

*British Columbia (Child, Family and Community Service) v W and H, 2022 BCPC 216.*

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## SUMMARY

The Director seeks an order pursuant to s. 41(1)(b) of the [Child, Family, and Community Service Act](#) (CFCSA) placing the child in the temporary care of “The Caregivers”. There are differing opinions on child’s Indigeneity. The Court adopts Ontario court’s test of self-identification. A.H. is found to be Métis and placed with The Caregivers on temporary order for 3 months with supervision.

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| <b>JURISDICTION</b>                           | British Columbia                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>COURT</b>                                  | Provincial Court of British Columbia                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <b>JUDGE</b>                                  | Mengering J                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>PARTIES</b>                                | <b><u>Parties in the matter of The Child, Family and Community Service Act, R.S.B.C. 1996 c. 46:</u></b><br><b>Applicant</b><br>1. Director of Child, Family and Community Service [Director]<br><b>Respondents</b><br>1. R.D.W. <b>Father</b> (deceased)<br>2. C.A.H. <b>Mother</b><br><br><b><u>Parties in the matter of The Family Law Act, S.B.C. 2011 c. 25:</u></b><br><b>Applicant</b><br>1. R.D.W. <b>Father</b> (deceased)<br><b>Respondents</b><br>1. C.A.H. <b>Mother</b> |
| <b>TREATY TERRITORY</b>                       | None.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <b>INDIGENOUS GROUP, COMMUNITY, OR PEOPLE</b> | Omitted for publication.                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| <b>APPLICABLE INDIGENOUS LAW</b>              | None.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <b>TOPICS</b>                                 | Best Interests<br>Cultural Continuity<br>Historical context considered                                                                                                                                                                                                                                                                                                                                                                                                               |

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|                            | <p>Indigenous Identification</p> <p>Temporary Care and Custody</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <b>LEGISLATION CITED</b>   | <p><u><i>An Act respecting First Nations, Inuit and Métis children, youth and families</i>, SC 2019, c 24.</u> (Federal Act)</p> <p>Preamble, Sections 1 (“Indigenous Peoples”), 2, 10, 11(c)</p> <p><u><i>Child, Family and Community Service Act</i>, RSBC 1996, c 46.</u> (CFCSA)</p> <p>Sections 1 (“Indigenous Child”), 4, &amp; 41(1)(b)</p> <p><u><i>Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982</i>, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.</u> (Constitution)</p> <p>Section 35</p> <p><u><i>Child, Youth and Family Services Act, 2017</i>, SO 2017, c 14, Sched 1.</u> (CYFSA)</p> <p>Section 90(2)(b)</p>                                                                                                                                                                                                                                         |
| <b>CASE LAW CONSIDERED</b> | <p><u><i>British Columbia (Child, Family and Community Service) v MJK</i>, 2020 BCPC 39.</u></p> <p><u><i>British Columbia (Child, Family and Community Service) v SH</i>, 2020 BCPC 82.</u></p> <p><u><i>British Columbia (Director of Child, Family and Community Service) v HDC</i>, 2020 BCPC 214.</u></p> <p><u><i>Castonguay and Faucher v R</i>, 2006 NBCA 43.</u></p> <p><u><i>Catholic Children’s Aid Society of Hamilton v GH</i>, 2016 ONSC 6287.</u></p> <p><u><i>Catholic Children’s Aid Society of Toronto v ST</i>, 2019 ONCJ 207.</u></p> <p><u><i>Children’s Aid Society of the Regional Municipality of Waterloo v CE</i>, 2020 ONSC 6314.</u></p> <p><u><i>Daniels v Canada (Indian Affairs and Northern Development)</i>, 2016 SCC 12.</u></p> <p><u><i>LP and DP v CC</i>, 2022 BCPC 34.</u></p> <p><u><i>R v Caissie</i>, 2012 NBQB 1.</u></p> <p><u><i>R v Daigle</i>, 2003 NBPC 4.</u></p> |

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|                     | <p><a href="#"><i>R v Eymard Chiasson</i>, 2012 NBPC 14.</a></p> <p><a href="#"><i>R v Gladue</i>, 1999 CanLII 679 (SCC), [1999] 1 SCR 688.</a></p> <p><a href="#"><i>R v Hamer</i>, 2021 BCCA 297.</a></p> <p><a href="#"><i>R v Hopper</i>, 2004 NBPC 7.</a></p> <p><a href="#"><i>R v Ipeelee</i>, 2012 SCC 13.</a></p> <p><a href="#"><i>R v Powley</i>, 2003 SCC 43.</a></p> <p><a href="#"><i>R v Van Der Peet</i>, 1996 CanLII 216 (SCC), [1996] 2 RCS 507.</a></p> <p><a href="#"><i>R v Vautour</i>, 2010 NBPC 39.</a></p> <p><i>TL v British Columbia (Attorney General)</i>, 2021 BCSC 2437.</p> <p><a href="#"><i>Windsor-Essex Children's Aid Society v AD</i>, 2021 ONCJ 425.</a></p> |
| <b>CASE HISTORY</b> | None.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

# CASE BRIEF

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## DECISION

- Child is Indigenous through mother, and Métis through father.
- If Order is made, it is expected that the Cultural Safety Plan be followed.
- Child is to be placed in the custody of The Caregivers, under Director supervision for 3 months.

## FACTS

- Child is A.H.
- Has Long QT Syndrome – caregiver must ensure medical follow up.
- C.A.H. struggled with substance abuse at birth and still struggles in present day.
- R.D.W. is deceased – Paternal family withdraws guardianship application prior to this proceeding.
- Métis Commission is only party that has spoken to concerns of preserving the A.H.'s Métis heritage.
- Has recognized both A.H. and her father as Métis through their own internal processes.
- “The Caregivers” do not recognize the child to be Métis.
- Says the Director is disregarding Aboriginal history by not differentiating between “genuine Indigenous Peoples” and post-contact Métis.
- Caregivers also disagree with the Métis Commission's definition of Métis - they seek their own definition of Indigeneity on another culture.
- The Band refuses to respect or maintain the A.H.'s knowledge or connection to Métis customs without proof that she is Métis.
- Had opportunity to provide Cultural Safety Plan for A.H. and did not.
- The Director says there is sufficient evidence to prove Métis heritage.

## ISSUES

1. Is the child an Indigenous child, pursuant to s. 1 of the CFCSA?
2. Can the court place a child in the temporary custody of the caregiver pursuant to s. 41(1)(b) if the proposed caregiver will not respect both the child's [omitted for publication] and Métis heritage?
3. Is it in the child's best interest to temporarily transfer custody of her to "The Caregivers"?

## ANALYSIS

- S. 41(1)(b) CFCSA – authority to place a child in the custody of someone other than a parent, if there is finding for need of protection.
- S. 4(2) CFCSA – If a child is Indigenous, court must determine best interest with regard to:
  - The importance of the child being able to learn about and practice Indigenous traditions, customs and language
  - The importance of the child belonging to her Indigenous community.
- s. 1 (CFCSA) – Definition of "Indigenous Child".
  - A child under 12 and has a biological parent who is of Indigenous ancestry (including Métis) and considers him or herself to be Indigenous.
- [An Act respecting First Nations, Inuit and Métis children, youth and families](#) (The Federal Act) – prioritizes reuniting Indigenous children with their families and communities.
- S. 1 Federal Act – Indigenous Person is a First Nations person, an Inuk, or a Métis person.
- s. 2 Federal Act – Cultural continuity is principal to the act.

### Issue 1: Is the child an Indigenous child?

- Not disputed that A.H. is Indigenous through her mother.
- The question is to whether A.H. is also Métis through her father.
- Neither the CFCSA, nor Constitution Act (CA), define Métis.
- Definition of Métis established by Supreme Court of Canada (SCC) in Powley does not apply to the child protection realm.
- The social purpose of ss. 1 and 4 of CFCSA and Federal Act and s. 35 of the CA are the same – recognize Indigenous heritage and ensure the survival of Indigenous cultural practices, languages and traditions.

- Legal outcomes are different – A child can be Métis for the child protection proceeding purposes but not gain s. 35 constitutionally protected rights.
- Ontario case law – self-identification is common and there are 3 principles to consider:
- Must be evidentiary and good faith basis to self-identification.
- Evidentiary threshold is low but must be reliable and credible.
- Court must take a broad view in interpreting if child is First Nations, Inuk or Métis.
- Court finds this test persuasive and adopts it.
- Definitional vagueness should not prevent the Director from providing culturally appropriate services.
- It goes directly against SCC in Gladue and Ipeelee to require the paternal family to establish a causal link to their heritage, as the Band suggests.
- The claim of the paternal family that the family is Métis is made in good faith, and there is a reliable and credible evidentiary basis to determine the father was Métis.
- The child is both part of the maternal band and Métis.

**Issue 2: Can the child be placed with a caregiver who will not respect her Métis heritage?**

- Court is not required to address if an Indigenous child can be placed with someone who denies the child is Indigenous.
- If an Order is made, it will be with the expectation that the caregiver comply with the Cultural Safety Plan.

**Issue 3: Is it in child's best interest to be placed with "The Caregivers"?**

- Court has concerns about The Caregiver's ethnocentric view of Indigeneity.
- However, Caregiver has indicated willingness to keep A.H. connected to both heritages (maternal and paternal) and to foster connection with extended family members.
- The child is to be placed with the Caregivers, for a period of 3 months

## RELEVANT EXCERPTS

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[23] The relevant portion of s. 1 of the CFCSA defines an “Indigenous child” as a child who is under 12 years of age and has a biological parent who (i) is of Indigenous ancestry, including Metis; and (ii) considers him or herself to be Indigenous.

[35] I was urged by the Band to adopt the definition of Metis as set out in Powley but I am not persuaded that test applies to the child protection realm. The principle underlying the definition of “Indigenous” in Powley is the non-extinguishment of pre-existing practices and titles that predate confederation and, with the Metis, reconciliation of pre-control practices and traditions with the imposition of colonial laws that infringe on those practices and traditions.

[37] Thus, I find that the overarching purpose of ss. 1 and 4 of the CFCSA, the Federal Act, and s. 35 of the Constitution Act is the same - to recognize Indigenous heritage and enhance and ensure the survival of Indigenous cultural practices, language and traditions - but the legal and constitutional outcome is, and should be, different. A child can be Métis for child protection proceeding purposes, but not gain section 35 constitutionally protected rights.

[64] I do not agree with the Band’s submission that if the child were not [omitted for publication], the Federal Act would not apply to her right now. I do not agree with the Band’s submission that the paternal cousins must show evidence of having been disenfranchised by the residential school system or the “60’s Scoop” before using that as an explanation for their lack of connection to a Metis community. It is offensive and contrary to the line of authority set out by the Supreme Court of Canada in Gladue and Ipeelee, which stand for the proposition that an Indigenous person need not establish a causal link between the systemic and background factors and their current situation before the court can consider the impact of colonialism on Indigenous persons.

# LEGISLATION CITED

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*[An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24.](#)*

## **Preamble**

Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;

Whereas Canada ratified the United Nations Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination;

Whereas Parliament recognizes the legacy of residential schools and the harm, including intergenerational trauma, caused to Indigenous peoples by colonial policies and practices;

Whereas Parliament recognizes the disruption that Indigenous women and girls have experienced in their lives in relation to child and family services systems and the importance of supporting Indigenous women and girls in overcoming their historical disadvantage;

Whereas Parliament recognizes the importance of reuniting Indigenous children with their families and communities from whom they were separated in the context of the provision of child and family services;

Whereas the Truth and Reconciliation Commission of Canada's Calls to Action calls for the federal, provincial and Indigenous governments to work together with respect to the welfare of Indigenous children and calls for the enactment of federal legislation that establishes national standards for the welfare of Indigenous children;

Whereas Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services;

Whereas Parliament affirms the need

to respect the diversity of all Indigenous peoples, including the diversity of their laws, rights, treaties, histories, cultures, languages, customs and traditions,

to take into account the unique circumstances and needs of Indigenous elders, parents, youth, children, persons with disabilities, women, men and gender-diverse persons and two-spirit persons,

to address the needs of Indigenous children and to help ensure that there are no gaps in the services that are provided in relation to them, whether they reside on a reserve or not,

to eliminate the over-representation of Indigenous children in child and family services systems, and

to enact legislation for the benefit of Indigenous children, including First Nations, Inuit and Métis Nation children;

Whereas the Government of Canada is committed

to working in cooperation and partnership with Indigenous peoples to support the dignity and well-being of Indigenous children and youth and their families and communities, as well as the achievement of their full potential, and to respecting, strengthening and building on the accomplishments of Indigenous peoples in this regard,

to achieving reconciliation with First Nations, the Inuit and the Métis through renewed nation-to-nation, government-to-government and Inuit-Crown relationships based on recognition of rights, respect, cooperation and partnership, and

to engaging with Indigenous peoples and provincial governments to support a comprehensive reform of child and family services that are provided in relation to Indigenous children;

And whereas the Government of Canada acknowledges the ongoing call for funding for child and family services that is predictable, stable, sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

## **Section 1 – Definitions**

1 The following definitions apply in this Act.

Indigenous peoples has the meaning assigned by the definition aboriginal peoples of Canada in subsection 35(2) of the [Constitution Act, 1982](#). (peuples autochtones)

## **Section 2 (Repealed, 2024, c 30, s 30)**

2 This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the [Constitution Act, 1982](#), and not as abrogating or derogating from them.

## **Section 10 – Best Interests of Indigenous Child**

10 (1) The best interests of the child must be a primary consideration in the making of decisions or the taking of actions in the context of the provision of child and family services in relation to an Indigenous child and, in the case of decisions or actions related to child apprehension, the best interests of the child must be the paramount consideration.

### **Primary consideration**

(2) When the factors referred to in subsection (3) are being considered, primary consideration must be given to the child's physical, emotional and psychological safety, security and well-being, as well as to the importance, for that child, of having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs and of preserving the child's connections to his or her culture.

### **Factors to be considered**

(3) To determine the best interests of an Indigenous child, all factors related to the circumstances of the child must be considered, including

- (a) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
- (b) the child's needs, given the child's age and stage of development, such as the child's need for stability;
- (c) the nature and strength of the child's relationship with his or her parent, the care provider and any member of his or her family who plays an important role in his or her life;
- (d) the importance to the child of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs;

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(f) any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs;

(g) any family violence and its impact on the child, including whether the child is directly or indirectly exposed to the family violence as well as the physical, emotional and psychological harm or risk of harm to the child; and

(h) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

### **Consistency**

(4) Subsections (1) to (3) are to be construed in relation to an Indigenous child, to the extent that it is possible to do so, in a manner that is consistent with a provision of a law of the Indigenous group, community or people to which the child belongs.

### **Section 11(c) - Effect of Services**

11 Child and family services provided in relation to an Indigenous child are to be provided in a manner that

(c) allows the child to know his or her family origins

[Child, Family and Community Service Act, RSBC 1996, c 46.](#)

### **Section 1 – Definitions and Interpretation**

"Indigenous child" means a child

(a) who is a First Nation child,

(b) who is a Nisga'a child,

(c) who is a Treaty First Nation child,

- (d) who is under 12 years of age and has a biological parent who
  - (i) is of Indigenous ancestry, including Métis and Inuit, and
  - (ii) considers themselves to be an Indigenous person,
- (e) who is 12 years of age or over, of Indigenous ancestry, including Métis and Inuit, and considers themselves to be an Indigenous person, or
- (f) who an Indigenous governing body or Indigenous authority confirms, by advising a director, is a child belonging to an Indigenous community;

#### **Section 4 – Best Interests of Child**

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 interests, 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.

(2) If the child is an Indigenous child, in addition to the relevant factors that must be considered under subsection (1), the following factors must be considered in determining the child's best interests:

- (a) the importance of the child being able to learn about and practise the child's Indigenous traditions, customs and language;
- (b) the importance of the child belonging to the child's Indigenous community.

## **Section 41(1)(b) - Orders Made at Protection Hearing**

41 (1) Subject to subsection (2.1), if the court finds that the child needs protection, it must make one of the following orders in the child's best interests:

(b) that the child be placed in the custody of a person other than a parent with the consent of the other person and under the director's supervision, for a specified period in accordance with section 43;

[Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(UK\), 1982, c 11.](#)

## **Section 35 – Rights of the Aboriginal Peoples of Canada**

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of aboriginal peoples of Canada

(2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.

### **Land claims agreements**

(3) For greater certainty, in subsection (1) treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons

*Child, Youth and Family Services Act, 2017, SO 2017, c 14, Sched 1.*

**Section 90(2)(b) - Child's Name, Age, Etc.**

(2) As soon as practicable, and in any event before determining whether a child is in need of protection, the court shall determine

(b) whether the child is a First Nations, Inuk or Métis child and, if so, the child's bands and First Nations, Inuit or Métis communities;