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Alberta's Bills Targeting Gender Diverse Youth: Comparisons, Constitutional Issues, and Challenges

By: Jennifer Koshan

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On December 3, 2024, the Alberta Legislature passed Bills 26, 27, and 29. These Bills place restrictions on gender diverse youth in the areas of health care, education, and sports respectively. This development means that Canada now has three provinces that have introduced legislation (in the case of Saskatchewan and Alberta) and/or policies (in the case of New Brunswick and Saskatchewan) targeting gender diverse youth. Only one of those provinces, Alberta, has included health care restrictions in its reforms. While these types of restrictions are not widespread in Canada, they deeply impact the individuals affected and their families.

This post will trace the history of these government laws and policies, showing how government actions have become increasingly more invasive and harmful over time. I begin by describing New Brunswick's and Saskatchewan's reforms – which focus on gender-affirming names and pronouns – as well as the history of constitutional challenges in those provinces to date. I then review the brief history of Alberta's development of similar policies leading to Bills 26, 27, and 29. On December 7, Egale and Skipping Stone Foundation announced that they have commenced a constitutional challenge to Bill 26 along with several gender diverse young persons in Alberta, but there are constitutional issues implicated by all three Bills. As I will elaborate, unlike Saskatchewan, the Alberta government did not invoke the s 33 notwithstanding clause in the *Canadian Charter of Rights and Freedoms* to shield its legislation from a constitutional challenge, so this litigation will be covering critical new ground.

Earlier ABlawg posts have documented some of the concerns with these government laws and policies (see e.g. here, here, and here). I add to that commentary by conducting a comparison across the provinces and by raising concerns about the specifics of the new Alberta Bills. This post is based on a presentation I made to the Canadian Bar Association – Alberta Branch Constitutional and Human Rights subsection on December 5, and has benefitted from the discussion in that forum. I use the term "gender diverse" to refer to those who identify as trans/transgender, non-binary, or two-spirit unless the context calls for different terminology.

Context

It is important to begin by noting that the Supreme Court of Canada has not yet ruled directly on the *Charter* rights of gender diverse persons, but it did recognize the vulnerability of transgender and other gender non-conforming individuals in *Hansman v Neufeld*, 2023 SCC 14 (Can LII). In that case, which concerned defamation, Justice Karakatsanis's majority reasons noted that these

individuals "were largely viewed with suspicion and prejudice until the latter half of the 20th century" (at para 84). They "occupy a unique position of disadvantage in our society" and "often find their very existence the subject of public debate and condemnation" (at para 85). They are also "at increased risk of violence, and report higher rates of poor mental health, suicidal ideation, and substance abuse as a means to cope with abuse or violence they have experienced" (at para 86).

This context of disadvantage is even more pronounced for gender diverse youth because of their age. While some parents, family, and friends are highly supportive of these youth, a growing volume of research documents what has been called "gender identity abuse" by parents, some teachers and students, and members of society more broadly (see e.g. Kate Fitz-Gibbon et al, Young people's experiences of identity abuse in the context of family violence (2023)). Organizations such as Egale Canada (which works on behalf of 2SLGBTQI people in Canada) also report that harassment and bullying of gender diverse youth and their families (including siblings) is increasing as a result of law and policy initiatives that target them. The "suspicion and prejudice" noted in *Hansman* continues and appears to have shaped the government policies and laws discussed in this post, even though they are often cloaked in the language of "protection."

With this context in mind, I turn to the first province to implement a policy targeting gender diverse youth, New Brunswick.

New Brunswick

In 2020, New Brunswick first developed Policy 713 on Sexual Orientation and Gender Identity. It included important protections for the safety, privacy, and inclusion of 2SLGBTQIA+ students in schools – for example, supporting gay straight alliances and the "right to learn and work together in an atmosphere that is respectful and free from harassment and discrimination" (s 5.2). On the topic of names and pronouns, the 2020 version of Policy 713 provided that school personnel "will consult with a transgender or non-binary student to determine their preferred first name and pronoun(s). The preferred first name and pronoun(s) will be used consistently in ways that the student has requested" (s 6.3.1). Students under 16 required parental consent for their preferred first name to be "officially used for record keeping purposes and daily management", but before contacting a parent, the school principal required informed consent from the student (s 6.3.2). If parental consent could not be obtained, "a plan will be put in place to support the student in managing the use of the preferred name in the learning environment" (s 6.3.2).

In July 2023, the Minister of Education and Early Childhood Education announced intended revisions to Policy 713 that would prevent students under the age of 16 years from using their chosen names and pronouns at school without parental consent. Interestingly, there was no change of government that spurred this reform, although Premier Blaine Higgs led a Conservative minority government at the time the 2020 Policy was adopted and later gained a majority in the September 2020 election. As noted by the Office of Child and Youth Advocate (Kelly A. Lamrock, K.C.) in their August 2023 report, "both the launch of Policy 713 in its original form and the initiation of the review were somewhat muted events without significant media coverage or public awareness" (at 3). The Advocate conducted its own public engagement process, while emphasizing

that their role was not that of pollster, but to conduct a "legal and policy review, from the perspective of the child's best interests" (at 2).

The Advocate expressed concerns that the revisions would remove both "the explicit guidance to school personnel to use the child's preferred name and/or pronouns in informal interactions absent parental consent, instead directing school personnel to refer the child to a school social worker or psychologist to discuss obtaining parental consent" and "the explicit requirement for the child to give informed consent to the school before school personnel can advise parents of the child's wishes" (at 4).The Advocate recommended that the Policy "establish and define the right of all students to choose how to be addressed in informal, daily interactions consistent with their evolving capacity and establish the presumption that a child has capacity to make this decision starting at Grade 6, consistent with policies in Quebec, Nova Scotia, and Newfoundland & Labrador" (recommendation 4). In its own version of the Policy, the Advocate recommended that for younger children, name and pronoun requests would be evaluated by the school principal case-by-case based on the child's capacity, the availability of appropriate supports and accommodations, and an assessment of how to consult parents (proposed s 6.3.3).

These recommendations were not adopted, but the revisions to Policy 713 implemented in August 2023 were scaled back somewhat from the July announcement. They provide that formal use of preferred first names for trans or non-binary students under 16 require parental consent. However, "if it is not possible to obtain consent to talk to the parent, the student will be encouraged to communicate with the appropriate professionals to develop a plan to speak with their parents when they are ready to do so." Where talking with the student's parents "is not in the best interest of the student or could cause harm to them (physically or mentally), … they will be encouraged to communicate with professionals for support" (s 6.3.2). The revised Policy also provides that a trans or non-binary student's preferred first name "may be used without parental consent if the student is…communicating with appropriate professionals in the development of a plan to speak to their parents; or …when communicating one on one with school professionals for support" (s 6.3.3).

The Canadian Civil Liberties Association (CCLA) launched a challenge to Policy 713 in September 2023, arguing that the revised Policy violates the New Brunswick *Human Rights Act*, RSNB 2011, c 171, and s 2(b) (freedom of expression), s 7 (rights to life, liberty and security of the person) and s 15 (equality rights) of the Canadian *Charter*. The CCLA was granted public interest standing in December 2023 in an unreported decision. A number of intervenors later obtained standing, including Egale Canada, Wabanaki Two-Spirit Alliance, and several local organizations representing the interests of gender diverse and two-spirit youth, as well as two groups taking the position that "the interests of children with gender dysphoria are best served when their parents are informed and involved in decisions regarding interventions" (Gender Dysphoria Alliance and Our Duty Canada) (see 2024 NBKB 91 (CanLII) at para 17). Several other intervenors, including the Women's Legal Education and Action Fund (LEAF), were granted standing in a subsequent decision (see 2024 NBKB 92 (CanLII)).

Interestingly, three unions representing teachers and school staff were denied intervenor standing in the CCLA-initiated litigation. The Court found that while the Policy may affect these union members, arguments as to their freedom of expression "would represent both a significant and

unwarranted expansion of the proceeding" and would "also run afoul of the principles of exclusive jurisdiction of labour adjudicators" (2024 NBKB 91 at para 94).

In separate litigation, the Anglophone East District Education Council (AEDEC) also sought to challenge the revisions to Policy 713 under the *Charter* and sought an interlocutory injunction, but it was denied standing (see 2024 NBKB 138 (CanLII)). Chief Justice Tracey K. DeWare found that direct standing was unavailable given that the rights of the AEDEC and the individual plaintiffs were not directly engaged. As for public interest standing on behalf of gender diverse students, Ware CJ found that "there are realistic and alternative means which favour a more efficient and effective use of judicial resources", namely the CCLA litigation (at para 86, applying the criteria from *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violent Society*, 2012 SCC 45 (Can LII)). The AEDEC was therefore denied public interest standing.

The CCLA challenge has not yet been heard. In the meantime, the new Liberal premier of New Brunswick, Susan Holt, has said that she will revise Policy 713 to accord with the Children's Advocate's recommendations from August 2023. The CCLA is urging the new government to return to the original wording of Policy 713 instead. The AEDEC has appealed the denial of public interest standing, but that litigation was adjourned by the Court of Appeal pending the new government's changes to the Policy (see here for these updates).

Saskatchewan

The Saskatchewan Party of Premier Scott Moe was the next to introduce a policy targeting gender diverse youth. On August 22, 2023, the "Use of Preferred First Name and Pronouns by Students" Policy was established, providing that when a student under the age of 16 requested that their preferred name, gender identity, and/or gender expression be used, parental/guardian consent would be required for students. For students 16 and over, parental consent was not required, and the student's preferred first name and pronouns were to be used as the student requested (see the government's news release; the policy is no longer available online). Similar to New Brunswick, the Policy also stated that where it was "reasonably expected that gaining parental consent could result in physical, mental or emotional harm to the student, the student will be directed to the appropriate school professional(s) for support. They will work with the student to develop a plan to speak with their parents when they are ready to do so" (at 4). Saskatchewan's Policy also required that parents be informed about sexual health curriculum and given the option to decline their children's participation. Delivery of sexual education was restricted to teachers, while the role of outside third parties in presenting and sharing materials was to be reviewed.

The Saskatchewan Advocate for Children and Youth (Lisa Broda, PhD) conducted a review of the Policy and released a report in September 2023. As in New Brunswick, the report is framed around the principle that while children have a right to parental guidance, "it is critical that this be understood from a child rights perspective" (at 7). The Saskatchewan Advocate agreed with her New Brunswick counterpart that "it is a violation of children's rights to require parental/guardian consent, without consideration of a young person's capacity for making personal decisions" (at 7-8). The report also noted the ambiguity in the Policy's inclusion of "gender expression", which could extend beyond use of chosen names and pronouns to include things like clothing and makeup

(at 21-22). The report concluded with recommendations for revisions to the Policy and a Children's Rights Impact Assessment which found that the Policy violated children's rights under provincial human rights law, the *Charter*, and the UN *Convention on the Rights of the Child* (see Appendix).

The Saskatchewan Policy was challenged by UR Pride Centre for Sexuality and Gender Diversity under ss 7 and 15 of the *Charter* in an application dated August 31, 2023. UR Pride sought an immediate interim injunction on an *ex parte* basis, which was denied by Chief Justice Martel Popescul, and the matter was set for a hearing on standing and an interlocutory injunction (unreported, but see 2023 SKKB 204 (CanLII) at para 12). Several organizations were granted intervenor standing by Justice Michael Megaw, including the CCLA, LEAF, the John Howard Society, and the Gender Dysphoria Alliance (which sought to make similar arguments as in the New Brunswick litigation) (see 2023 SKKB 197 (CanLII)).

In a decision released in September 2023, Justice Megaw granted public interest standing to UR Pride and granted an interlocutory injunction (see 2023 SKKB 204 (CanLII)). This is a key decision, as it is the only one so far that deals with the merits of the rights-based challenges to name and pronoun restrictions, albeit on an interim basis in the context of an injunction.

The evidence in the injunction application indicated that Saskatchewan had received 18 letters requesting a similar policy to that in New Brunswick, only 7 of which were letters from parents of school-aged children (at para 7). Justice Megaw noted that there was no evidence of the government having consulted with potential interested parties such as teachers, parents, or students, nor with experts (including legal experts) (at para 10). The government's stated rationale for the Policy was to address a lack of consistency in existing policies, although there was no indication of any problems with these.

Justice Megaw found that the Policy raised serious issues regarding the rights of gender diverse youth, which was in fact conceded by the government, meeting the first step of the test for an interlocutory injunction (at paras 70-72). He also found that the Policy would cause some youth irreparable harm, fulfilling the second step of the test. This finding was based on the affidavit evidence of three experts, and Justice Megaw accepted the overall view that youth under the age of 16 "must engage in the choice of electing between being "outed" to their parents in order to obtain the necessary consent, or remain closeted due to an inability or unwillingness to seek that parental consent" (i.e. risk being misgendered) (at para 106). The third step, the balance of convenience, also favoured the applicants. Here, Justice Megaw held that the "the public interest in recognizing the importance of the governmental Policy is outweighed by the public interest of not exposing that minority of students to exposure to the potentially irreparable harm and mental health difficulty of being unable to find expression for their gender identity" (at para 132).

After this decision was released, Saskatchewan passed legislation to replace the Policy with a law. *The Education (Parents' Bill of Rights) Amendment Act, 2023,* SS 2023, c 46 (Bill 137) requires parental consent for use of a student's "new gender-related preferred name or gender identity at school"; otherwise teachers and school employees "shall not use" them (s 197.4(1)). The new law continues to recognize that obtaining parental consent may result in physical, mental, or emotional harm, but now directs the student to appropriate professionals to develop a plan to speak to their parents without the caveat "when they are ready to do so" (s 197.4(2)). Section 197.4 is silent on

whether these professionals may use the student's preferred name and pronouns, but by implication, the parental consent requirement appears to apply here too. The Policy's provisions on sexual health education were continued in s 197.2(m) of Bill 137.

The government invoked the *Charter*'s notwithstanding clause, s 33, to shield the provision restricting use of names and pronouns from challenges in relation to *Charter* ss 2, 7, and 15 (s 197.4(3)). It also included a clause that the law would apply notwithstanding *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2 (s 197.4(4)). Bill 137 extinguished 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 then applied to amend its pleadings to add a s 12 *Charter* claim, arguing that the new law amounted to cruel and unusual treatment. The significance of this amendment was that s 12 of the *Charter* was not made subject to the notwithstanding clause in Bill 137. UR Pride also sought to amend its requested remedies to seek a declaration that Bill 137 violates ss 7, 12, and 15 of the *Charter*, and (for the alleged s 12 violation), that the violation cannot be justified under s 1. It also withdrew its application for an injunction.

As I noted in my post Seismic Shift: The Notwithstanding Clause and Litigation on the Rights of Trans and Gender Diverse Youth, Justice Megaw granted UR Pride's applications (see 2024 SKKB 23 (CanLII)). He held that the application to add s 12 was not an abuse of process – it was not UR Pride's actions, but those of the government in invoking the notwithstanding clause that led to the application to amend. Although the s 12 *Charter* claim might require different arguments and evidence than the ss 7 and 15 claims, the litigation was in its early stages and the amendment would not create prejudice or unreasonable delay (at paras 69-70).

Justice Megaw also held that a declaration on the relevant *Charter* rights was not precluded by the government's invocation of s 33. He dismissed the government's argument that a decision in the matter would amount to "judicial activism" (at para 25), noting that courts in a constitutional democracy play the role of constitutional guardian (at para 32). Noting the judicial and academic debate about the impact of the notwithstanding clause on judicial review, he undertook his own analysis based on the wording of s 33, its lack of explicit limitation of courts' powers to review the constitutionality of legislation, and the fundamental principle of access to the courts and judicial review of government actions. Justice Megaw also cited precedents establishing that superior courts have inherent jurisdiction to render declaratory judgments even if they have no legal effect. He noted that declarations can still be of utility in providing constitutional analysis and judicial oversight of government actions, promoting citizens' participation in democracy (at paras 158-165).

Saskatchewan appealed this decision, and the matter was argued before the Saskatchewan Court of Appeal (SKCA) in September 2024. New Brunswick and Alberta were both granted intervenor status given their "direct interest in the subject matter and outcome" of the appeal (see 2024 SKCA 74 (CanLII) at para 9). Focusing on Alberta's intervention, it supported the position of Saskatchewan that no declaration as to a violation of *Charter* rights could be made in light of s 33 – i.e. the jurisdiction of the court was ousted. Alberta argued that a declaration requires a live legal dispute; otherwise it is akin to an advisory opinion, which courts do not have the inherent

jurisdiction to provide. Alberta went so far as to say that judges who render advisory opinions "do so not as judges, but as citizens fulfilling statutory duties" (at para 21 of its factum).

On the other side of the issue, UR Pride and several public interest intervenors made submissions supporting the availability of a declaration. Unlike New Brunswick, labour organizations representing the interests of teachers and school staff were permitted to intervene in this litigation (the Saskatchewan Federation of Labour, Canadian Union of Public Employees and Canadian Teachers' Federation jointly intervened). LEAF, whose case committee I was a member of, argued that "a purposive reading of section 33 is one that recognizes democratic accountability and substantive equality as core considerations of *Charter* interpretation" (LEAF factum at para 3). Democratic accountability requires the right to an informed vote and access to meaningful participation in the electoral process (at paras 11 and 18). Substantive equality requires foregrounding the specific context and lived experiences of two-spirit, trans, and gender diverse youth, especially given that they are a vulnerable minority who cannot vote themselves (at para 31). LEAF distinguished *Hak c Procureure générale du Québec*, a case challenging restrictions on religious clothing in Quebec, where the Court of Appeal declined to make a declaration of *Charter* violations in light of the government's invocation of s 33, relying on citizen engagement in a parliamentary democracy as an alternative to a court ruling (see 2019 QCCA 2145 (CanLII)). The UR Pride challenge exists in a much different context where this type of engagement is largely unavailable to gender diverse youth (LEAF factum at paras 37-39). LEAF also expressed concerns about the broader effects of Saskatchewan's position on women, particularly Black, Indigenous, and racialized women, who are underrepresented in government and have had to rely on courts to enforce their rights (at para 45).

The SKCA reserved its decision.

Alberta

This brings us to Alberta. The issue of adopting similar policies to those in New Brunswick and Saskatchewan was first debated at the November 2023 United Conservative Party (UCP) Convention, leading to Policy Resolution 8, which requires "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." This resolution was followed on February 1, 2024 by a Government of Alberta News Release, "Preserving choice for children and youth", announcing the intent to implement legislation in three areas: (1) education (restrictions on youth's use of chosen names and pronouns without parental consent and on teaching and learning materials on gender identity, sexual orientation, and human sexuality); (2) health care (restrictions on access to gender affirming hormones and surgery); and (3) sports (restrictions on the eligibility of trans athletes to participate on girls' and women's teams).

Shortly after this announcement, faculty members and staff at the University of Alberta and University of Calgary Faculties of Law wrote an Open Letter to Premier Danielle Smith, arguing that these proposed laws would violate the rights of gender diverse youth under ss 2(b), 7, 12, and 15 of *Charter*. We also raised the possibility that the legislation would violate Indigenous laws and the s 35 Aboriginal rights of two-spirit persons, and encouraged the government to consult

broadly on these issues. I will not repeat our analysis here, but instead focus on the particularities of the Bills now that the details are known.

Bills 26, 27, and 29 were introduced on October 31, 2024 and received Royal Assent on December 5, 2024. I begin my discussion with Bill 27, as it is comparable to the policies and legislation I have discussed from New Brunswick and Saskatchewan.

Bill 27, the *Education Amendment Act, 2024*, has several components. First, it provides that educational offerings on gender identity, sexual orientation, and human sexuality will now require opt-in by parents and approval of external teaching/learning resources by the Minister (s 18.1). This aspect of Bill 27 is not my focus, as Shaun Fluker and his students published an excellent post on this topic in late November, UCP Grievance and Culture-War Politics Enter Schools. They note how this set of reforms impacts not just gender diverse youth, but also those vulnerable to sexual violence (see also this piece in The Conversation by Florence Ashley and JJ Wright). This is one of the ways in which Alberta has gone further than other provinces. Saskatchewan introduced a similar reform, but it used a parental opt-out approach, which is what Alberta previously did. Saskatchewan's reform also focused on human sexuality and did not include teaching and learning materials on gender identity and sexual orientation. Alberta's opt-in approach on a broader range of issues will leave many students without access to resources on crucial topics and will exacerbate the other reforms in Bills 27, 26, and 29.

Bill 27 also provides requirements for parental notification and consent for "new preferred names or pronouns", which are defined to be those the student prefers for reasons related to their gender identity (s 33.2(1)). This definition makes it clear that it is gender diverse youth who are targeted by Bill 27, and not youth who may have preferred names or pronouns for other reasons (such as using "they/them" pronouns to express solidarity with non-binary classmates). In Bill 27 Alberta also goes further than New Brunswick and Saskatchewan by requiring parental notification for students aged 16 and 17 who request use of preferred names or pronouns (s 33.2(2), emphasis added). This notification requirement, forced outing by another name, does not exist for older youth in the other provinces and seriously interferes with presumptions of capacity for youth 16 and older.

Bill 27 also explicitly mandates that teachers and staff shall not use a student's preferred names or pronouns until parental notification (for students 16 and 17) or consent (for students under 16) are accomplished (s 33.2(3)). As in Saskatchewan, this aspect of the Bill problematically requires gender diverse youth to decide between outing and misgendering themselves, but goes further by including older youth. It should also be noted that if parental consent is not forthcoming when requested for youth under 16, they will be both outed and misgendered.

Lastly, there is no clear exception in the law for youth who are at risk of being harmed by the parental notification requirement. The Bill only says that where parental notification is reasonably expected to cause emotional or psychological harm to the student, the board shall ensure the student is provided with counselling or other assistance (s 33.2(4)). Curiously, physical harm is absent from this provision, even though gender identity abuse may include physical violence, as I noted in my post Gender-Affirming Names and Pronouns, Parental Control, and Family Violence. Alberta continues to have a narrow definition of family violence that excludes physical force used

against children for discipline; it is the only Canadian province to do so. It may be that the exclusion of physical harm from Bill 27 was intended to be in line with this definition (for arguments that this definition should be revised, see here). At the time of its policy announcements in February 2024, the government said that child protection concerns would be addressed through the *Child, Youth, and Family Enhancement Act*, RSA 2000, c C-12. However, as we argued in our open letter, 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. This is unrealistic, and in many cases, harm will already have occurred.

Similar to Saskatchewan, Bill 27 also includes an exclusion of liability clause for the Crown, school board trustees, and their employees. Shaun Fluker and his students question whether this amounts to an admission that Bill 27 is likely to cause real harm. Unlike Saskatchewan, however, the Alberta government did not invoke the s 33 notwithstanding clause in Bill 27 or the other two Bills targeting two-spirit, trans, and gender diverse youth. Premier Danielle Smith has said that she believes s 1 *Charter* arguments will prevail as (in the government's view) the legislation is reasonable and evidence-based. She has not indicated if the government would invoke s 33 if a court rules against the province.

Bill 26, the *Health Statutes Amendment Act, 2024* (No 2), makes a number of changes to various health-related statutes, including the *Health Professions Act,* RSA 2000, c H-7 (*HPA*). The *HPA* amendments begin by adding definitions of "gender dysphoria" and "gender incongruence", "minor" (under 18 years old), and "sex reassignment surgery" (see s 9 of Bill 26). The Bill then creates two prohibitions: against sex reassignment surgery for minors (s 1.91 of the amended *HPA*), and against prescriptions of hormone therapy (including puberty blockers and hormone replacement) to minors for the treatment of gender dysphoria and gender incongruence (the new s 1.92).

These are absolute prohibitions, not subject to parental consent or the advice of a youth's health professionals. During the legislative debates on Bill 26, Health Minister Adriana La Grange stated that a ministerial order will provide exceptions for minors aged 16 and 17 who have parental, physician, and psychologist approval for hormone therapy, or who have already started using medications to treat gender dysphoria or incongruence (see Hansard, November 26, 2024 at p 2139; ministerial orders are enabled by s 1.93(a)). However, such an order would be discretionary and subject to revocation without legislative debate; the law itself does not provide these exceptions. It is also important to note that the language of "sex reassignment surgery" is considered inflammatory (as opposed to "gender-affirming" or "gender-confirming"), as was pointed out by many opposition MLAs in the legislature (see e.g. the comments of MLA Sarah Hoffman, Hansard, November 5, 2024 at p 1906).

The final Bill in this suite of reforms is Bill 29, the *Fairness and Safety in Sport Act.* This Bill does not include specific restrictions on trans athletes in girl's or women's sports, as anticipated. But in introducing the Bill, Minister of Tourism and Sport Joseph Schow stated that its goal is to "ensure biological female athletes are able to compete in biological female-only divisions" (Hansard, October 31, 2024 at p 1849). The Bill mandates schools (including post-secondary institutions) and sports organizations to develop and implement policies on fairness and safety for each sport (s 3). These policies must address eligibility requirements and related processes, and must include

reporting obligations on "mixed-gender or mixed-sex" leagues as well as complaints regarding eligibility (ss 3, 4). It is also open to the Minister to establish guidelines for the policies (s 5). Similar to Bill 27, Bill 29 contains an exclusion of liability clause for the Crown, boards of the affected organizations, and sports participants (s 6). As argued by Ashley and Wright, this Bill will impact not just trans athletes, but "will make all female athletes vulnerable to abuse, especially if they are perceived as "too masculine.""

Next Steps

Egale and Skipping Stone Foundation's originating application, filed on December 9, seeks interim and interlocutory injunctions for Bill 26. Although the injunction decision of Justice Megaw in Saskatchewan dealt with names, pronouns, and misgendering/outing as opposed to denial of gender-affirming health care, it provides strong support for such an injunction – perhaps even more so, given Bill 26's clear impact on ss 7 and 15 *Charter* rights. As noted by Ashley and Wright, prohibitions on gender-affirming care have been denounced as harmful by the Canadian Medical Association, the Canadian Paediatric Society, and the Alberta Medical Association, amongst other experts, grounding a s 7 challenge on the basis of security of the person. Like Bill 27, Bill 26 also clearly targets gender-diverse youth, in this case by making its prohibitions apply only to health care for gender dysphoria and gender incongruence. Hormone therapy for early onset puberty and surgeries for breast reduction for cisgender youth, for example, are not prohibited. Bill 26's singling out of a vulnerable group for adverse treatment thus directly engages s 15 equality rights. As argued by Egale and Skipping Stone, s 12 of the Charter is also engaged because Bill 26 is "intentionally targeted at a disadvantaged and marginalized group…for the express purpose of inflicting predictable and preventable physical and psychological suffering" (originating application at para 101).

As pointed out by many commentators, Bill 26 eschews the same parental rights that Bill 27 purports to protect, creating a strong arbitrariness argument under s 1 of the *Charter*. Bill 26 is also arbitrary within its own four corners. While framed by the government in the language of "preserving choice", Egale and Skipping Stone note how the health care ban will restrict the choices of gender diverse minors (e.g. regarding pubertal development), forcing some of them "to undergo more difficult, less efficacious, riskier, and potentially uninsured medical intervention in adulthood" (originating application at para 7).

Egale and Skipping Stone also argue that the prohibitions on gender-affirming care violate the new amendments to the *Alberta Bill of Rights*, RSA 2000, c A-14, which will protect the right "not to be subjected to, or coerced into receiving, medical care, medical treatment, or a medical procedure" without consent, at least for "individuals with capacity" (see Bill 24, the *Alberta Bill of Rights Amendment Act, 2024*, adding clause 1(h); and see the originating application at para 1 (f)-(h)). This is another way in which the government's reforms are inconsistent and arbitrary.

Although it is not included in the originating application, Bill 27 is also susceptible to *Charter* arguments. By way of comparison, as noted above, we see no exception to parental consent or notification requirements in Alberta where they would result in harm to a student, only provision of supports. Even teachers and other school staff cannot use a student's preferred name and pronouns when providing those supports. While many parents will be accepting of their two spirit,

trans, and gender diverse children, the possibility of state-enabled family violence engages s 7 of the *Charter*, the targeting of vulnerable youth engages s 15, and the misgendering requirement engages gender expression under s 2(b). As Florence Ashley argues in the Alberta Law Review, any justification based on parental rights is likely to fail.

School boards and unions representing school staff were not granted standing or intervenor status in the New Brunswick litigation, but did have a presence at the Saskatchewan Court of Appeal. Given that Bill 27 creates direct prohibitions against school staff, this could provide the basis for standing in Alberta. That being said, Alberta courts have interpreted their discretion to grant public interest standing narrowly in previous cases involving constitutional challenges (see e.g. here and here), so it remains to be seen how standing requirements will play out here.

With respect to Bill 29, it may be premature to commence litigation before schools and sports organizations develop specific policies, unless the Minister proceeds with guidelines.

By singling out patients, students, and athletes for adverse treatment on the basis of gender identity and expression, Bills 26, 27, and 29 also amount to discrimination under the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*). While human rights tribunals cannot strike down laws the same way courts can, s 1 of the *AHRA* provides that "[u]nless it is expressly declared by an Act of the Legislature that it operates notwithstanding this Act, every law of Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act." There were no such express declarations made in the Bills, so human rights complaints are open to gender diverse persons affected by these laws.

It will be some time before we have court or tribunal rulings on these matters, but my own hope is that injunctions will be granted as soon as possible to prevent these harmful Bills targeting gender diverse youth from taking effect.

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