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Gender-Affirming Names and Pronouns, Parental Control, and Family Violence

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Content Warning: *This post contains descriptions of family violence and gender identity abuse.*

At the United Conservative Party (UCP)'s recent annual general meeting, party members voted on a number of policy proposals. Policy Resolution 8 was "almost unanimously" supported, and would "[r]equire Teachers, Schools, and School Boards to obtain the written consent of the parent/guardian of a student under the age of 16 prior to changing the name and/or pronouns used by the student" (United Conservative Party, Annual General Meeting Policy and Governance Resolutions at 38 (UCP Resolutions)). In a similar vein, Policy Resolution 17 would require the government to "[s]upport a comprehensive Bill of Parental Rights which ensures that all legislation will recognize and support parents' rights to be informed of and in charge of all decisions to do with all services paid for by the province, including education and health care" (UCP Resolutions at 49). The Minister of Education, Demetrios Nicolaides, recently stated that the government is having an "active conversation" about this matter.

If Resolution 8 is adopted by the government, Alberta will be following the path taken by New Brunswick and Saskatchewan earlier this year. Organizations protecting the rights of transgender, non-binary, and gender diverse children and youth (hereafter "gender diverse youth") have launched litigation in New Brunswick and Saskatchewan challenging the policies of those governments under the *Canadian Charter of Rights and Freedoms*. The arguments on these challenges, generally, are that the policies violate the rights of gender diverse youth to security of the person under section 7 of the *Charter* and to equality under section 15 of the *Charter* (and in the case of the New Brunswick challenge, also freedom of expression under section 2(b)).

In September, UR Pride obtained an interlocutory injunction against the implementation and enforcement of Saskatchewan's policy from the Court of King's Bench (see *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)*, 2023 SKKB 204 (CanLII)). Justice Michael Megaw found that the policy raised serious issues regarding the rights of gender diverse youth (at paras 70-72), and would cause some youth irreparable harm that outweighed any harm that the injunction would cause to the public interest (at paras 98, 132). Saskatchewan then passed legislation to formalize the policy and invoked the notwithstanding clause under section 33 of the *Charter* (see Bill 137, *The Education (Parents' Bill of Rights) Amendment Act, 2023*, s 197.4(3), available here). Section 33 allows governments to declare that particular laws apply notwithstanding that they may violate certain rights and freedoms, including those under sections 2, 7, and 15 of the *Charter* (for an explainer on s 33 see here). Bill 137 also applies notwithstanding

The Saskatchewan Human Rights Code, 2018, SS 2018, c S-24.2 (at s 197.4(4)), and it extinguishes any action against the provincial Crown, cabinet, boards of education or their employees for loss or damage resulting from the Bill and related regulations and policies (at s 197.4(5), (6)). UR Pride and its co-legal counsel Egale Canada are currently considering next steps in the *Charter* litigation.

This post takes a slightly different tack and argues that laws and policies such as these, and the so-called "parental rights" on which they are premised, are potentially inconsistent with laws protecting children and youth from family violence. This framing helps refocus the debate away from "parental rights" and towards the best interests of the child, which includes the right to live free from violence. It also provides a legal basis for arguing that freedom from state-sanctioned violence is a fundamental norm from which states cannot derogate, especially when a vulnerable group such as gender diverse youth are affected. As noted by constitutional scholar Kerri Froc, section 33 has never been used previously to override the *Charter* rights of children and youth, so the scenario raised by Saskatchewan's Bill 137 is unprecedented (see also these comments here and here).

At the outset, it is important to acknowledge that many parents will be affirming and supportive when their children approach them about issues related to gender identity and expression (see *UR Pride* at para 96). However, some gender diverse youth face the choice of "electing between being 'outed' to their parents" to obtain the necessary consent related to names and pronouns, or "remain[ing] closeted due to an inability or unwillingness to seek that parental consent" (at para 106). Justice Megaw accepted several expert opinion affidavits establishing that outing gender diverse students to their parents can lead to increased risk of violence and abuse by some parents, as well as increased risk of violence, discrimination, and bullying at school if students' correct names and pronouns are not affirmed (at paras 84-86). Requiring parental consent before youth can use gender affirming names or pronouns at school can also cause "identity invalidation", which may result in psychological harm, depression and anxiety, suicidality, self-harm, and substance use disorders (at paras 75-84).

Whether government-sanctioned parental control over names and pronouns can lead to, or sometimes amount to, family violence requires exploration of definitions of family violence in existing laws and how they have been interpreted and applied by the courts. It also requires an understanding of the extent to which the law protects "parental rights" and the interplay of parental decision-making with the best interests of the child, which is where I begin my discussion.

Parental Rights/Control and the Best Interests of the Child

The *Charter* contains no express protection of "parental rights." However, the Supreme Court of Canada has interpreted freedom of religion under section 2(a), and the right to liberty under section 7, to include some protection of parental decision-making in regards to their children. In *B(R) v Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315, a narrow five person majority of the Court held that parents have the right "to rear their children according to their religious beliefs, including that of choosing medical and other treatments" (at 382). A minority of four judges also found that the right to liberty protects a parent's "right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care" (at 370). All judges agreed that even if these rights are protected, they are not absolute – they are justifiably limited by the state where parental decision-making would

interfere with a child's best interests, including their rights to life, health, and autonomy (at 372, 374). In *B(R)*, the Court unanimously decided that the state was justified in intervening to order a blood transfusion for an infant child that the parents did not consent to.

Parental decision making is also limited when children attain the capacity to make decisions on their own behalf. In *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII), another blood transfusion case, the Court considered the appropriate balance "between what the law has consistently seen as an individual's fundamental right to autonomous decision making in connection with [their] body and the law's equally persistent attempts to protect vulnerable children from harm" (at para 30). For the majority, Justice Rosalie Abella noted that the common law generally recognizes "that children are entitled to a degree of decision-making autonomy that is reflective of their evolving intelligence and understanding" (at para 46), also known as the mature minor doctrine. The majority found the legislation at issue in the case to be constitutionally valid because it could be interpreted to permit children under 16 "to attempt to demonstrate that their views about a particular medical treatment decision reflect a sufficient degree of independence of thought and maturity" (at para 87).

The ruling in *AC* indicates that a bright line age limit for decision-making by minors on matters related to their health or well-being will be constitutionally problematic – laws and policies must allow for case-by-case consideration of an individual child's capacity. For example, in *AB v CD*, 2020 BCCA 11 (CanLII), a 14-year-old trans child was found to be a mature minor capable of making the decision to pursue hormone therapy (more on this case later). There is also a strong argument that parents "are rarely better positioned" than their children to make medical decisions regarding gender, given that "gender uniquely pertains to personal identity and self-realisation" (see Florence Ashley, "Youth should decide: the principle of subsidiarity in paediatric transgender healthcare" (2023) 49 J Med Ethics 110 at 110). The nature of the decision is also relevant, and it bears mention that the name and pronoun policies in question pertain to gender diverse youth who wish to *socially* transition in relation to their identity and expression, not to *medically* transition. The New Brunswick Child and Youth Advocate recommended that the province "affirm the universal right of all students, consistent with their capacity and whether for the purposes of gender identity or not, to choose how they wish to be addressed" (at Appendix A, recommendation 1).

Justice Abella's approach to the best interests of the child in *AC* accords with international human rights instruments, including the *Convention on the Rights of the Child* (*CRC*), ratified by Canada in 1991. The *CRC* provides that the best interests of the child is a primary consideration "in all actions concerning children" (at art 3). Of more specific relevance to name and pronoun laws and policies, article 8 protects "the right of the child to preserve [their] identity, including nationality, name and family relations." Also relevant are: article 12, which provides that children who are capable of forming their own views have "the right to express those views freely in all matters affecting the child" in accordance with their age and maturity; article 14, which protects "the right of the child to freedom of thought, conscience and religion"; and article 19, which requires States Parties to "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."

Advocates of "parental rights" sometimes reference article 5 of the *CRC*, which provides that States Parties must "respect the responsibilities, rights and duties of parents … to provide …

appropriate direction and guidance" to their children in the exercise of their rights. However, this direction and guidance must be provided "in a manner consistent with the evolving capacities of the child" (at article 5; see also article 14). It is also significant that the rights in the *CRC* are guaranteed "irrespective of the child's … race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status" (at article 1). Although this equal rights guarantee does not mention gender identity or expression, UN human rights bodies have recognized that these grounds should be read in to existing human rights instruments. Therefore, children have equal rights to have their best interests respected, to preserve their identities, to expression and conscience, and to be free from violence, regardless of their gender identity or expression. These rights mediate parental guidance and direction.

The best interests of the child principle is also enshrined in family law legislation across the country. Parents do not have "rights" in relation to parenting and contact with children; rather parenting disputes must be resolved according to the best interests of the child (in Alberta, see the *Family Law Act*, SA 2003, c F-4.5, s 18(1) (*FLA*)). Child welfare legislation also recognizes that "the best interests, safety and well-being of children are paramount" in matters governed by that legislation, and creates a duty to report children who are in need of protection, which applies to teachers amongst others (see e.g. the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, ss 1.1(a), 2(1), and 4 (*CYFEA*)).

Alberta does reference the rights of parents in the *Education Act*, SA 2012, c E-0.3, the preamble of which provides that "parents have the right and the responsibility to make informed decisions respecting the education of their children" and "to choose the kind of education that may be provided to their children." As a more specific example, under section 58.1, parents are entitled to notice of "courses, programs of study or instructional materials, or instruction or exercises, that include subject-matter that deals primarily and explicitly with religion or human sexuality" and can request that their children be exempted from attending. However, the Act also includes parental *responsibilities* in the preamble and section 32. For example, parents must ensure that their conduct "contributes to a welcoming, caring, respectful and safe learning environment" and must co-operate and collaborate with school staff "to support the delivery of supports and services to the child." Under the *Education Act*, then, the rights of parents are again mediated by their responsibilities to act in the best interests of their children.

The foregoing discussion confirms that parental decision-making authority is always subject to the best interests of the child, and that as children grow in maturity, they will be accorded greater decision-making autonomy regardless of parental wishes. Interestingly, in the *UR Pride* case, the court found that the government did "not appear to advance an argument" that the policy in question was in the best interests of the students, nor that it would "lead to better outcomes for them from a mental health perspective" (at para 129). This suggests that the government's policy was motivated primarily by "parental rights", and accorded minimal consideration to the best interests of the child, if any.

It should be beyond dispute that violence is contrary to the best interests of children. Whether parental control over their children's names and pronouns can lead to or sometimes amount to "family violence" depends on the definition of that term in a given context, which I turn to next.

Family Violence

Background and Definitions

As noted by Suzie Dunn, "[t]he words used to describe a phenomenon shape the legal and social understanding of that experience" and ensure that harmful behaviours are not "normalized and minimized" (see "Is it Actually Violence? Framing Technology-Facilitated Abuse as Violence" in Jane Bailey, Asher Flynn & Nicola Henry (eds), *The Emerald International Handbook of Technology-Facilitated Violence and Abuse* (Bingley, UK: Emerald Publishing, 2021), 25 at 26). This is an important starting point for thinking about whether the harms experienced by gender diverse youth whose parents control and try to undermine their decisions to socially transition can amount to "family violence", and also, whether the state's enabling of this potential violence is legally permissible.

A 2006 UN Study on Violence against Children begins with the line: "No violence against children is justifiable; all violence against children is preventable" (at para 1). Yet the study found that violence against children exists in every country of the world, and is frequently legally and government-authorized (at para 1). Some groups of children are "especially vulnerable to violence", including "children with disabilities, those from ethnic minorities and other marginalized groups" (at para 31). The study recognized that children can experience physical, sexual, and psychological violence at the hands of parents and other family members, with psychological violence including "[i]nsults, name-calling, isolation, rejection, threats, emotional indifference and belittling" (at para 42). Schools were found to "have an important role in protecting children from violence" (at para 48), yet they can also be sites of violence against lesbian, gay, bisexual and trans youth, especially where governments fail to "enact and implement laws that provide students with explicit protection from discrimination" (at para 52).

Most family legislation across Canada now includes family violence as a factor relevant to the best interests of children (for a comparison of such laws see here). Federally, the *Divorce Act*, RSC 1985, c 3 (2nd Supp), provides that in determining the best interests of the child for the purposes of parenting orders, "the court shall consider all factors related to the circumstances of the child, including… any family violence" (at s 16(3)(j)). Family violence is defined broadly to include physical and sexual abuse, threats to cause bodily harm, psychological and financial abuse, harassment, and failure to provide the necessaries of life (at s 2(1)). Factors relevant to the impact of family violence on parenting orders include "whether there is a pattern of coercive and controlling behaviour in relation to a family member, … whether the family violence is directed toward the child, … the physical, emotional and psychological harm or risk of harm to the child, … [and] whether the family violence causes the child or other family member to fear for their own safety" (at s 16(4)).

Most provinces and territories across Canada have now harmonized their family legislation – which applies when the parties are not seeking a divorce – with the *Divorce Act.* However, some provinces, including Alberta, have yet to do so. Under Alberta's *FLA*, family violence is relevant to the best interests of the child, but it is defined more narrowly to include "causing or attempting to cause physical harm to the child …, including forced confinement or sexual abuse, or causing the child … to reasonably fear for [their] safety or that of another person" (at s 18(3)). The *FLA*'s definition of family violence also excludes "the use of force against a child as a means of correction

by a guardian or person who has the care and control of the child if the force does not exceed what is reasonable under the circumstances" (at s 18(3)(a)).

I have criticized this narrow definition of family violence previously (see here), and the exemption for disciplinary violence merits special mention. This provision is unique in family legislation in Canada, and it is contrary to the recommendations of the UN Study on Violence against Children noted above (see recommendation 1(c)). A majority of the Supreme Court declined an opportunity to find a similar exemption in section 43 of the *Criminal Code* unconstitutional from the perspective of children's rights (see *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 (CanLII)). However, they clarified that, properly interpreted, the criminal exemption should only apply to "minimal force of transient or trivial impact" and not "force that harms children, is part of a pattern of abuse, or is simply the angry or frustrated imposition of violence against children" (at para 59). This reading down to avoid a violation of children's rights would likely apply to the *FLA* also, although this issue has not been considered by Alberta courts (for the sole case applying s 18(3)(a), see *TMc v AML*, 2019 ABPC 302 (CanLII)). Regardless, this exemption may reinforce problematic notions of parental control over children at the expense of their best interests.

Another difference between the *FLA*'s definition of family violence and that in most other parts of Canada is the *FLA*'s omission of psychological/emotional abuse and coercive control. Although legislative reform to harmonize the *FLA* with the *Divorce Act* would be preferable, case law indicates that the *FLA* should be interpreted to include broader forms of violence such as psychological abuse and coercive control (see e.g. *ST v KT*, 2021 ABPC 167 (CanLII) at paras 81, 98-100). Coercive control is a form of family violence that requires a focus on patterns of coercive and controlling behaviour and tactics rather than discrete incidents of violence, and on the cumulative impact of these patterns on the victim's autonomy. Although coercive control was originally developed to describe abuse experienced by adult survivors, it also encapsulates the family violence experienced by many children and youth (see e.g. the work of Emma Katz).

Protection order legislation also aims to protect children from family violence by creating access to orders that can include conditions for no contact or communication with an abusive family member. In Alberta, the *Protection Against Family Violence Act*, RSA 2000, c P-27 (*PAFVA*) has a similar definition of family violence to that in the *FLA* (including the exemption for "corrective" violence; see s 1(1)(e)). Some other Canadian protection order statutes have broader definitions of family violence that include psychological and emotional abuse and coercive control (for a comparison see here). However, *PAFVA* does require the consideration of the best interests of children and the presence of any repetitive, escalating, or controlling behaviour by the respondent when deciding whether to grant an emergency protection order (at s 2(2)).

Although it is not yet mentioned explicitly in Canadian laws, another form of family violence is identity abuse. As noted in a 2023 study in Victoria, Australia, "Young people's experiences of identity abuse in the context of family violence", the term "identity abuse" was coined to identify the unique forms of family violence experienced by 2SLGBTIQ+ survivors, including "pressuring a person to conform to gender norms, … threatening to 'out' the person's gender, sexuality or HIV status, [and] exiling a person from the family due to their sexuality or gender" (at 8). With respect to gender identity abuse specifically, the vast majority of study respondents experienced this form of abuse alongside other types of family violence, including emotional abuse (85%), physical

violence (50%), and death threats (23%) (at 19). Some respondents experienced gender identity abuse weekly (27%) or almost daily (19%) (at 20), consistent with understandings of coercive control. Almost all of the respondents reported serious social, emotional, and mental health impacts of gender identity abuse (at 21-26). There are also systemic impacts of violence against marginalized groups such as gender diverse youth when they are dehumanized and marked as inferior (see Dunn at 32).

Similar studies on identity abuse against gender diverse youth, and the resulting harms of this abuse, exist in Canada, as discussed by the experts in the *UR Pride* case (see also this study by Trans PULSE Canada). For gender diverse adults too, misgendering or other forms of denying their gender identity and expression can cause harm (see e.g. this recent paper by Samuel Singer and Amy Salyzyn and this paper on non-binary people specifically). The findings from these studies indicate that gender identity abuse can be considered a form of psychological/emotional abuse and a tactic of coercive control. As such, it may be encompassed by definitions of family violence in Canada, including in Alberta, in appropriate circumstances. Next, I turn to case law that has elaborated on the interpretation of family violence in the context of gender identity.

Case Law

In a review of recent family law decisions, Claire Houston found that litigation involving the issue of whether it is in the best interests of trans children to support their decisions on gender identity and expression is becoming more common (see "Respecting and Protecting Transgender and Gender-Nonconforming Children in Family Court" (2020) 33:1 Can J Family Law 103). She noted that these cases often arise when one parent supports the child (typically the mother) and the other parent (typically the father) does not (at 104). Fathers sometimes accuse mothers of pressuring the child with respect to their gender identity/expression, thus perpetuating mother-blaming in the context of gender affirmation (at 148).

This was the scenario in what appears to be the only reported case in Canada that has considered the issue of family violence in a dispute involving a trans youth. In *AB v CD*, cited above, a 14-year-old transgender youth (AB), who had already transitioned socially, wished to begin hormone therapy with the support of his mother (EF) and a medical team. The child's father CD, who was separated from EF, sought to prevent the treatment by applying for an interlocutory injunction. In denying the injunction application and affirming AB's right to receive hormone therapy, Justice Gregory Bowden accepted the medical team's decision that the child was a mature minor entitled to consent to his own medical treatment (2019 BCSC 254 (CanLII) at paras 54-58). He also issued an order under BC's *Family Law Act*, SBC 2011, c 25 (BC *FLA*) that "[a]ttempting to persuade A.B. to abandon treatment for gender dysphoria; addressing A.B. by his birth name; referring to A.B. as a girl or with female pronouns whether to him directly or to third parties; shall be considered to be family violence" (at para 70).

When the matter next came before the court, AB was seeking a protection order against CD (2019 BCSC 604 (CanLII)). CD had been speaking publicly and engaging with media (including anti-trans media) about the case, misgendering AB, and sharing AB's personal and medical information online, including his depression and suicidal ideation. Granting a protection order required a finding that family violence was likely to occur against an at-risk family member. Justice Francesca Marzari noted that the definition of family violence in the BC *FLA* includes

"psychological abuse in the form of harassment or coercion, and unreasonable restrictions or preventions of a family member's personal autonomy" (at para 20). She indicated that one form of family violence had already been identified by Justice Bowden – misgendering, misnaming, and attempting to persuade AB to abandon medical treatment – and that there was evidence that CD had engaged in these behaviours (at para 21). AB also gave evidence that CD's communications made him "terrified that my father is going to go public in some way that will identify me and open me up to terrible bullying or violence", and that he was "concerned for my physical and emotional safety" (at para 32). Justice Marzari found that CD was "likely to continue to engage in conduct that constitutes family violence" against AB, both by rejecting AB's gender identity and by publishing and sharing "deeply private information" that exposed AB "to degrading and violent public commentary" and to "bullying, harassment, threats and physical harm, including self-harm" (at paras 46, 68, 70; see also paras 64 and 74). She also remarked that CD's rights as a parent "are necessarily guided and constrained by the *FLA* and … do not include harming his child" (at para 49). Justice Marzari granted the protection order and prohibited CD from communicating with AB and others in relation to his gender identity and related matters (at para 93).

At the BC Court of Appeal, CD sought to overturn both the treatment order and protection order, and several organizations sought intervenor status. On behalf of the Court, Justice Richard Goepel ruled that interventions on issues related to the best interests of the child and family violence were not warranted, given that this was a "private family law case involving the application of established principles" and that AB's counsel were "more than capable of making all necessary submissions on his behalf" (see 2019 BCCA 297 (CanLII) at para 72). This is unfortunate, as the Court (Chief Justice Robert Bauman and Justice Barbara Fisher, with Justice Harvey Groberman concurring) went on to overturn the finding of family violence, noting that there was no case law interpreting the relevant provisions of the BC *FLA* in a comparable context (see 2020 BCCA 11 (CanLII) at para 163).

The Court of Appeal found that Justice Bowden erred in making an order pertaining to family violence because he made no findings with respect to family violence at that stage of the proceedings – the focus was AB's medical treatment and his best interests in that context (at paras 107, 116, 140). In turn, the Court found that Justice Marzari had based much of her analysis on Justice Bowden's declaration of what conduct amounted to family violence (e.g. CD's misgendering of AB), with additional findings that CD's public disclosures about AB were "harmful" to him, short of finding that this was "family violence" (at para 167). The Court ultimately held that there was "insufficient evidence in the record" before both judges that CD's conduct "was grounded by an intent to hurt AB" (at para 171). More specifically, the earlier orders did not assess "whether CD's conduct in relation to the name and pronouns he used with AB, and his discussions of AB's treatment choices, were sufficiently intentional … to ground a finding of family violence" (at para 172). The Court also expressed the view that "caution should be exercised in identifying 'psychological or emotional abuse' as constituting 'family violence'", particularly in a case involving "a complex family relationship stemming from a profound disagreement about important issues of parental roles and medical treatment" (at para 175). The Court vacated the protection order and substituted a conduct order under s 222 of the BC *FLA* that was aimed at "minimiz[ing] the conflict between the parties" (at para 188). This conduct order was similar to the protection order in prohibiting CD from misgendering or misnaming AB and from publishing information relating to AB's gender identity, health, and medical status (at paras 220, 222). CD subsequently violated this conduct order repeatedly, disclosing AB's identity and exposing him to

further harms. He pleaded guilty to criminal contempt and was sentenced to 45 days imprisonment (see *R v CD*, 2023 BCCA 319 (CanLII)).

I have several concerns with the Court of Appeal's approach to family violence. First, the Court stated that "raising the issue of family violence in the context of this case caused the parties to become increasingly polarized in their positions, thus exacerbating the conflict and raising the stakes in the litigation" (at para 169). This comment appears to have been directed at Justice Bowden's order. However, family violence is an element of the best interests of the child under the BC *FLA*, so it was appropriate for the court to consider it when deciding CD's role in AB's treatment. Second, Justice Marzari *did* undertake independent analysis for her finding of family violence, interpreting the legislative definition and assessing the evidence, and did not simply adopt Justice Bowden's ruling (see her decision at paras 20, 21, 46, 64, 70, and 74). Third, the Court of Appeal minimized the inclusion of psychological and emotional abuse in the BC *FLA* and imported an intent requirement. Intent to cause harm was not part of the definition of family violence in the BC *FLA* at the time of *AB*, and the Act has since been amended to clarify this point, now providing that "family violence" includes conduct committed "with or without an intent to harm a family member" (s 1). Even if evidence of intent was required at the time of the decision, CD had been put on notice that his actions were harmful to AB, and he continued with and even ramped up his conduct in spite of court orders finding that had he acted contrary to AB's best interests. By way of comparison, Alberta, which has narrower definitions of family violence, only requires proof of conduct that *causes or attempts to cause harm* or *reasonable fear of safety* (*FLA* s 18(3)) or "intentional *or reckless*" acts or omissions or those that *intimidate* a family member "by creating a *reasonable fear* of property damage or injury" (*PAFVA* s 1(1)(e)). Even the proposed criminal prohibition against coercive or controlling violence in Bill C-332, currently before Parliament, has an intent element that is less stringent than what the Court of Appeal appeared to require in *AB*: the accused must have known, or *ought to have known*, that their conduct could, in all the circumstances, *reasonably be expected to have a significant impact* on the complainant (at proposed s 264.01(1)).

Overall, modern understandings of emotional and psychological abuse and coercive control are such that "family violence" should be interpreted to include the kinds of gender identity abuse that occurred in *AB* (and, as argued by Dunn at 37-38, CD's technology facilitated abuse also amounted to family violence). This does not mean that all instances of misgendering or misnaming, for example, would be seen by courts as constituting family violence. Isolated and mistaken incidents that have minimal impacts would likely fall outside the scope of legal definitions of family violence. At the same time, harmful impacts on gender diverse youth that do not meet the threshold for legal recognition as family violence may still be recognized as contrary to their best interests, and as a negative and avoidable consequence of both parental and governmental actions. Governments are therefore legally obligated to refrain from enabling family violence towards gender diverse youth and acting contrary to their best interests through parental consent requirements for changes to names and pronouns at school.

Internationally, there is case law providing that the "fundamental principle of equality and non-discrimination has entered the domain of jus cogens" – in other words, this principle is a legal norm that states cannot derogate from (see *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their Families v Brazil* (Inter-American Court of Human Rights, July, 2020) at para 182). Laws and policies that enact discrimination on the basis of the intersecting grounds

of age and gender identity are therefore contrary to international legal obligations. Gender-based violence is recognized as a form of discrimination, suggesting that freedom from gender identity abuse is also a non-derogable norm, or at the least, a norm of customary international law (see Committee on the Elimination of Discrimination against Women, General recommendation No. 35 at paras 1 and 2). As recognized in the *CRC*, states should be taking all appropriate measures to protect children from violence, and certainly not exposing them to potential violence on the basis of "parental rights."

Bill 137 and the New Brunswick policy (Policy 713) do contain qualifications to the parental consent requirement when obtaining consent is likely to result in physical, emotional, or mental harm to the student (Bill 137 at s 197.4(2)) and Policy 713 at s 6.3.2). In these instances, the student is to be directed to school-based professionals who can support and assist them to develop a plan to address their request with their parent(s) or guardian(s). However, the parental consent requirement still stands even if a plan is developed, which may lead to family violence if consent is sought, or the inability to use gender affirming names and pronouns at school if parental consent cannot safely be broached. These qualifications therefore do not save these laws and policies from the charge that they enable family violence.

Concluding Thoughts

I have argued that providing parents with control over their children's names and pronouns can lead to, or encourage, gender identity abuse and family violence, contrary to domestic legislation, the *Charter*'s guarantees of security of the person and equality, and international law. It is my hope that Alberta will not follow in the footsteps of New Brunswick and Saskatchewan by adopting a law or policy that gives parents this control. That a government would expose vulnerable children to violence, and even use the notwithstanding clause of the *Charter* to limit youths' ability to rely on their own rights in this context, is deeply problematic. To the extent these laws and policies are based on "parental rights" at the expense of the best interests of children and their right to be free from violence, they have no legal basis. Any use of section 33 of the *Charter* is subject to the norms of customary international law prohibiting discrimination and gender-based violence.

It should also not be up to gender diverse youth to have to litigate these matters. As Samuel Singer has noted, trans youth "have less access to resources and to trans competent legal representation" ("Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice" (2020) 35:2 Can J Law & Society 293 at 309). The Supreme Court of Canada has also recognized the access to justice barriers faced by trans people (see *Hansman v Neufeld*, 2023 SCC 14 (CanLII)). There are fantastic organizations such as UR Pride that provide support to gender diverse youth, but they have very limited capacity to undertake litigation given all of the resources that legal processes entail. It is incumbent on governments to refrain from passing laws and policies that violate constitutional and international norms in the first place.

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