*Legal Analysis*

# Lost in Translation: Examining the Constitutionality of Alberta's New Anti-Trans Legislation

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While protecting children has been a long-time issue within both the social and political spheres, the discourse has only shifted to centre trans individuals within the last decade or so. This has led to a resurgence of anti-trans rhetoric around the world, including in Canada, under the guise of protecting vulnerable youth. The resurgence of this rhetoric can be seen in three bills proposed by the Alberta government, which mainly aim to restrict inclusive education, gender-affirming care for youth, and the presence of transgender girls in sports.

In this paper, I focus on the healthcare and sports aspects of Alberta's proposed legislation, specifically through the lens of sections 7 and 15 of the Charter of Rights and Freedoms. I argue that the proposed legislation would be found to be infringing sections 7 and 15, and following a step by step analysis using the Oakes test, would not be upheld as a reasonable limit under section 1 of the Charter.

# *Introduction*

The objective of protecting children is a longstanding issue within both social and political spheres, and one that oftentimes draws much debate on how we can best execute this. However, it has only been within the last decade or so that this conversation has shifted to largely centre the role of transgender individuals in this matter. As trans individuals have become increasingly visible throughout this short time period, Canada has begun to see a resurgence of anti-trans rhetoric, particularly in relation to protecting children (Bellemare et al., 2021). The 'parental rights' movement specifically has gained much traction recently via anti-trans ideology. While 'parental rights' have become increasingly popular among those who hold conservative values, notably within the United States, growing opposition to inclusion policies in Canada resulted in the 1 Million March 4 Children, a protest that occurred in September 2023 that widely advocated against LGBTQIA2S+ inclusion in schools (Benchetrit, 2023; Mason & Hamilton, 2023). According to the Canadian Anti-Hate Network (2023), these mobilizations have coincided with the sharp rise in anti-LGBTQIA2S+ policies and platforms within Canadian political parties.

However, while 'parental rights' movements have been largely influential in the creation of anti-trans educational legislation, such as the disclosure policies in New Brunswick and Saskatchewan, this is not their only goal. Along with inclusive education, gender-affirming care for youth and the presence of transgender girls in sports are perhaps the most substantial issues these groups oppose. Similarly, these are the three main policy areas that were introduced in February of 2024 by the Alberta Government in an announcement titled, 'Preserving choice for children and youth'. In October of 2024, *Bills 26, 27*, and *29* were introduced in the Alberta legislature, which aim to amend health and education statutes, as well as create an act to promote

safety in sport. As of current writing (December 2, 2024), these bills have not been signed into law, meaning that there is still possibility for slight changes within the proposed legislation.

Considering that inclusion, affirmation, and care for transgender youth continues to be a highly contentious issue, it is no surprise that these bills have generated much controversy across the nation. While some support the proposed restrictions on trans care, others vehemently oppose these policies, claiming they undermine the *Charter* and citing them as a "risk of severe harm" (Law Faculty, Universities of Alberta and Calgary, 2024). The question that I seek to answer in this paper asks: would Alberta's proposed *Preserving Choice for Children and Youth* legislation be upheld if tested in court, or does a child's constitutional right to equality and self-expression outweigh concerns toward youth-decision making? While there have been numerous bills targeting LGBTQIA2S+ communities within the United States over the last several years, the few examples of anti-LGBTQIA2S+ legislation in Canada are still relatively recent, meaning there are few court rulings, and little legal or academic scholarly work on the matter. Given that these are the areas that are most lacking in terms of legal and scholarly analysis, I plan to focus on the healthcare and sports aspects of Alberta's proposed legislation, specifically through the lens of sections 7 and 15 of the *Charter of Rights and Freedoms*. I argue that the proposed legislation would be found to be infringing sections 7 and 15, and would not be upheld as a reasonable limit under section 1 of the *Charter*.

I begin the paper by outlining my intended contribution to the literature on this topic, before moving on to provide an overview of both the legislation in question and a small selection of relevant court rulings. I then outline my method of analysis, and examine potential violations of s.7 and s.15 of the *Charter* in the proposed legislation. Once infringement is established, I use the *Oakes* test to analyze whether these laws indicate a reasonable limit under s.1 of the *Charter*,

accounting for potential objectives and arguments that may be cited by the Alberta Government while defending this legislation. Finally, the conclusion notes areas for future research, as well as limitations within my own research and analysis.

## *Contribution*

The amount of literature examining issues that transgender youth face is not as extensive as many other areas of scholarship. Even so, there is a substantial base of research discussing the creation of safe environments for trans kids, educating their peers, and even the effects of certain health procedures. However, an area that is extremely lacking is the translation of increasing anti-trans sentiment into legislation, and the constitutional legitimacy of these policies. This is particularly true within the Canadian context.

Canada has only seen two bills explicitly targeting trans youth prior to Alberta's proposed legislation, both of which functioned as pronoun and name disclosure policies. Given that all three examples of anti-trans policy in Canada have been proposed or enacted within the last year and a half, there has not been enough time for constitutional challenges to proceed from start to finish, meaning that there is no direct legal precedent to inform the potential outcome of a challenge to legislation such as Alberta's *Bill 26* and *Bill 29*

By focusing specifically on the constitutionality of Alberta's proposed anti-trans legislation, my research aims to fill the gap on legal issues related to transgender youth, specifically within the Canadian context. Since we are all bound by the *Charter of Rights and Freedoms* in Canada, my findings do not only apply to Alberta's situation, but could be relevant to other jurisdictions as well.

## *What is Bill 26?*

*Bill 26*, introduced as *Health Statutes Amendment Act, 2024 (No. 2)* in October, claims to, "preserve choice for minors identifying as transgender or gender diverse" according to Alberta Health Minister Adriana LaGrange, involving amendments to Alberta's *Provincial Health Agencies Act*, *Public Health Act*, *Health Information Act*, and *Health Professions Act* (LaGrange, 2024). The text of the bill itself includes an amendment to section 1 of the *Health Professions Act* outlining definitions of gender dysphoria and gender incongruence, as well as defining a minor as a person under 18 years of age. The text goes on to outline ten examples of "sex reassignment" surgery and proposes the addition of section 1.91 to the *Health Professions Act*, which states:

> **1.91** A regulated member shall not perform a sex reassignment surgery on a minor. (p. 10).

Immediately following section 1.91, section 1.92 outlines a blanket ban on the use of puberty blockers or hormone therapy for transgender individuals under the age of 18. There are no exceptions listed within the law itself, as these are instead left to be granted by the Minister of Health. The text reads:

> **1.92(1)** A regulated member shall not prescribe a Schedule 1 drug within the meaning of the *Pharmacy and Drug Act*, or any other drug identifies in the regulations, to a minor for the purposes of hormone therapy, including puberty suppression and hormone replacement therapy, for the treatment of gender dysphoria or gender incongruence except in accordance with an order of the Minster under section 1.93.
>
> **(2)** The Minister may make regulations identifying any drug as a drug for the purposes of this section. (p.12)

This total ban of puberty blockers and hormones is not in accordance with the original policy ideas outlined in the *Preserving Choice for Children and Youth* (2024) announcement. In

the February 2024 announcement, the government aimed to ban the use of blockers and hormones for youth 15 and under, while 16 and 17 year old teens would be allowed these treatments under parental, physician, and psychologist approval. There was also an exception made in this announcement for youth 15 and under who had already begun treatment to continue on that path. While the Alberta government has publicly indicated the intention for Ministerial exceptions for youth in these situations, these exceptions are currently listed as 'next steps,' and are not included within *Bill 26* itself. Therefore, it is possible that the Alberta government may not honour these exceptions.

## *What is Bill 29?*

The *Fairness and Safety in Sport Act*, also known as *Bill 29*, was introduced by Alberta Minister of Tourism and Sport Joseph Schow with the intention of "ensuring a major step in ensuring fairness, safety, and inclusivity in sport for Albertans" (Schow, 2024). The bill, which applies to all organizations governing sport in Alberta, requires the implementation of fairness and safety policies via section 3(1). According to section 3(3), these policies must address:

> **(i)** Eligibility requirements to participate in the relevant sport;
>
> **(ii)** Processes or methods for determining whether individuals meet the eligibility requirements to participate in the relevant sport;
>
> **(iii)** Any other matters specified in the regulations (p.5).

Additionally, section 4(1) of *Bill 29* includes reporting requirements, requiring sport's governing boards to inform the Minister of complaints related to board policies, requests for mixed-gender leagues, establishment of mixed-gender leagues, and other matters within the Ministry's jurisdiction (p.5). Section 6 of the bill is dedicated to protection from liability, assuming the act is implemented in "good faith" (p. 6). Within the text itself, the meaning of

good faith is not clarified. Although the text of *Bill 29* does not explicitly ban transgender women or girls from participating in sports with their cisgender peers, it seems to provide an avenue for organizations to do so if they wish. At the very least, organizations would be forced to implement eligibility measures under *Bill 29*. Despite the text of the bill itself not explicitly singling out transgender women and girls, Minister Schow stated that the legislation sought to "ensure biological female athletes are able to compete in biological female-only divisions" in the first reading of the bill on October 31, 2024.

## *LGBTQIAS+ Legal Protections*

Given that the *Charter of Rights and Freedoms* was drafted in 1982, transgender individuals are certainly not mentioned as a protected group within the text of the document itself. While sexual orientation was added as a prohibited ground of discrimination in 1996, transgender people did not receive formal protection under the *Canadian Human Rights Act* until 2017, when an amendment was made to add gender identity and expression to the Act.

*Vriend v. Alberta* (1988) and *Egan v. Canada* (1995) are both considered foundational SCC judgements in the fight for same-sex rights. The judgement in *Vriend* (1988) found that the exclusion of sexual orientation in provincial human rights legislation violated s.15(1) of the *Charter*, while the *Egan* (1995) judgement led to sexual orientation being "read in" as an equivalent ground of discrimination under s.15. These cases are often cited as groundbreaking for LGBTQIA2S+ rights in Canada, and while they certainly were in terms of sexual orientation, there is no mention of transgender individuals. In fact, it was not until 2023 that transgender individuals in Canada were recognized as "undeniably a marginalized group" by the Supreme Court of Canada, who specifically noted that trans people occupy a "unique position of

disadvantage in our society" (*Hansman v. Neufeld*, 2023, para 84-85).

## *New Brunswick and the Canadian Civil Liberties Association (CCLA)*

One of the few examples of legal action related to anti-trans legislation in Canada is a lawsuit filed by the Canadian Civil Liberties Association (CCLA) against the Government of New Brunswick regarding amendments to *Policy 713*. This policy, originally enacted in 2020 to support queer and trans youth, was revised in July 2023 to require parental consent for youth to use a preferred name or pronouns at school.

According to the CCLA (2024), the latest update on this case is from May of 2024, although given the recent New Brunswick election, it is unlikely that the case will proceed any further. In October 2024, the CCLA stated that they, "welcome the commitment by the Premier-elect of New Brunswick to reverse changes to *Policy 713,"* citing them as having caused, "significant harms to trans and gender diverse students" (para 2). Considering that the only currently accessible material from this case is a briefing on the CCLA's issue with *Policy 713*, and that the case may be dropped entirely, it is not tremendously helpful in determining how Canadian courts may react to anti-trans legislation.

## *Saskatchewan and Section 33*

Taking direct inspiration from New Brunswick's *Policy 713* amendments, the Government of Saskatchewan passed *Bill 137*, also known as the *Parent's Bill of Rights* in October of 2023, which took a very similar structure to the pronoun and name disclosure required in *Policy 713*. However, a constitutional challenge was launched against *Bill 137* before

it was signed into law by the University of Regina Pride Centre, who argued that the bill violated the s.7 and s.15 rights of transgender youth. At the preliminary stage, the Saskatchewan Court of King's Bench found that youth affected by *Bill 137* would 'suffer irreparable harm' mentally and physically if the policy were implemented, placing an injunction that would prevent the implementation of the bill until court proceedings were finalized (para 98).

Instead of obeying this injunction, the Saskatchewan government invoked s.33 of the *Charter*, also known as the notwithstanding clause, to pass the bill regardless of its potential s.7 and s.15 violations. According to the BC Civil Liberties Association BCCLA), an intervener in the case, Saskatchewan asked for the University of Regina Pride Centre's challenge to be dismissed, arguing that the courts no longer had jurisdiction in the matter due to invoking s.33. Ultimately, the Saskatchewan Court of King's bench found that, "the notwithstanding clause does not mean that courts cannot still issue a declaration as to whether Charter rights are violated," although this does not have any effect on the actual implementation of the bill (BCCLA, 2024, para 3).

Similar to the New Brunswick case, *UR Pride Centre v. Saskatchewan* (2023) did not quite reach the point of determining the constitutionality of Bill 137, but the acknowledgement of irreparable harm that this bill puts forth is the closest thing to trans youth-specific legal precedent currently available in Canada. Although this was pertaining to an education based pronoun disclosure bill, the same principles could be applied to other forms of anti-trans legislation. Currently, Alberta does not seem to be at risk of invoking s.33 to pass their own anti-trans legislation, although if they did, the situation would likely play out similarly to how it has in Saskatchewan.

## *Healthcare Decision-Making for Youth*

Since *Bill 26* specifically targets gender-affirming care for youth, turning to legal precedent on youth decision making is helpful to contextualize this issue. *A.C. v. Manitoba* (2009) centers on an issue involving a 14 year old Jehovah's Witness who feels that her right to medical decision making was violated after being treated against her wishes. The judgement notes that, "young people should not automatically be deprived of the right to make decisions affecting their medical treatment," and should instead be entitled to a degree of decision making based on their developing understanding (para 45).

This judgement, despite being made based on a child who wished to refuse treatment, applies equally to transgender youth with mature decision making abilities who are seeking treatment. This precedent sets out that even if they have not reached the age of majority, youth should always be entitled to a certain degree of healthcare decision making, depending on their age and understanding. This judgement does not detract from the involvement of parents and physicians, but rather establishes and maintains a level of autonomy for youth.

## *Method of Analysis*

In performing my analysis, I will first establish violations of sections 7 and 15 of the *Charter of Rights and Freedoms* using previously established legal tests. Once I have established these violations, I will determine if the legislation remains constitutional as a reasonable limit under section 1 by performing the *Oakes* test on both pieces of legislation. This involves analyzing the text of *Bills 26* and *29*, as well as the inclusion of evidence supporting the benefits of gender affirming care, healthcare decision making, and inclusive sports policies. I will also consider potential counter arguments that the Alberta government would use to portray their

legislation as a reasonable limit of *Charter* rights under section 1.

## *Establishing Charter Violations: Section 7*

Section 7 of the *Charter* states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Simply put, laws may infringe on life, liberty or security of the person, but only if these laws accord with the principles of fundamental justice. According to Florence Ashely (2024), laws violate these principles if they are "arbitrary, overbroad, and grossly disproportionate" (p. 94). I would argue that both *Bill 26* and *Bill 29* meet this criteria.

As University of Alberta and University of Calgary Law Faculty pointed out in their February 2024 letter to Premier Danielle Smith, "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" (p. 4). Security of the person is particularly at risk under *Bill 26*, given that trans youth are already at a much higher risk for anxiety, depression, self-harm, and suicide (Being Safe Being Me, 2020). Additionally, research shows that gender-affirming experiences such as access to care and using a chosen name help mitigate these factors, and so banning these options is sure to cause harm (Russell et al., 2018).

*Bill 29* may threaten the security of the person by threatening the privacy of all women and girls, cisgender or not through the process of 'gender verification'. A 9 year old girl was verbally harassed in BC last year at a track meet with a man aggressively seeking to prove that she was not transgender, a move that had left the girl traumatized and sobbing (Winston & Strachan, 2023). Regardless of whichever verification processes Alberta is to implement, they

have the potential to be deeply intrusive and undermine personal security.

Given that both bills appear to undermine life, liberty and security of the person, are they in accordance with the principles of fundamental justice, or do they fall under the arbitrary, overbroad, and grossly disproportionate category? *Bill 26* creates a complete ban with no exceptions on gender-affirming care for youth, effectively enacting the exact opposite of typical care standards for trans youth set out by the Alberta Medical Association and Canadian Pediatric Society (2024). Considering the disregard shown toward medical advice, it is clear that this bill is arbitrary and overbroad. This bill, although broad in its banning of care, is hyper specific in who it targets, leading to grossly disproportionate effects on the very small percentage of transgender youth in Alberta.

Additionally, *Bill 29* is extremely overbroad in its text, allowing sports organizations to enact "gender verification processes" however they see fit. This too, is completely arbitrary, and not based on common practice or scientific advice. Additionally, these laws will grossly and disproportionately impact cis and trans girls alike, depending on what verification they are forced to undertake in order to participate in sport.

## *Establishing Charter Violations: Section 15*

Section 15 of the *Charter* outlines equality rights, stating:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

The Supreme Court of Canada uses a two-step test in determining s.15 violations, which was last reaffirmed in *R. v Sharma* (2022). The two steps in determining a violation are:

1. Creates a distinction based on enumerated or analogous grounds, on its face or in its impact;
2. Imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

*Bill 26* easily meets both criteria. It creates a clear distinction in medical treatment between cisgender and transgender youth, by stating that certain procedures and drugs are not to be prescribed for the purpose of gender-affirming care. I want to be clear that some of the banned gender-affirming procedures and drugs within *Bill 26* are still available to cisgender youth if necessary, such as puberty blockers and breast reductions. By creating a transgender specific ban, the bill denies care in a manner that reinforces the marginalization of trans youth in comparison to their cisgender peers.

*Bill 29* does not necessarily create a clear distinction between cisgender and transgender girls in the text of the bill itself, but based on the Minister of Sport and Tourism's promise to ensure 'biological female athletes are able to compete in biological female-only divisions' during the First Reading of the bill, it seems clear that the impact of the bill intends to create this division. According to the Alberta Law Faculty (2024), "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" (p. 4). Jones et. al's (2016) review of literature on transgender individuals and sport found that neither trans men nor trans women had an inherent athletic advantage, meaning that the creation of biological female-only leagues is not a necessity at this point in time. The participation rates of transgender youth in sports are already relatively low, it seems clear that Bill 29 is only furthering that burden.

## *What is the Oakes Test?*

According to the Government of Canada, the *Oakes* Test, originally defined in *R. v Oakes* (1986), sets out that a "limit on a Charter right must be 'reasonable' and 'demonstrably justified'" (Charterpedia, 2024). The test has become well-established over the years, and is now essential in determining reasonable limits on *Charter* rights under section 1. The *Oakes* Test consists of two overarching questions, with the second split into three elements:

1. Is the legislative goal pressing and substantial? i.e., is the objective sufficiently important to justify limiting a Charter right?
2. Is there proportionality between the objective and the means used to achieve it?
    a. "Rational Connection": the limit must be rationally connected to the objective. There must be a causal link between the impugned measure and the pressing and substantial objective;
    b. "Minimal Impairment": the limit must impair the right or freedom no more than is reasonably necessary to accomplish the objective. The government will be required to show that there are no less rights-impairing means of achieving the objective "in a real and substantial manner"
    c. "Final Balancing": there must be proportionality between the deleterious and salutary effects of the law

Oftentimes, for the sake of simplicity, the *Oakes* Test is listed as four individual criterions that need to be met, rather than two questions with subsections. I will be following this format in my own work, and have split my analysis of each individual criteria into sections titled: Pressing and Substantial Objective, Rational Connection, Minimal Impairment, and Proportionality.

## A Reasonable Limit?

Having established that *Bills 26* and *29* would impair the s.7 and s.15 rights of transgender youth in Alberta, I now turn to the *Oakes* Test to determine if these impairments could be considered reasonable under s.1. The first step is determining a pressing and substantial objective for each bill. For *Bill 26*, I assume that this would be protecting children and youth from irreversible health decisions, while for *Bill 29* the objective is in the title, preserving fairness in women's and girls' sports. These objectives are both pressing and substantial in my opinion. Children do need guidance and protection to a certain extent in medical decision making, and as *A.G. v Manitoba* (2009) noted, youth are entitled to a certain level of autonomy in their decision making, but this is carefully balanced based on their maturity level, and must include consultation with parents and physicians. As for *Bill 29*, promoting participation in sport for girls has been a goal for decades. During the Committee of the Whole meeting in the Alberta Legislature on November 26, 2024, MLA Julia Hayter cited statistics from Canadian Women & Sport stating that one in three girls leave sports in their teens, for many complex reasons. Therefore, the Alberta Government's objective with these bills can be considered pressing and substantial, passing step one of the *Oakes* test.

## Rational Connection

The second step of the *Oakes* test is establishing a rational connection between the law itself and the objective. Starting with *Bill 26*, I do not find the complete ban on gender-affirming care for youth to be rationally connected to the objective of protecting youth from irreversible health decisions. First the majority of the "sex reassignment" surgeries included in section 9 of the *Health Professions Act* are already not happening on minors. MLA Court Ellingson

specifically noted in his speech to the Alberta Legislature that "no bottom surgeries being performed on anyone under the age of 18" in Canada today, a fact which can be verified through the Canadian Pediatric Society. The MLA also noted that explicitly banning these surgeries could send a message that this is currently common medical practice.

Additionally, *Bill 26* only attempts to ban these procedures for the purpose of treating gender dysphoria. It does not apply to cisgender youth who may be in need of the same procedures. For example, a cisgender teen girl may seek out a breast reduction to alleviate back pain. This 'irreversible' procedure would be allowed, while a transgender teen boy would not be able to obtain the same care. If the true objective is to protect all children from these life-altering decisions, then why does the bill not apply equally to all children?

Much of the discussion on gender-affirming care tends to center surgery, but an important part of Alberta's blanket ban includes puberty blockers, which are entirely reversible. The American Academy of Pediatrics (2018) details that blockers have been used since the 1980s to delay precocious puberty, but are effective in preventing the development of secondary sex characteristics until 16 years old to allow gender-diverse youth time to explore their identities. If the blockers are stopped, puberty will proceed as normal. Therefore, banning blockers is not preventing children from accessing an irreversible health decision.

The Alberta government may argue in defence that they believe in taking a "watchful waiting" approach to gender-diverse youth rather than a gender affirming one, which involves therapy and waiting until youth are approximately 16 to take any gender-affirming action. However, this would be a misconception, as puberty blockers play an instrumental role in this approach, allowing youth the time to make a decision on their gender identity without experiencing the irreversible effects of puberty (Ashley, 2019). Additionally, puberty blockers

can remove the need for invasive, irreversible surgeries for transgender individuals later in life.

*Bill 26* does not allow for exceptions, regardless of parental, physician, or psychologist consent. First, this is surprising to see from a party that often boasts parental rights, and second, I would argue that informed consultation involving parents and physicians is the rational way toward obtaining the best care for a child. A study by Clark et al. (2020) outlined the importance of shared decision making in the process of gender affirming care, noting "supportive relationships, open communication, role agreement, decision agreement and adequate time" as key conditions (p. 578). If the Alberta government were truly interested in preserving choice for youth, and preventing youth from making life-altering medical decisions alone, the rational step to take would be to further encourage shared decision making, and follow standard medical practice as set out by the Alberta Medical Association, Canadian Pediatrics Society, and American Academy of Pediatrics.

*Bill 29* may contain even less rational connection to its objective of promoting fairness in girls' sports, and more broadly encouraging participation. To encourage participation in sport, the Alberta government may consider providing greater funding to female divisions, or figure out a way to alleviate the pressure of, "socialization, gender expectation, lack of consideration for social identities, structural barriers, and psychosocial barriers" that MLA Hayter cites as being influential in her speech to the Alberta Legislature. Instead, *Bill 29* sets out broad guidelines to create "gender verification" processes and "eligibility requirements" for girls to join sports. At best, these requirements have the ability to add a significant amount of red tape and hassle to joining sports for young girls and their families. At worst, these requirements could cause immense harm.

The text of *Bill 29* does not outline how organizations are to verify gender, meaning that

organizations have the freedom to implement whatever regulations they would like, regardless of how invasive or traumatizing they are. This could range anywhere from verifying birth certificates to deeply personal bodily examination, which is highly problematic, especially for minors. Requirements like this would jeopardize the safety of all women and girls in sports, regardless of their sex assigned at birth. There could be an additional impact on women of colour, who are already often considered insufficiently feminine, and will now constantly have their gender questioned, possibly in unsafe ways. The previously cited example out of BC, involving the gender questioning of a nine year old girl, is only the tip of the iceberg.

To further disprove the connection between fairness in sport and excluding transgender women and girls, I will turn to research by Veronica Ivy and Aryn Conrad (2018), where their analysis of the science, policies, and law of trans women in sports found, "no relationship between endogenous testosterone and performance, even for women." Additionally, they found that there is no scientific basis to impose a testosterone limit on women in sport, regardless of whether they are cisgender, transgender, or intersex (p. 137). Furthermore, they explain that even if there was a relationship between testosterone and performance, much larger advantages are permitted in competitive sport such as "height, metabolic mutations, socioeconomic status, coaching, access to facilities, etc." (p. 138). According to scientific study, transgender women and girls do not compromise the fairness or safety of sports, meaning *Bill 29* has no form of rational connection to its pressing and substantial objective.

## *Minimal Impairment*

Although both pieces of legislation have already failed the *Oakes* Test by failing to meet rational connection standards, it is still worthwhile to examine it through the lens of the

remaining two steps. Having said that, I strongly believe that both *Bills 26* and *29* would fail the minimal impairment requirement as well. The ban on gender-affirming care in *Bill 26* is extremely broad, and outlaws virtually every form of care that transgender individuals seek, including puberty blockers, hormone therapy, and surgery. Although the ban is hyper specific in its targeting of trans youth, one could argue that it attempts to enforce the most impairing legislation possible. The bill bans every form of gender-affirming care for youth under the age of 18, no exceptions.

In order to be considered minimally impairing, the Alberta government would need to work backwards from a full ban. Considering that most surgery was not available to youth under 18 anyway, that portion is not heavily impairing on the rights of trans youth. However, a minimally impairing approach to puberty blockers and hormones would include provisions that allow for shared decision making between the child, parents, physicians, and psychologists, who can determine what is best for the child based on their unique situation. *Bill 26* in its current state is a blanket ban, and does not account for mature minors aged 16 or 17, or the potential mental harm that could arise by removing access to treatment for youth who are currently on blockers or hormones. I cannot think of a more intrusive impairment to gender-affirming care than this one.

*Bill 29* is similar to *Bill 26* with quite a broad scope, but is also extremely vague in its phrasing. While the intention of the bill is clear from the *Preserving Choice for Children and Youth* announcement, as well as the commentary from members of Alberta's United Conservative Party, the bill itself does not provide a detailed explanation of what eligibility requirements will look like, or how they will be enforced. There are also broad protections from liability included within the act, which specifically provide complete protection for anyone enforcing it in "good faith" (s.6). However, good faith is not defined.

Considering the wide scope of this bill, and the potential of the eligibility requirements to be extremely intrusive, I do not think that *Bill 29* can be considered to be minimally impairing *Charter* rights. Depending on the severity of eligibility requirements and their enforcement, which will be fully protected from liability, safety and equality could be severely limited. If the Alberta Government is dead set on separating transgender girls from cisgender girls in sports, the most minimally impairing way to do this would be to create separate divisions, and allow girls to join by self-identifying themselves as cis or trans. This still violates *Charter* equality rights, but could somewhat mitigate the risk of safety. Unfortunately, given the vague nature of the text within *Bill 29*, I cannot be completely sure of what it will look like in action at this point.

## *Proportionality*

The final step of the *Oakes* Test seeks to determine whether the benefits of a law outweigh the harms caused by its infringement of *Charter* rights. For both *Bill 26* and *Bill 29*, this is clearly not the case. As noted by the American Academy of Pediatrics (2018), Canadian Association of Pediatrics (2024), and Alberta Medical Association (2024), removing access to gender-affirming care leads to an increased risk of anxiety, depression, self-harm, and even suicide for trans youth, behaviour that they are already at an elevated risk for. This is a very clear harm stemming from *Bill 26*, and one that I do not find to be proportionally outweighed. The only realistic benefit of this law is clear guidelines on gender-affirming care for health professionals, which certainly do not measure up to the harm caused by the bill.

I outlined the potentially catastrophic harms that *Bill 29* could cause for women and girls in sports when discussing rational connection, and I do not feel that these harms are outweighed by any benefits either. The research done by Ivy and Conrad (2018) proves that transgender

women and girls are not a threat to the integrity of sport, leaving this bill with virtually no benefits. The vague nature of enforcing eligibility criteria and the complete protection from liability are extremely concerning, and the harm presented here heavily outweighs any benefits. With the *Oakes* Test completed, neither *Bill 26* or *Bill 29* can be considered a reasonable limit, and should be struck down as unconstitutional

## Conclusion

The Alberta Government has recently introduced multiple bills targeting trans youth, becoming the first jurisdiction in Canada to suggest or implement such all-encompassing legislation on the issue. *Bill 26*, also known as the *Healthcare Amendment Act,* would enact a blanket ban on gender-affirming care for youth under 18 with no exceptions, while *Bill 29*, the *Fairness and Safety in Sport Act*, would create eligibility requirements for women and girls in sport, with the ultimate goal of removing transgender women and girls. I established *Charter* infringements for both pieces of legislation, finding them in violation of the s.7 right to life, liberty, and security of the person, as well as the s.15 right to equality. I then performed the *Oakes* Test, where I found that both bills had pressing and substantial objectives, but did not contain rational objectives, impair the infringed *Charter* rights as minimally as possible, or carry proportional benefits and harms. Considering this outcome, I was able to conclude that neither Bill 26 or Bill 29 can be considered constitutional, and would be struck down by the courts.

My findings, although centered around the legitimacy of Alberta's anti-trans legislation, have broader implications for the state of anti-trans policy in Canada. Since the *Charter* applies to all Canadians and all legislation in Canada, the lack of constitutionality found in Alberta's anti-trans laws sends a message as to what is acceptable under the *Charter*, and what is not. My

findings indicate that a simple disagreement with the trans lifestyle is not a good enough reason to enact anti-trans legislation, and instead points to the need for research and scientific fact to solidify the reasoning and connection behind the law and its objectives.

I faced several limitations within my research process, due to my limited scope and time. While I would have liked to discuss all three of Alberta's anti-trans bills, this simply would not have been possible while maintaining a narrow enough scope for this paper. Another limitation is the recent nature of the legislation. Both bills have been debated multiple times in the Alberta Legislature in the last month, leading to new information and slight changes here and there. The legislation will likely pass soon, however it is possible that there will be some changes in the implementation of these policies. Additionally, although they have not indicated it so far, the Alberta Government could enact the notwithstanding clause, leaving no grounds for the legal challenges I have predicted here.

These limitations within my own work lend themselves well to future research opportunities. Assuming these bills are enacted in their current form, there is research to be done on how they impact queer and trans youth in Alberta. Organizations including Egale and Skipping Stone announced their intention to take legal action in Alberta in October, meaning that there will be an opportunity to research how the courts actually respond to challenges of these bills.

## REFERENCES

*A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

Alberta Medical Association. (2024, February 2). *The doctor-patient relationship is sacrosanct.* https://www.albertadoctors.org/news/publications/presidents-letter/the-doctor-patient-relationship-is-sacrosanct/

Ashley, F. (2019). Watchful waiting doesn't mean no puberty blockers, and moving beyond watchful waiting. *The American Journal of Bioethics*, *19*(6), W3–W4. https://doi.org/10.1080/15265161.2019.1599466

Ashley, F. (2024). Parental Rights Over Transgender Youth: Furthering a Pressing and Substantial Objective? *Alberta Law Review*, *62*(1), 87–120. https://doi.org/10.29173/alr2797

BC Civil Liberties Association. (2024, August). *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan et al*. https://bccla.org/case/ur-pride-centre-for-sexuality-and-gender-diversity-v-government-of-saskatchewan-et-al/

Bellemare, A., Kolbegger, K., & Vermes, J. (2021, November 8). *Anti-trans views are worryingly prevalent and disproportionately harmful, community and experts warn*. CBC. https://www.cbc.ca/news/canada/anti-transgender-narratives-canada-1.6232947

Benchetrit, J. (2023, April 21). *How the parental rights movement resurged in response to trans inclusivity in classrooms*. CBC. https://www.cbc.ca/news/world/parental-rights-movement-us-canada-1.6796070

Bill 26, *Health Statutes Amendment Act (No. 2),*1st Session, 31st Legislature, Alberta, 2024.

Bill 29*, Fairness and Safety in Sport Act,* 1st Session, 31st Legislature, Alberta, 2024.

Canadian Anti-Hate Network. (2023, August 30). *"Parental Rights" Policies Emerging Across Canada That Critics Warn Could Impact At-Risk Trans Youth*. https://www.antihate.ca/parental_rights_policies_across_canada_critics_warn_impact_at_risk_trans_youth

Canadian Paediatric Society. (2024, February 2). *Letter to Danielle Smith: Gender Affirming Care in Alberta*. https://cps.ca/en/advocacy-defense

Canadian Civil Liberties Association. (2024, October 25). *CCLA Welcomes Commitment to Reverse Harmful Changes to Policy 713 in New Brunswick*. https://ccla.org/press-release/ccla-welcomes-commitment-to-reverse-harmful-changes-to-policy-713-in-new-brunswick/

Clark, B. A., Virani, A., Marshall, S. K., & Saewyc, E. M. (2020). Conditions for shared decision making in the care of transgender youth in Canada. *Health Promotion International*, *36*(2), 570–580. https://doi.org/10.1093/heapro/daaa043

Egale. (2024, February). *What's Happening in Alberta? Egale Explains*. Egale Canada. https://egale.ca/awareness/alberta/

*Egan v. Canada,* [1995] 2 SCR 513

Government of Alberta. (2024a, February 1). *Preserving choice for children and youth | Protéger le choix des enfants et des jeunes*. https://www.alberta.ca/release.cfm?xID=89690FEFD06CA-AC6A-E4E1-C9274DADFC0141DC

Government of Alberta. (2024b, October 31). *Advancing policies to support the health care system*. https://www.alberta.ca/advancing-policies-to-support-the-health-care-system

Government of Canada. (2024). *Charterpedia - Section 1 – Reasonable limits*. Justice.gc.ca.

https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html

*Hansman v. Neufeld,* 2023 SCC 14.

Ivy, V., & Conrad, A. (2018). Including Trans Women Athletes in Competitive Sport: Analyzing the Science, Law, and Principles and Policies of Fairness in Competition. *Philosophical Topics*, *46(2),* 103–140. https://www.jstor.org/stable/26927952

Jones, B. A., Arcelus, J., Bouman, W. P., & Haycraft, E. (2017). Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies. *Sports Medicine*, *47*(4), 701–716. https://doi.org/10.1007/s40279-016-0621-y

Law Faculty, Universities of Alberta and Calgary. (2024, February 12). *An open letter to Premier Danielle Smith Re: "Preserving choice for children and youth" Announcement*. The University of Calgary Faculty of Law Blog. https://ablawg.ca/2024/02/15/an-open-letter-to-premier-danielle-smith-re-preserving-choice-for-children-and-youth-announcement/

Mason, C. L., & Hamilton, L. (2023, September 20). *How the "parental rights" movement gave rise to the 1 Million March 4 Children*. The Conversation. https://theconversation.com/how-the-parental-rights-movement-gave-rise-to-the-1-million-march-4-children-213842

*R. v. Oakes*, [1986] 1 S.C.R. 103

*R. v. Sharma*, 2022 SCC 39

Rafferty, J. (2018). Ensuring comprehensive care and support for transgender and gender-diverse children and adolescents. *American Academy of Pediatrics*, *152*(4). https://doi.org/10.1542/peds.2023-063756

Russell, S. T., Pollitt, A. M., Li, G., & Grossman, A. H. (2018). Chosen name use is linked to reduced depressive symptoms, suicidal ideation, and suicidal behavior Among Transgender Youth. *Journal of Adolescent Health*, *63*(4), 503–505. https://doi.org/10.1016/j.jadohealth.2018.02.003

Szeto, W., & Strachan, B. (2023, June 15). *9-year-old's gender questioned in "gobsmacking" track-and-field incident, family says*. CBC. https://www.cbc.ca/news/canada/british-columbia/kelowna-short-hair-girl-gender-identity-1.6875738

Taylor, A.B., Chan, A., Hall, S.L., Saewyc, E. M., & the Canadian Trans & Non-binary Youth Health Survey Research Group (2020). *Being Safe, Being Me 2019: Results of the Canadian Trans and Non-binary Youth Health Survey*. Vancouver, Canada: Stigma and Resilience Among Vulnerable Youth Centre, University of British Columbia.

*UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education),* 2023 SKKB 204 (CanLII).

*Vriend v. Alberta*, [1998] 1 S.C.R. 493