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),

- and -

THE FIRST NATIONS FAMILY ADVOCATE OFFICE of the ASSEMBLY OF MANITOBA CHIEFS
Intervener.

FACTUM OF THE FIRST NATIONS FAMILY ADVOCATE OFFICE of the ASSEMBLY OF MANITOBA CHIEFS

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PART ONE – INTRODUCTION

1. The best interest of the child is a core principle of the child welfare system. According to *The Child and Family Services Act* (the "Act"), it is the "paramount consideration" in determining whether or not a child is in need of protection. Yet, the best interest analysis does not end with this determination. The principle of the best interest of the child infuses the entire child welfare process, including the plan for where and with whom a child will live, how a child will be cared for and how their sense of identity will be nurtured. Just as considerations of child welfare have evolved throughout the years – both in common law and in parallel legislation – to reflect "social conditions and attitudes",[1] so too has the principle of the best interest of the child.

2. This appeal arises at a time when the rate at which First Nation children are being taken from their families has reached crisis levels. In response, true reform of the child welfare system – including the reassertion of First Nations' jurisdiction over child welfare – is necessary. However, until such time as First Nations' own existing laws relating to families and children can be revitalized and codified, the status quo is no longer a viable option and interim measures are required.[2]

3. In light of the current child welfare crisis alongside existing domestic and international commitments, the interpretation of the best interest of the child must

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1 *King v Low*, [1985] 1 SCR 87 at 97 [*King*] **[TAB 1]**.

2 *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 16 [TRC Report] **[TAB 2]**.

always be done in accordance with the spirit of reconciliation, our commitments to the implementation of the Truth and Reconciliation Commission's (the "TRC") Calls to Action, the Honour of the Crown, substantive equality, and domestic and international human rights.

4. An impoverished application of this principle in determining the fate of children – both prior to and during child welfare hearings – has resulted in inconsistent processes perpetuating the historical disadvantage of First Nation children, further damaging relationships and contributing to the loss of cultural and linguistic identity.

5. This case illustrates why a robust interpretation, reflective of current social realities, is required. The processes and outcome of the trial at issue highlight the discordance between the Act, *The Adoption Act*, regulations and policies – and the manner in which section 38 hearings are conducted to determine the "best interest" of children.

6. The statutory scheme *entitles* families and children to services which respect their cultural and linguistic heritage. In theory, the Department's Policy *requires* agencies to set out in writing how they intend to meet a child's cultural, linguistic, racial and religious needs.[3] Yet, courts have favoured other factors within the best interest analysis which have (i) imposed Eurocentric values and (ii) resulted in an haphazard

3 Manitoba Families, "Child and Family Services Standards Manual" at vol 1, ch 1, s 3 at 1, 5–6 [Manual] **[TAB 3]**.

consideration of the plans to ensure cultural connectivity for First Nation children.

7. Given the tainted relationship between First Nation families, the child welfare system and the courts, agencies and courts must take positive actions to protect and promote the cultural identities and languages of First Nation children as an integral element of the best interest of the child. They must grapple with the vulnerabilities of First Nation children and act to address those vulnerabilities.

8. A legal interpretation of the best interest of the child which reflects current societal values and ensures the statutory scheme must be interpreted in a manner consistent with our commitments to principles of reconciliation, the Honour of the Crown, substantive equality, and domestic and international human rights.

9. The path to reconciliation requires uncomfortable change and immediate action by agencies and courts. The efficiency of trial processes cannot justify effectively ignoring issues relating to the identity and culture of First Nation children. Addressing our commitments to reconciliation and ensuring our interpretation of the best interest of the child is reflective of this commitment involves moving beyond check box approaches to cultural services and token visits to pow wows for First Nation children.

PART TWO – STATEMENT OF FACTS

10. This appeal concerns the best interest of five First Nation children –

(collectively, "the children"). The Intervener relies on the facts outlined in the Appellant's Factum and emphasizes particular facts as they relate to the arguments in this factum.

11. The four eldest children were apprehended from their mother (the "Appellant"), on July 20, 2015 and the youngest child ( ) was apprehended at birth The children have all been in the care of Dakota Ojibway Child and Family Services ("DOCFS") since their apprehensions.

12. The trial was held in July 2017. The biological family of the children testified to the integral role of their) heritage to their identity. testified that she was raised by her father, , with culture and values. She spoke about regularly attending pow wows and sweat lodges as well as making dreamcatchers with her father. father also taught her other First Nation art forms as well as protocols like how to smudge.[4]

13. is an artist who speaks some and regularly exercises his rights to fish and hunt. He is also knowledgeable about traditional medicines. He testified at trial that the children have asked to go trapping with him but that he thinks they are still too young. has shared teachings with the children as well as how to make First Nation crafts.

4 Transcript, vol 4 at 3, lines 11–28 **[TAB 40]**.

, testified that he was "definitely" prepared to continue providing cultural supports to the children.[5]

14. The Respondent, , is also . At trial, explained that and family practise Anishinaabe ways of living, including medicine picking and smudging. also testified to the Anishinaabe way of being and learning teachings directly from Grandmother. stated that Anishinaabemowin was "very much" still alive and spoken in family.[6]

15. The children are living in three separate homes – none are "culturally appropriate" placements. Agency staff testified that the availability of these homes is "very slim". It was revealed at trial that Agency staff were not aware of, nor had they enquired about the strong ties of the children's family to the Anishinaabe worldview. Agency staff testified that they met with the foster parents to create case plans for the children, however, no written Child in Care Plans were entered into evidence at trial. All that is known about these plans is what Agency staff testified to at trial.[7]

16. and have been placed together. Agency staff testified that their foster parent is "willing to do whatever" to introduce them to their culture. To date, that has involved taking to a cultural camp, cultural events at the YMCA, and on

5 Transcript, vol 3 at 140, lines 11–14 **[TAB 40]**; Transcript, vol 3 at 146, line 31 – 147, line 24 **[TAB 40]**.
6 Transcript, vol 4 at 161, line 9 – 162, line 16 **[TAB 40]**.
7 Transcript, vol 1 at 133, lines 11 –19 **[TAB 40]**; Transcript, vol 3 at 81, lines 2–14 **[TAB 40]**; Transcript, vol 2 at 65, line 18 – 66, line 16 **[TAB 40]**.

one occasion, attending a pow wow they drove by. Agency staff testified that and foster parents are also open to taking them to similar events, however, it is unclear from the trial record whether and have been exposed to any cultural activities. There was no evidence presented at trial by the Agency with respect to the cultural and linguistic services provided to .[8]

17. Notwithstanding the lack of evidence presented at the trial about the plan to meet the best interest of the children, on July 28, 2017, the permanent orders of guardianship were granted for all five children.

PART THREE – LIST OF ISSUES

18. The Intervener has been granted leave to make submissions on the appropriate interpretation of the "best interest of the child" principle and is particularly concerned with how this principle is best understood within the context of hearings involving First Nation children.

PART FOUR – ARGUMENT

The Legislative Framework Entitles Children and Families to the Provision of Cultural and Linguistic Services

19. The "best interest of the child" principle is the paramount consideration in determining whether a child is in need of protection.[9] This principle is not only at the

8 Transcript, vol 1 at 118, line 19 – 119, line 16 **[TAB 40]**; Transcript, vol 1 at 133, line 29 – 134, line 1 **[TAB 40]**.

9 *The Child and Family Services Act*, CCSM c C80, s 2(1) **[Appellant's Case Book, TAB 4]**; *The Adoption Act,* CCSM c A2, s (3) **[TAB 4]**.

heart of the legislative scheme in Manitoba, it is also recognized at the national and international levels. For example, the *United Nations Convention on the Rights of the Child*, to which Canada is a signatory, requires that the best interest of the child be a primary consideration in all actions concerning children, including the actions of child welfare agencies.[10]

20. The best interest of the child principle has evolved over time. Two important shifts have occurred since the emergence of the principle in 1756.[11] First, the focus has changed from parental rights to parental obligations and children's rights.[12] Second, a number of provincial and territorial legislative amendments have been made to reflect the "significance of cultural identity when intervening with First Nations children."[13] This is also consistent with judicial recognition that "preservation of a child's Indigenous identity and culture is in the Indigenous child's best interests".[14]

21. The child welfare system interrupts (at best) and severs (at worst) the connections between First Nation children, their families and communities and often their cultural identity:

> We already have the knowledge of how to teach them. It's [a question of] how... we get that to the children that are in care. Those kids are missing out

10 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) at art 8.1 [*CRC*] **[TAB 5]**.
11 *Ramsay v Ramsay* (1977), 13 OR (2d) 85 at 5 **[TAB 6]**.
12 *King*, *supra* note 1 at 93 **[TAB 1]**. See also Marlee G Kline, *Child Welfare Law, Ideology and the First Nations* (LLM Thesis, Osgoode Hall, York University, 1990) at 64–65 **[TAB 7]**.
13 Christopher Walmsley, *Protecting Aboriginal Children* (Vancouver: UBC Press, 2005) at 2 **[TAB 8]**.
14 *Children's Aid Society of London and Middlesex v EMEE*, 2017 ONSC 5292 at para 36 [quoting from factum of the respondent Kettle & Stony Point First Nation] **[TAB 9]**.

> on our cultural teachings on a regular basis. Bringing them to a pow wow for one day is just not doing it. They need more. They need to know who they are. They need that community to be there for them day to day, not just once in a while. It has to be consistent.[15]

22. In recognition of this fact, Manitoba has included respect for cultural and linguistic heritage as a fundamental element of the best interest of the child within the Act and the policies of the Manitoba Department of Families (the "Department"):

- section 2(1) of the Act states that in order to determine whether a child is in need of protection and in considering the child's best interest, a relevant consideration includes the child's cultural, linguistic, racial and religious heritage;
- similarly, section 3 of the Adoption Act confirms that a child's cultural linguistic, racial and religious heritage is a relevant factor in adoption proceedings;
- section 7(1) of the Act requires that *every* agency provide preventative services to avoid the apprehension of children and services which respect the cultural and linguistic heritage of families and children; and
- the Department's Policy Manual states that 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.

23. Under the legislative scheme, the provision of services that respect the cultural and linguistic heritage of families is not a choice, it is a substantive right of children.

24. An ordinary reading of the Act reveals that the legislative scheme is consistent with principles of substantive equality. By explicitly recognizing the need for services that meet cultural and linguistic needs, the scheme has the ameliorative purpose of

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15 Surrounding Children with Cedar, "The Nong Sila Urban Adoptions Project: A Community-Based Model for Urban Aboriginal Adoptions", online: <http://surroundedbycedar.com/UserFiles/NONGSILA%2OResearchReport.pdf> at 5 cited in Ashley Smith, "Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Save or Lose Our Children" (2009) 25:1 Can J Fam L 297 at 324 **[TAB 10]**.

addressing the impacts of colonization on First Nation children.

25. Hearings under section 38 of the Act are the only opportunity for judicial oversight to ensure the Child in Care Plans address the cultural and linguistic needs of First Nation children.[16] However, in practice, the interpretation of the principle by courts and the manner in which the cultural and linguistic needs are met by agencies has been problematic for First Nation children.[17] Rarely are "larger antecedent problems of poverty, racism, oppression and post-colonial residuals incorporated into legal decisions."[18]

26. Courts have recognized that in considering the best interest of the child, "none of [the] additional factors trump the others."[19] Some have specifically found that "Aboriginal heritage and cultural identity does not attract a "super-weight" over the other factors."[20] This interpretation does not, however, go so far as to permit a superficial consideration of agency plans in relation to children. The bests interest of the child does not end with the determination that a child is in need of protection. The court must also grapple with *how* the children will be protected.

27. Failing to meaningfully consider the plan to address the cultural and linguistic

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16 Manual, *supra* note 3 at vol 1, ch 1, s 3 at 1, 5–6 **[TAB 3]**.

17 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 11]**.

18 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 12]**.

19 *West Region Child and Family Services v LAH et al and MH et al*, 2016 MBQB 48 at para 55 **[TAB 13]**.

20 *MM v TB*, 2017 BCCA 296 at para 15 **[TAB 14]**.

needs of First Nation children ignores current societal values and is contrary to principles of substantive equality. It serves to further marginalize a highly vulnerable group.

28. A judicial interpretation that disregards the cultural and linguistic needs of First Nation children runs contrary to the spirit of reconciliation which the Government of Manitoba has committed to through legislation and which requires decision makers to respect the cultural identities of First Nation children.[21]

29. A failure by agencies to comply with statutory obligations, coupled with a failure of courts to harness appropriate procedural safeguards to ensure First Nation children's access to cultural and linguistic services, results in a best interest analysis that is out of step with the needs of First Nation children and families.

Recognition of the Vulnerability of First Nation Children is Required

30. In order for the best interest of the child to be interpreted within the current social context, it must be recognized that First Nation children are uniquely vulnerable because:

- they are members of a historically disadvantaged group who are over-represented within the child welfare system;
- the child welfare system has profound adverse impacts on the ability of First Nation children to connect with their First Nation identity;

21 *The Path to Reconciliation Act*, CCSM c R30.5 [*Reconciliation Act*] **[TAB 15]**.

- Eurocentric principles have been interpreted in an inconsistent manner, often to the detriment of First Nation children; and
- Western laws have failed to respect First Nation laws and First Nation understandings relating to keeping children and families safe.[22]

31. Whether consciously or not, decisions about the best interest of the child are made within the context of "decades of widespread removal of [First Nation] children from their home communities."[23]

First Nation Children are Over-Represented in the Child Welfare System

32. This Court can take judicial notice of the systemic and historical factors affecting First Nation children such as the ongoing effects of colonialism, displacement and residential schools.[24] The majority of First Nation children who are over-represented in the child welfare system are victims of neglect and poverty related to inter-generational trauma from assimilation policies and practices.[25] As recognized by the TRC, the history of colonization and assimilation left "deep scars" on the lives of First Nation peoples.[26]

33. In many respects, the experience of the children in this appeal is sadly illustrative of the experience of far too many other First Nation children. At each stage in the child

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22 *Winnipeg Child and Family Services v KLW*, 2000 SCR 519 at paras 72-73, 75 [*KLW*] **[TAB 16]**.

23 The Honourable Gladys Pardu, "Aboriginal Issues in Family Litigation" (2009) [unpublished, archived at the National Judicial Institute] at 39 cited in *Algonquins of Pikwakanagan v Children's Aid Society of the County of Renfrew*, 2014 ONCA 646 at para 56 **[TAB 17]**.

24 *R v Ipeelee*, 2012 SCC 13 at para 60 [*Ipeelee*] **[TAB 18]**.

25 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 2 at s 22.3 [Sinclair Inquiry Report] **[TAB 19]**; 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 20]**.

26 TRC Report, *supra* note 2 at 183 **[TAB 2]**.

welfare process – investigations, court applications, and long term care arrangements – the over-representation of First Nation children is amplified.[27] In Manitoba, nearly 90% of children in care are Indigenous, a majority of whom are placed in non-Indigenous homes.[28]

34. Recently, this Court recognized that delays in post-apprehension proceedings had a disproportionate impact on First Nations children because it resulted in First Nation children being raised outside their culture, traditions and community leading to cultural erosion.[29] Like delays in post-apprehension proceedings, an impoverished application of the best interest of the child also results in the over-representation of First Nation children in the child welfare system. The Supreme Court of Canada has also recognized that a proper contextual analysis cannot ignore how frequently child protection proceedings involve already disadvantaged members of society like First Nation families.[30]

The Child Welfare System Interferes with the Ability of First Nation Children to Connect with their First Nation Identity

35. By its very nature, the child welfare system interrupts the connection between

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27 Sinclair Inquiry Report, *supra* note 25, vol 2 at 448 **[TAB 19]**.

28 Manitoba Families, *Annual Report 2016 – 2017* (Winnipeg: Department of Families, Sept 2017) at 90 **[TAB 21]** According to the Manitoba Families Annual Report for 2016-2017, as of March 2017, 9,543 of the 10,714 children in care in Manitoba were in the care of a First Nations or Metis agency, amounting to just over 89% of all children in care; Statistics Canada, *Insights on Canadian Society: Living arrangements of Aboriginal children aged 14 and under* by Annie Turner, Catalogue no 75-006-x (Ottawa: Minister of Industry, 13 April 2016) at 7-8 **[TAB 22]**.

29 *Manitoba (Director of Child and Family Services) v HH and CG,* 2017 MBCA 33 at para 88 [*HH*] **[Appellant's Case Book, TAB 3]**.

30 *KLW, supra* note 22 at para 72 **[TAB 16]**. See also *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 86 **[TAB 23]**.

children, their families and their communities. When First Nation children are apprehended, their direct access to their culture is severed (in varying degrees), adversely affecting their ability to receive cultural teachings, learn First Nation languages and practice their inherent Aboriginal rights.[31]

36. The practice of removing First Nation children from their families and communities has been described as "cultural genocide".[32] The vulnerability of First Nation children in the child welfare system is compounded when they are placed into non-Indigenous homes. This leads to identity confusion that has negative impacts on their development.[33] These placements can result in First Nation children 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. Courts have recognized that the removal of children from parental custody seriously interferes with both parent and child's psychological integrity.[34]

Western Laws Fail to Respect First Nation Laws for Keeping Children and Families Safe

37. The principle of the best interest of the child is a western concept given life in

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31 *R v Côté*, [1996] 3 SCR 139 at para 56 **[TAB 24]**; *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 **[TAB 25]**.

32 Kimelman Report, *supra* note 17 at 272 **[TAB 11]**; TRC Report, *supra* note 2 at 1, 55, 133 **[TAB 2]**.

33 *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength,* vol 3 (Ottawa: Supply and Services Canada, 1996) at 17 **[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]**; Kenn Richard, "A Commentary Against Aboriginal to non-Aboriginal Adoption" (2004) 1:1 First Peoples Child and Family Review 101 at 106, online: First Nations Child and Family Caring Society of Canada <www.fncfcs.com/pubs/vollnuml/Richardpp10 1- 109.pdf> cited in Smith, *supra* 15 note at 332 **[TAB 10]**.

34 *New Brunswick (Minister of Health and Community Services) v G(J),* [1999] 3 SCR 46 at paras 64, 76 **[Appellant's Case Book, TAB 10]**.

western courts. It is based on liberal and individual notions of the law and childhood resulting in a perpetual struggle with the imperative to honour and protect cultural identity.[35] The results have been devastating to First Nation people and nations.

38. Eurocentric understandings of the best interest principle have ignored the fact that First Nation peoples have had, since time immemorial, their own legal systems and worldviews relating to the "best interest" of children. Instead, Western legal systems have imposed their concepts, institutions and laws upon First Nation children, ignoring pre-existing First Nation laws and justice systems.[36] This imposition fails to recognize First Nations' inherent jurisdiction over First Nations children and families, which has never been ceded or surrendered in any fashion.

39. Practical challenges can arise in courts when applying the best interest of the child principles to First Nation children. Little weight may be given to culture and identity. Courts may place less significance on a child's "bond" to their culture than the child's bond with their foster family. Courts may treat culture as an abstract "category" that can be filled with the content of a culture other than that of the particular First Nation to which the child belongs. Courts may even ignore the "stability" that comes from children maintaining a connection to their culture.[37]

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35 Cindy L Baldassi, "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences" (2006) 39:1 UBC L Rev 63 at paras 22–23 cited in Smith, *supra* 15 note at 328–29 **[TAB 10].**

36 TRC Report, *supra* note 2 at 1, 55, 133, 143 **[TAB 2]**. See e.g. *Beaver v Hill,* 2017 ONSC 7245 at para 82 **[TAB 28]**.

37 Kline, *supra* note 12 at 75–76 **[TAB 7]**.

40. In this case, the Trial Judge imposed a narrow understanding of "community" as referring to a geographical location. He found that the "exposure [of the children] to their aboriginal culture would be limited" because ' ' is not an Aboriginal community."[38] This characterization of community is indicative of a Western worldview[39] which ignores First Nation understandings and is detrimental to First Nation peoples. It also fails to recognize the children's own substantive rights to their identity and culture independent from the choices their biological parents have made for them.

41. From a First Nation perspective, "aboriginal culture" is not restricted to a physical place and community is not simply a geographic location. Community is inextricably linked to identity, culture, and family.[40] First Nation worldviews and laws are more holistic in nature – family and kinship include broader connections and are not limited to those related by blood.[41] First Nation laws about children and families are rooted in the Seven Sacred Teachings – respect, love, courage, honesty, wisdom, humility and truth.[42] It is through these First Nation ways of life and their relationships with their community that children are taught how to live a good life.[43]

42. The unilateral imposition of Eurocentric views on the best interest of First Nation

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38 Transcript, vol 6, Reasons for Judgment at 8, lines 14–18 **[TAB 40]**.
39 Richard, *supra* note 32 at 101–109, cited in Smith, *supra* note 15 at 330 **[TAB 10]**.
40 Richard, *supra* note 32 at 101–109, cited in Smith, *supra* note 15 at 330 **[TAB 10]**.
41 Anishinaabe Elder Barbara Rattlesnake in *Pratt* et al, *supra* note 31 at 65 **[TAB 25]**.
42 *Pratt* et al, *supra* note 31 at 69 **[TAB 25]**.
43 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> at 4 **[TAB 29]**.

children is not reflective of a "nation-to-nation" approach. Reconciliation requires courts to consider First Nation perspectives before drawing conclusions which could potentially reinforce stereotypes about First Nation people.

Adverse Impacts of Failing to Consider Culture and Linguistic Needs

43. This case highlights challenges that result from the discordance between the statutory objective of ensuring cultural connectivity as an integral element of the best interest of the child, and its practical and inconsistent application in courts.

44. Despite Department policies requiring timely written Child in Care Plans, none of the plans for the children were introduced as evidence at trial. Instead, Agency staff presented a superficial explanation about the exposure of some of the children to cultural activities, including attending cultural camps and pow wows. No specific evidence was offered about how the First Nation identity of the children would be nurtured. For , who was apprehended at birth, there was *no information* presented at trial about how cultural needs would be met. The Trial Judge simply accepted Agency staff testimony that the foster parents were committed to "exposing the children to their aboriginal culture and facilitating contact with their siblings."[44]

45. This conclusion is problematic given (i) none of the children are living in culturally appropriate homes; (ii) the biological family has deep connections to the Anishinaabe culture, speak Anishinaabemowin and continue to practice their inherent

44 Transcript, vol 6, Reasons for Judgment at 8, lines 5–13 **[TAB 40]**.

Aboriginal rights to hunt, trap, and pick medicines; and (iii) the purpose of DOCFS "has been and continues to be the provision of services which recognizes traditional First Nation values and customs and is compatible to the needs of the community in which they reside."[45] Regardless of the ultimate order, the statutory importance of protecting cultural identity coupled with the family's Anishinaabe identity highlights the necessity of applying the best interests test in a manner that respects rather than marginalizes the importance of cultural identity.

46. Without access to the Child in Care Plans, direct testimony of the foster parents, or alternatively, more robust testimony from Agency staff, the efficiency of the trial process is prioritized over the preservation and promotion of the cultural and linguistic needs of First Nation children. In the absence of meaningful evidence that the agency would fulfill the children's rights to the cultural and linguistic identities, the Trial Judge's decision compounded the vulnerabilities of the children by making a finding that their best interest would be better served by permanent orders of guardianship. This interpretation of the statutory scheme is not consistent with the statutory objectives nor with the Province's commitment to reconciliation.

A Way Forward

47. The legislative scheme for child welfare in Manitoba leaves significant discretion to agencies and courts in determining the best interest of the child and implementing

45 Dakota Ojibway Child & Family Services, "About", online: <https://www.docfs.org/about> **[TAB 30]**.

plans accordingly. Meaningful procedural protections are required to ensure compliance with the statutory objectives of ensuring the cultural and linguistic needs of children are met within the consideration of the best interest of the child.

48. To reflect current societal values, the application of the best interest principle must be rooted in principles of reconciliation, the Honour of the Crown, substantive equality, and domestic and international human rights. What does this mean in practice?

- *Reconciliation* means that First Nation and non-First Nation people can have respectful relationships as treaty partners. It involves First Nation people governing themselves and their children under their own laws. It also means Canadian laws must be interpreted by courts with respect for First Nation worldviews and laws about the best interest of First Nation children.

- *The Honour of the Crown* has reconciliation as its ultimate objective.[46] It is always at stake when dealing with First Nation people.[47] An interpretation of the statutory scheme consistent with the Honour of the Crown eradicates barriers for First Nation children in accessing their cultural and linguistic heritage.

- *Substantive equality* means that all human beings are of equal worth and that factors relating to historical, social, political, and economic experiences must be incorporated into decision making. A substantive equality lens requires courts to consider whether decisions will perpetuate prejudice, stereotyping or adverse impacts. The Agency must be required to create plans which respect First Nation children's substantive rights to cultural identity.

- *Domestic human rights* recognize that First Nation children have the right to live free from discrimination, including based on age and ethnicity.[48] An analysis of the best interest of the child consistent with human rights principles recognizes

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46 *Manitoba Metis Federation v Canada (AG),* 2013 SCC 14 at paras 66–67, 78 **[TAB 31]**. The *Reconciliation Act, supra* note 21, s 1(1) **[TAB 15]** defines reconciliation as "the ongoing process of establishing 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 2 at 16–17 **[TAB 2]**.

47 *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 16 **[TAB 32]**.

48 *Canadian Human Rights Act,* RSC 1985 c H-6, s 3(1) **[TAB 33]**; *The Human Rights Code,* CCSM c H175, s 9(1)–(2) **[TAB 34]**.

that affirmative actions may be required to remedy historical disadvantages.[49]

- *International human rights* recognize that children have rights to preserve their cultural identity independent from their parents.[50] When children are removed from their homes, they have the right to solutions which have due regard to their ethnic, religious, cultural and linguistic backgrounds.[51] It requires governments and institutions to protect against cultural genocide and assimilation.

49. The application of the best interest of the child must seek to break down barriers to cultural connectivity for First Nation children. This necessarily places a positive obligation on trial judges to conduct a meaningful review of Child in Care Plans to ensure the cultural, linguistic, and spiritual needs of First Nation children will be met. In undertaking this analysis, courts must always consider the individual and systemic impacts of colonization.

50. When considering the best interest of the child, agencies and courts have an obligation to grapple with and address the vulnerabilities of First Nation children on a case-by-case basis. Given the direct correlation between the child welfare and criminal justice systems, one way of achieving this would be to apply *Gladue*, *Ipeelee* and *Anderson* principles within child protection hearings.[52]

51. On at least three separate occasions, courts have overturned a trial decision or sent the matter back to the agency for further planning:

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49 *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 199, 399–404, 458–9 **[TAB 35]**.

50 *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, 14.3 [*UNDRIP*] **[TAB 36]**; *CRC*, *supra* note 10 at art 8.1 **[TAB 5]**.

51 *CRC*, *supra* note 10 at arts 8.1, 20 **[TAB 5]**; *UNDRIP*, *supra* note 50 at art 14.3 **[TAB 36]**.

52 *R v Gladue*, [1999] 1 SCR 688 **[Appellant's Case Book, TAB 6]**; *Ipeelee*, *supra* note 24 **[TAB 18]**; *R v Anderson*, 2014 SCC 41 **[TAB 37]**.

- In *T (EJ) v P (PM)*, this Court concluded that the trial judge "got it all wrong" by confirming guardianship to foster parents whose commitment to the child's culture was "lukewarm at best". Culture and heritage were significant factors that could not be treated "as if they were school courses to be taken at some later date".[53]

- 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 "happy acquaintanceship to the native community and culture." While not advocating for a total ban of cross-cultural adoptions or wardship, the decision recognized that such adoptions "present possible future problems for the child."[54]

- In *Metis Chief and Family Services v P F et al*, the court ordered a further temporary order because the 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."[55]

52. Without an interpretation of the best interest of the child that promotes the importance of cultural identity and respects Indigenous laws about children and families, Indigenous children and families will continue to languish. Reconciliation is an ongoing process.[56] It demands an interpretation of the best interest of the child which is reflective of our current values and commitments to the Honour of the Crown, substantive equality, and domestic and international human rights.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF MAY, 2018.

The Intervener estimates that 15 minutes will be required for oral arguments.

PUBLIC INTEREST LAW CENTRE

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53 *T (EJ) v V(PM)*, 110 Man R (2d) 219, 1996 CarswellMan 276 at paras 17, 19 **[TAB 38]**.
54 *R(HI), supra* note 54 at paras 46 and 49 **[TAB 39]**.
55 *Metis Child and Family Services v P F et al*, 2017 MBQB 193 at paras 62–63, 66 **[Appellant's Case Book, TAB 5]**.
56 TRC Report, *supra* note 2 at 16–17 **[TAB 2]**.