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 RESPONDENTS

TEAM NUMBER: 3

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PART I – OVERVIEW

[1] Xavier Jackson is a healthy, happy four-year-old boy who has lived with Keith Baxter and Jasmine Liu for most of his life. Xavier's birth mother has requested a direct placement adoption with Mr. Baxter and Ms. Liu, knowing it to be the best choice for her son. Xavier's Aboriginal biological father abandoned both mother and child before birth, and has been absent Xavier's entire life. The question in this case is whether the government can give an uninvolved biological father the right to prevent an otherwise favourable adoption, solely by virtue of his race.

Official Problem, the Wilson Moot 2014 at 1, 3 [Official Problem].

[2] Subsection 17(5) of British Columbia's *Adoption Act* is an ineffective attempt by government to protect the cultural identity of Aboriginal children and the rights of Aboriginal parents. The impugned provision aims to redress historic injustice at the expense of a vulnerable child. Ignoring context, the provision undermines substantive equality and constitutes discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*. Its mechanical application fails to preserve the child's specific cultural identity and results in unnecessary future court proceedings with little chance of success.

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 [*Charter*].

[3] Subsection 17(5) violates the *Charter* rights of three distinct groups, is overbroad in several contexts, and is grossly disproportional to the pursued objective. These violations are made more perverse by operating to further disadvantage Aboriginal children and their single mothers. Consequently, subsection 17(5) infringes sections 7 and 15 of the *Charter* and cannot be saved under section 1.

[4] Subsection 17(5) of the *Adoption Act* treats Aboriginal children as a means to a larger end. This is an unacceptable way to achieve justice.

PART II – STATEMENT OF FACTS

A. Background

[5] Xavier Jackson lives with Ms. Liu and Mr. Baxter in a multicultural community in Vancouver. Xavier enjoys watching "Dora the Explorer" and being read to each night before bed. He refers to the Respondents as "Mama" and "Daddy" and they are the only parental figures he recognizes. Xavier's birth mother, Christine Jackson, chose Ms. Liu and Mr. Baxter as Xavier's adoptive parents and has placed him in their care. They are completely devoted to Xavier's development and wellbeing.

Official Problem, *supra* para 1 at 6.

[6] Xavier's biological father is Don Sterling. Mr. Sterling has never been involved in Xavier's life. Mr. Sterling and Ms. Jackson's relationship ended because Mr. Sterling had no interest in being a father.

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

[7] Xavier was placed with Ms. Liu and Mr. Baxter at three months old and remained in their care for sixteen months. He was then returned to Ms. Jackson. After only four months, she found herself struggling to care for him and approached the Respondents about a direct placement adoption. They immediately agreed and Xavier has been in their care ever since.

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

[8] The Respondents began an adoption application under sections 8 and 9 of the *Adoption Act.* They made a number of unsuccessful attempts to contact Mr. Sterling to obtain his consent. When Xavier was 2 ½ years old, Mr. Sterling heard of the pending adoption through friends and contacted the Respondents' lawyer to oppose the adoption.

Official Problem, *supra* para 1 at 4-5.
Adoption Act, RSBC 1996, c 5 at ss 8-9 [*Adoption Act*].

[9] Mr. Sterling had a difficult upbringing on the South River First Nation reserve. His father died when he was seven years old, and his mother verbally and physically abused him. During his adolescence he developed issues with drugs and alcohol, which persisted through his relationship with Ms. Jackson. Since 2009, he has been only sporadically employed. He was arrested for shoplifting and possession of hashish in May 2012.

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

[10] In his affidavit, Mr. Sterling stated that he is a changed man. He wants to be a father to his son and to preserve Xavier's cultural identity as a member of the South River First Nation.

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

[11] Xavier has been thriving in the care of Mr. Baxter and Ms. Liu. Natalie Sharma, a social worker who provided an assessment of the adoption, found that the Respondents are exceptionally well placed to parent Xavier. She noted their well-developed plans for Xavier's education and social development and the positive relationships he has with his putative adoptive grandparents, aunts and uncles, and cousins. Xavier has only vague memories of Ms. Jackson and does not have a real sense of who Mr. Sterling is.

Official Problem, *supra* para 1 at 6.

[12] Ms. Sharma also assessed Mr. Sterling's capacity to care for Xavier. While she praised the sincerity of his intentions, she is concerned that Mr. Sterling is daunted by the prospect of disciplining a child. He possesses no real support network and has not been attending any continued alcohol or drug support programs. Ms. Sharma believes these programs are crucial to avoid his risk of relapse.

Official Problem, *supra* para 1 at 7.

[13] Professor Nicholas Dallaire prepared a report summarizing the history of Aboriginal and

transracial adoptions in Canada. His evidence describes trends in which transracial adoptees have experienced significantly greater difficulties than children who are adopted by parents of the same ethnic group. However, the position of the Canadian Association of Psychologists is that transracial adoptions are likely to result in well-adjusted children where the parents are able to assist them in developing skills to handle the challenges they may experience as a result of racism and discrimination. The problems identified by Dr. Dallaire are more likely when adoptees are older at the time of adoption.

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

[14] Mr. Baxter is of mixed Scottish and Irish descent and Ms. Liu is of mixed Chinese and Indian descent. They have been married for nine years. In her affidavit, Ms. Liu stated she takes a great deal of pride in her heritage and has experienced racism and prejudice as a result of her own cultural background. The Respondents understand the importance of any child's cultural identity and are committed to helping Xavier develop his own. They are participating in a First Nations cultural training program and have taken Xavier to visit the South River reserve, a practice they intend to continue.

Official Problem, *supra* para 1 at 3, 6.

B. Legislation

[15] Direct placement adoptions require the consent of both biological parents. As a necessary exception to this rule, subsection 17(1) of the *Adoption Act* allows a trial judge to dispense with consent when it is in the child's best interests to do so. This includes circumstances where the biological parent has abandoned the child or has not made reasonable efforts to meet their parental obligations. Where the biological parent is Aboriginal, subsection 17(5) operates despite subsection 17(1). It prevents the trial judge from dispensing with the Aboriginal biological

parent's consent unless the child faces a risk of serious harm in their care *and* an adoption with a suitable Aboriginal family is not available.

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

[16] The *Adoption Act* was amended to include subsection 17(5) in 2008. The stated purpose of this amendment is to ensure that the cultural heritage and identity of Aboriginal children and the rights of Aboriginal biological parents are given increased protection in direct placement adoptions.

Official Problem, *supra* para 1 at 1.

C. Procedural History

[17] The Respondents brought an application to the British Columbia Supreme Court (BCSC) seeking an adoption order, an order dispensing with Mr. Sterling's consent, and a declaration that subsection 17(5) is of no force and effect because it infringes sections 7 and 15 of the *Charter* and cannot be saved by section 1.

Official Problem, *supra* para 1 at 2.

[18] In dismissing the application, Murakami J found subsection 17(5) constituted an ameliorative law within the meaning of subsection 15(2) of the *Charter*. Without ruling on a section 7 *Charter* violation, she found that any such infringement would be in accordance with the principles of fundamental justice. Murakami J noted that but for subsection 17(5), she would have granted the adoption order as being in Xavier's best interests. She was prevented from doing so by the legislation.

Official Problem, *supra* para 1 at 9.

[19] Mr. Baxter and Ms. Liu appealed to the British Columbia Court of Appeal (BCCA). Speaking for the majority, Ali JA held that a law which sets aside the best interests of the child

and makes it more difficult for an Aboriginal child to be adopted into a secure, loving home could not be considered ameliorative. He found that the impugned provision discriminates against the Respondents, assuming, without individualized inquiry, that they are unable to raise a child in a culturally sensitive manner. He further held that the provision violated their security of the person in a manner that "must be considered arbitrary on any standard."

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

PART III – STATEMENT OF POINTS IN ISSUE

1. Subsection 17(5) of the *Adoption Act* is discriminatory under section 15 of the *Charter*
2. Subsection 17(5) of the *Adoption Act* infringes section 7 of the *Charter*
3. The infringements of sections 15 and 7 are not 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* is discriminatory under section 15 of the *Charter*

[20] Subsection 17(5) of the *Adoption Act* discriminates on the basis of race. In determining consent requirements for direct placement adoption, the impugned provision denies only Aboriginal children the protection of a best interests analysis. As a result, the child's best interests take a back seat to those of Aboriginal biological parents and Indigenous cultures at large. Subsection 17(5) further discriminates against non-Aboriginal prospective adoptive parents, assuming they cannot raise an Aboriginal child in a culturally sensitive manner. Subsection 17(5) is inconsistent with substantive equality and constitutes discrimination under section 15 of the *Charter*.

A. Overview of section 15: an overarching purpose of ensuring substantive equality

[21] The overarching purpose of section 15 is to ensure state action upholds substantive equality. As explained by McLachlin CJ, substantive equality is founded on the principle that human beings are "possessed of the same innate human dignity, which the law must uphold and protect, not just in form, but in substance." This principle demands that the state not treat the individual as a means to forward the wellbeing of others. Section 15 functions to uphold the inherent dignity of the individual and protect it from majoritarian processes.

> The Right Honourable Beverly McLachlin, "Equality: The Most Difficult Right" (2001) 14 SCLR (2d) 17 at 20, 22.
> Lorraine Weinrib, "Human Dignity as a Rights-Protecting Principle" (2004) 17 NJCL 325 at 340.

[22] The substantive equality informing section 15 as a whole guides the analysis of *both* subsections 15(1) and 15(2). More specifically, subsection 15(1) is aimed at preventing discriminatory distinctions that promote or perpetuate disadvantage on enumerated or analogous grounds. Subsection 15(2) allows the government to further substantive equality by developing ameliorative programs, provided those programs meet certain criteria.

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

[23] Three propositions regarding substantive equality are clear: (1) it goes beyond formal equality; (2) it looks to the outcomes of a challenged law; and (3) the analysis must consider the context of any resulting equality harm. The section 15 analysis must therefore be contextual, effects-based, and focused on more than mere similarity or difference.

> *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143 at paras 166, 168, 171, MacIntyre J [*Andrews*].
> The Honourable Lynn Smith & William Black, "The Equality Rights", in Errol Mendes & Stephane Beaulac, eds, *Canadian Charter Of Rights And Freedoms,* 5th ed (Markham, Ont: LexisNexis Canada, 2013) 951 [*Smith & Black*].
> Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 SCLR (2d) 183 [*Young*].

i) Requirements under section 15 of the *Charter*

[24] The current framework for a section 15 analysis is set out in *Kapp* and reaffirmed in *Quebec*. The claimant must first show that subsection 17(5) creates a distinction based on an enumerated or analogous ground. It is then open to the government to prove that the impugned provision is ameliorative within section 15(2) of the *Charter*. If the government is unsuccessful, the claimant must prove that the impact of the distinction identified infringes subsection 15(1) of the *Charter.*

> *Kapp, supra* para 22 at paras 40-41.
> *Withler v Canada (Attorney General)* 2011 SCC 12 at para 2 [*Withler*].
> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 331 [*Quebec*].

B. Stage One: Subsection 17(5) creates a distinction on the enumerated ground of race

[25] Subsection 17(5) of the *Adoption Act* creates a distinction on the enumerated ground of race and does so in two ways. First, the impugned provision draws a distinction between Aboriginal and non-Aboriginal children. If the court is satisfied that it is in a non-Aboriginal child's best interests, it may dispense with consent of a biological parent under subsection 17(1). In the case of an Aboriginal child, a best interests analysis is legislatively discarded under subsection 17(5). Second, the impugned provision distinguishes based on race of the prospective adoptive parents. Consent of an Aboriginal biological parent is required when non-Aboriginal parents apply for a direct placement adoption. If the adoptive parents are Aboriginal, consent may be dispensed with unless remaining with the biological parent will result in "serious harm" to the child.

> Official Problem, *supra* para 1 at 1, 2.
> *Adoption Act*, *supra* para 8 at s 17(1).

C. Stage Two: Subsection 17(5) of the *Adoption Act* does not constitute an ameliorative law

[26] Subsection 17(5) is not protected under subsection 15(2) of the *Charter.* Subsection 17(5)

is inconsistent with substantive equality. By denying Aboriginal children the benefit of an individual best interests analysis, the impugned provision uses those children as a means to the larger collective end of cultural preservation.

[27] Equality means nothing if not a commitment to recognizing each person's equal worth as a human being. Our society cannot tolerate legislative distinctions that otherwise offend fundamental human dignity. Any law that so denies individual dignity and worth is profoundly inconsistent with substantive equality, and cannot satisfy the requirements of subsection 15(2).

Kapp, supra para 22 at para 41.
Egan v Canada, [1995] 2 SCR 513 at para 36, L'Heureux-Dubé J, dissenting.

i) Requirements of section 15(2) of the *Charter*

[28] The test for applying subsection 15(2) of the *Charter* is set out by the Supreme Court of Canada (SCC) in *Kapp.* To satisfy the requirements, the government must demonstrate: (1) the impugned legislation has an ameliorative or remedial purpose; and (2) the legislation targets a disadvantaged group identified by the enumerated or analogous grounds. In *Cunningham,* the Court clarifies this test, adding two additional requirements. First, there must be a correlation between the legislation and the disadvantage suffered; and second, any distinctions must serve or be necessary to the ameliorative purpose. *Cunningham* refines the original articulation of the test to ensure that a subsection 15(2) application is consistent with substantive equality.

Alberta v Cunningham, 2011 SCC 37 at paras 41-48, McLachlin CJ [*Cunningham*].

ii) Subsection 17(5) fails the final requirement of subsection 15(2) of the *Charter*

[29] The stated purpose of subsection 17(5) is to ensure that the cultural heritage and identity of Aboriginal children and the rights of Aboriginal biological parents are given increased protection in direct placement adoptions. Distinctions made in subsection 17(5) do not serve, nor are they necessary to, an ameliorative goal.

Official Problem, *supra* para 1 at 1.

a) Subsection 17(5) fails to serve the ameliorative purpose

[30] The impugned provision does not preserve a child's distinctive heritage, as it is inattentive to the cultural context and needs of any specific child. Rather, the legislation arbitrarily assimilates various Indigenous peoples into the simple notion of one "Aboriginal" culture. This incorrectly assumes one Indigenous culture to be equivalent to any other. The legislation effectively repeats the errors of colonialism by treating Indigenous cultures as singular, homogenous, and generalizable. It thereby undermines the ameliorative goal of protecting the specific cultural identity of the child.

[31] Paragraph 17(5)(b) favours placing a child with *any* Aboriginal family regardless of that family's connection with the child's specific cultural heritage. This elision of specificity fails to recognize differences, which range from minor to substantial, among Indigenous peoples across Canada. Consider a South River child raised in the Coast Salish area by non-Aboriginal parents. If those parents actively facilitate close connections between the child and the South River community, that child may develop a strong connection to his or her cultural identity. A similar child placed in a northern BC Gitxsan home, without physical or cultural ties to the South River community, is unlikely to develop as strong a connection. Subsection 17(5) fails to recognize this. Thus, the racial distinction made between adoptive parents does not serve the ameliorative purpose.

Official Problem, *supra* para 1 at 2.

b) Distinctions made in subsection 17(5) are not necessary to the ameliorative purpose

[32] Excluding Aboriginal children from the best interests of the child analysis under subsection 17(1) is not necessary to advance the ameliorative purpose of protecting their cultural identity. Subsection 17(5) has created a "bright-line rule," which precludes a judge from

considering any context surrounding the adoption or interests of the child beyond race. Placing additional weight on an Aboriginal biological parent's race may be appropriate, but it is unnecessary to exclude the court's residual discretion to consider context. Doing so reverts to a "treating likes alike" formal equality analysis, subordinating the interests of an individual Aboriginal child to larger cultural preservation concerns. Thus, the distinction is unnecessary to the ameliorative goal.

[33] In sum, the Appellant cannot meet the requirements of an ameliorative law protected under subsection 15(2). Thus, the analysis under subsection 15(1) cannot be avoided.

D. Stage 3: Subsection 17(5) infringes subsection 15(1) of the *Charter*

[34] The overall impact of subsection 17(5) is to discriminate against two discrete groups, both on the basis of race. The impugned provision perpetuates the disadvantage of Aboriginal children, an already vulnerable group, by denying them the benefit of an individually assessed best interests analysis. Subsection 17(5) also discriminates against non-Aboriginal prospective adoptive parents. The legislation creates a hurdle for non-Aboriginal adoptive parents that does not exist for Aboriginal parents. This makes it more difficult for non-Aboriginal parents to adopt an Aboriginal child, without any consideration of the circumstances. Consequently, subsection 17(5) undermines substantive equality, rendering it unconstitutional and discriminatory under subsection 15(1) of the *Charter*.

i) Subsection 15(1) – a substantive equality approach

[35] The approach to subsection 15(1) demands a case-by-case analysis that focuses on whether the *impact* of the impugned law is consistent with substantive equality. Emphasizing legislative purpose at this stage is inconsistent with the substantive equality approach as it redirects the analysis away from the law's impact.

Andrews, supra para 23 at 168, 171.
Law v Canada, [1999] 1 SCR 497 at paras 23-41 [*Law*].
Quebec, supra para 24 at para 333, Abella J, para 421, McLachlin CJ.
Smith and Black, supra para 23 at 969.

ii) The current test: *Quebec v A*

[36] The SCC recently refocused the test for subsection 15(1), expressly returning to the earlier *Andrews* formulation. Having establishing that the law creates a distinction based on an enumerated ground, the Respondent must establish that this distinction has the impact of creating or perpetuating disadvantage. In *Quebec*, the majority formally rejects the contention that it is necessary to show promotion or perpetuation of prejudice or false stereotyping. Fundamentally, discrimination is "nothing more than a disadvantage imposed on a listed or analogous ground."

Quebec, supra para 24 at paras 319-324.
Andrews, supra para 23.
Kapp, supra para 22 at para 17.
Peter W Hogg, *Constitutional Law of Canada,* 5th ed (Toronto: Carswell, 2011) at 55-31.

[37] In showing discrimination, a variety of contextual factors were identified by *Law* as relevant. However, it is settled law that neither the presence nor absence of any factor is dispositive of a subsection 15(1) claim. Indicia that will militate toward a finding of discrimination include: pre-existing disadvantage, the degree of correspondence between the grounds of the claim and the actual characteristics or circumstances of the claimant, and the ameliorative effects of the impugned law upon a disadvantaged group.

Law, supra para 35 at para 62.
Quebec, supra para 24 at paras 319-324.
Gosselin v Québec, 2002 SCC 84 at para 126, L'Heureux-Dubé J.

iii) Subsection 17(5) discriminates against Aboriginal children

[38] Subsection 17(5) perpetuates the pre-existing disadvantage of Aboriginal children by denying them the protection of the best interests analysis. Under subsection 17(1), non-

Aboriginal children are better protected by the court's ability to carefully balance each child's best interests. In contrast, the mechanical test in subsection 17(5) ignores all contextual factors outside race, assuming the child's only significant characteristic is his or her Aboriginality. Subsection 17(5) thus favours the interests of Aboriginal parents and communities at large at the expense of the individual child. This undermines substantive equality and constitutes discrimination against a particularly vulnerable subset of an historically disadvantaged group.

[39] The importance of a best interests of the child analysis cannot be overstated. Canada's international obligations, embodied in the United Nations' *Convention on the Rights of the Child,* require the best interests of the child to be the primary consideration in all actions concerning children. Respecting parenting arrangements in British Columbia, the best interests of the child is the paramount consideration under the *Adoption Act* and the *only* consideration under the recently reformed *Family Law Act*. Contemporary government policy recognizes that although "all parties to an adoption have rights and interests, those of the child are the most important." In the words of Wilson J, a "child is not a chattel in which its parents have a proprietary interest; it is a human being to which they owe serious obligations." Sacrificing a child for the betterment of a group cannot uphold substantive equality.

> *Convention on the Rights of the Child,* 20 November 1989, Can TS 1992 No 3, (entered into force 2 September 1990) [*Convention*].
> *Adoption Act, supra* para 8 at s 2.
> *Family Law Act,* SBC 2011, c 25 at s 37(1) [*Family Law Act*].
> "Highlights of the Family Law Act", online: British Columbia Ministry of Justice, Legislation and Policy <http://www.ag.gov.bc.ca/legislation/family-law/>.
> *Racine v Woods,* [1983] 2 SCR 173 at 9, Wilson J [*Racine*].

[40] The trial judge held that absent subsection 17(5), she would have granted the adoption order as being in Xavier's best interests, particularly considering his history of care and close bond with the Respondents. Subsection 17(5) precluded her from doing so, based solely on

Xavier's race.

Official Problem, *supra* para 1 at 9.

[41] It is true that substantive equality requires sensitivity to the implications of historical injustice, but it also demands thoughtful consideration of the wellbeing of a four-year-old boy. As an Indigenous person, Xavier already bears pre-existing disadvantage in society by virtue of his race. If anything constitutes discrimination under section 15 of the *Charter*, perpetuating disadvantage of an Aboriginal child must.

iv) Subsection 17(5) discriminates against non-Aboriginal prospective adoptive parents

[42] Subsection 17(5) also discriminates against non-Aboriginal prospective adoptive parents. As held in the appeal court below, the mechanical operation of the impugned provision assumes, without individual inquiry, that non-Aboriginal parents do not have the ability to raise an Aboriginal child in a culturally sensitive manner. This prevents prospective non-Aboriginal parents from adopting an Aboriginal child, despite a close bond developed with the child, their history of caring for him or her, and their cultural sensitivity to the child's specific heritage.

[43] It is not a barrier to a finding of discrimination that non-Aboriginal adoptive parents may not be a previously disadvantaged group. The SCC has been clear that the presence of pre-existing disadvantage is merely one indicium among many; its absence bears no overriding weight.

Quebec, supra para 24 at para 331.

[44] Subsection 17(5) fails to consider the lack of correspondence between the grounds of the claim and the actual capacity, needs, or circumstances of the claimants. The legislation is indifferent to the presence or absence of correspondence between race and the actual capacity of the adoptive parents to meet an Aboriginal child's needs. To overcome the concern captured by this factor, legislation must take into account the different consequences a challenged provision

will have on different people. As stated in *Law*, discrimination will be more readily found where the law fails to take into account the claimant's actual situation.

Law, supra para 35 at para 88, point (9)(B).

[45] Lack of correspondence is often determinative of a finding of discrimination. Failure to assign this factor a crucial role reduces that analysis to one reflective of formal equality, a notion dismissed by jurisprudence as inadequate and misleading. The impugned legislation employs this very notion of equality by failing to adequately contextualize the circumstances of both non-Aboriginal adoptive parents and Aboriginal children.

Smith and Black, supra para 23 at 1007-1009.

[46] Appropriate legislative correspondence to claimant circumstances would reflect the best interests of the child by facilitating Xavier's adoption. The alternative envisioned by the legislation would mean tearing Xavier from the loving parents he knows and placing him with a biological parent he does not recognize.

[47] Subsection 17(5) does not allow a trial judge to consider important context. Rather, it makes a blanket assumption that Xavier's cultural identity will only be maintained if he is raised by those of his own race. By substituting race for culture, the impugned provision ignores cultural attributes particular to any individual Aboriginal child.

[48] Subsection 17(5) discriminates against both Aboriginal children and non-Aboriginal adoptive parents and undermines substantive equality. The provision is inconsistent with the government's equality obligations as entrenched in subsection 15(1) of the *Charter*.

Official Problem, *supra* para 1 at 6, 9.

ISSUE 2: Subsection 17(5) of the *Adoption Act* infringes section 7 of the *Charter*

[49] Subsection 17(5) deprives three distinct parties of their liberty and security of the person:

Ms. Jackson as the birth mother, Ms. Liu and Mr. Baxter as the prospective adoptive parents, and Xavier as an Aboriginal child. These deprivations are not in accordance with the principles of fundamental justice as the legislative effects are overbroad and grossly disproportional.

A. The test under section 7 of the *Charter*

[50] The internal analytical structure present within section 7 requires the following two-part test: (1) Is there an infringement of one or more of the rights to life, liberty and security of the person? (2) If so, is the infringement contrary to the principles of fundamental justice? This test requires a contextual approach. The court must evaluate the nature and scope of the right claimed and the seriousness of the *Charter* violation with an eye to the social and legislative context.

> *Winnipeg Child & Family Services (Central Area) v W(KL)*, 2000 SCC 48 at para 70.
> *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at para 22.

[51] The physical and psychological integrity of individuals is a key concern under the liberty and security of the person. Within this concern, the courts have recognized psychological wellbeing, rights of children in guardianship disputes, and parental rights as protected interests.

> *Blencoe v British Columbia*, 2000 SCC 44 at para 49 [*Blencoe*].
> *New Brunswick v G(J)*, [1999] 3 SCR 46 at para 76 [*G(J)*].

B. Subsection 17(5) violates the section 7 rights of three distinct groups

i) The birth mother's liberty

[52] A parent's liberty interest includes the right to nurture a child, to care for his or her development, and to make decisions for him or her in fundamental matters. According to the SCC, parents should make important decisions affecting their children as they are in a ideal position to appreciate the best interests of their children. In contrast, the state is ill-equipped to make such intimate decisions.

> *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 83, para 85 [*B(R)*].

[53] A birth mother faces an overwhelmingly difficult choice when placing her child for direct placement adoption. Adoption requires her to admit that her child's best interests lie in a home that is not her own and to seek out parents whom she trusts to care for her child. For mothers of Aboriginal children, subsection 17(5) interferes with this difficult choice by eliminating the best interests of the child analysis and by providing veto power to an Aboriginal biological parent, irrespective of the circumstances.

[54] The operation of the impugned provision thus interferes with Ms. Jackson's parental liberty. By preventing a court from dispensing with the consent of an otherwise absent biological father, subsection 17(5) unjustifiably interferes with her choice of adoptive parents for Xavier. This interference is made more perverse in these specific circumstances as the court has found her choice to be in Xavier's best interests.

Official Problem, *supra* para 1 at 9.

ii) The prospective adoptive parents' liberty and security

[55] The parental interests described above must equally extend to the large portion of prospective adoptive parents who have a close, pre-existing bond with the child. The contextual approach to *Charter* rights and the history of family law demand that we look to the "content of the relationship's social package, not at how it is wrapped." Prospective adoptive parents in the circumstances exemplified in this case have parental responsibility for and a vested interest in the wellbeing of the child.

Quebec, *supra* para 24 at para 285.

[56] The direct placement adoption process allows biological parents to choose the adoptive parent(s) of their children. In a large subset of cases, the chosen adoptive parent(s) will have a well-established relationship with the child as extended family members, close family friends or

foster parents. In recognition of this role, prospective adoptive parents are given joint guardianship of the child upon application for adoption.

Adoption Act, *supra* para 8 at s 38.

[57] These are the circumstances of the Respondents. Ms. Liu and Mr. Baxter have cared for Xavier for most of his life. They are the only parents he recognizes, they have fully accepted him as part of their immediate and extended families and they have made considerable efforts to learn about his cultural heritage. In the words of Wilson J, they are Xavier's "psychological parents."

Official Problem, *supra* para 1 at 7.
Racine, *supra* para 39 at p 184.

[58] Subsection 17(5) interferes with the liberty and security of Ms. Liu and Mr. Baxter by impeding recognition of their parental role in a manner that cannot but cause extreme psychological stress. They are denied the permanency of adoption and are reasonably discouraged from investing emotionally in Xavier as parents. As further guardianship or adoption applications are inevitable, Ms. Liu and Mr. Baxter will live in a constant state of uncertainty as to their formal relationship with Xavier. The resultant psychological stress imposed by the impugned provision amounts to an interference with their parental interest and their psychological wellbeing within the meaning of liberty and security of the person.

G(J), *supra* para 51 at paras 76, 116.

iii) The Aboriginal child's liberty and security

[59] Custody proceedings have a profound effect on children. They place the liberty and security of the child at risk as orders may be granted against the wishes of the child and a change in living arrangements is a traumatic experience. Removal from the home may cause behavioural issues and affect the child's feelings of self-worth and ability to function. "In very young children, it may affect their ability to form relationships and their development of self-identity."

RT (Re), 2004 SKQB 503 at para 67 [*RT (Re)*].

[60] The legislature and courts have acknowledged this risk by adopting the best interests of the child as a guiding legal principle that mandates consideration of the interests protected by section 7. Its analysis is a contextual inquiry that weighs all relevant factors to determine the individual child's views and need for protection, stability and care. The principle's primary importance serves to minimize the risk of infringing the child's section 7 rights.

Canadian Foundation for Children v Canada (Attorney General), 2004 SCC 4 at para 9 [*Canadian Foundation*].
G(J), supra para 51 at para 76.

[61] Aboriginal children are often in circumstances of vulnerability. They are disproportionately subject to more lengthy periods of foster care and it can be challenging to find adoptive placements for them. As such, the opportunity for permanency and stability presented by a direct placement adoption can be exceedingly valuable. Despite this vulnerability, the "bright-line rule" created by subsection 17(5) denies Aboriginal children the benefit of an individual and contextual analysis of their best interests. When the provision operates to deny an Aboriginal child an adoption expressly found to be in his or her best interests, that child suffers from a profound deprivation of liberty and security of the person.

Official Problem, *supra* para 1 at 8.

[62] Xavier has fallen victim to precisely this injustice. Murakami J found that a direct placement adoption with the Respondents was in Xavier's best interests considering his specific circumstances. Despite this, subsection 17(5) precluded Murakami J from granting the adoption.

[63] The provision at issue infringes the section 7 rights to liberty and security of multiple parties. In order to be constitutional, these infringements must be in accordance with the principles of fundamental justice.

C. The deprivations are not in accordance with the principles of fundamental justice

[64] Subsection 17(5) suffers from a "failure of instrumental rationality." It eliminates the safety valve constituted by the best interests of the child analysis in favour of a "bright-line rule" for the most vulnerable children. This substitution defeats the provision's stated purpose and exceeds what is necessary to protect Aboriginal cultures. Consequently, the provision falls afoul of the principles of fundamental justice by being overbroad and grossly disproportional.

> Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at p 151 [*Stewart*].
> Official Problem, *supra* para 1 at 10.

i) Defining the principles of fundamental justice

[65] The principles of fundamental justice are found in the basic tenets of our legal system. They include substantive and procedural protections and must be fundamental in the sense that they have general acceptance among reasonable people.

> *Reference re s 94(2) of Motor Vehicle Act (BC)*, [1985] 2 SCR 486 at para 37.
> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at para 58.

[66] The SCC has recognized overbreadth and gross proportionality as such principles, noting that each requires an assessment of the legislation's purpose and actual effects.

ii) The purpose of subsection 17(5)

[67] The stated purpose of subsection 17(5) is to give increased protection to the cultural heritage and identity of Aboriginal children and the rights of Aboriginal biological parents.

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

[68] Canada's full legislative response to its historical treatment of Aboriginal peoples must inform this purpose. Subsection 17(5) is part of legislative reforms that seek to ameliorate the cultural degradation caused by government policies and programs such as Indian residential schools and the Sixties Scoop.

Cunningham, supra para 28 at para 61.
Official Problem, *supra* para 1 at 1, 7.

iii) The effects of subsection 17(5)

[69] Subsection 17(5) operates to mandate consent of an Aboriginal biological parent where it would otherwise be dispensed with under subsection 17(1). The impugned provision ignores the best interests of the child and the circumstances of the parties involved. The effect is to deny an Aboriginal child an adoption into a suitable, loving home found to be in his or her best interests. Instead of considering the child's specific cultural identity, the consent requirement is determined solely on the basis of race.

Official Problem, *supra* para 1 at 2.

[70] This effect is seen in the present case. Mr. Stirling's absence would have otherwise allowed the court to dispense with his consent under subsection 17(1). However, his status as an Aboriginal biological parent enabled him to prevent an adoption found to be in Xavier's best interests.

Official Problem, *supra* para 1 at 9.

iv) Subsection 17(5) is overbroad and does not fulfill the stated objective

[71] A provision is overbroad when it creates effects that bear no connection to its objective. This principle recognizes that, although a law may be rational in some circumstances, it is unconstitutional when its effects reach beyond the scope of its purpose in other contexts.

R v Heywood, [1994] 3 SCR 761 at paras 51, 54.
Canada (AG) v Bedford, 2013 SCC 72 at paras 101-102 [*Bedford*].

[72] Subsection 17(5) overreaches its purpose in two circumstances: (1) when it allows an Aboriginal biological parent to prevent an adoption in circumstances where they are not seeking custody; and (2) when it precludes an adoption without placing the child in an Aboriginal home.

[73] Subsection 17(5) creates no requirement for an objecting Aboriginal biological parent to seek guardianship or custody of the child. This is overbroad when there is no suitable Aboriginal home within the meaning of paragraph 17(5)(b).

[74] The Saskatchewan Queen's Bench considered a similar problem. Provincial government policy allowed a child's First Nation to block his or her permanent placement for the purposes of adoption. This policy was found to be overbroad in circumstances where a suitable Aboriginal home was unavailable. The effect was to force the child to remain forever in foster care. Rightfully, the court found that even where the foster parents had been the child's prospective adoptive parents, perpetual foster care was inconsistent with the purposes of the policy and thus a violation of section 7. Accordingly, where subsection 17(5) prevents an adoption in the absence of a suitable Aboriginal home, the provision's effect is inconsistent with the purpose of protecting the cultural heritage or identity of the Aboriginal child.

TR (Re), *supra* para 59 at para 69.

[75] Subsection 17(5) also does not provide any practical protection to the parental rights of Aboriginal biological parents. Parenting arrangements and guardianship of the child are defined and governed by the *Family Law Act*. Under this legislation, a parent who has never resided with or regularly cared for his or her child is not recognized as a guardian. Therefore, Mr. Sterling is not Xavier's guardian and is not entitled to parental responsibilities or parenting time.

Family Law Act, *supra* para 39 at s 37, 39(3).

[76] Should the Aboriginal biological parent seek guardianship, parental arrangement proceedings require the trial judge to consider only the best interests of the child. Prospective adoptive parents have joint guardianship of the child by operation of the Adoption Act. Where the prospective adoptive parents were also found to be in the child's best interests, a trial judge is

unlikely to remove the Aboriginal child in favour of the Aboriginal biological parent.

Adoption Act, *supra* para 8 at s 28.

[77] Alternatively, a suitable Aboriginal family within the meaning of paragraph 17(5)(b) could seek an adoption order. However, consent by both parents remains a requirement of adoption. Where the biological parent who selected the original prospective adoptive parents refuses to consent to the alternative Aboriginal family, the adoption order will not be granted.

[78] In both these circumstances, the child is unlikely to be placed in an Aboriginal home and the cultural heritage of the child and the parental rights of the Aboriginal biological parent are not protected. Instead, the provision requires an Aboriginal child to undergo drawn out guardianship and adoption proceedings with no material impact on the outcome. A provision which does not advances its purpose cannot be within the principles of fundamental justice.

v) The effects of subsection 17(5) are grossly disproportional to its purpose

[79] This principle is engaged when a law's effects on the section 7 interests of the claimant are so grossly disproportionate to its purposes that they cannot be rationally supported. Unlike considerations of minimal impairment under Section 1 of the *Charter*, proportionality does not consider the beneficial effect of the law on society. "A grossly disproportionate effect on one person is sufficient to violate the norm."

Bedford, *supra* para 71 at para 109, 120, 122.

[80] Overriding a birth mother's choice of adoptive parents is grossly disproportional to the objective. It is also antithetical to the legislature's stated intent for regulating direct placement adoptions.

[81] The direct placement adoption provisions were added to the *Adoption Act* to closely regulate private adoptions, to protect the safety of children, and ensure that the parties to the

adoption make informed choices. Notably, the provisions imposed only procedural requirements and retained the rights of biological parents to choose adoptive parents they know and trust. In the words of Honourable J MacPhail: “Birth mothers will have the greatest voice in deciding who will raise their children.”

> British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly*, 35th Parl, 4th Sess, No 21 (26 June 1995) at 16123 (Hon Joy MacPhail).

[82] The impact of subsection 17(5) severely violates a birth mother’s right to make decisions respecting her own child. Parental rights, as a fundamental norm of Canadian society, cannot be subject to such a “bright-line rule.”

[83] Denying an Aboriginal child an adoption into a home found to be in their best interests is also grossly disproportionate to the objective.

[84] The best interests of the child is the paramount concern in adoptions and “the bedrock of child welfare law.” Under the *Adoption Act,* the best interests of the child test provides Aboriginal interests additional weight by demanding that trial judges consider the importance of preserving cultural identity. However, subsection 17(5) does not simply tip the scale in the favour of race, it provides zero weight to the other side.

> Official Problem, *supra* para 1 at 10.
> *Adoption Act*, *supra* para 8 at s 3(2).

[85] This disproportionately is seen in the present case. If Mr. Sterling had been a non-Aboriginal biological parent, his consent could have been dispensed with in Xavier’s best interests. However, subsection 17(5) precludes the court from considering those interests, and makes Xavier’s adoption subject only to his race.

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

[86] Denying an Aboriginal child the benefit of a best interests analysis also eliminates any

consideration of the child's views. This omission would prevent a court from disposing with an Aboriginal biological parent's consent even when a sufficiently mature and competent Aboriginal child has endorsed the adoption. The operation of subsection 17(5) allows an absent Aboriginal biological parent to place his or her views ahead of the child's.

[87] The effect of the impugned provision is to deny a birth mother her fundamental choice and an Aboriginal child any consideration of his or her best interests. This is grossly disproportional to the objective sought.

vi) The best interests of the child is a principle of fundamental justice

[88] The best interests of the child is an accepted legal principle of the common law. Its use is ubiquitous as the paramount concern in family law and social policy. It is recognized as the primary concern in all actions concerning children under the United Nations' *Convention*.

Convention, *supra* para 30.

[89] The principles of fundamental justice are found in the basic tenets of our legal system and "are informed by Canada's international human rights obligations." Thus, the Respondents submit that the best interests of the child should be reconsidered as a principle of fundamental justice.

Canada (Prime Minister) v Khadr, 2010 SCC 3 at para 29.

[90] In considering the best interests of the child principle, McLachlin CJ was concerned that it: (1) lacked sufficient precision; and (2) lacked significant societal consensus as a principle vital or fundamental to our societal notion of justice.

Canadian Foundation, *supra* para 60 at paras 10-12.
R v Malmo-Levine, 2003 SCC 74 at para 113.

[91] The best interests of the child is indeed a highly contextual legal principle. As noted, "reasonable people may well disagree about the result that its application will yield." However,

this concern also exists for other recognized principles of fundamental justice. The content of procedural fairness and the threshold for gross disproportionality both vary widely according to the nature of the interests affected and the social and legislative context. The requirements of fundamental justice are simply not immutable. They *must* vary according to the context in which they are invoked. While some level of precision is required, the best interests of the child principle cannot be held to a higher standard of exactitude than other already recognized principles of fundamental justice.

> *Canadian Foundation, supra* para 60 at para 11.
> *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 212-13.
> *Stewart, supra* para 64 at 224.
> *R v Lyons*, [1987] 2 SCR 309 at para 111.

[92] McLachlin CJ was also concerned that the principle lacked significant societal consensus because it may be subordinated to other concerns in appropriate contexts. In her words, "society does not always deem it essential that the 'best interests of the child' trump all other concerns in the administration of justice."

> *Canadian Foundation*, *supra* para 60 at para 10.

[93] However, exceptions to other principles of fundamental justice have been contemplated. In *Burns*, McLachlin CJ held that assurances that the death penalty would not be imposed by the requesting state are "constitutionally required in all but exceptional cases." A principle of fundamental justice can therefore permit exceptions without losing its fundamental status.

> *United States v Burns,* 2001 SCC 7 at para 8.

[94] In addition, some principles of fundamental justice exist only within certain legal contexts. For example, the right to counsel at trial is a component of procedural fairness that exists only in the context of criminal law. The best interests of the child can thus be limited to guardianship, adoption or other family law proceedings in which the child's liberty and security

interests are at stake. Within this context, the common law has created a hierarchy that places children's interests above all others in order to protect the vulnerable position of children in these proceedings. The best interests of the child *is* a principle vital to our societal notion of justice.

[95] On the basis that the best interests of the child is a principle of fundamental justice, the mechanical operation of subsection 17(5) overriding the best interests of the child cannot be in accordance with the principles of fundamental justice.

ISSUE 3: The infringement of sections 15 and 7 are not demonstrably justified in a free and democratic society under section 1 of the *Charter*

[96] Subsection 17(5) of the British Columbia *Adoption Act* cannot be justified under section 1 of the *Charter*. The impugned provision does not reflect the values and principles essential to a free and democratic society, particularly the best interests of the child. The concerns under section 1 are analytically distinct from those in section 7 and the onus is on the government to establish the efficacy of the law versus its deleterious consequences for members of society.

Bedford, supra para 71 at paras 127-129.

A) No pressing and substantial objective in this context

[97] The Respondents accept that repairing the damage caused by the historical treatment of Aboriginal peoples in Canada is a pressing and substantial objective. However, providing additional protection to the cultural heritage and identity of Aboriginal children and the rights of Aboriginal biological parents within the context of *direct placement adoptions* is not.

R v Oakes, [1986] 1 SCR 103 at para 91 [*Oakes*].

[98] Direct placement adoptions do not apply to a child who is in the continuing custody of the state. They are consensual agreements regarding the best interests of the child between at least one biological parent and the adoptive parents. They require no government involvement

beyond approval.

Adoption Act, supra para 8 at s 13(3).

[99] While state facilitated adoptions may warrant additional cultural protections, direct placement adoptions do not expose culture to the same risks.

B) Subsection 17(5) fails all three steps of proportionality

i) No rational connection between subsection 17(5) and the objective

[100] The rational connection stage requires the government to demonstrate that any limits placed on *Charter* rights further its objectives. The measures adopted must not be arbitrary, unfair or based on irrational considerations.

Bedford, supra para 71 at para 126.
Oakes, supra para 97 at para 70.

[101] Subsection 17(5) is not rationally connected to its objective. Though purportedly advancing the cultural heritage and identity of Aboriginal children, the provision wrongly conflates race with culture. In addition, the provision only minimally protects Aboriginal parents' interests. Its only consequence is to allow an Aboriginal biological parent, who would otherwise be caught by subsection 17(1), to oppose the adoption. It does not grant the Aboriginal biological parent guardianship nor does it place the child in his or her care.

ii) Subsection 17(5) applies mechanically and is not minimally impairing

[102] The test under minimal impairment asks whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner. Although this assessment is more challenging in the case of social policy, the court has clearly stated that "[t]he fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it."

Hutterian Brethren of Wilson Colony v Alberta, 2009 SCC 37 at para 55 [*Hutterian*].
Chaoulli v Quebec (Attorney General), 2005 SCC 35 at para 107.

[103] Subsection 17(5) has been demonstrated to be overbroad, and as such, is not minimally impairing. It requires trial judges to exclude all other relevant considerations in lieu of the race of the Aboriginal biological parent and child.

[104] The government could more effectively advance the objective of the provision using less intrusive means. By preserving the court's discretion, legislative direction to trial judges to place considerable weight on the importance of Aboriginal cultures would be less intrusive. The objective would be better advanced as the courts could respond to individual circumstances, potentially including those in which the child's cultural heritage and identity would be better protected by the adoption.

iii) Subsection 17(5) has a disproportional effect on *Charter* rights

[105] The final stage of this analysis requires that there be a "proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of sufficient importance." In *Dagenais*, this idea was expanded to include the salutary effects of the measures.

Oakes, supra para 97 at para 74.
Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at paras 77-78 [*Dagenais*].
Hutterian, supra para 102 at para 73.

[106] As previously stated, the objective of the provision is not a pressing and substantial one. Though Aboriginal cultures are deserving of protection in Canada, direct placement adoptions are not the appropriate means. In addition, the salutary effects of the provision are minimal. Subsection 17(5) operates *only* where an Aboriginal biological parent's consent would have been dispensed with under subsection 17(1). The impugned provision therefore only serves to protect an otherwise absent Aboriginal biological parent's right to object to an adoption. Furthermore, it

is unlikely that the provision will protect an Aboriginal child's cultural heritage or identity. Additional, and likely unsuccessful, court proceedings are required before the Aboriginal biological parent or suitable Aboriginal family can be granted guardianship.

[107] In contrast, the deleterious effects of the provision are substantial. The provision violates the *Charter*'s equality guarantees for both prospective adoptive parents and Aboriginal children. It interferes with birth mothers' rights to make fundamental choices for their children and infringes prospective adoptive parents' parental rights and psychological wellbeing. The provision fails to consider the best interests of the child, preventing an adoption found to be within his or her best interests or expressly endorsed by the child. The provision conflates culture and race, providing no additional contextual analysis. Subsection 17(5) inevitably subjects the Aboriginal child to further proceedings that are unlikely to change the outcome.

[108] The deleterious effects created by the impugned provision grossly outweigh the provision's salutary effects and objective.

[109] In conclusion, subsection 17(5) is inconsistent with substantive equality and discriminates on multiple levels. Further, the impugned provision does not fulfill its objectives in several circumstances and its effects are so grossly disproportionate to its purpose that they cannot be rationally supported. The section 1 justification fails.

Bedford, supra para 71 at para 120.

PART V – ORDER SOUGHT

[110] The Respondents respectfully request that the High Court of the Dominion of Canada dismiss the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of January, 2014.

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Counsel for Keith Baxter and Jasmine Liu

PART VI – LIST OF AUTHORITIES AND STATUTES

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Lorraine Weinrib, "Human Dignity as a Rights-Protecting Principle" (2004) 17 NJCL 325.	21
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Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2011).	36

International Materials	**Paragraph**
Convention on the Rights of the Child, 20 November 1989, Can TS 1992 No 3, (entered into force 2 September 1990).	39, 88

Official Wilson Moot Sources	
Official Problem, the Wilson Moot 2014.	1, 5-19, 25, 29, 31, 40, 48, 54, 57, 61, 64, 67, 69, 70, 84, 85