

The Charter's Forgotten Weapon: Reclaiming Section 28 For Trans Equality

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As trans rights face unprecedented legislative attacks in Canada, courts continue to overlook one of the *Charter's* most powerful equality guarantees. Section 28 demands equal protection across sex — but properly interpreted, it also compels recognition of gender identity and expression. This paper accordingly revives section 28 as a constitutional game-changer: a bold, underused tool to confront anti-trans laws and dismantle sexgender hierarchies.

I. Introduction

“Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons”¹

Across Canada, rising anti-trans legislation has exposed major gaps in constitutional protections for gender-diverse individuals. Although federal and provincial human rights codes now prohibit discrimination based on gender identity and expression,² judicial interpretations of the *Canadian Charter of Rights and Freedoms* (“*Charter*”) fall notably short of these protections. Section 28 of the *Charter*, historically understood to guarantee that each *Charter* right is secured to all persons equally, regardless of sex, has been largely overlooked in constitutional

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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 See *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(1). For provincial human rights protection, see, for example, *Human Rights Code*, RSBC 1996, c 210, s 1; *The Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2, part 3. Also, see generally, *Human Rights Code*, RSBC 1996, c 210; *Alberta Human Rights Act*, RSA 2000, c A-25.5.

litigation. However, a purposive and contemporary analysis reveals that section 28's guarantee of equality is not limited to sex in the binary sense but must also extend to gender, including the full spectrum of gender identities and expressions. Recognizing this broader purpose is critical not only for affirming the constitutional equality of gender-diverse individuals but also for strengthening *Charter* challenges to laws that target trans communities, such as Saskatchewan's *Parents' Bill of Rights*.³

The *Parents' Bill of Rights*, passed in 2023, mandates that school personnel obtain parental consent before recognizing a student under the age of 16 by a chosen name or pronoun.⁴ The legislation pre-emptively invokes section 33 of the *Charter* — the notwithstanding clause — in an attempt to shield itself from constitutional scrutiny under sections 2, 7 and 15.⁵ The current legal challenge against the *Parents' Bill of Rights* (“*UR Pride*”) focuses on its discriminatory impact on transgender and gender-diverse youth, arguing that the law violates section 15 by reinforcing systemic disadvantage and denying equal respect and dignity; section 7 by undermining youth autonomy and security of the person; and section 12 by mandating cruel treatment by the state.⁶ However, section 28, despite its textual guarantee of equality, has not been raised in the current litigation.⁷ This paper argues that invoking section 28 in tandem with other sections of the *Charter* not only offers a novel constitutional litigation pathway, but also strengthens equality claims by requiring courts to interpret all *Charter* rights through a lens of substantive sex and gender equality.

Properly understood through a purposive and contemporary interpretive lens, section 28 of the *Charter* requires the recognition of gender identity and expression as integral to its guarantee of equality — a recognition fundamental to dismantling entrenched sex-gender hierarchies and to realizing the *Charter*'s broader commitment to values of dignity, equality, and inclusion. Section 28 thus offers not only a basis for challenging laws like the *Parents' Bill of Rights*, but a broader interpretive tool applicable to any *Charter* case involving gender.

II. Understanding Section 28: Forgotten but Potentially Powerful

Section 28 occupies a curious position within Canadian constitutional law: despite its central placement within the *Charter*, it has historically been treated as ancillary, even marginal.⁸ In practice, the section is relied upon “[o]n the rare occasion [in order for] a Supreme Court of Canada justice to infuse other *Charter* rights and freedoms with principles of equality.”⁹ In the text of the *Charter*, the section falls under the heading “General” along with six other provisions. It is subtitled on some government sites as “Rights guaranteed equally to both sexes”

3 *The Education (Parents' Bill of Rights) Amendment Act*, SS 2023, c 46 [*Parents' Bill of Rights*].

4 See *ibid.*

5 See *ibid.*

6 See “Brief of Law (*UR Pride*) — Application to Amend” (KBG-RG-01978-2023) at para 9(a) [“Brief of Law”].

7 See *ibid.* (no submissions currently invoke section 28 of the *Charter*).

8 See Cee Strauss, “Section 28's Potential to Guarantee Substantive Gender Equality in *Hak c Procureur général du Québec*” (2021) 33:1 CJWL at 86.

9 *Ibid.* at 88.

(emphasis added) and on others as “*Gender equality rights*” (emphasis added).¹⁰ With these inconsistencies, and the brevity of the section’s wording, it’s no wonder there isn’t much clarity on what the section actually does. Yet, given recent developments, the purpose of section 28 is now being considered more than ever. On top of summarizing its theorized purposes, I respond to this renewed interest in section 28 by considering its scope, how it applies to trans rights, and how it could be one of the most potent legal avenues for supporting trans social justice claims.

Some scholars have argued that section 28 could override the notwithstanding clause. This would mean that section 33 could not be used to validate any law which violates whatever section 28 is determined to be about. Kerri Froc, the leading expert on section 28 when it comes to women’s rights, argues for this. She says, “a principled interpretation of section 28 means that legislatures may not validly invoke section 33 to permit the continued operation of laws violating *women’s equal rights*.”¹¹ Froc argues that the section confers substantive rights in this way, serving as a shield against the notwithstanding clause. This is certainly an interesting possibility, but it’s a discussion that this paper does not have room for.

Within the scope of this paper, however, is the related question of what section 28 purports to protect. Is the scope of the provision in fact, as Froc states, “women’s equal rights,” or does it extend to gender identity? Emmet Macfarlane, a professor of political science at the University of Waterloo, raises this possibility, arguing that if section 28 could neutralize the notwithstanding clause for laws which have a disproportionate impact on sex, it is possible this could be interpreted to extend from sex to gender identity.¹²

This is the focus of Part IV of this paper, below.¹³ Before laying the issue of section 33 to rest, however, I’ll note that if Emmet Macfarlane is correct, then section 28’s application to gender identity could allow for a section 7, 12, or 15 argument to result in the *Parents’ Bill of Rights* being declared of no force and effect, *despite* its use of the notwithstanding clause — an interesting prospect indeed. Still, the question of the scope of the section is relevant to the issue at hand whether or not section 28 can override a notwithstanding clause.

III. Section 28 as an Interpretive Tool for Substantive Equality

Other than overriding the notwithstanding clause, Cee Strauss, a genderqueer lawyer at the forefront of trans rights advocacy, makes a compelling argument that the purpose of section 28 is to serve as an interpretive guide for substantive equality.¹⁴ While Kerri Froc stands firm

10 See respectfully, Government of Canada, “The *Constitution Acts 1867 to 1982*” (27 June 2024), online: <laws-lois.justice.gc.ca/eng/const/page-12.html> [perma.cc/MJD8-HGB4]; “Section 28: Gender Equality Rights” (2 February 2024), online: <justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art28.html#:~:text=Section%2028%20requires%20that%20the,v.> [perma.cc/7EQA-ZBBK].

11 Kerri Froc “Are You Serious? Litigating Section 28 to Defeat the Notwithstanding Clause” 2023 114:1 SCLR at 6 [emphasis added].

12 Emmet Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2020) at 157–59.

13 See also Brandon Harder, “Experts mull whether Sec.18 of *Charter* impacts Sask. Pronoun bill” (30 Oct 2023), online: *Leader Post* <leaderpost.com/news/saskatchewan/experts-mull-whether-section-28-of-charter-could-impact-sask-parents-rights-law> [perma.cc/X8RC-NBXW].

14 See generally Strauss, *supra* note 8.

in her belief that section 28 is more than an interpretive tool, she does not deny that its purpose may, at least in part, be one of interpretive guidance. The following sections, grounded in purposive analysis, argue that extending Cee Straus's interpretation of section 28 to gender identity as well as sex aligns with existing *Charter* methodology and strengthens equality protections in litigation involving trans and gender-diverse individuals. This section outlines the doctrinal framework for purposive constitutional interpretation, while the next section applies that framework to section 28 and argues that its scope must extend beyond binary sex to include the full spectrum of gender identity and expression.

Interpreting the scope of a *Charter* protection goes hand in hand with interpreting its purpose. In this case, we must be able to argue that the purpose of the provision is to include gender identity in the scope of its protection (whatever those protections may be). There have been a few attempts at purposive analyses of section 28 already, most recently by Froc and Strauss, who each grapple with larger questions regarding what method of interpretation should be used for the interpretation of provisions of the *Charter*, generally.

The Supreme Court has long taken a purposive approach to the interpretation of the *Charter*.¹⁵ The overarching rule of early purposivism was “to delineate the nature of the interests [that the right in question] is meant to protect.”¹⁶ While this approach is often associated with the “living tree” doctrine, recent scholarship, including the analyses of Froc and Strauss, urges a “purposive textual” approach that reconciles progressive interpretation with original purpose.¹⁷ This modern methodology, championed by the Court and expanded by jurists such as Judge Barak of Israel's Supreme Court, prioritizes broader, contemporary understandings where there are multiple plausible readings of a right. The result is that the Court now takes the approach of a purposive analysis followed by a broad living tree interpretation: “*Charter* rights ... must be interpreted liberally within the limits that their purposes allow.”¹⁸

Both Strauss and Froc endorse the Supreme Court's shift toward a purposive textual approach that considers both the original meaning of *Charter* provisions and their evolving social context. While Froc champions a “hybrid originalism/new purposivism” and emphasizes historical meaning, Strauss situates section 28 within the Court's purposive textual doctrine.¹⁹ Despite methodological nuances, both scholars converge when it comes to section 28's purpose, suggesting that section 28 serves, in part, as an interpretive guide “that requires judges to choose constitutional interpretations that favour substantive gender equality.”²⁰ This interpretive function becomes particularly important in tandem with section 15. Indeed, section 28 has been cited alongside section 15 in cases of discrimination such as *R v Park* (“*Park*”) in order to serve this purpose.²¹ In *Park*, both sections were cited in relation to discrimina-

15 Spencer Millis, “Purposive Approach to *Charter* Interpretation” (27 July 2020), Centre for Constitutional Studies, online: <<https://www.constitutionalstudies.ca/2020/07/purposive-approach-to-charter-interpretation/>>.

16 Colin Feasby, “The Evolving Approach to *Charter* Interpretation” (2022) 60:1 *Alta L Rev* 35 at 43, citing *Hunter v Southam Inc*, [1984] 2 SCR 145 at 156.

17 See Strauss, *supra* note 8 at 88–91.

18 Feasby, *supra* note 16 at 53.

19 Strauss, *supra* note 8.

20 *Ibid.*

21 Tina Tai, “Section 28: Gender Equality” (16 August 2022), online: <[constitutionalstudies.ca/2022/08/section-28-gender-equality](https://www.constitutionalstudies.ca/2022/08/section-28-gender-equality)> [perma.cc/2GCN-ZGD4]; *R v Park* [1995] 2 SCR 836, 99 CCC (3d) 1.

tion on the basis of a muddled combination of sex and gender, illustrating how section 28 can reinforce and shape the interpretation of *Charter* equality guarantees.²² As gender identity and expression are increasingly recognized as analogous grounds under section 15,²³ section 28's guarantee reinforces the need to interpret all *Charter* rights in a way that affirms the dignity and inclusion of gender-diverse individuals.

Section 28, properly interpreted, strengthens gender discrimination analyses by requiring that all *Charter* rights — including section 15 — be interpreted consistently with a substantive commitment to equality across sex and gender diversity. This would strengthen the argument that gender identity should be recognized as a protected analogous ground. These interpretive dynamics make clear that section 28 can serve as a constitutional bridge between evolving equality claims and foundational *Charter* guarantees. To fulfil this potential, we must turn to the question of whether section 28's guarantee extends beyond binary sex to include gender identity and expression.

IV. Why Section 28 Must Include Gender Identity and Expression

The terms “sex” and “gender” have historically been conflated in their uses in law and in private society, although our understanding of these terms has evolved over time. When it comes to interpreting whether section 28 applies to gender-diverse people, we must ask whether it applies to gender at all, and then whether it applies only to a gender or sex binary.

A. Historical Conflation of “Sex” and “Gender”

Looking at the meaning and use of the word “sex” historically and more recently, it is becoming more and more restrictive as we increasingly separate the word from “gender.” Using the new, more restrictive definition to interpret section 28 would be inconsistent with its purpose. Froc's textual approach includes a solution to the phenomenon of language changing over time like this: taking into account linguistic drift.²⁴ Determining the meaning of the terms used at the time of drafting solves the problem of using a modern, inapplicable term to falsely interpret the purpose of a *Charter* section. Strauss's interpretation method would likely reach the same conclusion by taking into account historical context and textual interpretation. Though Froc believes linguistic drift is not an issue in the *Charter* today,²⁵ sex and gender were not always considered separate concepts, as I'll explain further below.

In fact, the harms and discriminatory outcomes caused by the historical conflation of these terms in law is addressed in Francisco Valdes's article “Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of ‘Sex,’ ‘Gender,’ and ‘Sexual Orientation’ in Euro-American Law and Society.”²⁶ Written in 1995, it explains the origin of the conflation of the terms as

22 *Ibid.*

23 Quebec is the first and, so far, the only province whose Superior Court has recognized gender identity as an analogous ground under section 15 of the *Charter*. See *Centre for Gender Advocacy c Attorney General of Quebec*, 2021 QCCS 191 at para 104.

24 See Froc, *supra* note 11 at 9.

25 See *ibid.*

26 Francisco Valdes, “Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of ‘Sex,’ ‘Gender,’ and ‘Sexual Orientation’ in Euro-American Law and Society” (1995) 83:1 Cal L Rev.

well as the effects of that conflation on European and American societies, the consequences of which include the frustration of efforts to advance protections against sex and gender discrimination. An example of this can be found in Barbara Findlay's 1996 study: when Minnesota became the first US state to enact a statute protecting trans people from discrimination, it did so by conflating the concept of gender identity with that of sexual orientation. "Sexual orientation" was the protected ground, but its definition included "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."²⁷ While probably well-meaning, conflations like this result in rights advancement and complaints being addressed repeatedly by pointing to intersecting identity categories instead of through gender identity as an independent category with its own merit for protection.

Going back to before the 1920s and until the Valdes article was written, the conflation was mainstreamed.²⁸ This would have been the case at the time our Constitution was patriated (and the *Charter* enacted) in 1982. It therefore seems likely that the original meaning of the terms "male" and "female" referred to gender as well as sex — a likelihood that is directly relevant to our understanding of section 28 and its role in combatting anti-trans legislation.

B. Overcoming Binary Language

In an interview, Froc stated that the sexual binary language of section 28 "is another vector of uncertainty in sec[ti]on 28's interpretation to cover trans rights."²⁹ While Froc's expertise and advocacy resides in women's rights, Strauss offers perspective on gender diversity that is not as present in Froc's work. On the topic of the scope of section 28, for example, Strauss concludes that "[s]ection 28 calls on courts to analyze our *Charter* rights and freedoms as though those rights belong to women, Two-Spirit, and non-binary individuals."³⁰ Gender-diverse individuals were not considered in much of Froc's writing on the topic, and therefore, there is a blind spot in her theorizing of section 28. For example, in her explanation of how the purpose of section 28 does not easily relate to trans rights, she came very close to identifying exactly why it *does*:

The purpose of sec[ti]on 28 was to protect the rights of women from being devalued by judges, especially in relation to collective interests of society or competing rights. Part of the purpose was likely related to dismantling sexual hierarchies expressed through law but its purpose is still not an easy fit concerning trans children.³¹

Froc's assessment of the purpose of section 28 seems reasonable and is in alignment with Strauss's categorization of section 28 as an interpretive tool. However, the statement that its purpose does not suit the community at hand was quick. Her stipulation that the purpose of section 28 was related to dismantling sexual hierarchies in law points to a very direct fit concerning trans children, and the protection of gender diversity generally, using Strauss' modified living tree doctrine of constitutional interpretation.

27 Barbara Findlay et al, *Finding Our Place: Transgendered Law Reform Project*, (Vancouver: High Risk Project Society, 1996) at 21.

28 See Valdes, *supra* note 26 at 90.

29 See Harder, *supra* note 13.

30 Strauss, *supra* note 8 at 115.

31 Harder, *supra* note 13.

Froc uses the term “sexual hierarchy” in the quote above to describe part of section 28’s original purpose that may apply to trans people. Breaking down what she meant by “sexual hierarchy” should help in finding that fit, starting with a recognition that “sexual hierarchy” is not a binary concept. Indeed, even if it is understood as referring to a hierarchy of the sexes, then it must include, male, female, and *intersex people* (defined as “bodies that fall outside the strict male/female binary”).³²

C. Section 28 and the Sexgender Hierarchy

Furthermore, noting the conflation of the terms “sex” and “gender,” the phenomenon Froc is describing almost certainly refers to a hierarchy based on sex and gender roles. “Hierarchical gendered divisions” is another term that can describe this dynamic within the private societal system,³³ and which more clearly includes divisions beyond the binary of male and female sexes. There is yet a better term, “sexgender,” which encompasses “a multiplicity of diverse sexes and genders ... [and] explicitly refers to a patriarchal, heteronormative, binary societal structure of power relations” based in the “sex/gender system.”³⁴ This term solves the problem of conflating the two terms by acknowledging them both, while still recognizing that one’s experiences of sex and gender in a patriarchal society are intertwined. Understanding what I would therefore call the sexgender hierarchy involves the understanding that there are societal and power divisions along the spectrums of male and female, masculine and feminine, cis and trans, gender conforming and non-conforming (etc.), and that these divisions are often expressed through law in the public sphere. To me, it is clear that a section referred to by the government as “gender equality rights” which has the purpose of protecting the rights of women (read “people whose identities are not at the top of the sexgender hierarchy”) and dismantling hierarchical sex and gendered divisions should extend to the protection of gender-diverse people. Baumgartinger puts it best: “[T]he goal ‘gender equality’ can only be sustainably achieved if we understand sexgender holistically; that means if the human rights of intersex, trans, and sexgender non-conforming people are included.”³⁵

With this in mind, the argument for not recognizing the inequality between social groups is one that is employed to maintain these hierarchies and depends on “[narrowing] avenues through which people can make social justice claims on the state.”³⁶ This paper outlines how section 28 could be one of the clearest legal and constitutional avenues for supporting trans social justice claims. Evidently, applying section 28 only to the binary of male and female persons would constitute a narrowing of these avenues, and would support the perpetuation of such sexgender hierarchies and inequalities. This approach would contradict Froc’s theory that the purpose of section 28 includes dismantling those hierarchies. Furthermore, the idea of excluding trans people from rights conferred to women because of binary language is con-

32 See Planned Parenthood, “What’s Intersex?,” online: <plannedparenthood.org/learn/gender-identity/sex-gender-identity/whats-intersex> [https://perma.cc/X6LU-K77Z].

33 See Alexa DeGagne, “Protecting Cisnormative Private and Public Spheres: The Canadian Conservative Denunciation of Transgender Rights” (2021) 15:3 *Studies in Social Justice* 497.

34 Persson Perry Baumgartinger, “Transitioning Gender Equality to the Equality of Sexgender Diversity” (2021) 5:5 *Transitioning to Gender Equality* 85 at 85. The phrase “sex/gender system” was coined by Gayle S Rubin, in “The Traffic in Women: Notes on the ‘Political Economy’ of Sex”, online: <philarchive.org/rec/RUBTTI> [perma.cc/CFF5-S9FF] at 34.

35 *Ibid.*

36 DeGagne, *supra* note 33 at 499.

cerningly evocative of discourse among trans-exclusionary radical feminists. Rising against the narrowing of avenues through which social justice claims can be made is also a potential argument for following Strauss's and the Supreme Court's purposive textual interpretation method, as it allows for broader application of *Charter* rights when there is ambiguity. A more originalist approach may narrow the scope of a right and maintain the very same hierarchies that the right supposed to dismantle.

The exclusionary narrowing of concepts caused by binary and conflated language is particularly damaging when used on political and legal platforms, even when intentions are good (e.g. gender equality). As Valdes writes:

[T]his conflation is a highly problematic contrivance that exerts a divisive force on society and a destabilizing influence in law: this conflation embodied, exudes and extends androsexist and heterosexist biases, which engender and accentuate social and sexual rankings and acrimonies in both law and society. In other words, this conflation constitutes and validates hetero-patriarchy.³⁷

When the term “gender” is used as a binary concept, especially when it assumes cis women are the only relevant class (as trans-exclusionary feminists do, for example), it excludes a large population of vulnerable classes of people who do not fit squarely within the binary definitions, “particularly intersex, trans, and sexgender non-conforming people.”³⁸

V. Section 28's Potential: Implications for Trans Rights and *Charter* Litigation

A. Section 28 as a Tool for Inclusion

The urgency of reclaiming section 28's full meaning is underscored by the rise in provincial legislation targeting gender-diverse individuals. Saskatchewan's *Parents' Bill of Rights* and Alberta's *Education Amendment Act*, for example, mandate the forced outing of students to their parents if they wish to use a chosen name or pronouns at school.³⁹ Alberta's recently implemented anti-trans laws also include prohibitions on trans athletes competing in women's sports and restrictions on gender affirming care for youth.⁴⁰

If section 28 is interpreted purposively to extend to gender identity and expression, it could play a crucial role in strengthening constitutional challenges to laws like these. It could do so 1) as a tool to bolster section 7, 15 and 12 arguments and encourage favourable *Charter* interpretations, and 2) as a blockade in the face of section 33's invocation. In both senses, a purposive interpretation of section 28 has the potential to act as an important constitutional protection for marginalized communities.

37 Valdes, *supra* note 26 at 8.

38 Baumgartinger, *supra* note 34 at 85.

39 *Parents' Bill of Rights*, *supra* note 3; *Education Amendment Act*, 2024, SA 2024, c 14 (Alberta).

40 Alberta's *Health Statutes Amendment Act*, 2024, SA 2024, c 10 amended the *Health Professions Act*, RSA 2000, c H-7 to restrict physicians from providing certain gender affirming care to minors. The restrictions conflict with established professional standards of care, which recognize the prohibited treatments as clinically appropriate and necessary in the treatment of transgender youth. The *Fairness and Safety in Sport Act*, SA 2024, c F-2.5, bans trans athletes from competing in women's sports and requires sport organizations to report questions of eligibility to the government.

Even if courts treat section 28 primarily as an interpretive tool, as Strauss suggests, it would nonetheless require judges to favour interpretations of *Charter* rights that promote substantive equality for trans and gender-diverse individuals.⁴¹ Recognizing gender identity and expression within the scope of section 28 would resist the narrowing of equality protections and reinforce the *Charter*'s broader commitment to dismantling entrenched sexgender hierarchies.⁴² By contrast, restricting section 28's application to binary categories of "male" and "female" would perpetuate systemic patterns of exclusion and inequality that the *Charter* was intended to overcome.⁴³

Moreover, using section 28 as an interpretive tool in tandem with a section 15 claim presents a powerful constitutional strategy. Section 15 arguments alone ground equality claims by identifying gender identity and expression as analogous grounds deserving protection.⁴⁴ Invoking section 28 alongside this framework compels courts to interpret *Charter* rights in ways that promote substantive equality, bolstering section 15 claims and shielding them from restrictive or regressive readings.⁴⁵ A combined approach therefore strengthens the constitutional case against laws like the *Parents' Bill of Rights*, both by affirming the harms faced by gender-diverse individuals and by reinforcing the judiciary's obligation to read the *Charter* as a living document committed to inclusion and equality.⁴⁶

Section 28's guarantee of equality must therefore be interpreted consistently with the evolving protections recognized under section 15. Properly understood, section 28 strengthens and deepens section 15's commitment to substantive equality by ensuring that *Charter* rights are not confined within outdated, binary conceptions of sex and gender, but instead protect the full diversity of human experiences.

B. In the Alternative: Section 28 is Exclusionary and Constitutionally Unconstitutional

If section 28 is an interpretive tool, then it must inform *Charter* rights in a manner that is inclusive of all individuals disadvantaged by gender-based hierarchies, not solely those who fit within the binary categories of men or women. A failure to interpret section 28 as extending to gender-diverse individuals would render it deliberately exclusionary, denying a large segment of society the full benefit of *Charter* protections. Such an exclusion would not only contribute to the continued non-acceptance of trans experiences in Canadian law and society but would also fundamentally undermine the *Charter*'s commitment to substantive equality.

Moreover, if gender identity and expression are recognized as analogous grounds under section 15, then an interpretation of section 28 that excludes gender-diverse individuals would be constitutionally incoherent. It would create a direct conflict within the *Charter*, privileg-

41 See Strauss, *supra* note 8.

42 The opposing argument for not recognizing the inequality between social groups is one which is employed to maintain hierarchies and depends on "[narrowing] avenues through which people can make social justice claims on the state." Alexa DeGagne, "Protecting Cisnormative Private and Public Spheres: The Canadian Conservative Denunciation of Transgender Rights" (2021) 15:3 *Studies in Social Justice* at 499.

43 See Valdes, *supra* note 26 at 34–37.

44 See *Egan v Canada*, [1995] 2 SCR 513; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13 (establishing the test for analogous grounds).

45 See Strauss, *supra* note 8.

46 See *Reference Re Same Sex Marriage*, 2004 SCC 79.

ing certain equality claims while negating others, and thereby narrowing the avenues through which marginalized groups can seek justice. In this light, section 28 itself would be rendered internally contradictory and constitutionally suspect: a provision intended to guarantee equality would instead operate to entrench systemic exclusions. Such a result would be inconsistent with the *Charter's* broader purposes and would demand judicial reconsideration or corrective interpretation.