COURT OF APPEAL OF ALBERTA

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RESPONDENT:	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
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Appeal from the Decision of
The Honourable Justice T.L. Friesen
Dated the 19th day of March 2020
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FACTUM OF THE RESPONDENT

Counsel for the Appellant
David Kamal
Alberta Justice
Constitutional and Aboriginal Law
11th Floor, 102A Tower
10025 102A Avenue
Edmonton, AB T5J 2Z2
Phone: 780-427-4418
Fax: 780-643-0852

Counsel for the Respondents
Avnish Nanda
Nanda & Company
3400 Manulife Place
Edmonton, AB T5J 4K1
Tel 780-801-5324
Fax: 587-318-1391
Email: avnish@nandalaw.ca

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PART I – FACTS

A. Overview

1. The Appellant Her Majesty the Queen in Right of Alberta ("**HMQA**") seeks to overturn an interim injunction that suspends the operation of legislative amendments to the *Child, Youth and Family Enhancement Act*[1] and *Child, Youth and Family Enhancement Regulation*[2] that reduces the maximum age eligibility for participants of the Support, Financial Assistance ("**SFA**") program.

2. The SFA program was established in 2004 after a series of consultations, studies, and reports that explored the unique challenges children raised in government care face as they transition to adulthood. Children in care often experience a significant amount of trauma, instability, and mental health impairments that stunt their development. HMQA enacted the SFA program to assist youth who were raised in government develop the capacity needed to function as healthy and self-reliant adults. The program provides these youth emotional and financial supports to manage and overcome the developmental and social barriers they face in building sustainable and independent lives as adults.

3. Under the SFA program, participants were eligible to receive emotional and financial supports until the age of 24. However, in November 2019, HMQA unilaterally reduced the maximum age eligibility for SFA participants from 24 to 22. The changes to the SFA regime would impact both new and existing program participants. Hundreds of vulnerable youth faced the prospect of being immediately deprived of critical emotional and financial supports on April 1, 2020, when the amendments were to take effect.

4. The Respondents A.C. and J.F., existing participants of the SFA program, commenced action against HMQA, alleging that the manner and impacts of the changes made to the SFA regime infringed their rights protected at sections 7 and 12 of the *Charter of Rights and Freedoms* and the fiduciary duty owed to them in the circumstances. A.C. then sought an interim injunction pending the final disposition of the action.

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[1] RSA 2000, c C-12.
[2] Alta Reg 160/2004.

5. On March 19, 2020, the Honourable Justice T.L. Friesen granted an interim injunction pursuant to section 24(1) of the *Charter*, "prohibiting the Government of Alberta from implementing amendments to section 6 of the *Child Youth and Family Enhancement Regulation*, which changed the maximum eligibility for the SFA program from 24 years of age to 22 years of age." The interim injunction applies to all SFA program participants.

6. A.C. submits that the Chambers Justice made no errors in law or fact that requires this Court's intervention to remedy. This Appeal should be dismissed with special costs, and the interim injunction order should remain in effect until the final determination of this action.

B. The SFA Program

7. A.C. accepts the findings of fact made by the Chambers Justice regarding the SFA program:[3]

> Understanding the SFA requires first understanding the *Child Youth and Family Enhancement Act* RSA 2000, c C-12, and its Regulations and the way in which it describes the relationship between the Government of Alberta, as represented by the Director of Child Youth and Family Enhancement Services, and children in the Government's care.
>
> Pursuant to the *CYFEA*, and depending on the arrangements made, the Director becomes either a custodian, or a guardian of the child. The Director ceases to be a custodian or guardian to the child, as that term is used in the statute, when the child turns 18.
>
> In 2004, after extensive academic engagement, community consultation and policy review, the Government of Alberta established the SFA program. Under the program, when a child in Government's care turns 18 years of age, and provided they meet the requirements under section 57.3 of the Act, the Director will assess whether continued support and financial assistance is necessary. Pursuant to the SFA program, the Director has undertaken responsibility for provision of support and additional financial assistance to young people aging out of the Child Services system.
>
> If the Director determines that support and financial assistance should be provided, a collaborative process ensues, in which the youth and the Director determine what supports are required to transition the young person into independence. This is done through an agreement known as an SFAA, which is prepared and entered into by the young person and the Director. The young person is assigned a case worker to help them meet their goal of independence. In some cases, such as A.C.'s, the young person will continue with the same case worker they worked with when they were a child in care.

[3] Appeal Record, F12, line 40 – F14, line 19.

> An SFAA can be entered into for periods of up to six months, until the young person reaches the legislated age limit or earlier, depending on the young person's needs. Attached to every SFAA is an updated Transition to Independence Plan. Every six months, the SFAA plans are reviewed and updated. This level of review ensures the young person has the supports required to achieve the goals of the SFAA. It also ensures that the young person's thoughts and perspectives are incorporated into the planning process. SFAAs can be varied, extended, or terminated or they may simply expire. As the purpose of the SFAA is to assist young people who are raised in government care to better transition into adulthood and independence, it includes helping them connect to other sources of government funding or adult services, such as Community and Social Services, Assured Income For the Severely Handicapped, Advancing Futures, Student Aid, therapeutic/counselling services, and supportive housing.
>
> According to the uncontradicted evidence contained in the Affidavits of Irene and John McDermott, private consultants specializing in Child Welfare who were involved with the development of the SFA program, the SFA program was developed to address a gap in support "for children raised in Government care transitioning to adulthood, with the aim of building emotional and financial self-sufficiency so they can live sustainable, independent and healthy lives."
>
> Initially, the age limit in the legislation was set at 22; however, in 2013, the maximum age of SFA Program participants was raised to 24. Relying on the uncontradicted Affidavit evidence of Jacqueline Pei, the Applicants submitted that the maximum age limit for the SFA program reflects the academic literature and research as it relates to early adulthood development, particularly in relation to children raised in Government care. The McDermott Affidavits confirm that the Government had good policy reasons for raising the age of eligibility to 24, at the time it occurred.
>
> According to Ms. Pei, for children who have been raised in government care, the transition to adulthood is particularly difficult, given their limited family connections and supports, and increased exposure to things like substance abuse and other forms of neglect and loss.

8. As the Chambers Justice noted, the background information on the purpose, intent, history, and structure of the SFA program was based on the extensive affidavit evidence tendered by the parties. A.C. tendered the affidavits of a number of witnesses who offered specialized expertise and understanding of the purposes and origins of the SFA program. This includes researchers and government managers who helped establish the program in 2004, and an expert on the neuropsychological health of vulnerable and marginalized youth and the effectiveness of state interventions intended to support the stabilization and development of vulnerable youth. The Chambers Justice accepted the affidavits in their entirety, as they were “uncontested” by HMQA.[4]

[4] Appeal Record, F12, lines 37-38.

9. The period between 18 and 25 years of age is a critical period of human development:[5]

> Researchers report that our brains continue to develop into our late twenties, as we build the skills and abilities we need to be healthy, functioning adults. The development and maturation of the prefrontal cortex occurs primarily during adolescence and is fully accomplished at the age of 25 years.
>
> The development of the prefrontal cortex is very important for complex behavioural performance, as this region of the brain helps accomplish executive brain functions. The prefrontal cortex provides an individual with the capacity to exercise good judgment when presented with difficult life situations and is responsible for cognitive analysis, abstract thought, and the moderation of behaviour in social situations.
>
> The prefrontal cortex acquires information from all of the senses and orchestrates thoughts and actions in order to achieve specific goals. However, this is one of the last regions of the brain to reach maturation, which explains why some adolescents and young adults exhibit behavioral immaturity and underscores the importance of recognizing the extended developmental period during which adolescents and young adults require transitional supports.
>
> Developmental psychologists also identify emerging adulthood as a unique developmental stage that is different from both adolescence (generally considered the period of 10 to 18 years old) and full adulthood (25 years old and beyond).
>
> Five major features have been identified as unique to emerging adulthood.
>
> First, in emerging adulthood the individual moves beyond identity exploration to involve learning more about who they are as adults, their interests, and developing lasting connections and relationships. Their experiences in friendships, work, and romantic love all happen within the context of exploring possible life directions.
>
> Second, emerging adults go through periods of greater instability, changing residences and jobs frequently. As adolescents emerge into young adults they experience many changes in their living and employment situations.
>
> Third, emerging adults have new legal rights and are less subject to parental or institutional control, while also being less constrained by formal roles than older adults. This gives them the freedom to explore their identities and to make choices that serve as important learning opportunities.
>
> Fourth, researchers have reported that emerging adults feel they are at an in between stage — not a child anymore, but not yet a full adult. When asked to identify the key hallmarks of reaching full adulthood, they point to self sufficiency, taking responsibility for their actions, and making decisions independently.
>
> Fifth and finally, emerging adults have more control over their own lives than adolescents, and are not yet burdened by the full expectations of adulthood. They have the opportunity to make dramatic changes in their lives. Notably, this somewhat steady and smooth path of transition is noted to occur most frequently amongst

[5] Key Extracts of the Respondent ("**Respondent's Key Extracts**"), R10-R12, ¶¶11-20.

> privileged youth – youth in care may not have that steady support group to encourage and facilitate safe exploration and development through these stages and may require additional supports during this phase.

10. For children raised in care, there are additional barriers that have to be overcome to transition to independent adulthood:[6]

> The challenges experienced during emerging adulthood have even greater significance for young people who have been involved with Children's Services. Moving into adulthood is especially challenging for young people who have limited connection to family and natural supports, mental health and substance use challenges, and involvement with government systems. Individuals who experience abuse, neglect, loss and other forms of trauma face added challenges in their functioning and development.
>
> Furthermore, emerging adults who have been involved with Children's Services may not have natural connections such as parents, relatives or long term relationships they can rely on for support. Youth in care have shared their fears and the actuality of loss of relational and support connections as they transition to young adulthood – regarding the severing of relations with caseworkers and foster parents. This in combination with the greater vulnerability due to adversity and trauma and the lack of opportunity to learn skills critical to independence, underscores the importance of support during this vulnerable period.

11. As a result of trauma, a lack of natural supports, or both, children in care are delayed in their personal development and specifically in relation to the experiences and skills necessary to function independently as an adult.[7] They may not have the capacity to make the transition to independent adulthood immediately at the age of 18. Additional time and supports may be required to achieve healthy and sustainable adulthood.

12. The SFA program was created for this cohort of former children in care who are unable to transition to independent adulthood upon reaching the age of 18 as they lacked the cognitive and social capacity to function on their own in a sustainable manner. The SFA program was designed to address a "gap in support for children raised in government care transitioning to adulthood, with the aim of building emotional and financial self-sufficiency so that they can live sustainable, independent, and healthy lives."[8]

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[6] Respondent's Key Extracts, R12-R13, ¶¶23-24.
[7] Respondent's Key Extracts, R13-R14, ¶¶25-27.
[8] Appeal Record, F14, lines 1-6, quoting the Affidavit of John McDermott, Respondent's Key Extracts, R36, ¶25.

13. Before a child in government care reaches the age of 18, HMQA assesses and determines if they have the capacity to function on their own as an adult in a healthy and sustainable manner.[9] If it is determined that the individual cannot, they are transitioned from the child welfare system to the SFA program, and continue to receive a wraparound model of emotional and financial supports until the age of 24 with the aim of providing additional time and opportunity to develop the capacity needed to achieve independent adulthood:[10]

> For many in the SFAA program, opportunities to learn these important independent skills were lost as needs related to personal safety, stability, and belonging were prioritized. Skill development in the domains of independent functioning, financial responsibility, and the maintenance housing were, understandably, not often elevated to the same priority. Instead, skill development in these domains was frequently addressed in reactive, or required/regulated ways during adolescence. As such, by the time youth reach age 18 the skill deficit is glaring.
>
> The SFAA program supports this critical developmental period. By providing both support and financial assistance during this period of time, Children's Services was responding to the acute needs of youth during this critical period. Particularly, given their histories of trauma and adversity, youth in the SFAA program present with an elevated complexity of needs that prolongs their journey to independence. This is not a rapid process. Just as brains require time to mature to their full adult status, so too do these youth – especially when we remember that their developmental trajectories have already been disrupted due to their experiences of adversity and instability.

14. The SFA program is not exclusively or primarily a financial benefits program. The program is entitled (emphasis added) "**Support**, Financial Assistance", and provides participants "**support** and financial assistance" as they transition to independent adulthood.[11]

15. "Support" and "financial assistance" are two different types of assistance offered under the SFA program. A.C. refers to "supports" as emotional supports, and "financial assistance" as financial supports. The Chambers Justice referred to "supports" as "human support" and "human resources," but recognized that this assistance was different than the financial benefits provided to youth under the SFA regime.[12]

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[9] Factum of the Appellant, at ¶11.
[10] Respondent's Key Extracts, R13, ¶¶26-27.
[11] Appeal Record, F5, lines 12-15.
[12] Appeal Record, F3, lines 1-5, F23, lines 15-17, and F25, lines 33-35.

16. The underpinning of the SFA program is the one-on-one emotional or human support of a dedicated social worker.[13] SFA program participants are assigned a specific social worker who provides tailored, wraparound support to achieve the participant's aim of self-sufficiency and independence. The social worker develops goals and workplans with each participant to aid a youth's transition to independent adulthood and assists them in the pursuit of this objective.

17. The availability of strong, natural emotional supports is a critical factor in a youth's ability to transition to independent adulthood.[14] Children in care are often missing natural supports in the form of adults who are able to nurture and guide a youth towards becoming a self-reliant adult.[15] The SFA program intended to bridge this gap by providing each participant with a social worker that is able to provide emotional support on all matters of life:[16]

> For those children not in government care, there is an expectation that their parents will continue to support them emotionally and financially until [they are] self-sufficient and able to exist independently. Children in care do not have that privilege. The SFAA program filled that gap.
>
> The SFAA program is essentially a continuation of the child welfare model of support. It is a wraparound service premised on providing strong emotional support to participants through dedicated social [workers] to stabilize them and build their capacity as adults…
>
> The social workers provide guidance and help to the participants of the SFAA program as they transition to adulthood. They help with basic tasks such as taking participants to medical appointments, to buying work boots, safety goggles, bus passes, and providing medical benefits. Sometimes the social workers talk and counsel the SFAA program participant. There is an emotional bond between the social workers and clients that is extensive and involved.

18. The role of the social worker in the SFA program is "essential, as simply providing financial benefits will not ensure a successful transition" to independent adulthood.[17] The dedicated support of social workers under the SFA program is critical to the success of program participants:[18]

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[13] Respondent's Key Extracts, R35-R36, ¶¶23-25; R15-R17, ¶¶34-36, ¶¶40-41, ¶¶45-46, and ¶49; and R21, ¶15.
[14] Respondent's Key Extracts, R12-R13, ¶23.
[15] Respondent's Key Extracts, R12-R13, ¶23.
[16] Respondent's Key Extracts, R41, ¶¶22-25.
[17] Respondent's Key Extracts, R21, ¶15.
[18] Respondent's Key Extracts, R15, ¶¶34-40.

> SFAA provides these vulnerable youth with complex needs an extended period of supported development. Positive relationships between young people and their caseworkers and service providers are key…
>
> Emerging adulthood is a period of developmental transition that comes with many risks and vulnerabilities, particularly for those most marginalized. Programming that provides consistent, relationally-based support while reducing stress and increasing stability through financial support, provides a critical bridge to those youth not yet ready to function independently in a healthy manner…
>
> Their SFAA caseworker is critical to helping identify these supports, and then walking with the youth as they access them…
>
> In my experience working with SFAA youth, caseworkers supported the youth in identifying and accessing supports. For instance, youth often struggle to attend appointments, particularly those that elevate perceptions of vulnerability - such as psychological assessments. Caseworkers would attend with the youth, help facilitate establishment of the clinical relationship, and also help to identify goals for the assessment. Caseworkers helped to articulate the basic needs of the youth- such as housing and financial stability, and have also been effective at helping the youth identify what matters most to them.

19. In effect, the SFA program is a continuation of the type of comprehensive and dedicated support that an individual received when they were a child in government care.[19] A SFA worker's singular focus is helping a participant develop the capacities needed to overcome the specific challenges they face in becoming independent and self-reliant. Those challenges can relate to mental health issues, social functioning impairments, a lack of education and employable skills, and a myriad of other challenges that are specific to a youth and their circumstances. It is a social worker's objective under the SFA program to help the youth address these challenges by the time they reach the age of 24.

20. Any financial support provided through the SFA program is incidental to the workplans developed by a participant and their social worker. Financial assistance is tied to the workplans, and the specific goals and tasks identified as part of a youth's transition towards sustainable adulthood.

21. For this reason, the SFA program is not a financial benefits program in the traditional sense. It is not the equivalent to a welfare or income assistance program. It is a program that aims to help vulnerable, marginalized children who were raised in government care live healthy and sustainable lives as adults. It does so by providing youth a dedicated social worker that delivers targeted

[19] Respondent's Key Extracts, R40, ¶23.

support to build the capacity and skills necessary for independent adulthood. The financial assistance is only a means to facilitate this capacity and skills development that the social worker undertakes to pursue with each participant.

C. A.C.

22. The record is also consistent regarding A.C., and her background, history of trauma, circumstances in government care as a child, significance of the SFA program to both her and her daughter, and the impact of HMQA's decision on A.C. to change the program and deny her supports past the age of 22.

23. A.C. was 21 years old at the time of the injunction but has since turned 22.[20] A.C. is of Indigenous heritage and ancestry, and suffers from depression, suicidal ideation, and a history of substance abuse resulting from a tumultuous childhood.[21]

24. At the age of 5, A.C.'s father was arrested and convicted for homicide, and has been incarcerated since that time.[22] For a period of time, A.C. was living with her mother, who physically abused her throughout her childhood:[23]

> My mother would beat me regularly. My mother would beat me if I misbehaved. My mother would beat me when she couldn't find her keys or pack of smokes. My mother would beat me for no real reason. My mother would throw [me] down the stairs. My mother would beat me with her shoes. It happened all the time.
>
> My mother would often beat me to a point where I would bleed. One time, I swore at my brother, and my mother smashed my head against the floor and cabinets repeatedly. I was in so much pain that I asked my mother to kill me. I couldn't take the pain. I was 12 years old.

25. A.C. was apprehended by child services in Edmonton at the age of 12 and placed in kinship care with an aunt. A.C. was no longer in regular contact with her mother and her aunt did not provide any parental support or supervision. A.C. "was basically on [her] own."[24]

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[20] Respondent's Key Extracts, R1, ¶2.
[21] Respondent's Key Extracts, R1 at ¶4 and ¶5, R4 at ¶28 and ¶29, and R7 at ¶64.
[22] Respondent's Key Extracts, R1-R2, ¶6.
[23] Respondent's Key Extracts, R2, ¶8.
[24] Respondent's Key Extracts, R2, ¶11.

26. At the age of 13, A.C. was procured into child sex trafficking and sexually exploited as a minor:[25]

> When I was 13 years old, I ran away from Aunty's house and lived at a trap house… The trap house was full of sex-workers. I slept there because I didn't want to return to my Aunty's home and enjoyed the drinking and partying.
>
> A woman who ran the trap house told me that I was pretty and that I could make a lot of money by hanging out with some men each night and partying. The men would have alcohol and other things, and I could hang out with them and make a lot of money. I was 13 years old, and was oblivious to sex and sex work. I agreed to join the women because I could hang out with older people, have fun and party, and make money for just hanging out…
>
> I continued to live with the woman, and get really drunk each night and wake up each morning not remembering what happened the night before. I may have been drugged various times.
>
> I have no precise memory of what happened to me when I blacked out from alcohol or drugs. It happened a lot. However, I do remember instances where I would wake up, and there were multiple men touching and having sex with me. I would refuse and try to push them off of me, but then blackout and lose control again.
>
> The woman had me live in a closet in the trap house. I wasn't allowed leave the trap house without permission and supervision.

27. After being rescued from the trap house, A.C. entered government care and lived in a group home before moving to Saskatchewan to live with her grandparents. There, A.C. was reunited with her mother, and the physical abuse resumed.

28. One night, after enduring a vicious and scarring beating at the hands of her mother, A.C. attempted suicide for the first time:[26]

> Around the time of my second suspension, I tried to kill myself. My mother found me walking home with a bunch of boys. My mother got upset, so she drove over to where I was and started beating me in front of everyone. My mother beat me badly. Later that night, I decided to kill myself. I prepared to killed myself. I decided to take a shower, so that I would be clean when I was found dead. I wrote a suicide note. My mother had a bunch of pills and serious narcotics. I decided to kill myself by swallowing a lot of them. I took the pills and felt terrible. I blacked out and my family found me and rushed me to the hospital.

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[25] Respondent's Key Extracts, R2-R3, ¶¶12-21.
[26] Respondent's Key Extracts, R4, ¶¶28-29.

29. A.C. was 14 years old at the time, and as part of her recovery, attended mental health counselling to address the causes of her suicidal ideation and attempt to take her own life.[27] However, A.C.'s mother attended the sessions with her, preventing A.C. from disclosing the physical abuse as she feared more violence if she revealed the truth.[28] The abuse and neglect continued until A.C. returned to Edmonton and fled her mother's care.

30. A.C. lived with her then boyfriend, another teenager, and became pregnant at the age of 15. A.C. was no longer attending school and had stopped working. After giving birth, A.C. was raising both her daughter and younger brother. A.C. had difficulties coping with the stress, and developed alcohol and cocaine dependencies that she supported by returning to sex work:[29]

> It was a very difficult time in my life. I couldn't cope with the stress. Around the age of 17, I started drinking alcohol a lot, and developed a serious cocaine addiction. I would go out with friends and meet men so that they would provide us cocaine. We would go out 4 or 5 times a week. The expectation was that we would return sexual favours for the cocaine.
>
> I was feeling very suicidal when I was on cocaine. It happened during withdrawal. I tried to kill myself many times over this period. I was not in a good place.
>
> I didn't like my life, so I quit doing cocaine. But, I started drinking more. I was drinking every day, including multiple bottles a day.
>
> Around this time, I started engaging in sex work for money, including becoming an escort. It was the only way that I felt that I could make the money I needed to buy things for myself and my family. However, I only did it when I was desperate for money.

31. At the age of 19, A.C. had aged out of government care and was in the SFA program. A.C was assigned the same social worker that she had since she entered government care at the age of 11. A.C. realized that the path she was on was not sustainable and that her life needed to change for the sake of her daughter. A.C. realized the opportunity the SFA program provided her, and was determined to take advantage of it to be able to live a healthy, sustainable, and independent life as an adult:[30]

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[27] Respondent's Key Extracts, R4, ¶30.
[28] Respondent's Key Extracts, R4, ¶30.
[29] Respondent's Key Extracts, R4, ¶¶39-42.
[30] Respondent's Key Extracts, R4, ¶¶43-46.

> Around the age of 19, I started drinking less. I decided to change my life. I wanted to go back to school, get a university education, and be independent and support myself and my daughter.
>
> I wanted to be able to take care of myself without the help of others or the government. I wanted to take care of myself and my family on my own accord. I realized I wasted most of my life, and that I need to take the opportunity that I had at that time to become self-reliant and become someone that my daughter would look up to when she got older.
>
> When I was under 18 years old, I was on a family enhancement agreement. My social worker told me that I wouldn't be ready to be on my own when I turned 18 years old, so I would go on the SF AA program to help me transition into adulthood. I was told that I would be on the SF AA program until I was 24 years old.
>
> When I decided to tum my life around, I realized the opportunity that SF AA program provided, and that I should take advantage of it to become self-reliant and not waste it.

32. A.C. developed a series of goals and workplans to ensure she had the capacity and skills to live as a healthy, self-reliant adult. A.C.'s workplan included: acquiring a drivers' license, upgrading and obtaining a degree in Native Studies from the University of Alberta, and creating an alcohol-free home for her daughter.[31]

33. A.C. identifies her social worker as the critical factor in the development and pursuit of the objectives identified in her workplan: [32]

> The most helpful aspect of the SFAA program is having my social worker Melissa Wilks-Woodman ("**Melissa**") I. have had the same social worker since I was 11 years old. I trust her entirely. I tell her everything.
>
> Melissa and I develop goals and transition planning. We set out plans and strategies to help me become self-sufficient, and then Melissa helps me work to achieve them. Melissa ensures that I have the means to pursue my goals. Melissa counsels me through any challenges I have, tracks my success and where I need to work a bit more, motivates me continue to work towards my goals, and helps me navigate social and government agencies that can support me.
>
> Melissa as helped me complete my pre-employment course and create an alcohol free home for my daughter. These achievements made me so proud. They showed what I am capable of if I commit myself. This wouldn't have been possible without Melissa. Melissa guided me through everything, and inspired me to push to achieve them.

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[31] Respondent's Key Extracts, R6, ¶¶52-56.
[32] Respondent's Key Extracts, R6, ¶¶51-57.

> With Melissa, I developed a roadmap for my education. Melissa helped me realize that I want to go back to school and become an Aboriginal liaison. Melissa is the reason that I am back in school. Melissa guided me through the registration and funding process. I would have had no idea of how to do this myself.
>
> My goal is to graduate from the Native Studies program from the University of Alberta. I am at Norquest with the plan of transferring to the University of Alberta.
>
> Melissa helps me maintain contact with my family, including my mother. Melissa mediates the disputes we have and ensures that my daughter knows my extended family.

34. A.C. is reliant on her social worker to develop and execute her SFA workplan. This is a deliberate feature of the SFA program. The academic literature establishes that the ability of former youth raised in care to transition to independent adulthood is dependent on their access to strong emotional supports. These emotional support are able to encourage and guide youth through the capacity building necessary to become self-sufficient as an adult.[33] Children in care lack natural emotional supports that others tend to rely upon to acquire these skills.[34] The SFA program provides these emotional supports through the social workers that are assigned to each participant.

35. A.C. deposes that when she entered the SFA program, she was told that she would receive emotional and financial supports under the program until the age of 24.[35] A.C. worked with her social worker to develop a workplan that would allow her to acquire the skills and capacity necessary for independent adulthood, and structured the workplan on a timeframe that ended when she turned 24 years old. The workplan lasted the entire duration of time that A.C. had been told and reasonably expected to receive SFA supports. This ensured that A.C.'s progress was manageable, making it more likely for her to achieve her aims under the SFA program.[36] A.C. was never told that the maximum eligible age under the program would be lowered to 22.

36. In November 2019, A.C. was told by her social worker that the maximum age under the SFA program was being lowered from 24 to 22.[37] Further, that A.C. would no longer receive SFA supports past August 2020, which is when she would turn 22 years old. The social worker advised

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[33] Respondent's Key Extracts, R12-R13, ¶¶23-24.
[34] Respondent's Key Extracts, R12-R13, ¶¶23-24.
[35] Respondent's Key Extracts, R5, ¶45.
[36] Respondent's Key Extracts, R7, ¶60.
[37] Respondent's Key Extracts, R7, ¶59.

that A.C. should work towards completing as many items on her workplan before she turned the age of 22 and was removed from the program.[38]

37. HMQA chose not to question or challenge A.C. on her affidavit. Instead, HMQA tendered evidence outlining A.C.'s lack of engagement with her social worker after being told she would be removed from the SFA program at the age of 22 and not 24.

38. The Chambers Justice accepted both A.C. and HQMA's evidence regarding A.C. and her experience in the SFA program, as there was no material dispute between the parties on the record. There is no material inconsistency or contradiction in fact between the record tendered by the parties in relation to A.C. and her involvement in the child welfare system and SFA program.

D. The Consequences Resulting from Changes to the SFA Program

39. A.C.'s mental health deteriorated after being told that she would be removed from the SFA program at the age of 22. A.C. developed a significant amount of stress and anxiety when told that she would have to accomplish all the items on her workplan by August 2020 instead of the August 2022 deadline she had initially been told, which is when she would turn 24 years old.

40. A.C. provided a thorough account of the impacts the decision of lowering the maximum age of eligibility under the SFA program would have on her:[39]

> Sometime in the fall of 2019, Melissa told me that I no longer have until 24 years old to build my capacity as an independent and self-reliant adult through the SFAA program. The SFAA program's age requirement would be decreased to 22 years old. I would be cut off from the SF AA program in August 2020.
>
> The goals and plans I had developed with Melissa, including the timelines set out for each objective, were made on the expectation that I would get support from the SFAA program until the age of 24. It is impossible for me to address the things in my work plan by the summer.
>
> When Melissa told me about the change, I burst out in tears. I was shocked. All the hard work and plans I had made would now be lost. I didn't know how to achieve my goals, and build a healthy and sustainable life for my daughter and me without the SFAA supports.
>
> The first thing that went through my mind was that I would have to return sex work. It made me feel disgusted but I don't know any other way to make the money I need to support myself and my family. I don't have any other skills or

[38] Respondent's Key Extracts, R7, ¶60.
[39] Respondent's Key Extracts, R7, ¶¶59-64.

> work experience. This is the only way for me to make the money I need to survive.
>
> I am afraid of being in the world without Melissa's support. Melissa is my rock and guiding light. Melissa and I had a plan, and I don't think I can do it on my own without her support. From the moral backing and encouragement, to helping me navigate the system. I thought I could work with Melissa until the age of 24, and I don't know how I can survive without her
>
> I am not prepared to do this on my own. I am afraid that my mental health may suffer. I fear that things might deteriorate to the point where I return to substance abuse and thoughts of suicide. I am in a fragile place, and losing Melissa and the other supports SFAA provides can trigger a spiral.

41. A.C. had anticipated being in the SFA program until the age of 24 and built a workplan with her social worker based on that timeline.[40] The workplan set out incremental and manageable steps towards addressing the challenges A.C. faced in attaining independent adulthood, including creating an alcohol free home for her daughter, and completing her studies at Norquest and transferring to the University of Alberta to enrol in the Faculty of Native Studies.

42. With HMQA reducing the age eligibility for the SFA program, A.C. would have to complete all that she had set out to perform over the remaining 2.5 years in her workplan in 6 months. For A.C., it seemed impossible to complete all that she would need to do to become self-sufficient by the upcoming summer.[41]

43. A.C. fears that she may slide back into substance abuse and suicidal ideation.[42] A.C. has accepted the idea of returning to the sex trade to earn income for her family.[43] The idea of returning to sex work disgusts A.C. but it is the only way she knows how to make money.[44] The hope A.C. had for a stable and secure life for her daughter seems to have disappeared with the changes announced to the SFA program.

44. All that A.C. describes is consistent with what the experts set out as the likely impacts on SFA participants by abruptly changing the program's eligibility criteria. SFA participants are likely to face a significant loss in stability; the re-emergence of a variety of mental health and substance abuse issues arising from the stress and inability to contend with the changes and

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[40] Respondent's Key Extracts, R7, ¶¶59-64.
[41] Respondent's Key Extracts, R7, ¶60.
[42] Respondent's Key Extracts, R7, ¶64.
[43] Respondent's Key Extracts, R7, ¶62.
[44] Respondent's Key Extracts, R7, ¶62.

associated pressures; feelings of abandonment and mistrust; the loss of the only longstanding, healthy emotional bonds that they have in their lives; the sense of a lack of control over their lives and future; an increase in homelessness, criminality, and other forms of marginalization and anti-social behaviour; and a variety of other adverse effects.[45]

45. HMQA did not question or challenge A.C. or any of the other witnesses on the evidence tendered on the impacts of reducing the maximum age eligibility under the SFA program. Instead, HMQA tendered evidence to suggest that A.C. would receive the same amount in financial benefits through alternative financial benefit programs.

46. However, HMQA misconstrues the nature of the SFA program. SFA is intended to provide emotional and financial supports to program participants. The basis and structure of the program revolves around a dedicated team of social workers providing each participant emotional and human supports to develop the capacity and skills necessary to live healthy and sustainable lives as adults. The financial supports are secondary to the primary aim of offering children raised in government care a substitute to the natural emotional supports that they are lacking. Financial supports exist only to the extent that they support the relationship that exists between a participant and their social worker, and the workplan developed to achieve independent adulthood. As such, simply extending financial supports does not serve as a real alternative to the SFA program.

47. In addition, there is no evidence to establish whether A.C. will actually be admitted into the financial benefits programs that HMQA presents as alternatives to the SFA program. All that is provided is a suggestion of how much financial support A.C. would receive through Advancing Futures Benefits. There is no evidence of the specific criteria for Advancing Futures Benefits, whether A.C. would have been approved for Advancing Futures Benefits, and where A.C. would receive supports that she currently receives through the SFA program but not provided for through Advancing Futures Benefits. This includes the emotional and human supports A.C. is currently dependent on as she transitions to independent adulthood.

E. No Evidence Tendered on the Rationale Behind Lowering the Age Limit

48. Despite the opportunity to do so, HMQA filed no evidence on the rationale behind its decision to lower the maximum age eligibility under the SFA program. There is nothing on the

[45] Respondent's Key Extracts, R35-R36, ¶¶22-33; R17, ¶¶50-53; R27-R28, ¶¶40-44; and R42, ¶¶30-32.

record to establish the intent or purpose behind the amendment to the SFA regime, and what it is designed to achieve.[46]

49. HMQA failed to marshal any evidence on the number of SFA participants that will be immediately impacted and denied supports over the course of the next year if the injunction was not granted. HMQA also filed no evidence on how much it would cost the government if the injunction was granted.

50. Finally, HMQA alleges that A.C. "waited months before filing" this action to acquire a tactical advantage in the injunction application. This is patently untrue, and also the first time that HMQA has raised this allegation. This allegation was not argued before the Chambers Justice and is not considered or part of the decision on appeal.

PART II – GROUNDS OF APPEAL

51. The Chambers Justice made no errors in law or fact that requires this Court's intervention to remedy.

PART III – STANDARD OF REVIEW

52. The granting of an interim injunction is a discretionary decision.[47] The standard of review on appeal is deferential.[48] Appellate intervention is justified only where a chambers justice has committed a legal error, a serious misapprehension of the evidence, or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge . . . could have reached it."[49]

PART IV – ARGUMENT

A. The Framework for Assessing Injunctions Against *Charter*-Infringing State Action

53. This Appeal presents an opportunity to revisit the legal framework for determining injunctions against state action that is alleged to infringe the *Charter*.

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[46] Appeal Record, F23, lines 18-19.
[47] *Alberta Union of Provincial Employees v Alberta*, 2019 ABCA 320 ["***AUPE***"] at ¶5 and ¶42, Book of Authorities of the Respondent ("**Respondent's Authorities**"), Tab 1
[48] *Ibid*, Respondent's Authorities, Tab 1.
[49] *AUPE*, 2019 ABCA 320 at ¶5 and ¶42, Respondent's Authorities, Tab 1 and *R v Canadian Broadcasting Corp*, 2018 SCC 5 at ¶27, Tab 2.

54. In *AUPE*, the Court of Appeal departed from the established approach to injunctions against legislation impugned on the grounds of the *Charter*. This has created uncertainty in the law of injunctions in Alberta.

55. The Chambers Justice applied the *AUPE* framework and determined that an injunction was warranted in the circumstances. However, the *AUPE* is a much more stringent iteration of the traditional test for injunctive relief. The Majority in *AUPE* held that there is a "strong presumption of constitutionality" in challenges to government legislation that weighed against granting an interim injunction.[50] Further, at the serious issue to be tried stage of the test, the Majority imposed a more stringent "clearest of cases" threshold on applicants.

56. A.C. submits that the correct formulation of the test for injunctive relief in this context is found in the dissenting reasons of the Honourable Justice M.S. Paperny in *AUPE*. Justice Paperny correctly identifies the legal test for injunctions, and also critiques the modifications to the framework made by the Majority.

57. First, there is no presumption of constitutionality in injunction applications of this nature. The existence of a presumption of constitutionality in such applications has been considered and dismissed by courts in Canada numerous times, including most notably by the Supreme Court of Canada in *Manitoba v Metropolitan Stores (MTS) Ltd.*[51] Holding otherwise is a departure from the established jurisprudence, inconsistent with the *Charter*, would impose a significant burden on applicants, and drastically narrow the availability of the remedy.

58. In addition, the Majority in *AUPE* imposed a much higher threshold at the first stage of the test for injunctive relief. Under the traditional approach to injunctions, an applicant must establish a serious issue to be tried to satisfy the first prong of the test. Only frivolous or vexatious claims fail at this stage of the framework; is a low threshold that consists of a limited assessment of the merits of the underlying case. If there is an arguable constitutional claim, then the threshold has been met, regardless of the strength of the action. A court is "not [to] decide the underlying constitutional claim" at the first stage of the test for injunctive relief.[52]

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[50] *AUPE*, 2019 ABCA 320 at ¶7, ¶¶12-17, and ¶¶22-25, Respondent's Authorities, Tab 1.
[51] [1987] 1 SCR 110
[52] *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 ["***RJR***"] at pages 334, 337, and 340, Respondent's Authorities, Tab 3.

59. However, the Majority in *AUPE* embraced a "clearest of case" cases standard at the first prong of the test.[53] The Majority found that an injunction against government legislation could only be issued in the clearest of cases. This is a stricter threshold than requiring an applicant to merely establish an arguable claim. The standard departs from the limited merits assessment that courts are to engage in at this stage of the test.

60. As Justice Paperny notes, this is not a correct statement of the law, as it conflicts with what the Supreme Court of Canada has repeatedly stated regarding the threshold that applies to applicants at the first stage of the test for injunctive relief against *Charter*-infringing government legislation.[54] Accepting the Majority's characterization of the first stage of the test would restrict the availability of injunctions against the state to "exceptional and rare instances."[55]

61. A.C. submits that the injunctive relief framework that should be applied in this Appeal is the one articulated by Justice Paperny in *AUPE*. The version of the test adopted by Justice Paperny is consistent with the approach that courts in Canada have traditionally applied in injunction applications of this nature. There is no reason to depart from the traditional approach.

B. A.C. Advances a Negative Section 7 *Charter* Claim

62. A.C. advances a negative rights claim at section 7 of the *Charter*.

63. A.C. does not claim a free-standing entitlement to SFA supports under section 7 of the *Charter*. A.C. is not arguing that she should be given SFA supports in perpetuity. Rather, A.C. argues that since she is subject to the SFA regime, any changes to it must be compliant with the *Charter*. In other words, once HMQA decided to provide vulnerable youth raised in the child welfare system supports through the SFA program, any amendments to the regime must be made in accordance with section 7 of the *Charter*. Any changes to the SFA regime must maintain the life, liberty, and security of the person interests of the program's participants, including A.C.

64. The Chambers Justice correctly noted and accepted that section 7 *Charter* jurisprudence recognizes this iteration of a claim under the provision. The jurisprudence identifies it as a negative

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[53] *AUPE*, 2019 ABCA 320 at ¶¶15-17, Respondent's Authorities, Tab 1.
[54] *AUPE*, 2019 ABCA 320 at ¶¶47-51, Respondent's Authorities, Tab 1.
[55] *AUPE*, 2019 ABCA 320 at ¶¶47-51, Respondent's Authorities, Tab 1.

right claim as it involves a deprivation of a government benefit and does not require there to be a free-standing right to the benefit for a *Charter* claim made pursuant to section 7 to be actionable.

65. For instance, in *Chaoulli v Quebec (Attorney General)*,[56] Chief Justice McLachlin and Justice Major explained that "where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."[57] In *Chaoulli*, the scheme referred to the public health care regime that exists in Quebec. Since Quebec government provides its residents public health care coverage, any restrictions or benefits provided under the regime must comply with the *Charter*, even though there was no free-standing entitlement to health care.

66. Alberta courts have adopted a similar approach to section 7 *Charter* claims. In *Khadr v Bowden*,[58] the Court of Queen's Bench of Alberta found that section 7 of the *Charter* afforded offenders serving jail time in Canada for convictions abroad the right to seek bail pending the outcome of appeals in foreign jurisdictions. The court recognized that there is no constitutionally entrenched right to appeal in Canada but noted that since a statutory regime exists that provides individuals with a right to appeal, then it must operate in a *Charter* compliant manner.[59] For the appeal mechanism in *Khadr* to be *Charter* compliant, the court reasoned that there must be access to bail pending appeal, which is a principle of fundamental justice pursuant to section 7 of the *Charter*.[60] As a result, the right to bail pending appeal became a *Charter* entitlement, even though there is no free-standing right to an underlying appeal mechanism.

67. The same approach was applied in *Inglis v British Columbia (Minister of Public Safety)*,[61] where the Supreme Court of British Columbia held that mothers incarcerated in provincial prisons had no free-standing right to a program slated for closure that allowed incarcerated mothers and their babies to reside together at a correctional facility. Section 7 of the *Charter* did not recognize an entitlement to the program and the benefits it could provide to incarcerated mothers and their babies.[62] However, the creation of a program engaged the section 7 *Charter* rights of its

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[56] 2005 SCC 35.
[57] *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at ¶104, Respondent's Authorities, Tab 4.
[58] 2015 ABQB 261.
[59] *Khadr v Bowden*, 2015 ABQB 261 at ¶¶21-22, Respondent's Authorities, Tab 5.
[60] *Khadr v Bowden*, 2015 ABQB 261 at ¶28, Respondent's Authorities, Tab 5.
[61] 2013 BCSC 2309.
[62] *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 ["***Inglis***"] at ¶347-357, Respondent's Authorities, Tab 6.

participants, and since it did, any changes to the program would impact their rights.[63] The cancellation of the program constituted state action that *deprived* mothers in the program of their security of the person interests at section 7 of the *Charter*, resulting in a breach of their section 7 *Charter* rights.[64]

68. The court in *Inglis* characterized its conception of the breach as a negative rights claim. The section 7 *Charter* interests of the participants were engaged once the state offered them the benefits of the program.[65] The program provided physical and psychological well-being to both participants and their babies, and the potential of better health and social outcomes. The cancellation of the program meant that the participants would suffer psychological harm, which would deprive the mothers and babies of their security of the person interests protected at section 7 of the *Charter*.[66]

69. In *Chaoulli*, *Khadr*, *Inglis*, and countless other section 7 *Charter* claims of a similar nature, the structure is the same. An individual does not have a free-standing right to a particular government benefit. But, once it receives the benefit, their section 7 *Charter* interests are engaged. If the state then attempts to alter or deny the benefit, then there is a deprivation of the section 7 *Charter* interests. If the deprivation did not occur in accordance with the principles of fundamental justice, then the section 7 *Charter* breach has been made out.

70. A.C. does not have an independent, free-standing right to the SFA supports. Instead, A.C. argues that once she was accepted into the SFA program, her section 7 *Charter* interests were engaged. The proposed amendments to the SFA regime will deny her supports to transition to a healthy and sustainable life as an adult, and will therefore *deprive* her of her section 7 *Charter* interests.

71. The Chambers Justice found that given this particular line of section 7 *Charter* jurisprudence, which begins with *Chaoulli* and continues on with *Inglis* and *Khadr*, A.C.'s section 7 *Charter* claim is arguable. Specifically, that the psychological harm that A.C. will suffer if the amendments are implemented is beyond normal stress and anxiety, and is a basis to argue that it

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[63] *Inglis* at ¶390-412, Respondent's Authorities, Tab 6.
[64] *Inglis* at ¶501, Respondent's Authorities, Tab 6.
[65] *Inglis* at ¶390-412, Respondent's Authorities, Tab 6.
[66] *Inglis* at ¶501, Respondent's Authorities, Tab 6.

deprives A.C. of her security of the person interest at section 7 of the *Charter*.[67] The Chambers Justice committed no error in law or fact in reaching this determination, which satisfies the first prong of the test for injunctive relief. A.C. has an arguable claim that HQMA's abrupt and arbitrary reduction in the maximum age of eligibility for the SFA program infringes her rights at section 7 *Charter*.

C. A.C. is Not Advancing an Economic Rights Claim

72. Section 7 *Charter* jurisprudence "has demonstrated that the fact that a particular claim may involve a request that the government spend money in a particular way is not necessarily fatal to the claim."[68] Even though the specific government benefit or remedy sought in a section 7 *Charter* claim may entail the state spending financial resources in a particular way to ensure the life, liberty, or security of the person interests of an individual, it does not cast the claim as an economic rights action that can be dismissed on that basis.

73. For instance, in *New Brunswick (Minister of Health and Community Services) v G. (J.)*,[69] the Supreme Court of Canada declared that section 7 of the *Charter* entailed the right to state-funded legal representation in certain child welfare matters. The state was required to provide financial assistance to allow impacted individuals to maintain their section 7 *Charter* right to counsel in a particular judicial context. Requiring the state to expend financial resources to realize an individual's section 7 *Charter* right was not in and of itself a basis to declare the action as an economic rights claim, and as such, not actionable pursuant to the provision.

74. There is a body of jurisprudence that recognizes that section 7 of the *Charter* may entail an economic or financial dimension that requires the state to incur specific expenditures to fully protect the right.[70] A.C. submits that the main consideration in these claims is if the state action and relief sought is primarily economic in nature or if the financial dimension to the claim is a secondary factor that is a means to facilitate some other action that directly engages the impugned *Charter* interests. In *J.G.*, there was a financial component to the claim that was secondary though

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[67] Appeal Record, F22, line 39 to F23, line 1.
[68] *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 ["***Refugee Care***"] at ¶522, Respondent's Authorities, Tab 8.
[69] [1999] 3 SCR 46 at ¶¶75-81, Respondent's Authorities, Tab 8.
[70] In addition to *J.G*: *Inglis,* at ¶393, Respondent's Authorities, Tab 6; *Refugee,* at ¶522, Respondent's Authorities, Tab 7; and nearly every section 7 *Charter* action.

necessary to obtain the remedy required to fully protect the *Charter* right at stake. State funds were required to provide indigent individuals with adequate legal representation in child welfare matters to realize their section 7 *Charter* right to a fair trial.

75. A.C. concedes that a portion of the SFA supports that she is seeking to maintain consists of financial benefits. However, the financial benefits are neither the primary form of support that the SFA program provides to A.C. nor determinative in her ability to transition to healthy and sustainable adulthood. The financial supports are a means to facilitate A.C.'s relationship with her social worker, and to identify, develop, and achieve the goals in her workplan, which are the main state enabled benefits that engage the section 7 *Charter* interests of SFA participants.

76. As the expert evidence sets out, the lack of natural supports in the life of a youth who was been raised in government care is a major obstacle that prevents them from acquiring the skills and capacity necessary to live as an independent, self-reliant adult. The SFA program addresses this gap in a youth's development by assigning them a social worker and ensuring that the worker provides the emotional supports that are missing in a youth's life. The presence of a social worker is an integral part of the SFA program, and is described as the "most important" and determinative factor in the program and success of participants.[71] "The role of the social worker is essential, as simply providing financial benefits will not ensure a successful transition."[72]

77. A.C. describes her social worker as vital to her life and transition plan to becoming an independent and self-reliant adult. A.C. has been working with her social worker since the age of 11, and trusts her social worker entirely and tells her everything. A.C.'s social worker has helped her develop a workplan, realize her potential, and achieve her goals through the SFA program. For A.C., her social worker is an essential part of her development, and without her, it will be difficult for A.C. to reach her goal of living a healthy and sustainable adult life.[73]

78. The SFA program is more than a financial benefits program and is primarily about providing participants with the natural emotional or human supports that are missing in a youth's life.

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[71] Respondent's Key Extracts, R41, ¶24.
[72] Respondent's Key Extracts, R21, ¶15.
[73] Respondent's Key Extracts, R6, ¶¶51-57.

79. A.C.'s claim is therefore advanced in the similar vein as *J.G.* It is an action that requires the state to expend financial supports to safeguard an individual's section 7 *Charter* interests, though the provision of the financial benefits themselves does not guarantee the interests engaged. The right is protected by the non-financial government benefits that the financial expenditures from the state enables or facilitates. In *J.G.*, the non-financial state benefit consists of access to legal counsel, which ensure the right to a fair trial in child welfare matters.

80. In this action, non-financial government benefit is access to a dedicated social worker that provides tailored, wraparound supports to vulnerable youth who grew up in government care and were promised assistance until the age of 24 as part of a deliberate effort to ensure they transitioned to healthy and sustainable lives as adults. The financial supports under SFA are simply a means to facilitate the relationship between each participant and their social worker, and to help ensure their workplan towards independent adulthood is achieved. Financial supports, in and of themselves, are not the focus of A.C.'s claim, and are not determinative for SFA program participants to realize their objective.

81. The Chambers Justice correctly decided that at the injunction phase of the action, A.C.'s section 7 *Charter* claim could not be characterized as strictly an economic rights claim and be dismissed on that basis. There was a serious issue to be tried: does A.C.'s claim follow the line of jurisprudence arising out of *J.G.*, and affirmed in *Inglis* and *Refugee Care*, or is it strictly an economic rights claim that is not recognized pursuant to section 7 of the *Charter*.

D. The Cuts to the SFA Program Constitute Cruel and Unusual Treatment

82. In the non-penal, civil context, "treatment" for the purposes of section 12 of the *Charter* has only been judicially interpreted two times over the course of the provision's nearly 40-year history.

83. In *Rodriguez v British Columbia (Attorney General)*,[74] Justice Lamer for the Majority held:

> that 'treatment' within the meaning of s. 12 may include that imposed by the state in contexts other than that of a penal or quasi-penal nature… [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

[74] [1993] 3 SCR 519.

> be positive action, inaction or prohibition, to constitute 'treatment' under s. 12.[75]

84. A state process that involves the government engaging in some form of positive action or inaction over an individual, or prohibiting them from doing something, is enough to trigger section 12 of the *Charter*. If that positive action (doing something), inaction (not doing something), or prohibition (banning something) is cruel and unusual, in the sense that it is "so excessive as to outrage standards of decency" or "grossly disproportionate to what would have been appropriate," then a section 12 *Charter* breach is made out.

85. However, in *Rodriguez*, the court held that since the appellant was challenging the impacts of a law of general application, in the sense that all individuals in Canada were subject to the same criminal code provisions against assisted dying, then the prohibition on medically assisted death did not constitute "treatment" for the purposes of section 12 of the *Charter*.[76] The was no special administrative control over the appellant that distinguished her experience from other individuals in Canada. There was no "active state process in operation" to engage her section 12 *Charter* rights to ground a breach.[77]

86. In contrast, refugee claimants in *Refugee Care* were found to be subject to an active state process: "those seeking the protection of Canada are under immigration jurisdiction, and as such are effectively under the administrative control of the state."[78] The state process they are under as foreign nationals seeking legal status in Canada creates a dependency on the state, which affects their rights and interests. This engaged the section 12 *Charter* rights of refugee claimants (emphasis added):[79]

> in the unusual circumstances of this case, I am prepared to find that the decision of the Governor in Council **to limit or eliminate a benefit previously provided to a discrete minority of poor, vulnerable and disadvantaged individuals coming within the administrative control of the Government of Canada subjects these individuals to "treatment"** for the purposes of section 12 of the Charter.

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[75] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 ["***Rodriguez***"] at pages 611-612, Respondent's Authorities, Tab 9.
[76] *Rodriguez* at pages 611-612, Respondent's Authorities, Tab 9.
[77] *Rodriguez* at pages 611-612, Respondent's Authorities, Tab 9.
[78] *Refugee Care* at ¶585, Respondent's Authorities, Tab 7.
[79] *Refugee Care* at ¶590, Respondent's Authorities, Tab 7.

In *Refugee Care,* determining whether a particular form of state conduct constitutes treatment for the purposes of section 12 of the *Charter* was an involved, contextual determination that required significant fact-finding and review by the court.

87. The court ruled in *Refugee Care* that the state treatment in that case rose to the level of being cruel and unusual because forcing vulnerable and marginalized individuals "to beg for life-saving medical treatment" was demeaning, signifying "that their lives are worth less than the lives of others."[80] This outraged the standards of decency and was grossly disproportionate to how refugee claimants should have been treated in the circumstances.

88. The SFA program is an active state process. The state action complained of in this proceeding is not government conduct of general applicability. Rather, it is a program limited to youth formerly raised in government care who lack the capacity to function independently as adults. An individual's eligibility for the program is decided by HMQA, who reviews the circumstances of each child in government care prior to them reaching the age of 18 and determining if they are able to function on their own as an adult. If there are concerns over a youth's capacity to be on their own, they are directed to the SFA program. SFA participants are among the most marginalized and vulnerable members of our society, and like A.C., have endured and overcome incredible violence, exploitation, and trauma.

89. Participants are also entirely dependent on the SFA program for both their emotional and financial wellbeing. They have no or minimal natural supports in their lives. They have no income aside from the financial assistance the SFA program provides. If not for the SFA program, incarceration, homelessness, severe substance abuse, and premature death are all likely outcomes for participants.[81]

90. The situation of SFA participants is analogous to the claimants in *Refugee Care* in terms of the vulnerability and dependency of the impacted parties. Further, the decision to prematurely cut supports that were previously promised to participants until the age of 24 in an abrupt manner would destabilize them and add chaos to their already fragile lives. In the case of A.C., it could slide her back into substance abuse, inherently risky activities such as sex work, and suicidal

[80] *Refugee Care* at ¶688, Respondent's Authorities, Tab 7.
[81] Respondent's Key Extracts, R17, ¶50.

ideation. The substance and manner in which the decision was made and implemented reflects a degree of cruelty and lack of humanity that imposes additional suffering on the most vulnerable youth in our society. HMQA's conduct outrages the standards of decency and is so grossly excessive to what is appropriate in the circumstances.

91. For these reasons, A.C.'s section 12 *Charter* claim is arguable, or in the words of the Chambers Justice, constitutes a serious issue to be tried.

92. A.C. further submits that this Court must recognize the limited judicial interpretation that a section 12 *Charter* claim of this nature has received. A civil, non-penal assessment of the section 12 *Charter* right to be free from cruel and unusual treatment has been judicially considered infrequently and never by a court in Alberta. The novelty and possibilities of the constitutional protection should militate towards allowing A.C. to make the argument on her entitlement to protection under section 12 of the *Charter*, and not prejudge the outcome by deciding the claim to be frivolous or vexatious based on the limited jurisprudence that exists on this conception of the right.

E. Alberta Has Tendered No Evidence on the Purpose, Impact of the Cuts

93. At the balance of convenience stage of the test for injunctive relief, the Chambers Justice correctly noted that there is a presumption that the impugned legislation is enacted in the public interest. However, as set out in *RJR-MacDonald*:[82]

> in order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the Applicant who relies on the public interest must demonstrate the suspension of the legislation would itself provide a public benefit.

94. HMQA relied on this presumption, and nothing more at this stage of the test. It did not tender any evidence on the purpose behind the amendments to the SFA regime. It failed to marshal any information on the number of youth who would be impacted by the changes over the course of the next year, or the savings or costs incurred by the state if the injunction application were dismissed or granted. All the Chambers Justice had to determine the relative impact of granting

[82] *RJR* at pages 315, Respondent's Authorities, Tab 4.

the injunction on the parties from the standpoint of HMQA is the presumption that the decision to amend the SFA regime was made in the public interest.

95. In contrast, A.C. has marshalled a significant amount of evidence demonstrating the widespread and immediate negative impacts the amendments would have on the approximately 2,100 SFA participants: individuals like A.C. who are young, vulnerable, marginalized, and have fragile existences, and in many cases, have dependents that rely on them. According to A.C.'s evidence, hundreds of SFA participants would have been deprived of their SFA supports when the legislative amendments were slated to come into effect on April 1, 2020.

96. The Chambers Justice found that issuing the injunction would maintain the status quo between the parties. In the unique context of this action:[83]

> Maintaining the *status quo* would obviously benefit A.C. and any other affected young people in the system who might otherwise age out of the program, pending a determination of the constitutional challenge. 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.

97. Although there was a presumption that HMQA's conduct was intended to serve the public interest, without more, the Chambers Justice determined that the presumption did not outweigh the public interest served by keeping the higher age limit in place, pending the outcome of the constitutional challenge.

98. The Chambers Justice correctly apprehended the law and facts before her in assessing and determining the balance of convenience stage of the test for injunctive relief, and finding that it weighed in favour of A.C. and the SFA participants.

99. When seeking an injunction against a piece of legislation, it should be assumed that the legislation serves the public interest. However, at the balance of convenience stage, a court must consider what harm the legislation is aimed at curing and the impact of granting an injunction. Where granting an injunction would itself cause or perpetuate harm to the public, the public good will correspondingly weigh against granting the injunction. Conversely, where granting an

[83] Appeal Record, F26, lines 16-23.

injunction will not cause the public harm, this factor weighs significantly less against refusing an injunction.

100. Here, the evidentiary record establishes that the SFA program is intended to help youth who were raised in government care transition to independent and sustainable adulthood. HMQA tendered no evidence to establish what the reduction in the maximum age for the SFA program from 24 to 22 is designed to achieve, and whether it is linked to the SFA regime's objective. The evidentiary record demonstrates that by not granting the injunction, the purpose and aims of the SFA regime will be undermined. Desperate, vulnerable youth who are unable to function as adults on their own in a self-reliant manner will be forced on their own earlier than expected and without the capacity needed to effectively transition to independent adulthood. On the record tendered by the parties, the amendments to the SFA regime appear to be fostering the same form of harms that the legislation as a whole is intended to ameliorate.

PART V – RELIEF SOUGHT

101. A.C. seeks a dismissal of this Appeal and costs on a full indemnity basis. As pled in the Originating Application, A.C. is an indigent, single mother in her early 20s without the means to fund litigation of this nature to protect her *Charter* rights. In the event that A.C. is successful in this Appeal, costs should be awarded in her favour on a complete and full indemnity basis.

Estimate of time required for the oral argument: 45 minutes.

Table of Authorities

Jurisprudence		Cited At
1.	*Alberta Union of Provincial Employees v Alberta*, 2019 ABCA 320	¶52, ¶55, ¶59, ¶60
2.	*R v Canadian Broadcasting Corp*, 2018 SCC 5	¶52
3.	*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311	¶58, ¶93
4.	*Chaoulli v Quebec (Attorney General),* 2005 SCC 35	¶65
5.	*Khadr v Bowden*, 2015 ABQB 261	¶66
6.	*Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309	¶67, ¶68, ¶74
7.	*Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651	¶72, ¶74, ¶86, ¶87
8.	*New Brunswick (Minister of Health and Community Services) v G. (J.),* [1999] 3 SCR 46	¶73
9.	*Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519	¶83, ¶85