

## AK v JJ, 2024 ABCA 324.

### SUMMARY

After NK was removed from her mother’s care in 2018 and was placed with her maternal aunt and uncle (the Respondents) under a Customary Care Agreement (CCA), which her father, AK, later revoked. Despite AK seeking reunification and opposing the guardianship application, the trial judge granted permanent guardianship to the Respondents, concluding that it was in NK’s best interests to remain with them, and the Court of King’s Bench upheld that decision. AK argued that the lower courts failed to properly apply the Federal Act by giving insufficient weight to family reunification, Indigenous cultural continuity, placement priorities under s. 16, and the distinct best-interests analysis for Indigenous children. The Respondents maintained that the Act either did not apply because NK was no longer receiving family services or, alternatively, that it had been correctly applied. The Court held that the appeal presents significant questions of law with precedential value, particularly whether the Federal Act applies after a CCA is terminated and whether it modifies the best-interests analysis for Indigenous children. The Court concluded that AK’s appeal is arguable, has a reasonable chance of success, and is not frivolous.

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|-----------------------------------------------|-----------------------------------------------------------------|
| <b>JURISDICTION</b>                           | Alberta                                                         |
| <b>COURT</b>                                  | Alberta Court of Appeal                                         |
| <b>JUDGE</b>                                  | de Wit J                                                        |
| <b>PARTIES</b>                                | <b>Applicant</b><br>1. AK<br><b>Respondents</b><br>1. JJ and JJ |
| <b>TREATY TERRITORY</b>                       | Treaty 7                                                        |
| <b>INDIGENOUS GROUP, COMMUNITY, OR PEOPLE</b> | Tsuut’ina Nation                                                |
| <b>APPLICABLE INDIGENOUS LAW</b>              | None                                                            |
| <b>TOPICS</b>                                 | Application of Act                                              |

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|----------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                            | <p>Customary Care</p> <p>Guardianship</p> <p>Priority placement</p>                                                                                                                                                                                                                  |
| <b>LEGISLATION CITED</b>   | <p><a href="#"><i>An Act Respecting First Nations, Inuit and Metis children, youth and families</i>, SC 2019, c 24.</a> (Federal Act)</p> <p>Sections 10; 16</p> <p><a href="#"><i>Alberta Rules of Court</i>, Alta Reg 124/2010.</a></p> <p>Rule 14.5(1)(i)</p>                     |
| <b>CASE LAW CONSIDERED</b> | <p><a href="#"><i>Szakaly v Smith</i>, 2024 ABCA 171.</a></p> <p><a href="#"><i>Mezo v Watts</i>, 2021 ABCA 76.</a></p> <p><a href="#"><i>Mckerness v Whitson</i>, 2017 ABCA 207.</a></p> <p><a href="#"><i>Belway v Lalande-Weber</i>, 2017 ABCA 108.</a></p>                       |
| <b>CASE HISTORY</b>        | <p><a href="#"><i>AK v JJ</i>, 2025 ABCA 345.</a></p> <p><a href="#"><i>JJ v AK</i>, 2025 ABCA 113.</a></p> <p><a href="#"><i>AK v JJ</i>, 2024 ABKB 582.</a></p> <p><a href="#"><i>AK v JJ and JJ</i>, 2024 ABKB 467.</a></p> <p><a href="#"><i>JJ v AK</i>, 2023 ABCJ 166.</a></p> |

# CASE BRIEF

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## DECISION

- Application for permission to appeal is granted.

## FACTS

- AK is the biological father of NK, who was born in November 2017.
- The Applicant, AK, seeks leave to appeal the decision of the Court of King's Bench.
- The Respondents, JJ and JJ, are NK's maternal uncle and aunt.
- NK was removed from her mother's care by Dilico Anishinabek Family Care in February of 2018, after which she was temporarily placed in foster care.
- AK was unable to care for NK at the time of apprehension, as such NK was placed in the Respondent's care in May of 2018 pursuant to a Customary Care Agreement (CCA), which was entered into by Dilico, NK's mother, AK, the mother's band and AK's band.
- The CCA provided that any party to the agreement could terminate the agreement after providing 90 days' notice.
- In April of 2021, the Respondents brought a guardianship application pursuant to the FLA, seeking to be made permanent guardians of NK. The application was supported by the uncle's band and the mother's band.
- NK is currently a member of the mother's band.
- AK and his band opposed the application and sought NK's return to her father, AK.
- In October of 2021, AK revoked the CCA.
- In June of 2023, the trial judge granted guardianship to the Respondents and waived AK's consent.
- In their reasons, the trial judge claimed to consider the Federal Act and concluded that it was in NK's best interests to remain with the respondents.
- On appeal to the Court of King's Bench, AK contended that the trial judge erred in applying the Federal Act. Specifically, that the trial judge (1) failed to consider the important the Federal Act places on family reunification between Indigenous children and their parents, (2) failed to properly consider the priority of placement set out in section 16 of the Federal Act, (3) failed to consider the high important the Federal Act places on preserving NK's cultural

connections, and (4) failed to consider that the best interests test for Indigenous children is different from the best interest test for non-Indigenous children.

- On appeal, the Respondents asserted that the Federal Act did not apply as NK was not receiving family services at the time.
- On July 30, 2024, the appeal judge held that trial judge did not misapply the Federal Act and did not err in finding that it was in NK's best interest to remain with the Respondents. As such, the judge dismissed the appeal. As a result, AK brought a leave application to this court pursuant to rule 14.5(1)(i) on the ground that the Court of King's Bench Justice erred in law in his incorrect application of applying sections 10 and 16 of the Federal Act.

### **Parties' Positions**

#### *AK*

- AK contends that the Federal Act has never been considered or interpreted by this Court and that this appeal raises important questions of law.
- AK maintains that the Federal Act requires judge to consider the best interests of Indigenous children and place less weight on preserving the child's status quo, as doing so frustrates the intent of the Federal Act.
- AK also maintains that the Federal Act requires judges to place special emphasis on cultural needs and family reunification as section out in section 16 of the Federal Act.
- Lastly, he asserts that the lower Courts erred in failing to properly consider the preferences of AK's band, being the only relevant Indigenous governing body. AK asserts that the consequences of the lower Courts' decisions will have a chilling effect on future CCAs.

#### *JJ and JJ*

- The Respondents assert that the trial and appeal judge correctly applied the Federal Act and took its provisions into consideration when deciding that it was in NK's best interests to remain with them.
- The Respondents also contend that the Federal Act does not apply in this case, as NK was not receiving family services.
- The Respondents argue that AK is asserting that the Federal Act creates a statutory presumption that a child must be placed with their parent, absent concerns, and maintain that no such presumption exists.

## ISSUES

1. Does this appeal raise important questions of law or precedent?
2. Does this appeal have a reasonable chance of success?

## ANALYSIS

- To be successful on this child, the applicant, must demonstrate
  - (1) there is an important question of law or precedent,
  - (2) there is a reasonable chance of success on appeal,
  - and (3) the delay will not unduly hinder the progress of the action or cause undue prejudice.
  - See *Mezo v Watts*, 2021 ABCA 76.
- This appeal focuses on whether there are important questions of law or precedent and whether the appeal has a reasonable chance of success.
- The best interests of the child and resources of the parents should always be considered in deciding whether to grant permission to appeal.
  - See *Szakaly v Smith*, 2024 ABCA 171.
  - See also *Mckerness v Whitson*, 2017 ABCA 297.
- Issues raised in this appeal raise important questions of law that have precedential value.
- This court has never directly considered or interpreted the Federal Act. This appeal also raises issues of whether the Federal Act applies in the context of a guardianship application where a CCA has been terminated.
- Whether the Federal Act alters the best interest test for Indigenous children is an important question of law.
- AK's appeal is arguable, has a reasonable chance of success and is not frivolous.

## RELEVANT EXCERPTS

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[22] The leave to appeal test was articulated by this Court in *Mezo v Watts*, 2021 ABCA 76 at para 11: To be successful on this application, the applicant must demonstrate: (1) there is an important question of law or precedent, (2) there is a reasonable chance of success on appeal, and (3) the delay will not unduly hinder the progress of the action or cause undue prejudice.

# LEGISLATION CITED

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*An Act Respecting First Nations, Inuit and Metis children, youth and families, SC 2019, c 24.*

## **Section 10**

### **Best interests of Indigenous child**

(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 16**

### **Placement of Indigenous Child**

#### **Priority**

(1) The placement of an Indigenous child in the context of providing child and family services in relation to the child, to the extent that it is consistent with the best interests of the child, is to occur in the following order of priority:

(a) with one of the child's parents;

(b) with another adult member of the child's family;

(c) with an adult who belongs to the same Indigenous group, community or people as the child;

(d) with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or

(e) with any other adult.

#### **Placement with or near other children**

(2) When the order of priority set out in subsection (1) is being applied, the possibility of placing the child with or near children who have the same parent as the child, or who are otherwise members of the child's family, must be considered in the determination of whether a placement would be consistent with the best interests of the child.

#### **Customs and traditions**

(2.1) The placement of a child under subsection (1) must take into account the customs and traditions of Indigenous peoples such as with regards to customary adoption.



**Family unity**

(3) In the context of providing child and family services in relation to an Indigenous child, there must be a reassessment, conducted on a ongoing basis, of whether it would be appropriate to place the child with

- (a) a person referred to in paragraph (1)(a), if the child does not reside with such a person; or
- (b) a person referred to in paragraph (1)(b), if the child does not reside with such a person and unless the child resides with a person referred to in paragraph (1)(a).

[\*Alberta Rules of Court, Alta Reg 124/2010.\*](#)

**Rule 14.5(1)(i)****Appeals only with permission**

(1) Except as provided in this rule, no appeal is allowed to the Court of Appeal from the following types of decisions unless permission to appeal has been obtained:

- (i) any decision of the Court of King's Bench sitting as an appeal court under rule 10.26, 10.44 or 12.71.