Section 28 of the Canadian Charter of Rights and Freedoms : A Purposive Interpretation

Beverley Baines

Canadian Journal of Women and the Law, Volume 17, Number 1, 2005, pp. 45-70 (Article)

Published by University of Toronto Press
DOI: https://doi.org/10.1353/jwl.2006.0004

Section 28 of the *Canadian Charter of Rights and Freedoms*: A Purposive Interpretation

Beverley Baines

Concerned about substantive equality and intersectionality, a feminist legal scholar recently cautioned against calling on section 28 to help reinvigorate section 15 analysis. This article examines her concerns about section 28 by posing three questions: Why was section 28 added to the Canadian Charter of Rights and Freedoms*? What are the traditional features of section 28 analysis? And, what does a purposive interpretation of section 28 reveal? The responses reveal that its feminist framers intended section 28 to be rights bearing; that traditional analysis has diminished its status to an interpretive provision; and that purposive interpretation suggests section 28 is consistent not only with substantive equality but also with intersectionality. The article concludes by proposing that we treat section 28 as neither independently rights bearing nor dependently interpretive, but rather as independently rights enhancing. In reconsidering the interpretation of section 28, it is also important to reflect on the intergenerational tensions that may surface between the feminists who framed section 28 and those whose exposure to it is more contemporary and mediated through section 15 jurisprudence.*

Une juriste féministe qui s'intéresse à la question de l'égalité substantive et de l'intersectionalité a fait récemment une mise en garde contre l'utilisation de l'article 28 pour aider à revigorer l'analyse fondée sur l'article 15. Le présent article répond à ses préoccupations au sujet de l'article 28 en posant trois questions : pourquoi l'article 28 a-t-il été ajouté à la Charte canadienne des droits et libertés*? Quels sont les éléments classiques d'une analyse fondée sur l'article 28? Que révèle une interprétation téléologique de l'article 28? Les réponses révèlent que les féministes qui ont participé à la rédaction de l'article 28 avaient l'intention que cet article confère des droits, mais que l'analyse classique a réduit son statut à une disposition d'interprétation. Par contre, une interprétation téléologique de l'article 28 laisse voir qu'il est conforme non seulement à l'égalité substantive, mais aussi à l'intersectionalité. L'article conclut en proposant qu'on invoque l'article 28 non pas comme conférant des droits indépendants ni comme simplement interprétatif, mais comme ajoutant aux droits de façon indépendante. En remettant en cause l'interprétation de l'article 28, il importe aussi de réfléchir aux tensions intergénérationnelles qui peuvent survenir entre les féministes qui ont participé à la rédaction de l'article 28 et celles qui en ont pris connaissance plus récemment, par le biais de la jurisprudence concernant l'article 15.*

Introduction

The *Canadian Charter of Rights and Freedoms* contains two sex equality provisions—sections 15 and 28.[1] Until recently, it never occurred to me that there might be any conflict between these sections. I knew the history behind their entrenchment because I was consulted by the feminist activists who lobbied for them. Given the history of legislative and judicial sex discrimination in Canada,[2] these activists had despaired of entrenching a right to sex equality that would make a difference for women. Ultimately, they lobbied for two provisions to emphasize the necessity for a paradigm change. To date, several provincial appellate courts have recognized the importance of an effective constitutional guarantee of sex equality for women.[3] However, the Supreme Court of Canada seems oblivious. Despite two *Charter* provisions, the Court has denied every sex equality claim litigated by women.[4] Preoccupied with the Court's negativity, I would not have taken the possibility of a conflict between sections 15 and 28 seriously had it not been raised by a feminist legal scholar.

---

1. The *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], contains two sex equality provisions—sections 15 and 28—which provide:

   > 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
   > 15. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or economic origin, colour, religion, sex, age or mental or physical disability.
   > 28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

   The *Constitution Act, 1982*, also contains a third sex equality provision—section 35(4)—guaranteeing Aboriginal and treaty rights equally to male and female persons, but this section is not part of the *Charter*.
2. Mary Eberts, "Women and Constitutional Renewal" at 3, and Beverley Baines, "Women, Human Rights and the Constitution" at 31, in Audrey Doerr and Micheline Carrier, eds., *Women and the Constitution in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981).
3. For example, *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (OCA); *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993) 101 D.L.R. (4th) 224 (NSSCAD) [*Sparks*]; *Falkiner v. Ontario*, [2002] O.J. No. 1771 (OCA) [*Falkiner*]; *Trociuk v. British Columbia* (2001), 200 D.L.R. (4th) 685 (BCCA) [*Trociuk*].
4. *Symes v. Canada*, [1993] 4 S.C.R. 695 [*Symes*]; *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 [*NWAC*]; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 241 [*Thibaudeau*]; *Vancouver Society of Immigrant and Visible Minority Women v. Canada*, [1999] 1 S.C.R [*VSIVMW*]; and *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees* 2004 S.C.C. 66 [*NAPE*].

However, Sonia Lawrence examines the relationship between these sections and voices two concerns.[5] One focuses on the meaning of equality and the other on the significance of gender. First, she worries that if section 28 were to be interpreted in terms of formal equality, it might provide fodder for an even more formalistic interpretation of section 15. Then she warns that if section 28 were to be construed as promoting the primacy of gender, it would create a hierarchy of oppressions and likely compromise claims based on intersectionality. These concerns are significant and explain why Lawrence cautions against calling on section 28 to help reinvigorate section 15 analysis.

In this article, I want to address her concerns. Since she begins with a historical approach, I adopt the same approach. More specifically, I pose three questions. Why was section 28 added to the *Charter*? What are the traditional features of section 28 analysis? And what does a purposive interpretation of section 28 reveal? I contend that section 28 was intended to be rights bearing; that traditional analysis has diminished its status to an interpretive provision; and that a purposive interpretation suggests section 28 is consistent not only with substantive equality but also with intersectionality. Therefore, my conclusion is that we would be justified in reassessing the rights-bearing potential of section 28.

Ultimately, my perspective on the historical development of section 28 is shaped by being present when feminist activists lobbied for it. Accordingly, when I was told that the intentions of its feminist ''framers'' should not govern the interpretation of section 28, I was shocked. This was a defining moment for me. Thus I conclude with a reflection about this claim for discarding the feminist ''framers'' intentions for section 28. I suggest that this claim represents a larger issue, namely how to resolve intergenerational differences between feminist activists and scholars who advocate legal changes and their counterparts who follow afterwards.

Historical Background

Why was section 28 added to the *Charter*? From the perspective of the feminist activists who framed and lobbied for it, the answer is simple. It was added because, even though section 15 (originally section 7) had been ''strengthened'' in early 1981, they did not believe it would protect the right to sex equality. More specifically, they did not believe that the wording of

5. Sonia N. Lawrence, ''Equality's Shield? Notes on the Promise and Peril of Section 28,'' presented at the Women's Legal Education and Action Fund (LEAF) Colloquium, In Pursuit of Substantive Equality Colloquium, Toronto, 19 September 2003.

the section was adequate to the task of persuading the Supreme Court of Canada judges, all fifty-seven of whom had been male appointees, to recognize women's entitlement to sex equality. Among the many reasons for their distrust, four stand out.

First was the fact that the Supreme Court of Canada had denied that women were persons when the Canadian government sought a ruling about whether women were eligible for appointment to the Canadian Senate.[6] This decision, which involved interpreting the word "persons" in section 24 of the *Constitution Act, 1867*, was overturned on appeal to the Judicial Committee of the Privy Council in England,[7] which was the court of last resort for Canadian matters until 1949. Even the Judicial Committee caviled, however, ruling that women were "persons" only if a contrary intention did not appear in the legislation. Thus, men always are persons, while women's personhood is hostage to legislative directive.

Second, over the years some very prominent male members of Canada's Parliament have voiced opinions stereotyping women and supporting our subordinate status. After Justice Minister Davie Fulton added a prohibition against sex discrimination to the *Canadian Bill of Rights* in 1960,[8] he undermined its inclusion at the committee hearing into the bill, stating: "I do feel that the expression . . . would not be interpreted by the courts so as to say we are making men and women equal, because men and women are not equal: they are different."[9] This was not an isolated incident. For example, equally denigrating comments were made in November 1980 before another Parliamentary committee hearing, this time the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada. At the end of the presentation by the National Action Committee on the Status of Women and immediately before the submission from the Canadian Advisory Council on the Status of Women, the co-chair of the committee, Senator Harry Hayes, took it upon himself to emphasize the importance of continuing to subordinate women.[10] The fact that a federal

6. *In the Matter of a Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867*, [1928] S.C.R. 276.
7. *Henrietta Muir Edwards and Others v. Attorney-General for Canada*, [1930] A.C. 124 (JCPC) [*Persons*].
8. *Canadian Bill of Rights*, S.C. 1960, c. 44.
9. Eberts, *supra* note 2 at 10 and Baines, *supra* note 2 at 41, citing Canada, Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, Numbers 1 to 12 (July 12–29, 1960), 643.
10. Beverley Baines, "Law, Gender, Equality," in Sandra Burt, Lorraine Code, and Lindsay Dorney, eds., *Changing Patterns: Women in Canada* (Toronto: McClelland & Stewart, 1993), 2d., 243 at 263, citing Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes and Proceedings of Evidence*, 32nd Parliament, 1980, 1st session, Issue no. 9 at 75, which reported Co-Chair Senator Hayes, as stating: "We want to thank the National Action Committee on the Status of Women for

Royal Commission on the Status of Women had reported to Parliament[11] midway between these two sexist incidents did not appear to have penetrated co-chair Hayes's consciousness. However, the Royal Commission's report was omnipresent to the feminist activists who doubted section 15's potential to protect women's right to sex equality.

The third reason for distrusting the equality guarantee even after section 15 was "strengthened" by changing its title from non-discrimination rights to equality rights and by increasing it from two equality clauses to four was because it would be interpreted by judges, just as Justice Minister Fulton had warned about the *Canadian Bill of Rights* twenty-one years earlier. Judges rely on the process of common law legal reasoning that is founded on precedent and *stare decisis*. Feminist activists and legal scholars knew that the only precedents for interpreting equality rights derived from *Canadian Bill of Rights* and statutory human rights jurisprudence, neither of which had served women well. The former had justified a sexist interracial marriage regulation and a pregnancy discrimination law, while the latter had upheld single-sex recreational sports leagues for children.[12] Feminists feared judges would use the separate-but-equal principle (or formal equality) to deny women's equality claims. Nothing about the wording of section 15, not even the four equality clauses, could dispel this foreboding (which I have argued elsewhere has come to pass).[13]

Finally, feminist activists and scholars did not believe that section 15 offered sex as much protection as it provided for claims based on race, national or ethnic origin, colour, and perhaps religion. This belief derived from the positioning of sex after these other five grounds and just before age in the listing of protected grounds. Their belief was not frivolous or spurious; rather it was founded on American Fourteenth Amendment jurisprudence, in which the United States Supreme Court had created a hierarchy of protected equality claims—with race, national or ethnic origin, and colour receiving the most protection, and age receiving the least.[14] Sometimes the US court

being present today and for your brief. We appreciate your coming and as a matter of fact we are honoured. However, your time is up and I was wondering why we do not have a section in here for babies and children. All you girls are going to be working and we are not going to have anybody to look after them."

11. Royal Commission on the Status of Women in Canada, *Report* (Ottawa: Information Canada, 1970).
12. *Attorney-General for Canada v. Lavell and Bedard*, [1974] S.C.R. 1349 (interracial marriage sex discrimination); *Bliss v. Attorney-General of Canada*, [1979] 1 S.C.R. 183 (pregnancy discrimination); *Cummings v. Ontario Minor Hockey Association*, (1979), 26 O.R. (2d) 7 (OCA); and *Ontario Rural Softball Association v. Bannerman* (1979), 26 O.R. (2d) 134 (CA) (single-sex recreational sports leagues).
13. Beverley Baines, "Is Substantive Equality a Constitutional Doctrine," in Ysolde Gendreau, ed., *La doctrine et le développement du droit/Developing Law with Doctrine* (Montreal: Les Editions Thémis, 2005 forthcoming), 59.
14. See Baines, "Women, Human Rights and the Constitution," *supra* note 2 at 52; and Eberts, *supra* note 2 at 12.

treated sex-based claims minimally, as if they were analogous to age-based claims that justified virtually total deference to legislatures. Less often, sex-based classifications were held to a somewhat higher level of scrutiny than age. However, the American court had never treated sex as a suspect classification that called for a compelling justification, which was the level of scrutiny given to legislative classifications based on race, national or ethnic origin, and colour. In other words, legislatures could justify subordinating women by invoking a reasonable or an important reason. Thus, the American Supreme Court subscribed to a hierarchy of equality rights, which Canadian feminists rejected because it offered women less equality rights protection than was provided for some of the other marginalized groups.

These were the critical historical factors that led feminist activists to perceive that section 15 would be inadequate in guaranteeing sex equality. They began to lobby for an independent provision not unlike the American Equal Rights Amendment, which was still enmeshed in the ratification process.[15] I tried to persuade them to phrase this independent provision in terms of women, contending that "the proscribed classification, women, should be used to emphasize that it is women who have been traditionally, and who continue to be, disadvantaged with respect to the legal status of personhood because of gender."[16] My suggestion did not prevail. However, they did reject "sex," opting instead for "male and female persons." In doing so, they sought to exorcize the distinction between men's personhood (absolute) and women's (qualified or even extinguished if a contrary intention appears in the legislation), which had been created by the decision of the Judicial Committee of the Privy Council in the *Persons* case.[17]

15. The most recent American Equal Rights Amendment (ERA) ultimately failed the ratification process in June 1982: Mary Frances Berry, *Why ERA Failed: Politics, Women's Rights and the Amending Process of the Constitution* (Bloomington: Indiana University Press, 1986) at 81; Jane J. Mansbridge, *Why We Lost the ERA* (Chicago: University of Chicago Press, 1986); and Joan Hoff-Wilson, ed., *Rights of Passage: The Past and Future of the ERA* (Bloomington: Indiana University Press, 1986).
16. Baines, "Women, Human Rights and the Constitution," *supra* note 2 at 55–6, continuing: "In view of the startling inability of the courts to recognize when a gender classification has been used, it seems to be necessary also to provide that a law would be construed as classifying on the basis of womanhood when only, but not necessarily all, women and no men are included in or excluded from the law in question." The question of whether to express a Bill of Rights equality provision in terms of women rather than sex or gender was debated by Reg Graycar, Jenny Morgan, and Hilary Charlesworth, "Equality for Women under the Constitution?" lecture given at the Women's Constitutional Convention, Canberra, Australia, January 1998, available online at <http://www.women-sconv.dynamite.com.au/threept.htm> (date accessed: 20 September 2002, but no longer available).
17. *Persons*, *supra* note 7.

Moreover, these feminist activists were adamant about the positioning of this new sex-equality provision. They argued that it should appear in section 1 of the *Charter* to counter the limitations clause. In a meeting on 18 March, 1981, at which I was present, Ministry of Justice officials Fred Jordan and Edythe MacDonald met with feminist activists Suzanne Boivin, Marilou McPhedran, and Tamra Thomson and worked out a compromise.[18] The proposed provision could not appear in section 1 but rather in a new section 28 that would open with the words: "Notwithstanding anything in this Charter." This clause was understood by all present as having the same effect as if the provision had appeared in section 1. No other section of the *Charter* starts with such powerful and sweeping words. Two other sections that come close, sections 29 and 31, begin with "Nothing in this Charter." Whatever the intention behind the drafting of these latter sections, the intention of those who negotiated the opening words of section 28 was mainly to provide relief against the limitations clause in section 1. If a testament to the accuracy of this intention is necessary, it can derive from the events that transpired in November 1981 when the override provision, section 33, first saw the light of day and caused feminist activists to rally yet again to exempt section 28 from its reach.[19]

What remains are two questions about the scope of section 28. First, did the feminist framers believe they were drafting a rights-bearing or an interpretive provision? Interestingly, my impression is that this question was never discussed because the answer was so self-evident, partly because they had so completely rejected the *Canadian Bill of Rights* sex-equality jurisprudence. Since this jurisprudence was founded on the notion that the Bill had only interpretive force and did not extend to justifying judicial review of federal legislation, it was not adequate to the task of providing a remedy against legislated sex discrimination. Mainly, however, the answer seemed self-evident because the feminist framers of section 28 viewed section 15 with such distrust that they did not believe it would be capable of offering a remedy against legislated sex discrimination. Thus, it was inevitable that these framers, and the legion of feminists who stood behind them, intended section 28 to be rights bearing.

Furthermore, only if section 28 is construed as rights bearing does it make any sense to ask the second question about its scope—namely whether the feminist framers sought special protection for sex equality? As phrased, this question ignores the framers' starting point, which was to challenge the prevailing hierarchy that treated sex discrimination as less heinous than some

18. Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Press, 1983) at 75.
19. *Ibid.* at 83–95.

other forms of discrimination. Clearly, they were worried that multicultural heritage, which is protected in section 27, might be used to justify the unequal treatment of women. The feminist framers had in mind what has recently been identified as the "paradox of multicultural vulnerability" by Ayelet Shachar.[20] By this paradox, she meant "the ironic fact that individuals inside the group can be injured by the very reforms that are designed to promote their status as group members in the accommodating, multicultural state."[21] Even without knowing its evocative label, however, the feminist framers understood women's vulnerability in the context of some multicultural groups, particularly religious groups. Religions that refuse to accept women as priests or that grant the unilateral right of divorce only to men exemplify this paradox. Thus, the feminist framers wanted section 28 to protect women from the hierarchies inherent in the paradox—that is, they wanted religious and other multicultural groups to receive state support only when they subscribed to egalitarian relationships between women and men.

Traditional Analysis

What are the traditional features of section 28 analysis? On the one hand, it is a misnomer to refer to the "traditional" approach to this section. Despite intermittent efforts to invoke it over more than two decades, section 28 has never received more than a passing glance from the courts. For instance, the Supreme Court of Canada has mentioned it in fourteen cases, virtually all of which were criminal matters, without developing any analysis of it.[22] Nor is the literature any more forthcoming than the jurisprudence. Aside from two early writings,[23] there is no sustained commentary about section 28. On the other hand, such references as there are reveal a common thread: jurists and commentators alike treat section 28 as if it were an interpretive provision.

---

20. Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001) at 3.
21. *Ibid.*
22. *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Hess*, [1990] 2 S.C.R. 906 [*Hess*]; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Osolin*, [1993] 4 S.C.R. 595; *Symes, supra* note 4; *NWAC, supra* note 4; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Esau*, [1997] 2 S.C.R. 777; *New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Darrach*, [2000] 2 S.C.R. 443; and *R. v. Shearing*, [2002] 3 S.C.R. 33.
23. Kome, *supra* note 18; and Katherine J. de Jong, "Sexual Equality: Interpreting Section 28," in Anne F. Bayefsky and Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 493.

Such provisions are not typical of constitutional laws. We expect constitutions to provide rights, whether to political institutions such as legislatures or to individuals and groups seeking protection from the state. Nevertheless, scholars such as William Pentney (who may have been the earliest) have argued that a number of *Charter* provisions are interpretive.[24] "The Charter contains several explicit interpretation sections which," Pentney maintains, "can be resorted to as aids in the construction of the substantive guarantees."[25] He specifically identifies sections 25 to 29 as "interpretive guides."[26] Based on the structure of the *Charter*, he reasons: "These sections are grouped under a single heading (General), which is separate from the substantive guarantees."[27] Furthermore, since all "apply with reference to other rights or freedoms; they do not stand alone either as merely symbolic statements or as independently enforceable guarantees."[28] In other words, Pentney distinguishes interpretive provisions from those that are rights bearing (that is, independent). And he relies on this distinction to restrict these sections, including section 28, to functioning interpretively (that is, dependently).

Thus, we need to understand the operation of interpretive provisions. According to Pentney, they operate in one of two ways, which he represents metaphorically as either shields or prisms.[29] As shields, interpretive provisions function "to preserve existing rights guaranteed by or under the Constitution (or other law, in the case of section 26) from diminution or obliteration by other Charter rights."[30] As shields, in other words, interpretive provisions impose limits on *Charter* rights. Pentney refers to sections 25 and 29, in addition to section 26, as provisions that limit *Charter* rights and, hence, function as shields preserving other constitutional rights.[31] Yet he does not describe section 28 as a shield. Rather, he sees it performing the alternative interpretive function, which is to operate as a prism.[32]

According to Pentney, an interpretive provision acts as a prism when it "alters the content or scope of a right guaranteed by the Charter."[33] What does "alters" mean in this context? It is ambiguous. On the one hand, prisms

24. William F. Pentney, "Interpreting the Charter: General Principles," in Gerald-A. Beaudoin and Ed Ratushny. eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1989) 21 at 39–51.
25. *Ibid.* at 39.
26. *Ibid.*
27. *Ibid.*
28. *Ibid.*
29. *Ibid.* at 43.
30. *Ibid.*
31. *Ibid.* at 47.
32. *Ibid.* at 50.
33. *Ibid.* at 43.

cannot "limit" *Charter* rights because Pentney already assigns that function to shields. On the other hand, if "alters" connotes the opposite of "limiting" rights, which would be to "broaden" them, then we encounter a further complication. How can we justify empowering prisms, which are by definition not rights bearing, to "broaden" other *Charter* provisions that are rights bearing? There is no discourse or jurisprudence to suggest that some *Charter* rights might require assistance on the ground that they guarantee less comprehensive protection than other rights offer. Thus, the function prisms serve must be something other than "broadening" *Charter* rights if we want to avoid jeopardizing the distinction between interpretive and rights-bearing provisions. Given that section 28 operates as a prism, I propose to examine its application as a basis for understanding what function prisms actually serve.

First, however, I want to take up a different and equally significant issue that Pentney addresses. This issue concerns interpretive provisions and applies irrespective of whether they operate as shields or prisms. Does relegating provisions to interpretive status not diminish their importance? This question does not admit of an easy answer especially in the constitutional context where, as I noted earlier, virtually all provisions are rights bearing. Nevertheless, Pentney has some success in countering this concern. "Denominational school rights, multiculturalism, other existing rights and aboriginal rights are," he explains, "all a reflection of the unique fabric of Canadian society."[34] Thus, these interpretive provisions are significant because they represent the "embodiment of Canadian values and traditions."[35]

Yet Pentney makes no reference in this particular context to section 28. Is there nothing uniquely Canadian about gender equality? Does this mean that the status of section 28 is more vulnerable to diminution than that of the other interpretive provisions? Pentney maintains the importance of section 28. He attributes its salvation to the fact that "its unique wording may lead to a separate manner of application."[36] He focuses, in other words, on the legal arrangements evoked by section 28. Specifically, its importance as an interpretive provision derives from its relationships with other *Charter* provisions, particularly sections 1 and 33. According to Pentney, these relationships pose two controversies: (1) does section 28 trump the section 1 limitations clause and (2) is section 28 exempt from the section 33 override, to which I propose to add a third consideration: (3) what is the relationship between section 28 and section 27? In the remainder of this section of the

34. *Ibid.*
35. *Ibid.*
36. *Ibid.* at 40.

article, I will set out these controversies partly to illustrate what happens when section 28 is construed as an interpretive provision that acts like a prism and partly to serve as the basis for distinguishing interpretive provisions that function as prisms from those that function as shields.

Section 28 and Section 1

Does section 28 trump section 1? It is surprising that this question has surfaced, given the historical developments that led to section 28. The feminist activists who framed this section negotiated that its opening clause would be: "Notwithstanding anything in this Charter." They insisted on this clause—the precise wording of which is unique to section 28—in order to exempt the right to sex equality from the reach of the section 1 limitations provision. However, interpretivists have challenged this rendering. They claim that the wording of section 28 does not preclude imposing section 1 limits on the right to sex equality. Thus, this controversy has arisen over the relationship between section 28 and section 1.

In *Equality Rights and the Canadian Charter of Rights and Freedoms*, Mary Eberts[37] and Katherine J. de Jong[38] illustrate the opposing sides in this controversy. Both draw on John D. Whyte's exposition of the alternatives, which he describes as a contest between "net rights" and "bald rights."[39] On the one hand, the "net rights" theory to which Mary Eberts subscribes "would see section 28 applied to the rights of section 15 as qualified by section 1."[40] On the other hand, de Jong contends that "Section 28 guarantees equality with respect to the 'bald rights' prior to the operation of any restriction under section one."[41] According to de Jong, the role of section 28 was "to supplant the reasonableness standard adopted in section 1 whenever the rights and freedoms it is being applied to are enjoyed unequally on the basis of sex."[42] Eberts disagrees, suggesting it was neither "likely or desirable that a regime would develop in which no deviations from an 'equality' standard were permissible."[43]

Although these alternatives were propounded almost twenty years ago, the Supreme Court of Canada has never addressed, let alone resolved, them.

37. Mary Eberts, "Sex-based Discrimination and the Charter," in Anne F. Bayefsky and Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 183 at 215–16.
38. De Jong, *supra* note 23 at 524–5.
39. John D. Whyte, "The Effect of the Charter of Rights on Non-Criminal Law and Administration" (1982) 3 Canadian Human Rights Reporter C/82-10–11.
40. Eberts, "Sex-based Discrimination," *supra* note 37 at 215.
41. De Jong, *supra* note 23 at 524.
42. *Ibid.* at 525.
43. Eberts, "Sex-based Discrimination," *supra* note 37 at 215.

Indeed, the Court is not very receptive to the claims of equality seekers in general. In 2001, Sheilah Martin reported that "around seventy percent of equality cases are dismissed because a breach of section 15 has not been established."[44] This conclusion continues to hold true for the Court's more recent decisions.[45] If we focus on the ten section 15(1) sex-equality cases that the Court has decided, five (or six) were dismissed at the section 15(1) stage[46] and one was converted to a different ground,[47] leaving only four (or three) where breaches of section 15(1) resulted in section 1 analysis.[48] Thus, the Court has rarely presented any occasion in which the relationship between sections 1 and 28 might be raised.

Moreover, feminists would have had no reason to invoke section 28 in two of the four sex-equality cases that reached the section 1 stage.[49] In *Weatherall v. Canada*, the Court used section 1 to uphold a sex-differentiated, cross-gender guarding policy that male inmates had challenged; while in *Benner v. Canada*, section 1 did not save the Canadian government's policy of treating Canadian mothers of children born abroad as more dangerous purveyors of citizenship than their male counterparts. However, section 28 could have played a role in *Trociuk v. British Columbia,* when the Court denied that section 1 could save the provision that allowed mothers to register the surnames of their newborn children.[50] Since the Court treated Mr. Trociuk's formal equality complaint as exhausting section 15(1)[51] and since a lower court had compelled the mother, Reni Ernst, to become a defendant,[52] why did the judges not recognize that Ms. Ernst might have a claim for substantive equality under section 28? Given that the Court of Appeal had upheld her equality argument, albeit not under section 28,[53] how could the Supreme Court of Canada completely ignore it?

---

44. Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Canadian Bar Review 299 at 306.
45. Baines, "Constitutional Doctrine," *supra* note 13.
46. *Hess, supra* note 22; *Symes, supra* note 4; *N WAC, supra* note 4; *Thibaudeau, supra* note 4; and *VSIVMW, supra* note 4. In *Weatherall v. Canada*, [1993] 2 S.C.R. 872 [*Weatherall*], the Court opined: "It is also doubtful that s. 15(1) is violated."
47. *Schachter v. Canada*, [1992] 2 S.C.R. 679.
48. *Benner v. Canada*, [1997] 1 S.C.R. 358 [*Benner*]; *Trociuk v. British Columbia,* 2003 S.C.C. 34 [*Trociuk* 2003]; *NAPE, supra* note 4; with the ambiguous case being *Weatherall, supra* note 46.
49. In *Weatherall*, *supra* note 46, section 1 justified different cross-gender guarding policies for male and female prisoners; while in *Benner*, *supra* note 48, section 1 did not save a provision that treated mothers as more dangerous purveyors of citizenship than fathers.
50. *Trociuk* 2003*, supra* note 48.
51. Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill Law Journal 627 at 644–5.
52. *T. (D.W.) v. British Columbia* (1999), 214 W.A.C. 5.
53. Two of the three Court of Appeal judges did advert to Ms. Ernst's equality argument in their opinions: *Trociuk, supra* note 3 at para. 84 (Southin J.A. referring to the rights of single mothers) and at para. 186 (Newbury J.A. referring to the harms of forced public disclosure of paternity).

My objective is not to insist that the novelty of juxtaposing sections 15 and 28 is justified by the novelty of forcing a woman to become a defendant in a *Charter*-based sex-equality complaint initiated by a man. Rather, *Trociuk* provides a realistic hypothetical to sustain my contention for recognition of the potential that section 28 offers. Moreover, when the Supreme Court of Canada ignored this section in *Trociuk*, the justices also missed a perfect opportunity to analyze its meaning without incurring the hierarchy of rights critique. Had the Court credited Ms. Ernst with a substantive equality argument under section 28, it could have illuminated and checked Mr. Trociuk's all too neat and tidy formal equality argument without trenching in any way on any other prohibited grounds. This approach would have enabled section 28 to shift the analysis from the formal to the substantive equality principle, hence, truly broadening the meaning of the right to sex equality in section 15(1). And, more importantly, it would have obviated resorting to the limitations clause in section 1 because section 28 would have already provided the Court with a justification—protecting women's substantive equality—for upholding the legislation.

If it was surprising that the Court did not evoke[54] section 28 in *Trociuk*, it was even more troubling that this section remained unrecognized in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (NAPE)*, the Court's most recent decision involving sections 15(1) and 1.[55] In *NAPE*, female employees in the health care sector challenged the decision of the government of Newfoundland and Labrador to renege on its commitment to end pay discrimination. After enacting pay equity legislation, this government deferred it and extinguished the arrears. The Arbitration Board and all three levels of court found that section 15 was violated on the ground of sex equality. However, the courts, including the Supreme Court of Canada, also held that the impugned legislation was justifiable under the section 1 limitations clause. The government claimed that a fiscal crisis existed, and the courts accepted that this argument about budgetary constraints was reasonable without ever adverting to section 28.

Had this section been invoked in *NAPE*, however, it would not have operated to broaden section 15(1). The equality seekers had already made a completely successful equality rights argument under section 15(1). Nothing further was required to show that the government had violated the equality rights of the female employees in the health sector in Newfoundland and Labrador. If section 28 had been invoked in *NAPE*, its force would have been directed entirely towards section 1. Had it functioned effectively,

54. Irrespective of whether counsel raised section 28, judges are presumed to know the law.
55. *NAPE, supra* note 4.

in other words, section 28 would have limited the reach of the section 1 limitations clause. Therefore, it would have preserved, but not broadened, the equality guarantee in section 15(1).

Section 28 and Section 33

Is section 28 exempt from the section 33 override? This question is also surprising in light of the political events that followed immediately upon the creation of section 33 in November 1981. Moreover, like the controversy about sections 28 and 1, there is as yet no resolution in the controversy about sections 28 and 33. Again, there is no pertinent Supreme Court of Canada jurisprudence. However, this lacuna does not mean that we should be complicit in allowing the relationship between sections 28 and 33 to remain unrecognized and unresolved. Despite popular cautions about resorting to section 33, governments have made significant use of its override mechanism, invoking it sixteen times in addition to its omnibus use in Québec between 1982 and 1985.[56] On five of these occasions, moreover, the override mechanism has preserved provisions that treated women differently from men. Specifically, Québec invoked it five times to ensure that women teachers and civil servants were eligible for pension benefits two to five years earlier than men.[57] And this legislation is contemporaneous, having been "renewed once, twice, three or four times," such that it "will expire in 2006."[58]

More questionably, Québec's resort to the section 33 override on these five occasions was preemptive—that is, it was invoked "in order to prevent judicial review altogether."[59] Obviously, such preemption appears to immunize this legislation from a section 28, or even section a 15(1), challenge. Thus, we are left only to speculate about the course that might be followed were a non-preemptive—that is, a remedial—use of section 33 to be adopted by a government.

Hypothetically, the government might still have opted "to re-enact legislation struck down by a court,"[60] if men had successfully invoked formal equality under section 15(1) to challenge these gendered pension-benefit eligibility rules. The rationale for using section 33 would have remained one

56. Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter" (2001) 44 Canadian Public Administration 255 at 256. Although Kahana used "notwithstanding" to designate section 33, I prefer to use "override" in order to emphasize the distinction (to which he did not advert) between sections 33 and 28.
57. *Ibid.* at 282, note 5.
58. *Ibid.* at 259.
59. *Ibid.* at 256.
60. *Ibid.*

of saving money, irrespective of the fact that it would be at women's expense. Consequently, feminists would have had to find a way, presumably by initiating litigation, to challenge the section 33 override. Since men had already relied on section 15(1), these feminists might have turned to section 28, arguing that substantive equality should protect women from the harm of gendered pension-benefit eligibility rules that effectively curtail their lifetime earning potentials.

However, their success would not be measured by establishing that the women's section 28 substantive equality argument complemented the men's section 15(1) formal equality claim. Such a conclusion would not end the story. Rather, the real question would be whether section 28, unlike section 15(1), had the power to exempt this hypothetically successful challenge to the gendered pension benefit eligibility rules from the section 33 override. Ranged on one side would be the government, defending the application of section 33 by referring to the objects of the *Charter* (providing rights and limits); and, on the other side, feminists, pointing both to the history of the removal of section 28 from the reach of the section 33 override and to the language of section 33, which names the specific sections that may be overridden without referring therein to section 28. That is, feminists would call upon section 28 to forestall the application of the override clause in section 33. Thus, they would not seek to invoke section 28 to broaden the right to sex equality guaranteed in section 15(1), although if the former section functioned successfully it would also have the effect of preserving the right contained in the latter.

Section 28 and Section 27

What is the relationship between section 28 and section 27? Perspective is crucial when responding to this question. On the one side are the commentators who allege that section 28 limits section 27. If it is perceived as limiting section 27, someone will be sure to disparage section 28 as creating a hierarchy of rights, noting that several judges have stepped forward to pronounce their distaste for such claims.[61] However, these judicial comments that reflect negatively on hierarchies of rights refer only to rights' competitions that were entirely internal to section 15(1). In reality, the *Charter* is silent about the relationships, if any, between or among its various rights and freedoms provisions. Arguably, therefore, treating section 28 as if it limits section 27 may not violate either the wording or the spirit of the *Charter*.

61. *Lavoie v. Canada*, 2002 S.C.C. 23 at para. 51 (Bastarache J.) [*Lavoie*]; and *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 46 (Sopinka J.).

On the other side, however, are the feminists who argue that the relationship between section 28 and section 27 is not a competition. They take their lead from the Ad Hoc Conference on Canadian Women and the Constitution, which, in February 1981, called for the clause that ultimately became section 28. More specifically, "Ad Hocers" argued not for the primacy of gender but rather for it to be taken as seriously as the other prohibited grounds of discrimination.[62] With respect to section 27, they sought "to ensure that the multiculturalism clause . . . not be interpreted so as to limit the guarantee of equality regardless of sex in clause 15."[63] Their objective was to challenge hierarchy, not to create it. Recognizing what has since become known as the "paradox of multicultural vulnerability,"[64] "Ad Hocers" and the feminists who followed them aspired to incorporate the guarantee of sex equality into the promise of multiculturalism. Far from being novel, moreover, their approach directly parallels that of the Aboriginal peoples who accepted the guarantee of sex equality in section 35 of the *Constitution Act, 1982*.[65]

Since section 27 is found among the provisions construed as interpretive, not rights bearing, the procedural difficulties of relating section 28 to it are considerable. Suffice it to say that in the foreseeable future governments are unlikely to impose discriminatory multicultural beliefs on women in general, although the exemptions in statutory human rights laws for special interest (religious) organizations come perilously close to doing precisely that. Or again, some may see the debate in Ontario over private religious family law arbitrations as evidence to the contrary, while others would not.[66]

Certainly, the reverse has already occurred. That is, sex equality has been used to justify limiting multicultural (religious) beliefs. For example, the federal government relies on sex discrimination to justify criminalizing polygamy even though it is an acceptable practice in some multicultural (religious) contexts. Still, it is unclear if a provision such as the polygamy prohibition would survive a *Charter* challenge. Crown attorneys currently refuse to prosecute polygamy fearing that it would be found to violate the *Charter*. An analogous challenge actually occurred in Québec where some public school dress codes banned religious attire (for example, the Islamic hijab and so on). This complaint resulted in a decision by Québec's Human Rights Commission, which ruled that the religious dress ban violated the provincial *Charter of Human Rights and Freedoms*.[67]

62. Eberts, "Sex-based Discrimination," *supra* note 37 at 202.
63. *Ibid.*
64. See text accompanying notes 20 and 21 in this article.
65. *Constitution Act, 1982, supra* note 1.
66. Ayelet Shachar, "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50 McGill Law Journal 49 at 61.
67. *Ibid.* at 60; *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12.

The foregoing examples illustrate some of the questions that might compel judges to begin to analyze the relationship between section 28 and section 27. Assuming they were to take an interpretive approach to both sections as Pentney suggests, litigants would have to rely on another provision—a rights-bearing provision—to initiate the *Charter* challenge. The provision most likely to lead to the invocation of sections 27 and 28 would be section 15(1) and, in particular, its guarantee of sex equality. However, the only reason to invoke section 27 in this context would be to limit an otherwise successful sex-equality argument. That is, section 27 would be asked to operate as an interpretive shield limiting the right to sex equality. In this hypothetical situation, therefore, the role that would fall to section 28 would be that of countering the impact of section 27. Under these circumstances, section 28 would function to preserve the section 15(1) right to sex equality, albeit without in any way broadening it.

Shield or Prism?

The foregoing survey of the mostly hypothetical applications of section 28 suggests that it does not function like a shield or a prism as Pentney defines them. Since it does not impose limits on *Charter* rights, it does not act like a shield. On the other hand, it does not operate like a prism either because prisms alter *Charter* rights whereas the provisions that section 28 is called upon to alter—sections 1, 27, and 33—are not rights bearing. To the contrary, these provisions serve as *Charter* limits. Therefore, either section 28 is not an interpretive provision or prisms must be re-conceptualized to take account of how this section operates.

The latter seems the more feasible starting point, especially since section 28 is the only example of an interpretive prism that Pentney gives. Interpretively speaking, we have three different illustrations of how this section operates. Section 28 has the potential to require that the limitations, multiculturalism, and override clauses not discriminate on the ground of sex. In other words, it constrains sections 1, 27, and 33 to the extent necessary to ensure respect for the *Charter*'s guarantee of sex equality. If section 28 exemplifies how an interpretive prism works, therefore, it tells us that they operate to limit *Charter* limits.

Not only is this function clearly distinguishable from that of interpretive shields that impose limits on *Charter* rights but it also provides a new way of understanding interpretive prisms, portraying them as altering the scope and content of *Charter* limits. However, instead of altering *Charter* rights as Pentney suggests, prisms preserve them. Moreover, since altering and preserving are distinctive activities, there is no need to justify empowering interpretive prisms, which by definition are not rights bearing, to "preserve" other *Charter* provisions that are rights bearing. In other words, prisms pose

no threat to the distinction between provisions that are interpretive and those that are rights bearing. Accordingly, we are free to construe section 28 as an interpretive provision that operates as a prism—limiting *Charter* limits and preserving *Charter* rights—without jeopardizing either the distinction between shields and prisms or the distinction between interpretive and rights-bearing provisions.

Purposive Interpretation

What does a purposive interpretation of section 28 reveal? In this section of the article, I apply a purposive interpretation to section 28 to address the two issues that Lawrence raises. One issue is whether section 28 is consistent with substantive equality and the other concerns whether section 28 promotes intersectionality. I conclude that, purposively interpreted, section 28 promotes both substantive equality and intersectionality. In the next section of this article, I develop the rights-bearing implications of this conclusion.

Before proceeding, two preliminary matters should be addressed. One involves explaining purposive interpretation. In *Hunter v. Southam*, Dickson C.J. held that purposive interpretation is the "proper approach to the interpretation of the Canadian Charter of Rights and Freedoms."[68] Identifying the purpose of a *Charter* provision requires judges "to delineate the nature of the interests it is meant to protect."[69] The chief justice traces the lineage of purposive interpretation back to the "living tree" or "large and liberal" interpretation that Viscount Sankey adopted in the *Persons* case.[70] In contrast, Dickson C.J. rejects "tabulated legalism,"[71] while Viscount Sankey disparages "a narrow and technical construction."[72] Neither made any reference to the intentions of the drafters—that is, to what Americans denote as "originalism."[73]

In *R. v. Big M Drug Mart Ltd.*, Dickson C.J. elaborates upon the analysis required to sustain purposive interpretation, setting out its essential features as follows:

> In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the

68. *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 157 [*Hunter*].
69. *Ibid.*
70. *Persons, supra* note 7 at 136–7.
71. *Hunter, supra* note 68 at 156.
72. *Ibid.*
73. Robin Elliott, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Canadian Bar Review 67 at 72.

> character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.[74]

In sum, *Charter* objects, rights language, conceptual analysis, and associated provisions are essential to purposive interpretation.

The other preliminary matter involves the scope of purposive interpretation. Is there any reason not to interpret section 28 purposively? The jurisprudence is ambiguous. On the one hand, *Hunter* refers to interpreting *Charter* provisions, presumably irrespective of whether they articulate rights, freedoms, limits, or interpretive analysis. On the other hand, *Big M Drug Mart* specifically addresses the construction of *Charter* rights or freedoms. However, since judges have not hesitated to interpret the limitations clause in section 1 purposively, there does not appear to be any reason to distinguish interpretive provisions. Moreover, it would be putting the cart before the horse to classify section 28 as an interpretive provision and then to rely on this classification to immunize it from purposive interpretation. Rather, purposive interpretation should be the starting point. If purposively interpreted, therefore, is section 28 consistent with substantive equality and with intersectionality?

Section 28 and Substantive Equality

Is section 28 consistent with substantive equality? If the prohibition against sex discrimination in section 15(1) is consistent with the principle of substantive equality, why would anyone attribute a different principle—formal equality—to the promise of sex equality in section 28? After all, both sections are governed by the same *Charter* objects, which are usually defined as respect for human dignity. Similarly, both sections enshrine the same concept—equality—that Chief Justice Beverley McLachlin has described as jurisprudentially founded on "the rock of substantive or material equality, as contrasted with formal Aristotelian equality."[75] Moreover, after the chief justice traced the lineage of substantive equality back to liberal German scholars of the Weimar Republic, she adds that in recent decades it

74. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344 [*Big M*].
75. The Right Honourable Beverley McLachlin, "Equality: The Most Difficult Right" (2001) 14 Supreme Court Law Reporter (2d) 17 at 21.

"has been affirmed throughout Europe, as well as in Canada, Israel and South Africa."[76] Expressing her acceptance of substantive equality as the "governing legal paradigm," she maintains: "It is here to stay. We can count on it."

In the face of such categorical conceptual analysis at the highest level of our judiciary, it is hard to find reasons for limiting substantive equality to section 15(1). Two reasons will suffice to illustrate why such efforts are problematic. One reason looks at the language differences between the two sections contending that the wording of section 28 is more formalistic. More specifically, this contention derives from a comparison of the phrase "male and female persons" in section 28 with the word "sex" in section 15(1). In the abstract, however, the former seems no more or less formal, or substantive, than the latter. If it matters, moreover, the intentions of the feminists who drafted section 28 were always to strengthen and not diminish the force of the sex equality guarantee in section 15(1). Thus, the claim for linguistic distinction seems inconclusive, if not completely unsupportable.

The second reason for limiting substantive equality to section 15(1) is that reading it into section 28 would make the latter redundant. This claim also is unpersuasive given that even the interpretive approach justifies treating section 28 as serving a rights-preserving function that is not served by section 15(1). In addition, as two of my illustrations reveal in the next part of this article—one involving *Trociuk* and the other Québec's gendered pension benefits eligibility rules—section 28 remains available to women claiming substantive equality where men have relied on formal equality to sustain their section 15(1) claims. Indeed, I have argued elsewhere, as have other feminist legal scholars, that notwithstanding its substantive equality rhetoric, the Supreme Court of Canada seems content to rely on formal equality as the basis for finding a violation of the sex-equality guarantee in section 15(1).[77] If we are right then, and I wish it were otherwise, section 15(1) has already been formalistically interpreted while section 28 waits in the wings to introduce substantive equality into the Court's jurisprudence.

However, my argument that a purposive interpretation of section 28 is consistent with substantive equality does not depend on section 15(1) being relegated to the formal equality camp. Rather, I contend that both sections can sustain interpretations based on substantive equality because they serve different functions. In the first place, they can play complementary roles when section 28 serves interpretively as a prism to preserve the right to sex

76. *Ibid.*
77. *Benner, supra* note 48; *Trociuk* 2003*, supra* note 48; and *NAPE, supra* note 4.

equality in section 15(1) in the face of limitations deriving from sections 1, 27, and 33. And in the second place, as I explain next, section 28 could also complement section 15(1)'s role in promoting intersectionality.

Section 28 and Intersectionality

Does section 28 promote intersectionality? We should not fool ourselves. Irrespective of assigning any such role to section 28, the Supreme Court of Canada has never recognized intersectionality despite deciding three equality cases involving Aboriginal, visible minority, and national origin claims by women.[78] The Court is mired in categorical analysis, forcing litigants to choose among the personal characteristics that have led to their unequal treatment. Only two provincial appellate courts, Nova Scotia in 1993 and Ontario in 2002,[79] have ever tried to reconcile the categorical imperatives—expressed or analogized—in section 15(1) with litigants' real life experiences of intersectional discrimination.

Perhaps one day enlightenment will happen. Until then, I suggest we should explore the feasibility of advocating intersectional claims that include sex-based inequalities by combining section 15(1) grounds other than sex with the promise of sex equality in section 28. The Native Women's Association of Canada (NWAC) set a precedent for such an approach by invoking their right to sex equality in section 28 to enhance their claim for freedom of expression under section 2(b).[80] They were successful at the Federal Court of Appeal where Justice Patrick Mahoney held that

> by inviting and funding the participants of those organizations in the current constitutional review process and excluding the equal participation of NWAC, the Canadian government has accorded the advocates of male-dominated aboriginal self-governments a preferred position in the exercise of an expressive activity, the freedom of which is guaranteed everyone by paragraph 2(b) and which is, by section 28, guaranteed equally to men and women.[81]

Writing the male majority decision at the Supreme Court of Canada, Justice John Sopinka decided that the evidence did not support the claim that the NWAC had made under sections 2(b) and 28.[82] However, Sopinka J. did not deny that section 28 might work in tandem

78. *NWAC, supra* note 4; *VSIVMW, supra* note 4; and *Lavoie, supra* note 61.
79. *Sparks, supra* note 3; and *Falkiner, supra* note 3.
80. *NWAC, supra* note 4.
81. *Native Women's Association of Canada v. Canada*, [1992] 3 F.C. 192 at para. 28.
82. *NWAC, supra* note 4 at paras. LVI-LXXII.

with section 2(b) to reach an outcome that neither could achieve alone. In other words, he did not rule out the possibility that the function of section 28 could extend beyond rights preserving to rights bearing or at least to rights enhancing. Moreover, if section 28 could enhance the right to freedom of expression in section 2(b), why not other *Charter* rights and freedoms, including the equality rights in section 15(1)?

De Jong may have been prescient when she analogized the interpretation of section 28 to the way in which the European Court of Human Rights had construed Article 14 of the European Convention on Human Rights,[83] concluding that Canadian judges should read the *Charter* "as though section 28 were the 'last paragraph' of each section."[84] According to de Jong, "[t]he standard of equal protection required by section 28 thus becomes a substantive element of each right and freedom referred to in the Charter."[85] Her conclusion may be borne out over time. For now, however, what remains is to explain how to use sections 28 and 15(1) to litigate women's intersectionality.

Put simply, an intersectionality claim could be founded on invoking the right to sex equality in section 28 to enhance the equality rights guaranteed in section 15(1) on grounds other than sex. For example, the NWAC could have reinforced their section 15(1) claim by also relying on section 28. They would have been able to use their Aboriginal status to give rise to a race-equality argument under section 15(1),[86] and then to address the sex equality component of their claim by turning to the guarantee of sex equality promised in section 28 rather than trying to figure out how to call on a second ground in section 15(1). Moreover, were section 28 thus to complement section 15(1), it would respect the intentions of the feminist activists who lobbied for section 28. Recall their concern, which was not to install gender as primary. To the contrary, their objective was to ensure women's inequalities did not get trumped, diminished, or overlooked.

Is this argument for combining section 28's commitment to sex equality with section 15(1) grounds other than sex to sustain women's intersectional claims consistent with a purposive interpretation of section 28? I submit that it is, as evinced by applying the four features—*Charter* objects, rights language, conceptual analysis, and associated provisions—that *Big M Drug Mart* ascribed to purposive interpretation. First, it enables women to

83. *Convention for the Protection of Human Rights and Fundamental Freedoms* (1955), 213 U.N.T.S. 221.
84. De Jong, *supra* note 23 at 521–2.
85. *Ibid.*
86. Like the NWAC, the Aboriginal claimants in *Corbiere v. Canada*, [1999] 2 S.C.R. 203, and *Lovelace v. Ontario*, [2000] 1 S.C.R. 190, also invoked section 15(1).

advance intersectional claims in keeping with the *Charter* object of promoting respect for human dignity. Second, there is nothing about the language of section 28 that would preclude its promise of sex equality from being used in tandem with an equality right based on another ground such as the one found in section 15(1). Third, as I have already argued earlier, interpreting section 28 in terms of substantive equality is historically and conceptually sound. Finally, combining section 28 with claims for intersectionality under section 15(1) would address the association between these sections, revealing that neither section need be condemned as redundant in spite of the other's existence. Moreover, perceiving them as complementary would also rescue judges from trying to forge artificial and fragmentary relationships between the grounds listed within section 15(1) and/or the grounds analogous to those listed, particularly given judicial proclivity to disparage and dismiss relationships internal to section 15(1) as hierarchical.

Conclusion

Since the Supreme Court of Canada has yet to explain why the *Charter* contains two sex equality provisions, scope remains for construing section 28 as its feminist framers intended, namely as an independent rights-bearing provision. For instance, section 28 could guarantee substantive equality to women when men invoke section 15(1) formal equality to achieve outcomes that will subordinate women (as in *Trociuk*). Alternatively if, as interpretivists maintain, section 28 must be read as a dependent interpretive provision, then it must operate only after section 15(1) has been exhausted. If section 28 is to have any function, therefore, it must be to preclude sections 1, 27, and 33 from discriminating on the ground of sex.

In other words, one day the Court will have to confront the choice between treating section 28 as guaranteeing the right to sex equality or as imposing limits on other *Charter* limits. Hopefully, the judges will find this choice too stark. Why should they have to choose between construing section 28 as independent and rights bearing or as dependent and interpretive? They will have to traffic either in existing rights or in their limits to give meaning to section 28, satisfying either the feminist framers or the interpretivists respectively but not both.

In the last part of this article, I tried to develop a third possibility, one that flows from purposively interpreting section 28 as consistent with substantive equality and with intersectionality. This possibility could not be resolved by treating section 28 as either rights bearing and independent or as rights preserving and dependent because litigating intersectionality by combining section 28 with section 15(1) would mean the former is all but rights bearing while remaining virtually dependent. Accepting that section 28

might be simultaneously rights bearing and dependent would collapse the distinction between provisions that are rights bearing and those that are interpretive. To resolve this dilemma, therefore, I argue for a third possibility, one in which section 28 is rights enhancing (not rights bearing or rights preserving) and interdependent (neither dependent nor independent).

To illustrate, what if being rights bearing and independent formed one end of a continuum that has being dependent and rights preserving at the other end? The former would house *Charter* rights and freedoms, while the latter would hold interpretive provisions. Continuing, what if section 28 could multi-task? That is, what if section 28 could fall not only at either end of this continuum, depending on the issue and the context, but also at its mid-point? Might this mid-point not be conceptualized as a site for *Charter* provisions that are neither rights bearing nor rights preserving but rather rights enhancing? Further, might this mid-point be reserved for provisions that are neither dependent nor independent but rather interdependent? Finally, might women's intersectionality present the paradigmatic illustration of an interdependent and rights-enhancing section 28 claim?

What difficulties are posed by interpreting section 28 as an interdependent and rights-enhancing *Charter* provision? I can think of four possible downsides. One is that section 15(1) would no longer dominate *Charter* equality jurisprudence. Since this section has failed to serve women well when sex equality is at issue, however, I see little reason to preserve its monopoly over equality litigation. Another downside is that the right to sex equality in section 15(1) might become redundant, which would become troubling if substantive equality analysis morphed from rhetoric to reality. Still, we could do worse than follow the lead of interpretivists who claim that we should sequence equality claims. They invoke section 15(1) first and call upon section 28 only if its assistance proves necessary.

A third downside is that sex-equality litigation might become more complex, given the availability of two provisions. However, perhaps such complexity is precisely what is called for to get past its current dismal prognosis. For instance, with two provisions, judges could hardly continue to avoid defining substantive equality, a practice that presently leaves them free not only to mis-identify formal equality analysis as substantive but also to assume that men can claim substantive equality. A final downside to construing section 28 as not locked into being either interpretive or rights bearing is that acceptance of its new status as interdependent and rights enhancing would require not only interpretivists, but also its feminist framers, to compromise. If their compromises resulted in section 28 becoming a more effective sex-equality provision, at least feminists might feel vindicated.

In fact, early feminist commentary portrayed section 28 as a viable litigation strategy. "Already, dozens—perhaps hundreds of lawyers and lay women are researching uses for sections 28 and 15," Penney Kome wrote in 1983, "and their preliminary reports . . . indicate that section 28 could be a very powerful tool for implementing women's rights and social change."[87] Yet this promise never materialized. Nor is it likely to, absent recourse to feminist legal activism. For starters, feminist lawyers and scholars should question its status as an interpretive provision. Next, they might examine its potential to promote substantive equality and intersectionality. Ultimately, their efforts might yield another defining moment if, for example, purposive interpretation were to go some distance towards sustaining the intentions of the feminists who framed section 28.

At some point, therefore, we need to reflect on the significance of the intentions of the feminist activists—framers, supporters, and lobbyists—who participated in the entrenchment of section 28. Who better than these activists to explain why it was necessary to argue for the inclusion of this section in March and then in November, to demand its exclusion from the section 33 override? Nevertheless, some feminists maintain that we should no more allow feminist activists' intentions to govern the interpretation of section 28 than we would allow the intentions of drafters of other constitutional provisions to govern their interpretation.

Perhaps I am wrong but I am impatient with this claim. In my eyes, it is a claim about sameness (or formal equality) that is being raised in a context—the *Charter* guarantees of sex equality—in which we would normally discard sameness claims in favour of substantive equality.[88] If women are not men's equals substantively, why do we suddenly become the same as male drafters when constitutional interpretation is at stake? Put differently, should it make a difference when the impugned intentions are not those of male power holders but rather those of feminist activists? Given the dearth of feminist-framed constitutional provisions, not only now but also in the foreseeable future, little practical opportunity exists—other than the one presented by section 28—to reflect on this question in our lifetimes.

Notwithstanding my impatience, however, I do respect one argument for not treating the intentions of the feminist activists who lobbied for section 28 as determinative. If feminists who were not born or who were too young to participate when section 28 was being drafted now question its interpretation, I believe their foremothers should listen. I am moved,

87. Kome, *supra* note 18 at 111.
88. *Andrews v. The Law Society of Upper Canada*, [1989] 1 S.C.R. 143.

therefore, by the claim for intergenerational equality among feminists. The fortuity of being involved in the process that led to the entrenchment of section 28 should not give feminist activists, including me, any interpretive advantages over feminists who were unavoidably absent. If neither generation should prevail over the other, both (or is it all) generations should begin to talk about section 28. And Lawrence deserves recognition for initiating this dialogue in the face of almost two decades of silence.