

**Docket: A-17-16**

**FEDERAL COURT OF APPEAL**

**BETWEEN:**

**CURTIS LEWIS**

Appellant

- and -

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondent

-and -

**JUSTICE FOR CHILDREN AND YOUTH**

Intervener

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**MEMORANDUM OF FACT AND LAW OF THE INTERVENER  
JUSTICE FOR CHILDREN AND YOUTH**

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**JUSTICE FOR CHILDREN AND YOUTH**

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## **PART I – STATEMENT OF FACTS**

1. JFCY accepts the facts as presented by the Appellant and takes no position where the Respondent might disagree.

## **PART II – INTERVENER'S POSITION ON THE QUESTIONS IN ISSUE**

2. The Immigration Officer incorrectly applied the Best Interests of the Child (BIOC) test by limiting the scope to only the “short term interests” of the child and the resulting analysis was unreasonable. While a removal may be executed for a custodial parent of a child, a fulsome BIOC analysis must occur at the deferral stage.
3. The BIOC principle requires a comprehensive analysis of the unique needs of the affected child including their cultural identity. When the affected child is Aboriginal, the analysis of their cultural identity must consider the harm caused and commitment towards reconciliation by the Canadian government for their history of discrimination towards Aboriginal people.
4. In the alternative, the removal of the parent(s) must be deferred until the BIOC analysis is completed in a Humanitarian and Compassionate grounds application consistent with s. 25 of the *Immigration and Refugee Protection Act*.<sup>1</sup>

## **PART III – BRIEF OF ARGUMENT**

5. JFCY's submissions focus on the BIOC, a fundamental principle of law,<sup>2</sup> that must be assessed in recognition of the child's vulnerable position and in order to comply with Canadian law and international human rights instruments. The BIOC principle has both procedural and substantive aspects and requires comprehensive consideration in both respects.

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<sup>1</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

<sup>2</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 70-71, SCJ No 39 (QL) [Baker] Intervener's Book of Authorities at Vol I, Tab 1 [JBOA].

**(i) Procedural Process:**

6. Procedurally, the BIOC must be the primary consideration in any decision that affects a child.<sup>3</sup> *IRPA* as a whole must be applied and construed in a manner that, *inter alia*, ensures decisions made under it are consistent with the *Charter*, domestic law and in compliance with international human rights instruments to which Canada is a signatory,<sup>4</sup> including the *UN Convention on the Rights of the Child*,<sup>5</sup> *Declaration on the Rights of Indigenous Peoples*,<sup>6</sup> *International Covenant on Economic, Social, and Cultural Rights*,<sup>7</sup> *Convention on Elimination of all Forms of Discrimination*,<sup>8</sup> and the *Universal Declaration on Human Rights*.<sup>9</sup>
7. The BIOC is a fundamental principle of law.<sup>10</sup> The Supreme Court of Canada has held that Canadian laws must be interpreted to comply with Canada's international treaty obligations<sup>11</sup> and that "(c)hildren's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society".<sup>12</sup> The recognition of the inherent vulnerability of children and the importance of attention to their unique interests has consistent and deep roots in Canadian law<sup>13</sup> and has been repeatedly recognized by the

<sup>3</sup> *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 37-40, 3 SCR 909 at Vol I, Tab 2 [JBOA]; UN Committee on the Rights of the Child, *General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UNCRCOR, 62nd Sess, UN Doc CRC/C/GC/14 at para 16 [CRC Comment No 14] [JBOA Vol 2 at Tab 29].

<sup>4</sup> *Supra* note 1 at s. 3.

<sup>5</sup> *Convention on the Rights of the Child*, 28 May 1990, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991) [*Children's Convention*] [JBOA Vol 2 at Tab 30].

<sup>6</sup> *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/RES/61/295 (2007) [UNDRIP] [JBOA Vol 2 at Tab 31].

<sup>7</sup> *International Covenant on Economic, Social, and Cultural Rights*, 993 UNTS 3 (entered into force 3 January 1979, accession by Canada 19 May 1976) [ICESCR] [JBOA Vol 2 at Tab 32].

<sup>8</sup> *International Covenant on the Elimination of All Forms of Racial Discrimination*, 24 August 1966, 660 UNTS 195 (entered into force 4 January 1969, ratified by Canada 14 October 1970) [ICERD] [JBOA Vol 2 at Tab 33].

<sup>9</sup> *Universal Declaration on Human Rights*, 10 December 1948, GA Res 217 A (III), UNGAOR, 3 Sess, Supp No 13, UN Doc A/810 (1948) [UDHR] [JBOA Vol 2 at Tab 34].

<sup>10</sup> *Baker*, *supra* note 2 at paras 70-71.

<sup>11</sup> *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC at para 32, 1 SCR 76 [JBOA Vol 1 at Tab 3].

<sup>12</sup> *Baker*, *supra* note 2 at para 67.

<sup>13</sup> The importance of safeguarding their unique position in Canadian society is demonstrated through a variety of legal measures, including the inherent *parens patriae* power of our courts, child welfare legislation in every province and territory, and the recognition of a shared responsibility to address the developmental challenges and needs of young persons as stated in the preamble to the *Youth Criminal Justice Act* SC 2002, c 1; which also recognizes that Canada is a party to the *Children's Convention*.

Supreme Court.<sup>14</sup>

8. BIOC is “the” Primary Consideration: Article 3(1) of the Convention on the Rights of the Child (*Children’s Convention*) provides that:

(i)n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>15</sup> [Emphasis added]

This is in fact the only primary consideration provided for within the *Children’s Convention*.<sup>16</sup> In the context of migration, the UN Committee on the *Children’s Convention* recently stated that:

In particular, primary consideration should be given to the best interests of the child in any proceeding resulting in the child’s or their parent’s detention, return or deportation<sup>17</sup> [Emphasis added]

9. The UN Committee on the *Children’s Convention* urged Canada, in its report evaluating Canada’s compliance with the *Children’s Convention* to:

Ensure that legislation and procedures use the best interests of the child as the primary consideration in all immigration and asylum processes ... [and] to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child.<sup>18</sup> [Emphasis added]

10. Recently, in *Kanthasamy*, the Supreme Court emphasized the centrality and singular importance of a BIOC analysis<sup>19</sup> and held that:

International human rights instruments to which Canada is a signatory, including the *Convention on the Rights of the Child*, also stress the centrality of the best interests of a child: Can. T.S. 1992 No. 3; *Baker*, at para. 71. Article 3(1) of

<sup>14</sup> *AB v Bragg Communications Inc.*, 2012 SCC 46 at para 17, 2 SCR 567 [JBOA Vol 1 at Tab 4]; *R v DB*, 2008 SCC 25 at para 48, 2 SCR 3 [JBOA Vol 1 at Tab 5]; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 151, 2 SCR [JBOA Vol 1 at Tab 6]; *Baker*, *supra* note 2 at para 67; *Gordon v Goertz*, [1996] 2 SCR 27 at para 44, 134 DLR (4th) 321 [*Gordon*] [JBOA Vol 1 at Tab 7].

<sup>15</sup> *Children’s Convention* *supra* note 5 at Article 3 [JBOA Vol 2 at Tab 30].

<sup>16</sup> CRC Comment No 14, *supra* note 3 at para 16.

<sup>17</sup> UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration*, UNCRCOR at paras 72 [CRC Migration] [JBOA Vol 2 at Tab 35].

<sup>18</sup> UN Committee on the Rights of the Child, *Concluding Observations: Canada*, 65th Sess, CRC/C/CAN/CO/3-4 (2012) at para 74 [CRC Canada] [JBOA Vol 2 at Tab 36].

<sup>19</sup> *Kanthasamy*, *supra* note 3 at para 37-40.

the *Convention* in particular confirms the primacy of the best interests principle.<sup>20</sup>  
[Emphasis added]

11. The Federal Court has consistently held that the BIOC is relevant to the determination of whether or not to defer the removal of a child's custodial parent. Prior to *Kanthasamy*, the BIOC analysis was limited to the so called "short-term" interests of the child.<sup>21</sup> However, *Kanthasamy* directs that the BIOC must be of singular, significant focus in decisions that affect a child. The decision-maker must, from the child's perspective, identify, define and examine the multitude of factors that may impinge on the child's best interests.<sup>22</sup> This has yet to be applied in the deferral context. When applying *Kanthasamy*, in the deferral context, it is clear that the BIOC analysis must also be comprehensive because, "children experience greater hardship than adults when faced with a comparable situation"<sup>23</sup> and the short term impact of a deferral will have long term consequences on a child as set out below in paragraph 16.
12. The UN Committee on the *Children's Convention* has stated that the principle of the BIOC must *take priority* over migration and policy considerations,<sup>24</sup> including deporting a child's parent. This is because children are individual rights holders, not simply the property of their parents. This principle has been recognized in the jurisprudence of the Supreme Court for over thirty years.<sup>25</sup> If a removal order can still be executed when the policy benefits of removal do not outweigh the harm to the child then, the BIOC is deprived of meaning and the child is treated as property rather than as a rights holder.
13. Importantly, the European Court of Justice has recognized the weight that must be accorded to the BIOC analysis in the deportation context because generally if a child's parent is removed, a child citizen is "constructively" deported. Consequently, their right of residency

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<sup>20</sup> *Ibid* at para 37.

<sup>21</sup> See *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, para 50-51, 57, 309 DLR (4th) 41 [JBOA Vol 1 at Tab 8]; *Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, para 34-40, 279 FTR 90 [JBOA Vol 1 at Tab 9]; *Baptiste v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1359, para 9-10, FCJ No 1433 [JBOA Vol 1 at Tab 10].

<sup>22</sup> *Kanthasamy*, *supra* note 3, paras 35-41.

<sup>23</sup> *Ibid* at para 41.

<sup>24</sup> CRC Migration, *supra* note 17 at para 73.

<sup>25</sup> *ANR v LJR*, [1983] 2 SCR 173, para 1, 1 DLR (4th) 193 [JBOA Vol 1 at Tab 11].

is robbed of any meaningful effect or alternatively, the child remains and is deprived of their right to family unity.<sup>26</sup>

**(ii) Substantive Analysis:**

14. In the decision making process, the BIOC framework involves an assessment of various factors that are inevitably unique to each child.<sup>27</sup> The purpose of the BIOC analysis is to “ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child.”<sup>28</sup> In *Kanthasamy*, the Supreme Court outlined how to conduct the BIOC analysis and held that:

It is not only the requirement that the "best interests" be treated as a significant factor in the analysis, it should also influence the manner in which the child's other circumstances are evaluated.<sup>29</sup>

15. When determining whether to remove an Aboriginal child's custodial parent, the most important factors to analyze include the short-, medium-, and long-term consequences to a child and the right to benefit from family unity,<sup>30</sup> cultural identity,<sup>31</sup> and non-discrimination.<sup>32</sup>
16. Short-, Medium-, Long-, Term Impact: By nature of their developmental processes, the short term impact of a removal on a child (even if the removal is temporary) will have a long term impact on their well-being.<sup>33</sup> The BIOC analysis must account for the temporariness of childhood that is marked by an enhanced vulnerability and increased dependence on adults.<sup>34</sup>

<sup>26</sup> *Zhu and Chen v Secretary of State for the Home Department*, [2004] ECR I – 9925, para 45-47, Case-200/02 [JBOA Vol 2 at Tab 27]; *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, ECJ 8 Mar 2011, para 44, 117, Case C-34/09 [JBOA Vol 2 at Tab 38]; Jacqueline Bhabha, “Staying Home: The Elusive Benefits of Child Citizenship” in Jacqueline Bhabha, *Child Migration & Human Rights in a Global Age* (Princeton: Princeton University Press, 2014) 203 at 83-86, 91-93 [JBOA Vol 2 at Tab 38].

<sup>27</sup> CRC Comment No 14, *supra* note 3 para 48 and 49.

<sup>28</sup> CRC Comment No 14, *supra* note 3 at para 82.

<sup>29</sup> *Kanthasamy*, *supra* note 3 at para 41.

<sup>30</sup> *Children's Convention*, *supra* note 5 at Articles 5, 8, and 9.

<sup>31</sup> *Ibid* at Article 2.

<sup>32</sup> *Ibid* at Article 30.

<sup>33</sup> *Catholic Children's Aid Society of Metropolitan Toronto v. CM* [1994] 2 SCR 165, para 44, 35 SCJ No 37 [CM] [JBOA Vol 1 at Tab 12]; CRC Comment No 14, *supra* note 3 at para 93.

<sup>34</sup> CRC Comment No 14, *supra* note 3 preamble, para 16 and 37.

17. Children have a unique perception of the passage of time that is different from and faster than adults. In *CM*, the Supreme Court of Canada held that altering a situation of perceived permanence for a child (even only for a few months) can cause lasting emotional harm;<sup>35</sup> and in *BSC*, the Alberta Court of Appeal emphasized that a BIOC analysis must take a "broad view of past, present and future circumstances and needs of the child."<sup>36</sup> For this reason, in the deferral context, it is not sufficient to consider the short-term BIOC.
18. Family Unity: Family is the natural environment for the growth and well-being of children.<sup>37</sup> Given the gravity of the impact on a child who is separated from their parents, such separation should only occur as a measure of last resort.<sup>38</sup> The Supreme Court has long recognized that separating a child from their parent for child welfare reasons engages both a child and parent's section 7 *Charter* right to security of the person because, "few state actions can have a more profound effect on the lives of both parent and child."<sup>39</sup> As such, the preservation of the child's family unit should be taken into account when assessing the BIOC<sup>40</sup> in the deferral context.
19. Cultural Identity: The unique cultural identity of an Aboriginal child requires particular attention and is a significant factor in a BIOC analysis.<sup>41</sup> The importance of recognizing the unique cultural identity and rights of Aboriginal children is embedded into provincial and federal legislation that relate to children.<sup>42</sup> In the Canadian context, Aboriginal heritage is

<sup>35</sup> *CM*, *supra* note 32.

<sup>36</sup> *BCS v CLJ*, 2007 ABCA 24, para 17, 155 ACWS (3d) 116 [JBOA Vol 1 at Tab 13].

<sup>37</sup> *Children's Convention*, *supra* note 5 at preamble.

<sup>38</sup> CRC Comment No 14, *supra* note 3, para 61.

<sup>39</sup> *New Brunswick (Minister of Health and Community Services) v JG*, [1999] SCR 46, at para 76, 177 DLR (4<sup>th</sup>) 124 [JBOA Vol 2 at Tab 14].

<sup>40</sup> CRC Comment No 14, *supra* note 3 at para 66.

<sup>41</sup> *Van de Perre v Edwards*, 2001 SCC 60 at para 40, 2 SCR 1014 [JBOA Vol 1 at Tab 15]; *Ibid* at para 55; *General comment No 11 (2009): Indigenous children and their rights under the Convention*, UNCRCOR, 50th Sess, UN DOC CRC/C/GC/11 at para 1-5 [CRC Comment 11] [JBOA Vol 2 at Tab 37].

<sup>42</sup> *Youth Criminal Justice Act*, SC 2002, c 1, s. 3(c)(iv); Alberta: *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 at s. 2(p); British Columbia: *Child, Family and Community Service Act*, RSBC 1996, c 46 at s. 2(f), 4(2); *Adoption Act*, RSBC 1996, c 5 at s. 3(2); Manitoba: *The Child and Family Services Act*, CCSM c C80 at Declaration of Principles no. 11; Nunavut: *Adoption Act*, SNWT (Nu) 1998, c 9 at s. 7(7); *Child and Family Services Act*, SNWT (Nu) 1997, c 13 at s. 2(2)(3); Ontario: *Child and Family Services Act*, R.S.O. 1990, CHAPTER C.11 at s. 1(1), 37(4); Prince Edward Island: *Child Protection Act*, RSPEI 1988, c C-5.1 at s. 2(2)(j); Quebec: *Youth Protection Act*, CQLR c P-34.1 at s. 2.4(5)(c); Saskatchewan: *The Child and Family Services Act*, SS 1989-90, c C-7.2 at 61(1); Yukon: *Child and Family Services Act*, SY 2008, c 1 at s. 2(d), 4(2).

more than a race-based consideration,<sup>43</sup> because it has multiple elements including those listed below.

20. Membership to Community: Article 30 of the *Children's Convention* states that for an indigenous child to meaningfully exercise their right to a unique cultural identity, they must have the right to participate *collectively* with members of their group and practice their culture as a part of that community.<sup>44</sup> Multiple provincial appeal courts have recognized that cultural identity cannot be maintained solely by attending the occasion pow-wow or reading Aboriginal stories;<sup>45</sup> and in *Cote*, the Supreme Court recognized the importance of the ongoing connection to community in Aboriginal culture and held that:

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.<sup>46</sup>

21. Significance of Land: A BIOC analysis must consider the cultural significance of an Aboriginal child's right of connection to their traditional land.<sup>47</sup> In *Delgamuukw*, the Supreme Court held that when assessing the unique rights afforded to Aboriginal people under s. 35(1) of the *Constitution Act*, due weight must be given to Aboriginal people's unique and fundamental relationship to land given their history, customs, traditions and practices related to the land.<sup>48</sup> This has been followed by the British Columbia Court of Appeal when evaluating the BIOC in the family law context.<sup>49</sup>

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<sup>43</sup> *G(T) v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 43, para 122, 316 NSR. (2d) 202 (N.S. C.A.) [JBOA Vol 1 at Tab 16]; Blackstock, C., et al, "Reconciliation in child welfare: Touchstones of hope for Indigenous children, youth, and families" (2006) First Nations Child & Family Caring Society of Canada, 10-11 [Blackstock] [JBOA Vol 2 at Tab 39]; Hadley Friedland, "Tragic Choices and the Division of Sorrow: Speaking About Race, Culture and Community Traumatization in the Lives of Children" (2009) 25 Can J Fam L 223 at para 6 (QL) [JBOA Vol 2 at Tab 43].

<sup>44</sup> CRC Comment No 11, *supra* note 40 at para 31.

<sup>45</sup> *EJT v. PMVI*, [1996] MJ No 287, at para 19, 110 Man R (2d) 219 (Man CA) [JBOA Vol 1 at Tab 17]; *AL v KD*, 2000 BCCA 480, para 52, BCWLD 1315 [AL] [JBOA Vol 1 at Tab 18].

<sup>46</sup> *R v Côté* [1996] 3 SCR 139 at para 56, SCJ No 9 [JBOA Vol 1 at Tab 19].

<sup>48</sup> *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, para 84, 114, 153, 176, DLR (4th) 1993 [JBOA Vol 1 at Tab 20].

<sup>49</sup> *AL*, *supra* note 44, at para 52.

22. Non-Discrimination: Freedom from discrimination is a fundamental right guaranteed under the *Canadian Human Rights Act*<sup>50</sup> and in all the international human treaties and covenants listed in paragraph 6 of this factum.<sup>51</sup> The Canadian Human Rights Senate Committee recognized that, “the protection of Aboriginal children’s rights is an issue of primary importance for all Canadians and an issue of fundamental concern with respect to Canada’s compliance with the *Children’s Convention*.”<sup>52</sup>
23. Aboriginal children are among the most vulnerable children in Canada.<sup>53</sup> In the report titled: *Honouring the Truth, Reconciling for the Future*, the Truth and Reconciliation Commission of Canada<sup>54</sup> describes the source of the current vulnerability of Aboriginal children as being intimately tied to the legacy of residential schools:
- Many of today’s aboriginal children and youth live with the legacy of residential schools every day, as they struggle to deal with high rates of addiction, fetal alcohol syndrome, mental health issues, family violence, incarceration of parents and the intrusion of child welfare authorities.<sup>55</sup>
24. Canada’s history of discrimination with residential schools, an action previously deemed to have been in the “best interests” of Aboriginal children, has been documented as cultural genocide.<sup>56</sup> This history coupled with the Canadian government’s *sui generis* relationship

<sup>50</sup> *Canadian Human Rights Act*, RSC 1985, c H-6, s. 2.

<sup>51</sup> *Children’s Convention*, *supra* note 5 at Article 2; ICESCR, *supra* note 7 at Article 2; ICERD, *supra* note 8 at Articles 6, and 7; UDHR, *supra* note 9 at Articles 7, 8, and 22. See also: Committee on the Rights of the Child, 2003 *Day of General Discussion on the Rights of Indigenous Children: Recommendations*, 34<sup>th</sup> Sess, UNCRCOR at preamble, para 2, 9-11, 17 [CRC Migration] [JBOA Vol 2 at Tab 39].

<sup>52</sup> Canada, Senate, Standing Committee on Human Rights, *Children: The Silenced Citizens, Effective Implementation of Canada’s Obligations with Respect of Children* (April 2007) 172 and 179 (Chair: Raynell Andreychuk) [JBOA Vol 2 at Tab 26].

<sup>53</sup> CRC Canada, *supra* note 18 at para 32, 33, 42, 46, 55, 65, 67, 69, 85; Canadian UNICEF Committee, *Canada’s Supplement to the State of the World’s Children 2009, Aboriginal Children’s Health: Leaving No Child Behind* (2009) at page 3 [JBOA Vol 2 at Tab 40]; *First Nations Child and Family Caring Society of Canada v Canada (Minister of Indian Affairs and Northern Development)*, 2016 CHRT 2, para 383, 406-427, 467, CHRD No 2 [JBOA Vol 2 at Tab 21]; Special Rapporteur on the rights of indigenous peoples, *The situation of indigenous peoples in Canada*, 27<sup>th</sup> Sess, A/HRC/27/52/Add.2 (2014), [Indigenous Canada][JBOA Vol 2 at Tab 38].

<sup>54</sup> The Truth and Reconciliation Committee founded as a component of the Canadian Government’s Residential Schools Settlement Agreement, has a mandate to inform all Canadians about what happened in Indian Residential schools and document the truth of everyone personally affected.

<sup>55</sup> *Summary of the Final Report of the Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling the Future*, Truth and Reconciliation Commission of Canada, 31 May 2015 at v-vi, 1-3, 183 [JBOA Vol 2 at Tab 41].

<sup>56</sup> *Ibid* at v-vi, 1-3 and 183; S Bernd Walter, Janine Isenegger, & Nicholas Bala, “‘Best Interests’ in Child Protection Proceedings: Implications and Alternatives” (1995) 12 Can J Fam L 367 at para 74 (QL) [JBOA Vol 2 at Tab 42].

with Aboriginal people<sup>57</sup> heightens the requirement to ensure that such assimilative practices are forever removed from the BIOC evaluation of a child's right to their Aboriginal cultural identity.<sup>58</sup>

25. In the General Comment on Indigenous Children, the UN Committee on the *Children's Convention* recognizes the need to analyze historic discrimination in order to properly recognize, respect, and preserve Aboriginal culture, history, language and their way of life, and that proactive measures may be required to diminish or eliminate the conditions that cause discrimination.<sup>59</sup>

26. In *Gladue*, the Supreme Court held that when applying Section 718.2(e) of the *Criminal Code*, the sentencing judge must look at:

- the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
- the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.<sup>60</sup>

These "Gladue Principles" were designed to ameliorate the historical discrimination and disadvantage of Aboriginal people in Canada.<sup>61</sup>

27. In *Ipeelee*, Justice LeBel found that the systemic circumstances of Aboriginal people in Canada provide the *necessary context* for understanding and evaluating case-specific information, and that the moral blameworthiness of an Aboriginal offender must be assessed in the context of their lived experience of intergenerational trauma.<sup>62</sup> This assessment looks

<sup>57</sup> *R v Wewaykum Indian Band*, 2002 SCC 79 at para 79-89, 4 SCR 245 [JBOA Vol 2 at Tab 22].

<sup>58</sup> Blackstock, C., Brown, I., & Bennett, M., "Reconciliation: Rebuilding the Canadian child welfare system to better serve Aboriginal children and youth" in I. Brown, et al, eds, (Prairies Child Welfare Consortium 2007) *Putting a human face on child welfare: Voices from the Prairies*, 59 at 62 [JBOA Vol 2 at Tab 44]; Indigenous Canada supra note 50 at preamble and para 9.

<sup>59</sup> CRC Comment No 11, supra note 40 at para 18, para 25 and para 41.

<sup>60</sup> *R v Gladue* [1999] 1 SCR 688, para 66, SCJ No 19 [JBOA Vol 2 at Tab 23].

<sup>61</sup> *Ibid* at para 93.

<sup>62</sup> *R v Ipeelee*, 2012 SCC 13, para 60, 73 and 82, 91 CR (6<sup>th</sup>) 1 [Appellants Book of Authorities].

at how the Aboriginal offender's birth and childhood significantly impact their current situation.<sup>63</sup>

28. The Gladue Principles fit into Canada's broader obligations for reconciliation with all Aboriginal people. As the Supreme Court held recently in *Daniels*, Canada is entering "another chapter in the pursuit of reconciliation and redress" in its relationship with Aboriginal peoples.<sup>64</sup> The Ontario Court of Appeal has held that the unique statutory obligations for Aboriginal children in child welfare courts in Ontario exist as a reconciliatory action<sup>65</sup> akin to the Gladue Principles.
29. Irrespective of whether the Gladue Principles should be considered in the immigration context, the analysis of the Gladue Principles mirrors the expected analysis of the principle of non-discrimination in the BIOC analysis because of the Canadian government's unique relationship with and history of discrimination towards Aboriginal people.
30. **Conclusion:** A fulsome analysis of the short-, medium-, and long-term consequences unique to an Aboriginal child must be central to the BIOC analysis. The BIOC must be the primary consideration in deciding whether to execute a removal order for the custodial parent of an Aboriginal child in compliance with domestic and international law.

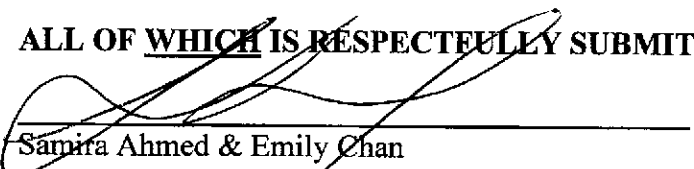
#### PART IV – SUBMISSIONS RELATING TO COSTS

31. JFCY does not seek costs and asks that costs not be ordered against them.

#### PART V – ORDER REQUESTED

32. This Honourable Court grant this appeal. JFCY requests 30 minutes for oral arguments.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of October, 2016.**

  
 Samira Ahmed & Emily Chan  
 Counsel for the Intervener Justice for Children and Youth

<sup>63</sup> Amy Bombay, Kim Matheson & Hymie Anisman, "Intergenerational Trauma: Convergence of Multiple Processes among First Nations peoples in Canada" (2009) 5:3 JAH 6 at page 7, 15-18, and 28-29 [JBOA Vol 2 at Tab 24].

<sup>64</sup> *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, para 1, 264 ACWS (3d) 552 [JBOA Vol 2 at Tab 24].

<sup>65</sup> *Algonquins of Pikwakanagan v. Children's Aid Society of the County of Renfrew*, 2014 ONCA 646, para 61, 50 RFL (7th) 272 [JBOA Vol 2 at Tab 25].