CACV4329

IN THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN:

GOVERNMENT OF SASKATCHEWAN AS REPRESENTED BY THE MINISTER OF EDUCATION

APPELLANT
(*Respondent/Applicant*)

AND:

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

RESPONDENT
(*Applicant/Respondent*)

AND:

CONSEIL DES ÉCOLES FRANSASKOISES, CHINOOK SCHOOL DIVISION, CHRIST THE TEACHER CATHOLIC SCHOOL, CREIGHTON SCHOOL DIVISION NO. 111, GOOD SPIRIT SCHOOL DIVISION, GREATER SASKATOON CATHOLIC SCHOOLS, HOLY FAMILY ROMAN CATHOLICS SEPARATE SCHOOL DIVISION #140, HOLY TRINITY CATHOLIC SCHOOLS, HORIZON SCHOOL DIVISION, ILE-A-LA CROSSE SCHOOL DIVISION NO. 112, LIGHT OF CHRIST CATHOLIC SCHOOLS, LIVING SKY SCHOOL DIVISION NO. 202, LLOYDMINSTER CATHOLIC SCHOOL DIVISION, LLOYDMINSTER PUBLIC SCHOOL DIVISION, NORTH EAST SCHOOL DIVISION, NORTHERN LIGHTS SCHOOL DIVISION NO. 113, NORTHWEST SCHOOL DIVISION #203, PRAIRIE SOUTH SCHOOL DIVISION, PRAIRIE SPIRIT SCHOOL DIVISION, PRAIRIE VALLEY SCHOOL DIVISION, PRINCE ALBERT CATHOLIC SCHOOL DIVISION, REGINA CATHOLIC SCHOOLS, REGINA PUBLIC SCHOOLS, SASKATCHEWAN RIVERS SCHOOL DIVISION, SASKATOON PUBLIC SCHOOL, SOUTH EAST CORNERSTONE PUBLIC SCHOOL DIVISION #209, and SUN WEST SCHOOL DIVISION

NON-PARTIES
(*Respondents*)

AND:

THE ADVOCATES' SOCIETY, AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH SPEAKING), ATTORNEY GENERAL FOR NEW BRUNSWICK, ATTORNEY GENERAL OF ALBERTA, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,

CANADIAN CIVIL LIBERTIES ASSOCIATION, JOHN HOWARD SOCIETY OF SASKATCHEWAN, JUSTICE FOR CHILDREN AND YOUTH, SASKATCHEWAN FEDERATION OF LABOUR, CANADIAN UNION OF PUBLIC EMPLOYEES, CANADIAN TEACHERS' FEDERATION, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA and WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

INTERVENORS

FACTUM OF THE INTERVENOR
JUSTICE FOR CHILDREN AND YOUTH

This document delivered by:
JUSTICE FOR CHILDREN AND YOUTH
55 University Avenue, Suite 1500
Toronto, ON M5J 2H7
Lawyers in charge of file: Mary Birdsell and Allison P. Williams
Tel: 416-920-1633 / Fax: 416-920-58

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PART I - INTRODUCTION

1. By order of the Court of Appeal for Saskatchewan, dated July 26th, 2024, Justice for Children and Youth ("JFCY") was granted Leave to Intervene in this appeal pursuant to Rule 17 of *The Court of Appeal Rules*.[1]

2. JFCY seeks to assist this honourable Court by providing a child-rights informed analysis of the core issues in dispute, namely: 1) the availability of judicial review and declaratory relief when the Notwithstanding Clause of s. 33 of the *Canadian Charter of Rights and Freedoms*[2] ("the Notwithstanding Clause"; and "the *Charter"* respectively) has been pre-emptively invoked in legislation; and 2) the permissibility and propriety of permitting the amendment of the pleadings by UR Pride (Respondent on Appeal, Applicant at the Court below) to include a claim under s. 12 of the *Charter*. JFCY submits that this honourable Court's analysis of the issues must place children, whose interests are directly at stake, at the centre of each of the issues under consideration.

3. That enhanced protections are owed to children in the application and interpretation of legal rights has been unequivocally recognized by the Supreme Court of Canada,[3] and derives, at least in part, from Canada's obligations as a signatory to the United Nations *Convention on the Rights of the Child ("UNCRC"),*[4] and in accordance with the values of the *Charter*.

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[1] Sask, *The Court of Appeal Rules* (combined), r 17. [*Rules*]
[2] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11. ["*Charter*"]
[3] *R v Sharpe*, 2001 SCC 2 at para 177; *AB v Bragg Communications Inc.*, 2012 SCC 46 at para 17; *Ontario (Children's Lawyer) v Ontario (Info. and Privacy Commissioner)* 2018 ONCA 559 at para 74
[4] United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No.3. ["*UNCRC*"]

4. A child-rights respecting approach, informed by domestic and international human rights law, supports the availability of judicial review and the issuance of declaratory relief, and supports permitting the amendment of UR Pride's application to include a claim under s. 12 of the *Charter*. The fundamental interests, rights, integrity, dignity, and security of gender-diverse children are at stake, and a meaningful judicial review of those interests is required, especially where government has pre-emptively invoked the Notwithstanding clause in legislation affecting them.

PART II – JURISDICTION AND STANDARD OF REVIEW

5. JFCY agrees the Court of Appeal for Saskatchewan has jurisdiction.

6. JFCY adopts the Respondent UR Pride's position on standard of review.

PART III– THE FACTS

7. JFCY accepts the facts as presented by the parties, and takes no position if there are points of disagreement. Generally, JFCY relies on the facts as presented by the Respondent UR Pride in support of its submissions.

8. This Appeal is brought by the Government of Saskatchewan (Appellant on Appeal, Respondent at the Court below), as represented by the Minister of Education (the "Government"), from the February 16th, 2024 decision of the Learned Chambers Judge permitting UR Pride to amend their pleadings in the underlying application for judicial review of a Ministry of Education policy directed at managing when and how gender diverse youth may use their names and pronouns of choice at school.

9. The requested amendments arose because the Government had recently passed legislation

which legislated the policy under review into law and pre-emptively invoked the Notwithstanding Clause in section 197.4(3) of *The Education Act*[5] (the "*Act*") with the intent of insulating the law from judicial review, specifically under ss. 2, 7, and 15 of the *Charter*. In response to this action UR Pride sought to amend their application to supplant their application for a review of the policy, with a review of the new legislation. They also sought to amend their claim to include an allegation that the new law breached s.12 *Charter* rights. Notably, s. 12 had not been referenced in the legislation as a ground the Notwithstanding Clause applied to. The Government opposed the proposed amendments in their entirety, and furthermore, suggested that the request for the addition of a s. 12 claim to UR Pride's pleadings was ultimately brought for an improper purpose.

10. The Government also appealed the decision of the Learned Chambers Judge which affirms the availability of judicial review for the provision of declaratory relief, despite the Government's pre-emptive invocation of the Notwithstanding Clause in its legislation. The Government opposed this, having taken the position that the application to amend should be rejected in its entirety and the whole matter should be rendered moot, arguing that the invocation of the Notwithstanding Clause foreclosed any and all access to judicial review.

[5] *The Education Act*, 1995, SS 1995, c E-0.2.

PART IV – POINTS IN ISSUE

11. This Appeal will decide whether the Learned Chambers Judge erred: 1) in exercising his discretion to permit UR Pride's amendments to the originating application, including the addition of a s.12 *Charter* claim; 2) in holding that the invocation of the Notwithstanding clause in s. 33 of the *Charter* does not oust the jurisdiction of the Court of King's Bench to consider alleged violations of ss. 7 and 15 of the *Charter*; and, 3) in exercising his discretion by declining to determine the issue of mootness at this stage.

12. JFCY submits that in addressing all of the issues before it, this Honourable Court must incorporate a child-rights informed analysis in reaching its determination. As a signatory to the *UNCRC,* Canada has specific legal obligations, including a mandate to ensure special protections, and to consider the best interests and the dignity of children in making any and all decisions that affect them. This is specifically relevant to both the procedural and substantive rights considerations and analysis of the issues before this Honourable Court.

PART V – ARGUMENT

Centring Children in the Analysis

13. This Honourable Court's analysis must evaluate the rights and interests at stake from the vantage point of the group of children whose interests are engaged, placing children at the centre of each of the issues under consideration. Its analysis must provide for special protection, and use the best interests of children as its foundation, with interpretive guidance from the tools most relevant to evaluating children's rights, including the international human rights instrument, the United Nations *Convention on the Rights of*

Children ("UNCRC")[6] and the General Comments developed thereunder.

14. Children are uniquely vulnerable, marginalized, and disenfranchised members of society, and their rights and interests are entitled to special or enhanced protection. The UNCRC provides that "childhood is entitled to special care and assistance" and "special safeguards and care, including appropriate legal protection.[7]

15. Children are an equity-seeking group who experience ongoing and historical personal, social, and political marginalization, exclusion, and dispossession just as other equity-seeking groups. As uniquely vulnerable people, children are entitled to greater attention to their dignity, rights, and security.

16. As described by Canada's Standing Senate Committee on Human Rights "Children are the only group in Canada – left out on the basis of age alone – with no voice, no vote, and little access to powerful lobby groups, the media, or legal services."[8] Citing the UN Committee on the Rights of the Child and UNICEF Innocenti Research Centre, the Senate Committee goes on to note that "children's voices rarely inform government decisions, yet they are one of the groups most affected by government action or inaction. Children are not merely underrepresented; they are almost not represented at all." [citation omitted].[9]

17. Further, this Court's analysis must carefully attend to the intersecting vulnerabilities of

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[6] *UNCRC, supra* note 4
[7] *Ibid*, Preamble
[8] Canada, Parliament, Senate, Standing Committee on Human Rights, *Children: the silenced citizens: effective implementation of Canada's international obligations with respect to the rights of children*, 39th Parl, 1st Sess, No 10 (April 2007) (Chair: Raynell Andreychuk) at p 27
[9] *Ibid* at p 27

gender-diverse children – this is especially true where the *Charter* interests of children are directly engaged, as here.

Applicability of International Law

18. It is a well-established principle that Canadian law must be interpreted to comply with Canada's international treaty obligations,[10] and the *Charter* is to be presumed to provide at least as great a level of protection as the *UNCRC*.[11] Absent clear wording in a statute to the contrary, courts must not interpret domestic law in a manner that would violate Canada's international commitments.[12]

19. Canada's international human rights commitments provide a framework for the interpretation of the legal principles at stake, including the interpretation of the *Charter*. The Supreme Court of Canada recently affirmed this presumption of statutory compliance with international law in *Mason v Canada,* finding that "legislation is presumed to operate in conformity with Canada's international obligations"[13], that "international human rights instruments to which Canada is a party trigger the interpretive presumption of conformity with international law", and that a decision that fails to consider "the legal constraints imposed by international law" is "unreasonable."[14]

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[10] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 31; *R v Sharpe*, *supra* note 3 at para 175; *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 70; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 72 and 105 ["*Mason"*]

[11] *Health Services and Support-Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 at para 70

[12] *R v Hape*, 2007 SCC 26 at para 53 ["*Hape*"]

[13] *Mason, supra* note 10 at paras 72 and 105

[14] *Mason, supra* note 10 at paras 10, 105 and 122

20. This presumption of conformity extends to the *Charter.* Where the express wording of the *Charter* is capable of supporting a construction that is compliant with Canada's international obligations, that is the construction that should be adopted.[15] The Supreme Court of Canada in *Hape* states (quoting *Slaight Communications Inc v Davidson,* and *Reference re Public Service Employee Relations*):

> The content of Canada's international human rights obligations is… an important indicia of the meaning of the "full benefit of the *Charter*'s protection" I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.[16]

Best Interests of the Child & Applicability of the UNCRC and General Comments

21. "Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system." [17]

22. The *UNCRC* was ratified by Canada in 1991.[18] Article 3 mandates that "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."[19] Therefore, in assessing whether judicial review and declaratory relief ought to be available in this circumstance, the Court shall consider children's best interests as a primary consideration.

23. As shall be explained further below, a child's best interests is a procedural guarantee, as

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[15] *Hape*, *supra* note 12 at para 56
[16] *Ibid*, at para 55
[17] *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at paras 36 - 39
[18] The Government of Canada ratified the *UNCRC* on December 12, 1991
[19] *UNCRC,* at art 3.1

well as a substantive right and a fundamental interpretive legal principle.[20]

24. The General Comments, developed under the *UNCRC*, provide detailed explanatory and interpretive content, and are another persuasive interpretive tool which have been regularly used by Canadian courts to assist in contextualizing how the *UNCRC* should be applied.[21]

25. In describing the nature and scope of the obligations of state parties, General Comment No. 14 (2013) *on the right of the child to have his or her best interests taken as a primary consideration, ["GC No. 14"]* specifies that States parties have

> The obligation to ensure that the child's best interests are **appropriately integrated and consistently** applied in **every action** taken by a public institution, **especially** in all implementation measures, administrative and **judicial proceedings which directly or indirectly impact on children**;[22]
>
> (emphasis added)

26. Furthermore, in guidance surrounding the definition of what "in all actions concerning children" encompasses, *GC No. 14* cites the Committee's earlier General Comment No. 7 (2005): *Implementing child rights in early childhood*[23] for the proposition that "all actions concerning children"

> …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**.[24]

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[20] United Nations Committee on the Rights of the Child, *General Comment No. 14, (2013) on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, 29 May 2013 at para 6 ["*GC No. 14*"]
[21] See for example *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1; *JESD v YEP*, 2018 BCCA 286; and *Justice for Children and Youth v JG*, 2020 ONSC 4716
[22] *GC No. 14, supra* note 20 at para 14(a)
[23] United Nations Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, 20 September 2006
[24] *GC No. 14, supra* note 20 at para 19

(emphasis added)

27. JFCY submits that in coming to a determination on the issues in this appeal this Honourable Court has a domestic and international legal obligation to thoroughly consider the impact of foreclosing access to judicial review and declining to issue appropriate declaratory relief to vulnerable children whose rights are at risk of infringement and who otherwise lack a voice to speak for themselves, specifically through the lens of the "best interests of the child."

Availability of Judicial Review and Declaratory Relief

28. JFCY submits that nothing in s. 33 of the *Charter* supersedes the jurisdiction of the Court of King's Bench to judicially review and declare a law as unreasonably limiting *Charter* rights, even where the Notwithstanding clause has been pre-emptively invoked.

29. However, if there were any ambiguity or uncertainty as to the state of the law, or a question of the direction in which the law should develop, the uncertainty should be resolved in favour of an interpretation of the law that supports children's access to justice when questions of alleged rights violations arise. Such an approach provides essential protections and safeguards for inherently vulnerable and historically excluded people and groups, specifically here gender-diverse children, by ensuring that the roles of the various branches of government are robustly maintained.

Best Interests of Children Considerations Militate in Favour of the Availability of Judicial Review and Declaratory Relief, supported by a best interests analysis

30. In applying a best interests of children analysis to the underlying questions at issue there

is helpful normative guidance in *GC No. 14* noting that "best interests" is a "threefold concept":

> (a) **A substantive right**: The right of the child to have his or her best interests assessed and taken as **a primary consideration when different interests are being considered** in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented **whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general**. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and **can be invoked before a court.**
>
> (b) **A fundamental, interpretative legal principle:** If a legal provision is open to more than one interpretation, **the interpretation which most effectively serves the child's best interests should be chosen.** The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.
>
> (c) **A rule of procedure:** Whenever a decision is to be made that will affect a specific child, **an identified group of children or children in general**, the decision-making process **must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned**. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.[25]
>
> (emphasis added)

31. Each of the substantive, procedural, and interpretive approaches to safeguarding the rights and interests of children militate in favour of this Court upholding the decisions of the Learned Chambers Judge below as demonstrating no error.

32. Speaking specifically to the interpretive approach, an interpretation of the impact of the pre-emptive invocation of the Notwithstanding Clause which preserves the court's ability

[25] *GC No. 14*, *supra* note 20 at para 6

to review an allegation that the underlying legislation unjustifiably violates *Charter* rights is in the substantive and procedural best interests of gender diverse children as a particularly vulnerable group of people. The same is true regarding a conclusion that UR Pride be permitted to amend their application to include an allegation that the impugned legislation violates s. 12 of the *Charter* and is not justified.

33. *GC No. 14* specifically notes how the "best interests of the child" links to children's right to be heard under Article 12 of the *UNCRC*, "either directly or through a representative, in any judicial or administrative proceeding affecting him or her."[26]

34. General Comment No. 12 (2009), *The right of the child to be heard* also discussed the interplay between Articles 3 and 12 of the *UNCRC*, noting

> 72. Article 3 is devoted to individual cases, but, explicitly, also requires that the best interests of children as a group are considered in all actions concerning children. States parties are consequently under an obligation to consider not only the individual situation of each child when identifying their best interests, but also the interests of children as a group. Moreover, States parties must examine the actions of private and public institutions, authorities, as well as legislative bodies. The extension of the obligation to "legislative bodies" clearly indicates that **every law, regulation or rule that affects children must be guided by the "best interests" criterion.**
>
> 73. There is no doubt that the best interests of children as a defined group have to be established in the same way as when weighing individual interests. **If the best interests of large numbers of children are at stake, heads of institutions, authorities, or governmental bodies should also provide opportunities to hear the concerned children from such undefined groups and to give their views due weight when they plan actions, including legislative decisions, which directly or indirectly affect children.**
>
> 74. There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best

[26] *GC No. 14, supra* note 20 at paras 43-45

> interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, **there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.**
>
> (emphasis added)

35. JFCY submits that declining to permit a judicial review of the impugned legislation and foreclosing the possibility of declaratory relief would prevent gender-diverse children's perspectives from being heard, respecting a matter that directly impacts them at school - where they work and play. This is contrary to their best interests in every way, but especially when we consider the factual genesis of the impugned legislation.

36. The Government legislated the amendments to the *Education Act* quickly. We are not aware of any effort to meet the obligation on state parties quoted above "to hear the concerned children from such undefined groups and to give their views due weight when they plan actions, including legislative decisions, which directly or indirectly affect children." Therefore, it is extremely important that UR Pride and any other intervenors are not foreclosed from the opportunity to represent a child rights perspective to the judiciary, in an effort to seek declaratory relief and to bring attention to the dignity, rights, and security of children.

37. Children, as individuals and as a group, have limited capacity to organize and protest against oppressive or discriminatory actions, and they are specifically barred from democratic participation in elections as a result of their age. Access to judicial review may have heightened significance in providing an important forum to identify and evaluate breaches of children's rights, even those which may be made legally permissible through

the invocation of the Notwithstanding clause. Declaratory relief can highlight breaches of rights to adults who have the political and social power to act upon such findings. As a marginalized group with little or no access to the political arm, access to judicial review of the *Charter* rights of gender-diverse children may represent their only access to rights consideration. Declaratory relief may, in some contexts such as in the matter before this Honourable Court, be among the only available avenue of recourse or remedy.

38. Notably, to foreclose access to judicial review, and / or the amending of pleadings to permit the inclusion of a s. 12 *Charter* claim has a differential impact on children by delaying a substantive consideration of the issues to a time at least 5 years into the future. The passage of time is understood to impact children differently, and will, for some children impacted by this legislation, affect most or all of their formative years. A declaration regarding ss 7 and 15 of the *Charter*, and a possible finding of no force and effect regarding s. 12 of the *Charter*, regarding the *Act*'s violation, or not, of children's rights and interests ensures the requisite protection by the judicial branch of the rights and interests of this particularly vulnerable group.

Permissibility and Propriety of Amending Pleadings to include a Section 12 Claim

39. JFCY submits that the Learned Chambers Judge did not err by permitting UR Pride to amend its pleadings to include a s. 12 *Charter* claim, alleging that the law requiring the misgendering or outing of gender-diverse children at school breaches gender-diverse children's rights to freedom from cruel and unusual treatment.

40. It is essential, in the best interests of children, and gender-diverse children in particular,

that the *Act* be evaluated for compliance with s. 12 of the *Charter*. There is a reasonable cause of action, and a pressing and relevant justiciable case to be tried. UR Pride's application must be amended to include s. 12 to ensure that the *Charter* rights of children will be appropriately and fully canvassed.

41. The purpose of s. 12 is "to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals."[27]

42. In *Canadian Doctors for Refugee Care v Canada*, the Court cited the long standing maxim from the Supreme Court of Canada, that "in its modern application, the meaning of 'cruel and unusual treatment or punishment' must be drawn 'from the evolving standards of decency that mark the progress of a maturing society.'"[28]

43. There is a growing awareness, including at law in Canada, of the unique challenges faced by transgender people as among the most marginalized in our society" [29], their lives marked by "disadvantage, prejudice, stereotyping, and vulnerability", people who "often find their very existence the subject of public debate and condemnation."[30]

44. There is additional recognition that gender-diverse children face significant barriers, adversity, and poor outcomes across a wide range of domains, including education, health,

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[27] *R v Bissonnette*, 2022 SCC 23 at para 59
[28] *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 at paras 612-613 citing *R v Smith (Edward Dewey)*, 1987 CanLII 64 (SCC) at paras 54, 57 and 84
[29] *Oger v Whatcott (No. 7)*, 2019 BCHRT 58 at para 62 ["*Oger*"]
[30] *Hansman v Neufeld*, 2023 SCC 14 at paras 85-89, citing *Oger*, at para 62, and *CF v Director of Vital Statistics (Alta)*, 2014 ABQB 237 at para 58

bullying and violence, and future prospects.[31] A prospective claim under s. 12 of the *Charter*, of cruel and unusual treatment, related to the fundamental interests, rights, integrity, dignity, and security of gender-diverse children must be permitted to proceed.

PART VI – RELIEF SOUGHT

45. The Appeal should be dismissed.

46. No costs shall be awarded for or against JFCY

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August, 2024.

JUSTICE FOR CHILDREN AND YOUTH
Mary Birdsell/Allison P. Williams
Counsel for the Intervenor

[31] *Oger, supra* note 29 at para 62

This Document is Filed By:

JUSTICE FOR CHILDREN AND YOUTH
55 University Avenue, Suite 1500
Toronto, ON M5J 2H7

And the address for service is the same as above.
Lawyers in Charge of the File: Mary Birdsell / Allison P. Williams
Tel.: (416) 920-1633
Fax: (416) 920-5855
Email: mary.birdell@jfcy.clcj.ca / allison.williams@jfcy.clcj.ca

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