IN THE HIGH COURT OF THE DOMINION OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

B E T W E E N :

BRITISH COLUMBIA (DIRECTOR OF CHILD, FAMILY AND COMMUNITY SERVICES) and DON STERLING

Appellants

– AND –

KEITH BAXTER AND JASMINE LIU

Respondents

FACTUM OF THE RESPONDENTS

COUNSEL FOR THE RESPONDENTS:

TEAM 13

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PART I – OVERVIEW

1. Subsection 17(5) of the British Columbia *Adoption Act* destroys the Respondents' family without regard for the best interests of Xavier Jackson. Specifically, the provision severs the family ties that the Respondents, Mr. Keith Baxter and Ms. Jasmine Liu, have forged with Xavier, a four-year-old aboriginal boy whom they have nurtured for roughly eighty-five percent of his life. Subsection 17(5) also displaces the individualized adoption regime previously contained in the *Adoption Act* in favour of a blunt approach that can result in placing aboriginal children in homes contrary to their best interests. The question in this case is whether the state is permitted, in furtherance of a noble purpose, to legislate in a manner resulting in such powerful negative consequences.

> *Adoption Act*, RSBC 1996, c 5, ss 2, 3(2), 7, 17(5) [*Adoption Act*].
> Official Problem, Wilson Moot 2014 at paras 5, 11-15 [Official Problem].

2. Subsection 17(5) violates ss. 15 and 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The provision discriminates against Mr. Baxter and Ms. Liu by implying they are inherently ill-suited to raising Xavier in a culturally sensitive manner – despite strong evidence to the contrary – solely on the basis of their race. By breaking up their family, s. 17(5) has also caused the Respondents severe psychological distress in a manner inconsistent with the principles of fundamental justice.

> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 1, 7, 15 [*Charter*].

3. It is imperative that this country does not repeat the atrocities of the residential schools program and the "Sixties Scoop." But s. 17(5) is not the answer. It cannot be that our Constitution permits the state to enact legislation with such significant adverse effects both *within* and *beyond* Canada's aboriginal community. The *Charter* demands more.

PART II – STATEMENT OF FACTS

1. Factual background

4. Keith Baxter and Jasmine Liu seek to adopt Xavier Jackson through a direct placement procedure under the British Columbia *Adoption Act*. Xavier's biological mother, Ms. Christine Jackson, consents to the adoption. His biological father, Mr. Don Sterling, who is a member of the South River First Nation, does not.

Official Problem, *supra* para 1 at 1.

5. Xavier was born on March 3, 2010. In his lifetime, Xavier has lived with Ms. Jackson for approximately 7 months. He has lived with the Respondents for 39 months and continues to live with them today. Xavier has never lived with Mr. Sterling.

Official Problem, *supra* para 1 at paras 5-6, 11-13, 15, 20-21.

6. The Respondents became Xavier's foster parents in June 2010. The Director of Child and Family Services placed Xavier in their care because Ms. Jackson was unable to care for him. Xavier lived with the Respondents for 16 months, during which Mr. Baxter and Ms. Liu integrated him into their extended family. They played with Xavier, read to him every night, and even personalized his room in a theme inspired by the children's show "Dora the Explorer", which Xavier enjoys watching on television. The Respondents returned Xavier to Ms. Jackson when she became able to care for him in October 2011. Though parting with Xavier was devastating for Mr. Baxter and Ms. Liu, they facilitated a smooth transition.

Official Problem, *supra* para 1 at paras 6, 11-12.

7. In February 2012, Ms. Jackson was struggling to care for Xavier and asked the Respondents to adopt him. Elated, they agreed immediately. Xavier moved back with the

Respondents in March 2012 and still lives with them. According to Ms. Sharma, the social worker who assessed Xavier's placement, the Respondents are "exceptionally prepared to be parents" and will provide Xavier with a "loving environment." Xavier recognizes the Respondents – whom he calls "Mama" and "Daddy" – as his parents.

Official Problem, *supra* para 1 at paras 13-15, 26.

8. The Respondents are committed to fostering Xavier's unique aboriginal heritage. They are taking an aboriginal cultural training program offered by a Vancouver aboriginal cultural centre. They have also taken Xavier to visit the South River reserve, and plan to continue doing so.

Official Problem, *supra* para 1 at paras 24-25.

9. Mr. Sterling has never been involved in Xavier's upbringing. Mr. Sterling's relationship with Ms. Jackson ended in the summer of 2009, before Xavier was born, when he informed her that he had no interest in raising their child. Mr. Sterling was arrested for shoplifting and hashish possession in May 2012, although those charges were withdrawn. After he happened to hear through an acquaintance that Ms. Jackson was placing a son for adoption, Mr. Sterling contacted the Respondents in September 2012 to oppose the adoption and to seek custody of Xavier. Xavier does not understand who Mr. Sterling is. Ms. Sharma expressed concern about Mr. Sterling's ability to raise Xavier and is worried that Mr. Sterling, who has struggled with substance abuse, may relapse.

Official Problem, *supra* para 1 at paras 4, 17, 20-21, 26-27.

2. Legislative history

10. Canada has a history of discriminatory policies to separate aboriginal children from their families, including the residential schools program and the "Sixties Scoop", during which non-aboriginal families foster-parented or adopted 20,000 aboriginal

children between 1960 and 1990. Many of the adopted children were abused and never told of their aboriginal heritage. In 1995, British Columbia amended its adoption legislation to affirm the importance of preserving aboriginal cultural identity.

Official Problem, *supra* para 1 at para 29.
Adoption Act, *supra* para 1, ss 3(2), 7.

11. In 2008, British Columbia added s. 17(5) to the *Adoption Act*. Its purpose is to ensure that the "cultural heritage and identity of aboriginal children and the rights of aboriginal biological parents" are further protected in direct placement adoptions.

Official Problem, *supra* para 1 at 1.

3. Procedural history

12. The Respondents applied for an adoption order, an order dispensing with Mr. Sterling's consent to the adoption, and an order that s. 17(5) be struck down for violating ss. 15 and 7 of the *Charter*. Murakami J dismissed the application, holding that the impugned provision does not violate s. 15(1) because it is an ameliorative law under s. 15(2), and does not violate s. 7 because it respects the principles of fundamental justice. However, Murakami J noted that the proposed adoption is in Xavier's best interests.

Official Problem, *supra* para 1 at 2, 9.

13. Ali JA, Finnerty JA concurring, allowed the appeal. He found s. 17(5) is not an ameliorative law under s. 15(2), and it violates s. 15(1) by assuming the Respondents cannot properly raise Xavier because of their ethnicity. Ali JA found that s. 17(5) also violates s. 7 by arbitrarily depriving the Respondents of security of the person. In dissent, Downie JA found that the impugned provision is an ameliorative law under s. 15(2) and, alternatively, that it does not violate s. 15(1) of the *Charter*.

Official Problem, *supra* para 1 at 9-10.

PART III – STATEMENT OF ISSUES

14. The present appeal raises three issues:

Issue 1: Does s. 17(5) of the *Adoption Act* infringe s. 15 of the *Charter*?

The Respondents' position is that s. 17(5) draws a distinction on the prohibited ground of race; the law is not ameliorative under s. 15(2); and it discriminates against non-aboriginal prospective adoptive parents under s. 15(1).

Issue 2: Does s. 17(5) of the *Adoption Act* infringe s. 7 of the *Charter*?

The Respondents' position is that s. 17(5) deprives the Respondents of security of the person in a manner that is overbroad, arbitrary, grossly disproportionate, and inconsistent with the best interests of a child, Xavier.

Issue 3: If the answer to issues 1 or 2 is "yes", is the infringement demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

The Respondents' position is that, although s. 17(5) has a pressing and substantial objective, it is not rationally connected to this objective; the provision is not minimally impairing; and its deleterious effects outweigh its salutary effects.

PART IV – ARGUMENT

Issue 1: Subsection 17(5) of the *Adoption Act* discriminates against prospective adoptive parents who are non-aboriginal under s. 15 of the *Charter*

15. Subsection 17(5) of the *Adoption Act* violates s. 15 of the *Charter*. The impugned provision creates a distinction based on the enumerated ground of race, is not ameliorative pursuant to s. 15(2), and is discriminatory under s. 15(1). The test for discrimination outlined in *Kapp* and affirmed in *Quebec* is met.

> *R v Kapp*, 2008 SCC 41 at paras 40-41, [2008] 2 SCR 483 [*Kapp*].
> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 324, [2013] 1 SCR 61 [*Quebec*].

1. Subsection 17(5) of the *Adoption Act* draws a distinction based on the enumerated ground of race

16. Subsection 17(5) gives aboriginal prospective adoptive parents priority over non-aboriginal prospective adoptive parents. In doing so, the provision draws a distinction based on race, a ground expressly prohibited in s. 15(1) of the *Charter*. All levels of court in this case accepted that s. 17(5) draws such a distinction, including both the majority and dissent at the British Columbia Court of Appeal.

> *Kapp*, *supra* para 15 at para 56.
> Official Problem, *supra* para 1 at 9, 10.

17. Subsection 17(5) prioritizes prospective aboriginal adoptive families over prospective non-aboriginal adoptive families by mandating a search for aboriginal adoptive parents before non-aboriginal adoptive parents may be considered. The requirement of a search for a suitable aboriginal adoptive family is a necessary implication of s. 17(5). The only reasonable interpretation of the provision is that an aboriginal biological parent's consent is required in all but two situations:

(a) First, if there is a risk of serious harm to the child and a suitable aboriginal adoptive family *can* be found, consent will be dispensed with and the child will be placed with the aboriginal adoptive family. This result is implied by s. 17(5).

(b) Second, if there is a risk of serious harm to the child and a suitable aboriginal adoptive family *cannot* be found, consent will be dispensed with and the child will be placed with the non-aboriginal adoptive family. This result is simply a restatement of the two prongs of s. 17(5).

18. A non-aboriginal prospective adoptive family must therefore cross two hurdles for consent to be dispensed with: (1) a risk of serious harm to the child *and* (2) a suitable alternative aboriginal placement is not possible. An aboriginal family, however, must cross only the first hurdle to dispense with consent and adopt a child under s. 17(5).

19. The language and structure of s. 17(5) are difficult. Adopting a purposive reading that is attentive to the consequences of the proposed interpretation is therefore important. A literal reading of s. 17(5) is untenable: the statute cannot possibly mean that the court does *not* dispense with the aboriginal biological parent's consent when an aboriginal child is at a serious risk of harm and a suitable aboriginal adoptive placement is possible. Such an interpretation would force an aboriginal child to be subjected to a serious risk of harm, even if a suitable aboriginal member of the child's extended family is able to provide a home for the child – a completely absurd result.

20. Subsection 17(5) makes it more difficult for Mr. Baxter and Ms. Liu to adopt Xavier because they are not aboriginal. Accordingly, s. 17(5) draws a distinction based on the enumerated ground of race, triggering the rest of the s. 15 equality analysis.

Kapp, *supra* para 15 at para 56.

2. Subsection 17(5) of the *Adoption Act* is not an ameliorative law under s. 15(2) of the *Charter*

21. Subsection 17(5) of the *Adoption Act* does not qualify as an ameliorative program under s. 15(2) of the *Charter* because when it is applied to privilege the consent of the aboriginal biological parent, the provision *harms* aboriginal children – the very group the provision purports to benefit. In this way, s. 17(5) does not "serve" and is not "necessary to" its purpose and therefore fails the s. 15(2) test outlined in *Kapp*. In the alternative, to achieve substantive equality, the purpose-driven s. 15(2) inquiry articulated in *Kapp* should be complemented by a more robust examination of the effects of the program. The harmful effects of s. 17(5) on aboriginal children prevent the provision from being an ameliorative law.

Kapp, *supra* para 15 at paras 40, 41, 52.

A. Subsection 17(5) does not serve an important part of the Legislature's ameliorative purpose because it harms rather than benefits aboriginal children

22. Subsection 17(5) does not satisfy the two-stage s. 15(2) test:

(a) while the law is part of a "genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance" (*Cunningham*),

(b) the impugned distinction drawn by the provision does not "serve" and is not "necessary to" a central component of the ameliorative purpose (*Kapp*).

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at paras 44-45, [2011] 2 SCR 670 [*Cunningham*].
Kapp, *supra* para 15 at paras 40, 41, 52.

23. Murakami J accepted that the purpose of s. 17(5) is to ensure that the cultural heritage and identity of aboriginal children and the rights of aboriginal biological parents are given increased protection in direct placement adoptions. The Respondents concede

that s. 17(5) serves the objective of giving the rights of aboriginal biological parents increased protection. However, s. 17(5) does not serve the central purpose of enhancing the cultural heritage and identity of aboriginal children.

> Clarifications to the Official Problem, Wilson Moot 2014 at para 4 [Clarifications].

24. Rather than enhancing aboriginal culture and identity, the impugned provision *damages* this objective. Subsection 17(5) can privilege an aboriginal biological parent's consent even when doing so is contrary to a child's best interests. This is what has occurred in this case, as Murakami J found that the adoption was in Xavier's best interests. A law that actively impinges on the best interests of aboriginal children will, in the long term, adversely impact the vitality of aboriginal peoples by exacerbating the vulnerability of the next generation of aboriginal youth. Children subjected to the s. 17(5) regime can be placed in households contrary to their best interests, solely because of their aboriginal heritage. These children may grow up to resent their aboriginal heritage, instead of embracing it. This is contrary to the purpose of the law.

> Official Problem, *supra* para 1 at 9.

25. The Supreme Court of the United States, in a recent case with strikingly similar facts, accepted a similar line of argument: "The Indian Child Welfare Act was enacted to preserve the cultural identity and heritage of Indian tribes, but […] the Act would put certain vulnerable children at a great disadvantage solely because an ancestor – even a remote one – was an Indian." Imbedded in the s. 15(2) concept of 'ameliorating disadvantage' is the notion that "[a] valid affirmative action program may treat a disadvantaged group differently from others on the basis of an enumerated or analogous ground, <u>but it cannot disadvantage it</u>" (Tremblay).

Adoptive Couple v Baby Girl, 133 S Ct 2552 at 2565, 186 L Ed 2d 729 (2013).

Luc B Tremblay, "Promoting Equality and Combating Discrimination Through Affirmative Action: The Same Challenge? Questioning the Canadian Substantive Equality Paradigm" (2012) 60 Am J Comp L 181 at 198 (emphasis added) [Tremblay].

26. The facts of this case exemplify the negative impact s. 17(5) has on aboriginal children. Privileging Mr. Sterling's consent over Xavier's best interests will result in stripping Xavier of two people he calls "Mama" and "Daddy" and placing him with a man who has avoided his parental duties for the duration of Xavier's life. Further, Mr. Baxter and Ms. Liu are highly committed to raising Xavier in a manner that preserves and enhances his aboriginal heritage and identity. It is unclear, on the other hand, whether Mr. Sterling will be capable of effectively raising Xavier given his struggles with substance abuse and the law. If s. 17(5) is upheld and Xavier is placed with Mr. Sterling, Xavier will be placed in an environment that is potentially less conducive to preserving his aboriginal heritage and identity.

Official Problem, *supra* para 1 at paras 5, 20-21, 24-27.

27. The social science evidence accepted by Murakami J concerning the adverse effects aboriginal children may experience when adopted by non-aboriginal families has little application to this case. This evidence seems to contemplate uprooting an aboriginal child from her aboriginal community. But in this case, Xavier has had little exposure to his aboriginal community. His family life has crystallized with the Respondents. The only way to uproot Xavier would be to separate him from Mr. Baxter and Ms. Liu.

Official Problem, *supra* para 1 at para 29.

28. It is not possible to disaggregate the best interests of aboriginal children from the desire to enhance aboriginal cultural identity. In many ways, aboriginal children *are*

aboriginal culture. Adverse effects on aboriginal children are adverse effects on aboriginal culture.

29. Subsection 17(5) does not qualify as an ameliorative program because the bluntness of the impugned distinction undermines, rather than serves, the law's central purpose of protecting the cultural heritage and identity of aboriginal children. Although s. 17(5) furthers the objective of protecting the rights of aboriginal biological parents, the objective pertaining to the cultural identity of aboriginal youth is far more important in light of the overarching purpose of the *Adoption Act*: "to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests." The rights of aboriginal biological parents are important; however, the impact of the impugned law on aboriginal children is the crux of the analysis.

Adoption Act, *supra* para 1, s 2 (emphasis added).

B. In the alternative, substantive equality will be achieved only if greater latitude is given to scrutinize the effects of the law in the s. 15(2) analysis

30. If this Court does not accept that s. 17(5) fails to meet the s. 15(2) test articulated in *Kapp*, the Respondents submit in the alternative that this case indicates the need for a re-examination of the purpose-driven approach to s. 15(2). *Kapp* was a straightforward decision because, unlike in this case, the effects of the law in question (giving aboriginal fishermen additional time to fish) aligned with the law's ameliorative purpose (assisting aboriginal fishermen). However, the Court conceded in *Kapp* that the test only "provides a basic starting point" that "leaves open the possibility for future refinement."

Kapp, *supra* para 15 at paras 41, 58.

31. To achieve substantive equality, courts must be given greater latitude to consider the *effects* of the law in question in the s. 15(2) analysis. Failing to meaningfully consider

the effects of purported ameliorative programs will shield a whole category of legislation from robust constitutional scrutiny. Some negative externalities must be tolerated when the Legislature attempts to ameliorate the conditions of a historically disadvantaged group. However, negative effects that accrue to the precise group the legislation purports to benefit, as is the case here, are not acceptable.

Tremblay, *supra* para 25 at 198.

32. An approach that permits greater examination of the effects of the law aligns with the momentum of the equality jurisprudence. First, the enactment of the *Charter* marked a move toward scrutinizing state action that breaches rights *in effect*. This was a move away from the *Canadian Bill of Rights* approach, which emphasized *intended* rights infringements. As Wilson J discussed in *Turpin*, giving undue weight to the state's legislative purpose at the breach of the right stage is an inappropriate reversion to the *Canadian Bill of Rights* era. Second, giving sufficient attention to legal effects resonates with the spirit of *Quebec*: discrimination is an effects-driven inquiry. The purpose of the law should chiefly be considered at the s. 1 stage, where the state bears the burden of justifying its action within the proportionality framework.

Canadian Bill of Rights, RSC 1985, App III, s 1(b).
R v Turpin, [1989] 1 SCR 1296 at paras 44-45, 48 CCC (3d) 8 [*Turpin*].
Quebec, *supra* para 15 at paras 328, 333.

33. There are three important adverse effects of s. 17(5) that undermine the provision as an ameliorative program:

(a) Subsection 17(5) may make it more difficult for aboriginal children to be placed into stable, loving households. A non-aboriginal foster or prospective adoptive parent may be discouraged from opening her home to an aboriginal child with the knowledge that s. 17(5) could make it impossible to adopt the child. As a result,

s. 17(5) will intensify the existing overrepresentation of aboriginal children in foster care. Further, even when aboriginal children are placed with non-aboriginal foster families, s. 17(5) may discourage the family from developing emotional ties with the child as the child could be abruptly taken away from them.

(b) As discussed above, s. 17(5) may result in aboriginal children resenting their aboriginal heritage, rather than embracing it.

(c) Subsection 17(5) replaces the nuanced 'best interests of the child' approach – an approach that already accounts for preserving the child's aboriginal heritage – with a blunt regime that in many cases will result in placing the child in a home contrary to his or her best interests, as in this case. Such an approach is in direct opposition to the *Adoption Act*'s purpose of "giving paramount consideration in every respect to the child's best interests." In this case, Murakami J, who is particularly attentive to the importance of preserving aboriginal culture, noted that it would be in Xavier's best interests to remain with the Respondents.

Official Problem, *supra* para 1 at para 29 and at 9.
Adoption Act, *supra* para 1, ss 2, 3(2).

34. The pursuit of substantive equality requires greater scrutiny of the state's actions. The negative effects s. 17(5) has on aboriginal children – the very group the provision purports to protect – prevent it from being considered an ameliorative law under s. 15(2).

3. Subsection 17(5) of the *Adoption Act* discriminates against Mr. Baxter and Ms. Liu and thus violates their equality rights under s. 15(1) of the *Charter*

35. Subsection 17(5) discriminates against Mr. Baxter and Ms. Liu: the law compounds the disadvantages they face as prospective adoptive parents, and perpetuates

prejudiced beliefs and false stereotypes about their needs, circumstances, and characteristics.

36. The Supreme Court's decision in *Quebec* confirms that a law is discriminatory if it perpetuates a disadvantage on the claimants. Writing for the majority on the issue of s. 15(1), Abella J was clear that, although prejudice and stereotyping are valuable indicia of disadvantage, "they are not discrete elements of the test which the claimant is obliged to demonstrate."

Quebec, *supra* para 15 at paras 323, 325.

37. Under s. 15(1), the Court should take the perspective of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant" (*Law*). Section 15 is aimed at preventing discriminatory *conduct*, regardless of "the underlying attitude or motive" (*Quebec*). That s. 17(5) has a noble purpose does necessarily defeat the Respondents' discrimination claim.

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 60, 170 DLR (4th) 1 [*Law*].
Quebec, *supra* para 15 at para 328.

A. Subsection 17(5) of the Adoption Act perpetuates prejudiced beliefs and stereotypes about prospective adoptive parents

38. Subsection 17(5) perpetuates prejudice and stereotyping against non-aboriginal prospective adoptive parents. Prejudicial attitudes are perpetuated by legislation that leads a reasonable observer to conclude that the claimant is less worthy of respect or less capable as a result of an immutable characteristic (*Trociuk*; *Law*). A reasonable observer would conclude that s. 17(5) of the *Adoption Act* implies that non-aboriginal adoptive

parents are less capable of raising an aboriginal child than aboriginal parents because of the limits imposed by their race. This is prejudicial.

> *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34 at para 21, [2003] 1 SCR 835 [*Trociuk*].
> *Law*, *supra* para 37 at para 88.

39. Subsection 17(5) also perpetuates stereotyping against non-aboriginal prospective adoptive parents. Abella J described stereotyping in *Quebec* as a disadvantaging attitude "that attributes characteristics to members of a group regardless of their actual capacities." Mr. Baxter and Ms. Liu are deeply committed to protecting and enhancing Xavier's cultural heritage: the couple is taking a First Nations cultural training program offered at an aboriginal cultural centre and they have taken Xavier to visit the South River reserve, which they intend to continue doing. Even though Mr. Baxter and Ms. Liu have made, and are committed to continue making, reasonable efforts to foster Xavier's cultural identity and heritage, s. 17(5) rejects these efforts. No matter what the Respondents do, the law implies that they are less capable as a result of their race. In doing so, the provision discriminates against Mr. Baxter and Ms. Liu.

> *Quebec*, *supra* para 15 at para 326.
> Official Problem, *supra* para 1 at paras 24-25.

B. Subsection 17(5) of the Adoption Act exacerbates the disadvantage experienced by prospective adoptive parents

40. Subsection 17(5) compounds the existing disadvantages faced by prospective adoptive parents. The fact that members of a claimant group are also members of other disadvantaged and vulnerable groups buttresses the equality claim and increases the need to ensure legislation does not adversely impact the group.

New Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46 at para 114, 177 DLR (4th) 124, L'Heureux-Dubé J, concurring [*G(J)*].

Withler v Canada (Attorney General), 2011 SCC 12 at para 63, [2011] 1 SCR 396.

41. Prospective adoptive parents are comprised of various intersecting marginalized groups: same-sex couples, those biologically incapable of having children, and single prospective parents. These intersecting marginalized groups heighten the vulnerability of prospective adoptive parents more generally. Subsection 17(5) worsens the disadvantage experienced by non-aboriginal prospective adoptive parents by making it harder for them to adopt aboriginal children solely on the basis of an immutable characteristic.

42. It may seem counterintuitive to suggest that the Respondents – two well-educated, affluent individuals – are at a disadvantage in our society. However, for many prospective adoptive parents, the inability to create a child biologically can be a source of shame and embarrassment. Subsection 17(5) exacerbates these feelings and implies that non-aboriginal adoptive parents are less capable of raising a child in a culturally sensitive manner.

43. In *Pratten*, the British Columbia Court of Appeal found that adoptees are a historically disadvantaged group because they are subject to "negative social characterization." It is difficult to divorce negative attitudes toward adoptees from attitudes concerning adoptive parents. The fact that the former group experiences negative attitudes naturally leads to the conclusion that, by association, the latter do as well.

Pratten v British Columbia (Attorney General), 2012 BCCA 480 at para 38, 357 DLR (4th) 660 [*Pratten*].

44. Even if this Court does not accept that prospective non-aboriginal adoptive parents are members of a disadvantaged group, in *Trociuk*, a case involving a claim brought forward by a heterosexual white male, the Supreme Court explicitly rejected the notion that "the absence of historical disadvantage is a compelling factor against a finding of discrimination."

Trociuk, *supra* para 38 at para 20.

C. The interests at stake are significant

45. The Respondents' interests affected in this case are significant. The nature of the affected interests is an important factor in determining if a law perpetrates disadvantage (*Law*). Severing a child from two people who have formed a profound relationship with the child is a grave consequence. In *Trociuk*, Deschamps J held that the claimant's discrimination claim was bolstered by the weighty interest at play: a father's interest in having his child adopt his last name. The interest at stake in this case – the bond between Xavier and the Respondents developed over more than three years – is perhaps even more significant than the interest at stake in *Trociuk*. Such an important interest is worthy of protection.

Law, *supra* para 37 at para 74.
Trociuk, *supra* para 38 at paras 14-19.

Issue 2: Subsection 17(5) infringes section 7 of the *Charter*

46. Subsection 17(5) of the *Adoption Act* violates s. 7. By effectively preventing the Respondents' proposed adoption of Xavier, s. 17(5) deprives them of security of the person in a manner inconsistent with the principles of fundamental justice.

Canada (Attorney General) v Bedford, 2013 SCC 72 at para 58, [2013] SCJ no 72 (QL) [*Bedford*].

1. Subsection 17(5) deprives the Respondents of security of the person

47. Subsection 17(5) infringes the Respondents' security of the person because it causes them severe psychological distress by severing their relationship with Xavier. The Supreme Court held in *G(J)* that the state's removal of a child from her parent's custody can infringe the parent's security of the person by violating the parent's psychological integrity. *G(J)*'s holding is not limited to situations where the state removes a child from the custody of his "biological or adoptive parent" (*CM*). To deny that the state deprived the Respondents of security of the person merely because they were not legally Xavier's parents is to engage in a formalistic analysis that wrongly privileges "legal label[s]" over the "interests at stake" (*Charkaoui*). Rather, "[a]s the history of modern family law demonstrates, fairness requires that we look at the *content* of the relationship's social package, not at how it is wrapped" (*Quebec*).

> *G(J)*, *supra* para 40 at paras 60-61.
> *CM v New Brunswick (Minister of Justice and Consumer Affairs)*, 2012 NBCA 45 at para 38, 397 NBR (2d) 321 [*CM*].
> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 18, [2007] 1 SCR 350 [*Charkaoui*].
> *Quebec*, *supra* para 15 at para 285, Abella J (emphasis in original).

48. Accordingly, the state's removal of a child can infringe the psychological integrity of any person who cares for the child in day-to-day life, demonstrating a "settled intention to treat the child as a child of his or her family" (*CM*). Since the impact of the state interference on the claimant's psychological integrity must be assessed objectively (*G(J)*), in order for the removal of the child to engage the claimant's security of the person, the claimant must have a reasonable expectation that the child will remain a member of his or her family.

> *CM*, *supra* para 47 at para 38.

G(J), *supra* para 40 at paras 60-61.

49. Xavier's removal will infringe the Respondents' security of the person. In March 2012, when the Respondents "immediately agreed" to adopt Xavier, they began caring for Xavier in day-to-day life and, today, are the "only parental figures [Xavier] recognizes." By integrating Xavier into their extended family, reading to him every night before bedtime, and taking him to "parent-and-tot" swimming lessons on the weekend, the Respondents have formed an indelible bond with Xavier. Furthermore, in March 2012, the Respondents reasonably expected that Xavier would remain a member of their family because they had a reasonable belief that Mr. Sterling would not exercise his right under s. 17(5) to block the adoption. Not only were their reasonable efforts to contact Mr. Sterling unsuccessful, but Mr. Sterling had also never shown the slightest intention of becoming involved in Xavier's life. Given the strength of the Respondents' relationship with Xavier, they reasonably expected that a court would dispense with Mr. Sterling's consent under s. 17(1) so that they could become, in law, what they had already become on the ground – Xavier's parents.

Official Problem, *supra* para 1 at paras 13, 15, 20-21, 26.
Clarifications, *supra* para 23 at para 2.

50. Xavier's removal also infringes the Respondents' security of the person by stigmatizing them as unfit parents. In *G(J)*, a child protection case, one reason why the state conduct infringed the parent's security of the person was that the parent from whom the state removed the child was "stigmatized" as "unfit." Subsection 17(5) stigmatizes the Respondents as unfit to raise Xavier in a culturally appropriate manner. The law draws an unfair parallel between the Respondents and the adoptive parents in the "Sixties Scoop."

G(J), *supra* para 40 at paras 61-62.

51. It is no impediment to the Respondents' argument that Mr. Sterling, not the state, is the immediate cause of the harm. It is Mr. Sterling who refuses to consent to the Respondents' adoption of Xavier. But to engage s. 7, it is sufficient that the state conduct is necessary to effect the harm, and that the harm is a foreseeable consequence of the state conduct, even if the harm "was effected by someone else's hand" (*Suresh*). It is also no obstacle to the Respondents' argument that s. 17(5) may not violate a prospective adoptive parent's security of the person in many of its applications, because the "question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad" (*Bedford*).

> *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 54, [2002] 1 SCR 3 [*Suresh*].
> *Bedford*, *supra* para 46 at para 123 (emphasis in original).

2. The deprivation does not respect the principles of fundamental justice

52. The deprivation of the Respondents' security of the person violates the principles of fundamental justice. It is overbroad, arbitrary, grossly disproportionate, and does not respect the best interests of a child, Xavier.

A. Subsection 17(5) is overbroad

53. Subsection 17(5) is overbroad as it uses "means which are broader than necessary to accomplish [its] objective[s]", which are to give increased protection to aboriginal culture and aboriginal biological parents. Presently, unless the child faces a risk of serious harm in the custody of the aboriginal biological parent, the latter may veto any direct placement adoption – even if the prospective adoptive parent is a member of the child's aboriginal community *and* the adoption is in the child's best interests. It is not necessary to give aboriginal biological parents such power to achieve the purposes of s. 17(5).

R v Heywood, [1994] 3 SCR 761 at para 49, 120 DLR (4th) 348 [*Heywood*].

54. More tailored means are available. One possible alternative is that, instead of assuming that a child's aboriginal heritage is always better preserved in the custody of her aboriginal biological parent, the law could create a rebuttable presumption to this effect. Under this approach, a court would dispense with the biological parent's consent if the prospective adoptive parent could demonstrate that the child's aboriginal heritage would be better preserved through the adoption. This presumption achieves both purposes of s. 17(5). First, it enhances the rights of aboriginal biological parents by presuming they are better suited to raise the child. Second, it preserves aboriginal culture by placing the child in the care of whoever is better suited to raise her in her aboriginal culture.

55. This rebuttable presumption is not the only more tailored alternative. For instance, to protect aboriginal culture in direct placement adoptions, Alberta requires prospective adoptive parents to file a "cultural connection plan" addressing "how the child's connection with aboriginal culture, heritage, spirituality and traditions will be fostered and the child's cultural identity will be preserved." If the adoption order is granted, the adopting parent must take reasonable steps to comply with the plan.

Child, Youth and Family Enhancement Act, RSA 2000, c C-12, ss 63(3)(e), 71.1(a) [*CYFEA*].

56. To protect the rights of aboriginal biological parents and aboriginal communities, Ontario permits adoptive parents to create "openness agreements", whose purpose is to "facilitat[e] communication or maintain[] relationships." The adoptive parents may enter into the agreement with the child's biological parent or, if "the child is an Indian or native person, [with] a member of the child's band or native community…[who] will help the child recognize the importance of his or her Indian or native culture and preserve his or

her heritage, traditions and cultural identity." The agreements are enforceable, as they may contain dispute resolution mechanisms.

Child and Family Services Act, RSO 1990, c C.11, s 153.6 [*CFSA*].

57. This Court need not decide which more tailored possibility best suits the Legislature's purposes. That is for the Legislature to determine. However, the existence of these alternatives is sufficient to demonstrate that s. 17(5) is overbroad.

B. Subsection 17(5) is arbitrary

58. Subsection 17(5) is arbitrary in relation to the purpose of promoting the cultural heritage and identity of aboriginal children because there is "no connection…between its effects and [this] purpose." At best, s. 17(5) is not necessary to achieve this purpose. At worst, s. 17(5) may actually undermine it.

Bedford, *supra* para 46 at paras 118-119.

59. Giving aboriginal biological parents an effective veto over direct placement adoptions is not necessary to promote aboriginal cultural heritage. There "is no reason why children cannot have a stable and loving home through adoption and still be guaranteed a connection with their aboriginal community and cultural roots…even if…the adoption is with a <u>non-aboriginal</u> family." This is demonstrated in the present case, as the Respondents live near the South River reserve, are taking an aboriginal cultural training course, and are committed to raising Xavier in his aboriginal heritage.

Re T(R), 2004 SKQB 503 at para 104, 284 DLR (4th) 303 [*T(R)*] (emphasis added).
Official Problem, *supra* para 1 at paras 19, 24-25.

60. Subsection 17(5) may undermine its objective of protecting the cultural heritage of aboriginal children. All aboriginal biological parents have a presumptive veto over direct placement adoptions, as the consent of both parents is normally required under s.

13. The only parents who benefit from the existence of s. 17(5) are those whose consent would otherwise be dispensed with under s. 17(1), including: parents whose children's best interests consist of dispensing with the parent's consent; or who abandoned their children; or who did not make reasonable efforts to meet their parental obligations; or who cannot care for their children. Courts apply the tests for dispensing with a parent's consent strictly: "only the most serious and important reasons should justify dispensing" with consent (*M(RT)*). There is no reason to think that parents whose consent would otherwise be dispensed with are more capable at inculcating aboriginal culture in children than prospective parents who are better suited to parenthood in the first place. Such parents may actually be less capable at inculcating aboriginal culture in their children.

Adoption Act, *supra* para 1, ss 13(1)(b), 17(1).
M(RT) v S(TS), 2010 BCCA 137 at para 23, 318 DLR (4th) 740 [*M(RT)*].

C. Subsection 17(5) is grossly disproportionate to its purpose

61. Subsection 17(5) is grossly disproportionate because its effects on the Respondents' security of the person are "totally out of sync" with its objective.

Bedford, *supra* para 46 at paras 120-121.

62. The negative effect of s. 17(5) on the Respondents is clear. The law causes them severe psychological distress by breaking up their family.

63. The law's objective is to protect aboriginal culture by preventing the breakup of aboriginal families through adoption. This purpose includes preventing the breakup of familial relationships that exist *only* in law, where a biological parent was never involved in his child's life – such as Mr. Sterling's relationship with Xavier.

64. Subsection 17(5) is grossly disproportionate because it is not "reasonable in relation to the threat" posed by the adoption of aboriginal children by non-aboriginal

persons (*Suresh*). It aims to preserve aboriginal culture by protecting familial relationships that have never been more than formal legal parent-child relationships. In the process, the law destroys stable and loving familial relationships that actually exist on the ground, such as Xavier's relationship with the Respondents.

Suresh, *supra* para 51 at para 47.

D. Subsection 17(5) does not respect the best interests of the child

65. Subsection 17(5) also violates the best interests of the child, which is a principle of fundamental justice in the context of this case.

66. In *G(J)*, the Supreme Court held that one of "the principles of fundamental justice in child protection proceedings…[is] the best interests of the child." However, in *Canadian Foundation*, a subsequent criminal law case, the Supreme Court denied that the best interests of the child is a principle of fundamental justice.

G(J), *supra* para 40 at para 70.
Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), 2004 SCC 4 at paras 9-11, [2004] 1 SCR 76 [*Canadian Foundation*].

67. These cases can be reconciled by acknowledging that the best interests of the child is not a principle of fundamental justice in criminal law, but it is a principle of fundamental justice in proceedings directly involving the care or custody of children (Anand). Goudge JA, writing for the Ontario Court of Appeal in *Canadian Foundation*, recognized this possibility when he denied that the best interests of the child was a principle of fundamental justice in criminal law, but left open the possibility that in "family law…if the removal by the state of a child from a parent's custody infringes the parent's right to security of the person, fundamental justice may require an evaluation of the best interests of the child."

Sanjeev Anand, "Reasonable Chastisement: A Critique of the Supreme Court's decision in the 'Spanking' Case" (2004) 41 Alta L Rev 871 at 874 [Anand].

Canadian Foundation for Children, Youth and the Law v Canada (Attorney General) (2002), 57 OR (3d) 511 at para 38, 207 DLR (4th) 632 (CA) (emphasis added).

68. In the context of proceedings directly involving the care or custody of children, the best interests of the child meets the three requirements for recognition as a principle of fundamental justice. First, it is a legal principle (*Malmo-Levine*). Second, there is "significant social consensus" that it is "fundamental" to the fair operation of the legal system (*Malmo-Levine*) because, in this context, "paramount consideration in every respect [is given] to the child's best interests" (*Adoption Act*). Third, it can be "identified with sufficient precision" (*Malmo-Levine*) as it is already applied in many legal contexts. Subsection 17(5) violates this principle because, as Murakami J found, it frustrates Xavier's best interests.

R v Malmo-Levine; R v Caine, 2003 SCC 74 at para 113, [2003] 3 SCR 571 [*Malmo-Levine*].

Adoption Act, *supra* para 1, s 2.

Issue 3: The violations of s. 15 and s. 7 are not reasonable limits demonstrably justified in a free and democratic society under s. 1 of the *Charter*

69. Under s. 1 of the *Charter*, the Appellant bears the burden of demonstrating that s. 17(5) imposes "reasonable limits" on the Respondents' s. 15 and s. 7 rights "as can be demonstrably justified in a free and democratic society." Section 1 provides a "stringent standard of justification" and the analysis "must be premised on an understanding that the impugned limit violates constitutional rights" (*Oakes*).

Charter, *supra* para 2, s 1.

R v Oakes, [1986] 1 SCR 103 at paras 63-66, 26 DLR (4th) 200 [*Oakes*].

1. The Appellant is owed little deference under s. 1

70. This Court should provide the Appellant little deference in determining whether it discharged its onus under s. 1. Courts are more deferential to the state under s. 1 where the burden on the claimant in establishing a violation of her *Charter* right is not onerous. But "given the heavier burden that must be met by a claimant to show an infringement of section 7 and section 15", the "burden on the government within section 1" is "more onerous" in the present case (Mendes). A majority of the Supreme Court has never upheld a s. 7 violation under s. 1 (Hogg) and the Court has held that justifications of s. 7 violations would require "exceptional conditions" such as war, which are not present in this case (*Motor Vehicle*). Similarly, the Supreme Court only rarely upholds violations of s. 15 under s. 1 (Hogg).

> Errol Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" (2005) 27 SCLR (2d) 47 at 58.
> Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 2, loose-leaf (consulted on 13 January 2014), (Toronto: Carswell, 2007) at 38-46, 55-53.
> *Reference re Motor Vehicle Act (British Columbia) s 94(2)*, [1985] 2 SCR 486 at para 83, 24 DLR (4th) 536 [*Motor Vehicle*].

2. The limit imposed by subsection 17(5) is prescribed by law and aims at a pressing and substantial objective.

71. Subsection 17(5) imposes a limit prescribed by law and has a pressing and substantial objective. The provision attempts to remedy some of Canada's historical mistreatment of aboriginal peoples. However, the means chosen by the Legislature to achieve this important purpose do not meet basic constitutional standards.

3. The limit imposed by subsection 17(5) fails the proportionality test

A. There is no rational connection between the purpose and effects of the law

72. Subsection 17(5) is not rationally connected to its objective of promoting aboriginal culture because there is no "causal connection between the infringement and the benefit sought on the basis of reason or logic" (*RJR*). The Supreme Court has strongly suggested that arbitrary laws under s. 7 necessarily fail the rational connection requirement (*Chaoulli*). That s. 17(5) is arbitrary, as argued above, implies it is not rationally connected to its objective.

> *RJR-Macdonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 153, 127 DLR (4th) 1 [*RJR*].
> *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 155, [2005] 1 SCR 791 [*Chaoulli*].

73. Subsection 17(5) is not rationally connected to its objective of promoting aboriginal culture because its effect is to remove Xavier from a stable, loving environment in which the Respondents are well-equipped to raise him in his aboriginal heritage. Instead, the law gives Mr. Sterling full control over Xavier's adoption, contrary to Xavier's best interests. This undermines the objective of promoting aboriginal culture. Aboriginal children are the future of aboriginal culture. A law that frustrates the best interests of aboriginal children will harm aboriginal culture in the long run by exacerbating the already vulnerable position of many aboriginal children.

B. Subsection 17(5) is not minimally impairing

74. Subsection 17(5) is not minimally impairing. The law must be "reasonably tailored", and there cannot be "less harmful means of achieving the legislative goal" in a "real and substantial manner" (*Hutterian*). The Supreme Court has strongly suggested

that overbroad laws under s. 7 fail the minimal impairment requirement (*Heywood*). That s. 17(5) is overbroad, as argued above, implies that it is not minimally impairing.

> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 53-55, [2009] 2 SCR 567 [*Hutterian*].
> *Heywood*, *supra* para 53 at para 71.

75. There are more tailored alternatives to achieving s. 17(5)'s objectives. As argued above, the law could place the onus on prospective adoptive parents to prove the child's aboriginal culture would be better preserved through the adoption. Or the law could require prospective adoptive parents to submit and follow "cultural connection plans" to keep the child connected to aboriginal culture (*CYFEA*). Or the law could provide for openness agreements between the child and the biological parent or members of the child's aboriginal community (*CFSA*). These alternatives could achieve the Legislature's objectives without making the discriminatory assumption that non-aboriginal adoptive parents cannot raise children in a culturally appropriate manner.

> *CYFEA*, *supra* para 55, ss 63(3)(e), 71.1(a).
> *CFSA*, *supra* para 56, s 153.6.

C. The deleterious effects of subsection 17(5) outweigh its salutary effects

76. Finally, s. 17(5) cannot be justified because its deleterious effects "outweigh the public benefit that may be gained from the measure."

> *Hutterian*, *supra* para 74 at para 78.

77. The harms directly imposed by the rights infringement in s. 17(5) are clear. Subsection 17(5) breaks up the Respondents' family on the basis of stereotypical assumptions about the Respondents. To redress the harms caused by the "Sixties Scoop", this law in fact scoops Xavier away from the only family he has ever known.

78. The salutary effects of s. 17(5) are speculative and uncertain. The deleterious effects are real. In the present case, s. 17(5) harms Xavier by preventing the court from ordering what is in his best interests. Subsection 17(5) would place Xavier in the care of Mr. Sterling, who is "daunted by the prospect of disciplining a child", has no support system in place, and is at risk of relapsing into substance abuse. Furthermore, s. 17(5) may have a chilling effect on aboriginal adoptions and exacerbate the already significant overrepresentation of aboriginal children in foster care.

Official Problem, *supra* para 1 at paras 27, 29.

79. Subsection 17(5) does not have the salutary effect of preventing some of the problems with transracial adoptions. For instance, some evidence indicates that transracial adoptees have greater difficulty developing "ethnic, racial and cultural identities" and strategies to cope with racism. However, such adoptees are likely to be well-adjusted if their adoptive parents are equipped to assist them in dealing with these issues. But inquiring into the capacity of the prospective adoptive parent is precisely what s. 17(5) prohibits. In this case, Ms. Liu, like Xavier, is biracial. She is of mixed Chinese and Indian descent and has experienced racism and prejudice. She is well-suited to assist Xavier in forming his identity and coping with racism. Indeed, as Canadian society grows ever more multicultural, families like the Respondents' family – mixed union couples with children – are becoming increasingly common. Embracing this trend is consistent with Canada's commitment to multiculturalism, enshrined in s. 27 of the *Charter*.

Official Problem, *supra* para 1 at paras 24, 29.
Charter, *supra* para 2, s 27.

D. The infringement of the Respondents' rights is not saved under s. 1

80. Subsection 17(5) has a very important purpose. But the means selected by the legislature to achieve it are too blunt to pass constitutional muster. Subsection 17(5) removes Xavier from the care of Mr. Baxter and Ms. Liu, not because there is reason to think that they *in particular* are incapable of raising Xavier in a culturally appropriate manner, but because of their race. To paraphrase McLachlin J, as she then was, in *Rodriguez*, the Respondents are "asked to bear the burden of the chance that other people in other situations" are incapable of raising adopted aboriginal children while preserving their aboriginal heritage.

Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519 at 621, 107 DLR (4th) 342, McLachlin J, dissenting.

81. We also cannot overlook the impact of this law on Xavier. Subsection 17(5) tramples on Xavier's best interests. These interests should be paramount. "Our greatest responsibility is to our children. How we shoulder that responsibility measures our success or failure as a society." Subsection 17(5) does not honour this responsibility.

T(R), supra para 59 at para 1.

PART V – ORDER SOUGHT

82. The Respondents request that the appeal be dismissed.

All of which is respectfully submitted this 31st day of January, 2014.

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Team 13
Counsel for the Respondents

PART VI – LIST OF AUTHORITIES AND STATUTES

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