Section 28: Gender Equality

What is Section 28?

Section 28 of the *Charter of Rights and Freedoms* is a special provision of the *Charter* that prioritizes gender equality. The exact words of section 28 are: "Notwithstanding anything else in this *Charter*, the rights and freedoms in it are guaranteed equally to male and female persons."[1]

While section 28 doesn't create a distinct, standalone right to gender equality, it guarantees that all of the rights in the *Charter* are granted equally to men and women. It can be cited along with section 15 (the general equality rights section of the *Charter*) in cases where gender discrimination is at play.[2]

Section 28 and Section 1

Section 28 interacts with section 1 of the *Charter* in a unique way. Section 1 outlines the idea that our rights and freedoms can be justifiably infringed by the state.[3] The *Oakes* test, devised by the Supreme Court in *R v Oakes*,[4] set out a general framework for assessing whether a law or government action that violates a *Charter* right can be justified under section 1.

According to Beverley Baines, the activists who argued (successfully) for the inclusion of section 28 in the *Charter* in the early 80s did so "in order to exempt the right to sex equality from the reach of the section 1 limitations provision."[5] The aim, in other words, was to ensure that gender equality rights could not be justifiably infringed the way that other *Charter* rights could.

However, in practice, section 28 has not protected gender equality rights from infringement but has merely been factored into the courts' section 1 analyses. For example, while the Supreme Court has held that criminal offences that only apply to one sex – like the criminalization "a female person" who commits infanticide[6] — can be justified under section 1, section 28 means that someone accused of such an offence cannot be denied the *Charter* rights and freedoms that are guaranteed to all persons.

On the other hand, the sex of people other than the accused can be a valid justification for infringing *Charter* rights. This was the case in *R v Osolin*, which concerned fair trial rights in the context of a sexual assault trial. There, Justice Cory wrote that "[t]he provisions of section 15 and section 28 of the *Charter* guaranteeing equality to men and women … should be taken into account in determining the reasonable limits that should be placed on the cross-examination of a complainant" in a sexual assault trial.[7] Recognizing that sexual assault is a predominantly gender-based crime that disproportionately victimizes women, Justice Cory held that "[c]ross-examination … which relies upon groundless rape myths and fantasized stereotypes is improper and should not be permitted,"[8] regardless of the impact

that this has on an accused's right to a fair trial.

Section 28 and Section 33

Section 28 is sometimes regarded as the "notwithstanding" clause to the section 33 "notwithstanding clause."[9] Section 33(1) reads as follows: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*."[10]

Provincial and federal governments can use this "notwithstanding clause" to protect a law from *Charter* challenges under section 2 and sections 7 to 15. Notably, section 28 is not mentioned in section 33, suggesting that it is immune to the section 33 notwithstanding clause. Thus, while the notwithstanding clause can be used to override section 15 equality rights, it can't override the requirement under section 28 that the rights and freedoms found in the *Charter* must be guaranteed equally to men and women.

This situation has recently given rise to controversy. In 2019, the Quebec government used the section 33 notwithstanding clause to pass Bill 21, a law that banned certain public sector workers from wearing religious symbols at work. To the extent that Bill 21 disparately impacts Muslim women — if they wish to wear a hijab at work, for example — some scholars have argued that the use of section 33 doesn't shield it from invalidation by the courts.[11] Instead, these scholars claim that section 28 is a shield against section 33.[12] They assert that Bill 21 results in the unequal protection of *Charter* rights for men and women in Quebec, which would be a violation of section 28. Since section 28 can't be overridden by section 33, Bill 21 may accordingly be vulnerable to judicial invalidation.[13]

[1] *Canadian Charter of Rights and Freedoms*, s 28, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[2] *R v Park*, [1995] 2 SCR 836, 99 CCC (3d) 1.

[3] *Charter, supra* note 1, s 1.

[4] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

[5] Beverley Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation" (2005) 17 Canadian J of Women & L 45 at 55.

[6] *Criminal Code*, RSC 1985, c C-46, s 233.

[7] *R v Osolin*, [1993] 4 SCR 595, 109 DLR (4th) 478.

[8] *Ibid*.

[9] Kerri Froc, "Shouting into the Constitutional Void: Section 28 and Bill 21" (2019) 28:4

Const Forum Const 19-22 [Froc].

[10] *Charter, supra* note 1, s 33(1).

[11] See Froc, *supra* note 9.

[12] *Ibid*.

[13] *Ibid*.