CHILD PROTECTION MATTERS IN THE ERA OF RECONCILIATION

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Webinar Overview

1 - Charter issues with permanent orders under the *Child and Family Services Act*

2 - Best Interests of the Indigenous Child

3 – *An Act respecting First Nations, Inuit and Metis children, youth and families*

Permanent Orders

- Once a child is found to be ‘in need of protection’ pursuant to section 11 of the *Child and Family Services Act*, the court must determine what order is in the best interests of the child under section 37.

- Section 37 specifies a ‘hierarchy’ of Orders: If short term orders are no longer appropriate and there is no PSI available, the legislation **requires** the Court to make a permanent order and then **prohibits** the court from placing any conditions on that order (ie: for access)

Orders re child in need of protection

37(1) Subject to subsection (2), if the court determines that a child is in need of protection, the court shall make an order that the child:

Short term Orders

(a) remain with, be returned to or be placed in the custody of his or her parent;
(b) be placed in the custody of a person having a sufficient interest in the child; or
(c) remain in or be placed in the custody of the minister for a temporary period not exceeding six months.

37(2) If, in the opinion of the court, none of the orders described in subsection (1) is appropriate, **the court shall make an order permanently committing the child to the minister.**

Permanent Order

(3) Notwithstanding subsections (1) and (2), the court may, if it is of the view that:

Long term Order

(a) a child is in need of protection; and
(b) by reason of the age of the child or other circumstances, it is unlikely that an adoption plan would be made if the child were permanently committed to the minister; order that the child be placed in the custody of the minister until the child attains the age of 18 years.

(4) In making an order pursuant to subsection (1), (2) or (3), the court:

(a) shall consider the best interests of the child; (b) may consider the recommendations of the officer mentioned in subsection 36(2); and (c) may consider the recommendations of a chief, a chief's designate or an agency that appears in court pursuant to subsection (11).

(5) In making an order pursuant to subsection (1) or (3), the court may: (a) impose any terms and conditions that the court considers appropriate; and (b) include in the order a provision respecting access to the child.

The result in practice of the application of s.37(2) & 37(5) of the CFSA

- Unless a parent is able to have a child returned or a PSI is available, an ‘adoptable’ child shall be made a permanent ward and in all likelihood lose contact with any/all family and their home community & culture.

- Permanent wardship orders are arguably this generation’s version of a 60’s scoop or residential school system as they often sever all ties between a child and their family of origin and their culture (and will lead to an adoption order where the legislation similarly prohibits conditions)

- The only way to contest permanent orders under the current legislation is to argue that the child is “not adoptable” by reason of age or other circumstance. (*CFSA* s.37(3))

- Not to say that there will never be a case where a permanent order with no conditions is best for a child – the problem is the legislation purports to be about ‘best interests’…. but then prohibits any consideration that permanent committal and ongoing access or other conditions may be in a child’s best interests. (in other words – why can’t a kid have a ‘forever home’ AND still have visits with a health member of their birth family?)

- If child welfare is really about best interests – then the discretion for access ought to lie with the Court and not predetermined by the legislation.

Pursuant to Sections 7, 15, and 24(1) of *The Canadian Charter of Rights and Freedoms* for an Order declaring:

Sections 37(2), 37(3) and 37(5) of *The Child and Family Services Act ("CFSA")* unconstitutional and therefore of no force and effect in their current form (in so far as they preclude a judge from granting conditions on a permanent committal order), as they violate the equality, liberty and security interests of children, and indigenous children in particular, in child protection proceedings;

~ Excerpt from a Constitutional Questions Act notice I filed last year (not adjudicated on as the file resolved with an IPSI Order)

The *Charter* issue with Permanent Orders

- The Supreme Court of Canada has confirmed that child protection proceedings infringe the section 7 (Life Liberty and Security of the Person) interests of parents and children:
  - *KLW v. Winnipeg Child and Family Services* [2000] 2 S.C.R.

  (dealing with the threshold used for child apprehension)

  - *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [1999] 3 S.C.R.

  (dealing with whether parents in protection proceedings are entitled to counsel)

The test is of course then whether an infringement accords with the principles of fundamental justice

The *Charter* issue with Permanent Orders Cont.

- *J.T. v. Newfoundland and Labrador (Child, Youth and Family Services),* 2015 NLCA 55
  - NFL's legislation very similarly prohibited conditions including access on their "continuous custody orders".
  - The trial judge found that the best interests of the children *required* ongoing contact with their mother despite her inability to parent, but the legislation *prohibited* the trial judge from ordering access
  - 2 of 3 Judges on the NLCA concurred that the prohibition of access or other conditions was a violation of the section 7 rights of children and families
  - The sections of the NFL legislation prohibiting conditions on permanent orders was declared to be of no force and effect.

[4] "The evidence in this case vividly revealed longstanding problems in dealing with children and families in trouble caused not by the circumstances of their lives, but by inflexible provisions in the Children's Act. The criticism that permeates this judgment derives from the contribution these inflexible provisions make to the long parade of broken families producing broken children, who grow up to destroy their lives, the lives of their children, and the lives of the victims of their crimes. The criticism targets the legislation and the practices the legislation generates, not the professionals who work in the system....."

~ His Honour Chief Judge Stuart

In the matter of R.A. 2002yktc28

Best Interests of the Indigenous Child

Child and Family Services Act

Section 4 If a person or court is required by any provision of this Act other than subsection 49(2) to determine the best interests of a child, the person or court must take into account:

(a) the quality of the relationship that the child has with any person who may have a close connection with the child;

(b) the mental, emotional, physical and educational needs of the child and the appropriate care or treatment, or both, to meet those needs;

(c) the child's **cultural and spiritual heritage and upbringing**;

(d) the home environment proposed to be provided for the child;

(e) the plans, with respect to the care of the child, of the person to whom it is proposed that the custody of the child be entrusted;

(f) if practicable, the child's wishes, having regard to the age and level of the child's development;

(g) the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity; and

(h) the effect on the child of a delay in making a decision.

Typically by the time there is litigation over whether a permanent commital order is appropriate, the child has been in care for in excess of two years – if the foster parents are the proposed adoptive parents sections (a) and (g) typically trump section (c).

Best Interests of Indigenous Child (*An act respecting First Nations, Inuit and Metis children and families*)

10 (1) The best interests of the child must be a primary consideration in the making of decisions or the taking of actions in the context of the provision of child and family services in relation to an Indigenous child and, in the case of decisions or actions related to child apprehension, the best interests of the child must be the paramount consideration.

Primary consideration

(2) When the factors referred to in subsection (3) are being considered, primary consideration must be given to the child's physical, emotional and psychological safety, security and well-being, as well as to the importance, for that child, of having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs and of preserving the child's connections to his or her culture.

Factors to be considered

(3) To determine the best interests of an Indigenous child, all factors related to the circumstances of the child must be considered, including

(a) the child's cultural, linguistic, religious and spiritual upbringing and heritage;

(b) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(c) the nature and strength of the child's relationship with his or her parent, the care provider and any member of his or her family who plays an important role in his or her life;

(d) the importance to the child of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs;

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

(f) any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs;

(g) any family violence and its impact on the child, including whether the child is directly or indirectly exposed to the family violence as well as the physical, emotional and psychological harm or risk of harm to the child; and

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

Consistency

(4) Subsections (1) to (3) are to be construed in relation to an Indigenous child, to the extent that it is possible to do so, in a manner that is consistent with a provision of a law of the Indigenous group, community or people to which the child belongs.

An act respecting First Nations, Inuit and Metis children and families S.C. 2019, c.24

- Affirms the rights of First Nations peoples to exercise jurisdiction over child and family services;
- Establishes national principles such as the best interests of the child, cultural continuity and substantive equality;
- Contributes to the implementation of the UN Declaration on the Rights of Indigenous Peoples
- Responds to the first five Calls to Action issued by the TRC dealing with child welfare systems
- Responds to many Calls for Justice made in the MMIWG Final Report

Placement of Indigenous Child

Priority
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:

(a) with one of the child's parents;

(b) with another adult member of the child's family;

(c) with an adult who belongs to the same Indigenous group, community or people as the child;

(d) with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or

(e) with any other adult.

Placement with or near other children
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.

Customs and traditions
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.

Family unity
16(3) In the context of providing child and family services in relation to an Indigenous child, there must be a reassessment, conducted on a ongoing basis, of whether it would be appropriate to place the child with

(a) a person referred to in paragraph (1)(a), if the child does not reside with such a person; or

(b) a person referred to in paragraph (1)(b), if the child does not reside with such a person and unless the child resides with a person referred to in paragraph (1)(a).

Attachment and emotional ties
17 In the context of providing child and family services in relation to an Indigenous child, if the child is not placed with a member of his or her family in accordance with paragraph 16(1)(a) or (b), to the extent that doing so is consistent with the best interests of the child, the child's attachment and emotional ties to each such member of his or her family are to be promoted.

Shortfalls of the new legislation…

- No positive obligation for Canada or provinces to fund child welfare in accordance with the Canadian Human Rights Tribunal funding principles
- Does not address the drivers of over-representation of indigenous children in care
- There is no structure provided for support or accountability (courts, advocates, etc.)
- Some lack of clarity on ‘indigenous governing groups’ or the application of placement principles

Provincial Legislation

- No guidance on placement – entirely MSS discretion
- Best Interests does not emphasize culture (s.4)
- Access conditions are prohibited on permanent orders (s.37(5))
- Requires adoptable kids to be made permanent wards (s.37(2))

Federal Legislation

- Requires indigenous children to be placed in an order of priority
- Best interests test is indigenous specific and emphasizes cultural continuity as being essential to the well-being of a child (s.2(a))
- Child's attachment to each member of his family is to be promoted (s.17)
- Prohibits the assimilation of an indigenous group (s.2(d))

Concluding Comments

- The *CFSA* is sadly out of date and out of line with all other reforms towards reconciliation and Calls to Action. Permanent Orders are the most obvious, but not the only issue.
- The federal legislation came into effect January 1st, 2020 – it is incumbent on all lawyers practicing in this area to familiarize themselves with it and rely on it in their practices.
- Absent a renewed interest from the Government of Saskatchewan to substantively revise the *CFSA,* change is dependent on the work of lawyers on behalf of parents and children to continue challenging its constitutionality.

Further reading / more information:

Indigenous Services Canada: https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851

First Nations Caring Society: https://fncaringsociety.com/ikp?keywords=c-92

Assembly of First Nations: https://www.afn.ca/policy-sectors/social-secretariat/first-nations-child-and-family-services/

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