

**FAMILY
CONTENTS**

OTHER PROCEEDINGS

[§8.01]	Child, Family and Community Service Act	71
[§8.02]	Adoption Act	74

Chapter 8

Other Proceedings¹

[§8.01] Child, Family and Community Service Act

The *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, as amended (the “*CFCSA*”) outlines the practice and procedures for dealing with state intervention in the well-being and safety of children. While the Act applies to aboriginal children both on and off reserve, it does not apply on reserves where bands have passed child welfare by-laws under s. 81 of the *Indian Act* and the Minister of Indian and Northern Affairs has approved them.

The Provincial Court has jurisdiction over all proceedings under the *Child, Family and Community Service Act* (s. 1) except appeals.

The guiding principles for interpreting the *CFCSA* are detailed in s. 2. Generally, the Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations. The section enumerates 7 specific principles, including that

- children are entitled to be protected from abuse, neglect, and harm or threat of harm;
- a family is the preferred environment for a child; and
- attachments with the extended family, and with the cultural identity of aboriginal children, should be preserved.

The service delivery principles are detailed in s. 3. The delivery principles support the guiding principles and, in particular, support the involvement of aboriginal people and community services in delivering services in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services.

Section 4 provides that in determining the child’s best interests, all relevant factors must be considered including the child’s safety, physical and emotional needs, heritage, and views, as well as the importance of continuity in the child’s care.

Section 4(2) provides:

- (2) If the child is an aboriginal child, the importance of preserving the child’s cultural identity must be considered in determining the child’s best interests.

Section 4(2) recognizes that a disproportionate and greater number of aboriginal children are removed into care. The section was enacted as one measure toward ameliorating this situation.

Under Part 7, the Minister of Children and Family Development may enter into agreements with an Indian Band or legal entity representing an aboriginal community, the Nisga’a Nation or a Nisga’a Village, a treaty First Nation, the federal government, provincial governments or foreign government, Community Living British Columbia or “any person or group of persons” (s. 90). The Minister has delegated child protection services to family service agencies both on and off reserve.

The Minister may also designate one or more persons as “directors” under the *CFCSA* for the purposes of any or all provisions of the Act (s. 91). Directors of Child, Family and Community Services are designated by the Minister under the *CFCSA* to administer the Act. Some of the powers and duties of Directors include the power to:

- (a) make written agreements with a parent about care of a child, the provision of services to a family, the taking a child into care temporarily (ss. 5 and 6) and for the payment of child maintenance (s. 97);
- (b) establish support services for youth and make written agreements with young adults around support services (Part 2.1, ss. 12.1 and 12.2);
- (c) investigate a child’s need for protection (s. 16);
- (d) take an unattended child, including a runaway, into care for up to 72 hours (ss. 25, 26);
- (e) remove a child if there are reasonable grounds to believe the child needs protection and, either the child’s health or safety is in immediate danger, or there is no less disruptive way to adequately protect the child (s. 30);
- (f) obtain information within the control of any public body except that protected by solicitor-client privilege (s. 96); and
- (g) make agreements with an Indian Band or a legal entity representing an aboriginal community or the Nisga’a Nation or a Nisga’a Village (s. 90).

¹ **Trudy Macdonald** of Peterson Stark Scott, kindly revised this chapter in January 2010, March 2005 and March 2006. Reviewed in November 2001, by Kelly A. MacDonald, Vancouver. Reviewed in January 1997 by Robin J. Stewart, McLachlan Brown Anderson, Vancouver; reviewed in February 1998 by Charles F. Rendina, Davidson & Company, Enderby, B.C.

A director can delegate to any person or class of persons, any or all of the director's powers, duties, or functions under the *CFCSA* (s. 92).

The *CFCSA* prescribes the procedures that a director must follow when responding to concern around the well-being of a child. The responses may be classified within two broad categories: Alternatives to Removal (including voluntary care agreements and non-removal supervision orders) and Removal.

A. Alternatives to Removal

1. Voluntary Agreements

Procedurally, a case under the *CFCSA* begins when a report to the ministry is investigated. The *CFCSA* gives a director several avenues to assist with a child without having to move the child into the director's care. These alternatives include support services and agreements, take charge provisions, protective intervention orders, mediation, and family conferences.

In appropriate cases, a director and a parent may enter into a written agreement to provide or to assist the parent to purchase, services to support and assist a family to care for a child (s. 5). The initial term must not exceed 6 months, but an agreement can be renewed for a further 6 months.

A voluntary care agreement can be made between a director and a parent if the parent is temporarily unable to look after the child in the home (s. 6). In this case the parent agrees to give care of the child to the director under a plan of care. The initial agreement term is up to 3 months for a child under 5, or up to 6 months for child older than 5. There are also maximums for extending the terms of these agreements:

- (a) 12 months, if the child is under age 5;
- (b) 18 months, if the child is age 5 or older but under age 12;
- (c) 24 months, if the child is age 12 or older.

Part 2.1 gives the director authority to enter into voluntary agreements with young adults for residential, educational or other support services, or financial assistance (ss. 12.2(2) and 12.3).

2. Take Charge Provisions

Section 25 provides that if a child is found unattended, a director may take the child to a safe place for up to 72 hours. Section 26 also permits a director to take charge of a child for up to 72 hours, if it appears that the child is lost or has run away. These provisions permit a

director to intervene temporarily, without removing the child.

3. Protective Intervention Orders

If a director has reasonable grounds to believe that contact between a child and another person would cause the child to need protection under s. 13(1)(a) to (e) or (i), that director can apply to either the Provincial or the Supreme Court for a protective intervention order (s. 28).

4. Non-Removal Supervision Orders

A director may apply for a supervision order without first removing the child where there are reasonable grounds to believe that the child needs protection and a supervision order would be adequate protection (s. 29.1). A director must attend a presentation hearing no later than 10 days after applying for a supervision order (s. 33.1(1)). After removal and before the presentation hearing, the director may determine that interim custody is not necessary and may return the child to the parent apparently entitled to custody (s. 33(1)).

If the court finds reasonable grounds to support the director's concerns, then the court must make an interim supervision order and set a date for a protection hearing. If at that protection hearing, the court finds that the child needs protection, then the court must order a supervision order under s. 41.

Notice of the date, time and place of the presentation hearing, in the form of a written report described in s. 33.2(1), must be served on

- (a) the child, if 12 years of age or over, and
- (b) the person with care of the child.

In addition, the director must, if practicable inform those people outlined in s. 33.1(4).

At the presentation hearing for a supervision order, the director must present to the court a written report that includes (s.33.2):

- (a) the grounds for making the application, and
- (b) an interim plan of care for the child, including the director's recommendations about the terms and conditions to be included in the supervision order.

5. Mediation

Section 22 provides a mediation mechanism by which a director and any person may resolve an issue about the child or a plan of care.

B. Removal

A director may, without court order, remove a child if that director has 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 that is available is adequate to protect the child (s. 30). Note that s. 13 contains a very wide definition of when the child needs protection. For example, the circumstances include those in which there has been or is likely to be physical harm, sexual abuse or exploitation, neglect, emotional harm, deprivation of necessary health care, deprivation of treatment for treatable conditions, or inadequate care.

The duties and powers of a director following a removal are set out in those sections following section 30.

If the director does not return the child to the parents, the director must, within 7 days of removing the child under s. 30, attend a presentation hearing (s. 34(1)). The director must, if practicable, inform the following parties of the time, date and place of the hearing:

- the child (if 12 years of age or older),
- each parent,
- the Public Guardian and Trustee, if the parent apparently entitled to custody of the child is under 19 years of age,
- the applicable aboriginal organization prescribed in the regulations for the purpose of s. 34, if the child is an aboriginal child, other than a Nisga'a child or a treaty first nation child,
- the Nisga'a Lisims Government, if the child is a Nisga'a, and
- the treaty first nation, if the child is a treaty first nation child (s. 34(3)).

Section 35 governs the material required at the presentation hearing. In the case of an aboriginal child, the director must present the steps to be taken to preserve a child's aboriginal identity. At the conclusion of the hearing, the court must make an interim order for custody to the director; an interim order for return of the child to the parent under the supervision of the director; an order that the child be returned to or remain with the parent, or an interim order that the child be placed in the custody of a person other than a parent with the consent of the other person and under the director's supervision. Except where the judge orders return to the parent without supervision, the court must set a protection hearing within 45 days. Section 38 requires at least 10 days notice of the protection

hearing. For who must be served, see s. 38(1) and s. 39.

At the protection hearing the court must

- (a) determine whether the child needs protection (s. 40); and if so,
- (b) make an order that (s. 41)
 - (i) the child be returned to or remain in the custody of the parent and be under the director's supervision for up to six months;
 - (ii) the child be placed in the custody of a person other than the parent with the consent of the other person and under the director's supervision, for a specified period in accordance with section 43;
 - (iii) the child remain or be placed in the custody of the director for the specified period in accordance with section 43;
 - (iv) the child be placed in the continuing custody of the director, if the requirements of s. 41(2) are met.

Temporary orders under s. 41 are time-restricted (s. 43), unless extensions are sought under s. 44. The time restrictions on the duration of orders under the Act apply to every child in a group of children at that time before the court (such as a sibling group from one family) and are then determined by the age of the youngest child in the group. For example, three brothers are removed aged 4, 9, and 13 years. The order for custody of all three is limited to the restriction affecting the 4 year old. The time restrictions under s. 43 are as follows:

- (a) three months if any child in a group is a four year old or younger child;
- (b) six months if any child in a group is a five to 11 year old;
- (c) 12 months if any child in a group is a 12 year old or older child.

Section 49 outlines the procedures and time consideration for the director to apply for a continuing custody order.

Once a continuing custody order is made, the director becomes sole guardian of the person of the child and the Public Guardian and Trustee of the estate of the child (s. 50), until one of the following events occurs (s. 53):

- (a) the child reaches the age of 19,
- (b) the child is adopted,
- (c) the child marries,

- (d) the court cancels the continuing custody order , or
- (e) custody of the child is transferred under section 54.1.

Section 54 creates a form of proceeding in which a party to a proceeding in which a continuing custody order was made may apply, with permission of the court, to cancel a continuing custody order. Under s. 54.1, the director may apply to the court to permanently transfer the custody of a child who is in the custody of the director under a continuing custody order to a person other than the child's parent. For example, this may allow the child to be transferred into the permanent custody of an individual within an aboriginal community who is not a parent. Once this transfer is ordered, the individual to whom custody is transferred becomes the guardian of the person and estate of the child (s. 54.2).

Section 70 of the *CFCSA* outlines the rights of a child who is in care.

Section 71 directs that the director must consider the best interests of the child when deciding where to place a child (after removal). Subsection 71(3) provides:

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

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

Part 5 governs confidentiality and disclosure of information under the *CFCSA*. Part 5 expressly exempts the information collected and kept under this Act from the operation of the *Freedom of Information and Protection of Privacy Act*. The procedures for accessing file information are complex and unique to this Act.

It is appropriate to hear protection proceedings together with custody applications under the *Family Relations Act*. Often grandparents, aunts and other relations, apply for custody of a child who has been removed from a parent's care. However, the court may refuse to hear a contested custody application at the presentation stage of the protection proceedings.

A party may appeal to the Supreme Court as of right (s. 81) and from the Supreme Court to the Court of Appeal with leave on a question of law (s. 82). Procedure on the appeal is governed by the Supreme Court Rules.

Rule 2 of the Provincial Court Rules to the Act directs that if at the commencement of a contested protection hearing, a consent order is not made and the judge determines the matter cannot be heard that day, the judge must direct the parties and lawyers to attend a case conference. At any other time a judge can direct that a case conference be held either at the request of a party or if the judge thinks it will help (Rule 2(2)). In practice, all protection hearings must be referred to a Rule 2 case conference before a hearing date will be set.

Mediation is also encouraged under the Act. A list of approved mediators has been prepared and mediations are being conducted regularly under s. 22.

For more detailed information about proceedings under the *Child, Family and Community Service Act*, see Chapter 19 of the *BC Family Practice Manual* (Vancouver: CLE); Chapter 14 of the *Family Law Sourcebook* (Vancouver: CLE). See also *Court Procedures for Child Protection*, a publication of the Ministry for Children and Families. See also, Darwin Hanna, "Aboriginal families and the Child, Family and Community Service Act", in *Practice Desk: Aboriginal Practice Points* (Vancouver: CLE, website). See also *Child Protection Practice* (Vancouver: CLE)

[§8.02] Adoption Act

There are four types of adoption:

- (a) direct placement by an adoption agency, in which a child with whom there is no relationship by blood or marriage is adopted;
- (b) relative or stepparent adoptions;
- (c) ministry adoptions, by which children in the continuing custody of the director of Child, Family and Community Service are adopted; and
- (d) custom adoptions.

Under s. 5 of the *Adoption Act*, R.S.B.C. 1996, c.5 one adult or two adults jointly may adopt a child: this provision extends the eligibility for adoption to unmarried couples and to same-sex couples.

Proceedings are commenced in the Supreme Court by petition (most non-family adoptions) or requisition (Supreme Court Family Rules 3-1 (2)(b) and (3) and 17-1 (24) The adopting parents must have been resident in British Columbia for at least six months and the applicant(s) and child(ren) must have been living as a family unit for six months before making an application.

Under s. 13(1), consents are required from the child if 12 years of age or over; the birth mother; the father (see the expanded definition in s. 13(2)); any person appointed as the child's guardian. The consents of the birth mother and father are not required if the child is in the continuing custody of the director under the *Child, Family and Community Service Act*, or if the director is the child's guardian under the *Family Relations Act*. In special circumstances, a person's consent may be dispensed with (s. 17).

When an adoption order is made the child becomes the child of the adopting parent(s) alone (s. 37(1)). Financial obligations of the natural parents to pay maintenance are terminated, although payments in arrears are still due. Right to access also ends unless expressly preserved in the adoption order (s. 38(1)). In the case of aboriginal children, rights or privileges acquired under other statutes are not lost upon adoption (s. 37(7)).

Section 46 of the *Adoption Act* recognizes custom adoptions:

On application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.

Several issues around custom adoptions were raised by Hugh Braker, "Adoptions: Aboriginal Issues", in *Adoption* (Vancouver, CLE, 1997). As he concludes, the *Adoption Act* is silent on some key definitions, making the provisions difficult to apply. The author concludes that the clearest conclusion that can be reached is that the law around adoptions continues to be different for aboriginal people than for non-aboriginal people. See this paper for more information.

For more information on adoptions, see Chapter 20 of the *British Columbia Family Practice Manual* and Chapter 15 of the *Family Law Sourcebook*. See also Darwin Hanna, "Aboriginal families and the Child, Family and Community Service Act", in *Practice Desk: Aboriginal Practice Points* (Vancouver: CLE, website).