

**IN THE COURT OF APPEAL FOR SASKATCHEWAN  
ON APPEAL FROM THE COURT OF KING'S BENCH  
(FAMILY LAW DIVISION)  
JUDICIAL CENTRE OF SASKATOON**

BETWEEN:

**DAWN WALKER**

Appellant  
(Respondent)

AND:

**ANDREW JANSEN**

Respondent  
(Petitioner)

AND:

**WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.**

Proposed Intervener

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**FACTUM OF THE PROPOSED INTERVENER,  
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.**

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September 18, 2023

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## **PART I – INTRODUCTION**

1. An interim parenting order may be exceedingly important in the life of a child.<sup>1</sup> Indeed, removal of parenting time has been called the capital punishment of family law.<sup>2</sup> In making a major change to a final parenting order on an interim basis, a judge’s reasons should acknowledge the importance of cultural continuity for an Indigenous child. The court must analyze all of the best interests factors in a child-centered, holistic manner consistent with the constitutional imperative of promoting reconciliation and substantive equality.<sup>3</sup>

## **PART II - POINTS IN ISSUE**

2. As outlined in legislation, case law, and across legal traditions, the only consideration in relation to parenting time and decision-making is the best interests of the child.<sup>4</sup>

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<sup>1</sup> *Liu v Xie*, [2021 ONSC 222](#), at para [72](#); *Cosentino v Cosentino*, [2016 ONSC 5621 \(CanLII\)](#) at para [10](#).

<sup>2</sup> *Children's Aid Society of Stormont, Dundas & Glengarry (United Counties) v S (B)*, 2009 CarswellOnt 1126, [2009] at para 14.

<sup>3</sup> *R v Sharma*, [2022 SCC 39](#) at para [114](#) per Karakatsanis, Martin, Kasirer and Jamal JJ; *Mikisew Cree First Nation v Canada*, [2018 SCC 40](#) at para [88](#); *Michel v Graydon*, [2020 SCC 24](#), at paras [101](#) and [103](#); *CNL v GAM.*, [2023 ONSC 339](#).

<sup>4</sup> *Gordon v Goertz*, [1996] 2 SCR 27, [1996 CanLII 191 \(SCC\)](#) at para [28](#).

3. The best interests factors must be analyzed in context, and the factors understood as inextricably intertwined and inseparable from each other, without hierarchies or abstraction from the lived realities of the particular child.<sup>5</sup>

4. Indigeneity does not have super-weight in understanding best interests, but judges must exercise their discretion in relation to best interests with an eye to the constitutional imperatives of reconciliation and substantive equality. The best interests analysis must respect a child's Indigenous identity, culture(s) and community(ies).

5. Given the ongoing realities of colonial and gender-based violence and discrimination, courts must zealously guard against any apprehension of bias, and ensure that myths and stereotypes do not infect legal decision-making.<sup>6</sup>

6. The best interests analysis must meaningfully address family violence, including coercive control, within the wider context of the ongoing systemic inequality of women, particularly Indigenous women.<sup>7</sup>

## **PART III – ARGUMENT**

### **A. Best Interests is the Only Consideration**

7. Best interests of the child is not merely the paramount consideration, it is the *only* consideration in relation to the adjudication of parenting time and decision-making.<sup>8</sup> Under the *Children's Law Act*, and beyond, the analysis of best interests requires holistic consideration of

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<sup>5</sup> *BJT v JD*, [2022 SCC 24](#) at paras [53 - 55](#); *Van de Perre v Edwards*, [2001 SCC 60](#).

<sup>6</sup> *R v Barton*, [2019 SCC 33](#), at para [1](#); Linda C Neilson, "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases", Canadian Legal Information Institute, 2nd ed (2020), [2017 CanLII Docs 2](#) at [19.3](#).

<sup>7</sup> *Children's Law Act*, 2020, [SS 2020, c 2, s. 10\(3\)\(j\)](#).

<sup>8</sup> *Children's Law Act*, 2020, [SS 2020, c 2, s. 10\(1\)](#). *Gordon v Goertz*, [1996] 2 SCR 27, [1996 CanLII 191 \(SCC\)](#) at para [28](#).

the individual child's circumstances and wider social context, understood in harmony with constitutional rights and values.<sup>9</sup>

8. The *Children's Law Act* sets out the non-exhaustive factors relevant to adjudication of the best interests of a child in the context of a parenting dispute:

- (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
- (b) the nature and strength of the child's relationship with each parent, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
- (c) each parent's willingness to support the development and maintenance of the child's relationship with the other parent;
- (d) the history of care of the child;
- (e) the child's views and preferences, by giving due weight to the child's age and maturity, unless they cannot be ascertained;
- (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) any plans for the child's care;
- (h) the ability and willingness of each person with respect to whom the parenting order would apply to care for and meet the needs of the child;
- (i) the ability and willingness of each person with respect to whom the parenting order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j) any family violence and its impact on, among other things:
  - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child; and
  - (ii) the appropriateness of making a parenting order that would require persons with respect to whom the parenting order would apply to cooperate on issues affecting the child; and

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<sup>9</sup> *Children's Law Act*, 2020, [SS 2020, c 2](#), s. [10\(3\)](#).

- (k) any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child.<sup>10</sup>

9. As this Court has recognized, “[t]hese factors are not intended to be exhaustive nor treated like a rote checklist. Instead, the factors assist the court in a tailored analysis of the evidence, viewed through a child-centred lens, with full discretion to determine the requisite focus and weight to accord to each factor depending on the unique circumstances presented by the evidence.”<sup>11</sup>

10. It is the court’s sacred responsibility to promote the child’s long-term physical, psychological and emotional safety, security, and well-being.<sup>12</sup> In this task, the court steps into the shoes of an unconditionally loving caregiver who considers the child’s existing connections and attachments, from the perspective of the child; comprehends the needs of the child; and evaluates plans for the child’s future welfare. The best interests of the child are “not simply the right to be free of significant harm. It is the right of the particular child in question to the best possible arrangements in the circumstances of the parties, taking into consideration the wide spectrum of factors which may affect the child's physical, spiritual, moral and emotional well-being and the milieu in which the child lives.”<sup>13</sup>

## **B. No Single Best Interests Factor has Super-Weight, including Criminal Proceedings**

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<sup>10</sup> *Children’s Law Act, 2020*, [SS 2020, c 2](#), s. [10\(3\)\(f\) and \(j\)](#); *Divorce Act*, [RSC 1985, c 3 \(2nd Supp\)](#), s. [16\(3\)\(f\) and \(j\)](#). (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including (f) the child’s cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage; (j) any family violence and its impact on, among other things, (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child.

<sup>11</sup> *RCS v RDL*, [2022 SKCA 52](#) at para [43](#).

<sup>12</sup> *Children’s Law Act, 2020*, [SS 2020, c 2](#), s. [10\(2\)](#).

<sup>13</sup> *Young v Young*, [\[1993\] 4 SCR 3](#) at para [100](#) per L’Heureux-Dubé J; *TS v JB*, [2022 SKKB 246](#) at para [92](#)

11. The best interests factors are understood holistically. It is not helpful to assign comparative weights to different factors in the abstract.<sup>14</sup> Each factor is relevant only to the extent that it relates to the well-being of the individual child before the court. No factor has super-weight over any other factor; it would be an error of law to treat one factor as determinative and neglect to consider the web of other factors touching the life of a child.

12. The singular factor in s. 10(3)(k) of an existing criminal proceeding must not be given super-weight within the best interests analysis.<sup>15</sup> The child's physical, psychological, and emotional safety, security, and well-being must be assured, and advanced, by the court having regard to all the best interests factors simultaneously. The impact of criminal proceedings on parenting time and decision-making responsibility must relate to the best interests of the child.<sup>16</sup>

13. The best interests of a child may be to have contact with a parent despite ongoing criminal proceedings. For example, after a white mother was charged with criminal negligence causing the death of one of her sons, the father sought that the mother have supervised access. The court noted that allegations are not proof of the crime and ruled:

I am not persuaded on the record before me that the mother's contact with the child should take place in a supervised access centre. It is in the best interests of the child to maintain as close a relationship with his mother, who was until October 12, 2018 his primary caregiver. The evidence before me does not establish that the mother poses a risk of harm to the child while supervised by third parties. I have considered the impact of the criminal charges on the need for supervised and limited access. Despite those criminal charges, the child has the right to have a relationship with his mother. Maintaining a relationship with his mother is critical to Mason's development. Mason is very young. In addition to the trauma of losing his older brother, he has suffered the trauma of suddenly losing his mother as his primary care giver. He has had to move his primary residence from his mother's home and community and has had to adjust to the introduction of the father's girl-friend and her young child into his everyday life. In my view, despite the difficulties Ms. Hanson finds herself in, it is in the child's best interest that he has as much access to his mother as reasonably possible having regard to the safety concerns that are also present. It is equally important that access

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<sup>14</sup> *TS v JB*, [2022 SKKB 246 \(CanLII\)](#) at para 93.

<sup>15</sup> *Children's Law Act, 2020*, [SS 2020, c 2](#), s. 10(3)(k).

<sup>16</sup> *Young v Hanson*, [2019 ONSC 1245 \(CanLII\)](#) at para 32-34.



take place in as natural and familiar an environment as reasonably possible, while at the same time minimizing the risk of harm to the child. In my view, this can be accomplished through supervised access by third parties who appreciate the responsibility and obligations they are taking on.<sup>17</sup>

14. Sole decision-making is not meted out as a parental reward or punishment; instead, joint decision-making responsibilities reflect the ability of a child's parents to communicate and cooperate.<sup>18</sup> Similarly, restrictions on parenting time are not imposed as punishment of a parent, but must reflect the best interests of *the child*.<sup>19</sup> Parenting time must promote the well-being of the child, and recognize the value of ongoing connection to parents, other attachments, and communities, rather than focusing on the utility of the child as a witness for the Crown. To the extent contact with an Indigenous parent is limited by criminal restrictions, supervised parenting time should be approached in a child-centered manner, seeking to facilitate safe and meaningful parenting time, time with Indigenous family members, and cultural continuity with the child's Indigenous community(ies), including through professional and community supports.<sup>20</sup> As acknowledged by the United Nations Convention on the Rights of the Child ("UNCRC"), children have a right to a parental relationship consistent with their best interests and have the right, "in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language" as an Indigenous person.<sup>21</sup>

### **C. The Important Best Interests Factor of Indigenous Upbringing and Heritage**

15. One of the statutory best interests factors is the child's heritage, including the child's Indigenous heritage and culture.<sup>22</sup> The importance of the child's Indigeneity and the principle of

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<sup>17</sup> *Young v Hanson*, [2019 ONSC 1245 \(CanLII\)](#) at para 33.

<sup>18</sup> *Kaplanis v Kaplanis*, [2005 CanLII 1625 \(ON CA\)](#) at para 11.

<sup>19</sup> *Barendregt v Grebliunas*, [2022 SCC 22](#) at paras 134 and 135.

<sup>20</sup> *Karimi v Kyron*, [2022 ONSC 5996](#) at 29; *Young v Hanson*, [2019 ONSC 1245 \(CanLII\)](#) at para 33.

<sup>21</sup> UN General Assembly, *Convention on the Rights of the Child*, 1989, United Nations, [Treaty Series, vol 1577, p 3 Article 30](#).

<sup>22</sup> *Children's Law Act, 2020*, [SS 2020, c 2](#), s. [10\(3\)\(f\)](#).

cultural continuity do not have super-weight to other factors but must be acknowledged as critically important in determining the best interests of the child.<sup>23</sup> In relation to an Indigenous child, the *Children's Law Act* best interests factors are to be considered, harmoniously, with the principles of cultural continuity reflected in the articulation of best interests under the *Act respecting First Nations, Inuit and Métis children, youth and families* (“*Indigenous Children's Act*”).<sup>24</sup> Although the statute directly applies to the area of Indigenous child welfare, the *Indigenous Children's Act* “reflects an express mandate in Canadian law and must not be ignored” by courts adjudicating family law cases.<sup>25</sup> Its principles include recognition that:

1. cultural continuity is essential to the well-being of a child, a family and an Indigenous group, community or people;
  2. the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity;
  3. a child's best interests are often promoted when the child resides with members of his or her family and the culture of the Indigenous group, community or people to which he or she belongs is respected;
  4. child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people; and
  5. the characteristics and challenges of the region in which a child, a family or an Indigenous group, community or people is located are to be considered.<sup>26</sup>
16. The *Indigenous Children's Act* also provides a helpful articulation of the primary consideration involved in assessing the best interests of an Indigenous child, namely “the child's physical, emotional and psychological safety, security and well-being, as well as the importance, for that child, of having an ongoing relationship with his or her family and with the Indigenous

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<sup>23</sup> *Algonquins of Pikwakanagan v Children's Aid Society of the County of Renfrew*, [2014 ONCA 646](#) at para [67](#).

<sup>24</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#).

<sup>25</sup> *JMS v British Columbia (Director of Child, Family and Community Services)*, [2021 BCSC 2104 \(CanLII\)](#) at para [37](#).

<sup>26</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#), s. [9\(2\)\(e\)](#).

group, community or people to which he or she belongs and of preserving the child’s connections to his or her culture.”<sup>27</sup> As recognized by the Court of Appeal for Ontario, in *ML v BT*, the *Indigenous Children’s Act* “removes any doubt that an ongoing relationship between the family and the child’s Indigenous community is of central concern.”<sup>28</sup> This is true whether the proceeding is a child protection case, family law case, or both simultaneously.

17. Indigenous legal traditions – and now Canadian common law and statutes – increasingly recognize and value a child’s myriad connections and seek to promote and enhance multiple relationships beyond those with legal parents, as necessary in a child’s best interests.<sup>29</sup> Looking at the best interests factors as interconnected and inseparably intertwined, and as constitutive of children’s well-being, the best interests of an Indigenous child recognizes the importance of a child maintaining an ongoing relationship with the child’s existing Indigenous and non-Indigenous caregivers and communities, as well as the importance of preserving the child’s connections to their Indigenous culture(s).<sup>30</sup>

18. Cultural continuity is advanced by lived participation in Indigenous communities and active culture-building. Accordingly, a child’s Indigenous parent(s) should generally be responsible for decision-making specific to maintaining the child’s attachment to the child’s Indigenous community(ies) and culture(s). As Dr. Friedland explains, cultural continuity benefits from a child’s Indigenous relationships:

[T]aking Indigenous children to cultural activities is not sufficient in the absence of relationships through which that child can learn who they are and achieve an orienting sense of social and cultural competency within their own community and people. Socialization in

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<sup>27</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#), s. [10\(2\)](#).

<sup>28</sup> *ML v BT*, [2021 ONCA 683 \(CanLII\)](#) at para [21](#).

<sup>29</sup> *JJ v AK*, [2023 ABCJ 166](#) at para [137](#); Hadley Friedland, “Reference Re: *Racine v Woods*” (2021) in Kent McNeil and Naomi Metallic, eds., Special Edition: Systems Disruption: Reimagining Canada’s Aboriginal Rights Jurisprudence Collection *Canadian Native Law Reporter* 155 at 42-44.

<sup>30</sup> *JJ v AK*, [2023 ABCJ 166](#) at para [137](#).

and internalization of their unique way of life requires meaningful time spent immersed in multiple and continuing relationships within their own family, community, and people.<sup>31</sup>

19. In every case, judicial reasoning should communicate respect for a child’s Indigeneity, and respect the constitutional imperative of advancing reconciliation.<sup>32</sup> This requires rejecting the idea that “culture” is opposed to, and has an inverse relationship with, “attachment”.<sup>33</sup> Reconciliation also requires that judges zealously guard against any anti-Indigenous stereotype or bias in decision-making, including the stereotype of Indigenous criminality. The Supreme Court of Canada has decried the overincarceration of Indigenous women,<sup>34</sup> most of whom have limited contact with their children while imprisoned. The cycle of separation of Indigenous children from Indigenous parents continues, causing intergenerational trauma.<sup>35</sup>

20. To promote reconciliation, in a child’s best interests, judges must fully appreciate and take judicial notice of colonialism’s impact generally on Indigenous children, families and communities, as well as its impacts on the particular child and family.<sup>36</sup> The exercise of judicial

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<sup>31</sup> Hadley Friedland, “Reference Re: *Racine v Woods*” (2021) Kent McNeil and Naomi Metallic, eds., Special Edition: Systems Disruption: Reimagining Canada’s Aboriginal Rights Jurisprudence Collection *Canadian Native Law Reporter* 155 at para 51.

<sup>32</sup> 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: The Truth and Reconciliation Commission of Canada, 2015); Truth and Reconciliation Commission of Canada, [What We Have Learned, Principles of Truth and Reconciliation](#) (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015).

<sup>33</sup> This is in contrast with the analysis in *Racine v Woods*, [1983 CanLII 27](#) (SCC), [1983] 2 SCR 173, at [174](#), a “transracial” adoption case in which the Supreme Court of Canada held that “the significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes.” The *Racine* decision has been widely criticized for failing to honour the importance of Indigenous culture and community to the best interests of Indigenous children and the reciprocal importance of those children to the community: see e.g., Ardith Walkem, [Wrapping Our Ways Around Them: Aboriginal Communities and the Child, Family and Community Service Act \(CFCSA\) Guidebook](#) (ShchEma-mee.tkt Project, 2015). This approach is also inconsistent with recent developments in the social and legal context, including the acknowledgement of the genocide of Indigenous peoples; the enactment of *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#); and the passage of the *Indigenous Children’s Act*.

<sup>34</sup> *R v Ipeelee*, [2012 SCC 13](#) at para [60](#); *R v Sharma*, [2022 SCC 39](#) at paras [114-115](#) per Karakatsanis, Martin, Kasirer and Jamal JJ.

<sup>35</sup> *R v Sharma*, [2022 SCC 39](#) at paras [114, 125, 127, 226, 234-236](#); Department of Justice, [Miscarriages of Justice Commission, Office of the Honourable of Kim Pate, C.M.](#) (Ottawa: Department of Justice, May 2022) at 3 and 6.

<sup>36</sup> *R v Gladue*, [1999 CanLII 679 \(SCC\)](#), [1999] 1 SCR 688 at para [60](#); Linda C Neilson, “Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases,” Canadian Legal Information Institute, 2nd ed

discretion should seek to promote reconciliation and respect constitutional values, as is consistent with children’s best interests.<sup>37</sup> The *Charter* affirms the rights of Indigenous children to non-discriminatory parenting orders which promote substantive equality, and which honour the specificity and promote the well-being of the child’s Indigenous identity, family and community(ies).<sup>38</sup>

21. Canadian law recognizes and affirms Indigenous peoples’ inherent jurisdiction over the protection and well-being of Indigenous children and families as a constitutional right.<sup>39</sup> Indigenous legal traditions and s. 35 of the *Constitution Act* also recognize and affirm the importance of Indigenous traditions, language, land, and cultural connections.<sup>40</sup> Courts are required to consider the best interests of Indigenous children harmoniously with these constitutional imperatives.<sup>41</sup> There is no question that a child’s Indigenous upbringing and heritage is a key – and constitutionally required – consideration in determining the child’s best interests.<sup>42</sup>

22. Canada recently enacted the *United Nations Declaration on the Rights of Indigenous Persons Act* (“UNDRIPA”), affirming the articles of the United Nations Declaration on the Rights of Indigenous Persons (“UNDRIP”).<sup>43</sup> UNDRIPA directs the advancement of the well-being and substantive equality of Indigenous women and children, making real their right to enjoy equal respect and recognition and to live free from discrimination and violence. This constitutional

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(2020), [2017 CanLIIDocs 2](#) at [20.4.1](#) and [20.4.2](#); Department of Justice, [A Miscarriages of Justice Commission by Hon. Harry LaForme and Hon. Juanita Westmoreland-Traoré](#) (November 2021) at 26, 27.

<sup>37</sup> *R v Williams*, [\[1998\] 1 SCR 1128](#) at para 44.

<sup>38</sup> *Haynes v Canada (Attorney General)*, [2023 FCA 158](#) at para 20.

<sup>39</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#), s. 18(1).

<sup>40</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#), s. 9(2).

<sup>41</sup> *ML v Dilico Anishinabek Child and Family Care*, [2022 ONCA 240](#) at para 74.

<sup>42</sup> *Welter v Kequahtooaway*, [2023 SKKB 33](#) at para 50; *ML v BT*, [2021 ONCA 683](#) at para 21.

<sup>43</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#); Department of Justice Canada, [Joint Statement by Minister Lametti and Minister Bennett on the Senate Passing Bill C-15, An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples](#) (Ottawa: Department of Justice, 16 June 2021).

promise is inseparable from promoting cultural continuity and respecting Indigenous legal traditions, practices, languages, lands, communities, and cultures in children’s best interests.<sup>44</sup>

23. While parenting disputes are not the same as a child protection proceeding, UNDRIPA remains relevant to understanding the best interests analysis. As the court acknowledged in *SK v Alberta (Child, Youth and Family Enhancement Act, Director)*, “[t]o be properly willing and able to parent an Indigenous child, an applicant must demonstrate that they will meet the spirit ... of ... the *Child, Youth and Family Enhancement Act*, the *Indigenous Children’s Act* and the UNDRIPA and that there is adequate assurance that the child’s connections to his family, community and culture be respected, nurtured and encouraged so that the child will be protected from the risk of assimilative forces.”<sup>45</sup>

24. The *Indigenous Children’s Act* is intended to advance the substantive equality of Indigenous women and children under s. 15 of the *Charter*,<sup>46</sup> read in harmony with s. 35 of the *Constitution Act*.<sup>47</sup> The promise of reconciliation, inseparable from the promotion of substantive equality, does not seek accommodation nor assimilation, but requires recentering to fully respect and recognize Indigenous legal principles, languages, lands, communities, and cultures.<sup>48</sup> Substantive equality advances the political, legal, social, and economic power of Indigenous peoples, so that all children and families are equally included in, and respected by, Canadian law and society.<sup>49</sup>

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<sup>44</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#) at Article [8](#) and [22](#).

<sup>45</sup> *SK v Alberta (Child, Youth and Family Enhancement Act, Director)*, [2022 ABPC 144](#) at para [30](#).

<sup>46</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#), s [3](#) and s [11](#); *Fraser v Canada (Attorney General)*, [2020 SCC 28 \(CanLII\)](#), [2020] 3 SCR 113, at para [27](#); *Haynes v Canada (Attorney General)*, [2023 FCA 158](#) at para [20](#).

<sup>47</sup> *R v Williams*, [1998 CanLII 782 \(SCC\)](#), [1998] 1 SCR 1128 at para [49](#).

<sup>48</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [\[1999\] 3 SCR 3](#) at para [41](#).

<sup>49</sup> *Fraser v Canada (Attorney General)*, [2020 SCC 28 \(CanLII\)](#) at para [47](#); *Quebec (Attorney General) v A*, [2013 SCC 5 \(CanLII\)](#) at para [332](#).

25. In particular, Canadian law acknowledges “the disruption that Indigenous women ... have experienced in their lives in relation to child and family services systems and the importance of supporting Indigenous women ... in overcoming their historical disadvantage.”<sup>50</sup> With the *Indigenous Children’s Act*, Parliament also affirmed the need to respect “the diversity of the[] laws, rights, treaties, histories, cultures, languages, customs and traditions” of Indigenous people, and “to take into account the unique circumstances and needs of Indigenous elders, parents, youth, children, persons with disabilities, women, men and gender-diverse persons and two-spirit persons.”<sup>51</sup> In the context of determining the best interests of an Indigenous child in a family law case, it is imperative that the court take seriously its constitutional obligations: to advance the right of an Indigenous child to maintain attachments and emotional ties; to respect the child’s views and preferences, including the child’s worldview; and the right of an Indigenous child to enjoy the best possible future, individually and as a member of their communities.

#### **D. The Important Best Interests Factor of Family Violence**

26. Indigenous cultural continuity has not been taken sufficiently seriously as a best interests consideration, within a wider context of systemic discrimination and cultural genocide of Indigenous peoples. Similarly, family violence – like other forms of gender-based violence – has not been appropriately addressed within the wider context of the ongoing systemic inequality of women, particularly Indigenous women.<sup>52</sup> Women consistently face minimizing, discriminatory disbelief, and outright denial, of their reports of gender-based violence including intimate partner violence. As Jennifer Koshan explains:

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<sup>50</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#) at [Preamble](#).

<sup>51</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#) at [Preamble](#).

<sup>52</sup> Linda C Neilson, “Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases”, Canadian Legal Information Institute, 2nd ed (2020), [2017 CanLII Docs 2](#) at [20.1](#).

Judicial reliance on myths and stereotypes leads to prejudicial reasoning, false logic, and errors of law. Recognition that some common assumptions about domestic violence are grounded in myths and stereotypes does not entail acceptance of all domestic violence claims, however. The role of legal decision makers remains that of assessing the credibility of these claims and their impact on legal issues and processes. At the same time, legal actors must be alert to what they may not understand and open to evidence, arguments, and education to help avoid the application of myths and stereotypes. In the wake of #MeToo and #IBelieveHer, it is important to acknowledge that many legal actors have yet to start from a point of not disbelieving women about domestic violence.<sup>53</sup>

27. Indigenous women face a very high rate of violent victimization including exceedingly high rates of intimate partner violence, with limited state assistance.<sup>54</sup> There is pervasive anti-Indigenous bias, from which legal decision-makers are not exempt.<sup>55</sup> This includes discriminatory myths and stereotypes in relation to Indigenous women's reports of family violence, "including stereotypes about credibility, worthiness, and criminal propensity, to name just a few."<sup>56</sup> Women face a credibility deficit and unrealistic demands regarding their expected responses to violence, particularly those who come from different social or economic backgrounds than the decision maker.<sup>57</sup> Often, survivors are expected to cooperate with police or provide timely reports and evidence from health professionals, failing which their claims may be seen as non-credible.<sup>58</sup> This is particularly problematic vis-à-vis Indigenous women, who may avoid the police, social and

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<sup>53</sup> Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases," 2023 35-1 Can J Fam L 33, [2023 CanLIIDocs 632](#) at 40.

<sup>54</sup> Statistics Canada, *Violent victimization and perceptions of safety: Experiences of First Nations, Métis and Inuit women in Canada*, (Ottawa: Statistics Canada, 26 April 2022).

<sup>55</sup> *R v Barton*, [2019 SCC 33 \(CanLII\)](#) at paras [199-204](#); *R v Gladue*, [1999 CanLII 679 \(SCC\)](#), [1999] 1 SCR 688 at para [65](#); *R v Ipeelee*, [2012 SCC 13 \(CanLII\)](#), [2012] SCR 433 at paras [59-60 and 67](#); *R v Williams*, [1998 CanLII 782 \(SCC\)](#), [1998] 1 SCR 1128 at paras [54 and 58](#).

<sup>56</sup> *R v Williams*, [1998 CanLII 782 \(SCC\)](#), [1998] 1 SCR 1128 as cited in *R v Barton*, [2019 SCC 33 \(CanLII\)](#) at paras [199-200](#).

<sup>57</sup> Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases," 2023 35-1 Can J Fam L 33, [2023 CanLIIDocs 632](#) at 49; Linda C Neilson, "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases", Canadian Legal Information Institute, 2nd ed (2020), [2017 CanLIIDocs 2](#) at 20.4; Shana Conroy, Marta Burczycka and Laura Savage, *Family violence in Canada: A statistical profile, 2018* (Statistics Canada, 12 December 2019).

<sup>58</sup> Jennifer Koshan, Challenging Myths and Stereotypes in Domestic Violence Cases, 2023 35-1 Can J Fam L 33, [2023 CanLIIDocs 632](#), at 49.



health service professionals and the legal system itself because of the colonialism, systemic racism, and other forms of oppression that have impacted their interactions with these authorities.<sup>59</sup>

*i. Intimate Partner Violence and its Impacts*

28. Intimate partner violence (IPV) is an important factor in considering the best interests of a child. Overwhelmingly, it is women who act as primary caregivers for their children.<sup>60</sup> Overwhelmingly, it is women who are abused by men within heterosexual intimate relationships.<sup>61</sup> Overwhelmingly, it is Indigenous mothers who are disadvantaged under matrices of anti-Indigenous and sexist bias in relation to white male fathers.<sup>62</sup> IPV expresses, and reinforces, mothers' substantive inequality.<sup>63</sup> It very significantly harms children's physical, emotional, and psychological safety, security, and well-being.<sup>64</sup>

29. The adverse impacts of IPV include that pre-school and school aged children may experience aggression and sleep disturbances; withdraw; exhibit symptoms of post-traumatic stress disorder ("PTSD"), depression, and anxiety; and have distorted beliefs about parental

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<sup>59</sup> Jennifer Koshan, Challenging Myths and Stereotypes in Domestic Violence Cases, 2023 35-1 *Can J Fam L* 33, [2023 CanLIIDocs 632](#), at [54](#); Linda C Neilson, "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases, Canadian Legal Information Institute", 2nd ed (2020), [2017 CanLIIDocs 2](#) at [20.4](#); National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry Into Missing and Murdered Indigenous Women and Girls* Vol. 1a. (2019) at [115](#).

<sup>60</sup> Statistics Canada, *Portrait of children's family life in Canada in 2016* (Ottawa: Statistics Canada, 2 August 2017).

<sup>61</sup> *Michel v Graydon*, [2020 SCC 24 \(CanLII\)](#) at para [95](#), Martin J concurring; Shana Conroy, Marta Burczykca and Laura Savage, *Family violence in Canada: A statistical profile, 2018* (Statistics Canada, 12 December 2019) at 24; Katreena Scott, "Fathering in the context of domestic violence and abuse" (2021) *The Routledge International Handbook of Domestic Violence and Abuse* at [478-494](#).

<sup>62</sup> *R v Barton*, [2019 SCC 33 \(CanLII\)](#) at paras [199-204](#); Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases," 2023 35-1 *Can J Fam L* 33, [2023 CanLIIDocs 632](#).

<sup>63</sup> Iqra Khalid, *The Shadow Pandemic: Stopping Coercive and Controlling Behaviour in Intimate Relationships*, House of Commons: Report of the Standing Committee on Justice and Human Rights, 43-2 (April 2021) at [4](#); Canada Public Health Agency, *Chief Public Health Officer's Report on the State of Public Health in Canada 2016: A Focus on Family Violence in Canada (Report)* (Ottawa: Canada Public Health Agency, October 2016) at [7](#) and [24](#).

<sup>64</sup> Katreena Scott, "Fathering in the context of domestic violence and abuse" (2021) *The Routledge International Handbook of Domestic Violence and Abuse* at [478-494](#); Nadine Wathen and Harriet Macmillan "Children's exposure to intimate partner violence: Impacts and interventions" (October 2013) *Paediatric Child Health*, 18(8) 419-22 online: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3887080/>>; Canada Public Health Agency, *Chief Public Health Officer's Report on the State of Public Health in Canada 2016: A Focus on Family Violence in Canada (Report)* (Ottawa: Canada Public Health Agency, October 2016) at [16](#).

violence.<sup>65</sup> In adolescence, children may continue to exhibit such behaviours, and additionally may engage in substance misuse, have poor self-esteem, have suicidal ideation, engage in or experience dating violence, and run away from home.<sup>66</sup> Children’s exposure to intimate partner violence is associated with significant adverse mental health outcomes, including an increased risk of psychological, social, emotional and behavioural problems including mood and anxiety disorders, PTSD, substance abuse and school-related problems.<sup>67</sup> Children exposed to intimate partner violence are more likely to experience violent intimate relationships as adults (either as victims or perpetrators). IPV threatens intergenerational harms and trauma.<sup>68</sup>

30. Recent federal and provincial legislative amendments, as well as the constitutional imperatives of reconciliation and substantive equality, require family judges to recognize and address the severe harms of family violence on children, including the harms of coercive controlling violence.<sup>69</sup> UNDRIPA, the UNCRC, s. 35 and s. 15 require judges to advance the well-being and equality of Indigenous women and children by keeping them safe from family violence including the harms of coercive controlling violence.<sup>70</sup>

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<sup>65</sup> *JG v PG*, [2017 SKQB 137](#) at para [102](#); Peter Jaffe, David A Wolfe & Marcie Campbell, *Growing Up with Domestic Violence* (Cambridge, MA: Hogrefe Publishing, 2012) at 10-11.

<sup>66</sup> Peter Jaffe, David A Wolfe & Marcie Campbell, *Growing Up with Domestic Violence* (Cambridge, MA: Hogrefe Publishing, 2012) at 5, [12](#).

<sup>67</sup> *ACR v DRM*, [2021 YKSC 22](#) at paras [71-72](#); Peter Jaffe, David A Wolfe & Marcie Campbell, *Growing Up with Domestic Violence* (Cambridge, MA: Hogrefe Publishing, 2012) at [12](#); Canada Public Health Agency, *Chief Public Health Officer's Report on the State of Public Health in Canada 2016: A Focus on Family Violence in Canada (Report)*” (Ottawa: Canada Public Health Agency, October 2016) at [18](#).

<sup>68</sup> Renee Hoffart and Nicholas A Jones, “Intimate Partner Violence and Intergenerational Trauma Among Indigenous Women” (2017) 28:1 Int’l Criminal Justice Rev, at 40; Peter Jaffe, David A Wolfe & Marcie Campbell, *Growing Up with Domestic Violence* (Cambridge, MA: Hogrefe Publishing, 2012) at [12](#).

<sup>69</sup> *Children’s Law Act, 2020*, [SS 2020, c 2](#), s. 10(1)-10(4); *Divorce Act*, [RSC 1985, c 3 \(2nd Supp\)](#), s. [16\(1\)-16\(4\)](#); *Barendregt v Grebliunas*, [2022 SCC 22](#) at paras [143](#), [146](#); *Judges Act*, [RSC 1985, c J-1](#), s. [60\(2\)\(b\)](#).

<sup>70</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14 Article 19](#). UN General Assembly, *Convention on the Rights of the Child*, 1989, United Nations, [Treaty Series, vol. 1577](#), p 3; *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, ss. [35](#), 91(24); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s. [15\(1\)](#).

31. Identifying coercive control requires a contextualized analysis, studying who holds power and privilege and thereby wields the ability to strike fear in another person within the family.<sup>71</sup> A mother victim of coercive control, ensnared by structural inequalities, lives in fear for herself and her dependents; lacks power, rights and liberties or fears their removal; is deprived of resources and social supports; and has her parenting controlled through being disempowered or undermined, or has her parenting made impossible.<sup>72</sup> Family violence is always contrary to the best interests of the children in the family, and the court is required to take judicial notice of its adverse impact, without demanding evidence of the specific harms to the child.<sup>73</sup>

*ii. Challenges to Responding to IPV*

32. Coercive controlling violence may not easily or immediately be identified by victims or legal professionals. Research reveals that an adult victim is unlikely to be asked about family violence or be able to identify it herself, and that she is likely to be dissuaded from disclosing it by legal professionals.<sup>74</sup> Systemic inequality shapes how choices are made,<sup>75</sup> such that the victim may “consent” to court orders undermining her own autonomy and well-being, given the impact

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<sup>71</sup> Marianne Hester and Evan Stark, “Coercive Control: Update and Review” (2019) 25:1 Violence Against Women 81–104 at [89](#).

<sup>72</sup> Janet Mosher, “Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners” (2015) Windsor YB Access Just 32.2 at [151](#); House of Commons, *The Shadow Pandemic: Stopping Coercive and Controlling Behaviour in Intimate Relationships: Report of the Standing Committee on Justice and Human Rights*, [43-2](#) (April 2021), at page [7](#); Katreena Scott, “Fathering in the context of domestic violence and abuse” (2021) *The Routledge International Handbook of Domestic Violence and Abuse* at [478-494](#).

<sup>73</sup> *Friesen v Friesen*, [2023 SKCA 60](#) at para 38, citing *Barendregt v Grebliunas*, [2022 SCC 22](#); *Barendregt v Grebliunas*, [2022 SCC 22](#) at paras [134](#) and [135](#).

<sup>74</sup> Zara Suleman, Haley Hrymak, and Kim Hawkins, *Are We Ready to Change? A Lawyer’s Guide to Keeping Women and Children Safe in BC’s Family Law System* (British Columbia: Rise Women’s Legal Centre: May 2021) at [16](#); Joanna Radbord & Deborah Sinclair, “In Children’s Best Interests: Addressing Intimate Partner Violence In Parenting Cases” (June 2021) 34 OFLR at 156 citing Lorne Bertrand et al, *The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program*, (2016) [Canadian Research Institute for Law and the Family](#).

<sup>75</sup> *Fraser v Canada (Attorney General)*, [2020 SCC 28 \(CanLII\)](#), [2020] 3 SCR 113 at para [90](#).

of her abuse including a lack of financial resources. It is well understood that when mothers allege intimate partner violence, these mothers are at serious risk of losing parenting time.<sup>76</sup>

33. The judicial obligation to protect the well-being of children requires judges to identify and address systemic and individual power imbalances and to recognize coercive controlling violence without discriminatory myths and bias. Family judges also have a special obligation to prevent litigation abuse, which threatens to make courts complicit in family violence and its harms to children and vulnerable litigants.<sup>77</sup>

**iii. Accountability and Reconciliation: Parenting Orders in the Context of Family Violence**

34. It is in a child's best interests to enjoy safe and positive parenting time. When there is coercive controlling violence, this is correlated with direct child maltreatment, and fundamentally, the perpetrator's abuse of the child's parent represents maltreatment of the child.<sup>78</sup> In the context of unaddressed coercively controlling violence, shared parenting time is not in the child's best interests.<sup>79</sup> Coercively controlling violence through verbal, emotional, and psychological abuse also makes joint decision-making responsibility impossible as it requires respectful co-parenting

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<sup>76</sup> Haley Krymak and Kim Hawkins, *Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger* (January 2021), at 45-46; Rise Women's Legal Centre at 45-46; Deborah Epstein & Lisa A (I) Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2019) 167:2 U Pa L Rev 399 at 431; Elizabeth Sheehy & Susan Boyd, (2020) "Penalizing women's fear: intimate partner violence and parental alienation in Canadian child custody cases" J Soc Welfare & Fam L 42 at 80-91; Rana Fuller, "How to Effectively Advocate for Battered Women When Systems Fail" (2007) 33:3 Wm Mitchell L Rev 939 at 945.

<sup>77</sup> *Children's Law Act, 2020*, [SS 2020, c 2](#), s. [10\(4\)\(b\)](#); *Divorce Act*, [RSC 1985, c 3 \(2nd Supp\)](#), ss. [16\(3\)\(j\)](#), [16\(4\)](#); *JK v RK*, [2021 ONSC 1136](#) at paras [36-39](#); *Levely v Levely*, [2013 ONSC 1026](#) at paras [12-13](#).

<sup>78</sup> *JG v PG*, [2017 SKQB 137](#) at para [102](#); *Friesen v Friesen*, [2023 SKCA 60](#) at para [75](#); *ACR v DRM*, [2021 YKSC 22](#) at paras [71-72](#).

<sup>79</sup> *Barendregt v Grebliunas*, [2022 SCC 22](#) at paras [134 - 135](#); Peter Jaffe *et al.*, "Making Appropriate Parenting Arrangements in Family Violence: Summary and Supplemental Materials" (Ottawa: Department of Justice, February 2023) at 3; Peter Jaffe, "A Presumption Against Shared Parenting for Family Court Litigants" (2014), [Fam Ct Rev](#), [52](#) 187-192 at 190.

communication.<sup>80</sup> Steps must be taken to protect the safety and support the well-being of the IPV victim parent and child, and to hold the perpetrator accountable for the abuse.<sup>81</sup> Protective conditions, restrictions, and therapeutic assistance are required for the perpetrator, as well as adult and child survivors of abuse.<sup>82</sup> The priority is the safety and well-being of the child.

35. A trauma-informed approach will assist the child to maintain connections that are nurturing and supportive of the child’s long-term development.<sup>83</sup> Family dispute resolution should strive to provide individualized restorative solutions that facilitate healing from abuse and trauma, with the benefit of empowered, community-directed professional assistance and support.<sup>84</sup> This requires respecting an Indigenous child’s heritage and culture, affirming Indigenous parenting traditions, and responsiveness to colonialism’s impact on that particular child and community. The constitutional imperative of reconciliation incorporates a promise to advance substantive equality for Indigenous women and children, who are entitled to physical, psychological, and emotional safety, security, and well-being.

#### **PART IV - ORDER REQUESTED**

36. LEAF takes no position on the disposition of the appeal and seeks no costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 18th day of September, 2023.

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<sup>80</sup> *MacDonald v Cannell*, 2021 ONSC 7769 at paras 68-72; *ACR v DRM*, [2021 YKSC 22](#) at para [72](#).

<sup>81</sup> Peter Jaffe, David A Wolfe & Marcie Campbell, *Growing Up with Domestic Violence* (Cambridge, MA: Hogrefe Publishing, 2012) at [2](#).

<sup>82</sup> *SS v RS*, [2021 ONSC 213](#) at paras [107-110](#); *McConnell v Norman*, [2012 SKQB 127](#), at para [76](#); Peter Jaffe *et al.*, “[Making Appropriate Parenting Arrangements in Family Violence: Summary and Supplemental Materials](#)” (Ottawa: Department of Justice, February 2023) at [3](#).

<sup>83</sup> Hadley Friedland, “Reference Re: *Racine v Woods*” (2021) Kent McNeil and Naiomi Metallic, eds., Special Edition: Systems Disruption: Reimagining Canada’s Aboriginal Rights Jurisprudence Collection *Canadian Native Law Reporter* 155 at para 58.

<sup>84</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls, [Reclaiming Power and Place: The Final Report of the National Inquiry Into Missing and Murdered Indigenous Women and Girls](#) Vo.. 1a. (2019).

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## PART V – AUTHORITIES

### A. Legislation

**Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, [1st Sess, 42nd Parl, 2019 \(assented to 21 June 2019\) SC 2019, c. 24.](#)**

***Canadian Charter of Rights and Freedoms*, [Part I of the Constitution Act, 1982](#), being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, [section 15](#).**

Equality before and under law and equal protection and benefit of law

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

***Constitution Act, 1982*, [being Schedule B to the Canada Act 1982 \(UK\), 1982, c 11, section 35](#).**

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of aboriginal peoples of Canada

(2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

***Children’s Law Act, 2020*, [SS 2020, c 2, section 10](#).**

Best interests of child

10(1) In making, varying or rescinding a parenting order, the court shall take into consideration only the best interests of the child.

(2) A parenting order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

(3) In determining the best interests of a child, the court shall consider all factors related to the circumstances of the child, including:

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(b) the nature and strength of the child's relationship with each parent, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

(c) each parent's willingness to support the development and maintenance of the child's relationship with the other parent;

(d) the history of care of the child;

(e) the child's views and preferences, by giving due weight to the child's age and maturity, unless they cannot be ascertained;

(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

(g) any plans for the child's care;

(h) the ability and willingness of each person with respect to whom the parenting order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person with respect to whom the parenting order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

(j) any family violence and its impact on, among other things:

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child; and

(ii) the appropriateness of making a parenting order that would require persons with respect to whom the parenting order would apply to cooperate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child.



(4) In considering the impact of any family violence pursuant to clause (3)(j), the court shall take the following into account:

- (a) the nature, seriousness and frequency of the family violence and when it occurred;
- (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
- (c) whether the family violence is directed towards the child or whether the child is directly or indirectly exposed to the family violence;
- (d) the physical, psychological and emotional harm or risk of harm to the child;
- (e) any compromise to the safety of the child or other family member;
- (f) whether the family violence causes the child or other family member to fear for one's safety or for the safety of another person;
- (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and to improve the person's ability to care for and meet the needs of the child;
- (h) any other factor that the court considers relevant.

(5) In determining the best interests of a child, the court shall not consider the past conduct of any person unless the conduct:

- (a) is relevant to the ability of that person to exercise decision-making responsibility or parenting time; or
- (b) constitutes family violence

***Divorce Act, [RSC 1985, c 3 \(2nd Supp\), section 16.](#)***

**Best interests of child**

16 (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.

**Primary consideration**

(2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

**Factors to be considered**

(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

- (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
- (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
- (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
- (d) the history of care of the child;
- (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) any plans for the child's care;
- (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j) any family violence and its impact on, among other things,
  - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
  - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
- (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

#### Factors relating to family violence

(4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:

- (a) the nature, seriousness and frequency of the family violence and when it occurred;
- (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
- (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
- (d) the physical, emotional and psychological harm or risk of harm to the child
- (e) any compromise to the safety of the child or other family member
- (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
- (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
- (h) any other relevant factor.

## B. Case Law

1. *Algonquins of Pikwakanagan v Children's Aid Society of the County of Renfrew*, [2014 ONCA 646](#).
2. *ACR v DRM*, [2021 YKSC 22\(CanLII\)](#).
3. *Barendregt v Grebliunas*, [2022 SCC 22 \(CanLII\)](#).
4. *BJT v JD*, [2022 SCC 24](#);
5. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [\[1999\] 3 SCR 3](#), 1999 SCC 48.
6. *Children's Aid Society of Stormont, Dundas & Glengarry (United Counties) v S (B)*, 2009 CarswellOnt 1126, [2009].
7. *CNL v GAM*, [2023 ONSC 339](#).
8. *Cosentino v Cosentino*, [2016 ONSC 5621 \(CanLII\)](#).
9. *Fraser v Canada (Attorney General)*, [2020 SCC 28 \(CanLII\)](#).
10. *Friesen v Friesen*, [2023 SKCA 60\(CanLII\)](#).
11. *Gerbert v Wilson*, [2015 SKCA 139\(CanLII\)](#).
12. *Gordon v Goertz*, [1996] 2 SCR 27, [1996 CanLII 191](#) (SCC).
13. *Haynes v Canada (Attorney General)*, [2023 FCA 158\(CanLII\)](#).
14. *JG v PG*, [2017 SKQB 137 \(CanLII\)](#).
15. *JJ v AK*, [2023 ABCJ 166\(CanLII\)](#).
16. *JK v RK*, [2021 ONSC 1136 \(CanLII\)](#).
17. *JMS v British Columbia (Director of Child, Family and Community Services)*, [2021 BCSC 2104 \(CanLII\)](#).
18. *JTS v JB*, [2022 ABKB 791 \(CanLII\)](#).
19. *Karimi v Kyron*, [2022 ONSC 5996\(CanLII\)](#).
20. *Lively v Lively*, [2013 ONSC 1026\(CanLII\)](#).
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**DAWN WALKER**  
Appellant

- and -

**ANDREW JANSEN**  
Respondent

Court File No.: CACV4151

***COURT OF APPEAL FOR  
SASKATCHEWAN***

Proceeding commenced at **SASKATOON**

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