

COURT OF APPEAL OF ALBERTA

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APPLICANT: A.C. and J.F.
STATUS ON APPEAL: RESPONDENTS
RESPONDENT: HER MAJESTY THE QUEEN
IN RIGHT OF ALBERTA
STATUS ON APPEAL: APPELLANT
APPLICANT: BRITISH COLUMBIA CIVIL
LIBERTIES ASSOCIATION
STATUS ON APPEAL: INTERVENOR
DOCUMENT: **FACTUM**



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

**FACTUM OF THE INTERVENOR,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

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PARTS 1, 2 and 3 – FACTS, GROUNDS OF APPEAL AND STANDARD OF REVIEW

1. This Factum is submitted on behalf of the Intervenor, the British Columbia Civil Liberties Association (“BCCLA”). The BCCLA’s application for leave to intervene in this appeal was granted on certain conditions by the Hon. Madam Justice Pentelchuk on September 4, 2020. By the terms of that decision, the BCCLA was granted leave to file a Factum of up to 8 pages respecting the following issue: “Building on *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, if the Respondents’ section 7 claim is a ‘positive rights’ claim, there is a serious issue to be tried with respect to that claim.”

2. The BCCLA has not been granted leave to present submissions respecting points of fact, the grounds of appeal, or the standard of review, and defers to the factual submissions of the parties on those subjects.

3. The following facts are of significance to the submissions presented in this Factum. The Appellant provides emotional and financial supports to children raised in government care as they transition to adulthood through the Support Financial Assistance Program (“SFA Program”). The Respondents, who are participants in this program, challenged the constitutionality of amendments to the *Child, Youth and Family Enhancement Act*¹ and the *Child, Youth and Family Enhancement Regulation*,² which reduced the maximum age of eligibility for the SFA program. They argued that the amendments violated their rights under ss. 7 and 12 of the *Charter* and breached a fiduciary duty owed to them by the Appellant. Before the Court below, the Respondents obtained an interim injunction suspending the operation of the amendments for existing SFA program participants pending the final determination of the action.

4. The BCCLA’s submissions relate to the following ground of appeal: “whether the Court committed a reversible error in concluding that the s. 7 *Charter* claim is arguable.”³

PART 4 – ARGUMENT

5. The Appellant argues the s. 7 *Charter* claim is not actionable because it is a positive rights

¹ *Child, Youth and Family Enhancement Act*, RSA 2000, c. C-12

² *Child, Youth and Family Enhancement Regulation*, Alta. Reg. 160/2004

³ See Appellant’s Factum, ¶37

claim.⁴ In contrast, the Respondents argue that the claim is actionable because it is a negative rights claim.⁵ The BCCLA submits that, even assuming the s. 7 claim is a positive rights claim, or has positive rights dimension, there is still a serious issue to be tried with respect to that claim.

A. Positive Rights Have Not Been Excluded from Section 7 Charter Protection

6. The Supreme Court of Canada has long refused to exclude positive rights from the scope of s. 7 Charter protection.

7. In *Irwin Toy*, the Court left open the possibility that some positive rights could fall within the ambit of the right to security of the person under s. 7.⁶ While it determined that a *corporation's* economic rights were not protected by s. 7, it refused to precipitously decide whether economic rights fundamental to human life or survival (such as the rights to social security, equal pay for equal work, adequate food, clothing and shelter) “are to be treated as though they are of the same ilk as corporate-commercial economic rights.”⁷

8. In *G. (J.)*, the Court went further and explicitly acknowledged the positive dimension of s. 7. It interpreted s. 7 as “impos[ing] a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing.”⁸ It accordingly recognized a positive s. 7 right to state-funded counsel in the context of a child custody hearing in the circumstances of that case.

9. In *Dunmore*, the Court once again acknowledged the positive dimension of *Charter* protections, noting that “exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom.”⁹

10. The issue of positive s. 7 rights came before the Court again in *Gosselin*, which concerned the constitutionality of a social assistance scheme that payed recipients under 30 considerably less than those over 30. Recipients under 30 could receive a comparable level of social assistance if

⁴ Appellant’s Factum, ¶45

⁵ Respondent’s Factum, ¶¶62-71

⁶ *Irwin Toy Ltd. v. Quebec (AG)*, [1989] 1 SCR 927 [*Irwin Toy*], at 1003-04

⁷ *Irwin Toy*, at 1003-04

⁸ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46, ¶107

⁹ *Dunmore v. Ontario (AG)*, 2001 SCC 94, ¶22

they participated in a designated work activity or education program.¹⁰

11. A majority of the Court concluded that the scheme did not violate ss. 7 or 15 of the *Charter*.¹¹ However, only one judge (Bastarache J., in dissent) held that s. 7 exclusively protects negative rights.¹² In contrast, the majority acknowledged that s. 7 may protect positive rights in a future case.¹³ In a passionate dissent, Arbour J. concluded that s. 7 included a positive dimension and that the challenged scheme violated this positive right.¹⁴ L’Heureux-Dubé J. substantially agreed with Arbour J.’s s. 7 analysis.¹⁵

12. The majority’s decision in *Gosselin* sheds light on the distinction between positive and negative s. 7 rights, and the circumstances in which positive s. 7 rights may attract constitutional protection. The majority explained that a positive rights claim arises when the claimant seeks to impose upon the government “a positive obligation to sustain life, liberty or security of the person.”¹⁶ A negative rights claim arises when the claimant has been *deprived* of a s. 7 interest.¹⁷ The majority held that Ms. Gosselin was seeking to advance a positive rights claim, as she was claiming “the right to receive a particular level of social assistance from the state adequate to meet basic needs.”¹⁸

13. The majority rejected this positive rights claim due to insufficient evidence,¹⁹ but acknowledged that s. 7 may protect positive rights in special circumstances:

The question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory “workfare” provisions and the evidence of

¹⁰ *Gosselin v. Québec (AG)*, 2002 SCC 84 [*Gosselin*], ¶2

¹¹ *Gosselin*, ¶5

¹² *Gosselin*, ¶209

¹³ *Gosselin*, ¶83 (LeBel J., in dissent, agreed in part with the majority’s reasons on s. 7, ¶414)

¹⁴ *Gosselin*, ¶308

¹⁵ *Gosselin*, ¶99

¹⁶ *Gosselin*, ¶83 (emphasis added)

¹⁷ *Gosselin*, ¶81

¹⁸ *Gosselin*, ¶75

¹⁹ *Gosselin*, ¶5

actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.²⁰

14. The Supreme Court has not addressed the issue of s. 7 positive rights since *Gosselin*.²¹ However, parties seeking to advance s. 7 positive rights claims have been met with considerable resistance before lower courts.²² As many scholars and commentators have argued, this resistance is extremely problematic and s. 7 of the *Charter* must protect positive rights in at least some circumstances, for several reasons.²³

15. First, and as discussed above, Supreme Court jurisprudence does not preclude the protection of s. 7 positive rights.²⁴ Rather, as noted, the recognition of such rights is not inconsistent with *Irwin Toy, G. (J.), Dunmore* and *Gosselin*.

16. Second, the protection of s. 7 positive rights is consistent with Canada's international obligations.²⁵ Canada has endorsed the *Universal Declaration of Human Rights* and is a party to the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"), both of which protect many positive rights.²⁶ The *Universal Declaration* is relevant and persuasive when interpreting the *Charter*²⁷ and the *Charter* is "presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."²⁸

²⁰ *Gosselin*, ¶¶82-83 (emphasis added)

²¹ Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin*" (2019) 39 NJCL 85 ("Jackman, 'One Step'"), at 113

²² Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights under the *Charter*: Closing the Divide to Advance Equality" (2011) 30 Windsor Rev Legal & Soc Issues 37 ("Wilkie & Gary"), at 44-45; See ex: *Flora v General Manager, Ontario Health Insurance Plan*, 2008 ONCA 538, ¶108 [*Flora*]; *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651, ¶571; *Tanudjaja v Canada (AG)*, 2014 ONCA 852, ¶36 [*Tanudjaja ONCA*]

²³ See ex: Jackman, "One Step"; Martha Jackman and Bruce Porter, "Social and Economic Rights", in Peter Oliver, Patrick Maklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) ("Jackman & Porter") 843, at 859; Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38:2 UBC L Rev 539 ("Young, 'Section 7'"); Wilkie & Gary; Alison M. Latimer, "A Positive Future for Section 7? Children and Charter Change" (2014) 67 SCLR (2d) 537 ("Latimer")

²⁴ Young, "Section 7", at 540-46; Jackman, "One Step", at 113

²⁵ Jackman, "One Step", at 113; Margot Young "The Other Section 7" (2013) 62 Sup. Ct. L. Rev. (2d) 3 ("Young, 'The Other Section 7'"), at 9-11; see also *Victoria (City) v Adams*, 2008 BCSC 1363 [*Adams*], ¶¶85-100

²⁶ Universal Declaration of Human Rights, General Assembly Res 217 (III), UN Doc A/810 (1948), Art. 22-23, 25-26; UN *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, Art. 9, 11-12. See also the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31, Art. 11(1)(e), 11(2)(b), 13(a)

²⁷ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, ¶¶57-60 (per Dickson C.J., dissenting); *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, ¶64

²⁸ *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, ¶23

Canada has come under international criticism for its failure to fulfill its *ICESCR* obligations within its constitutional framework.²⁹

17. Third, an interpretation of s. 7 which encompasses positive rights is consistent with the governing interpretive principles for the *Charter*. *Charter* rights must be interpreted in a large and liberal manner, in light of their purposes.³⁰ Interpreting s. 7 in light of other *Charter* rights also indicates that it must include a positive dimension.³¹ The text of s. 7 also supports the conclusion that it protects positive rights.³²

18. Fourth, and as many commentators have noted, the distinction between positive and negative rights is formalistic, rather than substantive, and has been abandoned in international human rights law and by other constitutional democracies.³³

19. In short, positive rights have not been excluded from s. 7 *Charter* protection, and the s. 7 claim in this appeal should not be dismissed on this basis, particularly where the standard is whether it arguable whether such a right exists. In the words of Martha Jackman:

For people living in poverty who, unlike affluent Canadians, lack alternate social, economic or political means of holding elected governments to account, continued reliance by Canadian courts and tribunals on the distinction between positive and negative rights as a basis for dismissing socio-economic rights claims represents a fundamental failure of constitutionalism and of the rule of law.³⁴

B. A Section 7 Positive Rights Claim is Actionable on the Facts of this Case

20. The BCCLA submits that a s. 7 positive rights claim is actionable on the facts of this case in light of the door left open to such claims in *Gosselin*. The majority's decision in *Gosselin* acknowledges that positive rights may attract s. 7 protection in special circumstances where the challenged law causes actual hardship.³⁵ It is arguable that both of these conditions are met here.

²⁹ Young, "Section 7", at 547; Jackman & Porter, at 859-60

³⁰ *R v Poulin*, 2019 SCC 47, ¶54; Margot Young, "Temerity and Timidity: Lessons from *Tanudjaja v. Attorney General (Canada)*" (2020) 61:2 *Les cahiers du droit* 469, at 491

³¹ See Young "The Other Section 7", at 12

³² Jessie Givner, "Child Poverty and Social Assistance: *Gosselin v. Quebec (Attorney General)*" (2005) 24 CFLQ 105 ("Givner"); *Gosselin*, ¶¶336-43 (per Arbour J., dissenting)

³³ See e.g.: Young, "The Other Section 7", at 44; Jackman, "One Step", *fn* 71

³⁴ Martha Jackman, "Remedies for Socio-Economic Rights Violations: Sleeping under a Box?" in Robert J. Sharpe & Kent Roach, eds., *Taking Remedies Seriously* (Montreal: Les Editions Yvon Blais, 2009), at 283 (emphasis added)

³⁵ *Gosselin*, ¶83; see also *Flora*, ¶105; *Melanson et al. v New Brunswick (AG) et al.*, 2007 NBCA 12, ¶¶20-21

21. First, there was compelling uncontested evidence³⁶ before the Chambers Justice that the challenged law would cause serious hardship to the Respondents. The Chambers Justice found that A.C. feared she would be forced to return to sex work against her will due to the loss of SFA benefits. A.C. also feared the loss of benefits would cause her mental health to deteriorate and lead her to engage in substance abuse and suicidal ideation.³⁷ In *Gosselin*, the s. 7 claim failed due to insufficient evidence that the challenged law caused actual hardship.³⁸ Young people were eligible for increased social assistance if they participated in a designated work experience or education program.³⁹ In contrast, the uncontested evidence here shows that the challenged law will cause real physical, psychological, and material hardship.

22. Second, it is arguable that “special circumstances” arise in this case warranting the recognition of positive s. 7 rights. The BCCLA submits that cases in which the state owes a fiduciary duty to the claimant should constitute a “special circumstance.”

23. The Respondents plead that the Appellant breached a fiduciary duty by abruptly reducing the maximum eligibility age for the SFA program.⁴⁰ The Chambers Justice concluded that there was a serious issue to be tried with respect to the interplay between s. 7 of the *Charter* and the Appellant’s fiduciary duty.⁴¹

24. Fiduciary duties should give rise to “special circumstances” within the meaning of *Gosselin* for several reasons. First, the Supreme Court has recognized that “the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances.”⁴² This is because the Crown is generally required “to act in the best interests of society as a whole,”⁴³ rather than the best interests of one particular group.⁴⁴

³⁶ Oral Reasons for Judgment of Friesen J., Appeal Record, F2, p. 60

³⁷ Oral Reasons for Judgment of Friesen J., Appeal Record, F2, p. 64

³⁸ *Gosselin*, ¶¶5, 83

³⁹ *Gosselin*, ¶2

⁴⁰ Amended Originating Application, ¶¶1(c), 20, 100-102; Respondent’s Factum, ¶4

⁴¹ Oral Reasons for Judgment of Friesen J., Appeal Record, F2, p. 71

⁴² *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*], ¶37 (emphasis added)

⁴³ *Elder Advocates*, ¶44

⁴⁴ *Elder Advocates*, ¶¶36, 44. See also *Grant v Canada (AG)* (2005), 77 OR (3d) 481 (ONSC) [*Grant*]. In *Grant*, a class of First Nation Band members argued that Canada breached their s. 7 positive rights by failing to provide them with adequate housing. They argued that “special circumstances” arose due to the “sui generis relationship between the Crown and on-reserve Indians”, which is a fiduciary relationship (at ¶54). The Ontario Superior Court of Justice struck the s. 7 claim because no principles of fundamental justice were engaged (at ¶55). However, *Grant* does not foreclose the possibility that this fiduciary relationship was a “special circumstance.”

25. Second, imposing positive s. 7 obligations on the state when it is acting as a fiduciary is appropriate due to the beneficiary's vulnerability to the fiduciary's control.⁴⁵ Several commentators have argued that positive s. 7 rights should be recognized for children due to their "special vulnerability."⁴⁶ As Latimer explains, while courts may be generally reluctant to recognize positive s. 7 rights due to "a liberal anxiety about interfering with autonomy,"⁴⁷ this concern does not arise with respect to children, given their vulnerability. While the respondents are no longer children, they remain vulnerable.

26. Third, imposing positive s. 7 obligations on the state when it is acting as a fiduciary is consistent with the nature of fiduciary duties. A fiduciary duty is onerous. It is a duty of "absolute loyalty."⁴⁸ It will only arise where the fiduciary has given "an undertaking of responsibility to act in the best interests of a beneficiary."⁴⁹ In such circumstances, it is appropriate to impose heightened s. 7 obligations on the government.

27. Fourth, recognizing positive s. 7 rights in such cases would not open the floodgates to positive rights claims, as the state only owes fiduciary duties in rare circumstances.⁵⁰

28. In brief, the s. 7 claim in this appeal is actionable, even if it is a positive rights claim, because it is arguable that the challenged law would cause actual hardship and the Appellant owes the Respondents a fiduciary duty.

C. Courts Must Not Lightly Conclude that A Positive Rights Claim is Not Actionable

29. In light of *Gosselin*, courts must exercise caution before concluding that a s. 7 positive rights claim is not even arguable. The recent *Single Mothers' Alliance of BC Society*⁵¹ decision illustrates this point. The plaintiffs argued that B.C.'s family law legal aid regime violated s. 7 because it failed to provide adequate legal aid for women leaving abusive relationships.⁵² The defendants

⁴⁵ *Elder Advocates*, ¶33

⁴⁶ Latimer, at 538; see also Givner

⁴⁷ Latimer, at 544

⁴⁸ *Elder Advocates*, ¶¶22, 43

⁴⁹ *Elder Advocates*, ¶30

⁵⁰ *Elder Advocates*, ¶¶44, 48

⁵¹ *Single Mothers' Alliance of BC Society v British Columbia*, 2019 BCSC 1427 [*Single Mothers' Alliance of BC Society*]

⁵² *Single Mothers' Alliance of BC Society*, ¶1

argued the s. 7 claim should be struck because it was a positive rights claim.⁵³ Hinkson C.J. refused to strike the claim “given the comment of Chief Justice McLachlin in *Gosselin* that “[o]ne day s. 7 may be interpreted to include positive obligations,” and the holdings in *Adams, Bedford*, and *PHS*.”⁵⁴

30. The appellant relies on *Tanudjaja*⁵⁵ to argue that the s. 7 claim is not actionable.⁵⁶ However, *Tanudjaja* does not foreclose s. 7 positive rights claims. The claimants argued that the actions and inaction of Canada and Ontario had resulted in homelessness and inadequate housing, contrary to ss. 7 and 15 of the *Charter*.⁵⁷ The Ontario Court of Appeal dismissed the appeal from a judgment striking the claim. The Court of Appeal held that the claim must be struck because it was not justiciable.⁵⁸ That said, it *explicitly refused* to strike the claim on the basis that that it was a s. 7 positive rights claim. Rather, it held that it was “not necessary to explore the limits, in a justiciable context, of the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin*.”⁵⁹

PART 5 – RELIEF SOUGHT

31. The BCCLA takes no position respecting the appropriate relief to be granted in this appeal.

32. The BCCLA does not seek costs and asks that no costs be awarded against it.

Estimated time for argument: 10 minutes.

⁵³ *Single Mothers' Alliance of BC Society*, ¶52

⁵⁴ *Single Mothers' Alliance of BC Society*, ¶112

⁵⁵ *Tanudjaja v AG (Canada)*, 2013 ONSC 5410, ¶38 (aff'd 2014 ONCA 852; leave denied 2015 CanLII 36780 (SCC))

⁵⁶ Appellant's Factum, ¶34

⁵⁷ *Tanudjaja ONCA*, ¶9

⁵⁸ *Tanudjaja ONCA*, ¶27, 36

⁵⁹ *Tanudjaja ONCA*, ¶37. In *Cambie Surgeries Corporation v British Columbia (AG)*, 2020 BCSC 1310, the Court underscored that *Tanudjaja* has been the subject of significant criticism and positive rights have not been excluded from s. 7 protection (¶2052).

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UN *International Covenant on Economic, Social and Cultural Rights*, [Can. T.S. 1976 No. 46](#), Art. 9, 11-12

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