# 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)

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## FACTUM OF THE RESPONDENTS

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TEAM #12

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## PART I – OVERVIEW

[1] At the center of this case is a family. Ms. Liu and Mr. Baxter seek legal recognition of that family, which includes three-year old Xavier Jackson. The issue in this appeal is whether or not this Court will allow that recognition to be dictated by Xavier's aboriginality.

[2] A life with Ms. Liu and Mr. Baxter (the "Respondents") has been determined to be in Xavier's best interests. In any other case, the consent of a biological parent could be dispensed with on that ground alone. However, the impugned section provides additional considerations that serve to abrogate Xavier's best interests. Without facing a risk of serious harm and without the absence of a suitable aboriginal placement, no court can dispense with the consent of Xavier's aboriginal biological father, Mr. Sterling. The impugned section strikes directly at the ability of Canadian courts to act in the best interests of *all* children and does more to undermine equality of aboriginal peoples than to enhance it. In denying the Respondents the ability to have their application decided in Xavier's best interests, the impugned section discriminates against them and infringes their right to security of the person. These violations of their *Charter*-protected rights cannot be justified in a free and democratic society.

*Adoption Act*, RSBC 1996, c 5 [the "*Act*"].
Official Problem, The Wilson Moot 2014 at 2 ["Official Problem"].
*Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

## PART II – STATEMENT OF FACTS

### A. Background

[3] Xavier Jackson ("Xavier") is three years old and has been living in the home of Keith Baxter and Jasmine Liu ("Mr. Baxter" and "Ms. Liu", or, together, the "Respondents") for more

than two-thirds of his life. The Respondents seek to adopt Xavier through the direct placement process under the British Columbia *Adoption Act* (the "*Act*"). Xavier's biological mother, Christine Jackson ("Ms. Jackson"), asked the Respondents to adopt Xavier as she feels she is unable to care for him. While the adoption is pending, Xavier resides with the Respondents and previously lived with them for nearly sixteen months as their foster child.

Official Problem, *supra* para 2 at 1, 4.

[4] Xavier was removed from Ms. Jackson's care by the Director of Child, Family and Community Services (the "Director") at the age of three months, due to her substance abuse. The Respondents have developed a close bond with Xavier. He refers to them as "Mama" and "Daddy" and is excited for parent-and-tot swimming lessons. When Ms. Jackson approached them to adopt Xavier, the Respondents knew immediately that they wanted him to continue to be a part of their family.

Official Problem, *supra* para 2 at 3, 6.

[5] Xavier's biological father is Don Sterling ("Mr. Sterling"). Mr. Sterling is a member of the South River First Nation and is registered as a status Indian under the *Indian Act.* In 2009, after learning of the pregnancy, Mr. Sterling told Ms. Jackson he was not interested in being a father. Ms. Jackson ended the relationship and the two had no further contact.

Official Problem, *supra* para 2 at 1, 3.

[6] In September 2012, Mr. Sterling heard through mutual acquaintances that Ms. Jackson had given birth to a son who was in the process of being adopted. With the aid of a social worker, he contacted the Director who had been notified about the pending adoption. Mr. Sterling informed the Respondents' lawyer that he did not consent to his son being adopted and wanted to take custody of Xavier.

Official Problem, *supra* para 2 at 5.

**B. The impugned section**

[7] The *Act* states that the consent of the child's biological parents is generally required for a direct placement adoption, unless the court dispenses with that consent via section 17(1). Above all, the biological parent's consent can be dispensed with where it is in the child's best interests. Consent can also be dispensed with where the biological parent has abandoned or deserted the child or has not made reasonable efforts to meet their parental obligations.

*Act*, *supra* para *2* at s 17(1).

[8] In consultations with the Government of British Columbia, numerous First Nations communities expressed concerns about aboriginal adoptions outside of the child protection context. In 2008, in response to these consultations, the legislature added section 17(5):

> (5) Despite subsection (1), the court shall not dispense with the consent of a person who is an aboriginal child's biological parent and who is an aboriginal person and who objects to the child's adoption, unless the court is satisfied that:
>
> (a) there is a risk of serious harm to the child if he or she remains in the custody of the biological parent whose consent is to be dispensed with; and
>
> (b) a suitable adoptive placement with the aboriginal child's extended family, other members of the child's aboriginal community, or another aboriginal family is not possible.

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

[9] The Respondents brought an application before the British Columbia Supreme Court seeking an adoption order, an order to dispense with Mr. Sterling's consent, and a declaration that section 17(5) is unconstitutional as it infringes sections 15(1) and 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

Official Problem, *supra* para 2 at 4.

**C. Procedural history**

[10] At the hearing, the Respondents accepted that Xavier would not face a risk of serious harm if Mr. Sterling was granted custody but argued that it was in Xavier's best interests for the adoption order to be granted. Ms. Liu noted in her affidavit that both she and Mr. Baxter were taking a First Nations cultural training program and would continue to take Xavier to visit the South River reserve. They are committed to facilitating Xavier's aboriginal identity.

Official Problem, *supra* para 2 at 3, 6.

[11] Murakami J of the British Columbia Supreme Court dismissed the application and found that she could not dispense with Mr. Sterling's consent. She ruled that section 17(5) was an ameliorative law under section 15(2) of the *Charter.* Yet, she found that adoption by the Respondents was in Xavier's best interests and in any other circumstance she would have granted the order.

Official Problem, *supra* para 2 at 9.

[12] The Respondents appealed to the British Columbia Court of Appeal. Ali JA, writing for himself and Finnerty JA, reversed Murakami J's decision and granted the adoption order. They could not comprehend how "a law that has the effect of making it more difficult for an aboriginal child to be adopted into a secure, loving home can be considered an 'ameliorative program.'" The majority found that section 17(5) "casts aside the careful balancing of the 'best interests of the child' test, which has been the bedrock of child welfare law for decades, with a bright-line rule." They also held that section 17(5) infringed Ms. Liu and Mr. Baxter's security of the person interest under section 7. Downie JA dissented, and largely adopted Murakami J's reasoning.

Official Problem, *supra* para 2 at 9-10.

## PART III – STATEMENT OF POINTS IN ISSUE

[13] This appeal raises four issues:

(i) Section 17(5) of the *Act* infringes section 7 of the *Charter.*

(ii) Section 17(5) of the *Act* infringes section 15(1) of the *Charter.*

(iii) Section 17(5) of the *Act* does not constitute an ameliorative law or program within the meaning of section 15(2) of the *Charter.*

(iv) The infringement of sections 15(1) and 7 cannot be justified under section 1.

## PART IV – ARGUMENT

**Issue 1: The impugned section infringes the Respondents' security of the person**

[14] Xavier, Ms. Liu, and Mr. Baxter are a family. They act, operate, and relate to one another and to the world as a family unit. Their respective rights to security of the person are aligned in interest. It is for this reason that the Respondents characterize their security of the person interest to the inclusion of Xavier's interests.

**A. The impugned section creates serious state imposed psychological stress**

[15] The right to security of the person protects "both physical and psychological integrity." In order to violate the psychological integrity of an individual, state action must amount to "serious state-imposed psychological stress" in the context of "real or imminent" deprivation. That deprivation requires a "sufficient causal connection" to state action: "a flexible standard" allowing for the facts of "each particular case to be taken into account." This standard does not require that "the impugned government action or law be the only or the dominant cause" of the stress, and it is satisfied "by a reasonable inference, drawn on a balance of probabilities."

*R v Morgentaler,* [1988] 1 SCR 30 at 56, 173, 62 CR (3d) 1.
*R v S.(R.J.),* [1995] 1 SCR 451 at 479, 121 DLR (4th) 589.
*R v Bedford,* 2013 SCC 72 at paras 75, 76, 2013 CarswellOnt 17682.

[16] The Respondent submits that a sufficient causal connection is made between the enactment of the impugned section and the claimants' imminent serious psychological stress. Mr. Sterling's refusal to consent to the adoption is the triggering mechanism and one cause of the deprivation. However, but for section 17(5), the consent of Mr. Sterling could have been dispensed with. It is the operation of this section that would prevent the adoption and give rise to serious state imposed psychological stress for both Xavier and the Respondents.

**i) Stress is imposed by the separation of a *de facto* family**

[17] State action resulting in the separation of parents and children has been linked to the deprivation of the security of the person. In *New Brunswick v G.(J.),* Lamer CJ found that the apprehension of the claimant's children amounted to serious state imposed psychological stress.

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

[18] The Court in *G.(J.)* found that "the separation of parent and child […] would unquestionably have profound effects on both." The same unquestionable effect is present in this case, as the Respondents and Xavier are, in substance, a *de facto* family. The Respondents have had Xavier in their custody for more than two-thirds of his young life. They consider themselves to be his parents. The initial sixteen months of their relationship developed in a fostering context, and the Respondents have now had Xavier in their care for an additional twenty-three consecutive months. The Respondents are, in Ms. Liu's words, "completely devoted" to Xavier. They have integrated him into their extended families and he enjoys positive relationships with grandparents, aunts, uncles and cousins. The "obvious distress arising from the loss of

companionship of [a] child" is a reality for the Respondents since they are, for all intensive purposes, Xavier's parents.

*G.(J.), supra* para 17 at paras 57, 61.
Official Problem, *supra* para 2 at 4, 6.

[19] Paramount to how the Respondents feel about Xavier is how he feels about them. The report of social worker Natalie Sharma ("Ms. Sharma") confirms that Xavier refers to the Respondents "as 'Mama' and 'Daddy,'" and that "it is clear that they are the only parental figures that he recognizes." Given Xavier's view, the Respondents may be regarded by this Court as his "psychological parents." Nicholas Bala, a prominent writer in children's law, noted that courts appreciate the "importance of the child's links to 'psychological parents', extending a range of rights and obligations, thereby extending the notion of what it means to be a parent." This relationship has been protected by Canadian courts to prevent the "emotional and developmental harm" that may occur from its disruption. Harm is "especially apparent when the child is young, the child has no psychological ties to the biological [parent] and the parent has not demonstrated an ability to care for the child." This observation is acute to the facts before the Court, as Xavier is only three and "does not yet have a real sense of who Mr. Sterling is."

Official Problem, *supra* para 2 at 6.
Nicholas Bala, "The Evolving Canadian Definition of the Family: Toward A Pluralistic and Functional Approach" (1994) 8(3) Int'l JL Pol'y & Fam 295 at 295-297 [emphasis added].
*D.C.W. v Alberta (Child, Youth and Family Enhancement, Director),* 2012 ABPC 199 at para 67, [2012] AJ No 815.

**ii) Stress is imposed by the indefinite nature of the separation**

[20] Furthermore, the indefinite nature of the separation between the Respondents and Xavier will cause emotional trauma surpassing that in *G.(J.).* In that case the Minister had obtained a temporary custody order and sought an extension of that order for up to six months. The

claimant had the opportunity to regain custody of her children at a later hearing. However, if this Court does not grant the adoption, Xavier will be taken into Mr. Sterling's custody and there will be no further hearings. Unless Mr. Sterling has a change of heart, the Respondents could only seek custody of Xavier as a result of his apprehension and return to the foster system: a circumstance that the Respondents would be loath to hope for.

**iii) Stress is imposed due to the disregard for the best interests of the child**

[21] Unique to this case, the separation between parent and child is made without regard for the child's best interests. This disregard causes additional stress for the Respondents who want nothing but the best for Xavier. Yet the impugned section allows for the child to be removed from the Respondents' care even despite his best interests. Due to the section, the child must face a risk of *serious* harm in the care of the aboriginal biological parent before there is even a possibility of dispensing with consent.

[22] Paramount to the stress visited upon the Respondents is the stress that Xavier faces as a result of having his best interests disregarded. The Respondents submit that there is *some* risk to Xavier's psychological integrity should he be transferred to Mr. Sterling's custody. The Respondents cannot allege that there is a risk of *serious* harm to Xavier or that he would be "in danger" as there is no information upon which to sustain that assertion. Mr. Sterling is a well-intentioned man but he remains an unknown quality. His abilities as a parent have never been demonstrated. It is clear on the evidence of Ms. Sharma that Mr. Sterling "does not have relationships with extended family or others who would be able to provide support" to him as a parent. There is also a risk of relapse for Mr. Sterling, as he is not attending any support programs with regard to his past substance abuse. Mr. Sterling represents the risk of the

unknown, untested, unsupported biological father who would attempt to raise a three-year old child whom he does not know.

Official Problem, *supra* para 2 at 6, 7, 9.

[23] This reality serves to exacerbate the Respondents' stress. They are not only faced with the permanent loss of Xavier—that loss is not justifiable in the name of the child's best interests. Rather, Xavier will be delivered into the hands of someone who is a stranger to him: a stranger who has only recently demonstrated his ability to care for himself, and has never demonstrated an ability to care for a child.

[24] The Respondents submit that the psychological toll of this separation will be as significant and genuine as the separation of any biological family. The accumulation of the above factors transcends "the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action." This is not a mere matter of "hurt feelings." What is at stake in this appeal is the profound effect of the impugned section on the psychological integrity of Ms. Liu, Mr. Baxter, and three-year old Xavier. The Respondents submit that section 17(5) imposes serious psychological stress on them all, depriving them of their respective rights to security of the person.

*G.(J.), supra* para 17 at para 59.
Official Problem, *supra* para 2 at 10.

**B. The deprivation is not in accordance with the best interests of the child: a principle of fundamental justice**

[25] In family law, the best interests of the child are of fundamental concern. The Respondents submit that when a court must decide who should raise a child, it is a principle of fundamental justice that the best interests of that child be determined and applied.

[26] A principle of fundamental justice must meet three criteria: it must be a legal principle, capable of being applied with precision, and with sufficient social consensus as to its vital connection to justice. The Supreme Court has frequently asserted "the need to interpret the principles of fundamental justice" with reference to the "specific context in which s. 7 is being asserted". Limited, context specific principles of fundamental justice have been recognized, such as the narrow principle that certain criminal offenses require proof of a specific fault element. Other principles, such as the presumption of diminished moral blameworthiness for youth offenders, exist only in application to children. In *Winnipeg Child and Family Services v K.L.W.*, L'Heureux-Dube J found that the "protection of a child's right to life and to health... is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice." Arbour J went further, and stated: "...to satisfy the substantive content of the principles of fundamental justice in the child protection context, the apprehension of a child… requires an evaluation of the best interests of the child." Therefore, the best interests of the child can function as a principle of fundamental justice limited in its application to a specific legal context.

> *R v Malmo-Levine*, 2003 SCC 74 at para 113, [2003] 3 SCR 571.
> *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 884, 84 DLR (4th) 105 [emphasis added].
> *R v Martineau*, [1990] 2 SCR 633, 79 CR (3d) 129.
> *R v D.B.*, 2008 SCC 25, [2008] 2 SCR 3.
> *Winnipeg Child and Family Services v K.L.W.*, 2000 SCC 48 at 534, 572, [2000] 2 SCR 519 [*K.L.W.*] [emphasis added].

[27] In the case at bar, section 7 is asserted in the specific context of family law. Interests similar to child protection are engaged. L'Heureux-Dube J identified that the interests surrounding the "separation of parents and children," specifically "psychological and emotional well-being" and "the child's life and health," were interests "of the highest order." Those interests are at stake in family law and in this case.

*K.L.W., supra* para 26 at 572.

[28] Family law statutes are "saturated" by the best interests standard as a paramount consideration. The ubiquity of the principle has been noted by academics and has even been described as "a supraconstitutonal value, a grundnorm." Courts have noted that in the family law context "[e]very child is entitled to the judge's decision on what is in its best interests." The Court below stated that the impugned section "casts aside the careful balancing of the 'best interests of the child' test, which has been the bedrock of child welfare law for decades."

*Canadian Foundation for Children, Youth and the Law v Canada (Attorney General),* 2004 SCC 4 at 93, [2004] 1 SCR 76.
DA Rollie Thompson, "The rap on the Supreme Court, or, what about the best interests of all children?" in *Special Lectures of the Law Society of Upper Canada 2000: Family Law: "The Best Interests of the Child"* (Toronto: University of Toronto Press, 2000) at 206.
*Gordon v Goertz,* [1996] 2 SCR 27 at 340, 134 DLR (4th) 321.
Official Problem, *supra* para 2 at 10.

[29] When the first and second parts of the test are taken together, they establish that a principle of fundamental justice must be "a legal principle capable of being identified with some precision." These requirements guard against uncertainty for lawmakers as to the constitutionality of the laws they make. The best interests of the child, when understood as a *determination* that must be made and applied, is sufficiently precise. Under this formulation of the principle, the legislature is not called upon to determine, in advance, what a court will find to be in the best interests of each child. Rather, the legislature is notified that laws that abrogate a determination and application of the best interests of the child do not accord with the principles of fundamental justice in the context of family law.

Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 107 [Stewart].

[30] Further, this formulation of the principle does not curtail Parliament's ability to legislate as to how a court is to decide what is in the best interests of children. It merely requires that there be *some* such test. The test can evolve as our knowledge of children and their needs expands.

[31] In addition, the principle can both enhance protections to children's rights and also justify restrictions on those rights. In *A.C.*, Abella J determined that the best interests of the child was not incompatible with legislation that *limited* a child's right to liberty and security of the person. She found that the mature minor rule, captured by the legislation, was not arbitrary because it accorded with the best interests of children. Those interests include an opportunity to prove that one is mature enough to make a personal medical decision. However, it would not be in the best interests of *all* children to presume that capacity. The determination of the best interests of the child struck "a fair balance" between the interests of the child and the interests of society as a whole, as is fitting of a principle of fundamental justice.

> *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181.
> *Cunningham v Canada*, [1993] 2 SCR 143 at 152, 20 CR (4th) 57.

[32] The third requirement, social consensus, can be found in the existing consensus for the values that inform the best interests of the child. Sopinka J has instructed that the analysis of social consensus should consider not only "the existence of the practice itself" but also "the rationale behind the practice and the principles that underlie it." In other words, it is a normative endeavour, not a descriptive, historical, or empirical one. The question is "what role the principle plays in a legal order that is committed to the values expressed in the *Charter,*" consensus for which already exists.

> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 592, [1993] SCJ No 94.
> Stewart, *supra* para 29 at 109.

[33] The rationale that underlies the best interests of the child is derived from its origin in the *parens patriae* jurisdiction of the court. This doctrine is concerned with the vulnerability of children in society due to their inability to express and defend their own interests. The right of children to have their interests heard and defended is inherent in their status as part of 'everyone' under the *Charter.* The application of the best interests of the child facilitates the *Charter* values of dignity, the right to be heard, and access to an impartial arbitrator. These concepts are considered fundamental to our societal notions of justice. Parliament has affirmed these Canadian values internationally by ratifying the *Convention on the Rights of the Child.*

> Anne McGillivray, "Childhood in the Shadow of *Parens Patriae*" in H Goelman, S Marshall & S Ross, eds, *Multiple Lenses Multiple Images: Perspectives on the child across time, space, and disciplines* (Toronto: University of Toronto Press, 2004) at 26.
>
> *Convention on the Rights of the Child,* Can TS 1992 no 3, Art 3(1).

[34] Indeed, the Supreme Court has recognized the underlying constitutional value of the best interests of the child. In *Young,* the best interests of the child were used to interpret *Charter* rights: "the guarantees of religious freedom and expressive freedom in the Charter do not protect conduct which violates the best interests of the child test." Therefore, while there is no social consensus as to the *content* of what is in the best interests of all children, there is consensus that those interests, whatever they may be, should be determined and applied. As a result, the best interests of the child may be rightly understood as operating with the social consensus required of a principle of fundamental justice.

> *Young v Young*, [1993] 4 SCR 3 at 121, 108 DLR ($4^{th}$) 193.

[35] Section 17(5) is not in accordance with the principles of fundamental justice. It purports to act even despite the best interests of the child when dispensing with an aboriginal biological

parent's consent to a direct placement adoption. Instead of enhancing aboriginal identity as a factor within the best interests analysis, the legislature has subverted the analysis in its entirety. The Respondents submit that this action, giving rise to a deprivation of their security of the person, is not in accordance with the principles of fundamental justice.

**Issue 2: The impugned section infringes the equality guarantee in section 15(1)**

[36] In *Quebec v A*, Abella J stated: "[a]s the history of modern family law demonstrates, fairness requires that we look at the *content* of the relationship's social package, not at how it is wrapped." The circumstances of the case at bar call for such an approach. Ms. Liu, Mr. Baxter, and Xavier are aligned in interest. They seek to remain together by formalizing "new and permanent family ties." The facts of this case require a "flexible and contextual inquiry" into the circumstances of a direct placement adoption and the "negative *impact*" of the impugned section. The Respondents seek "meaningful access to what is generally available" in other circumstances: a resolution of the adoption order in accordance with the best interests of the child.

> *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 285, 319, 331, 328, [2013] ACS No 5 [*Quebec v A*] [emphasis in original].
> *Act*, *supra* para 2 at s 2.

[37] The test for a section 15(1) violation was recently clarified in *Quebec v A* and requires: (1) a distinction in law based on an enumerated or analogous ground; and (2) a discriminatory disadvantage. Abella J, whose reasons were adopted by the majority of the Supreme Court, confirmed that prejudice and stereotyping, though indicia of disadvantage, are not distinct elements of the test that must be proven by the claimant. Rather, the claimant must show disadvantage as a result of the distinction in law.

> *Quebec v A*, *supra* para 36 at para 325.

**A. The impugned section draws a distinction in law on the enumerated ground of race or ethnic origin**

[38] When the equality analysis is "contextual, not formalistic, [and] grounded in the actual situation" of those involved, the source of the discrimination in this case is illuminated. Although it may first appear that the section distinguishes between non-aboriginal prospective adoptive parents like the Respondents, and the possible suitable aboriginal placements contemplated by subsection (b), this distinction is unhelpful. On the facts of this case, the latter is not preferred to adopt the child as compared to the Respondents. A direct placement adoption is an adoption between two parties—a parent and the specific individuals seeking to adopt the child. Other possible aboriginal placements are not contemplated in this legal process. The parent placing the child for adoption must complete Form 2 of Schedule 3 of the *Adoption Regulation.* This form requires the parent to provide the names of those people to whom they give their consent. Hypothetical individuals contemplated by section 17(5)(b) could not be known by the biological parent at the time of placement. In the case at bar, the Respondents are the *only* people to whom Ms. Jackson has given her consent to adopt Xavier. Therefore, the invocation of any possible aboriginal placement merely serves to block the adoption by bolstering the consent of the aboriginal biological parent. The distinction does not advantage aboriginal placements over the Respondents—it advantages the aboriginal biological parent.

*Withler v Canada (Attorney General)*, 2011 SCC 12 at para 37, [2011] SCJ No 12 [*Withler*].
*Act, supra* para 2 at s 2.
*Adoption Act; Financial Administration Act*, BC Reg 291/96, s 6 [*Adoption Regulation*].

[39] Further, while there may be a distinction created between prospective adoptive parents who are aboriginal and those who are not, that distinction is also unhelpful. Regardless of race,

anyone seeking to adopt an aboriginal child is at a disadvantage due to subsection (a): the child must face a risk of serious harm before subsection (b) can be considered.

[40] The adverse distinction in this case is based on the ethnicity of the child. As L'Heureux-Dube J said in *Egan*, a preoccupation with "the grounds for the distinction instead of [with] the *impact* of the distinction" risks "undertaking an analysis that is distanced and desensitized from real people's experiences." The negative impact of this distinction is felt by the Respondents, as only prospective adoptive parents who seek to adopt aboriginal children are subject to a more restrictive legal regime. That regime jettisons the consideration of the best interests of the child.

*Egan v Canada*, [1995] 2 SCR 513 at para 53, 124 DLR (4th) 609.

[41] Courts have seen fit to extend standing to "raise discrimination upon an enumerated ground" not personal to the claimant. In *Benner*, Iacobucci J found that although the gendered distinction in law applied to the claimant's mother, the child claimant was nonetheless a discriminatory "target" of the law. He allowed the claimant "to raise discrimination upon an enumerated ground" even though that ground did not apply directly to him. Recognizing the enumerated ground as the source of the claimant's disadvantage allowed for "protection against discrimination" to "extend to the full range of [that] discrimination" in accordance with "the 'purposive' interpretation of *Charter* rights mandated by this Court." Similarly, in *Inglis*, the Court allowed for infants to be "protect[ed] from discrimination" even though the distinction in law was based on the personal characteristics of their mothers. In the case at bar, the Respondents are a target of the distinction in law made on the ethnicity of the child adoptee. They have a "direct interest in having [the impugned section] subjected to *Charter* scrutiny."

*Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at paras 80, 81, 84, 143 DLR (4th) 577.

*Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at para 567, 2013

CarswellBC 3813.

**B. The distinction in law has a discriminatory impact**

[42] Family is about relationships. The legal process of adoption can be a catalyst in the formation of those relationships, but it can also be a formal recognition of relationships that already exist. The adoption before this Court belongs in the latter category. The Respondents' adoption of Xavier would only create 'new and permanent family ties' in legal form—as they are already a family in substance. The Respondents seek to have their relationship with Xavier considered, equally, as it would be if he were of any other ethnicity: in terms of his best interests.

[43] However, the impugned section significantly disadvantages the Respondents, and Xavier, by denying them equal access to the best interests standard. Abella J has confirmed that the imposition of a disadvantage upon a claimant is sufficient to establish a breach of section 15. The focus of the discrimination inquiry is "on the actual impact of the impugned law" on the individual, not on prejudice and stereotyping as "discrete elements of the test."

*Withler, supra* para 38 at para 39.
*Quebec v A, supra* para 36 at para 325.

[44] The distinction disadvantages the Respondents by imposing additional barriers on their application to adopt Xavier. The new standard upon which the consent of the aboriginal biological parent may be dispensed with, and the adoption granted, has nothing to do with the best interests of the child.

[45] As a result of disregarding these interests, disadvantage abounds for both aboriginal children and those who seek to adopt them. Two *Law* factors are relevant to demonstrating this disadvantage: the nature of the interest affected and the correspondence with actual needs and characteristics of the claimants.

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

**i) The Respondents' interest is in having their relationship with Xavier considered by the Court**

[46] Adoption is a legal process caught between two competing ideologies: the necessity of giving children "the security of a loving, permanent, and 'forever' family" and the traditional "assumption that blood relationship is central to what family is all about."

Naomi R Cahn & Joan Heifetz Hollinger, eds, *Families by Law: An Adoption Reader* (New York: New York University Press, 2004) at 117 [Cahn].

[47] The common law has long held a "powerful blood bias" that guards biological "God given or natural law rights to hold on to [one's] progeny." The vulnerable position of prospective adoptive parents has been well-catalogued in Canadian jurisprudence. It has been held that "[a]doption is purely a creature of statute" and that the *Act* "provides a complete code for adoptions within the province." As a result, there is "no legal right to adopt nor any legal remedy for would-be adoptive parents apart from those expressly provided in the legislation."

Cahn, *supra* para 46 at 117.
*K v HMTQ (BC) & Others,* 2003 BCSC 1248 at para 7, 44 RFL (5th) 124.

[48] All that the Respondents seek is a fair opportunity to have their application for adoption considered on the basis of the best interests of the child. That standard requires an investigation into the actual abilities and intentions of the Respondents, as well as the relationship that they have with Xavier. This would give the Court a full picture of what this child's life is like with the Respondents, and what it would be like if he were separated from them. The child's safety, the importance of continuity in the child's care, the quality of the child's relationships, and the importance of preserving an aboriginal child's cultural identity would all be considered.

*Act, supra* para 2 at ss 3(1), 3(2).

[49] However, the impugned section overrides each of these considerations in favour of the interest of the aboriginal biological parent. It imposes two additional conditions on the Respondents: (a) a risk of serious harm should the child remain with the aboriginal biological parent and (b) the absence of any possible suitable aboriginal adoptive placement. These stipulations have nothing to do with the Respondents and their relationship with Xavier, nor do they evaluate his relationship with Mr. Sterling. Where the aboriginal biological parent is a stranger to the child, proving the existence of a risk of serious harm is an onerous burden for the Respondents to bear. Even where a risk of serious harm can be shown, the adoption is still encumbered by the possibility of any suitable aboriginal placement.

[50] The Respondents' interest ought to be assessed on the basis of their abilities as parents, their relationship with Xavier, and ultimately whether or not a life with them is in his best interests. As a result of the section, the only opportunity that they have to adopt this child has been significantly diminished.

**ii) The impugned section does not correspond to the Respondents' abilities**

[51] The adverse effect of the impugned section is to keep aboriginal children with their aboriginal biological parents, even despite their best interests. Section 17(5) makes it harder for an aboriginal child to be raised by anyone who is *not* aboriginal. In effect, the discrimination against the Respondents includes the operation of a stereotype: that those who would adopt across racial lines are unable and unwilling to facilitate the cultural identity of the child.

The Supreme Court has recently affirmed that stereotyping is "unfair treatment based on personal traits or circumstances which do not relate to individual needs, capacities, or merits." In this case, the stereotype does not accord with the evidence before the Court.

*Law, supra* para 45 at para 53.

[52] Antagonism has long surrounded adoption across racial lines. Race-matching, or the use of race as the primary ground for adoption, was the practice of adoption agencies in Canada throughout the 1940s and 1950s. The practice of race-matching was premised on minimizing the shame and deviance associated with adoption and creating families that looked alike. Otherwise, it was assumed that the adoption was doomed to fail: prospective adoptive parents were presumed *incapable* of supporting the child's cultural identity as a result of racial dissonance.

> Dumont, Reginald T, *Transracial Adoptions and Placement: An Annotated Bibliography* (1987) [unpublished, archived at Alberta Family and Social Services Library] at 61.
> Daly, Kerry J & Michael P Sobol, *Adoption in Canada: Final Report* (Ontario: University of Guelph, 1993) at 67.
> Griffith, Ezra & Rachel L Bergeron, "Cultural Stereotypes Die Hard: The Case of Transracial Adoption" (2006) 34(3) Journal of the American Academy of Psychiatry and the Law 303 at 305.

[53] Ms. Liu and Mr. Baxter have demonstrated their commitment to preserving Xavier's cultural heritage. They have taken Xavier to the South River reserve and are taking a First Nations cultural training course. Ms. Liu, who is of Chinese and Indian descent, has attested to her own experience with racism and prejudice. She has a first-hand understanding of the importance of culture to identity. The couple is committed to giving Xavier the tools he needs to overcome prejudice and stereotyping in the future. They are devoted to him in every way and they have well-developed plans for his social development.

> Official Problem, *supra* para 2 at 6.

[54] Expert evidence provided by Professor Nicholas Dallaire has ousted this stereotype in its application to the Respondents. Adopted children raised by parents who assist them in developing coping skills for discrimination are more likely than not to be well-adjusted.

> Official Problem, *supra* para 2 at 8.

[55] Wilson J rejected the application of this stereotype over 30 years ago. The Respondents submit that this Court should do the same.

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

[56] The Respondents, who are in the best interests of this child, have been deprived of equal consideration before the law. The impugned section imposes upon them additional barriers that are not imposed on others in society. This "differential treatment" significantly disadvantages them, in addition to the child, and denies their ability to be legally recognized as a family under the *Act.* This violates their guaranteed right to equality under section 15 of the *Charter.*

*Trociuk v British Columbia (Attorney General),* 2003 SCC 34 at para 10, [2003] 1 SCR 835.

**Issue 3: Section 17(5) is not protected under section 15(2) of the *Charter***

[57] If the Court accepts that section 17(5) creates a distinction in law, the government may seek to establish that the section is an ameliorative law that targets a disadvantaged group and is shielded by section 15(2). The Crown's burden cannot be met in this case. Section 17(5) does not have an ameliorative purpose nor does it promote substantive equality.

*R v Kapp,* 2008 SCC 41 at para 29, 294 DLR ($4^{th}$) 1 [*Kapp*].

**A. Section 17(5) is not an ameliorative program protected by section 15(2)**

[58] The Supreme Court set out in *Kapp,* and re-affirmed in *Cunningham,* the modern framework for cases where the government relies on section 15(2). A law will only be protected under section 15(2) if the Crown can establish that it "is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality." Once those conditions are met, section 15(2) "protects all

distinctions drawn on enumerated or analogous grounds that 'serve and are necessary' to the ameliorative purpose."

> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at paras 44, 45, [2011] 2 SCR 670 [*Cunningham*].
> *Kapp, supra* para 57 at para 52.

[59] Section 15(2) can be utilized to create affirmative action programs to assist disadvantaged groups. It "is aimed at permitting governments to *improve* the situation of disadvantaged groups that have suffered discrimination in the past, in order to enhance substantive equality."

> *Cunningham, supra* para 58 at para 40 [emphasis in original].
> *Kapp, supra* para 57 at paras 33, 53.

[60] Section 17(5) has no ameliorative purpose, as this legislation is concerned with direct placement adoptions. The Respondents submit that aboriginal parents have not been in a disadvantaged position with respect to such adoption arrangements. The Canadian government has historically discriminated against aboriginals through such programs and policies as residential schools and the "Sixties Scoop". However, the context of section 17(5) is that of direct placement adoption. These adoptions rely on "the action of a parent or other guardian …placing the child for adoption" and do not involve state removal of a child.

> Official Problem, *supra* para 2 at 7.
> *Act*, *supra* para 2 at s 1.

[61] Direct placement adoptions take place in a different and distinct context from those that involve child apprehension by the state. Adoptions via state intervention occur where the state removes the child from their home and the Director places the child for adoption. In contrast, direct placement adoptions are voluntary and consensual, and can only take place where a parent or guardian places the child for adoption. There have been historic disadvantages to aboriginal

peoples regarding state intervention and adoption; however no such discrimination ever existed in relation to direct placement adoptions.

*Act*, *supra* para 2 at s 1.

[62] Historical discrimination has never been a factor in dispensing with an aboriginal biological parent's consent. Legislated programs such as the Sixties Scoop referred to "the accelerated removal of children from their birth families by child welfare/protection agencies." The Sixties Scoop and residential schools resulted from government policies that targeted aboriginal families; direct placement adoptions do not fit into this category. The enactment of section 17(5) is an overreach in terms of cultural amelioration and is therefore misdirected.

William Boyce, Jennifer Roche & Diane Davies, *Adolescent Health: Policy, Science and Human Rights* (Canada: McGill-Queen's Press, 2009) at 98.

[63] Any disadvantage suffered by aboriginal peoples does not correlate to a program relating to direct placement adoption. Aboriginal parents have been treated equally, both in a formal and substantive way, by the law governing direct placement adoption. Consequently, the increased protection provided by section 17(5) is unnecessary and is not ameliorative.

**B. Section 17(5) does not accord substantive equality to aboriginal children**

[64] The purpose of section 17(5) is two-fold: to ensure that the rights of aboriginal biological parents and the cultural heritage and identity of aboriginal children would both be given increased protection in direct placement adoptions. While the impugned section may achieve the former, it does so at the expense of aboriginal children.

Official Problem, *supra* para 2 at 1.

[65] Aboriginal children should not be disadvantaged by having their future decided on the basis of their race, instead of on the basis of their best interests—the paramount consideration of

the *Act.* While section 17(5) attempts to further protect the cultural identity of aboriginal children, it fails to do so. It assumes that being raised by aboriginal people will protect the child's culture. However, it does not investigate into the willingness or abilities of those people to provide this enhanced protection. Section 17(5) assumes that any aboriginal person is more capable than a non-aboriginal person of passing on the child's heritage and culture.

*Act*, *supra* para 2 at s 2.
Official Problem, *supra* para 2 at 2.

[66] The language of section 17(5) places the supposed protection of the child's aboriginal culture at the behest of the aboriginal biological parent. The operation of the section is contingent on that parent withholding consent. Therefore, the section does not serve to protect the heritage of *all* aboriginal children—only those who have a parent who objects. The legislation thus fails to meet the purpose of protecting the cultural heritage of all aboriginal children, regardless of their parent's view.

*Act*, *supra* para 2 at s 2.

[67] Section 15(2) can only be applied to those programs that further substantive equality and that "aim to 'ameliorate' the condition of disadvantaged groups." The Supreme Court in *Kapp* noted that "[s]ections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s 15 as a whole." *Kapp* is an example of how section 15(2) was used to further substantive equality and ameliorate the disadvantaged economic position of aboriginal communities. The same however cannot be said of section 17(5).

*Kapp*, *supra* para 57 at paras 16, 53.

[68] Section 15(2) of the *Charter* allows for governments to defend and save laws on the basis of affirmative action. In the context of direct placement adoptions, no affirmative action for

aboriginal parents is necessary. The impugned provision is paternalistic and creates further distinctions in law between aboriginals and non-aboriginals. The section therefore cannot be protected under section 15(2).

**Issue 4: The infringements of sections 7 and 15(1) cannot be justified under section 1**

**A. The burden of proof is on the government to justify a *Charter* violation**

[69] Under section 1 of the *Charter*, the burden of proof is on the state to show "that a limitation on any *Charter* right is reasonable and demonstrably justified" on a balance of probabilities. The Supreme Court held in *Hutterian Brethren* that courts should adopt a deferential approach when applying the *Oakes* test to complex social issues. However, the fact that this is a difficult social issue "does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for Charter compliance." Section 17(5) cannot be justified under section 1, as it does not reflect the values and principles essential to a free and democratic society.

> *R v Oakes*, [1986] 1 SCR 103 at 105, 53 OR (2d) 719.
> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 53, [2009] 2 SCR 567 [*Hutterian Brethren*].
> *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 107, [2005] 1 SCR 791 citing *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 SCR 486 at 497, 24 DLR (4th) 536 [*Motor Vehicle Reference*].
> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 34 at para 12, [2003] 1 SCR 835 [*Sauvé*].

[70] The Supreme Court has never upheld an infringement of section 7 and has questioned whether such a violation "can ever be justified, except perhaps in times of war or national emergencies." The Respondents submit that because the violation of their security of the person is not in accordance with the principles of fundamental justice, no justification can be possible

under section 1. With respect to the violation of section 15, the impugned section fails to meet the requirements of the *Oakes* test to justify the infringement.

*R v Heywood*, [1994] 3 SCR 761 at 802, 34 CR (4th) 133.
Stewart, *supra* para 29 at 289-291.
*Motor Vehicle Reference, supra* para 69 at 518.

**B. One of the objectives of section 17(5) is not pressing and substantial**

[71] At the first stage of the *Oakes* test, courts must assess whether the law has a sufficiently pressing and substantial objective. The Respondent accepts that the provision in question is a limit prescribed by law and has a sufficiently pressing and substantial objective with respect to ensuring the cultural protection of aboriginal children.

[72] The Supreme Court stated in *Sauvé* that "[t]o establish justification, one needs to know what problem the government is targeting, and why it is so pressing and important that it warrants limiting a *Charter* right." As discussed above in relation to section 15(2), the Respondents submit that increased protection for aboriginal parents in the context of direct placement adoptions is not a pressing and substantial objective.

*Sauvé, supra* para 69 at paras 22, 24, 27.

**C. The means chosen are not proportional to the stated objectives**

[73] Even if the impugned legislation does not serve a pressing and substantial objective, "prudence suggests that we proceed to the proportionality analysis, rather than dismissing the government's objectives outright." Regardless of any possible well-intentioned objective, section 17(5) cannot meet the requirements of the proportionality test under section 1.

Official Problem, *supra* para 2 at 1.
*Sauvé, supra* para 69 at para 26.

**i) Section 17(5) is not rationally connected to the stated objectives**

[74] The objective of ensuring the cultural identity of aboriginal children is not rationally connected to the impugned provision. In order to show a rational connection, the government "must show a casual connection between the infringement and the benefit sought on the basis of reason or logic" such that "the restriction on rights serves the intended purpose." The section does, on its face, provide additional protection to aboriginal parental rights as it makes their consent more onerous to dispense with. However, the section does not rationally connect to the second objective: increasing protection for the aboriginal identity of the child.

> *RJR –MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 153, 127 DLR (4th) 1 [*RJR-MacDonald*].

[75] The impugned section has nothing to do with the child's interest in developing a cultural identity for his or her own sake. It is only triggered by the aboriginal biological parent's refusal to consent to the adoption. Therefore, even if the section did protect the cultural identity of the child, it could only do so at the insistence of the biological parent. In the course of a direct placement adoption where the aboriginal biological parent does consent, or where their consent could be dispensed with, no additional protection is given to the child's interest. Consequently, the child's independent interest in increased protection for his or her aboriginal heritage and identity is of no concern to the section.

[76] Second, the impugned section assumes without determining that the denial of the adoption can provide increased protection to this interest. In reality, the operation of the impugned section may keep the child from being adopted by those who are willing and capable of developing his cultural identity. Section 17(5) prevents the court from determining if the adoption itself would in fact protect the child's aboriginal identity.

[77] Last, there is no rational connection between denying the child what is in his or her best interests in the name of protecting his aboriginal identity. The interests of a child cannot be so easily divided. Other interests, such as the child's interest in safety, in being a secure member of a family, and in emotional and physical development, all contribute to the circumstances under which cultural identity is formed. It does not follow that extracting this interest and favoring it, perhaps even in opposition to the child's overall best interests, will result in its protection. Cultural identity, and the development of identity *per se,* may be placed at a far greater risk where the child does not have continuity in care, or does not have his emotional development considered. Therefore, the denial of a secure placement for aboriginal children does not necessarily further the objective of protecting a child's aboriginal culture.

**ii) Section 17(5) is not minimally impairing**

[78] At this point of the *Oakes* test, the government must show that the measures chosen impair the Respondents' *Charter* rights "as little as reasonably possible in order to achieve the legislative objective." There are other less drastic means to achieve these objectives in a real and substantial manner without infringing the Respondents' *Charter* rights.

*Hutterian Brethren, supra* para 69 at 104.
*RJR-MacDonald, supra* para 74 at para 160.

[79] The importance of preserving a child's aboriginal culture is already considered in determining the child's best interests under sections 3(1)(f) and 3(2). A less impairing approach would be to elevate the weight given to a child's aboriginal identity as a primary consideration under section 17. The statute could also take direction from the language of the *Child, Family and Community Service Act*, which utilizes family conferences that "take into account the child's

culture and community" when developing a plan of care. This concept could be incorporated into section 17 of the *Act* to enhance protection of the child's aboriginal culture.

*Act*, *supra* para 2 at ss 3(1)(f), 3(2).
*Child, Family and Community Service Act*, RSBC 1996, c 46 at s 20(1)(d).

[80] Furthermore, instead of focusing on whether or not the adoptive parents are of the same ethnicity as the child, the legislation should focus on what is in the best interests of the child. This would allow for all parents, regardless of race, to meet the legislation's requirements by demonstrating the ability to facilitate the child's aboriginal culture.

[81] Alternatively, the legislature could create a rebuttable presumption that the retention of custody of a child by an aboriginal biological parent is presumed to be in the child's best interests. The presumption could be defeated in circumstances where the child's well-being would be placed at risk. A presumption of this type would keep aboriginal children within their communities more often and still have at its core the best interests of the child. Furthermore, it would not infringe upon the Respondents' *Charter* rights.

**iii) The potential benefits of section 17(5) are outweighed by its deleterious effects**

[82] This stage of the analysis considers "whether the benefits of the impugned law are worth the cost of the rights limitation." The overall impact of section 17(5) is not proportionate; any potential salutary effects are clearly outweighed by the provision's deleterious effects.

*Hutterian Brethren*, *supra* para 69 at para 77.

[83] A clear salutary effect of section 17(5) is that it enhances the legal rights of aboriginal biological parents. However, the facts of this case demonstrate the deleterious effects of the impugned section. In contrast to children of other races, because of section 17(5), the court is unable to consider any harm to an aboriginal child unless it rises to the requisite level of

seriousness. Furthermore, as has been discussed, the impugned section perpetuates a negative stereotype against non-aboriginal parents in the position of the Respondents.

**D. Section 17(5) cannot be saved by section 1**

[84] The Supreme Court has stated that "*Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside." The overall impact of section 17(5) is not proportionate. The provision fails to meet the requirements of the *Oakes* test to justify the infringement of the Respondents' *Charter*-protected rights.

*Sauvé, supra* para 69 at para 14.

[85] Section 17(5) cannot be seen as a reasonable limit in a free and democratic society and consequently cannot be saved by section 1. It does not ameliorate disadvantage—it creates it. The section does not further aboriginal interests or cultural identity. Rather, it defeats the best interests of aboriginal children and discriminates against those that would adopt them.

## PART V – ORDER SOUGHT

[86] The Respondents respectfully request that the appeal be dismissed.

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

## PART VI – LIST OF AUTHORITIES AND STATUTES

**LEGISLATION**



**JURISPRUDENCE**

**SECONDARY SOURCES**

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