Citation: ☼British Columbia (Child, Family and Community Service) v. W. and H. 2022 BCPC 216

Date: ☼20220929
File No: [omitted for publication]
Registry: Prince George

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

IN THE MATTER OF
THE *CHILD FAMILY AND COMMUNITY SERVICE ACT*, R.S.B.C. 1996 c. 46
AND THE CHILD:
A.H., born [omitted for publication]

BETWEEN:

DIRECTOR OF CHILD, FAMILY AND COMMUNITY SERVICE

APPLICANT

AND:

R.D.W. aka R.W. (Deceased)
and C.A.H.

PARENTS

File No: [omitted]
Registry: Prince George

AND IN THE MATTER OF
THE *FAMILY LAW ACT*, S.B.C. 2011 c. 25

BETWEEN:

R.D.W. aka R.W.

APPLICANT

AND:

C.A.H.

RESPONDENT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE MENGERING

Counsel for the Director:	D. Poulin
Counsel for the Parent:	I. Henderson
Counsel for [omitted] Band	K. Barnes, C. Roberts
Counsel for the Applicant:	Counsel for the Applicant:
Counsel for the Respondent:	C. Macmillan for Metis Commission of BC
Place of Hearing:	Prince George , B.C
Dates of Hearing:	May 24, Jun 27, 28, 2022
Date of Judgment:	Sept 29, 2022

[1] Although I will refer to the parties by name today in court, I will change those names to reflect the role of the parties so as to preserve the anonymity of the child in the written form of these reasons, which will be distributed no later than Monday.

[2] Further, I may edit the Reasons for Judgment to ensure the proper structure, grammar and readability. That may include adding the full citations and quotes from any caselaw to which I refer, but the results and substance of my decision will not change.

INTRODUCTION

[3] By way of an application filed May 5, 2022, the Director seeks an order placing the child in the temporary care of certain caregivers ("the caregivers") pursuant to s. 41(1)(b) of the *Child, Family, and Community Services Act (*the *CFCSA)*.

[4] The Metis Commission is the only party that has provided its written consent, modified by submissions reflecting their concerns for the preservation of the child's Metis heritage.

[5] Anticipating that the Order would be made, the child's paternal cousins withdrew their *FLA* applications for guardianship on June 28, 2022. They consent to the Order placing the child in the temporary custody of the caregivers despite their grave concern about the preservation of the child's Metis heritage. They hope the caregiver stays true to her word and facilitates their contact with the child so that they can teach her about being Metis.

[6] The child's biological mother provided her oral consent to the Order.

[7] The proposed caregivers obtained independent legal advice and thereafter indicated their consent to a six month order on the terms set out in the May 5, 2022 Application. They do not recognize the child to be Metis.

[8] The [omitted for publication] Band (the Band) provided its oral consent to the temporary custody order but maintain that, absent proof of the child's Metis heritage, they will not sign or adhere to a Metis Cultural Safety Plan (CSP), tell the child that she

is Metis, or respect or maintain the child's knowledge of, or connection to, Metis customs, traditions or community.

[9] The Director says that there is sufficient evidence that the child is an Indigenous child based on her Metis heritage as well as her [omitted for publication] heritage. They note that the Band and caregiver say that they will implement a cultural safety plan if this court finds that the child is Metis, and ask that the s. 41(1)(b) order be made on that basis. Alternatively, the order can be made without a CSP as it is in the child's best interests to do so. If the Court declines to do so, it can either place the child with another person or make an order placing her in the continuing custody of the Director.

[10] The child is [omitted for publication] through her mother. The issue, however, is whether she is also Metis for the purposes of ss. 1 and 4 of the *CFCSA*.

[11] Today, the Court is called upon to decide what makes a Metis child "Indigenous" for the purpose of child protection proceedings.

[12] I will not now cite all the caselaw I reviewed but will include the citations in the written Reasons for Judgment: *R. v. Van Der Peet*, [1996] 2 R.C.S. 216; *R. v. Powley*, [2003] SCC 43; *Daniels v. Canada (Indian Affairs and Northern Development)* [2016] 1 SCR; *R. v. Daigle*, [2003] NBPC 4; *R. v. Hopper*, [2004] NBPC 7; *Castonguay and Faucher v. R.*, [2006] NBCA 43; *R. v. Vautour,* [2010] NBPC 39*; R. v. Caissie*, [2012] NBQB 1; *R. v. Eymard Chiasson*, [2012] NBPC 14; *Children's Aid Society of the Regional Municipality of Waterloo v. C.E.* [2020] OJ No. 5040; *Catholic Children's Aid Society of Toronto v. S.T.* [2019] OJ No 1783; *Windsor-Essex Children's Aid Society v. A.D.* [2021] OJ No. 4563; *British Columbia (Child, Family and Community Service) v. S.H.,* [2020] BCJ No. 687 (PC); *British Columbia (Director of Child, Family and Community Service) v. H.D.C.,* [2020] BCJ No. 1794 (PC); *British Columbia (Child, Family and Community Service v. M.J.K.,* [2020] BCJ No. 389 (PC); *T.L. v. British Columbia (Attorney General)* [2021] BCJ No. 2437 (SC) *L.P. and D.P. v. C.C.* 2022 BCPC 0034; *R. v. Gladue* [1999] 1 SCR 688; and *R. v. Ipeelee* [2012] 1 SCR 433; and *Catholic Children's Aid Society of Hamilton v. G.H.*, 2016 O.J. No. 5233.

ISSUES

[13] The issues before me, then, are:

1. Is the child an Indigenous child, pursuant to s. 1 of the *CFCSA*?

2. Can the Court place a child in the temporary custody of the caregiver pursuant to s. 41(1)(b) if the proposed caregiver will not respect both the child's [omitted for publication] and Metis heritage? and

3. Is it in the child's best interests to temporarily transfer custody of her to the caregivers?

POSITION OF THE PARTIES

[14] The [omitted for publication] Band says that it is in the child's best interests to know whether she is Metis or not, and that in the absence of any evidence of her Metis Heritage, a Metis plan should not be part of the child's care plan. It says that placing the child, an Indigenous child, with the caregiver is in the child's best interests as set out in both the *Federal Act* and provincial child protection legislation. They say that I must apply the definition of Metis set out in *Powley* to establish whether the child is Metis. The Band says that it will implement a Metis Cultural Safety Plan if someone proves to their satisfaction that the child is Metis or if the Court makes that determination.

[15] The proposed caregiver addressed the Court and made a series of misinformed statements about the proceedings generally, accused the paternal family of recently fabricating a claim of Indigeneity to support their *FLA* application, and advised that it would be damaging to the child if she were taught a culture that is not her own. This court does not accept that exposure to different cultures and practices, on its own, is damaging to a child.

[16] Despite the caregiver having participated in meetings with the social worker and the Metis Commission, contributing to the CSP and saying that she would honour the child's Metis Heritage, she abruptly changed her tune on May 12, 2022, indicating that she will not sign the CSP until the Director proves the child's "alleged" Metis status to

the satisfaction of the Band. She is “extremely offended that the Director would ever disregard Aboriginal history.” She differentiated between “genuine Indigenous Peoples” and post-contact Metis, whose membership rules should be more strict so as to prevent non-Indigenous persons from claiming to be Metis because it benefits them to do so.

[17] The caregiver disagrees with the Metis Commission’s definition of Metis and seeks to impose her own definition of Indigeneity on another culture.

[18] The Director says that the child is both [omitted for publication] and Metis, evidence of which came from her father’s cousin, and that when the TCO application was filed, it believed it had a CSP in place to address the child’s Metis heritage. It was with some surprise that it learned that the caregiver was resiling from her earlier stated commitment to the CSP. The Director says that it is in the child’s best interests to move forward with the application even in the absence of cooperation of the proposed caregivers.

[19] The Metis Commission of BC (Metis Commission), the designated Aboriginal organization for the Metis community under the *CFCSA* and *Regulations*, is involved with any Ministry-involved child or family that self-identifies as Metis. It has recognized both the child and her father as Metis, and has been involved with her for most of her life. The child’s father self-identified as Metis, as does his cousin and all of the paternal family that has stepped forward over the years. Further, the Metis Commission has an internal process as set out in a Memorandum of Understanding (MoU) to determine whether a child is Metis and, therefore, an “Aboriginal child” as defined by the *Act*.

[20] The mother herself told the Court that the child’s father was Metis, so the child is both Metis and [omitted for publication].

THE LAW

[21] Section 41(1)(b) of the *CFCSA* allows the Court to make an order placing the child in the custody of a person other than a parent with the consent of the other person and under the Director’s supervision, for a specific period if the Court finds that the child needs protection.

[22] Section 4(2) says that if a child is an Indigenous child, the court must determine what is in her best interests, having regard to (a) the importance of the child being able to learn about and practice her Indigenous traditions, customs and language, and (b) the importance of the child belonging to her Indigenous community.

[23] The relevant portion of s. 1 of the *CFCSA* defines an "Indigenous child" as a child who is under 12 years of age and has a biological parent who (i) is of Indigenous ancestry, including Metis; and (ii) considers him or herself to be Indigenous.

[24] The Preamble to *An Act respecting First Nations, Inuit and Metis Children, Youth and Families* S.C. 2019, c. 24 (the *Federal Act*) recognizes, amongst other things, the importance of reuniting Indigenous children with their families and communities, and affirms the need to respect the diversity of all Indigenous peoples, address the needs of Indigenous children, and to help ensure that there are no gaps in the services that are provided in relation to them.

[25] Section 1 of the *Federal Act* defines an Indigenous person as a First Nations person, an Inuk or a Metis person. "Indigenous peoples" has the meaning assigned by the definition of "Aboriginal peoples of Canada" in subsection 35(2) of the *Constitution Act*, *1982* ("*Constitution Act*") which defines Aboriginal peoples of Canada as including the Indian, Inuit and Metis peoples of Canada.

[26] The *Federal Act* is to be interpreted and administered in accordance with the principal of cultural continuity, which is expressly recognized as being essential to a child's well-being (s. 2). The transmission of language, culture, practice, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity. Child and family services for Indigenous children are to be provided in a way that does not contribute to the assimilation of the Indigenous people to which the child belongs, or to the destruction of the culture of that Indigenous group, community or people.

[27] S. 10 of the *Federal Act* discusses what a child's "best interests" are in child protection proceedings involving Indigenous children. There is, necessarily, a deep

emphasis on the importance of a child having an ongoing relationship with her family and with the Indigenous people to which she belongs and of preserving her connection to her culture. Allowing a child to know her family origins is a fundamental precept in the provision of child and family services to Indigenous children (s. 11(c)).

[28] The Director provided caselaw arising from Ontario's provincial child protection legislation, which is different than in British Columbia, in that the Ontario legislation expressly requires the Court, before determining whether a child is in need of protection, to determine whether the child is a First Nations, Inuk or Metis child and if so, the child's bands and First Nations, Inuit or Metis communities (s. 90(2)(b) *CYFSA*). The derivative case law is nevertheless of some assistance to the present analysis of the child's indigeneity. The Ontario line of authority concludes as follows:

i. Self-identification is a common avenue by which children are identified as First Nations, Inuit or Metis under the Ontario legislation. As such, there are three principles to consider:

    a) There must be an evidentiary basis to the self-identification, and the underpinning of any self-identification right is that it must be made in good faith;

    b) The evidentiary threshold is low, but must be reliable and credible. A person related to the child need only demonstrate that they identify as a First Nations, Inuk or Metis person;

    c) The court is to take a broad view in interpreting if a child is First Nations, Inuk or Metis. This approach is consistent with the statements in both the preamble and purposes section of the child protection legislation;

ii. While the inability of a person to name specific bands or First Nations, Inuit or Metis communities might be a factor in assessing the identification issue, it should not be determinative; and

iii. A child's identification as Indigenous, whether or not they are a member of a band or First Nations community, is important given the unique considerations available to Indigenous children under the *CFCSA*.

Catholic Children's Aid Society of Toronto v. S.T. at paras 25 – 27; *Children's Aid Society of the Regional Municipality of Waterloo* at para 69, 71-72, 149; *Windsor-Essex Children's Aid Society* at paras. 40 and 44.

ISSUE 1: IS THE CHILD AN INDIGENOUS CHILD?

[29] It is common ground that the child is matrilineally Indigenous. She is a citizen of the [omitted for publication] Nation, a registered member of the [omitted for publication] Band, and holds a Status Card issued under the *Indian Act*.

[30] The issue is whether she is also Metis through her father.

[31] There is no definition of the word Metis in the *Constitution Act*, nor does it provide a list of which persons, or group of persons are to be included as Metis people. The *CFCSA* does not define Metis.

[32] The Supreme Court of Canada in *Powley* considered who is Metis under s. 35 of the *Constitution Act*. The case involved two Metis hunters charged with violating Ontario's provincial *Game and Fish Act* who claimed an Aboriginal right to hunt for food under s. 35(1). The Court suggested three criteria for defining who qualifies as Metis for purposes of s. 35(1):

i. Self-identification as Metis;
ii. An ancestral connection to an historic Metis community; and
iii. Acceptance by the modern Metis community.

[33] Thus, the criteria in *Powley* were developed specifically for the purposes of applying s. 35, which is about protecting historic community-held rights. That is why the third prong of the test – acceptance by the community – was found to be a prerequisite to holding those rights (*Daniels* at para. 49).

[34] The inclusion of Metis in section 35 of the *Constitution Act* is based on a commitment to recognizing the Metis and enhancing their survival as distinctive communities. The purpose and the promise of section 35 is to protect practices that

were historically important features of these distinct communities and that persist in the present day as integral elements of the Metis culture (para. 13 of the *Report of the Royal Commission on Aboriginal Peoples*).

[35] I was urged by the Band to adopt the definition of Metis as set out in *Powley* but I am not persuaded that test applies to the child protection realm. The principle underlying the definition of “Indigenous” in *Powley* is the non-extinguishment of pre-existing practices and titles that predate confederation and, with the Metis, reconciliation of pre-control practices and traditions with the imposition of colonial laws that infringe on those practices and traditions.

[36] From the plain wording of s. 1 of the *CFCSA* I find that its specific purpose is to respect the rights of a child who has a biological parent that is both of Metis ancestry and who considers themself to be Metis. The express purpose of s. 4 of the *CFCSA* is to ensure that such a child learns about and practices their Metis traditions, customs and language and that courts recognize the importance of their belonging to their Metis community.

[37] Thus, I find that the overarching purpose of ss. 1 and 4 of the *CFCSA*, the *Federal Act*, and s. 35 of the *Constitution Act* is the same - to recognize Indigenous heritage and enhance and ensure the survival of Indigenous cultural practices, language and traditions - but the legal and constitutional outcome is, and should be, different. A child can be Métis for child protection proceeding purposes, but not gain section 35 constitutionally protected rights.

[38] The Band provided a number of criminal cases from our Maritime Provinces, which relate to the interplay between Indigenous rights and distinct practices, customs or traditions that attract the protection of section 35 of the *Constitution Act* and therefore require a section 35 analysis. I am not satisfied that the same principles are at play in criminal proceedings as in child protection proceedings.

[39] I find the principles flowing from the Ontario caselaw to be persuasive, and adopt the test for Indigeneity, including Metis, set out therein.

[40] To require a child in care to meet the stringent three-part test set out in *Powley* in order to have her Metis heritage acknowledged and fostered would, I fear, lead to the loss of that cultural heritage and connection. And that is the opposite of the stated purpose for the inclusion of Metis in section 35, which is a commitment to recognize the Metis and enhance their survival as distinctive communities. The interest at stake is fundamentally different in child protection and criminal contexts.

[41] A finding that a child is a Metis child in *CFCSA* matters affords that child services and benefits that preserve their cultural heritage.

Evidence relating to the child's Metis Heritage

[42] The Director states that the family's self-identification as Indigenous through both the mother and the father is a sufficient basis to conclude that the child is both Metis and [omitted for publication].

[43] The child's paternal cousin testified that he is the cousin of the child's father: their fathers were brothers. Thus, he is the child's cousin. He identifies as Metis on both his mother and his father's side. His father, who resides in Nova Scotia, is a registered member of a Metis tribe, the Eastern Woodland Metis Nation of Nova Scotia (EWMN). His cousin, the child's father, who passed in 2018, was Metis. He said the family genealogy is held by his and the child's grandmother. He has more family in Ontario, where he resides. He identified as descending from a tribe known as the Petite Noire, related to the Mi'kmaw in Nova Scotia, and believed his people to be extinguished.

[44] The Band provided a June 10, 2022, letter from the Metis Nation of British Columbia, the Metis political body in British Columbia, which says that the "Eastern Woodland Metis Association," which I assume the Band says is the same as the Eastern Woodland Metis Nation Nova Scotia with which the child's father and cousin are registered, is not associated with or represented by the Metis National Council; and that its definition of Metis identity is incongruent with the national definition.

[45] The Band says that membership in the EWMN is not proof that one is Metis. The child's cousin says he is a current member, and traces his roots back to a different line

of peoples. I cannot make a determination on the evidence before me as to which Metis tribe the paternal family is descended from. The Band says there has never been Metis in Nova Scotia: I need not decide that issue, but even if I agreed, a Metis person does not stop being Metis simply because they move between provinces, either temporarily or permanently. They may not be able to exercise Aboriginal rights under the Constitution if they cannot establish a site-specific right to do so in their adopted province, but that is not the same as extinguishing their Indigeneity.

[46] Further, as the Metis Commission noted, there are many reasons why people cannot trace their lineage with particularity including historical and ongoing colonialism, displacement, and forced assimilation through residential schools and the “60’s Scoop.” All of those factors may cause alienation, displacement from community, and disconnection from culture, community, family and supports. Not everyone with Indigenous roots can prove those roots; but they ought not to be disentitled from receiving culturally appropriate services in *CFCSA* matters.

[47] The child’s paternal cousin considers his heritage to be based in his spirituality as well as activities that promote his spirituality. He cited his cultural practices, including tracking and bow-hunting of game, which he learned from his father. He has given his oldest daughter a bow as well, and is teaching his children to track animals. He and his son fish together. He plays the spoons and has taught his children. He recognized the symbolism of the Metis scarf, flag and language, but testified that “for me, it’s not one particular activity. You probably want answers like playing the spoons, which is something I can do…but that’s not how I view being a Metis; there are a lot of parts of me made up as that identity. Being spiritual is one of the key things in my household.” In trying to define the nebulous concept of “being spiritual” he said that his belief in a higher power brings him solace and peace and impacts his life. His children are aware they are Metis; their cultural knowledge is and will continue to be transmitted inter-generationally over a lifetime through activities, gatherings, kitchen parties and cultural events. He recalls being told cultural stories as a child that he has passed on to his children, including a creation story about Glooscap. He has been a registered member of the EWMN since December 11, 2007, which rebuts the baseless accusation by the

Band and the caregiver that he has recently fabricated a Metis connection to buttress his December 2020 application for guardianship of the child. He said that it is important to him that the child have access to her Metis culture, and that he contacted the Metis Commission of BC as soon as he became a prospective guardian to ensure that the child's Metis concerns were cared for.

[48] He said that the child still has Metis family in Nova Scotia.

[49] The wife of the paternal cousin is not Metis, but testified that her husband is, and that he observes Metis practices. She said that it is important for him to do a lot of outdoor activities including hunting and tracking.

[50] The May 2016 Affidavit of the social worker K.P. summarizes the social worker's home visit with the child's father on October 30, 2015, wherein he said that he is Metis and the child's mother is [omitted for publication].

[51] On April 28, 2021, the Band representative, sent an email accusing social workers of failing to foster the child's "Metis side" despite the plethora of Metis resources in Prince George, which is perplexing in light of the Band's position that the child is not Metis.

[52] Jillian Powell prepared a Family Finders Report from Sept 4, 2020 which indicates that:

i. The child's paternal grandmother has her Metis citizenship card, and believes the father also had one; and

ii. The father's former partner of 16 years described him as a proud Metis man who would want the child to know her Metis culture, which I note, is consistent with what the child's mother said.

[53] During the course of submissions on June 28, 2022, the child's mother gave a most candid, heart-wrenching perspective, saying:

i. The child's father identified as Metis;

ii. When asked if she supported the paternal cousin speaking to the child about being Metis, the child's mother said, "that's her father's side!"

iii. "It is important for my child to learn both sides of her heritage;"

iv. "I think the [caregiver] will read Metis bedtime stories to [the child];" and

v. When asked 'is it important to you that the child know about her Metis heritage," the child's mother began crying and said "yes, it was so important to her dad. Right up until we lost him."

[54] Counsel for the Band responded, "that is the first time we have heard it, and he never identified himself as Metis." I did not understand that Ms. Barnes or Ms. Roberts knew the child's father before his passing in 2018, so I do not understand how they can give evidence on that point.

[55] In response, the child's mother, appearing much smaller than earlier and somewhat defeated, circled back and said, "I never said that." But I heard it. She said it. Between 10:31 and 10:35 a.m. on June 28, 2022, the child's mother got to her feet, addressed the Court, and testified to the importance to the child's father of his Metis heritage; and I took notes. I have listened to the DARS Recording, which is faint but I am left with no doubt that she said it.

[56] I do not understand the apparently complex interplay between the Band, proposed caregiver and the child's biological mother that has resulted in the first two parties taking a position as to the child's Metis heritage that is so opposed to that of the mother, who would appear to be in the best position to say what role, if any, his Metis heritage played in the child's father's life.

[57] The Metis Commission has an internal process for identifying and accepting members of its community. Their Memorandum of Understanding with MCFD defines Metis as a person who self-identifies as Metis, is of historic Metis Ancestry, is distinct from other Aboriginal people and is accepted by Metis people. It also includes people of mixed First Nation and European ancestry who identify themselves as Metis, as distinct

from First Nation people, Inuit or non-Aboriginal people. They recognize as Metis the child, her cousin, her father, another cousin, and other members of the paternal family.

[58] Having recognized the child as Metis, the Metis Commission has been involved with her planning for years, and wishes to ensure all her Metis cultural needs are met including the maintenance of connections with her Metis family. The representative for the Metis Commission advised that she is not a lawyer and the Commission does not have the resources to retain counsel to provide legal argument on the important issue of defining Metis heritage in *CFCSA* matters.

Finding

[59] I agree that identity findings should not be made casually. There must be some evidence or information to make a finding that a child is Indigenous, and the self-identification must be made in good faith. The inability of a person to name specific Bands or First Nations, Inuit or Metis communities may be a factor in assessing self-identification, but it is not dispositive, especially in light of residential schools and the "60's Scoop" which has shattered communities and destroyed connections between Indigenous persons and their communities. The court should, in my view, take a broad view in interpreting whether a child is a First Nations, Inuk or Metis child: that is consistent with the preamble and purposes of both the *CFCSA* and the *Federal Act*.

[60] Definitional vagueness should not prevent the Director from providing, or a child from receiving, culturally-appropriate services. I do not believe that the intention of the framers of the legislation was to exclude Indigenous children and families from receiving the benefits of the *Federal Act* or s. 4(2) of the *CFCSA* simply because they were unable to sufficiently trace their lineage. To import the *Powley* criteria to child protection proceedings would increase inequities, further disadvantage Indigenous children and families, hinder reconciliation, and drive a further wedge between Indigenous persons and their ability to stay connected with their Indigenous heritage, a right we now recognize.

[61] In a child protection context, it is only necessary for my purposes to verify there is some evidentiary basis to the self-identification as Metis. The evidentiary basis is low, but must be reliable and credible. This is a fact-driven question to be decided on a case-by-case basis. Because we are not concerned with a site-specific Aboriginal right, I do not need to establish that the Metis community to which the child's father belonged had any degree of continuity and stability, historically and today.

[62] This decision is not to be construed as placing a positive obligation on the Director, when dealing with a self-identifying Indigenous family, to make inquiries or otherwise verify the information before complying with ss. 2 and 4(2) of the *CFCSA*.

[63] I am satisfied that the child's paternal family's claim to be Metis is made in good faith, and that there is a reliable and credible evidentiary basis to believe that the child's paternal family is Metis.

[64] I do not agree with the Band's submission that if the child were not [omitted for publication], the *Federal Act* would not apply to her right now. I do not agree with the Band's submission that the paternal cousins must show evidence of having been disenfranchised by the residential school system or the "60's Scoop" before using that as an explanation for their lack of connection to a Metis community. It is offensive and contrary to the line of authority set out by the Supreme Court of Canada in *Gladue* and *Ipeelee*, which stand for the proposition that an Indigenous person need not establish a causal link between the systemic and background factors and their current situation before the court can consider the impact of colonialism on Indigenous persons.

[65] If I am wrong in assessing the evidence as to the child's Metis heritage, I do not see that it is the role of this court to serve as gatekeeper to Indigenous identity. The province's delegated agency has defined who is Metis, and one wonders on whose authority the court can enter the fray and purport to second guess its criterion. Unlike the Ontario legislation that requires the Court to make a determination as to Indigeneity, the *CFCSA* is silent on the issue. The BC Court of Appeal cited Jonothan Rudin in *Indigenous People and the Criminal Justice System* (Toronto, Edmon, 2019 at 103):

> Identity is a challenging concept and for many a somewhat malleable one. Inviting courts to determine if someone is or is not an Indigenous person after the individual has made that assertion is …. fraught with moral, ethical and legal concerns, all of which are heightened by the impact of colonialism …...
>
> (*L.P. and D.P.* at para 47, citing *R. v. Hamer*, 2021 BCCA 297)

[66] I find that the child is both [omitted for publication] and Metis.

ISSUE 2: CAN THE CHILD BE PLACED IN THE TEMPORARY CUSTODY OF A CAREGIVER WHO WILL NOT RESPECT HER METIS HERITAGE?

[67] The caregivers participated in the creation of the Cultural Safety Plan before inexplicably denying the child's Metis heritage. In submissions, both the Band and the caregiver now indicate that they will abide by a Metis CSP if this Court determines that the child is Metis.

[68] Accordingly, I am not required to address whether, in the absence of a cultural safety plan, an Indigenous child can be placed with a caregiver who denies that the child is Indigenous.

[69] If I make the Order as sought, it will be with the expectation that the caregivers will comply with the Cultural Safety Plan prepared in collaboration with them and attached to the Court Plan of Care filed May 5, 2022.

ISSUE 3: IS IT IN THE CHILD'S BEST INTERESTS TO BE PLACED IN THE TEMPORARY CARE OF THE CAREGIVERS?

[70] At times, the Court is called upon to make decisions where all of the various factors to be considered under the *CFCSA* and the *Federal Act* are not fulfilled. That does not mean the Court lacks jurisdiction to make an order if making the order is nevertheless in the child's best interests.

[71] The child was removed on April 27, 2015, when she was just [omitted for publication] years old. The parties agree that the child was in need of protection at the time of the removal and continues to be in need of protection. As I understand it, the

mother has an ongoing struggle with substance misuse and is not capable of taking care of the child. The father is deceased. The paternal family has withdrawn its application for guardianship. The Band has not proposed any other caregiver.

[72] The child is a happy and healthy [omitted for publication] year-old girl born with Long QT Syndrome for which she takes daily medication. The condition is easily managed and the caregiver is able and willing to ensure she receives appropriate medical follow up. She is seeing an Expressive Arts therapist and can continue to do so from the community in which she now resides.

[73] A January 19, 2022 report of Dr. Elterman indicates that the child is content to reside with the caregivers, although he notes the recency effect of his preliminary opinion: having lived in her current residence since October 2021, those experiences were most fresh and salient in her mind.

[74] The Plan of Care indicates that the child has been having weekly supervised visits with her biological mother in the community now that the mother has moved back; sees one brother daily at school; enjoys phone calls and electronic contact with another brother; and has begun visiting a third brother, in a nearby town. Her grandmother lives on reserve as well as other family members.

[75] The child first met the caregivers in October 2021, when the Band overheld her during a scheduled 10-day access visit, and has been living with them since. The child is attending school in that community and, as of the last school year, was doing very well.

[76] In its April 8, 2022, letter to counsel for the Band, the Metis Commission confirmed that the child is a Metis child under their MoU and that they have been providing services to her for years. The Metis Commission reiterated its position from mediation - that it will not agree to any application that does not include the child’s Metis culture, Metis family connections, and Metis community, all of which are important for the child’s sense of family, belonging and cultural identity. That being said, it has filed a written consent, modified by comments at this hearing.

[77] The Band has only been actively involved since approximately May 2021. Despite being aware that the child has been in the care of the Director since shortly after her removal in April 2015, it did not propose a permanent caregiver until May 2021, some 6 years later, despite repeated requests by the social workers to do so. The Band representative told social workers repeatedly that the Band was not interested in providing out-of-care placement for the child; they were content to put the child in the residence of the maternal grandmother on an in-care basis after the Continuing Custody Order was made. It was not until September 10, 2021, the first day of trial that the maternal grandmother indicated a willingness to be the child's 'forever home.' The Band's representative declined to work with Jillian Powell, the Family Finders report author, to locate extended family on the mother's side. An MCFD social worker with ties to the community brought the child from Prince George to a feast on the [omitted for publication] Territory in Nov 2019 at the request of the Band, yet nobody welcomed the child onto her traditional territory, or told the child or the Director that the feast had in fact been cancelled. The Band has done little to educate the paternal cousins of the specific role the paternal family plays in [omitted for publication] culture, despite its assurances it will do so and the paternal cousins' enthusiasm for learning that role. Despite having been provided templates for a CSP, the Band declined to provide a CSP to foster the child's [omitted for publication] heritage even when faced with the September 2021 commencement of the joint *FLA – CFCSA* trial which could have resulted in an order giving the paternal cousins guardianship and the child moving to Ontario.

[78] I have serious concerns about the caregiver's ethnocentric view of Indigeneity; her high-handed attitude in obtaining citizenship in the EWMN to "prove a point," despite not identifying as Metis; and her willingness to opine on matters of which she is woefully uninformed or misinformed. She appears to have little respect for the courts or the judicial process.

[79] The caregiver advised, however, that she and her partner are able and willing to meet the child's needs, including her need to be connected to both her [omitted for

publication] and Metis culture and to have ongoing connection to her extended family members.

[80] Accordingly, I will vary the August 17, 2018, Order made pursuant to s. 41(1)(c) and, pursuant to s. 41(1)(b), make an order that the child be placed in the custody of a person other than a parent – the caregivers – under the Director's supervision for a period of three months on the terms and conditions set out in the May 5, 2022, Application.

The Honourable Judge S. Mengering
Province of British Columbia