

What Section 15 Has Achieved

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Abstract

The triumphant Canadian women's constitution fight was a "political earthquake." Massive lobbying efforts created or amended, inserted, and defended two sections relevant to sex equality—sections 15 and 28—in the *Canadian Charter of Rights and Freedoms*. Responses from both provincial and federal governments included the appointment in 1982 of the first woman justice of the Supreme Court, Bertha Wilson. A series of court challenges under section 15 resulted in a legal earthquake with respect to equal treatment for sexual preference. The presence of women justices on the Canadian Supreme Court—a political change—may produce the level of scrutiny that section 28 was intended to invoke.

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Résumé

Le combat constitutionnel triomphant des femmes canadiennes a été un « cataclysme politique ». Les efforts massifs de lobbying ont permis de créer ou de modifier, d'insérer et de protéger deux articles pertinents à l'égalité des sexes—les articles 15 et 28—dans la *Charte canadienne des droits et libertés*. Les réactions du gouvernement fédéral et des gouvernements provinciaux ont comporté la nomination, en 1982, de la première femme juge à la Cour suprême, Bertha Wilson. Une série de contestations judiciaires en vertu de l'article 15 a provoqué un cataclysme juridique en ce qui concerne l'égalité du traitement face à l'orientation sexuelle. La

présence de femmes juges à la Cour suprême du Canada —un changement politique—pourrait entraîner le degré de minutie que l'article 28 visait à invoquer.

In *The Taking of Twenty-Eight* (1983), I called the triumphant Canadian women's constitution fight a "political earthquake." By that I did mean *political*, in that, afterwards, the federal Liberal government and all the provincial governments professed and demonstrated a sudden deep respect for the depth and breadth of activist women's networks. For example, the previously resistant Liberals changed their minds about putting the first woman on the Supreme Court and appointed Bertha Wilson in March 1982, a month before the new *Charter of Rights and Freedoms* (Charter) came into force.

At the same time, I would argue that the second wave of feminism had already visited an earthquake on the legal profession, beginning in the 1970s. Citing the Canadian Bar Association, Mary Jane Mossman (2005) wrote: "Although only 3.2 percent of the practising profession was female in 1971, the percentage of female practitioners in 1986 was already 16 percent" (18-19). Because second-wave feminists knocked down law schools' traditional barriers to women, there were enough women with the legal expertise to analyse the proposed Charter's "Non-Discrimination" wording as initially presented on the basis of *Bill of Rights* precedents—and reject it. Moreover, because other university barriers fell at the same time, there was a solid core of educated women from all kinds of backgrounds who understood the significance of a constitutional equality guarantee. Kathleen Mahoney (1994) told the Australian Parliament:

During the 1970s the Supreme Court of Canada decided ten cases under [the 1960 Diefenbaker *Bill of Rights*]. In nine of the cases, the Court declined to find any breaches of 'equality before the law' or the 'equal protection of the law' guarantees. Needless to say, equality seekers were disheartened by this result. It appeared to them that the *Bill of Rights* was more an instrument to perpetuate inequality than one to redress past inequities and promote reform. (50)

However, as Mahoney continued, "Canadian women have never willingly accepted legally imposed invisibility and disadvantage" (49). She explained: "After a massive lobbying effort, two sections relevant to sex equality were incorporated into the Charter. They were section 15 and section 28, which read as follows:

Section 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.

(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 ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 28: Notwithstanding anything in the Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. (54)

Mahoney's summary of the transition from the *Bill of Rights* to the Charter continued as follows:

Insertion of the guarantee of equality 'under' the law was considered to be essential in order to avoid the result reached in the *Bliss* and *Lavell* cases. It was thought that this guarantee would ensure that constitutional review would reach the substance of laws as well as their procedure. The guarantee of 'equal benefit' of the law was proposed to overcome the *Bliss* holding which permitted Parliament to differentiate as long as a benefit rather than a burden was conferred by legislation. (54)

The spontaneous Women's Constitutional Conference was stunning, with professionals in front and other activists behind the scenes. I recall one press conference where lawyer Marilou McPhedran removed her blazer and scarf so that a woman in a tee-shirt and jeans could wear them for the TV cameras. The lobbying that followed involved some guerilla tactics too. When article 28 was about to be voted on, a dozen Ad Hockers slipped into the House of Commons, counting on the guards to assume they were some of the many anonymous women on the Hill. The women were dressed demurely in dark A-line skirts and cardigans—Ottawa secretaries' uniform at the time. As MPs entered the Chamber, they were handed ivory "invitations" with a Picasso butterfly on the front and closed with a gold seal. Inside they found a card which said, in part, "WE INVITE YOU to further strengthen the Charter with respect to women's equality. We will be watching closely

in the days ahead to see how you respond to the needs of Canadian women” (Kome 1983, 77).

The core group in the women’s constitution fight included McPhedran (who was awarded the Order of Canada for her part), Pat Hacker, Linda Ryan Nye, and Tamra Thomson. A much broader group of women undertook the hard slogging that won many legal victories before section 15 actually came into force (Kome 1983, 58-59). Governments had demanded and gotten a three-year moratorium on section 15 so they could vet their own legislation and cull out the overtly sexist parts. Women generously stepped forward and offered to help legislators identify inequitable laws. Women law students across Canada pored over provincial statutes and prepared cases that persuaded jurisdictions to change their laws even before the April 17, 1985 deadline—cases such as Yukon’s *Married Woman’s Name Act*, which required married women to take their husbands’ names, or the *Ontario Man in the House Rule*, where social services regulations stated that the presence of a man in the household affected a woman’s eligibility for social assistance—even if he was just a financially-necessary roommate.

The women’s legal review groups disbanded once the review was complete. Soon, however, a new organization emerged. Future Senator Nancy Ruth dressed as a tap-dancing tree, covered with leaves, to introduce the Women’s Legal Education and Action Fund (LEAF) at the April 17, 1982 celebration of the Charter’s Proclamation. And while men have indeed launched the majority of sex-equality challenges under the Charter, non-profit organizations like LEAF and EGALE Canada (formerly Gays and Lesbians Everywhere) have punched way above their weight by winning status as interveners in Supreme Court cases, representing the public interest in cases that are often intensely personal.

Whether achieving sections 15 and 28 constituted a *legal* earthquake remains open to debate. Gwen Brodsky and Shelagh Day (1989) argued the contrary. They pointed out that men actually placed most of the equality court challenges in family areas, such as community property, and criminal areas, such as sexual assault—areas where court decisions based on very narrow technical grounds could put women’s hard-won respect at risk in the name of equality. McPhedran and other feminist lawyers have said that Canada has

developed a new and distinctive definition of “equality,” based on “equal benefit and protection” as well as equal opportunity, perhaps because of the combination of a fairly sympathetic Supreme Court, a failsafe definition in the text, and feminist legal interventions. According to Mahoney (1994),

The Court’s statement that identical treatment can accentuate inequality incorporates the idea that neutral laws or policies can violate section 15 if they have a disparate impact on disadvantaged individuals or groups. This result-oriented approach expands the protective ambit of the equality guarantees under the Charter substantially beyond that permitted by the equal protection doctrine adopted under the *Bills of Rights* in both Canada and the United States. (57)

One outstanding change that section 15 made possible for Canada is in the area of gay rights or, more properly, gay, lesbian, bisexual, trans, queer, questioning, and intersex rights, which I will call LGBTQ rights for brevity. Brenda Cossman (2002) has pointed out that legal equality is a great starting point even though many issues remain unresolved: “The Charter has been an effective tool in challenging the denial of formal legal equality of lesbians and gay men...legislatures have been forced to amend their laws to extend formal legal equality” (224).

I have a vivid recollection of McPhedran explaining that women wanted to use the Charter the way that the National Association for the Advancement of Colored People (NAACP) won equality in the United States—by building case law, one carefully chosen case at a time. There was no single Canadian women’s group that was the strategist for LGBTQ rights. However, as Cossman (2002) has written, many activists planned “to pursue incremental equality by developing the jurisprudence in relation to unmarried cohabitants, and only turning to marriage once that victory was in hand” (236). A series of cases cropped up on their own. LEAF and the National Association of Women and the Law (NAWL) intervened in some cases and EGALE Canada intervened in twenty-four cases, including eleven before the Supreme Court of Canada. Thus, a handful of organizations delivered a consistent message to the courts on this issue.

Another difference from the NAACP's experience was that, with the weight of section 15 on the side of equality, the LGBTQ cases added up to a declaration of legal equality in less than twenty years. Cossman (2002) has written: "Doctrinally, conservative judges focused on biological differences to justify the exclusion of same-sex couples while more progressive judges focused on the equality of same-sex relationships and the recognition of diverse family forms" (226). While this conversation around biology initially dominated same-sex marriage cases, eventually the relationship theory won. Equality seekers lost two early cases at the Supreme Court that later became significant, *Mossop* and *Egan*. While *Mossop* did not invoke section 15, Justice Claire L'Heureux-Dubé's dissenting opinion was the first to spell out that family is about relationships not gender. This set the stage for James Egan's lawsuit to win a spousal pension for his partner, John Norris Nesbit. In a 5 – 4 opinion, the majority held that the equality rights of Egan and Nesbit under section 15 had been violated. But they also voted 5 – 4 that this violation was reasonable under section 1. In other words, it was a violation, but one that was "demonstrably justified in a free and democratic society." Cossman called this "a ground-breaking victory within a defeat" (229).

Both of the aforementioned cases were anchored in family settings. The *Vriend* case was the turning point perhaps, in part, because, by contrast, it was a question of employment. Fired from his job at a Christian college because he was gay, Delwin Vriend brought a challenge to the Alberta *Individual Rights Protection Act* for failing to include sexual orientation as a prohibited ground of discrimination. The Supreme Court of Canada agreed and took the extraordinary step of "reading in" sexual orientation rights into section 15. This set the stage for *M v. H*, a *Family Law Act* case about division of property between a lesbian couple who had separated. The majority of the court agreed that the two women had indeed had a common-law marriage and their separation was governed by section 29 of the *Family Law Act*. Therefore, the judges struck down that section. Cossman (2002) has argued that, "Within six years, the spirit of the powerful dissent from *Mossop* had become the majority opinion" (235).

Some LGBTQ folks find this kind of equality too "assimilationist." They say they have their own cultures

and their own standards for relationships. Egan and Norris, for instance, avoided mention of monogamy in their claim for equal pensions. Nor has gay bashing disappeared with the addition of sexual orientation to the *Criminal Code* section on hate crimes. But overall, section 15 has brought progress and made Canada a world leader in recognizing LGBTQ rights. By contrast, the United States is still struggling with impediments to recognizing LGBTQ equality. And this brings us to the question of section 28. This section of the Canadian Charter was intended to operate as the equivalent of "heightened scrutiny" or "strict scrutiny" in the United States. In the United States, strict scrutiny is the most rigorous form of judicial review. Government action that violates fundamental freedoms and rights or, as was later established, discriminates on the basis of race is considered "suspect" from the outset. Those freedoms and rights can be violated only for some compelling and immediate purpose in the public good (*S v. "Strict Scrutiny" in West's Encyclopedia* 2008). In November 2012, when the New York Federal Court of Appeal struck down the 1996 *Defense of Marriage Act* (DOMA), it also directed that any case involving allegations of discrimination on the basis of sexual orientation should be subject to "heightened scrutiny" or "strict scrutiny," a level of judicial review that is much more rigorous than the usual "reasonable basis" test.

The review court, the US Supreme Court, however, did not mention strict scrutiny in its 2012 decision about the constitutionality of DOMA.¹ Rather, Justice Anthony Kennedy's majority opinion leaned heavily on states' right to set their own marriage laws even though he had written two of the most important Supreme Court decisions involving, and ultimately affirming, gay rights: *Lawrence v. Texas* (2003) and *Romer v. Evans* (1996).² Kennedy also wrote, in 2012, that "DOMA seeks to injure the very class New York seeks to protect...By doing so, it violates basic due process and equal protection principles applicable to the federal government" (See US Consti, Amdt 5, *Bolling v. Sharpe* 347 U.S. 947 (1954)). The 2012 Kennedy decision returned again and again to the questions of protection and of dignity:

The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by marriage laws, sought to

protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.³

The concept of “equal protection” also appears in decisions written by Justice Sandra Day O’Connor (who, in July 1981, was the first woman appointed to the US Supreme Court). The reference is to the Fourteenth Amendment, which contains the Equal Protection Clause, a directive to the states to keep persons safe:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*⁴ (emphasis added).

Supreme Court rulings under the Equal Protection Clause have involved differential treatment of hippies and people of colour as well as (in *Lawrence v. Texas*) a law that forbade homosexual, but not heterosexual sodomy. Another noteworthy aspect of the 2012 decision was that the three women justices supported Justice Kennedy’s position. Justices Elena Kagan, Sonia Sotomayor, and Ruth Bader Ginsburg joined Kennedy’s majority opinion, along with Justice Stephen Breyer.

Section 28 does achieve three things that the Ad Hoc conference wanted: it specifically puts the words “equality between male and female” into the Charter and it emphasizes the word “persons” which, as we all know, is defined as someone “born alive” from their mother. Most of all, this section was intended to be an “interpretive” clause, directing the courts to look very closely at any case alleging discrimination on the basis of gender. However, so far, section 28 has not been cited effectively in gender equality cases.

This is where the *political* earthquake makes a difference. In her speech, “Will Women Judges Really Make a Difference?” Justice Bertha Wilson answered her own question strongly in the affirmative (Cameron 2007). She went on to prove her point in *R. v. Lavallee* where her own work introduced the concept of a “battered wife” into Canadian law (Benedet 2013, 2). “Numbers do count,” Justice Marie Deschamps said, when she stepped down from the Supreme Court: “I

was sad that I was not replaced by a woman. We are looked at not just as a model for the courts in Canada, but around the world—and I think it’s very important that the Supreme Court of Canada remains a model” (Makin 2013). Perhaps the presence of so many women justices on the Canadian Supreme Court can produce the level of scrutiny that section 28 was intended to invoke. “The public must perceive judges as fair, impartial and representative of the public,” said Bertha Wilson. She quoted Diane Martin who reported that women judges view women lawyers as “normal” as compared to male judges who need points translated into “man language” (Cameron 2007). Canadians who care about the spirit of section 28 should keep pressure on the federal government to appoint more women to all courts and especially to the Supreme Court.

Endnotes

- ¹ See <http://www.npr.org/blogs/thetwoway/2013/06/26/195857796/supreme-court-strikes-down-defense-of-marriage-act>.
- ² See <http://news.yahoo.com/blogs/news/supreme-court-strikes-down-doma-140330141.html>.
- ³ See <http://www.npr.org/2013/06/26/195863800/read-the-rulings-inside-the-same-sex-marriage-decisions>.
- ⁴ See <http://www.law.cornell.edu/supct/html/02-102.ZC.html>.

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