File No: AH 17-30-08950

IN THE COURT OF APPEAL

IN THE MATTER OF: *The Child and Family Services Act*, RSM 1985, c C80 and amendments thereto

AND IN THE MATTER OF:

BETWEEN:

DAKOTA OJIBWAY CHILD AND FAMILY SERVICES,
(Petitioner) Respondent,

- and -

(Respondents) Appellant,

- and -

(Respondents).

MOTION BRIEF OF THE FIRST NATIONS FAMILY ADVOCATE OFFICE – ASSEMBLY OF MANITOBA CHIEFS HEARING DATE: APRIL 5, 2018

PUBLIC INTEREST LAW CENTRE
200-393 Portage Avenue
Winnipeg, MB R3C 0B9

Joëlle Pastora Sala / Allison Fenske
Telephone: (204) 985-8540 / Fax: (204) 985-8544

File No: AH 17-30-08950

IN THE COURT OF APPEAL

IN THE MATTER OF: *The Child and Family Services Act*, RSM 1985, c C80 and amendments thereto

AND IN THE MATTER OF:

BETWEEN:

DAKOTA OJIBWAY CHILD AND FAMILY SERVICES,
(Petitioner) Respondent,

- and -

(Respondents) Appellant,

- and -

(Respondents).

MOTION BRIEF OF THE FIRST NATIONS FAMILY ADVOCATE OFFICE – ASSEMBLY OF MANITOBA CHIEFS

INDEX

PAGE

I. LIST OF DOCUMENTS

II. LIST OF AUTHORITIES

III. LIST OF POINTS TO BE ARGUED

A. OVERVIEW

1. This appeal raises the central question of how the "best interest of the child" – a core principle of the child welfare system – must be interpreted in light of the spirit of reconciliation and our commitments to the implementation of the Truth and Reconciliation (the "TRC") Calls to Action, the Honour of the Crown, substantive equality, and domestic and international human rights.

2. This case illustrates the discordance between *The Child and Family Services Act* (the "Act"), *The Adoption Act*, their regulations and policies – and the manner in which section 38 hearings are conducted to determine the "best interest" of children. The statutory scheme *entitles* children to services which respect their cultural identity, and yet, an impoverished and inconsistent approach to the best interest of the child results in barriers for Indigenous children and families.

3. The First Nations Family Advocate Office of the Assembly of Manitoba Chiefs (the "FNFAO–AMC") can offer a unique and distinct perspective that will assist the Court in determining the issues on appeal. There will be no true reform of the child welfare system until Indigenous nations are able to reassert their jurisdiction over child welfare. In the interim and recognizing the impact of the statutory scheme on the lives of Indigenous children, the proposed intervention

seeks to address the existing statutory analysis in a manner that appropriately honours the legislative commitment to cultural connectivity for Indigenous children.

4. Through its daily interactions with First Nation children and their families and its systemic advocacy relating to child welfare reform, the FNFAO–AMC has substantial expertise relating to First Nation children and the child welfare system.

5. The FNFAO–AMC suggests a legal interpretation which ensures the statutory scheme is consistent with the principles of reconciliation, the Honour of the Crown, substantive equality and domestic and international human rights.

6. Given the history of assimilation of Indigenous children and families, the imposition of Western laws and Eurocentric values, and the over-representation of Indigenous children in the child welfare system – the status quo is no longer a viable option. The path to reconciliation requires uncomfortable change and immediate actions by agencies and courts. Reconciliation goes beyond check box approaches to cultural services for Indigenous children. The efficiency of trial processes cannot be used to erase the identity and culture of Indigenous children.

7. In light of the tainted relationship between Indigenous families, the child welfare system and the courts, agencies and courts must take positive actions to protect and promote the cultural identity of Indigenous children as an integral part

of the best interest analysis. It is for this reason that, if granted leave to intervene, the FNFAO–AMC would take the position that the learned Trial Judge both erred in principle and also manifestly failed to give due consideration to the lack of evidence before the court on how the children's right to cultural identity would be advanced.

8. In cases where agencies fail to ensure cultural connectivity, it is the responsibility of the court to direct the agency to act in accordance with the statutory objective of ensuring a child's substantive right to cultural identity.

B. STATEMENT OF FACTS

9. This appeal concerns the best interest of and (collectively, "the children"). For the purposes of this motion, the FNFAO – AMC relies on the facts outlined in the Appellant's Factum and emphasizes the particular circumstances as outlined below.

10. At trial, the Court heard testimony from the Appellant her father and the Respondent suggesting that for this family, as for many First Nation families, Indigenous ways of being and knowing are integral to their identity.

11. testified about her Ojibway background and the way her father taught her cultural values and practices. Along with her

father, would be able to teach the children their Ojibway language and introduce them to their culture.[1]

12. regularly participates in cultural activities and has significant connections in his community. He is willing and able to provide cultural supports to the children who have already expressed an interest in learning these skills.[2]

13. testified to the way that he and his extended family practise their Ojibway traditions, including language, medicines, and ceremony. Agency staff were not aware of nor inquired about these strong traditional practices.[3]

14. Agency staff also testified, but notwithstanding policy requirements for every child in care to have a written "Child in Care Plan" addressing, among other things, plans to maintain a child's "cultural, linguistic, racial and religious connections," no written Child in Care Plans were placed before the Trial Judge for his consideration. All that is known about Agency plans is what Agency staff testified to during their oral examinations.

15. None of the children have been placed in "culturally appropriate homes" and according to Agency staff, the availability of these homes is "very slim".[4]

---

1 Transcript, vol 4 at 3, lines 8–28; Transcript, vol 6, Reasons for Judgment, at 5, line 32 – 6, line 1 **[TAB 49]**.
2 Transcript, vol 3 at 140, lines 3–20; Transcript, vol 3 at 146, line 31 – 147, line 31 **[TAB 49]**.
3 Transcript, vol 4 at 161, line 9 – 162, line 25; Transcript, vol 2 at 65, line 18 – 66, line 7 **[TAB 49]**.
4 Transcript, vol 2 at 138, lines 2–31; 81, lines 9–10, respectively **[TAB 49]**.

16. With respect to and , Agency staff testified that "[t]he foster parent is willing to do whatever it is to, to introduce the girls to their, to cultural needs." To illustrate this, Agency staff stated that and attended one cultural camp and "drove by a pow-wow." In addition to the cultural camp that and attended and the pow wow they drove by, Agency staff referenced the availability of cultural events at the YMCA in Winnipeg.[5]

17. With respect to and Agency staff testified that their foster parents are also open to taking them to similar events.[6]

18. Similarly, there was no evidence that the Agency had any plans to ensure that would be provided culturally appropriate services while in care. Instead, Agency staff testified that her foster parent is "open to providing culturally appropriate services to her". This superficial (and hearsay) assertion of the foster parent's intentions from Agency staff was the only reference to culture and Indigenous identity.[7]

19. When the Agency Supervisor was asked whether the current placements were able to adequately meet the needs of the children, she made no reference to any plans to connect the children to their Indigenous identity, culture, language or

---

5 Transcript, vol 1 at 118, lines 19 – 119, line 16; 133, lines 29–33 **[TAB 49]**.
6 Transcript, vol 1 at 133, line 33 – 134, line 1 **[TAB 49]**.
7 Transcript, vol 2 at 65, lines 16–17 **[TAB 49]**.

traditions in her answer.[8]

20. Ultimately, the Trial Judge issued his decision on July 28, 2017 granting permanent orders for all five children. The permanent orders are under appeal.

C. POINTS IN ISSUE

21. Should this Honourable Court grant leave to the FNFAO–AMC to intervene in this appeal?

D. STATEMENT OF SUBMISSIONS

22. The FNFAO–AMC applies to intervene in this matter pursuant to Court of Appeal Rule 46.1.[9] The factors to consider on a motion for leave to intervene are:

a) the nature of the case;
b) the issues which arise; and
c) the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.[10]

23. The following additional factors are considered for public interest groups:

a) whether the intervener has a real, substantial and identifiable interest in the subject-matter of the proceedings;
b) whether the intervener has an important perspective distinct from the immediate parties; or
c) whether the intervener is a well-recognized group with a special expertise and with a broad and identifiable membership base.[11]

---

8 Transcript, vol 2 at 144, lines 3–11 **[TAB 49]**.
9 *Court of Appeal Rules*, Man Reg 555/88R, s 46.1 **[TAB 1]**.
10 *R v Mabior (CL)*, 2009 MBCA 93 at para 5, 245 Man R (2d) 81 [*Mabior*] **[TAB 2]**.
11 *Mabior, supra note* 10 at para 6 **[TAB 2]**.

E. FNFAO–AMC INTEREST AND EXPERTISE

The nature of the case and the issues which arise

24. The issues which arise in this appeal relate to the importance of considering a child's culture, tradition, language and community as an integral feature of the best interest of the child, in particular when the child is Indigenous. This appeal also concerns the obligations of courts to ensure that meaningful procedural protections are in place within its consideration of the best interest of the child in order to prevent the unnecessary severance of children's connection to culture, language, traditions and community.

The FNFAO–AMC is a well-recognized group with a special expertise and with a broad and identifiable membership base

25. The AMC was formed in 1988 as the collective voice of First Nations, to advocate on issues that commonly affect all First Nations in Manitoba, including child welfare.[12] It represents a diversity of language and legal traditions.[13] Courts and administrative proceedings have acknowledged the AMC as being a well recognized group with a special expertise and a broad identifiable membership base that is able to make useful contributions to these proceedings. For example, the AMC has intervened before the Supreme Court of Canada ("SCC"), the National Energy Board, and this Honourable Court. On child welfare matters, the

12 Affidavit of Grand Chief Arlen Dumas at paras 2, 13.
13 Affidavit of Grand Chief Arlen Dumas at paras 4–13.

AMC has participated in the Phoenix Sinclair Inquiry and intervened in *Manitoba (Director of Child and Family Services) v HH and CG.*[14]

26. As a result of extensive community engagement and research, the AMC issued the *Bringing Our Children Home* report.[15] One of the recommendations of this report was to establish a First Nations Advocate for families. In 2015, the AMC Secretariat created the FNFAO–AMC.[16] Since opening their doors in July 2015, the FNFAO–AMC has provided advocacy and support services to over 750 families and demand is continually growing.[17]

27. As outlined in the Affidavits of Cora Morgan and Grand Chief Arlen Dumas, the FNFAO–AMC has developed an expertise in the current structure and realities of the child welfare system in Manitoba and is uniquely positioned to bring the perspectives of First Nations before the court.[18]

FNFAO–AMC has a real, substantial, and identifiable interest

28. Due to the prevalence of First Nations children in care, the issues within this appeal have a significant and disproportionate impact on First Nations people across Manitoba.[19] The FNFAO–AMC is concerned about courts' failure to consider plans to preserve the culture, traditions, language and community as an

14 Affidavit of Grand Chief Arlen Dumas at para 28.
15 Affidavit of Grand Chief Arlen Dumas at paras 18–19.
16 Affidavit of Grand Chief Arlen Dumas at para 21.
17 Affidavit of Cora Morgan at paras 4–6.
18 Affidavit of Grand Chief Arlen Dumas at paras 23–24; Affidavit of Cora Morgan at paras 9–11.
19 Affidavit of Grand Chief Arlen Dumas at para 34.

integral feature of the best interests of the child and the systemic impact any appellate decision will have on First Nations in Manitoba.

FNFAO–AMC has an important perspective distinct from immediate parties

29. The FNFAO–AMC is uniquely positioned to bring the perspectives of First Nations children and families most directly impacted by the issues raised in the appeal. The Appellant (and father Respondents if they chose to participate) are or would be advancing a position that focuses on their rights as parents. While this necessarily concerns the family as a unit, the FNFAO–AMC is able to offer a perspective that centres on the children's own inalienable and substantive rights.

30. The FNFAO–AMC has observed the systemic negative impacts of the child welfare system (including policies and court processes), felt particularly in circumstances where children have been removed from their families and plans have been made without meaningful consideration of cultural connectivity.[20]

31. The FNFAO–AMC can provide the Court with an understanding of the importance of identity, language and culture, and the priority in ensuring that young children – wherever they may be physically – understand who they are and where they come from.[21] In this way, the argument of FNFAO–AMC will not duplicate the positions of the immediate parties. The FNFAO–AMC takes no

20 Affidavit of Cora Morgan at para 12.
21 Affidavit of Cora Morgan at para 15.

position on whether the children should be returned to . Instead, the proposed intervention focuses on bringing full meaning to the statutory objective of the Act of ensuring children have services to meet their cultural, linguistic and spiritual needs. The FNFAO–AMC proposes an interpretation of the best interest which gives life to our commitments to reconciliation, the Honour of the Crown, substantive equality, and domestic and international human rights. Without the submissions of the FNFAO–AMC, the way these concepts infuse the Court's understanding of its own obligations are not otherwise before the Court.

The FNFAO–AMC will make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties

32. The proposed intervention of the FNFAO–AMC will not cause any injustice or delay to any party. The Appellant supports the FNFAO–AMC motion and the Respondent Agency has not indicated that it would be opposed. The Appellant and Respondent Agency have also advised that they have reached an agreement between counsel as to the timing of the Respondent Agency's factum which accounts for the consideration and resolution of this application for leave and which FNFAO–AMC suggests eliminates any potential prejudice or delay to the immediate parties.

33. Given the over-representation of Indigenous children in care, the impacts of child welfare decisions will likely always reverberate beyond the immediate

children and families involved. For this reason, it is necessary to hear from the FNFAO–AMC as its systemic perspective can assist the Court in meaningfully addressing the issues on appeal.

F. FNFAO–AMC'S PROPOSED LEGAL ARGUMENTS

34. If permitted, the FNFAO–AMC will advance legal arguments distinct from the parties to this appeal by addressing how the "best interest of the child" should be interpreted in light of the principles of reconciliation and our commitments to the Honour of the Crown, substantive equality, and domestic and international human rights obligations.

35. The best interest analysis is a fundamental principle in all child welfare hearings. It is the primary consideration in determining whether the child is in need of protection and whether the state must intervene in a family's life to ensure the well-being of a child. Recognizing the historical disadvantage of Indigenous children, the connection to *culture, language and religion* is an integral feature of the best interest consideration under the statutory framework for child welfare.

36. In granting permanent orders of the children, the Trial Judge failed to consider the best interest of the child within the spirit of reconciliation and our commitments to the Honour of the Crown, substantive equality, and domestic and international human rights obligations.

1. A LEGISLATIVE FRAMEWORK WHICH REQUIRES THE PROVISION OF CULTURAL AND LINGUISTIC SERVICES

37. The provision of child and family services in Manitoba is governed by the Act and the Adoption Act.[22] According to the Act, "the safety, security and well-being of children and their best interests are fundamental responsibilities of society."[23] In light of this responsibility, the State intervenes in the lives of children and their families when their "life, health or emotional well-being" is endangered.[24]

38. Under both section 2(1) of the Act and section 3 of the Adoption Act, the best interest is said to be the paramount consideration to determine whether a child is in need of protection.[25] The concept of the best interest of the child is not only at the heart of the legislative scheme in Manitoba and is also recognized at the national and international levels.[26]

39. The Act and policies of the Manitoba Department of Families (the "Department") link the best interest of the child to the respect for cultural and linguistic identity.[27] The Act also recognizes that families are the source of acculturation of children and have the primary responsibility to ensure their well-

---

22 *The Child and Family Services Act*, CCSM c C80 [*Act*] **[TAB 3]**; *The Adoption Act*, CCSM c A2 [*Adoption Act*] **[TAB 4]**.

23 *Act, supra* note 22, Preamble **[TAB 3]**.

24 *Act, supra* note ss 21(1), 17(1)–(2) **[TAB 3]**.

25 *Act, supra* note 22, s2(1) **[TAB 3]**; *Adoption Act, supra* note 22, s 3 **[TAB 4]**.

26 See also *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4 at para 9, [2004] 1 SCR 176 **[TAB 5]**; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 71, 174 DLR (4th) 193 [*Baker*] **[TAB 6]**.

27 *Act, supra* note 22, ss 2(1), 7(1) **[TAB 3]**; Manitoba Families, "Child and Family Services Standards Manual" at vol 1, ch 1, s 3 at 8 [CFS Standards Manual] **[TAB 7]**.

being.[28]

40. While it is rare that the legislature *requires* the provision of services, the guiding principles of the Act state that "[f]amilies are ***entitled*** to services which respect their cultural and linguistic heritage."[29] (emphasis added)

41. The Act also states that the Agency has the *duty* to provide services to prevent or avoid the apprehension of children, including services which respect the cultural and linguistic heritage of families and children.[30]

42. According to Department Policies, Agencies must set out in writing (in the "Child in Care Plan") how they intend to meet a child's needs, including their *cultural, linguistic, racial and religious needs*. Hearings under section 38 of the Act are the only opportunity for judicial oversight to ensure the Child in Care Plans address the cultural needs of children.[31]

43. The legislative framework is grounded in the respect for cultural and linguistic heritage as a fundamental element of the best interest of the child. However in practice, the interpretation of the best interest of the child has been problematic for Indigenous children.[32] As stated by Pintarics & Sveinunggaard,

---

28 *Act, supra* note 22, Preamble **[TAB 3]**.
29 *Act, supra* note 22, Preamble [emphasis added] **[TAB 3]**; see also CFS Manual, *supra* note 27 at 1 **[TAB 7]**.
30 *Act, supra* note 22, s 7(1)(b),(m) **[TAB 3]**.
31 CFS Manual, *supra* note 27 at 1, 5–6 **[TAB 7]**.
32 Manitoba, Review Committee on Indian and Métis Adoptions and Placements, *No Quiet Place: Final Report to the Honourable Muriel Smith, Minister of Community Services* (Winnipeg: Community Services, 1985) at 274 [Kimelman Report]**[TAB 8]**.

> The court's reliance on this **'best interest' test has, more often than not, proven discriminatory for First Nations families**. It has often been cited as being **too vague and subject to the personal values** and interpretations of the decision-maker, resulting in **inconsistent judgements** (Bernd & Issenegger, no date, and Monture, 1989). As is the case for all Canadian common law, Manitoba's Child and Family Services Act is based on the **standards of behaviour generally set by Euro-Canadian middle class society. Seldom is the larger antecedent problems of poverty, racism, oppression and post-colonial residuals incorporated into legal decisions** (Awassis Agency of Northern Manitoba, 1997) (emphasis added). [33]

44. Courts have stated that in the best interest of the child, the safety and security of the child is a priority and that "none of [the] additional factors trump the others".[34] Relying on this analysis to ignore the cultural needs of Indigenous children fails to recognize principles of substantive equality which require a consideration of the particular circumstances of Indigenous children. Further, such an impoverished analysis of the best interest of the child by the courts perpetuates the historic disadvantage of Indigenous children and fails to consider the context which has led to the disproportionate number of Indigenous children in care.

45. This type of judicial interpretation is contrary to the spirit of reconciliation to which the Government of Manitoba has committed through legislation.[35] The Reconciliation Act recognizes that the path to reconciliation is "founded on respect

---

33 Joe Pintarics & Karen Sveinunggaard, "Meenoostahtan Minisiwin: First Nations Family Justice "Pathways to Peace"" (2005) 2:1 First Peoples Child & Family Rev 67 at 69 **[TAB 9]**.

34 *West Region Child and Family Services v LAH et al and MH et al*, 2016 MBQB 48 at para 55, 324 Man R (2d) 297 **[TAB 10]**.

35 *The Path to Reconciliation Act*, CCSM c R30.5 [*Reconciliation Act*] **[TAB 11]**; *The National Centre for Truth and Reconciliation Act*, CCSM c N20 **[TAB 12]**.

for Indigenous Nations and Indigenous peoples and their history, language, and cultures."[36] It also commits to the implementation of the Truth and Reconciliation Commission's ("TRC") Calls to Action and the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") which both call on decision makers to respect the cultural identities of Indigenous children.[37]

46. A failure of any agency to live up to its statutory obligations coupled with a failure of the courts to harness appropriate procedural safeguards to prevent an agency's failure only further perpetuates the unique vulnerabilities and disadvantages facing Indigenous children in the child welfare system.

2. UNIQUE VULNERABILITY OF INDIGENOUS CHILDREN IN THE CHILD WELFARE SYSTEM

47. In many respects, the experiences of the children in this appeal is sadly representative of far too many other Indigenous children in Manitoba, where nearly 90% of children in foster care are Indigenous, and another nearly 90% of children in care are placed in non-Indigenous foster care homes.[38]

48. While it is widely recognized that all children are vulnerable because they depend on others to provide them with the necessities of life, Indigenous children are uniquely vulnerable as:

---

36 *Reconciliation Act, supra* note 35, Preamble **[TAB 11]**.
37 *Reconciliation Act, supra* note 35, Preamble **[TAB 11]**.
38 Affidavit of Grand Chief Arlen Dumas at para 33; Affidavit of Cora Morgan at para 13.

- they are members of a historically disadvantaged group;
- they are over-represented within the child welfare system;
- the child welfare system has profound adverse impacts on the ability of Indigenous children to connect with their Indigenous identity;
- Eurocentric principles have been interpreted in an inconsistent manner, often to the detriment of Indigenous children; and
- Western laws have failed to respect Indigenous laws and Indigenous understandings relating to keeping children and families safe.[39]

49. Given this reality, when considering the "best interest of the child", agencies and courts must not only recognize that Indigenous children are uniquely vulnerable but they must also act accordingly to address those vulnerabilities. There is little evidence to suggest that in this case, the Trial Judge grappled with his responsibilities and the application of the best interest in light of this reality.

50. The Court can, and must, take judicial notice of these systemic and historical factors. There are direct parallels between this case and the Supreme Court of Canada's ("SCC") decision in *R v Ipeelee* where the SCC states:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society. To be clear, **courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools** and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher incarceration for Aboriginal peoples.[40] (emphasis added)

---

39 *Winnipeg Child and Family Services v KLW*, 2000 SCR 519 at paras 73, 75, [2000] 2 SCR 519 [*KLW*] **[TAB 13]**; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, arts 8, 20 (entered into force 2 September 1990) [*CRC*] **[TAB 14]**.

40 *R v Ipeelee*, 2012 SCC 13 at para 60, [2012] 1 SCR 433 [*Ipeelee*] [emphasis added] [citations omitted] **[TAB 15]**.

(i) Indigenous children are historically disadvantaged

51. Indigenous children and youth represent a growing demographic throughout Manitoba. However, there continues to be myriad challenges for Indigenous children and families because of our history of colonization and assimilation.

52. The majority of Indigenous children in the child welfare system are victims of neglect and poverty related to inter-generational trauma, the causes of which include: the experience of Indian Residential Schools, the Sixties Scoop, assimilation policies, the *Indian Act* and the displacement of Indigenous people from their lands.[41]

53. As recognized by the Aboriginal Justice Inquiry Report, apprehensions of Indigenous children were "standard operating procedure" which was a continuation of the Indian residential schools system and has ultimately served to "remove aboriginal children from the influences of their parents and communities."[42] Recently, the TRC outlined in their Report that the history of colonization and

---

41 Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, *The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children* (Winnipeg: Minister of Justice and Attorney General, December 2013) vol 1 at 23, vol 2 at s 22.3 [Sinclair Inquiry Report] **[TAB 16]**; *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at paras 120, 161, 416 [*Caring Society*] **[TAB 17]**; Grand Chief Ed John, *Indigenous Resilience, Connectedness and Reunification - From Root Causes to Root Solutions: A Report on Indigenous Child Welfare in British Columbia* (British Columbia: Ministry of Child and Family Development, 2016) at 32 **[TAB 18]**.

42 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: The Inquiry: 1991) at ch 14 **[TAB 19]**.

assimilation has left "deep scars" on the lives of Indigenous people.[43]

54. While the goal of the child welfare system is significantly different than the residential schools and Sixties Scoop, it has had many of the same outcomes – the removal of First Nation children from their families, culture, and communities and integration into mainstream society.

(ii) Indigenous children are over-represented in the child welfare system

55. The over-representation of Indigenous children in the child welfare system must be factored into the best interest analysis by agencies and courts. According to the SCC, a proper contextual analysis

> cannot ignore the **frequent occurrence of child protection proceedings involving already disadvantaged members of society** such as single-parent families, **aboriginal families** and disabled parents.[44] (emphasis added)

56. For the first time, this Court recently acknowledged the over-representation of Indigenous children in the child welfare system. It held that because of this over-representation, delays for post-apprehension hearings have disproportionate adverse impacts on Indigenous children. Specifically, this Court states:

> The vast **majority of apprehensions in Manitoba involve Indigenous children**. Because of such over-representation, any delay in post-apprehension proceedings has had, and continues to have, a

---

43 *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 183 [TRC Report] **[TAB 20]**.

44 KLW, *supra* note 39 at para 72 [emphasis added] **[TAB 13]**. See also, *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 86, 280 ACWS (3d) 130 **[TAB 21]**.

> **disproportionate impact on First Nation children**, results in First Nation children being raised outside their culture, traditions, language and community, **leads to cultural erosion** (which leads to assimilation) and results in the **over-representation of Indigenous children** in the child welfare system. These additional and significant impacts cannot be ignored and reinforce the need for prompt post-apprehension hearings.[45]

57. Indigenous children in the child welfare system are over-represented at each stage – investigations, court applications and long term care arrangements.[46] Indigenous children are more likely to be apprehended at birth or in the first year of their lives and the earlier a child enters care, the longer they stay in care.[47]

58. The over-representation of Indigenous children in the child welfare system compounds the inter-generational effects of colonialism and assimilation. This necessary contextual framework must be factored into the best interest analysis.

(iii) The child-welfare system has profound adverse impacts on the ability of Indigenous children to connect with their Indigenous identity

59. The apprehension of children has inter-generational effects on the identities of Indigenous children, families and communities. For this reason, it has been recognized that the continued practice of removing children from their families and communities results in an ongoing cultural erosion, continued assimilation and "cultural genocide".[48]

---

45 *Manitoba (Director of Child and Family Services) v HH and CG*, 2017 MBCA 33 at para 88, 409 DLR (4th) 90 [*HH*] **[TAB 22]**.

46 *Sinclair Inquiry Report*, *supra* note 41, vol 2 at 448 **[TAB 16]**.

47 Brownell et al, *The Educational Outcomes of Children in Care in Manitoba* (Winnipeg: Manitoba Centre for Health Policy, June 2015) at xii-xiii **[TAB 23]**.

48 Kimelman Report, *supra* note 32, at 272–73 **[Tab 8]**; TRC Report, *supra* note 43 at 1, 55, 133 **[TAB 20]**.

60. When children are removed from their families and communities, their direct access to their culture is severed. Specifically, their ability to receive cultural teachings, learn Indigenous languages and practise traditional activities is adversely impacted. As stated by the SCC:

> In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.[49]

61. Removing children from their families disrupts cultural continuity and affects the rights of children to practice their inherent aboriginal rights protected under section 35 of the Canadian Constitution.[50]

62. The vulnerability of Indigenous children in the child welfare system is perpetuated because the vast majority of children who are taken from their families are placed into non-Indigenous homes.[51] Indigenous children are being forced to assimilate into the culture, language, religion and traditions of their foster families to the extent that they no longer know or understand their own identity.[52]

63. When Indigenous children are raised outside their culture, traditions, language and community – *assimilation* and *cultural erosion* are perpetuated.[53]

---

49 *R v Côté*, [1996] 3 SCR 139 at para 56, 138 DLR (4th) 385 **[TAB 24]**.
50 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35 **[TAB 25]**.
51 Affidavit of Grand Chief Arlen Dumas at para 35.
52 Affidavit of Cora Morgan at para 13.
53 *HH, supra* note 45 at para 88 **[TAB 22]**.

Indigenous children who are raised in non-Indigenous homes have even fewer opportunities to learn or practice their culture, traditions and languages.[54]

64. According to the Report of the Royal Commission on Aboriginal Peoples:

> Foster placement outside the Aboriginal community has **compounded the identity confusion of children**, while their physical characteristics ensure that they will be perceived as `Indians`. If separation from families and communities occurs after several years of cultural patterning have taken place, the **adjustment they are required to make is all the more traumatic. If they are removed while very young, they never learn how to behave and respond in an Aboriginal manner**. Yet if their appearance marks them as Aboriginal in society that makes much of racial difference, the social expectation that they should be Aboriginal would present them with a constant dilemma.[55] (emphasis added)

65. Exposure to cultural identity and language is especially key to the healthy development of Indigenous children.[56]

66. Loss of language is one of the particular elements affecting the development of Indigenous children and adults. The SCC has recognized that language is "more than a mere means of communication, it is a part and parcel of the identity and culture of the people speaking it. Language is the means by which individuals

---

54 Affidavit of Grand Chief Arlen Dumas at para 35.

55 *Report of the Royal Commission on Aboriginal Peoples: Gaining Strength*, vol 3 (Ottawa: Supply and Services Canada, 1996) at 17 [*RCAP Report*] **[TAB 26]**. See also Office of the Children's Advocate, Manitoba, *Don't Call Me Resilient: What Loss & Grief Look Like for Children and Youth in Care* (Winnipeg: Office of the Children's Advocate, 2016) at 15 **[TAB 27]**.

56 Public Health Agency of Canada, "Aboriginal children: the healing power of cultural identity", online: <https://www.canada.ca/en/public-health/services/health-promotion/childhood-adolescence/programs-initiatives/aboriginal-head-start-urban-northern-communities-ahsunc/aboriginal-children-healing-power-cultural-identity.html> [Public Health Agency Report] **[TAB 28]**. See also, Assembly of Manitoba Chiefs, *Bringing Our Children Home: Report and Recommendations* (Winnipeg: Assembly of Manitoba Chiefs, 2014) at 10 **[TAB 29]**.

understand themselves and the world around them."[57] It has a unique importance to Indigenous people:

> One of the seven original gifts given by the Creator is language. Through the sacred gift of language, we are able to communicate with other members of our family, language and cultural group in keeping with the original laws of the Creator. **Language carries history, culture, identity, law, complex understandings of life, connections to the past and future, and concepts of time and space.**[58] (emphasis added)

67. Despite profound negative impacts of apprehensions on Indigenous identity and culture, decisions continue to be made by agencies and courts that remove Indigenous children from their families and communities.

(iv) Western laws fail to respect Indigenous laws for keeping children and families safe

68. The principle of the "best interest of the child" is a western concept given life in western courts. Eurocentric understandings of the best interest test have ignored the fact that Indigenous people have, since time immemorial, their own legal systems and worldviews relating to the "best interest" of their children. The SCC has acknowledged that Indigenous laws existed prior to colonization.[59]

69. Since colonization, Western legal systems have imposed their institutions and laws upon Indigenous peoples. While governments and courts continue to acknowledge that Indigenous people possessed pre-existing laws and interests,

57 *Mahé v Alberta*, [1990] 1 SCR 342 at 362, 68 DLR (4th) 69 **[TAB 30]**.

58 *Doris Pratt et al, Untuwe Pi Kin He - Who We Are: Treaty Elders' Teachings Volume 1* (Winnipeg: Treaty Relations Commission of Manitoba, 2014) at 69 [emphasis added] **[TAB 31]**.

59 *R v Van Der Peet*, [1996] 2 SCR 507 at 544–45, 137 DLR (4th) 289 **[TAB 32]**.

they continue to reject the demands of Indigenous nations to operate in accordance with their own Indigenous laws and justice systems.[60]

70. Indigenous peoples' own laws about caring for and protecting children and families are bound by the Seven Sacred Teachings – respect, love, courage, honesty, wisdom, humility and truth. As stated by Elder Thomas:

> We have been caring for our children since time immemorial. The teachings of our values, principles, and ways of being to the children and youth have ensured our existence as communities, nations, and peoples. The values of our people have ensured our existence. It is to the children that these values are passed. The children are our future and our survival.[61]

71. Indigenous worldviews and laws are more holistic in nature – family and kinship include broader connections and are not limited to those related by blood.[62] For example, the Meenoostahtan Minisiwin Program incorporates Cree Laws and the child welfare system in Northern Manitoba. Extended family, community members, Elders, social workers and service providers work together to establish the well-being of children and the community at large.[63]

72. First Nation people carry the laws, knowledge and gifts to help children understand their culture, traditions, language, identity and community.[64] The unilateral imposition of Eurocentric views on the best interest of Indigenous

60 TRC Report, *supra* note 43 at 143 **[TAB 20]**.
61 Public Health Agency Report, *supra* note 56 **[TAB 28]**.
62 Anishinaabe Elder Barbara Rattlesnake in *Pratt* et al, *supra* note 58 at 65 [emphasis added] **[TAB 31]**.
63 Pintarics & Sveinunggaard, *supra* note 33 at 67 **[TAB 9]**.
64 Affidavit of Grand Chief Arlen Dumas at para 35.

children perpetuates historical disadvantage, contributing to their over-representation in the child welfare system contrary to the spirit of reconciliation.

3. A FLAWED DECISION WHICH PERPETUATES RATHER THAN ERADICATES BARRIERS TO CULTURAL CONNECTIVITY

(i) A Decision Which Perpetuates Historical Disadvantage

73. The decision on appeal exemplifies the discordance between the statutory objectives of ensuring cultural connectivity as an integral element of the best interest of the child analysis, and its practical and inconsistent application.

74. Infused with the spirit of reconciliation and obligations under the Honour of the Crown, substantive equality, domestic and international human rights - the application of the best interest of the child must eradicate rather than perpetuate barriers to cultural connectivity for Indigenous children. The Trial Judge's order was not consistent with these principles and obligations.

75. Despite Department policies requiring timely written Child in Care Plans, none of the plans for the children were introduced as evidence at trial. The analysis of the best interest of the child was inadequate as information about how the cultural needs of the children would be met was incomplete at best, and in the case of , wholly absent.

76. None of the children have been placed in culturally appropriate homes. The only definite information before the Trial Judge relating to the plan to ensure

cultural connectivity was that some of the children would attend cultural camp and pow wows. No specific evidence was offered about how these particular events would ensure the Indigenous identity of the children would be nurtured. This is particularly incongruous when one looks to the deep cultural roots of the biological family which extend beyond driving by pow wows and attending cultural camps.

77. The superficial consideration of the activities required to ensure the cultural connectivity of the children in the trial hearing is wholly inadequate. The error is particularly egregious given the biological family's proposed plan to ensure the children would be exposed to the Ojibway language and cultural activities such as trapping, snaring, medicine picking, and regular Indigenous events. Given departmental policy requiring written Child in Care Plans, it is unacceptable that this information was not tendered at trial.[65]

78. The Trial Judge found that "culturally appropriate placements" were not feasible in this case. He accepted that the foster parents were committed to "exposing the children to their aboriginal culture and facilitating contact with their siblings." However, it is unclear what evidence the Trial Judge relied upon in coming to this conclusion.[66]

79. The record of the trial is replete with hearsay statements from Agency staff

---

65 CFS Manual, *supra* note 27 at 5 **[TAB 7]**.

66 Transcript, vol 6, Reasons for Judgment at 8, lines 5–13 **[TAB 49]**.

about commitments made by foster parents, with nothing more substantiating these purported commitments. This hearsay evidence is insufficient to discharge the Agency and court's obligations in the consideration of cultural connectivity.

80. Without access to the Child in Care Plan, direct testimony of the foster parents, or alternatively, more robust testimony from Agency staff (including actual evidence as to the substantive nature of the plans around cultural connectivity), the efficiency of the trial process is effectively prioritized over the necessary preservation and promotion of the cultural identity of Indigenous children.

81. The culturally appropriate services required under the Act are meant to account for the historical disadvantage and unique vulnerability of Indigenous children in the child welfare system. The unavailability of culturally appropriate homes cannot be used as an out for providing meaningful Child in Care plans.

82. These errors were compounded by the Trial Judge's finding that the mother's residence in a non-Aboriginal community limited the children's exposure to their culture while in her care. This represents a fundamental misunderstanding of the nature of community, which transcends geographic place, particularly from the perspective of Indigenous worldviews.

83. In this case, the Trial Judge's decision compounded the systemic and unique vulnerability of Indigenous children by making a finding that the best interest of

the children would be better served with permanent orders in favour of the Agency. This erroneous interpretation of the statutory scheme is not consistent with the statutory objectives and the Province's commitment to reconciliation.

(ii) A Decision which Violates the Children's rights to their Identity

84. The Act and the Adoption Act leave significant discretion to agencies and courts in determining the best interest of the child and implementing plans accordingly. Meaningful procedural protections are required to ensure that the best interest of the children are adequately and consistently applied. The Trial Judge erred in his interpretation of the best interest of the child by failing to consider historical disadvantages and in failing to read the overall statutory objective of the Act in light of reconciliation, the Honour of the Crown, substantive equality principles, the *Convention on the Rights of the Child* ("CRC"), and UNDRIP.

a) The Trial Judge's decision is against the Honour of the Crown and the Principle of Reconciliation

85. The Honour of the Crown is rooted in the recognition of the "special relationship" between Indigenous people with the Crown which is often described as a "fiduciary relationship".[67] It is "always at stake in its dealings with Aboriginal peoples"[68] and its ultimate purpose is reconciliation.[69]

---

67 *R v Sparrow*, [1990] 1 SCR 1075 at 1108, 70 DLR (4th) 385 **[TAB 33]**. See also *Guérin v The Queen*, [1984] 2 SCR 335 at 385–88, 13 DLR (4th) 321 **[TAB 34]**.

68 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16, [2004] 3 SCR 511 **[TAB 35]**.

69 *Manitoba Metis Federation v Canada (AG)*, 2013 SCC 14 at paras 66–67, 78, [2013] 1 SCR 623 **[TAB 36]**. The *Reconciliation Act*, *supra* note 35, s 1(1) **[TAB 11]** defines reconciliation as "the ongoing process of establishing

86. By failing to meaningfully consider the Agency's plan for the children's cultural connectivity, the Trial Judge's interpretation of the best interest of the child violated the Honour of the Crown, perpetuating the damaged relationship between Indigenous and non-Indigenous people and failing to respect Indigenous laws.

b) The Trial Judge's decision Violates the Domestic and International Rights of the Children

87. According to domestic and international human rights principles, Indigenous children have the right to preserve their Indigenous identity separate and apart from their parents' rights.

88. The Canadian Human Rights Tribunal (the "CHRT") recently recognized that past and current child welfare practices have failed to recognize the substantive rights of First Nation children and have continued to have ongoing adverse impacts on First Nation children.[70] The CHRT also relied upon the principles of substantive equality to determine that First Nations children must be treated in a unique manner to remedy historical disadvantages.[71]

89. The *Charter* value of substantive equality is of direct relevance to this case. All human beings are of equal worth while taking full account of historical, social,

---

and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples in order to build trust, affirm historical agreements, address healing and create a more equitable and inclusive society." See also, TRC Report, *supra* note 43 at 16–17 **[TAB 20]**.

70 *First Nations Caring Society, supra* note 41 at paras 399–404, 458 **[TAB 17]**.

71 *First Nations Caring Society, supra* note 41 at paras 199, 459 **[TAB 17]**.

political, economic factors concerning a group.[72] In practice, this means that affirmative actions may be required to account for the historical disadvantage of Indigenous children. A consideration of *Charter* equality values also asks whether decisions perpetuate prejudice, stereotyping or adverse impacts.

90. At the international level, both the CRC and UNDRIP outline the right of the child to preserve their cultural identity. Under the CRC, children have the same human rights as adults but have particular needs given their unique vulnerability. When children are temporarily or permanently removed from their homes, they have the right to solutions which have due regard to their ethnic, religious, cultural and linguistic background.[73]

91. Under UNDRIP, Indigenous peoples have the right to practise and revitalize their cultural traditions and customs and to transmit them to future generations.[74] Furthermore, States shall take effective measures in order for Indigenous children living outside their communities to have access to their culture and language.[75]

92. While unincorporated conventions are not directly binding in Canadian courts, the common law presumes that courts ought to comply with Canada's

---

72 *Quebec (AG) v A*, 2013 SCC 5 at paras 135, 144, 156, [2013] 1 SCR 61 **[TAB 37]**; *Withler v Canada (AG)*, 2011 SCC 12 at para 38, [2011] 1 SCR 396 **[TAB 38]**.

73 *CRC, supra* note 39, arts 8, 20 **[TAB 14]**.

74 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), arts 11.1, 13.1, [UNDRIP] **[TAB 39]**.

75 UNDRIP, *supra* note 74, art 14.3 **[TAB 39]**.

international law obligations.[76] Canadian courts have recognized that these international agreements can be used as interpretive tools by the courts.[77]

93. The Trial Judge erred in failing to interpret the best interest of the child in a manner consistent with the substantive rights of Indigenous children protected under both domestic and international human rights obligations.

4. A WAY FORWARD

94. In light of the principle of reconciliation and our commitments to the Honour of the Crown, and human rights principles; the best interest of the child analysis must consider a meaningful review of Child in Care Plans and how the cultural, linguistic and spiritual needs of Indigenous children will be met. In undertaking this analysis, courts must always consider the systemic and individual impacts of colonization, including the residential school and Sixties Scoop legacies, in decision making. A failure to consider the best interest of the child in light of these commitments is a serious legal error.

95. This decision cannot be considered in isolation. The CHRT has determined that Canada has discriminated against First Nations children by under-funding child welfare services, and Manitoba has recently introduced legislation to allow for the creation of customary care agreements.[78]

---

76 *Re Arrow River & Tributaries Slide & Boom Co,* [1931] 2 DLR 216 at 217, 66 Ont L Rep 577 (ONCA) **[TAB 40]**.

77 *Baker, supra* note 26 at paras 68–69 **[TAB 6]**.

78 Bill 18, *The Child and Family Services Amendment Act (Taking Care of Our Children),* 3rd Sess, 41st Leg,

96. The CHRT decision takes important strides towards remedying historic under-funding of child welfare services on reserve. The proposed Bill recognizes "Indigenous children's fundamental need to maintain their cultural identity and connections to their Indigenous communities."[79] At the same time, the existing systems continue to ignore Indigenous laws relating to family and children which existed prior to the imposition of both the Act and the Adoption Act.[80]

97. The Western governance of child welfare services for Indigenous children is a temporary measure until such time as Indigenous laws are revitalized and codified.[81] In the meantime, constrained by existing Western laws, statutes and policies must be interpreted in a way that eradicates rather than reinforces barriers.

98. The statutory scheme must be interpreted in a manner which protects against cultural genocide and assimilation of Indigenous children and is consistent with reconciliation, the Honour of the Crown, *Charter* values, and Canada's human rights obligations.

99. The FNFAO–AMC agrees with the analogy that the Appellant draws to the *Gladue*, *Ipeelee* and *Anderson* cases.[82] There is a direct correlation between

---

Manitoba, 2018 [Bill 18] **[TAB 41]**.

79 Bill 18, *supra* note 78, s 2 **[TAB 41]**.

80 Affidavit of Cora Morgan at para 14.

81 Affidavit of Grand Chief Arlen Dumas at para 16.

82 *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 **[TAB 42]**; *Ipeelee*, *supra* note 40 **[TAB 15]**; *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 **[TAB 43]**.

Indigenous children and youth in state care and the criminal justice system.[83] Incorporating the *Gladue*, *Ipeelee* and *Anderson* principles within child protection hearings is consistent with the TRC calls to action.[84]

100. The Agency must be required to create a plan which respects the Indigenous children's substantive rights to cultural identity. On at least three separate occasions, courts in Manitoba and Alberta have either overturned a trial decision or sent the matter back to the agency for further planning to ensure the cultural, language and spiritual needs of the children are being met.

101. In *R (HI) Re*, the Alberta Court of Appeal agreed the trial judge had jurisdiction to allow biological parents access in order for the child to have exposure to their Indigenous community and culture.[85] In *T (EJ) v P (PM)*, this Court concluded that the trial judge had "gotten it all wrong" by confirming guardians whose commitment to the child's culture was "lukewarm at best". Culture and heritage were significant factors that could not be treated "as though they were courses that could be taken at some later time".[86] In *Metis Child and Family Services v PF et al*, the court ordered a further temporary order because the

---

83 Rebecca Jaremko Bromwich, "Still Wearing Scarlet? Discursive Figures of the Unfit Mother as Pervasive Phantom Active in Governing Mothers through Ontario's Child Protection Regime" in Michelle Hughes Miller, Tamara Hager & Rebecca Jaremko Bromwich, eds, *Bad Mothers: Regulations, Representations and Resistance* (Bradford, Ontario: Demeter Press, 2017) 26 at 44 **[TAB 44]**.

84 *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at call to action 4(ii) **[TAB 45]**.

85 *R (HI), Re*, 30 Alta LR (2d) 97, 1984 CarswellAlta 11 at paras 2,4-6, 45-48 (ABCA) **[TAB 46]**.

86 *T (EJ) v V(PM)*, 110 Man R (2d) 219, 1996 CarswellMan 276 at paras 17, 19 **[TAB 47]**.

agency's plan for the children was not satisfactory, stating that once "a permanent order is pronounced, these children will be beyond future judicial oversight."[87]

102. If granted leave to intervene, FNFAO–AMC would take the position that the Trial Judge committed a serious error by making permanent orders concerning the children without a full consideration of the best interest analysis. The Trial Judge failed to interpret the statute in a manner which links the statutory and policy objectives of "maintaining cultural, linguistic, racial and religious connections" to the need to ensure the Child in Care plans meaningfully address the need for all children to ensure their cultural connectivity. This leads to significant and real inter-generational effects on Indigenous children.

103. If granted leave, the FNFAO–AMC would support the Appellant's position that a new trial be ordered. It would ask this Court to provide direction to trial courts as to how the best interest analysis must ensure a meaningful plan for cultural connectivity for all children consistent with the statutory objectives, the spirit of reconciliation and our commitments to the Honour of the Crown, substantive equality, domestic and international human rights obligations.

G. CONCLUSION

104. The FNFAO–AMC is a well-recognized group with special expertise and a

---

87 *Metis Child and Family Services v F(P)*, 2017 MBQB 193 at paras 62–63, 66, 2017 CarswellMan 537 **[TAB 48]**.

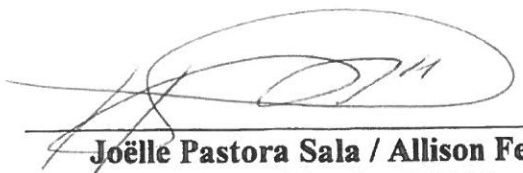
broad membership base. It has significant advocacy experience related to child welfare issues and First Nation children. It has an important perspective distinct from that of the immediate parties who cannot address the wider implications of this appeal on Indigenous families generally and who have not raised arguments relating to the Honour of the Crown, substantive equality, and domestic and international human rights.

105. The FNFAO–AMC seeks leave to intervene in these proceedings and to be granted leave to:

- file a factum that does not exceed 20 pages and within that factum, to rely on and refer to publicly issued reports, scholarly articles and academic papers
- present oral argument; and
- rely on the affidavits of Grand Chief Arlen Dumas, affirmed February 13, 2018 and First Nation Family Advocate Cora Morgan, affirmed February 15, 2018, filed in this application for leave.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th DAY OF MARCH, 2018.

PUBLIC INTEREST LAW CENTRE



Joëlle Pastora Sala / Allison Fenske
Counsel for the FNFAO–AMC