

Supporting Children and
Indigenous Families in
the BC Family Law
System – Part 2



Supporting children

- Intersection of family law/criminal law
- Parental consent
- Staying out of the conflict



"THE IMPORTANCE OF KINSHIP..."

MONE McLEOD 2023

Supporting Indigenous families in family law

- History of harm
- Decolonization
- Intersection of the Federal Act in Family Law
- Reconciliation
- Trauma-Informed Practice & Cultural Humility

“When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men.”

(Sir John A. MacDonald, Canada House of Commons Debates (9 May 1883) 1107-1108)

- Residential Schools –1880's to 1996 (first school opened in 1831)
- 150,000 Indigenous children attended residential schools
- Estimated 1800 unmarked graves identified (several confirmed)
- Indian Day School – 1880's to 1990's
- 60's Scoop – 1951-1991
- Millennium Scoop 1980's to the present day
- Current overrepresentation of Indigenous children in foster care
54% Canada (2021)
68% BC (2022)

The Colonial Project

The Harm

Severed/fragmented
community and family
connections

Intergenerational trauma

Loneliness and isolation

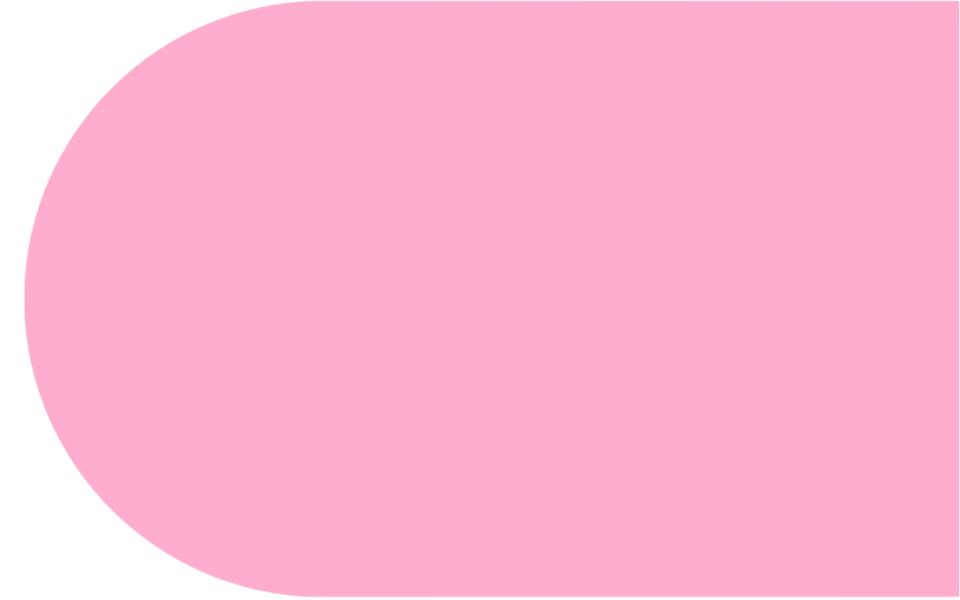
High rates of suicide and
premature death

Loss of language, culture and
spiritual practices

Loss of identity

Disparate outcomes

Missing and murdered Indigenous
women and girls



Anti- Indigenous Racism Persists

Indoctrination

Cultural alienation

Indigenous customs, values and traditions undermined

Over-policing

Systemic bias/stereotyping and racism

Legal system built on colonial precedents

Western views prevail



Decolonization
the remedial way
forward

Legislative Reform

Timeline of key changes

- Bill C-32: Child, Family and Community Service Amendment Act (contained 50 amendments), in force April 1, 2019.
- Declaration on the Rights of Indigenous People's Act [SBC 2019, Ch. 44]
- An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24
- Bill 38 –2022 Indigenous Self-Government in Child and Family Community Services Act, in force Nov 22, 2022

Best Interests of Child Framework

- Derived without consultation with Indigenous peoples
- Based on Eurocentric views of parenting
- Prioritizes attachment theory and undermines cultural continuity (Racine v. Woods)

Reform

- Indigenous engagement and consultation
- DA s. 16(3)(f): the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage
- S. 37 no express cultural protections but not an exhaustive list
- s. 41(e) references Indigenous Identity

Indigenous perspectives in family law

- Indigenous communities are in the best position to inform and alter the trajectory for their families and child members
- compliance with fundamental human rights
- eradicate anti-indigenous racism in the legal system
- substantive equality
- shared accountability for history of harm
- Indigenous views of family are distinct and beautiful

How to bring Indigenous perspectives into the dialogue

- Ask your client about their culture and community
- Inquire about family, kinship ties, and distinct family system
- Attend cultural and community events
- Who are the knowledge keepers/elders (urban/remote)
- Reject proposals of pan-Indigenous exposure to culture
- Bring cultural perspectives into discussions both in and outside of work
- Call upon cultural advisors/experts and knowledge keepers to educate self/others
- Learn about cultural plans and immersion vs. pan-Indigeneity



Cultural continuity
prioritized
in FLA cases

J.W. v British Columbia (Director of Child, Family and Community Service), 2023 BCSC 512

- Non-Indigenous, missionary foster parents caring for 3 Indigenous children long-term
- Video of the foster father giving a lecture describing Indigenous people's spiritual beliefs and practices as having been constructed by governments and social service agencies
- Communities described as “religious marketplace” for churches to compete to instill their beliefs
- This led to the removal of the children from the foster home and placement with extended family in their Indigenous community
- Foster parents made application under the FLA for access to the children, s. 211 report and counsel to be appointed to the eldest child

Inherent Jurisdiction of Indigenous Peoples

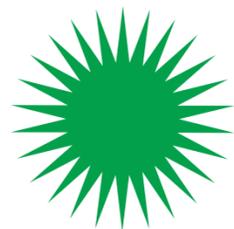


- [59] There are two parts to the Federal Act.
- empowers Indigenous Peoples to articulate their own laws for the care children and establishes how that jurisdiction will be recognized by other governments
- It did not create jurisdiction which is inherent to Indigenous Peoples and recognized in s. 35(1) of the Constitution Act, 1982,
- creates a roadmap for one way that jurisdiction might be actualized.

All Applications Dismissed

[62] ... The Preamble identifies a history of policy and actions—some made with the express purpose of assimilating Indigenous children and breaking down Indigenous cultures (such as Indian Residential Schools) and others arguably made with good intentions, nonetheless blinded by bias and stereotyping (such as the child welfare system)—which have had devastating intergenerational impacts on Indigenous children, families, communities and Nations.

Racine v. Woods, [1983] 2 S.C.R. 173, 1983 CanLII 27



- “... [w]hen the test to meet is best interests of the child, significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond develops with the prospective adoptive parents the less important the racial element becomes (para 82)
- As per Indigenous survivors of the child welfare system in Brown, and the Federal Act, “... Indigenous cultural bonds and connections do not abate in importance over time, but rather are increasingly important as children mature into youth and young adulthood..” (para 85)
- It is necessary to provide child and family services to Indigenous children in ways which preserve and protect their Indigenous cultural attachments (paras 86)

Cultural Alienation Comes at a Tremendous Cost

- [94] Assessing the BIOIC requires a consideration of the Children's physical, emotional, and psychological safety, security, and well-being, and the importance of the Children's ongoing relationship with their family, Indigenous community, and of preserving their connections to their culture.
- [98] The Federal Act mandates a broader analysis of attachment, understood in the context of the need to protect and nourish Indigenous cultural connection. Attachment is not to be understood solely to caregivers, but rather to encompass a broader set of relationships with extended family, cultural community members, territory and culture. The lesson from the Brown class action is that culturally alienating Indigenous children comes at tremendous cost to them over their lifetimes.

Views of Indigenous Children and Expert Reports

“I would find it useful to have guidance from the Indigenous Nation itself as to how the voice of the child is heard according to their laws and traditions, and to ensure that is reflected in any order” and that “...any lawyer appointed should be well-versed in the purposes of the Federal Act” (para 117)

S. 211 not in the best interests of the children ...“I would find it necessary to order that the person who prepared that report be fully versed in the culture of the Indigenous Nation and in the BIOIC as defined by the Federal Act, and would list the importance to the Children in building and maintaining cultural identity and connection to their Indigenous nation(s) as a factor to be considered in any s. 211 report (para 120)

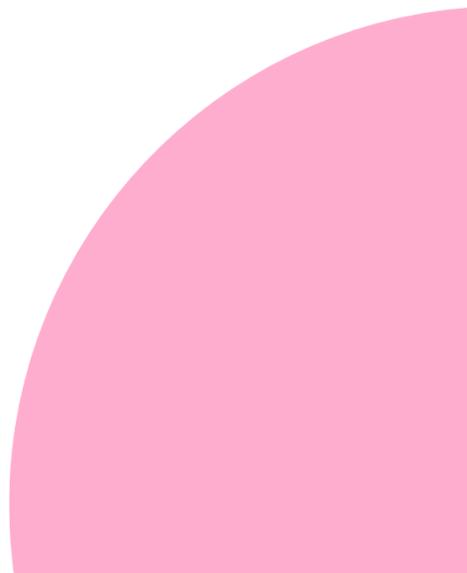
Dodginghorse v. Limas, 2019 BCSC 1385



FLA case dealing with primary residence - father in Texas and the mother is Indigenous from Adam's Lake residing in Chase, BC

List of factors in s. 37 is not exhaustive and the court may consider other factors including Indigenous heritage

“becoming an active participant in her indigenous community is not simply aspirational as it relates to [the child], but is already a fundamental part of her life” (para 74)



Cultural continuity prioritized

Court satisfied that the child would have some exposure to her heritage and culture in Texas, "[h]owever, she would not be immersed in the culture on a full-time basis and would not enjoy the opportunity to learn the language". This consideration would also militate in favour of child remaining in Chase (para 74)

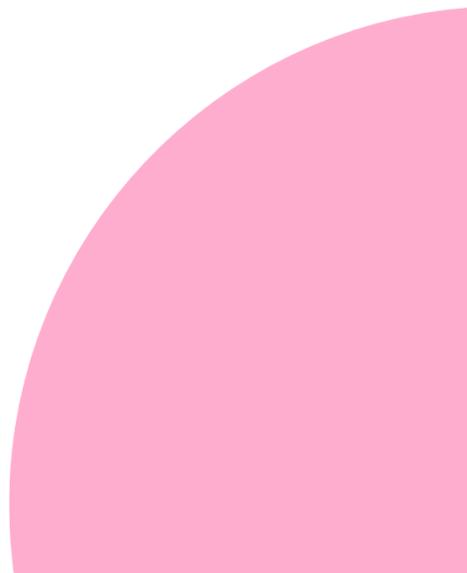
L.P. and D.P. v C.C., 2022 BCPC 34



Indigenous paternal grandparents make application for access pursuant to FLA after the passing of the child's father

Non-Indigenous mother opposes application and claims that that child is not Indigenous and she does not wish for the child to be exposed to the father's Indigenous culture

Court decides that maintaining family cultural connections needs to be prioritized for Indigenous children in FLA matters



Cultural Ties Prioritized

“Legal instruments at the international, federal and provincial level relating to state responsibility towards children show that Indigenous heritage is an important factor to be considered in determining an Indigenous child’s best interests” (para 55)

finding that courts apply BIOIC considerations daily and therefore relevant in FLA matters.

s. 37(2)(f) FLA subverts the mother’s wish that the child not be exposed to their culture. Protection of the child’s culture is in their best interest and parental decisions that go against this would not be in the BIOIC (paras 118-119).

- Anti-Indigenous racism impacting multiple generations leading to widespread intergenerational trauma

- Trauma is understood as the response to a deeply distressing event or events that overwhelms a person's ability to cope
- There are both psychological and physiological responses to trauma and these responses can continue long after the event has past
- Traumatic experiences that persist long-term can lead to a diagnosis post-traumatic stress disorder (See RR case)



- feeling overwhelmed or helpless
- denial & avoidance
- *difficulty regulating emotions which may be interpreted as irritability or hostility*
- flashbacks & nightmares
- difficulty with day to day functioning

Understanding Trauma

Working with intergenerational survivors

Your client

- may be distrustful and it may take time to build a rapport
- may have emotional outbursts
- may feel shame and act defensively
- inability to place events in chronological order or may recount things differently
- may lash out at you if you have said something to trigger them
- May not attend scheduled meetings or arrive on time
- may shut-down and avoid you

Creating safety

- Be transparent, predictable and supportive
- Be mindful of the meeting space and try and create a safe space
- Ask how your client is coping; use normalizing language
- Ask your client if they would like to have a support present during the meeting and inquire about a plan for afterwards
- Support client agency
- Practice patience, don't rush your client and allow for breaks as needed



Practice Cultural Humility

- Lifelong self-reflection by objectively and honestly evaluating your own cultural biases, stereotypes & sources of knowledge
- the survivor is the expert of their life experiences and you are the listener and learner questioning how these experiences shaped their lives
- enter the relationship with the intention of honouring their values, customs, beliefs and lived experiences
- Imbues an understanding of racial oppression and power imbalance, inspiring a desire to redress it
- creates mutual respect and acceptance for cultural difference

Substantive Equality

- It is not helpful to treat everyone the same regardless of their background -in fact, it can be harmful
- Go the extra mile - seek to minimize the ongoing affect of historical disadvantage and marginalization
- Reject stereotypes such as “race-based discounts” and recognize that enhanced protections are required to level the playing field
- Proactively and consciously work against anti-indigenous racism
- Be a part of the solution and share in the collective responsibility for systemic reform

“While Indigenous children were being mistreated in residential schools by being told that they were heathens, savages and pagans and inferior people - that same message was being delivered in the public schools of this country”

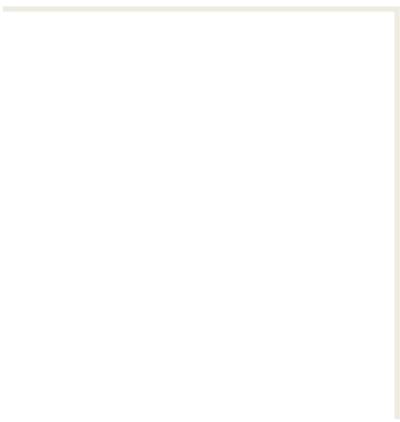
“Education is what got us here and education will get us out...”

Murray Sinclair (TRC Chief Commissioner, retired Justice & Senator)

Self-care

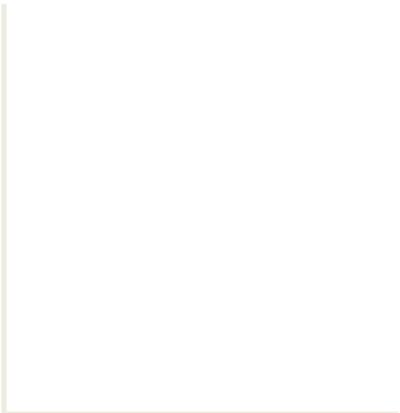
- Vicarious Trauma: Lawyers can develop their own trauma response from being exposed to their clients' traumatic experiences (distinguished from burnout or compassion fatigue).
- Be mindful of your well-being and check-in with yourself. Seek support when you need it and don't forget to prioritize your own well-being when working with clients impacted by trauma





“The road we travel is equal in importance to the destination we seek. There are no shortcuts. When it comes to truth and reconciliation we are forced to go the distance.”

(Murray Sinclair)



Thank you!
Questions?