

British Columbia (Children and Family Development) v MKC,
2024 BCPC 55.

SUMMARY

Director is seeking order returning R.M.C to A.W.’s care under 6-month supervision order, pursuant to [Children, Family and Community Service Act](#) (CFCSA), s 41(1)(a) – Director also consents to child being returned to M.K.C. Brecknell J conducts a best interest of the child analysis according to [An Act Respecting First Nations, Inuit and Métis Children, Youth and Families](#) (Federal Act) and determines this is placement with A.W., subject to supervision terms.

JURISDICTION (APTOS; 11; BOLD; CAPS)	British Columbia
COURT	Provincial Court of British Columbia
JUDGE	Brecknell J
PARTIES	Applicant 1. Director of Ministry of Children and Family Development [Director] Respondents 1. M.K.C. Father 2. A.W. Mother
TREATY TERRITORY	None.
INDIGENOUS GROUP, COMMUNITY, OR PEOPLE	Omitted for publication.
APPLICABLE INDIGENOUS LAW	None.
TOPICS	Access Best Interests Priority Placement
LEGISLATION CITED	An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24. (Federal Act) Sections 4; 9; 10; 11; & 16(1) Child, Family and Community Service Act, RSBC 1996, c 46. (CFCSA)

	Sections 2; 3; 4(1); 13(1); 16(1); 29.1(1); 30(1); 33.2; 35(1) & (2)(d); 41; 41.1; 55(1) (2) (5) (6). <i>Family Law Act, SBC 2011, c 25.</i> (FLA)
CASE LAW CONSIDERED	<i>British Columbia (Child, Family and Community Service) v SH, 2020 BCPC 82.</i>
CASE HISTORY	None.

CASE BRIEF

DECISION

- It is in the best interests of R.M.C. to be returned to A.W., under supervision for 6 months.
 - M.K.C. is a 'very suitable' placement, but it is in the child's best interests to be returned to A.W.
 - A.W. must abide by supervision terms such as no physical discipline, participating in anger management, and permitting access with M.K.C.

FACTS

- R.M.C is child of M.K.C. and A.W.
- Both M.K.C. and A.W. are members of Gitxsan Nation.
- Multiple incidents of intimate partner violence (IPV) from M.K.C. to A.W.
 - In 2016, M.K.C. is arrested and receives no contact order with A.W.
- Relationship ends in 2017 after additional instances of IPV – A.W. and child R.M.C. live with various family members who assist in raising the child.
 - M.K.C. has very limited access with child during these years.
- In 2022 access with M.K.C. and R.M.C. increases into night visits.
- May 10, 2023
 - R.M.C. visits M.K.C. and reports A.W. assaulted him.
 - R.M.C. taken to hospital.
 - There were some protection concerns, but R.M.C. is not removed from A.W.'s care.
- May 21, 2023
 - A.W. is arrested by RCMP and released on undertaking to have no contact with R.M.C.
- July 24, 2023
 - A.W. attends M.K.C.'s home and takes the child.

- M.K.C. alleges A.W. abducted the child and safety plan entered into for A.W.'s access to be supervised by her mother, R.W.
- August 15, 2023
 - A.W. rearrested.
 - R.M.C. left in R.W.'s care under new safety plan.
- R.W. is granted interim custody order – soon after Crown enters Stay of Proceedings (halt) on all charges A.W. is facing.
- Since January 2024, A.W. has had regular access with child.
- A.W.'s Band insists Society's actions are based on colonial constructs.
- A.W. denies assault allegations, brings evidence that R.M.C. retracts statements of abuse as they were made under M.K.C.'s influence and encouragement.

ISSUE

- Should the child, R.M.C. be returned to the care of A.W. or M.K.C., pursuant to s 41(1)(a) of the CFCSA?

ANALYSIS

- Where there are differences in the *Federal Act* and the CFCSA, the *Federal Act* takes paramountcy.
- S 2 CFCSA – the act must be interpreted and administered with safety and wellbeing of child being paramount consideration.
 - Indigenous children are entitled to learn about their traditions and customs.
- S 3 CFCSA – impact of residential schools should be considered in delivery of services.
 - Services to Indigenous children and families should be provided in a coordinated manner with Indigenous child and family services.
- S 4 CFCSA – Best interests of the child include the importance of child learning and practising their Indigenous traditions and customs.
- S 10(1) *Federal Act* – Best interests of an Indigenous Child (BIOIC).

- S 16(1) *Federal Act* – Priority placement – all efforts to place an Indigenous child with a member of the Indigenous group or community must be exhausted prior to placing them with a non-Indigenous adult.
 - Priority placement is to the extent that it is consistent with the BIOIC.
- The actions of the Director in leaving R.M.C. in the care of M.C. deprived A.W. and the Nation from formally objecting to the placement and presenting alternative placement to the court.
- The Chief and Band were not consulted by the Society on decisions, and the court expresses concern on this.
 - But, the Chief and Band also did not participate in this matter, as they believe it to be a “flawed process in light of their traditional law and customs”.
 - Their presence would have assisted the court in the interpretation of the *Federal Act*.
- The fact that A.W. may need some assistance if R.M.C. is returned to her care does not make her inferior to M.K.C.

RELEVANT EXCERPTS

[50] When the hearing commenced on March 28, 2024 I expressed concern about the lack of formal participation by the Chief and Council of the [omitted for publication] Band. While I understand that they have chosen not to participate in what they consider to be a flawed process in light of their traditional laws and customs it would have been helpful to me to listen to and consider their perspectives, particularly in light of the Federal Act that requires the Court to give consideration to such participation.

[54] The Director submitted that the Federal Act prioritizes the placement of the Child with a parent over other family members which would favour M.C. However, that is only part of the wording of Section 16 of the Federal Act. It also states that the placement priority for a child must be “to the extent that it is consistent with the best interests of the child”

LEGISLATION CITED

An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24.

Section 4 – Minimum Standards

For greater certainty, nothing in this Act affects the application of a provision of a provincial Act or regulation to the extent that the provision does not conflict with, or is not inconsistent with, the provisions of this Act.

Section 9

Best interests of child

9 (1) This Act is to be interpreted and administered in accordance with the principle of the best interests of the child.

Principle — cultural continuity

(2) This Act is to be interpreted and administered in accordance with the principle of cultural continuity as reflected in the following concepts:

- (a)** cultural continuity is essential to the well-being of a child, a family and an Indigenous group, community or people;
- (b)** the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity;
- (c)** a child's best interests are often promoted when the child resides with members of his or her family and the culture of the Indigenous group, community or people to which he or she belongs is respected;
- (d)** child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous

group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people; and

(e) the characteristics and challenges of the region in which a child, a family or an Indigenous group, community or people is located are to be considered.

Principle — substantive equality

(3) This Act is to be interpreted and administered in accordance with the principle of substantive equality as reflected in the following concepts:

(a) the rights and distinct needs of a child with a disability are to be considered in order to promote the child's participation, to the same extent as other children, in the activities of his or her family or the Indigenous group, community or people to which he or she belongs;

(b) a child must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;

(c) a child's family member must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;

(d) the Indigenous governing body acting on behalf of the Indigenous group, community or people to which a child belongs must be able to exercise without discrimination the rights of the Indigenous group, community or people under this Act, including the right to have the views and preferences of the Indigenous group, community or people considered in decisions that affect that Indigenous group, community or people; and

(e) in order to promote substantive equality between Indigenous children and other children, a jurisdictional dispute must not result in a gap in the child and family services that are provided in relation to Indigenous children.

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 11 – Effect of Services

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

(a) takes into account the child's needs, including with respect to his or her physical, emotional and psychological safety, security and well-being;

(b) takes into account the child's culture;

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

(d) promotes substantive equality between the child and other children.

Section 16(1) - Priority Placement of Indigenous Child

(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.

Child, Family and Community Service Act, RSBC 1996, c 46.

Section 2 – Guiding Principles

This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

- (a) children are entitled to be protected from abuse, neglect and harm or threat of harm;
- (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
- (b.1) Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;
- (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
- (d) the child's views should be taken into account when decisions relating to a child are made;

- (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
- (f) Indigenous children are entitled to
 - (i) learn about and practise their Indigenous traditions, customs and languages, and
 - (ii) belong to their Indigenous communities;
- (g) decisions relating to children should be made and implemented in a timely manner.

Section 3 – Service Delivery Principles

The following principles apply to the provision of services under this Act:

- (a) families and children should be informed of the services available to them and encouraged to participate in decisions that affect them;
- (b) in the planning and delivery of services to Indigenous children and families, there should be consultation and cooperation with Indigenous peoples and Indigenous governing bodies;
 - (b.1) services should be planned and provided in ways that prevent discrimination prohibited by the [Human Rights Code](#) and that promote substantive equality, respect for rights and culture and, in the case of Indigenous children, cultural continuity;
- (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;
 - (c.1) the impact of residential schools on Indigenous children, families and communities should be considered in the planning and delivery of services to Indigenous children and families;
- (d) services should be integrated, wherever possible and appropriate, with services provided by government ministries, community agencies and Community Living British Columbia established under the [Community Living Authority Act](#);
 - (d.1) services to Indigenous children and families should be provided in a coordinated manner with Indigenous child and family services provided by Indigenous authorities;

(e) the community should be involved, wherever possible and appropriate, in the planning and delivery of services, including preventive and support services to families and children;

(f) services for specified adults should be planned and provided

(i) using an approach that is strengths-based, trauma-informed and led by the specified adult and, in the case of an Indigenous specified adult, supports cultural continuity and a connection to the land, and

(ii) in a way that recognizes the importance of housing, mental health and lived experience and makes all reasonable efforts to connect specified adults to services.

Section 4(1) - Best Interests of the 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.

Section 13(1) - Where Protection is Needed

(1) A child needs protection in the following circumstances:

(a) if the child has been, or is likely to be, physically harmed by the child's parent;

- (b) if the child has been, or is likely to be, sexually abused or exploited by the child's parent;
- (c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child;
- (d) if the child has been, or is likely to be, physically harmed because of neglect by the child's parent;
- (e) if the child is emotionally harmed by
 - (i) the parent's conduct, or
 - (ii) living in a situation where there is domestic violence by or towards a person with whom the child resides;
- (f) if the child is deprived of necessary health care;
- (g) if the child's development is likely to be seriously impaired by a treatable condition and the child's parent refuses to provide or consent to treatment;
- (h) if the child's parent is unable or unwilling to care for the child and has not made adequate provision for the child's care;
- (i) if the child is or has been absent from home in circumstances that endanger the child's safety or well-being;
- (j) if the child's parent is dead and adequate provision has not been made for the child's care;
- (k) if the child has been abandoned and adequate provision has not been made for the child's care;
- (l) if the child is in the care of a director or another person by agreement and the child's parent is unwilling or unable to resume care when the agreement is no longer in force.

Section 16(1) - Finding out if a child needs protection

(1) On receiving a report about a child under section 14, 15 or 27, a director must determine whether to refer the report

- (a) to another director, or
- (b) if the child is an Indigenous child, to an applicable Indigenous authority.

Section 29.1(1) - If a supervision order is needed

(1) A director may apply to the court for an order that the director supervise a child's care if the director has reasonable grounds to believe that

- (a) the child needs protection, and
- (b) a supervision order would be adequate to protect the child

Section 30(1) - Removal of a child

(1) A director may, without a court order, remove a child if the director has reasonable grounds to believe that the child needs protection and that

- (a) the child's health or safety is in immediate danger, or
- (b) no other less disruptive measure that is available is adequate to protect the child

Section 33.2 - Presentation hearing about application for supervision order

(1) At a presentation hearing relating to an application under section 29.1 for a supervision order, the director must present to the court a written report that includes

- (a) the grounds for making the application, and
- (b) an interim plan of care for the child, including the director's recommendations about the terms and conditions to be included in the supervision order.

(2) If satisfied that there are reasonable grounds to support the director's concerns regarding the child, the court must make at the conclusion of the presentation hearing an interim order that the director supervise the child's care.

Section 35(1) & (2)(d) - Presentation hearing and orders

(1) At a presentation hearing relating to the removal of a child under section 30, the director must present to the court a written report that includes

- (a) the circumstances that caused the director to remove the child,
- (b) an interim plan of care for the child, including, in the case of an Indigenous child, the steps to be taken to support the child to learn about and practise the child's Indigenous traditions, customs and language and to belong to the child's Indigenous community, and
- (c) information about any less disruptive measures considered by the director before removing the child.

(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 – 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:

- (a) that the child be returned to or remain in the custody of the parent apparently entitled to custody and be under the director's supervision for a specified period of up to 6 months;
- (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;
- (c) that the child remain or be placed in the custody of the director for a specified period in accordance with section 43;

(d) that the child be placed in the continuing custody of the director.

(1.1) When an order is made under subsection (1) (b) or (c), the court may order that on the expiry of the order under subsection (1) (b) or (c) the child

(a) be returned to the parent, and

(b) be under the director's supervision for a specified period of up to 6 months.

(2) The court must not order under subsection (1) (d) that the child be placed in the continuing custody of the director unless

(a) the identity or location of a parent of the child has not been found after a diligent search and is not likely to be found,

(b) a parent is unable or unwilling to resume custody of the child, or

(c) the nature and extent of the harm the child has suffered or the likelihood that the child will suffer harm is such that there is little prospect it would be in the child's best interests to be returned to the parent.

(2.1) If an order was made under section 33.2 (2), the child has not been removed since that order was made and the court finds that the child needs protection, the court must order that the director supervise the child's care for a specified period of up to 6 months.

(3) The court may attach to an order under this section any terms or conditions recommended by the director to implement a plan of care.

Section 41.1 - Content of supervision orders

The court may attach to a supervision order terms and conditions recommended by the director to implement the plan of care, including

(a) services for the child's parent or another person in the child's home,

(b) daycare or respite care,

(c) the director's right to visit the child, and

(d) the requirement that the director remove the child if a person does not comply with one or more specified terms or conditions of the order.

Section 55(1), (2), (5), & (6) - 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.

(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.

[Family Law Act, SBC 2011, c 25.](#)