A MACDONALD-LAURIER INSTITUTE PUBLICATION

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THE CHILDREN'S CHARTER

Alberta's trans policy and legislated rights for children

June 2024

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The authors are grateful to the anonymous peer reviewers and to Andrew Irvine, Chris Martin, and Jamie Sarkonak for their valuable comments and support.

Cover design: Renée Depocas (photo: Ron and Patty Thomas/iStock)
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Executive summary | *sommaire*

Alberta recently announced that it would follow New Brunswick and Saskatchewan by enacting policies requiring schools to notify and obtain consent from parents in order to change the names and pronouns of children under the age of 15. Alberta also set out plans to go further than Saskatchewan and New Brunswick by restricting the availability of medical interventions such as puberty blockers and cross-sex hormones to children under the age of 16 and sex reassignment surgeries to children under 18. It also proposed restrictions on the participation of biological males in female sports. The policy announcements have provoked a wave of one-sided criticism from academics, especially legal academics.

Of particular note, was the "Open Letter to Danielle Smith" signed by 36 Faculty members at the University of Alberta and University of Calgary faculties of law (Koshan et al. 2024). The letter openly attacks *any* limits on "gender affirming" interventions for children, including Alberta's proposed ban on sex change surgeries, as a violation of *Charter of Rights and Freedoms* rights and mischaracterizes Canadian law by suggesting that parental rights are fictional or irrelevant. It also dismisses the empirically proven advantages of biological males in women's sports as no different from "the significant advantages already allowed within women's sports, such as the advantage tall women have when playing basketball."

In this research article, we engage with the claims of this open letter, in addition to other reactions to the kinds of policies proposed by Alberta, Saskatchewan, and New Brunswick. Against these views, we argue that policies such as Alberta's are best understood as *protecting* the rights of transgender-identifying children and their parents, as well as the rights of girls and adult women to meaningfully participate in athletic activity. We demonstrate how critics of Alberta's proposals have mischaracterized the significant protections that the *Charter* offers to children, parents, and to women and girls in this policy context.

First, we note how much of the criticism of Alberta's policies has failed to properly focus on the special vulnerabilities of children. We survey the myriad ways that Canadian law, including the *Charter*, offers special protections for children as the most vulnerable members of society.

Second, we argue that parental notification and consent policies are quite consistent with the special role Canadian law accords to parents and other caretakers as the agents best positioned to make decisions in the best interests of their own children. Those who dismiss or diminish the importance of parental rights are not only mischaracterizing positive law but also rejecting foundational liberal principles.

Third, we observe how age-related restrictions on children's access to different products and activities are widespread and easily justified in Canadian law as being in the interest of protecting children. We also review growing evidence of the uncertain benefits and grave risks of "gender affirming" medical interventions such as puberty blockers or cross-sex hormones and argue that this evidence helps to justify Alberta's age-based restrictions on such interventions.

Fourth, we review the special protections offered to women and girls in Canadian law, including sections 15 and 28 of the *Charter*, and how Alberta's proposed restrictions on biological males participating in women's and girls' sports are simply part of the exclusivity necessary to make these sports fair and substantively equal. The advantages possessed by biological males, even after medical interventions, are empirically clear and significant such that prohibiting them from participating in female sports serves the non-discriminatory purpose of protecting women and girls against arbitrary and unfair sporting events.

In the final sections of the paper, we note that any invocation by Alberta of section 33 of the *Charter* (the notwithstanding clause), following Saskatchewan's example to protect its policies from substantive judicial review, is best understood as anticipating disagreement with federally appointed courts about how *Charter* rights relate to this policy context. Laws invoking section 33 can protect rights and other communal interests. We also argue that claims about how Alberta's policies violate "Indigenous legal orders" should be made with much more caution considering the colonial history of denying Indigenous parents rights over their children's upbringing. **MLI**

À l'instar du Nouveau-Brunswick et de la Saskatchewan*, l'Alberta vient d'annoncer qu'elle mettra en place des politiques obligeant les établissements scolaires à informer les parents et à obtenir leur consentement pour modifier les noms et pronoms de leurs enfants de moins de 15 ans. L'Alberta envisage également d'aller au-delà de ces provinces en limitant l'accès à des interventions médicales telles que l'administration d'inhibiteurs de puberté et la prise d'hormones de réassignation sexuelle pour les moins de 16 ans, et aux chirurgies de réassignation sexuelle pour les moins de 18 ans. Elle a également proposé des limites à la participation des personnes de sexe biologiquement masculin aux sports féminins. La politique annoncée a suscité des réactions peu nuancées de la part des universitaires, dont surtout des professeurs de droit.*

Tel est notamment le cas de la « Lettre ouverte à Danielle Smith » signée par 36 membres des facultés de droit de l'Université de l'Alberta et de l'Université de Calgary (Koshan et al. 2024). Elle remet en question ouvertement toutes les limites aux interventions d' « affirmation de genre » pour les enfants en tant que violation des droits reconnus par la Charte des droits et libertés *– en particulier le projet albertain interdisant les réassignations sexuelles chirurgicales – et définit de manière erronée les droits parentaux dans la législation, en laissant entendre qu'ils sont fictifs ou non pertinents. Elle affirme aussi que l'avantage empiriquement prouvé des personnes de sexe biologiquement masculin dans les sports féminins n'est pas distinct des avantages notables déjà acceptés dans ces sports, comme celui des femmes de grande taille au basket-ball.*

Cet article examine les affirmations énoncées dans cette lettre ouverte, ainsi que d'autres réactions suscitées par ces types de politiques. À l'encontre de ces interventions, nous croyons qu'il est préférable d'adopter des politiques similaires à celles de l'Alberta afin de protéger à la fois les droits des enfants à identité transgenre et de leurs parents ainsi que les droits des filles et des femmes adultes à participer pleinement à des activités sportives. Dans ce contexte particulier, nous montrons comment les opposants ont mal compris les protections essentielles accordées par la Charte *aux enfants, aux parents, aux femmes et aux filles.*

En premier lieu, nous constatons que les critiques à l'encontre des politiques albertaines ont largement négligé les vulnérabilités particulières des enfants. Nous examinons les multiples dispositions du droit canadien, y compris de la Charte*, qui accordent des protections spéciales aux membres les plus vulnérables de la société, nos enfants.*

Ensuite, nous arguons que les politiques qui obligent d'informer les parents et d'obtenir leur consentement sont en accord parfait avec le rôle particulier prévu dans le droit canadien pour les parents et les tuteurs, qui sont considérés comme les mieux placés pour agir en fonction de l'intérêt supérieur de l'enfant. Celui ou celle qui nie ou réduit l'importance des droits parentaux ne trahit pas seulement le droit positif, mais rejette également les principes de base de la philosophie politique libérale.

Troisièmement, nous observons à quel point l'établissement de limites d'âge pour l'accès à divers produits et activités est largement répandu et facile à justifier en droit canadien, dans le but de protéger les enfants. Nous examinons également les données de plus en plus nombreuses qui permettent de mesurer les bénéfices incertains et les risques graves des interventions d' « affirmation de genre » telles que les inhibiteurs de puberté ou les hormones de réassignation sexuelle, et nous croyons que ces données contribuent à légitimer les limites fondées sur l'âge imposées par l'Alberta.

Quatrièmement, nous examinons les protections spéciales accordées aux femmes et aux filles en droit canadien, notamment dans les articles 15 et 28 de la Charte*, et la manière dont les limites établies par l'Alberta concernant la participation des hommes biologiques aux sports féminins renforcent l'exclusivité nécessaire pour garantir l'équité*

et l'égalité dans ces sports. Les avantages de ces hommes biologiques sont démontrés et significatifs malgré les soins médicaux. Il est donc justifié d'interdire leur participation aux sports féminins en raison de l'objectif non discriminatoire que vise la protection des femmes et des filles contre des événements sportifs arbitraires et injustes.

Dans les dernières parties de l'article, nous notons que toute utilisation par l'Alberta de l'article 33 de la Charte *(clause nonobstant), comme l'a fait la Saskatchewan pour préserver ses politiques d'une révision judiciaire substantielle, doit être envisagée comme un moyen d'anticiper un désaccord avec les tribunaux judiciaires nommés par le fédéral concernant les droits prévus dans la* Charte *relativement à ce contexte politique. Les lois qui font référence à l'article 33 peuvent garantir la protection de droits et d'intérêts collectifs. Les allégations de violation des « ordres juridiques autochtones » à l'encontre des politiques albertaines doivent aussi être formulées avec beaucoup plus de précautions, étant donné le déni historique des droits des parents autochtones à l'éducation de leurs enfants.* **MLI**

Introduction

On February 29, 2024, Radio-Canada's investigative news program *Enquête* ran an episode titled "Trans express," in which a fourteen-year-old actress hired by the network and placed under cover was able to procure a testosterone prescription from a gender reassignment clinic in under 10 minutes (*Enquête* 2024). A few days later, an investigative reporter working for the group Environmental Progress published a cache of conversations between members of the World Professional Association for Transgender Health (WPATH). Members discussed in frank detail the possible side-effects of puberty-blocking drugs, cross-sex hormones, and sex reassignment surgeries carried out on minors, as well as the inability of their minor patients to understand the risks and likely consequences of these various interventions. Among the cases discussed was that of a sixteen-year-old who had developed liver cancer that was believed to be linked to the use of the very same cross-sex hormone prescribed to the Quebec actress hired by *Enquête* (Hughes 2024, 23).

These revelations came on the heels of the Alberta government's announcement, on February 1, 2024, of a proposed set of policies titled "Preserving choice for children and youth" (Government of Alberta 2024). This announcement itself follows policy changes both in New Brunswick (Government of New Brunswick 2023) and in Saskatchewan, where the provincial government's *The Education (Parents' Bill of Rights) Amendment Act* 2023 required parental notification and consent where schools formally change the name and gender of a child under the age of 16. Alberta's proposed policy would set that age at 15. But Alberta's announcement also goes further, by proposing to restrict medical interventions such as the use of puberty-blocking drugs and cross-sex hormones to minors over the age of 16, and to prohibit sex reassignment surgeries carried out on persons under the age of 18. It also proposes restrictions on biological males' participation in girls' and women's sports (for a summary, see Dawson 2024).

To date, Canadian academics' reaction to the Alberta announcement has been one-sided. This is probably to be expected, given the lack of political and intellectual diversity in Canadian universities (Dummitt and Patterson 2022). Notably, neither revelations like those just outlined, nor the adoption of a more cautious approach to medical interventions for minors in Norway, Finland, Sweden, and the UK (on which see generally Cohen 2023; Burga 2024), appears to be recognized in these objections.

Similarly, widespread popular support for these policies (on which see Kaufmann 2024) is either ignored or dismissed as irrelevant. For opponents, these policies appear to be simply unacceptable *in principle* as an infringement of the rights of transgender-identifying individuals. A striking example is provided by the "Open Letter to Premier Danielle Smith Re: 'Preserving choice for children and youth' Announcement" dated February 12, 2024, and published on the University of Calgary Faculty of Law's blog on February 15, 2024 (Koshan et al. 2024). The letter, signed by law professors at the University of Calgary and University of Alberta, denounces each facet of the Alberta government's announcement, on the basis that each constitutes an unjustifiable infringement of the rights of transgender-identifying individuals under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

In what follows, we engage with and respond to the claims of this open letter, as well as other reactions to the Alberta announcement and to the similar parental notification measures already adopted in New Brunswick and Saskatchewan (see e.g. Macfarlane 2023; Mason and Hamilton 2023; Salvino and Des Rosiers 2023; Barbeau et al. 2023; Macfarlane 2024; Bucholtz et al. 2024; Ashley 2024). As a general matter, we are dispirited by the reflexively ideological character of these critical interventions. More importantly, we are concerned by the profound confusion that they display with respect to the role that legislation and other measures can and should play in ensuring the protection of vulnerable persons, particularly with regards to what are perhaps the most vulnerable persons of all – children. As against these views, we argue that policies such as Alberta's are best understood as *protecting* the rights of transgender-identifying children and their parents, as well as the rights of girls and adult women to meaningfully participate in athletic activity.

Protecting trans-identifying children, girls, and women

It seems reasonable to take the open letter as representative of the broader academic reaction to the policies at issue, although it is true that other critics express somewhat different positions, some of which we address directly below. The letter makes several similar claims in respect of each of the Alberta government's proposed measures on parental notification and consent (Koshan et al. 2024, 2–3), the proposed restrictions on various forms of medical intervention (Koshan et al. 2024, 3–4), as well as the proposed restrictions aimed at protecting girls' and women's sports (Koshan et al. 2024, 4). According to its signatories, these proposed measures each infringe the section 7 *Charter* guarantee of "life, liberty, and the security of the person," the section 15 *Charter* equality guarantee, the section 2(b) *Charter* guarantee of freedom of expression, and the section 12 *Charter* guarantee against cruel and unusual punishment. The signatories also supplement these claims with the suggestion that the proposals infringe Indigenous legal orders (Koshan et al. 2024, 2).

It is telling, in our view, that while these claims repeatedly reference the vulnerabilities of trans-identifying children (Koshan et al. 2024, 1, 2, 3, 5), the signatories' arguments are framed exclusively through the prism of gender identity. Not considered is the fact that trans-identifying children, in addition to experiencing gender dysphoria, are *also* children, with the additional, unique vulnerabilities that this status entails. In effect, this omission means that the signatories' discussion of the policy proposals that most directly affect children as a class – i.e., on the issues of parental notification and age-related restrictions – proceeds from the standpoint that trans-identifying children are *only* vulnerable in ways that mirror the vulnerabilities of trans-identifying adults. They wrongly assume that trans-identifying children do not experience special limitations in their capacity to understand and to act in accordance with their own best interests on the issues at hand. They wrongly assume that trans-identifying children are unlike other children, in that they are not legally entitled to, nor derive a special benefit from, the guidance provided by parents and other caretakers.

This is not to say that trans-identifying youth do not experience unique vulnerabilities of their own, similar to, even if different from, those of trans-identifying adults. We have no doubt that this is the case, particularly given the temptation to politicize their plight that has been demonstrated by actors

from across the political spectrum. Our point is that the academic discussion of the policy proposals at issue has so far failed to notice that these special vulnerabilities of trans-identifying children proceed not only from their expressed gender identities, but also from the vulnerabilities that they have in common with *all children*. One burden must not erase another (Crenshaw 1989, 140). Indeed, it is difficult to understand the unique intersectional problems facing trans-identifying children if we do not also understand that their vulnerabilities proceed in part from their status *as children*. Trans-identifying children are children, and any discussion of policies pertaining to their well-being must squarely contend with the vulnerabilities that they share with other children.

“*Trans-identifying children are children, and any discussion of policies pertaining to their well-being must squarely contend with the vulnerabilities that they share with other children.*

A similar confusion is displayed by the signatories' approach to the issue of girls' and women's sports. Here, their focus is exclusively on the special vulnerabilities experienced by trans-identifying persons, including trans-identifying adults. Unfortunately, this framing underplays the overlapping vulnerabilities experienced by girls and women on account of their biological sex. As the signatories of the open letter explicitly affirm, they believe that differences in physical ability attributable to biological sex are for all practical purposes no different from "the significant advantages already allowed within women's sports, such as the advantage tall women have when playing basketball" (Koshan et al. 2024, 4). This is unfortunate. Rather than recognizing and attempting to find ways to reasonably address the vulnerabilities of those who experience gender dysphoria, on the one hand, and the special vulnerabilities that girls and women experience on account of their biological sex, on the other, their approach can be read as dismissing the existence of the latter entirely.

In contrast to the approach adopted by the signatories, the special and sometimes overlapping vulnerabilities of children and those of girls and adult women are widely recognized within Canadian law. With respect to children, the Supreme Court of Canada has recognized their special vulnerability in its *Charter* jurisprudence going back at least as far as its 1989 decision in *Irwin Toy Ltd. v. Quebec (Attorney General)*, in which it upheld Quebec legislation prohibiting commercial advertisements aimed at children on precisely these grounds (at para 987).

The special vulnerability of children is also widely recognized through other legislative and jurisprudential protections afforded across the whole of the Canadian legal order. These include limitations on the capacity of children to conclude contracts (see e.g. *Sale of Goods Act* 2000, at s 4; *Toronto Marlboro Major Junior A Hockey Club et al. v. Tonelli et al.* 1979; *Civil Code of Québec*, at arts 155-56), their exemption from or limited liability for criminal (see e.g. *Criminal Code* 1985, at s 13; *Youth Criminal Justice Act* 2002) and tortious conduct (see e.g. *McEllistrum v Etches* 1956; *McHale v Watson* 1966; *Civil Code of Québec* 1991, at art. 1457 al. 2), the duties and corresponding rights assumed by their parents (see e.g. *Family Law Act* 2003, at ss. 20, 21; *Civil Code of Québec* 1991, at art. 599), or the other specific age-related restrictions that the law imposes for their protection (see e.g. *Tobacco, Smoking and Vaping Reduction Act* 2005, at ss. 3.1, 7.5; *Gaming, Liquor and Cannabis Act* 2000, at ss. 75, 87; *Operator Licensing and Vehicle Control Regulation* 2002, at s. 7). The recent Quebec Court of Appeal decision in *Attorney General Québec v. Centre for Gender Advocacy*, pertaining to the constitutionality of the requirements that Quebec imposes on legal name and gender changes for minors between the ages of 14 and 17, explicitly draws an analogy with these existing restrictions (2024, at para 214). This decision follows an entirely reasonable and coherent approach. It ought to guide any constitutional evaluation of the proposed Alberta policies.

Likewise, the special vulnerabilities of girls and adult women are widely recognized by our broader legal order, informing and undergirding much of our family law system (see e.g. *M. v. H.* 1999, at para 180; *Michel v. Graydon* 2020, at para 100; *Anderson v. Anderson* 2023, at para 41; *Bruker v. Marcovitz*, 2007, at para 82) and the specificities of the law of sexual assault (*R. v. Osolin* 1993, at p. 669; *R. v. Ewanchuk* 1999, at para 69; *R. v. Ashlee* 2006, at para 12; *R. v. Kruk* 2024 SCC 7, at para 40). The Supreme Court of Canada has also

repeatedly recognized these special vulnerabilities in its *Charter* jurisprudence (see e.g. *R. v. L. (D.O.)* 1993, at p. 464; *M. v. H.* 1999, at para 91; *R. v. Brown* 2022, at para 10; *Brooks v. Canada Safeway Ltd*. 1989). To dismiss the vulnerabilities that girls and women experience as a class, as though such differences are no different from "the advantage tall women have when playing basketball" (Koshan et al. 2024, 4), is to deeply misconstrue what it means to pursue substantive equality between the sexes. The vulnerabilities of girls and women should carry significant weight in any constitutional evaluation of the proposed Alberta policies.

> *The vulnerabilities of girls and women should carry significant weight in any constitutional evaluation of the proposed Alberta policies.*

To be sure, recognizing the special vulnerabilities of trans-identifying children, and of girls and women, does not preclude the possibility of disagreement with the particulars of the proposed Alberta policies, many of which have yet to be made public. There is room for reasonable disagreement, for instance, with respect to the particular age at which notification and parental participation are no longer required to obtain a formal name and gender change at school – which is to say, with respect to the age in which minors are legally considered capable of making these decisions with no necessary input from their parents. As already noted, Saskatchewan and New Brunswick currently set this age at 16 (Government of New Brunswick 2023, at s. 6.3.1; *The Education (Parents' Bill of Rights) Amendment Act* 2023, at s. 197.4(1)). The proposed Alberta measures would set this age at 15 (Dawson 2024).

It is similarly possible to argue that the scope of the exceptions to parental notification and participation under these policies ought to be further tailored to address cases in which it is reasonable to suspect that abuse will follow from the disclosure in question. In this regard, it is instructive to note that in

Attorney General Québec v. Centre for Gender Advocacy, the Quebec Court of Appeal recently recognized the possibility of diverging approaches to similar issues, while emphasizing that a strong degree of deference must be shown to legislatures when crafting legislation (2024, at paras 153, 163, 172).

However, this type of disagreement operates at a different level from the objections formulated to date by opponents, including academic opponents, of the proposed Alberta policies. Instead of disagreement over particulars, they object to the *very idea* of policies aimed at the protection of trans-identifying children as children, by requiring parental notification and participation and imposing age-related restrictions on medical interventions, and to the *very idea* of measures aimed at ensuring the integrity of girls' and women's sports (Koshan et al. 2024: 1; see also Ashley 2024: 3). These assertions ought to be dismissed, as any good faith reading of the Alberta proposals understands them as attempts at *enhancing* the protection of the *Charter* rights of trans-identifying children and their parents, as well as the protection of the *Charter* rights of girls and women. Although it is impossible to comment on their full merits prior to their release, there is in fact a clear case that the general outlines of the policies described by Premier Smith will help protect rights. Notably, they will protect the rights of children, parents, girls, and women to life, liberty, and security of person (as recognized by section 7), and their right to equal treatment under the law (as recognized by section 15).

There is no conflict between these conclusions and expressing the view, as the Supreme Court did in *Hansman v Neufeld*, that trans-identifying persons have suffered from past discrimination and disadvantage (2023, at para 84). To protect the rights of vulnerable persons, legislation cannot regard vulnerability from only one angle. It cannot disregard the special vulnerabilities that trans-identifying children experience *as children*. Nor can it be taken to mean that the inclusion of trans-identifying persons must be given effect through measures that outright deny the *Charter* rights of another vulnerable group – i.e., girls and women – by preventing their meaningful participation in athletic activities.

Parental notification and consent

That opponents of Alberta's proposed policies do not properly understand the special vulnerabilities that trans-identified children experience as *children* is perhaps most evident in the way they present the effects of provincial measures requiring parental notification of and consent to formal name and gender changes by schools. As per the framing adopted by the signatories of the open letter (Koshan et al. 2024, 2), as well as by one of its lead signatories in a subsequent paper devoted entirely to this issue (Ashley 2024, 30), the very possibility that parents might be *notified* of these changes, let alone consent to them, is seen as pitting the rights of children against parents (see also the Canadian Press 2023).

Noticeably absent from this discussion is the role that parents or other caretakers will necessarily play in important decisions such as those involved in a formal name and gender change, which children of any age are incapable of making without at least some assistance and guidance from others. As even proponents of the "gender affirming" model have elsewhere recognized, its successful implementation likely requires significant support and guidance (Spivey and Edwards-Leeper 2019, 349).

This is why many school boards have put in place policies to address the challenges that arise from this type of intervention. Schools necessarily take an active role in making and implementing decisions concerning a child's recognized name and gender, as they rightly understand that children are not fully equipped to make these decisions, and cannot implement them, on their own. These decisions, moreover, often have significant implications on a child's psychosocial development. As Dr. Hilary Cass concluded in *The Cass Report: Independent review of gender identity services for children and young people*, commissioned by the National Health Service ("NHS") in England and published in April 2024, "those who had socially transitioned at an earlier age and/or prior to being seen in clinic were more likely to proceed to a medical pathway" (Cass 2024, 31).

Once the necessary role played by parents or other caretakers in these important decisions is understood, it becomes apparent that the issue of parental notification and consent does not truly pit the rights of children against parental rights. Instead, the issue is fundamentally about who, as between schools (i.e., the state) or parents, bears the primary duty to counsel

children and act in their best interests. Given the choice, our law presumptively favours parents, for good reason.

Absent a basis to suspect that a given parent will fail to discharge parental duties, that parent is generally far better placed to act in the child's overall best interest. For instance, a parent will almost always have far better knowledge of a child's particular needs, including mental health needs, than a school teacher or principal, who at best has care for a child for a set number of hours, for a part of a given year. Parents assume the primary duty to care for and attend to their children's overall needs, simply because in the vast majority of cases it is in the best interest of their children that they do so. The role of schools, meanwhile, is an important but subordinate one – i.e., schools exercise a form of *delegated* authority – during the much more limited time in which children are in their care (*R. v. Audet* 1996, at para 41; *Chamberlain v. Surrey School District No. 36*, 2002, at paras 111-112 (Gonthier and Bastarache JJ, dissenting on other grounds); *W.W. et al. v. Lakefield College School* 2012, at para 93; *Civil Code of Québec* 1991, at art. 1460).

"A parent will almost always have far better knowledge of a child's particular needs, including mental health needs, than a school teacher or principal.

Although the proposed Alberta policies have yet to be made public, the approach adopted in New Brunswick and Saskatchewan is consistent with this presumed parental role. Indeed, contrary to the assertions of some opponents, these are not in fact "blanket consent and disclosure" measures (Ashley 2024, 3). Both the Saskatchewan and New Brunswick policies only presumptively require disclosure, as both feature exceptions aimed at those cases where disclosure might give rise to a risk of abuse (Government of New Brunswick 2023, at ss. 6.3.2, 6.3.3; *The Education (Parents' Bill of Rights) Amendment Act* 2023, at s. 197.4(2)). Alberta's policies are expected to follow a similar approach. Opponents might disagree with the scope of these exceptions, wishing that they were broader than they currently are. But they cannot seriously contend that

parents do not at least have a presumptive right to be involved in important decisions affecting their children, and certainly a presumptive right to be *notified* that these decisions are taking place. This right is necessary for parents to properly discharge their duties towards their children, which are justified in the children's own best interests.

This understanding of parental rights has been recognized in the Supreme Court of Canada's own *Charter* jurisprudence. For example, consider the way it has been understood in relation to section 7 of the *Charter*, which provides "[e]veryone 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." It is worth quoting Justice La Forest's reasons in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, for interpreting "liberty" to include parental rights (1995, at p. 372):

> While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society.... This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*.

In that case, the Court developed a framework to determine how the state could justify limiting parents' section 7 *Charter* right to freedom to raise their children, holding that any such limits must "meet the requirements of fair procedure" (*B. (R.) v. Children's Aid Society of Metropolitan Toronto* 1995, at 319). It held that section 7 of the *Charter* required that parents be notified

where their rights were being limited under the law at issue, in addition to providing for an adversarial process in which a judge could evaluate the relevant evidence (*B. (R.) v. Children's Aid Society of Metropolitan Toronto* 1995, at 319; see also *Convention on the Rights of the Child* 1989, at art. 9(1)).

Put differently, the Court took parental rights seriously as a necessary corollary of the parental duty to act in their children's best interest. The requirement of parental notification, far from amounting to an infringement of the rights of children, was characterized as a *necessary part* of any legislative scheme that might otherwise limit the role played by parents in safeguarding their children's best interests. *B. (R.)* ultimately stands for the proposition that, though the state may intervene in exceptional circumstances where a child's well-being is jeopardized, parents have the *prima facie* rights to make important life decisions in the best interests of their child, because this right is necessary to discharge their *duty* to act in their child's best interest. Although we offer no conclusive opinion on the merits of such a claim, it is conceivable that this constitutional recognition of the parental role might even ground a challenge to any existing or eventual policies that would actively prohibit educators from notifying parents, even in cases where there is no reason to fear that abuse will result from such notification.

In the later case of *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, the Supreme Court arguably went further still, by recognizing that there exists, in some cases, a constitutional duty to provide legal representation to parents who risk being deprived of their rights relative to their children. As Lamer C.J. explained in an opinion delivered for the majority in that case (1999, at para 61):

> I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in B. (R.), *supra*, at para. 83, "an individual interest of fundamental importance in our society." Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when

> relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

In contrast to the Supreme Court's recognition of the parental role under section 7 of the *Charter*, and in contrast to the recognition of the special vulnerabilities of children in cases including the recent Quebec Court of Appeal decision in *Centre for Gender Advocacy* (2024, at paras 172, 180), opponents have taken up the extremist position that parental notification and consent should be excluded in all cases, in respect of children of *all* age groups. This position follows a concerning trend to minimize the very notion of parental involvement in children's well-being by referring to parental rights in scare-quotes (see e.g. Macfarlane 2023; Salvino and Des Rosiers 2023; Koshan et al. 2024, 3) or using such phrases as "so-called parental rights" (see e.g. DeLeskie 2023; Passafiume 2023; Mason and Hamilton 2023; on which see Snow 2023). In some cases, opponents have even gone so far as to deny the existence of parental rights altogether, as when no less than New Democratic Member of Parliament Randall Garrison declared during a February 8, 2024, press conference that "there is no such thing as parental rights in Canada" (Van Maren 2024).

This dismissive view of parental rights is legally baseless. It is also irresponsible, particularly where it is expressed by law professors. As noted by Justice La Forest above, the very existence of parental duties towards their children supposes that parents presumptively hold the corresponding rights necessary to carry out those duties (*B. (R.) v. Children's Aid Society of Metropolitan Toronto* 1995, at p. 372). This is consistent with the views of liberal political philosophers such as Harry Brighouse and Adam Swift, who note that those who deny the existence of parental rights will have trouble explaining what would be wrong *in principle* with state schemes to redistribute children (Brighouse and Swift 2006, 86). The parental role, and the duties that it supposes towards children, is precisely why the concept of parental rights – i.e., of the rights parents hold as a corollary of their duty to care for and act in the best interest of their children – is such a well-established part of Canadian common law, civil law, and constitutional law. It is precisely for this reason, as well, that the state's duty to respect this parental role is explicitly recognized under the United Nations' *Convention on the Rights of the Child* (1989, at arts 5, 7(1), 9(1)).

Similarly, the attempt by one of the open letter's signatories, in a separate paper, to distinguish what the author conceives as legitimate "parental authority" from what the author derides as "parental entitlement," is both morally objectionable and conceptually confused. It is objectionable because the author dismisses as "parental entitlement" the transmission of cultural and religious values, apparently on the belief that it is both possible and in the best interests of children that they be raised in values-free environments (Ashley 2024, 8).

This argument is especially troubling in light of the author's expressed concern, as a lead signatory of the open letter, for the continued existence of distinct Indigenous cultures and legal traditions (Koshan et al. 2024, 2). The author's denial that Indigenous parents have any "entitlement" to educate their children in their culture and values is inconsistent with the goal of ensuring the continued existence of these cultures and traditions, and the corresponding right of Indigenous children to cultural transmission enshrined in the *Convention on the Rights of the Child* (1989, at art. 30). It is also contrary to the implementation of many of the Truth and Reconciliation Commission's Calls to Action.

These difficulties only serve to highlight the conceptual confusion that undergirds the author's proposed distinction. Indeed, the author's understanding of "parental authority" can itself be understood as a species of normative power over another, and thus, as the author appears to use the term, as a species of "entitlement" (see Raz 200, 16–20). Since children are incapable of making choices as to the cultural values and belief systems in which they are to be grounded, they will inevitably be subject to the authority of adults over these matters. The transmission of cultural values and beliefs from adults to children is not an "entitlement" but a basic reality that every society must manage in a way that respects pluralism and the rights of families. The only question, in this policy context, is whether parents or school officials (and by extension the state) are best positioned to exercise this authority on their behalf.

In truth, the position adopted by opponents of the notification and consent requirements – effectively, a blanket denial of parental notification, and by extension participation – appears to be rooted in stereotypes about the kinds of parents seeking the adoption of the requirements at issue. This is consistent with the only two rationales offered by opponents for their preferred position, namely that a formal recognition of a name and gender change at school may improve mental health outcomes (Ashley 2024, 16) and

that disclosure alone will put children at significant risk of abuse at the hands of their parents (Koshan et al. 2024, 2–3). The claim concerning improved mental health outcomes is dubious, in light of the Cass Report's conclusions (Cass 2024, 31). But even assuming that it can be substantiated, this rationale erroneously assumes that most parents who seek notification will reflexively refuse to consent to the proposed changes, instead of giving these likely life-altering decisions the serious consideration they deserve in consultation with their children and other family members. The claim that children will be abused, meanwhile, assumes that parents seeking notification are very likely to be abusive. It is instructive, in this context, to note that the author of the stand-alone paper referenced above has expressed belief that these laws were "influenced by religious and anti-trans advocacy groups" (Ashley 2024, 4), as though this allegation alone impugns the motives of those who seek notification of and participation in important decisions affecting their children.

> *Parents should expect notification in order to be able to properly discharge their own parental duties to act in their children's best interests.*

Being stereotypes, these assumptions fail to capture the much wider range of reasons for which parents may want to be notified of and participate in these decisions. At the very least, parents should expect notification in order to be able to properly discharge their own parental duties to act in their children's best interests. This is perhaps particularly important given that "those who had socially transitioned at an earlier age and/or prior to being seen in clinic were more likely to proceed to a medical pathway" (Cass 2024, 31). But it is also consistent with the logic adopted by the opponents of such measures, according to which a lack of parental notification "will cause significant harm" because youth will continue to be "misgendered" at home (Koshan et al. 2024, 2). Likewise, these assumptions also fail to recognize that the proposed Alberta policies, like the measures now adopted in New Brunswick and Saskatchewan, are expected to properly exclude notification where the school has grounds to

suspect that such notification will lead to abuse (Government of New Brunswick 2023, at ss. 6.3.2, 6.3.3; *The Education (Parents' Bill of Rights) Amendment Act* 2023, at s. 197.4(2)). If the law is applied correctly, the parents concerned by the notification and consent measures are thus *not* the parents who are likely to abuse their children, but parents acting in good faith with a view to ensuring that their children's best interests are protected.

These stereotypes are closely connected to the claim, often repeated on social media, that children will only refrain from voluntarily disclosing information to their parents if they feel that it is "unsafe" to do so (see e.g. Moscrop 2024). This argument proceeds from a set of deep and rather obviously misleading assumptions concerning the relationship between parents and children. Any adult who considers what it was like to have been a child, and perhaps especially a teenager, knows that children will fail to disclose even important information to their parents for all sorts of reasons, many of them unreasonable and contrary to their own best interests. Sometimes children even lack the capacity to fully communicate this information in the first place. This is to be expected, given that children are not adults, and thus lack the fully formed judgment to truly act in their own best interests, especially when unassisted by others. Conversations around topics of personal identity and feelings of gender dysphoria are likely to be especially difficult for children and their parents. Far from justifying a blanket denial of parental notification, this difficulty only compounds the need to ensure that all children, including trans-identifying children, receive proper guidance from those best placed to provide it.

To this, we add that the vulnerabilities generally affecting children, including trans-identifying children, are further supplemented by other factors that may limit or even prevent proper communication with their parents. This is true, for instance, of children experiencing certain kinds of disabilities, such as developmental delays, cognitive impairments, or forms of mental illness. As the Supreme Court has recognized, these children are particularly vulnerable because "they may be perceived as easier to victimize, may not be able to fully understand or communicate what has happened to them, and face barriers to reporting" (*R. v. Friesen* 2020, at para 72). For the reasons just mentioned, it seems probable that any children with feelings of gender dysphoria will have difficulty communicating their experiences *even* where they are communicating them to loving and concerned parents. These difficulties are heightened when the children in question are also experiencing developmental delays,

cognitive impairments, or forms of mental illness. It is therefore especially crucial in these cases that schools facilitate full communication with parents, rather than undermining the parent-child relationship and the trust between schools and parents by taking steps to conceal what the child is experiencing while at school (as reportedly occurred in one case where classmates were instructed to lie to the parents of the affected child: see Blackwell 2023). Parents should be *presumed* to be the best bet for helping children communicate and understand such difficult experiences, and this is perfectly consistent with also carefully crafting exceptions for the rare instances where parents do not live up to this role.

> *Parents should be* presumed *to be the best bet for helping children communicate and understand such difficult experiences.*

In light of these considerations, the proposed Alberta policies on parental notification, like their kindred New Brunswick and Saskatchewan policies, are in our view based on a common sense compromise applied in all other instances where parental notification and participation are warranted. Understanding that children do not enter the world as fully formed adults and are entitled to the counsel and assistance of others in making decisions, the policies in question take as their starting point the fact that parents are in the vast majority of cases best positioned – and legally bound – to provide the counsel and assistance in question. The proposed exceptions where a risk of abuse can be demonstrated are also consistent with this principle: it is because the parents are not likely to act in their children's best interest if the information is disclosed that the school can reasonably withhold the disclosure of that information. It is only in non-central cases where there is reason to suspect abuse will result from the disclosure, and thus reason to suspect that parents will fail in their duty to act in the best interests of their children, that the parental rights that correspond to that duty can be reasonably limited.

Indeed, we have trouble seeing how this compromise differs in any significant way, in terms of the cases where disclosure is to be withheld, from University of Waterloo Political Scientist Emmett Macfarlane's recent proposal that the federal government override what he terms a "trampling of the rights of a distinct and oppressed minority" by "pass[ing] a new Criminal Code provision making it illegal for anyone to out someone in a context where they have reason to believe that outing them might result in physical, emotional, or psychological harm" (Macfarlane 2024). To be sure, the *means* of Macfarlane's proposal are deeply concerning, in that the proposal improperly attempts to bring the full prohibitive power of the criminal law to bear on a problem for which it is especially ill-suited. It also raises constitutional issues in its own right, including potential violations of the *Charter* and the federal division of powers. Nonetheless, the suggestion that the proposed Alberta policies, like the similar measures adopted in New Brunswick and Saskatchewan, pose a risk of schools disclosing information to parents where schools have reason to suspect that abuse will follow, is simply unfounded. The measures in question all contemplate or provide exceptions to disclosure aimed at precisely these cases. They are all reasonable, good faith attempts at protecting vulnerable members of society, and entirely consistent with a proper understanding of *Charter* rights.

Age-based restrictions

The same issues identified above appear in the way opponents frame their objections to Alberta's other proposed measures, including those that aim to impose age-based restrictions on medical interventions such as the use of puberty-blocking drugs, cross-sex hormones, and sex reassignment surgeries. Under the proposed policies, Alberta is slated to ban sex reassignment surgeries for all persons under 18 years of age, and to ban the use of puberty-blocking drugs and cross-sex hormones for minors under the age of 16 (Dawson 2024). At no point do the signatories of the open letter, for example, acknowledge the special vulnerability of trans-identifying children as children in this context. They do not consider how children in general require special protections against choices that may irreversibly damage their bodies. Nor do they offer anything like an even-handed review of the research on the targeted interventions, which suggests that the benefits of such interventions are uncertain while the risks appear quite grave.

This is an unfortunate position, especially since children's special vulnerability is again recognized by virtually every facet of our legal order. For the purpose of these age-related restrictions, this includes various age-related restrictions that the law imposes for their protection on such things as the ability to obtain a motor vehicle licence (see e.g. *Operator Licensing and Vehicle Control Regulation* 2002, at s. 7), to purchase and consume tobacco (see e.g. *Tobacco, Smoking and Vaping Reduction Act* 2005, at ss. 3.1, 7.5) and alcohol (se e.g. *Gaming, Liquor and Cannabis Act* 2000, at ss. 75, 87), and even to consent to certain forms of medical intervention (*A.C. v. Manitoba (Director of Child and Family Services)* 2009, at para 46; *J.I. v. Alberta (Child, Youth and Family Enhancement Act, Director)* 2023; *Civil Code of Québec* 1991, at art. 14). Perhaps more importantly still, the special vulnerability of children has been widely recognized as a compelling *justification* for the imposition of these kinds of age-based restrictions in *Charter* jurisprudence. The Quebec Court of Appeal's decision in *Centre for Gender Advocacy* is just the latest in a long line of cases to do so (2024, at paras 172, 180; see also e.g. *R. v. L. (D.O.)* 1993; *A.C. v. Manitoba (Director of Child and Family Services)* 2009, at paras 70–79, 143).

For our part, we would resist the characterization of age-related restrictions as properly amounting to an "infringement" or "violation" of *Charter* rights, to the extent that they serve a proper protective function. If they can be understood as "limitations," this is only in the sense that they serve to specify the *scope* of these rights as they are to be enjoyed by children of different age groups, with a view of better *protecting* the overall rights of these children (for an argument in support of a similar reading, see Webber 2022). That said, to the extent that such age-based restrictions have been characterized as "infringements" in prior *Charter* decisions, the Supreme Court has also found that children's unique vulnerability makes it quite easy to justify the limitations in question. In the words of Justice Abella in *A.C. v. Manitoba (Director of Child and Family Services)* (2009, at para. 110):

> Age distinctions have frequently been upheld by this Court (see *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, [1990] 3

> S.C.R. 483; and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570)... They are currently employed to determine when a person can marry, vote, drive, consent to sexual intercourse and sell property. As noted by McLachlin C.J. in *Gosselin*, it must be recognized that "agebased distinctions are a common and necessary way of ordering our society" (para. 31). In the context of s. 15 of the *Charter*, McLachlin C.J. has commented that while "all agebased legislative distinctions have an element of this literal kind of 'arbitrariness,'" this alone does not invalidate them "[p]rovided that the age chosen is reasonably related to the legislative goal" (*Gosselin*, at para. 57).

In this context, the suggestion that the imposition of age-related restrictions on puberty-blocking drugs, cross-sex hormones or sex reassignment surgeries presents a unique infringement of the rights of children is inconsistent with the broader state of Canadian law. This includes the recent Quebec Court of Appeal decision in *Centre for Gender Advocacy*, in which the Court upheld age-related requirements imposed on applicants seeking to amend their name and sex recorded on Quebec's register of civil status (2024, at para. 214). As noted by Justice Abella above, our law recognizes that children do not enter the world as fully formed adults, and that certain choices, particularly where they carry a risk of irreparable harm, are not properly made until children achieve at least a relatively mature age. In some cases, as with some provincial regimes relating to smoking and alcohol consumption, that age may even be placed beyond the generally accepted legal age of maturity (see e.g. *Liquor Licence and Control Act* 2019, at ss. 33, 34; *Smoke-Free Ontario Act* 2017, at s. 3). There is room for reasonable disagreement on the precise age to be fixed in respect of individual issues, even as the underlying objective of protecting children is unassailable.

This approach contrasts with that adopted by the signatories of the open letter, which entirely disregards the legitimate role to be played by age-related restrictions for the protection of minor persons. Instead of critiquing the particulars of the proposed Alberta policies, their argument trades exclusively on the belief that the targeted medical interventions are absolutely necessary to avert suicide by at-risk children. In effect, they argue that the imposition of *any* age-based restrictions on these interventions increases the risk of suicide in youth with gender dysphoria, and therefore violates the section 7 right to

life, liberty, and security of person without justification under the principles of fundamental justice (Koshan et al. 2024, 4). The reasonable line drawn by Alberta's government in setting age restrictions on their availability is thus perceived as *per se* illegitimate, because of a denial of "healthcare" that puts the "very lives" of children at risk (Koshan et al. 2024, 3, 5).

It is especially difficult for Alberta's critics to maintain their absolutist position in light of a growing body of empirical evidence suggesting that the benefits of gender affirming medical interventions for children are highly uncertain. In 2020 the NHS commissioned the UK's National Health Institute for Health and Care Excellence ("NICE") to conduct a systemic review of the use of Gonadotropin-Releasing Hormone (GnRH) puberty agonists (i.e., puberty-blocking drugs) and cross-sex hormones for children under 18. The study found that puberty-blocking drugs have little to no effect on gender dysphoria and that the few studies showing benefits were "at high risk of bias" (National Health Institute for Health and Care Excellence 2020, 109). The review also concluded that studies claiming to find benefits for cross-sex hormones were unreliable and "must be weighed against the largely unknown long-term safety profile of these treatments." (National Health Institute for Health and Care Excellence 2020, 14). Recently, these evidence reviews have motivated the NHS to abandon its "gender affirming mode" of treatment for children experiencing gender dysphoria, after concluding that "there is not enough evidence to support the safety or clinical effectiveness of [puberty-blocking drugs] to make the treatment routinely available at this time" (Burga 2024).

These conclusions have been further buttressed by the publication of *The Cass Report: Independent review of gender identity services for children and young people* (Cass 2024). The report is a result of a four-year review conducted at the behest of the NHS. Regarding puberty-blocking drugs, the report notes that "no changes in gender dysphoria or body satisfaction were demonstrated" in children undergoing this form of medical intervention (Cass 2024, 32). Regarding cross-sex hormones, the report similarly finds a general lack of evidence concerning the benefits of these forms of intervention. In particular, it observes that "[i]t has been suggested that hormone treatment reduces the elevated risk of death by suicide in this population, but the evidence found did not support this conclusion" (Cass 2024, 33). It also concludes that "[t]he percentage of people treated with hormones who subsequently detransition remains unknown due to the lack of long-term follow-up studies, although

there is suggestion that numbers are increasing" (Cass 2024, 33). This last conclusion is consistent with evidence that a majority of the subset of children who renounce previous trans identities or "detransition" did not appear to meet proper criteria for psychiatric diagnoses in the first place. Their cases have been identified by some as instances of "rapid onset gender dysphoria" (gender dysphoria lacking historical precedent that is facilitated by the social contagion of peer pressure) (Littman et al. 2024).

> *Regarding cross-sex hormones, the report similarly finds a general lack of evidence concerning the benefits of these forms of intervention.*

Similar studies in other countries have helped motivate Norway, Sweden, and Finland, which had been some of the first countries in the world to enable gender affirmation procedures for minors (e.g. Finland in 2011), to also move away from "gender affirming" medical interventions for children with gender dysphoria (Cohen 2023). Like the *Cass Report*, other recent studies in these jurisdictions have in fact explicitly undermined one of the central claims of those who oppose Alberta's policies: that restrictions on gender affirming procedures raise the risk of suicide in children experiencing gender dysphoria. For example, a 2024 Finnish study has concluded "that Clinical gender dysphoria does not appear to be predictive of all-cause nor suicide mortality when psychiatric treatment history is accounted for" (Ruuska et al. 2024). When considered alongside the conclusions of the *Cass Report*, this study makes it difficult to oppose Alberta's policy on the grounds of suicide prevention.

Even as empirical reviews of evidence cast doubt on benefits, there are also increasing reasons for alarm about the risks of these different medical interventions. Studies have shown that puberty-blocking drugs reduce bone density in minors (Lee et al. 2020), and that children who take them are unlikely to stop (de Vries 2020). Indeed, one of the conclusions of the *Cass Report* was that "the vast majority of young people started on puberty blockers

proceed from puberty blockers to masculinising/feminising hormones, there is no evidence that puberty blockers buy time to think, and some concern that they may change the trajectory of psychosexual and gender identity development" (Cass 2024, 32). For their part, cross-sex hormones have been found to induce major health risks in children, including vaginal atrophy, endometrial cancer and sterility in girls given testosterone (Shrier 2020, 169) and breast cancer in boys given estrogen (Zitner 2022, 5). And in the case of sex reassignment surgeries, one California study even concluded that the risk of attempted suicide for recipients of vaginoplasty was twice as high during the period tracked following the procedure as it was before the surgery (Dallas et al. 2021).

Much policy that allows for such medical interventions follows the model recommendations of WPATH, which allows the use of medical interventions on minors provided the minor "demonstrates the emotional and cognitive maturity required to provide informed consent/assent for the treatment" (Coleman et al. 2022). As already noted, recently leaked files from WPATH, on which newspapers such as the *New York Post* (Posner 2024), the *National Post* (Kirkey 2024), and *The Economist* (2024) have reported, have shown participants admitting that minors have difficulty understanding the risks of "gender affirming" medical interventions. Notably, a British Columbia endocrinologist (who coauthored the Canadian Pediatric Association's position paper on trans healthcare) is recorded as saying, "I think the thing you have to remember about kids is that we're often explaining these sorts of things to people who haven't even had biology in high school yet" (Hughes 2024, 184). "[I]t's always a good theory that you talk about fertility preservation with a 14-year-old" he adds, "but I know I'm talking to a blank wall… They'd be like, Ew, kids, babies, gross. Or, or the usual SPAC answer is I'm going to adopt. I'm just going to adopt. And then you ask them, well, what does that involve? Like, how much does it cost? Oh, I thought you just like went to the orphanage and they gave you a baby." (Hughes 2024, 192).

On the whole, there is no evidence that conclusively supports the argument that puberty-blocking drugs, cross-sex hormones or sex reassignment surgeries improve outcomes for at-risk children. At least some of the evidence appears to run the other way. The threat such interventions can pose to children's fertility, even potentially rendering them sterile (Cheng et al. 2019), may in itself offer a good reason for policies restricting access to adults. The fact that physicians

have been aware of these issues, including issues relating to patient ability to provide informed consent, and yet have continued to administer medical interventions with little to no self-imposed restrictions, suggests that Alberta is addressing a real policy concern. These and other risks have led the United Nations Special Rapporteur on Violence Against Women and Girls to recommend the full implementation of the *Cass Report*'s conclusions, on the basis that doing so is "key to protecting girls from serious harm" (Alsalem 2024). It is certainly not reasonable to dismiss these concerns as participating in "white supremacist ideology," as one of the leading signatories of the open letter has bizarrely suggested in a separate co-authored piece (Ashley and Buchanon 2023).

"The age-related restrictions proposed under the Alberta policies appear reasonable and appropriate.

In light of these facts, the age-related restrictions proposed under the Alberta policies appear reasonable and appropriate. They are nothing more, and nothing less, than attempts to regulate practices aimed at children with uncertain benefits and serious known drawbacks. Just as the age-related restrictions on such things as smoking, consuming drugs and alcohol, and the operation of motor vehicles are designed to protect the life, liberty, and security of children, these measures protect the rights of children against the spectre of irreversible decisions made without full knowledge and a full capacity to consent. In the words appropriately chosen by the Alberta government, these measures are about "[p]reserving choices for children and youth."

This conclusion holds even against a less extreme objection that might be raised against the proposed Alberta policies, on the basis that they set fixed age restrictions instead of relying on more flexible standards to evaluate appropriateness on a case-by-case basis (as for instance the "mature minor" doctrine discussed in *A.C. v. Manitoba (Director of Child and Family Services)* 2009). Again, this is not the position endorsed by most opponents

of the Alberta policies, such as the signatories of the open letter, who instead adopt an extremist anti-regulatory position according to which restrictions on irreversible medical interventions on children are illegitimate. But even supposing that opponents were to concede the value of imposing *some* form of age-based restrictions on these procedures, the significant known risks carried by these procedures and the lack of evidence of their benefits both militate in favour of the adoption of bright-line rules like those proposed by Alberta.

Indeed, adopting bright-line rules like those proposed by Alberta in this case is consistent with the use of such rules in other contexts where certainty is to be favoured in the face of sufficiently serious health risks, as with prohibitions on the sale of cigarettes and the consumption of alcohol. If anything, the argument in this case is far stronger than for cigarettes and alcohol, given the greater risks posed by the procedures at issue, as well as the apparent lack of self-restraint demonstrated by certain health professionals in the leaked WPATH files. In the words of Chief Justice McLachlin in *Gosselin v. Québec (Attorney General)* (2002, at para. 57), quoted by Justice Abella in *A.C. v. Manitoba (Director of Child and Family Services)* (2009 at para. 110): "all age based legislative distinctions have an element of this literal kind of 'arbitrariness,'" this alone does not invalidate them "[p]rovided that the age chosen is reasonably related to the legislative goal." Although there is some measure of arbitrariness to all bright-line rules, the mounting empirical evidence reviewed above suggests that bright-line rules in this context may be even less arbitrary than analogous rules for cigarettes and tobacco.

The overall reasonableness of the proposed Alberta policies is also sufficient to dispense with the argument advanced during a recent podcast featuring two of the open letter signatories from the University of Calgary, according to which Alberta's proposed age-based restrictions are said to undermine parental rights (Bucholtz et al. 2024). This argument is more than a little paradoxical, given the position that the signatories have adopted on the requirement of parental notification, discussed above. But more importantly, it is also entirely ungrounded, given that the proposed restrictions have no direct bearing on the parent-child relationship or on parental duties to act in their children's best interests.

Unlike the denial of parental notification, which the signatories of the open letter endorse, the age-based restrictions proposed by the Alberta government on puberty-blocking drugs, cross-sex hormones and sex reassignment surgeries

are simply rules that specify the types of activities in which minors can engage, for their own protection. Unlike the denial of parental notification, they do not interfere with the parent-child relationship by undermining the ability of parents to counsel their children with full information on hand. Instead, the proposed age-based restrictions are hardly different from existing age-based restrictions on smoking, alcohol consumption, and operating motor vehicles. These are restrictions that parents are expected to enforce, but only within the parameters set by the duties they already owe their children and attendant rights. Insofar as these types of restrictions are understood to constrain parental autonomy, they set reasonable limits on the scope of parental rights in the same way that other age-based restrictions do.

Girls' and women's sports

Although this issue has generally received less attention from opponents of the proposed Alberta policies, the signatories of the open letter also object to the portion of the Alberta announcement that pertains to the protection of girls' and women's sports.

Once again, reasonable disagreement is possible on the particulars of these policies. However, the signatories appear to believe that participation in girls' and women's sports is an absolute entitlement of any female-identifying individual, regardless of the advantages that the person's biological sex may provide. In their view, restricting participation in girls' and women's sports is a violation of the section 15 equality rights of female-identifying persons (Koshan et al. 2024, 4). They also suggest that measures to protect the girls' and women's sports as distinct categories, by requiring demonstration that a trans-identifying person wishing to participate in girls' and women's sports does not benefit from an undue biological advantage, is a potential infringement of that trans-identifying person's section 7 rights to life, liberty, and security of the person (Koshan et al. 2024, 4). In effect, the signatories are thus suggesting that measures that protect distinct sporting categories, aimed at reflecting real differences between the sexes, are *per se* illegitimate.

The signatories' position on this issue suggests that they fundamentally misunderstand not only the purpose of the proposed Alberta measures, but also the importance of line-drawing more generally to the preservation

of fundamental rights and freedoms. Rather than being exclusionary, the distinction proposed by the Alberta government is aimed at ensuring the continued integrity of girls' and women's sports. In a context where biological males display obvious innate advantages in at least some activities, the participation of all female-identifying individuals, whether those individuals were born as women or not, in all types of sporting activities, means eliminating girls' and women's sports as distinct categories. It means preventing girls and women from meaningfully participating in sport of any fair kind, a possibility that the signatories of the open letter have rightly noted is "an important determinant of health, social functioning, and academic success" (Koshan et al. 2024, 4).

As studies have confirmed, some of these biological male advantages are genetic (Gershoni and Pietrokovski 2017), and others derived from exposure to testosterone early in infancy (Becker and Hesse 2020). This means that some differences exist even among school-aged boys and girls. However, the majority of the advantages experienced by biological males arise at puberty and are believed to result from prolonged exposure to higher levels of testosterone (Clark et al. 2019; Hilton and Lundberg 2021). These advantages exist even between biological males and females of roughly the same height and weight, owing most notably to the higher muscle mass relative to total body mass of biological males (Sonksen 2018). As the authors of a recent Macdonald-Laurier Institute report on the subject noted, "[c]omparing 2010–2021 world record lifts by body weight across males and females in weight-restricted categories demonstrates that males are around 30 percent stronger than females of the same size. In a specific example, the current 55 kg male record holder, who is 1.52m tall, lifts 29.5 percent more than the current 55kg female record holder, also 1.52m tall" (Pike et al. 2021). Crucially, significant advantages are retained even where biological males subsequently undergo medical interventions that include the use of cross-sex hormones (Hilton and Lundberg 2021; Harper et al. 2021; Pike et al. 2021, 16–17).

While opponents of the proposed Alberta measures typically deny the existence of such advantages, their arguments tend to be rooted in the perceived consequences of denying trans-identifying biological males' participation in girls' and women's sports. They fail to seriously contest the existence of biological male advantages. The open letter once again illustrates our point, as its signatories cite to a single meta-study that on their reading supports the

conclusion that "there is no direct or consistent research suggesting transgender female individuals … have an athletic advantage" (Koshan et al. 2024, 4, citing Jones et al. 2017). But this single meta-study predates numerous contrary studies such as those referenced in the Macdonald-Laurier Institute report (Pike et al. 2021). Moreover, its core claim, like that of the signatories of the open letter, is less about the advantages experienced by trans-identifying biological males than it is about the existence of barriers that, it is suggested, make their participation in sports unpleasant (Jones et al. 2017). This is a serious concern. However, there are other ways of ensuring that trans-identifying individuals can meaningfully participate in sport that do not involve a wholesale violation of the rights of girls and women to do the same.

It is difficult to conceive of Alberta's proposed policies as anything other than a reasonable attempt at preserving the fundamental right to equality of girls and women.

In light of these considerations, it is apparent that the signatories' position on the issue of girls' and women's sports is entirely at odds with the broader view that our law takes towards the idea of discriminatory distinctions. Indeed, it is difficult to conceive of Alberta's proposed policies as anything other than a reasonable attempt at *preserving* the fundamental right to equality of girls and women. As section 15(1) of the *Charter* provides, "[e]very 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… sex… ." If the Alberta government has announced restrictions on who can participate in girls' and women's sports, then it is because the very possibility of such a thing as girls' and women's sports supposes a certain degree of exclusivity. These are *girls' and women's sports*, and not general categories open to all who wish to participate. They are exclusive because the right of girls and women to meaningfully participate in athletic life requires them to be. To claim that the very existence of such a distinction

offends section 15(1)'s equality guarantee implies a rejection of substantive equality in favour of the kind of "formal equality" that the Supreme Court of Canada has repeatedly rejected in its jurisprudence (see e.g. *Withler v. Canada (Attorney General)* 2011, at para. 39; *Centrale des syndicats du Québec v. Quebec (Attorney General)* 2018, at para. 25).

Moreover, even if measures designed to protect the continued existence of girls' and women's sports were found to offend the equality guarantee enshrined in section 15(1), section 15(2) of the *Charter* unambiguously offers legislative discretion in determining which policies lead to the "amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of… sex." Alberta's proposal could thus further be understood an exercise of the section 15(2) power to ameliorate conditions of disadvantage facing girls and women in the context of many sports. The distinction exists for a valid, even ameliorative purpose, and not for the sake of being discriminatory.

As already noted, the special vulnerability of girls and adult women is broadly recognized by the Canadian legal order, and perhaps especially in certain criminal and family law contexts. In the already-referenced case of *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, Justice L'Heureux-Dubé went so far as to note that (1999, at para 113):

> This case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings: see, for example, M. Callahan, "Feminist Approaches: Women Recreate Child Welfare," in B. Wharf, ed., Rethinking Child Welfare in Canada (1993), 172. The fact that this appeal relates to legal representation in the family context for those whose economic circumstances are such that they are unable to afford such representation is significant. As I wrote in Moge v. Moge, [1992] 3 S.C.R. 813, at p. 853, "In Canada, the feminization of poverty is an entrenched social phenomenon." The patterns of relationships within marriage disproportionately lead to women taking responsibility for child care, foregoing economic opportunities in the workforce, and suffering economic deprivation as a result: Moge, supra, at p. 861. Issues involving parents who are poor necessarily disproportionately affect women and therefore raise equality concerns and the need to consider women's perspectives.

In that case, the conclusion that there existed a section 7 *Charter* duty to provide legal representation to parents who were facing a removal of their parental rights was thus understood to be bolstered by reference to section 15 of the *Charter*. As L'Heureux-Dubé noted, "[a]ll *Charter* rights strengthen and support each other" (*New Brunswick (Minister of Health and Community Services) v. G. (J.)* 1999, at para 112).

Our understanding of section 15 is similarly bolstered by the interpretive guidance of section 28 of the *Charter*, which provides that "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Section 28 does not speak of the right to gender identity or gender diverse individuals. It speaks in biological terms of sex and holds that no right should be interpreted in the *Charter* in a way that undermines the equal guarantee of rights to male and female persons. Interpreting section 15 as granting an absolute right to biologically male but female-identifying persons to play in girls' and women's sports, even where those persons have clear advantages as a result of their male sex, is at odds with both the plain text and the spirit of section 28. It supposes that any individual who identifies as female can play in girls' and women's sports, even where that person's participation makes it impossible for members of the female sex to participate in sports fully and fairly themselves.

Importantly, this argument does not depend on the answer that ought to be given to the interesting question of whether section 28 confers a substantive right or serves only as an interpretive guide that qualifies explicitly enumerated *Charter* rights (for different views on this issue, see e.g. Froc 2015; Hartery 2023; Kennedy 2024). Even on the purely interpretive reading, it requires that section 15 not be read in such a way that it undermines the equal guarantee of rights to persons of both sexes, and thus requires that the section 15 guarantee be qualified, *inter alia*, by the recognition that both biological men and women have an equal right to participate in sporting activities. In truth, the plain text of section 28 even cuts against reading "gender identity" as an analogous ground under section 15(1), although that does not necessarily foreclose legislatures from protecting against discrimination on the basis of gender identity in human rights legislation if such protection is tailored not to violate the equality rights of the sexes. This reading reflects a proper interpretation of what substantive equality requires under the *Charter* and in light of the differing physical abilities of biologically male and female persons.

Far from presenting an infringement of rights, the proposed Alberta policies on girls' and women's sports thus enhance, and indeed ensure the continued survival of, the ability of girls and women to meaningfully engage in athletic activities and pursue athletic excellence. Not all distinctions are discriminatory, as both our *Charter* jurisprudence (see e.g. *R. v. Sharma* 2022, at paras 31, 198) and human rights jurisprudence (see e.g. *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal* 2007 SCC 4, at para. 50) rightly recognize. Distinctions that serve a legitimate purpose, particularly where that purpose is to protect potentially disadvantaged groups, are not discriminatory. They are essential to ensuring that all persons can meaningfully and equally participate in society.

Sections 2 and 12 of the *Charter*

The arguments outlined above are in our view sufficient to dispense with the various claims that the proposed Alberta measures infringe sections 7 and 15 of the *Charter*. In respect of the claims of the open letter signatories concerning section 2, we add simply that many of the policies under discussion can hardly be said to infringe or even limit the expressive rights of children, including trans-identifying children. Such is the case with parental notification and consent requirements. These merely require disclosure by schools of information that the schools already have on-hand, and to obtain parental consent prior to formally recording a name or gender change, all in accordance with the school's delegated duties to abide by the best interests of the children concerned. As for Alberta's proposed age-based restrictions on puberty-blocking drugs, cross-sex hormones, and sex reassignment surgeries, it is true that *these* policies might imply a restriction on "expressive" activity, broadly conceived. However, if they do so, then it is in a way that is no different in kind from the restrictions that arise where a government attempts to ban commercial advertisements aimed at children (as was found to be justified in *R. v. Irwin Toy* 1989) or prohibits the sale to and consumption of certain products by minors. These are measures aimed at the overall welfare of children, and as such can hardly be said to involve significant infringements on their own freedom of expression. Any infringements that do arise are easily justified in a truly free and democratic society, for reasons already outlined.

A similar point ought to be made in respect of the signatories' argument that the proposed Alberta policies infringe section 12 of the *Charter*. That provision states that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." This is squarely aimed at protecting against the imposition of disproportionate sanctions upon criminal offenders and others subject to government sanction or procedure. It is unclear to us how this provision can be seen to apply to a set of policies that aims to benefit children (and adult women) by more clearly securing them in their rights.

Section 33 of the *Charter*

For the reasons outlined above, the Alberta government policies under discussion do not on any reasonable reading involve an infringement of the particular guarantees provided by the *Charter*, and any such infringement that is discovered ought to be easily justified. It is therefore unnecessary in one sense to discuss section 33 of the *Charter*, also known as the "notwithstanding clause" or "Parliamentary supremacy clause," at this juncture. Nonetheless, the Alberta government may invoke the provision, following a similar move already undertaken by Saskatchewan. Section 33(1) provides that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*."

If the Alberta government decides to invoke the notwithstanding clause, it will not only be signalling the importance of these proposed measures, but also ensuring that its own distinctive understanding of the *Charter* is respected by the courts. This is consistent with reading section 33 as a means of furthering constitutional "dialogue" between courts and legislatures (see e.g. Newman 2019). The Supreme Court has explicitly embraced this view of the notwithstanding clause as an instrument of extra-judicial constitutional interpretation, stating that a "legislature may give continued effect to *its* understanding of what the Constitution requires by invoking s. 33" (*Toronto (City) v. Ontario (Attorney General*) 2021, at para. 60).

Alberta's potential use of the notwithstanding clause would also be consistent with the role that section 33 plays in addressing federalism

concerns that arise under the *Charter*. As many political scientists have long argued, the *Charter* has eroded provincial autonomy to some degree due to the lack of substantive provincial input in the appointment of appellate courts due to the failure of the *Meech Lake Accord* (with the exception Quebec's new non-constitutional agreement with the federal executive regarding Supreme Court appointments) and substantial federal funding for rights litigation against provincial laws (Morton 1995). The degree and nature of *Charter* centralization remains a matter of empirical debate, but even political scientists who argue that *Charter* centralization has been exaggerated agree that the use of section 33 is one tool for the provinces to resist centralization (Kelly 2001, 335).

All of the ingredients of *Charter* centralization are present in the activist-led litigation against Saskatchewan's parental notification and consent law and will also likely feature in Alberta's context. The main activist group supporting the challenge to Saskatchewan's invocation of section 33, Egale Canada, receives the majority of its funding (54 percent, or $2,588,735.00) from the federal government (Government of Canada 2022). The trial court judge presiding over the challenge to Saskatchewan's law is also federally appointed, a structural fact beyond the judge's own control (Government of Canada 2014). Federal control over appellate appointments does not compromise judicial independence, but it does make it possible for the *Charter* to asymmetrically affect provincial laws. Judges can offset this structural impact by taking section 33 seriously as part of the very compact that legitimates their power to review laws for *Charter* compliance. In this context, the invocation of section 33 is not a comment on the incompatibility of these measures with sections 2 or 7 to 15 of the *Charter*, but a sign of disagreement with federally funded activists, and potential disagreement with federally appointed judges, about how the *Charter* protects children.

These concerns also serve as a reminder that *all* guarantees enshrined in the *Charter* were part of a broader political compromise. Under that compromise, the courts were given the power to assess the compliance of legislation with certain fundamental, but necessarily individual, rights guarantees. These guarantees did not, however, encompass all of the individual or collective rights recognized by our broader legal system, and rightly so. For instance, the concern that courts would improperly invoke individual property rights against legitimate government attempts to protect the rights of workers, as had occurred

in the United States in cases such as *Lochner v. New York* (1905), weighed heavily in the decision not to give courts the power to review legislation for compliance with property rights (Dodek 2018, 200–201). A similar purpose was served by the inclusion of section 25 in the *Charter*, which provides that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada." As the Supreme Court has recently confirmed, this provision ensures that the *Charter*'s individual rights guarantees cannot be used to undermine the collective rights of Indigenous peoples (*Dickson v. Vuntut Gwitchin First Nation* 2024, at paras 107–108).

These concerns also serve as a reminder that all guarantees enshrined in the Charter *were part of a broader political compromise.*

Under the compromise struck in 1982, courts would presumptively be given the power to review legislation for compliance with some, but not all of, the individual rights traditionally recognized at common law. But the concern that even these individual rights might be improperly invoked against legitimate government attempts at ensuring the common good, including for the purpose of securing truly collective rights, also weighed on the bargain that was finally struck. This was yet another reason that section 33 was also included in the *Charter* (Newman 2019). Contrary to the assertions of the signatories of the open letter (Koshan et al. 2024, 5) and other critics of the policies at issue (see e.g. Macfarlane 2023; Salvino and Des Rosiers 2023), the use of the clause in a case like this one is neither illegitimate nor surprising. The Parliamentary supremacy clause represents an important tool to advance rights not specifically contemplated in the *Charter*, as well as a means of offering differing interpretations of the rights guarantees it specifically contains (Sérafin

et al. 2023; Sigalet 2023). In this case, the Saskatchewan legislature has chosen to invoke section 33 in order to ensure that children's rights are protected. If Alberta chooses to use section 33 in a similar fashion, it will also be a legitimate way of offering interpretations of rights that it anticipates may be at odds with the views of federally appointed judges.

Indigenous legal orders

Finally, a very brief comment is warranted on the suggestion advanced by the signatories of the open letter, according to which the proposed Alberta policies infringe Indigenous legal orders (Koshan et al. 2024, 2). We do not doubt that many if not all pre-contact Indigenous groups did not recognize the same gender roles and expectations as the Western European cultures from which Canada's other legal orders descend. But to claim that these differences in gender roles and expectations somehow justify a lack of parental notification where schools record a formal name or gender change, that these differences are at odds with restrictions on administering puberty-blocking drugs, cross-sex hormones and sex-reassignment surgeries on children, or that they prevent the adoption of policies governing participation in girls' and women's sports, is a complete *non sequitur*.

The signatories should take more caution when invoking Indigenous legal orders against measures that are aimed at the protection of children, given the history of abuse of Indigenous children's rights at the hands of the Canadian government. This historical abuse almost always occurred in tandem with a denial of the important role played by parents in safeguarding their children's interests, including the parental role in transmitting Indigenous traditions and culture. To understand the need for caution when discussing policies that might threaten the rights of Indigenous parents, one need only point to the abuses of the residential schools system (see generally Truth and Reconciliation Commission 2015) and the infamous "sixties scoop," during which Indigenous children were taken from their parents and placed in state-directed care facilities or with Canadian families of European descent (see Truth and Reconciliation Commission 2015, Vol. 1, 147–73). Policies denying parental notification are of course not equivalent to these past injustices, but it is worth keeping their history in mind. If the protection of children means ensuring, among other

things, that parents are properly notified of important facts affecting their children's well-being, then such notification is clearly warranted in respect of Indigenous parents, as well.

Conclusion

We are dispirited by the reflexively ideological character of the existing academic responses to Alberta's proposed measures, and to the similar policies already adopted in Saskatchewan and New Brunswick. But more importantly, we are concerned by the profound confusion that their interventions display with respect to the role that legislation and other measures should play in the protection of vulnerable persons. This is particularly true of what are perhaps the most vulnerable persons of all – children – whom opponents of Alberta's policies assume possess a fully formed capacity to understand and act in accordance with their own best interests on contentious issues, without the need for guidance from parents or other caretakers. It is also true of girls and women, whose special vulnerabilities the signatories of the open letter dismiss as no different from "the significant advantages already allowed within women's sports, such as the advantage tall women have when playing basketball" (Koshan et al. 2024, 4).

In contrast with this distorted view, we have defended an account of Alberta's proposed policies as a necessary part of any rights-protecting regime. Seen in this light, the proposed measures relating to parental notification and consent can be properly understood as reflecting a good faith compromise between the autonomy of trans-identifying children and the reality of their vulnerability as children. They are consistent with the presumptive role that our law generally confers upon parents to counsel and act in their children's best interests. The same is true of the proposed age-based restrictions on puberty-blocking drugs, cross-sex hormones, and sex-reassignment surgeries. These are simply one example among many already in place of restrictions designed to protect children, including trans-identifying children, from procedures with uncertain benefits and serious known consequence. Similarly, the proposed measures aimed at ensuring the continued existence of girls' and women's sports are merely one example of a distinction that serves a valid, and indeed ameliorative purpose. On the whole, these measures reflect the fact that our

world is complex, and that individuals may experience interlocking forms of vulnerability at different points in their lifetimes. If the Canadian legal system is to ensure that the rights of all persons receive their due protection, then any interpretation given to the *Charter* must take stock of the special vulnerabilities of trans-identifying children, girls, and adult women. Children must not be caricatured as adults to fit new worlds of rights; new rights must be tailored to fit the world of children. **MLI**

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