recognizes the “unique values of the child’s tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child’s tribe and tribal community.”<sup>57</sup> In South Africa, the *Children’s Act, 2005* mentions as factors that must be considered:

- (f) the need for the child-
  - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (h) the child’s physical and emotional security and his or her intellectual, emotional, social and cultural development;<sup>58</sup>

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contact with the biological parent while custody will generally favour contact with both parents.”

<sup>55</sup> For a critique of the Australian statute’s approach to “culture” see generally Chew, *supra* note 34.

<sup>56</sup> *Care of Children Act 2004* (NZ), 2004/90, s 5.

<sup>57</sup> *California Family Code*, § 175(a).

<sup>58</sup> *Children’s Act, 2005*, (S Afr), No 38 of 2005, s 7(f).

Australia's *Family Law Act 1975*, lists as an additional factor to be considered:

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;<sup>59</sup>

We will address the question of whether more directive statutory language on race or culture or both would make a difference to judicial decision making in our conclusion.

### **THE LEADING CASE: *VAN DE PERRE V. EDWARDS***

The Supreme Court of Canada last heard a case dealing with custody and access and a mixed race child in 2001—*Van de Perre v. Edwards*.<sup>60</sup> Due to its importance as one of the few Supreme Court pronouncements on the relevance of race in Canadian society generally, and on mixed race children in custody disputes specifically, we discuss it prior to our case law review. In addition, the case involved other significant questions of gender, marital status, and class, illustrating how difficult it can be to treat particular factors, such as race, in isolation from others. *Van de Perre* is routinely cited by Canadian courts, often for the point that the decision of trial judges who have seen and heard all the evidence must be given great deference by appellate courts.<sup>61</sup> Our research suggests, however, that it has not made as much difference to how decisions are made in cases involving mixed race children as might have been expected.

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<sup>59</sup> *Family Law Act 1975*, (Aus), No 53 of 1975 as amended, s 60CC, (3)(g).

<sup>60</sup> *Supra* note 1; see also *DH v HM*, *supra* note 53.

<sup>61</sup> See e.g. *Fitzgibbon v Fitzgibbon*, 2014 BCCA 403, 65 BCLR (5th) 131.

*Van de Perre v. Edwards* involved a mixed race child named Elijah, the biological son of Kimberley Van de Perre, a young white woman living in the Vancouver area, and Theodore (Blue) Edwards, an African American man. He was married to another woman (Valerie), with whom he had twin girls. Mr. Edwards had an affair with Ms. Van de Perre, who was ten years his junior, while playing professional basketball for a Vancouver team. The Edwards lived in the Vancouver area at the time of the trial, but then relocated to North Carolina. At trial, the mother, Ms. Van de Perre, was awarded custody, with Mr. Edwards receiving joint guardianship and four one-week access periods per calendar year. The British Columbia Court of Appeal overturned that order and awarded joint custody to Mr. Edwards and his wife, with generous access to Ms. Van de Perre, who retained joint guardianship. In doing so, the Court of Appeal emphasized the mixed race heritage of the child more than had the trial judge. The Supreme Court of Canada restored the trial decision, returning custody to the mother.

A review of the appeal books indicates that race was not invoked by the parties at trial nearly to the same extent as was evidence related to gender, history of care, sexuality (promiscuity), and family form.<sup>62</sup> That said, the controversy about the weight that race should carry in a custody case arguably elevated the case to a higher status as a media item<sup>63</sup> than it otherwise might have achieved, especially when combined with the celebrity status of Blue Edwards.

Factors in favour of the father, other than the fact that he was the racialized parent of a mixed race child who presented as “Black,” included his financial stability (wealth) and his offer of a traditional family form with his wife as stay-at-home mother. In contrast, the

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<sup>62</sup> The authors were able to review the appeal books, which included many excerpts from transcripts, thanks to the generosity of the lawyer for Ms. Van de Perre.

<sup>63</sup> See Williams, *supra* note 5.

mother was a single parent without many resources, although she had been primarily responsible for the son since his birth and had extended-family support. The trial judge, Warren J., acknowledged that Elijah needed exposure to his African-American heritage and culture, but he also acknowledged that Elijah was mixed race and, as such, his white Canadian heritage must also be considered.<sup>64</sup> Racism as such was not discussed, and Elijah's two racial heritages were essentially given equal consideration.

The trial judge emphasized the “overarching need for the child to be in a stable and loving environment”<sup>65</sup> and concluded that the mother “has been the primary caregiver for Elijah who by all accounts is a bright, cheerful and healthy little boy who, I find on the evidence, has firmly bonded with his mother.”<sup>66</sup> In addition to emphasizing the solid history of care by the mother, Warren J. was not confident that the Edwards' marriage would survive Mr. Edwards' history of extra-marital affairs, thus making any evidence about Valerie Edwards as an excellent parent less pertinent. Overall, then, the trial judge resisted the efforts of Mr. Edwards to paint Ms. Van de Perre as a promiscuous single mother without education or stability, and emphasized the primary caregiving role that the mother had played “under the extremely difficult circumstances of this very hotly contested litigation.”<sup>67</sup>

In reversing the trial decision, Newbury J.A. found the trial judge erred in not engaging in a close analysis of factors related to Ms. Van de Perre's lack of a grade 12 education, her lifestyle, and her character.<sup>68</sup> Newbury J.A. further felt that the trial judge had been

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<sup>64</sup> *KV v TE* (1999), 5 BCTC 1 at para 80, [1999] BCJ No 434.

<sup>65</sup> *Ibid* at para 80.

<sup>66</sup> *Ibid* at para 83.

<sup>67</sup> *Ibid* at para 84.

<sup>68</sup> *KV v TE*, 2000 BCCA 167 at para 42, 184 DLR (4th) 486.

diverted by arguments concerning Mr. Edwards’ affairs and that his personal life should be treated separately from his ability as a parent. She decided it was an error in law to consider Blue Edwards in isolation from the rest of his family.<sup>69</sup> The Court of Appeal considered the Edwards’ family situation to be “superior,” added Valerie Edwards as a party to the custody claim, and described Ms. Van de Perre’s childhood as a “rather troubled family background.”<sup>70</sup>

Significantly, Newbury J.A. also found that the trial judge should have considered culture, ethnicity, and race and that these factors weighed in favour of Elijah’s living with the Edwards:

If it is correct that Elijah will be seen by the world at large as “being black”, it would obviously be in his interests to live with a parent or family who can nurture his identity as a person of colour and who can appreciate and understand the day-to-day realities that black people face in North American society—including discrimination and racism in various forms.<sup>71</sup>

Although Newbury J.A. was careful to state that racial considerations were not determinative in this case, overall, the Court of Appeal interpreted the evidence more sympathetically in relation to the Edwards and resisted efforts to find good parenting by the mother. Although race was not discussed extensively, it was taken to be a more significant factor than in the trial decision. The diminished focus on the history of care by the mother and the negative evidence about her was enough to persuade the Court of Appeal to change custody to the Edwards.

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<sup>69</sup> *Ibid* at para 9.

<sup>70</sup> *Ibid* at para 16.

<sup>71</sup> *Ibid* at para 50.

The Supreme Court's main reason for restoring the trial decision was that the Court of Appeal was wrong to reconsider the evidence because there was no indication that the trial judge had made a material error.<sup>72</sup> With regard to Valerie Edwards, Bastarache J. said: "A trial judge cannot give custody to a father merely because his wife is a good mother. Her presence is a factor but, overall, the court must consider if the applicant would make a good father in her absence."<sup>73</sup>

As for race, Bastarache J., writing for the Court, said that "race is not a determinative factor and its importance will depend greatly on the facts."<sup>74</sup> The Supreme Court also referred to the argument of the interveners (the African Canadian Legal Clinic, the Association of Black Social Workers, and the Jamaican Canadian Association) that a biracial child needs key tools in order to foster racial identity and pride, such as the means to deal with racism and develop a positive racial identity.<sup>75</sup> However, the Supreme Court specifically rejected the intervener's argument that race always would be a crucial factor and should never be ignored in custody decisions. The intervener had not advocated that the minority parent should necessarily be granted custody but did submit that "[r]ace is an important or 'major' factor, which must be given explicit consideration and considerable weight in custody and access cases."<sup>76</sup> They suggested that the question was which parent would best be able to contribute to a healthy racial

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<sup>72</sup> *Van de Perre*, *supra* note 1 at para 35.

<sup>73</sup> *Ibid* at para 30. Arguably this statement took account of feminist analyses of custody cases in which a father's ability to offer a substitute mother to a child in the form of a new wife or a paternal grandmother has sometimes trumped a mother's claim. See, for example, Boyd, *supra* note 4 at 96–99, 110–11.

<sup>74</sup> *Van de Perre*, *supra* note 1 at para 39.

<sup>75</sup> *Ibid* at para 37.

<sup>76</sup> African Canadian Legal Clinic, The Association of Black Social Workers & The Jamaican Canadian Association, *Factum of the Intervenors in Van de Perre v Edward*, para 3.

socialization and overall healthy development of the child, and which parent would facilitate contact and development of racial identity in a manner that avoided conflict, discord, and disharmony.<sup>77</sup> They also submitted that, in addition to race being given explicit, independent consideration, the historical and social context of racialized groups should inform each specific best-interests factor considered by a court.<sup>78</sup>

In contrast to the interveners’ argument, the Supreme Court gave little guidance to trial judges on the way in which factors such as race, culture, and caregiving should be considered, weighted, or balanced in relation to one another. Indeed, the Court appeared to reduce the question of race to only one of many factors that may be “considered in determining personal identity; the relevancy of this factor depends on the context.”<sup>79</sup> Perhaps most significantly, Bastarache J. added that “[o]ther factors are more directly related to primary needs and must be considered in priority.”<sup>80</sup> He stated that “[r]ace can be a factor in determining the best interests of the child because it is connected to the culture, identity and emotional well-being of the child,”<sup>81</sup> and added:

I would therefore agree that evidence regarding the so-called “cultural dilemma” of biracial children (i.e. the conflict that arises from belonging to two races where one may be dominant for one reason or another) is

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<sup>77</sup> *Ibid* at paras 90–91.

<sup>78</sup> *Ibid* at para 93.

<sup>79</sup> *Ibid* at para 38.

<sup>80</sup> *Ibid* at para 38. Echoes of *Racine v Woods*, [1983] 2 SCR 173, [1983] SCCA No 322 can be traced here, although the SCC does not refer to *Racine v Woods* in *Van de Perre*. See text below at notes 132–33 for a discussion of *Racine v Woods*.

<sup>81</sup> *Van de Perre*, *supra* note 1 at para 40.



relevant and should always be accepted. But the significance of evidence relating to race in any given custody case must be carefully considered by the trial judge.<sup>82</sup>

Bastarache J. observed that “the trial judge noted that this issue was not determinative and that, in this case, Elijah would be in a more stable and loving environment if custody was granted to the [mother].”<sup>83</sup> He thus emphasized stability and the history of care, as did the trial judge, and added that the Court of Appeal had given “disproportionate emphasis” to the issue of race on its own initiative.<sup>84</sup>

Although opinion on the Supreme Court’s approach in *Van de Perre v. Edwards* was mixed, several commentators suggested race should have been emphasized to a greater extent.<sup>85</sup>

### CASE LAW ANALYSIS

As we have seen, *Van de Perre* left the field open to a fairly wide judicial discretion in how to deal with mixed race children. In the remainder of this article, we review judicial decisions that were rendered before and after the *Van de Perre* case.<sup>86</sup> After introducing

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<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid* at para 41.

<sup>84</sup> *Ibid.*

<sup>85</sup> Law, *supra* note 8; Joanna L Radbord, “Equality and the Law of Custody and Access” (2004) 6:1 J Assoc for Research on Mothering 28; Zahara Suleman, “Race(ing) Family Law: A Feminist Critical Race Analysis of the “Best Interests of the Child” Test and the Impact for Racialized Women in Custody and Access Cases” (LLM Thesis, University of Victoria Faculty of Law, 2006) Ottawa: Library and Archives Canada, 2007.

<sup>86</sup> These cases were compiled through a comprehensive online search (via the websites LexisNexis Quicklaw, Westlaw, and CanLII) for family law cases using search terms such as “race,” “mixed race,” “biracial,” “mixed heritage,”

our qualitative study we use eight categories to try to understand how race (and culture) are used in the cases:

- (A) Judicial Racism,
- (B) Essentialist “Race-Matching,”
- (C) Weighing Race and Culture against Other Factors,
- (D) Fostering a Supportive Approach to Mixed Race Heritage,
- (E) Dismissing Race as a Factor: Evidence and Strategy,
- (F) The Role of Access,
- (G) Two (Different) Minority Races, and
- (H) Does the White Race Merit Equal Consideration?

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“ethnicity,” “minority,” and “bicultural.” The leading case on this topic, *Van de Perre v Edwards*, *supra* note 1, was also noted up in order to locate all subsequent cases referencing it. The search was up to date as of December 2014. Some of the cases that were found are not discussed in this paper, due to their limited relevance. These cases include *Re Shing*, [1898] BCJ No 7, an adoption case that discusses whether it was in a child’s interest to be brought up in “her own” Chinese culture; *Stutt v Stutt*, [1993] OJ No 2149, a child support case in which an obviously mixed race child was deemed to not be the child of the white respondent father; *NN v TK*, [1998] QJ No 4259, in which the white father raised concerns that the Nigerian mother might return to Nigeria with their child; *SSK v JS*, [2002] Nu J No 3, in which the Court engaged with evidence regarding the tradition of Inuit customary adoption; and *IR v LR*, [2007] BCJ No 2684, in which a grandmother was granted sole custody and was permitted to move with her mixed race grandchildren to Panama. None of the reported cases involved a dispute between same-sex parents, although one reported case involved a dispute between a lesbian mother (in a relationship with another woman) and a biological father with whom the mother was no longer in a relationship. Both parents were Aboriginal: *JSB v DLS* (2004), [2004] 3 CNLR 110.

On occasion, we discuss cases that talk about religious, linguistic, or cultural heritage rather than those framed in terms of race. This is because judges often speak about race and culture in a very unclear and euphemistic manner. Cases involving children who we can assume are racialized (based on the identification of their parents' ethnicities in judgments) may not directly discuss race, and instead use the terminology of culture and language to address what are actually issues of racial discrimination and racism. (For more on this, see the section "Approaches to Race, Culture, and Ethnicity" above.)

The majority of cases that we found that mentioned race or culture in relation to a mixed race child came from three provinces: Nova Scotia (23 out of 89 cases), Ontario (20 out of 89 cases), and BC (24 out of 89 cases). The high number of cases from Ontario and BC is perhaps unsurprising, given their larger populations (Ontario has the highest population in Canada, and BC has the third highest).<sup>87</sup> However, Nova Scotia only has the seventh highest per cent of the national population,<sup>88</sup> yet produced almost a quarter of the cases. Apart from this interesting incongruity, no meaningful differences emerged

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<sup>87</sup> See Statistics Canada, "Population and dwelling counts, for Canada, provinces and territories, 2011 and 2006 censuses" (Ottawa: Statistics Canada, 2014), online: <[www12.statcan.gc.ca/census-recensement/2011/dp-pd/hltfst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=101&S=50&O=A](http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hltfst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=101&S=50&O=A)> [Statistics Canada, "Population and dwelling counts"]. Note that Ontario and BC also have some of the highest proportions of racialized people in Canada. See Statistics Canada, "Immigration and Ethnocultural Diversity in Canada" in National Household Survey: Analytical Products, Catalogue No 99-010-X (Ottawa: Statistics Canada, 2011), online: <[www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm](http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm)>.

<sup>88</sup> Statistics Canada, "Population and dwelling counts", *supra* note 87. Nova Scotia also has quite a low proportion of racialized people, at just 5.2%, compared to 19.1% for Canada generally. See Statistics Canada, "NHS Focus on Geography Survey – Nova Scotia" (Ottawa: Statistics Canada, 2014), online: <[www12.statcan.gc.ca/nhs-enm/2011/as-sa/fogs-spg/Pages/FOG.cfm?lang=E&level=2&GeoCode=12](http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/fogs-spg/Pages/FOG.cfm?lang=E&level=2&GeoCode=12)>.

in relation to how courts in different geographical areas of Canada dealt with mixed race custody issues. Of course it must be emphasized that our study is qualitative and limited by the fact that most custody disputes are resolved out of court. As well, many are unreported. Nevertheless, the reported cases guide other decisions and other methods of dispute resolution, and are thus worthwhile studying.

The cases do not reveal meaningful differences between how different levels of court treated issues of race. The vast majority of custody cases mentioning race are trial-level decisions, with only a handful of appellate decisions. When race is raised as an issue in an appeal case, a more in-depth discussion of racial issues can ensue (as in *Van de Perre*), but sometimes the appeal court merely affirms that there is no evidence of race being relevant and dismisses the race issue that was raised.<sup>89</sup>

Our study is limited, due not only to the existence of unreported decisions, but also to the fact that we cannot know how many decisions involving a mixed race child never made any mention of the child’s mixed background. Such cases could not have been captured by our search, although their very absence may suggest something about how courts deal with custody disputes over mixed race children—namely that their mixed backgrounds were not viewed as relevant. Moreover, even when cases do mention some aspect of the mixed racial or cultural background of a child, it can be difficult to isolate the impact of race and culture as discrete factors. Race or culture may be mentioned, but so are many other issues that are relevant to determination of the best interests of a child. Consequently, it is not always possible to know the true extent to which race or culture contributed to the end result, unless the judge is explicit on this point. These methodological issues are due to silences in judicial discourse and questions about what judicial words actually reveal about judicial thought processes, perhaps especially in a field where it is unclear to

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<sup>89</sup> E.g. *Adams v McLeod* [1978] 2 SCR 621, 84 DLR (3d) 440.

what extent race or culture should be accorded weight. As we discussed in the section “Approaches to Race, Culture, and Ethnicity,” it is not uncommon for Canadians to resort to silence when uncomfortable questions are raised about racial difference and racism.

We did find cases in which the child was white,<sup>90</sup> but from different cultural heritages. These cases suggest that race and culture are not brought up as often for white children, and that, when they are raised, are not considered to be as important as for racialized children. This pattern reflects the assumption that whiteness is the racial norm in Canada and is, accordingly, taken for granted. The cases that mention race and culture almost always involve racialized children. Where culture and cultural heritage are raised in cases involving white children, judges tend not to attach as much significance to these issues as in the cases involving racialized children. For instance, in the early 1957 case *Maat v. Hepton*,<sup>91</sup> the Dutch parents of children that had been adopted into a non-Dutch family were seeking to regain custody. In considering whether the trial judge had overlooked the issue of culture, the appeal judge said that exposure to Dutch culture would be important if the children were to be brought up in the Netherlands. Since they were to be brought up in Canada, however, it was of “equal importance” that they be immersed in Canadian culture (with their non-Dutch adoptive parents, who maintained custody). The Court did not dismiss outright the importance of the minority culture, but it was clearly not an important factor in the decision. It is possible that the judge assumed that because the children appeared white, they would be better able to blend into mainstream Canadian society (compared to a racialized child), and therefore would not feel much need to engage

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<sup>90</sup> With respect to nomenclature, there was little consistency in the case law with respect to how judges referred to the racial categorization of the people appearing before them. Some judges referred to non-racialized individuals as white, and some referred to them as Caucasian.

<sup>91</sup> [1957] OR 64, 7 DLR (2d) 488 (CA). This case was appealed at the Supreme Court of Canada, but the Court did not discuss culture in its decision. See *Hepton v Maat*, [1957] SCR 606, 10 DLR (2d) 1.

strongly with their minority culture.<sup>92</sup> This case raises the question of whether having a strong connection to a minority culture is more relevant to the best interests of children who do not appear to be white.

We now turn to a more detailed discussion of the cases under the eight categories that we outlined above.

### **Judicial Racism**

Unsurprisingly, some older custody cases, including those outside our sample, demonstrate a more explicitly racist attitude.<sup>93</sup> For instance, in 1982 in *Re Comeau*,<sup>94</sup> custody of a white child was awarded to the father, in part because the mother’s interracial relationship with a Black man was thought to not be in the child’s best interests.<sup>95</sup>

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<sup>92</sup> This perspective echoes the “melting pot” theory of racial and cultural assimilation. This theory is largely discredited today, but advocates that different groups synthesize together to form a new group rather than maintain their original identities. Implicit in this theory is the idea that it is preferable not to retain and perpetuate distinct minority cultures and that all people should instead blend into a common cultural milieu. For an exploration and critique of the “melting pot” theory, see Driedger & Halli, “Racial Integration”, *supra* note 23 in Driedger & Halli, *supra* note 15, at 55–58.

<sup>93</sup> It is unsurprising that racism is more apparent in older cases because these cases predate the prevalence of critical legal approaches to race and racism, which became more common after the first Critical Race Theory workshop, which was held in 1989 in Madison, Wisconsin. See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2012) at 4.

<sup>94</sup> [1982] NSJ No 84.

<sup>95</sup> *Ibid* at para 29. This case did not involve a mixed race child, and as such was not included in our case law sample. However, it serves as a Canadian parallel to the landmark 1984 US case of *Palmore v Sidoti* (466 US 429), which involved a similar set of facts, with the trial level decision saying that it would not be in a white child’s best interests to be in a mixed race home due to the potential negative effects of racial difference and racism on the child. *Palmore*

Racist attitudes are not just a thing of the past, however. Judges have made explicitly racist comments in their custody determinations as recently as 1999. In *D.T.L. v. L. (Police Service)*,<sup>96</sup> Justice Barakett made several derogatory comments about an Aboriginal mother, saying that two “blonde freckled”<sup>97</sup> children had been “brainwashed away from the real world into a child like myth of pow-wows and rituals” by their mother.<sup>98</sup> Justice Barakett also said the children had been “indoctrinated into Indian culture,”<sup>99</sup> suggesting that, based on their white appearance, their rightful place was in the non-Aboriginal community. This decision by Justice Frank G. Barakett in the “Audrey Isaac” case was the subject of complaints by several First Nations organizations to the Canadian Judicial Council. The fundamental concerns highlighted by these complaints included the fact that Justice Barakett ignored Ms. Isaac’s ex-husband’s history of criminal assault against her and her mother; that he ignored the fact that Mr. Isaac signed false affidavits; that he demonstrated insensitivity, ignorance, and bias concerning First Nations people; that his biased views unfairly affected Ms. Isaac’s and her children’s rights; and that his claims of brainwashing and indoctrination were not grounded in the evidence.<sup>100</sup> The Canadian Judicial Council panel that reviewed the case expressed their disapproval of Justice Barakett’s statements, but concluded that he was sincere in the recognition of his errors, and that his statements

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*v Sidoti* went to the United States Supreme Court, where it was ultimately found that it was improper for courts to give effect to private racial biases in their decisions.

<sup>96</sup> [2000] RDF 35, [1999] QJ No 5364 [cited to QJ].

<sup>97</sup> *Ibid* at para 15.

<sup>98</sup> *Ibid* at para 18.

<sup>99</sup> *Ibid* at para 14.

<sup>100</sup> T Brettel Dawson, *Women, Law and Social Change: Core Readings and Current Issues* (Toronto: Captus Press, 2009) at 255–58.

did not affect the outcome of the case.<sup>101</sup> He affirmed that he would attend seminars to improve his understanding of Aboriginal culture, and was deemed capable of continuing as a judge serving the public.<sup>102</sup>

More recent decisions likely still exhibit elements of racism, but do so more subtly. Although many judges discuss the value that minority cultures and identification with a racial minority can offer, whiteness is still situated as the normative racial identity. When two parents of different racial or cultural backgrounds are engaged in a custody dispute, the race or culture of the non-white parent is often described, but that of the white parent is left to be assumed, giving the sense that the author of the judgment considered whiteness to be the norm or the neutral racial category in Canada. Although it is the majority race in (most of) Canada, the assumption of neutrality is problematic and reinforces assumptions of whites being racially superior, as discussed in the section “Approaches to Race, Culture, and Ethnicity.” The cases *Kucherawy v. Gill*,<sup>103</sup> *W.D. v. L.C.*,<sup>104</sup> *D.M. v. A.G.L.*,<sup>105</sup> *R.C. v. S.S.*,<sup>106</sup> *D.G.E.E. v. J.E.*,<sup>107</sup> *Ho v. Gallinger*,<sup>108</sup> *P.M.S. v. G.T.*,<sup>109</sup> *Sherwood v. Pardo*,<sup>110</sup> and *Allen v. Wu*<sup>111</sup> are all instances of

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<sup>101</sup> *Ibid* at 259–64.

<sup>102</sup> *Ibid* at 259–60.

<sup>103</sup> 2005 ONCJ 49, [2005] OJ No 660.

<sup>104</sup> 2004 SKQB 10, [2004] SJ No 18.

<sup>105</sup> 2004 ABQB 69, (2004) 3 RFL (6th) 79.

<sup>106</sup> 2003 BCPC 209, [2003] BCJ No 1383.

<sup>107</sup> 2003 BCPC 348, [2003] BCJ No 2348.

<sup>108</sup> [2002] OJ No 5427, 2002 CarswellOnt 5308.

<sup>109</sup> 2011 ABCA 103, [2011] AJ No 356.

<sup>110</sup> 2011 BCSC 1405, [2011] BCJ No 1991.

<sup>111</sup> 2011 ONSC 6813, [2011] OJ No 5414.



this tendency to presume and normalize whiteness. One example can be found in the case *D.G.E.E. v. J.E.*, in which it was stated that “[t]he child is half Filipino, and the mother promises to expose her child to the rich cultural heritage of the Philippines.”<sup>112</sup> Nowhere in the case does it also state that the child is part white, nor is there any discussion of the unique cultural enrichment that the white father could offer.

### **Essentialist “Race-matching”**

An essentialist race-matching approach to custody does not attempt to address the nuances of the development of racial identity or explain why the racialized parent might be better equipped to care for a mixed race child. This approach appears in some older cases<sup>113</sup> but, as we shall see,<sup>114</sup> more recent decisions awarding custody of a mixed race child to his or her racialized parent tend to be based primarily on reasons other than race (such as stability, parenting history, bonding, financial means, etc.—the same reasons cited when giving custody to white parents). If these decisions do discuss race or culture, the judgments comment on why the racialized parent is better suited to raising the biracial child (for instance, because they have demonstrated a greater willingness or ability to expose the child to both sides of his or her heritage or they are more willing to foster access). As a result, it is difficult to isolate the extent to which essentialist or reductive race-matching has motivated these decisions.

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<sup>112</sup> *Supra* note 107 at para 46.

<sup>113</sup> But, importantly, not in all older cases. For instance, *GG c J-LF*, [1992] RDF 150 is a Quebec appeal decision that is interesting because it demonstrates a distancing from race matching, which one may not expect at first from an older case. Though the majority and minority judgments disagreed on the result on appeal, they both agreed that considering a child’s skin colour was irrelevant and impermissible.

<sup>114</sup> See the section “When the Racialized Parent Gets Custody” below.

The 1973 case *Hayre v. Hayre*<sup>115</sup> is perhaps the best known instance of race-matching in Canadian custody case law. The Court said that society would not “permit” the part-Punjabi child any identity other than Sikh, and the white mother would never be able to cope with the task of bringing her son up with that identity. Although the judge did not say that the child would necessarily experience racism because of his racial appearance, he did say that the child would not have a choice in what his racial identity (and his consequent place in society, one can assume) would be, and custody was awarded to the “Sikh by race and religion” father despite evidence of the father’s abuse, older siblings supporting the mother, and the mother being a fit and loving parent that the judge said he would ordinarily incline towards in a custody decision. The judge briefly commented on how the father would be capable of bringing up the child within the language, religion, and cultural traditions of the Sikhs,<sup>116</sup> but did not otherwise address why race was the main motivating factor behind his decision, leaving one to assume that the decision was primarily the result of essentialist race-matching.

Similarly, in the 1942 case, *W. v. A.K.*,<sup>117</sup> although the racial appearance of an infant with a Chinese father and an Aboriginal mother was not explicitly discussed, the assumption that the child would be seen as Chinese (and should therefore live among Chinese people) can be inferred from the fact that one of the Court’s considerations was that one particular neighbourhood would be better for the child than another, because it had a greater population of children of Chinese descent (or, as the decision says, of the child’s “own kind”).<sup>118</sup> In this

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<sup>115</sup> (1973), 11 RFL 188, [1973] BCJ No 544.

<sup>116</sup> This can be seen as an example of the common judicial failure to distinguish between racial and cultural factors. See the section “Approaches to Race, Culture, and Ethnicity” above.

<sup>117</sup> [1942] OJ No 136.

<sup>118</sup> The Court of Appeal in *Van de Perre*, *supra* note 68 at para 51, 184 DLR (4th) 486 made a similar comment, saying the Edwards were better suited to raising

case, the father sought custody and the mother (deemed to have “loose character”) hoped to complete the formal adoption of the child to a Chinese couple. The application was dismissed and custody was not given to the father for several reasons (particularly his lack of finances), and it was furthermore noted that the adoptive parents’ Chinese neighbourhood would be more suitable for the child.

A more recent (2000) case, *Kassel v. Louie*,<sup>119</sup> is sometimes referred to as an example of race-matching,<sup>120</sup> because a part-Chinese boy who resembled his Chinese father was placed with his father after the Court put considerable weight on the fact that they looked similar. However, the judgment also took into account the fact that the child would have more continuity and stability if he lived with his father, so it is difficult to know the real extent to which the decision was motivated by essentialist race-matching. On a similar note, the judgment in *Thompson v. Murphy*<sup>121</sup> said that a part-white, part-Black child was “of the same race” as his Black father, and ordered joint custody.<sup>122</sup> However, the decision commented on why this racial resemblance was important, saying that the child would need a racial role model in multicultural Canadian society, and also considered many other factors apart from race in the best interests of the child analysis. It is accordingly difficult to determine the true extent to which

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Elijah in part because “being raised in an Afro-American family in a part of the world where the black population is proportionately greater than it is here, would to some extent be less difficult than it would be in Canada. Elijah would in this event have a greater chance of achieving a sense of cultural belonging and identity.” For a contrasting approach to the question of a part-Chinese child being raised within Chinese culture and neighbourhoods, see *JD c NW* [1989] RDF 625.

<sup>119</sup> 2000 BCSC 1417, (2000) 11 RFL (5th) 144.

<sup>120</sup> The Factum of the Interveners in *Van de Perre v Edwards* did so, *supra* note 76 at para 29, along with *Hayre v Hayre*, *supra* note 115.

<sup>121</sup> 2013 ONSC 3197, [2013] OJ No 2666.

<sup>122</sup> *Ibid* at para 18.

essentialist race-matching motivated the decision. In general, contemporary judges do not appear to adopt an explicit race-matching approach in the way that happened in some earlier decisions.

### **Weighing Race and Culture against Other Factors**

In this section, we turn to the most important insights of our study. We first discuss how race and culture tend to be discussed before analyzing the cases according to: (i) When the Racialized Parent Loses Custody; (ii) When Joint Custody is Ordered; and (iii) When the Racialized Parent is Awarded Custody.

Overall, race per se does not emerge as a very important factor in the custody cases involving mixed race children. Race and culture are, however, typically very intertwined in the judicial discourse. When differences between parents could be cast as either racial differences or cultural differences, it is common for judges to prefer the latter framing. As mentioned in the section “Legislative Analysis,” legislation is often silent on race or culture, but when a reference is made, it is to culture only. The judicial preference to refer to culture may partly reflect the legislative approach. It may also reflect discomfort around the blatant discussion of race and racism, or a desire to cast a broad semantic net that assumes racial issues fall within the scope of cultural issues. In any case, it is important to note that race is typically not made explicit in the case law in the same way that culture is.<sup>123</sup>

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<sup>123</sup> As mentioned earlier, Sherene Razack has criticized the process of the “culturalization of difference” as a way to obfuscate the underlying issues of inequality that are tied to “race and class exploitation and oppression”: Razack, *Looking*, *supra* note 19 at 60. Razack further cautions that “[c]ulture becomes the framework used by White society to pre-empt both racism and sexism. . . . The risks of talking culture require us to exercise great caution whenever cultural considerations enter legal discourse” because “cultural considerations often work in the service of dominant groups” (*ibid* at 60).

Racial and cultural issues—such as a parent’s ability to impart racial or cultural knowledge—seem to become important when all other factors, such as stability, the child’s attachment to the parents, parental willingness to foster access, and financial means, are equal. What this means is that racial and cultural factors (and recall that these are often conflated) will only work in a parent’s favour if no other factors tip the scales towards one or the other parent. Racialized parents and parents belonging to minority cultures are not automatically favoured because of these aspects of their (and their children’s) identity. Rather, before these aspects can have any meaningful weight in a best-interests analysis, both parents must be scrutinized on all other bases to reveal whether they are on equal footing. Such scrutiny will likely result in various other factors (such as financial stability and history of care) working for or against the parents, with one parent consequently looking like the more fit parent. In such a scenario, racial and cultural factors will not be enough to change the overall balance of factors. All other things are rarely equal enough for race and culture to make an impact in a placement decision.<sup>124</sup>

This judicial method of considering racial and cultural issues is illustrated by *S.H. v. A.M.*,<sup>125</sup> which used the phrase “all other things being equal”<sup>126</sup> when discussing the fact that race has the greatest impact on a child custody decision when the parents are otherwise on equal footing. In this case, the judge acknowledged that the racialized mother had greater “cultural competence” and would be better able to equip her child with the tools needed to deal with being racialized.<sup>127</sup>

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<sup>124</sup> Similarly, the tender-years doctrine or maternal preference was supposed to apply when all other factors were equal. In fact, the factors were rarely “equal,” given the heightened scrutiny of women’s conduct as wives and mothers, making the doctrine much less powerful than is often surmised. See Boyd, *supra* note 4 at 63–71.

<sup>125</sup> [1998] NJS No 599.

<sup>126</sup> *Ibid* at para 18.

<sup>127</sup> *Ibid* at para 22.

However, custody was still awarded to the white paternal grandparents, because the child had bonded more with them.

Further demonstrating the idea that race and culture do not always have a consistent level of impact on a decision is the fact that race is sometimes not even discussed in cases involving mixed race children. In these cases, it was raised neither by the parties or the judge, presumably because other factors were understood by all people involved to be more important. One can assume this was the case in *Phelps v. Andersen*,<sup>128</sup> which involved a child the court identified as mixed race (with a Black father and a white mother), but did not analyze race and culture, instead focusing on stability of residence and ability to meet the child’s day-to-day care needs.

More often, race is at least mentioned, but is not determined to be significant enough to decide the outcome of a custody case. First, as we discuss in more detail immediately below, when the white parent receives custody, the court will typically say that more factors overall weigh in the white parent’s favour. Often, when this is so, the fact that the white parent says they are willing to educate the child about their biracial heritage is seen by the court as sufficient to address any potential issues regarding race and culture. As the section “The Role of Access” will show below, access can be another device by which judges assume that children will be exposed to the racial heritage of the non-custodial parent. Second, when joint custody is ordered, a consideration of all of the factors puts the parents on equal footing, and race and culture do not tip the scales in favour of one parent or the other. Third, in some cases, issues of race and culture figure more prominently than in others, but when the racialized parent receives custody, many other non-racial/non-cultural factors usually weigh in favour of the racialized parent.

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<sup>128</sup> [1994] OJ No 2382.

*When the Racialized Parent Loses Custody: Race and Culture are Outweighed by Other Factors*

In several cases, race and culture are outweighed by other factors: typically, a combination of non-racial and non-cultural factors. For instance, in *Costa v. Costa*,<sup>129</sup> the minority (Catholic Portuguese) father did not receive custody because he was overall less able to meet the children's needs. Similarly, in *Anderson v. Williams*,<sup>130</sup> custody was not awarded to the Black father, even though the Court acknowledged the relevance of racial issues to the child's well-being. The reason for the decision was that the father did not have a very good parenting history, whereas the mother was an overall more fit parent. In *Allen v. Wu*,<sup>131</sup> culture was deemed an important factor for the part-Chinese children, but the other factors considered still combined to outweigh culture, and the white father received custody. In *G.W.Z. v. S.M.Z.*,<sup>132</sup> an Aboriginal mother's application to vary a custody order was denied when the Court said that culture was merely one factor, and the white father retained custody. Demonstrating how non-racial factors can outweigh racial and cultural ones in the adoption context is *P.C. v. P.C.C.-G.*,<sup>133</sup> in which a child's white Croatian-Canadian stepfather and mother sought to dispense with the consent of the child's Mexican father to the adoption of the child. Consent was dispensed with, because the father did not have a history of caring for or regularly seeing the child, had been a violent partner, and did not pay child support. The father's argument that adoption would deprive the child of exposure to her Mexican cultural heritage was heavily outweighed

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<sup>129</sup> [2002] OJ No 3257, 2002 CarswellOnt 2778.

<sup>130</sup> [1988] BCJ No 1428, [1988] WDFL 1969.

<sup>131</sup> *Supra* note 111.

<sup>132</sup> 2010 BCSC 92, [2010] BCJ No 117.

<sup>133</sup> 2004 ONCJ 130, [2004] OJ No 3247. Note that as an adoption issue, this case was not included in our original sample of 89 custody cases involving mixed race children.

by other issues, and the white parents were deemed able to raise the child with a healthy sense of cultural identity without the biological father’s involvement.

In the well-known and much cited case of *Racine v. Woods*,<sup>134</sup> a dispute between white and Métis foster parents and an Aboriginal biological mother, race was outweighed by the bond the Aboriginal child had formed over time with the foster parents.<sup>135</sup> Sometimes financial and environmental needs are also cited as important factors that appear to trump race and cultural concerns. In *K.J.S. v. M.T.*,<sup>136</sup> even though the child’s Inuit mother was better able to provide for the child’s cultural needs, the white father was better able to provide for the child’s financial and environmental needs, and was therefore awarded custody. A similar scenario occurred in *R.N.G. v. K.Q.N.G.*,<sup>137</sup> in which the Inuit mother was only granted access, while her Caucasian ex-partner received sole custody due to his history of caring for the children, family support, and healthier mental state (even though the judge acknowledged the importance of the children’s cultural heritage). *D.H. v. H.M.*<sup>138</sup> was a custody case between an Aboriginal biological grandfather and the white “adoptive” parents of an Aboriginal mother who had been removed from her home at an early age. The custody award of the grandchild to the white grandparents also pointed to race and culture only having been one consideration

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<sup>134</sup> *Supra* note 80.

<sup>135</sup> For critical analysis of this case, see e.g. Patricia Monture, “A Vicious Circle: Child Welfare and the First Nations” (1989) 3:1 CJWL 1; Marlee Kline, “Child Welfare Law, ‘Best Interests of the Child’ Ideology, and First Nations” (1992) 30:2 Osgoode Hall LJ 375.

<sup>136</sup> 2001 NSFC 8, (2001) 194 NSR (2d) 222.

<sup>137</sup> 2001 NBQB 240, (2001) 244 NBR (2d) 303.

<sup>138</sup> *Supra* note 53.



that was outweighed by others such as economic ability, bonding, and maintaining the status quo.<sup>139</sup>

Willingness to foster access frequently figures as a significant issue as well. For instance, in *Ffrench v. Ffrench*<sup>140</sup> race was considered, and the racialized father argued that only he could impart cultural knowledge and the necessary tools for his children to deal with racism. However, the Court found the father less likely to support access than the mother, so even though the Court accepted evidence of the reality of racialization and racism, custody was still awarded to the white mother. *S.B. v. S.H.J.G.*<sup>141</sup> also saw a white parent receiving custody in part because he seemed more willing to support access. Similarly, in *Sawatzky v. Campbell*,<sup>142</sup> an Aboriginal father argued that only he could support his child's Aboriginal identity. However, the Court said that it would favour the racialized parent only if all else were equal. The father had a history of withholding access, there was evidence of his less than ideal history of caring for other children, and he was deemed to be overall less mature and capable compared to the

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<sup>139</sup> This case evokes the history of the systemic removal of children from indigenous households to be raised institutionally or as adoptees or foster children of white people. For more on this topic, see generally Christopher Walmsley, *Protecting Aboriginal Children* (Vancouver: UBC Press, 2005); Nico Trocmé, Della Knoke & Cindy Blackstock, "Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System" (2004) 78:4 Social Service Rev 577; Deena Mandell et al, "Aboriginal Child Welfare" in Gary Cameron, Nick Coady & Gerald R Adams, eds, *Moving Toward Positive Systems of Child and Family Welfare: Current Issues and Future Directions* (Waterloo: Wilfrid Laurier University Press, 2007) 115; Kathleen Kufeldt & Brad McKenzie, eds, *Child Welfare: Connecting Research, Policy, and Practice* (Waterloo: Wilfred Laurier University Press, 2011).

<sup>140</sup> (1994) 118 DLR (4th) 571, 134 NSR (2d) 241.

<sup>141</sup> 2003 BCSC 344, (2003) 37 RFL (5th) 23.

<sup>142</sup> 2001 SKQB 250, [2001] 4 CNLR 300.

mother. For these reasons, the white mother received custody. In *Nova Scotia (Minister of Community Services) v. B.F.*,<sup>143</sup> although the Aboriginal mother argued that she was better able to support the children’s biracial, First Nations heritage, the case focused on the fact that the white father had a superior parenting plan and history and seemed more willing to foster access.

*Rushton v. Paris*<sup>144</sup> is a particularly interesting instance of a racialized parent being denied custody, even after racial issues figured prominently in the reasons. This decision was written by Judge Corinne Sparks, the African Canadian judge mentioned earlier.<sup>145</sup> The white mother received custody even after Judge Sparks considered at some length the significant reality of racism and the difficulties that racialized children face. It was determined that the children in question were confused at best and resentful at worst of their biracial heritage, and Judge Sparks remarked on the fact that the assessment ordered by the court did not adequately address or explore issues of race. Interestingly, it was also said that the assessor did not hear out the father’s concerns about race, and the mother merely “paid lip service” about exposing the children to racial and cultural learning.<sup>146</sup> There had, however, been allegations that the father had been abusive and angry, and he had displayed poor judgment during access visits, which made him a less suitable parent. Acknowledging that a white mother may have trouble with some aspects of raising a racialized child, Justice Sparks awarded the mother custody but suggested she take a course on parenting biracial children. Judge Sparks also commented on the importance of the father engaging the children in cultural activities during his access visits. We return to this idea in the section “The Role of Access” below.

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<sup>143</sup> 2014 NSSC 94, [2014] NSJ No 133.

<sup>144</sup> 2002 NSFC 10, 205 NSR (2d) 242.

<sup>145</sup> See Fletcher, *supra* note 36 and accompanying text.

<sup>146</sup> *Supra* note 144 at para 21.

*When Joint Custody Is Ordered: Parents on Equal Footing and Race and Culture Do Not Tip the Scales*

Since the 1980s, joint custody awards have become far more common—some would say the norm—in Canadian courts, reflecting shifting approaches to fatherhood and motherhood and a valuing of the ongoing involvement of parents in a child’s life.<sup>147</sup> This pattern can be detected in our case sample, arguably as a way to satisfy concerns that a child have contact with both aspects of her racial heritage. In *A.R.D. v. G.B.G.D.*,<sup>148</sup> joint custody was awarded in a dispute between a Malaysian-Chinese-Canadian mother and a white father. Although it was acknowledged that residing with the mother would better facilitate exposure to Chinese culture, race and culture were deemed to be only one factor. Primary residence was to be with the white father, largely because of a reluctance to remove the child from Comox, where he had been living, and due to concerns about the mother moving to Malaysia. *Stead v. Stead*<sup>149</sup> saw a similar outcome, with joint custody and equal parenting time awarded to both parents, even though the Métis mother was acknowledged as being more able to guide her son regarding his Aboriginal heritage, and even though the father had a history of making racist comments. Joint custody was also ordered in *D.M. v. A.G.L.*,<sup>150</sup> with the primary residence being with the white mother and the Aboriginal father receiving generous access to support the child’s cultural development. Finally, joint custody was awarded to a white mother and a Jamaican-Canadian father in the case of *Szakacs v. Clarke*,<sup>151</sup> where it was stated that “[t]he fact that an order for joint

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<sup>147</sup> See e.g. Susan B Boyd, “Joint Custody and Guardianship in the British Columbia Courts: Not a Cautious Approach” (2010) 29:3 Can Fam LQ 223.

<sup>148</sup> 2004 BCSC 1080, [2004] BCJ No 1669.

<sup>149</sup> [2005] OTC 1043, [2005] OJ No 5203.

<sup>150</sup> 2004 ABQB 69, (2004) 3 RFL (6th) 79.

<sup>151</sup> 2014 ONSC 7487.

custody will ensure that the child experiences her full cultural inheritance is a bonus,” rather than a determinative factor, suggesting that cultural or racial factors did not tip the scales in favour of one parent or the other.<sup>152</sup> In these cases, the overall balance of factors, including those relating to race and culture, seemed to weigh fairly evenly for both parents, leading the judges to order joint custody. Typically, practical concerns such as the need to relocate the child would dictate primary residence, as in *A.R.D. v. G.B.G.D.*<sup>153</sup>

*When the Racialized Parent Gets Custody: Race and Culture Are Not Pivotal Reasons*

Typically, when the racialized parent does receive custody, race is not the overriding reason. When race and culture do figure more prominently in a decision, they will still be combined with other factors that tip the scales in favour of the racialized parent. For instance, in *Gordon v. Mustache*,<sup>154</sup> custody of a part-Aboriginal child was awarded to the Aboriginal mother. The Court stated that culture has to be lived on a day-to-day basis and occasionally engaging with it is not enough. However, the majority of the decision dealt with issues other than race and culture, such as the history of caregiving, the stability of the home environment, and parental emotional stability and maturity. In *Gray v. Reynolds*,<sup>155</sup> the Black father received custody after the Court discussed the effects of racialization and racism, but much time was also spent discussing the mother’s history of inadequate day-to-

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<sup>152</sup> *Ibid* at para 65.

<sup>153</sup> *Supra* note 148; For more discussion on mixed race custody disputes in which joint custody was ordered, see the section “Fostering a Supportive Approach to Mixed Race Heritage” below, where the following cases are discussed: *WIW v MAW* [1995] NSJ No 554; *Ho v Gallinger*, *supra* note 105; *Merriam v McGee*, 2007 NSFC 7, [2007] NSJ No 39 [*McGee*]; *WMW v JW*, 2011 BCPC 360, [2011] BCJ No 2432.

<sup>154</sup> [1990] BCJ No 2556.

<sup>155</sup> 2010 NSFC 14, [2010] NSJ No 364.

day care. Similarly, in *Dighe v. Dighe*,<sup>156</sup> the racialized father was awarded custody of the child, but most of the discussion centred on how he was a more fit and dedicated parent. In *Imamura v. Remus*,<sup>157</sup> custody was awarded to the Japanese mother who wished to relocate to Japan. The white Canadian father raised the issue of a part-Japanese child potentially facing racial discrimination in Japan, but this concern was dismissed and most other factors weighed in the mother's favour. Similar sets of facts occurred in *Takenaka v. Kaleta*<sup>158</sup> and *P.M.S. v. G.T.*<sup>159</sup> In *I.G.C. v. K.A.C.*,<sup>160</sup> the father, who himself had a mixed background with an Aboriginal mother and a Caucasian father, was awarded custody, and though the court mentioned his ability to share the benefits of his Aboriginal ancestry, the decision also focused on the presumably white mother's poor parenting history. A white stepfather was seeking custody of his Black stepdaughter in *J.H.F. v. A.M.F.*,<sup>161</sup> but custody was awarded to the Black mother. Race was discussed, but it was only one of several other factors making the mother the more suitable parent. In *D.G.E.E. v. J.E.*,<sup>162</sup> a Filipino mother retained custody over the presumably white father and was able to relocate with her child to Florida, where her fiancé resided. Race and culture were mentioned, but were not a large focus of the judgment. In *G.A.C. v.*

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<sup>156</sup> [1978] SJ No 330, 1978 CarswellSask 334.

<sup>157</sup> [2004] OTC 1192, (2004) 12 RFL (6th) 346.

<sup>158</sup> [2006] OTC 187, (2006) 28 RFL (6th) 119.

<sup>159</sup> *Supra* note 109. The argument that a mixed race child might face discrimination overseas and should therefore not go was also unsuccessful in *Shortridge-Tsuchiya v Tsuchiya*, 2010 BCCA 61, (2010) 315 DLR (4th) 498. In this case, a white mother was ordered to return to Japan, which was the location of existing family law proceedings, after the BC Court said that the Japanese Court was in a better position to exercise jurisdiction.

<sup>160</sup> (1998) 71 OTC 1, [1998] OJ No 2229.

<sup>161</sup> [1984] NSJ No 91.

<sup>162</sup> *Supra* note 107.

*I.C.*,<sup>163</sup> a custody order was varied to give sole custody to a Black father after the white Russian mother removed the child to Russia without notifying the father. Race was not discussed apart from mentioning that living in multicultural Canada would benefit the child, and more discussion was devoted to how the mother had placed her own school and training ahead of her mothering duties. Finally, in *Yu v. Jordan*,<sup>164</sup> a white father questioned a trial judge’s finding regarding the cultural benefit his daughter would have by living with her mother and Chinese grandmother by saying that the grandmother did not actually reside with them full-time. The Court dismissed his appeal, and though the Court acknowledged the uncertainty of the evidence regarding the grandmother’s residency, it was stated that the numerous other findings supported the mother retaining primary residence, again demonstrating how race and culture are not the primary focus of judicial decision making.

### **Fostering a Supportive Approach to Mixed Race Heritage**

When issues of race or culture are discussed in custody cases, they are often discussed in terms of whether each parent would be able to foster an open, informed, and supportive approach to the mixed race child exploring his or her cultural or racial identity, which typically means exploring a racialized identity or a minority cultural identity.<sup>165</sup> This

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<sup>163</sup> 2004 BCPC 444, [2004] BCJ No 2554.

<sup>164</sup> 2012 BCCA 367, 354 DLR (4th) 8.

<sup>165</sup> The importance of parents being sensitive to the special needs of mixed race children was emphasized in some adoption cases as well (which were not included in our sample of 89 custody cases), such as *TL v AK*, 1985 OJ No 764; *B v A*, 13 RFL (3d) 209, [1988] OJ No 206; *Re T* (1974), [1975] 1 WWR 267, [1974] NWTJ No 11; and *TG v Nova Scotia (Minister of Community Services)*, 2012 NSCA 43, 18 RFL (7th) 54. A Vietnamese birth mother was also permitted to withdraw consent to the adoption of her mixed race child in *LP v DGH* (1986), 76 AR 327, [1986] AJ No 362, because the adoptive parents were not thought to be capable of meeting the child’s unique needs. Also, in *Newfoundland and Labrador (Child, Youth and Family Services) v*

principle was articulated in *Van de Perre* as being based on which parent would “best be able to contribute to the child’s healthy racial socialization and overall healthy development”<sup>166</sup> and drew to some extent on the argument of the interveners in that case.<sup>167</sup> This parent will not always be the racialized parent, and the focus is on the overall development of the child, so racial and cultural issues will always be considered in conjunction with other factors. As can be seen in many of the cases above, considering race and culture in this way along with numerous other factors may or may not result in the racialized parent being awarded custody.

Cases in which the racialized parent received custody when they were deemed to be open to fostering a supportive approach to the child’s mixed race heritage include *Maier v. Chiao-Maier*.<sup>168</sup> In *Maier*, custody of a young boy was awarded to his Chinese-Canadian mother (who wanted her son to learn about Chinese culture) rather than the white father (who did not seem interested in enabling that learning). A similar set of circumstances occurred in *Larocque v. Markie*,<sup>169</sup> which concerned a part-Mi’kmaq, part-white child. In *Camba v. Sparks*,<sup>170</sup> the Court also considered which parent would be better equipped to address the needs of a child with a Black mother and a white French-Canadian father, awarding custody to the child’s Black mother.

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*JC*, 2012 NLF(D) 14, 322 NFD & PEIR 1, custody of a mixed race part-Inuit child was given to his Inuit paternal grandparents, after the Court commented that they seemed more firm in their plan to protect the child’s Inuit heritage and culture.

<sup>166</sup> *Supra* note 1 at para 37.

<sup>167</sup> See *supra* note 76 and accompanying text.

<sup>168</sup> [1990] SJ No 531.

<sup>169</sup> (1990), 96 NSR (2d) 241, [1990] NSJ No 530.

<sup>170</sup> (1993), 124 NSR (2d) 321, [1993] NSJ No 521.

Similarly, in *Hannebohm v. Hannebohm*,<sup>171</sup> both parents were found to be loving and committed, but the Black mother demonstrated a greater understanding of the effects of racialization and racism than did the white father. In *Flemmings v. Collet*,<sup>172</sup> in which a Black father was given custody, a significant concern was that the white maternal family had a history of frustrating access to the father, which would impede the child benefiting from her dual racial heritage. As a result, the father could better support her dual heritage. These cases awarded custody to the racialized parent after mentioning the racialized parent’s willingness to foster an open approach to the child’s exploration of his or her mixed race heritage. However, as was discussed in the section “When the Racialized Parent Gets Custody,” race and culture still were not the pivotal reasons for the custody determination. Other factors also weighed heavily in these parents’ favour, such as history of care and stability.

In *W.I.W. v. M.A.W.*<sup>173</sup> and *Ho v. Gallinger*<sup>174</sup> joint custody was ordered, in part because both parents were seen as able to promote the child’s mixed race heritage. In *Merriam v. McGee*,<sup>175</sup> joint custody was also awarded, but the white father was instructed to further educate himself on how to teach his children about their African heritage and was prevented from exposing his children to people who might use

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<sup>171</sup> (1995), 149 NSR (2d) 125, 432 APR 125.

<sup>172</sup> [1997] OJ No 1382.

<sup>173</sup> *Supra* note 153.

<sup>174</sup> *Supra* note 108.

<sup>175</sup> *Supra* note 153.



racial slurs.<sup>176</sup> In *W.M.W. v. J.W.*,<sup>177</sup> custody of a part-Aboriginal child was given jointly to his Aboriginal and non-Aboriginal extended family members, in part due to their willingness and ability to provide exposure to Aboriginal culture.

In *Young v. Mallett*,<sup>178</sup> *Perkins v. Perkins*,<sup>179</sup> *M.S.-O. v. R.K.*,<sup>180</sup> and *J.D. c. N.W.*,<sup>181</sup> white mothers were awarded custody, in part because they were willing to ensure their mixed race children would be able to learn about and engage with their racialized identities. In *Pigott v. Nochasak*,<sup>182</sup> a non-Inuit father was awarded custody of a part-Inuit child, in part because he was very attuned to the child's needs and was well-educated in Inuktitut. In *W.D. v. L.C.*,<sup>183</sup> the white father was awarded custody rather than the Cree mother, after the father was deemed to be "sufficiently culturally aware" and willing to support his

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<sup>176</sup> This case is interesting because the judgment discussed the need for family court assessors to be trained in cross-cultural relationships and parenting practices that will foster healthy self-esteem in biracial children. It was written by Judge Corinne Sparks, who also wrote the decision in *Rushton v Paris*, *supra* note 144, discussed above, which also commented on family court assessors. Judge Sparks based this comment on the fact that "even though race is an artificial social construct, it translates into different daily realities for an African Canadian and a White" *McGee*, *supra* note 153 at para 10. The judgment also talked about the relevance of skin colour to the child's healthy self-esteem and identity development, mentioning that the child's light skin had caused her to be confused about her racial identity (*ibid* at para 7).

<sup>177</sup> *Supra* note 153.

<sup>178</sup> 2013 NLTD(G) 16, [2013] NJ No 50; 2013 NLCA 48, 2013 CarswellNfld 265.

<sup>179</sup> [2007] OJ No 5015, 2007 CanLII 56508.

<sup>180</sup> 2006 NBQB 250, (2006) 304 NBR (2d) 1.

<sup>181</sup> *Supra* note 118.

<sup>182</sup> 2011 NLTD(F) 26, (2011) 309 NFLD & PEIR 334.

<sup>183</sup> *Supra* note 104.

child’s racial and cultural development. The mother also had a history of frustrating the father’s access, and was said to put her needs ahead of those of the child, which also made the father seem like the more appropriate primary caregiver. Similarly, in *R.C. v. A.A.*,<sup>184</sup> the white father figure (who was not the biological father, but raised the child from birth) received custody over the African-Canadian mother in part because he was able and willing to expose the child to his mixed racial background. Also weighing in the father’s favour were his more stable home, more evident permanent plan for the child, and stronger bond with the child.

*Langille v. Dossa*<sup>185</sup> raises the complex question of the intersection of racial and religious identities and considers what is actually required of a parent who has agreed to expose his or her child to a minority culture or religion that he or she does not share. This case involved a disagreement between a South Asian Ismaili-Muslim father and a white Christian mother regarding the religion and culture in which their child would be raised. The father had concerns that the mother was not upholding a provision in their separation agreement that required the child to be brought up Muslim in addition to being exposed to Western culture. The Court said the provision was being upheld, and that it was not reasonable to expect the mother, who was not herself Muslim, to do anything more than facilitate the father in educating the daughter about Islam. This meant that the mother did not have to fulfill Muslim religious duties herself, although the Court emphasized that the parents must communicate and discuss the process of the child’s religious upbringing together.<sup>186</sup>

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<sup>184</sup> 2012 ONCJ 192, [2012] OJ No 1532.

<sup>185</sup> (1995), 144 NSR (2d) 223, [1995] NSJ No 354.

<sup>186</sup> We cannot properly explore in this space the larger issue of religious difference between parents and how it relates, or does not relate, to race. For more on religion and child custody, see Shauna Van Praagh, “Religions, Custody and a Child’s Identity” (1999) 35 Osgoode Hall LJ 309; Aliamisse O

### Dismissing Race as a Factor: Evidence and Strategy

Race is raised in some cases, but is not a factor in the ultimate determination because no evidence about its importance is brought forward. The requirement that evidence of racial issues must be brought forward before race will be judicially considered was an outcome of the *Van de Perre* decision, which concluded that race is merely one factor among many for a judge to consider and that race is not always relevant in a mixed race custody dispute.<sup>187</sup>

Race was not ultimately a factor in the decision in *S.E.D. v. G.S.D.*,<sup>188</sup> after the judge decided there was no relevant evidence regarding race. Also, in *G.R.B. v. E.L.M.B.*,<sup>189</sup> *D.D. v. A.S.S.*,<sup>190</sup> *F.E.C. v. A.M.Q.*,<sup>191</sup> *Fairfax v. Garland*,<sup>192</sup> *N.H. v. K.H.*,<sup>193</sup> *Stevenson v. Kuhn*,<sup>194</sup> *C.C. v. A.S.*,<sup>195</sup> *V.K. v. T.S.*,<sup>196</sup> and the appeal case *C.B. v. T.M.*,<sup>197</sup> the court mentioned or alluded to the fact that the child in question was mixed race, but race and culture were not discussed,

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Mundulai, “Stretching the Boundaries in Child Access, Custody and Guardianship in Canada” (2004) 21 Can J Fam L 267 at 293.

<sup>187</sup> See generally *supra* note 1.

<sup>188</sup> 2002 BCSC 373, [2002] BCJ No 546.

<sup>189</sup> [1993] AJ No 1295.

<sup>190</sup> 2004 BCPC 56, [2004] BCJ No 534.

<sup>191</sup> 2004 BCPC 169, [2004] BCJ No 1283.

<sup>192</sup> 2009 NSSC 299, [2009] NSJ No 516.

<sup>193</sup> 2010 BCSC 1457, (2010) 92 RFL (6th) 206.

<sup>194</sup> 2010 NSSC 398, [2010] NSJ No 591.

<sup>195</sup> 2009 ABPC 370, [2009] AJ No 1364.

<sup>196</sup> 2011 ONSC 4305, [2011] OJ No 4046.

<sup>197</sup> 2013 NSCA 53, [2013] NSJ No 203.

presumably because neither party submitted evidence of race or culture being relevant to the child’s best interests.

In other cases, a parent may allege that the other party is racist, but it will not be a factor in the determination if the judge does not believe the allegations are true or material or if there is an absence of evidence of racism. Allegations of racism were deemed to be untrue in *A.C.C. v. I.C.G.*<sup>198</sup> and *Young v. Mallett*.<sup>199</sup> In *Sherwood v. Pardo*,<sup>200</sup> a Guatemalan father emphasized the importance of his children learning Spanish and engaging with that part of their heritage, and also accused the mother of racism. However, the evidence of the assessor who originally considered these issues was three years old, and circumstances had since changed, so a new report was ordered. This outcome emphasizes the importance of providing reliable evidence when racism is alleged. Also, in *Durham v. Durham*,<sup>201</sup> which was a custody dispute in which neither parent was racialized,<sup>202</sup> the father accused the mother of being racist for wanting to move their son to an area that would have more children who share their culture and religious beliefs. The Court, however, determined these cultural issues to be immaterial in the determination of the child’s best interests.

In other cases, instead of becoming a meaningful factor in the determination, a party’s emphasis on race and culture backfired on the party intending to win favour. For instance, in *Appiah v. Appiah*,<sup>203</sup> the racialized father was not awarded custody, in part because his attention to race and racism was understood by the Court as burdening the

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<sup>198</sup> [1999] BCJ No 963.

<sup>199</sup> *Supra* note 178.

<sup>200</sup> *Supra* note 110.

<sup>201</sup> 2012 ONSC 7023, [2012] OJ No 5890.

<sup>202</sup> Since this case did not involve a mixed race child, it was not counted in our set of 89 cases.

<sup>203</sup> (1996) 20 OTC 154, [1996] OJ No 4433.

children instead of enriching them. Similarly, in *Ffrench v. Ffrench*,<sup>204</sup> the Black father did not receive custody in part because he had emphasized racial issues so much that the Court thought he was doing so in order to deny the mother custody rather than out of genuine concern.<sup>205</sup> In *T.K. v. R.J.H.A.*,<sup>206</sup> a Chinese-Canadian mother's emphasis on the importance of her part-Chinese, part-white children being exposed to more Chinese culture in Toronto compared to Victoria during a relocation application also backfired. In this case, the Court said that she was bringing up cultural issues strategically rather than in consideration of the children's best interests, since she had not made cultural exposure an issue during her marriage and had seemed content until that point for her children to live in Victoria.

### **The Role of Access**

As with most custody cases, whichever parent does not receive custody almost always is awarded access in one form or another. The access parent was the father rather than the mother in somewhat more of the cases we reviewed, also reflecting general trends, and the father was racialized in slightly more cases.

When the access parent is racialized, as well as when joint custody is ordered, the court usually mentions, at least briefly, that having at least some time with the child will permit the racialized parent to sufficiently impart cultural knowledge or aid with the development of the child's racial identity.<sup>207</sup> This was the case for the

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<sup>204</sup> *Supra* note 140.

<sup>205</sup> Allegations of sexual abuse can similarly backfire if not substantiated: Boyd, *Child Custody*, *supra* note 4 at 126.

<sup>206</sup> 2013 BCSC 2112, [2013] BCJ No 2540.

<sup>207</sup> The idea of the sufficiency of access as a means to impart racial or cultural knowledge can also be seen in *Coates v Kelly*, 2006 ONCJ 198, [2006] OJ No 2259, an adoption case (not included in our original sample of 89 custody disputes over mixed race children) where a racialized biological mother's

racialized fathers in *K.R.D. v. L.A.L.*,<sup>208</sup> *Anderson v. Williams*,<sup>209</sup> *Darling v. Chung*,<sup>210</sup> *Colley v. Munro*,<sup>211</sup> *Ffrench v. Ffrench*,<sup>212</sup> *Appiah v. Appiah*,<sup>213</sup> *Sawatzky v. Campbell*,<sup>214</sup> *Rushton v. Paris*,<sup>215</sup> *M.S-O. v. R.K.*,<sup>216</sup> *Perkins v. Perkins*,<sup>217</sup> and *Young v. Mallett*.<sup>218</sup> An illustrative example of this tendency can be seen in *Anderson v. Williams*, in which the connection between a child’s biracial heritage and the ability to explore it through access with a racialized parent was acknowledged. The Court said that “[d]uring his access to her, Dr. Williams will have a full opportunity to introduce Alexandra to his customs and traditions. Ms. Anderson realizes and is sensitive to the fact that because Alexandra is part black, she and Alexandra will likely have to cope with racial prejudices that may confront them in the future. I am satisfied that Ms. Anderson will be able to cope, and that Alexandra

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consent was dispensed with so that the white paternal grandparents could adopt the child. The mother brought up the issue of the child’s biracial heritage necessitating a more substantial role for her in the child’s life, but the court said the existing access order was adequate.

<sup>208</sup> (1987) 82 NSR (2d) 6, 207 APR 6.

<sup>209</sup> *Supra* note 130.

<sup>210</sup> 1988 CarswellOnt 1381, [1988] WDFL 1587.

<sup>211</sup> (1991) 111 NSR (2d) 19, [1991] NSJ No 641.

<sup>212</sup> *Supra* note 140.

<sup>213</sup> *Supra* note 203.

<sup>214</sup> *Supra* note 142.

<sup>215</sup> *Supra* note 144.

<sup>216</sup> *Supra* note 180.

<sup>217</sup> *Supra* note 179.

<sup>218</sup> *Supra* note 178.

will have the benefit of both parents' support and guidance in dealing with black related issues."<sup>219</sup>

As in cases that do not deal with mixed race children<sup>220</sup> and illustrating general judicial reluctance to deny access to a parent, in some cases the racialized father is awarded access even when he had a notably negative personal or parenting history. In *R.C. v. S.S.*,<sup>221</sup> supervised access was given to a Black father of "low moral character"<sup>222</sup> who had a history of substance abuse and violent behaviour. In *Brusselers v. Shirt*,<sup>223</sup> in which a white mother opposed the Aboriginal father having access due to him having been abusive to her, the Court still granted the father access in order to support the child's cultural education. In *Costa v. Costa*,<sup>224</sup> the Portuguese Catholic father also received access, albeit strictly outlined and specified. Access was also awarded to the Black father in *Aziz v. Dolomont*,<sup>225</sup> even though he had not been involved in the first five years of the child's life, in order to support the child's knowledge of his African heritage.

Along similar lines, when the racialized father is not in the picture, access is sometimes awarded to his racialized extended family instead. For example, in *S.H.B. v. R.F.*,<sup>226</sup> custody of a part-Black child

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<sup>219</sup> *Supra* note 130.

<sup>220</sup> See generally Fiona Kelly, "Enforcing a Parent/Child Relationship at All Cost?: Supervised Access Orders in the Canadian Court" (2011) 49:2 Osgoode Hall LJ 277.

<sup>221</sup> *Supra* note 106.

<sup>222</sup> *Ibid* at para 76.

<sup>223</sup> (1996) 38 Alta L Rev (3d) 191, 183 AR 27.

<sup>224</sup> *Supra* note 129.

<sup>225</sup> 2006 NSSC 194, (2006) 245 NSR (2d) 24.

<sup>226</sup> (1988), 83 NSR (2d) 422, [1988] NSJ No 545.

was awarded to the white mother, but the mother was instructed to take the child to visit the Black paternal side of the family. This also happened in *White v. Matthews*,<sup>227</sup> in which access was awarded to a mixed race child’s Black paternal grandparents, in part because they would be able to “offer racial and cultural perspectives” to the child’s life that “may advance his welfare.”<sup>228</sup>

When the mother is both racialized and denied custody, access also tends to be awarded to her to facilitate cultural awareness or racial identification. This happened in the following parental custody cases: *K.J.S. v. M.T.*,<sup>229</sup> *R.N.G. v. K.Q.N.G.*,<sup>230</sup> *W.D. v. L.C.*,<sup>231</sup> *Stead v. Stead*,<sup>232</sup> *S.B. v. S.H.J.G.*,<sup>233</sup> *N.A.B. v. H.L.B.*,<sup>234</sup> *C.G. v. P.D.*,<sup>235</sup> *G.W.Z. v. S.M.Z.*,<sup>236</sup> *N.H. v. K.H.*,<sup>237</sup> *Allen v. Wu*,<sup>238</sup> *Pigott v. Nochasak*,<sup>239</sup> and *Nova Scotia (Minister of Community Services) v. B.F.*<sup>240</sup> For instance, in *R.N.G. v. K.Q.N.G.*, the Court stated the following:

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<sup>227</sup> [1997] NSJ No 604, 1997 CarswellNS 528 [cited to NSJ].

<sup>228</sup> *Ibid* at para 104.

<sup>229</sup> *Supra* note 136.

<sup>230</sup> *Supra* note 137.

<sup>231</sup> *Supra* note 104.

<sup>232</sup> *Supra* note 149.

<sup>233</sup> *Supra* note 141.

<sup>234</sup> 2006 ABQB 953, [2006] AJ No 1786.

<sup>235</sup> 2010 NSFC 23, [2010] NSJ No 530.

<sup>236</sup> *Supra* note 132.

<sup>237</sup> *Supra* note 193.

<sup>238</sup> *Supra* note 111.

<sup>239</sup> *Supra* note 182.

<sup>240</sup> *Supra* note 143.



That being said, while I am awarding sole custody of K.G. (born January 23, 1997) and D.G. (born September 26, 1998) to R.N.G. I want to put into place as best that I can a system of visitation and access which will foster their cultural heritage. I also want to admonish R.N.G. that as was stated in Paragraph 40 of the decision that I just quoted that it is important that the custodial parent recognize the child's need of cultural identity and foster its development accordingly.<sup>241</sup>

This statement demonstrates how the Court understood access time as a means for a racialized or minority parent to impart cultural knowledge and experiences to their children.

When the racialized parent does receive custody, the non-racialized parent also gets access, as was the case for the white fathers in the following cases: *C.C. v. M.M.*,<sup>242</sup> *Gordon v. Moustache*,<sup>243</sup> *J.H.F. v. A.M.F.*,<sup>244</sup> *Larocque v. Markie*,<sup>245</sup> *Maier v. Chiao-Maier*,<sup>246</sup> *Camba v. Sparks*,<sup>247</sup> *Hannebohm v. Hannebohm*,<sup>248</sup> *D.G.E.E. v. J.E.*,<sup>249</sup> *Imamura v. Remus*,<sup>250</sup> and *Takenaka v. Kaleta*.<sup>251</sup> It was also the case

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<sup>241</sup> *Supra* note 137 at para 18.

<sup>242</sup> 2013 QCCS 2327, [2013] QJ No 5408.

<sup>243</sup> *Supra* note 154.

<sup>244</sup> *Supra* note 161.

<sup>245</sup> *Supra* note 169.

<sup>246</sup> *Supra* note 168.

<sup>247</sup> *Supra* note 170.

<sup>248</sup> *Supra* note 171.

<sup>249</sup> *Supra* note 107.

<sup>250</sup> *Supra* note 157.

<sup>251</sup> *Supra* note 158.

for the white mothers in the following cases: *Dighe v. Dighe*,<sup>252</sup> *Hayre v. Hayre*,<sup>253</sup> *Flemmings v. Collet*,<sup>254</sup> *I.G.C. v. K.A.C.*,<sup>255</sup> *G.A.C. v. I.C.*,<sup>256</sup> and *Gray v. Reynolds*.<sup>257</sup> The rationale that tends to be used in these cases for awarding access to the non-racialized parent is simply that access is valuable for the child and that the access parent has something to offer. For instance, in *Larocque v. Markie*, the Court stated that the white father “has always had a major role, financially and otherwise in supporting his daughter. Due to his major role, I would order there be regular and generous access.”<sup>258</sup>

*Drummond v. Lane*<sup>259</sup> provides an interesting counterexample to the above cases, where access was initially denied to a racialized father on the basis of racial issues. In this case, a Black father was seeking access to his mixed race child, but the mother’s white family refused to allow it. There were suggestions that the mother’s family was racist. The Court acknowledged that the father could contribute positively to the child’s life, but nevertheless did not award access, and instead implored the father in an interim order to reconsider whether his presence would really benefit the child when it would cause stress in the family. Stability and peace seemed to outweigh the racialized father’s presence. However, in a decision involving the same family, further to the previous interim order by the same judge, *K.R.D. v.*

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<sup>252</sup> *Supra* note 156.

<sup>253</sup> *Supra* note 115.

<sup>254</sup> *Supra* note 172.

<sup>255</sup> *Supra* note 160.

<sup>256</sup> *Supra* note 163.

<sup>257</sup> *Supra* note 155.

<sup>258</sup> *Supra* note 169 at para 69. See also *Flemmings v Collet*, *supra* note 172 at para 45, in which it was implied it would support the child’s emotional stability to continue to have contact with her white mother and grandmother.

<sup>259</sup> (1986), 76 NSR (2d) 430, [1986] NSJ No 496.

*L.A.L.*,<sup>260</sup> the Court ultimately responded negatively to the family's racist attitude towards the Black father and awarded him access.

## **Two (Different) Minority Races**

As we have seen, many custody cases that we have discussed above involve one minority parent and one white parent. Custody disputes involving parents from two minority backgrounds seem to represent far fewer cases, or at least do not evoke judicial comment about race. When discussion occurs, race and culture do not seem to be very significant deciding factors.

For instance, in *A.H. v. T.R.*,<sup>261</sup> which involved an Israeli Jewish mother and a Catholic Egyptian father, as in other cases, "culture" (which in this case encompassed factors such as religion and language) was considered along with other factors. The majority of factors considered (including the fact that some anti-Semitic sentiments were attributed to the father) made the mother the more suitable parent for custody, while the father received access. The parents were encouraged to help the child become knowledgeable about both aspects of his background (and were also encouraged to expose the child to a secular context to "defuse the tension"<sup>262</sup>). In *Pheasant v. Idowu*,<sup>263</sup> both parties were also from minority backgrounds: the father was Nigerian and the maternal great-aunt seeking custody was Ojibwa. Like many other cases, race and culture did not figure prominently in the judgment—the child had bonded with the maternal great-aunt, and the father was unable to explain why he had not exercised access. The great-aunt maintained custody, and the father was given access in order to impart his heritage and culture. In

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<sup>260</sup> *Supra* note 208.

<sup>261</sup> (1997), [1998] RL 98.

<sup>262</sup> *Ibid* at para 26.

<sup>263</sup> 2008 ONCJ 420, [2008] OJ No 3599.

*V.K. v. T.S.*,<sup>264</sup> race and culture, though mentioned, were not addressed as factors in the best interests analysis, presumably because neither party brought them up as issues. Similarly, though in the context of culture rather than race, in *Re G.B.M.*,<sup>265</sup> custody of three part-Jewish Polish and part-Mennonite children was in dispute. This child protection case involved the Director of Child and Family Services and the children’s extended family members rather than a dispute between two parents.<sup>266</sup> The Director obtained a permanent custody order. The Court, citing *Van de Perre*’s emphasis on the overall best interests of the child, with culture and race being but one factor to be dealt with pragmatically, stated that “[t]he children have equal contributors to their DNA, as well as equal heritage or cultural contributors. It would be a gross oversimplification to say that they are half this, or half that—it is one of the responsibilities or obligations that guardians are entrusted with, and this Court is relieved at not having to make a ruling on race or culture.”<sup>267</sup> This comment acknowledges the children’s dual religious and cultural heritage, but consciously resists analyzing it in depth, relegating culture and religion to a minimal role.

### **Does the White Race Merit Equal Consideration?**

In a few cases, judges expressed a concern that part-white mixed race children need exposure to the white part of their backgrounds, as alluded to by the trial judge in *Van de Perre*.<sup>268</sup> For instance, *Dighe v. Dighe*<sup>269</sup> expressed concern that a part-East Indian, part-white child

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<sup>264</sup> *Supra* note 196.

<sup>265</sup> 2014 ABPC 248.

<sup>266</sup> For this reason, and because the children involved, though having two different religious and cultural backgrounds, were not mixed race, this case was not counted in our overall sample of 89 cases.

<sup>267</sup> *Supra* note 265 at para 34.

<sup>268</sup> *Supra* note 1 at para 36.

<sup>269</sup> *Supra* note 156.

would not have exposure to “Western culture” if raised by her East Indian father in an East Indian household. The judge was reassured by the fact that the father wished to raise the child in “the Western culture.” The judge did not go into detail regarding what “the Western culture” consists of, apart from mentioning that English would be the child’s primary language and that she would attend Bible study classes. The white mother received generous access but was denied custody primarily due to a period in which she had neglected her child. Similarly, though not dealing with a racialized child, in *Von Bezold v. Brideau*,<sup>270</sup> the judge gave custody of a child with German heritage on one side to the child’s uncle, whose family maintained involvement with German culture and language “without prejudice” to mainstream Anglo-Canadian culture. This decision showed a concern for fostering “dual heritage” (though the judgment also placed emphasis on the uncle’s family’s stability and ability to provide for the child). *Hoskins v. Boyd*<sup>271</sup> also made a point of saying that an Aboriginal child was part white before ordering that the child be returned to his white father. Finally, *J.Y. v. A.C.*<sup>272</sup> ordered joint custody on the basis that it was in the part-white, part-Chinese child’s best interests to have equal access to the cultures of both parents. *Szakacs v. Clarke*<sup>273</sup> also mentioned the added “bonus” of the child having access to both cultural heritages (Canadian and Jamaican) in a joint custody scenario. This apparent concern in some of the case law for supporting mixed race children’s access to both minority and white backgrounds echoes the melting pot theory of racial integration discussed above.<sup>274</sup> Rather than maintaining a distinct minority identity as people who present as racialized or non-white, mixed race children in these cases were encouraged to see

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<sup>270</sup> [1986] PEJ No 2.

<sup>271</sup> [1997] 6 WWR 526, 90 BCAC 111.

<sup>272</sup> 2009 BCPC 34, [2009] BCJ No 172.

<sup>273</sup> *Supra* note 151.

<sup>274</sup> See *supra* note 23 and accompanying text.

themselves as having more than one racial or cultural facet that mix together, of which the white/Western background was one.

## CONCLUSION

This article has reviewed the complex issues that are raised when parental disputes arise over the custody and access of mixed race children. We have been informed by the notion that race is socially constructed in Western societies and remains an important factor to consider, given that racialization can be related to how a child is treated and her experience in life. That is, although race may be rooted in biological markers such as skin colour, its social meaning is of concern in the legal realm, in particular the ways in which race can generate racist assumptions and behaviour, including towards children. In addition, we have noted that race intersects with other factors such as gender and class, which can also influence assumptions and decision making. As such, we tried to take a non-essentialist approach to race and to consider its complex role in judicial decision making.

We agree with Carasco that in a world where race still matters and racism persists, race is inevitably relevant to the development of children’s senses of self, their well-being, and to their futures in society, based on how others perceive them.<sup>275</sup> That said, a child’s best interests must take account of the individual facts in a given case and the intersection of multiple factors such as race and gender. As several of our cases illustrate, a parent who is racialized may be a less than suitable custodial parent due to factors that are unrelated to race, such as abuse and failure to manage anger. We tend to agree with the Supreme Court of Canada in *Van de Perre v. Edwards* that racial identity cannot trump in these circumstances, although it can, and we would say should, still be taken into account. For instance, in *Rushton v. Paris*, Judge Sparks awarded custody to the white mother, but she

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<sup>275</sup> Carasco, *supra* note 9 at 28–29.

addressed race and racism in her decision and noted that a white mother might need assistance in parenting a biracial child.<sup>276</sup>

The heart of our paper was a study of Canadian custody cases involving mixed race children, both prior to and following the Supreme Court decision in *Van de Perre v. Edwards*. Our case law study shows that the Supreme Court decision is routinely cited in the cases, but mainly for the point of appellate courts giving deference to trial judges. There was no significant finding of different outcomes before and after *Van de Perre*, and so we found little difference in judicial decision making in relation to custody disputes over mixed race children. Perhaps this finding is not surprising given the hesitant approach that the Supreme Court took to race as a factor, and its rejection of the argument that race should be given explicit consideration and considerable weight in custody cases.<sup>277</sup> Prior to *Van de Perre*, race was discussed primarily when a party brought it up. Since *Van de Perre*, race seems to still only be discussed in any detail when a party raises it. As we saw in the section “Legislative Analysis,” Canadian custody statutes do not direct consideration of race or Aboriginal heritage, although judges have general discretion to consider these factors if relevant. Moreover, the Court did not give any guidance on how to weigh race against other factors, apart from saying that race is “but one factor.”<sup>278</sup> At a formal level, then, the Supreme Court of Canada decision in *Van de Perre* prevents judges from engaging in either simplistic race-matching while ignoring other factors, or in colour-blindness when someone wants to raise the issue of race. That said, it is not clear that these problems arose often prior to *Van de Perre*.

The most significant pattern in our case law study, as discussed in the section “Weighing Race and Culture against Other Factors,” was

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<sup>276</sup> *Supra* note 144.

<sup>277</sup> *Van de Perre*, *supra* note 1.

<sup>278</sup> *Ibid* at para 38.

that race is rarely found to be the key factor and the racialized parent is not favoured in custody cases involving mixed race children. Indeed sometimes race is not even discussed in such cases. When it is considered, race is treated as one among many factors, echoing *Van de Perre*. When a racialized parent is awarded custody, there are typically several other factors in that parent’s favour. When a non-racialized parent is awarded custody, race is only one of several factors and the other factors favour the non-racialized parent or there is evidence about the racialized parent that raises concerns about their parenting. If factors are more equal between the two parents, then joint custody may be awarded as a form of “compromise.”

Another trend in some of the case law is to suggest that race or culture should only make a difference when all else is equal. This approach can be unhelpful in that it shifts the focus away from race and culture and onto other factors, thus understating the relevance of race in a child’s life. The court will spend its time scrutinizing whether all else is equal before it looks at race, and, in the process of scrutinizing, it will likely be demonstrated that all else is not equal and that one parent seems more fit than the other.<sup>279</sup> In these scenarios, race never seems sufficient to sway a decision one way or the other, and consequently looks like a factor of lesser significance.

We are not suggesting that a racialized parent is inevitably the parent who is best suited for primary care or custody of a racialized child. Instead, we suggest that it is key for any parent seeking custody to be able to demonstrate their ability to foster the healthy development of a child’s multifaceted identity. This multifaceted identity may sometimes include multiple racial and cultural backgrounds. As we mentioned earlier, some of the case law seems to be going in this direction; when courts do look at race, they frame the issue in terms of which parent will be better able to deal with issues of race that may

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<sup>279</sup> We note again that this also occurred in relation to the application of the “tender-years doctrine.” See Boyd, *Child Custody*, *supra* note 4 at 63–71.



come up, and this may or may not be the racialized parent. This idea draws on the Supreme Court of Canada decision in *Van de Perre*, which talked about which parent would “best be able to contribute to the child’s healthy racial socialization and overall healthy development.”<sup>280</sup> This kind of language was used in pre-*Van de Perre* cases, but all of the cases that used this framing of the issue and awarded custody to a white parent in part due to their ability to foster a healthy racial development were post-*Van de Perre*.<sup>281</sup> As Judge Sparks suggested in *Rushton v. Paris*, parental education about how to raise a racialized child will be useful in many such cases.

In some ways, the cases involving mixed race children are more similar to than they are different from other custody and access decisions. Certainly it was clear in several cases in which the racialized parent lost custody that she or he manifested serious inadequacies in relation to parenting. Another common trend across decisions in cases involving race and those that do not is to use access as a mechanism through which to keep a non-custodial parent’s relationship with a child vibrant. In mixed race cases, access can be a way to ensure that a racialized parent can play a role in the healthy development of a mixed race child even if she or he does not have custody. The extent to which access is used as a mechanism to deal with the racialized parent’s claims was, however, striking and might merit scrutiny in the future in order to determine whether a racialized parent’s merits as a potential custodial parent are being underplayed. Overall, then, another Supreme Court of Canada decision giving more guidance on how to weigh race against other factors relevant to a child’s best interests would be useful.

Legislatures might also consider introducing more directive language into sections outlining factors related to the best interests of the child. In the child-placement cases that came up in our study in our

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<sup>280</sup> *Supra* note 1 at para 37

<sup>281</sup> See the section “Fostering a Supportive Approach to Mixed Race Heritage” for a list of these cases.

case law analysis, when the relevant legislation being discussed referred specifically to culture as a factor in the best interests test, culture typically was discussed—at the least to say that culture is not a relevant factor in the case at hand.<sup>282</sup> This indicates that even though most of the cases we reviewed that considered cultural factors were decided under legislation that did not specifically refer to culture, when the legislation does specifically mention a factor, it can ensure that at least some judicial attention is paid to it. Given the discomfort that some judges may feel in relation to discussing race and culture and the silence that can result, it could be beneficial to be given further direction as to what is appropriate in a child-custody determination. As Amber Chew says, “it is not enough to rely on unspoken logic and subliminal prompting in the legislation to effect substantive equality.”<sup>283</sup> Like *Bunting and Law*,<sup>284</sup> we are not certain that the adoption/child protection and custody contexts are so different that the former requires specific legislative mention of culture while the latter does not. Exposure to race and culture, and education about these things, is important in both contexts. Legislation could list race (or “visible minority” status to use the more common Canadian language), indigeneity, and culture as specific factors that should be taken into account when considering a child’s best interests. If these factors are not relevant in a given case, a court can simply state as such and explain why.

We also wanted to raise the question of evidence in cases involving mixed race children, given that the cases discussed in the section “Dismissing Race as a Factor” suggested that failure to submit evidence about race or racism might be fatal to race being given weight in a determination. In the *Van de Perre* case, the Supreme Court of Canada stated that if race is to be an issue in custody determinations,

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<sup>282</sup> See e.g. *CC v AS*, *supra* note 195; *RNG v KQNG*, *supra* note 137; *MS-O v RK*, *supra* note 180.

<sup>283</sup> Chew, *supra* note 34 at 9.

<sup>284</sup> *Bunting*, *supra* note 10; *Law*, *supra* note 8.

evidence should be brought forward as to its significance. Bastarache J. stated that “I would also add that evidence of race relations in the relevant communities may be important to define the context in which the child and his parents will function. It is not always possible to address these sensitive issues by judicial notice, even though some notice of racial facts can be taken.”<sup>285</sup>

Possibly in a subtle critique of a simplistic “race-matching” approach, Bastarache J. observed in relation to the *Van de Perre* case specifically that “there was absolutely no evidence adduced which indicates that race was an important consideration” and added:

As noted by the appellant in her factum, there was essentially no evidence of racial identity by reason of skin colour or of race relations in Vancouver or North Carolina; there was no evidence of the racial awareness of the applicants or of their attitudes concerning the needs of the child with regard to racial and cultural identity. The issues of race and ethnicity were not argued at trial, nor were written submissions provided in the appeal. The sole evidence relied upon by the respondents in this Court was a blanket statement by Mrs. Edwards that the appellant could not teach Elijah what it was to be Black and the testimony of Dr. Korpach that Elijah would likely be considered to be of Black colour.<sup>286</sup>

From this perspective, we can understand Bastarache J.’s concern that evidence be adduced as to the impact of race in the particular case. That said, some authors have suggested that it should not be necessary to bring forward evidence of the significance of race or racism in cases

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<sup>285</sup> *Supra* note 1 at para 38.

<sup>286</sup> *Ibid* at para 42.

involving mixed race children.<sup>287</sup> Instead, judicial notice might be taken of the importance of race in children’s lives, especially those who are mixed race, and the continued prevalence of racism in Canadian society. Evidence as to the ability of particular parents to deal with potential racism or difficult social interactions and their child’s racial identity is likely key in some cases, but requiring parents to bring forward evidence of racism existing where they live in order for race to be considered relevant can be an onerous burden and should only be required when necessary.

Finally, as many others have argued, considerable work needs to be done to improve the diversity of the Canadian judiciary. As well, more judicial education about the role of factors such as race, gender, and class is needed, as well as the ways in which these factors can intersect in some cases, including those related to the care of children. In emphasizing the significance of race to children and to parenting, we do not wish to suggest that the gendered nature of caregiving in Canadian society should be overlooked. Nor do we suggest that joint custody or shared parenting norms should be used as an easy compromise to involve both parents in the life of a mixed race child, especially if other factors contraindicate its use. Rather, judges and others involved in child-custody determinations should be encouraged to consider carefully the facts in any given family’s history and to weigh carefully the complex factors that may often shape parenting patterns in the past and in the future.

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<sup>287</sup> See Carasco, *supra* note 9; Law, *supra* note 8; Suleman, *supra* note 85; Radbord, *supra* note 85.

**Appendix A**

Case Name	Citation
<i>Hayre v Hayre</i>	(1973) 11 RFL 188 (aff'd (1975) 21 RFL 191) (BCSC)
<i>Adams v McLeod</i>	[1978] 2 SCR 621 (AB)
<i>Dighe v Dighe</i>	[1978] SJ No 330 (Sask QB)
<i>Racine v Woods</i>	[1983] 2 SCR 173 (MB)
<i>JHF v AMF</i>	[1984] NSJ No 91 (NS Fam Ct)
<i>Drummond v Lane</i>	(1986) 76 NSR (2d) 430 (NS Fam Ct)
<i>Von Bezold v Brideau</i>	[1986] PEI J No 3 (PEI SC)
<i>KRD v LAL</i>	(1987) 82 NSR (2d) 6 (NS Fam Ct)
<i>Anderson v Williams</i>	[1988] BC J No 1428 (BCSC)
<i>Darling v Chung</i>	[1988] OJ No 1334 (ONSC)
<i>SHB v RF</i>	(1988) 83 NSR (2d) 422 (NS Fam Ct)
<i>JD c NW</i>	[1989] RDF 625 (QCSC)
<i>Gordon v Mustache</i>	[1990] BCJ No 2556 (BCSC)
<i>Larocque v Markie</i>	(1990) 96 NSR (2d) 241 (NS Fam Ct)
<i>Maier v Chiao-Maier</i>	[1990] SJ No 531 (Sask QB)
<i>Colley v Munro</i>	(1991) 111 NSR (2d) 19 (NS Fam Ct)
<i>GG c J-LF</i>	[1992] RDF 150 (QCCA)
<i>Camba v Sparks</i>	(1993) 124 NSR (2d) 321 (NS Fam Ct)
<i>GRB v ELMB</i>	[1993] AJ No 1295 (AB QB)

<i>Stutt v Stutt</i>	[1993] OJ No 2149 (ONPC)
<i>Ffrench v Ffrench</i>	(1994) 118 DLR (4th) 571 (NSSC)
<i>Phelps v Andersen</i>	[1994] OJ No 2382 (ONPC)
<i>Hannebohm v Hannebohm</i>	(1995) 149 NSR (2d) 125 (NS Fam Ct)
<i>Langille v Dossa</i>	(1995) 144 NSR (2d) 223 (NSSC)
<i>WIW v MAW</i>	(1995) FK No 92K-0277 (NS Fam Ct)
<i>Appiah v Appiah</i>	(1996) 20 OTC 154 (ONPC)
<i>Brusselsers v Shirt</i>	(1996) 183 AR 27 (ABQB)
<i>AH v TR</i>	[1998] RL 98 (QCSC)
<i>Flemmings v Collet</i>	[1997] OJ No 1382 (ONPC)
<i>H (D) v M (H)</i>	[1997] BCJ No 2144, rev'd (1998) 156 DLR (4th) 548, rev'd [1999] 1 SCR 328
<i>Hoskins v Boyd</i>	(1997) 90 BCAC 111
<i>White v Matthews</i>	[1997] NSJ No 604 (NS Fam Ct)
<i>IGC v KAC</i>	(1998) 71 OTC 1 (ONPC)
<i>SH v AM</i>	(1998) FK 93-018 (NS Fam Ct)
<i>ACC v ICG</i>	[1999] BCJ No 963 (BCPC)
<i>DTL v Listuguj (Police Service)</i>	[2000] RDF 35 (QCSC)
<i>Kassel v Louie</i>	2000 BCSC 1417
<i>KV v TE</i>	2001 SCC 60
<i>KJS v MT</i>	2001 NSFC 8
<i>RNG v KQNG</i>	2001 NBQB 240

<i>Sawatzky v Campbell</i>	2001 SKQB 250
<i>Costa v Costa</i>	(2002) 116 ACWS (3d) 71 (ONSC)
<i>Ho v Gallinger</i>	[2002] OJ No 5427 (ONSC)
<i>Rushton v Paris</i>	2002 NSFC 10
<i>SED v GSD</i>	2002 BCSC 373
<i>DGEE v JE</i>	2003 BCPC 348
<i>RC v SS</i>	2003 BCPC 209
<i>SB v SHJG (aka Brooke v Grandin)</i>	2003 BCSC 344
<i>ARD v GBGD</i>	2004 BCSC 1080
<i>DD v ASS</i>	2004 BCPC 56
<i>DM v AGL</i>	2004 ABQB 69
<i>FEC v AMQ</i>	2004 BCPC 169
<i>GAC v IC</i>	2004 BCPC 444
<i>Imamura v Remus</i>	[2004] OTC 1192 (ONSC)
<i>WD v LC</i>	2004 SKQB 10
<i>Kucheraway v Gill</i>	2005 ONCJ 49
<i>Stead v Stead</i>	[2005] OTC 1043 (ONSC)
<i>Aziz v Dolomont</i>	2006 NSSC 194
<i>MS-O v RK</i>	2006 NBQB 250
<i>NAB v HLB</i>	2006 ABQB 953
<i>Takenaka v Kaleta</i>	[2006] OTC 187 (ONSC)
<i>Merriam v McGee</i>	2007 NSFC 7

<i>Perkins v Perkins</i>	(2007) 162 ACWS (3d) 983 (ONSC)
<i>Pheasant v Idowu</i>	2008 ONCJ 420
<i>CC v AS</i>	2009 ABPC 370
<i>Fairfax v Garland</i>	2009 NSSC 299
<i>JY v AC</i>	2009 BCPC 34
<i>CG v PD</i>	2010 NSFC 23
<i>Gray v Reynolds</i>	2010 NSFC 14
<i>GWZ v SMZ</i>	2010 BCSC 92
<i>NH v KH</i>	2010 BCSC 1457
<i>Shortridge-Tsuchiya v Tsuchiya</i>	2010 BCCA 61
<i>Stevenson v Kuhn</i>	2010 NSSC 398
<i>Allen v Wu</i>	2011 ONSC 6813
<i>Pigott v Nochasak</i>	2011 NLTD(F) 26
<i>PMS v GT</i>	2011 ABCA 103
<i>Sherwood v Pardo</i>	2011 BCSC 1405
<i>VK v TS</i>	2011 ONSC 4305
<i>WMW v JW</i>	2011 BCPC 360
<i>Yu v Jordan</i>	2012 BCCA 367
<i>RC v AA</i>	2012 ONCJ 192
<i>CB v TM</i>	2013 NSCA 53
<i>Young v Mallet</i>	2013 NLTD(G) 16; rev'd 2013 NLCA 48



<i>Thompson v Murphy</i>	2013 ONSC 3197
<i>CC v MM</i>	2013 QCCS 2327
<i>TK v RJHA</i>	2013 BCSC 2112
<i>Nova Scotia (Minister of Community Services) v BF</i>	2014 NSSC 94
<i>Szakacs v Clarke</i>	2014 ONSC 7487