

British Columbia (Children and Family Development) v RT,
2024 BCPC 41.

SUMMARY

Application for a continuing custody order (CCO) pursuant to s 49(9) of the [Child, Family and Community Service Act](#) (CFCSA). If denied, the Director submits that E.E.T. must be returned to R.T.'s care, pursuant to s 49(10)(b) of the CFCSA. Merrick J reiterates the purpose of the court is to make orders in the best interest of the child. Both the Director and R.T. are found to have disregarded a plan of care for E.E.T.'s culture, and the application is dismissed.

JURISDICTION	British Columbia
COURT	Provincial Court of British Columbia
JUDGE	Merrick J
PARTIES	Applicant 1. Director of Ministry of Children and Family Development [Director] Respondents 1. R.T. Father 2. V.L. Mother 3. [Omitted for publication] Nation (Treaty First Nation)
TREATY TERRITORY	None.
INDIGENOUS GROUP, COMMUNITY, OR PEOPLE	Omitted for publication.
APPLICABLE INDIGENOUS LAW	None.
TOPICS	Best Interests Continuing Custody Order Cultural Continuity
LEGISLATION CITED	An act respecting First Nation, Inuit and Métis children, youth and families, SC 2019, c 24. (Federal Act) Sections 10; 16(3) Child, Family and Community Service Act, RSBC 1996, c 46. (CFCSA) Sections 4; 8(1); 35(2)(d); 41(1)(b); 44.1(3); 49(7)(9)(10); 55

	<u><i>United Nations Declaration on the Rights of Indigenous Peoples</i></u>, GA Res. 61/295. (UNDRIP) Articles 9; 11; 14.3
CASE LAW CONSIDERED	<u><i>BB v British Columbia (Director of Child, Family and Community Services)</i></u>, 2005 BCCA 46. <u><i>DBS v SRG</i></u>, 2006 SCC 37. <u><i>J(L) v British Columbia (Director of Child, Family & Community Services)</i></u>, 2000 BCCA 446. <u><i>Michel v Graydon</i></u>, 2020 SCC 24. <u><i>Reference re An Act respecting First Nations, Inuit and Métis children, youth and families</i></u>, 2024 SCC 5.
CASE HISTORY	None.

CASE BRIEF

DECISION

- Application for CCO is denied.
 - The best interest factors and violation of the plan of care do not support a CCO.
- Trial is adjourned to the Judicial Case Manager, pursuant to Rule 8(1) of the CFCSA.
 - Parties are to use the adjournment to put forth an appropriate care arrangement.

FACTS

- Child is E.E.T.
- E.E.T. is born addicted to substances and with brain membrane missing
 - Extent of further medical needs is unknown.
- E.E.T. removed from parents care at 40 days old in the hospital.
- Has always lived with maternal great aunt and uncle, D.L. and L.L.
 - Plan of Care for E.E.T. is to have stable, permanent adoptive home. She should participate in the cultural activities and programming offered through the party Nation.
- V.L. is member of party Nation and R.T. is Métis.
 - Both parties struggle with substance use.
- V.L. intermittently attended trial – not able to care for E.E.T. at this time.
- R.T. has two other children, T and M.
 - T is in the care of the Director.
 - M lives with their mother.
- R.T. only has facetime access 2x per week – requests for more time but Director says no because of COVID, R.T. not being vaccinated, and other issues.
- R.T. submits he is sober, has appropriate living conditions and support of family to help raise E.E.T.

- Director has protection concerns regarding R.T.'s father.
- E.E.T. has never been cared for by R.T., nor had overnight access with him.
- R.T. has not been given the opportunity to show what his relationship with E.E.T. is like.

ISSUE

- Should the application for a CCO pursuant to s 49(9) of the CFCSA be granted?

ANALYSIS

- The last reunification assessment by the Director took place in November 2022.
 - This does not comply with s 16(3) of [*An Act respecting First Nations, Inuit and Métis children, youth and families*](#) (*Federal Act*) which requires reassessment on an ongoing basis.
- S 49(10) of CFCSA – court must consider past conduct of parent, plan of care, and the child's best interests
 - Then make order placing child in continuing custody of the Director or returning to the parent entitled to custody.
- S 4 CFCSA and s 10 *Federal Act* – Best interest of the child factors.
 - Lists are non-exhaustive.
 - *Federal Act* factors must consider an ongoing relationship with the child's Indigenous group, community or people.
 - Primary consideration must be given to the importance of the child having an ongoing relationship with their family and Indigenous group and preserving connection to their culture.
 - E.E.T.'s strongest connections are with her maternal great aunt, maternal great uncle (D.L. and L.L.) and her teenage half-sister, B.
- The cultural agreement to keep E.E.T. connected to her family, kinship and culture is not being followed.

- D.L. and L.L.'s focus is their own Nation. E.E.T. participates in the events of their Nation.
 - D.L. has said that if the CCO is granted, she would register E.E.T. with the party Nation.
- Neither the Director, D.L. and L.L., nor R.T. have ensured E.E.T.'s connection to the party Nation.
 - No one is ensuring E.E.T.'s cultural connections are being preserved.
 - Nation has directly requested that D.L. and L.L. bring E.E.T. to their events / gatherings – this has never occurred.
 - D.L. and L.L. have prioritized their own Nation - unclear why the Director has allowed this to happen.
 - This is not in E.E.T.'s best interest.
 - Being 'busy' is not an acceptable reason to minimize E.E.T.'s exposure to all of her cultures.
- *Reference re Federal Act 2024 SCC 5* – the child must be placed at the centre of cultural continuity.
- [United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP)
 - Guarantees Indigenous People the right to belong to their community, practice their cultural traditions and, for Indigenous Children, the right to access an education in their own culture.
- Almost all other factors favour granting the CCO – but the failure to implement the plan of care respecting E.E.T.'s culture sways the balance.
 - The Director's care arrangement is not appropriate.
- E.E.T. has the right to an appropriate care arrangement, which includes connection to her cultures
 - The Director and R.T. have both failed to propose a plan of care that satisfies this.
 - It is not enough to say that E.E.T.'s culture will be prioritized if the CCO is granted, because this should have already been happening.

- The best interest factors do not indicate that E.E.T. should be returned to R.T. either.
 - The present care arrangement is not appropriate.
 - The party Nation has suggested a care arrangement that R.T. should follow.

RELEVANT EXCERPTS

[50] While many factors favour the granting of a continuing custody order, the prioritizing of the [omitted for publication] culture to the extent of nearly abandoning E.E.T.'s [omitted for publication] cultures is not in E.E.T.'s best interests.

[53] However, the failure to implement the plan of care respecting E.E.T.'s culture and the resulting impact and the potential for harm that has on E.E.T., combined with the significant importance of the following two best interest factors - the child being able to learn about and practice the child's [omitted for publication] traditions, customs and language and the belonging to the child's [omitted for publication] community - sway the balance.

[56] A consideration and weighing of the best interest factors, in addition to the plan of care not being followed, do not support the making of a continuing custody order. It is my judgment that the Director's care arrangement is not appropriate. Therefore, the application for a continuing custody order is denied.

LEGISLATION CITED

An act respecting First Nation, Inuit and Métis 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(3) - 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).

Section 4 – Best Interests of Child

(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 8(1) - Agreements with Child's Kin and Others

(1) A director may make a written 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.

Section 35(2)(d) - Presentation Hearing and Orders

(2) At the conclusion of the hearing, the court must make

(d) an interim order 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.

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

(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;

Section 44.1(3) - Extension of Temporary Custody Order if Permanent Transfer of Custody Planned

(3) The court may, in the child's best interests, extend the temporary custody order for a period of time that, at a minimum, meets the residency requirement referred to in section 54.01 (5) (c), but that is not beyond the period permitted under section 45.

Section 49 – Continuing Custody Hearing and Orders

(7) If the court does not make a continuing custody order, it must make one of the following orders:

(a) that the child be returned to the custody of the parent apparently entitled to custody;

(b) that the child remain in the temporary custody of a person other than the parent for a specified period of up to 6 months;

(c) that the child remain or be placed in the temporary custody of the director for a specified period of up to 6 months.

(9) Not sooner than 60 days before a temporary custody order under subsection (7) (b) or (c) expires, the director may apply to the court for a continuing custody order.

(10) If the director applies under subsection (9), the court after considering the factors in subsection (6) must make one of the following orders:

- (a) that the child be placed in the continuing custody of the director;
- (b) that the child be returned to the parent apparently entitled to custody.

Section 55 – Access to Child in Interim or Temporary Custody of Director or Other Person

(1) At the time an order, other than a continuing custody order or an order made under section 54.01 (5) or 54.1, is made under this Part, the parent who had custody when the child was removed may apply to the court for access to the child.

(2) After an order, other than a continuing custody order or an order made under section 54.01 (5) or 54.1, is made under this Part, any person may apply to the court for access to the child.

(3) At least 10 days before the date set for hearing an application under subsection (2), notice of the hearing must be served on

- (a) the child, if 12 years of age or over,
- (b) the director, and
- (c) in addition

- (i) if the application is made before the protection hearing, the persons mentioned in section 34 (3) (b), (d), (e) and (f), and

- (ii) if the application is made after the protection hearing, the persons who under section 39 are entitled to notice.

(3.1) If a person referred to in subsection (3) (b) and (c) (i) appears at the commencement of the hearing, that person is entitled to be a party at the hearing.

(4) If the parent who had custody when the child was removed applies under subsection (1) or (2), the court must order that the parent be given access to the child unless the court is satisfied access is not in the child's best interests.

(5) If a person, other than the parent who had custody when the child was removed, applies under subsection (2), the court may order that the person be given access to the child unless the court is satisfied access is not in the child's best interests.

(6) The court may attach to an access order under this section or section 56 any reasonable terms or conditions.

[United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295.](#)

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.

Article 11

(1) Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

(2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 14.3

(3) States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.