

The 2014 Wilson Moot Problem

British Columbia (Director of Child, Family and Community Services) and Don Sterling v. Keith Baxter and Jasmine Liu

Keith Baxter and Jasmine Liu are a married couple from Vancouver seeking to adopt Xavier Jackson, who is now almost four years old, through a “direct placement” process under the British Columbia *Adoption Act*. Xavier’s mother, Christine Jackson, has asked Keith and Jasmine to adopt Xavier because she feels that she is unable to properly care for him. Xavier has been residing with Keith and Jasmine while the adoption is pending.

Pursuant to section 13 of the *Adoption Act*, the consent of the child’s biological parents is generally required for a direct placement adoption, though the court may dispense with a required consent in certain circumstances.

Xavier’s biological father, Don Sterling, is a member of the South River First Nation and is registered as a status Indian under the *Indian Act*. (Christine is non-aboriginal.) Though Don has never been involved in Xavier’s life, he learned of the pending adoption and is refusing to provide his consent.

In the course of consultations with British Columbia’s aboriginal communities regarding various child protection and adoption issues, a number of First Nations expressed concern about the relative lack of mandated community involvement in adoptions outside of the child protection context. In 2008, following these consultations, the Legislature enacted legislation amending the *Adoption Act* by adding a new subsection 17(5), to ensure that the cultural heritage and identity of aboriginal children and the rights of aboriginal biological parents would be given increased protection in direct placement adoptions.

Following this amendment, section 17 of the *Adoption Act* reads:¹

Dispensing with consent

17. (1) On application, the court may dispense with a consent required under this Part if the court is satisfied that it is in the child's best interests to do so or that

(a) the person whose consent is to be dispensed with is not capable of giving an informed consent,

¹ For the purposes of the Wilson Moot, assume that aside from section 17, that the *Adoption Act* is the same as was in force as of November 18, 2013, and that there was no debate in the Legislature regarding the enactment of subsection 17(5). Also assume that there are no relevant agreements between the Minister with any aboriginal community pursuant to section 76 of the *Adoption Act* or otherwise.

(b) reasonable but unsuccessful efforts have been made to locate the person whose consent is to be dispensed with,

(c) the person whose consent is to be dispensed with

(i) has abandoned or deserted the child,

(ii) has not made reasonable efforts to meet their parental obligations to the child, or

(iii) is not capable of caring for the child, or

(d) other circumstances justify dispensing with the consent.

(2) Despite subsection (1), the court may dispense with the consent of a child only if the child is not capable of giving an informed consent.

(3) Before making an order under this section, the court may consider any recommendation in a report filed by a director or by an adoption agency.

(4) An application under this section may be made without notice to any other person and may be joined with any other application that may be made under this Act.

(5) Despite subsection (1), the court shall not dispense with the consent of a person who is an aboriginal child's biological parent and who is an aboriginal person and who objects to the child's adoption, unless the court is satisfied that:

(a) there is a risk of serious harm to the child if he or she remains in the custody of the biological parent whose consent is to be dispensed with; and

(b) a suitable adoptive placement with the aboriginal child's extended family, other members of the child's aboriginal community, or another aboriginal family is not possible.

Keith and Jasmine brought an application before the British Columbia Supreme Court (naming Don and the Director of Child, Family and Community Services as respondents) seeking an adoption order, an order dispensing with Don's consent to the adoption, and declarations that:

a) subsection 17(5) of the *Adoption Act* infringes section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") because it discriminates against prospective adoptive parents who are non-aboriginal;

b) subsection 17(5) of the *Adoption Act* infringes section 7 of the *Charter* because it deprives non-aboriginal prospective parents of security of the person in a manner not in accordance with the principles of fundamental justice;

c) the infringements of sections 7 and 15 are not saved by section 1 of the *Charter*; and

d) subsection 17(5) of the *Adoption Act* is of no force or effect.

The application was heard by Justice Michelle Murakami in April 2013. All of the parties participated in the hearing with the assistance of counsel. At the outset of the hearing, counsel for Jasmine and Keith conceded that Xavier was not at risk of “serious harm” if Don were granted custody, but did argue strenuously that it was in Xavier’s best interests that the adoption order be granted.

Justice Murakami made the following findings of fact:

1. Don was 28 years old at the time of the hearing. He grew up on the South River First Nation reserve, which is located outside of Abbotsford. His father passed away when Don was seven years old and he was raised by his mother, who relied on part-time jobs as a housekeeper and cook to make ends meet, and was often verbally and physically abusive towards Don.
2. Christine was 25 years old at the time of the hearing. She is non-aboriginal.
3. Don and Christine met in 2009 in Abbotsford and began a relationship that lasted for several months. By that time, Don had a history of difficulties with alcohol and marijuana dating back to his adolescence, and was only sporadically employed.
4. Don and Christine’s relationship ended in the summer of 2009 when she told him that she was pregnant with his child. Don told Christine that he had no interest in being a father and did not see how they could afford to support a child. Disappointed by his reaction, Christine broke off the relationship, and moved to Vancouver to live with a friend for the rest of her pregnancy. She had no further contact with Don.
5. Xavier was born on March 3, 2010 at a hospital in Vancouver. Christine did not contact Don to tell him that Xavier had been born but did list Don as Xavier’s father on his birth certificate.
6. When Xavier was three months old, he was removed from Christine’s care by the Director of Child and Family Services, as a result of her abuse of alcohol and inability to care for him. Xavier was placed with Jasmine and Keith as foster parents.
7. Keith and Jasmine were 34 and 33 years old, respectively, at the time of the hearing. Keith is of mixed Scottish-Irish descent (though all of his great-grandparents were born in Canada). Jasmine is of mixed Chinese and Indian descent.

8. Keith and Jasmine have been married for nine years and reside in a multicultural suburban community in Vancouver.
9. Jasmine is an associate editor at a publishing house and Keith is an accountant. Their yearly household income is approximately \$130,000 per year.
10. Keith and Jasmine do not have any other children.
11. Xavier lived with Keith and Jasmine for nearly 16 months. Over that time, they developed a close bond with Xavier, playing with him and reading to him every night. They brought him to functions with their extended family and arranged play-dates for him with their nieces and nephews and their friends' children. After Xavier had been living with them for six months, Keith and Jasmine decorated his room in a "Dora the Explorer" theme because they noticed how much he enjoyed watching her on TV. On his first birthday, Keith and Jasmine threw Xavier a birthday party with their extended families, neighbours, and close friends.
12. While Xavier was in Keith and Jasmine's care, Christine received counselling and managed to overcome her issues with alcohol. In October 2011, Xavier was returned to her custody. Though Jasmine and Keith were devastated to lose him, they brought Xavier to Christine's home and facilitated as smooth a transition as possible.
13. By February 2012, although she managed to maintain her sobriety, Christine felt overwhelmed and was again struggling to care for Xavier. After a great deal of reflection, she contacted Jasmine and Keith and asked whether they would be prepared to adopt him. The couple were thrilled and immediately agreed.
14. Keith and Jasmine met with an adoption lawyer, Colin Fox, and began working to fulfill the requirements for a direct placement under sections 8 and 9 of the *Adoption Act*. Christine provided the last address and telephone number she had for Don. Despite a number of efforts to locate him and request his consent to the adoption, Colin was unable to contact Don.
15. In March 2012, Xavier moved back in with Keith and Jasmine. Although they were open to the idea of allowing visitation with Christine, she said that she would find it too painful and has not maintained contact with Xavier. Keith and Jasmine commenced an application before the British Columbia Supreme Court seeking an adoption order and dispensing with Don's consent to the adoption.

16. Xavier is a healthy child and does not have any physical or mental impairments or special needs.

17. In May 2012, Don was arrested for shoplifting and possession of hashish. He was able to enter into a diversion program, through which he received substance abuse counselling. Since then, Don has made a number of improvements in his life. He does not currently abuse drugs or alcohol and is working full-time as a mail clerk earning \$35,000 per year. He consistently received positive reports from his diversion counsellor and the charges against him were eventually withdrawn in March 2013.

18. Don lives in a one-bedroom apartment in Abbotsford, but visits the South River First Nation reserve once or twice a month to attend community events.

19. Vancouver is approximately 65 km from Abbotsford, and approximately 110 km from the South River First Nation reserve. The reserve is located approximately 45 km from Abbotsford.

20. In September 2012, Don heard through mutual acquaintances that Christine had a son and had put him up for adoption. Through a social worker, he contacted the Director of Child and Family Services, who had been notified about Xavier's pending adoption and put Don in touch with Colin.

21. Don told Colin that he did not know that Xavier had been born but believed that he was probably his son, and that if he was, Don wanted to take care of his child himself and did not want him to be adopted. A DNA test confirmed that Don is Xavier's biological father; the parties do not dispute that Don has acknowledged his paternity. Don has visited Xavier on several occasions, during which Keith and Jasmine have been present.

22. Keith and Jasmine amended their notice of application to name Don as a respondent and to request constitutional remedies.

23. In his affidavit filed in support of his opposition to the application, Don stated:

I won't deny that I was not present for the first years of my son's life. I was irresponsible and I did not do right by Christine, either. But I am a changed man. I have my life on track, and I want to be a father to my son.

I want Xavier to know his people. I want him to know he is from South River and to be proud of our nation. My grandfather was forced to attend a residential school and in his generation we have seen how easy it is for our people to begin to lose our language, our religion, and our heritage when we are taken away from our community. I want my son to have the

guidance and the wisdom of our community and I know that can only happen if he lives with me. Ms. Liu and Mr. Baxter are nice people, and I will always be grateful to them for caring for Xavier when I was not there, but they can never understand what it means to be part of our people.

24. In her affidavit filed in support of the application, Jasmine stated:

My husband and I made the decision to become foster parents because we sincerely felt we had a lot of love to offer to children that did not have a lot. I could not have imagined that we would be lucky enough to find a boy as special as Xavier. We are completely devoted to him, and we are the only parents he knows.

Keith and I have had many discussions about the challenges of raising an adopted child and we agree that we want to do everything we can to make sure Xavier is aware and proud of his aboriginal heritage. I myself take a great deal of pride in my Chinese and Indian heritage and understand that this is an important part of any child's identity. I am also sad to say, I have also experienced racism and prejudice as a result of my background. Though I understand that aboriginal culture is unique, Keith and I are committed to learning more about the South River people and helping Xavier develop his aboriginal identity as he grows up and to be able to stand up to prejudice and stereotyping.

25. Jasmine also indicated in her affidavit that she and Keith were taking a First Nations cultural training program offered at an aboriginal cultural centre in Vancouver in association with the Ministry of Children and Family Development and that they had taken Xavier to visit the South River reserve, which they would continue to do.

26. A report from Natalie Sharma, a social worker who provided an assessment of Xavier's placement, was admitted into evidence. She wrote:

There is no doubt that Mr. Baxter and Ms. Liu will be able to provide Xavier with a comfortable upbringing in a secure and loving environment. They are exceptionally prepared to be parents and have well-developed plans for his education, recreation, and social development. Xavier attends a well-regarded local preschool four days per week and is cared for by Mr. Baxter's parents on Fridays. He enjoys story time with Ms. Liu or Mr. Baxter each night at bedtime and is excited for "parent-and-tot" swimming lessons on Saturdays.

Ms. Liu and Mr. Baxter have now cared for Xavier for most of his life. Xavier refers to them as "Mama" and "Daddy," and it is clear that they are the only parental figures he recognizes. Xavier has also been welcomed into Mr. Baxter and Ms. Liu's extended families and has positive relationships with his putative adoptive grandparents, aunts and uncles, and cousins. He seems to have only vague memories of Ms. Jackson, his biological mother, and does not yet have a real sense of who Mr. Sterling is.

27. She made the following observations of Don:

Mr. Sterling's desire to provide Xavier with a loving home is clearly heartfelt and sincere. I would also add that his self-improvement efforts are commendable, given his difficult personal history.

Though it is no fault of his own, I have some concern that Mr. Sterling has never had an appropriate model of a stable and nurturing parental relationship and is daunted by the prospect of disciplining a child. He does not have relationships with extended family or others who would be able to provide support in this regard. I would at the very least recommend that he complete a recognized parenting course if he is awarded custody of Xavier. Mr. Sterling also indicated that he has not been attending any therapy or support programs with respect to his issues with alcohol and illegal drugs since completing his diversion program, which in my view is crucial to avoid the risk of relapse.

28. The court was satisfied that there was no realistic alternative culturally-suitable adoptive placement for Xavier within the meaning of paragraph 17(5)(b) of the *Adoption Act*.

29. Professor Nicholas Dallaire of the University of Victoria was jointly retained by the parties to provide the court with an independent survey of the experience of aboriginal adoptions in Canada. Professor Dallaire holds a PhD in sociology and is well-regarded as an expert in aboriginal culture, with particular emphasis on the experience of aboriginal children. His evidence was that:

- a. Canada has a history of policies and programs that have resulted in the removal of thousands of aboriginal children from their families and communities, including the Indian residential schools program and the "Sixties Scoop," which have had significant negative impacts on aboriginal people and cultures.
- b. At least 150,000 aboriginal children attended Indian residential schools between the 1870s and the 1990s. Disease and malnutrition were rampant in the schools, and many aboriginal students were subjected to physical, sexual, and psychological abuse. Residential school students were generally prohibited from speaking their native languages, practicing their own religions, or engaging in aboriginal cultural practices.
- c. Between 1960 and 1990, in what is commonly known as the "Sixties Scoop," at least 20,000 aboriginal children across Canada were removed from their homes and foster-parented or adopted by non-aboriginal families, where some suffered abuse. In many cases, the records of such adoptions were incomplete or sealed, and

- adoptees were not told of their aboriginal background or given any opportunity to participate in their home communities or traditions.
- d. Aboriginal children who were forced to attend residential schools or who were removed from their homes during the Sixties Scoop have experienced exceptionally high rates of alcohol and drug addiction, mental illness, and suicide compared to the rest of the Canadian population.
 - e. The position statement of the Canadian Association of Psychologists on transracial adoption concludes that transracial adoptees experience considerably more difficulties than any other group in developing their ethnic, racial, and cultural identities and in developing strategies to respond to experiences of racism and discrimination. Nonetheless, the Association's position is that transracial adoptees whose parents are able assist them in developing the skills to handle these challenges are more likely than not to be well-adjusted.
 - f. Aboriginal children are consistently overrepresented in foster care across Canada. At any given time, between 35% and 50% of the children in foster care in Canada are aboriginal children, despite the fact that only 5% of all children in Canada are aboriginal. A recent report of the Family Caring Society of Canada concluded that aboriginal children in foster care are less than 50% as likely as non-aboriginal children to be successfully placed for adoption and are more frequently subject to lengthy periods of foster care.
 - g. A longitudinal study of 120 aboriginal children in Saskatchewan who were adopted by non-Aboriginal families found that 55% of the children had "moderately low" self-esteem and that they were on the whole three times more likely to contemplate suicide than aboriginal children who remained in their home communities.
 - h. A large survey of over 300 Canadian families whose families included transracially adopted children found that approximately 20% of transracially adopted children and adolescents experienced "pronounced" behavioural and educational problems, compared with 12% of adoptees whose adoptive parents were members of the same ethnic group. These issues were more likely to occur in cases involving older age at the time of adoption, learning/developmental disabilities, or previous abuse.

- i. Approximately 5% of couples in Canada are mixed union couples (i.e. couples where one partner is a member of a visible minority group and the other is not, or where both partners are members of different visible minority groups). Approximately 20% of couples who have married in major Canadian urban centres over the last five years are mixed union couples. Six percent of all children born in Canada last year (and approximately 10% of children born in major urban centres) were born to mixed union couples, and that number is growing rapidly.

Justice Murakami dismissed the application. In her judgment, she wrote:

The statutory scheme in this case is clear. Mr. Sterling's consent to the proposed adoption may not be dispensed with, given the applicants' admission that Xavier would not be in danger in his care. I am unable to accede to the applicants' arguments that subsection 17(5) of the *Adoption Act* contravenes the equality guarantee of *Charter*. Rather, I find that this provision constitutes an ameliorative law within the meaning of section 15(2). For decades, Canadian law has favoured socio-economic considerations over the importance of cultural identity, leading to the separation of countless aboriginal children from their communities; this law attempts to bring some balance to that paradigm. Further, assuming without deciding that the applicants' section 7 interests are engaged, I find that any deprivation does not offend the principles of fundamental justice.

Though it is not necessary to decide the issue in light of my disposition of the constitutional issues, I do note that in the ordinary course, I would have granted the proposed adoption order as being in Xavier's best interests, particularly given the length of time he has been in the care of Mr. Baxter and Ms. Liu and the close bond that they have developed. However, the Legislature has manifested its intention that the interests of aboriginal parents and keeping aboriginal children within their communities are of paramount importance in these circumstances.

Keith and Jasmine appealed Justice Murakami's decision to the British Columbia Court of Appeal; the appeal was heard on an expedited basis in August 2013. Justice Reza Ali, writing for himself and Justice Celeste Finnerty, allowed the appeal and granted the adoption order:

With the greatest respect to the applications judge, I simply cannot see how a law that has the effect of making it more difficult for an aboriginal child to be adopted into a secure, loving home can be considered an "ameliorative program." Rather, the impugned provision of the *Adoption Act* assumes, without any individualized inquiry, that people in the position of the applicants are not able to raise a child in a culturally sensitive manner, simply because they are of a different ethnic background. This is not consistent with the multicultural values and reality of modern Canada. Moreover, it casts aside the careful balancing of the "best interests of the

child” test, which has been the bedrock of child welfare law for decades, with a bright-line rule.

I further find that the impugned law has infringed the appellants’ security of the person interest in a manner that must be considered arbitrary on any standard; it certainly does not correspond to the actual abilities and circumstances of the applicants.

In dissent, Justice Morris Downie largely adopted the reasoning of Justice Murakami, adding:

The emotional stakes in this case are high. I do not doubt for a moment that Mr. Baxter and Ms. Liu love Xavier and that they subjectively feel that the impugned provision of the *Adoption Act* puts them at a disadvantage. However, hurt feelings do not a section 15 claim make. With all due respect to my colleagues, I am frankly at a loss to understand how people in the privileged position of the applicants can make out a claim that they have been discriminated against by a law that seeks to mitigate historical wrongs and to protect an equity-seeking group. Even had I not concluded that the law serves an ameliorative purpose, I do not see how a reasonable person could conclude that it treats the applicants as less capable or less worthy of respect or value as human beings.

The Director of Child, Family and Community Services has been granted leave to appeal the British Columbia Court of Appeal’s judgment to the High Court of the Dominion of Canada, which has stated the following constitutional questions:

1. Does subsection 17(5) of the *Adoption Act* constitute an ameliorative law or program within the meaning of section 15(2) of the *Charter*?
2. Does subsection 17(5) of the *Adoption Act* infringe section 15(1) of the *Charter*?
3. Does subsection 17(5) of the *Adoption Act* infringe section 7 of the *Charter*?
4. If the answer to questions 2 and/or 3 is “yes,” is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?²

Don has advised the parties that he is satisfied that the Director will adequately represent his position on the constitutional issues and that he does not intend to make submissions on the appeal to the High Court.

The High Court has not asked the parties to make submissions on the issue of remedy.

² Note that the High Court of the Dominion of Canada will not consider any facts other than those found by Justice Murakami.