

November 19, 2025

## The Nuclear Option: An Update on Alberta's Legislation Targeting Trans and Gender Diverse Youth

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**Case and Bill Commented On:** *Egale Canada v Alberta*, [2025 ABKB 394 \(CanLII\)](#); [Bill 9, Protecting Alberta's Children Statutes Amendment Act, 2025, 2<sup>nd</sup> Session, 31st Legislature](#)

On November 18, 2025 the UCP government introduced Bill 9, which seeks to amend three statutes that were passed last year restricting the rights of trans and gender diverse youth. The *Protecting Alberta's Children Statutes Amendment Act, 2025* invokes s 33 of the *Charter*, such that if the Bill is passed, the three statutes will apply notwithstanding several *Charter* rights and freedoms, the *Alberta Bill of Rights*, [RSA 2000, c A-14](#), and the *Alberta Human Rights Act*, [RSA 2000, c A-25.5](#). This is the second time s 33 has been used in recent weeks, with Bill 2, the *Back to School Act*, [SA 2025, c B-0.5](#), invoking s 33 to end the teachers' strike and impose a contract on them in late October (see an ABlawg post on Bill 2 by Shaun Fluker et al [here](#)).

An earlier [ABlawg post](#) set out the history of Alberta's three statutes targeting trans and gender diverse youth, which came into effect in December 2024. Since that time, a [constitutional challenge](#) was commenced by Egale, Skipping Stone Foundation, and five youth to Bill 26, the *Health Statutes Amendment Act, 2024 (No. 2)*, [SA 2024, c 16](#). Bill 26 would restrict access to gender-affirming health care (puberty blockers and hormone replacement therapy) for youth under age 18, but an interlocutory injunction granted by Justice Allison G. Kuntz in June 2025 prevented this legislation from coming into force (see *Egale Canada v Alberta*, [2025 ABKB 394 \(CanLII\)](#)). A [second Charter challenge](#) to Bill 26 brought by the Canadian Medical Association and three Alberta doctors argues that the law violates doctors' freedom of conscience. Bill 27, the *Education Amendment Act, 2024*, [SA 2024, c 14](#), restricts students' use of gender-affirming names and pronouns. It has also been [constitutionally challenged](#) by Egale and Skipping Stone Foundation. No litigation has been commenced as of yet in relation to Bill 29, the *Fairness and Safety in Sport Act*, [SA 2024, c F-2.5](#). Bill 29 mandates K-12 schools, post-secondary institutions, and sports organizations to limit eligibility for persons over 12 to participate in female-only sports only to those who were registered as female at birth. It also requires confirmation of eligibility and allows challenges by others who question a person's eligibility (see also the *Fairness and Safety in Sport Regulation*, [Alta Reg 124/2025](#) and a comment on the invasiveness of the scheme [here](#)).

The *Egale* decision regarding Bill 26 was [appealed by the province](#), and the government's invocation of s 33 of the *Charter* will likely affect the scope of that appeal going forward. However, litigation in Saskatchewan concerning that province's restrictions on gender-affirming

names and pronouns held that courts still have the power to declare legislation unconstitutional if s 33 of the *Charter* is invoked (see *UR Pride Centre for Sexuality and Gender Diversity*, [2025 SKCA 74 \(CanLII\)](#)). *UR Pride* – which also began with an injunction application – is now [on its way to the Supreme Court of Canada](#).

This post is the first of what is expected to be a series of at least two. This first post reviews the decision in *Egale* to contextualize the crucial issues at stake in the Alberta litigation and in the upcoming debates on Bill 9. An interlocutory injunction is not lightly granted, especially in constitutional claims where there is a presumption that the law is in the public interest. The decision of Justice Kuntz carefully reviews the evidence tendered by all parties and concludes that the applicants meet all the criteria for an injunction. The government had the options of continuing with its appeal of this decision and with defending Bill 26 on the merits. Yet it chose the nuclear option of s 33 of the *Charter*, calling into question its confidence in its ability to justify Bill 26 and the other Bills not yet subject to litigation. A subsequent post will provide more context on Bill 9 and what it means for the litigation going forward, including the implications of the *UR Pride* decision.

## **The *Egale et al* Litigation**

*Egale*, *Skipping Stone*, and the five youth (the “Doe applicants”) challenged ss 1.92 and 1.93 of the *Health Professions Act*, [RSA 2000, c H-7](#), which had been added by Bill 26. These sections would prohibit doctors from prescribing drugs to minors (those under 18) for the treatment of gender dysphoria or gender incongruence (s 1.92) except as authorized by the Minister (s 1.93). Gender dysphoria and gender incongruence are defined respectively as “distress caused by a marked incongruence” between a person’s gender identity or gender expression and their sex assigned at birth and “a marked and persistent incongruence between a person’s gender identity and that person’s sex assigned at birth” (s 1(1) (o.1) and (o.2)). At the time of the injunction application, ss 1.92 and 1.93 had not been proclaimed in force, and according to the government this was to be done concurrently with a Ministerial Order issuing exceptions to the prohibition (at para 9). That order was “expected to” provide for exemptions for youth already taking puberty blockers or hormone therapy and for those aged 16 or 17 who had parental, physician, and psychologist approval (at para 10). *Egale et al* argued that these sections (“the ban”) violated ss 7 and 15 of the *Charter* and sought an interlocutory injunction preventing the government from proclaiming them in force. (Their originating application also raised the *Alberta Bill of Rights* but this legislation was not relied on in the injunction decision).

## **Preliminary Issues**

The first issue was whether the court had jurisdiction to hear an injunction application prior to proclamation of the ban, with the government arguing the application was premature and interfered with the legislative process. Justice Kuntz sided with *Egale et al* on this issue, noting that injunctions “may be granted before any harm has actually been suffered” and that case law supported the argument that an injunction could be granted once legislation has been enacted (at paras 17, 20). Because Bill 26 received royal assent in December 2024, the injunction application was not premature. Nor did the possibility that the Minister might create exemptions mean that the application was premature. Justice Kuntz noted that the Minister’s power was discretionary and

the government had conceded that a Ministerial Order might never be issued (at para 24). Case law supported the view that the legislation must be assessed as it currently stands, such that the court had jurisdiction to consider the injunction application at this stage (at paras 25-26).

The second preliminary issue was standing. The government argued that the Doe applicants did not qualify for private interest standing and Egale and Skipping Stone did not meet the test for public interest standing. Justice Kuntz quickly dismissed these arguments. She found that the Doe applicants had private interest standing (which is “as of right”) because they were affected by the impugned provisions differently than members of the general public: the ban would cause them “to go through puberty that does not align with their identity” (at para 32). She also exercised her discretion to grant Egale and Skipping Stone public interest standing. The main issue here was whether public interest litigants were necessary in light of the Doe applicants’ private interest standing. The court was persuaded that “with the passage of time or changing circumstances the Doe applicants may “age out” or may not be affected by the impugned provisions, which could bring the proceedings to an end” (at para 34). Justice Kuntz also cited with approval an earlier decision of Justice Colin Feasby which stated that “Courts should not be parsimonious in granting public interest standing where a justiciable issue important to the public has been raised and the proposed litigant is the best or only capable party willing to take the matter forward” (at para 37, quoting *WV v MV*, [2024 ABKB 174 \(CanLII\)](#) at para 129). These decisions move towards a more generous approach to public interest standing in Alberta, which has been lacking in some cases previously (see e.g. [here](#) and [here](#)).

## **The Merits of the Injunction Application**

The applicants’ evidence included affidavits from the Doe youth, their parents, Skipping Stone and Egale, and two doctors who work with transgender and gender diverse youth, as well as the reports of four experts. The government’s evidence consisted of affidavits from the Executive Director of the Strategic Policy and Legislative Services branch of Alberta Health, youth and two adults who had de-transitioned, parents whose children had transitioned or de-transitioned, and five doctors, along with four expert reports (see paras 39-49). Justice Kuntz rejected the applicants’ argument that some of the government’s expert evidence should be struck for bias and lack of expertise, finding that the evidence was admissible for the limited purposes of an interlocutory injunction application (at para 47). She summarized the evidence at paras 57-119, indicating a divergence in views on the risks and benefits of restricting access to puberty blockers and hormone replacement therapy for youth experiencing gender dysphoria and gender incongruence. In particular, the government leaned heavily on the [Cass Review](#) from England to support its position that “the science surrounding the risks and benefits of puberty blockers and hormone replacement therapy is speculative at best” (at para 44), while the applicants’ experts critiqued the Review as the views of one person and relied on the international consensus reflected in the Endocrine Society Guidelines and the World Professional Association for Transgender Health (WPATH) Guidelines (at paras 82-85).

The test for an interlocutory injunction is whether (1) there is a serious issue to be tried; (2) there will be irreparable harm if the injunction is not granted; and (3) the balance of convenience favours granting the injunction (at para 120, citing *RJR-MacDonald Inc v Canada (Attorney General)*,

[1994 CanLII 117 \(SCC\)](#), [1994] 1 SCR 311 at 348-49). Justice Kuntz found that each stage of the test favoured the applicants.

### **Serious *Charter* Issues to be Tried?**

Determining whether there was a serious issue to be tried required consideration of the applicants' *Charter* arguments. The applicants' s 7 *Charter* argument was that the restriction on gender-affirming health care had a “serious and profound” effect on the psychological integrity of transgender and gender diverse youth” (at para 135). Justice Kuntz noted that the applicants' evidence showed the benefits of hormone therapy for some trans and gender diverse youth, and that preventing access to this therapy could damage their health and well-being “by causing, for example, increased anxiety and depression, unwanted and irreversible changes to their bodies, or outing them as trans and thereby subjecting them to (even more) bullying and discrimination” (at para 139). Even the government's evidence did not “preclude Hormone Therapy as a viable treatment for some” (at para 139). Accordingly, Justice Kuntz found that it was arguable that the ban “will create a risk to health by preventing access to health care”, contrary to the right to security of the person (at para 139, citing *Canada (Attorney General) v PHS Community Services Society*, [2011 SCC 44 \(CanLII\)](#)).

The court dismissed several arguments of the government in reaching this conclusion. First, the government argued that this case was comparable to *Lewis v Alberta Health Services*, [2022 ABCA 359 \(CanLII\)](#), where the Court of Appeal dismissed a s 7 challenge to a vaccine requirement that was a precondition to receiving transplant surgery. *Lewis* was distinguishable because in the case at bar, the Doe applicants were not refusing to follow medical pre-conditions and were challenging a legislative prohibition rather than a requirement imposed by physicians (at paras 141-142). Second, the government argued that hormone therapy is not medically necessary “because gender identity is self-assessed” (at para 144). Justice Kuntz rejected this position, noting that although gender identity is self-assessed, a diagnosis of gender dysphoria or gender incongruence is made by medical professionals and they make treatment recommendations according to protocols (at para 144). Importantly, she also held that gender identity is not a “choice” (at para 145), which was elaborated on in her s 15 reasons finding that gender identity is immutable or constructively immutable (at paras 145, 178). Finally, while there was conflicting expert evidence on the benefits and risks of hormone therapy, this was not something to be resolved on an application for an interlocutory injunction. To the government's argument that it should have wide latitude to set health policy, Justice Kuntz stated that “the courts have an obligation to step in where a proposed policy may or will infringe a person's *Charter* rights” (at para 147).

The applicants also argued that Bill 26 violated the autonomy of trans and gender diverse youth to have control over their own bodies, which is protected under the right to security of the person (see *Carter v. Canada (Attorney General)*, [2015 SCC 5 \(CanLII\)](#)). The government responded that the ban on hormone therapy “preserves autonomy by preserving the choice to grow in accordance with the sex you were assigned at birth and to possibly have biological children” (at para 149). Justice Kuntz found that there was a serious issue to be tried here too, as the restrictions in Bill 26 favour “preserving a very specific choice that some youth may not want to preserve, or that some youth may want to approach differently than the Ban assumes” (at para 150). She also rejected the government's argument that puberty and not government action was the cause of any harm to the

applicants, noting that “[t]he starting point for an alleged harm might not be caused by government action, but government action may impact an individual’s ability to address the harm in a way that infringes their *Charter* rights and causes further harm” (at para 152).

A serious issue to be tried in relation to s 7 of the *Charter* also required consideration of whether any violation of security of the person was contrary to the principles of fundamental justice. On the applicants’ argument that Bill 26 was arbitrary, Justice Kuntz found that there was a rational connection between the government’s objective – “to protect the health, safety and long-term choices of children and youth with gender dysphoria or gender incongruence” (at para 158) – and the ban on hormone therapy (at para 160). However, there was a serious issue to be tried with respect to the ban’s overbreadth given that the ban would prevent mature minors from accessing hormone therapy even when they have capacity to make such decisions about their bodies. While the government argued that a total ban was required “because of an overeagerness among physicians to designate youth as mature minors, and to prescribe Hormone Therapy on demand” (at para 167), Justice Kuntz found that the applicants’ evidence supported their position that “doctors are treating gender diverse minors in accordance with established science and accepted protocols” (at para 169). She also found that there was a serious issue to be tried as to whether the ban was grossly disproportionate, given the conflicting evidence on its necessity in protecting trans and gender diverse minors (at para 173).

Turning to the applicants’ s 15 arguments, the test for a *prima facie* violation is whether “the impugned law creates a distinction on an enumerated or analogous ground, either on its face or in its impact” and whether the law “imposes burdens or denies benefits to the identified group ‘in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage’” (at paras 176-177). Although the issue has not been directly addressed by the Supreme Court of Canada, Justice Kuntz found that gender identity is an analogous ground of discrimination for the purposes of s 15 analysis, noting lower court decisions that support this view (at para 178). She also noted the Supreme Court’s decision in *Hansman v Neufeld*, [2023 SCC 14 \(CanLII\)](#), which (in a different context) recognized that “gender diverse persons are ‘undeniably a marginalized group in Canadian society’, that they ‘occupy a unique position of disadvantage’, and that ‘harmful...therapy’ has historically (and wrongly) been imposed on them to try and force conformity with their gender assigned at birth” (at para 181). The ban created a distinction based on this ground given that it targeted only trans and gender diverse youth, while cisgender youth would continue to have access to hormone therapy for medical reasons (at para 186). On the government’s argument that any distinction was based on a mental health diagnosis of gender incongruence or gender dysphoria and not gender identity, Justice Kuntz indicated that this “technical” argument was one to be considered at trial (at paras 187-190).

On the second branch of the test for s 15 Justice Kuntz also found that there was a serious issue to be tried. The government relied on the case of *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004 SCC 78 \(CanLII\)](#) to argue that hormone therapy was an “emergent or uncertain treatment” that the government was not required to provide, such that it could not be subject to a s 15 challenge. While the court appreciated this point, it was dependent on an assessment of the conflicting evidence and was thus one to be decided at trial (at para 192). Overall, Justice Kuntz found the applicants had raised sufficient evidence to establish that there was a serious issue on whether the ban “perpetuates disadvantage and prejudice by denying them access

to medically indicated treatment that remains available to others, thereby prolonging or worsening gender dysphoria, distress, prejudice, and mental health challenges of gender diverse youth” (at para 193).

The final question was whether the government’s possible justification of the ban under s 1 of the *Charter* was a serious issue to be tried. The government argued that the court should be deferential in assessing its s 1 arguments due to the scientific uncertainty of hormone therapy and the government’s precautionary approach to the protection of minors (at para 197). Justice Kuntz found that the government’s evidence and arguments were “not enough to preclude a finding that there is a serious issue to be tried in respect of whether the Ban is justified under section 1” (at para 198). As to deference, she again reminded the government that “the courts are required to assess their decisions for compliance with the *Charter*” (at para 198).

Overall, the applicants were found to have an arguable case that the ban unjustifiably violates ss 7 and 15 of the *Charter* and their claim was not frivolous or vexatious (at para 199).

### **Irreparable Harm?**

On the second criterion, Justice Kuntz noted that where an injunction is sought to prevent “prospective harm”, the applicants must establish with a “high degree of probability that the harm will in fact occur” (at para 204, citing *Operation Dismantle v The Queen*, [1985 CanLII 74 \(SCC\)](#), [1985] 1 SCR 441 at para 35). While this is a relatively high standard, she found that the applicants had demonstrated that the ban would cause irreparable harm “by causing gender diverse youth to experience permanent changes to their body that do not align with their gender identity” (at para 205). She rejected the government’s argument that the applicants’ evidence in this regard was speculative. Justice Kuntz also found that targeting gender diverse youth and subjecting their health care to government control would cause irreparable harm “by reinforcing the discrimination and prejudice that they are already subjected to” (at para 206). Lastly, the ban would deny gender diverse youth the benefit of receiving expert care from the medical community and of being able to make informed and collaborative decisions “in the very narrow window of opportunity they have to act on such advice” (at para 206), another form of irreparable harm.

### **Balance of Convenience?**

Justice Kuntz noted that the third criterion requires the court to focus on “whether the granting or withholding of interlocutory relief would occasion greater harm pending a decision on the merits” (at para 213). In injunction applications involving constitutional issues, there is a presumption that the law is in the public interest and the applicants bear the burden of overcoming this presumption. Justice Kuntz found that even if it was assumed that an injunction would harm the public interest by denying protection to gender diverse youth as claimed by the government, the balance of convenience still favoured the applicants. This was because the benefit of the law would only be felt by a very small subset of youth who made the decision to access gender-affirming care and later regretted it. She noted that while the scientific evidence was in issue, it did support the argument that “informed choice is possible and that the doctors who prescribe Hormone Therapy do so with a careful eye to the needs of the patient and the risks of the treatment” (at para 216). On the other side of the balance, the evidence established that the injunction would benefit the public

by allowing “a marginalized group to continue receiving medical care from trusted doctors and a broader team of health professionals thereby avoiding the adverse consequences the Ban will have on them” (at para 217).

Justice Kuntz thus found the three criteria for an interlocutory injunction were met and she enjoined the Lieutenant Governor in Council of Alberta from proclaiming the impugned sections in force until the applicants’ claim was finally adjudicated (at para 221).

## Commentary

There are strong arguments that the invocation of s 33 in relation to Bill 26 and the other Alberta legislation targeting trans and gender diverse youth is a premature response by the UCP. The *Egale et al* case reinforces how the litigation is only at an early stage and still subject to submission of full evidentiary records, argumentation, and judicial assessment of issues on which there is a great divergence of opinion and evidence. Allowing this litigation to unfold would provide the government with an opportunity to attempt to justify the ban as a reasonable limit under s 1 of the *Charter* and thus allow deeper scrutiny of its claim that it is taking an evidence-based approach to protecting trans and gender diverse youth. There is still the doctors’ challenge to Bill 26 to be heard, along with the claim related to Bill 27 and any future litigation on Bill 29. That the government seeks to avoid letting these claims run their course by relying on s 33 speaks volumes about its lack of confidence in its grounds for justification.

The invocation of s 33 at this stage also undermines the constitutional duty of courts to oversee the actions of governments in relation to possible breaches of *Charter* rights and freedoms, a duty that Justice Kuntz noted repeatedly in her reasons for decision. Although *UR Pride* – if followed in Alberta – would allow the courts to retain some role in reviewing legislation that has been made subject to s 33, the SKCA found that judicial powers in this context are merely declaratory and do not permit remedies such as striking down legislation (or presumably ordering injunctions that prevent legislation from coming into force).

As [noted by Dr. Margot Burnell](#), president of the Canadian Medical Association speaking prior to the introduction of Bill 9, use of the notwithstanding clause for Bill 26 would mark an “unprecedented government intrusion into the physician-patient relationship that requires doctors to disregard clinical guidelines, the needs of patients and their own conscience.” It also “risks setting a precedent that affects other national health issues, such as vaccination, reproductive health, medical assistance in dying, or even cancer or surgical care.” Section 33 as applied to Bills 27 and 29 takes its intrusive scope even further, into student-teacher relationships and those between athletes and their sports organizations. The fact that s 33 was also mobilized to subvert the collective bargaining rights of teachers leaves one asking what potentially unconstitutional laws would be spared this strategy by the UCP government.

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This post may be cited as: Jennifer Koshan, “The Nuclear Option: An Update on Alberta’s Legislation Targeting Trans and Gender Diverse Youth” (19 November 2025), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2025/11/Blog\\_JK\\_Egale.pdf](http://ablawg.ca/wp-content/uploads/2025/11/Blog_JK_Egale.pdf)

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