**Appendix B: Outline of Legal Basis**

1. Section 56 of the *CFCSA* permits a court to grant an access order to a parent after a continuing custody order has been made. Under s. 56(3), the court has the discretion to grant access if the access is:
   1. in the child’s best interests,
   2. consistent with the plan of care, and
   3. consistent with the wishes of the child, if 12 years of age or over.

*[If the child is* ***not*** *Indigenous]*

1. When deciding this application, the court must apply the definition of the best interests of a child from s. 4 of the *CFCSA*. The court must also consider the *CFCSA*’s guiding principles set out in s. 2.
2. In *J.L.F. v. Director,* 2010 BCPC 17 (“*J.L.F.*”), Judge Skilnick summarized the law on post-CCO access as established in the leading case of *A.M. v. British Columbia (Director of Child, Family & Community Service)*, 2008 BCCA 178 (“*A.M.*”):

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.

*J.L.F.* at para. 23 (citations removed).

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 Given that access orders can be varied or rescinded under s. 57 when there is a significant change of circumstances (such as a pending adoption), courts should not be unduly reluctant to grant parents access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

*British Columbia (Director of Family and Child Services) v. D. (H.)*, 2001 BCPC 368.

*[If the child* ***is*** *Indigenous]*

1. In cases involving Indigenous children, the *CFCSA* applies concurrently with *An Act respecting First Nations, Inuit and Métis children, youth and families* (the “*Federal Act*”).Where there is a conflict or inconsistency, the *Federal Act* is paramount.

*Federal Act*, ss. 4 and 8; *J.W. v. British Columbia (Director of Child, Family and Community Service)*, 2023 BCSC 512 (“*J.W.*”), at para. 48.

1. The *Federal Act*’s jurisdiction over this case means that when deciding whether to grant access under s. 56(3) of the *CFCSA*, the court must consider the best interests of an Indigenous child (“BIOIC”) as defined by s. 10 of the *Federal Act*.
2. Further, when making decisions about access, the court must consider the *Federal Act*’s purpose and guiding principles set out in ss. 8 and 9, and its minimum standards set out in ss. 11 to 17. Together, these provisions place an emphasis on the protection of Indigenous children’s cultural and relational continuity.
3. Finally, the court must consider the historical and social context of ongoing colonialism as outlined in the *Federal Act*’s preamble.

*J.W. v. British Columbia (Director of Child, Family and Community Service)*, 2023 BCSC 512 (“*J.W.*”), at paras. 62-66.

1. In *J.L.F. v. Director,* 2010 BCPC 17 (“*J.L.F.*”), Judge Skilnick summarized the law on post-CCO access as established in *A.M. v. British Columbia (Director of Child, Family & Community Service)*, 2008 BCCA 178 (“*A.M.*”):

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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.

*J.L.F.* at para. 23 (citations removed).

1. *A.M.* was decided before the enactment of the *Federal Act*. The applicant will argue that the *Federal Act* requires a different approach to post-CCO access in cases involving Indigenous children.
2. The *Federal Act*’s emphasis on the protection of Indigenous children’s cultural and relational continuity cannot be squared with the treatment of post-CCO access as exceptional. Instead, post-CCO access orders will often be required under the *Federal Act*’s minimum standards.
3. The importance of protecting an Indigenous child’s cultural and relational continuity does not diminish with time or age. As observed by Justice Walkem in *J.W.*:

[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.

1. The courts have not yet squarely addressed the application of the *Federal Act* to the law on post-CCO access. 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*. However, because the parties later resolved the appeal by consent, the Court of Appeal did not have the opportunity to decide the appeal on its merits.

*Brown v. British Columbia (Director of Child, Family and Community Service)*, 2024 BCCA 248

*[Optional submissions]*

1. Section 56 of the *CFCSA* must be interpreted and applied in ways that are consistent with BC’s *Human Rights Code*. 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.”
2. Section 56 of the *CFCSA* must be interpreted and applied in ways that are consistent with *Charter* values and principles, including those arising from ss. 7 and 15 of the *Charter*.

*British Columbia (Director of Child, Family & Community Service) v. O*, 2009 BCSC 1370, at paras. 41-43; *British Columbia (Director of Child, Family and Community Service) v D.O.S,* 2022 BCSC 168, at para. 84.

1. The Provincial Court has an essential oversight role throughout *CFCSA* proceedings to consider the Director’s conduct and to ensure the *Charter* rights of parents and children.

*B.J.T. v. J.D.*, 2022 SCC 24, at paras. 63-67.

1. Section 56 of the *CFCSA* must be interpreted and applied in ways that are consistent with the values and principles of the *Convention on the Rights of the Child*, including those arising from Articles 5, 8(1), 9(3), 20(1), 20(3) and 30.

*Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), at paras. 69-71.

1. Section 55 of the *CFCSA* must be interpreted and applied in ways that are consistent with the values and principles of the *United Nations Declaration on the Rights of Indigenous Peoples*, including Articles 7-9, 11, and 13.

*K.K.M. V. T.J.S.*, 2021 BCPC 316, at paras. 76-78.