ARTICLE

NOWHERE TO TURN: ALBERTA'S DISMAL HISTORY OF SUPPORT FOR YOUTH IN TRANSITION TO ADULTHOOD - *A.C. AND J.F. V. ALBERTA*

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ABSTRACT

This article explores the existing standard of care for youth transitioning from government care into independent adulthood. The article will first explore the history of Alberta's child welfare laws and policy, specifically regarding youth who 'age out' of care. It will then review the existing literature on the impact of the 'aging out' process on the individual and on society before examining the current case of A.C. and J.F. v. Alberta, where two youth who had a support agreement expected to continue to age 24 are challenging the constitutionality of removing supports from youth 'aging out' of care 2 years earlier than expected. Finally, this article will provide an analysis on the rights of youth in transition to adulthood under the Charter of Rights and Freedoms and the Alberta Human Rights Act, with a particular focus on the rights of Indigenous children and youth.

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INTRODUCTION

When we discuss child welfare, the focus is often on intervention to save a child from harmful situations; however, children apprehended into government care transition into youth, and eventually are expected to become well-adjusted adults who contribute to a functioning society. Most often, these youth in transition, or youth 'aging out' of government care, have been an afterthought, and recently were even excluded from the federal legislation that set a minimum standard of care for Indigenous children in the child welfare system.[1] A growing body of research into the outcomes of intervention during and after care raises concern for whether the children 'saved' by the system are sufficiently supported by that system in a manner that enables them to become well-adjusted adults who can contribute to a functioning society.

Part I of this article provides context on youth in care, including statistics and demographics. Part II provides background information on Indigenous overrepresentation in child welfare and colonial and Indigenous approaches to Indigenous child protection, given the significant overrepresentation of Indigenous children in care. Part III of the article will then explore the history of Alberta's child welfare regime, focusing on policy for youth who transition out of government care. This section will also discuss recent developments in child welfare policy that are likely to impact Indigenous children and youth in care.

Part IV will review the economic and social impacts of supporting or not supporting youth as they transition out of care. Part V examines the current case of *A.C. and J.F. v. Alberta*, where two youth who had support agreements with the government expected to continue to age 24 are challenging the constitutionality of removing supports from youth 'aging out' of care 2 years earlier than expected. Finally, Part VI will provide an analysis on the rights of youth in transition under the *Charter of Rights and Freedoms*.[2]

In the interest of disclosure, I approach this article from the perspective of a former child in care, and as someone who has experienced 'aging out' firsthand. Throughout the research process, I allowed myself to relate sensitive topics to my personal experiences, hoping to lend my voice to these vulnerable young people who are so often invisible and left on the margins of society to survive without support.

I. CONTEXT ON YOUTH TRANSITIONING OUT OF GOVERNMENT CARE

As noted previously, youth transitioning out of care are often overlooked in child welfare research and policy. This section provides information on children in care and transitioning out of care, as well as a discussion of the commonly used term 'aging out' applied to affected youth.

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1 *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 [*ARFNIM*].

2 *AC and JF v her Majesty the Queen in Right of Alberta*, (19 March 2020), Edmonton 2003-048252020 (ABQB) [*Interlocutory Injunction Judgment*]; *AC and JF v Alberta*, 2020 ABCA 251 [*Reconsideration Decision*]; *AC and JF v Alberta*, 2020 ABCA 309 [*Intervenor Decision*]; *AC and JF v Alberta*, 2021 ABCA 24 [*Injunction Appeal*].

A. Children in Care and Transitioning out of Care

In Alberta, approximately 15,000 children and youth between the ages of 0 and 24 are either in government care, receiving supports following adoption or private guardianship out of care, or receiving supports through supported independent living programming.[3] For approximately 8,000 children "in care", there are a variety of care arrangements, but mainly these are categorized as temporary or permanent. When a child becomes the subject of a Permanent Guardianship Order (PGO), the Government of Alberta becomes the sole guardian of the child and all other guardians are terminated by statute.[4] Alberta is the sole guardian of approximately 5,000 children in Alberta at any given time.[5] Many of these children will eventually leave care, either through adoption, private guardianship by a caregiver, or 'aging out' of care. Children under a TGO may 'age out' of care as well, particularly if they enter care in their teens. Under a TGO, parental guardianship is not terminated, but the Alberta government becomes a joint guardian, usually given sole decision-making authority.[6] Like any other young person transitioning to adulthood, youth in care must look to their legal guardian for support in the transition to adulthood.

Reports on family living situations since 2016 have found that nearly 60% of Canadians aged 20-24 still live at home, and 97% of parents surveyed reported providing financial support to children between the ages of 18 and 35.[7] That young adults continue to live with their parents has been given judicial notice in Alberta in the cases of *Brear v. Brear* and *KMR v. IWR*.[8] In *KMR,* the court, relying on the comments of Pentelechuk JA in *Brear,* stated at para 40:

"…the current social and economic conditions may support an order of child support for a reasonable transitionary period for an adult child who is not in school full-time, or who has ceased their post-secondary education or training. Pentelechuk JA's comments may provide support for an extension of that transition period." [9]

In general, it is supported in law that Canadian youth are able to make a gradual and supported transition to adulthood where it is needed. However, for youth transitioning or "aging out" of care, this process has traditionally left young people to transition to adulthood unsupported and very suddenly upon reaching the age at which supports are terminated.

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3 *Child Intervention Information and Statistics Summary: 2019/20 Fourth Quarter (March) Update* (Alberta: Government of Alberta, 2020), tbl 3,7,8.

4 *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 [*CYFEA*], s 34(4).

5 Child Intervention Information and Statistics Summary, *supra* note 3, tbl 3.

6 *CYFEA*, *supra* note 4, s 31(2).

7 *2019 RBC Family Finances Survey* (Toronto, Ontario: Royal Bank of Canada, 2019); Stacey Hallman et al, "Young adults living with their parents in Canada in 2016" (2 August 2017), online: *Statistics Canada* <www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016008/98-200-x2016008-eng.cfm>; Statistics Canada, *Diversity of young adults living with their parents*, By Anne Milan, Catalogue no 75-006-X (Ottawa: Statistics Canada, 2016) [perma.cc/BTZ6-V7TG].

8 *Brear v Brear*, 2019 ABCA 419 [*Brear v Brear*]; *KMR v IWR*, 2020 ABQB 77 [*KMR v IWR*].

9 *KMR v IWR*, *supra* note 8 at para 40.

B. What is 'Aging out' of Care?[10]

'Aging out' is what eventually happens to most children who go into government care. It is not a term that is applied to children generally, as most families do not cut off all financial, emotional, and other supports at a particular age. 'Aging out' is a term specifically applied to children who have been in care. It means that a child has reached the arbitrary age at which the government expects them to be wholly independent and at which supports for that child are terminated. The age at which supports are terminated can vary depending on the region, type of care arrangement, and individual capability of the child, but typically planning for transition begins in the late teens and supports can be available into the early 20s.[11]

Not every child in care goes through the 'aging out' process. Most jurisdictions aim to support family reunification efforts where possible, and some children are adopted when reunification does not occur within the timeframe required by the courts; however, even in these situations, outcomes are not always positive. Many families do not receive adequate support in reunification and children end up back in care or in unstable housing situations.[12] Adoptions, too, may 'break down' in the child's teens and these children, again, end up back in government care.[13] It is important to note that when a child is the subject of a permanent guardianship order under the *Child, youth and family enhancement act,* all other existing guardians of that child have their guardianship rights automatically terminated by statute.[14] The government becomes the sole guardian and provider for the child, who in many instances, has been removed from their family and/or community, and too often cannot even remain permanently in a single placement for the duration of their time in care.

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10 I have adopted the practice of the National Council of Youth in Care Advocates which puts the term 'aging out' in single quotes to de-normalize a term that is widely and casually applied to very abnormal treatment of youth; see Dr Melanie M Doucet, *A Long Road Paved with Solutions: 'Aging out' of care reports in Canada: Key Recommendations and Timelines (1987-2020)* (Canada: National Council of Youth in Care Advocates, 2020) at 5.

11 *Ibid* at 9.

12 Tonino Esposito et al, "Family reunification for placed children in Québec, Canada: A longitudinal study" (2014) 44 Children and Youth Services Review 278 at 279; Sonia Hélie, Marie-Andrée Poirier & Daniel Turcotte, "Risk of maltreatment recurrence after exiting substitute care: Impact of placement characteristics" (2014) 46 Children and Youth Services Review 257 at 261–263; Elaine Toombs et al, "First Nations parenting and child reunification: Identifying strengths, barriers, and community needs within the child welfare system" (2018) 23:3 Child & Family Social Work 408 at 411; Sophie T Hébert, Tonino Esposito & Sonia Hélie, "How short-term placements affect placement trajectories: A propensity-weighted analysis of re-entry into care" (2018) 95 Children and Youth Services Review 117 at 120.

13 See e.g. Richard P Barth, *Adoption and Disruption: Rates, Risks, and Responses* (Routledge, 2017) at 441; Gerald P Mallon & Peg McCartt Hess, *Child Welfare for the Twenty-first Century: A Handbook of Practices, Policies, & Programs* (Columbia University Press, 2014), ch 4; Various studies have found adoption breakdown rates ranging from 2% to 20%. It should be noted that this data is difficult to track, because there is no legal difference between an adopted child who enters government care after adoption breakdown, and a biological child who enters care.

14 *CYFEA*, *supra* note 4, s 11(1).

II. CHILD WELFARE AND INDIGENOUS YOUTH

As we delve into the issues faced by youth in transition, it is imperative to remain aware of the staggering disproportionality of Indigenous youth in care. Currently, 70% of children in care in Alberta are Indigenous.[15] The legacy of hundreds of years of colonial oppression through displacement, disenfranchisement, racist policy, over-incarceration, residential schools, and intergenerational trauma carry on in today's child welfare system. Because of this, this article will not specifically address the effects and outcomes on Indigenous youth in comparison to non-Indigenous youth. The youth who 'age out' of care in Alberta are disproportionately Indigenous, and throughout the process of researching and writing this article, it was this statistic that was front of mind. It is imperative that the reader proceeds with the knowledge that 70% of children in care in Alberta are Indigenous. It is this staggering number that will make the implementation of the National Standard set out in the *Act respecting First Nations, Inuit and Metis children and families* such a critical element in the process of transitioning out of care.[16] While a fulsome review of this legislation is beyond the scope of this article, it is useful to illustrate the shifting legal landscape in child welfare to acknowledge reconciliation and colonial harm.

A. Overview of Colonial Laws for Indigenous Children in Care

The *Act respecting First Nations, Inuit and Metis children and families* does not specifically address youth 'aging out' of care, despite zealous advocacy to include them.[17] The *Act* can be separated into two parts. The first part sets out national standards which establish the minimum standards applicable to Indigenous children in care. These national standards require that Indigenous identity be protected, that relationships with family and community be maintained and/or cultivated, and that placements are subject to ongoing reassessment which can be triggered on request of an interested party.[18] These provisions affect Indigenous youth who are 'aging out' of care because they work to keep Indigenous children in their families or communities and to maintain a lasting support network that is not available to many youth today when leaving government care.[19] Further, the act places an emphasis on

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15 Child Intervention Information and Statistics Summary, *supra* note 3 at 4.

16 *ARFNIM*, *supra* note 1.

17 Canada, Parliament, Senate, Standing Committee on Aboriginal Peoples, Ashley Bach, President, Youth in Care Canada, *Proceedings and Evidence*, 42nd Parl, 1st Sess, (1 May 2019).

18 *ARFNIM*, *supra* note 1, ss 10, 16, 17.

19 See the following cases where the new minimum standards were applied to support ongoing connection for the child with their identity, community, and family, even where the simplest answer was an available foster placement. These cases take a more individualized approach to child welfare and give more consideration to the long term impacts of apprehension on a child. *CAS v CE, ME, NC, LB and T B,* ONSC 2020 6314 [*CAS v. C.E., M.E., N.C., L.B. and T. B.*]; *CAS v K C and Constance Lake First Nation,* 2020 ONSC 5513 [*CAS v. K. C. and Constance Lake First Nation*]; *Children's Aid Society of the Regional Municipality of Waterloo v NH*, 2021 ONSC 2384 [*Children's Aid Society of the Regional Municipality of Waterloo v. N.H.*]; *Kina Gbezhgomi Child and Family Services v MA*, 2020 ONCJ 414 [*Kina Gbezhgomi Child and Family Services v. M.A.*]; *Protection de la jeunesse -- 209343*, 2020 QCCQ 13410 [*Protection de la jeunesse -- 209343*]; *TL (Re)*, 2021 SKQB 2 [*T.L. (Re)*]; *Youth protection - 206762*, 2020 QCCQ 7952 [*Youth protection - 206762*].

prevention over intervention, and provides for mandatory reassessment of placements to evaluate whether the child can be placed with family or community.[20]

The second part of the *Act* affirms the inherent jurisdiction of Indigenous governing bodies over child welfare, and provides the framework for giving notice of intention to exercise that jurisdiction. It should be noted that the sections of the *Act* that give Indigenous law the same force and effect as federal laws, and paramountcy in a conflict with provincial law were recently challenged before the Supreme Court of Canada, with decision reserved. The *Act* is intended to respond to the overrepresentation of children in care by establishing a minimum standard for Indigenous children in care nationwide, and by supporting communities and Peoples in caring for children in their own way. Despite the exclusion of youth transitioning out of care from this act, it is an important development in child welfare law, in particular because Indigenous child raising practices and definitions of family can vary greatly from western child raising practices.

B. Indigenous Laws for Indigenous Children

Canada is home to more than 50 distinct First Nations across over 630 communities, in addition to multiple Metis and Inuit communities and Peoples. Child raising practices will vary across Nations, communities, and Peoples. This section will provide some examples of Indigenous child rearing practices to illustrate the ways in which they vary from western practices. In many Indigenous cultures, the development of Indigenous children throughout childhood, adolescence and into adulthood includes roles beyond those of biological parents. Members of a child's nuclear, extended, community, nationhood, clan, and cultural families are all integral to a proper upbringing.[21] These various forms of family comprise a natural protective network for a child. A consultation with Anishinaabe elders on best practices in child development between the ages of 13 and 18 found that it was critical for youth to develop supported independence.[22] Making mistakes should be permitted and accepted as an important part of youth learning to make good decisions. However, during the phase of learning independence, youth are still in need of consistent parenting, which includes supervision, rules, routines, expectations, and obligations to all levels of family.[23] In many Indigenous cultures, children are cherished as gifts from the spirit world, and their upbringing is an obligation of the entire community. Children are taught throughout their lives about the interconnected systems of life between people, communities, animals, the earth, and the spirit world.[24] Further, and importantly, this consultation process found that while there are rough age ranges for when children will be taught certain things, they are allowed to learn and develop at their own pace and they remain supported by family and community until they are ready for the next stage of development.[25]

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20 *ARFNIM*, *supra* note 1, ss 14, 16(3).

21 Estelle Simard & Shannon Blight, "Developing a Culturally Restorative Approach to Aboriginal Child and Youth Development: Transitions to Adulthood" (2011) 6:1 First Peoples Child & Family Review 28 at 42.

22 *Ibid* at 46.

23 *Ibid* at 47.

24 *Ibid* at 44.

25 *Ibid* at 45.

A community engagement process in Coast Salish territory brought together 20 Nations to discuss the transition of youth to adulthood. Part of the process included the development of a narrative with Knowledge Holders from each Nation that is designed to teach the 'aging out' process in a way that reflects Indigenous child rearing best practices. The last portion of this narrative is:

> *You are this fire.*
>
> *We will work to keep it lit.*
>
> *Because one day you will be the fire keeper.*
>
> *When you are ready, when it is your time.*
>
> *You carry these wisdoms within you.*
>
> *As does your family.*
>
> *And your community*
>
> *But we need to weave them together.*
>
> *Because the fabric of the teachings frayed a little.*
>
> *You will decide how to receive these teachings.*
>
> *When you step out of the forest.*
>
> *But we are all listening.*
>
> *When you are ready to tell your story.*[26]

This portion of the narrative tells us that a youth is the leader of their own journey to adulthood, but that coming of age takes community, and that we are all stronger together.[27] Both examples are also reflected in the child rearing best practices for Indigenous youth in Alberta. Dr. Hadley Friedland has participated in several community engagements on Indigenous child welfare, and when asked the appropriate age for youth to receive support during transition to adulthood, the response from the community is always "as long as they need it." [28]

These Indigenous best practices dictate a youth led, fully supported transition to adulthood. Historically, if an Indigenous youth was not ready for a full transition to adult obligations, then the family and community provided the needed support until the youth was ready. This practice is in line with the current social and economic conditions in families across

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26 Andrea Mellor, Denise Cloutier & Nick Claxton, "'Youth Will Feel Honoured if They Are Reminded They Are Loved': Supporting Coming of Age for Urban Indigenous Youth in Care" (2021) 16:2 International Journal of Indigenous Health 308 at 315–316.

27 *Ibid* at 316.

28 Dr Hadley Friedland, *Class Discussion* (University of Alberta, Faculty of Law: Indigenous Peoples, Law, Justice and Reconciliation, 2020).

Canada, where youth are not leaving home until much later and do so with the support of their family. In fact, 2019 amendments to family legislation has eliminated age limits of 18 and 22 for adult child support, creating a statutory obligation for separated or divorced parents to provide for support in situations where a young adult is unable by reason of illness, disability, student status, or other cause to "withdraw from his or her parents' charge or to obtain the necessaries of life."[29] We must ask, why should it be any different for youth who have been taken out of the care of their family and community and placed in the care of the government?

III. YOUTH 'AGING OUT' OF CARE IN ALBERTA SINCE 1985

This section will review the history of child welfare in Alberta, including incredible efforts by child advocates to improve supports for youth transitioning to adulthood. After years of gradual improvement to these services, the Alberta government suddenly announced it would reduce supports for affected children.

A. The old regime: Caring for youth when the focus is caseload reduction

Reports advocating for Alberta's vulnerable youth date back decades. Child welfare legislation in Alberta has historically defined a child as any person under the age of 18; however, the social worker in contact with the child often had full discretion as to whether adolescent youth received care or supports beyond the age of 15.[30] Often there was a reluctance to provide care to youth over 15, and when provided, it was typical for support to take the form of assisted independent living supports (financial assistance).[31] A regular approach to adolescent support was to discontinue services for failing to meet very high standards for school and work attendance or documentation of attendance, cleanliness of their living space, or merely personal conflict with their social worker.[32] While the option to extend benefits for up to 2 years beyond the age of 18 did exist, it was seldom exercised and significantly more common for youth to be prematurely removed from benefits instead.[33]

B. Improving care with unreasonable expectations

In the early 2000s, emerging research showed that youth were transitioning to adulthood with adult support well into their 20s.[34] Employment that enabled self-sufficiency required a higher level of education and training beyond a high school diploma, and the cost of living

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29 *Family Law Act,* SA 2003, c F-45, s 46(b) [*Family Law Act*].

30 *Child Welfare Act*, SA 1984, c C-81 [*Child Welfare Act*].

31 OYCA Alberta, *OCYA Annual Report 1997-1998* (Alberta: Office of the Child and Youth Advocate, 1998) at 22.

32 *Ibid* at 23; OYCA Alberta, *OCYA Annual Report 1999-2000* (Alberta: Office of the Child and Youth Advocate, 2000) at 23–26.

33 OYCA Alberta, "OCYA Annual Report 1999-2000", *supra* note 32 at 24–26.

34 See e.g. Richard A Settersten Jr & Barbara Ray, "What's Going on with Young People Today? The Long and Twisting Path to Adulthood" (2010) 20:1 Future of Children 19 at 26–28.

was such that low-wage entry-level work was not sufficient to support living independently.[35] The Office of the Children's Advocate, as it was then known, advocated for improved educational and transitional supports for youth in care.[36] This, and other advocacy efforts, led to a review of the *Child Welfare Act* in which the Ministry of Children's Services acknowledged the increased risk for youth 'aging out' of care for harmful behaviours, substance abuse, minimal education, unemployment, and involvement in crime, sex work, and suicide as compared to their peers who have not been in care.[37] The recommendations that came out of the *Strengthening Families* review specific to youth in care included:

- an emphasis on unique needs of youth;
- separating youth provisions into their own section of the legislation;
- increasing service and support availability to age 22;
- ensuring individual and comprehensive independence planning; and
- enabling lasting connections for youth.[38]

The *Child, Youth, and Family Enhancement Act* came into force in 2004 and incorporated the recommendations of the *Strengthening Families* review regarding youth.[39] Along with the development of new legislation, the government of Alberta increased the age limit for supports to age 22 and established a bursary program for current and former youth in care up to age 24 to pursue education or vocational training.[40]

In 2013, the Office of the Child and Youth Advocate released a special report on youth in transition. Much like the motivation for this article, the OYCA found the report was necessary given that readiness for independence remained an issue continually brought up by youth.[41] The report re-iterated that compliance-based short-term support agreements left youth in a constant state of precarity regarding their ongoing support.[42] These agreements provided a minimum level of support and held youth to standards that most youth who have never been in care cannot achieve. Most youth cannot imagine being evicted and unable to eat if they do not have a clean room, perfect attendance at school, or get perfect grades.[43]

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35 *Ibid*.

36 OYCA Alberta, *OCYA Annual Report 2002-2003* (Alberta: Office of the Child and Youth Advocate, 2003) at 9, 12.

37 *Strengthening Families, Children and Youth: Report and Recommendations from the Child Welfare Act Review, 2002* (Edmonton, Alberta: Alberta Children's Services, 2002) at 22.

38 *Ibid*.

39 *CYFEA*, *supra* note 4; "Strengthening Families", *supra* note 37 at 22.

40 *Alberta Children's Services response to the Children's Advocate annual report / 2002/2003* (Edmonton Alberta: Alberta Children's Services, 2003) at 2.

41 *Where do we go from here? OCYA: Special Report on Youth Aging out of Care* (Alberta: Office of the Child and Youth Advocate, 2013) at 7; An average of 70 youth per year voiced concerns of inadequate support and preparation in transition.

42 *Ibid* at 2.

43 OYCA Alberta, "OCYA Annual Report 1997-1998", *supra* note 31 at 23; OYCA Alberta, "OCYA Annual Report 1999-2000", *supra* note 32 at 16-23.

Overall, the agreements failed to account for the stage of development of people in their youth, generally. Finally, and most crucially, these agreements failed to consider that these particular youths have experienced significant trauma through no fault of their own and likely need more support than their peers who are not in care, not less. Additional concerns included a lack of youth specific training for social workers, and a need for improved awareness of additional community supports, strengthened relationships with supportive adults, and access to mental health care.[44] This report issued five broad recommendations, which the Ministry of Children's Services accepted in full, inclusive of a detailed action plan for each recommendation.[45] Notable actions included a promise to review the support agreements and possibly expand them and to allow youth to stay supported in their foster homes where those homes were willing.[46]

C. The gold standard: Supporting youth transitions

These promises came to fruition in the 2014 Speech from the Throne, when Alberta expanded the age of support for youth 'aging out' to age 24 and guaranteed these supports to any youth who wanted them.[47] The expansion of the age of support was reflective of the factors required for youth independence, and the age at which youth typically become self-sufficient. As discussed above, nearly 60% of Canadians aged 20-24 still live at home, and 97% of parents surveyed report providing financial support to children between the ages of 18 and 35.[48] This means that the typical Canadian youth can make a gradual and supported transition to adulthood that includes making some youthful mistakes, pursuing vocational training, or pursuing personal interests rather than focusing on becoming self-sufficient. Removing the compliance based, discretionary eligibility, and allowing youth 'aging out' of care to access support until age 24, afforded youth a transition experience more in line with their peers who were not in care. This expansion was not offering youth 'aging out' of care an opportunity to take a gap year and travel the world, but merely providing a guaranteed safety net for transition to occur with less risk of harm, exploitation, or impeded advancement.

By increasing the age of support to age 24, Alberta positioned itself as a leader in transition to adulthood.[49] Besides the expanded age limit, the policy for administering the Support and Financial Assistance Agreement (SFAA) was modified to take a significantly more youth centered approach (*fig. 1*). The policy guaranteed support for any youth who wanted it. It removed worker discretion for determining when supervisor approval was needed and

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44 "Where do we go from here?", *supra* note 41.

45 Ministry of Human Services, *Ministry of Human Services' Response to the Office of the Child and Youth Advocate Youth Aging Out Of Care Special Report: "Where Do We Go From Here?"* (Alberta: Government of Alberta, 2013).

46 *Ibid* at 3.

47 Alberta, Legislative Assembly, *Speech from the Throne*, 28th Leg, 2nd Sess, (14 March 2014) at 3.

48 Rutman & Hubberstey, *supra* note 7; "RBC Survey", *supra* note 7; Statistics Canada, *supra* note 7; Stacey Hallman et al, *supra* note 7.

49 Ingrid Mir Iniesta, "Alberta government improving services for youth leaving care", *Calgary Journal* (7 November 2016), online: <https://calgaryjournal.ca/2016/11/07/child-and-youth-advocates- push-for-stronger-support-systems/> [perma.cc/SQ6D-Y6FH].

instead required supervisor or third party approval in cases where a youth was declining services.[50] The policy for negotiating the agreement accounted for the power dynamic between a vulnerable youth and a social work professional, and removed the ability to terminate an agreement for non-compliance.[51] The 2018 policy also left open-ended the resources available to youth and specified that the process is youth-led and may or may not involve financial supports. These changes in the administration of the SFAAs significantly narrowed the gap in transitional support between youth 'aging out' of care and other youth in Canada.

Fig. 1

Comparison of Transitional Supports for Youth 'Aging Out' of Care			
Terms of Support	Governing Policy		
	Child Welfare Act, 198552	CYFEA Policy 201353	CYFEA Policy 201854
Post-intervention support to age	20	22	24
Eligibility	Must be 16 or older, provided at the discretion of the social worker	If the youth wishes to enter into a post-intervention agreement and worker deems support necessary and is of the opinion that other methods for support have been exhausted and are insufficient	If the youth wishes to enter into a post-intervention agreement, the director must enter into the agreement. Supervisor review required if youth does not wish to enter into the agreement.
Negotiation of Agreement	Terms as stipulated by worker; youth voice recommended	Considered an adult-to-adult agreement, with each term negotiated between the youth and the worker	Services provided as well as the 4 Areas of Connection (cultural, relational, physical, and legal) must be discussed as the relationship between the young adult and caseworker is supportive. The young adult may require the support of an advocate (such as a formal advocate from the OCYA, former caregiver, youth worker.)

50 *Enhancement Policy Manual* (Alberta Children's Services, 2018), s 5.2.6.

51 *Ibid*.

52 *Child Welfare Act*, *supra* note 30, ss 8(2), 35(2); *General Regulation*, Alta Reg 38/2002 [*General Regulation*], s 5; *Enhancement Policy Manual* (Alberta Children's Services, 2013), s 5.2.6.

53 *"Enhancement Policy Manual"*, *supra* note 52, s 5.2.6.

54 *"Enhancement Policy Manual"*, *supra* note 50, s 5.2.6.

Length of Agreement	6 months	9 months	6 months
Termination	Either party can terminate services at will	Youth can terminate at will; director can terminate if youth is otherwise receiving support or for non-compliance	Youth can terminate at will; director can terminate if youth and worker agree that support is no longer required.
Review required to terminate?	no	Yes	Yes
Notice required for director to terminate services	None specified	30 days	30 days
Re-entry to program	Not specified in act/ regulation	Yes	Yes

D. The silver standard? Backsliding to save a buck

In October 2019, the UCP announced to a standing committee its intention to reduce the age of transitional supports through SFAAs to age 22.[55] The Minister of Children's Services at the time, Rebecca Shultz, cited as the reason for the rollback in service: a 6% increase in young people accessing the program over the prior year, a natural decline in program usage in young people over age 22, and the existence of adult support programs and the *Advancing Futures Bursary* program as sufficient to meet the needs of these youth in transition.[56]

The increase in overall uptake of the program can likely be attributed to the change in the policy to a more youth centric approach for administering the benefit as noted in *fig. 1*. When youth are guaranteed transitional support, cannot opt out of the program without supervisor approval and are not subject to compliance-based termination, it follows that there will be more users of the service. However, in subsequent legislative sessions, then Minister Schultz relied mainly on the evidence of youth exiting the program voluntarily by age 22, and the existence of alternative supports to replace the SFAA program for these young people. Minister Schultz stated that of approximately 2,200 young people under an SFAA, approximately 500 of those would fall between the age of 22 and 24.[57]

This would suggest that by age 22, around 80% of young people will voluntarily exit the program, while just over 20% remain in need of the supports provided by an SFAA. Increasing the age to 24 involved an extensive process that included consultation with youth, former children in care, the Office of the Child and Youth Advocate, child welfare workers,

55 Alberta, Legislative Assembly, *Standing Committee on Families and Communities (Hansard)*, 30th Leg, 1st Sess, (31 October 2019) at FC-83

56 *Ibid.*

57 *Ibid.*

and child welfare experts.[58] The decision to reduce the age does not appear to have undergone any similar formal process of consultation. The proposed amendment was due to take effect in April 2020 but was stopped by an interlocutory injunction that was later overturned. Despite the reversal of the injunction, Alberta announced in March 2021 that they would not change transitional benefits during 2021 because of the impacts of the COVID-19 pandemic on employment and self-sufficiency plans.[59] This announcement was followed by another in March 2022, with an announcement of a new Transition to Adulthood Program (TAP).

Under TAP, participants still have all financial support terminated at age 22, but are able to continue accessing social and emotional transition supports. The Advancing Futures bursary program has been encompassed by TAP, and it is unclear how the total funding allotment of $48 million for the administration of both programs will be distributed. Overall, this budgets for $9.7 million less than these programs have been allocated in prior years, which is concerning given an uptake in use of the programs.[60] Unlike the SFAA program and the increase in eligibility to age 24, it does not appear that TAP has been developed with any consultation with stakeholder groups, but rather to prevent the charter litigation that is the subject of this article from proceeding.[61] Under TAP there is a maximum financial benefit of $1,810 per month to age 22, where under the SFAA, financial support was needs based. In fact, J.F. who is one of the applicants in the constitutional challenge was receiving $2,500 per month based on her needs, which is significantly more.[62] Overall, the new program lacks transparency in how it will maintain supports for youth transitioning out of care in a time where a record breaking number of youth receiving these supports died while receiving intervention services.[63]

While adult support services do exist for young adults between the age of 22 and 24, the supports provided by an SFAA are not always financial. Additionally, the program aims to have the young person work through transition with the same worker they have known since they came into care or with a worker who understands the unique circumstances of youth who have been in care and need to transition into adulthood. These agreements require review at six-month intervals, and termination needs review by a supervisor. Some of these young people may require lifelong supports provided by other social programs, but others, like A.C. and J.F., may just fall into the 60% of young Canadians between the age of 20 and

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58 *AC and JF v her Majesty the Queen in Right of Alberta*, (Affidavit of John McDermott) [*McDermott Affidavit*] at paras 10–14; Exhibit B; *Transition Framework for Youth with Disabilities: The DTF*, Report of the Advisory Committee on Transitions for Youth with Disabilities (Government of Alberta, 2003) at 1, 18, 19.

59 Andrea Huncar, "Province won't cut benefits for young adults formerly in government care", *CBC News* (12 March 2021) online: <https://www.cbc.ca/news/canada/edmonton/young-adults-sfaa-bene- fits-alberta-1.5946961> [perma.cc/SM4S-75JH].

60 "Alberta promising to reinstate social workers for young adults formerly in government care following cuts", *Edmonton Journal* (7 March 2022) online: <https://edmontonjournal.com/news/politics/alberta-introduces- some-supports-for-young-adults-formerly-in-government-care-following-cuts-last-year> [perma.cc/478F-ZM26].

61 *Ibid*.

62 *AC and JF v her Majesty the Queen in Right of Alberta*, (December 2021), Edmonton 2003-048252020 (Amended Originating Application) [*Amended Originating Application*].

63 OYCA Alberta, *OCYA Annual Report 2021-2022* (Alberta: Office of the Child and Youth Advocate, 2022) at 26.

24 who require support for a gradual transition to adulthood. All of these youth deserve to be properly supported in the transition to the next stage of their life by the guardian responsible for their care.

E. Advancements in Transitional Support

One exciting development is the Agreement in Principle signed in December 2021 by the Assembly of First Nations and the Government of Canada. This agreement arises from the class action settlement brought against Canada for discriminating against Indigenous children in care. While this Agreement has been rejected by the Canadian Human Rights Tribunal due to the settlement portion being insufficient and exclusionary to some affected parties, the long term commitments show recognition of support requirements for youth transitioning to adulthood. Under the long term reform portion of the agreement, child and family services funding will be allocated to support Indigenous youth 'aging out' of care up to the age of 26, or to the age of post-majority services under applicable provincial or territorial legislation.[64] The Agreement is currently being renegotiated to address the concerns of the CHRT, but it highlights important recognition of the standard of care that youth should receive when exiting the child welfare system.

Another sign of progress is the increasing number of Indigenous governing bodies seeking to exercise their inherent jurisdiction over child welfare matters, including drafting of Indigenous child raising laws and taking over the administration of programming. Progress in this area is slow, but gaining traction. With the high numbers of Indigenous children in care, and transitioning out of care after being separated from community and family supports, it is heartening to see the government taking Indigenous law and jurisdiction seriously. However, this process is not without issues. The Louis Bull First Nation in Alberta will be entering into a coordination agreement with Canada to define the delivery of child welfare services for Louis Bull children. The province of Alberta will not be a party to this agreement after Alberta refused to negotiate further with the Nation.

IV. ECONOMIC IMPACT OF SUPPORTING OR NOT SUPPORTING YOUTH IN TRANSITION

The proposed amendments to the *Child, Youth, and Family Enhancement Act* will immediately impact approximately 500 young people. Research involving a detailed cost/benefit analysis of extending the age of support for youth in transition is limited but gaining more attention as we learn about the development of the adolescent brain in the late teens and early 20s.

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64 Government of Canada; Indigenous Services Canada, "Long-term reform of First Nations Child and Family Services and long-term approach for Jordan's Principle", (10 March 2022), online: <https://www.sac-isc.gc.ca/eng/1646942622080/1646942693297#chp5> [perma.cc/E777F-KFV3].

To date, there are several studies from Canada, the US, and Australia that have compared the economic impact of supporting youth through transition to the long-term costs of not providing support.[65]

These reports looked at the economic cost of the difference in rates between former youth in care and those who were never in care for outcomes in:

- Incarceration
- Homelessness
- Educational attainment
- Early pregnancy
- Health, mental health & addictions services
- Adult social programs

Each of these studies predicted a cost savings to making an up-front investment to provide former youth in care with a level of support similar to that received by their peers who had not been in care.

The Ontario study *25 is the New 21* calculated a return of $1.36 for each dollar spent in transition programming. For one youth, the cost of transitional supports to age 25 would total $33,155, while the financial benefit from an increase in tax revenue from lifetime earnings and reduced cost of incarceration and adult social programs would total $43,859.[66]

The BC report *Opportunities in Transition* covered additional cost and benefit factors and cited a higher up front cost at $99,000 per youth to extend support to age 25. However, this report also found that these supports would significantly reduce the cost of adverse outcomes in these youth which are currently estimated at between $222,000 and $268,000 per youth.[67] The adverse outcomes considered in this report included lower rates of educational attainment, employment, and income and higher rates of premature death, homelessness, involvement in

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65 *25 is the New 21: The Costs and Benefits of Providing Extended Care & Maintenance to Ontario Youth in Care Until Age 25* (Ontario, Canada: Office of the Provincial Advocate for Children & Youth, 2012); Marvin Shaffer, Lynell Anderson, & Allison Nelson, *Opportunities in Transition: An Economic Analysis of Investing in Youth Aging out of Foster Care*, Summary Report (SFU School of Public Policy: Fostering Change, Vancouver Foundation, 2016); Thomas Packard et al, "A cost-benefit analysis of transitional services for emancipating foster youth" (2008) 30:11 Children and Youth Services Review 1267; *Cost Avoidance: Bolstering the Economic Case for Investing In Youth Aging Out of Foster Care* (USA: Cutler Consulting, 2009); *Cost Avoidance: The Business Case for Investing in Youth Aging Out of Foster Care* (USA: Jim Casey Youth Opportunities Initiative, 2013); Jim Casey Youth Opportunities Initiative, *Future Savings: The Economic Potential of Successful Transitions From Foster Care to Adulthood* (Baltimore, Maryland: The Annie E. Casey Foundation, 2019); Sunitha Raman, Brett Andrew Inder & Catherine Scipione Forbes, *Investing for success: The economics of supporting young people leaving care* (Sydney, Australia: Centre for Excellence in Child and Family Welfare, 2005).

66 "25 is the New 21", *supra* note 65 at 49.

67 Marvin Shaffer, Lynell Anderson, & Allison Nelson, *supra* note 65 at 2, 5.

the criminal justice system, substance use and abuse, mental health issues, and early pregnancy. This report also found that even without considering the cost savings of adverse outcomes, the additional per household cost of increasing the support age to 24 was approximately $2.75 per month and would not require tax increases.[68]

According to Minister Rebecca Schultz, the cost for Alberta's SFAA program in 2018 was $28 million, which translates to approximately $13,000 per each of the 2,100 youth in the program.[69] Reducing the age to 22 directly impacts only about 500 of these youth, resulting in approximately $6.5 million in estimated savings per year. Even applying Ontario's more conservative estimate, which includes only a difference in lifetime tax revenue and a reduction in the cost of incarceration and delivery of adult social programs, the benefit of investing $13 million to continue support for 500 youth up to age 24, is an estimated net lifetime benefit of about $9 million, or $18,000 per youth. Analyzing these figures, it is difficult to rationalize the short term cost savings when there is an unsettling social cost in addition to the greater financial cost associated with not supporting these youth.

V. BACKGROUND OF A.C. AND J.F. V. ALBERTA

A.C. and J.F brought a joint application before the Alberta Court of Queen's Bench upon learning that the supports they had been receiving under Supported Financial Assistance Agreements (SFAAs) would end earlier than expected. Supports would end for A.C upon their 22nd birthday and for J.F. immediately upon the coming into force of the proposed amendments to the *Child, Youth, and Family Enhancement Act.* Both A.C. and J.F. had prepared transition plans under their respective SFAAs that were designed to prepare them for independence by the age of 24, and both had made significant life decisions with the understanding that this benefit would remain in place.

The original application challenged the validity of the proposed amendments to the *CYFEA* on the basis that these amendments constitute an infringement on the Section 7 and Section 12 *Charter* rights of A.C., J.F, and other young people affected by the change to the *Act.*[70] The pleadings have since been amended to include a claim of infringement on section 15 *Charter* rights as well.[71] According to A.C. and J.F., Alberta owes a fiduciary obligation to continue providing support through these agreements until age 24 for all people currently receiving supports under an SFAA.[72] The application also requested relief in the form of an interlocutory injunction preventing the amendments from taking force and effect until the *Charter* challenge can be heard and decided.[73] LEAF and the BC Civil Liberties Association

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68 *Ibid* at 2.

69 Janet French, "Alberta Benefit Changes Throw Plans by Vulnerable Young Adults Into Disarray," *Edmonton Journal* (4 November 2019), online: <https://edmontonjournal.com/news/politics/alberta-benefit-changes-throw-plans-by-vulnerable-young-adults-into-disarray> [perma.cc/MN5B-32QJ].

70 *AC and JF v her Majesty the Queen in Right of Alberta*, (19 March 2020), Edmonton 2003-048252020 (Originating Application) [*Originating Application*] at 2.

71 *Amended Originating Application*, *supra* note 62.

72 *Originating Application*, *supra* note 70 at 2.

73 *Ibid* at 2–3.

have both applied for intervenor status in the proceedings, which Alberta is opposing. At the time of writing, only the interlocutory injunction had been heard before the courts.[74]

A. Circumstances of A.C. and J.F.

Young people transitioning to adulthood from government care typically come from a background of trauma, abuse, physical and mental health struggles, exposure to substance dependencies, and poverty. A.C. and J.F. are no exception.

i. A.C.

A.C. is a 22-year-old Indigenous single parent who survived a childhood wrought with abuse and poverty.[75] A.C. survived sexual exploitation from a young age, became pregnant at age 15, and eventually lived through substance dependency and suicide attempts while still managing to support her child and herself through sex work.[76] A.C. credits the SFAA program with providing the tools she required to put her life on a more sustainable path to independence.[77] Under this program A.C received one-on-one support from the support worker who had been assigned to her file since she was 11 years old and who A.C. looks to as a significant support in her life.[78] Together, they developed an attainable plan that would see A.C. transitioning to independence gradually, and ultimately become fully independent by age 24.[79] A.C. planned to exit the program at age 24 with her driver's license, employment education, progress toward a post-secondary degree, an alcohol free home, and the emotional and social readiness to provide for herself and her child.[80]

The premature removal of these supports for A.C. would mean losing the support of the worker she has learned to count on for encouragement and counselling. It is likely that A.C. would have to abandon the educational plan she developed and return to sex work to support herself and her child.[81] The emotional impact of returning to work that she expected to be done with would have a traumatic impact on A.C.'s health and wellbeing and could lead to falling back into substance use and suicidal thoughts.[82]

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74 *Interlocutory Injunction Judgment*, *supra* note 2; *Injunction Appeal*, *supra* note 2.

75 While detailed accounts of pain and trauma are useful in the context of providing evidence to a court, I have deliberately chosen not to exploit the personal traumas of these young persons for emotional impact in this article. This choice was made with a deep awareness of just how traumatic and painful a childhood that ends with a youth 'aging out' of care can be, and is not intended to downplay the personal and lived experiences of these young people.

76 *Originating Application*, *supra* note 70 at 3; See also Omar Mosleh, "She survived a childhood of sexual abuse and addiction. Now she's suing the Alberta government to keep the support she says she needs", *The Toronto Star* (14 March 2020), online: <https://www.thestar.com/edmonton/2020/03/14/she-survived-a-childhood-of-sexual-abuse-and-addiction-now-shes-suing-the-alberta-government-to-keep-the-support-she-says-she-needs.html> [perma.cc/WX7J-FEW3].

77 *Interlocutory Injunction Judgment*, *supra* note 2 at 2.

78 *Originating Application*, *supra* note 70 at 8.

79 *Ibid*.

80 *Ibid*.

81 *Ibid* at 9.

82 *Ibid*.

ii. J.F

J.F. was 23 at the time the application was filed. She is an Indigenous single parent to two young children, who survived abuse, trauma, and homelessness before being taken into care with her two children at age 17.[83] J.F. lives with several health issues that affect her ability to become fully independent. From the time that J.F. and her children came into the SFAA program, she was informed that the emotional and financial supports offered to her under the program would be available to support her transition to independence until age 24.[84] J.F.'s supports include continual contact and one-on-one support with her worker. Under the SFAA program, J.F. receives access to more services and funding than would be available under adult government programs. J.F credits the program with pulling her and her children out of homelessness, and she has been able to further her education, get her learner's license and reconnect with family because of these supports.

If J.F. is prematurely removed from the program, she will be stuck in a lease contract for housing that is beyond what she can afford with adult assistance programs or employment.[85] Because J.F. is still very reliant on the emotional and financial supports she receives, removal is likely to leave her and her children homeless and impoverished and is likely to result in her children being removed from her care.[86]

B. Procedural History

i. Injunction Hearing

The first step in this case was to apply for an interlocutory injunction. Constitutional challenges do not move quickly, and with the amendments coming into force before there would be an opportunity to present the case, there was some urgency to stop the implementation of the amendments. A.C. brought the injunction application alone because the COVID-19 pandemic thrust the province into a state of partial shut-down just prior to the hearing and prevented J.F. from presenting evidence.[87] The injunction application sought a stay of the implementation of the amendments to the legislation rather than just an exemption from the legislation for A.C.[88]

The Chamber's Judge granted the injunction after applying the test for injunctive relief as set out in *RJR-Macdonald v. Canada (Attorney General)* and refined in *AUPE v. Alberta* for injunctions that would prevent the implementation of otherwise valid legislation.[89] In applying the *RJR* test, Justice Friesen noted that A.C has a difficult constitutional case to make, particularly with respect to a section 7 infringement.[90] However, the Court found

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83 *Ibid* at 3.
84 *Ibid* at 9.
85 *Ibid* at 11.
86 *Ibid* at 12.
87 *Interlocutory Injunction Judgment*, *supra* note 2 at 3.
88 *Ibid*.
89 *RJR - MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334 [*RJR*]; *AUPE v Alberta*, 2019 ABCA 320 [*AUPE*].
90 *Interlocutory Injunction Judgment*, *supra* note 2 at 21–22.

neither the section 7 nor the section 12 claim to be vexatious or frivolous and the serious potential negative effects on young people did constitute a serious issue to be tried.[91] Justice Friesen found that there would be irreparable social, psychological and financial harm to A.C. and to similarly situated young people.[92] This harm would be irreparable in that it could not be compensated by a future financial judgment in A.C.'s favour.[93] At the balance of convenience stage of the test, after making the presumption set out in *AUPE* that the legislation is constitutional and in the public interest, Justice Friesen relied on *RJR* to find that the benefit of preventing the amendments from taking effect would outweigh the harm. Here, preventing the legislation would mean maintaining a status quo supported by medical and sociological evidence.[94] As there would be no change to the existing SFAA program if the injunction is granted, the harm to Alberta did not outweigh the potential harm to the affected young people if the age reduction was allowed to take effect before the merits of the case can be decided.[95]

ii. Alberta Appeals the Injunction

Alberta subsequently appealed the special chambers decision of Justice Friesen on the grounds that she applied the threshold test incorrectly in deciding whether there was a serious issue to be tried, and in the treatment of the presumption that legislation is constitutional in the balance of convenience stage of the test.[96] A.C simultaneously applied for leave to argue for the *AUPE* decision to be reconsidered as it incorrectly created a more stringent test when an injunction is sought to prevent legislation from being implemented.[97] The key issue to be clarified from *AUPE* on appeal was whether the strong presumption that legislation is constitutional modified the test from *RJR* when determining whether to grant injunctive relief in a case challenging the constitutionality of legislation.[98] Here, the Court of Appeal found that a presumption of constitutionality was not supported at any stage of the test for injunctive relief and is a question that had been considered and dismissed by the Supreme Court in *Manitoba (AG) v Metropolitan Stores Ltd.*[99] In the lower court decision, Justice Friesen had applied the third branch of the test with the presumption of constitutionality from *AUPE*. Thus, the appeal would proceed on the issue of whether she had erred in law in granting the injunction.

a. Injunction Reversal

In reapplying the tripartite test from *RJR*, part two of the test, the question of irreparable harm, was not at issue. With respect to the first stage of the test, the Court of Appeal noted that whether the constitutional claim will be successful could require an expansion of section

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91 *Ibid* at 23.
92 *Ibid* at 24.
93 *Ibid*.
94 *Ibid* at 25.
95 *Ibid*.
96 *Reconsideration Decision*, *supra* note 2 at para 4.
97 *Ibid*.
98 *Injunction Appeal*, *supra* note 2 at para 35.
99 *Ibid*; *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 [*Metropolitan Stores*].

7 to include positive rights, but that this does not mean the claim could not succeed.[100] The Court found that there was a serious issue to be tried based on the preliminary analysis of the section 7 claim and declined to comment on the merits of the section 12 claim or whether there was a breach of fiduciary duty.

The injunction was reversed at the third stage of the test. The Court of Appeal found that the chamber's Justice had not given proper weight to the presumed public interest of otherwise valid legislation.[101] In *Metropolitan Stores*, the Court noted that legislation serves an important purpose for the public and its important sectors such that deprivation of the protection and advantages of that legislation should not occur without giving the public interest of the legislation the weight it deserves.[102] In the earlier decision, Justice Friesen had not fully considered the public interest beyond the limited information provided by Alberta, and instead looked to the well supported evidence she had before her about the previous government's policy. The Court of Appeal stated that relying on previous policy decisions would "hamstring the government from making any changes to policy" that might negatively affect any part of the population.[103]

The Court of Appeal further noted that the chambers judge failed to consider that other support programs would meet or exceed the supports available to A.C. under the SFAA program.[104] Finally, the Court determined that the likelihood that the case would succeed, and the nature and extent of the irreparable harm, needed to be considered in the balance of convenience portion of the test and was not.[105] On these points, the Court of Appeal found the barriers to the success of the case too insurmountable such that it could not be termed the "clearest of cases." Moreover, it found that the alternative supports mitigated the harm to A.C. and other young people substantially enough that the balance of convenience did not favour A.C.[106]

iii. Leave to Appeal to the Supreme Court of Canada

On March 25, 2021, A.C. filed for leave to appeal the injunction decision to the Supreme Court of Canada.[107] A.C. argued in their application for leave, that the jurisprudence in applying the third stage of the *RJR* test for injunctive relief is lacking clarity which has led to differing outcomes between courts and jurisdictions. In particular, the application sought clarification on whether a party must demonstrate a strong likelihood of success to meet the "clear case" threshold, and whether a Judge is required to consider public interest factors outside of the evidence led. The issue of injunctive relief has been an issue before the Supreme court on several other occasions, and ultimately the questions at issue in this case were not

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100 *Injunction Appeal*, *supra* note 2 at para 52.
101 *Ibid* at para 64.
102 *Metropolitan Stores*, *supra* note 99 at para 57.
103 *Injunction Appeal*, *supra* note 2 at para 65.
104 *Ibid* at para 66.
105 *Ibid* at paras 67–69.
106 *Ibid* at paras 69–70.
107 *AC and JF v her Majesty the Queen in Right of Alberta*, (25 March 2021), Supreme Court of Canada 39551 (Memorandum of Argument for Leave to Appeal) [*Leave to Appeal*].

enough to warrant further intervention. Leave to Appeal was dismissed, and the Court of Appeal decision stands. The affected youth in Alberta remained in a state of precarity until March 2022, when TAP was announced.

iv. Will A.C. and J.F. Proceed in the face of TAP

After taking some time to review the new services provided with TAP, the plaintiffs decided to proceed with the litigation in June 2022. The assessment by counsel for the plaintiffs was that TAP provides supports, both financial and emotional, only on a conditional basis. While public information on the program is limited, many youth, including A.C., are claiming difficulties in qualifying for TAP since the program was rolled out in April 2022. At the date of writing, the matter has not yet been heard.

VI. MERITS OF CONSTITUTIONAL CLAIMS AND THE RIGHTS OF YOUTH IN TRANSITION

While the constitutional claims in *A.C. and J.F. v. Alberta* have yet to be heard by the courts, both the Chambers Judge and the Court of Appeal carried out a preliminary assessment of the merits of the claims during the injunction decisions. The Chambers Judge noted that A.C. and J.F. would have an "upward battle" in proving their claim while the Court of Appeal mentioned that an expansion of the existing jurisprudence would be required for the claim to succeed.[108] Both courts noted that these difficulties did not mean that the case could not succeed.

The claims made in the originating application and the amended originating application are that the policy change to terminate SFAA agreements at age 22 rather than age 24 is an infringement on the section 7 right to life, liberty and security of the person, an infringement on section 12 right to be free from cruel and unusual treatment, and an infringement on the section 15 right to equal treatment. This section will evaluate the claims made by A.C and J.F.

A. Section 7: Life & Security of the Person

To show a violation of section 7 of the *Charter*, there must be infringement on the right to life, liberty, and security of the person; and the infringement must not accord with the principles of fundamental justice.[109]

The issue here is whether Alberta's decision to terminate the SFAA program two years earlier would constitute "state action" in the context of a section 7 infringement. Here, A.C. and J.F. entered into an agreement that could be terminated with notice by either party, so the right to access the SFAA program until age 24 may require proving some level of fiduciary duty by the government to continue support.

Positive rights with respect to social benefits have been a point of contention at the Supreme Court level in the past. In *Gosselin v. Quebec (Attorney General),* the door was left

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108 *Injunction Appeal*, *supra* note 2 at paras 43, 52.

109 *Canadian Charter of Rights and Freedoms,* s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *R v CP*, 2021 SCC 19 [*R v CP*] at para 125.

open for positive rights that "sustain life, liberty or security of the person" under "special circumstances."[110] However, the court ultimately ruled against a positive right to access sufficient social supports, due to insufficient evidence.[111] Importantly, this case was a very close decision (a 5/4 split) even at the time it was decided nearly two decades ago. The supporting research and transition to adulthood patterns since *Gosselin* show that young people are now relying on support well into their 20s to successfully transition to independence. Further, positive rights have been recognized in other contexts, and particularly with respect to children. In *G.(J.)* the SCC recognized a limited positive right to state funded counsel where a child and parents right to security of the person are engaged through the apprehension of that child and the principles of fundamental justice demand state funded counsel for a fair hearing.[112]

i. Is the right to life, liberty, or security of the person engaged?

While there is no free-standing right to government support or assistance currently, A.C., J.F., and other young people receive more than merely financial support through the SFAA program. To be eligible for the SFAA or TAP program, youth must have been the subject of state action taking them into government care. This is an action that children are powerless against. Transitional support programs like SFAA and TAP are developed for the purpose of supporting a transition out of care to adulthood. SFAA in particular was a needs-based program which provided wrap-around style supports specific to the needs of each youth. Removal of these supports prematurely engages the right to life, liberty and security of the person.

The link between death by suicide and time in government care is supported in the reports by child advocacy groups across Canada.[113] Suicide is the second leading cause of death in youth under 24.[114] In Alberta, we lose 11 youth each year to suicide, which is among the highest rates of youth suicide in Canada.[115] Indigenous youth are over six times more likely to die of suicide than non-Indigenous youth.[116] The risk factors associated with suicide are well aligned with the experiences of young people in care who are more likely to have experienced abuse and trauma, suffer from a mental disorder, disability, or substance dependency, live in poverty, be involved in the criminal justice system, etc. It is no surprise then, that youth who have lived in care are three times more likely to commit suicide than youth

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110 *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 83 [*Gosselin*].

111 *Ibid* at para 5.

112 *New Brunswick (Minister of Health and Community Services), v G(J)*, [1999] 3 SCR 46 [*G(J)*] at para 107.

113 Manitoba Advocate for Children and Youth, *"Stop Giving Me a Number and Start Giving Me a Person": How 22 Girls Illuminate the Cracks in the Manitoba Youth Mental Health and Addiction System* (Manitoba: The Manitoba Advocate for Children and Youth Office, 2020); Manitoba Advocate for Children and Youth, *Finding the Way Back: An aggregate investigation of 45 boys who died by suicide or homicide in Manitoba* (Manitoba: The Manitoba Advocate for Children and Youth Office, 2021); OYCA Alberta, *Toward a Better Tomorrow: Addressing the Challenge of Aboriginal Youth Suicide* (Alberta: Office of the Child and Youth Advocate, 2016).

114 *Ministry of Children's Services, Building Strength, Inspiring Hope: a provincial action plan for youth suicide prevention 2019 - 2024* (Alberta: Government of Alberta, 2019) at 3.

115 *Ibid*.

116 *Ibid*.

who have not lived in care.[117] Past suicide attempts are also an indicator of risk for future attempts because 37% of people who attempt suicide once will attempt it again. Nearly 7% of those people will eventually die of suicide.[118]

When state action results in an increased risk of death, either directly or indirectly, the right to life has been infringed.[119] This standard is flexible, meaning that if A.C. and/or J.F.'s life becomes imperilled, and this can be linked to the state action by reasonable inference that the state action contributed, the standard is met.[120] Security of the person is engaged by any state action that causes physical or serious and profound psychological suffering.[121] The SFAA program is a unique program that provides support that is not available through other social programs. There are other financial supports available, but the supports provided by the SFAA program are not always financial in nature and are provided based on the needs of the recipient. Prematurely terminating the primary support network of 500 young people will have long term effects that must be considered. With respect to A.C., she is concerned that the removal of support will mean she must return to sex work. Additionally, she fears that termination of support will lead to severe anxiety about how to support herself and her child as well as depression and possible death from suicide. For J.F., the removal or reduction of supports puts her at increased risk of eviction and homelessness, and removes the non-financial supports which keep her and her children safe while she works one-on-one with a worker on her plan to transition off the program. The risk of continuing the cycle of apprehension with A.C. and J.F's own children must also not be ignored, given that this has been found in *G.(J.)* to engage section 7 rights.

Given A.C.'s history of suicide attempts, being left with no option but to return to sex work, both A.C. and J.F.'s ongoing mental health struggles, and J.F.'s risk of homelessness, the premature removal of a primary support system, and the potential of having their own children removed from their care is will certainly lead to serious psychological harm beyond typical stress and anxiety, and may even pose a risk to their lives. This can clearly be linked to state action, which engages section 7 rights.

ii. Does removing or reducing supports accord with the principles of fundamental justice.

Youth who face 'aging out' of care come from a background of trauma and uncertainty. The government assumes the role of caring for children brought into care, and often in doing so, statutorily terminates guardianship of any other existing guardians.[122] The termination of guardianship is only typical in the child welfare context. In private family law, it is very

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117 Rhiannon Evans et al, "Comparison of suicidal ideation, suicide attempt and suicide in children and young people in care and non-care populations: Systematic review and meta-analysis of prevalence" (2017) 82 Children and Youth Services Review 122 at 123.

118 Isabel Parra-Uribe et al, "Risk of re-attempts and suicide death after a suicide attempt: A survival analysis" (2017) 17:1 BMC Psychiatry 163 at 163.

119 *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 62 [*Carter*].

120 *Canada v Bedford*, 2013 SCC 72 at paras 74–78 [*Bedford*].

121 *G(J)*, *supra* note 112 at para 60.

122 *CYFEA*, *supra* note 4, s 11(1).

difficult to show that it is in the best interests of a child to have a guardian removed as any issues related to access and decision making can be resolved through a parenting order. However, upon government apprehension of a child and the granting of a permanent guardianship order under the *Child, youth and family enhancement Act*, all other guardians are terminated automatically and without recourse.[123] The government takes on the sole obligation to the child and becomes responsible for providing all the care and support that is normally expected of parents. To actively remove the role of existing guardians and then argue that the government is no longer responsible for the child at age 18, and that any support agreement entered into beyond age 18 can be terminated by either party, shows outdated and detached thinking about how children successfully transition to adulthood.

Additionally, the unilateral termination of support for children is not supported by other Canadian family law statutes. Under the federal *Divorce Act* and the *Family Law Act* in Alberta, children are entitled to support from their parents for as long as they are unable to withdraw from their parents' charge.[124] The unique and imbalanced relationship between the government and children in care deserves due weight when considering whether it is time to move towards a positive right to social assistance in the context of the government providing for children that it assumes responsibility for until they are able to withdraw from its charge. It is this unique relationship that does not permit termination of life sustaining supports to accord with the principles of fundamental justice.

B. Section 12: Cruel & Unusual Treatment

A.C. and J.F. also state that refusal to exempt current program participants is cruel and unusual treatment under section 12 of the *Charter*. Cruel and unusual treatment is not usually considered in the civil context and, as a result, may be more available for expansion than section 7 jurisprudence. However, the threshold for establishing a breach of section 12 is high, particularly where a law is designed to meet a "worthy social goal."[125] A.C. and J.F. must first show that the state action constitutes "treatment" under section 12, then demonstrate that the treatment in question is so excessive as to outrage the standards of decency.[126] For state action to be considered treatment, it must involve active exercise of state control over the individual whether it be positive action, inaction, or prohibition.[127] Secondly, the court will ask whether the treatment is cruel and unusual.

In *Canadian Doctors for Refugee Care v. Canada (Attorney General).* the court found that the government had intentionally targeted a vulnerable, poor, and disadvantaged group constituted "treatment" for the purpose of section 12 when it reduced the health care coverage for refugees to Canada. [128] In that case, many of the recipients were statutorily barred from

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123 *Ibid*.

124 *Divorce Act*, RSC 1985, c 3 (2nd Supp) [*Divorce Act*], s 2(1); *Family Law Act*, *supra* note 29, s 46(b).

125 *McNeill v Ontario (Ministry of Solicitor General and Correctional Services)*, [1998] OJ No 2288 (QL), 53 CRR (2d) 294 [*McNeill v. Ontario (Ministry of Solicitor General and Correctional Services)*] at para 24.

126 *Interlocutory Injunction Judgment*, *supra* note 2 at 19.

127 *Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519 at paras 67, 182 [*Rodriguez*].

128 *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 at para 587 [*Refugee Care*].

earning employment income, and were entirely dependent on the government for these benefits. This was found to constitute "active exercise of state control over the individual."[129]

In determining whether a treatment is cruel and unusual the court will look to several factors including:

- Does the treatment go beyond what is necessary to achieve the objective?
- Are there adequate alternatives?
- Is the treatment arbitrary?
- Does it have a valuable social purpose?
- Is the treatment unacceptable to a large portion of the population?
- Does it shock the general conscience?
- Is it degrading to human dignity and worth?[130]

i. Is the removal or reduction of supports "Treatment"?

Because of the contractual nature of the agreement between A.C. and J.F. and Alberta that allows for termination upon notice, treatment will require A.C. and J.F. to demonstrate that the relationship between children in care and government is unique. Through this relationship of child dependency on the government for adequate care and support, A.C. and J.F. may be able to show that even beyond age 18, there is an element of state control over young people in state decisions that alter or remove these supports arbitrarily. Protection of the needs and best interests of children is codified in both international conventions, to which Canada is a signatory, and woven throughout Canadian law.[131] Part of this codification is in the authority of the state to exercise *parens patriae* jurisdiction where necessary to protect the best interests of the child, and permits the termination of all natural guardians of the child by statute. In *Baker*, the SCC recognized that the needs of children should be given substantial weight as "central humanitarian and compassionate values."[132]

In the case of youth transitioning from care, these are not children under the *CYFEA*, as children under that act cease to be children upon reaching the age of majority. All supports provided after the age of majority are provided by agreement, which either party can terminate at will. Youth are dependent on the government for support up until they reach the age of majority, and most at this stage will not have any other transition support available to them than supports through SFAA or TAP. This relationship of dependence, established by state action of taking on the guardianship obligation to a child should constitute treatment for the purposes of section 12.

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129 *Ibid* at paras 608–610.

130 *R v Smith*, [1987] ACS no 36, [1987] SCJ No 36 (QL) at para 44 [*R v Smith*].

131 *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [*UNCRC*], art 6(2); *Family Law Act*, *supra* note 29; *Divorce Act*, *supra* note 125; *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 [*CYFEA*]; *ARFNIM*, *supra* note 1.

132 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 39 (QL), [1999] SCJ No 39 (QL) at paras 67, 70 [*Baker*].

ii. Is the treatment "Cruel and Unusual"

The objective of the reduction or removal of supports under the SFAA is to reduce costs of social spending. While this will be reviewed more fulsomely under section 1 analysis, on its face, the treatment does not go beyond what is necessary, and in fact does not appear to achieve the objective at all. As shown in earlier sections, the overall costs of reducing supports to this vulnerable population outweigh any short-term cost savings.

While there are alternative supports available for people over the age of majority, these are not a suitable alternative to the supports available under the SFA. The wrap around, needs based, recipient specific supports were unique to this program. The program was developed in response to lengthy consultations and studies that showed everyone benefits when youth are supported, and that youth 'aging out' of care often require additional support as compared to their peers who have not been in care. Alberta argues that the alternative benefits will fill any gap created by the change from the SFAA program to the TAP program, however, the new program remains deficient. Following the reasoning in *Refugee Care,* the extreme economic deprivation of youth transitioning from care, places self sufficiency upon 'aging out' beyond the reach of most youth.[133]

While legislators are afforded deference in decisions about the distribution of scarce social resources, the age limit of 22 is arbitrary and does not follow the treatment of youth the same age in the majority of the population. Looking again to other Canadian family law statutes, children are entitled to support from their parents for as long as they are unable to withdraw from their parents' charge.[134] For children not entitled to child support, the available data shows that parents are willing and do continue to support their children well beyond the age of majority based on their needs.[135] Again looking to the reasoning in *Refugee Care*, placing youth who are entirely dependent on the government as their guardian "in a position where they must beg" for life sustaining supports is demeaning. "It sends the message that their lives are worth less than the lives of others. It is cruel and unusual treatment that violates section 12 of the Charter."[136]

The decision in the *Refugee Cares* case turned on the intentional targeting of the disadvantaged group, so A.C. and J.F.'s success on a section 12 claim may depend on ability to frame the SFAA cuts as one that intentionally targeted youth 'aging out' of care, a group that is demonstrably vulnerable, poor and disadvantaged. They may also need to demonstrate that the result of this reduction in services was the predictable and preventable physical and psychological suffering of youth transitioning out of government care.[137]

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133 *Refugee Care*, *supra* note 128 at para 675.

134 *Divorce Act*, *supra* note 124, s 2(1); *Family Law Act*, *supra* note 29, s 46(b).

135 "RBC Survey", *supra* note 7; Statistics Canada, *supra* note 7; Rutman & Hubberstey, *supra* note 7.

136 *Refugee Care*, *supra* note 128 at para 688.

137 *Ibid* at para 587.

C. Section 15: Equality

Section 15 of the charter protects against discrimination. For a government policy to infringe on section 15, it must, on its face or in its impact, create a distinction based on an enumerated or analogous ground; and it must impose a burden or deny a benefit in a manner that perpetuates a disadvantage.[138]

The enumerated grounds under section 15 include: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[139] Factors identified by the Supreme Court of Canada that should be considered when determining whether a ground is analogous include:

- Whether a link can be shown between the ground and historical stereotyping, prejudice or disadvantage.[140]
- Whether the group claiming discrimination can be considered a "discrete and insular minority…lacking in political power or influence";[141]
- The immutability of the characteristic, meaning the characteristic is beyond an individual's control or is "changeable only at unacceptable personal cost";[142] and
- Whether the characteristic is recognized as a prohibited ground of discrimination under federal or provincial human rights laws.[143]

i. Family status as an analogous ground

When we look at whether the proposed change to the SFAA program is discriminatory under section 15, the enumerated grounds of age and race appear immediately applicable. The intersectional element between age, race, and family status cannot be ignored when considering the potential for this proposed legislation to be discriminatory. These are youth, who are mainly Indigenous youth, have been stripped of all natural guardians and taken into the care of the government. When these grounds are taken together, we have a group of people, the majority of whom have been the object of historical disadvantage or prejudice, and who will be further disadvantaged by a policy that applies to them only because of their age and their family status. This intersectional element shows a clear link between the historical disadvantage and family status. Further, youth 'aging out' of government care

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138 *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27 [*Fraser v Canada (Attorney General)*].

139 *Canadian Charter of Rights and Freedoms,* s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

140 *Miron v Trudel*, [1995] 2 SCR 418 (124 DLR (4th) 693) [*Miron v. Trudel*] at para 158; *Egan v Canada*, [1995] 2 SCR 513 (124 DLR (4th) 609) [*Egan*] at 554; *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 (176 DLR (4th) 513) [*Delisle*] at para 44; *Baier v Alberta*, [2007] 2 SCR 673 (283 DLR (4th) 1) [*Baier*] at para 65.

141 *Andrews v Law Society of British Columbia,* 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at 152 [*Andrews v. Law Society of British Columbia*]; *R v Turpin*, [1989] 1 SCR 1296 (Supreme Court of Canada) at 1333 [*R. v. Turpin*]; L'Heureux-Dubé J Concurring in Miron v Trudel, supra note 140 at para XIII."

142 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 (Supreme Court of Canada) at paras 13, 60 [*Corbiere*]; *Miron v Trudel*, *supra* note 140 at para 148.

143 *Corbiere*, *supra* note 142 at para 60; *Miron v Trudel*, *supra* note 140 at para 148.

are a clear minority, with limited resources or supports to influence policy in their favor. Youth in care possess this family status through no fault of their own, and given that the decision to apprehend occurs before the age of majority, family status is not a characteristic that the youth has any ability to change. In addition, family status is already protected under human rights legislation, though the SCC recently had an opportunity to recognize family status as an analogous ground protected under the *Charter* and stopped short of doing so.[144] Family status has been recognized as an analogous ground under section 15(1) in lower courts, with respect to age limits for child support in Alberta's *Family Law Act*, infants of incarcerated mothers, and in dissenting reasons with respect to the tax consequences of child support.[145]

The discrimination element with respect to age and family status becomes even more apparent and significant when the proposed amendments to the SFA's are viewed alongside the contemporaneous amendments to the Alberta *Family Law Act*, which eliminated age limits of 18 and 22 for adult child support where a young adult is unable by reason of illness, disability, student status, or other cause to "withdraw from his or her parents' charge or to obtain the necessaries of life."[146] The *Family Law Act* is a piece of legislation that applies to families who are not subject to the *Divorce Act*, which means it applies primarily to families with unmarried parents. Under the *Divorce Act,* there is no upper age limit that disentitles a child from parental support, but rather the definition of a "child of the marriage" allows for support for any child unable to withdraw from the care of their parents. Following a successful *Charter* challenge in Ontario, which was the only other province to impose an upper age limit on child support for children of unmarried parents, Alberta amended the *Family Law Act.*[147] In essence, the government of Alberta agreed following the outcome in *Coates*, that it was discriminatory for children of unmarried parents to be disentitled from parental support at age 22. In spite of this, the year after that amendment came into force, Albert has determined that children under the sole care of the government should no longer require financial support beyond age 22.

While the Supreme Court of Canada in *Fraser* declined to recognize family status as an analogous ground on the basis that the enumerated ground of sex was sufficient to grant relief in that case, the door was left open for the possibility of recognizing family status as an analogous ground subject to protection under the *Charter.*[148] Here, the reduction in support for youth in transition creates a distinction primarily on the basis of family status. Age and race are important intersecting factors, but the main reason these youth will receive less support for a shorter time period than their peers, is because the government was their guardian as a child.

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144 *Fraser v Canada (Attorney General)*, *supra* note 138 at para 123.

145 *Ryan v Pitchers*, 2019 ABQB 19 at para 25 [*Ryan v Pitchers*]; *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at para 567 [*Inglis v British Columbia (Minister of Public Safety)*]; *Thibaudeau v Canada*, [1995] 2 SCR 627 at 644–646, 722–723 [*Thibaudeau v Canada*].

146 *Family Law Act*, *supra* note 29, s 46(b).

147 *Coates v Watson*, 2017 ONCJ 454 [*Coates v. Watson*].

148 *Fraser v Canada (Attorney General)*, *supra* note 138 at para 27.

ii. Reducing support for youth in transition perpetuates historical disadvantage

To infringe upon section 15 rights, the distinction created by the change to SFAA support policies must reinforce, perpetuate or exacerbate disadvantage for youth transitioning to adulthood from government care. Youth who have been in care are at increased risk of adverse outcomes such as lower rates of educational attainment, employment, and income, and higher rates of premature death, homelessness, involvement in the criminal justice system, substance use and abuse, mental health issues, and early pregnancy as compared to youth who have never been in care.[149] Further, these youth are disproportionately Indigenous. The overrepresentation of Indigenous children in care, and the intergenerational trauma caused by the removal of children from their homes, families and communities has been recognized by the Truth and Reconciliation Commission, and by the Canadian Human Rights Tribunal.[150] Indigenous youth are particularly vulnerable to abuse, mental disorders, substance use, exposure to criminal activity, and suicide.[151] Youth going through the 'aging out' process likely need more support than their peers who are not in care, not less.[152]

A change to SFAA supports that does not sufficiently address the increased vulnerability of youth transitioning out of government care perpetuates the historical disadvantages for all youth, but in particular for Indigenous youth.

For A.C. and J.F., and many other young women like them, this discrimination leaves them disproportionately vulnerable, given that Indigenous women 'aging out' of care face a greater risk of violence, becoming "street-engaged", or death.[153] All of these vulnerabilities place them, as young mothers, at risk of having their own children apprehended, thus perpetuating the cycle of child removal. The effects of a reduction in support are disproportionately severe and reinforce, exacerbate, and perpetuate these pre-existing disadvantages.

D. Is it saved by section 1?

Section 1 provides for limits on *Charter* rights, where the state can show that an infringement is "demonstrably justified in a free and democratic society."[154] This justification requires a two-part test. First, the objective of the policy or provisions in question must relate to a pressing and substantial concern. Second, the discriminatory measure must be proportional to the objective.[155]

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149 Marvin Shaffer, Lynell Anderson, & Allison Nelson, *supra* note 65 at 2, 5.

150 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada.* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 104; *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 [*FN Caring Society childrens case*].

151 "Building strength, inspiring hope", *supra* note 115 at 3.

152 Rutman & Hubberstey, *supra* note 7.

153 National Inquiry into Missing & Murdered Indigenous Women and Girls, *Reclaiming Power and Place*, The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a (Vancouver: Privy Council Office, 2019) at 297–298.

154 *Charter*, *supra* note 109, s 1.

155 *R v Oakes*, [1986] 1 SCR 103 [*R v Oakes*] at paras 68–71.

A pressing and substantial objective must be "of sufficient importance" and not "trivial."[156] Deference to legislators is appropriate in determining whether the infringing measure is directed towards a pressing and substantial objective. [157] The proportionality branch of the test, asks whether the provision is rationally connected to the objective, whether the provision is minimally impairing to those impacted, and whether the deleterious effects are proportionate to the objectives of the law. If an impugned provision fails at any step of the test, the infringement is not justified.

On its face, the changes to the SFAA do not appear unobjectionable. The objective is to reduce public spending, which is a beneficial objective of more than trivial importance. It must be noted that at this stage of the analysis, there is a presumption that legislators are in the best position to craft laws that take into account a variety of considerations, in particular with respect to the distribution of scarce public resources. Little evidence is required at this stage, and any conflicting evidence is most appropriately dealt with in the proportionality steps of the test. A reduction to benefits of SFAA recipients is rationally connected to the objective of reducing spending.

Minimal impairment is a more arguable step of the test. Alberta has expressed the position that there are other social supports available to these youth that can serve to minimize the negative impact of a reduction to the more fulsome SFAA supports. However, these youth are particularly vulnerable, and where they were accessing services up to the age of 24, are likely in need of more support than was even available under the SFAA program.

Where this change may fail, is when the deleterious effects of the change are compared to the objective. The deleterious effects are quite severe. As this article has shown, youth transitioning out of care are particularly vulnerable, and at increased risk for adverse outcomes. The government assumes guardianship of these children when it apprehends or otherwise takes them into care, which comes with a corresponding obligation to provide support that has historically not been met. The personal cost to the youth directly impacted is very high, and the social cost for the increase in adverse outcomes, including the risk and costs of apprehension of the children of these youth, cannot be fully accounted for. The sole benefit to Alberta in depriving youth of necessary supports is a $15 million per year savings. Studies have shown that such a saving may be outweighed by a loss in tax revenue, an increase in costs for social supports, incarceration, further child welfare involvement, or criminal activity. Even where youth can access other supports, these are financial only and do not involve the same wrap-around care that youth receive under the SFAA program. Further, they may not be eligible for funding under adult programming at all. The deleterious effects of any reduction in support to youth transitioning out of care will not be outweighed by a short term cost savings. The impugned provisions may not withstand the proportionality branch of a section 1 analysis.

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156 *Ibid* at para 69; *Sauvé v Canada*, 2002 SCC 68 at para 20 [*Sauvé v Canada*].

157 *Andrews v Law Society of British Columbia, supra* note 141.

CONCLUSION

Alberta's history of supporting youth as they transition to adulthood is dismal with a brief bright(er) spot from 2014 to 2019 where the government engaged with youth, academics, and youth advocates to reform the *Child, Youth, and Family Enhancement Act* and corresponding policy to better support youth through their transition to adulthood. The announcement in 2019 to roll back supports to force youth to 'age out' of their transition years by age 22 came as a shock to young people like A.C. and J.F. who had developed a transition plan that included support to age 24. At the time that this change was announced, A.C. and J.F. were fully dependent on government support, and faced being placed in a dangerous position if supports were terminated. While the TAP program was rolled out to avoid the *Charter* litigation brought by these two young adults, it lacks transparency and appears to be deficient in ensuring that youth are properly supported when transitioning out of government care.

The constitutional questions raised by A.C. and J.F. have yet to be determined by the courts, but this may be a suitable case for a determination on positive section 7 rights to social supports following the 5/4 split decision 20 years ago in *Gosselin.* Further, this may be an opportunity for the courts to expand upon cruel and unusual treatment under section 12 in the civil context.

The section 15 analysis allows for the most forward-looking possible outcomes. This article asked the question of whether young people 'aging out' of care are entitled to a level of support that matches that of their peers who have never been in care, and whether the government must provide that support. This article has shown that there are significant economic disadvantages in failing to support youth transitioning out of care. These youth are a vulnerable population with an increased risk of adverse outcomes such as lower rates of educational attainment, employment, and income, and higher rates of premature death, homelessness, involvement in the criminal justice system, substance use and abuse, mental health issues, and early pregnancy as compared to youth who have never been in care.[158] Further, these youth are disproportionately Indigenous. The overrepresentation of Indigenous children in care, and the intergenerational trauma caused by the removal of children from their homes, families and communities has been recognized by the Truth and Reconciliation Commission, and by the Canadian Human Rights Tribunal.[159] Indigenous youth are particularly vulnerable to abuse, mental disorders, substance abuse, exposure to criminal activity, and suicide.[160]

All of these adverse outcomes have significant social and economic costs associated, that appear to exceed the financial costs of preventing adverse outcomes through the provision of adequate support. It is difficult to justify such significant risk of harm to such a vulnerable population for a relatively small short term economic benefit.

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158 Marvin Shaffer, Lynell Anderson, & Allison Nelson, *supra* note 65 at 2, 5.

159 Truth and Reconciliation Commission of Canada, *supra* note 150 at 104; *FN Caring Society Childrens Case, supra* note 150.

160 "Building strength, inspiring hope", *supra* note 115 at 3.

In spite of Alberta's dismal history of supporting youth transitioning out of care, there have been some exciting developments in this area, particularly with respect to Indigenous youth. The Agreement in Principle will provide for supported transition up to the age of 26, and jurisprudence and legislation are beginning to recognize Indigenous laws as more communities exercise jurisdiction and engage in law revitalization processes with respect to child welfare.

The bottom line is that children do not put themselves into government care. They end up in care through no fault of their own, and face barriers in transition that are both resource related, and experience related. Youth going through the 'aging out' process likely need more support than their peers who are not in care, not less.[161] Ultimately supporting these youth with wrap-around, needs-based services makes sense from a moral standpoint, a legal standpoint, and a policy standpoint.

161 Rutman & Hubberstey, *supra* note 7.