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

BETWEEN:

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

APPELLANTS

-AND-

KEITH BAXTER AND JASMINE LIU

RESPONDENTS

FACTUM OF THE APPELLANTS

Team Number: 3

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PART I – OVERVIEW

[1] Canada has only recently emerged from an era when the government infamously sought to "kill the Indian in the child" through destructive policies of assimilation. In 2008, Prime Minister Stephen Harper said"[t]oday, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country." Subsection 17(5) of the British Columbia *Adoption Act* brings these words to life. This provision recognizes that connection to culture is integral to an Aboriginal child's spiritual and emotional well-being.

> Stephen Harper, "Statement of Apology—to former students of Indian Residential Schools" (Apology delivered on 11 June 2008), online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649> [*Harper's Apology*].
> Official Problem, the Wilson Moot 2014, at 2 [Official Problem].

[2] Subsection 17(5) is part of a collective effort between the British Columbia government and Aboriginal communities to address the pressing need to foster Aboriginal children's connection with their heritage. This provision is exactly the kind of ameliorative law embraced by subsection 15(2) of the *Canadian Charter of Rights and Freedoms*. By strengthening the autonomy of Aboriginal parents, this provision protects the cultural heritage of Aboriginal children during direct placement adoptions. The provision promotes the section 15 guarantee of substantive equality.

> Official Problem, *supra* para 1 at 1.
> *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, s 15 [*Charter*].

[3] Furthermore, the provision does not violate section 7 of the *Charter*, because it does not deprive anyone of rights to life, liberty, or security of the person, nor is it inconsistent with the principles of fundamental justice. Should any infringements of *Charter* rights be found, they are

justified by the objective of putting harmful policies of assimilation behind us, and pursuing a future where all cultures within our borders can flourish and prosper.

Charter, *supra* para 2, s 7.

PART II – STATEMENT OF FACTS

Historical Background

[4] The consequences of the residential school program and the "Sixties Scoop" were disastrous. The residential school program alone removed at least 150,000 Aboriginal children from their homes. Many of these children were exposed to disease, malnutrition and abuse, and were forbidden from engaging in Aboriginal practices.

Official Problem, *supra* para 1 at 7.

[5] During the "Sixties Scoop," at least 20 000 Aboriginal children were placed in non-Aboriginal foster homes or adoption placements. Some of these children were abused, and many were denied the opportunity to engage in Aboriginal practices. These programs have left a continuing legacy of increased rates of alcohol and drug addiction, mental illness, and suicide in the Aboriginal children affected by them.

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

[6] Today, Aboriginal children are alarmingly overrepresented in foster care. Between 35 and 50 percent of the children in foster care in Canada are Aboriginal.

Official Problem, *supra* para 1 at 8.

[7] Professor Dallaire, an expert in Aboriginal culture, gave evidence that transracially adopted children are more likely to have behavioural and educational difficulties than children who are adopted into their own ethnic group. Furthermore, a study of Aboriginal children in Saskatchewan found that 55 percent of Aboriginal adoptees in non-Aboriginal homes had

moderately low self-esteem and were three times more likely to contemplate suicide than Aboriginal children who were adopted within their own communities. In addition, according to the Canadian Association of Psychologists, transracial adoptees experience increased difficulty developing cultural identities and dealing with racism and discrimination.

Official Problem, *supra* para 1 at 8.

Legislation

[8] Section 13(1) of the *Adoption Act* requires both biological parents to consent to a child's direct placement adoption. Section 17(1) allows the court to dispense with the consent of a biological parent under certain circumstances. In 2008, in response to consultations with Aboriginal communities, the British Columbia legislature amended the *Adoption Act* by adding subsection 17(5), which provides:

> 17(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

Adoption Act, RSBC 1996, c 5, ss 13(1), 17(1) [*Adoption Act*].
Official Problem, *supra* para 1 at 2.

[9] The object of the amendment is "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."

Official Problem, *supra* para 1 at 1-2.
Clarifications to the Official Problem at 1 [Clarifications].

Background of the Parties

Mr. Sterling

[10] Don Sterling was raised on the South River First Nation reserve. Mr. Sterling's grandfather was forced to attend a residential school, so Mr. Sterling is intimately familiar with the detrimental effects of separating Aboriginal children from their communities. Mr. Sterling's father passed away when he was seven years old. His mother frequently abused him, both verbally and physically. During his adolescence, Mr. Sterling developed difficulties with alcohol and marijuana.

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

[11] Mr. Sterling met Christine Jackson in 2009, and they began a relationship that lasted several months. Mr. Sterling had only been sporadically employed when Ms. Jackson told him that she was pregnant. He did not see how they could afford to support a child, and said that he did not want to be a father. Ms. Jackson ended the relationship and the two lost contact.

Official Problem *supra* para 1 at 3.

[12] Although Mr. Sterling was arrested for shoplifting and possession of hashish in May 2012, those charges have since been withdrawn. Since his arrest, Mr. Sterling has improved his life dramatically. He entered a diversion program, underwent substance abuse counselling and overcame his difficulties with drugs and alcohol. He consistently received positive reports from his diversion counsellor, and he has been sober since August 2012.

Official Problem *supra* para 1 at 5.
Clarifications to the Official Problem at 1.

[13] Mr. Sterling currently resides in Abbotsford, but he is actively involved in the Aboriginal community. For instance, he attends community events at the South River First Nation reserve once or twice a month. The reserve is only 45 km from Abbotsford.

Official Problem *supra* para 1 at 5.

[14] In September 2012, Mr. Sterling learned that Ms. Jackson had given birth to his son, Xavier, and had put the child up for adoption. Mr. Sterling contacted Colin Fox, the lawyer of the prospective adoptive parents. He told Mr. Fox that he wanted to raise Xavier. Since finding out about his son's existence, Mr. Sterling has visited Xavier on several occasions.

Official Problem *supra* para 1 at 5.

[15] Mr. Sterling opposes the application for adoption. He intends to raise Xavier. It is important to Mr. Sterling that Xavier knows and is proud of his people.

Official Problem *supra* para 1 at 5-7.

The Respondents

[16] The Respondents, Jasmine Liu and Keith Baxter, want to adopt Xavier. He was placed with the Respondents when he was three months old. They acted as his foster parents for 16 months. Xavier was returned to Ms. Jackson for a brief period of time, but when she once again found herself struggling to care for him, Ms. Jackson asked the Respondents to adopt Xavier. They agreed, and Xavier has lived with them since February 2012.

Official Problem *supra* para 1 at 3-4.

Procedural History

[17] The Respondents brought an application for an adoption order, an order dispensing with Mr. Sterling's consent, and declarations that subsection 17(5) is contrary to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

Charter, *supra* para 2, s 7, 15.

[18] Justice Murakami of the British Columbia Supreme Court dismissed the application. She found that the impugned provision is an ameliorative law designed to compensate for Canada's

historical undervaluing of cultural considerations in Aboriginal child placement, and is therefore protected by subsection 15(2) of the *Charter*.

Official Problem, *supra* para 1 at 9.

[19] Without ruling on whether the section 7 interests of the Respondents were engaged, Murakami J found that any such deprivation would be consistent with the principles of fundamental justice. She would not dispense with Mr. Sterling's consent given the legislature's clear intention to keep Aboriginal children in their communities.

Official Problem, *supra* para 1 at 9.

[20] The Respondents appealed. On appeal, the British Columbia Court of Appeal was divided. The majority, per Ali J, held that subsection 17(5) did not constitute an ameliorative provision for the purposes of subsection 15(2), and that the provision violated the Respondents' right to security of the person in an arbitrary manner.

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

[21] Justice Downie wrote a strong dissent, which largely adopted the reasons of Murakami J. Justice Downie was unable to understand how people in such a privileged position could claim that they are discriminated against by a law that seeks to mitigate historical wrongs. He concluded that the impugned provision has an ameliorative purpose, and in any event, does not treat the Respondents as less capable or worthy of respect.

Official Problem *supra* para 1 at 10.

PART III: STATEMENT OF POINTS IN ISSUE

[22] This appeal raises the following issues:

1. Does subsection 17(5) of the *Adoption Act* infringe section 15 of the *Charter*?
2. Does subsection 17(5) of the *Adoption Act* infringe section 7 of the *Charter*?

3. If the answer to questions 1 or 2 is “yes”, is the infringement demonstrably justified in a free and democratic society, under section 1 of the *Charter?*

PART IV: ARGUMENT

Issue 1: Subsection 17(5) of the *Adoption Act* does not infringe section 15 of the *Charter*

Interpretive principles of section 15 of the *Charter*

[23] The equality guarantee affirmed by section 15 of the *Charter* reflects Canada’s commitment to combatting discrimination and fostering equality. Canadian equality jurisprudence establishes that analysis under section 15 must be conducted in a contextual and purposive manner, with an emphasis on the actual impact of the impugned provision on a claimant group, and with an eye to the full social, political, and legal context of the claim.

> *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 39, 43, [2011] 1 SCR 396 [*Withler*]

[24] The jurisprudence surrounding section 15 has repeatedly rejected comparisons based on formal equality or “treating likes alike”. Rather, the courts have required analysis under section 15 to be informed by the notion of substantive equality. This model of equality involves the “promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”

> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 165, 171, 56 DLR (4th) 1 [*Andrews*].

[25] Substantive equality, the “animating norm” of section 15**,** necessitates consideration of “the outcomes of a challenged law or action, and the social and economic context in which a claim of inequality arises.”

> *Withler, supra* para 23 at para 2.

> Lynn Smith & William Black, "The Equality Rights" in Gerald-A Beaudoin and Errol Mendes, eds, *The Canadian Charter of Rights and Freedoms*, 3rd ed, (Scarborough: Carswell, 1996) at 953-954.

[26] Subsections 15(1) and 15(2) of the *Charter* work together to further substantive equality, yet each has a distinctive role in the inquiry. While subsection 15(1) prohibits governments from making discriminatory distinctions, subsection 15(2) enables governments to proactively improve the situation of disadvantaged groups through the use of ameliorative laws and programs.

> *R v Kapp*, 2008 SCC 41 at para 16, [2008] 2 SCR 483 [*Kapp*].

[27] In *Kapp*, the Supreme Court of Canada (the "SCC") summarized the three-step test used for a section 15 analysis. This test was reaffirmed in *Quebec v A*. The first step of this test involves establishing that the law in question creates a distinction that is based on an enumerated or analogous ground. If the claimant is successful in satisfying this first condition, the government may then demonstrate that the law is an ameliorative law and fulfills the criteria set out under subsection 15(2). Only if the government fails to satisfy its burden under this inquiry does a subsection 15(1) inquiry become necessary.

> *Kapp*, *supra* para 26 at para 37-40.
> *Quebec (Attorney General) v A*, 2013 SCC 5, at para 323 [2013] SCJ No 5 [*Quebec v A*].

Subsection 17(5) does not distinguish based on an enumerated or analogous ground

[28] Subsection 17(5) prohibits a court from dispensing with the consent of the Aboriginal biological parent of an Aboriginal child in the context of a direct placement adoption, unless both of the exceptions set out in paragraphs 17(5)(a) and (b) apply. These paragraphs specify that courts must only dispense with the Aboriginal parent's consent if the child is at risk of serious harm by remaining with said parent and there is no suitable alternative Aboriginal placement available.

Official Problem, *supra* para 1 at 2.

[29] As a result, all prospective adoptive parents seeking to adopt an Aboriginal child must secure the consent of the child's Aboriginal parent(s), unless the exempting conditions apply. Thus, this provision creates no relevant distinction between the claimant group, non-Aboriginal prospective adoptive parents seeking to adopt an Aboriginal child, and Aboriginal prospective adoptive parents seeking to adopt an Aboriginal child. Consequently, no enumerated or analogous ground is implicated by subsection 17(5).

[30] Should the court find that subsection 17(5) does create a distinction based on an enumerated or analogous ground, any such a distinction will satisfy the conditions of subsection 15(2) and, thus, cannot be seen to be discriminatory.

Subsection 17(5) is an ameliorative law within the meaning of subsection 15(2)

The purpose of subsection 15(2)

[31] The purpose of subsection 15(2) is to allow, indeed encourage, governments to ameliorate the situation of historically disadvantaged groups, with the goal of promoting substantive equality.

> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 at paras 40 and 41 [*Cunningham*].

[32] The SCC has consistently stressed that subsection 15(2) permits legislatures to enact laws or programs designed to provide a benefit to specific disadvantaged groups. For example, in *Kapp*, the SCC found that the issuance of a communal fishing license that granted three aboriginal bands the exclusive right to fish during a 24-hour period constituted an ameliorative program under subsection 15(2).

> *Kapp*, *supra* para 26 at para 61.

The test under subsection 15(2)

[33] Provisions protected under subsection 15(2) must: (a) have a remedial or ameliorative purpose; and (b) target a disadvantaged group identified by an enumerated or analogous ground. In *Cunningham*, the SCC elaborated on this test, by emphasizing that the first step of the test requires looking at whether the means chosen by the legislature are rationally connected to the ameliorative purpose. Further, the second stage of the test requires that the distinction made by the law "serve[s] and [is] necessary" to the ameliorative purpose. A law that satisfies these conditions will constitute an ameliorative law under subsection 15(2) and will be protected from challenge under subsection 15(1).

Kapp, supra para 26 at paras 41, 49, 52.
Cunningham, supra para 31 at para 46.

Subsection 17(5) has an ameliorative purpose

[34] An 'ameliorative purpose' is one that aims to improve the situation "of a group that is in need of ameliorative assistance in order to enhance substantive equality." The focus of the inquiry at this stage is the purpose of the law, and not its effects.

Cunningham, supra para 31 at para 44.
Kapp, supra para 31 at para 44.

[35] Subsection 17(5) was inserted into the *Adoption Act* following consultations between the British Columbia provincial government and various representatives of Aboriginal communities. Thus, the enactment responded to concerns raised by Aboriginal communities about the lack of mandated community involvement in the context of adoptions.

Official Problem, *supra* para 1 at 1.

[36] The declared objective of subsection 17(5) is to provide enhanced protection for the cultural heritage and identity of Aboriginal children and the rights of Aboriginal biological

parents in direct placement adoptions. Through this provision, the legislature seeks to redress the deleterious effects of historical laws and policies that resulted in the separation of thousands of Aboriginal children from their families and communities.

Official Problem, *supra* para 1 at 1.

[37] The overwhelming evidence before the trial judge confirms the enduring adverse effects of removing Aboriginal children from their families. The involuntary separation of Aboriginal children from their families deprived these children of their native languages and traditional Aboriginal religious and cultural practices. These individual and cultural harms have put Aboriginal traditions, practices, and languages under threat.

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

[38] Subsection 17(5) responds to these historical injustices by ensuring that Aboriginal children remain with their families and are raised within their communities, whenever possible. The provision accomplishes this by granting Aboriginal parents the right to withhold consent to the adoption of their children by non-Aboriginal families. In doing so, the provision ensures that Aboriginal parents and communities have the opportunity to expose their children to Aboriginal culture, thus preserving Aboriginal traditions, practices and languages. This exposure works to foster Aboriginal children's pride and self-esteem as Aboriginal individuals. Thus, subsection 17(5) combats the widespread trauma experienced by Aboriginal children in non-Aboriginal settings. In this way, the impugned provision respects the autonomy and dignity of both Aboriginal parents and Aboriginal children.

The means chosen are rationally connected to the ameliorative purpose

[39] In analyzing the purpose of the impugned law, courts must consider whether the means chosen by the legislature are rationally connected to the ameliorative purpose.

Kapp, supra para 26 at para 48.

[40] Prohibiting courts from dispensing with the consent of Aboriginal biological parents in direct placement adoptions, unless paragraphs 17(5)(a) and (b) apply, is rationally connected to the objective of subsection 17(5). This provision restores the agency of Aboriginal parents, giving the parents a chance to impart Aboriginal cultural values to their children.

[41] Simply put, subsection 17(5) seeks to ameliorate the conditions of Aboriginal peoples in British Columbia, thereby fulfilling the first condition of the subsection 15(2) test.

Subsection 17(5) targets a disadvantaged group identified by an enumerated ground

[42] The second step of the subsection 15(2) test requires that the impugned provision target a disadvantaged group identified by an enumerated or analogous ground. “Disadvantage” in this context is defined as “vulnerability, prejudice and negative social characterization.”

Kapp, supra para 26 at para 55.

[43] Subsection 17(5) targets Aboriginal children and their biological parents, groups that are identified by the grounds of Aboriginality or race. Courts have repeatedly acknowledged that Aboriginal peoples have a demonstrated history of vulnerability, prejudice and negative social characterization. Specifically, the evidence in this case indicates that Aboriginal children who were forced to attend residential schools or were removed from their families during the “Sixties Scoop” experienced substantially higher rates of substance addiction, mental illness, and suicide than the rest of the Canadian population. Aboriginal children remain particularly vulnerable to being removed from their families and placed in foster care. As a corollary, Aboriginal parents are particularly vulnerable to having their children removed from their custody.

Kapp, supra para 26 at para 59.
Official Problem, *supra* para 1 at 7, 8.

The distinction created is necessary to the ameliorative purpose

[44] The second stage of the subsection 15(2) test requires that the distinction made by the provision "serve[s] and [is] necessary to" the ameliorative purpose. However, "necessary" here does not require "proof that the exclusion is essential to realizing the object of the ameliorative program." Rather, the question at this stage of the inquiry is whether the distinction, "in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality."

Kapp, supra para 26 at para 52.
Cunningham, supra para 31 at para 45.

[45] The distinction drawn by subsection 17(5) serves the ameliorative purpose of the provision. By limiting the protection of subsection 17(5) to Aboriginal children, the provision recognizes the distinctive nature of Aboriginal culture and the pressing need for its protection. By excluding non-Aboriginal children from the protection of subsection 17(5), the legislature has not gone "further than is justified by the object of the ameliorative program."

Cunningham, supra para 31 at para 45.

[46] The British Columbia legislature enacted subsection 17(5) against the backdrop of judge-made law that minimized the significance of culture in the in the context of adoption and custody disputes. For instance, provisions in various provincial statutes mandate a court to consider the importance of preserving an Aboriginal child's cultural identity as part of the best interests of the child analysis. However, custody and child protection jurisprudence in Canada has repeatedly indicated that culture has had very little impact on the decisions rendered by courts in proceedings involving Aboriginal children. In effect, these provisions have not sufficiently deterred courts from placing Aboriginal children with non-Aboriginal families even under the guise of the best interests of the child analysis.

Adoption Act, *supra* para 8, s 3(2).
Child, Family and Community Service Act, RSBC 1996, c 46, s 4(2).
See for example, *H(D) v M(H)*, [1999] 1 SCR 328, 169 DLR (4th) 604, aff'g [1997] BCJ No 2144 (BCSC).

[47] Indeed, the SCC went even further in *Racine*, stating that the importance of a child's culture abates over time, whereas the importance of psychological bonding between the child and prospective adoptive parents continues to increase the longer the child resides with them. While the legislation that was under issue in that case was quite dissimilar from the *Adoption Act*, the SCC's unequivocal statement minimizing the importance of culture is illustrative of the historical trend in jurisprudence towards de-emphasizing Aboriginal culture in the adoption context. Subsection 17(5) responds to this historical insensitivity.

Racine v Woods, [1983] 2 SCR 173 at 174, 1 DLR (4th) 193 [*Racine*].

[48] The consultations that led to the enactment of subsection 17(5) support the conclusion that Aboriginal communities in the province considered the earlier legislative protections to be inadequate. The subsequent introduction of subsection 17(5) to the *Adoption Act* implies that the legislature was persuaded by the concerns raised by these communities.

[49] Through this provision, the legislature has signalled to the courts that an Aboriginal child's cultural heritage is always significant, and is, in fact deserving of *additional* protection during direct placement adoptions where an Aboriginal parent refuses to provide consent.

[50] Subsection 17(5) has a genuinely ameliorative purpose and targets a disadvantaged group. It is therefore protected as an ameliorative program under subsection 15(2). A subsection 15(1) inquiry is therefore, unnecessary.

Subsection 17(5) does not infringe subsection 15(1) of the *Charter*

[51] Should the court find that subsection 17(5) is not protected by subsection 15(2), the provision, nonetheless, does not infringe subsection 15(1).

The test under subsection 15(1)

[52] To establish that a law infringes subsection 15(1), the claimant must demonstrate that: (a) the provision creates a distinction based on an enumerated or analogous ground; and, (b) the distinction perpetuates disadvantage.

> *Kapp, supra* para 26 at para 17, 23-24.
> *Quebec v A, supra* para 27 at paras 325 -332, Abella J.

[53] A law infringes subsection 15(1) if it perpetuates or promotes "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."

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

Subsection 17(5) does not create a distinction based on an enumerated or analogous ground

[54] To repeat, it is the Appellants' position that the impugned provision creates no distinction based on an enumerated or analogous ground. However, should the court find a distinction, any such distinction cannot be found to be discriminatory within the meaning of subsection 15(1).

Any distinction subsection 17(5) might create does not discriminate

[55] In *Quebec v A*, Abella J, supported by a majority of the SCC, stated that the test for discrimination under subsection 15(1) is whether or not " the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory." More generally, this test must be understood to require focus on perpetuation or creation of disadvantage of the claimant group.

> *Quebec v A, supra* para 27 at paras 324-332.

Any distinction does not create a discriminatory disadvantage

[56] An examination of the four contextual factors set out in *Law* is useful in determining whether a law is discriminatory under subsection 15(1). These factors include: (i) any pre-existing disadvantage of the claimant group; (ii) the degree of correspondence between the differential treatment and the claimant group's reality; (iii) the ameliorative impact or purpose of the law; and, (iv) the nature of the interests affected. Each of these factors speaks against a finding of discrimination in this case.

Kapp, supra para 26 at paras 19, 23-24.
Law, supra para 53 at para 88.

[57] In *Withler*, the SCC emphasized that although considering the four *Law* factors may be beneficial, a step-by-step analysis of each factor is unnecessary in every case. In this case, the factors of a lack of pre-existing disadvantage and the presence of an ameliorative purpose are determinative, although the other two factors of correspondence and interest affected also support rejection of the discrimination claim.

Withler, *supra* para 23 at para 66.

[58] There is no evidence to suggest that the claimant group is a historically disadvantaged group. Conversely, Aboriginal children and parents, groups that subsection 17(5) seeks to assist, have a demonstrated history of pre-existing disadvantage and vulnerability.

[59] Subsection 17(5) seeks to redress the historical disadvantage faced by Aboriginal parents and children. By enacting this provision, the legislature has recognized the importance of culture in the lives of Aboriginal adoptees and the unique capacity of Aboriginal families and communities to foster this culture. In this way, subsection 17(5) acknowledges that child rearing forms a significant part of culture and is an indispensible part of the transmission of culture from one generation to another. By enhancing the opportunity for Aboriginal children to be raised

within Aboriginal culture, subsection 17(5) attempts to prevent the dismantling of Aboriginal families and the continued imposition of non-Aboriginal cultures on Aboriginal children.

[60] Subsection 17(5) corresponds to the circumstances of the claimant group. It is also sensitive to both the interests of the claimant group and the more immediate and critical interests of both Aboriginal communities and Aboriginal adoptees. The provision recognizes that the claimant group is not able to authentically communicate, through lived experience, Aboriginal culture to Aboriginal adoptees. The legislation responds to this undoubted shortcoming of non-Aboriginal prospective adoptive parents.

[61] In turn, the interests affected of the non-Aboriginal prospective adoptive parents must be understood in light of the larger, more urgent needs of the survival of Aboriginal cultures and the individual well-being of Aboriginal adoptees. In any case, no one factor can be determinative of finding discrimination. This fourth *Law* factor must be read in light of the very strong support the other factors lend to the conclusion that the impugned provision does not perpetuate discriminatory disadvantage. Thus, subsection 17(5) cannot be seen to infringe section 15.

Subsection 17(5) is protected by section 25 of the *Charter*

[62] Section 25 of the *Charter* protects "any aboriginal, treaty or other rights…that pertain to the aboriginal peoples of Canada" from abrogation by other rights in the *Charter*. As McLachlin CJC and Abella J stated in *Kapp*, "'[o]ther rights'…..comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government." Subsection 17(5) creates a statutory right for Aboriginal parents to withhold their consent to the direct placement adoption of their children. This provision seeks to protect Aboriginal culture. Therefore, it is protected from a challenge under section 15 by section 25 of the *Charter*.

Charter, *supra* para 2, s 25.
Kapp, *supra* para 26 at para 105.

Issue 2: Subsection 17(5) does not infringe section 7 of the *Charter*

[63] Subsection 17(5) does not impinge on anyone's security of the person. Even if subsection 17(5) were found to deprive anyone of security of the person, the deprivation would be in accordance with the principles of fundamental justice.

Subsection 17(5) does not deprive prospective adoptive parents of security of the person

[64] Chief Justice Lamer stated: "[f]or a restriction of security of the person to be made out… the impugned state action must have a serious and profound effect on a person's psychological integrity." Any negative psychological consequences faced by prospective adoptive parents, which result from subsection 17(5), fall far below the level that would constitute a deprivation of security of the person.

> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 60, 177 DLR (4th) 124, Lamer CJC.

[65] By merely having an application to adopt a child denied, prospective adoptive parents are not deprived of any protected interest, nor do they face any profound negative effects on their psychological integrity. Someone who applies to adopt does not have a positive right to have that adoption take place. When an adoption is denied, no one is deprived of a right. Any distress that a person faces when an application is denied does not meet the high threshold required to constitute a deprivation of security of the person.

[66] Even in specific cases where the prospective adoptive parents are foster parents who have established a relationship with the prospective adoptee, subsection 17(5) does not deprive them of security of the person, because this relationship does not entail a right to, or expectation of, permanent custody. British Columbia's *Foster Family Handbook* explains that:

> The overall goals of the Family Care Home [foster] program are to provide family-based care for children which nurtures, heals, and develops their potential

> and to provide *temporary* care for a child who has to live away from their family until they can achieve permanency through *reunification with their family* or another permanency option.

Since reunifying a child permanently with his/her family is the primary goal of the foster program, the foster parent-child relationship must be considered a temporary one.

> British Columbia Ministry of Children and Family Development, *Foster Family Handbook*, 5th ed (1997) at p 4, online: <http://www.mcf.gov.bc.ca/foster/pdf/handbook.pdf> [emphasis added].

[67] In order to infringe section 7 interests, the impact on a parent's psychological integrity must be profound. Ordinary and anticipated distress, like the termination of a foster parent-child relationship, does not meet this threshold.

Subsection 17(5) protects children's security of the person

[68] Subsection 17(5) is specifically designed to protect children, and does not deprive them of security of the person. Section 2 of the *Adoption Act* provides that the child's best interests must be given paramount consideration. Subsection 17(5) accords with this purpose by including paragraphs 17(5)(a) and (b), which act as safety valves that prevent outcomes in which a child is put at risk. Chief Justice McLachlin stated: "constitutional validity…cannot be determined without considering the provisions in the Act designed to relieve against unconstitutional or unjust applications." Paragraphs 17(5)(a) and (b) prevent any unconstitutional or unjust applications of subsection 17(5).

> *Adoption Act*, *supra* para 8, s 2.
> Official Problem, *supra* para 1, at 2.
> *Canada AG v PHS Community Services Society*, 2011 SCC 44 at para 109, [2011] 3 SCR 134, McLachlin CJC.

[69] Paragraph 17(5)(a) protects children from being placed with a biological parent if such a placement would put them at a risk of serious harm. When an Aboriginal biological parent withholds consent to the adoption of his/her child, the child can potentially be placed in his/her

custody. This paragraph allows the courts to dispense with the parent's consent if staying in that parent's home puts the child at a risk. When consent is dispensed with, the direct placement adoption can take place, and the child can be safely placed in the adoptive home. Therefore, subsection 17(5) will never lead to a child being placed in a biological parent's home, when such a placement puts the child at a serious risk of harm.

[70] Paragraph 17(5)(b) accounts for circumstances in which living with the biological parent would put the child at risk of harm, but where there is a suitable alternative Aboriginal adoptive placement. In this circumstance, the biological parent's consent will not be dispensed with. If this parent does not consent to the adoption, the child will not be placed with him or her, but can rather be placed in the suitable Aboriginal home, where the child will not be at a risk of harm.

[71] Placing an Aboriginal child with his/her biological parent or with another suitable Aboriginal placement protects against the harms associated with cultural displacement. Putting children like Xavier in Aboriginal adoptive placements protects a fundamentally important aspect of their wellbeing: their cultural heritage. Moreover, no evidence suggests that children like Xavier will face harm as a result of being moved out of foster homes. In any event, in creating subsection 17(5), the legislature has made a determination that any potential harm associated with moving a child is outweighed by the dangers of being raised outside of an Aboriginal community. On balance, subsection 17(5) reduces the overall risk of harm to a child.

Subsection 17(5) is in accordance with the principles of fundamental justice

[72] Subsection 17(5) does not impose limits on anyone's right to security of the person. Were any limits to be found, they would not infringe section 7 of the *Charter*, because they would be in accordance with the principles of fundamental justice.

Subsection 17(5) is not arbitrary

[73] The onus for demonstrating that a law is arbitrary lies with the Respondents, and the test is demanding. Chief Justice McLachlin stated: "[a] law that imposes limits on [life, liberty, or security of the person] in a way that bears *no connection* to its objective arbitrarily impinges on those interests", and is not in accordance with the principles of fundamental justice. All alleged limits of section 7 rights imposed by subsection 17(5) are closely connected with its object. The object of the law is to preserve the cultural heritage of Aboriginal children. When Aboriginal children are adopted outside of Aboriginal homes, the connection to their cultural heritage can be impaired. Any alleged infringements of life, liberty, and security of the person are direct results of preventing adoptions that impair Aboriginal children's connections to their cultural heritage. Since subsection 17(5) limits the impairment of cultural ties, it is rationally connected with preserving cultural heritage.

> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 111, McLachlin CJC [*Bedford*].

[74] Subsection 17(5) meets the rational connection requirement regardless of how well it achieves the objective of maintaining a child's ties to his/her cultural heritage. The efficacy of a law in achieving its desired objective is not part of the process of determining if the law is arbitrary. Justice Ali and Finnerty concluded that subsection 17(5) was arbitrary, since it did not correspond with the circumstances and abilities of the applicants. The ability of the applicants to raise Xavier in a culturally sensitive manner pertains to how effectively the provision furthers the goal of protecting cultural heritage. Therefore, with respect, the appellate judges incorrectly concluded that subsection 17(5) was arbitrary, since their analysis pertained to its efficacy rather than its connection with the objective.

> *Bedford*, *supra* para 73 at para 123.

Subsection 17(5) is not overbroad

[75] Chief Justice McLachlin stated, "overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts". All of the impacts of subsection 17(5) are rationally connected with its purpose, since it will only place children in homes that help preserve their connection with their Aboriginal heritage. Paragraph 17(5)(b) anticipates the placement of an Aboriginal child in an alternate "suitable adoptive placement" with "another aboriginal family". To be satisfied that another Aboriginal family constitutes a *suitable* adoptive placement, courts must take the cultural heritage of the child into consideration. Accordingly, children will be placed in homes of similar Aboriginal heritage to their own. Properly applied subsection 17(5) will not be overbroad in causing a child to be raised in an Aboriginal home that does not help to preserve his/her cultural heritage.

> *Bedford*, *supra* para 73 at para 112 [emphasis in original].
> Official Problem, *supra* para 1 at 2.

Subsection 17(5)'s effects are not grossly disproportionate to its purpose

[76] An impugned law will only be deemed to have grossly disproportionate effects "in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure". Moreover, "[t]he connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society". The denial of a direct placement adoption to foster parents is not draconian, nor is the placement of a child in the home of its biological parent where there is no risk of serious harm. Moreover, restoring Aboriginal families and preserving the cultural heritage of members of a group that has faced extreme cultural degradation for generations is an urgent and pressing objective. Any negative impact of subsection 17(5) is insignificant in comparison with the importance of its objective, and is well within the norms accepted in Canadian society.

Bedford, *supra* para 73 at para 120.

Upholding the best interests of the child is not a principle of fundamental justice

[77] "The best interests of the child" is not itself a principle of fundamental justice. Justices Gonthier and Binnie state:

> for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

Although "the best interests of the child" is a legal principle, it is not fundamental to the legal system, nor does it have the requisite consensus and precision to be deemed a principle of fundamental justice.

> *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 113, 233 DLR (4th) 415, Gonthier and Binnie JJ.

Upholding "the best interests of the child" is not fundamental to the legal system

[78] Because the importance of considering the child's best interest varies according to context, the best interests of the child is not fundamental to the legal system. Chief Justice McLachlin held that "the best interests of the child" is not fundamental to the legal system, because it "may be subordinated to other concerns in appropriate contexts". For instance, a parent can be legitimately imprisoned in the name of justice, despite the fact that the child would be better off if the parent were not imprisoned. Although a child's best interests are often a factor courts will consider, in many contexts, upholding the absolute best interest of the child is not a primary aspect of consideration in the administration of justice.

> *Canadian Foundation for Children, Youth and the Law v Canada AG*, 2004 SCC 4 at para 10, [2004] 1 SCR 76, McLachlin CJC.

There is insufficient consensus and precision regarding "the best interests of the child"

[79] The "best interests of the child" principle lacks the requisite consensus and precision to be deemed a principle of fundamental justice. There is little consensus regarding the boundaries of this principle, because it is varies significantly according to context. For instance, section 3 of the *Adoption Act* requires a consideration of nine different factors in determining a child's best interests. With so many factors, and such broad discretion about how these factors are considered, it is more than likely that reasonable people will regularly fail to come to any kind of consensus when applying this principle.

Adoption Act, supra para 8, s 2.

[80] Over and above concerns about contextual sensitivity, "the best interests of the child" principle lacks precision, due to the way that the unique perspectives of the people applying the principle will colour their analysis. Marlee Kline explained:

> [t]he best interests of the child standard serves in practice to privilege an understanding of children as decontextualized individuals whose interests are separate and distinct from those of their families, communities, and cultures. To this extent, it tends to render irrelevant or unimportant the child's cultural identity and heritage, thus helping to justify her separation from it.

Aspects of a child's situation are weighed and analyzed differently depending upon one's particular cultural understanding of children, which hinders any potential for conceptual precision regarding "the best interests of the child" principle.

> Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30 Osgoode Hall LJ 375 at 395-96.

Subsection 17(5) promotes "the best interests of the child"

[81] Even if "the best interests of the child" were found to be a principle of fundamental justice, subsection 17(5) accords with this principle through giving recognition to the importance

of an Aboriginal child's cultural heritage. Because subsection 17(5) was devised in consultation with Aboriginal communities, it incorporates their recognition that connection with Aboriginal heritage is a vital part of an Aboriginal child's best interests. Subsection 17(5) takes decisions about the importance of being raised in an Aboriginal community out of the hands of judges, and places them with Aboriginal parents. Because these parents understand how significant a child's connection with his/her Aboriginal community is to the child's best interests, they are well situated to determine whether an adoption is in the best interests of their child.

Section 25 of the *Charter* protects subsection 17(5) from a section 7 challenge

[82] If the court were to find that subsection 17(5) infringed section 7 of the *Charter,* the rights conferred by this provision would nonetheless be protected by section 25. As discussed above, the right for Aboriginal parents to withhold consent to direct placement adoptions constitutes one of "the other" rights in section 25, and therefore, cannot be derogated from by any construction of other *Charter* rights. Thus, subsection 17(5) withstands *Charter* scrutiny, since section 7 cannot detract from the right that this provision confers.

Issue 3: Subsection 17(5) is constitutional pursuant to Section 1 of the *Charter*

[83] If subsection 17(5) were found to infringe section 7 or section 15 of the *Charter*, the infringement would be justified under Section 1. Any limits of rights caused by subsection 17(5) are reasonable in a free and democratic society, because the provision meets the requirements laid out in *Oakes*: it has a pressing and substantial objective, there is a rational connection between the law and its objective, a minimal impairment of rights, and proportionality between its effects and objective.

R v Oakes, [1986] 1 SCR 103 at paras 69-70, 26 DLR (4th) 200, Dickson CJC [*Oakes*].

Courts must exercise deference towards Parliament in reviewing subsection 17(5)

[84] Courts must exercise deference towards the legislature in determining whether any alleged rights infringements caused by subsection 17(5) are reasonable limits pursuant to section 1. A high degree of deference is required "in the case of difficult policy judgments regarding the claims of competing groups or the evaluation of complex and conflicting social science research". Subsection 17(5) is the result of a difficult policy judgement balancing the interests of Aboriginal parents, prospective adoptive parents, and children. The dispute over Xavier's custody demonstrates how the interests of these groups can conflict. Subsection 17(5) results from consultation with Aboriginal communities, and responds to a complex and conflicting sociological and historical context.

M v H, [1999] 2 SCR 3 at para 79, 171 DLR (4th) 577, Cory and Iacobucci JJ.

Subsection 17(5) has a pressing and substantial objective

[85] The broader goal of subsection 17(5) must be considered in determining whether it has a pressing and substantial objective. Chief Justice McLachlin says "[t]he question of justification on the basis of an overarching public goal is at the heart of s. 1". Moreover, section 1 aims to limit rights where exercising them "would be inimical to the realization of collective goals of fundamental importance".

Bedford, *supra* para 73 at para 125.
Oakes, *supra* para 83 at para 65.

[86] The overarching goal of restoring Aboriginal cultures and families that have been subjected to policies of assimilation is an objective of fundamental importance. Prime Minister Stephen Harper's 2008 apology to the victims of Residential Schools was an expression of the nation-wide aspiration to restore Aboriginal cultures and to collectively heal from the wrongs of Canada's past. Assisting Aboriginal families with the growth and restoration of their cultures is a

pressing and substantial objective, in light of the enormous toll that previous policies of assimilation have wrought on Aboriginal peoples.

Harper's Apology, *supra* para 1.

[87] Subsection 17(5) fosters Aboriginal cultures by preventing the pattern of separating Aboriginal children from Aboriginal communities. This pattern has continued from the Residential Schools, to the Sixties Scoop, and to the ongoing overrepresentation of Aboriginal children in foster care. Aboriginal communities have also expressed concerns about how adopted Aboriginal children lacked involvement with their communities under the previous *Adoption Act*.

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

[88] By giving an Aboriginal parent the ability to withhold consent to a child's adoption, Subsection 17(5) curbs the continuing separation of Aboriginal children from their communities that results from insufficient consideration of culture in the analysis of a child's best interests. An example of the devaluation of a child's culture occurred in *Racine and Racine v Woods*, when Scollin J said "matters of cultural background and heritage cannot be allowed to interfere with the paramount consideration of the best interests of the child". Despite the fact that subsection 3(2) of the *Adoption Act* requires judges to consider a child's cultural heritage in determining his/her best interests, best interest analysis itself can significantly undervalue the importance of a child's cultural identity. As explained above, the decontextualized approach to assessing a child's best interests can render his/her identity and cultural heritage irrelevant, and result in more children being placed outside of the Aboriginal cultures of their heritage.

Racine and Racine v Woods, [1985] 2 CNLR at 191, (Man QB) Scollin J.
Adoption Act, *supra* para 8, s 3(2).

[89] Furthermore, subsection 17(5) provides opportunities to Aboriginal families and cultures to heal, while accounting for the legacy of past wrongs. The SCC has recognized how

> the history of colonialism, displacement, and residential schools… continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

In light of the ongoing social concerns faced by the families of victims of colonial policies, subsection 17(5) provides added opportunities for Aboriginal parents to ensure that their children can have a connection to their cultural heritage. When possible, the provision gives parents the ability to raise their children and to personally forge their children's connection to their cultural heritage. When parents are unable to raise their children, subsection 17(5) allows them to provide this cultural connection by favouring a placement with a suitable Aboriginal family over a non-Aboriginal family, when one is available.

R v Ipeelee, 2012 SCC 13 at para 60, [2012] 1 SCR 433, LeBel J.

There is a rational connection between subsection 17(5) and its objective

[90] Chief Justice McLachlin stated: "[t]he 'rational connection' branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective." Subsection 17(5) is a rational way to restore Aboriginal culture. A primary means of cultural transmission is through the child rearing process and the functioning of the family unit. When a non-Aboriginal family adopts an Aboriginal child, Aboriginal cultural heritage is not transmitted to the child in this way. When an Aboriginal parent withholds consent to an adoption of this nature, the parent prevents the child from being permanently raised in a home that lacks a primary means of Aboriginal cultural transmission. Preventing these adoptions will likely lead to more Aboriginal children being raised in Aboriginal homes. Therefore, subsection 17(5) is rationally connected to the restoration of Aboriginal culture, since it promotes a primary means of cultural transmission.

Oakes, supra para 83 at paras 103, 139.

Subsection 17(5) minimally impairs Charter rights

[91] A law meets the minimal impairment standard unless "a less intrusive means would achieve the 'same' objective or would achieve the same objective as effectively". A less rigid scheme than subsection 17(5), leading to less alleged rights intrusions, would not advance the pressing and substantial objective as effectively. The most effective means of protecting Aboriginal culture is having Aboriginal parents raise Aboriginal children. Not requiring the consent of Aboriginal parents will lead to more Aboriginal children being raised by non-Aboriginal parents. Therefore, subsection 17(5) minimally impairs rights, since there is no less intrusive means that would as effectively protect Aboriginal culture.

R v Chaulk, [1990] 3 SCR 1303 at 1342, 62 CCC (3d) 193.

Subsection 17(5) is proportional to its objective

[92] To justifiably infringe *Charter* rights, "the underlying objective of a measure and the salutary effects that actually result from its implementation [must] be proportional to the deleterious effects the measure has on fundamental rights and freedoms." The salutary effects of subsection 17(5) outweigh the minor deleterious effects. Therefore any alleged infringements of *Charter* rights are justified.

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at 887, 120 DLR (4th) 12.

[93] The underlying objective of restoring Aboriginal culture is extremely important. Subsection 17(5) will almost certainly lead to more Aboriginal children being raised by either their biological parents or another Aboriginal family. This outcome will provide opportunities for Aboriginal cultures to be rebuilt and to be passed on to future generations. Additionally, this provision will likely reduce the number of Aboriginal children being raised in non-Aboriginal adoptive homes. This reduction will likely mitigate the low self-esteem and suicidal tendencies

faced by Aboriginal children who are raised in non-Aboriginal homes. It is also likely to reduce the behavioural and educational difficulties faced by transracially adopted Aboriginal children, and avoid their increased difficulties in dealing with racism and discrimination.

Official problem, *supra* para 1 at 8.

[94] The deleterious effects of subsection 17(5) are little more than the "hurt feelings" experienced by prospective adoptive parents who are unable to adopt an Aboriginal child. In feeling that the law treats them differently, these prospective adoptive parents are experiencing a deleterious effect. However, non-Aboriginal people in a position where they are ready to adopt a child are likely to be socially and economically privileged. Justice Iacobucci has noted that differential treatment of people who are disadvantaged is likely to have a severe impact, since they are already vulnerable. Conversely, differential treatment of privileged, less vulnerable individuals will likely have a less severe impact, and should be considered less deleterious. Since non-Aboriginal prospective adoptive parents are likely to be privileged, any differential treatment that they face, in light of subsection 17(5), is only slightly deleterious and is proportional to the provision's many salutary effects and its pressing objective.

Law, s*upra* para 53 at para 63.

PART V – ORDER SOUGHT

[95] The Appellants respectfully request that the appeal be allowed, and that the Respondents' application be dismissed.

PART VI – TABLE OF STATUTES AND AUTHORITIES

Legislation	**Paragraph**
Adoption Act, RSBC 1996, c 5.	8, 46, 68, 79, 88
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Official Wilson Moot Sources	
Official Problem, the Wilson Moot 2014.	1, 2, 4-21, 28, 35-37, 43, 68, 75, 87, 93
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