

Family

Indigenous children and the child welfare system in Canada

By **Darlene Rites**



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(December 2, 2020, 2:43 PM EST) -- In Canada, Indigenous children represent approximately 50 per cent of foster children under age 14 despite making up only 7.7 per cent of the population in this group.

In *A.M. v. Ministry of Social Services* 2020 SKCA 114, the Saskatchewan Court of Appeal rendered a decision that grappled with pressing issues facing the Indigenous community, children's rights and even s. 7 rights under the *Canadian Charter of Rights and Freedoms*.

This appeal concerned the apprehension of two children by the Ministry of Social Services (Ministry). This was an appeal of the 2019 decision by Indigenous parents and members of the Yellow Quill First Nation. The parents were appealing the previous dismissal of their application which sought to vary a permanent committal order related to two of their children.

The parents relied on the following grounds in the appeal:

1. The court failed to correctly apprehend the evidence;
2. The court failed to find that there had been a material change in circumstance;
3. The best interest of the child; and
4. Violation of s. 7 of the Charter because it took the variation judge nearly two years to render his decision.

At the time of the children's apprehension by the Ministry in 2011, both appellants were struggling with addiction issues and the father's violence was a problem in the home. In June of 2013, the court determined that both children needed protection and they were committed permanently to the care of the Ministry.

In April of 2016, the parents applied to vary or terminate the permanent committal order. Some of their treatment programming and counselling was complete at this time but they had not complied with all treatment recommendations. Almost two years went by before the variation judge rendered his decision and found that the parents failed to demonstrate a material change in circumstance or that the best interest of the children would be served by varying the order.

The variation judge acknowledged that although the appellants had made significant progress in addressing the addiction issues, the violence in the home continued to be an issue.

Ultimately, the judge determined the best interests of the children would be served by having them remain in a stable home environment where they spent the majority of their young lives. Doing so would allow them to keep their familial bonds intact with their foster family and younger sister.

The children, who were represented by counsel at trial and on appeal, wished to remain with and be adopted by their foster parents. This decision meant that the children would be adopted by a non-Indigenous family.

However, the Saskatchewan Court of Appeal found that the judge adequately took into account the children's cultural heritage in reaching this conclusion and in assessing their best interest, including relying on an Opikinawasowin report prepared through the Saskatoon Tribal Council.

The parents also argued that the delay in the case affected the procedural fairness of the process and did not accord with the principles of fundamental justice. Among other things, the remedy they sought for this alleged violation was the return of the two children to their care. The Court of Appeal found there was insufficient evidence to find a breach of s. 7 due to delay, especially since this issue was first raised on appeal.

Looking ahead

New legislation co-developed with Indigenous peoples came into force on Jan. 1 with a goal of reducing the number of Indigenous children and youth in care and improve child and family services.

The *Act respecting First Nations, Inuit and Métis children, youth and families* (the Act) is intended to affirm the rights of Indigenous peoples to exercise jurisdiction over services affecting children and their families. This legislation also establishes national principles that involve the best interests of children, cultural continuity and substantive equality. Ultimately, this Act provides an opportunity for Indigenous peoples to determine their own solution for families and their children.

This Act, long overdue, provides hope for establishing a national standard for Indigenous child welfare.

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