and cooperate with Indigenous authorities and/or Indigenous communities to provide services under the CFCSA, acting in a manner consistent with each Indigenous law, while supporting the dispute to be resolved in a timely and objective manner.

(d) When an Indigenous authority provides written confirmation that it is, or will be, providing Indigenous child and family services or intends to have custody of a child in the continuing custody of the director, and another Indigenous authority has made an application for an order respecting Indigenous law, encourage the use of alternative dispute resolution wherever possible to support resolving the dispute in a timely and objective manner and see [cross-references omitted].

(e) If more than one Indigenous law applies to the child/youth and all relevant Indigenous authorities agree in writing that one Indigenous authority will be responsible for providing Indigenous child and family services to the child/youth, follow the applicable policies below, based on the child/youth's legal status under the CFCSA, so that responsibility can shift to the Indigenous authority.

(Ministry Policy 1.2: "Upholding Indigenous Jurisdiction over Child and Family Services", *MCFD Core Policy—Child Safety, Family Support & Children in Care Services*, effective November 25, 2022, amended May 15, 2024, available at www2.gov.bc.ca/assets/gov/family-and-social-supports/policies/policy_12_upholding_indigenous_jurisdiction_over_cfs.pdf, p. 5. See the policy for the complete text with cross-references and more detail.)

F. INDIGENOUS IDENTITY IN CHILD AND FAMILY SERVICES [§3.35]

1. CULTURAL ALIENATION [§3.36]

Canada's legacy of assimilationist laws and policies, which have specifically targeted Indigenous children by forcibly removing them from their homes and communities, has resulted in the intergenerational dislocation and displacement of Indigenous communities. Courts have been instructed to take judicial notice of colonialism, displacement, and residential schools (*R. v. Ipeelee*, 2012 SCC 13; *R. v. Gladue*, 1999 CanLII 679 (SCC)), and to acknowledge how these laws and policies have been largely successful in alienating Indigenous Peoples from their culture and community (*R. v. Hamer*,

2021 BCCA 297; *R. v. Kehoe*, 2023 BCCA 2). The Court of Appeal states in *Hamer* at para. 115:

> it is important to acknowledge that these methods of assimilation are often the very things that give rise to an Indigenous person's alienation from their Indigenous community or culture. Thus, not everyone with Indigenous roots can prove those roots. The government's system of assimilation was, in many ways, "successful". It resulted in many Indigenous people being partially or totally estranged from their Indigenous heritage and disconnected from their culture, their community, and their support. This disconnection is intergenerational and acts as a barrier[.]

"Applied to the child protection context, there is meaning in singling out Indigenous children, families and communities…It necessarily *alters the method of analysis* in assessing risk and determining placements of Indigenous children" (*Kina Gbezhgomi Child and Family Services v. J.M.*, 2023 ONCJ 93 at para. 26, emphasis in original).

In *First Nations Child & Family Caring Society of Canada v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39, the CHRT found that Canada had willfully and recklessly discriminated against Indigenous children by unnecessarily removing them from their homes, families, and communities, amounting to a breach of their fundamental human rights (at para. 13).

Cultural alienation is a direct consequence of these policies and continues to be affected by the "staggering" overrepresentation of Indigenous children in the child and family services system (*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para. 11). Courts have taken judicial notice of the "alienation, disempowerment and frustration that Indigenous families and communities feel when it comes to child welfare" (*Kina Gbezhgomi Child and Family Services v. M.A.*, 2020 ONCJ 414 at para. 42; see also *British Columbia (Child, Family and Community Service) v. S.B. and D.M.B*, 2022 BCPC 140 at para. 180).

Historically, courts prioritized attachment to foster parents over the importance of an Indigenous child's connection to family, community, and culture (*Racine v. Woods*, 1983 CanLII 27 (SCC)). In *Racine*, the court held that the significance of a child's culture "abates over time", while their bonding to foster parents grows. The decision in *Brown v. Canada (Attorney General)*, 2017 ONSC 251, otherwise known as the "Sixties Scoop Class Action", dispels this notion. The court found that Indigenous children "scooped" and raised in the care of

non-Indigenous families suffered significant impacts due to a loss of cultural identity. (See "Class Actions to Advance Children's Rights" in chapter 4 for further discussion of class proceedings to remedy systemic wrongs involving Indigenous children.)

Justice Walkem highlights this issue in *J.W. v. British Columbia (Director of Child, Family and Community Service)*, 2023 BCSC 512 (at paras. 85 to 86):

> The message of the Indigenous survivors of the child welfare system in *Brown*, and reflected in the *Federal Act*, is that Indigenous cultural bonds and connections do not abate in importance over time, but rather are increasingly important as children mature into youth and young adulthood. The *Federal Act* recognizes that protecting the BIOIC requires protecting an Indigenous child's cultural connections and their attachments and relationships to their extended family, community, and territory.
>
> The direction of the *Federal Act* is that stability for Indigenous children is not found in prioritizing attachment to non-Indigenous caregivers, over an Indigenous child's connection to their culture, extended family, territory, and community. Instead, that it is necessary to provide child and family services to Indigenous children in ways which preserve and protect their Indigenous cultural attachments.

It is crucial for counsel and the courts to acknowledge the impact of child removal systems on Indigenous children and families, and take measures to address them. As was summarized in *J.M.S. v. British Columbia (Director of Child, Family and Community Services)*, 2021 BCSC 2104 (at para. 37):

> For centuries, colonial policies have enabled the intentional removal and isolation of Indigenous children from their families and communities. The [Federal Act] seeks to address these wrongs by prioritizing an Indigenous child's connection with their cultural identity and community in the adoption process. It reflects an express mandate in Canadian law and must not be ignored.

2. CULTURAL CONTINUITY [§3.37]

Both the Federal Act and the *CFCSA* require that services to Indigenous children be delivered in accordance with the principle of cultural continuity. Though not defined in the *CFCSA*, this principle is set out in s. 9(2) of the Federal Act, according to the following precepts: