**Court of Appeal File No.: CA45940**
**Vancouver Registry**

**COURT OF APPEAL**

ON APPEAL FROM: the Order of Mr. Justice Bowden of the Supreme Court of British Columbia pronounced on the 27th day of February 2019 and the order of Madam Justice Marzari of the Supreme Court of British Columbia pronounced on the 15th day of April, 2019

BETWEEN:

C.D.

APPELLANT
(Respondent)

AND:

A.B

RESPONDENT
(Claimant)

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, and Association for Reformed Political Action (ARPA) Canada

INTERVENERS

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# FACTUM OF THE INTERVENER ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

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**No redactions required and for public release pursuant to the orders of Justice Groberman**

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## OPENING STATEMENT

Can a parent be arrested and prosecuted for criminal contempt for merely sharing a thought or belief with their child with which their child disagrees?

Section 2(b) of the *Charter* jealously guards the freedom to "express" one's profoundly personal and deeply held "thoughts, beliefs, and opinions" on matters of scientific, philosophical, and moral importance, both privately and publicly.

This intervener submits that the protection order power in Part 9 of the *Family Law Act (FLA)* does not empower the court to single out particular thoughts, beliefs, or opinions for censorship at the behest of one family member against another. Such an interpretation is not required by the plain wording, structure, or purpose of Part 9 of the *FLA*, and any ambiguity must be resolved in favour of the interpretation which avoids infringing the *Charter* rights of both parents and children.

Even if the court's jurisdiction under Part 9 extended to the regulation of parents' right to express their thoughts, beliefs, and opinions in this way, the justificatory burden under the *Charter* for a targeted censorship order under Part 9 would be extremely high, and an objective analysis would be required.

What makes a person male or female is a question of both law and philosophy. The law honours citizens' gender identity and corresponding rights (including to medical treatment). However, this does not authorize statutory censorship orders, enforced by the criminal law, of persons who do not or cannot philosophically agree with the conception of sex or gender held by a family member, or who honestly believe that a proposed medical treatment carries more risks than benefits. In a free and democratic society, the rights to medical treatment for gender dysphoria can and do co-exist with the right to hold and express a different view of the value of that treatment.

The orders below represent a profound state interference with both the right to family integrity, and the "fundamental freedom" under the *Charter* of "thought, belief, opinion and expression." Even if aspects of this appeal are resolved on 'procedural' grounds, the courts below require guidance on when, if ever, Part 9 protection orders restraining speech *per se* are demonstrably justified. These constitutional issues cannot be moot.

I

## PARTS 1 AND 2 – STATEMENT OF FACTS AND ISSUES ON APPEAL

1. Pursuant to the intervention order, ARPA Canada proposes a coherent analytical framework regarding "s. 2(b) and s. 7 of the *Charter* and the connection between those rights and orders made under s. 183 of the *FLA*."[1] It does not argue the facts.

## PART 3 – ARGUMENT

### A. Charter Context: s. 2(b) rights of children, parents, and families

2. Section 2(b) protects the free "expression" of persons' actual "thoughts, beliefs, and opinions" in order to promote truth, political and social participation, and self-fulfilment.[2]

3. The freedom is jealously guarded concerning matters of scientific, philosophical, or moral truth as these fall within the core purposes of section 2(b).[3] Censorship invokes an "assumption of infallibility," but "the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part".[4]

4. A parent's freedom to hold certain beliefs – including about sex, gender, and medical treatment – is protected by s. 2(b). A parent also has the right and duty to give guidance to his children in accordance with those beliefs.[5] This can only be done via free expression.

5. Section 2(b) of the *Charter* protects not only the speaker, but also the hearer.[6] Children have a right and interest in receiving guidance from their parents.[7] This applies

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[1] *A.B. v. C.D.*, 2019 BCCA 297 at para. 81. In so doing these submissions must also address the definitions of "at-risk family member" in s. 182 and "family violence" in s. 1 which are incorporated by reference into s. 183.

[2] *R. v. Zundel*, [1992] 2 S.C.R. 731, at 752.

[3] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 762. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at paras. 58, 119 and 163 [*Whatcott*]. *R. v. Edward Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 759 (by analogy).

[4] *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 583, citing John Stuart Mill, "On Liberty"; second quote from later in Mill.

[5] *FLA*, section 41. *Fawcett v. Read*, 2016 BCSC 310 at paras. 25-28.

[6] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1329, citing *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 1326, at 767. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 976. *Universal Declaration of Human Rights* (UDHR), at Art. 19, and *International Covenant on Civil and Political Rights* (ICCPR) Art. 19(2): "freedom of expression… shall include freedom to seek, receive and impart information and ideas of all kinds."

[7] See intervener factum of the Justice Centre for Constitutional Freedoms herein; *B.(R.)*

even (perhaps especially) where the child disagrees with the parent's guidance.[8]

6. International legal instruments declare the family to be the "fundamental group unit of society"[9] and require states to "respect the responsibilities, rights, and duties of parents … to provide … direction and guidance in the exercise by the child of the [child's] rights..."[10] Recent scholarship suggests these and other instruments establish a right of "family integrity" which sees "the family as a unit entitled to protection from the state..."[11]

7. Thus, the state cannot prohibit parents from sharing their "thoughts, beliefs, and opinions" with their own children. In a free and democratic society of families "recognized as a unit fundamentally autonomous from the state,"[12] family integrity must not be so fragile as to permit criminal sanctions to be imposed on parents who cannot affirm prevailing political, legal, or medical views at the behest of a family member.

## B. Interpreting s. 183 of the *FLA* in context and in compliance with the Charter

8. If "a statutory provision is capable of an interpretation that is constitutional and one that is not, then the courts should choose the construction that conforms with the Charter."[13] Rightly interpreted in light of its text, its context within Part 9, and the *FLA* as a whole,[14] and consistently with the *Charter*, s. 183 does not authorize targeted censorship of "thoughts, beliefs and opinions" based on their particular, substantive content.

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*v. Children's Aid Society of Metropolitan* Toronto, [1995] 1 S.C.R. 315, at 369-370. *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at paras 109-111 (Gonthier J. in dissent, but not on this point; see majority's agreement at para. 3).

[8] Otherwise there would be little or no need for parental guidance. See also footnote 39.

[9] *UDHR*, at Art. 16 [UDHR]. See also *ICCPR* at Art. 18(4).

[10] *Convention on the Rights of the Child* at Art. 5.

[11] Amy Anderson, Hon. Dallas Miller, & Dwight Newman, "Canada's Residential Schools and the Right to Family Integrity," 41 Dalhousie L.J. 301 (2018) at pp. 311-320e, 323 [Anderson et al.], which describes how then-leading social thought asserted that Canadian aboriginal children's best interest required them to be separated from parents who were seen as an obstacle to the provision of a 'modern' education.

[12] Anderson et. al., *ibid*. *E.T. v. Hamilton Wentworth District School Board*, 2017 ONCA 893 at paras 65-72, summarizing leading *Charter* jurisprudence and international law.

[13] *R. v. Ruzic*, 2001 SCC 24 at para. 26.

[14] Per E. Driedger*, Construction of Statutes (2nd ed. 1983),* at 87*,* as cited by the Supreme Court of Canada most recently in *R. v. Penunsi*, 2019 SCC 39, at para 36.

*i. Protecting against safety and security risks posed by a family member*

9. Only the federal Parliament has the legislative competence to prohibit 'bad speech' *qua* speech.[15] Provincial legislation can have only the minimum collateral impact on speech necessary to the achievement of its otherwise-valid provincial objects.[16] The purpose of Part 9 of the *FLA* is to protect people from abuse by a family member, determined according to an objective, intelligible, *Charter*-compliant standard. Part 9 is not aimed at resolving philosophical, scientific, medical, linguistic, or moral debates.

10. Section 183 protection orders guard an "at-risk family member" against threats to their "safety and security" (s. 182). The risk must be posed by "a[nother] family member" – not by bullies at school or internet trolls (even if done in reference to a parent's conduct).[17] Protection orders do not issue automatically where there has been family violence (most of which is serious criminal conduct), nor where a court considers it to be in the child's best interest.[18] In recognition of the extremely invasive nature of protection orders, and the *Charter* rights potentially engaged, a future "safety and security" risk is required, such that:

> while "family violence" should be defined broadly in light of the social context and problems the legislation was intended to address, the purpose of the protection order scheme remains narrow …[19]

11. Prior to enactment of the *FLA* in 2011, the Attorney General's White Paper proposed to limit judicial discretion over protection orders in order to keep them safety-focused.[20] This proposal came to be reflected in Part 9 of the *FLA*. As the Ministry of Attorney General's

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[15] *Reference re: Alberta Statutes*, [1938] S.C.R. 100 [*Alberta Press Act*] at pp. 133-135 (Duff and Davis JJ.); 144-146 (Cannon J.); *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Switzman v. Elbling and A.G. of Quebec*, [1957] S.C.R. 285.

[16] *Whatcott*, *supra* at paras 47-62.

[17] *FLA* s. 182 definition of "at-risk family member". Marzari J. erred in not respecting this limitation: *A.B. v. C.D. and E.F.*, 2019 BCSC 604, at paras. 23-46 ["Marzari RFJ"].

[18] *B.H.C. v. F.G.J.P*, 2017 BCPC 378, at paras. 6-11, noting, *inter alia*, that *FLA* sections 37-38 are not incorporated by reference into Part 9.

[19] *B.H.C. ibid* at para. 11; emphasis added.

[20] *White Paper on Family Relations Act Reform* (July 2010) at 147. Relied upon by this court in numerous decisions, most recently in *Li v. Rao*, 2019 BCCA 265, at paras. 27-28. The Paper notes (at 145) that stakeholders pointed to family homicides to illustrate the need for a new protection mechanism that would be more strongly and quickly enforced.

current online resource, *Family Law Act Explained*,[21] states:

> Section 183 limits the terms that may be included in protection orders to ensure they are safety-focused and appropriate for enforcement by police and the criminal justice system. … Under the *Family Relations Act*, many restraining orders also included provisions that were not safety-related, which undermined the seriousness of the order and resulted in enforcement challenges. […] If a person requires an order for non-safety-related issues, there are "conduct orders" available under Part 10 […].[22]

12. The protection order below was issued under s. 183(3)(a)(i) and (e) of the *FLA*[23]. Neither subsection expressly or impliedly authorizes the selective censorship of thoughts, beliefs, or opinions. It is therefore "impossible to interpret [this] legislation conferring discretion as conferring a power to infringe the *Charter*" in this way.[24] Rather, s. 183(3)(a)(i) empowers the court to prohibit X from "communicating with or contacting" Y at all (i.e. a no-contact order), while s. 183(3)(b) empowers restrictions on the "manner or means" of communication (e.g. that all communication be in writing).[25]

13. These content-neutral restrictions on expression are connected to the statutory objective of preventing escalating conflict amongst family members subject to the *FLA* which can lead to harm such as assaults, or reasonably-based fear by way of threats, intimidation, or harassment.[26] This satisfies the "safety and security" requirement under s. 182 and keeps s. 183(3)(a)(i) and (3)(b) focused on safety like the rest of s. 183(3)(a) which empowers restraints on stalking and possession of weapons.

### *ii. Fear for safety and security must be objectively reasonable*

14. A protection order may be issued to prevent a family member's expression having the *effect* of causing an at-risk family member to fear for their safety and security, but only

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[21] Relied upon by this court in *V.J.F. v. S.K.W.*, 2016 BCCA 186, at para 6.

[22] *The Family Law Act Explained*, at Part 9: Protection from Family Violence: "A protection order is a safety-related order" and "Use of the Criminal Code to enforce protection orders […] can save lives."

[23] Marzari RFJ at para. 15.

[24] *R. v. Conway*, 2010 SCC 22 at paras. 41-44.

[25] As ordered in *S.M. v. R.M.*, 2015 BCSC 1344 at para 55 (total ban); and in *C.L.M. v. M.J.S.*, 2017 BCSC 799, at para. 413 (total ban with exception for emails for necessary factual information regarding care of children); and in *Morgadinho v. Morgadinho*, 2014 BCSC 192, at para 66 (total ban with similar exception as that in *C.L.M.*).

[26] Definition of "family violence" in s. 1.

if that fear is objectively reasonable.[27] The "emotional abuse" branch of family violence thus requires something more than mere words.[28] Objectionable words alone, short of threats, are neither family violence nor a safety and security threat.[29]

15. The protection order below proscribed a parent's speech which bore none of the hallmarks of family violence, much less of a safety and security threat. The alleged harm was the thoughts, beliefs, and opinions expressed *per se*. But this is precisely the core of what s. 2(b) protects.[30] Even Human Rights Code 'hate speech' prohibitions are "not designed to censor ideas or to compel anyone to think 'correctly'."[31] Thus, while the alleged at-risk family member's perceptions must be *considered*,[32] the only "construction [of s. 183] that conforms with the Charter"[33] and prevents protection orders being used for censorship rather than for safety risks[34], is an objective analysis. This gives effect to the words "is or is likely at risk" in s. 182, and prevents the subjective reaction of the applicant from determining the scope of the respondent's s. 2(b) rights. A subjective standard would grant judges "plenary discretion" rather than an "intelligible standard" for limiting expression.[35] As the Ontario Court of Appeal recently stated:

> The employees were indeed frightened, but the evidence does not disclose any reasonable basis for their fear … [the] statutory obligation to promote workplace safety, and the "safe space" policies enacted pursuant to them, cannot be used to swallow whole *Charter* rights. In a free and democratic society, citizens are not

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[27] *K.W.*, *infra*., at para. 123; *J.R.E.* *infra* at para 17; *B.H.C.* *supra* at paras 44 and 47.

[28] Protection orders issued for words plus brandishing a butcher knife and stabbing water bottles during a fit of jealousy (*Morgandinho*, *supra* at paras. 61-62) or "thinly-veiled threats" "designed to intimidate and harass" (*S.M.*, *supra* at paras. 44-46). Family violence found for words plus viciously beating the family dog in front of family members (*Maher v. Maher*, 2018 BCSC 275, at paras. 25-55 and 80-83) or words plus throwing belongings outside and encouraging child to do the same and to urinate on mother's bed (*K.W. v. L.H.*, 2018 BCCA 204, at para 123.). *Maher* and *K.W.* did not involve protection orders.

[29] E.g. profane and derogatory remarks (*Morgandinho*, *supra*, at para 63); mutually unpleasant exchanges and incivility (*S.M.*, *supra*, at para 24); "rigid" and "confrontational" approach to marital disagreements (*J.R.E. v. 07-----8 B.C. Ltd.*, 2013 BCSC 2038, at 21).

[30] Footnote 3, *supra*.

[31] *Whatcott* at para. 58.

[32] FLA, s. 184(1)(f).

[33] Footnote 13, *supra*.

[34] *J.R.E.*, *supra*, at para. 17.

[35] *Irwin Toy*, *supra* at 983.

> to be handcuffed and removed from public space traditionally used for the expression of dissent because of the discomfort their protest causes.[36]

*iii. Reconciliation of rights: no right to be free of disagreement*

16. The interpretation of s. 183 proposed above respects the Supreme Court's direction that apparent rights conflicts be avoided by the proper "delineation of rights" – here the s. 2(b) and s. 7 rights of both parents and children.[37] Both parents and children have the constitutional right to be free of state censorship or coercion in sharing their thoughts, beliefs, and opinions with each other regarding each other's identities or what kind of medical treatment is (in)appropriate in light of those identities. Both also have the right to choose not to listen to the other. The corollary of these rights is that neither can invoke the power of the state to compel the other into either speech or silence.

17. The statutory objective of Part 9 of the *FLA* is not to provide children an environment free of parental disagreement. Avoiding offense has never justified censoring expression at the core of s. 2(b).[38] Exposure to the expression of others (even persons in a position of authority) who hold different thoughts and beliefs creates a cognitive dissonance, which:

> is neither avoidable nor noxious. […] The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others. […] [This] is arguably necessary if children are to be taught what tolerance itself involves.[39]

18. Thus, that a child rejects the parent's perspective does not transform it into a "safety and security" risk under s. 182. Part of the role of a parent is to lovingly but openly disagree with a child about a course of conduct which the parent believes to be contrary to the child's best interest. Part 9 is not an invitation for courts to micro-manage these conversations.

19. If one person within a family could invoke the power of the state, through Part 9 of

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[36] *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, at paras. 46, 82.

[37] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 52. See also *R. v. N.S.*, 2012 SCC 72 at para. 52 (also paras. 9 and 30-33).

[38] *Zundel*, *supra* at 753 (the *Charter* "serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception"); *Whatcott*, *supra* at para. 57 ("repugnant or offensive" statements); *Lund v. Boisson*, 2012 ABCA 300 at paras. 70-72 ("extreme and insensitive" and "polemical" statements), see also paras. 4, 60.

[39] *Chamberlain*, *supra* at paras. 64-66. Followed in *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 at para. 40 and *E.T.*, *supra* at para. 94.

the *FLA*, to censor the beliefs of another, it would lead to logical and legal incoherence, and to outcomes which are obviously impermissible in a free and democratic society, such as: to force a parent to refer to a child as "pro-life" rather than "anti-abortion"; to force an orthodox Muslim or Hindu parent to refer to their child as "brother" or "saint" (or to refer to Jesus as God) to respect the child's conversion to Christianity; to force a Christian parent not to say "You are a child of God" or "God made you" if the child does not believe that about himself; to prohibit a parent from advising the child against amputating a healthy limb if the child has apotemnophilia (identifies as disabled); or to prohibit a parent of black African descent from saying to her mixed-race child "you're not white, you're black."

20. Even if the parent's speech was distressing to the child in any of these examples, all of which relate to affirming identity, it would not be a breach of the child's s. 7 *Charter* or legal rights, nor a reasonably feared safety or security risk justifying a protection order. An interpretation of s. 183 permitting such orders would also be incoherent as each party could make logically inconsistent demands of the other; such an interpretation is neither necessarily implied nor minimally impairing of *Charter* rights. A child's financial or emotional dependency, or mental health challenges (including self-harm) does not change this result.

21. In a free and democratic society, no one has a monopoly over the meaning of words. It is not the role of the law to compel one person to adopt the definition of another. A person's legal right to adopt and express a male gender identity (including by medical means) or even to change their birth certificate, is not limited by or in conflict with the freedom of another person to still recognize that there is something (namely biological sex) which will always remain female about that person.[40] Utilizing the pejorative label "misgendering" does not advance the analysis.[41] Nor does analogizing this case to one of criminal defamatory libel.[42] It is not noxious for a (born female) child identifying as male

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[40] EF's citation of *Morgentaler* and *Carter* are not on point. Family members do not hold s. 7 rights against each other; but against government action.

[41] To the extent *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58 (currently under judicial review), relied upon by the Respondents, suggests "misgendering" is *per se* hate speech, this goes too far and would make lawbreakers out of ordinary Canadians who have no animosity toward transgender persons, but who hold to a different anthropology of sex and gender.

[42] As A.B. does by citing *R. v. Lucas*, [1998] 1 S.C.R. 439, which required proof of *mens rea* of intent to defame and knowledge that the statements were false. Here, CD is expressing opinions he believes to be true and protective of, not harmful to, his child.

to have a parent who believes the child remains essentially female. EF's factum correctly notes (para 2) that a person can have both a "female sex and male gender identity".

22. Diversity of identity, or of thought, belief, and opinion can be challenging to navigate in any relationship. But such diversity is something to be reconciled and managed by family members, not a 'problem' for the state to 'solve' by the obliteration of difference under the guise of "safety and security" protection orders, enforced through the criminal law. AB seeks to invoke the protection order power not to protect safety and security, but to have a relationship with CD on AB's own terms – namely that CD use language that AB demands. That is not what Part 9 of the *FLA* is for.

### C. In the alternative: high justificatory burden

23. *If* the proper construction of s. 183 permits the censorship of *particular* beliefs and opinions, the court of first instance must first determine whether such an order would "give effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" and thus restrict *Charter* rights "no more than is necessary."[43] This is particularly so where there is only – at most – an *implied* power to infringe *Charter* rights.

24. The court below did not understand the gravity of its order, stating that "there is no requirement that CD change his views," but only "how he expresses those views privately to AB and publicly to third parties."[44] The "fundamental freedoms" to "thought, belief, opinion and expression" are (literally and structurally) inseparable within s. 2(b). A right to hold a belief but not express it, even within one's own family relationships, is no right at all. To coerce expression in this way is to coerce thought within a person's most intimate relationships.[45] Furthermore, the "prior restraint" of expression is the "most severe" type of restriction, and censorship on the basis of particular content (i.e. viewpoint) is the most dangerous in a democracy.[46]

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[43] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paras. 39, 114. Marzari J. accepted at para. 51 that "necessity" and "proportionality" were required.

[44] Marzari RFJ at para. 50.

[45] Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms" (2019), 91 S.C.L.R. (2d) 107-122 at paras 21-30.

[46] Peter Hogg, *Constitutional Law of Canada,* 5th ed. Supp. Scarborough, Ont.: Thomson/Carswell, 2007 (updated 2017, release 1), at 43.6 and citations therein; *Little*

25. The determination by a court that a particular medical treatment is in a child's best interest does not make it family violence or a safety or security threat for the child to hear that a parent continues to disagree. Parties are required to obey court orders; they are not required to agree with them. The protection order analysis in this case treated as "binding on the parties … and not open to re-determination"[47] the original family violence declaration which itself was made without any *Charter* analysis whatsoever.[48]

26. For reasons articulated by the appellant and the intervener Justice Centre for Constitutional Freedoms, many parents hold beliefs and opinions, protected by s. 2(b), that pre-pubescent cross-hormone treatment poses more risks than benefits.[49] If a child is a mature minor empowered to make the decision to assume the risks of this treatment, they are – by definition – mature enough to critically consider both input that aligns with their own initial views regarding that treatment, and input that contradicts their beliefs and preferred outcome. A child who cannot think critically about other perspectives would not be mature enough to decide in the first place.[50] Hormone treatment is ongoing; a mature minor must receive all information and perspectives to enable them to re-assess, adjust, or cease their treatment in light of changing circumstances such as new research about risks and benefits, or the patient's own (dis)satisfaction with the treatment's side effects or outcome.

27. Accordingly, both the value of the proscribed speech, and thus the constitutional cost of the censorship order below, was high. By contrast, the order's 'benefit' – depriving AB of a relevant perspective from a loving parent – was low. The censorship provisions of the protection order were therefore disproportionate and not demonstrably justified.

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*Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, Iacobucci J. in dissent, but not on this point, at paras. 32-36.

[47] Marzari RFJ at para. 11.

[48] The only mention of family violence in Bowden J.'s reasons is in para. 2(c) of the "summary of orders" at the very end of his judgment.

[49] What kind of treatment to seek and accept for gender dysphoria is both a matter of a parent's scientific opinion and moral belief protected by s. 2(b): e.g. Marta Bizic et al., "Gender Dysphoria: Bioethical Aspects of Medical Treatment," *Biomed Res Int.*, 2018:9652305; and See e.g. Kelsey Hayes (2018), "Ethical Implications of Treatment for Gender Dysphoria in Youth," *Online Journal of Health Ethics*, 14(2).

[50] *Van Mol v. Ashmore*, 1999 BCCA 6, at para 75 and 89, leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 117, cited in *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 58.

## D. Freedom of Expression and Democracy

28. "Free expression is 'the matrix, the indispensable condition of nearly every other … freedom.'"[51] "It is difficult to imagine a guaranteed right more important to a democratic society."[52] The public has a right to know about important court proceedings, including the parties' perspective.[53] The parties' identities and privacy can be protected by anonymization and sealing orders.[54] Censoring substantive thoughts, beliefs, and opinions in order to accomplish a privacy objective thus cannot be minimally impairing.

29. The public interest is profoundly undermined by singling out those personally affected by current laws for exclusion from public discussion, as done below. Legal proceedings and political debate can co-exist on the same general issue, as in the Medical Aid in Dying context. This does not constitute improper pressure on the court.[55]

30. Furthermore, s. 183 of the FLA does not authorize orders prohibiting communication with the world at large. Only communications "with … the at-risk family member" or with "a specified person" may be restrained (s. 183(a)(i) and (b)). Neither phrase can be interpreted to mean "with anyone and everyone" as in the orders below.[56]

## PART 4 – NATURE OF ORDER SOUGHT

31. These interveners seek to present oral argument at the hearing of the appeal. They do not seek costs and ask that no order as to costs be made against them.

All of which is respectfully submitted at the City of Vancouver, Province of British Columbia, this 22 day of August 2019.

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Geoffrey Trotter and John Sikkema
Counsel for the intervener ARPA Canada

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[51] *R. v. Sharpe*, 2011 SCC 2 at para 23.

[52] *Edmonton Journal*, *supra* at 1336.

[53] See citations at Appellant's factum footnote 71. *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175 at 185: "covertness is the exception and openness the rule" and, generally, "the sensibilities of the individuals involved are no basis for exclusion of the public." *Edmonton Journal* at 1341 notes that "matters pertaining to custody of children [and] access to children" are "matters of public interest".

[54] *Edmonton Journal*, *supra* at 1346-1347.

[55] Marzari J. erred in assuming improper motive: Marzari RFJ at para. 57.

[56] Marzari RFJ at para. 82 ("to third parties and publicly").

# APPENDIX: ENACTMENTS

## *Convention on the Rights of the Child*

**Article 5**

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

## *Universal Declaration of Human Rights*

**Article 16**

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

**Article 19.**

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

## *International Covenant on Civil and Political Rights (ICCPR)*

**Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

**Article 19**

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

IV

**Family Law Act**

**[SBC 2011] CHAPTER 25**

Part 1 — Interpretation

**Definitions**

**1** In this Act:

**"family violence"** includes

(a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

(b) sexual abuse of a family member,

(c) attempts to physically or sexually abuse a family member,

(d) **psychological or emotional abuse of a family member, including**

**(i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,**

(ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,

(iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence;

Part 9 — Protection from Family Violence

**Definitions**

**182** In this Part and the regulations made under section 248 (1) (d) *[general regulation-making powers]*:

**"at-risk family member"** means a person whose safety and security is or is likely at risk from family violence carried out by a family member;

**"firearm"** has the same meaning as in the *Criminal Code*;

**"residence"** means a place where an at-risk family member normally or temporarily resides, including a place that was vacated because of family violence;

**"weapon"** has the same meaning as in the *Criminal Code*.

**Orders respecting protection**

**183** (1) An order under this section

(a) may be made on application by a family member claiming to be an at-risk family member, by a person on behalf of an at-risk family member, or on the court's own initiative, and

(b) need not be made in conjunction with any other proceeding or claim for relief under this Act.

(2) A court may make an order against a family member for the protection of another family member if the court determines that

(a) family violence is likely to occur, and

(b) the other family member is an at-risk family member.

(3) An order under subsection (2) may include one or more of the following:

(a) a provision restraining the family member from

(i) directly or indirectly communicating with or contacting the at-risk family member or a specified person,

(ii) attending at, nearing or entering a place regularly attended by the at-risk family member, including the residence, property, business, school or place of employment of the at-risk family member, even if the family member owns the place, or has a right to possess the place,

(iii) following the at-risk family member,

(iv) possessing a weapon, a firearm or a specified object, or

(v) possessing a licence, registration certificate, authorization or other document relating to a weapon or firearm;

(b) limits on the family member in communicating with or contacting the at-risk family member, **including** specifying the manner or means of communication or contact;

(c) directions to a police officer to

(i) remove the family member from the residence immediately or within a specified period of time,

(ii) accompany the family member, the at-risk family member or a specified person to the residence as soon as practicable, or within a specified period of time, to supervise the removal of personal belongings, or

(iii) seize from the family member anything referred to in paragraph (a) (iv) or (v);

(d) a provision requiring the family member to report to the court, or to a person named by the court, at the time and in the manner specified by the court;

(e) any terms or conditions the court considers necessary to

(i) protect the safety and security of the at-risk family member, or

(ii) implement the order.

(4) Unless the court provides otherwise, an order under this section expires one year after the date it is made.

(5) If an order is made under this section at the same time as another order is made under this Act, including an order made under Division 5 *[Orders Respecting Conduct]* of Part 10, the orders must not be recorded in the same document.

**Whether to make protection order**

**184** (1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:

(a) any history of family violence by the family member against whom the order is to be made;

(b) whether any family violence is repetitive or escalating;

(c) whether any **psychological or emotional abuse** constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;

(d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;

(e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;

(f) the at-risk family member's perception of risks to his or her own safety and security;

(g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

(2) If family members are seeking orders under this Part against each other, the court must consider whether the order should be made against one person only, taking into account

(a) the history of, and potential for, family violence,

(b) the extent of any injuries or harm suffered, and

(c) the respective vulnerability of the applicants.

(3) For the purposes of subsection (2), the person who initiates a particular incident of family violence is not necessarily the person against whom an order should be made.

(4) The court may make an order under this Part regardless of whether any of the following circumstances exist:

(a) an order for the protection of the at-risk family member has been made previously against the family member against whom an order is to be made, whether or not the family member complied with the order;

(b) the family member against whom the order is to be made is temporarily absent from the residence;

(c) the at-risk family member is temporarily residing in an emergency shelter or other safe place;

(d) criminal charges have been or may be laid against the family member against whom the order is to be made;

(e) the at-risk family member has a history of returning to the residence and of living with the family member against whom the order is to be made after family violence has occurred;

(f) an order under section 225 *[orders restricting communications]* has been made, respecting the at-risk family member, against the family member against whom the order is to be made.

**If child a family member**

**185** If a child is a family member, the court must consider, in addition to the factors set out in section 184 *[whether to make protection order]*,

(a) whether the child may be exposed to family violence if an order under this Part is not made, and

(b) whether an order under this Part should also be made respecting the child if an order under this Part is made respecting the child's parent or guardian.

**Orders without notice**

**186** (1) An application for an order under this Part may be made without notice.

(2) If an order is made under this Part without notice, the court, on application by the party against whom the order is made, may

(a) set aside the order, or

(b) make an order under section 187 *[changing or terminating orders respecting protection]*.

**Changing or terminating orders respecting protection**

**187** (1) On application by a party, a court may do one or more of the following respecting an order made under this Part:

(a) shorten the term of the order;

(b) extend the term of the order;

(c) otherwise change the order;

(d) terminate the order.

(2) An application under this section must be made before the expiry of the order that is the subject of the application.

(3) Nothing in subsection (2) of this section prohibits a person from making a subsequent application for an order under section 183 *[orders respecting protection]*.

**Enforcing orders respecting protection**

**188** (1) An order made under this Part may not be enforced

(a) by means of any order that may be made under this Act, or

(b) under the *Offence Act*.

(2) A police officer having reasonable and probable grounds to believe that a person has contravened a term of an order made under this Part may

(a) take action to enforce the order, whether or not there is proof that the order has been served on the person, and

(b) if necessary for the purpose of paragraph (a), use reasonable force.

**Conflict between orders**

**189** (1) In this section, **"protection order"** means any of the following orders:

(a) an order made under this Part;

(b) an order, made under the *Criminal Code*, that restricts a person from contacting or communicating with another person;

(c) an order, made by a court in British Columbia or another jurisdiction in Canada, that is similar in nature to an order made under this Part.

(2) If there is a conflict or an inconsistency between a protection order and an order made under a Part of this Act other than this Part, the other order is suspended, to the extent of the conflict or inconsistency, until

(a) either the other order or the protection order is varied in such a way that the conflict or inconsistency is eliminated, or

(b) the protection order is terminated.

**Rights not affected by Act**

**190** The making of an order under this Part does not affect any existing right of action of a person who has been the subject of family violence.

**Extraprovincial orders**

**191** The *Enforcement of Canadian Judgments and Decrees Act* applies to an order, made by a court in another jurisdiction of Canada, that is similar to an order made under this Part.

**Part 10 — Court Processes**

**Division 2 — Procedural Matters**

**Intervention by Attorney General or other person**

**204** (1) The Attorney General may intervene in a proceeding under this Act and make submissions respecting any matter, arising in the proceeding, that affects the public interest.

(2) Any person may apply to the court for leave to intervene in a proceeding under this Act and the court may make an order entitling the person to intervene.

(3) The Attorney General or another person who intervenes in a proceeding becomes a party to the proceeding.

# LIST OF AUTHORITIES

## Enactments

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| Family Law Act (BC) | S. 37<br><br>S. 38<br><br>S. 41<br><br>S. 182<br><br>S. 183<br><br><br><br>S. 184 | 10<br><br>10<br><br>4<br><br>10, 13, 15, 18<br><br>1, 8, 10, 12, 13, 15, 16, 20, 23, 30<br><br>15 |
| International Covenant on Civil and Political Rights (ICCPR) | Article 18<br>Article 19 | 6<br>5 |
| Universal Declaration of Human Rights (UDHR) | Article 16<br>Article 19 | 6<br>5 |

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