IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

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 APPELLANT

COUNSEL FOR THE APPELLANT

TEAM 13

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PART I – OVERVIEW

[1] Subsection 17(5) of the British Columbia *Adoption Act* gives a child's aboriginal identity the emphasis that is required in direct placement adoptions. The law respects the unique and communal nature of aboriginal identity and culture. It responds to Aboriginal communities' concerns about the lack of mandated community involvement in direct placement adoptions.

Official Problem, the Wilson Moot 2014 at 2 [Official Problem].

[2] The question in this appeal is whether the Respondents have a constitutional right under ss. 15 or 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") that would destroy this ameliorative law. The Respondents' claim does not engage the purpose of s. 15 nor is their psychological distress sufficient to engage s. 7.

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

[3] Subsection 17(5) of the *Adoption Act* is a genuinely ameliorative program that has twin goals. It advances aboriginal children's cultural heritage and identity, as well as aboriginal biological parents' rights to participate in proceedings involving their children. The law is therefore shielded under s. 15(2) of the *Charter*, and additionally is not discriminatory under s. 15(1). The law does not trigger the Respondents' s. 7 rights to security of the person and, in the alternative, any perceived deprivation is in accordance with the principles of fundamental justice. Any infringement of the Respondents' *Charter* rights is demonstrably justified in a free and democratic society.

> *Charter*, *supra* para 2, ss 1, 7, 15.
> Official Problem, *supra* para 1 at 2.

PART II – STATEMENT OF FACTS

A. Factual Background

[4] The Respondents seek to adopt Xavier Jackson, a four-year-old aboriginal child. Xavier's biological father, Mr. Don Sterling, is a status Indian who grew up on the South River First Nation Reserve. Mr. Sterling refuses to consent to the adoption. His consent is required under s. 13(2) of the *Adoption Act*.

Official Problem, *supra* para 1 at 1.
Adoption Act, RSBC 1996, c 5 at s 13(2).

[5] Mr. Sterling and Ms. Christine Jackson, Xavier's birth mother, met in 2009 in Abbotsford and began a relationship that lasted for several months. Ms. Jackson is not aboriginal. The relationship ended in 2009 when Ms. Jackson told Mr. Sterling that she was pregnant. Xavier was born on March 3, 2010. Ms. Jackson did not contact Mr. Sterling to inform him that Xavier had been born, but listed him as the father on Xavier's birth certificate.

Official Problem, *supra* para 1 at 1, 3.

[6] When Xavier was three months old, the British Columbia Director of Child and Family Services removed him from Ms. Jackson's care. Xavier was placed in the care of the Respondents as foster parents.

Official Problem, *supra* para 1 at 3.

[7] The Respondents are an affluent, married couple, who reside in Vancouver. Their combined income is approximately $130,000 per year. The Respondents are not aboriginal, but have expressed a commitment to learning about the South River People.

Official Problem, *supra* para 1 at 4, 6.

[8] Xavier lived with the Respondents for sixteen months. Ms. Jackson subsequently took custody of Xavier for five months and then contacted the Respondents to begin a direct placement adoption. In March 2012, Xavier moved back with the Respondents.

Official Problem, *supra* para 1 at 4.

[9] Prior to September 2012, Mr. Sterling did not know that Xavier had been born. When Mr. Sterling heard about the pending adoption, he contacted the Director of Child and Family Services and was put into contact with the Respondents' lawyer. Mr. Sterling told the lawyer that he does not want Xavier to be adopted, and that he wants to raise Xavier himself. The Respondents are unable to dispense with Mr. Sterling's consent under s. 17(5) of the *Adoption Act*, as there is no "risk of serious harm" to Xavier if he remains in the care of Mr. Sterling. The parties agree that if the appeal is allowed, there is no legal barrier to Mr. Sterling taking custody of Xavier.

Official Problem, *supra* para 1 at 3, 5.
Clarifications to the Official Problem, the Wilson Moot 2014 at 1 [Clarifications].

[10] Mr. Sterling's father passed away when he was seven years old, and his grandfather attended a residential school. Mr. Sterling was raised by his mother, who was abusive towards him. Mr. Sterling has a history of difficulties with alcohol and marijuana but was able to enter into a diversion program in May 2012. After overcoming these difficulties, Mr. Sterling made a number of improvements in his life and has consistently received positive reports from his diversion counsellor. He has visited Xavier on several occasions. Mr. Sterling is currently employed full-time as a mail clerk and earns $35,000 per year.

Official problem, *supra* para 1 at 5.

[11] Mr. Sterling wants to teach Xavier about his aboriginal culture and heritage. He states: "I want Xavier to have the guidance and wisdom of our community and I know that can only

happen if he lives with me." Mr. Sterling lives in Abbotsford, which is approximately forty-five kilometers from the reserve. The Respondents live approximately one hundred and ten kilometers from the reserve. Mr. Sterling visits the South River First Nation reserve once or twice a month to attend community events.

Official Problem, *supra* para 1 at 5, 6.

B. Social Context

[12] As demonstrated by the uncontradicted evidence of Professor Nicholas Dalliare, a well-regarded expert in aboriginal culture and the experiences of aboriginal children, aboriginal families and communities in Canada have suffered significantly as a result of various government policies. At least 150,000 aboriginal children attended Indian residential schools between the 1870s and the 1990s. Over 20,000 aboriginal children across Canada were removed from their homes between 1960 and 1990 in what is commonly known as the "Sixties Scoop." These children were foster-parented or adopted by non-aboriginal families. In many cases, they were not told of their aboriginal identities and suffered abuse. These children have experienced exceptionally high rates of alcohol and drug addiction, mental illness, and suicide compared to the rest of the Canadian population.

Official Problem, *supra* para 1 at 7, 8.

[13] The Canadian Association of Psychologists has found that transracial adoptees, such as Xavier, experience considerably more difficulties than any other group in developing their ethnic, racial, and cultural identities. Transracial adoptees also experience difficulties responding to racism and discrimination.

Official Problem, *supra* para 1 at 8.

[14] A study of one hundred and twenty aboriginal children adopted by non-aboriginal families in Saskatchewan found that 55% of the children had “moderately low” self-esteem compared to those who were adopted by aboriginal families. The children were also three times more likely to contemplate suicide than their peers.

Official Problem, *supra* para 1 at 8.

[15] A survey of three hundred Canadian families that included transracially adopted children found that approximately 20% of transracially adopted children and adolescents experienced “pronounced” behavioural and educational problems. In comparison, only 12% of adoptees whose adoptive parents were members of the same ethnic group experienced these problems.

Official Problem, *supra* para 1 at 8.

C. Legislative History

[16] The British Columbia Legislature consulted with aboriginal communities on adoption issues as a direct response to the concerns these communities raised regarding their children’s loss of cultural identity. Aboriginal communities were highly concerned about the relative lack of mandated community involvement in adoptions outside of the child protection context. In response to these consultations, the Legislature enacted s. 17(5) of the *Adoption Act* in 2008 to ensure that the cultural heritage of aboriginal children and the rights of aboriginal biological parents would be given increased protection in direct placement adoptions.

Official Problem, *supra* para 1 at 1.

[17] Under s. 17(1) of the *Adoption Act*, the court can dispense with the consent required for an adoption in certain situations. Subsection 17(5) governs situations where the court is asked to dispense with the consent of child’s aboriginal biological parent.

Adoption Act, *supra* para 4, s 17(1).

[18] Section 17(5) of the *Adoption Act* reads:

> (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.

Official Problem, *supra* para 1 at 2.

D. Procedural History

[19] At first instance, Justice Murakami dismissed the Respondents' application to dispense with Mr. Sterling's consent. She held that s. 17(5) constitutes an ameliorative law within the meaning of s. 15(2) of the *Charter*, as it "brings some balance" to Canadian law, which "has favoured socioeconomic considerations over the importance of cultural identity" in the adoption context. Further, without deciding whether the Respondents' s. 7 interests were engaged, she found that any deprivation does not offend the principles of fundamental justice.

Official Problem, *supra* para 1 at 9.

[20] The British Columbia Court of Appeal allowed the appeal and granted the adoption order. Justice Ali, writing for himself and Justice Finnerty, held that the impugned law arbitrarily infringes the Respondents' security of the person. He found that the law is not an ameliorative program under s. 15(2) of the *Charter*, and that it violates s. 15(1). In dissent, Justice Downie held that the law has an ameliorative purpose, which is "to mitigate historical wrongs and to protect an equity-seeking group," and therefore does not violate s. 15 of the *Charter*.

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

PART III – STATEMENT OF POINTS IN ISSUE

[21] The present appeal raises the following three issues:

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

The Appellant's position is that s. 17(5) constitutes an ameliorative program under s. 15(2) of the *Charter* and does not infringe s. 15(1) of the *Charter*.

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

The Appellant's position is that s. 17(5) does not infringe the Respondents' security of the person and does not violate the principles of fundamental justice.

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 Appellant's position is that s. 17(5) of the *Adoption Act* can be justified pursuant to s. 1 of the *Charter*.

PART IV – ARGUMENT

Issue 1: Subsection 17(5) of the *Adoption Act* is not discriminatory under s. 15 of the *Charter*

[22] Subsection 17(5) does not violate s. 15 of the *Charter*. Any distinction that the law draws based on an enumerated or analogous ground does not affect the Respondents. The law is ameliorative under s. 15(2) and therefore shielded from s. 15(1) review. In the alternative, if s. 15(2) is found not to apply, this distinction is not discriminatory under s. 15(1).

> *R v Kapp*, 2008 SCC 41 at para 42, [2008] 2 SCR 283 1 [*Kapp*].
> *Charter*, *supra* para 2, s 15.

A. The law does not draw a distinction related to the Respondents on the enumerated ground of race

[23] Any racial distinctions drawn by the law do not affect the Respondents. All prospective adoptive parents, regardless of race, receive the same treatment under s. 17(5).

i) The distinctions the law draws based on race only affect children and biological parents

[24] The Respondents are not subject to differential treatment on an enumerated or analogous ground and therefore cannot sustain a s. 15(1) claim. The existence of s. 17(5) creates a distinction between aboriginal children and non-aboriginal children, as only aboriginal children are subject to this law. The law also creates a distinction between aboriginal biological parents and non-aboriginal biological parents, as only aboriginal biological parents have the benefit of s. 17(5). The law does not create a distinction based on race for prospective adoptive parents.

> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 51, 170 DLR (4th) 1 at para 88 [*Law*].

[25] Under s. 17(5), the biological parent's custodial interest is always given primacy as long as there is no "risk of serious harm" to the child. This is based on the legitimate legal and genetic

ties that biological parents have to their children. The Supreme Court has held, with regard to biological parents, that "the parental interest in bringing up, nurturing and caring for a child...is an individual interest of fundamental importance to our society" (*B(R)*).

Official Problem, *supra* para 1 at 2.
B(R) v Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315 at para 83, 122 DLR (4th) 1 [*B(R)*].

ii) The law does not draw a distinction regarding the race of prospective adoptive parents

[26] Subsection 17(5) applies when an aboriginal biological parent's consent is at issue. Under s. 17(5), the court can dispense with the consent of a child's aboriginal biological parent only if the following two conditions are met:

A. there is a "risk of serious harm" to the child; 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.

Official Problem, *supra* para 1 at 2.

[27] As the Respondents have conceded that there was no "risk of serious harm" to Xavier in Mr. Sterling's care, the Court could not dispense with Mr. Sterling's consent, regardless of the Respondents' race.

Official Problem, *supra* para 1 at 3.

[28] Even if there was a "risk of serious harm" and the Respondents were aboriginal, the Court would still be unable to dispense with Mr. Sterling's consent. Subsection 17(5)(b) only directs the court to dispense with consent if a suitable aboriginal placement is "not possible." The law does not mandate dispensing with consent where the prospective adoptive parent is aboriginal or when a suitable aboriginal placement is possible. This plain reading of the statute

does not lead to an absurd result, as a child could not stay with his or her biological parent if a court has made a finding that the child would be at "risk of serious harm." If a court made such a finding, the court would have a duty to report that a child is in need of protection to the director of British Columbia Child, Family and Community Services.

Official Problem, *supra* para 1 at 2.
Child, Family and Community Service Act, RSBC 1996, c 46 at ss 13,14.

B. Subsection 17(5) is an ameliorative law and is therefore shielded under s. 15(2)

[29] Should the Court find that s. 17(5) draws a distinction on an enumerated or analogous ground, the provision is shielded from further s. 15(1) review by s. 15(2) of the *Charter*. Subsection 17(5) satisfies the test set out in *Kapp* and *Cunningham*:

A. the program has an ameliorative or remedial purpose and targets a disadvantaged group identified by an enumerated ground (*Kapp*) and;

B. the distinction drawn by the law "serves" and "is necessary" to the ameliorative purpose (*Cunningham*).

Kapp, *supra* para 22 at para 41.
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at para 45, [2011] 2 SCR 670 [*Cunningham*].

i) Subsection 17(5) has an ameliorative purpose for aboriginal parents and children

[30] Subsection 17(5) has twin ameliorative purposes. Justice Murakami found that the purposes of s. 17(5) are 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. In *Kapp,* the Supreme Court held that aboriginal peoples are a disadvantaged group.

Clarifications, *supra* para 9 at 1.
Kapp, *supra* para 22 at para 59.

[31] Subsection 17(5) is the product of consultations with British Columbia's aboriginal communities. The provision embodies aboriginal peoples' ideas about how to strengthen their cultural identity and should therefore be accorded deference by the court. In *Cunningham*, the Court emphasized the role that Métis people played in crafting the impugned provision, and held that reviewing courts must approach the s. 15(2) analysis "with prudence and due regard to the Métis' own conception of the distinct features of their community."

Official Problem, *supra* para 1 at 1.
Cunningham, supra para 29 at para 82.

[32] This law is similar to the program in *Cunningham*, where the Court upheld the *Métis Settlement Act* under s. 15(2). The impugned law provided Métis-only land settlements because the Métis believed an important way to enhance their cultural identity was to establish a solely Métis land base. Both the program in *Cunningham* and s. 17(5) strengthen the identity of aboriginal groups recognized in the Constitution. The provision in this case strengthens aboriginal identity by keeping aboriginal children with their aboriginal families.

Cunningham, supra para 29 at para 60.
Charter, *supra* para 2, s 27.

ii) The distinction drawn in s. 17(5) serves and advances the ameliorative purpose

[33] The analysis under s. 15(2) is a purpose-driven inquiry. The Court should uphold s. 17(5), so long as the racial distinction is a rational approach to addressing the ameliorative goal. The question at this stage is not whether s. 17(5) is the only way to advance the interests of aboriginal parents and children in direct placement adoptions, but whether it is a rational way to do so.

Cunningham, supra para 29 at para 45.

[34] This distinction is a rational way to ameliorate the disadvantage that aboriginal parents experience in the adoption process. Historically, state policies such as residential schooling and

the “Sixties Scoop” forcibly removed aboriginal children from their parents. Parents were denied their right to participate meaningfully in proceedings involving children, and the opportunity to pass on cultural traditions. Subsection 17(5) responds directly to this history for aboriginal parents, as it ensures that children stay in the care of their aboriginal parent unless there is a “risk of serious harm” to the child.

Official Problem, *supra* para 1 at 7.

[35] This distinction is also a rational way to ameliorate the disadvantage that aboriginal children experience when adopted by non-aboriginal families, namely their loss of connection to aboriginal culture and identity. Culture is multifaceted: it cannot be taught in the classroom, and must be experienced through participation in communities and families. The record establishes that aboriginal children experience difficulties in developing their ethnic, racial, and cultural identities when they are separated from their aboriginal culture. Further, this loss of culture often results in serious mental health issues for children and an inability to cope with experiences of racism and discrimination.

Official Problem, *supra* para 1 at 8.

[36] Subsection 17(5) further ameliorates the disadvantage suffered by aboriginal children by offering clear direction as to how a court should construe the ‘best interests of the child’ in proceedings involving aboriginal children. This law elevates the importance of preserving aboriginal culture and identity in the ‘best interests of the child’ analysis. The Supreme Court articulated the ‘best interests of the child’ test in *King v Low*:

> It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult.
>
> *K(K) v L(V)*, [1985] 1 SCR 87 at 101 (sub nom *King v Low*), 16 DLR (4th) 576 [*King v Low*].

[37] The Legislature recognized that the previous regime under the *Adoption Act* did not effectively protect the culture of aboriginal children. A child's aboriginal heritage is currently only one of the many factors that must be considered in an evaluation of the 'best interests of the child.' Subsection 17(5) ensures that a child's aboriginal identity is given the emphasis that is required to ensure that courts seriously consider the cultural heritage of a child in the 'best interests' analysis.

Adoption Act, *supra* para 1, s 3.

[38] As the 'best interests of the child' is a forward-looking test, the best interests of an aboriginal child must take into account the unique concerns that will face aboriginal youth and adolescents. In *M(M)*, the Ontario Family Court discussed a provision similar to s. 17(5)(b). Like s. 17(5)(b), the provision in *M(M)* instructed the court to look for a suitable aboriginal alternative family. In its discussion of the provision, the Court stated: "These are not just bald, technical words but finally recognized as being of eminent importance to a child's healthy development. Without full respect and recognition of these children's past and cultural heritage, their future will be precarious" (*M(M)*).

> *Kenora-Patricia Child and Family Services v M(M)*, [1989] OJ no 1346 at 6 (QL), Kenora Registry No C145/82 [*M(M)*].

[39] Xavier's cultural identity is an integral component of his well-being. While at the age of four Xavier has not been fully connected to his aboriginal community, his aboriginal identity will play a crucial role in his future development.

[40] The correspondence between the law and the ameliorative goal is not negated by the fact that some children like Xavier are mixed-race. The Legislature made a choice to privilege a child's aboriginal heritage over other cultural identities. This is consistent with the constitutionally protected status of aboriginal groups and the social science evidence in the record.

Official Problem, *supra* para 1 at 1, 7, 8.
Charter, *supra* para 2, s 27.

[41] Subsection 17(5) provides clear benefits to aboriginal parents and children, and therefore the law "serves" and is "necessary" to its purpose. Subsection 17(5) is ameliorative under s. 15(2).

Cunningham, *supra* para 29 at para 45.

C. In the alternative, s. 17(5) is not discriminatory under s. 15(1)

[42] Should the Court proceed to an analysis under s. 15(1), s. 17(5) is not discriminatory because it does not perpetuate arbitrary disadvantage against non-aboriginal prospective adoptive parents. Subsection 17(5) enhances, rather than undermines, substantive equality.

Quebec (Attorney General) v A, 2013 SCC 5 at paras 325, 331, [2013] 1 SCR 61 [*Quebec v A*].

i) A finding of discrimination would not serve the purpose of s. 15

[43] Substantive equality aims to remedy historic disadvantage, prejudice, and stereotyping. *Quebec v A* reaffirmed that s. 15 focuses on historic disadvantage. Justice Abella, writing for the majority on s. 15, states that:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.
>
> *Quebec v A, supra* para 42 at para 332.

[44] Subsection 17(5) does not perpetuate any disadvantage against the Respondents based on an enumerated or analogous ground. As affluent, non-aboriginal people, the Respondents have not experienced historic disadvantage.

[45] A finding of discrimination in this context would hinder substantive equality. By keeping aboriginal children within their families, s. 17(5) strengthens aboriginal families and communities. Children are a "vital resource" to aboriginal communities (*Owen Sound*). Mr. Sterling explained the link between children growing up in aboriginal communities and the strength of aboriginal culture in his affidavit: "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 the community" (Official Problem). Subsection 17(5) puts aboriginal cultures on an equal footing with cultural groups that have not been systematically destroyed by state policies, and thus promotes substantive equality.

> *Children's Aid Society of Owen Sound and County of Grey v M B*, [1985] OJ no 737 (QL) at para 9, Owen Sound Registry C 326/82 [*Owen Sound*].
> Official Problem, *supra* para 1 at 5.

ii) Subsection 17(5) is not discriminatory because it does not perpetuate arbitrary disadvantage

[46] Prejudice and stereotyping are two ways in which the law can perpetuate arbitrary disadvantage. Subsection 17(5) does not prejudice or stereotype non-aboriginal prospective adoptive parents.

> *Quebec v A, supra* para 42 at paras 325, 332.

[47] The distinction in s. 17(5) does not perpetuate a prejudicial view of non-aboriginal prospective adoptive parents. A law is prejudicial when it perpetuates the view that the individual is "less capable" or "less worthy of recognition or value as a human being or as a member of Canadian society." Subsection 17(5) expresses the view that adoption of aboriginal children by aboriginal parents is preferable because of the difficulties aboriginal children experience in developing their cultural identities when they are adopted by non-aboriginal peoples. A "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to and under similar circumstances, as the claimant" would understand that the law expresses this view for the benefit of children, not the detriment of prospective adoptive parents.

Law, *supra* para 24 at paras 51, 60.

[48] Similarly, the distinction in s. 17(5) does not rely on false stereotypes. Stereotyping attributes characteristics to members of a group regardless of their actual capacities. The reality is that non-aboriginal parents are less able than aboriginal parents to foster the distinctive and unique communal culture of aboriginal peoples in aboriginal children.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143, 56 DLR (4th) 1 at 174-175 [*Andrews*].

[49] Subsection 17(5) is rooted in compelling social science evidence concerning the benefits of keeping aboriginal children with their aboriginal families. The government is entitled to enact legislation based on informed statistical generalizations that may not correspond perfectly with the needs of all members of the claimant group, so long as the claimant group is not disadvantaged.

Law, *supra* para 24 at para 106.

iii) A finding of discrimination would not be consistent with Canada's obligations under international law

[50] Canada has committed, under the United Nations Convention on the Rights of the Child, to ensure that laws aimed at children do not deny the rights of aboriginal children to live with other aboriginal peoples, to enjoy their own culture, to profess and practice their own religion or use their own language. The Supreme Court in *Canadian Foundation* held that the Convention must inform the interpretation of the *Charter*. Courts seek to ensure consistency between the application of the *Charter* and Canada's international obligations (*Hape*). Subsection 17(5) provides this consistency, as it elevates the importance of preserving aboriginal children's cultural identity in direct placement adoptions.

United Nations Convention on the Rights of the Child, 20 November 1989, 1557 UNTS 3, Can TS 1992 No 3, (Entered into force 02 September 1990, ratification by Canada 31 December 1991), Article 30.

Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), 2004 SCC 4 at para 186, [2004] 1 SCR 76 [*Canadian Foundation*].

R v Hape, 2007 SCC 26 at para 55, [2007] 2 SCR 292.

Issue 2: Subsection 17(5) does not violate the s. 7 *Charter* rights of the Respondents

A. Subsection 17(5) does not deprive the Respondents of security of the person

[51] The Respondents' right to security of the person does not encompass a right to adopt Xavier. The Supreme Court has recognized that an individual's interest in security of the person is violated only when state interference causes "serious psychological incursions" (*Blencoe*). The threshold for such interference is high (Stewart). According to *G(J)*, the impact on the claimant's psychological integrity must be "serious and profound" and "greater than ordinary stress or anxiety." The stress caused by the court's refusal to dispense with Mr. Sterling's consent does not reach this significant threshold.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at para 82, [2000] 2 SCR 307 [*Blencoe*].
Hamish Stewart, Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms (Toronto: Irwin Law, 2012) at 88 [Stewart].
New Brunswick v G(J), [1999] 3 SCR 46 at para 60, 177 DLR (4th) 124 [*G(J)*].

[52] The stress imposed on the Respondents is not sufficiently serious or profound to deprive the Respondents of security of the person. The Respondents have no legal relationship with Xavier and their relationship with him is subject to the wishes of his biological parents. The Respondents knew, or ought to have known, that their relationship with Xavier was temporary and that their home would not necessarily be his final destination.

AI v Ontario (Director, Child and Family Services Act), (2005) 75 OR (3d) 66 at para 74, OJ no 2358 (QL) (*AI*).

[53] The Supreme Court has recognized a mother's security of the person interest in her relationship with her biological child (*G(J)*). The Respondents are not the biological parents of Xavier. In *AI*, the Court found that foster parents could not exert a s. 7 right with respect to their relationship to a foster child. The claimants argued that the state violated their security of the person by removing a foster child from their care when the state was aware that they wanted to adopt the child. The Court found that the claimants did not have a security of the person interest as the state's conduct was not "a gross intrusion into a private and intimate sphere" (*AI*). It was not a gross intrusion because people can reasonably expect state involvement in foster care and adoption proceedings. In this case, the Respondents understood that their relationship with Xavier was conditional on the adoption order.

G(J), *supra* para 51 at para 61.
AI, *supra* para 52 at paras 72, 74.

[54] This case can further be distinguished from *G(J)*, in which the Minister of Health and Community Services applied for an order extending the state's removal of the claimant's

children from her care and custody. The Supreme Court highlighted the state's inspection of the relationship between the parent and child and the stigma of being labeled an "unfit" parent as a major aspect of the claimant's psychological distress. Subsection 17(5) does not require the state to make any assessment of the Respondents or their ability to look after a child. The denial of this adoption order does not stigmatize the Respondents as unfit to adopt a child.

G(J), supra para 51 at paras 61, 64.

B. In the alternative, any deprivation of the Respondents' life, liberty, or security of the person is in accordance with the principles of fundamental justice

[55] Should the Court find that s. 17(5) infringes the Respondents' security of the person, any infringement is in accordance with the principles of fundamental justice, and therefore is not a violation of the Respondents' s. 7 rights. The claimant bears the burden of proving that any limitation is contrary to a principle of fundamental justice (*Bedford*).

Charter, *supra* para 2, s 7.
Canada v Bedford, 2013 SCC 72 at para 127, [2013] SCJ no 72 (QL) [*Bedford*]

i) Subsection 17(5) is not arbitrary

[56] A law is arbitrary if the limit imposed on the claimants' rights bears no connection to its objective. Subsection 17(5) is not arbitrary.

Bedford, *supra* para 55 at para 119.

[57] Subsection 17(5) protects the rights of aboriginal biological parents. The "risk of serious harm" requirement in s. 17(5)(a) prevents the interests of aboriginal biological parents from being disregarded in the adoption process. The requirement gives aboriginal biological parents the right to decide whether to give their children up for adoption, unless there is a risk of serious harm to the child.

Official Problem, *supra* para 1 at 2.

[58] Subsection 17(5) ensures that the cultural heritage and identity of aboriginal children is protected. The overall effect of s. 17(5) is that more aboriginal children will remain with their families and tied to their communities. According to the Canadian Association of Psychologists, transracial adoptees experience considerably more difficulties with developing their ethnic, racial, and cultural identities and with developing strategies to respond to experiences of racism and discrimination. By remaining tied to their communities, children will be able to experience their culture and truly learn about aboriginal identity. Further, aboriginal children will be shielded from the negative effects flowing from transracial adoptions.

Official Problem, *supra* para 1 at 8.

ii) Subsection 17(5) is not overbroad

[59] Legislation that pursues a legitimate objective is overbroad only if it is "broader than is necessary to accomplish that objective." Neither of the requirements in s. 17(5) is any broader than necessary.

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

[60] The requirement that a child be facing a "risk of serious harm" is necessary to accomplish the state's objective. Justice Murakami found that "[f]or decades, Canadian law has favoured socio-economic considerations over the importance of cultural identity." Aboriginal parents were seen as less fit to take care of their children because of their relative economic disadvantage. As a result, many aboriginal children were separated from their parents. By requiring a "risk of serious harm" before the aboriginal biological parent's consent may be disregarded, the Legislature intended to restrict the factors that a judge may consider in dispensing with the consent of aboriginal biological parents. Without s. 17(5)(a), there would be no adequate

safeguard to ensure that courts place sufficient weight on the importance of aboriginal culture and heritage.

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

[61] The "risk of serious harm" threshold still allows for an individualized inquiry into the abilities of the aboriginal biological parent. Related statutes in British Columbia define "harm" as including both physical and emotional harm. As part of the s. 17(5)(a) inquiry, the court must assess whether the aboriginal biological parent can raise the child in a way that avoids such physical and emotional harm. This assessment ensures that both the well-being of the child and the capacities of the parent are considered.

Official Problem, *supra* para 1 at 2.
Child, Family and Community Service Act, *supra* para 28, s 16(5)(a).

[62] The requirement to look for a suitable placement within the child's extended family, community or another aboriginal family is also necessary to accomplish the state's objective of protecting the aboriginal child's cultural heritage. It ensures that a prospective adoptive parent cannot adopt an aboriginal child if a suitable aboriginal alternative is available. Given the distinctness of aboriginal culture, these alternative placements are in a better position to teach an aboriginal child about his or her cultural heritage and identity.

[63] The term "another aboriginal family" is not overbroad. Subsection 17(5)(b) requires that any placement to another aboriginal family be "suitable." It is consistent with the purpose of the provision to read the term "suitable" to include cultural-suitability. The Legislature recognizes that aboriginal people are diverse and that different groups have different cultures and traditions. Thus, s. 17(5)(b) ensures that, in order to dispense with an aboriginal parent's consent, there must be no alternative placements that share the same traditions and culture as the child and would therefore be more able to foster their cultural heritage and identity.

Official Problem, *supra* para 1 at 2.

[64] Subsection 17(5) is not overbroad in requiring that both ss. 17(5)(a) and (b) must be met to dispense with an aboriginal biological parent's consent. Mandating only one of the requirements would jeopardize the state's objectives. If only s. 17(5)(a) had to be met in order to dispense with consent, aboriginal children could be taken away from their communities even if there was a suitable alternative aboriginal placement. If only s. 17(5)(b) had to be met, consent could be dispensed with even if the child did not face a "risk of serious harm."

Official Problem, *supra* para 1 at 2.

iii) Subsection 17(5) is not grossly disproportionate to the state's objective

[65] Subsection 17(5) is not grossly disproportionate, as it is not "so extreme" that it is "totally out of sync" with the government's objective (*Bedford*). There is a two-step analysis for gross disproportionality: first, whether the law pursues a legitimate state interest; and second, whether the law is grossly disproportionate. Gross disproportionality is a high threshold. The Supreme Court has held that the constitution provides the Legislature with a "broad latitude" to take action to pursue a legitimate objective (*Malmo-Levine*).

Bedford, *supra* para 55 at para 120.
R v Malmo-Levine, 2003 SCC 74 at para 175, [2003] 3 SCR 571.

[66] The Supreme Court has only found a law to be grossly disproportionate in extreme circumstances. For example, in *Bedford*, the Court found that laws that jeopardized the safety and lives of sex workers were disproportionate to the goal of regulating public nuisance. The Supreme Court also held in *Insite* that the refusal of an exemption for a safe injection facility to be grossly disproportionate to the goal of presenting a uniform stance on the possession of narcotics, given that the facility saved the lives of drug users. The detriment caused to the

Respondents does not reach the extreme levels necessary for s. 17(5) to be grossly disproportionate.

> *Bedford*, *supra* para 55 at para 159.
> *Canada v PHS Community Services Society*, 2011 SCC 44 at para 133, [2011] 3 SCR 134 [*Insite*].

[67] Subsection 17(5) pursues the legitimate state objectives of ensuring that the cultural heritage and identity of aboriginal children and the rights of aboriginal biological parents are given increased protection in direct placement adoptions.

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

[68] Subsection 17(5) is proportionate to these objectives. Any perceived detriment to non-aboriginal prospective adoptive parents is outweighed by the protection of aboriginal children's cultural heritage and identity and the rights of aboriginal biological parents.

[69] The purpose of s. 17(5) is to alleviate the historical wrongs that have been inflicted on aboriginal children and families as a result of government policies, such as the "Sixties Scoop" and residential schools. These policies prevented aboriginal children from speaking their native languages, practicing their religions, or engaging in aboriginal cultural practices. These children suffered from high levels of alcohol and drug addiction, mental illness, and suicide. Subsection 17(5) limits the circumstances in which an aboriginal child is separated from his or her community. It also gives aboriginal biological parents a voice before their legal relationship with their child is severed. Any detrimental effects on the Respondents are not extreme in comparison to the importance of the government's objective in ameliorating the historical wrongs caused to aboriginal children and parents.

> Official Problem, *supra* para 1 at 7, 8.

iv) The 'best interests of the child' is not a principle of fundamental justice

[70] Subsection 17(5) furthers the best interests of the child. However, any perceived conflict does not violate a principle of fundamental justice. In *Canadian Foundation*, the Supreme Court rejected the 'best interests of the child' as a principle of fundamental justice for two reasons. First, there is insufficient consensus that the principle is vital or fundamental to societal notions of justice. Even in the family law context, the 'best interests of the child' may be subordinated to other concerns. For example, when a court has to decide whether to return a child who has been wrongfully removed from their home state to Canada, it is not entitled to consider the 'best interests of the child' (*Thomson*). This is because the primary objective of the Hague Convention on the Civil Aspects of International Child Abduction is the enforcement of custody rights, and not the 'best interests of the child.'

> *Canadian Foundation*, *supra* para 50 at para 10.
> *Thomson v Thomson*, [1994] SCR 551 at para 44, 119 DLR (4th) 253.
> Convention on the Civil Aspects of International Child Abduction, 07 December 1988, Can TS 1983 No 35, (Entered into force 01 December 1983) preamble, Articles 3, 16.

[71] Second, as the Supreme Court found in *Canadian Foundation*, the 'best interests of the child' does not provide a manageable standard. Application of the principle is highly contextual and depends on a variety of factors. The *Adoption Act* itself recognizes that there are a number of relevant factors that must be considered in determining the child's best interests.

> *Canadian Foundation*, *supra* para 50 at para 11.
> *Adoption Act*, *supra* para 4, s 3(1).

Issue 3: Any infringements are justified under s. 1 of the *Charter*

[72] Any infringement caused by s. 17(5) is prescribed by law and demonstrably justified in a free and democratic society. Subsection 17(5) has a pressing and substantial objective and employs means that are proportional in achieving those objectives. Subsection 17(5) is rationally

connected to the state's objectives, minimally impairing, and the salutary effects of the provision outweigh its deleterious effects.

Charter, *supra* para 2, s 1.
R v Oakes, [1986] 1 SCR 103 at paras 73-75, 26 DLR (4th) 200 [*Oakes*].

[73] The Court should show deference to the Legislature in its s. 1 analysis as the provision deals with a range of competing interests (*Irwin Toy*). The government has to weigh the interests of prospective adoptive parents against those of aboriginal children and their communities. These include the prospective parents' interests in adopting an aboriginal child, the child's interest in developing his or her culture, the biological parent's interest in raising their child and in teaching their child about their culture, and the interest of the aboriginal community in being involved in the child's upbringing. The relationship between these interests is complex and the Legislature is entitled to make a reasonable judgment about how to balance them.

Irwin Toy Ltd v Quebec, [1989] 1 SCR 927 at para 75, 58 DLR (4th) 577 [*Irwin Toy*].
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 35, [2009] 2 SCR 567 [*Hutterian Brethren*].

[74] The Court should defer to the Legislature when it is acting to protect a vulnerable group. After consulting with a number of aboriginal communities, the government of British Columbia enacted s. 17(5) to protect the cultural heritage and identity of aboriginal children and the rights of aboriginal biological parents. This is exactly the type of legislation that entitles the Legislature to deference.

Irwin Toy, *supra* para 74 at para 79.
Official Problem, *supra* para 1 at 1.

A. Subsection 17(5) reflects a pressing and substantial objective

[75] The government's pressing and substantial objectives in enacting s. 17(5) are twofold. First, it protects the cultural heritage and identity of aboriginal children. Second, it gives the

rights of aboriginal biological parents increased importance. Given the historical wrongs that aboriginal children and parents have suffered, this objective is pressing and substantial.

Official Problem, *supra* para 1 at 1.
Oakes, *supra* para 72 at 69.

B. Subsection 17(5) is rationally connected to the government's objectives

[76] Subsection 17(5) is rationally connected to the government's objectives of ensuring that the cultural heritage and identity of aboriginal children and the rights of aboriginal biological parents are given increased protection in direct placement adoptions. In order to meet the rational connection test, the government need only show "that it is reasonable to suppose that the limit may further the goal, not that it will do so."

Hutterian Brethren, *supra* para 73 at para 48.

[77] It is reasonable for the government to believe that the restrictions in s. 17(5) will further its objectives. Under s. 17(5), aboriginal biological parents can decide whether they want to give their child up for adoption. They lose this choice only when the child is subject to a risk of serious harm. This protects parents' rights in direct placement adoptions. For aboriginal children, a loss of connection with their culture can have a grave impact. Allowing children to remain within their communities will help them foster their cultural heritage and identity.

C. Subsection 17(5) minimally impairs the Respondents' rights

[78] Subsection 17(5) is minimally impairing because it is reasonably tailored to its objectives. The Supreme Court held in *Quebec v A* that "the question at the minimal impairment stage is whether the limit imposed by the law goes too far, *in relation to the goal the legislature seeks to achieve.*" The only means that the court considers at this stage are those that "actually achieve" the objective (*Hutterian Brethren*). That s. 17(5) is not overbroad, as argued above, implies that it minimally impairs the Respondents' rights.

Quebec v A, *supra* para 42 at 442 (emphasis in original).
Hutterian Brethren, *supra* para 73 at para 54.

[79] The Supreme Court has recognized that the state must have a margin of appreciation when drafting legislation (*Quebec v A*). The Legislature is in a better position to make judgments regarding the interests of different groups (*Hutterian Brethren*). Thus, the Court should assess minimal impairment based on a standard of reasonableness.

Quebec v A, *supra* para 42 at para 439.
Hutterian Brethren, supra para 73 at para 53.

[80] The requirement that the child be facing a "risk of serious harm" is reasonable. By ensuring that an aboriginal biological parent's consent can only be dispensed with when the child faces harm, the state ensures that courts do not remove children from their communities based on the mistaken view that aboriginal parents are less able to take care of them. The provision ensures that judges give proper consideration to the child's aboriginal culture and the ability of the aboriginal biological parent to foster that identity. A lower threshold would not achieve this result.

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

[81] Subsection 17(5)(b) also imposes a reasonable restriction on prospective adoptive parents. Given that aboriginal children who are placed with non-aboriginal parents face an increased risk of losing a connection with their culture, it is reasonable for the state to require that an aboriginal alternative is not possible before dispensing with an aboriginal biological parent's consent.

Official Problem, *supra* para 1 at 8.

[82] The Legislature determined that s. 17(5) was a reasonable way for the government to achieve its objectives. Alternative measures would not achieve both of these objectives.

Quebec v A, *supra* para 42 at para 439.

[83] The Court of Appeal erred in holding that an individualized inquiry into prospective parents' ability to raise the child in a culturally sensitive manner will fulfill both of the state's objectives. First, it will not protect the rights of aboriginal biological parents. In fact, such a scheme will disregard their rights. Second, even if non-aboriginal adoptive parents make efforts to raise an aboriginal child in a culturally sensitive manner, the child's biological parent and community would still be better placed to teach the child about his or her culture. Aboriginal culture is distinct, and non-aboriginal adoptive parents cannot empathize with the unique experiences that an aboriginal child will encounter. The facts of this case support this proposition. Mr. Sterling has experienced problems associated with the general disadvantage that aboriginal people face. He grew up on the South River First Nation reserve and his grandfather was forced to attend a residential school. His ability to draw on these experiences makes him uniquely well placed to teach Xavier about his cultural identity and heritage.

Official Problem, *supra* para 1 at 3, 5, 9.

D. Any alleged deleterious effects of s. 17(5) are proportional to the salutary effects

[84] The salutary effects of s. 17(5) outweigh any alleged deleterious effects. For a law to be demonstrably justified in a free and democratic society, the deleterious effects must be proportional to the salutary effects. In this case, the adverse effects on prospective adoptive parents are proportionate to the benefits of s. 17(5).

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at para 99, 120 DLR (4th) 12.

[85] The deleterious effects of s. 17(5) are limited. First, this amendment only applies to the narrow class of direct placement adoptions. Second, while the law impacts non-aboriginal adoptive parents, it does not significantly worsen their situation. Prospective adoptive parents are not deemed unfit to care for a child.

Official Problem, *supra* para 1 at 4.

[86] Subsection 17(5) protects the rights of aboriginal biological parents. Historically, many aboriginal children were separated from their families and communities without the consent of their biological parents. This law gives aboriginal biological parents a voice in determining how their own children are raised, unless they pose a risk of serious harm to the child.

Official Problem, *supra* para 1 at 7.

[87] Subsection 17(5) also ensures that more aboriginal children are able to remain with their families and tied to their communities. Aboriginal families and communities are able to help the child develop their ethnic, racial and cultural identities. They are able to empathize with the child's experiences and will have shared many of the same experiences themselves. As a result, children will be more likely to avoid the difficulties associated with transracial adoptions.

Official Problem, *supra* para 1 at 8.

[88] Canada's history is tarnished by discriminatory policies against aboriginal children and families. Policies such as the residential schools program and the "Sixties Scoop" are not ancient history – they operated until the 1990s and continue to have a significant negative impact on aboriginal communities. In consultations with aboriginal groups, the Legislature recognized that an effective way to ameliorate these historical wrongs was to strengthen the ties between aboriginal children and their aboriginal parents. Subsection 17(5) is exactly the type of law that the *Charter* should encourage, not frustrate.

Official Problem, *supra* para 1 at 1, 7.

PART V – ORDER SOUGHT

[89] The Appellants request that the appeal be allowed and the orders of Justice Murakami be restored.

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

Team 13
Counsel for the Respondents

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