STATUTORY BAN

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER	**2003-0087AC**
TRIAL COURT FILE NUMBER	2003 04825
REGISTRY OFFICE	EDMONTON
PLAINTIFF/APPLICANT	A.C. and J.F.
STATUS ON APPEAL	RESPONDENT
DEFENDANT/RESPONDENT	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
STATUS ON APPEAL	APPELLANT
DOCUMENT	**FACTUM of the APPELLANT**

Appeal from the Decision of
The Honorable T.L. Friesen
Pronounced on the 19th day of March, 2020

FACTUM of the APPELLANT

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Dated: July 31, 2020

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PART I - FACTS

Overview

1. This appeal seeks to overturn an interlocutory injunction ordered by the Honourable Justice T.L. Friesen on March 19, 2020. The injunction stays operation of Ministerial Order 2020-01[1] (enacted on January 22, 2020), which lowers the maximum age eligibility for Support and Financial Assistance Agreement (SFAA) program benefits from 24 to 22 beginning on April 1, 2020. Pursuant to the injunction, Her Majesty the Queen in Right of Alberta (Alberta) must continue providing benefits to program recipients until the age of 24.

2. There is a single Respondent on this appeal (A.C.) because no evidence was filed on behalf of the party known as "J.F."

3. The decision below contains clear errors of law and palpable and overriding errors of fact that lead to an untenable constitutional precedent.

4. It is trite law that a benefit program must comply with the *Charter*. However, the Court below misconstrued this basic statement of law and erroneously concluded that a *Charter* violation can occur in the absence of a pre-existing *Charter* right - the Court found that the Respondent has no s. 7 *Charter* right to SFAA benefits but that changes to the program may violate her s. 7 and s. 12 rights. This is circular reasoning and cannot be correct because it provides a "backdoor" constitutional right to all benefit programs. Indeed, it constitutionalizes everything.

5. The Court found irreparable harm in the absence of a pre-existing *Charter* right.

6. During the balance of convenience analysis, the Court found that the policy choices of a prior government can overcome the presumption of constitutionality with respect to legislation enacted by the present government. This is absolutely contrary to democratic and constitutional principles.

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[1] **Tab 1**

7. The Court did not consider or gave no weight to evidence that was a necessary component of the analysis at every step of the injunction test.

Facts

Support and Financial Assistance Agreement (SFAA)

8. The SFAA program has existed since 2004.[2]

9. Pursuant to Section 57.3 of the *Child, Youth and Family Enhancement Act*[3] (the Act) and s. 6 of the *Child Youth and Family Enhancement Regulations*[4] (the "Regulations") the Director of Children's Services to may provide support and financial assistance to an adult who had previously been the subject of a family enhancement agreement, custody agreement, a temporary guardianship order, or a permanent guardianship order.

10. In situations where the Director is a custodian or a guardian of the child or youth, the Director ceases to be a custodian or a guardian to a child or youth no later than the age of 18 years.[5]

11. Once a youth turns 18 years of age and meets the requirements under section 57.3 of the Act, the Director will assess whether support and financial assistance is necessary taking into account other supports that are reasonably available from other sources. If the Director determines that support and financial assistance will be provided, there is a collaborative effort with the young adult to determine their needs and supports to transition them into independence. A SFAA is signed between the young adult and the Director and the young adult is assigned a case worker to help the young adult meet their goal of independence. In some cases, the young adult will continue with the same case worker they worked with as a child and/or youth.[6]

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[2] AR 160/2004 s. 6. **Tab 2**
[3] RSA 2000, c C-12. **Tab 3**
[4] AR 160/2004
[5] Appellant's Extracts of Key Evidence A23 at para. 5.
[6] *Ibid.*, A24 at para. 9.

12. If eligible for support and financial assistance, the young adult is required to meet the criteria as described under the Act and Regulations. If a young adult is denied support and financial assistance pursuant to section 57.3 of the Act, the young adult has the right to request an administrative review.[7]

13. An SFAA can be entered into for periods of up to 6 months until the young adult reaches the legislated age limit or earlier depending on the needs of the young adult. Attached to every SFAA is an updated Transition to Independence Plan. Every six months, the SFAA and Transition to Independence is reviewed and updated. This level of review ensures that the young adult has the supports required to achieve the goals within the SFAA. It also ensures that the young adult's thoughts and perspectives are incorporated into all planning.[8]

14. At any time, the SFAA can be changed as follows:

    a. Varied through negotiation,

    b. Extended to provide necessary supports,

    c. Terminated following the decision of either party to cancel the agreement, or

    d. Terminated by allowing the agreement to expire.[9]

15. As the purpose of the SFAA is to assist young adults to better transition into independence, this includes helping them connect to other sources of funding or adult services. Some examples would include income supports through Community and Social Services, Assured Income for the Severely Handicapped, Advancing Futures, Student Aid, therapeutic/counselling services, and supportive housing.[10]

16. For most of the program's history (2004-2013), individuals would cease to receive SFAA benefits upon their 22nd birthday.[11]

17. In 2013, the age of eligibility was increased to 24.[12]

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[7] *Ibid.*, A23 para. 8.
[8] *Ibid.*, A24 para. 10.
[9] *Ibid.*, A24 para. 11.
[10] *Ibid.*, A25 at para. 13.
[11] AR 160/2004 s. 6.
[12] AR 147/2014.

18. On January 22, 2020, Ministerial Order 2020-01 was enacted, lowering the age of program eligibility back to 22 as of April 1, 2020.

19. On March 3, 2020, the Respondents filed an Originating Application challenging the age change under ss. 7 and 12 of the *Charter* and seeking an interim injunction.

20. The injunction application was heard on an expedited basis on March 17, 2020. The urgency of this matter was compounded by the fact that the Respondent had waited months before filing the Originating Application.

21. On March 19, 2020, the Honourable Justice T.L. Friesen issued an interim injunction against Ministerial Order 2020-01 requiring Alberta to continue providing SFAA benefits to program members until the age of 24.

Post SFAA Temporary Funding

22. In November 2019, notice was provided to young adults that would be impacted by the eligibility change taking place on April 1, 2020. Intensive work was done over a period of 4 months by staff and community agencies to ensure a smooth and supportive transition for each of the young adults who would no longer be eligible. As an additional measure, short term funding would have been provided as an interim measure to young people who met specific criteria.[13]

23. The intent of the short term funding mechanism was to create a bridge to finalize a transition already in progress, so that no young person impacted by the age eligibility change would be left without the required supports because of timing. The interim funding would have been available from April 1, 2020 to September 1, 2020.[14]

24. The interim funding eligibility criteria fall under two different categories. The first pertains to young adults with complex service needs who require:

    - Ongoing support in order to live safely in the community;
    - More time to transition because adult services are not fully in place due to issues related to assessments, applications, eligibility or contract processes; and/or

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[13] Appellant's Extracts of Key Evidence, A25 at para. 14.
[14] *Ibid.*, A25 para. 15.

- Additional support for dependent children to mitigate against future Child Intervention Involvement.[15]

25. The second category is for young adults who need more time to make alternative living arrangements and/or adjust budgets to align with the current cost of living, including those young adults who have dependent children whose well-being could be compromised without that additional time. Young adults must show that they have been making demonstrable efforts to review and alter their budget and living expenses and have a plan in place to live within new financial parameters.[16]

The Respondent

26. Pursuant to the provisions of the Act, the Director ceased to be the guardian or custodian of the Respondent when she turned 18.[17]

27. On August 24, 2016, the Respondent qualified for and signed a SFAA. Her original goals at the time of the first SFAA were to begin working on independence skills such as getting a learners license, budgeting and registering for Partners for Youth School.[18]

28. The SFAA signed by the Respondent explicitly states "NOTE: the expiry date may not go beyond the person's 24th birthday" and "We agree that to cancel this agreement, one of us may provide a letter to the other person that sets a date for the agreement to end".[19]

29. At the time of the interim injunction hearing on March 17, 2020, the Respondent had signed onto an SFAA ending on May 24, 2020. At that time, a further SFAA would be entered with an end date of August 24, 2020 (the Respondent's 22nd birthday).[20]

30. At the time of the interim injunction hearing, the Respondent was receiving $1990 per month and childcare fees on the SFAA program.[21]

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[15] *Ibid.*, A25 at para. 16.
[16] *Ibid.*, A25 at para. 17.
[17] *Ibid.*, A23 para. 5.
[18] *Ibid.*, A2 at para. 6.
[19] *Ibid.*, A5.
[20] *Ibid.*, A2 at para. 7.
[21] *Ibid.*, A3 at para 10.

31. On July 23, 2019, the Respondent's Transition to Independence Plan included upgrading at NorQuest in the Fall of 2019 with plans to transition to the Native Studies program at the University of Alberta in the Fall of 2020.[22]

32. On October 31, 2019, the Respondent was advised by her caseworker that SFAA age eligibility requirements were changing but there were still 10 months to transition and get things in order.[23]

33. The transition plan was for the Respondent to complete upgrading at NorQuest College and transition to the Native Studies program at the U of A in Fall 2020.[24]

34. The Respondent was to be fully financially transitioned to the Advancing Futures program and have child subsidy care in place for Fall 2020. Under this plan, the Respondent would have received Advancing Futures Benefits of $1991 per month and a childcare subsidy until the age of 26.[25]

35. From November 2019 to February 2020, the Respondent had infrequent contact with her caseworker. The caseworker made weekly calls, texts, and sent Facebook messages but A.C. was unresponsive.

36. On February 7, 2020, the Respondent met with her caseworker and advised that she had stopped attending NorQuest College.[26]

PART II – RESPONSE TO GROUNDS OF APPEAL

37. Alberta submits that the Court below made five errors that are reversible on this appeal:

- Finding that the s. 7 *Charter* claim is arguable.
- Finding that the s. 12 *Charter* claim is arguable.
- Finding that the fiduciary duty claim is arguable.
- Finding irreparable harm despite the absence of a *Charter* right to SFAA benefits and evidence to the contrary.

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[22] *Ibid.*, A2 at para. 8.
[23] *Ibid.*, A3 at para. 11.
[24] *Ibid.*, A4 at para. 17.
[25] *Ibid.*, A4 at para. 18.
[26] *Ibid.*, A3 at para. 15.

- Failing to properly consider all relevant contextual factors during the balance of convenience analysis, which do not support issuance of the injunction.

PART III - STANDARD OF REVIEW

38. An interim injunction is a discretionary order and the standard of review on appeal is deferential. However, the Court of Appeal may interfere with the decision below where the chambers judge committed an error of law or principle, where there are palpable and overriding errors of fact, or where the exercise of discretion is unreasonable.[27]

PART IV - ARGUMENT

39. The Court below applied the injunction test set out in *RJR – MacDonald Inc v Canada*: (a) there is a serious issue to be tried; (b) irreparable harm will be suffered if interim relief is not granted; and (c) the balance of convenience between the parties favours the applicant.[28]

40. This is the appropriate test and threshold ("serious issue to be tried") for this matter.

There is no serious issue to be tried

There is no s. 7 right to SFAA benefits

41. All relevant case law suggests that the Respondent's s. 7 claim cannot succeed:

(1) there is no right to government benefit programs;

(2) there is no obligation upon Alberta to support the Respondent's life, liberty, and security of the person;

(3) changes to a benefit program cannot ground a claim of state induced psychological distress under s. 7; and

(4) the mere enactment of legislation cannot ground a claim of state induced psychological distress under s. 7.

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[27] *2101845 Alberta Ltd. v. Urban Leaf Inc.*, 2020 ABCA 142 (CanLII) at para. 7 **Tab 4**; *Alberta Union of Provincial Employees v. Alberta* 2019 ABCA 320 [AUPE] at para. 5. **Tab 5**

[28] *RJR – MacDonald Inc. v Canada (Attorney General)* [1994] 1 SCR 311 [RJR] at paras 46-48 (cited to 1994 CarswellQue 120). **Tab 6**

42. Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the fundamental principles of justice".

43. The Respondent claims that she should have been consulted prior to changes in the SFAA program. There is no right to pre-legislative consultation.[29]

44. The *Charter* does not protect economic rights.[30]

45. There is no positive obligation upon government to ensure that each person enjoys, life, liberty, or security of the person.[31]

46. There is no right to social assistance.[32]

47. Where a government elects to provide a financial benefit that is not otherwise required by law, legislative limitations on the scope of the benefit do not violate s. 7.[33]

48. Governments do not create obligations when they extend benefits, and benefits can be reduced or removed without violating s. 7.[34]

The Respondent's claim of psychological harm has been rejected in other cases

49. In *Canadian Doctors for Refugee Care v Canada (Attorney General)*,[35] the federal government significantly reduced health care coverage under the *Interim Federal Health Program* for refugee claimants generally, and essentially eliminated health coverage for risk-based claimants (including prenatal care, cancer treatment, the cost of medication for diabetes, etc.). The government took the view that severely restricting health coverage would dissuade false refugee claims because there would be no incentive to come or stay in Canada in order to access the healthcare system. These changes were challenged in Federal Court under ss. 7 of the

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[29] *Meredith v Canada (Attorney General)*, 2015 SCC 2 at para. 45. **Tab 7**
[30] *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at paras. 81-82 [*Gosselin*]. **Tab 8**
[31] *Ibid.*, at paras. 80-81.
[32] *Masse v Ontario (Ministry of Community and Social Services)* 1996 CanLII 12491 at para. 72. **Tab 9**
[33] *Flora v General Manager, Ontario Health Insurance Plan*, 2008 ONCA 538 at para. 108. **Tab 10**
[34] *Tanudjaja v Attorney General (Canada)(Application)* 2013 ONSC 5410 (Aff'd 2014 ONCA 852; leave denied 2015 CanLII 36770 (SCC) at para. 38. **Tab 11**
[35] 2014 FC 651. **Tab 12**

Charter, *inter alia*, on the basis that they caused "severe psychological distress" to the applicants.[36] The Court dismissed the argument on the basis that the claim of psychological distress requires a pre-existing s. 7 right to health care funding, and there is no right to health care funding.[37]

50. The Court in *Canadian Doctors* also refused to consider further arguments that economic disadvantage could bolster the s. 7 claim, and explicitly rejected the notion that a *Charter* violation can occur in the absence of a pre-existing *Charter* right:

> I fully recognize that the right of those affected to pay for their own medical treatment will be a largely illusory one, given the fact that most of those affected by the 2012 modifications to the IFHP will be economically disadvantaged individuals...[38]
>
> As the Court observed in *Wynberg*, there was no mandatory requirement that school-age children attend public school. Parents were free to seek treatment elsewhere, and there was no legal impediment to parents educating their children at home or in private schools. The Court expressly recognized that the financial realties were such that this may not be a viable option for "many if not most parents". This financial reality did not, however, engage section 7 rights that were not otherwise engaged, nor did it convert a non-section 7 deprivation into a deprivation of section 7 rights: at para. 231.[39] [emphasis added]

51. Applying these principles in the present matter, the Respondent's claim of psychological distress requires a pre-existing right to SFAA benefits. There is no right to benefit programs. Therefore, the Respondent's claim of psychological distress cannot succeed.

State induced psychological harm requires state intrusion, compulsion, or prohibition

52. Case law establishes that a violation of s. 7 requires direct state interference upon the activities of the individual, or some form of compulsion ("you must do this") or prohibition ("you cannot do that"). The mere withdrawal of SFAA benefits is not an interference, a compulsion, or a prohibition and the Court below erred in law in finding that this could trigger s. 7 rights.

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[36] *Ibid.*, at paras. 499-504.
[37] *Ibid.*, at paras. 558-563.
[38] *Ibid.*, at para. 564.
[39] *Ibid.*, at para. 567.

53. The Supreme Court cases relied upon by the Respondent and the Court below (*Chaoulli*,[40] *Carter*,[41] *PHS*,[42] *Bedford*, *Morgentaler*,[43] and *Godbout*,[44] and *Khadr*[45]) are all distinguishable from the present matter because they involved explicit legislative compulsions, prohibitions, and direct intrusions upon the activities of the affected individuals:

    - *Chaoulli* involved a legislative prohibition against the purchasing of private insurance.
    - *Carter* involved a legislative prohibition against assisted suicide.
    - *PHS* involved legislative prohibitions against the use of intravenous drugs at Insite facilities, and a situation where healthcare workers would have been prohibited from providing medical care and counselling to drug users at a safe injection site.
    - *Bedford* involved legislative prohibitions with respect to activities surrounding prostitution.
    - *Morgentaler* involved a legislative prohibition upon unapproved therapeutic abortions.
    - *Godbout* involved a municipal resolution that compelled all new permanent employees to live within municipal boundaries.
    - *Khadr* involved the active participation and conduct of Canadian officials in an illegal detention regime carried out by the U.S. government at Guantanamo Bay.

54. It should be further noted that *Chaoulli* involved a challenge to legislation enacted by the government of Quebec, and so the Supreme Court relied upon the *Quebec Charter of Human Rights and Freedoms* in the first instance in order to resolve the issues in that case.

55. The Court below misinterpreted the trite statement of law enunciated in *Chaoulli* that statutory schemes must comply with the *Charter* ("where the government puts in place a scheme to provide health care, that scheme must comply with the

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[40] *Chaoulii v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791. **Tab 13**
[41] *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331. **Tab 14**
[42] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134. **Tab 15**
[43] *R v Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 SCR 30. **Tab 16**
[44] *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844. **Tab 17**
[45] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 (CanLII), [2010] 1 SCR 44. **Tab 18**

Charter")[46] as support for the proposition that a *Charter* violation can occur in the absence of a pre-existing right. This is clearly an error of law.

56. In *Blencoe v British Columbia (Human Rights Commission)*,[47] the Supreme Court rejected the claim that delays in the human rights hearing process violated s. 7 because these did not amount to compulsions, prohibitions, or state interference. The Court stated:

> "Liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. The s. 7 liberty interest protects an individual's personal autonomy. In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. Such personal autonomy, however, is not synonymous with unconstrained freedom. Here, the state has not prevented the respondent from making any "fundamental personal choices". Therefore, the interests sought to be protected in this case do not fall within the "liberty" interest protected by s. 7. [emphasis added]

57. In *New Brunswick (Minister of Health and Community Services) v G.(J.)*,[48] the government tried to remove children from a parent. The Supreme Court found that this action interfered with the psychological integrity of the parent because it constituted direct state interference into the parent-child relationship. The Court quoted LaForest J. from the prior decision in B.(R.)

> Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. [emphasis added]

58. The Court below erred in law in finding that the mere enactment of legislation is sufficient to trigger s. 7.

59. In *Canada (Attorney General) v Bedford*,[49] the Supreme Court found that the "sufficient causal connection" standard is appropriate for examining whether

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[46] *Supra*, note 39, at para. 104.
[47] 2000 SCC 44 at headnote. **Tab 19**
[48] [1999] 3 SCR 46 at headnote. **Tab 20**
[49] *Canada (Attorney General v Bedford*, 2013 SCC 72 [*Bedford*]. **Tab 21**

legislation or the conduct of state actors engages s. 7 interests.[50] However, to be clear, the Court in *Bedford* did not find that the mere enactment of legislation that causes a person to be distressed can engage s. 7. The Court found that s. 7 may be engaged where either legislation or the conduct of state actors intrudes into the private lives of individuals and compels or prohibits certain activities (and in *Bedford*, the impugned legislation prohibited activities associated with prostitution, resulting in increased risk of harm to sex trade workers).

The s. 12 claim cannot succeed

60. Section 12 of the *Charter* provides that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment".

61. The threshold for a breach of s. 12 is high. The question is whether the treatment or punishment is "so excessive as to outrage standards of decency".[51] Demonstrating that a treatment or punishment is merely excessive is not sufficient to ground a finding that s. 12 has been violated.[52]

62. In the Court below, the Respondent made the bare assertion that the SFAA is "treatment" for the purposes of s. 12, and did not provide any argument with respect to how changes to the SFAA can meet the threshold of treatment "so excessive as to outrage the standards of decency". The Court erred in law in finding that the bare claim was sufficient to meet the "serious issue" threshold.

63. The Court characterized the Respondent's argument as follows:

> [I]t was argued it would be cruel and unusual treatment for the state, having made a promise to the specific young people that they would be taken care of, to renege on that promise. To do so would breach their reasonable expectations, and would cause them to suffer real psychological and possibly even physical harm.[53]

64. There is no case law in which "reneging on promises" or "reasonable expectations" has been the foundation of a successful s. 12 challenge. Indeed, there is no

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[50] *Bedford*, at para. 76.
[51] *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at para. 95. **Tab 22**
[52] *R v Nur*, 2015 SCC 15 at para. 39. **Tab 23**
[53] Appeal Record F23 at lines 6-10.

applicable principle suggesting that such a position is arguable. On this basis, the Court erred in law in finding the s. 12 claim to be meritorious.

65. With respect to the issue of promises and reasonable expectations, the Court below erred in law in not giving any consideration or weight to evidence that the SFAA signed by all program recipients explicitly states "NOTE: the expiry date may not go beyond the person's 24th birthday" and "We agree that to cancel this agreement, one of us may provide a letter to the other person that sets a date for the agreement to end."[54]

66. The Court made an palpable and overriding error of fact in finding that SFAA recipients as a whole were "cared for as children, not by their parents or relatives, but by the state itself."[55] There was no evidence on the record establishing that all SFAA recipients have been raised by the state. Indeed, there was no evidence on the record that the Respondent herself was "raised by the state" in the thoroughgoing manner suggested by the Court.

67. Pursuant to Section 57.3 of the Act, there is no requirement that an adult be "raised by the state" in order to be eligible for SFAA benefits.

68. The Court further erred in law in giving no consideration or weight to evidence that in situations where the Director is a custodian or a guardian of the child or youth, the Director ceases to be a custodian or a guardian to a child or youth no later than the age of 18 years.[56]

69. In addition to the palpable and overriding errors of fact set out above, the Court erred in law in the following findings:

- That the government stands in *loco parentis* to SFAA recipients.[57]
- That SFAA recipients had a reasonable expectation that they would receive benefits until the age of 24[58] and

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[54] Key Extracts Affidavit of Cinthia Langlois Exhibit A.
[55] Appeal Record F23 at lines 14-15.
[56] Affidavit of Joni Brodziak at para. 5.
[57] Appeal Record F23 at lines 21-23.
[58] Appeal Record F23 at line 28.

- Therefore, changes to the program might constitute cruel and unusual punishment contrary to s. 12.[59]

70. SFAA recipients are adults that have freely signed an agreement with the government in order to receive benefits.

71. Interpretation of the term "punishment" has been limited to the penal and quasi-penal context. The question then is whether changes in the SFAA program constitute "treatment" for the purposes of s. 12.

72. Applicable principles establish that changes to the SFAA are not "treatment" for the purposes of s. 12.

73. In *Rodriguez v British Columbia (Attorney General)*,[60] Sopinka J. for the majority stated, "[t]here must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be a positive action, inaction or prohibition, to constitute "treatment" under s. 12."[61] [emphasis added]

74. The principle of state control enunciated in *Rodriguez* has been applied in only one case.

75. In *Canadian Doctors* (discussed above), the Federal Court rejected the claim that reduction and elimination of health coverage for certain refugee claimant's violated their psychological integrity under s. 7, but accepted that in the "unusual circumstances of this case"[62] the reduction in health coverage constituted "treatment" under s. 12 because refugee claimants were subject to state control (per the reasoning in *Rodriguez*) and the measures were enacted with the specific intention of harming this group:

> In this case, those seeking the protection of Canada are under immigration jurisdiction, and as such are effectively under the administrative control of the state. Some claimants may be detained, and obligations such as reporting requirements may be imposed on others. In addition, their rights and opportunities (such as the right to work or their ability to receive social assistance benefits) may be limited

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[59] Appeal Record F23 at line 12.
[60] [1993] 3 SCR 519. **Tab 24**
[61] *Ibid.*, at para. 67.
[62] *Ibid.*, at para. 590.

> in a number of different ways by the state. Indeed, their entitlement to a range of benefits is wholly dependent upon decisions made by various branches of the Government as to their right to seek protection, and the ultimate success of their claims for protection...through the introduction of the 2012 changes to the IFHP, the Governor in Council is intentionally trying to make life harder for vulnerable poor and disadvantaged individuals who have lawfully come to Canada seeking the protection of this country.[63]

76. In the present case, changes to the SFAA do not constitute "treatment" because this is a benefit program like any other; SFAA recipients are not under administrative control of the state; and there was no evidence before the Court below that changes to the program were enacted with the intention of harming the Respondent.

77. Indeed, it is not possible for the Respondent to be under "state control" in the legally relevant sense described in *Rodriguez* and *Canadian Doctors* given that she simply walked away from the program of her own volition. The Court erred in law in failing to take this evidence into account when assessing the Respondent's s. 12 claim.

78. The Court erred in law in ignoring the ample evidence on the record that the Respondent had access to transitional funding from April 1, 2020 until September 1, 2020, and that the 10 month transition plan was to have the Respondent completing upgrading via NorQuest College and then transitioning to the Native Studies program at the University of Alberta in fall 2020. The Respondent was to be fully transitioned financially to the Advancing Futures program by Fall 2020, receiving $1991 per month plus childcare costs until she turned 26. Clearly, there was no intention to harm the Respondent.

79. On the facts of the matter, the Court erred in law in concluding that changes to the SFAA constitute "treatment" in the legally relevant sense.

80. Further, the Court erred in law in not addressing whether changes to the SFAA could possibly meet the high threshold of being so excessive that it would outrage standards of decency. Alberta submits the provision of transitional funding,

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[63] *Ibid.*, at paras. 585-589.

education, and childcare benefits until age 26 would not outrage standards of decency.

There is no fiduciary duty in this case

81. The Court below erred in law finding that the Respondent's fiduciary duty claim met the "serious issue" threshold:

> The possible interplay between section 7 and section 12 and equitable doctrines of reasonable expectation fiduciary duty, in this particular context, constitute a serious issue to be tried an as follows: reasonable expectation and fiduciary duty.[64]

82. The Respondent failed to bring evidence on two distinct and fundamental issues:

- First, that she has a specific *private law* interest in the benefits afforded under the SFAA that is a pre-existing distinct and complete legal entitlement.[65]
- Second, that Alberta stands in a fiduciary relationship to her with respect to management of SFAA benefits.

83. The Supreme Court decision in *Alberta v Elder Advocates of Alberta Society* [66] makes it clear that a bare claim for access to a benefit scheme does not create a fiduciary duty.[67]

84. Vulnerability alone will not support a fiduciary claim.[68]

85. Alberta ceased to act as guardian or trustee for the Applicants when they turned 18.

86. As set out above, the Court made a palpable and overriding error of fact in finding that SFAA recipients as a whole were "raised by the state", and erred law in finding that Alberta stands in *loco parentis* to SFAA recipients.

87. The mere grant to a public authority of discretionary power to affect a person's interests will not support a claim of fiduciary duty,[69] and Alberta does not stand in a

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[64] Appeal Record F23 at lines 27-30.
[65] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 51. **Tab 25**
[66] *Ibid.*
[67] *Ibid.*, at paras. 52-54.
[68] *Ibid.*, at para. 28.
[69] *Ibid.*, at para. 45.

fiduciary relationship with the Respondent simply because it has discretion with respect to the allocation of public funds.

There is no irreparable harm

88. In the absence of a constitutional right to SFAA benefits, the Respondent cannot suffer irreparable "social, financial, and psychological"[70] harm if there are changes to the program. Therefore, the Court erred in law in finding that changes to the SFAA program result in irreparable harm to the Respondent.

89. The *Charter* does not protect economic rights. Therefore, the Court erred in law in finding that the Respondent suffered irreparable "financial" harm.

90. There is no positive obligation upon government to ensure that each person enjoys, life, liberty, or security of the person. Therefore, the Court erred in finding that the Respondent suffered irreparable "social" harm.

91. The Court made a palpable and overriding error of fact in finding irreparable harm despite uncontroverted evidence that the Respondent had not lost any benefits due to changes in the SFAA program. The Respondent was receiving $1990 per month plus childcare costs on the SFAA program,[71] and there was a plan in place to have her attend NorQuest College while being transitioned financially to the Advancing Futures Benefits program for the Fall of 2020 at $1991 per month plus child care fees until she turned 26.[72]

92. The Court erred in law in rejecting all evidence that that the Respondent had not lost any benefits due to changes in the SFAA program ("I do not accept this argument").[73]

93. In the absence of any loss of benefits (indeed, an extension of benefits until age 26), the logical conclusion of the Court's reasoning is that irreparable harm exists because the Respondent did not have a choice with respect to the source of her

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[70] Appeal Record F25 at lines 9-10.
[71] Affidavit of A.C. at para. 58.
[72] Affidavit of Cinthia Langlois at paras. 17-18.
[73] Appeal Record 24 at 41.

publicly funded benefits (i.e., SFAA over Advancing Futures). This constitutes a further error in law.

The Balance of Convenience favours the government

94. When an injunction is sought against legislation, the Court must take into account the "presumption of constitutionality" during the balance analysis. This does not mean that the impugned legislation is assumed to be constitutionally valid. Rather, as stated by the Supreme Court in *Harper v Canada (Attorney General)*: [74]

> In assessing the balance of convenience, the motions judge must proceed on the assumption that the law...is directed to the public good and serves a valid public purpose...The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.[75] [emphasis added]

95. A concise articulation of the "clear case" principle is provided by the dissenting Madame Justice Paperny in *Alberta Union of Provincial Employees v Alberta*:[76]

> [T]he "clear case" criterion is to be applied only at this third stage, namely balance of convenience. Thus, it cannot go to the merits of the case; that test is already established in the jurisprudence...Having regard to all the circumstances, is this a clear case for granting the injunction? Put another way, the applicant must satisfy the court that the injunction ought to be granted in order to immediately protect the rights of those adversely affected.[77]

96. As explained by Madame Justice Paperny, a "clear case" does not refer to whether the claim will succeed at trial – the question of whether a claim is not frivolous or vexatious has already been determined at the first stage of the analysis. Rather, the "clear case" analysis is a contextual analysis of all relevant factors to determine whether it is "clear" that an injunction should issue.

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[74] 2000 SCC 57. **Tab 26**
[75] *Ibid.*, at para. 9.
[76] 2019 ABCA 320. **Tab 5**
[77] *Ibid.*, at para. 70.

97. This is not a "clear case" for the issuance of an injunction, and the Court erred in both fact and law in failing to properly assess the relevant contextual factors during the balance of convenience analysis.

The policy choices of past governments cannot overcome the public interest

98. MO 2020-01 is assumed to serve the public interest. The government must be free to allocate limited public resources across Ministries in order to ensure the sustainability of programs and services for all 4 million Albertans.

99. The result of the injunction in this case is a "suspension" of the legislation. As stated in RJR, "public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case."[78] The Court erred in law in failing to consider this factor in the analysis.

100. In addressing the public interest, the Court found that the policy choice of a prior government overcomes the presumption of constitutionality of legislation enacted under the present government:

> As the age limit of 24 was chosen by an earlier government after receiving recommendations based on well-supported medical and sociological evidence, and considering the small number of young people affected, it is difficult to see how it would not be in the public interest to leave the age limit in place for the time being.[79]

101. On the Court's reasoning then, the policy choices of former governments can bind present governments. This is absolutely antithetical to democratic and constitutional norms, and is clearly an error of law.

The claims are either weak or bare assertions

102. On the Court's own reasoning, this case is unlikely to succeed at trial:

- "There is no question that A.C. faces an upward battle in this matter, particularly as it relates to the asserted breaches of s. 7."[80]

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[78] RJR at para. 78.
[79] Appeal Record F26 at lines 19-23.
[80] F22 at lines 20-21.

- "This is a difficult argument to advance, other than in the context of a section 15 violation, which is not relevant in the present matter."[81]

- "I note that the litigants in cases like *Bedford*, *Saskatchewan Federation of Labour*, and *Carter,* were also told on, numerous occasions, that the case law was stacked against them, the precedents had already been established, their arguments that had been made before and rejected, and their cause was hopeless. Yet they succeeded."[82]

103. The weakness of the case militates against the issuance of an injunction, and the Court erred in law in failing to consider this factor within the contextual analysis. On the Court's reasoning, absent a frivolous or vexatious claim, an injunction should issue if there is a "faint hope" that a case might succeed. This constitutes an error in law.

104. The Court erred in law in finding the bare assertion of a s. 12 violation could support the issuance of an injunction.

105. The Court erred in law in finding that the bare assertion of a fiduciary duty could support the issuance of an injunction.

The Court failed to consider relevant evidence

106. As discussed throughout these submissions, the Court erred in both law and fact by failing to consider, or giving no weight, to any evidence that undermines both the substantive *Charter* claims, and the claim of irreparable harm: The Respondent signed an agreement that explicitly states that benefits may end before age 24; the Respondent was on a transition plan that would have supported her education and maintained the same benefits until age 26; and the Respondent walked away from the program prior to April 1, 2020.

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[81] F22 at lines 33-34.
[82] Appeal Record F24 at lines 19-22.

The nature of the injunction must be considered in the analysis

107. The injunction in this case is a mandatory injunction, and the Court erred in law in characterizing it as a prohibitive injunction.

108. As stated by the Supreme Court in *R v Canadian Broadcasting Corp.*,[83] "[a] mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*."[84] [emphasis added].

109. The injunction nullified the effect of MO 2020-01 (enacted on January 22, 2020), and requires the government to undertake a positive course of action contrary to its express legislative intentions (i.e., continue paying SFAA benefits to individuals over 22 after April 1, 2020). Therefore, it is a mandatory injunction.

110. The Justice stated that "[t]he effect of the injunction would be to maintain the *status quo*: It would prevent the Government from reducing the age eligibility from 24 to 22".[85]

111. However, the government had already reduced the age eligibility through enactment of MO 2020-01 on January 22, 2020. The *status quo* changed on January 22, 2020, and the injunction requires the government to take steps to restore the *status quo* existing prior to enactment of MO 2020-01.

112. Similarly, in *Medical Laboratory Consultants Inc. v Calgary Regional Health*,[86] the Calgary Regional Health authority was providing monthly $40,000 fee for service payments to Medical Laboratory Consultants pursuant to the *Alberta Health Care Insurance Act* and a separate contract. Calgary Regional gave 30 days notice that payments would be terminated. Medical Laboratory Consultants filed a Statement of Claim and sought an injunction preventing termination of the payments pending disposition of the matter. The Alberta Court of Queen's Bench issued a mandatory injunction requiring Calgary Regional to continue payments in order to preserve the *status quo*.[87] On appeal, the Alberta Court of Appeal found that "the action taken by

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[83] 2018 SCC 5 (CanLII). **Tab 27**
[84] *Ibid.*, at para. 15.
[85] Appeal Record F12 at lines 24-25.
[86] 2003 ABQB 995. **Tab 28**
[87] 2005 ABCA 97. **Tab 29**

CHR was to change the *status quo* by stopping payments"[88] and so the mandatory injunction was required to "maintain the *status quo*".

113. In the present case, the statutory framework existing prior to January 22, 2020 precluded Alberta from simply terminating SFAA payments. MO 2020-01 was enacted in order to change the statutory *status quo* and enable the government to lawfully terminate SFAA payments at age 22.

114. In *M.P v Chinook Regional Health Authority*,[89] the Honourable Madame Justice E.A. Hughes of the Alberta Court of Queen's Bench stated that the "seeking of an interlocutory mandatory injunction is a factor to consider in assessing the balance of convenience because the granting of an interlocutory mandatory injunction requires the respondent to take positive action and such interlocutory injunctions are less readily granted."[90] [emphasis added]

115. The Court erred in law in failing to consider that requiring Alberta to take positive action (i.e., continue paying SFAA benefits) weighs against issuance of an injunction during the balance of convenience analysis.

Reconsideration of *AUPE v Alberta*

116. This Court has granted leave to reconsider the recent injunction decision in *Alberta Union of Provincial Employees v Alberta.*[91]

117. The purpose of reconsideration is not to determine whether AUPE was wrongly decided,[92] but to clarify whether the majority's assertion that there is a "strong presumption that the legislation is constitutional"[93] has altered the injunction test.[94]

118. Alberta submits that the parties are in agreement with respect to interpretation of the *AUPE* decision; reconsideration of the decision is not necessary to resolve the *lis*

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[88] *Ibid.*, at para. 7.
[89] 2004 ABQB 10 (CanLII) **Tab 30**
[90] *Ibid.*, at paras. 24-25.
[91] *Supra*, note 26; *A.C. and J.F. v Her Majesty the Queen in Right of Alberta*, 2020 ABCA 251, [2020] AWLD 2193 [*Reconsideration Decision*]. **Tab 31**
[92] *Edmonton (Police Service) v Deluca*, 2020 ABCA 31, [2020] AWLD 627 at para. 6. **Tab 32**
[93] *AUPE* at para 7.
[94] *Reconsideration Decision* at para. 10.

between the parties on this appeal; and Alberta has not relied upon the majority decision in order that the Court can avoid this "red herring" in deciding this appeal.

119. The language of the *AUPE* decision is loose – this was a Memorandum of Judgment - but the majority clearly defines "the presumption that legislation is constitutional" as "a presumption that enjoining validly enacted legislation will affect the public interest."[95] This statement is entirely consistent with decades of injunction law.

120. Further, this statement was made because the majority found that the Court below had erred in finding that the impugned legislation was not in the public interest ("No part of the tripartite test gives the chambers judge a mandate to assess whether validly enacted legislation is in the public interest").[96]

121. It is obvious that the majority in *AUPE* was addressing the issue of public interest during the balance of convenience analysis, and was <u>not</u> suggesting that legislation is presumed to be constitutionally valid for the purposes of the injunction test (i.e., that legislation is presumed not to violate the *Charter*).

PART V - RELIEF SOUGHT

122. Alberta requests that the interlocutory injunction issued by the Honourable Justice T.L. Friesen on March 19, 2020 be overturned.

Estimate of time for oral argument: 45 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st DAY OF JULY, 2020.

for **David N. Kamal**
Counsel for the Minister of Justice and Solicitor General of Alberta

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[95] *AUPE* at para. 25.
[96] *AUPE* at para. 11.

TABLE OF AUTHORITIES

Tab **Legislation**

Tab **Authority**

16. *R v Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 SCR 30

17. *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844

18. *Canada (Prime Minister) v Khadr*, 2010 SCC 3 (CanLII), [2010] 1 SCR 44

19. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307

20. *New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] 3 SCR 46, [1999] SCJ No. 47

21. *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101

22. *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350

23. *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773

24. *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 579, [1993] SCJ No. 94

25. *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261

26. *Harper v Canada (Attorney General)*, 2000 SCC 57, [2000] 2 SCR 76

27. *R v Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 SCR 196

28. *Medical Laboratory Consultants Inc. v Calgary Regional Health*, 2003 ABQB 995, 33 Alta LR (4th) 242

29. *Medical Laboratory Consultants Inc. v Calgary Regional Health*, 2005 ABCA 97, [2005] AJ No. 276

30. *M.P. v Chinook Regional Health Authority*, 2004 ABQB 10, [2004] AJ No. 32

31. *A.C. and J.F. v Her Majesty the Queen in Right of Alberta*, 2020 ABCA 251, [2020] AWLD 2193 [*Reconsideration Decision*]

32. *Edmonton [Police Service] v Deluca*, 2020 ABCA 31, [2020] AWLD 627