Citation: Métis Child, Family and Community Services v HDGJ, 2021 MBCA18
Date: 20210304
Docket: AH19-30-09337

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Holly C. Beard
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

***B E T W E E N:***

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| ***METIS CHILD, FAMILY AND COMMUNITY SERVICES*** | ) | ***K. M. Saxberg*** *and* ***S. C. Scarcello*** *for the Appellant (via videoconference)* |
| *(Petitioner) Appellant* | ) | |
| *- and -* | ) | ***M. L. Mitchell*** *for the Respondent (via videoconference)* |
| ***H. D. G. J.*** | ) | |
| *(Respondent) Respondent* | ) | ***D. A. Johnston*** *for the Intervener (via videoconference)* |
| *- and -* | ) | |
| ***THE DIRECTOR OF CHILD AND FAMILY SERVICES*** | ) | *Appeal heard:* ***May 29, 2020*** |
| *Intervener* | ) | *Judgment delivered:* ***March 4, 2021*** |

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On appeal from 2018 MBQB 154

**BURNETT JA**

[1] The petitioner (the agency) appeals the decision of the trial judge granting an order, pursuant to section 38(1)(b) of *The Child and Family Services Act*, CCSM c C80 (the *CFS Act*), that the child in question (M.J.) be placed with her maternal grandmother (the grandmother) without transfer of guardianship and that the agency continue to be the legal guardian of M.J.

[2] The ultimate issue for the trial judge, and this Court, is whether there should be an alternate placement order pursuant to section 38(1)(b) or a permanent order of guardianship pursuant to section 38(1)(f). (All references in this decision to sections are references to sections in the *CFS Act* and are reproduced in the appendix to these reasons.)

[3] Specifically, the agency says that the trial judge erred:

(1) when he granted the order pursuant to section 38(1)(b); and

(2) when he made the order subject to conditions contingent upon the possible enactment and proclamation of provincial legislation.

[4] A trial judge's decision as to the type of order that is in a child's best interests following a finding that the child is in need of protection is a discretionary decision, which should not be interfered with unless there has been an error in principle, a misapprehension of the evidence or a manifest failure to give due consideration to the evidence. (See *Michif Child and Family Services v VEMB et al*, 2016 MBCA 13 at para 16; *Child and Family Services of Western Manitoba v CLH et al*, 2016 MBCA 120 at paras 15-16;

*Dakota Ojibway Child and Family Services v KRF et al*, 2018 MBCA 104 at paras 47, 59; and *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 at para 163.)

[5] With respect, I disagree with my colleague's approach, analysis and disposition of this appeal. In my view, it is not necessary or desirable, in the unique circumstances of this case, to interpret a provision in the *CFS Act* that has not been controversial for the past 34 years. Moreover, it was never agreed that the issue on appeal requires an interpretation of section 38(1)(b).

[6] In my view, the trial judge made both of the errors identified by the agency and, for the reasons that follow, I would allow the appeal and appoint the agency as permanent guardian of M.J. pursuant to section 38(1)(f).

## I. PLACEMENT WITHOUT TRANSFER OF GUARDIANSHIP

[7] Section 38(1)(b) provides:

> **Orders of the judge**
> **38(1)** Upon the completion of a hearing under this Part, a judge who finds that a child is in need of protection shall order
>
> (b) that the child be placed with such other person the judge considers best able to care for the child with or without transfer of guardianship and subject to the conditions and for the period the judge considers necessary; or
>
> [emphasis added]

[8] The trial judge acknowledged that the previous order (made by the master on September 23, 2016) appointing the agency as temporary guardian

was deemed to continue only until the application before him was "disposed of" as provided in section 40(2) (at para 74). He also acknowledged that it was not possible to pronounce another temporary order because of section 41(1).

[9] The trial judge was caught on the horns of a dilemma. It is apparent from his reasons that he did not want to appoint the grandmother as permanent guardian because he believed that she would not continue to receive government funding, and he did not want to appoint the agency as permanent guardian because he believed that a complete severance of all parental ties was not in the best interests of M.J. Because the trial judge could not pronounce another temporary order and he did not want to make a permanent order, he decided that the agency would "continue" (at para 101) to be and would "remain" (at para 105) the guardian of M.J.

[10] In my view, given that the existing order did not continue after the application was disposed of, the agency could not continue to be or remain the guardian of M.J.

[11] Even if my colleague's interpretation is correct, and the trial judge could order that guardianship be transferred to the agency pursuant to section 38(1)(b), the trial judge failed to do so. He specifically said—at least twice in his reasons and again in his order—that M.J. would be placed with the grandmother without transfer of guardianship.

## II. IMPROPER CONDITIONS

[12] The trial judge further erred when he imposed improper conditions.

[13] In his reasons (see paras 102-3), the trial judge said that the order was to remain in effect until the following conditions (the conditions) have been satisfied:

> (1) legislation authorising customary care to Indigenous children has been implemented;
>
> (2) consultation between the respondent (the mother), the grandmother and the agency has occurred in regard to whether it is in the best interests of M.J. that the grandmother be her customary caregiver;
>
> (3) the Manitoba government has determined whether it will enact legislation to provide for the payment of subsidies and supports to a guardian of a child in care; and
>
> (4) if legislation is enacted, a determination is made as to the amount of financial assistance and supports which the grandmother would receive if she is appointed the guardian of M.J.

[14] As noted by my colleague, the intervener (the director) argues that the conditions contemplate termination of the order upon the enactment of legislation at some undetermined future time; unduly complicate M.J.'s legal status; create unnecessary uncertainty; and are not in M.J.'s best interests. The director also argues, and I agree, that the trial judge fell into error by failing to observe the separation of judicial, legislative and executive powers, and that the allocation of public funds is a core function of the legislative branch.

[15] All parties agree that the conditions must be deleted.

[16] Section 38(1)(b) specifically requires that a child be placed "for the period the judge considers necessary". Simply put, an alternate placement order under that section must be in place for a defined period of time. (I note, in passing, that the wording of a similar provision in the 1984 Proposed Act (see paras 89-90 herein) is not the same wording used in section 38(1)(b).) (See Manitoba Community Services, *The Report of the Committee Reviewing The Child Welfare Act* (Winnipeg: MCS, January 1984).)

[17] The mother agrees that section 38(1)(b) contemplates a "time duration" and, at the appeal hearing, the mother's counsel acknowledged that the period of time contemplated by the trial judge's order was until the conditions of that order were met.

[18] Clearly, if the conditions are deleted, there is no defined period for the placement, and one of the requirements for a section 38(1)(b) order does not exist.

[19] To summarise, the trial judge erred in law when he purported to leave the agency as guardian of M.J. without transferring guardianship from the mother to the agency, when he imposed the conditions and when he failed to properly identify the duration of his order.

[20] Although I would ordinarily be inclined to remit the matter to the lower court (see *Dakota Ojibway Child and Family Services Inc v S (J O D)*, 2001 MBCA 47 at para 15), the parties specifically requested that this Court decide whether there should be an order pursuant to section 38(1)(b) or section 38(1)(f).

[21] In the agreed statement of facts filed at the hearing, the parties agreed that:

(1) the agency had ongoing concerns about the domestic violence between the mother and her partner, the impact of that violence on the mother and her need for trauma counselling, the mother's use and abuse of substances, and the mother's mental health;

(2) although the mother had made some efforts to address the agency's concerns, she was not yet in a position to parent;

(3) M.J. was in need of protection at the date of apprehension and continues to be in need of protection;

(4) the agency had no child protection concerns regarding the grandmother;

(5) the agency plan under a permanent order of guardianship is for the grandmother to provide long-term care for M.J., and the agency agreed to support her having guardianship of M.J.; and

(6) the grandmother could not financially assume guardianship of M.J. and requires the continued financial support of the agency.

[22] It is clear from the trial judge's reasons that the conditions were fundamental to his decision, and it is not reasonable to assume that the trial judge would have made the same order in their absence. It is also clear that a

prime concern of the trial judge was that the grandmother continue to receive funding.

[23] My colleague and I appear to agree that an order under section 38(1) that places M.J. with the grandmother, as the person best able to care for her, and transfers guardianship to the agency, is the order that best meets M.J.'s best interests in the uncontested facts of this case, as found by the trial judge. We part company in our view as to whether an order under section 38(1)(b) or section 38(1)(f) would be in M.J.'s best interests.

[24] As my colleague notes, the decision as to the type of order that is in M.J.'s best interests is a discretionary decision, which should not be interfered with unless there has been an error in principle, a misapprehension of the evidence or a manifest failure to give due consideration to the evidence. Here, the trial judge misdirected himself and erred in law in two fundamental respects.

[25] The agency sought a permanent order so that it could provide financial assistance to the grandmother. While a permanent order of guardianship is the most serious form of state interference with parental rights, the agency agreed that it would enter into a commitment agreement that would recognise the grandmother as the long-term placement for M.J. and that the plan for a permanent order would not include adoption. In addition, the mother can apply at a future time to set aside any permanent order (section 45(3)). Significantly, the trial judge found that the "[a]gency provides culturally appropriate services and financial assistance for the care of Métis children from funding received from Métis Child and Family Services Authority" (at para 7).

[26] Based on all of the evidence and the submissions of the parties, I have concluded it is in M.J.'s best interests that the agency be appointed permanent guardian pursuant to section 38(1)(f).

[27] In my view, the agency's plan is consistent with all of the principles outlined in the Declaration of Principles at the beginning of the *CFS Act*, some of which are set out in my colleague's decision: "it would support and preserve the well-being of the family (#2); it would cause the least interference in the family's affairs (#4); it would allow for a continuous family environment (#5); and it would help to preserve the family unit (#7)" (at para 152 herein).

[28] In this case, the grandmother is a close family member and parental figure with whom M.J. has lived for her entire life. Unfortunately, the grandmother cannot afford to care for M.J. without financial and other support from the agency. The effect of a permanent order, in the circumstances of this case, will ensure M.J. remains in the care of the only parental figure who has consistently cared for her throughout her life; ensure she and the grandmother have the necessary and appropriate financial and other supports from a culturally appropriate agency; maintain a connection between M.J., her mother and her siblings as part of her extended family unit; and allow for the possibility that the mother may apply for a termination of the permanent order.

[29] My colleague suggests that, in arriving at this decision, I have failed to give deference to the trial judge's key factual findings. I disagree. As to the suggestion that the mother has made "great strides" (at para 193 herein), that is inconsistent with the agreed statement of facts and was not the trial judge's finding. While the mother has apparently made some progress in

relation to M.J.'s younger brother and a new baby, on the evidence before us, it would be a stretch to suggest that she has made "great strides" in her ability to parent M.J. This is particularly so given the agreed fact that M.J. continued to be in need of protection at the time of the trial.

[30] Contrary to my colleague's assertion, I am giving deference to the order that the trial judge would have made had he known that the order which he did make was not possible for the reasons stated at para 19 herein. The trial judge himself felt that it would be in the best interests of M.J. that the grandmother continue to receive financial assistance, that the agency should be the guardian of M.J. and that a permanent order pursuant to section 38(1)(f) would achieve this objective. My disposition is entirely consistent with those key findings.

[31] Given the foregoing, it is not necessary or desirable to interpret section 38(1)(b) in the unique circumstances of this case. Having said that, I have serious concerns with my colleague's proposed interpretation of section 38(1)(b) and the application of that interpretation to the facts of this case. I therefore make the following additional observations.

[32] First, I do not agree that "with transfer of guardianship" must mean transfer of guardianship to an agency. A plain and natural reading of section 38(1)(b), when read harmoniously with the balance of the *CFS Act*, suggests that the words "with or without transfer of guardianship" mean "with or without transfer of guardianship [to that person]" (underlined words added). The trial judge himself observed that section 38(1)(b) does not identify who can be appointed guardian and that he could appoint the grandmother as guardian of M.J. pursuant to that section. The agency noted,

and I agree, that it remains unresolved as to whether an agency can be the "other person" referred to in section 38(1)(b), and that it "is an interesting question, but one that is not necessary to decide" in this case.

[33] Second, and perhaps most significantly, if section 38(1)(b) contemplates another means of appointing an agency as guardian (i.e., other than appointing an agency as a temporary guardian or a permanent guardian pursuant to sections 38(1)(c) to (f)), it would appear to be inconsistent with the statutory scheme as a whole. I note, for example, that sections 38(1)(c), (d) and (e), which provide for the appointment of an agency as a temporary guardian, would be unnecessary, and that the time restrictions on temporary guardianships specified in section 41(1) would effectively be eliminated. The suggestion that an order pursuant to section 38(1)(b) could be for an indefinite period further underscores that sections 38(1)(c), (d) and (e) would serve no purpose. Such an order is, in substance, a further temporary order. Section 41(1) is clear and specific; there are no exceptions in the *CFS Act* to the time restrictions on temporary guardianships. Even Carr J, who figured prominently in the development of the *CFS Act* and who was a member of the Family Division of the Court of Queen's Bench for 31 years, did not give section 38(1)(b) the interpretation which my colleague proposes.

[34] Third, if the agency is appointed guardian of M.J. pursuant to section 38(1)(b), does it have care and control? In my view, it is not possible to reconcile sections 44(4) and 48 with the trial judge's decision. The trial judge said that the grandmother would have care of M.J. and that the agency "shall continue to be the guardian of [M.J.] with the authority conferred on it by s. 48 of [the] *CFS Act*" (at para 101). Section 48(a) provides that, unless the guardianship is limited by the Court, the agency shall have care and control

of M.J. The trial judge did not limit the agency's guardianship. Section 44(4) provides that, where a judge has made an order under section 38(1)(b), " the agency shall release the child from its care and control in accordance with the terms of the order within 14 days of the date on which the judge pronounced the order". Does the agency have care and control of M.J.? My colleague and I agree that an agency can only distribute funds for the maintenance of children in care so the answer to this question is of crucial importance.

[35] The matter is further complicated by the fact that the trial judge did not transfer guardianship and he failed to appoint the agency as guardian. In those circumstances, guardianship reverted to the parents and section 48 has no application.

[36] Fourth, while there is no question that the *CFS Act* was enacted to modernize and improve Manitoba's child welfare legislation, I strongly disagree with the suggestions, which underline my colleague's entire analysis, that this case has its roots in the "sixties scoop" and that the enactment of the *CFS Act* was directed to righting the wrongs of the "sixties scoop" (see, for example, paras 44-47, 68 herein). Those suggestions were not made by any of the parties to this proceeding, and we have come a long way from the era of the "sixties scoop". While reconciliation and the development of policies and programs which improve the delivery of child welfare services to Indigenous families are important goals, those matters were not issues raised in this appeal.

[37] Fifth, section 51(1) specifically provides that an "agency may at any time remove a child in its care from the person with whom the child was placed". While an agency can usually apprehend without an order, in this

case, there is a specific order that M.J. be placed with the grandmother. Where does that leave the agency? Does the agency have to go to court to get a variation? This problem is not an academic issue. The grandmother said that there had been conflicts between herself and the mother and was told by the agency to resolve them, or the agency could remove M.J. from her care.

[38] Sixth, while I agree that the legislative background and history may be of assistance in understanding the purpose and scope of the *CFS Act*, I do not agree that they assist with the interpretation of section 38(1)(b). There is no clear statement of legislative intent regarding that provision, nor can it be said that section 38(1)(b) was enacted to remedy the problems with child welfare practices as they affected Indigenous children and families. The parties made no submissions regarding these matters—no one argued that the legislative history was relevant to an interpretation of section 38(1)(b), and we do not have the benefit of legal argument. My colleague suggests that the parties' arguments were "incomplete and incorrect" (at para 73 herein). With respect, it is entirely possible that counsel concluded, for good reason, that an argument relying on legislative background and history was unconvincing. Nor do I accept as fact all of the findings in the various reports referred to by my colleague. Clearly, the Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1 (Winnipeg: Queen's Printer, 1991), is not part of the legislative history described by Côté J in *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22. It is not "material relating to the conception, preparation and passage of the enactment" (at para 14, quoting *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 43), the

report of a royal commission recommending that the *CFS Act* be enacted, or a report or study which existed at the time of the enactment of that statute "relied upon by the government that introduced the legislation" (*1704604 Ontario* at para 14, quoting Prof Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp (Toronto: Thomson Reuters, 2019) vol 2 (loose-leaf updated 2019, release 1), ch 60 at 60-2).

[39] Seventh, I do not agree with the suggestion that the funding issue is a red herring. The trial judge repeatedly said that this case is about funding for the grandmother, and it was a principal reason for not transferring guardianship to her. In the opening paragraph of his reasons, the trial judge said, "The facts of this case disclose an issue that relates to child welfare funding, which is both significant and troubling." My colleague, herself, considers whether funding is permitted if an order is made under section 38(1)(b), and she concludes that whether her interpretation of that section will result in an increase in the demand for funding is not an issue but, if it becomes an issue, it will be for the government to address.

[40] It is evident that fitting together various threads of the *CFS Act* to achieve a particular interpretation of section 38(1)(b) is extremely difficult. As I indicated at the outset, it is not necessary or desirable to interpret that section in the unique circumstances of this case.

[41] For the foregoing reasons, I would allow the appeal and order that

the agency be appointed permanent guardian of M.J. There will be no order as to costs.

_____ JA

I agree: _____ JA

**BEARD JA** (dissenting):

## I. THE ISSUE

[42] The parties agree that the sole issue on this appeal is the interpretation of section 38(1)(b) of *The Child and Family Services Act*, CCSM c C80 (the *CFS Act*), which is one of several orders that can be made when a child has been found to be in need of protection under the *CFS Act*. All references to statutory provisions refer to the *CFS Act* unless otherwise stated. Those provisions are, for the most part, set out in the appendix to these reasons.

[43] While my colleague takes issue with my characterisation of the issue on appeal (see para 5 herein), that is how each party describes the appeal in their factum. In any event, my colleague states that "[t]he ultimate issue . . . is whether there should be an alternate placement order pursuant to section 38(1)(b) or a permanent order of guardianship pursuant to section 38(1)(f)" (at para 2 herein). That does not change the issue, being the correct interpretation of section 38(1)(b), because, to make the ultimate decision that he identifies, one must first determine how to correctly interpret and apply section 38(1)(b). By not considering whether there could be an order under section 38(1)(b), as correctly interpreted, my colleague has not determined the issue that he identified.

[44] The statutory interpretation issue in this case has its roots in the "sixties scoop", which is part of the much larger story of the correction of, and settlement for, injustices visited upon Indigenous peoples by various governments in Canada that started in the 1800s. The sixties scoop, which began in the early 1950s, refers to the permanent transfer of guardianship of

Indigenous children to government agencies, pursuant to provincial child welfare legislation, by court orders that had the effect of terminating all parental rights and responsibilities.

[45] My colleague begins his reasons by stating that "it is not necessary or desirable . . . to interpret a [statutory] provision . . . that has not been controversial for the past 34 years" (at para 5 herein). When considered in the context of the history of this provision (which I explain later) and the settlement of both this and other injustices by governments to Indigenous peoples in Canada, 34 years is a relatively short period of time. I note, for example, that some proceedings related to residential schools and day schools (which were set up beginning in the early 1900s) are still ongoing before the courts. (See, for example, *McLean v Canada*, 2019 FC 1074.) As recently as June 18, 2015, the then premier of Manitoba, the Hon Greg Selinger, made a public apology on behalf of the Manitoba government to Indigenous peoples for its role in the sixties scoop.

[46] Further thereto, the Government of Canada (Canada) just recently settled two class proceedings with Indigenous peoples related to the sixties scoop, by agreements that received court approval on May 11, 2018 (see *Riddle v Canada*, 2018 FC 910; and 2018 FC 901) and June 20, 2018 (see *Brown v Canada (Attorney General)*, 2018 ONSC 3429; and 2018 ONSC 5456); however, other proceedings raising similar claims remain outstanding in many jurisdictions, including Manitoba. (See, for example, *Thompson et al v Minister of Justice of Manitoba et al and Meeches et al v The Attorney General of Canada*, 2016 MBQB 169; and *Laliberte v Canada (Attorney General)*, 2019 FC 766, aff'd *Laliberte v Day*, 2020 FCA 119.)

[47] As the history of the legislation and the provision at issue show, the provision was enacted in 1986 to provide justice to Indigenous peoples in Manitoba. In my view, it is not too late to correct the errors highlighted in this case to provide the justice that was clearly intended by the Legislature and to promote the principles in the Declaration of Principles, referenced at the beginning of the *CFS Act*, that guide the application of the legislation.

[48] In addition to agreeing that this appeal is about the interpretation of section 38(1)(b) of the *CFS Act*, the parties are also in agreement that the child in question, M.J., was and remains in need of protection, that she should remain living with her maternal grandparents on a long-term basis, and that the petitioner, Metis Child, Family and Community Services (the agency), should have guardianship so that it can continue to provide funding and services for her.

[49] A further order of temporary guardianship was not an option, as the total period for temporary guardianship to an agency under section 41 had expired prior to the trial. The agency took, and continues to take, the position that guardianship to the agency was not available under section 38(1)(b) and that, to accomplish all of the agreed goals, the only order available is a permanent order of guardianship under section 38(1)(f). The respondent (the mother) argues that an order under section 38(1)(b) (an alternate placement order) transferring guardianship to the agency and placing M.J. with her grandparents, as the people best able to care for her, without granting them guardianship, is both available and the order that best addresses M.J.'s best interests. The important difference between those orders is that a permanent order of guardianship under section 38(1)(f) operates as an absolute

termination of parental rights and obligations (section 45(1)), while a transfer of guardianship to an agency under section 38(1)(b) does not have that effect.

## II. BACKGROUND

[50] The facts are not at issue. M.J., who was five years old at the time of the trial, had lived her entire life with her maternal grandparents. Her mother was living with her parents when M.J. was born, and M.J. remained living with her grandparents at those times that her mother resided elsewhere. M.J. has a brother, M.E. (the brother), who was three years old at the time of the trial. In September 2018, after the trial but before the trial judge released his decision, the mother entered into a voluntary placement agreement (VPA) with the agency regarding the brother. At the appeal hearing, agency counsel advised the Court that the VPA had ended successfully, as intended, and that the brother and a new baby were living with the mother.

[51] The agency became involved with the family at the grandmother's request, initially before M.J. was born, due to her concern about the mother's substance abuse. When M.J. was about two years old, the mother obtained her own residence and wanted to take M.J. with her when she moved out. The grandmother had concerns about the mother's ability to care for M.J. due to her continued substance abuse and, later, domestic violence in the mother's home, which the grandmother communicated to the agency. The agency apprehended M.J. and her brother and placed them with the grandparents.

[52] When the agency apprehended M.J. and her brother in January 2016 and became responsible for their care (section 25(1)), it began providing financial assistance and support services to the grandparents to assist with caring for the children. Given that M.J.'s brother had been returned to the

mother and remains with her, both the application and this appeal deal only with M.J. The grandmother retired in 2016 and takes the position that she cannot afford to care for M.J. without financial assistance from the agency.

[53] The agency was prepared to consent to the grandparents, or the grandmother, who was the primary caregiver, becoming M.J.'s guardians by way of a private guardianship application but, in that event, its financial support would end, as the agency can only provide funding and related services to support children who are in care or for whom it is the guardian. The evidence before the trial judge, which was uncontested, was that the agency would terminate its support for, and involvement with, M.J. upon guardianship being granted to the grandmother. Thus, the grandparents were, and remain, unprepared to assume private guardianship.

[54] To be clear, the agency is not opposed to retaining guardianship of M.J., to her residing with the grandparents, and to providing funding and services for her on a long-term basis. The only issue is whether the only way that can happen is by the agency having permanent guardianship of her.

## III. THE TRIAL JUDGE'S DECISION

[55] The trial judge began his analysis by referring to the preamble to the *CFS Act* and the Declaration of Principles, one of which states that the family, as the basic unit of society, is to be supported and preserved (#2). He also pointed out that several of the principles assert the rights and entitlements of families, including the right to the least interference and to receive services directed to preserving the family unit (see paras 64-65).

[56] He found that it would be in M.J.'s best interests to remain living with her grandparents and for them to receive "optimum financial assistance and services to enable [them] to satisfy [M.J.'s] needs", and that that should occur with the least interference to her and her family (at para 69; see also paras 68, 70).

[57] The trial judge agreed that another order of temporary guardianship was not available (see para 76).

[58] Having found that it would be in M.J.'s best interests to remain with her grandparents and for them to continue to receive financial assistance "at the optimum level that is available" (at para 82), the trial judge acknowledged that this could be accomplished by way of a permanent order of guardianship. He found, however, after noting the mother's progress in counselling and the impending return of M.J.'s brother, that a permanent order would be "contrary to the fundamental principles and philosophy of [the] *CFS Act*, which emphasize the importance of supporting and preserving the family unit" (at para 83). Relying on statements by this Court in *Winnipeg Child and Family Services v D (KA)* (1995), 125 DLR (4th) 255 (Man CA) (*D (KA)*), that "[a]n order of permanent guardianship should . . . be . . . one of last resort only to be made where the court is satisfied that a complete severance of all parental ties is in the best interests of the child" (at p 261), and that "[t]he purpose of the [*CFS Act*] is not to tear families apart, but to heal them" (*ibid*), he concluded that "[i]t would be a tragedy to pronounce a permanent order of guardianship in regard to a child when the order is not 'one of last resort' but rather, is an order to ensure that a family in Manitoba receives needed financial assistance and support" (at para 84).

[59] The trial judge then considered the availability of an alternate placement order under section 38(1)(b). He stated (at para 88):

> In ***A.R.W.*** [*Sagkeeng Child and Family Services v ARW et al*, 2006 MBQB 256 at para 81], Goldberg J. correctly identified s. 38(1)(b) of [the] ***CFS Act*** as "… a provision which retains the legislative scheme's flexibility and enables a judge to exercise discretion …." The provision provides that where under present circumstances, the person best able to care for a child does not require financial assistance to satisfy the needs of the child, a guardianship order in favour of that person may be made. Where under current child welfare funding principles, the caregiver requires financial assistance, an order may be pronounced that does not include a transfer of guardianship.

[60] He found that, where guardianship is not transferred to the caregivers under section 38(1)(b), the child's best interests require that another guardian be appointed (see para 98). He further found that the agency was the guardian pursuant to the last temporary order, and that it was in M.J.'s best interests that guardianship remain with the agency (see paras 99-100, 105).

[61] The trial judge then made the following order (at paras 101-3):

> There shall be an order pursuant to s. 38(1)(b) of [the] ***CFS Act*** that [M.J.] be placed with the grandmother as she is the person best able to care for her without a transfer of guardianship. The [a]gency shall continue to be the guardian of [M.J.] with the authority conferred on it by s. 48 of [the] ***CFS Act***.
>
> It is in the best interests of [M.J.] that this order remain in effect until:
>
> a) The legislation authorizing customary care to Indigenous children has been implemented; and

> b) Consultation between the mother, the grandmother and the [a]gency has occurred in regard to whether it is in the best interests of [M.J.] that the grandmother be her customary caregiver.
>
> This order shall also remain in effect until:
>
> a) The Government of Manitoba determines whether it will proceed following consultation to enact legislation to provide for the payment of subsidies to a guardian of a child who has been in care; and
>
> b) If legislation is enacted, the amount of financial assistance and supports that will be available to the grandmother if she is appointed the guardian of [M.J.] can be determined.

[62] The conditions regarding the duration of the order relate to *The Child and Family Services Amendment Act (Taking Care of Our Children)*, SM 2018, c 13, which had been passed but not proclaimed at the time of the trial judge's decision (see paras 37-39). That legislation has yet to be proclaimed.

## IV. THE PARTIES' POSITIONS

[63] The agency's position is that the trial judge erred in ordering that "[t]he [a]gency shall continue to be the guardian of [M.J.] with the authority conferred on it by s. 48 of [the] ***CFS Act***" (at para 101) because there is no authority in the *CFS Act* to make such an order for an unlimited or unknown period of time. Its position is that the only order available to the trial judge was a permanent order of guardianship. The mother argues that the order made by the trial judge is authorised by section 38(1)(b) of the *CFS Act*. The Agency's position regarding section 38(1)(b) is that "without transfer of guardianship" means that guardianship would remain with the parents or

guardian at the time of apprehension but that the child would be placed with the best caregiver, and that "with transfer of guardianship" means that guardianship would be transferred to the best caregiver when the child was placed with that person, akin to a private order of guardianship, and not to an agency.

[64] The mother's position is that section 38(1)(b) is a different type of order than a temporary or permanent order of guardianship, and that "with transfer of guardianship" means transfer to the agency. She argues that the plain-reading, remedial, child-centred and family-centred approach taken by the trial judge in relation to his interpretation of section 38(1)(b) was consistent with the preamble to the *CFS Act* and the goal of least interference with the family. She submits that his interpretation was correct and should be upheld.

## V. STANDARD OF REVIEW

[65] A trial judge's decision as to whether a child is in need of protection is a question of mixed fact and law and is reviewed on the standard of palpable and overriding error. (See *Child and Family Services of Western Manitoba v CLH et al*, 2016 MBCA 120 at para 29 (*CLH*); and *Manitoba (Director of Child and Family Services) v HH and CG*, 2017 MBCA 33 at para 27; see also *AC v Nova Scotia (Community Services)*, 2017 NSCA 1 at para 17.)

[66] A trial judge's decision as to the type of order that is in the child's best interests following a finding that the child is in need of protection is a discretionary decision, which should not be interfered with unless there has been an error in principle, a misapprehension of the evidence or a manifest failure to give due consideration to the evidence. (See *Michif Child and*

*Family Services v VEMB et al*, 2016 MBCA 13 at para 16; *CLH* at paras 15-16; *Dakota Ojibway Child and Family Services v KRF et al*, 2018 MBCA 104 at paras 47, 59; and *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 at para 163.)

[67] In this case, the agreed issue on appeal is that of the interpretation of section 38(1)(b). This issue does not rely on factual findings or on the application of the facts in this case to the law. Thus, the issue is one of statutory interpretation, which is a question of law. (See *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 33.) The applicable standard of review is that of correctness. (See *First Nations of Northern Manitoba Child and Family Services Authority v Manitoba (Minister of Family Services and Housing) et al*, 2014 MBCA 42 at paras 39-40 (*First Nations*); *Robertson v Harding*, 2018 MBCA 67 at para 21; and *Hyczkewycz v Hupe*, 2019 MBCA 74 at paras 32, 105.)

## VI. ANALYSIS

[68] Section 38(1)(b) first appeared as an available order, upon a finding that a child is in need of protection, in the *CFS Act*, which replaced the former act (*The Child Welfare Act*, SM 1974, c 30 (the *CWA*)), as repealed by the *CFS Act*, section 87(1)). The enactment of the *CFS Act* was a step in the evolving relationship between Indigenous peoples and the Manitoba government (Manitoba) that was directed to righting the wrongs of the sixties scoop. It followed several years of intense public consultation and study by a number of government-sponsored bodies, each of which produced its own report and recommendations. All of these are important to understanding the purpose and scope of the legislation.

### *1. Principles of Statutory Interpretation*

[69] The process for interpreting a statute begins with "Driedger's Modern Principle" of statutory interpretation, being that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Prof Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 1, citing Elmer A Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67).

[70] This principle was recently applied in *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 (*Pointes Protection*), wherein Côté J, for the Court, stated (at para 6):

> Before I explain the parameters of the s. 137.1 framework, it is necessary, as part of the exercise of statutory interpretation, to outline the legislative background of the bill which brought s. 137.1 into effect. Such legislative background and history offer contextual clues to and insight into the legislative purpose of the bill, as well as indicia of the proper interpretation of the provisions at issue, which will be explored in turn below. . . .

[71] She explained further (at para 14):

> . . . It must be remembered that "(l)egislative history includes material relating to the conception, preparation and passage of the enactment", and this "may often be (an) important par(t) of the context to be examined as part of the modern approach to statutory interpretation" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43 ("*CHRC*")). Indeed, the late Peter W. Hogg defined legislative history as including the following:

> 1. (T)he report of a royal commission or law reform commission or parliamentary committee recommending that a statute be enacted;
>
> . . .
>
> 3. a report or study produced outside government which existed at the time of the enactment of the statute and was relied upon by the government that introduced the legislation . . . .
>
> (*Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, at pp. 60-1 to 60-2)
>
> While reports like the APR [*Anti-Slapp Advisory Panel: Report to the Attorney General*] are generally "admissible for any purpose the court thinks appropriate", the weight accorded to them depends on the circumstances (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 685; see also *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 51). As I have explained, the APR was the clear impetus for the legislation, and was relied upon heavily by the legislature in drafting s. 137.1 of the *CJA* [*Courts of Justice Act*, RSO 1990, c C43]. Accordingly, it is a persuasive source that "provide(s) helpful information about the background and purpose of the legislation" (*CHRC*, at para. 44).

(See "Anti-Slapp Advisory Panel: Report To The Attorney General" (28 October 2010), online: *Ministry of the Attorney General* <www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html> (date accessed 17 February 2021).)

[72] In this case, in my view, an understanding of the history of the provision and the statutory framework, that is, the scheme and object of the *CFS Act*, are important to correctly interpret the provision at issue. I have adopted the terminology found in each report when discussing that report.

[73] My colleague takes issue with the use of this history on the basis that it was not referenced by the parties. The parties described this appeal as being a statutory interpretation case, which engages the contextual interpretation process outlined in *Pointes Protection*. The fact that the parties did not refer to this material does not mean that this Court should not do so. Rather, to the extent that the parties did not consider this history and background, their arguments were incomplete and incorrect and, in my view, it would be an error to fail to consider it now. The question is how to correctly interpret the legislation, and the application of the correctness standard requires us to consider this material, whether or not it was referenced by the parties.

### *2. History of the CFS Act*

#### *2.1 Overview*

[74] When the *CFS Act*, then Bill 12, was given second reading in the Legislature, the Minister of Community Services and the Minister Responsible for the Status of Women, the Hon Muriel Smith (the minister), introduced it as "a major piece of social legislation," stating that it was "the culmination of three years of review and reform in the Child and Family Services system" (Bill 12, *The Child and Family Services Act*, 2nd reading, Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 32-4, vol 45A (9 May 1985) at 1753 (Hon Muriel A Smith), online (pdf): *Legislative Assembly of Manitoba* <www.gov.mb.ca/legislature/hansard/32nd_4th/hansardpdf/45a.pdf> (date accessed 25 February 2021)).

[75] The minister specifically acknowledged contributions that informed and shaped the legislation, including those leading to the tripartite agreements and the development of Native agencies, the Committee of Departmental and

Agency Members that held community meetings over a period of two years, Carr J's review of the *CWA*, the "fundamental recommendations of the Kimelman Review Committee on Indian and Metis adoptions and placements", and her own departmental consultation paper and related community consultations, as well as the underlying briefs and presentations at all levels (*ibid*).

[76] Many of her comments emphasised that the Bill reflected significant changes in the provision of child welfare services and included, as a "fundamental aspect", a Declaration of Principles (*ibid*). I will first look at the history of the underlying reports and recommendations that relate to what is now section 38(1)(b), as they provide the context for the minister's 1985 statements about the Bill.

[77] The history leading to the *CFS Act* is explained in *The Aboriginal Justice Inquiry Report* (the *AJI Report*). While that report deals with much more than child welfare, I will limit my review to the part that relates to child welfare. The *AJI Report* was written after the *CFS Act* was passed, so it is not a document that, itself, "was relied upon by the government that introduced the legislation" (*Pointes Protection* at para 14, quoting Prof Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp (Toronto: Thomson Reuters, 2019) vol 2 (loose-leaf updated 2019, release 1), ch 60 at 60-2). It does, however, provide a summary of the history that preceded the *CFS Act*, which is relevant to understanding the legislation, as well as tying together the reports which did form a direct part of that context. It is, thus, "material relating to the conception . . . of the enactment" (*Pointes Protection* at para 14, quoting *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 43). I have limited my use of the *AJI Report*

to only those parts and for those purposes. (See The Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1 (Winnipeg: Queen's Printer, 1991).)

[78] As a result of the constitutional division of powers between Canada and the provinces, the federal government has jurisdiction over "Indians, and Lands reserved for the Indians" under section 91(24) of *The British North America Act 1867* (UK), 30 & 31 Vict, c 3, and, historically, the provincial governments were reluctant to extend their provincial responsibilities for child welfare to include those groups without receiving federal funding. The result was that, in the end, neither level of government was prepared to fund those services to Indians living on- or off-reserve.

[79] Following growing public awareness of the dire social and economic conditions on reserves and the welfare of Aboriginal children living there, Canada signed agreements with some provinces in the mid-1960s to share the costs of extending existing provincial child welfare services to Aboriginal peoples living on reserves. What resulted was the apprehension of over 3,400 Aboriginal children between 1971 and 1981. These children were removed from their families and communities and placed with, or adopted by, non-Aboriginal families far removed from their homes and cultures. Of the Aboriginal children apprehended between 1971 and 1981, 70 to 80 per cent were adopted into non-Aboriginal homes, many in the United States. This became known as the "sixties scoop", although it continued into the 1980s.

[80] The unprecedented number of apprehensions led, in the 1970s, to Aboriginal communities putting intense pressure on governments to stop what, in their view, amounted to cultural genocide.

[81] In 1977, the federal and provincial governments established a tripartite working committee on Indian child welfare, which included representatives from the Indigenous community. The Indian Child Welfare Subcommittee, as it became known, released its report in 1980, calling for sweeping reforms to the existing child welfare system to serve Indigenous peoples better. This led to an agreement, entitled *Canada – Manitoba – Indian Child Welfare Agreement*, signed on February 22, 1982, that set out the framework for the devolution of child welfare services from child welfare agencies operated by Manitoba to Indian authorities. (See *Report of the Indian Child Welfare Subcommittee Manitoba: To the Tripartite Committee*, Catalogue No Manitoba SpR 1977 ICWS c 1 (Legislative Library) (Winnipeg: March 1980); and *Canada – Manitoba – Indian Child Welfare Agreement*, 22 February 1982, online (pdf): *Brant Family and Children's Services* <www.brantfacs.ca/wp-content/uploads/2017/08/1982_Canada_and_Manitoba_agreement_on_Indian_child_welfare.pdf> (date accessed 17 February 2021).)

[82] As the scope of the export of children under the provincial child welfare system became known, the reaction of Aboriginal peoples was one of anger and outrage. In 1982, Manitoba ordered a stop to all out-of-province adoptions and appointed Kimelman PJ (Fam Div) (as he then was), to head an inquiry into the child welfare system and how it affected Aboriginal peoples. Kimelman ACJPC released several interim reports, with his final report being released in 1985 (the Final Report). (See Manitoba Community Services, *No*

*Quiet Place: Review Committee on Indian and Metis Adoptions and Placements: Final Report*, part 1 (Winnipeg: MCS, 1985) (Edwin C Kimelman ACJPC), online (pdf): *Government of Manitoba* <digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=24788&md=1> (date accessed 17 February 2021); part 2, online (pdf): *Government of Manitoba* <digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=24789&md=1> (date accessed 17 February 2021).)

[83] The Final Report refers to the cultural misconceptions about Aboriginal peoples and the way they raised their children. It advocates a drastic overhaul of the child welfare system, including recommendations to include consideration of "the child's 'cultural and linguistic heritage'" (at p 32) as an aspect of a child's best interests and to make better use of the extended family.

[84] Further, Manitoba commissioned a review of the *CWA* by Robert Carr (Carr J), who issued a report in May 1982 (the Carr Family Law Report) that was prepared for the Attorney-General of Manitoba and included, but was not limited to, a review of child welfare legislation. (See Robert Carr, *A Report on the State of Family Law in Manitoba: Recommendations for Change* (Winnipeg: Taylor Brazzell McCaffrey, 1982).)

[85] In addition, in March 1982, Manitoba set up a committee (the review committee) to "assess, modernize and improve Manitoba's child welfare legislation" (Manitoba Community Services, *The Report of the Committee Reviewing The Child Welfare Act* (Winnipeg: MCS, January 1984) at 1 (the 1984 Proposed Act)). The review committee was composed of representatives of provincial and Aboriginal child welfare agencies, several

branches of the government that related to child welfare and the First Nations Confederacy. In addition to reviewing judicial decisions, legislation from other jurisdictions and the Carr Family Law Report, the review committee consulted with various human rights service agencies and the Department of the Attorney General, and held public hearings where it received over 50 briefs and proposals.

[86] During the course of its mandate, the review committee produced several drafts of proposed new child welfare legislation. The review committee completed its work in January 1984 by proposing changes to the *CWA* that were contained in draft legislation (see the 1984 Proposed Act) of what is now the *CFS Act*. Upon receiving the review committee's recommendations and draft legislation, the minister undertook further public consultations, seeking further community input into the proposed changes. To initiate the process, she circulated the Consultation Paper on the *CWA* in July 1984 prepared by the review committee that "describe[d] briefly the draft legislative proposals prepared by the [review committee]" (Manitoba Community Services, *Consultation Paper on The Child Welfare Act* (Winnipeg: MCS, July 1984) at 4 (the Consultation Paper)). This draft legislation became Bill 12, referred to at para 74 herein.

### *2.2 The Carr Family Law Report*

[87] In the Carr Family Law Report, Carr J recommends significant changes to many aspects of the child welfare legislation, including that "[m]ore options should be available to a judge following protection proceedings" (at p 90).

### *2.3 The Review Committee's Proposals*

[88] In the Consultation Paper, the review committee emphasises the addition of new dispositions available to a court. It states that "Part III of the proposed Act deals with child protection. *It contains . . . additional court dispositions for children found to be in need of protection*; . . . [and the] specification of culturally appropriate placement of children in care in their home communities whenever possible" (italics added) (at p 2). In discussing Part III in more detail, the review committee described that the 1984 Proposed Act "include[d] several changes from that in the [*CWA*]. . . . [T]he [*CWA*] does not contain the disposition of placement of a child with another person" (emphasis added) (at p 18).

[89] The 1984 Proposed Act that was the subject of the Consultation Paper contains clause (f) to section 38(1), which was worded as follows (at p 40):

> (f) that the child be placed with such other person the judge considers best able to care for the child with or without transfer of guardianship and subject to whatever conditions and for whatever period the judge considers necessary.

[90] This wording is almost identical to that used in section 38(1)(b) of the *CFS Act*.

[91] Clause (f) is also referenced in section 42(1) of the 1984 Proposed Act, which dealt with further hearings and set out the orders that are available if a child remains in need of protection. One option under section 38(1) is an order to "place the child with such other person as the judge considers best

able to care for the child with or without transfer of guardianship to or supervision by an agency" (emphasis added).

[92] The 1984 Proposed Act makes it clear that the guardianship order intended to accompany an alternate placement order was guardianship to an agency. This is repeated in the Consultation Paper, wherein the review committee explained the placement option following a further hearing as "place the child with another person with or without transfer of guardianship or supervision to the agency" (at p 19).

[93] The Consultation Paper also notes that, as a new provision, the guardianship authority of the director or an agency is defined (enacted as section 48) but it can be limited by the Court (see p 20). This new limitation is important because it addresses what would otherwise be an inconsistency between the agency's guardianship authority to place a child in care (section 51(1)) and the new alternate placement order that takes away that authority by directing where the child will be placed (section 38(1)(b)). I will say more about this later.

[94] Finally, the part of the Consultation Paper dealing with child protection concludes with the statement that "[t]his section is similar to . . . the [*CWA*] with adjustments made for additional dispositions" (emphasis added) (at p 19). The only additional disposition is that in what is now section 38(1)(b).

### *2.4 The Kimelman Reports*

[95] Kimelman ACJPC released an interim report in May 1983 in which he anticipated that his Final Report would recommend that the *CWA* be

amended to provide for four types of court orders, rather than the then current provisions for only temporary and permanent orders of guardianship. He stated that "[c]onsideration might well be given to court orders with placement within the family structure" (Manitoba, *Review Committee on Indian and Metis Adoptions and Placements: Interim Report*, Catalogue No Manitoba SpR 1982 Adoptions c 2 (Legislative Library) (Winnipeg: RCIMAP, May 1983) at 24).

[96] In his File Review Report in 1984, Kimelman ACJPC again suggested that he would be recommending alternative types of guardianship and wardship orders in his Final Report. (See Manitoba, *Review Committee on Indian and Metis Adoptions and Placements: File Review Report*, Catalogue No Manitoba SpR 1982 Adoptions c 2 (Legislative Library) (Winnipeg: RCIMAP, April 1984) at 3, 60.)

[97] His Final Report was completed in 1985, after the draft of the *CFS Act* had already been introduced into the Legislature, so Kimelman ACJPC did not make any specific recommendations about alternative types of guardianship or wardship orders. He did, however, describe some situations that explain past practices and are relevant to the interpretation of the *CFS Act*.

[98] Dealing with past practices, he noted that the federal Guardian Social Allowance Program had, historically, provided funding for Indian children placed with relatives in cases where, without financial help, hardship would have occurred (see p 203). This included children placed with grandparents at birth, or relatives taking responsibility for children when their parents were experiencing difficulties. "These children were placed in homes

other than their own with no transfer of legal guardianship, no legal sanction, and no judicial process" (at p 204). In April 1983, children funded under this program, known colloquially as the pay list, were transferred to the social assistance program being funded through the Indian bands. Kimelman ACJPC made several recommendations in relation to these children, including that the federal government continue to fund "the cost of support of treaty Indian children in homes other than their own" (at p 206).

[99] After reviewing the many problems and shortfalls in the child welfare practices as they affected Indian children and the plight of Indian families under the legislation, he concluded that "[n]ew ways of supporting families must be developed" (at p 264). He urged that "[p]olicies and structures . . . be put in place to make and keep child welfare services flexible, responsive, and culturally relevant" (at p 279), and he stressed that "[t]he function and role of an agency is to maintain a child in its own home but when removal is necessary to minimize the negative emotional consequences of that removal" (at p 373).

### *2.5 The Minister's Response*

[100] Getting back to the minister's explanation of Bill 12 during second reading, she stated that "Part 3, which deals with Child Protection gives wider scope to the courts in handling protection matters" (emphasis added) (at p 1754).

[101] The minister emphasised the Bill's recognition of "the unique characteristics and structure of Native extended families" (at p 1755), explaining that changes to the definition of family (to include extended family

members) "reflects the needs and wishes of Native people and the role of culture in the lives of families throughout the province" (at p 1754).

[102] She concluded by saying (at p 1756):

> . . .
>
> We believe, Mr. Speaker, that this bill will strengthen community-based Child and Family Services in Manitoba. It will support the efforts of our child-caring agencies to keep children and families together in the community by strengthening the available options to taking children into care.
>
> At the same time, it offers better service for those children who require an agency's care and protection. . . .
>
> . . .

### *2.6 Conclusion—History of the CFS Act*

[103] These reports uncovered major problems with the delivery of child welfare services to Indigenous peoples, particularly those living on reserves. Each report recognised the need for significant legislative changes to address those problems, including the addition of new statutory options that would support the family structure and Indigenous culture, rather than permanently removing children from their parents, families and/or communities. The recommendations were an invitation to think outside the box, to find new and innovative solutions for providing care for children in care, and the clear message was that changes should be significant and meaningful.

[104] These recommendations were accepted and endorsed by Manitoba and formed the basis of many of the changes to the *CWA* which were enacted

in the *CFS Act*, including the addition of section 38(1)(b) as the only new disposition upon finding that a child is in need of protection.

### *3. Statutory Framework*

[105] The second step in interpreting section 38(1)(b) is looking at the framework of the statute; that is, the scheme and object of the act.

#### *3.1 Purpose of the CFS Act*

[106] Steel JA, for the Court, explained the purpose of the *CFS Act* in *First Nations* as being to protect the best interests of the child (see paras 55-56). (See also *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 31.)

#### *3.2 The Scheme of the CFS Act*

[107] The scheme of the statute is the set of defined criteria within which the determination of best interests is made.

[108] The *CFS Act* begins with a Declaration of Principles, which did not form part of the *CWA*, and which are stated to be "the fundamental principles guiding the provision of services to children and families". Those that are particularly applicable in this case are:

> . . .
>
> 2. The family is the basic unit of society and its well-being should be supported and preserved.
>
> 3. The family is the basic source of care, nurture and acculturation of children and parents have the primary responsibility to ensure the well-being of their children.

> 4. Families and children have the right to the least interference with their affairs to the extent compatible with the best interests of children and the responsibilities of society.
>
> 5. Children have a right to a continuous family environment in which they can flourish.
>
> . . .
>
> 7. Families are entitled to receive preventive and supportive services directed to preserving the family unit.
>
> 8. Families are entitled to services which respect their cultural and linguistic heritage.
>
> 9. Decisions to place children should be based on the best interests of the child and not on the basis of the family's financial status.
>
> . . .

[109] The minister explained that "[t]he Declaration of Principles is meant to support the act's intended balance of focus on children and families. It will also help develop agency policy, serve as a guide to the interpretation of the act and assist in judicial and administrative decision-making" (emphasis added) (at p 1754).

[110] Section 2(1) of the *CFS Act* deals with the best interests of the child, which are specified to be "the paramount consideration of the director, an authority, an agency and a court in all proceedings under this Act" except for proceedings to determine whether the child is in need of protection. In determining the child's best interests, the section states that the child's safety and security are the primary considerations, after which other relevant matters,

including eight listed criteria, shall be considered. While all of the criteria are equally important, those of particular relevance to this matter are:

> . . .
>
> (a) the child's opportunity to have a parent-child relationship as a wanted and needed member within a family structure;
>
> . . .
>
> (d) the child's sense of continuity and need for permanency with the least possible disruption;
>
> (e) the merits and the risks of any plan proposed by the agency that would be caring for the child compared with the merits and the risks of the child returning to or remaining within the family;
>
> . . .
>
> (h) the child's cultural, linguistic, racial and religious heritage.

[111] While the *CFS Act* is divided into eight parts, we need only consider Parts III, IV and VII for the purposes of this matter. Part III, entitled Child Protection, is particularly relevant as it deals with the apprehension of a child where an agency, on reasonable grounds, believes that the child is in need of protection (sections 17, 21). Where an agency apprehends a child, the agency is responsible for the child's care, maintenance, education and well-being (section 25(1)) and must apply to court for a hearing to determine if the child is in need of protection (section 27).

[112] Upon completion of a hearing, a judge who finds that the child is in need of protection must make one of the six orders set out in section 38(1):

. . .

> (a) that the child be returned to the parents or guardian under the supervision of an agency and subject to the conditions and for the period the judge considers necessary; or
>
> (b) that the child be placed with such other person the judge considers best able to care for the child with or without transfer of guardianship and subject to the conditions and for the period the judge considers necessary; or
>
> (c) that the agency be appointed the temporary guardian of a child under 5 years of age at the date of apprehension for a period not exceeding 6 months; or
>
> (d) that the agency be appointed the temporary guardian of a child 5 years of age or older and under 12 years of age at the date of apprehension for a period not exceeding 12 months; or
>
> (e) that the agency be appointed the temporary guardian of a child of 12 years of age or older at the date of apprehension for a period not exceeding 24 months; or
>
> (f) that the agency be appointed the permanent guardian of the child.

[113] Where a court makes an order under any of sections 38(1)(b) to (e), the judge can order that the parent or guardian pay maintenance to the agency for the support of the child (section 38(3)). Where a court makes an order under section 38(1)(a) or (b), the agency with supervision of the child has the right to enter the home to provide guidance and counselling and to ensure that proper care is being provided to the child (section 38(6)). That agency can apprehend the child if it finds that he/she is not being properly cared for and

maintained or that the child is in need of protection, “notwithstanding the order made under subsection (1)” (at section 38(7)).

[114] Where there has been an order under any of sections 38(1)(b) to (e), the parents or guardian have the right of reasonable access and, where the parents or guardian and agency cannot agree, either can apply for an access order. Where there has been a permanent order of guardianship, the agency has complete discretion regarding access, subject to review by a judge (section 39).

[115] As noted earlier, where an order other than a permanent order is made, a judge may hold a further hearing to determine whether the child is still in need of protection (section 40(1)). If the former order expires before the date of the further hearing, that order is deemed to continue until the application is either withdrawn or disposed of (section 40(2)).

[116] A maximum period of temporary guardianship is mandated, depending on the age of the child at the time of apprehension (section 41). Finally, a permanent order of guardianship terminates parental rights and obligations and, following the expiration of the appeal period, the agency can place the child for adoption (section 45). The parents have limited rights to apply to terminate that order, provided the child has not been placed for adoption (sections 45(3), 45(5)).

[117] Part IV of the *CFS Act* is entitled Children in Care and relates to children who are under the guardianship of, or the supervision of, the director or an agency. Section 48 states:

> **Authority of the guardian**
> **48** Where the director or an agency is the guardian of a child under this Act unless the guardianship is limited by the court, the director or agency shall
>
> (a) have the care and control of the child;
>
> (b) be responsible for the maintenance and education of the child;
>
> (c) act for and on behalf of the child; and
>
> (d) appear in any court and prosecute or defend any action or proceeding in which the child's status is or may be affected.
>
> [emphasis added]

[118] Section 51(1) permits an agency to "remove a child in its care from the person with whom the child was placed, if the agency considers that it is in the child's best interests".

[119] Part VII deals with private guardianship of the person and access, which are addressed separately from agency guardianship. Under section 77, upon application by an adult, a judge may appoint that adult as the guardian of the person of a child, which can be done on an interim basis and can be made reviewable. A guardian so appointed is the guardian of the child "for all purposes", with care and control of the child and responsibility for the child's maintenance, education and well-being (section 77(4)).

### *3.3 Conclusion—Statutory Framework*

[120] In my view, the statute clearly differentiates between guardianship proceedings involving an agency or the director (Parts III, IV), on the one hand, and private guardianship proceedings, including applications by a

family member (Part VII), on the other. Section 38(1)(b) is found in Part III, which deals only with agency guardianship.

### *4. Interpretation of Section 38(1)(b) in the Context of the Act as a Whole*

[121] In discussing the interpretation of section 38(1)(b), I will focus primarily on the arguments of the parties and discuss how the *CFS Act*, as a whole, either supports their arguments, or not.

#### *4.1 Different Type of Order*

[122] The mother's position is that the alternate placement option under section 38(1)(b) is a different type of order than either temporary or permanent guardianship in clauses (c) to (f), so I will begin by comparing those provisions.

[123] Section 38(1)(b) refers to a transfer of guardianship, not to either temporary or permanent guardianship. Initial temporary orders under clauses (c) to (e) have clear time limitations related to the age of the child, while an alternate placement order under (b) does not: it can be in place "for the period the judge considers necessary". An alternate placement order can have conditions attached, whereas there is no authority to attach conditions to either a temporary or permanent guardianship order. Finally, the *CFS Act* has specific provisions that set out the temporal parameters of temporary and permanent guardianship, separate from those in clauses (c) to (f), and neither is applicable to an alternate placement order under clause (b) (sections 41, 45(1)).

[124] In my view, this comparison supports the mother's view that an order under section 38(1)(b) was intended to be a different type of order than either a temporary or permanent order of guardianship.

### *4.2 "With or Without Transfer of Guardianship"*

[125] The agency's position, with which I agree, is that "without transfer of guardianship" means that guardianship would remain with the parents or guardian. In this case, the order of temporary guardianship had expired pursuant to section 41(1) and, under section 40(2), was deemed continued until the application under consideration was "either withdrawn or [was] disposed of." Upon the application either being withdrawn or disposed of, the agency's guardianship would terminate and guardianship would revert to the parents or guardian, unless another guardian was appointed.

[126] As noted earlier, the agency's position is that "with transfer of guardianship" in section 38(1)(b) means guardianship to the person best able to care for the child, not guardianship to an agency. The mother takes the opposite view.

[127] Within the scheme of the *CFS Act*, section 38(1)(b) is located in Part III dealing with Child Protection, which is solely concerned with the guardianship rights and obligations between the parents or guardian and the agency (or "state") in relation to the child. The guardianship rights and obligations of third parties in relation to the child are simply not addressed in Part III. Rather, the guardianship rights and obligations of third parties towards a child are addressed in Part VII dealing with Private Guardianship.

[128] Section 77(1), which is in Part VII, requires the third party to make an application for guardianship and sets out a specific procedure, following which a judge may appoint that person as guardian. If the agency is correct, then the third party would not have to make an application before being appointed guardian under section 38(1)(b). Given this separate scheme for appointing a private guardian, it seems contrary to this scheme to allow a third party to become a private guardian without making an application.

[129] Further, the authority of a guardian under Parts III and IV, as contained in sections 38(1)(b) and 48, can have conditions attached and be limited, while a guardian appointed under section 77 "is for all purposes the guardian" and there is no provision to attach any conditions (section 77(4)). If both sections 38(1)(b) and 48 refer to guardianship to an agency, they are consistent as both permit limits to the guardianship authority of an agency. If sections 38(1)(b) and 77 both refer to guardianship to the caregiver, then they are inconsistent, because one permits limits to the guardianship, while the other does not. Clearly, the more harmonious interpretation requires that section 38(1)(b) refer to guardianship to an agency.

[130] In fact, the third party best caregiver may be prepared to have the child placed with him or her and be the caregiver but may not be willing to become the legal guardian with all of the obligations that that entails. If section 38(1)(b) does not refer to the transfer of guardianship to an agency, then the only options available would be leaving guardianship with the parents or transferring it to the caregiver, neither of which may be acceptable.

[131] The words "without transfer of guardianship" also appear in section 14 of the *CFS Act*, which provides for voluntary placement

agreements "without transfer of guardianship" (section 14(1)). The agreement is between the person with care of the child and the agency, so any transfer of guardianship could only be to the agency. Thus, the interpretation of "transfer of guardianship" as referring to transfer to an agency in section 38(1)(b) is consistent with the use of those same words, albeit in a different context, in section 14.

[132] In my view, the most coherent manner of reading section 38(1)(b) within Parts III, IV and VII of the *CFS Act* is if the words "with transfer of guardianship" mean transfer to the agency, not to the caregiver.

### *4.3 Inconsistencies Raised by the Agency*

[133] The agency argues that the mother's proposed interpretation of section 38(1)(b) leads to inconsistencies with other provisions of the *CFS Act*, which I will now address.

#### *4.3.1 Ranking Within Section 38(1)*

[134] The agency contends that reading section 38(1)(b) as referring to transfer of guardianship to the agency is not consistent with the ranking of the available orders, which proceeds with increasing severity from clause (a), which leaves the parents with all rights subject only to supervision, to (f), which grants permanent guardianship to the agency and terminates all parental rights. If guardianship can be transferred to the agency under section 38(1)(b), the agency argues that there would be a sudden jump in the level of severity, as the children would not be placed with the parents and the agency would have guardianship.

[135] This argument views the matter from the perspective of the parent or the agency, rather than from the best interests of the child. From the viewpoint of the best interests of the child, section 38(1)(a) leaves the child in the care and control of the parents, with the agency only supervising. Under section 38(1)(c), the agency has temporary guardianship of the child with the right to determine and change the child's placement (section 51(1)). Under section 38(1)(b), the child goes to the best caregiver, most likely a relative or known foster parent. Even if guardianship is transferred to the agency under that provision, the child would remain with the best caregiver, which is less intrusive for the child than being in the temporary guardianship of the agency and being placed and moved as it determines.

[136] Furthermore, the placement with a best caregiver can be for a longer time than a temporary guardianship order, which would mean that a child would not be subject to bouncing between various foster or group homes, as could occur with either a temporary or permanent guardianship order.

[137] Thus, seen from the best interests of the child, an order under section 38(1)(b) that transfers guardianship to an agency is less severe and less intrusive to the family than an order of temporary or permanent guardianship, and it is, in fact, consistent with the ranking of available orders.

#### *4.3.2 Section 51(1)*

[138] The agency also argues that interpreting "with transfer of guardianship" in section 38(1)(b) as referring to transferring guardianship to an agency is inconsistent with section 51(1) of the *CFS Act*, which indicates that an agency can, at any time, remove a child in its care from its placement where that is in the child's best interests. The argument is that, if a judge

orders the placement with a best caregiver but guardianship is transferred to an agency, then the agency could not exercise its authority under section 51(1). It must be noted that section 51(1) is a general provision found in Part IV of the *CFS Act*, which relates to all children in care. In my view, there are two answers to this argument, both of which undermine the agency's position.

[139] First, a placement order under section 38(1)(b) does not prevent an agency from apprehending the child. If a judge orders the placement of a child with a caregiver and transfers guardianship to an agency under section 38(1)(b), section 38(7) would apply to that placement to give the agency the right, albeit more limited than under section 51(1), to move the child. Subsection (7) states that, where an agency is authorised to exercise supervision over a child under section 38(1), it can apprehend a child who is not properly cared for and maintained or who is in need of protection "notwithstanding the order made under subsection (1)" (emphasis added). Section 38(7) is not limited to orders under subsection (1)(a), but applies to any order under subsection (1) where the agency is authorised to exercise supervision—such as would occur if guardianship had been transferred to an agency under section 38(1)(b).

[140] Section 38(6) states that, where a judge or master "makes an order under clause (1)(a) or (b) any representative of the agency under whose supervision the child is placed has the right to enter the home" (emphasis added) to check on the child. With guardianship under section 38(1)(b), an agency would have supervision of the child and could enter the best caregiver's home pursuant to section 38(6) to supervise the placement made under section 38(1)(b) and apprehend the child from the best caregiver under

section 38(7) if the conditions in that provision were met, notwithstanding the placement order.

[141] Thus, an agency can still remove a child from the placement but, in order to remove a child who has been placed by a court order under subsection (1)(b), the legislation requires the agency to meet the more specific test in section 38(7), rather than the test of best interests in the more general provision in section 51(1).

[142] Second, section 51(1) is a specific application of the agency's guardianship authority in section 48, but that authority is not unlimited; rather, section 48 sets out the agency's guardianship authority "unless the guardianship is limited by the court" (emphasis added).

[143] An order that a child be placed with a specific caregiver under section 38(1)(b) is an order of the Court that limits the guardianship authority of an agency under section 48, including authority over the care and control of the child and over the ability to place and move a child under section 51(1). In my view, the limits on an agency's section 48 and 51(1) guardianship authority that result from an alternate placement order are addressed through the authority given to it under sections 38(6) and 38(7), as explained above.

#### *4.3.3 Section 44(4)*

[144] The agency also argues that ordering guardianship to an agency under section 38(1)(b) is inconsistent with section 44(4), which requires the agency to release the child from its care and control when the judge makes an order under section 38(1)(a) or (b), unless it obtains a stay from an appeal judge pending an appeal. The argument is that, if the agency is appointed

guardian under section 38(1)(b), how can it be required to release the child from its care and control when care and control is part of its guardianship authority under section 48(a)?

[145] First, section 44(4) does not require the agency to release the child; it requires the agency to "release the child . . . in accordance with the terms of the order" (emphasis added) under subsection (1)(a) or (b). Second, section 48 does not state that guardianship to an agency gives it complete care and control of the child; it states that an agency that has guardianship has care and control "unless the guardianship is limited by the court" (emphasis added).

[146] Section 38(1)(b) permits a judge to make a guardianship order with conditions, i.e., limits. The provision, itself, contains the condition that the child be placed with a specific caregiver—that placement is a "term of the order" under section 44(4) and a limit to the agency's guardianship under section 48. The agency's argument presumes that it has care and control, but that does not take into account the limits on that aspect of its guardianship that are permitted in the legislation.

[147] What section 44(4) requires is that, where an agency is appealing a court order, it must still comply with that order unless it gets a stay. If, under section 38(1)(b), the agency has guardianship with placement with a best caregiver, it would retain guardianship but would be required to place the child with that caregiver, even if it were appealing that placement. That is how the words "release the child . . . in accordance with the terms of the order" apply. Thus, in my view, an order of placement with a caregiver and guardianship to

an agency are not inconsistent with any of sections 44(4), 48 or 51(1) of the *CFS Act*.

### *4.3.4 Time Limits*

[148] Finally, the agency argues that reading section 38(1)(b) as permitting placement with a caregiver and guardianship to an agency without a time limitation would render sections 38(1)(c) to (f) useless. It questions why a court would ever order temporary or permanent guardianship to an agency when it could simply appoint the agency as guardian under section 38(1)(b) and not be limited by the time limits in clauses (c) to (e) and section 41.

[149] The agency's argument fails to take into account the limitations involved in making an order under section 38(1)(b)—in particular, the requirement to place the child "with such other person the judge considers best able to care for the child". This requires that there be a person best able to care for the child, and that person must be willing to take the child, which will not always be the case. If returning the child to his or her parents or guardian is not an option and there is no best caregiver available, then the Court would have no choice but to make a temporary or permanent order of guardianship to the agency.

[150] Even if there is a best caregiver available, the judge would have to find that it is in the child's best interests to order guardianship to an agency, rather than leaving guardianship with the parents or guardian. This would require the weighing of Declaration of Principle #4, which recognises the right to the least interference in the affairs of families and children as is compatible with the child's best interests. An order of placement with a caregiver that

leaves guardianship with the parents or guardian will meet the child's best interests in some cases while, in others, the best interests will require the transfer of guardianship to an agency.

[151] None of this takes away from the efficacy of temporary and permanent orders. These orders still have their place where there is either no best caregiver who will undertake long-term placement or, taking into account the child's best interests, the best permanency plan would be to see the child made a permanent ward, such as to facilitate an adoption.

[152] The agency's argument also glosses over the positive aspects of a long-lasting judicial placement in the home of a family member. This would generally respect many of the principles outlined in the Declaration of Principles at the beginning of the *CFS Act*: it would support and preserve the well-being of the family (#2); it would cause the least interference in the family's affairs (#4); it would allow for a continuous family environment (#5); and it would help to preserve the family unit (#7). Importantly, it would avoid the stress inherent in the possibility that an agency with temporary or permanent guardianship could move the child to another placement simply because the agency thinks that it would be "better".

[153] These matters suggest that section 38(1)(b) permits a judge to do something different than simply making a temporary order of guardianship until time runs out and then making a permanent order, despite a permanency plan which supports the long-term placement of the child with a family member who can best care for the child and which would be more likely to keep open meaningful family ties between the child, the parents and other family members.

[154] Further, interpreting section 38(1)(b) in a way that allows placement with the best caregiver while transferring guardianship to an agency is consistent with the factors that are to be considered under section 2(1) when determining the best interests of the child, including the child's opportunity to have a parent-child relationship and the merits and risks of any plan proposed by the agency. The risks associated with the agency having permanent guardianship include the agency moving the child according to its interpretation of best interests, the parents' slim opportunity to have the child returned to their care and the increased risk of a future adoption.



### *4.3.5 Sections 38(3) and 39(1)*

[155] When the Court makes an order under sections 38(1)(b) to (e), it can make ancillary orders dealing with the payment of child support (section 38(3)) and access by the parents or guardian to the child (section 39(1)). A review of these provisions supports the position that guardianship under clause (b) would go to the agency, not to the best caregiver.

[156] Section 38(3) provides that, where an order is made under clause (b) or (e), the Court can make an order that the parent or guardian pay "to the agency" appropriate maintenance. Although an order under clause (b) is specifically included in section 38(3), there is no provision for the payment of maintenance to the best caregiver. Further, why would the agency be entitled to maintenance in relation to a clause (b) order at all if it could not have guardianship?

[157] Similarly, section 39(1) states that, where an order has been made under any of clauses (b) to (e) of section 38(1), the parents or guardian have

the right of reasonable access to the child. Section 39(2) states that, "[w]here the parents or guardian and the agency are unable to agree", either party may apply for an order and "the agency shall bear the burden of proof that any limitation of access is reasonable." Again, in relation to clause (b), this presupposes that an agency has guardianship. It makes no allowance for parental access where guardianship has been ordered in favour of a best caregiver. Why, in relation to an order under clause (b), would an agency have to agree to access or bear the burden of proof on an application for access if it is not, and could not be, the guardian? If clause (b) permits guardianship to the best caregiver, should it not be that person who must agree to access or bear the burden of proof, given that the agency would not be involved at all?

[158] It is clear that including an order under clause (b) in sections 38(3) and 39(1) only makes sense if guardianship under clause (b) can be granted to an agency, rather than to the best caregiver.

### *4.4 Conclusion—Section 38(1)(b) in Context*

[159] In my view, when section 38(1)(b) is examined in the context of the other provisions of the *CFS Act*, it is clear that the interpretation proposed by the mother, being that "with transfer of guardianship" means the transfer of guardianship to an agency, is consistent with those other provisions. The inconsistencies with this interpretation that are raised by the agency do not hold up to closer scrutiny and the interpretation proposed by the agency, being that "with transfer of guardianship" means transfer to the best caregiver, is not consistent with the other provisions of the *CFS Act*.

[160] While, in my view, the legislation, when examined in accordance with the modern principles of statutory interpretation, is neither unclear nor

inconsistent, to the extent that others may be of a differing view, this Court has provided the following direction in *Dakota Ojibway Child and Family Services Inc v S (J O D)*, 2001 MBCA 47 (at para 10):

> If one looks at the purpose of [the *CFS Act*] and in particular the Declaration of Principles that form part of the preamble to [the *CFS Act*], it is clear that it is the best interests of children which are to be served. This leads me to state that if there is either an inconsistency or an unclear passage in the legislation, it should be resolved in favour of the best interests of the children.



[161] I have already explained why I have concluded that interpreting "with transfer of guardianship" as meaning transfer to the director or an agency, rather than to the person best able to care for the child, is in the child's best interests (see, for example, paras 134-37, 149-54 herein).

[162] My colleague has posed, without answering, questions regarding this interpretation of section 38(1)(b) and has suggested inconsistencies with other provisions of the *CFS Act* (see paras 32-35 herein). These merely restate some of the inconsistencies alleged by the agency, all of which have been addressed and refuted herein (see paras 122-61 herein). As explained, all of these issues are answered within the scheme of the legislation and, in my view, none of them raise inconsistencies with the interpretation of section 38(1)(b) set out herein, or even call it into question.

### *5. Jurisprudence*

[163] Section 38(1)(b) has been mentioned in the following cases: *Winnipeg Child & Family Services Agency v L (L)*, 1991 CarswellMan 459 (QB); *Anishinaabe Child & Family Services Inc v O (DM)*, 1992 CarswellMan 187 (QB); *Dakota Ojibway Child & Family Services Inc v M (MJ)*, 1994

CarswellMan 34 (QB (Fam Div)); *D (KA)*; *Anishinaabe CFS v LS and DWM*, 2001 MBQB 78; *S (J O D)*; and *Sagkeeng Child and Family Services v ARW et al*, 2006 MBQB 256.

[164] In my view, none of these cases addresses the interpretation issue now before this Court in a substantive way, or provides guidance as to the interpretation of the phrase "with or without transfer of guardianship". Further to my colleague's observation that section 38(1)(b) "has not been controversial for the past 34 years" (at para 5 herein), there was no indication either how or how often this provision has been used in the past. The fact that it has not been controversial is irrelevant to its correct interpretation, particularly given the lack of information as to its past use. The issue has been appropriately raised by the parties in this matter and is before this Court now for determination.

### *6. An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, SC 2019, c 24 (the First Nations Act)*

[165] The *First Nations Act* came into force on January 1, 2020, following the release of the trial judge's decision in this matter. It sets out national principles applicable to the provision of child and family services in relation to Indigenous children in Canada. Section 16(1) states that placement is to occur in the following order: with a parent; with another adult member of the child's family; with an adult of the same Indigenous group, community or people as the child; with an adult belonging to another Indigenous group; or with any other adult. Section 16(2.1) requires that the placement of a child "must take into account the customs and traditions of Indigenous peoples such as with regards to customary adoption."

[166] In my view, a long-term placement with a family member supported by agency guardianship, rather than making the child subject to a permanent order of guardianship simply because the temporary guardianship time limits have been reached, is consistent with the specific provisions, as well as the spirit, of the *First Nations Act*. Thus, in my view, the interpretation of section 38(1)(b) set out above would be consistent with the *First Nations Act*.

### *7. Conclusion—Interpretation of Section 38(1)(b)*

[167] Taking into account the persuasive history of section 38(1)(b), the minimal case law, which primarily suggests that the provision has not been utilised or understood, the overall purpose and principles of the *CFS Act*, and the context of the provisions within the scheme of the *CFS Act*, it is my opinion that section 38(1)(b) was enacted to fulfill the recommendations leading up to the enactment of the *CFS Act* for a new and different type of order, i.e., one different from either a temporary or permanent order of guardianship. It was clearly envisioned by the legislators as a new and flexible type of order that would be in addition to the judge's existing options of ordering temporary and/or permanent guardianship. The agency's interpretation is equivalent to private guardianship, which was already available under the *CWA*, and does not represent a new or innovative solution. The mother's interpretation, on the other hand, provides a new type of order that does fulfill that vision.

[168] In my view, the section 38(1)(b) placement order was intended to help alleviate the problems associated with the time limitations in temporary guardianship orders and the stigma and finality of a permanent order of guardianship, specifically where there was the possibility of a long-term

placement of the child with a family member or other best caregiver, and to facilitate placement in a way that would be culturally sensitive and supportive of the family structure and did not carry the stigma of permanently terminating parental rights and obligations.

[169] Dealing with the wording of section 38(1)(b), it is my opinion that the words "with transfer of guardianship" in section 38(1)(b) mean transfer of guardianship to an agency, and the words "without transfer of guardianship" mean that guardianship would remain with the parents or guardian. It would be open to a judge, in the appropriate circumstances, to order that a child be placed with such other person as the judge considers best able to care for the child, with or without transferring guardianship from the parents or guardian to an agency, and to make the order subject to the conditions and for the time period that the judge thinks necessary. To be clear, this order should not be considered either a temporary or permanent order of guardianship.

### *8. The Intervener's Position*

[170] The Director of Child and Family Services (the director) was granted leave to intervene on a limited basis. In addition to supporting the agency's position, it raises three issues: (i) the agency can only disburse funds for the daily maintenance of children in the care of its mandated child and family services agencies; (ii) the conditions imposed by the trial judge create uncertainty over M.J.'s legal status and fail to determine custody on a final basis; and (iii) the trial judge failed to observe the separation of judicial, legislative and executive powers.

### *8.1 Children in Care*

[171] I accept the director's argument that an agency can only distribute funds for the maintenance of children in care. (See the *CFS Act* at section 7(1)(g); and *The Child and Family Services Authorities Act*, CCSM c C90 at section 19.)

[172] The director's position is that a child may be in care only pursuant to sections 21 (upon apprehension), 14 (pursuant to a voluntary placement agreement), 16 (pursuant to a voluntary surrender of guardianship), or 38(1)(c) to (f) (pursuant to a temporary or permanent guardianship order in favour of an agency).

[173] The director argues that a child placed with a best caregiver under section 38(1)(b) is not a child in care and, therefore, the agency is not able to provide the funding that the trial judge was trying to facilitate. Its arguments in support of its position are those already advanced by the agency.

[174] I have already explained my view of the interpretation of section 38(1)(b), including that "with transfer of guardianship" means transfer to an agency. Clearly, if a judge transfers guardianship of a child to an agency under section 38(1)(b), the agency would have the authority of a guardian under section 48 (subject to any conditions imposed by the judge), including for that child's care, control, maintenance and education, and that child would be a "child in care", in the same way as if the judge had made an order of guardianship under any of sections 38(1)(c) to (f). In my view, this argument is not persuasive and I would dismiss it.

### *8.2 Conditions Imposed*

[175] The director argues that the conditions imposed by the trial judge (see para 61 herein) related to the termination of the order upon the enactment of legislation at some undetermined future time unduly complicate M.J.'s legal status, create unnecessary uncertainty and are not in M.J.'s best interests. The parties agree that the appeal should be allowed to the extent of deleting those conditions. I agree with the parties and the director, with the result that I would allow the appeal on this issue and delete those conditions.

### *8.3 Failure to Observe the Separation of Powers*

[176] The director argues that the trial judge's interpretation of the *CFS Act* was driven by his dissatisfaction with child welfare funding. It argues that the allocation of public funds is a core function of the legislative branch, and that the trial judge erred by permitting that policy concern to drive his interpretation of the legislation. (See, for example, *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras 27-31.)

[177] While the funding issue was raised by the parties and was the subject of much comment by the trial judge, in the end, it is not a factor in the interpretation of the legislation. It was, and is, a factor in determining which order under section 38(1), or private guardianship under section 77, would be in M.J.'s best interests, but that is a separate issue from the interpretation of the legislation. The first issue deals with the determination of what orders are available, while the second deals with which of the available orders is the most appropriate. With respect, my colleague, as well, has failed to make this important distinction in his analysis (see para 39 herein). For this reason, I would not find this argument persuasive, either.

[178] Given the focus on the funding issue in the Court below and at the appeal, however, some further comment is appropriate. The issue in this case was very narrow, given the positions taken by the parties and the agreements between them (see paras 48-49, 53-54 herein). The only issue before the trial judge was how the final order would be structured, that is, under section 38(1)(b) with guardianship to the agency or permanent guardianship under section 38(1)(f). That would not, however, affect the amounts to which the grandmother was entitled or that the agency would have to pay, as the agency would provide the same funding under both. Thus, I agree with the agency that, in this case, the funding issue was and is a red herring in relation to the only contested issue in this appeal, being the interpretation of the legislation.

[179] In other cases, the issue of whether the judge should have transferred guardianship to an agency, thus triggering funding for a child, may become an arguable issue. Funding under section 38(1)(b) is not available on demand; there must first be a finding that the child is genuinely in need of protection and that an order under section 38(1)(b) would be appropriate based on the facts of a particular case. To repeat, those were not issues in this case.

[180] Whether this interpretation of section 38(1)(b) will result in an increase in the demand for funding in the future is not an issue before this Court. If it becomes an issue in the future, it will be for government to address at that time.

### *9. Application to the Facts and the Trial Judge's Decision*

[181] As stated earlier, the underlying facts were all agreed to by the parties. In applying those facts to the law, the trial judge made findings

regarding M.J.'s best interests, which are findings of mixed fact and law to be reviewed on the standard of palpable and overriding error.

[182] The trial judge found that it was in M.J.'s best interests to remain living with her grandmother (see para 68). He also found that it was in M.J.'s best interests "that any order . . . causes the least interference to her and her family that is '... compatible with the best interests of children and the responsibilities of society'" (at para 70). After reviewing the uncontested evidence of the mother's progress in treatment, including the impending return of M.J.'s brother (see para 81), he found that "granting a permanent order of guardianship in this case is contrary to the fundamental principles and philosophy of [the] *CFS Act*, which emphasize the importance of supporting and preserving the family unit" (at para 83). Finally, he found that "[i]t would be a tragedy to pronounce a permanent order of guardianship in regard to a child when the order is not 'one of last resort'" (at para 84). Clearly, he did not view the mother's situation as one that would justify the implementation of the "last resort" order and the permanent severance of parental ties with the child. None of these findings has been appealed. The finding that a permanent order is not in a child's best interests is entitled to deference for the same reasons that a finding that a permanent order is in a child's best interests is entitled to deference (see para 66 herein).

[183] My colleague states that a prime concern of the trial judge was that the grandmother continue to receive funding (see para 22 herein). While that was clearly a concern for the trial judge, it was not his prime concern. If it had been, he would have addressed it by ordering permanent guardianship to the agency. In my view, the trial judge's prime concern was his findings that there should be no "complete severance of all parental ties" (at para 80), as

would occur with a permanent order (see paras 78-80, 83-84), and that there should be an order that causes the "least interference to [M.J.] and her family" (at para 70). The former reference is found in *D (KA)*, which the trial judge cites on three occasions in his reasons and references on other occasions, underlining its importance to his decision (see paras 18, 61-62, 80).

[184] Based on these findings, it is clear that the trial judge found that the goal of meeting M.J.'s best interests would best be accomplished by an order whereby M.J. would remain living with her grandmother, the agency would have guardianship, and there would be no permanent severance of parental ties. In exercising his discretion under section 38(1), but without the benefit of the interpretation of section 38(1)(b) set out herein, he attempted to find a way to accomplish that goal by invoking sections 38(1)(b) and 40(2) to make the order.

[185] The trial judge did that by ordering under section 38(1)(b) that M.J. reside with her grandmother, as the person best able to care for her, and by extending the agency's guardianship under section 40 on an indefinite basis. Specifically, he found that the agency had guardianship of M.J. at the date of the hearing under sections 40(1) and 40(2) (see para 99), and that the agency should continue to be M.J.'s guardian until the legislation referred to at para 62 herein came into effect and alternative arrangements thereunder could be made (see paras 101-3).

[186] In my view, the trial judge erred in his interpretation and application of section 40, which deals with an application for a further order. Guardianship under section 40 comes into effect only where the former order of guardianship expires before a hearing for a further order can be completed.

It is clear from the wording of the legislation that this guardianship is of limited duration and only continues "until the application [for a further order] is either withdrawn or is disposed of" (at section 40(2)). At that point, the judge must either return the child to the parents or guardian or, if the child would still be in need of protection, make an order under section 38 (section 40(3)). There is no provision to continue guardianship under section 40(2) past the withdrawal or disposition of the application for a further hearing.



[187] The trial judge's findings of fact and mixed fact and law (as summarised at paras 182-85 herein), have not been appealed but, even if they had been appealed, they would all be reviewed on the standard of palpable and overriding error. In my view, there was no such error. The trial judge's decision as to the appropriate order under section 38(1) is a discretionary decision that is entitled to deference, which includes his finding that a permanent order would not be in M.J.'s best interests. While the trial judge erred in his interpretation of section 38(1)(b), his error was in failing to find that that provision would accomplish the goals that he found were in M.J.'s best interests; that is, he erred in failing to find that he could transfer guardianship to the agency under that provision. This error does not taint his separate factual findings regarding M.J.'s best interests.

[188] In my view, an order under section 38(1)(b) that places M.J. with her grandmother, as the person best able to care for her, and transfers guardianship to the agency without an absolute termination of parental rights and obligations is the order that best meets M.J.'s best interests in the uncontested facts of this case, as found by the trial judge. It shows deference to his decision that, based on those facts, a permanent order would not be in

M.J.'s best interests. I would agree that the trial judge was on the right track in making an order under section 38(1)(b), but I would get there by another route.

[189] Section 38(1)(b) states that an order made thereunder would remain in effect "for the period the judge considers necessary". The mother accepted, and the other parties agreed, as do I, that the period ordered by the trial judge, as set out at para 61 herein, cannot stand. My colleague takes the position that the words "for the period the judge considers necessary" require that the order remain in effect for a definite period of time (at para 16 herein; see also paras 17-18). I do not read that provision in that way. In my view, the wording is wide enough to include any period that the trial judge considers necessary, including one of indefinite duration. This interpretation, which provides more flexibility to a judge, is most in keeping with the remedial nature of the legislation and is the one that most favours the best interests of the child (see para 160 herein).

[190] The evidence, as agreed by the parties and accepted by the trial judge, was that, while the mother was not in a position to parent M.J. at the time of the trial, she was making great strides in treatment to address the problems that interfered with her ability to parent, so much so that the agency was planning to return M.J.'s brother to the mother pursuant to a six-month VPA (see paras 9, 23-24, 81 of the trial judge's decision) rather than seeking any order of guardianship of him. This suggests that she may be in a position to have M.J. returned to her care in the future. In my view, a provision that the order would continue in effect until further order of the Court would best reflect the situation, as found by the trial judge, and would leave open the ability to return M.J. to her mother's care, if and when she is able to resume

that responsibility such that a return is in M.J.'s best interests. This would also best respect the trial judge's finding that a complete severance of parental ties was not in M.J.'s best interests.

[191] Regarding my colleague's analysis, we are in agreement that the trial judge erred in his interpretation of the *CFS Act*; however, we disagree as to how to proceed from there.

[192] My colleague continues his analysis by considering the agency's plan that, if granted permanent guardianship, it was prepared to enter into a commitment agreement to leave M.J. with the grandmother and not place her for adoption, together with the fact that a permanent order can be terminated (section 45). Based on the agreed facts and the agency plan, my colleague concludes that, in his view, a permanent order to the agency would be in M.J.'s best interests (see paras 21, 25-26 herein).

[193] The problem with this, in my view, is that all of the information on which my colleague relies was before the trial judge, who had the agreed statement of facts and specifically mentions the agency's offer of a commitment agreement (see para 20), yet the trial judge still found that the permanent order of guardianship being proposed by the agency would not be in M.J.'s best interests (see paras 83-84). Further, one piece of evidence that was clearly important to the trial judge in his analysis but is not given credit by my colleague in his analysis of M.J.'s best interests is the evidence of the great strides that the mother had made between apprehension and trial to address the issues that led to the apprehension, and the fact that M.J.'s brother would soon be living with the mother (see paras 23, 81). Nowhere in my

colleague's analysis of M.J.'s best interests does he address these pivotal findings, which are entitled to deference, in a meaningful way.

[194] My colleague questions my description of the mother's progress as having made great strides, suggesting that that is a "stretch" (at para 29 herein). The children were apprehended in 2016 due to the mother's substance abuse and the domestic violence in her home. She went to counselling and, by July 2017, she had made sufficient progress so that the agency would be returning M.J.'s brother to her under a VPA. By the appeal hearing in 2020, the VPA had been completed as intended and she was parenting both M.J.'s brother and a new baby. What more could she do? As I see it, she has made great strides.

[195] The question on appeal that my colleague does not address is whether there is a less onerous order available that would meet the requirements of the parties and also fit with the trial judge's findings of fact and mixed fact and law; in particular, he chose not to consider whether that order could be granted under the correct interpretation of section 38(1)(b). The answer is that an order under section 38(1)(b), when correctly interpreted as set out herein, is the order that best fits the requirements of the parties and the trial judge's findings. This is what the trial judge was clearly attempting to do, albeit he got there, in my view, by the wrong route due only to the error in his interpretation of the statute.

[196] My colleague states that the agency's plan of a permanent order would be consistent with the Declaration of Principles, including causing the least interference in the family's affairs; however, that is not the case (see para 27 herein). A permanent order is the "capital punishment" of orders to

an agency, the "last resort" (*D (KA)* at p 261) that causes the most interference that is possible under the legislation. An order of placement with a best caregiver and guardianship to an agency under section 38(1)(b) would clearly result in less interference in the family's affairs than would a permanent order.

[197] My colleague says that he is giving deference to the order that the trial judge would have made had he known that the order that he did make was not possible (see para 30 herein). That conclusion fails to consider an order under section 38(1)(b) as interpreted herein. At the end of the day, a permanent order of guardianship "operates as an absolute termination of parental rights and obligations" (emphasis added) (at section 45(1)). The order is final and the family has no rights. There is a stigma that accompanies such a finding. An order under section 38(1)(b) does not carry the same stigma, the same complete loss of rights, and this is what is meant in the Declaration of Principles, which states "[f]amilies and children have the right to the least interference with their affairs to the extent compatible with the best interests of children and the responsibilities of society" (at #4). In my view, it is clear that the trial judge would not have resorted to the "last resort" of giving the agency permanent guardianship with its absolute termination of parental rights and obligations if there was another option. He said that a permanent order should be a "last resort" (at para 84). If there is another option, then one is not at the point of last resort that requires a permanent order.

[198] In conclusion and with respect, I differ from my colleague as to how to apply the deferential standard of review. Once my colleague identified an error in the interpretation of section 38(1)(b), he went on to make his own findings of fact and mixed fact and law, ignoring important findings made by

the trial judge. He then imposed the order that he thought was in M.J.'s best interests, based on the evidence as he saw it, rather than identifying and correcting the trial judge's error in interpreting section 38(1)(b) and, with that correction, giving deference to the order that the trial judge would have imposed, based on the trial judge's findings of fact and mixed fact and law. This deference is important because it limits the number, length and cost of appeals, promotes the autonomy and integrity of the trial process, and recognises the trial judge's expertise and advantageous position. (See *Housen v Nikolaisen*, 2002 SCC 33 at paras 15-18; and *R v Friesen*, 2020 SCC 9 at para 28.).

[199] For these reasons, I cannot agree with my colleague's conclusion that there should be a permanent order of guardianship. My conclusion as to the correct order in this case is set out in paras 188 to 190 and 200 to 203 herein.

## VII. DECISION

[200] For the reasons set out above, I would find that the words "with transfer of guardianship" in section 38(1)(b) of the *CFS Act* mean transfer of guardianship to an agency, and that the words "without transfer of guardianship" mean that guardianship would remain with the parents or guardian. This is the interpretation that most respects the intention of the legislators in enacting the legislation and promotes justice for Indigenous peoples.

[201] Further, I would confirm the trial judge's order that guardianship of M.J. be transferred to the agency, albeit under section 38(1)(b), rather than

sections 40(1) and 40(2), and that M.J. be placed with her grandmother, as the person best able to care for her.

[202] Finally, I would allow the appeal to the extent of deleting the conditions attached to the order, referred to at paras 102 to 103 of the trial judge's decision, and I would add to the order a provision that the order remain in effect until further order of the Court.

[203] There was no request for costs made at the hearing, so there will be no order for costs.

_____ JA

# APPENDIX

*The Child and Family Services Act*, CCSM c C80:

. . .

**Duties of agencies**
**7(1)** According to standards established by the director and subject to the authority of the director every agency shall:

. . .

(g) provide care for children in its care;

. . .

. . .

**Voluntary placement agreement**
**14(1)** An agency may enter into an agreement with a parent, guardian or other person who has actual care and control of a child, for the placing of the child without transfer of guardianship in any place which provides child care where that person is unable to make adequate provision for the care of that child

(a) because of illness, misfortune, or other circumstances likely to be of a temporary duration; or

(b) because the child

(i) is a child with a mental disability as defined in *The Vulnerable Persons Living with a Mental Disability Act*, or

(ii) is suffering from a chronic medical disability requiring treatment which cannot be provided if the child remains at home, or

(iii) is 14 years of age or older and beyond the control of the person entering into the agreement.

**Agreement**
**14(2)** An agreement under subsection (1) shall be on a prescribed form for a period not exceeding 12 months and, subject to subsection (3), may be renewed.

**Limit on renewals of agreement**
**14(3)** The period of an agreement entered into under clause (1)(a) together with all renewals shall not exceed 24 months but agreements under clause (1)(b) may be renewed on an annual basis until the child reaches the age of majority.

**Termination of agreement**
**14(4)** An agreement entered into under this section and any renewal may be terminated at any time, upon the execution of a prescribed form, either by the agency or person who entered into the agreement and notice of the termination shall be given by the agency to the director.

**Parent leaving province**
**14(5)** Where a person who has entered into an agreement with an agency under this section takes up residence outside the province without the prior approval in writing of the agency, the agency may immediately terminate the agreement and shall notify the director in writing.

**Transition**
**14(6)** Where the Director of Psychiatric Services has placed a child under the care of the director under section 14 of *The Child Welfare Act*, the child shall be deemed to be under the care of an agency pursuant to an agreement under clause 1(b).

. . .

**Voluntary surrender of guardianship by parents**
**16(1)** The following persons may, by agreement on a prescribed form, surrender guardianship of the child to an agency:

(a) the parents of the child;

(b) if a parent is deceased, the surviving parent; or

(c) if both parents are deceased, the individual who is the child's guardian appointed by court order.

**Voluntary surrender of guardianship by mother**
**16(2)** The mother of a child who is

(a) unmarried and without a common-law partner; or

(b) married or had cohabited with a common-law partner, but ceased cohabiting with her spouse or common-law partner 300 days or more before the child was born;

may, by agreement on a prescribed form, surrender guardianship of the child to an agency.

**Agreements in name of director**
**16(3)** An agreement under subsection (1) or (2) by an agency that is a regional office shall be in the name of the director.

**Agreements by minor**
**16(4)** An agreement under subsection (1) or (2) is valid notwithstanding that the person surrendering guardianship is a minor.

**No surrender until 48 hours after birth**
**16(5)** No agreement shall be entered into under subsection (1) or (2) until the expiration of at least 48 hours after the time of the birth of the child.

**16(6) and (7)** [Repealed] S.M. 1997, c. 47, s.131.

**Agreement subject to approval of director**
**16(8)** The director may require an agency to submit all or any agreements entered into under this section to him or her for approval.

**Effect of agreement**
**16(9)** Upon the signing of a surrender of guardianship under this section, the rights and obligations of the person surrendering guardianship with respect to the child are terminated.

**Withdrawal of voluntary surrender of guardianship**
**16(10)** A person who has voluntarily surrendered guardianship of a child under this section may, by written notice to the director or to the agency to whom guardianship was surrendered, withdraw the voluntary surrender of guardianship within 21 days after the date of the agreement.

**Child returned**
**16(10.1)**Where a person withdraws a voluntary surrender of guardianship under subsection (10), the child and family services agency to whom guardianship was surrendered shall return the child to the person who withdraws the voluntary surrender of guardianship.

**Application to director**
**16(11)** Where more than 1 year has expired since the signing of a surrender of guardianship under this section and the child has not been placed for adoption, the person who surrendered guardianship may apply to the director to have the surrender of guardianship withdrawn and upon the director approving the application in writing the agreement is terminated.

**Appeal to court**
**16(12)** Where the director refuses the application under subsection (11), the person may apply to the Court of Queen's Bench for an order that the agreement be terminated and the court may grant the order subject to such terms and conditions as the court considers appropriate.

**Action prior to accepting surrender**
**16(13)** Prior to accepting a surrender of guardianship under this section, an agency shall explain fully to the person considering surrendering, the effect of the agreement and shall advise that person of his or her right to have independent legal advice and, after the execution of the agreement, a representative of the agency shall swear an affidavit in prescribed form, that the provisions of this subsection have been complied with.

**No notice of adoption application**
**16(14)** A person who has surrendered guardianship under this section shall not be given notice of an application for an order of adoption of the child under *The Adoption Act*.

## PART III
## CHILD PROTECTION

**Child in need of protection**
**17(1)** For purposes of this Act, a child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person.

**Illustrations of child in need**
**17(2)** Without restricting the generality of subsection (1), a child is in need of protection where the child

(a) is without adequate care, supervision or control;

(b) is in the care, custody, control or charge of a person

(i) who is unable or unwilling to provide adequate care, supervision or control of the child, or

(ii) whose conduct endangers or might endanger the life, health or emotional well-being of the child, or

(iii) who neglects or refuses to provide or obtain proper medical or other remedial care or treatment necessary for the health or well-being of the child or who refuses to permit such care or treatment to be provided to the child when the care or treatment is recommended by a duly qualified medical practitioner;

(c) is abused or is in danger of being abused, including where the child is likely to suffer harm or injury due to child pornography;

(d) is beyond the control of a person who has the care, custody, control or charge of the child;

(e) is likely to suffer harm or injury due to the behaviour, condition, domestic environment or

associations of the child or of a person having care, custody, control or charge of the child;

(f) is subjected to aggression or sexual harassment that endangers the life, health or emotional well-being of the child;

(g) being under the age of 12 years, is left unattended and without reasonable provision being made for the supervision and safety of the child; or

(h) is the subject, or is about to become the subject, of an unlawful adoption under *The Adoption Act* or of a sale under section 84.

**Economic and social advantages not determinative**
**17(3)** A child must not be found to be in need of protection only by reason of their parent or guardian — or if there is no parent or guardian, the person having full-time custody or charge of the child — lacking the same or similar economic and social advantages as others in Manitoba society.

. . .

**Apprehension of a child in need of protection**
**21(1)** The director, a representative of an agency or a peace officer who on reasonable and probable grounds believes that a child is in need of protection, may apprehend the child without a warrant and take the child to a place of safety where the child may be detained for examination and temporary care and be dealt with in accordance with the provisions of this Part.

**Entry without warrant in certain cases**
**21(2)** The director, a representative of an agency or a peace officer who on reasonable and probable grounds believes

(a) that a child is in immediate danger; or

(b) that a child who is unable to look after and care for himself or herself has been left without any responsible person to care for him or her;

may, without warrant and by force if necessary, enter any premises to investigate the matter and if the child appears to be in need of protection shall

(c) apprehend the child and take the child to a place of safety; or

(d) take such other steps as are necessary to protect the child.

**Warrant to search for child**
**21(3)** On application, a judge, master or justice of the peace who is satisfied that there are reasonable and probable grounds for believing there is a child who is in need of protection, may issue a warrant authorizing an agency or a peace officer

(a) to enter, by force if necessary, a building or other place specified in the warrant and search for the child; and

(b) if the child appears to be in need of protection,

(i) to apprehend the child and to take the child to a place of safety, or

(ii) to take such other steps as are necessary to protect the child.

**Child need not be named**
**21(4)** It is not necessary in the application or the warrant to describe a child by name.

**Assistance of peace officer**
**21(5)** The director or a representative of an agency who needs assistance in apprehending a child may seek the assistance of a peace officer and the peace officer shall provide the assistance.

. . .

**Care while under apprehension**
**25(1)** Where a child has been apprehended, an agency

(a) is responsible for the child's care, maintenance, education and well-being;

(b) may authorize a medical examination of the child where the consent of a parent or guardian would otherwise be required; and

(c) may authorize the provision of medical or dental treatment for the child if

(i) the treatment is recommended by a duly qualified medical practitioner or dentist,

(ii) the consent of a parent or guardian of the child would otherwise be required, and

(iii) no parent or guardian of the child is available to consent to the treatment.

. . .

**Application to court for protection hearing**
**27(1)** The agency shall, within 4 juridical days after the day of apprehension or within such further period as a judge, master or justice of the peace on application may allow, make an application for a hearing to determine whether the child is in need of protection.

**Access pending protection hearing**
**27(2)** The agency shall at the time of making the application under subsection (1) state at what times, if any, and on what conditions it will allow access by the parents or guardian to the child pending the hearing.

**Hearing re access by parents or guardian**
**27(3)** Where the parents or guardian do not consent to the access provided by the agency, they may make application to court for a hearing to determine what access provisions are appropriate in the circumstances.

**Burden of proof**
**27(4)** The agency shall bear the burden of proof at the hearing under subsection (3) that any limitation of access is reasonable.

**Variation of order**
**27(5)** Either party may make an application for a variation of an order under subsection (3) at any time on the grounds that there has been a change in circumstances since the order was granted justifying a change in access or that the access permitted has been shown to be in practice contrary to the best interests of the child.

. . .

**Orders of the judge**
**38(1)** Upon the completion of a hearing under this Part, a judge who finds that a child is in need of protection shall order

(a) that the child be returned to the parents or guardian under the supervision of an agency and subject to the conditions and for the period the judge considers necessary; or

(b) that the child be placed with such other person the judge considers best able to care for the child with or without transfer of guardianship and subject to the conditions and for the period the judge considers necessary; or

(c) that the agency be appointed the temporary guardian of a child under 5 years of age at the date of apprehension for a period not exceeding 6 months; or

(d) that the agency be appointed the temporary guardian of a child 5 years of age or older and under 12 years of age at the date of apprehension for a period not exceeding 12 months; or

(e) that the agency be appointed the temporary guardian of a child of 12 years of age or older at the date of apprehension for a period not exceeding 24 months; or

(f) that the agency be appointed the permanent guardian of the child.

. . .

**Child support orders**
**38(3)** Where an order is made under clause (1)(b), (c), (d) or (e) with respect to a child, the judge at the time of making the order, or any judge at a subsequent time, shall order the parent or guardian to pay to the agency such maintenance for the child by way of lump sum, periodic payments, or both, as is appropriate.

. . .

**Right to enter home**
**38(6)** Where a judge or master makes an order under clause (1)(a) or (b) any representative of the agency under whose supervision the child is placed has the right to enter the home where the child is to provide guidance and counselling and to ascertain that the child is being properly cared for and maintained and any person who obstructs the representative in so doing is guilty of an offence and is liable on summary conviction to a fine of not more than $50,000 or imprisonment for a term of not more than 24 months, or both.

**Further apprehension of child**
**38(7)** Where an agency that is authorized pursuant to subsection (1) to exercise supervision over a child finds that the child is not being properly cared for and maintained or that the child is in need of protection, the child may be apprehended notwithstanding the order made under subsection (1).

. . .

**Access by parents during temporary order**
**39(1)** Where a judge or master makes an order under clause 38(1)(b), (c), (d) or (e), the parents or guardian shall have reasonable access to the child.

**Application to determine access during temporary order**
**39(2)** Where the parents or guardian and the agency are unable to agree as to what constitutes reasonable access to the child, either party may make an application to the judge or master who made the order for an order determining what provisions as to access are appropriate in the circumstances and the agency shall bear the burden of proof that any limitation of access is reasonable.

**Access by parents during permanent order**
**39(3)** Subject to subsection (4), where a judge makes an order under clause 38(1)(f) the agency shall have complete discretion as to the access, if any, which the parents or guardian shall have to the child.

**Application to determine access where permanent order**
**39(4)** Where the parents or guardian are dissatisfied as to the access, if any, which the agency is willing to grant them under subsection (3) they may make an application to the judge who made the order for an order determining what provisions as to access, if any, are appropriate.

**Variation of order under subsec. (2) or (4)**
**39(5)** Either party may make a further application to the judge or master who made the order under subsection (2) or (4) for a variation of the order on the grounds that there has been a change in circumstances or that the access permitted has been contrary to the best interests of the child.

**No application where child placed for adoption**
**39(6)** No application shall be made under subsection (4) or (5) where the child has been placed for adoption under *The Adoption Act*.

**Where judge unable to act**
**39(7)** Where the judge or master who made the order is unable for any reason to hear an application under subsection (2), (4) or (5) any judge of the same court may hear the application.

**Further hearings**
**40(1)** Notwithstanding an order under clause 38(1)(a), (b), (c), (d) or (e), any judge may, at any time the order is in force and upon application by the agency, parent or guardian of the child or person with whom the child was placed under clause 38(1)(b), hold further hearings to determine whether the child would be in need of protection if returned to the parents or guardian.

**Former order deemed to be continued**
**40(2)** Where the date fixed for the hearing of an application under subsection (1) falls on or after the expiry date of the former order, the former order shall be deemed to continue until the application is either withdrawn or is disposed of.

**Further orders**
**40(3)** Upon the conclusion of the hearing, the judge,

(a) if satisfied that the child would not be in need of protection, shall order that the child be returned to the parents or guardians;

(b) if satisfied that the child would be in need of protection, shall extend the previous order or make any of the other orders under section 38.

**Consent orders**
**40(3.1)** Where all persons who have received notice of an application under subsection (1) consent, a judge or master may, without receiving further evidence, make an order respecting the child under subsection (3), and a person who was served but does not appear or with respect to whom an order was made dispensing with service is deemed to consent.

**Provisions of Part apply**
**40(4)** The provisions of this Part apply with the necessary changes to a hearing under this section.

**Maximum period of temporary guardianship**
**41(1)** The total period of temporary guardianship shall not exceed

(a) 15 months with respect to a child under 5 years of age; or

(b) 24 months with respect to a child 5 years of age or older and under 12 years of age.

**Extension of guardianship for child over 12**
**41(2)** A judge may extend the order of guardianship of a child 12 years of age or over for further periods not exceeding 24 months each.

**Age for purposes of subsecs. (1) and (2)**
**41(3)** A child who was under 5 years of age when apprehended, shall be deemed for the purposes of clause (1)(a) to be a child under 5 years of age even if at the time of making the order the

child is 5 years of age or more but in all other cases the court shall be governed by the age of the child at the time of making the order.

. . .

**Status of child during appeal**
**44(4)** Where a judge has found that a child is not in need of protection or made an order under clause 38(1)(a) or (b) the agency shall release the child from its care and control in accordance with the terms of the order within 14 days of the date on which the judge pronounced the order, unless within that period it obtains from a judge of the Court of Appeal in chambers an order that the child remain in the care and control of the agency pending the disposition of the appeal.

**Effect of order of permanent guardianship**
**45(1)** An order of permanent guardianship operates as an absolute termination of parental rights and obligations and the agency may, following the expiration of the allowable period of appeal under section 44, place the child for adoption in accordance with *The Adoption Act*.

**Termination of permanent guardianship on application**
**45(2)** The agency having permanent guardianship of a child may apply to court for an order that the guardianship be terminated.

**Application by parents to terminate permanent guardianship**
**45(3)** The parents of a child with respect to whom an order of permanent guardianship has been made may apply to court for an order that the guardianship be terminated if

(a) the child has not been placed for adoption; and

(b) one year has elapsed since the expiry of the parents' right to appeal from the guardianship order or, if an appeal was taken, since the appeal was finally disposed of.

**Order**
**45(4)** A judge hearing the application under subsection (2) or (3) may

(a) terminate the permanent order and return the child to the parents; or

(b) terminate the permanent order and make an order under clause 38(1)(a), (b), (c), (d) or (e); or

(c) dismiss the application.

**Consent orders**
**45(4.1)** A judge or master may, without receiving further evidence, make an order under subsection (4) where

(a) the agency that has permanent guardianship of the child consents; and

(b) the parents of the child consent.

**Deemed consent**
**45(4.2)** For the purpose of clause (4.1)(b), a person is deemed to consent if

(a) the person was served but does not appear at the hearing; or

(b) an order was made dispensing with service on the person.

**No application for another year**
**45(5)** Where the judge dismisses the application, the parents may not bring another application under subsection (3) until 1 year has elapsed from the dismissal.

. . .

## PART IV
## CHILDREN IN CARE

**Authority of the guardian**
**48** Where the director or an agency is the guardian of a child under this Act unless the guardianship is limited by the court, the director or agency shall

(a) have the care and control of the child;

(b) be responsible for the maintenance and education of the child;

(c) act for and on behalf of the child; and

(d) appear in any court and prosecute or defend any action or proceeding in which the child's status is or may be affected.

. . .

**Removal of child**
**51(1)** An agency may at any time remove a child in its care from the person with whom the child was placed, if the agency considers that it is in the child's best interests to do so.

. . .

**PART VII**
**PRIVATE GUARDIANSHIP OF THE PERSON AND ACCESS**

**Court may appoint guardian of person**
**77(1)** Upon application to court by an adult, a judge may appoint the applicant a guardian of the person of a child and may remove a guardian so appointed with or without appointing another guardian.

**Interim order**
**77(1.1)** The court may make an interim order with respect to an application under subsection (1).

**Review of order**
**77(1.2)** An order under this section may require the parties to return after a specified interval to the court making the order for a review of the provisions of the order. Upon review the court may vary or terminate the order.

**Notice**
**77(2)** No order shall be made under subsection (1) unless the person applying has given at least 30 days notice of the time, date and place of the hearing to

(a) the parents of the child;

(b) the guardian of the child;

(c) the child, if the child is 12 years of age or older;

(c.1) the agency that has care of the child;

(c.2) the agency serving the appropriate Indian band if the person making the application has reason to believe that the child is registered or is entitled to be registered as an Indian under the *Indian Act* (Canada); and

(d) such other person as a judge or master may direct.

**Judge may reduce or dispense with notice**
**77(3)** Where notice is required under this section, a judge or master may

(a) abridge the time within which notice shall be given;

(b) authorize substitutional service of the notice; or

(c) dispense with the requirement to give notice.

**Effect of order**
**77(4)** Where an order is made under this section, the applicant is for all purposes the guardian of the person of the child and has the care and control of the child and is responsible for the maintenance, education and well-being of the child.

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