

SECOND EDITION

# WRAPPING OUR WAYS AROUND THEM

INDIGENOUS COMMUNITIES AND CHILD WELFARE GUIDEBOOK



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**In 1914**, while building track through the Fraser Canyon, the CN Railway created a blast which entirely blocked the Fraser River at Hell's Gate as sockeye runs were migrating through. Millions of salmon were trapped, unable to make it to their spawning grounds.

Nlaka'pamux people carried the salmon in baskets, blankets and buckets over the slide so that the runs would survive. Some neighbouring Indigenous Nations came to help. We honoured our obligation to care for their lives as they have cared for ours.

The story of Hell's Gate illustrates Nlaka'pamux laws about our relationships with other life and our obligations to other life; it illustrates the principle that all life is related and that our actions must honour that fact.

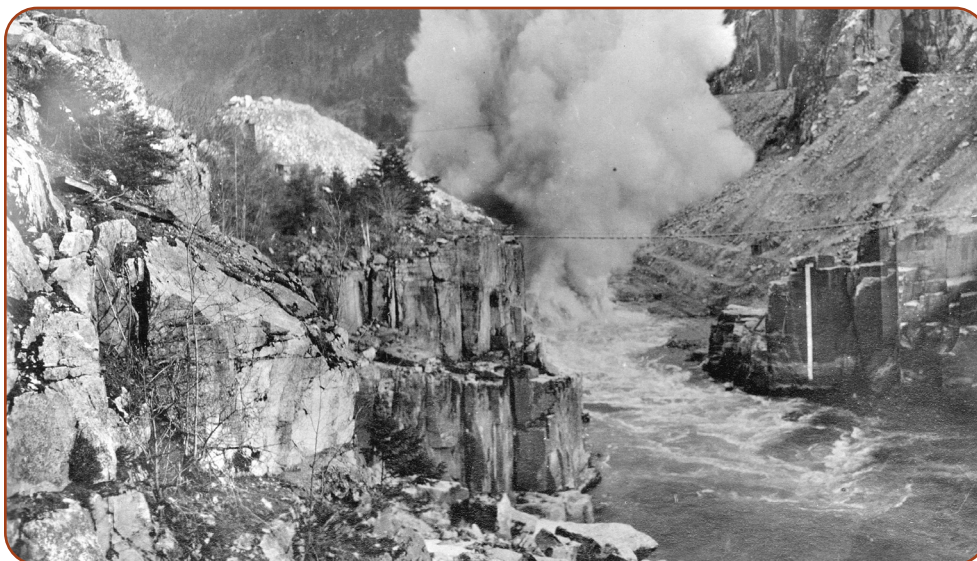


Nlaka’pamux elders have said that the Hell’s Gate story illustrates the laws that guide the work we do in Wrapping Our Ways.

In child welfare, our children and families need our collective help—as families, as communities, as Nations—to survive, to make it through.

Our laws tell us that we do not exist apart from each other. We carry obligations to stand with each other to help each other through critical times. This is what we do with Wrapping our Ways—search for the blankets, the baskets, the ways of linking our hands together that will help Indigenous children, families, communities and Nations to make it through. This is our law in action.

Our laws as Nlaka’pamux have helped to guide our care for our children and family since time before lived memory. Our laws, like our waters, flow then as they do now.



# Table of Contents

01. Invitation to a Transformative Approach	8
02. Overview of Federal Act	20
03. Indigenous Laws Jurisdiction	31
04. Articulating Indigenous Laws	44
05. National Standards	56
06. Best Interests of the Indigenous Child (BIOIC)	75
07. Protecting a Child’s Indigenous Identity, Culture and Heritage	96
08. Addressing Biases Against Indigenous Parents and Indigenous Parenting	109
09. Rights of Indigenous Children and Youth	135
10. Child Welfare and International Human Rights	141
11. Trauma-Informed Approach to Child Welfare	148
12. Steps Within the Child Welfare Process	159
13. Confidentiality and Disclosure	198
14. Traditional and Alternative Dispute Resolution Mechanisms	202
15. In-Depth Case Study: ShchEma-mee.tkt (Our Children) Project	216
16. Sources	238
APPENDIX: Forms and Making Applications	247
APPENDIX: Tips for Going to Court	273



**WRAPPING OUR WAYS** is intended to be a resource that empowers Indigenous Nation and community involvement in caring for Indigenous children. It provides advice to lawyers, judges, children, families, community members and social work teams.

## KEY

The following icons will be used throughout this Guidebook to guide the reader to important points.

ADVOCACY .....



ACTIONS .....



BEST PRACTICES .....



CASE STUDIES.....



INDIGENOUS LAWS.....



*In too many instances, the involvement of Indigenous communities and protection of a child's Indigenous identity and heritage exist only as “paper rights” or requirements and not in practice.*

# 01. Invitation to a Transformative Approach

## I. Ground We Are Standing On

Improving outcomes for Indigenous children and families involved in the child welfare system requires empowering Indigenous laws. *Wrapping Our Ways: Indigenous Peoples and Child Welfare Guidebook (WoW)* provides guidance for Indigenous communities and individuals, the Bench, bar and social work teams. *WoW* suggests immediate steps that can be taken on the ground we are standing on—within the federal and provincial systems that impact Indigenous children and families today—to improve outcomes for Indigenous children, while working to implement Indigenous laws and jurisdiction.

There is a sphere of inherent Indigenous jurisdiction, collectively vested, that empowers Indigenous Peoples to care for and protect their children in accordance with their own legal orders. Indigenous laws exist independent of federal or provincial laws. Laws for the care and protection of children and families are a crucial part of any society's laws. It is through children that each society calls forth its future as a unique People. A revitalization of Indigenous laws could transform the experiences of Indigenous children and families.

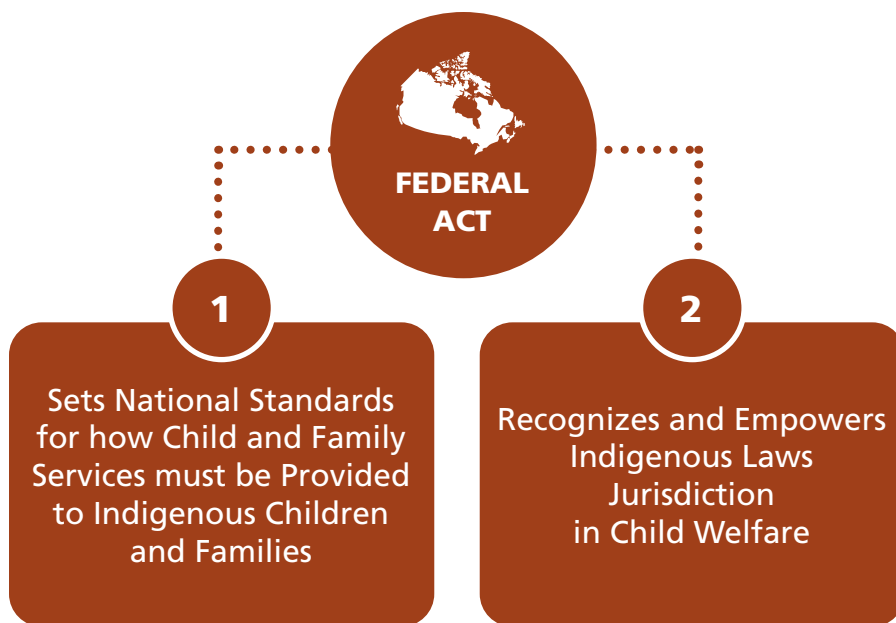
Three levels of jurisdiction operate in the area of child welfare: Indigenous, federal and provincial/territorial.

The federal *Act respecting First Nations, Inuit and Métis children, youth and families*<sup>1</sup> (Federal Act) creates a process for Indigenous Peoples to pass their own laws and establishes national standards that all provincial and territorial child welfare providers must meet.

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<sup>1</sup> SC 2019, c 24.





*A revitalization of Indigenous laws could transform the experiences of Indigenous children and families.*

Under the Federal Act, provincial laws and policies continue to apply unless they conflict with Indigenous laws or the Federal Act itself. British Columbia's child welfare legislation impacting children and families includes the *Child, Family and Community Service Act* (BC CFCSA),<sup>2</sup> *Child, Family and Community Service Regulation* (BC CFCSA Regulation),<sup>3</sup> and the *Provincial Court (Child, Family and Community Service Act) Rules* (Rules).<sup>4</sup>

The Federal Act arose from Indigenous advocacy for change to protect Indigenous children and families.

In delivering child welfare services, a child welfare authority must show the efforts made to:

- Keep a family together; and
- Preserve a child's relationships with their Indigenous family, community and culture; and
- Actively involve the child's Indigenous community(ies) in planning for their care.

<sup>2</sup> RSBC 1996, c 46.

<sup>3</sup> BC Reg 149/2019.

<sup>4</sup> BC Reg 49/2019.

*The Federal Act clears the way for recognition of inherent Indigenous jurisdiction but does not create it.*

As a result of the Federal Act:

- The protection of an Indigenous child’s cultural identity and connections, including through Indigenous laws, is super-weighted;
- It is not enough to say that “child protection” is a reason to remove an Indigenous child from their family and community. The Federal Act’s principle of substantive equality means that the result of any child welfare services must be that the child is *actually* protected. Protection must be considered to include whether a child’s cultural connections and identity were preserved.
- Child welfare actions must be measured over the long-term. It is no longer acceptable to “protect” children by removing them from their families and Indigenous communities without thought to their long-term cultural connections, health and well-being;
- Biases and stereotypes against Indigenous Peoples or parenting styles must be addressed and set aside in making child welfare decisions; and
- Indigenous children have the right to have their community involved in protecting them according to their own laws and traditions.

*WoW aims to empower Indigenous Peoples to “Wrap Our Ways”—Indigenous laws, practices and customs—around children and families. WoW is an invitation to Indigenous communities, the legal system and agencies who work within child welfare systems to adopt a transformative approach that empowers Indigenous voices and ways of protecting children and healing families today, while Indigenous Peoples do the work necessary to articulate and empower their own laws.*

The rights of Indigenous children should be understood in the context of their broader social and cultural connections. Child protection solutions for Indigenous children dictated solely to the parents—without a broader distribution of responsibility within an Indigenous community or extended family—are not likely to be successful. Involvement of Indigenous communities can interrupt the rising number of Indigenous children in care and prevent the loss of identity and cultural disconnection experienced by past generations of Indigenous children.

The rights of Indigenous Nations, communities, families and children are intertwined. Cultural and social wealth and stability are created over a child’s lifetime by maintaining those connections.

Indigenous community involvement could distribute responsibility away from individual parents to the extended family and community by standing up teachings of forgiveness, compassion, love, wholeness and balance, by identifying what it means to keep children safe within Indigenous cultures and according to Indigenous laws.

Indigenous laws could address how children and youth will have their voices heard in child protection matters.

## II. Indigenous Laws

Indigenous Peoples' laws and legal orders pre-dated and survived the assertion of Crown sovereignty and received constitutional protection through s. 35 of the *Constitution Act, 1982*.<sup>5</sup> Crown governments, for the most part, have ignored or denied this jurisdiction.

Canadian courts have long recognized and encouraged solutions based on Indigenous laws for children and families.<sup>6</sup> In *Connolly v. Woolrich*,<sup>7</sup> the Superior Court of Quebec recognized a marriage under Cree law, noting that the arrival of newcomers did not displace Indigenous laws; instead, "the Indian political and territorial right, laws and usages remained in full force ...". In *Campbell v. British Columbia (AG)*, the BC Supreme Court recognized "the legitimacy of an evolving customary or traditional law;"<sup>8</sup> that, "since 1867 courts in Canada have enforced laws made by Aboriginal societies;" and that, "such rules, whether they result from custom, tradition, agreement, or some other decision making process, are "laws"". <sup>9</sup> Laws for the protection of children fit within this category.

The rationale for many customary adoptions falls within what is now considered child welfare law, including situations where a parent is unprepared or unable to care for a child; the illness or death of a parent; or, financial hardship. In *Casimel*, the BC Court of Appeal recognized

*Involvement of Indigenous communities can interrupt the rising number of Indigenous children in care and prevent the loss of identity and cultural disconnection experienced by past generations of Indigenous children.*

<sup>5</sup> *Schedule B to the Canada Act 1982 (UK), 1982, c 11. See: Mitchell v. MNR [2001] 1 SCR 911; R v. Van der Peet [1996] 2 SCR 507 [Van der Peet]; and Delgamuukw v. BC [1997] 3 SCR 1010 [Delgamuukw].*

<sup>6</sup> *See for example: Casimel v. ICBC, [1994] 2 CNLR 22 (BCCA) [Casimel]. Law Commission of Canada. "Justice Within: Indigenous Legal Traditions" (2006) Ottawa, ON contains an extensive discussion of Indigenous laws and legal traditions and their recognition within Canadian common law.*

<sup>7</sup> (1867), 1 CNLC 70 (Que SC) [Connolly].

<sup>8</sup> [2000] BCJ No. 1525 [Campbell], at 106.

<sup>9</sup> *Campbell, supra, at. 86.*

the legality of an Indigenous custom adoption and noted that no declaration of the court was required to give effect to adoptions made under Indigenous customs.<sup>10</sup>

### III. Section 35(1) Recognition

The right of self-government is protected under s. 35 of the *Constitution Act, 1982*.<sup>11</sup> The Federal Act clears the way for recognition of inherent Indigenous jurisdiction in child welfare but does not create it. Indigenous Peoples have always had laws for the care of children.

The circumstances in which child welfare matters arise make them less than ideal for establishing a s. 35 right: most cases involve individual families in challenging circumstances. Child welfare matters proceed within the statutory framework of the CFCSA, are bound by the facts of each child's situation, and subject to strict time limits. Without a prior declaration of an Aboriginal right to self-government in the area of child welfare, child welfare cases are a poor forum to try to establish a s. 35 right. Section 35 cases (involving extensive evidence and constitutional matters) usually play out over a longer time and at considerable expense.

Cases where Aboriginal groups have sought to establish a s. 35 right to self-government in Aboriginal child-welfare have not succeeded due to (1) insufficient evidence; (2) the lateness of Aboriginal community involvement; or (3) where courts have suggested that the concerns of communities are political rather than directed toward the interests of the child.

The fact that cases have not yet successfully established a s. 35 right in this area should not be read as indicating that Aboriginal rights in this area do not exist but rather as highlighting the barriers to this approach, posed by the nature of the proceedings. The nature of some court proceedings pose inherent difficulties to Aboriginal rights recognition. In the context of Aboriginal rights claims made in criminal or quasi-criminal cases, the Supreme Court of Canada has noted:

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<sup>10</sup> *Casimel, supra*, at 26, citing the BCCA judgment in *Delgamuukw v. BC*, [1993] 5 WWR 97 (BCCA). See also: *Re Beaulieu's Petition* (1969), 3 DLR (3d) 479 (NWTTTC); *R v. Bear's Shin Bone* (1899), 4 Terr. LR 173 (NWTSC); *Re Katie's Adoption Petition* (1961), 32 DLR (2d) 686 (NWTTTC); and *Re Wah-Shee* (1975), 57 DLR (3d) 743 (NWTSC).

<sup>11</sup> See for example: *R v. Pamajewon*, [1996] 2 SCR 821, and *Delgamuukw, supra*.

*Jurisdictional discussions in Canada dividing authority over Indigenous children between the federal government and provinces/territories have wrongly ignored the fact of separate Indigenous jurisdiction.*



Procedural and evidentiary difficulties inherent in adjudicating Aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process.<sup>12</sup>

CFCSA matters originate in Provincial courts which do not hear constitutional questions. Children are living and growing beings who cannot wait for matters to move through the Court. The challenge in these circumstances is how to have Aboriginal voices meaningfully heard and incorporated into child welfare decisions, without advance recognition of s. 35 right. This Guidebook contemplates actions Aboriginal communities can take to help children and families today while building toward recognition of Aboriginal jurisdiction in the future.<sup>13</sup>

However, recognition of Indigenous child welfare jurisdiction has occurred through recognition of custom adoptions, a resolution under Indigenous child welfare law.<sup>14</sup>

Indigenous jurisdiction in child welfare is inherent and exists outside of the Federal Act. If Indigenous Nations choose to do so, they can enact or otherwise articulate a child welfare law and seek to have it protected from infringement of federal or provincial/territorial laws on the basis of s. 35(1). This path could be difficult because it may require costly court challenges to prove that the provincial and federal laws unjustifiably interfered with Indigenous jurisdiction. If successful, Indigenous Peoples would have to find resources for the exercise of their jurisdiction.

An example of the exercise of inherent Indigenous jurisdiction is the Splatsin bylaw. Though it was formalized through the mechanism of

*If Indigenous Nations choose to do so, they can enact or otherwise articulate a child welfare law and seek to have it protected from infringement of federal or provincial/territorial laws on the basis of s. 35(1).*

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12 Walkem, A. "Wrapping Our Ways Around Them: Aboriginal Communities and the Child, Family and Community Service Act (CFCSA) Guidebook" (2015) ShchEma-mee.tkt Project (Nika'pamux Nation Tribal Council) [WOW version 1], at 15, citing *R v. Marshall*; *R v. Bernard*, 2005 SCC 43, LeBel, J., concurring at 142.

13 *Wrapping Our Ways*, version 1, at 14-15.

14 See for example, *Casimel*, *Supra*.

*The over-representation of Indigenous children and families within the child welfare system is a human rights issue.*

an *Indian Act*<sup>15</sup> bylaw, it reflects inherent Indigenous jurisdiction in this area and carves out a scope of jurisdiction beyond the Federal Act.

#### IV. Division of Powers

While child welfare is not a listed head of power in the *Constitution Act, 1867*,<sup>16</sup> it has generally been found to be an area of provincial responsibility. In the case of Indigenous Peoples, however, “Indians, and Lands reserved for the Indians” fall under exclusive federal jurisdiction under s. 91(24). Historically, it was widely accepted that provincial child welfare legislation did not apply to Indigenous children because this was an area of exclusive federal responsibility.

The role of the provinces regarding Indigenous children changed when the federal government amended the *Indian Act* to include s. 88 which referentially incorporated provincial laws to apply to Indigenous Peoples, subject to the terms of any treaty or federal legislation.<sup>17</sup> After enacting s. 88, Canada entered agreements with the provinces to provide child welfare services to status Indian children.

The recent trend in constitutional law and interjurisdictional immunity would likely hold that provincial legislation applies of its own force and effect to Indigenous children and does not rely on invigoration through s. 88.<sup>18</sup> However, this discussion highlights, from an Indigenous perspective, how jurisdictional questions remain outstanding. Indigenous Peoples were not consulted with, nor involved in, the decision to acknowledge provincial child jurisdiction or the control over Indigenous children that resulted.

Jurisdictional discussions in Canada dividing authority over Indigenous children between the federal government and provinces/territories have overlooked the fact of separate Indigenous jurisdiction.

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<sup>15</sup> RSC 1985, c 1-5.

<sup>16</sup> (UK), 30 & 30 Victoria, c 3.

<sup>17</sup> As it now reads:

*88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.*

<sup>18</sup> See for example: *Tsilhqot'in Nation v. BC*, 2004 SCC 44 [Tsilhqot'in]; *Quebec (AG) v. Canadian Owners and Pilots Assn*, [2010] 2 SCR 526.

## V. Addressing Systemic Bias and Discrimination in Child Welfare

The disproportionate over-representation of Indigenous children within child welfare systems reflects systemic bias and discrimination.

Applying a human rights framework to child welfare could shift the discussion, including through the international human rights lens of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)<sup>19</sup> which acknowledges Indigenous Peoples' collective human rights.

*The CHRT ruled that Indigenous children are entitled to substantive equality in the provision of child and family services.*

### *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*<sup>20</sup>

The First Nations Child and Family Caring Society and the Assembly of First Nations brought a case before the Canadian Human Rights Tribunal (CHRT) challenging the discrimination experienced by Indigenous children, particularly those who live on-reserve. The CHRT identified pervasive, systemic discrimination against Indigenous children, and found that Indigenous children on-reserve did not receive comparable child welfare services as other Canadian children. The CHRT ruled that Canada failed to:

- Take into account historic disadvantages suffered by Indigenous Peoples in providing services;
- Provide culturally appropriate services and imposed provincial and territorial laws with no consideration of Indigenous laws and how those laws could operate to protect Indigenous children; and
- Implement Jordan's Principle to ensure that on-reserve Indigenous children would not be denied services while federal and provincial/territorial governments argued about who should pay for those services.

The CHRT found that non-Indigenous child welfare service providers were funded at a higher rate, and with fewer conditions, than on-reserve child welfare services; and the on-reserve child welfare system incentivized removals and the provision of non-culturally appropriate services. The CHRT ruled that Indigenous children are entitled to substantive equality in the provision of child and family services. Canada

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<sup>19</sup> *United Nations Resolution 1* adopted by the UN General Assembly (2 October 2007), A/RES/61/295.

<sup>20</sup> 2016 CHRT 2 [*First Nations Child and Family Caring Society*].

*Indigenous laws and policies can help prevent racialized assessments in child protection in areas such as the best interests of Indigenous children and articulate steps needed to protect children.*

must “consider the distinct needs and circumstances of First Nations children and families living on-reserve—including their cultural, historical and geographical needs and circumstances.”<sup>21</sup>

### **Sixties Scoop—The Brown Class Action**

In 2014, a class action was filed on behalf of Indigenous Peoples in Ontario who were removed from their families and placed in foster care from 1965-1984 (a period also known as the “Sixties Scoop”) based on loss of culture, language and identity (*Brown v. Attorney General of Canada*).<sup>22</sup> Large numbers of Indigenous children were removed from their families after Canada contracted with Ontario to provide child welfare services. The *Brown* class action plaintiffs sued Canada for failing to ensure that the Ontario child welfare system would protect them and maintain their identity as Indigenous persons. The *Brown* class action alleged that:

[M]any of these children lost their identity as aboriginal persons, and their connection to their aboriginal culture, that ultimately led to them suffering emotional, psychological and spiritual harm ... This led them to experience loss of self-esteem, identity crisis and trauma in trying to re-claim their lost culture and traditions.<sup>23</sup>

In a preliminary ruling in *Brown*, the Ontario Supreme Court of Justice noted that Canada’s good intentions did not remove its responsibility for the results of its actions.<sup>24</sup> Canada breached its duty of care by failing to take reasonable steps to prevent children who had been removed from their families from losing their Indigenous heritage.

A settlement agreement extended the agreement across Canada. The Court approved settlements to First Nations and Inuit who were adopted out of their families and communities during the Sixties Scoop. Non-status First Nations and Métis were excluded from the settlement.

### **Millennial Scoop**

The term “Sixties Scoop” is misleading because it suggests that the removal of Indigenous children from their families and communities has

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<sup>21</sup> *First Nations Child and Family Caring Society, supra*, at 465.

<sup>22</sup> 2014 ONSC 6967 [*Brown*].

<sup>23</sup> *Brown, supra*, at 2; *Brown v Attorney General (Canada)*, 2017 ONSC 251.

<sup>24</sup> *Brown, supra*, at 37.



stopped. In fact, more Indigenous children are in care now than at any point in the past.

A class action is currently underway on behalf of Indigenous children who were removed from their Indigenous families and communities from 1991 to 2019.

The statement of claim alleges that “Government’s chronic underfunding of First Nations Child and Family Services has led to epidemic numbers of First Nations youth being removed from their homes and communities and placed into out-of-home care—a practice known as the ‘Millennial Scoop.’” The allegation is that child welfare law, policies and funding continue to incentivize the removal of Indigenous children from their families and cultures.

*Indigenous parents are judged more harshly and given less chances and supports compared to their non-Indigenous counterparts.*

## **Human Rights Concerns**

The over-representation of Indigenous children and families within the child welfare system is a human rights issue. The Truth and Reconciliation Commission (TRC) identified large scale child welfare removals of Indigenous children as cultural genocide:

The establishment and operation of residential schools were a central element of this policy, which can best be described as “cultural genocide”...Cultural genocide is the destruction of those structures and practices that allow the group to continue as a group. ... [M]ost significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.<sup>25</sup>

The disproportionate over-representation of Indigenous children has been said to reflect, in part, the racial profiling of Indigenous parents and families.<sup>26</sup> Indigenous children and families are more likely than non-Indigenous families to have a protection concern reported, be investigated, be found in need of protection, be admitted into care and be offered less supportive services to allow them to address child protection concerns. Indigenous parents are judged more harshly and giv-

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<sup>25</sup> Truth and Reconciliation Commission of Canada. “Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada” (2015), at 1.

<sup>26</sup> Ontario Human Rights Commission. “Under Suspicion. Research and Consultation Report on Racial Profiling in Ontario”; RR v. Vancouver Aboriginal Child and Family Services Society (No. 2), 2019 BCHRT 85.

en less chances and supports compared to their non-Indigenous counterparts. In the end result, Indigenous children are more likely to be taken into, to remain in, and then age out of, care with no permanent solutions.<sup>27</sup>

*Addressing the disproportionate over-representation of Indigenous children and families within child welfare processes requires a willingness to identify and challenge the racial profiling of Indigenous families. Indigenous laws and policies can help prevent racialized assessments in child protection in areas such as the best interests of Indigenous children and articulate steps needed to protect children.*



## Case Study: Racial Profiling in the Child Welfare Sector

*In “Under Suspicion: Research and Consultation Report on Racial Profiling,” the Ontario Human Rights Commission commented on discrimination against Indigenous parents within the child welfare system, concluding that:*

- *Racial profiling in the child welfare sector disproportionately targets Indigenous parents, particularly mothers, for over-scrutiny;*
- *Incorrect assumptions about risk based on Indigenous race often drive the decision-making of child welfare authorities and people who make child welfare reports; and*
- *An intersection between Indigeneity and poverty disproportionately impacts Indigenous Peoples in child welfare systems.*

*In RR v. Vancouver Aboriginal Child and Family Services Society (No. 2),<sup>28</sup> an Indigenous mother challenged the director’s refusal to return her children and restrict her access to her children, arguing that these actions stemmed from discrimination on the grounds of race, colour, ancestry and mental disability. Arguments in this case highlight the complex, systemic nature of racial profiling in the area of Indigenous child protection.*

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27 Ministry of Children and Family Development. “Aboriginal Children in Care Report” (October 2009) Prepared by Research, Analysis and Evaluation Branch, at 10 [References omitted]. For 2018/2019 fiscal year figures, see: Ministry of Children and Family Development. “Child Protection Reports” (2018-19) British Columbia. [available online: <https://mcfcd.gov.bc.ca/reporting/services/child-protection/protection-calls/case-data-and-trends>]; and Ministry of Children and Family Development. “Residential Services to Children in Need of Protection” (2018-19) British Columbia. [available online: <https://mcfcd.gov.bc.ca/reporting/services/child-protection/services-to-children-in-need-of-protection/case-data-and-trends>].

28 *Supra*.



## **Actions/Best Practices: Steps to Counter Racial Profiling**

*Addressing the disproportionate over-representation of Indigenous children and families within child welfare processes requires a willingness to identify and challenge the racial profiling of Indigenous families. Indigenous laws and policies can help prevent racialized assessments in child protection in areas such as the best interests of Indigenous children and articulate steps needed to protect children.*

*Cultural competence, humility and best practices that empower and uphold the rights of Indigenous children, families and communities are needed.*

*Steps to counter racial profiling against Indigenous Peoples in child welfare:*

- *Actively involve and work with Indigenous communities and Nations, recognizing that this is how to best protect a child's best interests;*
- *Educate service providers on Indigenous childcare practices to address explicit bias;*
- *Raise consciousness of service providers' and decision makers' implicit biases, including through ongoing training opportunities;*
- *Identify and address examples of institutional and structural bias;*
- *Put in place a process to measure outcomes from training and efforts on an ongoing basis (and to course-correct if feedback shows efforts are not working as intended);*
- *Put in place complaint mechanisms and advocates to challenge systemic bias against Indigenous Peoples and parenting;*
- *Collect and share data and stories about Indigenous Peoples' lived experiences of the child welfare system at all levels; and*
- *Promote diversity and inclusion to ensure that people that provide child welfare services (including social workers, parenting experts, lawyers, judges) include Indigenous Peoples at all levels.*

*Whenever someone has the power to make decisions that could remove an Indigenous child from their family and culture, the exercise of that discretion should be guided by clear rules for how decisions must be made in the best interests of the Indigenous child, with direct involvement of the Indigenous community, and based on the child's Indigenous and human rights. Where at all possible, decisions should be made by Indigenous Peoples, considering and exercising Indigenous laws.*

*Cultural competence, humility and best practices that empower and uphold the rights of Indigenous children, families and communities are needed.*



## 02. Overview of Federal Act

*The Federal Act sets out a process for how Indigenous Peoples can articulate their laws and enter negotiations with the federal and provincial/territorial governments to have that jurisdiction recognized and funded.*

The Federal Act requires that the Indigenous laws and traditions of a child's own community be reflected in all aspects of caring for that child, even where the Indigenous community has not entered (or may not enter) a process to officially pass their own child welfare law.

The purpose of the Federal Act (s. 8) is to:

1. Affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;
2. Set out national standards for the provision of child and family services in relation to Indigenous children; and
3. Contribute to the implementation of the UNDRIP.

The Federal Act sets out a process for how Indigenous Peoples can articulate their laws and for how these laws will interact with federal and provincial/territorial laws.

18(1) The inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.

Indigenous Peoples, under the Federal Act, can articulate their own child and family service laws; administer and enforce these laws; and provide dispute resolution mechanisms under those laws (s.18(2)).

*The process of articulating laws, and how that jurisdiction will operate, is a task for Indigenous communities, reflecting the values and principles that define who they are as a Peoples and what they hold as important. Indigenous communities can appoint or create organizations (such as a child welfare agency or community board) to carry out (implement) their laws. Where there are disputes or the need to decide matters under their own laws, Indigenous communities may also appoint people to make those decisions. For example, this could include elected band or community leadership; a council of elders or knowledgeable community members chosen by the community; an Indigenous judge; or recognition of the authority of clans or houses.*



## NEW CONCEPTS AND DIRECTION:

### Areas Where the Federal Act Changes Child Welfare Practice

**S.9**

Introduces cultural continuity and substantive equality. Asserts children's rights to their traditions, customs, languages and community.

**Ss.14**

Priority to preventive care including early intervention, especially in preventing apprehension of children at birth.

**S.15**

Prevents apprehension "solely on the basis" of socioeconomic conditions, to the extent that it is consistent with the best interests of the child.

**S.16(3)**

Requires a reassessment of placement on an ongoing basis to determine if the child can be returned to parents or extended family (defined by Indigenous law).

**S.12**

Identifies the need to provide notice to parents, caregivers and Indigenous governing bodies about "significant measures" involving a child's care to the extent that it is consistent with the best interests of the child.

**S.16**

Sets a priority for placement: Within the family - Indigenous community - other Indigenous Peoples. The placement of a child must take into account the customs and traditions of Indigenous Peoples.

*Indigenous Peoples, under the Federal Act, can articulate their own child and family service laws; administer and enforce these laws; and provide dispute resolution mechanisms under those laws (s.18(2)).*



*The Federal Act addresses the inter-generational disconnect that Indigenous families experience as a result of colonial law and policies that continue to disrupt Indigenous ways for keeping children safe.*

## I. Preamble

The Preamble outlines Parliament’s intention in passing the Federal Act. Canada’s *Interpretation Act*<sup>29</sup> says that the “preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.” Indigenous communities and advocates should be prepared to argue for how provisions in the Preamble provide guidance on how the Federal Act should be interpreted.

The Federal Act addresses the inter-generational disconnect that Indigenous families experience as a result of colonial law and policies that continue to disrupt Indigenous ways for keeping children safe.

The Federal Act recognizes:

- The drastic over-representation of Indigenous children in the child welfare system stems from a colonial history of suppression of Indigenous laws.
- How child welfare systems have disadvantaged Indigenous women and girls. This includes:
  - Canada, through the *Indian Act*, denied status recognition to Indigenous women who married non-Indigenous men. These women (and their children) could no longer live within, or actively participate in, their Indigenous communities. Generations of children were denied the legal right to live in their home communities and were subject to both cultural and geographic dislocation.<sup>30</sup> This dislocation continues for many families involved in child welfare processes.
  - The MMIWG2S Inquiry Report talked about the persistent denial of the human rights of Indigenous women, girls and two-spirited people.<sup>31</sup>

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<sup>29</sup> RSC 1985, c I-21, at 13.

<sup>30</sup> *Indian Act, supra* (current and earlier versions). See for example: *Corbierre v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203; *Mclvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 (The trial judge extensively reviewed the discriminatory provisions. The BCCA considered this case in *Mclvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153); and *Lovelace v. Canada, Communication No R6/24, UN Doc Supp No 40 (A/36/40) (1981)*.

<sup>31</sup> *National Inquiry Into MMIWG. “Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls” (3 June 2019) [MMIWG2S Inquiry Report], Vol 1a.*

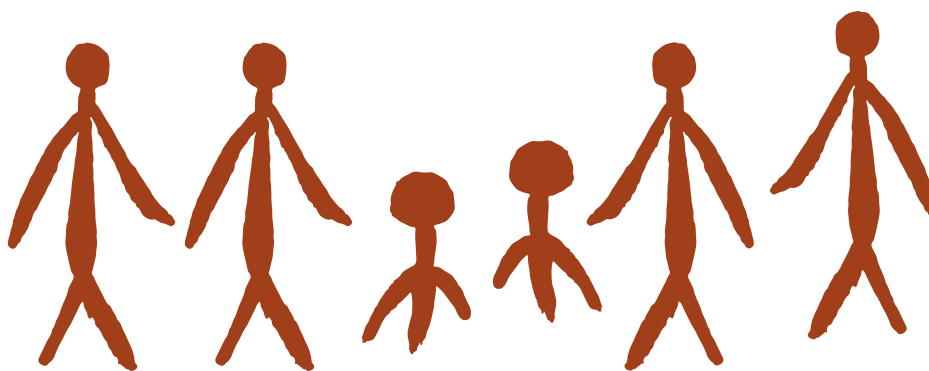


- The international human right standards in the UNDRIP and the *United Nations Convention on the Rights of the Child* (UNCRC)<sup>32</sup> should guide how child welfare services are provided to Indigenous children and families.
- Many child protection concerns are rooted in the inter-generational impacts of trauma from IRS. Indigenous children came through these systems disconnected from their Indigenous communities and families. The IRS system forcibly removed Indigenous children from their families, cultures and communities and prevented generations of Indigenous Peoples from parenting their children, while often subjecting those children to horrific levels of abuse.<sup>33</sup>

### *TRC Calls to Action*

The TRC was established as part of the largest class action settlement in Canadian history, and their first Call to Action is the need to reduce the numbers of Indigenous children in care and reform the child welfare system. The TRC noted the inter-generational impact of the IRS: “The Survivors are not the only ones whose lives have been disrupted and scarred by the residential schools. The legacy has also profoundly affected the Survivors’ partners, their children, their grandchildren, their extended families, and their communities.”<sup>34</sup> In recognition of the importance of child welfare and the inter-generational impacts of IRS, the TRC devoted its first set of Calls to Action to calling for child welfare changes.

*The TRC was established as part of the largest class action settlement in Canadian history, and their first Call to Action is the need to reduce the numbers of Indigenous children in care and reform the child welfare system.*



<sup>32</sup> *United Nations Resolution 1 adopted by the UN General Assembly (20 November 1989), A/RES/44/25.*

<sup>33</sup> *For a general overview of IRS and its impacts see: “Report of the Royal Commission on Aboriginal Peoples” [RCAP], Vol 1, at 376-379, which recognized the connection “between the schools’ corrosive effect on culture and the dysfunction in their communities... Abuse had spilled back into communities, so that even after the schools were closed their effects echoed in the lives of subsequent generations of children...”*

<sup>34</sup> *Truth and Reconciliation Commission of Canada. “What We Have Learned: Principles of Truth and Reconciliation” (2015), at 103.*



## Case Study: TRC Calls to Action Focus on the Need to Reform Child Welfare and Recognize Indigenous Laws

- 1. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by:*
  - Monitoring and assessing neglect investigations.*
  - 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.*
  - Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the history and impacts of residential schools.*
  - 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.*
  - Requiring that all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers.*
- 2. We call upon all levels of government to fully implement Jordan's Principle.*
- 3. 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:*
  - Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.*





## II. Interaction of Federal/Provincial/Indigenous Laws

The Federal Act is based on a concurrent laws model. Provincial and territorial child welfare legislation continues to apply up to the point of conflict with the provisions of the Federal Act. Federal and provincial/territorial laws (and potentially Indigenous laws) will apply concurrently with each other.

When there is a disagreement about whether a provincial/territorial law is in conflict with a provision of the Federal Act, or federal or provincial/territorial laws conflict with Indigenous laws, then that matter will be determined by the courts, or, under Indigenous laws, perhaps with reference to Indigenous adjudication or hybrid adjudication bodies. Judicial training on the Federal Act, and how it will interact with emerging Indigenous jurisdictions, is needed.

Under ss. 20 and 21 of the Federal Act, Indigenous laws will have the same force and effect as federal laws, subject to the *Charter*,<sup>35</sup> *Canadian Human Rights Act*,<sup>36</sup> and ss. 10-15 of the Federal Act which address best interests of the Indigenous child, substantive equality for Indigenous children, families and communities, and focus on preventive care.

*Where treaties or inter-governmental agreements address child and family services, these treaty or inter-governmental agreements may take precedence over the Federal Act.*



### Case Study: BC Policy 1.1

*The Ministry of Children and Family Development (MCFD) issued Policy 1.1: Working with Indigenous Children, Youth, Families and Communities (Policy 1.1)<sup>37</sup> to give direction about how the BC CFCSA should be interpreted in light of the Federal Act. The BC CFCSA will likely be further amended to be consistent with the Federal Act, and as required under the BC Declaration on the Rights of Indigenous Peoples Act (DRIPA).<sup>38</sup>*

<sup>35</sup> *Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].*

<sup>36</sup> *RSC 1985, c H-6.*

<sup>37</sup> *Ministry of Children and Family Development. "Policy 1.1 Working with Indigenous Youth, Families and Communities" (2020) [Policy 1.1].*

<sup>38</sup> *SBC 2019 c 44.*

*Modern land claim agreements or treaties may provide for special notice or jurisdictional space for Indigenous groups to pass laws to occupy the area of child welfare.*

### III. Treaties or Existing Agreements

The Federal Act does not impact existing treaty or land claim agreements about child welfare. Numbered or pre-Confederation (Douglas) treaties may provide for a continuation of Indigenous Peoples' way of life, and may have been understood by all parties to include protection of Indigenous laws for the care and protection of Indigenous children and families.

Modern land claim agreements or treaties may provide for special notice or jurisdictional space for Indigenous groups to pass laws to occupy the area of child welfare. Where communities with modern treaties or self-government agreements have negotiated (but not yet occupied space in child welfare), the Federal Act will apply to their children and families, as it does to other Indigenous children and families. To the extent that Indigenous Peoples have occupied child welfare space through their own laws under modern treaty agreements, that jurisdiction will not be impacted. Modern treaties contain definitions of citizenship, and those definitions impact who is entitled to receive notice when a child is involved in the child welfare system.

To date, Tsawwassen is the only First Nation in BC that has occupied the legislative space and passed the *Tsawwassen First Nation 2009 Children and Families Act*,<sup>39</sup> which applies to Tsawwassen children on their lands. Indigenous Peoples in other areas of Canada may have different land claim or treaty agreements in place that address child welfare.

#### BEST PRACTICES



*Children who are members of, or entitled to be enrolled under, a treaty may have a different set of laws or policies that apply to them. Where treaties or inter-governmental agreements address child and family services, these treaty or inter-governmental agreements may take precedence over the Federal Act.*

- *Treaties and inter-governmental agreements should be reviewed as they may influence the interpretation of the Federal Act or the BC CFCSA.*
- *Where Indigenous children or families are members of Indigenous Nations that have passed their own laws, those Indigenous laws could entirely replace or modify the operation of the Federal Act or the BC CFCSA.*

<sup>39</sup> Available online: <http://tsawwassenfirstnation.com/governance-overview/laws/>.

## IV. Key Definitions: Federal Act and BC CFCSA

There are several areas where the Federal Act introduces slightly different definitions than the BC CFCSA.

### Advocacy/Best Practices

*An assessment of whether a conflict exists between definitions within the Federal Act and the BC CFCSA must occur in light of the overall purposes of the Federal Act to recognize Indigenous jurisdiction in child welfare (this requirement exists even if an Indigenous community has not given notice and articulated a law under the Federal Act); implement the UNDRIP; incorporate Indigenous laws and traditions in the care of Indigenous children; and ensure that Indigenous children remain culturally connected.*



*There are several areas where the Federal Act introduces slightly different definitions than the BC CFCSA.*

**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. A care provider may be defined according to the customs or traditions of the child's Indigenous community. A care provider is entitled to receive notice of significant measures concerning a child and may become a party to a child welfare proceeding. This provision ensures that people who care for children under Indigenous traditions and laws, such as customary adoptive parents, have their role and place in a child's life recognized.

### Advocacy

*Policy 1.1 clarifies that BC does not consider the definition of care provider to include paid, non-related care providers or foster parents. The issue of whether non-related and paid foster parents should be considered care providers under the Federal Act is a contested issue. Read in light of the Federal Act overall, the Federal Act should not be read as creating rights to unrelated third parties, but rather to support Indigenous laws and traditions for categories of people who care for children.*



**CHILD AND FAMILY SERVICES** includes all services to support children and families, including prevention, early intervention and child protection services. This definition includes preventive care and early intervention (allowing for support at the prenatal stage) that are not included in the BC CFCSA.

*The BC CFCSA definition matches the Constitution Act, 1982 s. 35 definition of who is “aboriginal,” which recognizes the right of Indigenous Peoples to define their own membership.*

**FAMILY** includes a person whom a child considers to be a close relative or whom the child’s Indigenous community considers to be a close relative of the child. Indigenous laws and customs for defining family, including through traditional adoption and kinship systems, are recognized.

**INDIGENOUS**, when used in respect of a person, also describes a First Nations person, an Inuk or a Métis person.

The BC CFCSA s. 1 defines “Indigenous child” to include a First Nation, Nisga’a or Treaty First Nation child; any child who is under 12 years of age and has a biological parent who is Indigenous and considers themselves to be Indigenous; or any child who is 12 years or older of Indigenous ancestry, and considers themselves to be Indigenous.

The BC CFCSA definition matches the *Constitution Act, 1982 s. 35* definition of who is “aboriginal,” which recognizes the right of Indigenous Peoples to define their own membership.

### **Advocacy/Best Practices: Establishing that a Child is Indigenous**

*Due diligence should be exercised in identifying a child’s Indigenous heritage. This could include interviewing the parent, extended family and child (if appropriate), and asking about the child’s status and membership within, or connection to, an Indigenous community.*

*Where multiple generations of a family were involved in the child welfare system, it may be necessary to access parental child welfare records, or talk to extended family members, to trace connections that have been severed over time.*

*Evidence supporting a finding that a child is Indigenous, or that a child is considered a member of a particular Indigenous community, could include:*

- *Statements from leaders, elders or knowledge keepers outlining a child’s connection to the Indigenous community;*
- *Statements from a parent, sibling or extended family members about the child and family’s Indigenous heritage;*
- *Statements by the child about how they identify;*
- *The family or child’s participation in cultural activities; and*
- *How family members and people closest to the child identify culturally.*





## Case Study: Considerations of Indigenous Identity

*Catholic Children’s Aid Society of Toronto v. ST*<sup>40</sup>—The Court said that sufficient evidence is required to determine whether a child is Indigenous to avoid an abuse of administration of justice. However, the Court acknowledged that people may lack specific information about their Indigenous communities due to the inter-generational impacts of involvement in the child welfare system. “Many will not be registered with any First Nations band or belong to any First Nations, Inuit or Métis organization. ... The new legislative provisions are an opportunity for these children to reignite lost connections with their culture and heritage.”<sup>41</sup>

*Children’s Aid Society of Brant v. SG*<sup>42</sup>—The Court rejected the director’s argument that the question of Indigenous identity was “not applicable”. A finding about a child’s Indigenous identity is required by statute and “triggers an obligation by the Society to meet the child’s cultural needs.” The Children’s Aid Society, as an “institutional litigant”, had the responsibility to make “early and proactive inquiries” about a child’s Indigenous identity. The Court rejected the Children’s Aid Society’s attempt to displace responsibility to the Indigenous parents, noting that parents “are often stressed and vulnerable. It’s not reasonable to assume that the parents will understand the need to self identify at an early stage.”

The direction of the TRC cannot be achieved if children are not identified as Indigenous: “As a society, we have to be vigilant that these protections have not be legislated for naught.”<sup>43</sup>

*Where multiple generations of a family were involved in the child welfare system, it may be necessary to access parental child welfare records, or talk to extended family members, to trace connections that have been severed over time.*



40 2019 ONCJ 207 [Catholic CAS Toronto v. ST].

41 Catholic CAS Toronto v. ST, *supra*, at 36.

42 2018 ONCJ 958 [CAS Brant].

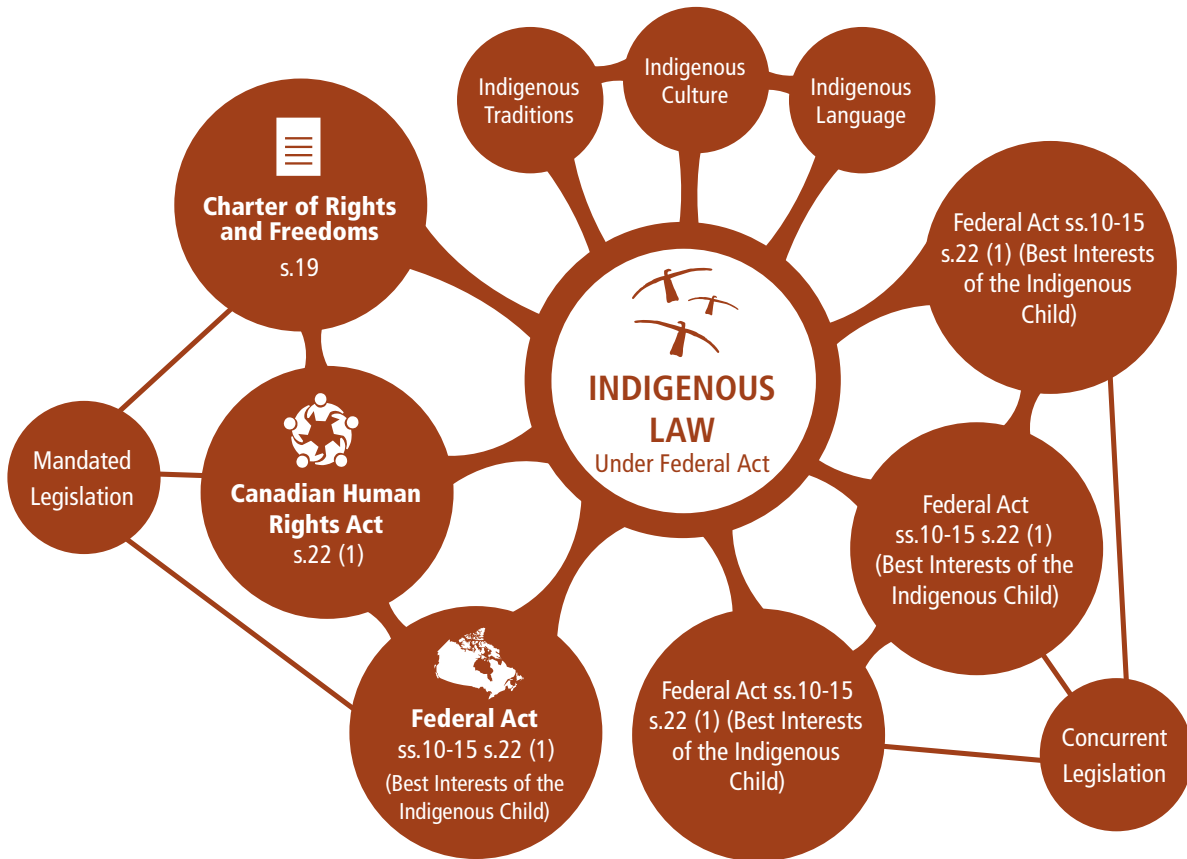
43 CAS Brant, *supra*.

The BC CFCSA s. 1 defines “First Nation” to include a Band (under the *Indian Act*) or an Indigenous legal entity prescribed by regulation.

Regulations made under s. 103(2) will prescribe who the province may recognize as a “First Nation”.

A full list of designated representatives can be found in Schedules 1 (First Nations; Bands), 1A, 1B (Treaty First Nations with Agreements for Child Welfare) and 2 (Indigenous Community Organizations, such as Friendship Centres, Métis Commission and Nunavut and Inuvialuit Representatives) of the BC CFCSA Regulation. Policy 1.1 says it will add IGBs to these lists as they are appointed by Indigenous groups.

*The direction of the TRC cannot be achieved if children are not identified as Indigenous: “As a society, we have to be vigilant that these protections have not be legislated for naught.”*



**Indigenous Governing Body:** Indigenous Governing Body (IGB) means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized, and affirmed by s.35 of the *Constitution Act, 1982*. It is IGBs that will be appointed by Indigenous Nations to exercise the child welfare jurisdiction under the Federal Act. The IGB is different from the definition of a First Nation under the BC CFCSA.



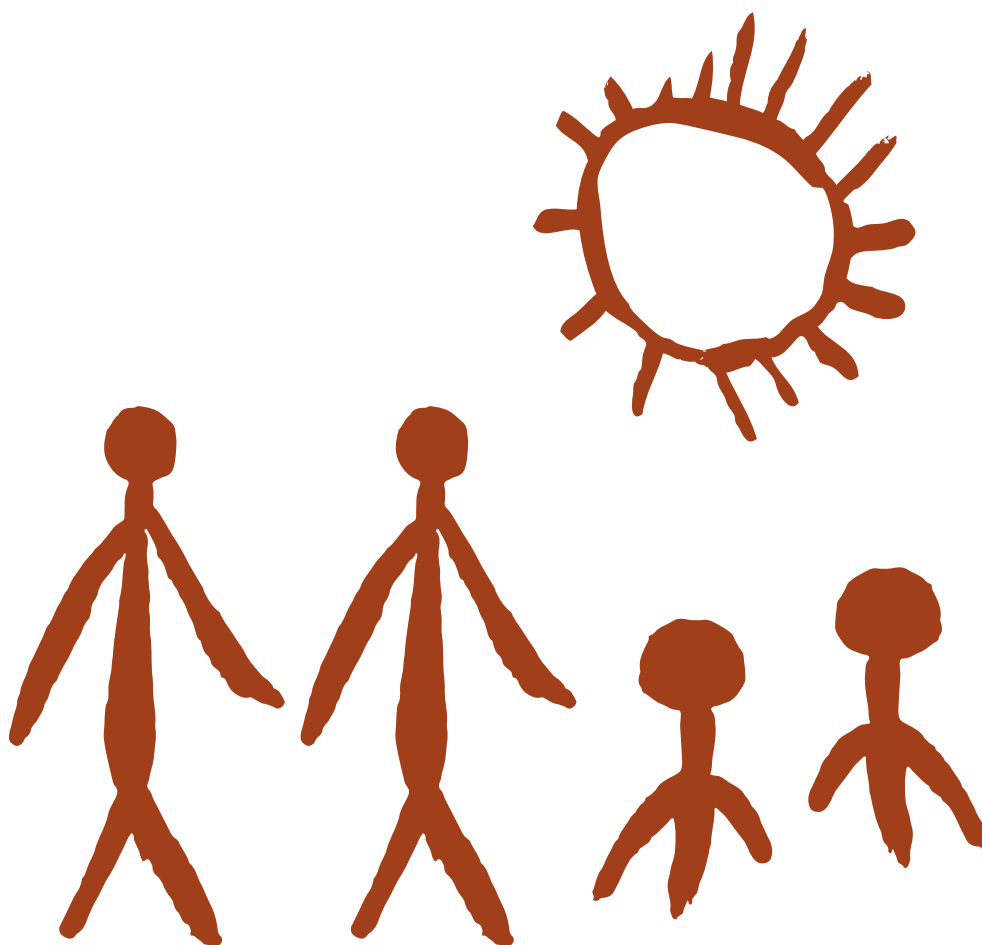
## 03. Indigenous Laws Jurisdiction

The Federal Act sets out a process for Indigenous Peoples to pass and enforce their own laws in the area of children and families.

Section 35(1) of the *Constitution Act, 1982* protects inherent Indigenous jurisdiction and could shield Indigenous child welfare laws passed outside of the Federal Act. (This possibility is not discussed in-depth here.)

Implementing Indigenous laws is the work of governance and will require strategic decisions about how to implement Indigenous jurisdiction.

*Implementing Indigenous laws is the work of governance and will require strategic decisions about how to implement Indigenous jurisdiction.*



*Indigenous communities may chose to reconstitute or remake child welfare service agencies under their own laws.*

## **Actions/Indigenous Laws: Indigenous Peoples have choices about the types or extent of child welfare laws that they could pass under the Federal Act**

*Some options are:*

- 1. COMPREHENSIVE (all-in):** *Pass a comprehensive child welfare law that entirely replaces provincial/territorial laws. This law could set its own processes and standards and create the bodies necessary to carry out the law. The child welfare regime established under Indigenous laws would include dispute resolution mechanisms, as well as how decisions would be made and appealed. Indigenous courts or other community-based decision-making bodies could be part of this.*
- 2. INCREMENTAL (some areas, not all):** *An Indigenous law which addresses only some areas of child welfare but not others, and incrementally increases the reach of their laws as they gain capacity. For example, an interim Indigenous law could define the best interests of the child or refer all decisions about a child's care to a community-based dispute resolution process.*
- 3. GUIDING (saying how the Federal Act should be applied to their children):** *Provide direction on how the Federal Act should be interpreted and applied to their children and families while they work toward articulating a more comprehensive law. Provide direction on how the Federal Act should be interpreted according to Indigenous laws and traditions. For example, Indigenous Peoples could pass laws:*
  - *About how they define preventive care;*
  - *Setting out steps to keep children connected to their culture;*
  - *Setting out their own definition for the best interests of their child members; or*
  - *Directing when they require notice to be provided to themselves by defining what they consider to be "significant measures" related to their own children.*







## BEST PRACTICES



*The Federal Act directs that Indigenous traditions and laws (even if not officially passed or articulated under the Federal Act) must guide how Indigenous children are cared for. It is always incumbent upon child welfare service providers and those in the legal system to actively seek to involve, and work with, Indigenous communities in caring for Indigenous children.*

*The process that Indigenous Peoples will follow in passing their own child welfare law will, first and foremost, reflect their own cultures and traditions.*

### 1. Steps for Indigenous Peoples to Follow in Passing Their Own Child Welfare Law

The process that Indigenous Peoples will follow in passing their own child welfare law will, first and foremost, reflect their own cultures and traditions. Questions such as how decisions are to be made; governance principles; key principles of Indigenous law and values; will guide the process and continue to operate. Some questions that will guide this process are addressed in the *Articulating Indigenous Laws* chapter.

#### A. Identify an Indigenous Governing Body (IGB)

*Indigenous governing body (IGB)* means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

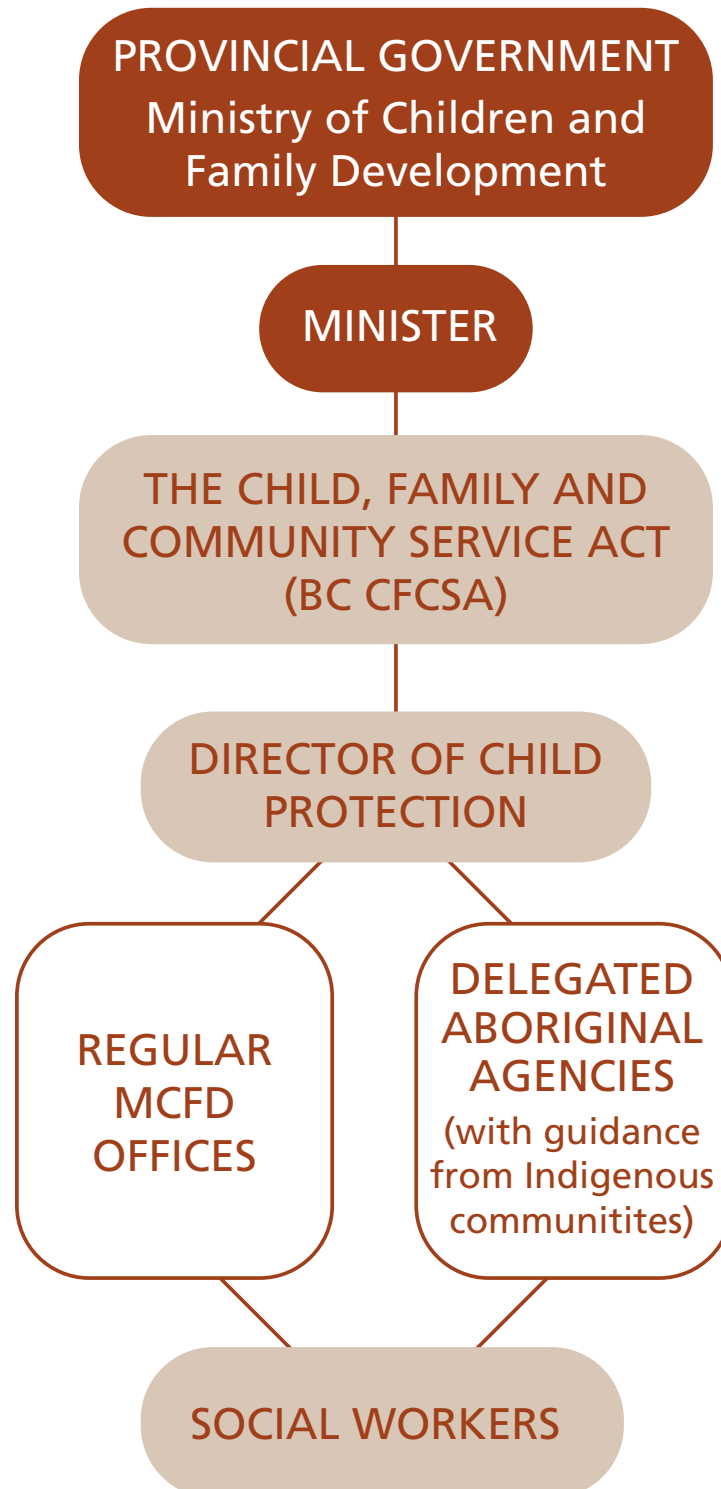
The Federal Act recognizes that ultimate authority (and inherent jurisdiction in the area of child welfare) sits with Indigenous Peoples in the meaning of the *Constitution Act, 1982*. To pass a child welfare law under the Federal Act, an Indigenous Nation or community that holds s. 35 rights must choose how they will be represented through identifying an IGB. An IGB could include a council (such as a Band council, Tribal council or other organization that Indigenous Peoples choose to be represented by), government or other entity.

An IGB can draft and administer child welfare laws (s. 18(1)) and provide for dispute resolution mechanisms under those laws (s. 18(2)).

#### *Delegated Indigenous/Aboriginal Agencies (DAs)*

DAs were established, in part, to fulfill the mandate to involve Indigenous Peoples in planning for the care of Indigenous children. DAs deliver child welfare services with an Indigenous focus and may have

## BC CFCSA Roles (Provincial System)



protocol agreements for how they work with Indigenous communities. DAs are created under provincial statute and administer provincial legislation and policies.

A DA is not the same as an Indigenous group that holds s. 35 Aboriginal Rights under the *Constitution Act, 1982*. DAs may work closely with IGBs and be asked to play a role in new child welfare regimes established under Indigenous laws. For example, a DA could be asked by an IGB to provide:

- Technical support and expertise to the IGB in developing their own laws and policies;
- Be a service provider (most likely under an amended set of directions or parameters that reflect Indigenous laws) to implement and enforce the IGB's child welfare law; or
- Specific outreach and support services, as outlined in the IGB's own law, within their own communities and for members living in urban communities.

*The IGB must provide notice to Canada and the provinces/territories that it intends to occupy child welfare jurisdiction.*

Indigenous communities may choose to reconstitute or remake child welfare service agencies under their own laws. Consent can not be inferred from the creation of a DA under provincial law to say a DA is a validly appointed IGB. New (and continued) consent, in light of the changed circumstances of the Federal Act, will be required (under conditions outlined by the Indigenous group holding s. 35(1) rights) in the context of the Federal Act. The Supreme Court of Canada highlighted that consent must be “ongoing, conscious and present” in other contexts.<sup>44</sup> This same standard would apply here, especially in the context of considerably changed circumstances represented by the Federal Act's recognition of inherent Indigenous jurisdiction in this area.

## **B. Notice**

This notice should be sent to Canada and each province where the IGB has children, and where they intend their law to apply. Generally, this may be only the province where an Indigenous group is located. However, if there are many children or families living in a neighbouring province, an IGB should consider issuing a notice to those other provinces as well.

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<sup>44</sup> *In circumstances related to sexual assault: R v. JA, 2011 SCC 28, at 39. See also R v. Goldfinch, 2019 SCC 38, where the Supreme Court of Canada confirmed that consent must be “contemporaneous”.*



*If no tripartite coordination agreement is reached after twelve months of “reasonable efforts,” then the Indigenous law still has the force of law as federal law.*

## BEST PRACTICES



*Indigenous Peoples often share connections to children and families. A child belonging to one Indigenous Peoples will often live in other Indigenous communities. While it is not required under the Federal Act, Indigenous Peoples should contemplate how their laws will work with other Indigenous laws. This could include renewing treaties or protocols between Nations, setting out how they will support each other’s jurisdictions, or putting in place dispute resolution mechanisms.*

*Agreements between Indigenous Nations are needed where children may be shared between Indigenous Nations—Indigenous protocols could say how the “stronger ties” provisions of s. 24(1) will be interpreted and how they plan to work together to care for their shared children.*

### **C. Negotiating a Tripartite Coordination Agreement**

The IGB, federal and provincial/territorial governments negotiate and attempt to reach a tripartite coordination agreement to address how their jurisdictions work together and funding. A tripartite coordination agreement could cover emergency services to ensure children’s safety, support to help children exercise their rights, fiscal arrangements or anything else necessary to allow the IGB to effectively exercise their jurisdiction.

If no tripartite coordination agreement is reached after twelve months of “reasonable efforts,” then the Indigenous law still has the force of law as federal law. If there is a conflict or inconsistency between a law of the IGB and a federal law (s. 22(1)) or provincial law (s. 22(3)), the Indigenous law prevails. The *Charter, Canadian Human Rights Act*, and ss. 10-15 of the Federal Act (best interests of the Indigenous child, substantive equality and focus on preventive care) apply and could limit interpretation of any Indigenous law.

#### **Reasonable Efforts**

What “reasonable efforts” are to reach a tripartite coordination agreement is not defined, nor is who determines if reasonable efforts were taken. Reasonable efforts will likely be found to include good faith efforts and an openness to hearing and considering the viewpoints of the other parties. It may include the provision of adequate funding to allow Indigenous Peoples to fully engage in discussions.

Only Indigenous Peoples have to show that they exercised reasonable efforts (governments do not have to show they negotiated reasonably.) This is positive because Indigenous Peoples can proceed even if governments have not acted reasonably.

### *Personal not Territorial Law*

There is no territorial limit set out in the Federal Act, and it is up to Indigenous groups and communities to determine whether legislation applies to all their members, including those located outside their province or territory. However, operationally, this might be difficult to enforce if Indigenous Peoples do not have a coordination agreement with provinces or territories about how their law would operate in that area. Whether Indigenous laws apply in certain areas, or to certain children and families, will engage courts absent prior agreements or alternative dispute mechanisms agreed to between Indigenous Peoples and governments.

*Indigenous communities could pass a law requiring that disputes, particularly on an urgent basis, be referred to a community-defined dispute-resolution mechanism.*

The IGB can exercise jurisdiction after the expiration of the one-year period even where tripartite coordination agreements are not reached. IGBs can exercise jurisdiction as soon as the community(ies) ratifies their own law, but the paramountcy provisions will not apply until the end of the one-year period in the case of a conflict of laws. A community could enter negotiations before their law is ratified, and it would not be operational until it is passed and operationalized within the community. Practically speaking, this jurisdiction could be limited by a potential lack of funding or a refusal on the part of provinces to recognize that jurisdiction.

If no coordination agreement is reached:

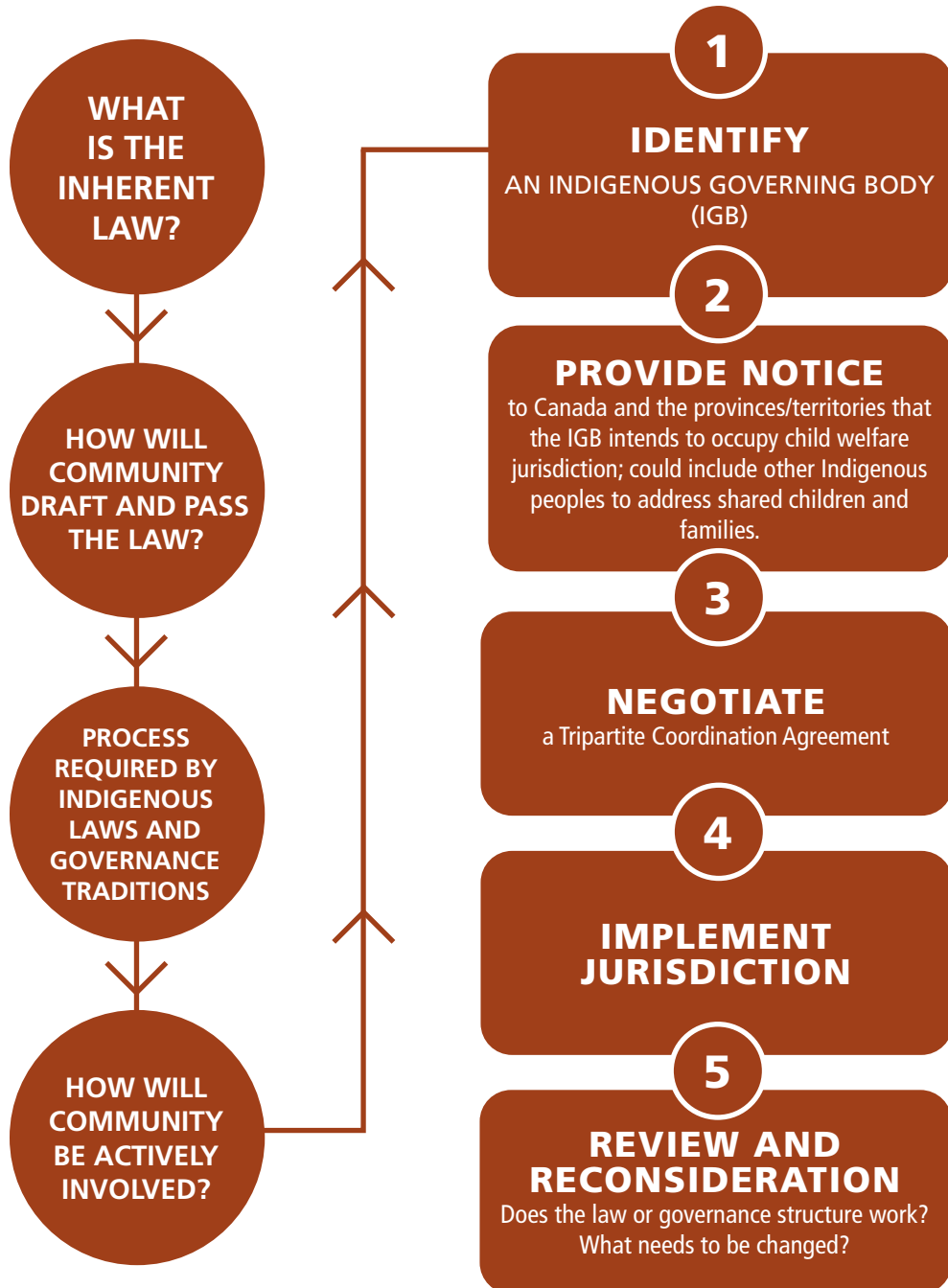
- There will be no agreement for service delivery between the Indigenous group and provincial or federal government (s. 20(2)); and
- No agreement on fiscal arrangements relating to the provision of child and family services (s. 20(2)(c)).

Where an IGB provides notice under s. 20(1), and no efforts are made to reach a tripartite agreement or the IGB's efforts are found to be unreasonable, the Indigenous law will not prevail over federal or provincial laws (absent a separate successful s. 35(1) challenge by the Indigenous group). The best interests test would apply to the Indigenous law, as would the *Charter* and *Canadian Human Rights Act* (subject to a s. 35(1) analysis).

# ROUTES TO INDIGENOUS LAWS RECOGNITION

Under the Federal Act

*Indigenous laws are subject to the application of the Charter (s. 19) and the Canadian Human Rights Act (s. 22(1)).*





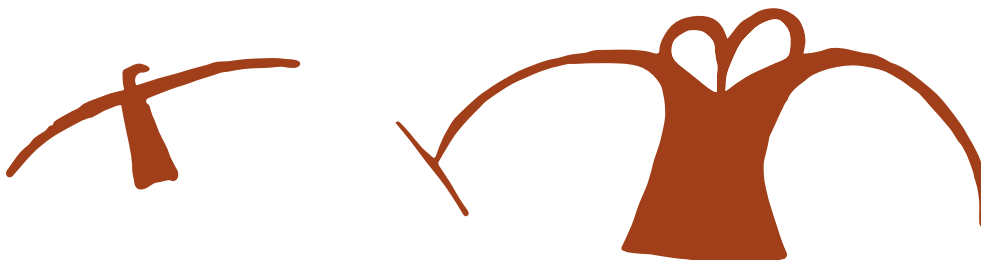
## ***D. Limits on Indigenous Jurisdiction Under the Federal Act***

The Federal Act limits Indigenous laws in these ways:

1. Indigenous laws are subject to the application of the Charter (s. 19) and the Canadian Human Rights Act (s. 22(1)).
2. Where a child belongs to two or more Indigenous groups, the laws of the group deemed to have “stronger ties” to the child will prevail in cases of conflict or inconsistency between the Indigenous groups (s. 24(1)). Absent Indigenous dispute mechanisms or protocols between Indigenous Nations, this determination will be made by courts. Indigenous Peoples could pass their own laws recognizing multiple Indigenous identities and saying how they will work together: Insofar as possible, a guiding principle should be that a child is better protected to the degree that their cultural connections and belonging to all of their Indigenous identities is maintained and fostered.
3. Indigenous child welfare laws will not apply where they are found to be contrary to the best interests of the child (s. 23). However, the best interest test must incorporate Indigenous connection, values and cultural continuity. The best interests of the Indigenous child definition is to be interpreted, to the extent possible, in a manner that is consistent with a provision of a law of the Indigenous group, community or people to which the child belongs (s. 10(1)-(3)).

*Indigenous laws have ways of solving conflict of laws issues and of sharing jurisdictions.*

There is no mechanism for how it will be determined that the operation of Indigenous law is not in a child’s best interest. Indigenous communities could propose the dispute resolution mechanism that would operate to determine conflicts about whether the Indigenous law is in the child’s best interests. Absent any dispute resolution mechanisms, this will be determined by courts. For this reason, it is very important for courts to find ways, in keeping with the direction of the Federal Act, to actively involve Indigenous communities in decision-making.



*Indigenous laws often embrace multiple connections and identities, seeing these as a source of cultural wealth and connection.*

### Advocacy/Actions/Indigenous Laws

*Indigenous communities could pass a law requiring that disputes about whether a particular measure or action is in a child's best interests, particularly on an urgent basis, be referred to a community-defined dispute-resolution mechanism. This mechanism could be a community council and include others (people from other Nations, psychologists, etc.) to address interim areas of dispute between the Indigenous law and the Federal Act or BC CFCSA in a way that includes Indigenous adjudicators and ways of making decisions.*



### Stronger Ties

Section 24(1) of the Federal Act contemplates a conflict of laws between Indigenous Peoples and says that, in the event of a conflict or inconsistency between Indigenous laws, “the provision that is in the law of the Indigenous group, community or people with which the child has stronger ties—taking into consideration his or her habitual residence as well as his or her views and preferences, giving due weight to his or her age and maturity, unless they cannot be ascertained, and the views and preferences of his or her parent and the care provider—prevails to the extent of the conflict or inconsistency.”

### Advocacy/Best Practices/Indigenous Laws

*The concept of “stronger ties” or a dominant Indigenous identity defeats many of the features of Indigenous laws whereby a child or family may be fully members of, and participate in, more than one Indigenous Nation. The shared kinship connection reflects a cornerstone of many Indigenous laws and diplomatic regimes. Where there is no direct conflict or inconsistency, more than one Indigenous law could operate to direct child and family services for one child.*



Indigenous laws often embrace multiple connections and identities, seeing these as a source of cultural wealth and connection. The operation of the stronger ties test has the possibility of harming a child's best interests by denying or diminishing the importance of legal and cultural connections. A child could be, and has a right to be, meaningfully connected to more than one Indigenous community or Peoples.



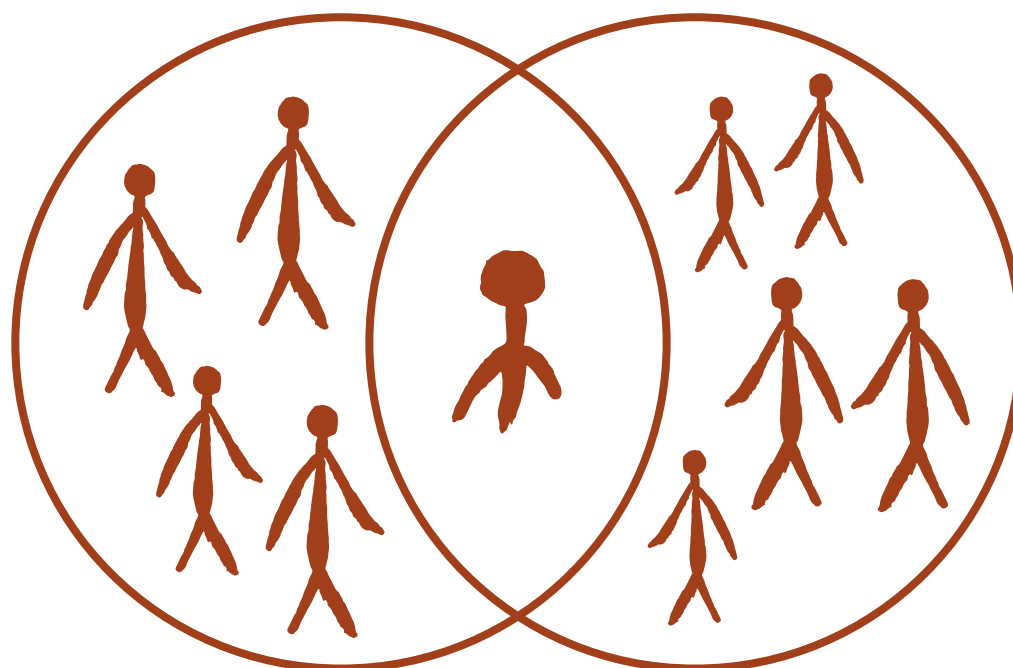


Indigenous laws have ways of solving conflict of laws issues and of sharing jurisdictions. These Indigenous mechanisms have operated over time, reflecting robust diplomatic regimes, and they should be explicitly acknowledged. For example, many Indigenous Nations have treaties resolving how to share lands or migratory resources, or reflecting peace after conflict. In some cases, kinship relations established through children who were members of more than one Indigenous Nation or culture were powerful signals of ongoing peaceful intentions. Shared, not exclusive, Indigenous identity (where a person is seen as wholly of more than one Indigenous culture) is a powerful part of many Indigenous legal traditions.

Indigenous Nations may wish to extend historic protocols to cover this area. Indigenous laws could say how they will coordinate jurisdiction or resolve disputes with other Indigenous Nations. The stronger ties test of the Federal Act could be challenged on the basis that it conflicts with Indigenous law. It is important to interpret the “stronger ties” from an Indigenous laws perspective from the outset, including finding ways to

*The Federal Act’s requirement to consider the child’s own Indigenous customs and traditions in placement decisions is a positive obligation to take active steps to identify caregivers who include members of a child’s family or Indigenous community.*

**Best Practices: A child could be, and has a right to be, meaningfully connected to more than one Indigenous community or Peoples.**



honour Indigenous dispute resolution mechanisms and creating space for recognition of multiple and shared Indigenous identities and jurisdictions as allowed under Indigenous law(s).

*The Indian Child Welfare Act (ICWA) is federal legislation in the United States that recognizes Tribal jurisdiction in disputes involving Indigenous children and empowers Tribes to resume child welfare jurisdiction.*



### **Case Study: Indian Child Welfare Act and Tribal Jurisdiction in the United States**

*The Indian Child Welfare Act (ICWA)<sup>45</sup> is federal legislation in the United States that recognizes Tribal jurisdiction in disputes involving Indigenous children and empowers Tribes to resume child welfare jurisdiction. The ICWA's remedial goal is to address the damage done to children, families and Tribes by the removal of Indigenous children through IRS and the child welfare system. The ICWA provides an illustrative example of how the provisions of the BC CFCSA to actively involve Indigenous communities could be implemented and also illustrates the benefits of Tribal involvement.<sup>46</sup> The Federal Act was modelled after the ICWA.*

*The ICWA recognizes the ways in which the interests of children and Tribes are intertwined and has been read to require affirmative, continuing and active efforts to contact and involve a child's Tribe in planning for Indian children. A key component of the ICWA is the recognition that an Indian child has the right to maintain or develop his or her relationship with their Tribe. The ICWA defines the best interests of the child and the Tribe as being joined rather than in opposition to each other. The Tribal interest in children has been described as that of a "quasi parent" with an "interest in protecting the best interests of their children while also protecting the existence and future of their citizenry."<sup>47</sup>*

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<sup>45</sup> 25 USC §§ 1901-63. In 2015, the Bureau of Indian Affairs issued new guidelines for status in the interpretation of the ICWA: Bureau of Indian Affairs, Interior. "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings" (25 February 2015) 80:37 Federal Register.

<sup>46</sup> For further discussion of the ICWA see: Native American Rights Fund. "A Practical Guide to the Indian Child Welfare Act" (2007) Native American Rights Fund—National Indian Law Library [available online: <https://www.narf.org/nill/documents/icwal/index.html>] [Native American Rights Fund]; California Center for Judiciary Education and Research. "Bench Handbook: The Indian Child Welfare Act" (Revised 2013) Judicial Council of California.

<sup>47</sup> ICWA Special Committee State Court Administrative Office. "Indian Child Welfare Act of 1978: A Court Resource Guide" (March 2011) Michigan.



## *ICWA and Canadian Indigenous Children*

The ICWA applies to Indian children and defines an “Indian child” to include those who are a member of a federally recognized Tribe in the United States or children who are eligible for membership in a federally recognized Tribe and are the biological child of a Tribal member. Technically, the ICWA does not apply to children who are members of Indigenous Nations recognized solely in Canada, which are not on the American Register of recognized Tribes.<sup>48</sup>

There are many instances where Canadian Indigenous children have become involved in child welfare proceedings in the United States. Indigenous Nations (such as Nlaka’pamux, Sto:lo, Sylix, and many others) whose territorial land and water base was artificially divided by the imposition of the Canada-United States border continue to live their lives on both sides of the border, without legal recognition of their Nation status.

Though the ICWA does not technically apply, Canadian Indigenous Nations have been successful in asking American courts to honour the spirit, intent and purpose of the ICWA in making decisions about their child members, and there are instances where children have been returned to relatives living in Canada or where courts have followed the placement suggestions made by the child’s Canadian Indigenous Nation. Indigenous communities should feel encouraged to participate and advocate for their involvement in planning for their child members, with reference to the spirit and intent of the ICWA and in the best interests of their child members.

*Indigenous Nations (such as Nlaka’pamux, Sto:lo, Sylix, and many others) whose territorial land and water base was artificially divided by the imposition of the Canada-United States border continue to live their lives on both sides of the border, without legal recognition of their Nation status.*

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<sup>48</sup> See for example: *In re Wanomi P.* (1989), 216 CA 3d 157, at 166-168.

## 04. Articulating Indigenous Laws

*Indigenous laws are reflected in each Nation's unique customs, laws and oral traditions. "The laws of our ancestors"—shared through stories, dances and ceremony passes down from generation to generation.*

Indigenous laws are reflected in each Nation's unique customs, laws and oral traditions. "The laws of our ancestors"—shared through stories, dances and ceremony passes down from generation to generation. Often Indigenous laws look different from Western laws. Indigenous laws are not recorded on the dry pages of books—but alive, danced, told, carved in wood or stone, found in ceremonies and celebrations and discussions amongst each other.<sup>49</sup>

Canada has several founding peoples: Indigenous Peoples, French and English—and Canada's legal landscape reflects these roots. Canadian "common law" has always recognized Indigenous laws. The Supreme Court of Canada has said that the "Doctrine of Continuity"—the idea that, when newcomers arrived, Indigenous laws already existed on these lands, and continued to exist, despite Canada's assertion of sovereignty—became part of Canada's law. Recognition of Indigenous laws was easiest in areas considered "internal" to Indigenous Peoples, such as marriage and adoption.<sup>50</sup>

In early years, Canada denied that Indigenous Peoples even had laws. The doctrine of "Terra Nullius" governed: Canada argued that Indigenous Peoples had no laws (were pre-legal) and that laws arrived with newcomers. As a result of Canada's denial of Indigenous laws, Indigenous Peoples and Canadian society have suffered. Indigenous children and families have suffered through the imposition of laws which have separated children from their families.

Indigenous laws can be hard to see when we are used to seeing law as something the Canadian government or province make or do. Some people may have even been taught that Indigenous people did not have law before white people came here. This is a lie. Law can be found in how groups deal with safety, how they make decisions and solve problems

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<sup>49</sup> Walkem, A. "A New Way Forward: Incorporating Indigenous Laws and Legal Orders into Specific Claims Processes" (2018) Vancouver: Union of BC Indian Chiefs, Specific Claims Working Group [Walkem, A New Way Forward].

<sup>50</sup> See for instance: Casimel, *supra*, and Connolly, *supra*.

together, and what we expect people “should” do in certain situations (their obligations).<sup>51</sup>

Indigenous Peoples have experienced “profound alienation” from the legal system: Canadian law was imposed—and used as a tool—to prohibit ceremony, governance, laws and cultural expression. This alienation is reflected in the poor socio-economic conditions; disproportionate representation of Indigenous Peoples in prisons and the child welfare system (where children are removed from their families and communities); and extreme levels of violence against Indigenous women and children. The Federal Act’s recognition of inherent Indigenous laws addresses this history of denial.

Indigenous laws for the care of children and families are long-standing and enduring. The pathways to recover and re-empower Indigenous laws will be as diverse as our lands and legal traditions. Each Indigenous Nation will have experienced the colonial imposition of laws and policies differently.

*Law is alive; it changes to adapt to new situations; it endures over time, finding new expression as needed.*

*Law is alive; it changes to adapt to new situations; it endures over time, finding new expression as needed. Indigenous child welfare laws, reflecting sacred, ancient and enduring laws, will find the expression that their Peoples need today. In their own ways, Indigenous Peoples will decide how to wrap their own ways, laws and traditions around their children and families to keep them safe and healthy in the future. Each Indigenous Nation will choose their path to empower their child and family jurisdiction differently. Some will build systems entirely based in traditional governance and decision-making. Others will choose hybrid systems which may incorporate Canadian courts or DAs created under the BC CFCSA or similar provincial child welfare legislation.*

Given the diversity of paths that Indigenous Nations and communities will follow, WoW does not propose a specific process and, instead, highlights questions Indigenous Peoples may consider and outlines examples other Indigenous Peoples have taken.

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<sup>51</sup> Friedland, H. “The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization” (2018) Toronto: University of Toronto.

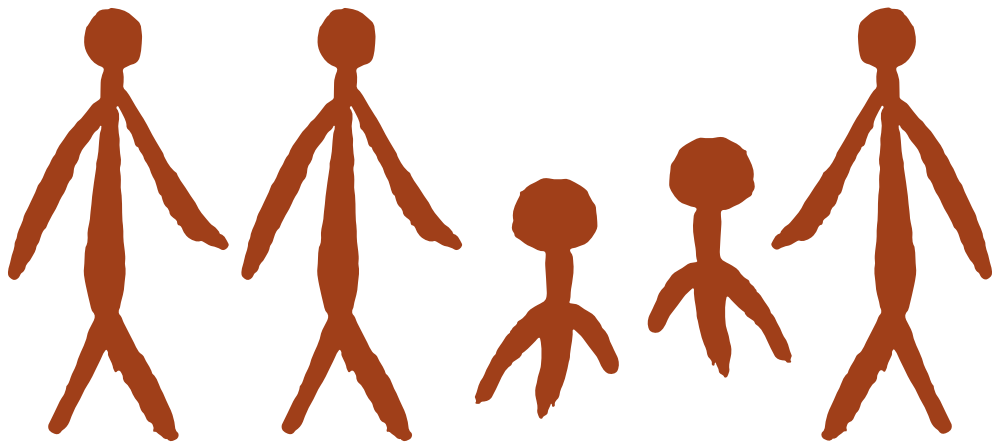
*Laws may be referred to as “our ways” and seen in the way Indigenous Peoples continue to care for each other and make decisions in times of crises.*

## I. What Are Indigenous Laws?

Indigenous laws do not look the same as what many consider to be law. They are not primarily recorded in statutes or books (though some Indigenous Peoples may choose to reflect their laws in this way). Many are exercised in an active practice and taught through experience, reflecting the lands and territories that gave rise to them. Indigenous laws are widely concerned with relationships and how people interact with each other and their living worlds, and often talk about the inter-relationship and inter-dependency between humans and other living beings. Law, at a basic and profound level, tells how we are connected and relate to each other.

Though Indigenous laws have been suppressed, they have continued. Sometimes these are no longer called “law.” (Often a lack of naming was designated as a protective feature when Indigenous laws were outlawed through the potlach prohibition.) Laws may be referred to as “our ways” and seen in the way Indigenous Peoples continue to care for each other and make decisions in times of crises.

Indigenous Peoples’ origin stories often contain Indigenous Peoples’ original instructions (how to be a good human being in the world),<sup>52</sup> and tell how to hold each other in relationship and how to heal relations when they break. These stories tell of what is important to them, as a People. They also tell what is important in how to care for, or make decisions about how to care for, and protect their children.



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<sup>52</sup> Cohen, WA. “School Failed Coyote, So Fox Made A New School: Indigenous Okanagan Knowledge Transforms Educational Pedagogy” (November 2010) Doctoral Thesis, University of British Columbia.



## Case Study: Five Sources of Indigenous Laws

*Dr. John Borrows has discussed five sources of Indigenous laws: sacred, natural, deliberative, positivistic and customary:*

- 1. Sacred laws are those which stem from the Creator, including creation stories or revered ancient teachings that have withstood the test of time.*
- 2. Natural law is based upon observations of the physical world and seeks to develop rules for regulation and conflict resolution from studying the behavior of the world.*
- 3. Deliberative law is a broad source that is formed through processes of persuasion, deliberation, council and discussion.*
- 4. Positivistic law is described as the proclamations, regulations, rules, codes, teachings and axioms that are considering binding on behavior.*
- 5. Customary law can be defined as practices developed through repetitive patterns of social interaction that are also accepted as binding.<sup>53</sup>*

*Legal principles and values that Indigenous traditions frequently embody may include: respect, restitution, reconciliation, responsibility and connection with natural and spiritual environments, Creator and community.*

While there is no overarching set of Indigenous laws, and each Indigenous tradition is as unique as the territory it arises from and the language and culture which carries it forward, legal principles and values that Indigenous traditions frequently embody may include: respect, restitution, reconciliation, responsibility and connection with natural and spiritual environments, Creator and community.

### **A. Diversity of Indigenous Legal Traditions**

There are over 50 distinct Indigenous Peoples within Canada, each with their own languages, territories and legal systems. Indigenous cultures shape how Indigenous Peoples understand law, conflict and conflict resolution. Dr. Wenona Victor identified these worldview differences, which often mark the differences between Indigenous and Western legal traditions: The concept of individuality; life as an indivisible whole;

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<sup>53</sup> Borrows, J. "Canada's Indigenous Constitution" (2010) University of Toronto Press, at 33-66.

concept of time; modes of societal organization, especially in relation to kinship ties; concept of land guardianship/ownership; leadership; and principle of reciprocity.<sup>54</sup>

*In articulating their own laws, each Indigenous Nation will reflect those key beliefs and differences.*

*“Indigenous laws are often concerned less with rights than with relations (not only amongst humans but also with the living world) and question “what is the right action?” or “what is the right way of deliberating or thinking about this?” in light of the need to consider, reflect, and maintain relationships. This principle is reflected in Kukpi7 Ron Ignace’s statement that our laws tell us: “How to be great and good.” Canadian/Western law may be more concerned with “rights” and questions such as: “What am I entitled to?” “Where am I protected from interference?” or “What am I obligated to do?””<sup>55</sup>*

In articulating their own laws, each Indigenous Nation will reflect those key beliefs and differences. For example, Dr. Hadley Friedland noted these differences in different Indigenous traditions studied:<sup>56</sup>

Mi’kmaq: “Mi’kmaq legal traditions suggested the predominant legal response to harm is the principle of promoting the taking of responsibility by offenders. The two main ways respondents described promoting responsibility for the offender were, (1) to provide restitution to his or her victims, and (2) to develop empathy for his or her victims.”

Cree: “[H]ealing of the offender as the predominant and preferred legal response to even extreme harms. For example, when one researcher asked about published stories in which people who became wetikos (windigos)—a Cree legal concept describing a very harmful or dangerous person) were killed, one elder, who practices traditional medicine, exclaimed: “probably someone who didn’t know nothing and had no compassion would just go kill someone”. She went on to state emphatically that instead, the proper response is to try to help and heal the person turning wetiko.

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<sup>54</sup> Victor, W. “Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review” (April 2007) Prepared for Canadian Human Rights Commission.

<sup>55</sup> Walkem, A New Way Forward, *supra*.

<sup>56</sup> Friedland, Dr. H. “IBA Accessing Justice and Reconciliation Project: Final Report” (4 February 2014) Indigenous Law Research Unit, University of Victoria.



She stressed that these people should not be seen as faceless dangers, but rather, “these are our family members”.

Tsilhqot’in: “One of the paramount considerations underlying responses and resolutions to harm in the Tsilhqot’in legal tradition is maintaining individual and community safety.”

There are many different resources and processes that Indigenous Nations, lawyers and legal scholars use today to access and articulate their own unique Indigenous laws. There is no one ‘right’ or ‘better’ way to do this, and often communities draw on multiple resources and processes, from accessing deeply rooted resources to developing and drafting new laws and legal processes that reflect their current needs and values.<sup>57</sup>

*There are many different resources and processes that Indigenous Nations, lawyers and legal scholars use today to access and articulate their own unique Indigenous laws.*

## II. Questions to Ask

Indigenous communities who seek to articulate their own laws in protecting children and helping to heal families could ask the following questions as a starting point:

- How do your People define family?
- How do your People define what a child or family needs to be safe, happy, well?
- How do your People define what is in a child’s best interests?
- What words or parts of language talk about how to protect children?

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<sup>57</sup> See, for example, different resources described in Lindberg, D. “Drawing upon the Wealth of Indigenous Laws in the Yukon” (2020) 50 *The Northern Review* 179; the “Narrative Analysis Method” (analyzing stories and oral histories): Napoleon V & Hadley, Dr. F. “An Inside Job: Engaging With Indigenous Legal Traditions Through Stories” (2016) 61 *McGill Law Journal* 725; the “linguistic method” (drawing principles from language): Fletcher, M. “Rethinking Customary Law in Tribal Court Jurisprudence” (2006) *Michigan State University College of Law, Indigenous Law and Policy Centre Occasional Paper Series*; “land-based learning” (learning from the land itself): Sandy, N. “Stsqey’ulecw re St’exelcenc (St’exelmc Laws from the Lands)” (2016) 33 *Windsor Y B Access Just* 187 [available online: <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/4817>] and Morales, S. “St’ul nup: Legal Landscapes of the Hul’Qumi’um must-imuhw” (2016) 33 *Windsor Y B Access Just* 103 [available online: <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/4813>]; *Using the Indian Act Bylaw power: Metallic N. “Indian Act By-Laws: A Viable Means for First Nations to (Re)assert Control over Local Matters Now and Not Later”* [available online: <https://www.ualberta.ca/wahkohtowin/media-library/data-lists-pdfs/viable-means.pdf>].



- Identify the potential sources of Indigenous law about caring for children and families. Ask:
  - How have your People protected children in need of protection?
  - What are examples from ancient and abiding stories?
  - What are examples of how the community or families responded when children were in need of protection?
    - Examples from different times—100 years ago? 50 years ago? Now?
    - Has this changed? How? Should it change more?
  - Who would usually be involved in taking action when a child was in need of protection? If those persons did not, or could not, act to protect a child, what would happen then?
  - Role of extended families? Clans? Houses? Community or Nation leadership?
  - How would families or the broader community come together to discuss this issue? Sometimes this answer may be found in asking:
    - How did your Nation/community respond in times of war or threat? When resources, such as salmon, were endangered?
- What ways would your People make decisions or settle disputes in general?
  - Who would be involved?
  - What process was followed?
  - Who would oversee the process?
  - What steps were involved?
  - Any principles that would help guide decision-making?
- What would your community have considered to be the responsibilities and rights of children, parents, grandparents, aunts, uncles, cousins, other family and community members?
  - Were there people appointed or who naturally advocated for children?



- Do your traditions appoint any people/positions with specific responsibilities for the care of children and families? This could be within families, communities, nations, or within houses, clans or extended families.
- Who has responsibilities to help heal families who are struggling? Do different people or groups have different responsibilities? Is this solely within a family? What if an extended family needs help?
- If no action is taken to protect children today, what does your community see as being the costs to the child-family-community-Nation into the future?
- If a child is connected to more than one Indigenous Peoples or culture, what would your own laws and traditions say about how to honour or recognize their other Indigenous connections?
  - Do you have protocols or treaty agreements with other Indigenous Nations that provide guidance?
  - For migratory or shared resources, such as salmon, do you have protocols for how to share and jointly care for them, and if so, do those protocols provide any guidance on how to care for children?
- Important areas of territory related to child protection?
  - How is relationship to territory necessary to maintain well-being? Does it play a role in healing?
- Who do your Nation's laws apply to, and what is the process for determining citizenship?
  - How do you define who is a member child?
- Are other beings that we share the world with (such as animals, plants, fish, birds, spiritual beings, ancestors) considered, and if so, how?
- Which, if any, ceremony or spiritual elements are important in caring for a child?
- How have your People seen your laws for caring for children impacted? What steps might be necessary to account for disruptions that have occurred?
- Are there features of Canadian or Western law that your People find helpful and may want to incorporate?

- Are there specific roles for: women, men, mothers, fathers, aunties, uncles, grandparents, other people within the community?

There is no one-size-fits-all approach to articulate Indigenous laws or legal traditions. Indigenous Peoples have always resisted the erasure of their own laws and legal traditions, and have found ways to articulate them.

*The Splat-sin created a bylaw “A By-law for the Care of Our Indian Children” (Splat-sin Bylaw) that gives to the Spallumcheen (Splat-sin) Band exclusive jurisdiction over any proceeding involving the removal of a child from their family, notwithstanding the residency of the child.*



### Case Study: Splat-sin Bylaw

*The Splat-sin created a bylaw “A By-law for the Care of Our Indian Children”<sup>58</sup> (Splat-sin Bylaw) that gives to the Spallumcheen (Splat-sin) Band exclusive jurisdiction over any proceeding involving the removal of a child from their family, notwithstanding the residency of the child. It is the only child welfare bylaw which has been allowed under s. 81 of the Indian Act. The Splat-sin Bylaw is written in both English and Secwepemctsin.*

*Key provisions of the Splat-sin Bylaw include:*

*1. RECOGNIZING the special relationship which exists among band members to care for each other and to govern themselves in accordance with the five basic principles of Indian government:*

*1. Tslaxastap tas q7asts us ta knucwatwacwup wa7 kanmes re ctsu7etnkt. Kwastknkt xwexwayt swat. Tsilkst res lleqemalts re kukpi7 me7a tkwamiplatn. Yi7ana ma7 res tsqays;*

*(i) WE ARE THE ORIGINAL PEOPLE OF THIS LAND AND HAVE THE ABSOLUTE RIGHTS TO SELF- DETERMINATION THROUGH OUR OWN UNIQUE FORMS OF INDIAN GOVERNMENTS (BAND COUNCILS).*

*(i) ULL NUWI7S RE SNXETAQS T7ALYA, TELRI7 US PE TKWAMIPLENTSUTET NE KUKPI7.*

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<sup>58</sup> Splat-sin Bylaw #3-1980.



- (ii) OUR ABORIGINAL RIGHT TO SELF-DETERMINATION THROUGH OUR OWN UNIQUE FORMS OF INDIAN GOVERNMENTS ARE TO BE CONFIRMED, STRENGTHENED AND EXPANDED OR INCREASED, THROUGH SECTION 91(24) OF THE BRITISH NORTH AMERICAN ACT.
- (ii) ULL NUWI7S KUC RE SECTSWILCS ES YIGWATEM ES TSETSATS RE CTSU7ETNS KUC ES TĶWAMIPLENTSUTS.
- (iii) OUR INDIAN RESERVE LANDS ARE TO BE EXPANDED TO A SIZE LARGE ENOUGH TO PROVIDE FOR THE ESSENTIAL NEEDS OF ALL OUR PEOPLE.
- (iii) RE TMICWS KUC TSUT ES XYAWILCTS MA7 PUTES NES XWEXWAYTS KUC.
- (iv) ADEQUATE AMOUNTS OF LAND, WATER, FORESTRY, MINERALS, OILS, GAS, WILDLIFE, FISH, AND FINANCIAL RESOURCES ARE TO BE MADE AVAILABLE TO OUR INDIAN GOVERNMENTS ON A CONTINUING BASIS AND IN SUFFICIENT QUANTITIES TO ENSURE DOMESTIC, SOCIO-ECONOMIC SELF-DETERMINATION FOR PEACE, ORDER AND GOOD GOVERNMENT OF INDIAN PEOPLE.
- (iv) MA7 PUT RES KECTAS KUC RE SAMA7 TĒ KUKPI7S A TMICWS KUC, SAWLLKWA, SXĪSAY, TSQŪWASCA7, CTAĶAWI7LATN TĪSĪ7, SWAWLL, ALL SQLAW, TUKWA7MITA7 MA7 LA7ES XWEXWAYT KUC AS MUTS.
- (v) OUR INDIAN GOVERNMENTS (BAND COUNCIL) OR LEGISLATURES ARE TO HAVE THE AUTHORITY TO GOVERN THROUGH MAKING LAWS IN RELATION TO MATTERS COMING WITHIN SPECIFIED AREAS OF JURISDICTION THAT HAVE BEEN DEFINED BY OUR PEOPLE.
- (v) KECTAM KUC RE KUKPI7 MEĪA TĶWAMIPLATN ES YUGWYUGWTS ES QUQWELUTS WA7 STAMES K XWEXWISTAM.

*The Splantsin Bylaw is written in both English and Secwepemctsin.*

*The Splatsin Bylaw makes chief and council guardians of the first instance for a Splatsin child deemed in need of protection and contains provisions setting out the process to be followed in determining the placement of a child apprehended under the bylaw. The province has an agreement to work with Splatsin.*

AND RECOGNIZING OUR AUTHORITY TO CARE FOR OUR CHILDREN WITHIN THE TERMS OF THE INDIAN ACT R. S.O. -149 S. 81 AND IN PARTICULAR S. P.I (a) (c) (d) AND ANCILLARY POWERS IN S. 81 (g)

**ULL NUWI7S MA7 TKWAMIPLENTA RE STSMALTS KUC.**

The Spallumcheen Indian Band finds:

**Re Splatsinac tsloxastas:**

(a) that there is no resource that is more vital to the continued existence and integrity of the Indian Band than our children.

**(a) re stsmalts kuc res snximams te xwexwayt stam.**

(b) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-band agencies.

**(b) tekwa7m7uy te glmuc ac re kellowses re sama7 us re tskwactmes te stsmalts.**

(c) that the removal of our children by nonband agencies and the treatment of the children while under the authority of non-band agencies has too often hurt our children emotionally and serves to fracture the strength of our community, thereby contributing to social breakdown and disorder within our reserve.

**(c) re stsmamlt all re ste7exam7 ac re kwyusmes us re tskwantstmes te sama7. Me yaww re qlmuculucw res qwnuxws.**

3. (a) The Spallumcheen Indian Band shall have exclusive jurisdiction over any child custody proceeding involving an Indian child, notwithstanding the residence of the child.

**3. (a) Tskuk ull Splatsinac ma7 pell tkwamiplatn ne stsmamlt p7acw te qllmins.**

5. The Chief and Council shall be the legal guardian of the Indian child, who is taken into the care of the Indian Band.

**5. Re kukpiy me7a knucwtns ma7 tsqay ne cqlmucwicwlt a kwantmes te Spaltsinac es yucwamins.**



6. *The Chief and Council and every person authorized by the Chief and Council may remove an Indian child from the home where the child is living and bring the child into the care of the Indian Band, when the Indian child is in need of protection.*

6. *Re kukpi7 méta knúcwtns all wa7 swates a k'wlmatns ma7 k wans re cqlmucwicwlt us ne mutes ma7 ts7ukwases 'é Splatsinac es yucwaminta a ta7us kes lecaksts us ne mutes.*

*The Splatsin Bylaw makes chief and council guardians of the first instance for a Splatsin child deemed in need of protection and contains provisions setting out the process to be followed in determining the placement of a child apprehended under the bylaw. The province has an agreement to work with Splatsin.*

*The Federal Act recognizes and empowers Indigenous jurisdiction and sets national standards for how child and family services must be provided to Indigenous children and families.*

## 05. National Standards

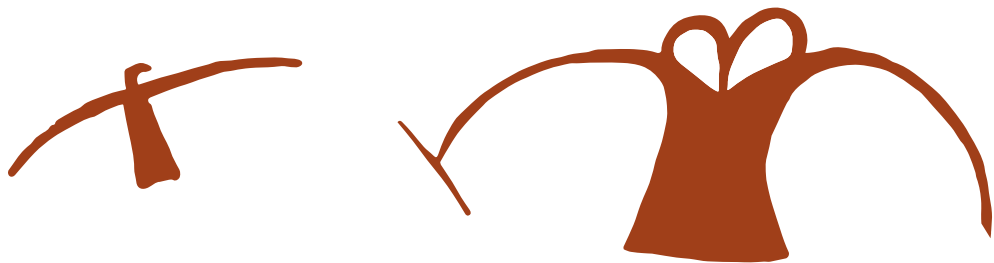
The Federal Act recognizes and empowers Indigenous jurisdiction and sets national standards for how child and family services must be provided to Indigenous children and families. The national standards say how the best interests of Indigenous children are to be defined and impose the principles of cultural continuity and substantive equality for the care of Indigenous children. The Federal Act super-weights cultural connection and continuity in considering what is in the best interest of Indigenous children.<sup>59</sup>

### I. Priority to Preventive Care

The Federal Act requires that child and family services be provided with a priority given to preventive measures to support Indigenous children and families to prevent Indigenous children from being removed from their parents, extended family and community, where possible.

s. 14(1): In the context of providing child and family services to an Indigenous child, to the extent that providing a service that promotes preventive care to support the child's family is consistent with the best interests of the child, the provision of that service is to be given priority over other services.

Priority to preventive care mandates a focus on keeping a child culturally connected, including providing preventive services to extended family or members of the child's Indigenous community, so that the child can be cared for within their Indigenous community.



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<sup>59</sup> Friedland, Dr. H & Lightning-Earle, K. "Bill C-92—From Compliance to Connection" (2020) Edmonton: Wahkohtowin Law & Governance Lodge [Friedland & Lightning-Earle].





## Best Practices/Indigenous Laws

*Even where an Indigenous community has not passed a child welfare law under the Federal Act, preventive services should reflect the Indigenous culture, traditions and laws of the child's Indigenous community. Under Indigenous law, preventive care could include measures such as engaging extended family members to work together to proactively meet the needs of a child, support the family, provide education on childcare traditions and laws, and encourage active engagement in the community so that the family is culturally involved and responsibility to support the family is broadly distributed/shared.*

*If the Indigenous community believes a child can be kept safe within the community or family, they can identify those preventive options based in Indigenous laws or ways.*



*Even where an Indigenous community has not passed a child welfare law under the Federal Act, preventative services should reflect the Indigenous culture, traditions, and laws of the child's Indigenous community.*



### Case Study: **Re CP**

*Re CP,<sup>60</sup> was a custody dispute arising in Australia between a caregiver and a mother from different Indigenous cultures. The Court looked into the differences between Indigenous cultures and whether or not it is sufficient for a child to be placed within an "Indigenous culture" that is not their own. The evidence introduced included a discussion of the movement of children between and among different family members which was seen as being a natural and important part of their cultural development and set the stage for the relationships that they develop over their lifetimes.*

*In Re CP, the mother sought an order that the custody of the child be returned to the child's kinship group rather than a particular parent, herself. It was proposed that an elder from within the cultural community be appointed to take responsibility for the child to allow the child to be returned to the cultural group while still meeting the law's requirement that someone take responsibility for taking care of the child.*

*The lower court found that the fact that the mother failed to provide a plan for a specific home where the child would live was detrimental to her case. The appeals court disagreed and found the lower court had not properly respected Indigenous ways of caring for children and, therefore, had misunderstood the birth mother's failure to set out a firm plan for where the child would live.*

60 (1997) 21 Fam LR-486.



## Advocacy/Best Practices

Examples of preventive measures may include:

- *Having elders or other community members work with the family; recognizing family or community members that play an important role in the child's life (such as elders or extended family members), and planning for how to protect those relationships; having elders, cultural or spiritual supports who can work with the child or family on traditional wellness or healing;*
- *Appointing "parenting guides" or mentors to provide support and help teach parents how to parent; having people who could mentor Indigenous parents where the parents cannot safely parent on their own but could if they had support;*
- *Removing unsafe people (including parents) so the child can stay within the home;*
- *Caring for children across several families or homes;*
- *If a parent is struggling with substance abuse issues, working with the Indigenous community or extended family to identify options for treatment according to their own traditions; assisting a family to coordinate their support network at times when a parent is unable to care for their child;*
- *Land- or culture-based healing;*
- *Providing respite care for parents;*
- *Helping parents address stressors in their lives, such as housing, food insecurity, childcare or transportation;*
- *Teaching parents life skills, such as budgeting, nutrition, fishing or hunting;*
- *Providing individual and family counselling to address specific needs, such as trauma, unresolved grief, anxiety, mental health, emotions regulation and management and problem-solving;*
- *Providing literacy, education and employment opportunities for parents;*
- *Supporting traditional dispute resolution systems to address family conflict; and*
- *Helping families connect to health care services, such as pediatricians, physical therapists and occupational therapists.*



## A. Prenatal Preventive Care

Section 14(2) of the Federal Act requires that priority be given to prenatal care, when likely to be in the best interest of the child, to prevent apprehension at birth.

The Federal Act differs from the BC CFCSA, in which unborn children are not yet considered children and so does not apply until birth. Under Policy 1.1, BC recognizes prevention, early intervention and child protection services to support children and families. However, consent of the expectant parent is required under provincial policy. BC's position is that information may be shared with a child's Indigenous community without parental consent where there is an agreement with an Indigenous community under s. 92.1 of the BC CFCSA or where necessary for the safety or well-being of an Indigenous child under s. 79(a) of the BC CFCSA.

*Section 14(2) of the Federal Act requires that priority be given to prenatal care, when likely to be in the best interest of the child, to prevent apprehension at birth.*

### BEST PRACTICES: PRENATAL PREVENTIVE CARE



*Prenatal preventive care could include:*

- *Addressing socio-economic conditions of the parent(s) by providing food, shelter and help to stabilize their situation;*
- *Having parent(s) and baby live with family member(s);*
- *Assigning elders, or others within an Indigenous community, to assist with parenting;*
- *Keeping a parent and child in the hospital until other options are put in place;*
- *Involving Indigenous communities in planning for a child;*
- *Using Indigenous dispute resolution processes;*
- *Helping a parent seek treatment or harm reduction strategies;*
- *Providing prenatal medical care, including culturally sensitive and relevant care; and*
- *Traditional parenting, life skills and counselling supports and resources.*

*The preventive mandate of the Federal Act means that provincial or territorial laws, orders or agreements, which provide for automatic removal if certain conditions are not met, need to be removed.*



### Case Study: *LS v. British Columbia*

*In LS v. British Columbia (Director of Child, Family and Community Services),<sup>61</sup> the Court found that it is in a child's best interests not to be removed from their parent at birth. Removal at birth had the impact of "hampering [a mother's] ability to nurse and bond with her baby [and] is not in the best interests of the child".*

## B. Reasonable Efforts

### Actions/Best Practices

*The Federal Act requires that service providers show that they made reasonable efforts to keep an Indigenous child with their parent or family member before a decision to apprehend the child is made (s. 15.1).*



The preventive mandate of the Federal Act means that provincial or territorial laws, orders or agreements, which provide for automatic removal if certain conditions are not met, need to be removed. Removal of a child should only occur as a last resort and only after demonstrably active efforts have been made to exhaust all other options. Options to keep a child with their family must be considered prior to a removal every time.



### Case Study: Active Measures Under Policy 1.1

*Under Policy 1.1, BC says that the requirement for preventive measures includes the need to take active measures to prevent the removal of a child from their parents, extended family or Indigenous community. The requirement to take active measures mirrors the language used in the ICWA and is in line with the remedial purposes of the Federal Act.*

*Active measures require something more than telling a family what they should do to address child welfare concerns. Active measures mean, instead, working with a family to help correct child protection concerns.*

<sup>61</sup> 2018 BCSC 255.



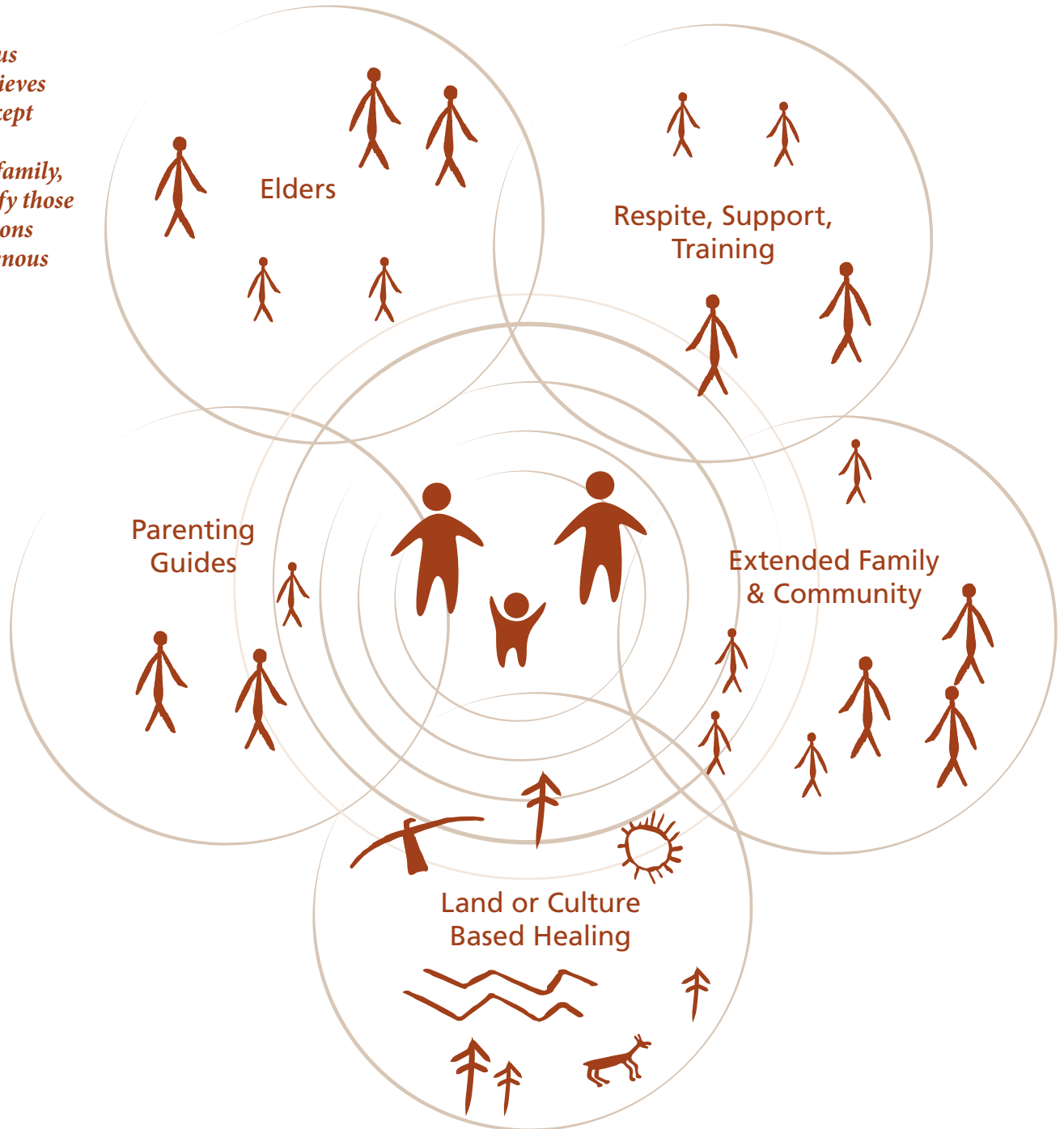
REASONABLE EFFORTS	ACTIVE EFFORTS <sup>62</sup>
Referral	Arranging services, transportation, helping family (extended family) engage
Managing the case	Proactively engaging with the parents, family and Indigenous community, follow-up visits, service provision
Meeting minimum policy standards	Understanding the specific needs of the family involved and creatively meeting those needs (e.g., more face-to-face contact than required by policy)
Mainstream service provision	Culturally appropriate service provision
Updating the Indigenous community	Seeking service and case management suggestions and actively co-case managing with the Indigenous community; where the Indigenous community has articulated their own traditions, following those
Mediation/case conferencing	Where an Indigenous community has their own dispute resolution or decision-making mechanism, working with that. For example: grandparents' circles, community or clan meetings.

*Active measures require something more than telling a family what they should do to address child welfare concerns. Active measures mean, instead, working with a family to help correct child protection concerns.*

<sup>62</sup> As modified from National Indian Child Welfare Association. "Where We've Been" (July 2019).

## PREVENTIVE CARE

*If the Indigenous community believes a child can be kept safe within the community or family, they can identify those preventive options based in Indigenous laws or ways.*





**Best Practices/Case Studies: The National Council of Juvenile and Family Court Judges defines active efforts to include the following:<sup>63</sup>**

Active efforts—Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.

Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

- Conducting a comprehensive assessment of the circumstances of the Indian child’s family, with a focus on safe reunification as the most desirable goal;
- Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- Identifying, notifying, and inviting representatives of the Indian child’s tribe to participate in providing support and services to the Indian child’s family and in family team meetings, permanency planning, and resolution of placement issues;
- Conducting or causing to be conducted a diligent search for the Indian child’s extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child’s parents;
- Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child’s tribe;
- Taking steps to keep siblings together whenever possible;
- Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
- Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child’s parents or, when appropriate, the child’s family, in utilizing and accessing those resources;
- Monitoring progress and participation in services;
- Considering alternative ways to address the needs of the Indian child’s parents and, where appropriate, the family, if the optimum services do not exist or are not available;
- Providing post-reunification services and monitoring.



*Active efforts—  
Affirmative, active,  
thorough, and timely  
efforts intended  
primarily to  
maintain or reunite  
an Indian child with  
his or her family.*

<sup>63</sup> National Council of Juvenile and Family Court Judges. “Indian Child Welfare Act Judicial Benchbook” (2017) Reno, NV, at 7.

## Socio-Economic Conditions

The Federal Act prohibits the removal of a child based on their family's socio-economic conditions, to the extent it is consistent with their best interests, including poverty, lack of housing or infrastructure, or the health of their parent or care provider (s. 15). It is difficult to imagine circumstances where it could be found to be in a child's best interests to be removed from their parent based solely on socio-economic conditions.

*The Federal Act prohibits the removal of a child based on their family's socio-economic conditions, to the extent it is consistent with their best interests, including poverty, lack of housing or infrastructure, or the health of their parent or care provider (s. 15).*

### Advocacy/Best Practices

*Some examples of situations that are linked to socio-economic conditions where a child should not be removed from their family could include where:*

- *A family cannot access counselling, childcare or other supports;*
- *A family does not have access to regular cell or telephone service;*
- *Un- or under-employment resulting in food insecurity;*
- *Families live in over-crowded homes or cannot secure access to housing;*
- *Inadequate water infrastructure results in poor access to drinking water;*
- *A parent does not have sufficient income to pay for child supervision while the parent is at work;*
- *A child does not have access to sports, tutoring or activities because their family cannot afford it;*
- *A family does not have transportation for visits, medical appointments or to ensure participation at cultural events;*  
*or*
- *A family has been evicted from their home and is living in an emergency shelter or with different friends/family members.*





In providing child welfare services, it is important to ask how socio-economic conditions may create or contribute to protection concerns (including parental stress) and how to address socio-economic factors as part of a preventive approach, which may include providing resources or actively seeking supports for families.

## BEST PRACTICES

*Options for a preventive approach to address the socio-economic conditions include:*

- *Removing financial penalties where more than one member in an extended family home collects social assistance;*
- *Supporting a parent so they can keep housing while they seek treatment;*
- *Improving educational and employment opportunities for family members, especially for women, two-spirited or gender diverse parents;*
- *Providing free or affordable childcare;*
- *Providing access to a cell phone, internet or transportation;*
- *Providing access to vocational training or education; or*
- *Addressing food insecurity and housing needs on a long-range basis to assist families in achieving stability.*

*In providing child welfare services, it is important to ask how socio-economic conditions may create or contribute to protection concerns (including parental stress) and how to address socio-economic factors as part of a preventive approach, which may include providing resources or actively seeking supports for families.*

## Time Limits

### Advocacy/Best Practices

*The Federal Act does not contain time limits, and its emphasis on preventive measures and exploring options to keep a child culturally connected suggests that a strict adherence to the BC CFCSA timelines—if at the expense of the overarching goals of the Federal Act—should be avoided.*



*There are challenges of how Indigenous communities are notified, especially when a child/family is living away from their home community/territory.*

Timelines are meant to minimize the time children spend waiting for important decisions. However, in practice, time limits can interfere with the best interests of the child, have the result of disrupting cultural continuity and substantive equality for a child, and prevent options which would keep a child with their parents or cultural community.

The BC CFCSA sets time limits on how long a child can remain in the temporary custody of the director.

Where more time is required for measures that uphold the national standards imposed by the Federal Act, provincial timelines should not be strictly followed. The focus should be on ensuring that Indigenous children are cared for in ways that protect them over the course of their lives, including through measures that keep them within their families (if at all possible) and connected to their Indigenous culture and community(ies) (always).

There are a number of cases where the outcome of child welfare matters for Indigenous children is determined, not on the merits of a particular case, but, rather, because parents, grandparents or the Indigenous community have missed deadlines. A delay may reflect a number of cultural, social or economic considerations, rather than that an Indigenous community does not care. An Indigenous community may not become involved immediately out of respect for the parents' or family's efforts to resolve the matter on their own first, or the history of Indigenous Peoples' past involvement with government institutions may prevent active engagement that might resolve child protection concerns.

### **Advocacy/Best Practices**

*There are challenges of how Indigenous communities are notified, especially when a child/family is living away from their home community/territory. In these cases, it is important for lawyers and judges to make efforts to involve Indigenous communities to address systemic failures to properly include Indigenous communities in the care of their children.*



Lawyers can explain the benefits of Indigenous community involvement and should get client instructions to contact the Indigenous community the child/parent is connected to.



Judges could:

- Inquire into what Indigenous community(ies) the child is connected to;
- Determine what efforts have been made to involve the Indigenous community in care;
- Adjourn court matters until the Indigenous community is meaningfully notified or to allow time for Indigenous communities to seek legal counsel;
- Ensure that Indigenous communities are included in court plans of care at all stages of the proceedings;
- Inquire as to whether Indigenous communities were involved in mediations where mediation agreements are filed with the court;
- Approve court orders for the child to attend community events and ceremonies, or access orders to ensure a child stays connected and involved in the traditions and culture of their Indigenous community; and
- Any other steps that could be taken to enable to the Indigenous community(ies) to participate.

*The Federal Act adopts the principle of “substantive equality” (s. 3), which guarantees equal outcomes for Indigenous children and families despite differences based on factors such as Indigenous identity, disability, sex or gender identity or expression (of child or family member), or on- or off-reserve residency.*

## II. Substantive Equality

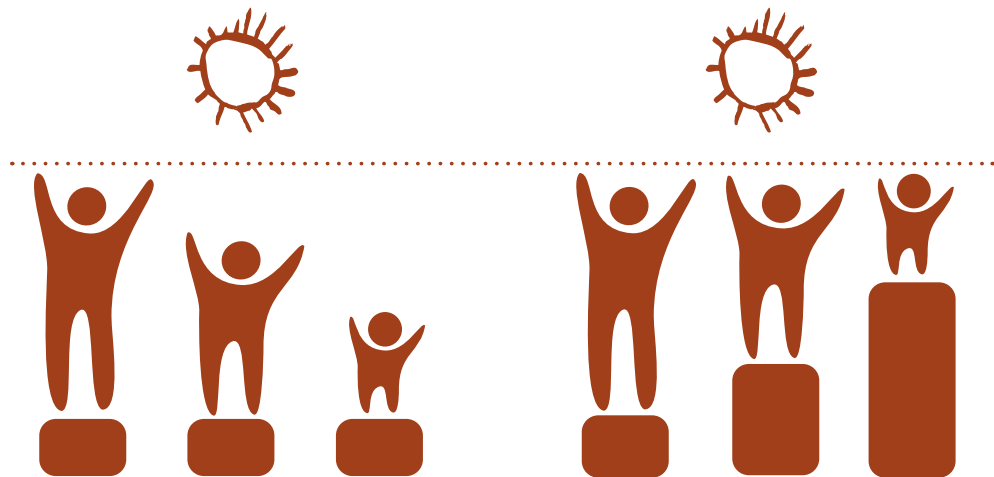
In the past, although child welfare laws were neutral on their face and did not say that they targeted Indigenous children and families for removal, Indigenous families were offered less supports to keep their children with them; and Indigenous children with disabilities, and Indigenous women, girls and two-spirited Peoples, often experienced additional hardship and discrimination.

The Federal Act adopts the principle of “substantive equality” (s. 3), which guarantees equal outcomes for Indigenous children and families despite differences based on factors such as Indigenous identity, disability, sex or gender identity or expression (of child or family member), or on- or off-reserve residency.

*Substantive equality measures the success of child and family services by impact, not good intentions.*

Substantive equality measures the success of child and family services by impact, not good intentions, and ensures:

- Equal outcomes and opportunities to participate for Indigenous children, and their families, without regard to disability, sex, sexual orientation, gender expression or on- or off-reserve residency;
- That children with disabilities have their distinct needs and rights considered so that they can participate in the activities of their family and Indigenous community to the same extent as other children (s. 9(3)(a));
- That Indigenous communities have their views and preferences considered in child and family decisions that impact them and their children and families (s. 9(3)(d));
- That a jurisdictional dispute does not result in a gap in services provided to Indigenous children (Jordan's Principle, s. 9(3)(e)); and
- That an Indigenous community's laws and traditions are reflected in child and family services.



Substantive Equality (s. 3): Right to equal outcomes for Indigenous children and families free from discrimination, including based on:

- Disability;
- Sex or gender identity or expression (of child or family member);
- On- or off-reserve residency (Jordan's Principle); and
- Includes the right to have the views and preferences of the child, their family and their Indigenous community heard.

### III. Placement Priorities

The Federal Act and BC CFCSA set placement preferences.

Placement Priorities
FEDERAL ACT (SECTION 16)
<p>(a) with one of the child’s parents;</p> <p>(b) with another adult member of the child’s family;</p> <p>(c) with an adult who belongs to the same Indigenous group, community or people as the child;</p> <p>(d) with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or</p> <p>(e) with any other adult.</p> <p>(2) When the order of priority set out [above] is being applied, the possibility of placing the child with their siblings should be considered if consistent.</p> <p><b>(2.1) in determining placement priority for an Indigenous child placed outside of their home, this consideration “must take into account the customs and traditions of Indigenous peoples such as with regards to customary adoption.”</b></p> <p>s.16(3) requires an ongoing reassessment (including before and after a CCO has been issued) of whether it is possible to place the child with a parent or family member (which should be understood broadly according to Indigenous tradition).</p>

*In the case of a conflict or inconsistency between these placement priorities and provincial or territorial placement preferences, the Federal Act governs.*

In the case of a conflict or inconsistency between these placement priorities and provincial or territorial placement preferences, the Federal Act governs. Where Indigenous Peoples pass their own laws under the Federal Act, those laws would govern in the event of a conflict or inconsistency with the Federal Act or the BC CFCSA. Where two (or more) Indigenous laws apply, the Indigenous laws may set out how they will resolve any differences. Where this is not possible, the law of the Indigenous community with the strongest ties to a child will apply.

The Federal Act’s requirement to consider the child’s own Indigenous customs and traditions in placement decisions is a positive obligation to

*Decisions about where to place a child must consider things such as the traditional responsibilities of different people within the Indigenous Nation or community and the potential role of clans, houses or other socially and culturally important people to that child.*

take active steps to identify caregivers who include members of a child's family or Indigenous community.

Decisions about where to place a child must consider things such as the traditional responsibilities of different people within the Indigenous Nation or community and the potential role of clans, houses or other socially and culturally important people to that child.

When the order of priority set out in the Federal Act is being applied, the possibility of placing the child with their siblings should be considered if consistent with the best interests of a child (s. 16(2)). Where a child is not placed with their family, the Federal Act requires, to the extent that it is consistent with their best interests, that "the child's attachment and emotional ties to each such member of his or her family are to be promoted" (s. 17).

### Indigenous Laws

*Indigenous communities could pass their own laws setting out placement priorities, which could consider:*

- *Preference for placement with siblings and extended family members, or in ways that build, preserve and maintain those relationships;*
- *Preference for placement according to house-clan-extended family or other traditionally important relationships;*
- *Maximum cultural contact provisions which should include a consideration of the ability to keep a child meaningfully connected to each of their Indigenous cultural communities;*
- *Preference for placement with people best able to build, preserve and maintain a child's relationship with extended family (on both sides), territory, language and culture; and*
- *Mechanisms to allow for multiple Indigenous Peoples or communities to work collectively or collaboratively in deciding where a child should be placed.*





## Regular Review of Placement

The Federal Act requires an ongoing assessment of the possible return of a child to their parent or family where the child was placed outside of their family (s. 16(3)). Family should be defined by Indigenous laws or customs and traditions and could include a far broader group than nuclear (or blood-related) family members.

The Federal Act directs an active and ongoing practice of investigation about alternative (family- or community-based) placements and support for those options where an Indigenous child is not placed within their family or community. All plans, agreements and court orders involving children should include an ongoing review process.

*The Federal Act directs an active and ongoing practice of investigation about alternative (family- or community-based) placements and support for those options where an Indigenous child is not placed within their family or community.*

### Actions/Best Practices

*Times for a reconsideration of a child's placement could include when:*

- *The child or the child's Indigenous community asks for this review, including when they identify extended family members recognized under Indigenous tradition or custom;*
- *A change of placement or legal status is being considered;*  
*and*
- *The child's care plan is reviewed.*<sup>64</sup>



"As long as the sun shines, grass grows, rivers flow."<sup>65</sup> Indigenous children, families and communities live and grow—and care plans should too. Indigenous communities should regularly review plans of care to see what might have changed or what needs to change to keep a child connected to their culture. Indigenous laws could set out conditions and methods for review, including what active efforts may be required to move a child from long-term care back to being cared for within their Indigenous culture.

To be effective, regular reviews of a child's placement should consistently ask how it is possible to ensure maximum cultural and family contact for a child. The more that it is possible to maintain and foster relationships, the better the outcomes for that child will be. As peoples' circumstances

<sup>64</sup> Friedland & Lightning-Earle, *supra*, at 11.

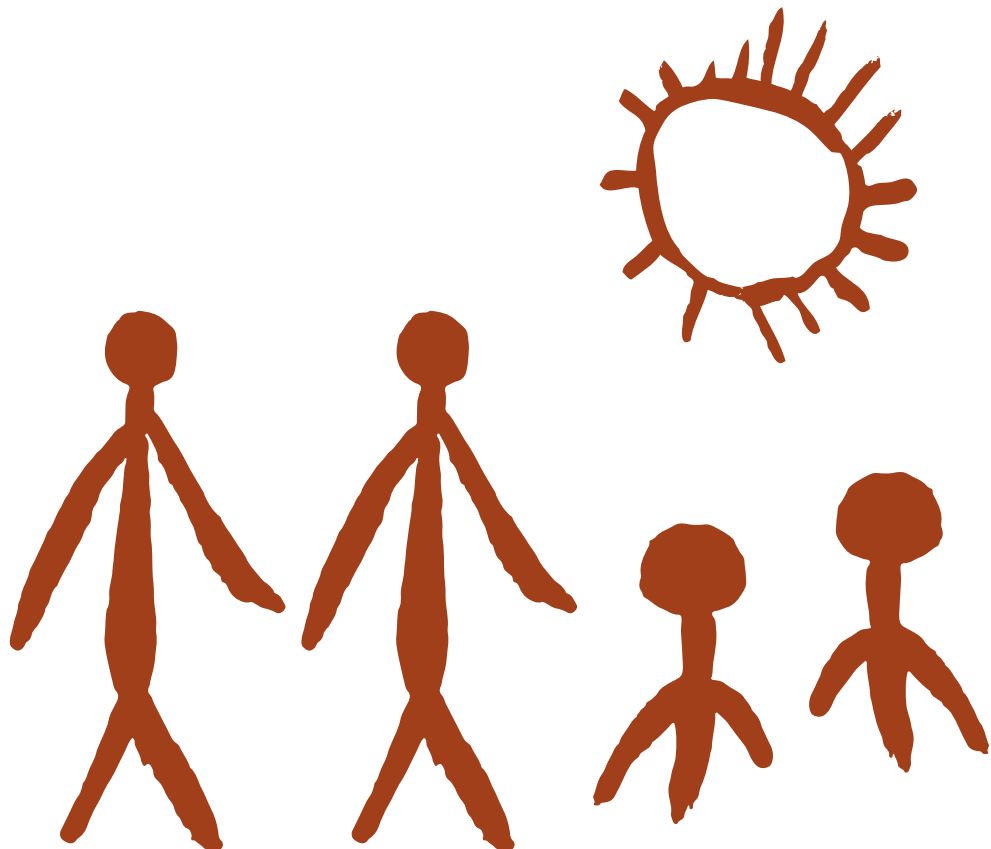
<sup>65</sup> Phrase included in several numbered treaties and indicates the ongoing and living nature of those agreements from an Indigenous perspective.

*Best practices require that Indigenous communities be actively involved in helping to plan for their child members' care, especially where a child is not being cared for within their own Indigenous Nation.*

change, it is important to continually ask if people related to a child are in a position to help care for them, or be more meaningfully involved in a child's life. A good relationship with the child's home community will allow for an ongoing identification of opportunities for cultural involvement and a consistent reexamination of where it may be possible to:

- Create and maintain relationships between the child and members of their Indigenous community, such as cultural events, dinners, or other formal and informal opportunities;
- Provide opportunities for a child to know and develop a relationship with their territory;
- Maintain and foster relationships for the child to members of their cultural community which will last over a child's lifetime and may develop into placements.

Best practices require that Indigenous communities be actively involved in helping to plan for their child members' care, especially where a child is not being cared for within their own Indigenous Nation.







## Case Study: Jordan's Principle

*Federal and provincial governments have disagreed about who has the financial responsibility to pay for services to Indigenous Peoples. This jurisdictional wrangling often resulted in a situation where both federal and provincial governments denied financial responsibility to vulnerable Indigenous children, leaving them without services.*

*Jordan's Principle arose after the death of a five-year-old Indigenous child with special needs. Jordan's parents could not pay for his needs on their own, so they put him into care to get government assistance. Jordan passed away in the hospital, and was never able to be in a home, because Canada and Manitoba could not agree on who should cover the costs for his care outside of the hospital.*

*Jordan's Principle is an agreement that applies in situations where there is a jurisdictional dispute between federal and provincial governments concerning an Indigenous child. It requires that the government of first contact pay for the service and that governments agree to work out jurisdiction and financial responsibility later. First Nations children resident off-reserve who do not have Indian Act status, but who are recognized by their Nation, are entitled to benefit from Jordan's Principle.*

*The Federal Act recognizes Jordan's Principle must be applied to the delivery of services and to the benefit of the Indigenous child.*

*First Nations children resident off-reserve who do not have Indian Act Status, but who are recognized by their Nation, are entitled to benefit from Jordan's principle.*

***An application for funding under Jordan's Principle can be made by calling Canada's Jordan's Principle Call Centre at 1.855.JP.CHILD (1.855.572.4453). (If this contact number changes, search Jordan's Principle on Indigenous Services Canada's website).***

***Jordan's Principle is an agreement that applies in situations where there is a jurisdictional dispute between federal and provincial governments concerning an Indigenous child.***

*When services are provided in a way that honours substantive equality, Indigenous children, families and communities participate in and guide the decisions that impact their lives and are treated in a way that honours their inherent dignity.*

## Advocacy/Best Practices

*In practice, substantive equality may look like:*

- *Honouring a child's gender identity and making sure they are placed in a safe home that respects their gender expression;*
- *Where a parent is two-spirited or gender diverse, placing their child with a family who can fully honour and respect their gender expression so as not to interfere with the relationship between the parent and child;*
- *Honouring an Indigenous community's spiritual traditions by ensuring that a child is placed in a family that will embrace and encourage those spiritual traditions;*
- *Ensuring that a child's Indigenous community, even prior to passing or articulating their own child welfare laws, participates fully and meaningfully in decision-making for their child members;*
- *Where an Indigenous community has passed their own law, ensuring that that law is empowered, respected and resourced. It should, in practice, make a difference in how Indigenous children are cared for; and*
- *Asking how historic disadvantages of Indigenous women and girls, including gender and structural discrimination, led to the present child welfare concerns; and then providing child welfare services in a way that does not make those disadvantages worse and, instead, corrects them to achieve substantive equality.*

*When services are provided in a way that honours substantive equality, Indigenous children, families and communities participate in and guide the decisions that impact their lives and are treated in a way that honours their inherent dignity.*



## 06. Best Interests of the Indigenous Child (BIOIC)

The Federal Act confirms that the best interests of the child are a primary consideration for child and family services and must be the paramount consideration when a decision is made to apprehend a child. In defining BIOIC the Federal Act super-weights cultural connection,<sup>66</sup> and emphasizes the need to care for Indigenous children according to their own Peoples' law, culture and traditions.

*Maintaining cultural connections offers the best chance of providing Indigenous children with a stable, life-long care provider.*

### Advocacy/Best Practices/Indigenous Laws

*The best interests of the child provisions are to be interpreted, to the extent that it is possible (s. 10(4)), as consistent with Indigenous laws. Considerations for determining the BIOIC should include recognition that:*

- *It is in the best interests of a child to know and to be actively involved with their Indigenous culture, community, territory, language and cultural connection;*
- *Protection under Indigenous laws is in a child's best interests;*
- *Culture and cultural connections have a profoundly protective role in the lives of Indigenous children; and*
- *Maintaining cultural connections offers the best chance of providing Indigenous children with a stable, life-long care provider.*



Under s. 10(3), factors to be considered when deciding what is in the BIOIC include:

- 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;

<sup>66</sup> Friedland & Lightening-Earle, *supra*.

*The preservation of a child's cultural identity and connections does not address situations where disconnection was caused by the operation of IRS/child welfare systems over time, and where these connections need to be re-established.*

- c. The nature and strength of the child's relationship with his or her parent(s), the care provider and any members of the child's family who play an important role in their life;

Though not mentioned here, the maintenance of a child's relationship with their siblings should be a primary concern and protected before and after a child or their siblings leave care, including due to age or adoption.

- 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;

The preservation of a child's cultural identity and connections does not address situations where disconnection was caused by the operation of IRS/child welfare systems over time, and where these connections need to be re-established. Policy 1.1 talks about the need to help children or families who experience cultural alienation, in keeping with the overall purposes of the Federal Act.

- e. The child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

There is no way to hear the voice of the child in the Federal Act. Indigenous children have agency and mechanisms to have their voice heard within many Indigenous laws and traditions. These traditions need to be articulated and empowered.

- 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;

Where Indigenous communities articulate their own laws, customs or preferences, including for placement decisions or steps to help heal a family, these should be reflected in the actual services provided.

- 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;



Family violence is a serious issue and needs to be addressed. However, the Federal Act may impose more onerous conditions for Indigenous families than found in provincial legislation. Without careful scrutiny, there is a risk that this provision could further incentivize removals or prevent steps to reunite Indigenous families.

- h. Any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child.

Given Indigenous Peoples' grossly disproportionate involvement in the criminal justice system, this provision could further incentivize removals or prevent steps to reunite families and caution should be taken to read this provision in light of the overall remedial purposes of the Federal Act.

*The Federal Act's requirement to consider any family violence or criminal charges and their impact on the child in determining the BIOIC tracks the language in the federal Divorce Act.*

### Advocacy/Best Practices

*The Federal Act's requirement to consider any family violence or criminal charges and their impact on the child in determining the BIOIC tracks the language in the federal Divorce Act.<sup>67</sup> Given the history of colonization and disproportionate over-representation of Indigenous Peoples in child welfare and criminal law, a consideration of history of family violence or involvement in civil or criminal law must be read in light of:*

- *The direction in the Preamble of the need to address Indigenous over-representation in the child welfare system;*
- *Acknowledgement of Indigenous laws and jurisdiction;*
- *The direction in s. 9(2)(d) that the provision of childcare services should not contribute to the assimilation of Indigenous Peoples; and*
- *The overall trauma-informed approach outlined in the Federal Act.*

*Cultural safety measures in place and assessments of the child's own Indigenous community about safety are important factors in determining the safety and best interests of the child where there is a history of family violence or civil or criminal proceedings.*



<sup>67</sup> RSC 1985, c 3 (2nd Supp).

*Achieving substantive equality for children or families who have been culturally alienated requires giving those children a chance to learn and connect to their culture, just as other children who have not experienced the same barriers and loss are able to.*

*In British Columbia (Child, Family and Community Service) v SH,<sup>68</sup> the Court observed that the BIOIC provisions in the Federal Act have a broader application than similar provisions in the BC CFCSA. Whereas the BC CFCSA only directs the court to consider the BIOIC in relation to certain provisions, the Federal Act states the BIOIC must be considered at all stages of the process.*

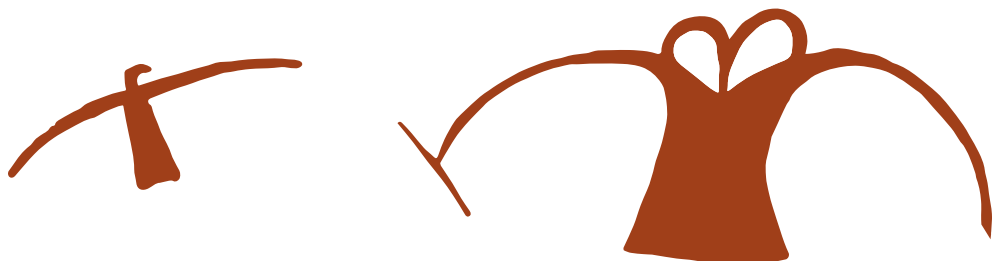
## I. Cultural Alienation

### Advocacy/Best Practices

*The Federal Act's direction to consider the importance to a child of preserving their cultural identity or connections must be considered in light of the cultural alienation that has resulted from the imposition of federal or provincial/territorial law and policy.*



Sometimes, where a child was raised in care or away from their home community (or their parent or grandparent was), they may not know about their Indigenous culture or community. Cultural alienation may result from years of a family's involvement in IRS and the child welfare system. To protect the rights of a child who has been alienated from their Indigenous culture, the child (and their family) should have a chance to learn about how they can become connected to their Indigenous community, and what that might mean in the immediate and long-term. Efforts to remediate cultural alienation should be a consideration in the "stronger ties" clause. Achieving substantive equality for children or families who have been culturally alienated requires giving those children a chance to learn and connect to their culture, just as other children who have not experienced the same barriers and loss are able to.



<sup>68</sup> 2020 BCPC 82.



## II. Cultural Bias Inherent in the BIOIC Test

When the standard of the “best interests of the child” is applied, Indigenous Peoples have reason for caution. Common sense assumptions about what is in the best interests of a child, or what is required to keep a child safe, have been used to remove Indigenous children and keep them from their families and communities. Past considerations of the BIOIC have led to decisions about immediate protection of an Indigenous child that severed the child’s connection to their culture, extended family and community, and led to long term damage and disconnection.<sup>69</sup>

The BIOIC should never be interpreted or understood as requiring a choice between protecting a child or preserving their Indigenous culture. Instead, the rights of Indigenous children and communities should be read as mutually reinforcing and supportive. Strengthening Indigenous children and families strengthens Indigenous Nations, and *vice versa*.

All parties to child welfare proceedings involving an Indigenous child should start with the presumption that there is a mutually beneficial (non-adversarial) relationship between an Indigenous community and their child members. A child’s attachment to their community, culture, territory and extended cultural community form a crucial part of the relationships that will help to sustain and nurture them over their lifetimes.

Culture and cultural connection have a profoundly protective role in the lives of Indigenous children. The long-term benefits of cultural connection call for a long-term consideration of what is in the best interests of an Indigenous child.

*All parties to child welfare proceedings involving an Indigenous child should start with the presumption that there is a mutually beneficial (non-adversarial) relationship between an Indigenous community and their child members.*

### Advocacy/Best Practices

*An approach that sees Indigenous communities as having a quasi-parental (or, *parens patriae*) relationship with their child members, and a mutual interest in protecting the best interests of their child members and their collective future, would be helpful in understanding the relationship of Indigenous children and their communities.*



<sup>69</sup> Brown, *supra*.

### III. BC CFCSA Best Interests Definition

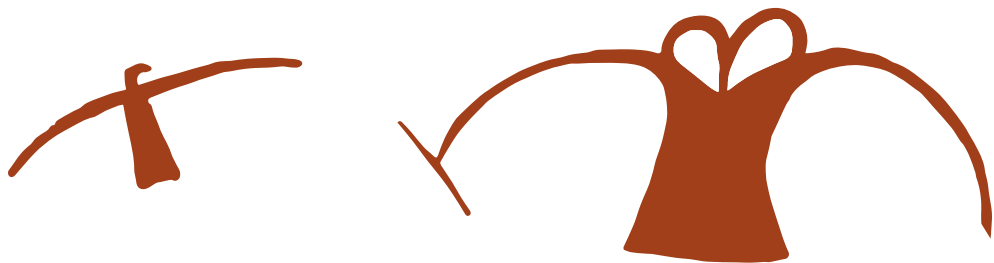
The BC CFCSA defines the best interests of the child to include these references to preserving a child's cultural identity or connections:

#### 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:
- (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;
- (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.

*Culture and cultural connection have a profoundly protective role in the lives of Indigenous children. The long-term benefits of cultural connection call for a long-term consideration of what is in the best interests of an Indigenous child.*

A key difference between best interests according to the Federal Act and the BC CFCSA is that the Federal Act says that three primary considerations hold greater weight than the remaining factors: (1) the child's physical, emotional and psychological safety, security and well-being; (2) the importance of the child having an ongoing relationship with their family and Indigenous community; and (3) the importance of preserving the child's connection to their culture.



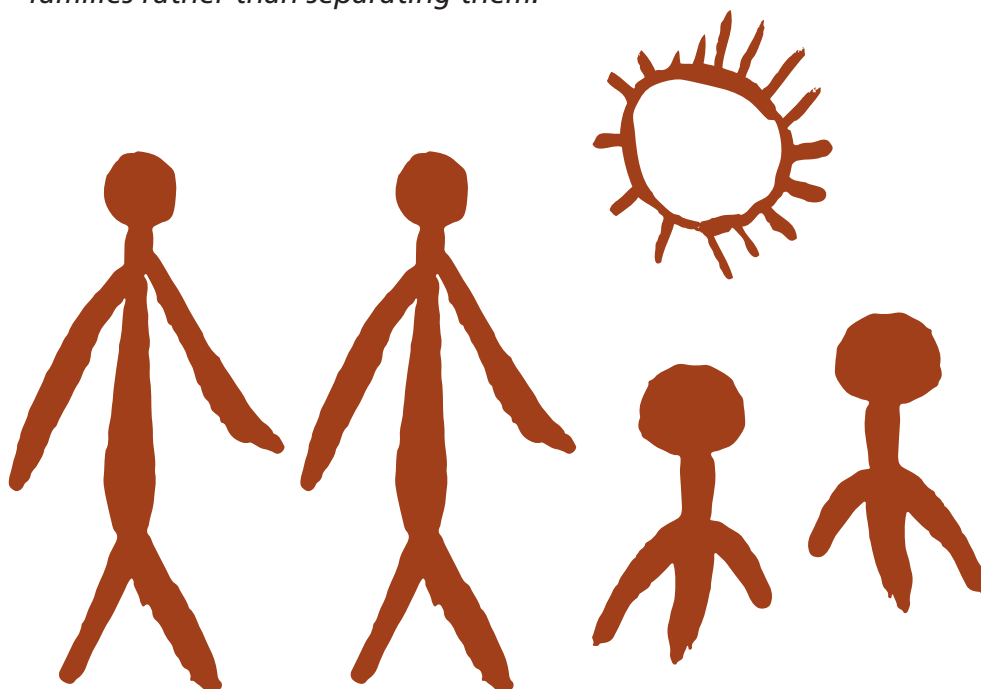




## Case Study: *Michif CFS v. CLH and WJB*

*In Michif CFS v. CLH and WJB,<sup>70</sup> the Michif Child and Family Services apprehended a child from the hospital and later sought a six-month temporary order which led the Court to assess whether the child was in need of protection. The child's mother pleaded guilty to failing to provide the necessities of life to the child's sibling in 2016, after not acting urgently or quickly enough to seek medical care for her child. In 2018, she was registered on the Child Abuse Registry. Despite this history, the Court found that the child's life, health and well-being were not endangered by the acts or omissions of his parents, and the child was not currently in need of protection. The Court acknowledged that the Federal Act requires that the best interests of the child be considered at all stages of the process, rather than after determining a child is in need of protection, as the provincial legislation directs. The Court applied the Federal Act, in accordance with s. 4, which stipulates that, when there is conflict or inconsistency between the Federal Act and the provincial legislation, the Federal Act takes precedence. The Court returned the child and recognized the remedial nature of the Federal Act and overall goal of healing families rather than separating them.*

*The Court applied the Federal Act, in accordance with s. 4, which stipulates that, when there is conflict or inconsistency between the Federal Act and the provincial legislation, the Federal Act takes precedence.*



<sup>70</sup> 2020 MBQB 99 [Michif], especially at 21-46.

*Indigenous laws can also be used to address gaps in the Federal Act. Indigenous communities/Nations may wish to pass their own laws defining the BIOIC from their own perspective.*

## **Advocacy/Actions/Indigenous Laws: Indigenous Peoples can define the BIOIC according their own laws**

*Indigenous laws can also be used to address gaps in the Federal Act. Indigenous communities/Nations may wish to pass their own laws defining the BIOIC from their own perspective.*

*Provisions could include:*

- 1. It is in an Indigenous child's best interests that active efforts, not just reasonable efforts, are required to keep a child in family care;*
- 2. The BIOIC requires maximum contact with siblings, extended family, community and territory as a principle for all children living out of family care;*
- 3. Culture and cultural connection play a profoundly protective role in the lives of Indigenous children;*
- 4. The BIOIC should be defined and interpreted according to the Indigenous Peoples' own values, traditions and norms;*
- 5. It is in the best interests of a child to know, and be actively involved with, their Indigenous culture, community, territory and language, and this involvement creates a source of protective stability over a child's lifetime;*
- 6. Being protected under Indigenous laws, and the continued involvement of a child's Indigenous community(ies) in planning for their care, is in a child's best interests;*
- 7. The operation of Indigenous laws has the best chance for maintaining the child's identity and for healing and restoring families, which is always in a child's best interests;*
- 8. Where cultural connections do not exist as a result of impositions of colonial law and policy, such as IRS or the child welfare system, it is in a child's best interests to have an opportunity to heal and repair that cultural alienation;*
- 9. Where a child is meaningfully connected to more than one Indigenous community or culture, it is in a child's best interests to maintain and nourish those connections and for the Indigenous communities to reach an accord on how the child will be cared for in a way that honours their multiple Indigenous identities;*



10. *It is in a child's best interests to build and maintain a relationship with the territory of their Indigenous community; and*
11. *It is in a child's best interests to have "maximum contact" with their Indigenous cultural identity(ies) and be placed with caregiver(s) who are best able to ensure maximum cultural contact.*

*Judicial notice refers to the approach of going outside the record of the case and taking judicial notice of facts that are important to a decision in the case.*

#### **IV. Judicial Notice of the Long-Term Impacts on Indigenous Children Raised in Care**

Judicial notice refers to the approach of going outside the record of the case and taking judicial notice of facts that are important to a decision in the case.<sup>71</sup> Judicial notice is usually confined to facts that are considered to be uncontroversial and well known within the community. In *R v. Williams*,<sup>72</sup> *R v. Ipeelee*,<sup>73</sup> and *R v. Gladue*,<sup>74</sup> the Supreme Court of Canada directed an approach that takes judicial notice of systemic racism and barriers that Indigenous Peoples face.

In *Brown*,<sup>75</sup> the Court acknowledged the factual background of the Sixties Scoop and resultant harm to children, families and communities. The Court acknowledged that thousands of Indigenous children living on reserves in Ontario were apprehended and removed from their families by provincial child welfare authorities and placed in non-Indigenous foster and adoptive homes. The resultant loss of Indigenous identity left children fundamentally disoriented, with reduced ability to lead healthy and fulfilling lives, and resulted in psychiatric disorders, substance abuse, unemployment, violence and suicide.

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<sup>71</sup> *R v. Find*, 2001 SCC 32. *Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. ... [T]he threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.*

<sup>72</sup> [1998] 1 SCR 1128.

<sup>73</sup> 2012 SCC 13.

<sup>74</sup> [1999] 1 SCR 688.

<sup>75</sup> *Brown*, *supra*, at 3-9.

*Asking about the impacts on children of being raised in care could re-orient the discussion of protection concerns for Indigenous children by focusing on protecting a child over the course of their lives.*

## Advocacy/Best Practices

*The interest of an Indigenous child in maintaining and fostering their connections to their Indigenous culture and heritage over their lifetime must be considered in an assessment of their best interests. In *H(D) v. M(H)*, the BC Court of Appeal observed the “considerable history of unsuccessful outcomes” of the adoption of Indigenous children into non-Indigenous families.<sup>76</sup> Contrary to the analysis of the Supreme Court of Canada in *Racine v. Woods*,<sup>77</sup> practically speaking, the importance of Indigenous cultural heritage does not abate over time; evidence suggests that it becomes increasingly important. Outcomes for Indigenous children in care are not positive. Indigenous children in care are less likely to graduate and more likely to end up in prison, have their own children taken into care, and experience unemployment, substance abuse or suicide.<sup>78</sup>*



Asking about the impacts on children of being raised in care could re-orient the discussion of protection concerns for Indigenous children by focusing on protecting a child over the course of their lives. “A court should ... consider not only what is best for the child immediately, but also whether the disposition ... will also serve the child’s long-term interests.”<sup>79</sup> Assessing protection concerns in the immediate timeframe, without asking what the mid- to long-term impacts of removing a child from their families and Indigenous community(ies) is, may have devastating impacts for a child.

Indigenous laws could direct how protection over a child’s lifetime should be considered in planning for a child’s care. For example, some Indigenous traditions may require that the impacts of decisions on a child and family be considered beyond immediate impacts and in the short-, medium- and long-term.

<sup>76</sup> *H(D) v. M(H)*, [1998] 156 DLR (4th) 548, at 16.

<sup>77</sup> [1983] 2 SCR 173 [Racine].

<sup>78</sup> Turpel-Lafond, ME. “Aboriginal Children, Human Rights as a lens to break the inter-generational legacy of Residential Schools” (July 2012) Representative for Children and Youth, Submission to the Truth and Reconciliation Commission of Canada.

<sup>79</sup> *Child and Family Services of Winnipeg (East) v. D(KA)*, [1995] 1 DLR (4th) 255 [CFS Winnipeg v. D(KA)], at 27 and 33.

## Advocacy/Best Practices/Indigenous Laws: Seventh Generation Principle

*A forward-looking principle, sometimes referred to as a “seventh generation” principle, asks what the impacts of actions and decisions made today will be into the future. Asking what the impacts of a particular child protection decision are in the long-term, such as to remove a child from their parent(s) and put them into care, requires a consideration of what will happen to a child over the course of their life, and in the lives of their children and descendants, not merely during the immediate future.*

*The BC CFCSA limitation periods allow a relatively short period of time for decisions to be made to permanently sever a child’s relationship with their parents under the rationale that this will allow for other placements to be made that will create permanency for that child. From a long-term perspective, when an Indigenous child is put into care and their ties to their birth family and culture are severed, these children often age out of care with no replacement connections and with significant adverse consequences. They are left, at the end of a process meant to protect them, radically isolated.*

*An analysis of the BIOIC must consider the long-term impact on children of actions ostensibly taken to address immediate protection concerns. The long-term outcomes of children raised in care continue to be very poor. Indigenous children spend longer in care than non-Indigenous children, “if a...[CCO] has been granted, Aboriginal children are more likely to “age-out” of care than their non-Aboriginal counterparts, without being adopted or entering other out-of-care arrangements.”<sup>80</sup> Indigenous youth represent only 6% of all youth in BC but, in 2008–2009, represented: 27% of youth remanded, 36% of youth admitted to sentenced custody, and 24% of youth admitted to probation.<sup>81</sup>*



*The BC CFCSA limitation periods allow a relatively short period of time for decisions to be made to permanently sever a child’s relationship with their parents under the rationale that this will allow for other placements to be made that will create permanency for that child.*

<sup>80</sup> Barker, B, Kerr, T. Alfred, GT, et al. “High prevalence of exposure to the child welfare setting among street-involved youth in a Canadian setting: implications for policy and practice” (24 February 2014) *BMC Public Health* 14: 197 [available online: <http://www.biomedcentral.com/1471-2458/14/197>], at 11.

<sup>81</sup> Calverley, D, Cotter, A, & Halla, E. “Youth custody and community services in Canada—2008/2009,” (2010) *Juristat* 30(1) Ottawa, ON: Statistics Canada.

*Indigenous children's best interests rest with their community, and their psychological integrity, identity and well-being are seriously impacted by the disruption of that relationship.*

## V. Measuring Best Interests Over a Child's Lifetime

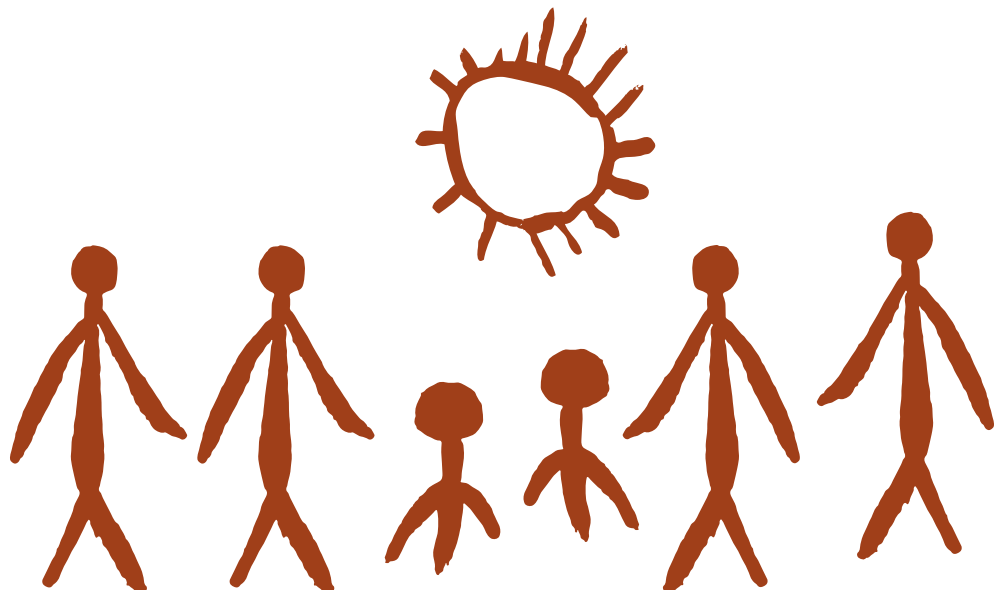
Indigenous children's best interests rest with their community, and their psychological integrity, identity and well-being are seriously impacted by the disruption of that relationship. Interference with those relationships last over a child's lifetime and could forever foreclose a lifetime of cultural connections and belonging, denying the child access to, and the benefit of, a rich cultural, spiritual and legal tradition.

The need for "stability" has tended to only look at connections to foster parents—not to culture, community, extended family or siblings. The need for stability, defined without Indigenous considerations, is therefore commonly used to justify keeping children away from their families and culture.

### BEST PRACTICES



*Courts could take judicial notice of the long-term negative outcomes for Indigenous children raised in care. The BIOIC should be assessed to ensure that a child's long-term well-being is not sacrificed for short-term safety. An appropriate consideration of an Indigenous child's best interests must consider their safety in the immediate-term and into the future. Maintaining and fostering a child's connection to their Indigenous culture and identity has a better chance of protecting a child in the long-term and ensuring a better life outcome.*



## A. Maximum Cultural Contact

When Indigenous communities are involved in making child welfare decisions, it is more likely that a child will be placed with Indigenous caregivers and keep their cultural and community connections.

### BEST PRACTICES

*Previously, discretion was left with social work teams or foster parents about contact with family, Indigenous community members or participation in community events. The focus of substantive equality on assessing results, combined with the Federal Act's direction to keep children culturally connected, suggests the need to set firmer guidelines for the exercise of discretion about fundamental aspects of an Indigenous child's care, how they remain culturally connected and how their family ties are maintained.*

*When Indigenous communities are involved in making child welfare decisions, it is more likely that a child will be placed with Indigenous caregivers and keep their cultural and community connections.*

The voices of Indigenous survivors of the child welfare system and cases such as *Brown* and *The First Nations Child and Family Caring Society*, emphasize the importance of maintaining a child's Indigenous cultural connections. The Federal Act clearly responds to this evolving knowledge about the costs of cultural disconnection and arguably "super-weights" Indigenous culture and connection.



### Case Study: Canadian Divorce Act and Federal Act Maximum Contact

*The Canadian Divorce Act sets out a "maximum contact" principle which says the goal is to maximize parenting time with both parents.<sup>82</sup> Dr. Hadley Friedland has suggested that a similar principle should apply when Indigenous children are placed in care. A principle of "maximum cultural contact" would shift the discussion, emphasizing that cultural connection is not a bonus, but rather a necessity to ensure the health and well-being of*

<sup>82</sup> *Metallic, NW, Friedland, H, , et al. "An Act respecting First Nations, Métis and Inuit children, youth and families: Does Bill C-92 Make the Grade?" (22 March 2019) Yellowhead Institute [Metallic & Friedland, Does Bill C-92 Make the Grade?], at 8.*

*Mistaken interpretations of “attachment” to non-Indigenous caregivers are often used to deny placement within a child’s cultural community(ies) or restoration of relationships.*

*Indigenous children who are placed in care over the long-term.*

*The Federal Act includes provisions that support the principle of maximum cultural contact, including consideration of the importance for an Indigenous child of having an ongoing relationship with their family or Indigenous community, and of preserving their connections to their culture (s. 10(2)). The principle of cultural continuity and related concepts discussed in s. 9 provides a basis for maximizing cultural contact for Indigenous children placed outside of their families or communities.*

*Provisions to ensure maximum cultural contact could include “an access order with some family or community member and a long-term funding commitment for regular travel back to the community ... as a term of any permanency order.”<sup>83</sup>*

## Indigenous Models of Attachment

### Advocacy/Best Practices/Indigenous Laws

*An important strategy to address the cultural bias implicit in the best interests of the child test is to honour Indigenous models of attachment and family. The focus on immediate attachment that grounds traditional best interests assessments ignores the risk inherent in the breakdowns of many placements that occur over time, or even if placements are successful, the lifetime cost of the cultural loss that results.*



Mistaken interpretations of “attachment” to non-Indigenous caregivers are often used to deny placement within a child’s cultural community(ies) or restoration of relationships. Taking into account Indigenous cultural contexts, measuring the ability to build and maintain meaningful and lasting relationships—including with family, elders, territory, peers within a cultural community—would be a better measure. Experience has shown that a model of “replacement nuclear parenting” (removing a child from their family and placing them with another foster family) does not work for Indigenous children. Meeting a child’s need for stability in the case of an Indigenous child must include maintaining or building connections to culture, community, extended family and territory.

<sup>83</sup> *Metallic & Friedland, Does Bill C-92 Make the Grade?, supra, at 8.*





Approaches based on a nuclear family model have hurt Indigenous children by diminishing the importance of more expansive Indigenous cultural connections, including to territory and language. Interventions designed to heal families, or, where this is not possible, to protect children and keep them connected to their Indigenous culture, could help to mitigate the negative impacts of involvement within the child welfare system over a child's lifetime.

Relationship to territory is a very important part of Indigenous identity. Caring for Indigenous children and fostering cultural connections must include plans to build and maintain connections to territory. The extensive set of Indigenous territorial relationships encompasses the other life Indigenous Peoples share their territories with, and these relationships are reciprocal, spiritual and deeply constitutive of Indigenous identities. There is a need to reconnect children, youth and families to their Indigenous culture and territories and to address the lack of attachment and connections that result from generations of removals.

*Approaches based on a nuclear family model have hurt Indigenous children by diminishing the importance of more expansive Indigenous cultural connections, including to territory and language.*

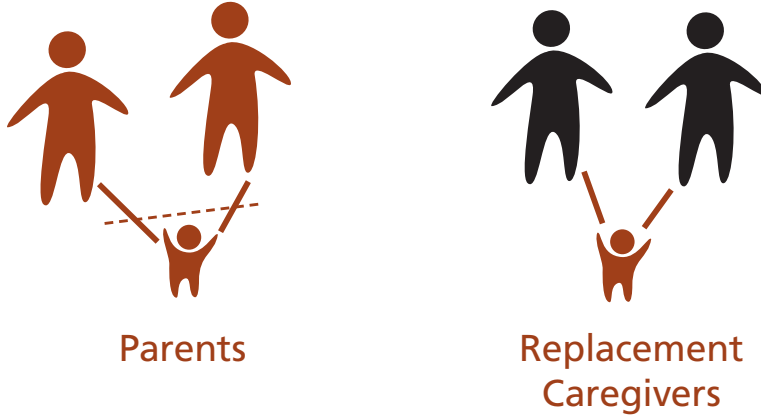
## ***B. Permanency Solutions Based in Indigenous Culture and Laws***

Cultural continuity is considered in determining the BIOIC in the Federal Act (s. 4). The Federal Act imposes a positive duty to ensure that an Indigenous child remains connected to their culture and cultural community, not merely as a factor that must be considered amongst other factors in decision-making, but rather as a legal requirement. The Federal Act removes the discretionary nature of considering a child's Indigenous heritage, or involving their Indigenous cultural community, in decision-making.

Policy 1.1 (s. 9) directs that attachment and emotional ties should be promoted in cases where a child has not been placed with one of their parents or another adult member of their community, as long as it is consistent with the best interests of the child. A plan to promote attachment and emotional ties can include visitation and access, ongoing contact with family members, changes in placement and transitioning out of care (s. 12).

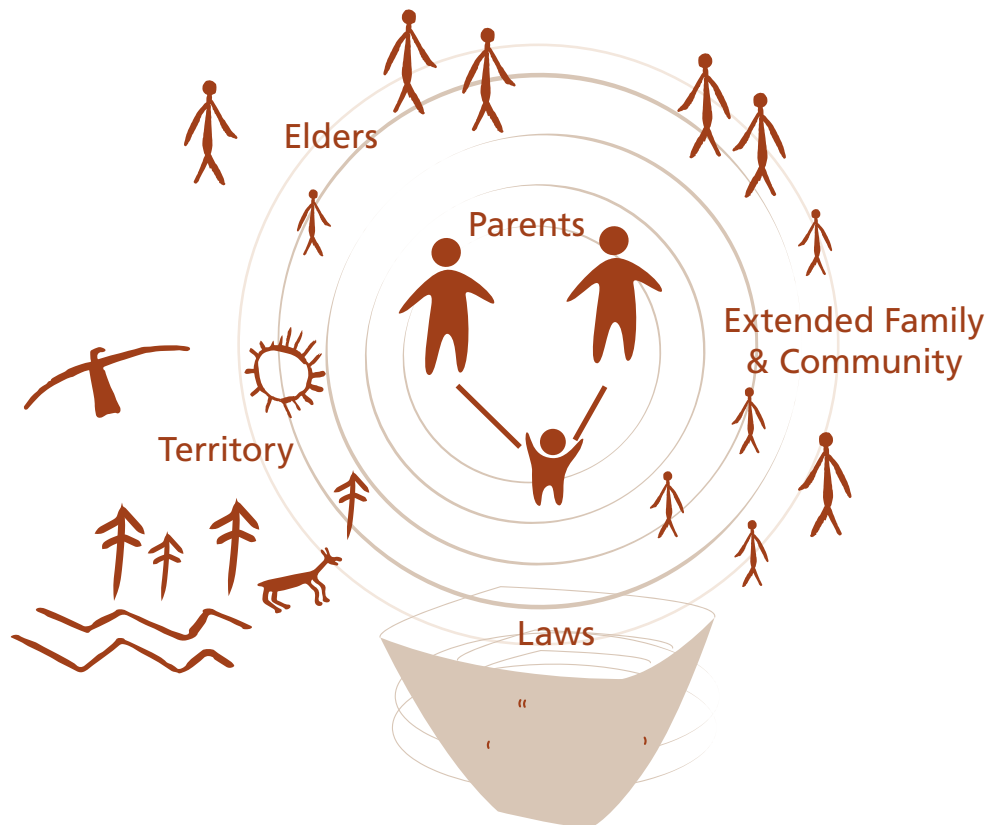
Indigenous laws recognize extended kinship and cultural relations that are important to Indigenous children and families. Relationships may be to territory, language or culturally important groups or people. The Federal Act supports the approach in Indigenous laws. "Permanence" and "stability" are defined differently within Indigenous cultures. For example, movement either geographically or within a broader family or community group within Indigenous traditions of caring for children

## Western Nuclear Family Model



*Caring for Indigenous children and fostering cultural connections must include plans to build and maintain connections to territory.*

## Indigenous Family Model



may be seen as both natural and beneficial for children, not as breaking their attachments.<sup>84</sup>

*Customary care is an important strategy for avoiding the cultural displacement experienced by First Nations children separated from their families, extended families and communities. While customary care can be generally understood as a traditional approach to caring for children through extended family members in ways that are grounded in the traditions, values and customs of the community ... this concept is more comprehensive in nature in the sense that it is care that extends throughout the life-cycle from birth to death. Customary care is not merely about alternative care arrangements; it is a way of life that ensures natural cultural resiliency and promotes positive cultural identity by way of language, clan and family.<sup>85</sup>*

*Indigenous communities can facilitate solutions that allow for both permanency of placement and ongoing and meaningful connection to a child's Indigenous culture and heritage.*

Child welfare law normalizes the nuclear family, focusing on parents, the state and immediate family members as active participants. This nuclear family focus erases the larger social-legal-cultural context that Indigenous children exist within. The default presumption in Canadian law is that parents or immediate nuclear families have primary rights and responsibility for the care of children.

In an Indigenous context, the people who have cultural obligations, responsibilities and rights for the care of children may be much broader. Indigenous Peoples have wider kinship relationships and privileging parents diminishes the role of other people who are culturally very important to Indigenous children.<sup>86</sup>

Indigenous communities can facilitate solutions that allow for both permanency of placement and ongoing and meaningful connection to a child's Indigenous culture and heritage.

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<sup>84</sup> *Re CP, supra, as cited in Dewar, J. "Indigenous Children and Family Law" (1997) 19 Adel L Rev 217, at 222.*

<sup>85</sup> Ferris, P, Simard, E, Simard, G & Ramdatt, J. "Weechi-it-te-win Family Services: Utilizing a Decentralized Model in the Provision of Bi-Cultural Services" (2005) *Promising Practices in First Nations Child Welfare Management and Governance Series, First Nations Child and Family Caring Society of Canada.*

<sup>86</sup> Australian Human Rights Commission. "Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families" (April 1997) Commonwealth of Australia.

*Indigenous communities could be instrumental in achieving arrangements that allow for permanency of placements while maintaining a child's Indigenous identity and cultural heritage.*



### Case Study: *EV v. RB*

*To deprive children of access to their cultural language and cultural heritage amounts to an alteration of their fundamental identity and damages their lifelong connections to kin, community, culture, and spirituality... For children who have been through the foster care system, the intense frustration and psychological damage of knowing their family could have raised them except for an imposed legal decision, exacerbates the losses exponentially.<sup>87</sup>*

### Advocacy/Indigenous Laws

*The balanced approach suggested in WoW seeks to ensure both attachment and cultural connection for Indigenous children. Making decisions “either/or” (“either” Indigenous identity and culture “or” attachment and security) without meaningfully exploring options of working collaboratively with a child's Indigenous community denies possibilities that would allow children to be permanently placed while maintaining and fostering their connections to their Indigenous families, culture and heritage. (Certainly there is a higher likelihood of identifying Indigenous placements with the active involvement of Indigenous communities—but connections should be maintained no matter where a child is placed.) Indigenous communities could be instrumental in achieving arrangements that allow for permanency of placements while maintaining a child's Indigenous identity and cultural heritage.*

*Examples might include:*

- *Traditional adoptions—having extended family or clans collectively be responsible for determining a child's care;*
- *Recognizing that two (or more) families or households have shared responsibility for a child;*
- *Appointing member families to help parents who need help or support; or*
- *Allowing a child to remain within their family home and removing the parent or other people who are not safe.*



<sup>87</sup> Dr. Raven Sinclair, as quoted in *EV v. RB*, 2019 BCPC 205.

## Exploring Permanency Alternatives

The experience of Indigenous children raised within the child welfare system has shown that long-term stability does not result from an approach that puts attachments to foster or adoptive parents—which can, and often do, change over time, or are experienced differently by different children—before permanency expressed through maintaining lifelong connections to Indigenous culture, community and extended family.

Indigenous groups could pass their own laws allowing for permanency solutions that ensure a child remains actively connected to their Indigenous culture, such as:

- Shared parenting arrangements which recognize responsibility and guardianship in more than one person who is identified by the Indigenous community and family; or
- Arrangements where a child is placed outside of their Indigenous family or culture but is ensured active access to their siblings, family and cultural events.

*All too often, considerations of a child's Indigenous identity or cultural heritage are treated as a procedural hoop (considered and either dismissed or met with simplistic actions), rather than guiding decisions about a child's plan of care.*

## Proposing an Indigenous Cultural Preservation Plan

All too often, considerations of a child's Indigenous identity or cultural heritage are treated as a procedural hoop (considered and either dismissed or met with simplistic actions), rather than guiding decisions about a child's plan of care. The lifelong importance of Indigenous culture may be improperly weighed against an assessment of a child's permanency and attachment needs, and so dismissed.

Efforts to maintain a child's Indigenous cultural heritage are often generic, reflecting a failure to understand the child's unique cultural identity. Courts have found acceptable efforts to preserve the Indigenous identity of a child in care as including: attending powwows or cultural activities;<sup>88</sup> internet searches;<sup>89</sup> age-appropriate reading materials;<sup>90</sup> having Indigenous artwork or artifacts in the foster home,<sup>91</sup> or providing a child with Indigenous foods.

<sup>88</sup> A [...] (First Nation) v. Children's Aid Society of Toronto, 2004 Can[IT 34409 [AC[...]], at 53.

<sup>89</sup> H(D) v. M(H), *supra*, at 25.

<sup>90</sup> DCW v. Alberta (Child, Youth and Family Enhancement, Director), 2012 ABPC 199 [DCW], at 51.

<sup>91</sup> A [...], *supra*, at 53.

*Maintaining a child's access to, or involvement with, their Indigenous identity and heritage cannot be achieved through general measures.*

Pan-Indigenous daycares, play groups or cultural events should not be read as sufficient to fulfill legal requirements to maintain a child's Indigenous heritage because they do not achieve the benefits that flow from the involvement of the Indigenous child's community and do not protect a child's unique Indigenous identity: "[A] full understanding of one's culture comes through a day to day exposure to it."<sup>92</sup>

*...fostering an Aboriginal identity can be a lifelong process. A person learns from what is passed down from generation to generation orally, and through sharing experiences through relatives, friends and community, as well as from geography, language, and other social facts. Within this process, the individual identity is "inseparable" from the collective identity of Aboriginal people. For Aboriginal people, early childhood attachment is to relatives and the community.<sup>93</sup>*

Indigenous identity and heritage are a sense of belonging with cultural, social and historical roots, reflecting membership and affiliations with a particular historic cultural and linguistic group. Maintaining a child's access to, or involvement with, their Indigenous identity and heritage cannot be achieved through general measures. Maintaining a child's Indigenous identity and heritage require concrete efforts to maintain or establish relationships to their particular Indigenous cultural community (for example, a Nlaka'pamux child would require connections to the Nlaka'pamux people).

### Advocacy

*For some Indigenous children, it may be important to attend cultural gatherings hosted by the child's family, extended family, clan or community where rites of passage and relationships are formalized and recognized (e.g., potlatches, feasts and winter ceremonies, as well as teaching hunting and/or fishing traditions at culturally significant times of the year). Participation at such gatherings may confer rights, solidify relationships and maintain the child's culture, traditions, language and identity. Equally important, and often overlooked, is the participation in the preparation and explanation of these events, which happens informally and as part of the larger cultural immersion giving meaning and context to these gatherings.*



<sup>92</sup> CDR1 & CDR2 v. Native Child and Family Services of Toronto, 2007 CFSRB 20, at 39.

<sup>93</sup> Smith, A. "Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Save or Lose Our Children" (2009) 29 Can J.F.L. 297 [Smith], at 309-310.



## Advocacy/Actions/Best Practices: Building a Cultural Preservation Plan

*Steps to build permanency plans for Indigenous children that preserve their Indigenous culture(s):*

- 1. Identify cultural factors that need to be included in a child's plan of care (including specific steps or opportunities for a child to participate in cultural activities that maintain or establish their connection to their land and culture, such as language classes, gathering activities, spiritual or cultural celebrations, community dinners or sporting events, lahal and other activities);*
- 2. Identify community supports to maintain a child's connection with their Indigenous community and cultural heritage;*
- 3. Identify family or community members that could take care of the child on a temporary basis while a child protection matter is addressed to keep the child within their extended family or cultural community; or, on a permanent basis, if necessary;*
- 4. List family or community members that play an important role in the child's life (such as elders or extended family members), together with a proposal for how to maintain those relationships;*
- 5. Identify a network of people or supports to keep the child safe and ensure that they can grow to adulthood within their culture;*
- 6. Identify elders, cultural or spiritual supports from within the Indigenous community who can work with a child or family within a traditional wellness or healing model; and*
- 7. Identify alternative or traditional decision-making processes—including those based in Indigenous traditions—that the Indigenous community may wish to refer the matter to (for example, under s. 22 of the BC CFCSA or under Indigenous law directly).*



*The Federal Act imposes a positive duty to ensure that an Indigenous child remains connected to their culture and cultural community, not merely as a factor that must be considered amongst other factors in decision-making, but rather as a legal requirement.*

## 07. Protecting a Child's Indigenous Identity, Culture and Heritage

*The approach supported by WoW is to read provisions in the BC CFCSA and the Federal Act outlining cultural connections and preservation steps and standards as promises that society has made to Indigenous children.*

The approach supported by WoW is to read provisions in the BC CFCSA and the Federal Act outlining cultural connections and preservation steps and standards as promises that society has made to Indigenous children. Keeping a child culturally connected determines their well-being, health and safety over the course of their lives.

Where “legislation [is] enacted to protect vulnerable groups in society,” including children, the standard adopted by courts has been to view this legislation as remedial and to interpret the legislation so as to ensure that its purposes are achieved.<sup>94</sup>

*Child welfare legislation is remedial in nature: “A court should try to plot the course most likely to remedy parental inadequacies and bring about family reunion. The purpose of the Federal Act is not to tear families apart, but to heal them...”<sup>95</sup> When considering child welfare laws which protect an Indigenous child's Indigenous identity and connections, ask: How can this legislation be read and interpreted to achieve the goal of maintaining cultural preservation and connection for Indigenous children?*

The *Brown* and *First Nations Child and Family Caring Society* cases strongly support a remedial approach. The Federal Act should be read to ensure that children are protected through active efforts to prevent removal and to involve their Indigenous communities in their care. Indigenous laws and traditions should direct the care of Indigenous children.

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<sup>94</sup> *Sullivan, supra*, at 232 and 234, citing *Roberts v. Ontario*, (1994) 19 OR (3d) 387. For examples where courts have applied a remedial analysis to legislation or enactments involving Indigenous Peoples, see: *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85, at 143; and *Nowegijick v. The Queen*, [1983] 1 SCR 29. See also: *CFS Winnipeg v. D(KA)*, *supra*, at 27 and 33.

<sup>95</sup> *Winnipeg Child and Family Services (East) v. TSL*, 125 DLR. (4th) 255 [Winnipeg CFS v. TSL], at 27.



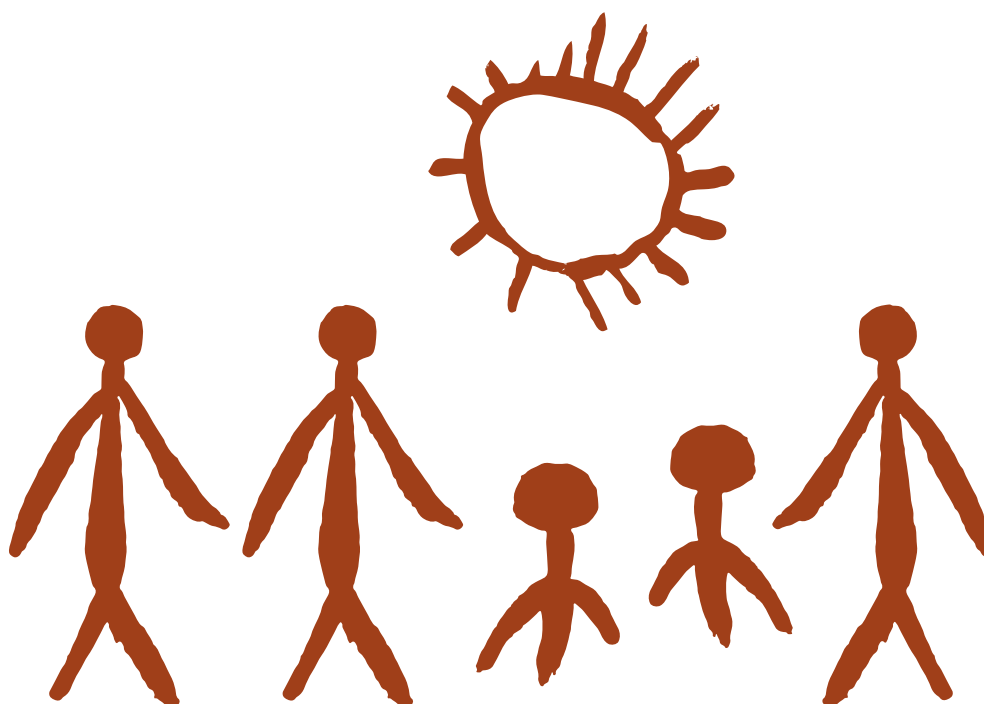


## BEST PRACTICES



- *Highlighting the remedial purposes of child welfare laws that involve Indigenous communities could breathe life into these provisions so that they are brought to bear in a real and meaningful way in judicial decisions about the lives of Indigenous children.*
- *Empowering Indigenous laws can create effective preventive and restorative solutions for Indigenous children and families.*
- *Effective legal problem-solving requires acknowledging and confronting biases and false assumptions about Indigenous cultures or parenting which result in Indigenous children being disproportionately removed from their families and communities.*

*Highlighting the remedial purposes of child welfare laws that involve Indigenous communities could breathe life into these provisions so that they are brought to bear in a real and meaningful way in judicial decisions about the lives of Indigenous children.*



*The Federal Act and the BC CFCSA contain provisions that focus on maintaining, preserving and protecting a child's Indigenous heritage and identity.*

## I. Provisions of the Federal Act and BC CFCSA Protecting a Child's Indigenous Heritage and Identity

Provisions of the Federal Act and BC CFCSA that focus on maintaining, preserving or protecting a child's Indigenous heritage and identity are set out below.

### Federal Act

<b>PREAMBLE</b>
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.
<b>CULTURAL CONTINUITY</b>
<p>(2) This Act is to be interpreted and administered in accordance with the principle of cultural continuity as reflected in the following concepts:</p> <p>(a) cultural continuity is essential to the well-being of a child, a family and an Indigenous group, community or people;</p> <p>(b) the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity;</p> <p>(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;</p> <p>(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</p> <p>(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.</p>
<b>BEST INTERESTS OF THE INDIGENOUS CHILD</b>
<p>Primary consideration</p> <p>10(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.</p>



<b>BEST INTERESTS OF THE INDIGENOUS CHILD, CON'T</b>
<p>Factors to be considered</p> <p>(a) the child's cultural, linguistic, religious and spiritual upbringing and heritage;</p> <p>(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;</p> <p>(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;</p>
<b>PROVISIONS OF CHILD AND FAMILY SERVICES</b>
<p>Effect of services</p> <p>11 Child and family services provided in relation to an Indigenous child are to be provided in a manner that</p> <p>(b) takes into account the child's culture;</p> <p>(c) allows the child to know his or her family origins;</p>
<b>PLACEMENT OF INDIGENOUS CHILD</b>
<p>Priority</p> <p>16(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:</p> <p>(a) with one of the child's parents;</p> <p>(b) with another adult member of the child's family;</p> <p>(c) with an adult who belongs to the same Indigenous group, community or people as the child;</p> <p>(d) with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or</p> <p>(e) with any other adult.</p> <p>Placement with or near other children</p> <p>16(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.</p> <p>Customs and traditions</p> <p>16(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.</p>

*Empowering  
Indigenous laws  
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and families.*

*Effective legal problem-solving requires acknowledging and confronting biases and false assumptions about Indigenous cultures or parenting which result in Indigenous children being disproportionately removed from their families and communities.*

## BC CFCSA

<b>S. 2 GUIDING PRINCIPLES—DECISIONS MADE ABOUT A CHILD SHOULD CONSIDER THAT</b>
<ul style="list-style-type: none"> <li>(b.1) Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;</li> <li>(e) kinship ties and a child’s attachment to the extended family should be preserved if possible;</li> <li>(f) Indigenous children are entitled to               <ul style="list-style-type: none"> <li>(i) learn about and practise their Indigenous traditions, customs and languages, and</li> <li>(ii) belong to their Indigenous communities;</li> </ul> </li> </ul>
<b>S. 3 SERVICE DELIVERY PRINCIPLES</b>
<ul style="list-style-type: none"> <li>(b) Indigenous people should be involved in the planning and delivery of services to Indigenous families and their children;</li> <li>(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;</li> <li>(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.</li> </ul>
<b>S. 4 BEST INTERESTS OF THE CHILD</b>
<ul style="list-style-type: none"> <li>(1) (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;</li> <li>(e) the child’s cultural, racial, linguistic and religious heritage;</li> <li>(f) the child’s views;</li> <li>(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:               <ul style="list-style-type: none"> <li>(a) the importance of the child being able to learn about and practise the child’s Indigenous traditions, customs and language;</li> <li>(b) the importance of the child belonging to the child’s Indigenous community.</li> </ul> </li> </ul>
<b>S. 20(1) FAMILY CONFERENCE</b>
<p>The purpose of a family conference is to enable and assist the family to develop a plan of care that will</p> <ul style="list-style-type: none"> <li>(d) take into account the child’s culture and community.</li> </ul>
<b>S. 35(1)(b) PRESENTATION HEARING</b>
<p>At a presentation hearing, the director must provide a report to court which includes “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”.</p> <p>BC CFCSA Regulation s. 7 (2)(h): An interim plan of care must set out “if the child is 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.”</p>



### **S. 42.1(5)(b) PROTECTION HEARING**

At a protection hearing, the director must provide a report to court which includes “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.”

BC CFCSA Regulation s. 8 requires that a child’s plan of care include information about:

- The involvement of the child’s First Nation or Indigenous community, in the case of a Treaty First Nation child, the involvement of the child’s Treaty First Nation and in the case of a Nisga’a child, the involvement of the Nisga’a Lisims Government, in the development of the plan of care, including its views, if any, on the plan;
- A description of how the director proposes to meet the child’s need for
  - Continuity of relationships, including ongoing contact with parents, relatives and friends,
  - Continuity of education and of health care, including care for any special health care needs the child may have, and
  - Continuity of cultural heritage, religion, language, and social and recreational activities; and
- For 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.

### **S. 70 RIGHTS OF CHILDREN IN CARE**

Children in care have the right to receive guidance and encouragement to maintain their cultural heritage. Indigenous children have the right to:

- (1.1.) (a) receive guidance, encouragement and support to learn about and practise their Indigenous traditions, customs and languages, and
- (b) belong to their Indigenous communities.

### **S. 71(3) OUT-OF-HOME LIVING ARRANGEMENTS**

If the child is an Indigenous child, the director must give priority to placing the child as follows:

- (a) with the child’s extended family or within the child’s Indigenous community;
- (b) with another Indigenous family, if the child cannot be safely placed under paragraph (a);
- (c) in accordance with subsection (2), if the child cannot be safely placed under paragraph (a) or (b) of this subsection.

### **S. 79 DISCLOSURE WITHOUT CONSENT**

A director may, without the consent of any person, disclose information obtained under this Act if the disclosure is

- (a.2) intended to facilitate or support, with respect to an Indigenous child,
- (i) the child learning and practising the child’s Indigenous traditions, customs or language, or
- (ii) the child belonging to the child’s Indigenous community.

*The goal in interpreting provisions of child welfare legislation designed to maintain an Indigenous child's identity and cultural heritage should be to choose from amongst the various possible options the one which best achieves permanency and safety in the lives of Indigenous children by keeping them within, or meaningfully connected to, their Indigenous communities, identity and heritage.*

## II. Considerations of Indigenous Cultural Heritage

The goal in interpreting provisions of child welfare legislation designed to maintain an Indigenous child's identity and cultural heritage should be to choose from amongst the various possible options the one which best achieves permanency and safety in the lives of Indigenous children by keeping them within, or meaningfully connected to, their Indigenous communities, identity and heritage.

Creating space for the participation of a child's Indigenous community can "[assist] the court in making a more informed and sensitive decision." Indigenous communities have "a deep seated collective ethic that extends to the children of the community and their well-being," and an Indigenous child's "cultural and psychological needs" can be addressed by their Indigenous community.<sup>96</sup>

Examples where Indigenous cultural requirements and connection have played a role in child welfare decisions include:

- *CED v. CLL*:<sup>97</sup> "[A] cultural plan of care was developed where the father and mother were members of different bands. Part of the plan included researching different benefits associated with the child's membership in their respective bands and the requirement for the father to arrange an Indigenous naming ceremony for the child."<sup>98</sup>
- *V(E) v. B(R)*:<sup>99</sup> The Indigenous grandparents' ability to keep a child culturally connected to ensure the child's cultural needs could be met was a determining factor in deciding to place the child with them.
- *S(M) v. S(G)*:<sup>100</sup> The children's paternal grandparents were Indigenous and the mother was not. The Court ordered the mother and the grandparents to be joint guardians of the children as a way of preserving the children's Indigenous cultural connections.

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<sup>96</sup> *L(MSD)*, *supra*, at 22 and 26.

<sup>97</sup> 2014 BCPC 34.

<sup>98</sup> *Continuing Legal Education Society of BC. "British Columbia Family Practice Manual" (1 April 2020).*

<sup>99</sup> 2019 BCPC 205.

<sup>100</sup> 2013 BCSC 1744.

- *In the Marriage of B and R*,<sup>101</sup> the Court said that the history of past removals of Indigenous children from their families and environment had to be considered in family law cases. Rights of Indigenous children are beyond the right to know one’s culture—it also imposes a legal requirement to acknowledge the impact of being raised in a non-Indigenous environment, which does not reinforce their identity, so contributes to confusion of that identity and profound alienation.
- *British Columbia (Director of Child, Family and Community Service) v. GLJ*:<sup>102</sup> The Indigenous identity of the children, and their ability to maintain their cultural connection, was a factor in determining their best interests. The Court found that a CCO would not be in the best interests of the children, in part because it would threaten their Indigenous cultural connections.
- *British Columbia (Child, Family and Community Service) v. MJK*:<sup>103</sup> The parents were from different communities, and the child had been placed with relatives of her mother. Opportunities for the child to actively engage with members of her Indigenous Nation and extended family, and the ability to incorporate language and culture into her daily life, were determinative factors in considering her best interests. To determine the best interests of the Indigenous child, the Court considered Indigenous family attachment styles, as directed by the Federal Act,<sup>104</sup> and noted:
  - “Classic attachment theory, which posits a primary attachment between an infant and a single caregiver (usually the mother) and lesser attachments to members of the child’s nuclear family, is now challenged by reputable scholars ... as an ethnocentric European model which does not reflect the values and practices of other human cultures.”
  - “[I]n many human cultures, child care is shared among members of the community, including but not limited to extended family, and that the child’s attachments in those cultures are much more diffuse. They say that there is no evidence to support the inference that the European model of the nuclear family

*Indigenous cultural requirements and connection have played a role in child welfare decisions.*

101 (1995) 19 Fam LR 594.

102 2013 BCPC 68.

103 2020 BCPC 39 [MJK].

104 Choate, P, et al. “Rethinking *Racine v Woods* from a Decolonizing Perspective: Challenging the Applicability of Attachment Theory to Indigenous Families Involved with Child Protection” (2019) 34:1 Can JL & Soc 55.

is superior to those of other cultures, and they urge judges to facilitate connections between indigenous children in care and the broader community to which they belong.”<sup>105</sup>

*The Court discussed at length the importance of Indigenous community and culture, finding that the child was tied by blood and culture to her extended family and members of her communities.*



### **Case Study:** ***AL et al v. DK et al***

*AL et al v. DK et al*<sup>106</sup>—Involved a family law custody dispute rather than a BC CFCSA matter. Both family members vying for custody were members of the same Indigenous Nation, connected to the Namgis and Tsawataineuk communities. Justice Owen-Flood discussed at length the importance of Indigenous community and culture, finding that the child was tied by blood and culture to her extended family and members of her communities: “These people constitute the epicentre of [the child’s] familial and cultural identity. In short, they are her roots.” Comments about the nature and benefits of Indigenous cultural connection and involvement included:

- *The need to preserve and nurture “any ties similar to love and affection that exist between the child and the traditional lands of his or her community”;*
- *Recognition of the importance of the “opportunity to be instructed in the language of one’s people”;*
- *Discussion of cultural education and training as including: “The continuity of an Aboriginal people’s culturally integral practices, traditions and customs is to be ensured by teaching”;*
- *A description of potlatching as “a form of moral education and lifeskills training” which “transmits culture across generations.”*

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<sup>105</sup> *MJK, supra*, at 57.

<sup>106</sup> 2000 BCSC 480.





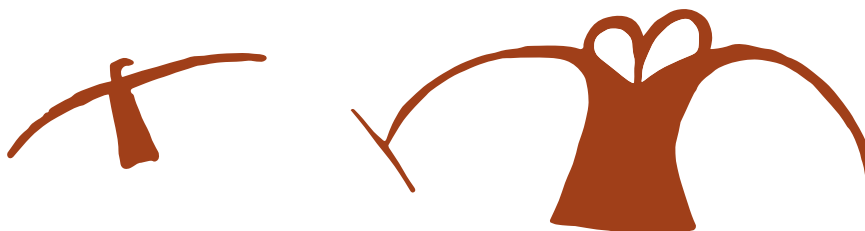
## Advocacy/Actions

*An Indigenous Community Could Present Their Own Indigenous Cultural Preservation Plan Which Talks About:*

- *Ways to help a family to heal the problems that have led to the child protection concern.*
- *Family or community members that could take care of the child to keep the child within their family, community, or Nation when they cannot stay with their parent(s).*
- *People who could mentor the parents where Indigenous parents cannot safely parent on their own, but could if they had support.*
- *Ideas to care for children that reflect Indigenous traditional parenting or other ways of caring for children across several families or homes.*
- *How a child can participate in cultural activities while in care, such as language classes, gathering activities, spiritual or cultural celebrations, community dinners or sporting events.*
- *Family or community members that play an important role in the child's life (such as elders or extended family members), and a plan for how to protect those relationships.*
- *Elders, cultural or spiritual supports who can work with the child or family on traditional wellness or healing.*
- *Alternative or traditional decision-making processes that the Indigenous community wants to use to plan for the child or to address protection concerns.*



*Cultural experts could be elders, cultural leaders or others recognized by their Indigenous Nation and Peoples as knowledgeable in their Peoples' customs and practices regarding child rearing.*



*Indigenous cultural experts could provide direction and guidance where the Federal Act, BC CFCSA or Indigenous law requires that Indigenous laws or perspectives be taken into account, including for how to best preserve a child's cultural connections or explore options to heal families and keep children safe that are rooted in culture.*

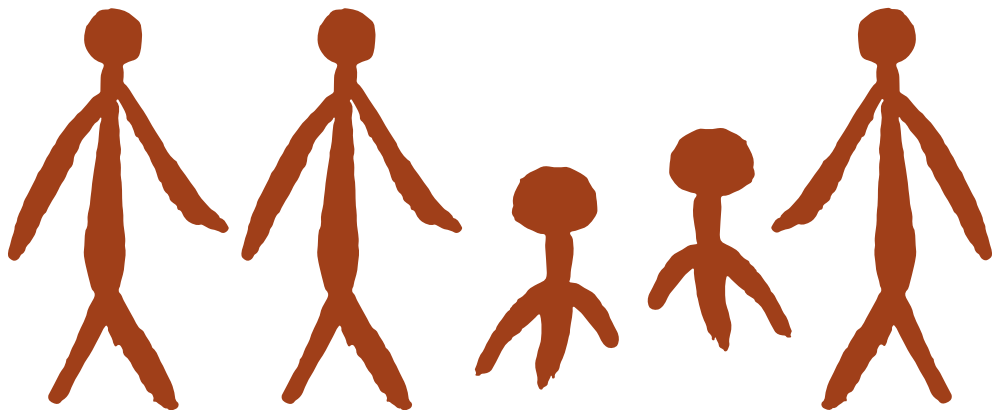
### III. Indigenous Cultural Experts

Under the ICWA, in the United States, Indigenous Tribes appoint experts to provide information in child welfare proceedings to ensure that information is considered about the traditions, community standards and norms for assessing protection concerns and also identifying a range of culturally acceptable options in planning for Tribal children. The ICWA requires an expert opinion before parental rights are terminated or a foster placement is made.<sup>107</sup> A similar expertise may be helpful in the Canadian child welfare context.



#### Case Study: Indigenous Cultural Expert

*In In re NL,<sup>108</sup> the Supreme Court of Oklahoma said that the purpose of these reports was to “provide the Court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias.” The Court held that the experts contemplated under the ICWA include people who could render “an opinion on whether an Indian child is suffering emotional or physical harm because of the actions or inactions of the parents or caretaker. Indian family structure and child rearing customs or practices differ and the expert must be qualified with this knowledge. Also, the remedial active efforts to cure the behavior of the parents or caretaker may be different due to cultural differences.”<sup>109</sup>*



<sup>107</sup> 25 USC § 1912 (e) and (f).

<sup>108</sup> 754 P. 2d 863, 867 (Okla. 1988).

<sup>109</sup> Native American Rights Fund, *supra*.



## Advocacy

*Indigenous cultural experts, appointed by Indigenous Peoples, could be useful in ensuring that the national standards are met. Cultural experts can help to bring the Indigenous perspective, including about safety assessments, community standards and placement options before the court. Indigenous cultural experts could help the court, and others involved in decision-making, to understand the Indigenous community's perspective on decisions involving their child and family members, and explain circumstances or different options to assess or ensure safety. Cultural experts could be elders, cultural leaders or others recognized by their Indigenous Nation and Peoples as knowledgeable in their Peoples' customs and practices regarding child rearing.*



*Indigenous cultural experts could talk about their knowledge of social and cultural standards and child rearing practices, healing methods, the importance of cultural connection and connection to territory or other things important to consider from within that Indigenous cultural tradition.*

Indigenous cultural experts could provide direction and guidance where the Federal Act, BC CFCSA or Indigenous law requires that Indigenous laws or perspectives be taken into account, including for how to best preserve a child's cultural connections or explore options to heal families and keep children safe that are rooted in culture.

Indigenous cultural experts could talk about their knowledge of social and cultural standards and child rearing practices, healing methods, the importance of cultural connection and connection to territory or other things important to consider from within that Indigenous cultural tradition.

## Indigenous Laws

*Indigenous Nations may wish to articulate their own cultural standards for assessing parenting, including through a consideration of cultural supports and resources available to support parenting.*



*Indigenous communities can identify experts within their traditions to ensure that the national standards are met.*

## Indigenous Laws

*Indigenous communities can identify experts within their traditions to ensure that the national standards are met, including in the following areas:<sup>110</sup>*



- *Indigenous laws (written and articulated now; carried forward over generations, including in their current expression) for the care of children;*
- *Clan/social group relationships and extended family relationships in the child's Indigenous community, including how these people should be involved in helping to plan for the child's care;*
- *Appropriate alternative caregivers for the child; relationships that need to be respected and maintained in caring for the child;*
- *Traditional and current practices for caring for and raising children within the child's Indigenous community, including potential alternative caregivers;*
- *Relationships with territory and how these should be maintained;*
- *Traditional discipline within the child's Indigenous community;*
- *Spiritual practices and cultural traditions within the child's Indigenous community, and how the child can be involved in these;*
- *Traditional healing of the child's Indigenous community;*
- *Importance of connection to land, life upon the land, and the broader Indigenous community;*
- *Reflecting on the impact within the family or Indigenous community on the impacts of IRS, inter-generational trauma and forced assimilation on parenting in a Nation—community—family context for the family involved; and*
- *Attachment or relationship models within the Indigenous community.*

<sup>110</sup> This list adapted from: Tribal Information Exchange. "Qualified expert witness: A handbook for Indian child welfare social workers", at 8 [available online: [https://tribalinformationexchange.org/files/users/ldyer/QUALIFIEDEXPERTWITNESS\(2\).pdf](https://tribalinformationexchange.org/files/users/ldyer/QUALIFIEDEXPERTWITNESS(2).pdf)].

## 08. Addressing Biases Against Indigenous Parents and Indigenous Parenting

One of the strongest messages of the TRC is the need for a process of truth-telling about the impact of law, policy and practice on Indigenous Peoples. The drastic over-representation of Indigenous children in care reflects biases against Indigenous Peoples and parenting. The Federal Act mandates an approach that counteracts biases against Indigenous Peoples and parenting.

*False assumptions about Indigenous culture and identity, or the inability of Indigenous Peoples to parent or Indigenous communities to care for their children, are reflected in the inordinately high number of Indigenous children involved in the child welfare system.*

### I. Identifying Biases and False Assumptions

False assumptions about Indigenous culture and identity, or the inability of Indigenous Peoples to parent or Indigenous communities to care for their children, are reflected in the inordinately high number of Indigenous children involved in the child welfare system. Common examples include:

- Children or their families may be found to not be “Indigenous enough”—because of a mixed heritage or a perceived disconnect with their cultural roots—and so not entitled to benefit from provisions of child welfare laws that protect Indigenous culture or identity;
- Responsibility for care of Indigenous children in Indigenous cultures is often distributed or shared across households. The failure to recognize the role of extended families or community members in Indigenous parenting can lead to a finding that a child has been abandoned or neglected if left in temporary or distributed care;
- Indigenous parenting styles allow for a greater degree of autonomy or exploration. Discipline that is less obvious—such as teaching or storytelling—may be judged “too permissive” or as poor or neglectful parenting;<sup>111</sup>

<sup>111</sup> Bull, S. “The Special Case of the Native Child” (1989) Vol 4 The Advocate. See also the trial judgment in *NH and DH v. HM, MH and the Director of Child, Family and Community Service*, [1988] BCJ No. 221, where the grandfather’s parenting seemed to be questioned because he believed in allowing children to learn on their own which the Court called a “high regard” for his child’s independence.

*Indigenous communities should be involved in assessing child protection concerns in a culturally appropriate way, and can identify where protection concerns stem from cultural differences that do not indicate that a child is in need of protection.*

- Real or perceived disabilities of Indigenous children or parents (such as fetal alcohol syndrome (FAS)/fetal alcohol exposure (FAE)) may be used to disqualify Indigenous family or community members from caring for a child; or
- Some child welfare concerns may reflect socio-economic conditions such as overcrowding in a home, lack of seasonally appropriate clothes or not participating in school or community activities.

Indigenous communities should be involved in assessing child protection concerns in a culturally appropriate way, and can identify where protection concerns stem from cultural differences that do not indicate that a child is in need of protection.

### **A. Questioning a Child's Indigenous Identity**

Questioning whether a child (or their family) is truly “Indigenous” and, therefore, entitled to have their Indigenous identity or cultural heritage protected can be a way of avoiding child welfare laws aimed at preserving Indigenous cultural connections. Where a child or family is found to be “not Indigenous enough,” based on a racial/blood quantum analysis or an assessment of cultural authenticity, it is less likely for that child’s Indigenous cultural heritage to be protected or for efforts to be made to involve their Indigenous community.

### **Mistakenly Applying a Blood Quantum Analysis**

Examples where courts have found a child to be “not Indigenous enough” include:

- *D(MB) v. Saskatchewan (Minister of Social Services)*<sup>112</sup>—where a child’s Indigenous heritage was minimized, as the Court concluded that the child’s racial identity is “unclear and clearly mixed”: “Her mother is Aboriginal, her father was black and apparently was partially of East Indian origin. ...She has dark skin, a broad nose and white palms and footpads.”<sup>113</sup>

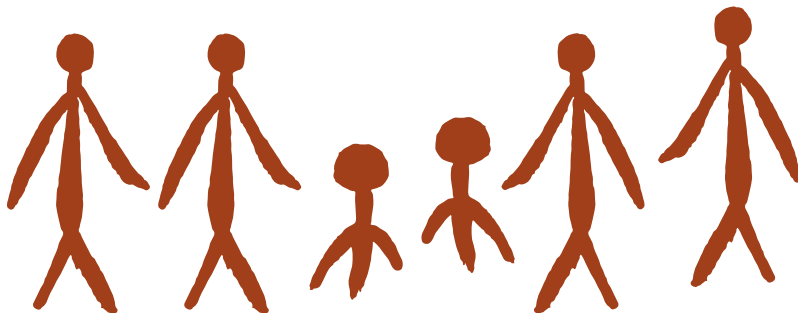
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112 2001 SKQB 513 [D(MB)]. See also: A [...] *supra*, at 53, where the Court observed of a child who was Indigenous and Chinese that “all of the children’s rights are important”.

113 *D(MB)*, *supra*, at 3, 71, 77 and 83. For a contrary approach see *MS v. GS*, 2013 BCSC 1744, where a non-Indigenous mother and Indigenous grandparents each applied for custody. The Court found the grandparents could “best educate the children about their Aboriginal identity” and were granted shared custody: “The children have one-eighth Aboriginal blood, which is sufficient to provide them with Indian status and the

- *AJ v. SJM*<sup>114</sup>—where the Court delved into the father’s Indigenous identity and, despite that the father had Indian status, the Court found he “is no more than approximately one-sixteenth to one-eighth Squamish Indian in terms of his genetic make-up”. This investigation ultimately led the Court to conclude that to acknowledge the child’s Indigenous identity would prejudice the child’s other identities: “[T]his Court cannot conclude that [the child’s] other cultural heritages, other than Native Indian, have no importance. [The child] has a right to know and learn about all of the distinct cultures underlying his genetic makeup, without fostering one to the exclusion of the others.”
- *Tearoe v. Sawan*<sup>115</sup>—where the BC Court of Appeal refused the Indigenous birth mother’s application to revoke an adoption and diminished the importance of the child’s Indigenous heritage, observing that the child is “one-quarter native Indian” and seemed reluctant to allow that 1/4 to prejudice the child’s 3/4 non-Indigenous heritage.
- *Wesley v. CFCS*<sup>116</sup>—where the BC Supreme Court noted that the director had considered the children’s Indigenous heritage as “that the children were Métis, having a white mother and Aboriginal father,” so were placed “in a Métis foster home.” This assessment is troubling because Métis are an Indigenous Peoples with historical roots and a distinct culture and language. The fact that a child (particularly in the context of British Columbia where many Indigenous Nations recognize a matrilineal or bi-lineal heritage and recognize full citizenship to their children, regardless of mixed parentage) has one parent who is non-Indigenous does not mean that the child is Métis.

*The Federal Act clearly ends speculation about whether a child is Indigenous (First Nation, Inuk or Métis) or not by adopting a definition based in s. 35(1) of the Constitution Act, 1982.*




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*resulting benefits. I agree that it is important for these children to be educated and counselled on their Aboriginal status.”*

114 1994 CanLII 264 (BCSC), at 46.

115 1993 CanLII 2581 [Tearoe], at 24.

116 2006 BCSC 1666, at 14.



*Adopting a frozen view of Indigenous identity or cultures can lead to an impoverished analysis that overlooks the lived political and social experience of Indigenous children and can be used to diminish the importance of maintaining a child's Indigenous heritage.*

## BEST PRACTICES

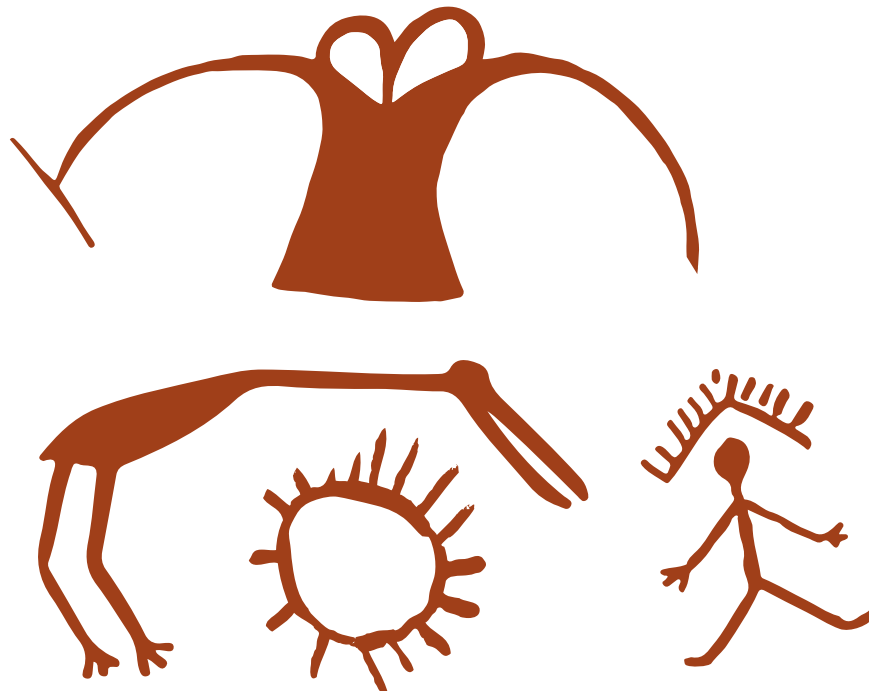


*A blood quantum definition of Indigenous identity should be rejected. That a child has a non-Indigenous parent or heritage does not make them “less Indigenous”. Where a child is of mixed parentage, to accord the Indigenous identity of that child less weight, and so overlook the ways citizenship and belonging form part of Indigenous cultural identity, should be avoided.*

The Federal Act clearly ends speculation about whether a child is Indigenous (First Nation, Inuk or Métis) or not by adopting a definition based in s. 35(1) of the *Constitution Act, 1982*.

### *Analyzing Indigenous Identity as Inauthentic or Frozen*

Adopting a frozen view of Indigenous identity or cultures can lead to an impoverished analysis that overlooks the lived political and social experience of Indigenous children and can be used to diminish the importance of maintaining a child's Indigenous heritage. That Indigenous families live in an urban setting, or do not live a “traditional” lifestyle, have been used to support arguments that there is no “cultural connection”—and hence no cultural loss—in removing children from those families.







## Case Studies: Assessing Indigenous Identity as Frozen in Time

Examples include:

- *Saskatchewan (Social Services) v. LB*<sup>117</sup>—The Court decided the grandmother could not preserve the child’s Indigenous culture, as they did not find her connected to it. The “grandmother did not know what cultural activity she was last involved in” and testified that “culture means to be a family/to sit around with one another.”
- *Children’s Aid Society of Halifax v. H*<sup>118</sup>—The relevance of Indigenous culture was diminished because of the parents’ lack of connection or knowledge: “The impact of religious and cultural heritage is not as profound when ... reliance by the parents on those heritages is not occurring.”
- *CJK v. Children’s Aid Society of Metropolitan Toronto*<sup>119</sup>—The Court minimized consideration of an Indigenous grandmother’s ability to maintain the child’s connection to Indigenous cultural heritage: “there is very little in [her] life ... which recognizes or maintains a native tradition, beyond her knowing some words of her native tongue.” *Tearoe*<sup>120</sup>—The judge described the Indigenous mother’s connection to her culture as more illusory or hopeful than real, noting she “has not lived on the reserve for approximately six years,” that “[t]here is little, if any, evidence of any contact by her with members of her family,” and that she did not speak

*That Indigenous families live in an urban setting, or do not live a “traditional” lifestyle, have been used to support arguments that there is no “cultural connection”—and hence no cultural loss—in removing children from those families.*

117 2009 SKQB 46, at 60. See also: A.[...], *supra*, at 45; *Family and Children’s Services of Waterloo Region v. BY*, 1988 CanLII 4332 (ONCJ) where the parents themselves had given the children no exposure to their Indigenous culture and had, in fact, severed ties with their cultural heritage and traditions.

118 2006 NSSC 1, at 36 and 37. The facts in this case showed parents who were disconnected from their Indigenous heritage. The mother was told she was Indigenous on her father’s side, but was uncertain about this connection. As a child she lived with her grandmother in the United States near a reservation where she attended school and visited. She does not have Indigenous status and has not applied for it. As an adult, she is not associated with an Indigenous community or culture. The father, likewise, has no Indigenous status, believes he has MicMac and/or Apache roots, and has not participated in Indigenous culture.

119 [1989] 4 CNLR 75, at 81.

120 *Tearoe*, *supra*, at 20-21.

*The Supreme Court of Canada has explicitly rejected a “frozen rights” approach to Indigenous or treaty rights, arguing that the constitutional recognition of Indigenous and treaty rights must be “interpreted flexibly so as to permit their evolution over time.”*

*Cree. The mother’s cultural disconnection and off-reserve residency was used to minimize the weight to be given the child’s Indigenous culture and identity.*

- *L(MSD)<sup>121</sup>—The child and family’s disconnection from the Indigenous community was used to defeat the participation of the Band. The fact that the child was raised outside the community (a situation which the Band sought to remedy by its intervention) was used to deny the Band legal standing in the court proceedings.*

The Supreme Court of Canada has explicitly rejected a “frozen rights” approach to Indigenous or treaty rights,<sup>122</sup> arguing that the constitutional recognition of Indigenous and treaty rights must be “interpreted flexibly so as to permit their evolution over time.” This flexibility ensures effective protection over time. The same flexibility should be incorporated into the consideration of Indigenous culture and heritage under child welfare laws.

### Advocacy/Best Practices

*Increasing numbers of Indigenous Peoples live in urban environments. This does not mean they are less Indigenous, rather that they translate and transport Indigenous culture to urban environments.<sup>123</sup> Colonization through IRS and the child welfare systems forcibly removed and disconnected Indigenous Peoples from their cultures and languages. The court or social work team should not substitute its own view of what real or authentic “Indigenous culture” is for that presented by Indigenous families or communities. False assumptions about what it means to be truly or authentically “Indigenous” should not be allowed to defeat the purposes of the child welfare legislation meant to protect Indigenous children and their cultural connections and heritage.*



<sup>121</sup> *L(MSD), Re, 2008 SKCA 48, [L(MSD)], at 29.*

<sup>122</sup> *R v. Sparrow, [1990] 1 SCR 1075, at 1093; Van der Peet, supra, at 64; R v. Sundown [1999] 1 SCR 393, at 32; Simon v. The Queen, [1985] 2 SCR 387.*

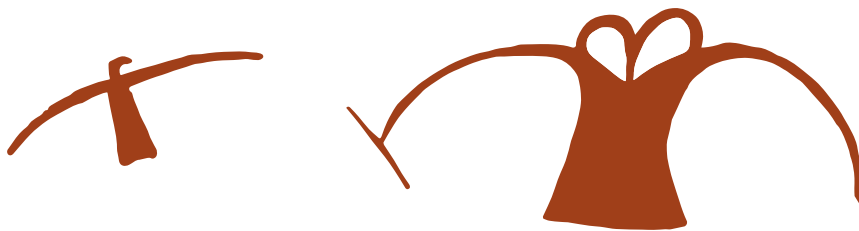
<sup>123</sup> *The urban community is made up of a diverse number of Indigenous cultures and Nations and may be concentrated in areas where low-income families live. Programs and services may be concentrated in these areas, as well as a rich and vibrant cultural*

In the wake of the disruptions that have been caused by colonialism, for some Indigenous Peoples, it may not be possible to re-establish connections to their home communities.<sup>124</sup> This fact should not be used to excuse no effort, or insufficient effort, to investigate what connections to a family's home community or culture might exist or be capable of repair. The cultural disconnect itself may create and enforce the reasons families become involved in the child welfare system and are unable to independently address the challenges that they face in keeping their children safe. Indigenous parents raised within the child welfare system and dislocated from their home communities face a catch-22: They may not know, or be connected to, their Indigenous heritage, and it is that very lack of connection that leads them to further involvement in the child welfare system as parents.

*In the wake of the disruptions that have been caused by colonialism, for some Indigenous Peoples, it may not be possible to re-establish connections to their home communities.*

## BEST PRACTICES

*The child welfare system should not further penalize Indigenous Peoples for the impacts of colonialism (such as loss of language, culture or increased urbanization). Where a parent was raised in the child welfare system or isolated from their community through IRS or other reasons, or a child was born and partially raised away from their home community, active efforts may be required to build connections to an Indigenous community to establish permanency and stability for a child. The absence of connection to an Indigenous community, and lack of community support, may be a key factor leading to protection concerns.*



community. For example, according to a *City of Vancouver Area Profile (2012)* [available online: <http://vancouver.ca/files/cov/profile-dtes-local-area-2012.pdf>], in Vancouver, Indigenous Peoples comprise 2% of the overall population, and 10% of Vancouver's Indigenous population reside in the Downtown Eastside. Within geographic proximity of this area, a myriad of programs and services are offered, as well as the Vancouver Aboriginal Friendship Centre, which houses cultural programming offered by various Indigenous Nations.

<sup>124</sup> See for example: Brant Castellano, M. "Contemporary Family Trends, Aboriginal Family Trends: Extended Families, Nuclear Families, Families of the Heart" (2002) *The Vanier Institute of the Family, Occasional Papers*, at 1.

*The Federal Act clearly directs that, to the extent it is in a child's best interest, no child should be apprehended based solely on their socio-economic conditions (s. 15).*

## BEST PRACTICES



*Off-reserve Indigenous parents and children live in circumstances which may bring them into contact with child welfare agencies in significantly greater numbers than non-Indigenous families. The urban Indigenous experience, though different from the on-reserve experience, should not be assumed to be devoid of culture and tradition.*

### Indigenous Laws: Addressing Inter-generational Cultural Alienation



*Indigenous laws could talk about ways to address inter-generational cultural alienation experienced by their members as a result of inter-generational involvement in IRS or the child welfare system.*

## B. Poverty

The Federal Act clearly directs that, to the extent it is in a child's best interest, no child should be apprehended based solely on their socio-economic conditions (s. 15).

*...Indigenous children face a disproportionate risk of child abuse and neglect, ...maltreatment by caregivers and by other individuals in positions of day-to-day power over the child. Additionally, there are many indications that most systems to prevent and address such abuse are failing Indigenous children as they focus primarily on mediating risk at the level of the family and fail to address the societal factors (poverty, poor housing, discrimination, dislocation, etc.) which have the most significant impact on child maltreatment experienced by Indigenous children.<sup>125</sup>*

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<sup>125</sup> First Nations Child and Family Caring Society of Canada. "Indigenous Children: Rights and Reality. A Report on Indigenous Children and the U.N. Convention on the Rights of the Child" (August 2006) Toronto: First Nations Child and Family Caring Society of Canada, at 68.

“A lack of material or social advantage does not ground the need for a finding that a child is in need of protection.”<sup>126</sup> Courts should carefully consider where poverty might be at the root of child protection concerns. Indigenous Peoples in Canada experience the highest levels of poverty: “...1 in 4 Indigenous peoples (Aboriginal, Métis and Inuit) or 25% are living in poverty and 4 in 10 or 40% of Canada’s Indigenous children live in poverty.”<sup>127</sup> Indigenous women were more likely “to have more children, to be a lone parent and to be living with either immediate or extended family members when compared to non-Aboriginal women,” and further “the average incomes of Aboriginal women were about 77% of the average incomes of non-Aboriginal women”.<sup>128</sup> Though poverty may not be overtly a factor in a finding that a child needs protection, an examination of reasoning can reveal that it is.

Judge R. Smith, in *Director of Family and Child Services v. MB*, identified poverty (as opposed to bad parenting) as a factor in a contentious situation where a mother was heating her home with her oven because her natural gas was not connected, noting that, while “[u]nquestionably the mother needed to be taught that there were more proper interim measures that could be taken to heat the trailer,” nonetheless, caution must be taken “not to overemphasize protection concerns that are primarily rooted in poverty, otherwise a significant portion of our population would be deemed to be in need of protection.”<sup>129</sup>

Factors related to poverty can be listed as disincentives to placing a child within their Indigenous community. For example, housing shortages, “a lot of movement on and off the reserve,”<sup>130</sup> and a relative lack of educational or social opportunities are all factors related to poverty or socio-economic conditions, and making placement decisions based on these factors violates the national standards.

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126 *Re Aubichon* (1970), 4 RFL 39 (Sask QB).

127 Canadian Poverty Institute. “Poverty in Canada” [available online: <https://www.povertyinstitute.ca/poverty-canada>].

128 Aboriginal Affairs and Northern Development Canada. “Aboriginal Women in Canada: A Statistical Profile from the 2006 Census” (2012) Her Majesty the Queen in Right of Canada, represented by the Minister of Aboriginal Affairs and Northern Development, at II & III.

129 *Director of Family and Child Services v. MB*, 2003 BCPC 0429, at 39.

130 *Children’s Aid Society of Owen Sound and Grey County v. P(C)*, 2004 ONCJ 453 [P(C)], at 40.

*The fact that a child (or their parent or family member) is disabled or has special needs should call for more supports to be offered for their family and community to care for them, not be used as an indicator that the child cannot be placed within their family or community.*

## BEST PRACTICES



*Factors that may reflect poverty rather than neglect or not caring include: overcrowding; a child not having their own room or bed; a child not having seasonally appropriate clothing; a family not having fresh or nutritious food available; or parents or extended family not calling or attending at access visits regularly where transportation or telephone access is limited due to financial concerns.*

### C. Disabling Indigenous Care

The Federal Act's guarantee of substantive equality mandates an awareness of how supports need to prevent/counteract discrimination and to achieve substantive equality with the goal of keeping children with their Indigenous families, Nation(s) and communities. The fact that a child (or their parent or family member) is disabled or has special needs should call for more supports to be offered for their family and community to care for them, not be used as an indicator that the child cannot be placed within their family or community.

A parent or child's disabilities often ground a finding that parents or caregivers cannot care for a child and that removing them from their Indigenous family and community is in the child's best interests. The Federal Act, through its guarantee of substantive equality to Indigenous children and families receiving child welfare services, prohibits discrimination based on disability of the parent or child (s. 9(3)(a) and (c)).

Often children are removed from, or not placed with, Indigenous caregivers due to a disability (of children and/or their parent or family member), based on the argument that a child needs care beyond the ability of their parent, family or community. This dual discrimination—disability intertwined with Indigeneity—often prevents a child from being placed within their Indigenous family or community.





## Case Studies: Indigenous Caregivers Appear to Have Been Refused Based on Perceived Disabilities

Examples include:

- *In the Matter of the Children NP and BP*<sup>131</sup>—Custody of the children was granted to a non-Indigenous couple, rather than their Indigenous aunt and uncle, because the Court “afforded significant weight to the “greater understanding” of the non-First Nations couple of the special educational needs of children suffering learning disorders. Comparatively little consideration was accorded to the presumably far greater understanding of the First Nations aunt and uncle of the special cultural needs of First Nations children.”
- *RRE (Re)*<sup>132</sup>—An Indigenous grandmother sought to have her grandson, with FAS, placed in her care. The Court was troubled by the grandmother’s suggestion that she had “finished” raising her eldest grandchild, a 19-year-old woman with FASD because it showed “a lack of understanding of her role as a parent in a vulnerable child’s life” and “a disturbing lack of understanding of [her] limitations as an adult living with FASD.”<sup>133</sup>
- *RSB (Re)*<sup>134</sup>—The Court found the child with FAS needed parents who could “manage and guide him,” not the Indigenous community that had little resources to assist and which the Court characterized as an “amorphous group of well-intentioned members of the extended family.”<sup>135</sup>

*Parent or child disabilities should not be used to find that they cannot be cared for within their Indigenous community, nor to deny them a lifelong identity and sense of belonging.*

131 Lynch, P. “Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia”, (2001) 23 Sydney L Rev 501, at 524, citing *In the matter of the children NP and BP: NP and SM v. the Director of Child, Family and Community Service (BCSC Prince George Registry 03998, 1999)*.

132 2011 SKQB 282.

133 *RRE (Re)*, *supra*, at 54-55.

134 [1994] 4 CNLR 191.

135 *RSB (Re)*, *supra*, as cited in *Smith*, *supra*, at note 160.

*Indigenous laws could set out standards or processes for helping to protect and guide children with disabilities.*

## Advocacy/Best Practices: Parent or Child Disabilities

*Parent or child disabilities should not be used to find that they cannot be cared for within their Indigenous community, nor to deny them a lifelong identity and sense of belonging. Another way this discrimination based on disability appears is in the classification of a child's needs in such a way that extended family and community members are disqualified as potential caregivers because the child's "needs" are classified as too severe and requiring specialized care.*

- *Decisions about where to place a child with a disability must include a full consideration of the range of individual, family and community support available within Indigenous communities that can provide safety and connectedness for the child.*
- *Before determining if a child needs to be removed due to a protection concern, in the case of a parent with confirmed or suspected fetal alcohol spectrum disorder (FASD) or other disability, the child's Indigenous community should be actively involved in an exploration about whether there are support or supervision options which would allow the family to remain together. Support agreements between the director and Indigenous community could help families who need additional support to remain together because of parent or child disabilities.*



## Indigenous Laws: Helping to Protect and Guide Children with Disabilities

*Indigenous laws could set out standards or processes for helping to protect and guide children with disabilities. This could include setting out protective features which arise from explicitly recognized care within the Indigenous community.*







## ***D. Past Challenges (Including BC CFCSA Involvement) Used to Invalidate Care***

The Federal Act's lengthy Preamble sets out a trauma-informed approach, intended, in part, to counteract the inter-generational and ongoing impacts of Canadian law and policy. Achieving this goal in the Federal Act requires not allowing a parent, family or community member's history to automatically (and often unfairly) disqualify them from caring for their children.

There are numerous cases that suggest that there is little parents or grandparents can do to repair or overcome the negative implications of their history of involvement within the child welfare system.

*The Federal Act's lengthy Preamble sets out a trauma-informed approach, intended, in part, to counteract the inter-generational and ongoing impacts of Canadian law and policy.*



*There are numerous cases that suggest that there is little parents or grandparents can do to repair or overcome the negative implications of their history of involvement within the child welfare system.*



## Case Studies: How Past Challenges Have Been Used to Find Indigenous Family Members Unfit to Care for a Child

*Examples include:*

- *DCW v. Alberta (Child, Youth and Family Enhancement, Director)*<sup>136</sup>—The Court noted that a grandmother had all of her children removed because of her “severe and long-term addiction issues” and “domestic violence.” The fact that the grandmother had stopped actively using and was now employed did not displace the implications of her personal history.
- *D(MB)*<sup>137</sup>—The Court was concerned about a proposal to return a child to her Indigenous family: “Social services wants to return her to her own culture which they say is Aboriginal. She would be returned to the same extended family in which she was exposed to drugs in utero.”
- *Children’s Aid Society of Sudbury and Manitoulin v. B(J)*<sup>138</sup>—An Indigenous grandmother’s application for custody of her grandchildren, who were subject to child protection proceedings, was denied due to her past involvement with child welfare services, criminal record and history of substance abuse. On appeal, the Band supported the grandmother and highlighted its communal responsibility to its members and “argued that the agency’s narrow-mindedness causes it to focus on [the grandmother’s] failures rather than on her gains, highlighted her life-altering changes and underscored her education.”<sup>139</sup> The Band argued that the grandmother “struggled and fought hard to overcome her unhealthy lifestyle and has managed to turn her life around and is definitely ready to take ownership and the responsibility of parenting her grandchildren.”<sup>140</sup>

<sup>136</sup> *DCW, supra*, at 35. See also: *RRE (Re), supra*, at 47, the Court observed that: “[T] here have been multi-generational issues in [the grandmother’s] home which make her an unacceptable placement.”

<sup>137</sup> *D(MB), supra*, at 5; see also: *D(MB) v. Saskatchewan (Minister of Social Services)*, 2002 SKQB 308.

<sup>138</sup> [*CAS Sudbury and Manitoulin*], 2007 ONCJ 137.

<sup>139</sup> *CAS Sudbury and Manitoulin, supra*, at 6.

<sup>140</sup> *CAS Sudbury and Manitoulin, supra*, at 2.



*Even where Indigenous parents have stopped substance abuse, or removed themselves from dangerous situations, their histories are often used to deny them the opportunity to care for their children. If a history of substance abuse exists, the court or social work teams may ignore the good (childcare support from within the Indigenous community; healing that has happened) and emphasize the bad (previous incidents of alcohol abuse; past involvement in the child welfare system), resulting in the disqualification of large numbers of people. There is no consideration of whether community resources for treatment are available or the extent to which an applicant has been personally involved in excessive drinking or violence that may be taking place elsewhere in the extended family.<sup>141</sup>*

*Even where Indigenous parents have stopped substance abuse, or removed themselves from dangerous situations, their histories are often used to deny them the opportunity to care for their children.*

### Advocacy/Best Practices

*The involvement of Indigenous communities could reorient the discussion by helping to highlight how caregivers may have transformed their lives and provide a more balanced consideration of the suitability of prospective caregivers.*

- *Indigenous caregivers' ability to safely protect and care for Indigenous children should be assessed in a fair and equitable way in each situation, taking into account how people have transformed their lives.*
- *Given the history of colonization and historic trauma that Indigenous Peoples have experienced, many prospective caregivers may have histories (of substance abuse, crime, involvement in the child welfare system, and so forth) that they have had to work hard to overcome. This history should not be used to automatically disqualify them as caregivers. A family's Indigenous community can be helpful in assessing the safety of the parents/family.*



141 Macdonald, K. "Returning to Find Much Wealth: Identifying the Need for a Revised Judicial Approach to Aboriginal Kinship in British Columbia" (2010) 15 Appeal 114-135, at 128.

*Indigenous parents or family members may be experiencing symptoms of extreme trauma and not know how to respond (or feel powerless) within the child welfare system.*

## **E. Assumption That Indigenous Parents Cannot Parent or do not Care**

One stereotype about Indigenous parents is that they simply do not care, or do not care enough. Often this assumption is made in response to a parent's trauma response as a result of being involved in the child welfare system or other institutions in their own childhood or lifetimes.



### **Case Study: Children's Aid Society of Brant v. SG**

*Children's Aid Society of Brant v. SG<sup>142</sup>—Parents, when told of their child's need for heart surgery, were documented by the social worker to appear "very overwhelmed when presented with the information," noting the "parents sat and passively listened to the doctor." The trial judge noted the need to be aware of potential bias in this characterization. Overwhelmed is an understandable reaction, not information on whether the parents understood. Additionally, the fact that their names were not on the lease does not mean that their housing is not stable. The trial judge dismissed the director's application for a summary judgment of need for protection.*

### **Advocacy/Best Practices**

*Indigenous parents or family members may be experiencing symptoms of extreme trauma and not know how to respond (or feel powerless) within the child welfare system. This may appear as though they do not care or are uninvolved. A trauma-informed approach is necessary to allow those parents/family members to fully participate, and the Indigenous community may be of assistance to achieve that. A child's best interests cannot be protected without a trauma-informed approach.*



<sup>142</sup> CAS Brant, *supra*.



## ***F. Assuming a Conflict Between the Interests of Indigenous Children and Communities***

The belief that an adversarial relationship exists between Indigenous children and Indigenous communities, or between Indigenous communities and child protection agencies, can prevent consideration of the voice of Indigenous communities in planning for the future of their child members.

*Many areas where the involvement of Indigenous communities could help to resolve child protection concerns go unexplored because of misunderstandings about the role that Indigenous communities could play or the relationships between the interests of Indigenous children and communities.*

*The belief that an adversarial relationship exists between Indigenous children and Indigenous communities, or between Indigenous communities and child protection agencies, can prevent consideration of the voice of Indigenous communities in planning for the future of their child members.*

Indigenous communities, Bands and First Nation governments are political and social entities that represent the collective social and cultural societies which Indigenous Peoples are part of. They have independent rights/responsibilities to, and in, children. Treating Indigenous Peoples as cultural minorities or “racial groups” negates the fact that Indigenous Peoples are “political and cultural entities” with “legitimate political authority” and “ancestral and historical rights,” and that “their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.”<sup>143</sup>

The individual rights of children and the collective interests of Indigenous Nations and communities are intertwined and mutually reinforcing.

A fundamental lesson of Indigenous cultures is that looking at a child as an individual—without the family, community and Nation connections that provide their cultural background and identity—can harm that child, not protect them. Consideration of the possibilities inherent in preserving a child’s relationship with their Indigenous community, and the losses which result in the child’s life when that relationship is severed, is required for a full consideration of a child’s best interests. All too often, the powerful protections opened through this membership are dismissed.

Courts often fail to appreciate that a child’s rights should not be seen in opposition to their Indigenous community, and so discount the benefits

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<sup>143</sup> Dussault, Justice Rene. “Indigenous Peoples and Child Welfare: The Path to Reconciliation” (2007) 3:3 *First Peoples Child & Family Review*, 8, at 10.

*Courts often fail to appreciate that a child's rights should not be seen in opposition to their Indigenous community, and so discount the benefits and possibilities over a lifetime that a child has as a result of their connection to their Indigenous community.*

and possibilities over a lifetime that a child has as a result of their connection to their Indigenous community. For example:

- *Adoption—07202, 2007*<sup>144</sup>—The Court opined that a Band's interests relating to the child's cultural heritage, ancestry, and identity "must not obscure ... the moral, intellectual, emotional, and physical needs of the child, as well as the child's age, health, personality and family environment."<sup>145</sup> The Court assessed the matter as one of the individual rights of the child juxtaposed against the collective interests of the Indigenous community: "[A]doption involves individual rights that cannot be fettered by collective interests."<sup>146</sup>
- *Catholic Children's Aid Society of Toronto v. C(B) and H(JC)*<sup>147</sup>—The Children's Aid Society asked for an adjournment to track down the suggestion that the child might have Indian status based on a statement made by the father who made a phonetic guess about the spelling of his Indigenous community. The father had been adopted as a child and had no knowledge of his natural parents. The Court failed to see the benefit to a child of Indigenous community involvement and felt this approach only impacted the rights of the unnamed Indigenous community, not the rights of the Indigenous child. "An approach to decision making under this legislation that tries to avoid potential deprivation to an as yet unidentified Indian band runs the risk of elevating the rights of an Indian band above the rights of the child who is the central focus of the statute."<sup>148</sup>

Indigenous communities become involved in child welfare matters for many different reasons relating to care and concern for their child members. There is no inherent contradiction between an Indigenous community's political efforts and their genuine love and concern for an Indigenous child. Yet, the fact that Indigenous communities may be acting politically is often mistakenly used to dismiss their involvement or to diminish valid concerns they may raise about their child members.<sup>149</sup>

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<sup>144</sup> 2007 QCCQ 13341 [Adoption].

<sup>145</sup> *Adoption, supra*, at 27, see also: *M-KK (Dans la situation de)*, (2004) RDF 264 (CA).

<sup>146</sup> *Adoption, supra*, at 19.

<sup>147</sup> 2004 ONCJ 27 [Catholic CAS Toronto v. C(B)].

<sup>148</sup> *Catholic CAS Toronto v. C(B)*, *supra*, at 31.

<sup>149</sup> In *Racine, supra*, at 165, for example, the Supreme Court of Canada was concerned that the Indigenous mother had sought support of political organizations and wondered if her concern was for the child or the political issue.



## BEST PRACTICES



*Involvement of Indigenous communities in child protection matters should not be diminished or dismissed as “political”. An Indigenous community can be motivated to take political and legal actions due to genuine care and concern for Indigenous children, and many may argue that they are obligated to do so. Further, the full measure of an Indigenous child’s individual and collective interests cannot be protected without their community’s involvement.*

*A child’s right to love and nourishment (cultural, emotional, spiritual and physical) is the community’s responsibility; in turn, these collective “responsibilities are [the child’s] individual rights.” Thus, to place a child outside her kinship community absent culturally relevant safeguards is to deny that child basic individual rights. Moreover, from a collective rights standpoint, such a placement works to break the cycle of Indigenous life.<sup>150</sup>*

*Courts often assess that parents or Indigenous community representatives are antagonistic toward child welfare agencies, social workers or the court, and this has repercussions for their legal position.*

### **G. Indigenous Distrust of the Child Welfare Process**

Courts often assess that parents or Indigenous community representatives are antagonistic toward child welfare agencies, social workers or the court, and this has repercussions for their legal position. For example, in *Racine*, the Supreme Court of Canada noted the “venom of [the] anti-white feelings” of the Indigenous mother who was seeking to have her daughter returned.<sup>151</sup> In *RRE (Re)*, the Court noted three of the grandmother’s grandchildren had died in care and that her “faith and trust in the Ministry has been badly bruised as a result.”<sup>152</sup> Nonetheless, the grandmother’s distrust toward the Ministry was weighted against her.

Justice Anthony Sarich observed in the Report on the Cariboo-Chilcotin Justice Inquiry that the “court process is a strange and bewildering one

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<sup>150</sup> Graham, L. “Reparations, Self-Determination, and the Seventh Generation” 21 *Harv Hum Rts J* 47, at 95-96 [References omitted].

<sup>151</sup> *Racine*, *supra*, at 165.

<sup>152</sup> *RRE (Re)*, *supra*, at 49. See also *Kenora-Patricia Child and Family Services v. P(L)*, 2001 *CanLII 32703 (ONCJ)*, at 27, where the court noted the Indigenous father was “antagonistic to the agency.”

to most native people. Even those who have been through the process a number of times remain confused and frightened. With rare exceptions, natives simply don't trust those who operate in it and administer it."<sup>153</sup>

*Indigenous community representatives or family members may express distrust of the child welfare system or its participants, which should not be used as a justification to ignore, disqualify or diminish their input.*



### Case Study: The West Coast L.E.A.F.

*In discussing women as victims of family violence and how they present in the context of a parenting capacity assessment report, the West Coast L.E.A.F. observed that:*

*[A]n additional barrier for abused women is that many victims suffer from a variety of trauma symptoms related to their abuse. Abuse survivors may present as angry, distrustful and suspicious of the professionals involved in their court proceedings. A behaviour may result in judges and custody assessors drawing adverse inferences about the attitudes, parenting skills, and ability to promote a relationship between the child and other parent.<sup>154</sup>*

*Distrust or hostility toward the child welfare system may reflect feelings of powerlessness or fears about a lack of justice or equality. In some cases, there may be systemic biases and stereotypes actively at work that Indigenous community and family members are reacting to.*

Indigenous community representatives or family members may express distrust of the child welfare system or its participants, which should not be used as a justification to ignore, disqualify or diminish their input. There are times when Indigenous distrust of the child welfare process is a normal, appropriate and rational response to historical and ongoing systemic racism, and may reflect inter-generational trauma experienced by the Indigenous communities.

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<sup>153</sup> Sarich, AJ. "Report on the Cariboo-Chilcotin Justice Inquiry" (1 January 1993) Victoria, BC: The Inquiry.

<sup>154</sup> Rahman, S & Track, L. "Troubling Assessments: Custody and Access Reports and their Equality Implications for BC Women" (June 2012) West Coast L.E.A.F. [available online: <http://www.westcoastleaf.org/wp-content/uploads/2014/10/2012-REPORT-Troubling-Assessments-Custody-and-Acess-Reports-and-their-Equality-Implications-for-BC-Women.pdf>] [Rahman & Track, Troubling Assessments], citing cases in an Indigenous context where many Indigenous parents have a history of trauma or inter-generational trauma, particularly with courts or others in authority, which may be reflected in their interactions with assessors, courts or lawyers and can lead to a poor assessment of their parenting capacity, which is not a fair assessment.



Given Indigenous Peoples' history within the child welfare and IRS systems, a trauma-informed approach is required that acknowledges that distrust of the child welfare process is an expected and natural reaction. This should not be used against parents or community members.

## II. Biases That Indigenous Communities Must Address to Protect Children

Indigenous Peoples also hold biases—rooted in histories of colonization—which need to be addressed to protect Indigenous children within the child welfare process. Due to the history of Indigenous Peoples, where generations of Indigenous children were wrongfully removed from their families, Indigenous communities may automatically support a parent without first asking about the child protection concern, thereby missing an opportunity to bring Indigenous laws and practices to bear on what actions are necessary to protect a child.

The interest of the Indigenous community should not be understood as the “same” as that of the parents or extended family. The Indigenous community itself, collectively, has a relationship with its child members. Failure to make a distinction between the interests of parents or caregivers and the community, or to adequately and fully address protection concerns, has led to situations where children were left without protection. *Jane Doe v. Awasis Agency of Northern Manitoba*,<sup>155</sup> for example, was a case where an Indigenous child was returned to her home community without protections and subject to severe abuse and sexual assault.

*Given Indigenous Peoples' history within the child welfare and IRS systems, a trauma-informed approach is required that acknowledges that distrust of the child welfare process is an expected and natural reaction. This should not be used against parents or community members.*

### Indigenous Laws

*The exercise of Indigenous laws requires asking what a child needs for their protection, acting to ensure that happens, and having a willingness to support (or challenge) the positions of both the director and the parents, based on the community's own assessment of safety.*



155 [1990] 72 DLR (4th) 738. This case is discussed in Friedland, Dr. H. “Tragic Choices and the Division of Sorrow: Speaking About Race, Culture and Community Traumatization in the Lives of Children” (2009) 25 Can J Fam L 223-256.

*Indigenous communities need to address biases to fully act to protect Indigenous children.*

## Advocacy

*Biases that Indigenous communities need to address to fully act to protect Indigenous children include:*



- *The automatic belief that a child protection concern is invalid, and so failing to ask whether a child needs protection and what steps need to be taken to protect them;*
- *Not knowing how to address issues such as sexual abuse or violence, and so allowing shame or uncertainty to drive a response which denies that those harms exist;<sup>156</sup> or*
- *Not wanting to create a rift or divisions within the community, and so not challenging parenting practices or activities that the community knows to be unsafe.<sup>157</sup> For example, situations in which community members do not want to interfere with the relationship of children to their parents, despite potentially dangerous and unhealthy circumstances. In P(C), the Court noted that families or community members often “do not want to be seen as part of the structure that interferes with the parent”.<sup>158</sup>*

*The closeness of the community on the reserve is both a positive and negative. Although the people appear from the evidence to support each other, they appear to loathe to be critical or to interfere. This makes a special challenge for any placement of children within the parents’ community. ... [A] child should not be made a foster child permanently just to make the situation easier on the adults involved.<sup>159</sup>*

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<sup>156</sup> *Borrows, J & Rotman, L. “Aboriginal Legal Issues: Cases, Materials & Commentary” (2003) Markham, ON: LexisNexis, at 830, citing RCAP, supra, Vol 3, at 23, where the Court characterized this as shame: “Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. It is a shame that countless Aboriginal families have experienced, some of them repeatedly over generations.”*

<sup>157</sup> *P(C), supra, at 15 and 39, where the Band agreed that an adoption was likely best for the child but did not support this option as they did not want a “rift in the community”. The Band “seems focused on the father’s interests” and “committed simply to keeping her on the reserve” without regard for her best interests.*

<sup>158</sup> *P(C), supra, at 22.*

<sup>159</sup> *P(C), supra, at 43.*



## Indigenous Laws

*There is an overwhelming need for Indigenous communities to exercise their jurisdiction and laws—acting as a legal and political entity—rather than as unquestioned support for parents.*



- *Assessing each child protection situation through the lens of Indigenous laws—and asking what the legal standard and practice would be under Indigenous law—could be a powerful tool for protecting Indigenous children.*
- *Advocating for a child within the context of Indigenous laws may mean advocating that a child remain within their Nation or community, but not with their parents or extended family if they cannot safely care for them.*
- *Indigenous communities must honestly examine in each case whether there is a real child protection concern, rather than rejecting outright any intervention.*
- *Indigenous communities should ask how their perspective is different from that of the parent(s) to focus the discussion on the best interests of the child and the protection concerns. An Indigenous community may support the parents' position because they do not want more of their child members lost to the child welfare system and may not have considered other options to keep a child either within the community or actively connected through participation in community activities, events and practices. Engaging in a conversation can help to highlight an Indigenous community's actual position, based in Indigenous laws, in child welfare matters.*

*The exercise of Indigenous laws requires asking what a child needs for their protection, acting to ensure that happens, and having a willingness to support (or challenge) the positions of both the director and the parents, based on the community's own assessment of safety.*

*The methodology used in parenting capacity assessments is often based on a Euro-centric interpretation of family which fails to take into account Indigenous cultural definitions.*

### III. Assessing Parenting

Assessments of parenting capabilities can be dangerous ground for the reproduction of bias and stereotypes. Addressing bias against Indigenous parents and parenting requires scrutiny of the way parenting capability is assessed. West Coast L.E.A.F. has observed that parenting reports can “operate to perpetuate pre-existing societal biases against women,” including Indigenous women.<sup>160</sup> Parental capacity assessment reports assess the needs of children and the capacity of parents to meet those needs. These reports are seen as being produced by professionals, so often their neutrality is not questioned.

A wide range of people can prepare a report, including social workers, psychologists and counsellors. There is no specific training that an assessor is required to take that would enable them to make assessments in an Indigenous family law context and to properly assess Indigenous Peoples’ parenting or the cultural needs of Indigenous children. The cost of preparing parental capacity assessment reports is significant and represents a structural barrier for many Indigenous parents who cannot pay for the reports.

Indigenous parents are at a significant disadvantage by not having a report prepared that fully and adequately reflects the needs, heritage and culture of Indigenous parents and children. Indigenous identity is most often ignored, minimized or completely misunderstood.

The methodology used in parenting capacity assessments is often based on a Euro-centric interpretation of family which fails to take into account Indigenous cultural definitions. Elements of these assessments do not consider standards or practices within Indigenous communities and do not consider the socio-political realities parents face such as poverty, poor access to services and the impacts of inter-generational trauma.<sup>161</sup>

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<sup>160</sup> Rahman & Track, *Troubling Assessments*, supra, quoting Boyd, S. “Child custody, law and women’s work” (2002) Don Mills, ON: Oxford University Press.

<sup>161</sup> Choate, P & Lindstrom, G. “Parenting Capacity Assessment as a Colonial Strategy” (2018) 37 *Canadian Family Law Quarterly* 42 [Choate & Lindstrom].



## Advocacy/Best Practices

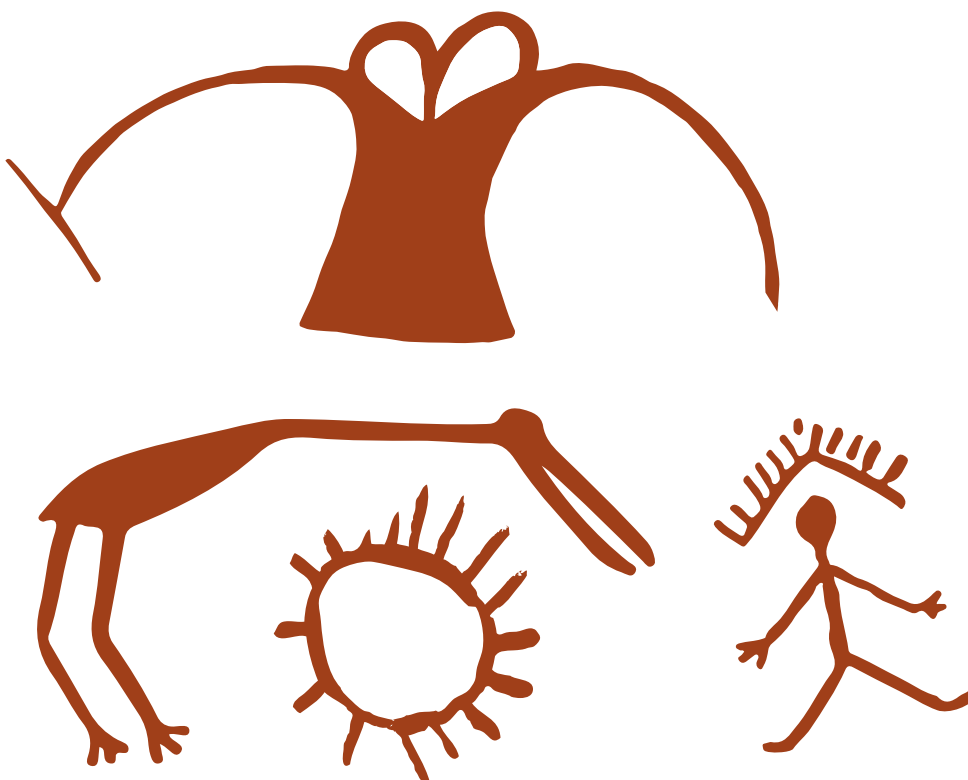
*Parental capacity assessment reports must be researched and prepared in a way that reflects the cultural needs of Indigenous children. Parental assessment should ensure that culture, identity and community form the basis upon which decisions are made.*

*An expert cannot render an opinion on an Indigenous family if they do not understand how Indigenous family systems work. Their methodology and knowledge base must fit the issues that they are being asked to offer an opinion on.*

*Where possible, Indigenous communities could consider preparing their own parenting assessments (or setting criteria for them to be done) in ways that reflect a trauma-informed approach, knowledge of Indigenous culture and the child and family's particular Indigenous cultural background and parenting traditions.*



*Where possible, Indigenous communities could consider preparing their own parenting assessments (or setting criteria for them to be done) in ways that reflect a trauma-informed approach, knowledge of Indigenous culture and the child and family's particular Indigenous cultural background and parenting traditions.*



*(See Chapter 10 for a discussion of the possible roles for Indigenous cultural experts.)*

*Assessments of parenting capabilities can be dangerous ground for the reproduction of bias and stereotypes.*

## Advocacy/Best Practices

*Courts must be aware of, and counsel should be prepared to point out, the potential for biases and ways that stereotypes make their way into parenting assessments.*

- *Current parental capacity assessment tools do not respond to the unique needs of Indigenous Peoples (a violation of Charter rights, as in *Ewert v. Canada*,<sup>162</sup> considered in a criminal law context).*
- *Advocate for the development of a meaningful parental capacity assessment model rooted in Indigenous culture. This could include appointing or identifying Indigenous cultural or parenting experts and knowledge-keepers.<sup>163</sup>*
- *Recognize that the impacts of poor access to services and the inter-generational trauma of IRS are not included in approaches for assessing parents. Identify when and how these factors may impact assessments.<sup>164</sup>*
- *Argue that party-retained experts who ignore factors based in Indigenous culture and history, therefore, reflect cultural biases and do not meet the test for admissibility of expert evidence, which requires that the expert evidence be necessary and reliable, relevant and offer evidence outside the knowledge of the court.<sup>165</sup>*



<sup>162</sup> 2018 SCC 30.

<sup>163</sup> Choate, P & McKenzie, A. "Psychometrics in Parenting Capacity Assessments: A problem for Aboriginal parents" (2015) 10:2 *An Interdisciplinary Journal* 31.

<sup>164</sup> Choate & Lindstrom, *supra*.

<sup>165</sup> Choate & Lindstrom, *supra*.

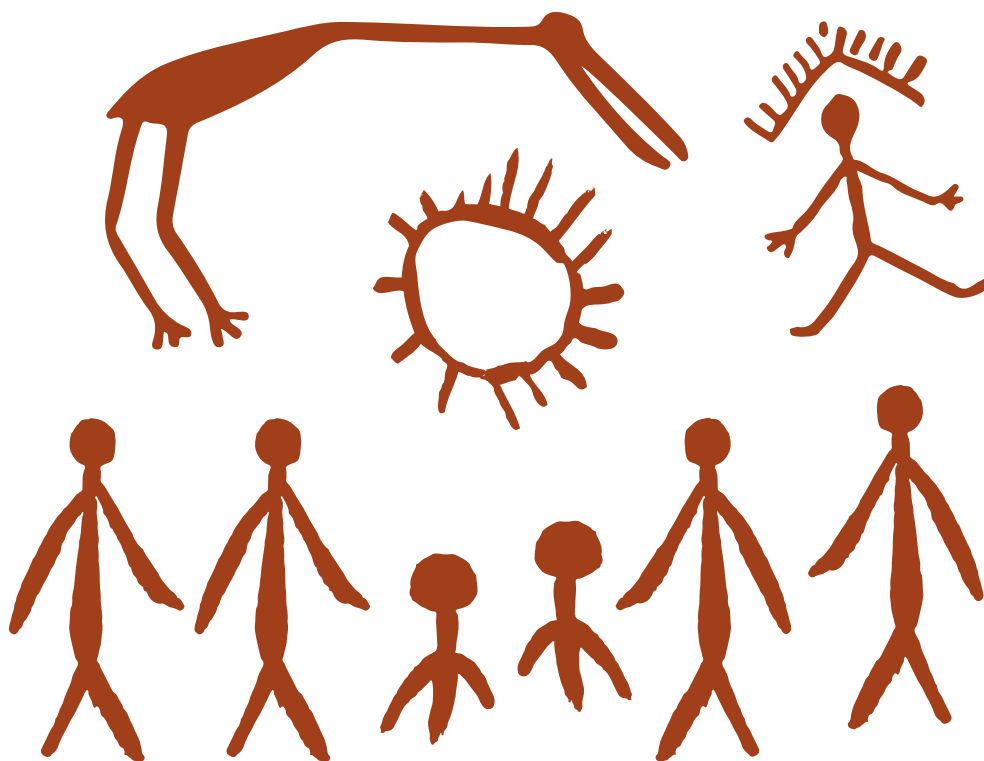


## 09. Rights of Indigenous Children and Youth

Collectively, the UNCRC, Federal Act and BC CFCSA recognize a child's right to be heard and to maintain their Indigenous cultural identity and connections. This recognition provides an opportunity to examine an Indigenous child's own opinions on staying connected to their Indigenous culture and heritage. Indigenous laws may also set out mechanisms and procedures to ensure the voices of children and youth are heard.

In *G(BJ) v. G(DL)*,<sup>166</sup> Justice Martinson contemplated a child's right to be heard in a domestic family law matter, applying the UNCRC to find that "all children in Canada have legal rights to be heard in all matters affecting them," and that "[d]ecisions should not be made without ensuring that those legal rights have been considered."

*Collectively, the UNCRC, Federal Act and BC CFCSA recognize a child's right to be heard and to maintain their Indigenous cultural identity and connections.*



<sup>166</sup> 2010 YKSC 44, at 2-4.

*It is not enough to say that the voice of children and youth matter; effective mechanisms to enforce those rights are required.*

<b>UNDER THE FEDERAL ACT, CHILDREN AND YOUTH HAVE RIGHTS TO:</b>	<b>UNDER THE BC CFCSA, CHILDREN IN CARE HAVE RIGHTS TO:</b>
Be protected according to the standards set out in the UNDRIP and the UNCRC, and have their s. 35 rights affirmed by s. 35 of the <i>Constitution Act, 1982</i> recognized and implemented (s. 2);	Know their rights within the child welfare system and how to enforce them;
Have their cultural identity and connections to their Indigenous language and territory preserved (s. 10(3)(d));	Receive medical and dental care, as needed;
Be cared for according to their Peoples' own laws (s. 8);	Their own personal belongings;
Have their distinct needs considered if they have a disability in order to promote their participation, to the same extent as other children, in the activities of their family or Indigenous group (s. 9(3)(a));	Help to preserve their culture;
Have a say about plans of care and important decisions about their life, while not being discriminated against, including based on their sex or gender identity or expression (s. 9(3)(b));	Participate in religious, social and recreational activities of their choosing, as appropriate;
Have their family members and IGB exercise their rights and have a say in the care of Indigenous children and youth without facing discrimination (ss. 9(3)(c) & (d).	Be fed, clothed and cared for according to community standards;
	Be provided with an interpreter if language or disability is a barrier to consulting them on decisions affecting their lives;
	Be informed and have a say about plans of care and important decisions about their life;
	Be told of standards of behaviour caregivers expect and be aware of the consequences of not meeting expectations;
	Help to contact the Representative for Children and Youth or the Ombudsperson if they have concerns about their care;
	Have reasonable privacy during discussions with their families, lawyers, Representative for Children and Youth, Ombudsperson, member of the Legislative Assembly or member of Parliament.





It is not enough to say that the voice of children and youth matter; effective mechanisms to enforce those rights are required. Indigenous legal traditions and practices may have tools for ensuring that the voices of children are heard. Indigenous communities could incorporate these tools into their own child welfare laws. For example, Indigenous communities can help ensure that the voices of Indigenous children and youth are heard by appointing (related or unrelated) auntie or uncle advocates to assist children and youth to effectively participate and seek legal representation, where needed.

*Indigenous legal traditions and practices may have tools for ensuring that the voices of children are heard.*

## Indigenous Laws

*Indigenous laws could:*

- *Specify the rights of Indigenous children to remain connected, or build connections, to their siblings, including in placement preferences, and to maintain that connection when members of their sibling group are adopted or otherwise leave care;*
- *Guarantee the rights of Indigenous children and youth to have their voice heard, including where that voice is directed toward their desire to remain connected and fully participating members of their Indigenous cultures. Where children or youth need assistance to have their voices heard, including through legal representation or advocacy within their cultural community(ies), they should have support for this;*
- *Build on ongoing mechanisms to check in with children and youth, including forums for children and youth to raise concerns about their care;*
- *Set out the rights of youth who age out of care to have continued supports and services;*
- *Create opportunities for agreements with the youth's Indigenous community(ies) that would help to keep them culturally connected; and*
- *Explicitly state that children and youth have the right to maintain a connection with their cultural peer group(s)—the children and youth within their cultural community(ies).*



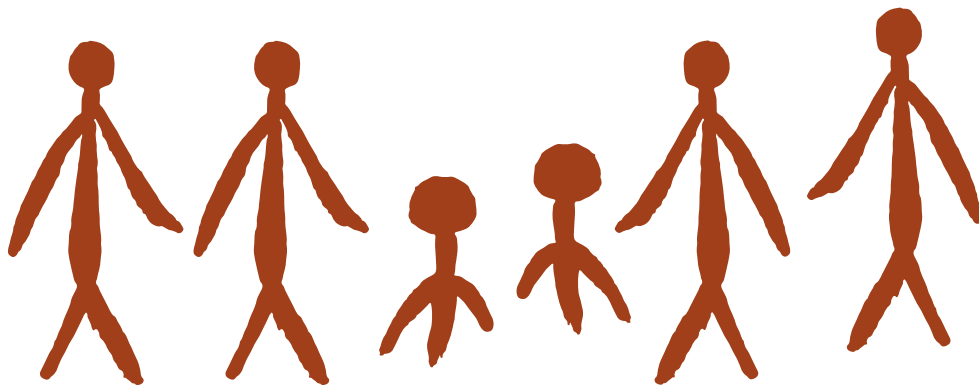
*Courts should require that investigations about the views of the child and the child's rights be made, and Indigenous communities could assist in this conversation.*

## BEST PRACTICES



*Courts should require that investigations about the views of the child and the child's rights be made, and Indigenous communities could assist in this conversation.*

- *Courts can ask whether the Indigenous child was invited to attend the hearing, or to provide testimony in some other way to give evidence of their views about their Indigenous heritage and culture and the need to preserve those connections or their views overall (they should be afforded the opportunity and support to do this freely and not through social workers or foster parents);*
- *Courts can ensure that notice to a youth is not dispensed with unless there are extraordinary circumstances. (In practice, notice to a youth is often dispensed with because the social worker forgot to serve the youth or because the youth is seemingly okay with the order being sought). Serious inquiries should be made about when a youth requires independent support or advice (including legal counsel) to ensure that their voice is heard and considered.*
- *An advocate from the child's Indigenous community could be identified to help them articulate their wishes. Children should be supported in getting legal representation where required to have their voice heard.*





## Indigenous Laws

### *Indigenous Communities Could:*

- *Help children talk about the importance of their Indigenous culture and how to protect and strengthen it in planning for their care;*
- *Advocate for Indigenous children to help build and maintain relationships with their siblings in and out of care;*
- *Appoint an advocate (such as an auntie or uncle advocate) to help children have their voice heard with social workers and in court;*
- *Help children get legal representation, where needed;*
- *Help children to identify who they want to keep connected with, including elders, aunts/uncles, other young people within their community, and how they want those visits to happen;*
- *Help children talk about how they want to keep connected to their territory;*
- *Help children or youth to ask for:*
  - *A review of their placement;*
  - *Consideration of other homes within their family or Indigenous cultural community;*
  - *An administrative review of their file, or to file a complaint within the MCFD/IDA process;*
  - *A review where their plan of care is not being followed; or*
  - *Support from the Representative for Children and Youth.*
- *In the case of children and youth who have been alienated or disconnected, develop plans to teach them about their family, cultural roots and history, and introduce them to these connections and their territories;*
- *Empower Indigenous decision-making mechanisms that help the voices of Indigenous children be heard in planning for their own care.*



***Courts can ask whether the Indigenous child was invited to attend the hearing, or to provide testimony in some other way to give evidence of their views about their Indigenous heritage and culture and the need to preserve those connections or their views overall.***



*Courts can ensure that notice to a youth is not dispensed with unless there are extraordinary circumstances.*

### **Representative for Children and Youth (RCY)**

*The Representative for Children and Youth Act<sup>167</sup> creates the position of RCY who has the power to review programs or services, or initiate an investigation of services, offered under the BC CFCSA. The RCY can advocate for children and review or investigate services provided to children. The scope of this review would include the ability to investigate whether services were being provided to Indigenous children as required under the BC CFCSA or to assist Indigenous children in advocating for themselves. This could include advocating to make certain that the provisions of the BC CFCSA preserving a child's Indigenous identity and cultural heritage are honoured. The RCY could support Indigenous children to ensure that a child's Indigenous identity and cultural heritage are honoured within the child welfare process. (See [www.rcybc.ca](http://www.rcybc.ca) or call 1.800.476.3933.)*

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167 SBC 2006, c 29.

## 10. Child Welfare and International Human Rights

International instruments, such as the UNDRIP and the UNCRC, both endorsed by Canada, set out international standards governing state conduct that should guide the interpretation of domestic law,<sup>168</sup> including child welfare laws. It should be assumed that domestic child welfare laws, such as the Federal Act and the BC CFCSA, are consistent with international principles, and that an “interpretation that produces compliance with international law is preferred over one that does not.”<sup>169</sup>

*International human rights standards in the UNDRIP and the UNCRC outline a positive duty to keep Indigenous children within their families or cultural community.*

International human rights standards in the UNDRIP and the UNCRC outline a positive duty to keep Indigenous children within their families or cultural community. One purpose of the Federal Act is to implement the UNDRIP (s. 8(2)). The Preamble also recognizes the rights of Indigenous children under the UNCRC. The DRIPA affirms the application of the UNDRIP to the laws of British Columbia, including the BC CFCSA. Implementation of the recognition of Indigenous Peoples’ rights as human rights, and recognition of children’s rights to their Indigenous culture and identity, are important legal principles in applying child welfare law to Indigenous children and families.

*Collectively, the UNDRIP and the UNCRC talk about Indigenous children’s human rights to:*

- *Maintain their unique cultural identity as Indigenous Peoples;*
- *Be heard in matters that impact them; and*
- *Be raised with, and protected according to, the laws of their Indigenous culture.*

<sup>168</sup> *R. v. Hape*, 2007 SCC 26, at 39; *Canada (AG) v. Canadian Human Rights Commission*, 2007 SCC 26.

<sup>169</sup> *Sullivan, R. “Statutory Interpretation” (2007) 2nd ed Toronto: Irwin Law [Sullivan]*, at 241.



*Human rights standards articulated in the UNDRIP and required by the UNCRC require that Indigenous Peoples be effectively involved in making decisions that will impact Indigenous children.*

Human rights standards articulated in the UNDRIP and required by the UNCRC require that Indigenous Peoples be effectively involved in making decisions that will impact Indigenous children. This should include adequate resourcing for Indigenous Nations to be able to articulate and operate their own laws; a reconsideration of laws formed without Indigenous participation; and the ongoing participation and direction of Indigenous Peoples in the way those laws are carried out, including financial means necessary for that participation to be meaningful.

Domestic laws tend to only recognize a limited number of parties in child welfare, emphasizing the interests of parent(s) and state. The involvement of children and their Indigenous communities is often ignored or underplayed. The UNDRIP operates to challenge the erasure of Indigenous children, communities and Nations from child welfare decision-making.

## **I. United Nations Convention on the Rights of the Child (UNCRC)**

The UNCRC recognizes the human rights of children to have their Indigenous culture and identity preserved. A full measure of a child's human rights must reflect their broader cultural and societal relationships. Key provisions relevant to child welfare include (paraphrased):

### **Article 5**

Parties shall respect the responsibilities, rights and duties of parents or extended family or community, as provided for by local custom, to provide direction and guidance for the exercise of rights in the UNCRC.

### **Article 19**

Parties shall protect children from all forms of physical or mental violence, injury or abuse, neglect, maltreatment or exploitation, including sexual abuse.

Protective measures could include establishing social programs for the child and their caregivers, other forms of prevention and judicial involvement.

### **Article 20**

Where a child cannot remain with their family and are placed in alternative care, in placing a child outside of their home, consideration "shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

### Article 30

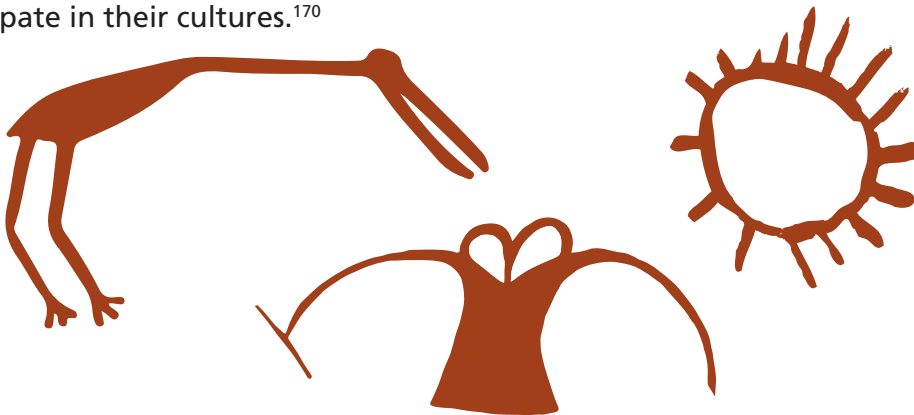
Indigenous children “shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”

## II. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The UNDRIP is a declaration of states of the world that sets out standards for the survival, dignity and continued existence of Indigenous Peoples. The UNDRIP:

- Recognizes the individual and collective rights of Indigenous Peoples as human rights;
- Provides guidance on how child welfare laws should be interpreted, and highlights the need for greater recognition of Indigenous Peoples’ laws and ways of making decisions to protect children and heal families; and
- Recognizes a right of self-determination of Indigenous Peoples to choose their own cultural paths, including for the care and protection of children and families.

The Indigenous Bar Association observes that the UNDRIP guarantees that Indigenous Peoples have the right to not have the Canadian state interfere with their cultures and “to not have their children removed *en masse*”; or, where children are removed, they must be able to participate in their cultures.<sup>170</sup>



<sup>170</sup> Indigenous Bar Association. “Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook” (2011) Winnipeg: Indigenous Bar Association [available online: [https://www.indigenousbar.ca/pdf/undrip\\_handbook.pdf](https://www.indigenousbar.ca/pdf/undrip_handbook.pdf)].

*The UNCRC recognizes the human rights of children to have their Indigenous culture and identity preserved.*

Relevant articles in the UNDRIP to child welfare include (paraphrased):

**Article 7**

Indigenous Peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

**Article 8**

Indigenous Peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. States shall provide effective mechanisms for prevention of, and redress for, any form of forced assimilation or integration.

**Article 9**

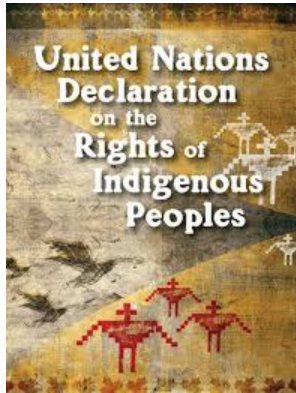
Indigenous Peoples and individuals have the right to belong to an Indigenous community or Nation, in accordance with the traditions and customs of the community or Nation concerned. No discrimination of any kind may arise from the exercise of such a right.

**Article 11**

Indigenous Peoples have the right to practice and revitalize their cultural traditions and customs.

**Article 13**

Indigenous Peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.







## Advocacy/Best Practices: Key provisions of the UNDRIP which should animate family justice process are:

### 1. Right of self-determination.

*Self-determination protects the right of Indigenous Peoples to create and be governed according to their own institutions, including in the areas of justice, family law and child welfare laws. Indigenous Peoples have a right of self-determination, which includes the right to be governed by Indigenous laws, legal traditions and institutions. This is a right Indigenous Peoples enjoy as individuals and as communities and Nations.*

### 2. Right to cultural identity as distinct Peoples.

*The right to be able to preserve and pass on collective cultural identity to children is a fundamental human right. Without this right, Indigenous Peoples would assimilate into dominant or larger populations and become functionally extinct.*

*Indigenous identity should not be discounted where Indigenous Peoples have a mixed heritage. Consideration of the rights of children, as Indigenous persons, should not be discounted where only one parent is Indigenous.*

*This means a robust, not merely superficial, cultural connection must be built and maintained.*

### 3. Free, prior and informed consent.

*The right of Indigenous Nations to actively participate and consent to the application of legal processes that impact their children and families.*

*Indigenous Peoples' have the right to participate in the legal and political processes that impact their lives. This includes the right of children to have their voice heard, including when that voice is directed toward their desire to remain connected and fully participating members of their Indigenous cultures or have Indigenous laws direct their care. This right also applies to Indigenous communities and Nations.*

### 4. Protection from discrimination.

*Indigenous Peoples are protected to live free from discrimination on the basis of their Indigenous identity or heritage. This includes protection from decisions made on the basis of racial profiling in child welfare matters.*



*The Indigenous Bar Association observes that the UNDRIP guarantees that Indigenous Peoples have the right to not have the Canadian state interfere with their cultures and “to not have their children removed en masse”; or, where children are removed, they must be able to participate in their cultures.*

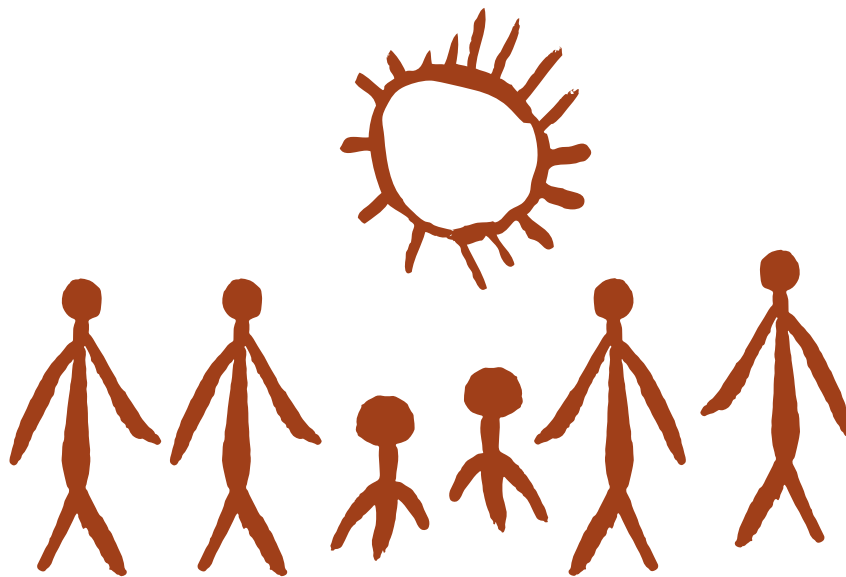
*Integrating the UNDRIP in child welfare processes requires moving from legal systems and structures that are imposed on Indigenous Peoples toward ones that reflect Indigenous reality, existence, laws and ways of being.*

Integrating the UNDRIP in child welfare processes requires moving from legal systems and structures that are imposed on Indigenous Peoples toward ones that reflect Indigenous reality, existence, laws and ways of being. This can be done by empowering Indigenous laws and supporting their operation. The UNDRIP requires that Indigenous Peoples—as Nations, communities, individuals and families—fully and directly participate in family justice processes that impact them. Where Indigenous Peoples have not articulated their own laws in writing, under the Federal Act or through an independent process, the UNDRIP nonetheless requires Indigenous Peoples' meaningful participation in direct decisions made about their children and families, including by their own laws.

## Indigenous Laws

*Indigenous communities could pass laws that:*

- *Interpret what the UNDRIP/UNCRC principles mean to them in practice under their own laws;*
- *Engage the UNDRIP/UNCRC as guiding principles;*
- *Create mechanisms to hear the voices of children; and*
- *Articulate the rights of their children according to their laws.*





## BEST PRACTICES

*Interpretive principles set out in the UNDRIP and the UNCRC should guide an analysis of the BC CFCSA, including as directed by the Federal Act. International standards in child welfare law require:*

- *Where Indigenous laws or standards exist for the care of Indigenous children, these should govern, as they reflect self-determination;*
- *Positive duties and obligations on courts, the director and Indigenous communities to make active efforts to maintain Indigenous children's identity and cultural heritage;*
- *Active measures to involve a child and their Indigenous community in planning to protect and maintain the Indigenous child's cultural identity and heritage; and*
- *The ability to protect children according to laws, traditions and language fundamental to the cultural survival of Indigenous children are to be protected as an incidence of Indigenous Peoples' human rights. Courts should be conscious of this fact when entertaining submissions by Indigenous communities under child welfare legislation.*

*The UNDRIP requires that Indigenous Peoples—as Nations, communities, individuals and families—fully and directly participate in family justice processes that impact them.*

# 11. Trauma-Informed Approach to Child Welfare

*The TRC addressed the need for cultural competence in working with Indigenous Peoples as a result of how IRS survivors were treated by lawyers and the legal system in the IRS class actions (the settlement of which led to the creation of the TRC itself).*

The TRC addressed the need for cultural competence in working with Indigenous Peoples as a result of how IRS survivors were treated by lawyers and the legal system in the IRS class actions (the settlement of which led to the creation of the TRC itself).

Justice Murray Sinclair identified the need for “institutional change” to achieve “true reconciliation”:

Much of what has been enacted since Confederation of the laws of this country have been tainted by rationales, terminology and intent that have been fundamentally racist. In many ways, Canada waged war against Indigenous peoples through Law, and many of today’s laws reflect that intent.<sup>171</sup>

Reconciliation involves acknowledging the harm done, making a commitment to address that harm and moving forward in a way that heals and does not duplicate the problems of the past. Reconciliation, in the context of child welfare, requires acknowledging and addressing the colonization and historic trauma that Indigenous Peoples have been subject to, which continues through child welfare decisions made outside of Indigenous laws.

The Federal Act mandates a trauma-informed approach by acknowledging the following in the Preamble:

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

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<sup>171</sup> Sinclair, Senator Murray. “Statement of the Honourable Murray Sinclair, Senator, concerning the introduction of a Bill [C-262] in the House of Commons requiring the Government of Canada to adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples” (21 April 2016).

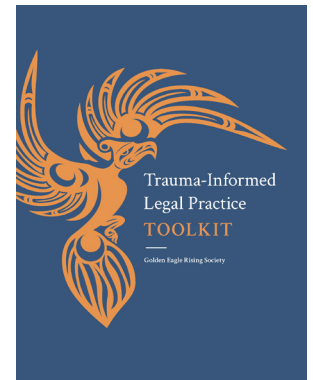
supporting Indigenous women and girls in overcoming their historical disadvantage;

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...

The service delivery principles of the BC CFCSA acknowledge the historic trauma Indigenous children and families have experienced, and that this history must be taken into account in providing child welfare services, acknowledging (s. 3(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.”

*Taking a trauma-informed legal approach in the area of child welfare requires an awareness of how a history of colonial interventions over generations may be driving Indigenous Peoples’ reactions within legal processes today.*

*A person’s willingness or ability to engage with the legal system (police, social workers, lawyers and the court) may be very impacted by trauma. The child welfare system, including interactions with social workers and the courts, can be overwhelming or frightening to many parents, children, family and community members. This may manifest in ways that may be assumed to be non-participatory or defensive. Trauma may make it harder for Indigenous Peoples to participate or achieve solutions that work for them and their families.*



Lawyers, judges, social workers and Indigenous advocates are not immune from the impacts of trauma on their work and should be aware of how their own trauma (or vicarious trauma) may impact their decisions.<sup>172</sup>

A good resource is the *Trauma Informed Legal Practice Toolkit* (pictured right) or *The Trauma-Informed Lawyer* podcast available online at <https://thetraumainformedlawyer.simplecast.com>.<sup>173</sup>

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172 See for example: McCallum, M. “The Trauma-Informed Lawyer” podcast. [available online: <https://thetraumainformedlawyer.simplecast.com>].

173 Golden Eagle Rising Society. “Trauma Informed Legal Practice Toolkit.” (September 2020) [available online: <https://www.goldeneaglerising.org/photos/trauma-informed-legal-practice-toolkit>].

*Trauma refers to intense and overwhelming experiences that involve serious loss, threat or harm to a person's physical or emotional wellbeing.*

## Actions



Judges, lawyers and social workers can take steps to control the experience of court with an awareness of how trauma may be impacting people:

- Reduce, as far as possible, the time people have to wait for hearings. For example, if someone is told to arrive at 8:30am, and then are not called until 11:00am, this can drastically increase their stress and increase the chance they may leave or be unable to participate. Explore ways to prioritize their matters being heard earlier;
- Where people show up in person to court, they should be heard before lawyers with no clients present.

## I. What Is Trauma?

Trauma refers to intense and overwhelming experiences that involve serious loss, threat or harm to a person's physical or emotional wellbeing. Trauma may involve a single traumatic event or may be repeated over many years.

Indigenous Peoples' experiences of trauma may be many and varied, including:

Sexual, physical or emotional abuse	Drug or alcohol addiction in the home
Past involvement as parents or children in the child welfare or IRS systems	Involvement (direct or indirect) with police or other authority figures
Past involvement as parents or children in the criminal justice system	Involvement (including inter-generational) within the child welfare process
Targeted violence against Indigenous women, girls and two-spirited people	
Systemic or institutional racism	Poverty
Family or community violence	Neglect or abandonment
Death of a parent, close family or community member	Homelessness or insecure housing
Suicide of family members or community members	Witnessing violence

Trauma is the experience of an intense or overwhelming experience, usually involving serious loss, threat or harm, and, while a person finds a way to survive while the instance(s) are happening, they can then carry that response into the future. This often leads the person to find a way of coping that may work in the short-run, but may cause serious harm in the long-run.

Some common trauma-based responses include:

- Re-living: Exaggerated emotional and physical reactions where people re-live, often repeatedly, the traumatic experience;
- Avoidance and numbing: Efforts to avoid thoughts, feelings, activities or situations associated with trauma; or feelings of detachment from people, places and things; or
- Over-sensitivity and irritability: Being constantly on guard; difficulties concentrating; or outbursts of anger.

In situations where a person feels threatened, or under attack, they may respond in the way that they responded to past threats. Many problems faced by families may be related to traumatic life experiences. People who have experienced traumatic life events are often very sensitive to situations that remind them of the people, places or things involved in their own trauma(s), and this can cause a person to re-live the trauma, have difficulty seeking solutions, and impair their ability to fully participate in child welfare processes or discussions.

Over longer periods, trauma can change the way the brain responds or reacts in situations it identifies as similar to the original traumatic event(s). A person can adopt coping mechanisms (substance abuse, self-harm, sexual promiscuity, violence), which result in higher levels of substance abuse, suicide and self-harm.

Reports in America have shown that teens who have experienced physical or sexual abuse or assault are three times more likely to report past or current substance abuse,<sup>174</sup> and people who are incarcerated report higher levels of childhood trauma.<sup>175</sup> One study found that up to 80% of women being treated for a substance use disorder report a history of trauma, most commonly physical or sexual abuse.<sup>176</sup>

*Trauma is the experience of an intense or overwhelming experience, usually involving serious loss, threat or harm, and, while a person finds a way to survive while the instance(s) are happening, they can then carry that response into the future.*

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174 Silvermist Addiction Recovery Centre. "The Relationship Between Trauma and Substance Abuse" (28 March 2018) [available online: <https://www.silvermistrecovery.com/blog/2018/march/the-relationship-between-trauma-and-substance-ab/>].

175 Wolff N & Shi, J. "Childhood and Adult Trauma Experiences of Incarcerated Persons and Their Relationship to Adult Behavioral Health Problems and Treatment" (2012) 9:5 *Int J Environ Res Public Health* 1908.

176 Cohen, LR & Hien, DA. "Treatment Outcomes for Women with Substance Abuse and PTSD Who Have Experienced Complex Trauma" (2006) 57:1 *Psychiatr Serv* 100.

*When someone's "survival brain" has been triggered, their survival instincts take over. This response is sometimes referred to as a "flight, fight, freeze, appease" response*

### **Flight, fight, freeze, appease:**

*When someone's "survival brain" has been triggered, their survival instincts take over. This response is sometimes referred to as a "flight, fight, freeze, appease" response.*

*Reactions that can be signs that a person may be triggered and which can reflect elements of a "flight, fight, freeze, appease" response include:*

- *Jumping up;*
- *Lashing out in court or child welfare meetings;*
- *Difficulty tracking a social worker or lawyer's questions;*
- *Difficulty making themselves clearly understood (e.g., a long, convoluted story; or providing little detail);*
- *An inability to accurately or chronologically recall details of an event;*
- *Providing inconsistent statements because of the way trauma impacts the brain (this is important to acknowledge because there can be an assumption that a parent is lying when, in fact, their ability to recall is impacted by trauma);*
- *Seeing neutral environments, or helping people, as threatening;*
- *Losing contact with social workers, family members and their Indigenous community;*
- *Shutting down or checking out, or not remembering what they were talking about;*
- *Stimming;*
- *Missing access visits, social worker visits, program attendance, court dates or mediations;*
- *Leaving court before their matter is heard or not completing an ongoing trial; or*
- *Agreeing to plans or agreements easily and without asking for their lawyer or community's support, even where they do not agree with the terms of the agreement or where they do not agree that those plans are in their own, or their child's, best interests.*





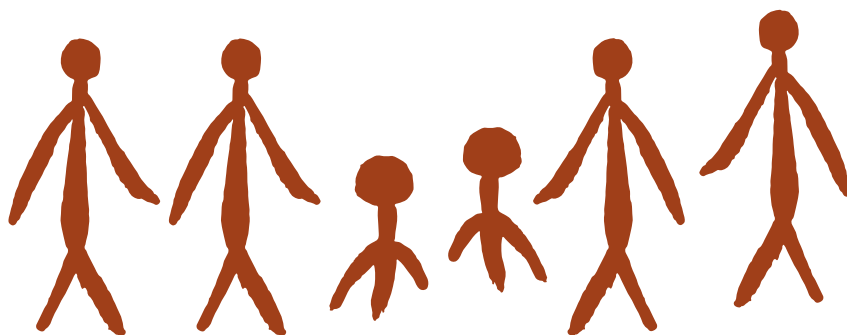
## Inter-Generational Trauma

Trauma can carry across generations and result in inter-generational/cumulative impacts on Indigenous Peoples. Dr. Maria Yellow Horse Brave Heart has called this “historical trauma”: “Historical trauma is cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma.”<sup>177</sup>

Dr. Maria Yellow Horse Brave Heart identified these features of historical trauma in Indigenous communities:

*Intergenerational trauma is one element of historical trauma and refers to the effects that can be experienced by people who live with survivors of trauma, including family members and loved ones of survivors of the residential school system and other colonial systems. People who experience intergenerational trauma may share some of the same mechanisms and patterns of the generation of family or friends who experienced the trauma.*<sup>178</sup>

*Trauma can carry across generations and result in inter-generational/cumulative impacts on Indigenous Peoples.*

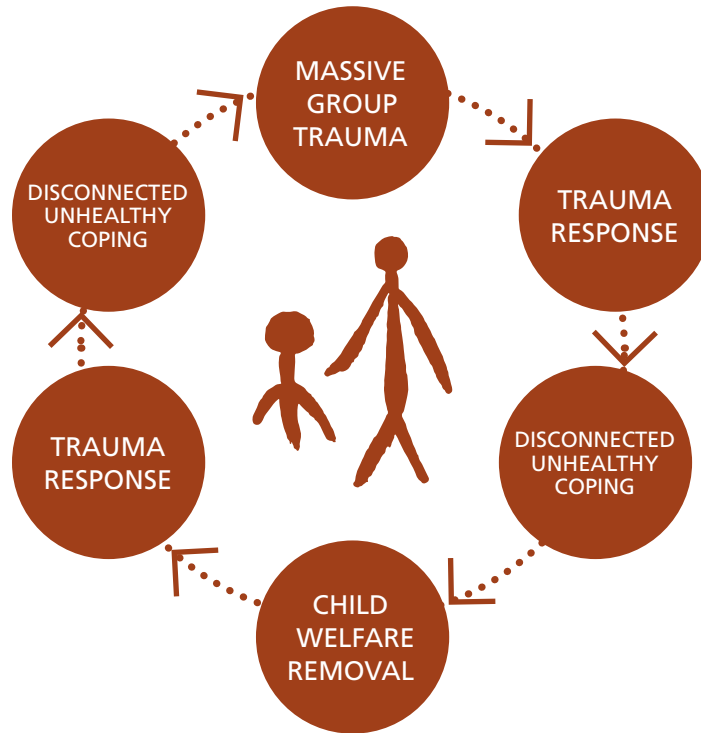


177 BC Ministry of Children and Family Development. “Child, Family and Community Service Act (CFCSA) Amendments—Spring 2018” (14 September 2018) PowerPoint Presentation [MCFD PowerPoint]. See also: Brave Heart, Dr. MYH. “Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research, and Clinical Considerations” (October-December 2011) 43:4 *Journal of Psychoactive Drugs* 282 [Brave Heart, Historical Trauma], at 282-290; Brave Heart, Dr. MYH & Deschenie, T. “Resource guide: Historical trauma and post-colonial stress in American Indian populations” (2006) *Tribal College Journal of American Indian Higher Education*, 17 (3), at 24-27; Brave Heart, Dr. MYH. “The historical trauma response among Natives and its relationship with substance abuse: A Lakota illustration” (2003) *Journal of Psychoactive Drugs*, 35(1), at 7-13.

178 West Coast L.E.A.F. “A toolkit for navigating section 276 and 278 Criminal Code matters as complainant counsel in criminal proceedings” (April 2020) [available online: <http://www.westcoastleaf.org/wp-content/uploads/2020/04/lower-res-Complainant-Counsel-Toolkit-April-22-2020-web.pdf>], at p. 7. See also the ground-breaking work of Brave Heart, *Historical Trauma*, *supra*.

The cycle of inter-generational trauma can be seen in child welfare for Indigenous families and communities:<sup>179</sup>

*An essential component of being trauma-informed is to understand the behaviours of parents, children and extended family members, not as character flaws or symptoms of mental illness, but as strategies or behavioural adaptations developed to cope with the physical and emotional impact of past trauma.*



## II. Trauma-Informed Approach to Working With Indigenous Families and Communities

An essential component of being trauma-informed is to understand the behaviours of parents, children and extended family members, not as character flaws or symptoms of mental illness, but as strategies or behavioural adaptations developed to cope with the physical and emotional impact of past trauma.

Practices and policies that seem neutral can unintentionally cause harm. Dealing fairly with Indigenous Peoples within family justice processes requires acknowledging the history of inter-generational (and institutional) trauma that Indigenous families have experienced. There is a better chance of reaching workable solutions if trauma is acknowledged and addressed.

<sup>179</sup> Elm, Dr. J, Ulrich, Dr. JS & Demientieff, Dr. LX. "A relational Approach to Transcending ACEs and Intergenerational Trauma" (1 April 2020) ICWA Virtual Protecting Our Children Conference [Elm, Ulrich & Demientieff]



## Advocacy/Best Practices

*As a starting point to a trauma-informed approach, ask: “What happened to you?” instead of: “What’s wrong with you?” Plan to maximize the agency and self-determination of people involved. Plan for advocacy or working with people in a way that is not going to re-traumatize them and, instead, empower their participation.*

*A trauma-informed approach requires asking:*

- *Are things going to trigger a parent—family member—child or youth—community member through the process?*
- *What could be done differently to make it easier for that person to participate?*
- *How can making things worse for them be avoided?*

*When a trauma-informed approach is taken, the landscape of options is different. For example, solutions may include first steps to address the challenges to full participation due to trauma. A full legal response may require that seemingly unrelated issues are addressed first (for example, is a person hungry? Worried about housing or their physical safety? Do they require more time to talk before they can fully engage?)*

*Trauma-informed practices may require:*

- *Identifying systemic barriers that Indigenous parents, caregivers or communities may face, and a plan for how to address those barriers;*
- *Asking about real experiential differences and how people may experience the child welfare and court systems differently;*
- *Involving Indigenous communities in assessing child protection concerns, including a cultural examination of safety factors and solutions; and*
- *Appointing a team to ask how a workplace (Indigenous community office; Friendship Centre; court; law office) can be trauma-informed.*



*Dealing fairly with Indigenous Peoples within family justice processes requires acknowledging the history of inter-generational (and institutional) trauma that Indigenous families have experienced.*

Encouraging a trauma-informed approach to child welfare could include:

1. **Safety and connection:** Create the conditions to allow people to engage and participate. Build collaborative relationships with parents, children and families, and within and between Indigenous communities.
  - Be aware of the physical environment: Privacy, lighting, no cramped or crowded spaces, and make sure there is an easy way to leave and that people do not feel trapped;
  - Set up an environment governed by the belief “we are all here to help” (i.e., no wrong desk or person to approach);
  - When a person misses an appointment, ask if there is a way to help them deal with that (not judging);
  - Acknowledge, in advance, that events such as court, mediation or meetings will be hard, and create a strategy for when people feel under extreme stress and may be tempted to leave;
  - Encourage people to bring support people;
  - Talk about steps in the process (fear about not knowing what is happening may cause people to shut down);
  - Make sure people can easily find their way in buildings such as courthouses or offices, or consider meeting on territory or Indigenous spaces where possible;
  - If there is a chance that people may be hungry, have difficulties with transportation or similar issues that may impact their ability to participate, plan to address those concerns.
2. **Self-determination:** Make sure people have a voice in decisions that impact their lives. For example:
  - Set out different options to reach their goals;
  - Provide advice on an “if/then” format: If these are your goals, then these are the steps that you could take;
  - Emphasize choice (where they would like to sit; how they want to meet—phone, location; allow them to set the order of things to be talked about).

*There is a better chance of reaching workable solutions if trauma is acknowledged and addressed.*



3. Be honest with people about their case or situation.
  - Leave enough time to talk;
  - Set out when, how, good times to be contacted;
  - Follow through on commitments made;
  - Regularly preview the process, upcoming decisions and court dates or mediations/meetings people will have to attend.

*People who have experienced traumatic life events are often very sensitive to situations that remind them of the people, places or things involved in their own trauma(s), and this can cause a person to re-live the trauma, have difficulty seeking solutions, and impair their ability to fully participate in child welfare processes or discussions.*

<b>THE IMPORTANCE OF POLICIES AND PROCEDURES</b>	
<b>HARM</b>	<b>HELP</b>
<ul style="list-style-type: none"> <li>• Focus on what the organization needs rather than on what the client needs to help heal the situation (for example, requiring certain forms before a person gets help; allowing lawyers' schedules to determine when court matters are heard and making parents wait);</li> <li>• Difficult forms or language;</li> <li>• Rigid timelines and unrealistic expectations;</li> <li>• Relationships that are: judging, impersonal, or disrespectful; and</li> <li>• A parent is often very traumatized when they feel they do all of the steps they were asked to do and their children are not returned, or the "goal posts keep moving".</li> </ul>	<ul style="list-style-type: none"> <li>• If there are rules or policies that always seem to be broken, change the rules;</li> <li>• Rules and polices should be clear and focus more on what a person can do rather than what they can't do;</li> <li>• Plain language;</li> <li>• Relationships that show: kindness, patience, respect and acceptance;</li> <li>• Processes that incorporate Indigenous values, traditions or cultures; and</li> <li>• Where a person understands what is expected of them.</li> </ul>

*The operation of Indigenous laws offers a restorative, trauma-informed healing approach to address Indigenous children and parents' rights and increase their access to justice.*

## Approaches Based in Indigenous Cultures

*Trauma disconnects people from themselves and from others. Indigenous cultural responses often cultivate connections to self, family, community/Nation, culture and nature.<sup>180</sup> Many traditional practices and ceremonies function to both prevent and restore balance back to the individual and community and to nurture wellness. These practices plant seeds of wellness that can be used to regain balance throughout life when faced with overwhelming challenges.<sup>181</sup>*

*Approaches based in Indigenous cultures and practices are effective at helping to reduce trauma responses when working with Indigenous children and families. The operation of Indigenous laws offers a restorative, trauma-informed healing approach to address Indigenous children and parents' rights and increase their access to justice.*



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<sup>180</sup> Elm, Ulrich & Demientieff, *supra*.

<sup>181</sup> Elm, Ulrich & Demientieff, *supra*.

## 12. Steps Within the Child Welfare Process

The BC CFCSA applies to all children in BC and is meant to protect children from abuse, neglect, harm or threat of harm, including from physical, sexual or emotional abuse. The BC CFCSA sets out steps the director (either MCFD or a DA) must take when there is a child protection concern. The operation of the BC CFCSA is subject to the Federal Act, which imposes national standards.

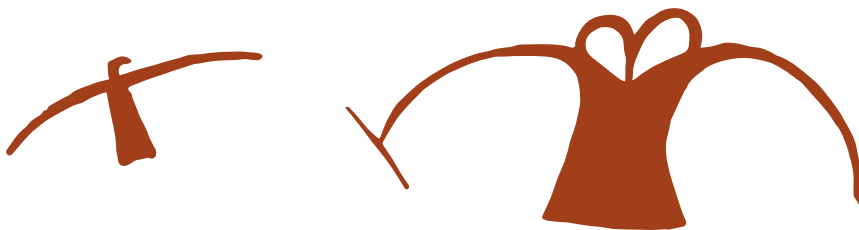
The Federal Act does not impact specific child welfare procedures, and instead imposes national standards, including a definition of the BIOIC and notice provisions that change how child and family services must be provided.

*The BC CFCSA applies to all children in BC and is meant to protect children from abuse, neglect, harm or threat of harm, including from physical, sexual or emotional abuse.*

### Concurrent Jurisdiction

The federal and provincial laws must be read together. Where an Indigenous group passes its own child welfare laws, the Indigenous law could replace or change how the BC CFCSA applies. In cases of conflict, the Federal Act and Indigenous law displace the BC CFCSA.

Section 13(1) of the BC CFCSA sets out the circumstances under which a child will be found to be in need of protection. Making a determination about whether a child is in need of protection involves multiple considerations. Courts must be “careful to avoid parent-shopping” in determining if a child is in need of protection. The question is not whether the children “might be better off, or happier, or obtain a better upbringing in the care of other “parents” than with their natural parents. If that were the criterion for a protection order, not many children would remain with their natural parents.”<sup>182</sup>



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<sup>182</sup> *Saskatchewan (Minister of Social Services) v. SE and EE*, [1992] 5 WWR 289 (Sask UFC), at 296.

*The Federal Act and BC CFCSA each provide different rules about when and how a child’s Indigenous community is notified of, and provided the opportunity to be involved in, child welfare matters.*

AREAS WHERE THE FEDERAL ACT CHANGES CHILD WELFARE PRACTICE	
s.9	Introduces cultural continuity and substantive equality; Asserts children’s right to their traditions, customs, languages and community.
Ss.14 (1) & (2)	Priority to preventative care including early intervention, especially in preventing apprehension of children at birth.
s.15	Prevents apprehension “solely on the basis” of socio-economic conditions, to the extent that it is consistent with the best interests of the child.
s.16(3)	Requires a reassessment of placement on an ongoing basis to determine if the child can be returned to parents or extended family (defined by Indigenous law).
s.12	Narrows the list of those who are given notice when a First Nations child is involved in a child welfare proceeding to the Indigenous governing body, parent and caregiver, and limits the sharing of information to what is necessary to explain the proposed significant measure, and to the extent that is consistent with the best interests of the child.
s.16	Priority for placement; preference within the family—Indigenous community—other Indigenous Peoples—then outside (2.1) The placement of a child under subsection (1) must take into account the customs and traditions of Indigenous Peoples.

## Notice and Indigenous Community Involvement

The Federal Act and BC CFCSA each provide different rules about when and how a child’s Indigenous community is notified of, and provided the opportunity to be involved in, child welfare matters. These are not mutually exclusive categories. Under the Federal Act, IGBs have a right to be notified of all “significant measures” involving their child members. The right of notification extends, on an ongoing basis, for the entire time a child remains in care.

The Federal Act provides for notice to the IGB and an opportunity for the IGB to provide input about significant measures involving a child’s care. Significant measures include both court and non-court proceedings.

The notice required to be given under the Federal Act is provided to a different Indigenous representative body, and with a different result, than occurs under the BC CFCSA.

Under the Federal Act, an IGB (appointed by an Indigenous community) is entitled to notice of all significant measures involving their child members:





12(1) to the child's parent and the care provider, as well as to the Indigenous governing body

- to the extent that doing so is consistent with the best interests of the child
- before taking any significant measure in relation to the child

Notice to an IGB is only required where it is first triggered by the IGB informing the service provider that they are acting on behalf of an Indigenous group.

Significant measures are not defined in the Federal Act. Policy 1.1 states notice must be provided before taking the following significant measures under the BC CFCSA:

- (I) entering or renewing voluntary care agreements (s. 6);
- (II) entering or renewing special needs agreements (s. 7);
- (III) entering or renewing agreements with youth (s. 12.2);
- (IV) removing a child (s. 30, s. 36, s. 42);
- (V) withdrawing from court proceedings;
- (VI) returning a child before presentation hearings related to a removal (s. 33(1), s. 33(1.1));
- (VII) consenting to a child's adoption (s. 50(2)); and
- (VIII) placing the child in an out-of-home living arrangement, by taking into account the placement priorities for Indigenous children (s. 16).

*It is a matter of prudent policy to seek to advise a child's Indigenous community early, and meaningfully, even where an IGB has not given official notice.*



### **Case Study: Alberta (Child, Youth and Family Enhancement Act, Director) v. CL<sup>183</sup>**

*The director's duty to consult or involve children's Indigenous community(ies) (even before official notice under the Federal Act) was discussed. Competing interests from different Indigenous Nations were addressed. "Prudent policy looking forward... would have the Director identifying, advising and potentially involving all relevant bands in permanency planning at an early date as it is in best interest of the children involved".*

It is a matter of prudent policy to seek to advise a child's Indigenous community early, and meaningfully, even where an IGB has not given official notice.

183 2020 ABPC 23.

*Under the Federal Act, the IGB has a right to make representations and be involved, but not a right to party status.*

## *Different Rights of Involvement Under the Federal Act and BC CFCSA*

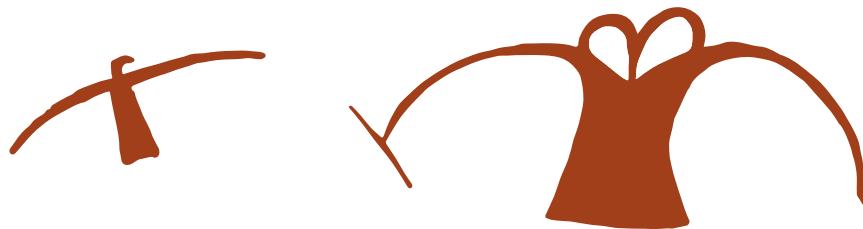
Under s. 13 of the Federal Act, an IGB is not entitled to party status but has the right to make representations in court proceedings. The right to make representations in court allows for the ability to provide information about, and views on, the proposed intervention. Section 13 says that a child's parent and care provider have the right to make representations and have party status in court proceedings; however, the IGB only has the right to make representations in the court proceedings.

Under the Federal Act, the IGB has a right to make representations and be involved, but not a right to party status. Party status allows for disclosure and involvement in litigation. The Indigenous group (whether IGB or otherwise) could use the provisions of the BC CFCSA to apply for party status.

In the United States, courts have recognized that the notice requirements to Indian Tribes under the ICWA recognizes their right to participate in decisions about their child members and that, without notice, Indian Tribes could not exercise that right. The purpose of notice (to trigger Tribal involvement) suggests the seriousness with which it should be addressed.<sup>184</sup> A similar seriousness should be assumed in the context of notice and Indigenous community involvement under the Federal Act and BC CFCSA.

## *Significant Measures*

Significant measures are decisions and actions taken in relation to a child. Significant measures could include court proceedings, such as: Applying for protective intervention orders; supervision orders; orders at protection hearings; extension of orders; continuing custody orders; cancellation of continuing custody orders; transfer of custody under s. 54.01 or 54.1; access orders; changes to supervision; temporary custody and access orders; or restraining orders in relation to a child in care.



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<sup>184</sup> *Re CI*, 491 Mich 81, 82 (2012).

*Policy 1.1 defines significant measures to include non-court proceedings such as:*

- *Referrals to parent centres or mediated or negotiated agreements reached at those centres;*
- *Entering or renewing voluntary care or special needs agreements, or agreements with youth;*
- *Returning a child before a presentation hearing related to a removal;*
- *Placing a child for adoption or placing a child out of their home;*
- *Starting a new placement or changing the placement for a child.*

*Under s. 12(1) of the Federal Act, a service provider is to provide notice to the IGB if that IGB has informed the service provider that they are acting on behalf of that Indigenous group, community or people.*

Under s. 12(1) of the Federal Act, a service provider is to provide notice to the IGB if that IGB has informed the service provider that they are acting on behalf of that Indigenous group, community or people. However, given the overall purpose of the Federal Act, courts have found official notice is not required before there is a requirement to notify and involve a child's Indigenous community.

In *Alberta (Child, Youth and Family Enhancement Act, Director) v. KC and JP*,<sup>185</sup> the judge stated that s. 12 is fundamentally concerned with notice being given to the IGB and that there is no requirement that the IGB give any notice to anyone of their intention to act on behalf of a group, community or people. She went on to clarify that, if an IGB wished to participate in a process, it could do so by satisfying the court that it was authorized to act on behalf of the group, community or people.

## **Indigenous Laws**

*Indigenous laws could define appropriate notice to say when the Indigenous community will require notice of actions taken concerning their child members. Indigenous laws could expand the scope of significant measures to ensure that Indigenous communities are made aware when their children and families become involved within the child welfare system.*



<sup>185</sup> 2002 ABPC 62.

*The BC CFCSA sets out how Indigenous communities will be notified at particular stages of the child welfare process.*

<b>NOTICE</b>	
<b>FEDERAL ACT</b>	<b>BC CFCSA</b>
<p>Unless the child’s health or safety is in immediate danger, prior to removing a child, notice must be provided to the IGB (s. 6(c))</p> <hr/> <p>Notice must be provided to the IGB to the extent that doing so is consistent with the best interests of the child, and before taking any significant measure in relation to the child (s. 12(1)).</p> <p>The requirement to provide notice is only triggered where the IGB has informed the service provider that they are acting on behalf of that Indigenous group.</p> <hr/> <p>However, given the overall purposes of the Federal Act, formal notice is not required before an Indigenous community is entitled to be involved in decisions about their child members, as it is impossible to achieve the purposes of the Federal Act without involving a child’s Indigenous community.</p>	<p><b>Possible—Report assessment and consideration stage:</b> Section 16(3)(c)—The director can share information early in its process if required for a child’s well-being.</p> <hr/> <p><b>Suggested—Presentation stage:</b> Section 33.1(4)—Prior to a presentation hearing, the director must, if practicable, inform the child’s Indigenous community (as prescribed by regulation). Indigenous communities will additionally receive notice at applications to extend or vary temporary custody orders, protection proceedings and cancel continuing custody orders.</p> <hr/> <p><b>Required—Protection stage:</b> Section 38—At least ten days before a protection hearing, notice must be provided to a child’s Indigenous community prescribed by legislation.</p>

Under the BC CFCSA the director currently provides notice or shares information in two ways:

- 1. Recognized Agencies and Organizations:** The director has agreed to grant greater involvement and decision-making ability to a particular set of Indigenous agencies or organizations prescribed

by provincial regulation. The organizations must have practice standards, staff and the ability to financially and legally indemnify the director for any mistakes they make.<sup>186</sup> Provincial policy allows greater involvement of these Indigenous groups to receive, consider and address child protection reports. Upon a report that a child is in need of protection, the director can refer the matter to an Indigenous group in this category. This could include DAs or other entities created under the Federal Act. Matters could be referred at the report-investigation-assessment stage and Indigenous groups could be more involved in diversion and protection decisions.

- 2. General Notice to Indigenous Communities:** The BC CFCSA sets out how Indigenous communities will be notified at particular stages of the child welfare process. Indigenous communities and organizations listed in Schedules 1, 1A, 1B and 2 to the BC CFCSA, include Bands, First Nations, some treaty organizations, the Métis Commission for Child and Family Services and Friendship Centres. Decisions made in the early stages of the child welfare process are often difficult to displace and become permanent. The early involvement of Indigenous communities can have a profound and lasting impact on the possibility for resolution.

*Indigenous communities should become involved in the child welfare process as early as possible.*

## BEST PRACTICES



*Indigenous communities should become involved in the child welfare process as early as possible.*

- Even where there is no positive duty on the director to involve the Indigenous community, the best practice is to seek the intervention of the Indigenous community as early as possible.*
- Educating Indigenous communities and Indigenous parents, as well as director's and parents' counsel and the court, about the need for, and benefits of, early involvement of Indigenous communities in child welfare matters is necessary.*
- Information provided to Indigenous communities with notice of child welfare matters involving their child members could include steps that they could take or options for involvement.*

<sup>186</sup> MCFD PowerPoint, *supra* at 12.

*Under the Federal Act's overall direction to involve Indigenous communities in making decisions about their child members, the practice of dispensing with Indigenous community involvement or consent violates the direction of the Federal Act.*

## Advocacy/Best Practices

*An Indigenous parent or child could also notify their Indigenous community (or request that their community be notified) as soon as they become aware of a child protection investigation.*



The director must give notice to a child's Indigenous community(ies):

1. At the presentation stage (if practicable) (s.34(3)); and
2. At the protection stage (required) (s.38(1)).

Under s. 69 of the BC CFCSA, the court has the power to vary notice requirements and to dispense with the notice requirement. The application of s. 69 can result in orders being made without notice to parties or which restrict the time they have to seek legal advice. When orders are granted by way of consent under s. 60, it is routine that the consent of the Indigenous community is dispensed with pursuant to s. 60(3).

*Under the Federal Act's overall direction to involve Indigenous communities in making decisions about their child members, the practice of dispensing with Indigenous community involvement or consent violates the direction of the Federal Act.*

## Notice and Party Status

Providing notice to Indigenous communities allows them to exercise their rights. More importantly, it allows them to help protect and articulate the rights of their child members. When Indigenous communities are aware that their children and families are involved in child welfare matters, they can become involved to seek solutions that could keep a child within their Indigenous family or community.

Under s. 39(1)(c), if the Indigenous community appears on the first day of the protection hearing, they will be given party status and will then be entitled to notice of subsequent hearings.

Under the BC CFCSA, children 12 years and older are served, but not automatically added as a party. A child can be made a party by court order, pursuant to s. 39 of the BC CFCSA. Anyone, including the child who is the subject of the proceeding, can apply to become a party to the proceeding by applying under this section.

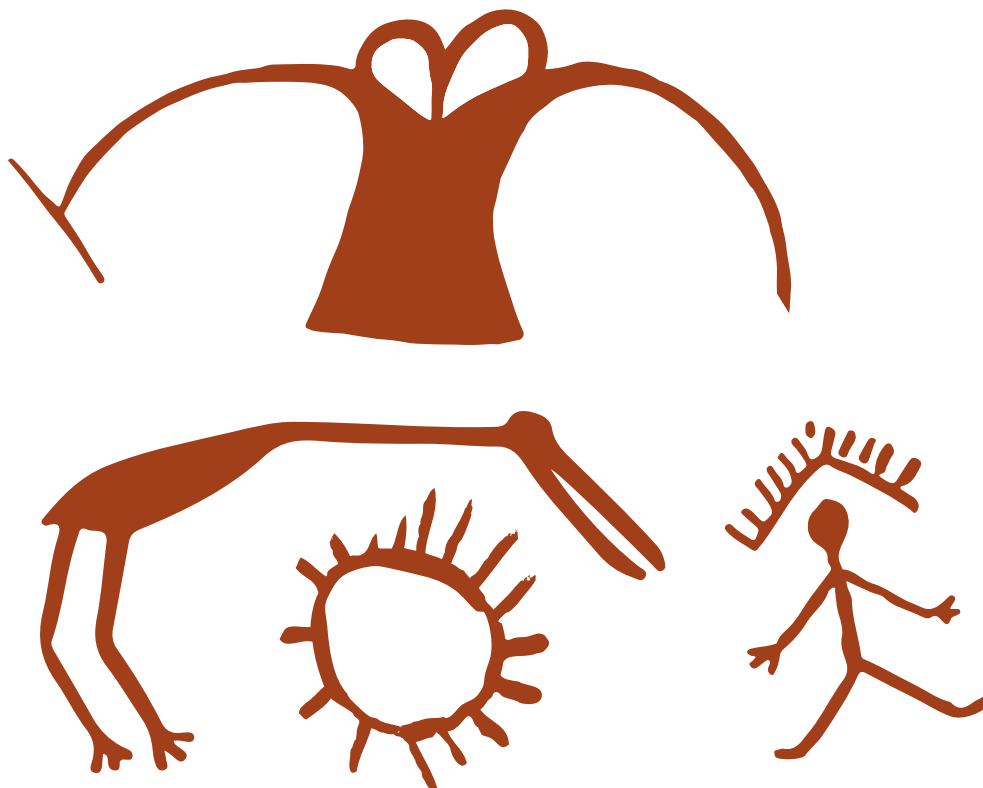


## Party status under the BC CFCSA allows the Indigenous community to:

- *Participate in the court proceedings;*
- *Receive information about the child protection concern (disclosure);*
- *Speak in court;*
- *Call witnesses; and*
- *Participate in case conferences and alternative dispute resolution processes.*

*Participation as a legal party allows the Indigenous community to advocate for the child's Indigenous identity and cultural heritage to be taken into account in decisions about supervision, removal and temporary or continued custody.*

*Participation as a legal party allows the Indigenous community to advocate for the child's Indigenous identity and cultural heritage to be taken into account in decisions about supervision, removal and temporary or continued custody.*



*The national standards set out in the Federal Act disrupt the past common practice of proceeding without Indigenous community involvement in child welfare matters involving Indigenous children.*

The rights of IGBs under the Federal Act are less than the party status contemplated in the BC CFCSA, though they do occur earlier and for more matters.

The right of IGBs under the Federal Act to make representations is less than an Indigenous community has as a legal party to a proceeding under the Federal Act. It is the ability to provide information about the relevant facts of a matter and views on the proposed intervention, without including party status (similar to a right to be consulted in other areas of the law).

### Advocacy/Best Practices

*The national standards set out in the Federal Act disrupt the past common practice of proceeding without Indigenous community involvement in child welfare matters involving Indigenous children. Efforts to involve the Indigenous community should be active and ongoing. Indigenous community involvement is the right of the child, which cannot be waived, and applies at every stage of the child's involvement or contact with the child welfare system.*

*Where an Indigenous community is not automatically added as a party after an appearance, they can make an application to be added as a party by asking the judge in court to be added as a party, under the Rules (Rule 1(4)) and s. 39(4) of the BC CFCSA, at a hearing or case conference. An Indigenous community can also initiate a motion to be added as a party by filing a Form 2 Application for an Order (available online or at the Provincial Court Registry). (For an example of Form 2, see Appendix—Tips for Going to Court.)*

*In practice, Indigenous communities could appear in court and ask to be added as a party, as this is the practice when a child needs to be made a party. Indigenous communities could make a similar oral request to be added, and be prepared to say how it is in the child's best interests and mandated under the overall scheme of the Federal Act.*







PARTY STATUS	
FEDERAL ACT	BC CFCSA
<p>IGBs are not automatically entitled to party status in child welfare matters (s.13 (a)).</p> <hr/> <p>IGBs have the right to make representations, similar to a right to be consulted.</p> <hr/> <p>If an IGB wanted party status in a proceeding relying on the Federal Act, they would have to make an application under the Rules to be added as a party. Or, where the IGB was the same as the Indigenous community representative under the BC CFCSA, they could have party status recognized under that Act by appearing.</p>	<p>Generally, in litigation, the child’s Indigenous community is entitled to notice and, if they appear, full party status.</p> <hr/> <p>Indigenous organizations include First Nations, Bands, Nisga’a Lisims Governments, Treaty First Nations, the Métis Commission for Child and Family Services and some Friendship Centres (listed in the BC CFCSA Regulation) and can have full party standing in matters involving their child members.</p> <hr/> <p>Although specific representatives are listed, the purpose of notice is not to involve that particular person—but rather to ensure the purposes of the BC CFCSA are met by involving a child’s Indigenous community(ies) in planning for their care.</p>

*Even where an Indigenous group has not formally articulated its law(s) under the Federal Act, Indigenous Peoples’ traditions, laws and standards for caring for their children and families must always be reflected in the planning and care of their children.*

### Indigenous Laws

*Even where an Indigenous group has not formally articulated its law(s) under the Federal Act, Indigenous Peoples’ traditions, laws and standards for caring for their children and families must always be reflected in the planning and care of their children.*





*A lack of response to efforts to notify a child's Indigenous community does not mean the Indigenous community is not interested or does not care.*

## BEST PRACTICES: NON-APPEARANCE BY INDIGENOUS COMMUNITIES



*It is routine in Indigenous child protection matters for notice that an Indigenous child is involved in a BC CFCSA proceeding to be sent to an Indigenous community, for no representative of the Indigenous community to appear, and for the matter to proceed to subsequent stages without their involvement.*

*In practice, notification to Indigenous communities can operate as more of a procedural hurdle rather than a practice that makes any meaningful difference to the operation of the child welfare system for Indigenous children.*

*A lack of response to efforts to notify a child's Indigenous community does not mean the Indigenous community is not interested or does not care. There may be a number of reasons why Indigenous communities do not respond. Indigenous communities may:*

- *Not have received the notice. For example, faxes may not have gone through or not have been brought to the appropriate person's attention;*
- *Lack the professional, human and financial resources to respond in a timely way or to attend the court proceedings;*
- *Not have legal counsel and, instead, may send a chief, councillor, social worker or support worker to attend court. In some instances, these people may not identify themselves in court; or*
- *Face barriers as a result of involvement with IRS and the child welfare system that might paralyze actions in this area.*

The Federal Act's focus on substantive equality and directive that children must be cared for according to their own Peoples' laws and traditions suggests the need for funding to support the real and meaningful involvement of Indigenous communities. Simply providing notice cannot, by itself, achieve the purpose of the Federal Act if Indigenous communities lack the resources to be able to effectively respond and participate in response to the notice.

### **Actions/Best Practices**

*Proactive steps that an Indigenous community can take when their child members are involved in the child welfare system:*

- *Appear by telephone and video-conference by requisition (especially important if hearing is away);*
- *Have leadership nominate a representative to get the notices and appear or create a representative position (for example, if the Indigenous community has no legal representative);*
- *Have legal counsel appear on their behalf;*
- *Send out a notice to all child and family service agencies/parents/legal centres in the province of who gets notice and their contact information, including email;*
- *Provide a notice to court Registries with contact notice/ details;*
- *Send written statements to the social worker/parent's counsel/director's counsel to provide in court if they cannot appear in court in person or by telephone or video-conference;*
- *Request that social workers notify them by telephone or email of adjournment dates, and request adjournments to allow the Indigenous community time to appear or to allow processes within the child's own cultural traditions to be followed or put in place.*

*The Federal Act's focus on substantive equality and directive that children must be cared for according to their own Peoples' laws and traditions suggests the need for funding to support the real and meaningful involvement of Indigenous communities.*



## Report, Assessment and Investigation



### BEST PRACTICES

*At each stage, an Indigenous community or parent can request that a matter be referred to mediation or a traditional dispute resolution process.*

*The director must look into any report received that a child may be in danger. If the director decides that a child may be in need of protection, they can:*

- *Involve the Indigenous community: Where an Indigenous community has an agreement with the director under s. 92.1, the director may involve the Indigenous community in collaboratively addressing a report. This could include sharing information about the child protection report. Where certain Indigenous organizations are prescribed by provincial regulation, the director may refer the child protection report to that entity.*
- *Enter into a safety plan or supervision order to protect the child in keeping them with their family, which could include an Indigenous community; or*
- *Remove the child if they cannot safely stay in their home.*

### Actions

*Parents who learn that a child welfare complaint has been made against them can:*

- *Apply for a Legal Aid lawyer as soon as they are aware of the complaint; and*
- *Ask their Indigenous community to become involved.*





## Actions

At each stage, an Indigenous community or parent can request that a matter be referred to mediation or a traditional dispute resolution process.

- A family conference (s. 20) could involve the family and Indigenous community in addressing a child protection concern. Opinions are split amongst Indigenous Peoples about the success of these conferences. Generally, they are controlled by the director, discussion about whether a child is actually in need of protection is not allowed, and there are less options available to resolve differences. An Indigenous community may have a greater ability to influence outcomes under other processes, such as mediation, or their own traditional dispute resolution process.
- Mediation or other alternative dispute resolution processes, including traditional Indigenous models, are available under ss. 22-23.
- In some cases parties do not wait for a FGC or mediation and, instead, have a four-way meeting between the parent(s) their legal counsel, the social worker and director's counsel. These are usually informally requested by legal counsel or director's counsel. The Indigenous community could request this as well.
- If the Indigenous community is concerned that decisions will be made at informal processes without their involvement, they can require their involvement by identifying these as "significant measures" in their own law (if passing an interim law to direct how the national standards in the Federal Act will apply to their child members).



*The Federal Act (s. 10(1), 14, 15, 15.1) influences available options. The primary consideration must be the BIOIC, which requires that a child's cultural connections are preserved.*

*The Federal Act (s. 10(1), 14, 15, 15.1) influences available options. The primary consideration must be the BIOIC, which requires that a child's cultural connections are preserved. Where possible, priority should be given to preventive measures rather than removal. In all cases, the importance of keeping a child culturally connected should be a primary consideration.*

## Voluntary Agreements

The BC CFCSA authorizes the director to enter into a number of different agreements with parents, or others, for the support and/or temporary care of a child.<sup>187</sup>

*The BC CFCSA authorizes the director to enter into a number of different agreements with parents, or others, for the support and/or temporary care of a child.*

Parents may enter voluntary agreements where there is no child protection concern to access supports. Parents may also enter voluntary care agreements to avoid court hearings, resolve issues quickly or access supports. For example, a parent may require short-term support or care for their child for medical reasons, to attend a treatment program, or for respite. A child may be experiencing behavioural issues requiring intervention, or there may be socio-economic issues (e.g. housing) affecting the parent's ability to temporarily care for the child.

### BEST PRACTICES



*Legal counsel may not be involved at this stage unless a parent or child seeks independent legal advice in relation to the agreement. Indigenous communities may be included as a party to voluntary services or supports for families (s. 5 (1.1)). However, the agreement must include a description of their role in the agreement and conditions about the use, disclosure and security of information provided to them (s. 5 (1.2)).*

Voluntary agreements can lead to increased scrutiny of a family and may lead to child protection concerns, and the involvement of Indigenous communities at this stage could be very important in the long-term.<sup>188</sup>

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<sup>187</sup> Part 2 of the BC CFCSA lists several types of voluntary agreements: Support Services Agreements; Voluntary Care Agreements; Special Needs Agreements; Extended Family Program (Formerly Kith and Kin Agreements); and Agreements with Youth or Young Adults.

<sup>188</sup> See for example these cases that show the progression from voluntary agreements to more intrusive measures: *DCP v. SM & WD*, 2010 PESC 41, at 3, and *The Children's Aid Society of Prince Edward Country v. KS*, 2012 ONCJ 727, at 7-9.



## BEST PRACTICES



*Indigenous parents should be referred to a lawyer for independent legal advice before entering into any agreement. Legal Aid services are available for those who cannot afford a lawyer but are seeking advice, legal information or representation services. Applications can be made by phone or in-person at a Legal Aid office.*

*The director should identify the child's Indigenous community, advise that a voluntary care agreement is being developed and ensure the child's community has an opportunity to participate (including providing financial resources and sufficient time) in developing the plan.*

*Where a voluntary care agreement is already in place, the director should notify the child's Indigenous community, allow for a review of the voluntary care agreement, make any changes necessary that Indigenous communities may want, make a legal review of the voluntary care agreement and seek changes, if necessary.*

*Indigenous parents should be referred to a lawyer for independent legal advice before entering into any agreement.*

### *Types of Voluntary Agreements*

1. **Safety Plan:** An informal agreement which talks about how a child will be kept safe. Safety plans can last for a long time and are often made without parents having a lawyer or their Indigenous community involved. If a safety plan breaks down, this can quickly lead to more intrusive involvement of the MCFD in a family's life, such as a removal or supervision order. To avoid this, all parties could agree on a safe place in the community for the children to stay as a "Plan B" so that the child is not taken from their community.
2. **Support Services Agreements (s. 5):** The director could enter into agreements to pay for support services to help a family, such as counseling, home support, respite care or parenting programs. The director could enter into support services agreements with an Indigenous community to provide services to families.
  - Support services agreements made under s. 5 allow the director to provide or purchase support services for a term (renewable) of up to 6 months, including support for children who have witnessed domestic violence.
  - Section 93 allows the director to provide preventive and support services for families to promote the purposes of the

BC CFCSA, including “to assist the parent or other person to purchase support services... so that the child can reside at home,” and establish services to “assist communities to strengthen their ability to care for and protect their children”. These agreements could allow resources to be provided to support approaches based on Indigenous traditions and open significant options for Indigenous community involvement with resources attached to that involvement.

*Where a voluntary care agreement is already in place, the director should notify the child’s Indigenous community, allow for a review of the voluntary care agreement, make any changes necessary that Indigenous communities may want, make a legal review of the voluntary care agreement and seek changes, if necessary.*

3. **Voluntary Care Agreements:** The director may make a written agreement with a parent who has custody of a child and is temporarily unable to look after the child in the home (s. 6). Indigenous communities may be included as a party to these agreements (s. 2.1). Before making the agreement, the director must consider if there is a “less disruptive way of assisting the parent to look after the child” which could include providing services in the child’s home. A plan of care must be included in voluntary care agreements. Voluntary care agreements may allow the Indigenous community to identify alternate caregivers within a child’s family or cultural community who can assist in caring for a child and have that alternative care funded by the director.
4. **Special Needs Agreements:** A special needs agreement allows the director to provide services to a child with special needs.
  - Special needs agreements under s. 7 allow a parent to “delegate to the director as much of the parent’s authority as ... required”. Funding could be provided to Indigenous communities to provide services for children with special needs, given the Federal Act’s guarantee of substantive equality.
  - Special needs agreements may allow the Indigenous community to identify and support alternate caregivers within a child’s family or cultural community who can assist in caring for a child and have that alternative care funded by the director.
5. **Extended Family Program (Formerly Kith and Kin Agreements) (s. 8):** The director can enter into agreements with important people in a child’s life, including people who are traditionally or culturally responsible for a child. Indigenous communities can help identify who is culturally important or connected to a child.
  - The director can enter an 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.”





- Agreements under the extended family program can allow the director to contribute to the child's support while the child is in care, recognizing traditional Indigenous care providers.
  - A challenge of extended family program agreements is the discretion the director has to decide whether to provide funding to support the child's care. This discretion may result in a child's relatives being provided with no, or reduced, financial support. However, the Federal Act's requirement of substantive equality for Indigenous children should allow this lack of adequate and equitable funding to be challenged.
6. Agreements with Youth: The director can enter into agreements with youth to live independently. Indigenous communities could help to reconnect Indigenous youth with their cultures and communities, especially where youth were disconnected by placement outside of their family and culture while in care.
- Indigenous community involvement in these agreements could address the situation of youth who have been in care for a long time and have no familial connections or are culturally disconnected.
7. Agreements with Adults: The director can enter into agreements with adults who have aged out of care under certain conditions to provide support services and/or financial assistance while they are enrolled in an educational or vocational training program or taking part in a life skills or rehabilitative program (s. 12.3). Indigenous communities could provide programs which could facilitate cultural connections.
- Support services generally end when a youth turns 19; however, under s. 12.3, support can be continued to allow a young adult who was in care when they turned 19 to continue with educational/vocational training or a rehabilitative program until the age of 24.

*In articulating their own laws, Indigenous Peoples may wish to contemplate categories of agreements that may fit within their own culture or ways of caring for and supporting children and families, including ways of supporting children who require additional supports and older youth.*

## Indigenous Laws

*In articulating their own laws, Indigenous Peoples may wish to contemplate categories of agreements that may fit within their own culture or ways of caring for and supporting children and families, including ways of supporting children who require additional supports and older youth.*





## BEST PRACTICES

*Indigenous community involvement is necessary to structure voluntary agreements that are responsive to the family's and child's needs and rights.*

*Indigenous community involvement is necessary to structure voluntary agreements that are responsive to the family's and child's needs and rights.*

- *Indigenous communities may have knowledge about a family's strengths and challenges and can strengthen voluntary agreements by identifying potential problems and developing cultural plans to ensure that the child's Indigenous identity is preserved and protected from the earliest point of contact with the child welfare system.*
- *Indigenous communities can identify, and potentially provide, services (which the director could pay for all or part of) under a support services agreement or separate agreement to address child protection concerns in a culturally meaningful way.*
- *Indigenous communities can help to identify extended family to care for a child under extended family program agreements that allow a child to remain within their community and promote the development and preservation of the child's Indigenous cultural heritage and identity.*
- *Indigenous children who—post-CCO—are disconnected from their Indigenous communities and extended families could enter voluntary agreements that involve their Indigenous community. Indigenous communities could work with the director to seek to reconnect Indigenous youth with their cultures and communities and provide broader support to youth who may be isolated from their Indigenous community.*
- *Agreements between the director, parents, caregivers or Indigenous communities under s. 93 could include providing funding to allow a child to remain at home, with supports, or to assist Indigenous communities to strengthen their ability to care for and protect their children.*
- *Indigenous communities could define which voluntary agreements that they consider to be "significant measures" that they require notice about under their own laws.*

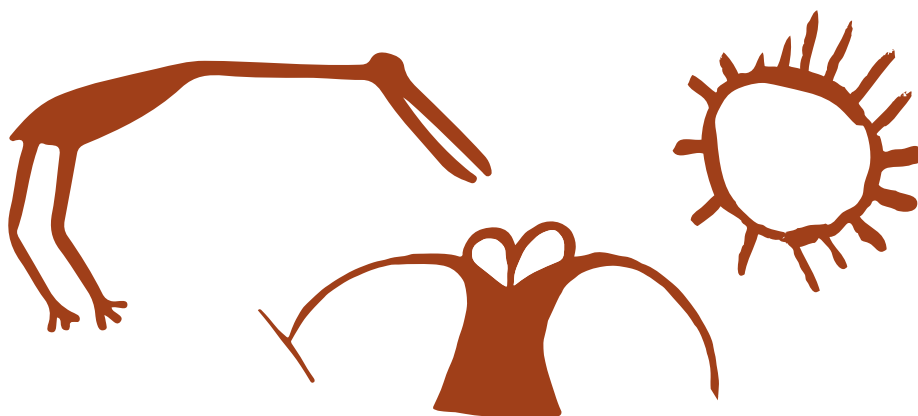


## Plans of Care

The director must provide the court with a plan of care when applying for interim supervision and custody orders at presentation and protection hearings, and when filing applications for a continuing custody order. A plan of care must address an Indigenous child's cultural development and cultural identity in determining their best interests. The BC CFCSA Regulation s. 8(2) outlines the information that must be included in a plan for care for each child, including:

- Whether or not the child's views on the plan of care have been considered;
- The name of the child's Indigenous community (including Treaty First Nation or Nisga'a Lisims Government);
- The involvement of the child's Indigenous community in the development of the plan of care, including its views, if any, on the plan;
- How the director plans to meet the child's need for continuity of relationships, including ongoing contact with parents, relatives and friends, and continuity of cultural heritage, religion, language and social and recreational activities;
- Steps taken to preserve an Indigenous child's cultural identity and comply with the placement priorities for Indigenous children under s. 71(3) of the BC CFCSA, which requires that they be placed within their extended family, Indigenous cultural community or with another Indigenous family before other options are considered;
- If applying for a CCO, what arrangements are made to meet the child's need for permanent stable relationships; and
- A schedule for the review of the plan of care.

*The director must provide the court with a plan of care when applying for interim supervision and custody orders at presentation and protection hearings, and when filing applications for a continuing custody order.*



*Once a child is removed, the director must go to court within 7 days to show that there is some evidence that a child is in need of protection.*

### **An Indigenous community could:**

- *Identify ways for supervised visits to take place in the community. For example, family or community members could supervise visits within the community.*
- *Talk about who should be able to visit a child beyond just parents and extended family. Plan for access visits when a child is placed outside of their community, including:*
  - *When visits will occur;*
  - *Safe people or places for supervised visits to occur in the community;*
  - *How the child, family or Indigenous community can ask for visits; and*
  - *Transportation (how the parents, child or community members will get to and from the visits and how this transportation will be paid for).*



### **Presentation Hearings**

Once a child is removed, the director must go to court within 7 days to show that there is some evidence that a child is in need of protection. This is often the first court appearance. Here, the court decides whether there is some evidence that a child is in need of protection. This hearing is designed to ensure that a child is not arbitrarily taken into care.

At the presentation hearing, the director must show:

- That the removal was justified;
- That they took the least disruptive actions possible (i.e., that removing the child was the least disruptive action that could be taken in order to protect the child);
- Steps taken to preserve the child's Indigenous identity in planning for the care of the child; and
- Any less disruptive steps the director considered before removing the child.

*As a result of the Federal Act, the director must show that they took a preventative approach and took all reasonable steps to keep the child safely within their home prior to a removal.*

In practice, it is common that, after the first appearance, the matter is adjourned for a short period of time (for example, to allow parents to get legal counsel or to refer a matter to mediation).

*When a child is placed in the interim custody of the director, the director becomes the guardian of the child.*

## **Actions**

*Indigenous community involvement between the first appearance and presentation hearing could provide a culturally appropriate consideration of the protection concerns and help to plan for the care of the child to ensure that they remain within their extended family or Indigenous community.*



When a child is placed in the interim custody of the director, the director becomes the guardian of the child. Although an interim order is for an initial term of 45 days, this can be extended. In practice, this order runs until a further order is made, which can be many months. At this stage, the parties may seek to explore alternatives, such as mediation, during which time Indigenous community involvement could be crucial to addressing protection or other concerns.

Section 32(1) of the BC CFCSA allows the director to withdraw from a proceeding at the presentation stage if the director considers an agreement with the Indigenous group can protect the child.

Possible outcomes at a presentation hearing include:

- A child may be returned to their parent(s) with no conditions or with supervision terms.
- An interim (temporary) order might be made placing a child under the custody of the director or other person. Where a child is removed from the parents, access to the child is addressed at a presentation hearing, including for parents, grandparents, extended family members or culturally important people to the child.
- The court can make a s. 60 supervision or custody order with the parents' written consent without the finding that a child is in need of protection.

*As a result of the Federal Act, the director must show that they took a preventative approach and took all reasonable steps to keep the child safely within their home prior to a removal.*

### Indigenous Communities Could:

- *Educate community members about how Indigenous community involvement can help to protect children and prevent them from being lost in the child welfare system.*
- *Work with the director to pre-approve community members as emergency foster homes, so that children are not removed from their communities when there is a protection concern.*
- *Make an emergency plan in writing with the director and parents for what will happen if parents don't follow the terms of a supervision order or safety plan.*
- *Say where supervision terms will not work or there are better options within the community.*
- *Suggest other ways to help the family, such as traditional parenting classes, taking part in activities on the land or traditional healing.*



## BEST PRACTICES



*Indigenous communities could:*

- *Make submissions at presentation hearings to ensure Indigenous children remain connected to their Indigenous cultural heritage;*
- *Strengthen the effectiveness of supervision terms that the director suggests and offer alternatives;*
- *Engage in emergency planning with the director and parents for what to do in case of breach of a supervision order, and identify options to address protection concerns while having a child remain within their extended family or community;*
- *Identify where supervision terms are not workable or not likely to ensure a child is protected. For example, it makes no sense for a parenting course or anger management course to be part of a supervision order if there are no locally offered courses. An Indigenous community could highlight that the courses do not exist locally and propose alternate supports within the community with the same purpose, including traditional parenting classes or elder counseling or mentoring;*



- *Ensure that access visits to a child are addressed as part of the terms of any orders that are made at an interim stage, particularly where a child is placed outside of their community, the community is remote or transportation is likely to be an issue for the extended family or community members who wish to visit the child;*
- *Identify alternate caregivers within the child's Indigenous community;*
- *Work with the director where there are reasonable grounds to believe that contact between a child and another person would endanger the child. An Indigenous community could exercise its authority (where possible) to ban a person from residing on, or entering, the Indigenous community, which could add another layer of protection to the child; or the Indigenous community could help to ensure there is no contact with the child at cultural or community gatherings;*
  - *The director can seek a protective intervention order (s. 28), which can include a 6-month no contact order prohibiting a person from living with the child or being in the same dwelling, vehicle or vessel with the child, or a restraining order under s. 98 against a person who the director believes poses a danger to a child.*
  - *Under the Family Homes on Reserve and Matrimonial Interests or Rights Act,<sup>189</sup> it is possible for a spouse or third party (including a social worker or member of the Indigenous community) to apply for a 90-day emergency protection order forcing a party to vacate a family home on-reserve where there is a risk of violence within the family.*

*Permanent custody decisions, with long-term impacts, may happen at a protection hearing.*

## Protection Hearings

At a protection hearing, the court decides if a child is in need of protection. Permanent custody decisions, with long-term impacts, may happen at a protection hearing. A protection hearing must take place no more than 45 days after the presentation hearing and must be concluded as soon as possible (s. 37 (2)). (The Federal Act practically extends deadlines where doing so would help to ensure a child is culturally connected or to involve their Indigenous community in planning for their care.)

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<sup>189</sup> SC 2013, c 20.

*Indigenous communities can help assess child protection concerns in a culturally sensitive way and identify any stereotypes, or false assumptions, that may be reflected in the consideration of a child's risk.*

At a protection hearing, a court can order that a child (see ss.41 and 49 of the BC CFCSA):

1. Does not need protection and should be returned to their parent(s), and any interim orders about the child be terminated;
2. Remain with their parent(s) under supervision of the director;
3. Be placed in the custody of their parent, or a person other than their parent, under supervision of the director;
4. Where the director is requesting a CCO under s.49, a court can order that the child be placed in the custody of the director for a specified period of time (also known as a "last chance order") (either to another person or to the director) to give the parent a "last chance" to address protection concerns and potentially regain custody of their child. To grant a last chance order, the court must be satisfied that progress has been made toward addressing the child protection concerns; or
5. Be placed in the continuing custody of the director (CCO). A CCO has the legal impact of putting the child in the permanent custody of the director.

### **Advocacy/Indigenous Laws**

*At a protection hearing, Indigenous communities could make interventions, including:*

- *Identifying supports within the community to help a family to heal the problems that have led to the child protection concern;*
- *Where parents are unable to safely parent, identifying options that can keep a child safely within their extended family or community; or*
- *Identifying options for long-term permanency outside of a CCO or adoption. For example, if an Indigenous-specific process is operating and keeping a child protected and within their family, community or Nation, this provides a form of permanency that does not need to be reflected in a CCO or other order.*





## BEST PRACTICES

*Indigenous communities can help assess child protection concerns in a culturally sensitive way and identify any stereotypes, or false assumptions, that may be reflected in the consideration of a child's risk. Additionally, Indigenous communities can help define the risks that a child faces through involvement in the child welfare system by pointing out how:*

- *Removing an Indigenous child from their cultural connections may endanger them over the long-term;*
- *Cultural factors may insulate an Indigenous child against identified risks; and*
- *False assumptions about Indigenous cultures or parenting styles may influence a determination that a child is at risk.*

*Indigenous laws could create different steps in a child welfare process, ultimately contemplating situations where parent(s) are unable to care for a child, and how that child would be cared for within their family and community.*

## Indigenous Laws

*Indigenous laws could create different steps in a child welfare process, ultimately contemplating situations where parent(s) are unable to care for a child, and how that child would be cared for within their family and community.*

## Access Orders and/or Cultural Connection Orders

Access orders can be made under Indigenous laws, or potentially s. 60 of the BC CFCSA.

The overall scheme of the Federal Act requires that a child's attachments and emotional ties to members of their extended family are to be promoted (s.17), to the extent it is consistent with the BIOIC, as interpreted through the different approach required by the Federal Act, and particularly ss 9(2), 10(2), 10(3)(c) & (d).

## Indigenous Laws

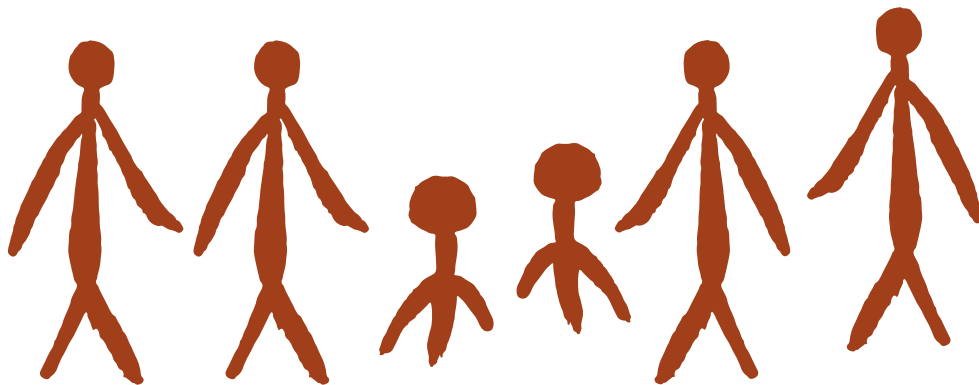
*Indigenous laws may create options for ongoing access or cultural connection orders, either operating with or separate from provincial jurisdiction.*



*Access orders to family or community members, and a long-term funding commitment for regular travel back to the community, could be included as a term of any permanency order if a child was placed outside of their Indigenous family or community.*

Access orders to family or community members, and a long-term funding commitment for regular travel back to the community, could be included as a term of any permanency order if a child was placed outside of their Indigenous family or community.<sup>190</sup> Permanency orders could also consider ongoing participation in activities or programs based in a child's Indigenous community to build maintain relationships.

Custody transfers (could include to community or family members) under ss. 54.01 and 54.1 often come with a provincial commitment to provide monthly financial support for a child's care where custody transfers have occurred. While these pathways could lead to opportunities for keeping Indigenous children culturally connected if the person who has taken custody is a member of the child's Indigenous community, there are some drawbacks. If persons who are not members of that child's Indigenous community take custody of a child, lack of oversight or enforcement measures to connect under ss.54.01 and 54.1, maintain or preserve the child's connection to their culture and Indigenous identity could result in the continued erosion of Indigenous identity and cultural disconnection across generations. For practical purposes, a custody transfer is very similar to adoption.



<sup>190</sup> *Metallic & Friedland, Does Bill C-92 Make the Grade?, supra, at 8.*



Section 54.1	<p>Section 54.1 sets out that a person other than the child’s parent can be granted permanent custody of a child who is in the custody of the director under a CCO where the CCO was made by consent. The director must notify the child’s Indigenous community and anyone who has access to the child of the hearing time, date and place. A court can permanently transfer custody of a child from the director to a person other than the child’s parent if the person has consented to the transfer of custody and the court is satisfied that it is in the child’s best interests.</p> <p>These provisions may allow for family and community members who are not parents to gain custody of Indigenous children. This could lead to opportunities for keeping Indigenous children culturally connected, but there are some drawbacks. If people who are not members of that child’s Indigenous community (such as foster parents) take custody, there will be no oversight or enforcement measures to preserve a child’s connection to their culture and Indigenous identity, or siblings. The result could be continued erosion of Indigenous identity and cultural disconnection across generation.</p>
Section 50.1	<p>Under s. 50.1, the director may request that a child be placed for adoption if that child is under a CCO if the CCO was made by consent. Adoption allows a family to have financial support (in an assisted adoption plan) and makes rescinding a CCO and an access order impossible.</p>
Section 54.01	<p>Under s. 54.01 of the BC CFCSA, if a child is in the care or custody of a person other than the child’s parent, as per an agreement made under s. 8 or a temporary custody order, an application can be made to the court to permanently transfer custody of the child to that person before the agreement expires. A court can make an order permanently transferring custody of a child to such a person as long as:</p> <ul style="list-style-type: none"> <li>• There is no significant likelihood that the circumstances that led to the s. 8 agreement or to the child’s removal will improve within a reasonable time or the parent will be able to meet the child’s needs;</li> <li>• The person has consented to the transfer of custody; and</li> <li>• The child has been living with the person with whom the agreement or temporary custody order has been made for at least 6 consecutive months immediately before the application.</li> </ul> <p>Before transferring custody, the court must consider the past conduct of the parent towards any child who is, or was, in their care, the child’s plan of care and the child’s best interests.</p>

***Custody transfers (could include to community or family members) under ss. 54.01 and 54.1 often come with a provincial commitment to provide monthly financial support for a child’s care where custody transfers have occurred.***

Under s. 57, a party can apply to change conditions of a supervision, temporary custody or access order.

Indigenous laws could help to define the Indigenous community's roles and responsibilities for children in a CCO.

*Once a CCO has been granted, children are eligible to be placed for adoption under s. 50.1.*

## Advocacy

*A CCO places a child in the permanent care of the director. Often, children lose contact with their family and extended Indigenous culture after a CCO.*

*A child who has been placed under a CCO is very vulnerable. Indigenous communities can advocate and plan to keep Indigenous children connected to their Indigenous culture. The period of post-CCO planning and access is one of the areas profoundly altered by the Federal Act which requires ongoing efforts to keep a child connected to their Indigenous cultural identity are highlighted.*



Where a CCO is issued, under s. 50(4), the director must provide a copy of the order to the child's Indigenous community. This notification, and ongoing annual updates, allow for involvement and tracking over a child's life. Reassessments under the Federal Act about whether it is possible to place a child with their parents or family (defined by Indigenous tradition) can be done during an annual update.

Planning for an Indigenous child after a CCO has been granted is addressed in s. 50.01 of the BC CFCSA. The director must conduct planning according to agreements made under section 92.1; however, if there is no such agreement in place, reasonable efforts must be made to involve the designated representative of the child's Indigenous community once a year.

*The Federal Act (s. 16(3)) says that there must be an ongoing assessment of whether a child in care can be returned to their family. Family may be broadly defined by Indigenous traditions, so potentially include opportunities for a child's return to their larger cultural community. As well, given the overall focus of the Federal Act, active efforts to support placements within a child's Indigenous community should be considered. For example, providing funds to allow a community member to secure housing that would allow a child to be placed with them.*



## BEST PRACTICES



*A fluid approach to finding permanency for Indigenous children must explore models based in Indigenous laws that would maintain Indigenous childrens' identity, culture and community connections.*

*Options include:*

- *Customary adoption;*
- *Extended family care and guardianship situations where the birth parents or family maintain an ongoing set of obligations and relations with the adoptive family, rather than requiring a complete severance of parental rights and connection to Indigenous community and extended family;*
- *Broader and extensive supports to enable parenting where Indigenous parents cannot safely parent on their own;*
- *Parenting solutions that reflect Indigenous ways of caring for children across several families or homes, providing permanency by recognizing shared parenting practices or distributed responsibility amongst a community or extended family.*

*A fluid approach to finding permanency for Indigenous children must explore models based in Indigenous laws that would maintain Indigenous childrens' identity, culture and community connections.*

*Though a custom adoption may be valid under Indigenous law, legal recognition may require an application for recognition in provincial court or an application to the federal government that a custom adoption has occurred and is recognized under the Indian Act.*

Though a custom adoption may be valid under Indigenous law, legal recognition may require an application for recognition in provincial court or an application to the federal government that a custom adoption has occurred and is recognized under the *Indian Act*. Parties will have to be aware of this if seeking to create permanent solutions for Indigenous children by customary adoptions.

In *Prince & Julian v. HMTQ et al*,<sup>191</sup> the BC Supreme Court set out factors necessary for a finding that an Indigenous custom adoption has occurred:

- Consent of natural and adopting parents;
- Voluntarily placement with the adopting parents;
- The adopting parents are Indigenous or entitled to rely on Indigenous custom;
- The rationale for Indigenous custom adoptions is present (there is a recognized reason within the scope of the custom, whether it be to provide for children without parents, or otherwise, for the adoption to take place);
- The relationship created by the custom adoption must be understood to create fundamentally the same relationship as that resulting from an adoption order under provincial adoption legislation.

In *Natural Parents v. Supt. of Child Welfare*,<sup>192</sup> the Supreme Court of Canada confirmed that, while provincial adoption laws apply to a status Indian child, adoption under provincial legislation does not impact a child's status registration as an Indian.

The *Adoption Act*<sup>193</sup> requires notification of a child's Indigenous community when an adoption is contemplated and efforts to involve the

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191 2000 BCSC 1066. The first four factors were originally listed in *Re Tagornak Adoption Petition* [1984] 1 CNLR 185 (NWTS), and the final factor was originally listed in *In the Matter of The Adoption of A Female Child*, 1998 CanLII 5839 (BCSC), 1998 CanLII 5839 (BCSC) [paraphrased].

192 [1976] 2 SCR 751.

193 RSBC 1996, c 5.

Indigenous community in proposed adoption placements.<sup>194</sup> Adoption is a significant measure which would require notice to an IGB under the Federal Act. Under s. 80 of the *Adoption Act*, financial assistance is only available where the director has placed a child for adoption (so there is a question whether financial assistance is available in a traditional or customary adoption).

## Indigenous Laws

*Policy 1.1 states that Indigenous customs and traditions should be considered in adoption placement decisions. Section 10(a) indicates that consultations with the child's Indigenous community should take place to determine if customary care or custom adoption traditions specific to the child's Indigenous community may be considered when determining placement.*

*Policy 1.1 s. 10(b) states that customary care arrangements can be supported financially through interim or temporary custody orders with a person other than a parent or through a parent giving care of the child to another person who is supported by an extended family program agreement under s. 8 of the BC CFCSA.*



*Under s. 56 of the BC CFCSA, a parent or any other person can apply for access to a child who is the subject of a CCO, and this would include the child's grandparents and extended family members.*

## Access Post-CCO

Under s. 56 of the BC CFCSA, a parent or any other person can apply for access to a child who is the subject of a CCO, and this would include the child's grandparents and extended family members.

Under the BC CFCSA, in deciding if the parent or another person should have access to the child, the court must find that access "(a) is in the child's best interests, (b) is consistent with the plan of care, and (c) is consistent with the wishes of the child, if 12 years of age or over." Granting access to parents after a CCO is "the exception rather than the norm, although in recent years such access is becoming more common."<sup>195</sup> In determining whether to grant post-CCO access, the child's interests will be considered ahead of the parents', and "[i]f adoption is more important than access for

<sup>194</sup> Olthuis, Kleer, Townshend LLP. "Aboriginal Law Handbook" 4<sup>th</sup> ed (2012) Toronto: Thomson Reuters Canada Ltd., at 349 [References omitted.]

<sup>195</sup> Kirwin, LM. "Child Protection Law in Canada" (2010) 2<sup>nd</sup> ed Toronto: Carswell [Kirwin], at 6-12.

the welfare of the child and would be jeopardized if a right of access were exercised, access should not be granted.”<sup>196</sup>

*Granting access to parents after a CCO is “the exception rather than the norm, although in recent years such access is becoming more common.”*

### Best Practices/Indigenous Laws

*This is an area where the Federal Act significantly changes the law. Instead of cutting off children, the presumption now is that the goal, even post-CCO, is to ensure a child remains culturally connected to their Indigenous community, family and parents. Decisions about post-CCO access should be made in conjunction with a child’s Indigenous community(ies) and should reflect Indigenous laws and traditions.*

*Indigenous communities may want to articulate laws setting out access provisions for siblings, parents, family and community members after a CCO. These may include how any party (including children and youth) can initiate and enforce access.*



### Case Study: *NP v. British Columbia (Director of Child, Family and Community Services)*

*In NP v. British Columbia (Director of Child, Family and Community Services),<sup>197</sup> the applicants (uncle and aunt) sought to cancel a CCO for three Indigenous children. While they were unsuccessful in having the CCO cancelled, as the trial judge was not convinced that the children would be safe with the applicants full-time, access was granted under s. 56 and Rules 6(3)(c) and 8(2), which included “at least one month in the summer,” “at least half of the spring break holiday,” “one-half of every Christmas holiday,” “other access in Mackenzie or in Fort Ware, at the expense of the director,” and “telephone access at the expense of the director.”*

<sup>196</sup> Kirwin, *supra*, at 6-11, citing *New Brunswick (Minister of Health and Community Services) v. L(M)*, [1998] 2 SCR 534.

<sup>197</sup> 1999 CanLII 6514 (BCSC), at 30, citing the decision of the trial judge.





## Case Study: *Reference re Child Welfare Act*

*Reference re Child Welfare Act*<sup>198</sup> concerned an appeal of a decision of the trial judge to grant access to the Indigenous grandmother and mother after a CCO had been granted. The Alberta Court of Appeal upheld the decision of the trial judge, made, in part, on the understanding that maintaining contact with his Indigenous heritage was beneficial to the child. (“[T]he child is of Indian ancestry and is being raised in a white home. He expressed the view that the child, as he grew, should have some happy exposure to the native community and culture.”)<sup>199</sup> The Alberta Court of Appeal found that the “child is a member of a visible minority. He must, some day, adjust to that fact. It is a fair and respectable point of view that that adjustment will be made easier if he has grown up in happy acquaintanceship with the native community and the native culture.”<sup>200</sup>

*Indigenous communities could work with parents, extended family or community members to apply for access to children currently under a CCO under s. 56.*

## BEST PRACTICES



*Indigenous communities could work with parents, extended family or community members to apply for access to children currently under a CCO under s. 56.*

*This could involve:*

- *Developing a plan which would establish or maintain the cultural connection of Indigenous children with their cultural community; or*
- *A plan for reunification of the child to their parents, extended family or Indigenous cultural community, where possible.*

<sup>198</sup> 1984 ABCA 28 [*Reference re Child Welfare Act (Alta)*].

<sup>199</sup> *Reference re Child Welfare Act (Alta)*, *supra*, at 44.

<sup>200</sup> *Reference re Child Welfare Act (Alta)*, *supra*, at 45.

*Section 16(3) of the Federal Act calls for ongoing re-assessment of placements where an Indigenous child has been placed with anyone other than their parent or another adult member of their family.*



### **Case Study: MCW v. BC (Director of Child, Family and Community Service)**

*In MCW v. BC (Director of Child, Family and Community Service),<sup>201</sup> an Indigenous mother's application to restrict access visits organized by the director with community members was dismissed. The mother argued that her children (on their way to being placed under a CCO) should not have contact with Indigenous community members as this would "traumatize" them now that they are living with a non-Indigenous foster family. Lake Babine Nation opposed placement with a non-Indigenous foster family. The director arranged visits with the child's half-sister, which the mother claimed was traumatic and an attempt to break up foster placement. The Court found it was within the director's obligation to keep the child connected to culture, including siblings, and therefore, the mother's application was dismissed.*



### **Case Study: Kawartha-Haliburton Children's Aid Society v. MW**

*In Kawartha-Haliburton Children's Aid Society v. MW,<sup>202</sup> the children were under the long-term care of the director. There was no contact ordered for the mother, and the mother was seeking access. Noting the presumption before the Federal Act was against ongoing access and stressed removing all familial ties with the presumption of easing adoption possibilities, the Court noted that the Federal Act had changed these presumptions. The Court recognized that the Federal Act "is particularly remedial for Indigenous children"<sup>203</sup> and "changed the criteria for access to children in extended care by removing the presumption against access, making the child's "best Interests" predominant in determining access, and emphasizing the importance of preserving Indigenous children's cultural identity and connection to community."<sup>204</sup> The Court referred the mother back to the lower court to make determinations about access based on these principles.*

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<sup>201</sup> 2019 BCPC 289.

<sup>202</sup> 2019 ONCA 316 [MW].

<sup>203</sup> MW, *supra*, at 38-39.

<sup>204</sup> MW, *supra*, at 31.



## Indigenous Laws

*Indigenous communities could pass their own laws setting out the steps they will follow to maintain active connections to children placed outside of their family or culture.*



## Cancelling a CCO

Section 16(3) of the Federal Act calls for ongoing re-assessment of placements where an Indigenous child has been placed with anyone other than their parent or another adult member of their family. This means that placements must be continually evaluated to determine if it is in a child's best interests to be placed with their parent or another adult member of their family. According to Policy 1.1, reasonable times to reassess include when a previously unknown parent or adult family member is identified, when it is requested by the child's Indigenous community, whenever a change of placement or legal status is being considered or when the childcare plan is reviewed (s.11(a)).

*Indigenous communities can make requests based on their interpretation of when and how often re-assessment should take place based on lived experience and a deep understanding of the impacts of separating Indigenous children from their families, communities and culture.*

## Actions

*Indigenous communities can make requests based on their interpretation of when and how often re-assessment should take place based on lived experience and a deep understanding of the impacts of separating Indigenous children from their families, communities and culture.*



In addition, courts have acknowledged the remedial nature of child welfare legislation and the overarching goal of keeping families together rather than separating them.<sup>205</sup> Opportunities to achieve this goal, whether by re-assessing placements or other means, should be taken in order to prevent further harm. Indigenous communities could consider proactively addressing this by sending a written request for re-assessment of a placement at set times throughout the year or based on circumstances and life events unique to the child in care.

<sup>205</sup> See *Michif*, *supra*, at 49, and *Winnipeg CFS v. TSL*, *supra*, at 27.

*Where a parent or family has turned their life around, an Indigenous community could support an application to cancel a CCO.*

## Actions

*Where a parent or family has turned their life around, an Indigenous community could support an application to cancel a CCO. Even if that does not happen, Indigenous communities could actively seek, support and develop placement options within the extended family and cultural community. The test for setting aside a CCO is set out in Director of Child, Family & Community Service v. Al.<sup>206</sup> Section 54 allows a party to a CCO proceeding to apply to the court to cancel a CCO “if circumstances that caused the court to make the order have changed significantly” or to receive notice if another party makes an application to cancel the CCO. Only a party to a child protection proceeding can apply to cancel a CCO. Permission of the court is required to ask for a CCO to be set aside, and that will only be granted where “the circumstances that caused the court to make the order have changed significantly”.*



## Indigenous Laws

*Indigenous communities may wish to articulate areas where they could pass laws cancelling a CCO for their child members, where they determine that they can be safely cared for within their extended family or community or otherwise setting out how they will be connected to care for a child under CCO. Access orders, including for their siblings, may be part of this planning.*



## Appeal

Matters decided by the BC Provincial Court (the court that hears BC CFCSA matters) can be appealed to the BC Supreme Court within 30 days (s. 81). Decisions of the BC Supreme Court can be appealed to the BC Court of Appeal, on a matter of law, but require leave (permission) of the BC Court of Appeal. Under s. 66(2) of the BC CFCSA, no order may be set aside because of any informality at the hearing or for any other technical reason not affecting the merits of the case.<sup>207</sup>

<sup>206</sup> 2005 BCPC 620.

<sup>207</sup> Kirwin, *supra*, at 8-10.

Indigenous laws may set out terms, or alter the times or mechanisms, of an appeal. Indigenous communities may set up their own appeal bodies.

The Federal Act affirms that the authority to administer and enforce laws includes the ability to provide for dispute resolution mechanisms (s. 18(2)). Indigenous laws can set appeal options that ensure fair outcomes and procedures, which can include complaint or dispute resolution provisions.

*Indigenous laws can set appeal options that ensure fair outcomes and procedures, which can include complaint or dispute resolution provisions.*

### **MCFD Complaint Process**

*If a party wishes to make a complaint or challenge decisions and behaviors, the MCFD offers a process but encourages that an attempt to resolve the issue with the social worker be made first. If a resolution cannot be met, parties can speak to the social worker's supervisor or call 1.877.387.7027 to speak with a complaints specialist.*

*Options for making a complaint outside the MCFD can include contacting the Office of the Ombudsperson or the BC College of Social Workers, if the social worker is a member.*

### **BC Human Rights Tribunal**

*The BC Human Rights Code sets out a process for addressing complaints of discrimination to the BC Human Rights Tribunal. If an Indigenous community or parent feels they are being discriminated against, they can file a complaint within one year.*

## 13. Confidentiality and Disclosure

*Sharing confidential information can allow Indigenous communities to take steps to protect and plan for their children.*

In the child welfare process, information is kept confidential to protect the dignity and privacy of children and families. Confidential information about a family, or reasons for a protection concern, can be shared where it is necessary to plan for a child or keep a child safe. Sharing confidential information can allow Indigenous communities to take steps to protect and plan for their children.

The active and direct involvement of Indigenous communities can help to protect children. Knowledge about what endangers children is necessary for them to be protected.

*Confidentiality should never be used as a justification for allowing children to be harmed or for preventing Indigenous community involvement that could help to protect a child and heal their family. Disclosure should be provided where necessary to plan for children, keep them safe or take preventive measures to prevent (or remediate) a removal.*

### BEST PRACTICES



*As a best practice, Indigenous communities should have the right to full disclosure of the information that brings their child members into the child welfare system (subject to requirements to honour the dignity and confidentiality of the family). Indigenous communities possess knowledge, resources and expertise in child and family wellness. Excluding Indigenous communities from decision-making in the past has resulted in poor outcomes for Indigenous children, families and communities.*

### Information Sharing Under Federal Act

The Federal Act sets out information to be shared with an IGB. Information provided in notice under the Federal Act must include: “information that is necessary to explain the proposed significant measure.” Indigenous laws can help to define what information they require. The information provided to the IGB should not contain personal

information about the child, their family or care provider, other than information that is necessary to explain the proposed significant measure, as required by an agreement with the Indigenous group.

## Information Sharing Under BC CFCSA

The BC CFCSA provides an opportunity for the Indigenous community to request, and be provided with, full disclosure about the child protection concerns when they participate as parties in a child welfare matter.

Disclosure provisions in the BC CFCSA:

- Section 64—All parties to a child protection proceeding are required to make full and timely disclosure before a protection hearing to a party that requests it.
- Section 75(a)—Disclosure under an agreement between the director and an Indigenous community includes “conditions on the use, disclosure and security of information provided under the agreement”.
- Section 79—The director can disclose information, even without parental consent, where necessary to ensure the safety or well-being of a child or necessary for an alternative dispute resolution process.
- Section 92.1(1)—The director can make agreements respecting the referral of child protection reports.

Due to the sensitive nature of child protection issues (including suspected child abuse, neglect and/or exploitation), timely and full disclosure and information sharing between the director and a child’s Indigenous community is critical to ensure the safety of the child. In the absence of such information, Indigenous communities are at a distinct disadvantage to provide plans for support; services or supervision; and plan for prevention, care and steps necessary to protect a child.

*Due to the sensitive nature of child protection issues (including suspected child abuse, neglect and/or exploitation), timely and full disclosure and information sharing between the director and a child’s Indigenous community is critical to ensure the safety of the child.*

*Indigenous communities need disclosure to be able to plan for the safety of children and how best to provide supports and resources in the best interests of the child.*

## Indigenous Laws

*The strict adherence to Western norms or views about confidentiality devalues Indigenous ethics, perspectives and understandings about how and who should be involved in determining the outcome of a child welfare issue or concern. Indigenous communities should be viewed as part of the solution. Indigenous laws could address how confidentiality is constructed and maintained in the child welfare context.*



Full disclosure allows parties to protect and plan for the safety and well-being of a child and to pursue alternatives to court. Indigenous communities need disclosure to be able to plan for the safety of children and how best to provide supports and resources in the best interests of the child. Disclosure can be an essential tool allowing for the full participation of the Indigenous community.

Under the Federal Act, the Minister may gather information about individuals and the services provided in relation to Indigenous children and disclose it to the affected families and communities (s. 27). The Minister may enter into agreements with IGBs about collection, retention, use and disclosure of such information to identify Indigenous children, improve services and facilitate disclosure to affected families and communities (s. 28). To implement such an agreement, a provincial government or public body can collect and disclose this information (s. 30).

## Obligation to Act

There has been concern to keep decision-making in the area of child welfare outside of the political realm and to protect decisions from “political interference”. This simplistic statement ignores the reality of Indigenous obligations to watch over and care for their child members, an obligation which is to heal collectively. The work of the ShchEma-mee.tkt Project is based on the belief that political leaders have a responsibility to protect Nlaka’pamux children. In child welfare matters, the more appropriate caution is not that there be “no political interference” but, rather, that leadership should avoid “conflicts of interest”.

“Conflict of interest” guidelines may prevent leadership or other project members from acting in their “official” capacity (i.e., as a chief, councillor or member of the project team) regarding closely related children or families while allowing (and even encouraging) them to act in their private and personal capacity.





*Nlaka'pamux elders were asked whether it was "too political" to have Indigenous communities involved in child welfare matters. They said, "if we expect our leadership to prevent trees or fish from being taken from our territory, to do all that they can to protect the fish or trees, why would we do less for our children? Without our children, we would cease to exist as Peoples. Our leaders, and we as communities, should fight strongest to protect our children." Political involvement is different from the need to recuse oneself from discussions if there is a direct conflict of interest.*

*Under the Federal Act, the Minister may gather information about individuals and the services provided in relation to Indigenous children and disclose it to the affected families and communities (s. 27).*

## BEST PRACTICES



*Before passing their own laws, Indigenous communities require enough information about protection concerns to be able to intervene to protect and support their child members. It is impossible to meet the purposes of the Federal Act without sharing enough information for Indigenous communities to plan responses based on their own laws and traditions on protection concerns.*

*Not disclosing potentially crucial information could prevent the Indigenous community from presenting valid options to ensure a child's safety and preserve a child's connections to their extended family and Indigenous community.*

*Indigenous communities could develop their own laws based on their own traditions, ethics and values. Indigenous laws can set out what information should be shared or how information should be kept confidential.*

*Options to address the fact that Indigenous communities cannot act to protect their child members, without disclosure of confidential information, include:*

- *Parties can develop a joint statement on accepted facts that outlines the protection concerns in sufficient detail to allow the Indigenous community to assess the concerns, determine what actions may need to be taken within the community's own laws or traditions, and can direct a response that helps to address the protection concerns or protect the children.*

## 14. Traditional and Alternative Dispute Resolution Mechanisms

*The success of alternative dispute resolution processes, and the degree to which they are able to reflect Indigenous values in the outcomes, depends upon the willingness of the parties to explore the strengths and supports within the child's Indigenous culture and community and to listen in new ways to Indigenous communities.*

Joint decision-making, which incorporates Indigenous legal orders, has the potential to change outcomes for Indigenous children by building a cooperative—rather than adversarial—approach that involves the child's extended family and Indigenous community in making decisions. The success of alternative dispute resolution processes, and the degree to which they are able to reflect Indigenous values in the outcomes, depends upon the willingness of the parties to explore the strengths and supports within the child's Indigenous culture and community and to listen in new ways to Indigenous communities. Indigenous dispute resolution mechanisms empowered by Indigenous communities can shift the way decisions are made.

### Indigenous Laws

*The Federal Act recognizes the authority of Indigenous communities to assert jurisdiction in relation to child and family services (s.18). This includes the ability for Indigenous communities to draft their own laws, administer and enforce them, and provide dispute resolution mechanisms (ss. 18(1)(2)). Indigenous communities can create their own processes and institutions to resolve disputes based on Indigenous laws and practices. This area of Indigenous decision-making will continue to grow and evolve and may involve Indigenous courts or tribunals, or councils representing clan houses, chiefs or extended families.*



The BC CFCSA provides opportunities for Indigenous community participation within alternative decision-making processes. Options including mediation, family group conferences or case conferences are cooperative planning mechanisms to resolve child protection concerns outside of court. Participation by Indigenous communities in alternative dispute resolution processes could be an effective way for Indigenous communities to participate in planning for their child members. Indigenous Peoples could propose alternatives, or amendments, to these processes under their own laws.

## I. Cooperative Planning and Alternative Dispute Resolution

Cooperative planning and alternatives to court have become a common practice in child protection disputes. Active participation of Indigenous communities within these processes provides an opportunity for Indigenous ways of considering child protection concerns and culturally appropriate solutions to be addressed.

*Cooperative planning and alternatives to court have become a common practice in child protection disputes.*

### A. Case Conferences

At the commencement of a protection hearing, the Rules (Rule 2) require that a case conference must be directed unless the matter is resolved by consent. Parties can also request a case conference at other times in the child protection process. At a case conference, the judge can:

- Attempt to resolve issues and facilitate the resolution of any issues in dispute, other than the issue of whether a child needs protection;
- With the consent of the parties, refer any issue, other than the issue of whether a child needs protection, to mediation or other alternative dispute resolution mechanism under s. 22 (this would include traditional Indigenous dispute resolutions);
- Give a non-binding opinion on the probable outcome of a hearing;
- Address outstanding procedural issues between the parties (for example, whether adequate disclosure has been provided); or
- Give other directions for the fair and efficient resolution of the issues.

Indigenous communities could request that traditional decision-making practices be incorporated into the case conference to consider the Indigenous child's culture, community and identity, as well as short- and long-term care options. As case conferences are presided over by a judge, there is a greater chance that the parties, including the director, will act in good faith and be more willing to listen and consider alternatives presented.

### Indigenous Laws

*Indigenous laws may include alternate decision-making mechanisms and procedures.*



*A family group conference (FGC) provides an opportunity for the Indigenous community to plan for the care of children.*

## **B. Family Group Conference**

A family group conference (FGC) provides an opportunity for the Indigenous community to plan for the care of children. Family members are invited to talk about child protection concerns plan for how to address those concerns. The child's social worker usually attends to review the FGC's proposed care plan and to ensure it addresses the director's child protection concerns. The FGC is promoted as a shared decision-making process that provides parents and caregivers, extended family and the child's Indigenous community an opportunity to come together in an informal setting to develop a plan for a child.

FGCs may suffer from disclosure constraints, leading to serious child abuse issues being un- or under-examined, and so prevent the development of a comprehensive safety plan for the child, further frustrating relationships between the parties, extended family, community and the director. While the director's staff may summarize the child protection concerns, key information necessary to address the child protection concerns may not be shared. Indigenous communities can request full disclosure by consent or, if consent is not possible, under s. 79(a), where required to ensure a child's safety.

FGCs are envisioned as a way to involve families, and potentially community members, in the planning for the child, and may be successful for some matters; however, they often do not ensure the broader community or Nation participation necessary to care for Indigenous children.

## **C. Mediation**

Laura Matthews, Indigenous mediator, explained: "As a mediator you can customize the process to suit the participant's needs. You can create hybrid processes which involve Indigenous Peoples in guiding the process, or ask how to reflect Indigenous laws. You can create a hybrid process which works with Indigenous dispute resolution mechanisms, co-mediate, or help to facilitate the participation of elders or other decision makers within an Indigenous community. Mediation does not need to take place in a Ministry office which often produces a trauma response in many cases with Indigenous Peoples. Holding the mediation in a neutral space can help level out the power imbalance. Mediations can take place in health centres, community centres, Band offices on indigenous territory—wherever the parties feel most comfortable."

Section 22 of the BC CFCSA allows parties to try to settle issues in dispute through mediation or other dispute resolution mechanisms. Any party can request mediation at any time where the parties are trying to work out an agreement regarding the safety of the children. A mediator is a neutral third party who guides the discussion between the parties (parents, other family members, Indigenous community representatives, the director, and usually the lawyers for the parents and director). The role of the mediator is to address the power imbalance between the parties and try to create a safe place and process for discussions to occur.

*With some exceptions, information that is shared or gained within mediation cannot be used in court.*

With some exceptions, information that is shared or gained within mediation cannot be used in court. In practice, mediation is sometimes used as a discovery-type proceeding for the parties to learn the relative positions and concerns of the other parties.

*Benefits of mediation include the possibility of transforming the relationships between the parties and building a cooperative approach toward caring for children and families, which provides an opportunity for different parties to share their perspectives and offer solutions in a non-adversarial environment where a mediator can help to ensure a fair discussion. A successful mediation may allow the parties to identify misunderstandings, resolve issues more quickly and assist in realigning the relationships between the parties.*

A limitation of mediation under the BC CFCSA is that there are matters that cannot be mediated. For example, the decision about whether a child is in need of protection is not open for discussion, and this can be frustrating for parents or community members who think that this is something that can and should be discussed.

A mediation's success depends on the willingness of the parties to participate and the skills of the mediator. Indigenous communities have raised concerns that the child protection mediation roster is not always culturally relevant for the needs of Indigenous children from their particular communities. While mediators with experience dealing with Indigenous child welfare issues are necessary, the mediator must also have knowledge and sensitivity with the particular Indigenous community's own unique traditions, practices and laws. Mediators may not know or be able to reflect Indigenous values or ways of making decisions, and so these may not be reflected in the mediation process.

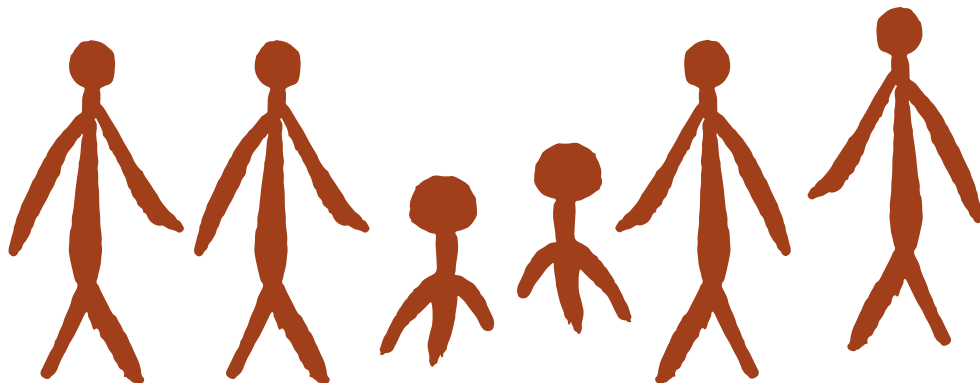
*Indigenous community participation in alternative or traditional dispute resolution processes can ensure that a child's right to their Indigenous identity and cultural heritage are central to any protection proceedings and planning.*

## BEST PRACTICES



*Indigenous community participation in alternative or traditional dispute resolution processes can ensure that a child's right to their Indigenous identity and cultural heritage are central to any protection proceedings and planning.*

- *Indigenous communities in mediation could:*
  - *Identify a mediator with specific knowledge about the child's Indigenous culture, traditions and community, or identify individuals trained within the child's culture and traditions to be appointed as co-mediators;*
  - *Identify features of their own traditional dispute processes that must be incorporated;*
  - *Identify culturally important people to participate, such as representatives of the Indigenous community;*
  - *Identify ceremonial or other elements that should be included;*
  - *Require that mediations occur on their own territory or in a culturally safe space.*
- *Indigenous communities could request an informal meeting with the parties to try to resolve a dispute or deal with access to a child. Indigenous laws may establish processes to address interim matters, which could be based on dispute resolution or decision-making mechanisms within that Indigenous community's traditions.*





## II. Indigenous Traditional Decision-Making Process

Solutions within the area of child welfare law must combine the being and the becoming:<sup>208</sup> The present-day reality in which Indigenous children, family and communities and Nations exist within Canadian law and legal practices, while reaching forward and back to Indigenous legal orders, making space for their present-day formulations. Solutions in the area of child welfare must be transformative, reflecting a state of flux, which recalls and re-establishes Indigenous traditions and laws, with awareness of the roadblocks and the opportunities presented by Canadian law.

Traditional decision-making processes provide a promising opportunity within the BC CFCSA for genuine Indigenous community involvement in considering a child's best interests and rights to protection, care, community and identity.

The BC CFCSA allows for "other alternative dispute resolution mechanism[s]" than those listed in the BC CFCSA to resolve issues relating to children and families. Traditional Indigenous dispute resolution processes, based on Indigenous culture and traditions, would be an "other dispute resolution mechanism". Indigenous dispute resolution mechanisms may provide a cooperative, rather than an adversarial, lens through which to explore solutions in child welfare matters.

Section 22 allows the director and any person to explore mediation or other alternative dispute resolution mechanisms, which includes traditional dispute resolution processes: "If a director and any person are unable to resolve an issue relating to the child or a plan of care, the director and the person may agree to mediation or other alternative dispute resolution mechanisms as a means of resolving the issue." Section 23 allows a judge to adjourn/suspend a child protection matter for up to three months once an alternate dispute resolution process is engaged to attempt to resolve issues without going to court.

*Traditional decision-making processes provide a promising opportunity within the BC CFCSA for genuine Indigenous community involvement in considering a child's best interests and rights to protection, care, community and identity.*



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<sup>208</sup> This section is adapted from Walkem, A. "Indigenous Laws in the Area of Children and Families: Transformative Possibilities of Recognition" (November 2012) Continuing Legal Education Society of British Columbia Conference: Indigenous Legal Orders and the Common Law, Vancouver.

*Although the Opikinawasowin was ordered by a provincial court judge, under the provincial child welfare law, the process was left to the elders to set.*



## Case Study: Opikinawasowin

*In Re D(J),<sup>209</sup> Justice Wright proposed a hybrid process, incorporating features of the parents' Cree and Métis heritages, (finding authority for this novel approach in sections of Saskatchewan's The Child and Family Services Act),<sup>210</sup> and ordered that an Indigenous form of community decision-making—an Opikinawasowin—be used in a child protection matter.<sup>211</sup>*

*3. With the approval of R.P. and H.D., Saskatchewan Justice shall arrange for three traditional Elders from across the province to form a council of Elders that will preside over the Opikinawasowin, on a date and time acceptable to the Elders. At least one Elder is to be Métis, in recognition of the importance of Métis culture to the P. family. At least one Elder is to be Cree, in recognition of the importance of Cree traditions to the D. family. Although Elders from Onion Lake First Nation [the mom's home community] may be invited to attend the Opikinawasowin, no Elder from that community shall be asked to sit on the council.*

*4. Saskatchewan Justice shall provide the three Elders forming the council with appropriate instruction on the general legislative framework of The Child and Family Services Act. This instruction is to be a minimum of six hours in length, non case specific, and must occur before the Opikinawasowin commences.*

*5. ... [T]he Department of Community Resources and Employment shall be responsible for any costs that may reasonably be incurred by the Elders ...*

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<sup>209</sup> 2003 SKQB 309.

<sup>210</sup> SS (1989-90), c C-7.2.

<sup>211</sup> "Opikinawasowin" is a Cree word, which, literally translated, means "the lifting up of the children" or "holding the children in high esteem" and is the name given by a Métis Elder and pipe carrier to a traditional method of dispute resolution. An Opikinawasowin requires the family, extended family and others from the community to appear before a council of elders, often three in number, who are regarded within their community as the "guardians of the society's history and the repository of its collective wisdom".





12. The Elders shall preside over the Opikinawasowin, and direct the proceedings, including the manner of participation by attendees. The Elders may request opening and closing prayers, purification processes or the inclusion of any other rituals consistent with traditional customs, in any manner that they deem appropriate.

13. The Elders shall permit legal counsel for the Department and for the parents to be present throughout the Opikinawasowin, other than during deliberations by the council alone.

14. The Opikinawasowin shall last as long as the council of Elders deems necessary, but it shall be concluded on or before July 3, 2003 at 5 p.m.

15. Within 7 days from conclusion of the Opikinawasowin, the council of Elders shall submit written recommendations to the Court of Queen's Bench, Family Law Division, regarding their recommendations... These recommendations shall be accompanied by written reasons that support the recommendation... Alternatively, with the approval of the Court, one or more Elders shall appear in Chambers and provide this information orally.

19. The recommendation from the Opikinawasowin shall be given careful judicial deference, however, it is subject to the residual jurisdiction of the Court of Queen's Bench, and the parties may appeal any order to the Court of Appeal, subject to the provisions in The Child and Family Services Act.

*In this case, the Elders of the Cree and Métis Nations (forming the Opikinawasowin) were to consider the matter and make recommendations to the Court about how to resolve the matter. The Court said that this process was in the best interests of the children because:*

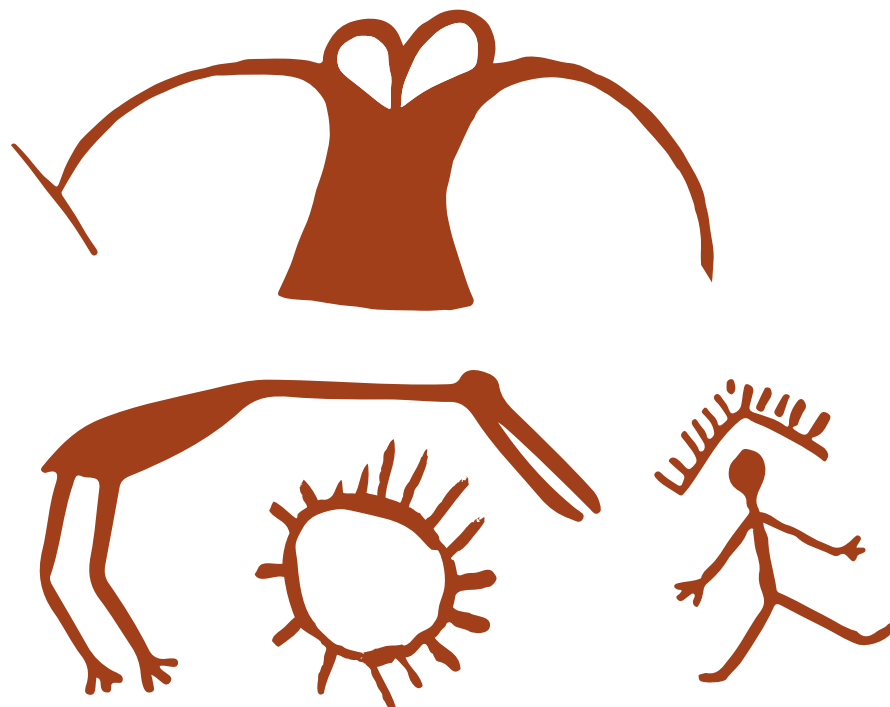
*An Opikinawasowin ...[utilizes] a hybrid of alternative methods including negotiation, mediation and adjudication, while ensuring that the court maintains its supervisory jurisdiction to ensure that the outcome complies with the legislation and is in the best*

*The Opikinawasowin made recommendations to the judge about what to do, but the judge made the final decision about which recommendations to accept, reject or modify.*

**Indigenous communities could seek to have their own traditional dispute resolution processes used to address child protection.**

*interests of the child. Broad participation by the family, professionals working with the family, extended family and the community, under the control and direction of a council of Elders, is consistent with the concept of restorative justice embraced in the criminal justice system in Aboriginal communities. It has the potential to address child protection concerns in a manner more responsive to the needs of the large number of Aboriginal families appearing in this court together with the possibility that the outcome will be more effective and legitimate to those most directly affected. The children involved can only benefit from a resolution that is both non-adversarial and more culturally significant.*

*Although the Opikinawasowin was ordered by a provincial court judge, under the provincial child welfare law, the process was left to the elders to set. The elders were asked to consider the principles of the provincial child welfare legislation in making their decision (the judge ordered that a one-day course in the principles of the legislation be offered to them). The Opikinawasowin made recommendations to the judge about what to do, but the judge made the final decision about which recommendations to accept, reject or modify.*





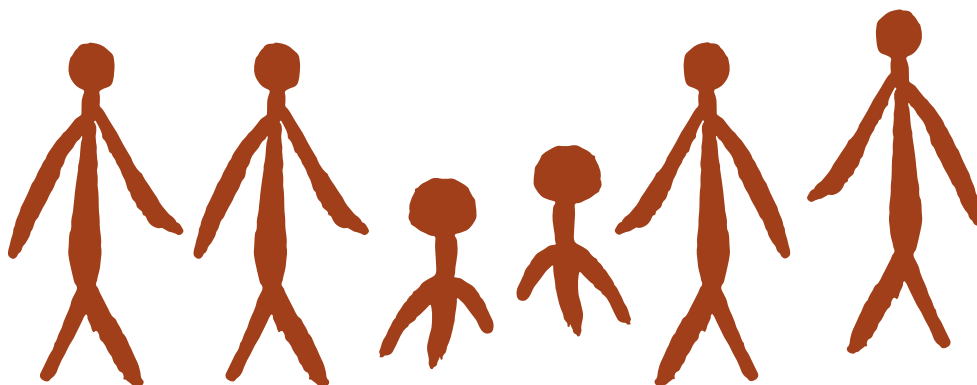
## BEST PRACTICES



*Indigenous communities could seek to have their own traditional dispute resolution processes used to address child protection. This is possible under s. 22 of the BC CFCSA and also more broadly under the Federal Act's incorporation of Indigenous ways and laws.*

- *Where an Indigenous child's community or family identifies or requests it, traditional dispute resolution mechanisms and decision-making processes should be used to plan for Indigenous children.*
  - *There are options to propose mechanisms that blend traditional decision-making processes with other strands of alternative dispute resolution processes (such as an FGC or mediation) to create a model that involves Indigenous elders, community and family members and, if appropriate, the child, working together with the director, and legal counsel.*
  - *Adapting alternative dispute resolution models could be an interim step for developing an Indigenous traditional decision-making model that reflects Indigenous child and family wellness and could ultimately mature into a stand-alone process, including adjudication falling under the jurisdiction of Indigenous laws and legal orders.*

*Where an Indigenous child's community or family identifies or requests it, traditional dispute resolution mechanisms and decision-making processes should be used to plan for Indigenous children.*



### III. New or Parallel Judicial Institutions

#### Indigenous Laws

*Indigenous Peoples cannot continue to be unwilling consumers of child welfare services imposed by the state. New or parallel judicial institutions are necessary that allow for the true participation of Indigenous communities and fundamentally change the way that Indigenous children are protected. Indigenous laws, and ways of doing things, must lead the way forward. It is anticipated that Indigenous laws could address:*

- *Alternate dispute resolutions (such as mediations or peacemaking under Indigenous laws);*
- *Adjudication (creating tribunals, councils, courts or a traditional mechanisms) to make decisions;*
- *Appeal processes.*



*In Canada, “problem-solving courts” attempt to address legal problems in a holistic and healing, rather than adversarial, manner.*

Indigenous Peoples may wish to join with other Indigenous Peoples to create these mechanisms or propose to work with existing court structures in hybrid processes.

#### A. Therapeutic Indigenous BC CFCSA Courts

In Canada, “problem-solving courts” attempt to address legal problems in a holistic and healing, rather than adversarial, manner. The First Nations Courts in New Westminster, North Vancouver, Duncan, Merritt, Prince George and Kamloops; the *Gladue* (Indigenous Persons) Court in Toronto; and the Tsuu T’ina Peacemaker Court in Alberta operate on a restorative justice model that takes into account an Indigenous offender’s individual, family and community background in sentencing.

These models are built on principles of restorative or therapeutic justice with the goal of correcting and healing, and so offer a greater chance of innovative solutions shaped by healing principles. Within these flexible models, efforts have been made to identify opportunities to reflect the values and ways of doing things of the Indigenous community who participates. These courts often focus on healing plans that put in place community or Nation-based supports that are necessary to correct behaviours, including establishing and accessing services and relationships within the Indigenous community. Restorative or therapeutic justice courts which address BC CFCSA matters—reflecting Indigenous communities and healing principles—could be transformative.



## Case Study: Aboriginal Family Healing Court Case Conferences

*A hybrid court established in the New Westminster Provincial Court which is a set process involving the judge, elders, parents and the director (and potentially representatives of a child's community(ies)). The goal is to create a wraparound approach that supports families in addressing child protection concerns.*

*Indigenous child welfare courts (similar to Gladue sentencing courts) offer the opportunity to develop innovative solutions that incorporate Indigenous values, ways of making decisions and healing.*

- *Parents and families work closely with elders to better understand their strengths, challenges and how they can heal from the impacts of colonization and systemic racism;*
- *Judges, lawyers and social workers are educated about the impact that past government policies had, and continue to have, on Indigenous Peoples in Canada and their culture;*
- *Parents and families work with elders, the program coordinator and any chosen personal or professional supports to develop a cultural safety agreement in order to provide a culturally safe environment for the family;*
- *The program coordinator utilizes the tools available in the BC CFCSA to improve outcomes for Indigenous children by actively involving Indigenous communities in child welfare matters. Involvement of Indigenous communities can diminish the isolation parents and children experience within the child welfare process and prevent the loss of identity and disconnection experienced by past generations of Indigenous children; and*
- *Families work with elders and the program coordinator to develop a cultural family history healing and wellness plan.<sup>212</sup>*

*Indigenous child welfare courts (similar to Gladue sentencing courts) offer the opportunity to develop innovative solutions that incorporate Indigenous values, ways of making decisions and healing.*

<sup>212</sup> Edited from Provincial Court of British Columbia. "Aboriginal Family Healing Court Conferences" (23 January 2018) [available online: <https://www.provincialcourt.bc.ca/enews/enews-23-01-2018>].

*The establishment of Indigenous parallel judicial institutions could transform the situation for Indigenous children, families and communities.*

## **B. Section 104 Tribunal**

Under s. 104 of the BC CFCSA, the Lieutenant Governor in Council may make regulations “(a) for the purpose of establishing, as a pilot project, a tribunal ... and enabling the tribunal to act under this Act in that area in place of the court, (b) governing the powers, duties, functions and rules of procedure of the tribunal and the effect of its decisions, (c) governing appeals from the tribunal’s decisions, and (d) modifying, or making an exception to, any requirement of this Act to the extent necessary to enable the tribunal to act under this Act in place of the court.”

The province has the power currently to take steps within the BC CFCSA framework to recognize parallel Indigenous legal institutions to apply to the area of Indigenous children and families. The provision could be relied on in conjunction with Indigenous Peoples’ own laws to create and recognize unique decision-making bodies that reflect Indigenous laws and ways of making decisions. A tribunal is an option for implementing a hybrid area of jurisdiction under Indigenous and provincial jurisdiction.

### **Indigenous Laws: Parallel Indigenous Legal Institutions**



*The establishment of Indigenous parallel judicial institutions could transform the situation for Indigenous children, families and communities. Options for the recognition of parallel Indigenous judicial institutions include:*

- *Indigenous BC CFCSA courts (similar to the Gladue/First Nations sentencing courts already in operation) that implement the BC CFCSA provisions in a culturally sensitive and appropriate way. This could include having Indigenous Peoples involved at all levels of the process (bench and director’s, parent(s)’ and children’s counsel) and broader categories of people as identified by Indigenous laws.*
- *Options for parallel legal institutions created under Indigenous laws, perhaps implemented by protocol or agreement between Indigenous Peoples and the Crown, where decisions are respected across jurisdictions. In some cases, this could involve an Indigenous group passing its own child welfare laws that would apply to the child or family, irrespective of residence on- or off-reserve, and envision the judicial and administrative institutions necessary to carry out that scheme.*



## Indigenous Laws: Potential Indigenous Decision-Making Bodies



*Indigenous communities, as they pass their own laws, will begin the process of articulating their own decision-making bodies which reflect their own laws and traditions.*

*Potential decision-making bodies within Indigenous child welfare laws could include:*

- *Community-based councils, such as an elders' or grandmothers' council;*
- *Decision-makers who are connected to a child or family by clan or house, including perhaps with specific sets of obligations or responsibilities based on that cultural relationship;*
- *A group representing people chosen by the community based on their personal qualifications or characteristics;*
- *A community counsel or body representing the main families within the community;*
- *A panel based on hereditary chiefs or their delegates;*
- *Indigenous lawyers or judges;*
- *A regional panel with representatives chosen from different Nations for their skills and knowledge about child welfare and Indigenous laws;*
- *A hybrid arrangement which incorporates helpers from outside of the Indigenous community (for example, from other Indigenous Nations, or a judge, lawyer or mediator from outside the community who participates as a member of the decision-making body).*

*Indigenous communities, as they pass their own laws, will begin the process of articulating their own decision-making bodies which reflect their own laws and traditions.*

Additionally, Indigenous communities will need to contemplate if the decisions of their decision-making bodies can be appealed or reconsidered and how to structure those appeal or reconsideration mechanisms.

## 15. In-Depth Case Study: ShchEma-mee.tkt (Our Children) Project

*The ShchEma-mee.tkt Project advances Nlaka’pamux ways to work with children and families involved, or at risk of becoming involved, in the child welfare system, with the goal to reinvigorate Nlaka’pamux traditions and involve our communities to protect and keep our children safe.*

The ShchEma-mee.tkt (Our Children) Project is a project of three communities (Lytton [TlkemchEEn], Skuppah and Oregon Jack Creek [Snapa/Ntequem]) within the Nlaka’pamux Nation Tribal Council (NNTC). The ShchEma-mee.tkt Project reflects Nlaka’pamux governance and can grow to include other Nlaka’pamux communities in the future.

The ShchEma-mee.tkt Project advances Nlaka’pamux ways to work with children and families involved, or at risk of becoming involved, in the child welfare system, with the goal to reinvigorate Nlaka’pamux traditions and involve our communities to protect and keep our children safe.

As a Nation, as communities, families and individuals, we share obligations to our children. The goal of the ShchEma-mee.tkt Project honours the spirit of Nlaka’pamux traditions, translating them to fit modern times.

To build the ShchEma-mee.tkt Project, we researched Nlaka’pamux cultural teachings, working with elders and knowledge-keepers; relied on Nlaka’pamux stories that carry forward our laws and show our ways of making decisions; and based our work on Nlaka’pamux governance roles and decision-making processes.

We engaged with stories, including origin stories and ancient stories from transformation times, and historical reflection, which illustrate (as the Hell’s Gate story that opened WoW does) how we exercise our laws in practice.

The land itself: Our stories are tied to the land itself, which reflects our fundamental character and being as Nlaka’pamux people.

The Nlaka’pamux Language: We looked at our language and how it outlines and carries forward important concepts about how we care for children.

In building the ShchEma-mee.tkt Project, we looked at “the ground we are standing on” (where we are right now) and decided that we needed to know, and work with, the systems that impact our children and





families today, while rebuilding our capacity as a Nation. Our actions, or inactions, today impact future generations. A better future for our children starts with the actions we take today.

The ShchEma-mee.tkt Project is a transformation process. It works within the established system—with the MCFD and DAs—while working to build a better future for children and families, outside of the system and based on our own legal traditions.

*In building the ShchEma-mee.tkt Project, we looked at “the ground we are standing on” (where we are right now) and decided that we needed to know, and work with, the systems that impact our children and families today, while rebuilding our capacity as a Nation.*

## Our Past, Our Present, Our Dream for the Future



*Nlaka’pamux laws are ancient and contain teachings about our ways of coming to correct decisions to ensure wellness for our children, families, communities and Nations.*

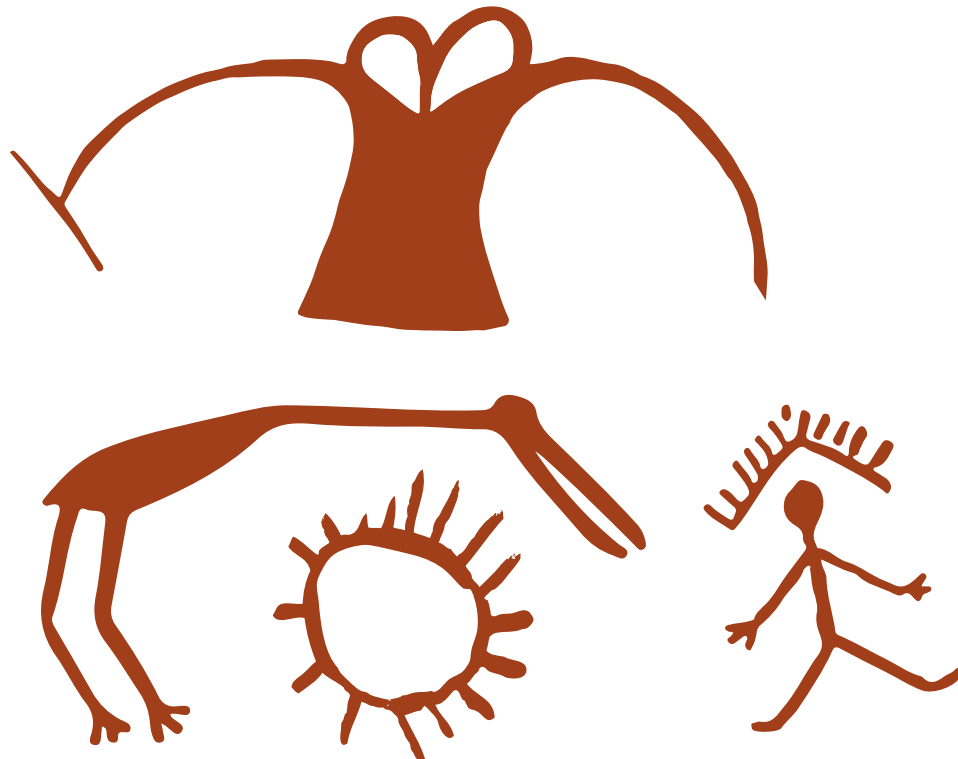
## I. Creation Stories: Illustrating a Justice Trail

Nlaka’pamux laws are ancient and contain teachings about our ways of coming to correct decisions to ensure wellness for our children, families, communities and Nations.

Many of our laws are contained within our creation stories originating in a time of chaos—when our world was being transformed into the world we live in today. Our laws came to us during this time and taught us to live in the right way with each other.

Our creation stories teach us our laws and show us how to live by them. Their messages adapt to situations, keep our laws current, and reflect our core ways of being and relating to each other and our world. Historic stories show how our ancestors may have applied our laws/teachings in their own lives and provide the guidance of example.

Stories show us a trail toward justice. The ShchEma-mee.tkt Project identified stories that illustrate Nlaka’pamux laws for caring for children and families: Skalula (Owl) and the Boy, The Battle of the Birds, The Boy who was Abandoned, and Coyote and Rabbit Help the People Defeat the Monsters. Though these stories may be told differently by individuals, families or communities, they share common elements across tellings.





## Battle of the Birds

All the birds agreed to help the Hala'u to steal the wife of the Bald-headed Eagle, who was a very good woman, but got treated bad by her husband. The Hala'u said, "We will all go to the underground lodge of our grandfather, the Bald-headed Eagle. I will stay outside whilst all of you go inside, and engage him in a game of lahal, and you will at the same time complain of the cold, and keep putting wood on the fire, until the house gets very hot, then his wife will be sure to come outside to cool herself." Accordingly, all the birds entered and engaged the Bald-headed Eagle in a game. They did as directed by the Hala'u, and soon the place was very hot.

Before long the wife arose and said, "I am going out to cool myself. I cannot stand the heat." As soon as she got outside, the Hala'u took possession of her, and conducted her to his house. Shortly afterwards the birds ceased playing with the Bald-headed Eagle, and all went home in a body. As the woman did not return, the Bald-headed Eagle knew what had happened, and began to train himself.

After training for some time, he donned a collar of several thicknesses of birch-bark, and returned to the house of the Hala'u, where all the birds were assembled. Here he took up his position on the top of the ladder and challenged them to battle.

Each one of the smaller birds went in succession to the woman to get his hair combed, and straightway to fight the Bald-headed Eagle; but they all fell an easy prey to their warlike and powerful enemy.

Then the larger and more powerful birds had their hair combed and went out; but they also were slain. The Raven had his hair combed by the woman and then went out; but he, too, soon fell a victim.

Next came the Chicken Hawk; but he soon shared the same fate. Then the Fish Hawk sailed forth, and there was a stubborn fight, but eventually the Bald-headed Eagle killed him and cut off his head. After that the Hala'u himself went forth with a birch-bark collar around his neck, and forthwith ensued a fierce battle. The combatants rose to the clouds, and dropped to the earth, fighting; but at last the Hala'u was slain and decapitated.

The woman then commenced to wail inside the house, for there was only one bird left, viz., the Ha'tabat [type of Hawk], who also had his hair combed, and went to give battle to the Bald-headed Eagle. The contest was a very furious one. The combatants flew up to the clouds several times, and back again. At last the Bald-headed Eagle was slain, and the Ha'tabat took possession of the woman. Afterwards he went around and healed the wounds of the dead birds, put their heads on their bodies, and they all came to life again, except the Bald-headed Eagle.

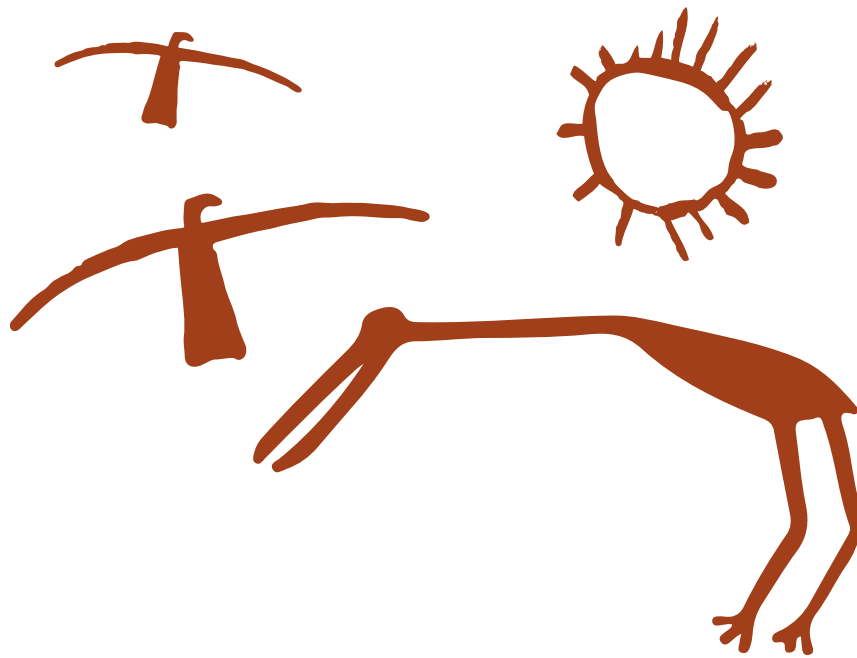
*This is a story where other efforts to address a situation (perhaps with a closer family unit) have failed.*



*This story addresses a community-level response to domestic violence and illustrates our obligations to act.*

### Some of the justice teachings we draw from this:

- *Hala'u is responsible for coordinating the discussion and response;*
- *The bird family is willing to take action to protect a party, even as against a closely related family member or a very powerful member of the community/Nation;*
- *This is a story where other efforts to address a situation (perhaps with a closer family unit) have failed;*
- *To arrive at the solution, the birds engage in a joint discussion to decide what needs to be done and how to do it. No one is left out of the discussion or the solution; there are obligations on all members of the bird family to act; and*
- *This story addresses a community-level response to domestic violence and illustrates our obligations to act.*





## *The Boy Who Was Abandoned*

*The story happened right here in Lytton (TlkemchEEn)—It is about a poor boy that everyone disliked. Everyone spoke together and decided to get rid of him.*

*“Take him to Npupiychen” (a creek north of Lytton [TlkemchEEn]), they decided. “Plaster his eyes with pitch, urinate on him, spit on him, blow snot on him. By the time he gets his eyes clean we’ll be far away, climbing to Petani.”*

*While some of the people were plastering the boy’s eyes, the others packed and bundled everything and left for Petani. His grandmother disagreed, and she was left behind too. They put an old basket over her and left her in the pithouse—they left a few dried salmon for her in one room.*

*All alone, the boy was going along wailing, “hi7!” [wailing sound]. Everything he could obtain, such as dried pine needles and dried grass, he put on his head. Going along with no one around, he came to a huge overturned old basket. “What is this basket doing here?” he wondered. He kicked it over, and his grandmother was under it.*

*“Stop it, dear! Stop it!” she hollered. “I don’t know why the people have done this to us, but they have left us behind!” The old woman still had a little spark in her bosom, which she could blow on and burn to make something to eat. She gave it to the boy and told him to take it and fix it to make it burn.*

*“The people may have left us some food,” she told the boy. “Look around the other buildings.” The boy searched through all the houses. He found a few things, brought them in, and fixed something to eat. After the two had eaten, the old woman said to the boy, “Sleep now, dear—sleep. In the morning you’re going to go wash your face in the spring. That water is really wonderful—it is from the Creator. He gave it to us.”*

*First thing the next morning, his grandmother woke the boy and told him to go to the spring and wash his face. When he returned he made bows and arrows and other weapons, which he gave to his grandmother. She examined them and told the boy that they were good.*

*“Now I can go and shoot mice, magpies, rats and anything else I can find,” said the boy. “I’ll bring them to you and you can fix them for me.” This the boy did. He shot many little animals and brought them to his grandmother. She skinned them for him, sewed a patchwork, and made several lovely blankets. The boy took them to hang outside.*

*Common and recurring situations in Nlaka’pamux stories are where someone is being “abandoned” or left (form of banishment) without their community to support them.*



*They way that people in the community try to help those who are being abandoned (even when they agree that they need to change their ways), are important teachings about compassion.*

*“You’d better not, dear,” the grandmother warned. “Sun is not very kind—he will kill you. That’s not good—I’m afraid!”*

*“No,” the boy replied, “don’t be afraid. I’m going to go and hang up my blankets.” He crawled out from the pithouse, hung up the blankets, and sat around.*

*A short time later a flashing light in the form of a man appeared before him. This was Sun. “My friend, I very much admire your blankets,” he said to the boy. “Here, I brought you a rifle and this is something to put into it—gunpowder. You are going to give me your blankets,” he continued. “I’m going to gather all the deer into one ravine and that’s where you will go hunting. The people who have disowned you will go hungry—they will be so hungry they will be pitiful”. The boy was reluctant to give away his blankets because they were decorated with blue jays and other pretty things, but finally he sold them. Sun rose up like a flash of fire reaching into the sky.*

*The boy gladly told the news to his grandmother.*

*“My friend brought me a rifle. Feel it,” he said. The grandmother felt the rifle and asked, “What will you do with this? You don’t know how to use it.” “I know how,” the boy replied. “My friend showed me. He took the blankets, just as I told you. He also told me where to shoot deer.” “Oh well, whatever....” Said his grandmother.*

*Early the next morning, the boy again washed at the spring and then left to hunt. He came home with a large number of deer. “I won’t be able to fix these for you,” his grandmother told him, “not any more.”*

*“I’ll fix them myself,” the boy said. “I know how—I was taught how to fix skin.” He began cutting up the meat and hanging it to dry. “Feel it,” he told his grandmother. “Oh, my dear, you did well!” said his grandmother. “Now we’ll eat it.”*

*The boy’s parents arrived home and found their son still alive and now a grown man. They visited their son at this house, but he would not give his people anything. The father wept, hungry of all that meat, while his son felt wonderful at heart.*

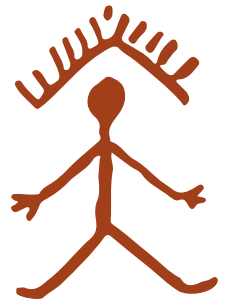
*You see now how the Sun turned himself into a man and came to earth. The grandmother was very proud of the boy.*



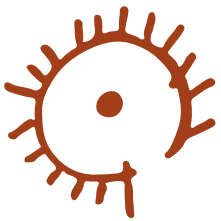
## Some of the justice teachings we draw from this:

- Common and recurring situations in Nlaka'pamux stories are where someone is being "abandoned" or left (form of banishment) without their community to support them. This story occurs in various forms where the community abandons a person who is felt to be misbehaving (for example, people who gamble excessively; leaders who are disrespecting the people; here, a child). Often members of the community have compassion or feel for their situation and leave foods for them. Later, when the person has transformed and turned him or herself around, they are very favourable to the people who took pity on them before;
- The way that people in the community try to help those who are being abandoned (even when they agree that they need to change their ways), are important teachings about compassion. The need to hold people accountable (to tell them very clearly when they are not behaving properly, when their actions are not acceptable) while still helping them illustrate key principles which underpin the Nlaka'pamux child and family response;
- The community decides to abandon the boy who is not well liked (he appears to be rude, unkind, and not contributing to the life of the community). His parents abandon him as well, and only his grandmother stays with him;
- The grandmother stays, and it is she who trains the boy to be self-sufficient, to hunt, and she also provides spiritual training to him. In this story, though it appears to be the boy who has a problem with his behaviour, later, when he helps those who helped him, this illustrates that the parents (who did not raise or care for him properly as they should have done as parents) were also not correct;
- There are members of the community who felt sorry for the grandmother and the boy and left some dry fish for them so that they would not starve;
- Grandparents are a very important part of caring for children. Grandparents are regular caregivers and have an important role to play in teaching children discipline and traditions. The boy grows to adulthood in this story. Being cared for by his grandmother is not a short-term or temporary solution;

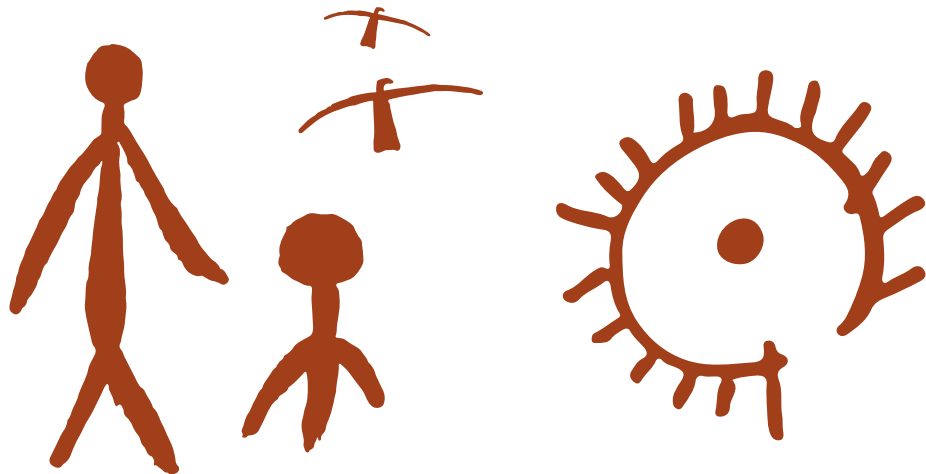
*The grandmother teaches the boy to become responsible and disciplined. He learns to care for himself, his grandmother, and ultimately others in the community.*



*Grandparents are a very important part of caring for children. Grandparents are regular caregivers and have an important role to play in teaching children discipline and traditions.*



- *In one version of the story, the animals themselves refuse to be caught by the people who abandoned the boy—causing them to need to move farther away for food. This shows how our entire living world acts to protect children and responds when they are threatened;*
- *After they are abandoned, the grandmother begins teaching the boy spiritually (bathing in water) and also to make hunting tools and to hunt and dress his catch—she starts with teaching him to catch smaller birds and animals;*
- *Eventually the boy progresses, and they have made a beautiful blanket with the skins of birds he has caught. He trades these blankets to the Sun who gives him tools and teaches him how to hunt deer;*
- *The grandmother teaches the boy to become responsible and disciplined. He learns to care for himself, his grandmother, and ultimately others in the community;*
- *The boy's healing and learning occurs slowly, in stages. He starts with learning to hunt and dress smaller birds or animals and then progresses through to deer; and*
- *The grandmother teaches the boy the daily spiritual practice of bathing in water, and of honouring that way of healing and wellness that the Creator gave to the people.*







## Skalula (Owl) and the Boy

Once upon a time, there was a little boy who always cried. His parents tried to frighten him by saying, "The owl will hear you and take you away. He will put you in his basket, which is full of snakes." One night he cried more than usual, and his parents, being much annoyed, said, "Owl, come and take him!" After a while he became quiet, and his parents said, "Our child is now very quiet." They were glad.

He had not become quiet, however, for Owl had entered the lodge quietly, and in the dark put the boy in his basket and carried him off. He took him to his house and reared him. He made him wash in the creek, and the boy grew very rapidly. He grew as much in one day as he would have grown in a year under ordinary circumstances. His parents could find no trace of him, and gave him up for lost. They thought Owl had taken him, but they did not know where to search for him.

In a short time, the boy had grown to be a young man, and Owl had taught him how to hunt and shoot. Every day they hunted. Owl drove the game, and the lad sat down at a certain place to shoot the animals as they came up. Owl carried the meat away, and gave the lad very little to eat.

One morning, when washing himself, he saw a lodge across the creek. He went there and found that Crow and his wife lived there. Crow said to him, "Owl treats you badly. He starves you," He answered, "Yes, I am hungry all the time." Crow said, "Your grandmother will feed you." Crow-Woman gave him some food to eat.

On the following day, he hunted with Owl again. He was at a deer-trail on the top of a ridge. Owl was driving the deer, and shouted, "Go to my slave, go to my slave!" The lad heard him, and became angry. He said, "Not only does he starve me, but he also calls me his slave." He hurried back to the house, made a big fire, took down Owl's heart, and threw it into the fire. Owl always left his heart hanging in the house when he went hunting. He was still driving deer, when he felt a pain in his heart. The pain became more severe, as his heart was burning. He hastened home, and fell down dead at the lodge door at the very moment when his heart was consumed. The lad went to Crow's lodge and told him that he had killed Owl.

Crow questioned him: "Have you any grandmother? Have you any mother? Have you any elder sister? Have you any younger sister?" He answered that he had. Crow asked him, "Have you any toy dried salmon? Have you any toy dried berries? Have you any toy salmon-oil? Have you any toy deer-fat?" He answered that he had. Crow said, "Shall I go and get them?" and the boy answered, "Very well."

*Stories where Skalula (Owl) steals children and the process of how they are returned to their family and community teach us about how we should care for and treat our children.*





*Within the story, it is not just the child who is healed or whose behaviours must change, a transformation occurs with both the child and the family.*



*Then Crow flew away, and arrived at the cellar of the lad's mother. She was inside, taking out some dried fish, and her daughter was sitting on top of the cellar. Crow said to the girl, "I have come to get the toy dried salmon of your elder brother." The girl spoke to her mother, saying, "Crow is here, asking for the toy dried salmon of my elder brother." Then the mother cried, saying, "You ought not to speak that way." The girl remonstrated, saying that she was speaking the truth: therefore, the woman came out and asked Crow where her son was. She made up a pack for Crow, who said, "Now, watch where I go! Where I end my flight, there you will see a pillar of smoke. I live there with your son." They watched Crow, and lost sight of him in the distance. Crow came successively for all the toy food belonging to the lad. The longest-sighted among the people watched his flight, but none could see where he stopped. The fourth time they asked the Ska'kuk to watch from the top of an underground lodge. Ska'kuk followed Crow's flight and discovered a pillar of smoke. Then he fell in a swoon because of the strain of looking so far. The people revived him with cold water. Then he told them where Crow had gone.*

*Then the lad's mother and sister set out to find him, and at last reached the place where he was. He returned with them; and when passing a lake on the way home, he said he would bathe in the lake because he felt hot. They tried to dissuade him, but he persisted. He bathed and dived. When he came up again, he had become a loon.*

### **Some of the justice teachings we draw from this:**

- *The problem revealed in this story is not just with the child (who may be said to be misbehaving) but also with the parents who are not properly caring for the child and who are reckless—who do not honour the sacred gift that children are—and call for Skalula to take him away;*
- *Within the story, it is not just the child who is healed or whose behaviours must change, a transformation occurs with both the child and the family;*
- *At the beginning of the story, the boy is always crying, at the end he turns into his true self—a loon who sings at night. This reflects our need to watch for, and respect, our children's true natures—who they really are (this could be read to respect a child's sexual orientation or gender expression);*



- Crow and Crow-Woman help the boy by feeding him and giving him information on his condition. Crow seeks out the boy's mother and sister and shows them the way to find the boy with the help of Ska'kuk;
- The boy himself helps in defeating Owl (he destroys the owl's heart when the owl takes it off during hunting). In other versions of the story, the family of the boy is able to defeat Owl because Crow tells them that when Owl takes off his heart he is weakened and can be killed;
- This story illustrates transformation in the process of the child being taken away. While being taken by Skalula, the child is taught. This teaching includes spiritual teaching (bathing in the water), as well as skills needed to be self-sustaining and contribute to the world (here, hunting);
- The family is involved in a learning process—to recover the child, the parents/family seek help from others who are knowledgeable about the problems that are faced and what actions are necessary;
- Stories where Skalula (Owl) steals children and the process of how they are returned to their family and community teach us about how we should care for and treat our children. They reveal situations where both the children and family gain additional knowledge or skills to deal with the challenges they face. In modern day terms, this story could refer to situations where families suffer from problems such as substance abuse or trauma and need help to heal so that they can properly care for children. It shows us that children are harmed from being raised in that environment and need assistance to recover and grow strong. In the end, the solution for the child is when he transforms into his true self.

*In modern day terms, this story could refer to situations where families suffer from problems such as substance abuse or trauma and need help to heal so that they can properly care for children. It shows us that children are harmed from being raised in that environment and need assistance to recover and grow strong.*



*This story is an example where the solutions that will bring us peace—the right way of doing things—is one that involves People working with Animals and our living world, which is equally alive and features as part of our legal system.*

## ***Coyote and Rabbit Help the People Defeat the Monsters***

*This story is about monsters that were troubling families. Today, the reason why children are getting taken away from the families is the monsters that gather in our minds and play on the innocent children. This story tells of how our People gathered, together with the Animals.*

*A long time ago, the Nlaka’pamux people and Animals were being bothered by Monsters. Some said these Monsters were aliens or from another world. These Monsters could be heard in the minds of the People with fighting and arguing and causing chaos.*

*The little rabbit was down at Lytton, and he was watching all the Animals go by and all the Indians walking by and he asked, “Where is everyone going?” “Oh, we are going to go part way up Botany Valley and we are going to have a war.” The little rabbit replied, “I want to join.” But he was limping because his back leg was broken and he was getting left behind, but he wanted to help the animals and Indians get rid of the Monsters. The Indians, they stopped on the bottom of this big rock, and they were planning on how to get rid of the Monsters.*





*The Nlaka'pamux people and Animals gathered up sticks and logs and bush to make a fire. They were going to surround this big rock and make a fire. And that little rabbit was slowly catching up. The coyote came along and asked the rabbit, "Where are you going?" And he said, "Oh, I am going to go help these Indians and the rest of the Animals fight these Monsters." And the coyote says, "Let me help you." So he grabbed the rabbit's leg and he pulled on it and he pulled off the broken part of his leg and he rubbed the rabbit's leg up against the rock until it was nice and sharp so the rabbit was able to run and catch up.*

*This little rabbit had this chance to come and help the Indians and other animals fight these Monsters. So, they all gathered on the bottom of the big rock and made a fire. And the fire went up the hill. They kept feeding it. The Monsters were watching the rock from the top of the hill. They were watching and they didn't know where to run. There was nowhere to run. The fire kept coming up and up and up. The Indians and Animals were just throwing wood in the fire until, when the fire was about 25 feet away, the Monsters couldn't jump off the side of the rock face, so they started to melt. The Indians kept pushing sticks and everything, rocks and logs, on these Monsters and they started to melt. The Monsters were screaming away there—just like in your mind, if you have Monsters in your mind—just screaming away, and they started to melt and melt until all the Monsters were melted. The Indians and Animals got rid of these Monsters. The Monsters melted down on that rock.*

*So that's how the Animals and the people at that time got rid of their Monsters. The people and Animals got together, like we are doing in the ShchEma-mee.tkt Project, to get rid of the Monsters.*

*Now, people say that, if you wipe away your tears, and put them in a box on a rock and the sun shines on the box, your problems are lifted away. This story also talks about our way of seeing and perceiving the world and how we must not be so much "in our heads" seeing things in warped ways. We need to be conscious of our thoughts and actions.*

*This is the same thing that we are working on, with the ShchEma-mee.tkt Project and child welfare. Now the Monsters we are facing are alcohol and drug abuse, sexual abuse, violence and elder and child abuse. Just trying to help the children to get rid of their Monsters and bring them back to our society. Humclth.*

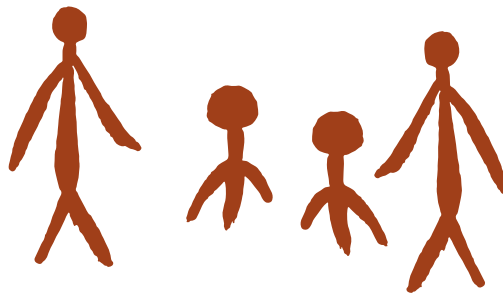
*The solution involves action, doing things—gathering wood, working together, tending the fire—rather than just talking about what needs to be done.*



*Working together, the Animals and People had to keep working, piling more and more fuel onto the fire, before they were successful.*

### Some of the justice teachings we draw from this:

- *Monsters were causing disharmony and chaos amongst the People and Animals. (We see the same Monsters—challenges—in child welfare and can learn how we are obligated to act);*
- *People were arguing, confused and violent. Many of the Monsters were in the minds of the People and Animals, reflecting disordered thinking;*
- *People and Animals were individually suffering and could not protect themselves alone. The animal and human worlds acted together to solve the problem Monsters that plagued them. Rabbit helped to defeat the Monsters even though he was “broken” (broken leg). With Coyote’s help, what was broken became a source of strength;*
- *The solution is found in ending the isolation that the People and Animals felt trying to face the Monsters each on their own, and instead deciding to act together. As many of the Monsters were in the minds of the People, to carry this solution forward, we need to be conscious of our thoughts and how our thoughts impact us and our world. We also need to take action at times;*
- *This story is an example where the solutions that will bring us peace—the right way of doing things—is one that involves People working with Animals and our living world, which is equally alive and features as part of our legal system;*
- *The solution involves action, doing things—gathering wood, working together, tending the fire—rather than just talking about what needs to be done. This is an example where the solution was not easily reached. Working together, the Animals and People had to keep working, piling more and more fuel onto the fire, before they were successful.*



## II. Ways of Being the ShchEma-mee.tkt (Our Children) Project Will Follow

These stories show us how to honour who we are as a people and in relation to each other. Ways that we will follow to achieve a just or right result or decision.

### 1. Relations

AnkshAytkn—We are all related. The impacts of not doing things the “right way” are not limited to immediate families, but are experienced by extended families, communities and Nations.

When something is not right, and nothing is done, problems worsen. If we fail to act, our inactions impact the children who come after us, and problems grow over time and generations. Our knowledge of our relationships across time and generations creates a responsibility for us to act now.

When families themselves cannot address problems, members of the community, and those with specialized knowledge, have a responsibility to become involved. The knowledge that we are all related reminds us that what happens to children and families impacts us all as members of extended families, communities and Nations.

Ask: If we are all related, and we know that what happens to these children, or this family, impacts us all, what are the impacts of our actions now and into the future?

### 2. Knowledge

We need to know our traditions and teachings, and the monsters and challenges we face, to make things right for our children. In many Nlaka’pamux stories, there are figures, such as Crow, who share the information needed to resolve issues.

*When families themselves cannot address problems, members of the community, and those with specialized knowledge, have a responsibility to become involved.*

*To protect our children, we need knowledge about the signs, symptoms and impacts of modern monsters and challenges that Indigenous Peoples face.*

To protect our children, we need knowledge about the signs, symptoms and impacts of modern monsters and challenges that Indigenous Peoples face, such as:

- Trauma and inter-generational impacts of involvement in IRS and the child welfare systems;
- Substance abuse;
- Sexual abuse;
- Domestic violence;
- Special needs (disabilities, mental health issues, FAS/FAE); and
- Erosion of traditional parenting and spiritual knowledge.

Knowledge of these monsters/challenges, as well as Nlaka'pamux cultural strengths and resources within the community, are needed to keep children safe and to help heal families.

Ask: What are the monsters/challenges that families face that threaten children? How do they impact children today and into the future? What do we know about how we can fight those monsters/challenges (information from all sources: our own traditions, healers, counselors)?

### *3. Responsibility*

People are responsible for the impacts of their actions on children. When we see things that are not right, we have to face the problems we see despite our fear of involvement with the child welfare or criminal justice systems or fear of the reaction of family and community members.

Ask: When we see that something is not right, or that children are being harmed by the actions or inactions of someone, what is our responsibility to do?

### *4. Compassion*

We need to show compassion and help people face their challenges and do things in the right way.

Ask: What actions could we take to help these children, or this family, to heal or to do things in a better way?



### III. Education to Empower Action

The ShchEma-mee.tkt Project will empower our communities to confront the monsters and challenges that prevent our children from being safe and our families from being well. Project members will receive training on the monsters/challenges that put our children at risk, and will share this knowledge within the community about issues such as:

- Domestic violence;
- Sexual abuse;
- Substance abuse;
- Historic trauma; and
- Knowledge about Nlaka'pamux cultural traditions and the impact of colonialism on those traditions.

We will learn about the monsters/challenges that our families face, as well as strengths within our communities and culture, and will help to share this information and teach others. This process to defeat monsters collectively reflects a key narrative of Nlaka'pamux stories.

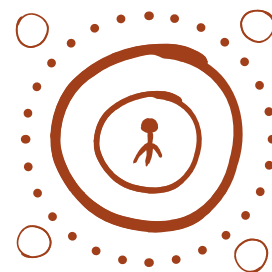
### IV. Gathering Around a Child to Keep Them Safe/ Circle of Care and Accountability Process

A Circle of Care and Accountability process will be formed to support each family or child where intervention is required, and will work together on an ongoing basis to keep the children safe, and to help heal the family where possible.

Guides will oversee the Circle of Care and Accountability process for each family, often together with the ShchEma-mee.tkt Project Director, and are responsible for ensuring that the Circle has knowledge of the monsters/challenges that prevent the children from being safe, identifying options and finding a way forward.

Guides are not “neutral” but work with a consciousness of the guiding principles of the ShchEma-mee.tkt Project.

*A Circle of Care and Accountability process will be formed to support each family or child where intervention is required, and will work together on an on-going basis to keep the children safe, and to help heal the family where possible.*



*AnkshAytkn—We  
are all related.*



<b>VOICES REPRESENTED WITHIN THE GATHERING AROUND A CHILD/CIRCLE OF CARE AND ACCOUNTABILITY PROCESS</b>
<b>VOICE FOR THE NATION/OUR SHARED FUTURE</b>
This voice thinks about the future, for the children who are yet to come, and of the impacts of our inactions today within our lifetimes and beyond. This voice is closely aligned with that of the child, but may be very different or distinct from the interests of the parents or extended family. Where parents or extended families cannot keep a child safe (for example, due to addictions or inter-generational sexual abuse) this voice may conflict with the family about what is required to protect the child.
<b>PARENT(S)/PRIMARY CAREGIVERS</b>
People who are primarily responsible for the care of a child, which may include grandparents, aunts and uncles. Where a child has been placed outside of their home, this may include their caregivers, depending on the situation (or for limited purposes). Where there are safety concerns or other reasons why a person cannot attend, the Guide may talk with the person who cannot attend directly to get their views, and that person may choose to have someone to speak on their behalf.
<b>CHILD (WITH AN AUNTIE/UNCLE ADVOCATE AS NEEDED)</b>
Children should be involved and are entitled to have their voices heard. An auntie/uncle advocate should be chosen who can sit with and help the child to find voice and advocate for their interests within this process. An advocate may be necessary where children cannot attend all or part of the proceedings or be able to speak on their own.
<b>EXTENDED FAMILY</b>
Extended family may be involved, or families may appoint a representative who will have the responsibility to talk with the family in the process.
<b>ELDER(S)</b>
<b>DIRECTOR-CHILD PROTECTION SOCIAL WORKER</b>
If there is a social worker, including under an Indigenous laws entity or on behalf of the MCFD or DA involved, they will be invited to attend, where appropriate.
<b>OTHER</b>
Other supports or people within the community might be necessary to provide support or to help address the issues; legal counsel; Band social workers; drug and alcohol counselors; and cultural and spiritual healers.



## Preparation

To move away from what is broken or “not right” about a situation requires us to look at what is causing problems. Though we may “shy away” from directly confronting problems, we have to be willing to name and address these problems to protect children.

## First Go Round

(Identify the Voice Represented within the Gathering Around a Child/ Circle of Care and Accountability Process—what is “not right”—what needs to be addressed to protect the children.)

- Agree on how people will treat each other with respect and dignity and the confidentiality of the discussions. Talk about being prepared to participate with an open heart and mind;
- Identify the problem(s) that the family must address that are preventing the family from being well (why a family is at risk, or why children have been taken into care);
- Present the background information. Identify the overall goal of the process (e.g., making things right; working together for the children; steps family and community can take; keeping children culturally connected and safe);
- Incorporate Nlaka’pamux traditions into responses;
- Identify strengths within the family, community and other people;
- Different parties offer information or preliminary reactions to the situation, including about Nlaka’pamux traditions or other knowledge and ask questions if they want to challenge or are not sure about any of the information presented.

*First Go Round —  
identify the Voice  
Represented within  
the Gathering Around  
a Child/Circle of Care  
and Accountability  
Process—what is “not  
right”—what needs  
to be addressed to  
protect the children.*



## Second Go Round

(Identify the right way to be or possible solutions to address the problem.)

*Second Go Round — identify what is the right way to be or possible solutions to address the problem.*



- People give input into what could be done and what solutions are necessary. A discussion about what is the right thing to do or how to make things right for the children and family in this situation;
- Offer solutions or thoughts for what needs to be included in a solution;
- Identify social, family or community factors that allow the abuse or chaos to continue. For example—denial of historic or ongoing sexual abuse within families, people who give parents money to purchase alcohol or drugs, etc.;
- May include reminiscences about ways that decisions were made or how the community addressed similar problems in the past and why that approach might or might not work today.

## Third Go Round

(Gather information and find a way forward.)

*Third Go Round — gather information and find a way forward.*



- Gather and interpret the information shared and decide what actions to take.
- Statement bringing together different voices and identify the way to go forward (the “right way of doing things” that has been collectively identified);
- Identify ways to support parent(s) or families to build or regain their capacity to care for their children;
- Where parents cannot safely care for children (and are not actively working toward or cannot regain that capacity), identify resources within the extended family and community that can care for the children, involving the parents and extended families to the extent it is safe to do so for the child’s emotional, physical and spiritual safety and well-being;
- Establish long-term co-parenting relationships (with extended family or ongoing involvement to keep children safe);
- All decisions must respect and reflect the Guiding Principles.

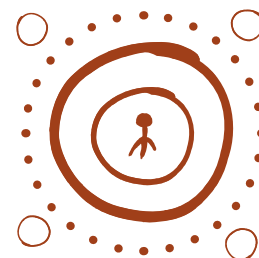
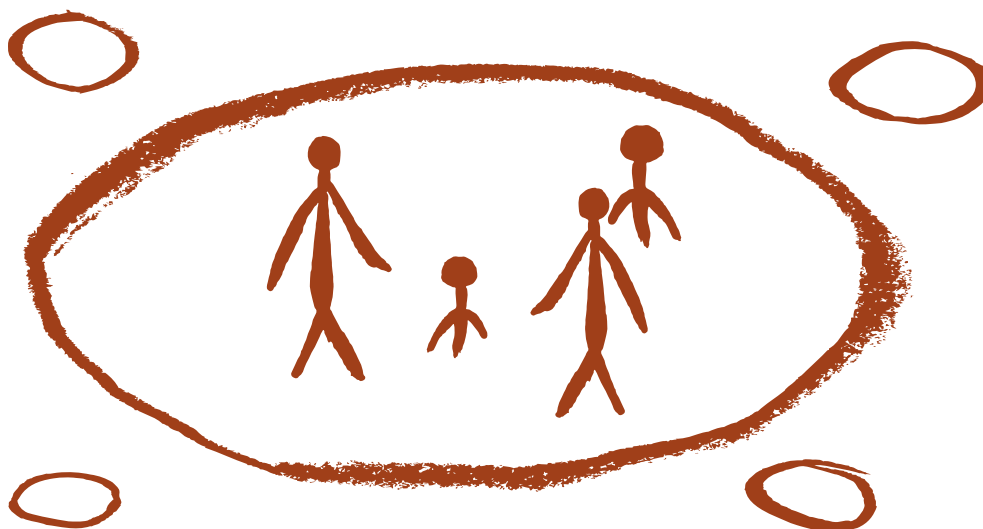


## Fourth Go Round

(Implementation—Identify how the decision will be carried forward.)

- Decide which actions each member of the Circle of Care and Accountability will take. Create a community of action;
- Identify steps that need to be taken before everyone meets again (information that is needed, actions that people will take, etc.);
- Identify need for ongoing meetings to follow up and help people keep the commitments they make; and
- Arrange for intensive and ongoing supervision, where required, to keep children safe.

***Fourth Go Round—  
Implementation—  
Identify how the  
decision will be  
carried forward.***



## 16. Sources

### Cases

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# APPENDIX: Forms and Making Applications

## Introduction

The BC CFCSA, BC CFCSA Regulation and Rules set out the law and process of child protection matters. The purpose of the BC CFCSA Rules is to “promote the safety and well-being of children by allowing court decisions to be obtained fairly and efficiently”. Where necessary to ensure the best result for children, the Rules or procedures may allow for some flexibility.

*The BC CFCSA, BC CFCSA Regulation and Rules set out the law and process of child protection matters.*

Appendix A of the Rules contains forms that can be used when asking the court to make certain orders. Some of these forms are for use by the director (for example, Form 1 is a Presentation Form and contains information which the director must file when they take a child into care); other forms can be used by the director, parents, Indigenous communities or others to make an application about a child. There are no specific forms for exclusive use by Indigenous communities.

There are two ways for Indigenous communities to ask the court to make an order about a child: (1) File a written application, using the forms provided in the Rules; or (2) Make an in-person application in court. The Judge has the discretion to decide whether to allow an application to be made orally or require that official forms be filed to make an application.

Orders that Indigenous communities could ask a court to make include:

1. Access to a child in:
  - a. interim or temporary custody (s. 55), or
  - b. continuing custody (s. 56);
2. Changes to supervision, temporary custody or access orders (s. 57);
3. Disclosure (s. 64 or 79);
4. Adding the Indigenous community as a party to a proceeding (s. 39(4));
5. Transferring the file to a different Registry (Rule 8(12)), or with the consent of all parties (Rule 8(13));

*If an Indigenous community appears in court on a child protection matter, they can orally request that certain decisions or orders about a child be made.*

6. Allowing parties to appear by, or for proceedings to be conducted by, telephone (Rule 1(7));
7. Cancelling a CCO (s. 54) (Rule 8(6)) [If the Indigenous community was a party to the CCO application]; or
8. Having custody of a child transferred to a third party after a CCO (s. 54.1).

Provisions of the BC CFCSA and the Rules that impact how child welfare proceedings may be carried out include:

- Hearings may be as informal as a judge allows (s. 66(1)(b));
- Courts can admit hearsay evidence, written statements (s. 68) (which could include statements or letters drafted by the Indigenous community), and affidavits (Rule 4(1)) (where Indigenous communities want to give evidence about their application, or to introduce written materials in support of their application); and
- A judge may permit an application to be made orally in court without the filing of a form (Rule 1(4)).
- The best interests of the child are most important. Where an Indigenous community makes an application, they should be prepared to explain how the order that they are seeking is in the child's best interests. This could include evidence about preserving a child's Indigenous identity and heritage.

## **In-Person Applications (Without Filing a Form)**

If an Indigenous community appears in court on a child protection matter, they can orally request that certain decisions or orders about a child be made. An application made orally will only be allowed to proceed where the court decides it is in the best interests of the child, and allowing the application to be made orally does not prejudice the interests of the other parties, or where the other parties consent. Depending on the circumstances of the case, and the position taken by the director or parents, the court may refuse to hear an oral application and require that the Indigenous community file a written application for the order that they are seeking.





## BEST PRACTICES

Indigenous communities can make applications concerning their child members orally in court, and should tell the court that:

- They are self-represented and want to make an application orally, and without notice, under s. 66(1) (b) of the BC CFCSA (which allows for informal proceedings), and the Rules (Rule 1(4)) (which allows a party to make an application in person (orally) without filing a form);
- The specific order that they are asking the court to make. (For example: The order may be for access to a child; to have the matter adjourned to allow the Indigenous community time to identify alternate placements for the children; to work out a plan which would preserve the child's Indigenous identity and connection to their Indigenous culture; or to have a matter transferred to a Registry that is closer to the child's home community); and
- Explain why it is in the child's best interests that the order be granted, and how the child will benefit from having the order made. For example, the order may allow the child's Indigenous identity and cultural heritage to be preserved or for a preventive approach to be taken with the goal of restoring the family's ability to safely care for the child.

*The Rules and the BC CFCSA set out when an application must be filed, how the other parties must be provided with copies of the application (served), and what evidence must be filed in support of that application*

## Forms

The Rules and the BC CFCSA set out when an application must be filed, how the other parties must be provided with copies of the application (served), and what evidence must be filed in support of that application. An application is filed with the Provincial Court Registry, and the Registry assigns a date and time when the matter will be heard. An application can only be made without advance notice if the judge allows it.

*There are no forms specifically for Indigenous communities. Under Rule 8(19), if you are using your own form, it must be “substantially the same” as the court forms, and any areas that are different from the court forms must be in bold print.*

## Steps in Applying for an Order:

1. Complete the application or form.
2. File the application by taking it to the Provincial Court Registry (can also be mailed or faxed in). The Registry will provide a date/time for the hearing requested.
3. Parties who seek an order, must provide notice to (serve) the other parties.
  - Documents may be served by leaving a copy with a person, by registered mail, facsimile transmission, or by leaving a copy at, or by facsimile transmission to, that person’s lawyer’s office.
  - Usually service is required at least two days before the hearing (two business days, weekends and holidays would not count).
  - The Rules provide a form for parties to provide a certificate of service (Form 9) which must be provided to the Registry after the other parties have been served.
4. Appear in court at the date and time set by the Registry. When you arrive in court, speak to the court clerk, tell them your name and provide them with the name of the child that you are there to speak to the court about. Where Indigenous communities are self-represented, they should clearly state this for the record. Explain to the court what order is being asked for and why. Explain why the order is in the child’s best interests, which could include: that it helps to maintain a child’s Indigenous and cultural identity, keeps the child safe, or involves the child’s Indigenous community in planning for their care.

## User-Generated Forms for Indigenous Communities

Section 8 of the Federal Act identifies as its purposes (1) to affirm the inherent right of self-government in relation to child and family services, (2) to set out national principles on the provision of child and family services in relation to Indigenous children, and (3) to contribute to the implementation of the UNDRIP. By generating their own forms, Indigenous communities can assert their rights and achieve the purposes of the Federal Act.

There are no forms specifically for Indigenous communities. Under Rule 8(19), if you are using your own form, it must be “substantially the same” as the court forms, and any areas that are different from the court forms must be in bold print.



The forms provided in WoW are not official. These forms should be used as a guide for orders that Indigenous communities could ask a court to make about their child members. The BC CFCSA, Rules and BC CFCSA Regulation all have as their purpose the best interests of children. In addition, the Federal Act imposes the best interests of the child, cultural continuity and substantive equality as national standards which must be met. Rules and procedures can be relaxed where it is necessary to achieve the best result for children based on these principles.

- Parties should review forms with a lawyer (or duty counsel at their local courthouse) before filing with the Provincial Court Registry.
- Not all general forms are included in WoW. Other forms are available through the Provincial Court Registry, or online. These include: Form 3 (Change or Cancel an Order), Form 4 (Subpoena), Form 8 (Notice of Address for Service), Form 10 (Order), and Form 11 (Written Consent).
- Check online at the provincial court page for forms.

*The forms provided in WoW are not official. These forms should be used as a guide for orders that Indigenous communities could ask a court to make about their child members.*

### Indigenous Laws

Indigenous communities may wish to create their own forms to be used in applying for different actions under their own child welfare law.



### Advocacy/Best Practices

The forms here list different factors that should be considered in making a child welfare application and can help Indigenous communities know what to ask for.



# APPLICATION FOR AN ORDER

## Form 2 APPLYING FOR AN ORDER FOR ACCESS

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

Court File Number:
Court Location:

<b>In the matter of the child(ren):</b>	
Name(s)	Date(s) of Birth (mm/dd/yy)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

<b>The parent(s) of the child(ren) is/are:</b>
Name(s)
_____
_____
_____

<b>This application is filed by:</b>
Indian Band/Indigenous Organization/Designated Representative/Indigenous Governing Body
_____
Address _____ City _____ B.C.
Postal Code _____ Phone _____ Fax _____

<b>Notice to:</b>	
Name(s) [Parents, Director, any other parties]	Address(es) (include tel. & fax if applicable)
_____	_____
_____	_____
_____	_____
_____	_____

The child is Indigenous per the meaning of *An Act respecting First Nations, Inuit and Métis children, youth and families*, and therefore, the national standards set out in that Act apply. This includes principles of substantive equality, preventive care, the need to preserve an Indigenous child's culture and to actively involve a child's Indigenous community(ies) in their care.

**Amendments have been made to this Form to reflect orders an Indigenous community may want to apply for. Under Rule 8(19), if people use a form they made themselves, it must be "substantially the same" as the court forms, and any differences must be in bold print.**

Date and time will be provided by the Registry when the Application is filed

**APPLYING FOR:**  
This lists the order that the court will be asked to make, and the section of the Act or Rule that allows it.

**ORDER FOR ACCESS**

**Details of the order requested and the section of the Act or Rule relied upon are included below.**

I will apply to this court on [date] \_\_\_\_\_ at [time] \_\_\_\_\_  am  pm  
at [court location] \_\_\_\_\_

**FOR:**

- An order for access to a child(ren) in  interim or temporary custody (section 55) or  continuing custody (section 56) of the director.**

**If applying for this order, fill out the following:**

**We are applying for access visits to the child(ren) as follows (propose how access should occur; how often; if, or how, it will be supervised; if any travel or other costs or involved who should be responsible for those (director, Indigenous community, etc.):**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**To allow this access is in the child's best interests, promotes the national standards of cultural continuity and is in accordance with principles of substantive equality required by *An Act respecting First Nations, Inuit and Métis children, youth and families*, as it (check all that apply):**

- helps the child(ren) to maintain their Indigenous identity
- helps the child(ren) to main their connection to their Indigenous cultural heritage
- allows for continuity in the child(ren)'s life by maintaining relationships with extended family members, elders, or other members of their Indigenous community
- allows the child(ren) to maintain their spiritual and religious identity and participation as a member of the \_\_\_\_\_ Indigenous community
- Other (list):** \_\_\_\_\_

**Where the child(ren) is/are under continuing custody of the director (a CCO), this access is consistent with the plan of care because it (check all that apply):**

- allows the child to maintain a connection with their Indigenous identity
- preserves the child's Indigenous cultural heritage
- involves the child's Indigenous community in planning for their care
- is consistent with the direction of *An Act respecting First Nations, Inuit and Métis children, youth and families* that an Indigenous child should maintain their cultural connections and cultural access

**If the child(ren) is/are 12 years of age or older, access is consistent with the wishes of the child(ren):**

- yes
  - no
  - the child(ren) was raised in care, and s/he may not know about their Indigenous community or possibilities for involvement with their Indigenous community, and the Indigenous community would like an opportunity to meet with the child and to discuss with them options for them to be connected to their Indigenous community;
- or
- other (explain) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Under Rule 7(2) we request that the director's lawyer prepare the order if granted.

Signature of Applicant or Agent

Dated \_\_\_\_\_

**Address for service if different from Applicant's:**

Address \_\_\_\_\_ City \_\_\_\_\_ B.C.

Postal Code \_\_\_\_\_ Phone \_\_\_\_\_ Fax \_\_\_\_\_

# APPLICATION FOR AN ORDER

## Form 2 APPLYING FOR AN ORDER FOR PARTY STATUS

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

Court File Number:

Court Location:

### In the matter of the child(ren):

Name(s)

Date(s) of Birth (mm/dd/yy)

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

### The parent(s) of the child(ren) is/are:

Name(s)

_____
_____

### This application is filed by:

Indian Band/Indigenous Organization/Designated Representative/Indigenous Governing Body

_____	_____	_____
Address _____	City _____	B.C.
Postal Code _____	Phone _____	Fax _____

### Notice to:

Name(s) [Parents, Director, any other parties]

Address(es) (include tel. & fax if applicable)

_____
_____
_____
_____
_____

The child is Indigenous per the meaning of *An Act respecting First Nations, Inuit and Métis children, youth and families*, and therefore, the national standards set out in that Act apply. This includes principles of substantive equality, preventive care, the need to preserve an Indigenous child's culture and to actively involve a child's Indigenous community(ies) in their care.

**Amendments have been made to this Form to reflect orders an Indigenous community may want to apply for. Under Rule 8(19), if people use a form they made themselves, it must be "substantially the same" as the court forms, and any differences must be in bold print.**

Date and time will be provided by the Registry when the Application is filed

**APPLYING FOR:**  
This lists the order that the court will be asked to make, and the section of the Act or Rule that allows it.

**ORDER FOR PARTY STATUS**

A child's Indigenous community is entitled to notice and usually is added as a party when they appear at hearings involving their child members. If this has not happened (either they did not appear at earlier stages, or because the registry did not add them as a party) then it may be necessary for Indigenous communities to apply for party status.

**Details of the order requested and the section of the Act or Rule relied upon are included below.**

I will apply to this court on [date]\_\_\_\_\_ at [time]\_\_\_\_\_  am  pm  
at [court location]\_\_\_\_\_

**FOR:**

**An order adding \_\_\_\_\_ Indigenous community [the child's Indigenous community] as a party (s. 39(4))**

- a. **The child(ren) is Indigenous and is  registered or  entitled to be registered as a member or  recognized as a member of the \_\_\_\_\_ Indigenous community.**
- b. **The \_\_\_\_\_ Indigenous community/Indigenous Governing Body seeks party status to allow it to be actively involved and fully plan for the care, safety and future of their child member(s).**

**The \_\_\_\_\_ Indigenous community/Indigenous Governing Body makes this application for an order that:**

**The \_\_\_\_\_ First Nation (an Indigenous community as designated under the BC CFCSA and Regulations) or the Indigenous Governing Body (defined in section 1 of *An Act respecting First Nations, Inuit and Métis children, youth and families*) be added as a party to this proceeding under section 39(4) of the *Child, Family and Community Service Act*.**

**Under Rule 7(2) we request that the director's lawyer prepare the order if granted.**

\_\_\_\_\_

Dated \_\_\_\_\_

Signature of Applicant or Agent

**Address for service if different from Applicant's:**

Address \_\_\_\_\_ City \_\_\_\_\_ B.C.

Postal Code \_\_\_\_\_ Phone \_\_\_\_\_ Fax \_\_\_\_\_



# APPLICATION FOR AN ORDER

## Form 2 APPLYING FOR AN ORDER FOR DISCLOSURE

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

Court File Number:
Court Location:

<b>In the matter of the child(ren):</b>	
Name(s)	Date(s) of Birth (mm/dd/yy)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

<b>The parent(s) of the child(ren) is/are:</b>
Name(s)
_____
_____

<b>This application is filed by:</b>
Indian Band/Indigenous Organization/Designated Representative/Indigenous Governing Body
_____
Address _____ City _____ B.C.
Postal Code _____ Phone _____ Fax _____

<b>Notice to:</b>	
Name(s) [Parents, Director, any other parties]	Address(es) (include tel. & fax if applicable)
_____	_____
_____	_____
_____	_____
_____	_____

The child is Indigenous per the meaning of *An Act respecting First Nations, Inuit and Métis children, youth and families*, and therefore, the national standards set out in that Act apply. This includes principles of substantive equality, preventive care, the need to preserve an Indigenous child's culture and to actively involve a child's Indigenous community(ies) in their care.

**Amendments have been made to this Form to reflect orders an Indigenous community may want to apply for. Under Rule 8(19), if people use a form they made themselves, it must be "substantially the same" as the court forms, and any differences must be in bold print.**

Date and time will be provided by the Registry when the Application is filed

**APPLYING FOR:**  
This lists the order that the court will be asked to make, and the section of the Act or Rule that allows it.

**ORDER FOR DISCLOSURE**

A party to a proceeding is entitled to disclosure of the protection concerns. The first step would be for the Indigenous community to request disclosure from the director. If disclosure is not received, it may be necessary to seek an order for disclosure.

**Details of the order requested and the section of the Act or Rule relied upon are included below.**

I will apply to this court on [date]\_\_\_\_\_ at [time]\_\_\_\_\_  am  pm  
at [court location]\_\_\_\_\_

**FOR:**

**An order for disclosure (ss. 64 and 79(a))**

- a. **To fully and effectively participate in the planning for the care of the child(ren) and to help to ensure their safety and well-being the \_\_\_\_\_ Indigenous community/Indigenous Governing Body requires disclosure.**
- b. **The \_\_\_\_\_ Indigenous community/Indigenous Governing Body requires disclosure of all relevant facts about the protection concerns to take an informed position in these court proceedings, and to act to ensure the safety of the children.**

**Under Rule 7(2) we request that the director's lawyer prepare the order if granted.**

\_\_\_\_\_

Dated \_\_\_\_\_

Signature of Applicant or Agent

**Address for service if different from Applicant's:**

Address \_\_\_\_\_ City \_\_\_\_\_ B.C.

Postal Code \_\_\_\_\_ Phone \_\_\_\_\_ Fax \_\_\_\_\_

# APPLICATION FOR AN ORDER

## Form 2 APPLYING FOR AN ORDER TO TRANSFER REGISTRY

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

Court File Number:
Court Location:

<b>In the matter of the child(ren):</b>	
Name(s)	Date(s) of Birth (mm/dd/yy)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

<b>The parent(s) of the child(ren) is/are:</b>
Name(s)
_____
_____

<b>This application is filed by:</b>
Indian Band/Indigenous Organization/Designated Representative/Indigenous Governing Body
_____
Address _____ City _____ B.C.
Postal Code _____ Phone _____ Fax _____

<b>Notice to:</b>	
Name(s) [Parents, Director, any other parties]	Address(es) (include tel. & fax if applicable)
_____	_____
_____	_____
_____	_____
_____	_____

The child is Indigenous per the meaning of *An Act respecting First Nations, Inuit and Métis children, youth and families*, and therefore, the national standards set out in that Act apply. This includes principles of substantive equality, preventive care, the need to preserve an Indigenous child's culture and to actively involve a child's Indigenous community(ies) in their care.

**Amendments have been made to this Form to reflect orders an Indigenous community may want to apply for. Under Rule 8(19), if people use a form they made themselves, it must be "substantially the same" as the court forms, and any differences must be in bold print.**

Date and time will be provided by the Registry when the Application is filed

**APPLYING FOR:**  
This lists the order that the court will be asked to make, and the section of the Act or Rule that allows it.

**ORDER TO TRANSFER REGISTRY**

**Details of the order requested and the section of the Act or Rule relied upon are included below.**

I will apply to this court on [date]\_\_\_\_\_ at [time]\_\_\_\_\_  am  pm  
at [court location]\_\_\_\_\_

**FOR:**

- An order to have a file transferred to the \_\_\_\_\_ court registry [(Rule 8(12) or if by consent (Rule 8(13))]**

The \_\_\_\_\_ Indigenous community/Indigenous Governing Body makes this application for an order that this file be transferred to the \_\_\_\_\_ Registry. Transferring this file upholds national standards of the child's best interests, cultural continuity and substantive equality because:

- this would allow the child(ren)'s Indigenous community to fully participate in planning for their care (sections 3(b) and (c));
- the child(ren) is/are normally resident closest to the \_\_\_\_\_ Registry;
- members of the child(ren)'s Indigenous community cannot fully participate if the matter proceeds where it currently is due to prohibitive costs and distance and time necessary to travel to that registry; or
- Other reasons:** \_\_\_\_\_

- Under Rule 7(2) we request that the director's lawyer prepare the order if granted.**

\_\_\_\_\_

Signature of Applicant or Agent

Dated \_\_\_\_\_

**Address for service if different from Applicant's:**

Address \_\_\_\_\_ City \_\_\_\_\_ B.C.

Postal Code \_\_\_\_\_ Phone \_\_\_\_\_ Fax \_\_\_\_\_

# APPLICATION FOR AN ORDER

## Form 2 APPLYING FOR AN ORDER TO APPEAR BY TELECONFERENCE

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

Court File Number:
Court Location:

<b>In the matter of the child(ren):</b>	
Name(s)	Date(s) of Birth (mm/dd/yy)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

<b>The parent(s) of the child(ren) is/are:</b>
Name(s)
_____
_____

<b>This application is filed by:</b>
Indian Band/Indigenous Organization/Designated Representative/Indigenous Governing Body
_____
Address _____ City _____ B.C.
Postal Code _____ Phone _____ Fax _____

<b>Notice to:</b>	
Name(s) [Parents, Director, any other parties]	Address(es) (include tel. & fax if applicable)
_____	_____
_____	_____
_____	_____
_____	_____

The child is Indigenous per the meaning of *An Act respecting First Nations, Inuit and Métis children, youth and families*, and therefore, the national standards set out in that Act apply. This includes principles of substantive equality, preventive care, the need to preserve an Indigenous child's culture and to actively involve a child's Indigenous community(ies) in their care.

**Amendments have been made to this Form to reflect orders an Indigenous community may want to apply for. Under Rule 8(19), if people use a form they made themselves, it must be "substantially the same" as the court forms, and any differences must be in bold print.**

Date and time will be provided by the Registry when the Application is filed

**APPLYING FOR:**  
This lists the order that the court will be asked to make, and the section of the Act or Rule that allows it.

**ORDER TO APPEAR BY TELECONFERENCE**

**Details of the order requested and the section of the Act or Rule relied upon are included below.**

I will apply to this court on [date]\_\_\_\_\_ at [time]\_\_\_\_\_  am  pm  
at [court location]\_\_\_\_\_

**FOR:**

**An order to allow the**  
 \_\_\_\_\_ **Indigenous community/Indigenous Governing Body,**  
**Contact person/telephone number to make arrangements:**  
\_\_\_\_\_

**to appear by teleconference (Rule 1(7)) at all future hearings regarding this matter. This is in the child(ren)'s best interests because:**

**otherwise the** \_\_\_\_\_ **Indigenous community/Indigenous Governing Body cannot fully participate in planning for the care and safety of the child(ren) due to the distance and cost of travel to attend hearings; or**

**other reasons:** \_\_\_\_\_

**Under Rule 7(2) we request that the director's lawyer prepare the order if granted.**

\_\_\_\_\_

Signature of Applicant or Agent

Dated \_\_\_\_\_

**Address for service if different from Applicant's:**

Address \_\_\_\_\_ City \_\_\_\_\_ B.C.

Postal Code \_\_\_\_\_ Phone \_\_\_\_\_ Fax \_\_\_\_\_

# AFFIDAVIT

## Form 7

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

Court File Number:

Court Location:

### In the matter of the child(ren):

Name(s)

Date(s) of Birth (mm/dd/yy)

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

### The parent(s) of the child(ren) is/are:

Name(s)

_____
_____
_____

I, [name] \_\_\_\_\_  
Of [Address] \_\_\_\_\_ [City] \_\_\_\_\_  
[Province] \_\_\_\_\_

swear that:

1. I know or firmly believe the following facts to be true. Where these facts are based on information from others, I have stated the source of that information and I firmly believe that information to be true.
2. I make this affidavit in relation to an application by  me or by  \_\_\_\_\_ Indigenous community/First Nation. I am the  Chief  Elected Councillor  Social Development Worker  or [list position: Elder/member/etc.] \_\_\_\_\_ of the \_\_\_\_\_ Indigenous community/Indigenous Governing Body.
3. The \_\_\_\_\_ Indigenous community/Indigenous Governing Body recognizes the child, \_\_\_\_\_ as a member of the \_\_\_\_\_ Indigenous community/Indigenous Governing Body. Their  mother  father  grandparent(s) \_\_\_\_\_ is/are a member of the \_\_\_\_\_ Indigenous community/Indigenous Governing Body.

### COPIES NEEDED:

- 1 – COURT FILE 2 – APPLICANT 3 – RESPONDENT 4 – EXTRA COPY FOR SERVICE  
5 – PROOF OF SERVICE 6 – LAWYER'S OR FAMILY COPY

**[Here Indigenous communities could provide any additional information that they believe would help the Court to make an informed decision about the child(ren) and family, including information about culturally important considerations regarding who should care for a child and information about how a child could remain connected to their Indigenous culture.]**

Include relevant information to support any orders you are seeking.

Lined area for providing information, overlaid with a large 'DRAFT' watermark.

**COPIES NEEDED:  
1 – COURT FILE 2 – APPLICANT 3 – RESPONDENT 4 – EXTRA COPY FOR SERVICE  
5 – PROOF OF SERVICE 6 – LAWYER’S OR FAMILY COPY**



**[If any supporting documents are attached fill out the following:]**

The following documents are attached and marked as Exhibits to this affidavit.

- Exhibit "\_\_\_\_": \_\_\_\_\_
- Exhibit "\_\_\_\_": \_\_\_\_\_
- Exhibit "\_\_\_\_": \_\_\_\_\_
- Exhibit "\_\_\_\_": \_\_\_\_\_

Rule 5(3) If any part of this affidavit is defective or does not comply with the proper form, I seek permission of the Judge to use this affidavit.

SWORN BEFORE ME at \_\_\_\_\_ )  
[location] \_\_\_\_\_ )  
in the Province of British Columbia, )  
on [month/day/year] \_\_\_\_\_ )  
\_\_\_\_\_) )  
A Commissioner for taking Affidavits )  
for British Columbia )  
Name of Commissioner: \_\_\_\_\_ ) [signature]

**This affidavit is filed by:**

Name \_\_\_\_\_  
Address \_\_\_\_\_ City \_\_\_\_\_ Prov \_\_\_\_\_  
Postal Code \_\_\_\_\_ Phone \_\_\_\_\_ Fax \_\_\_\_\_

**COPIES NEEDED:**  
**1 – COURT FILE 2 – APPLICANT 3 – RESPONDENT 4 – EXTRA COPY FOR SERVICE**  
**5 – PROOF OF SERVICE 6 – LAWYER’S OR FAMILY COPY**

# CERTIFICATE OF SERVICE

## Form 9

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

Court File Number:

Court Location:

### In the matter of the child(ren):

Name(s)

Date(s) of Birth (mm/dd/yy)

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

### The parent(s) of the child(ren) is/are:

Name(s)

_____
_____
_____

I certify that I, [name] \_\_\_\_\_

of [Address] \_\_\_\_\_

[City] \_\_\_\_\_ [Province] \_\_\_\_\_

served [Name of person served] \_\_\_\_\_

on [Date] \_\_\_\_\_

at [Address] \_\_\_\_\_

with a copy of: (List each document served)

_____
_____
_____
_____

- by leaving the copy with him or her personally;
- by mailing the copy to him or her by registered mail. Attached and marked as an exhibit to this certificate is:

- the original acknowledgement of receipt card, marked Exhibit “\_\_\_\_\_”; or
- the unopened envelope returned by Canada Post, marked Exhibit “\_\_\_\_\_”.

by sending the copy by facsimile transmission. Attached and marked as Exhibit “\_\_\_\_\_” to this certificate is a transmission report generated by the sending machine, confirming transmission to

[Number]\_\_\_\_\_ which is the facsimile number of

[Name]\_\_\_\_\_

Signature

Dated \_\_\_\_\_

# INDIGENOUS CHILD INDIGENOUS COMMUNITY PLAN OF CARE

Court File Number:
Court Location:

In the Provincial Court of British Columbia  
Under the *Child, Family and Community Service Act*

**We rely on the following:**

- Section 68(2)(b) a Court may admit as evidence “(b) any oral or written statement or report the court considers relevant”.
- Rule 4(1)(c) which says that a Court can rely on evidence given under s. 68(2)(b).

It is in the best interests of Indigenous children that their Indigenous community be fully and actively involved in planning for their care, and that their Indigenous identity, culture and relationships within their cultural community and extended family be maintained.

The \_\_\_\_\_ Indigenous community/Indigenous Governing Body files this document (Indigenous Child Indigenous Community Plan of Care) and requests the Court take into consideration in making Orders concerning our Child members.

A Plan of Care for a child in interim, temporary or continuing custody of the director should plan for the preservation of an Indigenous child’s identity and cultural heritage, in accordance with the national standard of cultural continuity in *An Act respecting First Nations, Inuit and Métis children, youth and families*.

**In the matter of the child(ren):**

Name(s)	Date(s) of Birth (mm/dd/yy)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**The parent(s) of the child(ren) is/are:**

Name(s)
_____
_____
_____

**This Plan of Care is filed by:**

Indigenous Organization/First Nation/Designated Representative		
_____		
Address _____	City _____	B.C.
Postal Code _____	Phone _____	Fax _____

Check all that apply:

- CFCSA Regulation (ss. 7 and 8) requires that a child's plan of care include whether the child's Indigenous community was involved in the development of the plan, and their views on it, and a description of how the director proposes to meet the child's need for continuity of their cultural heritage, religion, language, social and recreational activities, and steps to preserve an Indigenous child's cultural heritage and identity.
- Section 70 of the CFCSA says that children in care have the right to receive guidance and encouragement to maintain their cultural heritage.
- Section 71 of the CFCSA lists priorities to place Indigenous children within their cultural community or extended family.
- Section 14(1) of *An Act respecting First Nations, Inuit and Métis children, youth and families* requires that “to the extent that providing a service that promotes preventive care to support the child’s family is consistent with the best interests of the child, the provision of that service is to be given priority over other services.”
- Section 15(1) of *An Act respecting First Nations, Inuit and Métis children, youth and families* requires that service providers show that they made reasonable efforts to ensure that an Indigenous child remains with their parent or family member, as defined by their Indigenous community, before a decision to apprehending the child is made.
- Section 15 of *An Act respecting First Nations, Inuit and Métis children, youth and families* requires that a child must not be removed based on their socio-economic conditions.
- An Indigenous community’s laws must be considered in the care of their child members, including in the placement of children, defining the best interests of a child, determining who is a family member of the child, and in setting placement priorities.
- Section 16 of *An Act respecting First Nations, Inuit and Métis children, youth and families* lists priorities to place Indigenous children within their families, their own Indigenous group, community or people, or another Indigenous group, community or people.

We file this Proposed Plan of Care to:

- Maintain the child(ren)’s Indigenous identity and heritage (sections 2(f), 4(1)©, 4(2))
- Maintain the child(ren)’s connection to their Indigenous community and extended family (section 2©)
- Involve the child(ren)’s Indigenous community in planning for their care (sections 3(b) and (c))
- Ensure cultural continuity and the best interests of the Indigenous child are being met (sections 9(2), 10(2)) of *An Act respecting First Nations, Inuit and Métis children, youth and families*)

The child(ren)’s Indigenous community

- has not been provided with the Director’s proposed plan of care, or
- has reviewed the Director’s proposed Plan of Care and [check one of the following]
  - Supports the proposed plan
  - Does Not Support the proposed plan
  - Supports the proposed plan with the following changes:

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The \_\_\_\_\_ Indigenous community/Indigenous Governing Body has identified the following steps that should be taken, or resources relied on, to preserve the child's Indigenous culture and identity:

An Indigenous Cultural Preservation Plan for this/these child(ren) could include:

- (a) Cultural factors that need to be included in a child's plan of care (identify specific steps or opportunities for a child to participate in cultural activities that maintain or establish their connection to their land and culture, such as language classes, gathering activities, spiritual or cultural celebrations, community dinners or sporting events, or other activities):

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- (b) Cultural or community supports or programs within the \_\_\_\_\_ Indigenous community to assist the family in addressing protection concerns, and/or maintain the child's connection with their Indigenous community and cultural heritage:

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- (c) Less disruptive means than removal to keep families together (including culturally-based and appropriate resources within the community) that should be explored, or potential alternate caregivers within the child's cultural community or extended family, family or community members that could take care of the child on a temporary basis while the child protection matter is addressed to keep the child within their extended family or cultural community; or, on a permanent basis, if necessary, which would keep the child within their extended family, community, or nation where the parent(s) are unable to address the child protection concern:

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**(d) Family or community members that play an important role in the child’s life (such as elders or extended family members), together with a proposal for how to maintain those relationships:**

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**(e) Network of people or supports to assist the family in addressing protection concerns, or where it is not possible to restore a family’s ability to parent, to assist in keeping a child safe and ensure that they can grow to adulthood within their culture:**

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**(f) Preventive steps that can be taken to keep a child safely within their family or Indigenous community:**

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**(g) Elders, cultural or spiritual supports from within the nation who can work with the child or family within a traditional wellness or healing model:**

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**(h) Alternative or traditional decision-making processes—including those based in Indigenous traditions—that the Indigenous community may wish to refer the matter to, as allowed under s. 22 of the CFCSA:**

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(i) **Considerations from the laws of the child’s Indigenous community, group or people recognized and affirmed by *An Act respecting First Nations, Inuit and Métis children, youth and families*: (For example: If Indigenous laws or traditions suggest placement should be with particular people; people who should be involved in making decisions about a child’s care; specific actions that may be required to keep a child connected to their Indigenous culture.)**

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(j) **Substantive equality concerns: Specific factors (race, gender, sexual orientation, disability of child or parent, steps to fully involve the Indigenous community) that should be addressed to ensure substantive equality in caring for the Indigenous child:**

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(k) **Socio-economic conditions: If socio-economic conditions are a factor, list them and suggestions for how they can be addressed to prevent removal solely on socio-economic grounds:**





# APPENDIX:

## Tips for Going to Court

Appearing in court can be scary. The Provincial Court (where BC CFCSA matters are heard) is known as the “Peoples’ Court” and has relaxed rules so that people (or Indigenous communities) can talk for themselves if they do not have a lawyer.

### What if Your Indigenous Community Cannot Attend Court?

If your Indigenous community wants to be involved, but court is too far away (or you cannot afford the travel), your Indigenous community still has a legal right to be involved (and your children have the right to have you involved in helping to care for them).

You could:

1. Tell the social worker (and a lawyer for a parent or the director) that you want to participate by video- or tele-conference. Do this as soon as possible, as plans need to be made to have a tele-conference or video-conference.
2. Write out your preferred plan for the child, or other concerns, and send it to the Registry to be brought to the court’s attention (send a copy also to the social worker, lawyer for parents and the director, and ask that they bring it to the judge’s attention).
3. Ask that a traditional dispute resolution process or mediation that reflects your Indigenous community’s traditions and involves your community be used to plan for the child.
4. Ask the social worker/lawyers for the parent/director’s counsel to adjourn a court hearing if you need more time to prepare a preferred plan for the child or prepare for a traditional dispute resolution process.

*If your Indigenous community wants to be involved, but court is too far away (or you cannot afford the travel), your Indigenous community still has a legal right to be involved (and your children have the right to have you involved in helping to care for them).*



*Identifying barriers to Indigenous community involvement in child welfare proceedings (e.g., resources, personnel or travel) could help Indigenous communities be involved in planning for their child members.*

## BEST PRACTICES



*Identifying barriers to Indigenous community involvement in child welfare proceedings (e.g., resources, personnel or travel) could help Indigenous communities be involved in planning for their child members.*

*Tools available within the BC CFCSA, Rules and BC CFCSA Regulation to address barriers that prevent Indigenous communities from becoming involved in child welfare include:*

- *Members of the Indigenous community or extended family could participate in court proceedings by video- or tele-conference when they are unable to participate in person (Rule 1(7)).*
- *Matters could be transferred to a Registry closer to the child's home community, which would allow the Indigenous community, or family members, to take a more active role in planning and participating in the care of the child.*
  - *Under Rule 8(12), a judge may order the transfer of the file to another Registry after considering the balance of convenience, any special circumstances that exist and the best interests of the child. The balance of convenience test requires the judge to consider each party's circumstances. This could include what issues or barriers the Indigenous community faces that would prevent their active involvement, and why transferring the file is in the child's best interests.*
  - *Alternatively, under Rule 8(13), the parties can consent to the transfer of the file and file a written consent in the Registry where the file is located.*
- *Matters could be addressed through a traditional dispute resolution process suggested by the Indigenous community (under s. 22), which is more culturally appropriate and relevant for the child and family.*
- *A judge may permit an application to be made orally in court, without the filing of a form. The court proceedings may be informal in nature (s. 66(1)(b) and s. 66(2)). The best interests of the child are most important. Where an Indigenous community makes an application, they should be prepared to explain how it is in the child's best interests that they be involved as a party in the proceeding.*



Indigenous communities may not have the financial resources to hire a lawyer, and this poses challenges to the community, the court and counsel in child protection proceedings. Indigenous communities may send a chief or council member or a Nation or community social worker to court hearings.

A Nation may send an employee, chief or council member to a child protection hearing under the belief that merely having someone in the courtroom is sufficient to secure standing and participation in the proceedings and at subsequent stages, not making a distinction between having a representative merely attending in court versus making an official “Appearance.”

It is not always clear to Indigenous communities and lay persons that “Appearance” in a legal sense does not simply mean being in the courtroom when a child protection matter is called but, instead, means actively taking part in the proceedings in person, or through a lawyer or agent. Thus, there are times when an Indigenous community sends a representative to court, but their presence is not officially noted on the record.

To make an official legal “Appearance” does not simply mean being in the courtroom. A representative of the Indigenous community must tell the judge that they want to be on the record as appearing on behalf of the Indigenous community.

*It is not always clear to Indigenous communities and lay persons that “Appearance” in a legal sense does not simply mean being in the courtroom when a child protection matter is called but, instead, means actively taking part in the proceedings in person, or through a lawyer or agent.*

*The Director v. CS and JK<sup>213</sup> illustrates how an Indigenous community’s lack of knowledge about court procedure can undermine a Nation’s role in child protection proceedings. A representative of the Indigenous community was in court but did not officially appear. The Court noted that a “representative of the ... Band was present during the hearing, but did not take an active role in the proceeding.”<sup>214</sup>*

*If an Indigenous community has sent someone to court, it is likely at considerable expense and cost; they are there because the Indigenous community cares and wants to contribute in planning for their child members.*

Indigenous communities who send representatives to court in response to notice provided under the BC CFCSA should be treated as

<sup>213</sup> 2007 BCPC 19 [CS and JK].

<sup>214</sup> CS and JK, *supra*, at 4.

self-represented litigants who need the court's assistance to ensure the Indigenous community's participation and the child's rights are fully realized.

*The court and legal counsel should make specific inquiries at the start of the hearing to determine if a representative of an Indigenous community is present.*

## BEST PRACTICES



*The court and legal counsel should make specific inquiries at the start of the hearing to determine if a representative of an Indigenous community is present.*

*If an Indigenous community representative is present and appears without a lawyer, they should be treated as a self-represented litigant.*

*Where Indigenous communities appear without legal counsel, they should speak to the court clerk, identify themselves [name/position] and the fact that they are representing the child's Indigenous community and state clearly that they are self-represented.*

Be prepared to say how what you are asking for is in the child's best interests. This could include to:

- Help the child(ren) keep connected to their Indigenous cultural heritage and identity;
- Identify the child's Indigenous community's traditions and law for their care;
- Protect the child's relationships with their family, elders or other members of their Indigenous community; or
- Allow the child(ren) to maintain their spiritual and religious identity as a member of the Indigenous community or Nation.

"My name is \_\_\_\_\_  
(spell your last name) and I am here  
representing the [Indigenous community]. The  
child(ren) is/are members of our community and  
we are appearing as a party in this matter."





IF YOU WANT	SAY THIS
<p>Access to a child (BC CFCSA ss. 55 &amp; 56)</p>	<p>We are asking for access visits to the child(ren):</p> <ol style="list-style-type: none"> <li>1. Who the visits are with;</li> <li>2. When the visits will occur (for example, “every second weekend at Auntie Y’s house,” or “each Thursday at the parent’s home from 4:30-8:00”);</li> <li>3. How the children and others involved in the visits will travel to and from the visits;</li> <li>4. If the visits are to be supervised, how that will happen (for example, “the community social worker will supervise visits,” or “visits will occur at the home of Uncle Y who will supervise the visits”);</li> <li>5. How any costs associated with the visits will be covered, including who will pay for travel, meals and supervision (i.e., director, Indigenous community, family);</li> <li>6. How access visits are in the child’s best interests because they: <ul style="list-style-type: none"> <li><input type="checkbox"/> Help the child(ren) to maintain their connection to their Indigenous cultural heritage and identity</li> <li><input type="checkbox"/> Maintain the child’s relationships with extended family members, elders or other members of their Indigenous community</li> <li><input type="checkbox"/> Allow the child(ren) to maintain their spiritual and religious identity</li> <li><input type="checkbox"/> Other reasons you think that the access visits are important for the child (list): _____ _____ _____</li> </ul> </li> </ol>



<p>Disclosure (BC CFCSA ss. 64 &amp; 79)</p>	<p>We are asking for an order for disclosure (ss. 64 and 79):</p> <p>“To fully and effectively participate in the planning for the care of the child(ren) and to help to ensure their safety and well-being the _____ Indigenous Community/First Nation requires disclosure of all relevant facts about the protection concerns to take an informed position in these court proceedings, and to act to ensure the safety of the children.” [Can also send as a letter to the lawyer for the director.]</p>
<p>To add the Indigenous community as a party to a proceeding (BC CFCSA s. 39(4))</p>	<p>If an Indigenous community is not automatically added as a party after they appear in court, they can ask the judge to add the Indigenous community as a party and say this is in the best interests of their child members because it keeps the community involved and helps to protect the child’s Indigenous cultural identity.</p>
<p>If there is a question about whether the child is “Indigenous” within the scope of the definition provided in s. 1 of the Federal Act</p>	<ol style="list-style-type: none"><li>1. I am the Chief; Elected Councilor; Social Development Worker; or (Elder/member/etc.) _____ of the _____ Indigenous Community/First Nation.</li><li>2. Say how the child is related to your community, and that your community recognizes this child as a member of your community.</li><li>3. The _____ First Nation/Indigenous Community makes this application for an order that:  “The _____ First Nation be added as a party to this proceeding under section 39(4) of the <i>Child, Family and Community Service Act</i>.”</li></ol>



<p>To allow parties to appear by, or for BC CFCSA proceedings to be conducted by, telephone (Rule 1(7))</p>	<ol style="list-style-type: none"> <li>1. We are asking to allow the _____ Indigenous Community/First Nation to appear by teleconference (Rule 1(7)) at all future hearings regarding this matter.</li> <li>2. This is in the child(ren)'s best interests because otherwise the _____ Indigenous Community/First Nation cannot fully participate in planning for the care and safety of the child(ren) due to the distance and cost of travel to attend hearings.</li> </ol>
<p>The court to consider your own Indigenous plan of care for a child in temporary or permanent custody (BC CFCSA s. 35(1))</p>	<ol style="list-style-type: none"> <li>1. We are asking the Court to consider the Plan of Care we are submitting because: <ul style="list-style-type: none"> <li>• It is in the best interests of Indigenous children that their Indigenous community be fully and actively involved in planning for their care, and that their Indigenous identity, culture and relationships within their cultural community and extended family be maintained.</li> <li>• It is the director's legislated responsibility to ensure that the child's Indigenous identity, culture and relationships within their cultural community and extended family be maintained.</li> </ul> </li> <li>2. The _____ Indigenous Community/First Nation has identified the steps that should be taken, or resources relied on, to preserve the child's Indigenous culture and identity and set these out in the Plan of Care.</li> </ol>

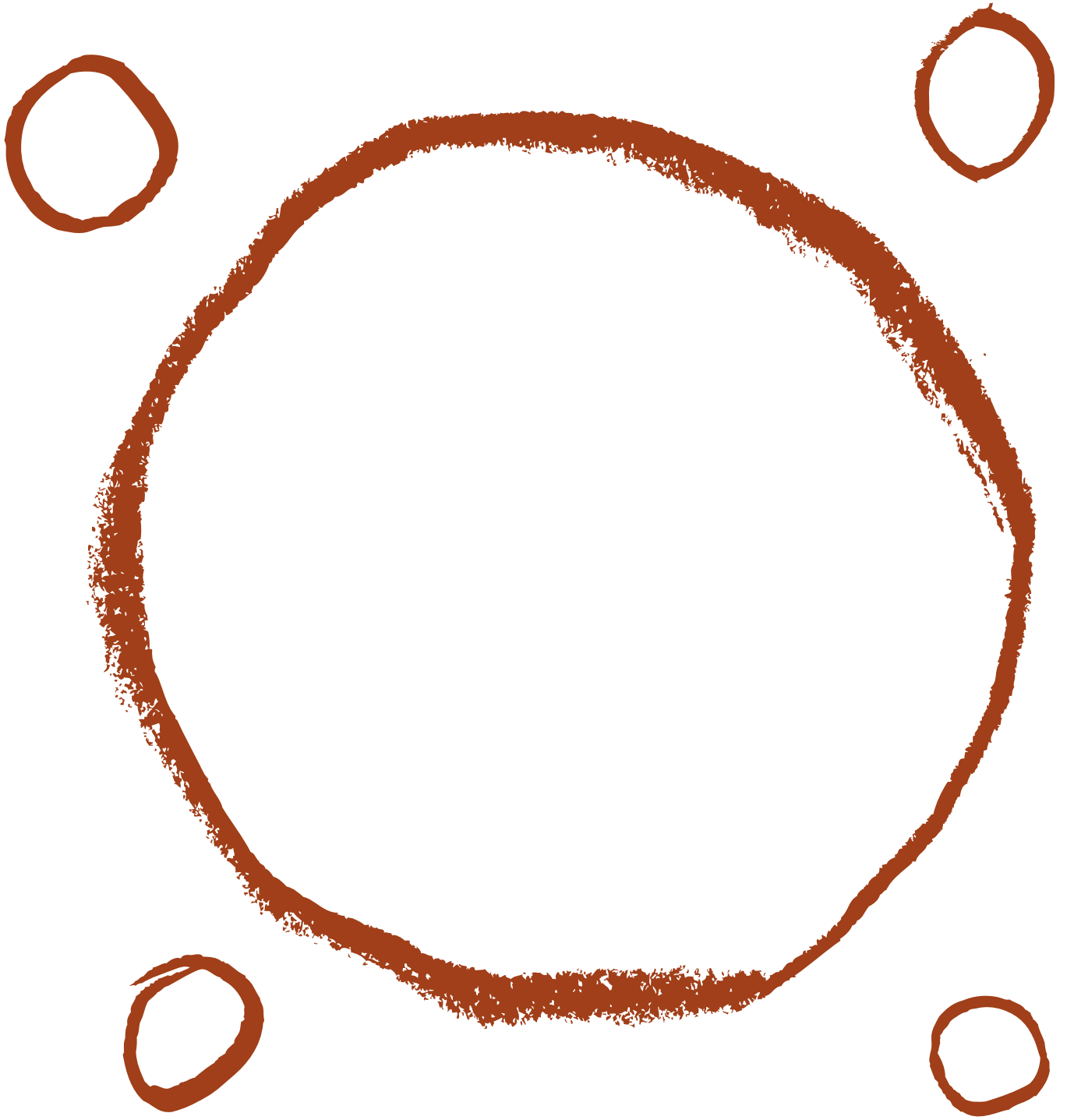
## SHCHEMA-MEE.TKT (“OUR CHILDREN”) PROJECT – OUR LIFE IS A CIRCLE

Our logo was designed by Nlaka’pamux elders, youth and community members and shows our collective responsibility to gather around and protect children. A pictograph of the same design, located in the Stein Valley, was described by Nlaka’pamux elder Annie York as representing our cosmos:

*“The circle ... tells the earth and the four directions. The little circle at the top, right is the North. Opposite is South. Lower right is West, upper left is East. East is the sunrise, West is the sunset, North is midday, and South is the middle of the night. You must pray at those four times and to the directions. The big circle is the earth that travels all the time without end. The living earth never has an end. Nothing that travels and has the circle has an end... The circle tells them, “Look, you’re living on this earth, but the whole earth is round and it has no end.” The directions were given to them to tell them where they divide the people out. It tells them there’s other peoples, not just you on this earth.”*

York, A. et al, “They Write their Dreams on the Rock Forever” (Vancouver: Talon Books, 1993) at 124-125 and fig. 86.





SECOND EDITION

# WRAPPING OUR WAYS AROUND THEM

INDIGENOUS COMMUNITIES AND CHILD WELFARE GUIDEBOOK



*Photos courtesy of (left to right): Blend Images, Royal BC Museum, Nadya Kwandibens - Redworks Studios, Nadya Kwandibens - Redworks Studios.*

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