

43%

(and what about the other 57%?)

The Ontario *CFSA*'s refusal to provide children ages 16 and 17 access to child welfare services breaches the ss. 7 and 15 *Charter* rights of children ages 16 and 17

Date: May 22nd, 2012

Outline

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- Evidentiary foundations
- Section 7 Breach
- Section 15 Breach
- Limitations to the challenge & overcoming shortfalls of evidence
- What do you think?

Introduction - People and things that led me to look at this problem

- My clients & their lack of legal options to pursue safety/security
- Gaetz & O'Grady research
- ABA Conference & cross-jurisdictional talks with my colleague
- Reform efforts at the Provincial Child Advocate over last year. Housing & CFSA and now Hearings - ECM25 & extended foster care

<http://provincialadvocate.on.ca/main/en/hearings/pages/home.html>

- Right to Housing Challenge & *Bedford*

Katie's case

- Katie is a 16 year old Canadian citizen from Windsor, Ontario. Her parents separated when she was young and she remained in the care of her mother. Her father kept contact but was not involved with her upbringing. In childhood, CAS had concerns about her welfare because on some occasions she had come to school unkempt and with unexplained injuries. About a year ago, Katie's mother moved back to her home country.
- Katie couch-surfed for a little while, and then contacted her father. Her father agreed that she could come live with him, but this arrangement was short-lived because of conflict between the two of them. Katie reports that her father changed the locks, and that she went to live with a neighbour, but the neighbour could only let her stay for a few weeks.
- Katie is now at Covenant House shelter in Toronto. Last night she received a trespassing ticket at Ryerson University. She is having difficulty maintaining her part time job at No Frills, and they are docking her pay. She is still going to school, but has missed a few days this week because she was feeling depressed.
- Katie informs me that her mother is not coming back to Canada, and that she does not want to try to live with her dad again because he drank a lot and there were some violent fights when she lived with him.

Tyrell's case

- Tyrell is a 17 year old living in Toronto. He is a permanent resident to Canada, sponsored by his father. He has been here for 2 years, and after he arrived with his family, Tyrell told his mother that he was gay. Since then, his father has been treating him badly, threatening him and sometimes hitting him. One day, his father called him a 'faggot' and kicked him out of the house.
- Tyrell keeps going back to the house when his father isn't there. He has a close relationship with his 15 year old brother, and loves his four other younger siblings, aged 3-7. Sometimes, his father finds out that he has been to the house, and calls his phone and threatens him that if he comes back, he would beat him or his brother or mother for letting him come. Tyrell is fearful to go on welfare because he has heard that the welfare authorities will contact his father and try to obtain the sponsorship payments from him. Tyrell has been living at a youth shelter for over a year.

What are Katie's legal options in Ontario to secure stability in finances and housing and social/developmental support?

What are Tyrell's legal options in Ontario to secure stability in finances and housing and social/developmental support?

What are Katie and Tyrell's Legal Options in:

- Nunavut?
- Saskatchewan?
- British Columbia?
- The UK? Eg: **Section 20(1) of the Children Act 1989 (UK)** requires a children's services authority to provide accommodation to any "child in need" who lacks suitable accommodation or care as a result of:
 - There being no person who has parental responsibility for him;
 - His being lost or having been abandoned
 - The person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care (The House of Lord has held this section applies to a child who is kicked out of home)

Jurisdictional comparison of child welfare services for older youth?

- Memos outlining child welfare services available for older youth across Canada. Only compared child welfare services (not other services. Should also review other statutes related to safety/security of youth).

Findings – The Bad and Ugly

- a) Not every jurisdiction has protection services for older youth, but all except Ontario have voluntary service options
 - b) Ontario is the only jurisdiction that does not provide access to services to youth 16 and 17 (unless a 16 or 17 yr. old with a disability)
 - c) Ontario's preamble non-existent and outlined duties are weak – Nunavut (incorporates UN Convent.); NS stronger
 - d) Where voluntary services and protection services are offered, study/advocacy should be done to know how effectively the services are being utilized.
- Difficult to judge how effective these different regimes are at serving older youth and preventing youth homelessness through looking only at the legislative options. Must next look at the effectiveness of the systems + procedural guarantees and access to justice **key** (Ontario memo. = good guidance)

Ontario's Memo – the kinda good

- a) If child is a society or Crown wards, CAS has rights and responsibilities of a parent
****Research point – family status challenge?****
- b) Special needs agreements in Ontario as a hinge to get in for 16 and 17 year olds
****Research point for trans youth and Metro CAS****
- c) **Social welfare is partially 'filling the gap' -**
****Research point – is that really good enough****
- d) **Complaints mechanism may assist legal challenges**
- e) **2011 Bill 179 - will help some – s. 71.1(3) now reads that youth eligible for support services when 16 and 17 years old may be provided extended care and maintenance. Cracks door open for potential JR's if NOT provided with services (complaint then review?)!**

R. v. R.D. [2005] A.J. No. 267

Facts: R.D. is 16 years old. He broke into his family's house (it was locked) and took food. Neighbours called the police and he was charged with break and enter. The officers noted that R.D. was sober, co-operative, and had poor hygiene. Officers took R.D. to a crisis unit with child welfare workers. Background to incident- R.D. kicked out of his father's house at end of the school year. Father still receiving child tax money but did not offer R.D. any money nor help him find other living arrangements. R.D. began living on the streets, but R.D.'s father invited to several meals at the family home.

R. v. R.D. [2005] A.J. No. 267

Issue: Defence of legal right?

Judge cited the UN CAT art. 27.1 re: every child has a right to an adequate standards of living, and parents have responsibility to secure conditions of living necessary for the child's development

Parents duty – first looked at s. 215 CC – **providing necessities of life** to a person under your charge if they are unable to withdraw from charge and unable to provide necessities in life. ****Research point – relational duty****

Black's Law - Necessaries of life include: food, drink, clothing, medical attention, suitable place of residence.

R. v. Popen (1981), 60 C.C.C. (2d) 232 (ONCA), Justice Marin stated the necessities in life may be wide enough to include food, shelter, care and medical attention to sustain life and to protect a child from harm.

Finding through Alberta's *Child Youth and Family Enhancement Act* and *Family Law Act* that a parent is responsible for the care, supervision, and maintenance and support of his children.

Judge found that this **parental duty** was commensurate with R.D.'s legal right to be sheltered and fed by his father. Para. 33- Reflected on spousal rights to a matrimonial home-law in this area grew out of the need to address the real danger of precipitous homelessness, particularly where a power or economic imbalance exists.
JM read para. 35.

Why is homelessness* a threat to security interests?

- Right to housing challenge evidence as to chronic and intensive health and safety risks

<http://www.acto.ca/en/cases/right-to-housing.html>

- Shelters act as an emergency response not responsive to s. 7 needs.
- 20% of homeless youth have severe mental health problems (Wellesley Institute, 2009)
- Victimization - 76% of homeless youth experiencing criminal victimization in the last year. 87.5% of 16 and 17 year olds. Gaetz and O'Grady, (2010) Surviving Crime and Violence, page 30.

* Using definition of homeless at:

<http://www.homelesshub.ca/Topics/Homelessness-176.aspx>

Who are the homeless youth in the GTA?

Stat's from: Gaetz and O'Grady and Buccieri (2010) *Surviving Crime and Violence: Street Youth and Victimization in Toronto*, Homeless Hub and Justice for Children and Youth, pages 22-26.

- 233 research participants people in study
- mean age** of participants in the study = 21
- mean age of leaving home** = 16.5 – male, 16.9- female
- 65.8% male, 32% female, 2.2% trans.
- 23% GLBTQ**
- 35% identified as 'visible minority' – some did not know what that meant. 47% 'white, 22% 'black', 15% aboriginal.
- 45% of youth born in GTA, 32% out of GTA, 22% out of country
- education – 65.7% have NOT received a gr. 12 education**
- \$\$ = 23% employed, 21% shelter allowance, 15% social assistance; 15% crime, 8% sex work**
- Link to Child Welfare - 43% have previously been in the care of a Children's Aid Society**

Unknowns (and research points)

- What percentage of 16 and 17 year old homeless youth have status to receive services under the *CFSA*? What percentage have temporary care agreements in place?
- If not already entitled, would 16 and 17 year old homeless youth be interested in receiving services through the *CFSA*?
- Does lack of service provision really *cause* homelessness? (must prove it –or strongly link it)

Katie, Tyrell, and R(D) as claimants

- Pretending R(D) lives in Ontario, and pretending that Katie, Tyrell, and R(D) all tried to access child welfare services through the *CFSA*, do they have a case to claim that, by denying them service, the *CFSA* is breaching their ss. 7 and 15 *Charter* rights?

CFSA Breaching s. 7 right of 16 and 17 year olds?

- Section 7 of the *Charter*
- *Life, liberty and security of person*
- 7. *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

Causal connection on security interest – *Bedford*, para.287

- We argue a breach of security interests because of (i) high level of violence 16 and 17 year olds facing; ii) risk of violence can be lowered; and iii) refusing service to 16 and 17 year olds prevents 16 and 17 year olds from taking safer precautions.

Is the deprivation in accordance with principles of fundamental justice?

- The claimants argue that the law is not in accordance with the principles of fundamental justice because it is:
 - a) arbitrary; and
 - b) the harmful effects are grossly disproportionate to the benefits gains (but we're not going to analyze this now).

Arbitrariness – *Bedford*, con't

- **[369]** *It is a well-recognized principle of fundamental justice that laws should not be arbitrary: A.C. v. Manitoba (Director of Child and Family Services), [2009 SCC 30 \(CanLII\)](#), [2009] 2 S.C.R. 181, 2009 SCC 30, at para. 103;*
- *A law is arbitrary where ‘it bears no relation to, or is inconsistent with, the objective that lies behind [it]’. To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: Rodriguez, at pp. 594-95.*

Lack of connection to state's goals in child welfare legislation - *A.C. v. Manitoba*, para. 104

- In *B. (R.)*, La Forest J. discussed the importance of the state's role in protecting children:

The state's interest in legislating in matters affecting children has a long-standing history. In *R. v. Jones*, *supra*, for example, I acknowledged the compelling interest of the province in maintaining the quality of education. More particularly, the common law has long recognized the power of the state to intervene to protect children whose lives are in jeopardy and to promote their well-being, basing such intervention on its *parens patriae* jurisdiction; see, for example, *Hepton v. Maat*, *supra*; *E. (Mrs.) v. Eve*, [1986 CanLII 36 \(SCC\)](#), [1986] 2 S.C.R. 388. The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure. [Emphasis added; para. 88.]

- And this Court has long recognized that children are a “highly vulnerable” group (*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004 SCC 4 \(CanLII\)](#), 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 56; *R. v. D.B.*, [2008 SCC 25 \(CanLII\)](#), 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 48).

State action or inaction?

- Precedent and guidance from Canada (*Attorney General v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 ?)
- The state action/inaction undermines the purposes of the legislation...to promote the best interests, protection, and well being of children.
+ a look to history (1888 An Act for the Protection and Reformation of Neglected Children)
- Similar to the Right to Housing Challenge?

[http://www.acto.ca/assets/files/cases/Amended%20Not.%20of%20App.\(R2H\).pdf](http://www.acto.ca/assets/files/cases/Amended%20Not.%20of%20App.(R2H).pdf)

Positive Obligations, con't

- *Gosselin* left the door open for a finding of positive obligations
- *Chaoulli v. Quebec* also assists – where there are significant health and safety ramifications resulting from a particular government action or inaction that causes manifest unfairness = contrary to principles of fundamental justice. Reiterates that a deprivation flowing from an arbitrary law cannot accord with the principles of fundamental justice (*Chaoulli*, para. 128) and that *deprivation* of a right will be arbitrary and will thus infringe s. 7 if it bears no relation to, or is inconsistent with, the state interest that lies behind the legislation, citing *Rodriguez*, at pp. 619-20, and also stating:

CFSA breaching s. 15 *Charter* rights of 16 and 17 year olds?

- Section 15 of the *Charter* guarantees that all Canadians should have equal benefit of the law without discrimination. The duty of the Province to provide for the well-being of children must be exercised in a way that gives all children equal access to effective services to enhance their well-being.
- The *CFSA* provides child welfare services to children and families. Children ages 16 and 17 are denied access to services - *CFSA* ss.29(2), and 37(1).

What the *Charter* says

- Equality before and under law and equal protection and benefit of law
- **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- Affirmative action programs
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. [\(84\)](#)

Back to Andrews...cited in *Withler*

- Discrimination was defined by McIntyre J. in *Andrews*, as follows:

discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. [pp. 174-75]

Withler v. Canada (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396, para. 29.

The test part one

- (1) Does the law create a distinction based on an enumerated or analogous ground?

Comparator Group

- Both children age 0-15, and children aged 16 and 17 who are under an existing court order or agreement for service can act as a comparator group, as both of these groups of children receive the benefit of service under the *CFSA*.

The test part two

- (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

The decision at (2) will be highly contextual/factual.

Eg: perpetuating prejudice - when a law is proven to exacerbate the historically disadvantaged suffered by a group.

Eg: prejudice – when a disadvantage imposed by law is based on a stereotype that does not correspond to the actual characteristics and circumstances of the group

(*Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 30, 35, 36).

S.(J.) v. Nunavut (Minister of Health and Social Services), 2006 NUCJ 20

Facts: S.(J.) was a permanent ward of the Director of Child and Family Services. At sixteen, the Director had discretion to extend his wardship (47(3)) but made it clear that they would not take this action. S.(J.) was left with the option of entering into an agreement with the Director to receive s. 6 services for support. Section 6 services including programming and services for improving the person's financial or housing situations (paras. 3-8, 17).

S.(J.) v. Nunavut (Minister of Health and Social Services) [2006]

- Issue – does s. 6 of the Nunavut's *Child and Family Services Act* breach the applicant's equality rights? (para. 1)
- Analysis – looks to international covenant (enshrined in their Act); the YJCA principles; Nunavut's principles; the Social Assistance Act (not permitted under 18's from obtaining welfare). (para's 12-27)
- Identifies a common thread that, subject to some differentiation – youth should receive special attention, guidance and support, basic rights and freedoms, and a base standards of living (para. 27 and 38).

S.(J.) v. Nunavut (Minister of Health and Social Services) [2006]

- Finding – a significant distinction in the Act regarding the actual services available to young people under 16, those between the ages of 16 and 18, and those over 18. The list of services provided in s. 6(2) of the CFSA are vague and discretionary and, in some ways, difficult to comprehend (para. 40).
- Finds a burden because Under 16? Director has obligation to care for them, provide a home life, including all necessities. Over 18? Can apply for social assistance and public housing. Reality for 16-18 – assistance for housing is scarce, and disadvantaged in labour laws/market (para. 41-43). Perpetuates prejudice – difference in care required or basic services necessary for survival at 15-17 is the same.

S.(J.) v. Nunavut (Minister of Health and Social Services) [2006]

Finding - It is without a doubt that youth are considered disadvantaged and vulnerable. Particularly homeless, poor, and parentless youth living in a large community. (para. 47)

Where there are circumstances where there is no legal parent, the Director must take on the responsibilities of providing the basic necessities of life for those young people between age 16 and 18 (para. 48)

It is essential that the Government of Nunavut considers the appropriate legislative provisions for the care of young people between ages 16 and 18. We have many who are homeless, parentless, and poor and are not being adequately served by the present legislation (para. 52).

Amendment made:

Support services – housing (2.1) Services to be provided under paragraph (2)(d) may include placement of the youth in a foster home or child care facility or such other accommodation as may best meet the needs of the youth.

Limitations to the Challenge

- UN Convention is not enshrined in the Ontario CFSA
- Ontario has housing and welfare provisions for children 16 and 17.
- Section 15(2) justification from government.
- Do other feasible options for security exist? (welfare? But contrast language of *Mohamed* [1996] from Victoria's presentation— 'children require more types of support than just financial support: such as emotional, social and psychological support.)

Overcoming shortfalls with evidence – work to be done

- A deep historical analysis of child welfare laws & ages attached; historical look at position of 16 and 17 year olds in society
- *YCJA* as national guidance
- Arguing the International Covenants as best as possible.
- Blending in a fiduciary duty & *parens patriae* analysis creating a *positive* duty of care/provide service.
- Looking at the *FLA*, *Ontario Works Act* & *CFSA* in concert to find fiduciary and *Charter* breaches (Grover article, 2005)
- Has there been an EROSION of services (as in housing challenge)
- Proof of a causal link to HOMELESSNESS required

What do you think?

What reforms to child welfare laws would enhance the security interests of and effectively serve older youth, age 16+?

If litigation is required to challenge current laws to steer reforms, then what legal principles from common law and our Constitution can be used to best guide litigation, and how can it be done?

Next questions

- Cross jurisdictional comparison of social assistance legislations for 16 and 17 year olds? – including a historical time-line on when welfare for 16 and 17 year olds became available in Ontario
- Cross jurisdictional comparison of housing legislations for 16 and 17 year olds?
- Does the CFSA, FLA, and Ontario Works Act work in concert to a) discriminate on family status &/or age and/or b) breach rights to safety and security?
- Has there been an erosion in services – what has been done that has inhibited/eroded security interests?
- Social scientific research on positive services/programming in Ontario and other jurisdictions

Next questions, con't

- Legal memo. answering question: If the CFSA finds a CAS having the rights and responsibilities of a parent (s. 63(1)(2)), then could a child bring an application for discrimination on family status if the duties owed flowing from those rights were different from those of a non-CAS parent? Eg: parental obligation to support until non-dependant v.s. CAS parental obligation to support only until age 18? Working in concert with the FLA & Divorce Act, do laws affecting children relating to their care and support discriminate based on their family status?
- Exploratory memo on the fiduciary duty (and positive obligation) of parents/ the state to provide care/assistance
- Short Research memo on the interpretation of s. 215 of the CC, the duty of providing for the necessaries of life as relevant to the relational duty of parent to child (and age analysis)

So What Do We Tackle First?

- Promote positive policy & give legal education?
(eg Metro CAS policy)
- Lobby legislative change?
-what sections? Which Act(s)?
- Keep researching?
-which questions?
- Litigate?
-how & which point?– JR – Constitutional -best fact scenario brainstorm?

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References - Legislation

- *Child and Family Services Act*, R.S.O. 1990, CHAPTER C. 11, [CFSA] and every other provincial child protection legislation (*in jurisdictional chart*)
- Section 20(1) of the *Children Act* 1989 (UK)
- *Family Law Act* and *Ontario Works Act*
- *Canadian Charter of Rights and Freedoms*, ss. 7, 15.

References - Caselaw

- *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII), [2009] 2 SCR 181
- *Attorney General v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134
- *Bedford v. Canada (Attorney General)*, 2010 ONCA 814 (CanLII)
- *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 (CanLII), [2005] 1 SCR 791
- *First Nations Child and Family Caring Society v. Attorney General of Canada*, [2012] FC 445
- *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 (CanLII), [2002] 4 SCR 429
- *Mohamed v. Metropolitan Toronto (Municipality) General Manager, Department of Social Services*, 1996 CarswellOnt 609
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- Amended notice of Application – Right to Housing Case
[http://www.acto.ca/assets/files/cases/Amended%20Not.%20of%20App.\(R2H\).pdf](http://www.acto.ca/assets/files/cases/Amended%20Not.%20of%20App.(R2H).pdf)