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Alberta Court Grants Injunctive Relief in a Constitutional Case

By: Myrna El Fakhry Tuttle

Case Commented On: *A.C. and J.F. and her Majesty the Queen in Right of Alberta* (19 March 2020), Edmonton 2003-048252020 (ABQB) (Transcript available here)

On March 19, 2020, Court of Queen's Bench Justice Tamara Friesen granted a temporary injunction prohibiting the Alberta Government from implementing an amendment of the *Child, Youth and Family Enhancement Regulation,* Alta Reg 160/2004, which lowered the age of eligibility from 24 to 22 for young adults receiving financial and social support under the Support and Financial Assistance (SFA) program. This temporary injunction will apply until the Court hears and rules on the issue of whether the amendment unjustifiably violates the *Canadian Charter of Rights and Freedoms*.

Background

In 2004, the SFA program was set up by the Government of Alberta under the *Child Youth and Family Enhancement Act,* RSA 2000, c C-12 (the *Act*). It is administered through Alberta's Ministry of Children's Services.

The SFA was created to help transition young people who have been involved with Child Intervention Services into adulthood. Before the amendment, the program was available to individuals between the ages of 18 to 24 (Transcript at p 2, lines 1 to 5). At first, the age of eligibility was set at 22; but in 2013, it was pushed up to 24 (at p 13, lines 8 to 9).

Under the SFA program, when children in the Government's care turn 18 and age out of the Child Services system, and if they are qualified under section 57.3 of the *Act*, the Director of Child, Youth and Family Enhancement Services may determine whether continued support and financial help is required. If additional assistance is necessary, the child and the Director decide, through an agreement between the two, known as a SFAA, what supports are required to move the young person into independence and adulthood (at p 12, lines 11 to 21).

Following that, the young person is assigned a case worker to help support them in reaching their independence. Sometimes, such as in the case of A.C., the young person can keep working with the same case worker that they had when they were "a child in care" (at p 12, line 13 to 14). In summary, the SFA program assists young adults, who were raised in the care of the government, get ready for the responsibilities of adulthood (at p 12, lines 36 to 37).

In fall 2019, the Minister of Children's Services in Alberta announced that the maximum age for young people getting financial and social support under the SFA program would be reduced from 24 years to 22.

The amendment of section 6(4) of the *Child, Youth and Family Enhancement Regulation* (mentioned above) was passed in January of 2020 to become effective on April 1, 2020.

Currently, there are over 2,100 young adult participants in the SFA program and implementation of the new age limit will affect any of them who are already over 22, or who will turn 22 after March 31, 2020 (Transcript at p 2, lines 7 to 12).

A.C., the applicant and one of the young people affected by the change, was told by her social worker in the fall of 2019 that she would no longer receive support under the SFA program when she turns 22 in August 2020. Initially, she was supposed to take advantage of this program until the age of 24 (at p 15, lines 7 to 9).

A.C. had a "violent and tumultuous childhood" (at p 2, line 14) and was raised in government care from the age of 11. She became a participant in the SFA program when she turned 18 with the belief that she would receive support until she turns 24. That gave her "hope and stability and allowed her to turn her life around" (at p 2, line 18). However, she got lost when she knew that she would not be able to participate in the program after her 22nd birthday (at p 2, lines 14 to 21).

A.C., together with another litigant, J.F., filed an Originating Notice challenging the constitutionality of the amendment, arguing that the age limit breached sections 7 and 12 of the *Charter*. In addition, they claimed that the Government breached its fiduciary duties toward them (at p 2, lines 23 to 27). Then, A.C. filed an application seeking an "interim injunction staying the implementation of the amendment until such time as the constitutional and other issues can be decided" (at p 2, lines 29 to 30).

Decision

Justice Friesen granted an interim injunction "prohibiting the Government of Alberta from implementing amendments to section 6 of the Child Youth and Family Enhancement Regulation" (at p 25, lines 32 to 35).

Granting an Injunction

An injunction is an equitable remedy, issued at the court's discretion, in which one party is stopped from doing an act harmful to the party seeking the injunction (prohibitive injunction), or is compelled to do something positive (mandatory injunction). According to the Canadian Encyclopedia:

> There are two basic types of injunctions: mandatory and prohibitive. Mandatory injunctions require a person to perform an act, usually within the context of remedying past wrongs committed by that person. Prohibitive injunctions prevent a person from performing an act, and are designed to prevent that person from committing wrongs to the detriment of others. They can be permanent or temporary and are generally favoured by courts as opposed to mandatory injunctions.

> Injunctions are best suited to situations where an award of damages would be an inadequate way of compensating an aggrieved person.

Justice Friesen relied on the three part test for an interlocutory injunction established by the Supreme Court of Canada (SCC) in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311: (1) the existence of a serious question to be tried (2) will the party seeking the injunction suffer irreparable harm if it is not granted and (3) does the balance of inconvenience favour the party seeking the injunction (*A.C.* Transcript at p 6, lines 13 to 25).

However, the Alberta Government relied on *R v CBC*, 2018 SCC 5, and 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" (Transcript at p 7, lines 20 to 23). The Government claimed that staying the implementation of the amendment would mean compelling the Government to keep supporting and assisting the affected young people (at p 11, lines 21 to 23).

Justice Friesen disagreed with the Government's argument and stated that:

> 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* … applies in constitutional cases where the operation of legislation was not overturned, nor was it modified by the *CBC* decision. (at p 11, lines 11 to 14)

Justice Friesen added that the outcome of the injunction would be to keep the status quo and to halt the Government from reducing the age of eligibility from 24 to 22. Therefore, "the injunction sought is best characterized as prohibitive, and the low threshold set out in *RJR-MacDonald* should be applied" (at p 11, lines 25 to 27). She then went on to apply the *RJR-MacDonald* test.

Serious Question to be Tried

Section 7

Section 7 of the *Charter* states 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."

According to *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350 (at para 19):

> [S]ection 7 of the Charter requires that laws or state actions that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process. These principles include a guarantee of procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security (citing *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, 2002 SCC 1 at para 113).

Justice Friesen noted that even if there is no right to social assistance, social assistance regimes must be regulated in compliance with the *Charter*. She added that "A.C.'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," is reasonable in this case (Transcript at pp 21, lines 39 to 41 and 22, line 1).

Section 12

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

In this case, A.C. expected, when she participated in the SFA program at the age of 18, that the support would continue until she turns 24. However, three years later, she was told that she would be cut off from that financial benefit (at p 19, lines 6 to 7). A.C. argued that this would constitute cruel and unusual treatment under section 12. The Government made a promise to these young adults and cannot back out of that promise. Otherwise, their expectations would be violated and this "would cause them to suffer real psychological and possibly even physical harm" (at p 22, lines 9 to 10).

Justice Friesen held that preventing hundreds of young people from receiving financial support under the amendment constitutes cruel and unusual treatment. According to Justice Friesen, due to their vulnerability, these young adults were cared for by the government and not by their parents or relatives. When they turned 18, they expected to keep receiving support under the SFA program until they reach the age of 24 (at p 22, lines 15 to 17).

Justice Friesen added that the relationship between these young adults and the Government that has evolved as a consequence of government care and their participation in the SFA program "is akin to that of a person found to be in loco parentis to a child or youth." (at XX) Justice Friesen argued that if this relationship is not a fiduciary one, it is definitely a relationship where these vulnerable young people depend particularly on the discretion and judgment of the government. Therefore, "the possible interplay between section 7 and section 12 and equitable doctrines of reasonable expectation [and] fiduciary duty, in this particular context, constitute a serious issue to be tried…" (at p 22, lines 21 to 30).

Justice Friesen concluded that given the arguments presented under *Charter* sections 7 and 12, "the constitutional challenge in this case is neither frivolous nor vexatious" (at p 23, lines 13 to 14). Therefore, the first stage of the test for an injunction was met.

Irreparable Harm

The SCC, in *RJR-MacDonald,* defined irreparable harm as harm that "cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (at p 37). It added that "irreparable refers to the nature of the harm rather than its magnitude" (at p 37). Therefore, parties to a dispute who might suffer irreparable harm, have the right to seek an early remedy in the form of a temporary injunction pending trial.

Justice Friesen stated (*A.C.* Transcript at p 24) that "harm is generally assessed from the standpoint of the person seeking to benefit from the interlocutory relief", citing *PT v Alberta*, 2019 ABCA 158 (PT at para 50).

Justice Friesen argued that given the fact that there is a current public health crisis – the COVID-19 pandemic – there is a strong possibility that the constitutional challenge won't be heard before her 22nd birthday. Therefore, if the injunction is not granted and her funding is removed when she turns 22, A.C. will likely suffer irreparable harm. Justice Friesen added that it is clear that A.C. has suffered psychologically after being told that her funding will be cut off two years earlier than anticipated. A.C. had suicidal thoughts and felt that she had to return to sex work. Justice Friesen concluded that "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" (at p 23, line 41 to p 24, lines 1 to 11).

Balance of Convenience

Here, the Canadian Encyclopedia notes that a court has to determine whether not granting the plaintiff an injunction will "so affect the plaintiff's rights that, by the time of final judgment, the plaintiff will have suffered irreparable harm less than or greater than the extent the defendant will be harmed if the injunction is granted".

In this case, Justice Friesen asserted that all 2,100 participants in the SFA program will be affected by the amendment, but only those who are over 22 or will turn 22 on April 1, 2020, and before the case is settled, will be immediately affected (at p 24, lines 26 to 31).

Justice Friesen noted that the result of constitutional challenges is unpredictable, therefore usually injunctions are not granted in constitutional cases when considering the balance of convenience. There is an assumption that there should be no intervention in implementing legislation as it is made in the public interest.

But that was not the case here (at p 24, lines 40 to 41 to p 25, lines 1 to 2). Justice Friesen found that granting an interim injunction would keep the *status quo,* which would benefit A.C. and those affected by the amendment, awaiting the outcome of the constitutional challenge. The previous government had raised the age for termination of benefits to 24, relying on "medical and sociological evidence". The number of young people impacted is small and it was hard for Justice Friesen "to see how it would not be in the public interest to leave the age limit in place for the time being." She found that "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 of the Applicant, A.C." (at p 25, lines 25 to 30).

Commentary

In November 2019, the same time the government decided to change the age limit, a report entitled A Critical Time: A Special Report on Emerging Adults Leaving Children's Services Care was issued by the Office of the Child and Youth Advocate Alberta after six young adults died in 2018. All of these young people were participants in the SFA program.

The report pointed out that the age of 18 to 24 years old is a critical stage of development during which young adults go through important turning points. They need assistance and advice to help them become independent and healthy adults. The report added that the age of eligibility was pushed up to 24 due to the many challenges young adults encounter when they transition out of care (at p 34).

The sudden change in support will increase these young people's vulnerability as they get ready to take vital steps toward a successful future. Therefore, the A.C. decision allows hundreds of young people to keep getting the necessary support they need in order to stay healthy and to transition out of government care.

It is important to note that it is not clear how much money the government will save by lowering the age limit and how many young people would qualify for other adult programs if they lose the SFA benefits.

It will be interesting to see whether the *Charter* arguments are successful once the case is heard on its merits. In the meantime, the Alberta Government has launched an appeal of the injunction decision.

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