COURT OF APPEAL FILE NO. CA45940
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COURT OF APPEAL

ON APPEAL FROM the order of Mr. Justice Bowden of the Supreme Court of B.C. pronounced on the 27th day of February, 2019, and the orders of Madam Justice Marzari of the Supreme Court of B.C. pronounced on the 15th day of April, 2019

BETWEEN:

A.B.

RESPONDENT
(Claimant)

AND:

C.D.

APPELLANT
(Respondent)

AND:

E.F.

RESPONDENT
(Respondent)

AND:

Attorney General of British Columbia

RESPONDENT

AND:

Provincial Health Services Authority; West Coast Legal Education and Action Fund; Canadian Professional Association for Transgender Health; Egale Canada Human Rights Trust; Justice Centre for Constitutional Freedoms; Association for Reformed Political Action Canada

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OVERVIEW

1. The *Canadian Charter of Rights and Freedoms* (the "*Charter*") is heir to, and has been interpreted to incorporate, centuries of common law jurisprudence deferential to the family unit. As the Supreme Court of Canada has stated, "The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being."[1]
2. The common law's recognition of parental autonomy is codified in the liberty interest of section 7 of the *Charter.* Speaking of section 7 in *B.(R.) v Children's Aid Society of Metropolitan Toronto*[2], LaForest J. stated, "I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent."
3. The recognition of parental autonomy by both the common law and the *Charter* is based on a fundamental and immutable fact: it has always been, and always will be, parents who bring children into this world, and not the state. With few exceptions, it is parents who raise their children, make countless sacrifices for them, are deeply invested in them, and who know and love them. It is not the state.
4. The result of the within appeal will have broad implications nationally. Courts must create parameters around the permissible actions of the government's medical establishment promoting experimental and elective gender transition to impressionable underage children over the objections of deeply concerned parents. Canadian parents have a constitutional right to assert on their child's behalf that puberty is a normal, natural and essential process that adolescents ought to complete **prior** to embarking on experimental drug and hormone therapies that carry with them irreversible consequences, and the potential for lifelong regrets.
5. The within appeal will also address the national implications of compelled speech, which is expressly prohibited by section 2(b) of the *Charter* and has been described by the Supreme Court of Canada as "totalitarian and as such alien to the tradition of free nations like Canada."

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[1] *B. (R.) v Children's Aid Society of Metropolitan Toronto*, [1995] SCR 315 ("*B.R.*") at paras 83.

[2] *B.R.* at para 83.

PART 1: FACTS[3]

PART 2: ISSUES ON APPEAL

1. Pursuant to the Intervener Order, this Intervener will address the broad implications of this Appeal on parental rights and on freedom of speech, pursuant to sections 7 and 2(b) respectively of the *Charter*.[4]

PART 3: ARGUMENT
Section 7 of the *Charter*

2. Parental rights are constitutionalized in section 7 of the *Charter*, which states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[5]

3. The rights of children to life and security are protected via their right to have their parents appropriately informed and enabled to provide necessary support and protection.[6] According to the Supreme Court, this vital link between parent and child may only be interfered with on a case by case basis when "necessity" is demonstrated, and it is justified in doing so.[7]
4. A child at birth, and for many years thereafter, is unable to exercise the duty of care towards his or herself, nor is the child able to exercise any duty towards its community or

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[3] This Intervener takes no position on the facts and was not provided with the record.
[4] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [The *Charter*]
[5] Section 7 of the *Charter*.
[6] *C.P.L., Re*, 1988 CanLII 5490 (NL SC) [*C.P.L.*], at paras 76-80, 87-88 and 97: "Almost secretively the Director was contacted, consent obtained and the operation performed. This effectively kept the parents out of the picture. … The child was still denied his right to be informed through his parents. I find the apprehension and detention of C.P.L. was not in accordance with fundamental principles of justice." Also see para. 77: "The right that an infant child has, which is important to this case, is a right to be cared for by its parents. This is a right which I find is a right enshrined in the Charter under section 7. The right to security of the person. This is a right which a person is not to be deprived of except in accordance with principles of fundamental justice. The right of the state or the Crown to interfere with the right of security of the person can only be exercised if it is in accordance with the principles of fundamental justice."
[7] *B.R.* at para 83.

society. A child is born into the world as a baby via the procreation of a mother and father who make decisions for the child which the child will one day make for him or herself.[8] While children benefit from the *Charter*, they are unable to exercise their section 7 liberty and security interests, and the state recognizes the right of parents to raise children in accordance with their own judgment.[9] Parents teach children how to care for and control themselves so they will be able to do so independently upon adulthood.

5. Children are naïve and impressionable. The Supreme Court of Canada has found as fact that minors are uniquely exploitable by visual mediums such as television (and by extrapolation by what they watch on the internet) and are especially vulnerable to those who seek to influence their judgment via such methods.[10] In upholding the constitutionality of provincial legislation restricting commercial advertising to minors under 13 years of age, the Supreme Court of Canada stated,

> Broadly speaking, the concerns which have motivated both legislative and voluntary regulation in this area **are the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message, and the secondary effects of exterior influences on the family and parental authority.** Responses to the perceived problems are as varied as the agencies and governments which have promulgated them. However the consensus of concern is high.[11]

6. The Court went on to note that young children are "completely credulous" when confronted with advertising,[12] and found that a U.S. government report on the subject was a sound basis on which to find that "**television advertising directed at young children is *per se* manipulative**" and aimed at "**those who will always believe.**"[13] There is no currently no regulation in Canada over the promotion of transgender theory to young and impressionable children.

7. Due to a recognized and well-documented lack of maturity, as well as in the interests of

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[8] Nicholas Bala & J. Douglas Redfearn, "Family Law and the 'Liberty Interest': Section 7 of the Canadian Charter of Rights" (1983) 50:274 Ottawa L Rev 274 at 293.
[9] *C.P.L.* at paras 76-80, 87-88 and 97.
[10] *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 SCR 927 at p. 987. [*Irwin Toy*]
[11] *Irwin Toy*, at p. 987. [emphasis added]
[12] *Irwin Toy,* at p. 988.
[13] *Irwin Toy*, at p. 988. [emphasis added]

protecting children (and society) from the consequences of minors' own poor decision making, the state mandates that a child (person under the age 18 years) cannot vote,[14] enroll in the military,[15] purchase alcohol,[16] purchase cigarettes,[17] purchase marijuana,[18] or purchase pornography and, in many cases, obtain a tattoo or body piercing.[19]

8. Similarly, in some Canadian and U.S. jurisdictions, minors cannot get a tattoo without written parental consent or the physical presence of the parents at the procedure.[20] In a number of U.S. jurisdictions, minors are prohibited from being tattooed at all, even *with* parental consent,[21] due to the permanent and near-irreversible nature of tattoos. In some U.S. states, tattooing a minor without a parent present is a criminal offence punishable by fine or incarceration.[22] Piercing is similarly regulated. For example, California, Oregon, Minnesota and New Jersey prohibit the piercing of the nipples or genitals of a minor, regardless of parental consent.[23]

9. The British Columbia Ministry of Health itself "strongly recommend[s] not to pierce the genitalia or nipples of people under 18 years old." The Ministry further recommends, regarding "invasive or permanent procedures" performed on those under 18 years of age, that service and product providers obtain written acknowledgement from the minor's parent or guardian. [24]

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[14] *Canada Elections Act*, S.C. 2000, c. 9, s. 3.
[15] *National Defense Act*, R.S.C. 1985, c. N-5, s. 20(3).
[16] *Liquor Control and Licensing Act*, S.B.C. 2015, c. 19, s. 78(1).
[17] *Tobacco and Vapour Products Control Regulation*, BC Reg 213/2018, s. 2.
[18] *Cannabis Distribution Act*, S.B.C. 2018, c. 28, s. 3(3).
[19] Capital Region District Bylaw No. 3304: A Bylaw Regulating Tattoo Facilities; The City of Winnipeg Tattoo Studio By-Law No. 4653/87; The City of Brandon By-Law No. 6685.
[20] Alaska (Alaska Stat. § 08.13.217), Arizona (Tattoos. Ariz. Rev. Stat. § 13-372), In Arizona, breaches of the cited statute are a class 6 felony.
[21] District of Columbia (Body Artists. DC Code § 47-2853.76d), Iowa (Iowa Code §135.37; Iowa Code §135.37)[22] Tattoos. Ariz. Rev. Stat. § 13-3721 – a breach of the provisions is a class 6 felony.
[22] Tattoos. Ariz. Rev. Stat. § 13-3721 – a breach of the provisions is a class 6 felony.
[23] Body Art. Cal. Health & Safety Code § 119300 to 119328 ; Cal. Penal Code 653; Minnesota Statutes 146B.07 ; N.J. Stat. Ann. §2C:40-21 ; N.J.A.C. 8:27-1 et seq. ; N.J. Stat. Ann. §26-1A-7
[24] Guidelines for Body Modification: https://www2.gov.bc.ca/assets/gov/health/keeping-bc-healthy-safe/pses/body_modification_guidelines_nov_2017.pdf; Guidelines for Personal Service Establishments: https://www2.gov.bc.ca/assets/gov/health/keeping-bc-healthy-safe/pses/pse_guidelines_final_nov_2017.pdf

10. The foregoing safeguards exist to protect minors from themselves, irrespective of their wants and desires. The law recognizes that minors are too immature to completely understand the gravity and full repercussions of decisions.[25] The brains of human beings are not fully developed until the age of 25.[26] Impetuosity, naivety, personal trauma or abuse, the influence of pop culture and the desire to be popular are often in conflict with sound judgment and proper reasoning.
11. There is a profound incongruity, therefore, between the state preventing a minor from getting a tattoo or having her genitals pierced without written parental consent, and the state overriding parental objection (and thereby infringing section 7 *Charter*-protected parental rights) to something far more serious: the controversial, uncertain and elective treatment to arrest the natural puberty process and prescribe cross-sex hormones to physically healthy children (the "Treatment").
12. Treatment for gender dysphoria using affirmation of the dysphoric patient, puberty blockers and cross-sex hormones has not been shown to resolve or even reliably assist the underlying dysphoria or other mental issues of the dysphoric. A.B.'s primary care physician, Dr. GH, admits as much, stating that, "when youth are provided with affirming hormone therapy <u>they may</u> have an improvement of dysphoria and relief from other co-morbid mental issues."[27]
13. Dr. GH's statement is an acknowledgement that the interference with the natural puberty process and prescribing cross-sex hormones in fact <u>may do nothing positive at all</u> to assist the underlying mental state of a dysphoric adolescent. Emerging research corroborates this statement, evidencing that affirmation and puberty blockers may in fact *aggravate* and not assuage underlying psychological instability, and have been linked to an increase in suicidality.[28] Further, the underlying issue, gender dysphoria, has been demonstrated

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[25] The recognized difference between child and adult culpability is evidenced by the demarcation of a line between youth (under the *Youth Criminal Justice Act*, S.C. 2002, c. 1) and adult criminal prosecutions (under the *Criminal Code*, RSC 1985, c C-46. When section 17 of the *Infants Act*, RSBC 1996, c 223 was codified in 1996, the Legislature did not have in mind a child's ability to consent to blocking their own puberty or taking cross-sex hormones because this treatment was not in use at that time.
[26] Record of the Appellant's Appeal Book ("AAB").
[27] Factum of A.B. at para. 1(g) as per Dr. GH. [emphasis added]
[28] Record of the AAB.

to be an observable social contagion, particularly among adolescent girls,[29] which highlights the fact that there is a social/media component to gender dysphoria which is separate from physiology, and not well understood.

14. As such, the Treatment for gender dysphoria is far different than a known and well-established medical treatment which has been in use for many decades, such as a blood transfusion. Blood transfusions are demonstrably proven to increase platelets or hemoglobin in patients with low levels, and have been shown to be *medically necessary* and efficacious in saving lives.[30] The exercise of state authority using the *parens patriae* power has been considered in this context, and courts have ruled that parental rights can be overridden in order to administer a known life-saving treatment such as a blood transfusion upon demonstrable necessity.[31]
15. In stark contrast to a life-saving blood transfusion, the Treatment in this case is both experimental and uncertain, and much more controversial in the medical community. As stated above, underlying social factors contributing to gender dysphoria are not well understood. What is known is that it is promoted aggressively as fact on the internet with messaging that is particularly geared toward children. Gender dysphoria is also known to manifest particularly in adolescent females between the ages of 12 and 15, and that there is a strong peer social component linked to many cases. The Treatment itself is linked to dramatically elevated rates of suicide, especially for female-to-male patients.[32]
16. Courts have ruled that where an alternative treatment exists that is known to be just as or more effective, constitutionalized parental rights should not be overridden regarding the parent's preferred choice of treatment.[33]

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[29] See Littman L (2018) Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria. PLoS ONE 13(8): e0202330, available at https://doi.org/10.1371/journal.pone.0202330 - Record of the Appellant.
[30] See, for example, *B(R).*
[31] See, for example, *B(R)*.
[32] Transgender Adolescent Suicide Behavior : Russell B. Toomey, Amy K. Syvertsen, Maura Shramko; Pediatrics Oct 2018, 142 (4) e20174218; DOI: 10.1542/peds.2017-4218 – see Record of the Appellant.
[33] B(R), at p. 386: "I agree, of course, that parents may not, in the exercise of their rights to nurture their children, refuse them medical treatment that is necessary and for which there is no reasonable alternative."

17. Puberty resolves gender dysphoria in the majority of patients,[34] is natural, non-invasive, and does not render children dependent and reliant on the medical establishment *for the rest of their natural lives* for the purpose of procuring cross-sex hormones and medical care necessary for those who have sex reassignment surgery ("SRS").[35]

18. There are good reasons for parents across Canada to prefer psychologist therapy and puberty to affirmation and cross-sex hormones to deal with gender dysphoria. In addition to creating a life-long dependence on cross-sex hormones, full surgical "transitioning" for female patients includes removal of the female genitals, uterus and breasts. Canadian parents are justifiably concerned about the long-term well-being of their children, including the possible inability to engage in a satisfying sexual relationship, permanent infertility, and profound regret. These consequences are too grave for children's immature, developing minds to comprehend appropriately.

19. The Supreme Court of Canada has held that few interests are as compelling as the parents' right (and responsibility) to raise their own children; this is an intrinsic part of individual autonomy and dignity,[36] and an issue of "fundamental importance" in our society.[37] Lamer C.J. observed in *G.J.* that section 7 of the *Charter* protects the "psychological integrity of the individual,"[38] and not merely the physical dimension. In *G.J.*, the Court held that "direct state interference with the parent-child relationship,

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Also see *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295, at pp. 336-37: "One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others." For the applicability of this statement given in the context of 2(a) of the *Charter* to broader *Charter* applications see *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136.

[34] Factum of the Appellant, citing the Affidavit Dr. Quentin Van Meter.

[35] Surgical transitioning renders each patient lifelong dependents on the medical establishment for cross sex hormones and drugs which their new bodies must have to maintain the new appearance. In trans men, the body treats the opening created by a vaginoplasty as a wound which needs healing. It must artificially be kept open or it will close – see Affidavit of Dr. Michael Laidlaw; Affidavit of Sasha Ayad.

[36] B*lencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307, at para. 86;

[37] *B.R., supra*, at para. 83

[38] *New Brunswick (Minister of Health and Community Services)* v. G. (J.), [1999] 3 SCR 46, 1999 CanLII 653 (SCC), at paras. 58 [*G.J.]*

through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere."[39]

20. *G.J.* was a custody case, but the interference by the state with a child's natural developmental process through the interruption of puberty is every bit as invasive, carrying irreversible consequences that are at least as disturbing, if not more so, and a *prima facie* breach of section 7 parental rights.

21. The Supreme Court of Canada has also expressly rejected the notion that section 7 parental rights could be overridden simply because a professional is of the opinion that it is necessary to do so. Writing for the majority on the section 7 issue in *B(R),* LaForest J. wrote:

> If my colleagues are concerned with my mode of approach -- the approach, I may say, traditionally employed by this Court from the earliest stages of Charter adjudication --, I have concerns with their method of limiting one constitutional right against another without relevance to context. **Thus some of their remarks may be understood as supporting a parent's rights being overturned simply because a professional thinks it is necessary to do so. I would be very much concerned if a medical professional were able to override the parent's views without demonstrating that necessity.** On my approach to the issues so far as s. 7 is concerned, **it would be necessary to show that such action would not be contrary to the principles of fundamental justice. More generally, s. 1 requires an interference with the right to be demonstrably justified. That, I think, is perfectly right.[40]**

B. Section 2(b) of the *Charter*

22. The Supreme Court of Canada has taken a very "broad view" of expressive activity, going so far as to consider even the parking of a car, for example, or one's silence, as expressive activities in certain contexts.[41] In addition to protecting every person's freedom to form, hold and utter opinions, ideas and thoughts, freedom of expression protects individuals from being coerced by the state to utter words and opinions that are not their own.[42]

23. Section 2(b) of the *Charter* "guarantee[s] to every person the right to express the opinions

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[39] *Ibid*, at para. 61.
[40] *B(R)* at p. 386.
[41] *Canada (Attorney General) v JTI-Macdonald Corp*., 2007 SCC 30 at para 132.
[42] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.) at page 1080.

he may have: *a fortiori* they must prohibit compelling anyone to utter opinions that are not his own."[43] This right exists independent of whether the truth or accuracy of the content of the forced speech is agreed to by the speaker, although state compulsion to utter what the speaker believes is a falsehood is even more egregious. The Supreme Court calls state-compelled speech "totalitarian and as such alien to the tradition of free nations like Canada".[44] The Court forcefully opposed such extreme state overreach, "even for the repression of the most serious crimes."[45]

24. Bowden J.'s Order compels the Appellant C.D., and indeed the entirety of the Canadian public, to refer to the Respondent A.B. as a male, and to use only male pronouns and a new male name when referring to A.B.[46] The purpose and the effect of these Orders are to put a "particular message into the mouth"[47] of everybody who encounters or refers to A.B., regardless of the fact that many people disagree with that message. No basis in law is cited by Bowden J. for this totalitarian interference with freedom of expression; nor did the lower court apparently consider the *Charter's* prohibition on compelled speech.

25. Even if some doctors and the lower Court believe, or at least are prepared to endorse the view, that A.B. is now male, the Appellant, some doctors and many members of the public do not believe that A.B. is male, based on the observational reality that A.B. is not biologically, chromosomally or anatomically male. It is entirely beyond the power of the state to compel parents who have lovingly raised a little girl to suddenly think the girl is a boy. It is beyond the power of the state to compel parents to forget the infancy of their children. By attempting to compel public assent, the lower Court's Orders are not merely compelling a **form** of expression, but forcing the expression of particular **content**[48]; the

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[43] *National Bank of Canada v. Retail Clerks' International Union,* [1984] 1 S.C.R. 269, citing the majority of the Court at p. 296. [*National Bank*]
[44] *Ibid*.
[45] *Ibid*. In *National Bank* the Canada Labour Relations Board ("CLRB") ordered the National Bank of Canada to write a letter of contrition using compulsory language chosen by the CLRB. The majority of the Court found this extraordinary state overreach an unjustified breach of section 2(b) of the *Charter*.
[46] Bowden Order
[47] *R.J.R.-MacDonald v. Canada (Attorney General),* 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 13.
[48] This is an interference with both thought and opinion, which also is an infringement of section 2(b).

expression of a particular message. This is direct and blatant violation of *Charter* section 2(b), which protects citizens from compelled speech.[49]

26. It is not lawful for the courts or any apparatus of government to demand citizens refer to any individual with words that are not freely chosen by them, all the more so when uttering such words commits the speaker to speak what they believe to be false. To do so is to severely undermine the values underlying freedom of expression, particularly the values of truth-seeking and self-fulfillment.

27. In *Baars v. Children's Aid Society of Hamilton*,[50] a government social worker demanded that foster parents tell children in their care that the Easter Bunny is real. When the foster parents refused, partly because they refused to utter what they considered to be a lie, the social worker removed the children from the care of the foster parents, and closed their foster home. The Ontario Superior Court of Justice found such government action to be an unjustified infringement of freedom of expression, stating that:

> … [the social worker's] **arbitrary conduct effectively sought to compel the [foster parents] to express an opinion with regard to the Easter Bunny that was not their own.** As mentioned above, the Court in *National Bank* emphasized that **the right to freedom of expression prohibits compelling anyone to express opinions that are not their own**[.]
> …
> What the [government body] essentially did by taking the children away and closing down the foster home was "**control the ability of the one conveying the meaning to do so**," which, again, the Court in *Irwin Toy* expressly states is a violation of a person's s. 2(b) rights.
> …
> The [government body's] actions had the effect of undermining the first principle upon which 2(b) freedom of expression is based as outlined in *Irwin Toy*, namely how seeking and attaining truth is an inherently good activity. In refusing to lie to the children about Santa Claus and the Easter Bunny the [foster parent's] were perpetuating that exactly [*sic*] value: promoting the truth. In attempting to limit what the [foster parents] told the children about Santa Claus and the Easter Bunny, which was the truth, the [government body's] conduct, essentially, has the effect of undermining one of the core values underlying section 2(b) of the *Charter*.[51]

28. Similarly, it is a gross infringement for the state to compel objecting parents to mouth

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[49] *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at para 102.
[50] *Baars. v. Children's Aid Society of Hamilton*, 2018 ONSC 1487
[51] *Baars. v. Children's Aid Society of Hamilton*, 2018 ONSC 1487 at paras 114-117. [emphasis added]

acquiescence with the state's interference with parental autonomy and judgment in a matter such as the Treatment. The Order of Bowden J. requires the Appellant to verbally affirm the state intrusion in the life and future of his child and the overriding of his own constitutional rights as a parent. That is an exceedingly dangerous and concerning precedent for a society which values freedom, such as Canada. Respectfully, it is an oppressive, and even cruel intrusion in the minds and mouths of parents and citizens.

29. The state cannot lawfully compel parents to voice agreement and support for a Treatment which the parent with good reason believes is dangerous, harmful and against the interests of impressionable children. The state cannot compel parents to forget their daughters and remember sons in their stead.

PART 4: CONCLUSION

30. The *Charter* is concerned at a foundational level with personal liberty. According to the Court, "[L]iberty" permeate[s] [the *Charter*]…, especially as it relates to the maintenance of Canada as a "free and democratic society".[52]
31. This Intervener respectfully requests that this Honourable Court affirm both section 7 and section 2(b) *Charter* rights in the interests of preserving the rights of citizens across the country in similar fact scenarios. Courts should not make common cause with ideology to arrest the natural process of puberty in adolescents through controversial and unproven medical interventions, and then compel desperate parents to voice agreement with the Treatment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

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Jay Cameron and James Kitchen

Justice Centre for Constitutional Freedoms

[52] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at para 71.

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