West Coast LEAF

The Access Toolkit

A parent's counsel's guide to advocating for meaningful access arrangements in child and family services proceedings.

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The Access Toolkit:
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This toolkit is for the purposes of education and discussion only, and it is aimed at a parent's counsel audience. It is not intended to provide legal advice. Parent's counsel should exercise professional judgment about the correctness and applicability of the toolkit's information, references, and template materials. For readers whose families are involved in child and family services cases, we encourage you to get help from a lawyer or advocate.

The links (URLs) referenced in this document were correct as of January 27, 2025.

The Access Toolkit was developed on the traditional, unceded homelands of the xʷməθkwəy̓ əm (Musqueam), Skwxwú7mesh (Squamish), and Səl̓ílwətaʔ/Selilwitulh (TsleilWaututh) Nations.

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The Access Toolkit seeks to provide parent's counsel with the advocacy tools to dismantle these barriers.

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CHAPTER ONE
Introduction

A. WHY WE DEVELOPED THE ACCESS TOOLKIT

BC's colonial child and family services system is in a pivotal moment. Long governed by the provincial *Child, Family and Community Service Act* ("*CFCSA*")[1], its services in relation to Indigenous children are now subject to the minimum standards established by *An Act respecting First Nations, Inuit and Métis children, youth and families* ("*Federal Act*").[2] Further, Indigenous Peoples are increasingly reclaiming jurisdiction over their own child and family services. These shifts- which are empowering Indigenous laws and systems of care- hold transformative potential within and outside the colonial system.

Despite this progress, colonial laws and practices remain a source of devastating and intergenerational harms. The colonial system continues to intrude on the lives of Indigenous families- as well as of other families affected by overlapping inequalities- at grossly disproportionate rates. Moreover, it continues to rely on surveillance, regulation, and separation at the expense of meaningful prevention services and supports. For these reasons, some advocates (including West Coast LEAF) have adopted the term "family policing" to describe the colonial system's interventions.[3]

The Access Toolkit arises out of West Coast LEAF's 2021-2023 Communities of Practice project, which aimed to build out spaces for systemic advocacy within the colonial system and support transformative change. As part of the project, a working group of parent's counsel sought to improve standards of legal advocacy and professional responsibility in child and family services matters, including through the development of practice resources. They suggested the creation of the Access Toolkit to provide parent's counsel with guidance, practical insights, and template materials on the issue of access after a child has been removed under the *CFCSA*. This guide may be particularly helpful for new or junior parent's counsel, who can lack access to sufficient training and mentorship in a complex and evolving practice area.

Access orders and agreements are what enable parents and other people to spend time with a child who has been removed under the *CFCSA* and is in the interim, temporary, or continuing custody of the Director or a third party.

Meaningful access arrangements are essential to preserving a child's important relationships after their removal, while working toward their return, and in cases where they will be permanently separated from their parents. For Indigenous children, meaningful access arrangements are also intrinsically intertwined with protecting their Indigenous identities and community and cultural connections.[4]

Section 55 of the *CFCSA* authorizes access where a child is in the interim or temporary custody of the Director or a third party. It presumes that a child's custodial parent(s) will have access rights.[5] It also permits the court to grant access orders to other people in accordance with the child's best interests.[6] In cases involving an Indigenous child, a liberal and generous approach to access under s. 55 is reinforced by the *Federal Act*'s purpose and minimum standards, which seek to maintain Indigenous children's relationships and community and cultural connections.

Section 56 of the *CFCSA* authorizes access after a continuing custody order ("CCO") has been made. It has been narrowly interpreted by the courts to treat post-CCO access "as the exception, not the rule."[7] However, there is also a growing awareness within the colonial system of the importance of children's relational and cultural permanency.[8] This means that, in practice, post-CCO access orders and agreements are becoming more common.[9] Further, with the enactment of the *Federal Act*, the law on post-CCO access to an Indigenous child has become unsettled. Today, there is the opportunity to argue that the current state of the law on post-CCO access is not consistent with the *Federal Act*'s purpose and minimum standards.

Despite the potential for meaningful access arrangements under ss. 55 and 56 of the *CFCSA*, parent's counsel continue to confront legal, cultural, and practical barriers to actually obtaining such access on behalf of their clients. The Access Toolkit seeks to provide parent's counsel with the advocacy tools to dismantle these barriers by explaining the laws on access and suggesting a combination of negotiation and litigation strategies. Parent's counsel advocacy is most effective when it is proactive and multipronged.

While access issues are commonly resolved through collaborative planning processes, parent's counsel must also be prepared to obtain justice for their clients through invoking judicial oversight.

One of the challenges when advocating about access is the limited body of case law on the strength and scope of access rights under the *CFCSA*, especially where the *Federal Act* also applies. Our hope in creating the Access Toolkit is that parent's counsel will feel empowered to test the outer edges of the *CFCSA*'s access regime through litigation. By bringing contested access applications and appeals, parent's counsel will help to evolve the access law jurisprudence.

AT A GLANCE
This guide is organized as follows:

Chapter 2 discusses trauma-informed legal practice and is authored by Myrna McCallum.

Chapter 3 provides an overview of the jurisdictional and legal landscape, as well as the stages of a child and family services proceeding in BC Provincial Court.

Chapter 4 discusses the laws affecting access under the *CFCSA* and the *Federal Act.*

Chapter 5 suggests advocacy strategies for negotiating access and for bringing contested access applications.

Appendix A addresses the availability and scope of legal representation in child and family services matters.

Appendix B contains a more detailed discussion of the stages of a child and family services proceeding. This content is aimed at new or junior parent's counsel.

Appendix C contains template court applications on access-related issues.

Access advocacy takes on additional significance in the context of systemic delays in the child and family services system. Of particular concern, it can take months or even years to schedule a substantive protection hearing to challenge a child's removal.[10] As a child's time in care increases, so too does the risk of irreparable harm to the child's relationships.

To support responsible and culturally competent parent's counsel advocacy, the Access Toolkit also includes a chapter on trauma-informed lawyering. State intervention in a child's care, and in particular the removal of a child from their home, causes trauma to the child, their family, and their community. For many parents and caregivers, this trauma interacts with other experiences of trauma and oppression to create complex legal and relational needs. The author of this chapter- subject matter expert Myrna McCallum- will discuss how parent's counsel can recognize the impacts of trauma on their clients and themselves, take steps to avoid re-traumatizing clients, and develop client relationships that are characterized by empathy, cultural humility, trust, and respect.

B. SCOPE OF TOOLKIT

The Access Toolkit was developed for the purposes of education and discussion, **and it is not intended to provide legal advice.** It is essential that readers exercise professional judgment about the correctness and applicability of the Toolkit's information, references, and template materials.

While the Access Toolkit may be helpful to any person involved in a child and family services proceeding, it is primarily directed at a parent's counsel audience and assumes basic legal competencies.

The Access Toolkit addresses parent's counsel advocacy *within* BC's colonial legal system. In choosing this focus, we recognize that the future of Indigenous child and family services lies in the reclamation of inherent Indigenous jurisdiction and self-governance.

While the Access Toolkit discusses the access rights and interests of parents, extended family members, and community members, its focus is on representing parents.

The *CFCSA* authorizes access orders in the context of interim and temporary orders (under s. 55), CCOs (under s. 56), and orders that permanently transfer a child's custody to a third party (under ss. 57.01 and 57.1). The issue of access after a permanent transfer of custody is beyond the scope of the Access Toolkit.

C. A NOTE ON OUR USE OF TERMINOLOGY

Child and family services: we use the term "child and family services" in place of the terms "child welfare" or "child protection." This is because the language of "child welfare" or "child protection" risks obscuring the colonial system's harms. The term "child and family services" is used in the *Federal Act*, as well as in the Continuing Legal Education Society of BC's *Child and Family Services Law and Practice Manual*.[11]

Parent: we use the term parent to mean a biological parent, legal guardian, or person who stands in the place of a parent or legal guardian (such as a stepparent).

Caregiver: we use the term caregiver to mean an extended family or community member who provides day-to-day care to a child (such as a kinship caregiver).

Custodial parent: we use the term custodial parent as shorthand to refer to a parent who is "apparently entitled to custody" to a child under the *CFCSA*. The *CFCSA* does not include a definition of "apparently entitled to custody." Courts have interpreted it to include parents with guardianship status and at least some parental responsibilities.[12]

Parent's counsel: we use the term parent's counsel to describe lawyers who represent parents and caregivers in child and family services matters.

CHAPTER 2

Trauma-informed lawyering in child and family services cases

A. INTRODUCTION

Trauma-informed lawyering is a **critical competency** in child and family services practice. The vast majority of a parent's counsel's clients are dealing with the effects of compounding traumas, resulting in **complex legal and relational needs**. The intrusion of the colonial state into a child's care is in and of itself acutely traumatic. Further, many clients are also affected by past experiences of trauma, oppression and harm. Indigenous clients, in particular, face **intergenerational trauma** from historical and ongoing colonialism and racism. Traumas enacted by the colonial state include the theft and dispossession of Indigenous lands, assimilationist policies and practices, the residential school system, the Sixties Scoop, and the current era's Millenium Scoop.[13]

In this chapter, **Myrna McCallum** discusses the elements of a trauma-informed and culturally safe approach to parent's counsel advocacy. In particular, Myrna addresses the neuroscience of trauma, how trauma manifests in the legal system, and the ways in which parent's counsel can address the impacts of trauma to better meet their clients' needs. This chapter is intended to be introductory in nature. It is thus essential that parent's counsel pursue **additional and lifelong learning** to continue to develop this competency.

Myrna McCallum is a true change-maker, award-winning podcaster, and leading champion of trauma-informed lawyering. She is the host of "The Trauma-Informed Lawyer" Podcast and acts as a subject matter expert on trauma-informed policy, procedure, and process. Myrna has also become a highly sought after public speaker due to her work on how trauma impacts lawyering.

Myrna has co-edited two publications; ***Canadian Law, Indigenous Laws and Critical Perspectives*** published by CanLII as a Criminal Law Open Access eBook, and ***Trauma-Informed Law: a Primer for Lawyer Resilience and Healing*** published by the American Bar Association.

Myrna received the 2020 Federal Department of Justice Excellence in Legal Practice and Victim Support Award, the 2022 Canadian Bar Association BC Aboriginal Lawyer's Forum Special Contributor Award, the 2022 Saskatchewan Ombudsman's Game Changer Award, the 2023 Canadian Bar Association BC Women Lawyers Forum Award of Excellence, and the 2023 Canadian Bar Association Cecilia I. Johnstone Award.

B. WHAT IS TRAUMA AND TRAUMA-INFORMED LEGAL PRACTICE?

Trauma lives and breathes in and around us and it is the most elite world traveler. One place trauma can be found all day, every day, is in the child and family services system. It is found inside courtrooms and most definitely in the lawyers and families who work in and pass through these spaces.

Before I can explain what trauma-informed lawyering is, I have to comment on **emotional intelligence** as a pre-requisite to developing a trauma-informed approach to lawyering. Emotional intelligence will allow you to be **self-aware** and engage in necessary self-reflection and self-critique.

i. Emotional intelligence

As lawyers, we are trained to resolve legal issues, but not to see the human beings at the heart of those legal issues. That is where emotional intelligence comes in.

Daniel Goleman defines emotional intelligence as "the capacity for recognizing our own feelings and those of others, for motivating ourselves, and for managing emotions well in ourselves and in our relationships."[14] **It is often said that we cannot offer what we do not have.** This is especially true in the context of patience, empathy, psychological safety, and compassion. These qualities are essential to establishing a trauma-informed practice.

When lawyers have not taken the time and put in the effort to develop their emotional intelligence and engagement practices, they can unknowingly do harm to themselves, their clients, and their colleagues. On the other hand, many long-time lawyers understand that better outcomes occur when they engage with others in a **relational way** that prioritizes connection, humility, and empathy.

This is an invitation to embrace self-awareness and to courageously reflect on your behaviours, beliefs, and biases. Only then can you make the adjustments necessary to bring a more **humanizing approach** to your work.

ii. The trauma-informed lawyering framework

Sarah Katz and Deeya Haldar authored "The Pedagogy of Trauma-Informed Lawyering," which describes the **four hallmarks** of a trauma-informed lawyer.[15] They describe a trauma-informed lawyer as someone who is committed to:

- identifying trauma;
- adjusting the lawyer-client relationship;
- adapting their litigation strategy; and
- preventing vicarious trauma.

Building upon the hallmarks provided by Katz and Haldar, I expanded their trauma-informed lawyering framework to include a focus on:

- relationship building by practicing **humility**;
- acquiring tools to achieve **connection and co-regulation**;
- modelling **boundary setting and self-regulation**; and
- committing to a lifelong practice of **self-reflection and self-critique**.

In sum, the framework I have developed, as inspired by Katz and Haldar, recognizes that without a commitment to personal evolution, professional reflection, and lifelong learning, it is impossible to help others navigate harmful legal processes in a trauma-informed manner.

More specifically, trauma-informed lawyers:

- Possess a general acceptance that trauma exists everywhere in our legal processes and that it moves through every party, every judge, every lawyer, and every other actor who is required to work (or work through issues) in our courtrooms.
- Commit to understanding trauma and its impacts on the brain, behaviour, communication and memory.
- Possess the capacity to self-regulate (calm and soothe) and depersonalize when trauma responses present as rage, sadness, anxiety, or silence.
- Adapt their advocacy to prioritize the safety and empowerment of their clients.
- Recognize the importance of humility and compassion when building positive relationships.
- Keep their personal unconscious and conscious biases in check.

- Ensure that their own mental health and resilience is equally prioritized by practicing healthy boundaries and recognizing the signs of burnout, compassion fatigue, and vicarious trauma.

iii. What is trauma?

Trauma is generally defined as "the lasting emotional response that often results from living through a distressing event. Experiencing a traumatic event can harm a person's sense of safety, sense of self, and ability to regulate emotions and navigate relationships. Long after the traumatic event occurs, people with trauma can often feel shame, helplessness, powerlessness and intense fear."[16]

Trauma comes to us in many forms, including individual trauma, collective trauma, and intergenerational (or historical) trauma.

Individual trauma. Individual trauma arises from a traumatic event that happens to a person or to a small group of people, such as a car accident.

Collective trauma. According to Dan Reidenberg, a mental health expert, collective trauma "happens to not just a small group of people but society."[17] It "changes history and memory for many. It changes the way we process and see not only the trauma that was experienced, but what we do with our memory of it as we move forward."[18] A recent example of collective trauma is the COVID-19 pandemic.

Intergenerational trauma. Eduardo Duran, a Native American psychotherapist, defines intergenerational trauma as a "soul wound."[19] His work involves "the recognition that horrifically violent experiences inflicted on individuals in the past result in unhealthy outcomes that are passed on to one's offspring and manifested in future generations."[20] Indigenous people, for example, deal with intergenerational trauma arising from ongoing colonization and, in particular, the residential school system. This trauma continues to reverberate in today's child and family services proceedings.

iv. The impacts of trauma on lawyers

I invite lawyers to reflect on how the work we do makes witnesses out of us, as well as the traumatizing effects of our role as witness.

Lawyers experience direct traumatization simply by witnessing- either directly or indirectly- how others have been traumatized. Sometimes, without knowing it, we suppress our traumatic experiences and become desensitized as a means of continuing the work we have long felt called to do. The consequence of becoming desensitized as a coping mechanism is that we often unknowingly dehumanize others, including the clients we are trying to help.

The impacts of trauma do not just harm lawyers as individuals, but also as a group. Consider how group trauma may influence our engagement, relationships and advocacy. Sherri Mitchell, a Native American lawyer and author, observed: [21]

> Group trauma is passed along in ways that impact the entire group. Group trauma can lead to distorted thinking, which often manifests as internalized oppression, as people try to maintain some sense of misplaced control over the circumstances of their oppression. In addition, trauma from longstanding oppression can leave the group huddled together in a form of stagnated solidarity. When anyone tries to move beyond the place of suffering that the group has occupied, they are attacked by the group and brought back down. Some within the group may feel a sense of loyalty to the suffering that the group has endured, and they hold onto it as an act of allegiance. Others attach their identity to the suffering and no longer know who they are beyond its boundaries. In instances like this, the group has become a place holder for the pain, a living memorial to the trauma that the group has experienced. When the trauma becomes

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a badge of identity or a living shrine, it's very difficult for the people to consider a new path forward.

Our legal system, with all its demoralizing and dehumanizing side effects, desperately cries out for an overhaul, a transformation, and a **new path forward**. Trauma-informed lawyering is that new path forward.

v. The Brain and Trauma Responses

Now that we have obtained some insight into what trauma is and how we can create trauma or aggravate traumatic responses in ourselves and others, we need to understand the impacts of trauma on the brain. The brain responds to trauma in varied and complex ways which only a neuroscientist or psychotherapist can fully explain. However, for our purposes, this introduction will focus on the hippocampus, the amygdala, and the pre-frontal cortex.

The **hippocampus** affects learning, attention, and memory or memory retrieval. This means that sometimes a traumatized person struggles to listen, pay attention, or recall memories. Further, their memory recall may be fragmented or out of order. For these reasons, what are sometimes perceived as indicators of deception, or a lack of reliability, may in fact be indicators of trauma.

The **amygdala** is commonly referred to as the survival brain or reptilian brain. Others refer to it as the **"smoke detector"** in our brain which sounds the alarm when we are under threat. For some people who have experienced a recent trauma or who have had a high number of adverse childhood experiences, the smoke alarm is constantly going off. What does this mean for lawyers? It means that traumatized clients may feel unsafe and under threat when we work with them. Further, they may react to our questions in **fight, flight, freeze or fawn mode**. Astrid Burke, a Licensed Mental Health Counselor, describes the "four F's" of trauma responses as follows:[22]

Fight. The goal of the "fight" is self-preservation and protection from pain through *conflict*. A "fight" response may feel like a rush of adrenaline, a desire to defend ourselves and feel empowered at all costs, picking fights, or yelling at or controlling others. To an observer, it may look like an explosive temper, angry or aggressive outbursts, bullying, and may be mislabeled as conduct disorder in children or narcissism in adults.

Flight. The intent of "flight" is protection from pain through *escape*. A "flight" response can make it difficult to slow down and rest. It may feel like you're constantly rushing, worrying, panicking, or micromanaging. Someone experiencing this response might look like a workaholic, over-achiever, or perfectionist. They may also physically leave a space when they feel threatened and hide in a bathroom or car, or leave social situations by "ghosting" people or avoiding difficult conversations.

Freeze. "Freeze" types attempt to self-preserve though *dissociation*. When we dissociate, it can have the effect of spacing out and feeling detached from the world around us (derealization) or from ourselves (depersonalization). A "freeze" response can be characterized by feeling immobilized by stress, self-isolating, struggling to make or act on decisions, passivity, feeling frozen in a low-risk state making it frightening to step outside of our routine or set new goals.

Fawn. "Fawning" is an attempt at self-preservation and safety through *placation*. This might look like people-pleasing, flattering others to avoid conflict, difficulty saying no, feeling afraid to share what we think or feel, concern with how others perceive us, anticipating others' needs or studying their interests or patterns to fit in with or be useful to them. The belief behind

the "fawn" response is, "If I can appease this person, I can be safe from conflict or pain."

When we work with families in child and family services cases, it is likely that everyone within that family unit will present with one or more of the "four F's." It is also likely that, no matter how much time has passed, these feelings of intense fear, horror or pain will persist.

The **prefrontal cortex** is responsible for many things, including helping us to manage our emotions. When our central nervous system is in overdrive and the hippocampus and amygdala are engaged, the prefrontal cortex will experience challenges in calming, regulating, and relaxing. In other words, traumatized clients may struggle to self-regulate, pay attention, focus, and remain present as we work with them.

C. IMPLEMENTING TRAUMA-INFORMED PRACTICE

The child and family services system is full of trauma and painful experiences. If you look closely enough, you will see fight, flight, freeze and fawn responses everywhere, as well as people who do not feel safe, respected, heard, or seen.

It is thus important to remember that **strong emotions will run high in every corner of parent's counsel work**. When resolving your client's legal issues, you must keep in mind that everyone wants to feel **seen and heard** in a system that has become known for its dehumanizing qualities. So, it all starts with you.

This section will provide you with the necessary tools and strategies for creating a safe, empowering, trauma-informed, and respectful experience for you and your clients.

i. Practice Self-Awareness

Be aware of the experience that your client is having with you. There is an inherent power-imbalance between you and your client. Imagine who you would like to meet if you were in your client's shoes: someone **relatable and personable** or someone who appears to live in a world separate and apart from yours. Here are some questions you can use to check your own behaviours:

- Do you often wear a suit to meetings while pulling your large, black, litigation suitcase behind you?
- Do you invite individuals to sit opposite you at a meeting table?
- Do you conduct your meetings in small, claustrophobic rooms behind closed doors?
- Are you usually stretched for time and eager to get through the list of questions you prepared?
- Are you listening to responses to check a box on your list or are you listening to learn?
- Do you often feel exhausted at the end of the day and see yourself as just another cog in a wheel who makes little to no difference in the system within which you work?

If you answered yes to most or all these questions, you are likely causing yourself and others unnecessary stress and anxiety. This will lead you and those around you to experience triggers or trauma throughout the legal process.

ii. Commit to life-long learning

Practising law in a trauma-informed way requires **specific education and training** in identifying trauma, emotional intelligence, neuroscience, boundary setting, unconscious bias, cultural humility, and trauma responses. Self-awareness and self-critique must become a life-long commitment for lawyers who are invested in doing no further harm to vulnerable and traumatized clients.

A trauma-informed approach to parent's counsel advocacy also requires learning more about the specific context of child and family services work. Understand that when you engage with clients in this system- as well as family members, lawyers, judges, and social workers- everyone has been touched by trauma. Indigenous people, in particular, deal with the compounding effects of individual, collective, and intergenerational traumas.

iii. Adopt safety and empowerment strategies

A parent confronting the prospect of losing their child (potentially permanently) through state intervention is experiencing an acutely traumatic experience. Consider how you can create a sense of safety and empowerment for your client in these devastating circumstances. Below I suggest some practical strategies for building trust with your client from the very first time you meet with them.

Be mindful of how you present. Your attire, demeanor, and body language communicate about who you are and what matters to you:

- If you do not need to be in court, consider dressing informally for your meeting. If you do not need a suitcase full of files, consider ditching the bag in exchange for a simple notepad and pen or voice recorder.
- Open hands, relaxed shoulders, and a genuine smile can go a long way to ease the fears and anxieties of most people, especially when this presentation accompanies a meaningful introductory meeting with your client.

Adjust your meeting space. A small, enclosed meeting space behind a closed door can be quite triggering for some people, especially when that room has no windows. Sometimes, you do not have control over your meeting space. However, even where that space is uncomfortable, you can still take steps to communicate safety and empowerment. For example, you can:

- Consider not taking a seat until your client has arrived.
- Once your client has arrived, ask them where they would like to sit. They may prefer a seat where they have a full view of the room or where they are close to the exit.
- Ask your client if they have a preference about where you sit. Most times they will say no, but sometimes they have a preference. Where possible, it may serve you well to sit to the left or the right of your client. This is because a seating arrangement that puts your client on the opposite side of a desk or table can convey feelings of confrontation or conflict.
- If privacy is possible with an open door, ask your client if they have a preference about whether the door should remain open or closed. For obvious reasons, a closed door can be triggering for some clients.

Be intentional and proactive with your introduction. Your introductory meeting sets the foundation and tone for the lawyer-client relationship. During this meeting, you should:

- Explain in a calm tone, while using **plain language**, who you are, what your role is, and how committed you are to helping your client.
- Be **upfront** about any limitations to what you can do or for how long. Disclosing those limitations at a later date can result in a loss of trust and the relationship could be irreparably harmed.
- Ask your client about their **boundaries**. In other words, ask what they need to feel safe and respected in their relationship with you. Take this opportunity to also explain your own boundaries.

- Establish what is important to your client and **manage their expectations** about what outcomes are reasonable.
- Invite your client to ask questions **now, later and a lot later**. Often, your client will not know what to ask during your initial meeting. Assure them that they can ask you questions at any time.
- Address issues of **confidentiality and privacy** that arise in the lawyer-client relationship, as well as the legal process as a whole.

Discussing your own boundaries

It is essential that you take the time to explain your own boundaries to your client. For example, if you become triggered when someone yells or swears, you can tell your client that you are at your best and most focused self when the environment is calm, and that loud voices and profanity cause you to lose focus. You can explain that if you notice yelling or swearing, you will remind the client of your boundary. If the yelling and screaming continues, you will need to end the meeting or call for a break.

The importance of addressing confidentiality and privacy. Intergenerational trauma and systemic racism in the child and family services system has inspired skepticism and suspicion in Indigenous families and communities, which is 100% reasonable and valid. It is thus essential that you address, in a transparent way, the scope and limits of your client's confidentiality and privacy during the legal process.

During this conversation, you should:

- Explain solicitor-client privilege and the circumstances in which you might be required to disclose confidential information because of an exception to solicitor-client privilege.
- Discuss who else may have access to the client's private information (such as health records), why these persons may be entitled to access that information, and what that access means for the client.
- Consider offering your client an opportunity to review your meeting notes. This practice will also inspire trust between yourself and the client because they will know with absolute certainty what you are recording and why.

Be mindful of your client's comprehension, attention, and memory. In light of what we learned about the impacts of stress and trauma on the brain, you should offer more meeting time with your clients to:

- Allow their stories to unfold naturally and without interruption or leading.
- Explain next steps repeatedly.
- Listen for your client to repeat back what they heard.
- Use your active listening skills and pay attention to what is being communicated via body language. Active listening skills will also help you learn more about your clients, their natural pauses, their thought processes, their struggles (especially with memory recall), and their personal triggers which lead to trauma responses.

iv. Adopt strategies to help your clients regulate their emotions

Lawyers should only ask questions when clients are in their "window of tolerance." The "window of tolerance" is a term coined by Dr. Daniel Siegel, a psychiatrist, to describe an emotionally regulated space where good decision-making can take place.[23]

Continuing to ask questions when a client is in distress can have the effect of pushing them out of their window of tolerance.

When individuals come out of their window of tolerance, they enter into an irrational state of fight or flight or freeze or fawn. They are no longer capable of good decision-making, and they certainly cannot offer reliable evidence.

Keeping your client in their window of tolerance. Here are some examples of practices that will ensure that your client answers questions while they are rational and able to tolerate external stressors:

- Build in extra time for meetings so that if emotions surface, you can accommodate their rise and fall.
- When you need a decision from your client, give them adequate time to think about it before seeking a response.
- Where time is of the essence, still allow your client to take a break before giving their answer.

Grounding yourself to help your clients. When a client is having difficulty self-regulating, you can support them by recognizing that a trauma response has taken over and helping them to calm down. This requires remaining **calm, focused and centered**. If you react to a trauma response in a harsh way because you are triggered, the heavy energy in the room is likely to escalate and the relationship could break down. Accordingly, it is important to become acquainted with your personal triggers and learn to self-regulate so that when you become uncomfortable, you can remain calm. In doing so, you increase the likelihood of calming others around you.

Other calming strategies include:

- Offer 5-to-10-minute breaks so that everyone can move, breathe and ground themselves.
- Provide your client with grounding or calming aids such as an eagle feather (for Indigenous people), a stone, a stress ball, or simply a signal or gesture which lets you know that they are coming out of their window and need a break from being questioned.

v. Identify and locate emotional supports

It should go without saying, but it is essential that lawyers inquire with their clients about the emotional supports they are accessing. We know that legal processes- as well as some lawyers, judges, and other legal actors- can trigger or traumatize individuals and entire families. Knowing the likelihood for trauma, it is unethical and harmful to allow clients into these spaces without ensuring that they are properly supported. A client's support system may include family members, community members, therapists, support workers, and/or local support agencies.

You should always be prepared to identify local resources by offering a contact list of local support agencies and therapists in your client's community or region. Where the client is Indigenous, these resources must include Indigenous agencies, culturally specific support providers, and Indigenous Service Canada approved therapists.

vi. Practice empathy

Empathy is necessary for connection. Empathy requires connecting with the experiences of another, and it requires a willingness to validate the experiences of another. Empathy is **listening without judgement**, assumptions or attempts to

offer unsolicited advice. In child and family services practice, empathy also requires acknowledgement of the courage it takes for clients to engage with lawyers, judges, and social workers who hold power over them.

In many circumstances you will encounter parents struggling with guilt or shame because of their child's removal. Empathy asks you to show up with an open mind and **open-ended questions** beginning with, "where would you like to start?" or "what do you remember?" or "where does this incident begin for you?"

Should you ever ask, "how did this happen?", you may also want to ask, "what happened to you or your family?" This can provide you with insights into the individual or intergenerational trauma that has led to some of your client's current circumstances.

Listening to the traumatic events your client has had to endure may compel you to offer advice or to respond with comments such as, "I understand." If that is the case, please stop yourself. Instead, as Brené Brown advises, the most empathetic response you can offer is, **"I don't know what to say, I'm just so glad you told me."**[24]

vii. Practice humility

Humility asks lawyers to remain **teachable**. It is a core competency which will allow you to look beyond the legal issues and truly see your clients. Humility asks you to become comfortable saying, **"I don't know"** or "there is more I need to learn" or "you are the expert in your lived experience." This approach is especially critical when you are working with those who have had different lived experiences from you, including because of racial or cultural differences. Without humility, you will miss critical information which can help your legal argument or strategy, strengthen your lawyer-client relationship, or, at the very least, enlighten your worldview.

Check your biases

Humility also helps you to do the necessary work of **checking your biases.** It is as simple as asking yourself: what do I know about how these people are often impacted by this experience? What do I know about this cultural/racial/religious group? Where did my source of knowledge come from? Was that source ill-informed, false, or outdated? Is there new or better information available?

When working with an Indigenous client, practicing humility may lead you to ask questions about whether:

- The client's Indigenous community provides relevant services the client would like to access.
- The client has any concerns about extended family relationships which should be known before exploring kinship care options.
- The client would like you to include elder support in your processes for their wisdom, caring presence, cultural knowledge, and community respect.

viii. Take care of yourself

Lawyer wellness is the final step toward becoming a trauma-informed lawyer. If you do not feel safe and respected- or you do not have the personal capacity to set healthy boundaries and practice empathy and humility- then you and everyone around you will feel the impact.

For far too long, the legal profession has failed to acknowledge that a crushing workload, coupled

with repeated exposure to traumatized clients, can adversely affect lawyers' mental health and wellness. We must recognize that if lawyers are not well supported by the profession in achieving and maintaining good mental health and wellness, then the pace at which we open and close files, especially trauma-filled ones, will destroy us. This will not only harm us as individuals, but also as a collective which creates and upholds the systems which either help or harm those in need of justice.

Safeguarding the individual and collective well-being of lawyers is thus imperative. For individuals, self-care asks us to commit to a life-long practice of identifying, communicating, and maintaining healthy boundaries in all our relationships. Other self-care strategies include:

- Exercising on a regular basis, such as by running or practicing yoga.
- Taking regular time off.
- Spending time outside.
- Engaging in hobbies that are unrelated to the practice of law.
- Maintaining a mindfulness practice.
- Creating a mental health checklist that includes your red flags for burnout, compassion fatigue, and vicarious trauma.

Whichever self-care strategy works best to build you up, it is critical to maintain this practice. Without it, you risk burn out, compassion fatigue and becoming traumatized by your work - directly or vicariously.

Collective care is just as important as self-care because mental health and wellness are hard to achieve and maintain alone – we need each other to succeed.

Examples of collective care practices include:

- Routine debriefing sessions with colleagues to talk through practice issues.
- Group therapy sessions for lawyers who work on high trauma exposure files.
- Ensuring that leaders within the legal profession prioritize, maintain, and model resilience strategies.

Boundaries and burnout

You cannot offer others what you do not have. If you are struggling with boundaries, self-regulation, and burnout, then you are more likely to engage in a dehumanizing manner because your personal capacity is at its limits. It is difficult to remain connected, empathetic, and compassionate without personal capacity. You can protect your mental health by being honest about your capacity levels, triggers, unhelpful coping mechanisms, and whether you have been maintaining your boundaries. You must also be proactive about taking care of yourself. If you like to talk out your issues, a routine debriefing practice may work well for you. If you tend to self-reflect, then engaging in an outdoor activity or mindfulness practice can begin to replenish your reserves and build up your resilience.

Determining whether a child needs protection involves multiple policy considerations. While the stated intent of the *CFCSA* is to protect children from harm, the right of parents to care for their children is basic and should not be easily displaced.

Courts in other provincial jurisdictions have defined the minimum standard of care as "good enough parenting" and have cautioned against "parent-shopping" or assessing parenting based on a "middle class yardstick."

CHAPTER 3
Understanding BC's child and family services system

A. OVERVIEW OF THE LAWS THAT GOVERN CHILD AND FAMILY SERVICES IN BC

i. A multi-jurisdictional landscape

BC's child and family services system involves three spheres of jurisdiction: Indigenous, provincial, and federal.

Since time immemorial, Indigenous Peoples have had inherent jurisdiction over the safety and well-being of their children and families.[25] This jurisdiction survived the assertion of Crown sovereignty and exists outside of the colonial legal system.[26] However, until recently, the BC government has ignored, denied, or obstructed Indigenous jurisdiction, subjecting Indigenous Peoples to colonial legal regimes with devastating and intergenerational effects.[27] While the imposition of the colonial state suppressed Indigenous systems of care, it did not extinguish them. Through reclaiming jurisdiction and self-governance, Indigenous Peoples are empowering their laws, wisdom, and best practices to protect and heal their community members.[28]

The 2019 enactment of the *Federal Act* marked a turning point in that it provided legislative recognition of the inherent jurisdiction of Indigenous Peoples over their own child and family services. The *Federal Act* creates a pathway within the colonial legal system through which Indigenous Peoples can resume this authority.[29] Today, some Indigenous Peoples in BC have used this pathway to implement their own child and family services laws,[30] while others are in the process of doing so. However, there are other Indigenous Peoples that have not yet accessed this pathway because of barriers in the process and/or insufficient resources.[31] Many Indigenous children thus continue to receive child and family services through the colonial system and pursuant to the provisions of the *CFCSA* and the *Federal Act*.

The *CFCSA* remains the legislative backbone of BC's colonial child and family services system, and it authorizes state intervention in the care of children in BC who are deemed to need protection. The *CFCSA*'s intent is to protect children from harm while also recognizing that the responsibility to care for children rests primarily with the parents.[32] (Of course, this intent reflects an ideal rather than the colonial system's lived realities).

The *Federal Act* establishes national minimum standards for child and family services in relation to Indigenous children, including those delivered under the *CFCSA*. Thus, in child and family services proceedings involving an Indigenous child, the *CFCSA* and the *Federal Act* must be read together.[33] Where there is a conflict or inconsistency between the *CFCSA* and the *Federal Act*, the *Federal Act* prevails.[34] This includes instances where the *Federal Act* addresses issues that are not covered in the *CFCSA*, or where its provisions augment or are more robust than those in the *CFCSA*.[35]

The most significant difference between the *CFCSA* and the *Federal Act* is the latter's requirement that the best interests of the child be considered at all stages of decision-making under the *CFCSA*.[36] The *CFCSA*, on the other hand, only requires such consideration when a particular provision expressly says so.[37]

The role of MCFD, ICFSAs, and social workers

BC's Ministry of Child and Family Development ("MCFD") administers the *CFCSA*. It does so through designating one or more directors to investigate and act on child protection concerns, as well as provide services to remediate those concerns.[38] The directors in turn delegate their powers and duties to social workers across the province.[39]

As well, MCFD delegates authority to Indigenous Child and Family Services Agencies (ICFSAs) and their employees to undertake administration of all or parts of the *CFCSA*. ICFSAs are agencies that deliver services to specific Indigenous Nations and communities. There are currently 25 ICFSAs with various levels of delegation.[40]

There are other laws and policies- including international instruments- that may apply to decision-making under the *CFCSA* and the *Federal Act*. They include MCFD's Child Safety, Family Support & Children in Care Policies ("the MCFD Policy Manual"), BC's *Human Rights Code*, the *Canadian Charter of Rights and Freedoms* ("*Charter*"), the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*"), and the *United Nations Convention on the Rights of the Child* ("*CRC*"). We will discuss these laws and policies in more detail in Chapter 4 as they apply to issues of access.

ii. When a child is deemed to need protection under the *CFCSA*

Section 13(1) of the *CFCSA* sets out a list of circumstances in which a child is deemed to need protection and thus state involvement in their care. It includes cases in which a child has been, or is at risk of being, abused, neglected, or harmed.[41]

Determining whether a child needs protection involves multiple policy considerations. While the stated intent of the *CFCSA* is to protect children from harm,[42] the right of parents to care for their children is basic and should not be easily displaced.[43] Courts in other provincial jurisdictions have defined the minimum standard of care as "good enough parenting"[44] and have cautioned against "parent-shopping"[45] or assessing parenting based on a "middle class yardstick."[46]

Where the Director has reasonable grounds to believe that a child needs protection under s. 13(1), the *CFCSA* sets out a range of options to address the protection concerns. These options include cooperative planning and dispute resolution processes under Division 2 of the *CFCSA*. The most intrusive option is child removal, which is governed by Division 3 of the *CFCSA*.

Section 13(1) in practice: Concerns about bias and systemic discrimination

Both the *CFCSA* and the *Federal Act* confirm that a child cannot be removed from their home solely because of their family's socio-economic circumstances.[47] However, allegations of "neglect"- i.e., not meeting a child's basic needs[48]- continue to raise concerns about bias and systemic discrimination against Indigenous families, poor families, and other families affected by overlapping inequalities.[49] Neglect remains the most common protection concern. It is the reason for about 73% of all child removals and 75% of Indigenous child removals in BC.[50]

iii. Child removals and judicial oversight

Under the *CFCSA*, a child removal can only take place where there are reasonable grounds to believe that the child needs protection and that the child's health or safety is in immediate danger or no less disruptive measure would adequately protect the child.[51] When an Indigenous child is involved, the *Federal Act* imposes an additional positive obligation on the Director to engage in "reasonable efforts" to avoid the child's removal.[52]

The removal of a child under the *CFCSA* initiates (or continues) a proceeding in BC Provincial Court. Following the removal, there are generally three stages in a child and family services proceeding:

- **The presentation hearing stage.** A presentation hearing is a preliminary hearing. Its purpose is for the judge to ensure that the child was not removed arbitrarily and to make an **interim order** about the child's care pending a substantive protection hearing.[53]
- **The protection hearing stage.** A protection hearing is a substantive hearing in which the judge must determine whether the child in fact needs protection and, if so, make a **temporary order** about the child's care in the child's best interests.[54] After the temporary order expires, the child may be returned to their custodial parent(s) with or without the Director's supervision.[55] However, the Director may also apply for an extension of the temporary order,[56] a continuing custody order ("CCO"),[57] or a permanent transfer of custody to a third party. [58]
- **The permanency hearing stage**. A continuing custody or permanent transfer of custody hearing is a substantive hearing. A judge may grant a **CCO** or a **permanent transfer of custody order** where there is no significant likelihood that the circumstances that led to the child's removal will improve within a reasonable time, or that the parent will be able to meet the child's needs.[59]

The total amount of time that a child can be in the interim or temporary custody of the Director or a third party, as well as under the supervision of the Director, is subject to legislated time limits.[60] However, in light of systemic delays in child and family services proceedings, courts commonly grant extensions of these timelines.

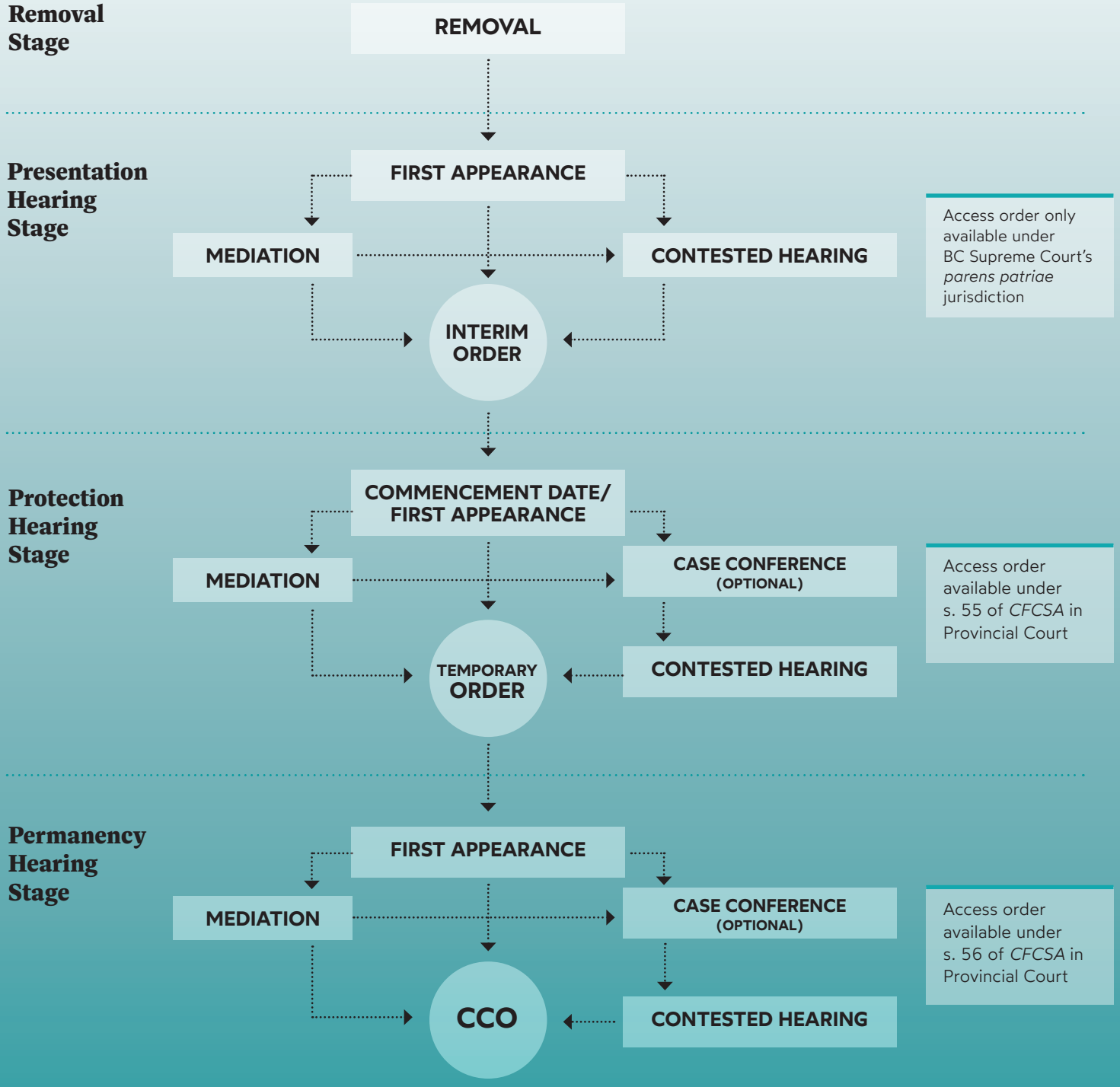
Judicial oversight in practice

The Provincial Court has the power to exercise a vital supervisory role within child and family services proceedings. However, in practice, **many legal issues are resolved outside of the courtroom** due to an increasing emphasis on collaborative planning processes, as well as systemic barriers to meaningful court oversight (including insufficient court time and chronic delays in scheduling contested court hearings).

Parties to a child and family services proceeding routinely agree to **consent orders** under s. 60 of the *CFCSA*. Section 60 allows the Provincial Court to grant a consent order without a hearing, the giving of evidence, a finding that the child needs protection, or an admission by a parent of any of the alleged protection concerns.[61]

The stages of a child and family services proceeding

Access advocacy must be situated within the stages of a child and family services proceeding, as each stage raises unique legal and policy considerations. This chart illustrates the progression of a child and family services proceeding from a child's removal to a continuing custody hearing.



See **Appendix B** for a more detailed discussion of child and family services proceedings. Appendix B is intended for new or junior parent's counsel who may benefit from this additional procedural context.

CHAPTER 4
The laws governing access

A. OVERVIEW

This chapter aims to:

- explain the laws on access at different stages of a child and family services proceeding,
- discuss the best interests of a child in the context of access,
- suggest how parent's counsel can use principles from the *CFCSA* and the *Federal Act,* as well as other laws and policies, to aid in the interpretation and administration of access laws,
- provide options for addressing non-compliance with access orders, and
- explain the laws and procedures governing appeals of access orders.

Sections 55, 56, and 57 of the *CFCSA* provide the **legislative authority** to make and change access orders. Section 55 permits access orders where a child is the subject of an interim or temporary order. Once a child is in the continuing custody of the Director, s. 56 permits post-CCO access orders. Any party (including the Director) can apply under s. 57 to change an access order where there has been a "significant" change in circumstances since the order was made.[62] Provincial Court orders under ss. 55, 56, and 57 can be appealed to BC Supreme Court and subsequently to the BC Court of Appeal.

Where a child has been removed and is in the Director's care *prior* to the granting of an interim order, the *CFCSA* is silent on the issue of access. This means that at this stage, the Provincial Court does not have the authority to make an access order. Only the Supreme Court may grant an access order through exercising its ***parens patriae* jurisdiction**.[63]

Where there has been non-compliance with an access order, the *CFCSA* authorizes the Provincial Court to order a penalty.[64] Moreover, the Provincial Court has the ability to order *Charter* costs as another means of controlling its processes and enforcing access orders.[65] Outside of court enforcement, a parent has access to an administrative review process to complain about a Director's exercise of discretion with respect to access.[66] The outcome of the administrative review process is subject to judicial review.[67]

In the case of an Indigenous child, the *CFCSA*'s access provisions must be **read together** with the *Federal Act*'s **minimum standards**. Where there is a conflict, the *Federal Act*'s minimum standards prevail.

The *CFCSA*'s access regime must also be interpreted and applied in accordance with the *CFCSA*'s guiding principles and service delivery principles, the *Federal Act*'s purpose, guiding principles and service delivery principles, MCFD's Policy Manual, human rights protections under the *Human Rights Code* and the *Charter*, and Canada's international obligations under *UNDRIP* and the *CRC*.

B. ACCESS BEFORE A PERMANENT ORDER HAS BEEN MADE- S. 55 OF THE *CFCSA*

Section 55 of the *CFCSA* permits an access order where a child is in the interim or temporary custody of the Director or a third party. That is, s. 55 applies *before* a continuing custody or other permanent order has been made.

i. When a custodial parent applies- ss. 55(1) and (4)

Under s. 55(4), a **custodial parent** can apply for an access order at the same time as or after an interim or temporary order has been made.[68]

When a custodial parent applies for access to a child, the court *must* grant access unless it is not in the child's best interests. In other words, there is a *presumption of access for a custodial parent*.[69]

As confirmed by the Court of Appeal, this presumption reflects "the goal during this period of time to remediate the child protection concerns sufficiently to enable a child to be returned to [their] custodial parent."[70]

There is limited case law addressing the types of circumstances in which a custodial parent's presumption of access would be rebutted. Parent's counsel report to us that these circumstances would be exceptional in nature.

ii. When a person who is not a custodial parent applies- ss. 55(2) and (5)

Under s. 55(5), **a person who is not a custodial parent** can apply for an access order *after* an interim or temporary order is made.

There is no presumption of access for an applicant who is not a custodial parent.[71] However, the court may grant access to the applicant unless it is not in the child's best interests.

In other words, s. 55(5) is permissive in nature. There is limited case law on the nature and scope of the court's discretion to make access orders under s. 55(5). Courts have confirmed that an applicant under s. 55(5) must be able to demonstrate a real connection to or relationship with the child.[72]

Most applicants under s. 55(5) are non-custodial parents or extended family members. However, s. 55(5) can also be interpreted to support a child's broader community and cultural connections. For example, in the case of an **Indigenous child,** an order under s. 55(5) could provide access to a culturally important person from the child's Indigenous community.[73]

In practice, applications under s. 55(5) are rare. Instead, a parent will often seek access arrangements on behalf of extended family or community members through collaborative planning processes. An important barrier to court applications by extended family or community members is limited access to legal representation. See **Appendix A** for a discussion of the availability of free legal representation in child and family services matters.

SPOTLIGHT ON CASE LAW
Valoris v. J.W., C.R. Muskeg Lake Cree Nation,* 2022 ONSC 2901 *("Valoris")

Case law from Ontario suggests the possibility of an access order being granted to an Indigenous Nation (or representative of an Indigenous Nation). In *J.W*, the court addressed the access needs of a group of Indigenous siblings after a CCO was granted, and granted an access order to the children's Nation by consent.[74] The access was to take place between the children and band representatives, and the purpose of the access was to have the children connect with Elders and attend cultural events.[75]

iii. Terms and conditions on access orders under s. 55- s. 55(6)

The Provincial Court may attach any reasonable terms and conditions to an access order under s. 55.[76] While the *CFCSA* does not require consideration of the best interests of the child when doing so, such consideration is required under the *Federal Act*.[77]

In practice, parents are typically granted what is called the "standard access order." The standard access order entitles the applicant to "reasonable access" to the child "supervised at the discretion of the Director."

The details of the access arrangement are then decided by the Director or negotiated between the parties. These details include:

- How much access.
- When the access will take place.
- Where the access will take place.
- Whether the access will be supervised and, if so, by whom.
- Whether the access must be supervised by a professional agency who will provide written reports about the access visits.
- Who else may attend the access visits (such as a sibling or grandparent).
- Rules placed on what can or cannot take place during access.
- Supports that will facilitate access (such as financial and/or logistical support for a parent to travel to and from access visits).

In some cases, the standard access order works well because of its **inherent flexibility**. For example, it enables the parties to make agreed upon changes to the access arrangement without making changes to the underlying order. However, **in the event of a dispute over access**, the standard access order may not provide sufficient guidance or direction. Moreover, it contributes to the significant power differential between the Director and the parent with respect to decision-making about a child.

SPOTLIGHT ON CASE LAW
BS (Re),* 1997 BCPC 2 *("Baker").

The meaning of the standard access order has received limited judicial attention. *Baker,* however, stands for the proposition that the standard access order imposes a positive obligation on the Director to provide access to the parent. Further, the standard access order does not provide the Director with the discretion to outright deny access to a parent.[78]

In *Baker*, the mother had been granted a standard access order. After the Director unilaterally terminated portions of the mother's access, the mother applied to the court to have her access defined.[79] In deciding the mother's application, the Court rejected the Director's argument that the Director had discretion under the standard access order to "allow" access.[80] Instead, the "only reasonable interpretation" of the mother's access order was that that the mother had "a right of access limited to the Director having discretion to supervise such access."[81] The Court proceeded to consider the mother's highly restricted access schedule and ordered the Director to provide the mother with an additional weekly visit.

Most disputes arising from the standard access order are not about the outright denial of access. Rather, they are about what constitutes a reasonable access arrangement.

Where the parties are not able to agree on the access arrangement arising from the standard access order, a defined access order may be required.[82]

Defined access orders can:

- specify an access arrangement,
- provide direction to the parties about when supervision should be required (or not required), and/or
- provide direction on what would constitute reasonable access.

Such orders do not need to result in an access schedule that is static or unable to evolve. Instead, they can be structured to establish a baseline of access and also to allow the parties to negotiate changes to the access arrangement. For example, an access order that specifies an access schedule can also include a term that permits additional visits as agreed to by the parties.

A potential barrier to obtaining a defined access order is judicial deference to the Director's professional judgment. Courts may be reluctant to limit the Director's discretion to protect children from harm and to respond to a family's changing circumstances.

ADVOCACY TIP

It is incumbent on parent's counsel to push back against this judicial deference where it stands in the way of meaningful access, especially where there are special considerations at stake or the Director has not exercised their discretion around access in a reasonable manner.

SPOTLIGHT ON CASE LAW

L.S. v. British Columbia (Director of Child, Family and Community Services)*, 2018 BCSC 255 *("L.S.")

L.S. is an example of a case in which the access order included directions on what would constitute an appropriate amount of access. In *L.S.*, the mother provided the Court with detailed evidence about her efforts to negotiate an access arrangement that would allow her to continue breastfeeding her child.[83] Despite these efforts, at the time of the application, the mother was only receiving "limited" weekday access and no access at all on the weekends.[84] The Court found that this access was insufficient to maintain the breastfeeding relationship.[85] While the Court was not prepared to order a specific access schedule, its order included the following term:[86]

> *The Director is to make changes to increase L.S.'s access to V.S. to ensure that breastfeeding is not interrupted and that the maternal bond is unharmed. I am reluctant to make an order as to how many hours a day this requires but I suggest that it will necessitate morning, mid-day, and evening access for a total of at least 6 hours per day, every day, weekends included.*

iv. Forms of applications under s. 55- s. 55(3)

Section 55 of the *CFCSA*, read together with Rules 1(2) and 6(1) of the *CFCSA Rules*, contemplates a written application (in Form 2) to be served on prescribed persons before the application hearing (2 days before the hearing if the applicant is asking the court to grant an access order at the same time as an interim or temporary order, and 10 days

before the hearing if the applicant is asking the court to grant an access order after an interim or temporary order has been made). Subsection 55(3) sets out the persons who must be served with the application. They include:

- the Director;
- the child (if 12 years of age or older); and
- the persons who were entitled to notice of the presentation hearing under s. 34(3)(b), (d), (e), and (f) (if the application takes place prior to the protection hearing) **OR** the persons who were entitled to notice of the protection hearing under s. 39 (if the application takes place after the protection hearing).

Rule 6 of the *CFCSA Rules* sets out detailed requirements for effecting service.[87]

While parent's counsel should seek to comply with the procedural requirements outlined above, these requirements should not act as a bar to addressing the issue of access at a presentation hearing or a protection hearing. Rule 1(4) of the *CFCSA Rules* provides judges with the discretion to permit an application to "be made orally in court, without the filing of a form."[88]

ADVOCACY TIP

At the presentation hearing of a child and family services proceeding, custodial parents will often make an oral application for a standard access order and the order will often be granted by consent. This simplified approach has developed because of the presumption under s. 55 of a custodial parent's right to access.

Further, the Court may be assured that the standard access order will operate to protect the child because of the discretion afforded to the Director.

See **Appendix C** for a template s. 55 application.

C. ACCESS AFTER A CCO HAS BEEN MADE- S. 56 OF THE *CFCSA*

Once a child is the subject of a **CCO**, a parent or other person can apply for access under s. 56 of the *CFCSA*.[89]

Unlike s. 55, s. 56 does not create a presumption of access in favour of a parent.[90] The focus of the analysis under s. 56 becomes whether a continuing relationship with the parent is in the child's best interests.

A child's **extended family members and community members** may also apply for an access order under s. 56. A non-parent who applies for access under s. 56 must be able to demonstrate a real connection to or relationship with the child.[91] As discussed above, case law from Ontario suggests the possibility of an access order being granted to a child's Indigenous Nation for the purposes of supporting the child's cultural and community connections.[92]

i. Current state of the case law on post-CCO access

Prior to the enactment of the *Federal Act*, the discretion of the court to grant access orders under s. 56 was governed by the criteria set out in s. 56(3) of the *CFCSA* and the common law principles outlined by the Supreme Court of Canada in *New Brunswick v. L.(M.)*, 1998 CanLII 800 (SCC) ("*L.M.*").[93]

Section 56(3) states that a court may grant access if access:

- is in the child's best interests,
- is consistent with the plan of care, and
- is consistent with the wishes of the child, if 12 years of age or over.

In *L.M.*, the Supreme Court of Canada took a **narrow and conservative** approach to access after a permanent order has been made. In particular, it described such access as the "exception, not the rule."[94]

In *J.L.F. v. Director,* 2010 BCPC 17, Judge Skilnick provided a helpful summary of the statutory criteria under s. 56 and the common law principles arising from *L.M.*:[95]

> 1. When a continuing custody order is made, parents lose the right of access to the child. Access then becomes a right of the child and not of the parent.
>
> 2. An order for access may exist alongside a continuing custody order.
>
> 3. Where a continuing custody order exists, an order for parental access is the exception, not the rule.
>
> 4. The principle of preserving family ties should only be a consideration in granting access, where a continuing custody order has been made, if it is shown to be in the best interests of the child, having regard to all relevant factors, including the security or health of the child.
>
> 5. An adoption which is in the best interests of a child who is the subject of a continuing custody order must not be hampered or jeopardized by the existence of a right of access.
>
> 6. Access to a child who is the subject of a continuing custody order should not be granted if its exercise would have negative effects on the physical or psychological health of the child.
>
> 7. Any access which is ordered for such a child must be consistent with the child's plan of care.
>
> 8. These principles are binding on the Provincial Court in considering whether to make an access order in favour of a biological parent where the plan of care is for adoption. It is an error of law if a judge fails to exercise his or her discretion guided by these principles.

The applicant bears the burden of establishing the circumstances that would justify an access order.[96]

Courts have often declined to make an access order under s. 56 because of concerns that such an order would interfere with the child's adoption or permanent placement.[97]

ADVOCACY TIP

Given that access orders can be varied or rescinded under s. 57 when there is a significant change of circumstances (such as a pending adoption), courts should not be unduly reluctant to grant parents access orders when the prospects of adoption are uncertain.[98]

Courts may view the inclusion of an openness agreement in an adoption plan as preferable to an access order.[99] However, parent's counsel should be wary of openness agreements as they do not confer access rights and are not legally enforceable.[100]

ii. The approach to post-CCO access is shifting

Despite longstanding common law principles that characterize post-CCO access "as the exception, not the rule,"[101] there is a growing awareness of the importance of children's relational and cultural permanency.[102] In practice, post-CCO access orders and agreements are becoming more common.[103]

Further, the enactment of the *Federal Act* unsettles the law on post-CCO access to an Indigenous child. The courts have not yet squarely addressed the application of the *Federal Act* to issues of post-CCO access. For example, is it consistent with the *Federal Act* to treat a parent's post-CCO access "as the exception, not the rule"? We would argue no.[104]

For parent's counsel, this presents an opportunity to argue that the current state of the law on post-CCO access is not consistent with the *Federal Act*'s purpose and minimum standards.

Specifically:

- The *Federal Act* requires ongoing efforts to maintain the child's community and cultural connections (as per s. 9(2)), including through meaningful post-CCO access.
- At a minimum, courts should be applying the *Federal Act*'s more robust definition of the best interests of an Indigenous child to their reasoning processes.[105] In *British Columbia (Child, Family and Community Service) v. S.H.*, 2020 BCPC 82, the court considered this definition when deciding that an access order was justified because the children would "continue to benefit from a cultural, spiritual, and familial connection to their mother."[106]
- Another critical consideration is the Director's ongoing obligation to promote the child's attachments under s. 17 of the *Federal Act*.[107]

ADVOCACY TIP

Where possible, decision-making about post-CCO access should involve the child's Indigenous community(ies), who can help to ensure that access arrangements reflect their own laws, wisdom, and best practices.[108]

In the recent case of *Brown v. British Columbia (Director of Child, Family and Community Service)*, 2024 BCCA 204, the parents were granted leave to appeal the cancellation of their post-CCO access order on grounds including that the judge did not properly apply the *Federal Act*.[109] However, because the parties later resolved the appeal by consent, the BC Court of Appeal did not have the opportunity to decide the appeal on its merits.[110]

iii. Terms and conditions on access orders under s. 56- s. 55(6)

The Provincial Court may attach any reasonable terms and conditions to an access order under s. 56, per section 55(6). While the *CFCSA* does not require consideration of the best interests of the child when doing so, such consideration is required under the *Federal Act*.[111]

Access orders under s. 56 often contain the same terms as the **standard access order** under s. 55- namely, "reasonable access" to the child "supervised at the discretion of the director."[112] However, access orders under s. 56 also commonly define the parent's access.[113] Historically, defined access orders under s. 56 provided for highly restricted access.[114] However, defined access orders could also be designed in ways that are protective of long-term, meaningful access. Further, like defined access orders under s. 55, they can build in helpful flexibility (such as by including a term that permits additional access visits by agreement).

The court has the discretion under s. 56 to make **an access order that expires** after a certain period of time.[115] In *British Columbia (Director of family and child services) v. B.(J.)*, 2002 BCPC 603, the court granted an access order that would expire the earlier of 6 months after the date of the order or when the child was placed in a prospective adoptive home.[116] The mother had leave to apply for a review of access if the child was not placed in a potential adoptive home within 6 months.[117]

iv. Forms of applications under s. 56- s. 56(2)

Section 56 of the *CFCSA*, read together with Rule 1(2) of the *CFCSA Rules*, requires a written application (in Form 2) to be served on prescribed persons at least 10 days before the application hearing. Subsection 56(2) sets out the persons who must be served with the application. They include:

- the Director;
- the child (if 12 years of age or older); and
- the parties to the proceeding in which the CCO was made.

Rule 6 of the *CFCSA Rules* sets out detailed requirements for effecting service.[118]

While parent's counsel should seek to comply with the procedural requirements outlined above, these requirements should not act as a bar to addressing the issue of access at a CCO hearing. Rule 1(4) of the *CFCSA Rules* provides judges with the discretion to permit an application to "be made orally in court, without the filing of a form."[119]

Section 56 applications are typically heard together with applications for CCO. However, they can also be heard at a later date.

See **Appendix C** for a template access application under s. 56.

D. ACCESS APPLICATIONS PRIOR TO AN INTERIM ORDER- INVOKING THE BC SUPREME COURT'S *PARENS PATRIAE* JURISDICTION

The Director should be providing access to a child's custodial parent(s) from the time of the child's removal. However, as discussed above, s. 55 does not permit access orders before an interim order has been made. Further, the Provincial Court does not have the jurisdiction to grant orders that are not authorized by the *CFCSA*. This means that where the parties cannot reach an agreement about access during this period, there is **no available remedy** in Provincial Court. This gap in the legislation is especially problematic in cases where there are delays in concluding the presentation hearing stage.

In *L.S.*, the BC Supreme Court confirmed that it has the ***parens patriae* jurisdiction** to fill the *CFCSA*'s gap and grant an access order before an interim order has been made.

SPOTLIGHT ON CASE LAW
L.S.[120]

L.S. is a precedent-setting case in which the BC Supreme Court exercised its *parens patriae* jurisdiction to grant an access order to a breastfeeding mother before there was an interim order in place.

The Indigenous mother's contested presentation hearing had been subject to numerous scheduling delays and was scheduled to take place 66 days after the child's removal.[121] At the time of the application, the mother was only receiving "limited" weekday access and no access at all on the weekends.[122]

The Supreme Court agreed with the mother that there is a legislative gap under the *CFCSA* that prevented her from seeking an access order in Provincial Court, and that the Supreme Court has the *parens patriae* jurisdiction to fill it.[123] The Court further found that the current access was not in the child's best interests and thus granted an access order.

See **Appendix C** for template court documents for obtaining an access order in Supreme Court.

E. CHANGES TO ACCESS ORDERS UNDER S. 57 OF THE *CFCSA*

Section 57 of the *CFCSA* authorizes changes to access orders under ss. 55 or 56.

Pursuant to s. 57(1)(c), any party to a child and family services proceeding (including the Director) may apply to the court to change an access order. The court has the discretion to change the access order where the applicant establishes that both of the following conditions are met: [124]

(a) **There has been a significant change in circumstances**. The meaning of a significant change of circumstances has received little judicial attention. Many applicants may be able to meet this threshold through establishing a significant change in their *own* circumstances (such as where a parent is taking steps to address the Director's protection concerns). As well, in *B.C. (Director of Family and Child Services) v. B.(B.)*, 2002 BCPC 65 ("*B.(B.)*"), the court suggested that s. 57 may at times permit changes to an access order in the absence of a significant change of circumstances.[125]

(b) **The change would be in the child's best interests.** In cases involving an Indigenous child, the test must use the *Federal Act*'s definition of the best interests of an Indigenous child.

SPOTLIGHT ON CASE LAW:
Baker[126] **and** ***B.(B.)***[127]

In *Baker*, the court did not specify the legislative provision under which the mother sought to define her access. However, it appears as though the court did not decide the application under s. 57. With respect to the nature of the mother's application, the court observed (emphasis added): "In this case an order for access was made so the only reasonable interpretation is that the Mother has a right to access limited to the Director having discretion to supervise such access. **This application therefore is not a new application for access. It is an application to define access**."[128]

In *B.(B.)*, the mother applied under s. 55 to define her access under the standard access order.[129] However, the Director argued, and the court agreed, that **the application should be decided under s. 57**.[130] As a threshold issue, the court determined that the mother had not established a significant change of circumstances.[131] However, the court also observed that **s. 57 is permissive in its construction and thus permits changes to an access order in the absence of a significant change of circumstances.**[132] In these cases, the court may change an access order where there is an exceptional circumstance or where the Director has improperly exercised their discretion under the order (meaning that the Director has acted in a manner that is "biased or capricious," or "based on erroneous information").[133]

Baker was decided in 1997 and *B.(B.)* was decided in 2002. Since then, there has not been subsequent judicial consideration of whether an application to define access under the standard access order must be sought under s. 57. Further, there has not been subsequent judicial consideration of whether s. 57 permits a standard access order to be changed in the absence of a significant change in circumstances.

i. Defining access under the standard access order

When a parent seeks to define access under a standard access order, there is a lack of clarity in the case law about whether they must apply under s. 57 to do so. This question is important because of s. 57's requirement of a significant change of circumstances (note: *B.(B.)* suggests some narrow exceptions to this requirement).

ii. The importance of a non-technical approach

ADVOCACY TIP
In practice, parent's counsel report that they do not tend to rely on s. 57 when applying to define access under the standard access order, and that the Director does not tend to take a technical approach to these applications.

A non-technical approach to defining access under the standard access order is appropriate and reflects the interests at stake. Given the ubiquity of the standard access order, it is important to ensure that there is a remedy where the standard access order does not result in reasonable access and there has not been a significant change in circumstances. In the case of an Indigenous child, permitting defined access orders in these circumstances may also be required under the *Federal Act*'s minimum standards.

iii. Changes to access orders in the post-CCO context

The Director may apply under s. 57 to change an access order because of a change of circumstances arising from the post-CCO context. For example, the Director may apply to cancel a s. 56 access order that would hamper or jeopardize an impending adoption. However, mere planning around an adoption may not meet the threshold of a significant change of circumstances.[134]

iv. Forms of applications under s. 57- s. 57(2)

Section 57 of the *CFCSA*, read together with Rule 1(3) of the *CFCSA Rules*, requires a written application (in Form 3) to be served on prescribed persons at least 10 days before the application hearing. Subsection 57(2) sets out the persons who must be served with the application. They include:

- the Director;
- the child (if 12 years of age or older);
- the persons who were entitled to notice of the presentation hearing under s. 34(3)(b), (d), (e), and (f) (if the application takes place prior to the protection hearing) **OR** the persons who were entitled to notice of the protection hearing under s. 39 (if the application takes place after the protection hearing and prior to a continuing custody or permanent transfer of custody hearing) **OR** the persons who were entitled to notice of the continuing custody hearing under s. 49(3) or the permanent transfer of custody hearing under s. 54.01(4) (if the application takes place after a continuing custody or permanent transfer of custody hearing).

Rule 6 of the *CFCSA Rules* sets out detailed requirements for effecting service.[135]

While parent's counsel should seek to comply with the procedural requirements outlined above, these requirements should not act as a bar to addressing the issue of access at an existing court hearing. Rule 1(4) of the *CFCSA Rules* provides judges with the discretion to permit an application to "be made orally in court, without the filing of a form."[136]

See **Appendix C** for a template variation application under s. 57.

To be effective advocates, parent's counsel must be alert to and vigorously push back against biased assumptions about the best interests of a child. In the case of an Indigenous child, this includes rejecting false dichotomies between protecting the child and preserving their Indigenous culture.

F. BEST INTERESTS OF THE CHILD IN ACCESS APPLICATIONS

As discussed above, all access applications require consideration of the child's best interests. The *CFCSA*'s definition will apply to applications involving a non-Indigenous child, whereas the *Federal Act*'s definition will apply to applications involving an Indigenous child.

The *CFCSA* defines the best interests of a child as follows:[137]

> **4** (1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:
>
> (a) the child's safety;
>
> (b) the child's physical and emotional needs and level of development;
>
> (c) the importance of continuity in the child's care;
>
> (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
>
> (e) the child's cultural, racial, linguistic and religious heritage;
>
> (f) the child's views;
>
> (g) the effect on the child if there is delay in making a decision.
>
> (2) If the child is an Indigenous child, in addition to the relevant factors that must be considered under subsection (1), the following factors must be considered in determining the child's best interests:
>
> (a) the importance of the child being able to learn about and practise the child's Indigenous traditions, customs and language;
>
> (b) the importance of the child belonging to the child's Indigenous community.

The *Federal Act*, on the other hand, defines the best interests of an Indigenous child as follows:[138]

> **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.
>
> **Marginal note: 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.
>
> **Marginal note: 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.

Marginal note: 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.

The *Federal Act*'s definition of the best interests of an Indigenous child must be applied in access applications involving Indigenous children because it is more robust than the *CFCSA*'s definition.[139]

Moreover, it establishes a different analytical framework. While the factors listed in the *CFCSA's* definition are provided as "examples" of the relevant considerations in a best interests analysis, the factors listed in s. 10(3) of the *Federal Act* are specific categories that must be addressed by the Court.[140]

v. Pushing back against bias

The best interests of the child analysis- whether informed by the legal definition in the *CFCSA* or the *Federal Act*- remains susceptible to bias. This is in part because the people who are tasked with interpreting and applying these legal definitions- such as judges, lawyers, and social workers- often carry "common sense" assumptions that are rooted in Eurocentric, middle class, and ableist worldviews.

To be effective advocates, parent's counsel must be alert to and vigorously push back against biased assumptions about the best interests of a child. In the case of an Indigenous child, this includes rejecting false dichotomies between protecting the child and preserving their Indigenous culture.[141] As observed by the WoW Guidebook: "Culture and cultural connection have a profoundly protective role in the lives of Indigenous children."[142]

vi. Protecting attachments between infants and their parents

The courts have recognized that an important consideration in the best interests of the child analysis is the ability of an infant to bond with their birth parent and breastfeed (if there is a breastfeeding relationship).

As discussed above, in *L.S.*, the Indigenous mother of a newborn applied to the BC Supreme Court seeking an access order that would allow her to continue breastfeeding her child.[143] The Court agreed with the parties that it was in the child's best interests to be breastfed.[144] It thus exercised its *parens patriae* jurisdiction to make an access order that would ensure that "breastfeeding is not interrupted and that the maternal bond is unharmed."[145]

In a Joint Special Report by the Representative for Children and Youth and MCFD, the two agencies applied a rights-based lens to recognize the importance of protecting attachments between infant children and their parents, including through supporting breastfeeding relationships and access to breastmilk.[146] As part of its work on this report, MCFD agreed to implement a number of policy changes, including the creation of guidelines for social workers to promote breast-feeding in circumstances in which infants have been removed.[147]

vii. Access needs do not diminish with age

While the importance of access in relation to infant children has received special attention by courts and policymakers, access needs do not diminish with age. With respect to Indigenous children, the BC Supreme Court has observed:[148]

> [85] The message of the Indigenous survivors of the child and family services system in [the *Brown* class action], and reflected in the *Federal Act*, is that 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. The *Federal Act* recognizes that protecting the BIOIC requires protecting an Indigenous child's cultural connections and their attachments and relationships to their extended family, community and territory.
>
> [86] The direction of the *Federal Act* is that stability for Indigenous children is not found in prioritizing attachment to non-Indigenous caregivers, over an Indigenous child's connection to their culture, extended family, territory and community. Instead, that it is necessary to provide child and family services to Indigenous children in ways which preserve and protect their Indigenous cultural attachments.

G. THE APPLICATION OF THE *FEDERAL ACT* TO THE *CFCSA*'S ACCESS REGIME

The *Federal Act* applies to all decision-making around access in relation to an Indigenous child. In particular, courts must interpret and apply the *CFCSA*'s access provisions in ways that are consistent with the *Federal Act*. The aspects of the *Federal Act* that may be most relevant to supporting a parent's position on access are described below.

i. Preamble and purpose section- s. 8

The *Federal Act* has a lengthy preamble that addresses the historical and social context giving rise to the legislation, including the intergenerational harms of residential schools and colonial child and family services systems.[149] In *J.W. v. British Columbia (Director of Child, Family and Community Service)*, 2023 BCSC 512, Justice Walkem observed that the *Federal Act*, as well as the courts' jurisprudence, requires consideration of such context when interpreting and applying the *CFCSA* and the *Federal Act*.[150]

Following its preamble, the *Federal Act* goes on to define its purposes as:

> (a) affirming **inherent Indigenous jurisdiction** over child and family services matters;
>
> (b) establishing **national minimum standards** for child and family services in relation to Indigenous children; and

(c) contributing to the **implementation of *UNDRIP.***[151]

ii. Guiding principles and service delivery principles- ss. 9 and 11

The *Federal Act*'s **guiding principles** are the best interests of the child,[152] cultural continuity,[153] and substantive equality.[154]

Cultural continuity is of particular relevance to the issue of access. According to s. 9(2) of the *Federal Act*, the principle of **cultural continuity** "is reflected in" concepts including:

> (a) cultural continuity is essential to the well-being of a child, a family and an Indigenous group, community or people;
>
> (b) the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity;
>
> (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;
>
> (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
>
> (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.

The *Federal Act*'s **service delivery principles** are set out in s. 11, which states that child and family services must be provided in a manner that:[155]

> (a) takes into account the child's needs, including with respect to his or her physical, emotional and psychological safety, security and well-being;
>
> (b) takes into account the child's culture;
>
> (c) allows the child to know his or her family origins; and
>
> (d) promotes substantive equality between the child and other children.

iii. Best interests of a child- s. 10

Pursuant to s. 10(1) of the *Federal Act*, the best interests of an Indigenous child must be a "primary consideration" in any decision or action in relation to an Indigenous child under the *CFCSA*, and the "paramount consideration" in any decision or action related to the removal of an Indigenous child under the *CFCSA*.

As discussed above, the *Federal Act*'s definition of the best interests of an Indigenous child should be applied to any access application involving an Indigenous child, including in relation to the terms and conditions on access orders.

iv. Attachment and emotional ties- s. 17

Section 17 of the *Federal Act* provides that:

> **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.

There is a clear intersection between the issue of access and the state's obligation under s. 17 of the *Federal Act* to promote an Indigenous child's attachments and emotional ties.[156] It is also important to note the ongoing nature of this obligation, meaning that it continues to apply after a CCO has been made.

H. OTHER RELEVANT LAWS AND POLICIES

In addition to the *Federal Act*, there are other laws and policies that parent's counsel can invoke to inform the interpretation and application of ss. 55, 56, and 57 of the *CFCSA*, as well as the BC Supreme Court's jurisdiction to grant access orders.

i. The *CFCSA*'s guiding and service delivery principles- ss. 2 and 3

While the *CFCSA* does not contain a purpose clause, it sets out guiding principles with respect to the interpretation and administration of the *Act* (s. 2), as well as service delivery principles (s. 3).[157]

The guiding principles under s. 2 are not merely an interpretive aid in court applications- rather, they are principles of positive law that must guide the consideration of the legal issues.[158] The paramount considerations under s. 2 are the "safety and well-being of children." Of course, like definitions of the best interests of a child, the meaning of "the safety and well-being of children" is susceptible to **cultural bias**. Parent's counsel must therefore guard against the invocation of the guiding principles to support a Eurocentric approach to the legal issues.

For ease of reference, the *CFCSA*'s guiding principles and service delivery principles are reproduced below.

We have bolded the principles that may be most relevant to supporting a parent's position on access, as well as collaborative planning around access that includes Indigenous communities.

Guiding principles

2 This Act must be interpreted and administered so that the **safety and well-being of children are the paramount considerations** and in accordance with the following principles:

(a) children are entitled to be protected from abuse, neglect and harm or threat of harm;

(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;

(b.1) Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;

(c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

(d) the child's views should be taken into account when decisions relating to a child are made;

(e) kinship ties and a child's attachment to the extended family should be preserved if possible;

(f) Indigenous children are entitled to

(i) learn about and practise their Indigenous traditions, customs and languages, and

(ii) belong to their Indigenous communities;

(g) decisions relating to children should be made and implemented in a timely manner.

Service delivery principles

3 The following principles apply to the provision of services under this Act:

(a) families and children should be informed of the services available to them and encouraged to participate in decisions that affect them;

(b) in the planning and delivery of services to Indigenous children and families, there should be consultation and cooperation with Indigenous peoples and Indigenous governing bodies;

(b.1) services should be planned and provided in ways that prevent discrimination prohibited by the Human Rights Code and that promote substantive equality, respect for rights and culture and, in the case of Indigenous children, cultural continuity;

(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;

(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;

(d) services should be integrated, wherever possible and appropriate, with services provided by government ministries, community agencies and Community Living British Columbia established under the *Community Living Authority Act*;

(d.1) services to Indigenous children and families should be provided in a coordinated manner with Indigenous child and family services provided by Indigenous authorities;

(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.

Alignment of the *CFCSA* and the *Federal Act*

Sections 3 (b.1) and (d.1) were added to the *CFCSA* in 2022 as part of a package of amendments that sought to align the *CFCSA* with the *Federal Act*.[159]

The Provincial Court has observed that the guiding principles in s. 2 of the *CFCSA* are consistent with the purposes and principles set out in ss. 8 and 9 of the *Federal Act*.[160] The Provincial Court has also observed that the service delivery principles in s. 3 of the *CFCSA* are consistent with those set out in s. 11 of the *Federal Act*.[161]

ii. MCFD's policies and procedures

MCFD's Policy Manual sets out processes and procedures to support social workers in carrying out their powers and duties under the *CFCSA*.

MCFD's policies provide important **information** about MCFD's approach to access. However, while policies may be used as evidence in a contested access application hearing, they are ***not*** **binding** on courts when making decisions about access.[162]

Chapter 5, Policy 5.3

Chapter 5, entitled Children & Youth in Care Policies, addresses issues related to the care of children who have been removed from their custodial parent(s).[163]

With respect to access, here are some relevant excerpts from Policy 5.3:[164]

Promoting Continuity and Stability for the Child/Youth

- Promote and support opportunities for the child/youth to develop and maintain emotional attachments with their parents, siblings, extended family and others who are significant in their life.
- Whenever possible, develop an out-of-care living arrangement that will provide the opportunity for the child/youth to maintain and develop lifelong relationships with extended family or other individuals who have a relationship with or a cultural or traditional responsibility to the child/youth, including the following options:
    - Extended Family Program Agreement;
    - Interim or temporary out-of-care order: placement with a person other than the parent under the Director's supervision under section 35(2)(d) or section 41(1)(b) of the *CFCSA*;
- When deciding about visitation and access to the child/youth, consider their best interests, including attachment and continuity of relationships, as well as belonging to their Indigenous community for Indigenous children and youth.
- Regularly review access orders or provisions for access to determine whether the arrangement is consistent with the child/youth's wishes and best interests.
- Inform and involve the caregiver in developing and implementing strategies to promote the child/youth's stability and continuity of lifelong relationships, as well as belonging to their Indigenous community for Indigenous children and youth.
- Make every effort to prevent unnecessary delays in decision making and implementation of court orders and agreements.

Policy 1.1- Working with Indigenous Children, Youth, Families and Communities under the CFCSA

MCFD's Policy 1.1 discusses the ways in which the *Federal Act* modifies the Director's powers and duties under the *CFCSA*.[165] With respect to access, Policy 1.1 draws a direct connection between access arrangements and s. 17 of the *Federal Act*:[166]

> **11. Promoting the child/youth's attachment and emotional ties to family when separated (*Federal Act* s. 17)**
>
> (a) Where a child/youth has not been placed with one of their parents or another adult member of their family, promote their attachment and emotional ties to each such member of their family if consistent with the child/youth's best interests. Document the planning for involvement of each member of the family.

The relevant procedures under Policy 1.1 are:[167]

> **13. Promoting the child's attachment and emotional ties to family when separated.**
>
> (a) Develop a plan to promote the child/youth's attachment and emotional ties to family members when separated, including but not limited to:
>
> i. visitation and access;
>
> ii. role of the caregiver in promoting attachment and emotional ties through supporting ongoing contact with family members; and
>
> iii. promoting attachment and emotional ties through changes in placement and transitioning out of care.

iii. BC's Human Rights Code

BC's *Human Rights Code* (the "*Code*") is relevant to issues of access in two ways.

- First, **a parent can bring a human rights complaint** before the Human Rights Tribunal (the BCHRT) to address discriminatory decision-making in relation to access. It should be noted that human rights complaints in this context are rare, resource intensive, and can take years to resolve.
- Second, **a parent can invoke the *Code* within child and family services proceedings** to enforce their entitlement to non-discriminatory services under s. 3 of the *CFCSA* and s. 11(d) of the *Federal Act.* This is a more accessible means of accessing the *Code's* protections.

Bringing a complaint before the BCHRT

The BCHRT has jurisdiction over child and family services pursuant to s. 8 of the *Code*, which prohibits discrimination in the provision of services to the public.[168] Its jurisdiction is concurrent with that of the Provincial Court. More specifically:

- The Provincial Court has jurisdiction over determining whether a child needs protection and making orders about the child's care; and
- The BCHRT has concurrent jurisdiction to determine whether services provided under the *CFCSA* were discriminatory and, if so, to order remedies to address the discrimination.[169]

The meaning of discrimination in the context of child and family services is in flux.

SPOTLIGHT ON CASE LAW
RR v. Vancouver Aboriginal Child and Family Services Society (No. 6), 2022 BCHRT 116 (*"R.R.-BCHRT"*).

R.R.'s complaint is an important examination of how the colonial legal system engages with Indigenous parents and their human rights. In this case, the BCHRT held that the Vancouver Aboriginal Child and Family Services Society discriminated against an Afro-Indigenous mother by restricting her access to her children based on stereotypical reasoning about her parenting capacity.[170]

However, on judicial review, the BC Supreme Court held that the BCHRT had erred by applying a test for discrimination that did not uphold "the child-centred approach of the *CFCSA*."[171] Such an approach, according to the Court, "accommodates a substantial degree of differential treatment" to achieve its goal of protecting children.[172] In other words, where a Director's risk assessment about access is made in "good faith," it cannot be discriminatory, "even if it engages stereotypical reasoning and escalating assertions of power and control."[173]

The complainant appealed the Supreme Court's decision to the BC Court of Appeal. The Court of Appeal heard the appeal in December 2024 and has not yet released its judgment.

Invoking the *Code* within a child and family services proceeding

A more accessible means of accessing the *Code*'s protections is through invoking the *Code* within a child and family services proceeding, including in support of an access application.

Section 3(b.1) of the *CFCSA* requires that services "be planned and provided in ways that prevent discrimination prohibited by the *Human Rights Code* and that promote substantive equality, respect for rights and culture and, in the case of Indigenous children, cultural continuity." Moreover, s. 11(d) of the *Federal Act* requires that services in relation to an Indigenous child be provided in a manner that "promotes substantive equality between the child and other children."[174] Pursuant to these overlapping service delivery principles, parent's counsel can make legal arguments that discriminatory decision-making in relation to access is a direct contravention of the *CFCSA* and/or the *Federal Act*.

iv. The *Charter*

Courts have long recognized that state intervention in a parent-child relationship engages the *Charter* rights of both parents and children.[175] However, the use of the *Charter* in this context has been rare, including because of the Provincial Court's limited jurisdiction to grant *Charter* remedies.[176] This section will address two ways in which parent's counsel can use the *Charter* within Provincial Court proceedings and in support of access applications:

- First, parent's counsel can invoke *Charter* rights as an interpretive tool.[177]
- Second, parent's counsel can ask the court to exercise its "essential oversight role" over the Director's conduct as it relates to the *Charter* rights of parents and children.[178]

Later in the Toolkit, we will also address the Provincial Court's jurisdiction to award *Charter* costs in relation to non-compliance with access orders.

The relevant *Charter* rights

Two rights that are generally relevant to issues of access are ss. 7 and 15 of the *Charter*.

Section 7 of the *Charter* provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

State intervention in a parent-child relationship engages the s. 7 interests of both the parent and child. As observed by the Supreme Court of Canada in *K.L.W.*, the "mutual bond of love and support between parents and their children is a crucial one and deserves great respect" and "unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child."[179]

ADVOCACY TIP

Given the s. 7 interests at stake, the Director's decisions and actions in relation to access must be in accordance with the principles of fundamental justice, including procedural fairness[180] and the principles against arbitrariness and overbreadth.

Section 15(1) of the *Charter* further provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In a concurring decision in *New Brunswick (Minister of Health and Community Services v. G.(J.)*.,

the Supreme Court of Canada highlighted **the intersection of s. 7 and s. 15 rights in child and family services cases:**

> 113. This case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings...
>
> 114. As well as affecting women in particular, issues of fairness in child protection hearings also have particular importance for the interests of women and men who are members of other disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people, and the disabled. As noted by the United States Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982), at p. 763:
>
> > Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups. . . such proceedings are often vulnerable to judgments based on cultural or class bias.
>
> Similarly, Professors Cossman and Rogerson note that "The parents in child protection cases are typically the most disadvantaged and vulnerable within the family law system...."

More recently, the Ontario Court of Appeal called on courts to be "mindful of the reality and material circumstances" of parents when considering issues of procedural fairness, observing:[181]

> [69] Poverty and other forms of marginalization form part of the experience of many parents involved in child protection proceedings. If we do not face up to this reality we risk forgetting the hard-learned lessons of the past by exacerbating pre-existing inequities and harms. The miscarriages of justice outlined in the *Report of the Motherisk Commission* (2018: Ontario Ministry of the Attorney General) speak, by way of example, to the significant imbalance between parents and Children's Aid Societies, noting that parents, even when represented by counsel, were "simply overpowered" (at p. 121). Fairness in the child protection context demands recognition of these dynamics.

Parent's counsel can use the *Charter* as an interpretive tool

Parent's counsel can invoke *Charter* rights when making submissions about the proper interpretation of legislation or the development of the common law in relation to access.

In *British Columbia (Director of Child, Family & Community Service) v. O.*, 2009 BCSC 1370 ("the *O. Decision*"), the Supreme Court considered s. 7 of the *Charter* when deciding on the legal test to be applied to applications under s. 17 of the *CFCSA*.[182] More specifically, when considering the scope of the legal authority to grant court orders in aid of MCFD investigations, the court considered the potential harms to families arising from state intrusion during those investigations.

In *British Columbia (Director of Child, Family and Community Service) v D.O.S.*, 2022 BCSC 168, the appellant relied upon the *O. Decision* to argue that s. 48 of the *CFCSA* should be interpreted in accordance with the Supreme Court of Canada's *Charter* jurisprudence (namely, its decision in *K.L.W.*).[183] While the Supreme Court expressly confirmed that the *CFCSA* should be interpreted in accordance with *Charter* values, it went on to caution that those "abstract values cannot override the plain language and structure of a statute."[184]

Parent's counsel can ask the court to exercise its oversight role over the Director's actions

The Supreme Court of Canada has confirmed

that the court has an "essential oversight role" throughout child welfare proceedings to ensure the *Charter* rights of parents and children.[185] This oversight role, "with its attendant checks and balances," may require the court to consider the Director's actions or misconduct.[186] For example, in *B.J.T. v. J.D.*, 2022 SCC 24, the trial judge did **not err** by observing, as part of the best interests of the child analysis, that the director had overheld the child and thus lacked the jurisdiction to direct his care and transfer him to a different province.[187] This led the trial judge to place less emphasis on the child's *status quo* that had arisen as a result of the Director's actions (i.e., living with his father instead of his grandmother).

Accordingly, parent's counsel can invoke *Charter* rights when asking the court to exercise oversight over the Director's decision-making in relation to access. For example, parent's counsel could raise s. 7 of the *Charter*- and the harms to the parent-relationship- when asking the Court to exercise oversight over the Director's non-compliance with an access order. Parent's counsel could also raise s. 15 of the *Charter* to highlight the parent's vulnerabilities in relation to the access dispute.

v. The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*

UNDRIP is an international instrument that protects **the individual and collective rights** of Indigenous peoples of the world. It was ratified by Canada without qualification in 2016.[188] The inherent rights of Indigenous peoples enshrined in *UNDRIP* include the rights of Indigenous children to equality and freedom from discrimination, as well as to belong to their Indigenous community or nation and to practice their culture.

Both Canada and BC have passed legislation respecting the implementation of *UNDRIP* within their respective jurisdictions.[189] In the child and family services realm, Canada has sought to contribute to the implementation of *UNDRIP* through the enactment of the *Federal Act*.[190] BC is separately required under its *Declaration on the Rights of Indigenous Peoples Act* to bring all provincial laws, including the *CFCSA*, into alignment with *UNDRIP* through consulting and cooperating with Indigenous Peoples. The Supreme Court of Canada has described such steps as being part of a process of "legislative reconciliation."[191]

UNDRIP is a source of positive law that must guide the interpretation and application of the _CFCSA_ and _Federal Act_.[192]

This is illustrated by a growing number of cases where courts and human rights tribunals have considered *UNDRIP* when making decisions affecting the rights and interests of Indigenous children.[193]

UNDRIP Articles that may be especially relevant to access issues include:[194]

- **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.

Looking at the implications of *UNDRIP* as a whole, the WoW Guidebook observes:

> 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.** [Emphasis added].

vi. *Convention on the Rights of the Child (CRC)*

The *CRC*, which was ratified by Canada in 1991, recognizes the human rights of children, as well as their special vulnerability and corresponding need for protection.[195] While Canada has not expressly incorporated the *CRC* into domestic law, courts and human rights tribunals have long used the *CRC* as an **interpretive aid** when making decisions that affect the rights and interests of children.[196] The *CRC*- while sometimes overlooked in child and family services proceedings- is thus an important advocacy and decision-making tool.[197]

In broad strokes, children's rights under the *CRC* include the right to survival; to develop to the fullest; to be protected from abuse and exploitation; and to participate fully in family, cultural and social life.[198] States that have ratified the *CRC* have committed themselves to protecting and ensuring children's rights in a manner that is consistent with the best interests of the child.[199] With respect to realizing Indigenous children's rights, the *CRC*'s monitoring body (the *CRC* Committee) has stressed the importance of culturally appropriate social services.[200]

CRC Articles that may be especially relevant to access in *CFCSA* matters include:

- **Article 5:** States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.
- **Article 8(1):** States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
- **Article 9(3):** States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
- **Articles 20(1) and 20(3):** A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State…[in providing a child with alternative care], due regard 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:** In those States in which ethnic, religious or linguistic minorities or persons of Indigenous origin exist, a child belonging to such a minority or who is Indigenous 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 practise his or her own religion, or to use his or her own language.

As well, parent's counsel should be attentive to **Article 12** of the *CRC*, which supports the right of a child to be heard in a child and family services proceeding and to have their views on access be given appropriate weight. This right is reflected in **s. 70** of the ***CFCSA***, which describes the rights of children in care, including the right "to be consulted and express their views, according to their abilities, about significant decisions affecting them."[201]

I. OPTIONS FOR ADDRESSING NON-COMPLIANCE WITH ACCESS ORDERS

The *CFCSA* does not contain a robust enforcement mechanism for access orders. However, there are several pathways that could address situations where the Director does not provide reasonable access under the standard access order or otherwise does not comply with an access order.

vii. Apply for a new access order

Applying for a new access order is a common means of *indirectly* enforcing an existing access order. As discussed above, where **parent's counsel** is seeking to define access in the context of an existing standard access order, this may require an application under s. 57.

viii. Prevent the Director from suspending access without a s. 57 application

Where **the Director** seeks to suspend access in the context of an existing access order, the Director may be required to change the order under s. 57. As discussed above, *Baker* stands for the proposition that the Director does not have the discretion under the standard access order to outright deny access to the access holder.[202] The Director typically has even less discretion to deny access under a defined access order.

Clarifying the circumstances in which the Director must apply to change an access order will improve accountability around the implementation of access orders. This is because s. 57 applications require the Director to prove a significant change of circumstances and that the proposed change is in the child's best interests. On a more intangible level, the need to bring a court application engages Director's counsel and this additional oversight may help the parties to resolve or narrow the access issues in dispute.

ADVOCACY TIP

Parent's counsel can play a critical role in pushing the Director to bring s. 57 applications in appropriate cases. If the Director refuses to do so while not complying with the existing access order, this can be evidence in support of a penalty under s. 102 of the *CFCSA* or *Charter* costs.

ix. Penalty under s. 102 of the *CFCSA*

Under s. 102 of the *CFCSA*, a person who "contravenes" an access order under ss. 55 or 56 commits an offence and is liable to a fine of up to $10,000 and/or imprisonment of up to 6 months.[203] The meaning and application of this provision has received little judicial attention. The Provincial Court has confirmed in *obiter* that a party could bring an application under s. 102 as a means of enforcing an access order.[204]

See **Appendix C** for a template penalty application.

x. *Charter* costs

The Provincial Court has the jurisdiction to award costs in relation to *Charter* breaches by the Director that relate to the Provincial Court's ability to control its own proceedings, pursuant to s. 24(1) of the *Charter*.[205] Such jurisdiction "enhances the court's function" in administering the *CFCSA* by giving it a tool to enforce its orders and to ensure that the best

interests of the child "are at the forefront and being protected."[206]

In the precedent-setting case of *British Columbia (Child, Family and Community Service) and L.M.R. and S.F.*, 2021 BCPC 353 ("*L.M.R. and S.F.*"), the Provincial Court confirmed that it had the power to award *Charter* costs in relation to the Director's non-compliance with an access order.

SPOTLIGHT ON CASE LAW
L.M.R. and S.F.

In *L.M.R. and S.F.*, the father sought *Charter* costs after the Director denied him access to his children for nearly a year, in contravention of a standard access order granting him "reasonable access" to the children "supervised at the discretion of the Director."[207] In confirming its jurisdiction to award *Charter* costs in these circumstances, Judge Mengering observed:

> [41] The removal of a child from their parents, family, and home is one of the most intrusive things the state can do. In this case, Judge McDermick found that it was not contrary to the best interests of the S.F./L.M.R.'s children to maintain contact with their parents, and accordingly, he made a s. 55 Access Order in favour of the father. Judicial oversight of that order is essential to the court's role in making orders for the protection of children taking into account the children's best interests (*J.R.A.*, para 86). To say that the court does not benefit from an implied authority to do so ignores the interest this society has in protecting children and fostering their relationship with their parents and extended family, even while in the care of the state.

See **Appendix C** for a template *Charter* costs application.

xi. Complaints and administrative reviews

A Director's actions and decision-making under the *CFCSA*, including with respect to an access order, are subject to an internal complaints management process. There are two streams within this process: "complaints resolution" and "administrative review." Section 101.1 of the *CFCSA* protects complainants against retaliation.

Bringing a complaint

Anyone who receives services under the *CFCSA* is entitled to make a complaint.[208] Complaints will generally be accepted where they concern a Director's actions or decision-making under the *CFCSA* and where the complaint is not eligible to be addressed through a different review process.[209] The complainant has the choice between participating in the complaints resolution process or requesting an administrative review.[210] Most complaints are addressed through the more informal complaints resolution process.[211]

ADVOCACY TIP
Parent's counsel should generally make a written complaint on behalf of their client and address it to Director's counsel. The letter should contain sufficient contextual information to ground the complaint, as well as clearly identify the decisions, actions, or lack of action that is at issue. It should also include supporting documentation. Parent's counsel will often opt to indicate in their initial complaint letter whether they want the complaint to be addressed through the complaints resolution or administrative review process.

The complaints resolution process supports the complainant and their social workers to communicate and work together to resolve the complaint.[212] It must conclude within 30 days unless the complainant and their social workers agree to an extension of time.[213] At any time during the complaints resolution process, the complainant may opt to switch to the administrative review stream.[214] The complainant may also request an administrative review at the conclusion of the complaints resolution process.[215]

The administrative review process is implemented by MCFD's Quality Assurance Branch (QAB).[216] A designated person (called a "review authority") considers the complaint and provides a written decision containing their conclusions, recommendations, and reasons.[217] Like the complaints resolution process, the administrative review process must conclude within 30 days unless the complainant and the review authority agree to an extension.[218]

An administrative review decision (including a review authority's failure to render a decision) is subject to **judicial review** by the Supreme Court.[219] A judicial review of an administrative review decision is a novel way to invoke the Supreme Court's oversight of the Director's exercise of discretion around access. However, we could not locate case law in which a court judicially reviewed a substantive administrative review decision.

J. APPEALS OF ACCESS ORDERS

Appeals, where appropriate, are an important advocacy tool. Not only do they provide the client with additional court oversight, but they also help to build and evolve the jurisprudence on access. There is currently a limited body of access law on the strength and scope of access rights under the *CFCSA*, especially where the *Federal Act* also applies. The current state of the law on post-CCO access, in particular, requires appellate-level clarification.

xii. Appeals of trial decisions to the BC Supreme Court

A parent has a statutory right to appeal an order of the Provincial Court to the Supreme Court under s. 81 of the *CFCSA*. This statutory right of appeal applies equally to interim and final orders.[220] After hearing the appeal, the Supreme Court can either confirm or set aside the Provincial Court's order.[221] Where it sets aside the Provincial Court's order, the Supreme Court can either make any order that the Provincial Court could have made or direct the Provincial Court to conduct a new hearing.[222]

Procedure and time limits

The time limit for filing the notice of appeal is 30 days from the date of Provincial Court order.[223] However, on application, the Supreme Court has the discretion to extend this time limit.[224]

Rule 18 of *BC Supreme Court Rules* applies to appeals under s. 81 of the *CFCSA*.[225] To bring an appeal, the parent must file a notice of appeal (in Form 73) with the Supreme Court and serve a copy of the notice of appeal on all the parties to the proceeding in which the order was made.[226] The notice of appeal must include an application for directions as to the conduct of the appeal.[227] (This application is embedded in Form 73.) The application for directions must be scheduled at least 7 days after the date on which the notice of appeal will be served.[228]

The standard of review

When hearing appeals, the Supreme Court accords significant deference to the trial judge. The BC Supreme Court recently summarized the applicable **standard of review** as follows:[229]

> **18** There is no dispute about the applicable standard of review. On a question of law, it is correctness. On a question of fact or of mixed fact and law where a legal standard is applied to a set of facts, it is palpable

and overriding error, applied on a sliding scale with more deference accorded to the extent that the alleged error is more one of fact: *Director of Child, Family & Community Service v. A.M.*, 2007 BCSC 1039 at paras. 23-25, aff'd 2008 BCCA 178. In child custody and child protection matters, an appellate court is especially deferential because of the "polymorphous, fact-based, and highly discretionary nature of such determinations": *B.J.T. v. J.D.*, 2022 SCC 24 at paras. 56 and 58.

Questions of law

A correctness standard will apply where the appellant can establish that the trial judge was mistaken or misdirected about the law or legal principles to be applied. This includes:

- failing to identify the applicable legal test,
- failing to apply the legal test,
- failing to apply relevant common law principles, and/or
- failing to apply the *Federal Act* or to recognize the *Federal Act's* paramountcy over the *CFCSA* in areas of inconsistency.

SPOTLIGHT ON CASE LAW
A.M, A.B.M.,* and *Housen v Nikolaisen

Failing to apply the correct legal test and relevant common law principles may constitute an error of law. In *Director of Child, Family and Community Service v. A.M.*, 2008 BCCA 178 ("*A.M.*"), the BC Court of Appeal considered a Provincial Court decision on an application to cancel a parent's post-CCO access.[230] The Court of Appeal confirmed that the trial judge had erred in law by neither applying the best interests of the child principles under s. 4 of the *CFCSA* nor the relevant common law principles.[231]

A.B.M. v. British Columbia (Director of Child, Family and Community Service), 2024 BCSC 312 ("*A.B.M.*"), is another case in which the BC Supreme Court considered a Provincial Court decision on an application to cancel a parent's post-CCO access.[232] The Court cited *A.M.* in finding that a failure to apply the principles from the *Federal Act*, or a failure to recognize the *Federal Act*'s paramountcy over the *CFCSA* in an area of inconsistency, would constitute an error of law attracting a correctness standard.[233]

A trial judge also commits an error of law where they correctly identify the applicable legal test, but do not proceed to apply that test. As explained by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33:[234]

> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Questions of fact or of mixed fact and law

The standard of "palpable and overriding error" applies to errors of fact and of mixed fact and law. To meet this standard, the appellant must establish that the trial judge was "clearly wrong," and that the error affected the result.[235]

This threshold may be met where the appellate court can explain why or in what respect a finding is unreasonable or unsupported by the evidence.[236]

xiii. Appeals of BC Supreme Court appeal decisions to the BC Court of Appeal

An appeal decision by the Supreme Court may only be appealed to the Court of Appeal in limited circumstances, pursuant to s. 82 of the *CFCSA*. More specifically, an appeal requires leave by the Court of Appeal and **must be restricted to questions of law**.[237]

Procedure and time limits

The *Court of Appeal Rules* set out the procedures for an appeal.[238] To initiate the appeal process, the parent must file a notice of appeal (in Form 1) and serve it on the parties to the appeal below and any other person whose interests could be affected by the relief sought.[239] The time limit for filing and serving the notice of appeal is 30 days after the date of the order under appeal.[240]

Not more than 30 days after serving the notice of appeal, the parent must also file and serve an application for leave to appeal (in Form 4).[241] The hearing of the application must be set down on a date that is at least 10 business days after the date on which the application will be served.[242]

The factors relevant to granting leave

When making a decision about whether to allow a leave application, the Court of Appeal will consider the factors set out in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.).[243] They are:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

The overriding consideration when applying this test is whether it is in the interests of justice to grant leave.[244] The threshold is low with respect to the requirements of the merits of the appeal.[245] The question is "[w]hether the applicant has identified a good arguable case of sufficient merit to warrant scrutiny by a division of this Court."[246]

Whether leave should be granted under s. 82 of the *CFCSA* also "requires consideration of the best interests of the child in accordance with s. 2 of the *CFCSA*, which provides that the 'safety and well-being of children are the paramount considerations.'"[247]

The standard of review

Where leave is granted, the Court of Appeal's standard of review when deciding an appeal is one of **correctness**. This is because the Court of Appeal only considers **errors of law** in appeals under s. 82 of the *CFCSA*.

The challenges of informal decision-making on appeal

The *CFCSA* permits Provincial Court hearings to be "as informal as a judge may allow."[248] While this informality can reduce procedural barriers to considering the interests of children and parents, it can also make appeals more challenging. This is illustrated by a recent case, *A.B.M.*, where the trial judge did not adequately explain his reasons for cancelling the parents' post-CCO access.[249]

SPOTLIGHT ON CASE LAW

A.B.M.

In *A.B.M.*, a case involving Indigenous children, the trial judge did not provide formal reasons for judgment when he cancelled the parents' post-CCO access.[250] It was thus not obvious whether the trial judge had in fact applied the correct legal principles under the *CFCSA* and the *Federal Act*.

In concluding that the trial judge had not made an error of law, the Supreme Court made a series of problematic assumptions about the trial judge's reasoning, including that:

- The trial judge would have been "very familiar" with s. 4 of the *CFCSA* and s. 10(3) of the *Federal Act* and how they apply.
- The trial judge would have been aware of the children's Indigenous background and circumstances because of his "involvement in their case through the years."
- The trial judge would have considered the ability of the adoption plan to preserve the children's community and cultural connections after the cancellation of the parents' access.[251]

The parents obtained leave to appeal the Supreme Court's decision to the Court of Appeal on grounds including that the trial judge had not applied the *Federal Act*.[252] However, the Court of Appeal did not have the opportunity to decide the appeal on its merits. In July 2024, and with the consent of the parties, the BC Court of Appeal remitted the matter to Provincial Court for rehearing.[253]

While access issues are commonly resolved through collaborative planning processes, parent's counsel must also be prepared to obtain justice for their clients through invoking judicial oversight.

CHAPTER 5

Practice Strategies for Parent's Counsel

A. OVERVIEW

Parent's counsel advocacy for their client's access to their child will be most effective if it is proactive and multifaceted. In many cases, parent's counsel will be successful at establishing meaningful access arrangements through collaborative processes and through regular contact with Director's counsel and social workers. Engaging in negotiation may also resolve access disputes faster, as the court system continues to be beset by delay. In other words, negotiation should generally be the first resort to resolve or narrow the issues in dispute.

Negotiations are more likely to be successful where parent's counsel is prepared to bring an access application or contest the Director's application for an interim, temporary, or continuing custody order.

The act of serving an access application or scheduling a contested hearing has the effect of "kicking up" negotiations with Director's counsel and will often result in an agreement about access before a hearing takes place.

This Chapter coaches parent's counsel to negotiate a **laddered approach** to access, with a focus on negotiations that take place at mediations. It also addresses strategic considerations when bringing a stand-alone access application, including the **types of evidence** that should be adduced in support of such an application and **how** that evidence should be adduced.

B. NEGOTIATION STRATEGIES

i. Preparing to negotiate access at a mediation (or other collaborative process)

Negotiations around access will often take place in the course of a collaborative planning process, such as a "Family Group Conference," mediation, or traditional decision-making process (i.e., a process informed by practices from the family's culture or community). The negotiating strategies in this section will be oriented toward a mediation, as it is common practice for parties to attend a mediation before proceeding with a contested access application. However, these strategies can be adapted and applied to other collaborative planning processes.

A mediation can take different forms and may integrate Indigenous laws and best practices. Along with the Director and the parents, a mediation will often include other participants such as the child's current caregivers, representatives from the child's Indigenous communities, and other family and community members. A mediation is an effective forum for negotiation for several reasons:

- it is a **structured process** that involves the parties' respective counsel,
- there is a **neutral third-party** mediator (albeit one who is hired and paid for by the Director), and
- Director's counsel is required to provide **disclosure in advance of the mediation**.

Given these features, parties will often schedule an initial mediation early in the child and family services proceeding, either before an interim order is made

or after an interim order has been made and before the commencement of the protection stage.

After the parties agree to attend a mediation, the Director will handle the logistical aspects of organizing the mediation, including retaining and paying for the mediator (who will be an independent contractor from MediateBC's *CFCSA* roster). While the Director will typically host the mediation at their office, other locations are possible.

Before the mediation takes place, parent's counsel should:

- reach out to Director's counsel to discuss the substantive issues in dispute, as well as procedural issues related to the mediation,
- ask Director's counsel to confirm the Director's position on access, as well as the reasons underlying that position,
- provide meaningful input into the selection of the mediator, the location of the mediation, the structure of the mediation, and who may attend,
- address the participation of the child's Indigenous community(ies), in cases involving an Indigenous child,
- talk to Director's counsel about disclosure timelines to ensure that parent's counsel will be able to review the disclosure package before the mediation takes place,
- request that disclosure include a copy of the child's current schedule (and any subsequent updates) and then review that schedule,
- where appropriate, provide a list of people whom the Director can pre-approve to act as non-professional supervisors, and
- where appropriate, prepare a list of community spaces that are accessible to the parent for unsupervised access.

Indigenous communities can play an important role in access negotiations

With the client's agreement, parent's counsel should seek to ensure the involvement of the child's Indigenous community(ies) in the mediation. An Indigenous community is generally entitled to become a party to the proceeding and, even where it is not a party, can play an important role in access negotiations. For example:

- As a preliminary matter, an Indigenous community can help to identify placements for a child with extended family or community members, who are often in a better position to support the child's relationships. [254]
- An Indigenous community can help to identify access arrangements that will maintain the child's cultural and community connections.[255] For example, they could propose regular visits with an elder or another community member who can share cultural teachings.
- The Indigenous community(ies) may be able to identify potential supervisors, community spaces where supervised or unsupervised access can take places, and community and cultural events that should be included in the access schedule.[256]

ii. Navigating supervision requirements and other resource-based constraints on access

Supervision requirements

A supervision requirement is not only highly intrusive, but it also results in resource-based constraints on the amount of access provided to a parent. This is especially the case where professional supervision is required, as professional supervision is costly and limited in its availability (especially outside of urban centres). Even where the Director permits non-professional supervision, the amount of access will be constrained by the capacity of those who volunteer to supervise.

ADVOCACY TIP

In light of resource-based constraints, parent's counsel should consider from the outset whether a supervision requirement is justified and, if so, whether it can be time limited.

Despite the issues described above, there can be **strategic reasons to agree to professional supervision** at the early stages of a child and family services proceeding. This is because a professional supervisor can provide important third-party evidence about the quality of the parent-child relationship and how access is going, including through the preparation of written supervision reports. In some cases, a **hybrid approach to supervised access**—in which some access is supervised by a professional and some access is supervised by family or community members—can help to maximize access without giving up the strategic advantages of a professional supervisor's evidence.

In anticipation of a transition to non-professional supervision, parent's counsel should prepare a list of **people who can act as non-professional supervisors**, along with their contact information. Where possible, parent's counsel should provide this list to Director's counsel before the mediation takes place, as the Director must conduct background checks on and approve non-professional supervisors. The list should include "routine" supervisors (i.e., people who are prepared to provide regular, frequent supervision, such as on a weekly basis) and "periodic" supervisors (i.e., people who are prepared to provide occasional supervision, such as on a monthly or *ad hoc* basis). The more supervisors who can be pre-approved the better, as this will reduce delay when making changes to the access schedule or adding supervised access visits. It will also minimize the cancellation of access visits when a scheduled supervisor becomes unavailable.

Parent's counsel should also review the child's existing schedule to identify events, activities, and appointments **where "indirect" supervision will be sufficient** to address the Director's safety concerns. For example, the Director may be prepared to permit a parent to attend a child's school play, basketball game, or parent-teacher conference without the accompaniment of a designated supervisor. Sometimes, a parent will not be aware of their child's existing schedule, especially when the child lives with a foster family. This is why it is important to request a copy of the child's schedule before mediation. Parent's counsel should also ask the Director to notify them, on an ongoing basis, of any changes to the child's schedule.

A less intrusive alternative to a supervision requirement is **permitting unsupervised access in public places**, often referred to as "community access." Parent's counsel should prepare a list of community spaces that are accessible to the parent and would support high quality, routine access, such as libraries, community centres, Friendship Centres, and playgrounds. Parent's counsel should also obtain schedules for routine activities that take place in community spaces, such as story times, swimming pool times, or a weekly Pow Wow night, as well as seasonal activities and special events, such as a Santa's breakfast.

ADVOCACY TIP

It is important to tease out resource-based constraints on supervised access from the Director's safety concerns. For example, where the presence of a non-professional supervisor addresses the Director's safety concerns, the only constraint on the amount of access should be the number of people who are willing to provide supervision and their respective availabilities.

Other resource-based constraints on access

Other resource-based constraints on access include:

- Parents may face financial and logistical challenges that limit their ability to travel to and from visits (especially when they do not live in the same community as the child).
- Parents may lack access to appropriate housing that would support increased access (including overnight access).

The Director should provide the parent with material supports and assistance to help overcome these barriers. However, the reality is that the Director's contributions may not be sufficient to maximize the parent's access. Parent's counsel should thus also engage in planning to address these barriers, such as through identifying people who can drive the parent to access visits and identifying spaces (such as the home of an extended family member) where longer access visits can take place.

iii. Negotiating a laddered approach to access

It is common practice for the parties to seek to negotiate a **laddered approach** to access.

Access agreements should provide for a structured transition to unsupervised access that increases over time.

A laddered approach to access includes clear timelines or goalposts for the removal of limits on access.

Early in the child and family services proceeding, an access agreement will likely not address every "rung" of the ladder. For example, it may only address the transition from professionally supervised access to non-professionally supervised access. As the proceeding progresses, the parties will continue to build the ladder as circumstances allow.

With respect to the **requirement of professionally supervised access**, the access terms should specify an end date or the number of positive supervision reports before professional supervision is no longer required. As a general rule of thumb, professional supervision should be of a short duration. For example, the access agreement could contemplate a transition to non-professionally supervised and/or community access after 3 weeks of professionally supervised visits, subject to positive supervision reports and no new child protection concerns. Where a parent would benefit from the evidence contained in additional supervision reports, one strategy is to propose a transition to a combination of professionally supervised visits and visits that are not professionally supervised.

A laddered approach to the **amount of access** will depend on whether there is a supervision requirement and, if so, whether professional supervision is required. As discussed above, the main constraint on the amount of **non-professionally supervised access** should be the number of people who are willing to provide supervision and their respective availabilities.

The transition from supervised to unsupervised access, as well as increases to the amount of unsupervised access, will often depend on a number of factors, including the resolution of the underlying protection concerns. **To maximize a parent's access while transitioning to unsupervised access**, it will often make sense to schedule a

combination of supervised access and unsupervised access. For example, a parent could continue to have supervised overnight access with their children at a grandparent's home while also building up unsupervised daytime visits.

Ultimately, where the Director shares the goal of **returning the child to the parent**, the Director will need to agree to an access arrangement that concretely builds toward this goal. Once the return of the child becomes imminent, the parties will negotiate a "**return home" plan** that includes a structured transition of care from the child's current caregivers to their parent(s). Such a plan will usually include extended, overnight visits of several days or weeks. At this stage, it is advisable to use a calendar to write out an exact access schedule leading up to the child's return.

It will often make sense to **schedule review times and additional mediations** in advance to support ongoing access negotiations, especially where the parties can establish a good working relationship. Moreover, parent's counsel can continue to negotiate with Director's Counsel outside of those scheduled times, such as through a more informal 4-way phone check-in between parties. Such regular contact will allow the parties to troubleshoot issues as soon as they emerge. It will also allow the parties to make agreed upon changes to the access arrangement without delay.

Often, the sticking points in a laddered approach to access will be around when the parent can transition from one "rung" of the ladder to the next. Parent's counsel must engage in ongoing advocacy to make sure that the Director does not move the goal posts with respect to these transitions.

To support a dynamic approach to a parent's access, the access agreement should always **include a term that permits additional access** as agreed upon between the parent and the Director and/or the parent and a supervisor. Where the Director needs to approve additional access that has been agreed to by a supervisor, the access agreement should clarify the procedure for obtaining such approval (such as through texting the Director at least 24 hours before a proposed visit).

Where a child has been placed with a kinship caregiver

A kinship caregiver, such as a grandparent, can play a critical role in supporting the parent's access. For example, they may be able to support supervised overnight access in their home, or even live with the parent while providing supervision. As well, the Director may authorize the kinship caregiver to make access arrangements directly with the parent. In these cases, the Director expects the kinship caregiver to act as a protective person and supervise or withhold access as needed. The success of this arrangement depends on a good working relationship between the Director and the kinship caregiver, as well as between the kinship caregiver and the parent. Some kinship caregivers do not want the burden of making decisions about their family member's access, especially where this gives rise to conflict and/or relational harm.

Where the Director decides to seek a CCO, the Director's approach to access could shift because they are no longer seeking the child's return. However, parent's counsel must not be complacent about access during this time, as the nature and quality of the parent-child relationship will be relevant to the adjudication of the CCO application. Further, a continuing custody hearing could take months or years to be heard, during which time there could be changes to the parent's circumstances and/or the Director's position on the

child's return. Parent's counsel should thus continue to advocate for a laddered approach to access as if the child will be returned to the parent, with clear timelines or goalposts for removing supervision requirements and increasing the amount of access. Moreover, where there is an existing access order, parent's counsel should consider asking the Director to bring a s. 57 application before cancelling or substantially reducing the parent's access.

iv. Negotiations during the removal and presentation stages

The early stages of a child and family services proceeding are a critical period for laying the groundwork for meaningful access arrangements. Negotiations around access should start as soon as possible to minimize disruption to the child's relationships. These negotiations can take place before a child's removal, in the context of an uncontested court process (i.e., where the parent has consented to plans to consent to an interim order), or where the parent is seeking a contested presentation hearing.

At this point in the proceeding, the parent's access will often be shaped by:

- the Director's safety concerns in relation to access, and
- resource-based constraints on access (such as the cost and availability of professional supervision).

In many cases, the parties will not agree about the Director's safety concerns in relation to access. However, these safety concerns are not easily displaced at the presentation stage, as the parent has not yet had the opportunity to contest the underlying protection concerns at a substantive hearing or take remedial steps to resolve them. On the other hand, parent's counsel has more latitude to seek to maximize the amount of access- and minimize any terms or conditions on access- while accounting for the Director's safety concerns.

ADVOCACY TIP

Parent's counsel should ensure that any limits on their client's access are neither arbitrary nor unduly restrictive.

Where a parent is not receiving satisfactory access, scheduling a contested presentation hearing can be a means of applying pressure to the Director's position on access as part of the interim plan of care. In *S.B. and D.M.B.*, 2022 BCPC 140 ("*B.C. (Child, Family and Community Service) v S.B. and D.M.B.*, 2022 BCPC 140 ("*S.B. and D.M.B.*")"), the judge was highly critical of the Director's decision-making around access and ordered that the children be returned to their mother under supervision.[257]

Timing considerations

The early retention of parent's counsel supports a proactive approach to access. While the Director should be providing the child's custodial parent(s) with access from the time of removal, the reality is that the start of access is often subject to delay. Delay is more likely where there is limited or no oversight by parent's counsel. In many cases, parents will not retain counsel until shortly before or after the commencement of the presentation hearing stage. Further, there is often a lag between when a parent retains counsel and when a parent is able to meet with and instruct counsel about access.

The best opportunity to advocate for and create accountability around early access arrangements is when a parent retains counsel *before* the child is removed, as this allows parent's counsel to negotiate an access arrangement that starts from the time of removal (or earlier, if the child is placed outside of the home under the terms of a safety plan or other agreement). The pre-removal involvement of parent's counsel has become more commonplace. As discussed in **Appendix A,** Legal Aid BC and Indigenous Justice Centres provide legal

representation to eligible parents from the time of initial contact with a social worker.

Whether retained before the child's removal or at a later date, parent's counsel should approach early access issues with a sense of urgency and initiate conversations with their client and Director's counsel about access as soon as possible. Further, and with the client's agreement, parent's counsel should involve the child's Indigenous community(ies) in access negotiations from the outset. As emphasized in the WoW Guidebook, the purposes of the *Federal Act* cannot be realized without the meaningful participation of the child's Indigenous community(ies) in decision-making processes.[258]

v. Protection stage negotiations

As the child and family services proceeding progresses, negotiations around access will be increasingly shaped by the extent to which the parent can narrow or resolve the underlying protection concerns.

A parent may do so by taking steps to address the Director's protection concerns, such as through attending a substance-use related treatment program. A parent may also do so by contesting the Director's positions before the court and otherwise using advocacy to apply pressure on the Director's positions. In many cases, both strategies will be required. For example, where a parent agrees to specific steps to address a protection concern, parent's counsel must ensure that the Director does not later "move the goal posts." In the case of a moving goal post, parent's counsel will have a stronger negotiating position where they are prepared to invoke judicial oversight.

vi. Negotiations about post-CCO access

Negotiating a s. 56 access order commonly takes place in the context of negotiations around consenting to a CCO. The nature and scope of negotiations around post-CCO access is highly fact dependent and may also vary by MCFD or ICFSA office. However, in every case, parent's counsel should be prepared to address all dimensions of a child's permanency needs. A myopic focus on the child's legal permanency (i.e., their adoption prospects) could result in no access or highly restricted access, especially where the likelihood of an adoption is considered to be high. On the other hand, consideration of the child's needs for relational and cultural permanency could open the door to a more liberal approach to access, even in the context of adoption planning.[259]

In the case of an Indigenous child

Where a child is Indigenous, the Director has to meet their own obligations toward maintaining the child's family, community, and cultural connections, including through conducting reassessments of whether the child could be returned to their parent(s). These obligations will often give rise to issues of post-CCO access.[260]

Parent's counsel should also be prepared to advocate for access arrangements that are compliant with the *Federal Act*'s minimum standards and guiding principles. In particular, the *Federal Act*'s emphasis on cultural continuity may necessitate meaningful post-CCO access for parents, extended family members, and/or community members. The child's Indigenous community(ies), where involved in the negotiations, can play a vital role in developing access arrangements that will support the child's community and cultural connections.[261]

Where an Indigenous child has been placed outside of their family or Indigenous community, parent's counsel should seek a long-term commitment from the Director to fund travel to and from access visits.[262]

Parent's counsel report that the Director sometimes treats post-CCO access like a bargaining chip to incentivize a parent's consent to a CCO. Parent's counsel should be wary of this strategy because of the implications of a CCO and because decision-making around post-CCO access should be grounded in the child's best interests. On the other hand, the parent will have a stronger negotiating position when they are prepared to contest the CCO application and/or bring an access application under s. 56.

After a CCO has been made, and even where there is no access order, the parties can continue to address and negotiate about access so long as the child is in the Director's custody (i.e., there has not been an adoption or permanent transfer of custody). This is because the parent continues to have the right to apply to obtain an access order under s. 56 of the *CFCSA*, change an existing access order under s. 57, or cancel a CCO under s. 54.

Where a parent's circumstances improve after a CCO has been made, negotiations around post-CCO access may shift toward supporting a return of the child (and the cancellation of the CCO under s. 54 of the *CFCSA*). In these cases, parent's counsel should seek to negotiate a laddered approach to access as described in the sections above.

vii. Addressing the cancellation of access visits

A common access issue is the cancellation of access visits by the Director, which can be perceived by the parent as a disciplinary or punitive tactic. For example, the Director may opt to cancel access visits due to the parent's lack of attendance at prior access visits or concerns about the parent's behaviours during access visits.

The first step when dealing with the cancellation of access visits is to reach out to Director's counsel and/or schedule a collaborative meeting to discuss the issue. During this discussion, parent's counsel should seek clear reasons for the cancellation of access visits, as this practice should not be used to discipline or punish a parent. The parties should also seek to identify and address any root causes of the cancellation of access visits. For example, where the Director has cancelled access in response to the parent having missed previous visits, why did the parent miss those visits? Does the parent require additional support with transportation to and from visits? Could the location or timing of the access visits be changed to make them more accessible? Could the parties agree on a communication protocol when the parent is unable to attend a visit?

Taking a proactive approach to the cancellation of visits is vital because of the impacts of missed visits on both the parent and child. Parent's counsel should be prepared to bring an application to obtain or enforce an access order where the parties are unable to resolve the problem through negotiation.

viii. Creating an evidentiary record

Throughout access negotiations, parent's counsel should be strategic about creating an evidentiary record in support of a possible access application. Parent's counsel should communicate with Director's counsel in writing where appropriate, as written correspondence can be attached to an affidavit or adduced at a hearing. Parent's counsel should also log and take notes about their meetings and phone communications with Director's counsel and social workers.

In the lead up to an access application, written correspondence takes on greater strategic importance. It is often strategic for parent's counsel to write a letter to Director's counsel in which they set out the issues in dispute and advise Director's counsel of their intention to bring an application if those issues cannot be resolved by a certain date.

C. ACCESS APPLICATION STRATEGIES

As discussed above, negotiations around access will be more productive where parent's counsel is prepared to pursue a contested access application. The mere act of serving an access application will often be sufficient to advance the negotiations and reach an agreement on access before a contested hearing takes place.

In preparing an access application and deciding on the access order to be sought, parent's counsel should be mindful of the stage of the child and family services proceeding. A court will be cautious about scrutinizing the Director's safety concerns in relation to access before considering the underlying protection concerns. Thus, where parent's counsel seeks to have the access application heard before a substantive protection hearing, it will generally be prudent to seek an access order that accounts for the alleged safety concerns. The evidence and submissions in support of the application should thus focus on two questions:

- Accounting for the alleged safety concerns, has the Director provided access in accordance with the child's best interests?
- Has the Director imposed limits on the parent's access that are unfair, arbitrary, disproportionate, or overly broad?

Where an access application asks the Court to directly scrutinize the Director's safety concerns in relation to access, parent's counsel should consider whether the access application should be heard at the same time as a substantive protection hearing. A court may also order that these applications be heard together.

ix. Stand-alone access applications

This section addresses stand-alone access applications by parents (i.e., access applications that are not heard at the same time as a contested presentation or protection hearing). For example, a parent might bring a stand-alone access application while an interim order is in effect and before a protection hearing takes place.

Categories of relevant evidence

Categories of relevant evidence that parent's counsel may wish to adduce in support of an access application include:

- Biographical information about the family, including information that will allow parent's counsel to address the best interests of the child factors. Where the child is Indigenous, parent's counsel should adduce evidence in accordance with the *Federal Act*'s definition of the best interests of an Indigenous child.[263]
- A procedural history.
- A history of the child's caregiving arrangements before and after removal.
- A history of the parent's access arrangements since removal.
- A history of the parties' efforts to maintain the child's community and cultural connections since removal.
- A history of the parties' efforts to negotiate about access (include written correspondence as exhibits). Be careful to avoid violating any confidentiality agreements, such as in relation to negotiations during a mediation.
- Information that challenges the validity of the Director's safety or protection concerns (see caution below).
- The parent's steps to address the Director's safety or protection concerns (include documentation as exhibits).
- Evidence about how access has been going (including professional supervision reports, if available, as exhibits).

- The impacts of insufficient access on the parent and the parent-child relationship.
- The impacts of insufficient access on the child, including their community and cultural connections.
- The child's views.
- The perspectives of the child's Indigenous community(ies).
- Information that is relevant to the proposed access order, including evidence about:
    - Supervisors, support people, and anyone else who might be present during access (such as a grandparent).
    - Locations, including private homes and community spaces.
    - Community and cultural activities during which access can take place.
    - Logistical supports.
    - The child's schedule.
- If this is an application to change an existing access order, information demonstrating a significant change of circumstances.

Parent's counsel should ensure that there is sufficient evidence to satisfy the legal test that applies to the application.

ADVOCACY TIP
In particular, parent's counsel should ensure that the evidence meaningfully addresses the applicable best interests of the child factors.

Parent's counsel must also be strategic when adducing evidence. They should only adduce evidence that is **relevant** and **necessary**. In particular, parent's counsel should be cautious about adducing evidence that challenges the validity of the Director's safety or protection concerns. First, and as discussed above, the court may not want to adjudicate these facts outside of a substantive protection hearing. Further, such evidence could result in prejudicial findings of fact and/or be used against the parent at a later date.

Witnesses

Where a parent brings an access application, they will typically be the most important witness. Other witnesses could include:

- Any professional or non-professional supervisor who can provide evidence about how access has been going.
- Any person who can speak to the child's community and cultural connections (this is especially relevant where the child is Indigenous).
- Any person who can speak to the parent's circumstances, the child's circumstances, and/or the parent-child relationship.
- Any person who would supervise or otherwise support access under the proposed access order.

Deciding on affidavit versus *viva voce* evidence

An important question when preparing a stand-alone access application is whether to adduce affidavit evidence, *viva voce* evidence (i.e., evidence delivered orally by a witness at the hearing), or a combination of the two.

Affidavit evidence has important benefits:

- Where the affidavit is served on the Director with the access application, it can help to illustrate the strength of the access application and thus encourage an early resolution of the matter.
- It is easier for parent's counsel to control the evidence in an affidavit and prevent irrelevant or prejudicial evidence from slipping into the hearing.
- Some witnesses will feel more comfortable providing evidence by way of affidavit, especially where they are dealing with the effects of trauma.

However, affidavit evidence also has **drawbacks**:

- Director's counsel can readily use affidavit evidence against a parent or other witness in later hearings.
- It will remain in the Director's possession even if the parties resolve the application before a contested hearing.
- It may be less compelling than viva voce evidence, especially when speaking to the intangible impacts of inadequate access.
- Where an affidavit contains contested facts, the court may still require the affiant to testify and/or be subject to cross examination on their affidavit.

Given these trade-offs, counsel may want to consider a hybrid approach in which they put more "neutral" or non-contentious facts into an affidavit and then prepare witnesses to provide *viva voce* evidence on contested facts and subjective experiences.

x. Strategic considerations when applying for a standard access order

An important practice question is whether a parent should apply for a standard access order during the early stages of a child and family services proceeding.

Such an application will often be consented to by Director's counsel, though we have heard from parent's counsel that this practice varies by office and by Director's counsel. For example, some Director's counsel take the position that the standard access order is not necessary because the Director already has a positive obligation to provide such access.

The advantage of the standard access order is that it reinforces the Director's positive obligation to provide access and thus supports meaningful access negotiations, especially where there is a good working relationship between counsel. Moreover, from a practical perspective, there is a clear and simple pathway to obtaining this order that does not require the use of limited legal aid resources. On the other hand, the standard access order is difficult to interpret and does not provide sufficient guidance to the parties in the event of a dispute over the ensuing access arrangement. Moreover, there is limited case law about the legal criteria for replacing a standard access order with a defined access order or for enforcing the standard access order through an application for a penalty or *Charter* costs.

In light of the tensions outlined above, parent's counsel should consider the value of attending a mediation or other collaborative process before advising the client about whether to consent to the standard access order. This will be an opportunity to determine the breadth and depth of the access issues in dispute. Often, this will also be an opportunity for Director's counsel to become more engaged on the issue of access and to ensure that their client is meeting their legal obligations in

relation to access. During these initial negotiations, the extent to which the parties are able to resolve or narrow the access issues will be an indicator of whether the standard access order will be appropriate.

If the parent subsequently decides to pursue a defined access application, their efforts to resolve the issues outside of court will be useful evidence in support of their application. Some judges will decline to hear a contested access application until after the parties have attended a collaborative process.

The Supreme Court of Canada has recognized that a parent has a right to counsel in child and family services proceedings where, due to the complexity of the proceeding and/or the parent's capacity, legal representation is required to ensure a fair hearing.[264] It is widely recognized that most parents in child and family services proceedings would meet this test.

APPENDIX A

The availability of legal representation in child and family services proceedings

In BC, Legal Aid BC (LABC) provides legal aid representation to all parents and guardians in child and family services proceedings who meet LABC's financial eligibility criteria.[265] LABC also provides legal aid representation to other financially eligible individuals who are "acting in the place of a parent" or who are a party to the proceeding.[266]

LABC has established Parents Legal Centres (PLCs) in courthouses throughout BC to serve legal aid clients who are engaged with the child and family services system.[267] PLCs are legal clinics that deliver holistic services to their clients through a multidisciplinary team of staff lawyers and advocates. They seek to help clients resolve their legal issues early and collaboratively. They can assist clients from the time of their initial contact with a social worker.[268]

While PLCs primarily assist clients with uncontested court processes, they have discretion to assist clients with some contested matters. For example, they may be able to run a contested access application hearing.

In cases where a PLC has a conflict or is unable to assist a client with a contested court process, LABC will refer the client to a lawyer in the private bar. LABC's contracts with private lawyers impose caps on the number of hours that a lawyer can allocate to the case. While LABC routinely approves requests for additional hours, this decision is discretionary and dependent on available budget. Parent's counsel report that the caps on hours impede their ability to meet their clients' needs and pursue contested court applications.

Indigenous people with a child and family services issue, *regardless of whether they qualify for legal aid*, can now access free legal representation through an Indigenous Justice Centre ("IJC").[269] Established by the BC First Nations' Justice Council, there are currently IJCs located in communities throughout BC.[270] Clients who cannot access a physical location can also receive services through a virtual IJC.[271]

APPENDIX B

The stages of a child and family services proceeding

This Appendix seeks to help familiarize new parent's counsel with the stages of a child and family services proceeding that culminates in a continuing custody hearing. In sum:

- The **removal** of a child under the *CFCSA* initiates (or continues) a proceeding in Provincial Court.
- The **presentation hearing stage** commences within 7 days of the child's removal and is intended to confirm interim care arrangements pending a substantive protection hearing.
- The **protection hearing stage** commences within 45 days of the granting of an interim order and is intended to determine whether the child in fact needs protection and, if so, determine the appropriate temporary order. Before the temporary order expires, the Director can apply to, among other things, extend the existing order, return the child to a custodial parent under a supervision order, or place the child in the Director's continuing custody.
- A CCO application initiates the **permanency hearing stage**. In the case of a CCO application, this stage is intended to determine whether the child should be placed in the long-term care of the Director.

The Provincial Court plays an essential oversight role throughout each stage of the proceeding. This role includes supervising the Director's exercise of powers and safeguarding the rights of parents and children.[272]

While exercising their oversight role, the *CFCSA* encourages Provincial Courts to avoid rigid processes and procedures. Hearings may be "as informal as a judge may allow" and hearsay evidence is admissible.[273]

A. THE REMOVAL STAGE

The Director is authorized to remove a child pursuant to s. 30, 36(1), or 42 of the *CFCSA*. While the Director does not require a warrant or court order before removing a child, the removal is subject to judicial oversight through the scheduling of a post-removal hearing in Provincial Court (the "presentation hearing").

i. Advance notice requirements

Under the *CFCSA*, the Director may remove a child without providing advance notice of the removal to the child's parents or others. On the other hand, where an Indigenous child is involved, the *Federal Act* generally does require the Director to provide such notice to the child's parents and any care providers and Indigenous governing bodies.[274]

ii. Removal where there is no existing child and family services proceeding — s. 30

Section 30 of the *CFCSA* authorizes the Director to remove a child where the Director has reasonable grounds to believe that the child needs protection and that:

> (a) the child's health or safety is in immediate danger, or

(b) no other less disruptive measure that is available is adequate to protect the child.

The *Federal Act* imposes additional requirements on the Director before removing an Indigenous child. The best interests of the child (as defined by the *Federal Act*) must be the Director's paramount consideration,[275] and the Director must be able to demonstrate that they engaged in reasonable efforts to avoid removal.[276]

iii. Removal where an interim or temporary supervision order is in effect — ss. 36(1) or 42

In the context of an ongoing child and family services proceeding, the Director has the authority to remove a child where the Director has reasonable grounds to believe that:

- An interim supervision order is no longer able to protect the child or there has been a breach of an interim supervision order and the order requires the Director to remove the child in that event.[277]
- A temporary supervision order no longer protects the child or there has been a breach of a temporary supervision order, and the order requires the Director to remove the child in that event.[278]

As discussed above, the *Federal Act* imposes additional requirements on the Director before removing an Indigenous child. The best interests of the child (as defined by the *Federal Act*) must be the Director's paramount consideration,[279] and the Director must be able to demonstrate that they engaged in reasonable efforts to avoid removal.[280]

iv. Care of a child after removal and before an interim order is made

Until an interim order is granted at the presentation hearing stage, the Director may retain care of the child without a court order.[281]

B. THE PRESENTATION HEARING STAGE

The removal of a child triggers a post-removal hearing in Provincial Court called a **presentation hearing**. A presentation hearing is a "summary hearing and must be concluded as soon as possible."[282] Its purpose is to ensure that the child's removal was not arbitrary and to make an interim order about the child's care pending a substantive **protection hearing**.[283] In other words, the focus of the hearing is on making appropriate interim care arrangements.[284]

i. Initiating the presentation hearing stage and timelines

The presentation hearing must take place in Provincial Court within 7 days of a child's removal under s. 30, 36(1) or 42 of the *CFCSA*.[285] *In practice,* the presentation hearing itself does not take place within the legislated 7-day timeline. Instead, **the presentation hearing stage commences with a first appearance**. Where a parent seeks a contested presentation hearing, the parties will schedule the hearing to take place on later dates.

The Director initiates the commencement of the presentation stage by filing with the court a **Presentation Form** (Form 1).[286] The Director must also provide the court with a **"Report to Court"** (Form A or Form F) which contains information including:

- the circumstances of the child's removal,
- in cases of a removal under s. 30, any less disruptive measures considered by the Director before removing the child, and
- the interim plan of care, which includes the

director's recommendations about the **care and supervision** of the child and about **access** to the child.

Form 1 and the Report to Court are referred to together as the "Presentation Hearing Application."

ii. Notice requirements and party status

Pursuant to s. 33.1(2) of the *CFCSA*, the Director is required to **provide notice** of the presentation hearing to the person from whom the child was removed.[287] Otherwise, the *CFCSA* only requires the Director to provide information about the hearing, *if practicable*, to the child's parents (if they were not already served under s. 33.1(2)) and to the child's Indigenous community(ies).[288] A person who receives notice or information about the presentation hearing in accordance with the *CFCSA* will become **a party** if they appear at the commencement of the hearing.[289]

Where an Indigenous child has been removed, the *Federal Act* requires the Director to provide notice of the presentation hearing to the child's parents and any care providers and Indigenous governing bodies.[290] Under the *Federal Act*, a parent or care provider is entitled to party status whereas an Indigenous governing body may only make representations to the court.[291]

iii. The first appearance

At the first appearance, the parties can consent to an interim order under s. 60 of the *CFCSA*, ask the judge to adjourn the first appearance to a later date, or ask the judge to schedule contested hearing dates.

Where the parties seek a contested presentation hearing, the hearing should be set down as soon as possible. However, the scheduling of contested hearing dates is often subject to delay due to factors including a lack of earlier available court time.[292]

iv. The hearing

At a contested presentation hearing, the court will consider the Presentation Hearing Application as well as any affidavit evidence from the parties.[293] The parties may also adduce *viva voce* evidence where appropriate, but the evidence should be brief.[294]

Factual disputes are resolved in the Director's favour, unless the Director's evidence can be shown to be "manifestly wrong, untrue, or unlikely to have occurred."[295]

Where the court decides that there is some admissible evidence which, if accepted, could lead to a determination that **a child needs protection**, the court must make an **interim order** about the child.[296] The available interim orders include that the child:

- be returned to or remain with a parent under the supervision of the Director,[297]
- be placed in the custody of a third party under the supervision of the Director,[298]
- be returned to or remain with a third party under the supervision of the Director, [299] or
- be placed in the custody of the Director.[300]

The *CFCSA* does not require the court to consider the **best interests of the child** when making an interim order. However, the *Federal Act* imposes this requirement where the child is Indigenous.[301]

v. Practice considerations

Given the nature and purpose of presentation hearings- as well as the issue of delay- contested presentation hearings are rare, and parties routinely consent to interim orders under s. 60 of the *CFCSA*. Even where a parent does not consent to an interim order at the outset of the presentation hearing stage, they will often consider it to be more strategic and time-effective to reach an agreement on interim care arrangements at a mediation or another collaborative process.

Despite the limitations of the presentation hearing stage, parent's counsel should feel empowered to pursue a contested presentation hearing where appropriate. For example, a contested presentation hearing can be an important means of **challenging the Director's interim plan of care** in addition to the removal itself. Further, the mere act of scheduling a contested presentation hearing can have the effect of applying pressure to the Director's position, resulting in better negotiation outcomes.

SPOTLIGHT ON CASE LAW
S.B. and D.M.B.

In *S.B. and D.M.B.*, the custodial parent successfully challenged the Director's interim plan of care. In this case, the Director sought interim custody of an Indigenous mother's children, while the mother sought the children's return with or without an interim supervision order.[302] After determining there was some evidence that the children needed protection, the court considered the *CFCSA* and the *Federal Act* together to conclude that the "children's Indigeneity militated toward returning them to their mother's care" under an interim supervision order.[303] In other words, while the court did not consider the removal to be arbitrary, it rejected the Director's proposed interim order and agreed with the mother that the children could be returned to her care under the Director's supervision. In reaching this decision, the court critiqued the "highly restricted" access arrangements that were in place pending the presentation hearing, observing "I am at a loss to understand how the current access arrangement recognizes the importance of [the children] having an ongoing meaningful relationship with their only active parent and relative."[304]

ADVOCACY TIP
The limitations of the presentation hearing are such that a parent may prefer to challenge the Director's actions at a substantive protection hearing. Where a parent wants to access a protection hearing as soon as possible, they can consent to an interim order while asking the court to "collapse" the presentation and protection stages (in other words, order the immediate commencement of the protection stage rather than have it commence up to 45 days later).[305]

Following the conclusion of the presentation stage, the parties will often attend a mediation before (or soon after) the commencement of the protection hearing stage. Through collaborative planning, the parties may agree on the next steps in the *CFSCA* proceeding or, at least, narrow the issues in dispute.

C. THE PROTECTION HEARING STAGE

A protection hearing is a substantive hearing. The purpose of the protection hearing is to determine whether the child in fact needs protection and, if so, to make an order about the child's care in accordance with the child's best interests.[306]

i. Initiating the protection hearing stage and timelines

The Director **initiates the protection hearing stage** by filing with the Court an Application for an Order (Form 2) and a plan of care ("the Protection Hearing Application").[307]

A protection hearing must commence no later than 45 days after the conclusion of the presentation hearing.[308] *In practice,* the commencement date is treated as a **first appearance**.[309] A contested protection hearing often takes place months or

years after the commencement date, in part due to a lack of earlier available court time.[310]

ii. Notice requirements and party status

The persons who must receive **notice of a protection hearing** include the child's parents and any person who has custody of the child under an interim order.[311]

In the case of an Indigenous child, the Director must also provide notice to the child's Indigenous community(ies) and any care providers and Indigenous Governing Bodies.[312]

All of the persons described above, with the exception of Indigenous Governing Bodies, are entitled to gain party status.[313] Under the *Federal Act*, an Indigenous Governing Body is entitled to make representations to the court.[314]

iii. The first appearance

At the first appearance, the parties can consent to a temporary order under s. 60 of the *CFCSA*, ask the judge to adjourn the first appearance to a later date, or ask the judge to schedule contested hearing dates.

It is common practice to adjourn the first appearance of the protection hearing to attend a mediation or other collaborative process.

iv. Case conferences

Historically, the parties were required under the Provincial Court's *CFCSA Rules* to attend a case conference before scheduling a contested protection hearing. However, under the most recent changes to the *CFCSA Rules,* a case conference is no longer mandatory. Instead, a case conference **may** be ordered upon the request of a party or where a judge considers that "it may promote a fair and effective resolution of the issues."[315]

At a case conference, the judge will attempt to support the parties in resolving the Director's Protection Hearing Application, often through agreeing to a consent order under s. 60 of the *CFCSA*. The judge only has the authority to make substantive orders by consent as well as procedural orders in connection with the contested application (such as orders respecting disclosure).[316]

While case conferences can be a useful opportunity to resolve or narrow the issues in dispute with the input of a judge, it often takes weeks or months to schedule a case conference. The advantages of attending a case conference must thus be weighed against the possibility of additional delay.

v. The hearing

A contested protection hearing is a **substantive hearing** during which the court hears evidence in relation to (i) whether the child needs protection, and (ii) the appropriate order to be made. Unlike at a presentation hearing, the court has the benefit of a **full evidentiary record** and **weighs** the evidence to resolve factual disputes between the parties.

Where the court finds that **a child does not need protection**, the court must return the child to their custodial parent(s) as soon as possible and terminate the interim order.[317]

Where the court finds that a **child needs protection**, the available temporary orders are that the child:

- be returned to or remain in the custody of the parent under the director's supervision for a specified period of up to 6 months,
- be placed in or remain in the custody of third party under the Director's supervision for a specified period, or
- be placed with or remain in the custody of the Director for a specified period.[318]

The court also has the discretion to grant a **CCO** in exceptional circumstances.[319]

The duration of an initial temporary custody order is subject to time limits of up to 3, 6, or 12 months, depending on the child's age (or the age of the youngest child of a group of children).[320]

vi. Subsequent applications to extend temporary orders

The Director may apply to extend a temporary custody or supervision order prior to its expiration under s. 44 of the *CFCSA*. Alternatively, the Director may apply under s. 46 of the *CFCSA* to return the child to their parent(s) under the temporary supervision of the Director. In either case, the Director must file with the Court an Application for an Order (Form 2).[321] We will refer to these applications collectively as "Extension Applications."

vii. Notice requirements and party status for Extension Applications

The persons who must receive **notice of an Extension Application** include the child's parents and any person who has custody under the temporary order.[322] In the case of an Indigenous child, the Director must also provide notice to the child's Indigenous community(ies) and any care providers and Indigenous Governing Bodies.[323]

The persons described above, with the exception of an Indigenous Governing Body, are also entitled to gain **party status**.[324]

viii. Extension Application hearings

A **contested extension application hearing** is a substantive hearing in which the court weighs the evidence to resolve factual disputes between the parties. The court may:

- **extend a temporary order**, where the court finds that the extension is in the child's best interests *and* the circumstances that caused the child to need protection are likely to improve within a reasonable time, per s. 44 of the *CFCSA*.[325]
- **grant a temporary supervision order to a custodial parent** upon the expiration of a temporary custody order whenever it is in the child's best interests to do so, per s. 46 of the *CFCSA*.[326]

ix. Statutory time limits on the total length of supervision or custody

At this stage of the child and family services proceeding, the **time limits** on how long a child can be the subject of a supervision or custody order become legally relevant.

The total period during which a child can be in the care of a parent under the Director's supervision is 12 months.[327]

The total period during which a child can be in the temporary custody of the Director or a third party depends on the age of the child (or the age of the youngest child in a group of children) and ranges from 12 to 24 months.[328]

On the application of Director's counsel, the court may extend a time limit if it is in the child's best interests to do so.[329] *In practice,* requests by the Director to extend a legislated time limit are rarely refused. Moreover, in rare cases where the Director loses jurisdiction over a child because of the inadvertent expiration of a legislated time limit, the Director can "re-remove" the child and refile the Presentation Hearing Application.

D. THE PERMANENCY STAGE: CCO APPLICATIONS

Prior to the expiration of a temporary custody order, the Director may apply for a CCO in cases where the Director does not believe that the protection concerns will be resolved within a reasonable time or that the parent will be able to meet the child's needs.[330]

To do so, the Director must file with the court an Application for an Order (Form 2).

i. Notice and party status

The persons who must receive **notice of a continuing custody hearing** include the child's parents and any person who has custody of the child under the temporary order. In the case of an Indigenous child, the Director must also provide notice to the child's Indigenous communities and any care providers and Indigenous Governing Bodies.[331]

All the persons described above, with the exception of an Indigenous Governing Body, are entitled to gain party status.[332]

ii. The hearing

A contested CCO hearing is a substantive hearing in which the court weighs the evidence to resolve factual disputes between the parties.

To grant a CCO, the court must conclude that there is no significant likelihood that the "circumstances that led to the child's removal will improve within a reasonable time" or that "the parent will be able to meet the child's needs."[333] When deciding whether one or both of these criteria is met, the court must consider the past conduct of the parent toward any child who is or was in their care, the Director's plan of care, and the child's best interests.[334]

If the parents consented to a temporary custody order under s. 60, and thus there has not yet been a finding that the child was in need of protection at the time of removal, the court must make this finding before it considers the criteria for a CCO.[335]

Where neither of the criteria for a CCO is met, the court can order the return of the child to the custodial parent(s) or make an order that the child remain in the temporary custody of the director or another person for a specified period of up to 6 months. The latter order is often referred to as a "last chance order."[336]

APPENDIX C
Template court applications

Access template court applications online on West Coast LEAF's website.

ENDNOTES

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204 *L.M.R. and S.F.*, *supra* note 65, at para. 7.

205 *J.R.A.*, *supra* note 176.

206 *L.M.R. and S.F.*, *supra* note 65, at para. 43.

207 *Ibid*, at paras. 4-8.

208 MCFD's Complaints Policy ("Complaints Policy"), pg. 1.

209 *Ibid*, pg. 2

210 *Ibid*, pg. 3.

211 *Ibid*, pg. 6.

212 *Ibid*, pgs. 6-7.

213 *Ibid*, pgs. 6-7.

214 *Ibid*, pgs. 6-7.

215 *Ibid*, pgs. 6-7.

216 *Ibid*, pgs. 8-10.

217 *Ibid.*

218 *Ibid.*

219 *E.B.*, *supra* note 67, at para. 46.

220 *CFCSA*, s. 81(1).

221 *CFCSA*, s. 81(7).

222 *CFCSA*, s. 81(7).

223 *CFCSA*, s. 81(2).

224 *CFCSA*, s. 81(8)

225 *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 18(1)

226 *CFCSA*, s. 81(3).

227 *Supreme Court Civil Rules*, Rule 18(3).

228 *Ibid*, Rule 18(5).

229 *E.H. v British Columbia (Director of Child, Family and Community Service)*, 2024 BCSC 234, at para. 18.

230 *A.M.*, *supra* note 7.

231 *Ibid*, at paras. 2 to 5.

232 *A.B.M.*, 2024 BCSC 312 ("*A.B.M.*"). Please note that this decision was appealed to the BC Court of Appeal on grounds unrelated to the standard of review and the parties agreed by consent to remit the matter back to the Provincial Court for rehearing. See *Brown v. British Columbia (Director of Child, Family and Community Service)*, 2024 BCCA 248, at para. 12.

233 *A.B.M.*, *supra* note 232, at para. 24.

234 *Housen v. Nikolaisen*, 2002 SCC 33, at para. 27.

235 *A.B.M.*, *supra* note 232, citing *H.L.* v. *Canada (Attorney General)*, 2005 SCC 25, at paras. 55-56.

236 *Ibid.*

237 *CFCSA*, s. 82.

238 *Court of Appeal Rules*, BC Reg 120/2022.

239 *Ibid*, Rule 6.

240 *Ibid*, Rule 6 (2).

241 *Ibid*, Rule 13.

242 *Ibid*, Rule 13(b).

243 *British Columbia (Child, Family and Community Service) v. A.D.T.*, 2016 BCCA 117 ("*A.D.T.*"), at para. 12; *M.D. v. R.*, 2015 BCCA 399, at para. 12.

244 *A.D.T.*, *supra* note 243, at para. 12, citing *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538, at para. 2.

245 *Brown BCCA 1*, *supra* note 109, at para. 27, citing *A.D.T.*, *supra* note 243, at para. 12.

246 *A.D.T.*, *supra* note 243, at para. 14, citing *A.L.J. v. S.J.M.* (1994), 1994 CanLII 2614 (BC CA).

247 *Brown BCCA 1*, *supra* note 109, at paras. 9 to 12.

248 *CFCSA*, s. 66(1).

249 *A.B.M.*, *supra* note 232, at para. 53.

250 *Ibid*, at para. 53.

251 *Ibid*, at paras. 53-59.

252 *Brown BCCA 1*, *supra* note 109, at para. 12.

253 *Brown BCCA 2*, *supra* note 110.

254 WoW Guidebook, *supra* note 4, at pg. 180.

255 *Ibid.*

256 *Ibid.*

257 *S.B. and D.M.B.*, *supra* note 35.

258 WoW Guidebook, *supra* note 4, at p. 164.

259 Representative for Children and Youth, B.C. Adoption & Permanency Options Update (2019).

260 WoW Guidebook, *supra* note 4, at pgs. 185-186 and 191-192.

261 *Ibid.*

262 *Ibid*, at pg. 186.

263 *S.B. and D.M.B.*, *supra* note 35, at para. 152, *S.H.*, *supra* note 36, at paras. 123-125.

264 *G.(J.)*, *supra* note 175.

265 Legal Aid BC, "Parents Legal Centres," online.

266 *Ibid.*

267 *Ibid.*

268 *Ibid.*

269 BC First Nations Justice Council, "Indigenous Justice Centres in British Columbia," online.

270 *Ibid.*

271 *Ibid.*

272 *B.J.T.*, *supra* note 178, at paras. 63-67.

273 *CFCSA*, ss. 66 and 68.

274 *Federal Act*, s. 12; Policy 1.1, *supra* note 156, at pg. 3.

275 *Federal Act*, s. 10(1).

276 *Federal Act*, s. 15.1.

277 *CFCSA*, s.36(1).

278 *CFCSA*, s. 42.

279 *Federal Act*, s. 10(1).

280 *Federal Act*, s. 15.1.

281 *CFCSA*, s. 32.

282 *CFCSA*, s. 33.3.

283 *B.B. BCCA*, *supra* note 10, at paras. 12-14.

284 *Ibid*, at para. 13.

285 *CFCSA*, s. 34.

286 *CFCSA Rules*, Rule 1(1).

287 *CFCSA*, s. 33.1(2).

288 *CFCSA*, s. 33.1(4).

289 *CFCSA*, s. 33.1(6).

290 *Federal Act*, ss. 12-13; Policy 1.1, *supra* note 156, pg. 4.

291 *Federal Act*, s. 13; Policy 1.1, *supra* note 156, pg. 4. Note: an Indigenous Governing Body may be entitled to gain party status through the operation of the *CFCSA* where they are also the designated representative of

a First Nation or Indigenous community under the *CFCSA*.

292 Law Society of BC, CFCSA Practice Checklist "*CFCSA* Practice Checklist"), at D-6-9 to D-6-11.

293 *CFCSA*, s. 35(1).

294 *Child and Family Services Law and Practice Manual*, *supra* note 11, at pg. 253.

295 *B.B. BCCA*, *supra* note 10, at para. 14.

296 *British Columbia* (*Director of Child, Family and Community Service) v. SG*, 2019 BCPC 258, at para. 31.

297 *CFCSA*, ss. 35(2)(b) and 36(3)(b)(i).

298 *CFCSA*, s. 35(2)(d).

299 *CFCSA*, ss. 36(3)(b)(i) and 42(6).

300 *CFCSA*, ss. 35(2)(a) and s. 36(3)(b)(ii).

301 *Federal Act*, s. 10(1).

302 *S.B. and D.M.B.*, *supra* note 35, at para. 2.

303 *Ibid*, at para. 184.

304 *Ibid*, at para. 183.

305 *CFCSA* Practice Checklist, *supra* note 292, at D-6-10.

306 *B.B. BCCA*, *supra* note 10, at para. 16.

307 *CFCSA Rules*, Rule 1(2).

308 *CFCSA*, s. 37.

309 *B.B. BCCA*, *supra* note 10, at para. 15.

310 *Ibid*, at para. 15.

311 *CFCSA*, s. 38.

312 *CFCSA*, s. 38; *Federal Act*, s. 12.

313 *CFCSA*, s. 39; *Federal Act*, s. 13.

314 *Federal Act*, s. 13; Policy 1.1, *supra* note 156, pg. 4. Note: an Indigenous Governing Body may be entitled to gain party status through the operation of the *CFCSA* where they are also the designated representative of a First Nation or Indigenous community under the *CFCSA*.

315 *CFCSA Rules*, Rule 2(2).

316 *CFCSA Rules*, Rule 2(5).

317 *CFCSA*, s.40(2); *B.B. BCCA*, *supra* note 10, at para. 16.

318 *CFCSA*, s. 41(1).

319 Under s. 41(2) of the *CFCSA*, these circumstances are a parent is missing and unlikely to be found or is unable or unwilling to resume custody of the child, or "the nature and extent of the harm the child has suffered or the likelihood that the child will suffer harm is such that there is little prospect it would be in the child's best interests to be returned to the parent."

320 *CFCSA*, s.41; *B.B. BCCA*, *supra* note 10, at para. 17.

321 *CFCSA Rules*, Rule 1(2).

322 CFCSA, ss. 44(2) and 46(2).

323 *CFCSA*, ss. 44(2) and 46(2); *Federal Act*, s. 12.

324 *CFCSA*, ss. 44(2) and s. 46(2); *Federal Act*, s. 13. Note: an Indigenous Governing Body may be entitled to gain party status through the operation of the *CFCSA* where they are also the designated representative of a First Nation or Indigenous community under the *CFCSA*.

325 *CFCSA*, ss. 44(3) and 46(3).

326 *CFCSA*, s. 46(3).

327 *CFCSA*, s. 44(3.1).

328 *CFCSA*, s. 45(1).

329 *CFCSA*, s. 45(1.1).

330 *CFCSA*, s. 49(5).

331 *CFCSA*, s. 49(2); *Federal Act*, s. 12.

332 *CFCSA*, s. 39; *Federal Act*, s. 13. Note: an Indigenous Governing Body may be entitled to gain party status through the operation of the *CFCSA* where they are also the designated representative of a First Nation or Indigenous community under the *CFCSA*.

333 *CFCSA*, s. 49(5).

334 *CFCSA*, s. 49 (6).

335 *B.B. BCCA*, *supra* note 10.

336 *Ibid*, at para. 20.

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