Shouting into the Constitutional Void: Section 28 and Bill 21

Kerri A Froc*

For several years now, I have been arguing that section 28 of the *Canadian Charter of Rights and Freedoms*¹ is more than a symbolic flourish, more than just emphasis for section 15's sex equality guarantee, and more than an interpretive provision. In fact, it has its own independent work to do. This includes blocking attempts by government to use section 33 to preserve gender inequality.

I did not make up this interpretation of section 28. Rather, it is part of section 28's text and history and is uncontroversial among those who have studied the matter. That is why I was not only perplexed, but annoyed, at section 28 seemingly being ignored in the debate over the constitutionality of *An Act Respecting the Laicity of the State*² (commonly known as Bill 21). Section 6 of Bill 21 mandates that certain government employees (including school teachers, police, Crown prosecutors and judges) do not wear religious symbols at work, but in effect (if not in purpose) infringes the rights mainly of Muslim women. It is in fact reminiscent of the way that women's rights were ignored in the 1981 constitutional negotiations, which galvanized women to insist upon section 28 in the first place.³ Below, I discuss section 28's interpretation vis a vis section 33, and then how it would be pled in a constitutional challenge to Bill 21.

Section 28's beginning phrase reads: "Notwithstanding anything in this *Charter*." This means its guarantee of equal rights is not to be derogated by other provisions of the *Charter*. Provincial and federal bureaucrats attempted after

the November 1981 "Kitchen Accord" to subject section 28 to section 33. They drafted amendments to section 28 and section 33, notionally to "implement" the terms of the Accord (though first ministers never discussed section 28). The opening words of Section 28 would have been revised to read, "Notwithstanding anything in this *Charter* except section 33," and section 33 would have been amended to end with, "or section 28 of this *Charter* in its application to discrimination based on sex referred to in section 15."⁴ These proposed additions were scrubbed from the *Charter*'s final text through the hard work of feminist advocates, women MPs from all parties, and, angry women from across the country who protested outside in the November cold, wrote, and phoned their governments. This history, however, merely confirms that "notwithstanding anything" means what it plainly says.

In *Canada... Notwithstanding*, Roy Romanow, John Whyte and Howard Leeson (all members of the November 1981 Saskatchewan constitutional delegation) confirmed that the removal of the application of section 33 from section 28 "in effect...meant that sexual equality in section 15 could not be overridden."⁵ Justice Carole Julien, in a 2004 *Charter* case involving pay equity, *Syndicat de la fonction publique c Québec (PG)*, had occasion to discuss the legal effect of section 28. She noted that the predominant scholarly opinion was that the override did not apply to section 28 "due to the historical context of its adoption and its objectives."⁶ It is unfortunate that this judgment was merely (and literally) a passing footnote in the recent Supreme Court

decision, *Centrale des syndicats du Québec v Québec (AG)*.⁷

How would it potentially play out if litigants argued section 28 in relation to the Bill 21 constitutional challenge? There are potentially two *Charter* claims that could be advanced by women who are adversely affected by section 6. The first is that it discriminates against them on the basis of sex, contrary to section 15(1). The second is that section 6 violates their freedom of religion disproportionately, so that women are unable to exercise this freedom on an equal basis with men. Sex discrimination is contrary to *Charter* sections 15(1) and 28; a gender-disproportionate violation of religious freedom would be contrary to sections 2(a) and 28. Section 28 is involved in both claims as section 6 results in unequal rights afforded to men and women. A section 28 violation cannot be preserved using section 33.

One could also use an alternative legal argument in relation to section 15. Quebec could argue that a general sex equality violation, in and of itself, does not implicate section 28 (saying that section 28 does not really “add” anything to the section 15 determination). However, if additional state action is taken to attempt to *preserve* a section 15 sex equality violation by invoking section 33, section 28 operates to block the effect of that invocation. Taking action to preserve women’s section 15 rights violation results in unequal rights contrary to section 28. This is quite applicable to Bill 21, in that section 30 contains a pre-emptive declaration that the Act operates notwithstanding sections 2 and 7-15 of the *Charter*.

Regardless of which argument(s) you accept, the validity of section 6 cannot be maintained by the section 33 override because doing so would mean section 28 is made subject to the legal effect of section 33.

A question I am sometimes asked is: where is the gender inequality in Bill 21? Many media sources have indicated that the group most affected is Muslim women wearing the head scarf (hijab), but they do not indicate the sources they rely upon for that fact. I’ve done some of my

own, preliminary data analysis to provide initial support for that point.

Of the groups mentioned, Muslims are in vastly greater numbers in Quebec than both Jews and Sikhs (men from these two other groups have been mentioned as being the others affected by the law). For the last year in which we have data (2011), there were nearly two and a half times as many Muslims in Quebec as Jews and Sikhs together.⁸ Approximately 53%, of Muslim women in Canada wear the hijab.⁹ Nearly half of Quebec’s workers in the public sector are female (among school teachers, one of the largest groups affected by Bill 21, that percentage is much higher).¹⁰ It stands to reason given these statistics that most of those affected are Muslim women. While some judges may not consider these statistics more than a “web of instinct,”¹¹ this data could be supplemented by access to information requests and litigation disclosure to obtain numbers of affected employees. Further, one could argue that the state demanding women remove clothing has a more threatening import and communicates a sex-specific devaluation, given the way women’s attire has been regulated and judged by law throughout history.¹² Thus one could argue that the qualitative impact constitutes a sex-based distinction in itself.

Even apart from disparate impact, if the purpose of a law is discriminatory or is to privilege certain religious beliefs, then that would be a violation of sections 15(1) and section 2(a) respectively. A good case could be made that Bill 21 targets Muslim women based, for instance, on the Quebec Minister for the Status of Women’s comments that the hijab is a “sign of oppression.”¹³ Concerning the privileging of religious beliefs, it is worth noting that symbols of Quebec’s “religious cultural heritage” (read: Christianity/Catholicism) were specifically exempted in a previous version of Bill 21 (section 17 now reads more neutrally but is to the same effect).

Of course, there are potentially other elements in relation to a *Charter* analysis that would have to be successfully argued, such as showing “disadvantage” for section 15(1) and more than a trivial infringement of religious freedom, for

section 2(a). However, I do not regard those as posing much of an impediment.

In the initial challenge to the law brought by the Canadian Civil Liberties Association *et al.*,¹⁴ section 28 and gender equality were relegated to the supporting role of “context” to claims that included those based on implied bills of rights, unwritten principles, and constitutional architecture. Certainly these claims raise serious constitutional issues. But to me (and, I might add, the Supreme Court of Canada), the written text of the *Charter* can and should have primacy.¹⁵ This is especially so when the case so squarely raises issues of religious women’s equal rights. I thought: if not section 28 in this case, then when?

I am gratified that a group led by Comité Juridique de la Coalition Inclusion Québec brought another challenge to the law in which section 28 features prominently, and that, in the appeal of CCLA’s unsuccessful application for an injunction, the Chief Justice of Quebec recently requested submissions on section 28.

Ultimately, I hope that section 28 contributes to a court decision that Bill 21 cannot be validated through the Quebec government’s invocation of the section 33 override. I hope that there is some judicial acknowledgement that the equality of Muslim women cannot be sacrificed to feed nationalist campaigns based on projections of Muslim threat to Western European cultural identity, as well as what one author has called “femonationalism.”¹⁶ Finally, I am hopeful that this case may be the “big bang” needed to fill the void in Canadian constitutional law with a more meaningful interpretation of section 28’s important equal rights guarantee.

Endnotes

* Kerri A Froc is an Assistant Professor in the Faculty of Law, University of New Brunswick. The original version of this article was published on the *Double Aspect* blog (24 June 2019): doubleaspect.blog/2019/06/24/shouting-into-the-constitutional-void/.

- 1 *Canadian Charter of Rights and Freedoms*, s 28, Part I of the *Constitution Act, 1982*, Being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].
- 2 *An Act Respecting the Laicity of the State*, SQ 2019, c 12.
- 3 See e.g. Kerri A Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms* (PhD Thesis, Queen’s University Faculty of Law, 2015) [unpublished]; Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women’s Press, 1983).
- 4 See Anne F Bayefsky, *Canada’s Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) vol 2 at 911-912.
- 5 Roy Romanow, John Whyte & Howard Leeson, *Canada...Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell, 1984) at 213.
- 6 *Syndicat de la fonction publique c Québec (PG)*, [2004] RJQ 524 at para 1422, 2004 CanLII 656 (Qc SC) [translated by author] (“Ainsi selon les auteurs, en raison du contexte historique de son adoption et des objectifs visés, l’article 28 protégerait de façon particulière le droit à l’égalité des sexes. Le législateur ne pourrait y déroger par application de l’article 33”).
- 7 *Centrale des syndicats du Québec v Québec (AG)*, 2018 SCC 18 at 535, n 1.
- 8 See Statistics Canada, *2011 National Household Survey: Data tables*, Catalogue No 99-010-X2011032 (Ottawa: Statistics Canada, 2013).
- 9 See Environics Institute for Survey Research, *Survey of Muslims in Canada 2016 Final Report* (Toronto: Environics Institute for Survey Research, 2016) at 18.
- 10 See Canada, *Canada’s Fifth Report on the United Nations’ Convention on the Elimination of All Forms of Discrimination against Women* (Ottawa: Government of Canada, 1998) at 136.
- 11 See *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 34 (referring to the evidence required to demonstrate disparate impact under s.15(1) of the *Charter*).
- 12 See e.g. Ruthann Robson, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes* (Cambridge: Cambridge University Press, 2013).
- 13 See Philip Authier, “Quebec Minister for Women Stands by Belief That Hijabs are Oppressive” (6 February 2019), online: *Montreal Gazette* <montrealgazette.com/news/quebec/quebec-minister-for-women-stands-by-belief-that-hijabs-are-oppressive>.

- 14 See Canadian Civil Liberties Association, “Constitutional Challenge and Application for Suspension of the Law” (17 June 2019) at para 138, online (pdf): ccla.org/cclanewsites/wp-content/uploads/2019/07/2019-06-17-Constitutional-Challenge-and-Application-for-Suspension-of-the-Law.pdf. The claim does raise a section 3 claim in relation to another provision of Bill 21, which concerns elected representatives of the National Assembly being required to exercise their functions with their faces uncovered.
- 15 See *Caron v Alberta*, 2015 SCC 56 at para 36; *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 53, 161 DLR (4th) 385.
- 16 See Sara R Farris, *In the Name of Women’s Rights: The Rise of Femonationalism* (Durham: Duke University Press, 2017) (describing the instrumentalization of feminism in service of anti-Islamic and anti-immigration politics and to secure a Western identity that is based on its superiority, including in matters of gender relations).