

Brown v British Columbia (Director of Child, Family and Community Service), 2024 BCCA 204.

SUMMARY

The appellants are seeking leave to appeal (ability to appeal) a previous order made by the Supreme Court of British Columbia, which dismissed their appeal from the Provincial Court. In the original order, the Provincial Court ordered that access between the appellants and their children, post a continuing custody order [“CCO”], be cancelled. The Court granted the leave to appeal and ordered the appeal on an expedited basis.

JURISDICTION	British Columbia
COURT	British Columbia Court of Appeal
JUDGE	Abrioux J
PARTIES	Appellants 1. D.B.B. Father 2. A.B.M. Mother Respondent 1. Director of Child, Family and Community Service [“the Director”]
TREATY TERRITORY	Unknown
INDIGENOUS GROUP, COMMUNITY, OR PEOPLE	Unknown
APPLICABLE INDIGENOUS LAW	Unknown
TOPICS	Access Best Interest of the Child Continuing Custody Order
LEGISLATION CITED	An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, SC 2019 c 24. Section 10

	Child, Family and Community Service Act, RSBC 1996, c 46. Sections 2; 57; 81; 82
CASE LAW CONSIDERED	British Columbia (Child, Family and Community Service) v ADT, 2016 BCCA 117. MD v R, 2015 BCCA 399. Goldman, Sachs & Co v Sessions, 2000 BCCA 326. JW v British Columbia (Director of Child, Family and Community Service), 2023 BCSC 512.
CASE HISTORY	ABM v British Columbia (Director of Child, Family and Community Service), 2024 BCSC 312. Brown v British Columbia (Director of Child, Family and Community Service), 2024 BCCA 204. Brown v British Columbia (Director of Child, Family and Community Service), 2024 BCCA 248.

CASE BRIEF

DECISION

- Grant the leave to appeal.
- As such, the merits of the appeal will not be discussed in this matter.
- The appeal should proceed on an expedited basis.

FACTS

- Appellants are the biological parents to children G and D.
- August 2017, interim custody of the children was granted on consent.
- March 2018, the Director obtained temporary custody.
- April 2020, the Court granted a CCO that places the children with the Director and provides the appellants with access.
- February 2023, the Director filed an application to terminate access as the children were to be placed with a permanent adoptive family. The application was successful.
- The appellants appeal the order, alleging procedural unfairness and a failure to apply [*An Act respecting First Nations, Inuit and Métis children, youth and families*](#) [“the *Federal Act*”].
 - The appellants believe this point is arguable on appeal as “the courts have yet to clarify how the *Federal Act* and the [*Child, Family and Community Service Act*](#) [“*CFCSA*”] are to be interpreted simultaneously”

Appellants’ (Parents’) Grounds for Appeal

- The Appellants argue that the Court failed to apply the *Federal Act* and that the *Federal Act* is not entirely consistent with the provincial legislation.
 - They further argue that the *Federal Act* is the paramount legislation.
- The Appellants also argue that they were denied procedural fairness as the Court erred in the appropriate procedures and determined substantive issues at what was scheduled for, and was intended to be, a procedural hearing only.
- The Appellants argued that the Director did not satisfy their statutory disclosure obligations and were denied procedural fairness at the hearing of the application.
 - There are disclosure requirements for litigants seeking to sever the relationship between a parent and child permanently, as well as a degree of procedural fairness

owed by the courts and the Director to the parties to a *CFCSA* matter who are typically vulnerable and disadvantaged.

The Response of the Director

- The Respondent indicated that, through oversight, its position had not been set out in a response to the application for leave, the Director was able to give submissions on s. 50 of the *CFCSA*.
 - Para 23: Section 50 provides “When an order is made placing a child in the continuing custody of a director, the director becomes the sole personal guardian of the child and may consent to the child’s adoption”.
- The Respondent further argued that the Appellants are attempting to use the *Federal Act* to bootstrap their legal rights, rights that were severed as a result of the CCO being made.
 - They further argue that the *Federal Act* does not exist to create rights that are taken away by the CFSA.

ISSUE

1. Should the leave to appeal be granted?

ANALYSIS

- The test for a leave to appeal is set out in *Goldman, Sachs & Co. v Sessions*, 2000 BCCA 326, and includes the significance of the point on appeal, and if the appeal will unduly hinder progress of the matter.
- The test for a leave to appeal also applies to s. 82 of the *CFCSA*: *M.D v R*, 2015 BCCA 399.
 - Pursuant to s. 82 of the *CFCSA*, an appeal can only be made on a question of law.
 - A leave granted under s. 82 of the *CFCSA* requires consideration of the best interests of the child – s. 2.
- *JW v British Columbia (Director of Child, Family and Community Service)*, 2023 BCSC 512.:
 - S. 10 of the *Federal Act* runs concurrently with the *CFCSA*.
 - Specifically, it informs s. 57 of the *CFCSA* and the best interests of the children, when a child is Indigenous.
 - The *Federal Act* contains best interest of the child principles that exceed the *CFCSA*.
- The Appellants were entitled to know in advance of the hearing that the Director was opposing the granting of leave.

- Further, the director did not properly respond to the application.
- There is no appellate authority on the issues in the context of a post-CCO access order.
- At its core, the grounds of appeal are two-fold:
 - What effect s. 10 of the *Federal Act* has on an application under s. 57 of the *CFCSA*.
 - Whether the Appellants were accorded procedural fairness at the hearing to cancel the post-CCO access.
- While the grounds for appeal may well be weak, they are still arguable.
 - It is in the interests of justice to grant leave to appeal.

RELEVANT EXCERPTS

[12] Whether leave should be granted under s. 82 of the CFCSA requires consideration of the best interests of the child in accordance with s. 2 of the CFCSA, which provides that the “safety and well-being of children are the paramount considerations”: *British Columbia (Child, Family and Community Service) v. A.D.T.*, 2016 BCCA 117 at para. 13 (Chambers) [A.D.T.].

[26] The starting point is that pursuant to s. 82 of the CFCSA, an appeal may only be made with respect to a question of law.

[29] Relying on *J.W. v. British Columbia (Director of Child, Family and Community Service)*, 2023 BCSC 512 at para. 48, Justice Wilson determined that the Federal Act, particularly s. 10, applies concurrently with the CFCSA.

LEGISLATION CITED

An Act Respecting First Nations, 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.

[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 57

Changes to Supervision, Temporary Custody and Access Orders

(1) If circumstances have changed significantly since the order was made, any party may apply to the court for a change to

(a) a supervision order other than one that is an interim order,

(b) a temporary custody order, or

(c) an access order, except an order made under section 57.01 (3).

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

(a) the child, if 12 years of age or over,

(b) the director,

(c) the Public Guardian and Trustee, if the order is a temporary custody order and the Public Guardian and Trustee has been appointed as the child's property guardian under [section 58](#), and

(d) in addition,

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

(ii) if the application is for any order referred to in subsection (1) of this section and is made after the protection hearing, the persons who under section 39, 49 (3) or 54.01 (4) are entitled to notice, and

(iii) if the application is for a change to a temporary custody order, the persons listed in section 38 (1) (b) to (d) who are not already entitled to notice under subparagraph (ii) of this paragraph.

(2.1) If a person referred to in subsection (2) (b) or (d) (i) or (iii) appears at the commencement of the hearing, that person is entitled to be a party at the hearing.

(3) If the court finds that circumstances have changed significantly since the order was made, the court, in the child's best interests, may cancel the order and make no other order or may cancel the order and do one of the following:

(a) if the order was made under section 42.2, 44, 46 or 54.01 (9) (b) or (c) or (10), make an order under [section 41](#);

(b) in any other case, make any order provided for at the hearing where the order was made.

(4) If the court finds that circumstances have not changed significantly since the order was made, the court may confirm the order.

(5) This section does not apply if the change of circumstances relates to an application to transfer custody under section 54.01 (1) or 54.1, whether or not custody is transferred under section 54.01 (5) or 54.1, as applicable.

Section 81

Appeal to Supreme Court

(1) A party may appeal to the Supreme Court from an order of the Provincial Court made under this Act.

(2) The time limit for bringing an appeal under subsection (1) is 30 days, beginning on the day after the order of the Provincial Court is made.

(3) An appeal is brought by

(a) filing a notice of appeal in a registry of the Supreme Court, and

(b) serving a copy of the notice of appeal on

(i) the parties to the proceeding in which the order of the Provincial Court was made,
and

(ii) the Public Guardian and Trustee, if the child's property guardian.

(4) The [Supreme Court Civil Rules](#) apply to an appeal under subsection (1) to the extent that they are consistent with this section.

(5) On application the Supreme Court may suspend the order under appeal for the period and subject to the conditions it thinks appropriate.

(6) If the order under appeal is suspended under [section 62](#), the Supreme Court may continue or cancel the suspension.

(7) After hearing the appeal, the Supreme Court may do one or more of the following:

(a) confirm the order of the Provincial Court;

(b) set aside the order of the Provincial Court;

(c) make any order that the Provincial Court could have made;

(d) direct the Provincial Court to conduct a new hearing.

(8) On application, the Supreme Court may extend the time limit for bringing an appeal.

Section 82

Appeal to the Court of Appeal

With leave of the Court of Appeal, a party may appeal to that court on a question of law from an order of the Supreme Court made by it on an appeal under this Act.