

Is it Time to Dust-Off Section 28 of the Charter?

Introduction

Quebec has passed Bill 21, *An Act Respecting the Laicity of the State* (“the Act”) which bans some public sector workers from wearing religious symbols while on the job. The Act uses the notwithstanding clause of the *Charter* which means the Act remains in force despite potential *Charter* violations, of which there are at least a few.^[1] However, section 28, the gender equality requirement of the *Charter*, which states that the rights guaranteed in the *Charter* must apply equally to men and women, may be the basis for a constitutional challenge to the Act. The notwithstanding clause does not apply to this section. While this section is not often used to challenge laws, the new Quebec law may provide an optimal opportunity to test its powers.

What is the Gender Equality Requirement?

Section 28, which for clarity sake, will be called the gender equality requirement, states: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons”.^[2] Unlike section 15, the [equality rights](#) section of the *Charter*, the gender equality requirement only protects rights guaranteed in the *Charter*, not equality rights generally.^[3]

To date, legal scholars have questioned the usefulness of this section.^[4] It has not been used in any landmark gender equality cases. Gender equality rights are typically argued under the equality rights section (s 15) of the *Charter*.^[5] However, constitutional legal scholar Peter Hogg suggests that the gender equality requirement is actually stronger than the equality rights section for two reasons:

- The notwithstanding clause does not apply to section 28;
- The government may not be able to justify a law under section 1, the justification clause, which would allow an act to remain in force even if there were a violation of gender equality rights if section 28 were to be invoked.^[6]

The fact that the notwithstanding clause does not apply to the gender equality requirement was the result of a hard-fought movement by Canadian women as part of the patriation process for Canada’s Constitution. Women lobbied to ensure their equality rights were properly reflected in the *Charter*. The initial successful fight was to ensure that both equality rights (s 15) and the gender equality requirement (s 28) were included in the *Charter*. However, at the end of negotiations, the notwithstanding clause had been applied to both those sections, making them powerless once the notwithstanding clause was used. Women then fought to have sections 15 and 28 removed from the reach of the notwithstanding clause. They were unsuccessful with section 15, but did successfully free

section 28 from the notwithstanding clause.

The equality rights requirement, as it is written, may mean that even where a law is passed that uses the notwithstanding clause and therefore allows for the infringement of certain *Charter* rights, it may not be able to do so in a way that has a disproportionate effect on one gender.^[7]

There is an argument that Quebec's most recent use of the notwithstanding clause has a disproportionate effect against women. This would be a violation of the gender equality requirement.

What is An Act Respecting the Laicity of the State?

The Act

Quebec's new Act is based on the desire to separate church and state.^[8] The Act bans some public employees, including teachers, judges, and police officers from wearing religious symbols while on the job.^[9] It also makes promotion impossible for those who continue to wear these symbols. Additionally, persons receiving public services must have their face uncovered when receiving the service.^[10] For example, a Muslim woman wearing a niqab would have to remove the cloth covering her face to ride public transit.

The Act invokes the *Charter's* [notwithstanding clause](#) which allows an Act to continue in force even if it infringes on certain *Charter* rights. These rights include fundamental freedoms, liberty rights, and equality rights.^[11] In order to use this clause, the government must clearly state in the law itself that the law will operate despite its potential *Charter* violations. The power of the clause only lasts for five years. If the clause is not re-enacted after this period, the notwithstanding clause no longer applies to it.^[12]

The Issues

The Act has received enormous backlash due to its impact on *Charter* rights. The Act likely infringes on individuals' [freedom of religion](#) and their equality rights because the ability to freely practice religion, at least while in certain jobs, has been significantly impacted.

In terms of the limit on freedom of religion, the Act forbids individuals in a number of public service positions from wearing religious symbols, which, for many religions, is part of their religious practice. The Act could also violate equality rights on the basis of sex and religion, both protected grounds under the *Charter*, because it discriminates against people of specific religions who wear religious symbols, many of whom are women. People who do not associate with any religion do not have to face the same hurdles to work in these positions.

The use of the notwithstanding clause means the Act remains in force despite the fact that it likely infringes on these *Charter*-protected rights.

The Gender Equality Requirement vs the Notwithstanding Clause

The gender equality requirement may be used to find the Act's use of the notwithstanding clause to be unconstitutional. The notwithstanding clause will violate the gender equality requirement if it is found that, as a result of the clause, the Act applies disproportionately to one gender over the other - that the rights guaranteed in the *Charter* are not being applied equally to men and women.

There are strong arguments to be made that the use of the notwithstanding clause in the Act will allow discrimination against women, and more specifically, Muslim women. The population of Muslim people in Quebec, is much greater than it is for other religious populations such as Jews and Sikhs.^[13] Muslim women are more affected by the Act due to the type of religious symbols they wear, such as niqabs, hijabs and burkas.

Legal scholar Kerri Froc argues the disproportionate effect of the Act is clear: "No one appears to be denying that Muslim women are disproportionately affected by Bill 21, regardless of fact that it applies to other religious clothing/symbols. This is an unequal violation of s.2(a), over and above Bill 21's discriminatory purpose and effect."^[14] As a result, more women than men will have to remove their religious symbols to work certain jobs or use public services.

The use of the notwithstanding clause is therefore allowing the violation of equality rights guaranteed in the *Charter*. Men will not face the discrimination Muslim women do when it comes to working and living in Quebec because of the use of the notwithstanding clause. The notwithstanding clause is therefore a violation of the gender equality requirement.

In the event the gender equality requirement renders the use of the notwithstanding clause unconstitutional, the Act would no longer be able to remain in force as a result of its infringement on *Charter*-protected freedom of religion and equality rights.

Conclusion

The time has likely come to use section 28 to challenge the use of the notwithstanding clause to override *Charter* infringements. Senator Marilou McPhedran presented this idea years ago when Quebec attempted to enact a similar law as part of their Charter of Values. She stated: "If the Parti Quebecois had passed its proper charter of values, which, among other things, prohibits the wearing of religious symbols in the performance of public duties, we may have seen a contest between section 33 and section 28."^[15] The exact same situation has arisen in 2019 and it may be the perfect time to test the power of section 28 to flex its muscle.

^[1] *Canadian Charter of Rights and Freedoms*, s 33, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 . The Act likely infringes

on individuals' freedom of religion under section 2(a) and gender and religious equality rights under section 15.

[2] *Ibid*, s 28.

[3] Marilou McPhedran, Judith Erola & Loren Brault, "'28 - Helluva Lot to Lose in 27 Days': The Ad Hoc Committee and Women's Constitutional Activism in the Era of Patriation" in Lois Harder & Steven Patte, eds, *Patriation and Its Consequences - Constitution Making in Canada* (Vancouver: UBC Press, 2015) 203 at 218.

[4] *Ibid* at 217.

[5] Department of Justice, "Section 28 - Gender equality rights" (17 June 2019), online: < <https://www.justice.gc.ca/eng/csjs-sjc/rfc-dlc/ccrf-ccd1/check/art28.html>>.

[6] Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 55.17(c).

[7] Department of Justice, *supra* note 5.

[8] *An Act respecting the Lacitie of the State*, SQ 2019, c 12, Preamble.

[9] *Ibid* at s 6, Schedule II.

[10] *Ibid* at s 8.

[11] *Supra* note 1.

[12] *Ibid* at s 33(3)-(4).

[13] Kerri Froc, "Shouting into the Constitutional void" (24 June 2019), online (blog): *Double Aspect* < <https://doubleaspect.blog/2019/06/24/shouting-into-the-constitutional-void/>>.

[14] Kerri Froc, "No one appears to be denying that Muslim women are disproportionately affected by Bill 21, regardless of fact that it applies to other religious clothing/symbols. This is an unequal violation of s.2(a), over and above Bill 21's discriminatory purpose and effect" (17 June 2019 at 9:30 pm), online: Twitter < <https://twitter.com/KerriFroc/status/1140824103365959680>>.

[15] *Supra* note 3 at 219.