Court of Appeal File No. CA45940

COURT OF APPEAL

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

BETWEEN:

A.B.

Respondent
(Claimant)

AND:

C.D.

Appellant
(Respondent)

AND:

E.F.

Respondent
(Respondent)

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent

AND:

THE PROVINCIAL HEALTH SERVICES AUTHORITY, WESTCOAST LEGAL EDUCATION AND ACTION FUND, CANADIAN PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, EGALE CANADA HUMAN RIGHTS TRUST, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, and THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

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OPENING STATEMENT

Egale submits that limitations on parental verbal abuse are constitutionally sound. Such limitations are routine in the family law context. Parental verbal abuse is not constitutionally protected speech under s. 2(b) of the *Charter* because it (1) is violent; (2) undermines the values underlying free expression; and (3) is a narrow category of speech, obviating floodgates concerns. Alternatively, if this Court holds that limits on parental verbal abuse infringe free expression, then such limits are justified under s. 1 of the *Charter* as they are more defensible than already accepted limits on hate speech.

PART 1 – STATEMENT OF FACTS

1. A.B. (a respondent) is a 14-year-old transgender boy.[1] He has a chosen male name and is referred to by his teachers and peers as a boy and with male pronouns.[2] A.B.'s self-identification as male was reinforced by various professionals.[3]

2. C.D. (the appellant) is A.B.'s father.[4] He has launched a "public campaign"[5] against A.B.'s access to health care, by exploiting A.B. as an "unwilling poster child"[6] for C.D.'s conservative gender ideology. C.D. rejects A.B.'s chosen gender, and the judicial and medical determination that hormone treatment is in A.B.'s best interests.[7] C.D. sought an injunction restraining gender transition treatments for A.B.,[8] which appeared to be a "somewhat disingenuous" attempt at "delaying proceedings as a way of preventing his son from obtaining the gender transition treatment he seeks."[9] Further, C.D. has given interviews to various conservative media sites (e.g., the Federalist and Culture Guard)

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[1] *A.B. v. C.S. and E.F.*, 2019 BCSC 254 at paras. 2 & 29 ["Best Interests Decision"].

[2] Best Interests Decision at para. 12.

[3] Best Interests Decision at paras. 14, 19, & 28-29.

[4] Best Interests Decision at para. 3.

[5] *A.B. v. C.D. and E.F.*, 2019 BCSC 604 at para. 57 ["Protection Order Decision"].

[6] Protection Order Decision at para. 69.

[7] Protection Order Decision at para. 3.

[8] Best Interests Decision at para. 3.

[9] Best Interests Decision at para. 43.

broadcasting his son's private medical decisions to their antagonistic constituencies,[10] which Marzari J. held "may in fact endanger" A.B.[11] Indeed, those interviews generated "personal and derogatory comments about [A.B.], including statements that [A.B.] is mentally ill, and anticipating and even encouraging his suicide"[12] as well as his murder[13] — what Marzari J. labelled "degrading and violent public commentary."[14] In the interviews, C.D. "discusses in detail [A.B.]'s medical history", "trivializes [A.B.]'s suicide attempt", and "expresses pleasure at the breadth of attention and publication his story is getting."[15]

3. Two judges held that C.D.'s expressive acts were significantly and tangibly harmful to A.B. These determinations demonstrate that A.B. is in an exceptional situation. Many parents may exhibit discomfort or confusion regarding a child's transgender identity, and those emotions may raise difficult discussions. Moreover, the transmission of values between parent and child is an important aspect of parenting in any pluralistic society.[16] C.D.'s conduct, however, does not constitute merely difficult discussions or good faith parenting. Rather, C.D. has repeatedly and intentionally acted in an abusive manner towards A.B., and "is using [A.B.] to promote his own interests above those of his child."[17] Bowden J. held that, in these particular circumstances, "[a]ttempting to persuade A.B. to abandon treatment for gender dysphoria", "addressing A.B. by his birth name" (i.e., "deadnaming"),[18] and "referring to A.B. as a girl or with female pronouns whether to him

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[10] *C.D. v. Provincial Health Services Authority*, 2019 BCSC 603 at para. 62 ["Publication Ban Decision"].

[11] Publication Ban Decision at para. 63.

[12] Protection Order Decision at para. 26.

[13] Protection Order Decision at para. 33.

[14] Protection Order Decision at para. 68.

[15] Protection Order Decision at paras. 29 & 67.

[16] See e.g. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 64.

[17] Protection Order Decision at para. 69.

[18] Deadnaming is a term commonly used where a transgender person's former given name is used instead of their chosen name. Parker Malloy, "How Twitter's Ban on 'Deadnaming' Promotes Free Speech", *The New York Times* (November 29, 2018),

directly or to third parties" (i.e., "misgendering") constitute "family violence" under s. 38 of the *Family Law Act*,[19] i.e., it is abusive.[20] Similarly, Marzari J. held that C.D.'s expressive conduct "is causing A.B. harm"[21] and, similarly, amounts to family violence.[22] In this context, Marzari J. ordered that C.D. cannot further misgender, deadname, or out A.B.[23]

4. C.D. argues in this Court that the BC Supreme Court's orders violate his right to free expression under s. 2(b) of the *Charter*.[24] On August 9, 2019, Egale was granted leave to intervene to make submissions on this discrete point.[25]

PART 2 – ISSUES ON APPEAL

5. Egale's submissions address two questions: (1) do limits on parental verbal abuse infringe free expression under s. 2(b) of the *Charter*; and if so (2) are limits on parental verbal abuse justified under s. 1 of the *Charter*.

PART 3 – ARGUMENT

6. Egale submits that limits on parental verbal abuse are constitutionally sound. Such abuse is routinely proscribed in the family law context. Limits on such abuse do not infringe free expression under s. 2(b) of the *Charter*. In the alternative, if parental verbal abuse is held to be constitutionally protected speech, then its reasonable limitation is justified under s. 1 of the *Charter*.

7. To be clear, Egale is an ardent supporter of free speech; free expression is "central to our democracy."[26] However, this appeal does not concern political discourse in any

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online: <https://www.nytimes.com/2018/11/29/opinion/twitter-deadnaming-ban-free-speech.html>.

[19] Best Interests Decision at para. 70.

[20] *Family Law Act*, S.B.C. 2011 c. 25, s. 1.

[21] Protection Order Decision at para. 3.

[22] Protection Order Decision at para. 46.

[23] Protection Order Decision at para. 93.

[24] Appellant's Factum at para. 108.

[25] *A.B. v. C.D.*, 2019 BCCA 297 at paras. 53, 79, & 83.

[26] *Saskatchewan (H.R.C.) v. Whatcott*, 2013 SCC 11 at para. 64 ["*Whatcott*"].

meaningful sense, but rather targeted abuse of a vulnerable minor. Abuse is not a form of protected expression, and to consider it as such trivializes the critical role that free expression plays in the maintenance of liberal democratic norms. While C.D. undeniably has important expressive rights, "[h]is rights do not include harming his child."[27]

A. Parental Verbal Abuse is Routinely Proscribed in Family Law

8. To begin, parental verbal abuse is routinely proscribed in the family law context, where the interests and safety of children are paramount.[28] The regularity of such prohibitions reflects the triviality of this constitutional claim and its principal motivation, which is not to vindicate free expression, but to oppose transgender identity. If a father had an extensive history of calling his anorexic and suicidal daughter fat — both in person and online to virulently hostile audiences — few would claim that limitations on the father's abusive expressions would warrant constitutional protection. Yet, when the victim of that abuse is transgender, free expression suddenly presents itself as a supposed defense.

9. Judicially affirming a "free speech" defence to parental verbal abuse would be unprecedented, putting at risk all youth, transgender and otherwise. Indeed, it is commonplace for courts to restrain expression, including expression that is less harmful than that at issue here, in the best interests of children. For example, in *A.T. v. L.T.H.*, the BC Supreme Court prohibited anyone with knowledge of its order (including both parents) from identifying a daughter as the alleged victim of parental abuse by her father.[29] And in *R.W. v. P.C.* the BC Supreme Court ordered a mother to remove an online posting alleging abuse by the father, and prohibiting the mother from posting any further information about the father, their children, or their divorce proceedings.[30] Both of these cases — which are regular, not remarkable — upheld orders limiting parents' expressive freedom in the interest of preserving either a child's safety or privacy. In turn, to find such

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[27] Protection Order Decision at para. 49.

[28] See e.g. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 72.

[29] *A.T. v. L.T.H.*, 2006 BCSC 1689 at paras. 1-4 & 67-79.

[30] *R.W. v. P.C.*, 2015 BCSC 748 at paras. 47 & 59.

limits constitutionally unsound — or worse, as claimed here, to find that *even verbal abuse itself* cannot be restrained (a common legal sanction)[31] — would unravel many critical protections for vulnerable youth. Transgender youth should not be excluded from the generally accepted principle that tailored limitations against abusive expression by parents are constitutionally sound. In fact, as they are a particularly vulnerable group, the pressing need to protect transgender youth from abuse is only greater. Further, a "trans exception" to abusive limitations would be antithetical to constitutional norms, particularly equality.

B. Parental Verbal Abuse is Not Constitutionally Protected Speech Under Section 2(b)

10. Parental verbal abuse should be excluded from s. 2(b) protection because it (1) is violent; (2) undermines the values underlying free expression; and (3) is a narrow form of expression, thereby obviating any floodgates concerns.

1. Parental Verbal Abuse is Not Protected Speech Because it is Violent

11. Section 2(b) of the *Charter* guarantees freedom of expression. However, "expression" (i.e., "attempts to convey meaning"[32]) is a broad term, capturing "most human activity",[33] including various forms of conduct (e.g., murder, assault, and abuse) that must be prohibited in any functioning democratic society — indeed, to conceive of free expression in absolute terms is "obviously untenable."[34]

12. The legal test governing constitutional free expression reflects its non-absolute nature. The first step in the test for a s. 2(b) infringement is whether the impugned activity falls "within the sphere of conduct protected by [freedom of expression]."[35] Thus, certain forms of expression fall outside the scope of s. 2(b).

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[31] See e.g. *Fyfe v. Fyfe*, 2014 BCSC 1999 at paras. 36-42 & 48; *K.L.L. v. D.J.*, 2014 BCPC 85 at paras. 18 & 20; *Primeau v. L'Heuruex*, 2018 BCSC 740 at paras. 95 & 153.

[32] *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 968.

[33] *Irwin Toy* at 968.

[34] Thomas I. Emerson, "Towards a General Theory of the First Amendment" (1963) 72 Yale LJ 877 at 914.

[35] *Irwin Toy* at 978.

13. The paradigmatic form of expression excluded from free expression is "violence."[36] For example, one could kill someone to "express" hatred, or assault someone to "express" dominance. Yet, "a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen."[37] Likewise, "threats of violence" are excluded from free expression because they "undermine the very values and social conditions that are necessary for the continued existence of freedom of expression."[38] Indeed, even harassment is excluded from s. 2(b) protection.[39] Parental verbal abuse falls comfortably within this range of exclusions, especially given that the list of forms of expression that fall outside the scope of s. 2(b) is not closed,[40] and given that the violence exception is not "confined to actual physical violence."[41] With this in mind, and since parental verbal abuse is violent, Egale submits that such abuse, too, lacks constitutional protection.

14. Thirty years ago, the Supreme Court of Canada explained that "a murderer or rapist" could not insulate their expressive conduct from legal limitations on the basis of free expression. These examples could be read as suggesting that only *physical* violence is excluded from s. 2(b). However, arbitrarily privileging physical over psychological violence is an antiquated conception of harm, now rejected in Canadian jurisprudence. Indeed, recent Supreme Court of Canada decisions have dismissed this physical/psychological dichotomy for being founded on "dubious perceptions of […] mental illness" and perpetuating both "stigma" and "misguided prejudices",[42] as well as for being "elusive and arguably artificial in the context of tort."[43] Similarly, the Court has held

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[36] *Irwin Toy* at 969-970.

[37] *Irwin Toy* at 969-970.

[38] *R. v. Khawaja*, 2012 SCC 69 at para. 70 ["*Khawaja*"].

[39] *Irene Bremsak v. The Professional Institute of the Public Service of Canada, et al.*, 2014 FCA 11 at para. 27.

[40] *Irwin Toy* at 970-971.

[41] *Khawaja* at para. 70.

[42] *Saadati v. Moorhead*, 2017 SCC 28 at para. 21.

[43] *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 8.

that both psychological and physical suffering can trigger a s. 7 *Charter* infringement.[44] Even further, the Court has repeatedly noted how psychological injury can cause, not only similar, but greater harm than physical violence.[45] A.B.'s circumstances illustrate this insight, as C.D.'s conduct has harmed A.B., arguably, in a manner even more severe than physical violence. In any event, *psychological* abuse can manifest in *physical* consequences (e.g., suicide) calling into question the merit of distinguishing psychological and physical violence for constitutional purposes.

15. Misgendering, deadnaming, and outing are simply three ways in which transgender people can be abused. Such abuse can make transgender people feel dehumanized;[46] it can lead to depression and suicidal thoughts;[47] and it can compromise their ability to participate in civil society,[48] including in our legal system.[49] Such treatment from a parent, who a child will look up to for support, especially during difficult formative periods, only aggravates these demonstrated harms (especially since children are a captive audience to their parents in light of parental custody and access rights). This informs why C.D.'s conduct has been held to be abusive — it is not worthy of constitutional protection.

2. Parental Verbal Abuse is Not Protected Speech Because it Undermines the Values of Free Expression

16. The violence innate to abuse is itself sufficient to exclude parental verbal abuse from the scope of constitutionally protected free expression. That said, abuse also fails to advance any of the values of free speech.

17. *Charter* rights are defined purposively, "in the light of the values [they are] meant to protect."[50] In the context of free expression, those values are (1) individual self-fulfillment;

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[44] *Blencoe v. British Columbia*, 2000 SCC 44 at para. 81.

[45] See e.g. *Saadati* at para. 23; *R. v. McCraw*, [1991] 3 S.C.R. 72 at 81.

[46] *Dawson v. Vancouver Police Board (No. 2)*, 2015 BCHRT 54 at para. 197.

[47] *C.F. v. Alberta (Vital Statistics*), 2014 ABQB 237 at para. 46; *X.Y. v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 at paras. 48 & 165-166.

[48] *Oger v. Whatcott (No. 3)*, 2018 BCHRT 183 at para. 39.

[49] *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58 at para. 330.

[50] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 116.

(2) truth-seeking; and (3) political discourse fundamental to democracy.[51]

18. Parental verbal abuse does not serve any of these values. In *Keegstra*, Dickson C.J. held that hate speech "contributes little" to these three values.[52] Targeted abuse of a vulnerable child contributes to them even less. On self-fulfilment, to the extent abusing one's child is 'fulfilling' for a parent, such fulfilment is constitutionally trivial — a perverse notion of self-fulfilment at the expense of a child, and that child's own access to self-fulfilment.[53] On truth-seeking, abusing children is wholly unnecessary for and does not advance the search for the supposed "truth" of gender identity. C.D. is free to participate in societal discussions on gender; he is simply obligated not to abuse his child concurrently. Lastly, on political discourse fundamental to democracy, C.D.'s targeted abuse of his son is a trivial form of political discourse, and certainly not a form of political discourse "fundamental" to Canadian democracy — if anything, child abuse is antithetical to our democratic norms; indeed, "protecting children from harm has become a universally accepted goal."[54]

3. Excluding Parental Verbal Abuse from Protected Speech Does Not Raise Floodgates Concerns

19. C.D. argues that limitations on his abuse are "totalitarian"[55] and constitute censorship of "[u]npopular minority views."[56] But these statements exaggerate the scope of the impugned limitations and misrepresent the scope of speech at issue.

20. The limitations at issue are narrow, anchored not in any particular outlook on gender identity, but rather, on the abusive nature of C.D.'s expressive conduct. Recall that two judges at first instance ruled that C.D.'s behaviour is "family violence", a finding of mixed fact and law that may only be disturbed on appeal based on an exceptional holding

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[51] *Irwin Toy* at 955-956; See also *Whatcott* at para. 65.

[52] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 766.

[53] *Whatcott* at paras. 75 & 114; See also *Keegstra* at 763.

[54] *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 at para. 73.

[55] Appellant's Factum at para. 110.

[56] Appellant's Factum at para. 114.

of “palpable and overriding error.”[57] Thus, limiting C.D.’s expression in this circumstance has a trivial impact on political dialogue, and leaves significant room for ideological divisions in society. Canadians are still permitted to continue their active engagement in public debates surrounding gender identity.[58] And C.D.’s abusive behaviour contributes little, if at all, to this discussion. Recognizing psychological harm does not raise valid concerns of indeterminacy.[59]

C. Limits on Parental Verbal Abuse Are Justified Under Section 1

21. In the alternative, if this Court holds that verbal child abuse is protected speech under s. 2(b), Egale submits that reasonable limitations on such speech are easily justified under s. 1. As explained above, parental verbal abuse, far from advancing the values of free expression, undermines them. It follows that limitations on such abuse are subject to lower scrutiny.[60] And limitations on parental verbal abuse in the nature of those imposed by the courts below satisfy the low level of s. 1 scrutiny to which they are subject.

22. The Court has already recognized that criminal prohibitions on hate speech are justifiable in a free and democratic society.[61] The limits on child abuse raised here are even more readily justified. The Court has upheld hate speech restrictions despite the

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[57] *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 36-37.

[58] See e.g. Lee Airton & Florence Ashley, “Protecting transgender people means protecting our pronouns”, *The Globe & Mail* (May 30, 2017), online: <https://www.theglobeandmail.com/opinion/protecting-transgender-people-means-protecting-our-pronouns/article35149520/>; “'I'm not a bigot' Meet the U of T prof who refuses to use genderless pronouns”, *CBC Radio* (Sept. 30, 2016), online: <https://www.cbc.ca/radio/asithappens/as-it-happens-friday-edition-1.3786140/i-m-not-a-bigot-meet-the-u-of-t-prof-who-refuses-to-use-genderless-pronouns-1.3786144>.

[59] *Saadati* at para. 34.

[60] *Whatcott* at para. 112; See also *Ross v. New Brunswick School District No 15*, [1996] 1 S.C.R. 825 at paras. 82-83 and 87.

[61] *Keegstra* at 787-788.

broadly-held view that hate speech can be regulated through the "marketplace of ideas"[62] (no such marketplace exists in the home). Further, the Court has upheld hate speech restrictions despite the fact that the hate speech in *Whatcott* was a form of "political expression", which is close to the core of s. 2(b)[63] (child abuse is not political expression). Thus, if sanctions against hate speech are justifiable under s. 1, it follows that sanctions against parental verbal abuse are too. Indeed, the competing *Charter* values of equality, privacy, and security of the person — which inform s. 1[64] — oppose transphobic abuse.

23. No floodgates concerns arise here. Hate speech regulations are a "discrete and narrow" limitation,[65] and child abuse limitations are even narrower. In both contexts, the objective "is not to censor ideas or to legislate morality", but rather, "to address harm",[66] the prototypical reasonable limit on individual freedom.

PART 4 – NATURE OF ORDER SOUGHT

24. Egale seeks leave to make oral submissions at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 22nd day of August, 2019.

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[62] *Whatcott* at paras. 102-104.

[63] *Whatcott* at para. 115. Indeed, the form of speech justifiably limited in *Whatcott* — disseminated flyers — is one of the archetypal forms of political expression. See e.g. Vincent Blasi, "Milton's *Areopagitica* and the Modern First Amendment" *Ralph Gregory Elliot First Amendment Lecture* (March 1995), online: <http://fs2.american.edu/dfagel/www/Class%20Readings/WLT%20Readings/Milton%27s%20Areopagitica%20and%20the%20Modern%20First%20Amendment%20by%20Vincent%20Blasi.pdf> citing John Milton, *Areopagitica: a speech of Mr. John Milton for the liberty of unlicensed printing, to the Parliament of England* (London, 1644).

[64] See e.g. *Whatcott* at para. 66.

[65] *Whatcott* at para. 97.

[66] *Whatcott* at para. 110.

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