

February 15, 2024

## **An Open Letter to Premier Danielle Smith Re: “Preserving choice for children and youth” Announcement**

**Matter Commented On:** Government of Alberta, News Release, “[Preserving choice for children and youth](#)” (1 February 2024)

Editor's Note:

*This post is a reproduction of a letter sent by faculty members, legal researchers, and staff at the University of Alberta and University of Calgary Faculties of Law to the Premier of Alberta regarding the government’s announcement of restrictions targeting transgender youth.*

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By email: [premier@gov.ab.ca](mailto:premier@gov.ab.ca)

12 February 2024

Dear Premier Smith:

### **Re: “Preserving choice for children and youth” announcement**

We are faculty members, legal researchers, and staff at the University of Alberta and University of Calgary Faculties of Law. We have come together to express our deep concerns with the government’s announcement of restrictions targeting transgender youth. These restrictions will harm Two-Spirit, trans, and gender diverse children and youth by undermining their education, restricting their access to healthcare, and narrowing their sport and recreation opportunities. We believe these restrictions violate their rights, as enshrined in the [Canadian Charter of Rights and Freedoms](#) (the “Charter”).

The Supreme Court of Canada [has recognized that](#) “the transgender community is undeniably a marginalized group in Canadian society. The history of transgender individuals in our country has been marked by discrimination and disadvantage.” Two-Spirit, trans, and gender diverse youth are especially vulnerable. They depend on adults to care for them. Too often, adults in their lives are not prepared to accept and care for them because of who they are. They are bullied. They are

subject to violence and gender-based victimization. The *Charter* has a critical role to play in protecting them, given their heightened vulnerability.

Protecting fundamental freedoms, safeguarding legal and equality rights, and respecting human dignity are guiding principles of Canadian society. Infringing *Charter* rights and freedoms undermines our collective aspirations and diminishes all of us. In the words of Desmond Tutu: “My humanity is caught up, is inextricably bound up, in yours.” We believe in an Alberta that protects and cherishes Two-Spirit, trans, and gender diverse youth from harm. We want to be part of a province that protects the rights and freedoms of all Albertans.

This letter details our belief that the Alberta government’s proposed restrictions violate the *Charter*, including section 2(b) (freedom of expression), section 7 (life, liberty, and security of the person), section 12 (cruel and unusual treatment), and section 15 (equality rights). We believe that it would be wrong for the government to invoke the notwithstanding clause to force through legislation that violates the *Charter* rights of minors. As legal experts, we provide this analysis with the hope that it will encourage the Alberta government to change course and withdraw the proposed restrictions.

While we focus on the *Charter* implications of the proposed restrictions, we also wish to stress that they suffer from other deficiencies. Notably, we believe them to be inconsistent with Indigenous law. The Final Report on Missing and Murdered Indigenous Women and Girls ([Volume 1A, 171-72](#)) outlines how “some First Nations also challenged European norms that understood gender as binary, or male and female only, and that understood sexuality as heterosexual, or between a woman and a man.” The Report details how Two-Spirit folks were revered and included in many social and ceremonial roles. The Edmonton 2 Spirit Society has flagged that the Government of Alberta’s proposed restrictions are “in violation of Indigenous sovereignty, treaty rights, and traditional laws and culture of Indigenous Peoples.” Therefore, the Government of Alberta should also be consulting with Indigenous communities about the impact of the proposed restrictions on Indigenous law.

### Education

The proposed restrictions will require parental notification and/or approval of youth’s change of name and pronouns at school. This policy deprives Two-Spirit, trans, and gender diverse youth of their freedom of gender expression, contrary to section 2(b) of the *Charter*, and will cause significant harm to youth who are forced to choose between misgendering themselves at school or outing themselves to non-supportive and potentially abusive parents. This cruel choice violates their section 7 right to make fundamental personal decisions and be free from state-imposed psychological distress, and violates the prohibition against cruel and unusual treatment under section 12. By singling out a historically disadvantaged and vulnerable group for adverse impact, the restrictions also violate the right to equality guaranteed by section 15 of the *Charter* and the *Alberta Human Rights Act*. A court has already found that a similar Saskatchewan policy would likely cause irreparable harm to Two-Spirit, trans, and gender diverse youth: *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)*, [2023 SKKB 204](#).

Contrary to the Alberta government’s claim, child protection legislation is insufficient to protect Two-Spirit, trans, and gender diverse youth from the severe risk of family violence and homelessness. This approach would require children to report their own parents to child protection authorities, or rely on teachers or other trusted adults to do so. In many cases, grave harm will

already have occurred by the time child protection authorities become involved. This reliance on child protection laws is completely unrealistic and untenable, and exacerbates the violations of the *Charter* and human rights legislation discussed above.

We also have deep concerns about the government's planned changes to require parental notification and opting in for formal instruction on matters involving gender identity, sexual orientation, and human sexuality. The current notification and opt-out approach in the *Education Act* is already flawed since it emphasizes parental rights rather than the best interests of the child, resulting in a risk that children most in need of this type of instruction will be deprived of it. The creation of an opt-in framework will likely lead to fewer children having access to important educational resources that can assist them with understanding their gender identity and sexual orientation, [their rights not to be discriminated against on those grounds](#), and protections they are owed in relation to sexual activity. The proposed restrictions will cause harm to all youth, especially to those who are vulnerable to sexual violence, including girls and 2SLGBTQ+ youth. In addition to the *Charter* provisions mentioned above, the proposed scheme impacts youth's right to access to information, which is an important aspect of freedom of expression.

In the days since these restrictions were announced, the government has not provided any evidence as to why they are necessary, beyond an appeal to "parental rights". We remind the government that children hold rights under the *Charter*, and that any policies regarding children must abide by the best interests of the child principle enshrined in Canadian and international law, including the *Convention on the Rights of the Child*. It is difficult to see how these serious violations of the rights of Two-Spirit, trans, gender diverse youth, girls, and sexual minorities could be justified as reasonable limits under section 1 of the *Charter*.

### Health Care

The proposed restrictions include bans on gender-affirming healthcare for youth. Regardless of parental consent, the government would prohibit puberty blockers and hormone therapy until the age of 16 and gender-affirming surgery until the age of 18. Mature minors would also be prohibited from consenting on their own to puberty blockers or hormone therapy, contrary to established practice for all other forms of healthcare.

Gender-affirming care for trans adolescents is considered the standard of care and is [widely-accepted](#) within the medical profession. The [Alberta Medical Association](#) Section of Child and Adolescent Psychiatry and [Canadian Pediatric Society](#) have expressed their opposition to the proposed restrictions. These bans are a form of political interference with established medical standards of care. They prevent youth, their families, and their healthcare team from making healthcare decisions that are in the youth's best interest.

The restrictions will have real and significant harms on youth. Access to gender-affirming care is critical to Two-Spirit, trans, and gender diverse youth's ability to express and live out their authentic gender. Denying youth access to care violates their rights to autonomy and freedom of expression. Barriers to care can inhibit the psychosocial development of youth, undermining the development of self-trust and self-esteem as well as impairing their ability to build authentic and healthy relationships with others. These harms can follow youth throughout the lifespan. Access to gender-affirming care is known to have a protecting impact on the mental wellbeing of Two-Spirit, trans, and gender diverse youth, and is associated with reduced levels of self-harm and

suicidality. Moreover, youth who are denied access to puberty blockers may have to undergo more invasive procedures in the future (e.g. mastectomies).

Decisions about healthcare are fundamental to a person's humanity and bodily integrity. As the Supreme Court of Canada explained in *AC v Manitoba*, [2009 SCC 30](#), “young people should not automatically be deprived of the right to make decisions affecting their medical treatment,” but are instead “entitled to a degree of decision-making autonomy that is reflective of their evolving intelligence and understanding.” Youth are entitled to input on any healthcare decision concerning them, and are entitled to have their decisions respected once they are sufficiently mature, even if they have not yet reached the age of majority. Imposing a medical decision onto youth by prohibiting standard-of-care interventions is a serious violation of their section 7 right to life, liberty, and security of the person. The fact that the government is only targeting gender-affirming care also evinces a violation of youth's section 15 right to equality.

Despite the firm opposition of the organized Alberta medical profession, the government has failed to provide compelling evidence as to why these restrictions and the profound harms they would cause are necessary. This is a political decision that cannot be justified under section 1 of the *Charter*.

## Sports

The government proposes to exclude trans women from women's sports, regardless of age, hormonal status, or level of sport. Such a clear distinction based on sex and gender identity unquestionably impairs the right to equality of trans women under section 15 of the *Charter* and under the *Alberta Human Rights Act*. The right to equality stands for the proposition that differential treatment cannot be based on needless speculation or stereotype, but must be rooted in clear evidence of need and necessity.

Access to sport is a human right and is an important determinant of health, social functioning, and academic success. Denying access to sport requires robust evidence that [is not met](#) in the present case. According to a [systematic review](#) of the research on trans women in competitive sports, “there is no direct or consistent research suggesting transgender female individuals ... have an athletic advantage.” Moreover, to justify the proposed restrictions, any such advantages would have to be greater than the significant advantages already allowed within women's sports, such as the advantage tall women have when playing basketball.

In addition to violating equality rights, restrictions on sports participation would also likely violate all women and girls' right to privacy and bodily integrity under section 7 of the *Charter* by encouraging practices of ‘gender verification.’ In British Columbia, for example, a nine-year-old girl [was harassed](#) and asked to prove that she was not trans for participating in a track-and-field event. We are concerned that the proposed restrictions will only further embolden harassers and increase the recurrence of similar events, to the detriment of all women and girls.

Given the wide variations in size, strength, and athletic abilities among trans and non-trans women alike, it is difficult to imagine how the proposed restrictions could be justified as a reasonable limit under section 1 of the *Charter*.

## Notwithstanding Clause

The notwithstanding clause, contained in section 33 of the *Charter*, allows governments to circumvent fundamental freedoms or legal and equality rights guaranteed under the *Charter*. As such, it would allow the government to freely violate the rights of Two-Spirit, trans, and gender diverse youth under sections 2, 7, 12, and 15 of the *Charter*. While the clause cannot override other constitutional provisions, such as the division of powers, it nevertheless severely limits the possibility of judicial review of governmental action. The Alberta government has indicated a willingness to invoke the notwithstanding clause to protect its proposed restrictions from constitutional scrutiny.

The notwithstanding clause was included in the *Charter* with the understanding that voters would be able to hold legislatures responsible for using it too cavalierly. Unfortunately, this democratic safeguard offers no protection against legislatures who target marginalized groups who cannot vote and/or lack sufficient political clout to vote a government out of office. In other words, it leaves minorities vulnerable to the tyranny of the majority—the very thing that the *Charter* was meant to shield against.

Invoking the notwithstanding clause to violate the rights of Two-Spirit, trans, and gender diverse youth would be highly inappropriate. Minors cannot vote and Two-Spirit, trans, and gender diverse adults make up a small percentage of the population. [Less than 1 percent](#) of Albertans aged 15 or over are trans or non-binary. To override their rights knowing that they are too few to hold the government accountable at the ballot box would be fundamentally anti-democratic.

Given the risk of severe harm posed by the proposed restrictions, it is critical for courts to retain the ability to review the science, apply human rights law, and come to a determination on whether the restrictions can be justified in a free and democratic society. If the government genuinely believes that the restrictions are in alignment with the best interests of trans youth, invoking the notwithstanding clause should be wholly unnecessary. Instead, the restrictions could be justified under section 1 of the *Charter*. Only if the government believes that neither science nor human rights are on their side does using section 33 become necessary. Using the notwithstanding clause to promote partisan political aims at the expense of a small, vulnerable group of youth would be, in our opinion, unconscionable. In particular, we struggle to see any justification for depriving minors of the right to life, to security of the person, to equality, or to be free from cruel and unusual treatment.

Therefore, we urge the government not to implement the proposed restrictions and not to invoke the notwithstanding clause to override the *Charter* rights of Two-Spirit, trans, and gender diverse youth. The rights, physical health, mental health and, indeed, the very lives of Two-Spirit, trans and gender diverse youth are at stake.

Sincerely yours,

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