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Indigenous Children and Child Protection Law: How British Columbia and Canada Stand on the International Stage

Reflection Essay

Children are some of the most vulnerable members of any society. Accordingly, states aim to protect children from neglect and abuse through child protection law. While the objectives of this body of law are no doubt noble, its uneven application has been criticized. In British Columbia, children are most often removed from single mothers who experience mental disability, addiction, male violence, or poverty¹. Indigenous children are highly overrepresented in the foster care system². The Truth and Reconciliation Commission (“TRC”) concludes that “Canada’s child-welfare system has simply continued the assimilation that the residential school system started”³.

In this context, the essay aims to identify and analyse international principles of child protection law and examine to what extent they are being respected in British Columbia and Canada. I postulate that child protection law in the province is inconsistent with a number of these principles, particularly in regard to the provision of support to families and culturally appropriate placements.

The Convention on the Rights of the Child (“CRC”) is a landmark international treaty defined by the principle of the best interests of the child, a primary consideration in all decisions relating to children⁴. Under the CRC, children of all ages are afforded procedural rights such as the rights to have their views considered systematically and to be represented⁵. They also have substantive rights, such as the right to family and community⁶. Regarding child protection, the CRC aims to prevent family separation through the provision of support and services to families in need,

¹ Judith Mosoff *et al*, “Intersecting Challenges: Mothers and Child Protection Law in BC” (2017) 50 UBC L Rev 435 at 436.

² “Children and Youth in Care (CYIC)”, online: *B.C. Government* <<https://mcfid.gov.bc.ca/reporting/services/child-protection/permanency-for-children-and-youth/performance-indicators/children-in-care>>.

³ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future : Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRC, 2015) 2015 at 138.

⁴ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 3(1) [CRC].

⁵ *Ibid*, art 12; Committee on the Rights of the Child, *General comment No. 12 (2009) on the right of the child to be heard*, 2009, CRC/C/GC/12 at paras 35, 53–54.

⁶ CRC, *supra* note 4, art 5, 16; Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 2013, CRC/C/GC/14 at 8 [General comment No. 14].

particularly families dealing with poverty, disability, addiction, or discrimination⁷. Removing custody is a last resort, used when no other option would protect the child⁸. In that event, the removal should most often be temporary in the hope that the child can soon be returned to their family. The CRC also affords the right to a culturally appropriate foster placement, ideally with relatives and within the child's community⁹. Indigenous children have rights specific to them, including the right of a child to preserve their identity and maintain their culture and language¹⁰.

Contrasted to the CRC, the British Columbia Child, Family and Community Service Act ("CFCSA")¹¹ contains a number of inconsistencies. Safety and well-being of children are made the "paramount considerations" above their other rights¹². Preventative measures are lacking as evidenced by the rates of child poverty in the province and the fact that poverty and situations arising therefrom are often used to justify the removal of children¹³. In general, while the CFCSA allows for *soft* supports like parenting courses, it does not offer as many *material* services such as housing¹⁴. Furthermore, children are more often removed when they or their parents have a disability or an addiction¹⁵. Under the CRC, states should instead provide support in the raising of children in these cases¹⁶. Indigenous children in care remain highly overrepresented, due in part to the intergenerational effects of the Sixties Scoop and other racist policies¹⁷. Though the CFCSA does encourage placements with the child's relatives and in their community, these wishes are difficult to implement in reality considering the diversity of Indigenous groups and the number of Indigenous children in care¹⁸. Finally, the CFCSA allows for flexibility in procedure and evidence, which enables the child to better express their views, but does not *require* that these adaptations be used by judges¹⁹. Examples include informal hearings and admissible hearsay evidence.

⁷ CRC, supra note 4, art 18(2); *Guidelines for the Alternative Care of Children*, GA Res 64/142, UNGAOR, 64th Sess, Supp No 49, UN DOC A/64/142 (2010) 64, Annex s II (A) (3) [*Guidelines for Alternative Care*].

⁸ *General comment No. 14*, supra note 6 at 8.

⁹ CRC, supra note 4, art 8, 20; *Guidelines for Alternative Care*, supra note 7 Annex s V (53), VI (62).

¹⁰ CRC, supra note 4, art 30. See also *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN DOC A/61/251 68 (2007), art 7(2), 14(3).

¹¹ *Child, Family and Community Service Act*, RSBC 1996 c 46 [CFCSA].

¹² *Ibid*, s 2.

¹³ Mosoff, supra note 1 at 446-447; "2021 BC Child Poverty Report Card" (23 November 2021) at 6, online (pdf): *First Call* <still1in5.ca/wp-content/uploads/2021/11/First_Call_Report_Card_2021_Nov_23_web.pdf>. See for example *The child W.M.W. born January 2004*, 2004 BCPC 476 at para 65; *The Director of Child, Family and Community Services v G.M.*, 2013 BCSC 265 at para 24; *S.H. v British Columbia (Child, Family and Community Service)*, 2015 BCSC 230 at para 27.

¹⁴ CFCSA, supra note 11, s 5(2); 41.1; Mosoff, supra note 1 at 446-447.

¹⁵ Mosoff, supra note 1 at 457-458. See for example *British Columbia (Director of Family & Child Services) v M. (C.L.)*, 2003 BCPC 298 at para 5; *Director v A.M.*, 2008 BCPC 279.

¹⁶ *Guidelines for Alternative Care*, supra note 7, Annex s II (A) (9) (a); *General comment No. 14*, supra note 6 at 8.

¹⁷ Mossof, supra note 1 at 456; "Children and Youth in Care (CYIC)", supra note 2.

¹⁸ See for example *British Columbia (Child, Family and Community Service) v S.H.*, 2020 BCPC 82 at para 145.

¹⁹ CFCSA, supra note 6, s 66(1)(b), 68(2).

Overall, while recent trends and legislative reforms²⁰ are positive, child protection law in B.C. could become more respectful of the CRC by increasing material support to families in need and by better educating judges on the effects of poverty, discrimination, disability, and addiction. All in all, I am confident that we have the power to honour the TRC's Calls to Action and find a just way to both protect *and* uplift those who embody our collective future.

Annotated Bibliography

Legislation

Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019 c 24

Declaration on the Rights of Indigenous Peoples Act, SBC 2019 c 44

United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021 c 14

- These recently adopted acts are examples of positive developments regarding child protection law and Indigenous children. While the first empowers Indigenous governing bodies to administer and regulate child protection law, the second and third indicate an intention of the provincial and federal legislatures to uphold the United Nations Declaration on the Rights of Indigenous Peoples, including articles 7(2) and 14(3) regarding children.

Canadian Charter of Rights and Freedoms, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

- Section 7 of the Charter guarantees procedural rights to parents of a child who may be removed, as recognized in *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 SCR 46 (see below).

Child, Family and Community Service Act, RSBC 1996 c 46

- This Act is the cornerstone of child protection law in British Columbia. It includes guiding principles, procedural and substantive rights for children in care, supports for families in need, criteria for the removal of a child and the factors considered in finding the appropriate foster family, among other stipulations.
- Directors, persons designated by the minister of Children and Family Development, are the key government actors under this legislation. Their powers are generally exercised by

²⁰ See for example the *Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019 c 24; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021 c 14.

applying to the Provincial Court, which can then make orders after hearing from interested parties. If the court finds that a child needs protection, it can order the return of the child to the parent under a director's supervision (known as a "supervision order"), a temporary custody order with a relative or a director, or continuing custody with a director. Continuing custody allows directors to consent to the child's adoption. Courts may also grant interim orders. Furthermore, directors have the power to remove a child without a court order in cases of immediate danger; they can then return the child or apply to the court for an interim order. Directors may enter into voluntary agreements with the parent of a child to help the family care for the child.

Criminal Code, RSC 1985 c C-46

- Children of delinquents may be separated from their parents who are incarcerated. While the CRC provides that this is a factor that should be considered during sentencing, this is not a factor enumerated in section 717 of the Criminal Code.

Family Law Act, SBC 2011 c 25

Income Tax Act, RSBC 1996 c 215

- These acts help alleviate child poverty and situations leading to child removal. The Family Law Act allows for child support, while the Income Tax Act provides the child opportunity benefit aimed at low-income families. (The federal Canada child benefit was also mentioned in the essay.)

Representative for Children and Youth Act, SBC 2006 c 29

- This Act creates the position of Representative for Children and Youth, who can help children, including children in care, obtain information about their rights.

Jurisprudence

A.J. v British Columbia (Director of Child, Family and Community Service), 2018 BCSC 903

- Regarding criteria for the removal of a child, this appeal decision confirmed a lower court decision to order a continuing custody order in a situation where a parent showed no willingness to make change and refusal to respect court orders.

Bjornson v Shaw, 2010 BCCA 510

F.H. v McDougall, 2008 SCC 53

- Regarding procedural rights, these decisions stipulate that a judge is obliged to give reasons to justify their conclusion. This also applies in matters of child protection before the court, which is consistent with the CRC.

British Columbia (Child, Family and Community Service) v S.H., 2020 BCPC 82

- Regarding culturally appropriate placements, this decision is an example of an inadequate placement of an Indigenous child because no adequate placements could be found.

British Columbia (Director of Child, Family and Community Service) v JM, 2012 BCPC 333

British Columbia (Director of Family & Child Services) v M. (C.L.), 2003 BCPC 298

Director v A.M., 2008 BCPC 279

- Regarding support for families, these are examples of a child being removed from a parent with mental disabilities where more appropriate supports may have been more appropriate instead. In *M. (C.L.)*, the mother was described by the court as having “low intellectual functioning” (at para 5). In *A.M.*, she was described as functioning at a third-grade level.

Cardinal v Director of Kent Institution, [1985] 2 RCS 643, 24 DLR (4e) 44

- This decision grants procedural rights at common law to individuals affected by an administrative decision. It could be used to fill gaps in the CFCSA.

C.C.V. v British Columbia (Child, Family and Community Service), 2017 BCSC 412

Director v V.F., 2017 BCPC 176

The Director of Child, Family and Community Services v G.M., 2013 BCSC 265

- Regarding the conditions for the removal of a child, these decisions are examples where a child with “special needs” was removed. Since children with special needs require more attention, they are more likely to be removed from parents. Judges may sometimes refer to a foster family’s resources and ability to care for a child with special needs.

National Corn Growers v Canada (Import Tribunal), [1990] 2 SCR 1324

Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association, 2022 SCC 30

- These decisions stipulate that international treaties ratified by Canada (such as the CRC) can be used in the interpretation of statutes (such as the CFCSA).

New Brunswick (Minister of Health and Community Services) v G. (J.), [1999] 3 SCR 46

- This decision established that section 7 of the Canadian Charter of Rights and Freedoms guarantees the right of parents to counsel in matters of child protection.

Quebec (Attorney General) v 9147-0732 Québec inc., 2020 SCC 32

- This decision stated that international treaties ratified by Canada can be used as an interpretative tool regarding rights guaranteed by the Charter.

S.H. v British Columbia (Child, Family and Community Service), 2015 BCSC 230

- This is an example of poverty and homelessness being used, in part, as justifications for the removal of a child. The mother's frequent homelessness was described by the court as a "transient lifestyle".

S.M. v British Columbia (Child, Family and Community Service), 2011 BCSC 1131

- Regarding the right of the child to be heard, this decision states that no *voir dire* is necessary to admit hearsay evidence in matters of child protection under the CFCSA. Instead, courts hear all evidence and then receive submissions on its reliability.

The child W.M.W. born January 2004, 2004 BCPC 476

- The decision states that poverty alone is not a sufficient reason for the removal of children in B.C. law. This is consistent with the CRC.

Secondary materials: international materials

African Charter on the Rights and Welfare of the Child, July 1990 (entered into force 29 November 1999)

American Convention on Human Rights "Pact of San José, Costa Rica", 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978)

Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, 19 October 1996, 2204 UNTS 503 (entered into force 1 January 2002)

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 1 (entered into force 3 September 1981)

European Convention on the Exercise of Children's Rights, 25 January 1996, 2135 UNTS 267 (entered into force 1 July 2000)

- All of these international instruments, along with the CRC, recognize the “best interests of the child” as a primary or paramount consideration regarding decisions made in relation to a child.

Declaration of the Rights of the Child, GA Res 1386 (XIV), UNGAOR, 14th Sess, Supp No 16, UN Doc A/4354 (1959) 19

Geneva Declaration of the Rights of the Child, League of Nations OJ, 1924, Supp No 21

- These resolutions are the first international recognitions of rights specific to children. They do not yet include the “best interests of the child” principle.

Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Canada*, 2022, CRC/C/CAN/CO/5-6

- As prescribed by the CRC, the Committee on the Rights of the Child regularly issues observations on states party to the CRC as to their conformity to the Convention. These concluding observations regarding Canada’s observance of the CRC were published in June 2022. Notably, the Committee states being “deeply concerned about [...] [t]he discrimination against children in marginalized and disadvantaged situations in the State party, such as the structural discrimination against children belonging to indigenous groups and children of African descent [and] [t]he apparent disparities in the treatment of children and their rights among the different regions and territories, especially with regard to children with disabilities, migrant children and children belonging to ethnic minority groups” (at para 17). It also “welcomes the coming into force of the Act respecting First Nations, Inuit and Métis children, young people and families, in January 2020” (at para 31). Finally, the Committee states the following:

“[The Committee] remains seriously concerned about the following:

- (a) The persistently high number of children in alternative care;
- (b) The continuing overrepresentation of indigenous children and children of African descent in alternative care, including foster care, often outside their communities;
- (c) That different criteria are being used across jurisdictions for making decisions on child removal and placement in care, on the basis of socioeconomic factors that disproportionately affect indigenous children, children of African descent and other children belonging to minority groups;
- (d) That indigenous and children of African descent are at higher risk of abuse, neglect and violence in alternative care than other children.” (at para 31).

Committee on the Rights of the Child, *General comment No. 12 (2009) on the right of the child to be heard*, 2009, CRC/C/GC/12

- This General comment issued by the Committee on the Rights of the Child describes how the right of the child to be heard, protected by article 12 of the CRC, should be interpreted. Notably, the child is presumed to be to be capable of expressing his or her own views regardless of age or ability to express views verbally. Courts must thus take into consideration non-verbal communication, such as play, body language, facial expressions, and drawings. When necessary, children should be provided with representation in order to better assert their interests, especially children who will not or cannot express themselves. Adaptive measures should also be put into place for children with disabilities, those who are victims of violence, and children from a minority culture or who speak a non-official language. In order to express their views in a meaningful way, children must be provided information about their rights and circumstances in an age-appropriate way. Furthermore, they should be heard in an environment where they feel free to express their opinion and outside of open court. Their views must have a consequential impact on the outcome of the decision. Overall, to objectively determine the child's views, a multidisciplinary team of professionals should perform the assessment.

Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 2013, CRC/C/GC/14

- This comment issued by the Committee on the Rights of the Child concerns the application of article 3(1) of the CRC and the best interests of the child as a primary consideration. The child's best interests are simultaneously a fundamental interpretative legal principle, a substantive right, and a rule of procedure. As an interpretative principle, the child's best interests guide the interpretation of other provisions in the CRC. As a substantive right, article 3(1) mandates states parties to consider the best interests of the child as a primary consideration when making a decision concerning a specific child, a group of children or children in general. As a rule of procedure, article 3(1) mandates that the decision-making process include systematically an evaluation of the possible impact of the decision on the child or children in general and to show, in the justification of a decision, that this evaluation was performed. Decision-makers will often have to balance children's interests with those of other actors, such as parents, the public or other children. However, the best interests of the child remain the primary consideration, meaning they have high priority and a large weight compared to other considerations.

Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

- This landmark international treaty was used as the basis for this essay's analysis. A brief explanation of the rights relevant to child protection, as interpreted by the Committee on the Rights of the Child, is included in the reflection essay.

- While Canada has ratified this treaty, it has entered reservations to article 21 regarding adoption and paragraph 37(c) regarding youth incarceration.

Guidelines for the Alternative Care of Children, GA Res 64/142, UNGAOR, 64th Sess, Supp No 49, UN DOC A/64/142 (2010) 64

- These Guidelines were adopted in a 2010 resolution of the United Nations General Assembly.
- They touch on the provision of services by states in order to prevent harm. These services and supports should include basic health, education and social welfare services, adequate housing, and measures to combat poverty and substance abuse. Particular care should be given to families in vulnerable situations. Child apprehension should be viewed as a last resort, used only when the state's support cannot prevent the harm to the child.

United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN DOC A/61/251 68 (2007)

- Regarding Indigenous children specifically, this United Nations General Assembly resolution encourages states to provide education in Indigenous languages. It also stipulates that Indigenous children have the right to not be forcibly removed from their group into another group.

Secondary materials: other materials

“2019/20 Annual Service Plan Report” (2020), online (pdf): *Ministry of Children and Family Development*

<https://www.bcbudget.gov.bc.ca/Annual_Reports/2019_2020/pdf/ministry/cfd.pdf>

- This report from the B.C. governments provides relevant information to children's rights. For one, it states that only 28,000 children in 2019-2020 had access to affordable daycare, which may be insufficient in regard to the CRC's preventative goals. Furthermore, the B.C. Extended Family Program was expanded such that caregivers that are a part of a child's family can receive the same amount as foster caregivers since 2020. This favours placements within the child's community among relatives.

“2021 BC Child Poverty Report Card” (23 November 2021), online (pdf): *First Call*
<still1in5.ca/wp-content/uploads/2021/11/First_Call_Report_Card_2021_Nov_23_web.pdf>

- This report discusses the prevalence of child poverty in British Columbia. In 2021, around one in five children lived in poverty.

“Canada child benefit”, online: *Government of Canada*
<www.canada.ca/en/revenue-agency/services/child-family-benefits/canada-child-benefit-overview/canada-child-benefit-we-calculate-your-ccb.html#wb-cont-nav>

“Canada disability benefit”, online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/child-family-benefits/child-disability-benefit.html>

“Support Needs for Families”, online: *Government of B.C.* <www2.gov.bc.ca/gov/content/family-social-supports/youth-and-family-services/special-needs-supports-for-families>

- These websites discuss the social benefits available to parents and children in British Columbia.

“Children and Youth in Care (CYIC)”, online: *B.C. Government* <<https://mcfcd.gov.bc.ca/reporting/services/child-protection/permanency-for-children-and-youth/performance-indicators/children-in-care>>

Statistics Canada, *Insights on Canadian Society: Living arrangements of Aboriginal children aged 14 and under*, by Annie Turner, Catalogue no. 75-006-X (Ottawa: Statistics Canada, 13 April 2016)

- These materials provide data regarding the number and proportion of Indigenous and non-Indigenous children in care in Canada and British Columbia.

Mossof, Judith *et al.*, “Intersecting Challenges: Mothers and Child Protection Law in BC” (2017) 50 UBC L Rev 435

- This study performed an extensive review of child protection case law under the CFCSA. The authors conclude that children are most often removed from single mothers who experience mental disability, addiction, male violence, or poverty. Mothers are often blamed for addiction or poverty, with some judges qualifying these issues as a “lifestyle choice”.

Sinclair, Niigaanwewidam James and Sharon Dainard, “Sixties Scoop”, (22 June 2016), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/sixties-scoop>

- This article discusses the Sixties Scoop, which saw thousands of Indigenous children removed from their homes and adopted into (mostly) non-Indigenous families across Canada and the United States from the 1950s to the 1990s. This is the context in which legislative reforms emerged from the 1990s onwards. The Sixties Scoop also had an intergenerational impact, with a significant portion of parents who lose custody of their children having themselves been in care as children.

“The IBCR child participation policy” (August 2021), online (pdf): *IBCR* <ibcr.org/wp-content/uploads/2022/04/EN-politique-participation.pdf>

- This material explains the International Bureau for Children’s Rights view on the participation of children in the decision-making process. This is an example of transnational legal principles being developed by a non-governmental organization.

Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future : Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRC, 2015)

- The Truth and Reconciliation Commission of Canada issued five calls to action regarding child welfare. It notably asks governments to reduce the number of Aboriginal children in care and to provide resources in order to keep Aboriginal families together.