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 #12

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PART I – OVERVIEW

[1] This dispute is about what the government can do to maintain the integrity of aboriginal families and cultures. For decades, aboriginal children were removed from their families and communities, causing untold harm. In response to this, the legislature of British Columbia amended the *Adoption Act* through the addition of subsection 17(5) (the "impugned section"), which gives greater protection to the rights of aboriginal parents and the cultural heritage of their children in adoptions. The Respondents challenge this law on *Charter* grounds because they want to adopt an aboriginal child over the protests of the child's aboriginal father. Their challenge should not succeed. The trial judgment should be restored and the legislation declared constitutional.

> *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*].
> *Adoption Act*, RSBC 1996, c 5.
> Wilson Moot 2014 Official Problem at 1-2 [Official Problem].
> Wilson Moot 2014 Clarifications to the Official Problem at para 4 [Clarifications].

[2] The impugned section does not violate the *Charter*. It is a genuinely ameliorative law that aims to rectify the historical disadvantage that aboriginal people have suffered, and is protected under section 15(2). It treats the Respondents no differently than anyone else. Even if differential treatment is established, it is not discriminatory under section 15(1) since it does not perpetuate prejudice or stereotyping. It is also consistent with section 7. Nothing in this case rises to the stringent threshold required to show an infringement of life, liberty, or security of the person, and the impugned section is consistent with the principles of fundamental justice. Should any infringements of the Respondents' *Charter* rights be found, they are justified in a free and democratic society under section 1.

> *Charter*, *supra* para 1, ss 1, 7, 15.
> Official Problem, *supra* para 1 at 2, 9.

PART II – STATEMENT OF FACTS

A. BACKGROUND INFORMATION REGARDING SUBSECTION 17(5) OF THE *ADOPTION ACT*

[3] Aboriginal children have long been the target of policies and programs that have separated them from their families and communities. For over a century, they were sent to residential schools, where disease, malnutrition, and physical, psychological, and sexual abuse were common. Those children were forbidden from speaking their native language or participating in their culture. In the "Sixties Scoop," from 1960 to 1990, aboriginal children were removed en masse from their homes and placed into foster care or adopted out to non-aboriginal families. Many were abused and kept from knowing about or participating in their culture. For those affected, these policies have led to very high rates of addiction, mental illness, and suicide.

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

[4] While these policies are no longer in effect, aboriginal children and families are still vulnerable. Aboriginal children account for up to half of the children in Canadian foster care systems. They are less than half as likely as non-aboriginal children to be adopted. Those who are adopted by non-aboriginal families often suffer low self-esteem and are more likely to consider suicide compared to aboriginal children who remain in their communities.

Official Problem, *supra* para 1 at 8.
Clarifications, *supra* para 1 at para 2(c).

[5] In 2008 the British Columbia legislature amended the *Adoption Act* by adding subsection 17(5), following consultation with First Nations who were concerned by the lack of community involvement in direct placement adoptions of aboriginal children. The purpose of the amendment is to better protect the rights of aboriginal parents and the "cultural heritage and identity of aboriginal children."

Official Problem, *supra* para 1 at 1-2, 9.
Clarifications, *supra* para 1 at para 4.

B. FACTS IN THIS DISPUTE

[6] Xavier Jackson was born on March 3, 2010. He is the son of Don Sterling and Christine Jackson. This has been confirmed by a DNA test. Mr. Sterling is a status Indian belonging to the South River First Nation. This means that Xavier is an aboriginal child under the *Adoption Act*, even though Ms. Jackson is not aboriginal. Mr. Sterling lives in Abbotsford, and visits the South River reserve, which is around 45 km away, to attend events once or twice a month.

Official Problem, *supra* para 1 at 1, 3, 5.
Adoption Act, *supra* para 1, s 1.

[7] While Mr. Sterling is listed as Xavier's father on Xavier's birth certificate, he did not know that Xavier had been born until the adoption proceedings began. His relationship with Christine began and ended in 2009, when she revealed that she was pregnant. He has had no contact with Christine since then.

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

[8] Both Mr. Sterling and Ms. Jackson have had issues with substance abuse in the past. Ms. Jackson's problems with alcohol led to the seizure of Xavier, when he was three months old, by the Director of Child and Family Services. Xavier was placed in foster care with the Respondents, who live in Vancouver, for about 16 months. Xavier was returned to Ms. Jackson's custody in October 2011, after she received counselling for her alcohol abuse.

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

[9] In February 2012, Ms. Jackson asked the Respondents if they would adopt Xavier. They agreed to, contacted a lawyer, and began to satisfy the requirements for a direct placement adoption under the *Adoption Act*. There are no suitable alternative adoptive placements available in an aboriginal community. They attempted to contact Mr. Sterling to get his consent to the adoption, but they were not able to do so. They then applied to the court to dispense with Mr.

Sterling's consent. Xavier has been living with the Respondents since March 2012. Ms. Jackson has had no contact with Xavier since then.

Official Problem, *supra* para 1 at 4, 7.
Clarifications, *supra* para 1 at para 2(a).

[10] Mr. Sterling became aware of the impending adoption in September 2012, and contacted the Respondents by way of the Director of Child and Family Services. He does not consent to the adoption. He wants to raise Xavier himself as a member of the South River Nation, connected to his heritage and his community. Since becoming aware of Xavier, Mr. Sterling has visited his son on several occasions.

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

[11] It was conceded at trial that Xavier would not face a risk of serious harm were he placed in Mr. Sterling's custody. He is a healthy child with no special needs. Mr. Sterling received counselling for his substance abuse problems in May 2012, and has been sober since August 2012. He is steadily employed, and says he has his life on track. While Natalie Sharma, a social worker, has raised some concerns about Mr. Sterling's capacity for parenting, she did not suggest he would be an unfit parent. Instead, she recommended that Mr. Sterling complete a parenting course and seek further support to maintain his sobriety.

Official Problem, *supra* para 1 at 3, 5-7.
Clarifications, *supra* para 1 at para 2(b).

C. PROCEDURAL HISTORY

[12] Justice Murakami of the British Columbia Supreme Court dismissed the Respondents' challenge to the constitutionality of the impugned section and their request to dispense with Mr. Sterling's consent. She held that subsection 17(5) is an ameliorative law aimed to counteract the tendency in Canadian law to value socioeconomic concerns above cultural identity when dealing with the adoption of aboriginal children, and was thus protected by section 15(2) of the *Charter*.

She also held that any infringement of the Respondents' interests under section 7 of the *Charter* was consistent with the principles of fundamental justice. While she stated, in obiter, that it would be in Xavier's best interests to remain with the Respondents, the impugned section precluded that absent Mr. Sterling's consent.

Official Problem, *supra* para 1 at 9.

[13] The British Columbia Court of Appeal overturned Murakami J.'s judgment. Ali and Finnerty J.J.A. held that subsection 17(5) is not an ameliorative program, since it makes it harder to place aboriginal children in adoptive homes. They found that the legislation assumes that non-aboriginal parents cannot raise aboriginal children in a culturally appropriate manner and ignores the best interests of the child. They also held that subsection 17(5) arbitrarily infringes the respondents' right to security of the person, violating section 7 of the *Charter*.

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

[14] Downie J.A. dissented, agreeing with Murakami J.'s judgment. He held that the impugned section was intended to rectify historical wrongs against aboriginal Canadians, a marginalized group, and that it could not be reasonably construed as discriminating against or demeaning privileged people like the Respondents. While the Respondents may feel as though they are being disadvantaged, he stated that "hurt feelings do not a section 15 claim make."

Official Problem, *supra* para 1 at 10.

PART III – STATEMENT OF POINTS IN ISSUE

[15] The Appellants submit that:

1. Subsection 17(5) of the *Act* is an ameliorative law that falls under the scope and protection of section 15(2) of the *Charter*;
2. Alternately, subsection 17(5) does not violate section 15(1) of the *Charter* by creating disadvantage for the Respondents by perpetuating prejudice or stereotyping;

3. Subsection 17(5) does not violate section 7 of the *Charter*, as it neither infringes on the Respondents' life, liberty, or security of the person nor does it offend the principles of fundamental justice;
4. Should any breach of the *Charter* be found, subsection 17(5) is a limitation that is demonstrably justified in a free and democratic society under section 1 of the *Charter*.

PART IV – ARGUMENT

A. THE STATUTORY CONTEXT OF THE IMPUGNED SECTION

[16] The *Adoption Act* and its subordinate legislation form a comprehensive scheme that regulates all adoptions, other than customary aboriginal adoptions, in British Columbia. The purpose of the *Act* is "to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests." The process of creating these new family ties is initiated when the child is placed for adoption by a parent or guardian, a director, or an adoption agency.

> *Adoption Act*, *supra* para 1, s 2.
> *K v HMTQ (BC) & Others*, 2003 BCSC 1248 at paras 12-17, 44 RFL (5th) 124.
> *Casimel v Insurance Corp of British Columbia*, 106 DLR (4th) 720 at 731-33, 82 BCLR (2d) 387 (CA).

[17] Mr. Sterling's consent to the prospective adoption is *prima facie* necessary. In order for any adoption to proceed, section 13 of the *Act* requires that the consent of both of the child's parents be received. In some cases, defined by subsection 13(2), the consent of a biological father is not required, but that provision does not apply in this case.

> *Adoption Act*, *supra* para 1, s 13.

[18] The requirement to get a parent's consent can be waived in some circumstances. Section 17 of the *Act* states that the court may dispense with a parent's consent if it is in the child's best interests, if the parent cannot consent (because they cannot give consent or they cannot be

located), or if the circumstances justify it. “May” is a “permissive and empowering” (*Interpretation Act*) term, which confers discretion on the courts that they are not obliged to exercise in a particular way.

> *Adoption Act*, *supra* para 1, s 17.
> R Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada, 2008) at 70.
> *Interpretation Act*, RSBC 1996, c 238, s 29.

[19] In 2008, section 17 of the *Act* was amended after consultation with aboriginal communities. The amended section of the *Act*, subsection 17(5), states that the court shall not dispense with the consent of an aboriginal biological parent when their aboriginal child is being adopted if that parent objects unless *both* conditions (a) and (b) are met. The court retains some discretion in determining when the conditions are met.

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

[20] Condition (a) in subsection 17(5) is that the child must face a risk of serious harm if they remain in the aboriginal parent’s custody. While “risk of serious harm” is not defined in the *Act*, the language suggests a similar threshold to what would be considered when a child is apprehended without judicial authorization. Condition (b) is that there are no suitable adoptive placements available with another aboriginal family, with preference given to placements with the aboriginal child’s extended family or community. What constitutes a “suitable” adoptive placement is not defined, but given the purpose of the *Act* it presumably includes a consideration of the best interests of the child as defined in section 3.

> Official Problem, *supra* para 1 at 1-2.
> *Adoption Act*, *supra* para 1, s 3.
> *Winnipeg Child and Family Services v KLW*, 2000 SCC 48 at para 104, [2000] 2 SCR 519.

B. SUBSECTION 17(5) DOES NOT VIOLATE SECTION 15 OF THE *CHARTER*.

[21] The guiding norm of section 15 of the *Charter* is substantive equality—that all Canadians are given the equal protection and benefit of the law, in light of the social, political, and legal circumstances that exist in society. It signals Canada's commitment to respecting all people and eliminating disadvantages suffered by individuals on the basis of the enumerated and analogous grounds.

> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171, 56 DLR (4th) 1 [*Andrews*].
> *R v Kapp*, 2008 SCC 41 at paras 14-16, [2008] 2 SCR 483 [*Kapp*].
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 2, 39, [2011] 1 SCR 396 [*Withler*].
> *R v Turpin*, [1989] 1 SCR 1296 at 1331, 69 CR (3d) 97.

[22] The test for a breach of section 15 has three parts. First, an adverse distinction in law based on an enumerated or analogous ground must be identified. Where a law is aimed at ameliorating the disadvantage of a group identified by those grounds, section 15(2) can be invoked to shield the law. Absent the protection of section 15(2), a law will violate section 15(1) where the distinction creates disadvantage by perpetuating prejudice or stereotyping.

> *Kapp*, *supra* para 21 at paras 17, 41.
> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at paras 39, 43-45, [2011] 2 SCR 670 [*Cunningham*].

1. There is no relevant distinction based on enumerated or analogous grounds.

[23] When making a claim that section 15 has been breached, the claimants need to show that they have been discriminated against on the basis of a distinction made on enumerated or analogous grounds. Discrimination does not work in the abstract. Where no distinction is made, or where it is not based on an enumerated or analogous ground, a section 15 claim must fail.

> *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 at paras 33-34, [2004] 3 SCR 357.
> *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 35, [2002] 4 SCR 429.

Kapp, *supra* para 21 at para 17.
Quebec (Attorney General) v A, 2013 SCC 5 at para 321-22, [2013] 1 SCR 61 [*Quebec v A*].

[24] There is no relevant adverse distinction made on enumerated or analogous grounds by the impugned section. It does not impact the Respondents differently than any other person, nor does it deprive them of a benefit or protection of the law to which others are entitled.

Andrews, *supra* para 21 at 174-75.
Quebec v A, *supra* para 23 at para 323.

[25] Failing to satisfy either condition (a) or (b) is sufficient to defeat a request to dispense with an aboriginal biological parent's consent under the impugned section. It was conceded at trial that Xavier does not face a risk of serious harm if he remains in Mr. Sterling's custody. Subsection 17(5)(a) of the *Adoption Act* has not been satisfied.

Official Problem, *supra* para 1 at 3.

[26] The Respondents cannot adopt Xavier because of this condition. The relevant question for the section 15 inquiry is whether there is some other group, defined by the enumerated or analogous grounds, that is not similarly deprived. As McIntyre J. held in *Andrews*, discrimination requires a distinction that "has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society." In this case, there is no such group. Prospective aboriginal adoptive parents could not adopt Xavier were they in the Respondents' position, because *no prospective adoptive parents can adopt an aboriginal child if the child's aboriginal biological parent objects absent a risk of serious harm*. The impugned section is a uniform ban on adoptions in these circumstances. With respect, the Court of Appeal erred in finding a distinction based on ethnic origin in the operation of subsection 17(5).

Andrews, *supra* para 21 at 174.

Withler, *supra* para 21 at para 62.

[27] The Respondents cannot appeal to other distinctions that the law might make, such as between aboriginal biological parents and non-aboriginal biological parents, or between aboriginal children and non-aboriginal children. Those distinctions do not bear on claimants in the Respondents' circumstances. The Respondents are not Xavier's parents. The rights of the aboriginal biological parent—not the child's race—shape the operation of the section. If Ms. Jackson sought to prevent Xavier's adoption, the impugned section would not be operative despite Xavier being an aboriginal child.

[28] It is important to keep in mind that Xavier is not a party to this litigation. While he is treated differently than other children by the impugned section, by virtue of his aboriginal parentage, there are neither grounds nor standing in this case to consider whether his rights have been violated.

Clarifications, *supra* para 1 at para 3.

[29] While this Court saw fit to grant leave to consider whether the impugned provision violates the Respondents' section 15 rights, any discrimination that they claim to be experiencing is hypothetical. The Respondents are treated no differently than any other person in similar circumstances by the operation of the impugned provision.

2. Subsection 17(5) is shielded by section 15(2) of the *Charter*.

[30] If a distinction in the law on enumerated or analogous grounds is accepted, the question becomes whether the law is protected by section 15(2) of the *Charter*. In this inquiry, the government must first show that the law targets a disadvantaged group identified by the enumerated or analogous grounds. If so, it must then be shown that the law has a genuinely ameliorative or remedial purpose, that it is directed toward improving the situation of a group that requires ameliorative assistance to realize substantive equality, and that it correlates to the

disadvantage suffered by the group. Should these conditions be satisfied, the impugned law will be protected insofar as the distinctions are necessary to serve or advance the object of the law.

> *Kapp, supra* para 21 at paras 41-42.
> *Cunningham, supra* para 22 at paras 44-45.

[31] Legislatures are entitled to enact laws that benefit specific disadvantaged groups and promote substantive equality without having to extend the protection or benefit of those laws to everyone. The purpose of section 15(2) of the *Charter* is to prevent claims by people or groups that ameliorative laws constitute "reverse discrimination" against them. Section 15(2) can also function to shield the impugned law from claims made by other disadvantaged groups. This was the case in *Cunningham*, where an ameliorative law targeting Metis people was protected from attack by other aboriginal groups who were excluded from its benefits. In *Pratten*, the *Adoption Act* was held to be an ameliorative law with respect to providing information about adoptees' biological origins, a benefit denied to donor offspring.

> *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480 at paras 42-43, 357 DLR (4th) 660.
> *Cunningham, supra* para 22 at paras 41, 53, 83-88.

a. Aboriginal Canadians are a disadvantaged group targeted by the enumerated grounds.

[32] The impugned section prevents the courts from dispensing with the consent of an aboriginal biological parent for the adoption of their child unless conditions (a) and (b) are satisfied. The law expressly targets aboriginal people.

[33] Aboriginal Canadians have been consistently identified by the courts as a disadvantaged group based on enumerated grounds, including race. They have faced a "legacy of stereotyping and prejudice" (*Corbiere*) that has impacted their social, economic, and political status.

> *Kapp, supra* para 21 at paras 58-59.
> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at 256, 173 DLR (4th) 1 [*Corbiere*].

[34] The particular facts of this case point to two key disadvantages faced by aboriginal people in the context of adoption. First, as stated in the facts, aboriginal families have been specifically targeted and broken apart through programs and policies like residential schools and the Sixties Scoop. The legacy of these policies, including high rates of mental health problems and drug abuse, remains a pressing problem.

[35] Second, cultural and community concerns have been devalued when considering the interests of aboriginal children. Murakami J. held that socioeconomic concerns have historically trumped cultural ones when considering the appropriateness of adopting aboriginal children. This is borne out by older Supreme Court jurisprudence, where it has been held that the importance of a child's cultural background when considering their best interests decreases over time.

> *Racine v Woods*, [1983] 2 SCR 173 at 187-88, 1 DLR (4th) 193 [*Racine*].
> *Van de Perre v Edwards*, 2001 SCC 60 at paras 38-40, [2001] 2 SCR 1014 [*Van de Perre*].
> Official Problem, *supra* para 1 at 1, 9.

b. The law has a genuinely ameliorative purpose that correlates to the disadvantage that aboriginal Canadians have suffered, and it promotes substantive equality.

[36] Justice Murakami found, as a matter of fact, that the purpose of the impugned section is to ensure that the cultural heritage and identity of aboriginal children and the rights of aboriginal parents are given increased protection in direct placement adoptions. Since no palpable and overriding error has been identified, there is no reason to disturb this finding.

> *Housen v Nikolaisen*, 2002 SCC 33 at paras 10-14, [2002] 2 SCR 235.
> Clarifications, *supra* para 1 at para 4.

[37] Both of these purposes contribute to the protection of aboriginal families and communities. The relevant disadvantage suffered by aboriginal Canadians is the destruction of their families and the undermining of their cultures. It is rational to conclude that the purpose of the law correlates to this disadvantage. It gives aboriginal parents heightened protection in

adoptions where their consent could otherwise be dispensed with. The present case illustrates the need for this protection. Mr. Sterling's consent, but for the impugned section, likely would have been waived despite the difficulty and hardship that he has experienced as an aboriginal person. It also helps to ensure that aboriginal children can maintain connections to their cultural heritage by remaining in communities where it is lived. As Mr. Sterling stated, while he is grateful to the Respondents for caring for Xavier, they cannot "understand what it means to be part of our people" or provide "the guidance and wisdom of our community."

> *Kapp, supra* para 21 at para 49.
> Official Problem, *supra* note 1 at 5-6.

[38] Biological parents have strong interests in raising their children. Insofar as the opportunity to raise their own children has often been taken from aboriginal parents, the impugned section promotes substantive equality by providing protections that those parents have lacked historically. Without it, aboriginal families could still be torn apart by dispensing with the consent of the parents. It also promotes substantive equality by encouraging the retention of aboriginal children in their communities where they can grow up as members of an aboriginal culture, instead of being assimilated into non-aboriginal ways of life.

> *Trociuk v British Columbia (Attorney General),* 2003 SCC 34 at para 15, [2003] 1 SCR 835.
> *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 372, 122 DLR (4th) 1.
> *Cunningham, supra* para 22 at para 40.

c. The Court of Appeal erred in finding that subsection 17(5) was not an ameliorative law.

[39] With respect, the Court of Appeal made two errors in allowing the appeal. First, Ali J.A. erred in law by holding that the impugned section could not be ameliorative because its effect was to make it more difficult to adopt aboriginal children into secure homes. For the purpose of the section 15(2) inquiry, the effect of the law is not relevant. Only the intended purpose or

object of the legislation matters. Since the purpose of the impugned law is an ameliorative one that is appropriately targeted, it is protected by section 15(2).

Kapp, supra para 21 at paras 48-49.

[40] Second, Ali J.A.'s interpretation of the impugned law is unreasonable. Statutory interpretation is guided by several presumptions. The legislature is presumed to be fully informed and aware of all existing law. The "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]" (*Rizzo*). Statutes, as remedial legislation, are to be given a "fair, large and liberal construction and interpretation as best ensures the attainment of [their] objects." A liberal interpretation of a statute is also appropriate where the statute concerns aboriginal groups or individuals.

Re Rizzo & Rizzo Shoes Ltd, [1998] 1 SCR 27 at 41, 154 DLR (4th) 193.
Nowegijick v The Queen, [1983] 1 SCR 29 at 36, 144 DLR (3d) 193.
Sullivan, *supra* para 18 at 205-07, 509.
Interpretation Act, *supra* para 18, s 8.

[41] Ali J.A. held that the impugned section jettisons the consideration of the best interests of the child for a "bright-line rule." This cannot be reconciled with the purpose of the *Act* as a whole, which gives "paramount consideration in every respect to the child's best interests." This interpretation implies that the legislature, which is presumed to have knowledge of all existing law, inserted into the *Act* a provision that flatly contradicts the scheme and object of the *Act*. This is not a large and liberal interpretation of the statute. The Court should seek a different interpretation where such a contradiction does not exist.

Adoption Act, *supra* para 1, s 2.
Official Problem, *supra* para 1 at 10.

[42] Ali J.A. also attacked the impugned section for containing a presumption that only aboriginal families can raise an aboriginal child in a culturally sensitive manner. This reasoning is not sufficient to find the impugned section unconstitutional because it gives no weight to the other legislative purpose that Murakami J. found, the protection of the rights of aboriginal parents. A reasonable interpretation of the impugned section would accommodate both purposes.

[43] It is reasonable to infer that the legislature determined, after consultation with First Nations, that the best interests of aboriginal children were generally best served by keeping them in aboriginal communities. This was given effect, in the impugned section, by granting aboriginal biological parents more robust rights to protect the cultural identity of their children. This interpretation avoids the contradiction in Ali J.A.'s reading.

[44] The impugned section harmonizes the best interests of aboriginal children with its legislative purpose. Protections short of the impugned section are not adequate to address the disadvantage that aboriginal children and families have suffered. The impugned law does not go further than can be justified by the object of the ameliorative program, and it should be protected under section 15(2) of the *Charter.*

3. Subsection 17(5) does not violate section 15(1) of the *Charter*.

[45] Subsection 17(5) of the *Adoption Act* does not offend the norm of substantive equality by perpetuating disadvantage and prejudice against the claimants or imposing disadvantage based upon a stereotype. Distinctions made on enumerated or analogous grounds are not necessarily discriminatory. Whether a particular distinction is discriminatory, judged from the perspective of a reasonable person, is determined in a flexible and contextual manner. It does not require that a strictly defined comparator group be identified. Relevant considerations for this analysis include historical patterns of disadvantage, existing prejudice against the claimants, the nature of the interest affected, and correspondence between the law and the claimant's actual characteristics.

Andrews, *supra* para 21 at 168-69.
Corbiere, *supra* para 33 at 216-17.
Withler, *supra* para 21 at paras 37-40, 63, 65.
Kapp, *supra* para 21 at para 17.
Quebec v A, *supra* para 23 at paras 144, 331.
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at 532-41, 170 DLR (4th) 1 [*Law*].

[46] The Supreme Court of Canada, in *Quebec v A*, has recently divided on how to conceptualize the test for section 15(1) of the *Charter*. Justice Abella, for the majority on the issue, held that a breach of section 15(1) exists where there is a distinction that "has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group." Stereotyping and prejudice are merely indicia of arbitrary disadvantage. Justice LeBel held that stereotyping or prejudice must be demonstrated to find a breach of section 15(1). Justice LeBel's approach seems to better cohere with the post-*Kapp* equality jurisprudence, and the present argument will be structured around a search for the imposition of disadvantage by prejudice or stereotyping. However, Justice Abella's test would also not find a breach of section 15(1) on these facts as there is no arbitrary disadvantage.

Quebec v A, *supra* para 23 at paras 141, 171-74, 325, 331, 333.
Ermineskin Indian Band and Nation v Canada, 2009 SCC 9 at paras 188, 202, [2009] 1 SCR 222.
Ontario (Attorney General) v Fraser, 2011 SCC 20 at para 116, [2011] 2 SCR 3.
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 108, [2009] 2 SCR 567 [*Hutterian Brethren*].
Withler, *supra* para 21 at paras 35-36, 70-71.
AC v Manitoba (Director of Child and Family Services), 2009 SCC 30 at para 111, [2009] 2 SCR 181.

a. The impugned section does not impose disadvantage by perpetuating prejudice.

[47] Prejudice is "the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member." Prejudice is often an expression of, and reinforces, historical disadvantage, and underpins unjustifiable hierarchies in society based on the enumerated or analogous grounds.

Quebec v A, *supra* para 23 at paras 197, 326.
Withler, *supra* para 21 at para 35.

[48] There is no evidence on the record of historical disadvantage suffered by non-aboriginal Canadians in the context of adoption, nor is there evidence that the law perpetuates prejudice against the Respondents. As Justice Wilson noted thirty years ago, both interracial marriage and transracial adoption are ordinary and accepted features of our multicultural, pluralistic society. Around 20% of marriages in Canadian urban centres in the past five years have been between mixed unions. The Respondents, as Downie J.A. noted, are quite privileged. The impugned law does not "[widen] the gap between [a] historically disadvantaged group and the rest of society" (*Quebec v A*). Non-aboriginal Canadians are not a historically disadvantaged group as a whole in the context of adoption. In contrast, the evidence in this case points to large disadvantages suffered by aboriginal Canadians.

Racine, *supra* para 35 at 188.
Quebec v A, *supra* para 23 at para 332.
Official Problem, *supra* para 1 at 9-10.

[49] Any purported disadvantage that the Respondents suffer in this case does not restrict their full membership, or ability to participate, in Canadian society. As discussed above, in the circumstances of this case the Respondents are treated the same as anyone else under the impugned section. The Respondents retain full access to the protections and benefits of the *Adoption Act*. They can still adopt any child under that system should they meet its requirements—even Xavier, should Mr. Sterling agree to it. A partially completed adoption is not an adoption. There is no entitlement in law to a successful adoption, nor is there a right to demand that a court exercise its discretion to waive the requirement of a parent's consent.

Quebec v A, *supra* para 23 at para 200.
Law, *supra* para 45 at 540.

[50] There is no indication that the impugned section demeans or damages the dignity of the Respondents or claimants in their circumstances. It evinces no attitude whatsoever regarding the capabilities of non-aboriginal Canadians. A reasonable person, aware of the disadvantages that aboriginal people have faced, would not feel demeaned by a law that protects aboriginal families. As such there is no reason to find that it perpetuates prejudice against the Respondents.

Quebec v A, supra para 23 at para 200.

b. The impugned section does not impose disadvantage by stereotyping.

[51] A stereotype is defined in *Law* as "a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess." It "attributes characteristics to members of a group regardless of their actual capacities" (*Quebec*). Discrimination exists where a disadvantage is imposed on the basis of a stereotype that does not correspond to the claimant's capabilities.

Quebec v A, supra para 23 at para 326.
Law, supra para 45 at 535.
Withler, supra para 21 at para 36.

[52] On its face, the impugned section makes no stereotypical presumptions and does not attribute any characteristics to the Respondents or non-aboriginal Canadians more generally. It does not contemplate the parenting capabilities of prospective adoptive parents, nor does it attribute any undesirable traits to non-aboriginal Canadians. A reasonable person would not consider it stereotypical to recognize that they are not aboriginal, or that they do not belong to an aboriginal community. The effect of the law is not to suggest that the Respondents are not competent to raise an aboriginal child in a culturally sensitive manner, only that there is a preference by the legislature to keep aboriginal children in aboriginal communities.

[53] While the law does not correspond to the interests and characteristics of the claimants, it does correlate with the needs and interests of aboriginal Canadians. Non-aboriginal people have

not faced the same challenges that aboriginal people have in protecting their families and cultures. It is a rational policy choice to give aboriginal Canadians greater protections in light of the way they have been treated historically. The effect of the impugned law "arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice". It is not for the courts to second-guess whether this was a sound policy choice.

> *Hutterian Brethren*, *supra* para 46 at para 108.
> *Law*, *supra* para 45 at 538.

[54] There is no disadvantage, prejudice, or stereotyping in the operation of the impugned section. The claim that subsection 17(5) violates section 15(1) of the *Charter* fails.

C. SUBSECTION 17(5) DOES NOT VIOLATE SECTION 7 OF THE *CHARTER*.

1. Subsection 17(5) does not deprive the Respondents' life, liberty, or security of the person.

[55] The impugned section does not deprive the Respondents of their right to life, liberty, or security of the person. The right to life is clearly not engaged in this case.

[56] Subsection 17(5) does not threaten the Respondents' right to liberty. Beyond freedom from physical restraint, the right to liberty includes the right "to make decisions of fundamental importance free from state interference" (*Blencoe*). These decisions are "fundamentally or inherently personal" (*Godbout*). Since adoption is created by statute, it cannot be characterized as "inherently personal." The Respondents cannot adopt Xavier free from state interference.

> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 49, [2000] 2 SCR 307 [*Blencoe*].
> *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577.

[57] The legislation also does not deprive the Respondents of their right to security of the person. The Supreme Court has ruled that security of the person extends to both physical and psychological integrity. The former has not been engaged in this case. In order to find a breach of the Respondents' psychological security, there must be "a serious and profound effect on a

person's psychological integrity" (*Blencoe*). While many state procedures cause some level of "stress and disruption" (*Blencoe*), the threshold for demonstrating that state imposed stress has violated one's security of the person is high. Few government processes have been found to implicate this degree of psychological stress. While adoption is a complex and emotional process, the distress involved does not amount to an infringement of security of the person.

> *Blencoe*, *supra* para 56 at paras 81, 96.
> *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 60, 177 DLR (4th) 124 [*G (J)*].
> H Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 90.

[58] This case is distinguishable from the Supreme Court's decision in *G (J)*. There, the Court ruled that a mother's security of the person interest was engaged when the state intervened to apprehend her children. In those circumstances, Lamer C.J.C. found that a parent's right to raise and care for a child is "of fundamental importance in our society" and that the removal of that right in a child custody case constituted a breach of security of the person. Implicit in the Court's ruling is the notion that parents have the general expectation that they will be able to parent their child free from state intervention. However, the Court added that not every state action that separates a child from its parent can be seen as a serious threat to psychological integrity. In articulating the reasons why removing children from their parents in the child protection context is a serious intrusion into a parent's psychological security, the Court emphasized that the process stigmatizes the parent as unfit and involves a "gross intrusion" into their private life.

> *G (J)*, *supra* para 57 at paras 61-63.

[59] The facts of this case do not meet the threshold set by the Court in *G (J)*. A direct placement adoption can be a distressing process for prospective adoptive parents, especially when one biological parent has not consented from the outset of the proceedings. However, the

relationship that is at stake is not of the same character as a parent-child relationship. The Respondents developed a relationship with Xavier first as foster parents, and then as prospective adoptive parents. A foster placement is a temporary relationship governed by a service agreement. Prospective adoptive parents are not the legal parents of a child until an adoption order is granted. In both of these contexts, the Respondents willingly placed themselves in positions where they knew they would not be considered Xavier's legal parents. They cannot claim, as a parent could, that their distress is due to the expectation that the state would not interfere with their relationship with Xavier. By choosing to initiate a direct placement adoption without securing the consent of both biological parents, they could reasonably expect that the process would be stressful and the state would have to interfere.

> Official Problem, *supra* para 1 at 3-4.
> *Child, Family and Community Service Act*, RSBC 1996, c 46.
> *I (A) v Ontario (Director, Child and Family Services Act)* (2005), 75 OR (3d) 663 at paras 72-74, OJ no 2358 (QL) (ON SC) [*I (A)*].
> *Adoption Act*, *supra* para 1, s 37.

[60] Moreover, the Respondents are not stigmatized. There is no perception that they would be bad parents. Allowing a biological parent who never consented to a direct placement adoption to retain their parental rights is not stigmatizing to prospective adoptive parents—it is how the statute generally operates. Even if subsection 17(5) did not exist, a court may have refused to use its discretion to waive the requirement of Mr. Sterling's consent. Moreover, providing extra protection for aboriginal heritage does not stigmatize prospective non-aboriginal adoptive parents. Aboriginal cultural identity has been historically attacked. It is reasonable to assume that ameliorative programs aimed at strengthening aboriginal culture are not intended to stigmatize non-aboriginal people.

> *Adoption Act*, *supra* para 1, s 13.

[61] In *G (J)*, the intrusion into the parent's privacy contributed to a deprivation of security of the person because it subjected a private parent-child relationship to an involuntary and intensive state inspection. This factor does not apply in this case. The relationship between a prospective adoptive parent and the child they seek to adopt is not a private relationship. It is governed by the *Adoption Act*, which requires public inspections and assessments, until the adoption is final. There is no involuntary state intrusion into prospective adoptive parents' privacy.

> *G (J), supra* para 57 at para 62.
> *Adoption Act, supra* para 1, s 8.

2. Subsection 17(5) is consistent with the principles of fundamental justice.

a. The impugned section is not arbitrary.

[62] Principles of fundamental justice are basic requirements that a law must meet if it "negatively impacts on a person`s life, liberty, or security of the person." They are basic values that "[underpin] our constitutional order." One such principle is non-arbitrariness. This principle is violated when there is no connection "between the effect and the object of [a] law." In *Bedford*, the Supreme Court held that arbitrariness should be determined on "a case-by-case basis, in light of the evidence" rather than through the application of a rote test.

> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 94-98, 119 (available on CanLII) [*Bedford*].
> *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 131-132, 232, [2005] 1 SCR 791.

[63] The Appellants respectfully submit that the Court of Appeal erred in holding that the legislation is arbitrary. The impugned section is connected to its legislative objectives: protecting the rights of biological aboriginal parents and preserving the cultural identity of aboriginal children in direct placement adoptions. It promotes these objectives by prioritizing the rights of aboriginal biological parents who have not consented to having their child be adopted, and where that is not possible, attempting to ensure that the child remains in an aboriginal community,

connected to aboriginal culture. The Court of Appeal erred in not considering both ameliorative purposes when stating that the law was arbitrary.

> Clarifications, *supra* para 1 at para 4.
> *Cunningham*, *supra* para 22 at para 94.
> Official Problem, *supra* para 1 at 9-10

b. The "best interests of the child" is not a principle of fundamental justice.

[64] The Appellants also submit that the Court of Appeal erred in finding that subsection 17(5) overrides the best interests of the child. Ali J.A. stated that the impugned section dispenses with "the careful balancing of the 'best interests of the child test' which has been the bedrock of child welfare law for decades." With respect, this ruling overlooks the interaction between the impugned section and the purpose of the statute as a whole (as discussed *supra*, paras 41-44). Read in its context, the impugned section is consistent with the best interests of the child.

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

[65] The "best interests of the child" should not be treated as a principle of fundamental justice. A principle of fundamental justice is a legal principle, that is capable of being applied with precision, and that reflects a social consensus that it is fundamental to the operation of our legal system. As McLachlin C.J.C. held in *Canadian Foundation*, while "best interests of the child" is an important legal principle, it is does not meet the latter two requirements.

> *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 113, [2003] 3 SCR 571.
> *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at paras 10-11, [2004] 1 SCR 76 [*Canadian Foundation*].

[66] Chief Justice McLachlin correctly held that the principle is not sufficiently precise because its application is "highly contextual and subject to dispute." The factors considered in the best interests test are highly dependent on the contents of the relevant statute, and can vary based on the goals of the legislature. For example, the Ontario Superior Court recently rejected the federal government's argument that the Sixties Scoop could not be challenged in court since

the placements had been made on the basis of the best interests of the child. The relevant statute did not require that preserving aboriginal culture and identity be a component of the best interests test, and only some judges gave it weight. Because of this, Justice Belobaba held that the "best interests of the child" could not shield the government from liability for the harm done to aboriginal children.

Canadian Foundation, *supra* para 65 at para 11.
Brown v Canada, 2013 ONSC 5637 at paras 9-10, 5 CCLT (4th) 243.

[67] McLachlin C.J.C. held that there was insufficient social consensus that the "best interests of the child" is an essential principle of our legal system. It could "be subordinated to other concerns in appropriate contexts." For example, it is not placed above parental claims in the adoption context. In direct placement adoptions, a lawful adoption generally requires the consent of both parents. If the best interests of the child test was elevated to a principle of fundamental justice, the consequence would be that it could be used generally to trump the rights of parents who have not consented to the adoption of their child. This would undermine the respect that the law has given biological families and would permit gross intrusions into family life.

Canadian Foundation, *supra* para 65 at para 10.
B (R), *supra* para 38 at 372.

[68] Should the Court find a deprivation of life, liberty, or security of the person by the impugned section, it is consistent with the principles of fundamental justice.

D. Any violation of *Charter* rights by subsection 17(5) is justified in a free and democratic society under section 1.

[69] If the legislation is found to violate the *Charter*, any limitation of rights is reasonable under section 1. The test for determining whether a limitation is reasonably and "demonstrably justified" is laid out in *Oakes*. Under the test, the legislation must be prescribed by law and have a pressing and substantial objective. The limit must also be proportionate to its goals: it must be

rationally connected to its objectives, it must minimally impair the right that has been limited, and the salutary effects of the legislation must outweigh the deleterious effects.

R v Oakes, [1986] 1 SCR 103 at para 69-71, 26 DLR (4th) 200.

1. Subsection 17(5) is prescribed by law.

[70] Subsection 17(5) is prescribed by law. It is part of a legislatively-enacted statute.

Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927 at para 59, 58 DLR (4th) 577.

2. Subsection 17(5) has pressing and substantial objectives.

[71] The objectives of 17(5) are to ensure that "the cultural heritage and identity of aboriginal children and the rights of aboriginal parents" are given increased protection.

Clarifications, *supra* para 1 at para 4.

[72] Protecting the rights of aboriginal parents is a pressing and substantial objective because historically aboriginal children have been removed from their homes against their parents' wishes. Subsection 17(5) also addresses situations where aboriginal parents stand to lose their rights to raise their children.

Official Problem, *supra* para 1 at 7.

[73] Protecting the cultural heritage and identity of aboriginal children is also pressing and substantial. Historically, the residential school program and the Sixties Scoop systematically undermined aboriginal culture. Current studies show that aboriginal children who are adopted into non-aboriginal homes are more likely to face serious social problems.

Official Problem, *supra* para 1 at 8.

[74] The objectives are also pressing and substantial because they promote constitutional values. The legislation supports the practice of aboriginal culture in a multicultural society. Section 27 states that multiculturalism is a value that must be used for interpreting the *Charter*.

Charter, supra para 1, s 27.

3. Any limitation of *Charter* rights is proportional to the benefit of the law.

a. The objectives of the law are rationally connected to the limitations.

[75] The limitations on the Respondents' rights are rationally connected to the objectives. A rational connection is found when "the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt" (*RJR-MacDonald*). The government must show that it is reasonable to assume that the limits advance the objectives.

RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199 at para 82, 127 DLR (4th) 1.
Hutterian Brethren, *supra* para 46 at para 48.

[76] It is reasonable to infer that by requiring the consent of biological aboriginal parents in adoptions, the rights of those parents are better protected. Fewer parents will be subject to the court's discretionary power to waive their consent, keeping their parental rights intact.

[77] There is also a rational connection between being raised by an aboriginal parent and developing an aboriginal cultural identity. It is reasonable to infer that being raised by an aboriginal parent supports the development of aboriginal children's identities by exposing them to their culture. Evidence submitted by the expert witness indicates that non-transracial adoptees generally develop their cultural, racial, and ethnic identities with more ease.

Official Problem, *supra* para 1 at 8.

b. The law is minimally impairing of Charter rights.

[78] Subection 17(5) minimally impairs any *Charter* rights. The test for minimal impairment is whether there is a less drastic means for "achieving the objective in a real and substantial manner." In this case, less harmful means are not available for achieving the legislative goals.

Hutterian Brethren, *supra* para 46 at para 54.

[79] The goal of preserving the rights of biological aboriginal parents is achieved in a minimally impairing manner. It only maintains the legal rights of parents who do not pose a serious risk to their child. A strong and clear test on the rights of aboriginal parents is minimally impairing because a scheme that allows their consent to be waived would undermine the integrity and the goal of the legislation by allowing what it seeks to prevent.

Hutterian Brethren, supra para 46 at para 101.

[80] Subsection 17(5) is not just about the right to raise a child. It also protects an aboriginal parent's voice in determining whether a direct placement adoption is appropriate. The subsection gives aboriginal parents the opportunity to ensure that their concerns, such as preserving their child's cultural identity, are met in a direct placement adoption. It would be difficult to grant aboriginal parents this right in a more minimally impairing manner, since it depends on the heightened protection of parental rights that the impugned section gives them.

[81] The second goal of the legislation is to preserve the cultural heritage and identity of aboriginal children. Adoptions are final. Unlike foster care, the state does not generally have any more involvement in a child's life after an adoption order is made. The impugned section prioritizes the importance of aboriginal children's cultural identity when considering adoption placements. It reflects the legislature's judgment that it may be best supported by aboriginal parents. Since adoptions are final, it is suitable that the state has chosen to first consider prospective adoptive parents who may have a stronger history of involvement in aboriginal culture, and who have an aboriginal identity.

Clarifications, *supra* para 1 at para 4.
A Smith, "Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Save or Lose our Children?" (2009) 25 Can J Fam L 297 at para 23.

[82] Subsection 17(5) is also minimally impairing because it provides guidance for protecting aboriginal cultural identity in adoptions to a greater degree than was available before its enactment. The Supreme Court has held that cultural identity is only one factor to be considered in adoption cases, and that the importance of cultural identity in the adoption of an aboriginal child abates over time. In two leading cases, aboriginal children were placed with non-aboriginal adoptive parents for these reasons. But the preservation of their culture is part of the best interests of aboriginal children. If the legislature's goal is to protect aboriginal children's cultural heritage and identity during adoptions, it must provide a statutory framework, such as subsection 17(5), which compels the courts to examine suitable placements within an aboriginal community.

> *H (D) v M (H)*, [1997] BCJ No 2144 at paras 46-47, 1997 CarswellBC 2228 (SC), rev'd (1998), 54 BCLR (3d) 102, 156 DLR (4th) 548 (CA), aff'd, [1999] 1 SCR 328, 172 DLR (4th) 305.
> *Racine*, *supra* para 35 at para 187.
> *Van de Perre*, *supra* para 35 at para 39.

c. The salutary effects of the law outweigh the deleterious effects.

[83] The final stage of the Oakes analysis weighs the overall benefits of the legislation against its costs. The Appellants submit that the overall salutary effects of the impugned section outweigh its deleterious effects. The government must balance competing interests in the *Adoption Act*. The impugned legislation does so in a way that provides clarity on two key issues that affect aboriginal communities in BC: the status of aboriginal biological parents' rights and how aboriginal culture should be protected in adoptions.

> *Hutterian Brethren*, *supra* para 46 at para 77.

[84] One salutary effect of the legislation is that it clarifies the legal rights of biological aboriginal parents when they object to a direct placement adoption. This clarity is beneficial because it outlines a concrete process for deciding when to dispense with a parent's consent that is sensitive to the disadvantages that aboriginal parents have faced.

Official Problem, *supra* para 1 at 2.

[85] The legislation also helps to ensure that aboriginal children are placed in culturally appropriate families by anchoring cultural identity as a key consideration in the adoption process. While the Supreme Court has ruled that the importance of cultural identity decreases over time, evidence tendered by Professor Dallaire suggests the opposite. By first considering suitable placements in aboriginal families, the legislation provides clarity on protecting cultural identity in adoptions. The legislation properly balances this consideration by still allowing adoptive placements outside of aboriginal culture if a suitable community placement cannot be found.

Official Problem, *supra* para 1 at 8.
Racine, *supra* para 35 at 187.

[86] A final salutary effect of the legislation is that it recognizes the importance of multiculturalism, a vital *Charter* value. Multiculturalism is not only about recognizing differences. It is also about respecting the richness and lived experiences of different cultures. Subsection 17(5) respects aboriginal culture by prioritizing suitable adoptive placements with aboriginal families and treating it as something that must be passed on through experience.

R v Keegstra, [1990] 3 SCR 697 at para 77, 77 Alta LR (2d) 193.
Charter, supra para 1, s 27.

[87] There are two potential deleterious effects of the legislation. First, subsection 17(5)(b) considers aboriginal adoptive parents before non-aboriginal ones. However, this preference is remedial and recognizes the damage that removing aboriginal children has inflicted on them and their communities. The impugned section was implemented after consultation with aboriginal stakeholders and represents the legislature's best judgement of how to ensure that an aboriginal child's cultural identity is protected when waiving the consent of an aboriginal parent. A second deleterious effect of the legislation is that it could separate *de facto* families that have formed

during adoption proceedings. But the Respondents are not Xavier's legal parents until an adoption order is granted. It would threaten the integrity of the adoption system, and of family law more generally, if individuals could make parental claims without being a legal parent.

Official Problem, *supra* para 1 at 1.
I (A), *supra* para 59 at paras 72-74.

[88] Overall, the salutary effects of the law outweigh the deleterious effects because the law provides a clear framework to the courts on how to address the rights of biological aboriginal parents and protect the cultural identity of their children in adoptions. Canada has a history of policies and laws that devalued both aboriginal parental rights and cultural identity. A clear legislative process for addressing these issues, particularly when an aboriginal parents objects to the adoption of their child, is valuable to society. These benefits are reasonably and demonstrably justified in a free and democratic society in light of the minimal infringement of the Respondents' *Charter* rights.

PART V – ORDER SOUGHT

[89] The Appellants respectfully request:

1. That the judgment of Murakami J. be restored;
2. That the adoption order granted by the Court of Appeal be rescinded;
3. And that Mr. Sterling be granted custody of Xavier.

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

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Team #12
Counsel for the Appellants

PART VI – LIST OF AUTHORITIES AND STATUTES

SECONDARY SOURCES