

Director and R, 2022 BCPC 15.

SUMMARY

This matter involves an application for S.V. to be added as a party to proceedings per s. 39(4) of the [Child, Family and Community Service Act](#) ["CFCSA"]. S.V. is the maternal grandmother of the children. The court determines that the definition of 'caregiver' in [An Act respecting First Nations, Inuit and Métis children, youth and families](#) ["Federal Act"], combined with the best interest of the children test, favours adding S.V. as a party. Even if interpretation of the *Federal Act* is wrong, the discretion enabled under s. 39(4) of the *CFCSA*, when put in the context of the historical harms to Indigenous children in care, favours adding S.V. as a party.

JURISDICTION	British Columbia
COURT	Provincial Court of British Columbia
JUDGE	Phillips J
PARTIES	Applicant(s) 1. Director of Child, Family and Community Service ["Director"] Respondent(s) 1. D.H. Mother 2. S.R. Father
TREATY TERRITORY	Unknown
INDIGENOUS GROUP, COMMUNITY, OR PEOPLE	Omitted for Publication
APPLICABLE INDIGENOUS LAW	None
TOPICS	Best Interests Caregiver Historical Context Considered National Standards Parties
LEGISLATION CITED	An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24. Preamble; Sections 1 ("care provider"); 10; 13 Child, Family and Community Service Act, RSBC 1996, c 46. Sections 4; 39; 41(1)(d)

	Bill 29, Interpretation Amendment Act, 2021, 2nd Sess, 42nd Leg. British Columbia, 2021 (assented to 25 November 2021). Section 8.1 Truth and Reconciliation Commission of Canada: Calls to Action, 2015. Calls to Action 1; 2; 3; 4; 5
CASE LAW CONSIDERED	BC (Child, Family and Community Services) v MCW, 2020 BCPC 132, 2020 BCJ No 1116. Director of Child, Family and Community Service v ADR, 2021 BCPC 179, [2021] BCJ No. 1580. First Nation A v AB, 2020 BCPC 279, [2020] BCJ No. 2279. JL v British Columbia (Director of Child, Family & Community Service Act), 2001 BCSC 1604.
CASE HISTORY	None

CASE BRIEF

DECISION

- S.V. will be added as a party to the proceedings.

FACTS

- The children are K.D.M.R., T.D.R. and T.C.
 - All children are Indigenous.
- The father of K.D.M.R. and T.D.R. lives in Saskatchewan and has participated minimally in these proceedings.
 - Father of T.C. has not participated.
- D.H. and S.R. struggled with alcohol and substance use.
- They enter agreement with the Indian Band and S.V. ["Maternal Grandmother"] to have the children move to BC and live with S.V.
 - 4 days after moving to BC, K.D.M.R. (then 9 years old) was removed from S.V.'s care by the Director.
 - A dispute arose between S.V. and K.D.M.R. after S.V. finds marijuana in her belongings.
- Currently, T.D.R. and T.C. live with D.H. under supervision order.
- K.D.M.R. remains in Director's custody pursuant to a temporary custody order and lives in a foster home.
- S.V. was listed as a party for previous appearances but has since been removed. She continues to appear for all matters with counsel.
- Director and S.H. submit that S.V. is not a guardian and has minimal relations with the children. Further, this application is only preventing the timely resolution of the matter.
 - S.V. submits that the Federal Act supports her position of being added as a party, as she meets the definition of "caregiver" in the act.

ISSUE

1. Should S.V. be added as a party to the proceedings, pursuant to s. 13 of the *Federal Act*, or s. 39(4) of the *CFCSA*?

ANALYSIS

- S. 39(1) *CFCSA* – Those who are entitled to be parties are the Director, the parents and the Band.
 - S. 39(3) – If someone other than a parent or the Director is given custody, they can become a party at the hearing that gives them custody.
 - S. 39(4) – Authority to add a party – doing so is discretionary and must be in best interests of the child.
- The *Federal Act* sets out national standards for the welfare of Indigenous children. This includes their right to learn about and practice their Indigenous traditions, customs and languages.
- Provincial courts have jurisdiction to apply the *Federal Act* to *CFCSA* matters, especially where the *CFCSA* falls short.
 - Therefore, the *Federal Act* will be applied to determine if S.V. can be added as a party to the proceedings.
- S.V.’s desire to be a party upholds the Band’s wishes (per the original agreement placing the children with her), and ensures that, if further issues arise, the Director can always place the children with her.
 - However, the children were only in S.V.’s care temporarily.
- The Director’s concern of giving S.V. access to private information is not relevant in these facts.
 - D.H., the children, and S.V. are all family who know each other’s backgrounds.
- Definition of ‘caregiver’ in *Federal Act*:
 - Person that has primary responsibility for the day-to-day care of an Indigenous child, other than the child’s parent.
 - S.V. fits this definition – she can be added as a party pursuant to s. 13(a) of the *Federal Act*.
- It is in the best interest of the children for S.V. to be added as a party, should the parents fall back into addictions.
 - Even if this interpretation of the *Federal Act* is wrong, s. 39(4) *CFCSA* allows the court to exercise its discretion when adding parties.
- The context of the structural issues regarding Indigenous children in care favours using the court’s discretion under this section to be added as a party.

RELEVANT EXCERPTS

[19] The ARFNIM is relatively new federal legislation directed at Indigenous children and families. From the preamble, the Federal government commits to implementing the United Nations Declaration on the Rights of Indigenous Peoples; recognizes the legacy of resident schools and the harm, including intergenerational trauma, caused to Indigenous peoples by colonial practices; and breathes life into the Truth and Reconciliation Commissions call to action for all governments to work together with respect to the welfare of Indigenous children by enacting federal legislation that establishes national standards for the welfare of Indigenous children. [emphasis mine]

[25] I adopt the analysis of my fellow judges, Smith and Patterson in relation to the application of the ARFNIM to CFCSA matters involving Indigenous children and their respective conclusions that Provincial Courts have jurisdiction in certain circumstances to apply the terms of ARFNIM to CFCSA matters, particularly where the CFCSA fall short or is silent.

[36] I find that ARFNIM may be applied in this matter and that the Applicant grandmother is a caregiver and therefore ought to be added as a party as per s. 13 (a) of ARFNIM. I also find that per s. 10 of ARFNIM and s. 4 of the CFCSA, it is in the best interest of the children for the Applicant to be added as a party. If I am wrong in applying ARFNIM, I also find that in light of our evolving perspectives as it relates to the plight of Indigenous children in care, the exercise of discretion in s. 39(4) of the CFCSA is inclusive enough to accommodate an Indigenous grandmother, who through her actions, despite being removed as a parent, has consistently appeared at each court appearance with counsel to make known that she will care for her grandchildren, should the parents fall back into addictions.

LEGISLATION CITED

[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 (“Care Provider”)

1 The following definitions apply in this Act.

“care provider” means a person who has primary responsibility for providing the day-to-day care of an Indigenous child, other than the child’s parent, including in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs.

(fournisseur de soins)

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 13

Representations and Party Status

13 In the context of a civil proceeding in respect of the provision of child and family services in relation to an Indigenous child,

(a) the child's parent and the care provider have the right to make representations and to have party status; and

(b) the Indigenous governing body acting on behalf of the Indigenous group, community or people to which the child belongs has the right to make representations.

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

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 39(1)

Parties to Proceeding

39 (1) If the following persons appear at the commencement of the protection hearing, they are entitled to be parties at the hearing:

(a) each parent of the child;

(b) the director;

(c) if the child is an Indigenous child, other than a Nisga'a child or a Treaty First Nation child, the designated representative of the First Nation or other Indigenous community who was served with notice of the hearing;

(d) if the child is a Nisga'a child, the designated representative of the Nisga'a Lisims Government who was served with notice of the hearing;

(d.1) if the child is a Treaty First Nation child, the designated representative of the Treaty First Nation who was served with notice of the hearing;

(e) a person who has an interim order for custody of the child under section 35 (2) (d).

(2) If a person referred to in subsection (1) (a), (b), (c), (d) or (d.1) appears at the commencement of a protection hearing or a person becomes a party under subsection (4), that person is entitled

(a) to notice of a hearing under section 42.1, 42.2, 44, 44.1, 46, 49, 55, 57 or 58 relating to the child, and

(b) if the person appears at the commencement of the hearing, to be a party at that hearing.

(3) If the court orders under section 41 (1) (b) that the child be placed in the custody of a person other than the parent or a director, that person is entitled

(a) to notice of a hearing under section 42.1, 42.2, 44, 44.1, 46, 49, 54.01, 55, 57 or 58 relating to the child, and

(b) if the person appears at the commencement of the hearing, to be a party at that hearing.

(4) The court may order that a person be a party at any hearing.

Section 41(1)(d)

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:

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

[Bill 29, Interpretation Amendment Act, 2021, 2nd Sess, 42nd Leg, British Columbia, 2021 \(assented to 25 November 2021\).](#)

Section 8.1

Section 35 of Constitution Act, 1982 and Declaration

8.1 (1) In this section:

"Declaration" has the same meaning as in the Declaration on the Rights of Indigenous Peoples Act;

"Indigenous peoples" has the same meaning as in the Declaration on the Rights of Indigenous Peoples Act;

"regulation" has the same meaning as in the Regulations Act.

(2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the Constitution Act, 1982.

(3) Every Act and regulation must be construed as being consistent with the Declaration.

Call to Action 1

1. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by:

- i. Monitoring and assessing neglect investigations.
- ii. Providing adequate resources to enable Aboriginal communities and child-welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside.
- iii. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the history and impacts of residential schools.
- iv. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the potential for Aboriginal communities and families to provide more appropriate solutions to family healing.
- v. Requiring that all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers.

Call to Action 2

2. We call upon the federal government, in collaboration with the provinces and territories, to prepare and publish annual reports on the number of Aboriginal children (First Nations, Inuit, and Métis) who are in care, compared with non-Aboriginal children, as well as the reasons for apprehension, the total spending on preventive and care services by child-welfare agencies, and the effectiveness of various interventions.

Call to Action 3

3. We call upon all levels of government to fully implement Jordan's Principle.

Call to Action 4

4. We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:

- i. Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.
- ii. Require all child-welfare agencies and courts to take the residential school legacy into account in their decision making.
- iii. Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.

Call to Action 5

5. We call upon the federal, provincial, territorial, and Aboriginal governments to develop culturally appropriate parenting programs for Aboriginal families.