THE CHILD, FAMILY AND COMMUNITY SERVICES ACT
BRITISH COLUMBIA

JUDICIAL CASE CONFERENCES

These materials were prepared by The Honourable Associate Chief Judge E. Dennis Schmidt, Provincial Court of British Columbia, Vancouver, B.C., for the National Judicial Institute, March, 2001.

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C O N T E N T S

THE CHILD, FAMILY AND COMMUNITY SERVICES ACT AND RULES:

THE CASE CONFERENCE

I. *The Family and Child Services Act*

The *Family and Child Services Act*, in force since 1980, provided a one track litigation process for the resolution of child protection matters. Once a child was apprehended the court would set a date for trial, according to the schedules of the parties and its own availability, and the resolution would await the outcome of the trial. For all the reasons related to delay in litigation these trials were booked to occur many months from the time of apprehension. It was not uncommon for children to be in care for years awaiting the outcome of the adversarial process. While awaiting the trial date the Superintendent could return the child or a consent order could be entered into, provided that the parents admit that the child was in need of protection. Often these default solutions were not reached until the trial was imminent, or were agreed to in order to soften the harsh consequence of delay. While a trial was avoided, the time in care for the children was often not decreased. In other cases decisions were made by parents and social workers, based less on the needs of the children than on the hope of avoiding difficult court process.

II. *The Child, Family and Community Services Act* and Rules

The *Child, Family and Community Services Act* ("CFCSA") and Rules, proclaimed in January 1996, preserve the role of the court as adjudicator, but also provide process designed to avoid the adversarial approach in appropriate cases, to involve communities in planning for children and to supervise the progress of litigation where adjudication is required. The CFCSA has made a number of alternatives available for dispute resolution in child protection cases and has provided

a simple and efficient mechanism for streaming cases to the appropriate forum. If a case is not resolved by the parties immediately following apprehension, the case conference becomes the gateway for future process toward the ultimate decisions for the benefit of the child by the parents, social workers, aboriginal bands or the judge.

III. The Case Conference

The significant changes in process are found in Rule 2 of the Provincial Court (*Child, Family and Community Services Act*) Rules. Rule 2 provides, most significantly, for a case conference to be held in each case which cannot be completed at the protection hearing commencement. The protection hearing commencement must be held not more than 45 days after the presentation hearing. Previously a trial date would be set at that stage, often many months in the future. Under Rule 2 the judge must order a case conference at that stage. Where a judge orders a case conference, the judge must also review the extent of disclosure made and requested under Section 64 of the *Act*, and may make orders for disclosure (Rule 2(3)}. The expectation is that complete disclosure should be accomplished by the time the parties reach the case conference, so that non-disclosure is not an impediment to settlement at the case conference.

The case conference is designed to explore early resolution in a formal way and therefore Administrative Judges plan judicial rotas to provide for case conferences to occur within 30 days of the protection hearing commencement. Case conferences generally occur in a settlement conference room in a courthouse and are conducted by a Provincial Court Judge.
In most areas of the province, case conferences are held on special days with the judge assigned to conduct only case conferences on that day or half-day. This is designed to allow judges to

give undivided attention to the case before them. To further assist in avoiding time pressure, case conferences are single booked at 1 ½ hour intervals. Most Provincial Court Judges are trained in mediation and all judges conducting case conferences have mediation training and have volunteered for this assignment. Where possible, the case conference judge will also be the judge before whom the parties appear at the presentation and protection hearing commencement stage. While the case conference judge will not conduct any subsequent trial, the case conference judge will conduct a mini-hearing if one is ordered.

Rule 2(1) requires the attendance of the parties and their lawyers. Where a child has been made a party pursuant to Section 39(4), the child will also attend the case conference, as will any other person who has been made a party by court order. The judge may also allow any other person to attend the case conference {Rule 2(8)}. Typically, the parties in attendance are: the director's counsel, the parents, parent's spouses, the parent's counsel, the social worker, and representatives of an aboriginal band. Where appropriate, other persons who have something to offer the child or the parents are included. These persons include counselors, grandparents, foster parents, and older siblings. The usual process is for the clerk to record the names of all persons attending, before the judge arrives, and then to report that list to the judge. The judge may exclude those persons who are not appropriate.

Rule 2(5) gives the judge wide discretion as to what may be done at the case conference. The purpose is to give the court the opportunity, at this early stage in the proceedings, to stream the case to appropriate dispute resolution. To avoid protracted proceedings, this Rule anticipates

accomplishing a number of tasks at one sitting. Counsel can take advantage of the 'captive' judge and emerge from the conference either with the case resolved, or with clear direction for future proceedings and a handful of orders to assist in preparation.

The case conference is mandatory in new apprehensions but may be directed by a judge at any other time if a party requests it, or if the judge considers that it may promote a fair and efficient resolution of the issues. A case conference may be useful where the director is seeking an extension of a temporary order or a continuing care order after a temporary order.

This paper will discuss the concept and purpose of the case conference and then, make some comments about how it may be used in cases involving aboriginal children and aboriginal communities.

A. The Judge's Role at the Case Conference

The judge may wear a number of hats at the case conference, depending on what is required in the case. The important thing is that all persons who can be a source of support or nurture for the child are brought together in the same room shortly after the removal of the child.

1. Mediate Any Issue in Dispute

Generally judges will commence the session as a mediation. Note that Rule 2(5)(b) prohibits mediation of the issue of whether the child is in need of protection. There are numerous other issues which are ideal for mediation, including issues of access, expectations of social workers

and duration of orders. Often, a difficult relationship between social workers and parents or an aboriginal band prevents coordinated planning for children and the rehabilitation of a parent. In the case of aboriginal children, a strained relationship between outside social workers and the band will result in children being removed from the community. Consequently the return of children is often delayed. These are issues that are more appropriately mediated to consensus, rather than being exacerbated by an adversarial hearing.

Counsel should expect judges, when mediating, to engage their clients in discussions. There is no recording and, in the event of a trial, another judge will hear the case. Frank discussions are encouraged and necessary to expose and resolve issues in a meaningful way. What occurs in a case conference mediation cannot be used at a later trial.

2. Refer an Issue to a Mediator Appointed Under Section 22 of the *Act*

The *Child, Family and Community Services Act* Regulations require the director to establish a roster of mediators, paid by the director, to mediate child protection issues. Rule 2(5)(c) permits a judge to refer cases to a mediator from the case conference. Section 22 of the *Act* allows the judge to suspend the court proceedings for up to three months to allow for mediation. The roster has been established as of November 1996 and covers most areas of the province. There are aboriginal mediators on the roster. Experience has shown that mediators can be engaged quite quickly, allowing for adjournments of much less than three months to attempt outside mediation. There are no guidelines established for judges to use in exercising their discretion to refer. Experience has been positive in referring cases where there have been long standing relationship issues between parents and children, or parents and long term foster parents. Regrettably,

outside mediation has been under utilized. In many cases, the parties are not willing to commit to a process which may become protracted and desire to forge ahead with court process, even though that course is lengthy.

3. Make Any Order in the Terms Parties Agree to, Subject to Section 60 of the *Act*

This provision can be the most helpful and the most frustrating aspect of the case conference. The drafters of Section 60 wisely provided that consent orders for temporary or continuing care can be made without the court making a finding that the child is in need of protection. This provision allows the process to focus on the needs of the child rather than the fault of the caregiver. Many otherwise contentious cases can be resolved by consent using this provision. However, the legislation provides that each parent must consent to the order. In many cases there is an absent parent who has no interest in the child and who in fact is not a party or entitled to notice. If they are not present at the case conference, the matter cannot be resolved by consent unless the court makes a finding that the child is in need of protection. Representations have been made to legislators, and there is promise of correction. In the meantime, judges are being as creative as possible in seeking to fulfil the requirements of the *Act* in consent matters.

If a consent order is reached at the case conference, it will be recorded on the Case Conference Record completed by the clerk. The judge will ask one of the counsel to draft the Form 10 order and file the completed Section 60 consents. The director's counsel should have Section 60 forms available to complete in order to avoid the delay in obtaining the parents' signature later. Usually the judge will put the case over to open court to speak to the consent.

4. Decide Any Issues that Do Not Require Evidence or that can be Decided on the Basis of Facts Agreed to by the Parties

There may be issues which are stumbling blocks where parties agree on the facts but cannot make a decision on what to do with those facts. This option may be invaluable in avoiding trials where simple unresolved issues could push a case to trial. A decision, for instance, adding an extra hour of access may save a long hearing if in fact access is the trigger that puts everything in issue.

5. Make Orders for Disclosure

These orders include reviewing the adequacy of disclosure already made, ordering summaries of the intended evidence of a potential witness and order parties to allow inspection and copying of specific documents or records. It is recognized that most cases are settled and that they are settled by lawyers who are aware of all the evidence in the possession of the other side. The intention here is to get that disclosure accomplished early so that lawyers can make decisions about their cases as early as possible. Often, where there has not been disclosure prior to the case conference, but where disclosure may lead to settlement, another case conference will be ordered after disclosure has occurred.

6. Prepare Cases for Trial

Judges may, at the case conference, make orders that any further applications be brought within a set time, order agreed statements of facts to be filed within a set time, give directions about any evidence that will be required, or order a party to produce anything as evidence at the hearing. These orders and directions at an early stage of the trial track are intended to prevent trial day adjournments and the consequent delay.

7. Direct a Further Case Conference to Take Place

Often, a second case conference is necessary to reach consensus. The rate of resolution at a second case conference is quite high. If the alternative is a trial many months away, it may be preferable to seek another case conference with that judge. Some judges are able to hold case conference slots open for this contingency. If there is a real possibility of resolving, another case conference should be explored. A judge may also order another case conference if there is a long trial to be set and a case conference for the purposes of pre-trial may be of assistance closer to the trial date.

8. Direct that a Mini-hearing be Held

A mini-hearing can only be directed if the parties consent to have their case resolved by way of mini-hearing, and may be directed only where the matter can be resolved on the basis of limited evidence and submissions and where it can occur earlier than the proposed trial. At the case conference, the judge will make orders as to what evidence will be led at the mini-hearing and will set it over to his or her own list. At the conclusion of that evidence, the judge will make the same type of order as would be made at the conclusion of the trial. A mini-hearing is appropriate in cases where there can be an agreed statement of facts, but the parties want the opportunity to place a witness on the stand to give evidence or an opinion.

9. Give a Non-binding Opinion on the Probable Outcome of a Hearing

Judges are often uncomfortable in giving opinions without the benefit of the whole of the evidence, sanitized by admissibility rules. However, in many cases the considered and impartial

opinion of a judge who has experience in child protection cases at trial can be a valuable aid to parties and their lawyers. Rule 2(5)(o) gives legislative discretion to a judge to give an opinion in these circumstances. Judges will be cautious in their opinions in these emotional cases so as not to push someone into a decision they are not ready to make. However, if an opinion from the judge will be of assistance to parties or lawyers in making a decision, then they should seek that opinion.

10. Set Dates for Trial

A crucial aspect of the case conference is the ability of the judge to become familiar with the case and the evidence and to work with counsel to assess the amount of time required to lead the evidence required. Much of the court's inefficiency arises from poor trial time estimates and speculative trial scheduling. If the case conference resolves cases early without setting a speculative trial date, and estimates correctly the amount of time for the cases which must go to trial, most of the guess work in trial scheduling will be removed. The result could be firm and credible trial dates without overbooking. Lawyers often seek a trial date prior to the case conference being held to "reserve time" and are frustrated when a date is not given. However, booking speculative trials delays the entire list. Focus in these early stages should be on resolution, not working toward a trial date many months in the future.

11. Facilitate the Resolution of Any Issue

While terms like 'mediation', 'deciding' and 'ordering' are understood by legal practitioners, the term 'facilitate' is undefined as a legal procedure. What is anticipated as included in the facilitate power, found in Rule 2(5)(a), are such things as meeting counsel without the parties

present to resolve legal issues, or to meet privately with children, where appropriate, to discern their wishes pursuant to Section 2(d) of the *Act*. Judges may also attempt to facilitate by drawing social work supervisors into the case conference to help put in place resources for parents. Judges have also used this Section to move cases from the courtroom into the aboriginal community so that the community can participate in planning for the children of their community.

12. Make Any Order or Give Any Direction for the Fair and Efficient Resolution of the Issues

This is an omnibus section which can be effectively used to manage the progress of a case. If an order, not otherwise provided for, will speed a case to conclusion, that order can be requested from the judge at that stage.

B. The Lawyer's Role

Rule 2 provides an opportunity for lawyers to use the court in a way that has not been available in the past. Previously the court was available only by motion or on a date fixed for a trial. With this process lawyers have access to judges to assist them in the resolution of disputed issues without bringing motions or waiting for trial dates booked many months in advance. Case conferences are not double booked. Certainty of the event occurring at the time and on the date scheduled assists lawyers in their scheduling difficulties.

If counsel take full advantage of disclosure prior to the case conference and prepare for the case

conference as a meaningful event in the resolution of child protection cases, it is likely that most cases will be resolved at the case conference or prior to it. Preliminary statistics in the first six months in the Surrey courthouse show that 18 out of 55 cases that had a case conference were set for trial. Those 67% that were resolved, previously would have been set for trial. In Prince George, the preliminary statistics in the same time period show that only five out of 47 cases were set for trial, that 89% of cases were resolved. After two years, the settlement rates have held reasonably steady. In the large urban centers of Vancouver, Surrey and Victoria, approximately 26% of cases that have a case conference proceed to be set for trial. (See attached Appendix 3). While many of those cases resolved at case conference would resolve on the day of trial or before, the effect of having those speculative trials in the calendar is that trials have to be overbooked by 300 - 400% to ensure there is a trial for the courtroom that day. The uncertainty, expense and anxiety that this causes for lawyers who have to prepare for events which are unlikely to happen and for witnesses and parties is simply unacceptable if it is avoidable.

Counsel who take an entirely combative and adversarial approach to child protection, whether acting for the director or a parent, from the moment the file lands on their desk will miss the opportunities for their client for early and consensual dispute resolution that are available within the structure of the Provincial Court.

C. Opportunities in Aboriginal Cases

The CFCSA requires notice to an aboriginal band if an aboriginal child is removed from its home under the legislation. Notice is required for each step in the process in the same way notice is required to a parent.

This provision is helpful in a number of ways with respect to the case conference.

Where a child or a family have become disassociated from their band through movement or marriage, the band has an opportunity to attend the case conference and participate in the plan for the child. In some cases, a band will be able to take the opportunity to assist the parents or parent by welcoming them back to the community with the provision of support for the parents. If a child is permanently removed from the parents, a band may be able to take him or her back to their home band.

In some cases, a number of people from the community will travel to the court location to participate in the case conference and offer support to the parents or placement of the children. Their participation at the case conference may create options for the children within the extended family that were not considered by social workers.

In other cases, the court has moved its location to the community after seeking permission from the leaders in the community to enable fuller participation by the community members in planning for the children. These meetings have taken place in friendship centers, schools or community centers and have involved chiefs, band counselors, band social workers and ordinary members of the community. The case conference may look much like a circle with various members of the community adding their voice to the decisions. Often, this has led to children remaining in the community rather than being taken by social workers to foster homes or group homes in distant locations.

An important provision of the *Act* allows for parents to retain contact with their children even if a permanent order to remove the children is made. This provides a number of options for parents who cannot parent their children due to disabilities of their own or their children or other problems that need to be worked out over the long term. It also allows for long term placement of children without breaking the parental bond.

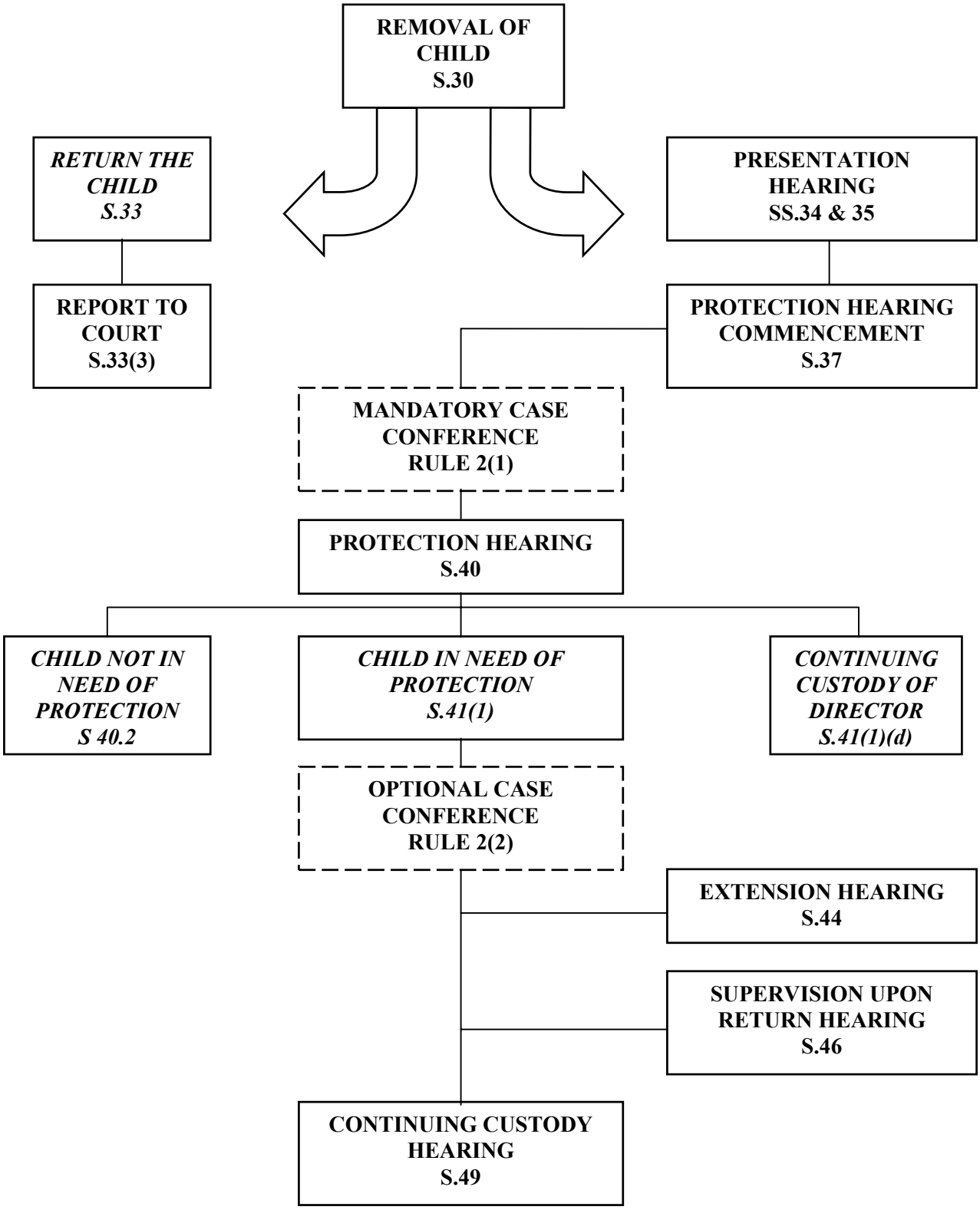
In a small community, this should allow a child to be placed in the community with extended family while keeping the parents involved and removing the necessity for intervention and supervision by the state.

IV. Conclusion

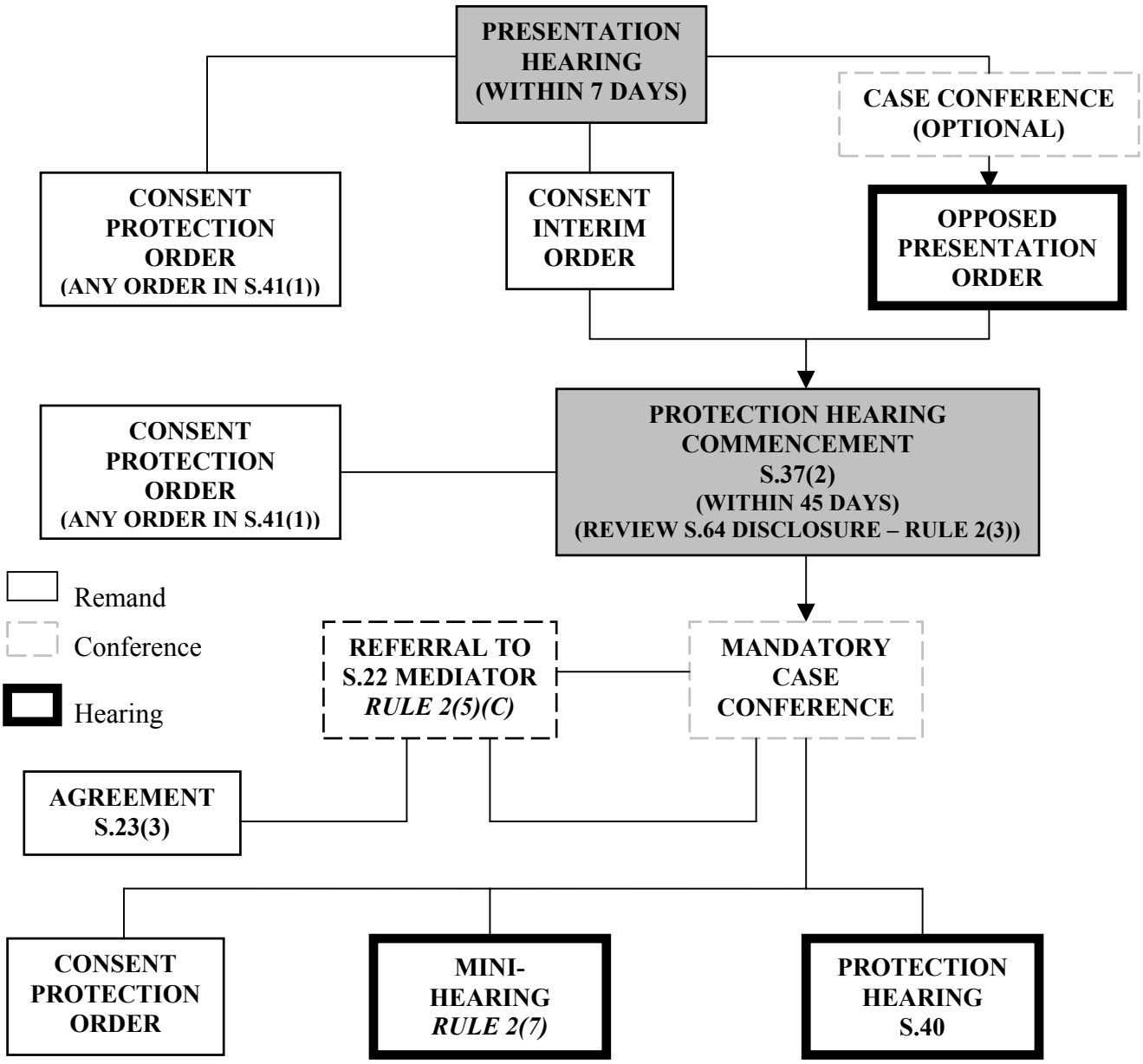
The case conference provides an opportunity to pursue the goal of appropriate dispute resolution in child protection matters. Many cases are resolved by lawyers shortly after apprehension. This is desirable and appropriate. In other cases there is a sticking point which a judge may be able to overcome using one of the tools provided for in Rule 2. Again this will result in timely and appropriate resolution. Where a hearing is necessary, Rule 2 can provide a disclosure and case management process which could result in credible and timely trial scheduling. In cases of aboriginal children, the case conference can involve the community in planning for the children where previously social workers and judges who were foreign to the community and the culture made decisions at trials without consultation or with the limited information available through the trial process.

The tools have been put in place as a first step in the process of returning child welfare to the community through the court process. There is much work to be done, but it is encouraging to see cases where the judges, social workers and community leaders have utilized this tool for the benefit of the children from aboriginal communities.

THE CHILD, FAMILY AND COMMUNITY SERVICE ACT AND RULES



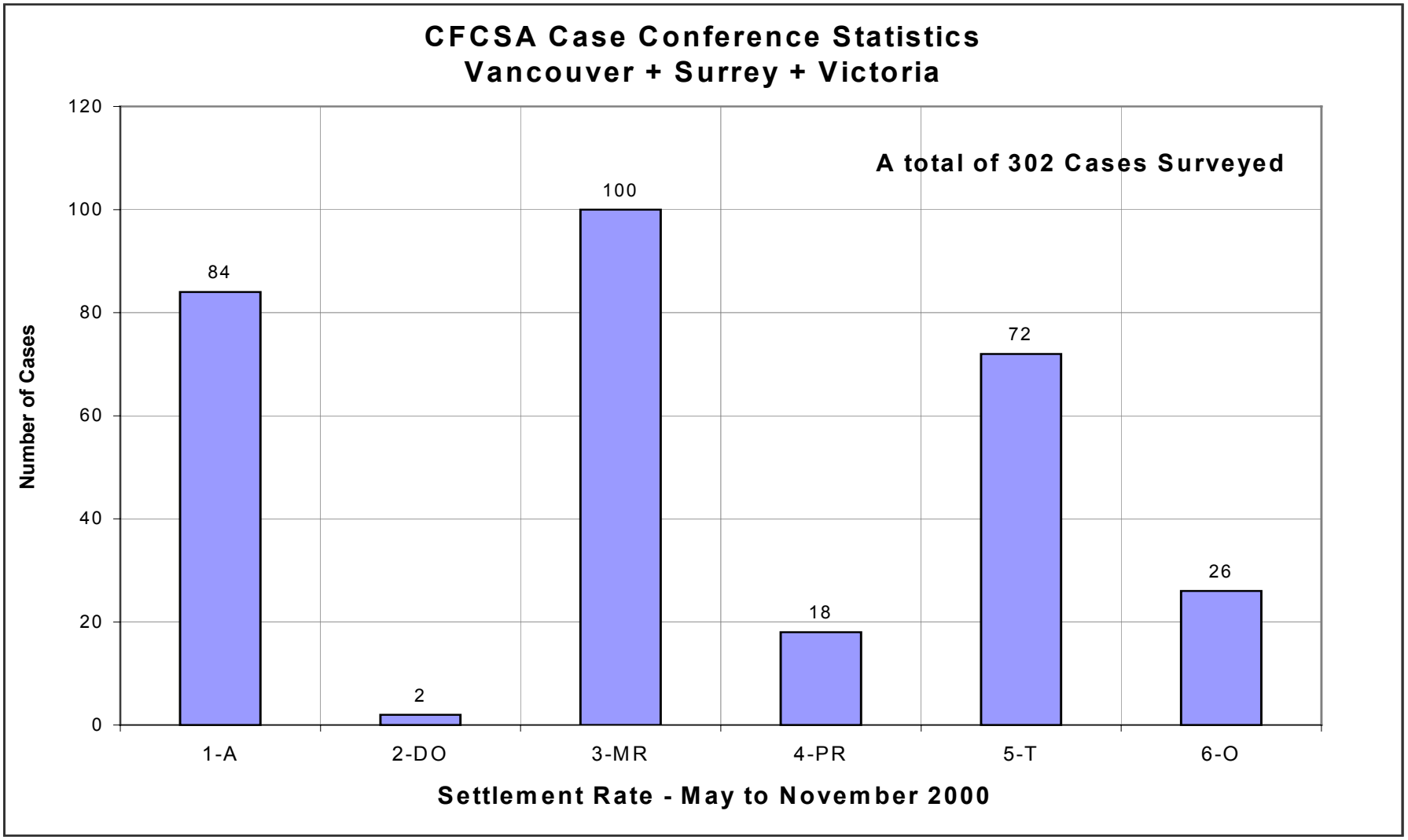
PRESENTATION HEARING TO PROTECTION HEARING



At any time after the presentation hearing the director may:

- Remove the child from an interim order situation and present a report to the court and seek to have the interim order changed (Section 36)
- Withdraw from the proceeding and the proceeding ends without an order being made. However the director must present a written report to the court (Section 48)
- Refer the matter to mediation or other alternative dispute resolution (Section 22) and upon application the court may adjourn one or more times up to a total period of 3 months.

At any time after the presentation hearing the court may make any custody or supervision order with the written consent of everyone with or without a finding that the child is in need of protection (Section 60).



1 - A ADJOURNED FOR ANOTHER CASE CONFERENCE	**4 - PR** PARTIAL RESOLUTION
2 - DO DEFAULT ORDER	**5 - T** SENT TO TRIAL ON ALL ISSUES
3 - MR MEDIATED RESOLUTION	**6 - O** OTHER