

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

FAIR CHANGE

Applicant

- and -

**HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE
ATTORNEY GENERAL OF ONTARIO**

Respondents

**FACTUM OF THE INTERVENER
JUSTICE FOR CHILDREN AND YOUTH**

JUSTICE FOR CHILDREN AND YOUTH

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OVERVIEW OF THE CASE

1. The constitutionality of the *Safe Streets Act (SSA)* must be considered in a manner that recognizes the context in which young people experiencing homelessness and who seek charity are marginalized and vulnerable to harm and victimization. The *SSA* was enacted as a response to societal and governmental attitudes that vilified and penalized poor, street-involved, and homeless young people¹, and must be scrutinized from the perspective of the young people that it targets. These young people are our society's most vulnerable and are deserving of, and entitled to, robust protection of their rights.

2. The *SSA* perpetuates harm to young people living in extreme poverty, and cannot withstand *Charter* scrutiny.

3. In this factum, JFCY draws specific attention to the factual context in which the vulnerabilities and marginalization experienced by young people, and the consequent harms visited on young people as a result of the *SSA* render the legislation unconstitutional. The analysis of *Charter* rights of young people (both children, those under 18 years of age, and young adults up to approximately 25 years of age) requires the court to appreciate this factual context and to give effect to young peoples' entitlements to enhanced protections under domestic and international law, including the guiding legal principle that all laws and decisions affecting children must be made in their best interests.

¹ Bill O'Grady, Stephen Gaetz, & Kristy Buccieri, *Can I See Your ID? The Policing of Youth Homelessness in Toronto* (Toronto: JFCY & Homeless Hub, 2011), [Exhibit "C" to the Affidavit of William O'Grady sworn May 2, 2023, Applicant's Amended Application Record Vol III, Tab 8, p 805-806] [hereinafter "O'Grady et al., "Can I See Your ID?"].

PART I – THE FACTS

4. Justice for Children and Youth (“JFCY” or the “Intervener”) accepts, adopts, and relies upon the facts as presented by Fair Change (the “Applicant”).

5. These submissions highlight the unique characteristics and experiences of children, and young people who experience homelessness and the need to beg for charity or panhandle. The SSA only affects people who beg for charity – a population who are experiencing extreme poverty and who are homeless or precariously housed.²

6. Street-involved youth - young people who may beg for charity - are understood to include those who are using the emergency shelter system, sleeping rough, couch surfing, or in short-term or otherwise precarious housing.³ Terms such as “homeless”, “street-involved,” “unhoused,” “precariously housed,” and “experiencing homelessness” are used interchangeably in these submissions. Street-involved young people who beg for charity or panhandle also include young people who, while housed, live with significant poverty, and extremely precarious housing, and indeed may reside in the care of Children’s Aid Societies.

Vulnerability and Marginalization of Young People Experiencing Homelessness

7. Children and young people are recognized as inherently vulnerable in society as a result of their developmental age and stage, lack of experience and sophistication, reduced physical and emotional maturity, reduced ability to exercise meaningful control over their environments, and dependency on adults.⁴

² Affidavit of William O’Grady sworn February 3, 2018, Applicant’s Amended Application Record Vol III, p 711, para 15.

³ O’Grady et al., “Can I See Your ID?”, Applicant’s Amended Application Record Vol III, Tab 8 at p 805.

⁴ *A.B. v. Bragg Communications Inc.*, [2012 SCC 46 \(CanLII\)](#), [2012] 2 SCR 567, at [para 17](#); *R. v. L.T.H.*, [2008 SCC 49 \(CanLII\)](#), [2008] 2 SCR 739 at [para 3](#) and [para 95](#); See also the United States Supreme Court in *Roper v. Simmons*, [543 U.S. 551 \(2005\)](#).

8. We understand “young people” or “youth” to include both children, people under age 18, who often have unique legal principles, regimes, and provisions that apply to them,⁵ and people under age 25, a period known as “emerging adulthood”⁶. This is consistent with the common understanding and jurisprudence,⁷ based on research on human development and neuroscience, which identifies that adolescent brain development and maturity continues into the mid-twenties. This acknowledges the important developmental similarities between older children (15-18) and young adults (19-25). Youth-serving agencies in Ontario, and in particular homeless-youth serving organizations, typically offer services to individuals up to age 25.

9. The *SSA* was proposed and enacted within the context of a moral panic that specifically targeted street-involved youth. This moral panic stereotyped and vilified street-involved young people framing them as a danger, a public nuisance, and “a menace”, and created a punitive scheme to sanction otherwise non-criminal activities – panhandling - used to make money and survive within homelessness.⁸ It is imperative that an analysis of the *Charter* compliance of the *SSA* situate the rights of these young people within the evidence that they are, in fact, among society’s most vulnerable.

⁵ Such legal regimes include the *Child, Youth and Family Services Act (CYFSA)*, the *Youth Criminal Justice Act (YCJA)* and the United Nations *Convention on the Rights of the Child (UNCRC)* and the accompanying General Comments, and related international legal norms.

⁶ Cesaroni, Carla & Peterson-Badali, Michele, (2017). “[Ashley Smith and Incarcerated Young Women: Marginalized at Any Age](#).” *Can J Law & Society* 249 at 256-7; Willoughby, T et al., (2013). “*Examining the link between adolescent brain development and risk taking from a social-developmental perspective*” 83 *Brain & Cognition* [315 at 315](#) and at note 2, at 256-7.

⁷ In *R. v Le*, [2019 SCC 34 \(CanLII\)](#), [\[2019\] 2 SCR 692](#), the Supreme Court accepted JFCY’s submission that “[w]hile the law may define adulthood as beginning at age 18, [scientific research shows that] the psychological and neurological development characteristic of adolescence in fact extends into a young person’s twenties.” at [para 122](#).

⁸ O’Grady et al., “Can I See Your ID?,” Applicant’s Amended Application Record Vol III, Tab 8 at p 805; Bill O’Grady, Stephen Gaetz, & Kristy Buccieri, “*Tickets... and More Tickets: A Case Study of the Enforcement of the Ontario Safe Streets Act*”, (2013) *Canadian Public Policy*, Vol 39, No. 4 [Exhibit “B” to the Affidavit of William O’Grady sworn May 2, 2023, Applicant’s Amended Application Record Vol III, Tab 9 at page 765].

Violence and Marginalization Experienced by Street Youth

10. Young people experiencing homelessness are struggling with some of today's most complex social and political challenges. They report poverty, family and social instability, trauma, and family violence as common childhood experiences.⁹ These young people are often escaping situations of neglect and physical and sexual abuse, are likely to have previous involvement in the child welfare system, have lower levels of educational attainment, and suffer mental illness at a rate several times higher than the national average.¹⁰ This transition from foster care and/or dysfunctional and dangerous homes to homelessness has been described as "going from the frying pan into the fire."¹¹ They "exhibit high levels of depression, anxiety (obsessive/compulsive and phobic), hostility, paranoia, psychoticism, and interpersonal sensitivity compared with healthy young adults".¹² Those under 18 and young homeless women in particular are more likely to suffer from post-traumatic stress disorder.¹³ They are vulnerable to poor health and ongoing victimization, including as victims of human trafficking.¹⁴

11. Street youth are victims of violent crime at a rate that far exceeds the general population: 63.6% of homeless youth report being victims of violent crime at least once.¹⁵ Homeless youth who identify as female were particularly vulnerable to violence, 38.2% report being victims of sexual assault. These risks are greater for homeless young women who are also 2SLGBTQ+. Sixty percent (60%) of queer female youth stated they had been victims of sexual assault in the

⁹ Stephen Gaetz, Bill O'Grady, & Krisy Buccieri, "Surviving Crime and Violence Street Youth and Victimization in Toronto" (Toronto: JFCY & Homeless Hub, 2010) [Exhibit "4" to Cross-Examination of William O'Grady, July 20, 2023, Cross-Examination, BCE, Vol V, p 281] [hereinafter, "Gaetz et al., "Surviving Crime and Violence"]].

¹⁰ *Ibid*, p 281.

¹¹ *Ibid*, p 328.

¹² *Ibid*, p 328.

¹³ *Ibid*, p 328.

¹⁴ *Ibid*, p 282.

¹⁵ *Ibid*, p 268.

last year.¹⁶ Young people under 20 years old, and particularly those between 16 and 17, have been shown to be the most prone to victimization.¹⁷

12. These rates of victimization are not hard to understand when the conditions of homelessness are taken into account. Street youth tend to have few and weak support networks, heightening the risk of vulnerability, harm, and isolation.¹⁸ They do not have access to a safe home, and do not have the economic means to spend less time in public and/or dangerous places.¹⁹ Homelessness heightens their vulnerability by compromising their rights to privacy, safety, food security, and a healthy lifestyle.²⁰

13. Children and young people are overrepresented in the homeless and street-involved populations compared to older adults. Young people who experience homelessness are especially vulnerable because of intersectional areas of systemic marginalization. Youth make up 20-30% of the homeless population, compared to only 13% of Canadians between the ages of 15 to 24.²¹ More than 40% of street youth have received child welfare services.²² Twenty-five to forty percent (25 to 40%) of the street youth population identifies as 2SLGBTQ+, compared to 5 to 10% of the general population.²³ Being black or Indigenous is a statistically significant

¹⁶ *Ibid*, p 369.

¹⁷ *Ibid*, p 333.

¹⁸ *Ibid*, p 267.

¹⁹ *Ibid*, p 282.

²⁰ O'Grady et al., "*Can I See Your ID?*", Applicant's Amended Application Record Vol III, Tab 8 at p 854.

²¹ Affidavit of William O'Grady sworn February 3, 2018, Applicant's Amended Application Record Vol III, p 714, para 23.

²² Stephen Gaetz,, Bill O'Grady, Kristy Buccieri, Jeff Karabanow, & Allyson Marsolais, (Eds.), *Youth Homelessness in Canada: Implications for Policy and Practice*. Toronto: Canadian Homelessness Research Network Press (2013). [Exhibit "6" to Cross-Examination of Joseph Hermer, July 13 2023, Cross-Examination, BCE, Vol IV, p 325]

²³ *Ibid*, p 714, para 24.

predictor of whether a young person will be ticketed while simply “walking down the street” or “hanging around with friends.”²⁴

14. Indigenous people of all ages are overrepresented among the homeless, and urban Indigenous individuals are eight times more likely to experience homelessness than non-Indigenous individuals.²⁵ Ontario courts have taken judicial notice of the assimilative and colonial policies, laws, and practices that have contributed to the dramatic overrepresentation of Indigenous children in child welfare systems in Canada.²⁶ These experiences of a legacy of residential schools and generational trauma are extremely relevant to the experience of Indigenous young people who transition from child welfare systems to homelessness.

Social Exclusion and Limited Access to Justice and Democratic Participation

15. Young people experience a more pronounced power imbalance in their interactions with the state as a consequence of their age and relative lack of life experience, and as a result of their reduced opportunities for civic engagement and democratic participation. All people under the age of 18 are denied the opportunity to vote. Young people experiencing homelessness experience additional disenfranchisement and disengagement from the social context in which others access civic participation²⁷. Homeless youth are less likely to be in school, where students have opportunities to engage with democratic participation and access supports, and they have limited access to employment, financial resources, and informal support networks.²⁸ They are

²⁴ *Ibid*, p 713, para 20.

²⁵ *Ibid*, p 712, para 18.

²⁶ *Kina Gbezhgomi Child and Family Services v. J.M.*, [2023 ONCJ 93 \(CanLII\)](#), at [para 30](#); See also: *Valoris v. J.W., C.R. Muskeg Lake Cree Nation*, [2022 ONSC 2901 \(CanLII\)](#), at [para 679](#), citing *Native Child and Family Services of Toronto v. A.B.*, [2022 ONCJ 75 \(CanLII\)](#).

²⁷ O’Grady et al., “Can I See Your ID?”, Applicant’s Amended Application Record Vol III, Tab 8 at p 854.

²⁸ O’Grady et al., “Can I See Your ID?”, Applicant’s Amended Application Record Vol III, Tab 8 at p 794; Gaetz et al., “*Surviving Crime and Violence*”, Cross-Examination, BCE, Vol V, p 316, 319- 321.

also often preoccupied by surviving violence, trauma, mental illness, generational trauma, and extreme poverty, which diminish their capacity for engagement.

16. Homeless youth engage in the range of economic activities that they do because of social exclusion and the limited choices available to them.²⁹ Young people experiencing homelessness are living on the margins, often lacking access to “legitimate” sources of income. They are at a distinct disadvantage even when competing for basic minimum wage jobs, despite desiring paid employment. For instance, many of these young people have not finished high school, and do not have a fixed address to offer a prospective employer, nor suitable clothing for interviews or work. Poor health and prevalence of mental illness and addiction, and a lack of overall life skills necessary to maintain consistent employment contribute to young people’s reliance on panhandling, squeegeeing, social assistance, and sex work for income.³⁰

17. Emergency shelters expect young people to leave the premises during the day. Young people who are not in school, or who are without consistent employment or any ability to pay to spend time in commercial establishments are thereby forced to be outside in public space, without safe social engagement, and often in unsafe places.³¹

18. There are very few resources available for street-involved young people to get help defending *SSA* tickets,³² and they experience difficulties defending these tickets as described in the evidence of Joanna Nefs.³³

²⁹ Bill O’Grady, & Stephen Gaetz, “*Making Money: exploring the economy of young homeless workers*” (SAGE Publications, 2002), [Exhibit “1” to the examination of William O’Grady help on July 20, 2023, Applicant’s Book of Cross Examinations Vol V, Tab “N”, p 145] [hereinafter, “O’Grady & Gaetz, “*Making Money*”].

³⁰ *Ibid*, pp. 141-142.

³¹ Gaetz et al., “*Surviving Crime and Violence*”, Cross-Examination, BCE, Vol V, p 331.

³² *Ibid*, at p 332,

³³ Affidavit of Joanna Nefs sworn May 25, 2018, Applicant’s Amended Application Record Vol II, Tab 7, para 10 to 23.

PART II – ISSUES AND ARGUMENT

19. JFCY adopts the arguments of the Applicant in their entirety and submits that sections 2 and 3 of the *SSA* violate the rights of children and young people as set out in s. 2(b), 7, 11(d), 12, and 15 of the *Charter*.

The *Charter* Rights of Young People must be Interpreted and Applied to Account for and Protect the Inherent Vulnerability of Childhood and Emerging Adulthood

20. JFCY submits that the *SSA*'s *Charter* violations are particularly apparent and egregious, and are brought into sharp relief when considered as they relate to young people. A contextual and intersectional analysis is required to properly consider the impact of the *SSA* on the *Charter* rights of young people experiencing homelessness and begging for charity.³⁴

21. The inherent vulnerability of children has been recognized by all levels of courts in Canada. The Supreme Court of Canada stated that “the inherent vulnerability of children has consistent and deep roots in Canadian law” resulting in recognition of the imperative for enhanced legal protections for young people in various legal contexts.³⁵ This is significant in the contextual and subjective approach to the *Charter* compliance analysis.

22. The Supreme Court has recognized that “while many adolescents may have the technical ability to make complex decisions, this does not always mean they will have the necessary maturity and independence of judgment to make truly autonomous choices” as a consequence of their developing or evolving capacities.³⁶ The Court has consequently recognized a legal

³⁴ *R v. Le*, 2019 SCC 34 (CanLII), [2019] 2 SCR 692 at para 75.

³⁵ *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 SCR 45 at paras 175-177; *AB (Litigation Guardian of) v Bragg Communications Inc.*, 2012 SCC 46 at paras 17-18 [hereinafter “*AB v Bragg*”]; *Kanthasamy*, at para 41; *FN (Re)*, 2000 SCC 35 at para 10 and para 14.

³⁶ *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII), [2009] 2 SCR 181, at para 71

obligation on the part of the state to protect young people from harm. The Court has expanded on the unique considerations and the need for enhanced protections to be afforded to adolescents:

Professors Nicholas Bala and Sanjeev Anand explain the relationship between young people’s vulnerability and their concomitant need for enhanced procedural protection compellingly:

The underlying rationale for giving greater legal protections to young persons than to adults — like the rationale for the limited accountability of adolescents — is their intellectual, social, and psychological immaturity. Adolescents are less likely to appreciate the significance of the legal process and the legal consequences of the decisions they are required to make. They generally do not fully understand and appreciate their rights and are likely unable to exercise them fully without assistance. Adolescents are also likely to have greater difficulty in formulating realistic plans and advocating for their views in the youth justice system. They may also be more vulnerable to pressure from the police and other agents of the state.³⁷ [internal citation omitted]

23. A recognition of the inherent vulnerability and diminished moral blameworthiness of young people underpins the *YCJA* and has been held to be a principle of fundamental justice.³⁸

The *CYFSA* also recognizes the inherent vulnerability of those under age 18, in that it creates an entire scheme of extra protection to provide for the welfare and support for young people.³⁹

Canada’s Commitments under the *UNCRC* Meaningfully Inform the Court’s *Charter* Analysis

24. The *UNCRC* serves to underpin and guide this Court’s analysis of the *Charter* rights of affected children. The *Charter* must be presumed to provide at least as great a level of protection as is found in the human rights instruments Canada has ratified.⁴⁰ Canadian courts, including the Supreme Court of Canada, have consistently recognized the importance of the *UNCRC* as an

³⁷ *R v. CP*, [2021 SCC 19](#) at [para 84](#).

³⁸ *R v. DB*, [2008 2 SCR 3](#) at [para 41](#), 61-69; *YCJA*, [supra](#) at note 1. The *YCJA* provides that, in light of their inherent vulnerability, young persons are entitled to enhanced procedural protections at all stages of their contact with the criminal justice system (Preamble, [s. 3](#)).

³⁹ *Child, Youth and Family Services Act*, [2017, SO 2017, c 14, Sch 1, Chapter 14](#), at Preamble and [s. 1](#)

⁴⁰ *Slaight Communications Inc. v. Davidson*, [\[1989\] 1 S.C.R. 1038](#) p. 1056; *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia v. B.C.* [2007 SCC 27](#), at [para 70](#); *R. v. Hape*, [2007 SCC 26](#), at [para 55](#); (quoting *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 SCR 313 at [p. 349](#))

interpretive tool, in particular when evaluating the *Charter* compliance of legislation and its impact on children.⁴¹

25. The *UNCRC* recognizes the inherent vulnerability of children and mandates their special protection, noting that young people, by reason of their physical and mental immaturity, are entitled to special safeguards and care.⁴²

26. The impugned provisions of the *SSA* fail to ensure the rights guaranteed to children by the *UNCRC*. In particular, for example: the principle of non-discrimination in Article 2⁴³ – which requires that states take positive measures aimed at redressing situations of real inequality⁴⁴; the mandate in Article 3 that all decisions and actions undertaken by public institutions and courts of law, must take as a primary consideration the best interests of the child⁴⁵; also, the right to be heard (12), to free expression (13), to be protected from all forms of violence (19), the right to access legal and other assistance (37 & 40), and others.⁴⁶

27. The principle of the best interests of the child is a fundamental legal principle, and guiding interpretive tool in Canadian law.⁴⁷ There is a positive duty on the state to act in the best interests of children, and to refrain from taking actions that may harm a child. The short-, medium-, and long-term effects of actions related to the development of the child over time must be kept in mind.⁴⁸ The

⁴¹ *R. v. D.B.*, [2008 SCC 25 \(CanLII\)](#), [2008] 2 SCR 3, at para 60; *A.C. v. Manitoba (Director of Child and Family Services)*, [2009 SCC 30 \(CanLII\)](#), [2009] 2 SCR 181, at para 93; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 SCR, at para 70; *Kanhasamy v Canada (Citizenship & Immigration)*, [2015 SCC 61 \(CanLII\)](#), [2015] 3 SCR 909, at para 37.

⁴² United Nations *Convention on the Rights of the Child*, Can TS 1992 No 3 (“*UNCRC*”), [Preamble](#).

⁴³ *UNCRC* at [Article 2](#).

⁴⁴ Committee on the Rights of the Child, [General Comment No 14 at B.1](#).

⁴⁵ *UNCRC* at [Article 3](#).

⁴⁶ *UNCRC*, at Articles 12, 13, 19, 37, 40.

⁴⁷ *Kanhasamy v Canada (Citizenship & Immigration)*, [2015 SCC 61 \(CanLII\)](#), [2015] 3 SCR 909, at para 36-40.

⁴⁸ CRC/GC/2013/14, 29 May, 2013, General Comment No 14 (2013) “*The right of the child to have his or her best interests taken as a primary consideration*”, at para 1.

SSA's repressive measures are antithetical to a child rights approach in general and to the principle of acting only in the best interests of the child in particular.

28. By creating a scheme under which impoverished children (and in some cases their parents) are arbitrarily penalized by fine and imprisonment for asking for charity the SSA fails to support the best interests of children in any respect. The best interests of the child imperative is a substantive right, an interpretive legal principle, and a procedural right.⁴⁹ This requires the government, in all actions affecting children, to consider the safety of children, including protection against physical and mental violence and against economic and other exploitation. The best interests analysis also requires governments and courts to consider situations of vulnerability, including living in a street situation, with a view to ensuring that children experiencing such vulnerabilities benefit from the full enjoyment of all rights provided for under the *UNCRC*.⁵⁰ The interpretive value of the best interests principle also applies where children's caregivers are living in extreme poverty and are required to panhandle to support their children, and where the provisions of the SSA perpetuate the poverty experienced by children and their families⁵¹. The best interests of the child must be considered when assessing their *Charter* rights. *Charter* compliance cannot be met where the best interests of effected children are not protected.

29. The *UNCRC*'s General Comments provide interpretive guidance regarding the rights of children. General Comment No 21 (2017) *on children in street situations*⁵² addresses rights-based analysis for street-youth. The General Comment explains that in addressing youth

⁴⁹ *Ibid*, para 61

⁵⁰ *Ibid*, at para [A.1. \(d\) and \(e\)](#).

⁵¹ This is analogous to the experience of the affiant, Margaret Bunting, who panhandles to support herself and her severely disabled adult son (para 33 – 35) and who cannot afford to lose a day of panhandling because of her caregiving responsibilities (para 41-42), Applicant's Amended Application Record Vol 1, at page 049.

⁵² CRC/GC/2017/21, 21 June 2017, [General Comment No. 21 \(2017\) "on children in street situations"](#), [hereinafter "GC No 21"].

homelessness “different approaches ... include a child rights approach ...a welfare approach, involving the “rescue” of children ... and a repressive approach, whereby the child is perceived to be a delinquent.” The Committee advises that the welfare and repressive approaches are not rights-respecting, and are not consistent with the best interests of the child.”⁵³

30. The *SSA* is a repressive tool that fails to give effect to the guidance of the General Comment and the government’s obligations under the *UNCRC* in various respects. This Honourable Court’s analysis court should be informed and guided by the examination of rights provided in General Comment No. 21 including that:

- “states should, with immediate effect: remove provisions that directly or indirectly discriminate on the grounds of the street situation of children or their parents or family; ... ; abolish where appropriate offences that criminalize and disproportionately affect children in street situations, such as begging, breach of curfews, loitering, vagrancy and running away from home⁵⁴; noting that such measures constitute direct discrimination, and that indirect discrimination is acute because of intersecting forms of discrimination including 2SLGBTQ+, disability, race, Indigenous identity, etc.;⁵⁵
- the right to life should not be interpreted narrowly and includes the right to enjoy a life with dignity, and extends to civil and political rights, as well as economic, social, and cultural rights; noting that the risks to life for street-youth include exposure to potentially life-threatening conditions [including] ... substance abuse, ...sexual exploitation and unsafe sexual practices; and ... lack of access to adequate nutrition, health care and shelter.⁵⁶
- children in street situations have a right to receive and impart information about their rights ... which gives effect to their freedom of expression and is crucial for their rights to be understood and realized in practice.⁵⁷
- the right under Article 27 of the *UNCRC* to an adequate standard of living for physical,

⁵³ *Ibid*, at para 5.

⁵⁴ *Ibid*, at para 14.

⁵⁵ *Ibid*, at para 26.

⁵⁶ *Ibid*, at para 29.

⁵⁷ *Ibid*, at para 42.

mental, spiritual, moral, and social development,⁵⁸ for homeless children includes the obligation to provide material assistance with nutrition, clothing, housing, provided directly to children.⁵⁹

31. A scheme of provincial offences that imposes fines on children and their caregivers who are experiencing homelessness and beg for charity, is directly and indirectly in contravention of the articulation of the rights of homeless children described in General Comment No. 21, which reflect, and in some instances are identical to the articulation of the *Charter* rights at issue in this Application.

32. The United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (The *Beijing Rules*) require that the principles expressed in the *Beijing Rules* be applied to young adults. They are guaranteed procedural safeguards to ensure that contacts with law enforcement respect their legal status, promote their well-being, and avoid harm⁶⁰

33. Where children are criminal justice-involved, they are entitled to be treated consistently with their dignity and worth and in a manner that promotes their reintegration.⁶¹ Young people should not to be “considered as mere objects of socialization or control.”⁶²

34. That almost all SSA tickets are prosecuted *ex parte* is but one specific demonstration of the ways in which young people’s *Charter* rights are violated by the SSA, especially when assessed from the vantage point of homeless young people who beg for charity.

⁵⁸ United Nations Convention on the Rights of the Child, Can TS 1992 No 3 (“*UNCRC*”), at [Article 27](#).

⁵⁹ GC No 21, at para 49.

⁶⁰ United Nations General Assembly, United Nations [Standard Minimum Rules for the Administration of Juvenile Justice \(“Beijing Rules”\)](#), A/RES/40/33, 29 November 1985 at Rule 3.3;

⁶¹ United Nations Convention on the Rights of the Child, Can TS 1992 No 3 (“*UNCRC*”), Articles 6 and 40.

⁶² United Nations General Assembly, [United Nations Guidelines for the Prevention of Juvenile Delinquency \(“The Riyadh Guidelines”\)](#), A/RES/45/112, 14 December 1990 at 23, 3, 31;

Inherent Vulnerability Extends to Young People, and in Particular Young People who are Homeless

35. There is a well-established body of research demonstrating that young people’s neurological development continues into their twenties and that many of the developmental characteristics of adolescence persist beyond age 18. This reality was accepted by the Supreme Court in *R v. Le*.⁶³ In that case the Court accepted that a 20-year old would reasonably perceive an interaction with authority differently than a mature adult. In making this finding the Court stated “what a reasonable person may perceive may be influenced by age and the knowledge, life experience and discernment associated with that age group... Indeed, his relative lack of maturity means the power imbalance and knowledge gap between citizen and state is even more pronounced, evident and acute.”⁶⁴

36. While teenagers and young people are entitled to the same protections of the *Charter* as older adults, their ability to defend their rights – which involves significant decision-making and executive functioning capacity⁶⁵ - is diminished. In the face of interaction with the police, and understanding rights under the *YCJA* the Supreme Court of Canada has found that “young persons do not understand their legal rights as well as adults” and “are less likely to assert those rights in the face of a confrontation with a person in authority.”⁶⁶

⁶³ *R. v. Le*, [2019 SCC 34](#), [2019] 2 S.C.R. 692 at para 122.

⁶⁴ *Ibid* at [para 122](#).

⁶⁵ See discussion in the context of *Miranda* rights King, KJ, “[Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children Unknowing, Unintelligent, and Involuntary Waiver of Miranda Rights](#)” (2006) Wis L Rev 431 at 431-434.

⁶⁶ *R. v. L.T.H.*, [2008 SCC 49 \(CanLII\)](#), [2008] 2 SCR 739, at [para 24](#); see also *R. v. J.(J.T.)*, [1990 CanLII 85 \(SCC\)](#), [1990] 2 SCR 755 at 766-7.

Contextual Analysis of *Charter* Rights of Young People Experiencing Homelessness and Begging for Charity

37. The penalization and criminalization of homelessness, poverty, and begging contributes to the significant, pre-existing harm that street youth experience. This occurs through laws that target the activities of street-involved persons.⁶⁷ The *SSA* is a salient example of this, where the *Act* was legitimized by villainizing, penalizing and criminalizing street-youth and other groups.⁶⁸ The young people that are the target of the *SSA* are not the “horrible and disgusting individuals,” “menace” or criminals that they were erroneously portrayed as.⁶⁹ Rather, they are highly vulnerable individuals engaging in activities of survival. The *SSA* is grossly insensitive to their circumstances and dignity – penalizing their methods of survival and imposing harmful penalties.

38. In order to ensure the full scope of protection that the *Charter* is intended to provide, any analysis of young people’s *Charter* rights must attend to their unique situation in society, and their different level of cognitive and psychological development as compared to older adults. A developmental approach that accounts for their age and associated vulnerability, as well as other aspects of their social realities, is critical to an analysis that meaningfully protects their rights and ensures that their constitutional rights are real, and not mere abstractions. The comprehensive and contextual analysis is taken from the vantage point of street-involved young people who beg for charity, and is guided by international legal commitments described at paragraphs 24-33.

39. Such an approach is necessary in order to correctly and meaningfully account for the disadvantage and marginalization experienced by youth who are street-involved, as described

⁶⁷ O’Grady et al., “*Can I See Your ID?*”, Applicant’s Amended Application Record Vol III, Tab 8 at p 788.

⁶⁸ *Ibid*, p 805-806.

⁶⁹ *Ibid*, p 805.

above in paragraphs 10-18. For young people who are Indigenous, and or black and street-involved, this approach is required to account for and mitigate the harmful effects of colonial practices including residential schools.

Section 2(b)

40. With respect to s. 2(b) of the *Charter*, the *prima facie* violation of free expression alleged by the Applicant is uniquely experienced by children and young people, who experience greater levels of exclusion from civic participation, public discourse and political power. Like adults, the SSA serves to limit young people's ability to ask for help and to communicate their poverty and need to the public, which constitutes political speech. Children and young people are uniquely excluded from civil, political and democratic participation, given their inability to vote, relative lack of personal and social power, and the frequent marginalization of children's voices and views in virtually all contexts. Begging for charity is in an important sense one of the only ways for homeless young people to publicly articulate their plight and seek support for their predicament.

Section 7

41. With respect to s. 7 of the *Charter*, the deprivations of life, liberty, and security of the person occasioned by the impugned provisions of the SSA have a distinct and disproportionate impact on children and young people. Children and young people have few ways of independently providing for themselves and the curtailment of their ability to publicly seek and obtain assistance and charity leaves them more susceptible to the harms of homelessness, including the dangers of increased victimization and exploitation, or resorting to dangerous or illicit forms of obtaining income. The prohibition of solicitation of "captive audiences" under the SSA arbitrarily denies young people their personal security, safety, and means of income by

preventing them from panhandling in safe locations such as in a parking lot, or near a bank or transit stop.⁷⁰

Section 11(d) and Principles of Fundamental Justice

42. With respect to both ss. 7 and 11(d) of the *Charter*, the SSA does not protect young people's presumption of innocence nor afford them procedural fairness in its application. Young people who are ticketed under the *SSA* will experience even greater struggles than adults to understand the process by which they might mount a defence or attend court and to answer the charges as described above at paragraph 18. Without adult support in the community, young people often struggle to understand the court process, to gather appropriate evidence, and to 'fight' a ticket. Young people who are homeless, have personal and generational trauma, and who may experience mental illness and addictions, will have monumental difficulty defending a *SSA* ticket, particularly where they have no fixed address and will not receive notice of court appearances, and for all of the reasons applicable to others ticketed under the *SSA* as described in the evidence of Ms. Nefs,⁷¹ including specifically the evidence that virtually all matters are disposed of *ex parte*. Furthermore, unlike the *YCJA*, the *Provincial Offences Act* fails to provide for any additional procedural protections that take into account the developmental realities and needs of young people, which have been found to be constitutionally mandated in other contexts, and are mandated by international legal principles described above at paragraphs 24-33.

Section 12

43. With respect to s. 12, given the heightened vulnerability of children and young people, the impugned provisions of the *SSA* and the effects of its enforcement upon them, constitute

⁷⁰ Affidavit of Joseph Michael Hermer sworn March 13, 2018, Applicant's Amended Application Record Vol III, Tab 11, para 12; *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, [2023 ONSC 670](#) at [paras 95-97](#)

⁷¹ Affidavit of Joanna Nefs sworn May 25, 2018, Applicant's Amended Application Record Vol II, Tab 7, para 10 to 23.

cruel and unusual treatment and punishment, grossly disproportionate to their conduct. The *SSA* imposes upon society's most vulnerable – children escaping abuse, exiting the care of the child welfare system, and experiencing poverty and social exclusion on multiple grounds – punishment that is grossly disproportionate to the behaviour. While simply seeking assistance and subsistence, the *SSA* exposes vulnerable children and young people to further harms, while achieving no legitimate objective. The collateral consequences will impact the child and young person for years to come, and possibly throughout their life course.

44. The imposition of fines that are virtually impossible for a young person to pay compound their vulnerability by, for example, impacting their ability to obtain identification like an identity card or drivers licence, to seek and maintain safe and secure housing, pursue education, all of which presents further difficulties for accessing social benefits. The fines serve to perpetuate the cycle of poverty in which young people experiencing homelessness are ensnared. The effects of the law go well beyond its purported aims and its consequences are grossly disproportionate to its purposes.

45. The *SSA* imposes sentences – including possible imprisonment and impossible and debilitating fines - that go beyond what is considered reasonable under the *YCJA*. Notably, the maximum fine that may be imposed under the *SSA* (\$1,000) is the same as the maximum fine allowable when sentencing a youth under the *YCJA*, yet the offences under the *SSA* are relatively minor and are inherently linked to poverty and the request for charity.⁷² Further, s. 54(1) of the *YCJA* requires that courts have regard to the present and future means of the young person to pay a fine before imposing a fine under s. 42(2)(d). The *SSA* contains no

⁷² [Youth Criminal Justice Act](#), (SC 2002, c 1), s. 42(2)(d).

similar requirement, despite creating a scheme under which extremely vulnerable and impoverished young people face similar fines. While such a provision would not save the *SSA* from its *Charter* violations, the lack of such a provision further demonstrates its constitutional deficiency.

Section 15

46. With respect to s. 15 of the *Charter*, the impugned provisions of the *SSA* impose upon homeless children and young people burdens not imposed on others. This burden reinforces, perpetuates and exacerbates existing disadvantage as described extensively above. The *SSA* also draws a formal distinction, allowing charities to seek donations to assist the disadvantaged while not allowing disadvantaged young people to seek charity and assistance for themselves. The *SSA* engages multiple enumerated grounds, including age. The impugned provisions and the consequences of their enforcement further exacerbate the disadvantage experienced by homeless children and young people in particular by, for example, perpetuating their poverty and marginalization, excluding them from public spaces available to others, and exposing them to the risk of victimization and exploitation.

47. Children and young people who are homeless and street-involved are disproportionately affected by the *SSA*, both in its application and by the consequences of its enforcement. Homeless youth captured by the *SSA* are more likely to be Indigenous or racialized, and /or suffer from mental health, addiction, or physical disability,⁷³ identify as 2SLGBTQ+, have experience in child welfare, and have been victims of violence. Indeed, it is not uncommon

⁷³ Affidavit of Sean Kidd sworn December 1, 2017, Applicant's Amended Application Record Vol III, Tab 10, para 81.

for street-involved individuals to present multiple grounds protected under s. 15.⁷⁴ Viewed from the perspective of a street-involved young person, the impugned provisions of the *SSA* impose upon young people, particularly those experiencing multiple intersecting grounds of disadvantage, burdens not imposed on others. Consequently, the *SSA* imposes a differential and significantly more harmful impact on youth, as compared to other members of the Ontario population, which is discriminatory.

48. The *SSA* also subjects children and young people to harms to their dignity by communicating that they are not worthy of society's equal care and concern.

PART IV – ORDER SOUGHT

49. JFCY respectfully requests that this Court grant the relief requested by the Applicant.
50. JFCY seeks no costs and requests that none be awarded against it.
51. ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st Day of December, 2023.



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⁷⁴Affidavit of Gerry Williams sworn April 14, 2018, Applicant's Amended Application Record Vol I, Tab 2, para 35.

SCHEDULE A - LIST OF AUTHORITIES

Cases

1. [*A.B. v. Bragg Communications Inc.*](#), 2012 SCC 46 (CanLII), [2012] 2 SCR 567
2. [*R. v. L.T.H.*](#), 2008 SCC 49 (CanLII), [2008] 2 SCR 739
3. [*Roper v. Simmons*](#), 543 U.S. 551 (2005)
4. [*R. v. Le*](#), 2019 SCC 34 (CanLII), [2019] 2 SCR 692
5. [*Kina Gbezhgomi Child and Family Services v. J.M.*](#), 2023 ONCJ 93 (CanLII),
6. [*Valoris v. J.W., C.R. Muskeg Lake Cree Nation*](#), 2022 ONSC 2901 (CanLII)
7. [*Native Child and Family Services of Toronto v. A.B.*](#), 2022 ONCJ 75 (CanLII)
8. [*R. v. Sharpe*](#), 2001 SCC 2 (CanLII), [2001] 1 SCR 45
9. [*Kanthisamy v. Canada \(Citizenship and Immigration\)*](#), 2015 SCC 61 (CanLII), [2015] 3 SCR 909
10. [*F.N. \(Re\)*](#), 2000 SCC 35 (CanLII), [2000] 1 SCR 880
11. [*R v C.P.*](#), 2021 SCC 19 (CanLII)
12. [*R. v. D.B.*](#), 2008 SCC 25 (CanLII), [2008] 2 SCR 3
13. [*Slaight Communications Inc. v. Davidson*](#), 1989 CanLII 92 (SCC), [1989] 1 SCR 1038
14. [*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*](#), 2007 SCC 27 (CanLII), [2007] 2 SCR 391
15. [*R. v. Hape*](#), 2007 SCC 26 (CanLII), [2007] 2 SCR 292
16. [*Reference Re Public Service Employee Relations Act \(Alta.\)*](#), 1987 CanLII 88 (SCC), [1987] 1 SCR 313
17. [*A.C. v. Manitoba \(Director of Child and Family Services\)*](#), 2009 SCC 30 (CanLII), [2009] 2 SCR 181
18. [*Baker v. Canada \(Minister of Citizenship and Immigration\)*](#), 1999 CanLII 699 (SCC), [1999] 2 SCR 817
19. [*R. v. J.\(J.T.\)*](#), 1990 CanLII 85 (SCC), [1990] 2 SCR 755
20. [*J. D. B. v. North Carolina*](#), 564 U.S. 261 (2011)

Secondary Sources

1. O’Grady, Bill, Gaetz, Stephen, & Buccieri, Kristy, (2011). *Can I See Your ID? The Policing of Youth Homelessness in Toronto* (Toronto: JFCY & Homeless Hub)
2. Cesaroni, Carla & Peterson-Badali, Michele, (2017). “[*Ashley Smith and Incarcerated Young Women: Marginalized at Any Age.*](#)” *Can J Law & Society* 249
3. Willoughby, T et al., (2013). “[*Examining the link between adolescent brain development and risk taking from a social-developmental perspective*](#)” *83 Brain & Cognition* 315
4. O’Grady, Bill, Gaetz, Stephen, & Buccieri, Kristy, (2013). “*Tickets... and More Tickets: A Case Study of the Enforcement of the Ontario Safe Streets Act*”, *Canadian Public Policy*, Volume 39, No. 4
5. Gaetz, Stephen, O’Grady, Bill & Buccieri, Kristy, (2010). “*Surviving Crime and Violence Street Youth and Victimization in Toronto*” (Toronto: JFCY & Homeless Hub)
6. Gaetz, Stephen, O’Grady, Bill, Buccieri, Kristy, Karabanow, Jeff, & Marsolais, Allyson (Eds.), *Youth Homelessness in Canada: Implications for Policy and Practice*. Toronto: Canadian Homelessness Research Network Press (2013).
7. O’Grady, Bill & Gaetz, Stephen, (2002). “*Making Money: exploring the economy of young homeless workers*” (SAGE Publications)
8. Miranda rights King, KJ, (2006). “[*Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children Unknowing, Unintelligent, and Involuntary Waiver of Miranda Rights*](#)” *Wis L Rev* 431 at 431-434

SCHEDULE B - RELEVANT PROVISIONS OF STATUTES, REGULATIONS, AND BY-LAWS

YOUTH CRIMINAL JUSTICE ACT (SC 2002, c 1)

Preamble

WHEREAS members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood;

WHEREAS communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes;

WHEREAS information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available;

WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms;

AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows

...

Declaration of Principle

Marginal note: Policy for Canada with respect to young persons

3 (1) The following principles apply in this Act:

- **(a)** the youth criminal justice system is intended to protect the public by
 - **(i)** holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
 - **(ii)** promoting the rehabilitation and reintegration of young persons who have committed offences, and

- **(iii)** supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;
- **(b)** the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
 - **(i)** rehabilitation and reintegration,
 - **(ii)** fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
 - **(iii)** enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
 - **(iv)** timely intervention that reinforces the link between the offending behaviour and its consequences, and
 - **(v)** the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;
- **(c)** within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should
 - **(i)** reinforce respect for societal values,
 - **(ii)** encourage the repair of harm done to victims and the community,
 - **(iii)** be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
 - **(iv)** respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and
- **(d)** special considerations apply in respect of proceedings against young persons and, in particular,
 - **(i)** young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,

- **(ii)** victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
- **(iii)** victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
- **(iv)** parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

Marginal note: Act to be liberally construed

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

2002, c. 1, s. 3

2012, c. 1, s. 168

**CHILD, YOUTH AND FAMILY SERVICES ACT, 2017, SO 2017, C 14, SCH 1,
CHAPTER 14**

Preamble

The Government of Ontario acknowledges that children are individuals with rights to be respected and voices to be heard.

The Government of Ontario is committed to the following principles:

Services provided to children and families should be child-centred.

Children and families have better outcomes when services build on their strengths. Prevention services, early intervention services and community support services build on a family's strengths and are invaluable in reducing the need for more disruptive services and interventions.

Services provided to children and families should respect their diversity and the principle of inclusion, consistent with the [*Human Rights Code*](#) and the [*Canadian Charter of Rights and Freedoms*](#).

Systemic racism and the barriers it creates for children and families receiving services must continue to be addressed. All children should have the opportunity to meet their full potential. Awareness of systemic biases and racism and the need to address these barriers should inform the delivery of all services for children and families.

Services to children and families should, wherever possible, help maintain connections to their communities.

In furtherance of these principles, the Government of Ontario acknowledges that the aim of the *Child, Youth and Family Services Act, 2017* is to be consistent with and build upon the principles expressed in the United Nations Convention on the Rights of the Child.

With respect to First Nations, Inuit and Métis children, the Government of Ontario acknowledges the following:

The Province of Ontario has unique and evolving relationships with First Nations, Inuit and Métis peoples.

First Nations, Inuit and Métis peoples are constitutionally recognized peoples in Canada, with their own laws, and distinct cultural, political and historical ties to the Province of Ontario.

Where a First Nations, Inuk or Métis child is otherwise eligible to receive a service under this Act, an inter-jurisdictional or intra-jurisdictional dispute should not prevent the timely provision of that service, in accordance with Jordan's Principle.

The United Nations Declaration on the Rights of Indigenous Peoples recognizes the importance of belonging to a community or nation, in accordance with the traditions and customs of the community or nation concerned.

Further, the Government of Ontario believes the following:

First Nations, Inuit and Métis children should be happy, healthy, resilient, grounded in their cultures and languages and thriving as individuals and as members of their families, communities and nations.

Honouring the connection between First Nations, Inuit and Métis children and their distinct political and cultural communities is essential to helping them thrive and fostering their well-being.

For these reasons, the Government of Ontario is committed, in the spirit of reconciliation, to working with First Nations, Inuit and Métis peoples to help ensure that wherever possible, they care for their children in accordance with their distinct cultures, heritages and traditions.

...

Paramount purpose and other purposes

Paramount purpose

1 (1) The paramount purpose of this Act is to promote the best interests, protection and well-being of children.

**UNITED NATIONS, CONVENTION ON THE RIGHTS OF THE CHILD, CAN. T.S.
1992 NO. 3.**

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

...

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

...

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

...

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

...

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

...

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

...

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

...

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

...

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

...

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

...

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

...

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

...

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

CRC/GC/2013/14, 29 MAY, 2013, GENERAL COMMENT NO 14 (2013) “THE RIGHT OF THE CHILD TO HAVE HIS OR HER BEST INTERESTS TAKEN AS A PRIMARY CONSIDERATION” (ART. 3, PARA 1)

A. Legal analysis of article 3, paragraph 1

1. “In all actions concerning children”

(a) “in all actions”

Article 3, paragraph 1 seeks to ensure that the right is guaranteed in all decisions and actions concerning children. This means that every action relating to a child or children has to take into account their best interests as a primary consideration. The word “action” does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures.

Inaction or failure to take action and omissions are also “actions”, for example, when social welfare authorities fail to take action to protect children from neglect or abuse.

(b) “concerning”

The legal duty applies to all decisions and actions that directly or indirectly affect children. Thus, the term “concerning” refers first of all, to measures and decisions directly concerning a child, children as a group or children in general, and secondly, to other measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure. As stated in the Committee’s general comment No. 7 (2005), such actions include those aimed at children (e.g. related to health, care or education), as well as actions which include children and other population groups (e.g. related to the environment, housing or transport) (para. 13 (b)). Therefore, “concerning” must be understood in a very broad sense.

Indeed, all actions taken by a State affect children in one way or another. This does not mean that every action taken by the State needs to incorporate a full and formal process of assessing and determining the best interests of the child. However, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.

Thus, in relation to measures that are not directly aimed at the child or children, the term “concerning” would need to be clarified in the light of the circumstances of each case in order to be able to appreciate the impact of the action on the child or children.

(c) “children”

The term “children” refers to all persons under the age of 18 within the jurisdiction of a State party, without discrimination of any kind, in line with articles 1 and 2 of the Convention.

Article 3, paragraph 1, applies to children as individuals and places an obligation on States parties to assess and take the child’s best interests as a primary consideration in individual decisions.

However, the term “children” implies that the right to have their best interests duly considered applies to children not only as individuals, but also in general or as a group. Accordingly, States have the obligation to assess and take as a primary consideration the best interests of children as a group or in general in all actions concerning them. This is particularly evident for all implementation measures. The Committee underlines that the child's best interests is conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights.

That is not to say that in a decision concerning an individual child, his or her interests must be understood as being the same as those of children in general. Rather, article 3, paragraph 1, implies that the best interests of a child must be assessed individually. Procedures for establishing the best interests of children individually and as a group can be found in chapter V below.

...

A(2)(d)Care, protection and safety of the child

When assessing and determining the best interests of a child or children in general, the obligation of the State to ensure the child such protection and care as is necessary for his or her well-being (art. 3, para. 2) should be taken into consideration. The terms “protection and care” must also be read in a broad sense, since their objective is not stated in limited or negative terms (such as “to protect the child from harm”), but rather in relation to the comprehensive ideal of ensuring the child’s “well-being” and development. Children’s well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.

Emotional care is a basic need of children; if parents or other primary caregivers do not fulfil the child’s emotional needs, action must be taken so that the child develops a secure attachment. Children need to form an attachment to a caregiver at a very early age, and such attachment, if adequate, must be sustained over time in order to provide the child with a stable environment.

Assessment of the child's best interests must also include consideration of the child's safety, that is, the right of the child to protection against all forms of physical or mental violence, injury or abuse (art. 19), sexual harassment, peer pressure, bullying, degrading treatment, etc., as well as protection against sexual, economic and other exploitation, drugs, labour, armed conflict, etc.(arts. 32-39).

Applying a best-interests approach to decision-making means assessing the safety and integrity of the child at the current time; however, the precautionary principle also requires assessing the possibility of future risk and harm and other consequences of the decision for the child's safety.

(e) Situation of vulnerability

An important element to consider is the child's situation of vulnerability, such as disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc. The purpose of determining the best interests of a child or children in a vulnerable situation should not only be in relation to the full enjoyment of all the rights provided for in the Convention, but also with regard to other human rights norms related to these specific situations, such as those covered in the Convention on the Rights of Persons with Disabilities, the Convention relating to the Status of Refugees, among others.

The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision-makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness. An individualized assessment of each child's history from birth should be carried out, with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process.

...

B. The best interests of the child and links with other general principles of the Convention

1. The child's best interests and the right to non-discrimination (art. 2)

The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.

CRC/GC/2017/21, 21 JUNE 2017, GENERAL COMMENT NO. 21 (2017) “ON CHILDREN IN STREET SITUATIONS”

5. There are different approaches used with respect to children in street situations, sometimes in combination. They include a child rights approach, whereby the child is respected as a rights holder and decisions are often made with the child; a welfare approach, involving the “rescue” of children perceived to be an object or victim from the street and whereby decisions are made for the child without serious consideration for her or his views; and a repressive approach, whereby the child is perceived to be a delinquent. The welfare and repressive approaches fail to take into account the child as a rights holder and result in the forcible removal of children from the streets, which further violates their rights. Indeed, claiming that welfare and repressive approaches are in the best interests of the child does not make them rights based.² To apply the Convention, it is essential to use a child rights approach.

...

Legislative and policy review

14. States should assess how laws and policies can be improved to reflect the recommendations of the present general comment. States should, with immediate effect: remove provisions that directly or indirectly discriminate on the grounds of the street situation of children or their parents or family; abolish any provisions allowing or supporting the round-up or arbitrary removal of children and their families from the streets or public spaces; abolish where appropriate offences that criminalize and disproportionately affect children in street situations, such as begging, breach of curfews, loitering, vagrancy and running away from home; and abolish offences that criminalize children for being a victim of commercial sexual exploitation, and so-called moral offences, such as sex outside of marriage. States should introduce or review an act on child protection or children based on a child rights approach and that specifically addresses children in street situations. The act should be implemented by enabling policies, mandates, operating procedures, guidelines, service delivery, oversight and enforcement mechanisms, and developed in collaboration with key stakeholders, including children in street situations. States may need to develop

nationally relevant policy and legal definitions of such children on the basis of participatory research, in contexts where this is necessary to facilitate interventions by legally mandated professionals and services. However, the process of developing legal definitions should not delay taking action to address rights violations.

...

Systemic discrimination

26. Discrimination may be direct or indirect. Direct discrimination includes disproportionate policy approaches to “tackle homelessness” that apply repressive efforts to prevent begging, loitering, vagrancy, running away or survival behaviours, for example, the criminalization of status offences,¹⁶ street sweeps or “round-ups”, and targeted violence, harassment and extortion by police. Direct discrimination can include: the refusal by police to take seriously reports by children in street situations of theft or violence; discriminatory treatment within juvenile justice systems; the refusal of social workers, teachers or health care professionals to work with children in street situations; and harassment, humiliation and bullying by peers and teachers in schools. Indirect discrimination includes policies that result in exclusion from basic services, such as health and education, for example by requiring payment or the provision of identity documents. Even if children in street situations are not isolated from basic services, they might be isolated within such systems. Children can face multiple and intersecting forms of discrimination, for example, on the basis of gender, sexual orientation and gender identity/expression, disability, race, ethnicity, indigenous status,¹⁷ immigration status and other minority status, particularly as minority groups are often overrepresented among children in street situations. Children subject to discrimination are more vulnerable to violence, abuse, exploitation, sexually transmitted infections, including HIV, and their health and development are put at greater risk.¹⁸ States are reminded that guaranteeing the right to non-discrimination is not only a passive obligation to prohibit all forms of discrimination, but also requires appropriate proactive measures to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This requires positive measures aimed at redressing a situation of

substantive inequality. 19 Systemic discrimination is responsive to, and can therefore be addressed by, legal and policy change. Children in street situations have highlighted the discrimination and negative attitudes by the public they face as a specific concern, and asked for there to be awareness-raising and educational measures to counter them.

...

Right to life

29. Children in street situations are at risk of, inter alia: extrajudicial killings by State agents; murder by adults or peers, including murder linked to so-called vigilante justice, and association with/targeting by criminal individuals and gangs, and when the State does not prevent such crimes; exposure to potentially life-threatening conditions associated with hazardous forms of child labour, traffic accidents,²³ substance abuse, commercial sexual exploitation and unsafe sexual practices; and death due to lack of access to adequate nutrition, health care and shelter. The right to life should not be interpreted narrowly.²⁴ It concerns individuals' entitlement to be free from acts and omissions intended or expected to cause their unnatural or premature death, and to enjoy a life with dignity. In 1999, in the case of the torture and murder by police of three children and two young people in street situations in 1990, the Inter-American Court of Human Rights ruled that arbitrary privation of life is not limited to the illegal act of homicide, but extends to the deprivation of the right to live with dignity. This conception of the right to life extends not only to civil and political rights but also to economic, social and cultural rights. The need to protect the most vulnerable people — as in the case of street children — definitely requires an interpretation of the right to life that encompasses the minimum conditions for a life with dignity.

...

Articles 13 on freedom of expression and 17 on access to information

42. The right of children in street situations to have access to, seek and impart information about their rights is crucial if those rights are to be understood and realized in practice. Context-specific, accessible child rights education will help to overcome barriers to participation so their voices can be heard. Children in street situations need to have

access through accessible and appropriate channels to accurate, high-quality and childfriendly information relating to: (a) the role and accountability of the State, and complaints mechanisms for redress in relation to human rights violations; (b) protection from violence; (c) sexual and reproductive health, including family planning and prevention of sexually transmitted infections; (d) healthy lifestyles, including diet and physical activity; (e) safe and respectful social and sexual behaviours; (f) prevention of accidents; and (g) the negative impacts of abuse of alcohol, tobacco, drugs and other harmful substances.

...

D. Adequate standard of living

Article 27 on the right to an adequate standard of living

Support to parents, caregivers and children

49. In accordance with article 27 (3), States should ensure that all children have a standard of living adequate for their physical, mental, spiritual and moral development, to prevent them ending up in street situations and to fulfil the rights of children already in street situations. States shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing. Those prescriptions leave no leeway for the discretion of States. The implementation of the above in accordance with national conditions and within the means of States parties should be interpreted in conjunction with article 4, that is, to the maximum extent of States parties' available resources and, where needed, within the framework of international cooperation, with particular regard to the obligations of States to fulfil the minimum core obligation for social, economic and cultural rights. In terms of material assistance, children in street situations prioritize the need for a safe place to live, food and free and accessible medical care and education, through State support to parents and caregivers, particularly in relation to subsidized, adequate housing and income generation. The interpretation of article 27 (3) is not limited to measures to assist parents and others responsible for the child. The obligation to provide material assistance and support programmes in case of need should be interpreted as also meaning assistance provided

directly to children. This is particularly relevant for children in street situations with nonexistent or abusive family connections. Direct material assistance to children in the form of services may be provided either by the State or via State support to civil society organizations. For single-parent and reconstructed families, States' measures to secure maintenance for the child are particularly important (see article 27 (4)).

**UNITED NATIONS GENERAL ASSEMBLY, UNITED NATIONS *STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE* (“BEIJING RULES”),
A/RES/40/33, 29 NOVEMBER 1985**

3. Extension of the Rules

3.1 The relevant provisions of the Rules shall be applied not only to juvenile offenders but also to juveniles who may be proceeded against for any specific behaviour that would not be punishable if committed by an adult.

3.2 Efforts shall be made to extend the principles embodied in the Rules to all juveniles who are dealt with in welfare and care proceedings.

3.3 Efforts shall also be made to extend the principles embodied in the Rules to young adult offenders.

UNITED NATIONS GENERAL ASSEMBLY, UNITED NATIONS GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY (“THE RIYADH GUIDELINES”), A/RES/45/112, 14 DECEMBER 1990

3. For the purposes of the interpretation of the present Guidelines, a child-centred orientation should be pursued. Young persons should have an active role and partnership within society and should not be considered as mere objects of socialization or control.

...

23. Young persons and their families should be informed about the law and their rights and responsibilities under the law, as well as the universal value system, including United Nations instruments.

...

31. Schools should promote policies and rules that are fair and just; students should be represented in bodies formulating school policy, including policy on discipline, and decision-making.

**FAIR CHANGE COMMUNITY LEGAL
CLINIC**

Applicant

and

**HIS MAJESTY THE KING IN RIGHT OF
ONTARIO AS REPRESENTED BY THE
ATTORNEY GENERAL OF ONTARIO**

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**FACTUM OF THE INTERVENER
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