

# WRAPPING OUR WAYS AROUND THEM

ABORIGINAL COMMUNITIES AND THE CFCSA GUIDEBOOK



# Wrapping Our Ways **AROUND THEM**

Aboriginal Communities and the Child, Family and  
Community Service Act (CFCSA) Guidebook

**WRAPPING OUR WAYS AROUND THEM:  
Aboriginal Communities and the Child, Family  
and Community Service Act (CFCSA) Guidebook**

Book ISBN: 978-0-9940652-0-9

Electronic Book ISBN: 978-0-9940652-1-6

Author: Ardith Walkem

Publisher: ShchEma-mee.tkt Project (Nlaka'pamux Nation Tribal Council)

ShchEma  mee.tkt

*To order copies of this Guidebook  
contact Romona Baxter, [romona@nzenman.org](mailto:romona@nzenman.org)*

# Acknowledgements

## **Editorial Board:**

Don Bain  
Cunliffe Barnett  
Romona Baxter  
Ray Harris  
Louise Mandell, Q.C.  
Crystal Reeves

ShchEma-mee.tkt Board and NkshAytkn Community Team Members who supported and contributed to the development of this Guidebook:

Debbie Abbott, Ralph Abbott, Jim Brown, Amy Charlie, Ruby Dunstan, Matt Frost, John Haugen, Kevin Loring, Susan Machel, Doug McIntyre, Sherry McIntyre, Patricia Munro, Grand Chief Robert Pasco, Naomi Peters, Shirley Raphael, Vernon Raphael, Janet Webster.

## **Author:**

Ardith Walkem

Thank you to these people who spoke at our pilot workshops, and contributed to the development of this Guidebook:

Romona Baxter, Hugh Braker, Halie Bruce, Honourable Marion Buller, Robyn Gervais, Grand Chief Ed John, Louise Mandell, Grand Chief Stewart Phillip, Pamela Shields, Linda Thomas, Marie Tonasket, and George William.

## **Research and Writing Assistance:**

Halie Bruce

Thank you to these people who reviewed and commented on drafts:

Pamela Shields, Linda Thomas, Sarah Rauch, and participants at two province-wide workshops held in Vancouver and Harrison Hot Springs.

Text design by: Alice Joe (alicejoe.com)

## **Photo Credits:**

Child running - Nadya Kwandibens, Red Works Studio; Child in basket - Nadya Kwandibens, Red Works Studio; Nlaka'pamux Basket - Royal BC Museum; Feet - Blend Images

Thank you to:

Andrea Halpin (legal support);  
Suzy Lyster and Elizabeth Bulbrook  
(additional case research)

The ShchEma-mee.tkt Project acknowledges the generous support of the Law Foundation of BC.



We also wish to acknowledge the support of:



Union of BC Indian Chiefs, Legal Services Society of BC and Cedar and Sage Law Corporation.



## SHCHEMA-MEE.TKT ("OUR CHILDREN") PROJECT— OUR LIFE IS A CIRCLE

Our logo was designed by Nlaka'pamux youth and elders and shows our collective responsibility to gather around and protect children. A pictograph of the same design was described by Nlaka'pamux elder Annie York as representing our cosmos:

*"The circle...tells the earth and the four directions. The little circle at the top, right is the North. Opposite is South. Lower right is West, upper left is East. East is the sunrise, West is the sunset, North is midday, and South is the middle of the night. You must pray at those four times and to the directions. The big circle is the earth that travels all the time without end. The living earth never has an end. Nothing that travels and has the circle has an end. ...The circle tells them, "Look, you're living on this earth, but the whole earth is round and it has no end." The directions were given to them to tell them where they divide the people out. It tells them there's other peoples, not just you on this earth."*

Annie York, et al, *They Write their Dreams on the Rock Forever*  
(Vancouver: Talon Books, 1993) at 124-125 and fig. 86.

# Index

- 01. INVITATION TO A TRANSFORMATIVE APPROACH 3**
  - I. Aboriginal Jurisdiction and the Ground we are standing on (CFCSA Process) 3**
  - II. How is this Guidebook Useful? 3**
    - A. Aboriginal Communities and Children 4
    - B. Courts 5
    - C. MCFD/Delegated Aboriginal Agencies 6
    - D. Aboriginal Parents/Parents' Counsel 7
  - III. Recognizing Continued Impacts of a Colonial History 8**
- 02. CFCSA AND THE LEGAL LANDSCAPE 13**
  - I. Aboriginal jurisdiction 13**
    - Aboriginal Self-Government in Child Welfare 14
  - II. Federal and Provincial Jurisdictions 16**
    - Case Study: Jordan's Principle 17
  - III. Treaties or Other Inter-Governmental Agreements 18**
    - Spallumcheen (Splatsin) "A By-law for the Care of Our Indian Children" 19
  - IV. International Instruments and the CFCSA 20**
    - United Nations Declaration on the Rights of Indigenous Peoples 21
  - V. United Nations Convention on the Rights of the Child 22**
    - Human Rights of Aboriginal Peoples in Child Welfare Matters 23
- 03. BEST INTERESTS OF ABORIGINAL CHILDREN AND IDENTIFYING BIASES 29**
  - I. Defining the Best Interests of Aboriginal Children 29**
    - A. Racine v. Woods 30
    - B. CFCSA: BC Adopts a Different Approach 31
  - II. Identifying Biases and False Assumptions 32**
    - A. Questioning a Child's Aboriginal Identity 33
    - B. Mistakenly Applying a Blood Quantum Analysis 34
    - C. Analyzing Aboriginal Identity as Inauthentic or Frozen 35
    - D. Poverty 38
    - E. Disabling Aboriginal Care 39
    - F. Past Challenges (including CFCSA Involvement) Used to Invalidate Care 40
    - G. Assuming a Conflict Between the Interests of Aboriginal Children and Communities 42
    - H. Dismissing the Involvement of Aboriginal Communities is "Political" 44
    - I. Aboriginal Distrust of the Child Welfare Process 45

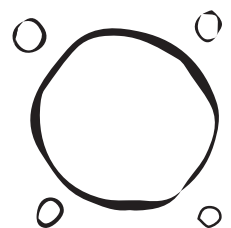
III.	Biases that Aboriginal Communities must Address to Protect Children	46
IV.	Positive Considerations of the role of Aboriginal Communities and Identity	48
<b>04.</b>	<b>PROTECTING A CHILD’S ABORIGINAL IDENTITY, CULTURE AND HERITAGE</b>	<b>57</b>
I.	Provisions of the CFCSA Maintaining a Child’s Aboriginal Heritage and Identity	58
A.	A Remedial Approach to Interpreting the CFCSA Provisions Aboriginal Identity and Heritage	59
B.	Case Study: Indian Child Welfare Act and Tribal Jurisdiction in the United States	60
C.	ICWA and Canadian Aboriginal Children	61
II.	What is an Aboriginal Community?	62
III.	Who is an “Aboriginal Child”?	63
A.	Parent or Child Registered, or Entitled to be Registered, Under the Indian Act	64
B.	Nisga’a and Treaty First Nation Children	65
C.	Self-identified Aboriginal Children and Families	65
IV.	Delegated Agencies	67
<b>05.</b>	<b>STEPS WITHIN THE CFCSA PROCESS</b>	<b>71</b>
I.	Voluntary Agreements	71
A.	Support Services Agreements	72
B.	Voluntary Care Agreements	72
C.	Special Needs Agreements	72
D.	Extended Family Program (Formerly Kith and Kin Agreements)	73
E.	Agreements with Youth or Young Adults	73
II.	Report, Assessment and Investigation	75
III.	Notice and Aboriginal Community Involvement	76
IV.	Importance of Early Involvement by Aboriginal Communities	77
A.	Non-Appearance by Aboriginal Communities	79
B.	Aboriginal Communities as Self-Represented Litigants	81
C.	Confidentiality and Disclosure	82
V.	Presentation Hearing	85
VI.	Plan of Care	88
VII.	Proposing an Aboriginal Cultural Preservation Plan	89
VIII.	Protection Hearing	91
A.	Determining Whether a Child is in Need of Protection	92
B.	Case Study: Choosing Traditional Medicine for a Child’s Care	93
C.	Judicial Notice of the Long Term Impacts on Aboriginal Child Raised in Care	95
IX.	Exploring Permanency Alternatives	97
	Ensuring Both Attachments and Cultural Continuity	100

- X. **After a CCO has been Granted** 102
    - A. Access 102
    - B. Custom Adoption, Adoption or Alternatives to Permanency 104
    - C. Cancelling a CCO 106
  - XI. **Appeal** 106
  - XII. **Representative of Children and Youth** 107
- 06. TRADITIONAL AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS WITHIN THE CFCSA** 113
- I. **Cooperative Planning and Alternative Dispute Resolution** 113
    - A. Case Conferences 114
    - B. Family Group Conference 114
    - C. Mediation 115
  - II. **Aboriginal Traditional Decision-Making Process** 117
    - A. Case Study: ShchEma-mee.tkt (Our Children) Project 118
    - B. Case Study: Opikinawasowin 119
  - III. **New or Parallel Judicial Institutions** 122
    - A. Restorative Justice or a Therapeutic Aboriginal CFCSA Court 123
    - B. Section 104 Tribunal 123
    - C. Invitation to Start the Journey Toward a Transformative Approach 124
- 07. BEST PRACTICES RECOMMENDATIONS** 129
- 08. FORMS AND MAKING APPLICATIONS** 153
- I. **Introduction** 153
  - II. **In Person Applications (Without Filing a Form)** 154
  - III. **Forms** 155
    - A. Steps in Applying For an Order 156
    - B. User Generated Forms for Aboriginal Communities 156
      - i. *Application for An Order* 158
      - ii. *Affidavit* 162
      - iii. *Certificate of Service* 165
      - iv. *Aboriginal Child Aboriginal Community Plan of Care* 167
- 09. SOURCES** 173
- I. **CASES** 173
  - II. **LEGISLATION** 176
  - III. **BOOKS AND ARTICLES** 177





# 01. Invitation to a Transformative Approach





# 01. Invitation to a Transformative Approach

## I. Aboriginal Jurisdiction and the Ground We Are Standing On (CFCSA Process)

This Guidebook is based on the belief that Aboriginal peoples need to know, and work with, the systems that impact children and families today such as the *Child, Family and Community Service Act* (CFCSA)<sup>1</sup>, Provincial Court (Child, Family and Community Service Act) Rules (Rules)<sup>2</sup>, *Child, Family and Community Service Regulation*<sup>3</sup> (CFCSA Regulation), Ministry of Children and Family Development (MCFD) and delegated Aboriginal agencies.

*Restoring aboriginal ways is essential for the health and well-being of children*

Exercising exclusive jurisdiction over child welfare remains the goal for Aboriginal peoples: Restoring Aboriginal ways of doing things, especially in caring for children, is essential for the health and well-being of children and families. Successive generations of Aboriginal children continue to be taken into the child welfare system. Without intervention, experience has shown that the outcome for these children will be bleak and reverberate outward, influencing the future of entire families, communities and nations. This Guidebook suggests immediate steps that can be taken on the ground we are standing on—within the CFCSA and systems that impact Aboriginal children and families today—to improve outcomes for Aboriginal children while building toward a better future.

## II. How is this Guidebook Useful?

This Guidebook identifies tools available in the CFCSA to improve outcomes for Aboriginal children through actively involving Aboriginal communities in child welfare matters. Similar to a “bench book” in the United States, the Guidebook provides direction to Aboriginal communities, judges and lawyers about how Aboriginal communities can become involved in CFCSA matters. Involvement of Aboriginal communities can address the rising number of Aboriginal children in care and prevent the loss of identity and disconnection experienced by past generations of Aboriginal children.



Involvement of Aboriginal communities could wrap laws and culture around children and end the isolation parents and children experience within the child welfare process. This Guidebook suggests—in a practical way—how Aboriginal communities could be involved in child welfare matters as contemplated by the CFCSA and sets out strategies to actively seek and facilitate that involvement. This Guidebook proposes methods for resolving child protection concerns starting from the premise that the early involvement of a child’s Aboriginal community can animate the provisions of the CFCSA directed at maintaining a child’s Aboriginal identity and heritage.



**BEST PRACTICE 1.01**

*A transformative and remedial approach to involving Aboriginal communities in child welfare matters is required*

*1. A transformative and remedial approach involving Aboriginal communities in child welfare matters under the CFCSA is required which:*

- *Reflects a belief that Aboriginal laws and community approaches to achieving safety and permanency can shift the legal ground and improve outcomes for Aboriginal children;*
- *Places obligations on members of the extended Aboriginal community to take positive actions in a process that mirrors the requirements within many Aboriginal legal systems and so have a higher likelihood of success; and*
- *Invites the Court, child welfare agencies, parents and Aboriginal communities to work together to ensure that the interests of children are protected and placed at the centre of decision-making, by recognizing an active voice for Aboriginal communities and creating space for Aboriginal ways of making decisions.*

### ***Aboriginal Communities and Children***

The CFCSA allows for the active involvement of Aboriginal communities in planning for their child members.<sup>4</sup> Despite this, participation by Aboriginal communities as legal parties remains rare. The CFCSA requires that a child’s Aboriginal culture and identity be preserved and creates legal party status for Aboriginal communities who choose to become involved in CFCSA matters. Interventions by Aboriginal communities could breathe life into the CFCSA provisions meant to preserve a child’s Aboriginal identity and cultural connections by requiring that they be implemented and offering clear and effective steps for how that could be done.

The child welfare system impacts entire Nations and communities—and yet individual children, parents and families often face the system alone. This disconnect prevents culturally based solutions. Interventions designed to heal families, or, where this is not possible, to protect children and keep them connected to their Aboriginal culture, could help to mitigate the negative impacts of involvement within the child welfare system. Acting in CFCSA matters today is a strong investment in the collective future for Aboriginal communities.

This Guidebook proceeds on the basis that the rights of Aboriginal children should be understood in the context of their broader social and cultural connections. Different members of Aboriginal communities have skills that can help to transform child protection situations, and often transformations cannot occur without their help. Child protection resolutions dictated solely to the parents—without a broader distribution of responsibility within an Aboriginal community, or extended family—are not likely to be successful. Solutions based on accountability and compassion, under Aboriginal laws and traditions, place obligations on members of the broader Aboriginal community to assist and take positive actions to help.

*Aboriginal community involvement can mitigate negative impacts of involvement in the child welfare system*



**BEST PRACTICE 1.02**

*Early and active interventions in CFCSA matters by Aboriginal communities is required*

- 1. Early and active interventions by Aboriginal communities when child members first become involved in the child welfare system is required and could make a real difference in the future of Aboriginal children and communities.*
- 2. A distributed sense of responsibility which recognizes that people live in community, and that our actions—or inactions—impact others now and into the future, means that Aboriginal communities have a strong interest in acting now to protect their child members.*

## **Courts**

Courts have struggled with how to understand the role and responsibility of Aboriginal communities in proceedings involving their child members. The current child welfare focus on parents and nuclear families—from an Aboriginal perspective—leaves parents and children standing alone.



This Guidebook:

- Provides methods and insights that allow the Court to engage Aboriginal communities and receive the benefit of Aboriginal wisdom, strengths and solutions in making decisions that affect Aboriginal children;
- Discusses biases and prejudices of the colonial past, which find expression, often unconsciously, in the political and legal culture, that can operate when decisions are made about Aboriginal children;
- Identifies systemic barriers to the participation of Aboriginal communities in child welfare proceedings, and ways to minimize those barriers; and
- Outlines how active efforts to involve Aboriginal communities could drastically change outcomes for Aboriginal children.



**BEST PRACTICE 1.03**

*A remedial and purposive approach to interpreting the CFCSA to protect a child's Aboriginal identity and heritage and involving Aboriginal communities is necessary*

- 1. Highlighting the remedial purposes of the CFCSA provisions that involve Aboriginal communities could breathe life into these provisions so that they are brought to bear in a real and meaningful way in judicial decisions about the lives of Aboriginal children.*
- 2. Effective legal problem solving requires acknowledging and confronting biases and false assumptions about Aboriginal cultures or parenting which result in Aboriginal children being disproportionately removed from their families and communities.*

### ***MCFD/Delegated Aboriginal Agencies***

This Guidebook suggests ways the director can ensure that the best interests of children are met through the active engagement of Aboriginal communities. In too many instances, the involvement of Aboriginal communities and protection of a child's Aboriginal identity and heritage, as required in the CFCSA, exist only as "paper rights" or requirements, but not in practice.



**BEST PRACTICE 1.04**

*The director should make active interventions to involve Aboriginal communities*

- 1. The director should make active interventions to implement CFCSA provisions involving Aboriginal communities based on the understanding that a child's Aboriginal community is in the best position to preserve a child's Aboriginal cultural identity and heritage, and that this involvement can lead to better and lasting resolutions for Aboriginal children.*

*Aboriginal communities can identify permanency solutions that keep children connected to their Aboriginal culture*

### **Aboriginal Parents/Parents' Counsel**

Efforts to resolve child protection concerns working solely with the parents or immediate family are not likely to be successful, especially where Aboriginal parents cannot safely parent their child(ren) on their own, or come from families who have also been unable to keep the children safe. Aboriginal community involvement could distribute responsibility away from individual parents to the extended family and community and stand up teachings of forgiveness, compassion, love, wholeness and balance by identifying what it means to keep children safe within the Aboriginal cultures.

**BEST PRACTICE 1.05**

*Parents' counsel can actively seek the involvement of a child's Aboriginal community*

- 1. Parents' counsel can actively seek the involvement of a child's Aboriginal community in CFCSA matters. Aboriginal communities may be able to provide supports to help parents heal. If parents cannot restore their ability to safely parent, a child's Aboriginal community can identify permanency options that can keep parents involved in their child's life and ensure that the children maintain or develop connections to their Aboriginal culture and identity.*



### III. Recognizing Continued Impacts of a Colonial History

The child welfare system reflects Canada's history of colonization. Canadian laws and policies subjected Aboriginal peoples to "debilitating policies" which systematically weakened Aboriginal peoples' legal, social and cultural traditions for the care of children and families:<sup>5</sup>

*The child welfare system reflects the disruption of Aboriginal peoples' social, political and legal institutions, and intergenerational harms of a colonial past*

- Generations of Canadian laws and policies denied Aboriginal title and forcibly removed Aboriginal peoples from their territorial homelands and undermined Aboriginal laws and governance systems: "[The] legal system has played an active role in the destruction, denial or limitation of First Nations cultural practices."<sup>6</sup>
- The Indian Act denied status recognition to Aboriginal women who married non-Indian men. These women (and their children) could no longer live within, or actively participate in, their Aboriginal communities. Denied recognition under Canadian law as "status Indians" generations of children were born without the legal right to live in their home communities, subject to both cultural and geographic dislocation.<sup>7</sup> This dislocation continues in many families involved in child welfare processes.
- The Residential School system forcibly removed Aboriginal children from their families, cultures and communities and prevented generations of Aboriginal people from parenting their children, while often subjecting those children to horrific levels of abuse.<sup>8</sup> Residential Schools "separated successive generations of Aboriginal children from their families and communities" damaging "feelings of self-worth, family connectedness, the intergenerational transfer of skills and traditions, and the essential core of trust in and respect for others."<sup>9</sup> Many child protection concerns are rooted in the intergenerational impacts of trauma from Residential Schools. Aboriginal children came through these systems disconnected from their Aboriginal communities and families.
- The child welfare system continues the large-scale removal of Aboriginal children from their families. More Aboriginal children live away from their families and communities today as a result of the child welfare system than lived away from their families in Residential Schools.<sup>10</sup> Numbers of Aboriginal children in BC's child welfare system have continued to grow since the closure of Residential Schools. Over 52% of all children in care in BC as of 2011 were Aboriginal.<sup>11</sup> A class action suit is currently underway in Ontario seeking to hold Canada accountable for the large numbers of Aboriginal children taken up in the "Sixties Scoop".<sup>12</sup>

Aboriginal children and families involved in the child welfare system today reflect the disruption of Aboriginal peoples' social, political and legal institutions, and carry the intergenerational harms and violence of a colonial past.

Not surprisingly, the legacy of this history is that Aboriginal people continue to be disproportionately enmeshed with Canadian law and legal systems, reflected in the high numbers of Aboriginal peoples involved in criminal law, youth justice, and child protection systems. To many Aboriginal people, the legal process continues this history of interference, domination, and control, and its operation is far removed from any concept of justice or fairness.<sup>13</sup>

*Outcomes for  
Aboriginal children  
within the child welfare  
system are bleak*

There is a significant over-representation of Aboriginal children at all stages of BC's child welfare system and outcomes for these children are bleak. Placing increasing numbers of Aboriginal children in care has only amplified the problem over generations, not solved it; more Aboriginal children are at risk now as a result of interventions through the child welfare system rather than less. Aboriginal children are: 4.4 times more likely to have a protection concern reported than a non Aboriginal child; 5.8 times more likely to be investigated; 7.7 times more likely to be found in need of protection; 7.1 times more likely to be admitted into care; and, 12.5 times more likely to remain in care.<sup>14</sup>

  
**BEST PRACTICE 1.06**

*Creating a better future for Aboriginal children requires acknowledging and addressing the impacts of colonization and historic trauma that Aboriginal peoples have been subject to*

- 1. Creating a better future for Aboriginal children requires acknowledging and addressing the colonization and historic trauma that Aboriginal peoples have been subject to, and which continues in decisions made under the CFCSA today. Colonial endeavors, such as denial of Aboriginal title and laws; legislation and policies meant to attack and diminish the role of Aboriginal women; Residential Schools; and the child welfare system, continue to be reflected in the overrepresentation of Aboriginal children within the child welfare system.*

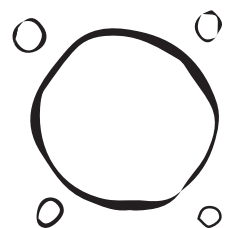


## Endnotes

---

1. [RSBC 1996] Ch. 46.
2. B.C. Reg. 533/95.
3. B.C. Reg. 527/95.
4. For example: s. 2; s. 33.1(4)(c); s. 34; s. 36(2.1); s. 38(1)(c), (c.1), (c.2), (d); s. 39; s. 49(2)(c), (c.1), (c.2), (d); s. 54.01(3)(c), (d), (e), (f); s. 54.1(2)(c), (d), (d.1), (e); s. 60(1)(e); s. 71 (3)(a); s. 90; s. 93(g)(iii); s. 103(2)(f), (g).
5. The Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples. Vol. 1: Looking Forward, Looking Back.* (Ottawa: Royal Commission on Aboriginal Peoples, 1996) [RCAP, Vol. 1] at 333-339 and Volume 3: *Gathering Strength* (1996): 23-29, 34-36 [RCAP, Vol. 3].
6. St. Lewis, Joanne. "Virtual Justice: Systemic Racism and the Canadian Legal Profession" in *Racial Equality in the Canadian Legal Profession* (Ottawa: Canadian Bar Association, 1999) [St. Lewis] at 69; See also: Sarich, Anthony (Commissioner), *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria Ministry of Attorney General, 1993) [Sarich].
7. *Indian Act, R.S.C., 1985, c. I-5* (and earlier versions). See, for example: *Corbierre v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, *Mclvor v. The Registrar, Indian and Northern Affairs Canada* 2007 BCSC 827 (the trial judge extensively reviewed the discriminatory provisions, the BCCA considered this case in *Mclvor v. Canada (Registrar of Indian and Northern Affairs)* 2009 BCCA 153), and *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) (1981).
8. For a general overview of the Residential School system and its impacts see RCAP, Vol. 1, at 376-379, which recognized the connection "between the schools' corrosive effect on culture and the dysfunction in their communities... Abuse had spilled back into communities, so that even after the schools were closed their effects echoed in the lives of subsequent generations of children..."
9. Dussault, Justice Rene, "Indigenous Peoples and Child Welfare: The Path to Reconciliation" *First Peoples Child & Family Review*, Vol. 3:3 (2007) 8 at 9 [Dussault]. Ted Hughes in "BC Children and Youth Review - Keeping Aboriginal Children Safe and Well" (Victoria: April 2006) [Hughes] at 49-50 observed of the "inter-generational" impact of residential schools "I have no hesitation in laying a significant portion of responsibility for today's unacceptable level of involvement of Aboriginal families in our child welfare system on the doorstep of that ill-conceived program of years ago."
10. It is estimated that three times as many children have been taken into the child welfare system than ever were taken into the Indian Residential Schools: See for example, Blackstock, C., "First Nations child and family services: restoring peace and harmony in First Nations communities" in K. Kufedlt & B. McKenzie (Eds.), *Child Welfare: Connecting Research Policy and Practice*, at 331-342. (Waterloo, Ontario: Wilfred Laurier University Press: 2003).
11. Special Report by the Council of Child and Youth Advocates "Aboriginal Children and Youth in Canada: Canada must do better" submitted to UN Committee on the Rights of the Child 2011, at 7.
12. In *Brown v. Attorney General of Canada*, 2014 ONSC 6967 (CanLII) [Brown], a panel of the Ontario Superior Court of Justice rejected an application by Canada to dismiss a class action suit commenced on behalf of people who were taken up in the "Sixties Scoop" where unprecedented numbers of Aboriginal children were removed from their homes. The suit alleges that "many of these children lost their identity as Aboriginal persons, and their connection to their Aboriginal culture, that ultimately led to them suffering emotional, psychological and spiritual harm. More specifically, it is alleged that these children were deprived of their culture, customs, traditions, language and spirituality. This led them to experience loss of self-esteem, identity crisis and trauma in trying to reclaim their lost culture and traditions." (at para. 2)
13. Walkem, Ardith. *Building Bridges: Improving Legal Services for Aboriginal Peoples* (Vancouver: Legal Services Society, 2007) [Walkem, LSS] at 1-2.
14. Ministry of Children and Family Development, *Aboriginal Children in Care, October 2009 Report, Prepared by Research, Analysis and Evaluation Branch*, at 10. Available online: <http://www.fndirectorsforum.ca/downloads/Aboriginal-children-in-care-10-09.pdf>. References omitted.

## 02. CFCSA and the Legal Landscape





## 02. CFCSA and the Legal Landscape

The CFCSA occupies conflicted territory, with roots in deeply contested jurisdictional battles, arising from Crown governments' historical denial of Aboriginal title, laws and legal orders, and also subject to ongoing division of powers disputes between Crown governments.

### I. Aboriginal Jurisdiction

There is a sphere of inherent Aboriginal jurisdiction, collectively vested, empowering Aboriginal peoples to care for and protect their children in accordance with their own legal orders. Aboriginal peoples' laws and legal orders pre-dated and survived the assertion of Crown sovereignty and received constitutional protection through s. 35 of the *Constitution Act, 1982: Mitchell v. M.N.R.*,<sup>1</sup> *R. v. Van der Peet*,<sup>2</sup> and *Delgamuukw v. B.C.*<sup>3</sup> Crown governments, for the most part, have ignored or denied this jurisdiction since Confederation. Nonetheless, Aboriginal laws remain an essential part of Canada's constitutional framework.

Canadian courts have recognized the legitimacy of customary laws, and encouraged solutions based on Aboriginal laws for children and families in the past. Recognition of Aboriginal laws as "customary law" in Canadian common law is well established where the matters are primarily internal to Aboriginal communities.<sup>4</sup> In *Connolly v. Woolrich*,<sup>5</sup> the Superior Court of Quebec recognized a marriage under Cree law, noting that the arrival of newcomers did not displace Aboriginal laws, instead "the Indian political and territorial right, laws and usages remained in full force ..." In *Campbell v. British Columbia (A.G.)* the B.C. Supreme Court recognized "the legitimacy of an evolving customary or traditional law,"<sup>6</sup> and that "since 1867 courts in Canada have enforced laws made by Aboriginal societies" and that "such rules, whether they result from custom, tradition, agreement, or some other decision making process, are "laws"".<sup>7</sup> Laws for the protection of children fit within this category.

*Inherent Aboriginal jurisdiction empowers Aboriginal peoples to care for and protect their children in accordance with their own legal orders*



In *Casimel v. I.C.B.C.*—the BC Court of Appeal recognized the legality of an Aboriginal custom adoption:

When the rights in issue are rights in relation to the social organization of the Aboriginal people in question, such as rights arising from marriage, rights of inheritance, and I would add, rights arising from adoption ...:

No declaration by this court is required to permit internal self-regulation in accordance with Aboriginal traditions, if the people affected are in agreement.

But if any conflict between the exercise of such Aboriginal traditions and any law of the Province or Canada should arise the question can be litigated.<sup>8</sup>

*The right of self-government protected under s. 35 includes the inherent right to care for and protect children according to Aboriginal cultures, laws and traditions*

The rationale for many customary adoptions falls within what is now considered child welfare law, including situations where a young parent is unprepared or unable to care for a child; the illness or death of a parent; or, financial hardship.

### *Aboriginal Self-Government in Child Welfare*

The right of self-government has been found to be a right protected under s. 35 of the *Constitution Act, 1982*.<sup>9</sup> Aboriginal peoples assert the inherent right to care for and protect their children according to their cultures, laws and traditions, which is constitutionally protected.<sup>10</sup>

Some Aboriginal peoples seek to apply Aboriginal laws today to address the situation of children in need of protection. The circumstances in which child welfare matters arise make them less than ideal for establishing a s. 35 right: most cases involve individual families in challenging circumstances. Child welfare matters proceed within the statutory framework of the CFCSA, are bound by the facts of each child's situation, and subject to strict time limits. Without a prior declaration of an Aboriginal right to self-government in the area of child welfare, child welfare cases are a poor forum to try to establish a s. 35 right. Section 35 cases (involving extensive evidence and constitutional matters) usually play out over a longer time and at considerable expense.

Cases where Aboriginal groups have sought to establish a s. 35 right to self-government in Aboriginal child-welfare have not succeeded due to (1) insufficient evidence;<sup>11</sup> (2) the lateness of Aboriginal community involvement;<sup>12</sup> or, (3) where courts have suggested that the concerns of communities are political rather than directed toward the interests of the child.<sup>13</sup>



The fact that cases have not yet successfully established a s. 35 right in this area should not be read as indicating that Aboriginal rights in this area do not exist but rather as highlighting the barriers to this approach, posed by the nature of the proceedings. The nature of some court proceedings pose inherent difficulties to Aboriginal rights recognition. In the context of Aboriginal rights claims made in criminal or quasi-criminal cases, the Supreme Court of Canada has noted:

Procedural and evidentiary difficulties inherent in adjudicating Aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process.<sup>14</sup>

*Aboriginal children share in and are entitled to have their Aboriginal rights recognized*

CFCSA matters originate in Provincial courts which do not hear constitutional questions. Children are living and growing beings who cannot wait for matters to move through the Court. The challenge in these circumstances is how to have Aboriginal voices meaningfully heard and incorporated into child welfare decisions, without advance recognition of a s. 35 right. This Guidebook contemplates actions Aboriginal communities can take to help children and families today while building toward recognition of Aboriginal jurisdiction in the future.



**BEST PRACTICE 2.01**

*Aboriginal self-government rights in the area of child welfare exist*

- 1. The family-specific and statutorily driven nature of CFCSA matters makes it difficult to have s. 35 Aboriginal self-government rights in child welfare recognized absent a prior agreement or court declaration. This difficulty should not be taken to mean that an Aboriginal child (who shares in Aboriginal rights and is equally entitled to benefit from them) cannot benefit from them absent a declaration.*
- Exploring options to have Aboriginal ways respected within the limits of the forum of the CFCSA is necessary for the well-being of Aboriginal children.*
- Actively listening to, and incorporating, the Aboriginal community's voice and input is one way to ensure some measure of consideration.*



*Aboriginal peoples were not involved in the creation of Provincial child welfare laws and view these laws as infringing constitutionally protected rights*

  
**BEST PRACTICE 2.01, CON'T**

2. *Aboriginal communities who wish to rely on s. 35 rights could:*
- *Pass their own child welfare legislation based on their Aboriginal legal orders and traditions (relying on their s. 35 rights and also international law to support their assertion) with a view to supplanting all aspects of provincial child welfare laws relating to their Aboriginal children;*
  - *Enter into separate agreements or Protocols with provincial and federal governments that recognize the community's s. 35 rights in child welfare, and commitment to work collaboratively to implement the transition to Aboriginal laws and legal orders in this area; or*
  - *Bring a separate court case seeking a declaration of those rights.*

## II. Federal and Provincial Jurisdictions

While child welfare is not a listed head of power in the *Constitution Act, 1867*, it has generally been found to be an area of provincial responsibility. “Indians, and Lands reserved for the Indians” fall under exclusive federal jurisdiction under s. 91(24). Historically, it was widely accepted that provincial child welfare legislation did not apply to Indian children because this was an area of exclusive federal responsibility. The role of the provinces regarding Aboriginal children changed when the federal government amended the *Indian Act* to include s. 88 which referentially incorporated provincial laws to apply to Indians, subject to the terms of any treaty or federal legislation.<sup>15</sup> In *Re Nelson and Children's Aid Society of Eastern Manitoba*<sup>16</sup> the Manitoba Court of Appeal found that s. 88 of the *Indian Act* makes provincial child welfare legislation applicable to Indians. In *Natural Parents v. Supt. of Child Welfare*<sup>17</sup> the Supreme Court of Canada confirmed that while provincial adoption laws apply to a status Indian child, adoption under provincial legislation does not impact a child's status registration as an Indian.

The recent trend in constitutional law and interjurisdictional immunity would now likely hold that provincial legislation applies of its own force and effect to Indian children and does not rely on invigoration through s. 88.<sup>18</sup> However, this discussion highlights, from an Aboriginal perspective, how the jurisdictional questions remain outstanding. Aboriginal

people were not consulted with, nor involved in, the decision to transfer this jurisdiction, and the control over their children that resulted. Most Aboriginal nations in BC view the continued imposition of provincial legislation on Aboriginal children and communities as an infringement of their constitutionally protected Aboriginal rights.<sup>19</sup>

Until the sphere of Aboriginal jurisdiction to care for Aboriginal children is recognized by Crown governments and properly resourced, or remedies are provided by Court Order recognizing an Aboriginal right in the area of child welfare, Aboriginal children are under the assumed authority of Crown governments.

After enacting s. 88, Canada entered agreements with the provinces to provide child welfare services to status Indian children. Aboriginal Affairs and Northern Development Canada (AANDC), the department most responsible for the administration of the federal government's obligations to Aboriginal people, negotiates and funds the programs and services delivered to Aboriginal people that fall within its mandate, including negotiating with provincial governments for the delivery of programs and services to Aboriginal children.

The provision and funding of programs and services for on-reserve children and families is problematic for Aboriginal communities. Inequitable funding to children living on reserve (or ordinarily resident on reserve) continues, and Aboriginal agencies delivering child welfare services on reserve receive less funding than their off-reserve counterparts. For example, foster parents off-reserve receive more funds to care for children, and may have greater access to services. Many Aboriginal communities are remote and may lack the professional and support services that would help children and families remain together. Socio-economic issues such as overcrowded housing, poverty, and chronic underfunding of programs and services keep Aboriginal children and families at risk of overrepresentation within the child welfare system.<sup>20</sup>

### ***Case Study: Jordan's Principle***

The federal and provincial governments have disagreed about who has financial responsibility to pay for services to Aboriginal people. This jurisdictional wrangling often resulted in a situation where both federal and provincial governments denied financial responsibility to vulnerable Aboriginal children, leaving them without services.

Jordan's Principle arose from the situation of a child from Norway House Cree Nation in Manitoba who died at five years of age.

***Inequitable funding to children living on reserve continues, and on-reserve Aboriginal agencies receive less funding than their off-reserve counterparts***



*Treaties, bylaws or agreements with the Province may influence the interpretation or implementation of the CFCSA*

He had special needs that his parents could not pay for on their own, and they put him into care to get government assistance. Jordan spent his first two years in hospital. After that, Canada and Manitoba could not agree on who should pay for his at home medical care. He remained hospitalized while the governments continued to disagree about who should pay for his home care supports. Jordan passed away in the hospital, and was never able to be in a home, because Canada and Manitoba could not agree on who should cover costs for his care outside of the hospital.

Jordan's Principle is an agreement that, where a jurisdictional dispute arises between federal and provincial governments concerning a status Indian child, the government of first contact pays for the service and the governments agree to work out jurisdiction and financial responsibility later. Despite Jordan's Principle, the federal government has challenged the extent of its funding responsibilities. In 2012, the Federal Court ruled that Jordan's Principle is legally binding on the federal government, and that the inequitable funding provided by the federal government for on-reserve Aboriginal services is a ground for a claim of racial or ethnic discrimination before the Canadian Human Rights Commission (CHRC) allowing a complaint brought by the Assembly of First Nations and the First Nations Child and Family Caring Society (FNCFCS) to proceed.<sup>21</sup> The case is currently before the CHRC.

### **III. Treaties or Other Inter-Governmental Agreements**

Aboriginal groups may have treaties, band bylaws or intergovernmental agreements (such as Memorandums of Understanding (MOUs) or Protocol agreements), which influence the interpretation or implementation of the CFCSA with respect to their child members, and address the jurisdictional interplay between Aboriginal and Crown government jurisdictions.

Treaties may provide for special notice or jurisdictional space for Aboriginal groups to pass laws to occupy the area of child welfare. The extent of these provisions are set out in the agreements themselves, and generally include that the Aboriginal group can pass laws which apply to children who are resident on their treaty settlement or reserve lands. Where a treaty allows an Aboriginal community to occupy jurisdiction, these provisions only become fully operational once that group has passed laws to occupy that jurisdiction. In many cases, Aboriginal groups have negotiated this space, but have yet to legislatively occupy it.



Agreements which include child welfare provisions are listed in Schedules 1A and 1B of the CFCSA Regulation and include: Nisga'a Lisims Government, Huu-ay-aht First Nations, Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations, Toquaht Nation, Tsawwassen First Nation, Uchuklesaht Tribe, and Ucluelet First Nation. To date, Tsawwassen is the only First Nation which has occupied the legislative space and passed the *Tsawwassen First Nation 2009 Children and Families Act* which applies to Tsawwassen children on their lands.<sup>22</sup>

### *Spallumcheen (Splatsin)* *"A By-law for the Care of Our Indian Children"*

Spallumcheen (Splatsin) "A By-law for the Care of Our Indian Children" (Bylaw #3-1980) gives to the Band exclusive jurisdiction over any proceeding involving the removal of a child from their family, notwithstanding the residency of the child.<sup>23</sup> It is the only child welfare bylaw which has been allowed under s. 81 of the *Indian Act*.

*Spallumcheen (Splatsin) has jurisdiction over their child members on or off reserve*

Key provisions of the by-law include:

1. ...The Spallumcheen Indian Band finds:
  - (a) that there is no resource that is more vital to the continued existence and integrity of the Indian Band than our children.
  - (b) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-band agencies.
  - (c) that the removal of our children by non-band agencies and the treatment of the children while under the authority of non-band agencies has too often hurt our children emotionally and serves to fracture the strength of our community, thereby contributing to social breakdown and disorder within our reserve.
3. (a) The Spallumcheen Indian Band shall have exclusive jurisdiction over any child custody proceeding involving an Indian child, notwithstanding the residence of the child.
5. The Chief and Council shall be the legal guardian of the Indian child, who is taken into the care of the Indian Band.
6. The Chief and Council and every person authorized by the Chief and Council may remove an Indian child from the home where the child is living and bring the child into the care of the Indian Band, when the Indian child is in need of protection.



The Bylaw makes chief and council guardians of the first instance for a child deemed in need of protection, and contains provisions setting out the process that the Band will follow in determining a placement of a child apprehended under the bylaw. The Province has an agreement to work with Splat-sin.

*Recognition of children’s human rights to Aboriginal culture and identity could transform child welfare law*



**BEST PRACTICE 2.02**

*Treaties, band bylaws and intergovernmental agreements may influence the interpretation or operation of the CFCSA with respect to some Aboriginal children*

- 1. Treaties, band bylaws and intergovernmental agreements should be reviewed by all parties (director, Aboriginal communities, counsel for parents or children) as they may influence the interpretation of the CFCSA with respect to some Aboriginal children.*
- 2. Children who are members of, or entitled to be enrolled under, a treaty may have a different set of laws or policies that apply to them.*
- 3. Children who are members of the Spallumcheen (Splat-sin) Indian Band are subject to that Band’s Bylaw Respecting Indian Children whether they live on or off reserve, and that Bylaw gives jurisdiction to the Chief and Council of the Splat-sin on child welfare matters.*
- 4. Where an Aboriginal community has negotiated an MOU or Protocol with the Province, that agreement may set out specific steps the parties have agreed to follow.*

#### **IV. International Instruments and the CFCSA**

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)<sup>24</sup> and the *United Nations Convention on the Rights of the Child* (UNCRC),<sup>25</sup> both endorsed by Canada, set out international standards governing state conduct that should guide the interpretation of domestic law, including the CFCSA. Implementation of the recognition of Aboriginal peoples’ rights as human rights, and recognition of children’s rights to their Aboriginal culture and identity, have the power to transform the application of child welfare law to Aboriginal children.

The Supreme Court of Canada has recognized that international instruments, such as UNDRIP and UNCRC, should guide interpretations of domestic law: “international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declared that its law is to the contrary.”<sup>26</sup> It should be assumed that the CFCSA is consistent with international principles, as an “interpretation that produces compliance with international law is preferred over one that does not.”<sup>27</sup>

### *United Nations Declaration on the Rights of Indigenous Peoples*

The UNDRIP sets standards to ensure the human rights and dignity of Aboriginal peoples and recognizes that the cultures, traditions, and laws that ensure the cultural survival and continuity of Aboriginal peoples are carried forward through children and emerging generations. Key provisions relevant to the area of child welfare include:

#### **Article 7**

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous Peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

#### **Article 8**

Indigenous Peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. States shall provide effective mechanisms for prevention of, and redress for:

Any form of forced assimilation or integration...

#### **Article 9**

Indigenous Peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

*Aboriginal children have human rights as members of Indigenous Nations which must be respected in the interpretation of child welfare legislation*



*Aboriginal children  
have the human rights  
to have their culture  
and identity preserved*

## V. United Nations Convention on the Rights of the Child

The UNCRC recognizes the rights of communities in caring for children and the human rights of children to have their Aboriginal culture and identity preserved. A full measure of a child's human rights must reflect their broader cultural and societal relationships. Key provisions relevant to child welfare include:

### Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the right recognized in the present Convention.

### Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse...

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and ... for judicial involvement.

### Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

3. Such care could include ... placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

## Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

In *G. (B.J.) v. G. (D.L.)*,<sup>28</sup> Justice Martinson contemplated a child's right to be heard in a domestic family law matter, applying the international standards set out in the UNCRC to find that as "all children in Canada have legal rights to be heard in all matters affecting them," that "[d]ecisions should not be made without ensuring that those legal rights have been considered." She noted that the UNCRC "does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation."

*Children have the right to be heard in matters affecting them*

## *Human Rights of Aboriginal Peoples in Child Welfare Matters*

The rights of Aboriginal children, outlined in international instruments, has been described as including "the right to grow up in strong Indigenous families, participating in their culture and community, free from abuse and neglect" which suggests state obligations to:

increase Indigenous self-government in child welfare; recognize cultural differences in child rearing and child protection practices; address the root causes of neglect and abuse; provide support to families to prevent the removal of children and promote healing; and place children within the same community/culture whenever possible if removal is necessary.<sup>29</sup>

In light of the guidance provided by the UNDRIP and UNCRC, the provisions of the CFCSA relating to Aboriginal children should be read to be consistent with international human rights standards. This implies a positive duty to keep Aboriginal children within their families or cultural community, similar to the active efforts required in the United States under the *Indian Child Welfare Act* (ICWA).<sup>30</sup> "Active efforts" to keep an Indian child within their tribes and families could include "utilizing the available resources of the Indian child's extended family, tribe, tribal and other Indian social services agencies, and individual Indian caregiver service providers."<sup>31</sup>





**BEST PRACTICE 2.03**

*Interpretive principles set out in the UNDRIP and UNCRC should guide an analysis of the CFCSA*

- 1. Incorporation of International standards to interpret the CFCSA suggests:
  - *Positive duties and obligations on Courts, the director, and Aboriginal communities to make active efforts to maintain Aboriginal children’s identity and cultural heritage;*
  - *Active measures are required to involve the child’s Aboriginal community in planning to protect and maintain an Aboriginal child’s cultural identity and heritage.**
- 2. The UNDRIP recognizes that the ability to pass the laws, traditions, and language fundamental to cultural survival to Aboriginal children are protected as an incidence of Aboriginal peoples’ human rights. Courts should be conscious of this fact when entertaining submissions by Aboriginal communities under the CFCSA.*
- 3. The UNCRC recognizes the child’s right to be heard; the CFCSA requires that a child over the age of 12 be notified and given an opportunity to be heard in matters that impact them. These sections provide an opportunity to examine an Aboriginal child’s own opinions on staying connected to their Aboriginal culture and heritage. Courts should require that these investigations be made, and Aboriginal communities could help assist in this conversation.
  - *Courts can ask whether the Aboriginal child was invited to attend the hearing or to provide testimony in some other way, to give evidence of their views about their Aboriginal heritage and culture and the need to preserve those connections;*
  - *An advocate from the child’s own Aboriginal community could be identified to help them articulate their wishes, and children are likewise entitled to legal representation where required to have their voice heard.**



## Endnotes

---

1. [2001] 1 S.C.R. 911 [Mitchell].
2. [1996] 2 S.C.R. 507 [Van der Peet].
3. [1997] 3 S.C.R. 1010 [Delgamuukw].
4. See for example: *Casimel v. I.C.B.C.*, [1994] 2 C.N.L.R. 22 (B.C.C.A.) [Casimel]. *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006) contains an extensive discussion of Aboriginal laws and legal traditions, and their recognition within Canadian common law.
5. (1867), 1 C.N.L.C. 70 (Que. S.C.).
6. [2000] B.C.J. No. 1525 [Campbell] at para 106.
7. Campbell, at para. 86.
8. Casimel at 26, citing the B.C.C.A. judgment in *Delgamuukw v. B.C.*, [1993] 5 W.W.R. 97 (BCCA). See also *Re Beaulieu's Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T.T.C.); *R. v. Bear's Shin Bone* (1899), 4 Terr. L.R. 173 (N.W.T.S.C.); *Re Katie's Adoption Petition* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.); *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743 (N.W.T.S.C.).
9. See for example: *R. v. Pamajewon*, [1996] 2 S.C.R. 821, and *Delgamuukw*.
10. RCAP, Vol. 3, at 10: "The authority of Aboriginal nations and their communities to exercise jurisdiction is central to specific strategies for protecting children, restoring balance between men and women in families, and establishing ethical standards of respect for vulnerable peoples..."
11. See for example: *A [...] (First Nation) v. Children's Aid Society Toronto*, 2004 CanLII 34409 (ON SC) [A [...]] at para. 40: "There was no evidence of any particular, or even general, child-rearing practices of the First Nation, or of First Nations in general. Thus it was impossible to find there were any traditional rights that had been guaranteed by s. 35, and thus infringed."
12. See for example: *A [...] L. (M.S.D.)*, Re 2007 SKQB 200 (CanLII) [L. (M.S.D.)]: The best interests of the child "could not be obtained if I were to permit this application to be the springboard for the substantive political and legal determinations of constitutionally protected inherent rights and treaty rights of First Nations' persons" (at para. 8); *L. (M.S.D.)*, Re, 2008 SKCA 48 (CanLII); *In the Matter of Q. (N.)*, [2004] 3 C.N.L.R. 262; 2003 YKTC 35 (CanLII), the court expressed concern "that the hearing will be unduly prolonged or become side tracked should the issue of intergovernmental relationships be injected into the proceedings," at para. 20.
13. See for example: *Racine v. Woods*, [1983] 2 S.C.R. 173 [Racine], Re R.T. 2004 SKQB 112 and 2004 SKQB 503; *A.[...]*; *Winnipeg (Child and Family Services) v. M.A.*, 2002 MBQB 209.
14. *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, LeBel, J., concurring, at para. 142.
15. As it now reads:  
88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.
16. (1975) 56 L.R. (3d) 567 (Man. CA).
17. [1976] 2 S.C.R. 751, (1975) 60 D.L.R. (3d) 148.
18. See for example: *Tsilhqot'in Nation v. B.C.* 2004 SCC 44 [Tsilhqot'in]; *Quebec (A.G.) v. Canadian Owners and Pilots Assn.*, [2010] 2 S.C.R. 526.
19. In allowing the class action challenging Canada's decision to allow the "Sixties Scoop" the Ontario Superior Court of justice in Brown noted that Canada maintained its obligations for Indian children, despite delegating powers to administer the child welfare system to the provinces: "It is acknowledged by Canada that it could have set up its own child welfare system to deal with these persons," while the decision to delegate child welfare in the provinces "undoubtedly made good sense from a practical and efficiency point of view, Canada cannot avoid its responsibilities as a fiduciary by delegating its discretionary authority to another." (at para. 26). Canada's good intentions do not remove its responsibility for the results of its actions: "The fact that Canada was trying to do something positive for these children does not remove the need for Canada to undertake its good work free



*of negligence. In other words, a duty of care is not eliminated just because the person who has the duty is engaged in what is intended to be an affirmative or beneficial act.” (at para. 37).*

20. National Collaborating Centre for Aboriginal Health: “Aboriginal and Non-Aboriginal children in child protection services” (National Collaborating Centre for Aboriginal Health, 2013) at 3.

21. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, (2012) [Ongoing].

22. Available online at: [www.tsawwassenfirstnation.com/laws-regulations-and-policies/laws/](http://www.tsawwassenfirstnation.com/laws-regulations-and-policies/laws/)

23. *The jurisdiction of the Splitsin Bylaw has never been successfully challenged in court. See for example: S. (E.G.) v. Spallumcheen Band Council*, [1999] 2 C.N.L.R. 318 (B.C.S.C.). *The Bylaw was discussed in M.M. (Re)*, 2013 ABPC 59 (CanLII) at paras 86-87.

24. United Nations Resolution adopted by the General Assembly 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007.

25. *Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.*

26. *R. v. Hape*, 2007 SCC 26; [2007] 2 S.C.R. 292 at para. 39 [Hape]; *Canada (A.G.) v. Canadian Human Rights Commission*, 2007 SCC 26; [2007] 2 S.C.R. 292.

27. Sullivan, Ruth. *Statutory Interpretation (2nd)* (Toronto: Irwin Law, 2007) [Sullivan] at 241.

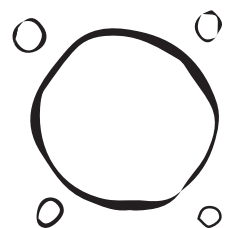
28. 2010 YKSC 44, 324 D.L.R. (4th) 367, at paras. 2-4.

29. *First Nations Child and Family Caring Society of Canada. Indigenous Children: Rights and Reality. A Report on Indigenous Children and the U.N. Convention on the Rights of the Child.* (Toronto: First Nations Child and Family Caring Society of Canada, 2006) [Indigenous Children] at 71.

30. 25 U.S.C. 1901-63.

31. California Legal Services, *California Judges Benchguide: The Indian Child Welfare Act* (Sacramento, CA: California Legal Services, 2012) [California Benchguide].

# 03. Best Interests of Aboriginal Children and Identifying Biases







## 03. Best Interests of Aboriginal Children and Identifying Biases

Child welfare law is embedded with biases and assumptions which compel intervention to protect children, while simultaneously rejecting or limiting the involvement of Aboriginal communities. Stereotypes about Aboriginal peoples impede the transformation that could occur through recognition of Aboriginal laws in the area of children and families. The Supreme Court of Canada has cautioned courts to be aware of equality and fairness considerations in child protection matters, where members of disadvantaged groups, such as women and Aboriginal people, are “vulnerable to judgments based on cultural or class bias.”<sup>1</sup>

### I. Defining the Best Interests of Aboriginal Children

The “best interests of the child” test guides all aspects of child welfare matters. The CFCSA contemplates that the preservation of an Aboriginal child’s cultural identity and heritage is vital to a full consideration of what is in the child’s best interests.

*Child welfare law is embedded with biases which limit the involvement of Aboriginal communities*

4 (1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child’s best interest, including for example:

- a. the child’s safety;
- b. the child’s physical and emotional needs and level of development;
- c. the importance of continuity in the child’s care;
- d. the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
- e. the child’s cultural, racial, linguistic and religious heritage;
- f. the child’s views;
- g. the effect on the child if there is delay in making a decision.



*An Aboriginal child's best interests require the full and active involvement of their Aboriginal community over their lifetime*

(2) If the child is an Aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

The best interests of the child test has been used to justify removal of many Aboriginal children from their homes, making the operation of child welfare law "appear natural, necessary, and legitimate, rather than coercive and destructive" and "has served to constrain judicial decision making so as to minimize, and even negate ... the relevance and importance of maintaining a child's First Nations identity and culture."<sup>2</sup>

This Guidebook reflects the belief that an Aboriginal child's best interests can be best achieved through the full and active involvement of their Aboriginal community. In practice, the application of the best interests test to considerations of an Aboriginal child's culture, identity, and lifelong need for connection and support from their Aboriginal community(ies), has been limited. The failure to recognize that maintaining a child's Aboriginal cultural connections and identity is in their best interests has resulted in the continued overrepresentation of Aboriginal children in the child welfare system.

### ***A. Racine v. Woods***

*Racine* continues to stand as an authority on the best interests of the child test in the context of Aboriginal children. *Racine* concerned an Ojibwe child, whose mother was experiencing some difficulties when she was born, and entered into a one-year temporary care arrangement where the child was placed with the Woods family. The mother voluntarily extended this agreement, and returned after several years to collect the child. The foster parents refused to return her. The Ojibwe mom sought the return of her child; and the proposed adoptive parents sought an adoption.

Justice Wilson, in *Racine*, considered the "best interests of the child" test to mean that "the significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes."<sup>3</sup> The Supreme Court of Canada adopted the statement of an expert witness and concluded that the case: "has nothing to do with race, absolutely nothing to do with culture, it has nothing to do with ethnic background. It's two women and a little girl, and one of them doesn't know her. It's as simple as that."<sup>4</sup>



*Racine* has been widely used to stand for the principle that in the case of Aboriginal children, the importance of culture diminishes over time and that bonding to adoptive or foster parents becomes more important.<sup>5</sup> Aboriginal communities have consistently argued that the *Racine* analysis fails to adequately or fully reflect the life-long importance of cultural identity and connections.

*Racine* has been characterized as based on “the underlying notion” that “with time, First Nations and Aboriginal peoples can somehow become less Indigenous; that, with time, Indigeneity somehow becomes less constitutive and important; that, with time, if First Nations and Aboriginal children are separated from their families and communities, they can be ‘successfully assimilated.’”<sup>6</sup>

*Cultural identity and connections are of lifelong importance to Aboriginal children*

## **B. CFCSA: BC Adopts a Different Approach**

The BC legislature adopted a different approach to that articulated in the *Racine* decision by creating legislative space in the CFCSA for the involvement of Aboriginal communities and requiring that plans of care maintain a child’s Aboriginal identity and heritage. In *N.H. and D.H. v. H.M., M.H. and the Director of Child, Family and Community Service*,<sup>7</sup> the *Racine* principles were considered in light of the CFCSA provisions. The biological mom was a child of the Sixties Scoop, raised in the United States and adopted by the H’s. She had a child with an African American dad (absentee). After his birth, she stayed with her adoptive parents for several months, and then came to Vancouver to meet her biological dad. The baby then lived with the Aboriginal grandfather for several years. Both the Aboriginal grandfather and adoptive parents wanted to keep the baby.

At trial, the Aboriginal mom’s non-Aboriginal adoptive parents were described as having a lively intellect; interested in Aboriginal culture (local groups in Connecticut); having researched the child’s Aboriginal home community on the internet; having access to African American culture; owning a large farmhouse in Connecticut; and as being able to provide private prep school for the child. The Aboriginal grandfather was described as being on social assistance, with a loving home; having experienced difficult younger years, including alcohol abuse and a short time in prison; being unemployed and volunteering on the Downtown Eastside of Vancouver; not comfortable with traditional spiritual practices; and having cared for his daughter who was charged with car theft. (His parenting style was found to indicate his “high regard for the independence of his offspring”—an attitude which the trial judge seemed to view as an absence of parenting.)





*The high number of Aboriginal children in care reflects false assumptions about Aboriginal peoples*

The BC Court of Appeal, interpreting the CFCSA, would have kept the child with the Aboriginal grandfather. The BC Court of Appeal found that the CFCSA directed that a child's Aboriginal culture and identity must be considered in determining a child's best interests, and that "the trial judge placed undue emphasis on economic matters and underemphasized ties of blood and culture that bind" the child to his Aboriginal family and heritage.<sup>8</sup>

The decision of the BC Court of Appeal was overturned by the Supreme Court of Canada<sup>9</sup> which found that cultural identity of Aboriginal children was to be considered but not determinative. Considerable weight was placed on the fact that the child was both African-American and Aboriginal, and the Court cited with approval the trial judgment that "[t]his is not a case of taking an Aboriginal child and placing him with a non-Aboriginal family in complete disregard for his culture and heritage."<sup>10</sup> The Supreme Court emphasized the importance of economic factors and the fact of the child's mixed Aboriginal/African American heritage, despite the child's "bonding" with his Aboriginal grandfather. In *Van de Perre v. Edwards*,<sup>11</sup> the Supreme Court of Canada referred to *H.(D.)*, SCC as saying that race "can be a factor in considering the best interests of the child because it is connected to culture, identity and emotional well-being of the child."<sup>12</sup>

## II. Identifying Biases and False Assumptions

False assumptions about Aboriginal culture and identity, or the inability of Aboriginal peoples to parent, or Aboriginal communities to care for their children, are reflected in the inordinately high number of Aboriginal children involved in the child welfare system. Common examples include:

- Children or their families may be found to not be "Aboriginal enough"—because of a mixed heritage or a perceived disconnect with their cultural roots—and so not entitled to benefit from provisions of the CFCSA which protect Aboriginal culture or identity.
- Responsibility for care of Aboriginal children in Aboriginal cultures is often distributed, and may be misunderstood. The failure to recognize the role of extended families or community members in Aboriginal parenting can lead to a finding that a child has been abandoned or neglected if left in temporary or distributed care.



- Aboriginal parenting styles that allow for a greater degree of autonomy or exploration, or discipline that is less obvious—such as teaching or storytelling—may be judged “too permissive” or as poor or neglectful parenting.<sup>13</sup>
- A real or perceived disability of an Aboriginal child or parent (such as FAS/FAE) may be used to justify the disqualification of Aboriginal family or community members from caring for that child.
- Some child welfare concerns may reflect poverty, rather than poor or neglectful parenting, such as overcrowding in a home, lack of seasonally appropriate clothes, or, not participating in school or community activities.

*Questioning whether a child (or their family) is truly “Aboriginal”*

**BEST PRACTICE 3.01**

*Child protection concerns must be assessed in a culturally appropriate way*

1. *Aboriginal communities should be involved in assessing child protection concerns in a culturally appropriate way. Aboriginal communities could identify where protection concerns stem from cultural differences and should not be read to indicate that a child is in need of protection. For example, leaving children with grandparents or extended family members, or keeping a child from school to attend important cultural or harvesting activities, may reflect cultural practices rather than neglect.*

## **A. Questioning a Child’s Aboriginal Identity**

Questioning whether a child (or their family) is truly “Aboriginal” and therefore entitled to have their Aboriginal identity or cultural heritage protected can be a way of avoiding CFCSA provisions aimed at preserving Aboriginal cultural connections. Where a child or family is found to be “not Aboriginal enough,” based on a racial/blood quantum analysis, or an assessment of cultural authenticity, it is less likely for that child’s Aboriginal cultural heritage to be protected, or for efforts to be made to involve their Aboriginal community.

## *Mistakenly Applying a Blood Quantum Analysis*

Examples where courts have found a child to be “not Aboriginal enough” include:

*A blood quantum analysis should not be used to disqualify Aboriginal children from the protections of their culture and heritage in the CFCSA*

- *D. (M.B.) v. Saskatchewan (Minister of Social Services)*<sup>14</sup>—where a child’s Aboriginal heritage was minimized, as the Court concluded that the child’s racial identity is “unclear and clearly mixed”: “Her mother is Aboriginal, her father was black and apparently was partially of East Indian origin. ... She has dark skin, a broad nose and white palms and footpads.”<sup>15</sup>
- *A.J. v. S.J.M.*<sup>16</sup>—where the Court delved into the dad’s Aboriginal identity, and despite that the dad had Indian status and was a member of Squamish First Nation, the Court found he “is no more than approximately one-sixteenth to one-eighth Squamish Indian in terms of his genetic make-up”. This investigation ultimately led the Court to conclude that to acknowledge the child’s Squamish identity would prejudice the child’s other identities: “this Court cannot conclude that [the child’s] other cultural heritages, other than Native Indian, have no importance. [The child] has a right to know and learn about all of the distinct cultures underlying his genetic makeup, without fostering one to the exclusion of the others.”
- *Tearoe*<sup>17</sup>—where the BC Court of Appeal refused the Aboriginal birth mother’s application to revoke an adoption and diminished the importance of the child’s Aboriginal heritage, observing that the child is “one-quarter native Indian” and seemed reluctant to allow that 1/4 to prejudice the child’s 3/4 non-Aboriginal heritage.
- *Wesley v. CFCS*<sup>18</sup>—where the BC Supreme Court noted that the director had considered the children’s Aboriginal heritage as “that the children were Métis, having a white mother and Aboriginal father,” so were placed “in a Métis foster home.” This assessment is troubling because Métis are an Aboriginal people with historical roots and a distinct culture and language. The fact that a child (particularly in the context of British Columbia where many Aboriginal nations recognize a matrilineal or bi-lineal heritage and tend to own children completely, recognizing their full citizenship, regardless of mixed parentage) has one parent who is non-Aboriginal does not mean that the child is Métis.



**BEST PRACTICE 3.02**

*A blood quantum definition of Aboriginal identity should be rejected*

- 1. A blood quantum definition of Aboriginal identity should be rejected in the application of the CFCSA. That a child has a non-Aboriginal parent or heritage does not make them “less Aboriginal”. Where a child is of mixed parentage, to accord the Aboriginal identity of that child less weight, and so to overlook the ways citizenship and belonging form part of Aboriginal cultural identity, should be avoided.*

*Aboriginal peoples in urban environments are equally entitled to have their culture and heritage reflected in child welfare decisions*

### *Analyzing Aboriginal Identity as Inauthentic or Frozen*

Adopting a frozen view of Aboriginal identity or cultures can lead to an impoverished analysis that overlooks the lived political and social experience of Aboriginal children, and can be used to diminish the importance of maintaining a child’s Aboriginal heritage. That Aboriginal families live in an urban setting, or do not live a “traditional” lifestyle, have been used to support arguments that there is no “cultural connection”—and hence no cultural loss—in removing children from those families. Examples include:

- *Saskatchewan (Social Services) v. L.B.*<sup>19</sup>—The Court decided the grandmother could not preserve the child’s Aboriginal culture as they did not find her connected to it. The “grandmother did not know what cultural activity she was last involved in” and testified that “culture means to be a family/to sit around with one another.”
- *Children’s Aid Society of Halifax v. H.*<sup>20</sup>—The relevance of Aboriginal culture was diminished because of the parents’ lack of connection or knowledge: “The impact of religious and cultural heritage is not as profound when ... reliance by the parents on those heritages is not occurring.”
- *CJK v. Children’s Aid Society of Metropolitan Toronto*<sup>21</sup>—The Court minimized consideration of an Aboriginal grandmother’s ability to maintain the child’s connection to Aboriginal cultural heritage: “there is very little in [her] life ... which recognizes or maintains a native tradition, beyond her knowing some words of her native tongue.”



*Aboriginal  
communities and  
individuals define  
what Aboriginal  
culture and identity is*

- *Tearoe*<sup>22</sup>—The judge described the Aboriginal mom’s connection to her culture as more illusory or hopeful than real, noting she “has not lived on the reserve for approximately six years,” that “[t]here is little, if any, evidence of any contact by her with members of her family,” and that she did not speak Cree. The mother’s cultural disconnection and off-reserve residency was used to minimize the weight to be given the child’s Aboriginal culture and identity.
- *L. (M.S.D.) (SKCA)*<sup>23</sup>—The child and family’s disconnection from the Aboriginal community was used to defeat the participation of the band. The fact that the child was raised outside the community (a situation which the band sought to remedy by its intervention) was used to deny the band standing.

Increasing numbers of Aboriginal peoples live in urban environments, this does not mean they are less Aboriginal, rather that they translate and transport Aboriginal culture to urban environments.<sup>24</sup> Colonization through residential schools and the child welfare systems forcibly removed and disconnected Aboriginal peoples from their cultures and languages. The Court should not substitute its own view of what real or authentic “Aboriginal culture” is for that presented by Aboriginal families or communities. False assumptions about what it means to be truly or authentically “Aboriginal” should not be allowed to defeat the purposes of the CFCSA.

According to 2006 Census, more than half (623,470) of the 1,172,790 people identifying themselves as members of at least one of Canada’s Aboriginal groups, that is, North American Indian, Métis or Inuit, resided in urban areas. Of this urban Aboriginal population, almost 34% (213,945) lived in five cities: Winnipeg, Edmonton, Vancouver, Calgary and Toronto.<sup>25</sup>

In the wake of the disruptions that have been caused by colonialism, for some Aboriginal peoples it may not be possible to re-establish connections to their home communities.<sup>26</sup> This fact should not be used to excuse no effort, or insufficient effort, to investigate what connections to a family’s home community or culture might exist or be capable of repair. The cultural disconnect itself may create and enforce the reasons families become involved in the child welfare system and are unable to independently address the challenges that they face in keeping their children safe. Aboriginal parents raised in care and dislocated from their home communities face a catch-22: They may not know, or be connected to, their Aboriginal heritage

and it is that very lack of connection that leads them to further involvement in the child welfare system as parents.

The Supreme Court of Canada has explicitly rejected a “frozen rights” approach to Aboriginal or treaty rights,<sup>27</sup> arguing that the constitutional recognition of Aboriginal and treaty rights must be “interpreted flexibly so as to permit their evolution over time.” This flexibility ensures effective protection over time. The same flexibility should be incorporated into the consideration of Aboriginal culture and heritage under the CFCSA.

*Areas where Aboriginal communities could help resolve child protection concerns go unexplored, especially in urban areas*



**BEST PRACTICE 3.03**

*A frozen rights approach to defining Aboriginal culture or identity should be rejected*

- 1. The child welfare system should not further penalize Aboriginal peoples for the impacts of colonialism (such as loss of language, culture or increased urbanization). Decisions of a Court in child welfare proceedings should not further isolate Aboriginal children from their Aboriginal cultural community.*
- 2. Off-reserve Aboriginal parents and children live in circumstances which may bring them into contact with child welfare agencies in significantly greater numbers than non-Aboriginal families. The urban Aboriginal experience, though different from the on-reserve experience, should not be assumed to be devoid of culture and tradition, and a frozen rights approach to defining Aboriginal culture or identity should be rejected.*
- 3. Where a parent was raised in the child welfare system or isolated from their community through Residential Schools or other reasons, or a child was born and partially raised away from their home community, active efforts may be required to build connections to an Aboriginal community to establish permanency and stability for a child. The absence of connection to an Aboriginal community may be a key factor leading to protection concerns.*

*Poverty should not be a ground for removing a child from their family*

## B. Poverty

...Indigenous children face a disproportionate risk of child abuse and neglect, ...maltreatment by caregivers and by other individuals in positions of day-to-day power over the child. Additionally, there are many indications that most systems to prevent and address such abuse are failing Indigenous children as they focus primarily on mediating risk at the level of the family and fail to address the societal factors (poverty, poor housing, discrimination, dislocation, etc.) which have the most significant impact on child maltreatment experienced by Indigenous children.<sup>28</sup>

“A lack of material or social advantage does not ground the need for a finding that a child is in need of protection”<sup>29</sup> courts should carefully consider where poverty might be at the root of child protection concerns. Aboriginal women make up the majority of off-reserve urban population, many are single parents living on low-incomes, and the number of Aboriginal children living in poverty is twice the amount of non-Aboriginal children.<sup>30</sup> Likewise, Aboriginal dads represent the largest portion of single dads. Though poverty may not be overtly a factor in a finding that a child needs protection, an examination of reasoning can reveal that it is.

Justice Smith, in *Director v. M.B.*, identified poverty (as opposed to bad parenting) as a factor in a contentious situation where a mom was heating her home with her oven because her natural gas was not connected: Noting that while “[u]nquestionably the mother needed to be taught that there were more proper interim measures that could be taken to heat the trailer,” nonetheless caution must be taken “not to overemphasize protection concerns that are primarily rooted in poverty, otherwise a significant portion of our population would be deemed to be in need of protection.”<sup>31</sup> Factors related to poverty can be listed as disincentives to placing a child within their Aboriginal community, including housing shortages, “a lot of movement on and off the reserve”<sup>32</sup> or a relative lack of educational or social opportunities.



  
**BEST PRACTICE 3.04**

*In assessing child protection concerns for Aboriginal children and families, determine where these concerns reflect poverty rather than actual safety concerns*

- 1. In assessing child protection concerns for Aboriginal children and families, determine where these concerns reflect poverty rather than actual safety concerns. Factors that may reflect poverty rather than neglect or not caring include: overcrowding; a child not having their own room or bed; a child not having seasonally appropriate clothing; a family not having fresh or nutritious food available; or, parents or extended family not calling or attending at access visits regularly (where transportation or telephone access is limited due to financial concerns).*

*An Aboriginal parent or child's disabilities often ground a finding that children cannot be cared for within their communities*

## C. Disabling Aboriginal Care

A parent or child's disabilities often ground a finding that parents or caregivers cannot care for a child and that removing them from their Aboriginal family and community is in their best interests. Examples where Aboriginal caregivers appear to have been refused based on perceived disabilities of the parent(s) or child include:

- *In the Matter of the Children NP and BP*<sup>33</sup>—custody of the children was granted to a non-Aboriginal couple rather than their Aboriginal aunt and uncle, because the Court “afforded significant weight to the “greater understanding” of the non-First Nations couple of the special educational needs of children suffering learning disorders. Comparatively little consideration was accorded to the presumably far greater understanding of the First Nations aunt and uncle of the special cultural needs of First Nations children.”
- *RRE (Re)*<sup>34</sup>—an Aboriginal grandmother sought to have her grandson, with FAS, placed in her care. The Court was troubled by the grandmother's suggestion that she had “finished” raising her eldest grandchild, a 19 year old woman with FASD because it showed “a lack of understanding of her role as a parent in a vulnerable child's life”<sup>35</sup> and “a disturbing lack of understanding of [her] limitations as an adult living with FASD.”<sup>36</sup>
- *R.S.B. (Re)*<sup>37</sup>—the Court found the child with FAS needed parents who could “manage and guide him” not the Aboriginal community who had little resources to assist and which the



Court characterized as an “amorphous group of well-intentioned members of the extended family.”<sup>38</sup>

That a child has a disability should not be used to ground a finding that they cannot be cared for within their Aboriginal community, nor to deny them a lifelong identity and sense of belonging.



**BEST PRACTICE 3.05**

*Parent or child disabilities should not be used to find that a child cannot be cared for within their Aboriginal community*

- 1. Decisions about where to place a child with a disability must include a full consideration of the range of individual, family, and community support available within Aboriginal communities that can provide safety and connectedness for the child.*
- 2. Before determining if a child needs to be removed due to a protection concern, in the case of a parent with confirmed or suspected FASD or other disability, the child’s Aboriginal community should be actively involved in an exploration about whether there are support or supervision options which would allow the family to remain together. Support agreements between the director and Aboriginal community could help families who need additional support because of parent or child disabilities to remain together.*

## **D. Past Challenges (including CFCSA Involvement) used to Invalidate Care**

There are numerous cases that suggest that there is little parents or grandparents can do to repair or overcome the negative implications of their history of involvement within the child welfare system. Examples of how an Aboriginal family member’s past challenges have been used to find they are unfit to care for a child include:

- *D.C.W. v. Alberta (Child, Youth and Family Enhancement, Director)*<sup>39</sup>—where the Court noted that a grandmother had all of her children removed because of her “severe and long-term addiction issues” and “domestic violence.” The fact that the grandmother had stopped actively using and was now employed did not displace the implications of her personal history.



- *D.(M.B.)*<sup>40</sup>—where the Court was concerned about a proposal to return a child to her Aboriginal family: “Social services wants to return her to her own culture which they say is Aboriginal. She would be returned to the same extended family in which she was exposed to drugs in utero.”
- *Children’s Aid Society of Sudbury and Manitoulin v. B.(J.)*<sup>41</sup>—an Aboriginal grandmother’s application for custody of her grandchildren, who were subject to child protection proceedings, was denied due to her past involvement with the society, criminal record, and history of substance abuse. On appeal, the Band supported the grandmother and argued that “extended family systems are important factors in the rearing of Aboriginal children” and highlighted “critical differences between the traditional child-rearing practices of Aboriginal people and the non-Aboriginal emphasis on the nuclear family as the model for child care”. The Band highlighted its communal responsibility to its members and “argued that the agency’s narrow-mindedness causes it to focus on Ms. M.B.’s failures rather than on her gains, highlighted her life-altering changes and underscored her education.”<sup>42</sup> The Band argued that the grandmother “struggled and fought hard to overcome her unhealthy lifestyle and has managed to turn her life around and is definitely ready to take ownership and the responsibility of parenting her grandchildren.”<sup>43</sup>

*Aboriginal communities could highlight how caregivers have transformed their lives and provide a more balanced consideration of their suitability*

Even where Aboriginal parents have stopped substance abuse or removed themselves from dangerous situations, their histories may still be used to deny them the opportunity to care for their children.

If a history of substance abuse exists, the court will choose to ignore the good (i.e. child-care support from within the Aboriginal community) and emphasize the bad (i.e. previous incidents of alcohol abuse). There is no consideration of whether community resources for treatment are available or the extent to which an applicant has been personally involved in excessive drinking or violence that may be taking place elsewhere in the extended family.<sup>44</sup>

The involvement of Aboriginal communities could reorient the discussion by helping to highlight how caregivers may have transformed their lives and providing a more balanced consideration of the suitability of prospective caregivers.

*The bonds an  
Aboriginal child has  
through their culture  
creates stability  
and connection  
over their lifetime*

 **BEST PRACTICE 3.06**

*Past history should not be used to invalidate care by  
Aboriginal caregivers*

- 1. Aboriginal caregivers' ability to safely protect and care for Aboriginal children should be assessed in a fair and equitable way in each situation, taking into account how people have transformed their lives.*
- 2. Given the history of colonization and historic trauma that Aboriginal peoples have experienced, many prospective caregivers may have histories (of substance abuse, crime, involvement in the child welfare system and so forth) that they have had to work hard to overcome. This history should not be automatically used to disqualify them as caregivers.*

## **E. Assuming a Conflict Between the Interests of Aboriginal Children and Communities**

The belief that an adversarial relationship exists between Aboriginal children and Aboriginal communities, or between Aboriginal communities and child protection agencies, can prevent consideration of the voice of Aboriginal communities in planning for the future of their child members. The bond an Aboriginal child has through his or her culture creates stability, social wealth, and connections over their lifetime: "Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal peoples."<sup>45</sup>

A child's right to love and nourishment (cultural, emotional, spiritual, and physical) is the community's responsibility; in turn, these collective "responsibilities are [the child's] individual rights." Thus, to place a child outside her kinship community absent culturally relevant safeguards is to deny that child basic individual rights. Moreover, from a collective rights standpoint, such a placement works to break the cycle of indigenous life.<sup>46</sup>

Courts often fail to appreciate that a child's rights should not be seen in opposition to their Aboriginal community, and so discount the benefits and possibilities over a lifetime that a child has a result of their connection to their Aboriginal community. For example:



- *Adoption - 07202, 2007*<sup>47</sup>—the Court opined that a band’s interests relating to the child’s cultural heritage, ancestry, and identity “must not obscure ... the moral, intellectual, emotional, and physical needs of the child, as well as the child’s age, health, personality and family environment.”<sup>48</sup> The Court assessed the matter as one of the individual rights of the child juxtaposed against the collective interests of the Aboriginal community: “adoption involves individual rights that cannot be fettered by collective interests”.<sup>49</sup>
- *Catholic Children’s Aid Society of Toronto v. C.(B.) and H.(J.C.)*<sup>50</sup>—the society asked for an adjournment to track down the suggestion that the child might have Indian status based on a statement made by the father who made a phonetic guess about the spelling of his Aboriginal community. The father had been adopted as a child and had no knowledge of his natural parents. The Court failed to see the benefit to a child of Aboriginal community involvement and felt this approach only impacted the rights of the unnamed Aboriginal community, not the rights of the Aboriginal child. “An approach to decision making under this legislation that tries to avoid potential deprivation to an as yet unidentified Indian band runs the risk of elevating the rights of an Indian band above the rights of the child who is the **central** focus of the statute.”<sup>51</sup>

*The best interests of the child should not be understood as requiring a choice between protecting a child or preserving their Aboriginal culture*

The best interests of the child should not be understood as requiring a choice between protecting a child or preserving their Aboriginal culture.

To ignore the rights of the collective is ... to invalidate the structure of many First Nations and Aboriginal societies which are based on cooperation and consensus ... [T]o ignore Indigenous collective rights on the grounds of the protection of individual liberty is to ignore the extent to which the fundamental liberty of First Nations and Aboriginal children to imagine and make themselves is so bound up in the fundamental liberty of Indigenous communities to do the same.<sup>52</sup>

*There is no inherent contradiction between an Aboriginal community's political efforts, and their love or concern for a child*



**BEST PRACTICE 3.07**

*All parties to a child welfare proceeding involving an Aboriginal child should start with the presumption that there is a mutually beneficial (non-adversarial) relationship between an Aboriginal community and their child members*

*1. All parties to a child welfare proceeding involving an Aboriginal child should start with the presumption that there is a mutually beneficial (non-adversarial) relationship between an Aboriginal community and their child members. An approach which sees Aboriginal communities as having a quasi-parental relationship with their child members, and a mutual interest in protecting the best interests of their child members and their collective future, would be helpful in understanding the relationship of Aboriginal children and their communities.*

## **F. Dismissing the Involvement of Aboriginal Communities is “Political”**

Aboriginal communities become involved in child welfare matters for many different reasons having to do with care and concern for their child members. There is no inherent contradiction between an Aboriginal community's political efforts, and their genuine love and concern for an Aboriginal child. Yet, the fact that Aboriginal communities may be acting politically is often mistakenly used to dismiss their involvement or to diminish valid concerns they may raise about their child members.<sup>53</sup>



**BEST PRACTICE 3.08**

*Involvement of Aboriginal communities in child protection matters should not be diminished or dismissed as “political”*

*1. Involvement of Aboriginal communities in child protection matters should not be diminished or dismissed as “political”. An Aboriginal community can be motivated to take political and legal actions due to genuine care and concern for Aboriginal children.*



## G. Aboriginal Distrust of the Child Welfare Process

Justice Anthony Sarich observed in the *Report on the Cariboo-Chilcotin Justice Inquiry* that the “court process is a strange and bewildering one to most native people. Even those who have been through the process a number of times remain confused and frightened. With rare exceptions, natives simply don’t trust those who operate in it and administer it.”<sup>54</sup> Courts often assess that parents or band representatives are antagonistic toward child welfare agencies, social workers, or the Court, and this has repercussions for their legal position. For example:

*Distrust of the child welfare system may reflect valid fears about a lack of justice*

- *Racine*—the Supreme Court of Canada noted the “venom of [the] anti-white feelings” of the Aboriginal mom who was seeking to have her daughter returned.<sup>55</sup>
- *RRE (Re)*—the Court noted three of the grandmother’s grandchildren had died in care and that her “faith and trust in the Ministry has been badly bruised as a result.”<sup>56</sup> Nonetheless, the grandmother’s distrust toward the Ministry was weighted against her.

Distrust or hostility toward the child welfare system may reflect feelings of powerlessness, fears about a lack of justice or equality. In some cases, there may be systemic biases and stereotypes actively at work which Aboriginal community and family members are reacting to.



### BEST PRACTICE 3.09

*That Aboriginal community representatives or family members express distrust of the child welfare system or its participants should not be used as a justification to ignore, disqualify or diminish their input*

- 1. That Aboriginal community representatives or family members express distrust of the child welfare system or its participants should not be used as a justification to ignore, disqualify or diminish their input.*
- 2. There are times when Aboriginal distrust of the child welfare process is a normal, appropriate and rational response to systemic racism, and may reflect intergenerational trauma expressed by the Aboriginal communities.*

*The interest of the Aboriginal community should not be understood as the “same” as that of the parents or extended family*

### III. Biases that Aboriginal Communities must Address to Protect Children

Aboriginal peoples also hold biases—rooted in histories of colonization—which need to be addressed to protect Aboriginal children within the child welfare process. Due to the collective trauma experienced by Aboriginal people where generations of Aboriginal children were wrongfully removed from their families, Aboriginal communities may automatically support a parent without first asking about the child protection concern, thereby missing an opportunity to bring Aboriginal laws and practices to bear on what actions are necessary to protect a child.

The interest of the Aboriginal community should not be understood as the “same” as that of the parents or extended family. The Aboriginal community itself collectively has a relationship with its child members. Failure to make a distinction between the interests of parents or caregivers, or to adequately and fully address protection concerns, has led to situations where children were left without protection. *Jane Doe v. Awasis Agency of Northern Manitoba*,<sup>57</sup> for example, was a case where an Aboriginal child was returned to her home community without protections and subject to severe abuse and sexual assault.

In some cases, both courts and Aboriginal communities appear to fail to make this distinction. The exercise of Aboriginal laws requires asking what a child needs for their protection and acting to ensure that happens, and a willingness to support (or challenge) the positions of both the director and the parents, based on the community’s own assessment of safety.

Biases that Aboriginal communities need to address to fully act to protect Aboriginal children include:

- The automatic belief that a child protection concern is invalid, and so failing to ask whether a child needs protection and what steps need to be taken to protect them;
- Not knowing how to address issues such as sexual abuse or violence and so allowing shame or uncertainty to drive a response which denies that those harms exist;<sup>58</sup> or
- Not wanting to create a rift or divisions within the community, and so not challenging parenting practices or activities that the community knows to be unsafe.<sup>59</sup> For example, situations in

which community members do not want to interfere with the relationship of children to their parents, despite potentially dangerous and unhealthy circumstances. In *P.(C)*, the Court noted that families or community members often “do not want to be seen as part of the structure that interferes with the parent”:<sup>60</sup>

The closeness of the community on the reserve is both a positive and negative. Although the people appear from the evidence to support each other, they appear to loathe to be critical or to interfere. This makes a special challenge for any placement of children within the parents’ community. ... [A] child should not be made a foster child permanently just to make the situation easier on the adults involved.<sup>61</sup>

*There is an overwhelming need for Aboriginal communities to exercise their jurisdiction and laws—acting as a legal and political entity—rather than as unquestioned support for parents*

There is an overwhelming need for Aboriginal communities to exercise their jurisdiction and laws—acting as a legal and political entity—rather than as unquestioned support for parents.

  
**BEST PRACTICE 3.10**

*Assessing each child protection situation through the lens of Aboriginal laws—and asking what the legal standard and practice would be under Aboriginal law—could be a powerful tool for protecting Aboriginal children*

- 1. Assessing each child protection situation through the lens of Aboriginal laws—and asking what the legal standard and practice would be under Aboriginal law—could be a powerful tool for protecting Aboriginal children.*
- 2. Advocating for a child within the context of Aboriginal laws may mean advocating that a child remain within their nation or community, but not with their parents or extended family if they cannot safely care for them.*
- 3. Aboriginal communities must honestly examine in each case whether there is a real child protection concern rather than rejecting outright any intervention.*
- 4. Asking Aboriginal communities how their perspective is different from that of the parent(s) may be useful to focus the discussion on the best interests of the child and the protection concerns. An Aboriginal community may support the parents’ position because they do not want more of their child members lost to the child welfare*





*system, and may not have considered other options to keep a child either within the community or actively connected through participation in community activities, events and practices. Engaging in a conversation with the Aboriginal community can help to highlight their actual position in child welfare matters.*

*There are examples where courts have made conscious efforts to set aside biases and stereotypes in making decisions that keep children safe while still protecting their Aboriginal heritage and culture*

#### **IV. Positive Considerations of the Role of Aboriginal Communities and Identity**

There are examples where courts have made conscious efforts to set aside biases and stereotypes in making decisions that keep children safe while still protecting a child's Aboriginal heritage and culture. For example:

- *Re S.M.S.*<sup>62</sup>—Justice Dhillon identified “systemic barriers” related to an Aboriginal mother’s background in declining to grant the CCO and granting a last chance order, giving the mother six additional months to continue with her progress toward sobriety and parenting skills. The systemic barriers included the mother’s “difficult life,” “childhood trauma from the effects of the Indian residential school system on her family of origin,” and that as “an Aboriginal woman, she has lived in poverty and been subject to discrimination, particularly in her quest for adequate family housing.”
- *Director of Family and Child Services v. M.B.*<sup>63</sup>—an expert report was presented which suggested the mother had challenges which rendered her unfit to parent. The analysis in this case highlights the importance of the Aboriginal community in identifying safety concerns and providing a culturally sensitive assessment of parenting skills and capacities. Support for the mother from the local Aboriginal community included a native drug and alcohol counselor, and advocates from the local friendship centre who described her as a very capable and loving parent to her youngest infant child, and her home as “very clean and organized” expressing the belief that she “was doing a good job raising her baby.” Justice Smith disagreed to a considerable extent with the expert assessment based on her own observation of the ways in which the mother acted in the Court after several days of testimony, her personality seeming to be more closely aligned with that described by her supporters than the expert report. Justice Smith noted the mother’s difficult upbringing in returning one child to the mother’s care under supervision:



M.B. was born into a dysfunctional family ... They lived a very rustic lifestyle, mostly in a tent, where the family had a trap line in the Chilcotin near Chezakut Lake, and they had minimal contact with the rest of society. Her father was very physically abusive towards her mother and the family dysfunction also included the parents having a serious addiction to alcohol. Within their Aboriginal community, the father was feared and the family was regarded as dysfunctional. The children never received any proper upbringing and they found themselves in foster care from time to time.

*Efforts to positively consider Aboriginal identity and cultural heritage are required*

When M.B. was just 14 years old, she became pregnant and gave birth to her first child named A.B. who was born on (date). The mother drank alcohol during several months of that pregnancy, and she was too young to even realize she was pregnant until seven months into the pregnancy...

The mom had met pre-conditions set by the director for unsupervised access to her child, but that access was still denied. Justice Smith found that the mom was denied a fair opportunity to have her kids returned based, in part, on cultural differences, and noted that the "perception from the Aboriginal community was that the social workers were so predetermined to have the girls adopted out into the white foster home that there was no proper focus on the mother's request for unsupervised access or on attempting to reunite the family."<sup>64</sup>

- *A.L. et al v. D.K. et al*<sup>65</sup>—involved a family law custody dispute rather than a CFCSA matter. Both family members vying for custody were members of the same Aboriginal nation, connected to the Namgis and Tsawataineuk communities. Justice Owen-Flood discussed at length the importance of Aboriginal community and culture, finding that the child was tied by blood and culture to her extended family and members of her communities: "These people constitute the epicentre of M.'s familial and cultural identity. In short, they are her roots."<sup>66</sup> Her findings about "the need for preserving and nurturing the child's cultural identity" and the nature and benefits of Aboriginal cultural connection and involvement included:
  - i. The need to preserve and nurture "any ties similar to love and affection that exist between the child and the traditional lands of his or her community"<sup>67</sup>



and the “opportunity to be instructed in the language of one’s people.”<sup>68</sup>

- ii. “[A] consideration and emphasis of the education and training for M. must go beyond formal schooling. The continuity of an Aboriginal people’s culturally integral practices, traditions and customs is to be ensured by teaching.” Justice Owen-Flood cited *R. v. Côté*<sup>69</sup> for the proposition that: “In the Aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration.”<sup>70</sup>
- iii. Potlatching was described as “a form of moral education and lifeskills training” which “transmits culture across generations,” with the trial judge concluding that the “opportunity to prepare and participate regularly in the potlatches of one’s relations should be emphasized when considering how best to equip M. for life as an adult and, at the same time, preserve and nurture M.’s cultural identity.”<sup>71</sup>



**BEST PRACTICE 3.11**

*Efforts to positively consider Aboriginal identity and cultural heritage are required*

*1. Efforts to positively consider Aboriginal identity, cultural heritage and the benefits to Aboriginal children of the active involvement of their Aboriginal community could include:*

- *Identifying systemic barriers that Aboriginal parents, caregivers or communities may face and a plan for how to address those.*
- *Involving the Aboriginal community in assessing child protection concerns, including a cultural examination of safety factors and solutions.*
- *Undertaking a full and broad consideration of the benefits to an Aboriginal child of being actively connected to, and involved within, the cultural and spiritual life of their Aboriginal community.*



## Endnotes

---

1. *L'Heureux-Dubé with Gonthier and McLachlin JJ. concurring in the result, New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 114, citing the United States Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982).
2. Kline, Marlee. "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations." *Osgoode Hall L.J.* 30.2 (1992): 375-425, at 393-394.
3. Racine, at 187.
4. Racine, at 188.
5. For example, in *Tearoe v. Sawan*, 1993 CanLII 2581 [Tearoe] at para. 47, the BCCA refused the Aboriginal mother's application to revoke an adoption consent, noting "To return this child as requested by the respondent, is to place him in an uncertain future that would take away from him the continuity and stability which he now has. As in the Racine case, the cultural background and heritage must give way in the circumstances of this case. ... The child's best interests must come first."
6. Smith, Ashley. "Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Save or Lose our Children" (2009) 25 Can J.F.L. 297 [Smith].
7. [1988] BCJ No. 221 (QL) [N.H. and D.H.]; at BCCA: *H.(D.) v. M.(H.)*, [1998] 3 C.N.L.R. 59 [H.(D.), BCCA].
8. *H.(D.)*, BCCA, paras. 16-19.
9. *H.(D.) v. M.(H.)*, 1999 CanLII 710 (SCC), [1999] 1 S.C.R. 761 [H.(D.), SCC].
10. *H.(D.)*, SCC, at para. 46.
11. [2001] 2 S.C.R. 1014 [Van de Perre].
12. Van de Perre at para. 40.
13. Bull, Samuel. "The Special Case of the Native Child" *The Advocate* (1989) Vol 4. See also the trial judgment in *N.H. and D.H.* where the grandfather's parenting seemed to be questioned because he believed in allowing children to learn on their own which the Court called a "high regard" for his child's independence.
14. 2001 SKQB 513 (CanLII) [D.(M.B.)]. See also A. [...] *First Nation*, at para. 53, where the Court observed of a child who was Aboriginal and Chinese that "all of the children's rights are important".
15. *D. (M.B.)*, at paras. 3, 71, 77 and 83. For a contrary approach see *M.S. v. G.S.* 2013 BCSC 1744 (CanLII), where a non-Aboriginal mother and Aboriginal grandparents each applied for custody. The Court found the grandparents could "best educate the children about their Aboriginal identity" and were granted shared custody: "The children have one-eighth Aboriginal blood, which is sufficient to provide them with Indian status and the resulting benefits. I agree that it is important for these children to be educated and counselled on their Aboriginal status."
16. 1994 CanLII 264 (BC SC) [A.J.] at 46.
17. At para 24.
18. 2006 BCSC 1666, at para. 14.
19. *Saskatchewan (Social Services) v. L.B.*, 2009 SKQB 46 [L.B.], at para. 60. See also: A. [...] *First Nation*, at para. 45. *Family and Children's Services of Waterloo Region v. Bonnie Y. and Frank D.* (1988), [1995] W.D.F.L. 1011, [1988] O.J. No. 2699 (Ont. Prov. Ct., Fam. Div.) where the parents themselves had given the children no exposure to their Aboriginal culture, and had in fact severed ties with their cultural heritage and traditions.
20. 2006 NSSC 1 (CanLII) [C.A.S.H. v. H.] at paras. 36 and 37. The facts in this case showed parents who were disconnected from their Aboriginal heritage. The mom was told she was Aboriginal on her father's side, but was uncertain about this connection. As a child she lived with her grandmother in the United States near a reservation where she attended school and visited. She does not have Aboriginal status and has not applied for it. As an adult she is not associated with an Aboriginal community or culture. The father, likewise, has no Aboriginal status, believes he has Mic Mac and/or Apache roots, and has not participated in Aboriginal culture.
21. [1989] 4 CNLR 75, at para. 81.
22. *Tearoe*, at paras. 20-21.
23. 2008 SKCA 48 (CanLII) at para. 29.
24. The urban community is made up of a diverse number of Aboriginal cultures and nations, and may be concentrated in areas where low-income families



live. Programs and services may be concentrated in these areas, as well as a rich and vibrant cultural community. For example, according to a 2012 City of Vancouver Area Profile [<http://vancouver.ca/files/cov/profile-dtes-local-area-2012.pdf>] in Vancouver Aboriginal people comprise 2% of the overall population and 10% of Vancouver's Aboriginal population reside in the Downtown Eastside. Within geographic proximity of this area, a myriad of programs and services are offered as well as the Vancouver Aboriginal Friendship Centre, which houses cultural programming offered by various Aboriginal nations.

25. *Aboriginal Affairs and Northern Development Canada, Fact Sheet—Urban Aboriginal Population in Canada, N.D.* Available online: [www.aadnc-aandc.gc.ca/eng/1100100014298/1100100014302](http://www.aadnc-aandc.gc.ca/eng/1100100014298/1100100014302)

26. See for example: Brant Castellano, Marlene. *Contemporary Family Trends, Aboriginal Family Trends: Extended Families, Nuclear Families, Families of the Heart (The Vanier Institute of the Family, Occasional Papers, 2002)* at 1.

27. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1093 [Sparrow]; *Van der Peet*, at para. 64; *R. v. Sundown* [1999] 1 S.C.R. 393, at para. 32; *Simon v. The Queen*, [1985] 2 S.C.R. 387 [Simon].

28. *Indigenous Children*, at 68.

29. *Re Aubichon* (1970), 4 R.F.L. 39 (Sask Q.B.).

30. *Aboriginal Affairs and Northern Development Canada, Fact Sheet—Urban Aboriginal Population in Canada, N.D.* Available online: [www.aadnc-aandc.gc.ca/eng/1100100014298/1100100014302](http://www.aadnc-aandc.gc.ca/eng/1100100014298/1100100014302).

31. *Director of Family and Child Services v. M.B.*, 2003 BCPC 0429 [Director v. M.B.], at para. 39.

32. *Children's Aid Society of Owen Sound and Grey County v. P.(C.)* 2004 ONCJ 453, at para. 40.

33. Lynch, Philip. "Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia" (2001) 23 Sydney L. Rev. 501 [Lynch] at 524 citing *In the matter of the children NP and BP: NP and SM v. the Director of Child, Family and Community Service (BCSC Prince George Registry 03998, 1999)*.

34. 2011 SKQB 282 (CanLII) [RRE (Re)].

35. RRE (Re), at para. 54.

36. RRE (Re), at para. 55.

37. [1994] 4 CNLR 191 [R.S.B.] Re:

38. R.S.B. (Re) cited in Smith at note 160.

39. 2012 ABPC 199 (CanLII) [D.C.W.] at para. 35. See also: RRE (Re), at para. 47, the Court observed that: "there have been multi-generational issues in [the grandmother's] home which make her an unacceptable placement."

40. *D. (M.B.)*, at para. 5; see also: *D. (M.B.) v. Saskatchewan (Minister of Social Services)*, 2002 SKQB 308 (CanLII).

41. 2007 ONCJ 137.

42. At para. 6.

43. At para. 2.

44. Macdonald, Kisa. "Returning to Find Much Wealth: Identifying the Need for a Revised Judicial Approach to Aboriginal Kinship in British Columbia." (2010) 15 Appeal 114-135 [Macdonald (Wealth)], at 128.

45. RCAP, Vol. 4, *Perspectives and Realities* at 521.

46. Graham, L. "Reparations, Self-Determination, and the Seventh Generation" 21 Harv. Hum. Rts. J. 47 at 95-96 (references omitted).

47. 2007 QCCQ 13341.

48. At para. 27, see also: *M.-K.K. (Dans la situation de)*, (2004) R.D.F. 264 (C.A.).

49. At para. 19.

50. 2004 ONCJ 27 (CanLII) [C.(B.)].

51. C.(B.) at para. 31. *Emphasis in original*.

52. Lynch, at 528-529 (references omitted).

53. In *Racine*, at 165, for example, the Supreme Court of Canada was concerned that the Aboriginal mother had sought support of political organizations and wondered if her concern was for the child, or the political issue.

54. Sarich.

55. *Racine* at 165.

56. RRE (Re), at para. 49. See also *Kenora-Patricia*



*Child and Family Services v. P.(L.)*, 2001 CanLII 32703 (ONCJ), at para. 27, where the court noted the Aboriginal father was “antagonistic to the agency.”

57. 72 DLR (4th) 738. This case is discussed in Friedland, Hadley. “Tragic Choices and the Division of Sorrow: Speaking About Race, Culture and Community Traumatization in the Lives of Children” (2009) 25 Can. J. Fam. L. 223 - 256.

58. Borrows, John and Rotman, Leonard. *Aboriginal Legal Issues: Cases, Materials & Commentary* (2003: LexisNexis; Markham, Ont.) at 830, citing RCAP, Vol. 3, at 23, characterized this as shame based on the “Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. It is a shame that countless Aboriginal families have experienced, some of them repeatedly over generations.”

59. *P.(C.)*, at paras. 15 and 39, where the band agreed that an adoption was likely best for the child but did not support this option as they did not want a “rift in the community”. The band “seems focused on the father’s interests” and “committed simply to keeping her on the reserve” without regard for her best interests.

60. *P.(C.)*, at para. 22.

61. *P.(C.)*, at para. 43.

62. *Director v. M.W. and A.M.S.*, 2003 BCPC 396 (CanLII) [Re S.M.S.], at paras. 9, 11 and 58.

63. *Director of Family and Child Services v. M.B.*, 2003 BCPC 0429 [Director v. M.B.], at paras. 2, 3, 20-28 and 37.

64. *Director v. M.B.* at para. 29.

65. 2000 BCSC 480 (CanLII) [A.L. v. D.K.].

66. *A.L. v. D.K.*, at para. 50.

67. *A.L. v. D.K.*, at para. 52. See also paras. 53 and 55.

68. *A.L. v. D.K.*, at para. 57, citing: *L.A.P. v. R.P.*, Q.L. 1996 B.C.J. No. 2353 (S.C.) at paras. 34 and 48, (27 November 1996) Vancouver Registry Nos. A911476 and 0004283 (B.C.S.C.).

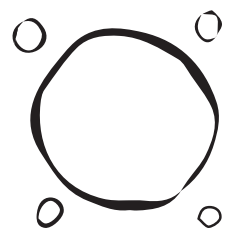
69. 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139 at 176.

70. *A.L. v. D.K.*, at para. 58.

71. *A.L. v. D.K.*, at para. 59.



# 04. Protecting a Child's Aboriginal Identity, Culture and Heritage









## 04. Protecting a Child's Aboriginal Identity, Culture and Heritage

[N]o authority is required to make a convincing argument that culture and heritage are significant factors in the development of a human being's most fundamental and enduring attributes. For anyone, Aboriginal or otherwise, they are the stuff from which a young person's identity and sense of self are developed. This being so, to suggest that concerns about a child's early upbringing and cultural environment can be addressed as if they were school courses to be taken at some later date totally misses the point.<sup>1</sup>

This Guidebook outlines options for, and potential benefits of, Aboriginal community involvement throughout the stages of the child protection process.

## I. Provisions of the CFCSA Maintaining a Child’s Aboriginal Heritage and Identity

Specific provisions of the CFCSA, which focus on maintaining, preserving or protecting a child’s Aboriginal heritage and identity, include:

<p><b>s. 2 Guiding Principles—decisions made about a child should consider that</b></p> <p>(e) kinship ties and a child’s attachment to the extended family should be preserved if possible; (f) the cultural identity of Aboriginal children should be preserved;</p>
<p><b>s. 3 Service delivery principles</b></p> <p>(b) Aboriginal people should be involved in the planning and delivery of services to Aboriginal families and their children; (c) services should be planned and provided in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services;</p>
<p><b>s. 4 Best interests of child</b></p> <p>(1) (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship; (e) the child’s cultural, racial, linguistic and religious heritage; (f) the child’s views; (2) If the child is an Aboriginal child, the importance of preserving the child’s cultural identity must be considered in determining the child’s best interests.</p>
<p><b>s. 35 Presentation Hearing</b></p> <p>At a presentation hearing, the director must provide a report to court which includes [s. 35 (1)(b)] “an interim plan of care for the child, including, in the case of an Aboriginal child, the steps to be taken to preserve the child’s Aboriginal identity”. An interim plan of care presented for a child must set out, under CFCSA Regulation s. 7 2(h) “if the child is an Aboriginal child, the steps to be taken to preserve the child’s Aboriginal identity.”</p>
<p><b>s. 42.1 Protection Hearing</b></p> <p>At a protection hearing, the director must provide a report to court which includes [s. 42.1(5)(b)] “an interim plan of care for the child, including, in the case of an Aboriginal child, the steps to be taken to preserve the child’s Aboriginal identity.” The CFCSA Regulation (s. 8) requires that a child’s plan of care include:</p> <ul style="list-style-type: none"> <li>• The involvement of the child’s Indian band/Aboriginal community in the development of the plan of care and their views on the plan;</li> <li>• a description of how the director proposes to meet the child’s need for continuity of the child’s cultural heritage, religion, language, and social and recreational activities; and</li> <li>• for an Aboriginal child, the steps taken to preserve the child’s cultural identity.</li> </ul>
<p><b>s. 70 Rights of children in care</b></p> <p>Children in care have the right to receive guidance and encouragement to maintain their cultural heritage.</p>
<p><b>Placement Preferences (s.71)</b></p> <p>Priority placement for an Aboriginal child:</p> <ul style="list-style-type: none"> <li>• With the child’s extended family or within the child’s Aboriginal cultural community;</li> <li>• With another Aboriginal family, if the child cannot be safely placed within their extended family or community; or</li> <li>• If placing the child within their family, cultural community or another Aboriginal family is not possible, where the child can remain in contact with relatives and friends; with their siblings; or where they can stay in the same school.</li> </ul>

Referring to the provisions of the CFCSA concerning Aboriginal communities, the Majority of the Supreme Court of Canada in *NIL/TU, O Child and Family Services v. BCGEU* observed that these provisions:

[B]y expressly recognizing, affirming and giving practical meaning to the unique rights and status of Aboriginal people in the child welfare context, and by expressly respecting Aboriginal culture and heritage, [represent] a commendable, constitutionally mandated exercise of legislative power. The very fact that the delivery of child welfare services is delegated to First Nations agencies marks significantly and positively, public recognition of the particular needs of Aboriginal children and families.<sup>2</sup>

*A remedial interpretive approach to the CFCSA could reorient the child protection discussion*

Creating space for the participation of a child's Aboriginal community can "[assist] the court in making a more informed and sensitive decision"<sup>3</sup> as Aboriginal communities are "unique communities with a deep seated collective ethic that extends to the children of the community and their well-being" and a child's best interests "extend to the child's *cultural* and *psychological* needs" which can be addressed by their Aboriginal community.<sup>4</sup>

## **A. Remedial Approach to Interpreting the CFCSA Provisions Aboriginal Identity and Heritage**

A remedial interpretive approach to the CFCSA could reorient the child protection discussion. Where "legislation [is] enacted to protect vulnerable groups in society," including children,<sup>5</sup> the standard adopted by courts has been to view this legislation as remedial and to interpret the legislation so as to ensure the objects or purposes of the legislation are achieved.<sup>6</sup> The CFCSA sets out a comprehensive scheme for the preservation of children's Aboriginal identity and cultural heritage, and for the involvement of Aboriginal communities in planning for their child members, including through notice of court proceedings and the opportunity to become involved as a legal party in those proceedings.

Child welfare legislation has been noted to be remedial in nature: "A court should try to plot the course most likely to remedy parental inadequacies and bring about family reunion. The purpose of the Act is not to tear families apart, but to heal them..."<sup>7</sup> A similar approach is required when considering provisions protective of the relationship of an Aboriginal child involved with the child protection process and their Aboriginal community.

*The United States  
Indian Child Welfare  
Act empowers tribal  
jurisdiction*

Canadian Courts have recognized the sacred nature of the agreements made between the Crown and the Aboriginal peoples through treaties and have set out principles of interpretation to ensure those agreements are interpreted in a manner which upholds the honour of the Crown in its dealings with Aboriginal peoples. The approach to interpreting the CFCSA provisions involving Aboriginal communities proposed here draws from that remedial and purposive approach.<sup>8</sup>



**BEST PRACTICE 4.01**

*A remedial and purposive interpretation of the CFCSA provisions designed to maintain an Aboriginal child's identity and heritage is required*

- 1. The goal in interpreting the provisions of the CFCSA designed to maintain an Aboriginal child's identity and cultural heritage should be to choose from amongst the various possible options, the one which best achieves permanency and safety in the lives of Aboriginal children by keeping them connected to their Aboriginal communities, identity and heritage.*

## **B. Case Study: *Indian Child Welfare Act* and Tribal Jurisdiction in the United States**

The *Indian Child Welfare Act* (ICWA)<sup>9</sup> is federal legislation in the United States that recognizes Tribal jurisdiction in disputes involving Aboriginal children, and empowers Tribes to resume child welfare jurisdiction. The ICWA's remedial goal is to address the damage done to children, families, and Tribes by the removal of Indian children through the residential schools and the child welfare system. The ICWA provides an illustrative example of how the provisions of the CFCSA to actively involve Aboriginal communities could be implemented, and also illustrates the benefits of Tribal involvement.<sup>10</sup>

The ICWA includes these congressional findings:

- that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;



- that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
- that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

The ICWA recognizes the ways in which the interests of children and Tribes are intertwined, and has been read to require affirmative, continuing, and active efforts to contact and involve a child's Tribe in planning for Indian children. A key component of the ICWA is the recognition that an Indian child has the right to maintain or develop his or her relationship with their Tribe. The ICWA defines the best interests of the child and the Tribe as being joined rather than in opposition to each other, and the tribal interest in children has been described as that of a "quasi parent" with an "interest in protecting the best interests of their children while also protecting the existence and future of their citizenry."<sup>11</sup>

### *ICWA and Canadian Aboriginal Children*

The ICWA applies to Indian children and defines an "Indian child" to include those who are a member of a federally recognized tribe in the United States, or children who are eligible for membership in a federally recognized tribe and the biological child of a tribal member. Technically, the ICWA does not apply to children who are members or Aboriginal Nations recognized solely in Canada, and not on the American Registrar of recognized tribes.<sup>12</sup>

There are many instances when Canadian Aboriginal children have become involved in child welfare proceedings in the United States. Aboriginal Nations (such as Nlaka'pamux, Sto:lo, Sylix, and many others) whose territorial land and water base was artificially divided by the imposition of the Canada-United States border continue to live their lives on both sides of the border, without legal recognition of their Nation status. Aboriginal nations who are based primarily in Canada, and have learned that their child members are involved in child welfare proceedings before American courts have chosen to appear and participate in those proceedings. Though the ICWA does



not technically apply, Canadian tribes have been successful in asking American courts to honour the spirit, intent and purpose of the ICWA in making decisions about their child members. For example, there are instances where children have been returned to relatives living in Canada or where courts have followed the placement suggestions made by Canadian Aboriginal Nations.

The approach followed may vary state by state. Aboriginal communities should feel encouraged to participate and advocate for their involvement in planning for their child members, with reference to the spirit and intent of the ICWA and in the best interests of their child members.



**BEST PRACTICE 4.02**

*Though not technically recognized under the ICWA in the United States, Canadian Aboriginal communities can appear in proceedings involving their child members in the United States and ask to have their involvement recognized as being in the child's best interests. Canadian Aboriginal communities may wish to point out that it is in their child member's best interests that they be involved in the proceedings, and suggest to the Court a disposition which would allow the child to remain within their Aboriginal family or nation.*

## II. What is an Aboriginal Community?

The CFCSA s. 1(1) defines an "Aboriginal community" as being designated by the Minister. Indian Bands or First Nations' designated contact persons are listed at Schedule 1. Schedule 2 lists other Aboriginal organizations such as Friendship Centres or other organizations primarily connected to urban Aboriginal communities. Notice requirements, depending on a child's Aboriginal identity, may be to a child's Indian band, a "designated representative of an Aboriginal community" identified by the parents or child, or a treaty nation. It is important to note that many Aboriginal people who live in an urban setting may see their primary or only cultural connection to their home community and not to an urban Aboriginal organization, or vice versa.

Aboriginal communities, bands or First Nation governments, are political and social entities that represent the collective social and cultural societies which Aboriginal peoples are part of. Within the



Canadian constitutional structure they have an independent place and source of rights/responsibilities to, and in, children. Treating Aboriginal peoples as cultural minorities or “racial groups” negates the fact that Aboriginal peoples are “political and cultural entities” with “legitimate political authority” and “ancestral and historical rights” and that “their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.”<sup>13</sup>

Many areas where the involvement of Aboriginal communities could help to resolve child protection concerns go unexplored because of misunderstandings about the role that Aboriginal communities could play, or of the relationships between the interests of Aboriginal children and communities. The individual rights of children and the collective interests of Aboriginal nations and communities are intertwined and mutually reinforcing. A fundamental lesson of Aboriginal cultures is that looking at a child as an individual—without the family, community, and nation connections that provide their cultural background and identity—can harm that child, not protect them. Consideration of the possibilities inherent in preserving a child’s relationship with their Aboriginal community, and the losses which result in the child’s life when that relationship is severed, is required for a full consideration of a child’s best interests.

*Many areas where the involvement of Aboriginal communities could help resolve child protection concerns go unexplored*

### III. Who is an “Aboriginal child”?

The definition of an Aboriginal child under the CFCSA does not require that a child be a status Indian, a member of a band, entitled to be registered as a status Indian, or officially recognized as a member of the Métis nation. If a child (age 12 and over) self-identifies, or their parent self-identifies, as a member of an Aboriginal community the provisions of the CFCSA apply.

The CFCSA defines an “Aboriginal child” under s. 1(1) as a child:

- (a) who is registered under the *Indian Act* (Canada),
- (b) who has a biological parent who is registered under the *Indian Act* (Canada),
  - (b.1) who is a Nisga’a child,
  - (b.2) who is a treaty first nation child,
- (c) who is under 12 years of age and has a biological parent who
  - (i) is of Aboriginal ancestry, and
  - (ii) considers himself or herself to be Aboriginal, or



(d) who is 12 years of age or over, of Aboriginal ancestry and considers himself or herself to be Aboriginal.

## **A. Parent or Child Registered, or Entitled to be Registered, Under the *Indian Act***

*While Status Registration is a common way to determine whether someone is Aboriginal, it is not conclusive or exclusionary of other Aboriginal identities*

Registration under the *Indian Act* determines “Indian” status. It is a legal category. Registration is not automatic. It requires an application to be filed on behalf of each child. Registration may entitle a child to certain benefits, such as health, education or have tax implications. The definition of an Aboriginal child includes Aboriginal children who are entitled to be registered as an Indian, though they may not be.

Status or registration is not the same as membership in a band or belonging to an Aboriginal community:

- A child can be a member of a band or community (a matter determined by the community) and not have status (a matter determined by the federal government).
- Where both parents are members of different bands, the child may be registered with one band but have the right to transfer that membership to another band, and may consider themselves culturally connected to both communities.

While status registration is a common way to determine whether someone is Aboriginal, it is not conclusive or exclusionary of other Aboriginal identities. Courts have misunderstood what “status” is and there are examples where the fact that a child has status has been used to justify making no further efforts to preserve their Aboriginal identity or culture. For example, courts have relied on the fact that adoption would not sever a child’s Indian status as showing that their Aboriginal heritage was preserved, mistakenly conflating Indian status registration (under a federal statute) with maintenance of Aboriginal culture or identity.<sup>14</sup>

The federal government has historically used denial of status as a tool of assimilation. Increasing numbers of Aboriginal children are not eligible for status registration due to contested federal policy aimed at phasing-out “status” Indian registration. That a child or parent does not have status does not mean that they are non-Aboriginal. Métis, Inuit, and other Aboriginal people have historically been denied status or had their status revoked.



  
**BEST PRACTICE 4.03**

*Indian status, absent active involvement in their Aboriginal culture, is insufficient to protect a child's Aboriginal identity, heritage and connection to their culture.*

## **B. Nisga'a and Treaty First Nation Children**

The definition of children who are a “treaty First Nation child” in s. 1(1)(b.2) references modern treaty agreements. The terms of treaties may set out processes for the Aboriginal community’s planning for their child members.

  
**BEST PRACTICE 4.04**

*Where a child or parent is a member of a modern treaty agreement investigate whether or not that treaty sets out specific provisions for how the Aboriginal community may be involved in planning or decision making for their child members.*

## **C. Self-identified Aboriginal Children and Families**

The Supreme Court of Canada said that Aboriginal identity is found in a combination of self-identification, community acceptance and historic connection to a community, subject to *Charter* scrutiny.<sup>15</sup> Membership and belonging within an Aboriginal community are matters largely internal, reflecting the peoples’ own laws and traditions: “courts must approach the task of reviewing membership requirements with prudence and due regard to the [Aboriginal group’s] own conception of the distinct features of their community.”<sup>16</sup> If a child is



twelve years or older they can self-identify as Aboriginal; or, where a child is younger than twelve years and has a parent who is Aboriginal, the parent can identify a child as Aboriginal.

Canadian common law recognizes the right of Aboriginal peoples to define their own membership. If an Aboriginal community recognizes a parent or child as a member or a child or family self-identifies, that identity should be respected and guide the way a child protection concern is considered. Evidence supporting a finding that a child is Aboriginal, or that a child is considered a member of a particular Aboriginal community could include:

1. Statements or affidavits from leadership, elders, or knowledge keepers outlining a child's connection to the Aboriginal community;
2. Statements by the child about how they identify;
3. The family or child's participation in cultural activities; and
4. How family members and people closest to the child identify culturally.



**BEST PRACTICE 4.05**

*Self-identification is very important for Aboriginal children and parents to ensure that a child's Aboriginal identity and heritage are considered and protected*

1. *Self-identification is very important for Aboriginal children and parents to ensure that a child's Aboriginal identity and heritage are considered and protected.*
- *Aboriginal communities could educate their members about the need to self-identify. This is particularly important where children do not have status and involvement of an Aboriginal community is only triggered by the self-identification of the child or parent. Aboriginal communities could develop an affidavit or letter which can be shared with the director and Court setting out how the Aboriginal community recognizes membership or belonging and their connection to a particular child or family.*
  - *Due diligence should be exercised in locating a child's Aboriginal community and providing notice of the proceedings, which could include interviewing the parent, extended family and the child (if appropriate) and asking about the child's status and membership within, or connection to, an Aboriginal community.*

## IV. Delegated Agencies

The Service Delivery Principles in s. 3 of the CFCSA recognize the vital role of the Aboriginal community in the early intervention and prevention stages of a child protection concern, and offer at risk Aboriginal families and children an opportunity to benefit from the support of their community in a culturally appropriate way. Section 3(b) directs that “Aboriginal people should be involved in the planning and delivery of services to Aboriginal families and their children.”

Aboriginal delegated agencies have been established, in part, to fulfill the mandate to involve Aboriginal people in planning for the care of Aboriginal children. Delegated agencies deliver services under the CFCSA with an Aboriginal focus. Delegated Aboriginal agencies are creations of provincial statute, they are bound by, and administer, the same provincial legislation and policies as other MCFD offices. *NIL/TU,O*<sup>17</sup> outlines how delegated Aboriginal agencies are provincially regulated child welfare agencies, and the province maintains ultimate decision making control of their operations.

Aboriginal agencies may be funded at lower rates, yet still be required to implement provincial policies, standards and programs. There are different degrees to which Aboriginal delegated agencies are part of (or isolated from) their originating Aboriginal communities. There are approximately 83 Aboriginal communities that do not operate within the framework of delegated agencies. The existence or involvement of a delegated agency does not diminish the need to separately notify and work with a child’s Aboriginal community(ies).

*The involvement of a delegated Aboriginal agency does not diminish the need to separately notify and work with a child’s Aboriginal community*

### BEST PRACTICE 4.06

*Delegated Aboriginal agency involvement does not fulfill the need to involve a child’s Aboriginal community*

- 1. The role and opportunities for Aboriginal communities under the CFCSA does not change depending on whether a child protection matter arises through a delegated Aboriginal agency or a regular MCFD office. The involvement of an Aboriginal delegated agency does not reduce or limit the rights and opportunities for Aboriginal community involvement as a legal party in CFCSA matters.*

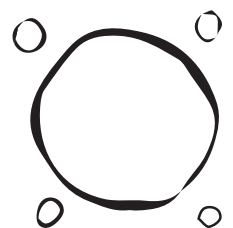


## Endnotes

---

1. *T.(E.J.) v. V.(P.M.)*, (1996), 110 Man. R. 219 (Man. C.A.) at 223.
2. [2010] 2 S.C.R. 696, at para. 41 [NIL/TU,O].
3. *L (M.S.D.) (SKCA)*, at para. 22.
4. *L (M.S.D.) (SKCA)*, at para. 26.
5. *Sullivan* at 232. For examples of where courts have applied a remedial analysis to legislation or enactments involving Aboriginal peoples see: *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.), at 143; and *Nowegijick v. The Queen*, [1983] S.C.J. No. 5, [1983] 1 S.C.R. 29.
6. *Sullivan* at 234, citing *Roberts v. Ontario*, (1994) 19 O.R. (3d) 387. See also: *Twaddle J.A. in Child and Family Services of Winnipeg (East) v. K.A.D. et al*, [1995] M.J. No. 178; *Man.R. (2d) 262*, at paras. 27 and 33.
7. *Winnipeg Child and Family Services (East) v. T.S.L.*, 125 D.L.R. (4th) 255, at para. 27.
8. See, for example, the treaty interpretation principles set out in *R. v. Marshall (I)* [1999] 3 S.C.R. at 456; *R. v. Badger*, [1996] 1 S.C.R. 771; and *R. Marshall (I)*, [1999] 3 S.C.R. 456; *R. v. Sundown*, [1999] 1 S.C.R. 393.
9. 25 U.S.C. §§ 1901-63. In 2015 the Bureau of Indian Affairs issued new guidelines for status in the interpretation of the ICWA: *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* (Bureau of Indian Affairs, Interior; Federal Register, Vol. 80, No. 37, February 25, 2015).
10. For further discussion of the ICWA see: *Native American Rights Fund. A Practical Guide to the Indian Child Welfare Act.* (Denver: Native American Rights Fund, 2011) [available online at [www.narf.org](http://www.narf.org)]; *California Center for Judiciary Education and Research, of the Administrative Office of the Courts. Bench Handbook The Indian Child Welfare Act (Revised 2013); ICWA Special Committee State Court Administrative Office July, 2012 (Michigan); Indian Child Welfare Act of 1978: A Court Resource Guide [Michigan, ICWA]; Minnesota Judicial Branch. Minnesota Judges Juvenile Protection Benchbook (November 2011) "Chapter 35: Indian Child Welfare Act" [Minnesota, ICWA]; California Indian Legal Services. California Judges Benchguide: The Indian Child Welfare Act (June 2012) [California Benchguide].*
11. *Michigan ICWA* at 18.
12. See for example: *In re Wanomi P.* (1989) 216 CA3d 156, 166-168.
13. *Dussault* at 10.
14. See for example: *Adoption—07202* at para. 26.
15. *R. v. Powley*, [2003] 2 S.C.R. 207, and *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 [Cunningham].
16. *Cunningham*, at para. 82.
17. *NIL/TU,O*, esp. paras. 38-39.

# 05. Steps Within the CFCSA Process







## 05. Steps Within the CFCSA Process

The CFCSA sets out a comprehensive scheme to protect children from abuse, neglect, harm or threat of harm including from physical or sexual abuse, emotional harm, or failure to provide healthcare. The CFCSA outlines steps from receiving, assessing and investigating a child protection complaint through increasing levels of intervention and involvement in a child's life.

### I. Voluntary Agreements

Not all child protection matters start with a report of a child protection complaint to the director. In some cases, a parent or child may enter into a voluntary agreement with the director. The CFCSA authorizes the director to enter into a number of different agreements with parents or others for the support and/or temporary care of a child.<sup>1</sup> These agreements include situations where a parent requests (or the director determines the parent needs) assistance, where a parent seeks respite or voluntarily places the child in the director's care for a specified period of time (for example, to attend a treatment program, seek counseling or the parent temporarily is unable to care for the child); or, where a child with special needs requires specialized care the parent cannot temporarily provide.

Parents may enter voluntary agreements to avoid court hearings, to resolve issues quickly, or to access supports. Legal counsel may not be involved at this stage unless a parent or child seeks independent legal advice in relation to the agreement. Aboriginal communities may not be involved when an Aboriginal parent or child enters a voluntary agreement with the director. Voluntary agreements can lead to increased scrutiny of a family, and may lead to child protection concerns.





## **A. Support Services Agreements**

Support services agreements made under s. 5 allow the director to provide or purchase support services for a term (renewable) of up to 6 months, including counseling, home support, respite care, parenting programs, and support for children who have witnessed domestic violence. Support services agreements provide an underutilized opportunity for the director and Aboriginal communities to work together. Other options for agreements, which provide an opportunity for the director to work with the Aboriginal community, are found in s. 93 which allow a director to provide preventive and support services for families to promote the purposes of the CFCSA, make payments to a parent or other person who has care of a child with special needs “to assist the parent or other person to purchase support services... so that the child can reside at home,” to establish services to “assist communities to strengthen their ability to care for and protect their children”.

## **B. Voluntary Care Agreements**

Voluntary care agreements are an option under s. 6 where a parent is temporarily unable to look after a child in the home. Before making the agreement the director must consider if there is a “less disruptive way of assisting the parent to look after the child” which could include providing services in the child’s home. A plan of care must be included in voluntary care agreements. Voluntary care agreements may allow the Aboriginal community to identify alternate caregivers within a child’s family or cultural community who can assist in caring for a child, and have that alternative care funded by the director.

## **C. Special Needs Agreements**

Special needs agreements under s. 7 allow a parent to “delegate to the director as much of the parent’s authority as ... required” to provide services to the child for an initial term of 6 months, renewable for 12 month terms. A special needs agreement could be a tool to allow parents to seek help in caring for a child with special needs, such as FAE/FAS. Special needs agreements may allow the Aboriginal community to identify alternate caregivers within a child’s family or cultural community who can assist in caring for a child, and have that alternative care funded by the director.



## D. Extended Family Program (Formerly Kith and Kin Agreements)

Under s. 8, the director can enter an agreement with “a person who (a) has established a relationship with a child or has a cultural or traditional responsibility toward a child, and (b) is given care of the child by the child’s parent.” Agreements under the extended family program can allow for the director to contribute to the child’s support while the child is in care recognizing traditional Aboriginal care providers. Extended Family Program (formerly Kith and Kin agreements) allow a child to remain within, and connected to, their family, extended family, and community. A challenge of the Extended Family Program is the discretion the director has to decide whether to provide funding to support the child’s care. This discretion may result in a child’s relatives being provided with no, or reduced, financial support. Likewise, there may be less funding available for this program as compared with outside funding for care.

*Aboriginal communities can identify alternate care givers or supports within a child’s community*

## E. Agreements with Youth or Young Adults

Under ss. 12.2 and 12.3, the director can enter into agreements with youth/young adults who cannot be re-established with their family or who do not have parents able to assist to provide residential, financial or educational support. The support services generally end when a youth turns 19; however, under s. 12.3, support can be continued to allow a young adult who was in care when they turned 19 to continue with educational/vocational training or a rehabilitative program until the age of 24.



### **BEST PRACTICE 5.01**

*Aboriginal community involvement could be very beneficial in structuring voluntary agreements*

- 1. Aboriginal communities may have knowledge about a family’s strengths and challenges and could contribute to strengthening voluntary agreements, by identifying potential problems, and developing a cultural plan to ensure that the child’s Aboriginal identity is preserved and protected from the earliest point of contact with the child welfare system.*
- 2. Aboriginal communities can identify, and potentially provide, services (which the director could pay for all or part of) under a Support Services Agreement or*



  
**BEST PRACTICE 5.01, CONT'**

*separate agreement to address child protection concerns in a culturally meaningful way.*

- 3. Aboriginal communities could identify solutions that address a child's special needs, and may be able to identify, provide, or help access, additional supports or resources while ensuring that a child remains connected to their Aboriginal community.*
- 4. Extended Family Program (formerly Kith and Kin agreements) can allow a child to remain within the community and promote the development and preservation of the child's Aboriginal cultural heritage and identity. Wider use of the Extended Family Program could be useful as an intervention and prevention tool that allows the director and Aboriginal community to work actively together.*
- 5. Aboriginal children who—post CCO—were raised in care, and are disconnected from their Aboriginal communities and extended families, could enter voluntary agreements that involve their Aboriginal community. Aboriginal communities could work with the director to seek to re-connect Aboriginal youth with their cultures and communities, and provide broader support to youth who are subject to a CCO and may be isolated from their Aboriginal community through participation in agreements with youth or young adults.*
- 6. Agreements between the director, parents, caregivers or Aboriginal communities under s. 93 could include providing funding to allow a child to remain at home, with supports, or to assist Aboriginal communities to strengthen their ability to care for and protect their children. These options cover a wide range of services that an Aboriginal community might identify as culturally necessary and appropriate to address child protection concerns within their community.*

## II. Report, Assessment and Investigation

Once the director receives a report that a child may be in danger, the director must assess the report and decide if the report should be investigated. After a preliminary assessment, the director may offer support services and agreements to the family, refer the family to a community agency, or investigate the child's need for protection. The director has broad powers at this stage to decide if the child may be in danger and whether the child should be removed immediately, or if there are less disruptive measures that can be taken that would allow the child to stay in the home with supports or supervision.

*Aboriginal community involvement at the investigation stage could encourage a preventative approach*

If the director decides there are reasonable grounds to believe that the child needs protection, the director can:

1. Remove the child if there is no less disruptive measure available to protect the child; or
2. Apply for a supervision order (setting out terms and conditions that the parents must follow) if they believe that the child can safely remain in the home with supervision from the director.

In some cases, parents may agree to supervision terms to avoid a court hearing, or because they are embarrassed, do not understand their options, or believe that they will get their children back sooner if they agree to the supervision conditions. If parents do not agree to be supervised, or if the director does not believe that a supervision order with the child remaining with the parent(s) is adequate to protect a child, they must remove the child and a protection hearing will be scheduled.

Notice to Aboriginal organizations is not required at the investigation stage. Decisions made in the early stages of the child welfare process are often difficult to displace and become permanent. The early involvement of Aboriginal communities can have a profound and lasting impact on the possibility for resolution. Under s. 16(3)(c) the director must report the results of the assessment or investigation "to any other person or community agency if the director determines this is necessary to ensure the child's safety or well-being." This provision could support the need to notify an Aboriginal child's community of child protection concerns before they escalate. An Aboriginal parent or child could also notify their Aboriginal community (or request that their community) be notified as soon as they become aware of a child protection investigation.



**BEST PRACTICE 5.02**

*Aboriginal community involvement at the report, assessment and investigation stage could encourage a preventative approach and ensure that an Aboriginal child's safety and cultural needs are properly assessed*

*1. Aboriginal community involvement at the report, assessment and investigation stage could encourage a preventative approach and ensure that an Aboriginal child's safety and cultural needs are properly assessed. Aboriginal community involvement could help to:*

- *Assess child protection concerns in a culturally sensitive way;*
- *Identify the least disruptive measures available to avoid removing the child from their family or Aboriginal community;*
- *Identify culturally appropriate interventions, programs and services;*
- *Provide supports to the child and the child's family to keep the child in the home or within the family or community;*
- *Put family supports in place to divert children from entering the foster care system; or*
- *Ensure a child stays within their family, community or nation by identifying placement options.*

### **III. Notice and Aboriginal Community Involvement**

The CFCSA requires the director to give Aboriginal communities notice at several points when one of their child members becomes involved in child welfare proceedings. Notice provides an opportunity for the Aboriginal community to officially appear in Court and become a "party" to the proceedings. Party status allows the Aboriginal community to participate in the court proceedings, to receive information about the child protection concern (disclosure), to speak in Court, to call witnesses, and to participate in case conferences and alternative dispute resolution processes. Participation as a legal party allows the Aboriginal community to advocate for the child's Aboriginal identity and cultural heritage to be taken into account in decisions about supervision, removal, and temporary or continued custody.

In the United States, courts have recognized that notice requirements to Indian tribes under the ICWA recognizes their right to participate in decisions about their child members, and that without notice, Indian tribes could not exercise that right. The heavy purposes

of notice (to trigger tribal involvement) suggest the seriousness with which it should be addressed.<sup>2</sup> A similar seriousness should be assumed in the context of notice and Aboriginal community involvement under the CFCSA.

## **IV. Importance of Early Involvement by Aboriginal Communities**

Aboriginal communities should be encouraged to become involved as early as possible in decision making about their child members. Temporary arrangements quite often become permanent solutions in child welfare matters given the fact that children are likely to become attached to their temporary caregivers: “a temporary order is often the first step in a fairly inexorable march to permanent wardship.”<sup>3</sup> The longer an Aboriginal community remains uninvolved the less likely it is that their involvement will be capable of transforming the outcome for their child members.

In *Dilico Anishinabek Family Care v. M.T.*<sup>4</sup> the Court highlighted the importance of early planning, noting that concerns about addressing a child’s Aboriginal identity and culture are at their “highest point during the period from the child’s apprehension through to the point where the agency caring for the child needs to make permanency planning decisions for the child” as it is here when “the best possible plan for the preservation of a child’s native culture is most critical” and including options such as customary care agreements, extended family or Aboriginal community placements.<sup>5</sup>

The potential for permanency must be at the forefront when making temporary arrangements for children. This suggests the need to involve Aboriginal communities as early as possible. Courts, the director and parents’ counsel can each request this involvement. Temporary care and custody plans have the potential to establish a status quo, which ends up becoming permanent. Repeated extensions of temporary placements may be found to establish bonds between the child and the interim caregiver that Courts may be unwilling to disrupt.

The CFCSA sets very clear time limits on how long a child can remain in the temporary custody of the director. Under s. 45(1), the upper limits of how long a child can remain in temporary care are: “(a) 12 months, if the child or the youngest child who was the subject of the initial order was under 5 years of age on the date of that order, (b) 18 months, if the child or the youngest child who was the subject



of the initial order was 5 years of age or over but under 12 years of age on the date of that order, and (c) 24 months, if the child or the youngest child who was the subject of the initial order was 12 years of age or over on the date of that order.” Under s. 45(1.1) a Court can extend the time limit if it is in the best interests of a child to do so.

There are a number of cases where the outcome of child welfare matters for Aboriginal children is determined not on the merits of a particular case, but rather because parents, grandparents, or the Aboriginal community, have missed deadlines. A delay may reflect a number of things, rather than that an Aboriginal community does not care. An Aboriginal community may not be involved immediately out of respect for the parents’ or family’s efforts to resolve the matter on their own first, or the history of Aboriginal peoples’ past involvement with government institutions may prevent active engagement that might resolve child protection concerns. Aboriginal peoples may not view courts as places of help or justice, but rather as another institution which they did not create, cannot influence, and which has enormous detrimental impact.<sup>6</sup> Early involvement of Aboriginal communities could transform outcomes for Aboriginal children.



**BEST PRACTICE 5.03**

*Aboriginal communities should become involved in the child welfare process as early as possible*

- 1. Even where there is no positive duty on the director to involve the Aboriginal community, the best practice is to seek the intervention of the Aboriginal community as early as possible.*
- 2. Educating Aboriginal communities, Aboriginal parents, as well as director’s and parents’ counsel, and the Court, about the need for, and benefits of, early involvement of Aboriginal communities in CFCSA matters is necessary.*
- 3. Information provided to Aboriginal communities with notice of child welfare matters involving their child members could include steps that they could take or options for involvement.*



## A. Non-Appearance by Aboriginal Communities

It is routine in Aboriginal child protection matters for notice that an Aboriginal child is involved in a CFCSA proceeding to be sent to an Aboriginal community, for no representative of the Aboriginal community to appear, and for the matter to proceed to subsequent stages without involvement of the Aboriginal community. Notification of Aboriginal communities can operate as more of a procedural hurdle rather than a practice that makes any meaningful difference to the operation of the child welfare system for Aboriginal children. At earlier stages of the CFCSA process (such as the presentation stage or at an application for a consented temporary custody order) the director must notify a child's Aboriginal community "if practicable". This wording can allow the director to avoid giving notice to Aboriginal communities at earlier stages. As well, some Aboriginal communities have observed that a time-saving practice may be for the director to say they do not know if a child is Aboriginal, or what their Aboriginal community is, at earlier stages.

*A lack of response to efforts to notify a child's Aboriginal community does not mean the Aboriginal community is not interested or does not care*

A lack of response to efforts to notify a child's Aboriginal community does not mean the Aboriginal community is not interested or does not care. There may be a number of reasons why Aboriginal communities do not respond. Aboriginal communities may:

- Not have received the notice. For example, faxes may not have gone through, or have been brought to the appropriate person's attention;
- Lack the professional, human and financial resources to respond in a timely way or to attend the Court proceedings;
- Not have legal counsel, and instead may send a chief, councilor, social worker, or support worker to attend Court. In some instances, these people may not identify themselves in Court; or
- Face barriers as a result of recent involvement with Residential Schools, and the child welfare system, that might paralyze actions in this area.

In practice, the time between the presentation and protection hearings can be lengthy, with no or little involvement of the child's Aboriginal community until the protection hearing stage. By this time, decisions about placement, access, cultural and other concerns relating to the care of the child have been made. *Racine*-type considerations privileging newly formed attachments over culture may start to be used to lessen the significance of the Aboriginal community's involvement. Consequently, early involvement of Aboriginal communities should always be actively encouraged.





*Aboriginal communities may not have the financial resources to hire a lawyer, and be self-represented in child welfare proceedings*



**BEST PRACTICE 5.04**

*Identifying barriers to Aboriginal community involvement in child welfare proceedings (e.g. resources, personnel, travel) could help Aboriginal communities to be involved in planning for their child members*

1. *Tools available within the CFCSA, Rules and Regulations to address barriers which prevent Aboriginal communities from becoming involved in child welfare include:*
  - *Members of the Aboriginal community or extended family could participate in CFCSA court proceedings by video- or tele-conferencing where they are unable to participate in person: Rule 1(7).*
  - *Matters could be transferred to a Registry closer to the child's home community where this would allow the Aboriginal community, or family members, to take a more active role in planning and participating in the care of the child.*
    - *Under Rule 8(12), a Judge may order the transfer of the file after considering the balance of convenience, any special circumstances that exist, and the best interests of the child. The balance of convenience test requires the judge to consider each party's circumstances. This could include what issues or barriers the community faces that would prevent their active involvement, and why transferring the file is in the child's best interests.*
    - *Alternatively, under Rule 8(13), the parties can consent to the transfer of the file and file a written consent in the Registry where the file is located.*
  - *Matters could be addressed through a traditional dispute resolution process suggested by the Aboriginal community (under s. 22), which is more culturally appropriate and relevant for the child and family.*
  - *A judge may permit an application to be made orally in court, without the filing of a form. The CFCSA proceedings may be informal (s. 66(1)(b) and s. 66(2)) in nature. The best interests of the child are most important. Where an Aboriginal community makes an application, they should be prepared to explain how it is in the child's best interests that they be involved as a party in the proceeding.*



## B. Aboriginal Communities as Self-Represented Litigants

Aboriginal communities may not have the financial resources to hire a lawyer, and this poses challenges to the community, the Court, and to counsel in child protection proceedings. Aboriginal communities may send a chief or council member, a band or community social worker to CFCSA hearings.

A band may send an employee, chief or council member to a child protection hearing under the belief that merely having someone in the courtroom is sufficient to secure standing and participation in the proceedings and at subsequent stages, not making a distinction between having a representative merely attending in court versus making an official appearance.

It is not always clear to Aboriginal communities and lay persons that “appearance” in a legal sense does not simply mean being in the courtroom when a child protection matter is called, but means actively taking part in the proceedings in person, or through a lawyer or agent. Thus, there are times when an Aboriginal community sends a representative to court, but their presence is not officially noted on the record.

*The Director v. C.S. and J.K.*<sup>7</sup> illustrates how an Aboriginal community’s lack of knowledge about court procedure can undermine the band’s role in child protection proceedings. A representative of the Band was in court but did not officially appear. The Court noted that a “representative of the ... Band was present during the hearing, but did not take an active role in the proceeding.”<sup>8</sup> If an Aboriginal community has sent someone to court, it is likely at considerable expense and cost; they are there because the Aboriginal community cares, and wants to contribute in planning for their child members.

Aboriginal communities who send representatives to court in response to notice provided under the CFCSA should be treated as self-represented litigants who need the Court’s assistance to ensure the Aboriginal community’s participation and the child’s rights are fully realized. The Canadian Judicial Council made suggestions about appropriate conduct when dealing with self-represented litigants, which include:<sup>9</sup>

1. Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.
2. Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.

*Disclosure to Aboriginal communities allows a child's community to protect and plan for the safety and well-being of the child*

3. Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.
4. ...Depending on the circumstances and nature of the case, the presiding judge may:
  - a. explain the process;
  - b. inquire whether both parties understand the process and the procedure;
  - c. make referrals to agencies able to assist the litigant in the preparation of the case;
  - d. provide information about the law and evidentiary requirements;
  - e. modify the traditional order of taking evidence; and
  - f. question witnesses.



**BEST PRACTICE 5.05**

*The Court and counsel should make specific inquiries at the start of the hearing if a representative of an Aboriginal community is present*

1. *If an Aboriginal community representative is present, and appearing without a lawyer, they should be treated as a self-represented litigant.*
2. *Where Aboriginal communities appear without legal counsel, they should identify themselves [name/position] and the fact that they are representing the child's Aboriginal community and state clearly that they are self-represented.*

## **C. Confidentiality and Disclosure**

One of the most powerful aspects of an Aboriginal community participating as a full party in child welfare proceedings under the CFCSA is that it provides an opportunity for the Aboriginal community to request, and be provided with, full disclosure about the child protection concerns that must be addressed. Due to the sensitive nature of child protection issues, (including suspected child abuse, neglect and/or exploitation) timely and full disclosure and information sharing



between the director and the child's Aboriginal community is critical to ensure the safety of the child. The CFCSA provides for the protection of confidential information, but allows information to be shared where it is necessary to make or implement an agreement about the child or to ensure the safety of the child or another person.

In the CFCSA, disclosure is possible in a number of ways:

1. Section 64 of the CFCSA requires all parties to a child protection proceeding to make full and timely disclosure before a protection hearing to a party that requests it. The intent of disclosure in s. 64 is to provide parties with evidence of the case they have to meet if the matter goes to a hearing.
2. Under s. 79 the director can disclose information obtained under the CFCSA where necessary to ensure the safety or well-being of a child, or necessary for an alternative dispute resolution process.

*Lack of disclosure can prevent an Aboriginal community from acting to protect their child members*

On a broader and purposive analysis, full disclosure allows parties to protect and plan for the safety and well-being of the child; and for the parties to pursue alternatives to court. Aboriginal communities need disclosure to be able to plan for the safety of children and how best to provide supports and resources in the best interests of the child. Disclosure can be an essential tool allowing for the full participation of the Aboriginal community.

The guiding principles for disclosure in child protection matters were set out in *K. (T.L.)*,<sup>10</sup> including that s. 64 is a "statutory minimum" of disclosure and applies to all parties. Disclosure must be timely. A minimum amount of disclosure may be enough where the director is seeking a minimal amount of interference (e.g. return to parent with supervision, or a 3 month temporary custody order where the director's plan of care is to work with the parent to return the child). Greater disclosure is needed where the director intends to permanently remove the child from the parent, including where the alleged abuse (e.g. physical abuse) is such that the child cannot ever safely be returned to the parents. Director's counsel (and other legal counsel) is responsible for deciding what documents must be disclosed (not the social workers, their supervisors, or parents). Counsel can apply to the Court if necessary to withhold or edit documents. Relevant documents to be disclosed include those that are adverse to the party's interest, and not limited to the party's intended evidence. Disclosure can be "providing the other parties a reasonable and timely opportunity to inspect all documents," and to make copies at their own expense.



The information the director must disclose to the parties includes the social worker's file recordings ("running records") and notes ("black book notes").<sup>11</sup> Disclosure by the director "may be by attendance to the director's office for a review of file materials."<sup>12</sup> The director can edit these documents to protect the confidentiality of informants and privilege, remove information not related to the child, and provide the edited copies to the parents' counsel, who must keep and use the information only for the child protection matter.

A coordinated response with the director working with the Aboriginal community is in the best interests of the Aboriginal child. Not disclosing potentially crucial information could prevent the Aboriginal community from presenting valid options to ensure the child's safety and preserve the child's connections to their extended family and Aboriginal community.



**BEST PRACTICE 5.06**

*Disclosure can allow the Aboriginal community to participate effectively in planning for the safety of Aboriginal children*

- 1. Disclosure can allow the Aboriginal community to participate effectively in planning for the safety of Aboriginal children. The director and the child's Aboriginal community could work together, guided by the Court where necessary, to identify and resolve any concerns about confidentiality and disclosure that would impede a full consideration of the least disruptive measures and services needed to support the child and the family.*
- 2. Disclosure (subject to awareness of confidentiality laws) is essential to ensuring Aboriginal communities can engage in a discussion of what steps are necessary. An Aboriginal community may support the parents' position due to a lack of disclosure and lack of knowledge about the severity of the problem. Participation as a full and effective party by Aboriginal communities requires an honest assessment of parental challenges and capacity and not simply an approach that advocates for the parents.*
- 3. Failing to provide full disclosure can undermine the principles of the CFCSA as it applies to Aboriginal children. Complete confidentiality may place Aboriginal children at higher risk, and prevent the sharing of information that would help their Aboriginal community to keep them safe. Confidentiality concerns should not be used to protect abusers and harm children.*

## V. Presentation Hearing

Under Rule 1(5), once a child is removed, the director must file a presentation form within 7 days in the Registry closest to where the child lives or closest to where the child was taken into care. At a presentation hearing, the Court decides whether there is some evidence that a child is in need of protection. This hearing is designed to ensure that a child is not arbitrarily taken into care.

At the presentation hearing the director must show:

- That the removal was justified;
- That they took the least disruptive actions possible (i.e., that removing the child was the least disruptive action that could be taken in order to protect the child);
- Steps taken to preserve a child's Aboriginal identity in planning for the care of a child; and
- Any less disruptive steps the director considered before removing the child.

In practice, it is common that, after the first appearance, the matter is adjourned for a short period of time (for example, to allow parents to get legal counsel).

Aboriginal community involvement in the time between the first appearance and presentation hearing could provide a culturally appropriate consideration of the protection concerns, and help to plan for the care of the child to ensure that they remain within their extended family or Aboriginal community where this can be done safely. When a child is placed in the interim custody of the director, the director becomes the guardian of the child until another order (for example, a temporary custody order, return with supervision or continuing custody order) is made. Although an interim order is for an initial term of 45 days, this can be extended. At this stage, the parties may seek to explore alternatives, such as mediation, and Aboriginal community involvement could be very important.

Possible outcomes at a presentation hearing include:

1. The child may be returned to their parent(s) with no conditions.
2. An interim (temporary) order might be made placing the child under the custody of the director or other person. Where a child is removed and not remaining with the parents under a supervision order, access to the child is addressed at a presentation hearing, including for parents, grandparents, extended family members, or culturally important people to the child.

*The earliest possible involvement of a child's Aboriginal community can help preserve a child's Aboriginal identity and heritage*



*Aboriginal community  
input could strengthen  
the effectiveness of  
supervision terms*

3. A finding that the child needs protection, and that the child may be returned to their parent(s) under a supervision order. If the director decides that there are some protection concerns, but that a child can remain in the home with supervision (s. 29.1(1)), the director can apply for an interim (temporary) supervision order keeping the child with the parent(s) under the supervision of the director. Section 33.2(1) requires the director to present a written report to the Court about their grounds for seeking the supervision order and an interim plan of care for the child. There is some area of uncertainty about whether courts can merely accept supervision terms proposed by the director or whether courts can dictate supervision terms different from those proposed by the director. While s. 41.1 lists terms the director may recommend, it does not limit supervision terms to those recommended by the director.
4. The Court can make a s. 60 supervision or custody order with the parents' written consent without the finding that a child is in need of protection.

Despite the principles and provisions of the CFCSA about Aboriginal community involvement, the Courts in some cases have interpreted the role of the Aboriginal community at the presentation stage narrowly. In *A.N.G. (Re)*<sup>13</sup> an application by a representative of the Aboriginal community at the presentation hearing was denied. The Court said that the Aboriginal community was entitled to be a party at the protection stage, and could remain in the Court to support the mother, but held that at the presentation hearing the Aboriginal community did "not really have at law a position to make or place before the Court". In other proceedings, Aboriginal communities who appear are routinely added as a party at early stages of CFCSA proceedings. A broad and remedial interpretation of the principles outlined in the CFCSA suggests that the earliest possible involvement of the child's Aboriginal community is contemplated to help plan for, and preserve, the child's Aboriginal identity and heritage.

Where an Aboriginal community is not automatically added as a party after an appearance, they can make an application to be added as a party by asking the judge in court to be added as a party, under the Rules (Rule 1(4)) at a hearing or case conference. An Aboriginal community can also initiate a motion to be added as a party by filing a Form 2 application for an Order (available online or at the Provincial Court Registry).



  
**BEST PRACTICE 5.07**

*Aboriginal communities could make submissions at presentation hearings with the goal of ensuring an Aboriginal child remains connected to their Aboriginal cultural heritage*

- 1. At a presentation hearing, the director is required to show that the least disruptive actions possible were taken (i.e., that removing the child was the least disruptive action that could be taken in order to protect the child), and steps taken to preserve a child's Aboriginal identity. Submissions by Aboriginal communities could speak to these points and present alternatives.*
- 2. Aboriginal communities could strengthen the effectiveness of supervision terms that the director suggests and offer alternatives. Aboriginal communities could:*
  - Do emergency planning with the director and parents for what to do in case of breach of a supervision order, identifying options to address protection concerns while having a child remain within their extended family or community.*
  - Identify where supervision terms are not workable or not likely to ensure a child is protected. For example, it makes no sense for a parenting course or anger management course to be part of a supervision order if there are no locally offered courses. An Aboriginal community could highlight that the courses do not exist locally, and propose separate supports within the community with the same purpose, including traditional parenting classes or elders counseling or mentoring.*
  - Ensure that access visits to the child are addressed as part of the terms of any orders that are made at an interim stage, particularly where the child is placed outside of their community, and/or the community is remote or transportation is likely to be an issue for the extended family or community members who wish to visit the child.*
  - Identify alternate caregivers within the child's Aboriginal community.*
- 3. Aboriginal communities could work with the director where there are reasonable grounds to believe that contact between a child and another person would endanger the child.*
  - The director can seek a protective intervention order (s. 28) which can include a 6 month no contact order prohibiting*



*Efforts to maintain a child's Aboriginal cultural heritage are often generic, reflecting a failure to understand the child's unique cultural identity*

  
**5.07, CON'T**

*a person from living with the child or being in the same dwelling, vehicle or vessel with the child, or a restraining order under s. 98 against a person who the director believes poses a danger to a child. Under the Family Homes on Reserve and Matrimonial Interests or Rights Act, S.C. 2013, c. 20, it is possible for a spouse or third party (including a social worker) to apply for a 90 day Emergency Protection Order forcing a party to vacate a family home on reserve where there is a risk of violence within the family.*

- *An Aboriginal community could exercise its authority (where possible) to ban a person from residing on or entering the Aboriginal community, which could add another layer of protection to the child.*
- *The Aboriginal community could help to ensure there is no contact with the child at cultural or community gatherings.*

## **VI. Plan of Care**

The director must provide the Court with a plan of care when applying for interim supervision and custody orders at presentation and protection hearings. The plan of care must address an Aboriginal child's cultural development and cultural identity in determining their best interests. CFCSA Regulation s. 8(2) outlines the information that must be included in a plan for care for each child, including:

- Whether or not the child's views on the plan of care have been considered;
- The name of the child's Aboriginal community (including treaty first nation or Nisga'a Lisims Government);
- The involvement of the child's Aboriginal community in the development of the plan of care, including its views, if any, on the plan;
- How the director plans to meet the child's need for continuity of relationships, including ongoing contact with parents, relatives and friends, and continuity of cultural heritage, religion, language, and social and recreational activities;
- Steps taken to preserve an Aboriginal child's cultural identity, and to comply with the placement priorities for Aboriginal children under s. 71(3) of the CFCSA which require that they be placed within their extended family, Aboriginal cultural community, or with another Aboriginal family before other options are considered;



- If applying for a continuing custody order, what arrangements are made to meet the child's need for permanent stable relationships; and
- A schedule for the review of the plan of care.

## VII. Proposing an Aboriginal Cultural Preservation Plan

While the CFCSA contains provisions to maintain, preserve and protect a child's Aboriginal cultural identity and heritage, it does not define what that means. All too often considerations of a child's Aboriginal identity or cultural heritage are treated as a procedural hoop (considered and either dismissed or met with simplistic actions) rather than guiding decisions about a child's plan of care. The lifelong importance of Aboriginal culture, identity and belonging may simply not be understood, or may be improperly weighed against an assessment of a child's permanency and attachment needs, and so dismissed.

Efforts to maintain a child's Aboriginal cultural heritage are often generic, reflecting a failure to understand the child's unique cultural identity. Courts have found acceptable efforts to preserve the Aboriginal identity of a child in care as including: attending powwows or cultural activities;<sup>14</sup> internet searches;<sup>15</sup> age-appropriate reading materials;<sup>16</sup> having Aboriginal artwork or artifacts in the foster home,<sup>17</sup> or providing a child with Aboriginal foods.

Pan-Aboriginal daycares, play groups or cultural events should not be read as sufficient to fulfill the legal requirements under the CFCSA, because they do not achieve the benefits that flow from the involvement of the Aboriginal child's community, and do not protect a child's unique Aboriginal identity: "[A] full understanding of one's culture comes through a day to day exposure to it."<sup>18</sup>

...fostering an Aboriginal identity can be a lifelong process. A person learns from what is passed down from generation to generation orally, and through sharing experiences through relatives, friends and community, as well as from geography, language, and other social facts. Within this process, the individual identity is "inseparable" from the collective identity of Aboriginal people. For Aboriginal people, early childhood attachment is to relatives and the community. In western cultures, however, early attachment focuses on the nuclear family.<sup>19</sup>

*Maintaining a child's Aboriginal identity requires connection to their unique Aboriginal cultural community*



Aboriginal identity and heritage is a sense of belonging with cultural, social and historical roots, reflecting membership and affiliations with a particular historic cultural and linguistic group. Maintaining a child's access to, or involvement with, their Aboriginal identity and heritage cannot be achieved through general measures. Maintaining a child's Aboriginal identity and heritage require concrete efforts to maintain or establish relationships to their particular Aboriginal cultural community (for example, a Nlaka'pamux child would require connections to the Nlaka'pamux community).

This Guidebook provides an example of the benefits of, and pathways toward, actively ensuring the involvement of Aboriginal communities in child welfare matters at different stages of the CFCSA process.

For some Aboriginal children, it may be important to attend at cultural gatherings hosted by the child's family, extended family, clan or community where rites of passage and relationships are formalized and recognized (e.g. potlatches, feasts, winter ceremonies, as well as teaching hunting and/or fishing traditions at culturally significant times of the year). Participation at such gatherings may confer rights, solidify relationships and maintain the child's culture, traditions, language and identity.



**BEST PRACTICE 5.08**

*Aboriginal Communities could provide information to assist the Court to make a decision which could include placing a child within that community and the ways that a child could be kept safe within that community; and, identify and present an Aboriginal Cultural Preservation Plan*

*1. An Aboriginal Cultural Preservation Plan could:*

- Identify cultural factors that need to be included in a child's plan of care (including identifying specific steps or opportunities for a child to participate in cultural activities that maintain or establish their connection to their land and culture, such as language classes, gathering activities, spiritual or cultural celebrations, community dinners or sporting events, lahal or other activities);*
- Identify cultural supports or programs to assist the family;*
- Implement community supports to maintain a child's connection with their Aboriginal community and cultural heritage;*



  
**BEST PRACTICE 5.08, CONT**

- *List less disruptive means than removal to keep families together (including culturally-based and appropriate resources within the community);*
- *Identify family or community members that could take care of the child on a temporary basis while the child protection matter is addressed to keep the child within their extended family or cultural community; or, on a permanent basis, if necessary, which would keep the child within their extended family, community, or nation where the parent(s) are unable to address the child protection concern;*
- *Name family or community members that play an important role in the child's life (such as elders or extended family members), together with a proposal for how to maintain those relationships;*
- *Identify a network of people or supports to assist the family in addressing protection concerns, or where it is not possible to restore a family's ability to parent, to assist in keeping a child safe and ensuring that they can grow to adulthood within their culture;*
- *Identify elders, cultural or spiritual supports from within the nation who can work with the child or family within a traditional wellness or healing model; and*
- *Identify alternative or traditional decision making processes—including those based in Aboriginal traditions—that the Aboriginal community may wish to refer the matter to, as allowed under s. 22 of the CFCSA.*

*At the protection hearing Aboriginal communities could make interventions to ensure children maintain their Aboriginal identity and cultural connections*

## VIII. Protection Hearing

The director must serve Notice on the child's Aboriginal community at least 10 days before the date set for the protection hearing, and include a copy of the plan of care proposed and any orders the director is requesting. Under s. 39(1)(c), if the Aboriginal community appears on the first day of the protection hearing, they will be given party status, and are entitled to notice to subsequent hearings (and be a party to those proceedings if they appear), including enforcement of a supervision order; extension of supervision and temporary orders; supervision of a child after a temporary custody order ends; continuing custody hearings and orders; access to the child in interim or temporary custody; changes to supervision, temporary custody and access orders; and appointment of a public guardian and trustee.

At the protection hearing, the Court decides whether or not a child is in need of protection. Permanent custody decisions with long term impacts may be decided at the protection hearing stage. At a protection hearing, Aboriginal communities could make interventions aimed at ensuring that Aboriginal children maintain their Aboriginal identity and cultural connections, including:

1. Identifying and putting in place supports within the community with the aim of helping a family to heal the problems that have led to the child protection concern;
2. Where the parents are unable to safely parent, identifying options that can keep a child safely within their extended family, Aboriginal community or nation; or
3. Identifying options that allow for a longer-term permanency outside of a CCO or adoption. For example, if an Aboriginal-specific process is operating and keeping a child protected and within their family/community or nation, that provides a form of permanency which does not need to be reflected in a CCO or other order.

## **A. Determining Whether a Child is in Need of Protection**

Section 13(1) of the CFCSA sets out the circumstances under which a child will be found to be in need of protection, including where there is evidence or a likelihood that a child will be physically harmed or sexually abused or exploited by the parent or another person, a parent is unwilling or unable to protect the child (for example, where the parent puts the child at risk through exposure to family violence, or unsafe conditions or people), and conditions of neglect, deprivation, emotional harm or failing to provide medical care.

Making a determination about whether a child is in need of protection involves multiple considerations. Courts must be “careful to avoid parent-shopping” in determining if a child is in need of protection. The question is not whether the children “might be better off, or happier, or obtain a better upbringing in the care of other ‘parents’ than with their natural parents. If that were the criterion for a protection order, not many children would remain with their natural parents.”<sup>20</sup>



**BEST PRACTICE 5.09**

*The Aboriginal community could assist in assessing child protection concerns in a culturally sensitive way*

- 1. The Aboriginal community can help to assess child protection concerns in a culturally sensitive way, and identify any stereotypes, or false assumptions, that may be reflected in the consideration of a child's risk. Defining the risks that a child faces with regard to cultural factors, requires asking:*
  - How removing an Aboriginal child from their cultural connections may endanger them over the long term;*
  - How cultural factors may insulate an Aboriginal child against identified risks; and*
  - How false assumptions about Aboriginal cultures or parenting styles may be influencing a determination that a child is at risk.*

### *Case Study: Choosing Traditional Medicine for a Child's Care*

*Hamilton Health Sciences Corp. v. D.H.*<sup>21</sup> concerned an application brought by a hospital concerning a young child, a member of the Six Nations of the Grand River, who has leukemia. Her mom elected to treat her with traditional medicines, and refused chemotherapy. The hospital brought a motion, seeking to force child welfare authorities to intervene, declare that the child was in need of protection, and force the child into chemotherapy. The mother was found to be a loving parent, but the hospital alleged that the decision to discontinue chemotherapy in favour of traditional Aboriginal medicines made the child a child in need of protection.

The band intervened in support of the mother, and argued for a s. 35(1) right. The Court investigated whether the Six Nations of the Grand River had a practice—constitutionally protected—of using traditional medicine, ultimately finding, “traditional medicine continues to be practiced on Six Nations as it was prior to European contact and, in this court's view, there is no question it forms an integral part of who the Six Nations are.”<sup>22</sup> Ultimately the Court concluded that it could not find the child to be “in need of protection when her substitute decision-maker [her mother] has chosen to exercise her constitutionally protected right to pursue their traditional medicine over the [hospital's] stated course of treatment of chemotherapy.”<sup>23</sup> *Hamilton Health Sciences* illustrates how the intervention of the Aboriginal community helped to provide a culturally sensitive

assessment of cultural practices and whether or not a child was in need of protection.

At a protection hearing, a court can order that a child:

1. Does not need protection and should be returned to their parent, and any interim orders about the child be terminated;
2. Remain with their parent(s) under supervision of the director;
3. Be placed in custody of a person other than their parent under supervision of the director;
4. Be placed in custody of the director for a specified period of time (also known as a “last chance order”) (either to another person or to the director). An order, made under s. 49(7)(b) or (c), may occur where a parent is addressing protection concerns but has reached the time limit for how long a child can remain in temporary care of the director under the CFCSA. Rather than issuing a CCO, the Court may issue a further extension of the time the children can be in care to give the parent a “last chance” to address protection concerns and potentially regain custody of their child. To grant a last chance order, the Court must be satisfied that “sufficient progress has been made” toward addressing the child protection concerns - “[g]ood intentions are not enough and there has to be some demonstrated basis for a determination that [the parent] is able to parent the child without endangering her safety. There is not to be experimentation with a child’s life with the result that in giving the parents another chance, the child would have one less chance;”<sup>24</sup> or
5. Be placed in the continuing custody of the director (“CCO”). A CCO has the legal impact of putting the child in the permanent care of the director. Section 41(2) contemplates a CCO where a parent cannot be found, is unable or unwilling to resume custody of the child, or the nature and extent of the harm the child has suffered, or likelihood that they will suffer such harm, indicates it is in the child’s best interest to not be returned to their parent. Section 49 contemplates a CCO at the end of a temporary custody order where there is no significant likelihood that the circumstances that lead to the child’s removal will improve, or that the parent will be able to meet the child’s needs. *British Columbia (Director of Family & Child Services) v. W.(D.)*<sup>25</sup> set out the test for granting a CCO

*Practically speaking, the importance of Aboriginal cultural heritage does not abate over time*

under the criteria in s. 49 as being: “whether there is a significant likelihood that the circumstances that lead to the children’s removal will improve within a reasonable time. The test is not whether there is a possibility of change, but whether there is a probability.”<sup>26</sup>

## **B. Judicial Notice of the Long Term Impacts on Aboriginal Child Raised in Care**

Judicial notice refers to the approach of going outside the record of the case and taking judicial notice of facts that are important to a decision in the case. Judicial notice is usually confined to facts that are considered to be uncontroversial and well known within the community. In *R. v. Williams*,<sup>27</sup> *R. v. Ipeelee*,<sup>28</sup> and *R. v. Gladue*,<sup>29</sup> the Supreme Court of Canada directed an approach which takes judicial notice of systemic racism and barriers that Aboriginal peoples face.

Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. ... [T]he threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.<sup>30</sup>

The interest of an Aboriginal child in maintaining and fostering their connections to their Aboriginal culture and heritage over their lifetime must be considered in an assessment of their best interests. In *H.(D) v. M.(H.)* the BC Court of Appeal observed the “considerable history of unsuccessful outcomes” of the adoption of Aboriginal children into non-Aboriginal families.<sup>31</sup> Contrary to the analysis of the Supreme Court of Canada in *Racine*, practically speaking, the importance of Aboriginal cultural heritage does not abate over time; evidence suggests that it becomes increasingly important. Outcomes for children in care are not positive. Children in care are less likely to graduate, and more likely to end up in prison, to have their own children taken into care, or to experience unemployment, substance abuse or suicide.<sup>32</sup>

*C.M.B. v. Ministry for Children and Families*<sup>33</sup> concerned an appeal from a decision dismissing an application to cancel a CCO. An Aboriginal mom, raised by non-Aboriginal adoptive parents, sought to cancel the CCO. Self-represented, her submissions were:

*Asking about the impacts on children of being raised in care could re-orient the discussion of protection concerns for Aboriginal children by focusing on protecting a child over the course of their lives*





*Under the limitation periods that are set out in the CFCSA in a relatively short period of time, decisions are often made to permanently sever a child's relationship with their parents, extended family and Aboriginal community*

The Ministry of Social Services took me from my mother at birth on the 9 day of March 1975 and sentenced to me a life without an identity. This is an identity that I searched for twenty years until I returned to my family 3 years ago. All I ask is for the courts to look at my daughter's future and see that being placed back with myself or my biological mother A.H. and her spouse J.S. will open many doors for L.B. ... I have already faced prejudices in Bella Coola because I am different (I was raised white) though maybe not fair this is reality. This is something that I want to prevent in my daughter's life.<sup>34</sup>

Asking about the impacts on children of being raised in care could re-orient the discussion of protection concerns for Aboriginal children by focusing on protecting a child over the course of their lives. "A court should ... consider not only what is best for the child immediately, but also whether the disposition ... will also serve the child's long-term interests."<sup>35</sup> Assessing protection concerns in the immediate timeframe, without asking what the mid- to long-term impacts of removing a child from their families and Aboriginal community(ies) is, may have devastating impacts for a child.

A forward looking principle, sometimes referred to as a "seventh generation" principle, asks what the impacts of our actions and decisions today will be into the future. Asking what the impacts of a particular child protection decision are in the long term, such as to remove a child from their parents and put them into care, requires a consideration of what will happen to a child over the course of their life, and in the lives of their children and descendants, and not merely during the immediate future. The CFCSA limitation periods allow a relatively short period of time for decisions to be made to permanently sever a child's relationship with their parents under the rationale that this will create permanency for that child. From a long-term perspective, when an Aboriginal child is put into care, and their ties to their birth family and culture are severed, these children often age out of care with no replacement connections.

An analysis of the best interests of Aboriginal children must consider the long-term impact on children of actions ostensibly taken to address immediate protection concerns. The long-term outcomes of children raised in care continue to be very poor, including the risk of low education attainment,<sup>36</sup> higher risks of street involvement and drug use,<sup>37</sup> and contact with the criminal justice system. Aboriginal children spend longer in care than non-Aboriginal children, "if a



...[CCO] has been granted, Aboriginal children are more likely to “age-out” of care than their non-Aboriginal counterparts, without being adopted or entering other out-of-care arrangements,”<sup>38</sup> and Aboriginal youth represented only 6% of all youth in BC, but in, in 2008–2009 represented: 27% of youth remanded, 36% of youth admitted to sentenced custody, and 24% of youth admitted to probation.<sup>39</sup> Aboriginal children’s best interests rest with their community and their psychological integrity and well-being are seriously impacted by the disruption of that relationship. Interference with those relationships last over a child’s lifetime and could forever foreclose a lifetime of cultural connections and belonging, denying the child access over their lifetime to a rich cultural and spiritual tradition.

*From a long-term perspective, when an Aboriginal child is put into care, and their ties to their extended family and Aboriginal culture are severed, these children often age out of care with no replacement connections*



**BEST PRACTICE 5.10**

*Courts could take judicial notice of the long-term negative outcomes for Aboriginal children raised in care*

- 1. Courts could take judicial notice of the long-term negative outcomes for Aboriginal children raised in care. The best interests of Aboriginal children should be assessed to ensure that their long term well-being is not sacrificed for short term safety. An appropriate consideration of an Aboriginal child’s best interests must consider their safety in the immediate term, and into the future. Maintaining and fostering a child’s connection to their Aboriginal culture and identity has a better chance of protecting a child in the long term and ensuring a better life outcome.*

## IX. Exploring Permanency Alternatives

The experience of children raised within the child welfare system has shown that long term stability does not result from an approach which puts attachments to foster or adoptive parents—which can, and often do, change over time, or are experienced differently by different children—before permanency expressed through maintaining lifelong connections to Aboriginal culture, community and extended family.

[T]here is ... considerable evidence demonstrating that removing Indigenous children from their homes in large numbers ... is making things worse, not better, for both Indigenous children and their communities. While removal may be the best option in some cases, research ... shows that in-home support would be a far better response than removal for



*The balanced approach suggested in this Guidebook seeks to ensure both attachment and cultural connection for Aboriginal children over their lifetime*

most Indigenous children. In all cases, it needs to be recognized that separated Indigenous children face substantial new threats in 'the system'. They tend to experience a lack of permanence, feelings of not belonging and not being loved, and are sometimes exposed to further abuse. Additionally, Indigenous children removed from their families are usually removed from their culture, causing additional anxiety and loss, and rupturing the transmission of Indigenous culture and identity from generation to generation.<sup>40</sup>

Under the limitation periods that are set out in the CFCSA in a relatively short period of time, decisions are often made to permanently sever a child's relationship with their parents, extended family and Aboriginal community, under the rationale that this will create permanency for that child. Justice Ryan-Froslic in *J.B.B. (Re)* expressed the importance of timely action when Aboriginal children come into care:

[W]hen children are apprehended, they cannot wait indefinitely for their parents to make changes to their lives. With every passing day, with every move, the risk of emotional, physical and psychological damage to them increases. Parents have a choice. They can take steps to address the issues which led to the apprehension of their children. The system has a choice. It determines the supports and resources it offers to both the parents and the children and until a final resolution is reached, it determines the placement of the children. The Band can choose to offer cultural experiences and they have a choice what resources to pursue. The children have no choice.

All children need stability. A child's view of time is very different from that of adults. The younger a child is, the greater the need to quickly ensure a stable long-term placement to avoid emotional and psychological damage.<sup>41</sup>

Currently, removing a child from parents who cannot safely parent them often means removing them from their extended family, Aboriginal culture and community, for the mid- to long-term. To guarantee short term safety and permanence, children are put at longer term and serious risk. Adoptions or long-term foster arrangements for Aboriginal children often break down, and so what appears to be a "permanent" arrangement for Aboriginal children is often not: "adoption of native children by non-native families is a major



issue and more often than not, there is a break down in the adoption in the early teenage years of the adopted child.”<sup>42</sup> From a long-term perspective, when an Aboriginal child is put into care, and their ties to their extended family and Aboriginal culture are severed, these children often age out of care with no replacement connections. They are left, at the end of a process meant to protect them, radically isolated.

Efforts to keep Aboriginal children connected to their Aboriginal cultural heritage, or to preserve their Aboriginal identities, often fail because they occur too late, or reflect an “either/or” scenario which does not consider possibilities which might allow children to remain in homes where they have formed attachments and still be actively connected to their Aboriginal cultural heritage. For example:

- *T.E. v. Alberta (Child, Youth and Family Enhancement Act, Director)*<sup>43</sup>—the Court considered a case where two children were removed from a foster home that they had lived in for a long time, and were attached to the foster mom who made efforts to keep them connected to their Aboriginal culture, to place them in their home community. The Court found that the Aboriginal agency’s plan was “overly aggressive and singularly focused on restoring these children to their Aboriginal community of origin ... at the expense of all other important considerations.” The Court objected to a “position that blindly follows policy” over a consideration of the best interests of the child.
- *Saskatchewan (Social Services) v. L.B.*<sup>44</sup>—a child was in care from 2 months to nearly 6 years of age, at which time her Aboriginal grandmother sought custody. An expert recommended that the child maintain contact with her extended family, noting that not taking culture into consideration “could have devastating consequences, causing resentment in the child, without knowledge of where she came from.”<sup>45</sup> The Court found it must consider all factors in a child’s best interest, not merely culture. Culture does not “supercede all other factors which the Court must take into account” and rejected a “dogmatic approach intent on realizing an equity adjustment for historic wrongs and discrimination.”<sup>46</sup>
- *Wpg. Child and Family Services v. M.A. et al.*<sup>47</sup>—an Aboriginal agency and the band refused placements which would have adopted a young Aboriginal child into a non-Aboriginal home, though they offered no permanent alternative for her. The Court found that the end result of the policy is that “the child is being held hostage by a child welfare system that has put its own political interests and expediencies ahead of her best interests.”<sup>48</sup>



*Aboriginal communities can facilitate solutions that allow for both permanency of placement and ongoing connection to a child's Aboriginal culture and heritage*

This is a case about an Aboriginal child who is being denied her right to a permanent, secure family because the Aboriginal agency and the band's community committee have vetoed any such placement. The reason for the veto arises from a desire to stop the removal of Aboriginal children from their cultural heritage. While a laudable goal, its dogmatic application is counterproductive and unfair. The tragedy in this case is that the best plan for the child, which would see her placed with a permanent family, has been rejected for historical and political reasons that have nothing to do with her case.<sup>49</sup>

- *T.E. v Alberta (Director of Child Welfare)*<sup>50</sup>—the Court considered a plan to move children from a settled foster home to an Aboriginal placement and found that “the needs of children supercede policy considerations,” noting “children are not widgets who can simply be moved from one column to another on a balance sheet.”<sup>51</sup>

## **A. Ensuring both Attachments and Cultural Continuity**

The balanced approach suggested in this Guidebook seeks to ensure *both* attachment and cultural connection for Aboriginal children. Making decisions “either/or” (“either” Aboriginal identity and culture “or” attachment and security) without meaningfully exploring options of working collaboratively with a child's Aboriginal community denies possibilities which would allow children to be permanently placed (certainly there is a higher likelihood of identifying Aboriginal placements with the active involvement of Aboriginal communities—but no matter where a child is placed) while also maintaining and fostering their connections to their Aboriginal families, culture and heritage. Aboriginal communities could be instrumental in achieving arrangements that allow for permanency of placements while maintaining a child's Aboriginal identity and cultural heritage.

In cases where Aboriginal children have been placed with foster or prospective adoptive parents over a long period, a wrongful assumption persists that the only solution is one which chooses either permanency through a foster or adoptive family, or severs that connection in favour of preserving Aboriginal culture and heritage. Aboriginal communities can facilitate solutions that allow for both permanency of placement and ongoing and meaningful connection to a child's Aboriginal culture and heritage.



When the potential repercussion of leaving a child alone as they reach adulthood is assessed, it requires different decisions about permanency in a child's life by recognizing broader parenting practices or distributed responsibility within the child's Aboriginal community. A broader approach to finding permanency for Aboriginal children is required that explores models based in Aboriginal laws (such as customary adoption, extended family care and guardianship situations where the birth parents or family maintain an ongoing set of obligations and relations with the adoptive family, and so forth) rather than requiring a complete severance of parental rights, Aboriginal community connections and placing of children into a foster care system.<sup>52</sup>

The potential repercussions of leaving a child isolated and alone as they reach adulthood, illustrate why different decisions are required: "cutting peoples off from their cultures and histories has a devastating impact upon the self, dividing peoples from 'the wealth of experience and reflection that constitutes the language in which we understand ourselves in the world.'"<sup>53</sup> Permanency options that keep Aboriginal children actively and meaningfully involved with their Aboriginal communities and extended family are needed. Expanding and reorienting notions of permanency could ensure stability and safety over a child's lifetime.

In the United States, the federal government "acknowledges that a Tribe's traditional and/or customary adoptions, without termination of parental rights, are an acceptable permanency option,"<sup>54</sup> allowing arrangements of distributive parenting and shared responsibility.<sup>55</sup>

Customary care is an important strategy for avoiding the cultural displacement experienced by First Nations children separated from their families, extended families and communities. While customary care can be generally understood as a traditional approach to caring for children through extended family members in ways that are grounded in the traditions, values and customs of the community ... this concept is more comprehensive in nature in the sense that it is care that extends throughout the life-cycle from birth to death. Customary care is not merely about alternative care arrangements; it is a way of life that ensures natural cultural resiliency and promotes positive cultural identity by way of language, clan and family.<sup>56</sup>

The CFCSA contains provisions which allow for recognition of alternative permanency solutions, including through the Extended Family

*Under s. 56 of the CFCSA a parent or any other person can apply for access to a child who is the subject of a CCO*

Program (formerly Kith and Kin agreements) or a permanent transfer of custody before or after a CCO is entered. These arrangements may allow for families or other caregivers to enter agreements for some level of financial support or assistance from the director. Collaborative planning with the Aboriginal community provides the best hope of reaching a resolution, which maintains a child's Aboriginal identity and connection to their cultural heritage over their lifetime, in the context of a continuing custody order.



### **BEST PRACTICE 5.11**

*A fluid approach is required to finding permanency for Aboriginal children that explores models based in Aboriginal laws*

*1. A fluid approach to finding permanency for Aboriginal children is required that explores models based in Aboriginal laws, and provides permanency solutions for children while maintaining their Aboriginal identity, culture and community connections. Options include:*

- *Customary adoption;*
- *Extended family care and guardianship situations where the birth parents or family maintain an ongoing set of obligations and relations with the adoptive family rather than requiring a complete severance of parental rights and connection to Aboriginal community and extended family;*
- *Broader and extensive supports to enable parenting where Aboriginal parents cannot safely parent on their own;*
- *Parenting solutions which reflect Aboriginal ways of caring for children across several families or homes, providing permanency by recognizing shared parenting practices or distributed responsibility amongst a community or extended family.*

## **X. After a CCO has been Granted**

### **A. Access**

Under s. 56 of the CFCSA, a parent or any other person can apply for access to a child who is the subject of a CCO, and this would include the child's grandparents and extended family members. In deciding if the parent or another person should have access to the child, the Court must find that access "(a) is in the child's best interests, (b) is consistent with the plan of care, and (c) is consistent with the wishes of the child, if 12 years of age or over." Granting access to parents after a CCO is "the exception rather than the norm, although in recent



years such access is becoming more common.”<sup>57</sup> In determining whether to grant post-CCO access, the child’s interests will be considered ahead of the parent’s and “[i]f adoption is more important than access for the welfare of the child and would be jeopardized if a right of access were exercised, access should not be granted.”<sup>58</sup>

In *Children’s Aid Society of Owen Sound and Grey County v. P. (C.)*<sup>59</sup> the Court granted an application terminating parental access because such access interferes with adoption options: “a child should have an opportunity to be a full member of a family,” and “there can be no placement for adoption if there are outstanding access orders.”<sup>60</sup> The presumption that Aboriginal children (especially those not burdened by parental or family access orders) will be adopted is not necessarily true. The presumption is contrary to the actual lived experience of Aboriginal children subject to a CCO, many of whom are not adopted, and far more likely to age out of the system.

*Once in care,  
Aboriginal children  
are likely to remain  
in care until they age  
out of the system*

[T]he court has been asked to find that that anything interfering with adoption for an Indian or native child should not be seen as an impediment to a permanent placement because the court should recognize that, *for Indian and native children, foster care is an appropriate form of permanency placement.* Although the [Act] recognizes special interests of Indian and native children, it does not support the premise that they should have less rights. A decision that finds that placement in foster homes (whether on the reserve or not) is good enough as permanency planning for some children because of their cultural heritage, is not in their best interests.<sup>61</sup>

In *New Brunswick (Minister of Health and Community Services) v. L.(M)*,<sup>62</sup> the Supreme Court of Canada noted that the right of access is a right of the child and not the parents after a CCO has been granted:

Parents have rights in order that they may fulfil their obligations towards their children. When they are relieved of all of their obligations, they lose the corresponding rights, including the right of access. After a permanent guardianship order is made, access is a right that belongs to the child, and not to the parents.

*Reference re Child Welfare Act*<sup>63</sup> concerned an appeal of a decision of the trial judge to grant access to the Aboriginal grandmother and mother after a CCO had been granted. The Alberta Court of Appeal



*Implementing a traditional or custom adoption once a child is the subject of an ongoing child protection concern requires working with the director who has the legal responsibility—having taken a child into care—to ensure their safety*

upheld the decision of the trial judge, made, in part, on the understanding that maintaining contact with his Aboriginal heritage was beneficial to the child (“the child is of Indian ancestry and is being raised in a white home. He expressed the view that the child, as he grew, should have some happy exposure to the native community and culture.”)<sup>64</sup> The Alberta Court of Appeal found that the “child is a member of a visible minority. He must, some day, adjust to that fact. It is a fair and respectable point of view that that adjustment will be made easier if he has grown up in happy acquaintanceship with the native community and the native culture.”<sup>65</sup>



#### **BEST PRACTICE 5.12**

*Aboriginal communities could work with parents, extended family or community members to apply for access to children currently under a continuing custody order*

- 1. Aboriginal communities could work with parents, extended family or community members to apply for access to children currently under a continuing custody order under s. 56. This could involve:*
  - Developing a plan which would establish or maintain cultural connection of Aboriginal children with their cultural community; or*
  - A plan for reunification of the child to their parents, extended family or Aboriginal cultural community where possible.*

## **B. Custom Adoption, Adoption or Alternatives to Permanency**

Under s. 80 of the *Adoption Act*, financial assistance is only available where the director has placed a child for adoption. Parties will have to be aware of this if seeking to create permanent solutions for Aboriginal children by customary adoptions. In *Prince & Julian v. HMTQ et al*,<sup>66</sup> the BC Supreme Court set out factors necessary for a finding that an Aboriginal custom adoption has occurred, where parties seek a declaration:

1. Consent of natural and adopting parents;
2. Voluntarily placement with the adopting parents;
3. That the adopting parents are Aboriginal or entitled to rely on Aboriginal custom;



4. That the rationale for Aboriginal custom adoptions is present (there is a recognized reason within the scope of the custom, whether it be to provide for children without parents, or otherwise, for the adoption to take place);
5. The relationship created by custom must be understood to create fundamentally the same relationship as that resulting from an adoption order under provincial adoption legislation.

If a transfer of custody occurs under s. 54.1 of the CFCSA, a custom adoption could follow and still leave an adopting family eligible for financial assistance.

Permanency placements through custom adoption are very common in Aboriginal cultures.<sup>67</sup> However, implementing a traditional or custom adoption once a child is the subject of an ongoing child protection concern requires working with the director who has the legal responsibility—having taken a child into care—to ensure their safety. Though a custom adoption may be valid under Aboriginal law, legal recognition may require an application for recognition in Provincial Court, or an application to the federal government that a custom adoption has occurred and is recognized under the *Indian Act*.

Justice Ryan-Froslic said in *R.T. (Re)*:<sup>68</sup>

... Adoption and the ability of children to maintain their culture are not mutually exclusive objectives. There is no reason why children cannot have a permanent, stable and loving home through adoption and still be guaranteed a connection with their community and cultural roots. This is so even if a child has no extended family or community resources and the adoption is with a non-Aboriginal family. ...<sup>69</sup>

Under s. 54.1, the director can apply *after* a CCO is granted to transfer permanent custody of a child to another person if the CCO was entered by consent, or the 30 days limitation period set out in s. 81 (Appeals to the Supreme Court) has expired, or all appeals have been exhausted. The director must notify the child's Aboriginal community and anyone who has access to the child of the hearing, time, date and place.

Once a CCO has been granted, children are eligible to be placed for adoption. Whether a child will be adopted depends upon the policy in place within different agencies. Most Aboriginal children in care in BC age out of care without being adopted.<sup>70</sup> Nonetheless,

*Once a CCO has been granted, children are eligible to be placed for adoption*



the director often uses the possibility of adoption (and fact that the need to maintain a continuing connection with a child's family will hinder an adoption) to limit the access of a child's family after a CCO has been granted.

These materials do not generally discuss the *Adoption Act*. They are solely concerned with the CFCSA. The *Adoption Act* requires notification of a child's Aboriginal community when an adoption is contemplated, and efforts to involve the Aboriginal community in proposed adoption placements.<sup>71</sup>

## C. Cancelling a CCO

Section 54 allows a party to a CCO proceeding to apply to the Court to cancel a CCO "if circumstances that caused the court to make the order have changed significantly" or to receive notice if another party makes an application to cancel the continuing custody order. Only a party to a child protection proceeding can apply to cancel (set aside) a continuing custody order. Parties include the parents and, where an Aboriginal community appeared at the continuing custody hearing, the Aboriginal community. Leave (permission of the Court) is required to even ask for a CCO to be set aside, and that will only be granted where "the circumstances that caused the court to make the order have changed significantly".

*N. P. v. British Columbia (Director of Child, Family and Community Services)*,<sup>72</sup> was a case where the applicants (uncle and aunt) sought to cancel a CCO for three Aboriginal children. While they were unsuccessful in having the CCO cancelled, as the trial judge was not convinced that the children would be safe with the applicants full-time, she granted access under s. 56 and Rules 6(3)(c) and 8(2), which included "at least one month in the summer", "at least half of the spring break holiday", "one-half of every Christmas holiday", "other access in Mackenzie or in Fort Ware, at the expense of the director" and "telephone access at the expense of the director."

## XI. Appeal

Matters decided by a Provincial Court (court that hears CFCSA matters) can be appealed to the BC Supreme Court within 30 days (s. 81). Decisions of the BC Supreme Court can be appealed to the BC Court of Appeal, on a matter of law, but require leave (permission) of the BC Court of Appeal. Under s. 66(2) of the CFCSA no order may be set aside because of any informality at the hearing or for any other technical reason not affecting the merits of the case."<sup>73</sup>



## **XII. Representative of Children and Youth**

*The Representative for Children and Youth Act (RCYA)*<sup>74</sup> creates the position of Representative for Children and Youth who has the power to review programs or services or initiate an investigation, of services offered under the CFCSA. The RCY can advocate for children, and review or investigate services provided to children. The scope of this review would include the ability to investigate whether services were being provided as required under the CFCSA to Aboriginal children, or to assist Aboriginal children in advocating for themselves. This could include advocating to make certain that the provisions of the CFCSA preserving a child's Aboriginal identity and cultural heritage are honoured.



## Endnotes

---

1. Part 2 of the CFCSA lists several types of voluntary agreements: Support Services Agreements; Voluntary Care Agreements; Special Needs Agreements; Extended Family Program (Formerly Kith and Kin Agreements); and Agreements with Youth or Young Adults.
2. *Re C.I.*, 491 Mich. 81, 82 (2012).
3. G. M. Thomson, "Judging Judiciously in Child Protection Cases", in R. S. Abella and C. L'Heureux-Dubé, eds., *Family Law: Dimensions of Justice* (1983), 213, at p. 233, cited at para. 121 of *New Brunswick concurring judgment*. In *New Brunswick*, the Court noted that "generally speaking, the longer the separation of parent from child, the less likely it is that the parent will ever regain custody."
4. 2010 ONCJ 105 (CanLII) [Dilico].
5. *Dilico* at paras. 31-32.
6. See, for example: *Sarich, Walkem, LSS, and St. Lewis*.
7. 2007 BCPC 19 (CanLII) [C.S. and J.K.].
8. *C.S. and J.K.* para. 4.
9. Canadian Judicial Council, *Statement of Principles on Self-Represented Litigants and Accused Persons*, September 2006, at 2-5.
10. [1996] B.C.J. No. 2554; reaffirmed in 2013 in *Director v. K.S.*
11. *Re A.L.S.*, [1996] B.C.J. No. 2668 (Prov. Ct.).
12. *Director v. K.S.*, at para. 34.
13. 1996 BCPC 1 (CanLII).
14. *A. [...]*, at para. 53.
15. *H.(D) v. M.(H.)*, at para. 25.
16. *D.C.W.*, at para. 51.
17. *A. [...]*, at para. 53.
18. *M.(R.) No. 2*, at para. 39.
19. *Smith* at 309-310.
20. *Saskatchewan (Minister of Social Services) v. S.E. and E.E.*, [1992] 5 W.W.R. 289 (Sask. U.F.C.), at para. 296.
21. 2014 ONCJ 603 (CanLII) [Hamilton Health Sciences].
22. *Hamilton Health Sciences* at para. 79.
23. *Hamilton Health Sciences* at para. 83.
24. *CAS v. L.T. and R.S.* 2013 ONSC 6512 (CanLII), *CAS* at paras. 33-35. In that case, the mother had addressed the protection concerns, including by finding safe, affordable housing; becoming an active participant at the Native Friendship Centre; she attended access visits regularly; she found daycare that could address her child's special needs; she has separated from the father; she worked cooperatively with the Society and community service providers to acquire basic skills, and attends counseling and parenting courses.
25. 2002 BCPC 616 (B.C. Prov. Ct.).
26. *Kirwin* at 6-11.
27. [1998] 1 S.C.R. 1128.
28. 2012 SCC 13, [2012] 1 S.C.R. 433.
29. 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688.
30. *R. v. Find*, 2001 SCC 32.
31. At para. 16.
32. *Turpel-Lafond, M.E.*, Representative for Children and Youth. "Aboriginal Children, Human Rights as a lens to break the intergenerational legacy of Residential Schools." Submission to the Truth and Reconciliation Commission of Canada (July 2012).
33. 2000 BCSC 774 (CanLII) [C.M.B.].
34. *C.M.B.*, at para. 4.
35. *Twaddle J.A. in Child and Family Services of Winnipeg (East) v. K.A.D. et al*, [1995] M.J. No. 178; *Man.R. (2d)* 262, at paras. 27 and 33.
36. Ministry of Children and Family Development [MCFD]: *Educational Experiences of Children Under a Continuing Custody Order*. Victoria: Ministry of Children and Family Development; 2012.
37. *Research Report for Bio Med Central Ltd.*, 2014



(Contributors Barker, Kerr, Alfred, Fortin, Nguyen, Wood, DeBeck), "High prevalence of exposure to the child welfare system among street-involved youth in a Canadian setting: implications for policy and practice," *BMC Public Health* 2014, 14:197. Electronic copy: <http://www.biomedcentral.com/1471-2458/14/197> [Bio Med].

38. *Bio Med* at 11.
39. Calverley, D., Cotter, A., & Halla, E. 2010. "Youth custody and community services in Canada — 2008/2009," *Juristat* 30(1). Ottawa, ON: Statistics Canada.
40. *Indigenous children* at 69. [References omitted]
41. 2008 SKQB 419 (CanLII) at paras. 169-171.
42. C.D.R1. and C.D.R2. v. *Native Child and Family Services of Toronto* 2007 CFSRB 20 (CanLII) at para. 19.
43. 2013 ABPC 265 (CanLII) [T.E.], at paras. 65 and 67.
44. 2009 SKQB 46 [L.B.].
45. L.B. at para. 95.
46. L.B. at para. 103.
47. 2002 MBQB 209 [M.A.].
48. M.A. at para. 2.
49. M.A. at para. 1.
50. T.E. at para. 78.
51. T.E. at para. 78.
52. See for example: Atwood, B. "Permanency for American Indian and Alaska Native Foster Children: Taking Lessons from Tribes" (2009) *Capital U.L.R. Arizona Legal Studies Discussion Paper No. 08-22*, and Macdonald, K. "Customary Adoption in British Columbia: Recognizing the Fundamental Differences" (2009) 14 *Appeal: Rev. Current L. Reform* 17.
53. Lynch citing J. Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in *Canadian Royal Commission on Aboriginal Peoples, Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: RCAP. 1993).
54. *Minnesota ICWA* at 35-16.
55. Customary care arrangements reflect Aboriginal traditions and enable a child to maintain their cultural and social ties. Sections 57(4) and 57(5) of the *Ontario Child and Family Services Act* contemplate customary care agreements: "this form of family or community placement is not intended to be foster care. The offer to assist a child in this way would seem to be expected to arise from a sense of connection to the child: family, community or band. ... Although there are not the tight lines limiting the length of supervision, some courts have recognized that, for the child's sake, there needs to be some long-term planning. This often takes the form of a custody order with limiting access terms where appropriate." (P.C.), at para. 23.
56. Ferris, P., Simard, E., Simard, G. and Ramdatt, J. "Weechi-it-te-win Family Services: Utilizing a Decentralized Model in the Provision of Bi-Cultural Services" (2005, *Promising Practices in First Nations Child Welfare Management and Governance Series, First Nations Child and Family Caring Society of Canada*).
57. *Kirwin*, at 6-12.
58. *Kirwin*, at 6-11, citing *New Brunswick*.
59. 2004 ONCJ 453 (CanLII) [P.(C.)]
60. P.(C.), at para. 37.
61. P.(C.), at para. 42.
62. [1998] 2 S.C.R. 534 [New Brunswick], at para. 17.
63. 1984 ABCA 28 (CanLII) [Reference re *Child Welfare Act* (Alta)].
64. *Reference re Child Welfare Act* (Alta), at para. 44.
65. *Reference re Child Welfare Act* (Alta), at para. 45.
66. 2000 BCSC 1066 (CanLII). The first four factors were originally listed in *Re Tagornak Adoption Petition* [1984] 1 C.N.L.R. 185 (N.W.T.S.) and the final factor was originally listed in *B.C. Birth Registration No 1994-09-040399, Re*, 1998 CanLII 5839 (BCSC) [paraphrased].
67. See *Casimel* for example.
68. 2004 SKQB 503 (CanLII), [R.T. (Re)].
69. R.T. (Re) at para. 104.
70. Turpel-Lafond, Mary Ellen. "Some Thoughts on Inclusion and Innovation in the Saskatchewan Justice System" (2005) 68 *Sask. L. Rev.* 293.



## WRAPPING OUR WAYS AROUND THEM:

Aboriginal Communities and the CFCSA Guidebook

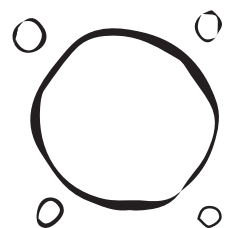
71. *Olthuis, Kleer, Townshend LLP, Aboriginal Law Handbook (4th) (2012, Thomson Reuters Canada Ltd., Toronto) at 349 [References omitted.]*

72. *1999 CanLII 6514 (BCSC), at para. 30 citing the decision of the trial judge.*

73. *Kirwin at 8-10.*

74. *SBC 2006, Ch. 29.*

# 06. Traditional and Alternative Dispute Resolution Mechanisms







## 06. Traditional and Alternative Dispute Resolution Mechanisms

The CFCSA provides opportunities for Aboriginal community participation within alternative decision-making processes. Options including mediation, family group conferences or case conferences are cooperative planning mechanisms to resolve child protection concerns outside of Court. Participation by Aboriginal communities in alternative dispute resolution processes could be an effective way for Aboriginal communities to participate in planning for their child members.

*Joint decision-making, incorporating Aboriginal legal orders can change outcomes for Aboriginal children*

Joint decision-making, which incorporates Aboriginal legal orders, has the potential to change outcomes for Aboriginal children by building a cooperative – rather than adversarial – approach that involves the child’s extended family and Aboriginal community in making decisions. The success of alternative dispute resolution processes, and the degree to which they are able to reflect Aboriginal values in the outcomes, depends upon the willingness of the parties to explore the strengths and supports within the child’s culture and community, and to listen in new ways to Aboriginal communities.

### I. Cooperative Planning and Alternative Dispute Resolution

Cooperative planning and alternatives to court have become a common practice in child protection disputes. Active participation of Aboriginal communities within these processes provides an opportunity for Aboriginal ways of considering child protection concerns and culturally appropriate solutions to be addressed.



*A family group conference (FGC) provides an opportunity for the Aboriginal community to plan for the care of children*

## A. Case Conferences

At the commencement of a protection hearing, the Rules (Rule 2) require that a case conference must be directed unless the matter is resolved by consent. Parties can also request a case conference at other times in the child protection process. At a case conference the judge can:

- Attempt to resolve issues and can facilitate the resolution of any issues in dispute, other than the issue of whether the child needs protection;
- With the consent of the parties, refer any issue, other than the issue of whether a child needs protection, to mediation or other alternative dispute resolution mechanism under s. 22 (this would include traditional Aboriginal dispute resolutions);
- Give a non-binding opinion on the probable outcome of a hearing;
- Address outstanding procedural issues between the parties (for example, whether adequate disclosure has been provided); or
- Give other directions for the fair and efficient resolution of the issues.

Aboriginal communities could request that traditional decision-making practice be incorporated into the case conference to consider the Aboriginal child's culture, community, and identity, as well as short and long-term care options. As case conferences are presided over by a judge, there is a greater chance that the parties, including the director, will act in good faith and be more willing to listen and consider alternatives presented.

## B. Family Group Conference

A family group conference (FGC) provides an opportunity for the Aboriginal community to plan for the care of children. Family members and others who care and concern for a child are invited to talk about concerns and encouraged to reach a plan together for how to address these concerns. The child's social worker usually attends to review the FGC's proposed care plan and to ensure it addresses the director's child protection concerns. The FGC is promoted as a shared decision-making process that provides parents and caregivers, extended family and the child's Aboriginal community, an opportunity to come together in an informal setting to develop a plan for the child.



FGCs may suffer from disclosure constraints, leading serious child abuse issues to be un- or under-examined, and so prevent the development of a comprehensive safety plan for the child, further frustrating relationships between the parties, extended family, community and the director. While the director's staff may summarize the child protection concerns, key information necessary to address the child protection concerns may not be shared. Aboriginal communities can request full disclosure by consent or, if consent is not possible, under s. 79(a), where required to ensure a child's safety.

*FGCs are family focused and so may not adequately reflect an Aboriginal community's role and perspective*

While FGCs are envisioned as a way to involve extended families and potentially communities in the planning for the child, and may be successful for some matters, they often do not ensure the broader community or nation participation necessary to care for Aboriginal children.<sup>1</sup> The director has ultimate authority to approve a plan. The FGC is family focused and may not adequately reflect an Aboriginal community's sense of shared responsibility beyond the immediate family.

## C. Mediation

Section 22 of the CFCSA allows the parties to try to settle issues in dispute through mediation or other dispute resolution mechanisms. Any party can request mediation at any time where the parties are trying to work out an agreement regarding the safety of the children. A mediator is a neutral third party who guides the discussion between the parties (parents, other family members, Aboriginal community representatives, the director, and usually the lawyers for the parents and director). The role of the mediator is to address the power imbalance between the parties, and to try to create a safe place and process for discussions to occur. With some exceptions, information that is shared or gained within mediation cannot be used in Court.

Benefits of mediation include the possibility of transforming the relationships between the parties and of building a cooperative approach toward caring for children and families, which provides an opportunity for different parties to share their perspectives and to offer solutions in a non-adversarial environment where a mediator can help to ensure a fair discussion. A successful mediation may allow the parties to identify misunderstandings, resolve issues more quickly, and assist in realigning the relationships between the parties. A limitation of mediation under the CFCSA is that there are matters that cannot be mediated. For example, the decision about



*Benefits of mediation include the possibility of transforming the relationships between the parties and of building a cooperative approach toward caring for children and families*

whether a child is in need of protection is not open for discussion and this can be frustrating for parents or community members who think that this is something that can and should be discussed.

Mediation's success depends on the willingness of the parties to participate, and on the skills of the mediator. Aboriginal communities have raised concern that the child protection mediation roster is not always culturally relevant for the needs of Aboriginal children from their particular communities. While mediators with experience dealing with Aboriginal child welfare issues are necessary, the mediator must also have knowledge and sensitivity with the particular Aboriginal community's own unique traditions, practices, and laws. Mediators may not know or be able to reflect Aboriginal values or ways of making decisions, and so these may not be reflected in the mediation process.



**BEST PRACTICES 6.01**

*Aboriginal community participation in alternative or traditional dispute resolution processes can ensure the child's right to their Aboriginal identity and cultural heritage are central to any protection proceedings and planning*

1. *Aboriginal community participation in case conferences provide an opportunity to actively plan for child members and encourage discussions to resolve issues based on the provisions of the CFCSA which protect a child's Aboriginal identity and cultural heritage.*
2. *Aboriginal community participation in the FGC can help to increase the cultural safety of the family and open new pathways of dialogue.*
3. *Aboriginal communities could actively participate in mediation processes, or seek to have mediation processes amended to reflect the cultural values and requirements of the community. Mediation can provide an opportunity for Aboriginal communities to participate in dialogue and joint decision-making regarding their child members.*
  - *Aboriginal communities could be invited to identify any concerns about a mediator's appointment and what can be done to overcome any real or perceived deficits or gaps in knowledge.*



6.01, CON'T

- *The Aboriginal community could identify a mediator with specific knowledge about the child's Aboriginal culture, traditions, and community, or identify individuals trained within the child's culture and traditions to be appointed as co-mediators.*
- *If the Aboriginal community finds that there are no culturally acceptable mediators to them on the roster, mediation may not be a desired option, and traditional dispute resolution mechanisms based in Aboriginal culture should be considered.*

## II. Aboriginal Traditional Decision-Making Process

Solutions within the area of child welfare law must combine the being and the becoming:<sup>2</sup> to find a way to combine the present-day reality in which Aboriginal children, family and communities and nations exist within Canadian law and legal practices while reaching forward and back to Aboriginal legal orders, making space for their present day formulations. Solutions in the area of child welfare must be transformative, reflecting a state of flux, which recalls and re-establishes Aboriginal traditions and laws, while aware of the road-blocks and the opportunities presented by Canadian law.

Traditional decision-making processes provide a promising opportunity within the CFCSA for genuine Aboriginal community involvement in considering the child's best interests and rights to protection, care, community and identity.

The CFCSA allows for "other alternative dispute resolution mechanism[s]" than those listed in the CFCSA to resolve issues relating to children and families. Traditional Aboriginal dispute resolution processes, based on Aboriginal culture and traditions, would be an "other dispute resolution mechanism". Aboriginal dispute resolution mechanisms may provide a cooperative, rather than an adversarial lens, through which to explore solutions in child welfare matters. Section 22 allows the director and any person to explore mediation or other alternative dispute resolution mechanisms, which includes traditional dispute resolution processes: "If a director and any person are unable to resolve an issue relating to the child or a plan of care, the director and the person may agree to mediation or other alternative dispute resolution mechanisms as a means of resolving the issue." Section 23 allows a judge to adjourn/suspend a child protection matter for up to 3 months once an alternate dispute resolution process is engaged to attempt to resolve issues without going to court.



*The goal of the ShchEma-mee.tkt Project is to reinvigorate Nlaka'pamux traditions to involve communities to protect and keep children safe*

## **A. Case Study: ShchEma-mee.tkt (Our Children) Project**

The ShchEma-mee.tkt (“Our Children”) Project is a project of three communities (Lytton, Skuppah and Oregon Jack Creek) within the Nlaka’pamux Nation that advances Nlaka’pamux ways to work with children and families involved, or at risk of becoming involved, in the child welfare system. The goal of the ShchEma-mee.tkt Project is to reinvigorate Nlaka’pamux traditions to involve communities to protect and keep children safe while intervening in the CFCSA process as a legal party and applying s. 22 to have matters referred to the ShchEma-mee.tkt Project’s Circle of Care and Accountability Process.

To address child protection issues, matters are referred to a Circle of Care and Accountability process. A separate Circle of Care and Accountability is formed at the community level so that family and community strengths are called together to help children, including in an emergency response model that empowers the community to act quickly when a child is in danger. The NkshAytkn Community Team (NCT) is a response team, trained with knowledge of the modern monsters and challenges that Aboriginal people face such as historical trauma and the intergenerational impacts of involvement in the Indian Residential School and Child Welfare systems; substance abuse; sexual abuse; violence; special needs (FASD, disabilities, mental health issues); and erosion of traditional parenting and spiritual knowledge. Members of the NCT also sit as part of individual Circles.

The Circle of Care and Accountability process brings together parents (and counsel), extended family, the director (and counsel), community members, Nation representatives (and counsel), elders, and NCT members in an ongoing decision-making forum that operates until the child protection concerns are resolved.

Decisions made by the Circles are reflected in voluntary agreements or consent orders. The Circle of Care and Accountability (unlike mediation) continues to meet on a regular basis until the child protection concern is resolved. A Circle could conceivably meet over the course of years if this was required to keep a child safe. Each member of the Circle has responsibilities and it is a way of spreading the responsibility for keeping a child safe to the extended family and community rather than just with the parents.



## B. Case Study: Opikinawasowin

In *D.(J.) (Re)*,<sup>3</sup> Justice Wright proposed a hybrid process, incorporating features of the parents' Cree and Métis heritages, (finding authority for this novel approach in sections of Saskatchewan's *The Child and Family Services Act*,<sup>4</sup> and ordered that an Aboriginal form of community decision-making—an Opikinawasowin—be used in a child protection matter.<sup>5</sup>

3. With the approval of R.P. and H.D., Saskatchewan Justice shall arrange for three traditional Elders from across the province to form a council of Elders that will preside over the Opikinawasowin, on a date and time acceptable to the Elders. At least one Elder is to be Metis, in recognition of the importance of Metis culture to the P. family. At least one Elder is to be Cree, in recognition of the importance of Cree traditions to the D. family. Although Elders from Onion Lake First Nation [the mom's home community] may be invited to attend the Opikinawasowin, no Elder from that community shall be asked to sit on the council.

4. Saskatchewan Justice shall provide the three Elders forming the council with appropriate instruction on the general legislative framework of The Child and Family Services Act. This instruction is to be a minimum of six hours in length, non case specific, and must occur before the Opikinawasowin commences.

5. ... [T]he Department of Community Resources and Employment shall be responsible for any costs that may reasonably be incurred by the Elders ...

12. The Elders shall preside over the Opikinawasowin, and direct the proceedings, including the manner of participation by attendees. The Elders may request opening and closing prayers, purification processes or the inclusion of any other rituals consistent with traditional customs, in any manner that they deem appropriate.

13. The Elders shall permit legal counsel for the Department and for the parents to be present throughout the Opikinawasowin, other than during deliberations by the council alone.

*The Opikinawasowin reflected a hybrid process, incorporating features of Cree and Métis heritages, and Saskatchewan law*





*Although the Opikinawasowin was ordered by a Provincial Court judge, under the provincial child welfare law, the elders set the process*

14. The Opikinawasowin shall last as long as the council of Elders deems necessary, but it shall be concluded on or before July 3, 2003 at 5 p.m.

15. Within 7 days from conclusion of the Opikinawasowin, the council of Elders shall submit written recommendations to the Court of Queen's Bench, Family Law Division, regarding their recommendations ... These recommendations shall be accompanied by written reasons that support the recommendation... Alternatively, with the approval of the Court, one or more Elders shall appear in Chambers and provide this information orally.

19. The recommendation from the Opikinawasowin shall be given careful judicial deference, however, it is subject to the residual jurisdiction of the Court of Queen's Bench, and the parties may appeal any order to the Court of Appeal, subject to the provisions in The Child and Family Services Act.

In this case, the Elders of the Cree and Métis nations (forming the Opikinawasowin) were to consider the matter and make recommendations to the Court about how to resolve the matter. The Court said that this process was in the best interests of the children because:

An Opikinawasowin ...[utilizes] a hybrid of alternative methods including negotiation, mediation and adjudication, while ensuring that the court maintains its supervisory jurisdiction to ensure that the outcome complies with the legislation and is in the best interests of the child. Broad participation by the family, professionals working with the family, extended family and the community, under the control and direction of a council of Elders, is consistent with the concept of restorative justice embraced in the criminal justice system in Aboriginal communities. It has the potential to address child protection concerns in a manner more responsive to the needs of the large number of Aboriginal families appearing in this court together with the possibility that the outcome will be more effective and legitimate to those most directly affected. The children involved can only benefit from a resolution that is both non-adversarial and more culturally significant.

Although the Opikinawasowin was ordered by a Provincial Court judge, under the provincial child welfare law, the process was left to the elders to set. The elders were asked to consider the principles of



the provincial child welfare Act in making their decision (the judge ordered that a one-day course in the principles of the Act be offered to them). The Opikinawasowin made recommendations to the judge about what to do, but the judge made the final decision about which recommendations to accept, reject, or modify.



**BEST PRACTICE 6.02**

*Aboriginal communities could seek to have their own traditional dispute resolution processes used to address child protection concerns under the CFCSA*

- 1. Consistent with the guiding principles and s. 22 of the CFCSA, where an Aboriginal child's community or family identifies or requests it, traditional dispute resolution mechanisms and decision-making processes could be used to plan for Aboriginal children.*
- There are options to propose mechanisms that blend traditional decision-making processes with other strands of ADR (such as the family group conference, mediation and/or arbitration) to create a model that involves Aboriginal elders, community and family members, if appropriate, the child, working together with the director, and legal counsel.*
- For many Aboriginal communities, their traditional practices draw on different people, experiences and approaches to create a plan to ensure the well-being and continued connection of their children, families, people, lands, and resources, and can be amended to work within the CFCSA process as a way of bringing Aboriginal ways and traditions into decision-making about Aboriginal children.*
- Adapting alternative dispute resolution models could be a vehicle for developing an Aboriginal traditional decision-making model that reflects Aboriginal child and family wellness and could ultimately mature into a stand-alone process, including adjudication falling under the jurisdiction of Aboriginal laws and legal orders.*

### **III. New or Parallel Judicial Institutions**

Aboriginal peoples cannot continue to be unwilling consumers of child welfare services imposed by the state. New or parallel judicial institutions are necessary. To be effective, transformation requires allowing for true participation of Aboriginal communities, and changes in the way that the process of child welfare is carried out. Aboriginal laws and ways of doing things must be incorporated.



*Aboriginal child  
welfare courts could  
be transformative*

Aboriginal lawyers and judges are likewise necessary. Though far from perfect, the process of mutual recognition and stated goal of mutual decision-making which respects the autonomy of Aboriginal peoples and with the aim of preserving Aboriginal cultural identity tied to lands and resources, as outlined in s. 35 jurisprudence in cases such as *Sparrow* and *Haida*, offers hope in the area of child welfare.<sup>6</sup>

## **A. Restorative Justice or a Therapeutic Aboriginal CFCSA Courts**

In Canada, “problem solving courts” attempt to address legal problems in a holistic and healing rather than adversarial manner. The First Nations Courts in New Westminster, North Vancouver, Duncan and Kamloops, the *Gladue* (Aboriginal Persons) Court in Toronto, and the Tsuu T’ina Peacemaker Court in Alberta, operate on a restorative justice model that takes into account an Aboriginal offenders individual, family and community background in sentencing.

These models are built on principles of restorative or therapeutic justice with the goal of correcting and healing, and so offer a greater chance of innovative solutions shaped by healing principles. Within these flexible models efforts have been made to identify opportunities to reflect the values and ways of doing things of the Aboriginal community who participates. These courts often focus on healing plans that put in place community or nation-based supports that are necessary to correct behaviours including establishing and accessing services and relationships within the Aboriginal community. Restorative or therapeutic justice courts which address CFCSA matters—reflecting Aboriginal communities and healing principles—could be transformative.

Aboriginal child welfare courts (similar to the *Gladue* sentencing courts) offer the opportunity to develop innovative solutions that incorporate Aboriginal values, ways of making decisions and healing.



## Section 104 Tribunal

Under s. 104, the Lieutenant Governor in Council may make regulations “(a) for the purpose of establishing, as a pilot project, a tribunal ... and enabling the tribunal to act under this Act in that area in place of the court, (b) governing the powers, duties, functions and rules of procedure of the tribunal and the effect of its decisions, (c) governing appeals from the tribunal’s decisions, and (d) modifying, or making an exception to, any requirement of this Act to the extent necessary to enable the tribunal to act under this Act in place of the court.”

The Province has the power currently to take steps within the CFCSA framework to recognize parallel Aboriginal legal institutions to apply to the area of Aboriginal children and families.



### BEST PRACTICE 6.03

*Aboriginal parallel legal institutions and judges are needed*

- 1. The appointment of Aboriginal judges to the bench who apply Canadian law while incorporating Aboriginal principles and ways of considering or making decisions could expand and transform notions of justice in child welfare matters. In the longer term, this could potentially include the appointment of judges who are tasked to apply Aboriginal legal principles to cases coming before them.*
- 2. The establishment of Aboriginal parallel judicial institutions could transform the situation for Aboriginal children, families and communities. Options for the recognition of Aboriginal parallel judicial institutions include:*
  - Aboriginal CFCSA courts (similar to the Gladue/First Nations sentencing courts already in operation) which implement the CFCSA provisions in a culturally sensitive and appropriate way. This could include having Aboriginal people involved at all level of the process (bench; directors, parents and children’s counsel; specific efforts to involve Aboriginal communities in matters concerning their child members; a process which has its purpose healing and restoration).*
  - Creation of a Tribunal under s. 104 of the CFCSA. The Province could enact enabling legislation for the establishment of a community-based decision making model in place of the Courts to resolve specific child and family issues. Such*

  
**BEST PRACTICE 6.03, CON'T**

*tribunals—created in close collaboration with different Aboriginal communities or nations—could reflect Aboriginal ways and cultural practices and be culturally relevant to specific Aboriginal peoples. The Province could exercise this power to establish an administrative tribunal specifically for Aboriginal child welfare or to establish a pilot project that the CFCSA contemplates to increase the use of an ADR system that could reduce the high numbers of Aboriginal child welfare matters in the courts, and as part of an access to justice initiative based on the CFCSA’s guiding principles.*

- *Options for parallel legal institutions within the framework of Aboriginal legal orders where – perhaps by protocol or agreement between Aboriginal peoples and the Crown – decisions are respected across jurisdictions. In some cases this could involve an Aboriginal group passing its own child welfare laws, that would apply to the child or family irrespective of residence on or off reserve, and which envisions the judicial and administrative institutions necessary to carry out that legislative scheme.*

## **B. Invitation to Start the Journey toward a Transformative Approach**

An examination of colonial history that Aboriginal peoples have been subject to, which has led to the high rates of Aboriginal children embroiled in the child welfare system, shows that the root of the problem is the disruption of Aboriginal communities, families, and legal orders. Turning legal attention to healing this wound requires acknowledging how the problem came about (denial of Aboriginal jurisdiction) and then crafting a solution (healing through restoration of Aboriginal jurisdiction). This healing is necessary to make a better future for Aboriginal children, families, communities, and society as a whole.



## Endnotes

---

1. In New Zealand, legislation was passed to recognize a family-centred approach through family group conferencing. While the extended family clans or descent group and tribe are recognized in principle, the Family group conference provisions specifically mention the extended family, but not the clans or tribe. In the result, they have not been successful in incorporating or reflecting that broader view consistently in planning for the care of children, and the number of Indigenous Maori children in care has continued to rise [See: <http://www.nzfamilies.org.nz/web/maori-children-whanau/mauri-oracultural-identity.html>]. (The family group conferencing outlined in this model was subsequently imported to Canada.)

2. This section is adapted from Walkem, Ardith. "Indigenous Laws in the Area of Children and Families: Transformative Possibilities of Recognition" (Continuing Legal Education Society of British Columbia Conference: Indigenous Legal Orders and the Common Law, Vancouver, November 2012).

3. *Re D(J)*, [2003] 4 C.N.L.R. 1 2003 SKQB 309.

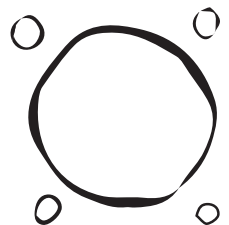
4. *S.S. (1989-90)*, c. C-7.2).

5. "Opikinawasowin" is a Cree word, which literally translated, means "the lifting up of the children" or "holding the children in high esteem" and is the name given by a Métis Elder and pipe carrier to a traditional method of dispute resolution. An Opikinawasowin requires the family, the extended family and others from the community to appear before a council of Elders, often three in number, who are regarded within their community as the "guardians of the society's history and the repository of its collective wisdom".

6. *Haida Nation v. B.C. (Ministry of Forests)* [2004] 3 S.C.R. 511.



# 07. Best Practices Recommendations









## 07. Best Practices Recommendations



### **BEST PRACTICE 1.01**

---

*A transformative and remedial approach to involving Aboriginal communities in child welfare matters is required*

- 1. A transformative and remedial approach involving Aboriginal communities in child welfare matters under the CFCSA is required which:*
  - Reflects a belief that Aboriginal laws and community approaches to achieving safety and permanency can shift the legal ground and improve outcomes for Aboriginal children;*
  - Places obligations on members of the extended Aboriginal community to take positive actions in a process that mirrors the requirements within many Aboriginal legal systems and so have a higher likelihood of success; and*
  - Invites the Court, child welfare agencies, parents and Aboriginal communities to work together to ensure that the interests of children are protected and placed at the centre of decision-making, by recognizing an active voice for Aboriginal communities and creating space for Aboriginal ways of making decisions.*



### **BEST PRACTICE 1.02**

---

*Early and active interventions in CFCSA matters by Aboriginal communities is required*

- 1. Early and active interventions by Aboriginal communities when child members first become involved in the child welfare system is required and could make a real difference in the future of Aboriginal children and communities.*
- 2. A distributed sense of responsibility which recognizes that people live in community, and that our actions—or inactions—impact others now and into the future, means that Aboriginal communities have a strong interest in acting now to protect their child members.*

### **BEST PRACTICE 1.03**

---

*A remedial and purposive approach to interpreting the CFCSA to protect a child's Aboriginal identity and heritage and involving Aboriginal communities is necessary*

- 1. Highlighting the remedial purposes of the CFCSA provisions that involve Aboriginal communities could breathe life into these provisions so that they are brought to bear in a real and meaningful way in judicial decisions about the lives of Aboriginal children.*
- 2. Effective legal problem solving requires acknowledging and confronting biases and false assumptions about Aboriginal cultures or parenting which result in Aboriginal children being disproportionately removed from their families and communities.*

### **BEST PRACTICE 1.04**

---

*The director should make active interventions to involve Aboriginal communities*

- 1. The director should make active interventions to implement CFCSA provisions involving Aboriginal communities based on the understanding that a child's Aboriginal community is in the best position to preserve a child's Aboriginal cultural identity and heritage, and that this involvement can lead to better and lasting resolutions for Aboriginal children.*

### **BEST PRACTICE 1.05**

---

*Parents' counsel can actively seek the involvement of a child's Aboriginal community*

- 1. Parents' counsel can actively seek the involvement of a child's Aboriginal community in CFCSA matters. Aboriginal communities may be able to provide supports to help parents heal. If parents cannot restore their ability to safely parent, a child's Aboriginal community can identify permanency options that can keep parents involved in their child's life and ensure that the children maintain or develop connections to their Aboriginal culture and identity.*



## **BEST PRACTICE 1.06**

---

*Creating a better future for Aboriginal children requires acknowledging and addressing the impacts of colonization and historic trauma that Aboriginal peoples have been subject to*

- 1. Creating a better future for Aboriginal children requires acknowledging and addressing the colonization and historic trauma that Aboriginal peoples have been subject to, and which continues in decisions made under the CFCSA today. Colonial endeavors, such as denial of Aboriginal title and laws; legislation and policies meant to attack and diminish the role of Aboriginal women; Residential Schools; and the child welfare system, continue to be reflected in the overrepresentation of Aboriginal children within the child welfare system.*

## **BEST PRACTICE 2.01**

---

*Aboriginal self-government rights in the area of child welfare exist*

- 1. The family-specific and statutorily driven nature of CFCSA matters makes it difficult to have s. 35 Aboriginal self-government rights in child welfare recognized absent a prior agreement or court declaration. This difficulty should not be taken to mean that an Aboriginal child (who shares in Aboriginal rights and is equally entitled to benefit from them) cannot benefit from them absent a declaration.*
  - Exploring options to have Aboriginal ways respected within the limits of the forum of the CFCSA is necessary for the well-being of Aboriginal children.*
  - Actively listening to, and incorporating, the Aboriginal community's voice and input is one way to ensure some measure of consideration.*
- 2. Aboriginal communities who wish to rely on s. 35 rights could:*
  - Pass their own child welfare legislation based on their Aboriginal legal orders and traditions (relying on their s. 35 rights and also international law to support their assertion) with a view to supplanting all aspects of provincial child welfare laws relating to their Aboriginal children;*
  - Enter into separate agreements or Protocols with provincial and federal governments that recognize the community's s. 35 rights in child welfare, and commitment to work collaboratively to implement the transition to Aboriginal laws and legal orders in this area; or*
  - Bring a separate court case seeking a declaration of those rights.*

## **BEST PRACTICE 2.02**

---

*Treaties, band bylaws and intergovernmental agreements may influence the interpretation or operation of the CFCSA with respect to some Aboriginal children*

- 1. Treaties, band bylaws and intergovernmental agreements should be reviewed by all parties (director, Aboriginal communities, counsel for parents or children) as they may influence the interpretation of the CFCSA with respect to some Aboriginal children.*
- 2. Children who are members of, or entitled to be enrolled under, a treaty may have a different set of laws or policies that apply to them.*
- 3. Children who are members of the Spallumcheen (Splatsin) Indian Band are subject to that Band's Bylaw Respecting Indian Children whether they live on or off reserve, and that Bylaw gives jurisdiction to the Chief and Council of the Splatsin on child welfare matters.*
- 4. Where an Aboriginal community has negotiated an MOU or Protocol with the Province, that agreement may set out specific steps the parties have agreed to follow.*

## **BEST PRACTICE 2.03**

---

*Interpretive principles set out in the UNDRIP and UNCRC should guide an analysis of the CFCSA*

- 1. Incorporation of International standards to interpret the CFCSA suggests:*
  - Positive duties and obligations on Courts, the director, and Aboriginal communities to make active efforts to maintain Aboriginal children's identity and cultural heritage;*
  - Active measures are required to involve the child's Aboriginal community in planning to protect and maintain an Aboriginal child's cultural identity and heritage.*
- 2. The UNDRIP recognizes that the ability to pass the laws, traditions, and language fundamental to cultural survival to Aboriginal children are protected as an incidence of Aboriginal peoples' human rights. Courts should be conscious of this fact when entertaining submissions by Aboriginal communities under the CFCSA.*



3. *The UNCRC recognizes the child’s right to be heard; the CFCSA requires that a child over the age of 12 be notified and given an opportunity to be heard in matters that impact them. These sections provide an opportunity to examine an Aboriginal child’s own opinions on staying connected to their Aboriginal culture and heritage. Courts should require that these investigations be made, and Aboriginal communities could help assist in this conversation.*
- *Courts can ask whether the Aboriginal child was invited to attend the hearing or to provide testimony in some other way, to give evidence of their views about their Aboriginal heritage and culture and the need to preserve those connections;*
  - *An advocate from the child’s own Aboriginal community could be identified to help them articulate their wishes, and children are likewise entitled to legal representation where required to have their voice heard.*



### **BEST PRACTICE 3.01**

---

*Child protection concerns must be assessed in a culturally appropriate way*

1. *Aboriginal communities should be involved in assessing child protection concerns in a culturally appropriate way. Aboriginal communities could identify where protection concerns stem from cultural differences and should not be read to indicate that a child is in need of protection. For example, leaving children with grandparents or extended family members, or keeping a child from school to attend important cultural or harvesting activities, may reflect cultural practices rather than neglect.*



### **BEST PRACTICE 3.02**

---

*A blood quantum definition of Aboriginal identity should be rejected*

1. *A blood quantum definition of Aboriginal identity should be rejected in the application of the CFCSA. That a child has a non-Aboriginal parent or heritage does not make them “less Aboriginal”. Where a child is of mixed parentage, to accord the Aboriginal identity of that child less weight, and so to overlook the ways citizenship and belonging form part of Aboriginal cultural identity, should be avoided.*

### **BEST PRACTICE 3.03**

---

*A frozen rights approach to defining Aboriginal culture or identity should be rejected*

- 1. The child welfare system should not further penalize Aboriginal peoples for the impacts of colonialism (such as loss of language, culture or increased urbanization). Decisions of a Court in child welfare proceedings should not further isolate Aboriginal children from their Aboriginal cultural community.*
- 2. Off-reserve Aboriginal parents and children live in circumstances which may bring them into contact with child welfare agencies in significantly greater numbers than non-Aboriginal families. The urban Aboriginal experience, though different from the on-reserve experience, should not be assumed to be devoid of culture and tradition, and a frozen rights approach to defining Aboriginal culture or identity should be rejected.*
- 3. Where a parent was raised in the child welfare system or isolated from their community through Residential Schools or other reasons, or a child was born and partially raised away from their home community, active efforts may be required to build connections to an Aboriginal community to establish permanency and stability for a child. The absence of connection to an Aboriginal community may be a key factor leading to protection concerns.*

### **BEST PRACTICE 3.04**

---

*In assessing child protection concerns for Aboriginal children and families, determine where these concerns reflect poverty rather than actual safety concerns*

- 1. In assessing child protection concerns for Aboriginal children and families, determine where these concerns reflect poverty rather than actual safety concerns. Factors that may reflect poverty rather than neglect or not caring include: overcrowding; a child not having their own room or bed; a child not having seasonally appropriate clothing; a family not having fresh or nutritious food available; or, parents or extended family not calling or attending at access visits regularly (where transportation or telephone access is limited due to financial concerns).*



### **BEST PRACTICE 3.05**

---

*Parent or child disabilities should not be used to find that a child cannot be cared for within their Aboriginal community*

- 1. Decisions about where to place a child with a disability must include a full consideration of the range of individual, family, and community support available within Aboriginal communities that can provide safety and connectedness for the child.*
- 2. Before determining if a child needs to be removed due to a protection concern, in the case of a parent with confirmed or suspected FASD or other disability, the child's Aboriginal community should be actively involved in an exploration about whether there are support or supervision options which would allow the family to remain together. Support agreements between the director and Aboriginal community could help families who need additional support because of parent or child disabilities to remain together.*

### **BEST PRACTICE 3.06**

---

*Past history should not be used to invalidate care by Aboriginal caregivers*

- 1. Aboriginal caregivers' ability to safely protect and care for Aboriginal children should be assessed in a fair and equitable way in each situation, taking into account how people have transformed their lives.*
- 2. Given the history of colonization and historic trauma that Aboriginal peoples have experienced, many prospective caregivers may have histories (of substance abuse, crime, involvement in the child welfare system and so forth) that they have had to work hard to overcome. This history should not be automatically used to disqualify them as caregivers.*

### **BEST PRACTICE 3.07**

---

*All parties to a child welfare proceeding involving an Aboriginal child should start with the presumption that there is a mutually beneficial (non-adversarial) relationship between an Aboriginal community and their child members*

- 1. All parties to a child welfare proceeding involving an Aboriginal child should start with the presumption that there is a mutually beneficial (non-adversarial)*





*relationship between an Aboriginal community and their child members. An approach which sees Aboriginal communities as having a quasi-parental relationship with their child members, and a mutual interest in protecting the best interests of their child members and their collective future, would be helpful in understanding the relationship of Aboriginal children and their communities.*



### **BEST PRACTICE 3.08**

---

*Involvement of Aboriginal communities in child protection matters should not be diminished or dismissed as “political”*

- 1. Involvement of Aboriginal communities in child protection matters should not be diminished or dismissed as “political”. An Aboriginal community can be motivated to take political and legal actions due to genuine care and concern for Aboriginal children.*



### **BEST PRACTICE 3.09**

---

*That Aboriginal community representatives or family members express distrust of the child welfare system or its participants should not be used as a justification to ignore, disqualify or diminish their input*

- 1. That Aboriginal community representatives or family members express distrust of the child welfare system or its participants should not be used as a justification to ignore, disqualify or diminish their input.*
- 2. There are times when Aboriginal distrust of the child welfare process is a normal, appropriate and rational response to systemic racism, and may reflect intergenerational trauma expressed by the Aboriginal communities.*



### **BEST PRACTICE 3.10**

---

*Assessing each child protection situation through the lens of Aboriginal laws—and asking what the legal standard and practice would be under Aboriginal law—could be a powerful tool for protecting Aboriginal children*

- 1. Assessing each child protection situation through the lens of Aboriginal laws—and asking what the legal standard and practice would be under Aboriginal law —could be a powerful tool for protecting Aboriginal children.*



2. *Advocating for a child within the context of Aboriginal laws may mean advocating that a child remain within their nation or community, but not with their parents or extended family if they cannot safely care for them.*
3. *Aboriginal communities must honestly examine in each case whether there is a real child protection concern rather than rejecting outright any intervention.*
4. *Asking Aboriginal communities how their perspective is different from that of the parent(s) may be useful to focus the discussion on the best interests of the child and the protection concerns. An Aboriginal community may support the parents' position because they do not want more of their child members lost to the child welfare system, and may not have considered other options to keep a child either within the community or actively connected through participation in community activities, events and practices. Engaging in a conversation with the Aboriginal community can help to highlight their actual position in child welfare matters.*



### **BEST PRACTICE 3.11**

---

*Efforts to positively consider Aboriginal identity and cultural heritage are required*

1. *Efforts to positively consider Aboriginal identity, cultural heritage and the benefits to Aboriginal children of the active involvement of their Aboriginal community could include:*
  - *Identifying systemic barriers that Aboriginal parents, caregivers or communities may face and a plan for how to address those.*
  - *Involving the Aboriginal community in assessing child protection concerns, including a cultural examination of safety factors and solutions.*
  - *Undertaking a full and broad consideration of the benefits to an Aboriginal child of being actively connected to, and involved within, the cultural and spiritual life of their Aboriginal community.*



### **BEST PRACTICE 4.01**

---

*A remedial and purposive interpretation of the CFCSA provisions designed to maintain an Aboriginal child's identity and heritage is required*

1. *The goal in interpreting the provisions of the CFCSA designed to maintain an Aboriginal child's identity and cultural heritage should be to choose from amongst the various possible options, the one which best achieves permanency and safety in the lives of Aboriginal children by keeping them connected to their Aboriginal communities, identity and heritage.*

## **BEST PRACTICE 4.02**

---

*Though not technically recognized under the ICWA in the United States, Canadian Aboriginal communities can appear in proceedings involving their child members in the United States and ask to have their involvement recognized as being in the child's best interests. Canadian Aboriginal communities may wish to point out that it is in their child member's best interests that they be involved in the proceedings, and suggest to the Court a disposition which would allow the child to remain within their Aboriginal family or nation.*

## **BEST PRACTICE 4.03**

---

*Indian status, absent active involvement in their Aboriginal culture, is insufficient to protect a child's Aboriginal identity, heritage and connection to their culture.*

## **BEST PRACTICE 4.04**

---

*Where a child or parent is a member of a modern treaty agreement investigate whether or not that treaty sets out specific provisions for how the Aboriginal community may be involved in planning or decision making for their child members.*

## **BEST PRACTICE 4.05**

---

*Self-identification is very important for Aboriginal children and parents to ensure that a child's Aboriginal identity and heritage are considered and protected*

- 1. Self-identification is very important for Aboriginal children and parents to ensure that a child's Aboriginal identity and heritage are considered and protected.*
  - Aboriginal communities could educate their members about the need to self-identify. This is particularly important where children do not have status and involvement of an Aboriginal community is only triggered by the self-identification of the child or parent. Aboriginal communities could develop an affidavit or letter which can be shared with the director and Court setting out how the Aboriginal community recognizes membership or belonging and their connection to a particular child or family.*
  - Due diligence should be exercised in locating a child's Aboriginal community and providing notice of the proceedings, which could include interviewing the parent,*



*extended family and the child (if appropriate) and asking about the child's status and membership within, or connection to, an Aboriginal community.*

## **BEST PRACTICE 4.06**

---

*Delegated Aboriginal agency involvement does not fulfill the need to involve a child's Aboriginal community*

- 1. The role and opportunities for Aboriginal communities under the CFCSA does not change depending on whether a child protection matter arises through a delegated Aboriginal agency or a regular MCFD office. The involvement of an Aboriginal delegated agency does not reduce or limit the rights and opportunities for Aboriginal community involvement as a legal party in CFCSA matters.*

## **BEST PRACTICE 5.01**

---

*Aboriginal community involvement could be very beneficial in structuring voluntary agreements*

- 1. Aboriginal communities may have knowledge about a family's strengths and challenges and could contribute to strengthening voluntary agreements, by identifying potential problems, and developing a cultural plan to ensure that the child's Aboriginal identity is preserved and protected from the earliest point of contact with the child welfare system.*
- 2. Aboriginal communities can identify, and potentially provide, services (which the director could pay for all or part of) under a Support Services Agreement or separate agreement to address child protection concerns in a culturally meaningful way.*
- 3. Aboriginal communities could identify solutions that address a child's special needs, and may be able to identify, provide, or help access, additional supports or resources while ensuring that a child remains connected to their Aboriginal community.*
- 4. Extended Family Program (formerly Kith and Kin agreements) can allow a child to remain within the community and promote the development and preservation of the child's Aboriginal cultural heritage and identity. Wider use of the Extended Family Program could be useful as an intervention and prevention tool that allows the director and Aboriginal community to work actively together.*



5. *Aboriginal children who—post CCO—were raised in care, and are disconnected from their Aboriginal communities and extended families, could enter voluntary agreements that involve their Aboriginal community. Aboriginal communities could work with the director to seek to re-connect Aboriginal youth with their cultures and communities, and provide broader support to youth who are subject to a CCO and may be isolated from their Aboriginal community through participation in agreements with youth or young adults.*
6. *Agreements between the director, parents, caregivers or Aboriginal communities under s. 93 could include providing funding to allow a child to remain at home, with supports, or to assist Aboriginal communities to strengthen their ability to care for and protect their children. These options cover a wide range of services that an Aboriginal community might identify as culturally necessary and appropriate to address child protection concerns within their community.*



## **BEST PRACTICE 5.02**

---

*Aboriginal community involvement at the report, assessment and investigation stage could encourage a preventative approach and ensure that an Aboriginal child's safety and cultural needs are properly assessed*

1. *Aboriginal community involvement at the report, assessment and investigation stage could encourage a preventative approach and ensure that an Aboriginal child's safety and cultural needs are properly assessed. Aboriginal community involvement could help to:*
  - *Assess child protection concerns in a culturally sensitive way;*
  - *Identify the least disruptive measures available to avoid removing the child from their family or Aboriginal community;*
  - *Identify culturally appropriate interventions, programs and services;*
  - *Provide supports to the child and the child's family to keep the child in the home or within the family or community;*
  - *Put family supports in place to divert children from entering the foster care system; or*
  - *Ensure a child stays within their family, community or nation by identifying placement options.*



### **BEST PRACTICE 5.03**

---

*Aboriginal communities should become involved in the child welfare process as early as possible*

- 1. Even where there is no positive duty on the director to involve the Aboriginal community, the best practice is to seek the intervention of the Aboriginal community as early as possible.*
- 2. Educating Aboriginal communities, Aboriginal parents, as well as director's and parents' counsel, and the Court, about the need for, and benefits of, early involvement of Aboriginal communities in CFCSA matters is necessary.*
- 3. Information provided to Aboriginal communities with notice of child welfare matters involving their child members could include steps that they could take or options for involvement.*

### **BEST PRACTICE 5.04**

---

*Identifying barriers to Aboriginal community involvement in child welfare proceedings (e.g. resources, personnel, travel) could help Aboriginal communities to be involved in planning for their child members*

- 1. Tools available within the CFCSA, Rules and Regulations to address barriers which prevent Aboriginal communities from becoming involved in child welfare include:*
  - Members of the Aboriginal community or extended family could participate in CFCSA court proceedings by video- or tele-conferencing where they are unable to participate in person: Rule 1(7).*
  - Matters could be transferred to a Registry closer to the child's home community where this would allow the Aboriginal community, or family members, to take a more active role in planning and participating in the care of the child.*
    - Under Rule 8(12), a Judge may order the transfer of the file after considering the balance of convenience, any special circumstances that exist, and the best interests of the child. The balance of convenience test requires the judge to consider each party's circumstances. This could include what issues or barriers the community faces that would prevent their active involvement, and why transferring the file is in the child's best interests.*
    - Alternatively, under Rule 8(13), the parties can consent to the transfer of the file and file a written consent in the Registry where the file is located.*



- *Matters could be addressed through a traditional dispute resolution process suggested by the Aboriginal community (under s. 22), which is more culturally appropriate and relevant for the child and family.*
- *A judge may permit an application to be made orally in court, without the filing of a form. The CFCSA proceedings may be informal (s. 66(1)(b) and s. 66(2)) in nature. The best interests of the child are most important. Where an Aboriginal community makes an application, they should be prepared to explain how it is in the child's best interests that they be involved as a party in the proceeding.*



### **BEST PRACTICE 5.05**

---

*The Court and counsel should make specific inquiries at the start of the hearing if a representative of an Aboriginal community is present*

1. *If an Aboriginal community representative is present, and appearing without a lawyer, they should be treated as a self-represented litigant.*
2. *Where Aboriginal communities appear without legal counsel, they should identify themselves [name/position] and the fact that they are representing the child's Aboriginal community and state clearly that they are self-represented.*



### **BEST PRACTICE 5.06**

---

*Disclosure can allow the Aboriginal community to participate effectively in planning for the safety of Aboriginal children*

1. *Disclosure can allow the Aboriginal community to participate effectively in planning for the safety of Aboriginal children. The director and the child's Aboriginal community could work together, guided by the Court where necessary, to identify and resolve any concerns about confidentiality and disclosure that would impede a full consideration of the least disruptive measures and services needed to support the child and the family.*
2. *Disclosure (subject to awareness of confidentiality laws) is essential to ensuring Aboriginal communities can engage in a discussion of what steps are necessary. An Aboriginal community may support the parents' position due to a lack of disclosure and lack of knowledge about the severity of the problem. Participation as a full and effective party by Aboriginal communities requires an honest assessment of parental challenges and capacity and not simply an approach that advocates for the parents.*



- 3. Failing to provide full disclosure can undermine the principles of the CFCSA as it applies to Aboriginal children. Complete confidentiality may place Aboriginal children at higher risk, and prevent the sharing of information that would help their Aboriginal community to keep them safe. Confidentiality concerns should not be used to protect abusers and harm children.*



## **BEST PRACTICE 5.07**

---

*Aboriginal communities could make submissions at presentation hearings with the goal of ensuring an Aboriginal child remains connected to their Aboriginal cultural heritage*

- 1. At a presentation hearing, the director is required to show that the least disruptive actions possible were taken (i.e., that removing the child was the least disruptive action that could be taken in order to protect the child), and steps taken to preserve a child's Aboriginal identity. Submissions by Aboriginal communities could speak to these points and present alternatives.*
- 2. Aboriginal communities could strengthen the effectiveness of supervision terms that the director suggests and offer alternatives. Aboriginal communities could:*
  - Do emergency planning with the director and parents for what to do in case of breach of a supervision order, identifying options to address protection concerns while having a child remain within their extended family or community.*
  - Identify where supervision terms are not workable or not likely to ensure a child is protected. For example, it makes no sense for a parenting course or anger management course to be part of a supervision order if there are no locally offered courses. An Aboriginal community could highlight that the courses do not exist locally, and propose separate supports within the community with the same purpose, including traditional parenting classes or elders counseling or mentoring.*
  - Ensure that access visits to the child are addressed as part of the terms of any orders that are made at an interim stage, particularly where the child is placed outside of their community, and/or the community is remote or transportation is likely to be an issue for the extended family or community members who wish to visit the child.*
  - Identify alternate caregivers within the child's Aboriginal community.*
- 3. Aboriginal communities could work with the director where there are reasonable grounds to believe that contact between a child and another person would endanger the child.*





- *The director can seek a protective intervention order (s. 28) which can include a 6 month no contact order prohibiting a person from living with the child or being in the same dwelling, vehicle or vessel with the child, or a restraining order under s. 98 against a person who the director believes poses a danger to a child. Under the Family Homes on Reserve and Matrimonial Interests or Rights Act, S.C. 2013, c. 20, it is possible for a spouse or third party (including a social worker) to apply for a 90 day Emergency Protection Order forcing a party to vacate a family home on reserve where there is a risk of violence within the family.*
- *An Aboriginal community could exercise its authority (where possible) to ban a person from residing on or entering the Aboriginal community, which could add another layer of protection to the child.*
- *The Aboriginal community could help to ensure there is no contact with the child at cultural or community gatherings.*



## **BEST PRACTICE 5.08**

---

*Aboriginal Communities could provide information to assist the Court to make a decision which could include placing a child within that community and the ways that a child could be kept safe within that community; and, identify and present an Aboriginal Cultural Preservation Plan*

### *1. An Aboriginal Cultural Preservation Plan could:*

- *Identify cultural factors that need to be included in a child's plan of care (including identifying specific steps or opportunities for a child to participate in cultural activities that maintain or establish their connection to their land and culture, such as language classes, gathering activities, spiritual or cultural celebrations, community dinners or sporting events, lahal or other activities);*
- *Identify cultural supports or programs to assist the family;*
- *Implement community supports to maintain a child's connection with their Aboriginal community and cultural heritage;*
- *List less disruptive means than removal to keep families together (including culturally-based and appropriate resources within the community);*
- *Identify family or community members that could take care of the child on a temporary basis while the child protection matter is addressed to keep the child within their extended family or cultural community; or, on a permanent basis, if necessary, which would keep the child within their extended family, community, or nation where the parent(s) are unable to address the child protection concern;*
- *Name family or community members that play an important role in the child's*



*life (such as elders or extended family members), together with a proposal for how to maintain those relationships;*

- *Identify a network of people or supports to assist the family in addressing protection concerns, or where it is not possible to restore a family's ability to parent, to assist in keeping a child safe and ensuring that they can grow to adulthood within their culture;*
- *Identify elders, cultural or spiritual supports from within the nation who can work with the child or family within a traditional wellness or healing model; and*
- *Identify alternative or traditional decision making processes—including those based in Aboriginal traditions—that the Aboriginal community may wish to refer the matter to, as allowed under s. 22 of the CFCSA.*



## **BEST PRACTICE 5.09**

---

*The Aboriginal community could assist in assessing child protection concerns in a culturally sensitive way*

1. *The Aboriginal community can help to assess child protection concerns in a culturally sensitive way, and identify any stereotypes, or false assumptions, that may be reflected in the consideration of a child's risk. Defining the risks that a child faces with regard to cultural factors, requires asking:*
  - *How removing an Aboriginal child from their cultural connections may endanger them over the long term;*
  - *How cultural factors may insulate an Aboriginal child against identified risks; and*
  - *How false assumptions about Aboriginal cultures or parenting styles may be influencing a determination that a child is at risk.*



## **BEST PRACTICE 5.10**

---

*Courts could take judicial notice of the long-term negative outcomes for Aboriginal children raised in care*

1. *Courts could take judicial notice of the long-term negative outcomes for Aboriginal children raised in care. The best interests of Aboriginal children should be assessed to ensure that their long term well-being is not sacrificed for short term safety. An appropriate consideration of an Aboriginal child's best interests must consider their safety in the immediate term, and into the*



*future. Maintaining and fostering a child's connection to their Aboriginal culture and identity has a better chance of protecting a child in the long term and ensuring a better life outcome.*



### **BEST PRACTICE 5.11**

---

*A fluid approach is required to finding permanency for Aboriginal children that explores models based in Aboriginal laws*

*1. A fluid approach to finding permanency for Aboriginal children is required that explores models based in Aboriginal laws, and provides permanency solutions for children while maintaining their Aboriginal identity, culture and community connections. Options include:*

- Customary adoption;*
- Extended family care and guardianship situations where the birth parents or family maintain an ongoing set of obligations and relations with the adoptive family rather than requiring a complete severance of parental rights and connection to Aboriginal community and extended family;*
- Broader and extensive supports to enable parenting where Aboriginal parents cannot safely parent on their own;*
- Parenting solutions which reflect Aboriginal ways of caring for children across several families or homes, providing permanency by recognizing shared parenting practices or distributed responsibility amongst a community or extended family.*



### **BEST PRACTICE 5.12**

---

*Aboriginal communities could work with parents, extended family or community members to apply for access to children currently under a continuing custody order*

*1. Aboriginal communities could work with parents, extended family or community members to apply for access to children currently under a continuing custody order under s. 56. This could involve:*

- Developing a plan which would establish or maintain cultural connection of Aboriginal children with their cultural community; or*



- *A plan for reunification of the child to their parents, extended family or Aboriginal cultural community where possible.*

## **BEST PRACTICES 6.01**

---

*Aboriginal community participation in alternative or traditional dispute resolution processes can ensure the child's right to their Aboriginal identity and cultural heritage are central to any protection proceedings and planning*

- 1. Aboriginal community participation in case conferences provide an opportunity to actively plan for child members and encourage discussions to resolve issues based on the provisions of the CFCSA which protect a child's Aboriginal identity and cultural heritage.*
- 2. Aboriginal community participation in the FGC can help to increase the cultural safety of the family and open new pathways of dialogue.*
- 3. Aboriginal communities could actively participate in mediation processes, or seek to have mediation processes amended to reflect the cultural values and requirements of the community. Mediation can provide an opportunity for Aboriginal communities to participate in dialogue and joint decision-making regarding their child members.*
  - *Aboriginal communities could be invited to identify any concerns about a mediator's appointment and what can be done to overcome any real or perceived deficits or gaps in knowledge.*
  - *The Aboriginal community could identify a mediator with specific knowledge about the child's Aboriginal culture, traditions, and community, or identify individuals trained within the child's culture and traditions to be appointed as co-mediators.*
  - *If the Aboriginal community finds that there are no culturally acceptable mediators to them on the roster, mediation may not be a desired option, and traditional dispute resolution mechanisms based in Aboriginal culture should be considered.*

## **BEST PRACTICE 6.02**

---

*Aboriginal communities could seek to have their own traditional dispute resolution processes used to address child protection concerns under the CFCSA*

- 1. Consistent with the guiding principles and s. 22 of the CFCSA, where an Aboriginal child's community or family identifies or requests it, traditional*

*dispute resolution mechanisms and decision-making processes could be used to plan for Aboriginal children.*

- *There are options to propose mechanisms that blend traditional decision-making processes with other strands of ADR (such as the family group conference, mediation and/or arbitration) to create a model that involves Aboriginal elders, community and family members, if appropriate, the child, working together with the director, and legal counsel.*
- *For many Aboriginal communities, their traditional practices draw on different people, experiences and approaches to create a plan to ensure the well-being and continued connection of their children, families, people, lands, and resources, and can be amended to work within the CFCSA process as a way of bringing Aboriginal ways and traditions into decision-making about Aboriginal children.*
- *Adapting alternative dispute resolution models could be a vehicle for developing an Aboriginal traditional decision-making model that reflects Aboriginal child and family wellness and could ultimately mature into a stand-alone process, including adjudication falling under the jurisdiction of Aboriginal laws and legal order*



### **BEST PRACTICE 6.03**

---

*Aboriginal parallel legal institutions and judges are needed*

1. *The appointment of Aboriginal judges to the bench who apply Canadian law while incorporating Aboriginal principles and ways of considering or making decisions could expand and transform notions of justice in child welfare matters. In the longer term, this could potentially include the appointment of judges who are tasked to apply Aboriginal legal principles to cases coming before them.*
2. *The establishment of Aboriginal parallel judicial institutions could transform the situation for Aboriginal children, families and communities. Options for the recognition of Aboriginal parallel judicial institutions include:*
  - *Aboriginal CFCSA courts (similar to the Gladue/First Nations sentencing courts already in operation) which implement the CFCSA provisions in a culturally sensitive and appropriate way. This could include having Aboriginal people involved at all level of the process (bench; directors, parents and children's counsel; specific efforts to involve Aboriginal communities in matters concerning their child members; a process which has its purpose healing and restoration).*



- *Creation of a Tribunal under s. 104 of the CFCSA. The Province could enact enabling legislation for the establishment of a community-based decision making model in place of the Courts to resolve specific child and family issues. Such tribunals – created in close collaboration with different Aboriginal communities or nations – could reflect Aboriginal ways and cultural practices and be culturally relevant to specific Aboriginal peoples. The Province could exercise this power to establish an administrative tribunal specifically for Aboriginal child welfare or to establish a pilot project that the CFCSA contemplates to increase the use of an ADR system that could reduce the high numbers of Aboriginal child welfare matters in the courts, and as part of an access to justice initiative based on the CFCSA’s guiding principles.*
- *Options for parallel legal institutions within the framework of Aboriginal legal orders where – perhaps by protocol or agreement between Aboriginal peoples and the Crown – decisions are respected across jurisdictions. In some cases this could involve an Aboriginal group passing its own child welfare laws, that would apply to the child or family irrespective of residence on or off reserve, and which envisions the judicial and administrative institutions necessary to carry out that legislative scheme.*



## **BEST PRACTICE 8.01**

---

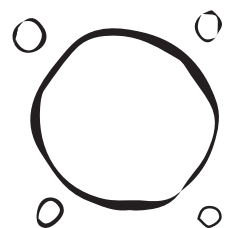
*Aboriginal communities can make applications concerning their child members orally in court*

*1. Aboriginal communities can make applications concerning their child members orally in court, and should tell the Court that:*

- *They are self-represented and want to make an application orally, and without notice, under s. 66(1)(b) of the CFCSA (which allows the Judge to allow for informal proceedings), and the Rules (Rule 1(4) which allows a party to make an application in person (orally) without filing a form;*
- *The specific order that they are asking the court to make (for example: for access to a child; to have the matter adjourned to allow the Aboriginal community time to identify alternate placements for the children or to work out a plan which would preserve the child’s Aboriginal identity and connection to their Aboriginal culture; to have a matter transferred to a registry that is closer to the child’s home community); and*
- *Explain why it is in the child’s best interests that the order be granted, and how the child will benefit from having the order made. For example: the order may allow the child’s Aboriginal identity and cultural heritage to be preserved, or for a preventative approach to be taken with the goal of restoring the family’s ability to safely care for the child.*



# 08. Forms and Making Applications









# 08. Forms and Making Applications

## I. Introduction

The CFCSA, Regulations and Rules set out the law and process of child protection matters. The purpose of the CFCSA Rules is to “promote the safety and well-being of children by allowing court decisions to be obtained fairly and efficiently”. Where necessary to ensure the best result for children, the Rules or procedures may allow for some flexibility.

Appendix A of the CFCSA Rules contains Forms that can be used when asking the court to make certain orders. Some of these forms are for use by the director (for example, Form 1 is a Presentation Form, and contains information which the director must file when they take a child into care); other forms can be used by the director, parents, Aboriginal communities or others to make an application about a child. There are no specific forms for use by Aboriginal communities.

There are two ways for Aboriginal communities to ask the court to make an order about a child: (1) File a written application, using the forms provided in the CFCSA Rules; or (2) Make an in-person application in court. The Judge has the discretion to decide whether to allow an application to be made orally, or to require that official forms be filed to make an application.

Orders that Aboriginal communities could ask a Court to make include (but are not limited to):

1. Access to a child in:
  - a. interim or temporary custody (s. 55), or
  - b. continuing custody (s. 56);
2. Changes to supervision, temporary custody or access orders (s. 57);



3. Disclosure (s. 64 or 79);
4. Adding the Aboriginal community as a party to a proceeding (s. 39(4));
5. Transferring the file to a different registry (Rule 8(12)), or with the consent of all parties (Rule 8(13));
6. Allowing parties to appear by, or for CFCSA proceedings to be conducted by, telephone (Rule 1(7));
7. Cancelling a Continuing Custody Order (CCO) (s. 54) (CFCSA Rule 8(6)) [If the Aboriginal community was a party to the CCO application]; or
8. Having custody of a child transferred to a third party after a CCO (s. 54.1).

Provisions of the CFCSA and Rules, which impact how child welfare proceedings may be carried out, include:

- Hearings may be as informal as a judge allows (s. 66(1)(b));
- Courts can admit hearsay evidence, or written statements (s. 68) (which could include statements or letters drafted by the Aboriginal community) or affidavits (Rule (4(1)) where Aboriginal communities want to give evidence about their application, or to introduce written materials in support of their application; and
- A judge may permit an application to be made orally in court, without the filing of a form (Rule 1(4)).

The best interests of the child are most important. Where an Aboriginal community makes an application, they should be prepared to explain how the order that they are seeking is in the child's best interests, and this could include evidence about preserving a child's aboriginal identity and heritage.

## **II. In Person Applications (Without Filing a Form)**

If an Aboriginal community appears in Court on a child protection matter, they can orally request that certain decisions or orders about a child be made. An application made orally will only be allowed to proceed where the Court decides it is in the best interests of the child, and allowing the application to be made orally does not prejudice the interests of the other parties, or where the other parties consent. Depending on the circumstances of the case, and the position taken by the director or parents, the Court may refuse to hear



an oral application and require that the Aboriginal community file a written application for the order that they are seeking.

  
**BEST PRACTICE 8.01**

*Aboriginal communities can make applications concerning their child members orally in court*

*1. Aboriginal communities can make applications concerning their child members orally in court, and should tell the Court that:*

- *They are self-represented and want to make an application orally, and without notice, under s. 66(1)(b) of the CFCSA (which allows the Judge to allow for informal proceedings), and the Rules (Rule 1(4) which allows a party to make an application in person (orally) without filing a form;*
- *The specific order that they are asking the court to make (for example: for access to a child; to have the matter adjourned to allow the Aboriginal community time to identify alternate placements for the children or to work out a plan which would preserve the child's Aboriginal identity and connection to their Aboriginal culture; to have a matter transferred to a registry that is closer to the child's home community); and*
- *Explain why it is in the child's best interests that the order be granted, and how the child will benefit from having the order made. For example: the order may allow the child's Aboriginal identity and cultural heritage to be preserved, or for a preventative approach to be taken with the goal of restoring the family's ability to safely care for the child.*

### III. Forms

The Rules and CFCSA set out when an application must be filed, how the other parties must be provided with copies of the application (served), and what evidence must be filed in support of that application. An application is filed with the Court Registry, and the Court Registry assigns a date and time when the matter can be heard. An application can only be made without advance notice, if the Judge allows it.

## A. Steps in Applying for an Order:

1. Complete the application for the Order or Form.
2. File the application by taking it to the Provincial Court Registry (can also be mailed in). The Registry will provide a date/time for the hearing requested.
3. Parties who seek an order, must provide notice to (serve) the other parties.
  - Documents may be served by leaving a copy with a person, by registered mail or facsimile transmission, or by leaving a copy at, or by facsimile transmission to, that lawyer's office.
  - Usually service is required at least two days before the hearing (business days, weekends and holidays would not count).
  - The Rules provide a form for parties to provide a certificate of service (Form 9) which you must provide to the Registry after you have served the other parties.
4. Appear in Court at the date and time set by the Registry. Where Aboriginal communities are self-represented, they should clearly state this for the record. Explain to the Court what order is being asked for and why. Explain why the order is in the child's best interests, which could include: that it helps to maintain a child's aboriginal and cultural identity, keeps the child<sup>137</sup> safe, or involves the child's Aboriginal community in planning for their care.

## B. User-Generated Forms for Aboriginal Communities

There are no forms specifically for Aboriginal communities. Under Rule 8(19), if you are using your own form, it must be "substantially the same" as the court forms, and any areas that are different from the court forms must be in bold print.

***The forms provided in this Guidebook are not official. These forms should be used as a guide for orders that Aboriginal communities could ask a Court to make about their child members. The CFCSA, Rules and Regulations all have as their purpose the best interests of children, and rules and procedures can be relaxed where it is necessary to achieve the best result for children.***



- Parties should review forms with a lawyer (or duty counsel at your local courthouse) BEFORE filing with the court registry.
- Not all general forms are included in this Guidebook. Other forms are available through the Provincial Court Registry, or online. These include: Form 3 (Change or Cancel an Order), Form 4 (Subpoena), Form 8 (Notice of Address for Service), Form 10 (Order), and Form 11 (Written Consent).
- See the CFCSA Rules online at [www.bclaws.ca](http://www.bclaws.ca); Forms are available online at [www.ag.gov.bc.ca/courts/family/info/forms.htm](http://www.ag.gov.bc.ca/courts/family/info/forms.htm)
- Copies of the forms provided here can be downloaded from the websites of [www.nzenman.org](http://www.nzenman.org) or at [www.ubcic.bc.ca](http://www.ubcic.bc.ca) in fillable PDF format.

# APPLICATION FOR AN ORDER

## Form 2

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

Court File Number:

Court Location:

### In the matter of the child(ren):

Name(s)

Date(s) of Birth (mo/day/yr)

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

### The parent(s) of the child(ren) is/are:

Name(s)

_____
_____

### This application is filed by:

Indian Band/Aboriginal Organization/Designated Representative

_____	_____	_____
Address	City	B.C.
Postal Code	Phone	Fax

### Notice to:

Name(s) [Parents, Director, any other parties]

Address(es) (include tel. & fax if applicable)

_____
_____
_____
_____
_____

The child is aboriginal:  Yes  No

**Amendments have been made to this Form to reflect orders an Aboriginal community may want to apply for. Under Rule 8(19), if people use a form they made themselves, it must be "substantially the same" as the court forms, and any differences must be in bold print.**

**Details of the order requested and the section of the Act or Rule relied upon are included below.**

#### COPIES NEEDED:

1 – COURT FILE 2 – APPLICANT 3 – RESPONDENT 4 – EXTRA COPY FOR SERVICE  
5 – PROOF OF SERVICE 6 – LAWYER'S OR FAMILY COPY

Date and time will be provided by the Registry when the Application is filed

**APPLYING FOR:**  
This lists the order that the court will be asked to make, and the section of the Act or Rule that allows it.

**ORDER FOR ACCESS**

I will apply to this court on [date]\_\_\_\_\_ at [time]\_\_\_\_\_  am  pm  
at [court location]\_\_\_\_\_

**FOR:**

- An order for access to a child(ren) in  interim or temporary custody (section 55) or  continuing custody (section 56) of the director.

If applying for this order, fill out the following:

We are applying for access visits to the child(ren) as follows (propose how access should occur; how often; if, or how, it will be supervised; if any travel or other costs or involved who should be responsible for those (director, Aboriginal community, etc.):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To allow this access is in the child's best interests as it (check all that apply):

- helps the child(ren) to maintain their aboriginal identity  
 helps the child(ren) to main their connection to their aboriginal cultural heritage  
 allows for continuity in the child(ren)'s life by maintaining relationships with extended family members, elders, or other members of their Aboriginal community  
 allows the child(ren) to maintain their spiritual and religious identity and participation as a member of the \_\_\_\_\_ Aboriginal community/First Nation  
 Other (list): \_\_\_\_\_  
\_\_\_\_\_

Where the child(ren) is/are under continuing custody of the director (a CCO), this access is consistent with the plan of care because it (check all that apply):

- allows the child to maintain a connection with their Aboriginal identity  
 preserves the child's Aboriginal cultural heritage  
 involves the child's Aboriginal community in planning for their care

If the child(ren) is/are 12 years of age or older, access is consistent with the wishes of the child(ren):

- yes  
 no  
 the child(ren) was raised in care, and s/he may not know about their Aboriginal community or possibilities for involvement with their Aboriginal community, and the Aboriginal community would like an opportunity to meet with the child and to discuss with them options for them to be connected to their Aboriginal community; or  
 other (explain) \_\_\_\_\_

**COPIES NEEDED:**

1 – COURT FILE 2 – APPLICANT 3 – RESPONDENT 4 – EXTRA COPY FOR SERVICE  
5 – PROOF OF SERVICE 6 – LAWYER'S OR FAMILY COPY



ORDER FOR PARTY STATUS

A child's Aboriginal community is entitled to notice and usually is added as a party when they appear at hearings involving their child members. If this has not happened (either they did not appear at earlier stages, or because the registry did not add them as a party) then it may be necessary for Aboriginal communities to apply for party status.

An order adding \_\_\_\_\_ Aboriginal community/First Nation [the child's Aboriginal community] as a party (s. 39(4))

- a. The child(ren) is Aboriginal and is  registered or  entitled to be registered as a member or  recognized as a member of the \_\_\_\_\_ First Nation/Aboriginal Community.
- b. The \_\_\_\_\_ First Nation/Aboriginal Community seeks party status to allow it to be actively involved and fully plan for the care, safety and future of their child member(s).

The \_\_\_\_\_ First Nation/Aboriginal Community makes this application for an order that:

"The \_\_\_\_\_ First Nation (an Aboriginal Community as designated under the CFCSA and Regulations) be added as a party to this proceeding under section 39(4) of the Child, Family and Community Service Act."

ORDER FOR DISCLOSURE

A party to a proceeding is entitled to disclosure of the protection concerns. The first step would be for the Aboriginal community to request disclosure from the director. If disclosure is not received, it may be necessary to seek an order for disclosure.

An order for disclosure (ss. 64 and 79(a))

- a. To fully and effectively participate in the planning for the care of the child(ren) and to help to ensure their safety and well-being the \_\_\_\_\_ Aboriginal community/First Nation requires disclosure.
- b. The \_\_\_\_\_ Aboriginal community/First Nation requires disclosure of all relevant facts about the protection concerns to take an informed position in these court proceedings, and to act to ensure the safety of the children.

ORDER TO TRANSFER REGISTRY

An order to have a file transferred to the \_\_\_\_\_ court registry [(Rule 8(12) or if by consent (Rule 8(13))]

The \_\_\_\_\_ First Nation/Aboriginal Community makes this application for an order that this file be transferred to the \_\_\_\_\_ Registry. It is in the child(ren)'s best interest that this file be transferred because:

- this would allow the child(ren)'s Aboriginal community to fully participate in planning for their care (sections 3(b) and (c));
- the child(ren) is/are normally resident closest to the \_\_\_\_\_ Registry;
- members of the child(ren)'s Aboriginal community cannot fully participate if the matter proceeds where it currently is due to prohibitive costs and distance and time necessary to travel to that registry; or
- Other reasons: \_\_\_\_\_

COPIES NEEDED:

1 – COURT FILE 2 – APPLICANT 3 – RESPONDENT 4 – EXTRA COPY FOR SERVICE  
5 – PROOF OF SERVICE 6 – LAWYER'S OR FAMILY COPY

**An order to allow the**  
 \_\_\_\_\_ **Aboriginal community/First Nation,**  
**Contact person/telephone number to make arrangements:**  
\_\_\_\_\_  
**to appear by teleconference (Rule 1(7)) at all future hearings regarding this matter.**  
**This is in the child(ren)'s best interests because:**  
 **otherwise the** \_\_\_\_\_ **Aboriginal community/First Nation**  
**cannot fully participate in planning for the care and safety of the child(ren) due to**  
**the distance and cost of travel to attend hearings; or**  
 **other reasons:** \_\_\_\_\_

**Under Rule 7(2) we request that the director's lawyer prepare the order if granted.**

\_\_\_\_\_

Signature of Applicant or Agent

Dated \_\_\_\_\_

**Address for service if different from Applicant's:**  
Address \_\_\_\_\_ City \_\_\_\_\_ B.C.  
Postal Code \_\_\_\_\_ Phone \_\_\_\_\_ Fax \_\_\_\_\_

**COPIES NEEDED:**

**1 – COURT FILE 2 – APPLICANT 3 – RESPONDENT 4 – EXTRA COPY FOR SERVICE  
5 – PROOF OF SERVICE 6 – LAWYER'S OR FAMILY COPY**

# AFFIDAVIT

## Form 7

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

Court File Number:

Court Location:

### In the matter of the child(ren):

Name(s)

Date(s) of Birth (mo/day/yr)

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

### The parent(s) of the child(ren) is/are:

Name(s)

_____
_____
_____

I, [name] \_\_\_\_\_  
Of [Address] \_\_\_\_\_ [City] \_\_\_\_\_  
[Province] \_\_\_\_\_

swear that:

1. I know or firmly believe the following facts to be true. Where these facts are based on information from others, I have stated the source of that information and I firmly believe that information to be true.
2. I make this affidavit in relation to an application by  me or by  \_\_\_\_\_  
Aboriginal community/First Nation. I am the  Chief  Elected Councilor  Social  
Development Worker  or [list position: Elder/member/etc.] \_\_\_\_\_  
of the \_\_\_\_\_ Aboriginal community/First Nation.
3. The \_\_\_\_\_ Aboriginal community/First Nation recognizes the  
child, \_\_\_\_\_ as a member of the  
\_\_\_\_\_ Aboriginal community/First Nation. Their  mother  
 father  grandparent(s) \_\_\_\_\_ is/are a member of the  
\_\_\_\_\_ Aboriginal community/First Nation.

#### COPIES NEEDED:

1 – COURT FILE 2 – APPLICANT 3 – RESPONDENT 4 – EXTRA COPY FOR SERVICE  
5 – PROOF OF SERVICE 6 – LAWYER'S OR FAMILY COPY



**[If any supporting documents are attached fill out the following:]**

The following documents are attached and marked as Exhibits to this affidavit.

- Exhibit “\_\_\_\_\_”:
- Exhibit “\_\_\_\_\_”:
- Exhibit “\_\_\_\_\_”:
- Exhibit “\_\_\_\_\_”:

Rule 5(3) If any part of this affidavit is defective or does not comply with the proper form, I seek permission of the Judge to use this affidavit.

SWORN BEFORE ME at \_\_\_\_\_ )  
[location] \_\_\_\_\_ )  
in the Province of British Columbia, )  
on [month/day/year] \_\_\_\_\_ )  
\_\_\_\_\_)  
A Commissioner for taking Affidavits )  
for British Columbia )  
Name of Commissioner: \_\_\_\_\_ ) [signature]

**This affidavit is filed by:**

Name \_\_\_\_\_

Address \_\_\_\_\_ City \_\_\_\_\_ Prov \_\_\_\_\_

Postal Code \_\_\_\_\_ Phone \_\_\_\_\_ Fax \_\_\_\_\_

# CERTIFICATE OF SERVICE

## Form 9

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

Court File Number:
Court Location:

In the matter of the child(ren):	
Name(s)	Date(s) of Birth (mo/day/yr)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

The parent(s) of the child(ren) is/are:
Name(s)
_____
_____
_____

I certify that I, [name]_____
of [Address]_____
[City]_____ [Province]_____
served [Name of person served]_____
on [Date]_____
at [Address]_____
with a copy of: (List each document served)
_____
_____
_____
_____
<input type="checkbox"/> by leaving the copy with him or her personally;
<input type="checkbox"/> by mailing the copy to him or her by registered mail. Attached and marked as an exhibit to this certificate is:
<input type="checkbox"/> the original acknowledgement of receipt card, marked Exhibit "____"; or
<input type="checkbox"/> the unopened envelope returned by Canada Post, marked Exhibit "____".
<input type="checkbox"/> by sending the copy by facsimile transmission. Attached and marked as Exhibit "____" to this

**COPIES NEEDED:**  
**1 – COURT FILE 2 – APPLICANT 3 – RESPONDENT 4 – EXTRA COPY FOR SERVICE**  
**5 – PROOF OF SERVICE 6 – LAWYER'S OR FAMILY COPY**

certificate is a transmission report generated by the sending machine, confirming transmission to  
[Number]\_\_\_\_\_ which is the facsimile number of  
[Name]\_\_\_\_\_

\_\_\_\_\_

Signature

Dated \_\_\_\_\_

**COPIES NEEDED:**

- 1 – COURT FILE 2 – APPLICANT 3 – RESPONDENT 4 – EXTRA COPY FOR SERVICE  
5 – PROOF OF SERVICE 6 – LAWYER’S OR FAMILY COPY**

**ABORIGINAL CHILD ABORIGINAL COMMUNITY  
PLAN OF CARE**

Court File Number:
Court Location:

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

**We rely on the following:**

- Section 68(2)(b) a Court may admit as evidence “(b) any oral or written statement or report the court considers relevant”.**
- Rule 4(1)(c) which says that a Court can rely on evidence given under s. 68(2)(b).**

**It is in the best interests of Aboriginal children that their Aboriginal community be fully and actively involved in planning for their care, and that their Aboriginal identity, culture and relationships within their cultural community and extended family be maintained.**

**The \_\_\_\_\_ Aboriginal community/First Nation files this document (Aboriginal Child Aboriginal Community Plan of Care) and requests the Court take into consideration in making Orders concerning our Child members.**

**A Plan of Care for a child in interim, temporary or continuing custody of the director should plan for the preservation of an Aboriginal child’s identity and cultural heritage.**

**In the matter of the child(ren):**

Name(s)	Date(s) of Birth (mo/day/yr)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**The parent(s) of the child(ren) is/are:**

Name(s)

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**This Plan of Care is filed by:**

**Aboriginal Organization/First Nation/Designated Representative**

\_\_\_\_\_

Address \_\_\_\_\_ City \_\_\_\_\_ B.C.

Postal Code \_\_\_\_\_ Phone \_\_\_\_\_ Fax \_\_\_\_\_



- CFCSA Regulation (ss. 7 and 8) requires that a child's plan of care include whether the child's Aboriginal community was involved in the development of the plan, and their views on it, and a description of how the director proposes to meet the child's need for continuity of their cultural heritage, religion, language, social and recreational activities, and steps to preserve an Aboriginal child's cultural heritage and identity.
- Section 70 of the CFCSA says that children in care have the right to receive guidance and encouragement to maintain their cultural heritage.
- Section 71 of the CFCSA lists priorities to place Aboriginal children within their cultural community or extended family.

We file this Proposed Plan of Care, to:

- Maintain the child(ren)'s Aboriginal identity and heritage (sections 2(f), 4(1)(e), 4(2))
- Maintain the child(ren)'s connection to their Aboriginal community and extended family (section 2(e))
- Involve the child(ren)'s Aboriginal community in planning for their care (sections 3(b) and (c))

The child(ren)'s Aboriginal community

- has not been provided with the Director's proposed plan of care, or
- has reviewed the Director's proposed Plan of Care and [check one of the following]
  - Supports the proposed plan
  - Does Not Support the proposed plan
  - Supports the proposed plan with the following changes:

---



---



---

The \_\_\_\_\_ Aboriginal community/First Nation has identified the following steps that should be taken, or resources relied on, to preserve the child's Aboriginal culture and identity:

An Aboriginal Cultural Preservation Plan for this/these child(ren) could include:

- (a) Cultural factors that need to be included in a child's plan of care (identify specific steps or opportunities for a child to participate in cultural activities that maintain or establish their connection to their land and culture, such as language classes, gathering activities, spiritual or cultural celebrations, community dinners or sporting events, or other activities):

---



---



---

**(b) Cultural or community supports or programs within the \_\_\_\_\_  
Aboriginal community/First Nation to assist the family in addressing protection concerns,  
and/or maintain the child's connection with their Aboriginal community and cultural  
heritage:**

---

---

---

---

---

---

---

---

**(c) Less disruptive means than removal to keep families together (including culturally-based  
and appropriate resources within the community) that should be explored, or potential  
alternate caregivers within the child's cultural community or extended family, family or  
community members that could take care of the child on a temporary basis while the child  
protection matter is addressed to keep the child within their extended family or cultural  
community; or, on a permanent basis, if necessary, which would keep the child within  
their extended family, community, or nation where the parent(s) are unable to address the  
child protection concern:**

---

---

---

---

---

---

---

---

**(d) Family or community members that play an important role in the child's life (such as  
elders or extended family members), together with a proposal for how to maintain those  
relationships:**

---

---

---

---

**(e) Network of people or supports to assist the family in addressing protection concerns, or where it is not possible to restore a family's ability to parent, to assist in keeping a child safe and ensure that they can grow to adulthood within their culture:**

---

---

---

---

**(f) Elders, cultural or spiritual supports from within the nation who can work with the child or family within a traditional wellness or healing model:**

---

---

---

---

**(g) Alternative or traditional decision making processes – including those based in Aboriginal traditions – that the Aboriginal community may wish to refer the matter to, as allowed under s. 22 of the CFCSA:**

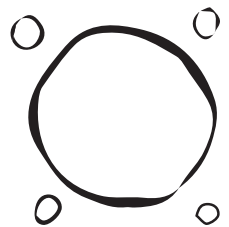
---

---

---

---

# 09. Sources







# 09. SOURCES

## I. CASES

- A.[...] (First Nation) v. Children's Aid Society of Toronto*, 2004 CanLII 34409 (ON SC)
- A.J. v. S.J.M.* 1994 CanLII 264 (BC SC)
- A.L. et al v. D.K. et al* 2000 BCSC 480 (CanLII)
- A.N.G. (Re)* 1996 BCPC 1 (CanLII)
- Adoption - 07202*, 2007 QCCQ 13341
- Alberta (Aboriginal Affairs and Northern Development) v. Cunningham* 2011 SCC 37
- B.C. Birth Registration No 1994-09-040399, Re*, 1998 CanLII 5839 (BCSC)
- British Columbia (Director of Family & Child Services) v. W.(D.)*, 2002 BCPC 616 (B.C. Prov. Ct.)
- Brown v. Attorney General of Canada*, 2014 ONSC 6967 (CanLII)
- C.D.R1. and C.D.R2. v. Native Child and Family Services of Toronto (CFSA s.144)* 2007 CFSRB 20 (CanLII)
- C.M.B. v. Ministry for Children and Families* 2000 BCSC 774 (CanLII)
- Campbell v. British Columbia (A.G.)*, [2000] B.C.J. No. 1525
- Canada (A.G.) v. Canadian Human Rights Commission*, 2007 SCC 26, [2007] 2 S.C.R. 292
- CAS v. L.T. and R.S.* 2013 ONSC 6512 (CanLII)
- Casimel v. I.C.B.C.* [1994] 2 C.N.L.R. 22 (B.C.C.A.)
- Catholic Children's Aid Society of Toronto v. C.(B.) and H.(J.C.)* 2004 ONCJ 27 (CanLII)
- Child and Family Services of Winnipeg (East) v. K.A.D. et al*, [1995] M.J. No. 178; Man.R. (2d) 262
- Children's Aid Society of Halifax v. H.* 2006 NSSC 1 (CanLII)
- Children's Aid Society of Owen Sound and Grey County v. P.(C.)* 2004 ONCJ 453
- Children's Aid Society of Sudbury and Manitoulin v. B.(J.)* 2007 ONCJ 137
- CJK v. Children's Aid Society of Metropolitan Toronto*, [1989] 4 CNLR 75
- Connolly v. Woolrich (1867)*, 1 C.N.L.C. 70 (Que. S.C.)
- Corbierre v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203
- D.(M.B.) v. Saskatchewan (Minister of Social Services)* 2001 SKQB 513 (CanLII)
- D.C.W. v. Alberta (Child, Youth and Family Enhancement, Director)*, 2012 ABPC 199 (CanLII)
- Delgamuukw v. B.C.* [1993] 5 W.W.R. 97 (BCCA)
- Delgamuukw v. B.C.* [1997] 3 S.C.R. 1010
- Dilico Anishinabek Family Care v. M.T.* 2010 ONCJ 105 (CanLII)



- Director v. C.S. and J.K.* 2007 BCPC 19 (CanLII)  
*Director v. K. (T.L.)*, [1996] B.C.J. No. 2554 (Prov. Ct)  
*Director v. K.S.* 2013 BCPC 100 (CanLII)  
*Director v. M.W. and A.M.S. (Re S.M.S.)* 2003 BCPC 396 (CanLII)  
*Director of Family and Child Services v. M.B.* 2003 BCPC 0429  
*Family and Children's Services of Waterloo Region v. Bonnie Y. and Frank D.* (1988), [1995] W.D.F.L. 1011, [1988] O.J. No. 2699 (Ont. Prov. Ct., Fam. Div.)  
*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, (2012) [Ongoing]  
*G. (B.J.) v. G. (D.L.)* 2010 YKSC 44, 324 D.L.R. (4th) 367  
*H.(D.) v. M.(H.)*, [1998] 3 C.N.L.R. 59  
*H.(D.) v. M.(H.)* 1999 CanLII 710 (SCC), [1999] 1 S.C.R. 761  
*Haida Nation v. B.C. (Ministry of Forests)*, [2004] 3 S.C.R. 511  
*Hamilton Health Sciences Corp. v. D.H.*, 2014 ONCJ 603 (CanLII)  
*In re Wanomi P.*, (1989) 216 CA3d 156  
*In the Matter of Q. (N.)*, [2004] 3 C.N.L.R. 262; 2003 YKTC 35 (CanLII)  
*J.B.B. (Re)*, 2008 SKQB 419 (CanLII)  
*Jane Doe v. Awasis Agency of Northern Manitoba*, [1990] 72 DLR (4th) 738  
*Kenora-Patricia Child and Family Services v. P.(L.)* 2001 CanLII 32703 (ON CJ)  
*L. (M.S.D.)*, Re 2007 SKQB 200 (CanLII)  
*L. (M.S.D.)*, Re 2008 SKCA 48 (CanLII)  
*Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981)  
*M.-K.K. (Dans la situation de)*, (2004) R.D.F. 264 (C.A.)  
*M.M. (Re)*, 2013 ABPC 59 (CanLII)  
*M.S. v. G.S.* 2013 BCSC 1744 (CanLII)  
*Mclvor v. Canada (Registrar, Indian and Northern Affairs)* 2007 BCSC 827, supp'l 2007 BCSC 1732, 2009 BCCA 153  
*Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911  
*Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.)  
*N.H. and D.H. v. H.M., M.H. and the Director of Child, Family and Community Service*, [1988] BCJ No. 221 (QL)  
*N.P. v. British Columbia (Director of Child, Family and Community Services)*, 1999 CanLII 6514 (BCSC)  
*Natural Parents v. Supt. of Child Welfare*, [1976] 2 S.C.R. 751, (1975) 60 D.L.R. (3d) 148  
*New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46



*New Brunswick (Minister of Health and Community Services) v. L.(M)*, 1998 CanLII 800 (SCC), [1998] 2 S.C.R. 534

*NILITU,O Child and Family Services v. BCGEU* [2010] 2 S.C.R. 696

*Nowegijick v. The Queen*, [1983] S.C.J. No 5, [1983] 1 S.C.R. 29

*Prince & Julian v. HMTQ et al*, 2000 BCSC 1066 (CanLII)

*Quebec (A.G.) v. Canadian Owners and Pilots Assn*, [2010] 2 S.C.R. 526

*R. v. Badger*, [1996] 1 S.C.R. 771

*R. v. Bear's Shin Bone* (1899), 4 Terr. L.R. 173 (N.W.T.S.C.)

*R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220

*R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139

*R. v. Find*, 2001 SCC 32

*R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688

*R. v. Hape*, 2007 SCC 26; [2007] 2 S.C.R. 292

*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433

*R. v. Marshall (I)*, [1999] 3 S.C.R. 456

*R. v. Pamajewon*, [1996] 2 S.C.R. 821

*R. v. Powley*, [2003] 2 S.C.R. 207

*R. v. Sparrow*, [1990] 1 S.C.R. 1075

*R. v. Sundown*, [1999] 1 S.C.R. 393

*R. v. Van der Peet*, [1996] 2 S.C.R. 507

*R. v. Williams*, [1998] 1 S.C.R. 1128

*R.S.B. (Re)* [1994] 4 CNLR 191

*R.T. (Re)* 2004 SKQB 503 (CanLII), 2004 SKQB 112 (CanLII)

*Racine v. Woods* [1983] 2 S.C.R. 173 (S.C.C.); 1983 CanLII 27 (SCC)

*Re A.L.S.*, [1996] B.C.J. No. 2668 (Prov. Ct.)

*Re Aubichon* (1970), 4 R.F.L. 39 (Sask Q.B.).

*Re Beaulieu's Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T.T.C.)

*Re C.I.*, 491 Mich. 81, 82 (2012)

*Re D(J)*, [2003] 4 C.N.L.R. 1 2003 SKQB 309

*Re Katie's Adoption Petition* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.)

*Re Nelson and Children's Aid Society of Eastern Manitoba* (1975) 56 L.R. (3d) 567 (Man. CA)

*Re Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T.S.)

*Re Wah-Shee* (1975), 57 D.L.R. (3d) 743 (N.W.T.S.C.)

*Reference re Child Welfare Act* 1984 ABCA 28 (CanLII)

*RRE (Re)* 2011 SKQB 282 (CanLII)



*S.(E.G.) v. Spallumcheen Band Council*, [1999] 2 C.N.L.R. 318 (B.C.S.C.)  
*Saskatchewan (Social Services) v. L.B.* 2009 SKQB 46 (CanLII)  
*Saskatchewan (Social Services) v. S.E. and E.E.* [1992] 5 W.W.R. 289 (Sask. U.F.C.)  
*Simon v. The Queen*, [1985] 2 S.C.R. 387  
*T.E. v. Alberta (Child, Youth and Family Enhancement Act, Director)* 2013 ABPC 265 (CanLII)  
*T.(E.J.) v. V.(P.M.)*, (1996) 110 Man. R. 219 (Man. C.A.)  
*Tearoe v. Sawan*, 1993 CanLII 2581  
*Tsilhqot'in Nation v. B.C.* 2004 SCC 44  
*Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014  
*Wesley v. CFCS*, 2006 BCSC 1666  
*Winnipeg (Child and Family Services) v. M.A.* 2002 MBQB 209  
*Winnipeg Child and Family Services (East) v. T.S.L.*, 125 D.L.R. (4th) 255

## II. LEGISLATION

*Adoption Act*, RSBC 1996, c. 5  
*California Rules of Court*, Rule 5.484(c)  
*Child and Family Services Act*, RSO 1990, c. C.11  
*Child, Family and Community Service Act* [RSBC 1996] Ch. 46  
*Child, Family Community Service Regulation*, B.C. Reg. 527/95  
*Constitution Act, 1867*  
*Constitution Act, 1982*  
*Indian Act*, R.S.C., 1985, c. I-5  
*Indian Child Welfare Act*, 25 U.S.C. §§ 1901-63  
*Provincial Court (Child, Family, Community Service Act) Rules*, B.C. Reg. 533/95  
Spallumcheen (Splatsin) "A by-law for the Care of Our Indian Children" (Bylaw #3-1980)  
*The Child and Family Services Act*, S.S. (1989-90), c. C-7.2  
*The Representative for Children and Youth Act*, SBC 2006, Ch. 29  
*Tsawwassen First Nation 2009 Children and Families Act* (Available online:  
[www.tsawwassenfirstnation.com/laws-regulations-and-policies/laws/](http://www.tsawwassenfirstnation.com/laws-regulations-and-policies/laws/))  
*United Nations Convention on the Rights of the Child*, adopted and opened for signature,  
ratification and accession by General Assembly resolution 44/25 of 20 November 1989  
entry into force 2 September 1990, in accordance with article 49  
*United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, United  
Nations Resolution adopted by the General Assembly 61/295



### III. BOOKS AND ARTICLES

- 2012 City of Vancouver Area Profile (Available online: <http://vancouver.ca/files/cov/profile-dtes-local-area-2012.pdf>)
- Aboriginal Affairs and Northern Development Canada, *Fact Sheet – Urban Aboriginal Population in Canada, N.D.* (Available online: [www.aadnc-aandc.gc.ca/eng/1100100014298/1100100014302](http://www.aadnc-aandc.gc.ca/eng/1100100014298/1100100014302))
- Atwood, B. "Permanency for American Indian and Alaska Native Foster Children: Taking Lessons from Tribes" (2009) Capital U.L.R. Arizona Legal Studies Discussion Paper No. 08-22
- Blackstock, C., "First Nations child and family services: restoring peace and harmony in First Nations communities" in K. Kufedlt & B. McKenzie (Eds.), *Child Welfare: Connecting Research Policy and Practice*. (Waterloo, Ontario: Wilfred Laurier University Press: 2003)
- Borrows, John and Rotman, Leonard. *Aboriginal Legal Issues: Cases, Materials & Commentary* (2003: LexisNexis; Markham, Ont.)
- Brant Castellano, Marlene. *Contemporary Family Trends, Aboriginal Family Trends: Extended Families, Nuclear Families, Families of the Heart* (The Vanier Institute of the Family, Occasional Papers, 2002)
- Bull, Samuel. "The Special Case of the Native Child" *The Advocate* (1989) Vol 4
- Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* (Bureau of Indian Affairs, Interior; Federal Register, Vol. 80, No. 37, February 25, 2015)
- California Center for Judiciary Education and Research, of the Administrative Office of the Courts. *Bench Handbook The Indian Child Welfare Act (Revised 2013)*
- California Indian Legal Services, *California Judges Benchguide: The Indian Child Welfare Act* (Sacramento, CA: California Indian Legal Services, 2012)
- Calverley, D., Cotter, A., & Halla, E. 2010. "Youth custody and community services in Canada – 2008/2009," *Juristat* 30(1). Ottawa, ON: Statistics Canada
- Canadian Judicial Council, *Statement of Principles on Self-Represented Litigants and Accused Persons*, September 2006
- Dussault, Justice Rene, "Indigenous Peoples and Child Welfare: The Path to Reconciliation" *First Peoples Child & Family Review*, Vol. 3:3 (2007)
- Ferris, P., Simard, E., Simard, G. and Ramdatt, J. "Weechi-it-te-win Family Services: Utilizing a Decentralized Model in the Provision of Bi-Cultural Services" (2005, Promising Practices in First Nations Child Welfare Management and Governance Series, First Nations Child and Family Caring Society of Canada)
- First Nations Child and Family Caring Society of Canada. *Indigenous Children: Rights and Reality. A Report on Indigenous Children and the U.N. Convention on the Rights of the Child*. (Toronto: First Nations Child and Family Caring Society of Canada, 2006)

- Friedland, Hadley. "Tragic Choices and the Division of Sorrow: Speaking About Race, Culture and Community Traumatization in the Lives of Children" (2009) 25 Can. J. Fam. L. 223 - 256
- Graham, L. "Reparations, Self-Determination, and the Seventh Generation" 21 Harv. Hum. Rts. J. 47
- Hughes, T. "BC Children and Youth Review - Keeping Aboriginal Children Safe and Well" (Victoria: April 2006)
- ICWA Special Committee State Court Administrative Office July, 2012 (Michigan)  
*Indian Child Welfare Act of 1978: A Court Resource Guide*
- Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006)
- Kirwin, Lynn M. "Child Protection Law in Canada" [Toronto: Carswell, 2010, 2nd ed.]
- Kline, Marlee. "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations." Osgoode Hall L.J. 30.2 (1992): 375-425
- Lynch, Philip. "Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia" (2001) 23 Sydney L. Rev. 501
- Macdonald, K. "Customary Adoption in British Columbia: Recognizing the Fundamental Differences" (2009) 14 Appeal: Rev. Current L. Reform 17
- Macdonald, Kisa. "Returning to Find Much Wealth: Identifying the Need for a Revised Judicial Approach to Aboriginal Kinship in British Columbia." (2010) 15 Appeal 114-135
- Ministry of Children and Family Development, *Aboriginal Children in Care*, October 2009 Report, Prepared by Research, Analysis and Evaluation Branch (Available online: <http://www.fndirectorsforum.ca/downloads/Aboriginal-children-in-care-10-09.pdf>)
- Ministry of Children and Family Development, *Educational Experiences of Children Under a Continuing Custody Order*. (Victoria: Ministry of Children and Family Development, 2012)
- Minnesota Judicial Branch. *Minnesota Judges Juvenile Protection Benchbook (November 2011)* "Chapter 35: Indian Child Welfare Act"
- National Collaborating Centre for Aboriginal Health: "Aboriginal and Non-Aboriginal children in child protection services" (National Collaborating Centre for Aboriginal Health, 2013)
- Native American Rights Fund. *A Practical Guide to the Indian Child Welfare Act*. (Denver: Native American Rights Fund, 2011) [available online at [www.narf.org](http://www.narf.org)]
- Olthuis, Kleer, Townshend LLP, *Aboriginal Law Handbook (4<sup>th</sup>)* (2012, Thomson Reuters Canada Ltd., Toronto)
- Research Report for Bio Med Central Ltd., 2014* (Contributors Barker, Kerr, Alfred, Fortin, Nguyen, Wood, DeBeck), "High prevalence of exposure to the child welfare system among street-involved youth in a Canadian setting: implications for policy and practice". (BMC Public Health 2014, 14:197) (Available online: <http://www.biomedcentral.com/1471-2458/14/197>)



- Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples. Vol. 1: Looking Forward, Looking Back.* (Ottawa: Royal Commission on Aboriginal Peoples, 1996)
- Sarich, Anthony (Commissioner), *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria Ministry of Attorney General, 1993)
- Smith, Ashley. "Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Save or Lose Our Children?" (2009) 25 Can. J.F.L. 297
- Special Report by the Council of Child and Youth Advocates "Aboriginal Children and Youth in Canada: Canada must do better" submitted to UN Committee on the Rights of the Child 2011
- St. Lewis, Joanne. "Virtual Justice: Systemic Racism and the Canadian Legal Profession" in *Racial Equality in the Canadian Legal Profession* (Ottawa: Canadian Bar Association, 1999)
- Sullivan, Ruth. *Statutory Interpretation* (2nd) (Toronto: Irwin Law, 2007)
- Turpel-Lafond, M.E., Representative for Children and Youth. "Aboriginal Children, Human Rights as a lens to break the intergenerational legacy of Residential Schools." Submission to the Truth and Reconciliation Commission of Canada (July 2012)
- Turpel-Lafond, Mary Ellen. "Some Thoughts on Inclusion and Innovation in the Saskatchewan Justice System" (2005) 68 Sask. L. Rev. 293
- Walkem, A. "Indigenous Laws in the Area of Children and Families: Transformative Possibilities of Recognition" (Continuing Legal Education Society of British Columbia Conference: Indigenous Legal Orders and the Common Law, Vancouver, November 2012)
- Walkem, A. *Building Bridges: Improving Legal Services for Aboriginal Peoples* (Vancouver: Legal Services Society of B.C., 2007)



# WRAPPING OUR WAYS AROUND THEM

ABORIGINAL COMMUNITIES AND THE CFCSA GUIDEBOOK



*Photos courtesy of (left to right): Royal BC Museum, Blend Images, Nadya Kwandibens - Redworks Studios, Nadya Kwandibens - Redworks Studios.*

ISBN 978-0-9940652-0-9

