

Egale Canada

Gender Equality and 2SLGBTQI Rights

Prepared by Egale Canada for CEDAW

Egale Canada (Egale) works to improve the lives of 2SLGBTQI people in Canada and to enhance the global response to LGBTQI issues. We shape public policy, inspire cultural change, and promote human rights and inclusion through research, education, awareness, and legal advocacy. Egale is the only 2SLGBTQI non-governmental civil society organization that supports and monitors Canada's efforts and record to promote global LGBTQI equality. We hold Canada accountable in global human rights spaces. Egale has been engaged in international advocacy since the 1980s, and we have a strong international development team focused on growing and sustaining this work.

Policies and Programs

Since Canada's last review under CEDAW, the Government of Canada has taken many positive steps to lessen discrimination and violence experienced by the 2SLGBTQI community. We have focused in our report on some of the more recent policies and programs that have been developed.

On December 8, 2021, the Government of Canada passed Bill C-4, An Act to amend the Criminal Code (conversion therapy). The Act proclaimed, "it is important to discourage and denounce the provision of conversion therapy in order to protect the human dignity and equality of all Canadians." Bill C-4 criminalized the acts of providing, advertising, and profiting off of conversion therapy practices. While the objective of Bill C-4 is laudable, some scholars have argued that the criminalization has merely pushed providers to go underground, with practitioners using intentionally vague language to describe their services in order to avoid prosecution. While there has yet to be any charges laid under these amendments to the Criminal Code (R.S.C., 1985, c. C-46), more time is needed to assess the true efficacy of Bill C-4.

On August 28, 2022, the Government of Canada launched the first Federal 2SLGBTQI+ Action Plan. The Action plan identifies the following six priority areas for action:

"Prioritize and sustain 2SLGBTQI+ community action;

Continue to advance and strengthen 2SLGBTQI+ rights at home and abroad;

Support Indigenous 2SLGBTQI+ resilience and resurgence;

Engage everyone in Canada in fostering a 2SLGBTQI+ inclusive future;

Strengthen 2SLGBTQI+ data and evidence-based policy making;

Embed 2SLGBTQI+ issues in the work of the Government of Canada."

In order to effectively implement the Action Plan, the Government of Canada committed \$100 million over five years through the 2022 Budget. While the Government of Canada has taken some steps to implement the Action Plan, many commitments have yet to be realized. For example, the Action Plan committed the Government to host public consultations on the "criminalization of purely cosmetic surgeries on intersex children's genitalia [...]," but has failed to host these sessions to date.

In December 2023, the Report of the Employment Equity Act Review Task Force was published, providing guidance on "how to modernize and strengthen the federal Employment Equity Act framework." Having found that the 2SLGBTQI+ community experiences heightened employment discrimination, the report recommended "2SLGBTQI+ workers should comprise a new employment equity group under the Employment Equity Act framework." This recommendation has yet to be implemented by the Government of Canada.

The Supreme Court of Canada [SCC] took judicial notice of the discrimination experienced by gender diverse people in *Hansman v. Neufeld*, 2023 SCC 14. Writing for the majority, Justice Karakatsanis noted "The transgender community is undeniably a marginalized group in Canadian society. The history of transgender individuals in our

country has been marked by discrimination and disadvantage.” In taking judicial notice of transphobia within Canadian society, the Supreme Court acknowledged that the trans community is entitled to the full protection of the law as a marginalized group.

The landscape for 2SLGBTQI rights is not consistent across Canada, however, with stark differences in rhetoric and policy between the federal and provincial governments. On July 1 and August 23, 2023, the government of New Brunswick revised Policy 713, which outlined the minimum requirements needed for schools to create a safe environment for 2SLGBTQI youth. The revised policy requires, “Formal use of preferred first name for transgender or non-binary students under the age of 16 will require parental consent.”

The Government of Saskatchewan followed suit, announcing the Use of Preferred First Name and Pronouns by Students policy on August 22, 2023. This policy was successfully challenged before the Court of King’s Bench for Saskatchewan: Justice Megaw granted an interlocutory injunction on September 28, blocking the implementation and enforcement of the policy. The Government of Saskatchewan responded by enacting the policy through legislation, passing Bill No. 137, An Act to amend The Education Act, 1995 respecting parental rights. S. 197.4(1) mandates, “If a pupil who is under 16 years of age requests that the pupil’s new gender-related preferred name or gender identity be used at school, the pupil’s teachers and other employees of the school shall not use the new gender-related preferred name or gender identity unless consent is first obtained from the pupil’s parent or guardian.” Additionally, the Bill allows parents to withdraw their child from the presentation of sexual education. Significantly, Bill No. 137 was passed using s. 33 of the Constitution Act, 1982, which allows a government to declare that legislation will operate outside of explicitly stated sections of the Canadian Charter of Rights and Freedoms. The section regarding “Consent for change to gender identity” was “declared to operate notwithstanding sections 2, 7 and 15 of the Canadian Charter of Rights and Freedoms.” As such, the “Consent for change to gender identity” provisions cannot be struck down by a court on the basis of having violated fundamental freedoms (s. 2); life, liberty and security of the person (s. 7); or equality rights (s. 15).

On January 31st, 2024, Premier of Alberta Danielle Smith announced a broad package of proposed policies governing trans youth in the province in a video posted to X. The proposed policy is far-reaching, including limitations on access to gender-affirming healthcare for youth, the ability for trans people to participate in gendered sports, curriculum, and the usage of names and pronouns in school. It is anticipated that this policy will be formally introduced in the Fall of 2024, when the Legislative Assembly of Alberta reconvenes.

Recommendations for Action

Ultimately, much has changed in Canada regarding the rights of the 2SLGBTQI community since it was last reviewed under CEDAW, with both positive advancements and worrying regressions. The most distressing trend is the increased politicization of gender diversity alongside the use of the notwithstanding clause to pass controversial legislation that aims to restrict the rights and freedoms of the 2SLGBTQI community. The invocation of this clause limits the types of remedy available to those whose rights and freedoms have been violated, as it restrains courts from providing judicial relief and defers consequences to the election cycle. Though the notwithstanding clause is a part of Canada’s constitutional fabric, it is currently being wielded in a way that threatens the rights of marginalized communities and undermines the checks and balances which maintain a Canadian healthy democracy.