Action No.: 2003-04825
E-File Name: EVQ20AC
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

BETWEEN:

A.C. and J.F.

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Respondents

P R O C E E D I N G S

Edmonton, Alberta
March 19, 2020

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March 19, 2020 — Morning Session

The Honourable Madam Justice Friesen — Court of Queen's Bench of Alberta

A. Nanda (by telephone) — For A.C. and J.F.
L. Friesenhan (by telephone) — For Alberta Justice
L. Bartia (by telephone) — For Alberta Justice
D. Kamal (by telephone) — For Alberta Justice
T. Steinhauer — Court Clerk

THE COURT: You may be seated. Thank you, everyone. Sorry for keeping you waiting. Who have I got on the line here?

MS. FRIESENHAN: You have Lisa Friesenhan, David Kamal and Lisa Bartia, with the -- with Alberta Justice.

THE COURT: All right.

MR. NANDA: And Avnish Nanda for the Applicant.

THE COURT: Thank you. Good morning, everyone.

MS. FRIESENHAN: Good morning.

THE COURT: Due to the nature of the injunction application in this case, and recognizing that this is a tumultuous time, I am going to be delivering my Reasons orally, as I told you on the last occasion. I reserve the right to edit these Reasons for clarity and grammar and add specific citations as required, if a transcript is ordered.

And so, I will just ask for your patience as I am reading it in. It is lengthy, and I find that when I have less time to write, I actually end up writing more than when I have more time to write. So, I'll begin.

Decision

THE COURT: Since its inception in 2004, Alberta Support

Financial Assistance program (*SFA)* has provided children who were raised in government care with human and financial support when they turned, 18 and transitioned out of the child welfare system and into adulthood. The *SFA* is administered through Alberta's Ministry of Children's Services. While the age eligibility was initially set at 22, in 2013, it was raised to 24.

In November of 2019, the Minister of Children's Services announced that the maximum age eligibility for the *SFA* program would be reduced back down to 22. The amendment, passed in January of 2020, comes into force on March 31, 2020. Currently, according to the affidavit evidence that was presented to me, there are over 2,100 individuals in the *SFA* program. The reduction in age eligibility applies to all of the existing program participants regardless of when they reach the age of 22.

The Applicant, A.C., had a violent and tumultuous childhood. She was essentially raised in government care from the age of 11. A.C. began participating in the *SFA* program when she turned 18. She says the financial and emotional support she has received through the program over the past 3 years has provided her with hope and stability, and has allowed her to turn her life around. She thought she would be able to continue her participation in the program to the age of 24. She was shocked when she found out in October of 2019 she would no longer be able to participate in the program when she turned 22 in September of 2020.

A.C., together with another litigant, J.F. filed an Originating Notice challenging the constitutionality of the amendment, alleging it breached their s7 rights to life, liberty and security of the person, as well as their s12 *Charter* right to be free from cruel and unusual treatment. In addition, the Applicants asserted the Government was in breach of fiduciary duties owed to them.

In the present application, A.C. seeks an interim injunction staying the implementation of the amendment until such time as the constitutional and other issues can be decided.

Nature of the Remedy Sought

In oral argument, the Crown sought clarification from the applicant's counsel as to the nature of the remedies sought, and whether A.C. was seeking an exemption from the operation of the legislation solely on her own behalf, or a stay on behalf of the entire affected class.

Counsel for A.C. clarified that he was acting for A.C. and JF with respect to the constitutional challenge, but as he had been too ill to obtain an affidavit from JF in time for the injunction application, he was acting solely for A.C. on that application. He was

not seeking an exemption from the operation of the amendment that would apply just to A.C.; rather, he was seeking a stay of implementation of the legislation.

Implementation of the new age limit will affect any of the *SFA* participants who are already over 22, or who will turn 22 after March 31, 2020. No evidence was brought before me as to how many people actually fall into that category. For the affected parties, a stay would result in maintaining the status quo until such time as a challenge to the legislation can be determined on its merits.

There is no question that A.C. has standing to bring the constitutional challenge or the injunction application, given that she's clearly a party directly impacted by the change to the *SFA* regime. The concern expressed by the Crown was whether counsel for A.C. purported to be acting on behalf of the rest of the affected people.

Counsel for A.C. submitted that he was properly following the same approach taken by the litigants in *Charter* cases such as *Carter*, in bringing an action, in the name of one person, which nevertheless has the potential to affect a number of similarly situated people. In so doing, A.C. was not acting as their agent, nor her counsel acting as counsel for those other affected parties. I agree with his submission and approach.

Section 24 (1) of the *Charter* allows the Court to give "such remedy as the Court considers appropriate and just in the circumstances." While ultimately the remedy sought by the Applicants - which is to declare the legislation unconstitutional - would need be sought under s52(1) of the Constitution, the remedy of an interim injunction pending that determination, is a s24(1) remedy.

The Court also has inherent power, pursuant to the *Judicature Act,* to deal with claims based in equity and to offer remedies accordingly, including injunctive relief independent of any *Charter* claim.

Legislation

Child, Youth and Family Enhancement Act, RSA 2000, c C-12.

The legislation in question begins with the *Child Youth and Family Enhancement Act*, Section 57.3, which deals with post-18 care and maintenance. That Section states that:

> **Post-18 care and maintenance**
>
> 57.3 When a youth who is the subject of a family enhancement agreement under section 57.2 (1), a custody agreement under section

57.2(2), a temporary guardianship order; or a permanent guardianship agreement agreement or order, attains the age of 18 years, a Director may continue to provide the person with support and financial assistance.

(a) for the periods and the purposes, and

(b) for the conditions prescribed in the regulations.

Child, Youth and Family Enhancement Regulations

Post-18 support, financial assistance

The regulations at Section 6 deal with post-18 support and financial assistance. Section 6 (1) currently reads that: (as read)

6(1) A Director may enter into an agreement in Form 12 of Schedule 1 with a person described in section 57.3 of the Act with respect to the provision of support and financial assistance required to assist or enable the person to establish or maintain an independent living arrangement, if, in the opinion of the Director, the support and financial assistance are not reasonably available to the person from other sources.

6 (2) states that: (as read)

An agreement referred to in subsection (1) must include a plan for the person's transition to independence and adulthood.

(3) An agreement referred to in subsection (1) may provide support and financial assistance that are required for the health, well-being and transition to independence and adulthood of the person referred to in section 57.3 of the Act, including

(a) living accommodation,

(b) financial assistance related to the necessities of life,

(c) if the person is less than 20 years of age, financial assistance related to training and education,

(d) if the person is less than 20 years of age, health benefits, and

(e) any other service that may be required to enable that person to. live independently or achieve independence.

(4) currently states that no agreement referred to in subsection (1) may be. entered into or remains in force after the person's 24th birthday.

The Child Youth and Family Enhancement Amendment Regulation which was filed on January 29th, 2020, was made by the Minister of Children's Services, Ministerial Order Number 202001, on January 22nd, 2020, pursuant to section 131(2) of the *Child Youth and Family Enhancement Act*.

***Child Youth and Family Enhancement Act,* AR8/2020**

Child Youth and Family Enhancement Amendment Regulation

Filed: January 29, 2020.

For information only: Made by the Minister of Children's Services (M.O. No 2020-01) on January 22, 2020 pursuant to section 131(2) of the Child, Youth and Family Enhancement Act.

The amendment reads as follows: (as read)

1. The Child, Youth and Family Enhancement regulation, (AR 160/ 2004), is amended by this Regulation.

2. Section 6(4) is amended by striking out "24th birthday" and substituting "22nd birthday".

3. Schedule 1 is amended

(a) in Form 12, in section 2, by striking out 24th birthday and substituting "22nd birthday";
(b) in Form 16 in section 1 by striking out "a person between the ages of. 18 and 24 years and am";
(c) in Form 17.

i. In the Part 4 heading by striking out "a Person Between the Ages of 18 and 24" and substituting "Receiving or Has Been Refused Support and Financial Assistance under section 57.3 of the Act.";

ii. in the Part 4 by striking out "a person between the ages of 18 and 24 years and am".

4. The regulation comes into effect on April 1, 2020.

I pause here to note that either of the parties and in particular, I think, in this case, Mr. Nanda, should have provided this regulation to me, given that he was seeking to have it stayed. I was able to find it, and I am entitled to do that, but certainly in an application of this kind, it should have been provided by counsel.

The Test For Injunctive Relief

Turning, then, to the test for injunctive relief. The well-known three part test for an interim injunction is set out in ***RJR - MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 SCR 311 at p. 334.

> ... First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried.
>
> Secondly, it must be determined whether the Applicant would suffer irreparable harm if the application were refused.
>
> And third, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy, pending a decision on merits.

As found by our Court of Appeal in ***AUPE v. Alberta***, (2019) ABCA, 320 where the injunction in question would prevent the implementation of otherwise ***AUPE* v. Alberta**, (2019) ABCA, 320 validly enacted legislation, the following additional principles need to be considered: (as read)

> (a) There is a strong presumption that legislation is constitutional: ***Harper v. Canada (Attorney General)***, 2000 SCC 57 at para.9 [2000] SCR 764; ***Toronto (City) v. Ontario (Attorney General)***, 2018 ONCA 761 at para. 21, 143 OR (3d) 481.
>
> (b) There is a strong presumption that the legislation is in the public interest. At this stage "...the motions judge must proceed on the assumption that the law... is directed to the public good and serves a valid public purpose." ***Harper v. Canada*** at para. 9, and

> (c) When they effectively mount to final relief, interim injunctions should be granted cautiously: ***Harper v. Canada*** at para. 7. An application for an interim injunction should not, in effect, amount to summary judgment.

In ***AUPE***, at para.13, the Court of Appeal found that the Chambers judge had strayed impermissibly beyond considering simply whether there was a "serious issue to be tried" by offering his opinion on whether the legislation was, in fact, in the public interest. In so doing, he "failed to properly apply the presumption that legislation is constitutionally valid, and that stays of legislation based on allegations of unconstitutionality should be sparingly granted."

The Court went on to note that at the injunction stage, the Court ought not to make "value judgments on what they regard as the proper policy choice": at para. 14, quoting from ***Vriend v. Alberta,*** [1998] 1 SCR 493 at para. 136.

Leave to appeal the ***AUPE*** injunction decision was recently denied by the Supreme Court of Canada.

In the present case, the Government, citing the SCC's dealing in ***R v. CBC,*** 2018 SCC 5, argued that where the injunction sought can be characterized as mandatory, rather than prohibitive, a higher standard of a "strong *prima facie* case" should be applied in determining the serious issue to be tried issue.

As observed by the Court of Appeal in ***AUPE***, starting at paragraph 16: (as read)

> This is not an issue respecting burden of proof, but rather one involving the presumption of legality, a presumption that does not exist in relation to private law claims. Before an injunction will issue to restrain the implementation of validly enacted legislation, there must be some precision with respect to the *Charter* claim. This informs the "clearest of cases" analysis. In other words, a court is not to stop legislation in its tracks merely because the court can discern from eloquent arguments of counsel that there might be something constitutionally objectionable about the law. That said, where the Applicant can show a clearly identifiable basis for proving a clearly identified *Charter* breach, and the effects of the breach, the question of whether those negative affects involve irreparable harm is considered at the second step of the injunction analysis.
>
> Not all legislation receives universal public support, and some

> legislation is subsequently found to be unconstitutional, but in the short term the elected legislators must be allowed to legislate except in the clearest of cases. In this situation, the Government has not purported to take away the right to binding arbitration, or a right to a wage increase in the third year of the collective agreements, but has merely deferred the arbitration for a few months. It is not sufficiently clear that Bill 9 is unconstitutional so as to justify an injunction on its implementation.

Justice Paperny, dissenting in the result, offered the following analysis, which in my view, is largely in keeping with the majority reasons as set out above: Her analysis starts at paragraph 47: (as read)

> The first criterion requires the court to undertake a preliminary assessment of the merits of the claim. The threshold, adopted from ***American Cyanamid,*** is a low one: whether there is a serious questioned to be tried.
>
> The court in ***RJR-MacDonald*** specifically rejected the argument that a stricter standard should apply where an injunction would have the effect of suspending legislation, noting the importance of the interests which are alleged to have been adversely affected when a *Charter* violation is alleged: ***RJR-MacDonald*** at p. 337. The court agreed with the statement of Beetz, J, in ***Metropolitan Stores***, that "the ***American Cyanamid*** 'serious question' formulation, is sufficient in a constitutional case where ... the public interest is taken into consideration in the balance of convenience." Beetz, J went on to state that it would be too high a test to say that it is only in exceptional and rare circumstances that the courts will grant interlocutory relief, particularly in exemption cases: ***Metropolitan Stores*** at p. 147. Indeed, a more stringent standard would be incompatible with the court's role under the *Charter*.
>
> The authorities recognize two exceptions to the limited inquiry into the merits. A more rigorous inquiry into the merits may be appropriate where the granting of the injunction amounts to a final determination of the action, or where the constitutional question "presents itself as a simple question of law alone." ***RJR-MacDonald*** at pp 338-339. The parties did not argue that either of these exceptions applies here, and, in my view, neither is applicable. In particular, the injunction granted does not amount to a final determination of the action. The issue of the constitutionality of the Government's action in passing Bill 9 remains unresolved.

> At one point in oral argument, it was argued that a higher threshold might apply to the assessment of the merits of the case on the basis of a statement in ***Harper*** to the effect that, "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed." ***Harper*** at para 9. I do not read this statement as implying a need for a higher threshold test on the merits. Such a reading would be imcompatible with the statements of the Supreme Court in both ***RJR-MacDonald*** and ***Metropolitan Stores***.

I am continuing to read from Justice Paperny's decision. I am now at paragraph 51: (as read)

> The Supreme Court has been clear that the public interest in the enforceability of validly enacted legislation is to be factored into the weighing of the balance of convenience: ***Metropolitan Stores*** at p.135, ***RJR-MacDonald*** at p. 343. ***Harper*** reiterated that point in paragraph 9. The court in ***Harper*** also emphasized that only when the interests that would be protected by the granting of the injunction will outweigh the public interest in the continued operation of the legislation should the injunction be granted. This is a balance of convenience assessment, and does not imply a stricter standard at the first stage of the test. The "serious question to be tried" threshold is applicable here.
>
> The second aspect of the ***RJR-MacDonald*** test consists in deciding whether the Applicant "would, unless the injunction is granted, suffer irreparable harm." "Irreparable" refers to the nature of the harm rather than its magnitude. Only harm to the Applicant is relevant; any alleged harm to the respondent and to the public interest should be considered at the third part of the analysis. ***RJR-MacDonald*** at p. 341.
>
> The third criterion is a weighing of the balance of convenience. This assessment has been described as "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits." ***Metropolitan Stores*** at p.129.

The principle set out by the majority in ***AUPE*** that an injunction should be issued only in the "clearest of cases" does not elevate the threshold that has to be met by an Applicant in a constitutional case with respect to whether there is a serious issue to be tried; rather, it reinforces the importance of showing respect for the will of the

legislature when considering the balance of convenience. This was also explained by the Court in ***PT v. Alberta***, 2019 ABCA 158.

In ***PT***, the Applicants sought an interim injunction against the implementation of s16.1 of the *School Act*, and further, prohibiting the Minister from de-funding or de-crediting their schools for noncompliance with the provisions of section 45.1.

The Court, after adopting the three-part test in ***RJR-MacDonald***, summarized the applicable legal principles as follows, starting at paragraph 33: (as read)

> Since legislation can be understood as expressing a reasoned choice by the legislature, "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged constitutionality succeed" [emphasis added]; [i]t follows that in assessing the balance of convenience," the court must proceed on the assumption that the law "is directed toward the public good and serves a valid public purpose": ***Harper v. Canada (Attorney General)***, 2000 SCC 57 at para 9 [2000]2 SCR 764 [**Harper**].
>
> As stated in ***RJR-MacDonald*** at 342: "In light of the relatively threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined [at the balance of convenience] stage.
>
> The factors which must be considered in assessing the balance of convenience are numerous and will vary in each case, but in all constitutional cases, the public interest is a "special factor" which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry": M***anitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd***, *[1987] 1 SCR 110 at 149, 38 DLR (4th) 321* ***[Metropolitan Stores]***.

The Court went on to observe at paragraph 43: (as read)

> *The threshold for showing a serious question is low, merely requiring the court to be satisfied the Applicant is "neither frivolous nor vexatious":* ***RJR-MacDonald*** at 337. In our view, the chambers judge reasonably concluded that s16.1 (6) of the School Act, could potentially engage the s7 *Charter* rights of the parents; thus, the constitutional question is neither frivolous nor vexatious. Given that ss45.1(4)(c)(i) and 50.1(4) of the *Act* also bear upon aspects of notification of parents,

> however, it is our view that a serious question is raised in relation to all of these provisions.
>
> In light of the very low bar required to meet the first age of ***RJR-MacDonald***, on the first question, the appellants' claims relating to s2 (a) of the *Charter* raises a serious question to be tried.

I am satisfied that these two recent cases from our Court of Appeal govern my approach to determining the issues in the present case. These cases do not refer to ***R. v. CBC*** in analyzing the threshold that needs to be met in proving a serious issue to be tried under the first step of the ***RJR-MacDonald*** test. The decision in ***R v. CBC*** deals with the proper test for injunctive relief in an entirely different, primarily private law context. The test in ***RJR-MacDonald*** as it applies in constitutional cases where the operation of legislation was not overturned, nor was it modified by the ***CBC*** decision.

In case I am wrong about that interpretation of ***CBC***, and I am required by virtue of that decision to decide whether the injunction sought in this case is mandatory or probative to determine whether the higher onus for mandatory injunctions applies, I find that the injunction sought in this case is prohibitive.

The Government argued that it would be mandatory because staying the operation of the legislation would mean forcing the Government to keep providing support and assistance to the affected young people. I disagree with that characterization. The 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. Thus, the injunction sought is best characterized as prohibitive, and the low threshold set out in ***RJR-MacDonald*** should be applied.

Turning, then, to the background of this case.

Background

Understanding the Support and Financial Assistance Program

Both sides prepared excellent summaries of this program and do not appear to disagree about its statutory context, goals, or operation. I have drawn extensively from both parties' submissions, as well as the various affidavits filed, which were uncontested, in setting out the background for my decision.

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.

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. The story of A.C.'s life certainly bears this out.

A.C.

A.C.'s particular circumstances are set out in her Affidavit. Additional information about her relationship with the Director and her participation in the *SFA* program was set out in the Affidavit of Cinthia Langlois.

A.C. is a 21-year-old single mother. She has been involved with child welfare system since the age of 11.

As a child, A.C. was beaten severely by her mother. She survived domestic violence, only to become a victim of child sex trafficking. After running away from home, she ended up living in a "trap house" where she was exposed to drug use and drug trafficking, and forced to have sex. She was rescued from the trap house when she was 13.

A.C. is also a survivor of drug and alcohol dependency. She began using drugs and alcohol at a young age and has often turned to drugs and alcohol to help her cope with her daily struggles.

In addition to struggling with drug and alcohol abuse, A.C. has suffered from suicidal ideation. She first attempted suicide at the age of 14 after a particularly vicious

beating by her mother, and has made other attempts since then.

A.C. has a history of engaging in sex work to support herself in order to ensure her survival.

Clearly A.C.'s childhood was unstable and tumultuous, and this impeded her social development and ability to function as an independent adult. As A.C. approached the age of 18, the Director determined that she could not yet function on her own as an independent and self-reliant adult, and allowed her to enter into the *SFA* program.

Through that program, she developed a work plan with her social worker, the same social worker who had been with her since the age of 11.

In keeping with the program limits then existing, A.C. was told by her social worker that she could remain in the *SFA* program until the age of 24. With that in mind, they developed a work plan together to try to ensure she would be independent and self-reliant by the time she aged out of the *SFA* system. That plan included: obtaining a driver's license, completing a pre-employment course, establishing an alcohol free home for her child, and pursuing post-secondary education to prepare her for eventual enrollment in Native Studies at the University of Alberta to become an Aboriginal liaison.

In keeping with her plan, A.C. has obtained her driver's license, completed a pre-employment course, and is pursuing studies in Norquest with the aim of transferring to the University of Alberta in the near future. At least that was the state of affairs when she prepared her Affidavit.

Similar to other *SFA* contracts, the contract A.C. signed specifically stated that the expiry date of the agreement "may not go beyond the person's 24th birthday". It further stated that either party could cancel the agreement by providing a letter to the other party indicating an end date. The appropriate notice period was not specified in the agreement.

A.C. currently receives $1,990 per month and child care fees through the *SFA* program.

A.C. states in her Affidavit that the *SFA* program has turned her life around. With the support of A.C.'s social worker, A.C. remains sober and lives with her young daughter in an alcohol-free home funded through the program. She states that the *SFA* program has provided her stability for the first time in her life, and given her the support she needs to become independent and self-sufficient. A.C. aims to use the program and

the supports provided to continue to live a sustainable and healthy life as an adult, so she can build the kind of stable and secure life for her daughter she never had as a child. She feels more confident and capable, and feels that a healthier and sustainable future is possible for her and her daughter. She credits the progress she has made to her social worker, who has been in her life since she was 11 years old.

In the fall of 2019, A.C. was informed by her social worker she would no longer be entitled to the *SFA* program supports until the age of 24 and that she would be cut off from the program when she turned 22 in August of 2020.

A.C.'s immediate response was that she would have to return to sex work to support her family. The thought of doing so upsets her, but she sees no other way to earn the money needed to support her daughter. According to her Affidavit, A.C. believes that sex work is the only skill she has to earn money.

A.C. says she is not prepared to be on her own without the support of *SFA* when she turns 22. She was told she would receive support until the age of 24, and developed a work plan with that timeframe in mind. As of November, 2019, she has suddenly had to expedite completion of her goals and attempt to establish the capacity to survive on her own by the time she turns 22. A.C. considers this to be an impossible task and fears what will happen if she loses the support of her social worker at this crucial time in her and her daughter's life. She worries about her own mental health deteriorating to the point where she once again spirals into drug and alcohol abuse and suicidal ideation.

From November, 2019, to February, 2020, A.C. has had infrequent contact with her case worker, despite frequent attempts to correspond through weekly calls, texts, and Facebook messenger. On February 7, 2020, A.C. met with her case worker and advised her that she had stopped attending Norquest.

Moving, then, to the legal arguments.

The Parties' Positions

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 principles of fundamental justice."

A.C.'s Position

The Applicant agrees she does not have a free-standing right to support and assistance

from the Director arising from section 7. She argues that having taken responsibility for supporting her through the *SFA* program, the Director must administer the *SFA* in compliance with the *Charter*. Put another way: having agreed to continue to support qualifying vulnerable young people, previously in the care of Government to the age of 24, the Director cannot arbitrarily and without consultation reduce the eligibility period to 22 years for young people currently participating in the program.

A.C. claims that the arbitrary withdrawal and support - both emotional and financial - engages her section 7 rights in the following ways:

Right to Life

The Applicant argues that she is a particularly vulnerable individual and the abrupt withdrawal of the Director's support puts her at risk of suicide. In addition to A.C.'s Affidavit evidence on this point, the Affidavit of Ms. Pei indicates that the age period between 18 and 24 years is a critical time period for brain and social development and suicide is the second leading cause of death for youth in this age category.

As described in the ***Carter v. Canada (Attorney General)***, 2015 SCC 5 decision at paragraph 62: the section 7 right to life guarantee is engaged if, as a result of state action, there is an increased risk of death, either directly or indirectly.

The Applicant goes on to argue that the requirement for a causal connection between the state action and the "infringement on life" under section 7 is discussed at paragraph 74 to 78 of the ***Canada v. Bedford***, 2013 SCC 72 decision. It is a flexible standard, and does not require that the state action be the only or even the dominant cause of the prejudice caused: the causal connection can be satisfied by a reasonable inference made in the context of a particular case. In this case, the Applicant asserts that A.C.'s particular history of suicidal ideation and mental health issues means that deprivation of support from the *SFA* program impacts on her right to life.

Security of the Person

Turning, then, to security of the person:

A.C. argues that "security of the person" in section 7 encompasses "a notion of personal autonomy involving ... control over one's bodily integrity free from state interference" as described in the ***Carter*** decision at para 64. That right is engaged by any state action that causes physical or serious psychological suffering. Psychological interference, in the context of state action, was addressed by the Supreme Court of Canada in ***New Brunswick (Minister of Health and Community Services), v. G(J)***,

[1999] 3 SCR 46 at paragraph 60: (as read)

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively with a view to their impact on the psychological integrity of a person of a reasonable sensibility. This need not rise to the level of nervous shock or psychiatric [page 78] illness, but must be greater than ordinary stress or anxiety.

In that case, the state's actions in removing a child from its parents' custody were found to constitute a breach of the parents' security of person as it would cause them psychological suffering beyond ordinary stress or anxiety.

In A.C.'s case, she argues that the withdrawal of support has already caused her to suffer psychologically, beyond ordinary anxiety, and her suffering will continue if she cannot stay in the *SFA* program. Her evidence is that she thinks she is going to have to return to sex work to meet her basic needs if she loses the support and guidance of *SFA* and her social worker. She is not thinking clearly.

Dr. Pei's Affidavit evidence at paragraphs 45 to 53, and 67 to 69 was presented as support for the Applicant's position that cutting young people off from their established support system in this way will leave them unequipped for life and will increase their vulnerability in the long term.

As per the Affidavit of Mark Cherrington, this increase in vulnerability will contribute to possible death, incarceration, drug and alcohol dependency, and a range of other negative consequences, all of which engage security of the person in the interests of A.C., as well as the other affected young people.

Right to Liberty

With respect to the right to liberty: A.C. argues that "liberty" extends to the ability to make fundamental personal life choices. Being deprived of *SFA* support will impact on A.C., specifically by forcing her to look at alternative methods of securing financial support for her family, including possible sex work, and it may result in an increased risk her own child will be apprehended.

Finally, drawing a link between the alleged violations and the principle of acting in accordance with the principles of fundamental justice, the Applicant argued that her procedural rights were impacted as the amendments were introduced abruptly and

without consultation with the program's participants, and the reduction in the age limit from 24 to 22 was arbitrary.

The Government's Position

In response, the Government asserts that no section 7 right has been clearly identified as having been breached in this case as the Applicant has no right to the *SFA* program. If she has no right to the program in the first place, her rights cannot be breached if that program is altered or removed. An economic benefit given by the Government can be reduced or taken away without breaching section 7: see, for example, the decisions in ***Tanudjaja v. Canada (Attorney General),*** 2013 ONSC 5410 and ***Flora v. Ontario (Health Insurance Plan, General Manager),*** (2008) 91 O.R. (3d) 412.

Furthermore in ***Gosselin v. Quebec (Attorney General)***, 2002 SCC 84, the Supreme Court of Canada found that there is no positive obligation on Government to ensure people enjoy life, liberty and security: the *Charter* does not guarantee a free-standing right to social assistance or benefits. This is well-established in the case law, including in ***Massey v. Ontario (Ministry of Community and Social Services)***, [1996] 134 D.L.R. (4th) 20 with dealt with a reduction to social assistance benefits.

The Government went on to argue that ***Massey v. Ontario (Ministry of Community and Social Services)***, [1996] 134 D.L.R. (4th) 20, the program in this case is being administered in a procedurally fair way, and there is no right to pre-legislative consultation, in any event. Relying on ***Meredith v. Canada (Attorney General)***, 2015 SCC 2, the Government argued there is no requirement to consult with affected individuals or groups before enacting legislation, even if it affects their rights.

In any event, the benefit in question here has not been withdrawn in breach of a promise made to A.C..: the agreement she signed indicated that either party could end the agreement to the other, which is what has happened. "On notice" as follows... the agreement she signed indicated that either party could end the agreement on notice to the other which is what has happened.

Section 12

Turning, then, to section 12.

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

A.C.'s Position

A.C. argued that the manner in which the proposed the amendments were made, and Alberta's refusal to exempt current participants of the *SFA* program from the operation of a lowered age eligibility, constitute cruel and unusual treatment.

A.C. reasonably expected, from the age of 18 when she entered the *SFA* program, that she would be entitled to support to the age of 24, provided she qualified for it. After three years of living with this expectation, she was told she had less than a year to transition out of the program. She argues that this constitutes treatment that is grossly disproportionate to what was expected or required in the circumstances.

This constitutes "treatment" as the *SFA* program was under the control of Government. A change in the *SFA* regime will have a clear, adverse impact on A.C., as well as on other people. It is cruel and unusual, both in the sense of what is happening and how it is happening.

The Government's Position

The Government argues that the section 12 argument cannot succeed. The threshold for proof of a breach of section 12 is high, and the treatment in question must be "so excessive as to outrage the standards of decency."

Here, the actions of Government do not constitute treatment as that word is used and understood in the context of section 12.

Quoting from the ***Rodriguez v. British Columbia (Attorney General),*** [1993] 3 SCR 519 at para 67 decision: (as read)

> There must be some more active state process in operation, including 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 section 12.

The Government pointed out that in only one case has the claim under section 12 based on this articulation of treatment, been applied: ***Canadian Doctors For Refugee Care v. Canada (Attorney General),*** 2014 FC 651. In that case, the Federal Government significantly reduced health care coverage for refugees, essentially eliminating it for risk-based claimants, such as cancer patients, with the goal of dissuading false refugee claimants by taking any way any health care based incentive they might have to come to Canada.

The Court dismissed the section 7 claim on the basis that there is no right to health care, but granted the section 12 claim, finding that the reduction in health constituted "treatment" under section 12 as the refugee claimants were subject to state control and the measures enacted were done so with what the Government described in their submissions as an intention to harm.

In this case, the Government argues that the changes do not constitute treatment, and the section 12 claim must fail because:

1) This is not an unusual case;
2) The Applicant is not subject to state control as described in ***Rodriguez***; and
3) There's no evidence the charges were enacted with the intention of harming the Applicant.

Furthermore, the changes to the program are not so excessive so as to outrage the standards of decency because:

- The *SFA* is a contract that A.C. entered into with the Government and that contract explicitly states either person may set a date for the agreement to end
- She was given 10 months' notice of the change in eligibility; and
- She potentially may continue to have access to funding at a rate of $1,990 until she turns 22, if she fulfills the terms of the existing *SFA* contract.

Fiduciary Duty

A word, then, about fiduciary duty.

The Applicant did not argue that the implementation of the legislation constitutes a breach of fiduciary duty as part of her application for an interim injunction.

The Government observed that regardless of whether or not that argument had been made, it is bound to fail as no fiduciary duty arises in this case.

Relying on the ***Alberta v. Elder Advocate of Alberta Society,*** 2011 SCC 24 case, the Government argued that a bare claim for access to benefit scheme does not create a fiduciary duty. For a fiduciary relationship to exist, the following characteristics must also exist:

- The fiduciary has scope for the exercise of some discretion or power;
- The fiduciary can unilaterally exercise that power or discretion to

effect the beneficiaries's legal or practical interests; and
- The beneficiary is peculiarly vulnerable or at the mercy of the fiduciary holding the discretion or power.

The Government observed that they ceased to be the legal guardian of A.C. when she turned 18 and therefore, owes no further duty to her and she cannot meet the established test for proving that an ad hoc fiduciary duty exists. Given the nature of governmental responsibilities and functions generally speaking, the Government will owe fiduciary duties only in rare, limited and special circumstances and generally only in a private law context.

Turning, then, finally to my decision.

Decision

Serious Issue to be Tried

I will begin with "serious issue to be tried."

There is no question that A.C. faces an upward battle in this matter, particularly as it relates to the asserted breaches of section 7. The type of argument being made - despite counsel's best interests to cast it in a different light - will ultimately require the trial court to address whether Section 7 protects economic rights.

Arguments pursuant to section 7 which rely on assertions of economic rights have been advanced unsuccessfully many times previously, in many different contexts. The Government properly and convincingly argued that these cases have clearly established the *Charter* does not guarantee a positive right to social assistance.

The Applicant in this case has therefore tried to distinguish A.C.'s claim from these other cases by describing it as a case about implementation: while there is no right to social assistance, once instituted, social assistance regimes must be administered in compliance with the *Charter*. This is a difficult argument to advance, other than in the context of a section 15 violation, which is not relevant in the present case. Furthermore, the facts in the present case distinguish it from cases like ***Khadr v. Bowden,*** 2015 ABQB 261 and ***Chaoulli v. Quebec,*** 2005 SCC 35 in which similarly construed arguments about *Charter* compliance were successfully advanced.

That said, the Applicant's argument regarding interference with her right to security of the person through infliction of psychological suffering beyond normal stress and anxiety caused by government action, appears to be arguable in the particular

circumstances of this case.

The argument the Applicant advanced with respect to section 12 was based on a somewhat similar rationale. It was not argued that the age limit in the legislation can never be lowered, or even that the *SFA* program than never be cancelled entirely without breaching the *Charter;* but rather, it 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.

There is a valid argument to be made that Alberta's refusal to exempt the 2,100 affected young people from the operation of the amendment constitutes cruel and unusual treatment. These highly vulnerable young people were cared for as children not by their parents or relatives, but by the state itself. Since they turned 18, they have lived their lives and conducted their affairs on the basis that they would at least have the opportunity to qualify for continued financial and human support to the age of 24. No evidence or explanation was presented to the Court, at the injunction stage, as to why the age limit was subsequently lowered to 22.

The relationship between the Government and these young people that has developed as a result of the years of government care, followed by their entry into the *SFA* program, is akin to that of a person found to be in *loco parentis* to a child or youth. If that relationship does not rise to the level of establishing a fiduciary relationship, it certainly constitutes a relationship in which one party is particularly and uniquely vulnerable to the whims and discretion of the other party, in a way that other social benefit recipients may not be. 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 and as follows: reasonable expectation and fiduciary duty.

I am going to pause right now because I have come to the end of the papers I have printed out and I have two left which, apparently, are back upstairs. So I am going to go retrieve those and I will be right back. My apologies.

(ADJOURNMENT)

THE COURT: All right. Sorry about that. I did not intend for this to become a cliff hanger. All right, I am not sure where I left off, so, okay.

In assessing the strength of both the section 7 and 12 arguments, I relied heavily on the

justiciability analysis applied by the trial judge in the ***Tanudjaja*** case. That decision, which I found to be incredibly helpful, represents an excellent example of the kind of moral and intellectual struggles that trial judges face when confronted with constitutional cases involving society's most vulnerable groups and validly enacted legislation which potentially impacts in a negative way on their collective well-being.

It is not my job to make value judgments with respect to the legislation in issue. Furthermore, in keeping with the principles set out in ***RJR-MacDonald***, and the recent jurisprudence of our Court of Appeal, on an application for injunctive relief, I am limited to a preliminary assessment of the merits of the case.

With all of that in mind, I find that with respect to both the section 7 and the section 12 arguments being advanced, the constitutional challenge in this case is neither frivolous nor vexatious. Furthermore, as per the Court's direction in ***AUPE***, I find that the Applicant has clearly articulated a basis for proving a clearly identified *Charter* breach and has illustrated the very serious potential negative effects of those breaches on A.C. specifically, and on other affected young people generally.

In so finding, 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.

The threshold for "serious issue to be tried" has been met.

Irreparable Harm

Turning, then, to "irreparable harm."
Having found that there is a serious question to be tried in this case, I must go on to consider the matter of irreparable harm. Harm is generally assessed from the standpoint of the person seeking to benefit from the interlocutory relief, and I cite there from the ***PT v. Alberta*** decision at para 50, decision of our Court of Appeal. The presumption that the legislation was enacted with the public good in mind, does not arise until the third stage of the ***RJR-MacDonald*** test.

The Government did not offer lengthy submissions on this point. Counsel simply pointed out that according to the terms of the *SFA* contract which A.C. entered into, she will not actually lose any benefits when the legislation is implemented, therefore, she will not suffer harm.

I do not accept this argument. A.C. will be cut off from *SFA* assistance on or before her

22nd birthday - possibly earlier, depending on what her current circumstances are. The odds of this constitutional challenge, particularly in light of the current public health crisis, being heard before she turns 22 is slim to none. The potential for irreparable harm to A.C. should the injunction *not* issue, and her funding be withdrawn when she turns 22, is therefore very real, and well-established in the Affidavit evidence. Furthermore, the psychological suffering she's already experienced as a result of being advised she was cut off two years earlier than expected, is evident in her statements about suicidal ideation and her feeling that she needs to return to sex work. The harm she would suffer if the legislation goes into effect on April 1, 2020, amounts to social, financial, and psychological harm which simply could not be compensated by any future financial judgment. It is, therefore, irreparable.

The Cherrington Affidavit provides additional support for the assertion that irreparable harm would be caused not only to A.C., but also to other affected *SFA* participants, and I accept his uncontradicted evidence in that regard.

Balance of Convenience

Turning, then, to the balance of convenience.

In assessing this aspect of the ***RJR-MacDonald*** test, as per the ***AUPE*** decision, I am instructed by the Court of Appeal to presume that the legislation is constitutional and was enacted with the public interest in mind. Only in the clearest of cases should an injunction issue.

In considering the balance of convenience, it would have been helpful for me to have had evidence or information about the number of young people who will be impacted by the change in age limit over the next year or so. Obviously, all 2,100 young people currently participating in the *SFA* program may ultimately be impacted; however, only those who are already over the age of 22 or who will turn 22 after April 1, 2020, but before the merits of the challenge can be heard, will be *immediately* impacted.

It also would have been helpful, in assessing harm, to know how much it would cost the Government, approximately, to continue to fund and provide human resources to the affected young people, pending a hearing on the merits. Conversely, how much money would the Government stand to save, were those young people to be cut off from their *SFAs* at the age of 22 rather than at the age of 24?

The presumption that legislation is enacted in the public interest and that it should not be interfered with in the short term, pending the uncertain outcome of a constitutional challenge, is usually enough to defeat an injunction application in most constitutional

cases when it comes to determining the balance of convenience. It is not enough in this case.

As stated in ***RJR-MacDonald***: (as read)

> 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. [Emphasis added]

The legislation being challenged impacts on the financial and psychological well-being of a definable and relatively small group of vulnerable people: specifically the approximately 2,100 young people in a province with a population of over 4 million.

The issuance of an interim injunction would result in maintenance of the *status quo*. 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.

While the public interest served by the implementation of the lower age limit is to be presumed, in the unique circumstances of this case, that presumption does not outweigh the public interest served by keeping the higher age limit in place, pending the outcome.

The balance of convenience is, therefore, in favour the Applicant, A.C.

An interim injunction pursuant to section 24 (1) of the *Charter* is therefore ordered, 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.

In the event that the parties are unable to agree on costs, they have leave to make written submissions, to a maximum of 3pages, within 30 days after receipt of this decision.

Thank you, counsel. I greatly appreciated your written and oral submissions. It is a

very interesting and difficult case that you have before you.

Are there any questions?

MR. NANDA: No, My Lady.

UNIDENTIFIED SPEAKER: I just want to thank you, the clerk, as well as my friend for dealing with me, given my circumstances. I really appreciate it.

THE COURT: It is no problem. All right. Stay healthy, everyone. Thank you.

UNIDENTIFIED SPEAKER: Thank you.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Tasheena Steinhauer, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen's Bench held in courtroom 413 at Edmonton, Alberta, on the 19th day of March, 2020, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Jackie Love, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a true and faithful transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Jackie Love, Transcriber
Order Number: AL-JO-1004-2261
Dated: March 25, 2020