LEAF FAEJ
WOMEN'S LEGAL EDUCATION & ACTION FUND
FONDS D'ACTION ET D'ÉDUCATION JURIDIQUE POUR LES FEMMES

October 13, 2023

Dear Members of the Legislative Assembly of Saskatchewan:

Re: Bill 137 (*The Education (Parents' Bill of Rights) Amendment Act 2023*)

We are writing to you on behalf of the Women's Legal Education and Action Fund (LEAF) to urge you to vote against enacting amendments to *The Education Act, 1995* (the "Act"), proposed in Bill 137, that would require parental consent to respect the proper name and pronouns of youth in schools.[1]

We agree that parents should be involved in their children's lives in healthy, supportive, and respectful ways. Unfortunately, for some children, this is not possible. For them, home is simply not a safe place. The impact of passing this bill as tabled would be to place some of the most vulnerable trans and non-binary youth in Saskatchewan in harm's way.

Even if you are not prepared to vote against these proposed amendments, we strongly urge you to at the very least reject the use of the notwithstanding clause in Bill 137. Invoking the notwithstanding clause will shield the parental consent requirement from scrutiny under certain provisions of the *Canadian Charter of Rights and Freedoms*, including the equality rights provision. **A vote in favour of invoking the notwithstanding clause is a vote in favour of overriding the *Charter* rights of children.**

About LEAF

LEAF is a national, non-profit organization that works towards ensuring the law guarantees substantive equality for all women, girls, trans, and non-binary people. Since its founding in 1985, LEAF has amassed 38 years of experience protecting and promoting gender equality rights, including through litigation, law reform, and public education.

LEAF is the only national organization that exists to use litigation to advance the equality rights of women, girls, trans, and non-binary people. As part of this work, LEAF has acted as an intervener in over 130 cases relevant to advancing substantive gender equality, including the scope of equality rights guaranteed under sections 15 and 28 of the *Charter*. We have appeared before courts across Canada, including in Saskatchewan.

[1] There are other proposed amendments to the *Act* that we equally urge you to reject: namely, the parental right to make decisions as to which courses of study their child enrols in (scl 197.2(e)); and the right to withdraw a pupil from the presentation of sexual health content (scl 197.2(m)(ii)). These proposed amendments will curtail access to vital educational content that can protect and/or empower all youth, and trans and non-binary youth in particular. While we oppose these proposed amendments, the main focus of this letter is the requirement to obtain parental consent before school personnel are permitted to use a student's proper name and/or pronouns.

LEAF has eleven volunteer branches across the country, from Edmonton to Thunder Bay to Halifax. Our broad base of members, supporters, and donors is comprised of women and gender-diverse people of all ages and backgrounds located throughout Canada, including in Saskatchewan.

Bill 137 (Proposed Enactment of scl. 197.2(n) and 197.4(1)-(2) of the *Act*)

Bill 137 proposes to legislate the government's policy called "*Use of Preferred First Name and Pronouns by Students*" (the "Policy"). The Policy only permits school personnel to refer to a trans, non-binary, or gender-diverse student under the age of 16 by their proper name and pronouns if their parent consents. It creates a patently absurd situation: respecting "Jacqueline's" request to be called "Jack" at school does not require parental consent if it is not related to gender identity, but requires parental consent if it is.

The effect of this Policy—which would be enshrined in scl 197.2(n) and 197.4(1)-(2), if Bill 137 is passed as tabled—is to require schools to call trans, non-binary, and gender-diverse students by the wrong names and pronouns unless and until parental consent is obtained. Repeatedly using the wrong name and/or pronouns when addressing someone, especially publicly and in front of their peers, is a profoundly distressing experience for that person that can cause lasting harm to their mental health.

The effect of the Policy is also to out students to their families, even when they're not ready or when it may cause them harm. Coming out to one's family about gender identity is one of the most significant decisions in a person's life. Taking that decision out of a young person's hands and putting it in the hands of the government robs children of the safety to develop their sense of identity on their own timeline. It may cause them real and irreparable harm in their own homes.

For many trans and non-binary students in the province, home is not a safe place. In 2014, more than one third of gender-diverse youth in Saskatchewan and Manitoba only sometimes or rarely felt safe at home. Particularly in this context, **supportive learning environments can be a significant protective factor for students.** 54% percent of trans, non-binary, and gender-diverse students with neither supportive family nor a supportive school environment will experience extreme despair, even with low levels of harassment or discrimination. This rises to 68% in the face of high levels of violence. Being supported at school—even with low levels of support at home—decreases the likelihood of extreme despair to 31%.

In granting an injunction to prohibit the implementation of the Policy pending the hearing of a *Charter* challenge to it, the Saskatchewan Court of King's Bench wrote: "I am satisfied that those individuals affected by this Policy, youth under the age of 16 who are unable to have their name, pronouns, gender diversity, or gender identity, observed in the school will suffer

irreparable harm." The Court granted LEAF leave to intervene in the *Charter* challenge, finding that our expertise "should assist the court in arriving at an appropriate determination of the matters in issue".

Drawing on our expertise in identifying gender-based discrimination, we urge you to acknowledge the evidence-based reality that the proposed legislation will cause material harm to trans, non-binary, and gender-diverse youth, particularly those who do not have supportive families. We know that it is ideal for parents to be involved in their children's lives in nurturing, supportive, and respectful ways. However, not all children have the benefit of that type of relationship with a parent or guardian. More than that, children deserve to have safe, supportive places (such as schools) to explore and define their own identities, without fear that they will be rejected by their families for being who they are – whether or not any consequences they may fear actually come to pass.

In summary, we urge you to vote against enacting these proposed amendments to the *Act*. They constitute a disconcerting targeting of trans, non-binary, and gender-diverse youth, undermining their rights to safety and equality.

The Proposed Use of the Notwithstanding Clause (Proposed Enactment of scl 197.4(3) of the *Act*)

Even if you are not prepared to vote against the proposed amendments requiring parental consent to respect the names and pronouns of youth, we urge you to reject the proposed invocation of the notwithstanding clause. This clause would shield these amendments from *Charter* scrutiny, including the *Charter* rights to equality (section 15), to freedom of expression (section 2(*b*)), and to life, liberty, and security of the person (section 7).[2]

While the parameters of the permissible use of the notwithstanding clause are a matter of ongoing adjudication and legal debate, its use should be exceedingly rare. Former Premier of Alberta Peter Lougheed once said it was to be used in instances "when major matters of public policy were being determined by the court as a result of an interpretation of the *Charter*."[3] This is not one of those instances. No major matter of public policy has been determined by any court. What has happened at this time is that a trial court—not the Saskatchewan Court of Appeal, not the Supreme Court of Canada—has issued a time-limited injunction against the enforcement of the government's Policy pending the trial court's determination of the *Charter* challenge before it. There is no reasonable basis to legislate to override a trial court's time-

[2] We similarly urge you not to shield scl 197.4 from scrutiny under *The Saskatchewan Human Rights Code, 2018*, or from claims for loss or damage resulting from its implementation (scl 197.4(4-6)).
[3] The Honourable Peter Lougheed, "Why a Notwithstanding Clause?" (Prologue by David Schneiderman), Centre for Constitutional Studies, Points of View/Points de vue No. 6 (1998) at p. 4, citing Alberta Hansard, No. 71 (21 November 1983).

limited injunction, let alone to pre-emptively override *Charter* rights. Your constituents agree: 68% of Saskatchewanians would prefer that you allow the courts to review the policy before rushing to overrule it.[4]

In this case, however, even if the Supreme Court had issued a final decision finding the Policy violated the *Charter* rights of trans, non-binary, and gender-diverse youth, it would still be inappropriate to use the notwithstanding clause to override that decision. **The notwithstanding clause should not be used to effectively eradicate the rights of an already-vulnerable population.** As Professor David Schneiderman, former Executive Director of the Centre for Constitutional Studies at the University of Alberta, wrote:

> It can fairly be said that, by virtue of the aims, objectives, and structures of the *Charter*, it would not be appropriate for a legislature to invoke the override where legislation is designed to further disadvantage a disadvantaged group. In other words, the notwithstanding clause should not be used to single out members of a minority group who already are vulnerable to the economic or political power of the majority.[5]

As a legislator, you occupy a position of incredible privilege in Saskatchewan and, more broadly, in Canada. We implore you not to use that privilege to override—especially pre-emptively—the rights of some of the most marginalized people in this province: trans, non-binary, and gender-diverse youth.

As we set out above, a vote in favour of invoking the notwithstanding clause in this context is a vote in favour of overriding the *Charter* rights of children. We sincerely hope that this is not a vote that you are willing to cast.

Sincerely,

Kerry Lynn Okita Board Co-Chair	Hadiya Roderique Board Co-Chair	Pam Hrick Executive Director & General Counsel

[4] Spark*Advocacy, "Canadians are divided on school pronoun mandates", Poll conducted October 4-8, 2023.
[5] The Honourable Peter Lougheed, "Why a Notwithstanding Clause?" (Prologue by David Schneiderman), Centre for Constitutional Studies, Points of View/Points de vue No. 6 (1998) at p. v.